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Horticulture Australia Council

Matters at issue between
Horticulture Australia Council
and Australian Workers Union
concerning Modern
Horticulture Industry Award

Stage 2 of Award Modernisation:
Agricultural Group

Modern Horticulture Industry Award

HAC Submission

1 Introduction

1.1 Matters in Issue between HAC and AWU

These submissions are made by the Horticulture Australia Council (**HAC**). They identify and explain various matters at issue between HAC and the Australian Workers Union (**AWU**) concerning the terms of a modern award to apply in the horticulture industry. These differences have been discerned by an examination of the draft award submitted by the AWU on 31 October 2008 and the attached HAC draft. There have also been some limited discussions between HAC representatives and the AWU about some of these key differences.

Written submissions were filed by many parties with interests in the Agricultural Group on 31 October 2008. It emerged from those submissions that there existed a broad consensus among all parties that it was not appropriate to create one modern award to apply across the Agricultural Group.¹

There is also a broad consensus which emerged from those submissions that however the task is broken up and no matter how many modern awards are made to rationalise the awards and NAPSAs in the Agricultural Group, that one such modern award should apply to the horticulture industry.

Accordingly, HAC embarked on urgent and detailed consultation with its members. The outcome of those consultations is a broad support for the making of a modern award for the horticulture industry. Hence, HAC has made these submissions in relation to the scope and content of such an award.

In the various discussions which occurred prior to the submissions of 31 October 2008 being lodged, significant effort was invested by employers to explore the possibility of one modern award being made to apply to the whole of the agriculture group. It was only hours prior to the lodging of those submissions that it was accepted that this was not practical and, hence, HAC was not in a position to lodge comprehensive or detailed written submissions on 31 October 2008.

A draft award is attached to these submissions which HAC submits complies with the requirements imposed by Part 10A of the *Workplace Relations Act 1996* (Cth) (the **Act**) and the award modernisation request made by the Minister for Employment and Workplace Relations (the **Request**). HAC submits that this draft Modern Horticulture Industry Award is also appropriate to the needs of the industry and should form the basis of the exposure draft which is prepared by the Full Bench.

HAC is most concerned that the draft award proposed by the AWU is not consistent with the requirements of the Act, nor the Request. Likewise, it includes terms which are wholly inappropriate for the industry. In some cases, these terms take no account whatsoever of the nature of the work performed in the industry, nor the circumstances in which that work is performed.

These submissions, therefore, explain HAC's concerns and in this way describe its points of difference with the AWU draft and identify matters in issue in the manner requested by Commissioner Lewin in his correspondence to the parties dated 13 November 2008. HAC will be present at the consultations listed for 27 November 2008 in Melbourne.

¹ See, in particular, submissions of the ACT, the AWU, the Australian Industry Group, the National Farmers Federation and Growcom (the Queensland fruit and vegetable growers union of employers).

Below are some brief submissions about HAC and precisely who it represents. The relevant award and NAPSAs are then identified before the submissions address particular points of difference. Initially, some general, more fundamental points of difference are addressed prior to particular differences in key clauses of the drafts being discussed.

Some information about HAC

HAC is the peak national industry body representing the horticulture industries. It is the most significant employer voice in the consultations concerning a Modern Horticulture Industry Award.

HAC represents over 97% of the Australian horticulture industry - an industry with approximately 30,000 growers employing 130,000 people (approximately 1/3 of those employed in agriculture). These employers and employees are responsible for the production of produce with an annual farm gate value of \$8 billion. It has eighteen members which include all of the peak industry bodies for the various horticulture commodities, and state grower associations.

On 31 October 2008, HAC lodged submissions on the Award Modernisation process. They explained in some detail the role of HAC and horticulture in Australia.

HAC's membership is wide and varied, and reflects the wide and varied activities undertaken in the horticulture industry throughout Australia. It represents members that have operations in all states and territories, and produce an extremely wide array of product. Much of that product is directed to human consumption, although significant activities are directed to other means (for example, nurseries). Various HAC members provided written submissions on 31 October 2008.²

The awards and NAPSAs currently applying to the horticulture industry

The Commission's research material identified 16 awards and NAPSAs which apply to work performed in the horticulture industry. HAC agrees with the identification of these instruments and submits that they must form the basis of the modern horticulture industry award. They are:

- (a) *Hop Industry Award 2001 (AP811240)*- Federal;
- (b) *Horticultural Industry (AWU) Award 2000 (AP784867CRV)*- Federal;
- (c) *Horticultural Industry (State) Award (AN120247)*- New South Wales;
- (d) *Mushroom Industry Employees (State) Award (AN120357)*- New South Wales;
- (e) *Nurseries Employees (State) Award (AN120379)*- New South Wales;
- (f) *Fruit and Vegetable Growing Industry Award - State 2002 (AN140126)*- Queensland;
- (g) *Nursery Award - State 2003 (AN140192)*- Queensland;
- (h) *Tea Industry Award - State 2003 (AN140295)*- Queensland;
- (i) *Horticulture Industry (Nursery & Landscape) Award (AN150065)*- South Australia
- (j) *The Dried Vine Fruits Industry Award, 1951 (AN160101)*- Western Australia;
- (k) *The Fruit Growing and Fruit Packing Industry Award (AN160134)*- Western Australia;

² These members include Nursery and Garden Industry Australia and Growcom.

- (l) *Horticultural (Nursery) Industry Award No. 30 of 1980 (AN160158)- Western Australia;*
- (m) *Farming and Fruit Growing Award (AN170032)- Tasmania;*
- (n) *Plant Nurseries Award (AN170077)- Tasmania;*
- (o) *Farm Employees' Award 1985 (AN160126) – Western Australia; and*
- (p) *Pastoral Industry (SA) Award (AN150104) – South Australia.*

2 Matters at issue – general matters

There are three matters about which HAC takes a different view to the view which appears to have been taken by the AWU. It is convenient to outline those matters, initially, before attention is directed to particular clauses of the parties' draft proposals.

2.1 The “Principal Federal award”

At paragraph 11 of the President's Statement issued on 29 April 2008 [2008] AIRC 387, the following appears:

“Within each industry/occupation, the principal federal award will usually be the starting point for drafting. The drafting process may take into account the terms of other Federal awards (non-enterprise) in the same industry. The Commission is required to take into account wage rates derived from State awards constituting NAPSAs as well as rates in transitional awards. Other terms in State awards may also be relevant.”

In paragraph 11 of its submission the AWU says that the modern horticulture award should be “centred on the scope of” the *Horticultural Industry (AWU) Award 2000* (the **HIA**). As one examines the AWU draft in more detail it appears that what has actually occurred is that the best available position for employees on each key matter has been selected from the 16 available alternatives. In some cases that is the HIA provision.

The above statement of principal, and the AWU approach, must be approached carefully in the context of the horticulture industry. The list of awards currently applying in the industry comprise two federal awards and 14 state awards/NAPSAs. At first blush, it might appear that the federal award with the more general scope clause, the HIA, should be the starting point for the preparation of a new modern award.

On closer examination, however, it is HAC's submission that such a view is not appropriate to the current task. Put shortly, the HIA is not the “principal Federal award” in the sense contemplated in the President's submission, nor in any other relevant sense. It has some unique features which render it inappropriate for use as the initial base for the new modern award. The key matters which lead to this conclusion are:

- (a) The award has two distinct groups of respondents, Schedule A respondents on the one hand, and Schedule B and C respondents on the other. As to Schedule A respondents, the application of the award is expressly limited to the states of Victoria, South Australia and New South Wales.³ Hence, this part of the HIA is restricted to three states and does not therefore have national application. When the list of Schedule A respondents is analysed, it is clear that those

³ See clause 6.1.

respondents, whilst being located in three different states, are all located in the same geographical area around the Murray River farming areas, at or near the borders of these three states.

- (b) The HIA is not expressly limited in its geographical application to Schedule B and C respondents.⁴ Once again, however, an analysis of the respondents listed in these Schedules makes it abundantly clear that the award's application does not extend in any material respect beyond the State of Victoria. An examination of the Schedule C respondents is a short example. That Schedule includes four named employer associations. The Victorian Farmers Federation Industrial Association, the Victorian Chamber of Commerce and Industry, the Tasmanian Fruit Growers Industrial Association and the Australian Industry Group. Clearly, only one of these bodies has any coverage outside of the States of Victoria and New South Wales. As has been previously submitted, HAC represents over 97% of the Australian horticulture industry. Hence, the production of any members of the AIG within the horticulture industry must comprise less than 3% of the nation's produce. The inclusion of the AIG as a respondent in Schedule C does not, therefore, give this award any national prominence or significance, nor alter the clear conclusion that its application is restricted to the State of Victoria, the State of Tasmania and certain additional farms at or near the Victorian borders with New South Wales and South Australia.
- (c) An examination of the scope clauses of the awards and NAPSA's in the horticulture sector makes it apparent that there are significant activities which will need to be subject to a modern horticulture award which are not subject to the HIA. For example, the production of hops, mushrooms and the variety of activities associated with nurseries (including, for example, retailing activities) are not within the scope of the HIA. Nor is the cultivation, harvesting and/or processing of tea subject to this award. Even this very quick analysis makes it clear that of the 16 instruments in the horticulture sector, seven of them make provision for work which is wholly outside the scope of the HIA.
- (d) It is a matter of common knowledge that climatic conditions across the nation vary greatly. Hence the nature of products produced throughout the nation varies greatly, as does the manner of their production and, accordingly, the work required to be performed as part of their production and subsequent processing. It is trite to say, of course, that bananas, for example, are not produced in colder states, such as Victoria and Tasmania. Avocados, macadamia nuts and a whole range of tropical fruits also serve to make this point.

The key point here is that the HIA has not been developed to take account of work performed across the various sectors of the horticulture industry. Its terms have been fashioned to make provision for the performance of work in a very narrow and specific sector of the industry which is conducted in an extremely small geographical area by comparison to the activities occurring elsewhere in the country.

This point can be geographically demonstrated by considering some of the objective facts concerning the horticultural industry in Queensland. Data from other states could equally be examined to highlight this point, however the Queensland data alone is sufficient to demonstrate this.

It should be borne in mind that 25,000 permanent employees are engaged in the Queensland horticulture industry, as well as many thousands of casual and seasonal workers⁵. To adopt the HIA as the starting point for the modern award for the horticulture industry would be to impose completely new terms and conditions of employment upon this extremely large number of employees.

⁴ See clause 6.2.

⁵ Information obtained from Growcom

Furthermore, these terms and conditions of employment were developed for the purpose of applying to different work being performed in different circumstances.

The following information has been obtained from Growcom (the Queensland fruit and vegetable growers union of employers):

The Queensland Department of Primary Industries and Fisheries forecasts the gross value of primary industry production in Queensland for 2007-08 at \$9.435 billion. The fruit and vegetable industry is forecast at \$1.920 billion, or 20.3% of overall primary production. Horticulture is Queensland's second largest primary industry behind cattle.

There are around 2,800 horticulture farms in Queensland that produce more than 120 types of fruit and vegetables. These enterprises are located in 16 defined horticulture regions - from Stanthorpe in the south to the Atherton Tablelands in the far north, with a total area under production of approximately 100,000 hectares.

Table 1 shows the gross value of production at the farm gate for fruit and vegetable crops in Queensland from 2002-03 to 2007-08, and demonstrates a 38% increase (58% for fruit; 16% for vegetables). The top five horticulture crops in Queensland that account for the highest value of production are (in order) bananas, tomatoes, strawberries, capsicums & chillies and mandarins. Together, these five commodities are forecasted to comprise more than 50% of the overall gross value of horticulture production in Queensland at the farm gate in 2007-08.

Table 1 – Value of Qld horticulture production; 2002-03 compared to 2007-08

Commodity	2002-03	2007-08	Increase from 2002-03 to 2007-08 (%)
	\$m	\$m	
Bananas	285	500	75.4
Pineapples	33	70	112.1
Mangoes	55	45	-18.2
Mandarins	85	95	11.8
Strawberries	70	130	85.7
Avocados	47	80	70.2
Macadamias	n/a	25	n/a
Apples	n/a	50	n/a
Other fruit and nuts	146	145	-0.7
TOTAL FRUIT	720	1140	58.3
Potatoes	66	45	-31.9
Tomatoes	123	205	66.7
Capsicums and Chillies	65	100	53.8
Other vegetables	420	430	2.4
TOTAL VEGETABLES	674	780	15.7
OVERALL TOTAL	1,394	1,920	37.7

Source: QDPI&F Prospects

Queensland is Australia's premier state for fruit and vegetable production, growing one-third of the nation's produce. There is an increasing reliance on Queensland to produce a wide variety of Australia's horticultural crops, and is already responsible for the majority of Australia's production of bananas, pineapples, mandarins, mangoes, beetroot, capsicums, and the list goes on. Referring to table 2, the trend from 2002-03 to 2006-07 indicates that Queensland is becoming responsible for producing an increasing proportion of Australia's production in many other commodities including lemons and limes, avocados, strawberries, beans and tomatoes.

...

Table 2 – Volume of Qld production compared to Australia; 2002-03 to 2006-07

Commodity	2002-03			2006-07			Increase in Qld from 2002-03 to 2006-07 (%)
	Qld (t)	Aust (t)	Qld % of Aust	Qld (t)	Aust (t)	Qld % of Aust	
Fruit and nuts							
Lemons & limes	11,847	34,472	34.4	20,731	35,915	57.7	75.0
Mandarins	70,446	98,343	71.6	68,873	104,433	65.9	-2.2
Apples	24,573	326,072	7.5	29,521	270,476	10.9	20.1
Avocados	21,469	40,531	53.0	33,596	47,238	71.1	56.5
Mangoes	29,300	38,970	75.2	41,478	57,947	71.6	41.6
Macadamias	9,008	24,347	37.0	7,884	33,532	23.5	-12.5
Strawberries	7,480	22,834	32.8	17,363	28,559	60.8	132.1
Bananas	231,896	264,772	87.6	188,653	213,193	88.5	-18.6
Paw paws	8,741	8,976	97.4	613	1,066	57.5	-93.0
Pineapples	104,738	104,743	99.9	164,691	164,732	99.9	57.2
Vegetables							
Beans	13,798	34,626	39.9	16,130	28,844	55.9	16.9
Beetroot	n/a	n/a	n/a	35,417	40,765	86.9	n/a
Broccoli	13,469	55,083	24.5	9,137	46,031	19.8	-32.2
Capsicums & Chillies	37,238	40,810	91.2	48,872	58,270	83.9	31.2
Lettuces	42,643	121,508	35.1	84,742	271,251	31.2	98.7
Melons	102,064	175,105	58.3	87,446	204,966	42.7	-14.3
Onions	24,299	228,608	10.6	40,152	246,496	16.3	65.2
Pumpkins	49,592	93,226	53.2	39,847	102,505	38.9	-19.7
Tomatoes	93,960	364,368	25.8	120,656	296,035	40.7	28.4

Source: ABS Agricultural Commodities 2002-03 and 2006-07'

It is submitted that what the President had in mind in paragraph 11 of the statement referred to are instances where there is a Federal award that:

- applies throughout the nation;
- includes terms which have been fashioned with a view to the actual work performed across the whole of, or at least the very substantial part of the industry which will be the subject of the relevant modern award; and

- includes overlapping coverage with NAPSAs and state awards where they exist within the same industry.

It is abundantly clear that this is not the case in the horticulture industry and the HIA should not be the starting point for the preparation of a modern award. Rather, it is more appropriate to regard it as a Victorian/Tasmanian instrument so that it has the same weight as other NAPSAs that apply throughout Australia.

Where this leads one in determining which approach should be taken with respect to particular award terms is dealt with later in these submissions where those award terms are examined. It is sufficient for the present to observe that HAC generally supports the submissions made by Australian Business Industrial in the General Round 2 Award Modernisation Submissions dated 10 October 2008. We refer, in particular, to the submissions that commence at paragraph 31. The modern award for the horticulture sector must include provisions which are economically sustainable and promote flexible working practices and the efficient performance of work. It must be a safety net award. It is apparent from the AWU draft that the union has “cherry picked” conditions from the HIA and the various state instruments which are the most favourable for employees. This is obviously an erroneous approach which is not consistent with the provisions of the Act or the Request. That is not the approach which has been adopted by HAC. We have explained in respect to individual award terms, the rationale for the selection of the particular provision in each case.

2.2 The transitional implementation of modern award provisions

Section 576T of the Act requires that a modern award must not include terms and conditions of employment that are determined by reference to State or Territory boundaries, or do not have effect in each State and Territory.

Sub-section 2 of the provision provides:

“Despite sub-section (1), a modern award may include terms and conditions of employment of the kind referred to in sub-section (1) for a period of up to 5 years, starting on the day on which the modern award commences.”

Clearly, the concept of a transitional period is included in the legislation in order to cushion the impact, where possible, of terms of NAPSAs and state awards being rationalised into a national award.

In discussions with the AWU, however, it has become clear that the AWU regards the existence of the transitional period differently. When questioning the union about its proposal for provisions such as piece rates and the span of ordinary hours, it was pointed out to the AWU that its proposal imposes significant additional costs on employers. Accordingly, it is directly contrary to the Request and, in particular, paragraph 2(d) thereof.

The AWU acknowledges that this is the case and its response is to offer its consent to have the imposition of the increased costs delayed until the expiration of a transitional period. We have been informed that the AWU will consent to a transitional period of up to five years for this purpose.

HAC’s response to such a proposal is clear. The Request requires that the making of modern awards will not increase costs for employers. It is no answer to this requirement to say that those increased costs can be imposed on employers, so long as they are not imposed immediately, but are imposed at the end of a transitional term. In either case, the employer is inappropriately burdened with increased costs.

We have referred to this in responding to specific award terms.

The appropriate use of the transitional period mechanism allowed by section 576T(2) of the Act is of the type contemplated by Australian Business

Industrial in paragraph 37 of their General Stage 2 Award Submission dated 10 October 2008. That is, a transitional period can be used with respect to wage rates so that existing rates can be preserved until they are overtaken by relevant wage increases. Such a mechanism saves employees from disadvantage, but yet does not involve any increased cost to employers.

2.3 Nature of the Commission's task

The Commission's task in reviewing and modernising awards is prescribed in some detail in Part 10A of the Act and the Request.⁶

These provisions and documents explain in some detail that the process relates to simplifying and rationalising awards and reducing the number of awards that apply to employers. There are some limited instances where these provisions mention specific award terms. One example is the award flexibility clause; another the interaction between awards and the NES.

The Commission is not given any responsibility or latitude to alter in a substantial way the terms and conditions of employment under awards. Indeed, the Commission has no power to embark upon a merit based assessment of specific terms and is instead limited to a rationalisation of existing terms. This is a fundamentally different process to altering their substantial affect.

This position is reinforced by the Federal Government in its recent submission to the Commission in respect of award modernisation:

*'The intent underpinning these elements of the request is that **the creation of modern awards should see modern awards reflect existing provisions in awards and NAPSAs** as opposed to including entitlements which extend beyond these existing provisions.'*⁷ (our emphasis)

This does not appear to be the approach adopted by the AWU in the preparation of its draft. The approach it has taken to piecework is an example. For reasons not explained in the submission, a provision from a Queensland NAPSA is used as the basis for the pieceworker proposal. It has been varied in important respects.

The point here is simply that if the AWU is concerned about the fairness of a particular award prescription, or wishes to use merit type arguments to seek improvements to award provisions, that this should occur after the modern award is made and all parties have the opportunity to bring evidence and submissions on those issues.

That is not the function of the Award modernisation process and substantial changes to award terms should not be contemplated in the process. The adoption of such an approach is not likely to cause unfairness as the modern awards are not due to commence operation until January 2010. That means there is plenty of time available to the AWU to prepare applications for variations of award provisions under the new system.

⁶ Made on 28 March 2008 and varied on 16 June 2008.

⁷ Federal Government Submission on the exposure drafts of the priority modern awards dated 10 October 2008, paragraph 6.

3 Matters at issue – specific clauses

3.1 The application of the award

(a) Award coverage

The application clause in each of parties' drafts is clause 4. It contains a range of features which have been included in the exposure drafts for the priority modern awards. We note that some aspects of those provisions have been the subject of submissions by parties who have interests in the priority industries. There may be aspects of the Commission's decision in relation to those matters about which HAC might wish to be heard. One example is the overlapping award coverage clause which is likely to be an important clause in this award. The current proposal arguably is not simple to understand or easy to apply. On one view it merely begs the question about award coverage.

There are three additions to subclause 4.3 of the HAC draft which we do not anticipate will create any issue with the AWU.

The first is the inclusion of subclause 4.3(d) to deal with the mushroom industry. It is a clause that was proposed in the submissions of the Australian Mushroom Growers Association dated 31 October 2008 and is as follows:

'(d) *producing compost for, cultivating, picking, preparing for packing, packing and/or forwarding of mushrooms.*'

The second concerns the nursery industry. HAC proposes that a new sub-clause 4.3(e) would be inserted which includes the words:

'(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.'

The third change involves some minor amendments to the introductory wording of clause 4.3.

This coverage is consistent with the coverage of numerous nursery based awards within the horticulture group. The nursery industry is very diverse throughout Australia. The present NAPSAs cover installation of plants in a landscaping sense. For many business this is their core activity. Nursery businesses distribute plant material by means of specialty transport in a variety of activities that cover the movement of tissue culture to very large trees which are frequently moved long distances.

Another feature of the nursery industry which is covered in the proposed clause are selling skills, both on a wholesale and retail basis. The industry is dependent on skilled horticulturalists being employed at the retail site to advise consumers of proper plant care and maintenance. These employees are typically also required to maintain plants in the store which takes their role into another dimension from merely retail activities.

HAC directs the Commission's attention to the proposed clause 4.4(d) in its draft. This subclause is not included in the AWU draft at present. It is noted in many submissions that there is potential for an overlap between coverage of a modern Agricultural Industry Award and the Modern Horticulture Industry Award. HAC anticipates that the scope for such overlap is greatest where vegetables

are grown on properties primarily in rotation with sheep and cattle farming so as to fix nitrogen levels in soil. It is HAC's submission that this proposed subclause will better delineate the area of operation of the Modern Horticulture Industry Award and hence make the Award more simple to understand and easy to apply as required by the Request. It can be seen that a purposive test is contemplated so that the exemption turns upon the purpose for which the relevant crop is being propagated. The intention is that where the purpose is human consumption that the Modern Horticulture Industry Award would apply.

There remain some further issues of potential difference in connection with the scope clause. They are:

(b) **The growing of grapes**

Submissions from the South Australian Wine Industry Association propose that the growing of grapes for the purpose of producing wine should be exempt from a modern Horticulture Industry Award but included with other wine making activities in a separate Wine Industry Award. This approach is also favoured by the AWU.

HAC opposes this approach and submits that it is not warranted. There are a variety of reasons for this including; first not all of the grapes grown in Australia find their way into wine making activities. Products such as table grapes and sultanas are produced using the same grape growing methods. Secondly, there are numerous grape growers who do not know from season to season whether their grapes will be used in wine making until after those grapes have been cultivated and picked. There is obviously a market for grapes within the wine industry and not every grape that might be initially destined for wine making will end up being utilised for that purpose. Thirdly, the creation of a separate wine industry award does not further the objective evident in the Act and the Request to reduce the number of awards in the workplace relations system. Fourthly, there is nothing inherent in the work required to be performed nor the circumstances in which that work is performed in the growing of grapes which means that it cannot be treated together, for the purposes of industrial regulation, with other crops that are included within the Modern Horticulture Industry Award. There are significant differences, for example, between the farming of avocados, mushrooms, macadamia nuts and stone fruits. That does not prevent the making of a modern award which can provide safety net terms and conditions of employment for employees performing all of this work. The growing of grapes is no exception. Fifthly and finally, there are many examples of farmers who grow grapes and sell them to wine makers. The wine industry is not entirely vertically integrated.

(c) **The Food Preservers Award 2000**

HAC notes the submissions of the AMWU where it outlines its concerns regarding the potential overlap between work subject to the Modern Horticulture Industry Award and work which might be considered to be more appropriately regulated by another award, currently the *Food Preservers Award 2000*.

In relation to that submission, HAC draws the Commission's attention to the significant activities covered by many awards within the horticulture group that can be described broadly as relating to valued added or post-cultivation activities. Briefly, those activities include:

- HIA (dehydrating, packing, processing, crystallisation, juicing, washing, storing);
- *Hop Industry Award 2001* (all work incidental to the preparation of hops for marketing);
- *Tas Plant Nurseries Award* (presentation);
- *Qld Tea Industry Award* (processing);

- *WA Fruit Growing and Fruit Packing Industry Award* (treating and packing);
- *Qld Fruit and Vegetable Growing Industry Award State 2002* (treating and packing); and
- *Farm Employees' Award 1985* (treating).

Accordingly, HAC submits that to restrict the scope of the Modern Award to preclude value added processes would be a significant departure from a common theme in horticulture awards and NAPSAs and would be outside of the scope of award modernisation.

It must flow from the above that the terms of the awards listed have been fashioned to provide appropriate regulation for those value added processes. Those terms must be regarded as fair and reasonable for achieving that purpose and hence HAC's position that they should remain in the Modern Horticulture Industry Award.

In the event that there is to be some alteration to this pre-existing position, HAC submits that it should not impact upon the conduct of any of the activities listed in the current awards which are carried out on a farmer's premises (including activities associated with the canning or preservation of product). This is not HAC's preferred position, however, and it would seek to be heard in relation to the concerns raised by the AMWU in Stage 3 of the award modernisation process.

Finally, HAC objects to the approach of the AMWU evident in paragraphs 9, 10 and 11 of its submission. There it makes assertions that are not accepted and which are properly matters of evidence. This is not the function of the award modernisation process. The matters addressed in those paragraphs should be progressed through applications to vary the relevant modern awards in accordance with the new system after those awards come into operation. Assertions such as those contained in paragraph 9 regarding the union's 'understanding' about processes that are already subject to the horticulture group of awards are matters that ought to be addressed in the appropriate forum. That is not the award modernisation forum.

(d) **Binding organisations**

HAC's position is that the Modern Horticulture Industry Award should not identify any organisations as being party to or respondent to the award. We note the comments made by the Commission in the Statement issued on 12 September 2008 and the many submissions which have been made to the Commission on this issue.⁸

HAC wishes to be heard further in relation to this matter if the Full Bench decides that it is appropriate that parties should be named as parties to or respondents to modern awards.

3.2 Part-time employment – minimum hours

HAC does not agree with the AWU's proposal that part-time employees be entitled to a minimum of four consecutive hours on any shift (see clause 11.5 of the AWU draft).

This proposal is inconsistent with the following awards and NAPSAs applicable in the horticulture industry, each of which provide for a minimum engagement period of less than four hours or no minimum engagement period at all:

- HIA (no minimum);

⁸ See the Statement issued on 12 September 2008 [2008] AIRCFB 717, paragraph 11.

- the *Hop Industry Award 2001* (no minimum);
- the *NSW Horticultural Industry (State) Award* (three hours);
- the *NSW Nurseries Employees (State) Award* (no minimum);
- the *WA Horticultural (Nursery) Industrial Award No 30 of 1980* (no minimum);
- the *NSW Mushroom Industry Employees (State) Award* (no minimum);
- the *Qld Tea Industry Award* (no minimum);
- the *WA Fruit Growing and Fruit Packing Industry Award* (no minimum);
- the *Qld Fruit and Vegetable Growing Industry Award State 2002* (no minimum);
- the *WA Dried Vine Fruits Award 1951* (no minimum);
- the *SA Horticultural Industry (Nursing & Landscape) Award* (no minimum);
- the *Farm Employees' Award 1985* (no minimum);
- the *Pastoral Industry (SA) Award* (no minimum);
- the *Qld Nursery Award - State 2003* (no minimum); and
- the *Tas Plant Nurseries Award* (no minimum).

The Request makes it clear that the award modernisation process should not increase costs for employers. An increase in the minimum duration of shifts for part-time employees will necessarily result in a reduction in flexibility and accordingly an increase in costs to employers.

Accordingly, HAC submits that no minimum engagement period should be specified for part-time employees.

It is submitted that it would be a curious result if a modern award were to include a provision which is not found in one single award from a group of awards which will be replaced by the modern award. There is no explanation of this approach in the AWU submissions and nor is any explanation given to HAC.

It might be the case that the AWU can mount an argument, based on merit and fairness grounds, that some different approach ought to be taken in relation to the minimum engagement period for part-time employees. Such an argument would necessarily involve a production of evidence and the description of some justification for this change. The award modernisation process is not the forum through which such alterations to terms and conditions of employment can or should be processed. There are 16 awards in the group being rationalised to create the Modern Horticulture Industry Award. In circumstances where 15 of those 16 awards are completely consistent on this particular issue, in HAC's submission there can be no justification for an alteration to that position.

3.3 Casual employment

(a) Minimum engagement period

HAC does not agree with the AWU's proposal that casual employees be entitled to a minimum payment of four hours' work (see clause 12.4 of the AWU draft).

This proposal is inconsistent with the following awards and NAPSAs applicable in the Horticulture Industry, each of which provide for a minimum engagement period of less than four hours or no minimum engagement period for casual employees:

- HIA (three hours);
- the *Hop Industry Award 2001* (no minimum);
- the *NSW Horticultural Industry (State) Award* (no minimum);
- the *NSW Nurseries Employees (State) Award* (no minimum);
- the *WA Horticultural (Nursery) Industrial Award No 30 of 1980* (no minimum);
- the *NSW Mushroom Industry Employees (State) Award* (no minimum);
- the *Qld Tea Industry Award* (no minimum);
- the *WA Fruit Growing and Fruit Packing Industry Award* (no minimum);
- the *Qld Fruit and Vegetable Growing Industry Award State 2002* (no minimum);
- the *WA Dried Vine Fruits Award 1951* (two hours);
- the *SA Horticultural Industry (Nursing & Landscape) Award* (three hours);
- the *Farm Employees' Award 1985* (no minimum);
- the *Pastoral Industry (SA) Award* (no minimum).

Again, the Request made it clear that the award modernisation process should not increase costs for employers. An increase in the minimum duration of shifts for casual employees will necessarily result in a reduction in flexibility and, accordingly, an increase in costs to employers.

It is evident from the above that a strong case could be made for suggesting that no minimum period of engagement should be included in the awards at all. The position is slightly less strong, however, than it is for the minimum engagement of part-time employees. HAC acknowledges that there is some further scope for debate, particularly given that one of the Federals award in the list includes a minimum engagement period. On this basis, and as its less preferred position, HAC is prepared to consent to a position where a minimum engagement for casual employees is included in the modern award. That minimum engagement period should be two hours (see clause 12.3 of the Draft HAC Award).

(b) **Casual employment – the amount of the casual loading**

HAC submits that a casual loading of 20% should apply (see clause 12.2 of the Draft HAC Award).

The majority of awards and NAPSAs applicable to the horticulture industry contain casual loading of 23% or less and many contain a casual loading of only 20%. Accordingly, a rise to a 25% casual loading would represent a significant cost increase for many employers in the horticulture industry.

We also note that a number of submissions made by parties interested in the exposure drafts of the priority modern awards have challenged the standard casual loading of 25%.

For example, the Australian Industry Group (**AIG**) points out that whilst a casual loading of 25% applies in a number of federal awards, 'it does not have uniform application across every award' and that the current legislated minimum prescribed by the Australian Fair Pay and Conditions Standard only requires a loading of 20%.⁹ The AIG also states that it has 'substantial concerns in relation

⁹ Australian Industry Group 'Award Modernisation Submissions and Draft Award Provisions – Stage 1 Priority Industries', 10 October 2008, paragraph 119.

to the ability for employers to absorb the additional costs associated with the increase in casual loading'.¹⁰

The Australian Chamber of Commerce and Industry has also submitted that a lower casual loading such as 20% would be more consistent with the award modernisation request.¹¹

In the event that the Commission does not agree to implement a casual loading of 20% within the Modern Award (and notwithstanding the submission made earlier concerning the appropriate use of a transitional period), HAC supports the implementation of a five year transitional arrangement to cushion the impact of the change.¹²

HAC will reconsider this issue once the Commission has announced its approach in this regard in the awards in respect of the priority industries.

Depending on the approach taken, it may be necessary for HAC to make further submissions on this issue.

HAC has also suggested a new clause 12.4 in its draft award.

(c) **Casual employment – payment to casual employees**

HAC does not agree to the inclusion of clause 12.3 of the Draft AWU Award. This clause requires that casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

None of the Awards and NAPSAs applicable to the horticulture industry include a clause of this type. It appears that this clause has been taken from awards applicable to the hospitality or retail industries which have no application to the horticulture industry.

There is no basis for the inclusion of a new and distinct obligation such as this in the Modern Horticulture Industry Award.

(d) **Casual employment - conversion to permanent employment**

HAC also does not agree with the AWU's proposed clauses concerning conversion from casual to permanent employment (see clauses 12.5 to 12.7 of the AWU draft).

In relation to the inclusion of casual conversion clauses generally, we note that a number of submissions made by parties interested in the exposure drafts in respect of the priority awards have addressed the issue of whether a casual conversion clause is a matter that may be dealt with by modern awards under section 576J of the Act. Depending on the outcome of the Commission's consideration in this regard, HAC may wish to make further submissions on this matter.

Of the 16 Awards and NAPSAs applicable to the Horticulture Industry only three (the HIA, the *NSW Horticultural Industry (State) Award* and the *NSW Mushroom Industry Employees (State) Award*) include any provision for casual conversion. These instruments apply to a minority of employers and employees in the sector. Even if such a clause is consistent with section 576J, no clause should be included in the modern Horticulture award.

Further, the AWU draft excludes part of the casual conversion clause in the HIA providing that where an employee refuses a conversion they forgo the right to

¹⁰ *Ibid.*, paragraph 120.

¹¹ Australian Chamber of Commerce and Industry Final Submission 'Award Modernisation Priority Awards – Stage 1', 10 October 2008, paragraph 111.

¹² As contemplated by the Commission in its 12 September 2008 decision.

any future conversion. No basis for this omission has been revealed in the submissions or during discussions.

(e) **Casual employment – summary**

Casual employment is utilised throughout the horticulture industry. Employers are subject, of course, to significant external pressures which are beyond their control. Like most sectors, these external pressures include market related pressures flowing from increasing global competition and technological related pressures as new and innovative methods of cultivation and propagation are developed.

Significantly, however, employers in the horticulture industry face an external pressure which does not impact so greatly on other employers in the economy. That is the impact of climate and weather patterns. Put simply, the cycles of nature play a significant factor in the production of horticulture products and those factors are, of course, completely outside of the control of employers. The employers must ensure that their produce is planted at just the right time, harvested at just the right time and presented to the market at just the right time in order for it to be economically sustainable.

There are literally thousands of examples that could be brought to bear to illustrate this point. Put simply, reductions in the flexibilities which are already available to employers in the sector concerning the use of casual employment will have significant detrimental impacts for them. Both the Act and the Request require that modern awards must be 'economically sustainable and promote flexible modern work practices and the efficient and productive performance of work'. Modern awards must also result in a 'certain, stable and sustainable modern award system for Australia'.

As can be seen from this section of the submission, the great majority of employers and casual employees in the horticulture sector have never before known of a minimum time limit for each engagement, a 25% casual loading, the making of payment at the end of each shift or of any conversion from casual to permanent employment. It has been acknowledged above that there are small pockets where some of these features have existed (although nowhere have they all existed). However, a proper analysis of the scope clauses in those instruments where those features have existed makes it abundantly clear that those employers and employees who have been subject to them are in a very small minority indeed. It is not appropriate or consistent with the award modernisation process to make such a fundamental change for the remaining great majority of them.

3.4 Piecework – introductory comments

Even a cursory glance at the industrial instruments which have historically applied across the horticulture sector makes it immediately apparent that a separate and independent category of piece worker has been a vital component of the employment options available in this sector for many years. One finds such an approach consistently through instruments arising from all jurisdictions.

There is nothing to suggest that the advent of the new workplace relations system, of which the modern industry awards will form a crucial part, suggests any departure from this position. Indeed, the indications are to the contrary. First, the draft NES contemplates the existence of piece workers and makes provision for the NES benefits to be available to piece workers.¹³

¹³ See the definition of the term 'piece worker' in section 1 the definition of 'full rate of pay' in section 6(2).

Secondly, section 576J(1)(a)(ii) specifically contemplates that a modern award may include terms about piece rates. Thirdly, the Request at paragraphs 43, 44 and 45 deals with specifically with the issue of piece workers.

Whilst the AWU seems to acknowledge such a place remains in the new system for piece workers, the clause they propose seeks to fundamentally alter the arrangements concerning the way in which piece workers have been utilised in the industry for many years. It is not a true piece rate provision and introduces rigidities and inflexibilities which will significantly increase employer costs.

HAC supports and adopts the submissions of the AMGA delivered on 31 October 2008 in relation to this issue. The HAC draft includes substantially the same clauses that were proposed in those submissions. For the same reasons advanced above in relation to casual employment, the use of piecework is a vital and long standing flexibility which allows employers in this sector to achieve a real connection between their labour costs and their output. The removal of this flexibility would have harsh consequences for employers.

It should be noted that:

- HAC's preferred proposal is to include a type of employment clause that describes the various piece rate employment options (see clause 13 of the Draft HAC Award). It is acknowledged that the form of this clause is new. Its substance, however, involves no change from the most commonly utilised piece rate provisions in the horticulture industry's awards.
- This preferred clause addresses piece rates as a type of employment in a manner which is consistent with the language in paragraphs 44 and 45 of the Request. It complies with the requirement that modern awards be simple and easy to apply.
- The proposal also involves an alternative position which is included without prejudice to the primary proposal but in order to advance discussion of the issue and facilitate a resolution (see "Alternative to above clause 13" of the Draft HAC Award).

3.5 Piecework – AWU clause 13.2

HAC agrees with the suggested clause 13.2 of the Draft AWU Award which has the effect that the piecework rates will be paid in lieu of the time rate for all hours worked. However, clause 13.2(a) states that piece rate employees 'must not be disadvantaged in relation to the (sic) his or her terms and conditions of employment'. The inclusion of this clause is contradictory to the notion of a genuine piece rate clause, and appears to imply that whilst piece work rates can be paid in lieu of hourly rates, the employee cannot be paid below these hourly rates.

This approach undermines the whole basis for piece work. It is nothing more than a bonus or incentive payment. It completely breaks the nexus between labour cost and output. This is the very principle that gave rise to the use of piece rates.

Of the 16 awards and NAPSAs that apply within the horticulture industry, more than half, including the HIA, include a genuine piece rate provision.

HAC submits that these existing arrangements which are fundamental to the industry, should not be altered as a consequence of the award modernisation process. Indeed, we submit that it is beyond the scope of the award modernisation process to remove these existing award provisions.

3.6 Piecework - unilateral termination of a piece rate agreement

Furthermore, HAC objects to the suggested inclusion of clause 13.2(b) of the Draft AWU Award which allows an employee to unilaterally terminate a piecework agreement in certain circumstances on 48 hours notice.

Of the Awards and NAPSAs applicable to the Horticulture Industry, only two (the *Qld Fruit and Vegetable Growing Industry Award - State 2002* and the *WA Dried Vine Fruits Industry Award, 1951*) include provisions allowing *either* party to terminate a piecework agreement in certain circumstances. The other seven awards containing piece rate provisions do not include an option to terminate a piecework agreement. Accordingly, HAC submits that a clause referring to the termination of a piecework agreement should not be included in the Modern Horticulture Industry Award.

In the event that the Commission agrees to the inclusion of a clause similar to clause 13.2(b) of the Draft AWU Award, HAC submits that this clause should allow either party to terminate the piecework agreement. Further, consistent with the purpose of the award modernisation process to increase certainty, HAC submits that any such clause should make it clear that, unless a non-piecework position is available, termination of a piecework agreement constitutes notice of termination of the employee's employment.

3.7 Redundancy

HAC is encouraged that the Draft AWU Award does not include a provision extending the application of redundancy payments to small businesses, the inclusion of which would increase costs to such employers.

Depending on the approach taken by the Commission, it may be necessary for HAC to make further submissions on this issue. HAC opposes the suggestion made in the modernisation of awards in the priority industries to the effect that small business should be responsible for making severance payments in cases of redundancy.

There are a great many employers in the horticulture sector who have less than 15 employees.

3.8 Minimum wage rates

HAC objects to the inclusion of clause 19 of the Draft AWU Award. These rates appear to be taken from the rates applicable to Schedule A respondents to the HIA.

There is no explanation in the AWU submissions as to why this is the case. As we have indicated above, Schedule A of the award is expressed to apply only in Victoria, South Australia and New South Wales.

If the HIA is to be relevant at all in the fixing of wage rates, then those that apply to Schedule B and C respondents ought to be selected. This is because the Schedule A respondents to the award comprise mostly dried fruit growers and it is apparent from the face of the award that the Schedule B and C parts of the award have a much broader application.

HAC does not wish to address this matter in any further detail at present given submissions as to scope and the nature of the classification structure. When the Commission's view about these matters becomes clearer we propose that the particular minimum wage rates be addressed after production of the Commission's exposure draft.

3.9 Allowances – summary position

HAC contemplates that the rationalisation of allowances in this industry will be particularly difficult. A review of the 16 instruments applying within the group makes it clear that different approaches are taken with respect to allowances. An allowance such as the wet weather allowance, for example, has the capacity to involve the imposition of a very significant cost upon employers. For example, such an allowance is typically not payable in nurseries where work is predominately performed indoors. Likewise, mushroom growing and its associated activities predominately incur inside. There is obviously no scope in those incidents for a wet weather allowance.

There are other examples where the rationalisation of the approach taken by the various instruments will prove difficult. The AWU's approach is difficult (or practically impossible) to reconcile with the existing industrial prescriptions. The Full Bench has announced its preference to express allowances as a percentage of the key classification rate in the award. Many submissions have been made in the priority industries as to this issue and the rationalisation of allowances generally. HAC may make further submissions on this issue when the Commission addresses this issue further in relation to those priority industries.

3.10 Leading hand allowance

HAC submits that the leading hand allowance should be based on the rates applicable to Schedule B and C respondents of the HIA.

HAC understands that the Commission proposes to express such allowances as a percentage of the key classification rate¹⁴ HAC may make further submissions on these allowances once the Commission's position in this regard is finalised.

3.11 Junior rates

HAC does not agree with the junior wage rates clause that has been suggested by the AWU (clause 18 of the Draft AWU Award). In this clause, the AWU has applied a combination of various junior rate clauses that apply to Schedule A respondents and Schedule B and C respondents to the HIA (in packing houses, on blocks and in orchards and vineyards).

HAC submits that the junior wage rates that apply to Schedule B and C respondents to the HIA which apply in orchards and vineyards are the most appropriate within the horticulture industry and should be adopted in the modern award (see clause 18 of the Draft HAC Award).

3.12 First aid allowance

HAC submits that the first aid allowance should be based on the rates applicable under the HIA Award.

HAC submits that the drafting of the proposed clause could be improved and it may be necessary for HAC to make further submissions on this once the exposure draft award is released.

3.13 Wet work allowance

HAC submits that the wet work allowance should be based on the rates applicable under the HIA Award.

¹⁴ As contemplated by the Commission in the Statement issued on 12 September 2008 [2008] AIRCFB 717..

3.14 Travelling allowance

HAC submits that a travelling allowance should not be included in the Modern Horticulture Industry Award. An allowance of this type is not included in the HIA, nor in the majority of other awards and NAPSAs applicable to the Horticulture Industry.

3.15 Accident pay

HAC submits that clause 22.4 of the Draft AWU Award should not be included in the Modern Horticulture Industry Award.

We note that a number of submissions were made in respect of the priority industries awards as to the Commission's power to include provision for accident pay in modern awards¹⁵. HAC submits that an accident pay clause is not a matter that can properly form part of a modern award under section 576J of the Act, as it is neither one of the matters referred to in this section nor incidental to any such matter and essential for the operation of the award.

HAC will reconsider this issue once the Commission has announced its approach in this regard in the final awards in respect of the priority industries.

Depending on the approach taken, it may be necessary for HAC to make further submissions on this issue.

3.16 Superannuation

HAC does not agree with the AWU's proposal that employees be entitled to superannuation contributions during absences from work due to work related injuries or illnesses (see clause 23.5(b) of the Draft AWU Award).

HAC submits that this is inconsistent with the following awards and NAPSAs applicable to the horticulture industry, each of which contain no requirement that superannuation contributions be made when the employee is absent from work:

- HIA;
- the *Hop Industry Award 2001*;
- the *NSW Horticultural Industry (State) Award*;
- the *NSW Nurseries Employees (State) Award*;
- the *WA Horticultural (Nursery) Industrial Award No 30 of 1980*;
- the *NSW Mushroom Industry Employees (State) Award*;
- the *Qld Tea Industry Award*;
- the *WA Fruit Growing and Fruit Packing Industry Award*;
- the *Qld Fruit and Vegetable Growing Industry Award State 2002*;
- the *WA Dried Vine Fruits Award 1951*;
- the *SA Horticultural Industry (Nursing & Landscape) Award*;
- the *Pastoral Industry (SA) Award*; and
- the *Tas Plant Nurseries Award*.

¹⁵ As contemplated by the Commission in the Statement issued on 12 September 2008 [2008] AIRCFB 717..

Accordingly, HAC submits that the inclusion of a clause requiring superannuation contributions when the employee is absent from work is inconsistent with the purpose of the award modernisation process.

HAC has not included clauses 23.4 and 23.5(a) of the AWU Draft Award as most of these matters are already covered by the relevant legislation.

HAC has assumed that the inclusion of clauses 23.5(c) and (d) in the AWU Draft Award is a typographical error, and that these clauses should properly be inserted after clause 23.4(e).

3.17 Hours of work – span of ordinary hours

(a) HAC's preferred clause

This is an issue of the utmost importance to employers throughout the horticulture sector. As previously submitted, this is because the employer most often has no control over when work needs to be performed. The time at which work such as planting, harvesting or picking needs to be performed is not dictated by the employer, but by nature itself.

A review of the industrial instruments currently applying to employers in the group shows that industrial tribunals throughout the country have recognised this circumstance and made careful prescription for flexibilities which permit work to be performed efficiently and economically at the time when it needs to be performed.

The Draft AWU Award merely chooses the least flexible and most high cost option of the variety of options available. No submissions are made as to why that option is appropriate, much less how it is consistent with the provisions of the Act or the Request. The fact of course is that the approach is entirely inconsistent with the Act and the Request. In discussions with the AWU attention is merely drawn to the provisions of the HIA. It appears to us that the sole argument that the AWU has for the inclusion of its draft clause (which has the effect of providing that the ordinary hours of work can only worked between Monday and Friday) is that this is the prescription contained in the HIA.

This is why it is so important to accept that the HIA is not the 'principal federal award' in this exercise and its provisions on this issue are entirely inappropriate for work performed outside the Murray River Region in Victoria.

A proper and accurate summary of the way in which the span of ordinary hours is treated in the industrial instruments in question is as follows:

- seven NAPSAs specify that ordinary hours can be worked on any day of the week (the *NSW Horticultural Industry (State) Award*; *NSW Nurseries Employees (State) Award*, the *SA Horticultural Industry (Nursing & Landscape) Award*, the *WA Horticultural (Nursery) Industrial Award No 30 of 1980*, the *NSW Mushroom Industry Employees (State) Award*, the *Qld Tea Industry Award* and the *Farm Employees' Award 1985*); ;
- two NAPSAs specify that ordinary hours can be any five consecutive days, Monday- Sunday (the *Qld Nursery Award - State 2003* and the *Qld Fruit and Vegetable Growing Industry Award State 2002*); ;
- two NAPSAs differentiate between work performed by station hands or workers engaged in packing and sorting (in which case ordinary hours are Monday- Friday) and work performed by workers engaged in fruit growing and picking (no fixed hours) or when engaged in essential work (in which case ordinary hours are Monday- Saturday) (the *WA Fruit Growing and Fruit Packing Industry Award* and the *Pastoral Industry (SA) Award*); ;

- one NAPSA specifies that ordinary hours can be worked on Monday to Friday but, with the agreement of the majority of employees affected, may be work cycle agreed with an average of 38 hours per cycle (the *Tas Farming and Fruit Growing Award*); and
- two awards and two NAPSAs specify that ordinary hours should be worked on Monday to Friday only (the HIA, the *Hop Industry Award 2001*, the *Tas Plant Nurseries Award* and the *WA Dried Vine Fruits Award 1951*). .

It is evident then that the prescription urged by the AWU would mean that the great majority of employers and employees in the industry would, for the first time, be subject to arrangements where the ordinary hours of work can only be performed between Mondays and Fridays. The great majority of work currently performed across the horticulture industry is performed in circumstances where significantly more flexibility is available.

Having regard to the above, HAC proposes that the prescription most commonly included in the 16 industrial instruments under consideration, and that which applies to the majority of employers and employees in the horticulture industry be adopted in the new modern awards. That is the ordinary hours might be worked on any day of the week. Such a conclusion is urged not merely because it involves the most flexible or favourable provision for employers. What it does do is recognise the peculiar and particular circumstances in which work is performed in this industry. There is ample justification for this approach in considering the unpredictable nature of the timing of particular tasks. In short, there is a logical, rational and reasonable justification for the selection of this particular prescription. It is a prescription which appears in the greatest number of industrial instruments under consideration.

We respectfully adopt the submissions made by Australian Business Industrial in paragraphs 38 and 39 of their 10 October 2008 submissions where it is stated:

'Modern awards must be economically sustainable and promote flexible working practices and the efficient performance of work. Flexibilities which are fair are clearly appropriate for inclusion in modern awards. Providing the capacity for flexibilities in the modern award which are new in the context of those applying in a particular award or NAPSA is not the same as imposing change on employees by the making of the award. Modern awards are required to promote flexible work practices, not to provide inflexibilities which are intended to be bought out by collective bargaining.

Conversely, where award/NAPSA flexibilities are actually applied in a workplace, their removal because the modern award no longer permits the flexibility (such as where a modern award provides a reduced span of ordinary hours) can impose additional costs on an employer who needs to continue to operate as before, particularly if classification rates or penalties are unchanged.'

The notion that ordinary hours ought to be able to be worked on any day of the week is not one which can be criticised as being 'unfair'. No less than four different industrial tribunals have concluded that in the circumstances in which work is performed in the horticulture industry such a prescription is indeed fair. Each of those industrial tribunals were under a statutory obligation to set fair and reasonable conditions of employment.

(b) **Alternative 2**

Having regard to the critical nature of this issue for the industry, a decision has been made to propose an alternative for the Commission's consideration. This alternative is significantly less attractive for HAC and it is proposed only as a

final fall back position. It is evident in the attached draft but can be explained briefly as follows:

- ordinary hours of work ought to be able to be scheduled on any five out of seven days;
- additionally, in circumstances where ‘critical work’ needs to be performed ordinary hours can be scheduled on any day of the week and for more than 10 hours per day; and
- there is a definition of ‘critical work’ which makes it clear that such work is only work that cannot be scheduled by the employer in advance and arises because of wholly external factors. This might include, for example, the blooming or ripening of particular crops or the completion of harvest or picking activities.

When the bullet points outlined above are considered in some detail it can be seen that this proposal strikes a very fair balance between the existing prescriptions. It would be fair to say that it is a proposal that reflects the way in which the spans of ordinary hours exist for the very great majority of the industry.

3.18 Hours of work - maximum number of hours on one day

Similarly, HAC submits that the maximum number of hours per day (subject to any further agreement) should be 10 hours per day (see clause 24.2(b) of the Draft HAC Award).

3.19 Individual agreement

The Draft AWU Award specifies that an agreement is required between an employer and the majority of employees to extend working hours (see clause 24.2(e) of the Draft AWU Award) but that an agreement to shorten hours can be with an individual employee (see clause 24.2(h) of the Draft AWU Award).

HAC submits that any agreement to extend as well as shorten hours should be an agreement between the employer and an individual employee given that:

- The model award flexibility clause (clause 7 of the HAC Draft Award) specifies that individual agreement can be made with respect to arrangements regarding when work is performed. This clause further states (see clause 7.8 of the HAC Draft Award) that this right is in addition to any other provision of the Award.
- Both the model award flexibility clause and clause 24.2 of the HAC Draft Award include protections to ensure that proper health and other protections are in place.

HAC has also amended clause 24.2(e) of the AWU Draft Award so that the arrangement reached between the employer and employee is not subject to ‘proper supervision being provided’. It is HAC’s submission that this is a vague concept which is not easy to understand (see clause 24.2(b)(ii) of the HAC Draft Award).

3.20 Overtime rates - time in lieu

HAC submits that there should be no restriction on when time in lieu is taken by an employee. None of the awards and NAPSAs applicable to the horticulture industry include the three week time restriction set out in clause 27.1 of the Draft AWU Award. No explanation is provided as to why this prescription is included. It is unwarranted and will increase cost.

3.21 Overtime on Sundays

If HAC's submission regarding the inclusion of a clause specifying that work performed during critical periods is paid as ordinary pay is rejected, HAC submits that work during critical periods on a Sunday should be paid at time and a half (see clause 27.2 of the Draft HAC Award).

HAC submits that the minimum engagement period for work on a Sunday should be two hours. Of the awards and NAPSAs applicable to the horticulture industry only the *NSW Horticultural Industry (State) Award* specifies a minimum engagement period of four hours on a Sunday.

HAC further submits that, in accordance with the HIA, pieceworkers should not be eligible to receive overtime rates for work on Sundays.

3.22 Payment for working on public holidays

Clause 27.3 of the Draft HAC Award has been drafted so that the same rate of pay applies to all employees for work performed on public holidays. HAC does not agree with the AWU's proposal to differentiate between employees in packing houses and on blocks (see clause 27.2 of the Draft AWU Award).

3.23 Call back

HAC submits that the minimum engagement period for an employee recalled to work should be two hours. Of the 16 awards and NAPSAs applicable in the Horticulture Industry, 11 include a minimum engagement period of three hours or do not specify a minimum engagement period (see clause 27.4 of the Draft HAC Award).

3.24 Leave and public holidays

We have inserted draft clauses dealing with the calculation of pieceworkers' entitlements in respect of notice of termination, redundancy, annual leave, personal leave and community service leave (see clauses 3.1, 14.4, 15.5, 28.3(c), 29 and 30.2 of the Draft HAC Award).

3.25 Shift work

We have removed the shift work clauses proposed by the AWU (see clauses 24.3 and 28.5(b) of the AWU Draft Award) as shift work is not relevant to the horticulture industry.

However, HAC would support the inclusion of shift work provisions if the Commission does not accept either of the alternative hours of work clauses proposed by HAC above. If necessary, HAC may need to make further submissions on this point at a future time.

3.26 Classification structure

HAC is concerned to explore the possibility of having a connection between the National Production Horticulture Training Package and classifications within the award.

HAC may seek to make further submissions on this at a future date.

Freehills

Schedule 1- Draft HAC Award

Freehills