

## **IN THE FAIR WORK COMMISSION**

**Matter: APPLICATION TO VARY THE HORTICULTURE AWARD 2020**

**Applicant: THE AUSTRALIAN WORKERS' UNION**

**Matter No: AM2020/104**

### **AIDE MEMOIRE OF AUSTRALIAN WORKERS' UNION**

#### **Introduction**

1. This aide memoire has been prepared consistent with the directions made by the Commission on 16 July 2021 to set out references to the evidence upon which it is intended to rely in closing oral submissions and to provides a short response to the questions contained in the Commission's Background Paper published on 26 July 2021.

#### **Outline of Subjects of Oral Submissions**

2. The documents intended to be referred to in the course of oral submissions (although not necessarily read from) are as follows by subject:

(a) ***History of piecerate provisions:***

- Fair Work Commission, Background Paper on Piece Rates
- *Rural Workers' Union and South Australian United Labourers' Union v Mildura Branch of the Australian Dried Fruits Association* (1912) 6 CAR 61
- *Australian Workers' Union v Young and District Producers Co-Operative Society* (1939) 41 CAR 285
- *Re Horticulture Award 2010* [2009] AIRCFB 966; (2009) 193 IR 163

(b) ***Composition of the Horticulture Workforce:***

- Underhill Report (AWU16) – CB p475.
- ABARES, Labour Use in Australian Agriculture – CB p511

- NALAC, National Agricultural Workforce Strategy – CB p1306
  - Fair Work Ombudsman, Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail – CB p994
  - Campbel I (2019), ‘Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers’ – FWC Research reference list – Part 1.1 (4)
- (c) ***Earnings Information and Survey Reports:***
- Underhill Report (AWU16) – CB p475
  - Underhill Report in Reply (AWU17) – CB p321
  - Houston Report (AFPA6) – CB p3118
  - Houston Supplementary Report (AFPA7)
- (d) ***Other Investigations and Reports:***
- Berg and Farbenblum, Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey – CB p878
  - Fair Work Ombudsman, Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail – CB p994
  - NUW, Farm Workers Speak Out Report – CB p1636
  - UnionsNSW, No Worker Left Behind Survey Results (AWU14) – CB p242
- (e) ***Average Competent Worker Standard:***
- *Fair Work Ombudsman v Hu (No 2)* (2018) 279 IR 162
  - McClintock Statement (NFF4) – CB p2956
  - Siah Statement (NFF8) – CB p2978
  - Eckersley Statement (NFF14) – CB p3054
  - King oral evidence –PN3310-3322
- (f) ***Compliance and Enforcement:***
- *Fair Work Ombudsman v Hu* (2019) 289 IR 240

- Fair Work Ombudsman, Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail – CB p994

(g) ***NFF Grower Evidence:***

- Fair Work Commission, Information note on McClintock and Kelly
- McClintock hours records (AWU21)
- Rogers Statement, Annexure F (NFF3) – CB p2893
- Costa Berries Analysis (AWU28)

(h) ***AFPA Alternative Proposal:***

- Appendix D to AFPA Closing Submissions

**Commission Background Paper**

3. The AWU responds to the questions contained in the Commission’s Background Paper published on 26 July 2021 as follows.

***Q1: 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?***

4. The AWU agrees that the Horticulture Award, Act and Regulations do not expressly require a record to be maintained of the hours of work of pieceworkers. A record of hours of work is required where an employee is a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked (Reg. 3.33(2)), with respect to overtime (Reg. 3.34) and in an employee’s payslip if the employee is paid at an hourly rate of pay (Reg. 3.46(3)).
5. It is arguably necessary for some record of the hours of work of pieceworkers to be kept in order for an employer to comply with the obligation in clause 15.2(b) of the Award to ensure that an average competent employee is able to earn 15% more per hour than the minimum hourly rate. However, it is accepted that this falls short of an express requirement to maintain records of the hours of work of individual employees working in accordance with a piecework agreement.

***Q2: Are any of the observations at [9] to [14] contested?***

6. The observations in paragraphs [9] to [14] of the Background Paper are not contested and are consistent with the summary provided in paragraph 7 of the AWU's initial Outline of Submissions. The AWU would add to the summary the observation that the s 134 considerations are not standards against which a modern awards is to be evaluated but matters to be taken into account as part of the evaluative assessment of the qualities of the safety net: *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* (2020) 301 IR 296 at [17].

***Q3: Does any party contest the proposition at [16]?***

7. The AWU does not contest that the observations in *4 Yearly Review of Modern Awards - Penalty Rates* are apposite to this matter.

***Q4: What does the AWU say about the AFPA submission regarding National Retail Association v FWC?***

8. The AFPA refer to *National Retail Association v FWC* (2014) 225 FCR 154 at [46], [61] and [62] and summarise the decision as finding that an award variation that applied existing adult rates to 20-year-old junior employees who worked for an employer for more than 6 months “related to” the award minimum wages. The inference sought to be drawn is that the present application is equivalent in that the proposed variation would change the minimum wages applicable to pieceworkers by requiring pieceworkers to be paid minimum hourly rates.
9. The decision in *National Retail Association v FWC* is of limited assistance in the present matter for three reasons. Firstly, it is not apparent that there was any contest between the parties as to whether the minimum wages objective applied. The SDA submitted that it did: *Re Modern Awards Review 2012 - Junior Rates* [2014] FWCFB 1846 at [8]. Secondly, the issue arose in the context of Item 6(4) of the Transitional Provisions legislation which provided that the minimum wages objective applied if the variation “relates to” modern award minimum wages. The language of ss 157(2) and 284(2)(b) of the Act is different. Thirdly, the application in *National Retail Association v FWC* sought to change the rates applicable to the work of 20 year old employees. The present application does not seek to alter the rates of minimum wages in clause 15.1 or 15.3 or the level by reference to which any piecework rate is required to be set in clause 15.2(b). It is not equivalent.
10. Section 157(2) of the Act provides that the Commission may make a determination varying modern award minimum wages if satisfied that the variation is justified by work value reasons and making

the determination outside of the system of annual wage reviews is necessary to achieve the modern awards objective. In this context, it is not sufficient to attract the operation of s 157(2) that an application “relates to” modern award minimum wages. It is submitted that the Commission is not being asked in this application to “make a determination varying modern award minimum wages” for the purposes of s 157(2) in the sense of varying the rates of minimum wages.

11. Section 284(2)(b) provides that the minimum wages objective applies to the exercise of the Commission’s “functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.” Although s 284(2)(b) uses the phrase “so far as they relate to” setting, varying or revoking modern award minimum wages, the better reading is that the subsection is referring to the exercise of powers under Part 2-3 to set, vary or revoke modern award minimum wages. The phrase “relates to” in s 284(2)(b) identifies those powers under Part 2-3 to which the minimum wages objective applies specifically rather than by relationship.
12. In any event, for the reasons given in the AWU’s initial Outline of Submissions, the minimum wages objective supports the proposed variation being made. To the extent necessary, the variation is also justified by work value reasons for the purposes of s 157(2)(a) of the Act. As pointed out in the AWU’s reply submissions, the hourly rates in clause 15.1 are already set by the Award for the same work in the same classifications as that undertaken by pieceworkers. The value of the work is the same whether it is performed by an employee on timework, a casual employee, an employee engaged on daily hire or an employee working on an incentive system: *Federal Meat Industry [Processing] Award 1996 [2000]* AIRC 276 at [7].

***Q5: 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)?***

13. In relation to the matters set out in s 284(1)(a) to (e), the AWU responds as follows. The matters in subparagraphs (b), (c) and (d) are identical to the matters identified in s 134(1)(a), (c) and (e) and the matter in subparagraph (e) does not appear to be relevant. The matter identified in subparagraph (a) is “the performance and competitiveness of the national economy, including business competitiveness and viability, inflation and economic growth.” Although not identical in its wording, that matter appears to overlap very significantly with the matter raised in s 134(1)(h). In any event, there is no evidence that has been advanced to suggest, much less demonstrate, that the variation sought would have any appreciable impact on the performance and competitiveness of the national economy in aggregate.

***Q6: 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] above)?***

14. The AWU does not contest the summary of key principles to be drawn from Hu (No 2) and the Hu Appeal.

***Q7: Does any party contest the summary at [60] and [61]?***

15. The AWU does not contest the summary at paragraphs [60] and [61] of the Background Paper.

***Q8: Interested parties are invited to confirm that the summary of their submission is accurate, or, if not, to identify any correction or additions.***

16. The AWU accepts that the summary of its submissions is appropriate.

***Q9: What do the other employer organisations say about the AFPA's alternate proposal?***

17. Not applicable.

***Q10: Are any of the observations at [155]-[157] contested?***

18. The AWU does not contest the observations at paragraphs [155]-[157] of the Background Paper.

***Q12: Does any party contest the proposition at [171]?***

19. The AWU does not contest the proposition at paragraphs [171] of the Background Paper.

***Q13: Are any of the observations at [184] contested?***

20. The AWU does not contest the observations at paragraphs [184] of the Background Paper. The AWU notes that, although the history of determination of the 15% figure in clause 15.2(b) of the Award is not entirely clear, it is partly explained by the fact that clause 15.2(f) excluded pieceworkers from hours of work, meal allowance and overtime provisions that would otherwise

apply. That is relevant to the contention advanced by the AFPA that the 15% target in clause 15.2(b) should logically be removed if a minimum floor of rates is implemented.

***Q14: Are the observations at [191] – [197] contested?***

21. With respect to paragraphs [191]-[197] of the Background Paper, the AWU agrees that the term “productivity” is used in s 134(1)(f) in the manner described in *Schweppes Australia Pty Ltd v United Voice (Vic Branch)* (2012) 226 IR 236 with respect to s 275(e). That is, productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Indeed, s 134(1)(f) distinguishes “productivity” and “employment costs”. This is also consistent with the definition from the Productivity Commission and the Commonwealth Treasury referred to in paragraphs [194] and [195].
22. The first sentence in paragraph [191] suggests that “the exercise of modern award powers to increase modern award minimum wages is likely to have a negative impact on business, by increasing employment costs for those businesses that engage pieceworkers.” It is not clear whether the sentence is intended to be a general statement with respect to any increase in minimum wages. For the avoidance of doubt, however, the AWU does not accept that its proposed variation will increase employment costs for businesses that engage pieceworkers. At the very least, any substantial increase in employment costs should only occur if the business is using piece rates which are not properly set in accordance with clause 15.2(b) of the Award.

***Q15: Are there any corrections or additions to the summary of the party submissions in respect of the s.134 considerations at [161] to [217] above?***

23. In relation to s 134(1)(b), the description of the submission of the AWU at paragraph [168] of the Background Paper should reflect that the AWU submits that there is little incentive for employers to engage in collective bargaining in circumstances in which the piecework arrangements permit employees to drive down labour costs without engaging in bargaining and that, for this reason, the proposed variation has the potential to encourage collective bargaining: AWU Outline of Submissions at [27].
24. In relation to s 134(1)(da), the AWU does not submit this is merely a neutral as suggested at paragraph [185] of the Background Paper. The AWU submits that the insertion of a guaranteed minimum payment for pieceworkers will assist in ensuring that the pieceworker rate provisions are

only utilised for genuine piecework agreements which provide the capacity for an employee to earn an income that will compensate for other benefits foregone, including with respect to overtime, unsocial, irregular or unpredictable hours and weekend or public holiday work: AWU Outline of Submissions at [32].

### **Information note on McClintock and Kelly**

25. The Commission's information note on piece rate data provided by Brent McClintock and Anthony Kelly published 26 July 2021 provides a summary of data provided in the documents produced by Mr McClintock and Mr Kelly. The AWU has not had the opportunity to check the calculations conducted by the Commission. However, it is appropriate to briefly comment on the documents produced by Mr McClintock.
26. The analysis conducted by the Commission examined the average and median hourly piece rates for all employees covered by the records. Looking at the average and median hourly rates does not necessarily describe the variety of the outcomes for individual employees. Mr McClintock indicated that the records provided (Exhibit AWU21) contained separate sheets for different labour hire providers: PN2076-2077. For some labour hire providers, all or virtually all of the workers earned well below both the target rate for pieceworkers and the minimum hourly rate: see, for example, Exhibit AWU21 p2, 4, 5, 7, 13, 14 and following.

### **Information note on NFF Survey Collection data**

27. The Commission's information note on survey location data and data from ABARES compares the location of respondents from ABARES as to the number of farm workers by State and territory. The analysis demonstrates that the respondents to the NFF survey do not represent a sample of farm workers in Australia.
28. The AWU notes that there are additional reasons why the NFF survey would not be regarded as representative, including:
  - (a) The survey was simply made available to members of the NFF and affiliated organisations on the NFF website and through social media and it was up to individual growers as to whether to respond to the survey: PN1876-1899.
  - (b) In circumstances in which employers were being asked to provide information in relation to pay rates of employees, it is unlikely employers who are paying low or substandard piece

rates will respond to the survey or do so truthfully. It is notable that a large number of respondents did not answer Q12 and Q13 in relation to earnings.

- (c) Furthermore, the information provided together with the survey inaccurately described the application: Exhibit AWU19.

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Dated: 29 July 2021