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Fair Work Commission

Fair Work Act 2009 (**Act**)

s. 158 – Application to vary a modern award

AM2020/104 – Horticulture Award 2020

Submission In Reply of Fruit Growers Tasmania as to draft variation determination in [2021] FWCFB 5554

1. Fruit Growers Tasmania (**FGT**) make this submission in reply in response to the Draft Determination of the Full Bench of the Fair Work Commission set out at Attachment D to the decision of 3 November 2021[1] (**Decision**), and the submissions of other parties, in accordance with the directions given in paragraph [586] thereof.

2. FGT repeats its appreciation of the Commission's aim as stated in the Decision[2] that "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".

3. It is in the context of this aim that FGT offers the following comments on the draft clause, and also the appropriate operative date of the draft clause as mentioned in B of ATTACHMENT D – DRAFT DETERMINATION.

Defining a competent pieceworker

4. The proposed clause 15.2(a)(iii) defines **pieceworker competent at the piecework task** as follows:

> "**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)"

[1] [2021] FWCFB 5554

[2] At [561]

5. FGT previously submitted that an amendment to this proposed clause 15.2(a)(iii) was required by inserting the words "with their current employer" after the word "experience", hence reading:

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

6. FGT has received further input from growers and also reviewed the submission of the Australian Fresh Produce Alliance (APFA) dated 26 November 2021.

7. FGT agrees with the AFPA's submission that the wording "2 weeks' experience" should be replaced with "76 hours' experience".

8. Accordingly, FGT now submits that the proposed clause 15.2(a)(iii) should read:

> "pieceworker competent at the piecework task means a pieceworker who has at least **76 hours'** ~~2 weeks'~~ experience **with their current employer** performing the task (for example, picking apples, picking strawberries or pruning grape vines)"

Defining the guarantee of minimum earnings

9. The proposed clause 15.2(f) defines the guarantee of minimum earnings as follows.

> "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."

10. Accordingly, and to assist in providing clarity of the intent and application of the minimum wage floor, FGT previously submitted that the following definition be added to draft clause 15.2(a).

> (iv) The **average hourly rate of a pieceworker** for the payment period means the calculated value of adding all payments made to the pieceworker using piece rates, and dividing this by the total hours worked by the pieceworker for the payment period in pieceworker tasks.

11. Upon review, we have identified that the term "payment period" was not what we intended. Instead our intention was to promote consistency by using the term already defined in Clause 16.1 of the Horticulture Award, namely "period of payment".

12. As a result, FGT now submits that the following revised 'definition' be added to draft clause 15.2(a).

> (iv) The **average hourly rate of a pieceworker** for the period of payment means the calculated value of adding all piece work payments made to the pieceworker during the period of payment, and dividing this by the total hours worked by the pieceworker during the period of payment in pieceworker tasks.

13. In addition, FGT previously submitted that draft clause 15.2(f) be amended as follows.

> "Despite any other provision of clause 15.2 **the average hourly rate of a pieceworker for the payment period** must be no less than if paid for each hour worked at the hourly rate for the pieceworker."

14. Similarly, we have identified that the term "payment period" in this draft clause should be replaced by the term already defined in Clause 16.1 of the Horticulture Award, namely "period of payment".

15. As a result, FGT now submits that draft clause 15.2(f) be amended as follows.

> "Despite any other provision of clause 15.2 **the average hourly rate of a pieceworker for the period of payment** must be no less than if paid for each hour worked at the hourly rate for the pieceworker."

16. The proposed clause 15.2(a)(i) defines the new term **hourly rate for the pieceworker** as follows.

> "**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"

17. FGT agrees with the AFPA's submission that draft clause 15.2(a)(i) should be clarified to remove potential ambiguity about the application of the casual loading. While we would support the AFPA's suggested rewording as contained in their submission, we submit that perhaps even greater clarity would be gained from using the Commission's suggested wording in proposed clause 15.2(h)(iv).

18. As a result, FGT submits that draft clause 15.2(a)(i) be amended as follows.

> "**hourly rate for the pieceworker** means the minimum hourly rate for the pieceworker's classification level under the Award (including the 25% casual loading for a casual pieceworker)"

Defining the 'Uplift Term'

19. The Commission has proposed to replace the existing clause 15.2(b) and re-define the 'Uplift Term' with the new clause 15.2(d) as follows.

> "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. "

20. FGT previously submitted that to assist in providing clarity of the intent and application of the 'Uplift Term', the following definitions be added to clause 15.2(a).

> (v) The **average hourly rate of an individual pieceworker competent at the piecework task** for the payment period means the calculated value of adding all payments made to the pieceworker over the payment period using piece rates, and dividing this by the total hours worked by the pieceworker for the payment period in pieceworker tasks.
>
> (vi) The average hourly rate of all pieceworkers competent at the piecework task for the payment period means the calculated value of:
>
> - adding the average hourly rates of all individual pieceworkers competent at the piecework task for the payment period; and
> - dividing this by the number of pieceworkers competent at the piecework task for the payment period.
>
> NOTE: For the purposes of the above calculation, the average hourly earnings of any pieceworker competent at the piecework task can be no less than the hourly rate for the pieceworker as defined in clause 15.2(a)(i), as the employer is required to pay a pieceworker no less than this rate under clause 15.2(f).

21. As submitted above, we have identified that the term "payment period" should be replaced by the term already defined in Clause 16.1 of the Horticulture Award, namely "period of payment".

22. In addition, for completeness, FGT now submits that both definitions of average should be specifically included to promote the application and compliance of employers.

23. As a result, FGT now submits that to assist in providing clarity of the intent and application of the 'Uplift Term', the following definitions be added to clause 15.2(a).

> (v) The **average hourly rate of an individual pieceworker competent at the piecework task** for the period of payment means the calculated value of adding all payments made to the pieceworker during the period of payment using piece rates, and dividing this by the total hours worked by the pieceworker during the period of payment in pieceworker tasks.

(vi) The average hourly rate of all pieceworkers competent at the piecework task for the period of payment means the calculated value of either:

- adding the average hourly rates of all individual pieceworkers competent at the piecework task for the period of payment; and
- dividing this by the number of pieceworkers competent at the piecework task for the period of payment;

or

- adding all payments made to all competent pieceworkers during the period of payment using piece rates, and dividing this by the total hours worked by all competent pieceworkers during the period of payment in pieceworker tasks.

NOTE: For the purposes of the above calculation, the average hourly earnings of any pieceworker competent at the piecework task can be no less than the hourly rate for the pieceworker as defined in clause 15.2(a)(i), as the employer is required to pay a pieceworker no less than this rate under clause 15.2(f).

24. As a result, FGT now submits that draft clause 15.2(d) be amended as follows.

> "The employer must fix the piece rate at a level which **ensures that the average hourly rate of all pieceworkers competent at the piecework task for the period of payment is** at least 15% more than the hourly rate for the pieceworker. "

Operative Date

25. FGT has previously submitted that the Decision will cause a significant change to the way employers will recruit, dismiss, monitor, record, analyse, supervise, manage and remunerate their pieceworkers, if they are to comply with draft clause 15.2.

26. We submitted that the Decision will require employers to design, construct and implement comprehensive and cost-effective 'smart' systems, employ new employees or at the very least train current employees, to be able to ensure they comply with draft clause 15.2. Not to do so would make the new requirements impossible and result in employers being not compliant. To do so will take time.

27. We submitted that the development of smart systems will require employers to investigate and assess systems and technological options, implement supporting processes and infrastructure and integrate these systems with existing payroll systems or develop (or source from third parties) and install new systems and software. This will need to be undertaken in an efficient and commercially cost-effective manner, which will again take time.

28. Accordingly, FGT strongly submitted that the appropriate operative date of the new clause 15.2 is 1 July 2022, which is logical, realistic and in accordance with the 'default' position under s 166 of the Act. FGT maintains that submission.

29. The Australian Workers' Union (AWU) in its submission dated 26 November 2021 also addresses the matter of the appropriate operative date, starting by acknowledging the applicability of s 166 of the Act (at [9]) (as does the UWU at [22] of its submission).

30. The AWU contends that "any negative impacts for employers from an earlier operative date are likely to be manageable" (at [19]).

31. FGT submits that there is no support for this assertion and says, as previously submitted, that an operative date of earlier than the standard or default date (under s 166) of 1 July 2022 is not manageable for employers and hence will not be conducive to compliance.

32. The AWU also "agrees that the draft determination will make the piecework term simpler and easier to understand, reduce the regulatory burden and promote compliance. Employers and employees should not have to wait until 1 July 2022 for these outcomes to be delivered" (at [18]).

33. FGT submits that it is clear from the original submissions of the AFPA, NFF and ourselves, as well as this submission in reply, that the draft determination without amendment is not simpler and easier to understand, and hence will not yet promote compliance. Accordingly, on this basis we submit there is no realistic case to support an operative date of 1 January 2022 - which at the date of this submission, and still without a final decision being made, is just 22 days away.

34. The AWU also states in its submission that it "is concerned that if the variations do not take effect until 1 July 2022, there may be an influx of applications for approval of enterprise agreements prior to this date" (at [20]).

35. FGT has seen no evidence of any such influx since the Decision was delivered, and hence this provides no basis to support an operative date other than 1 July 2022.

36. Finally, the AWU argues in its submission that "the AWU filed its application to vary the Horticulture Award on 15 December 2020" and that "an operative date of 1 January 2022 is not unreasonable given employers have been on notice about the nature and effect of the application since late 2020" (at [25]).

37. FGT submits that there is no merit to this argument. The timing of an application is irrelevant. It is the timing of a decision and the resulting variation that is relevant and must be complied with. As stated above, a final decision is yet to be made.

38. Discussions with growers since lodging our original submission have reinforced our concern about the amount of work, time and effort that will be required on the part of employers in response to any final decision of the Commission.

39. Accordingly, FGT submits that insufficient argument has been presented to justify the Commission being satisfied that it is appropriate to specify another day other than that which would normally be required by s166 of the Act, being 1 July in the next financial year. To require an earlier operative date than 1 July 2022 would be unworkable and would seriously compromise the objective of improving compliance that the Decision aims to achieve.

DATED: 10 December 2021

Peter Cornish
Chief Executive Officer
Fruit Growers Tasmania