

**APPLICATION BY THE AUSTRALIAN WORKERS' UNION  
IN RESPECT OF THE MA000028 HORTICULTURAL AWARD**

**Submission of the National Farmers' Federation**

1. We refer to the decision of the Full Bench of the Fair Work Commission on 3 November 2021<sup>1</sup> (**the Decision**) in which the Full Bench:
  - a) Decided to vary the *Horticulture Award 2020* (**the Award**) to insert a minimum wage floor with consequential time recording provisions in clause 15.2;
  - b) Took a provisional view that it is necessary to vary the Award in the terms set out at Attachment D to that decision; and
  - c) Invited interested parties to comment on the proposed draft variation or the provisional views by 4pm on 26 November 2021.
2. We make these submissions in response to the Decision.

Requirement for hourly comparison.

3. Provisional clause 15.2(f) provides that:

*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.*
4. The apparent effect of this clause is to require an employer to compare the earnings (piece rate to hourly rates) on an hourly basis and, if in any given hour, the piece rate earnings is less than the hourly rate then the grower must make up the difference for that given hour.
5. This comparison process will require the employer to engage in an audit and reconciliation for each hour of each employee's work. Thus, for example, if a grower

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<sup>1</sup> [2021] FWCFB 5544

has 43 workers who each work between 7 and 9 hour per day 6 days a week over the two weeks pay period, then the grower would have to make this comparison roughly 100 times for each of the 43 workers or about 4,000 different occasions for the single pay period, then calculate any shortfall in pay for each of those 4,000 occasions to make up the difference, and then make the necessary recordings<sup>2</sup>.

6. At paragraph 28 of his statement dated 9 June 2021, Brent McClintock stated that:

*If the AWU application were to succeed, it would add significantly to the administrative burden of managing the workforce as it would require us to check the earnings of every worker **each day** to ensure they earned at least the minimum hourly rate. I would estimate about 2 to 3 minutes for each worker per week which at its peak could amount to about 9 or 10 hours per week during harvest season.*

It appears that Mr McClintock's statement is premised on the expectation that the comparison would be done on a daily basis; i.e. after each shift. If the comparison was on an hourly basis, then it can reasonably be assumed that the amount of time required for each worker would be significantly greater than the 2 to 3 minutes Mr McClintock estimates.

7. Ultimately, growers may be able to adopt software and other solutions to assist with this process and reduce the time required to determine where 'top-up' payments are necessary, and if so how much the 'top-ups' should be. But at least until those solutions are available *and* the new requirement is normalised,<sup>3</sup> it will likely be time-consuming and cumbersome, particularly for growers who do not have a dedicated personnel/HR resource.
8. In addition, it bears noting that piece rates are principally used in harvest season. As such, for many growers this is a process which they will need to perform only occasionally, when their workforce swells exponentially and they are managing other significant demands on their time. Again, this will have the greatest impact on small growers who do not have a dedicated personnel/HR resource.

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<sup>2</sup> In pay slips, payroll records, etc.

<sup>3</sup> This will of course take some time and is one of many reasons why, as argued below at paragraph 25 and following, the varied clause 15.2 should not commence operation until at least the beginning of the new financial year on 1 July 2022.

9. In our submission, a more manageable approach would be to require growers to engage in this comparison over a longer period, for example, a pay period. If the pieceworker's earnings on piece rates for the entirety of that period are less than they would have earned on hourly rates for that same period, then the grower will make up the difference.
10. Importantly, the worker will be in no worse position than if they had been on hourly rates for the period, and the administrative burden on the grower will be significantly less onerous. In the example/scenario described above at paragraph 5, the grower would have to perform the comparison process just once rather than (roughly) 100 times.
11. It is our submission, therefore, that the unit of 'comparison' should be each pay period — provided that a pay period is no more than 2 weeks<sup>4</sup> — rather than each hour.<sup>5</sup> This will ensure that the employee ultimately receives at least the minimum wage for the period, while making the system simpler for growers to implement. In other words, the result will be no worse for the employees than if they had been on hourly rates for the period, while reducing the administrative burden and enabling and ensuring greater compliance on the part of growers.
12. This arrangement would also facilitate building the comparison process into the employer's pay practices and payroll systems. It would also assist employees in so far as that it would allow them to easily confirm they have been correctly paid, which would be particularly beneficial given the transient nature of much seasonal piece work and how employees frequently move between farms and regions.
13. To that end, in our submission proposed clause 15.2(f) should be varied as follows:

*Despite any other provision of clause 15.2, over the course of a full pay period 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.*

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<sup>4</sup> See clause 16.1 of the Award.

<sup>5</sup> We note that although it is the usual practice, the choice to measure earnings by hourly is largely arbitrary i.e. there is no reason in principle, why the preferred unit for measuring the duration of work could not be every 1 minute, or 90 minutes or even (e.g.) 134 minutes.

### Identifying the Applicable Pick Rate.

14. The current clause 15.2(b) of the Award provides that:

*The piecework rate ... 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.....*

15. In the Decision, the Full Bench propose an alternative clause which they say will address “some of the deficiencies in the current clause”:

*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.*

16. In particular, the clause proposed by the Full Bench’s provisional view include the following:

- a) Proposed clause 15.2(d) provides the following:

*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.*

- b) Proposed clause 15.2(a) defines “pieceworker competent at the piecework task” to be:

*A pieceworker who has at least 2 weeks’ experience performing the task (for example, picking apples, picking strawberries or pruning grape vines).*

17. In combination, these new provisions require the piece rate to be fixed at an amount which would enable a worker with at least two weeks experience to earn 15% more than they would otherwise earn on hourly rates.

18. However, in our submission this redraft does not provide enough guidance to employers as to the type of employee or, ultimately, the picking rate at which the piece rate should be set; i.e. it does not allow an employer to identify with precision who or what type of pieceworker should be able to earn 15% more than the hourly rate.

19. Firstly, the redraft does not identify where the worker should have acquired his/her experience. We note that every farm differs, not just in variety of produce, but also in

other critical ways which will impact on the skills required and therefore the pick rate. For example, workforce size, working operations and techniques, management practises, topography and layout, climate and weather, etc. It follows, in our submission, that the experience which the definition at clause 15.2(a) requires should be experience with the corresponding employer and in that particular piece rate task.

20. As such, in our submission proposed clause 15.2(a) should be varied to define “piecemaker competent at the piecework task” to be:

*A piecemaker who has at least 2 weeks’ experience performing the task (for example, picking apples, picking strawberries or pruning grape vines) with the employer’s enterprise.*

21. Secondly, the proposed clause 15.2(d) leaves some ambiguity as to the ‘type’ of employee or employees who must be able to earn 15% more than the relevant minimum hourly rate. The current clause 15.2 addresses this ambiguity by requiring the piece rate to enable the **average** competent employee to earn 15% more than the minimum. While there may be some uncertainty around who is an **average** (competent) worker, the concept at least narrows the category of worker.

22. However, this reference to the “average” worker has been removed from the proposed clause, so that the clause merely refers to “a competent piecemaker”. As such, it may be read to mean that the piece rate has to be set so that:

- a) Each individual employee (with more than 2 weeks experience) is able to earn 15% more than the applicable hourly rate, so that each employee should have their own piece rate;
- b) Any employee (with more than 2 weeks experience) is able to earn 15% more than the applicable hourly rate, so that the entire workforce has a piece rate set to the pick rate of just one (e.g. the fastest and most productive) worker; or
- c) Every employee (with more than 2 weeks experience) is able to earn 15% more than the applicable hourly rate, so that the entire workforce has a piece rate set to the picking rate of the slowest and least productive worker.

23. In our submission, the revised provision should retain the approach of pegging the rate to the performance of the *average* competent employee, so that proposed clause 15.2(d) should be varied as follows:

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

24. An alternative may be to require employers to set the piece rate based on the *mean* picking rate of all competent pieceworkers.

#### Operative Date

25. In the Decision, the Full Bench found<sup>6</sup> that the evidence suggested that the introduction of a piece rate ‘floor’ will have the following consequences:

1. *It will create an economic incentive to manage unproductive workers, leading employers to take more active steps in the recruitment, supervision and management of pieceworkers.*
2. *It is likely that underperforming pieceworkers will be dismissed.*
3. *It may demotivate some underperforming employees and reduce productivity; but such underperformance can be managed, for example, by setting productivity targets.*
4. *To the extent that a minimum wage floor will require employers to pay underperforming employees the minimum hourly rate, it will increase employment costs.*

26. Ideally, growers would be able will put in place measures and tools — i.e. other than the payment of piece rates — to deal with unproductive staff; for example, training regimes, incentive schemes, alternative duties, management techniques, etc. However, these options are less practical when dealing with seasonal staff as opposed to long-term/permanent staff. That is, investing in and developing staff who may number in the dozens (if not hundreds), who are performing relatively simple tasks, and who will only be retained for a few months or weeks is not commercially feasible. As such, when dealing with high volume, low skilled, short-term labour, the commercially pragmatic approach will be to be more selective in hiring and staffing. That is, refusing to engage potentially unproductive staff, and dismissing any staff member who is unproductive.<sup>7</sup>

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<sup>6</sup>At paragraph [463].

<sup>7</sup> Reardon at paragraph [36]; Distill at paragraph [28]; Eckersley at paragraph [34].

27. As such, the medium-to-long term consequences of the Decision will likely be to remove unsuitable (i.e. unproductive) workers from horticulture’s labour pool.
28. However, the evidence is that the labour pool which is available to the horticulture industry — which is always very limited — is significantly constrained at present.<sup>8</sup> As a consequence of the global pandemic and the fact that international borders have been closed for 18 months, there is a scarcity of international workers (e.g. working holiday makers) who make up very significant proportion of the harvest workforce.<sup>9</sup> It follows that the available labour pool is much smaller.
29. The logical consequence is that — at least in the short term and until they have time to invest in alternatives — growers will have to hire/retain unproductive staff. Again, those staff would have previously been on piece rates where there was no floor, so the impact of engaging these unproductive workers on the farm’s ‘bottom line’ would have been limited and manageable. That will not be the case once the new provisions take effect and a ‘piece rate’ floor is installed. As such, farms will be paying them significantly more in wages than anticipated.
30. It follows that the Decision and the new provisions will significantly increase many farms’ wage bill, which would have already been budgeted (through this harvest season) until the end of the 2021/22 financial year. Furthermore, the evidence shows that at present wages comprises about 30% to 50% of growers’ overhead. Although not possible to quantify with accuracy, it is safe to say that an increase in the wage bill will therefore have a massive impact on the farm business. Again, farms will not be able to manage this in the short term.
31. In addition, a related concern is that to adjust to and correctly implement the new provisions growers will have to adopt significant changes to the administrative processes of farm businesses. The change will potentially include the following:
  - a) Changes to personnel management systems/practices — potentially including adopting new technological tools and management practices — in order to

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<sup>8</sup> For example, see Kelly at paragraph [14]; Moss at paragraph [41]; Benham at paragraph [22]; Distill at paragraph [19]; Eckersley at paragraph [25].

<sup>9</sup> See paragraph [42] of the Decision.

monitor employee productivity on an ongoing basis and dismiss workers who are not sufficiently productive.

- b) Engage with labour markets and labour programs which generally guarantee more productive workers, e.g., engage with the Pacific Australia Labour Mobility (PALM) scheme rather than merely relying on working holiday makers.
  - c) Changes to payroll systems to ensure (as outlined above at paragraphs 7 and 12) the piece rate earnings of a piece worker are no less than the amount that they would have earned at the hourly rate.
32. It bears mentioning that all of these changes will have to take place under the cloud of COVID 19 and the fact that law and policy, particularly as it relates to labour movement, are changing rapidly and very difficult to anticipate. That uncertainty and shifting ground is difficult to build on, increasing the challenge for growers in developing the systems and tools necessary to adopt and adapt to the new piece rate requirements.
33. Finally, s 166(1)(a) of the *Fair Work Act 2009* establishes a presumption that a determination which sets or varies a minimum wage should come into operation on 1 July in the next financial year after the determination is made. The Decision apparently concludes that the change will set the minimum wage applicable to pieceworkers.<sup>10</sup> As such, s 166(1)(a) is enlivened. While subs (2) enables the Commission to determine that the new wage should take effect on another day if “appropriate to do so”, it is our submission that for the reasons given above it would not be appropriate to do so.

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<sup>10</sup> See, for example, paragraph [29] of the Decision.

34. On this basis, it is recommended that the implementation date be 1 July 2022 to allow for growers to adjust HR practices and to manage (as best they can) the current labour restraints caused by COVID 19.

DATED: 26 November 2021



**Ben Rogers**

**National Farmers Federation**