

## Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

### The Applicant



These are the details of the person who is making the application.

|                    |  |            |      |
|--------------------|--|------------|------|
| Title              | <input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Employee organisation |            |      |
| Name               | The Australian Workers' Union  |            |      |
| Postal address     | L1, 16 – 20 Good Street  |            |      |
| Suburb             | Granville  |            |      |
| State or territory | NSW  | Postcode   | 2142 |
| Phone number       | 02 8863 8900   | Fax number | N/A  |
| Email address      | <a href="mailto:nat.office@nat.awu.net.au">nat.office@nat.awu.net.au</a> ; <a href="mailto:stephen.crawford@nat.awu.net.au">stephen.crawford@nat.awu.net.au</a>      |            |      |

### If the Applicant is a company or organisation please also provide the following details

|                          |  |
|--------------------------|--|
| Legal name of business   | The Australian Workers' Union                    |
| Trading name of business | N/A  |
| ABN/ACN                  | 28 853 022 982                                   |
| Contact person           | Stephen Crawford (Senior National Legal Officer) |

### Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

**Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?**

Yes – Please specify the assistance required

No

**Does the Applicant have a representative?**



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

**Applicant's representative**



These are the details of the person or organisation who is representing the Applicant (if any).

|                               |  |            |  |
|-------------------------------|--|------------|--|
| Name of person                |  |            |  |
| Firm, organisation or company |  |            |  |
| Postal address                |  |            |  |
| Suburb                        |  |            |  |
| State or territory            |  | Postcode   |  |
| Phone number                  |  | Fax number |  |
| Email address                 |  |            |  |

**Is the Applicant's representative a lawyer or paid agent?**

Yes

No

## 1. Coverage

### 1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

*Horticulture Award 2020 MA000028*

### 1.2 What industry are the employers in?

Horticulture industry

## 2. Application

### 2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

## 2.2 What are the details of your application?

The AWU seeks the following variations to the *Horticulture Award 2020*:

1. Delete the existing clause 15.2(i) and inserting the following:

**15.2(i)** A full-time, part-time or casual employee working under a piecework agreement must be paid for each hour of work performed at least the minimum rate payable for the employee's classification and type of employment under this award. The minimum rate payable includes the casual loading prescribed in clause 11.3(a)(ii) for a casual employee.

2. Insert the following as a new clause 15.2(k):

**15.2(k)** The employer must keep a record of all hours worked by a pieceworker as a time and wages record.

Attach additional pages, if necessary.

## 2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

The grounds are identified in Attachment A.

Attach additional pages, if necessary.

## Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

|                   |   |
|-------------------|---|
| Signature         |  |
| Name              | Daniel Walton   |
| Date              | 15 December 2020  |
| Capacity/Position | National Secretary  |



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

**PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS**

**“ATTACHMENT A”**

**AWU APPLICATION TO VARY THE *HORTICULTURE AWARD 2020* – MINIMUM RATES OF PAY FOR PIECEWORKERS - GROUNDS FOR APPLICATION**

**A. Current piecework conditions in the Horticulture Award**

1. Clause 15 of the *Horticulture Award 2020* (“**Horticulture Award**”) permits an employee and employer to enter into an agreement for the employee to be paid a piecework rate.
2. Clause 15.2(b) of the Horticulture Award provides that the piecework rate “must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee.”
3. Clause 15.2(b) and 15.2(d) of the Horticulture Award state the agreed piecework rate is paid for all work performed in accordance with the piecework agreement and is paid instead of the minimum wages specified in clause 14 of the Horticulture Award. The ordinary hours, overtime and meal allowance conditions in the Horticulture Award do not apply to pieceworkers.<sup>1</sup>
4. Clause 15.2(i) of the Horticulture Award expressly confirms there is no guaranteed minimum hourly or weekly rate of pay for a pieceworker:

*Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly or hourly wage in this award for the type of employment and the classification level of the employee, as the employee’s earnings are contingent on their productivity.*

5. The terms appearing in clause 15.2(i) of the Horticulture Award were inserted as a result of a Decision to vary the Horticulture Award made by the Award Modernisation Full Bench of the Australian Industrial Relations Commission (“**AIRC**”) on 23 December 2009.<sup>2</sup>
6. Prior to that variation, the AIRC had determined on 3 April 2009 that the Horticulture Award, which was due to come into force on 1 January 2010, would include the following provision:<sup>3</sup>

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<sup>1</sup> *Horticulture Award 2020*, clause 15.2(e).

<sup>2</sup> [2009] AIRCFB 966.

<sup>3</sup> [2009] AIRCFB 345; (2009) 181 IR 19. The version of the Horticulture Award published in conjunction with the Decision is available here:

<http://www.airc.gov.au/awardmod/databases/agriculture/Modern/horticulture.pdf>

*In no case will a full-time, part-time or casual employee working under a piecework agreement be paid less than the prescribed ordinary rate payable to the employee for the hours of work performed.*

7. A primary reason for the AIRC Award Modernisation Full Bench's Decision to remove the safety net payment provision for pieceworkers was a variation to the award modernisation request made by the Minister for Employment and Workplace Relations on 26 August 2009. The variation included the insertion of the following clause 50 into the award modernisation request:

*The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.<sup>4</sup>*

## **B. Earnings of pieceworkers under the Horticulture Award**

8. A significant amount of research has been undertaken by academics, the Fair Work Ombudsman and Parliamentary Committees into working conditions in the horticulture industry, including for employees paid on a piecework basis, since the Horticulture Award came into effect.
9. Some relevant findings from research concerning earnings and working conditions for pieceworkers under the Horticulture Award are identified below.

Underhill, E and Rimmer, M. (2015) 'Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational health and safety', *Policy and practice in health and safety*, vol. 13, no. 2, 25-46

10. This paper is based on empirical fieldwork data collected in 2013 and 2014. The findings include:

*A second dimension of work organisation is payment systems. Around 40 per cent of survey respondents, irrespective of whether they were hired by a farmer or contractor, were paid piece rates. Their average hourly earnings were significantly lower than those paid hourly rates (A\$11.69 compared to A\$16.20 for hourly rates) and, as shown in Table 5, they responded to incentives to speed up production by taking more risks.*

*Those paid piece rates were, for example:*

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<sup>4</sup> [\[2009\] AIRCFB 966](#) at [2]-[3].

- *four times more likely to often, or always, not stabilise a ladder before climbing on it (noting that orchards typically have uneven terrain)*
- *two times more likely to work in extreme heat*
- *three times more likely to carry excessive loads such as climbing a ladder with a heavy bag of fruit*
- *two times more likely to be discouraged from taking lunch breaks.*

Underhill, E. and Rimmer, M. (2016) 'Layered vulnerability: Temporary migrants in Australian horticulture', *Journal of Industrial Relations* 58 (5), 608-626.

11. A survey was conducted in August 2014 into earnings information of 278 respondents, including 120 employees who were paid piece rates. The minimum hourly rate of pay under the Horticulture Award at this time was \$16.87 for a permanent employee and \$21.09 for a casual employee.

12. Taking into account the 15% piecework loading prescribed in the Horticulture Award, an average competent permanent employee should have been earning \$19.40 per hour and an average competent casual employee should have been earning \$24.25 per hour.

13. The survey identified the following hourly earnings for piecework employees<sup>5</sup>:

- Mean = \$11.69;
- Median = \$12.00;
- Minimum = \$2.00; and
- Maximum = \$30.00.

14. The research also identified that piecework employees were substantially more likely than employees paid by the hour to:

- Often/always carry excessive loads; and
- Often/always work in extreme heat (e.g. more than 35°C).<sup>6</sup>

15. The researchers concluded:

*... the award requires attention where it prescribes piece rates be*

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<sup>5</sup> Table 2 on page 619

<sup>6</sup> Table 4 on page 622.



*fixed by agreement between the farmer and worker so the ‘average competent worker’ can earn a certain amount. This process is unrealistic and allows productivity expectations to be fixed too high. In the United Kingdom, the national minimum wage fixes a floor to piece rate earnings so that exploitative individual bargaining cannot occur (Rogaly, 2008). Such a floor would eliminate many abuses in Australian horticulture. Policy reform is needed. The labour market trends described in this article have made harvest work unattractive to Australian workers, and increasingly to WHMs, and filling the gaps with undocumented workers should not be considered an acceptable solution to labour shortages.<sup>7</sup>*

Senate (2016) A National Disgrace: The Exploitation of Temporary Work Visa Holders, Education and Employment References Committee, Canberra, Commonwealth of Australia

16. The Senate Committee identified the absence of a safety net payment regime for pieceworkers in the Horticulture Award as a “potential loophole” in its final report:

*7.137 Nevertheless, the committee received evidence that points to a potential loophole in the Horticulture Award as opposed to the Poultry Award. Piece rates are allowed under the Poultry Award so long as there remains a requirement to ensure workers receive wages that equate to award minimums. By contrast, evidence to the committee indicated that no such safety net exists within the Horticulture Award. While the piece rate may provide an incentive that allows people to earn much more than the award, the committee is concerned that the piece rate may also mean that people working in the horticulture sector may earn much less than the award.*

Berg, L. and Farbenblum, B. (2017) Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey, available online:  
<https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf>

17. The key findings in this report include:

*Large scale wage theft was prevalent across a range of industries, but the worst paid jobs were in fruit-and vegetable-picking and farm work.*

- *Almost one in seven participants working in fruit- and vegetable-picking and farm work (15%) earned \$5 per hour or less. Almost a third (31%) earned \$10 per hour or less.<sup>8</sup>*

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<sup>7</sup> Page 623.

<sup>8</sup> Page 6.

Underhill, E., Groutsis, D., van den Broek, D. and Rimmer, M. (2018) 'Migration Intermediaries and Codes of Conduct: Temporary Migrant Workers in Australian Horticulture', *Journal of Business Ethics* 153(3), 675-689.

18. An online survey, presented in both English and Mandarin, was administered to harvest workers through a website commonly used to source employment in 2014. The minimum Horticulture Award rates at the time of the survey were \$16.87 per hour for a permanent employee and \$21.09 per hour for a casual employee.

19. The survey identified the following hourly earnings for piecework employees:

**Employed by farmer**

- Mean = \$12.35;
- Median = \$12.00;
- Minimum = \$3.30; and
- Maximum = \$30.00.

**Employed by contractor**

- Mean = \$9.03;
- Median = \$8.00;
- Minimum = \$2.00; and
- Maximum = \$17.00.

FWO (2018) *Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail*, Canberra, Commonwealth of Australia

20. The Fair Work Ombudsman's research identified the widespread misuse of piecework arrangements and its report states:

*The FWO found that in a number of instances, employers were not paying the piecework rates prescribed by the Horticulture Award 2010 (Horticulture Award) or had failed to document the arrangements as required in a written piecework agreement.*

*Currently, employers are not required to record hours worked by pieceworkers under the Horticulture Award and the Wine Industry Award 2010 (Wine Industry Award). Fair Work Inspectors also found workers rarely recorded their hours. This presented a further barrier to making accurate assessments of outstanding employee entitlements*

*where piecework arrangements were found to be invalid and where Fair Work Inspectors believed that underpayments had occurred...<sup>9</sup>*

*The FWO found that more than a third of employers were paying piece rates or a combination of piece and hourly rates, which is acceptable under the Awards. However, over 100 of those employers were not engaging pieceworkers correctly by having no written piecework agreement or having an invalid piecework agreement.*

*Fair Work Inspectors observed some growers and labour hire contractors applying group rates for pieceworker employees. This practice involves a group of employees working together to fill a unit of measurement (for example filling a bin of mangoes) for which they are paid an equal share. This method of arranging work does not take into consideration the actual contribution of each employee and can lead to situations where more productive employees are financially disadvantaged.<sup>10</sup>*

Howe, J., Clibborn, S., Reilly, A., van den Broek, D. and Wright, C. F. (2019)  
*Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, University of Adelaide, Adelaide

21. This paper is based on a survey, interviews, focus groups and a workshop of industry stakeholders during the period of 2016 – 2018.
22. One of the key findings in the report is:<sup>11</sup>

***Finding #10: Although piece rates can be an important tool in encouraging and rewarding greater productivity, there is evidence of an inappropriate use of piece rates in the employment of WHMs.***

*A key challenge with respect to piece rates is that the Horticulture Award stipulates that piece rates should allow a worker to earn 15% more than an ‘average competent worker’ being paid the relevant minimum hourly rate. The meaning of this term ‘average competent worker’ is subjective and can allow employers to set low rates.*

*In the focus groups WHMs reported receiving as little as \$1 per hour for piece rate work despite working at a consistent and steady rate. A reason for this low level of payment is that farmers and workers had*

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<sup>9</sup> Page 14 and 15.

<sup>10</sup> Page 29.

<sup>11</sup> Page 97.

*very different perspectives on what was an appropriate and attainable level of productivity in setting a piece rate.*

...

*We also found evidence that piece rates were used by some growers to enable different cost structures for different categories of workers, a practice known as ‘labour market segmentation’. Some employers request workers of particular ethnicity through labour hire contractors, a phenomenon depicted as employers having ‘ethno-specific cost demands’. One stakeholder reported that different categories of visa holders were paid different wage rates commensurate with the level of regulation of their visa. A community representative from Griffith stated:*

*“It’s very easy, obviously to come up with a piece rate that’s quite low. Or varying piece rates. That’s the other one that I came across in Queensland recently ... so it was different visa categories and different ethnicities got different bin rates for the same work. So locals got \$90 a bin, Seasonal Workers got \$70 a bin and it kind of went down from there ... Backpackers, then, mostly Taiwanese and Hong Kong and undocumented got the least.”*

Campbell, I. (2019) ‘Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers’, *Journal of Australian Political Economy*, No. 84, 46-88

23. This paper identifies that conditions for harvest workers in Australia appear to be deteriorating in a systemic manner:

### ***Deterioration in wages***

*Wages for harvest workers in Australia appear to be deteriorating, both relative to other sectors and in absolute terms. Scholars refer for example to an upward trend in non-compliance rates in FWO investigations (FWO 2010, 2018) and an upward trend in media exposés of underpayments (Clibborn and Wright 2018). Deterioration in wages fits with what we know of cost-minimising employers and low-wage labour markets, where labour regulation generally sets a floor and wage rates for lower-skilled workers tend to stabilize at or around the legal minimum. If, however, economic restructuring intensifies and enforcement of minimum wage (and related) laws weakens, an expansive field for labour-cost reduction opens up, and employers may*

*begin to experiment with the many different types and levels of underpayment. Once a sufficient number of employers within a specific region or product market starts down the path of illegal underpayment, a powerful and ongoing dynamic of ‘unfair’ wage competition is likely to result, accelerating the spread of underpayments, bringing even reluctant employers into line and ‘creating new industry conventions that normalize sub-standard jobs’ (Bernhardt et al. 2013: 829). The data on the extent of varied forms of underpayment suggest that this tipping point has been reached in many harvest labour markets (Underhill and Rimmer 2016; Underhill et al. 2018).*

### Further expert evidence

24. In addition to the reports referred to above, the AWU intends to lead additional expert evidence concerning average earnings for pieceworkers under the Horticulture Award.

### **C. The proposed variations**

25. The research cited above demonstrates the operation of the current piecework provisions in the horticulture industry frequently results in employees earning well below the minimum rates of pay in the Horticulture Award.

26. The AWU’s proposed variations seek to address this issue in a simple manner by:

- (i) inserting a protective provision which requires that a pieceworker must be paid at least the minimum rate payable for their classification and type of employment under the Horticulture Award for each hour worked; and
- (ii) requiring that employers keep a record of hours worked by pieceworkers so that compliance with the minimum payment rates can be properly assessed and enforced.

27. A number of other modern awards with piecework payment provisions contain a guaranteed minimum wage, including:

- (i) *Building and Construction General On-site Award 2010*: clause 19.6(e);
- (ii) *Silviculture Award 2020*: clause 15.2(a) and (b);
- (iii) *Sugar Industry Award 2020*: clause 17.3(a) and (b); and

(iv) *Wool Storage, Sampling and Testing Award 2010*: clause 16(d).

#### **D. The absence of a proper safety net**

28. While the modern awards objective in s 134 of the *Fair Work Act 2009* (“**FW Act**”) requires the Commission to take into account a number of factors, the ultimate statutory task is to ensure the modern awards, together with the National Employment Standards, “provide a fair and relevant minimum safety net of terms and conditions” (our emphasis).
29. The minimum Level 1 hourly rate payable to a non-piecework employee under the Horticulture Award currently reflects the national minimum wage of \$19.84 for a permanent employee or \$24.80 for a casual employee. These minimum rates were set by the Commission after a series of annual wage reviews, most recently the Annual Wage Review 2019-20.
30. A modest and staged increase of 1.75% was awarded in the Annual Wage Review 2019-20. Part of the justification for the awarding of this increase by the majority of the Expert Panel was the following assessment:

*[383] The proportion of low-paid households experiencing financial stress has increased over the latest year for which data are available. Some low-paid households are plainly experiencing significant disadvantage. An increase in minimum wages would assist these employees to better meet their needs.*

*[384] Our overall assessment is that while the relative living standards of NMW and award-reliant employees have improved over recent years, some low-paid award-reliant employee households (namely single-earner couples with and without children and where the non-earning partner is not seeking employment, and single-earner couple with 2 children (with NSA)) have household disposable incomes less than the 60 per cent of median income relative poverty line. Many household types are also likely to have disposable incomes that do not reach the threshold of the MIHL budget standard.*

*[385] The requirement to take into account relative living standards and the needs of the low paid is a factor which weighs in support of an increase in the NMW and modern award minimum wages.*

31. Therefore, the minimum rates in the Horticulture Award have been deliberately set at a level deemed appropriate after taking into account living standards and the needs of the low paid. However, the evidence strongly suggests that the

overwhelming majority of casual pieceworkers are actually earning well below the minimum award hourly rate for a permanent employee of \$19.84.

32. Given Australian fruit and vegetables are successfully being picked, packaged and sold to consumers, it cannot be the case that the overwhelming majority of workers in the industry do not meet the definition of an “average competent employee”. The explanation for the low earnings must be that piecework rates are not being set at a high enough level by farmers and/or contractors and the Horticulture Award is not effective in ensuring that a minimum safety net is maintained.
33. The requirement in clause 15.2(b) that the rate be “*fixed by agreement*” between the individual employee and the employer is not operating as a constraint on the setting of unfairly low wages in practice. The empirical data reflects the inequality of bargaining power in negotiations between an employer and an individual, unskilled employee.
34. In currently permitting piecework employees to regularly earn well below the minimum rates specified for non-piecework employees, the Horticulture Award fails to provide a fair and relevant safety net of terms and conditions.

#### **E. Modern awards objective**

35. Section 157(1)(a) of the FW Act permits the Commission to make a determination varying a modern award if satisfied that making the determination is necessary to achieve the modern awards objective. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.<sup>12</sup> The Commission is to take into account the following considerations.

#### Relative living standards and the needs of the low paid: s 134(1)(a)

36. The minimum wage rates in the Horticulture Award have been set at a level that takes into account relative living standards and the needs of the low paid. Current piecework conditions in the Horticulture Award fail to properly take into account relative living standards and the needs of the low paid because they have resulted in employees systematically being paid below the minimum award rates.
37. This factor strongly weighs in favour of the variations sought.

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<sup>12</sup> Section 134(1) of the FW Act.

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

38. The reports referred to above demonstrate that employees in the horticulture industry are a low-paid and vulnerable cohort relative to the workforce as a whole. Enterprise bargaining is not a significant feature of the industry.
39. Piecework rates are persistently set at levels which do not enable a competent employee to earn the minimum hourly rate. Employees earning substantially less per hour than the minimum wage are likely to need to work considerably greater number of hours, many of them at unsociable times, to earn enough to pay their living expenses.
40. Employees in these circumstances are hardly in a position to seek to collectively bargain with their employer. They are unlikely to have the time or resources to talk to their colleagues and develop proposals or requests to put to management for consideration.
41. Further, the data demonstrates that the current arrangements are highly beneficial to employers insofar as limiting labour costs are concerned (relative to the national minimum wage and award time work rates). The present piecework provisions give employers in the horticulture industry a significant incentive not to bargain with their employees to achieve mutually beneficial productivity gains, as they are currently able to access labour productivity incentives (piecework) without corresponding benefits to employees.

The promotion of social inclusion through increased workforce participation – s 134(1)(c)

42. The variations have the potential to increase the attractiveness of work in the horticulture industry for local workers. To the extent that this results in local workers moving from welfare payments to paid employment, the variations have the potential to increase workforce participation.
43. The horticulture industry is currently known for labour exploitation practices, as the reports referred to above demonstrate. It is reasonable to expect that removing provisions which, the evidence shows, are misused by employers to set piecework levels well below a rate at which the average worker could attain a fair wage, is likely to encourage workers to seek out employment in the industry.

Promoting flexible modern work practices and the efficient and productive performance of work – s 134(1)(d)



44. The requirement to pay pieceworkers at least the minimum award rates may encourage farmers to adopt more flexible and modern work practices to mitigate any additional costs. The issue of productivity is dealt with below.

Providing additional remuneration for various types of work arrangements – s 134(1)(da)

45. This is a neutral factor.

Equal remuneration – s 134(1)(e)

46. This is a neutral factor.

Impact on productivity, employment costs and the regulatory burden – s 134(1)(f)

47. While the data on pieceworker earnings suggests the variations may increase employment costs for some employers that pay piecework rates, this outcome only arises because employers are not currently paying average competent employees a rate which is 15% above the minimum award rates as the Horticulture Award already requires. The current outcome is unjust because it makes employers who are paying the correct rates less competitive.
48. The variations would not result in a reduction to productivity in the horticulture industry because an incentive will still exist to earn above the minimum award rates through the use of piecework payments. The variations will simply bring the horticulture industry into line with other industries in which piecework remuneration operates in a non-exploitative manner to provide performance incentives.
49. There is no reason to think that the proposed variations would have any negative effect on productivity *within lawful business operations*. Any negative effect on measured productivity which the variations could cause would be attributable to the need for employers to move from agreed piecework rates set at a level which is unjust and inconsistent with clause 15.2 of the Horticulture Award to a rate at which vulnerable workers receive at least the minimum wage set by the Expert Panel.
50. The variations may involve some additional regulatory burden for employers who engage pieceworkers through the requirement to keep a record of hours worked. However, that burden is slight and records of that type should already have been kept by employers so they could ensure average competent employees are earning at least 15% above the minimum award rate, as is already required by the Horticulture Award.

Ensuring a simple, easy to understand and stable award system that avoids overlap – s 134(1)(g)

51. This factor weighs in favour of the variations sought. The present piecework provisions require individual employees – often migrants with limited English ability – to fix a rate of pay by agreement with their employer. The award contains no information upon which an employee new to the industry could ascertain what a fair and reasonable rate might be. The current provisions are not simple or stable as they promote wide variability in pay rates across the industry – and permit, for instance, the offensive “ethno-specific cost demands” referred to in Howe et al (2019) at [21]-[22] above.

Impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – s 134(1)(h)

52. This factor is dealt with above.

**F. Minimum wages objective**

53. The variations sought will not alter the minimum wages prescribed in clause 15 of the Horticulture Award or clause 15.2(b) which requires a piecework rate to be set at a level that will enable an average competent employee to earn 15% more per hour than the minimum award rate. As such, the variations do not seek to vary modern award minimum wages or require application of the minimum wages objective, which only applies to the Commission’s award variation powers “so far as they relate to setting, varying or revoking modern award minimum wages”.<sup>13</sup>

54. The purpose and effect of the variations is not to modify the minimum wages set by the Horticulture Award; it is to insert a protective provision enforcing their payment. In any event, given the hourly rates in the Horticulture Award have been set by the Commission after taking into the minimum wages objective and the modern awards objective, it follows that it will be consistent with the minimum wages objective to guarantee that a pieceworker will earn at least the minimum wages prescribed in the Horticulture Award.

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<sup>13</sup> Section 284(2) of the FW Act.