

## IN THE FAIR WORK COMMISSION

AM2020/104 – Application by the Australian Workers’ Union to vary the *Horticulture Award 2020*

### **Submission of the NSW Farmers (Industrial) Association**

1. This submission is made in response 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 to insert a minimum wage floor for pieceworkers with consequential time recording provisions in clause 15.2;
  - b. Expressed a provisional view that it is necessary to vary the Horticulture Award in the terms set out as Attachment D to that decision; and
  - c. Invited interested parties to comment on the proposed draft variation of the provisional views by 4pm on 26 November 2021.

#### Introduction

2. NSW Farmers (Industrial) Association (NSW Farmers) is a registered organisation representing employers in food and fibre primary production in NSW. Our members produce a range of commodities, including horticultural crops. The majority of our membership are small and medium growers.
3. NSW Farmers observes that the Decision will effectively change the practical implications of piecework pay arrangement in the Horticulture Award from a method of remuneration based on output to an incentive based payment system where employees are guaranteed payment based on the applicable award prescribed hourly rate added with an incentive of earning more than the hourly rate should they exceed certain productivity level. This is at odds with the legislative intention for piecework arrangement as indicated by the definition of award/agreement free pieceworkers set out in Regulation 1.12 of the Fair Work Regulations 2009:
  - (1) For [paragraph 21\(1\)\(c\) of the Act](#), this regulation prescribes a class of award/agreement free employees as pieceworkers.
  - (2) The class is award/agreement free employees who:
    - (a) are paid a rate set by reference to a quantifiable output or task; and
    - (b) are not paid a rate set by reference to a period of time worked.
4. Notwithstanding NSW Farmers’ differing views with the conclusion reached by the Full Bench in this matter, we respect the Full Bench’s decision.

#### Junior employees

5. Clause 15.3 of the Horticulture Award prescribes junior rates, where minimum pay rates for employees younger than 20 years old are to be calculated based on a specified percentage of the adult rates depending on the employee’s age.

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

6. Clause 15.2(a)(i) of the draft variation provides that:

*Hourly rate for the pieceworker means that the minimum hourly rate for the pieceworker's classification level plus the 25% casual loading under clause 11.3 for a casual pieceworker.*

7. While it may be self-evident the provision of clause 15.3 should be taken into account when determining the 'hourly rate for the pieceworker' who is a junior, we submit that for the purposes of clarity, an explanatory note of the application of junior rates for pieceworkers should be inserted following clause 15.2(a)(i). This is consistent with the approach taken by the Full Bench to incorporate other clauses relevant to pieceworkers into clause 15.2 of the draft variation. One example is the inclusion of a note on the application of public holiday penalty following clause 12.5(d) of the draft variation.

#### Requirement for hourly comparison

8. Draft 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.*

9. The Full Bench provided further explanation of the draft clause 15.2(f)<sup>2</sup>:

*If a pieceworker would receive less in total in piece rates for any hour's work than the applicable hourly rate, then draft clause 15.2(f) requires that the pieceworker be paid the amount of the applicable hourly rate for that hour's work.*

10. Read together, the consequence of draft clause 15.2(f) as explained by the Full Bench is that an employer is expected to undertake a comparison between an employee's earning by piece rate and the hourly rate on an hourly basis and make up any shortfall (compared to the minimum hourly rate) for each hour.
11. The additional resources required from employers to meet the frequency of comparison required of employers by clause 15.2(f) will be cost prohibitive. It requires 8 times of checking for an employee working a full 8 hours' day, this equates to 400 instances of checking per day, or more than 2000 times in a seven day period, when 50 employees are involved. It is common for even a small horticulture enterprise to employ 50 employees or more during their peak harvest. In addition, these workers will be spread out in the orchard for most of the day which makes it extremely complicated to firstly, collect and record the pick rate of employees each hour, secondly, undertake the comparison (between piece rate and hourly rate), and thirdly, record any necessary make up pay into a payroll file.

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<sup>2</sup> At paragraph 574 of the Decision.

12. NSW Farmers submits that a sensible approach is to require the comparison to be conducted over a pay period, and draft clause 15.2(f) to be amended 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.*

13. The proposed amendment establishes a comparison regime that is less onerous for employers to implement while ensuring that employees ultimately will still earn at least the hourly rate for hours worked.

#### Competent pieceworker

14. Clause 15.2(a)(iii) of the draft variation provides that:

*Pieceworker competent at the piecework task means a pieceworker who has at least 2 weeks' experience performing the task (for example, picking apples, picking strawberries or pruning grape vines)*

15. The draft clause raises questions on information that employees can be reasonably expected to provide in confirming their experience performing the specific task and what method is available for employers to verify the information provided.
16. To simplify the verification process and acknowledge that nature of operations differ from farm to farm, NSW Farmers proposes for the draft clause 15.2(a) to be amended as follows:

*A pieceworker 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.*

#### Transition time

17. The Decision represents a significant departure from the long-standing piecework arrangement provided in the Horticulture Award. NSW Farmers submits that substantial transition period is required between finalisation of the amended piecework provisions to the time they become operative.

18. In the Decision<sup>3</sup>, the Full Bench found 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.*

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<sup>3</sup> At paragraph 463.



and establishment of a new set of verification process, to ensure their labour hire's employment practices are compliant. The labour hire companies themselves require adequate time to assess the implications of this Decision on their business model and service offerings to growers.