

**APPLICATION BY THE AUSTRALIAN WORKERS' UNION
IN RESPECT OF MA000028 HORTICULTURAL AWARD**

Submission of the National Farmers' Federation

1. We refer to the decision of the Full Bench of the Fair Work Commission (**the Commission**) on 3 November 2021 (**the Decision**) in relation to the *Horticulture Award 2020* (**the Award**). The Decision concluded with a draft variation to clause 15.2 of the Award which would insert a minimum wage floor, with time recording provisions, and invited parties to make submissions and submissions-in-reply in respect of that draft variation.
2. On 26 November 2021 the Australian Workers Union (**AWU**) and the United Workers Union (**UWU**) responded to that invitation with, inter alia, submissions as to the date on which the proposed variation to clause 15.2 should take effect. This submission is made in reply.
3. As indicated previously¹, the NFF shares the AWU's and UWU's view that s. 166 of the Fair Work Act (**FWA**) establishes a presumption that the variation should not take effect until 1 July 2022 "unless the [Commission] is satisfied that it is appropriate" to set another date of effect.
4. We describe at paragraphs 25 to 34 of earlier submissions² why it would not be appropriate for the Commission to set another operative date. We reiterate those submissions.
5. However, both the UWU and the AWU contend that it would be appropriate for the new provisions shou take effect on 1 January 2022.

¹ In submissions filed 26 November 2021; see paragraph [33] in particular.

² we filed in this matter on 26 November 2021

6. In support of this contention, both the AWU and UWU invoke³ the Commission’s finding that there is presently “widespread non-compliance with clause 15.2” and widespread underpayment of pieceworkers, and that the new provisions will address those issues.
7. We note that the Commission has expressly stated that these submissions should not be treated as an opportunity to reargue those findings⁴. As such, we do not take issue with the conclusions. Nonetheless, we note that a rapid introduction of the new provisions, which does not enable growers a reasonable opportunity to adapt may, in the short term, result in greater levels of Award non-compliance. As indicated in our earlier submissions, the Decision and the new provision will mandate significant changes to the management of labour on fruit and vegetable farms. Growers will need time to adapt their workplaces and administrative systems to conform. It follows that if adequate time is not allowed, far from the new provision improving compliance levels, instances of non-compliance — i.e., with the new requirements — may become more prevalent.
8. This is a concern which militates against any early adoption of the new provisions. However, it is particularly true with respect to the Unions’ proposed start date of 01 January 2022. That date is a mere two weeks (more or less) after it may be assumed that the Commission will issue the final decision in this matter i.e., which will formalise the determination. It would also mean that the variation takes effect during or just before the peak season⁵ for many commodities/regions when many growers are working long hours focused on harvest. Finally, a commencement during the Christmas/New Years’ period is particularly problematic, given that many of the professional support services which growers will call upon to assist them to implement the change⁶ may not be available. With these factors in mind, adopting the changes from 1 January 2022 would be exceedingly difficult if not impossible for growers to achieve.
9. In short, we argue that enabling compliance is a reason for rejecting an early commencement date, for allowing a reasonable transition period before the new

³ AWU at [14] – [17]. UWU at [24].

⁴ Paragraph [587] of the Decision.

⁵ See, for example, Reardon at [6], Kelly at [7], McClintock at [7], Trewin at [6], Gaeta at [3], Distill at [7].

⁶ Such as bookkeepers, accountants, lawyers, et cetera.

provisions take effect, and as such for retaining the presumptive commencement date established by s 166(1)(a).

10. The AWU also cites the Commission’s determination that the new provisions will increase productivity on the basis that “introducing a minimum wage floor will provide [growers with] an incentive to reduce the current cohort of unproductive workers, thus increasing productivity.” The AWU notes that, in consequence, “any negative impacts for employers from an earlier operative date are likely to be manageable and not sufficient to outweigh the positive factors ...”
11. We note, however, that the Commission’s finding on this point is premised on the assumption that growers will be able to replace the unproductive cohort with productive workers. Assuming that this to be true — whether through engaging with external labour mobility programs such as the The Pacific Australia Labour Mobility scheme⁷ or implementing tools to attract a committed domestic workforce — it will take time for growers to engage with/in those processes.
12. Indeed, the Commission’s findings assume that a more productive cohort of workers is available. Given the well documented workforce shortages which the sector is experiencing as a result of closed international borders⁸ an assumption that more workers will be available in the short term is particularly problematic. We note our earlier submission addresses this point at paragraph 28.
13. As such, in our view the AWU’s submission on this point also militates against an early implementation of the new provision and supports the retention of the presumptive commencement date of 1 July 2022.
14. Finally, the AWU refers to an earlier decision of the Commission in 2019 which introduced overtime for casual provisions. The AWU claims that numerous applications to the Commission were made for enterprise agreements which sought to nullify the effect of the decision. These claims are speculative and made without citing any supporting evidence, either as to the assertions made about historical occurrences or their relevance (if any) for future conduct. The Commission should weigh the claims accordingly. However, even if the AWU’s claims are accepted, we note that they

⁷ Formerly the Seasonal Worker Program.

⁸ See paragraph 28 of our 26 November 2021 submission.

acknowledge that a number of those “applications were ultimately dismissed by the Commission because they were found to not have been genuinely agreed or did not pass the better off overall test.” In other words, the fair work system filtered out applications which were objectionable. There is no reason to conclude that it would not do so again.

15. Finally, it should be noted that the fact some growers have been on notice as to the AWU’s application is irrelevant. Knowing that the AWU has made an application — bearing in mind, again, that the AWU cites no hard evidence as to the extent of that knowledge — is different to knowing what decision the Commission will reach in relation to that application⁹ or when it will take effect. In our submission, it is not open to the Commission to conclude that growers should have started preparing for the change in December 2020 (when the AWU made its application). Indeed, in our submission it would be unreasonable to expect growers to start those preparations until a final decision is reached. As such, the AWU’s contentions on this point are unhelpful and again favour retaining the presumptive commencement date.

DATED: 10 December 2021

Ben Rogers

National Farmers Federation

⁹ Noting that the AFPA made a counter proposal.