

## **FAIR WORK COMMISSION**

**Matter No:** AM2020/104

*Horticulture Award 2020*

### **SUBMISSIONS OF THE UNITED WORKERS' UNION IN REPLY REGARDING THE DRAFT DETERMINATION**

#### **A. Introduction**

1. The United Workers' Union (**UWU**) make these reply submissions regarding the draft determination<sup>1</sup> of the Fair Work Commission (**Commission**) in its decision dated 3 November 2021 (**Decision**).<sup>2</sup>
2. In these reply submissions, the UWU addresses certain submissions made by parties proposing amendments to the draft determination, including proposals for the piece rate to be fixed in accordance with an averaging mechanism, proposals regarding the operation of the minimum floor, a proposal for verbal notification of changes in the piece rate and submissions regarding the proposed operative date of the determination.

#### **B. Mechanism to set the piece rate**

3. Clause 15.2(d) of the draft determination provides that, "*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.*"<sup>3</sup>
4. Fruit Growers Tasmania, AFPA and the NFF each propose a variation to proposed clause 15.2 that would require the piece rate to be fixed in accordance with the average pick rates

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<sup>1</sup> *Horticulture Award 2020* [2021] FWCFB 5554 (Appendix D) (**Horticulture Decision**) (Ross J, VP Catanzariti & C Riordan).

<sup>2</sup> *Horticulture Award 2020* [2021] FWCFB 5554 (Appendix D) (Ross J, VP Catanzariti & C Riordan).

<sup>3</sup> *Ibid* (Appendix D).

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of pieceworkers.<sup>4</sup> In summary, the employer parties submit that an averaging mechanism is required because the current proposed variation does not provide sufficient guidance for employers on how to set piece rates<sup>5</sup> Further, the employer parties submit the proposed variation requires the piece rate to be set in accordance with the slowest competent picker.<sup>6</sup>

5. Contrary to the submissions of the employer parties, proposed clause 15.2(d) does not require that the piece rate be set so that every employee who is a “*piecemaker competent at the piecework task*” earns the 15% uplift. Rather, the clause requires that the rate be set so that a competent pieceworker is *enabled* to earn the 15% uplift.
6. Accordingly, we consider the proposed changes to be unnecessary. The clause proposed by the Commission is simple, it provides guidance as to who is a competent picker, and is consistent with the Decision. The changes proposed by the employer parties add unnecessary complexity to the clause which, as noted by the Commission, can result in a barrier to compliance.<sup>7</sup>

### **C. Comparison and reconciliation of piece rates paid against hourly rates of pay**

7. Clause 15.2(f) of the draft determination states that, “*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.*”
8. A number of employer parties have submitted that the proposed clause requires employers to conduct a separate and discrete comparison process, each and every hour of the amount paid to employees through piece rates, against the applicable minimum hourly rate of pay. It is submitted by the employer parties that each and every hour an employer is then required to reconcile those two amounts to ensure that employees earn at least the minimum hourly rate of pay per hour.<sup>8</sup> The UWU does not agree that this is what the wording of proposed clause 15.2(f) requires. However, to avoid any perceived ambiguity or uncertainty in the interpretation of the clause, the UWU would support an amendment requiring a comparison

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<sup>4</sup> Submissions of Fruit Growers Tasmania filed on 26 November 2021 (**FGT Submissions**) at [21]-[22]; Submissions of the NFF filed on 26 November 2021 (**NFF Submissions**) at [21]-[24]; Submissions of the AFPA filed on 26 November 2021 (**AFPA Submissions**) at [16].

<sup>5</sup> NFF Submissions at [18].

<sup>6</sup> AFPA Submissions at [13]; NFF Submissions at [22].

<sup>7</sup> Horticulture Decision at [438].

<sup>8</sup> See for example NFF Submissions at [4]; FGT Submissions [13]-[14]; Submissions of the NSW Farmers (Industrial) Association filed on 26 November 2021 (**NSW Farmers Submissions**) at [10].

and reconciliation of the amount paid in piece rates against the applicable minimum hourly rate of pay on a per shift or per day basis.

#### **D. Verbal changes to the piece rate**

9. The UWU does not agree to any proposed amendment regarding verbal changes to piecework rates.<sup>9</sup> The UWU submits that an employee has a right to certainty in respect of rates of pay. And therefore, a right to a written record of their rate of pay prior to commencing the piecework task. Written records are of particular importance in an industry with widespread non-compliance.<sup>10</sup>

#### **E. Operative date**

10. UWU has submitted that the Commission should exercise its discretion pursuant to section 166(2) of the *Fair Work Act (2009)* (Cth) to specify that an operative date of 1 January 2022 be adopted, as opposed to the date of 1 July 2022.
11. The UWU submits that the employer submissions<sup>11</sup> which seek an operative date later than 1 January 2022 are unpersuasive for the following reasons:
  - (a) *The operative date should be delayed for harvest periods:*<sup>12</sup> The horticulture industry contains a variety of crops that have different harvest periods throughout the year. There is no one time that the determination can come into force that will not affect the harvest period of a particular crop or grower.<sup>13</sup>

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<sup>9</sup> See AFPA Submissions at [29].

<sup>10</sup> Horticulture Decision at [429] and [560] refers to wide-spread non-compliance with the current clause 15.2 of the *Horticulture Award 2020*.

<sup>11</sup> See submissions of HW. Pogue & Co filed on 25 November 2021; submissions of NSW Cherry Growers Association filed on 26 November 2021; submissions of Citrus Australia filed on 26 November 2021; submissions of Growcom filed on 26 November 2021; submissions of Greater Shepparton City Council filed on 26 November 2021; submissions of Fruit Growers Victoria filed on 26 November 2021 (**FGV Submissions**); submissions of Blueberry Fields filed on 26 November 2021; FGT Submissions; submissions of Northern Victorian Fresh Tomato Growers Association filed on 26 November 2021 (**NVTGA Submissions**); NFF Submissions; submissions of Agribit Software filed on 26 November 2021; AFPA Submissions; NSW Farmers Submissions.

<sup>12</sup> See for example, NSW Farmers Submissions at [21]; NVTGA Submissions.

<sup>13</sup> For example, see statements of Ms Anne Reardon (**Reardon Statement**) at [6] stating peak season is from December to March or April; Statement of Mr Anthony Kelly at [7] stating that peak season is from mid to February to mid May; Statement of Mr Matthew Benham (**Benham Statement**) at [8] stating peak season is from March to August; Statement of Han Shiong Siah at [11] stating peak season is from September to November; Statement of Mr Glen Trewin (**Trewin Statement**) at [7] stating “[w]e grow, harvest and process fresh produce year-round, and our peak season runs from September to April each year.”

- (b) *The operative date should be delayed to allow time for training of supervisors:*<sup>14</sup> Employers already employ supervisors and monitor the performance of pieceworkers through employee pick rates.<sup>15</sup> Any necessary performance management changes can be implemented through existing practices.
- (c) *Employers require additional time to make the necessary administrative and record keeping changes:*<sup>16</sup> The employer is simply required to extend their hours of work record keeping to apply to pieceworkers.<sup>17</sup> Additionally, as stated earlier in these submissions, the UWU does not agree that employers are required to conduct a discrete comparison and reconciliation process for each and every hour that piecework is performed. This reduces the potential administrative burden outlined in employer submissions;
- (d) *Uncertainty regarding labour supply means the operative date should be delayed:*<sup>18</sup> It is not evident that issues in labour supply impacts on an employer's ability to implement changes as a result of the draft determination.
- (e) *Renegotiation of contracts with labour hire providers:*<sup>19</sup> As the employer, it is the responsibility of the labour hire company to ensure that it is paying the correct rates of pay to its employees. Therefore, the use of labour hire contractors should not impact upon the operative date of the determination.

12. For the reasons set out above and for the reasons also stated in our submissions of 26 November 2021, the UWU submits that 1 January 2022 is the appropriate operative date for the draft determination.

United Workers' Union

10 December 2021

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<sup>14</sup> See NFF Submissions at [31] and [32]; submissions of the Greater Shepparton City Council filed on 26 November 2021; FGV Submissions.

<sup>15</sup> Reardon Statement at [23] and [29]; Statement of Mr Jonathan Moss at [32]; Benham Statement at [9].

<sup>16</sup> See NFF Submissions at [31]; FGT Submissions at [43]; FGV Submissions; submissions of H.W. Pogue & Co filed on 26 November 2021; submissions of Blueberry fields filed on 26 November 2021; NVTGA Submissions.

<sup>17</sup> For evidence of employment of hourly workers see: Statement of Ms Christine Silverstein at [14]; Reardon Statement at [12]; Statement of Mr Reginald Brown at [15]; Statement of Mr Jonathan Moss at [25]; Benham Statement at [9]; Trewin Statement at [8] and [25].

<sup>18</sup> See NFF Submissions at [32].

<sup>19</sup> See NSW Farmers Submissions at [23].