

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission on Draft Determination

Horticulture Award 2010
(AM2014/231 & AM2016/25)

11 December 2017



4 YEARLY REVIEW OF MODERN AWARDS

AM2014/231 & AM2016/25 – HORTICULTURE AWARD 2010

1. On 16 November 2017, a Full Bench of the Fair Work Commission decided to vary the *Horticulture Award 2010* (**Horticulture Award**) retrospectively to 1 January 2010 ([2017] FWCFB 5536).
2. At paragraphs [172] to [174] of the Decision, the Full Bench set out the terms of a Draft Determination. (The terms are reflected in the Draft Determination in Attachment A of Ai Group’s submission of 7 December 2017).
3. This reply submission responds to the submissions of the NUW and AWU.
4. The arguments raised by the NUW and AWU are not new. These arguments were pursued in detail by the unions during the proceedings.
5. The unions’ arguments in the proceedings related to the draft determination proposed by Ai Group and the other employer parties. The same Draft Determination has been published by the Commission within its Decision of 16 November 2017.
6. Contrary to the unions’ submissions, varying the award in the terms set out in the Draft Determination would be consistent with the modern awards objective and would not lead to unintended consequences. In this regard, the following points are relevant:
 - The activities referred to in clause 4.2(a) of the Award need to be carried out in connection with a “horticultural enterprise”;
 - A “horticultural enterprise” is defined as “*an enterprise which as an important part of its enterprise engages in the raising of horticultural crops*”;
 - The definition of “enterprise” necessarily includes related entities because the evidence in the case demonstrated that horticulture businesses often consist of several related bodies corporate (for

example, because banks often require that a separate entity own the buildings and/or plant¹); and

- Warehousing businesses that are not connected with an enterprise that raises horticultural crops would not be covered by the Horticulture Award.

7. Accordingly, we urge the Full Bench to reject the unions' arguments about the Draft Determination.

Broadacre field crop issue

8. In relation to the broadacre field crop issue, the AWU's submission states:

Consent variation – broadacre field crops

31. As noted at paragraph [173] of the Decision, the AWU has agreed to an amendment to clause 4.3 to deal with the interaction between the Horticulture Award and the *Pastoral Award 2010*.
32. However, this variation does not arise from an application pursuant to s 160 of the FW Act and hence it does not appear capable of retrospective application as foreshadowed in the Decision.
33. Further, the relevant variation to the definition of broadacre field crops in the *Pastoral Award 2010* which has led to this agreed variation only took effect on 15 February 2016.

9. Contrary to the AWU's submissions, variations relating to the broadacre field crop issue were included within the s.160 application filed jointly by Ai Group and The Mitolo Group on 23 November 2016 (and re-filed with amendments on 1 December 2016). Therefore, there is no impediment to the Commission granting a retrospective operative date.

10. In the discussions between Ai Group, the NFF and the AWU, which led to the agreed position about the broadacre field crop issue, the operative date was not discussed.

¹ See paragraph 119 of Ai Group's final submission of 31 July 2017 regarding the evidence of Mr Dollison.

11. The AWU is correct that the variation to the *Pastoral Award 2010*, which led to the agreed position on varying the Horticulture Award, was operative from 15 February 2016. Accordingly, Ai Group has no objection to the broadacre field crop variation to the Horticulture Award taking effect from 15 February 2016 (with the other variations taking effect from 1 January 2010).
12. Ai Group has discussed with the NFF and the AWU the idea of the broadacre field crop variation taking effect from 15 February 2016 and neither organisation has expressed any objection.
13. An amended Draft Determination reflecting an operative date of 1 January 2010 for the main variations and an operative date of 15 February 2016 for the broadacre field crop variation, is **attached**. The amendment made to the Draft Determination included as Attachment A to Ai Group's submission of 7 December 2017, is highlighted in yellow.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Horticulture Award 2010

(AM2016/25)

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT SAMS

COMMISSIONER SAUNDERS

SYDNEY, ___ DECEMBER 2017

4 yearly review of modern awards – Horticulture Award 2010

A. Further to the decision issued on 16 November 2017¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Horticulture Award 2010*² be varied by:

1. Inserting a new definition of ‘enterprise’ in subclause 3.1 as follows:

Enterprise means a business, activity, project or undertaking, and includes:

- An employer that is engaged with others in a joint venture or common enterprise; or
- Employers that are related bodies corporate within the meaning of section 50 of the *Corporations Act 2001* (Cth) or associated entities within the meaning of section 50AAA of the *Corporations Act 2001* (Cth).

2. Inserting a new definition of ‘horticultural enterprise’ in subclause 3.1 as follows:

Horticultural enterprise means an enterprise which as an important part of its enterprise engages in the raising of horticultural crops.

3. Deleting subclause 4.2 and inserting a new subclause 4.2 as follows:

4.2 Horticulture industry means:

- (a) the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise; or

¹ [2017] FWCFB 6037

² MA000028.

- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).
4. Deleting subclause 4.3 and inserting a new subclause 4.3 as follows:

4.3 Horticulture industry does not mean:

- (a) the wine industry;
- (b) silviculture and afforestation;
- (c) sugar farming or sugar cane growing, sugar milling, sugar refining, sugar distilleries and/or sugar terminals;
- (d) any work in or in connection with cotton growing or harvesting; cotton ginneries and associated depots; cotton oil mills and the extraction of oil from seed; or
- (e) plant nurseries

B. Items 1, 2 and 3 of this determination come into effect on 1 January 2010. Item 4 of this determination comes into effect on 15 February 2016.

VICE PRESIDENT

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