

Submission

Fair Work Commission

Application to vary the Horticulture Award 2021

AM2020/104

November 2021

About Growcom

Growcom is the peak representative body for the fruit, vegetable and nut growing industries in Queensland, providing a wide range of advocacy, research and industry development services. We represent the second largest and fastest growing agricultural sector in Queensland. And as a state, we deliver approximately one third of all horticultural value of production nationally.

We are the only organisation in Australia to deliver services across the entire horticulture industry to businesses and organisations of all commodities, sizes and regions, as well as to associated industries in the supply chain. We are constantly in contact with growers and other horticultural business operators. As a result, we are well aware of the outlook, expectations and practical needs of our industry.

The organisation was established in 1923 as a statutory body to represent and provide services to the fruit and vegetable growing industry. As a voluntary organisation since 2003, Growcom now has grower members throughout Queensland and across Australia, and works alongside other industry organisations, local producer associations and corporate members.

To provide services and networks to growers, Growcom has over 20 staff located in Brisbane, Bundaberg, the Sunshine Coast, Innisfail, and Toowoomba. We are a member of a number of state and national industry organisations and use these networks to promote our members' interests and to work on issues of common interest.

Background

On 15 December 2020, the Australian Workers' Union (AWU) made an application to the Fair Work Commission (FWC) to vary the Horticulture Award 2020. The application seeks to vary clause 15.2 of the Horticulture Award, which deals with pieceworker rates.

The application sought to insert a new provision providing a floor for the earnings for pieceworkers such that an employee working under a piecework agreement must be paid for each hour of work at least the minimum rate payable for the employee's classification and type of the employment. It also sought to insert a new clause to require an employer to keep a record of all hours worked by a pieceworker to ensure that the requirement to pay a pieceworker at least the minimum hourly rate is capable of being monitored and enforced.

On 3 November 2021 the Full Bench of the Fair Work Commission issued their draft determination, supporting all variations to the Award sought by the AWU.

In reaching this determination the Full Bench expressed the view that the existing pieceworker provisions in the Horticulture Award are not fit for purpose, and that they do not provide a fair and relevant minimum safety net as required by s.134 of the Act.

The Full Bench expressed their satisfaction that the insertion of a minimum wage floor with consequential time recording provisions in the piecework clause is necessary to ensure that the Horticulture Award achieves the modern awards objective. The Full Bench was further satisfied that the insertion of a minimum wage floor in clause 15.2 is necessary to ensure that the Horticulture Award achieves the minimum wages objective. Accordingly, the Full Bench decided to vary the Horticulture Award to insert a minimum wage floor with consequential time recording provisions in clause 15.2.

The Full Bench has invited parties the opportunity to make submissions in response to the proposed draft variation determination and their provisional view by Friday 26 November 2021. This submission is the Growcom response to this invitation.

Response

Growcom is of the firm view that employment practices in the Australian horticulture industry can and must improve.

Which is why, following on from Harvest Trail Inquiry and with the support of the broader industry, we sought and received the support of the Fair Work Ombudsman (FWO) to develop the Fair Farms program, to drive up compliance with workplace law through an independent third-party audited certification of fair and ethical employment practice.

We are grateful for the confidence and further support for Fair Farms received from the Australian Government Department of Agriculture, Water and the Environment.

Our people are our greatest asset, and we have a duty to provide a safe and rewarding workplace to everyone who contributes to our industry and ultimately to the wellbeing of the nation.

We represent the interests of fair and ethical employers. Those operating outside the letter and spirit of our workplace laws are doing our industry a great disservice. Our members want to see unscrupulous operators leave the industry to ensure a level playing field for all.

Our response to the draft determination by the Full Bench then should be read in this context.

Weight of evidence and language

The AWU in its application cites a number of sources and pieces of research which, to a greater or lesser extent, concern the earnings and working conditions for pieceworkers under the Horticulture Award.

From the AWU application it is unclear whether any of these pieces of research are drawing on a statistically significant and representative sample of employment arrangements involving pieceworker rates.

In our view, by far the most authoritative source among those cited in the application is the Harvest Trail Inquiry report by the FWO which involved their inspectors completing 836 investigations, involving 444 growers and 194 labour hire contractors across all states in Australia and the Northern Territory.

However, the FWO report makes no claims to have attempted, through their investigations, to capture a representative sample of employers. In fact, the report states firstly that the inquiry was focused on areas and crop sectors that are heavily reliant on manual harvesting, preparation, maintenance and processing. And secondly, that while the majority of employers involved were selected randomly, a smaller number of employers, by which we can only assume some proportion less than half, were selected on the basis of intelligence gathered from industry stakeholders, other government agencies and departments, media, community members and workplace participants.

In its report the FWO states that in more than half (465 or 55.6%) of their 836 investigations, they determined that there had been a failure to comply with Australian workplace laws. It is on this basis that the FWO stated there was “widespread non-compliance” with workplace laws in horticulture.

Critically, while the FWO did find misuse of pieceworker rates through its investigations, throughout its report it made no reference to this misuse being “widespread” as is the claim made in the AWU application. In its application the AWU is misleading in transferring language used by the FWO in relation to compliance with workplace law generally and applying it to piecework arrangements.

In addition, it is also unclear the AWU through the hearing process was any better able to substantiate this claim with new evidence or research drawing on a statistically significant and representative sample of employment arrangements involving pieceworker rates.

In its draft determination at section 4.2 ‘The Expert Evidence’ the Full Bench adopts an observation that states in part:

“In evaluating the extent to which we can rely on survey evidence that is submitted to us, we would look for an account of the nature of the survey population, the method of collecting responses, the response rate and total number, evidence that the respondents are a true random sample (or close enough) of the survey population, and testing of findings against comparable aggregates produced by the ABS or other known reliable sources.”

In our view, it is difficult to understand how the Full Bench consistent with this observation has arrived at a finding that there is “widespread non-compliance with clause 15.2 of the Horticulture Award” with sufficient confidence to warrant making the significant changes to the Award requested by the AWU.

The language used in relation to employment conditions in the Australian horticulture industry is important and unfortunately is becoming increasingly loose. Claims unsupported by evidence of “widespread” underpayment or abuse of workers must be questioned. Similar words like “rampant” and “endemic” are creeping into discourse and used interchangeably. They are inaccurate and also harmful.

At the very least, in its final determination we ask the Full Bench to review its use of language and use words that better reflect the evidence presented.

Choice and responsibility

It is the view of Growcom that the application of the draft determination decision will result in many employers no longer being able to afford to offer pieceworker rates because they can't pay hourly rates for unproductive workers, or carry the extra administrative and supervisory burden required.

Most significantly this likely result will cost individual workers within our industry opportunity and choice, who will now have far fewer employment options where they can make great money through their own hard work and initiative.

For many employers in horticulture, labour is their most significant input cost. If they can't wear these increased costs of offering pieceworker rates, then our real concern is that we'll see another exodus from horticulture of the most willing and motivated workers right in the middle of a severe labour shortage when we need them the most.

It is the view of Growcom that we in fact need more employers offering rewarding pieceworker rate work if we're going to attract more Australians to our industry, and also more workers through Pacific labour programs and the new Agriculture Visa.

We believe that by making this draft determination the Full Bench has not met the objective of the *Fair Work Act* to assist employees to balance their work and family responsibilities by providing for flexible working arrangements.

Simplicity

In its draft determination the Full Bench considered an alternative piece work clause proposed by the Australian Fresh Produce Alliance (AFPA), acknowledging that the alternate

clause would be an improvement on the current clause 15.2, but expressed the view that it was far too complex.

In accepting the draft clause proposed by the AWU and accepting its deficiencies, the Full Bench noted the draft clause is intended to make the pieceworker term simpler and easier to understand, to reduce regulatory burden, and to promote compliance.

In the name of the same objective of simplicity and reducing burden, Growcom submits that provisional clause 15.2(f) be amended to clarify that employers would only be required to review and compare the earnings (piece rate to hourly rates) over a full and complete pay period and not on an hourly basis as is currently inferred.

Calculating piecework rates

With regard defining a methodology by which piecework rates are calculated, in its draft determination the Full Bench proposes that an 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, and further defines a “pieceworker competent at the piecework task” to be a worker who has at least two weeks’ experience performing that same task.

In addition to these definitions, there needs to be greater guidance in the final determination as to how piecework rates are calculated and set.

For instance, it needs to be clarified whether a piecework rate can be set if no employees have had at least two weeks experience, and if so, how it is to be calculated.

Also, as currently drafted, the definition allows for an interpretation that each and every competent worker with two weeks’ experience should be able to earn 15% more than the applicable hourly rate. So that in effect the entire workforce has a piece rate set to the picking rate of the slowest and least productive worker. Requiring clarification then is what employee or cohort of employees are to be used a reasonable benchmark of productivity.

Transition time

The latest and best analysis of the current critical shortage of seasonal workers in Australia developed by consultancy Ernst and Young suggests that at the start of the New Year the horticulture industry could have between 11,000 and 22,000 workers fewer than required.

The power imbalance, in favour of the employee, created by this shortage is significant at present. Growcom is aware of many reports of prospective employees demanding payment in cash and refusing to complete unattractive tasks, or are else walking off the job.

In these circumstances, the impacts on employers of introducing the proposed changes to piecework provisions in the Award will be severe and include needing to retain highly unproductive employees where there is no prospect of recruiting other workers.

Growcom submits that the Full Bench should only schedule the new provisions to begin once labour supply has begun to normalise and the power between employee and employer is in better balance. While we do not expect to have sufficient workers in the country before the end of next year, we propose an implementation date of 1 July 2022 as a reasonable compromise.

Obligation to consider prevailing industry dynamics

We contend this is the second successive change the FWC has made to the Horticulture Award, against the advice of the industry, which will ultimately work against the interests of employees.

In April 2019 the FWC decided to introduce overtime provisions into the award, all in the name of "modernising" our industrial relations system by treating all industries, employers and employees exactly the same regardless of industry peculiarities, including market power and the capacity of employers to pass on higher costs of labour.

In response to a national survey delivered by Growcom, designed to capture impacts of overtime introduction, over 60 percent of the over 250 employers responding to the survey reported staff had elected to end their employment due to a reduction in their hours. Before the award changes, 91 per cent of growers paid casual workers for working more than 38 hours a week. After the award changes, only 15 per cent of growers paid casual workers to work more than 38 hours a week.

Further to its obligation, as stated in the objectives of the *Fair Work Act*, to acknowledge the special circumstances of small and medium-sized businesses, it is the view of Growcom that the FWC also has an obligation to consider the prevailing dynamics of an industry to which an Award applies and take account of the foreseeable, and potentially unintended, consequences of proposed changes to its Award.