

IN THE FAIR WORK COMMISSION

Matter: APPLICATION TO VARY THE HORTICULTURE AWARD 2020

Applicant: THE AUSTRALIAN WORKERS' UNION

Matter No: AM2020/104

REPLY 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 Decision² ('**draft determination**').
3. The Full Bench provided interested parties with an opportunity to make submissions about the *provisional view* and draft determination by 4:00pm on Friday, 26 November 2021 and submissions in reply by 4:00pm on Friday, 10 December 2021. The AWU filed submissions supporting the *provisional view* and draft determination on 26 November 2021, as did the United Workers' Union, Australian Catholic Religious Against Human Trafficking in Humans and the Australian Catholic Migrant and Refugee Office.
4. Submissions were also filed by the following employers, employer groups and a local council on or around 26 November 2021:
 - (i) Gunnible Pastoral Company;
 - (ii) H.W.Pogue and Co.;
 - (iii) Roths Citrus;

¹ Decision at [584].

² Decision at [585].

- (iv) Grandview Orchards;
- (v) Australian Industry Group ('AIG');
- (vi) NSW Cherry Growers Association;
- (vii) Industrial Committee of FGV (Fruit Growers Victoria) and CDFGA (Cobram and District Fruit Growers Association);
- (viii) Citrus Australia;
- (ix) Growcom;
- (x) Sunny Ridge;
- (xi) Greater Shepparton City Council;
- (xii) Fruit Growers Victoria;
- (xiii) Blueberry Fields;
- (xiv) Fruit Growers Tasmania;
- (xv) Dermark Pty Ltd;
- (xvi) Citrus SA;
- (xvii) Northern Victorian Fresh Tomato Growers Association;
- (xviii) Luscious Citrus Pty Ltd;
- (xix) National Farmers Federation ('NFF');
- (xx) Agribit Software;
- (xxi) Australian Fresh Produce Alliance ('AFPA');
- (xxii) F Battistel;
- (xxiii) NSW Farmers (Industrial) Association ('NSW Farmers');
- (xxiv) Sutton Farms; and
- (xxv) PFT Agriculture.

5. Many of the submissions filed by the parties identified above, particularly those filed by individual employers, were directed at arguing against the insertion of a minimum wage floor into the Horticulture Award. The AWU has not responded to these arguments, given the Full Bench expressly stated at paragraph [587] of the Decision that the submissions were: '*...not* an opportunity to reargue a matter which has been determined; in particular, we have decided to vary the piecework clause in the Horticulture Award to insert a minimum wage floor, with

consequent time recording obligations, and do not seek further submissions in respect of these issues’.

6. The AWU submits the proposal from Citrus Australia that a trainee wage rate be inserted into the Horticulture Award³ is also beyond the scope of the submissions sought by the Full Bench in relation to the draft determination and could not reasonably occur as part of the current proceedings given it would need to be justified by evidence and work value reasons.
7. The AWU’s submissions in reply follow. Part 1 concerns amendments proposed by employer parties that the AWU does not oppose and Part 2 concerns amendments opposed by the AWU.

PART 1 - AMENDMENTS NOT OPPOSED BY THE AWU

8. The AWU does not oppose the draft determination being varied in accordance with the particular proposals identified below made by the NSW Farmers and AFPA. An amended version of the draft determination with track changes is attached to this submission. This version includes the amendments proposed below by the NSW Farmers and AFPA and an amendment proposed by the AWU.

1.1 NSW Farmers proposal – clause 15.2(a)(i)

9. NSW Farmers has proposed⁴ that a note alerting users to the junior rates in clause 15.3 of the Horticulture Award be inserted below the definition of ‘**hourly rate for the pieceworker**’ in clause 15.2(a)(i).
10. The AWU does not dispute that the wage floor for a junior employee is determined by reference to the percentages in clause 15.3 and does not oppose the addition of a note in the following terms at the end of clause 15.2(a)(i):

NOTE: Clause 15.3 contains percentages used to calculate the minimum hourly rate for junior employees.

1.2 AFPA proposal – clause 15.2(a)(iii)

11. The AWU does not oppose the AFPA proposal⁵ to amend clause 15.2(a)(iii) to read:

³ Citrus Australia submission on page 9.

⁴ NSW Farmers submission at [7].

⁵ AFPA submissions at [10].

pieceworker 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);

12. The AWU accepts that specifying an hourly figure will provide more certainty for employers and employees given the hours worked during a two-week period may fluctuate substantially amongst employees and may provide a more accurate measure of competence.

PART 2 - AMENDMENTS OPPOSED BY THE AWU

2.1 Comparison period for the minimum wage floor

13. Clause 15.2(f) of the draft determination states:

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.

14. Many of the submissions raise concerns about the administrative burden associated with complying with this provision. For example, the NFF's submission states:

The apparent effect of this clause is to require an employer to compare the earnings (piece rate to hourly rate) on an hourly basis and, if in any given hour, the piece rate earnings is [sic] less than the hourly rate then the grower must make up the difference for that given hour.⁶

15. The submission from NSW Farmers states:

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.⁷

16. In contrast, the AFPA submits clause 15.2(f) in the draft determination 'does not specify over what period the comparison is to be performed'⁸.

17. The submissions of the NFF, NSW Farmers and AFPA are all consistent in proposing that the appropriate period for the comparison of piecework earnings and hourly rates is the pay period⁹,

⁶ NFF submissions at [4].

⁷ NSW Farmers submission at [11].

⁸ AFPA submission at [24].

⁹ NSW Farmers submission at [12] and AFPA submission at [24].

albeit the NFF suggests an outer limit of two weeks¹⁰ which reflects the maximum duration of a pay period under clause 16.2 of the Horticulture Award.

18. If the Full Bench considers there is merit to the employers' concerns about clause 15.2(f) of the draft determination, the AWU submits that a per day or shift reconciliation would be appropriate rather than per pay period. The evidence in this case indicates employers currently undertake piecework calculations on a daily basis. For example, the evidence included:

- (i) Exhibit AWU 21 is a bundle of documents produced by Brent McClintock. The documents identify daily piecework calculations.
- (ii) Exhibit AWU 25 is a bundle of documents produced by Han Shiong Siah. The documents identify daily piecework calculations.
- (iii) Exhibit AWU 28 is a bundle of documents produced by Nicholas King. The documents identify daily piecework calculations.
- (iv) Exhibit NFF 1 is a witness statement from Anne Reardon. Paragraph [35] of Ms Reardon's statement refers to daily calculations for pieceworkers.
- (v) Exhibit NFF 2 is a witness statement from Anthony Kelly. Attachment A to Mr Kelly's statement is a spreadsheet which contains daily piecework calculations.
- (vi) Exhibit NFF 4 is a witness statement from Brent McClintock. At paragraphs [19] and [20] Mr McClintock refers to daily calculations for pieceworkers. In addition, as the NFF pointed out¹¹ in its submissions, at paragraph [28] Mr McClintock assumed daily reconciliations would be required if the AWU's application was successful.
- (vii) Exhibit NFF 5 is a witness statement from Catherine Silverstein. At paragraph [31] Ms Silverstein refers to daily calculations for pieceworkers.
- (viii) Exhibit NFF 6 is a witness statement from Glenn Trewin. At paragraph [21] Mr Trewin refers to daily calculations for pieceworkers.
- (ix) Exhibit NFF 7 is a witness statement from Gaetano Gaeta. At paragraph [11] Mr Gaeta refers to daily calculations for pieceworkers.
- (x) Exhibit NFF 9 is a witness statement from Jonathan Moss. At paragraph [33] Mr Moss refers to daily calculations for pieceworkers.
- (xi) Exhibit NFF 11 is a witness statement from Reginald Brown. At paragraphs [25] and [26] Mr Brown refers to daily calculations for pieceworkers.
- (xii) Exhibit NFF 13 is a witness statement from Michelle Distill. At paragraph [24] Ms Distill refers to daily calculations for pieceworkers.
- (xiii) Exhibit NFF 14 is a witness statement from Richard Eckersley. Annexure C to the statement contains a spreadsheet with daily calculations for pieceworkers.

¹⁰ NFF submission at [11].

¹¹ NFF submission at [6].

19. In circumstances in which the overwhelming majority of employees are engaged as casual employees and there is a high level of itinerant and transient work, calculation of the minimum hourly payment should occur on a daily or shift basis. Furthermore, a calculation on an, at most, daily or shift basis will provide individuals employees with a straightforward capacity to consistently monitor whether the piece rate is sufficient to ensure that his or her earnings are exceeding the minimum hourly rate.
20. A per day or per shift reconciliation would resolve the double payment concern expressed by Fruit Growers Tasmania¹² and is consistent with the manner in which the Greater Shepparton City Council has assumed the wage floor will operate.¹³ The submission from Citrus Australia also indicates that a daily reconciliation period is the minimum that is workable, albeit they express a preference for pay periods.¹⁴
21. A per day or shift reconciliation could be included in the draft determination by amending clause 15.2(f) to read as follows:
- Despite any other provision of clause 15.2, for each day or shift worked a pieceworker must be no less than the amount they would have received if paid for each hour worked at the hourly rate for the pieceworker.*
22. The amended version of the draft determination attached to these submissions includes this wording for clause 15.2(f).

2.2 Calculation of the piecework rate

23. Clause 15.2(a)(iii) of the draft determination contains the following definition:

***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).*

24. Clause 15.2(d) then provides:

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.

NOTE: A pieceworker is paid 200% of the piece rate for work on a public holiday (see clause 27.3).

¹² Fruit Growers Tasmania submission at [18].

¹³ Greater Shepparton City Council submission at page 1.

¹⁴ Citrus Australia submission on page 3 and 5.

25. The Full Bench indicated the above method of setting piecework rates is intended to be simpler than the existing clause 15.2(b) which refers to an ‘average competent employee’ earning at least 15% more than the applicable minimum hourly rate prescribed in the award.¹⁵
26. Several amendments to these elements of the draft determination have been proposed by employer parties. These are dealt with below.

Averaging element

27. The AFPA has proposed¹⁶ additions to clause 15.2(d) directed at:
 - (a) prescribing that the piecework rate must be set at a level which would enable an average worker within the defined group of ‘pieceworkers competent at the piecework task’ to earn 15% above the minimum award rate. The average worker is determined by reference to productivity levels in the previous pay period;
 - (b) requiring a ‘reasonable pre-estimate of the average productivity of pieceworkers competent at the piecework task’ where there is no productivity data to rely upon; and
 - (c) requiring employers to review piece rates at the end of each pay period and adjust them if necessary to achieve the minimum prescribed rate.
28. The NFF makes a similar point but proposes¹⁷ the following amendments to clause 15.2(d):

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.
29. The AWU opposes the amendments proposed by the AFPA and NFF. The changes would potentially result in around half of the employees who meet the definition of a ‘pieceworker competent at the piecework task’ not receiving the 15% uplift.
30. The draft determination effectively requires an employer to set the piece rate at a level that would enable a worker with two weeks (or potentially 76 hours) of experience at the relevant task to earn at least 15% more than the hourly rate for the pieceworker. Provided the piece rate is set using this method, the earnings of each pieceworker will fluctuate according to their productivity in accordance with the intent of the piecework arrangements, subject to the hourly wages floor.

¹⁵ Decision at [569].

¹⁶ AFPA submissions at [26].

¹⁷ NFF submissions at [23].

31. The AWU believes the approach in the draft determination is much simpler than the current provisions and that the employer parties are overstating the difficulties by failing to adequately recognise that clause 15.2(d) is not prescribing a minimum payment rate for each employee, it is prescribing how the piece rate must be set by the employer. An employee with two weeks (or potentially 76 hours) of experience performing the same task will be at a competent level and the piece rate should be set at a rate that enables them to earn at least the 15% uplift. Whether or not the higher earnings eventuate will depend on the productivity of the employee.
32. The alternative proposals advanced by the AFPA and the NFF would reintroduce the subjective and uncertain features of the existing provision which the Full Bench found unsatisfactory. Although the AFPA proposal endeavours to introduce a mechanism in accordance with which the earnings of the 'average worker' are to be determined, this is unlikely to be successful. The complexity of the proposed provision means it is unlikely to be followed in an industry with a history of non-compliance. The proposed mechanism is also such that an individual employee will have little practical ability to assess whether the proposed rate is properly set.
33. The AWU accepts that an estimate from the employer would be required if the task has not previously been performed by an employee for two weeks. However, it is unnecessary for express provision to be made in this respect in the draft determination. It is the only logical and workable interpretation of the requirement in the draft determination.

Experience performing the piecework task

34. The NFF¹⁸ and NSW Farmers¹⁹ propose amending clause 15.2(a)(iii) to read:

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) with the employer's enterprise.

35. A similar submission is made by Fruit Growers Tasmania.²⁰
36. The AWU does not consider these amendments are necessary. An employer will logically draw upon experience from their own farm to set a rate that would enable a pieceworker with two weeks (or 76 hours) of experience performing the task to earn the 15% uplift. If there is no relevant experience, they will need to estimate the productivity of an employee with that level of experience.

¹⁸ NFF submissions at [20].

¹⁹ NSW Farmers submissions at [16].

²⁰ Fruit Growers Tasmania submission at [6] and [7].

2.3 Changes to the piece rates

37. AFPA has proposed that clause 15.2(i) be amended to read:

- (i) *If an employer proposes to engage the pieceworker to perform a new piecework task not covered by an existing piecework record, the employer must give the pieceworker a further piecework record including the new task before commencement of the new task.*
- (ii) *If an employer proposes to change the piece rate of a pieceworker, the employer must inform the pieceworker of the new rate before commencement of work under the new rate and must give the pieceworker a further piecework record including the new rate as soon as reasonably practicable.*

38. The AWU opposes these amendments. The draft determination appropriately requires a new piecework record to be provided to the pieceworker before the relevant work commences. This ensures that the employer and employee are both clearly informed in writing about the applicable piece rate whenever the relevant work is being performed.

39. Given the compliance issues faced by this industry and the significant component of overseas workers, it is not appropriate for a record that sets the piecework rate of pay to be provided by the employer by reference to a vague standard such as ‘as soon as reasonably practicable’. This requirement is likely to be interpreted and applied in a range of different ways across the industry which is not appropriate for a safety net instrument and is likely to encourage disputation.

2.4 AIG proposal – clause 15.2(a)(i)

40. AIG has proposed²¹ that clause 15.2(a)(i) be amended to read:

hourly rate for the pieceworker means the minimum hourly rate for the pieceworker’s classification level under this Award plus the 25% casual loading under clause 11.3 for a casual pieceworker.

41. The AWU accepts the wage floor is intended to protect the minimum rates in the Horticulture Award and not higher contractual rates. The wording in the draft determination reflects this and the variation proposed by AIG is unnecessary.

2.5 AFPA proposal – clause 15.2(a)(i)

²¹ AIG submissions at [6].

42. AFPA has proposed²² that clause 15.2(a) be amended to read:

hourly rate for the pieceworker means the minimum hourly rate for the pieceworker's classification level plus, in the case of a casual pieceworker, the 25% casual loading under clause 11.3.

43. The wording in the draft determination is clear. The AWU does not consider the AFPA's proposed variation is necessary.

2.6 AIG proposal – clause 15.2(e)

44. AIG has proposed²³ that clause 15.2(e) be amended to read:

~~If a pieceworker does~~ 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.

45. The proposed amendment should be rejected. The amendment proposed by AIG is likely to generate disputes about whether a particular task was requested by the employer and whether a separate explicit request must be made on each occasion a certain task, such as cleaning up, is undertaken.

46. If an employee is at work at the direction of the employer and is not taking an unpaid break, the employee is entitled to be paid if the piecework task is not being performed. AIG's suggestion may permit an employer to argue that it is not required to pay wages to an employee who stops performing piecework to do necessary associated work (such as cleaning or retrieving equipment), unless directly requested to do so by a supervisor. Such an outcome is inconsistent with the wages-work bargain at the heart of the employment relationship.

2.7 AFPA proposal – clause 15.2(f)

47. AFPA has proposed²⁴ that clause 15.2(f) be amended to read:

Despite any other provision of clause 15.2, in each pay period a pieceworker must be paid no less than the number of hours worked during the pay period multiplied by the amount they would have received if paid for each hour worked at the hourly rate for the pieceworker.

²² AFPA submissions at [22].

²³ AIG submissions at [8].

²⁴ AFPA submissions at [27].

48. The AWU is opposed to the insertion of the words ‘in each pay period’. This issue is dealt with in Part 2.1 of these submissions above.
49. The AWU does not consider the other changes proposed by AFPA are necessary. The wage floor in clause 15.2(f) is linked to the definition of ‘hourly rate for the pieceworker’ in clause 15.2(a)(i). That definition is confined to the minimum hourly rate plus the 25% casual loading if applicable. Penalties and loadings are not included in this definition and hence are not encompassed by the wage floor in clause 15.2(f).

2.8 AFPA proposal – clause 15.2(h)

50. AFPA has proposed²⁵ that clause 15.2(h) be amended to clarify that a single piecework record can cover multiple piecework tasks. The AWU accepts that a single piecework record can cover multiple piecework tasks and does not consider a variation to the draft determination is necessary for this to be an option for employers.

2.9 Operative date

51. Many of the submissions from the employer parties propose an operative date of 1 July 2022 for the variations and highlight this is effectively the default operative date due to the operation of s 166(1)(a) of the *Fair Work Act 2009*.
52. The AWU relies on its submissions filed on 26 November 2021 which propose an operative date of 1 January 2022. Contrary to the submissions of various employer parties, it would be contrary to the modern awards objective to permit the current clause to continue operating until 1 July 2022 having regard to the findings of the Full Bench that there is widespread non-compliance with the current piecework conditions in the Horticulture Award.²⁶
53. The AFPA submissions refer repeatedly to ‘compliance traps’. Allowing the current clause to continue operating until 1 July 2022 would continue the existing ‘compliance traps’ identified in the Full Bench’s findings.

The Australian Workers’ Union

Dated: 10 December 2021

²⁵ AFPA submission at [30].

²⁶ Decision at [362].

ATTACHMENT – AWU AMENDED DRAFT DETERMINATION

MA000119 PRXXXXXX

**FAIR WORK COMMISSION
DRAFT DETERMINATION**

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Australian Workers' Union
(AM2020/104)

HORTICULTURE AWARD 2020
[MA000119]

Agricultural industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT
CATANZARITI
COMMISSIONER RIORDAN

PLACE, XX MONTH 2021

Horticulture Award 2020 – Pieceworker rates – minimum hourly rate.

A. Further to the decision [[2021] FWCFB XXXX] issued by the Fair Work Commission on XX MONTH 2021, the above award is varied as follows:

1. By deleting clause 15.2 and inserting the following:

15.2 Pieceworker rates

(a) In clause 15.2:

(i) **hourly rate for the pieceworker** means the minimum hourly rate for the pieceworker's classification level plus the 25% casual loading under clause 11.3 for a casual pieceworker;

NOTE: Clause 15.3 contains percentages used to calculate the minimum hourly rate for junior employees.

(ii) **pieceworker** means an employee being paid a piece rate; and

(iii) **pieceworker 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);

(b) The following clauses of this award do not apply to a pieceworker:

(i) Clause 13—Ordinary hours of work and rostering arrangements;

(ii) Clause 18.3(c)—Meal allowance; and

(iii) Clause 21—Overtime.

(c) An employer may pay a full-time, part-time or casual employee a piece rate for performing a task.

(d) 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.

NOTE: A pieceworker is paid 200% of the piece rate for work on a public holiday (see clause 27.3).

(e) If a pieceworker does 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.

(f) Despite any other provision of clause 15.2, **for each day or shift worked** 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.

(g) Pieceworkers are paid allowances under clause 18 (other than meal allowance) in addition to the rates payable under clauses 15.2(d), (e) and (f).

(h) Before a pieceworker begins a piecework task for an employer, the employer must give the pieceworker a written record signed by the employer (a **piecework record**) that must:

(i) state the date and time the piecework is to commence;

(ii) describe the task for which the piece rate will be paid;

(iii) state the amount of the piece rate;

(iv) include the following statement:

‘Under the *Horticulture Award 2020* a pieceworker must be paid **for each day or shift worked** no less than the amount they would have received if paid for each hour worked at their hourly rate under the Award (including the 25% casual loading for a casual pieceworker).’

and

(v) state the hourly rate for the pieceworker.

NOTE: An example of the type of record required by clause 15.2(h) is at Schedule I—Piecework Record. There is no requirement to use the form of record set out in Schedule I—Piecework Record.

(i) If an employer proposes to change the piece rate or piecework task of a pieceworker the employer must first give the pieceworker a further piecework record including the new rate or task.

(j) The employer must keep the following as employee records:

(i) a copy of each piecework record given to the pieceworker; and

(ii) a record of all hours worked by the pieceworker and the applicable piece rate at the time those hours were worked.

(k) For the purposes of the NES the base rate of pay and full rate of pay of a pieceworker are the same and are worked out as follows:

(i) By dividing the total amount earned by the pieceworker during the relevant period by the total hours worked by the pieceworker during the relevant period.

(ii) If the pieceworker was continuously employed by the employer for a period of 12 months or more immediately before the rate of pay is to be worked out—the **relevant period** is the 12 months before the rate is to be worked out. If the pieceworker was continuously employed by the employer for a period of less than 12 months immediately before the rate of pay is to be worked out—the **relevant period** is that period.

2. By replacing ‘piecework rate’ in clause 27.3 with ‘piece rate’.

3. By inserting a new Schedule I—Piecework record as set out in the attachment to this determination.

4. By updating the table of contents accordingly.

B. This determination comes into operation on 1 January 2022. In accordance with s.166(5) of the *Fair Work Act 2009*, this determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after 1 January 2022.

PRESIDENT