

FAIR WORK COMMISSION

Matter No: AM2020/104

Horticulture Award 2020

FINAL SUBMISSIONS OF THE UNITED WORKERS' UNION

Introduction and overview

1. This is an application by the Australian Workers' Union (**AWU**), supported by the United Workers' Union (**UWU**), to vary the *Horticulture Award 2020* to ensure that all employees earn at least the minimum wage.
2. Two forms of remuneration are available under the Horticulture Award. Workers can be paid minimum weekly or hourly rates pursuant to cl 15.1 and 15.3 (**time rates**), or they can be paid by reference to the volume of work completed over a shift pursuant to cl 15.2 (**pieceworker rates**).
3. Currently, clause 15.2 provides:

15.2 Pieceworker rates

(a) An employer and a full-time, part-time or casual employee may enter into an agreement for the employee to be paid a piecework rate. An employee on a piecework rate is a pieceworker.

(b) The piecework rate fixed by agreement between the employer and the employee must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee. The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement.

(c) The calculation of piecework rates in clause 15.2(b) for casual employees will include the casual loading prescribed in clause 11.3(a).

(d) An agreed piecework rate is paid instead of the minimum rates specified in clause 15.

(e) The following clauses of this award do not apply to an employee on a piecework rate:

- (i) Clause 13—Ordinary hours of work and rostering arrangements;

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(ii) Clause 18.3(c)—Meal allowance; and

(iii) Clause 21—Overtime.

(f) The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress.

(g) The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee.

(h) The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.

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

(j) For the purposes of the NES:

(i) The base rate of pay for a pieceworker is the base rate of pay as defined in the NES.

(ii) The full rate of pay for a pieceworker is the full rate of pay as defined in the NES.

4. The variation proposed by the AWU is to delete and replace clause 15.2(i), and to add a new clause 15.2(k):

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

...

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

5. The proposed variation is opposed in total by parties including the National Farmers' Federation (**NFF**) and the Australian Industry Group (**AIG**). The proposed variation to clause 15.2(i) is opposed by the Australian Fresh Produce Alliance (**AFPA**).

6. Clause 15.2, in its current form, does not provide workers with a fair and relevant minimum safety net of terms and conditions of employment. The clause as presently drafted fails to prevent workers from earning substantially below award minimum wages, and therefore fails to achieve its protective purpose. Piecework arrangements are imposed on workers without any genuine agreement, contrary to the express provisions of cl 15.2(f). The calculation of the pieceworker rate is complex and frequently misapplied, and workers are not provided

with or possessed of the necessary information to assess whether the pieceworker rate has been properly set. Each of these matters is compounded by the fact that the horticulture labour force is substantially comprised of workers with particular vulnerabilities that compromise workers' ability to genuinely agree to a pieceworker agreement, to monitor and assess if they are being properly paid, and to take steps to address underpayment issues with their employer and/or with the assistance of unions or regulators. For all of these reasons, the piecework provisions do not achieve the modern awards objective, and should be varied in accordance with the AWU's proposed variation.

7. The UWU is entitled to represent the industrial interests of employees covered by the Horticulture Award. Members of the UWU are engaged in the horticulture industry in Australia.

Structure of these submissions

8. These submissions address the following topics:

Background and context

- 1 The statutory framework
- 2 The relevant history of the Award and the purpose of the pieceworker provisions

Propositions established by the evidence

- 3 Pieceworker employees are frequently underpaid
- 4 No genuine agreement between employers and employees
- 5 No evidence of a negative impact on worker productivity if variation granted
- 6 No evidence of a negative impact on employment and employment costs
- 7 The application for a record-keeping requirement

Conclusion

- 8 Conclusion
9. The UWU relies on its submissions dated 19 March 2021 (**UWU Submissions**) and its reply submissions dated 5 July 2021 (**UWU Reply Submissions**).

(1) The statutory framework

10. The FWC may vary a modern award if it is satisfied that the variation is necessary to achieve the modern awards objective.¹ The modern awards objective requires the FWC to ensure that modern awards, together with the National Employment Standards (NES) provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the factors in s 134(1)(a) to (h).
11. The principles applicable to the exercise of power under s 157 are well established, and were recently summarised by the Full Bench in *Application to vary the Real Estate Industry Award 2020* [2020] FWCFB 3946 (Hatcher VP, Asbury DP, Spencer C) as follows:

[54] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters in s 134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

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

[56] What is “*necessary*” to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence. It is also the case that where variations are not self-evident, an applicant seeking a change, must adduce probative evidence to support the contention that the variations are necessary to achieve the modern awards objective.

(citations omitted, emphasis in original).

The minimum wages objective

12. The UWU relies on its Reply Submissions at paragraphs 35–38 on the relevance of the minimum wages objective to this application.

¹ FW Act s 157.

(2) Relevant history of the Horticulture Award

13. UWU refers to the UWU Submissions at paragraphs 15 to 21, and UWU Reply Submissions at paragraphs 17–22 regarding the relevant history of the Horticulture Award. The submissions below briefly expand on those submissions.
14. At modernisation, the Horticulture Award as made on 3 April 2009 ([2009] AIRCFB 345) contained clause 15.6, which read:

15.6: In no case will a full-time, part-time or casual employee working under a piecework agreement be paid less than the prescribed ordinary rate payable to the employee for the hours of work performed.
15. However, in August 2009, following a direct appeal by the NFF to the Minister for Employment and Workplace Relations,² the Minister issued an amended Award Modernisation request (**Amended AMOD Request**). The Amended AMOD Request relevantly directed that in regards to the Horticulture Award, the AIRCFB “*should enable employers in the horticulture industry to continue to pay piecework rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment*”.³
16. On considering the Amended AMOD Request, the AIRCFB noted that “*clause 15.6 [as previously made by the AIRC, see above] is inconsistent with ... the consolidated request*”, and granted the joint application by the NFF and AIG to vary the newly made modern Horticulture Award to include what is now clause 15.2.
17. The critical point is that by the terms of the Amended AMOD Request, the AIRC was expressly directed to remove any minimum rate floor from the Horticulture Award. The AIRC was not afforded any discretion to reject the joint application, or to maintain its decision made just four months earlier, regarding the form of the modern Horticulture Award.
18. As stated in UWU’s reply submissions at paragraph 22, there is nothing in the history of the pieceworker provisions of the Horticulture Award which can limit or constrain the FWC’s power under s 157 to vary the Award.

² See Rogers Statement, [15], and Annexure C to the Rogers Statement.

³ See [2009] AIRCFB 966, [2]. Emphasis added.

(3) Pieceworker employees are frequently underpaid

19. Horticulture workers are frequently paid a wage that is less than the equivalent of the modern award hourly minimum wage. Further, employees paid under clause 15.2 of the Horticulture Award who are “*average competent employees*” are frequently paid less than at least 15 per cent per hour more than the equivalent of the modern award hourly minimum wage.
20. The overwhelming preponderance of the evidence, summarised below, demonstrated that pieceworkers are routinely and systemically paid less than the minimum hourly Award wage.

Research reports, surveys and studies

21. In 2015, the Commonwealth Parliament Senate Education and Employment References Committee conducted an inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders. In its final report published in March 2016, titled *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (**Senate Committee Report**), the Committee referred to empirical fieldwork research conducted by Dr Elsa Underhill and Professor Malcolm Rimmer in 2013 and 2014 across regional Victoria, Tasmania and the Northern Territory. Underhill and Rimmer’s research found that horticulture workers, including working holiday maker (**WHM**) visa workers, experience significant vulnerability in the harvesting sector in Australia, and below award average hourly rates of pay.⁴ The empirical fieldwork research included a survey of 278 horticulture workers, of which 158 were paid time rates, and 120 paid pieceworker rates. The responses showed that pieceworkers were paid as little as \$3 per hour, with the average earnings of all workers being \$11.69 per hour.⁵ By comparison, as at August 2014, the minimum hourly rate of pay for a Level 1 casual employee covered by the *Horticulture Award 2010* was \$21.09.
22. The Committee also stated its concern that the Horticulture Award lacked a safety net to ensure that pieceworkers receive wages that equate to award minimums. The Committee observed that “*while the piece rate may provide an incentive that allows people to earn much*

⁴ Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016 (**Senate Committee Report**), [7.30]–[7.32], attached to the First Underhill Statement, at Court Book (CB) 518.

⁵ Dr Elsa Underhill and Prof. Malcolm Rimmer, ‘Layered Vulnerability: Temporary migrants in Australian horticulture’ (2015) *Journal of Industrial Relations*, 12; attached to the First Underhill Statement, CB 2207.

*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.”*⁶

23. In 2016, the Victorian Government commissioned an inquiry into the labour hire industry and insecure work. The Inquiry heard evidence from Underhill and Rimmer that their research (in 2013/2014) revealed that the mean hourly earnings for horticulture workers paid by contractors was \$12.66, compared with \$14.86 an hour for workers paid by farmers, and substantially less than the minimum casual hourly rate at the time, which was then \$21.09.⁷
24. The Inquiry specifically examined the use of piece rates by labour hire firms in the horticulture industry (which relevantly includes the wine industry).⁸ The Inquiry noted that the use of piece rates often “*resulted in very low wage rates for workers in the industry, when calculated over the period of time spent working*”.⁹
25. The Victorian Inquiry found that “*the operation of piece rate award provisions, particularly in the horticulture 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*” and that “*In the horticulture industry, the safeguards which attach to piece rate systems do not appear to be utilised in practice.*”¹⁰
26. In 2016, the Fair Work Ombudsman (FWO) conducted an inquiry into the wages and conditions of people working under the 417 visa WHM program. The results of that inquiry were reported in the first statement of Dr Johanna Howe, who was called by the UWU to give evidence (see further below). The report found that more than one third of WHMs were paid less than the minimum wage.¹¹
27. Greg Houston, an economist called to give evidence by the AFPA (and whose lack of relevant experience is addressed below), addressed the FWO Report in his first statement. Mr Houston stated that because the FWO Report concerned the pay of WHMs in general, it was of limited relevance to the question of whether there was underpayment of pieceworkers in the horticultural sector.¹² However, Mr Houston did not read the FWO Report, and has no

⁶ Senate Committee Report, [7.137].

⁷ Victorian Government, *Inquiry into the Labour Hire Industry and Insecure Work*, Final Report, 31 August 2016 (**Victorian Inquiry Report**), 155; attached to the First Underhill Statement, CB 1738.

⁸ See part 4.4, page 190.

⁹ Victorian Inquiry, 191.

¹⁰ Victorian Inquiry Report, 24, 193.

¹¹ First Howe Statement, [20].

¹² First Houston Statement, [172].

knowledge of the proportion of WHMs who work in the horticulture industry compared to other sectors, or of the proportion of horticulture workers who are WHMs.¹³ His evidence on this report should be disregarded.

28. In 2017 the National Temporary Migrant Work survey (**NTMW survey**) of 4,322 temporary migrants in Australia found that the worst paid jobs were in fruit and vegetable picking, where 15 per cent of participants said they had earned \$5 an hour or less and 31 per cent had earned \$10 an hour or less.¹⁴
29. Mr Houston, in his first statement, stated that he had not reviewed the survey at all, and had not reviewed the Berg and Farbenblum report “*in detail*”. Notwithstanding this, he offered some “*high level observations*” of the Berg and Farbenblum report.¹⁵ Given the failure to review this report in detail, Mr Houston’s ‘high level observations’ are not capable of constituting an expert opinion, based on his experience as an applied economist, regarding the Berg and Farbenblum report. His comments are merely observations that any person reading the report could make,¹⁶ and should accordingly not be treated as expert opinion evidence, should be given very little weight. Mr Houston’s comments on the NTMW survey (at paragraph 173) should be ignored, given that he did not read the survey, and has no knowledge of the horticulture workforce.¹⁷
30. In 2018, the FWO released a report based on its Harvest Trail Inquiry (**Harvest Trail Report**).¹⁸ The inquiry commenced in 2013 in response to concerns regarding non-compliance with Australian workplace laws in the relevant industries, including horticulture.¹⁹ The FWO found that in a number of instances, employers were not paying the piecework rates prescribed by the Horticulture Award.²⁰ The Harvest Trail Report also found that a number of employers had failed to document pieceworker agreements in writing, as

¹³ See discussion of this issue from paragraphs 57 and 58 below.

¹⁴ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017), 30; annexure JH-3 to the First Howe Statement. Dr Howe referred to this report the limited purpose of demonstrating the matters in paragraph 28 of these submissions: see Second Howe Statement, [39]–[40].

¹⁵ First Houston Statement, [168].

¹⁶ See, eg, First Houston Statement, [168(b)].

¹⁷ See paragraph 51 below.

¹⁸ Fair Work Ombudsman, *Harvest Trail Inquiry: A report on workplace arrangements along the Harvest Trail* (2018) (**Harvest Trail Report**). The Harvest Trail Report was attached to the First Underhill Statement, at CB 994.

¹⁹ Harvest Trail Report, 4.

²⁰ Harvest Trail Report, 14.

required,²¹ and that the absence of a requirement for employers to keep a record of hours worked by pieceworkers presented a barrier to Fair Work Inspectors being able to make accurate assessments of underpayment.²²

31. Between April and May 2019, the National Union of Workers (as it was then known) undertook a survey of over 650 union and non-union farm workers across Victoria and NSW. The results of the survey demonstrated that workers were paid average daily and hourly rates of pay that were significantly less than the average competent employee rate, the equivalent hourly rate, and the federal minimum wage.²³ The average hourly pay of all workers surveyed was \$14.80.²⁴ The lowest reported hourly wage was \$4.60, and the highest was \$37.50.²⁵ Most of these workers were paid piece rates.²⁶ Of the workers surveyed, 64.2 per cent reported earning less than the equivalent hourly rate, which at the time the survey was conducted \$24.36 per hour for Level 1 casual employees.²⁷
32. UWU National Co-ordinator for the Horticulture industry George Robertson, who has met and advised hundreds of farm workers across Australia in the course of his work, gave evidence that “*the overwhelming majority*” of pieceworkers he met have been paid less than the minimum wage equivalent hourly rate of pay, and less than would enable the average competent employee to earn at least 15 per cent more than the minimum hourly rate.²⁸ He was not cross-examined about this evidence.
33. The studies set out above, and Mr Robertson’s evidence, are consistent with the experience of workers in horticulture who gave evidence for the UWU. None of this evidence was challenged in cross-examination:
 - (a) Rodney McDonald, an experienced farm worker, worked at various locations between 2018 and 2021, earning piece rates for picking and stripping. During 2018 and 2019, while engaged in picking and pruning work respectively, he did not ever earn at least the minimum Award rate.²⁹ In 2019, the most he ever made was \$22.85

²¹ Harvest Trail Report, 14.

²² Harvest Trail Report, 14–15.

²³ The report into the survey (**NUW Report**) was annexure GR-1 to the Robertson Statement. The NUW Report is at CB 2340.

²⁴ NUW Report, 10.

²⁵ NUW Report, 11.

²⁶ NUW Report, 11.

²⁷ NUW Report, 11, Robertson Statement, [9]–[12].

²⁸ Robertson Statement, [7].

²⁹ McDonald Statement, [43], [51].

per hour (compared to the Level 1 casual minimum hourly rate of \$24.36 per hour in 2019), and the least was \$10.80 per hour.³⁰ In 2021, he earned as little as \$16.80 per hour picking while being paid piece rates.³¹ Since February 2021, Mr McDonald has been working at a medium sized apple, pear and stone fruit grower, where he is paid piece rates. He described this as “*the best farm I have worked for in the industry*”, because the picking and pruning work is done in a cherry picker, which is less onerous than picking and pruning on ladders. At this farm, Mr McDonald has been able to consistently – but not universally – earn around the award minimum rate.³²

- (b) Witness 1, an experienced farm worker and a temporary visa holder, worked at two medium sized farms between April and June 2020, and then between August and October 2020. At both farms, Witness 1 was paid less than the Award minimum rate for the work.³³
- (c) Lachlan Wakefield was living and working in Tabulam in NSW in the winter of 2018. He gave evidence that the backpackers in the hostel he was living at were working at a nearby blueberry farm and paid piece rates. Most of the blueberry farm workers told Mr Wakefield that they were struggling to make \$100 a day, and the well-paid workers made \$160 a day.³⁴ Although Mr Wakefield’s evidence is hearsay, it was not challenged in cross-examination, and is consistent with the majority of evidence on this point.
- (d) Niko Karhu, who is a working holiday visa holder from Finland, was paid \$5.25 per hour for about 6.5 hours work picking tomatoes in Bundaberg in May 2021,³⁵ and \$7.68 per hour for 5 hours work picking chilis, at a different farm the following day.³⁶ The majority of backpacker workers at the hostel where Mr Karhu was staying were earning under \$300 per week from piecework, which was less than the \$300 per week residence rate charged by the hostel.³⁷ As a result, Mr Karhu helped eight or nine

³⁰ McDonald Statement, [43].

³¹ Second McDonald Statement, [5].

³² Second McDonald Statement, [9]–[14].

³³ Witness 1 First Statement, [12], [13], [16].

³⁴ Wakefield Statement, [14]–[16], [23].

³⁵ Karhu Statement, [12].

³⁶ Karhu Statement, [15].

³⁷ Karhu Statement, [16].

workers at the hostel make complaints to the FWO regarding their rates of pay.³⁸ Mr Karhu was not cross-examined at all.

34. The evidence that horticulture workers are low paid is consistent with the evidence of low rates of pay in the agriculture sector more broadly. The FWC reported that in 2020, the median hourly earnings in the main job for employees in agriculture, forestry and fishing (the relevant ANZSIC industry) was \$25.40, which is well below the all industries' average of \$36 per hour.³⁹ The hourly rate for a Level 1 casual employee under the Horticulture Award in 2020 and up to 26 March 2021 was \$24.80. That rate plus 15 per cent was \$28.52.
35. Other than as stated in paragraphs 27 and 29 above, none of the evidence summarised above was challenged by other parties either in their own evidence, or in cross-examination. The cross-examination of the lay witnesses called by the UWU consisted of asking those witnesses if they had made complaints to their employer, their union, or regulatory authorities (or had observed others making those complaints). The relevance of this question is unclear. It was not put to workers that their experience of being underpaid were illegitimate if they did not make complaints. The UWU will address this matter in oral closing submissions, if necessary.

Dr Johanna Howe's evidence

36. Dr Johanna Howe, who was called to give evidence by the UWU, is an Associate Professor in Law at the University of Adelaide and the Associate Dean (Research) at Adelaide Law School. She holds a Bachelor of Economics and a Bachelor of Laws from the University of Sydney, and a Masters of Studies in Legal Research, and a PhD from the University of Oxford. She is a national and international researcher in temporary labour migration, with an established publication and research record. Dr Howe's evidence before the FWC was directed to two main propositions: the composition and features of the horticulture workforce (about which, more below), and the underpayment of workers in the horticulture industry.
37. Dr Howe was the project leader of a three-year national study into conditions of work in the horticulture industry, and is the lead author on the final report, titled *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry (Towards a Durable Future)*.⁴⁰ The study, funded by grower and industry groups, was undertaken by an

³⁸ Karhu Statement, [18].

³⁹ FWC, *Agriculture, Forestry and Fishing*, paper published for the purposes of this matter, page 16.

⁴⁰ Annexed to the First Howe Statement as JH-1, at CB 2457.

interdisciplinary research team of five scholars across two universities. The research project combined a literature review, quantitative survey, and extensive qualitative research,⁴¹ and consisted of three phases, involving (1) stakeholder meetings; (2) a national survey of vegetable growers; and (3) interviews and focus groups with a total of 335 individual growers, workers, regulators, and allied horticulture personnel such as recruitment agents, hostel managers, and trade union, labour hire, and government representatives.⁴²

38. Dr Howe’s evidence was that piece rates are generally set at levels which mean that pieceworkers do not earn at least award minimum rates.⁴³ Her opinion was based on her own research, including as reported in *Towards a Durable Future*, as well as the FWO 2016 report, and the NTMW survey, described at paragraphs 26 and 28 above. Dr Howe provided a representative sample of the type of responses received in focus groups regarding workers’ pay on piece rates. The responses indicated extremely low wages for piece rate workers involved in the study, many of which reported earning far less than \$10 an hour.⁴⁴
39. It was put to Dr Howe in cross-examination that the focus group research conducted as part of the *Towards a Durable Future* study suffered from three limitations. None of these are borne out on proper assessment of the research and the evidence.
40. First, that the research was conducted over a small sample set. Dr Howe agreed that some of the sample sets were small, but not all, and so whether the size of the sample was a limitation depended on the particular location of the sample.⁴⁵
41. Second, that participation and responses in interviews and focus groups was skewed by “*self-selection bias towards disgruntled workers*.”⁴⁶ Presumably this factual foundation for this question was Mr Houston’s opinion, in his second statement, that dissatisfied workers including those who are underpaid would be more likely to have participated in the interviews and focus groups.⁴⁷ However, in cross-examination, Mr Houston substantially qualified that opinion, stating that “*a focus group in itself doesn’t necessarily mean there’s self-selection bias; it’s the process of recruitment that’s very important for self-selection*”.⁴⁸

⁴¹ See further, Second Howe Statement, [7], [18].

⁴² Second Howe Statement, [10]–[12].

⁴³ First Howe Statement, [19].

⁴⁴ See the tables in Second Howe Statement, from [22] and from [28].

⁴⁵ PN 985.

⁴⁶ PN 986.

⁴⁷ Second Houston Statement, [51(c)].

⁴⁸ PN 4059–60.

Accordingly, it does not appear that there was an evidentiary foundation for the proposition put to Dr Howe.

42. In any event, Dr Howe agreed that while there was a self-selection bias in the sample pool of focus group participants, she also observed that in all qualitative and quantitative research, a self-selection bias will exist unless the researcher has the entire population sample.⁴⁹ Dr Howe disagreed that the bias will always be towards persons with a grievance⁵⁰ – a point with which Mr Houston agreed –⁵¹ and she disagreed that self-selection bias was a limitation of the focus group research.⁵²
43. As explained by Dr Howe, participants may have a variety of interests as to why they participate in focus groups and surveys, which can include incentives for participation, or the way in which the focus group is advertised.⁵³ In fact, the focus group recruitment process controlled for self-selection bias by incentivising participation and by using neutral advertisements,⁵⁴ both methods which Mr Houston accepted could minimise self-selection bias.⁵⁵ In addition, growers were closely involved in identifying workers to participate in the focus groups, a fact which Dr Howe suggested may have tipped the balance of self-selection bias in favour of growers’ interests.⁵⁶
44. Third, that there was a significant overrepresentation of WHMs who are not broadly representative of the horticultural workforce. Dr Howe agreed that there was a significant overrepresentation of WHMs in the focus groups and interview responses, but not that they were not broadly representative of the horticultural workforce.⁵⁷ Notably, the AFPA did not put any evidence before the FWC to suggest that WHMs do not represent a significant proportion of the horticulture workforce.
45. In her first statement, Dr Howe stated that workers who are paid piece rates generally earn less than \$15 an hour.⁵⁸ In her reply statement, she explained that that statement was based on her “*extensive and robust mixed methodology research of labour practices in the*

⁴⁹ PN 949; PN 959.

⁵⁰ PN 959.

⁵¹ PN 4067–68.

⁵² PN 896,

⁵³ PN 959.

⁵⁴ PN 1002–1007.

⁵⁵ PN 4069.

⁵⁶ PN 1008.

⁵⁷ PN 897.

⁵⁸ First Howe Statement, [19].

horticulture industry over many years”,⁵⁹ and provided a representative sample of the type of responses received in focus groups regarding workers’ pay on piece rates, which indicated extremely low wages for piece rate workers involved in the study.⁶⁰ In cross-examination, Dr Howe made it clear that her opinion was an approximation, and not a quantitative finding.⁶¹

46. It was put to Dr Howe that her evidence that workers who are paid piece rates generally earn less than \$15 an hour was “*materially misleading*” because she did not, in her first statement, address a finding in the vegetable grower’s survey conducted as part of her research to the effect that 65 per cent of the (25 per cent of) growers who paid piece rates reported paying the award rate or higher; and that to the extent she addressed the survey in her second statement, it was only as a result of Mr Houston referring to it in his report.⁶² Dr Howe rejected that proposition.⁶³ Both in cross-examination, and in her second statement, she identified numerous limitations with the vegetable growers survey, including that the survey authors (Omni Poll) noted that due to the small sample size of respondents to the question, results should be treated with caution; that Omni Poll advised Dr Howe and her research team that that particular finding was not robust; and that “*it is well known that survey respondents typically don’t answer surveys in a way that incriminate them*”.⁶⁴
47. Mr Houston agreed with Dr Howe’s identification of the limitations of the vegetable grower’s survey.⁶⁵ Further, he observed that the survey was not representative of the horticulture growers because it excluded fruit growers.⁶⁶ Further, given that the initial 1,592 potential survey participants was reduced to 332 after a selection process that included identifying 540 participants were not vegetable growers, 98 persons refusing to participate, and 467 not responding to calls or voicemails, along with various other reasons for not participating, Mr Houston accepted in cross-examination that it was possible there was self-selection bias in among those growers who chose to participate in the survey,⁶⁷ although he did attempt, somewhat equivocally, to distinguish between ‘passive’ and ‘active’ recruitment processes

⁵⁹ Second Howe Statement, [19].

⁶⁰ See the tables in Second Howe Statement, from [22] and from [28].

⁶¹ PN 804–05, PN 811, PN 820.

⁶² PN 905.

⁶³ PN 905.

⁶⁴ PN 903; Second Howe Statement, [27]–[28].

⁶⁵ First Houston Statement, [165]; Second Houston Statement, [54]–[55].

⁶⁶ PN 4082.

⁶⁷ PN 4106–07;

as a way of mitigating against self-selection bias.⁶⁸ Nevertheless, it is clear that there was no dispute between Dr Howe and Mr Houston that the vegetable grower’s survey has significant limitations, and could not be described as robust.

48. Despite this, it was put to Dr Howe that her evidence was partisan because she did not refer to the vegetable grower’s survey in her first statement. This proposition was entirely without foundation, and was firmly rejected by Dr Howe.⁶⁹ The proposition was even more egregious taking into account the fact that Dr Howe’s evidence, both on the extent of underpayment of horticulture workers, and on the horticulture labour force profile, was consistent with the vast majority of the evidence before the FWC, and taking into account the failure by the AFPA to put any evidence before the FWC – let alone “robust, statistically sound” evidence – to any contrary effect.
49. Despite the outsize fixation by the AFPA in cross-examination on the sentence of Dr Howe’s evidence concerning her general estimate of horticulture workers’ earnings, the substance of Dr Howe’s evidence that horticulture workers, particularly those paid by piece rates, are substantially underpaid was not disturbed by cross-examination.
50. The AFPA engaged Mr Houston to provide a critique of the methodology adopted in Dr Howe’s report. Mr Houston’s critique of Dr Howe’s work, and of the studies referred to in her statements, should be treated with caution.
51. Mr Houston, who holds a Bachelor’s degree in Science (majoring in Economics), is an applied economist. He has no experience or expertise in labour market economics. He has no industry sector experience in or familiarity with the horticulture industry.⁷⁰ While he has analysed survey results and critiqued survey design on a number of occasions, in his own words, he is not a specialist in the design and implementation of surveys,⁷¹ and has never been involved in any survey focus group or empirical research into employee employment conditions, experience, or pay of any group of workers.⁷² He was not provided with any assumptions or data about the composition of the horticultural workforce⁷³ or the horticulture industry, and he did not state any in his reports. These matters are relevant because, as Dr Howe explained, there are particular characteristics of the horticulture sector that make a

⁶⁸ PN 4111–115.

⁶⁹ PN 989.

⁷⁰ PN 3717; PN 3803, PN 3805

⁷¹ PN 3740.

⁷² PN 3746.

⁷³ See, eg, First Houston Statement, [115(a)], [137]–[139], [143]; and PN 4052–54.

national, quantitative survey of the workforce methodologically challenging to achieve in practice, and Mr Houston's analysis of the research conducted by Dr Howe, and Dr Underhill, did not acknowledge the particular dynamics and attributes of the horticulture labour market.⁷⁴ His evidence concerning the 'statistical robustness' of Dr Howe's research must be read in that context, and accordingly treated with the caution submitted in the preceding paragraphs.

Effect of underpayment evidence

52. As stated above, the overwhelming preponderance of the evidence demonstrates that pieceworkers are routinely and systemically paid less than the minimum hourly award wage, and accordingly, that there is a significant gap in the safety net. It follows that it is necessary, in order to ensure that workers covered by the Horticulture Award are able to access at least minimum terms and conditions of employment, to vary the award.

(4) No genuine agreement

53. Clause 15.2 requires that a piecework rate must be fixed by agreement between the employer and the employee, and that the agreement must have been genuinely made. The requirement that the agreement be genuinely made, self-evidently, relies on there being a realistic capacity for that to occur. However, the characteristics of the workforce, combined with the information asymmetry between growers as rate-setters, make that impossible. The industrial reality is that piecework agreements are made on a take-it-or-leave-it basis. A readily ascertainable minimum safety net is therefore required.

Workforce profile

54. The number of workers in the horticulture industry (fruit, grape and nut, and vegetable farms combined) is reported by the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) to be approximately 130,000.⁷⁵ However, as Dr Howe has observed, the exact number is difficult to quantify due to the data not taking into account undocumented workers and labour hire, and because adequate data is not collected on the volume of workers required in each occupation within the workforce.⁷⁶

⁷⁴ Second Howe Statement, [33].

⁷⁵ See First Howe Statement, [8].

⁷⁶ At [8].

55. The absence of perfect data on the size and characteristics of the horticulture labour force does not mean that there is a total absence of labour force data. The evidence is sufficient to establish the following matters.
56. First, migrants comprise a substantial cohort of the horticulture workforce. The evidence indicates that prior to COVID-19, between 70 and 75 per cent of the fruit and vegetable harvesting workforce were temporary migrants on various types of visas.⁷⁷
57. Second, of growers who employ migrant workers, WHMs are the most common type of visa held by workers, consistent with findings by, among other sources, the Harvest Trail Report,⁷⁸ and the Senate Committee Report. The Senate Committee heard “*a body of evidence that WHM visa holders played an important role in the agricultural sector harvesting perishable goods in regional and remote Australia*”,⁷⁹ and noted in its final report that “*growers and their industry associations in the horticulture sector asserted that the industry was utterly reliant on temporary visa labour to harvest the produce*”.⁸⁰ Further, the FWC’s *Agriculture, Forestry and Fishing* research paper, prepared for this matter, noted “*the majority of seasonal employees on vegetable and horticulture farms have a visa, with most using a WHM*”.⁸¹
58. Dr Howe estimates that in the year before the pandemic, approximately 80 per cent of the 43,219 second year visas granted to WHMs (i.e., over 36,000) earned their visa extension through employment on farms,⁸² and most, but not all of those WHMs were working horticulture (as opposed to agriculture).⁸³ Dr Underhill suggested that the proportion of WHMs working in horticulture was even higher – approximately 95 per cent,⁸⁴ or at least 40,000 WHMs.⁸⁵
59. Third, a substantial cohort of the horticulture workforce is comprised of undocumented migrant workers,⁸⁶ with Underhill and Rimmer estimating that up to a third of the

⁷⁷ See First Howe Statement, [10], [12]–[13]; Second Howe Statement, [41]; Harvest Trail Inquiry, 30.

⁷⁸ See, eg, Harvest Trail Inquiry, 31.

⁷⁹ *A National Disgrace*, [7.11].

⁸⁰ *A National Disgrace*, [4.35].

⁸¹ Page 15.

⁸² First Howe Statement, [12]; Second Howe Statement, [43].

⁸³ PN691–93.

⁸⁴ PN 1211, PN1223.

⁸⁵ PN 1231–32.

⁸⁶ First Howe Statement, [13], [15], [16], [18]; Second Howe Statement, [31]. In her first statement, Dr Howe referred to data from the Department of Home Affairs which estimated that there were approximately 62,900 unlawful non-citizens in Australia as at 30 June 2018: see footnote 10.

horticultural workforce are undocumented migrant workers.⁸⁷ Although the precise number of undocumented migrants working in horticulture is difficult to capture, for obvious reasons, one recent survey of growers in the Sunraysia region in Victoria found that 71 per cent of growers believed they had undocumented workers working on their farms.⁸⁸ The use of undocumented migrant workers in the industry is a global problem.⁸⁹

60. Fourth, horticulture farms tend to use relatively large amounts of casual and contract labour – between 30 and 39 per cent of the workforce is employed on a casual basis, and 38–47 per cent on a contract basis.⁹⁰
61. It is clear that while precise statistics are not available, the evidence nevertheless demonstrates that the horticulture industry is overwhelmingly reliant on temporary migrants, particularly WHMs, as a critical part of the workforce.⁹¹ The fact that certain federal politicians have made public statements to the effect that there may be, in the future, a new kind of ‘agriculture visa’ is irrelevant to the issues for determination in this application.⁹² Counsel for the AFPA stated that the AFPA would “*not be submitting that the Commission should presume that the agricultural visa will be implemented, or implemented at a particular time, or that it will have any particular – or that its protections in terms of labour regulation will mirror the protections that are in the Seasonal Workers Program...*”⁹³ Given those limitations, it is clear that no weight can attach to any submission that the current workforce may look different in the future, if a series of unspecific and unknown events take place, and it would be wrong for the FWC to take any such matters into account in deciding whether to vary the Horticulture Award.
62. It is axiomatic that a workforce which is predominated by temporary and undocumented migrants will have less or no knowledge about workplace rights and obligations in Australia, including at a most basic level, a lack of understanding about how to ensure their entitlements are provided, and where to find assistance.⁹⁴ This is the case regardless of whether particular

⁸⁷ First Howe Statement, [15].

⁸⁸ First Howe Report, [15].

⁸⁹ First Howe Report, [15].

⁹⁰ First Howe Statement, [9]; First Underhill Statement, [14].

⁹¹ See, eg, Senate Committee Report, [4.29]–[4.45].

⁹² As collected in the Statement of Elizabeth Tan (for the AFPA), and the Statement of Lyndal Ablett (for the UWU).

⁹³ PN 3648.

⁹⁴ See, eg, Harvest Trail Report, 32.

migrant groups are more or differently vulnerable than others.⁹⁵ Notably, the FWO considers temporary visa holders, including WHMs, as vulnerable workers due a higher incidence of cultural and language barriers, low awareness of workplace rights and barriers to accessing assistance.⁹⁶ These factors mean that a workforce comprised of a substantial percentage of temporary migrant workers will have less capacity to enter into a genuine agreement with their employer about rates of pay.

‘Take it or leave it’

63. Although clause 15.2 of the Horticulture Award requires an employer and employee to have genuinely made a piecework agreement, without coercion or duress, the industrial reality is that piece rates are offered on a take-it-or-leave-it basis, and workers have little or no opportunity or capacity to reach a genuine agreement with employers.
64. Evidence from both workers and growers supports this proposition.
65. The evidence of UWU witnesses Mr Robertson, Mr McDonald, and Witness 1 was summarised in the UWU Submissions at paragraph 33(a), and was not the subject of cross-examination. Further, the study conducted by Dr Howe and her team and reported in *Towards a Durable Future* found that very few workers have the power to negotiate piece rates.⁹⁷
66. The evidence of growers was that they simply inform workers (or labour hire contractors) of the piece rate they have determined.⁹⁸ Even those few growers who gave evidence that they routinely adjusted the piecework rate to accommodate the circumstances of the work, and informed their employees of the adjusted rates, did not give evidence that would amount to a finding that the employee and employer genuinely agreed to make a piecework agreement.⁹⁹ And workers engaged via labour hire contractors are even more removed from the process of genuine agreement.
67. As Mr Robertson observed, it is common for piece rate work to be advertised as such. In some parts of the industry and in certain regions, guidance for piece rates are provided by an industry association and applied by growers without any adjustment for relevant local factors

⁹⁵ See PN 722–734.

⁹⁶ Harvest Trail Report, 17, 32.

⁹⁷ See the Reply Statement of Dr Howe, [28].

⁹⁸ See, eg, PN 1655 (Reardon); Kelly (PN 1710–14); PN 2162–63 (Silverstein); PN 2530 (Gaeta); PN 2677, PN 2683 (Siah); PN 2854 (Benham); PN 3100–01 (Eckersley); PN 3515–3520 (King).

⁹⁹ Eg, McClintock Statement, [21] and PN 2042–48.

at a particular farm.¹⁰⁰ This approach means there is little realistic opportunity for employees to negotiate over whether the work should be paid at time or piece rates,¹⁰¹ or to renegotiate the rates once set.¹⁰² The situation is acute for certain workers, including casual employees (who have no right to or expectation of ongoing work),¹⁰³ seasonal workers (who are bonded to their employer as landlord and visa sponsor),¹⁰⁴ backpackers,¹⁰⁵ undocumented workers,¹⁰⁶ and participants in the Seasonal Workers Program, who are required to sign, in their country of origin, letters of offer that include provisions for them to be paid as pieceworkers.¹⁰⁷ Workers employed by a labour hire contractor are even more removed from the possibility of agreeing to a piece rate, as the rate is set by the grower with the labour hire provider, with no involvement of the worker.¹⁰⁸

68. The evidence of growers, and the experience of workers, is reflected in the conclusions of the Full Federal Court, which held that while clause 15.2 requires the piecework rate to be fixed by agreement, in practical terms, this will almost invariably mean that the employer fixes the rate, and the employee decides whether to accept it.¹⁰⁹

A complex calculation

69. Clause 15.2 is complex and involves the subjective application of a number of factors likely to be known only by the grower. The complexity involved in calculating a piece rate was set out in the UWU Submissions at paragraphs 22(c)–(f) and 33(b), (c), and (d), drawing in part on the observations of the Full Federal Court in *Fair Work Ombudsman v Hu* [2019] FCAFC 133.
70. Growers routinely gave evidence that there are “*many uncontrollable variables that influence the growing and picking of a horticulture crop*” including weather, crop size, fruit set, tree maturity, and pest and disease.¹¹⁰ This is not a disputed proposition.

¹⁰⁰ Robertson Statement, [25], and see the advertisements annexed at GR-4; [27].

¹⁰¹ Robertson Statement, [25], [26(b)].

¹⁰² Robertson Statement, [29].

¹⁰³ Robertson Statement, [30(a)].

¹⁰⁴ Robertson Statement, [30(b)(i)], [31].

¹⁰⁵ Robertson Statement, [30(b)(ii)], [31].

¹⁰⁶ Robertson Statement, [30(b)(iii)], [31].

¹⁰⁷ Robertson Statement, [26(a)].

¹⁰⁸ Robertson Statement, [34]–[38].

¹⁰⁹ *Fair Work Ombudsman v Hu & Ors (No 2)* [2018] FCA 1034 at [25]; see also McDonald Statement at [12]; Witness 1 Statement at [10].

¹¹⁰ Siah Statement, [26]; King Statement, [20];

Information asymmetry

71. The evidence of growers plainly demonstrated that determination of the appropriate piece rate is made by growers on the basis of information known only to them. For example, Anthony Kelly stated that determination of the rates to be paid for apple picking is made by him in consultation with his senior supervisor employees, who have “*an extensive history with the industry and [are] knowledgeable of the crop, the terrain, and the conditions on the field on a given day*”.¹¹¹ Richard Eckersley gave evidence that initial piece rates are set with reference to “*what has been paid in previous seasons, what is industry standard, and as well as our own experience and knowledge of what is achievable for an average competent worker*”.¹¹²
72. As Mr Robertson observed, in order to assess whether the unit rate set by the employer properly enables an average competent worker to earn 15 per cent above the minimum hourly rate, the individual worker would need access to the methodology used to establish the unit rate, and the hours of work and productivity of current and past employees, used by the grower to calculate the piece rate.¹¹³ Mr Robertson has not ever seen a pieceworker agreement that provides any information about how the rate is calculated,¹¹⁴ and there is no requirement that employers provide this information. The lack of any requirement for employers to keep a record of the hours worked by pieceworkers compounds the difficulty of ascertaining whether the piece rate has been properly calculated.¹¹⁵
73. The information asymmetry between growers and employees compromises workers’ ability to enter into a piecework agreement with sufficient knowledge for the agreement to be genuinely made.

Need for a minimum wages safety net

74. The industrial reality is that piecework agreements are offered by growers on a take-it-or-leave-it basis, to a workforce that is substantially comprised of temporary migrant workers who are likely to experience greater vulnerability than a labour force comprised mostly of Australian workers who are not dependent on their employers for visa purposes, or who due to language or cultural barriers, are unaware of, or unable to strongly advocate for, their

¹¹¹ Kelly Statement, [18].

¹¹² Eckersley Statement, [24]. See also Siah Statement, [28]; McClintock Statement, [21(b)].

¹¹³ Robertson Statement, [18]

¹¹⁴ Robertson Statement, [19].

¹¹⁵ Robertson Statement, [21]–[23].

workplace rights. The situation is compounded by the rate-setting information asymmetry between workers and growers.

75. The Federal Court has noted, in relation to contracts of adhesion, that while such agreements are not necessarily “*evil things in their own right*”, it is unrealistic to consider that there is not a degree of consumer vulnerability in dealing with a party which can change the terms of an agreement at will, on a take-it-or-leave-it basis.¹¹⁶ The Court observed that to some degree, consumers in such circumstances “*do have a form of inequality of bargaining power and inequality of bargaining position that can be legitimately characterised as a form of disadvantage*”.¹¹⁷ The disadvantage is manifested by the lack of information or knowledge by customers as to compliance with the terms of the contract.¹¹⁸ The situation is highly analogous to the present circumstances.
76. A minimum wages floor is a necessary safety net in circumstances where genuine agreement is structurally impossible. The operation of cl 15.2 has the effect that workers bear all of the risk that employers wrongly set the piece rate, and do so in circumstances that make it practically impossible to determine the correct rate of pay, let alone take steps to remedy or enforce any underpayment, and where the protective provisions of clause 15.2(f) are not realistically capable of operation. It follows that the safety net, such as it is, is highly inadequate for piece workers engaged under the Horticulture Award, and that the variation is necessary to ensure that workers are able to earn *at least* the minimum wage.

(5) No evidence of a negative impact on worker productivity if variation granted

Speculative and contradicted evidence of employers

77. Some, but not all, growers suggested that productivity would fall if workers were guaranteed a minimum rate, because workers would be “demotivated” to work hard without the “incentive” of trying to achieve at least the minimum wage.¹¹⁹ This evidence should be rejected. The evidence is pure speculation, made without any basis,¹²⁰ and often proceeding from a paternalistic assumption that workers cannot be trusted and require constant

¹¹⁶ *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421, [17] (Allsop CJ).

¹¹⁷ *Ibid*, [44].

¹¹⁸ *Ibid*, [44].

¹¹⁹ Eg, Siah Statement, [38]; Bentham Statement, [21]; McClintock Statement, [24], [26]; King Statement, [57].

¹²⁰ See esp Eckersley Statement, [29], [30]; Trewin Statement, [26].

supervision,¹²¹ and/or that workers are motivated only by money – unless they are grey nomads, who are apparently principally motivated by unspecified lifestyle factors.¹²² (No grey nomads were called to give evidence by the NFF or the AFPA).

78. The unchallenged evidence called by the UWU directly contradicted growers' assumption that time rates reduced productivity. Mr Karhu performed picking and packing work on farms, for hourly pay. He was motivated to make money, and knowing how much he would be earning would *"keep me going, even if the work was hard, or if it was hot, humid or raining"*.¹²³ Mr Wakefield stated *"I think piece rates would be motivating provided I could actually make a decent amount from it. I don't enjoy slouching, it makes the time go slower"*.¹²⁴ He expressly stated that *"Having a minimum floor would not demotivate me, I would still be motivated to make as much money as possible"*.¹²⁵ Mr McDonald found he was far more motivated to work when paid hourly rates, although he was still very busy.¹²⁶ By contrast, when being paid piece rates for pruning work in the winter, *"I didn't have a lot of incentives because I was getting so little. I really struggled to get out of bed..."*.¹²⁷
79. Further, the proposed variation does not seek to abolish piece rates. Logically, the incentive to workers to increase their productivity in order to earn above the minimum wage will remain. There is no rational basis to the hypothesis that workers are only motivated to increase productivity where the uplift is untethered to a minimum floor, but that workers will *not* be incentivised to increase productivity if the uplift is attached to a minimum floor.
80. Employers are able to pay time rates under the Horticulture Award, and many do, including for picking and pruning work which is the work most commonly paid at piece rates.¹²⁸ None of the parties who oppose the AWU's application called evidence from employers who pay just time rates, or who pay both time rates and piece rates, to give evidence to the effect that workers paid time rates are less productive, or demotivated, than workers paid piece rates. Given the number of employers who pay time rates, if that evidence was available, it would

¹²¹ Eg, Distill Statement, [30]; Kelly Statement, [30].

¹²² See, eg, King Statement, [54]; Gaeta Statement, [13].

¹²³ Karhu Statement, [21].

¹²⁴ Wakefield Statement, [24].

¹²⁵ Wakefield Statement, [25].

¹²⁶ First McDonald Statement, [38], [40].

¹²⁷ First McDonald Statement, [38], [41].

¹²⁸ See, eg, Trewin Statement, [12]–[13], Reardon Statement, [12]; see also the reference to the vegetable grower's survey as part of Dr Howe's research at paragraph 37 above, where only 75 per cent of growers paid time rates; 25 per cent of growers paid both time and piece rates; and just 2 per cent of growers paid just piece rates.

have been called. The FWC should accordingly discount grower's speculative evidence concerning the productivity of workers on time rates as compared to piece rates.

(6) No evidence of a negative impact on employment and employment costs if variation granted

81. As set out in the UWU Reply Submissions at paragraphs 23–31, certain of the employer submissions argue that if the variation is made, then employers will be exposed to higher than expected employment costs, and create a disemployment effect among persons who are not productive, but nevertheless wish to work in horticulture.
82. No credible evidence was tendered by the NFF or the AFPA in support of these propositions.
83. By contrast, the evidence of workers called by the UWU was that piece rates without a minimum floor inhibit employment. Mr McDonald,¹²⁹ Mr Wakefield,¹³⁰ Witness 1,¹³¹ and Mr Karhu¹³² all gave evidence that they had rejected work paid by piece rates because of their experience that piece rate work paid unsustainably low wages.
84. The AFPA submitted that if the proposed variation was made, employers would face increased employment costs as a result of having to pay the minimum hourly rate, and a 15 per cent uplift. The difficulties with this argument are addressed in the UWU's Reply Submissions at paragraph 24. Further, the letters of instruction by the AFPA to Mr Houston reveal that the AFPA considered, and then rejected, commissioning evidence as to the likely economic impact of the proposed variation. The FWC should infer that such evidence, had it been produced, would not have assisted the AFPA in opposing the proposed variation.
85. Some of the witnesses called by the NFF considered that if a floor for piece rates was introduced, they would need to increase supervision of workers (and thereby employment costs) – although they did not explain why this would be necessary.¹³³ Further, in many instances, the same growers already closely monitor and supervise the work rate of pickers.¹³⁴

¹²⁹ First McDonald Statement, [50], [52];

¹³⁰ Wakefield Statement, [22].

¹³¹ Witness 1 Statement, [32]

¹³² Karhu Statement, [19].

¹³³ See, eg, Gaeta Statement, [15]; Brown Statement, [20(a)].

¹³⁴ Eg, Bentham Statement, [9]; Distill Statement, [20]; Reardon Statement, [23], [30] and PN 1629–31; Kelly Statement, [20]; McClintock Statement, [21(c)]; PN 2654 (Siah); PN 1731–32 (Kelly).

86. To the extent that growers’ argued that they would experience an increase in costs if the variation was made because productivity would fall but employers would be obliged to pay at least the minimum hourly rate:
- (a) The evidence that productivity would fall was speculative and should be dismissed, for the reasons set out at paragraph 77 above.
 - (b) Many growers pay hourly rates for picking and pruning, and there was no evidence before the FWC that any of those businesses were unsustainable due to high labour costs.
 - (c) Piece rates will still be available under the Horticulture Award.
87. It bears repeating that no party is seeking to abolish the piece rate provisions. However, certain witnesses called by the NFF appear to have been erroneously operating under that assumption,¹³⁵ perhaps led astray by the NFF itself.
88. Mr Rogers, the General Manager – Workplace Relations and Legal Affairs of the NFF, gave evidence that he prepared a survey for distribution to NFF state-based affiliates (**NFF Survey**), for distribution to workers.¹³⁶ The introduction to the survey stated that the AWU had made an application to the FWC “... *which will effectively eliminate piecework arrangements under the Horticulture Award*”. Mr Rogers agreed that he knew the proposed variation does not seek to prohibit piece rates, and seeks to install a minimum payment obligation, but said that “*to my mind, that’s effectively eliminating piece rates*”.¹³⁷
89. The introduction to the survey went on to state that the variation may result in the removal of the piece rate provisions, which Mr Rogers agreed was not actually part of the proposed variation, but which he nevertheless considered was “*still a possibility*”.¹³⁸ Given Mr Rogers’ insistence that his interpretation of the possible outcomes of the proposed variation were probable, it is perhaps unsurprising that he did not accept that the introduction to the NFF Survey, which he drafted, was materially misleading.¹³⁹ Nevertheless, it is the case – as

¹³⁵ See, eg, Fetui Statement, [12]; PN 3004–05, PN 3010 (Distill), and paragraph 91 below.

¹³⁶ PN 1838–42.

¹³⁷ PN 1843–48.

¹³⁸ PN 1850–55.

¹³⁹ PN 1856.

accepted by Mr Rogers – that the introduction to the NFF Survey did not accurately reflect the terms of the proposed variation.

90. As to the NFF Survey itself, its relevance to this proceeding remains unclear.¹⁴⁰ The UWU will address the reliability of the survey by reference to the conclusions sought to be drawn from it, if necessary, in oral submissions.
91. Jonathan Moss, a grower called by the NFF, gave the survey to a number of his Seasonal Worker Program employees, 16 of whom completed it.¹⁴¹ Although Mr Moss understood the AWU is not seeking the removal of piece rates, he did not recall if he explained this to his employees when he gave them the survey, which, as set out above, substantially misrepresented the application.¹⁴² The employees' responses to the surveys are curious, to say the least. In answer to question 5, 'What would you do if you could not earn piece rates and/or your hours were capped?', 14 respondents wrote "*I have to survive with small income*", with about half making the same spelling error in the word 'survive' (spelled as 'servive' or 'service'). Similarly identical answers are observed to questions 4 and 6. Mr Moss' evidence was that he did not supervise his employees completing the surveys, nor did he direct them on how to complete it.¹⁴³ However, given these unexplained oddities, and the misleading nature of the survey description, it is clear that the survey results are at best highly unreliable, and ought not be given any weight.

(7) The record-keeping variation

92. The insertion of a record-keeping requirement is necessary to enable employees to determine whether they are being paid at least the minimum required under the Horticulture Award,¹⁴⁴ and to ensure compliance. The FWO has previously observed that its ability to detect, quantify and recover underpayments is impeded by record-keeping deficiencies and invalid or absent piecework agreements. Record-keeping deficiencies in particular prevent Fair Work Inspectors from being able to fully establish outstanding entitlements.¹⁴⁵

¹⁴⁰ See PN 1812–14.

¹⁴¹ See PN 2758–60; the responses are Annexure A to the Moss Statement.

¹⁴² PN 2765.

¹⁴³ PN 2766–69.

¹⁴⁴ See McDonald Statement, [24]l Witness 1 Statement, [20]; Robertson Statement, [22]–[23].

¹⁴⁵ Harvest Trail Report, 14.

93. Many of the growers who gave evidence already keep records of hours worked,¹⁴⁶ and it is difficult to see how growers could properly set and monitor piece rates in the absence of records of hours worked.¹⁴⁷ Accordingly, a requirement to keep a record of when workers start and finish work could not be characterised as onerous, particularly when compared to the ‘burden’ of the variable matters growers must take into account when calculating piece rates.

(8) Conclusions

94. The findings set out in these submissions support the UWU’s contention that clause 15.2, in its current form, does not provide workers with a fair and relevant minimum safety net of terms and conditions of employment. The clause as presently drafted fails to prevent horticulture workers, who are among the lowest-paid workers in Australia, from earning substantially below award minimum wages, leaving those workers without a safety net of terms and conditions of employment.
95. Piecework arrangements are provided to workers on a take it or leave it basis, and made without any genuine agreement contrary to the express provisions of clause 15.2(f). The calculation of the pieceworker rate is complex and frequently misapplied, and workers are not provided with or possessed of the necessary information to assess whether the pieceworker rate has been properly set. Each of these matters is compounded by the fact that the horticulture labour force is substantially comprised of workers with particular vulnerabilities that compromise workers’ ability to genuinely agree to a pieceworker agreement, to monitor and assess if they are being properly paid, and to take steps to address underpayment issues with their employer and/or with the assistance of unions or regulators. For all of these reasons, the piecework provisions do not achieve the modern awards objective, and should be varied in accordance with the AWU’s proposed variation.
96. The UWU otherwise relies on the UWU Submissions at paragraphs 36 to 37, and reserves its right to address the modern awards objective further, if necessary, in oral submissions.

26 July 2021

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Counsel for the United Workers’ Union

¹⁴⁶ See, eg, PN 2051–52 (McClintock); PN 2535 (Gaeta); PN 3070–74 (Eckersley).

¹⁴⁷ See, eg, PN 2053–54.