

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

AFPA's submission addressing the Draft Determination

1. On 3 November 2021, the Commission handed down its primary decision in this matter, acceding to the AWU's application to insert an hourly rate floor into the piecework clause of the Award (**Decision**).¹ But in addition to this, the Decision expressed a "provisional view" that substantial further amendments should be made to the piecework clause, as set out in the draft variation attached to the Decision. The Commission directed the parties to file submissions in response to this draft variation.
2. For the reasons set out below, AFPA submits, in summary, that:
 - a) **Part A** of this submission: Draft clause 15.2(d) addresses some of the issues identified in the Decision regarding the fixing of piece rates under the current clause. However, with respect, there are two significant issues with the draft provision:
 - i. *First*, it effectively requires piece rates to be set by reference to the slowest deemed-competent pieceworker. Manifestly, this shift of the reference point from average competent to slowest competent would significantly increase piece rates. Indeed, the evidence of the large variability in productivity levels within work groups confirms this. The Decision provides no justification for this approach. The reference point for setting piece rates under draft cl 15.2(d) should be *average* productivity, but without reintroducing the subjective concept of an average competent pieceworker.
 - ii. *Secondly*, it contains no express machinery provisions for how to calculate a compliant piece rate. The compliance and enforcement 'trap' has been moved (to a different reference point), but not removed. The clause should be amended to prescribe a procedure for determining the minimum piece rate. AFPA's proposed amendments to cl 15.2(d) would set the appropriate reference point of *average* productivity and prescribe a non-complex calculation method that is determinate and objective.
 - b) **Part B** of this submission: The draft clause contains other drafting issues that

¹ *Re Horticulture Award 2020 [2021] FWCFB 5554.*

should be addressed. AFPA's overriding concern underpinning these amendments is to ensure that the piecework clause is as clear as possible to assist with compliance and enforcement.

- c) **Part C** of this submission: The Commission's decision that makes the final variation should provide for the variation to take effect on 1 July 2022, to give the industry the lead time it will need to adjust to the new clause.
- 3. The amendments proposed by AFPA are set out in the **Appendix**.

A The clause should set the uplift by reference to average productivity and contain an express mechanism for setting and reviewing rates

- 4. The existing clause requires the piece rate to be fixed so as to enable the "average competent employee" to receive the 15% uplift:

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.

- 5. This leads to at least four difficulties, as identified by the Commission in the Decision.
- 6. First, the Commission has found that, in reality, piece rates are set unilaterally by the employer without negotiation.²
- 7. The draft clause addresses this issue by providing that the piece rates are set by the employer. AFPA has no submissions about this aspect of the clause.
- 8. Secondly, the concept of a "competent employee" used in the existing clause involves a large subjective element.
- 9. The draft clause addresses this issue by effectively defining a competent pieceworker as one who has at least two weeks' experience at performing the relevant task. AFPA notes that its own proposal was for a pieceworker to be deemed competent after 20 working days.³ AFPA assumes that the Commission decided that a shorter period is sufficient. Putting that to one side, AFPA submits that the period of time necessary to attain deemed competence should be expressed in hours rather than weeks, to accommodate part-time workers and irregular rosters.
- 10. Thus, AFPA proposes that the definition of "pieceworker competent at the piecework

² Decision [73].

³ Decision, Attachment F.

task” should be amended as follows:

pieceworker competent at the piecework task means a pieceworker who has at least 76 hours’2 weeks’ experience performing the task (for example, picking apples, picking strawberries or pruning grape vines);

11. *Thirdly*, the concept of an “average” competent employee in the existing clause creates an additional subjective element because an “average” competent employee has been held to refer to a hypothetical employee that is an “ordinary, normal or typical” competent employee, rather than involving a mathematical average.⁴ Relatedly, the existing clause gives rise to a compliance and enforcement ‘trap’ because, among other things, it requires the piece rate to be set in advance — predictively — to enable a certain pay outcome but the clause contains no mechanisms prescribing how this is to be achieved and maintained.
12. Draft clause 15.2(d) seeks to address these issues by doing away with the concept of “average” altogether and instead requiring that:

The employer must fix the piece rate at a level which enables a pieceworker competent at the piecework task to earn at least 15% more per hour than the hourly rate for the pieceworker.

13. With respect, there are two problems with this approach:
 - a) The new drafting appears to require the employer to set the piece rate so as to enable every competent pieceworker to earn the uplift. Thus, the employer must effectively set the piece rate by reference to *slowest* competent employee as distinct from *average* competent employee. This would significantly increase piece rates and make the new hourly rate floor superfluous. This increase cannot be justified, and the Decision does not attempt to do so. The Commission should not compound the cost impacts already arising from the insertion of the minimum wage floor and time recording obligations.
 - b) Further, the lowering of the reference point does not fix the compliance and enforcement trap with the existing clause. This is because the new clause prescribes no objective mechanism for how the piece rate is to be calculated and fixed.
14. Unavoidably, to fix a piece rate that complies with the uplifted hourly rate target, there is an inherent requirement to use a productivity reference point against which the uplift is to be assessed. AFPA submits that this reference point should be:

⁴ *FWO v Hu (No 2)* (2018) 279 IR 162 [29].

- a) determinate and objectively ascertainable, with express provision for regular review and adjustment; and
 - b) linked to mathematically average productivity rather than the productivity of the slowest competent employee.
15. The new requirement for the employer to keep time records in draft clause 15.2(j) — a requirement that AFPA supported from the beginning — means that employers will now have the productivity data that can provide an objective mathematical reference point for calculating average productivity without re-introducing the existing subjective concept of an “average competent employee”.
16. AFPA submits that draft clause 15.2(d) should be amended to provide this objective reference point linked to average productivity while preserving the existing wording of the headline obligation:

The employer must fix the piece rate at a level which enables a pieceworker competent at the piecework task to earn at least 15% more per hour than the hourly rate for the pieceworker. To do so:

- (i) The employer must determine whether the piece rate enables a pieceworker competent at the piecework task to earn the minimum amount required by this clause by reference to the average productivity of its pieceworkers competent at the piecework task during the previous pay period.
- (ii) If the piecework task was not performed during the previous pay period or if no pieceworkers competent at the piecework task performed the task during the previous pay period, the employer must determine whether the piece rate enables a pieceworker competent at the piecework task to earn the minimum amount required by this clause by reference to a reasonable pre-estimate of the average productivity of pieceworkers competent at the piecework task.
- (iii) The employer must review its piece rates at the end of every pay period and adjust them if necessary to achieve the minimum piece rate required by this clause.

B Other drafting issues that should be addressed

17. In addition to the more significant issues dealt with above, AFPA has identified several other drafting issues, including some ambiguities. While these are relatively minor, AFPA submits that they are worth addressing to provide greater precision and avoid unnecessary administrative burden.

B.1 Ambiguities in the hourly rate floor provisions

18. Draft clause 15.2(f) provides:

Despite any other provision of clause 15.2 a pieceworker must be paid no less than the amount they would have received if paid for each hour worked at the hourly rate for the pieceworker.

19. Draft clause 15.2(a)(i) defines the new term “hourly rate for the pieceworker” as follows:

hourly rate for the pieceworker means the minimum hourly rate for the pieceworker’s classification level plus the 25% casual loading under clause 11.3 for a casual pieceworker;

20. These provisions give rise to three potential ambiguities.

21. First, the definition of hourly rate could be construed as requiring the 25% casual loading to be included in the hourly rate for all pieceworkers. In other words, the words “for a casual pieceworker” at the end of the definition could be read as being part of the *description* of the 25% loading, rather than *qualifying* the application of the loading to only casual pieceworkers.

22. AFPA submits that this should be clarified by amending the definition of hourly rate as follows:

hourly rate for the pieceworker means the minimum hourly rate for the pieceworker’s classification level plus, in the case of a casual pieceworker, the 25% casual loading under clause 11.3 for a casual pieceworker;

23. Secondly, draft clause 15.2(f) requires a comparison between the amount paid to the pieceworker and the amount that the pieceworker “would have received if paid for each hour worked at the hourly rate for the pieceworker”. But it does not specify over *what period* the comparison is to be performed.

24. AFPA submits that draft clause 15.2(f) should be amended to make it clear that the relevant comparison is to be done over a pay period and not for individual hours within the pay period.

25. Thirdly, draft clause 15.2(f) could be construed as requiring penalties and loadings to be included when calculating “the amount [the pieceworker] would have received if paid for each hour worked at the hourly rate for the pieceworker”. Put differently, the words “if paid for each hour worked at the hourly rate for the pieceworker” could be construed as meaning “if engaged as a timeworker at the base rate of the hourly rate for the pieceworker”.

26. AFPA submits that draft clause 15.2(f) should be amended to make clear that the hourly rate for the pieceworker is intended to be a flat hourly rate floor.
27. AFPA proposes the following amendment to give effect to the last two submissions:

Despite any other provision of clause 15.2, in each pay period a pieceworker must be paid no less than the number of hours worked during the pay period multiplied by the amount they would have received if paid for each hour worked at the hourly rate for the pieceworker.

B.2 The requirement to provide a new piecework record

28. Draft clause 15.2(i) provides:

If an employer proposes to change the piece rate or piecework task of a pieceworker the employer must first give the pieceworker a further piecework record including the new rate or task.

29. The words “must first” suggest that the obligation to provide the piecework record must be discharged before a change in the piece rate takes effect. AFPA points out that the Award applies to the horticulture industry as a whole, across a very large variety of crops and growing set ups, that piecework is generally performed in the field, and that some employers change piece rates frequently.⁵ In these circumstances, the requirement to provide a new piecework agreement before the new rate takes effect may not be reasonably practicable in all cases. It may create a compliance trap. In some cases, it may delay a rate increase taking effect, to the disadvantage of pieceworkers. AFPA submits that these problems can be avoided without eroding the protections that the piecework record is designed to provide. To achieve that, AFPA proposes that draft clause 15.2(i) be replaced with the following:

- (i) If an employer proposes to engage the pieceworker to perform a new piecework task not covered by an existing piecework record, the employer must give the pieceworker a further piecework record including the new task before commencement of the new task.
- (ii) If an employer proposes to change the piece rate of a pieceworker, the employer must inform the pieceworker of the new rate before commencement of work under the new rate and must give the pieceworker a further piecework record including the new rate as soon as reasonably practicable.

B.3 Content of the piecework record

30. At the moment, draft clause 15.2(h) seems to contemplate that a piecework record

⁵ See, eg, Witness Statement of Anthony Beven dated 16 March 2021 (AWU-4, CB17–21) at [10].

can only cover one task, such that if an employee is engaged to perform multiple piecework tasks, they will need to be provided with a separate piecework record for each task. This creates unnecessary paperwork. Clause 15.2(h) should be amended as follows to permit a single piecework record to cover multiple piecework tasks:

Before a pieceworker begins a piecework task for an employer, the employer must give the pieceworker a written record signed by the employer (a piecework record) that must:

- (i) state the date and time the piecework is to commence;
 - (ii) describe the task(s) for which the piece rate will be paid;
 - (iii) state the amount of the piece rate for each piecework task;
 - (iv) include the following statement: [...]
31. Further, the statement included with the piecework record under draft clause 15.2(h) should be amended as follows to reflect the other amendments proposed above:

'Under the *Horticulture Award 2020* in each pay period a pieceworker must be paid no less than the number of hours worked during the pay period multiplied by amount they would have received if paid for each hour worked at their hourly rate under the Award (including the 25% casual loading in the case of for a casual pieceworker).'

C The variation should be made effective on 1 July 2022

32. Employers will require some lead time to comply with the new clause.
33. *First*, employers will need to make financial arrangements to cope with increased labour costs under the new clause.
34. *Secondly*, employers will need to adjust their payroll systems to correctly calculate pieceworker pay under the new clause.
35. *Thirdly*, employers will need time to cull unproductive employees, to adjust their recruitment to become more selective in hiring, and to put in place additional management and supervision for pieceworkers.⁶
36. *Fourthly*, the Commission has focused on non-compliance. It is vital that employers have time to understand and implement the proposed changes to ensure compliance on implementation.

⁶ See Decision at [463].

37. In these circumstances, AFPA submits that the variation should be made effective on 1 July 2022.

D Conclusion

38. The provisional draft clause 15.2 includes substantial further amendments to the existing piecework clause, well beyond the amendments sought by the AWU in their original application.
39. As a result of some of these additional amendments, employers would face further increases in labour costs beyond those found to be caused by the AWU's amendments. These increased costs can reasonably be expected to increase the retail price of all fruit and vegetables.
40. The objective of any amendments to this clause should be to provide clarity to ensure that all employers are operating the piecework clause to the same payment outcome. An important consideration in the Decision is to address and improve compliance in piecework arrangements. To that end, AFPA submits that it is vital that any variations to clause 15.2 can be readily understood and applied by employers.

26 November 2021

Richard Dalton QC

Dimitri Ternovski

Appendix — Amendments to draft clause 15.2 proposed by AFPA

15.2 Pieceworker rates

(a) In clause 15.2:

- (i) **hourly rate for the pieceworker** means the minimum hourly rate for the pieceworker's classification level plus, in the case of a casual pieceworker, the 25% casual loading under clause 11.3 for a casual pieceworker;
- (ii) **pieceworker** means an employee being paid a piece rate; and
- (iii) **pieceworker competent at the piecework task** means a pieceworker who has at least 76 hours' 2 weeks' experience performing the task (for example, picking apples, picking strawberries or pruning grape vines);

(b) The following clauses of this award do not apply to a pieceworker:

- (i) Clause 13—Ordinary hours of work and rostering arrangements;
- (ii) Clause 18.3(c)—Meal allowance; and
- (iii) Clause 21—Overtime.

(c) An employer may pay a full-time, part-time or casual employee a piece rate for performing a task.

(d) The employer must fix the piece rate at a level which enables a pieceworker competent at the piecework task to earn at least 15% more per hour than the hourly rate for the pieceworker. To do so:

- (i) The employer must determine whether the piece rate enables a pieceworker competent at the piecework task to earn the minimum amount required by this clause by reference to the average productivity of its pieceworkers competent at the piecework task during the previous pay period.
- (ii) If the piecework task was not performed during the previous pay period or if no pieceworkers competent at the piecework task performed the task during the previous pay period, the employer must determine whether the piece rate enables a pieceworker competent at the piecework task to earn the minimum amount required by this clause by reference to a reasonable pre-estimate of the average productivity of pieceworkers competent at the piecework task.
- (iii) The employer must review its piece rates at the end of every pay period and adjust them if necessary to achieve the minimum piece rate required by this clause.

NOTE: A pieceworker is paid 200% of the piece rate for work on a public holiday (see clause 27.3).

(e) If a pieceworker does any work in addition to the task for which they are being paid a piece rate, the pieceworker must be paid for that additional work at the hourly rate for the pieceworker.

- (f) Despite any other provision of clause 15.2, in each pay period a pieceworker must be paid no less than the number of hours worked during the pay period multiplied by the amount they would have received if paid for each hour worked at the hourly rate for the pieceworker.
- (g) Pieceworkers are paid allowances under clause 18 (other than meal allowance) in addition to the rates payable under clauses 15.2(d), (e) and (f).
- (h) Before a pieceworker begins a piecework task for an employer, the employer must give the pieceworker a written record signed by the employer (a **piecework record**) that must:
- (i) state the date and time the piecework is to commence;
 - (ii) describe the task(s) for which the piece rate will be paid;
 - (iii) state the amount of the piece rate for each piecework task;
 - (iv) include the following statement:

'Under the *Horticulture Award 2020* in each pay period a pieceworker must be paid no less than the number of hours worked during the pay period multiplied by amount they would have received if paid for each hour worked at their hourly rate under the Award (including the 25% casual loading in the case of for a casual pieceworker).'

and

- (v) state the hourly rate for the pieceworker.

NOTE: An example of the type of record required by clause 15.2(h) is at Schedule I—Piecework Record. There is no requirement to use the form of record set out in Schedule I—Piecework Record.

- (i) If an employer proposes to change the piece rate or piecework task of a pieceworker the employer must first give the pieceworker a further piecework record including the new rate or task.
 - (i) If an employer proposes to engage the pieceworker to perform a new piecework task not covered by an existing piecework record, the employer must give the pieceworker a further piecework record including the new task before commencement of the new task.
 - (ii) If an employer proposes to change the piece rate of a pieceworker, the employer must inform the pieceworker of the new rate before commencement of work under the new rate and must give the pieceworker a further piecework record including the new rate as soon as reasonably practicable.
- (j) The employer must keep the following as employee records:
 - (i) a copy of each piecework record given to the pieceworker; and

- (ii) a record of all hours worked by the pieceworker and the applicable piece rate at the time those hours were worked.
- (k) For the purposes of the NES the base rate of pay and full rate of pay of a pieceworker are the same and are worked out as follows:
- (i) By dividing the total amount earned by the pieceworker during the relevant period by the total hours worked by the pieceworker during the relevant period.
 - (ii) If the pieceworker was continuously employed by the employer for a period of 12 months or more immediately before the rate of pay is to be worked out—the **relevant period** is the 12 months before the rate is to be worked out. If the pieceworker was continuously employed by the employer for a period of less than 12 months immediately before the rate of pay is to be worked out—the **relevant period** is that period.