

Australian Industry Group

Application to vary the Horticulture  
Award 2020

**Aide Memoire**  
(AM2020/104)

**29 JULY 2021**



# AM2020/104 – APPLICATION TO VARY THE HORTICULTURE AWARD 2020

## 1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this Aide Memoire in accordance with the [Statement](#) issued by the Fair Work Commission (**Commission**) on 26 July 2021 and responds to the questions asked in the [Background Paper](#) issued on the same date relating to the Application that has been made by the Australian Workers' Union (**AWU**) to vary the provisions governing pieceworker rates in the *Horticulture Award 2020* (**Horticulture Award**).
2. Each question in the Background Paper is dealt with below.

**Question 1 - Is it common ground that neither the Horticulture Award nor the Act and Regulations require an employer to keep a record of hours worked by a pieceworker?**

3. It is Ai Group's position that neither the *Horticulture Award* nor the *Fair Work Act 2009* (Cth) and *Fair Work Regulations 2009* (Cth) require an employer to keep a record of hours worked by a pieceworker.
4. Ai Group relies on paragraphs [78] – [80] of its [1 June 2021 Reply Submission](#) on this point.

**Question 2 - Are any of the observations at [9] to [14] of the Background Paper contested?**

5. Ai Group does not contest any of the observations at paragraphs [9] – [14] of the Background Paper.

**Question 3 - Does any party contest the proposition at [16] of the Background Paper?**

6. Ai Group does not contest the proposition at paragraph [16] of the Background Paper.

**Question 4 - What does the AWU say about the AFPA submission regarding National Retail Association v FWC?**

7. This question is directed to the AWU. Ai Group agrees with the AFPAs submission that the AWU's Application seeks to vary modern award minimum wages.

**Question 5 - If the minimum wage objective is enlivened by the Application what do the parties say about the matters set out at s.284(1)(a) to (e)?**

8. Ai Group relies on paragraph [86] of its 1 June 2021 in response to this question.

**Question 6 - Does any party contest the UWU's submission regarding the key principles to draw from Hu (No 2) and the Hu Appeal (set out at [57] and [58] of the Background Paper)**

9. Point 5 of paragraph [57] of the Background Paper states:

*The 'average competent employee' is not necessarily 'proficient' but at least 'suitable, sufficient for the purpose, adequate' and must be selected from the pool of competent employees.*

10. Consistent with paragraph [31] of Rangiah J's Decision in *Hu (No 2)*, the average competent employee is selected from the pool of *hypothetical* competent employees.
11. Point 6(iii) of paragraph [57] of the Background Paper states that the relevant factors used in determining what a hypothetical employee will be able to earn include the general level of experience of the available workforce considered as a whole.
12. As stated in paragraph [34] of Rangiah J's decision in *Hu (No 2)*, the assessment of the average competent employee must be made by reference to the workforce that is available *or potentially available* to the employer.

**Question 7 - Does any party contest the summary at [60] and [61] of the Background Paper?**

13. Ai Group does not contest the summary at paragraphs [60] and [61] of the Background Paper.

**Question 8 - Interested parties are invited to confirm that the summary of their submission is accurate, or, if not, to identify any correction or additions.**

14. Ai Group does not contest the summary at paragraphs [60] and [61] of the Background Paper. However, on 21 June 2021, Ai Group filed a [List of Authorities](#) referenced in our 1 June 2021 Submission. This list has been published on the FWC's website.

**Question 9 - What do the other employer organisations say about the AFPA's alternate proposal?**

15. The AFPA's proposal as summarised at paragraph [108] of the Background Paper is unopposed to the extent that it provides 'implementation machinery' to facilitate the proper application of the current piecework provisions in the Horticulture Award.

16. However, Ai Group does not consider that the Commission has before it sufficient materials which would justify accepting any elements of the proposal which impose additional obligations upon employers which are not currently present in the Horticulture Award. These include:

- A requirement to review and adjust the piecework rate at prescribed intervals;
- A requirement to pay novice employees at the level of the slowest competent employee;
- A requirement to keep a record of all hours worked by a pieceworker; or

- A requirement to pay a pieceworker at the applicable minimum hourly rate (instead of the piecework rate) for any work that does not yield any piecework output and is not an inherent part of the piecework.

17. If the Commission is minded to give further consideration to any aspect of AFPA's alternative proposal in the future, Ai Group respectfully requests that the parties be given a further opportunity to respond once any suggested amendment is further elaborated upon and condensed into a draft variation.

**Question 11 - Does any party contest the proposition at [160] of the Background Paper?**

18. Ai Group does not dispute that the minimum weekly rates of pay for a full-time adult employee in cl. 15.1(a) of the Horticulture Award fall below the measurement for the 'low-paid' thresholds outlined at paragraph [160] of the Background Paper.

19. However, the pieceworker rates at cl. 15.2(b), for some classifications, require the pieceworker agreement to enable the average competent employee to earn a rate which exceeds the 'low-paid' thresholds referred to above.

**Question 12 - Does any party contest the proposition at [171] of the Background Paper?**

20. Ai Group does not contest the proposition at paragraph [171] of the Background Paper.

**Question 13 - Are any of the observations at [184] of the Background Paper contested?**

21. Ai Group does not contest the observations at paragraph [184] of the Background Paper.

**Question 14 - Are the observations at [191] – [197] of the Background Paper contested?**

22. Ai Group does not contest the observations at paragraphs [191] – [197] of the Background Paper.

**Question 15 - Are there any corrections or additions to the summary of the party submissions in respect of the s.134 considerations at [161] to [217] of the Background Paper?**

23. At paragraph [182] of the Background Paper, it states that Ai Group rejects the UWU's submissions that complying with clause 15.2(b) is onerous. Ai Group comments on the complexity of determining the correct piece rate under cl. 15.2(b) of the Horticulture Award at paragraphs [58] – [61] of our 1 June 2021 submission.
24. Ai Group takes the view that the unions' proposed variations would not remove any of the complexities or difficulties involved in applying cl 15.2(b).