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 AUSTRALIAN WORKERS' UNION IN RESPONSE TO DRAFT DETERMINATION AND PROVISIONAL VIEW

Introduction

1. On 3 November 2021, the Full Bench of the Fair Work Commission handed down a decision in relation to an application by The Australian Workers' Union (**'AWU'**) to vary the piecework conditions in the *Horticulture Award 2020* (**'Horticulture Award'**): *Horticulture Award 2020* [2021] FWCFB 5554 (**'Decision'**).

2. In the Decision, the Full Bench determined that the Horticulture Award will be varied to 'insert a minimum wage floor with consequential time recording provisions in clause 15.2'.[1] The Full Bench also expressed the *provisional view* that it was necessary to vary the Horticulture Award in the terms of a draft determination set out at Attachment D to the Decision.[2]

3. The Full Bench has provided interested parties with an opportunity to make submissions about the *provisional view* and draft determination by 4:00pm on Friday, 26 November 2021. The AWU's submissions regarding the *provisional view* and draft determination are below.

Provisional view and draft determination

4. The AWU supports the Full Bench's *provisional view* and the terms of the draft determination contained at Attachment D of the Decision. In addition to including a minimum wage floor and time recording provisions, the draft determination significantly improves the existing piecework clause in a number of important respects as identified in

[1] Decision at [584].
[2] Decision at [585].

the Decision from [560] to [583]. The additional features proposed in the Draft Determination are necessary and appropriate essentially for the reasons given by the Full Bench.

5. Firstly, the insertion of a definition of a 'pieceworker competent at the piecework task' in clause 15.2(a)(iii) and setting the level of the piece rate required to be fixed by an employer by reference to that definition in clause 15.2(d) represents a useful and necessary measure to address the uncertainty and ambiguity of the existing provision as interpreted in *Fair Work Ombudsman v Hu (No 2)*.[3] The period of two weeks' experience to become a competent pieceworker represents a conservative provision. For the reasons set out in the AWU's final submissions, the evidence suggested that workers are generally able to become competent within a few days or a week of commencing.[4]

6. Secondly, the removal of the requirement that the piece rate be agreed between the employer and employee is necessary having regard to the findings of the Full Bench that, in reality, piece rates are generally not the product of any genuine negotiation and agreement between the employer and an employee, but rather unilaterally determined by the grower and presented to the employee on a 'take it or leave it' basis.[5] Further, given the characteristics of the workforce, including its transient nature, it will rarely be even possible for genuine negotiation of piece rates to take place between employers and employees in the horticulture industry.

7. Thirdly, the proposed clause 15.2(f) gives effect to the decision of the Full Bench to insert a minimum wage floor and is supported by the record-keeping requirement in clause 15.2(j)(ii) which is consistent with the AWU's application.

8. Fourthly, the requirement for an employer to give an employee a piecework record in clause 15.2(h) and to retain a copy of the record in clause 15.2(j)(i) is consistent with the existing requirement to have a written piecework agreement. The additional specification of the content of the piecework record has merit to enhance the likelihood of compliance and, of particular utility, is the requirement to include the prescribed statement in relation to the minimum payment to be made to a pieceworker. That requirement is likely to improve understanding by employers and employees of the minimum payments required to be made to pieceworkers.

[3] See also references to the evidence set out in the AWU Submissions on Factual Findings at [82]-[108].
[4] AWU Submissions on Factual Findings at [110]-[113].
[5] Decision at [336], [362](4) and [429].

Operative date

9. Given the Full Bench's conclusion that the AWU's application seeks to set modern award minimum wages for pieceworkers[6], s 166 of the *Fair Work Act 2009* (**'FW Act'**) must be applied in relation to the operative date, at least for the part of the variation that involves setting a minimum rate of pay for pieceworkers.

10. The effect of s 166 of the FW Act is that a determination setting, varying or revoking modern award minimum wages comes into operation on 1 July in the next financial year after it is made, unless the Commission specifies another operative date. In addition, s 166(2) imposes the following limitation on the specification of an alternative operative date:

> *The FWC must not specify another day unless it is satisfied that it is appropriate to do so.*

11. While it was not specifically directed at s 166 of the FW Act, a Full Bench of the Commission stated the following in relation to the consideration of 'appropriate' transitional arrangements in *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001, in response to an argument from Australian Industry Group that the transitional arrangements adopted by a Full Bench in a previous matter should be followed, effectively as an authority :

> ***[75]*** *We reject the proposition advanced by Ai Group, for three reasons. First, the determination of appropriate transitional arrangements is a discretionary decision which depends on the relevant context. The determination of such issues in other cases is of limited assistance. The policy considerations which underpin the proposition that a previous Full Bench decision should usually be followed is more apposite to the determination of legal issues – such as the proper construction of the Act – not discretionary decisions.*

12. This passage highlights that a discretionary matter, such as whether it is 'appropriate' to depart from what is effectively a default operative date of 1 July in s 166(1) of the FW Act, will turn on the facts of the particular case, as opposed to previous decisions or established principles.

[6] Decision at [29], [538] and [540].

13. The AWU submits it is appropriate based on the facts of this case for the Full Bench to determine that the entirety of the draft determination in Attachment D of the Decision should take effect on 1 January 2022[7], as opposed to the 'default' operative date of 1 July 2022, for the reasons that follow.

Findings from the Decision that are relevant to the operative date

14. At paragraph [362] of the Decision, the Full Bench summarised its key factual findings. The findings included (endnotes omitted):

> *4. There is widespread non-compliance with clause 15.2 of the Horticulture Award:*
>
> • *many growers do not determine pieceworker rates in accordance with the method prescribed by clause 15.2, as interpreted by the Federal Court in Hu (No.2) and the Hu Appeal;*
>
> • *pieceworker rates are set unilaterally by the grower and presented to the employee on a 'take or leave it' basis, rather than being the product of any genuine negotiation between the employer and employee;*
>
> • *pieceworker rates are adjusted unilaterally by the grower and adjustments are not the subject of negotiation; and*
>
> • *pieceworkers are usually not provided with a written piecework agreement.*
>
> *5. Some pieceworkers earn significantly more than the 'target rate' for the average competent pieceworker', prescribed in clause 15.2(b), but the totality of the evidence presents a picture of significant underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate.*
>
> *6. A significant proportion of pieceworkers, and WHM's in particular, earn less per hour than the NMW ($20.33 per hour; which is also the minimum hourly rate for a level 1 employee in the Horticulture Award) and a substantial proportion*

[7] This will operate according to the next full pay period for a particular employee in accordance with s 166(5) of the FW Act.

earn less than the 'target rate' for the 'average competent pieceworker' prescribed in clause 15.2.

15. Further, the Full Bench found that that there is 'widespread underpayment of pieceworkers in the horticulture industry' and that a 'significant proportion of pieceworkers earn less than the National Minimum Wage'.[8] These findings provide compelling reasons for the Horticulture Award to be varied as soon as possible and that it would not be appropriate for the variations to take effect on 1 July 2022.

16. In particular, the finding of widespread non-compliance with the existing piecework clause makes it inappropriate to allow this provision to continue operating until 1 July 2022. That outcome would permit non-compliance and underpayment to continue in a manner that is contrary to the interests of employees and to the genuine interests of law-abiding employers. Further, the finding that there is 'a picture of significant underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate' and that a significant proportion of pieceworkers in the horticulture industry earn less than the National Minimum Wage justifies urgent action by the Commission.

17. In paragraph [561] of the Decision, the Full Bench described the overall intent of the draft determination in these terms:

> *The draft clause is intended to make the pieceworker term simpler and easier to understand; to reduce regulatory burden, and to promote compliance. In particular, the draft clause removes the requirement for piecework arrangements to be the product of genuine negotiation and agreement, and removes the requirement for piecework rates to be determined in accordance with the method presently prescribed by clause 15.2, as interpreted by the Federal Court in Hu (No.2) and the Hu Appeal.*

18. The AWU agrees that the draft determination will make the piecework term simpler and easier to understand, reduce the regulatory burden and promote compliance. Employers and employees should not have to wait until 1 July 2022 for these outcomes to be delivered.

19. Finally, the Full Bench found that inserting a minimum wage floor 'will provide an incentive to reduce the current cohort of unproductive workers, thus *increasing* productivity'.[9] The

[8] Decision at [478].
[9] Decision at [362](8).

Full Bench went on to determine 'the likely increase in employment costs and regulatory burden is offset to some extent by the expected increase in productivity'.[10] Given these findings, any negative impacts for employers from an earlier operative date are likely to be manageable and not sufficient to outweigh the positive factors identified above.

Concerns about the use of enterprise agreements to frustrate the variations

20. The AWU is concerned that if the variations do not take effect until 1 July 2022, there may be an influx of applications for approval of enterprise agreements prior to this date. There are precedents in the horticulture industry that give rise to these concerns.

21. On 2 April 2019, a final determination was issued to vary the Horticulture Award to include overtime entitlements for casual employees.[11] This was in response to an application by the AWU during the 4-yearly review of modern awards dealt with as part of Part-time and Casual Employment common issue proceedings. However, the Full Bench had at least provisionally determined back in July 2017 that casual overtime entitlements, in some form, would be inserted into the Horticulture Award. This led to an unusually[12] large number of enterprise agreements suddenly being made, largely without employee bargaining representatives, and ensuing applications for approval to the Commission.

22. The enterprise agreements were generally based on a template document and designed to allow employers to avoid paying overtime entitlements to casual employees. This was potentially a legally achievable outcome given the terms of a modern award do not *apply* to an employer if an enterprise agreement *applies* in relation to the particular employment and the relevant agreements did not contain overtime entitlements for casual employees.[13] A number of the applications were ultimately dismissed by the Commission because they were found to not have been *genuinely agreed*[14] or did not pass the better off overall test[15] (**'BOOT'**).[16]

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[10] Decision at [525].
[11] *4 yearly review of modern awards – Part-time and Casual Employment* [2019] FWCFB 2108.
[12] The Full Bench identified at [480] of the Decision that 'it is common ground that there is a low incidence of collective bargaining in the horticulture industry'.
[13] Section 57 of the FW Act.
[14] As required by s 186(2)(a) of the FW Act.
[15] As required by s 186(2)(b) of the FW Act.
[16] For example, the AWU successfully appealed the approval of 30 enterprise agreements in *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others* [2019] FWCFB 4253; (2019) 288 IR 364 (**'*Gray Australia*'**).

23. The logic behind this strategy adopted by some employers appears to have been that the BOOT is a point-in-time assessment at the *test time*, which is the time when the application for approval is filed with the Commission[17]. Given the Award had not been varied to include casual overtime entitlements at the *test time*, the employers argued these entitlements were irrelevant to the BOOT.[18] Similar issues also arose in 2009 and 2010 ahead of the change in approval requirements from the 'no disadvantage test' to the BOOT.[19]

24. These past experiences provide another factor in favour of the Full Bench being satisfied it is appropriate for the variations in the draft determination to take effect on 1 January 2022 as opposed to 1 July 2022. The history of changes to industrial regulation in the horticulture industry shows that some employers are likely to seek to take advantage of any transitional period to seek to 'lock-in' piecework rates through enterprise agreements on the basis of a point-in-time BOOT assessment.

Employers have been on notice

25. Finally, the AWU filed its application to vary the Horticulture Award on 15 December 2020, nearly 12 months ago. The case has attracted significant media attention and it is apparent from the evidence that employer organisations have informed their members about the case.[20] The AWU submits that an operative date of 1 January 2022 is not unreasonable given employers have been on notice about the nature and effect of the application since late 2020 and on notice that a minimum wages floor and record keeping requirements will be inserted into the Horticulture Award since 3 November 2021.

Conclusion

26. The AWU supports the Full Bench's *provisional view* and the draft determination in Attachment D of the Decision and submits an operate date of 1 January 2022 is appropriate for the reasons identified above.

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[17] Defined in s 193(6) of the FW Act.
[18] *Gray Australia* at [89].
[19] See *Fanoka Pty Ltd t/as Fairview Orchards & Another* [2010] FWA 2139.
[20] For example, the survey arranged by the National Farmers' Federation which is discussed in the Decision from [204] to [258]. There is also reference to surveys being distributed to 'State-based farming bodies and commodity groups' at [230].

The Australian Workers' Union

Dated: 26 November 2021