

Piecework

July 2021

This document has been prepared by Fair Work Commission staff and does not purport to be a comprehensive discussion of the issues involved. It does not represent the views of the Fair Work Commission on any issue.

Table of Contents

Piecework.....	1
1 Concept of piecework.....	2
1.1 Task-based and time-based systems of remuneration.....	2
1.2 Incentive-based payment systems.....	2
1.3 Pieceworker	3
1.4 Purpose of piecework	3
1.5 Prevalence and nature of historical piecework provisions.....	4
2 Guiding principles on piecework.....	5
2.1 Fixing piecework rates	5
2.2 Piecework and the concept of 'employee of average capacity'	6
2.3 Safeguards - minimum wage guarantee.....	8
3 Piecework provisions in modern awards.....	9
4 Operation of piecework provisions under the <i>Horticulture Award</i>.....	10
4.1 Guidance by the Fair Work Ombudsman	10
4.2 <i>Fair Work Ombudsman v Hu</i>	11
4.2.1 Does entering into an agreement that sets inadequate piece rates represent a single or continuing contravention of clause 15 of the Award?	11
4.2.2 What payment is an employee who has entered an agreement that sets inadequate piece rates entitled to?	12
4.2.3 Piecework safeguards.....	13
4.3 <i>Fair Work Ombudsman v Seasonal Farm Services</i>	14
4.4 Application to approve the JelliFish! Enterprise Agreement 2012	14
4.5 Harvest Trail Inquiry Report – Fair Work Ombudsman.....	14
4.5.1 Inquiry findings.....	14
4.5.2 Piecework arrangements	15
4.5.3 Industry characteristics and risks of non-compliance.....	16

4.5.4 Barriers to regulation 16

5 Award modernisation proceedings – Horticulture Award 2010.....16

1 Concept of piecework

1.1 Task-based and time-based systems of remuneration

Bromberg J, in his dissenting opinion in *Fair Work Ombudsman v Hu*,¹ explained the nature of task-based and time-based systems of remuneration:

[81] These clauses² are part of a time-based system of remuneration under which an employee is remunerated by reference to the number of hours worked and the time when work is performed. Time-based remuneration is standard in awards and industrial agreements. However, some awards, including the Award, provide for employers and employees to elect to be remunerated by reference to the work tasks performed by the employee rather than the time spent working. Employees remunerated under that system are commonly referred to as pieceworkers...

1.2 Incentive-based payment systems

The Industry Commission reported that incentive payment systems motivate higher productivity by rewarding effort and are a feature of remuneration in many industries. Benefits include increased workplace productivity and organisational commitment.³ Forms of incentive payment systems include:

- A 'straight' piece rate system is based on payment that is calculated in strict proportion to output.⁴
- A 'differential piece rate system' is "a method of wage payment whereby after tests have set a standard time for a task the worker receives a high piece rate for doing the job in task time and a lower piece rate for taking longer than task time".⁵ Differential piece rate systems may also increase piece rates if nominated quality standards are met.⁶
- A 'task bonus' involves payment of a bonus to workers who complete a nominated task in "less than a standard time, or meet some quality standards."⁷

Other forms include group-based piece rate systems, tally systems and gain sharing and employee ownership.⁸

Piecework arrangements have been differentiated from payment by results arrangements. For example, in the award modernisation proceedings before the Australian Industrial Relations Commission (AIRC) the Textile, Clothing and Footwear Union of Australia (TCFUA) submitted:

8. ... PBR Arrangements are sometimes colloquially called a 'bonus system' or 'incentive system'. PBR Arrangements are structured on an individual or group basis where employee/s receive a higher rate of

¹ *Fair Work Ombudsman v Hu* [2019] FCAFC 133

² Note: His Honour, at [80] of his [judgment](#), referred to clauses setting the minimum weekly or hourly wage, ordinary hours of work, shift work, overtime and public holiday penalty rates, meal breaks and the casual loading.

³ Industry Commission, [Meat Processing](#) (Report No. 38, 20 April 1994) vol 1,185-186.

⁴ Ibid vol 1,185.

⁵ Merriam-Webster.com Dictionary (online at 25 February 2021) '[Differential piece-rate system](#)'.

⁶ Industry Commission, [Meat Processing](#) (Report No. 38, 20 April 1994) vol 1, 185.

⁷ Ibid.

⁸ Ibid.

remuneration based on producing in excess of a daily, weekly or monthly quota. The quota is usually set by agreement between the employer, the employees affected and often with the involvement of the relevant union. The additional pay is over and above the minimum award rate of pay the employee/s receives for their classification. (i.e. it is incorrect to characterize this arrangement as one where an employee's overall remuneration is calculated by 'piece' or article or garment). The employee still works an award 38 hours per week (ordinary time) such that the PBR system operates within the spread of the normal working week.

9. Piecework arrangements on the other hand, is where an employee is literally paid per piece, article or garment, which has often in the past resulted in chronic underpayment of wages and other entitlements, particularly in the informal sector. In the TCFUA's view the concept of 'piece work' is generally an outdated and discredited form of working arrangement; in the textile, clothing and footwear sector, for example, it has been characterized by a significant undercalculation of working time taken to produce, make or otherwise deal with a garment, article or piece; bundling in of all other leave entitlements into a piece rate; long working hours without appropriate overtime compensation and poor OH&S standards. It is worth noting that the current Clothing Trades Award 1999 and the new modern TCF Award 2010 does contain provisions allowing for piece-rate working arrangements.

1.3 Pieceworker

The *Fair Work Act 2009* and the *Fair Work Regulations 2009* do not provide a definition of 'piecework'. Sections 21(a) and (b) of the *Fair Work Act 2009* provide that a 'pieceworker' is a national system employee to whom a modern award or enterprise agreement applies and who is defined or described in the award or agreement respectively as a pieceworker. In relation to award/agreement free employees a 'pieceworker' is someone who is paid a rate set by reference to a quantifiable output or task and is not paid a rate set by reference to a period of time worked. Examples include a rate of pay calculated by reference to the number of articles produced, kilometres travelled, articles delivered, articles sold or tasks performed.⁹

1.4 Purpose of piecework

The AIRC, in discussing piecework arrangements in the meat industry, explained the purpose and benefits of payment by results systems generally:¹⁰

Payment by results schemes have as their primary purpose the incentive for employees to work harder and faster to produce or process a given volume of work. But speed is not always the only relevant factor. Quality of the end product can have a vital bearing on the acceptability of the result.

...

Employees engaged and paid as pieceworkers are rewarded in this industry in two ways. When they produce more than minimum tally they receive additional remuneration. If they produce more than maximum tally they are paid as though they were working overtime. When they finish their work they are, and as far as I can ascertain from the evidence always have been, allowed to leave the work place.

Completion of the required work in a satisfactory manner is also beneficial to the employer. The largest saving relates to the completion of the slaughter on the appointed day. In some circumstances where

⁹ *Fair Work Regulations 2009* r 1.12(2).

¹⁰ [\[1990\] AIRC 143](#).

this may not be achieved on account of some unforeseen circumstance the animals have to be fed and maintained until they are slaughtered.

Leaving aside the question of reduced standard hours of work there are advantages flowing from payment by results schemes. The benefits flowing to employees from piecework schemes can be higher wages, reduced working time or perhaps a combination of both. The whole purpose of such schemes from the employers viewpoint is to encourage the production of goods and services either in greater quantity than the norm or to achieve the performance of a task in a shorter time than normal.

1.5 Prevalence and nature of historical piecework provisions

In July 2006 the Australian Government's Award Review Taskforce (the Taskforce) published its Final Report on the Rationalisation of Wage and Classification Structures.¹¹

In conceptualising piecework, the Taskforce explained that, historically, a number of awards included clauses permitting the payment of employees in accordance with their output and such employees were considered 'piece workers'. Following the introduction of the Work Choices Act, the Taskforce understood piece rates as:¹²

57. ... A piece rate is defined in the WR Act as a rate of pay that is expressed as a rate for a quantifiable output or task. Where a pre-reform award includes provisions that provide for rates for an output or task and these rates are provided in addition to a basic rate or pay, these provisions are considered an incentive-based payment or bonus...

Regarding the prevalence and nature of piece rates in pre-reform awards, the Taskforce reported:¹³

58. Initial research by the Taskforce found piece rates or payment by results systems were common in pre-reform awards in a number of industries, including agriculture and horticulture, textile and metals manufacturing, newspaper vending and dry-cleaning.

...

178. In some cases pre-reform awards contain a loading for piece workers, so that the piece rate is calculated to ensure that employees of average capacity earn at least the relevant loading on top of the relevant minimum wage rate. The piece rate loading is typically between 10 and 20 per cent. A number of pre-reform awards contain provisions that guarantee that a piece worker would at least earn a minimum wage rate. Others do not include specific piece rates but note that an employer may make a contract with an employee/s for payment by results by piecework and commonly include a piece rate loading.

179. A small number of pre-reform awards give piece rates in addition to the standard weekly wage rate. These employees are guaranteed the specified minimum payment not less than the FMW¹⁴ as their basic periodic rate of pay and the additional payments are likely to be classified under the WR Act, as an award based incentive-based payment or bonus.

¹¹ Australian Government's Award Review Taskforce, [Final Report on the Rationalisation of Wage and Classification Structures](#) (Report, July 2006).

¹² Ibid 177.

¹³ Ibid.

¹⁴ Note: FMW is a reference to the 'Federal Minimum Wage' under the Work Choices framework.

180. Awards in a range of industries specify detailed piece rates for employees to be paid on a payment by results system. They are most commonly found in agriculture, forestry and fishing, arts and recreation, health care and social assistance and transport, postal and warehousing industry sectors.

181. Of the piece rates located in the agriculture, forestry and fishing industry the Taskforce found there was significant variation in the piece wage rates despite a consistency in the piece rate descriptions. In other major industries such as transport, postal and warehousing and health care there is little or no consistency in either the piece wage rates or the piece rate descriptions.

2 Guiding principles on piecework

During the award modernisation proceedings, the AIRC observed the following about piecework generally:¹⁵

[6] We note that while a number of pre-reform awards and Notional Agreements Preserving State Awards (NAPSAs) provide for piecework it is rare that the conditions of pieceworkers are not based in one respect or another on time. Typically piecework rates are based in some way on the quantity which could be produced by an average employee. This is in many cases subject to a minimum payment contained in a stipulation that the weekly remuneration of a pieceworker cannot fall below a particular amount fixed as a percentage above the ordinary pay for the relevant classification... We also note that many pre-reform awards and NAPSAs do not exclude pieceworkers from the requirements governing ordinary hours of work. In those cases the view might be taken that any piecework should be dealt with by overaward arrangements...

2.1 Fixing piecework rates

In 1988 the Australian Conciliation and Arbitration Commission considered applications to adjust the tally levels in multiple meat industry awards. In his decision Deputy President Riordan referred to the following quote by Webb J in 1952 about the general approach to fixing piecework rates:¹⁶

... it is a matter of common knowledge that in fixing piecework rates, the general practice is to fix such a rate as will enable the average worker, working at no more than the normal speed at which he would work as time worker, to earn an amount higher by a percentage which varies from industry to industry than the time work rate.

In 2000 the AIRC considered the appropriate form for a new payment by results provision to be included in the *Federal Meat Industry [Processing] Award 1996*. In discussing the parties' proposed incentive systems, the AIRC stated:¹⁷

[7] ... It is not our intention to establish a separate minimum rate of pay for employees engaged on incentive systems. There should only be one minimum rate for each classification. The work value of the classification does not alter because of the nature of the engagement of the employee. 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. The approach adopted in our decision is one which involves a loading referable to the nature of the engagement...

¹⁵ [\[2009\] AIRCFB 450](#)

¹⁶ Dec 1008/88, S Print H5521, 23.

¹⁷ [\[2000\] AIRC 276](#)

The AIRC, in its Statement on the Review of Wage Fixing Principles – August 1994, responded to a request for guidance on the equitable operation of payment by results schemes in the context of a wages system based on safety net adjustments:¹⁸

The Commission considers that given the diverse nature of such schemes any review should be dealt with on a case by case basis in the context of the applicable PBR arrangement. In conducting such reviews regard should be had to the need to ensure that (in the context of a system under which awards may be reviewed and adjusted from time to time to ensure that they are maintained at a relevant level) the scheme in question operates equitably and that the incentive nature of the scheme is maintained.

In discussing piecework arrangements in the meat industry, the AIRC explained the general method of calculating piecework rates:¹⁹

Piece work rates are usually calculated by reducing the hourly rate of pay to a "minute rate". There being 3600 seconds in the hour each actual task is timed and the minute rate is calculated and determined by the units of work to be performed being multiplied by the time taken in seconds so as to achieve the minute rate. In the determination of the value of the units of work involved allowances are made for such matters as breaks to relieve fatigue, personal relief, as well as non-working time related to preparation of machines or tools of trade. Allowance is also made for slowing down which occurs at the end of a work period as a result of fatigue and the time taken at the commencement of the work period for employees to develop their natural work rhythm as they build up speed to the required pace. Allowances might also be made for other items which inhibit the pace of work performed in the particular establishment. All of this measurement is concerned with average numbers. Of course, some employees perform better than average and others below. There may be no person who performs strictly in accordance with the statistical average.

The minute rate so determined is multiplied by 60 to achieve the hourly rate and by 40 or 38 to achieve the weekly rate. If the standard hours are reduced by two and no form of time off in lieu of the reduced hours is acceptable there must be an increase in the relevant rates to achieve the equivalent of one weeks wages for 38 hours value of work intended in lieu of 40 hours value of work. In other words the minute rate must be adjusted to achieve the weekly minimum rate in a reduced standard working week. The fact that some will earn more by better performance or that some will earn less because of less efficiency or whatever reason is of no relevance in this exercise. The person who performs at the standard rate of performance will earn the same wages after 38 hours as was earned under 40 hours. Those who perform at better or less than the standard should continue to earn the same level of wages by working 38 hours as they earned for working 40 hours.

Generally piece work rates are fixed on the basis of the performance and output expected of the average worker who is a person of average ability and adequately trained and qualified to perform the task.

2.2 Piecework and the concept of ‘employee of average capacity’

In 2007 the Australian Fair Pay Commission (AFPC) conducted a review of minimum wage arrangements in the real estate sector.²⁰ The AFPC was required to “exercise its power in a way it

¹⁸ 55 IR 144, 168

¹⁹ [\[1990\] AIRC 143](#).

²⁰ [Wage-Setting Decision No. 6/2007](#), 7.

'considers' will not result in an 'employee of average capacity' being entitled to less basic pay per week."²¹

The AFPC quoted the following excerpt from the Explanatory Memorandum accompanying the Work Choices Bill about the concept of 'employee of average capacity':²²

The inclusion of this concept [employee of average capacity] would enable basic piece rates of pay to be converted into a basic periodic rate of pay or vice versa for the purposes of making comparisons under this Subdivision. For example, if the [Commission] adjusts [a Pay Scale] so that an employee that was [a Pay Scale] piece rate employee at reform commencement becomes entitled to a guaranteed basic periodic rate of pay after the [Commission] decision takes effect, the [Commission] must set that basic periodic rate of pay at a level that it considers would not be less than [a Pay Scale] piece rate employee of average capacity in the same circumstances as the employee would have received as basic pay immediately after reform commencement.

The AFPC observed that the term 'employee/worker of average capacity' had not, to its knowledge, received judicial consideration. In the absence of judicial guidance, the AFPC applied the term 'employee of average capacity' according to its ordinary meaning and adopted the view that "what is 'average' will be a matter of fact and evidence for each class of employee."²³

The AFPC observed that in some instances piece rates have been determined based on evidence such as time and motion studies. In such instances, the AFPC explained "an 'employee of average capacity' has not necessarily meant the arithmetic average for all employees, but rather has emphasised an ability to do the work and experience in undertaking the task."²⁴

To illustrate how some piece rates had been constructed, the AFPC quoted from a decision by the AIRC regarding piece rates within the textile sector:²⁵

The focus of the case is on PBR [payment by results] schemes wherein the individual employee's earnings are determined - subject to a minimum level being guaranteed - by the person's measured output. A version which is typical in the footwear industry is known as an Austral scheme. It involves the use of work-study techniques to determine a standard per-minute output. An employee who operates at this level achieves a 60 unit hour; and an employee who produces ten per cent more achieves a 66 unit hour. The PBR earnings are calculated - subject to what follows - by multiplying each unit by the per-minute wage of an employee who is remunerated on a time-rate basis. An employee whose output is no greater than 60 units per hour receives only the time-rate wage. Austral-type schemes typically require that the standard unit of output be set so as to create some expectation of an ability to earn more than the time rate.

For the purpose of applying the concept 'employee of average capacity' in its decision, the AFPC decided to consider "both average data and data for real estate businesses in the bottom 10 per cent of performers as well as the additional experience protections that could be provided to limit the scope of any new piece rates."²⁶

²¹ Ibid 10.

²² Ibid.

²³ Ibid.

²⁴ Ibid 16.

²⁵ Ibid 16.

²⁶ Ibid 17.

2.3 Safeguards - minimum wage guarantee

In 1912 Higgins J created an award covering fruit growers in the Mildura and Renmark regions. Regarding his decision to allow remuneration on a piecework basis subject to a guaranteed minimum wage, he stated:²⁷

The Rural Workers' Union expressly asks that piece-work shall be prohibited; and the United Labourers' Union asks for rates which from their very nature exclude piece-work. Both in Mildura and in Renmark the employers desire that they should be free to get the work done by piece-work if they so choose. From the nature of the case, the employee is forced to greater speed when he is paid by results than when he is paid by time; and saving of time is saving of money to the grower. On the other hand, the piece-worker has a greater temptation to "scamp" his work than the worker by time. If the one tends to loiter, the other tends to "scamp"; but the employer or his foreman is on the spot to correct both tendencies. On piecework an exceptionally capable worker earns good wages, better than he can earn at time-work. The employees point out to me, however, that in agreeing as to the price for piece-work the two parties contracting—the grower and the labourer—do not stand on the same contractual level. The grower negotiates with a much better knowledge than the labourer has of the age of the vines, the density of the crop, the plant and facilities for working, &c. Moreover, a child can hardly be expected to make a fair contract for a piecework rate. There seems to me to be much force in these considerations; but I do not like to tie the hands of growers so that they cannot use the system of piece-work in order to get their operations quickly over. I dislike interfering with the discretion of an employer as to the system of carrying on his business, of making his business pay, so long as the employees are treated fairly as to wages and conditions. At present, I think the case can be met by prescribing, in effect, that whether the work done be done by piece-work or by timework the remuneration shall not fall below the hourly rates prescribed. I am glad to say that some of the employees who came to the box most bitterly opposed to piece-work admitted either that they could see no injustice in this proposal, or that the system would be less objectionable than simple piece-work.

In 1939 O'Mara J varied the award to allow remuneration on a piecework basis without a minimum wage guarantee:²⁸

The claim asks that piece-work rates may be fixed between an employer and the Union at a rate which will enable an average worker to earn at least 25 per cent, above time worker's rates and it also asks that piece-workers be guaranteed the minimum time work rates.

Higgins J. in 1920 permitted piece-work but provided that the prescribed minimum rates should be paid whether the employee was engaged on time or piece rates. Piece-work except in the case of cherries and prunes does not appear to have been worked to any extent. This may have been due to the obligation to guarantee the time rates.

I propose to insert a clause permitting the employer and the Union to fix piece-work rates in respect of occupations for which piece-work rates have not been prescribed in this award but on the basis of the rates being such as will enable an average worker to earn at least 10 per cent, above the appropriate time work rate.

I do not propose to provide for a guaranteed wage in the case of piece-workers. I have had regard to the sources from which seasonal labour is recruited and to the fact that frequently previous experience is not

²⁷ [6 CAR 61](#), 75-76.

²⁸ [41 CAR 285](#), 334.

possessed or required and I am not satisfied that a guaranteed wage is justified or that it would not lead to imposition in some cases.

The rates will be arranged by the Union which is quite capable of protecting its members.

[Footnotes omitted]

In a decision considering whether piecework provisions under an award covering saddlery, leather and canvas workers applied to female employees, Piper J observed:²⁹

... the provision for allowing piece-work payment, whether for specified work or other agreed work, has contained a specific protection for a male journeyman engaged on piece-work by ensuring that he shall earn at least the minimum time rate payable under the award... The danger to an employee of leaving his or her wages to an agreement without any protection is pointed out by the Deputy President in his judgment of 1925.

[Footnotes omitted]

In that case it was stated:

The poorest and most needy worker will enter into any agreement which will enable her to keep body and soul together. If agreement between the parties could oust the jurisdiction of the Court, then so far as this Court is concerned the most sweated conditions in the community could not be altered, for where the worst sweated conditions exist an agreement could be most readily secured.³⁰

3 Piecework provisions in modern awards

Task-based remuneration provisions are included in the following modern awards:

- *Building and Construction General On-Site Award 2020* (see [clause 19.6](#))
- *Market and Social Research Award 2020* (see [clause 14.5](#))
- *Meat Industry Award 2020* (see [clause 18](#))
- *Pastoral Award 2020* (see [clause 51](#))
- *Real Estate Industry Award 2020* (see [clause 16.7](#))
- *Silviculture Award 2020* (see [clause 15.2](#))
- *Sugar Industry Award 2020* (see [clause 17.3](#))
- *Timber Industry Award 2020* (see [clause 13](#))
- *Wine Industry Award 2020* (see [clause 17](#))
- *Wool Storage, Sampling and Testing Award 2020* (see [clause 16.3](#))

The following modern awards provide pieceworkers with a minimum guaranteed wage:

- *Building and Construction General On-Site Award 2020*
- *Meat Industry Award 2020*
- *Pastoral Award 2020*
- *Silviculture Award 2020*
- *Sugar Industry Award 2020*
- *Wool Storage, Sampling and Testing Award 2020*

²⁹ [39 CAR 1172](#), 1173.

³⁰ [21 CAR 892](#), 896.

Other examples of safeguards incorporated into the task-based remuneration provisions include:

- An obligation on the employer to take measures to ensure an employee with limited English understands the proposed agreement (see [clause 17.9](#) of the *Wine Industry Award 2020*).
- An obligation on the employer to provide an assurance that the remuneration offered to a commission-only employee is comparable to the remuneration received by a comparable employee on a similar project being remunerated on a time-basis, plus a contingency margin (see [clause 14.5 \(b\)](#) of the *Market and Social Research Award 2020*).
- An obligation on employer requiring that the information upon which payments under an incentive system are calculated, and all payments made and other benefits provided to employees under a system be recorded in writing in the time and wages records of the employer kept in accordance with the requirements of the Act (see [clause 18.5](#) of the *Meat Industry Award 2020*).
- Limitations on entering a commission-only remuneration arrangement based on age, demonstrated earning experience, seniority, years of experience or required annual review showing minimum income threshold amount not received (see [clause 16.7](#) of the *Real Estate Industry Award 2020*).
- Piecework rates prescribed by the modern award (see [clauses 51.7\(a\)](#) and [51.9\(b\)](#) of the *Pastoral Award 2020*).
- An employee's right to unilaterally terminate the agreement if remuneration received over 3 consecutive shifts is below what would have been received under time-based remuneration arrangements (see [clause 15.2\(b\)](#) of the *Silviculture Award*).
- An obligation to review agreement to ensure employee receives full entitlements owed (see [clause 17.3\(b\)](#) of the *Sugar Industry Award 2020*).
- A requirement that working under a piecework agreement must not disadvantage the employee in relation to their terms and conditions of employment (see [clause 16.3\(d\)](#) of the *Wool Storage, Sampling and Testing Award 2020*).

4 Operation of piecework provisions under the *Horticulture Award*

4.1 Guidance by the Fair Work Ombudsman

The Fair Work Ombudsman (FWO) provides the following guidance on setting a piecework rate under the *Horticulture Award*:³¹

The piecework rate has to allow the 'average competent employee' to earn at least 15% more per hour than the relevant minimum hourly rate in the *Horticulture Award* at the time the piecework agreement is entered into.

To assess if the piecework rate enables the average competent employee to earn at least 15% more per hour than the minimum hourly rate, an employer will be required to identify the average competent employee and their pick rate at the time the piecework agreement is entered into.

This requires a range of factors to be considered including:

- the experience of the workforce available or potentially available
- the type of crop involved

³¹ Fair Work Ombudsman, *How to Use Piecework Agreements* <How to use piecework agreements - Horticulture Showcase - Fair Work Ombudsman>.

- conditions of work including the growing conditions and nature and quality of equipment provided
- when the business started operating as well as its size and setup
- how many units have been picked by all workers at a particular enterprise/location over a period of time?
- have any workers been able to earn 15% above their minimum hourly rate, and if yes, how often?

There is no standard piecework rate across the horticulture industry or within particular parts of the industry or locations. It can be different between properties with the same crop type and location. It can even be different on the same property at different times.

4.2 **Fair Work Ombudsman v Hu**

Fair Work Ombudsman v Hu concerns an appeal in the Full Court of the Federal Court of Australia by the FWO of a decision by the Federal Court of Australia in *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034.

In a majority decision by Flick and Reeve JJ the appeal was dismissed. Bromberg J issued a dissenting decision.

Two of the issues considered concerned the application of the piece work provisions in the *Horticulture Award*. The Court's consideration is outlined below.

4.2.1 **Does entering into an agreement that sets inadequate piece rates represent a single or continuing contravention of clause 15 of the Award?**

In *Fair Work Ombudsman v Hu (No 2)*, the primary judge concluded that the employer had contravened clause 15.2 of the *Horticulture Award* by entering into 329 piecework agreements that set an inadequate piecework rate.³²

On appeal, the FWO asked the Court to determine if such conduct contravenes clause 15 of the Award only at the point of time that the agreement is entered into or if continuing contraventions occur over the period that the arrangement is in place.³³

Flick and Reeve JJ formed the following view about this issue:³⁴

[16] The first of the four issues raised in the Appellant's written *Outline of Submissions* is resolved in favour of the Respondents. Clause 15 of the *Award*, it is concluded, gives rise to a contravention at the time a pieceworker agreement is entered into and does not thereafter give rise to continuing contraventions and/or separate contraventions on each and every day thereafter that an employee continues to be paid piecework rates that do not comply with cl 15.2.

[17] So much follows from the terms of cl 15 itself.

[18] Clause 15.1 of the *Award* provides that an employer and an employee "may enter into an agreement for the employee to be paid a piecework rate". On its terms, a contravention of cl 15 arises if an employer

³² [Fair Work Ombudsman v Hu \[2019\] FCAFC 133](#), 6.

³³ Ibid 9.

³⁴ Ibid.

and an employee “*enter into an agreement*” which does not provide for the payment of a piecework rate. Any such contravention thus occurs at the time of entering the agreement.

4.2.2 What payment is an employee who has entered an agreement that sets inadequate piece rates entitled to?

On appeal, the FWO contended that, in circumstances where an agreement under clause 15.1 of the *Horticulture Award* fails to set an adequate piece rate as prescribed by clause 15.2, an employee is entitled to payment in accordance with the minimum wage prescribed by the *Horticulture Award* (being clause 14 for adults and clause 16 for juniors).³⁵

Flick and Reeve JJ provided the following analysis of the remuneration methods available under the *Horticulture Award*:

[28] By their terms, cl 14 and cl 16 provide for minimum wage rates for adult and junior employees respectively. In addition, an employee is entitled to the other applicable allowances provided for under the *Award* including public holiday rates (cl 28.3) and paid rest breaks (cl 23.2). Clause 15, by way of contrast, provides an option open to be availed of by employers and employees to “*enter into an agreement for the employee to be paid a piecework rate*”. The rate is “*agreed*” or “*fixed*” by cl 15.2 as “*at least...the minimum level [that] must be paid for all worked performed in accordance with the agreement*” (at para [138]). For all employees it takes account of the minimum wage rates specified in cl 14 and cl 16; for casual employees it includes the loading prescribed by cl 10.4 (as required by cl 15.3); and for the “*average competent employee*” it includes the requirement in cl 15.2 that it be “*at least 15% more per hour than the minimum hourly rate prescribed*” by the *Award*. Evidently, the clauses provide for different rates of pay calculated on different bases. And, as pointed out by Bromberg J, cl 14 and 16 form part of what his Honour has characterised as “*a time-based system of remuneration*”; cl 15 provides for a “*task-based remuneration system*”. It is open to an employer and employee to either take advantage of the “*minimum wages*” guaranteed under cl 14 (or cl 16) and other applicable provisions of the *Award* or enter into an agreement for the employee to be paid a “*piecework rate*” as fixed and calculated under cl 15. Depending on factors such as their age, classification levels, hourly work patterns and competency, some employees will be attracted to the former regime and others to the latter.

In reaching their position, Flick and Reeve JJ noted their agreement with the following reasoning by the primary judge:³⁶

[138] ...Clause 15.2 stipulates that, “The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement”. The word “agreed” is apparently intended to have the same meaning as “fixed”, but, leaving that aside, the phrase is ambiguous. It could require that the piecework rate that has been agreed, regardless of whether it is inadequate, must be paid for all work performed in accordance with the agreement. Alternatively, it could mean the piecework rate that has been agreed and is at least at the minimum level must be paid for all work performed in accordance with the agreement.

[139] In my opinion, the latter construction is to be preferred. The former construction, which could require an employer to pay a piecework rate fixed at a level which does not comply with cl 15, is improbable. Further, that construction would mean that where a piecework rate was initially fixed at an adequate level, but where the piecework rate later becomes inadequate, there is no obligation on the employer to adjust the rate. That would mean, for example, that if the minimum hourly rate prescribed

³⁵ Ibid 23 and 9.

³⁶ Ibid 26 and 24.

under cl 14.1 of the Award increased during the term of an employment agreement, there would be no corresponding obligation on the employer to increase the piecework rate. Such an outcome cannot have been intended.

[140] I recognise the force of the intervener's submission that this construction produces an inconvenient outcome for employers. The piecework provisions of the Award, seen as a whole, attempt to balance the interests of employers with the risk that employees will be left vulnerable to exploitation. However, the requirements to fix and pay at least minimum piecework rates are protective of employees, and cl 15.2 should be construed in light of that protective purpose. Where the piecework rate was adequate when the agreement was entered, but becomes inadequate during the term of the agreement, it is a contravention of cl 15.2 of the Award for an employer to continue to pay only the agreed, inadequate piecework rate. Contrary to the intervener's submission, that does not guarantee any employee a minimum wage, but it does guarantee an adequate piecework rate. Such contraventions are capable of fitting the FWO's description of "ongoing" throughout the period during which the employee is paid an inadequate piecework rate.

Flick and Reeve JJ formed the view that an employee can either be engaged and receive the benefit of the minimum wage or enter into a piecework arrangement.³⁷ The majority concluded that employees who do not receive a properly determined piece rate in accordance with clause 15 of the *Horticulture Award* are not entitled to be paid in accordance with clause 14 or clause 16 by default.³⁸

Flick and Reeve JJ concluded that the primary judge was correct to construe the *Horticulture Award* as entitling an employee on an inadequate piece rate to be paid at least the minimum piece rate and excluding the employee from entitlements to hourly rates and other entitlements received by non-pieceworkers under the Award.³⁹

4.2.3 Piecework safeguards

Flick and Reeve JJ agreed with the primary judge's view that if a piecework rate that complied with clause 15 of the *Horticulture Award* at the time of agreement subsequently falls below the minimum pay rate prescribed by the Award, for example due to a change in the minimum wage, continuing payment at the agreed piecework rate is a contravention of clause 15.2. The majority considered this "a fair balancing of employer and employee interests".⁴⁰

Bromberg J made the following observation:

[98] I respectfully agree with the primary Judge that the Award seeks to balance the interests of employers to have work performed efficiently with, as the primary Judge put it, "the risk that employees will be left vulnerable to exploitation". That risk is manifest where remuneration is fixed by reference to the valuation of the work task rather than the certainty and clarity of a time-based payment, particularly where the information necessary to undertake the valuation is unlikely to be known or understood by the employee. The formula for fixing the piecework rate in cl 15.2 is a testament to the vulnerability of the employee and therefore the capacity for exploitation involved in the piecework-based system of remuneration provided for by the clause.

³⁷ Ibid 30.

³⁸ Ibid 27 and 29.

³⁹ Ibid 25 and 70.

⁴⁰ Ibid 30.

4.3 Fair Work Ombudsman v Seasonal Farm Services

*Fair Work Ombudsman v Seasonal Farm Services*⁴¹ concerned the determination of pecuniary penalties for breaches of the *Fair Work Act 2009* resulting from a failure to keep required records and breaches of the *Horticulture Award* resulting from a failure to pay workers their proper entitlements.

Vasta J made the following observation about the absence of record-keeping obligations under the Award and the implications for the FWO's compliance activities:

[11] The problem for the Fair Work Ombudsman was that there were no records as to the hours worked for the piece rate employees and that also impacted those workers who were on the mixed type of employment because, for the piece rate part of their component of their wages, there were no records. This made the investigation extremely difficult. Now, whilst that does mean that there is no evidence as to what was worked, it means that there is no way of ascertaining whether or not the breaches of the *Fair Work Act 2009* (Cth) ("the FW Act") were even more blatant than what the investigation discovered.

4.4 Application to approve the JelliFish! Enterprise Agreement 2012

In assessing whether an enterprise agreement met the 'better off overall test' Asbury C of Fair Work Australia described the piecework arrangements prescribed by the *Horticulture Award* as analogous to daily hire arrangements in other awards:⁴²

[103] Such flexibility is a feature of casual employment and is one of the components of the casual loading of 25% provided under the Award. It is also the case that employees covered by the *Horticulture Award 2010* may be employed under piecework arrangements. These are analogous to daily hire arrangements in other awards and there is a loading of 15% for such employees in addition to leave entitlements or the casual loading where a pieceworker is employed on that basis. I am not satisfied that approval of an agreement with daily hire provisions that would result in employees being paid less than other analogous categories of employees under the Award would not be contrary to the public interest. In my view, the Agreement provides for *de facto* casual employees who are paid at less than the rate that casual employees would be entitled to under the Award, and that concept, in the context of public interest considerations is a bridge too far.

4.5 Harvest Trail Inquiry Report – Fair Work Ombudsman

In 2018 the FWO reported on the findings of its inquiry into the drivers of non-compliance with workplace laws occurring in the horticulture and viticulture industries.

4.5.1 Inquiry findings

The FWO reported that the inquiry resulted in the recovery of \$1,022,698 for 2,503 employees. It reported that it believes the occurrence of worker underpayments is significantly higher than this because in many cases Fair Work Inspectors were not able to assess the full extent of underpayments due to poor record-keeping, cash payments and a transient workforce.⁴³ Invalid or absent piecework agreements was also identified as a key issue in relation to underpayments.⁴⁴

⁴¹ [\[2017\] FCCA 1020](#)

⁴² [\[2012\] FWA 9640](#)

⁴³ Fair Work Ombudsman, [Harvest Trail Inquiry](#) (Report, 2018), 4.

⁴⁴ *Ibid* 5.

Key findings reported by the FWO included the occurrence of widespread non-compliance among the employers investigated, misuse of piece rates and significant reliance by growers on overseas workers. A negative impact where labour hire arrangements were illegally used was also identified.⁴⁵

The FWO concluded that the horticulture sector continues to require attention for several reasons, including 'ongoing uncertainty concerning certain matters at law regarding the application of provisions within industrial instruments, for example, the application of piece rates', the 'high proportion of vulnerable workers employed', and 'ongoing issues relating to Harvest Trail labour supply and demand that can drive non-compliance'.⁴⁶

4.5.2 Piecework arrangements

The FWO noted that the *Horticulture Award* and *Wine Industry Award* are distinct from other modern awards because they allow the payment of piece rates without a minimum hourly payment.⁴⁷

The FWO reported that some piecework employees were being paid in accordance with group rates, that is, a group of employees collectively produce a measurement of output (for example filling a bin of fruit) and payment for that output is shared equally by the workers. The FWO noted that this practice does not account for the actual contribution of each worker and may financially disadvantage more productive workers.⁴⁸

The FWO considers this practice inconsistent with the intended operation of piecework arrangements under the *Horticulture Award* and *Wine Industry Award*, noting that, firstly, piecework arrangements are between an individual employee and their employer and, secondly, the sum payable to a worker is dependent on their output and this cannot be accurately measured under a group arrangement.⁴⁹

The FWO states that its position regarding piecework arrangements is that "an employer must be able to demonstrate that the piece rate offered will allow an average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed by the *Horticulture Award*, and at least 20% of the rate prescribed by the *Wine Industry Award*". As an example of good practice, the FWO explained that each season Fruit Growers Victoria, following a consideration of the period taken to pick bins of fruit and environmental conditions, publishes a piece rate guide for members and encourages them to keep productivity records for the purpose of demonstrating the calculation of their rates.⁵⁰

The FWO identified in a number of cases where employers had not paid the piecework rates prescribed by the *Horticulture Award* or had neglected the requirement to record the piecework arrangement in writing.⁵¹

⁴⁵ Ibid 5.

⁴⁶ Ibid 50.

⁴⁷ Ibid 23.

⁴⁸ Ibid 29.

⁴⁹ Ibid 29.

⁵⁰ Ibid 29.

⁵¹ Ibid 14.

4.5.3 Industry characteristics and risks of non-compliance

The FWO found that growers rely significantly on overseas workers.⁵² The FWO reported that overseas workers are more vulnerable to exploitation, explaining that the desire to secure a further visa by completing specified work requirements may result in a willingness to work for substandard pay and conditions and/or a reluctance to seek assistance from authorities. Additional vulnerabilities experienced by overseas workers include cultural and language barriers, suspicion of government, and limited knowledge about Australian workplace rights and obligations (including how to enforce their rights and access assistance).⁵³ The FWO expressed concern that many instances of exploitation are likely never reported.

The FWO reported that labour is one of the highest costs for employers and this creates a risk that some employers may try to improve their financial viability when experiencing market pressures by cutting labour costs. The FWO's experience suggests labour costs show a higher susceptibility to cost-cutting compared to fixed costs (for example fuel, electricity, mortgages and supplier contract prices).⁵⁴

The Inquiry examined the labour procurement methods used by growers and identified that around half of those examined used labour hire contractors.⁵⁵ The FWO further noted its experience indicates multiple levels of contracting heightens the risk of non-compliance with workplace laws, including that workers may not receive their full entitlements because there is insufficient funds once multiple parties have taken their share of the profits.⁵⁶

4.5.4 Barriers to regulation

The FWO noted in its report that employers are not required by the *Horticulture Award* or *Wine Industry Award* to record hours worked by pieceworkers. It further noted that workers rarely recorded their hours. The FWO identified this as a barrier to accurately assessing employee entitlements where piecework arrangements are not valid or it is believed that underpayment occurred.⁵⁷

The FWO expected the passage of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 to "address the most serious and deliberate cases of non-compliance through targeted interventions and strategic litigations."⁵⁸

5 Award modernisation proceedings – *Horticulture Award 2010*

In relation to piecework arrangements, the Australian Mushroom Growers Association (AMGA) stated during award modernisation proceedings that it is "crucial that the proposed clause is a 'genuine' piece rate that does not guarantee a minimum base rate of payment."⁵⁹ AMGA elaborated on the importance of piece rates:⁶⁰

⁵² Ibid 30.

⁵³ Ibid 32 and 17.

⁵⁴ Ibid 24.

⁵⁵ Ibid 34.

⁵⁶ Ibid 36.

⁵⁷ Ibid 15.

⁵⁸ Ibid 50.

⁵⁹ Submission by Australian Mushroom Growers Association on [31 October 2008](#), 2.1(c).

⁶⁰ Ibid 2.3.

... In functions such as picking, there is a direct link between the work performed and the volume harvested. Piece rates are important to the industry because they allow employers and their employees to focus on maximising yield whilst guaranteeing flexibility.

In particular, in an industry in which the value added by employees performing these functions is related to the yield, piece rates reward the more productive and efficient workers and encourage poorer performers to increase output. Piece rates also help to guarantee a certain cost per unit produced which is essential for planning and forecasting purposes and the commercial success of businesses within the industry.

During proceedings, the Horticulture Australia Council (HAC) opposed the AWU's draft piecework provisions, submitting:

It is not a true piece rate provision and introduces rigidities and inflexibilities which will significantly increase employer costs.⁶¹

... clause 13.2(a) states that piece rate employees 'must not be disadvantaged in relation to the (sic) his or her terms and conditions of employment'. The inclusion of this clause is contradictory to the notion of a genuine piece rate clause, and appears to imply that whilst piece work rates can be paid in lieu of hourly rates, the employee cannot be paid below these hourly rates. This approach undermines the whole basis for piece work. It is nothing more than a bonus or incentive payment. It completely breaks the nexus between labour cost and output. This is the very principle that gave rise to the use of piece rates.⁶²

The AWU objected to the 'genuine' piecework clause included by the AIRC in the *Horticulture Award* exposure draft. It stated the lowest piecework rate of the existing awards had been selected⁶³ and, unlike the *Horticultural Industry (AWU) Award 2000* which restricted piecework to casuals, the draft award allowed pieceworkers to be engaged on a permanent or part-time basis. It submitted that this change justified the inclusion of a protective provision in the *Queensland Fruit and Vegetable Growing Industry Award* that ensures full-time workers are not paid less than the minimum weekly rate and applies on a pro rata basis to part-time and casual workers.⁶⁴ It also submitted that full-time and permanent workers must have the ability to terminate a piecework agreement that is unfair or disadvantageous.⁶⁵

Following the publication of the *Horticulture Award*, the NFF submitted several criticisms, including that:

- The piecework clause constituted an incentive-based allowance rather than a true piece rate⁶⁶ and the absence of a true piece rate would increase labour costs.⁶⁷
- Inherent to the requirement that a pieceworker not be paid less than the prescribed ordinary rate payable for the hours worked is a requirement, additional to the existing requirement to keep a record of the number of units picked, to keep a record of hours

⁶¹ Submission by HAC on [24 November 2008](#), 3.4.

⁶² Ibid 3.5.

⁶³ Submission by AWU on [13 February 2009](#), 122.

⁶⁴ Ibid 123.

⁶⁵ Ibid 124.

⁶⁶ Submission by NFF on [28 May 2009](#), 26.

⁶⁷ Ibid 51-53.

worked.⁶⁸ Additionally, inherent in the right to terminate a piecework agreement if the piece rates paid fall below the ordinary time rates for more than 3 days is a requirement to conduct a comparison of the hours worked and the units picked at least every 3 days.⁶⁹ It submitted such regulation is exceptionally onerous on small business and leads to additional costs, loss of jobs, and reduced product in the marketplace.⁷⁰

- Supervisors oversee 80-100 pickers within a 5-10km radius.⁷¹ A 'work at your own pace' culture exists within the industry,⁷² including long breaks and varying work hours.⁷³ In this context there is no capacity to oversee or record actual hours worked.⁷⁴

In response to concerns expressed by employer groups about the cost of implementing the *Horticulture Award*, the AIRC stated:⁷⁵

[101] Given the scale of the cost increases referred to in the employers' submissions, which at this stage at least have not been contradicted, we have concluded that a number of the modern award provisions may require re-examination. We mention in particular the piecework provisions and provisions relating to hours of work, overtime and penalties...

On 26 August 2009 the Minister amended the award modernisation request to the effect that the AIRC, instead of a minimum rate of pay supplemented by an incentive-based payment, should permit the payment of piece rates to casual employees in the horticulture industry who pick produce.⁷⁶

On 23 December 2009 the AIRC determined to vary the *Horticulture Award* so that a guaranteed minimum payment no longer applied to pieceworkers:⁷⁷

[20] In relation to the first matter, the AWU submitted that the provision in cl.15.6 of the modern award that piecework employees receive a guaranteed minimum payment equal to the wage they would have earned for the hours actually worked should not be altered. We note, however, that there is no equivalent provision in the Horticulture Award 2000, or in any of the schedules to that award. As we have previously noted, that award is the main award in the industry and its provisions carry great weight. Furthermore, it appears to us that cl.15.6 is inconsistent with cl.50 of the consolidated request.

⁶⁸ Ibid 55 and 57.

⁶⁹ Ibid 57.

⁷⁰ Ibid 58.

⁷¹ Ibid 59.

⁷² Ibid 60.

⁷³ Ibid 61.

⁷⁴ Ibid.

⁷⁵ [\[2009\] AIRCFB 800](#)

⁷⁶ [\[2009\] AIRCFB 835](#) at [4]

⁷⁷ [\[2009\] AIRCFB 966](#)