BACKGROUND PAPER

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Horticulture Award 2020
(AM2020/104)

Agricultural industry MELBOURNE, 26 JULY 2021

Horticulture Award 2020 – application to vary an award

Note: This document has been prepared to facilitate the hearing and determination of the matter before a Full Bench. It does not represent the concluded view of the Full Bench on any matter or issue.

Contents

1. The Application

[1] Clause 15 of the *Horticulture Award 2020* (the Horticulture Award) is titled 'Minimum rates'. Clause 15.1(a) sets the classifications and minimum rates for an adult employee by reference to minimum weekly rates and minimum hourly rates. Clause 15.3(a) sets minimum rates for junior employees by reference to a percentage of the adult rate. Clause 15.2 is titled 'Pieceworker rates' and provides, relevantly:

> '**15.2 Pieceworker rates**
>
> (a) An employer and a full-time, part-time or casual employee may enter into an agreement for the employee to be paid a piecework rate. An employee on a piecework rate is a pieceworker.
>
> (b) **The piecework rate fixed by agreement between the employer and the employee 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**. The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement.
>
> (c) The calculation of piecework rates in clause 15.2(b) for casual employees will include the casual loading prescribed in clause 11.3(a).
>
> (d) **An agreed piecework rate is paid instead of the minimum rates specified in clause 15**.
>
> (e) The following clauses of this award do not apply to an employee on a piecework rate:
>
> (i) Clause 13—Ordinary hours of work and rostering arrangements;
>
> (ii) Clause 18.3(c)—Meal allowance; and
>
> (iii) Clause 21—Overtime.
>
> (f) The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress.
>
> (g) The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee.
>
> (h) The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.
>
> (i) **Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate 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**.' [Emphasis added]

[2] Clause 15.2(a) permits an employer and employee to enter an agreement for the employee to be paid a piecework rate. The piecework rate fixed by agreement must enable the average competent employee to earn at least 15% more per hour that the minimum hourly rate to comply with clause 15.2(b). Clause 15.2(i) provides that nothing in the Award guarantees that an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate in the Award.

[3] The Application seeks to vary clause 15.2 by:

- Deleting the existing clause 15.2(i) and insert 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.'

- Inserting 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.'

[4] The effect of the proposed variation is to:

- Delete the current clause 15.2(i) and replace it with a new provision providing a floor for the earnings for pieceworkers such that an employee working under a piecework agreement must be paid for each hour of work at least the minimum rate payable for the employee's classification and type of the employment.

- Insert a new clause 15.2(k) to require an employer to keep a record of all hours worked by a pieceworker to ensure that the requirement to pay a pieceworker at least the minimum hourly rate is capable of being monitored and enforced.

[5] The Horticulture Award does not require records of hours worked to be kept for pieceworkers. (Clause 15.2 (h) requires that a copy of the 'piecework agreement' be kept 'as a time and wages record').

[6] Sections 535 and 536 of the *Fair Work Act 2009* (Cth) (the Act) respectively require employee records to be kept and pay slips to be given. Their content is prescribed in the *Fair Work Regulations 2009* (Cth) (the Regulations) regs 3.32–3.34 and 3.46:

'**3.32 Records—content**

For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:

(a) the employer's name; and

(b) the employee's name; and

(c) whether the employee's employment is full-time or part-time; and

(d) whether the employee's employment is permanent, temporary or casual; and

(e) the date on which the employee's employment began; and

(f) on and after 1 January 2010—the Australian Business Number (if any) of the employer.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

3.33 Records—pay

(1) For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:

(a) the rate of remuneration paid to the employee; and

(b) the gross and net amounts paid to the employee; and

(c) any deductions made from the gross amount paid to the employee.

(2) If the 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, the record must set out the hours worked by the employee.

(3) If the employee is entitled to be paid:

(a) an incentive-based payment; or

(b) a bonus; or

(c) a loading; or

(d) a penalty rate; or

(e) another monetary allowance or separately identifiable entitlement;

the record must set out details of the payment, bonus, loading, rate, allowance or entitlement.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

3.34 Records—overtime

For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:

(a) the number of overtime hours worked by the employee during each day; or

(b) when the employee started and ceased working overtime hours.

3.46 Pay slips—content

(1) For paragraph 536(2)(b) of the Act, a pay slip must specify:

(a) the employer's name; and

(b) the employee's name; and

(c) the period to which the pay slip relates; and

(d) the date on which the payment to which the pay slip relates was made; and

(e) the gross amount of the payment; and

(f) the net amount of the payment; and

(g) any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement; and

(h) on and after 1 January 2010—the Australian Business Number (if any) of the employer.

(2) If an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid.

(3) If the employee is paid at an hourly rate of pay, the pay slip must also include:

(a) the rate of pay for the employee's ordinary hours (however described); and

(b) the number of hours in that period for which the employee was employed at that rate; and

(c) the amount of the payment made at that rate.'

[7] The employee record requirements do not include keeping a record of hours worked by pieceworkers—reg.3.33(2) requires a record of hours worked to be kept for 'a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked', and the Explanatory Statement indicates that this requires a record of hours worked to be kept for casuals or irregular part-timers who are 'paid by reference to a period of time worked'.

[8] Similarly, the pay slip requirements do not require an employer to report hours worked by pieceworkers—noting that pieceworkers will not fall within reg.3.46(3) (as they are not 'paid at an hourly rate of pay').

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?

2. Legislative Framework

[9] Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.[1]

[1] *4 yearly review of modern award – Penalty Rates* [2017] FWCFB 1001 at [269] ('*Penalty Rates Case*').

[10] Under s.157(1) of the Act, the Commission may only make the variation sought by the AWU if satisfied that the variation is 'necessary to achieve the modern awards objective'. The 'modern awards objective' is defined in s.134(1) as "provid[ing] a fair and relevant minimum safety net of terms and conditions", taking into account of the matters at s.134(1)(a) to (b).

[11] Section 138 of the Act emphasises the importance of the modern awards objective:

> 'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[12] There is a distinction between what is 'necessary' and what is merely 'desirable'. Necessary means that which 'must be done'; 'that which is desirable does not carry the same imperative for action.'[2]

[13] Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.[3] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[4]

[14] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[5]:

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the["] Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[6]

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

[15] In *4 Yearly Review of Modern Awards - Penalty Rates*[7] (the *Penalty Rates Decision*) the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

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[2] *SDA v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

[3] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [136].

[4] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[5] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

[6] Ibid at [48].

[7] *Penalty Rates Case.*

'1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[8]

[16] The above observations are also apposite to the Commission's consideration of the Application.

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

[17] Section 578 is also relevant, it provides:

'In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical

[8] Ibid at [269].

or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

[18] Additional considerations arise when the Commission is setting modern award minimum wages. Section 157(2) 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. If the Commission is setting, varying or revoking modern award minimum wages, the minimum wages objective set out in s.284 also applies.

[19] Section 157(2) provides:

'(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).'

[20] Section 157(2A) provides:

'(2A) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.'

[21] The meaning of 'modern award minimum wage' is set out in s.284(3):

'Meaning of ***modern award minimum wages***

(3) ***Modern award minimum wages*** are the rates of minimum wages in modern awards, including:

(a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and

(b) casual loadings; and

(c) piece rates.'

[22] Section 284(4) deals with the meaning of setting and varying modern award minimum wages:

*'Meaning of **setting** and **varying** modern award minimum wages*

(4) ***Setting*** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. ***Varying*** modern award minimum wages is varying the current rate of one or more modern award minimum wages.'

[23] Whether or not the Application seeks to vary modern award minimum wages is contested.

[24] In its submission of 19 March 2021 the AWU submits that s.157(2) and the minimum wages objective are *not* applicable,:

'The application does not seek to alter the rates of minimum wages prescribed in clause 15.1 or 15.3 of the Horticulture Award, nor does it seek to alter the level by reference to which any piecework rate is required to be set in clause 15.2(b). In those circumstances, the variations sought do not seek to set or vary the current rate of one or more modern award minimum wages for the purposes of s 284(4) of the FW Act and the requirements of s 157(2) and the minimum wages objective are not applicable.'[9]

[25] In its reply submissions the UWU supports the submission made by AWU that the Application does not seek a variation to modern award minimum wages, within the meaning of the Act, and therefore does not fall within the scope of s.157(2) requiring a justification by work value reasons.

[26] Contrary to the AWU's submission, the AFPA submits that proposed variation *does* seek to vary modern award minimum wages,:

'Section 284(4) defines "setting modern award minimum wages" as "the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award". It defines "varying modern award minimum wages" as "varying the current rate of one or more modern award minimum wages". Section 284(3) in turn defines "modern award minimum wages" as "the rates of minimum wages in modern awards".

Here, the rate of minimum wages currently applicable to pieceworkers under the Horticulture Award is the minimum piecework rate that must be set under the Uplift Term. The proposed variation would change the minimum wages applicable to pieceworkers by requiring pieceworkers to be paid minimum hourly rates. The fact that the particular hourly rates that the AWU proposes to apply to pieceworkers are already found in the Horticulture Award is irrelevant because these rates are currently inapplicable to pieceworkers.'[10]

[27] In support of its submission the AFPA relies on *National Retail Association v FWC*[11] where, the AFPA submits, an award variation that applied existing adult rates to 20-year-old junior employees who worked for an employer for more than 6 months was held to "relate to" the award minimum wages.[12]

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[9] AWU submission, 19 March 2021 at [10].

[10] AFPA submission, 11 June 2021 at [14]-[15].

[11] (2014) 225 FCR 154.

[12] (2014) 225 FCR 154 at [46], [61] and [62].

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

[28] Ai Group also submits that the Application involves a variation to modern award minimum wages:[13]

> ''Modern award minimum wages' are defined in s. 284(3) of the FW Act as (emphasis added):
>
> > the rates of minimum wages in modern awards, including:
> >
> > (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
> >
> > (b) casual loadings; and
> >
> > (c) piece rates.
>
> Section 284(4) of the FW Act defines 'setting' and 'varying' modern award minimum wages as follows: Setting modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. Varying modern award minimum wages is varying the current rate of one or more modern award minimum wages.
>
> It is absurd to consider the present Application to insert a 'floor' below which piece rates cannot be set pursuant to cl. 15.2(b) of the Horticulture Award as neither varying nor setting modern award minimum wages. The AWU's application would alter the method of determining piecework rates under cl. 15.2(b) as such rates would not be able to fall below the equivalent time rate of pay.'[14]

[29] Ai Group refers to s.157(2) of the Act and submits that the AWU has failed to demonstrate how the variation it proposed is justified for 'work value' reasons. Ai Group submits that it would be unjust to impose a 'floor' on the rate set under cl.15.2(b) where the value to the employer of the work performed has not increased.[15]

[30] In reply, the AWU argues that the submissions advanced by the AFPA and Ai Group do not properly interact with the provisions of the Act:

> 'The term "modern award minimum wages" is defined to mean the "rates of minimum wages" set in modern awards, including piece rates. The submissions do not explain how it is said that the application seeks to vary the rates of minimum wages in the award when no application is made to alter hourly rates or piece rates in the Award. Indeed, the floor of earnings sought to be introduced is calculated by reference to the existing hourly "rates".
>
> The assertion by AFPA that a "substantial cohort" of workers would inevitably receive an increase in remuneration, even if true, does not assist. A variation that results in an increase in earnings does not necessarily involve a change in the "rates of minimum wages". A change in hours of work or minimum engagement periods, for example, may result in an increase in

[13] Ai Group submission, 1 June 2021 at [81]-[86].

[14] Ai Group submission, 1 June 2021 at [83]-[85].

[15] Ai Group submission, 1 June 2021 at [87]-[90].

remuneration for some employees but does not vary rates of minimum wages. Furthermore, if the variation sought does "inevitably" increase remuneration for a substantial cohort of employees, that could only be so if a substantial number of employees are presently earning below the minimum hourly rates pursuant to pieceworker agreements. That underscores the necessity of the variation.'[16] [Footnotes omitted]

[31] In the alternative, if it is necessary to demonstrate that the variation is 'justified by work value reasons', the AWU submits 'there can be no doubt that the variation is justified on work value grounds':

'Section 157(2A) does not import a requirement that the work value considerations consist of identified changes in work value measured from a fixed datum point. The "work value reasons" must relate to the nature of the work performed, the level of skill or responsibility involved or the conditions under which the work is done. 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. There can be no sensible suggestion that the work performed does not justify employees earning the minimum hourly rate already set by the Award. It is surely a normal condition of employment that an employee should be entitled to the minimum rate expressed for a particular type of work.

As to the minimum wages objective, the only additional consideration identified in the submissions is the requirement to take into account "the performance and competitiveness of the national economy, including business competitiveness and viability, inflation and economic growth." That consideration appears to overlap, at least significantly, with the matter referred to in s 134(1)(h). In any event, no evidence 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.'[17]

[32] The AFPA also submits that the Union Parties 'have not explained why the inevitable increase in remuneration for the substantial cohort of workers in the industry who are not competent can be justified by work value reasons.'[18]

[33] In reply to the point advanced by the AFPA the UWU submits:

'Apart from the unproven assertion that a "substantial cohort" of workers employed under piecework arrangements are "incompetent", in the event FWC takes the view the application falls within the scope of s 157(2), the interested parties' submission is misconceived.

"Competency" (or otherwise) is not a work value consideration. The work value of work performed by employees who are covered by the award who are hypothetically "incompetent" is still the award minimum rate. Even if the clause *is* a minimum rates provision and thus s 157(2) does apply, the work value principles would not require the Unions to demonstrate a work value change in relation to so-called "incompetent" employees to justify the proposition that they be paid the minimum hourly rate of pay for work performed under the award (such rate having itself been fixed in accordance with work value principles).'[19]

[16] AWU submission in reply, 2 July 2021 at [5]-[6].

[17] AWU submission in reply, 2 July 2021 at [7]-[8].

[18] AFPA submission, 11 June 2021 at [38].

[19] UWU submission in reply, 5 July 2021 at [37]-[38].

[34] Section 284(2) provides that the minimum wages objective applies to the Commission's functions or powers under Part 2-3 so far as they relate to, relevantly, setting or varying modern award minimum wages. The minimum wages object is set out in s.284(1):

> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equal remuneration for work of equal or comparable value; and
>
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
>
> This is the ***minimum wages objective***.

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)?

[35] The AFPA submits that three of the matters in s.284(1) overlap with the modern awards objective factors, but s.284(1)(a) prescribes one additional factor that is presently relevant: 'the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth.'

3. History of Piecework Provisions Generally

[36] The AFPA addresses the history of piecework provisions in awards in Section D.1 of its submission, noting that piecework arrangements have a long history in Australia.[20] The AFAP submits that some of the earliest awards made by the Commonwealth Court of Conciliation and Arbitration provided for payments on a piecework basis with no weekly or hourly minimum, but set the piecework rate such that the average pieceworker received an uplift on the weekly wage that would otherwise be payable.[21] The AFPA submits that such awards were 'striking the same kind of risk-reward bargain that is struck by the Horticulture Award.'[22]

[37] The AFPA submits that over the next century, despite the significant changes in the Australian industrial relations landscape, awards continued to provide for piecework with no guaranteed weekly or hourly earnings, as was the case with the *Horticultural Industry (AWU) Award 2000*,[23] on which the current Horticulture Award is largely based.[24] The AFPA submits

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[20] See, eg, *Amalgamated Engineering Union v Metal Trades Employers Association* (1930) 28 CAR 923, 936-7; *Galvanised Iron Manufacturers (Lysaght's Newcastle Works Ltd, Newcastle) Award* [1937] AR (NSW) 598, 600.

[21] See, eg *AWU v The Pastoralists Federal Council of Australia* (1922) 16 CAR 375, 379, 415, 425.

[22] AFPA submission, 11 June 2021 at [18].

[23] Clauses 15.5, 18.4, 24.2.4.

[24] *Re Horticulture Award 2010* (2009) 193 IR 163 [6], [13].

that the award was in turn a successor of a long line of awards that have, since 1939, provided for piecework engagement with no weekly or hourly 'floor'.

[38] The AFPA submits that the early decisions that declined to guarantee pieceworkers the minimum weekly rates prescribed for timeworkers justified that conclusion by, among other things:[25]

- 'the sources from which seasonal labour is recruited and … the fact that frequently previous experience is not possessed or required', leading to 'remarkable' 'variation in quantities picked by different pickers' and;

- the fact that guaranteeing weekly earnings for pieceworkers 'would remove a most useful incentive to efficient work'.

[39] AFPA submits that the evidence in the present proceeding 'shows that these rationales remain relevant today.'[26]

[40] In reply the AWU submits that the AFPA's submission does not reflect the history of pieceworker provisions:

> 'The early adoption of pieceworker provisions is described in *Re Metal Trades Case* (1930) 28 CAR 928. Provisions permitting the payment of workers by piece rates generally involved the payment of a premium on weekly or hourly rates as well as other protections, through either or both of the following approaches:
>
> (a) Minimum weekly or hourly payment; and/or
>
> (b) Piece rates set by an independent board or other body or only through agreement or approval of the relevant union.
>
> Pieceworker provisions have existed in fruit growing awards since at least 1920 but subject to a minimum time-work rate. It is suggested predecessor awards have provided for piece rates without a minimum payment requirement since 1939. It is notable that the provision introduced in 1939 only permitted piecework when such rates were set by agreement between the employer and the union and not merely as dictated by the employer. Piece rates continued to require approval of the relevant union until at least the 1970s. Clearly, the involvement of a union with expertise to assess the appropriateness of piece rates was considered an essential safeguard in the absence of a minimum guaranteed payment. To the extent there was resistance to the inclusion of a minimum payment, that occurred in circumstances in which there was no evidence that an ordinary worker in ordinary circumstances would fail to earn a fair wage.
>
> Accordingly, the history of award regulation of pieceworkers does not suggest that provision for a minimum floor of remuneration in line with, or above, the minimum payments on hourly or weekly rates is inconsistent with the concept or rationale for piece rates. It is a common feature in other modern awards for piecework provisions to contain a minimum payment obligation. Modern awards which fail to include a minimum payment obligation are few. A minimum floor of remuneration was also a common feature of awards prior to award modernisation. As the Full Bench has observed in modern award proceedings, pieceworkers were "in many cases subject to a minimum payment contained in a stipulation that the weekly

[25] AFPA submission, 11 June 2021 at [23].

[26] AFPA submission, 11 June 2021 at [24].

remuneration of a pieceworker cannot fall below a particular amount fixed as a percentage above the ordinary pay for the relevant classification."'[27]

4. Relevant Award History

[41] The Horticulture Award was made pursuant to section 576E of the *Workplace Relations Act 1996* and a Request made by the then Minister for Employment and Workplace Relations that the Australian Industrial Relations Commission (AIRC) undertake an award modernisation process.[28]

[42] As initially published by the AIRC on 3 April 2009,[29] clause 15 provided:

'15.1 A full-time, part-time or casual employee may enter into an agreement to be paid piecework rates instead of the rate of pay which would otherwise apply to the type of employment and to the work performed by the employee.

15.2 Work may only be paid for at piecework rates where the piecework rates fixed by agreement enable the average employee working the ordinary hours of work to earn at least 15% more than the minimum hourly rate prescribed by this award for the type of employment and the work to be performed.

15.3 The piecework rates fixed in accordance with the requirements of these provisions will be paid for all work performed in accordance with the piecework agreement.

15.4 Where the earnings of an employee paid at piecework rates fall below the ordinary time rates prescribed by this award for more than three consecutive ordinary working days, the piecework agreement may be terminated by either party.

15.5 Agreements for payment by piecework rates must be recorded in writing and signed by the employee and the employer. The agreement must record the type of employment of the employee, the work to be performed, the appropriate minimum hourly rate for the type of employment and work to be performed, the times when the work is to be performed, the piecework rate payable and the duration of the agreement.

15.6 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 worked performed.'

[43] In about August 2009, Minister for Employment and Workplace Relations signed a consolidated version of a varied award modernisation request which relevantly provided as follows:

'Piece workers

43. The NES apply to a piece worker.

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[27] AWU submission in reply, 2 July 2021 at [10]-[12].

[28] *Re Request for the Minister for Employment and Industrial Relations – 28 March 2009* [2009] AIRCFB 345; (2009) 181 IR 19.

[29] Ibid.

44. The NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.

45. In modernising awards, the Commission must have regard to whether it is appropriate to include:

> (a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or
>
> (b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the NES. For example, a method of making payment to a piece worker employee when that employee is absent on annual leave. Any provisions setting out a calculation payment must take into account the various methods by which a piece worker may be remunerated under the modern award, including by incentive payments or bonuses.

…

Horticulture Industry

50. The Commission should enable employers in the horticulture industry to continue to pay piecework rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.

51. Where a modern award covers horticultural work, the Commission should:

> • have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
>
> • provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.'

[44] In *Re Horticulture Award 2010*,[30] the AIRC replaced clause 15.6 with a new clause substantially in its present form. The reasoning of the Full Bench in relation to a guaranteed minimum payment for pieceworkers (at [20]) was as follows:

> '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. We grant this part of the joint application.'

[45] The AIRC also indicated that the provisions of the new modern award were generally in line with the relevant provisions of the *Horticulture Industry (AWU) Award 2000* (the 2000

[30] [2009] AIRCFB 966; (2009) 193 IR 163.

Award) as it applied to Schedule A respondents.[31] Clause 18.4 of the 2000 Award provided that:

> **'18.4 Piecework**
>
> Piecework rates may be fixed by an employer and the employee at such rates as will enable the average employee working the ordinary hours prescribed by this award to earn at least 12.5% above the prescribed time rate. Such rate will, when fixed, be paid in lieu of the said time rate.'

[46] Similar provision was made with respect to what were referred to as Schedule B and C respondents in clause 15.5 of the 2000 Awawrd. That award did not prescribe a guaranteed minimum rate for pieceworkers.

[47] The AWU and UWU submit that the decision of the AIRC in *Re Horticulture Award 2010*[32] does not stand in the way of acceptance of the Application. As the AWU puts it:

> 'In that matter, the Full Bench removed from the published award a provision (then clause 15.6) which would have provided that an employee working under a piecework agreement could not be paid less that the prescribed ordinary rate payable for the work performed. However, it is appropriate and overdue for that issue to be reconsidered in light of the following considerations:
>
> (a) Firstly, the evidence which has become available over the period since 2009 convincingly demonstrates that the current pieceworker provisions have not been successful in achieving the purpose of ensuring that pieceworker agreements provide employees with earnings in excess of the minimum rates prescribed by the Award. The various reports and academic studies referred to above make clear that the pieceworker provisions have failed to provide a fair and relevant safety net of terms and conditions for employees covered by the Award and have permitted exploitation and substandard terms and conditions of employment to persist.
>
> (b) Secondly, the decision of the Full Bench of the former Commission was undertaken as part of the award modernisation process involving rationalising the provisions of a range of awards and NAPSAs.[33] The outcome was the result of the Commission's assessment of pre-existing federal award provisions and its understanding of the requirements of the consolidated award modernisation request. The decision does not represent an independent assessment by the Commission, based on evidence and submissions, of what was necessary to provide a fair and relevant safety net in the horticulture industry.[34]
>
> (c) Thirdly, the judgment of the majority of the Full Federal Court in Fair Work Ombudsman v Hu [2019] FCAFC 133; (2019) 289 IR 240 changed the understanding of the operation of the pieceworker provisions of the Horticulture Award. The effect of the judgment of the majority is that an employee who does not receive a properly determined piecework rate under clause 15.2 is not entitled to the benefit of the minimum weekly or hourly rates of

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[31] *Re Request for the Minister for Employment and Industrial Relations – 28 March 2009* [2009] AIRCFB 345; (2009) 181 IR 19 at [60]; *Re Horticulture Award 2010* [2009] AIRCFB 966; (2009) 193 IR 163 at [6].

[32] [2009] AIRCFB 966; (2009) 193 IR 163.

[33] As described by the Full Bench in *Re Horticulture Award 2010* [2009] AIRCFB 966; (2009) 193 IR 163 at [6].

[34] *Re Horticulture Award 2010* [2009] AIRCFB 966; (2009) 193 IR 163 at [20].

pay in clause 15.1.[35] For the reasons given by Bromberg J (in dissent), it is not to be readily accepted that this was the operation intended by the Full Bench.[36]

(d) Fourthly, the nature of the workforce in the horticulture industry has changed significantly over recent decades such that historical award provisions can no longer be confidently treated as an appropriate standard. In particular, the rapid increase in the proportion of overseas workers and the emergence of labour hire contractors as major employers in the industry since the early 2000s increases the need for the Horticulture Award to provide proper protections for pieceworkers.'[37]

[48] The UWU contends that at the time the Horticulture Award was made, no single existing instrument could be said to apply generally in the industry. The Award is largely based on the 2000 Award but also involved rationalising the provisions of a number of awards and Notional Agreements Preserving State Awards (NAPSAs) containing an extremely diverse range of conditions,[38] including the conditions relating to piecework rates. These awards included:

- *Farming and Fruit Growing Award, 2005,* (Tas), [AN1770032]
- *Fruit and Vegetable Growing Industry Award - State 2002,* (QLD), [AN140126]
- *Hop Industry Award 2001*, (Federal), [AP811240]
- *Horticultural Industry (State) Award*, (NSW), [AN120247]
- *Horticulturalists Award*, (Tas), [AN170045]
- *Mushroom Industry Employees (State) Award*, (NSW), [AN120357]
- *Pastoral Industry Award 1998*, (Federal), [AP792378CRV]
- *Pastoral Industry (South Australia) Award*, (SA), [AN150104]
- *Tea Industry Award- State 2003*, (QLD), [AN140295]
- *The Dried Vine Fruits Industry Award*, 1951, (WA), [AN160101]
- *The Farm Employees' Award 1985*, (WA), [AN160126], and
- *The Fruit Growing and Fruit Packing Industry Award*, 1979, (WA), [AN160134].

[49] The UWU submits that of the ten awards set out above, 5 contained a safety net provision similar to what is sought in the Application, ensuring that pieceworkers receive at least the equivalent of the relevant minimum hourly wages.[39]

[50] The submissions of a number of the employer parties rely on the fact that clause 15.2 was made, in its present form, as part of the award modernisation process and consistently with the varied request from the then Minister for Employment and Workplace Relations.[40]

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[35] *Fair Work Ombudsman v Hu* [2019] FCAFC 133; (2019) 289 IR 240 at [27]-[30].

[36] See, particularly, *Fair Work Ombudsman v Hu* [2019] FCAFC 133; (2019) 289 IR 240 at [84]-[85] and [93].

[37] AWU submission, 19 March 2021 at [23].

[38] *National Farmers Federation and the Australian Industry Group* [2009] AIRCFB 966 at [61]; Award Modernisation Statement [2009] AIRCFB 50 at [30].

[39] *Fruit and Vegetable Growing Industry Award- State 2002,* (QLD), [AN140126], cl 4.5; *Tea Industry Award- State 2003*, (QLD), [AN140295] cl 4.2; the *Dried Vine Fruits Industry Award, 1951*, (WA), [AN160101], cl 23; *The Farm Employees' Award, 1985,* (WA), [AN160126] cl 18(4); *The Fruit Growing and Fruit Packing Industry Award*, cl 24A(4).

[40] Ai Group submission, 1 June 2021 at [45]-[53]; NFF submission, 11 June 2021 at [15]-[16].

[51] It is variously submitted that the historical background is a 'significant motivating factor against the application',[41] or that the 'provisions should not be altered to satisfy the Unions' disagreement with the amended Request',[42] or that the 'variations proposed by the AWU would make the Horticulture Award inconsistent with the Award Modernisation Request which was varied specifically to avoid the outcome which the Union seeks to achieve.'[43]

[52] In reply the AWU acknowledges that it has been said that the Commission will proceed on the basis that *prima facie* a modern award achieved the modern awards objective when it was made, but submits that:

> 'the award modernisation process and the award modernisation request were not intended to fix awards in perpetuity. Indeed, the Act expressly provided that the Commission was required to review awards to ensure they met the modern awards objective in addition to the general capacity to vary a modern award.
>
> There is no basis upon which it could be concluded that, in making the Horticulture Award, the Commission considered the merits of the pieceworker provisions in any detail. The only matters mentioned by the Commission in its decision were the historical position under the Horticulture Award 2000 and the terms of the consolidated request. Consistently with the nature of the award modernisation process, the proper inference to be drawn is that the Commission adopted the more limited objective of establishing a fair safety net based on the terms of relevant pre-reform instruments. No different or higher threshold for a variation to the Horticulture Award is presented by the terms of the consolidated award modernisation request.'[44] [Footnotes omitted]

[53] The UWU also submits that the history of pieceworker rates in both the horticulture industry and in other industries, and the existence of numerous modern award provisions that provide for pieceworker rates as well as a minimum rate, 'is evidence that there is no fundamental or inherent inconsistency between pieceworker rates and minimum hourly wages.'[45]

[54] In its reply submission the UWU submits:

> 'The fact that a particular provision has been in place for a long time, or has not previously existed, does not - without more - justify the retention of the status quo. The statutory requirement that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, includes (by 'relevant') a requirement that modern awards be suited to contemporary circumstances, meaning community standards and expectations.'[46]

[55] The UWU responds to the various employer submissions as follows:

> 'To the extent that these submissions suggest that the FWC's power under s 157 to vary an award is limited or constrained by the history of that award, or the presumption that applied to the (now abolished) four yearly review of modern awards that a modern award met the modern awards objective at the time it was made, or that the varied award modernisation request is dispositive of this application, they are incorrect. The FWC is entitled to and should take into

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[41] NFF submission, 11 June 2021 at [16].

[42] Ai Group submission, 1 June 2021 at [6].

[43] Ai Group submission, 1 June 2021 at [53].

[44] AWU submission in reply, 2 July 2021 at [2]-[3].

[45] UWU submission in reply, 5 July 2021 at [19(c)].

[46] UWU submission in reply, 5 July 2021 at [20].

account all of those matters which it might properly consider to be relevant. That includes matters that have emerged since the making of the Award - including evidence of the operation of the modern award clause - that now justify the Award variation.'[47]

[56] The parties' attention is drawn to *Re Restaurant & Catering Industrial*[48] in which a Full Bench observed that 'the constraints that the Ministers Award Modernisation Request placed on the AIRC as to the terms it could include in modern awards do not apply to variations to modern awards under the Act.'[49]

5. Judicial Consideration of Clause 15.2

[57] Clause 15.2 of the Award was considered by the Federal Court in *Fair Work Ombudsman v Hu (No 2)*[50] (*Hu (No 2)*) and *Fair Work Ombudsman v Hu*[51] (the *Hu Appeal*). The UWU submits[52] that the following key principles can be drawn from these judgments:

1. Clause 15.2 is a protective provision designed to provide a safeguard for pieceworkers.[53]

2. While clause 15.2 requires the piecework rate to be fixed by agreement, in practical terms, this will almost invariably mean that the employer fixes the rate, and the employee decides whether to accept it.[54]

3. The clause requires the minimum piecework rate to be determined by the following method:

    (i) Ascertain the hourly rate prescribed under the Award for the type of employment and the classification level of the employee (including, for example, casual loading if applicable) and then add 15% to that amount.

    (ii) The hypothetical 'average competent employee' must be identified.

    (iii) Identify the hypothetical hourly pick rate of the 'average competent employee' performing the work at the particular place of work at that particular time.

    (iv) Divide the hourly rate plus 15% by the hourly pick rate of the hypothetical 'average competent employee' or, where an employer has already set a piecework rate, the employer can compare the hourly pick rate of the 'average competent employee' against the calculation performed at paragraph i above.[55]

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[47] UWU submission in reply, 5 July 2021 at [22].

[48] [2021] FWCFB 4149.

[49] [2021] FWCFB 4149 at [91].

[50] [2018] FCA 1034.

[51] [2019] FCAFC 133.

[52] UWU submission, 19 March 2021 at [22].

[53] *Hu (No 2)* at [24], [140]; *Hu Appeal* at [74] and [75] per Bromberg J.

[54] *Hu (No 2)* at [25]; see also Exhibit UWU2, Witness Statement of Rodney McDonald at [12]; Exhibit UWU6, Witness Statement of Witness 1 at [10].

[55] *Hu (No 2)* at [26]- [27].

4. The determination of the pick rate of the 'average competent employee' is not an arithmetical exercise, but rather a predictive, theoretical exercise[56]. For example, for fruit or vegetable pickers, the hourly pick rate of the 'average competent employee' would be dependant upon the average quantity of fruit or vegetables such an employee would pick per hour.

5. The 'average competent employee' is not necessarily 'proficient' but at least 'suitable, sufficient for the purpose, adequate' and must be selected from the pool of competent employees.[57] An employee who is not competent, for example, an employee who is still in training, must be excluded when determining the 'average competent employee'.[58]

6. To determine what such a hypothetical employee will be able to earn, factors both personal and external to the hypothetical employee must be considered. These factors include:

    (i) personal characteristics, such as diligence, aptitude, and experience; and an assumption that training and induction has been provided;

    (ii) personal characteristics such as age, strength, and stamina (which while not relevant, on the evidence, in the case of picking mushrooms, may be relevant in relation to 'some other types of horticulture');

    (iii) the general level of experience of the available workforce considered as a whole; and

    (iv) external factors which may include density, quality, size of the product, the prevalence of unhealthy product which may be affected by growing conditions, as well as the nature and quality of the equipment provided.[59]

[58] The UWU also submit that in *Hu (No 2)* the Court held that to be compliant with clause 15.2 of the Award, a piecework rate must not only be at a level which would allow the average competent employee to earn at least 15% more than the minimum hourly rate at the time the agreement is entered into, but must also be adjusted by the employer if the piecework rate later becomes inadequate (because, for example, if the minimum rates prescribed by the Award increased during the employment, but also if other variables associated with the fixing of the rate change).[60] Whilst the requirement to constantly vary the piecework rate can be a precarious task for the employer, '[a]n employer fixing a piecework rate fixed in an employment agreement takes a risk that the agreement will not comply with cl 15 of the Award.'[61]

[59] The AFPA's submission also considers *Hu (No 2)*.[62]

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[56] *Hu (No 2)* at [28]-[29].

[57] *Hu (No 2)* at [31].

[58] *Hu (No 2)* at [30] and [85].

[59] *Hu (No 2)* at [33]-[38].

[60] *Hu (No 2)* at [139].

[61] *Hu (No 2)* at [49].

[62] See AFPA submission, 11 June 2021 at [8].

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)?

[60] The *Hu Appeal* also dealt with the legal consequences of non-compliance with clause 15.2. A piecework rate which is set at a rate less than the rate required by the operation of clause 15.2 is a breach of the Award and a contravention of the Act.[63]

[61] In the *Hu Appeal* their Honours Flick and Reeves JJ held that an employee subject to a non-compliant piecework agreement does not, by result of the breach, become entitled to the 'non piecework provisions' of the Award. The only recompense for the employee is that they are instead is entitled to an award of compensation calculated as the difference between the piecework rate that was paid and the piecework rate that ought to have been paid.[64]

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

[62] At [23] of its submission dated 1 June 2021, Ai Group submits that in *Hu (No 2)* Rangiah J 'confirms that the protections outlined in cl 15.2 are, whilst more limited than the AWU would prefer, consistent with ss.134 and 138 of the *Fair Work Act 2009*.'[65]

[63] In reply the AWU submits that Ai Group's submission that, in *Hu (No 2)*, Rangiah J 'confirmed' that the protections in clause 15.2 are consistent with ss.134 and 138 of the Act[66] must be rejected:

> 'His Honour did no more than observe that the provision of safeguards for pieceworkers was consistent with the requirement to provide a fair safety net of terms and conditions. It is, obviously enough, not the role of the Court to consider whether the Award provides a fair and relevant safety net of terms and conditions. That is a matter for the Commission to determine when making or varying an award.'[67] [Footnotes omitted]

6. The Evidence and Findings Sought

[64] The principal parties (AWU, UWU, NFF and AFPA) have reached an agreed position in relation to the issue of evidentiary objections:

> 'The agreed position is that the parties will not raise objections to each other's evidence on the basis that each party will be free to make submissions that a piece of evidence will be given little weight or no weigh (irrespective of whether the relevant witness was cross-examined.'[68]

[65] A list of the exhibits tendered during the proceedings is attached at **Attachment A**.

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[63] Act, s 45.

[64] *Hu Appeal* at [26] per Flick and Reeves JJ; *Hu (No 2)* at [146] - [149].

[65] Ai Group submission, 1 June 2021 at [23].

[66] Ai Group submission, 1 June 2021 at [23]-[24].

[67] AWU submission in reply, 2 July 2021 at [4].

[68] Correspondence from the AWU, 9 July 2021.

[66] A list of the witnesses called to give evidence during the proceedings is attached at **Attachment B**.

[67] The attention of the parties is drawn to a number of Full Bench decisions which have commented on the assessment of the probative value of survey evidence and qualitative research:

- *Penalty Rates Decision* at [1063]-[1104], [1184]-[1264]
- *Annual Wage Review 2012-13* [2013] FWCFB 4000 at [442]-[446], and
- *4 yearly review of modern awards - Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383 at [168]-[173].

7. Summary of submissions

[68] To date the following submissions have been filed in the proceeding:

Union Parties

- AWU (19 March 2021)
- AWU in Reply (2 July 2021)
- UWU (19 March 2021)
- UWU in Reply (2 July 2021)

State Governments

- Queensland Government (27 May 2021)
- Victorian Government (11 April 2021)
- Western Australian Government (25 May 2021)

Other organisations

- Australian Council of Social Service (30 March 2021)
- Uniting Church in Australia (10 June 2021)
- 88 Days and Counting (11 June 2021)

Employer Associations

- AFPA (11 June 2021)
- NFF (11 June 2021)
- Ai Group (2 June 2021)
- Fruit Growers Tasmania (28 May 2021)

Individual Businesses

- Payne's Farm Contracting Pty Ltd (21 May 2021)
- Lucaston Park Orchards (10 June 2021)

[69] This summary does not include the closing submissions which are to be filed today.

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

7.1 Union Parties

7.1.1 AWU

[70] The AWU contends that the current piecework provisions in the Horticulture Award 'fail to provide for an equitable scheme or ensure proper protection against the abuse of piecework arrangements' and 'thereby fail to provide a fair and relevant minimum safety net'.[69] In particular the AWU submits that the current piecework provisions have 'failed to prevent the piecework arrangements resulting in employees frequently earning substantially below the minimum rates set by the Horticulture Award'. The AWU contends that:

> 'The variations sought are necessary to achieve the modern awards objective of ensuring that the modern award, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.'[70]

[71] The AWU submits that the characteristics of the workforce are also relevant to the assessment of what is necessary to provide a fair and relevant safety net of terms and conditions, in particular:[71]

- The size of the horticulture workforce is difficult to estimate due to the large number of transient workers, seasonality and an unquantifiable number of undocumented workers in the industry.
- The proportion of casual employees recorded in ABS data varies between around 35% and 50% with a high degree of volatility from quarter to quarter and are likely to underestimate both the total workforce and the proportion of casual employees in horticulture given the transient and seasonable nature of the workforce and the number of undocumented workers.[72]
- There is no official data on the number of workers in horticulture who are engaged on piecework arrangements.
- Temporary migrant workers make up a significant proportion of the horticulture workforce, including many undertaking work on the working holiday visa program as a result of encouragement to work in horticulture for 88 days during their first year to qualify for a second year visa. Temporary migrant workers are frequently poorly informed about their employment rights, may have limited English language skills and be vulnerable to exploitation.[73]
- There has been a radical increase in the proportion of overseas workers, including working holiday makers, working in horticulture since the early 2000s.

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[69] AWU submission, 19 March 2021 at [3].

[70] AWU submission, 19 March 2021 at [5].

[71] AWU submission, 19 March 2021 at [21].

[72] Exhibit UWU16, Report of Dr Elsa Underhill at [14]-[15].

[73] Exhibit UWU16, Report of Dr Elsa Underhill at [16]-[17].

- Along with the changing composition of the workforce, there has been a shift away from farmers hiring workers directly, over time labour hire operators have emerged as major employers of labour in the industry.

[72] The AWU submits that the evidence 'strongly' supports the conclusion that the piecework provisions do not ensure adequate minimum conditions are maintained in the absence of provision for a minimum guaranteed payment having regard to following considerations:

1. Various government reports and academic studies 'overwhelming demonstrate that the majority of workers in horticulture who are paid piecework rates receive well below the minimum hourly rates of pay in the Horticulture Award and below the national minimum wage.'[74]

2. The protection intended to be provided by clause 15.2(b) is 'insufficient and simply not working'.[75] In particular:

    - Clause 15.2(b) relies on an assessment of what piecework rate is necessary to enable an 'average competent employee' to earn 15% more than the minimum hourly rate; an assessment of the piecework rate required to achieve that objective is 'complex, subjective and difficult to enforce'.[76]

    - Clause 15.2(b), together with the statement in clause 15.2(f) that a piecework agreement must be made without coercion or duress 'is inadequate as the sole protective measure to ensure that piecework rates are not utilised in a manner intended to, or having the effect of, undermining the minimum rates set by the Horticulture Award.'[77]

3. The operation of clauses 15.2(a) and (b) and clause 15.2(f) relies on there being a realistic capacity for the employer and employee to reach a genuine agreement on a piecework rate that will enable the employee to earn at least 15% more than the applicable hourly minimum rate. But the characteristics of the workforce makes it inherently unlikely that a system reliant upon genuine agreements being reached between employers and employees will be adequate, in particular:

    - the horticulture workforce is commonly transient with a high level of temporary migrant workers, and

    - workers frequently have limited English language skills, are poorly informed about their employment conditions and legal entitlements, and are vulnerable to coercion and duress (including as a result of isolation, financial pressures and visa conditions).

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[74] AWU submission, 19 March 2021 at [22(a)].

[75] AWU submission, 19 March 2021 at [22(b)].

[76] AWU submission, 19 March 2021 at [22(b)].

[77] AWU submission, 19 March 2021 at [22(b)].

4. The majority judgment in *Fair Work Ombudsman v Hu*[78] revealed a deficiency in clause 15.2. The majority found that, if an employer and employee enter into a piecework agreement under clause 15.2(a), the employee does not have the benefit of the weekly or hourly rates in what is now clause 15.1 even if the piecework rate does not comply with clause 15.2(b).[79]

5. The following modern awards contain piecework provisions which include a guaranteed minimum payment:

    - *Building and Construction General On-site Award 2020*[80]
    - *Silviculture Award 2020*[81]
    - *Sugar Industry Award 2020*[82]
    - *Wool Storage, Sampling and Testing Award 2020.*[83]

7.1.2 UWU

[73] The UWU supports AWU's proposed variation and submits that the Commission can be satisfied that it necessary to achieve the modern awards objective for the following reasons:[84]

1. The operation of clause 15.2 'frequently results in employees covered by the Award being paid a wage that is less than the equivalent of the relevant modern award hourly minimum wage.'[85]

2. The operation of clause 15.2 'frequently results in employees covered by the Award who are average competent employees and who are pieceworkers being paid less than at least 15% more per hour than the minimum hourly rate prescribed in the award for the type of employment and the classification level of the employee.'[86]

3. Clause 15.2 is 'frequently misapplied and is unworkable.'[87]

4. Clause 15.2 fails to take account of changes in community standards and expectations in relation to paying workers low and unliveable wages,[88] and

[78] [2019] FCAFC 133; (2019) 289 IR 240.

[79] *Fair Work Ombudsman v Hu* [2019] FCAFC 133; (2019) 289 IR 240 at [27]-[30].

[80] Clause 19.6(e).

[81] Clauses 15.2(a) and (b).

[82] Clauses 17.3(a) and (b).

[83] Clause 16(d).

[84] UWU submission, 19 March 2021 at [8].

[85] UWU submission, 19 March 2021 at [8(a)].

[86] UWU submission, 19 March 2021 at [8(b)].

[87] UWU submission, 19 March 2021 at [8(c)].

[88] Fair Work Bill 2008 (Explanatory Memorandum) at [518].

5. The uncertainty in the operation of clause 15.2 'results in circumstances where even an employer attempting to comply with the Award in setting piecework rates, faces strong likelihood that their rates are not Award compliant.'[89]

[74] The UWU submits that the inclusion of a provision creating a safety net based on the equivalent hourly minimum wage 'has been shown to be workable under other modern awards and enterprise agreements', such as:

- *Building and Construction General On-site Award 2020*: clause 19.6(e)
- *Silviculture Award 2020*: clause 15.2(a) and (b)
- *Sugar Industry Award 2020*: clause 17.3(a) and (b)
- *Wool Storage, Sampling and Testing Award 2010*: clause 16(d)
- *Real Estate Industry Award 2020*: clause 16.7(c) and (f)
- *Textile, Clothing, Footwear and Associated Industries Award 2020*: clause 10.9, 21.2(f), and
- *Parwan Valley Mushrooms Enterprise Agreement 2019 (AG2020/183)*: clause 7(6)(h).

[75] The UWU submits that the proposed variation requiring the keeping of records is 'warranted and justified' because there is current no requirement to do so, and consequently, there is a 'common tendency' for employers covered by the Award not to keep records.[90] The UWU submits that this is 'a factor that inhibits the ability of an employee to determine whether they are being paid at least the minimum required under clause 15.2 of the Award'.[91]

[76] The UWU contends that the existing piecework provisions do *not* provide a fair and relevant minimum safety net and submits that the piece rate concept 'is based on the idea that an employee is given an opportunity to earn more than a minimum rate of pay, in exchange for higher productivity, but could be paid less than a minimum rate of pay as a result of lower productivity.'[92] It is contended that in order for such a clause to be 'fair' it:[93]

- must provide the employee with a fair opportunity to earn more than the minimum rate
- should not result in employees earning less than the minimum rate, on a frequent basis, and
- should not result in employees rarely or never earning more than the minimum rate.

[77] The UWU submits that the operation of clause 15.2 'frequently results in employees engaged on a casual basis to perform, for example, fruit or vegetable picking and packing, thinning or pruning being paid less than $24.80 per hour (or less than the relevant Award minimum rate which applies from time to time).'[94]

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[89] UWU submission, 19 March 2021 at [8(e)].

[90] UWU submission, 19 March 2021 at [9(b)].

[91] UWU submission, 19 March 2021 at [35].

[92] UWU submission, 19 March 2021 at [28].

[93] UWU submission, 19 March 2021 at [29].

[94] UWU submission, 19 March 2021 at [30].

[78] The UWU submits that the current clause 15.2 is 'unworkable' because:[95]

1. Piece work rates are rarely fixed by agreement and are instead imposed unilaterally on employees at the point of employment.

2. The clause requires a complex, predictive, theoretical exercise to be performed by an employer to ascertain the hourly rate that the average competent employee is able to earn at the piecework rate.[96] This complex process requires factors to be considered including workers' personal characteristics and also various external factors.

3. This complex process to ascertain the hourly rate that the average competent employee is able to earn required by the clause requires an ongoing assessment, taking into account shifting variables such as, for example, product density, quality, size, health, growing conditions, the nature and quality of the equipment provided[97] and changes in award minimum rates of pay[98] (Howe Statement at [231]).

4. The application of clause 15.2 commonly results in a failure to properly take into account factors such as workers' personal characteristics, and external factors such as those associated with the product and environmental conditions. For example:

    - Most commonly, the methodology used to fix a piece rate is derived from the performance of the fastest, most skilled or most experienced worker or from performance of a task in a short interval not reflective of a day's work (McDonald Statement at [25]);

    - Frequently, the health, size or abundance of the produce is not properly taken into consideration (McDonald Statement at [28], [29], [31]; Witness 1 Statement at [6], [7]);

    - Frequently, physical factors such as the size of the trees and their location, or the quality of previous years' pruning and weather conditions are not taken into account (McDonald Statement at [30], [35], [37]);

    - Frequently, specific requirements associated with the work are not taken into account (McDonald Statement at [32]; Witness 1 Statement at [14]); and

    - Frequently, other physical factors such as fatigue and injury are not taken into account (McDonald Statement at [36]; Witness Statement 1 at [16]);

5. It is also rare that the assessment of the hourly rate that the average competent employee is able to earn at the piecework rate is adjusted during the life of the

[95] UWU submission, 19 March 2021 at [33].

[96] *Hu (No 2)* at [28].

[97] *Hu (No 2)* at [36].

[98] *Hu (No 2)* at [140].

"agreement" properly, to take into account the shifting variables which affect the assessment, and are required to be taken into account. For example:

- McDonald Statement at [25 (c), (d) and (e)].
- Robertson Statement at [8] and [28].

[79] The UWU acknowledges that if the Application is granted the difficulties associated with the 'average competent employee' assessment will remain but submits that the variation proposed 'removes the unfairness that is currently being borne by employees as a result of operation of the clause…Thus alleviating the effect of exploitative piecework rates that are prevalent throughout the industry.'[99]

7.2 State Governments

[80] The State Governments of Queensland, Victoria and Western Australia made submissions which were supportive of the Application.

7.2.1 Queensland

[81] The Queensland Government submits that it shares the AWU's concern that employees entering into piecework agreements under the Horticulture Award are not guaranteed the minimum rates of pay available to non-piecework employees performing the same type of work and that existing piecework arrangements 'can create a clear risk that workers may be paid below the minimum award rate'. The Queensland Government submits that the minimum rates in the Horticulture Award 'are there to reflect a fair rate for work performed and also take into account factors such as the relative living standards and needs of the low paid. It submits that:

> 'While offering piecework for fruit picking provides an incentive for increased productivity and reward for skill development, which is relevant in picking a crop where time is of the essence, the Queensland Government supports the AWU's endeavours for piecework arrangements to be underpinned by the Horticulture Award's minimum wage rates. Underpinning piecework with a guarantee of the minimum award rate does not remove the incentive for workers to increase their productivity; rather it ensures that this cohort of workers has the benefit of a minimum guaranteed income for their labour.'[100]

[82] The Queensland Government also submits that:

> '…the piecework rate arrangements currently in the Horticulture Award exacerbate the underpayment of wages by unscrupulous employers against a workforce already more vulnerable to exploitation…The absence of accurate time and wages records makes claims of underpayment difficult to prove, further contributing to wage theft and unjust outcomes for workers.'[101]

7.2.2 Victoria

[99] UWU submission, 19 March 2021 at [34].

[100] Queensland Government submission, 27 May 2021.

[101] Queensland Government submission, 27 May 2021.

[83] The Victorian Government expressed 'strong' support of the AWU application and submitted that:[102]

- The method of payment under clause 15.2(b) has 'in practice,…failed to ensure fair pay is delivered and can result in very low wage rates for workers in the industry when calculated over the period worked, at significantly less than minimum rates.'

- Evidence presented to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (the Inquiry) suggested that 'piece rate workers almost universally have little or no say in determining whether they would be paid piece rates or what the rate would be.' The Inquiry found that:

  'piece rates in the Horticulture Industry undermine the minimum safety net intended to be established by minimum hourly rates and that the safeguards which attach to piece rate systems do not appear to be effective.'

- The existing protections in clause 15.2(b) are not effective and give rise to uncertainty and subjectivity about the appropriate rate of pay.

- The circumstances experience by many horticulture workers mean that most piece rates are not the product of genuine agreement,:

  'This renders null any other protection offered by clause 15.2(f), which aims to address coercion and duress. The variation in rates and lack of transparency further diminishes workers' ability to negotiate a fair rate. Additional protections are required to ensure that, for piece workers in the horticulture industry, the modern award objectives are met.'

[84] The Victorian Government went on to state:

> 'We know thousands of farm business and labour hire companies across the state value the contribution made by their seasonal workforce and manage their workplaces to ensure employees are safe and paid appropriately. However, the Victorian Government supports greater transparency in the horticulture industry, particularly when it comes to wages and workplace conditions. While most businesses in agriculture understand the value of their workers, we know there are unscrupulous operators in this industry. Exploitation of workers is unacceptable and will not be tolerated by this Government.
>
> The Victorian Government supports insertion of clauses proposed by the AWU to provide a clear safety net minimum wage floor for piece workers under the Horticulture Award. This support is consistent with the Victorian Government's commitment to addressing inequality in the workplace. It also aligns with our policy support for a fair and relevant safety net of workplace conditions for businesses and workers alike.'[103]

7.2.3 Western Australia

[85] The Western Australian Government submits that it 'strongly supports fair and safe work practices and pay' and 'the principle of a minimum wage' and believe that there should be adequate measures in place to protect workers from exploitation'.

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[102] Victorian Government submission, 11 April 2021.

[103] Victorian Government submission, 11 April 2021, p 2.

[86] The Western Australian Government submits:

> 'the availability of international holiday maker and seasonal worker labour has distracted from the need to invest in technological innovation that could reduce some of the physical demands of the work and make it easier to attract local labour. Government and industry need to place some focus in this area.
>
> While the vast majority horticulture businesses understand the value of their workers, we know there are some operators in the industry who operate without regard to providing a fair return to their workers. We support greater transparency in the horticulture industry when it comes to wages and workplace conditions.
>
> We recognise this is a complex issue and it is important that any changes to the award are sustainable for both businesses and workers. Horticulturalists are price takers and cannot necessarily pass on cost increases. However, the reputation of industry and its ability to attract workers into the future requires that standard safety nets of a minimum wage should apply to horticultural workers.
> …
>
> We also note that the circumstances experienced by many horticulture workers (transient, limited English language skills, isolation, financial and visa pressures) can mean that piece rates are not the product of genuine agreement. This renders null any protection offered by clause 15.2(f), which aims to address coercion and duress.
>
> We understand that some employers will start new workers on an hourly rate until they are competent before moving them onto piecework. There may be an option to regulate this approach or ensure further support or training is provided to bring workers up to an acceptable performance standard.'[104]

7.3 Other organisations

7.3.1 ACOSS

[87] ACOSS supports the AWU application and submits:

> 'Certain features of the labour market for horticultural work increase the risk that workers will be underpaid and unfairly treated. The work is temporary, people must usually travel long distances to commence, employment responsibilities are often delegated to labour hire firms (which are unregulated in NSW, the Northern Territory, WA, and Tasmania), and employers make widespread use of temporary migrant labour and undocumented workers.
>
> Working holidaymakers are especially vulnerable to under-payment as they must provide evidence of a three months' employment in a regional area (usually in agriculture) in order to gain a second year on their visa, and these arrangements are poorly regulated. Unlike the Seasonal Worker Program, employers are not required to register in order to employ working holiday-makers. In a major survey of temporary migrants, 15% of horticulture workers stated that they earned $5 per hour or less…'[105]

7.3.2 Uniting Church Australia

[104] Western Australian Government submission, 25 May 2021, p 1-2.

[105] ACOSS submission, 1 April 2021, p 2.

[88] Uniting Church in Australia (Uniting Church) supports the AWU application. The Uniting Church submits that:

> '…clause 15.2, as it stands, has been open to abuse by unethical growers and labour-hire businesses. We have experience of farms where no worker, no matter how hard they work, has been able to earn the average competent employee rate of 15 per cent more than the applicable minimum hourly rate under the award…
>
> In practice, the setting of piece rates under clause 15.2 has failed to ensure fair pay is provided in a substantial number of cases in our experience. The flexibility provided to employers under clause 15.2 also makes it very hard for the Fair Work Ombudsman to challenge the piece rates set, even when any reasonable person would conclude they have been set unfairly low in breach of the requirements.'[106]

[89] Uniting Church submits that adopting the AWU application will:[107]

- encourage growers to use more experienced people and invest more in training people to be more efficient at their work,[108] and
- continue to provide an incentive to people working in horticulture to increase their productivity in order to earn more than the minimum hourly rate and incentivise employers to set fair piece rates.

7.3.3 88 Days and Counting

[90] 88 Days and Counting also supports the AWU application.

[91] 88 Days and Counting describes itself as an organisation campaigning to raise awareness around Working Holiday Maker's financial exploitation, emotional and sexual abuse caused by the mandatory Australian Federal Government's Working Holiday Visa Program.

[92] 88 Days and Counting submits that:

- The piece rate provisions are sexist and discriminatory – women and people with disabilities are not able to earn as much as able bodied men.
- Employers can manipulate the picking rate to favour or punish competent workers:

> 'Piece rates are also not set and are at the discretion of farmers, meaning these rates can fluctuate from one far to another and over the course of a day. For example workers can be told at the start of the day the piece rate is $0.89 per bucket, then at lunch time they can be told they are being "too efficient" and the piece rate and advised that the rate will be reduced to 50c for the rest of the day.'[109]

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[106] Uniting Church submission, 10 June 2021, p 1, 3.

[107] Uniting Church submission, 10 June 2021, p 3-4.

[108] The Uniting Church conceded this was the same argument advanced by FGT, but submitted that, contrary to FGT's position, the outcome is desirable.

[109] 88 Days and Counting submission, 15 June 2021, p 2.

- The current provisions give rise to 'collective piece rates', which cap productive workers' ability to earn more:

> '"Collective piece rates" are also offered to workers who are paired up with another worker. Although piece rates are meant to be offered on an individual basis, what we are generally seeing happening on farms is workers are paired in groups. This means that faster workers are earning a lower wage and this means they are often less than the award wage. Also If [sic] a faster worker is paired with a slower worker or in a group that has more inexperienced workers that are undertaking training they can earn much more than their counterparts, while their colleagues are stuck earning much less unable to meet the more experienced workers picking rate.'[110]

[93] 88 Days and Counting submits that the Commission should seek to:[111]

- Abolish the 88 days working holiday visa requirement for working holiday makers in Australia.
- The introduction of a minimum hourly wage for all workers
- Abolish piece rates
- Reform and implement new regulations, including a directory of best practice, and employer registry (so unscrupulous employers can be removed from access to whv holders) across the Working Holiday Visa Program.

Note: the Commission's jurisdiction is set out in the Act and does not extend to the requirements of working holiday visa or the making of new regulations to facilitate the removal of employers from accessing the working holiday visa program.

7.4 Employer Associations

7.4.1 AFPA

[94] The AFPA opposes the Application and submits that if made the variation:

> 'would effectively abandon the concept of a piecework-based safety net. And in the absence of a risk-reward bargain, it would no longer be necessary to keep the Uplift Term [ie clause 15.2(b)] in the Award.'[112]

[95] It is convenient to note here that in its reply submission the UWU challenges the AFPA's characterisation of clause 15.2 as providing 'a performance-based safety net that contains an element of risk and reward', and containing a 'risk-reward bargain'. The UWU submits that the problem with that characterisation is threefold:

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[110] 88 Days and Counting submission, 15 June 2021, p 2.

[111] 88 Days and Counting submission, 15 June 2021, p 2.

[112] AFPA submission, 11 June 2021 at [3].

1. Performance-based remuneration is only capable of constituting a "safety net" of minimum terms and conditions if at least the minimum rate of remuneration is achievable.

2. The evidence is that workers bear the entirety of the burden of the risk that an employer has not properly or fairly calculated the piece rate. These matters are inconsistent with the purpose of clause 15.2, which contrary to the AFPA's submission, is intended to be protective of employees and ensure that employees are able to earn an adequate piecework rate.

3. To describe clause 15.2 as representing a 'bargain' between employers and workers is to wrongly characterise the content of the modern award as the outcome of a negotiation or other bargaining process between employers and employees. But modern awards are not made in settlement of industrial disputes between interested parties. They are regulatory instruments that set minimum terms and conditions of employment. The content of a modern award cannot be explained or justified on the basis that it represents a bargained outcome between employers and employees.

[96] AFPA's primary position is that the Union Parties have not made out a merits case for this significant change to 'a very long-standing award-based mode of remuneration in the horticultural industry' and on that basis, no variation to the Award is warranted.

[97] If contrary to AFPA's primary position, the Commission were satisfied that an amendment to the Award is required to ensure a fair and effective safety net, the AFPA submits that the variation proposed by the Union Parties 'would be unnecessary and inappropriate having regard to the circumstances of the horticultural industry.'

[98] The AFPA advances three broad lines of argument in support of its position:[113]

1. The case advanced by the Union Parties - that there is a widespread industry practice of setting the piecework rate too low, in breach of clause 15.2(b), resulting in pieceworkers being overwhelmingly paid less than the minimum hourly rates applicable to timeworkers - is significantly overstated. The Union Parties have not adduced reliable evidence concerning the earning outcomes of pieceworkers to satisfy the Commission that the variation they seek is necessary.

2. The issues raised by the Union Parties are 'about whether the existing safety net is being appropriately *implemented*' and while they do not justify the variation sought by the Union Parties, they 'might warrant improvements to the implementation machinery of the piecework provisions of the Award.' The AFPA notes that while clause 15.2(b) requires the piecework rate to be set so that the average competent worker receives a 15% uplift, the Award does not prescribe any specific process or mechanism for ensuring that this objective is actually achieved:

> 'In particular, the Award does not provide any express guidance as to how to identify the cohort of competent employees, how to calculate the initial piecework rate and what, if any, variables to include in that calculation, and how and when the piecework rate should be reviewed and updated to ensure compliance with the Uplift Term. The safety

[113] AFPA submission, 11 June 2021 at [6].

net could be improved to provide more clarity around this, requiring employers to follow a particular approach to setting the rate. This would make it easier to monitor compliance and close avenues for abuse by unscrupulous employers.'[114]

3. The Commission were satisfied that the safety net requires variation, the solution would not be to 'eviscerate the piecework-based safety net by throwing out the risk-reward bargain [which] would run the significant risk of causing disruption to the industry with adverse outcomes for many growers and the labour market.' The AFPA submits that a 'more cautious, measured and balanced approach could achieve substantial practical improvements to the safety net.'

[99] In section D.2 of its submission the AFPA submits that 'there are sound reasons why piecework remains an essential mode of engagement for some tasks', particularly picking:[115]

1. Growers require a workforce that is both seasonal, large in peak periods (to ensure that all the ripe produce is picked before it overripens or spoils) and varying in size over the course of the season. Fresh produce harvesting is generally seasonal, with produce being available to be harvested only during particular months or weeks of the year. The volume of product that ripens varies over the season, increasing from the start to the middle of the season and then dropping off until the end of the season. Further, even within the season, the produce needs to be harvested very quickly after it reaches the right level of ripeness and/or size. For example, mushrooms grow so quickly that there is only an 18-hour window to pick them at their optimum size and condition. Similarly, the picking window for raspberries and blackberries is only one day.

2. The inherent seasonality and unpredictability of the demand for picking labour has always meant that the workforce included a substantial proportion of inexperienced workers. But in recent years, the decline of professional 'picking gangs' means that (under normal conditions prevailing before the pandemic) much of the workforce is drawn from backpackers with no prior experience and often poor motivation. A substantial minority of pickers start the job, decide that the job is not for them and leave in a matter of days and sometimes on the first day. A majority leaves within eight weeks.

3. Picking is not rocket science, but it does require some experience to achieve a basic level of competence. Depending on the type of produce, it takes a novice several weeks of experience to become a competent picker and it can take longer than that to achieve an average level of competence.

4. Given the time it takes to achieve competency and the nature of the picking workforce described above, there is usually a substantial proportion of the workforce who have not yet achieved basic competence and many employees leave before they become competent. The output of these not-yet-competent employees is very low compared to the cohort of competent workers.

[114] AFPA submission, 11 June 2021 at [6(b)].

[115] AFPA submission, 11 June 2021 at [24].

[100] The AFPA submits that piecework engagement provides an 'attractive option for both employers and employees':[116]

- For the employers, the labour cost of the substantial proportion of employees with low productivity is kept commensurate with their productivity until they achieve basic competence:

> 'This allows employers not to be discerning in selecting and retaining their pickers and to continue engaging pickers found to have low productivity. It also means that novice employees are incentivised to learn the job and achieve competence as quickly as reasonably possible and more experienced employees are incentivised to maximise their productivity, while receiving the commensurate reward.'[117]

- Employees also benefit from the arrangement:

> 'Unskilled and unmotivated individuals with no experience, who would otherwise make unattractive candidates, can obtain employment. Pickers who are not motivated to be productive and maximise their remuneration (eg backpackers who are only doing the job to satisfy visa requirements or "grey nomads" who pick as a lifestyle choice) can pick at a pace that suits them but still retain their employment.'[118]

[101] The AFPA contends that the Award currently offers the choice of two alternative modes of engagement with different safety nets — engagement as a timeworker and engagement as a pieceworker, it submits that: 'The effect of the variation proposed by the AWU would effectively remove this choice, disadvantaging both employers and employees.'[119] This is said to be so for three reasons:[120]

1. The 'logical consequence' of the proposed variation would be that the 15% uplift for pieceworkers should be removed. The AFPA submits that the uplift is justified by the absence of a guaranteed hourly rate for pieceworkers as,:

> 'The requirement that an average competent pieceworker earn more than a timeworker doing the same work is the quid pro quo for the risk of earning less than the timeworker if the pieceworker underperforms. This is the risk-reward bargain. If pieceworkers are to be guaranteed the same hourly earnings as timeworkers, the main downside of piecework is removed and the upside is with the pieceworker — the opportunity to earn more than a timeworker. It is then difficult to see what justification would remain for requiring the piecework rate to be set so that the average competent pieceworker earns more than the time worker performing the same work. Hence, the 15% uplift would no longer be "necessary to achieve the modern awards objective".'[121]

   The AFPA submits that if pieceworkers are to be guaranteed the hourly rates of timeworkers but also retain the benefit of clause 15.2(b), this would make the pieceworker mode of engagement unattractive for employers,:

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[116] AFPA submission, 11 June 2021 at [25].

[117] AFPA submission, 11 June 2021 at [25(a)].

[118] AFPA submission, 11 June 2021 at [25(b)].

[119] AFPA submission, 11 June 2021 at [26].

[120] AFPA submission, 11 June 2021 at [27]-[33].

[121] AFPA submission, 11 June 2021 at [27].

> 'This is because an employer engaging someone as a pieceworker would then face the double whammy of both the minimum hourly rates and the Uplift Term. In contrast, if the employer were to engage someone as a timeworker, they can avoid the Uplift Term but can still incentivise high productivity by paying unregulated above-award performance-based bonuses.'[122]

2. It is said to follow that the practical effect of the variation would be to abolish the piece-work safety net and replace it with a safety net based on hourly rates. This is because clause 15.2(b) would no longer be "necessary" to maintain a fair and effective safety net. The uplift would have to go and the piecework provisions would then no longer provide any additional earnings for pieceworkers. The AFPA submits that 'this would be a fundamental change to the safety net.'

3. Such a change would create real difficulties for employers due and poses the risk of substantially disrupting the industry based on the structural reality of its labour market. Indeed, it could push some growers into non-compliance with the Award and other employee entitlements [and] would reduce the economic productivity of the sector (the amount of produce picked per hour worked) by disincentivising substantial parts of the workforce.' The AFPA also submits that such a change would also disadvantage many employees, particularly competent pieceworkers who currently benefit from the uplift provided that the piecework rate is set appropriately, and poorly-performing employees as the requirement to pay everyone the minimum hourly rates regardless of performance 'will force employers to become much more strict in culling workers with low productivity.'

[102] It is convenient to note here that in reply submission the UWU submits that the AFPA's submission that if the Application was granted then the 'logical consequence…would be that the 15% uplift for pieceworkers should be removed…' should be disregarded:

> 'There is no application to remove the "15% uplift" provided for in clause 15.2 and no reason to remove this incentive if a minimum rates floor were introduced.'[123]

[103] AFPA does not challenge the proposition that *some* employers set their piecework rates at inappropriately low levels but submits that the Union Parties' evidence of widespread exploitation 'suffers from fundamental methodological flaws that make it an unreliable guide as to the level of compliance'.[124]

[104] The AFPA submits that 'at its highest', all that the Unions' evidence shows is that:

> 'the practical application of the current piecework provisions may disadvantage employees because piecework rates are, in practice, being set too low. But that is not a reason to throw out the whole concept of a piecework-based safety net, rather it is a reason to vary clause 15 to provide mechanisms that will improve the *implementation* of the concept.'[125]

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[122] AFPA submission, 11 June 2021 at [28].

[123] UWU submission in reply, 5 July 2021 at [28].

[124] AFPA submission, 11 June 2021 at [6(a)].

[125] AFPA submission, 11 June 2021 at [40].

[105] The AFPA also notes that the characteristics of the workforce on which the Union Parties rely to justify the variation are not new:

> 'Indeed, the fundamental characteristics of the horticulture industry and its workforce that make piecework engagement so critical have been recognised in arbitral decisions going back as far as the 1920s and 1930s. The rise of backpackers as a major component of the workforce merely exacerbated an old problem of inexperienced labour and in any event pre-dates the making of the Award. What is new, however, are the recent regulatory schemes for licensing labour hire providers. These will presumably improve the level of compliance with workplace laws by labour hire providers.'[126] [Footnotes omitted]

[106] The AFPA submits that the *concept* of a piecework-based safety net with a 15% uplift is 'sound and meets the unique needs of the horticulture industry, where product is often highly perishable and must be picked within a narrow time window to maximise yield, quality and pricing. If any amendment were necessary, it would be to improve the practical implementation of that concept through additional machinery provisions.'[127]

[107] In section 3 of its submission the AFPA proposes an alternative variation for the Commission's consideration if the Commission were to form the view that the current piecework provisions need to be varied. The proposed alternative variation preserves the concept of a piecework-based safety net with an uplift of earnings for competent pieceworkers compared to timeworkers, but provides additional implementation machinery to support the transparent and consistent application of piecework rates.

[108] The AFPA's alternate proposal has five major parts, which can be either combined or chosen from.

1. The Award could prescribe a specific process that must be used to determine the piecework rate, along the following lines:

    (a) The employer must identify the cohort of competent employees, with 'competent employee' to be defined as someone who is suitable, sufficient or adequate to perform the work. The definition would also make it clear that the employee need not be 'proficient' to be competent. This part of the variation will provide specific guidance to employers as to how to set the competence threshold having regard to the complexity of the work and other factors. Importantly, an employee would be *deemed* to be competent after they have been performing the task for a prescribed period (indicatively, 4 weeks as a catch-all outer limit);

    (b) The employer must calculate (or, in the case of the initial setting of the piecework rate, estimate):

        (i) the total output[128] of the cohort of competent employees in a relevant period; (**Total Output**); and

[126] AFPA submission, 11 June 2021 at [37].

[127] AFPA submission, 11 June 2021 at [41].

[128] Measured in an appropriate unit, such as punnet, bucket, kilogram, etc.

(ii) the total combined hours of work of this cohort during the same relevant period (**Total Hours**);

(c) The employer must divide the Total Output by Total Hours to obtain the **Average Hourly Output of a Competent Worker**;

(d) For each applicable classification and type of employment, the employer must take the applicable minimum hourly rate, add 15% and then divide by the Average Hourly Output of a Competent Worker. The result is the minimum piecework rate.

2. The employer could be required to review and adjust the piecework rate at prescribed intervals (say, every pay period) to make sure that it is set appropriately.

3. To provide further protection to novice employees who have not yet become competent, the employer could be required to pay these employees at the level of the slowest competent employee.

4. The employer could be required to keep a record of all hours worked by a pieceworker, as well as the calculations set out above.

5. The Award could make it clear that the employer is required to pay a pieceworker at the applicable minimum hourly rate (instead of the piecework rate) for any work that does not yield any piecework output and is not an inherent part of the piecework.

[109] AFPA submits that its alternate proposal 'addresses the issues raised by the Union Parties while preserving and continuing the concept of a piecework-based safety net with an uplift, which is important to both employers and employees in the horticulture industry.'[129]

[110] In its reply submission the AWU advances the following submission in response to the AFPA's alternate proposal:

> 'The alternative proposal advanced by the AFPA does not adequately address the fundamental problem with the current pieceworker provisions of the Horticulture Award, namely, that the standard set by clause 15.2(b) is subjective and uncertain and that an individual employee will have little practical ability to assess whether the proposed rate is properly set. Furthermore, the proposal would fail to ensure that employees are not required to work for below the properly set minimum hourly rate. The alternative proposal would also involve a substantially greater administrative burden on employers than the variation sought by the AWU.'[130] [Footnotes omitted]

[111] In its reply submission the UWU supports the intention behind the AFPA's alternate proposals but submits 'they do not go far enough':

> 'The proposals on their own will not resolve the fundamental inconsistency between clause 15.2 and the concept of a fair and relevant minimum safety net of terms and conditions, given the

[129] AFPA submission, 11 June 2021 at [49].

[130] AWU submission in reply, 2 July 2021 at [26].

frequency with which employees covered by the Award are paid less than the equivalent of the Award minimum for work performed.'[131]

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

7.4.2 NFF

[112] NFF opposes the AWU application and advances three broad lines of argument:[132]

1. The proposed variation will not serve the intended purpose; it will not make the safety net 'appropriate':

   'the application is attended by a series of negative consequences which are likely to affect employees engaged by horticulture producers and growers, to change the balance of workers seeking work there; and are likely to render the industry less productive'[133]

2. The proposed variation will result in changes to the types of employees who will obtain work in the future; the engagement and utilisation of technology or alternative means of farming and dismissing or not hiring unproductive workers.

3. The proposed variation will put economic pressure on growers.

[113] The NFF submits that the 'safety net currently provided under clause 15.2 is appropriate and sufficient for the horticulture industry.'[134]

[114] The NFF submits that the Commission should find that the AWU's application and evidence relied upon do not warrant varying the Award, and that the AWU has failed to demonstrate a causative link between its submissions and evidence. The NFF submits that if there is a 'cure needed', the Application may not address that complaint and that non-compliance is matter to be dealt with under the existing facilities of the Act.[135] As to the last point the NFF submits:

'This is an approach which is misconceived, on several levels. The first level involves the consideration of non-compliance. If there be wide-scale (which NFF submits is not made out, whether from the AWU's material nor from any other direct source) then such a compliance matter is dealt with under the existing facilities of the FW Act. That is only a minor point in favour of an award variation and substantially outweighed by countervailing considerations.

In particular, the conclusions of the AWU in relation to compliance have the aspect of a hypothetical solution to an unspecified and unexplained problem. The Commission should conclude (on the basis of the NFF's statements) that vast majority of employees whose pay and wage records are specified in the NFF's material earn greater than 15% above the Award minima. A significant portion of those employees (such as annexed to the Kelly statement (at exhibit 'A') earn significantly above this sum.'[136]

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[131] UWU submission in reply, 5 July 2021 at [14].

[132] NFF submission, 11 June 2021 at [3].

[133] NFF submission, 11 June 2021 at [3].

[134] NFF submission, 11 June 2021 at [4].

[135] NFF submission, 11 June 2021 at [27]-[28].

[136] NFF submission, 11 June 2021 at [29]-[30].

7.4.3 Ai Group

[115] Ai Group opposes the AWU application and submits that the option of paying piecework rates rather than minimum hourly rates 'is a fair and appropriate conditions for the horticulture industry which enables employees to earn well above what would otherwise be the minimum hourly rate.'[137]

[116] Ai Group submits that the decision of Rangiah J in *Hu (No 2)* confirmed that the protections outlined in cl.15.2 are consistent with ss.134 and 138 of the Act.

[117] Ai Group submits that there are significant safeguards present in the Award to ensure that any vulnerabilities to which employees are exposed do not cause detriment:[138]

- The piecework rate must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the Award for the type of employment and the classification level of the employee (cl. 15.2(b))
- The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement (cl. 15.2(b))
- The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress (cl. 15.2(f))
- The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee (cl. 15.2(g)), and
- The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record (cl. 15.2(h)).

[118] As to the Unions' contention that the safety net currently provided by clause 15.2 is inadequate or not working, Ai Group submits that these arguments 'are less relevant to the issue of whether there currently is an adequate safety net than they are to the issue of adequate enforcement of existing provisions in the Award'[139] and that:

> 'An amendment which is founded on an alleged failure of some employers to apply current provisions should not be made. Enforcement of existing provisions is a separate issue outside the purview of the Commission.'[140]

[119] As to the awards that the AWU submit contain piecework provisions, Ai Group submits:

> 'The guarantee of payment at an equivalent hourly rate of pay in these provisions should be seen as a substitute for the more generous safeguard which already exists in cl. 15.2(b) of the Horticulture Award which guarantees payment at a rate which enables the average competent

[137] Ai Group submission, 1 June 2021 at [9].

[138] Ai Group submission, 1 June 2021 at [22].

[139] Ai Group submission, 1 June 2021 at [18].

[140] AI Group submission, 1 June 2021 at [13].

> employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the Award for the type of employment and the classification level of the employee. None of the Awards utilised for comparison purposes in the AWU's submission guarantees payment of the equivalent minimum hourly rate of pay in addition to a requirement that the rate set for piecework be such as to enable an average competent worker to earn a specified minimum percentage above the minimum hourly rate. The AWU's application would unnecessarily apply two safeguards and dramatically reduce the incentive on the employer's part for utilising the piecework rates at all.'[141]

[120] Ai Group submits that the AWU's proposed variation would *not* satisfy the need to ensure a simple, easy to understand, stable and sustainable modern award. As to the arguments raised by the Union Parties regarding uncertainty around the operation of clause 15.2(b), Ai Group contends such issues are not resolved by the Application.

[121] In respect of the ability of employees to make 'genuine agreements', Ai Group submits that asserted or actual non-compliance with an award provision should not be considered justification for adding additional entitlements to comply with:

> 'Any failure to comply with the present conditions mandated under the Horticulture Award is appropriately met with an enforcement response. As discussed above, the Australian Government and the FWO have taken numerous steps to increase compliance with workplace obligations, both generally and in respect of the horticulture industry…Existing safeguards are adequate.'[142]

[122] Ai Group submits that, contrary to the AWU's suggestion, asserted growth in the labour hire industry should have no bearing whatsoever on the Commission's decision in determining the AWU application, noting:[143]

- Engagement of labour hire is a legitimate and essential option for many companies
- Labour hire employees are afforded the same protections under the Act and modern awards as other employees, and
- Labour hire operators are subject to greater regulation in some jurisdictions, with labour hire licensing schemes in place in Victoria, Queensland, South Australia and the Australian Capital Territory.

[123] Ai Group submits that the AWU's submission in respect of the impact of a recording of hours requirement is 'misguided'.[144] Ai Group submits that an employer would need to take the steps outlined at [26]-[38] of Rangiah J's decision in *Hu (No 2)*, which involve identifying the characteristics of the hypothetical average competent employee and predicting the pick rate of that employee. Ai Group contends that:

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[141] Ai Group submission, 1 June 2021 at [38].

[142] Ai Group submission, 1 June 2021 at [65]-[66].

[143] Ai Group submission, 1 June 2021 at [70]-[71].

[144] Ai Group submission, 1 June 2021 at [75].

> 'At most, this would require reassessment of the hourly rate an average competent employee is able to earn performing the work to be done under the agreement at the proposed piecework rate each time a relevant variable that could impact that rate changes.'[145]

[124] Ai Group contends that it is unclear how an employee not being provided with a record of their working hours inhibits their capacity to determine whether they are being paid correctly pursuant to cl.15.2(b) as the minimum piecework rate is not determined on the basis of an individual's hours of work.[146]

7.4.4 Fruit Growers Tasmania

[125] Fruit Growers Tasmania (FGT) opposes the AWU application.

[126] FGT is a not-for-profit association with over 80 grower members across all three regions of Tasmania producing apples, berries, cherries and other stone fruits including apricots and pears. FGT represents growers who directly employer some 1,500 people in on-going roles, and over 8,000 seasonal roles in the peak of the season.

[127] FGT submits that the AWU is 'wrongly conflating the very serious issue of the underpayment of workers with merits of a legitimate payment system' and contends that the underpayment of workers is *not* simply a pieceworker rate issue.[147]

[128] FGT submits that pieceworker rates benefit both the worker and the employer by driving productivity and providing flexibility and incentives for the worker. FGT submits that the AWU application will undermine the fairness and effectiveness of pieceworker rates, contending:

- The AWU's argument that the 'majority of casual pieceworkers earn well below the minimum hourly rate' is factually incorrect with respect to the Tasmanian industry.[148]

- The AWU's argument that current arrangements are impossible for employees to understand is not correct; many thousands of employees in the Tasmanian fruit industry 'happily' work to the current arrangements, including those with English as a second language, foreign workers, international students and those on seasonal worker programs.[149]

- Piece rates without a floor do not create a loophole in the modern award 'safety net'; clause 15.2(b) constitutes a safety net and Tasmanian fruit growers set their piece rates to comply this requirement. FGT submits that 'just because some workers earn lower "effective" hourly rates does not in itself imply a loophole in any 'safety net, without further investigation and justification.'[150]

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[145] Ai Group submission, 1 June 2021 at [75].

[146] Ai Group submission, 1 June 2021 at [76]-[77].

[147] FGT submission, 31 May 2021, p 7.

[148] FGT submission, 31 May 2021, p 3.

[149] FGT submission, 31 May 2021, p 3.

[150] FGT submission, 31 May 2021, p 4.

- The introduction of a minimum hourly rate as a floor would break the current direct relationship between productivity and rate of pay and make the system 'less productive' – all workers would be paid the same irrespective of productivity.[151]

- Employers will be incentivised to recruit workers who are sufficiently productive, which would be costly for employers. Growers will be attracted to recruiting experienced workers, who are typically international workers.[152]

- The AWU's argument that Australians would be attracted to work in horticulture if a floor was set is misplaced; such opportunities already exist and are not pursued by Australians and an incentive already exists by virtue of clause 15.2(b) of the Award.[153]

[129] FGT also submits that the AWU application would deny 'young, young at heart people, and other workers who currently participate happily and freely in fruit picking work' the opportunity to work at pieceworker rates lower than the suggested floor. In particular:[154]

- Pieceworker rates encourage workers of many different skills, physical capabilities and commitment levels and under the current system, all persons undertaking the same work are rewarded equally, with productivity being the sole factor in determining the rate.

- Inexperienced workers, older workers and those with impaired capabilities or aptitudes will be excluded from participating because, despite being ready, willing and able, growers will not be able to afford to pay the equivalent of higher per-unit costs for workers whose productivity is less than the floor price.

7.4.5 Individual Businesses

(i) Payne's Farm Contracting Pty Ltd

[130] Payne's Farm Contracting Pty Ltd (Payne's) opposes the AWU application.

[131] Payne's offers specialist pruning services to growers in Sunraysia, and prior to the Covid-19 pandemic, worked in eastern Victoria, southern New South Wales and South Australia.

[132] Payne's asserts that over the last few years it has lost business to competitors who undercut them, but claims that it is not because of misuse of the piece rate provisions:

> '• The most popular method employed by our competitors is to classify their workers as 'part time' when in fact they are actually casual. This allows a significant reduction in the hourly rate charged. If the AWU is concerned about the incorrect use of Piece Rate then I would suggest that this is equally rife.

[151] FGT submission, 31 May 2021, p 4.

[152] FGT submission, 31 May 2021, p 5.

[153] FGT submission, 31 May 2021, p 6.

[154] FGT submission, 31 May 2021, p 6-7.

> • Our competitors seem to have a much larger supply of workers than we've ever been able to attract even though our pay rates are higher. How is this? Their workers are either illegal or are (in one region a large community who arrive at the site with their whole extended families [including grandparents and small children] and pool their work, are already in receipt of welfare payments and are paid in cash for their work).
>
> • Other competitors have a number of sub-contractors who dilute the takings at each stage and blur the lines of command, use illegal workers and again – pay in cash.
>
> • The preference for cash of course means that there will be no paper trail and the contractor avoids the expense and admin associated with paying WorkCover, Superannuation, PAYG and GST – all of which take its toll on our company. And given that the government withholds 65% of superannuation paid to backpackers – who can blame them?'[155]

[133] Payne's primary submission is that better enforcement of current laws is required, rather than more regulation. Payne's submits that 'changes to the Piece Rate arrangements will not improve the situation or effect [sic] those operating outside of the law'.[156]

(ii) Lucaston Park Orchards

[134] Lucaston Park Orchards (LPO) opposes the AWU application.

[135] LPO is a family business growing raspberries, cherries and applies and submits that many of its pickers earn well in excess of the reward requirements, with some earning up to $540 per day picking cherries and $420 per day picking apples.

[136] LPO submits that:

- Introducing a floor price would remove incentive and reward for effort which are 'the two cornerstones of piecework' and will exclude a whole demographic of slower workers.[157]
- The focus of the AWU application is misplaced:

  > 'Perhaps there need to be more emphasis on prosecuting non-compliant employers, rather than a knee-jerk reaction to the perhaps 5% who are not doing the right thing and, in the process, penalising the 95% of employers in our industry who are seeking to abide by the Award.'[158]

- Employers in this industry operate in a 'tight labour market' and could not 'add the extra cost onto what our product sells for'.[159]

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[155] Payne's submission, 21 May 2021, p 1.

[156] Payne's submission, 21 May 2021, p 1.

[157] LPO submission, 19 April 2021, p 1.

[158] LPO submission, 19 April 2021, p 2.

[159] LPO submission, 19 April 2021, p 4-5.

[137] LPO submits that 'if there needs to be a trade-off, to keep the existing arrangements, then the 88-day farm work requirement to extend Working Holiday Visas should be scrapped'[160]:

> 'When it was first introduced, it appeared to be a good thing to help farmers. However now it is apparent that it can put backpackers in a vulnerable situation with unscrupulous employers who have no intention of doing the right thing under the Award.'[161]

[138] LPO submits that the Commission should leave the Award as it stands but consider:

> '1. Push for scrapping the 88-day requirement to work on farms in order to extend working holiday visas.
>
> 2. Encourage prosecution of non-compliant operators.
>
> 3. Do not do anything to penalise the majority because of a minority, who will not abide by the rules no matter what the rules say.
>
> 4. Understand that the answer to the small amount of non-compliance, is not more rules.'[162]

7.5 Union Submissions in Reply

7.5.1 AWU

[139] In addition to the matters dealt with elsewhere in this Background Paper the AWU addresses three merit arguments in its reply submissions.

(i) Employees who are not competent (within the meaning of clause 15.2)

[140] The AWU notes that some submissions suggest that the existing pieceworker provisions are justified by the fact that horticultural workers may take a period of time to learn the skills involved and become competent to pick produce at a reasonable rate and that it would be unfair and/or undesirable for employers to be required to pay employees at least the minimum hourly rate whilst being inducted or trained or in the period it may take for an employee to work at the average rate.

[141] In reply, the AWU says that these submissions should not be accepted for three reasons:

1. The concern is overstated; evidence of multiple growers indicates that it can take as little as a day or 2-3 days before a worker is able to start picking at the rate of a competent worker.[163] The AWU submits: 'short period of familiarisation with the work hardly justifies payment below minimum rates for the type of work.'[164]

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[160] LPO submission, 19 April 2021, p 5.

[161] LPO submission, 19 April 2021, p 5.

[162] LPO submission, 19 April 2021, p 6.

[163] Statement of Reardon at [18]; Statement of McClintock at [16]; Statement of Kelly at [13] and [22]; Statement of Eckersley at [19].

[164] AWU submission in reply, 2 July 2021 at [15].

2. The basis upon which it is said to be fair for an employee, whilst expending time and effort being trained and acquiring skills to benefit the employer, should be paid at below the minimum hourly rate is not identified. The AWU submits that the Level 1 rate is set as the proper rate for a new employee undertaking 'induction training'.[165] Even if there is a period during which a new employee is trained and acquires skills on the job, the proper and fair rate for the employee to be remunerated is the Level 1 rate. The AWU submits:

> 'If an employee continues to fail to perform work to a reasonable level of competence, the employer is under no obligation to retain the employee in employment, particularly where the employees are engaged as casuals. The evidence indicates that employers will not engage or will let go or reassign employees who persistently fail to reach a reasonable level of competence.[166] This is unsurprising given the evidence put forward as to the urgency of the harvesting task. It is inconsistent with the asserted urgency of the picking and harvesting task to assume that employers would retain a substantial cohort of employees who fail to reach a reasonable degree of competence.'[167]

3. Some of the submissions also suggest that some groups of employees wish to work slowly and to earn lower rates of remuneration, including backpackers and 'grey nomads'.[168] In reply the AWU submits that the evidence in support of these submissions is 'unconvincing':

> 'Much of the evidence suggests that producers will not engage inefficient workers or require a worker who is not picking at a reasonable rate to move on even if they are being paid on piece rates. The Commission could not be satisfied, on the evidence, that this issue is one of substance. In any event, the willingness of a small cohort of employees to work for below minimum rates, even if established by evidence, provides no basis for the Commission to fail to provide a fair and relevant safety net. Minimum rates are set as appropriate for the type of work involved and cannot be contracted out of.'[169] [Footnotes omitted]

(ii) Compliance/Enforceability

[142] The AWU notes that a number of the submissions suggest that the variation should not be made because the true complaint by the AWU is that there is widespread non-compliance with the existing pieceworker provisions and that non-compliance should be addressed through the enforcement provisions of the Act. In reply the AWU contends that these submissions overlook two considerations:

1. The nature and structure of an award obligation may affect the ease of its enforceability and compliance with the minimum standards. The AWU submits that the difficulty in enforcing the existing piecework provisions arises from, or at least is contributed to, by the nature of the award provision,:

> 'The fact the minimum rate for a pieceworker is not set by reference to a certain and clear minimum exacerbates the risk of exploitation of vulnerable workers and the

[165] Horticulture Award, Schedule A.1.2.

[166] Statement of Moss at [36]; Statement of Kelly at [27]; Statement of Reardon at [30].

[167] AWU submission in reply, 2 July 2021 at [17].

[168] AFPA submission, 11 June 2021 at [25(b)]; Ai Group submission, 1 June 2021 at [103].

[169] AWU submission in reply, 2 July 2021 at [18].

prevalence of non-compliance. Award provisions which are dependant on discretionary and subjective assessments to be made by the employer lack objectivity, transparency, simplicity and enforceability.[170] The inclusion of a floor of remuneration for employees engaged on piecework agreements calculated by reference to an easily ascertainable hourly rate of pay would provide a straightforward mechanism for individual employees to know whether they are being appropriately paid and for inadequate piecework arrangements to be detected and sanctioned.'[171]

The AWU submits that 'the uncertain and subjective assessment required to apply clause 15.2(b) of the Horticulture Award inevitably provides a substantial barrier to individual employees being able to assess whether they are being paid correctly and to effective enforcement of the Award by employees, unions or the Ombudsman.'[172]

The AWU also submits that the 'bald statement' in clause 15.2(f) that the employer and the individual employee must have 'genuinely made the piecework agreement without coercion or duress' provides:

'little more than an aspirational standard. It is unlikely to prevent an employer offering employment on the basis that the employee accept the proferred piece rate on a take it or leave it basis or provide the basis for employees to meaningfully negotiate in relation to the piecework rate.'[173]

2. The objects of the Act include the object of 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.' Further, the Commission is required, by s.134(1)(g), to ensure that the modern award system is 'simply, easy to understand, stable and sustainable'. The AWU submits that 'Award provisions that lack objectivity, transparency, simplicity and enforceability will not achieve the modern awards objective, particularly for vulnerable groups of workers.'[174]

   The AWU also submit that the assertion that legal reforms and compliance initiatives from the Ombudsman 'have gone a long way to tackling non-compliance with horticulture industry employers' obligations to their workers'[175] is 'entirely unsupported by evidence':

   'The continued focus of the Ombudsman on the industry demonstrates its ongoing concern in relation to compliance. Further, the presence of licensing schemes for labour hire providers in some states and territories provides no basis for the Commission to refrain from addressing difficulties in the horticulture industry.'[176]

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[170] See *Re 4 Yearly Review of Modern Awards — Supported Employment Services Award 2010* [2010] FWCFB 8179; (2010) 293 IR 1 at [341]-[342] and [366].

[171] AWU submission in reply, 2 July 2021 at [22].

[172] AWU submission in reply, 2 July 2021 at [20]. In support the AWU relies on the observations of Bromberg J in the *Hu Appeal* at [98].

[173] AWU submission in reply, 2 July 2021 at [21].

[174] AWU submission in reply, 2 July 2021 at [23].

[175] Ai Group submission, 1 June 2021 at [36].

[176] AWU submission in reply, 2 July 2021 at [25] citing *Re 4 Yearly Review of Modern Awards — Annualised Wage Arrangements* [2019] FWCFB 1289; (2019) 285 IR 152 at [36] in support.

(iii) Requirement to Retain a Record of Hours Worked

[143] The AWU submits that the complaints advanced by some employer parties[177] that the requirement to maintain a record of hours of pieceworkers would impose an administrative burden on employers are 'not persuasive':

> 'The only additional administrative task suggested is the requirement to maintain records of the hours of work of employees. The Commission would not consider any additional regulatory burden to be a substantial factor in its consideration, particularly where it is an effective means of ensuring there was no employee disadvantage by reason of pieceworker arrangements.
>
> Proper compliance with the obligation to set a piecework rate that enables the average competent employee to ear[n] at least 15% more per hour than the minimum hourly rate would require monitoring of the hours of work of pieceworkers in any event. The evidence suggests that many producers already claim to track or monitor the hours of work of pieceworkers and, as such, would experience little (if any) additional burden. Further, the alternative proposal advanced by the APFA positively suggests that employers ought to be required to maintain records of hours worked by pieceworkers.'[178]

7.5.2 UWU

[144] In its reply submission the UWU addresses a number of key propositions advanced in support of the Application. In addition to matters dealt with elsewhere in this Background Paper the UWU reply deals with three merit arguments.

(i) Employees covered by the award who are pieceworkers are frequently paid less than the equivalent of the award hourly rate

[145] The UWU submits that the application of clause 15.2 'frequently results in employees being paid a wage that is less than the equivalent of the Award hourly minimum rate'. The UWU notes that the AFPA submit that none of the evidence relied on by the unions constitutes 'a reliable quantitative assessment of the level of industry compliance' such as to persuade the Commission that the variation is necessary. In reply the UWU submits:

> 'In making this submission, the AFPA seeks to elevate a particular (undefined) standard of quantitative evidence as the only acceptable source of evidence that could justify the application. Simultaneously, the AFPA and other opposing parties fail to address that the overwhelming preponderance of the evidence supports the unions' case that pieceworker rate agreements often result in workers earning far less than the minimum wage to which every other award-covered employee in Australia is entitled.
>
> The AFPA has not produced any evidence, quantitative or otherwise, in support of the proposition that pieceworker rates are functioning as a 'safety net' for workers. This is not surprising, given that the AFPA effectively concedes by its proposed variation that clause 15.2 is unworkable in its present form.'[179]

[146] The UWU also submit that:

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[177] NFF Submissions at [25(a)] and [26(b)]; AIG Submissions at [80].

[178] AWU submission in reply, 5 July 2021 at [27]-[28].

[179] UWU submission in reply, 5 July 2021 at [5]-[6].

'The industrial reality is that clause 15.2 is frequently used to attempt to legitimise a wage which is less than the equivalent of the relevant minimum wage, and which has resulted in large-scale under-award payments.

Perfect compliance (which is impossible in relation to this clause) would still result in employees frequently being paid below the relevant modern award hourly minimum rate. This is inconsistent with the notion of a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.'[180]

(ii) Clause 15.2 is frequently misapplied and is unworkable

[147] The UWU contends that Clause 15.2 is 'frequently misapplied and is unworkable':

'This unworkability frequently results in employees who are "average competent employees" and who are pieceworkers being paid less than at least 15% more per hour than the minimum hourly rate. Further, the uncertainty in the operation of the clause results in circumstances where even an employer attempting to comply with the award in setting piecework rates faces a strong likelihood that their rates are not Award compliant.
…

A key challenge is that to apply clause 15.2 correctly, the calculation as to what the "average competent worker" can earn requires constant adjustment for variables (such as seasonal factors, adjustments in underlying minimum rates etc). The evidence filed by interested parties *opposing* the variation shows this rarely happens (in addition to various other flaws in the methodology). This is not a case in which the classification of a complex clause and/or an enhanced compliance regime is sufficient. This is a broken provision. The insertion of a minimum rate guarantee would ensure that employers and employees are able to predict their base-line costs/earnings in a manner more consistent with the simple, easy to understand and *stable* modern award system envisaged by section 134(1)(g).'[181] [Footnotes omitted]

(iii) The purpose of pieceworker provisions

[148] The UWU contends that the requirement in clause 15.2 to fix and pay at least minimum piecework rates is 'intended to be protective of employees, and to guarantee employees an adequate rate' and 'the provisions are simply not achieving the intended purpose.'[182]

(iv) No material impact on employment, employment costs, productivity, or regulation

[149] The UWU notes that some of the employer submissions argue that if the variation is made, then employers will cease using pieceworker rates, because they will otherwise be exposed to higher than expected employment costs. For example, the AFPA argues that the variation if made would mean that pieceworker engagement becomes unattractive for employers, because employers would then face "the double whammy" of both the minimum hourly rates and the 15 per cent uplift.

[150] In reply the UWU submits that this is 'not a relevant detriment':

[180] UWU submission in reply, 5 July 2021 at [8].

[181] UWU submission in reply, 5 July 2021 at [10].

[182] UWU submission in reply, 5 July 2021 at [15].

'This argument proceeds from the assumption that employers who engage workers under clause 15.2 are not presently paying both the minimum hourly rate and the 15 per cent uplift. However, a proper pieceworker rate arrangement should have that effect. It follows that the 'harm' identified by the AFPA is simply the obligation to pay wages in accordance with the terms of the Award.'[183]

[151] Some of the employer parties argue that if employers cease using pieceworker rates, then employees will be deprived of the opportunity to earn more than the minimum award rate. In response the UWU submits:

'This submission is entirely speculative and, even if the speculation was borne out, is in any event unsustainable. It cannot be said that a consideration of the relative living which results in some (or many) employees being paid less than the award minimum rate, simply to retain the ability for some others to earn more than the minimum rate. This is especially so given that employees are frequently paid less than the equivalent of the award minimum.

Further, even if an employer was to cease using pieceworker rates, they could and may well still offer employees bonuses for higher performance - particularly if such incentives are as effective as driving productivity as some parties submit is the case.'[184]

[152] As to regulatory burden, the UWU submits that:

'any increase in the regulatory burden by the requirement to keep a record of hours worked is not substantial, and when compared to the records that employers should be keeping if engaging workers on pieceworker rates, is not a net increase in the regulatory burden.'[185]

[153] UWU notes that the variation proposed by the AFPA includes a record-keeping requirement similar to that proposed by the AWU.

8. Modern Awards Objective – Section 134 Considerations

[154] The modern awards objective is in s.134 of the Act and provides as follows:

'*What is the modern awards objective?*

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

[183] UWU submission in reply, 5 July 2021 at [24].

[184] UWU submission in reply, 5 July 2021 at [26]-[27].

[185] UWU submission in reply, 5 July 2021 at [34].

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'

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

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[155] The modern awards objective is very broadly expressed.[186] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h) (the s.134 considerations).[187] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[188]

[156] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-

[186] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

[187] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

[188] [2018] FWCFB 3500 at [21]-[24].

making process.[189] No particular primacy is attached to any of the s.134 considerations[190] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[157] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[191] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[192] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

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

s.134(1)(a): relative living standards and the needs of the low paid

[158] In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a).[193]

[159] The most recent data for the 'low paid' threshold is set out below:[194]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug 2020)	953.33
Employee Earnings and Hours survey (May 2018)	973.33

[160] All classification levels in the *Horticulture Award 2020* are below both measures of two-thirds of median earnings and on that basis may be regard as 'low paid' for the purpose of s.134(1)(a).

Q11: Does any party contest the proposition at [160]?

[161] The AWU and UWU contend that this consideration weighs in favour of the variation proposed.

[162] The AWU submit that the current piecework terms fail to properly take into account relative living standards and the needs of the low paid because they 'result in employees systematically being paid below the minimum award rates'.[195] The provision for guaranteed

[189] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

[190] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[191] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[192] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[193] Ibid at [34], [362] and [419].

[194] MA000028; ABS, *Characteristics of Employment, Australia*, August 2020; ABS, *Employee Earnings and Hours, Australia*, May 2018.

[195] AWU Application, 15 December 2020 at [36].

minimum earnings 'will ensure that piecework arrangements cannot result in employees being paid less than the national minimum wage.'[196]

[163] The UWU submits that the current arrangements result in an 'untenable situation' where competent and experienced horticulture workers are paid piecework rates that do not enable them to earn their equivalent minimum hourly rate. The UWU submits that current payments have resulted in significant consequence for workers including:[197]

- Working more than 12 hours a day in painful conditions in an attempt to earn enough money to survive[198]
- Forgoing essential items such as food or living on foods such as instant noodles[199]
- Missing important payments like rent and car payments or being forced to borrow money[200]
- Relying on other family members taking on additional work to make ends meet[201]
- Living with the uncertainty of whether you were going to make enough money each week to keep living.[202]

[164] The UWU submits that proposed variation ensures employees paid piecework rates have at least an adequate standard of living.

[165] Ai Group submits that s.134(1)(a) is either a neutral consideration, or weighs against the Application. Ai Group submits that when applied correctly, the piecework rates mandated under cl.15.2(b) do not diminish the living standards of those paid pursuant to that provision, rather, the current provision provide an avenue for employees to earn a great deal more than they would otherwise earn through time rates of pay.

[166] The NFF submits that contrary to the Union positions:[203]

- The present Award terms enable the average (competent) piece worker to earn 15% more than the amount which the FWC has assessed as adequate for a reasonably living standard
- Most pieceworkers are productive and receive well above the minimum wage
- The AWU application would restrict growers hiring experienced and productive workers, jettisoning or not hiring those who are less productive.

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[196] AWU submission, 19 March 2021 at [25].

[197] UWU submission, 19 March 2021 at [36(a)].

[198] Witness 1 Statement at [32].

[199] Witness 1 Statement at [26] and [27].

[200] McDonald Statement at [45]; Witness 1 Statement at [28] and [30]

[201] McDonald Statement at [46]

[202] McDonald Statement at [39].

[203] NFF submission, 11 June 2021 at [18].

s.134(1)(b) the need to encourage collective bargaining

[167] It is common ground that there is a low incidence of collective bargaining in the Horticulture industry.

[168] The AWU submits that at present, there is little incentive for employers to engage in collective bargaining.[204]

[169] The UWU submit that situations in which employees can be paid below minimum award wages create a disincentive to bargain and that efforts to make enterprise bargaining agreements have been 'extremely challenging'. The UWU submits that as the minimum piece rate payable changes throughout the life of an agreement, formulating a collective bargaining agreement that requires employees to be 'better off overall' is 'incredibly problematic'.[205]

[170] Ai Group and the NFF submit that s.134(1)(b) is a neutral consideration[206] and the NFF submits that 'there is no evidence that a 'floor' in the minimum hourly rate would lead to any consequence, including bargaining.'[207]

s.134(1)(c) the need to promote social inclusion through increased workforce participation

[171] The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[208]

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

[172] The AWU submits that the proposed variation has 'the potential' to increase the 'attractiveness' of work in the horticulture industry which in turn has 'the potential' to increase workforce participation.[209]

[173] The UWU submits that the current circumstances are a disincentive to workforce participation:

> 'The prospect of working in difficult conditions both environmentally and physically, in circumstances where it is difficult to earn even the equivalent of the award minimum wage, is a disincentive in relation to workforce participation…The variation to the award that is sought by this Application would incentivise workforce participation in this sector of the industry.'[210]

[174] Ai Group submits that the Union submission that the proposed variation would increase workforce participation 'should be viewed in the light of the potential disemployment effect' that making the proposed variation would have:

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[204] AWU submission, 19 March 2021 at [27].

[205] UWU submission, 19 March 2021 at [36(b)].

[206] AI Group submission, 1 June 2021 at [98]-[101]; NFF submission, 11 June 2021 at [19].

[207] NFF submission, 11 June 2021 at [19].

[208] *Penalty Rates Case* at [179].

[209] AWU Application, 15 December 2020 at [42]; AWU submission, 19 March 2021 at [28]-[29].

[210] UWU submission, 19 March 2021 at [36(c)].

'The significant numbers of 'grey nomads' and backpackers who enter the horticulture industry on a seasonal basis should be taken into account in determining whether the proposed amendments would indeed attract more entrants to the industry. Such workers are unlikely to have a background in horticulture and, in the case of elderly retirees, they are often using their employment in the industry to assist in financing their travels, and may not wish to work at the speeds required to meet the equivalent time rate of pay.

If employers are required to pay all pieceworkers at least at the equivalent minimum hourly rate of pay, this would require such employees to perform a quantity of work and meet productivity levels which would meet the cost of their labour. It is unlikely that employers would be capable of retaining many such employees were the AWU's proposed amendments to be made.

Taking this into consideration, there is a likelihood that any incentive which a 'floor' in the minimum piecework rate would have for new entrants to the industry would be counterbalanced by the inability of employers to retain less productive staff.'[211]

[175] The NFF submits that this consideration weighs against the Application because:[212]

- an hourly rate will reduce the employability of those who are not productive, and
- it will result in increased supervision and selective hiring.

[176] In reply the UWU responses to the employer submissions that the consideration in s.134(1)(c) weighs against the variation sought, because if the variation was made, it would reduce the employability of those who are 'not productive in picking' and create a 'disemployment effect' with respect to persons such as 'grey nomads' who are more likely to be working to 'support a holiday rather than supporting themselves generally.'

[177] The UWU submits that there are significant problems with the logic in these submissions, namely:

1. Picking and packing fruit and vegetables has to be done by someone.
2. It cannot be said that employees who are presently being paid less than the equivalent Award minimum will refuse to work or be less inclined to seek out the work if they are paid more money.
3. Employers could continue to employ the people who are presently being engaged in this work, on at least the equivalent minimum rate.
4. A significant majority of workers who are performing work in the industry are doing so because:

    (i) they are sponsored by a horticultural industry employer and are limited by their visa conditions to continue to work for that employer in the horticulture industry (for example, Seasonal Worker Program **(SWP)** and Pacific Labour Scheme **(PLS)** participants); or

[211] Ai Group submission, 2 June 2021 at [103]-[105].

[212] NFF submission, 11 June 2021 at [20].

(ii) they are seeking to extend their visa by fulfilling a requirement to work for a specified period of time in a rural or regional area (eg. Working Holiday Makers **(WHM)).**

5. Because of these visa settings, and the industry's structural reliance on them, temporary migrant workers (including WHM and SWP workers) will continue to seek employment in the industry, and employers are likely to continue to engage these workers, particularly considering labour supply constraints and shortages in the industry which have been exacerbated by the COVID-19 pandemic.

[178] The UWU also refers to its submissions and evidence in support of the contention that the 'prospect of working in difficult conditions both environmentally and physically, in circumstances where it is difficult to earn even the equivalent of the award minimum wage is a disincentive in relation to workforce participation.' The UWU submits that this submission has not been contradicted.

s.134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work

[179] The AWU submits that the requirement to pay pieceworkers at least the minimum award rates may encourage farmers to adopt more flexible and modern work practices, and that there is no reason to believe that a guaranteed minimum rate of earnings for pieceworkers would impede the efficient and productive performance of work.[213]

[180] The UWU submits that the current clause could not have been intended to promote efficient and productive performance of work because it disincentivises workforce participation by remunerating employees below the minimum award rate and employers who attempt to comply with the clause are required to engage in an 'onerous and multi-factor assessment which must be reviewed every time there is a change in one of the many variables that make up its composition'.[214]

[181] Ai Group submits that the Commission should not accept that the current piecework provisions encourage employers to drive down labour costs and submits that the imposition of a 'floor' would likely discourage employers utilising the piecework provisions as the productivity of higher performing employers would not offset the cost of lower performing workers.

[182] Ai Group rejects the UWU's submissions that complying with the clause is onerous, stating:

> 'The imposition of a 'floor' below which minimum piecework rates may not fall would not remove any of the difficulties in determining the minimum piecework rate.'[215]

[183] The NFF submits that this consideration weighs against the Application because:[216]

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[213] AWU submission, 19 March 2021 at [30]-[31]; AWU Application, 15 December 2020 at [44].

[214] UWU submission, 19 March 2021 [36(d)].

[215] Ai Group submission, 2 June 2021 at [109].

[216] NFF submission, 11 June 2021 at [21].

- a reduction in positions and reduction in offers to 'slower' workers weigh against this consideration, and

- there is no evidence that piece-rates in the horticulture industry discourages workers.

s.134(1)(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts.'

[184] In the Penalty Rates Decision the Full Bench made five observations which may be made about s.134(1)(da):[217]

1. Section 134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv). An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:

   (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);

   (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and

   (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

   The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays.

2. The expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances. Section

[217] *Penalty Rates Case* at [188].

s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which the Commission is required to take into account.

The requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which the Commission is required to take into account.

3. Section 134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not.

4. Section 134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive 'or' makes it clear that the provision is dealing with separate circumstances: 'unsocial, irregular or unpredictable hours'. Section 134(1)(da)(ii) requires that the Commission take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression 'unsocial … hours' would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. 'Irregular or unpredictable hours' is apt to describe casual employment.

5. Section 134(1)(da) identifies a number of circumstances in which the Commission is required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance (s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances means that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'.

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

[185] The AWU submits that this is a neutral factor.[218] Ai Group and the NFF also submit that this consideration is neutral.[219]

[186] The UWU notes that pieceworkers are not provided with additional remuneration for working overtime, unsocial, irregular or unpredictable hours, on weekends, on public holidays or shifts.[220]

s.134(1)(e) the principle of equal remuneration for work of equal or comparable value

[187] The 'Dictionary' in s.12 of the Act states, relevantly: 'equal remuneration for work of equal of comparable value: see subsection 302(2).'

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[218] AWU Application, 15 December 2020 at [45]; AWU submission, 19 March 2021 at [32].

[219] Ai Group submission, 2 June 2021 at [114]; NFF submission, 11 June 2021 at [22].

[220] UWU submission, 19 March 2021 at [36(e)].

[188] The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'. Hence, the appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.[221]

[189] It is common ground that this consideration is a neutral factor.[222]

s.134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[190] Section 134(1)(f) is expressed in very broad terms. The Commission is required to take into account the likely impact of any exercise of modern award powers 'on business, including' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.

[191] 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. The impact of an increase in modern award minimum wages upon productivity is less clear.

[192] The term 'productivity' appears in several Parts of the Act:

- Part 1-1 – Introduction: s.3 Object of the Act
- Part 2-3 – Modern Awards: s.134 The modern awards objective
- Part 2-4 – Enterprise agreements: s.171 Objective of the Part, ss.241 and 243 Low paid bargaining and authorisation
- Part 2-5 – Workplace determinations: ss.262 and 275
- Part 2-6 – Minimum wages: s.284 The minimum wages objective
- Part 2-8 – Transfer of business: ss.318–320 Making and variation of transferable instruments.

[193] 'Productivity' is not defined in the Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

[194] The Productivity Commission defines productivity as:

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[221] *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [192].

[222] AWU Application, 15 December 2020 at [46]; Ai Group submission, 2 June 2021 at [118]; NFF submission, 11 June 2021 at [23].

'… a measure of the rate at which outputs of goods and services are produced per unit of input (labour, capital, raw materials, etc). It is calculated as the ratio of the quantity of outputs produced to some measure of the quantity of inputs used'.[223]

[195] Similarly, the Commonwealth Treasury also defines productivity by reference to volumes of inputs and output:

'Productivity is a measure of the rate at which inputs, such as labour, capital and raw materials, are transformed into outputs. The level of productivity can be measured for firms, industries and economies. Productivity growth implies fewer inputs are used to produce a given output or, for a given set of inputs, more output is produced.'[224]

[196] The conventional economic meaning of productivity is the number of units of output per unit of input. It 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. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:

'… we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.'[225]

[197] While the above observation is directed at the use of the word 'productivity' in s.275, it is apposite to the Commission's consideration of this issue in the context of s.134(1)(f).

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

[198] The AWU submits that there is no reason to conclude the variations sought would have any significant impact on business, including through reducing productivity or increasing employment costs of workers covered by the Award. In response to the suggestion that any increased employment costs warrant rejecting the Application, the AWU submits:[226]

1. Clause 15.2(b) requires that the piecework rate be fixed so as to enable the average competent employee to earn at least 15% more per hour than the prescribed minimum hourly rate of pay. Accordingly, the employment cost for a worker on piecework rate should, if fixed properly under clause 15.2(b), generally be higher than for employees being paid on weekly or hourly rates. Any substantial or persistent increase in employment costs could only arise in the event that the piecework rate is fixed in a manner that contravenes clause 15.2(b), namely, does not permit an averagely competent employee to earn at least 15% more per hour than the minimum hourly rate.

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[223] Productivity Commission, *What is productivity and how is it measured?,* PC News, May 2015.

[224] Treasury submission to House of Representatives Standing Committee on Economics Inquiry into 'Raising the level of productivity growth in the Australian economy', August 2009 at p. 3

[225] [2012] FWAFB 7858 at [45]–[46].

[226] AWU submission, 19 March 2021 at [34].

2. The proposed variation does not seek to remove the capacity of an employer to engage an employee under a piecework agreement. To the extent that the incentive provided by piecework arrangements assists productivity, it will remain open to an employer to reach agreement with an employee to be paid piecework rates to provide an incentive to earn above the minimum hourly rate. In the event that an employee persistently or without reasonable excuse fails to perform to the standard of an averagely competent employee, the employer could (if justification existed) warn, discipline or cease to engage the employee. There is no basis to conclude that productivity would be reduced.

[199] As to the impact on productivity, the AWU submits that the Application does not seek to remove the capacity of employers to utilise piecework agreements provided that pieceworkers receive total remuneration at least equivalent to the hourly rate:

> 'Employers can continue to offer piece rates as an incentive for productive work. Properly set pieceworker arrangements will continue to offer an average competent employee the opportunity to earn at least 15% more than the hourly rate. The Commission would not be satisfied that the variation would have any substantial impact on productivity where piece rates remain available. There is no evidence that the presence of a minimum payment guarantee in other awards destroys the utility or effectiveness of piece rates. The speculative assertions of the producers who express concern that productivity will be affected should not be accepted.'[227]

[200] The AWU concedes that the proposed variation will impose some additional regulatory burden, but submits that such imposition is slight and unpersuasive:[228]

1. An employer engaging employees on piecework rates is already required by clause 15.2(b) of the Horticulture Award to ensure that the piecework rate enables the average competent employee to earn at least 15% more per hour than the minimum hourly. As a practical matter, the employer would need to maintain records of hours worked and pay received by employees to demonstrate compliance with that obligation.

2. Other modern awards which provide for the payment of piecework rates but provide for a guaranteed minimum payment by reference to the minimum hourly or weekly rates of pay and allowances necessarily require that an employer to maintain records of hours and time worked by employees being paid piecework rates and to conduct a comparison between the entitlements of each employee under alternative payment arrangements. That includes awards covering similar industries such as sugar, silviculture and wool. The Commission, in making those awards, has not regarded the requirement to maintain such records as imposing an unreasonable burden.

3. The Horticulture Award itself does not regard the imposition of a requirement to maintain records of an alternative payment arrangement as an unreasonable burden. Clause 17.2 requires that an annualised wage be no less than the amount the employee would have received under the award for the work performed (clause 17.2(a)), that the employer must calculate the amount of remuneration that would have been payable under the award each year and compare it with the annualised

[227] AWU submission in reply, 2 July 2021 at [13].

[228] AWU submission, 19 March 2021 at [36].

wage (clause 17.2(b)) and that the employer keep a record of starting and finishing times and breaks for the purposes of making that calculation (clause 17.2(c)).'

[201] The UWU submit that the proposed variation will not adversely impact on business because:[229]

- the incentivisation that comes from the prospect of earning more than the minimum award rate through a piecework rate is retained
- the disincentive in relation to workforce participation that results from the likelihood that the pieceworker is going to engage in physically and environmentally difficult work for less than the equivalent minimum award wage is removed, and
- the regulatory burden is eased; a provision which requires at least the minimum award wage to be paid provides a simple mechanism to allow for compliance.

[202] The UWU concedes that the insertion of a provision ensuring that all pieceworkers are paid at least the award minimum would increase employment costs, but submits that this must be measured against an improvement in productivity, the easing of regulatory burden and the other factors which make up the modern awards objective and weigh in favour of the variation sought.[230]

[203] As to productivity, the UWU submits that:

'the employer parties submit that piecework rates incentivise workers, either because employees are fearful of earning less money or through the hope of earning more. But a productivity incentive based on motivating workers by fear they will earn less than the minimum rate if not "productive" is fundamentally inconsistent with the concept of a fair and minimum safety net. And a productivity incentive based on motivating productivity through the possibility of earning more remains a feature of the piece rates model if varied in the manner proposed. The variation would not prevent such incentivisation from occurring.

Further…employees who know they are guaranteed at least the equivalent of the minimum aware hourly rate for the work perform are likely to be incentivised to be productive in order to retain the employment that will give them the ability to earn money at this rate. And the disincentive to be productive in circumstances where an employee has little hope of earning at least the minimum rate for the work performed is removed. Cast in this way, the impact of the proposed variation on productivity is not neutral - it is positive.'[231]

[204] Ai Group submit that this consideration weighs against making the proposed variation and that the AWU's argument is unpersuasive:

'A piecework rate set pursuant to cl. 15.2(b) has the potential for high performing employees to earn substantially over the equivalent time rate for their classification. The corollary to that effect is that low performing employees may earn under the equivalent time rate. Requiring unproductive employees to earn an amount which exceeds the value of their labour would result in a cost increase for employers. The quantum of this increase is as yet unknown. However, it should be regarded as axiomatic that a variation which would impose a floor in the minimum

[229] UWU submission, 19 March 2021 at [36(f)].

[230] UWU submission, 19 March 2021 at [36(f)(iii)].

[231] UWU submission in reply, 5 July 2021 at [32]-[33].

piecework would result in a cost increase for relevant employers in the horticulture industry.'[232] [Footnotes omitted]

[205] Ai Group rejects the UWU's submission that the proposed variation would improve productivity:

'Contrary to the UWU's argument at paragraph [36](f)(i)(2) of its submission, the proposed variation would not improve productivity. Even if the Commission accepts the UWU's argument that the amendments would remove a disincentive in relation to workforce participation and engagement, this has little relevance to productivity in the horticulture sector. As the Full Bench stated in the Penalty Rates Decision, the conventional economic meaning of productivity is the number of units of output per unit of input. The UWU's argument should therefore be rejected.

Moreover, as stated above, considering the limited incentive for employers to engage pieceworkers where the costs of engaging low performing employees would increase, the disemployment effect may be substantial.'[233] [Footnotes omitted]

[206] Ai Group submits that the regulatory burden imposed by a requirement to record hours of work weighs also against making the proposed variations and submits that the Commission should reject the AWU's argument that an employer engaging employees on piecework rates needs to maintain records of hours worked and pay received to demonstrate compliance with cl.15.2(b):

'In order to comply with cl. 15.2(b), the employer would need to take the steps outlined in paragraphs [26] – [38] of Rangiah J's decision in *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034. As outlined above, this involves identifying of the characteristics of the hypothetical average competent employee and predicting the pick rate of such an employee. It does not involve continuous monitoring of the hours of each individual employee.'[234] [Footnotes omitted]

[207] Ai Group also submits that the proposed variations will not ease regulatory burden, that 'making the proposed variation will not enable employers to simply remunerate pieceworkers according to the equivalent hourly rate of pay':

'Even if the proposed variations are made, employers who fail to apply cl. 15.2(b) correctly and set the piecework rate too low will still need to compensate relevant employees by calculating the difference between the rate they were paid and the applicable piecework rate rather than the equivalent hourly rate for the employees' classification.'[235]

[208] The NFF submits that this consideration weighs against the AWU application because:[236]

- The additional of an hourly rate as an alternative to the 15% loading in the Award will have a significant impact on productivity; some growers will not offer piece

[232] Ai Group submission, 2 June 2021 at [120].

[233] Ai Group submission, 2 June 2021 at [121]-[120].

[234] Ai Group submission, 2 June 2021 at [123].

[235] Ai Group submission, 2 June 2021 at [126].

[236] NFF submission, 11 June 2021 at [24].

rates, others will selectively hire, others will employ technology to reduce labour costs

- The proposed variation is 'vastly less efficient'; keeping additional records and supervising employees will require more staff, and

- The inclusion of a 'floor' will not militate towards compliance.

s.134(1)(g) the need to ensure a simply, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[209] The AWU submits the proposed variations would provide a certain and easily calculated guaranteed minimum payment for pieceworkers which would assist in making the Award comprehensible and easier to apply.[237]

[210] The UWU submits that the current clause is not simple, stable or unsustainable and is not easy for people to understand.[238]

[211] Ai Group submitted that this consideration was neutral and rejects the AWU's proposition, submitting that any uncertainties in applying cl.15(2)(b) of the Award, are not ameliorated by imposing an additional 'floor' in the piecework rate:

> 'Rangiah J's decision indicated the changeable nature of the notion of the 'average competent worker' and outlined how this would require the piecework rate to be reassessed when relevant variables changed. The AWU's application would not remove the requirement for employers to conduct the complicated reassessment of the piecework rate to ensure compliance with the Award. It would merely prohibit the payment of lower performing employees below the equivalent time rate of pay.'[239] [Footnotes omitted]

[212] The NFF submits that this consideration weighs against the AWU application because:[240]

- The additional administrative burden is neither simple, nor easy to understand, and

- The addition of an hourly rate as an alternative to piece rates does not ensure or encourage compliance.

s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[213] We note that the requirement to take into account the likely impact of any exercise of modern award powers on 'the sustainability, performance and competitiveness *of the national economy*' (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an

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[237] AWU submission, 19 March 2021 at [38]-[39].

[238] UWU submission, 19 March 2021 at [36(g)].

[239] Ai Group submission, 2 June 2021 at [129].

[240] NFF submission, 11 June 2021 at [25].

exercise of modern award powers. We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

[214] The AWU submits this is a neutral consideration; that there is no reason to believe that the proposed variations would have any identifiable impact on the national economy.[241]

[215] The UWU submits that the proposed variation would not adversely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy, for the following reasons:[242]

- Employees will have a greater incentive to work as they will be fairly remunerated
- Providing employees with a fair payment will mean they have more money to spend in the Australian economy
- By ensuring all pieceworkers are paid at least the minimum hourly rate applicable, labour costs will be fair across the board, encouraging fair competition amongst employers in the horticulture sector.

[216] Ai Group submitted that to the extent that the proposed amendments are inconsistent with ss.134(1)(d), (f) and (g), they will also have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[217] The NFF submits that this consideration weighs against the AWU application because:

- Labour costs, access to labour and productivity will be negatively affected, and
- Growers may turn to altered planting of crops, use of technology and selective hiring in response to the additional administrative burden arising out of the AWU application.

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?

[241] AWU submission, 19 March 2021 at [40].

[242] UWU submission, 19 March 2021 at [36(h)].

ATTACHMENT A – LIST OF EXHIBITS

AWU Exhibits

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
AWU1	13 July 2021	AWU	Witness Statement of Ms Chee Sing Ee	CB7	PN150
AWU2	13 July 2021	AWU	Witness Statement of Mr Xueliang Wang	CB12	PN185
AWU3	13 July 2021	AWU	Witness Statement of Ms Hsu	CB10	PN210
AWU4	13 July 2021	AWU	Witness Statement of Anthony Beven	CB17	PN232
AWU5	13 July 2021	AWU	Reply Witness Statement of Anthony Beven	CB14	PN235
AWU6	13 July 2021	AWU	Witness Statement of Darren Cameron	CB40	PN275
AWU7	13 July 2021	AWU	Witness Statement of Philip Gourlay	CB43	PN305
AWU8	13 July 2021	AWU	Witness Statement of Ronald Cowdrey	CB49	PN338
AWU9	13 July 2021	AWU	Witness Statement of Shane Roulstone	CB53	PN368
AWU10	13 July 2021	AWU	Witness Statement of Steven Carter	CB124	PN399
AWU11	13 July 2021	AWU	Reply Witness Statement of Steven Carter	CB121	PN407
AWU12	13 July 2021	AWU	Witness Statement of Suliman Ali	CB167	PN439
AWU13	13 July 2021	AWU	Wage Theft: The Shadow Market: Part Two: The Horticultural Industry	CB216	PN577
AWU14	13 July 2021	AWU	No Worker Left Behind: Support equal access to welfare for temporary migrants: Survey Results	CB241	PN585
AWU15	13 July 2021	AWU	Working for $9 a day: Wage Theft and Human Rights Abuses on Australian Farms	CB290	PN588

AWU16	15 July 2021	AWU	Report of Dr Elsa Underhill	CB475	PN1112
AWU17	15 July 2021	AWU	Reply Report of Dr Elsa Underhill	CB321	PN1117
AWU18	15 July 2021	AWU	Email from Alison Cooper to Tony Kelly and others dated 17 March 2021 (being page 1 of the bundle of documents produced by Anthony Kelly in response to an Order to Produce)	-	PN1787
AWU19	15 July 2021	AWU	NFF Media Release, 'Growers and farm workers asked to help protect piece rates'	-	PN1875
AWU20	15 July 2021	AWU	Survey Monkey: List of questions	-	PN1967
AWU21	15 July 2021	AWU	Bundle of documents submitted by Brent McClintock in response to an Order to Produce	-	PN2135
AWU22	15 July 2021	AWU	Bundle of documents submitted by Catherine Silverstein in response to an Order to Produce	-	PN2278
AWU23	15 July 2021	AWU	Payslips from Bulmer Farms Pty Ltd (being pages 1 – 5 of the bundle of documents produced by Glenn Trewin in response to an Order to Produce)	-	PN2413
AWU24	16 July 2021	AWU	Bundle of documents submitted by Gaetano Gaeta in response to an Order to Produce	-	PN2616
AWU25	16 July 2021	AWU	Bundle of documents submitted by Han Shiong Siah in response to an Order to Produce	-	PN2727
AWU26	16 July 2021	AWU	Pages 1-7 of bundle of documents submitted by Matthew Benham in response to an Order to Produce	-	PN2933
AWU27	16 July 2021	AWU	3 pages of bundle of documents submitted by Richard Eckersley in response to Order to Produce	-	PN3138
AWU28	16 July 2021	AWU	Bundle of documents submitted by Nicholas King in response to an Order to Produce	-	PN3616

AWU29	20 July 2021	AWU	Dr Underhill document, 'Distribution of Average Hourly Earnings, Horticulture Workers'	-	PN3641

UWU Exhibits

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
UWU1	13 July 2021	UWU	Witness Statement of George Robertson	CB2327	PN473
UWU2	13 July 2021	UWU	Witness Statement of Rodney McDonald	CB2669	PN514
UWU3	13 July 2021	UWU	Reply Witness Statement of Rodney McDonald	CB2666	PN520
UWU4	13 July 2021	UWU	Witness Statement of Lachlan Wakefield	CB2410	PN551
UWU5	13 July 2021	UWU	Witness Statement of Nicholas Karhu	CB2659	PN597
UWU6	13 July 2021	UWU	Witness Statement of Witness 1 attaching email from Lyndal Ablett dated 13 July 2021 setting out instructions from Witness 1	CB2647[243]	PN626
UWU7	13 July 2021	UWU	Witness Statement of Dr Joanna Howe	CB2449	PN642
UWU8	13 July 2021	UWU	Reply Witness Statement of Dr Joanna Howe with correction	CB2413	PN653
UWU9	26 July 2021	UWU	Witness Statement of Lyndal Catherine Ablett	-	-

AFPA Exhibits

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
AFPA1	15 July 2021	AFPA	Bundle of material used in cross-examination of Dr Howe	-	PN3623
AFPA2	16 July 2021	AFPA	Witness Statement of Nicholas King	CB3102	PN3166

[243] Note that the CB does not include the attached email.

AFPA3	16 July 2021	AFPA	Second Witness Statement of Nicholas King	-	PN3208
AFPA4	15 July 2021	AFPA	Bundle of material used in cross-examination of Dr Underhill[244]	-	PN3625
AFPA5	20 July 2021	AFPA	Witness Statement of Elizabeth Tan	-	PN3677
AFPA6	20 July 2021	AFPA	Expert Report of Greg Houston	CB3118	PN3693
AFPA7	20 July 2021	AFPA	Expert Report in Reply of Greg Houston		PN3700

NFF Exhibits

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
NFF1	15 July 2021	NFF	Witness Statement of Anne Reardon	CB2773	PN1608
NFF2	15 July 2021	NFF	Witness Statement of Anthony Kelly	CB2779	PN1692
NFF3	15 July 2021	NFF	Witness Statement of Ben Rogers with correction	CB2787	PN1808
NFF4	15 July 2021	NFF	Witness Statement of Brent McClintock with corrections	CB2956	PN2005
NFF5	15 July 2021	NFF	Witness Statement of Catherine Silverstein	CB2961	PN2147
NFF6	15 July 2021	NFF	Witness Statement of Glenn Trewin	CB2966	PN2290
NFF7	16 July 2021	NFF	Witness Statement of Gaetano Gaeta	CB2970	PN2501
NNF8	16 July 2021	NFF	Witness Statement of Han Shiong Siah[245]	CB2978	PN2630

[244] This exhibit was originally marked as AFPA1 (see Transcript, 15 July 2021 at PN1503), but subsequently marked as AFPA4 (see Transcript, 16 July 2021 at PN3620-3625).

[245] Although there were no corrections to this witness's statement, the witness did provide a 'note' in respect of paragraphs 13 and 32(a) of his statement as follows: 'So basically paragraph 13 (indistinct) they work roughly nine hours a day. However, we give our workers the freedom to start and stop and choose their own breaks. So they could work nine hours a day or they could work six hours a day, based on their personal preference and they're meeting their goals.'

NNF9	16 July 2021	NFF	Witness Statement of Jonathan Moss	CB2996	PN2740
NNF10	16 July 2021	NFF	Witness Statement of Leleiga Fetui	CB3018	PN2778
NNF11	16 July 2021	NFF	Witness Statement of Reginald John Brown	CB3049	PN2781
NNF12	16 July 2021	NFF	Witness Statement of Matthew Benham with corrections	CB3022	PN2812
NFF13	16 July 2021	NFF	Witness Statement of Michelle Distill with corrections	CB3026	PN2954
NFF14	16 July 2021	NFF	Witness Statement of Richard Eckersley	CB3054	PN3051

ATTACHMENT B – LIST OF WITNESSES

#	DATE	PARTY	WITNESS	TRANSCRIPT REFERENCE
1.	13 July 2021	AWU	Ms Chee Sing Ee	XN: PN132-150 XXN: PN151-168 RXN: PN169-176
2.	13 July 2021	AWU	Mr Xueliang Wang	XN: PN183-185 XXN: PN186-193
3.	13 July 2021	AWU	Ms Hsu	XN: PN203-210 XXN: PN211-222
4.	13 July 2021	AWU	Mr Anthony Beven	XN: PN228-236 XXN: PN238-263
5.	13 July 2021	AWU	Mr Darren Cameron	XN: PN270-274 XXN: PN276-288 RXN: PN290-293
6.	13 July 2021	AWU	Mr Philip Gourlay	XN: PN300-304 XXN: PN306-321 RXN: PN324-326
7.	13 July 2021	AWU	Mr Ronald Cowdrey	XN: PN333-337 XXN: PN339-353 RXN: PN355-357
8.	13 July 2021	AWU	Mr Shane Roulstone	XN: PN363-367 XXN: PN369-380 RXN: PN383-388
9.	13 July 2021	AWU	Mr Steven Carter	XN: PN393-406 XXN: PN408-421 RXN: PN423-424
10.	13 July 2021	AWU	Mr Suliman Ali	XN: PN435-439 XXN: PN440-447
11.	13 July 2021	UWU	Mr George Robertson	XN: PN466-474 XXN: PN476-488 Question from the Bench: PN491-496
12.	13 July 2021	UWU	Mr Rodney McDonald	XN: PN504-521

				XXN: PN523-531
13.	13 July 2021	UWU	Mr Lachlan Wakefield	XN: PN543-550 XXN: PN552-565
14.	13 July 2021	UWU	Dr Joanna Howe	XN: PN633-653 XXN: PN657-990 RXN: PN1002-1011
15.	15 July 2021	AWU	Dr Elsa Underhill	XN: PN1103-1129 XXN: PN1130-1503 RN: PN1507-1542
16.	15 July 2021	NFF	Ms Anne Reardon	XN: PN1601-1610 XXN: PN1611-1672 RXN: PN1673-1679
17.	15 July 2021	NFF	Mr Anthony Kelly	XN: PN1684-1693 XXN: PN1695-1779
18.	15 July 2021	NFF	Mr Ben Rogers	XN: PN1796-1809 XXN: PN1818-1966
19.	15 July 2021	NFF	Mr Brent McClintock	XN: PN1977-2006 XXN: PN2007-2120
20.	15 July 2021	NFF	Ms Catherine Silverstein	XN: PN2139-2148 XXN: PN2150-2264 RXN: PN2269-2272
21.	15 July 2021	NFF	Ms Glenn Trewin	XN: PN2283-2291 XXN: PN2292-2405
22.	16 July 2021	NFF	Mr Gaetano Gaeta	XN: PN2491-2502 XXN: PN2503-2592
23.	16 July 2021	NFF	Mr Han Shiong Siah	XN: PN2620-2644 XXN: PN2645-2717
24.	16 July 2021	NFF	Mr Jonathan Moss	XN: PN2731-2741 XXN: PN2743-2770
25.	16 July 2021	NFF	Mr Matthew Benham	XN: PN2788-2811 XXN: PN2813-2923
26.	16 July 2021	NFF	Ms Michelle Distill	XN: PN2938-2955

				XXN: PN2957-3034
27.	16 July 2021	NFF	Mr Richard Eckersley	XN: PN3043-3052 XXN: PN3054-3129
28.	16 July 2021	AFPA	Mr Nicholas King	XN: PN3158-3172 XXN: PN3122-3543 (AWU) XXN: PN3548-3581 (88 Days) RXN: PN3584-3613
29.	20 July 2021	AFPA	Mr Greg Houston	XN: PN3684-3701 XXN: PN3704-4042 (AWU) XXN: PN4051-4116 (UWU) RXN: PN4119-4131