

IN THE FAIR WORK COMMISSION

AM2020/104 – Application by the Australian Workers’ Union to vary the *Horticulture Award 2020*

Reply Submission of the NSW Farmers (Industrial) Association

1. The Full Bench of the FairWork Commission on 3 November 2021 made a decision¹ (the Decision) to insert a minimum wage floor for pieceworkers with consequential time recording and published a set of draft variations to the piecework terms in the *Horticulture Award* (the Award). Various parties have made submissions with regards to the draft variations.
2. In this reply submission, NSW Farmers (Industrial) Association (NSW Farmers) addresses a number of proposed changes to the draft variations.

Definition of competent pieceworker

3. NSW Farmers supports the description of the length of time period required to be deemed as pieceworker competent at the piecework task to be specified in work hours instead of in weeks. There are changing variables during a harvest season that cause fluctuations of daily work hours on a farm including weather conditions, stage of harvest, availability of fruits optimum for harvest. It is also not uncommon to have high turnover of harvest workers due to the nature of the labour pool, predominantly itinerant workers with high mobility. These variables mean that the period of work for each individual worker from week to week are likely to vary. Therefore, we submit that 76 hours would be a more accurate expression of the experience required for a pieceworker to be considered as competent.

The setting of piece rate

4. During the earlier proceedings, the Australian Fresh Produce Alliance (AFPA) advanced an alternative proposal to improve piecework arrangement under the Award which sets out a process for calculating the minimum piecework rate for a particular task. At paragraph 438 of the Decision, the Full Bench found that the AFPA’s proposed method of setting piece rate as “*far too complex and such complexity would be a barrier to compliance*” and rejected the alternative the proposal.

¹ [2021] FWCFB 5544.

5. The Fruit Growers Tasmania (FGT), in paragraph 32 of their submission to the draft variations, proposed to clarify how piece rate with the “Uplift Term” is to be calculated. This proposal is even more complex than the method advanced by the AFPA. The FGT proposed method requires two stages of averaging. The first averaging calculation is to be performed for each individual pieceworker. To put this in perspective, a grower with 50 workers will need to undertake 50 distinct calculations. The next step of the calculation, as proposed, is to add all these individual hourly average earnings to calculate an average for the entire cohort of pieceworkers which is subsequently used to calculate the relevant piece rate.
6. In addition, the proposed method of calculation by FGT refers to pieceworker earnings over the payment period, a figure that cannot be confirmed until the end of the pay cycle. We submit that this method of calculation is not compatible with the principle that piece rate must be set in advance, as specified in clause 12.2(h). Effectively, the proposed method by the FGT would require growers to review applicable piece rates retrospectively.
7. NSW Farmers submits that the FGT proposed method to calculate piece rate should not be adopted because it is overly complex and would excessively add to the administrative burden that is already imposed with the introduction of minimum hourly payment for pieceworkers.
8. The draft clause 15.2(d) as proposed by the Full Bench could be interpreted that all pieceworkers who are competent (those who have performed piecework task for more than at least 2 weeks) must earn at least 15% more per hour than the applicable hourly rate, consequently the productivity level of the slowest piecework determines the piece rate. There is no justification for this approach in the Decision.
9. NSW Farmers supports the amendment proposed by the National Farmers Federation (NFF) to retain the reference to “average worker” in the setting of piece rate, and therefore amend clause 15.2(d) of the draft variation as follows:

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.

Piecework record

10. The combination of draft clause 15.2(h) and 15.2(i) imply that a piecework record can only specify one piece rate and a further piecework record is required to be issued every time the piece rate changes. This would create significant administrative burden for growers considering that piece rate may change frequently on the field for each worker due to the different types of crops and varieties of crops that are picked concurrently or in close timeframe with each other. The applicable piece rate from one block of the farm to another may also vary due to density of planting, or age of trees which affect their height.
11. NSW Farmers supports the AFPA's amendments to draft clause 15.2(i) as they enable several piece rates to be set in advance for the range of piecework tasks that the workers would be assigned to, while at the same time maintaining the protections for workers whereby employers are still required to be notify workers in advance of the applicable piece rates prior to the commencement of the piecework tasks.

Operative date

12. NSW Farmers submits that there is no appropriate reason for the Commission to decide on an operative date that is earlier than 1 July 2022.
13. To achieve promotion of compliance, one of the Full Bench's stated objectives for the draft piecework clause, we submit that adequate timeframe should be afforded between finalisation of the piecework term to operative date. Industry requires time to communicate to growers the changes in detail to enable growers to assess and implement the relevant measures required to comply with the new terms. Our previous submission outlines the challenges faced by our members, small and medium growers, to meet the additional administrative and workforce management requirements of the new piecework term.