

**IN THE FAIR WORK COMMISSION**

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

**Applicant: THE AUSTRALIAN WORKERS' UNION**

**Matter No: AM2020/104**

**SUBMISSIONS FOR THE AWU**

**RE FACTUAL FINDINGS URGED BY APPLICANT**

1. These submissions are prepared by the AWU in response to the Commission's direction to file written closing submissions setting out "the findings sought by each party by reference to the evidence (cross-referencing the witness, exhibit paragraph and transcript); and address any issues arising in respect of the information statements, research reference list and submissions summary published by the Commission"<sup>1</sup>.

**SUMMARY OF FINDINGS**

2. By way of summary, the AWU contends the Full Bench would make findings of fact including the following:
  - a. The nature of the workforce within the horticulture industry has changed substantially over the past twenty years. Large and identifiable segments of the labour force come from overseas often with limited English language skills, facing cultural barriers and commonly without a good understanding of workplace rights and entitlements, or where to get help when needed. These features of the workforce make "the need to ensure a simple, easy to understand, stable and sustainable modern award..."<sup>2</sup> a consideration of particular importance when assessing whether the piece rate provisions in the Horticulture Award 2020 (Horticulture Award) provide "a fair and relevant minimum safety net of terms and conditions". In this connection, the AWU would urge the following subsidiary findings:
    - i. The horticultural workforce numbers in the order of approximately 130,000 workers over a year (potentially more given the apparent prevalence of undocumented migrant workers in the industry), and can fluctuate significantly from month to month. The industry is heavily reliant upon casual labour and labour hire, particularly during peak harvest season. Piece rates are a common form of payment for seasonal harvest workers.

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<sup>1</sup> [2021] FWCFB 4203 at [4], direction 3

<sup>2</sup> Section 134(1)(f)

- ii. The most reliable estimates indicate that during harvest season significantly more than 50% of the workforce is made up of overseas labour, principally drawn from persons on Working Holiday Maker (WHM) visas, workers from Pacific Island nations (under either the Seasonal Worker Program or the Pacific Labour Scheme), and a significant “undocumented” cadre of workers (largely made up of persons who have overstayed their visa, or are working in breach of their visa restrictions).
  - iii. The migrant workforce in the horticultural industry, particularly the WHMs and undocumented workers, are often young adults who have limited English language skills, who face cultural barriers and commonly do not have a good understanding of workplace rights and entitlements, or where to get help when needed. When these factors are combined with remote working locations and a desire to stay in Australia, overseas workers are more vulnerable to exploitation than Australian-born workers.
- b. The evidence discloses widespread problems in the use of the piece rate remuneration system under cl 15 of the Horticulture Award. The AWU would urge the following subsidiary findings:
- i. The requirement to enter into a written piece rate agreement that is “genuinely made...without coercion or duress” (cl 15.2(f) and (g)), provide a copy to the worker and retain a copy as a time and wages record (cl 15.2(h)), does not in practice provide a meaningful protection against worker exploitation. In this connection:
    - 1. A written piecework agreement is not always provided.
    - 2. When a written piecework agreement is provided, the piece rates to be paid are commonly set by the grower prior to the start of the season and presented to the worker (whether directly employed or engaged through a labour hire provider), with no real opportunity for the worker and employer to reach a “genuine” agreement on the piece rates to be paid.
    - 3. Piece rates are often unilaterally adjusted by employers without negotiation with, reference to or “genuine” agreement with workers, and are commonly not reflected in new written piecework agreements.
    - 4. The rate at which produce can be picked is not predictable or stable and varies considerably depending on weather conditions, the nature and conditions of the farm and the time of the season when the work is being performed.
- c. The evidence shows there is a substantial and widespread problem of pieceworkers being lowly paid despite working long, irregular hours, and commonly earning hourly rates well below the minimum hourly rate prescribed by the Award for the type of employment and

classification level.

- d. Piecework agreements are not required to and on the evidence commonly do not contain any method or mechanism for calculating what rate of work an “average competent employee” could be expected to achieve. The concept has no fixed meaning, is subjective, open to abuse and absent more is an unreliable protection for inclusion in a safety net of terms and conditions of employment. The concept of the “average competent employee” as the standard against which the piecework rate contemplated by cl 15.2(b) must be set is an inadequate protection against piece rates in piecework agreements being set at inappropriately low levels and does not ensure a modern award provision dealing with rates of pay for pieceworkers provides a fair and relevant minimum safety net.
- e. The evidence does not permit a finding that the proposed cl 15.2(k) requirement to keep a record of the hours worked by pieceworkers, would create an unreasonable or unjustifiable burden on employers. The evidence demonstrates a number of growers already keep records of the hours of work and pay records of pieceworkers and that any additional burden is not substantial.

3. It is convenient to discuss the evidence in support of each of these findings below.

#### **FINDING 1: WORKFORCE HAS DRAMATICALLY CHANGED IN RECENT YEARS AND LABOUR FORCE IS OPEN TO EXPLOITATION.**

- 4. The evidence indicates that the “composition of the horticulture workforce has changed dramatically over the past twenty years”<sup>3</sup>, both prompting and in turn being further driven by various visa reforms, including reforms to encourage working holiday makers to perform harvesting work (by offering a second WHM visa if 88 days of specified, mostly rural, work was undertaken during a first year of stay, and following further reforms in 2019, potentially a third visa)<sup>4</sup>, and in 2012 the creation of the Seasonal Worker Programme (the SWP)<sup>5</sup>.
- 5. In its December 2020 report “*Labour use in Australian Agriculture*”, ABARES recorded “*Australian farms employed 326,000 workers on average across 2018–19, including full-time, part-time, casual and contract employees*”, with significant variation across the year “*driven by changes in the use of casual and contract labour on farms (often known as seasonal workers)*” and “*reflecting the timing of relatively labour-intensive operations such as planting and harvest*”<sup>6</sup>.
- 6. The number of casual and contract workers on farms varies nationally over the course of the

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<sup>3</sup> Ex AWU16 CB478 at [12]

<sup>4</sup> Ex AWU16 CB478 -CB479 at [13]

<sup>5</sup> FWC Information Note, pg 15-16. Note there is general discussion of the difficulty in securing local labour in the “AgriFood” sector in NALAC, December 2020, CB1511 - 1512

<sup>6</sup> CB514

year<sup>7</sup>, increasing by one third from September to February in 2018/2019<sup>8</sup>, but is constantly a significant proportion of the farming workforce<sup>9</sup>. ABARES reports of the total casual and contract workforce on farms “40% to 50% were from overseas in 2018–19 (in addition to those from New Zealand), including people in Australia on working holiday maker (WHM) visas and participants in the seasonal worker program. The total number of these workers ranged from 65,000 in February 2019 to 44,000 in October 2019.”<sup>10</sup>

7. Whilst its size is difficult to ascertain with precision (due to the large number of transient workers, seasonality and the unquantifiable number of undocumented workers<sup>11</sup>), the horticultural workforce is clearly only a proportion of that larger farm workforce, with ABARES recording “Fruit grape and nut farms employed around 104,000 workers, vegetable farms employed 38,000 workers and dairy farms employed an average of 24,000 workers over the [2018/2019] year”<sup>12</sup>.
8. The horticulture industry is heavily reliant upon casual employment<sup>13</sup>, with ABARES reporting: “Horticulture farms tend to use relatively large amounts of casual and contract labour at key times of the year and less in other months, while broadacre and dairy farms tend to use this kind of labour more consistently over time. Farms with greater variation in casual and contract labour use tend to rely more heavily on workers from overseas than others”<sup>14</sup>. Dr Howe notes, based on ABARES data, that 30-31% of the industry is employed on a casual basis and 38-47% is employed on a contract basis<sup>15</sup>.
9. Until the early 2000s, seasonal horticulture workers were primarily employed directly by farmers. Whilst the proportion of the horticulture workforce employed by labour hire operators is not known with certainty, the rapid growth of labour hire contractors, and associated high levels of labour exploitation, has been well recognised by government enquiries in Queensland, South Australia and Victoria, as well as the Federal government’s Migrant Worker Taskforce.<sup>16</sup>
10. There are 3 primary sources of legal temporary migrant workers: the SWP, the Pacific Labour Scheme, and the WHM visa program<sup>17</sup>. Dr Howe<sup>18</sup>, Dr Underhill<sup>19</sup> (and other academic researchers) also refer to a group of illegal workers as “undocumented” workers, largely made up of migrant workers overstaying their visa or working in breach of their visa conditions. In December 2020, ABARES reported “In 2018–19, overseas workers accounted for more than half

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<sup>7</sup> ABARES, December 2020, CB514

<sup>8</sup> CB514

<sup>9</sup> ABARES, December 2020, CB514, Table “Number of workers by type, all industries, 2018-19

<sup>10</sup> CB513

<sup>11</sup> Ex AWU16 at [13]

<sup>12</sup> ABARES, December 2020, CB514

<sup>13</sup> Ex AWU16, CB479 - 481 at [13] – [15]

<sup>14</sup> CB515

<sup>15</sup> Ex UWU7, CB2451 at [9]

<sup>16</sup> Ex AWU16 at [18]-[20]

<sup>17</sup> NALAC, December 2020, CB1515

<sup>18</sup> PN679 – PN682

<sup>19</sup> PN1138 - 1139

*of the temporary workforce employed on horticulture farms. An important source of these workers were people on working holiday maker visas...*"<sup>20</sup>. Dr Howe states "*Prior to COVID-19, temporary migrants were the main source of farm labour for harvesting fruit and vegetables, accounting for three quarters of the workforce*"<sup>21</sup>.

11. In December 2020, ABARES reported "*Workers from overseas were a significant source of seasonal labour on horticulture farms throughout 2018–19 (around 50,000 workers from May to January), and were particularly important in February (around 63,000 workers), March (59,000 workers) and April (56,000 workers).*"<sup>22</sup> *Employment of Australian seasonal workers (locals and those from other regions) on horticulture farms ranged from 27,000 workers in October 2018 to 56,000 workers in February 2019*"<sup>23</sup>. Dr Underhill accepted that this estimate of 119,000 workers (collectively, overseas and local workers) in the horticulture industry in February 2019 was likely to underestimate the total workforce because it doesn't fully capture undocumented workers<sup>24</sup>. In Dr Underhill's opinion, "*the ABS statistics provide an estimate of the minimum workforce size, but the total workforce is likely to be substantially larger*"<sup>25</sup>, with a level of uncertainty as to the extent to which its above 119,000<sup>26</sup>. Dr Howe also accepted that these figures would not fully capture the undocumented workers, which she described as "a substantial cohort" or a "large cohort"<sup>27</sup> (not a marginal phenomenon<sup>28</sup>), with one research study positing that the numbers of undocumented workers is likely to be a third of the harvest workforce<sup>29</sup>.
12. ABARES estimated that in February 2019, 57% of casual and contract workers across a range of horticultural crops were from overseas<sup>30</sup>, noting this estimate failed to account for the substantial undocumented migrant workforce<sup>31</sup>. Of the types of overseas workers, "*WHMs are by far the most common source of harvest labour used in Australia; however, their engagement varies regionally*"<sup>32</sup>. Dr Underhill opines "*Based on ABARES estimates...the majority of seasonal horticulture workers are temporary migrant workers, predominantly WHM visa holders*"<sup>33</sup>. The other material, albeit significantly smaller segment of the overseas labour force in horticulture described in the evidence, is that provided by the Pacific Island Seasonal Worker Programme (**the SWP**). In its December 2020 report, noted by Dr Howe at [12]<sup>34</sup>, NALAC produced a report

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<sup>20</sup> CB513

<sup>21</sup> Ex UWU7, CB2451 at [10]

<sup>22</sup> PN1152 - 1156

<sup>23</sup> CB516

<sup>24</sup> PN1161 - PN1189

<sup>25</sup> Ex AWU16 CB482, at [16], PN

<sup>26</sup> PN1189 - PN1203

<sup>27</sup> PN679 – PN687, Ex UWU7 at [13]

<sup>28</sup> Ex UWU7 at [16]

<sup>29</sup> Ex UWU7 at [15]

<sup>30</sup> Ex AWU16 CB479 at [12]

<sup>31</sup> PN1156

<sup>32</sup> Dr Howe, UWU7 CB2452 at [12]

<sup>33</sup> Ex AWU16, CB482 at [17]

<sup>34</sup> Ex UWU7 CB2452

showing the rapid growth in the SWP participants from its inception in 2012 to 2018/2019<sup>35</sup>, and observed<sup>36</sup>:

*“The Seasonal Worker Programme was introduced as a pilot in 2008 and in full in 2012. Although it is not strictly limited to seasonal agricultural occupations, the program has grown to make a significant contribution to the horticulture sector, with around 97% of the 12,202 seasonal workers employed under the scheme in 2018–19 (Figure 51) employed in seasonal horticultural roles.”*

13. That heavy reliance on temporary migrant workers (of various kinds, but particularly WHMs) for seasonal harvesting work is also reflected in:
  - a. The FWO Harvest Trail 2018 report (CB1023): 420 (or 67%) of the 626 growers spoken to by the FWO employed overseas workers. Of that group of 420 growers, 73% (305 growers) identified WHMs (417 subclass visa workers) as the most commonly held visa type, with the next most common visa type being those for the SWP;
  - b. Reports of various investigations into the horticulture industry (referred to below);
  - c. The evidence of the NFF’s witnesses (referred to below); and
  - d. The evidence of the individual workers and union officials (both AWU and UWU) (referred to below).

*NFF Witnesses – Heavy Reliance on Overseas Labour*

14. Each of the employer witnesses who describe the structure of their workforce indicate that their farm reflects heavy reliance on temporary overseas labour, either employed directly or via labour hire, during their particular harvest season. For example:
  - a. Mr Anthony King, the National Capital/Operational Projects Manager for Costa Group, Berry Category, observed<sup>37</sup> the Costa Berries workforce was similar to what he experienced around the world, meaning “there is a variety of skill levels, with a mix of transient, local and “professional” pickers with years of experience” across all age groups. Prior to the COVID-19 pandemic, the workforce at Costa was typically comprised of “approximately 40% backpackers...approximately 30-40% third-party labour.. and approximately 20-30% local Australian workers. The third party, labour hire, was predominantly workers from the Pacific Islands on the SWP.
  - b. Ms Anne Reardon, an apple and cherry grower in the Huon Valley in Southern Tasmania, engages roughly 72 casual employees over the harvest season, on average 20 casual employees at any one time<sup>38</sup>. In past seasons about 90% of the pickers were

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<sup>35</sup> CB1516, Figure 51

<sup>36</sup> CB1515

<sup>37</sup> Ex AFPA2 CB3107 at [22] – [23]

<sup>38</sup> Ex NFF1 CB2774 at [10]

backpackers, mostly from Europe, Asia and in more recent years Argentina, Brazil and Chile<sup>39</sup>. Until the last season, most were directly employed but with border closures they have “had to rely on labour hire provides who access workers through the seasonal worker program”<sup>40</sup>.

- c. Ms Catherine Silverstein, one of the owners of Silver Orcahrds<sup>41</sup>, employs a relatively small number of pickers during the February to May harvesting period<sup>42</sup> (approximately 29 seasonal workers, and 11 casuals who work as orchard hands over the entire year), made up primarily of Seasonal Worker Program participants (“generally up to 10”<sup>43</sup>) who are employed directly<sup>44</sup>, with the remainder being backpackers (who are also employed directly<sup>45</sup>, generally two or three backpackers<sup>46</sup>), or labour hire workers (sourced through more than one labour hire supplier<sup>47</sup>). All work on piece rates when picking<sup>48</sup>.
- d. Mr Han Sia, the Farm Manager for a farm trading as Tropical Primary Products, grows tropical exotic fruits including mangoes, duran, jack fruit, pemelos and water apple. The farm directly<sup>49</sup> engages “up to five casual employees (at one time) to assist with mango pruning”, usually backpackers from Europe, and at the height of the harvest season about 15 casual employees engaged on picking and packing work, again usually backpackers from Europe<sup>50</sup>.
- e. Brent McClintock, General Manager, Tasmania Operations<sup>51</sup> for Pinnacle Fine Foods, described a permanent workforce of 15 to 20 workers doing management supervisor and support work, and a “substantial number of temporary casual workers over the course of the year for peak seasonal work”<sup>52</sup>, with a core of some 30 “local residents” and between 50 to 60 temporary workers for apple picking and approximately 200 for cherry picking, mostly made up of backpackers and working holiday makers<sup>53</sup> (no SWP workers<sup>54</sup>). All of their picking workforce was sourced through labour hire<sup>55</sup>.

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<sup>39</sup> Ex NFF1 CB2774 at [13]

<sup>40</sup> Ex NFF1 CB2774 at [14]

<sup>41</sup> Ex NFF5 CB2961

<sup>42</sup> Ex NFF5 at [13] – [15], PN2152 – PN2156

<sup>43</sup> Ex NFF5 at [15], PN2153

<sup>44</sup> PN2158-2159

<sup>45</sup> *ibid*

<sup>46</sup> Ex NFF5 at [19] – [20], PN2155

<sup>47</sup> PN2157

<sup>48</sup> Ex NFF5 at [23] – [24]

<sup>49</sup> PN2663

<sup>50</sup> Ex NFF8 CB2979 at [8] – [9]

<sup>51</sup> PN1984, amending paragraph [1] of Ex NFF4, CN2956

<sup>52</sup> Ex NFF4, CN2957 at [9]

<sup>53</sup> Ex NFF4, CN2957 at [11], PN2009 – PN2012

<sup>54</sup> Ex NFF4, CN2957 at [13]

<sup>55</sup> PN1992, amending paragraph 12 of Ex NFF4, CB2957

- f. Mr Gaeta, an apple and cherry grower and current chair of the NSW Farmers Horticulture Committee, in peak season described employing 50 to 70 workers as picking and packing workers<sup>56</sup>, “predominantly ...foreign workers who are in Australia holding a type of visa with work rights, especially backpackers (working holiday visa holders)”<sup>57</sup> and a “much smaller” contingent of local workers and retirees. They are too small an operation to use the SWP<sup>58</sup>. He described having used a labour hire supplier this year for the first time due to reduced backpacker labour. He had an agreement with the labour hire agency, which he understood would then have a pieceworker agreement with the workers<sup>59</sup>. All his seasonal workers are engaged as casuals, with the picking work being paid on piece rates and packing work on hourly rates<sup>60</sup>.
- g. Ms Michelle Distill, an apple and cherry farmer operating an orchard in Tasmania<sup>61</sup>, stated that over their harvest period, the seasonal workforce can swell to approximately 160 employees over the course of the season, with up to 120 employed at any one time<sup>62</sup>. Approximately 40% of the seasonal harvest workers are “local residents who return year on year, often students and recent school graduates” and approximately “60% are backpackers/working holidaymakers and itinerant workers”<sup>63</sup>.
- h. Mr Richard Eckersley, the owner and operator of Yambellup Estate, a citrus, avocado and wine grape horticultural operation in Harvey Western Australia, described employing “20 to 30 temporary workers as pickers”, mostly engaged through labour hire operators, and “about 10 temporary packers on a seasonal basis”, who are directly employed<sup>64</sup>. Prior to COVID border closures the vast majority of temporary workers were backpackers, but in more recent times they have used a labour hire provider that is a member of the SWP<sup>65</sup>.
- i. Mr Matthew Benham, Operations Manager for a citrus farm trading as Top Citrus, based in Gayndah Queensland<sup>66</sup>, described employing a seasonal workforce of 40-60 pickers and additional 10-15 packers, who work alongside 10-12 permanent employees (some of whom supervise the pickers and packers, and other engaged on general farm work)<sup>67</sup>. Pickers are mostly Nepalese, engaged via a labour hire

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<sup>56</sup> Ex NFF7 CB2970 at [6]

<sup>57</sup> Ex NFF7 CB2970 at [7]

<sup>58</sup> Ex NFF7 CB2971 at [9]

<sup>59</sup> PN2514 - 2515

<sup>60</sup> Ex NFF7 CB2971 at [9]

<sup>61</sup> Ex NFF13 CB3026 at [2]

<sup>62</sup> Ex NFF13 CB3028 at [17]

<sup>63</sup> Ex NFF13 CB3028 at [18]

<sup>64</sup> Ex NFF14 CB3055 at [12] – [13]

<sup>65</sup> Ex NFF14 CB3055 at [14], PN3065 - 3066

<sup>66</sup> Ex NFF12 CB3022 at [1] – [5]

<sup>67</sup> Ex NFF12 CB3023 at [9] – [11]

contractor<sup>68</sup>. Packers are usually backpackers employed directly<sup>69</sup> and paid hourly rates<sup>70</sup>.

- j. Mr Johnathan Moss, production manager of Mossmont Nurseries in Warburn NSW, on the outskirts of Griffith, describes employing between 45 to 100 seasonal workers during harvest<sup>71</sup> on their farm (a tree wholesaler<sup>72</sup>), 17 of which were overseas workers from East Timor under the SWP program (who have all returned each year for the past 5 years), and a “fluctuating number of backpackers”<sup>73</sup>. Normally only 30% of their staff were engaged through labour hire, but with border closures in the last year it was more like 80%<sup>74</sup>.

### Structure of Labour Market Leaves Workers Open to Abuse

15. Dr Howe states (footnotes omitted)<sup>75</sup>:

*“A significant and established body of academic literature, government inquiries and media reports have exposed a raft of exploitative practices in the horticulture industry, including underpayment or non-payment of wages, sexual harassment and bullying and, in some cases, treatment amounting to modern slavery. A key driver of this exploitation is the structure of the horticulture labour market which is reliant on a highly segmented temporary migrant workforce. Each form of temporary migrant labour is precarious, although the cause and nature of the precarity is different arising from differences in the immigration settings for each form of labour.”*

16. Dr Underhill’s 2018 research project reflects this observation, with high proportions of the WHM participants reporting they either struggled to understand written English, or only had a moderate understanding, often resulting in reliance upon inaccurate information from peers when seeking advice about their employment rights and leaving them “highly vulnerable to exploitation”<sup>76</sup>. The Fair Work Ombudsman’s Harvest Trail Inquiry Report 2018 (pg 32) observed:

*“The FWO’s experience indicates Harvest Trail workers from overseas are often young adults who have limited English language skills, face cultural barriers and commonly do not have a good understanding of workplace rights and entitlements - or where to get help when needed. When these factors are coupled with a strong desire to stay in Australia, overseas workers are more vulnerable to exploitation than Australian-born workers.”*

17. Similar observations are made by the McKell Institute in the Blue Harvest report, when discussing “The power imbalance at the heart of the WHM program”<sup>77</sup>. One of the key findings of the Blue

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<sup>68</sup> Ex NFF12 CB3023 at [12] and [18]

<sup>69</sup> PN2830 - 2831

<sup>70</sup> PN2840

<sup>71</sup> Ex NFF9 CB2998 at [18]

<sup>72</sup> Ex NFF9 CB2996 at [6]

<sup>73</sup> Ex NFF9 CB2998 at [19] – [20]

<sup>74</sup> Ex NFF9 CB2998 at [22]

<sup>75</sup> Ex UWU7 CB2452 at [11]

<sup>76</sup> Ex AWU16 CB482-483 at [17]

<sup>77</sup> Ex AWU9, CB72 - 73

Harvest research (Finding 7, Culture of silence)<sup>78</sup> was:

*“WHMs are reluctant to pursue actions to recover pay, instead simply wishing to complete their 88 days of regional work and return to urban areas. This permits nefarious labour hire contractors to capitalise on these workers’ tolerance for poor pay and conditions, given its temporary nature”.*

18. UnionsNSW in its report Wage Theft: The Shadow Market Report 2: The Horticulture Industry observes<sup>79</sup>

*“The conditioning of a migratory status to the performance of work through second- and third-year visa extensions makes employees in the horticulture industry targets for exploitation from contractors and recruitment agents. Visa extensions without proper and regular oversight and monitoring of working conditions will favour and perpetuate noncompliance of labour standards and workplace regulations in this industry”.*

19. Mr Carter, Northern NSW AWU organiser, observers of workers in his region<sup>80</sup>:

*Almost every worker engaged under piecework rates will not raise their concerns with employers for fear that they will not get further work given the nature of the insecure engagement of the work.*

*The insecure nature of the arrangement is an avenue for employers to further intimidate and exploit workers. In cases whereby workers have questioned the piece rate set then they have been quickly disengaged by the farm.*

*Employees engaged within labour hire companies, particularly Pacific Islander workers are extremely reluctant to raise concerns around piece rates due to a fear of being black banned from the sourcing agent in their home countries.*

20. Mr Beven, another AWU organiser, makes similar observations of overseas workers in his region (at [19]<sup>81</sup>). Mr Gourlay, another AWU organiser, makes similar observations in his area<sup>82</sup>. Mr Roulstone observes in his experience *“Casual workers who raise concerns around piece rates or working conditions are routinely starved of work until they leave. This is the standard practice across the industry”*<sup>83</sup>. Mr Cameron of the AWU similarly observes<sup>84</sup> *“With such a power imbalance - backpackers cannot leave or risk forfeiture of their visa, and most Pacific Islanders cannot leave the farm to choose other work, bullying and ill treatment can often occur”.*
21. Mr Roberston of the UWU describes having held *“discussions with a number of workers in all three of the cohorts above [SWP workers, backpackers and undocumented workers] and they indicated to me that they were reluctant to seek to negotiate or change the piece rates they were being paid because of the precariousness of their employment, and the concern that doing so*

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<sup>78</sup> Ex AWU9 CB65

<sup>79</sup> Ex AWU13 CB117

<sup>80</sup> Ex AWU10, CB129 at [48] – [50]

<sup>81</sup> Ex AWU4, CB19

<sup>82</sup> Ex AWU7 CB45 at [17]

<sup>83</sup> Ex AWU9 CB58 at [36]

<sup>84</sup> Ex AWU6 CB41 at [14]

*may jeopardise their employment or visa status.*<sup>85</sup>

22. The three workers who gave evidence in the AWU case, are tangible examples of the vulnerability of temporary migrant workers in the horticultural industry:
- a. Chee Sing Ee, a 31 year old Malaysian National, worked on piece rates via labour hire agencies between November 2016 and September 2019<sup>86</sup>, leaf plucking and grape picking in Mildura and Queensland, and orange picking in Mildura. The amounts earned over that entire period were well below the minimum hourly rates in the Horticulture Award, ranging from no pay at all<sup>87</sup>, to \$60 to \$80 for a 9-hour day (in cash, with no payslip or superannuation) to approximately \$200 for a 10-hour day when grape picking<sup>88</sup>, and \$50 - \$140 per 10 hour day orange picking<sup>89</sup>. Ms Ee describes not having lodged a complaint about her rates *“because that was a normal practice at the time by everybody”*<sup>90</sup>.
  - b. Mr Wang, a 57 year old Chinese National, who worked on piece rates through a labour hire company across numerous farms across South Australia, Victoria and NSW from 2018. Picking blueberries in Coffs Harbour where his daily income was approximately \$65 per 6-hour day (no payslips or superannuation)<sup>91</sup>, grapes in Mildura where he “could barely” make \$50 - \$100 per 9 hour day<sup>92</sup>, to a tomato farm in Coffs Harbour where Mr Wang states (at [12]) *“the owner could always make changes on his record and the owner never told workers what rate he was using. I worked 12 hours a day and seven days a week. The owner paid me \$400 in cash for a week’s work”*. He performed some work on hourly rates (which were also below the minimum hourly rates). In cross-examination, Mr Wang confirmed he didn’t lodge any complaint *“because of my language barrier”*<sup>93</sup>.
  - c. Ms Hsu, a 32-year-old Taiwanese National who came to Australia in 2017 as a working holiday maker<sup>94</sup>, worked in horticulture and agriculture through a labour hire provider, picking strawberries in Myponga South Australia and Caboolture Queensland, making between \$50 - \$100 per day<sup>95</sup>, and oranges in Renmark South Australia making between \$25 and \$120 per day<sup>96</sup> (for which she was not fully paid in any event<sup>97</sup>). Ms Hsu was never given an alternative to be paid on hourly rates<sup>98</sup>. Ms Hsu never made a complaint

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<sup>85</sup> Ex UWU1 CB2337 at [31]

<sup>86</sup> Ex AWU1, CB7 at [3]

<sup>87</sup> At [7] – [9]

<sup>88</sup> At [10] – [12]

<sup>89</sup> At [13]

<sup>90</sup> PN163

<sup>91</sup> Ex AWU2 CB12 at [4]

<sup>92</sup> Ex AWU2 CB13 at [8] – [9]

<sup>93</sup> PN190

<sup>94</sup> Ex AWU3, CB10 at [1]

<sup>95</sup> Ex AWU3 CB11 at [4] – [5]

<sup>96</sup> Ex AWU3 CB11 at [6] – [9]

<sup>97</sup> Ex AWU3 CB11 at [11]

<sup>98</sup> Ex AWU3 CB11 at [10]

about her pay rate because she “*didn’t know the threshold to be paid*”<sup>99</sup>, and didn’t go to the union earlier because she “*didn’t know the union could come to my rescue*”<sup>100</sup>.

23. These features of the workforce make “the need to ensure a simple, easy to understand, stable and sustainable modern award...”<sup>101</sup> of particular importance in the horticulture industry.

## **FINDING 2: WIDESPREAD PROBLEMS IN THE USE OF THE PIECE RATE REMUNERATION SYSTEM UNDER CL 15 OF THE AWARD.**

### **Current Requirement of a Written Pieceworker Agreement Not Effective Safety Net Protection**

24. As a general proposition, the Commission would not accept that the requirement to enter into a written piecework agreement contemplated by cl 15 of the Award, is not a meaningful safety net protection for workers in the horticulture industry.

### **Not Always a Written Pieceworker Agreement**

25. Of the 626 employers involved in the FWO Harvest Trail inquiry (more than a third of which were paying piece rates or a combination of piece rates and hourly rates), “*over 100 of those employers were not engaging pieceworkers correctly by having no written piecework agreement or having an invalid piecework agreement*”<sup>102</sup>. None of the workers called in the AWU case describe having been provided a written piecework agreement by their labour hire provider. Mr Robertson, Lead Organiser for the UWU, observed based on his experience<sup>103</sup>:

*“... it is common for piece rate workers, particularly those working for labour hire contractors, to experience the following, all of which are contraventions of the Award:*

*a. not receive a pay slip*

*b. not be asked to sign a written piece work agreement, or*

*c. not be provided with a copy of the written piece work agreement they have signed*

*d. be paid group piece rates, based on the productivity of a group of workers, rather than their individual efforts.”*

### **Piece rates commonly set / adjusted by employer with no capacity for genuine agreement**

26. Even where there is such an agreement, the piece rates provided for in a piecework agreement are in substance dictated by the grower and not the subject of a ‘genuine’ agreement between the employer (which may be the grower or commonly a labour hire provider) and the worker. In this connection, Rangiah J, noted the “limited”<sup>104</sup> protection afforded by cl 15 of the Award and

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<sup>99</sup> PN215 – PN216

<sup>100</sup> PN218 – PN219

<sup>101</sup> Section 134(1)(f)

<sup>102</sup> FWO Harvest Trail Report 2018, CB1022

<sup>103</sup> Ex UWU1 CB2339 at [39]

<sup>104</sup> *Fair Work Ombudsman v Hu (No.2)* (2018) 279 IR 162 at [24]

observed “*Clause 15.2 requires the piecework rate to be fixed by agreement. In practical terms, this will almost invariably mean that the employer fixes the rate and the employee decides whether or not to accept it*”<sup>105</sup>.

27. A “genuine” agreement is a “true, real, authentic” agreement, or an agreement “sincere, free from pretence or affectation”<sup>106</sup>. On the evidence there can be no doubt that the requirement of cl 15(2)(f) of the Award that the employer and an individual employee must have “*genuinely made the piecework agreement*”, is not operating in any way as an effective protection or safety net. The evidence of the NFF witnesses and union witnesses (variously discussed below), discloses that the piece rates paid to piece workers are:
- a. Commonly set prior to or at the commencement of the harvesting season, without reference to workers or any negotiation.
  - b. Communicated to workers at the time they are required to sign a pieceworker agreement, or at the commencement of work.
  - c. Are adjusted unilaterally and without reference to workers or any negotiation. Indeed, the evidence shows they are even adjusted retrospectively in some cases.
28. Mr Beven, AWU Organiser for the Tasmanian Branch, observed (at [28]):
- “I have never observed piece rates being set in consultation with the workers. My experience has been that the farmer or labour hire provider sets the piece rates and communicates this to the worker – it is not open for discussion”*<sup>107</sup>.
29. Mr Robertson, Lead Organiser for the UWU, observed that in his experience: “*...there is no genuine negotiation between employer and employee over the piece rate. Instead, the piece rate is fixed by the employer, and the employee is offered the opportunity to accept that rate (and therefore work) or decline it and lose the work – on a “take it or leave it basis”*<sup>108</sup>. He uses the illustration of Seasonal Worker Program workers, who are required to accept letters of offer that workers will be paid on piece rates whilst in their countries of origin, as rendering the Award requirement for “genuine” agreement on piece rates moot<sup>109</sup>.
30. Mr Carter, AWU Northern NSW Region Organiser observed in his experience guidelines developed by the Fair Work Ombudsman to assist in setting a fair piece rate are “*ignored by all companies within the berry industry*”, rather “*Companies have their own piece rate setting procedure without any inclusion or genuine agreement of any affected employee*”<sup>110</sup>. He provides an example of a document entitled Costa Berries – Domestic: Procedure for Piece Rate

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<sup>105</sup> *Fair Work Ombudsman v Hu (No.2)* (2018) 279 IR 162 at [25]

<sup>106</sup> Macquarie Dictionary, 3<sup>rd</sup> Ed, pg 886

<sup>107</sup> Ex AWU4, CB20

<sup>108</sup> Ex UWU1 CB2334 at [24]

<sup>109</sup> Ex UWU1 CB2335 at [26(a)]

<sup>110</sup> Ex AWU10, CB126 at [20]

Setting”<sup>111</sup>. The procedure used by Costa Berries for piece rate setting refers to piece rates being “calculated retrospectively”<sup>112</sup>, based on the “crew pick rate”, which is the “average pick rate of a harvest crew ...at the end of the picking day”<sup>113</sup>. The “Piece Rate Management Process”<sup>114</sup> makes no reference to agreement or negotiation with any individual picker. Mr Cater describes having been contacted “countless times” by members “as to the particular day’s piece rate they have been given. I am regularly informed by members that negative fluctuations in piece rates have occurred between two days whereby the crop or plants are identical”<sup>115</sup>.

31. The evidence of a number of the employer witnesses themselves reflect piecework agreements being presented to workers by the farm operator or a labour hire provider, with no capacity for negotiation or genuine agreement, and that the rates actually paid are commonly adjusted unilaterally and without a new piecework agreement. Mr King of the Costa Group described that the large workforce is informed of the “minimum rate” when they start with the business “during their induction”<sup>116</sup>, but confirmed the rate they would be paid would actually fluctuate day to day. He produced a record<sup>117</sup>, that showed the piece rate changing day to day<sup>118</sup>. On his evidence, workers (whether employed directly or through a labour hire agency<sup>119</sup>) would be actually told their piece rate “when they turn up for work each day”<sup>120</sup>. He considered that by signing onto a sign on sheet when they turned up to work, “they they’re happy to have the rate change”<sup>121</sup>.
32. Mr Beven provides a copy of the “pro forma Owen Pacific contract”, a labour hire agency that provides labour to Costa farms Berry business, as attachment AB3<sup>122</sup>. The terms confirm “*By signing this letter, you are making a piece work agreement with us. The terms of the agreement are found at Clause 7 on page 10 of this document. It shows the minimum piecework rates of pay for each piece that you pick, pack, prune or make. An ‘average competent’ worker can expect to earn \$27.28 per hour as a piece worker under a Pieceworker Agreement. If you do less work because you are slower, or if you are still learning the skills, you will be paid less*”<sup>123</sup>. The agreement records “*The piecework rate that you are paid may change from day to day. If the piecework rate changes we will agree to the changes with you in writing before you start work each day*”<sup>124</sup>. However, the “OPW Employment Terms” in cl 7.5 only identifies “minimum rates”<sup>125</sup>

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<sup>111</sup> Ex AWU10 CB127 at [31], a copy of which starts as CB132

<sup>112</sup> CB135, cl 3.1

<sup>113</sup> CB135 cl 3.2

<sup>114</sup> CB137, cl 4.1

<sup>115</sup> Ex AWU10 CB126 at [22]

<sup>116</sup> PN3518

<sup>117</sup> Ex AWU28

<sup>118</sup> PN3514

<sup>119</sup> PN3526 - PN3528

<sup>120</sup> PN3516

<sup>121</sup> PN3524

<sup>122</sup> Ex AWU4 CB20 at [25], a copy of which can be seen commencing CB24

<sup>123</sup> Ex AWU4 CB25

<sup>124</sup> Ex AWU4 CB25

<sup>125</sup> Ex AWU4 CB33

and otherwise states “*The piecework rate is subject to daily adjustment...*” (cl 7.3) and at cl 7.4<sup>126</sup>:

*“Prior to the commencement of work each day the client will inform you of the applicable piecework rate for that day. Commencement of piecework at the applicable rate will be taken as evidence of your acceptance of that rate. This will also serve the purpose of maintaining this part of the contract as current without the need for the parties to enter into new written terms whenever the piecework rate may change”.*

33. Seasonal Worker Program participants signing up to this piecework agreement (before even having travelled to Australia), have no real or genuine opportunity to negotiate or agree the rates they are “informed” of “daily” by the “client” (notably not their employer), and would have no basis for understanding whether the “minimum rates” in cl 7.5 meet the cl 15 Award conditions.
34. Brent McClintock, General Manager, Tasmania Operations for Pinnacle Fine Foods, who said all of their picking workforce was sourced through labour hire<sup>127</sup>, enter into an agreement with the labour hire agency as to what the piece rate will be (the “minimum rate that we will pay for the job”<sup>128</sup>) and the labour hire agency will use that as the rate they advertise with. That rate is determined at the beginning of the season<sup>129</sup> at a rate they ‘believe’ complies with the Award “*informed by our knowledge and experience and the guidance which is published by industry bodies such as Primary Employers Tasmania*”<sup>130</sup>. On their farm, the recommended rate from Primary Employers Tasmania may not reflect the Award requirement and so is adjusted – “*it may be higher or it may be lower than what Primary Employers Tasmania recommends*”<sup>131</sup>. That rate is adjusted “*at the beginning of each workday on the basis of difficulty, weather conditions etc*”<sup>132</sup>. The workers are told the rate for the day “as they start”<sup>133</sup>. The pick rates are monitored during the day and workers are told the next day if there is going to be a change in the rate<sup>134</sup>.
35. Mr Richard Eckersley, the owner and operator of Yambellup Estate, a citrus, avocado and grape operation in Harvey Western Australia, described employed “20 to 30 temporary workers as pickers”, mostly engaged through labour hire operators, and “about 10 temporary packers on a seasonal basis”, who are directly employed<sup>135</sup>. Prior to COVID border closures, the vast majority of temporary workers were backpackers, but in more recent times they have used a labour hire provider that is a member of the SWP<sup>136</sup>. The harvesting workers are paid piece rates. A sample piece rate agreement used by the labour hire agency is provided<sup>137</sup>. The piece rates are initially “*established with reference to what we have paid in previous seasons, what is industry standard,*

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<sup>126</sup> Ex AWU4 CB33

<sup>127</sup> PN1992, amending paragraph 12 of Ex NFF4, CB2957

<sup>128</sup> PN2014, PN2016

<sup>129</sup> Ex NFF4 CB2958 at [21], PN2029

<sup>130</sup> Ex NFF4 CB2958 at [21], PN2029 – PN2032

<sup>131</sup> PN2032

<sup>132</sup> Ex NFF4 CB2959 at [21], PN2029

<sup>133</sup> PN2040 – PN2041

<sup>134</sup> PN2043 - 2047

<sup>135</sup> Ex NFF14 CB3055 at [12] – [13]

<sup>136</sup> Ex NFF14 CB3055 at [14], PN3065 - 3066

<sup>137</sup> CB3074 - CB3075, PN3092, PN3096

as well as our own experience and knowledge of what is achievable for an average competent worker”<sup>138</sup>. Whilst in his statement Mr Eckersley stated of that initial piece rate “...we review the rate we are paying regularly – on a daily basis at the start of the season – with the use of spreadsheets which track hours worked and the quantity of fruit picked by bin”<sup>139</sup>, in cross-examination he confirmed the rate initially set is advised to the labour hire company at the start of the season<sup>140</sup>, they “tend not to change [the piece rate] on a daily basis if we can help it”, and the initial rate will generally stay the same throughout the season, but sometimes there might be a change<sup>141</sup>. He believed the rate set last year on one crop was increased because it was inadequate<sup>142</sup>. When that is done, the business does not enter into a new piecework agreement and just tell the worker the piece rate is changing<sup>143</sup>.

36. Mr Gaeta’s seasonal workforce are engaged as casuals, with the picking work being paid on piece rates and packing work on hourly rates<sup>144</sup>. Historically, his farm employed labour directly, but this season relied heavily on labour hire. In past years, having determined what the rate should be (as discussed below), he would write the rate in the piecework agreement and give it to the backpackers when they turned up at the farm<sup>145</sup>. With the labour from the labour hire agency, he had an agreement with the labour hire agency, which he understood would then have a pieceworker agreement with the workers<sup>146</sup>. Mr Gaeta described monitoring the picking work and would adjust the picking rate for the day<sup>147</sup>. Workers were told “straight away”<sup>148</sup>, “when they get there”<sup>149</sup> which could be at the start of the day or during the course of the day<sup>150</sup>.
37. Mr Siah described a calculation he did in his head (not documented or written down)<sup>151</sup> to determine the appropriate piece rate for picking mangoes on his farm, based around what he believed a “hypothetical competent and reasonably productive worker” could undertake<sup>152</sup>. He provides the workers a written pieceworker agreement when they arrive at the farm<sup>153</sup>, and the rate set by that agreement is the rate that is set for the season and remains the same throughout the season “most of the time”<sup>154</sup>. The piece rate is adjusted depending on conditions and performance<sup>155</sup>, and he “generally does” provide a new piece work agreement when that

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<sup>138</sup> Ex NFF14 CB3056 at [24]

<sup>139</sup> Ex NFF14 CB3056 at [24]

<sup>140</sup> PN3079

<sup>141</sup> PN3078 – PN3082

<sup>142</sup> PN3085

<sup>143</sup> PN3100 - PN3101

<sup>144</sup> Ex NFF7 CB2971 at [9]

<sup>145</sup> PN2529 - 2530

<sup>146</sup> PN2514 - 2515

<sup>147</sup> PN2545

<sup>148</sup> PN2546

<sup>149</sup> PN2547

<sup>150</sup> PN2546 – PN2547

<sup>151</sup> PN2678 - 2683

<sup>152</sup> Ex NFF8 CB2981 at [28(d)]

<sup>153</sup> PN2666 - 2667

<sup>154</sup> PN2670

<sup>155</sup> Ibid, PN2671-2672

happens<sup>156</sup>.

38. Ms Catherine Silverstein, sets the piece rate for the year at the start of the season, and that rate is maintained throughout the season<sup>157</sup> despite the fact it would appear the density of fruit varies significantly over the course of the harvest<sup>158</sup>. The rate is set on her farm by taking the piece rate recommended by the Industrial Committee of the Victoria Farmers Federation and Fruit Growers Victoria, and then adjusted. Ms Silverstein tells the labour hire company what the rate will be and the relationship between the labour hire agency and the worker, that's a matter the labour hire company works out<sup>159</sup>.
39. Mr Anthony Kelly, described the peak season harvesting and pruning workforce on their farm was on his estimation split 60/40 in favour of labour hire<sup>160</sup>. The pickers and pruners are paid piece rates<sup>161</sup>. Pieceworkers, whether they be directly employed or labour hire, are provided a written pieceworker agreement as part of their "on-boarding process"<sup>162</sup>. Self evidently, at that time, the piece rate must have already been determined and placed in the pieceworker agreement.
40. Ms Michelle Distill recruits seasonal workforce through the Harvest Trial website, local backpacker hostels and caravan parks, and some people just turn up at the farm looking for work<sup>163</sup>. When they arrive the workers are told what the work is, what the piece rate is get them to sign onto a pieceworker agreement (an example of which is provided<sup>164</sup>), and they are indicted on site at the same time<sup>165</sup>. They start work the same day<sup>166</sup>.
41. Dr Underhill opines (Ex AWU16 at [17]) that the nature of the horticulture workforce, heavily reliant upon transient migrant labour often with relatively low levels of English language proficiency, means the requirement for a piece work agreement to be in writing and "genuinely made ...without coercion or duress", is "likely to offer very little protection for temporary migrant workers with a poor understanding of English". The Commission should accept that evidence.

**FINDING 3: WIDESPREAD PROBLEM OF PIECEWORKERS BEING LOWLY PAID DESPITE WORKING LONG, IRREGULAR HOURS, AND COMMONLY EARNING HOURLY RATES WELL BELOW THE MINIMUM HOURLY RATE**

42. Dr Elsa Underhill, a current Visitor to the Department of Management at Deakin University with

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<sup>156</sup> PN2675 – PN2676

<sup>157</sup> PN2181 – PN2182.

<sup>158</sup> Ex NFF5 CH2963 at [25] – [26]

<sup>159</sup> PN2161 - PN2162

<sup>160</sup> PN1704 - 1707

<sup>161</sup> Ex NFF2 CB2781 at [15], [21]; PN1708

<sup>162</sup> PN1710 – PN1714

<sup>163</sup> PN2964

<sup>164</sup> CB3033-3034

<sup>165</sup> PN2965

<sup>166</sup> PN2968

over 30 years experience as an academic<sup>167</sup>, with major research areas in the employment and OHS aspects of temporary migrant labour<sup>168</sup>, has provided the Commission two expert reports: Ex AWU16 and Ex AWU17. The Commission would accept that her expertise in researching temporary migrant labour and labour hire employment, and in particular the significant research undertaken by her (and Professor Rimmer) in 2013/2014 (being the first major research project on employment conditions and OHS of Working Holiday Makers ...in harvesting work across Australia<sup>169</sup>) and the major research project in 2018 (with Professor Rimmer, Associate Professor Yi and Ms Huang) on how temporary migrant workers access information about their employment rights<sup>170</sup>, provides a strong foundation for understanding employment practices in horticulture<sup>171</sup>.

43. Dr Underhill's expert report observed that her 2013/2014 research project, referred to as Research Project 1, "*is the only major academic survey to collect data on pieceworker earnings in horticulture in Australia*"<sup>172</sup>. The data collated as part of Research Project 1, demonstrate both the *fact* of a significant disparity in mean and median earnings as between harvest workers on hourly rates and piece rates, and an approximation of its *magnitude*. Based on that research, Dr Underhill expressed the opinion (at [25]<sup>173</sup>)

*Piece rate average earnings are well below the earnings of hourly paid workers, and only 60% of the amount an "average competent worker" would be expected to earn. There is also high variance in hourly earnings, with the lowest average hourly rate for piece rates being \$2.00 and the maximum \$30.00 per hour. A range of factors impact the productivity of harvest workers, such as experience, equipment, and the type and quality of the product picked. However, the low average pay of piece workers suggests that farmers and contractors fix piece rates too low on the basis of exaggerated performance expectations of the "average competent worker".*

44. Dr Underhill's 2018 research reflected "*the same pattern of low piece rates*", and that notably "*the pay gap has widened between the piece workers and hourly workers since 2014*"<sup>174</sup>.
45. In her reply evidence (Ex AWU17 at [39] – [43]), Dr Underhill reanalysed the data from both Research Project 1 and 2, having had criticisms of the statistical analysis method used in her original expert report drawn to her attention, using "nonparametric statistical tests...developed to overcome problems which can arise when survey data does not meet all of the assumptions expected of probability samples"<sup>175</sup>, and reached essentially the same conclusion: "*The results indicate that based on both the 2014 and 2018 surveys, hourly paid harvesting workers were paid, on average, less than those paid by piece rates, and the difference in both survey results*

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<sup>167</sup> Ex AWU16 CB475, at [3]

<sup>168</sup> Ex AWU16 CB475, at [4]

<sup>169</sup> Ex AWU16 CB476, at [6]

<sup>170</sup> Ex AWU16 CB477, at [7]

<sup>171</sup> Ex AWU16 CB475-476, at [4] – [5]

<sup>172</sup> Ex AWU16 CB485, at [24]

<sup>173</sup> Ex AWU16 CB486, Ex AWU17 CB328 – 330 at [38] - [43]

<sup>174</sup> Ex AWU16 CB486-487 at [26] – [27]

<sup>175</sup> Ex AWU17 CB328 at [38]

*was statistically significant.*"<sup>176</sup>.

46. The document entitled the "Distribution of Average Hourly Earnings, Horticulture Workers" (Ex AWU29), contains the tabulated data obtained by Dr Underhill during each of the two research projects, tables recoding the average (mean) figures, the median figure for each study, and histograms that show the frequency of the reported hourly rates for hourly and piece workers respectively for the 2013/2014 research (pg 1 – 4), and the 2018 research (pg 5 – 8). The Commission would accept it clearly supports each of the conclusions expressed by Dr Underhill, at the least insofar as it reflected the WHM segment of the harvest workforce in horticulture.

#### Mr Houston's Evidence

47. The only evidence called in contradiction of the evidence of Dr Underhill and Dr Howe, is that of Mr Houston. On the one hand, the Commission has expert evidence of researchers who have spent decades conducting research of various kinds into the horticulture industry and migrant workers more generally. The Commission would note that a significant number of the research papers referred to in the Commission's Reference List identify either Dr Underhill or Dr Howe as contributing authors. On the other hand, the evidence of Mr Houston (Ex AFPA 6 and Ex AFPA 7), does not fall within this category.
48. As Mr Houston acknowledged in cross-examination he had not undertaken any primary research using surveys in the last 10 years<sup>177</sup>, and the research he had done prior to that involved consumers of water in the Australian Capital Territory and the valuation of intellectual property<sup>178</sup> (and in this latter connection, by assessing information collected via another party). As for the ACT water research, Mr Houston had oversight, but other people who "spend a much greater part of their professional time in that area" were more specifically involved in both sample selection and survey design<sup>179</sup>. He accepted he had never been involved in any survey, focus group or empirical research into employees' employment conditions, employees' experiences, or pay of any group of workers<sup>180</sup>, and accepted he was "*not a specialist in the design and implementation of surveys*"<sup>181</sup>.
49. Mr Houston confirmed he has no experience particular to the horticultural industry (this being the first work he had done in horticulture<sup>182</sup>). He confirmed in the course of preparing his expert reports he did not conduct any empirical research into the horticulture industry<sup>183</sup>, nor did he conduct any research into what other studies/research existed into horticultural workers

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<sup>176</sup> Ex AWU17 CB329 at [43]

<sup>177</sup> PN3719- PN3721, PN3723 – PN3725, PN3733

<sup>178</sup> PN3710

<sup>179</sup> PN3738 - PN3739

<sup>180</sup> PN3746

<sup>181</sup> PN3740

<sup>182</sup> PN3717

<sup>183</sup> PN3795

generally, or piece workers, in Australia or elsewhere<sup>184</sup>. This was the first time in his professional career that he had applied his applied economics background in analysing any matter involving the horticulture industry or workers employment conditions or employment arrangements in that industry<sup>185</sup>. Indeed, he accepted he had never before been engaged to undertake a methodological critique of primary empirical research into the pay and conditions of any group of employees, in any industry<sup>186</sup>.

50. In cross-examination, Mr Houston confirmed that in his reports he was not criticising the studies undertaken by Dr Underhill or the conclusions and opinions drawn in those studies<sup>187</sup>, but rather was critical of her drawing conclusions having regard to those studies that he described as being “much broader than the conclusions in the studies themselves”<sup>188</sup>. Ultimately, the primary criticism made by Mr Houston of Dr Underhill’s conclusions was that the research projects were directed at WHMs in particular, rather than the horticulture workforce as a whole and, for that reason, might not be representatively of the workforce as a whole.

#### Conclusions to be Drawn from Dr Underhill’s Research

51. Dr Underhill’s research targeted a particular segment of the horticulture workforce (WHM picking workers in ‘picking regions’<sup>189</sup>), and approximately 90% of the respondents were WHMs<sup>190</sup>. It was not research designed to examine the whole population of harvest workers<sup>191</sup> and was not put forward as a representative sample of the entire horticulture workforce (noting it appears uncontroversial on the evidence it is not possible to obtain such a sample)<sup>192</sup>. But that would not cause the Commission to entirely disregard, let alone reject, the important findings made.
52. It is not necessary or possible for the Commission to make a specific finding of fact that the mean or median hourly rate dollar figures calculated for piece workers by Dr Underhill and found in the tables in Ex AWU16 (Table 3 CB486), or Ex AWU17 (Table 4, CB329), or Ex AWU29, are in fact reflective of the entire pieceworker population in the horticultural industry in Australia. Nor does the Commission need to make such a finding to accept the core of the AWU’s case: that is, that the current pieceworker scheme in cl 15 of the Horticulture Award does not provide “a fair and relevant minimum safety net of terms and conditions”.
53. On the evidence, even on the conservative estimates of ABARES (conservative because of the significant undocumented worker cadre of overseas workers, as discussed above), the majority of seasonal harvest workers are overseas workers, the majority of which are WHMs. Even if Dr

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<sup>184</sup> PN3796 - PN3798

<sup>185</sup> PN3803

<sup>186</sup> PN3809 – PN3812

<sup>187</sup> PN3828

<sup>188</sup> PN3829

<sup>189</sup> PN1269 - PN1277

<sup>190</sup> PN1301 - PN1306

<sup>191</sup> PN1294

<sup>192</sup> Ex AWU17 CB327 at [28], [33]

Underhill's expressed findings (at AWU16 at [25]), namely that:

- a. *"Piece rate average earnings are well below the earnings of hourly paid workers";*
- b. *"Piece rate average earnings ...are only 60% of the amount an "average competent worker" would be expected to earn";*
- c. *"There is ...high variance in hourly earnings [of pieceworkers], with the lowest average hourly rate for piece rates being \$2.00 and the maximum \$30.00 per hour"; and*
- d. *"the low average pay of piece workers suggests that farmers and contractors fix piece rates too low on the basis of exaggerated performance expectations of the "average competent worker"*

are understood as confined to WHMs in the horticultural industry, and as likely to reflect the pay outcomes of the most vulnerable and worst paid workers in that industry (excluding the undocumented migrant group), they nonetheless establish the AWU's central contention that the current pieceworker scheme in cl 15 of the Horticulture Award does not provide "a fair and relevant minimum safety net of terms and conditions".

54. It is those workers, those who are the most vulnerable and are likely to have the worst pay outcomes under current Award conditions, to which the Commission must look when assessing whether a current award is achieving the Modern awards objective of a "a fair and relevant minimum safety net of terms and conditions". Dr Underhill's findings are supported by:
  - a. Numerous other pieces of academic research, union research, and/or governmental reports.
  - b. The evidence of the AWU and UWW organisers who, collectively, have decades of experience in the horticulture.
  - c. The evidence of the individual workers called in the AWU case (Exhibits AWU1 to AWU3 summarised above); and
  - d. To some extent, the evidence called by the employer interests in this case.

*Dr Underhill Supported by Other Research/Reports*

55. The research of Dr Underhill (and Dr Howe) reflects the conclusions and/or findings of a great many other research projects (some of which are referred to at paragraphs [30] - [36] of Ex AWU16), with Dr Underhill noting (at [37]):

*"In sum, all research findings confirm very low piece rate payments in the horticulture industry. Whilst the findings vary between surveys, all find most piece workers are earning well below the minimum rate set for hourly paid casual workers. Our two research projects showed an average hourly rate of \$11.69 in 2014, increasing to*

*\$16.28 per hour in 2018. The minimum paid in both surveys was \$2.00 and \$5 per hour respectively. In 2014, the maximum rate reported by respondents was \$30 per hour, above the expectations of the “average competent worker”. In 2018, the maximum rate of \$25 did not reach the level that the “average competent worker” was expected to earn. Average piece rate earnings fall far short of average minimum hourly earnings; the work rate necessary for the “average competent worker” to earn 15% above the minimum hourly rate is unachievable for most; and the floor to piece rate payments is exceptionally low.”*

56. Dr Underhill was not cross-examined on this summary of the position reflected in “*all research findings*”, nor was any report or research put to Dr Underhill (or Dr Howe) nor tendered in the case of any of the employer interests, to cause it to be doubted.
57. The findings urged by the AWU based on Dr Underhill’s evidence can be more confidently drawn in light of the complete absence of any academic research, government report or inquiry, or evidence of any other kind, reflecting some other conclusion. The findings are supported by the evidence of Dr Howe, herself having provided an expert report, based on the specific research informing the report *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (a copy of which is at CB2457, and the annexures to which are marked AFPA1) and her years of experience in researching this industry and migrant labour more generally is (Ex UWU7, CB2454 at [19]): “*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*”.
58. The evidence is replete with reports examining parts of the horticultural industry finding rates of pay for piece workers well below the minimum hourly rates permissible under the Award. Examples which include the following The 2017 report by Berg, L. and Farbenblum, B. *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* reported the outcome of a survey of 4,322 temporary migrants about their employment experience. The key findings of the report included that:<sup>193</sup>

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

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

59. At CB907, the Wage Theft in Australia Report records:

*“Across at least 12 types of jobs in which temporary migrants commonly work, a substantial number of participants were paid well below minimum wage (Figure 19). This is the case regardless of whether the legal minimum is calculated at the national absolute minimum (\$17.70 at the time of the survey), the absolute minimum rate for casual workers (\$22.13 at the time of the survey), or the higher Award wages in various industries, indicated by the examples in Table 2. ...Among fruit and vegetable pickers, packers and farm workers, almost one in seven participants (15%) earned \$5 per hour or less and almost a third (31%) earned \$10 per hour or less”.*

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<sup>193</sup> Ex AWU16 CB883

60. Figure 19 (CB908) showed, for the fruit/vegetable picker or packer or farm worker, 15% earned 0-5%, 16% between \$6-\$10, 12% between \$10-\$12, 10% between \$13-\$15, 11% between \$15 - \$17, and 37% at \$18 or above (CB908).
61. *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (per Howe, J., Clibborn, S., Reilly, A., van den Broek, D. and Wright, C. F. (2019)) reported on the outcome of research conducted between 2016 and 2018 involving 332 growers and 13 regional case studies involving interviews and focus groups. The findings included<sup>194</sup>:

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

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

*In the focus groups WHMs reported receiving as little as \$1 per hour for piece rate work despite working at a consistent and steady rate. A reason for this low level of payment is that farmers and workers had very different perspectives on what was an appropriate and attainable level of productivity in setting a piece rate.”*

62. *A National Disgrace: The Exploitation of Temporary Work Visa Holders* reported the outcome of a Senate Committee inquiry concerning the exploitation of temporary visa workers. The report noted that research demonstrated that working holiday visa workers experienced very low rates of pay when paid piece rates and growers and contractors were able to pay piece rates that did not allow the average competent worker to earn an amount which approximates that set out in the Award.<sup>195</sup> The report noted:<sup>196</sup>

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

63. *Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail* published the results of a major investigation conducted by the Fair Work Ombudsman into working arrangements on the harvest trail. The Ombudsman reported evidence of the misuse of piecework arrangements, including the absence of written piecework agreements, invalid piecework agreements or payment based on the output of a group of employees.<sup>197</sup> The

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<sup>194</sup> Ex AWU16, CB1271

<sup>195</sup> Senate (2016) *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Education and Employment References Committee, Canberra, Commonwealth of Australia, p169: Ex AWU16 CB726

<sup>196</sup> Senate (2016) *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Education and Employment References Committee, Canberra, Commonwealth of Australia, p198.

<sup>197</sup> Fair Work Ombudsman (2018) ‘Harvest Trail Inquiry: A Report on workplace arrangements along the harvest

Ombudsman recorded that:<sup>198</sup>

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

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

64. National Union of Workers (2019). "Farm-workers speak out". Involved a survey of 655 workers in 2019 found the average hourly rate earned by piece workers was \$14.80 per hour and that over 64% earned less than the minimum casual hourly rate of pay.<sup>199</sup>

#### Union Commissioned Research

65. In March 2021, UnionsNSW published a report entitled *Wage Theft: The Shadow Market Part Two: The Horticulture Industry*. This report arose from the review (between late December 2019 to September 2020) of 1000 job advertisements distributed through online channels for positions in the horticulture industry, predominantly in English, Chinese, Japanese and Korean<sup>200</sup>. The advertisements examined related to 17 crops, with the majority being for positions for strawberry, blueberry, grape, zucchini, and raspberry picking. The Commission would note the UnionsNSW audit "does not suggest piece rates were substantially lower in ads written in languages other than English"<sup>201</sup>. The key findings included<sup>202</sup>:

- a. 88% of the ads for jobs audited offered wage by piece rate;
- b. 96% of the piece rates advertised would not allow a worker to earn the national minimum wage. The Commission would note this finding was based against the national hourly minimum wage of \$19.84 per hour, and would likely be a higher proportion if the casual award rate was used for the comparison<sup>203</sup>. The authors observed, based on this information "Payment arrangements such as piece rates were conceived to encourage and reward greater productivity in the industry, however this audit reveals that employers systematically misuse piece rates to underpay horticultural workers"<sup>204</sup>.
- c. 65% of the ads for strawberry picking and 22% for grape picking would allow workers to earn less than \$2 an hour;
- d. 33% of the ads for blueberry picking would allow a worker to earn \$10 to \$12 an hour, and 43% would allow an employee to earn \$13 to \$14 an hour;

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trail', Canberra, Commonwealth of Australia, p29.

<sup>198</sup> Fair Work Ombudsman (2018) 'Harvest Trail Inquiry: A Report on workplace arrangements along the harvest trail', Canberra, Commonwealth of Australia, p14-15: Ex AWU16 CB1007 - 1008

<sup>199</sup> Ex AWU16, CB1645 – 1646

<sup>200</sup> Ex AWU13 CB221

<sup>201</sup> Ex AWU13, CB229

<sup>202</sup> Ex AWU13 CB221

<sup>203</sup> Ex AWU13 CB223

<sup>204</sup> Ex AWU13 CB223

- e. 64% of the ads for capsicum picking would allow a worker to earn \$10 to \$12 an hour;
- f. 24%, 10% and 29% of the ads for zucchini picking would allow a worker to earn \$10 to \$12, \$13 to \$14 or \$15 to 16 an hour, respectively;
- g. 5%, of the job ads for raspberry picking would allow a worker to earn less than \$2 an hour, while 5%, 15% and 25% would allow a worker to earn \$3 to \$5, \$10 to \$12 or \$15 to \$16 an hour, respectively; and
- h. The lowest piece rates were identified in Bundaberg, with 80% of the jobs ads advertising a rate that would allow a worker to earn less than \$2 an hour. Similarly, 78% of the job advertisements in Caboolture and Beerwah would enable a worker to earn under \$2 an hour. 71% of picker job ads for Banksia Grove also offered rates that would lead to earn less than \$2 an hour.

66. The Conclusions expressed by UnionsNSW included (CB238):

*Unions NSW audit confirms the systematic exploitation of workers in the horticultural industry aided by the piece rate system. Despite arguments piece rates encourage higher productivity, research consistently shows employers' preference for piece rates, to systematically pay workers below the minimum wage. The government has mistakenly focused on diversifying the regional workforce to ensure labour supply for horticultural businesses. However, the focus should be shifted to addressing poor working conditions and wage theft. Any other measures will be ineffective at attracting a workforce towards an industry with a reputation for underpayment and exploitation. Piece rates should be replaced by a minimum hourly wage for horticultural workers.*

67. In 2019 the UWU published a report of a survey of over 650 farm workers across Victoria and NSW (the vast bulk being in either the Sunraysia or the Goulburn Valley regions), undertaken between April and May 2019, during the main grape, apple, pear and stone fruit harvest season<sup>205</sup>. Mr Roberston, summarising some of the findings of that report, observed (at [10])<sup>206</sup>:

*"The results of the survey demonstrated that workers were paid average daily and hourly rates of pay that were significantly less than the ACE rate, the equivalent hourly rate, and the federal minimum wage. The average hourly pay of all workers surveyed was \$14.80. The lowest reported hourly wage was \$4.60, and the highest was \$37.50. 64.2% of workers reported earning less than the equivalent hourly rate, which at the time the survey was conducted was \$23.66."*

68. In 2020, the AWU, the Transport Workers' Union of Australia and the Shop Distributive and Allied Employees Union, NSW, sponsored the McKell Institute, an independent not for profit public policy institute, to undertake field research into the working conditions in the blueberry industry in Northern NSW<sup>207</sup>. Amongst the key findings of that research, Finding 4 Wage Theft is a Business Model, it was concluded<sup>208</sup>:

*"Working Holiday Makers in the area have alleged gross underpayments, orchestrated through an intentional misinterpretation of piece-rates. One WHM documented earning as little as \$21 in a 7 hour workday, after being asked to work on low-yield crops by his subcontractor"*.

<sup>205</sup> Ex UWU1 CB2330 at [9] – [12], a copy of which is GR1 at CB2340

<sup>206</sup> Ex UWU1 CB2330

<sup>207</sup> Ex AWU9 CB54 at [10] – [12], noting a copy of the Blue Harvest Report can be found commencing at CB60

<sup>208</sup> Ex AWU9 CB65

### Evidence of Union Officials

69. The evidence of the AWU officials similarly reflects high levels of migrant labour in seasonal harvest horticulture workforces across the country, experiencing chronically low rates of pay for piece rates workers:

- a. Mr Beven<sup>209</sup>, an AWU organiser in the Tasmanian Branch responsible for assisting AWU members in the horticulture in the North and North West of Tasmania (since February 2018), primarily blueberry and strawberry farms, confirms most of the workers he has observed have been “seasonal workers and backpackers”<sup>210</sup>, through “casual labour hire” working piece rates<sup>211</sup>. The workers regularly work in excess of 10 hours per day<sup>212</sup>. Piece rates are set “on a daily basis and the tunnels in which they pick vary in terms of rate of pay”, meaning “the earnings of piece workers are often determined by the area of the farm they are working in rather than their effort or competence”<sup>213</sup>. Workers on piece rates, in his observation, are required to undertake non-piece rate work whilst undertaking picking rate on piece work, again reducing their capacity to earn<sup>214</sup>. Whilst he acknowledged “some picking workers I have dealt with ...have earned good wages via piece rates”<sup>215</sup>, he observed (at [23]):

*“On average, the workers I have observed are earning well below the minimum rate for an average competent piecework employee under the Horticulture Award – which is the permanent award rate plus the 25% casual loading plus the 15% piecework loading. There are very few workers reaching this level of earnings despite being competent and experienced.”*

- b. Mr Cameron, who had responsibility for assisting AWU members in the horticulture industry in North-Eastern Victoria and Western NSW between 1995 and December 2020<sup>216</sup>, observes “the vast majority of fruit pickers are either backpackers or people from the Pacific Islands program”<sup>217</sup>, and the workforce in fruit picking in his experience is casual<sup>218</sup> and always piecework<sup>219</sup>. Mr Cameron stated (at [15]):

*“I have regularly been approached by backpackers who have sought help after working a 38 hour week and making less than one or two hundred dollars. Under the current structure of the Award there is simply no redress. It is fairly common for workers to have little or no money left after a 38 hour or longer working week and then having to reimburse the employer for accommodation.”*

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<sup>209</sup> Ex AWU 4 and Ex AWU5, starting at CB14 and CB17 respectively

<sup>210</sup> Ex AWU4 CB18 at [6]

<sup>211</sup> Ex AWU4 CB18 at [7] – [9]

<sup>212</sup> Ex AWU4 CB18 at [13]

<sup>213</sup> Ex AWU4 CB18 at [10]

<sup>214</sup> Ex AWU4 at [11] – [12]; Ex AWU5 at [8], PN249 - PN251; although Mr Beven could not comment on whether the performance of that work had been factored into the calculation of the relevant piece rate: PN259 - PN261

<sup>215</sup> Ex AWU4 CB19, at [21]

<sup>216</sup> Ex AWU6 CB40, at [1], [3]-[4]

<sup>217</sup> Ex AWU6 CB40, at [6]

<sup>218</sup> Ex AWU6 CB41, at [7]

<sup>219</sup> Ex AWU6 CB41, at [9]

*In particular I recall this occurring at Anderson's farm at Shepperton in 2018".*

- c. Mr Phillip Gourlay, AWU Victorian Branch organiser for the Mildura Region<sup>220</sup>, provides assistance to horticulture workers in the Sunraysia and North-West Victorian regions (since January 2018), and describes the local industry as having “*a high number of foreign workers many fulfilling their visa requirements and Seasonal Worker Program workers generally paid on piece rates*”. In his area, some workers employed under EBAs who have job security will work for up to 20 or 30 years with the same employer, but “*foreign workers may move round between employers chasing better pay rates and/or working conditions*” remaining with the one employer for “*a few days up to a few months*”<sup>221</sup>. Mr Gourlay gives evidence of having received reports of workers with very low incomes on piece rates (at [18] – [20]), “*regularly through harvest periods*”<sup>222</sup> (for example, somewhere between 20 and 30 in the previous 12 months<sup>223</sup>), noting one in particular<sup>224</sup>:

*“I have also had conversations with two foreign workers who had predetermined piece rates offered to them, and then when submitting the number of boxes to be checked by supervisor/manager and paid for, they have then been offered a lower amount per box to be paid in cash. They also reported payslips being falsified, the employer not asking for tax declarations, superannuation details or bank details to be paid electronically. When paid by cash, they received an envelope with their name and number of boxes, rate per box and total amount paid. Attached to this statement are copies of text messages and photographs of envelopes that the two workers provided”.*

- d. Mr Ron Cowdrey, AWU Vice President and Organiser with the NSW Branch, has responsibility for assisting AWU members in horticulture in South West and Western NSW, (since February 2013)<sup>225</sup>, describes having “predominantly” come across “backpackers from various backgrounds performing work in the horticulture industry”, although he noted an influx of workers from the South Pacific region in the last four years<sup>226</sup>. He observes “*Most workers are in their mid 20s or early 30s and have little or no idea of how our industrial laws work*”. He estimates, based on his experience, 95% of the workforce are casual<sup>227</sup>, generally employed for the length of a harvest season (although he notes Seasonal Worker Program workers being “shipped around the country to where they are needed by their ‘approved employer’”<sup>228</sup>), and 85-90% are on piece rates<sup>229</sup>. He describes having witnessed many issues in the conditions for such workers (at [11]), but as to piece work earnings states (at [12] – 16))<sup>230</sup>:

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<sup>220</sup> Ex AWU7 CB43 at [2]

<sup>221</sup> Ex AWU7 CB44 at [11]

<sup>222</sup> PN309

<sup>223</sup> PN310-311

<sup>224</sup> Ex AWU7 CB45 at [20]

<sup>225</sup> Ex AWU8 CB 49 at [3]

<sup>226</sup> Ex AWU8 CB 49 at [7]

<sup>227</sup> Ex AWU8 CB 50 at [8]

<sup>228</sup> Ex AWU8 CB 50 at [9]

<sup>229</sup> Ex AWU8 CB 50 at [10]

<sup>230</sup> Ex AWU8 CB51

*I've witnessed workers picking onions being paid \$45 per crate which totals 60 buckets that could take up to three to four hours to pick.*

*I've witnessed workers picking citrus in Hillston for a contractor, Prasard Management, receiving weekly wages of \$325.50 for the week then being taxed.*

*I've witnessed workers being paid \$25 per bin to pick oranges in Griffith and completing 2 bins per day.*

*Based on my experiences with the horticulture industry, the overwhelming majority of workers being paid piece rates are receiving well below the minimum rate of pay for a casual employee under the Horticulture Award.*

*It would be extremely rare for a piecework employee to currently be earning the minimum rate for an average competent employee under the Horticulture Award which is the casual rate plus 15%.*

- e. Mr Shane Roulstone, National Organising and Campaigns Director for the AWU National Office<sup>231</sup>, has been engaging with and assisting workers in the horticulture industry since March 2018, and has attended many farms across Central Western NSW, New England NSW, Northern Rivers NSW, Bundaberg, the Wide Bay Region, and Stanthorpe Queensland, Yarra Valley, Mildura, and Shepparton Victoria<sup>232</sup>. He has “engaged with thousands of workers in the horticulture industry” and been involved in a number of industry surveys of workers in recent years<sup>233</sup>, including the AWU Blue Harvest report into work in work in blueberry farms in the Coffs Harbour region in 2020. In the past 12 months, he estimated he had received “over 50, probably less than 100” complaints<sup>234</sup>, the “vast bulk” of which were about “underpayments and claims for backpay”<sup>235</sup>. Mr Roulstone has observed the overwhelming majority of workers are “casual or labour hire employees”, casuals being “predominantly pickers”<sup>236</sup>. In his observation, “*The majority of casual employees are overseas workers, which are mainly backpackers, followed by recently arrived migrants, seasonal worker programme participants, pacific labour scheme participants, overseas students, and local Australian making up the rest*”<sup>237</sup>. He observed (at [30]):

*“Also, the horticultural industry routinely employs tens of thousands of undocumented workers who have questionable work rights. These workers are nearly always engaged effectively as casuals on a cash in hand basis. Most of these workers are on between \$10 and \$14 an hour without any superannuation payments or workers’ compensation cover”.*

- f. Mr Roulstone estimates 90% of the seasonal casual horticulture workers are paid on piece

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<sup>231</sup> Ex AWU9 CB53

<sup>232</sup> Ex AWU9 CB53-54 at [6]

<sup>233</sup> Ex AWU9 CB54 at [8]

<sup>234</sup> PN373

<sup>235</sup> PN376

<sup>236</sup> Ex AWU9 CB56 at [23] – [24]

<sup>237</sup> Ex AWU9 CB56 at [25]

rates<sup>238</sup>, predominantly doing picking work (although some packing work is also paid on piece rates)<sup>239</sup>. The work is labour intensive, physically demanding, often involves long hours (routinely in excess of 10 hours per day, six days per week)<sup>240</sup>. As to the rates paid to piece workers, Mr Roulstone observes (at [37] – [40])<sup>241</sup>:

*“Piece rates are routinely set at rates that do not allow for most workers to achieve anything near the minimum hourly award rate.*

...

*Whilst a very small minority of workers will earn much more than minimum hourly award rate (sic), this is not usual and when consideration is given to the actual hours worked, it is at best rare.*

*A small number of employers are currently using the current award piece rate exemptions for overtime to prevent paying casual employees overtime. This is being done by moving casual hourly rate workers to piece rate workers for a week or two after 6 weeks, before moving them back to hourly rates. This prevents the hourly rate workers from reaching the 304 hours in an 8-week period which would generate overtime entitlements”.*

- g. Mr Carter, Organiser with the AWU NSW Branch, works in the NSW North Coast area. Since 2012, he has assisted members, predominantly on blueberry farms in the Coffs Harbour and Grafton areas<sup>242</sup>. He has a significant membership engaged in roles paid under piece rates, predominantly those who pick and prune blueberry, raspberry and blackberry bushes<sup>243</sup>. He observes *“working conditions in the horticulture industry are the toughest out of all the industries I deal with yet the earnings are the worst”*<sup>244</sup>. In his experience, 90% of workers are engaged as casual labour<sup>245</sup>, and *“100% of employees engaged in picking and pruning roles are on piecework rates of pay”*<sup>246</sup>. He describes having problematic issues around piecework rates on numerous occasions, and that *“The basis of all disputes raised with employers, wholly and solely relates to significant below Award minimum rates of pay”*<sup>247</sup>. He observed that whilst a particular employer, Costa, was *“at least making some attempt to pay correct rates”*<sup>248</sup>, in his experience *“95% of workers on piece rate arrangements are paid below minimum Award rates of pay”*<sup>249</sup>.

70. The UWU officials give similar evidence of their experience of problems in the use of piece rates

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<sup>238</sup> Ex AWU9 CB57 at [31]

<sup>239</sup> Ex AWU9 CB57 at [31] – [34]

<sup>240</sup> Ex AWU9 CB57 at [35] – [36]

<sup>241</sup> Ex AWU9 CB58

<sup>242</sup> Ex AWU10 CB124, at [1] – [5]

<sup>243</sup> Ex AWU10 CB125, at [6]

<sup>244</sup> Ex AWU10 CB129, at [51]

<sup>245</sup> Ex AWU10 CB126, at [15]

<sup>246</sup> Ex AWU10 CB126, at [19]

<sup>247</sup> Ex AWU10 CB125, [7] – [8]

<sup>248</sup> Ex AWU10 CB128, at [37]

<sup>249</sup> Ex AWU10 CB128, at [38]

in the horticulture industry, and in particular the low pay rates for piece workers.

Evidence of NFF Witnesses/Survey

71. A finding that there is a widespread problem of inadequate remuneration for harvesting workers on piece rates is also reinforced in some of the evidence from farmers called by the NFF and the AFPA.
72. Mr Rogers of the NFF, described the results of a survey conduct by the NFF (designed as part of a campaign designed to undermine the application). The survey report at Annexure F to Ex NFF3, identifies that there were some 196 responses, approximately 70% (137 responses) of which were from “Owners”, and approximately a further 21% (41 responses) were either a “Senior Manager” or “Supervisor”<sup>250</sup>. Questions 1 to 16 were apparently directed to a grower<sup>251</sup>, 17 to 21<sup>252</sup> were apparently directed to employees, and 22 onwards for a labour hire operator<sup>253</sup>. The respondents to the survey appear to have come from farms of different kinds<sup>254</sup>, appear to have been of varying size<sup>255</sup>, and to draw their seasonal workforce from a variety of sources<sup>256</sup>. Question 12 of that survey, directed to growers<sup>257</sup>, asking “*What is the proportion of piece-rate workers who make less than \$24.80 an hour?*”<sup>258</sup> (emphasis added), demonstrates that of the 109 respondents only 33 (approximately 30%) had no-one who was making less than \$24.80 (being the Level 1 casual rate under the Award at the relevant time). Approximately 70% of the respondents had at least some of their piece rate workers who make less than \$24.80 per hour, and approximately 36% indicated that 10% or more make less than \$24.80 per hour.
73. Mr Glenn Trewin, the Financial Controller of Bulmer Farms<sup>259</sup>, confirmed that their farming operation (a “very big business”<sup>260</sup> with a turnover in the order of \$25 million per annum<sup>261</sup>), paid “new” employees a substantially lower piece rate for approximately 6 months<sup>262</sup> (35c per bunch rather than 40c per bunch of baby broccoli<sup>263</sup>), noting baby broccoli is harvested for 12 months of the year<sup>264</sup>. As a consequence, a worker who it would appear was employed for “potentially” around 8 weeks (although he could not be certain)<sup>265</sup>, that had picked precisely the same number of ‘bunches’ of baby broccoli in a week as a more experienced worker<sup>266</sup> (both having picked

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<sup>250</sup> Ex NFF3 Q4 CB2903

<sup>251</sup> PN1898

<sup>252</sup> Ex AWU20 pg 4, PN1899

<sup>253</sup> PN1901, 1907

<sup>254</sup> Ex NFF3 Q3 CB2902

<sup>255</sup> Ex NFF3 Q5, 7 and 8, CB2904, CB2906, CB2907

<sup>256</sup> Ex NFF3 Q9, CB2908 - 2910

<sup>257</sup> PN1911-1912

<sup>258</sup> Ex AWU20 pg 3; Ex NFF3 Q12 CB2913

<sup>259</sup> Ex NFF6 CB2961 at [2]

<sup>260</sup> PN2293

<sup>261</sup> Ex NFF6 at [5]

<sup>262</sup> PN2344

<sup>263</sup> PN2334 – PN2335

<sup>264</sup> PN2347 - PN2348

<sup>265</sup> PN2341 - PN2343, the relevant payslip being Ex AWU23 pg 2

<sup>266</sup> Ex AWU23 pg 1

3080 bunches in the week between 25/2/2021 – 3/3/2021), was paid (before tax and superannuation deductions) a substantially different amount for that work: \$1078<sup>267</sup> for the “new” worker and \$1232<sup>268</sup> for the more experienced worker. A worker who had been employed for “potentially” as long as six months<sup>269</sup> was still being paid at the “new” employee rate<sup>270</sup>.

74. Mr Anthony Kelly, CFO of N&A Group, gave evidence of how his business set the piece rate for apple picking (at [18]), observing it was made “*by consultation with senior supervisors who has (sic) an extensive history with the industry and is knowledgeable of the crop, the terrain, and the conditions in the field on a given day*”. For pruning, piece rates were set by the planted block of trees (at [23]). Whilst the farm recorded hours of work for piece rate workers, it would appear that was not used in the setting of a rate, but as part of a recently created monitoring exercise. In that connection, he described having “*reviewed back-calculations on piece rate earnings amongst pickers*”, and observed “*rarely does anyone earn below the award minimum rate*”<sup>271</sup>. His evidence included a spreadsheet, described as a “sample wages spreadsheet” (at [26], a copy of which commences at CB2784). In addition to recording the number of picked items and the hours of work, recorded the “Piece target”, the “Piece Actual”, the “Piece variance” and the “Piece result”. The “Piece Target” is “calculated as what would be required to pay all piece work at 15% above the level 1 casual rate”<sup>272</sup>. The Piece Result column identified whether the Piece actual achieved that target or failed to achieve that target: that is, failed to ensure that the worker made 15% above the level 1 casual rate<sup>273</sup>. The document confirms some 24% of the workforce did not achieve the “piece target” for the relevant period.

75. Mr Siah produced a number of payslips for picking workers. On the ordinary hours of work described by Mr Siah (6 days, 9 hours per day, or 54 hours per week), for those payslips where it would appear 6 days were worked a number suggest workers *may* have earned less than the casual hourly rate plus 15%:

AWU Ex 25 pg no.	Gross pay	Hours assumed	Calculated Hourly rate
9	1347.5	54	24.95
11	1098.75	54	20.35
18	1032.5	54	19.12
23	1260	54	23.33

76. Brent McClintock, General Manager, Tasmania operations<sup>274</sup> for Pinnacle Fine Foods, produced

<sup>267</sup> Ex AWU23 pg 2

<sup>268</sup> Ex AWU23 pg 1

<sup>269</sup> PN2354

<sup>270</sup> PN2353, Ex AWU23 pg 5

<sup>271</sup> Ex NFF2 CB2781, at [24]

<sup>272</sup> Ex NFF1 CB2784

<sup>273</sup> PN1762

<sup>274</sup> PN1984, amending paragraph [1] of Ex NFF4, CN2956

records kept by his farming operation and communicated to the 3 labour hire suppliers used<sup>275</sup>. On that day workers were paid \$45 per bin to strip apples<sup>276</sup>. Using the records for the date of 23 March 2021 (AWU21 pg 2, 178 and 336), the Commission can see:

- a. Whilst Mr McClintock described a “competent worker of reasonable skills [being] capable of harvesting 6-8 bins of apples in a working day within 2 weeks of commencing” (at [19]), although he notes for some this will simply not be possible (at [20]), only 1 of the 7 workers employed through the labour hire provider for pg 2, 1 of the 14 workers employed through the labour hire provider for pg 178, and 8 of the 20 workers employed through the labour hire provider for pg 336, met that rate of work.
- b. Markedly different ‘average competent worker’ rates would be calculated for each of the 3 different employers.
- c. Whilst some of the workers (17 out of 41 workers that day) made an hourly rate at or above \$28.02 (the casual level 1 rate plus 15%), the majority (the remaining 24 workers) did not, with equivalent hourly rates ranging from \$11.25 to \$60:

For the labour hire provider on pg 2 of Ex AWU21, only 1 worker earned a rate at or above 15% above the casual minimum hourly rate:

Bins	Pay/Bin	Total hours	Hourly rate (Bins x Bin Rate)/Hours	Total paid for day	Hourly rate Less Casual Piece Rate
7	45	7	45.00	315.00	16.98
2	45	7.17	12.55	90.00	-15.47
2	45	6.42	14.02	90.00	-14.00
3	45	6.92	19.51	135.00	-8.51
3	45	6.67	20.24	135.00	-7.78
3	45	7.08	19.07	135.00	-8.95
2	45	6.17	14.59	90.00	-13.43

For the labour hire provider on pg 178 of Ex AWU21, only 3 workers earned a rate at or above 15% above the casual minimum hourly rate:

Bins	Pay/Bin	Total hours	Hourly rate (Bins x Bin Rate)/Hours	Total paid for day	Less Casual Piece Rate
1.5	45	6	11.25	67.50	-16.77
1.5	45	3	22.50	67.50	-5.52
1.5	45	3	22.50	67.50	-5.52
1	45	4	11.25	45.00	-16.77
10	45	7.5	60.00	450.00	31.98
5	45	7.5	30.00	225.00	1.98

<sup>275</sup> Ex AWU21, PN2059 - 2075

<sup>276</sup> PN2070 - PN2074

4	45	7.75	23.23	180.00	-4.79
3	45	7.33	18.42	135.00	-9.60
4	45	8.1	22.22	180.00	-5.80
1.5	45	6	11.25	67.50	-16.77
2.5	45	7	16.07	112.50	-11.95
2.5	45	7	16.07	112.50	-11.95
4	45	7.67	23.47	180.00	-4.55
5	45	7.33	30.70	225.00	2.68

For the labour hire provider on pg 336 of Ex AWU21, only 7 workers earned a rate at or above 15% above the casual minimum hourly rate:

Bins	Pay/Bin	Total hours	Hourly rate (Bins x Bin Rate)/Hours	Total paid for day	Hourly rate Less Casual Piece Rate
6	45	7.42	36.39	270.00	8.37
6	45	7.42	36.39	270.00	8.37
10	45	7.58	59.37	450.00	31.35
5	45	7.5	30.00	225.00	1.98
7	45	7.42	42.45	315.00	14.43
4.5	45	7.5	27.00	202.50	-1.02
4.5	45	7.5	27.00	202.50	-1.02
4.5	45	7.5	27.00	202.50	-1.02
7	45	7.75	40.65	315.00	12.63
4.5	45	7.5	27.00	202.50	-1.02
4	45	7.5	24.00	180.00	-4.02
6	45	6.75	40.00	270.00	11.98
5	45	7.5	30.00	225.00	1.98
7	45	7.75	40.65	315.00	12.63
7	45	7.5	42.00	315.00	13.98
5	45	7.75	29.03	225.00	1.01
4.5	45	7.5	27.00	202.50	-1.02
4.5	45	7.5	27.00	202.50	-1.02
6	45	7.5	36.00	270.00	7.98
8	45	7.42	48.52	360.00	20.50

77. Mr King, the National Capital/Operational Projects Manager for Costa Group, Berry Category, failed to produce actual wage or hours records required by the order for production issued by the Commission. Mr King took the position that such documents were not within his custody or control and explained that, having made inquiries, Costa Corporate was not willing to provide those documents to assist the Commission.<sup>277</sup> This is despite the fact that it appears that pay and hours records exist for harvest workers.<sup>278</sup> Mr King was only given permission to produce a summary document he referred to as a “dashboard”. As a result, it is impossible to check the information

<sup>277</sup> PN3459 - 3464

<sup>278</sup> PN3465 - 3467

in the “dashboard” or examine the earnings of particular employees or the spread of earnings of the workers.

78. The “dashboard” purports to show only the average hours of work, average picking rate and average hourly wage rate for workers in the berry business of Costa for May 2021.<sup>279</sup> Mr King was, upon examination, unable to explain how the average hourly rate was produced from the data contained in the spreadsheet. Mr King understood that the piece rate referred to in the “dashboard” was a payment per kilogram which, if correct, would produce extremely low hourly rates of pay.<sup>280</sup> On the face of the document, the hourly earnings of employees appear to be well below the averages given on Mr King’s understanding of the piece rate.
79. Even assuming the averages given are accurate, the documents does not demonstrate adequate piece rates are being set. The overall average hourly rate across the berry business was said to be \$28.31 per hour for May 2021<sup>281</sup> in circumstances in which an average competent worker should be able to earn \$28.54. However, that outcome also masks the variation between location. In particular, the average hourly rate for Corindi (Coffs Harbour) was \$26.36, for Far North Queensland \$26.12 and for Gingin (WA) \$25.35.<sup>282</sup> The workers in each of those regions earned on average well below the amount an average competent worker should be able to earn on a piecework agreement.

Victorian Government Submission to Commission

80. The Victorian government submission to the Commission (commencing CB pg 3226), based in part on its Inquiry into the Labour Hire Industry and Insecure Work, stated that cl 15(2)(b) of the Award “has failed to ensure fair pay is delivered”, that evidence to that inquiry demonstrated workers “almost universally have little or no say in determining whether they would be paid piece rates or what the rate would be”, that the piece rate provision “can result in very low wage rates for workers in the industry...significantly less than minimum award wages”<sup>283</sup>, that the “safeguards which attach to piece rate systems do not appear to be effective”, because that clause “gives rise to uncertainty and subjectivity about the appropriate rate of pay and therefore undermines the safety net intended to be established by minimum rates”<sup>284</sup>.
81. The specific finding that appears to have informed the Victorian Government Submission to the Commission, is finding 4.7 of the report into the Victorian Inquiry into the Labour Hire Industry and Insecure Work<sup>285</sup>:

*“The operation of the piece rate award provisions, particularly in the horticulture*

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<sup>279</sup> Ex AWU28

<sup>280</sup> PN3487 - 3509

<sup>281</sup> Ex AWU28 p1

<sup>282</sup> Ex AWU28 p2, 4 and 5

<sup>283</sup> CB 3226

<sup>284</sup> CB 3227

<sup>285</sup> Item 45 on the Fair Work Commission’s Reference List, pg 24

*industry, creates the possibility that employees may be paid below the minimum hourly rate, and accordingly undermines the minimum safety net intended to be established by minimum hourly rates. In the horticulture industry, the safeguards which attach to piece rate systems do not appear to be utilised in practice. Further, the use of piece rates in that industry contributes to a level of subjectivity and uncertainty regarding what rate is payable to an employee, and underlies a number of problematic outcomes.*

82. In its submission to the Commission the Victorian Government states<sup>286</sup>:

*“Additional protections are required to ensure that, for piece workers in the horticulture industry, the modern award objectives are met. This is especially the case in so far as the modern award objectives require a safety net that takes account of the living standards and needs of the low paid”.*

83. It is no doubt for that reason that the Victorian Government expresses “strong support for the AWU application and the provision of a safety net of fair and safe work practices and pay”<sup>287</sup>, because it would “provide a clear safety net minimum wage floor for piece workers under” the Award<sup>288</sup>.

#### Absence of any positive case about payments generally in the horticulture workforce.

84. Finally, whatever may be said about the limitations in the data set used to inform the research and findings of Dr Underhill and Dr Howe, it cannot be doubted that this Full Bench has a far better picture of the contemporary use of piece rates in the horticulture industry in Australia than any other reported or unreported case suggests has previously been available to the Commission or its predecessors.

85. There is nothing in the 2009 Award Modernisation process (described by Mr Rogers at [4] to [20]<sup>289</sup>) indicating the Commission gave any consideration to any evidence reflecting the then contemporary use of piece rates in the horticulture industry. The Commission would well appreciate that the Award Modernisation process more generally did not involve an evidential examination of industry, but rather was focussed on the consolidation of a great many existing industrial instruments themselves the product of a variety of arbitral or consensual processes of industrial tribunals across the country.

86. The Commission’s current statutory mandate under s 134 provides it “*must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions...*”. The Commission cannot discharge that obligation by reliance upon ‘presumptions’ about whether current modern awards achieve that objective, or notions of onus or burden of proof. None of the employer interests have themselves positively advanced an evidential case that could satisfy the Commission cl 15 of the Award is currently meeting the Modern Award objective.

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<sup>286</sup> CB 3227

<sup>287</sup> CB 3226

<sup>288</sup> CB 3227

<sup>289</sup> Ex NFF3, CB2787 – 2789 at [4] – [20]

## FINDING 4: STANDARD OF “AVERAGE COMPETENT WORKER” SUBJECTIVE, AND OPEN TO ABUSE

### Legal Standard Impenetrable for Ordinary Worker

87. Whilst the concept of the “average competent worker” has existed in awards for some years, it would appear the first consideration of the expression by a Court arose in the prosecution of Marland Mushrooms Qld Pty Ltd and others in *Fair Work Ombudsman v Hu (No 2)*(2018) 279 IR 162 (per Rangiah J), and *Fair Work Ombudsman v Hu* (2019) 298 IR 240 (Full Court).

88. Rangiah J at first instance relevantly found the piecework rate, that “must be fixed at the time the employment is entered”, requires that (at [26]):

*“An employer proposing to fix a particular piecework rate must assess the adequacy of the rate by first ascertaining the hourly rate prescribed under the Award for the type of employment and the classification level of the employee and then adding 15% to that amount. The employer must then assess the hourly rate an “average competent employee” is able to earn performing the work to be done under the agreement at the proposed piecework rate. The employer must make a comparison of the two rates to ensure that the latter equals or exceeds the former.”*

89. Assessing the hourly rate an average competent employee is able to earn at the piecework rate “involves a predictive, theoretical exercise”, requiring “identification of the characteristics of the hypothetical average competent employee and prediction of the pick rate of such an employee” (at [28]). The use of “average” in this context does not involve a “precise exercise” with mathematical precision but rather (at [29]): “The average competent employee is the ordinary, normal or typical competent employee. That is not to say that mathematical averages are irrelevant to determining the pick rates and earning capacity to be attributed to such an employee”.

90. The Court found the “average competent worker” concept (at [31]) “envisages the existence of a pool of hypothetical competent employees” from which those lacking competence must be excluded when identifying the average competent worker. The pool of workers to be considered in making that assessment is not at large – it “must be made by reference to the workforce that is available or potentially available to the employer. An employer cannot assess who is an average competent employee by considering the competence of a workforce that is not available, such as a workforce in another country or a workforce from a different era” (at [34]).

91. From that available or potentially available pool, the employer must assess who is of average competence. In this connection a “competent” worker is one who is suitable, sufficient or adequate to perform the work to be done as a pieceworker (at [30]), and the average competent employee is the “ordinary, normal or typical competent employee” (at [29]), but not one who is “proficient”, meaning “well advanced or expert in any art, science or subject; skilled” (at [30]).

92. Identifying the pick rate of an average competent employee in a pool of available or potentially available workers, requires consideration of factors “both personal and external to such an

employee” (at [33]). Personal factors “include diligence, aptitude and experience” (at [33]). Assessing those factors, other than “experience”, “can only be assessed as a matter of impression based upon ordinary human experience” (at [34]). What must be identified are those workers with “an average level of diligence and an average level of aptitude” (at [34]). Even as to experience, the judgment of how experienced the average competent employee is, “will be influenced by the general level of experience of the available workforce considered as a whole. In other words, the average competent employee in a less experienced workforce should be attributed with less experience, while the converse is also true” (at [34]).

93. As to the “external factors” that will affect the picking rate of the average competent employee, such factors “require an employer setting a piecework rate to make an assessment of the conditions under which the employee can be expected to work over the period of the contract” (at [36]). Relevant factors will include “the density, quantity and size of the [relevant produce picked], and the prevalence of unhealthy [produce], as well as the nature and quality of the equipment provided” (at [36]). As his Honour observed (at [37]) “Where there is an established farming enterprise, data about previous pick rates will no doubt assist in determining the rate of the average competent employee”.
94. In the context of cl 15, the concept of the ‘average competent employee’ is central to the establishment of appropriate minimum piece rates and lies at the heart of the limited protections contemplated by cl 15 of the Award. The notion of an ‘average competent employee’ is an inappropriate standard to rely upon as the core of a protection about minimum rates of pay.

#### **Various Methods Used to Set Piece rates – “average competent worker” has no fixed meaning**

95. The evidence demonstrates there are a variety of methods used to set piece rates, that those methods are seldom set out in the pieceworker agreements themselves, and by their nature are likely to be uncertain and unreliable: examples in the employer evidence shows they may be based on general industry guidelines published by industry bodies, on assessments or trials of ‘pick rates’ of experienced workers or the owner of a farm, and in some cases are reverse engineered from the minimum rate of pay required by cl 15.2(b) rather than pick rates of the available pool of workers.
96. Various methods of setting piece rates are described in the evidence of the NFF witnesses. Despite having received Orders requiring the production of records, including records relating to hours of work and pay for piece workers, not all did. Of those that did, a number appear to have piece rates that result in significant numbers of harvesting workers (it is accepted not all), earning low rates of pay, below that contemplated by cl 15 of the Award.
97. Ms Catherine Silverstein, of Silver Orchards, said she “always” made an assessment of what is necessary for her piece rate workers to earn the minimum amount required by the Award<sup>290</sup>, but

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<sup>290</sup> PN2216

does not describe any process of the kind necessary to assess an appropriate piece rate. The business does not record the hours of work of piece rate workers – “they don’t write it down”<sup>291</sup>. Ms Silverstein sets the piece rate for the year at the start of the season, and that rate is maintained throughout the season<sup>292</sup> despite the fact it would appear the density of fruit varies significantly over the course of the harvest<sup>293</sup>. The rate is set on her farm by taking the piece rate recommended by the Victoria Farmers Federation and Fruit Growers Victoria, which can be seen at Ex AWU22 pg 76 – 81 for the 2021, 2019, and 2020 years respectively, and then adds \$5 “standard”<sup>294</sup> per bin<sup>295</sup>. An additional amount of between \$1 and \$5 per bin is paid as a “bonus...per bin”<sup>296</sup> to “good pickers”<sup>297</sup>. Ms Silverstein initially agreed the additional \$5 per bin paid as part of the “standard” piece rate on her farm was added because it was seen as “*necessary for you to add an extra \$5 on the amount that had been recommended as appropriate for your farm to meet the award obligation; correct?---Correct*”<sup>298</sup>, although it would appear she later suggested this was done because she wanted the pickers “*to understand they are picking good quality fruit, not fruit for the cannery*”<sup>299</sup>, “*to get good quality work*”<sup>300</sup>.

98. On Ms Silverstein’s evidence the “general”<sup>301</sup> pattern of work for a picker is as follows: they begin work at “sunrise” (approximately 6.30am or 7.30am, depending on the time of year<sup>302</sup>) and will knock off at either approximately 4pm Monday to Friday (making an 8 or 9-hour day, allowing for a 30minute break for lunch<sup>303</sup>), or approximately 1pm on Saturdays<sup>304</sup> (making a 5 or 6 hour day, again allowing for a 30 minute break). That equates to a “general” working week of between 45 and 51 hours, depending on the time of year. If Ms Silverstein’s piece rate had been set so as to permit the “average competent worker” to earn “15% more per hour than the minimum hourly rate prescribed in this award” for a casual employee on that “general” pattern of work, they ought to have been earning between \$1283.40 (for 45 hours) and \$1454.52 (for 51 hours). In the 54 payslips produced for the period 29 March 2021 to 2 May 2021, only 2 payslips<sup>305</sup> record a weekly “Total Earnings” (ie before tax earnings) of greater than \$1283.40 and only 1 payslip<sup>306</sup> above \$1454.52 (albeit it should be acknowledged that some of the work recorded on many of the payslips appears to be paid at hourly rates).

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<sup>291</sup> PN2256

<sup>292</sup> PN2181 – PN2182.

<sup>293</sup> Ex NFF5 CH2963 at [25] – [26]

<sup>294</sup> Ex NFF5 at [27], PN2196 - PN2197

<sup>295</sup> Ex NFF5 at [27]

<sup>296</sup> Ibid

<sup>297</sup> PN2205 – PN2206; PN2212 - 2213

<sup>298</sup> PN2199, cf PN2216 - 2217

<sup>299</sup> PN2214

<sup>300</sup> PN2215

<sup>301</sup> At PN2176 Ms Silverstein accepted this was the general pattern of work “but if one needed to leave early on day, that might happen; that’s generally what you’re saying? Correct”

<sup>302</sup> Ex NFF5 CB2964 at [30], PN2163 -

<sup>303</sup> PN2168

<sup>304</sup> PN2174 – PN2179

<sup>305</sup> Ex AWU22 pg 52, 53

<sup>306</sup> Ex AWU22 pg 53

99. Brent McClintock, General Manager, Tasmania operations<sup>307</sup> for Pinnacle Fine Foods, described a permanent workforce of 15 to 20 permanent workers doing management supervisor and support work, and a “substantial number of temporary casual workers over the course of the year for peak seasonal work”<sup>308</sup>, with a core of some 30 “local residents” and between 50 to 60 temporary workers for apple picking and approximately 200 for cherry picking, mostly made up of backpackers and working holiday makers<sup>309</sup> (no SWP workers<sup>310</sup>). All of their picking workforce was sourced through labour hire<sup>311</sup>. They enter into an agreement with the labour hire agency as to what the piece rate will be (the “minimum rate that we will pay for the job”<sup>312</sup>) and the labour hire agency will use that as the rate they advertise. That rate is determined at the beginning of the season<sup>313</sup> at a rate they ‘believe’ complies with the Award “*informed by our knowledge and experience and the guidance which is published by industry bodies such as Primary Employers Tasmania*”<sup>314</sup>.
100. On their farm, the recommended rate from Primary Employers Tasmania may not reflect the Award requirement and so is adjusted – “*it may be higher or it may be lower than what Primary Employers Tasmania recommends*”<sup>315</sup>. That rate is then adjusted “*at the beginning of each workday on the basis of difficulty, weather conditions etc*”<sup>316</sup>. The workers, all labour hire workers, are told the rate for the day “as they start”, when they turn up for the day<sup>317</sup>. The pick rates are monitored throughout the day and workers are told the next day if there is going to be a change in the rate<sup>318</sup>. There was no suggestion that the labour hire companies used by Pinnacle Foods would enter into a new pieceworker agreement each time the rate was set.
101. Mr Anthony Kelly, Chief Financial Officer for N&A Group, described the decision as to the piece rates to be paid for their apple picking was made by the business in “consultation with senior supervisors who has an extensive history with the industry and is knowledgeable of the crop, the terrain, and the conditions in the field on a given day”<sup>319</sup>.
102. Mr Guy Gaeta described applying the “formula” in the Award “to determine the pick rate”, by “normally rely[ing] on our own pick rate and the pick rate of a number of our returning workers”, noting that “Prior to the start of picking for all workers, we would do and pick for an hour

<sup>307</sup> PN1984, amending paragraph [1] of Ex NFF4, CN2956

<sup>308</sup> Ex NFF4, CN2957 at [9]

<sup>309</sup> Ex NFF4, CN2957 at [11], PN2009 – PN2012

<sup>310</sup> Ex NFF4, CN2957 at [13]

<sup>311</sup> PN1992, amending paragraph 12 of Ex NFF4, CB2957

<sup>312</sup> PN2014, PN2016

<sup>313</sup> Ex NFF4 CB2958 at [21], PN2029

<sup>314</sup> Ex NFF4 CB2958 at [21], PN2029 – PN2032

<sup>315</sup> PN2032

<sup>316</sup> Ex NFF4 CB2959 at [21], PN2029

<sup>317</sup> PN2040 – PN2041

<sup>318</sup> PN2043 - 2047

<sup>319</sup> Ex NFF2 CB2781 at [18]

ourselves<sup>320</sup> to “just try to get an idea, you know, the time that it takes<sup>321</sup>. That is the basis of how the rate is set, which is then put in the piecework agreements when workers turned up at the farm<sup>322</sup>. In cross-examination, Mr Gaeta provided a different account of how the rate was calculated. Mr Gaeta produced a document headed “Cherry Season 2020 Piece Work” (Ex AWU24), which is what he used to work out the piece rate. The rate was calculated “about a week before harvest<sup>323</sup>. In cross-examination he described having calculated the casual rate of pay for 8 hours work, added 15%, and then divided the amount by the price per lug to get a minimum of 2.2 lugs per hour<sup>324</sup>. Mr Gaeta described they “continuously monitor” the work and it is “not uncommon that we adjust the piece rate higher if a large proportion of workers cant meet the set pick rates<sup>325</sup>. In cross-examination he described how he could vary the piece rate not only day to day, but even over the course of a day. His evidence was that he would just tell the workers what the rate would be before they started the particular work<sup>326</sup>.

103. Mr Han Siah, the Farm Manager for a farm trading as Tropical Primary Products or TPP Australia, grows tropical exotic fruits including mangoes. All pickers are directly employed on piece rates (an example piece rate agreement is supplied – it did not include any description of how the rate was derived)<sup>327</sup>. During harvest all employees work 6 days per week, roughly 9 hours each day (although this could vary<sup>328</sup>), with “a daily pay rate of \$200 – 300 or considerably more” not uncommon<sup>329</sup>. Mr Siah described a calculation he did in his head (not documented or written down)<sup>330</sup> to determine the appropriate piece rate, based around what he believed a “hypothetical competent and reasonably productive worker” could undertake<sup>331</sup>, but no records are kept of the start and finish times or hours of work of piece workers<sup>332</sup>.
104. Mr Johnathan Moss, production manager of Mossmont Nurseries in Warburn NSW, on the outskirts of Griffith, describes employing between 45 to 100 seasonal workers during harvest<sup>333</sup> on their farm (a tree wholesaler<sup>334</sup>), 17 of which were overseas workers from East Timor under the SWP program (who have all returned each year for the past 5 years), and a “fluctuating number of backpackers<sup>335</sup>. Normally only 30% of their staff were engaged through labour hire, but with border closures in the last year it was more like 80%<sup>336</sup>. The farm has a policy of

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<sup>320</sup> Ex NFF7 CB2971 at [10]

<sup>321</sup> PN2525

<sup>322</sup> PN2529-2530

<sup>323</sup> PN2583

<sup>324</sup> PN2584 - 2589

<sup>325</sup> Ex NFF7 CB2971 at [10]

<sup>326</sup> PN2540 - PN2550

<sup>327</sup> Ex NFF8 CB2980 at [24] – [25]

<sup>328</sup> PN2642

<sup>329</sup> Ex NFF8 CB2979 at [13]

<sup>330</sup> PN2678 - 2683

<sup>331</sup> Ex NFF8 CB2981 at [28(d)]

<sup>332</sup> PN2685 - PN2688

<sup>333</sup> Ex NFF9 CB2998 at [18]

<sup>334</sup> Ex NFF9 CB2996 at [6]

<sup>335</sup> Ex NFF9 CB2998 at [19] – [20]

<sup>336</sup> Ex NFF9 CB2998 at [22]

employing workers on a new or unfamiliar task on hourly rates for a two day “buffer” period before employing on piece rates<sup>337</sup>. Piece rates are paid for “tree work” (at [26] – [28]), with the rate paid dependent upon the task. That rate is based on “the rate paid for the previous season” but he varies it “drawing on the farm’s history of growing the trees, and my experience with the work, our workforce, and farming in general” (at [29]). He described “frequently” testing the rate he had set by doing some tree work personally “at an average (not my fastest) pace” (at [31]), and then “back checks” the “productivity and earnings of each pieceworker” although it would appear the rate of picking is being measured against that already set, not averaged across the workforce.

105. Mr Matthew Benham, Operations Manager for a citrus farm trading as Top Citrus, based in Gayndah Queensland<sup>338</sup>, described employing a seasonal workforce of 40-60 pickers and additional 10-15 packers, who work alongside 10-12 permanent employees (some of whom supervise the pickers and packers, and other engaged on general farm work)<sup>339</sup>. Pickers are mostly Nepalese, engaged via a labour hire contractor<sup>340</sup>. Packers are usually backpackers employed directly<sup>341</sup> and paid hourly rates<sup>342</sup>. The piece rates are varied season to season “*and we rely on our expertise and understanding of what different fruits are worth and our output to determine the rate payable per bin*”<sup>343</sup>. The “output” referred to is higher output, not the quality of the fruit picked<sup>344</sup>. The piece rate (which may vary from block to block on the farm, depending on growing conditions<sup>345</sup>), is set at or shortly prior to the start of the season<sup>346</sup>, and the rate for that season is then communicated to the labour hire contractor<sup>347</sup>. The amount earned by an individual is not determined by their individual output, but by the number of bins collectively filled<sup>348</sup>. The labour hire contractor is paid an amount reflecting the number of bins picked across the picking group, plus a premium<sup>349</sup>. The payment is made by the labour hire contractor to the workers, and Mr Benham’s business wasn’t directly involved in that<sup>350</sup>.
106. Ms Michelle Distill, described the seasonal pickers being all paid by piece rates, cherry pickers by the kilogram and apple pickers by the bin<sup>351</sup>. Ms Distill “have regards to the guidance materials which are published by Primary Employers Tasmania” when setting rates, but it is not followed “religiously and will vary it (usually up) if we don’t believe the rate is high enough”<sup>352</sup>. They

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<sup>337</sup> Ex NFF9 CB2998 at [23]

<sup>338</sup> Ex NFF12 CB3022 at [1] – [5]

<sup>339</sup> Ex NFF12 CB3023 at [9] – [11]

<sup>340</sup> Ex NFF12 CB3023 at [12] and [18]

<sup>341</sup> PN2830 - 2831

<sup>342</sup> PN2840

<sup>343</sup> Ex NFF12 CB3023 at [14], PN2862 - PN2866

<sup>344</sup> PN2866

<sup>345</sup> PN2850 - PN2853

<sup>346</sup> PN2849

<sup>347</sup> PN2854

<sup>348</sup> PN2873 - PN2875

<sup>349</sup> PN2855, PN2911 – PN2916

<sup>350</sup> PN2918

<sup>351</sup> Ex NFF13 CB3028 at [20] - [21]

<sup>352</sup> Ex NFF13 CB3028 at [23]

otherwise “use employees, who we know to be average pickers, to set the piece rate at the start of each season”<sup>353</sup>, meaning she uses the rate of picking of experienced loyal returning workers to set the piece rate<sup>354</sup>. Generally, the rate has been as recommended by Primary Employers Tasmania, “this year was the first year that we actually felt that the – that it needed to be changed and lifted up a little”<sup>355</sup>. Ms Distill observed “the average worker is usually capable of picking 3 bins<sup>356</sup> of apples immediately after commencing work, but once they understand and are comfortable with the technique they will generally pick 5 bins per working day on average”<sup>357</sup>

107. Mr Eckersley produced a document headed “2020 Season” was a document used to “check our bin rates”<sup>358</sup>. The process reflected in that document for determining the per bin piece rate was described in cross-examination, and involves a calculation of the rate required to meet cl 15.2(b) of the Award (PN3123), multiplying it by an 8.5 hour day (PN3124) (giving a daily amount of a little over \$236), and then divided that by a \$per bin rate (varying from \$90 per bin for “Imperial” to \$40 per bin for “Oranges” and “Hickson”) to calculating the picking rate per day (PN3125 – PN3128). This *reverses* how one ought to calculate the relevant piece rate. Mr Eckersley confirmed his workers keep a manual timesheet record of the hours they work<sup>359</sup>, but the labour hire company is paid in bulk by a cumulative total and he did not have any direct involvement in what is paid to the workers<sup>360</sup>.
108. Mr Carter, AWU Northern NSW Region Organiser observed in his experience guidelines developed by the Fair Work Ombudsman to assist in setting a fair piece rate are “ignored by all companies within the berry industry”, rather “Companies have their own piece rate setting procedure without any inclusion or genuine agreement of any affected employee”<sup>361</sup>. He provides an example of a document entitled Costa Berries – Domestic: Procedure for Piece Rate Setting<sup>362</sup>, and observes (at [21]): “*Companies regularly take into account factors such as market price when setting piece rates. This means the piece rate fluctuates day to day or week to week depending on how prices are fluctuating*”<sup>363</sup>.
109. The Commission would find, on the evidence:
- a. Piecework agreements are not required to, and on the evidence commonly do not, contain any method or mechanism for calculating what rate of work an “average

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<sup>353</sup> Ex NFF13 CB3028 at [22]

<sup>354</sup> PN2970 - PN2972

<sup>355</sup> PN2976 - PN2977

<sup>356</sup> Noting the bins are approximately 320 kilograms: PN2980

<sup>357</sup> Ex NFF13 CB3029 at [24]

<sup>358</sup> PN3115

<sup>359</sup> PN3071 – PN3074

<sup>360</sup> PN3075 – PN3076

<sup>361</sup> Ex AWU10, CB126 at [20]

<sup>362</sup> Ex AWU10 CB127 at [31], a copy of which starts as CB132

<sup>363</sup> Ex AWU10 CB126 at [21]

competent employee” could be expected to achieve.

- b. The concept of the “average competent employee” has no fixed meaning, is subjective, open to abuse and absent more is an unreliable protection for inclusion in a safety net of fair and reasonable terms and conditions of employment.
- c. The concept of the “average competent employee” as the standard against which the piecework rate contemplated by cl 15.2(b) of the Award must be set is an inadequate protection against piece rates in piecework agreements being set at inappropriately low levels and does not ensure a modern award provision dealing with rates of pay for pieceworkers provides a fair and relevant minimum safety net of terms and conditions.

### Competence

110. One of the matters relied upon by the various opponents to the AWU claim, is that it can take some time for workers to become “competent” or “average competent”. The evidence does not support a finding that work falling within the Level 1 classification in the Horticulture Award, the only classification level that specifically identifies “fruit or vegetable picking, thinning or pruning” as an indicative duty<sup>364</sup>, is of such complexity as to require a significant or material period of time to become “competent”.

111. Mr McClintock observed (at [16]<sup>365</sup>, emphasis added):

*“Fruit picking is certainly not an ‘unskilled’ role. It is possible to become highly proficient through experience, fitness and practiced technique. I expect most pickers will reach a competent skill level within about a week, although this may vary from picker to picker. The difference between a worker who is not competent, who is competent, and who is proficient mostly comes down to their economy of movement and use of time for example knowing how to move about the tree and down the row, and use of techniques to minimise time such as placement of bags and ladders”.*

112. Mr Siah did not consider picking mangoes to be skilled work, but observed it did require some technique and know-how<sup>366</sup> for the reasons he explained (at [16] – [21]). On his farm, workers are paid hourly rates<sup>367</sup> until it is determined they are “suitable to be able to pick piece rate”<sup>368</sup>, which usually occurred after “generally two to three days”<sup>369</sup>. Similarly, Mr Eckersley, a citrus farmer, observed that although such fruit must be carefully picked “Usually, it takes 2-3 days for a picker to become competent”<sup>370</sup>.

113. On the evidence, the Commission would accept workers are able to become competent in relation to work rate within a few days or a week of commencing, or at the least not such a

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<sup>364</sup> Horticulture Award, Schedule A, cl 1.3

<sup>365</sup> Ex NFF 4, CB2958

<sup>366</sup> Ex NFF8 CB2979 at [15]

<sup>367</sup> P2713

<sup>368</sup> PN2714

<sup>369</sup> PN2716

<sup>370</sup> Ex NFF14 CB3056 at [19]

material period of time as to justify the rejection of the AWU's claim.

Cannot be a "safety net" if "average competent employee" cannot be understood or enforced

114. Moreover, the Commission would be well satisfied of the inappropriateness of the notion of the 'average competent employee' as the core of a protection about minimum rates of pay, in light of the evidence about the impracticability of the current term.
115. Mr Carter, Norther NSW AWU Organiser, described having been unable to reach a reasonable resolution of *any* underpayment case he had raised to date "*due to the current Award provisions*". He observed (at 9) – [10]<sup>371</sup>:

*"...Due to the current Award wording I am unable to properly raise these exploitive matters with the FWC.*

*The main problem is the vague reference to an "average competent employee" earning 15% more than the Award rates. This leads to debates about whether or not the relevant workers is competent or not and this is a difficult issue to prove."*

116. Mr Carter referred to a particular dispute relating to underpayment on behalf of a group of workers. He was ultimately able to have that matter resolved (albeit the workers were made redundant not long thereafter)<sup>372</sup>, but in the course of dealing with that matter obtained advice that indicated the 'average competent worker' standard in the Award meant formal claims couldn't really be pursued (at PN423):

*---The advice I received from our industrial advocates was that there is not a very strong reference or provision that guarantees a minimum rate of pay. I run into the issue of "the average worker". Some of these employees that I ended up getting converted were industry best practice at pruning. They had been doing it for between - up to 16 years, some individuals, and they were still receiving below award rate. So the provision is very subjective, and the advice I got that it really couldn't be formally pursued. ...*

117. Mr Cameron, AWU Organiser, observed a significant "*power imbalance*" for piece workers in his region, which meant "*backpackers cannot leave or risk forfeiture of their visa, and most Pacific Islanders cannot leave the farm to choose other work, bullying and ill treatment can often occur*"<sup>373</sup>. Whilst he described receiving complaints in his role with the union<sup>374</sup>, using the cases in his last year in the role that involved supporting horticulture workers<sup>375</sup>:

*In all of those cases the complaints or the inquiries came from people who were unwilling to become members because they felt they wouldn't get work, and I was unable to justify further action for people that weren't members. Also the award itself is largely unenforceable.*

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<sup>371</sup> Ex AWU10 CB125

<sup>372</sup> PN423

<sup>373</sup> Ex AWU6 CB41, at [14]

<sup>374</sup> PN281

<sup>375</sup> PN283 - 284

*Generally, particularly Pacific Islanders, simply can't afford the union fees, even the reduced fee of \$9 a month. And in addition, the current structure of the award makes it impossible to enforce the provision around what is an average competent picker that sets the piecework rate.*

118. When asked to clarify what he meant by the piece rates in the Award being “largely unenforceable”, Mr Cameron observed<sup>376</sup>:

*“... there's never any way of determining what is an average competent picker, and there's no mechanism within the award to do that, and it's impossible because of the variations in the fruit types, and even within the same crop, and the varying piecework rates. So there's no empirical way to determine what is an average competent picker.”*

119. Mr Robertson, Lead Organiser for the UWU, similarly identifies the ‘average competent employee’ concept as “unworkable”, describing it as “*entirely subjective, and within the control of the employer to unilaterally determine*”<sup>377</sup>. The piece rate agreements he has seen “do not provide any information about how the rate itself was calculated”, a comment that is reinforced by each of the examples of the piecework agreements in evidence before the Commission.

120. Moreover, it would be impossible for an individual worker, let alone a typical temporary migrant worker, to ever be able to calculate what the ‘average competent worker’ is in *hindsight*, let alone at the time they are presented with a pieceworker agreement. Even experienced union industrial officers find it “extremely difficult” to answer questions about whether a worker was properly paid<sup>378</sup>. Mr Robertson, Lead Organiser for the UWU, describes this difficulty (at [18] – [20]<sup>379</sup>). To be able to give meaning to the ‘average competent employee’, the individual worker, or those advising them, would need “*the hours of work and productivity data*” for not only themselves (which is seldom kept), but also for the employers of other workers. As Mr Robertson observed (at [19] – [20]):

*“In the ordinary course of their employment, workers do not have access to the necessary information outlined above, and would have no legal right to request and have the employer disclose this information to them. The only time a worker may ever be able to have access to the necessary information – particularly the hours of work and productivity data of other workers - is if the worker is part of a group proceeding brought by the union or the Fair Work Ombudsman, for example.*

*In practice, this means it is impossible for an individual piece rate worker to establish the rate set by the employer is deficient because it does not enable an average competent employee to earn the compliant rate. This makes the “average competent worker” concept unworkable”.*

121. That practical inability to historically assess whether workers have been underpaid, particularly arising from there being no requirement to keep records of the hours of work of pieceworkers, was accepted by a number of the NFF witnesses:

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<sup>376</sup> PN292

<sup>377</sup> Ex UWU1 CB2333, at [18]

<sup>378</sup> For example, Ex UWU1 CB2334, at [21]

<sup>379</sup> Ex UWU1, CB2333

- a. Mr Glenn Trewin, the Financial Controller of Bulmer Farms<sup>380</sup>, confirmed that in their farming operation (a “very big business”<sup>381</sup> with a turnover in the order of \$25 million per annum<sup>382</sup> with an annual wage bill of “roughly \$5.9m, ... about 25% of [their] total operating costs”<sup>383</sup>), the business did not maintain any records of the hours worked by their piece rate workers<sup>384</sup>, although they did for workers on hourly rates, and that “the consequence of that is there's no way that anyone could go back and check what the effective hourly rate of the piece workers employees who were picking the baby broccoli is”<sup>385</sup>
- b. Mr Siah described a calculation he did in his head (not documented or written down)<sup>386</sup> to determine the appropriate piece rate, based around what he believed a “hypothetical competent and reasonably productive worker” could undertake<sup>387</sup>. He provides them a written pieceworker agreement when they arrive at the farm<sup>388</sup>, and the rate set by that agreement is the rate that is set for the season and remains the same throughout the season “most of the time”<sup>389</sup>. He adjusts the piece rate paid depending on conditions and performance<sup>390</sup>, and “generally do” provide a new piece work agreement when that happen<sup>391</sup>, but no records are kept of the start and finish times or hours of work of piece workers<sup>392</sup>. Mr Siah accepted that it wouldn't be possible to go back and work out the hourly rate of pieceworkers (PN2689 – PN2690):

*“No time records. All right. You would accept from that that it wouldn't be possible after the event to go back and work out the hourly rate, effective hourly rate, of a piece work employer based upon just their gross earnings without knowing what the hours were?---No.*

*That is, you agree with me?---Yes.”*

#### **FINDING 5: NO EVIDENCE OF SUBSTANTIAL ADMINISTRATIVE BURDEN.**

122. The employer interests opposing the application have raised what might generally be referred to as an increase in the administrative burden in the event the AWU proposal was accepted. On the evidence, the AWU proposal would not lead to such a significant increase in the administrative burden associated with an already highly transient and mobile workforce paid on piece rates, as to warrant its rejection.

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<sup>380</sup> Ex NFF6 CB2961 at [2]

<sup>381</sup> PN2293

<sup>382</sup> Ex NFF6 at [5]

<sup>383</sup> Ex NFF6 CB2966 at [5]

<sup>384</sup> PN2324 – PN2329

<sup>385</sup> PN2399 – PN2403

<sup>386</sup> PN2678 - 2683

<sup>387</sup> Ex NFF8 CB2981 at [28(d)]

<sup>388</sup> PN2666 - 2667

<sup>389</sup> PN2670

<sup>390</sup> Ibid, PN2671-2672

<sup>391</sup> PN2675 – PN2676

<sup>392</sup> PN2685 - PN2688

123. First, in order to establish and then properly monitor whether the piece rates utilised in a horticultural operation comply with the *current* obligation to ensure piece rates “*must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee*”<sup>393</sup>, an employer must keep not only pick rate information but also hours of work records for piece workers. To the extent that is not currently happening, the increased administrative burden from being expressly compelled to do so can be ignored.
124. Second, a number of the witnesses called on behalf of employer interests confirm such records are already maintained. Mr McClintock confirmed that on his farming operation hours of work records are kept for both hourly and piece workers<sup>394</sup>. As he put it: “*Under the Hort Award, we have to maintain the hours or else how can we work out the average?*”<sup>395</sup>. Mr Anthony Kelly confirmed that his farming operation recorded the hours of work of pieceworkers, and that the piecework and hours of work details recorded on the “sample wages spreadsheet” attached to his statement<sup>396</sup>, were recorded in their payroll data collection system by the relevant farm supervisor<sup>397</sup>.
125. Similarly, Mr Gaeta confirmed he kept written records of the start and finish times of the piece workers on his farm<sup>398</sup>. He understood he was required to produce them<sup>399</sup>, although no such records were produced: he observed (amongst other things), when asked why “*why should I produce them anyway*” and “*we would have them there somewhere, but I didn’t think I was on trial here either*”<sup>400</sup>. Mr Benham confirmed the labour hire contractor they utilise keeps a record of the hours worked by piece rate workers on his farm, that is provided to him at the end of each day<sup>401</sup>. Mr Eckersley confirmed in their farming operation they keep hours records and pay records for pieceworkers, but they had nothing to produce for the month identified in the Notice to Produce because he had been hospitalised and so no work was done<sup>402</sup>.
126. Mr Kelly confirmed the hours of work monitoring system was a “new process” as at March 2021<sup>403</sup>, developed to enable them to “do a better job” of “*monitoring the rates of pay for pieceworkers to make sure that they were adequate...?...Yes, ensuring that we were meeting the minimums, yes*”<sup>404</sup>. Whilst Mr Kelly states the farm uses piece rates “*because they remove the need to supervise the productivity of our pickers*”, and they were “*happy for them to work at*

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<sup>393</sup> CI 15.2(b) Horticultural Award

<sup>394</sup> PN2050 – PN2053

<sup>395</sup> PN2053

<sup>396</sup> Ex NFF2 CB2782 at [26], the spreadsheet itself being found at CB2784

<sup>397</sup> PN1758- PN1759

<sup>398</sup> PN2533 - 2538

<sup>399</sup> PN2551 – PN2557

<sup>400</sup> PN2553.

<sup>401</sup> PN2919 – PN2922

<sup>402</sup> PN3103 – PN3104, PN3118 - 3120

<sup>403</sup> PN1775

<sup>404</sup> PN1777

*their own rate*<sup>405</sup>, their work rates are nonetheless supervised (“constantly monitored”<sup>406</sup>, at [27])<sup>407</sup>:

*“At present, if a picker is not working at a pace which we consider adequate then, after trying to assist them to increase their pace, we will try to move them to an area of work which is paid hourly and individual productivity is not such a factor. In addition to taking care of the worker and ensuring our compliance with the Award requirements, this helps us control our costs as a less productive worker gives us a worse return on our wage investment and brings down the work rate of the “average competent worker” which means that we have to increase the piece rate across the board”.*

127. Mr McClintock, another farming operation that recorded hours of work and described adjusting piece rates daily, described pickers being “*monitored from start to finish, and we are highly responsive to standards and conditions in the orchards*”<sup>408</sup>. He observed (at [22])<sup>409</sup>:

*“In the case of underperformance or lower-than-desirable productivity, we will provide oversight and retraining to ensure employees receive the necessary attention to be capable of earning at a higher rate. Those who are not capable of doing so are generally offered an option to remain or leave.”*

128. Mr McClintock appears to be the only witness to have tried to tangibly describe the additional “burden” of introducing the AWU proposal, and observes for his workforce (which is over 50-60 pickers for apples and approximately 200 pickers for cherries, all through labour hire), that it would take “2 to 3 minutes for each worker per week which at its peak could amount to 9 or 10 hours per week during harvest season” to ensure workers “earn at least the minimum hourly rate” each day<sup>410</sup>.

129. Third, to the extent a need for increased supervision of workers is relied upon to establish an increased administrative burden, again the evidence demonstrates there is already at least some level of supervision on the farms of those called by the employer interests. There is no substantive evidence of the extent of any increase in the burden imposed by requiring hours of work to be maintained, or by increasing levels of supervision.

130. Mr Gaeta observed that because pickers on his farm are “often spread out” that “the idea of supervising ...pickers after they are hired will not work” and suggested he would “probably have to have a ‘test pick’ with certain pickers, who are then hired if their pick is of good quality and efficient enough”<sup>411</sup>. Mr Moss describes currently being “discerning in regards to the employees” who are offered piece rates and that he will “*only do this where I can be confident that they will work at an average (or better) pace because if they do not work at the necessary pace it means*

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<sup>405</sup> Ex NFF2 CB2781 at [25]

<sup>406</sup> PN1732, Ex NFF2 CB2781 at [20]

<sup>407</sup> Ex NFF2 CB2782 at [27]

<sup>408</sup> Ex NFF4 CB2959 at [21(c)]

<sup>409</sup> Ex NFF4 CB2959

<sup>410</sup> Ex NFF4 CB2960 at [28]

<sup>411</sup> Ex NFF7 CB2971 at [15]

*that they are not productive enough*<sup>412</sup>.

131. The evidence does not permit a finding that the proposed cl 15.2(k) requirement to keep a record of the hours worked by pieceworkers, or the proposed 15.2(i) requiring each pieceworker to be paid at least the minimum hourly rate, would create an unreasonable or unjustifiable burden on employers. The evidence demonstrates a number of growers already keep records of the hours of work and pay records of pieceworkers.

**Mark Gibian SC**

**Anthony Howell**

Counsel for the Australian Workers' Union

Dated: 26 July 2021

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<sup>412</sup> CB3000 at [36]