



# **SUBMISSION TO THE FAIR WORK COMMISSION AM2020/104 APPLICATION BY THE AUSTRALIAN WORKERS' UNION IN RESPECT OF THE MA000028 HORTICULTURAL AWARD**

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to

**Fair Work Commission**

E: [amod@fwc.gov.au](mailto:amod@fwc.gov.au)

by

**Nathan Hancock | Chief Executive Officer | Citrus Australia Ltd**

[REDACTED]

[REDACTED]

M: [REDACTED] | P: 03 5023 6333

E: [nathan.hancock@citrusaustralia.com.au](mailto:nathan.hancock@citrusaustralia.com.au) | W: [www.citrusaustralia.com.au](http://www.citrusaustralia.com.au)

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## **CALLS FOR ACTION**

Citrus Australia calls on the Fair Work Commission:

1. To delay the implementation of the draft determination, to ensure the transition from the current clause 15.2 can be thoroughly considered, implemented, and communicated to employees with confidence.
2. That provisional clause 15.2 (f) of the draft variation be reviewed, and a longer period of assessment inserted (more than hourly). At a minimum a review at the end of a work day, or preferably across a pay period (no greater than a fortnight).
3. To delay implementation of the draft determination whilst businesses determine new work procedures, reporting, traceability, and training of staff to manage and supervise employees for a smooth and well-informed transition.
4. To delay implementation in order for the Fair Work Ombudsman to determine in the case of labour hire companies, who will be responsible for in-field management of workers supplied by labour hire companies.
5. To delay the implementation of the draft determination until national legislation for mandatory regulation of labour hire companies is in place, as recommended in the National Agricultural Workforce Strategy produced in 2020.
6. To delay implementation of the draft determination until the Fair Work Ombudsman is sufficiently resourced to carry out compliance and enforcement of the various Horticultural Award.
7. To consider amending the draft determination to include an hourly rate applicable to inexperienced trainees only, and to introduce a two-week commencement period where the trainee is entitled to an hourly wage rate which is a percentage of the minimum hourly wage.

## **ABOUT CITRUS AUSTRALIA**

Citrus Australia is a not-for-profit, member-based organisation, and the industry representative body for the Australian citrus industry, managing levy-funded research and development projects nationally.

We are governed by a skills-based board with a team of 13 staff.

Over 1,300 grower businesses are represented nationally by Citrus Australia, and in 2021 over 330 grower and affiliate businesses have taken up voluntary membership.

Citrus Australia represents growers' interests in the strategic direction of research and development in industry, managing projects in biosecurity, agrichemicals, and market development.

We advocate to government on critical policy development surrounding labour, water, infrastructure, and trade protocols.

## **ABOUT THE CITRUS INDUSTRY**

The citrus industry is Australia's largest fresh produce exporter, with export volumes increasing from 158,000 tonnes in 2014 to 261,000 tonnes in 2020. As a result, the Australian citrus industry contributed almost \$900 million to the GDP through farm gate sales in 2020, including citrus exports to the value of \$480 million.

The citrus industry is one of Australia's largest horticultural industries, with a commercial production of 28,000 hectares in five states and one territory and production of 750,000 tonnes annually.

The Riverina, centred on the towns of Griffith and Leeton, in New South Wales (NSW), is the largest citrus producing region, with 30 per cent of the nation's plantings. Queensland, the Riverland in South Australia, and the Murray Valley on the border of Victoria and NSW follow, each representing approximately 20 per cent of national production. Smaller plantings can be found in Western Australia and the Northern Territory, representing four per cent of plantings.

## **SYNOPSIS**

From the outset, Citrus Australia finds any exploitation of employees to be abhorrent.

The decisions taken by the Fair Work Commission (the Commission) and the impacts of the draft variation however, are predicted to have numerous detrimental effects on the productivity of the horticulture industry without having any impact on reducing exploitation.

Horticultural crops are perishable and require efficient productive employees to harvest them in a timely manner to meet orders, to avoid environmental impacts, and to prevent food waste.

Citrus Australia refutes the claim that citrus businesses avoid paying employees fairly through the use of piece rates. Numerous examples exist of pieceworkers being paid well in excess of the hourly award rate. Moreover, the current labour shortage in Australia (exacerbated by the global pandemic) has meant that employers have increased the piece rates paid per unit in order to attract much needed employees. Rewarding employees for productivity has never been in question.

In and of themselves, the Commission's variations will not reduce exploitation in the horticulture industry where it exists, because those who exploit their employees, don't adhere to the law. In fact, this variation will have unintended consequences on law abiding employers, less able employees, and the end consumer.

By removing the self determination of an employee to set their own goals and achieve outcomes, the Commission has saddled industry with additional administrative and managerial burdens and enticed less motivated workers to take it easy at the expense of fresh produce, productivity, and the consumer. All of which spell increased costs for growers who must now try to pass them on to the supply chain – namely the retail sector – when it is well established that the grower in this equation is always the price taker.

This determination has taken a narrow view of a situation which has been blown out of proportion and imposed a solution which ignores the distinct differences between employment in the horticulture sector and other sectors in Australia. It is doubtful based on the reading of this decision that the Commission has any relative experience or deep knowledge of horticulture production, itinerant work, or regional employment.

Citrus Australia would prefer to see a national mandatory licensing scheme for labour hire companies and increased resourcing of the Fair Work Ombudsman (FWO) to ensure compliance

and enforcement activities can be taken out in a timely manner. That is where real change would happen, to stamp out exploitation where it exists which, contrary to the view of unions and academics alike, is not as widespread as has been made out.

An alternative variation is provided for consideration at the end of this document. It attempts to provide a safety net for inexperienced workers that also provides incentive for increased productivity – which is the core tenant of the piece rate.

## **ADMINISTRATION**

The Commission's decision to add a floor to the piece rate creates an administrative burden, particularly for small to medium sized growers who manage their farms alone or within the family. Businesses will require time to develop systems and put in place technologies which can assist the monitoring of workers to determine the pay rates which will apply to them.

It is our assessment that businesses will require time to assess the impacts of the Commission's decision on operations. Managers may need to hire and train new staff, likely in the accounting and human resources areas, as well as in management of staff in the orchard.

Many businesses will need to review their approach to hiring labour. They may need to rethink their operations and either bring recruitment activity in-house or seek appropriate skills from a trusted third-party provider (finding one that is available this season has been impossible).

Our assessment is that costs will rise for businesses through increased investment in additional staff for management and supervisory roles, investment in staff management technology and from paying hourly rates for poorly performing inexperienced staff, and through a drop off in productivity (this is well documented in the literature). These increases in costs related to the Commission's decision will mean businesses will need time to renegotiate budgets and subsequently terms with customers and clients.

For these reasons we ask that the Commission delays the implementation of the draft variation, to ensure the transition can be thoroughly considered for the benefit of all parties.

We also wish to draw to the attention of the Commission that the draft variation appears to require employers to compare each hour of work performed by the employee to the piece rate, and determine if that hour is to be paid at the hourly rate or the piece rate.

This scenario is completely impractical, whether the workforce is ten people or 1000, the administrative burden this rule creates is crippling. How does the Commission envisage employers keep track by the hour, the percentage of a 400kg bin of oranges a worker may have picked?

Citrus Australia asks that this part of the draft variation be reviewed, and a longer period of assessment inserted. At a minimum a review at the end of a work day, or preferably across a pay period (no greater than a fortnight).

## **INCREASED MANAGEMENT AND SUPERVISION OF WORKERS**

If the piece rate is set at the appropriate rate, then the onus falls on the pieceworker to find incentive to work at that rate or above; this creates efficiencies that the Commission is ignoring. Equally, if a pieceworker is not able to work at a rate that is financially sustainable for them, they have free will to leave. This is an area that could be improved by industry, but in itself this admission does not justify the decision to create a floor.

The self-determination by the pieceworker to work at a rate that meets their needs or goals is a valuable component of the piece rate which has now been lost. The Commission has now removed the onus from the pieceworker to perform, and put it on the employer to force the employee to be productive.

Managing the productivity of workers will increase costs. The Commission has not taken into account the large number of employees working over a vast geographical area. Rows of citrus trees can be hundreds of metres long and so dense that they cannot be seen through; access between rows can be limited. In practice it will be difficult to simply increase the management and supervision of workers. Skilled horticultural workers in Australia are just as scarce as unskilled workers.

In the example of workers supplied by a labour hire company, who will bear the responsibility of management and supervision? In practice the labour hire company drops workers at the property in the morning and picks them up in the afternoon. Who in the Commission's view will supply the supervision and management given the worker is in fact employed by the contractor (labour hire company)?

It is likely that growers will now need to determine a ratio of supervisor to work crew, potentially having to pay that supervisor hourly and above the award rate to manage productivity of that crew. It is likely that employers will increasingly be forced to lay off workers who underperform. These terminations will undoubtedly have negative implications for the morale of the workforce, it will affect interpersonal relationships (where a slow pieceworker may be laid off whilst their partner, spouse, friend remains employed) causing further tensions. Increased layoffs will likely expose employers to further scrutiny by unions and the FWO.

We call on the Commission to delay implementation of the draft variation whilst businesses determine new work procedures, reporting, traceability and train staff to manage and supervise workers.

Similarly, we request a delay to implementation in order for the FWO to determine, in the case of labour hire companies, who will be responsible for in field management of workers supplied by labour hire companies.

## **RECRUITMENT OF NEW MORE EFFICIENT WORKERS**

The Commission has overestimated the available workforce in Australia and in effect has created the potential for the deterioration of culture in the workforce.

In a perfect world, all workplaces would be free of unproductive employees, and hiring the most efficient employees would increase productivity.

In regional, rural, and remote Australia, there is not a large pool of workers to select from. There are even less who are motivated, healthy, strong, fit and have an interest in labour intensive seasonal work that requires travel, transport, and regular change of location if employment is to be ongoing. Therefore, the work is often taken up by migrant workers (who can earn more in Australia than at home) and working holiday makers (who are required to work in agriculture to extend their visa).

Many of the itinerant Australian workers in the workforce fit into the category of grey nomads, people on disability pensions, or aged pensions, looking to enjoy outdoor work to offset their day-to-day costs. Others are not able to meet the expectations of full-time work for other physical or mental health reasons. These Australian itinerant workers work at their own pace, often slower than their counterparts but they provide a returning, reliable workforce to growers.

Such Australian itinerant workers are no longer employable under the draft variation because they will never be able to pick at the piece rate. They will join the ranks of the unemployed and underemployed. Paradoxically the Commission's decision may make them further subject to exploitation if paid cash and not covered by workplace health and safety laws. In turn this creates further stress for growers who are unable to source workers in the regional and remote areas that they live and work.

Due to the global pandemic, Australia's borders have been closed for 18 months. Of the 210,000 working holiday makers in Australia prior to border closures, approximately 30,000 are left. A reduction in the horticulture and hospitality national workforce of 85 per cent. Though the international borders are due to open to working holiday makers on December 1, 2021, working holiday makers are not required to do their 88 days of farm work until after the first year of their visa is complete, and only if they wish to stay in Australia for a second year.

The horticulture industry has also suffered another blow with changes to the Free Trade Agreement between Australia and the United Kingdom whereby working holiday makers from the United Kingdom are no longer required to work in horticulture to receive their second-year visa. Further, in the far north of Australia working holiday makers may now choose to work in hospitality over agriculture to complete the required 88 days to extend their visas, further reducing the available workforce.

Successive Australian governments have encouraged university educations over manual labour. Internal migration in Australia mirrors that of other developed nations as populations recede in rural areas and build in capital cities and coastal locations. Australian farmers lament the loss of motivated Australian workers and watch as government financial assistance further demotivates the available workforce.

The Commission's conclusions that the underperforming worker will simply be replaced are made in absence of an understanding of the available workforce. It is a dangerous assumption and one that builds inefficiencies into the agricultural businesses which feed our nation.

The Commission's finding that *'A minimum wage floor would create an economic incentive to manage unproductive workers and it is likely that the introduction of a minimum wage floor will lead employers to take more active steps in the recruitment, supervision and management of pieceworkers'* demonstrates the Commissioner's lack of understanding of the situation on the ground.

Many farmers use third party labour hire companies to source their workforce, thus reducing the administrative burden on the farm staff. The farmer is therefore removed from the recruitment process and relies on the labour hire companies to vet the workers and provide training. Currently in Australia there is no uniform licensing or oversight of the labour hire sector. Added to this many accommodation providers stipulate that they will only provide accommodation to workers for whom they (the accommodation provider) find work, again removing any opportunity for the farmer to influence recruitment.

In order to provide comfort to those businesses who wish to engage third party labour hire companies, a uniform set of rules must be developed.

We ask that the Commission allows time for the establishment of a national labour hire licencing authority as recommended in the National Agricultural Workforce Strategy:

***"Recommendation 27 – The Committee recommends that all state and territory government enact mirror legislation to regular labour hire providers operating in their jurisdictions..... If this does not occur within 12 months, the Australian Government should establish national legislation for mandatory regulation of labour hire companies."***

The National Agricultural Workforce Strategy was produced in October 2020. To date there remains an ad hoc, state by state approach to labour hire licensing in Australia. The states that do have licensing schemes are largely under resourced and unable to investigate or enforce compliance on perpetrators of exploitation. Citrus Australia is strongly opposed to a harmonised state scheme. Harmonisation rarely works in practice (see work health and safety) and as has been observed in the management of the global pandemic, state and territory government results often vary as these governments fail to work together successfully.

We call on the Commission to delay the implementation of the draft variation until national legislation for mandatory regulation of labour hire companies is in place.

Additionally, we call on the Commission to delay implementation of the draft variation until the Fair Work Ombudsman is sufficiently resourced to carry out compliance and enforcement of the various awards. The variation to the piece rate award will not have the desired effect otherwise.

## **THE USE OF AUTOMATION AND MACHINERY TO REDUCE LABOUR COSTS**

The citrus industry has long held the ambition to transform to a robotic and automation driven industry. To a large degree the advancement in this area has been in post-harvest packing and logistics where manual grading has been replaced by machine grading and box stacking replaced by automation and robotics. A very small percentage (less than five per cent) of juice variety fruit is harvested mechanically because cosmetic damage caused to the fruit by this process is not significant for juice production.

However, the physical act of harvesting citrus fruits; oranges, mandarins, grapefruit, lemons, and limes for general consumption has not been replaced by automation. These fruit types have sensitive skins which when marked down-grade the quality and value of the fruit. Despite many years of research and development globally no technology in any country appears to have been able to solve the unique issues related to harvesting citrus fruits.

Should technology be developed in time, perhaps in the next decade, it is inconceivable to accept that the technology could be applied in Australia's current citrus farms. Adoption of any robotic technology is almost guaranteed to require the removal and replanting of citrus orchards in a new configuration to make the robotics and automation effective. This in itself would take time to adopt as on average a nursery takes two years to produce a citrus tree and once planted it takes five to eight years to become productive. Our current national plantings are approximately 28,000 hectares, and on average there are 750,000 tonnes of citrus harvested in Australia each year. We note that our industry is expected to grow by 30 per cent in the next five years.

The Commission has erred in their view that citrus growers can adopt new technology to replace slow workers.

The Commission has erred in their assessment of the ability of industry to rapidly adopt new technologies in the field.

The Commission's decision ignores the industry's need for a productivity driver to ensure harvest is high quality and timely.

In our view the hourly rate will become the unintended benchmark for productivity rather than a safety net for inexperienced pieceworkers; instead of focusing on units produced, the employee will think in terms of hours worked; the two are diametrically opposed.

## **ALTERNATIVE VARIATION**

The premise of the piece rate is to set a piece rate that provides an incentive for a self-determining employee to achieve or exceed the rate and be in control of their earning potential.

The Commission's draft variation impacts the incentivisation of inexperienced pieceworkers to improve quickly and to become productive, by setting the hourly rate minimum wage.

The Commission found that it takes a pieceworker two weeks to become competent in a role. Therefore, if an employee has no relevant experience, they should be started on a trainee basis with a trainee wage (a proportion of the minimum wage) so that there is an incentive to rapidly improve productivity.

If after a two-week period the trainee has not achieved the piece rate, they should have options; to continue as a trainee on a trainee wage, or to sign a waiver acknowledging that they are aware they do not meet the piece rate. At all times the trainee has free will to leave the employer.

After the two-week commencement period for trainees, and for experienced workers in general, a contract between the employee and the employer which stipulates that the employee and employer agree to negotiate piece rates on an ongoing basis should be signed and evidence recorded when the piece rate is reviewed and what changes were made to the rate.

By mandating the recording of hours worked by a pieceworker, the employer (grower or labour hire company) has a reference point to compare the employee's performance.

This should be used to communicate to the employee their suitability for the role. It provides opportunity for both parties to consider whether training would improve performance and provides evidence of performance to justify termination of the employee if required.