

Fair Work Act 2009 s.157— FWC may vary etc. modern awards if necessary to achieve modern awards objective

Review of certain C14 rates in modern awards

Australian Fresh Produce Alliance

(Interested Party)

Outline of Submissions for AFPA

1. This submission is filed by the Australian Fresh Produce Alliance (**AFPA**), an association of Australian fresh produce growers and suppliers in accordance with directions issued by the Commission in a statement published on 22 September 2021¹ (**September Statement**) inviting interested parties to file submissions and evidence regarding the Commission’s *provisional view* set out at [8] of the September Statement.
2. AFPA is not a registered organisation but is an “industrial association” within the meaning of the *Fair Work Act 2009* (**FW Act**). Its members (which include supply arrangements with over 1,000 partner growers) are covered by the *Horticulture Award 2020* (**Horticulture Award**) and the *Nursery Award (2020)* (**Nursery Award**). They are affected by the Commission’s *provisional view*, giving AFPA sufficient interest in the proceeding.²
3. The Commission has expressed a provisional view that the following principles should guide its completion of the C14 Review:³
 - (a) the lowest classification rate in any modern award applicable to ongoing employment should be at least the C13 rate;
 - (b) any classification rate in a modern award which is below the C13 rate (including the C14 rate) must be an entry-level rate which operates only for a limited period and provides a clear transition to the next classification in the award (which must not be less than the C13 rate); and
 - (c) the transitional period for the purpose of (b) above should not exceed 6 months.

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¹ [2023] FWCFB 168.

² In the unlikely event that its standing is challenged, AFPA can file evidence and submissions on that issue.

³ September Statement at [8].

4. The premise upon which the Commission has expressed its *provisional view* is not readily apparent. AFPA does not agree with the principles outlined in paragraph [8] of the September Statement.
5. In summary, AFPA submits that both the Nursery Award and the Horticulture Award meet the modern awards objective and there is no need to vary either award. Further, to the extent that the Commission maintains the *provisional view*, the Nursery Award is consistent with it.
6. In the alternative, submits that the classification structure of the Horticulture Award requires further review to ensure that Level 1 is truly transitional but that the period of transition should be three months experience with the employer performing the task.

(A) The Commission’s Review

7. This review is being conducted by the Commission pursuant to section 157 of the FW Act which provides that the Commission may make a determination to vary a modern award, otherwise than to vary modern award minimum wages if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective.
8. Section 134 of the FW Act sets out the modern awards objective:

134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
 - (a) relative living standards and the needs of the low paid; and
 - (aa) the need to improve access to secure work across the economy; and
 - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
 - (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:
- (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
9. This review was commenced by the Commission on 28 August 2019⁴ at which time, the Commission expressed a provisional view that 14 awards that contained a rate of pay at the C14 level should be referred to a Full Bench for review (**C14 Review**). Importantly, neither the Horticulture Award or the Nursery Award were included in the Commission's review of C14 rates at that time.
10. The commencement of the review followed the *Annual Wage Review Decision 2018-19*⁵ (**AWR 2019**) in which the Expert Panel commented that awards prescribing a rate at the C14 level, then equivalent to the National Minimum Wage (**NMW**), that is not transitional should be the subject of further examination.⁶
11. Relevantly, at [359] of the AWR 2019, the Expert Panel commented (with emphasis):
- In our judgment the magnitude of the increase required in this Review to lift these household types above the relative poverty line would run a significant risk of disemployment and of adversely affecting the employment opportunities of low-skilled and young workers. Further, it is not clear how many low-paid employees are in the household types which are the focus of the ACTU and ACBC submission. It is likely that a number of these employees are on a transitional modern award minimum wage from which they will progress after a relatively short period. Almost two-thirds of workers who enter low-paid employment leave within a year and most move into higher-paid work.*
12. In the *Annual Wage Review Decision 2022-2023* [2023] FWCFB 3500 (**AWR 2023**), the Expert Panel determined to realign the relativity of the NMW with the C13 classification (resulting in an increase to the NMW above the percentage increase applied to award rates). Relevantly, the Expert Panel determined:
- (a) At [8]:

The C14 rate is the lowest modern award minimum wage rate but was only ever intended to constitute a transitional entry rate for new employees. As such, it does not constitute a proper minimum wage safety net for award/agreement free employees in ongoing employment. A wider review, including supporting research, concerning the needs and circumstances of lowpaid award/agreement free employees is required, but the interim step we have decided to take in this Review is to align the NMW with the current C13 classification wage rate, which in nearly all relevant awards is the lowest modern award classification rate applicable to ongoing employment.
 - (b) At [104]

The above analysis also takes no account of casual employees in receipt of the 25 per cent loading (noting that casual employees constitute almost half of the modern award-reliant cohort). To the extent that the analysis may be applied to modern award-reliant employees on the C14 rate, it does not account for additional earnings by way of award penalty rates payable for ordinary-time work (such as evening or weekend penalty

⁴ [2019] FWC 5863.

⁵ [2019] FWCFB 3500.

⁶ *Ibid* at [340].

rates) or award overtime penalty rates, which are common incidents of modern award-reliant employment.

(c) At [108]

Further, an employee classified at the C14 rate under a modern award may be entitled to a range of additional earnings-enhancing benefits such as weekend penalty rates, overtime penalty rates, shift loadings and allowances to which an employee on the NMW will not be entitled.

(d) At [172]

There are two aspects to our consideration of the NMW. First, for the reasons set out in section 5 of our decision, we consider that the historic alignment between the NMW and the C14 rate should cease. We note in this connection that there is no requirement in the FW Act for the NMW to align with the lowest modern award adult rate, nor does the NMW operate as a floor to modern award minimum wage rates.

13. If the basis for the conclusion in the first sentence of paragraph [8] of the AWR 2023, that [t]he C14 rate is the lowest modern award minimum wage rate but was only ever intended to constitute a transitional entry rate for new employees, is said to be as set out in paragraph [107] of that decision, such a conclusion can only be limited to the classification as it appears in the Manufacturing and Associated Industries and Occupations Award and not in terms of its relativity to the NMW or other modern awards.
14. In the September Statement, the Commission proposed to broaden the scope of the C14 Review to include a number of other awards, including relevantly to AFPA, the Horticulture Award and the Nursery Award.
15. In doing so, and in expressing the *provisional view* summarised at paragraph 3 above, it appears that the Commission has not turned its mind to the Nursery Award or the Horticulture Award in any greater detail than as set out in Attachment D to the September Statement. That is, beyond a cursory consideration of whether the C14 equivalent classification in those Awards is transitional, the Commission has not considered the appropriateness of the *provisional view* to those Awards.
16. AFPA notes that the review has been ongoing in the Commission for a period of 4 years. AFPA has been provided with a period of 6 weeks in which to provide any material to the Commission in relation to variations to the Horticulture Award and the Nursery Award which may significantly and substantially affect its members.

(B) The Nursery Award

17. On 25 November 2019, the Commission made the Nursery Award⁷ having determined that the making of the award was necessary to achieve the modern awards objective.
18. The Nursery Award contains a C14 rate of pay equivalent in Grade 1A. Schedule A of the Nursery Award includes the classification description for a Grade 1A employee as follows (with emphasis):

Employees in this grade have no previous experience in the industry and no formal qualifications. They carry out general nursery and labouring duties of a routine and repetitive and/or manual nature, mainly under supervision, for a period of no longer than 3 months.

⁷ PR714160.

19. The Grade 1B classification provides a rate of pay equivalent to the C13 rate of pay and in Schedule A of the Nursery Award relevantly provides (with emphasis):

A.2.1 *Employees in this grade have 3 months experience in the industry. They perform and are accountable for nursery tasks as directed within the skill levels set out below. They work within established routines, methods and procedures. Supervision is direct.*

...

20. The information pertaining to the Nursery Award in the table at Attachment D to the September Statement is accurate.
21. To the extent that the Commission maintains the *provisional view* in respect of the Nursery Award, the provisions of the Nursery Award relating to the C14 and C13 equivalent classifications are consistent with the Commission's *provisional view*.
22. No variation to the Nursery Award is necessary to meet the modern awards objective.

(C) The Horticulture Award

23. On 7 October 2019, the Commission made the Horticulture Award⁸ having determined that the making of the award was necessary to achieve the modern awards objective.

24. In the Horticulture Award:

- (a) the Level 1 classification rate is relative to the C14 classification rate; and
- (b) the Level 2 classification rate is relative to the C13 classification rate.

25. The work within the scope of Level 2 is different to, and distinct from, that of Level 1. An employee engaged, for example, to perform duties of fruit or vegetable picking, thinning or pruning, is, in accordance with the classification descriptions in Schedule A of the Horticulture Award, classified as a Level 1 employee.⁹ There is no scope for picking, thinning, or pruning work in any other classification in the Horticulture Award.

26. There is no automatic requirement to transition a Level 1 employee to Level 2 after any period of time, other than where an employee is undertaking structured training so as to perform the duties of Level 2.

27. In this respect, information pertaining to the Horticulture Award in the table at Attachment D to the September Statement is accurate.

28. In *Application by The Australian Workers' Union to vary clause 15 of the Horticulture Award 2020* [2021] FWCFB 5554, a Full Bench of the Commission summarised the Horticulture Industry as follows (footnotes omitted):

[31] The Horticulture Award covers, in essence, the 'the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise.' Horticultural crops are defined in clause 2 of the Award to include:

⁸ PR722499.

⁹ Witness Statement of Carl Phillips dated 10 November 2023 at [15] to [22]. Mr Phillips' evidence is that of Costa's approximately 10,750 workers, 10,000 performing predominantly Level 1 duties.

'all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, or other specialised crops unless they are specifically named as a broadacre field crop in the Pastoral Award 2020.'

[32] The Horticulture Award does not cover the wine industry, silviculture and afforestation, sugar farming, cotton growing or harvesting and plant nurseries.

[33] In the horticulture industry, crop growth is seasonal and each crop has its own distinct picking season. The crop yield is lower at the beginning of the season, then ramps up during the middle of the season and tapers off in the late portion of the picking season.

...

[35] Due to the seasonality and picking windows, the size of the workforce at a particular site can vary significantly throughout the season. The demand for picking labour increases as the picking season progresses, peaks and then tapers off reflecting changes in crop yield.

[36] Work across the horticulture industry is labour intensive and predominantly seasonal.

[37] The workforce size and composition varies substantially over the course of the year and also varies from region to region.

[38] Horticulture farms tend to use relatively large amounts of casual and contract labour at key times of the year and the incidence of short term (seasonal) and casual employment is high, about 30% of the industry is employed on a casual basis and 38–47% is employed on a contract basis.

...

[40] The best estimate of the total horticulture workforce for 2019 is between 120,000 to 140,000. These figures capture employees in the industry regardless of the duration of their employment and the number of persons employed at any one time varies significantly from month to month. Seasonal labour demand increases significantly during November to March, a period during which many horticulture crops are harvested.

...

29. Mr Phillips' experience is that the workforce in the industry is often seasonal,¹⁰ and workers may work for one employer for a season and may then either not return, or not return until after a couple of seasons have passed.¹¹ Some employers, such as Costa, will specifically seek return workers in subsequent seasons from both direct labour and labour supply partners.¹² Employees who are paid according to the Horticulture Award classifications do not automatically transition from Level 1 to Level 2 unless they are employed for the purpose of duties set out in Level 2 and are undertaking training to enable them to perform those duties.¹³
30. In accordance with the terms of the Horticulture Award:
- (a) casual employees are paid a loading of 25%;¹⁴

¹⁰ Ibid at [16].

¹¹ Ibid at [18] to [20].

¹² Ibid at [17].

¹³ Ibid at [22].

¹⁴ Clause 11.2(a)(ii).

- (b) casual employees are entitled to penalty loadings for particular hours of work;¹⁵
 - (c) shiftworkers are entitled to penalty loadings for shift work;¹⁶
 - (d) the rate of pay for pieceworkers must be fixed so that pieceworkers competent at the piecework task, meaning a pieceworker who has at least 76 hours' experience performing the task, will earn at least 15% more per hour than the hourly rate;¹⁷
 - (e) pieceworkers are paid 200% of the piecerate for work on a public holiday;¹⁸
 - (f) where a pieceworker performs non-piecerate tasks, they are to be paid the hourly rate;¹⁹
 - (g) a pieceworker must be paid no less than the hourly rate;²⁰
 - (h) piecerate workers receive allowances in addition to the piecerates;²¹
 - (i) employees are entitled to allowances as applicable;²²
 - (j) hourly rate employees are entitled to overtime payments;²³ and
 - (k) employees receive annual leave loading of 17.5%.²⁴
31. Employees under the Horticulture Award are entitled to a range of additional earnings-enhancing benefits to which an employee on the NMW will not be entitled as was contemplated by the Expert Panel in the AWR 2019 and the AWR 2023.
32. The classification structure in the Horticulture Award appears primarily derived from the *Horticultural Industry (AWU) Award 2000*²⁵ (**2000 Award**). The classification definitions for Level 1 and Level 2 of the 2000 Award (the relevant classifications) are extracted at **Annexure A** to these submissions.
33. Relevantly, the 2000 Award, as with the Horticulture Award provides work within the scope of Level 2 classification that is different to, and distinct from, that of Level 1. There is no automatic requirement to transition a Level 1 employee to Level 2 after any period of time, other than where an employee is undertaking structured training so as to perform the duties of Level 2.
34. To the extent that employees otherwise progressed from Level 1 to Level 2 in the 2000 Award, such progression was based on the employee meeting certain promotional and

¹⁵ Clause 13.2.

¹⁶ Clause 13.3.

¹⁷ Clause 15.2(d).

¹⁸ Clause 27.3.

¹⁹ Clause 15.2(e).

²⁰ Clause 15.2(f).

²¹ Clause 15.2(g).

²² Clause 18.

²³ Clause 21.

²⁴ Clause 24.6.

²⁵ AP784867CRV.

competency criteria. Critically, these provisions were not included in the Horticulture Award.

35. An analysis, a summary of which is contained at **Annexure B**, of the remaining pre-modern awards which were affected by the making of the *Horticulture Award 2010 (2010 Award)* demonstrates that:
- (a) 4 awards contain 1 classification only;
 - (b) 3 awards provide for no automatic progression from the lowest classification to the next;
 - (c) 3 awards contain classifications with progression after 12 months from the lowest classification to the next;
 - (d) 2 awards contain classifications with progression after 6 months from the lowest classification to the next.²⁶
36. It is clear that it has not been a common feature in the Horticulture Industry that an employee will automatically transition from the lowest classification to the next after a fixed period of time.
37. Indeed, while the 2000 Award, consistent with the 2010 Award and the Horticulture Award, contains a period in which a Level 1 employee may progress to Level 2, such progression is limited to circumstances where the employee is undergoing structured training in relation to the duties of a Level 2 employee, which is, as set out above, distinct from the duties of a Level 1 employee.
38. In any event, to the extent that any pre-modern awards provided for automatic progression for a period, the period of time was between 12 and 6 months.
39. A consideration of the history of the Horticulture Award does not support a conclusion that it was intended that the Level 1 rate of pay was only ever intended to be a transitional rate of pay.
40. It is evident that the Horticulture Award was, and historically has been, drafted in a way that the Level 1 classification is not intended to be a transitional classification to Level 2. Indeed, as above, fruit picking is a duty that is only referable to the Level 1 classification and no other, including specifically the Level 2 classification. This arrangement is not unsurprising given the nature of the industry, and in particular taking into account that workers are predominately seasonal, and a season will only last for part of a year. This is reflected in the application of the classifications by the industry.
41. Accordingly, the *provisional view* expressed by the Commission in the September Statement is not consistent with the provisions of the Horticulture Award. As above, it is apparent that the Commission did not consider the terms of the Horticulture Award when expressing the *provisional view*.
42. The Horticulture Award contains a number of features identified by the annual wage review Expert Panels, as set out above, which tend a conclusion that it is not necessary

²⁶ 1 award contains no rates of pay.

to apply the *provisional view* to the Horticulture Award in order to meet the modern awards objective.

(D) Alternative Horticulture Proposal

43. If the Commission takes the view that, notwithstanding the intention of the Horticulture Award, the *provisional view* should nevertheless apply, AFPA submits that the Horticulture Award should be varied so that an employee transitions from Level 1 to Level 2 after a period of experience with the employer performing the task.
44. The C14 equivalent rate remains appropriate in the Horticulture Award.
45. The difficulty with a variation to the Horticulture Award at this time is that a variation to the Level 1 classification to transition to a Level 2 classification requires a further review so that the classification truly operates on a transitional basis. This requires further consideration of the classification definitions, beyond the simple inclusion of a transitional period given that the duties that are relevant to employees that are presently correctly classified as a Level 1 are not expressed as being less proficient or competent than a Level 2 employee for the reasons set out above.
46. The Horticulture Award already contains a period in which employee may be undertaking training for the purpose of transitioning to Level 2. That period is three months. The Level 2 classification description contains duties which are more complex and require a greater level of competency and proficiency than is required of a Level 1 employee.
47. The evidence of Mr Phillips is that the average period of time in which it takes an employee to become proficient in their role varies depending on the nature of the produce. By way of example:
 - (a) berry picking may between take 3 to 12 months to become proficient in all the varieties of berries that Costa produces but the berry season usually only lasts 6 months;
 - (b) citrus picking may take up to 3 to 6 months given the nature of the season and number of varieties of fruit to become proficient;
 - (c) mushroom picking may take 12 months to become proficient. For the reasons I refer to above, it can be the most technical of the produce that Costa produces to correctly harvest.²⁷
48. Mr Phillips' experience is that:
 - (a) The workforce is often seasonal.²⁸
 - (b) Workers may work for one employer for a season and may then either not return, or not return until after a couple of seasons have passed.²⁹

²⁷ Witness Statement of Carl Phillips dated 7 November 2023 at [32].

²⁸ Ibid at [16].

²⁹ Ibid at [16] and [35].

- (c) Different producers will have different standards and requirements in respect of their produce depending on the:
 - (i) price negotiated with wholesalers or retailers for a product;
 - (ii) nature of the use of the produce (i.e. produce to be used for freezing, jamming or juicing will not need to be of the same quality as first-grade produce);
 - (iii) distance the produce is required to travel once it leaves the producer;
 - (iv) general operations of the producer.³⁰
 - (d) If produce does not meet the standards required by wholesalers or retailers, it may be rejected;³¹
 - (e) A high level of physical fitness is often required to perform the duties required.³²
 - (f) The amount of time it takes for a worker to become proficient at fruit picking or harvesting can vary greatly between 3 to 12 months depending on the type of produce;³³
49. AFPA accepts that it is an undesirable position for the Horticulture Award to include varying periods before transitioning to Level 2 based on produce. For this reason, AFPA seeks a period of transition taking in account a consideration of the varied amount of time it takes for employees to meet the required proficiency standards for various produce.
50. The Nursery Award, in a similar industry grouping, contains a transition period of three months to progress from Grade 1A to Grade 1B.
51. If the *provisional view* is to be applied to the Horticulture Award, AFPA submits that Levels 1 and 2 should be reviewed to ensure that the classification descriptors are truly transitional, and that the period of transition should be three months experience with the employer performing the task.

Conclusion

52. AFPA does not support the *provisional view* set out in the September Statement.
53. To the extent that the Commission upholds the *provisional view* in respect of the Nursery Award, the Nursery Award is already consistent with the *provisional view* and no variation is required.
54. The Commission should conclude that the *provisional view* is not consistent with, nor appropriate to apply to the Horticulture Award and no variation is therefore required.
55. To the extent that the Commission upholds the *provisional view* in respect of the Horticulture Award, the Horticulture Award requires further consideration as to the necessary amendments to the classification structure should be given so as to vary the

³⁰ Ibid at [35].

³¹ Ibid at [25].

³² Ibid at [8] to [14].

³³ Ibid at [32].

Horticulture Award as set out above in part (D) above to make the classifications truly transitional and ensure the intention of the *provisional view* and the matters set out in the AWR 2023. Should the Commission consider that the Horticulture Award should be varied in light of the *provisional view*, AFPA reserves its rights to present further evidence and submissions to the Commission.

Kingston Reid

**Solicitors for AFPA
10 November 2023**

Annexure A

24. CLASSIFICATIONS AND WAGE RATES (APPLYING TO SCHEDULE B AND C RESPONDENTS)

24.1 Classification definitions

24.1.1 Level 1 employee means an employee classified in accordance with the following criteria:

24.1.1(a) General description

An employee at this level:

- Undertakes induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow workers, training and career opportunities, plant layout, work and documentation procedures, occupational health and safety, equal employment opportunity and quality control/assurance;
- Performs routine duties essentially of a manual nature and to the level of their training;
- Exercises minimal judgement;
- Works under direct supervision;
- Is responsible for the quality of their own work.

24.1.1(b) Points of entry

- New employee;
- Existing employee performing work within this grade who is undertaking in order to progress to Level 2.

24.1.1(c) Indicative duties

Indicative of the duties an employee may perform at this Level are:

- Performs general labouring duties;
- Fruit or vegetable picking, thinning or pruning;
- Operates small towing tractor engaged in transfer of produce bins and other containers during harvest;
- Performs a range of routing housekeeping tasks in premises and grounds;
- Sorting, packing or grading of produce where this requires the exercise of only minimal judgement;
- Performs basic recording functions related to work performed at this level;
- Provides assistance within the scope of this level to other employees as required;
- May be undertaking structured training to enable entry into Level 2.

24.1.1(d) Promotional criteria

An employee remains at this level until they demonstrate competency through assessment or appropriate certification in Level 1 and Level 2 skills required at the enterprise and may then progress to Level 2 as a position becomes available.

24.1.2 Level 2 employee means an employee classified in accordance with the following criteria:

24.1.2(a) General description

An employee at this level:

- Has completed up to three months structured training so as to enable the performance of work within the scope of this level;
- Works under general supervision either individually or in a team environment;
- Works with established routines, methods and procedures;
- Performs a range of tasks involving the use of skills above and beyond those of Level 1 and to the level of their training;
- Exercises limited discretion;
- Is responsible for the quality of their own work;
- Receives training in Occupational Health and Safety standards and practices relevant to the site;
- Performs lower level tasks as required without loss of pay unless re-engaged to perform tasks at predominantly a lower skill level.

24.1.2(b) Points of entry

- An existing employee who advances by satisfying the promotional criteria defined at Level 1 and is selected by the employer to fill a position at this level;
- A new employee selected for a position at this level after demonstrating through assessment or appropriate certification to the employer's satisfaction, competence in the skills required in the establishment at this level.

24.1.2(c) Indicative duties

Indicative of the duties an employee may perform at this level are:

- Performs a range of tasks involving the set up and operation of production and/or packaging or picking equipment, labelling and/or consumer picking equipment;
- Repetition work on automatic, semi-automatic or single purpose machines or equipment;
- Assembles/dismantles components using basic written, spoken and/or diagrammatic instructions in an assembly environment;
- Irrigation, spraying or pruning under general supervision;

- Sorting, packing and grading beyond the scope of Level 1 duties;
- Maintains simple records;
- Uses hand trolleys, pallet trucks or other mechanical or power driven lifting or handling devices not requiring a licence;
- Operates tractors with engine capacity of up to 70 kW;
- General and routine product testing;
- Provides assistance within the scope of this level to other employees as required;
- Assists in the provision of on-the-job training in conjunction with supervisors, tradespersons or trainers;
- May undertake training to enable entry into Level 3.

24.1.2(d) Promotional criteria

An employee remains at this level until they demonstrate competency through assessment or appropriate certification in Level 3 skills required at the enterprise and may then progress to Level 3 as a position becomes available.

Annexure B

Award	Summary of progression
AP767376 - Agriculture, Forestry and Fishing Industry Sector Minimum Wage Order - Victoria – 1997	Did not contain any automatic progression from Level 1 to Level 2
AP784867CRV - Horticultural Industry (AWU) Award 2000	Cl. 24.1.1(d) <i>Promotional Criteria</i> An employee remains at this level until they demonstrate competency through assessment or appropriate certification in Level 1 and Level 2 skills required at the enterprise and may then progress to Level 2 as a position becomes available.
AN160101 – The Dried Vine Fruits Industry Award, 1951	Cl. 22 Provided 1 rate of pay only.
AN160126 – Farm Employees' Award, 1985	Cl. 14 The lowest classification applied to a farm hand with less than 12 months experience in the industry. The next classification applied to a farm hand with 12 months experience in the industry.
AN170032 – Farming and Fruit Growing Award	Cl. 7. A farm and/or Orchard Hand Level 1 means a person with less than 6 months experience in the industry.
AN140126 – Fruit and Vegetable Growing Industry Award - State 2002	Cl. 5.1 Provided 1 rate of pay only.
AN160134 – The Fruit Growing and Fruit Packing Industry Award	Cl.24A Provided 1 rate of pay only.
AP811240 - Hop Industry Award 2001	Cl. 9.5 Hop industry hand grade 1 means an employee with less than six months experience in the industry. Cl. 9.6 Hop industry hand grade 2 means an employee with at least six months experience in the industry.
AN120247 – Horticultural Industry (State) Award	Cl. 3 A farm Employee Level two includes a Farm Employee Level One with at least twelve months experience in the industry.
AN170045 – Horticulturists Award	Cl. 8. Relevantly, contains rates for Horticultural Tradesman and an employee having less than one month's continuous service with their present employer.
AN120357 – Mushroom Industry Employees (State) Award	Cl. 2. Farm Employee Level 1 (83%). No automatic progression.

AN150104 – <i>Pastoral Industry (South Australia) Award</i>	Sch. 2 Station hand with less than 12 months experience in the industry. Station Hands with twelve months experience or more in the industry.
AP792378CRV – <i>Pastoral Industry Award 1998</i>	No rates included.
AN140295 – <i>Tea Industry Award - State 2003</i>	Cl. 5.1 – tea blender first years experience, second years experience. Tea picking – no progression.

Fair Work Act 2009 s.157 – FWC may vary etc. modern awards if necessary to achieve modern award objectives

Australian Fresh Produce Alliance
(Interested Party)

WITNESS STATEMENT OF CARL JOHN PHILLIPS

I, Carl John Phillips, Chief People Officer at Costa Group Holdings Ltd, of Level 5, 818 Bourke Street, Docklands, Victoria, state:

1. I make this statement based on my own direct observations and knowledge, or on the basis of information provided to me which, to the best of knowledge and belief, is correct.

My role and background

2. I am employed by a subsidiary of Costa Group Holdings Limited (**Costa**) as the Chief People Officer (**CPO**) and am based in Docklands, Victoria.
3. I commenced with Costa in 2014 and started in my role as CPO in February 2022. Before my role as CPO, I was employed as Group HR manager and then as HR Group Manager and Business Services. While my title changed during this period, my responsibilities remained largely the same.
4. In my role as CPO, I have overall responsibility and accountability for the company's people function, inclusive of Human Resources, Internal labour provision from Australian Government's regulated Pacific Australia Labour Mobility program (**PALM**), Workplace Health and Safety. At a high level, my duties include:
 - (a) closely managing and overseeing the workplace health and safety whilst accounting for the high risk profile associated with agriculture work;
 - (b) people accountabilities in relation to labour effectiveness, industrial relations requirements, payroll, talent, management and succession, remuneration equity plans of the Group and executive responsibility for the Human Resources and Remuneration Committee of the Board;
 - (c) controlling and monitoring the company's labour productivity including being accountable for the management of labour leakage such as through the payment of overtime or make up pay for piece rate workers;

- (d) ensuring labour compliance within all domestic and international operations;
 - (e) undertaking necessary reporting requirements including generating remuneration and labour reports and the presentation of these reports to the board.
5. Prior to my employment with Costa and throughout the course of my career I have held various Human Resources and Safety related roles. Most recently, I have worked in the following positions:
- (a) HR Manager - Servion Australia Pty Ltd;
 - (b) Chief Executive Officer – 370 Degrees Group;
 - (c) Executive General Manage People – SKILLED Group; and
 - (d) Director of Safety – Australia – Alcoa.

Australian Horticulture Industry

6. The horticulture sector in Australia encompasses the growing, processing, marketing and exporting of a variety of fruit, vegetables and tree nuts. This produce includes but is not limited to:
- (a) all kinds of fruits such as berries, bananas, citrus, cucurbits, pineapples, mandarins, avocados, mangos, tomatoes, apples, pears, papayas, lychees, stone fruit, and grapes;
 - (b) vegetables such as potatoes, carrots, brussels sprouts, cauliflower, capsicums, zucchini, lettuce, spinach and rocket;
 - (c) herbs, including basil, parsley, and coriander;
 - (d) fungus, including various strains of mushrooms; and
 - (e) various types of nuts such as cashews, chestnuts, hazelnuts, macadamias, peanuts, pecans, pistachio and walnuts.
7. To my knowledge, the majority of Australian produce is grown in the following regions:
- (a) Goulburn Valley, Victoria;
 - (b) Murrumbidgee Irrigation Area, New South Wales;
 - (c) Sunraysia, Victoria and New South Wales;
 - (d) Riverland, South Australia;
 - (e) Northern Tasmania;
 - (f) Southwest Western Australia; and
 - (g) Coastal Northern New South Wales and Queensland.

Costa's Operations

8. Within the horticulture industry, Costa is the leading grower, packer and marketer of fresh fruit and vegetables, supplying majority of the country's major food retailers.
9. Costa operates primarily in five core categories, being berries (blueberries, raspberries, strawberries, and blackberries), mushrooms, glasshouse-grown tomatoes, citrus and avocados. In addition to the primary categories, Costa also grows, markets and distributes bananas and table grapes.
10. Currently, Costa operates out of approximately 60 locations through Australia based in Western Australia, South Australia, Queensland, New South Wales, Victoria and Tasmania. In total, produce is grown across 7200 hectares of farmland, 40 hectares of glasshouse facilities and three main mushroom growing facilities across the country. In addition to its domestic production, the company operates berry farms covering an estimated total of 750 hectares in Morocco and China.
11. Costa's produce limb is also supported by its interrelated logistics, wholesale, and marketing operations. The company currently has distribution centres located in Western Australia, Victoria, Tasmania and New South Wales and wholesale markets located in South Australia, Queensland, Western Australia and Victoria.
12. The revenue that Costa is able to generate is largely dependent upon the prices negotiated with retailers. These negotiations and pricing discussions may involve different time periods depending on the retailer and the particular produce. In some cases, prices may be negotiated on a weekly basis, and in others, on a 12 month basis or longer. Depending on the retailer and the type of produce, Costa may not have any real bargaining power and may simply need to take the price offered by the retailer as opposed to being able to bargain for a higher price.
13. The prices negotiated with retailers can also depend on the quality of the produce. The higher quality the produce, the better the price can be for Costa. It is therefore necessary that Costa is producing the best quality produce to sell to retailers. I deal with this in greater detail below.
14. There is a significant amount of forward planning to grow and harvest the produce prior to it being able to be picked. This includes determining, sometimes years in advance, how much of a particular type of produce to grow and then negotiating with our suppliers and ensuring that they are able to supply Costa with the amount of seed or number of plants required. This means that our suppliers themselves need to plan how much seed or how many plants to cultivate to sell to us. To ensure that the produce is planted at the correct time for the harvest, this process and the associated expenses can be planned years in advance of the actual time of harvest.

Costa's Workforce and Industrial Landscape

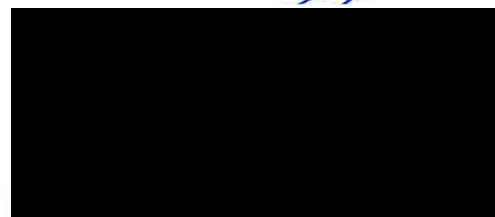
15. Each year, Costa's workforce is made up of approximately 10,750 workers. Of these workers, approximately 750 are permanent salaried employees working primarily in leadership or supervisory capacities.
16. Most of the remaining 10,000 workers form part of Costa's seasonal workforce and are engaged to harvest, process and pack fruit or "fruit pickers" at various times throughout the year depending on the harvest and produce season (**Seasonal Workers/Seasonal Workforce**).
17. The Seasonal Workforce is a combination of direct employees and labour hire workers. Currently, there are a greater number of Seasonal Workers who are Costa employees than those engaged via labour hire.
18. The Seasonal Workforce is made up of both local and transient workers. Where possible, Costa's preference is to engage local workers. Utilising local workers is beneficial for several reasons including managing labour expenses and mitigating the risks associated with transient labour such as social dislocation.
19. With that being said, the total percentage of local workers is low. As a result, the majority of the seasonal workers are either migrant workers or third-party labour. For the most part, Costa's third-party labour are workers from the Pacific Islands who live and work in Australia as part of PALM. In some operations, such as Costa's berry, citrus, and tomato operations, workers from the Pacific Islands are direct employees of Costa.
20. Generally, transient workers will work for Costa for anywhere between six to nine months. During this time, workers may move between different growing locations where they are skilled in picking different types of produce. For example, it is not unusual for workers to relocate from our Riverland citrus operations in South Australia at the end of the citrus season to our blueberry operations in Coffs Harbour New South Wales.
21. The general underpinning industrial instrument covering Costa's overall seasonal workforce is the *Horticulture Award 2020* (**Horticulture Award**). In other instances, seasonal workers may be covered by the terms of an enterprise agreement of the category such as berry or the site or duties such as in citrus. Where this is the case, the classifications and levels within the agreement typically reflect the classification structure in the Horticulture Award
22. Where the workers are employed under the Horticulture Award, they are always engaged at a Level 1 classification and are paid in accordance with this level. Unless the worker changes roles or is actively training in a skill which would see them move to a Level 2 classification, fruit pickers remain at a Level 1 classification.

Fruit Picking

23. The skills required to pick produce, and the time it takes for a worker to become proficient in picking produce are dependent largely on the type of produce the worker is picking as well as their overall fitness levels and the worker's previous experience in picking produce.
24. As Costa supplies directly to supermarkets and retailers, its produce is required to be the highest quality. This includes meeting any retail specifications around food safety, produce size, appearance and colour. These specifications are driven by the retailer or customer.
25. If produce does not meet these specifications, Costa runs the risk of the produce being rejected by retailers. The quality and standard of produce must also be maintained through the lengthy transportation from the regional areas where it is grown, through to metropolitan distribution centres and then onto stores.
26. As a result of these requirements, Costa's fruit pickers are required to pick produce in a manner which ensures it is of the highest quality from the time it leaves the grower to the time it arrives at the retailer.
27. When picking citrus, there are four different picking techniques that can be utilised depending on both the type of fruit and the end market for that fruit. When picking a navel orange, for retail sale pickers are required to examine the fruit to determine its quality and then twist and bring the fruit down from the tree. This technique is referred to as 'twist picking'.
28. Picking naval oranges for retail sale is different to picking juicing oranges which can be picked with less delicacy but with greater speed to maximise profit, this is referred to as 'strip picking'. Picking mandarins requires the worker to 'snip' or 'snap' the mandarin from the tree to prevent the rind of the mandarin from splitting and the technique will depend on the variety of mandarin. If this is not done correctly, the mandarin would spoil on transport from the grower to the retailer.
29. Picking citrus is significantly different to picking berries. When picking raspberries and blackberries pickers must be particularly dexterous to pick the fruit and prevent it from crushing before being placed on a tray for consumers. By contrast, blueberries must be pulled from a plant and can withstand more pressure as they are firmer than raspberries. However overall, when compared to citrus, berry picking is quite delicate in skill.
30. The requirement for picking mushrooms is more technical than the requirements for other produce. Mushrooms must be picked in a way that preserves their white or brown cap and does not bruise the fungus. Pickers must also be able to rapidly identify when a mushroom is ready for picking. If a mushroom is picked too soon, this reduces the harvest available for picking the following day resulting in an overall yield loss for Costa. To incentivise workers to pick mushrooms according to the required standards, the workers are paid an hourly rate with a

bonus based upon productivity. Overall, there is a greater level of training and experience that is required to learn how to pick a mushroom when compared to other produce such as citrus.

31. In addition to differing picking techniques, different types of produce are required to be picked according to different physical characteristics including size, shape, colour or level of ripeness. These desired characteristics vary between crop types and varieties. This requires fruit pickers to make an assessment of fruit characteristics prior to picking the produce.
32. Generally, it takes a fruit picker anywhere between 3 to 12 months to become proficient in picking any one type of produce. This timeframe includes the time it takes for the worker to obtain a level of physical fitness which allows them pick produce in a profitable manner. For example:
 - (a) berry picking may between take 3 to 12 months to become proficient in all the varieties of berries that Costa produces but the berry season usually only lasts 6 months;
 - (b) citrus picking may take up to 3 to 6 months given the nature of the season and number of varieties of fruit to become proficient;
 - (c) mushroom picking may take 12 months to become proficient. For the reasons I refer to above, it can be the most technical of the produce that Costa produces to correctly harvest.
33. By 'proficient' I mean that the worker is both able to consistently, accurately, and correctly execute the produce picking or harvesting technique in the way that they perform their work, and quick in the speed at which they are able to pick or harvest the produce.
34. Fruit picking is physical work which requires workers to have a relatively high level of physical fitness. For example, mushroom pickers are required to pick and move an average of 26 kilograms of produce every hour. Citrus pickers must be physically able to work out in the environment for extended periods of time while repeatedly climbing up and down a ladder and carrying bags of produce to the appropriate collection point. Generally, it takes pickers up to three weeks to acquire the level of fitness required to pick produce in a profitable manner.
35. Given the time it takes for workers to become proficient in picking one type of produce, Costa often tries to recruit the same workers to return the following season. However, given the transient nature of the workforce it is not uncommon for pickers to work for only one season or to be away for multiple seasons before returning. As a result, there is a continuous cycle of workers who are building up the skillset in fruit picking.



Carl Phillips

10 November 2023