

## FAIR WORK COMMISSION

Matter No: AM2020/104

*Horticulture Award 2020*

### SUBMISSIONS OF THE UNITED WORKERS' UNION IN RESPONSE TO THE DRAFT DETERMINATION

#### A. Introduction and overview

1. The United Workers' Union (**UWU**) supports the variation to clause 15.2 of the *Horticulture Award 2020* (**Award**) in the form proposed by the Fair Work Commission (**Commission**) in attachment D of its decision in relation to this matter, handed down on 3 November 2021.<sup>1</sup> Further, the UWU considers it is appropriate for the determination come into effect as soon as is practicable to ensure pieceworkers in the horticulture industry have the benefit of an award that meets the modern awards objective and has minimum wages for all employees.<sup>2</sup>
2. On 15 December 2020, the Australian Workers' Union (**AWU**) filed an application in the Commission to vary clause 15.2 of the Award. This application was supported by the UWU.
3. The variation sought to include in the Award, a minimum wage floor for pieceworkers and a requirement that employers keep a record of hours worked for pieceworkers.
4. On 3 November 2021, the Commission handed down a decision which determined that the introduction of a minimum wages floor, and a consequent record of hours worked requirement, was justified by work value reasons and necessary to achieve the modern awards objective (**the decision**). The Commission also expressed a provisional view that the Award should be varied in accordance with a draft determination published with the decision (**the provisional view**). The draft determination appears at Attachment D of the decision (**the draft determination**).<sup>3</sup>

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

<sup>2</sup> *Ibid* at [584].

<sup>3</sup> *Ibid* at [584] and Attachment D.

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## **B. The Provisional View**

5. The provisional view that the Award should be varied in the manner outlined in the draft determination is as follows:
  - (a) In clause 15.2:
    - i. 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;
    - ii. pieceworker means an employee being paid a piece rate;
    - iii. 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);
  - (b) The following clauses of this award do not apply to a pieceworker:
    - i. Clause 13—Ordinary hours of work and rostering arrangements;
    - ii. Clause 18.3(c)—Meal allowance; and
    - iii. Clause 21—Overtime.
  - (c) An employer may pay a full-time, part-time or casual employee a piece rate for performing a task.
  - (d) 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. NOTE: A pieceworker is paid 200% of the piece rate for work on a public holiday (see clause 27.3).
  - (e) If a pieceworker does any work in addition to the task for which they are being paid a piece rate, the pieceworker must be paid for that additional work at the hourly rate for the pieceworker.
  - (f) 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.
  - (g) Pieceworkers are paid allowances under clause 18 (other than the meal allowance) in addition to the rates payable under clauses 15.2(d), (e) and (f).
  - (h) Before a pieceworker begins a piecework task for an employer, the employer must give the pieceworker a written record signed by the employer (a piecework record) that must:
    - i. state the date and time the piecework is to commence;

- ii. describe the task for which the piece rate will be paid;
- iii. state the amount of the piece rate;
- iv. include the following statement:  
‘Under the Horticulture Award 2020 a pieceworker must be paid no less than the amount they would have received if paid for each hour worked at their hourly rate under the Award (including the 25% casual loading for a casual pieceworker).’ and
- v. state the hourly rate for the pieceworker.

NOTE: An example of the type of record required by clause 15.2(h) is at Schedule I—Piecework Record. There is no requirement to use the form of record set out in Schedule I—Piecework Record.

- (i) If an employer proposes to change the piece rate or piecework task of a pieceworker the employer must first give the pieceworker a further piecework record including the new rate or task.
- (j) The employer must keep the following as employee records:
  - i. a copy of each piecework record given to the pieceworker; and
  - ii. a record of all hours worked by the pieceworker and the applicable piece rate at the time those hours were worked.
- (k) For the purposes of the NES the base rate of pay and full rate of pay of a pieceworker are the same and are worked out as follows:
  - (l) By dividing the total amount earned by the pieceworker during the relevant period by the total hours worked by the pieceworker during the relevant period.
  - (m) If the pieceworker was continuously employed by the employer for a period of 12 months or more immediately before the rate of pay is to be worked out—the relevant period is the 12 months before the rate is to be worked out. If the pieceworker was continuously employed by the employer for a period of less than 12 months immediately before the rate of pay is to be worked out—the relevant period is that period.

6. The UWU supports the provisional view proposed by the Commission.

**C. BASIS FOR SUPPORTING THE PROVISIONAL VIEW**

7. The proposed variation contains six main elements:

- (a) a definition of competent worker;

- (b) an explanation of how the pieceworker rate is set;
- (c) the introduction of the minimum wage floor;
- (d) confirmation that non-piecework tasks are paid an hourly rate;
- (e) the requirement to make and keep a piecework record; and
- (f) the introduction of the hours of work obligation.

#### *Definition of competent worker*

8. UWU supports the Commission’s provisional view that an employee should be deemed competent where they have “*at least two weeks experience performing the task*”. While it is possible that an employee could be competent prior to having two weeks experience, given the variety in the types of piecework tasks that employees can be required to perform, the UWU accepts that two weeks strikes an appropriate balance between ensuring employees are remunerated appropriately for their competency, while preventing employers from having to include workers who have not yet reached competency in their calculations as to the appropriate pieceworker rate.

#### *Setting the pieceworker rate*

9. The draft determination removes the requirement that a piecework arrangement be one struck by agreement between an employer and employee. This is consistent with the decision.

#### *Minimum wage floor*

10. The UWU supports a minimum wage floor being introduced in the form proposed by clause 15.2(f) of the draft determination.
11. The Commission found that the evidence, “...presents a picture of significant underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate.”<sup>4</sup> This significant underpayment of pieceworkers occurs despite the employees performing the exact same work as hourly paid employees who are entitled to at least the minimum hourly rate of pay set out in the Award.<sup>5</sup>

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<sup>4</sup> Ibid at [362.5].

<sup>5</sup> Ibid at [547].

12. Proposed clause 15.2(f) of the draft determination ensures that, notwithstanding whether the employee has reached competency resulting in them being entitled to the 15% uplift, an employee will not receive less than the equivalent minimum hour rate for their hours worked. The form of this proposed variation gives proper effect to the decision.

#### *Non piecework tasks*

13. The UWU supports the introduction of clause 15.2(e) of the draft determination. The decision of Justice Rangiah in *Fair Work Ombudsman v Hu & Ors (No 2)*<sup>6</sup> made clear that where a pieceworker is engaged in tasks that are separate to the piecework tasks, the employee should be paid hourly rates for that work.<sup>7</sup> Subclause 15.2(e) sets this position out clearly in the Award so that employers and employees can clearly understand when a pieceworker rate should and should not be applied.

#### *The pieceworker record*

14. Clause 15.2 of the Award sets out that the employer must provide the employee with a copy of the “*piecework agreement*” and keep it as a time and wages record. However, the clause does not adequately specify what information is required to be included in the piecework agreement.
15. Proposed clause 15.2(h) of the draft determination expressly states what information must be included in the pieceworker record that is provided to the employee. The required information includes the date and time the piecework commences, a description of the piecework task and what the piece rate is.
16. Importantly, the clause also requires an employer to include on the piecework record the hourly rate the employee is entitled to and a statement confirming they cannot be paid less than that hourly rate.
17. Being in possession of this information will ensure pieceworkers better understand their entitlements which in turn will better enable them to enforce their rights or seek assistance in enforcing their rights if an issue arises.
18. Although there is the potential for non-compliance, an obligation to provide employees with a record of their pay rates and arrangements is important as it makes clear that pieceworkers

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<sup>6</sup> [2021] FCA 1034 (Rangiah J).

<sup>7</sup> *Ibid* at [77].

are entitled to know their rights. Employees having a right to be provided with this information will also assist in enforcement as it provides another enforceable entitlement that can be used to prevent rogue growers from taking advantage of workers who are more vulnerable to exploitation.<sup>8</sup>

#### *Hours of work record*

19. UWU supports the inclusion of proposed clause 15.2(j)(ii) as set out in the draft determination. As noted by the Commission, the lack of record keeping obligations in relation to pieceworkers makes enforcement problematic.<sup>9</sup> The requirement for employers to keep the hour of work record will assist employees in knowing what they are entitled to be paid and will assist in enforcement of that pay entitlement.
20. Further, in order to meet the minimum wage floor obligation, it is necessary for employers to know what hours of work an employee has worked. Without this record an employer would not be able to determine whether an employee is receiving a least the minimum hourly rate equivalent. It is appropriate this obligation – which is necessary anyway – be set out in the Award. This will assist other bodies such as unions and the Fair Work Ombudsman in enforcement of employees correct rate of pay.

#### *Summary*

21. The draft determination is a proper and workable expression of the decision. Importantly, the clause sets out clearer obligations for employers. Clearer obligations enable better enforcement which in turn will result in non-compliant employers having to change their practices. The likely consequence will be a more equal and fair playing field for all employers paying piecework rates in the horticulture industry.

#### **D. Operative Date**

22. The Commission determined that the introduction of the minimum wages floor was a variation of the modern award minimum wages and was justified by work value reasons.<sup>10</sup> Section 166(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) provides that a determination that varies modern award minimum wages comes into operation on 1 July in the next financial

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<sup>8</sup> Horticulture Decision at [362.3].

<sup>9</sup> Ibid at [460] noting *Fair Work Ombudsman v Seasonal Farm Services* [2017] FCCA 1020 at [11] (Vasta J).

<sup>10</sup> Horticulture Decision at [540] and [547].

year after it is made. However, section 166(2) of the FW Act provides that the Commission can specify a different operative date where it is satisfied that it is appropriate to do so.

23. The Award as it stands does not prescribe award minimum wages for pieceworkers.<sup>11</sup> However, workers doing the same work as pieceworkers, but who are paid on a time basis, are entitled to receive the minimum rate of pay that the Commission has determined is appropriate for the work they are performing.<sup>12</sup>
24. To prevent this ongoing injustice from continuing to occur, the variation should come into effect as soon as is practicable and it is appropriate, in the circumstances, that it occur earlier than 1 July 2022. Under the Award, pieceworkers are currently working without the protection of a minimum wage. This circumstance has created significant underpayment of workers and should not be left in operation until 1 July 2022.<sup>13</sup>
25. Additionally, the Commission held that the introduction of the minimum wages floor, and consequently the record of hours of work, was necessary to meet the modern awards objective.<sup>14</sup>
26. The modern awards objective, along with the NES, is what requires the Commission to ensure modern awards “...provide a fair and relevant minimum safety net of terms and conditions...”.<sup>15</sup> If the variation does not take effect until 1 July 2022, it would result in a further seven months of employees being subject to a modern award that does not meet the modern awards objective. It would mean a further seven months of pieceworkers being forced to work without a fair and relevant minimum safety net of terms and conditions.
27. Based on the need to ensure pieceworkers have access to a minimum wage and to a modern award that provides a minimum safety net for employees, it is appropriate for the Commission to declare that the variation should come into effect as soon as is practicable. The UWU submits that an appropriate date for this to occur is 1 January 2022.

UNITED WORKERS' UNION

26 November 2021

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<sup>11</sup> Ibid at [29].

<sup>12</sup> Ibid at [544] and [547].

<sup>13</sup> Ibid at [362.5].

<sup>14</sup> Ibid at [537].

<sup>15</sup> *Fair Work Bill 2008 (Cth)* (Explanatory Memorandum) [46].