

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Submission

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

31 July 2017

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/231 & AM2016/15 – HORTICULTURE AWARD 2010

No.	Title	Page
1.	Introduction	3
2.	The legislative framework	4
3.	The Commission’s approach to the Review	5
4.	The dividing lines between the coverage of relevant modern awards and the concept of the “farm gate”	6
5.	Award modernisation developments	15
5.1	Horticulture Award modernisation developments	15
5.2	Food Manufacturing Award modernisation developments	22
5.3	Storage Services Award modernisation developments	26
6.	The classifications in the Horticulture Award	29
7.	The <i>Mitolo</i> case	31
8.	The nature of the horticulture industry	31
9.	The Horticulture Award is currently being very widely applied to centralised washing and packing facilities	35
10.	The Inspections	36
11.	The proposed variation	37
12.	The modern awards objective	40
13.	Application under s.160	51
14.	Operative date	54
15.	Conclusion	58

1. INTRODUCTION

1. This final submission is filed in accordance with the Directions of the Full Bench.
2. This submission includes updated content from the submission which we filed on 23 December 2016, as well as additional content pertaining to the evidence, Inspections and other matters that arose during the course of the proceedings.
3. Ai Group proposes that the *Horticulture Award 2010* (**Horticulture Award**) be varied as reflected in the amended draft determination tendered as an exhibit at the hearing on 21 June 2017 (Exhibit AIG3, Transcript PN794).
4. The proposed variation is in the following terms:

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
- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).

5. A retrospective operative date of 1 January 2010 is sought given the exceptional circumstances which exist in relation to this matter. A retrospective operative date is permitted where a variation is made under s.160 of the *Fair Work Act 2009 (Act)*.

2. THE LEGISLATIVE FRAMEWORK

6. The variation is pursued under s.156 of the Act as part of the 4 Yearly Review of Modern Awards.
7. The variation is also pursued under s.160 of the Act on the basis that the existing coverage clause in the Horticulture Award is ambiguous and uncertain.
8. A joint s.160 application of Ai Group and The Mitolo Group was filed on 18 November 2016. An amended s.160 application was filed on 1 December 2016.
9. The Full Bench is hearing the ss.156 and 160 matters concurrently.
10. The modern awards objective in s.134(1) of the Act applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes ss.156 and 160.
11. The modern awards objective requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).
12. We later address each element of the modern awards objective with reference to our proposed variation for the purposes of establishing that, our proposed variation should be granted.
13. Later in this submission, we also address why the variation is consistent with s.160 of the Act and why a retrospective operative date can and should be granted.

3. THE COMMISSION'S APPROACH TO THE REVIEW

14. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*¹ provides the framework within which the Review is to proceed.

15. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.²

16. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair

¹ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

² *Ibid* at [23]

and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

17. In the *Preliminary Jurisdictional Issues Decision*, the Full Bench made the following relevant comments about s.160 in the context of the 4 Yearly Review: (emphasis added)

[51] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Commission may vary a modern award to “remove an ambiguity or uncertainty or to correct an error”. These provisions continue to be available during the Review, either on application or on the Commission’s own initiative.

[52] In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties will be provided with an opportunity to comment on any such proposed variation.

- - -

[57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the ‘specified day’). The default position is that the ‘specified day’ must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee’s first full pay period on or after the ‘specified day’. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive ‘and’ in s.165(2) that a variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

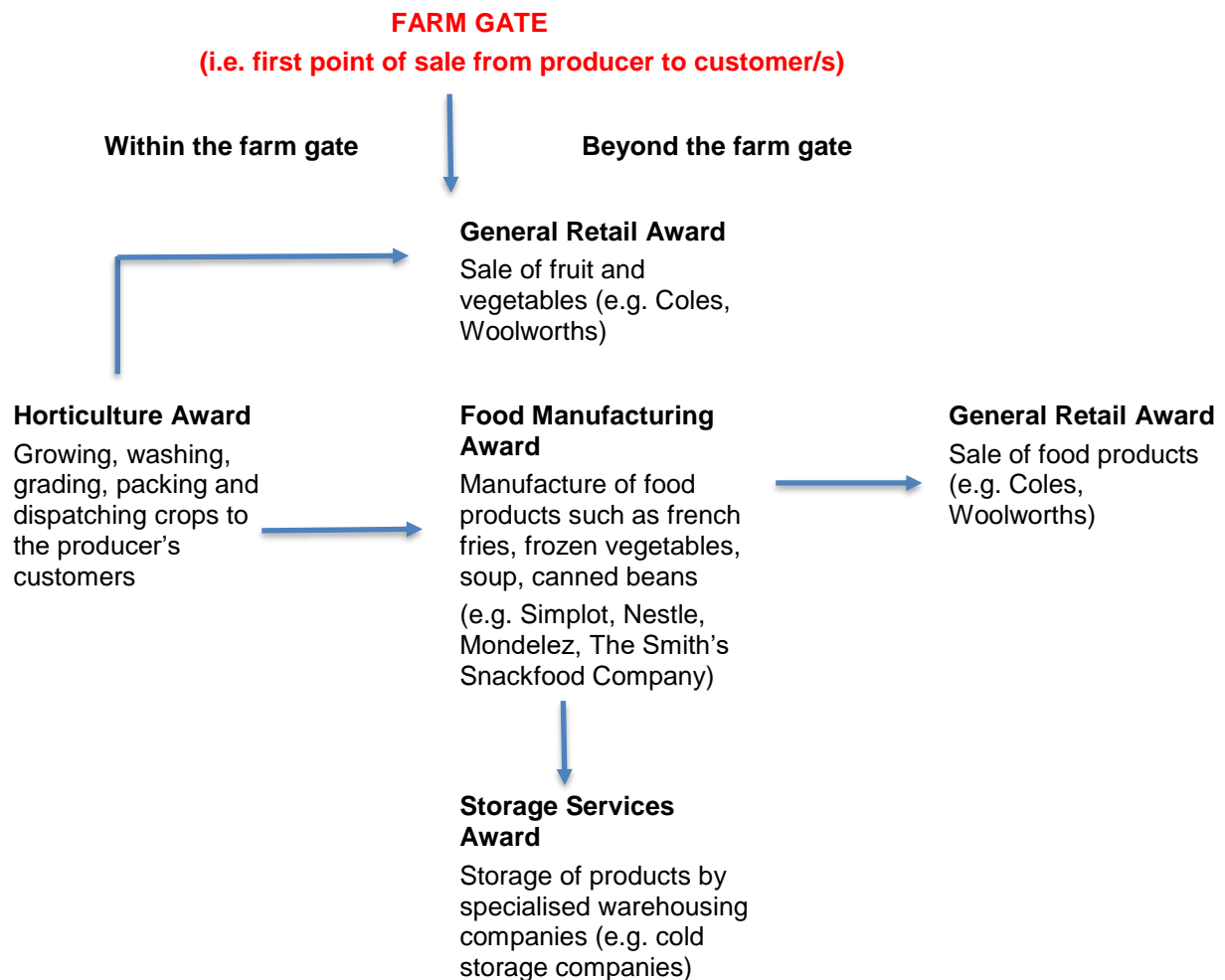
18. Ai Group’s proposed variation aligns with the principles in the *Preliminary Jurisdictional Issues Decision*.

4. THE DIVIDING LINES BETWEEN THE COVERAGE OF RELEVANT MODERN AWARDS AND THE CONCEPT OF THE “FARM GATE”

19. In these proceedings, it is necessary for the Full Bench to consider the intended coverage of relevant awards in the supply chain and the appropriate dividing lines between coverage.

20. The diagram below identifies the relevant dividing lines:

Diagram 1: Award coverage within the supply chain in the horticulture and related industries



21. The above diagram is eminently logical. The diagram reflects the existing industry practice. The diagram is also consistent with numerous developments during the award modernisation process.

22. The diagram delineates award coverage on the basis of activities that fall “within the farm gate” and those that fall “beyond the farm gate”.

23. The “farm gate” is the first point of sale from a producer to a customer, as highlighted by the following example relating to potatoes:

- All activities carried out by the producer up to the point at which the potatoes are sold to a retailer (e.g. Coles or Woolworths) or sold to a food processing company (e.g. Simplot that manufactures frozen chips under the Birds Eye brand, or The Smith’s Snack Food Company that manufactures potato chips) are within the “farm gate” and the work is carried out under the Horticulture Award.
- Once the potatoes move through the “farm gate”:
 - If the potatoes have been sold to a retailer, the retailer’s employees’ work of selling the potatoes to consumers is carried out under the *General Retail Industry Award 2010* (**General Retail Award**);
 - If the potatoes have been sold to a food processor, the food processor’s employees’ work of manufacturing frozen chips and potato chips is carried out under the *Food, Beverage and Tobacco Manufacturing Award 2010* (**Food Manufacturing Award**);
 - Food processors typically sell their products to retailers. The retailer’s employees’ work of selling processed food to consumers is carried out under the General Retail Award.
 - Food processors often engage specialised cold storage companies to store manufactured food products (e.g. frozen chips) which have not yet been delivered to retailers. Specialised cold storage companies and their employees are covered by the *Storage Services and Wholesale Award 2010* (**Storage Services Award**).

24. In its *Stage 2 Award Modernisation Decision*, the Full Bench of the AIRC noted that:
- [53] Our overall approach to coverage of the pastoral and horticulture awards is that they should be confined to agricultural production within the “farm gate”.³
25. The term “farm gate” was not defined or explained by the Full Bench.
26. The AIRC’s statement was made against the backdrop of arguments advanced by the AMWU that the coverage of the Horticulture Award should not cross over into food manufacturing activities previously covered by the *Food Preservers’ Award 2000* (see section 5.2 below regarding award modernisation developments relating to the Food Manufacturing Award). In light of this, the reference to the “farm gate” must be seen in the context of distinguishing between activities which are properly carried out as part of horticultural operations and those which are food manufacturing activities.
27. The “farm gate” is not a reference to a physical barrier or gate that hangs from a fence on a particular farm. Rather the “farm gate” is a well-known **concept** in the horticulture industry which refers to the activities which are carried out by the producer up to the first point of sale from the producer to its customer/s.
28. The “farm gate” concept has no relevance to the location of work.
29. The producing of horticultural crops involves a number of integrated and interconnected processes that often take place across numerous physical locations, to ensure the most efficient use of resources, and to meet production needs and customer requirements.
30. These include activities at the beginning of the process (such as sowing, planting and raising), in the middle of the process (such as harvesting and picking) and at the end of the process (such as washing, grading, packing and despatching) before the crops are transported to market.

³ [2009] AIRCFB 345

31. The fact that activities such as washing, grading, packing and despatching may be undertaken at different premises to where the crops are grown and harvested does not mean that these activities are “beyond the farm gate.”
32. It has been held that “cleaning, sorting and bagging” are “the last stages of harvesting.”⁴
33. Viewing the concept of “the farm gate” in this manner is consistent with the coverage of the pre-modern *Horticulture Industry (AWU) Award 2000* (**Horticulture Award 2000**), which was the main pre-modern award upon which the Horticulture Award was based. Coverage under the Horticulture Award 2000 was not constrained by locational limitations and the Horticulture Award was not intended to be either.
34. If it had been the Award Modernisation Full Bench’s intention to introduce a locational limitation to coverage under the modern award it surely would have set out its intention and reasons for doing so during the award modernisation process. Instead, the Full Bench used the expression “farm gate” which has a well-understood meaning in the industry; a meaning which is not related to the location where work is carried out.
35. The concept of the “farm gate” is directly connected to the concept of the “farm gate price,” which is commonly used for accounting purposes and economic analysis in respect of the horticulture industry.
36. The Organisation for Economic Co-operation and Development (**OECD**) defines the term “farm gate price” as:

A basic price with the ‘farm gate’ as the pricing point, that is, the price of the product available at the farm, excluding any separately billed transport or delivery charge.⁵

⁴ The National Union of Workers, South Australian Branch v Comit Farm Produce Pty Ltd (No. 2) [1998] SAIRC 14 (20 March 1998)

⁵ OECD Glossary of Statistical Terms – Farm Gate Price Definition. Available at: <https://stats.oecd.org/glossary/detail.asp?ID=940>

37. This definition is consistent with the definition of “farm gate price” in the Collins English Dictionary, which defines the term as:

The price for the sale of farm produce direct from the producer.⁶

38. The concept of the “farm gate price” is also used by the Australian Bureau of Statistics (**ABS**) for the purpose of agricultural statistics. In this context, the ABS refers to prices at the farm gate as “local value.” The term “local (basic value)” is defined by the ABS as:

The value of agricultural commodities at the point of production. Local value is derived by subtracting the marketing costs from Gross value. Marketing costs are defined as the cost of moving agricultural commodities from the point of production (farm) to the point of sale.⁷

39. “Gross value” (as referred to in the above definition) is defined by the ABS as:

The value of production at the point of sale (i.e. where it passes out of the Agricultural sector of the economy). It is the value placed on recorded production at wholesale prices, realised in the market place.⁸

40. It is evident from the above that the “farm gate price” of a cultivated product is generally considered to be the price of the product before it leaves the producer and is transported to the first point of sale.

41. The “farm gate price” of horticultural crops is the value of the crops at the end of the horticultural process, that is, once the crops have been grown, harvested, washed, sorted, graded, packed and bagged by the producer and are ready to go to market. It is not the value of crops at a specific, physical location or “gate” but the value of the crops at the completion of the horticultural process, regardless of where the activities are carried out.

⁶ See: <https://www.collinsdictionary.com/dictionary/english/farm-gate-price>

⁷ Australian Bureau of Statistics, Value of Agricultural Commodities Produced. Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/F276A671BC2F9899CA256F0A007D8CB1?OpenDocument>

⁸ Ibid

42. The following evidence strongly supports the above arguments.

Relevant extract from Witness Statement of Bryan Robertson (with amendments made by Mr Robertson at the hearing on 21 June marked):

“The ‘farm gate’

44. The accepted industry understanding of the term ‘farm gate’ is that it is a concept and not a physical thing. It refers to the time when the product leaves the primary producer in a ‘fit for purpose’ state for the customer.
45. The view that ‘the farm gate’ refers to a physical gate around a farm is archaic and not in line with what agriculture does and how it works today.
46. Although traditionally growers operated from one piece of land, there is no physical farm gate or boundary now because many businesses in the vegetable industry have multiple properties from which they run their businesses. The produce is typically grown in different locations and brought back to a central location where it washed, graded and packed to meet fitness for purpose criteria. Therefore, the modern, common understanding of the term is that produce leaves ‘the farm gate’ once it is ready for market.
47. Primary Industries and Regions SA (**PIRSA**), which is a key economic development agency in the Government of South Australia, requires the Horticulture Coalition of SA (of which HortEx is a part ~~and I am a Board Member~~) to provide information on the farm gate value of horticultural product leaving producers in South Australia every year. This information is used by PIRSA for future economic planning. I am also on the panel of Biosecurity South Australia which is the quarantine body for South Australia and a part of PIRSA.
48. I have been closely involved in the process of collecting this information for PIRSA in the past. From this it is my understanding that, for the purpose of collecting the information, produce that has left the farm gate is generally regarded as produce that is in a fit for purpose condition that is acceptable to the marketplace (with the market place referring to specifications from the supermarkets/merchants or the government).
49. I have always understood this to be how the term ‘farm gate’ is interpreted in the industry.”

Relevant extract from Transcript – Evidence of Bryan Robertson:

Re-examination of Mr Robertson by Mr Smith of Ai Group:

PN1012

Just one other question. You mentioned the concept of the farm gate. How do you view that concept or how is it viewed in the industry in your experience?---The farm gates in industry is a concept. If you're looking years ago, yes, there was a potential physical boundary that you could say was a gate, but because of the economies of scale and the competition for land, you may have an original home block where a family started producing vegetables. They've since expanded. They've grown to full capacity on that site. They've purchased other blocks of land that are further afield that meet their

requirements for their particular vegetable enterprise and those fields or paddocks and their product come back to the central location. That is all within what we classify as the "farm gate", even though geographically they are separated. But everything comes within the business. Anything outside the farm gate is when you first sell. So you've grown the product. You've graded, cleaned, made it fit for purpose and it's ready to leave for the first customer. So in the case of, say, capsicums, we've put the seedlings in the ground. We've grown the plants up. We've harvested over a number of weeks the capsicums themselves. We then grade those, pack those. They're chilled to a set temperature. They meet market specs and then they are despatched. As soon as they're despatched for sale, whether it's to a merchant, to a supermarket or to a value-add manufacturer who turn them into something other than the original, that's when they have left the farm gate and that's the industry recognised position of what the farm gate means.

Relevant extract from Witness Statement of Robin Davis:

"The 'farm gate' value

41. The 'farm gate' value is a widely used agricultural term that means the value of produce at the first point of sale. It is understood in the industry as the market price that the primary producer receives.
42. For example:
 - If potatoes are being processed into French fries, the farm gate value of the potatoes is the value at which the potatoes are sold to the food manufacturer (e.g. McCain Foods) for (this is the first point of sale);
 - If potatoes are being taken directly to the retail chain, the farm gate value of the potatoes is the value at which they are sold to the supermarket for (this is the first point of sale);
43. Potato producers in South Australia have an annual farm gate production worth in excess of \$208 million. This means that the value of potatoes at the first point of sale (i.e. when the potatoes leave the primary producer) is worth in excess of \$208 million.
44. In this context, the 'farm gate' is virtual – not physical. It means the point in the value chain when the product is fit for purpose and the first point of sale."

Relevant extract from Transcript – Evidence of Robin Davis:

Cross-examination of Ms Davis by Mr Crawford of behalf of the AWU:

PN1253

MR CRAWFORD: Ms Davis, do you see that's an OECD document taken from an OECD glossary of statistical terms?---Yes, I do.

PN1254

There's a definition cited of producer price for agricultural commodities and it reads:

PN1255

The producer price is the average price or unit value received by farmers in the domestic market for a specific agricultural commodity, produced within a specified 12 month period. The price is measured at the farm gate, that is at the point where the commodity leaves the farm and therefore does not incorporate the cost of transport and processing.

PN1256

Do you see that?---Yes, I see that.

PN1257

Do you agree with that definition of the farm gate, that is the farm gate is the point in time where the commodity leaves the farm?---There are many definitions of farm gate. What's important here is that farm gate is a virtual concept, so it is at the point where a commodity is actually directly sold from the producer. But where that farm gate is, is a concept only.

PN1258

Well why do you say it's a virtual concept? Where do you draw that definition from?---Because it's not a gate. It's not a real gate.

PN1259

Do you accept that the term "farm gate" is reference to a geographical area to the boundaries of a farm?---Not necessarily. A farm gate is really a point at which the product is sold directly to the supermarkets from a producer.

PN1260

I guess that means you dispute the OECD definition because they seem to think that term is geographical nature in that it refers to the point where the commodity leaves the farm?---No, I don't. I'm not saying that at all. Leaves the farm doesn't necessarily present itself geographically. I don't agree with that.

PN1261

Nothing further."

Re-examination of Ms Davis by Mr Smith of Ai Group:

PN1266

MR SMITH: Yes, just one point of clarification if I may, Ms Davis. With this concept of the farm gate, this document that you've just been provided, is this a definition that you are aware of or are knowledgeable about?---I have never seen it before until this morning when it was provided.

PN1267

In the interpretation that the question sought to place on this about the geographic nature of the words there, and you answered the question in the way that you did, but to the extent that there is a definition about a link to a geographical area, could you just describe what the farm gate concept means in your knowledge in the Australian context?---In the Australian context, well certainly if you look at definitions in dictionaries like the Oxford and Collins, it talks about where product is sold directly from the producer. So it is the first point of sale. It is where that produce, that commodity, is in its fit for purpose for the supermarket chain.

PN1268

Is it a concept or a geographical character?---It's a concept - it's a concept, absolutely it's a concept.

Thank you, no further questions.”

5. AWARD MODERNISATION DEVELOPMENTS

5.1 Horticulture Award modernisation developments

43. Whilst there were a number of pre-modern awards and NAPSAs which applied to horticulture businesses, the main pre-modern award upon which the terms of the Horticulture Award are based (including the coverage terms) is the *Horticulture Industry (AWU) Award 2000* (**Horticulture Award 2000**) which Ai Group was a party bound by.

44. This is evident from the following extract of the AIRC Full Bench’s *Stage 2 Award Modernisation Decision* regarding the making of the Horticulture Award (emphasis added):

[60] We have revised the ordinary hours and overtime provisions of the exposure draft. The provisions in the Horticulture Award 2010 are generally in line with the relevant provisions of the Horticulture Industry (AWU) Award 2000, as it applies to what are referred to as the Schedule A respondents to that award. We have also included more extensive provisions for pieceworkers and included piecework provisions we consider are consistent with the requirements of the consolidated request. A number of other provisions have been altered to make the interaction with the NES clearer.⁹

45. This is also confirmed in the recent Full Bench decision in the *4 Yearly Review of Awards - Casual and Part-Employment Case*:¹⁰

“[735] It is apparent that the current provisions of the Horticulture Award were derived substantially from provisions of the federal pre-reform *Horticultural Industry (AWU) Award 2000* (2000 Award) as it applied to respondents to that award, although it rationalised a range of other pre-reform awards and State award provisions transmitted into NAPSAs which contained diverse provisions. The 2000 Award provided for different provisions applicable to “Schedule A” respondents on the one hand and “Schedule B” and “Schedule C” respondents on the other...”

46. As identified by the Full Bench in the above extract, the Horticulture Award 2000 consisted of three schedules, with one set of key conditions applying to Schedule A respondents and another set of key conditions applying to

⁹ [2009] AIRCFB 345

¹⁰ [2017] FWCFB 3541

Schedule B and C respondents. Schedule A respondents were named employers in Victoria, South Australia and New South Wales. Schedule B and C respondents were named Victorian employers and four employer organisations – Ai Group, VECCL, the VFF Industrial Association and the TFGA Industrial Association.

47. The coverage provisions which applied to the different schedules of the Horticulture Award 2000 applied to the packing, storing, grading, forwarding, washing and/or treating of horticultural crops in connection with a horticultural enterprise without limitation as to where the work was carried out.
48. In relation to Schedule A respondents, clause 6.1 provided that the following functions were covered: (emphasis added)
- the dehydration of fresh fruits and/or partly dried fruits (clause 6.1.1(a));
 - the packing of fresh pears and all classes of citrus fruits (clause 6.1.1(b));
 - the processing of fruit juices (clause 6.1.1(c));
 - the cultivating, picking, packing and forwarding of fresh and/or dried fruits and canning fruits (clause 6.1.1(d)).
49. In relation to Schedule B and C respondents, clause 6.2 provided that the following functions were covered (emphasis added):
- the cultivation, picking, dehydration, crystallisation, washing, juicing, canning, or any other processing, of fruits or vegetables (clause 6.2.1(a));
 - the storing, packing, or forwarding of fruits or vegetables (clause 6.2.1(b)); and
 - the preparation of vineyard products (clause 6.2.1(c)).

50. It is clear from the above that as long as any of the commercial activities referred in clauses 6.1 (for Schedule A respondents) and 6.2 (for Schedule B and C respondents) were undertaken, the relevant business would be covered under the Horticulture Award 2000 regardless of *where* the activities were carried out.
51. During the award modernisation process, all of the draft Horticulture Awards submitted by parties involved in the proceedings clearly covered treatment, packing, storing and despatch of horticultural products by horticulture businesses, regardless of the location where such activities were carried out.
52. In a draft award submitted by the AWU on 31 October 2008, “horticulture industry” was defined as follows: (emphasis added)
- 4.3 Horticulture Industry means all employees who are employed in classifications in this award:
- (a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticultural products and crops, including fruit and vegetables; or
 - (b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural products and crops, including fruit and vegetables; or
 - (c) the storing, canning, grading, processing, packing or despatching horticultural products and crops.
53. An NFF draft award submitted on 31 October 2008 proposed the following definition: (emphasis added)
- 4.2 For the purpose of clause 4.1 Horticultural Industry includes:
- (a) the management, cultivation, picking, dehydration, crystallisation, washing, juicing, processing, canning, storing, grading, preparation for packing, packing and/or forwarding of horticultural products; and
 - (b) the preparation and treatment of land or other growing medium for any of the purposes in clause 4.2(a); and
 - (c) preparation of vineyard products where this is ancillary to activities in clause 4.2(a).

54. On 24 November 2008, the Horticulture Australia Council (**HAC**) submitted a draft award with the following coverage provision: (emphasis added)

4.3 This award applies to employees employed in the Horticulture Industry who are engaged in activities including the following:

- (a) upon farms, orchards, plantations, agricultural holdings, plant nurseries, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, dehydration, crystallisation or treating of horticulture industry products and crops, including fruit and vegetables; or
- (b) at clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticulture industry products and crops, including fruit and vegetables; or
- (c) the storing, canning, grading, processing, packing or despatching horticulture industry products and crops; or
- (d) producing compost for, cultivating, picking, preparing for packing, packing and/or forwarding of fungi or mushrooms; or
- (e) upon plant nurseries, flower, turf, tree farms or other similar enterprises in connection with the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; the production and modification of growing media and clearing, treating or preparing of land for the propagation, planting, growing, cultivation, maintenance, sales and distribution or treating of plant material and associated products; or the processing, grading, packing, storing, dispatching and distribution of plant material and associated products.

55. It can be seen that the abovementioned AWU, NFF and HAC draft awards all clearly covered treatment, packing, storing and despatch of horticultural products by horticulture businesses, regardless of the location where such activities were carried out.

56. The first version of the Horticulture Award that was made in April 2009 included the following definition of “horticulture industry” (emphasis added)

4.2 Horticulture industry means:

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.¹¹

57. On 26 August 2009, following an outcry from employers in the horticulture industry about the increased costs which would be imposed upon their businesses through the modern award, the then Deputy Prime Minister and Workplace Relations Minister, the Hon Julia Gillard MP, varied the Award Modernisation Request. The variation identified the following features of the horticulture industry which distinguish it from other industries:

51. Where a modern award covers horticultural work, the Commission should:

- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
- provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

58. Following the variation to the Award Modernisation Request, Ai Group and the NFF filed a joint application on 2 October 2009 to vary the Horticulture Award in a number of respects, including by inserting the words “storing, grading, forwarding” after the word “packing” in clause 4.2(a). The main rationale for this was to better align the award with coverage of the Horticulture Award 2000.

59. In considering the application, the Full Bench of the AIRC said: (emphasis added)

[13] There is no single existing instrument which could be said to apply generally in the industry. Further, it is necessary, when considering the various provisions, to have regard to the totality of the provisions in any particular instrument. There is no definitive information as to the application of the individual awards or NAPSAs. Whilst the provisions of all of the instruments are relevant to some degree, we think greatest weight should be given to the Horticulture Award 2000. That award is a major award. It operates, with respect to Schedule A, in Victoria, South Australia and New South Wales, with respect to Schedules B and C to named employers in Victoria and members of two Victorian employer associations, the Tasmanian Farmers and Graziers Association and the AiGroup.¹²

¹¹ [2009] AIRCFB 345

¹² [2009] AIRCFB 966

60. The Full Bench went on to say:

[16] We will insert the definition of “harvest period” as proposed by the NFF and the Ai Group. We will also insert “storing, grading, forwarding” into the coverage clause. Neither variation was opposed by the AWU.¹³

61. On the basis of this decision, the coverage clause of the Horticulture Award was expanded on 23 December 2009 to add the following underlined words to clause 4.2(a):

(a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or

62. The following definition of “harvest period” was also inserted into the Horticulture Award:

harvest period means the period of time during which the employees of the particular employer are engaged principally in the harvesting, grading or packing of horticultural crops

63. The NUW had no involvement in the horticulture award modernisation proceedings at all, or in the proceedings relating to the Ai Group and NFF joint application to vary the Award in late 2009. The NUW did not file written submissions or appear at the consultations. Therefore, the NUW cannot claim that the coverage of the Horticulture Award was in any way narrowed to take account of the coverage of the Storage Services Award. This issue was not even raised by any party in the proceedings.

64. All of the parties involved in the Horticulture Award proceedings intended that treatment, packing, storing and despatch of horticultural products by horticulture businesses should be included within the coverage of the Horticulture Award, regardless of the location where such activities were carried out.

¹³ Ibid

65. The abovementioned developments support the view that it was the intention of the AIRC's Award Modernisation Full Bench that:

- Storage, grading, packaging and despatching activities carried out by horticulture businesses would be covered by the Horticulture Award;
- These activities would be covered by the Horticulture Award, regardless of whether these activities are carried out on the same piece of land as the land where horticulture crops are grown; and
- Activities carried out by horticultural businesses "within the farm gate" (i.e. up to the first point of sale from the producer to a customer) would be covered by the Horticultural Award (i.e. where those activities are covered by the classifications in the Award).

66. The variation to the Horticultural Award that Ai Group is pursuing in the current proceedings would preserve the intended coverage of the Horticulture Award.

5.2 Food manufacturing award modernisation developments

67. Ai Group was the main employer group involved in the development of the Food Manufacturing Award. The terms of the award were based on a draft that Ai Group submitted to the AIRC as highlighted in the following extract from the AIRC's Stage 3 Award Modernisation Statement:¹⁴ (emphasis added)

"[87] The exposure draft is largely based on that submitted by the AiGroup. However, the definition of "food, beverage and tobacco manufacturing" has been altered to reduce the potential for overlap with other modern awards and exposure drafts. Further, the draft specifically excludes those covered by the Manufacturing Modern Award and the proposed Meat Industry Award 2010, Poultry Processing Award 2010 and Wine Industry Award 2010. Our preliminary view is that the award should not cover clerical employees."

¹⁴ [2009] AIRCFB 450.

68. During the Stage 2 Award Modernisation consultations, the AIRC was mindful of arguments advanced by the AMWU that the coverage of the Horticulture Award ought not cross over into food manufacturing activities previously covered by the *Food Preservers' Award 2000*. The AMWU's Food Preservers Award and the NUW's Manufacturing Grocers' Award were the two main pre-modern food manufacturing awards. The following extract from the AMWU's 31 October 2008 submission in the Stage 2 Award Modernisation proceedings is relevant:

5. Overlap with Food Preservers' Award 2000 – AP781106CRV

6. The AMWU seeks an exemption from the Agriculture Awards for the Food Preservers Award 2000 and specifically the industry that the Food Preservers' Award 2000 covers. The conditions and entitlements for the employees outlined in the Food Preservers' Award 2000 play an extremely significant role in determining what should be the industry "fair minimum safety net" and work regulated by that award should be considered in Stage 3 and excluded from any proposed Agriculture Awards.
7. A comparison of the coverage clauses of the Food Preservers' Award 2000 and the Horticultural Industry (AWU) Award 2000 reveals specific areas of overlap in the two industries. The comparison is attached at Appendix A at page 9 herein.
8. In summary, the key areas of overlap are:
 - a. Dehydration of fruits or vegetables
 - b. Crystallisation of fruit or vegetables
 - c. Juicing or processing of fruit juices
 - d. Canning of fruits or vegetables
 - e. "any other processing," of fruits or vegetables
9. The AMWU understands that the processes of dehydration and crystallisation require the establishment of a purpose built plant and with the advent of increased regulation for food preparation, the dehydration and crystallisation of fruits is no longer conducted absent a fully established plant as may have been the case for respondents to the awards superseded by the Horticultural Industry (AWU) Award. The processing of fruits and vegetables in wholly established plants has traditionally been regulated by the Food Preservers' Award 2000.
10. The AMWU understands that there are currently no respondents to the Horticultural Industry (AWU) Award 2000 that perform the work of, Canning of fruits or vegetables, which is another activity requiring the establishment of plants. Parties should provide evidence of this activity if they contend that canning can be done without a purpose built plant upon a farm. If canning has been regulated by both awards, the appropriate fair minimum safety net should be the Food Preservers' Award 2000.
11. There are only four (4) respondents to the Horticultural Industry (AWU) Award 2000 that engage in Juicing or processing of Juice. Six Berri Limited related companies are also respondents to the Food Preservers' Award 2000. Along with

the six Berri related respondents to the Food Preservers' Award, the Food Preservers' Award 2000 also has another thirty-one (31) incorporated respondents who engage in juicing or juice processing. Based on this analysis, it is clear that the Food Preservers' Award 2000 is the predominant Award for Juicing and Juice Processing and is the appropriate fair minimum safety net for this type of work.

12. The AMWU is opposed to the open ended statement, "any other processing, of fruits and vegetables," being included in the proposed Application clause of the modern Agriculture Award/s. The bulk of processing and manufacture of fruit and vegetable products from fresh fruit and vegetables is not regulated by an Award within the Agriculture Group.
 13. The conditions and entitlements of the Food Preservers' Award 2000 and the Horticultural Industry (AWU) Award 2000 differ significantly. Further submissions on this point will be made at the consultations.
 14. It is the AMWU's submission that the Food Preservers' Industry as described by the Food Preservers' Award 2000 has specific conditions and entitlements and industry characteristics that require it to be considered separately from the Agriculture Industry. Therefore the AMWU seeks an exclusion from the modern Agriculture Award/s for the Food Preservers' Award 2000 and the industry that it regulates.
69. The AIRC was also mindful of arguments advanced by the NUW in the Food Manufacturing Award modernisation proceedings that specialised cold storage companies should be covered under the Storage Services Award because the storage of goods is their principal business. The following relevant submissions were made by Mr Paul Richardson of the NUW (now the Assistant National Secretary) during the Stage 3 award modernisation consultations before Senior Deputy President Acton regarding the Food Manufacturing Award.¹⁵ (emphasis added)

PN234

In respect therefore of the proposed food award, we say that there are a number of issues that arise from the submissions of AI Group and to a certain extent by the CFMEU and the AMWU. Our preferred position is for sectoral awards but we do acknowledge that there is a food industry that can be defined. The difficulty that the NUW sees and encourages the Commission to cast it's attention to is that the proposed coverage of the food award put forward by the AI Group does not acknowledge certain sectors of the industry properly and I wish to take you through several examples to illustrate that point and I should add that our submissions today are effectively therefore limited to the issues of coverage and to the extent that coverage is something that should be understood in the context of the proposed classifications.

PN235

¹⁵ Transcript of proceedings, Acton SDP, 16 March 2009

In other words, we do not make any submissions as to rates, and conditions of employment generally. We believe that much of those matters are in effect settled and there is an onus to make out exceptions in respect of those matters. So if I can firstly turn to the example of the award to which my organisation is respondent the Butter Factories and Condensories Award if I can use its short title. In making this brief submission I dare say that it is the case for other awards or NAPSs that also apply in the dairy industry. That is that there is a longstanding recognition of certain activities being the equivalent in the level of skill and therefore the minimum rate of pay to that of tradespersons.

PN236

I just take one specific example, a cheese maker within the Butter Factories and Condensories award is somebody who is classed as having completed an Associate Diploma and is recognised as being equivalent to a tradesperson in terms of minimum rates. So there are – the point that I seek to make is that there are some activities or there are some occupations that relate to the manufacture, or preparation of food and food product that will not fit within the proposed structure put forward by the AIG. In fact we would say that the five level structure that the AI Group puts forward over simplifies the variety of functions, tasks and skills required in those sectors, or at least in some sectors of the food industry that the NUW has interest and the occupational classification of cheese maker is one such example.

PN237

Secondly, as we understand the proposed award put forward by AI Group it fails we say with respect to properly comprehend those activities. In our submission that industry that currently falls within the frozen goods award we say that the activities within that award can fall into two areas. Firstly there are manufacturers of food who operate a cold store. The easiest example would be the other major ice cream manufacturer Nestle which owns Peter Ice Creams that have Mr Terzic's members interests. They operate a cold store, ice cream is held there before it's dispatched to a retail outlet.

PN238

However there are a large number of other cold store operators who handle frozen goods that have no relationship to the food manufacturing industry at all, save and except that most if not all of the product that they store is food. They are third party logistics providers. Let me just give a few examples. Oxford Cold Storage, Versacold, Polar Fresh, PFD Food Service, these are all third party logistic supplies. They either hold food on behalf of a retailer, or a group of retailers, or they buy food in the form of – and then provide it to the trade in the form of food service.

PN239

Now we say with respect that there are particular activities and particular types of work that occur within those operations that are akin to the sort of classifications one sees in those awards that are known as storage services that are before as I understand it his Honour Senior Deputy President Kaufman and are perhaps better dealt with yet by his Honour at least in respect of those third party logistic providers. We would acknowledge or we would concede that in the case of the ice cream manufacturer who operates a cold store, to hold finished product before it being moved either to a third party provider or to a retail outlet is an activity that could be reasonably and certainly industrially described as incidental or ancillary to the manufacture of the food product. We don't think that AI Group has properly comprehended that group of frozen goods employers.

70. The above comments of Mr Paul Richardson of the NUW are also informative in understanding the difference between food storage activities legitimately covered by the Storage Services Award and those activities covered by the awards that operate in other industries. As highlighted by Mr Richardson, companies which produce goods and hold those goods in a store before despatch to a retailer (e.g. Peters Ice Cream), should be differentiated from an award coverage perspective to those companies whose entire business is the storage of goods (e.g. Oxford Cold Storage).

71. After considering the various arguments of Ai Group, the AMWU, the NUW and the other relevant parties, the AIRC determined the coverage clause of the Food Manufacturing Award. The key coverage definition in the Food Manufacturing Award is:

food, beverage and tobacco manufacturing means the preparing, cooking, baking, blending, brewing, fermenting, preserving, filleting, gutting, freezing, refrigerating, decorating, washing, grading, processing, distilling, manufacturing and milling of food, beverage and tobacco products, including stock feed and pet food, and ancillary activities such as:

- (a) the receipt, storing and handling of ingredients and raw materials to make food, beverage and tobacco products, including stock feed and pet food;
- (b) the bottling, canning, packaging, labelling, palletising, storing, preparing for sale, packing and despatching of food, beverage and tobacco products, including stock feed and pet food;

72. The abovementioned developments support the view that, at the time the Food Manufacturing Award was made, it was the intention of the AIRC's Award Modernisation Full Bench that:

- Food processing activities such as those previously covered by the pre-modern AMWU Food Preservers' Award and the NUW's Manufacturing Grocers' Award would be covered under the Food Manufacturing Award, rather than the Horticulture Award;
- Storage and distribution activities carried out by food manufacturing businesses would be covered by the Food Manufacturing Award; and

- Specialised cold storage companies that store food products (e.g. Oxford Cold Storage) would be covered under the Storage Services Award, rather than the Food Manufacturing Award, because the storage of goods is their principal business.

5.3 Storage services award modernisation developments

73. Ai Group was the main employer group involved in the development of the Storage Services Award. The main area of contention between Ai Group and the NUW concerned the potential disturbance in coverage of numerous industry awards (including the Manufacturing, Food Manufacturing, Horticulture, Wine, Vehicle, Graphic Arts, Business Equipment and numerous other industry awards) if the coverage of the Storage Services Award extended beyond those businesses that were principally engaged in the storage of goods.
74. Ai Group had no difficulty with the Storage Service Award covering the types of companies referred to by Mr Richardson in the abovementioned extract from the transcript of the Stage 3 consultations (see PN238 and PN239), such as Oxford Cold Storage, because storage is their entire business. However, stores and warehousing functions are carried out in numerous industries and Ai Group was determined to ensure that these functions remained covered under the industry awards applicable to the relevant industries.
75. In its Stage 3 pre-exposure draft submission of 6 March 2009,¹⁶ Ai Group stated: (emphasis added)

Chapter 22 – Storage Services

223. The Commission's list of indicative awards for the Storage Services Industry identifies 26 Awards or NAPSAs, excluding enterprise instruments, for consideration as part of the Storage Services Industry within Stage 3 of award modernisation.

¹⁶ Ai Group Submission, Award Modernisation – Stage 3 – Storage Services, 6 March 2008, pages 68 to 70. See http://www.airc.gov.au/awardmod/databases/storage/Submissions/AIG_allstage3.pdf

It is essential that any modern Storage Services Award not cover storepersons who are covered by any other industry award

224. It is extremely important that any modern Storage Services Award not intrude upon the coverage of the industry awards which cover storepersons. There are a large number of these awards. For example, the Metal Industry Award has always covered storepersons and the NUW's responsiveness to the award has revolved around this. Another example is the existing Business Equipment – Technical Service – Award. It covers storepersons and, again, the NUW is a respondent to the award to represent such workers. The Graphic Arts Award and the Rubber, Plastic and Cablemaking Industry Awards are further examples of awards that cover storepersons.
225. In manufacturing industries the stores / warehouse functions are typically highly integrated into the production process, regardless of whether the store contains materials and/or parts for use in production, or finished goods.
226. The federal Storage Services General Award 1999 contains a classification structure and wage rates which would be highly problematic if applied to storepersons in industries where stores work is currently covered under the relevant industry award.
227. With the above extremely important qualification relating to its coverage, Ai Group supports the making of a modern storage services award.

Ai Group's draft Storage Services Award 2010

228. Ai Group has drafted a modern *Storage Services Award 2010 (Annexure H)* for the Commission's consideration. On the whole, the Ai Group version of the Award is based on the *Storage Services General Award 1999*.
229. The coverage clause of Ai Group's draft Storage Services Award 2010 reads:
"This award covers employers throughout Australia in the storage services industry and their employees."
230. The draft award contains the following definition of the industry:
"Storage services industry means the receiving, unloading, handling, storing, packing, sorting, preparation of goods to order, loading, preparation for despatch and despatch of goods and merchandise, wares, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a warehouse facility"
231. The intent of the coverage clause is to ensure that the scope of the Award does not inadvertently extend coverage of the Award to employers operating in other industries. In order to ensure this, subclause 4.2 provides for a general exclusion.
232. In an abundance of caution and in response to submissions made by other parties with regards to the coverage of the Road Transport and Distribution during Stage 2 of award modernisation, Ai Group has also included specific exclusions from coverage in clause 4.3 of our draft, as follows:
"This award does not cover employers and employees covered by the following awards:
- *The Manufacturing and Associated Industries and Occupations Award 2010;*
 - *The Road Transport (Long Distance Operations) Award 2010;*

- *The Road Transport and Distribution Award 2010*¹⁷

76. As identified in the above submission, the draft Storage Services Award that Ai Group submitted to the AIRC Award Modernisation Full Bench contained a general exclusion (subclause 4.2) to prevent the award extending to employers operating in other industries that employ stores and warehousing employees.

77. The NUW strongly opposed Ai Group's proposed exclusion,¹⁷ but the Full Bench accepted Ai Group's arguments and an exclusion was incorporated into the Storage Services Award.

78. Clause 4.2(a) of the Storage Services Award states:

4.2 Notwithstanding clause 4.1, the award does not cover:

- (a) an employer to the extent that the employer is covered by another modern award that contains classifications relating to functions included within the definition of the storage services and wholesale industry with respect to any employee who is covered by that award;

79. Clause 4.2(a) of the Storage Services Award operates to exempt employers who employ employees to perform the functions included within the definition of "storage services and wholesale industry" in the award¹⁸ if another modern award covers that employer and the award contains classifications relating to the abovementioned functions. These functions are the "*receiving, handling, storing, freezing, refrigerating, bottling, packing, preparation for sale, sorting, loading, dispatch, delivery, or sale by wholesale, of produce, goods or merchandise as well as activities and processes connected, incidental or ancillary*".¹⁹

¹⁷ NUW Submission, Award Modernisation – Stage 3 – Storage Services, 7 April 2008, http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW_further_storage.pdf; Also see NUW mark-up of Storage Services and Wholesale Award 2010 exposure draft dated 9 May 2009, 19 June 2009, http://www.airc.gov.au/awardmod/databases/storage/Submissions/NUW_wholesa_ed.doc

¹⁸ Storage Services and Wholesale Award 2010, clause 3.1.

¹⁹ Storage Services and Wholesale Award 2010, clause 3.1.

80. The Horticulture Award contains classifications relating to functions included within the definition of the “storage services and wholesale industry”. For example, the classification structure of the Horticulture Award includes, as indicative tasks, the sorting and packing of produce²⁰ and inventory and store control.²¹ Furthermore, the Horticulture Award lists the activities of packing, storing and forwarding of fruit and vegetables within its coverage clause at 4.2(a).
81. The abovementioned developments support the view that, at the time the Storage Services Award was made, it was the intention of the AIRC’s Award Modernisation Full Bench that the Storage Services Award not apply to employers and employees in the horticulture industry, given that the Horticulture Award covers packing, storing and despatch functions.

6. THE CLASSIFICATIONS IN THE HORTICULTURE AWARD

82. In order to be covered by the Horticulture Award, the employees of a business that is covered by clause 4.2 must also be covered by the relevant classifications in the Award.
83. The classifications in Schedule B of the Award undoubtedly include the packing, storing, grading, forwarding, washing and treating of horticultural crops.
84. For example, in clause B.1.3, the indicative tasks of a Level 1 Employee include:
- sorting, packing or grading of produce where this requires the exercise of only minimal judgment.

²⁰ Clauses B1.1.3 and B1.2.3 of the Horticulture Award.

²¹ Clause B.4.3 of the Horticulture Award.

85. Similarly, in clause B.2.3, the indicative tasks of a Level 2 Employee include:
- performing a range of tasks involving the set up and operation of production and/or packaging or picking equipment, labelling and/or consumer picking equipment;
 - sorting, packing and grading beyond the scope of Level 1 duties;
 - using hand trolleys, pallet trucks or other mechanical or power driven lifting or handling devices not requiring a licence; and
 - general and routine product testing.
86. Further, the indicative tasks for Level 3, 4 and 5 Employees in Schedule B also clearly cover functions connected to the washing, grading and packing of horticultural crops (albeit at a higher skill level).
87. Indeed, Bartel DP at first instance in the *Mitolo* case accepted that the classifications in the Horticulture Award were more aligned with the duties undertaken by the employees at Mitolo's centralised washing, grading and packing facility than the classifications in the Storage Services Award.²²

7. THE MITOLO CASE

88. The decision of the Full Bench in *Mitolo*²³ adds weight to the argument that the coverage clause in the Horticulture Award should be amended.
89. The Full Bench invited parties to pursue changes to the coverage of the Horticulture Award during the 4 Yearly Review: (emphasis added)

[59] The 4 yearly review of modern awards required by s.156 of the FW Act is currently proceeding. The Horticulture Award and the Storage Services Award fall within shortly upcoming stages of the current review. If any party considers that the coverage or other provisions of the two awards are such that the modern awards objective in s.134 of the FW Act is not being met, the current review provides an opportunity for such an issue to be agitated before a Full Bench of the Commission.²⁴

²² [2014] FWC 2524 at [84].

²³ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 (21 April 2015)

²⁴ *Mitolo Group Pty Ltd v National Union of Workers* [2015] FWCFB 2524 (21 April 2015).

90. The statutory provisions which govern the current proceedings, including ss.156 and 160, are very different to those which governed the *Mitolo* proceedings.
91. Also, the submissions and evidence in the current proceedings deal with much broader issues than whether or not one enterprise agreement should be approved, which was the issue in contention in *Mitolo*.
92. Accordingly, we urge the current Full Bench to consider the issues afresh rather than being unduly influenced by the decision of the Full Bench in *Mitolo*.

8. THE NATURE OF THE HORTICULTURE INDUSTRY

93. Australia's horticulture industry is one of the largest agricultural sectors in Australia. In 2013/2014 alone, Australian horticulture (excluding wine grapes) had a gross value of \$8.73 billion, ranked third behind the meat and grain industries.²⁵
94. The industry operates in a highly competitive domestic and international market. It is labour intensive and mostly seasonal, and faces continuing cost pressures.
95. The evidence of Bryan Robertson, Robin Davis, Mark Cody and the individual employers who gave evidence, provide valuable insights into how businesses in the horticulture industry in Australia typically operate and the cost and competitive pressures they face.
96. The evidence provides strong support for Ai Group's arguments that the Horticulture Award needs to apply to all activities that are part of the horticulture production chain, and which are carried out by businesses that produce horticulture crops, regardless of where the activities are undertaken.

²⁵ ABARES Agricultural commodities: September quarter 2015 – Statistics. Taken from the Department of Agriculture and Water Resources, Horticulture Fact Sheet, available at: http://www.agriculture.gov.au/ag-farm-food/hort-policy/horticulture_fact_sheet#production-statistics

97. The evidence of Bryan Robertson, Robin Davis and Mark Cody reveal the following regarding the operation of horticultural businesses:

- Producing vegetables is an integrated process that typically involves a number of activities including preparing the land, seeding, growing, cultivating, harvesting, washing, grading and packing for despatch.²⁶
- It is common for vegetable producers to operate across multiple properties, with one central location and secondary properties for production.²⁷
- Businesses often have multiple properties because it is difficult to acquire land of the required size in one location and, consequently, as businesses expand they need to acquire land wherever they can obtain it.²⁸
- Horticultural businesses often draw produce from a large number of different growing locations.²⁹
- To produce various horticultural crops (e.g. potatoes), land needs to be left fallow.³⁰
- It is common for producers with multiple growing sites to have a single, centralised washing and packing facility where produce that has been grown and harvested is taken to be washed, graded and packed.³¹

²⁶ Witness statement of Bryan Robertson at paragraph 28; witness statement of Robin Davis at paragraph 24; Witness statement of Mark Cody at paragraphs 12 and 13

²⁷ Witness statement of Mark Cody at paragraphs 17-19; Witness statement of Robin Davis at paragraphs 28-30; Witness statement of Bryan Robertson at paragraphs 23-25

²⁸ Witness statement of Bryan Robertson at paragraph 21 and 22; Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 16

²⁹ Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 17

³⁰ Witness statement of Robin Davis at paragraph 27; Witness statement of Mark Cody at paragraph 17

³¹ Witness statement of Mark Cody at paragraphs 17-19; Witness statement of Robin Davis at paragraphs 28-30; Witness statement of Bryan Robertson at paragraphs 23-25

- These centralised washing and packing facilities are sophisticated and expensive and it would be nonsensical from both a financial and operational efficiency perspective for one horticulture business to have more than one such facility.³²
- Washing and packing facilities typically need to be in a centralised location to be able to access the required electricity, gas and water, and to ensure that the produce is able to be easily transported.³³
- Vegetable producers are required to meet strict fitness for purpose specifications set by Governments and major retailers in order to be able to sell their produce.³⁴
- The perishable nature of most horticulture products requires fast despatch to customers.³⁵
- Supermarkets generally receive potatoes within 24-48 hours of them being harvested.³⁶
- Cool rooms in centralised washing and packing facilities typically only hold products for a very short period of time pending despatch to customers.³⁷
- There are a substantial cost and competitive pressures upon businesses in the horticulture industry.³⁸

³² Witness statement of Bryan Robertson at paragraph 25; witness statement of Robin Davis at paragraph 30; Witness statement of Mark Cody at paragraphs 17-20

³³ Witness statement of Bryan Robertson at paragraph 25; Witness statement of Mark Cody at paragraph 17

³⁴ Witness statement of Bryan Robertson at paragraphs 28-43; and witness statement of Robin Davis at paragraphs 31-38

³⁵ Witness statement of Mark Cody at paragraph 15; Re-examination of Bryan Robertson at Transcript PN1011

³⁶ Cross-examination of Robin Davis at Transcript PN1216-PN1217

³⁷ Cross-examination of Robin Davis at Transcript PN1219

³⁸ Witness statement of Bryan Robertson at paragraph 57; and witness statement of Robin Anne Davis at paragraphs 47-48.

- Horticulture producers are under pressure to cope with seasonal changes in demand and supply, and unpredictable weather.³⁹
98. If washing, grading and packing activities undertaken at different locations to where the horticultural crops are grown and harvested is not covered under the Horticulture Award, the Award would be unaligned with how the industry operates.
99. The following adverse and illogical outcomes would result from the Storage Services Award being applied to centralised washing and packing facilities of horticultural businesses:
- Activities relating to the washing, packing, storing, grading, forwarding and treating of horticultural crops would be covered by the Horticulture Award only if they are physically undertaken on the same piece of land as where the crops are grown and harvested.
 - Activities relating to the washing, packing, storing, grading, forwarding and treating of horticultural crops would be covered by the Storage Services Award if they are undertaken on any different piece of land to the land where the crops are grown and harvested, even if, for example, the two pieces of land are adjacent to each other;
 - Award coverage would be misaligned with the nature of the horticulture industry.
100. If the NUW and AWU's assertions prevail, a decision of a horticulture business to purchase or sell a piece of land could completely change the award coverage of the business and its employees. Land ownership is not a logical basis for award coverage.

³⁹ Witness statement of Bryan Roberts on at paragraphs 5-56

9. THE HORTICULTURE AWARD IS CURRENTLY BEING VERY WIDELY APPLIED TO CENTRALISED WASHING AND PACKING FACILITIES

101. The Horticulture Award is currently being very widely applied to centralised washing and packing facilities in the horticulture industry, as highlighted by the evidence of Bryan Robertson⁴⁰ and Mark Cody.⁴¹
102. The Storage Services Award is not being widely applied to centralised storage and packing facilities in the horticulture industry, or any other operations in the horticulture industry.
103. The fact that the NUW may be able to identify a couple of businesses that have decided to apply the Storage Services Award (or an enterprise agreement based on the award) in response to NUW claims, does not alter the fact that the Horticulture Award is the one that is applied very widely throughout the Horticulture Industry.
104. For the past few years the NUW has been trying to increase its membership in the horticulture industry through claims for employers to apply the Storage Services Award. So far it has been very unsuccessful.
105. Disappointingly, the AWU – the main union in the horticulture industry – has opportunistically decided to support the NUW's position in these proceedings rather than maintaining the position that it adopted when the Horticulture Award was developed. As set out in section 5.3 above, during the award modernisation process the AWU, Ai Group, NFF and HAC all supported the inclusion of washing, packing, grading, storage and despatch of horticultural products being included within the Horticulture Award. None of these parties (or any other party) argued that centralised facilities operated by horticultural businesses should be covered under any other award.

⁴⁰ Witness statement of Bryan Robertson at paragraphs 58-59.

⁴¹ Witness Statement of Mark Cody at paragraph 23.

106. The NUW had no involvement in the award modernisation proceedings relating to the Horticulture Award.

10. THE INSPECTIONS

107. On 6 July 2017, the Full Bench conducted Inspections at the premises of Mitolo and Zerella in South Australia.

108. The following observations are very relevant to the issues that are being contested in the current proceedings:

- The activities carried out at the centralised washing and packaging facilities of Mitolo and Zerella are seamlessly connected with the growing and harvesting activities;
- The activities carried out at the facilities are obviously horticulture activities, rather than storage and warehousing activities;
- The centralised washing and packing facilities are located in a rural area, amongst farms operated by Mitolo and Zerella;
- It would be impossible to have washing and packing facilities located on each farm, given the nature of the activities carried out at these facilities;
- Vegetables move through the facilities very quickly – within 48 hours;
- The “use by” dates on the bags of potatoes despatched to supermarkets are within about two weeks of the despatch date, which highlights the perishable nature of the products and the importance of despatching the products very quickly;
- The cool rooms at Mitolo and Zerella are not areas for storing products, but rather they are holding areas for goods that are awaiting despatch;
- A large amount of dirt and waste is handled in the centralised washing and packing facilities, as well as vegetables;

- A substantial proportion of the potatoes, onions and carrots that are harvested do not meet quality standards and are returned to the land from the centralised washing and packing facilities.

109. At one point during the Inspections, the parties stopped (to observe Mitolo's farms) outside of the large centralised washing and packing facility of Virginia Farm Produce which is located on the same block of land to one of Virginia Farm Produce's farms. It would be irrational for Mitolo's and Zerella's centralised washing and packing facilities to be covered by the Storage Services Award, but for Virginia Farm Produce's facility to be covered by the Horticulture Award, simply because of the blocks of land on which the facilities are located.
110. It was abundantly clear from the Inspections that the centralised washing and packaging facilities at Mitolo and Zerella are nothing like the warehouses and cold storage facilities that are legitimately covered by the Storage Services Award. It was also abundantly clear that the activities carried out are horticultural in nature, and seamlessly connected to the growing and harvesting activities.

11. THE PROPOSED VARIATION

111. Ai Group proposes that the Horticulture Award be varied as follows (proposed additional wording is underlined and proposed deletions are struck out):

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) ~~agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise including fruit and vegetables upon farms, orchards and/or plantations; or~~
- (b) ~~clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a) for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.~~

112. The proposed variation was developed in consultation with employers operating in the horticulture industry.
113. The proposed variation captures the functions typically performed by businesses which grow horticultural crops. These functions are widely performed by businesses in the horticulture industry and are "horticultural" in nature.
114. The proposed inclusion of a definition of "horticulture enterprise" within clause 4.2 would clarify which types of businesses are included within the coverage of the Award and which are not. The key descriptor of a "horticultural enterprise" is that it is engaged in the raising of horticultural crops.
115. The definition of "enterprise" is important. It reflects the reality that many employers in the horticulture industry have corporate structures which involve different legal entities owning/operating different parts of the business, but within a common, integrated business.
116. Family businesses are common in the horticulture industry and many are set up with different legal entities.

117. As stated by Mr Bryan Robertson in his witness statement:

- “26. It is common for the businesses that we represent to have corporate structures that consist of different legal entities. They often have different entities for different functions of the business, for example, one for seed production, field production and harvesting, and washing, grading and packing. Some of our members also have different entities for different crops they grow.
27. The reason for structuring horticulture businesses in this way is so that the horticulture business (overall) can work out the profitability of different parts of the business. Having multiple entities is also used for tax purposes and to allow for flexibility in managing different parts of the business.”

118. This issue was also dealt with in the witness statement of Mr John Dollisson as follows:

- “12. As these facilities have been developed over time they often have different legal entities, still within the same corporate or family entity, sometimes a cooperative or joint venture entity. Often this is required by funding entities to ensure security of their loans. It is also true of dispatch, selling, and market entities involved in the overall horticulture process, but still part of the family enterprise or group.
13. Despite the different entities the labour needs to be shared across the different facilities, which are used at different times of the growing season and sometimes on the same day depending on the weather. This is commonly undertaken under the Horticulture Award 2010 and this should continue to be the case to simplify the necessary sharing of labour across facilities by what are still, in effect, family entities. To force family enterprises to employ staff, often the same staff on different awards depending on the work they perform for all or part of a day, would present a huge additional cost burden on these family farms.”

119. Mr Dollisson further explained the reasons why horticulture businesses often need to have different legal entities during cross-examination by Mr Crawford on behalf of the AWU on 21 June 2017:

PN929

At paragraph 12 of your statement, you talk about how sometimes different legal entities can be created and you say often this is required by funding entities to ensure security of their loans; is that correct?---That's correct.

PN930

Is it correct that banks or other lenders can be reluctant to lend money to a farm operator because of the inherent risk involved in running a farm?---Correct, and weather issues and the vulnerability of agriculture, correct.

PN931

Yes, because a farmer could plant all their crops and then there could be a fire or a flood or a drought and they would lose all that money they have invested

in the land, wouldn't they?---They'd lose the money invested in the crop. Obviously, they still have the money invested in the land. The land is always saleable.”

120. The proposed variation is sensible, practical and fair to all parties.
121. The proposed variation reflects the manner in which the horticulture industry is structured, and would ensure that the Horticulture Award covers the range of activities typically carried out by businesses in the horticulture industry.

12. THE MODERN AWARDS OBJECTIVE

122. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h) of the Act.

A fair safety net

123. The notion of “fairness” in s.134(1) is not confined in its application to employees. Consideration must also be given to the fairness or otherwise of award obligations on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a *fair* and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.⁴²

124. Similarly, in the recent 4 Yearly Review decision concerning the payment of wages common issues proceedings, the Full Bench decided to vary a number of payment of wage provisions in particular awards on the basis that they were not “fair” to employers, and hence did not reflect the requirement in s.134 that awards provide a “fair... safety net”. For example, in its decision the Full Bench stated: (emphasis added)

⁴² 4 yearly review of modern awards [2015] FWCFB 3177 at [109].

[93] But we also accept that there is considerable force in the ‘impracticability’ argument advanced by ABI and Ai Group. It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter

- - -

[181] The issue for us is whether the modern award, together with the NES, provides a fair and relevant safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[182] We have concluded that clauses 32.2 and 32.3 do not provide a ‘fair ... safety net’.⁴³

125. Along similar lines, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the *Workplace Relations Act 1996* (WR Act). That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

“In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. ...⁴⁴

126. The uncertainty that currently exists regarding the coverage of the Horticulture Award is not fair. Businesses need to be able to plan and enter into contracts with suppliers and customers with clarity regarding what costs are payable.
127. It would also not be fair to subject employers in the horticulture industry to much higher costs and reduced flexibility by requiring them to apply the Storage Services Award to their washing, treating, packing and despatch

⁴³ 4 Yearly review of modern awards [2016] FWCFB 8463

⁴⁴ *Re Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1 at [11].

operations that are integrally connected with their growing and harvesting operations. The Storage Services Award is not suited to horticultural operations from either a cost or flexibility perspective.

A relevant safety net

128. The changes that Ai Group is seeking to the Horticulture Award are aimed at ensuring that the award remains relevant to the horticulture industry.
129. Requiring that the Storage Services Award be applied to horticultural businesses' washing, treating, packing and despatch operations would result in the Award not being "relevant" to the manner in which the horticulture industry operates. These operations are integrally connected with growing and harvesting operations.
130. The Storage Services Award is not relevant to the operations of businesses which grow horticultural crops. It is an award designed for large warehousing operations.

Section 134(1)(a) to (h)

Section 134(1)(a) – Relative living standards and needs of the low paid

131. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a): (emphasis added)

[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.⁴⁵

132. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

⁴⁵ *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.⁴⁶

133. The variations proposed by Ai Group do not detract from the maintenance of the relative living standards and needs of the low paid. They are aimed at protecting employers from unwarranted cost increases and reductions in flexibility.
134. Further cost pressures or the imposition of inflexibilities on horticulture businesses would result in a loss of jobs and/or a reduction in hours for employees (see below regarding ss.134(1)(c) and 134(1)(f)) thereby resulting in a reduction of living standards for those employees.

Section 134(1)(b) – The need to encourage collective bargaining

135. The variations proposed are consistent with s.134(1)(b).
136. Clarifying the coverage of the Horticulture Award would assist the parties to more efficiently and effectively bargain. The present uncertainties about award coverage are deterring bargaining because of uncertainties surrounding the application of the Better Off Overall Test.⁴⁷

Section 134(1)(c) - The need to promote social inclusion through increased workforce participation

137. The flexibilities in the Horticulture Award enable horticulture industry employers to increase workforce participation by offering additional hours to existing employees, and by employing new employees, particularly during harvest periods.

⁴⁶ *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

⁴⁷ See sections 186 and 193 of the *Fair Work Act 2009*

138. The need to avoid imposing inflexibilities which would reduce workforce participation in the horticulture industry was highlighted in the recent decision of the Full Bench in the *4 Yearly Review of Awards – Casual and Part-Time Employment Case*:⁴⁸ (emphasis added)

[749] We consider that evidence adduced by the NFF and ABI convincingly demonstrates at least the following propositions:

(1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.

(2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.

(3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.

(4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence. Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry. The alternatives mentioned were to move to less labour intensive crops or reduce output.

- - -

[753] In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. There remains 2 critical issues to be resolved: first, over what period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time.

- - -

[755] We consider that a better solution to the difficulty would be to allow an averaging period of sufficient length to allow long hours of work to be performed in

⁴⁸ [2017] FWCFB 3541

short periods of time without attracting overtime penalty rates. We are provisionally minded to allow weekly hours to be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period. However because this was, again, an issue not extensively explored in the evidence and submissions, we will allow interested parties an opportunity to make further submissions about this (and, if necessary, to adduce further evidence) before we make a final decision. We will also direct the parties to confer in order to endeavour to reach an agreed outcome. A member of the Commission will be made available to assist if interested parties request this to occur.”

139. As highlighted by the Full Bench, flexible award conditions are needed in the Horticulture Industry. Otherwise employers would reduce the hours of their casual employees and less employees would choose to work in the industry.
140. The relatively inflexible provisions of the Storage Services Award are not suited to the horticulture industry. If horticulture businesses were forced to apply it, there would be negative impacts upon workforce participation.

Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

141. The Horticulture Award contains relatively flexible terms and conditions that suit the features of the horticulture industry. In contrast, the Storage Services Award is relatively inflexible and costly, and not suited to the horticulture industry.
142. The flexibilities provided to employers and employees under the Horticulture Award were clearly an acknowledgement by the Award Modernisation Full Bench of the AIRC of the unique needs of the industry.
143. The evidence in the case demonstrates that it would be highly inefficient, and often impossible, for horticulture businesses to have washing and packing facilities on each block of land where crops are grown. These facilities are typically centralised, even though they are an integral aspect of the business carried out by horticulture producers.

144. The Horticulture Award is currently very widely applied to centralised washing and packing facilities in the horticulture industry, as highlighted by the evidence of Bryan Robertson⁴⁹ and Mark Cody.⁵⁰
145. The Storage Services Award is not widely applied to centralised storage and packing facilities in the horticulture industry, or any other operations in the horticulture industry.
146. Ai Group's proposed variation is aimed at ensuring that the Horticultural Award continues to cover the operations of businesses which grow horticultural crops, including cleaning, grading, packing and despatch activities.

Section 134(1)(da) - The need to provide additional remuneration

147. This is a neutral consideration in this matter.

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

148. This is a neutral consideration in this matter.

Section 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden

149. The evidence shows that there are a substantial cost and competitive pressures upon businesses in the horticulture industry.⁵¹
150. The evidence also shows that horticulture producers are under pressure to cope with seasonal changes in demand and supply, and unpredictable weather.⁵²

⁴⁹ Witness statement of Bryan Robertson at paragraphs 58-59.

⁵⁰ Witness Statement of Mark Cody at paragraph 23.

⁵¹ Witness statement of Bryan Robertson at paragraph 57; and witness statement of Robin Anne Davis at paragraphs 47-48.

⁵² Witness statement of Bryan Robertson at paragraphs 5-56

151. The Full Bench in the *4 Yearly Review of Awards – Casual and Part-time Employment Case*⁵³ reached the following relevant conclusions:

[749] We consider that evidence adduced by the NFF and ABI convincingly demonstrates at least the following propositions:

(1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.

- - -

[750] Additionally the evidence of the AWU demonstrated what we, from our collective experience, already know to be the case, namely that award non-compliance in the horticultural industry is widespread. Therefore the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.”

152. A recent paper by AUSVEG and Horticulture Australia Limited looked at the costs of production for Australian Vegetable Growers noted that reducing and managing total cash costs is essential for Australian vegetable growers, given the rising average total cash costs that growers have had to contend with over recent years.⁵⁴
153. Ai Group has undertaken an analysis of the key provisions of the Horticulture Award and Storage Services Award which significantly impact upon an employer’s costs and flexibility. This analysis is found in the table at **Annexure A** to the submission that Ai Group filed in December 2016.
154. The table highlights the increased costs and reduced flexibilities that would be imposed on horticulture business if they were forced to apply the Storage Services Award. For example:
- The hours of work clause (clause 22.1) in the Horticulture Award set out a span of hours which reflect the nature of the horticulture industry. The

⁵³ [2017] FWCFB 3541

⁵⁴ AUSVEG and HAL, ‘Costs of production for Australian vegetable growers’ p. 2. Available at: <https://ausveg.com.au/app/uploads/2017/05/Costs-of-production-for-Australian-vegetable-growers-1.pdf>

span of hours for full-time and part-time employees is from 6am to 6pm,⁵⁵ with no span of hours for casuals, to allow work to be carried out at appropriate times of the day depending about weather, harvest times, etc. The span of hours is much shorter in the Storage Services Award, i.e. 7.30am to 5.30pm.⁵⁶

- Currently under the Horticulture Award casual employees do not receive overtime penalties. This will shortly be amended as a result of the decision of the Full Bench in the *4 Yearly Review of Awards – Casual and Part-time Employment Case*, but the overtime provisions for casuals will be a lot more flexible than those in the Storage Services Award (see extract from the decision as reproduced above in the section of this submission relating to s.134(1)(c) of the Act). The Storage Services Award does not exclude casuals from the payment of overtime rates.
- The Storage Services Award requires that minimum engagement periods be provided to part-time and casual employees⁵⁷ and for work performed on Saturdays, Sundays and public holidays.⁵⁸ The Horticulture Award does not include minimum engagement periods for work performed between Monday and Saturday.⁵⁹
- Under the Horticulture Award, ordinary hours can be worked on Saturdays without the imposition of a weekend penalty, unlike the Storage Services Award which requires that all Saturday work must be paid at a rate of 150%.

⁵⁵ See Horticulture Award 2010, clause 22.1(b).

⁵⁶ See Storage Services and Wholesale Award 2010, clause 22.1.

⁵⁷ See Storage Services and Wholesale Award 2010, clauses 11.3(e) and 11.4(a).

⁵⁸ See Storage Services and Wholesale Award 2010, clause 24.5.

⁵⁹ See Horticulture Award, clause 24.2(e).

- Overtime performed on a Saturday under the Horticulture Award is paid at a rate of 150%, unlike the Storage Services Award which requires that the first two hours of overtime be paid at 150% and thereafter at 200%.
- Clause 24.2(c) of the Horticulture Award allows for Sunday overtime by full-time and part-time employees to be substituted for Saturday overtime, by agreement between the employer and majority of employees affected. In such circumstances, the overtime performed on Sunday is paid as though it is a Saturday. This flexibility does not apply under the Storage Services Award.
- Clause 24.2(d) of the Horticulture Award allows for work to be arranged during the harvest period to accommodate for the increase in demand for labour during that time. The clause allows for the first eight hours of overtime in a week by full-time and part-time employees, which includes five hours on a Sunday, to be paid at 150%. This flexibility does not apply under the Storage Services Award.
- The Horticulture Award provides for piecework whereas the Storage Services Award does not.
- When comparing minimum weekly wages, the Storage Services Award is up to \$64 more expensive than the Horticulture Award for equivalent classifications.
- The Horticulture Award provides for a night shift loading of 15%,⁶⁰ whereas the Storage Services Award provides for a night shift loading of 30%.⁶¹

⁶⁰ Horticulture Award 2010, clause 22.2(d).

⁶¹ Storage Services and Wholesale Award 2010, clause 25.4(c).

- The Horticulture Award provides for a penalty of 200% for public holiday work⁶² whereas the Storage Services Award provides for a public holiday penalty of 250%.⁶³

155. In addition, the evidence in these proceedings demonstrates that it would be highly unproductive for horticulture businesses to have washing and packing facilities on each block of land where crops are grown.

156. Ai Group's proposed variation would prevent crippling additional cost increases and unproductive work methods being imposed on horticulture businesses and, accordingly, the proposed variation strongly supports s.134(1)(f) of the modern awards objective.

Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards

157. Our proposed variation would ensure that the Award is simple and easy to understand. The proposed provisions are clear and unambiguous.

158. Clause 4 of the Horticulture Award is ambiguous and uncertain for the reasons set out in section 13 of this submission, and hence the clause is inconsistent with s.134(1)(g).

Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

159. To the extent that the proposed amendments are consistent with s.134(1)(b), (d), (f) and (g), they would also have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

⁶² Horticulture Award 2010, clause 28.3.

⁶³ Storage Services and Wholesale Award 2010, clause 24.5(c)(i).

160. The horticulture industry is a significant contributor to employment, economic growth and export performance. Australia's horticulture industry is one of the largest agricultural sectors in Australia. In 2013/2014, Australian horticulture (excluding wine grapes) had a gross value of \$8.73 billion, ranked third behind the meat and grain industries.⁶⁴
161. It is important that the horticulture industry is able to continue to remain competitive both domestically and internationally. Access to reasonable labour costs, and an ability for horticulture businesses to arrange work in a way which enables them to readily respond to changes in demand due to harvest periods, weather events and customer requirements, are important features of the industry. These features are reflected in the provisions of the Horticulture Award.
162. If horticulture businesses are forced to apply the Storage Services Award, the horticulture industry will be less profitable, less productive, less sustainable, less competitive, and less able to maintain or increase employment levels.

Conclusion

163. In summary, the specific factors comprising the modern awards objective weigh strongly in favour of granting the proposed variation.

13. APPLICATION UNDER SECTION 160

164. The following section of this submission is made in support of the joint application of Ai Group and The Mitolo Group under s.160 of the FW Act to amend clause 4 of the Horticulture Award to remove ambiguity and uncertainty.

⁶⁴ ABARES Agricultural commodities: September quarter 2015 – Statistics. Taken from the Department of Agriculture and Water Resources, Horticulture Fact Sheet, available at: http://www.agriculture.gov.au/ag-farm-food/hort-policy/horticulture_fact_sheet#production-statistics

165. This section should be read in conjunction with other sections of this submission because many of the arguments in support of varying the Award to ensure consistency with the modern awards objective, are relevant to the merits of varying the Award to remove ambiguity and uncertainty.
166. Ai Group has standing to make the application as an organisation that is entitled to represent the industrial interests of one or more employers who are covered by the Horticulture Award (s.160(2)(c)).
167. In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Full Bench made the following relevant comments about s.160 in the context of the Review: (emphasis added)

[51] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Commission may vary a modern award to “remove an ambiguity or uncertainty or to correct an error”. These provisions continue to be available during the Review, either on application or on the Commission’s own initiative.

[52] In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties will be provided with an opportunity to comment on any such proposed variation.

168. Clause 4 of the Award is both ambiguous and uncertain, and this ambiguity and uncertainty should be addressed through the variation that Ai Group has proposed.
169. The key authority setting out the appropriate approach for the Commission to take when exercising jurisdiction to vary an industrial instrument on the basis of ambiguity or uncertainty is the decision of the Full Bench of the AIRC in *Re. Tenix Defence Pty Limited*.⁶⁵ In this case, the Full Bench said: (emphasis added)

‘[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

⁶⁵ *Re Tenix Defence Pty Limited* (PR917548, 9 May 2002, as cited in [2012] FWA FB 3210 and [2010] FWA 8732.

[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:

"The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.

[32] Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. In exercising such a discretion the Commission is to have regard to the mutual intention of the parties at the time the agreement was made.

170. The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*⁶⁶ provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':

'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'

171. Ai Group's application meets the relevant jurisdictional arguments.
172. Ai Group contends that the intended meaning of clause 4 of the Horticulture Award is that it does not require that treating, sorting, grading, packing and despatch activities are carried out at the same location as the growing of the horticultural crops.

⁶⁶ T3721, 24 November 2000

173. Clause 4.2(a) does not specify that the activities referred to need to be undertaken “at”, “on” or “in” an agricultural holding, flower or vegetable market garden. Rather the clause specifies that the activities need to be “in connection with” agricultural holdings, flower or vegetable market gardens.
174. The words “in connection with” do not, on their plain and ordinary meaning, impose a restriction on where the activities are undertaken. Instead they qualify coverage by specifying that there needs to a “connection” between agricultural holdings, flower or vegetable market gardens and the activities.
175. We understand that the NUW and AWU have an opposing view on the correct interpretation of clause 4.2(a).
176. Accordingly, there are “rival contentions advanced” and “an arguable case” has been “made out for more than one contention”. In such circumstances, the Commission should “err on the side of finding an ambiguity or uncertainty”.⁶⁷
177. The Full Bench can have no doubt that clause 4 meets the test of uncertainty articulated by Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*.⁶⁸ It is very obvious that clause 4.2(a) is in a “state of not being definitely known or perfectly clear, doubtfulness or vagueness”.
178. After finding that clause 4 is ambiguous and/or uncertain, the Commission has the jurisdiction to remedy the situation by varying the Award under s.160 of the Act.
179. It is in the public interest that the Award be varied in the manner proposed by Ai Group.

⁶⁷ *Re. Tenix Defence Pty Limited* (PR917548, 9 May 2002), at para [31].

⁶⁸ T3721, 24 November 2000

14. OPERATIVE DATE

180. Ai Group seeks a retrospective operative date of 1 January 2010, i.e. the date when the Horticulture Award was made.
181. Exceptional circumstances exist in order to justify granting the proposed retrospective operative date.
182. In its *Preliminary Jurisdictional Issues Decision* for the 4 Yearly Review of Awards, the Full Bench made the following relevant comments about retrospective operative dates: (emphasis added)

[57] The effect of s.165 is clear. A variation to a modern award comes into operation on the day specified in the determination (the 'specified day'). The default position is that the 'specified day' must not be earlier than the day on which the variation determination is made. In other words determinations varying modern awards generally operate prospectively and in relation to a particular employee the determination takes effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. It is apparent from the use of the conjunctive 'and' in s.165(2) that a variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

183. The circumstances surrounding this matter can be aligned with those dealt with by Justice Boulton in respect of a variation proposed by Ai Group to the coverage clause of the *Black Coal Mining Industry Award 2010* during the 2 Year Review of Awards. In His Honour's decision, Boulton J stated:⁶⁹ (emphasis added)

[12] The Ai Group submit that the amendment to the note in the coverage clause should have a retrospective operative date of 1 January 2010. The Ai Group submit that this would avoid any uncertainty about the coverage of the Award for the period since 1 January 2010, and avoid uncertainty about the coverage of the portable long service leave legislation, which is based upon the coverage of the Award as at 1 January 2010.

- - -

[18] I am satisfied that there are exceptional circumstances that make it appropriate for the variation to the note at clause 4.3 of the Award to operate retrospectively as sought by the Ai Group.

⁶⁹ 2 Year Review of Awards – Black Coal Mining Industry Award 2010, [2012] FWA 9606

184. Similar to the above matter, a retrospective operative date of 1 January 2010 for the variation to the Horticulture Award proposed by Ai Group would “*avoid any uncertainty about the coverage of the Award for the period since 1 January 2010*”.

185. The circumstances surrounding Ai Group’s current application can also be aligned with those dealt with by Vice President Lawler in respect of an application made by Ai Group under ss.157 and 160 to vary the *Telecommunications Services Award 2010* to include the National Training Wage Schedule.⁷⁰ In His Honour’s decision, Vice President Lawler stated: (emphasis added)

[4] I accept the submission of Mr Smith for AiG that there are employers in the industry who have engaged trainees in accordance with the provisions of the National Training Wage Award in the period since 1 January 2010 and it is necessary to give the variation a retrospective operation to 1 January 2010 as a reasonable protection for those employers. However, I am concerned that the retrospective variation should not be used as a basis for any employer making a claim for restitution of an overpayment of wages where a ‘trainee’ was employed in a substantive classification under the Award and received wages and other wage related payments in excess of those due under the National Training Wage schedule in the period between 1 January 2010 and the date the variation determination was made. Such employees should not be obliged to repay wages and other wage related payments solely because the present variation has a retrospective effect (of course, an employer should be free to pursue the recovery of overpayments arising for other reasons). I have included an additional paragraph 14.4(b) designed to achieve that outcome. None of the ‘parties’ that appeared raised any objection to the wording of clause 14.4(b)

186. The intent of the provision referred to in the second half of the above extract was to avoid any employer demanding that an employee repay any wages that the employee had already received prior to the date when the award was varied, solely because the variation had a retrospective effect.

187. Similar to the above matter, there are employers in the relevant industry who have applied particular award conditions (namely, the Horticulture Award conditions) “*in the period since 1 January 2010 and it is necessary to give the variation a retrospective operation to 1 January 2010 as a reasonable protection for those employers*”.

⁷⁰ [2010] FWA 8933

188. The following two AIRC cases in which Ai Group was involved also highlight relevant circumstances which justified granting retrospective operative dates for award variations:

- In *National Engineering Pty Ltd v AMWU*,⁷¹ a Full Bench of the AIRC varied the *Metal, Engineering and Associated Industries Award 1998*, as it related to National Engineering Pty Ltd, 8 years retrospectively to prevent the AMWU and its members pursuing a claim that the company had underpaid shift penalties, when the union and employees had accepted the shift penalty arrangements for the 8 year period. The Full Bench said: (emphasis added)

“[75] We are satisfied that equity will be better served by a determination to preserve the arrangement for the period over which it operated than by a determination that would in effect set it aside. If there may be some unfairness in an effective refusal to allow employees to claim their strict Award entitlement, it is offset by our finding that on a balanced view, the arrangement implements, through an agreement of a kind ostensibly enabled by the then award, a flexible work practice proposed by the employees themselves. The workforce was organised. The arrangement was sanctioned by union officials at various stages throughout its term of operation. In the circumstances current award rights should be adjusted to give effect to and ratify the informal but perhaps technically invalid agreement.”

- In *Mitsubishi Motors Australia Limited and Others*,⁷² a Full Bench of the Commission varied several awards for a number of years retrospectively to prevent the AMWU and the CEPU and their members benefitting from a new interpretation of the public holiday provisions of the awards, when a different interpretation had been applied throughout the vehicle industry for many years. The Full Bench said: (emphasis added)

“[42] We are satisfied that the circumstances of the case are sufficiently rare and singular to justify a conclusion that they are exceptional for purpose of section 146. The main grounds of employers' applications have been made out...The submissions of the AiG point to the desirability of acting to ensure that the scope of the award provision is consistent with the industry standard as it has been understood since at least 1952.”

⁷¹ PR912582, Munro J, Duncan SDP and Cargill C, 17 December 2001

⁷² Print T1300, Munro J, Harrison SDP and Foggo C, 3 October 2000

189. Similar to the above matters, *“equity is better served”* in the current proceedings by granting the retrospective operative date that Ai Group has proposed. Also, the Commission should act *“to ensure that the scope of the award provision is consistent with the industry standard”*.
190. Accordingly, exceptional circumstances exist justifying an operative date of 1 January 2010 for the variation to the Horticulture Award.

15. CONCLUSION

191. For the above reasons, Ai Group’s proposed variation meets all of the statutory requirements, including those under ss.134, 138, 156 and 160, and has obvious and substantial merit.

Accordingly, we urge the Full Bench to vary the Horticulture Award as sought, with a retrospective operative date of 1 January 2010.