

*Fair Work Act 2009* s.158—Application by The Australian Workers' Union to vary the *Horticulture Award 2020*

**AFPA's closing submissions on the evidence**

(filed pursuant to paragraph 3 of the directions made by the Commission on 16 July 2021)

**A Factual findings that AFPA submits should be made**

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1. AFPA submits that the Commission should make the factual findings set out below.

**A.1 Growth and seasonality of produce**

2. The Australian horticulture industry encompasses the production, processing, marketing and shipping of fruits, vegetables and tree nuts.<sup>1</sup>
3. Crop growth is seasonal and each crop has its own distinct picking season.<sup>2</sup> The crop yield starts lower at the beginning of the season, then ramps up during the middle of the season and tapers off in the late portion of the picking season.<sup>3</sup>
4. As a particular piece of produce (eg an individual berry) ripens, it reaches optimum size or ripeness. Unless picked within a particular window of time, the item of produce will become over-ripe or too big or otherwise spoil. The window of time during which the produce is at its optimal ripeness or size varies by crop (e.g., one day for raspberries and blackberries or one week for citrus and avocado).<sup>4</sup>
5. Each item of produce must be harvested during this narrow window of optimum size or ripeness for the grower to be able to sell the produce as first-grade fresh produce. Over-ripe items can only be sold as lower-grade or outgrade produce (eg fruit for freezing, jamming or juicing). The price of this lower grade / outgrade produce is much lower than first-grade produce, by as much as a factor of twenty. The price of lower-grade or outgrade produce may not even cover the cost of production. Hence,

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<sup>1</sup> King Primary Statement at [8] (CB3103). (See Appendix E for a list of abbreviated reference names, such as the "King Primary Statement", used in this submission).

<sup>2</sup> King Primary Statement at [12] (CB3104).

<sup>3</sup> King Primary Statement at [21] (CB3107).

<sup>4</sup> King Primary Statement at [13]-[14] (CB3105).

it is critical for growers to pick produce during the optimal picking window.<sup>5</sup>

6. Because individual items of produce ripen at different rates on the same plant, picking must be done repeatedly throughout the season at short intervals to continuously harvest the items of produce that have reached their optimal window.<sup>6</sup>

### **A.2 Seasonality of the labour requirements of the industry**

7. Work across the horticulture industry is labour intensive and predominantly seasonal.<sup>7</sup> Harvesting (or picking, which is an equivalent term) in particular requires a large workforce.<sup>8</sup>
8. Due to the seasonality and picking windows described above, the size of the workforce at a particular site can vary significantly throughout the season. The demand for picking labour ramps up as the picking season progresses, peaks and then tapers off reflecting the corresponding changes in crop yield.<sup>9</sup>

### **A.3 Size and composition of the horticulture workforce**

9. The Australian horticulture workforce comprises of local workers and temporary migrant workers. The migrant workers in turn comprise of the following cohorts:<sup>10</sup>
  - a) working holiday makers (**WHMs**), being the holders of subclass 417 and 462 visas;
  - b) temporary workers from the Pacific Islands (**Pacific Islander Workers**), working in Australia under the Seasonal Worker Program (**SWP**) and the Pacific Labour Scheme (**PLS**);<sup>11</sup>

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<sup>5</sup> King Primary Statement at [15] (CB3106).

<sup>6</sup> King Primary Statement at [13] (CB3105).

<sup>7</sup> King Primary Statement at [11] (CB3104).

<sup>8</sup> King Primary Statement at [13] (CB3105).

<sup>9</sup> King Primary Statement at [21] (CB3107).

<sup>10</sup> Howe Primary Statement at [10] (CB2451), [13] (CB2452); Transcript PN666-683 (Howe XXN); Transcript PN1134–1139 (Underhill XXN).

<sup>11</sup> Dr Howe confirmed that the SWP is “specifically calibrated to seasonal work in the horticulture industry” and that “everyone who is participating in that scheme is working in the labour force that is the subject of this proceeding”. The PLS “is a broader scheme for participation of Pacific Islanders in the labour force in Australia” and “covers a range of different industries, but it includes ... agriculture and horticulture”: Transcript PN674-677 (Howe XXN).

- c) international students;
  - d) undocumented migrants (being non-citizens without a valid visa, such as visa overstayers, and valid visa holders working in breach of visa conditions).
10. There is no reliable close estimate of the total horticulture workforce. The best available estimate for 2019 (the year before the onset of the pandemic) is about 120,000 to 140,000, not fully accounting for undocumented migrants.<sup>12</sup> If undocumented migrants are included, the total workforce estimate for 2019 would probably be well in excess of 120,000.<sup>13</sup> These figures capture employees in the industry regardless of the duration of their employment.<sup>14</sup>
11. Of that total:
- a) about 30,000 to 40,000 (about 21-33%) are WHMs;<sup>15</sup>
  - b) about 12,200 (about 9-10%) are Pacific Islander Workers under the SWP;<sup>16</sup>
  - c) an unknown but substantial number are Pacific Islander Workers under the PLS;<sup>17</sup>
  - d) an unknown number are international students;<sup>18</sup>

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<sup>12</sup> ABARES gives a figure of 119,000 for February 2019 and 130,000 for the 2018-2019 year: Howe Primary Statement at [8] (CB2451); CB516; Transcript PN1153-56 (Underhill XXN); PN697-699 (Howe XXN). A Unions NSW report gives a figure of 142,000: CB294; Transcript PN1190-1192 (Underhill XXN). Dr Howe used the ABARES estimate of 130,000: Transcript PN697-699 (Howe XXN). Dr Underhill did not disagree with an estimate of 120,000 to 140,000 and agreed that the number is at least 119,000: Transcript PN1193-1203, PN1230 (Underhill XXN).

<sup>13</sup> Transcript PN1187-89, PN1230, PN1233 (Underhill XXN); PN704 (Howe XXN).

<sup>14</sup> Transcript PN1158 (Underhill XXN).

<sup>15</sup> The National Agricultural Labour Advisory Committee estimated that 30,000-35,000 WHMs worked in agriculture in 2018-19: CB1514. Dr Underhill initially said that this figure seemed low but later accepted that she was applying an obsolete multiplier of 95% instead of 80% to determine the percentage of WHMs with a second-year visa that undertook horticultural work and later proffered a total estimate of at least 40,000 WHMs: Transcript PN1207-1232 (Underhill XXN). Dr Howe proffered a figure of about 36,000 in agriculture but accepted that only a proportion of this number worked in horticulture: Howe Primary Statement at [12] (CB2452); Transcript PN690-694.

<sup>16</sup> Figure provided by the National Agricultural Labour Advisory Committee: CB1514; Transcript PN717 (Howe XXN); Transcript PN1234-1236 (Underhill XXN).

<sup>17</sup> Transcript PN719 (Howe XXN); Transcript PN1238-1240 (Underhill XXN).

<sup>18</sup> Transcript PN1241-1243 (Underhill XXN).

- e) an unknown number in the thousands are undocumented migrants;<sup>19</sup>
- f) about 47% are local workers.<sup>20</sup>
12. This workforce size and composition varies substantially over the course of the year and also varies from region to region.<sup>21</sup>
13. The vast majority of the horticulture workforce is engaged in harvesting/picking work but the precise proportion is not known.<sup>22</sup> However, the proportion of temporary migrant workers in horticulture generally (53% in February 2019<sup>23</sup>) and in harvesting (57% in February 2019<sup>24</sup>) are very similar. This suggests that the proportion of WHMs in the harvesting workforce is also likely to be similar to their proportion among the broader population of horticulture workers, ie 21-33%.
14. The numbers of WHMs have dropped off dramatically due to the pandemic.<sup>25</sup> As a result, WHMs now make up a substantially lower proportion of the total population of horticulture workers than they did in 2019.
15. Temporary migrant workers are generally more vulnerable to exploitation than local workers. And within the cohort of temporary migrant workers, WHMs are the second most vulnerable cohort (after undocumented migrants) due to the absence of regulation and the pressure to fulfill the requirement of working 88 days in designated sectors (most notably agriculture) to obtain their second-year visa. In contrast, Pacific Islander Workers are generally less vulnerable because the schemes under which they are brought in Australia are highly regulated.<sup>26</sup> In particular, in order to employ

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<sup>19</sup> Transcript PN1184-1189 (Underhill XXN); Transcript PN687, PN704 (Howe XXN).

<sup>20</sup> ABARES gives figures of 63,000 migrants workers and 56,000 local workers in horticulture in February 2019, with local workers therefore making up about 47% of the total of 119,000 workers: CB516.

<sup>21</sup> Transcript PN1159-1160 (Underhill XXN); CB515-516.

<sup>22</sup> Transcript PN1385-1386, PN1534 (Underhill XXN). In cross-examination, Dr Underhill initially asserted that the 57% figure was the proportion of WHMs in the sub-population of horticulture workers that perform harvesting work but later corrected herself: Transcript PN1411-1415, PN1470, PN1533 (Underhill XXN).

<sup>23</sup> See fn 20 above.

<sup>24</sup> Underhill Primary Report at [12] (CB479). While this is not apparent from the description of the figure in her report, Dr Underhill later clarified that it represents the proportion of temporary migrants among the *harvesting* workforce: Transcript PN1386, PN1406-1408, PN1411-1415, PN1470, PN1533 (Underhill XXN).

<sup>25</sup> Transcript PN708 (Howe XXN); CB947.

<sup>26</sup> Howe XXN722-744; PN981-983 (Howe XXN).

Pacific Islander Workers under the SWP, the employer has to be approved by the relevant Commonwealth Department. The approval process requires the employer, among other things, to submit to audits of accommodation, pay and employment conditions.<sup>27</sup>

16. It is difficult to predict how long the pandemic-related travel restrictions (and travel reduction more generally) will continue. However, there is no reason to expect WHM numbers to return to pre-pandemic levels in the near future, or at all.<sup>28</sup>

#### **A.4 Mode of engagement**

17. A significant minority of the horticulture workforce (at least about a third) are engaged as pieceworkers.<sup>29</sup>

#### **A.5 Skills involved in picking, competence and variation in output**

18. Picking is not a highly skilled job but it does require some skills, knowledge and experience. The picker needs to be able to identify when the produce is ripe for picking, know how to appropriately pick the produce in question and, for some types of produce, be able to appropriately pack the product.<sup>30</sup>
19. It takes a new worker with no experience some time to become competent to the relevant legal standard, as articulated by Rangiah J in *FWO v Hu (No 2)*.<sup>31</sup> The

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<sup>27</sup> King Primary Statement at [25] (CB3108-3109); Transcript PN739-743 (Howe XXN).

<sup>28</sup> Including because of the proposal to introduce an agri-visa the details of which are not yet known and the impending abolition of the 88-day requirement as part of the UK-Australia free trade agreement: Statement of Elizabeth Tan dated 19 July 2021 (AFPA-5).

<sup>29</sup> Underhill Primary Report at [22] (CB485), [41] (CB493); Appendix C to the Durable Future Report at 37 (AFPA-1).

<sup>30</sup> King Primary Statement at [30] (CB3110).

<sup>31</sup> (2018) 279 IR 162 (*Hu*) (appeal dismissed in *FWO v Hu* (2019) 289 IR 240). It should be noted that Mr King was cross-examined to the effect that he correctly articulates the *Hu* test in [34] of the King Primary Statement (CB3111) but has not himself read the *Hu* judgment: Transcript PN3324-3351. This cross-examination suggests that, at some point, without himself reading the *Hu* judgment, Mr King became aware of the correct *legal test* of “competence” and “average competence”. It was suggested that his evidence about the test of competence in [34] was, in effect, contaminated by lawyers who helped to take his statement. But in [34] of his statement, Mr King is not giving evidence about what the test for competence is under the Award — that is a legal question and Mr King’s opinion on that question would be entirely irrelevant. Rather, Mr King is explaining what test he *applied* to his knowledge of the industry to come up with the competence-related figures about which he opines: how long it takes a new worker to become competent (at [33]), proportion of workers that are not competent (at [37]) and the relative output of novice, competent and high performing employees (at [39]). The fact that Mr King — who is not a lawyer — did not himself read the *Hu* judgment and relied on some other source of information to find out the correct legal test in no way impeaches his credibility. On the contrary,

precise amount of time varies depending on the type of crop and the individual but may be as short as one day or as long as six weeks.<sup>32</sup>

20. There is a great variation in the productivity (picking rates) of different workers. As a rough guide, an increase in productivity from a novice worker to a competent worker may be in the order of 70%. And a strong performer may be able to pick 40-100% faster than that.<sup>33</sup>

#### **A.6 *Proportion of workers who do not pick at the competent level***

21. Attrition rates in the horticulture industry are high.<sup>34</sup> They are particularly high for WHMs. For example, at Costa — Australia’s largest fresh produce supplier to major food retailers — 18% of WHMs left within their first two weeks of employment in 2019, 33% left within four weeks, and 45% left within 6 weeks.<sup>35</sup>
22. In contrast, Pacific Islander Workers have significantly lower attrition rates and therefore end up being more experienced.<sup>36</sup>
23. As a result of the high attrition rates in some cohorts, a substantial proportion of the workforce is not competent at any given point in time.<sup>37</sup>
24. Further, some pieceworkers engaged in picking are not necessarily motivated to pick as quickly as they can and maximise their earnings. These include some “grey-nomad” workers, who perform this work as a lifestyle choice and may prefer to work at a slower pace that suits them. Similarly, some WHMs perform picking work solely to obtain 88 days of prescribed work necessary to extend their visa and prefer to work

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the articulation of the test of competence in [34] makes transparent what test he applied to determine these figures and demonstrates that he applied the correct legal test (rather than some unarticulated idiosyncratic ideas about competence that an uninformed non-lawyer might have).

<sup>32</sup> King Primary Statement at [33] (CB3110); Statement of Anne Kathleen Reardon dated 9 June 2021 at [18] (CB2775). In *Hu*, Rangiah J held that it took mushroom pickers about two weeks to become competent: at [90].

<sup>33</sup> King Primary Statement at [39] (CB3111-3112).

<sup>34</sup> King Primary Statement at [41] (CB3112); Witness Statement of Steven Carter dated 16 March 2021 at [16] (AWU-10; CB126).

<sup>35</sup> King Primary Statement at [3] (CB3102), [43]-[47] (CB3112-3113). See also Transcript PN1355 (Underhill XXN).

<sup>36</sup> King Primary Statement at [44]-[45] (CB3112); see also Transcript PN1353 (Underhill XXN).

<sup>37</sup> Mr King gives a figure of 20% or more as a rough guide across the Costa workforce as a whole: King Primary Statement at [37] (CB3111).

at a leisurely pace instead of maximising their earnings.<sup>38</sup>

25. These workers, even if they have sufficient *skills and experience* to be competent, may lack the *motivation* to pick at the speed of a competent, or average competent, picker. No data has been adduced in this proceeding that would shed light as to how large this cohort is as a proportion of horticultural pieceworkers as a whole.
26. However, Pacific Islander Workers are some of the most motivated because in general they have come to Australia to earn as much as possible for themselves and their families.<sup>39</sup>

#### **A.7 *Earnings of workers in the horticulture industry***

27. For the reasons set out in Appendices A, B and C to this submission, based on the evidence adduced in this proceeding:
- a) It is not open to the Commission to extrapolate that any findings it makes in relation to WHMs hold true across the whole population of horticulture workers.
  - b) It is open to the Commission to find that some employers in the industry set their piece rates and/or time rates at inappropriately low levels or otherwise underpay their workers. But it is not open to make any findings as to what proportion of employers do so.
  - c) It is not open to the Commission to make any findings about:
    - i. the mean or median earnings of pieceworkers across the entire population of horticulture workers;
    - ii. the mean or median earnings of timeworkers across the entire population of horticulture workers; or
    - iii. the relationship between mean/median earnings of pieceworkers compared to the mean/median earnings of timeworkers across the entire population of horticulture workers.
  - d) Whatever might be said about the relationship between the median earnings of

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<sup>38</sup> King Primary Statement at [54] (CB3115); Statement of Gaetano Guy Gaeta dated 9 June 2021 at [13] (CB2971).

<sup>39</sup> King Reply Statement at [12(b)] (AFPA-3); Reply Statement of Anthony Beven dated 29 June 2021 at [11] (CB15).

WHMs engaged on a pieceworker basis compared to those engaged on a timeworker basis, it is not open to the Commission to find that the reason for any such difference is the mode of engagement per se rather than some other factor (such as experience) that correlates with *both* the mode of engagement and earning outcomes.

28. To the extent that some employees working in the horticulture industry (whether on piece rates or hourly rates) are currently paid less than what they are entitled to under the Award, this is explicable at least in substantial degree by employers that blatantly breach the Award.<sup>40</sup>

**A.8 *OH&S risks of piece workers in the industry***

29. For the reasons given in Appendix B to this submission, it is not open to the Commission to make any findings about any causal link between piecework mode of engagement and occupational health & safety (**OH&S**) risks.

**A.9 *Effects of the AWU's proposed variation***

30. Currently, the availability of a piecework mode of engagement with no hourly floor allows employers to maintain the employment of a substantial cohort of slower pickers (who are not yet competent and/or not motivated to work fast) without a cost penalty to the employer.<sup>41</sup> Further, it reduces the need to closely supervise and monitor the productivity of the picking workforce.
31. But if the AWU's variation is made, employers will be required to pay these slow, under-performing employees the minimum hourly rate. This will have the following direct effects:
- a) Employees who, due to their performance, currently receive piecework remuneration that is, on an hourly basis, either below the Award minimum rate, or at, or slightly above that rate, will be substantially demotivated. This is because these workers will be able to slow down and work at a leisurely pace and still either receive increased remuneration (for those currently below the Award hourly rate) or only slightly reduced remuneration (for those currently slightly above the

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<sup>40</sup> Transcript PN1434-1435 (Underhill XXN).

<sup>41</sup> King Primary Statement at [50] (CB3114), [54] (CB3115).

Award hourly rate).<sup>42</sup>

- b) The total labour cost of *compliant* employers will substantially increase.<sup>43</sup>
- c) Most of the additional cost will be borne by the growers.<sup>44</sup>
- d) To the extent that some of the additional cost is passed on to the supermarkets, it will then likely be passed on to the consumer in the form of higher prices for fresh produce.
- e) To minimise the cost increase, *compliant* employers will have a strong incentive to become much more discerning about employee performance. They are likely to increase supervision of their workforce. They are also likely to introduce minimum performance targets and cull employees that fail to meet them. This will deny employment to those groups of workers who are unable or unwilling to lift their performance.<sup>45</sup>
- f) Some employers will make greater use of automation and machinery to reduce labour costs.<sup>46</sup> This will reduce employment opportunities in the horticulture industry.
- g) The need to minimise the cohort of slow employees will lead *compliant* employers to favour Pacific Islander Workers over other cohorts because Pacific Islander Workers generally have superior motivation and lower attrition rate and therefore more experience.<sup>47</sup>
- h) Smaller growers are less likely to be able to access the Pacific Islander workforce. This is because smaller growers are less likely to grow a sufficient variety of

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<sup>42</sup> King Primary Statement at [57] (CB3115); King Reply Statement at [12(c)] (AFPA-3); Statement of Anthony Thomas Kelly dated 9 June 2021 at [30] (CB2783).

<sup>43</sup> King Primary Statement at [57] (CB3115), [59] (CB3116).

<sup>44</sup> King Reply Statement at [21] (AFPA-3).

<sup>45</sup> King Primary Statement at [59]-[60] (CB3116); Statement of Anne Kathleen Reardon dated 9 June 2021 at [36] (CB2776-2777); Statement of Anthony Thomas Kelly dated 9 June 2021 at [31]-[32] (CB2783); Statement of Jonathan Richard Moss dated 9 June 2021 at [40]-[41] (CB3000); Statement of Michelle Distill dated 9 June 2021 at [28]-[29] (CB3029); Statement of Richard Gurney Eckersley dated 9 June 2021 at [34] (CB3057); Statement of Akata Uata dated 10 June 2021 at [4]-[5] (CB3083).

<sup>46</sup> Eg Statement of Anne Kathleen Reardon dated 9 June 2021 at [36] (CB2776-2777).

<sup>47</sup> King Primary Statement at [62] (CB3116); King Reply Statement at [12(b)] (AFPA-3); Statement of Reginald John Brown dated 9 June 2021 at [31] (CB3053); Transcript PN1352-1355 (Underhill XXN).

crops, or to have multiple climatically-different locations for the same crop, to be able to provide employment for an extended part of the year rather than merely for a short picking season of one crop at one location.<sup>48</sup>

- i) Smaller growers are also less likely to be able to absorb the increased costs, or to have the market power to pass on a greater proportion of the increase to their customers.
- j) This will put pressure on the viability of many small growers. These growers will either be driven out of business or will resort to blatantly breaching their legal obligations, eg by offering cash-in-hand payments.<sup>49</sup>
- k) There would be a natural incentive for employers to move away from piece rates to hourly rates with unregulated above-Award incentives that will not necessarily provide an average competent worker with a 15% uplift.<sup>50</sup>

32. The effect on the pay outcomes of horticulture pieceworkers will be as follows:

- a) Many slow pieceworkers who would otherwise be employed will no longer be employed and therefore will not receive any remuneration at all.<sup>51</sup>
- b) Slower pieceworkers who currently receive less than the equivalent of the minimum hourly rate will now receive the minimum hourly rate but only to the extent that:
  - i. they can still obtain employment in the industry; and
  - ii. their employer was, and *remains*, compliant with the Award.

This is the only benefit to workers that will arise out of the AWU's proposed variation.

- c) Some proficient pieceworkers who currently earn substantially above the Award hourly rate will earn less because their employers will move to an hourly mode of

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<sup>48</sup> King Primary Statement at [64]-[65] (CB3117).

<sup>49</sup> King Primary Statement at [65] (CB3117); King Reply Statement at [14(b)] (AFPA-3); Statement of Richard Gurney Eckersley dated 9 June 2021 at [33] (CB3057); Statement of Reginald John Brown dated 9 June 2021 at [31] (CB3053).

<sup>50</sup> AFPA Opening Submission at [28].

<sup>51</sup> See [31.e)] above.

engagement with an unregulated above-Award performance incentives that provide a less than 15% uplift for the average competent worker.<sup>52</sup>

d) Employees who are currently underpaid because their employer is blatantly breaching the Award will continue to be underpaid.<sup>53</sup>

33. To the extent that the current drafting of clause 15.2 of the Award creates difficulties in correctly setting the piece rate for the average competent employee, or enforcing the Uplift Term, these difficulties will remain unaddressed.

#### **A.10 *Effects of AFPA's alternative variation***

34. In its opening submission, AFPA proposed an alternative variation if the Commission were to form the view that the current piecework provisions need to be varied.<sup>54</sup> That alternative variation is designed to preserve the concept of a piecework-based safety net with an uplift of earnings for competent pieceworkers compared to timeworkers, but provide additional implementation machinery to support the transparent and consistent application of piecework rates. Appendix D to this submission now sets out a possible draft implementation of this proposal for further consideration by the Commission and the parties.

35. AFPA submits that, if the Commission finds it necessary to consider AFPA's proposal, it should find that the proposal is likely to:

- a) make it easier for growers to correctly set piece rates;
- b) make it easier for workers, unions and the FWO to enforce the Uplift Term;
- c) increase the earnings of pieceworkers who are currently paid less than the minimum hourly rate; and
- d) largely avoid the adverse consequences of the AWU's proposed variation set out in the previous section of this submission.

## **B AFPA's submissions in response to the Commission's materials**

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### **B.1 *The FWC Industry Information Note***

36. In relation to the number of employees in the industry, the FWC Industry Information

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<sup>52</sup> See [31.k)] above.

<sup>53</sup> There is no reason to expect that employers who are currently prepared to blatantly breach the Award will suddenly become more compliant if the AWU's proposed variation is made.

<sup>54</sup> AFPA Opening Submission, section E.

Note appears to cite ABS data for the whole of the agriculture industry. More accurate data for the horticulture industry is set out in section A.3 of this submission. Further, it cannot be assumed that other data in the FWC Industry Information Note that covers all of the agriculture industry (or the agriculture, forestry and fishing industries combined) is representative of the horticulture industry.

37. In relation the composition of the horticulture workforce, again, more accurate information, obtained from multiple of sources and confirmed by Dr Underhill and Dr Howe in cross-examination, is set out in section A.3 of this submission.
38. Table 6 in the FWC Industry Information Note reproduces the data from the First Underhill Survey. This data is not probative of pieceworker earnings in the industry, for the reasons set out in Appendix B to this submission.
39. Some of the sources cited in the FWC Industry Information Note are not in evidence. These sources should not be used to make any findings of fact.

#### **B.2 *The FWC Piecework Research Paper***

40. In relation to Part 3 of the FWC Piecework Research Paper:
  - a) The proposition that the awards listed at the bottom of p 9 “provide pieceworkers with a minimum guaranteed wage” is inaccurate; accurate information can be found in the AFPA Opening Submission at [22] and footnotes thereto.
  - b) The history of piecework provisions in the horticulture industry is summarised in section D.1 of the AFPA Opening Submission.

#### **B.3 *The FWC Reference List***

41. Some of the sources in the FWC Reference List are not in evidence. These sources should not be used to make any findings of fact.

#### **B.4 *Other information notes***

42. AFPA has not had an opportunity to review the further information notes uploaded on 26 July 2021 and will seek to respond to them in oral submissions.

26 July 2021

Richard Dalton QC  
Dimitri Ternovski

## Appendix A — AFPA submissions about the evidence of pieceworker earnings in the horticulture industry

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### *Introduction*

43. The lay evidence about earnings comprises anecdotes about individual workers and their friends, anecdotes about individual farmers and their workers, and generalised assertions of union organisers. This sort of evidence, from a small number of witnesses hand-picked by interested parties, has almost no probative value. In any event, the NFF anecdotal evidence “cancels out” the Union Parties’ anecdotal evidence. This selective anecdotal evidence ought to be put to one side.
44. That leaves what may loosely be called “expert evidence” about pay outcomes of pieceworkers, primarily expert evidence from Dr Underhill and Dr Howe, but also evidence contained in the various reports and articles that Dr Underhill and Dr Howe have annexed or that otherwise ended up tendered in evidence.
45. Relying on this body of expert evidence, the Union Parties submit that the opinions and conclusions in those reports, and the studies and surveys on which they are based, demonstrates widespread and systemic underpayment of pieceworkers in the horticulture industry.
46. However, as this submission will show, this evidence does not withstand scrutiny. The reports and articles make sweeping assertions about pay outcomes of workers. But when their sources are examined, one sees that these reports and articles largely just cite and refer to each other and the number of actual *data sources* underpinning the various assertions is modest. In turn, when these data sources are examined, it becomes apparent that they are largely useless for the purpose of determining the earnings of pieceworkers in the horticulture industry. In particular:
- a) Some data sources do not even distinguish between pieceworkers and timeworker earnings (eg the FWO WHM Inquiry Report).
  - b) Others are poisoned by extreme self-selection bias, such as the Working for \$9 a Day Report, which documents a survey conducted by Unions NSW that expressly sought responses from victims of “exploitation” and “oppressive conditions”.
  - c) Dr Howe’s so-called “data” turned out upon scrutiny to be a collection of hand-picked anecdotes sprinkled with a few ipse dixit assertions.

d) The common thread that runs through all of these data sources is that they *target* WHMs (a particularly vulnerable cohort that makes up no more than a third of the workforce<sup>55</sup>) or in some cases international students (which are likely to make up a small proportion of the workforce<sup>56</sup>). The Union Parties have not adduced a single survey targeting (or adequately representing) local workers or Pacific Islander Workers even though, in combination these two groups represent the majority of the workforce. They are also the least vulnerable groups and likely to be the most experienced and best paid. Thus, the Union Parties' data sources target cohorts that are likely to be some of the worst paid. And even within those cohorts, their data suffers from self-selection bias towards disgruntled workers that further skews down the reported pay outcomes. It is not surprising therefore that these data sets produce low pay figures. This is because the data sets are not representative of the horticulture workforce as a whole.

47. Standing out from the Union Parties' data sources is Dr Howe's survey of vegetable growers that, despite its limitations, is the least bad piece of evidence in this case (for the reasons set out in Appendix C to this submission). This data source is less unrepresentative of the industry as a whole than the other data sets and shows that the pieceworker earnings in the industry are likely to be much better than the Union Parties' evidence suggests.

48. Regardless, the state of the evidence simply does not permit the Commission to make any findings about pieceworker earnings across the entire population of horticulture workers.

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<sup>55</sup> See [11] and [15] above.

<sup>56</sup> Transcript PN1241-1243 (Underhill XXN).

**AFPA submissions about main data sources**

49. The table below sets out the specific submissions that AFPA makes in relation to each of the main data sources, with more detailed submissions about Dr Underhill’s and Dr Howe’s research set out in Appendices B and C to this submission.

<b>Description of the evidence</b>	<b>Source</b>	<b>AFPA submission</b>
<p>Anecdotal evidence (ie evidence from selected worker witnesses about their and their friends’ pay outcomes, evidence from individual grower witnesses about pay outcomes on their farms, and generalised assertions about pay outcomes in the industry from individual workers, organisers and growers).</p>	<ul style="list-style-type: none"> <li>All AWU, UWU and NFF lay witnesses.</li> </ul>	<p>Anecdotal evidence from a small number of witnesses hand-picked by interested parties has almost no probative value.</p> <p>Generalised assertions about pay outcomes in the industry from individual workers, union organisers and growers has almost no probative value.</p> <p>In any event, the NFF evidence of this kind “cancels out” the Union Parties’ evidence of the same kind.</p>

Description of the evidence	Source	AFPA submission
Two surveys conducted by Dr Underhill.	<ul style="list-style-type: none"> <li>• Underhill Primary Report), including the following attachments: <ul style="list-style-type: none"> <li>○ Itinerant Foreign Harvest Workers Article;</li> <li>○ Layered Vulnerability Article; and</li> <li>○ Using Social Media Article.</li> </ul> </li> <li>• Underhill Reply Report.</li> </ul>	<p>See Appendix B to this submission.</p> <p>In summary, weak evidence that median earnings of WHMs working in the horticulture industry are lower for WHMs engaged on a pieceworker basis compared to those engaged on a timeworker basis. Cannot be extrapolated to the horticulture workforce as a whole.</p> <p>No probative value in establishing earnings in the horticulture workforce as a whole.</p>

Description of the evidence	Source	AFPA submission
Focus groups and interviews conducted by Dr Howe.	<ul style="list-style-type: none"> <li>• Howe Primary Statement, including the attached Durable Future Report.</li> <li>• Howe Reply Statement.</li> <li>• Appendices to the Durable Future Report (AFPA-1).</li> </ul>	<p>See Appendix C to this submission.</p> <p>In summary, a set of hand-picked anecdotes from WHMs that has very little probative value and, in any event, cannot be extrapolated to the horticulture workforce as a whole.</p>
Dr Howe's assertion about pay outcomes based on her experience	<ul style="list-style-type: none"> <li>• Howe Reply Statement.</li> </ul>	<p>See Appendix C to this submission.</p> <p>In summary, bare assertion with no probative value.</p>
Dr Howe's survey of vegetable growers.	<ul style="list-style-type: none"> <li>• Appendix C to the Durable Future Report (AFPA-1).</li> </ul>	<p>See Appendix C to this submission.</p> <p>In summary, the least bad evidence of pay outcomes in the industry, though it still suffers from limitations.</p>

Description of the evidence	Source	AFPA submission
NFF's survey.	<ul style="list-style-type: none"> <li>Attachment F to the Statement of Benjamin William Rogers dated 10 June 2021 (NFF3, CB2912-2914) at CB2893-2955.</li> </ul>	<p>Suffers from issues such as self-selection bias.</p> <p>Limited probative value.</p>
Survey of temporary migrant workers (across all industries) conducted by Berg and Farbenblum.	<ul style="list-style-type: none"> <li>Wage Theft in Australia Article.</li> </ul>	<p>See Appendix C to this submission. In summary, does not provide any useful data about the earnings of pieceworkers in the horticulture industry.</p> <p>No probative value.</p>
Survey of subclass 417 visa WHMs conducted by the Fair Work Ombudsman.	<ul style="list-style-type: none"> <li>FWO WHM Inquiry Report.</li> </ul>	<p>See Appendix C to this submission. In summary, does not provide any useful data about the earnings of pieceworkers in the horticulture industry.</p> <p>No probative value.</p>

Description of the evidence	Source	AFPA submission
Survey of migrant workers in horticulture conducted by Unions NSW.	<ul style="list-style-type: none"> <li>Working for \$9 a Day Report.</li> </ul>	<p>The survey sample was effectively limited to WHMs (84% of respondents were temporary visa holders and 89% of those were WHMs).<sup>57</sup> Even within that cohort, the survey was affected by extreme self-selection bias because it recruited respondents by expressly seeking evidence of “exploitation” from pieceworkers that “struggle to earn a living wage” and endure “oppressive conditions”.<sup>58</sup> Unsurprisingly, 80% of pieceworker respondents and 61% of timeworker respondents reported being underpaid.<sup>59</sup></p> <p>No probative value.</p>

<sup>57</sup> Working for \$9 a Day Report (CB301-302).

<sup>58</sup> Houston Reply Report at [80]-[81] (AFPA-7).

<sup>59</sup> Working for \$9 a Day Report (CB296).

Description of the evidence	Source	AFPA submission
Review of horticultural job ads by Unions NSW.	<ul style="list-style-type: none"> <li data-bbox="853 344 1205 373">Shadow Market Report.</li> </ul>	<p data-bbox="1339 344 2011 676">There is no evidence as to what proportion of horticulture jobs are advertised but, as a matter of common sense, it seems obvious that ads are more likely to target some cohorts of workers than others (eg WHMs rather than Pacific Islander Workers and repeat local workers). Thus, the sample of jobs that was analysed is likely to be unrepresentative.</p> <p data-bbox="1339 730 2029 1118">More fundamentally, it is unclear how the authors converted an advertised piece rate into an hourly rate given that the pick rates can vary dramatically depending on the picker's skill, experience and fitness, the characteristics of the particular farm and block, weather and changes in crop yield over the crop's picking season. There is simply no useful way of performing this conversion.</p> <p data-bbox="1339 1171 1592 1200">No probative value.</p>

Description of the evidence	Source	AFPA submission
Interviews with WHMs in the Coffs Harbour region conducted by the McKell Institute.	<ul style="list-style-type: none"> <li>Blue Harvest Report.</li> </ul>	<p>Both the methodology and the results of the interviews (or even the number of interviewees) do not appear to be discernible from the report.</p> <p>No probative value.</p>
Review of blueberry picking job ads in the Coffs Harbour region conducted by the McKell Institute.	<ul style="list-style-type: none"> <li>Blue Harvest Report.</li> </ul>	<p>Both the methodology and the results of the review do not appear to be discernible from the report.</p> <p>A review of job ads is an inherently problematic means of earnings of pieceworkers due to the impossibility of converting advertised piece rates into an effective hourly rate (see above in relation to the Shadow Market Report).</p> <p>No probative value.</p>

## Appendix B — Analysis of Dr Underhill’s evidence

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### *Introduction*

50. In her original report, Dr Underhill made three findings:<sup>60</sup>
- a) that pieceworkers in the horticulture industry are paid less than timeworkers (**Underhill Relational Earnings Finding**);
  - b) that pieceworkers in the horticulture industry receive only 60% of the amount that an average competent worker would be expected to earn (**Underhill Absolute Earnings Finding**); and
  - c) that low rates of pay for pieceworkers in the horticulture industry encourage an unacceptably high level of unsafe work practices (**Underhill OH&S Finding**).
51. All three findings were based on two surveys of workers that Dr Underhill conducted, first in 2013-14 (**First Underhill Survey**) and then in 2018 (**Second Underhill Survey**).
52. In her original report, Dr Underhill stated these findings in a completely bald, unqualified way. But once her methodology has come under scrutiny, it became apparent that these findings simply cannot be supported by Dr Underhill’s surveys. Ultimately, Dr Underhill was forced to concede that it was “careless” of her not to explain some of the limitations of her surveys in her primary report.<sup>61</sup> This is not an accident. While Dr Underhill agreed to be bound by the Harmonised Expert Code of Conduct, her professional work involves advocating for stricter regulation of the working conditions of temporary migrant workers and she has used her evidence in this case as another platform for continuing this advocacy.
53. Ultimately, in cross-examination, Dr Underhill conceded most of the problems set out below and came close to conceding that her surveys cannot support the Underhill Relational Earnings Finding and the Underhill Absolute Earnings Finding.
54. For the reasons set out below:
- a) The Underhill Absolute Earnings Finding is not supported by evidence in relation

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<sup>60</sup> Underhill Primary Report at [25] (CB486), [38]-[41] (CB491-494); Transcript PN1249-1258 (Underhill XXN).

<sup>61</sup> Transcript PN1344 (Underhill XXN).

to any cohort.

- b) The Underhill OH&S Finding is weak and limited to WHMs.
- c) WHMs are likely to earn less than some of the other cohorts and any findings about WHM earnings cannot be extrapolated to the horticulture workforce as a whole.
- d) The Underhill OH&S Finding is not supported by evidence in relation to any cohort.

***The Underhill Relational Earnings Finding and the Underhill Absolute Earnings Finding are not supported by evidence***

Dr Underhill surveys yielded unrepresentative samples

- 55. Dr Underhill conducted the First Underhill Survey for the purposes of a research project into WHMs working in the horticulture industry. The project concerned employment conditions and OH&S experiences of WHMs.<sup>62</sup>
- 56. In order to work out how to reach her audience, Dr Underhill conducted focus groups targeting WHMs. All 64 of the worker participants in these focus groups were temporary migrant workers and 51 out of 64 were WHMs. Armed with information from these focus groups, Dr Underhill then marketed her survey to WHMs by leaving postcards at backpacker hostels and placing ads on WHM websites.<sup>63</sup> 79% of her survey respondents were WHMs, and more specifically, WHMs holding a subclass 417 visa.<sup>64</sup>
- 57. Dr Underhill conducted the Second Underhill Survey for the purposes of a research project into the use of “digital communication” by “non-English speaking temporary migrant youth” working in various industries. The research specifically “targeted” WHMs and international students, with a particular focus on the Asian sub-cohort of WHMs.<sup>65</sup>

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<sup>62</sup> Underhill Primary Report [6] (CB476).

<sup>63</sup> Underhill Reply Report [7]-[8] (CB322), [10] (CB323); Layered Vulnerability Article (CB2209-10); Itinerant Foreign Harvest Workers (CB2187); Transcript PN1269-1284 (Underhill XXN).

<sup>64</sup> Layered Vulnerability (CB2210) (259 out of 303 respondents held a visa, and of these 92.3% held a first- or second-year subclass 417 visa).

<sup>65</sup> Underhill Reply Report [14] (CB324); Underhill Primary Report [7] (CB477); Using Social Media Article (CB2253); Transcript PN1327-1328 (Underhill XXN).

58. In order to work out how to target this audience, Dr Underhill again conducted focus groups but this time in Chinese and Korean languages. She then used information from these focus groups to market her survey to WHMs, particularly those speaking Asian languages.<sup>66</sup> 76% of her survey respondents were WHMs and 11% were international students.<sup>67</sup>
59. Given that WHMs represent only about 21-33% of the total population of horticulture workers (and a similar proportion of those doing harvesting work),<sup>68</sup> Dr Underhill's samples in both her surveys are obviously unrepresentative of the whole population. Indeed, she has belatedly acknowledged this in her reply report and in cross-examination.<sup>69</sup> This is unsurprising because in conducting these surveys, Dr Underhill was not even *trying* to obtain a representative sample of the whole population of horticulture workers in order to determine the earnings of pieceworkers in that population.<sup>70</sup> Rather, she conducted the surveys for the very different purposes of particular research projects that targeted WHMs.
60. Even within the WHM cohort, Dr Underhill's surveys are still unrepresentative because they are affected by self-selection bias. It was up to individual WHMs who saw her ads to "opt in" to answering the survey. As Dr Underhill acknowledged, this gives rise to self-selection bias where disgruntled individuals are more likely to respond.<sup>71</sup>
61. Dr Underhill tried to mitigate this effect for the First Underhill Survey by offering all participants a \$15 payment.<sup>72</sup> It is not at all clear that it had any such effect. As Berg and Fargbenblum explain (in a paper to which Dr Underhill refers) when dealing with a financial incentive in their own survey, "it is possible that the participants earning lower wages were more likely than higher income earners to be motivated to complete the survey by the [financial incentive]."<sup>73</sup> In any event, as Dr Underhill acknowledges, this incentive at best reduced the self-selection bias but did not eliminate it. The bias

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<sup>66</sup> Underhill Reply Report [14]-[15] (CB324-325); Using Social Media Article (CB2253, 2257-2258).

<sup>67</sup> Using Social Media Article (CB2259).

<sup>68</sup> See [11] and [13] above.

<sup>69</sup> Underhill Reply Report at [29] (CB327); Transcript PN1341 (Underhill XXN).

<sup>70</sup> Transcript PN1294-1300, PN1324, PN1373 (Underhill XXN).

<sup>71</sup> Layered Vulnerability Article (CB2210).

<sup>72</sup> Underhill Reply Report [9] (CB322-323); Transcript PN1310 (Underhill XXN).

<sup>73</sup> Wage Theft in Australia Article (CB888).

remains and she is unable to “estimate the extent to which [it] has biased [her] results”.<sup>74</sup>

62. The problem is no better with the Second Underhill Survey, where Dr Underhill offered a smaller incentive of a *chance* to win one of ten \$100 vouchers.<sup>75</sup>
63. Thus, Dr Underhill’s survey samples are not only drawn from a particular cohort of horticulture workers — WHMs — but are also skewed towards disgruntled WHMs to an unknown extent.

#### The design of Dr Underhill’s survey questions biased pieceworker earnings down

64. In both of her surveys, Dr Underhill asked respondents: “how much do you earn, on average, per hour”?<sup>76</sup> This question is easy to answer for a timeworker who has an agreed hourly rate that, as a matter of common experience, is inevitably expressed on a before-tax basis. But for a pieceworker, answering this question requires the respondent to pick a period of time (none being specified in the question), to work out their before-tax earnings and hours of work during that period, and then to divide the former by the latter.
65. As Dr Underhill acknowledged, in working out their earnings, some of the pieceworkers may have used an after-tax amount<sup>77</sup> (the question providing no guidance on this question), thus underestimating the numerator. And they may have included unpaid breaks (again, the question providing no guidance about this), thus overestimating the denominator. Even worse, because the question does not nominate a specific time period (such as the preceding fortnight), a respondent pieceworker whose earnings are likely to vary over time is more likely to select a memorable period in recent past when their earnings were particularly low. In contrast, the responses of timeworkers are less likely to suffer from this bias because timeworkers are inherently more likely to have consistent hourly earnings.<sup>78</sup>
66. Thus, the design of the questions results in a downward bias for the responses of pieceworkers about their earnings. This affects both the Underhill Relational Earnings

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<sup>74</sup> Underhill Reply Report [9] (CB322-323). See also Transcript PN1310-1314 (Underhill XXN).

<sup>75</sup> Transcript PN1334-1337 (Underhill XXN).

<sup>76</sup> Underhill Reply Report at [87] (CB337).

<sup>77</sup> Underhill Reply Report at [91] (CB337).

<sup>78</sup> See generally Houston Primary Report at [105]-[108] (CB3142-4143).

Finding and the Underhill Absolute Earnings Finding, further undermining them even in relation to the (unrepresentative) sample population.

WHM results cannot be extrapolated to the broader worker population

67. As set out above, when Dr Underhill conducted her two surveys in 2013-14 and 2018, she was not trying to obtain a representative sample of the whole population of horticulture workers. Nor was she specifically trying to determine the earnings of pieceworkers in horticulture. Rather, the purposes of her research were quite different. In the case of the First Underhill Survey, it was to investigate employment and OH&S experiences of WHMs in horticulture. In the case of the Second Underhill Survey, it was to examine the use of digital communications by temporary migrant youths. And she designed her survey questions and distribution channels to fit those purposes.<sup>79</sup>
68. When asked to prepare a report for this matter, Dr Underhill then tried to recycle her survey data about WHMs, collected for very different purposes, to estimate the earning outcomes of pieceworkers in the horticulture industry. But the problem is that this data cannot be used for the latter purpose. As a matter of mathematics, no statistical test or technique allows the results of Dr Underhill's unrepresentative samples to be extrapolated to the population as a whole:
- a) Dr Underhill initially applied a two-sample T-test to her survey data. But as she later acknowledged, this is a so-called parametric test that assumes samples to have a normal distribution of the mean. This assumption does not apply to her data so the test is inappropriate.<sup>80</sup>
  - b) In her reply report, she applied the non-parametric Mann-Whitney U-test and seemingly claimed that the results somehow justify both the Underhill Relational Earnings Finding and the Underhill Absolute Earnings Finding.<sup>81</sup> But in cross-examination, she acknowledged that the U-test has nothing at all to say about the Underhill Absolute Earnings Finding. Its utility is limited to assessing the Underhill Relational Earnings Finding.<sup>82</sup> And even in relation to the latter, this

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<sup>79</sup> Transcript PN1288-1300, PN1264, PN1373 (Underhill XXN).

<sup>80</sup> Houston Primary Report at [64]-[71] (CB3134-3135); Transcript PN1394-PN1397 (Underhill XXN).

<sup>81</sup> Underhill Reply Report [38]-[45] (CB328-330), [53] (CB331), [106] (CB340), [113] (CB343).

<sup>82</sup> Transcript PN1342-1343, PN1390-1393 (Underhill XXN); Houston Reply Report at [23] (AFPA-7).

test is confined to testing the finding against the *sampled* sub-population (disgruntled WHMs) rather than the *whole* population of horticulture workers.<sup>83</sup>

c) Mr Houston (an economist whose expertise and experience in statistics is obviously superior to that of Dr Underhill) has unequivocally confirmed that Dr Underhill's data "cannot be extrapolated to a wider population of all horticultural workers".<sup>84</sup>

69. In the absence of a statistical technique to remedy this defect, the only way in which results specific to WHMs could be extrapolated to the broader population would be if one of two further assumptions could be made:

a) that WHMs made up such a large proportion of the total population of horticulture workers that the other cohorts were insignificant; or

b) that the earnings of WHMs are similar to those of other cohorts.

70. As to the former assumption, in 2019 WHMs made up only 21-33% of the total population of horticulture workers and a similar proportion of harvest workers. This number has fallen since the pandemic and there is no basis to assume that it will ever return to its pre-pandemic figures, let alone that the numbers will return in the near future.

71. As to the latter assumption, not only is there no evidence that the population of horticulture workers is homogeneous in terms of pay outcomes but there is strong evidence that WHM pieceworkers are likely to be paid less than other documented migrants and less than local workers.<sup>85</sup>

a) Even among temporary migrant workers, WHMs are a particularly vulnerable group. Consistently with this proposition, Dr Underhill herself confirmed that there is at least anecdotal evidence of WHMs being paid lower piece rates for the same

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<sup>83</sup> Houston Reply Report at [25]-[28]; Transcript PN1408 (Underhill XXN). In XXN, Dr Underhill then sought to defend the Underhill Relational Earnings Finding by saying that the WHMs made up around 60% of the entire workforce in horticulture. However, later in XXN Dr Underhill conceded that the 60% (or more precisely, 57%) figure is not the percentage of WHMs in the picking workforce but the percentage of temporary migrants: Transcript PN1411-1415, PN1470, PN1533 (Underhill XXN), referring to Underhill Primary Report at [12] (CB479).

<sup>84</sup> Houston Reply Report at [35] (AFPA-7).

<sup>85</sup> Dr Underhill expressly confirmed this in cross-examination: Transcript PN1358 (Underhill XXN).

work.<sup>86</sup>

b) More fundamentally, WHMs are more likely than other cohorts to start in the job without any experience, and they also have a high attrition rate.<sup>87</sup> This means that they are likely to be slower than other cohorts and correspondingly earn less on piece rates. Dr Underhill made no attempt to control for this (e.g. by filtering out respondents that did not have a minimum level of experience).<sup>88</sup>

72. Dr Underhill's assertion that her surveys provide "the best evidence available"<sup>89</sup> misses the point. If, as a matter of proper statistical method, A is not evidence of B, the fact that no other evidence of B is available does not alter that position. Put differently, given that WHMs are a distinct group that is likely to have lower earnings than most other cohorts, Dr Underhill's data about WHM earnings simply does not evidence earnings of other cohorts and the fact that she otherwise has no data about the earnings of those other cohorts in no way fixes this problem.<sup>90</sup>

#### ***The Underhill OH&S Finding is not supported by evidence***

73. The Underhill OH&S Finding is something that Dr Underhill volunteered in her original report even though she was not asked to opine on this issue. She conceded in cross-examination that she should not have done so.<sup>91</sup>

74. In any event, the finding is based on the First Underhill Survey but is not supported by the results of that survey.

75. It suffers from three main problems.

76. First, the sample is unrepresentative and skewed for the reasons set out above.

77. Secondly, correlation does not equal causation.<sup>92</sup> There may be a third factor that simultaneously makes it more likely that the worker is exposed to OH&S risks and

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<sup>86</sup> Transcript PN1524-1525 (Underhill XXN).

<sup>87</sup> Transcript PN1352-1355 (Underhill XXN).

<sup>88</sup> Transcript PN1439, PN1443 (Underhill XXN).

<sup>89</sup> Underhill Reply Report at [30] (CB327); see also at [113] (CB343).

<sup>90</sup> Houston Primary Report at [121] (CB3145), [127] (CB3147); Houston Reply Report at [35] (AFPA-7).

<sup>91</sup> Transcript PN1449-1450, PN1462-1463 (Underhill XXN).

<sup>92</sup> Transcript PN1436 (Underhill XXN).

also more likely that the worker is engaged on a piecework basis.<sup>93</sup>

78. Here, Dr Underhill did not implement any controls to ensure that her cohort of pieceworkers and timeworkers were like-for-like in terms of their personal characteristics. For example, less experienced workers are probably more likely to take OH&S risks (including because they start off being slow and therefore have to push themselves to try to pick at a reasonable rate). And they are also less likely to be trusted to work on hourly rates.<sup>94</sup> Thus, lack of experience will correlate with both piecework mode of engagement and with greater OH&S risks.
79. Thirdly and relatedly, the design of Dr Underhill's questions is fundamentally flawed and obscures the distinction between a worker who is not encouraged to take a risk of a particular kind and a worker who is simply not exposed to that class of risk due to the nature of their work.
80. For example, consider the risk of failing to stabilise ladders. Obviously, whether a picker is exposed to this class of risk depends on the crop they are picking (e.g., ladders might be used to pick cherries<sup>95</sup> but are unlikely to be used to pick tomatoes). The question that Dr Underhill asked in her survey was: "The way I am paid encourages me to take risks such as ... Not stabilising a ladder before climbing on it". According to Dr Underhill, workers who do not use ladders will answer this question as "Never".<sup>96</sup> Thus a worker who answered the question "Never" may have done so for two quite distinct reasons — because they do not use ladders and because they do use ladders but do not feel that the way in which they are paid encourages them to take the risk of not stabilising ladders. In our example, *all* tomato pickers will select "Never" for the first reason.
81. Yet the mode of engagement is likely to correlate with crop type at least to some

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<sup>93</sup> Houston Primary Report [97]-[99] (CB3140-3141).

<sup>94</sup> Dr Underhill agreed that the new inexperienced workers were more likely to be paid piece rates rather than hourly rates: Transcript PN1368 (Underhill XXN). AWU official Ron Cowdrey gave evidence that in his experience workers engaged on hourly rates are predominantly Pacific Islander Workers under the SWP: Witness Statement of Ron Cowdrey dated 9 March 2021 at [10] (AWU-8; CB50). This example supports the common-sense proposition that more experienced workers (such as Pacific Islander Workers) are more likely to be engaged on hourly rates.

<sup>95</sup> Witness Statement of Darren Michael Cameron dated 9 March 2021 at [12] (CB41).

<sup>96</sup> Underhill Reply Report [66]-[68], Table 6 (CB332-3).

extent, either directly or indirectly through geographic distribution.<sup>97</sup> To return to the example above, if a timeworker is more likely to be a tomato picker than an apple picker and all tomato pickers answer “Never” because they do not use ladders, a lower proportion of timeworkers will show up as being encouraged not to stabilise ladders compared to pieceworkers. But the causal reason for this has nothing to do with the mode of engagement but relates to the crop type.<sup>98</sup>

82. Dr Underhill’s survey fails to control for this in any way. And the same issue arises in relation to the other questions.
83. Thus, no valid conclusions about relative OH&S outcomes of timeworkers and pieceworkers can be drawn from the First Underhill Survey, even in relation to WHMs.

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<sup>97</sup> Only a minority of harvest workers are engaged on a piecework basis so there must be factors that drive the engagement of the majority of harvest workers on timework basis. Dr Underhill acknowledged that some types of crops are more likely to be harvested on hourly rates, for example those harvested using machinery: Transcript PN1444-1445 (Underhill XXN).

<sup>98</sup> Houston Primary Report [82]-[84] (CB3137-3138); Houston Reply Report at [37]-[42] (AFPA-7).

## Appendix C — Analysis of Dr Howe’s evidence

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### ***The Howe \$15 Finding***

84. In her primary statement, Dr Howe made a “finding” that pieceworkers in the horticulture industry generally earn less than \$15 per hour (**Howe \$15 Finding**):

The data from my research outlined at [6] has supported a finding that piece rates are generally set at levels which mean that workers who are on a piece rate don’t earn at least Award minimum rates, in fact they are paid well below the Award minimum rates, generally earning less than \$15 an hour.<sup>99</sup>

85. Just as Dr Underhill’s findings in her primary report, Dr Howe also expressed this finding in a completely bald, unqualified way.

### ***The Howe \$15 Finding is not found in the Durable Future Report***

86. As the quote above makes clear, Dr Howe expressly based her “finding” on the “data” from her research outlined at [6] of her primary statement. And in [6], Dr Howe described a research project that she undertook in 2016-18 the results of which were published in the Durable Future Report. She does not refer to any other data source in paragraph [6].

87. The Durable Future Report makes 81 numbered findings. The Howe \$15 Finding is not one of them.<sup>100</sup>

88. Dr Howe’s methodology was not set out in the body of the Durable Future Report. The methodology was in appendices, which she failed to include in the version of the report annexed to her statement.<sup>101</sup> AFPA therefore sought the appendices from the UWU. But when the appendices were provided, it became apparent that they also contained no hint of the Howe \$15 Finding either. Indeed, even Dr Underhill, in describing the Durable Future Report, assumed that Dr Howe’s research simply “did

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<sup>99</sup> Howe Primary Statement at [19] (CB2454).

<sup>100</sup> The findings appear throughout the body of report but are collated in Appendix B to the Durable Future Report (AFPA-1).

<sup>101</sup> See Transcript PN886-887 (Howe XXN) for her belated explanation. This explanation should not be accepted. The Commission would be aware that there is a myriad of ways to overcome the alleged difficulty that the version of the Durable Future Report containing the appendices exceeded Dr Howe’s email size limits. For example, she could have sent the appendices in a separate email or uploaded them to a file sharing service. It should also be noted that the entire cross-examination bundle for Dr Howe which includes not only the appendices but other documents (AFPA-1) is less than 9MB in size.

not collect data on rates of pay”.<sup>102</sup>

### ***The Howe Growers Survey***

89. Appendix A to the Durable Future Report contains a description of the research methodology. It discloses that one of the two main pillars of the research was a 2016 survey of vegetable growers (**Howe Growers Survey**). A copy of the Howe Growers Survey was set out in Appendix C to the Durable Future Report.
90. The Howe Growers Survey does not support the Howe \$15 Finding; rather, it detracts from it. Further, for the reasons set out below, the Howe Growers Survey, while it has limitations, is the least bad evidence of pieceworker earnings in this proceeding.
91. The methodology of the Howe Growers Survey and its results were as follows:
- a) Dr Howe commissioned a specialist market research firm OmniPoll to conduct the survey.<sup>103</sup>
  - b) OmniPoll started by obtaining the contact details of vegetable growers from peak industry associations in all six Australian States. After removing duplicates, this yielded 1,552 contacts, which as *samples* go, is a very large proportion of the total population of 4,024 vegetable growing businesses in these States.<sup>104</sup>
  - c) OmniPoll then tried contacting these businesses by phone. After excluding businesses that turned out not to be vegetable growers and businesses that could not be contacted, OmniPoll was left with 611 contacts.<sup>105</sup>
  - d) From this pool, OmniPoll then interviewed a random sample of 332 growers.<sup>106</sup> This is still a substantial sample of 8% of the total vegetable grower population in the six States.
  - e) Of these 332 growers, 80 relied solely on family members, leaving 252 growers

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<sup>102</sup> Underhill Primary Report at [30] (CB488).

<sup>103</sup> Transcript PN840 (Howe XXN).

<sup>104</sup> Appendix C to the Durable Future Report (AFPA-1) at 8-9.

<sup>105</sup> Appendix C to the Durable Future Report (AFPA-1) at 8-9.

<sup>106</sup> Appendix C to the Durable Future Report (AFPA-1) at 68 (“your number has been randomly selected from the list to participate”).

who hired harvest workers.<sup>107</sup>

- f) Of these 252 growers, 63 used piece rates.<sup>108</sup>
- g) Of this total of 63 growers that used piece rates, 65% reported paying \$22 per hour or more, 15% reported paying less than that, and 20% did not answer the question.<sup>109</sup>

92. The Howe Growers Survey is not perfect — it suffers from a number of limitations, as AFPA’s expert Mr Houston explained (after getting a copy of the survey in the appendices to the Durable Future Report).<sup>110</sup> But despite these limitations, it is the least bad piece of evidence about pieceworker earnings in this case:

- a) While the survey targeted only vegetable growers, there is less reason to expect that this cohort is an unrepresentative cohort of growers compared to WHMs who are obviously unrepresentative for the reasons set out above.
- b) While the growers who were called by OmniPoll could “opt-out” of answering this telephone survey, this “pro-active” method of contact is far less susceptible to self-selection bias than the “opt-in” method of answering an ad that Dr Underhill used.<sup>111</sup>
- c) The 65% of pieceworker employers who reported paying at or above \$22 per hour already excludes the 20% that refused to answer the question. In other words, it is 65% of the *total cohort* that used piece rates, not just those that *answered* the question about pay. Thus, even if one were to assume 100% self-selection in that everyone who refused to answer the question did so because they underpaid their pieceworkers, the 65% figure still stands.
- d) The sample size of 64 is larger than the Second Underhill Survey (sample size of 47<sup>112</sup>) and similar or larger than the “sample size” of Dr Howe’s collection of anecdotes described below. Further, each grower can have multiple employees and indeed more than half of the 63 growers that used piece rates reported

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<sup>107</sup> Appendix A to the Durable Future Report (AFPA-1) at 132; Transcript PN850 (Howe XXN).

<sup>108</sup> Transcript PN868-873 (Howe XXN).

<sup>109</sup> Appendix C to the Durable Future Report (AFPA-1) at 39; Transcript PN879-880 (Howe XXN).

<sup>110</sup> Houston Primary Report at [165] (CB3153).

<sup>111</sup> Transcript PN3965-3972, PN4103-4115 (Houston XXN).

<sup>112</sup> Underhill Reply Report, Table 5 at [40] (CB329).

having 20 or more employees. Their answers thus provide an insight into a total pool of many hundreds, if not thousands, of employees.

***Dr Howe was an unimpressive expert who lacked objectivity and impartiality***

93. Dr Howe was an unimpressive expert. Her reports and cross-examination demonstrated that she lacked objectivity and impartiality as an expert. Dr Howe used her evidence as a platform to advance a cause that she pursues in her academic research work — improving regulation of the pay and working conditions of temporary migrants.<sup>113</sup> She did not charge a fee for her work,<sup>114</sup> confirming that she had other motivations to become a witness.
94. While Dr Underhill was ultimately prepared to concede errors and limitations of her work in most instances, Dr Howe was not. She did her utmost to avoid directly answering any questions where the answer looked unhelpful to the perspective she wanted to present. And she refused to make even the most obvious and necessary concessions. For example:
- a) The Howe Growers Survey formed part of the “[t]he data” to which Dr Howe referred in [19] of the Howe Primary Statement as “support[ing]” the Howe \$15 Finding. But Dr Howe made no mention of the Howe Growers Survey in her primary statement and, as explained above, omitted the appendices to the Durable Future Report that would have enabled the reader of her statement to easily find the survey. This omission (deliberate or otherwise) was a serious problem that made [19] substantially misleading. Dr Howe ought to have acknowledged this, as soon as the problem was revealed in Mr Houston’s report. But Dr Howe was unrepentant, both in her reply report and in cross-examination. She refused to even concede that the Howe Growers Survey did not “support” the Howe \$15 Finding.<sup>115</sup>
  - b) At one point, Dr Howe refused to directly concede that undocumented migrants are the most vulnerable cohort in the horticulture industry and insisted on trying to qualify this proposition, even though the proposition reflected verbatim a finding

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<sup>113</sup> Somewhat unusually, in her CV, Dr Howe states: “I take seriously the idea that as a labour migration scholar I have an important obligation to the community and profession to inform on law reform and policy proposals. I regularly disseminate my research to the public through print, television, radio and online forums” (CB2439).

<sup>114</sup> Transcript PN787 (Howe XXN).

<sup>115</sup> Howe Reply Statement at [34]-[37] (CB2435-2436); Transcript PN897-905 (Howe XXN).

that she herself had made in the Durable Future Report. Eventually, Ross P was forced to intervene to direct Dr Howe to “just answer the question that’s put”.<sup>116</sup>

- c) Another stark example of her preparedness to deny the obvious when it did not suit her was her response to the question about the proper classification of the Howe \$15 Finding. Despite volunteering that “quantitative” research is primarily concerned with the “What?” questions whereas “qualitative” research is primarily concerned with the “Why?” or “How?” questions,<sup>117</sup> Dr Howe refused to concede that her finding that pieceworkers generally earn less than \$15 per hour is a quantitative finding.<sup>118</sup> Her cross-examination is replete with other examples of this behaviour.<sup>119</sup>

95. For the above reasons, the Commission should carefully scrutinise Dr Howe’s opinions and the data on which they are based and should not accept any of her ipse dixit evidence.

***The Howe \$15 Finding is not valid***

96. In her reply report, Dr Howe tried to justify the Howe \$15 Finding on two bases. The first is so extraordinary that it warrants quoting in full:<sup>120</sup>

“... in my first statement where I state at paragraph 19 that “the data from my research” is the basis for my view that piece rate workers are “paid well below the Award minimum rates, generally earning less than \$15 an hour”, I am making this statement as a general, expert assessment formed through my extensive and robust mixed methodology research of labour practices in the horticulture industry over many years.”

97. She footnoted this paragraph to her CV.
98. This is an attempt to ex post facto justify the Howe \$15 Finding on an entirely different basis (i.e., no longer the “data” from the research for the Durable Future Report but her general experience as an expert). But more fundamentally, this amounted to a

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<sup>116</sup> Transcript PN722-727 (Howe XXN).

<sup>117</sup> Howe Reply Statement at [8] (CB2414); Transcript PN789–797 (Howe XXN).

<sup>118</sup> Transcript PN798-805 (Howe XXN).

<sup>119</sup> Transcript PN906-909 (Howe XXN) is another stark example.

<sup>120</sup> Howe Reply Statement at [19] (CB2417).

bare ipse dixit — “just take my word for it, I’m an expert”.<sup>121</sup> A bare assertion of this kind is not a tenable basis for making quantitative findings about earnings in an industry and has no probative value.

99. The second basis on which Dr Howe sought to justify her finding was a series of anecdotes that she obtained from focus groups conducted in Phase 3 of the research project for the Durable Future Report. Dr Howe euphemistically referred to these anecdotes as her “data”.
100. The methodology underpinning the collection and analysis of this so-called “data” was as follows:
  - a) She conducted focus groups and interviews with growers, workers and other stakeholders at 13 “case study locations.” The number of interview participants at each location was small and ranged from 0 to 24, with less than 10 interviewees at most locations. The number of focus group participants at each location was also small, ranging from 0 to 40, with 12 or less participants at 9 out of the 13 locations.<sup>122</sup>
  - b) In order to recruit participants for these interviews, Dr Howe placed ads that offered respondents a \$25 voucher to participate in a focus group or interview.<sup>123</sup> This led to self-selection bias among focus group and interview participants.<sup>124</sup> In some locations, the growers permitted her to conduct focus groups in the lunchroom at the farm. Dr Howe asserted that, in relation to those focus groups conducted on site at farms, there was a self-selection bias *among growers* who chose to make their lunchrooms available, being a bias towards more compliant growers.<sup>125</sup> However, it is difficult to reconcile this proposition with any of the anecdotes she extracts, which show extremely low rates of pay. In any event, Dr Howe conceded that she cannot quantify the extent of the self-selection bias.<sup>126</sup>
  - c) The transcripts of the focus groups (involving 157 participants) and 114 interviews were loaded into special software. Also loaded into the software was a list of

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<sup>121</sup> Transcript PN910-911 (Howe XXN).

<sup>122</sup> Appendix A to the Durable Future Report at 133 (AFPA-1).

<sup>123</sup> Transcript PN1003 (Howe RXN).

<sup>124</sup> Transcript PN948-949 (Howe XXN).

<sup>125</sup> Transcript PN1008-1009 (Howe RXN).

<sup>126</sup> Transcript PN960 (Howe XXN).

topics of interest, called “nodes”. The software allowed each “instance” where a topic is primarily discussed in the transcript to be marked or “coded” to the “node” corresponding to that topic.<sup>127</sup>

- d) One of the topics was “pay”. Despite there being 114 interviews and more than 9 focus groups,<sup>128</sup> the “pay” node featured in only 36 transcripts. And in those transcripts, it was coded to only 70 instances where the topic primarily arose in discussion. This means that the “sample size” of her pay “data” is at most 70 and, as she conceded, could be as low as 50.<sup>129</sup> (This is about the same size or smaller as the sample in the Howe Growers Survey that Dr Howe rejected as being so small that it was not even worth mentioning.<sup>130</sup>)
- e) However, Dr Howe did not provide any of the transcripts of her interviews or focus groups. Nor did she even provide all of the transcript excerpts coded to the “pay” node. Instead, she selected a sub-sample of 30 anecdotes from the transcripts and simply asserted that this is a “representative sample of the types of responses we received about workers’ pay on piece rates”.<sup>131</sup> This is another bare ipse dixit.<sup>132</sup>
- f) Of the 30 anecdotes, 28 were from WHMs, one was from a grower and one was from a local worker.
- g) 6 of the anecdotes did not actually nominate any hourly rate.
- h) Interestingly, the sole local worker among the anecdotes apparently gave up the job after one hour and presumably long before he or she achieved anything

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<sup>127</sup> Appendix A to the Durable Future Report at 133-134 (AFPA-1); Howe Reply Statement at [15] (CB2416), [21] (CB2417-2418); Transcript PN961-962 (Howe XXN).

<sup>128</sup> Focus groups were conducted at 9 locations but there was more than one focus group at some locations: Transcript PN929 (Howe XXN).

<sup>129</sup> Transcript PN965-967 (Howe XXN). 70 is the number of “references” coded to the “pay” node across the transcripts. Dr Howe defined the number of “references” as being the “number of instances in which the theme arises in the transcripts of interviews and focus groups”. “References” are to be distinguished from “sources”, which she defined as “the number of interviews and focus groups in which this theme emerged”: Howe Reply Statement at fns 9 and 10 (CB2417). Thus, if the topic of pay is raised by multiple individuals in a single focus group at different times in the same transcript, this would be coded as one “source” but each “instance” of the pay theme being raised will be counted as a distinct “reference”.

<sup>130</sup> Howe Reply Statement at [34] (CB2435).

<sup>131</sup> Howe Reply Statement at [22] (CB2418-2421).

<sup>132</sup> Transcript PN972-973 (Howe XXN).

resembling competence:

You had to do a whole row for \$16 and I got maybe a quarter of the way down the row and it took me like over an hour so I'm working on \$4 an hour. I can sit at home – I don't want to. I can sit at home on Centrelink and get \$500, \$600 a fortnight and someone wants to pay me \$4?! I'm Australian, I don't need to – I'm no-one's slave.<sup>133</sup>

101. It is immediately apparent that this “data” suffers from same sorts of problems as Dr Underhill’s data. At best it is limited to WHMs. Further, while Dr Underhill at least provided a numerical analysis of the whole of her sample, Dr Howe has extracted a sub-sample and simply asserted, as another bare ipse dixit, that this sub-sample is representative. In light of Dr Howe’s lack of independence and candour, the Commission should place no weight on this assertion.
102. For these reasons, the Howe \$15 Finding is not valid and has no probative value.

***The other materials to which Dr Howe refers have no probative value***

103. In the section of her primary statement dealing with the earnings of pieceworkers (entitled “Underpayment of Wages of Workers Earning Piece Rates”), Dr Howe refers to two other data sources: a 2016 survey of WHMs conducted by the Fair Work Ombudsman (reported in the FWO WHM Inquiry Report) and a 2017 survey of temporary migrant workers conducted by Berg and Farbenblum (reported in the Wage Theft in Australia Article).<sup>134</sup>
104. Neither provides any useful data about the earnings of pieceworkers in the horticulture industry.
105. The survey described in the FWO WHM Inquiry Report:
- a) Found that more than a third of respondents were paid less than the minimum wage (cf the Howe \$15 Finding that pieceworkers “generally” earn less than \$15 per hour).
  - b) Only surveyed WHMs, indeed it only surveyed a sub-cohort of WHMs being the holders of the subclass 417 visa.

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<sup>133</sup> Howe Reply Statement, table at [22] (CB2420).

<sup>134</sup> Howe Primary Statement [20]–[21] (CB2455).

- c) Was not confined to work in the horticulture industry.
- d) Did not distinguish between piecework and timework earnings.

106. As for the survey conducted by Berg and Farbenblum:

- a) In her reply statement, Dr Howe acknowledges that she does not rely on this survey “to discuss the average pay of average competent worker”.<sup>135</sup>
- b) Dr Howe asserts in her primary report that her “analysis” of the results of this survey “suggests that these participants were underpaid through the use of piece rates”.<sup>136</sup> But in fact, the Berg and Farbenblum survey did not even collect any data distinguishing piece rate earnings from timework earnings. Their paper that documents the survey methodology and reports its results makes no reference to piecework at all. Dr Howe does not provide or in any way explain her so-called “analysis” that takes undifferentiated earnings data covering both pieceworkers and timeworkers and somehow allows her to draw conclusions about piecework earnings. This is another ipse dixit. In any event, it is obvious that no such analysis is possible.
- c) Berg and Farbenblum’s survey only targeted migrant workers and it did not specifically target those working in horticulture. 55% of respondents were on a student visa and another 33% were WHMs.<sup>137</sup>
- d) The survey question asked respondents to identify earnings in their “lowest paid job”, thus skewing the response of those who worked in the relevant industry (described as “Fruit / vegetable picker or packer or farm worker”) to describe their worst pay outcomes in that industry.<sup>138</sup>
- e) The authors acknowledged that their survey suffered from a myriad of limitations, including self-selection bias that may have been made worse by the offer of prizes for participation and over-representation by students of two NSW universities.<sup>139</sup> (Again, Dr Howe said nothing about these limitations when referring to the survey

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<sup>135</sup> Howe Reply Statement at [40] (CB2436).

<sup>136</sup> Howe Primary Statement at [21] (CB2455).

<sup>137</sup> Wage Theft in Australia Article (CB890).

<sup>138</sup> Wage Theft in Australia Article (CB908).

<sup>139</sup> Wage Theft in Australia Article (CB888).

in her primary statement.)

107. For these reasons, these additional sources to which Dr Howe refers have no probative value and lend no support to the Howe \$15 Finding.

***Clean version***

**15.2 Piecework 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 **piecworker**.
- b) Subject to clause 15.2(n), all work performed in accordance with the piecework agreement must be paid at the piecework rate fixed by that agreement or the **minimum piecework rate** calculated in accordance with clause 15.2(k) (whichever is higher).
- c) The calculation of the minimum piecework rate in clause 15.2(k) for casual employees will include the casual loading prescribed in clause 11.3(a).
- d) Subject to clause 15.2(n), 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.
- j) For the purposes of the NES:
  - i. The base rate of pay for a piecworker is the base rate of pay as defined in the NES.

- ii. The full rate of pay for a pieceworker is the full rate of pay as defined in the NES.
- k) Each pay period, the employer must, for each group of pieceworkers performing a particular piecework task specified in the piecework agreement, calculate the minimum piecework rate for that task in that pay period in accordance with the following steps:
  - i. calculate:
    - the total output of the competent pieceworkers in the group in the pay period (**Total Competent Output**); and
    - the total combined hours of work of the competent pieceworkers in the group during the pay period (**Total Competent Hours**);
  - ii. divide the Total Competent Output by Total Competent Hours to obtain the **Average Hourly Output of a Competent Worker**;
  - iii. take the applicable minimum hourly rate, add 15% and then divide by the Average Hourly Output of a Competent Worker.
- l) A competent pieceworker for the purposes of this clause is an employee who, in the reasonable opinion of the employer, is suitable, sufficient or adequate to perform the task or tasks assigned to the relevant group. An employee is deemed to be competent at a particular task or set of tasks after he or she has been performing these task(s) for 20 working days.
- m) In calculating the piecework pay under this clause for an employee who is not yet competent, the employer must pay the employee on the basis of their actual output or the average rate of output of the slowest competent worker in the group during the pay period, whichever is higher.
- n) If an employer requires a pieceworker to perform work that does not yield any piecework output and is not an inherent part of the agreed piecework:
  - i. the time spent performing this work is to be excluded for the purposes of all calculations under this clause; and
  - ii. the employer must pay the employee at the applicable minimum hourly rates for this work.
- o) The employer must keep a record of the following:
  - i. the groups of employees (including the composition of the group and the tasks assigned to the group);
  - ii. the hours worked by all pieceworkers; and
  - iii. the calculations required by clauses 15.2(k) and 15.2(m).

**Version showing changes from the current clause 15.2**

**15.2 Piecework 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 Subject 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~~ clause 15.2(n), all work performed in accordance with the piecework agreement. — must be paid at the piecework rate fixed by that agreement or the minimum piecework rate calculated in accordance with clause 15.2(k) (whichever is higher).
- c) The calculation of the minimum piecework ~~rates~~ rate in clause 15.2(~~bk~~) for casual employees will include the casual loading prescribed in clause 11.3(a).
- d) ~~An~~ Subject to clause 15.2(n), 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.

- j) For the purposes of the NES:
- i. The base rate of pay for a pieceworker is the base rate of pay as defined in the NES.
  - ii. The full rate of pay for a pieceworker is the full rate of pay as defined in the NES.
- k) Each pay period, the employer must, for each group of pieceworkers performing a particular piecework task specified in the piecework agreement, calculate the minimum piecework rate for that task in that pay period in accordance with the following steps:
- i. calculate:
    - the total output of the competent pieceworkers in the group in the pay period (**Total Competent Output**); and
    - the total combined hours of work of the competent pieceworkers in the group during the pay period (**Total Competent Hours**);
  - ii. divide the Total Competent Output by Total Competent Hours to obtain the **Average Hourly Output of a Competent Worker**;
  - iii. take the applicable minimum hourly rate, add 15% and then divide by the **Average Hourly Output of a Competent Worker**.
- l) A competent pieceworker for the purposes of this clause is an employee who, in the reasonable opinion of the employer, is suitable, sufficient or adequate to perform the task or tasks assigned to the relevant group. An employee is deemed to be competent at a particular task or set of tasks after he or she has been performing these task(s) for 20 working days.
- m) In calculating the piecework pay under this clause for an employee who is not yet competent, the employer must pay the employee on the basis of their actual output or the average rate of output of the slowest competent worker in the group during the pay period, whichever is higher.
- n) If an employer requires a pieceworker to perform work that does not yield any piecework output and is not an inherent part of the agreed piecework:
- i. the time spent performing this work is to be excluded for the purposes of all calculations under this clause; and
  - ii. the employer must pay the employee at the applicable minimum hourly rates for this work.

o) The employer must keep a record of the following:

- i. the groups of employees (including the composition of the group and the tasks assigned to the group);
- ii. the hours worked by all pieceworkers; and
- iii. the calculations required by clauses 15.2(k) and 15.2(m).

## Appendix E — Definitions of abbreviated reference names

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The table below defines the abbreviated reference names used in this submission.

<b>Abbreviated reference name</b>	<b>Full reference</b>
AFPA Opening Submission	AFPA's submission dated 11 June 2021.
Blue Harvest Report	The McKell Institute, "Blue Harvest: Wage Theft & Other Labour Infringements in the NSW Mid-North Coast's 2019/20 Berry Harvest" (Attachment SR-1 to the Witness Statement of Shane Roulstone dated 9 March 2021 (AWU-8, CB60-96)).
CB	Electronic Courtbook.
Durable Future Report	Howe, Clibborn, Reilly, van den Broek and Wright, "Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry" (CB2457-2589), annexed to the Howe Primary Statement.
FWC Industry Information Note	Information Note - Agriculture, forestry and fishing dated 7 July 2021.
FWC Piecework Research Paper	Background paper – Piecework dated July 2021.
FWC Reference List	Research reference list dated 21 July 2021.

<b>Abbreviated reference name</b>	<b>Full reference</b>
FWO WHM Inquiry Report	Fair Work Ombudsman, "Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program" (cited by Dr Howe).
Houston Primary Report	Expert report of Greg Houston dated 14 June 2021 (AFPA-6, CB3118-3222).
Houston Reply Report	Expert report in reply of Greg Houston dated 16 July 2021 (AFPA-7).
Howe Primary Statement	Undated statement of Dr Joanna Howe (UWU-7, CB2449-2646).
Howe Reply Statement	Undated reply statement of Dr Joanna Howe (UWU-8, CB2413-2448).
Itinerant Foreign Harvest Workers Article	Underhill and Rimmer, "Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health" (CB2185-2206), annexed to the Underhill Primary Report.
King Primary Statement	Witness Statement of Nicholas David King dated 11 June 2021 (AFPA-2, CB3102-3117).
King Reply Statement	Second Witness Statement of Nicholas David King dated 16 July 2021 (AFPA-3).
Layered Vulnerability Article	Underhill and Rimmer, "Layered vulnerability: Temporary migrants in Australian horticulture" (CB2207-2225), annexed to the Underhill Primary Report.

<b>Abbreviated reference name</b>	<b>Full reference</b>
RXN	Re-examination.
Shadow Market Report	Unions NSW, “Wage Theft: The Shadow Market — Part 2: The Horticultural Industry” (AWU-13, CB217-240 and replicated as attachment SR-2 to the Witness Statement of Shane Roulstone dated 9 March 2021 (AWU-9, CB97-120) and attachment to the Underhill Primary Report (AWU-16, CB2279-2302)).
Underhill Primary Report	Dr Elsa Underhill, “Report on Piece Rates in the Australian Horticulture Industry” dated 19 March 2021 (AWU-16, CB475-2302).
Underhill Reply Report	Dr Elsa Underhill, “Response to Mr. Greg Houston’s Earnings of Horticulture Industry Pieceworkers Report” dated 30 June 2021 (CB321–439).
Using Social Media Article	Underhill, Huang, Yi and Rimmer, “Using Social Media to Improve Temporary Migrant Workers’ Access to Information About Their Employment Rights” (CB2251-2278), annexed to the Underhill Primary Report.
Wage Theft in Australia Article	Berg and Farbenblum, “Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey” (CB878-932), annexed to the Underhill Primary Report.
Working for \$9 a Day Report	Unions NSW, “Working for \$9 a day: Wage Theft & Human Rights Abuses on Australian Farms” (AWU-15, CB291-320).
XXN	Cross-examination.