

INTRODUCTION

88 Days and Counting would like to thank the Australian Workers Union (AWU) for putting forward the application to modernize the Horticulture Award in December 2020 and the full bench of the Fair Work Commission (FWC) for bringing down arguably the most important Australian industrial relations decision of the twenty-first century. This amendment to the Horticulture Award that involves adding a floor rate to the existing piece rate is a landmark decision and is a major step towards eliminating wage theft and modern slavery in the Australian horticultural industry.

88 Days and Counting is shocked and dismayed to read some of the submissions to the FWC by farming organizations and farming peak bodies. It is blatantly obvious that exploitation has been normalized within the horticulture industry such that many submitters do not even bother to disguise this fact.

Furthermore, in the face of much evidence supporting this proposed decision handed down by the FWC the horticulture industry is pushing back on these changes and wants the old piece rate system to remain.

88 Days and Counting would like to respond to loggements made to the FWC between 22 - 29 November 2021. Our organization supports the arguments presented by the Australian Workers Union (AWU) and the United Workers Union (UWU) and would like to address claims made and suggestions postulated by the National Farmers Federation (NFF), NSW Cherry Growers Association, the Greater Shepparton Council, Frank Battise from Riverina Citrus, Australian Industry Group (AIG), Fruit Growers Victoria (FGV), Australian Fresh Produce Alliance (AFPA) and Ai Group.

COMPETENT PIECEWORKERS

In Section 5 of the AWU document it states that fruit pickers are able to, “*become competent within a few days or a week of commencing*” (AWU, 2021, p. 2) instead of the two weeks proposed by the FWC. Fruit and vegetable picking and pruning is largely unskilled work and this means that piece workers engaged by farmers will be able to learn quickly if adequate and appropriate training is provided. Therefore, it is our view that the time required to gain competency needs to be reduced to one week instead of two weeks.

Based on our above assessment of piece work, 88 and Counting disagrees with the AFPA's definition of an ‘average competent pieceworker.’ The AFPA (2020) defines an average competent pieceworker being “*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)*” (p.3).

We also categorically oppose the proposed amendment to clause 15.2 (a) that has been put forward by the NFF. In Section 20, it states, “*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* (National Farmers Federation, 2021, p. 5).” These proposed changes do not adequately set a time limit for developing the competency of a piece worker and do not take into account their past experience picking and pruning similar fruit and vegetables. We also know from documents tendered to the FWC that individual fruit harvest seasons can be as short as 2 weeks (Greater Shepparton City Council, 2021). This is why we

believe this proposed change by the NFF will create a loophole for farmers to continue exploiting piece workers meaning the chronic underpayment of these workers will continue.

The NSW Cherry Growers Association (2021) argue that new pieceworkers in the horticulture industry should be classified as apprentices or trainees so that they can be paid a lower rate. However, there is no equivalence between pieceworkers who are new entrants to the horticulture industry and apprentice or trainee electricians. Unlike apprentice electricians farmwork by comparison is seasonal, and can be as short as two weeks (Greater Shepparton City Council, 2021) and there is relatively little ongoing work in the industry. Furthermore electricians are responsible for installing, repairing and maintaining electrical systems and leave their apprenticeship with a lifelong skill that is highly valued and highly remunerated. In contrast your typical pieceworker is engaged in picking and pruning fruit and vegetables and therefore can learn the job relatively quickly if provided adequate and appropriate training. This is why 88 Days and Counting is recommending the training period be reduced to one week and it seems severely unfair that these new entrants be paid piecework at \$13.23 per hour which would amount to severe underpayment.

Additionally, the Greater Shepparton Council (2021) states that, "*new entrants to seasonal harvest work are not immediately productive. It can take the average worker about two weeks of picking to reach a level where their piecework rate exceeds their hourly rate, which is the formula whereby pieceworker rates are set*" (p,2). Whilst the original intention of the Horticulture Award was to set piece rates at least 15% above the minimum hourly rate for 'average competent employees' (Fair Work Commission, nd(a), we know the reality for pieceworkers is vastly different.

We would like to draw the council's attention to research studies that clearly indicate that many pieceworkers fit the definition of modern slaves (APHEDA, 2020) as they are severely underpaid or not paid at all and often have their wages stolen from them. In addition a study undertaken by the Migrant Worker Center (2020) found that, "*78% of survey respondents were underpaid at some point when working in the horticulture industry*" (p. 6) with workers being paid as little as \$1 per hour (Migrant Worker Center, 2020).

We also would like to remind farming organizations that it is illegal to underpay their workers. Based on this knowledge we would like to know why the practice mentioned by Mr Battisel in his statement is prevalent within the horticulture industry. Battisel (2021) states, "*some are retirees who just want to work to supplement their pension..... in turn potentially doubling the picking cost for some of the picking for the work done by slower workers on hourly rate*" (p.1). Why aren't retirees and pensioners entitled to minimum wage having the ability to earn fair remuneration for a fair day's work?

FLOOR RATES vs. NEGOTIATED PIECE RATES

We concur with the AWU in relation to Section 7 where they agreed with the proposed FWC's decision to set a floor rate as part of piece rates. We also agree with Section 6 proposed by the AWU (2021), "*piece rates are generally not the product of any general agreement between the employer and an employee, but rather unilateral;y determined by the grower and presented to the employee on a 'take it or leave it' basis* (p. 2). This is especially the case for Working Holiday Makers (WHM) and Pacific Islander Workers who are engaged in farm work under the Seasonal Worker Program (SWP).

However, reading many of the statements made to the FWC, 88 Days and Counting would like to pose this question to the submitters. Why would having a minimum award wage be an issue if the industry was already paying an 'average competent piece worker' a piece rate that is 15% above the minimum hourly rate?

It seems to 88 Days and Counting that many farmers are not aware of their responsibilities under the old act and not across the amendments that have been proposed by the FWC. This is evidenced in the submission made by Battisel (2021), where he argues, *"why must all the average competent employee earn at least 15% more per than the minimum rate. Sometimes they earn 50% more than hourly rate some time only 10% why does it need to have a constant number farming is not constant some blocks are better than others this will mean we will need to keep adjusting the peace picking rate sometimes on a daily basis"* (p.2). Farmers have nothing to be worried about as they will not be penalized for paying highly productive piece workers an uplift that is above the floor rate. This means if Mr Battisel is engaging a piece worker whose productivity warrants a remuneration of 50% above the floor rate then there is nothing holding him back from doing so.

Furthermore, 88 Days and Counting believe based on statements made by a number of farming organizations that there seems to be a floor rate should not be an impediment to the operation of a business. One such statement has been made by Mr Battisel (2021), *"the pickers usually tell the farmers what they want to be paid according to the crop and conditions they are working in. We are continually in negotiations as the crop progresses and if it is not up to standard, the farmer pays a lot more. How can the farmer dictate terms when we have trouble sourcing enough workers due to labour shortage* (p.2).

This claim is supported by Roths Citrus (2021) who state their *Tongan crew earn above the piece rate and are able to return significant funds home* (p.1)." We ask farmers why then do they have an issue with the floor rate. This rate is just that and any piece worker earning well above this can be remunerated as such. This practice of paying above the floor rate will continue and farmers can still incentivise highly productive piece workers by paying them an uplift.

We are also very concerned by this statement made by Roths Citrus (2021) that reads, *"..... I will have to limit them to 30 hours per week and they will then earn less than if they were able to keep working at their slower pace for 6 days* (p.1). This statement is not very clear, as the floor rate introduces compliance of a minimum wage. If Roths Citrus is doing the right thing this shouldn't be an issue at all.

Furthermore, 88 Days and Counting is confounded by Battisel (2021) assertion, *"99.99% of the farmers under the Horticulture Award pay by the award and with piece rates, which is agreed by both parties prior to starting depending on picking conditions with an average picker always well exceeding the hourly rate, most the time it is the picker that decides the rate as the picker has the upper hand due to severe picker shortages which has been the case over last 20 years and more so since covid* (p.1)." Then he goes on to say, *"I think by the passing of the "floor" pay rate you are exploiting the farmer given the severe shortage of harvest labour to the point where you are rewarding rouge workers who will exploit the rules"* (p.1). Firstly where did Mr Battisel draw this 99.99% from? And how is it possible for *"rouge workers to exploit rules"* when the employer decides who to hire, retain and make redundant? Are we to believe that Mr Battisel is being "bullied" into hiring every worker that appears at his farmgate, especially when according to Mr Battisel 99.99% of farmers are already paying piece rates that are above the floor rate?

88 Days and Counting believes that the above statement is yet another example of employers mitigating their financial responsibilities onto their employees. This is out of line with all other businesses in contemporary Australia. Like all businesses in Australia Mr Battisel's business operates in a competitive open market, which is subject to business risks and responsibilities such as offering a competitive pay rate to attract and retain competent workers in a tight labor market. It is not the employees responsibility to mitigate this risk for Mr Battisel via their wages.

We are also concerned by NFF's (2021) suggestion, *"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."* We ask the NFF why would this be an issue at all if as they claim farmers are already paying average competent pieceworkers the correct piece rate which is supposed to be 15% above the minimum wage?

Additionally, 88 Days and Counting opposes Ai Group's amendment to the proposed clause number 15.2(e). Ai Group (2021) is arguing for the following, *"if an employer requests a pieceworker to perform 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 (p.3)."* 88 Days and Counting believes if this amendment is accepted, farming organizations will utilize labor hire companies as a loophole to get around adequately paying piece workers for any additional work undertaken.

88 Days and Counting also recognises a power imbalance exists when the Department of Home Affairs stipulates that WHM are required to undertake rural, regional and remote work in order to extend their visas and stay in Australia. This means that farmers have all the power when engaging with WHM and can set whatever piece rate they want to as they are fully aware of this requirement. Furthermore, Pacific Islanders employed under the SWP are hired for a nine month period, so they are not able to easily walk off their jobs even if they are being exploited. Therefore, setting a floor rate will mean these workers go into a job having a better understanding of what they will be earning. This is also an issue with Australian citizens who are engaged in job seeker programs, pensions, and work for the dole as they too are being underpaid. There is a cohort of farmers who view Centrelink or pension benefits as a means for subsidizing their businesses and the wages they pay.

Finally, it is common knowledge that a large number of undocumented workers are engaged in the horticultural sector and it is estimated this could be as many as 60,000 to 100,000 workers (Azarias, 2021). Many of these workers are exploited and grossly underpaid, so a floor rate will go some way to eradicating the exploitation these workers experience within the horticulture sector.

AGE DISCRIMINATION

The NSW Cherry Farmers Association (2021) submission states that, *"the implementation of the hourly rate of pay for fruit picking discriminates, particularly with regard to senior people who like to stay/work on farm, work to their own timeframe and capability, and enjoy the camp life on farm"* (p.3). This is very concerning and 88 Days and Counting would like to know if this

underpayment of older piece workers is endemic in the horticulture industry. We believe that this is a form of age discrimination and entrenches ageism within our society.

The sad thing about the above statement is that it is not an isolated sentiment as the FGV shares this view. In this submission they state, *“people who were happily employed using pieceworker rates which totaled less than the hourly rate in the past will not be offered work. This could include grey nomads who work to augment their income and help Aussie farmers”* (Fruit Growers Victoria, 2021). We would like to remind the NSW Cherry Farmers Association and Fruit Growers Victoria that refusing to hire employees based on their age is a form of age discrimination, our elderly citizens are entitled to have their time fairly remunerated for the hours they work, why are these employees not entitled to a minimum wage? And are these organisations openly admitting to discriminating against aged employees if a floor rate is introduced?

PIECEWORK RECORD

88 Days and Counting agrees with both AWU’s submission in relation to clauses 15.2(h) and 15.2(j)(i) and UWU’s in relation to clause 15.2(j)(ii). These measures are very important as it means every piece worker engaged in farm work knows the floor rate they will be paid by a farmer prior to commencement of employment with them. This eliminates the uncertainty of how much money a piece worker will earn on any given hour or day. It also eliminates some of the financial stress experienced by piece workers who up until now have not been able to adequately undertake forward financial planning due to a substantial variation in piece rates between farms and even on one farm from one day to the next.

We also agree with UWU’s arguments that these changes will better enable responsible unions and the Fair Work Ombudsman to enforce the correct pay (UWU, 2021) and entitlements of a piece worker.

RECRUITMENT, SELECTION & TRAINING

88 Days and Counting is very concerned that there seems to be a wide misunderstanding of the responsibility of farming organizations to provide training and development to new piece workers and this can be evidenced in some of the submissions made to the FWC. We would also like to remind farming organizations that new pieceworkers engaged in training must be paid the floor rate (Fair Work Ombudsman, nd(b)).

Therefore, we are very disappointed to read that some farming organizations do not seem to recognize that organizations have a responsibility to do this and that providing training would actually increase the productivity of their workers while reducing the incidences of accidents.

88 Days and Counting is concerned with the submission made by the Greater Shepparton Council (2021), which states, *“backpackers will also have difficulty entering this industry, traditionally many backpackers were seeking harvest work for the visa extension opportunities, though if inexperienced they too will be less likely to be directly hired by a grower for the harvest season (p. 2).”*

Furthermore, we urge the horticulture sector to adopt recruitment and selection practices that are aligned with the rest of contemporary Australia. This will require organizations to undertake

a thorough review of the work that piece workers perform and ensure that there are realistic expectations of 'average competent workers'. We also believe it is important for farming organizations to use this information when undertaking proper recruitment and selection processes that enable them to adequately screen workers, and hire the best workers for the job.

We also urge organizations to provide piece workers with adequate and appropriate training so that both the piece worker and the organization benefits from the employer-employee relationship.

The above suggestions would address some of the issues put forward by submitters such as Roths Citrus (2021) which states, *"we currently have a couple of men who are not fast workers, they realise this but still are grateful for the opportunity to work. As these men are part of the SWP we are required to give them an average of 30 hours per week. I am not able to lay them off, because they do not make the piecework rate as I can't send them back to Tonga"* (p.1). We believe organizations like Roths Citrus have a responsibility to implement proper recruitment and selection processes and offer piece workers training to achieve productivity targets in a safe manner.

MECHANIZATION

What exactly does the FGV (2021) mean by, *"to change to mechanical assisted harvesting means a grower needs time to assess the business and access capital, time for machinery to be produced and delivered, and time for old styled orchards to be replaced"* (p. 2). Does this mean the industry has been holding off from automating because it has for decades had access to a vast pool of a very cheap labor force?

FWC COMMISSION DECISION TO BE BROUGHT FORWARD

88 Days and Counting wholeheartedly supports Section 13 of the AWU's submission and Sections 22, 24, 26 and 27 of UWU's submission. Piece workers should not have to wait six months to finally be paid a living wage. This decision to implement the floor rate needs to be brought forward to 1 January 2022 from 1 July 2022 as per the Section 166(1) of the Fair Work Act 2009 (Cth) (FW Act).

It is inconceivable that in the twenty-first century farming organizations do not have in place adequate HR Systems that can be adapted at short notice. Therefore, we categorically oppose the following request by the Greater Shepparton Council (2021), *"the council supports the implementation of the pieceworker minimum floor rates to be introduced six (6) months after the final determination. This provides the horticulture industry the opportunity to prepare itself for this radical change to the way harvest occurs. Farm systems can be changed, training of supervisory staff undertaken, mechanisation can be implemented, agreements can be finalised with PALM and AgVisa supply countries, and customer supply agreements can reflect the changes and cost of production"* (p. 3).

CONCLUSION

In conclusion, it seems farming organizations are cherry picking the data they wish to submit for their own benefit. We do not accept the suggestions made by certain farming groups as this is

simply just a reintroduction of the old award, we believe introducing a floor rate will remove barriers and close an exploitative loophole and insure employers are compliant paying their employees the correct piece rate with minimum wage. From the statements submitted by these farming groups it is evident that this clearly wasn't being complied with under the old award, and it could be inferred that the old award was being used to mitigate businesses responsibilities and this push financial risk onto piece workers. The old award was discriminatory to workers espcailly the elderly, working holiday makers and seasonal workers from the Pacific Islands. 88 Days and Counting supports the Australian Workers' Union's application to vary clause 15.2 of the pieceworker rates in the Horticulture Award 2020 under section 158 of the Fair Work Act 2009

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