



# DECISION

*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

## Horticulture Award 2020

(AM2020/104)

Agricultural industry

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT CATANZARITI  
COMMISSIONER RIORDAN

MELBOURNE, 3 NOVEMBER 2021

*Horticulture Award 2020 – application to vary an award – Pieceworker rates –minimum hourly rate – provisional view.*

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## ABBREVIATIONS

Act	<i>Fair Work Act 2009 (Cth)</i>
AFPA	Australian Fresh Produce Alliance
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AWR	Annual Wage Review
AWU	Australian Workers' Union
Commission	Fair Work Commission
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
Horticulture Award	<i>Horticulture Award 2020 (MA000028)</i>
NES	National Employment Standards
NFF	National Farmers' Federation
<i>Penalty Rates Decision</i>	<i>4 Yearly Review of Modern Awards - Penalty Rates [2017]</i> FWCFB 1001
PLS	Pacific Labour Scheme
Regulations	<i>Fair Work Regulations 2009 (Cth)</i>
SWP	Seasonal Worker Program
The Employer parties	Ai Group, AFPA, NFF
The Union parties	AWU, UWU

UWU	United Workers Union
WHM	Working Holiday Maker

## 1. BACKGROUND

[1] On 15 December 2020, the Australian Workers' Union (AWU) made an [application](#) to vary the *Horticulture Award 2020* (the Horticulture Award or the Award)<sup>1</sup> (the Application). The Application was published on a separate webpage on the Commission's website and subscribers to the Horticulture Award were notified of the Application.

[2] The Application seeks to vary clause 15.2 of the Horticulture Award, which deals with pieceworker rates.

[3] Clause 15.2(a) permits an employer and employee to enter into an agreement for the employee to be paid a piecework rate. Clause 15.2(b) provides that the piecework rate fixed by agreement must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate. It is convenient to refer to this provision as the 'Uplift Term'. Clause 15.2(i) provides that nothing in the Horticulture Award guarantees that an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate in the Award as the employee's earnings are contingent on their productivity.

[4] The Application seeks to vary clause 15.2 by:

- Deleting the existing clause 15.2(i) and insert the following:

'15.2(i) A full-time, part-time or casual employee working under a piecework agreement must be paid for each hour of work performed at least the minimum rate payable for the employee's classification and type of employment under this award. The minimum rate payable includes the casual loading prescribed in clause 11.3(a)(ii) for a casual employee.'

- Inserting the following as a new clause 15.2(k):

'15.2(k) The employer must keep a record of all hours worked by a pieceworker as a time and wages record.'

[5] The effect of the proposed variation is to:

- Delete the current clause 15.2(i) and replace it with 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.
- Insert a new clause 15.2(k) 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.

[6] The following parties filed submissions during the proceeding:

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<sup>1</sup> Fair Work Commission, *Horticulture Award 2020*, MA000028.

*Union Parties*

- [AWU](#) (19 March 2021)
- [AWU in Reply](#) (2 July 2021)
- [AWU Closing Submission](#) (26 July 2021)
- [AWU Aide Memoire](#) (29 July 2021)
- [UWU](#) (19 March 2021)
- [UWU in Reply](#) (2 July 2021)
- [UWU Closing Submission](#) (26 July 2021)
- [UWU Aide Memoire](#) (29 July 2021)

*State Governments*

- [Queensland Government](#) (27 May 2021)
- [Victorian Government](#) (11 April 2021)
- [Western Australian Government](#) (25 May 2021)

*Other organisations*

- [Australian Council of Social Service](#) (30 March 2021)
- [Uniting Church in Australia](#) (10 June 2021)
- [88 Days and Counting](#) (11 June 2021)
- [88 Days and Counting Closing Submission](#) (26 July 2021)

*Employer Associations*

- Australian Fresh Produce Alliance ([AFPA](#)) (11 June 2021)
- [AFPA Closing Submission](#) (26 July 2021)
- [AFPA Aide Memoire](#) (29 July 2021)
- [AFPA Response to Questions in Statement \[2021\] FWCFB 4584](#) (30 July 2021)
- National Farmers' Federation ([NFF](#)) (11 June 2021)
- [NFF Closing Submission](#) (26 July 2021)
- [NFF Aide Memoire](#) (29 July 2021)
- [NFF Submission on Evidentiary Weight](#) (29 July 2021)
- Australian Industry Group ([Ai Group](#)) (2 June 2021)
- [Ai Group Aide Memoire](#) (29 July 2021)
- [Fruit Growers Tasmania](#) (28 May 2021)

*Individual Businesses*

- [Payne's Farm Contracting Pty Ltd](#) (21 May 2021)
- [Lucaston Park Orchards](#) (10 June 2021)

[7] A summary of the submissions<sup>2</sup> is set out in the [Background Paper](#) published on 26 July 2021. We have taken all of the submissions into account, but, save for our consideration of the principal arguments advanced by the parties set out below, we do not restate the submissions in our decision.

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<sup>2</sup> Excluding closing submissions, aide memoires and submissions in response to Statement [\[2021\] FWCFB 4584](#).

[8] The Commission published several Information Notes and a Research Reference List during the course of the proceedings:

- [Information Note – Piecework](#)
- [Information Note – Agriculture, forestry and fishing](#)
- [Information Note – Comparison of location data – NFF Survey and ABARES](#)
- [Information Note – Piece rate data – Anthony Kelly and Brent McClintock](#)
- [Research reference list](#)

[9] We refer to some of this material later.

[10] The list of the exhibits in this matter is attached at **Attachment A**.

[11] The hearings of evidence took place on 13, 15, 16, 20 and 30 July 2021. Transcripts of proceedings are available here:

- [Tuesday, 13 July 2021](#)
- [Thursday, 15 July 2021](#)
- [Friday, 16 July 2021](#)
- [Tuesday, 20 July 2021](#)
- [Friday, 30 July 2021](#)

[12] We turn first to the legislative framework before dealing with some general contextual matters.

## 2. THE LEGISLATIVE FRAMEWORK

[13] The following summary of the legislative framework relevant to our consideration of the Application is largely uncontentious; the only contentious issue concerns whether the Application is to be characterised as seeking to vary modern award minimum wages. We deal with that matter at the end of this section.<sup>3</sup>

[14] Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.<sup>4</sup>

[15] Under s.157(1) of the *Fair Work Act 2009* (Cth) (the Act), the Commission may only make the variation sought by the AWU if satisfied that the variation is ‘necessary to achieve the modern awards objective’. The ‘modern awards objective’ is defined in s.134(1) as “provid[ing] a fair and relevant minimum safety net of terms and conditions”, taking into account the matters at s.134(1)(a) to (h) (the s.134 considerations).

[16] Section 138 of the Act emphasises the importance of the modern awards objective:

‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[17] There is a distinction between what is ‘necessary’ and what is merely ‘desirable’. Necessary means that which ‘must be done’; ‘that which is desirable does not carry the same imperative for action.’<sup>5</sup>

[18] Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.<sup>6</sup> What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence.<sup>7</sup>

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<sup>3</sup> The material set out in this section was included in the Background Paper and no party contested any of the propositions in response to the legislative framework: See Australian Fresh Produce Alliance, ‘AFPA’s aide memoire’, Submission in *Horticulture Award 2020*, AM2020/104, 29 July 2021 at [2]–[3]; Australian Workers’ Union, ‘Aide Memoire of Australian Workers’ Union’, Submission in *Horticulture Award 2020*, AM2020/104, 29 July 2021 at [6]–[7]; United Workers Union, ‘United Workers Union: Aide Memoire’, Submission in *Horticulture Award 2020*, AM2020/104, 29 July 2021 at [3], Q2, Q3; Australian Industry Group, ‘Ai Group Aide Memoire’, Submission in *Horticulture Award 2020*, AM2020/104, 29 July 2021 at [5]–[6]; National Farmers’ Federation, ‘NFF’s Aide Memoire’, Submission in *Horticulture Award 2020*, AM2020/104, 29 July 2021 at [4]–[7].

<sup>4</sup> *Re Shop, Distributive and Allied Employees Association* (2011) 211 IR 462 at [24] (Lawler VP, Watson SDP and Hampton C), cited in *4 yearly review of modern awards – Penalty Rates* [2017] FWCFCB 1001 at [269] (‘*Penalty Rates Decision*’).

<sup>5</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 at [46].

<sup>6</sup> *Penalty Rates Decision* at [136], citing *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 at [46].

<sup>7</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[19] Further, the matters which may be taken into account are not confined to the considerations in s.134. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:<sup>8</sup>

‘What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a “fair and relevant minimum safety net of terms and conditions”, they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the” Fair Work Act.’<sup>9</sup>

[20] In *4 Yearly Review of Modern Awards – Penalty Rates*<sup>10</sup> (*Penalty Rates Decision*) the Full Bench summarised the general propositions applying to the Commission’s task in the four-yearly review of modern awards, as follows:

‘1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);

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<sup>8</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

<sup>9</sup> *Ibid* at [48], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

<sup>10</sup> *Penalty Rates Decision* at [269].



- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'<sup>11</sup>

[21] The above observations are apposite to the Commission's consideration of the Application.

[22] Section 578 of the Act is also relevant, it provides:

'In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

[23] Additional considerations arise when the Commission is setting, varying or revoking modern award minimum wages. Section 157(2) of the Act provides that the Commission may make a determination varying modern award minimum wages if satisfied that the variation is justified by work value reasons and making the determination outside of the system of annual wage reviews is necessary to achieve the modern awards objective. If the Commission is setting, varying or revoking modern award minimum wages, the minimum wages objective set out in s.284 of the Act also applies.

[24] The meaning of 'modern award minimum wages' is set out in s.284(3):

*'Meaning of modern award minimum wages*

- (3) Modern award minimum wages are the rates of minimum wages in modern awards, including:
  - (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
  - (b) casual loadings; and
  - (c) piece rates.'

[25] Section 284(4) deals with the meaning of setting and varying modern award minimum wages:

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<sup>11</sup> Ibid at [269].

*‘Meaning of **setting** and **varying** modern award minimum wages*

- (4) **Setting** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. **Varying** modern award minimum wages is varying the current rate of one or more modern award minimum wages.’

[26] Whether or not the Application seeks to set or vary modern award minimum wages is contested.

[27] The AWU, supported by the UWU, submits that s.157(2) and the minimum wages objective are *not* applicable because the Application does not seek to alter the rates of minimum wages prescribed in the Horticulture Award, nor does it seek to alter the level by reference to which any piecework rate is required to be set in clause 15.2(b).

[28] The AFPA and others submit that the proposed variation *does* seek to vary modern award minimum wages.

[29] We agree with the submissions of the AFPA; that at present the Horticulture Award does not prescribe a minimum wage for all pieceworkers. The Uplift Term only sets a minimum wage for the ‘average competent employee’. The Application proposes that a minimum be set for *all* pieceworkers; the fact that the Application does so by reference to the existing minimum wages in the Horticulture Award is not to the point. The Application plainly seeks to set the minimum wage applicable to a particular category of employees (pieceworkers). The Application enlivens ss.157(2) and 284. We consider these matters later in section [6.3].

[30] We now turn to consider some general contextual matters.

### 3. GENERAL CONTEXTUAL MATTERS

#### 3.1 Horticulture Industry

[31] The Horticulture Award covers, in essence, the ‘the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise.’<sup>12</sup> Horticultural crops are defined in clause 2 of the Award to include:

‘all vegetables, fruits, grains, seeds, hops, nuts, fungi, olives, flowers, or other specialised crops unless they are specifically named as a broadacre field crop in the *Pastoral Award 2020*.’

[32] The Horticulture Award does *not* cover the wine industry, silviculture and afforestation, sugar farming, cotton growing or harvesting and plant nurseries.<sup>13</sup>

[33] In the horticulture industry, crop growth is seasonal and each crop has its own distinct picking season.<sup>14</sup> The crop yield is lower at the beginning of the season, then ramps up during the middle of the season and tapers off in the late portion of the picking season.<sup>15</sup>

[34] The window of time during which produce is at its optimal ripeness or size varies by crop,<sup>16</sup> and must be harvested during this window of optimum size or ripeness for the grower to be able to sell the produce as first-grade fresh produce. Over-ripe items can only be sold as lower-grade or outgrade produce (e.g. fruit for freezing, jamming or juicing). The price of this lower-grade or outgrade produce is much lower than first-grade produce.<sup>17</sup>

[35] Due to the seasonality and picking windows, the size of the workforce at a particular site can vary significantly throughout the season. The demand for picking labour increases as the picking season progresses, peaks and then tapers off reflecting changes in crop yield.<sup>18</sup>

[36] Work across the horticulture industry is labour intensive and predominantly seasonal.<sup>19</sup>

[37] The workforce size and composition varies substantially over the course of the year and also varies from region to region.<sup>20</sup>

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<sup>12</sup> Fair Work Commission, *Horticulture Award 2020*, MA000028, 27 September 2021, cl. 4.2(a) (*‘Horticulture Award’*). Note the Award also covers earing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at cl. 4.2(a).

<sup>13</sup> *Horticulture Award*, cl 4.3.

<sup>14</sup> Exhibit AFPA 2 at [12].

<sup>15</sup> *Ibid* at [21].

<sup>16</sup> *Ibid* at [13]–[14].

<sup>17</sup> *Ibid* at [15].

<sup>18</sup> *Ibid* at [21].

<sup>19</sup> *Ibid* at [11].

<sup>20</sup> Transcript of Proceedings, *Horticulture Award 2020* (Fair Work Commission, AM2020/104, Ross J, 15 July 2021) at PN1159–60 (cross-examination of Dr Underhill) (*‘Transcript, 15 July 2021’*); Department of Agriculture, Water and the Environment, *Labour use in Australian agriculture* (Research Report 20.20, December 2020) at CB515–6.

[38] Horticulture farms tend to use relatively large amounts of casual and contract labour at key times of the year and the incidence of short term (seasonal) and casual employment is high, about 30% of the industry is employed on a casual basis and 38–47% is employed on a contract basis.<sup>21</sup>

[39] The Australian horticulture workforce is comprised of local workers and temporary migrant workers. Temporary migrant workers comprise of the following cohorts:<sup>22</sup>

- working holiday makers (WHMs), being the holders of subclass 417 and 462 visas;
- temporary workers from the Pacific Islands (Pacific Islander Workers), working in Australia under the Seasonal Worker Program (SWP) and the Pacific Labour Scheme (PLS);<sup>23</sup>
- international students; and
- undocumented migrants (being non-citizens without a valid visa, such as visa overstayers, and valid visa holders working in breach of visa conditions).

[40] The best estimate of the total horticulture workforce for 2019 is between 120,000 to 140,000.<sup>24</sup> These figures capture employees in the industry regardless of the duration of their employment and the number of persons employed at any one time varies significantly from month to month.<sup>25</sup> Seasonal labour demand increases significantly during November to March, a period during which many horticulture crops are harvested.<sup>26</sup>

[41] Of the total horticulture workforce:

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<sup>21</sup> See Exhibit UWU 7 at [9], citing Australian Bureau of Agricultural and Resource Economics and Sciences, *Labour use in Australian agriculture, 2018-19* (Web page, 13 January 2021) <<https://www.agriculture.gov.au/abares/research-topics/labour>>.

<sup>22</sup> Exhibit UWU 7 at [10], [13]; Transcript of Proceedings, *Horticulture Award 2020* (AM2020/104, Ross J, 13 July 2021) at PN666–83 (cross-examination of Dr Howe) ('Transcript, 13 July 2021'); Transcript, 15 July 2021 at PN1134–9 (cross-examination of Dr Underhill).

<sup>23</sup> Dr Howe confirmed that the SWP is 'specifically calibrated to seasonal work in the horticulture industry' and that 'everyone who is participating in that scheme is working in the labour force that is the subject of this proceeding.' The PLS 'is a broader scheme for participation of Pacific Islanders in the labour force in Australia' and 'covers a range of different industries, but it includes ... agriculture and horticulture': See Transcript, 13 July 2021 at PN674–677 (cross-examination of Dr Howe).

<sup>24</sup> ABARES gives a figure of 119,000 for February 2019 and 130,000 for the 2018–2019 year: Exhibit UWU 7 at [8]; Transcript, 15 July 2021 at PN1153–56 (cross-examination of Dr Underhill); Transcript, 13 July 2021 at PN697–9 (cross-examination of Dr Howe). A Unions NSW report gives a figure of 142,000: Exhibit AWU 15 at 4, CB294; Transcript, 15 July 2021 at PN1190–2 (cross-examination of Dr Underhill). Dr Howe used the ABARES estimate of 130,000: Transcript, 13 July 2021 at PN697–99 (cross-examination of Dr Howe). Dr Underhill did not disagree with an estimate of 120,000 to 140,000 and agreed that the number is at least 119,000: Transcript, 15 July 2021 at PN1193–203, PN1230 (cross-examination of Dr Underhill).

<sup>25</sup> Transcript, 15 July 2021 at PN1158 (cross-examination of Dr Underhill).

<sup>26</sup> Department of Agriculture, Water and the Environment, *Labour use in Australian agriculture* (Research Report 20.20, December 2020) at 4, CB513.

- about 30,000 to 40,000 (about 21–33%) are WHMs;<sup>27</sup>
- about 12,200 (about 9–10%) are Pacific Islander Workers under the SWP;<sup>28</sup>
- an unknown but substantial number are Pacific Islander Workers under the PLS;<sup>29</sup>
- an unknown number are international students;<sup>30</sup>
- an unknown number, estimated to be in the thousands, are undocumented migrants;<sup>31</sup> and
- about 47% are local workers.<sup>32</sup>

[42] So, broadly speaking, temporary migrant workers constitute just over half of the total horticulture workforce. Temporary migrant workers constitute a greater proportion of the seasonal harvesting workforce. This is particularly relevant for present purposes because workers engaged during harvesting are more likely to be remunerated by pieceworker rates. The *Labour use in Australian agriculture: Research Report 20.20* by the Department of Agriculture, Water and the Environment notes:

‘Workers from overseas were a significant source of seasonal labour on horticulture farms throughout 2018-19 (around 50,000 workers from May to January), and were particularly important in February (around 63,000 workers), March (59,000 workers) and April (56,000) workers. Employment of Australian seasonal workers (locals and those from other regions) on horticulture farms ranged from 27,000 workers in October 2018 to 56,000 workers in February 2019.’<sup>33</sup>

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<sup>27</sup> The National Agricultural Labour Advisory Committee estimated that 30,000–35,000 WHMs worked in agriculture in 2018–19: See National Agricultural Labour Advisory Committee, *National Agriculture Workforce Strategy: Learning to excel* (Report, December 2020) at CB1514; Dr Underhill initially said that this figure seemed low but later accepted that she was applying an obsolete multiplier of 95 per cent instead of 80 per cent to determine the percentage of WHMs with a second-year visa that undertook horticultural work, and later proffered a total estimate of at least 40,000 WHMs: Transcript, 15 July 2021 at PN1207–32 (cross-examination of Dr Underhill). Dr Howe proffered a figure of about 36,000 in agriculture, but accepted that only a proportion of this number worked in horticulture: Exhibit UWU 7 at [12]; Transcript, 13 July 2021 at PN690–4.

<sup>28</sup> Figure provided by the National Agricultural Labour Advisory Committee, see National Agricultural Labour Advisory Committee, *National Agriculture Workforce Strategy: Learning to excel* (Report, December 2020) at CB1514; Transcript, 13 July 2021 at PN717 (cross-examination of Dr Howe); Transcript, 15 July 2021 at PN1234–6 (cross-examination of Dr Underhill).

<sup>29</sup> Transcript, 13 July 2021 at PN719 (cross-examination of Dr Howe); Transcript, 15 July 2021 at PN1238–40 (cross-examination of Dr Underhill).

<sup>30</sup> Transcript, 15 July 2021 at PN1241–3 (cross-examination Dr Underhill).

<sup>31</sup> Ibid at PN1184–1189 (cross-examination of Dr Underhill); Transcript, 13 July 2021 at PN687, PN704 (cross-examination of Dr Howe).

<sup>32</sup> ABARES gives figures of 63,000 migrants workers and 56,000 local workers in horticulture in February 2019, with local workers therefore making up about 47 per cent of the total of 119,000 workers: see Department of Agriculture, Water and the Environment, *Labour use in Australian agriculture: Research Report 20.20* (Research Report 20.20, December 2020) at 4, CB516.

<sup>33</sup> Department of Agriculture, Water and the Environment, *Labour use in Australian agriculture* (Research Report 20.20, December 2020) at 4, CB516.

[43] Temporary migrant workers are generally more vulnerable to exploitation than local workers; but, as Campbell (2019) notes:

‘Because of the fundamental disparity of power between employers and employees, exacerbated by geographical isolation, the limited rights of casual status and the relative absence in horticulture of countervailing influences from trade unions and official enforcement bodies, all harvest workers can be seen as disempowered and dependent on their employer, at least to some extent.’<sup>34</sup>

[44] Similarly, Underhill and Rimmer (2015) note:<sup>35</sup>

‘Our findings suggest that all Australian horticulture workers are vulnerable but there are differences in degree which are consistent with various dimensions of layering’.

[45] Campbell also observes that ‘it is possible to observe gradations of vulnerability’;<sup>36</sup> Underhill and Rimmer (2015) make a similar point.

[46] Undocumented workers are particularly vulnerable, as Campbell notes:

‘Undocumented workers are vulnerable to detention and deportation if discovered, and this in turn generates heightened dependence, especially if the employer threatens to report the worker to immigration authorities.’<sup>37</sup>

[47] Within the cohort of temporary migrant workers, WHMs are the second most vulnerable cohort (after undocumented migrants) due to the absence of regulation and the pressure to fulfil the requirement of working 88 days in designated sectors (most notably agriculture) to obtain their second-year visa. In contrast, Pacific Islander Workers are generally less vulnerable because the schemes under which they are brought into Australia are subject to more regulation.<sup>38</sup>

[48] We accept that the characteristics of the horticulture workforce render it vulnerable to exploitation, emphasising the need for the Horticulture Award to be simple and easy to understand.

[49] There was some debate in the proceedings regarding the future composition of the horticulture workforce given the COVID-19 pandemic and a proposed seasonal agriculture visa. In respect of the proposed agriculture visa, the AFPA tendered a statement by Ms Elizabeth Tan<sup>39</sup> which attached the results of an online search for any relevant media releases, media interviews, media articles or Hansard regarding the conditions of the Federal

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<sup>34</sup> Exhibit AWU 30, 53.

<sup>35</sup> Elsa Underhill and Malcolm Rimmer, ‘Layered vulnerability: Temporary migrants in Australian horticulture’ (2015) 58(5) *Journal of Industrial Relations* 1 at 15, CB2221.

<sup>36</sup> Exhibit AWU 30 at 53.

<sup>37</sup> Ibid at 57.

<sup>38</sup> Transcript, 13 July 2021 at PN722–44; PN981–3 (cross-examination of Dr Howe). Note that the approval process requires the employer, among other things, to submit to audits of accommodation, pay and employment conditions: See Exhibit AFPA 2 at [25]; Transcript, 13 July 2021 at PN739–43 (cross-examination of Dr Howe).

<sup>39</sup> Exhibit AFPA 5.

Government's proposed seasonal agriculture visa and whether it would mirror the existing seasonal worker program, and any relevant announcements made by the Federal Government in relation to the proposed visa.

[50] Attached to Ms Tan's statement are a series of media releases, news articles and transcripts of media interviews with Mr David Littleproud, the Member for Agriculture and Northern Australia, and a Transcript from the Joint Standing Committee on Migration on 25 June 2021 and the Senate Select Committee on Temporary Migration on 30 June 2021. Additional material is attached to the statement of Ms Lyndal Ablett.<sup>40</sup>

[51] The material tendered discloses considerable uncertainty as to both the final form of any agriculture visa and the timeframe to implement the proposal.

[52] The material attached to Ms Tan's statement shows that in his evidence before the Joint Standing Committee on Migration on 25 June 2021, Mr Andrew Kefford, PSM, Deputy Secretary, Immigration and Settlement Services, Department of Home Affairs, said in respect of the proposed seasonal agriculture visa, that 'the broad policy intention has been announced along with the need now for us to do the work that we're doing with our colleagues inside the government to do the detailed program design that sits around that.'<sup>41</sup>

[53] Later, on 30 June 2021 before the same Senate Select Committee, Mr Michael Willard, First Assistant Secretary, Immigration Programs, Department of Home Affairs said that 'the government is working through the details of the ag visa' and that 'there are no further details to provide at this stage.'<sup>42</sup> Mr Willard also said 'we have some work to do in terms of design and implementation.'<sup>43</sup>

[54] It has been a long-standing practice of the Commission and its predecessors to determine matters before it on the basis of the existing legislative framework and not otherwise. In this context, we note that the Expert Panel constituted to determine the *Annual Wage Review* has, on a number of occasions, declined to take prospective legislative change into account. For example, in the *2013-14 Annual Wage Review* decision, the Expert Panel said:

'Implicit in the submissions of the Australian Government and ACCI is that the Panel should award a lower increase than it otherwise would on account of an asserted improvement in living standards consequent upon the abolition of the carbon price. In essence, the Panel is being invited to speculate on the outcome of an uncertain political process. We reject these submissions. The possibility of legislative change, in the event that the CTR Bill becomes law, is irrelevant to our consideration of this issue. It has been the longstanding practice of the Commission and its predecessors to determine the matters before it on basis of the existing legislative framework and not otherwise.'<sup>44</sup>

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<sup>40</sup> Exhibit UWU 9.

<sup>41</sup> Exhibit AFPA 5, Attachment ET-8 at 33; Exhibit AFPA 5 at 117.

<sup>42</sup> Exhibit AFPA 5, Attachment ET-4 at 1; Exhibit AFPA 5 at 25.

<sup>43</sup> Exhibit AFPA 5, Attachment ET-4 at 2; Exhibit AFPA 5 at 26.

<sup>44</sup> *Annual Wage Review 2013-14* [2014] FWCFB 3500 [229]. See also *Annual Wage Review 2016-17* [2017] FWCFB 3500 [414]; *Annual Wage Review 2017-18* [2021] FWCFB 3500 [292]; *Annual Wage Review 2018-19* [2019] FWCFB 3500 [223]; *Annual Wage Review 2020-21* [2021] FWCFB 3500 [63].

[55] The High Court took a similar approach in *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd*,<sup>45</sup> in which Starke J said:

‘Courts of law ... can only act upon the law as it is, and have no right to, and cannot, speculate upon alterations to the law that may be made in the future.’<sup>46</sup>

[56] It is not in dispute that it is difficult to predict how long the pandemic-related travel restrictions will continue; and we make no finding to this effect. We also find that since the onset of the COVID-19 pandemic the numbers of WHMs have dropped sharply.<sup>47</sup>

[57] The AFPA goes further and submits that:

‘To be clear, AFPA is not asking the Commission to find that the agri-visa *will* be introduced, let alone that it will have particular features. Rather, it is asking the Commission to find that “there is no reason to expect WHM numbers to return to pre-pandemic levels in the near future, or at all”.<sup>48</sup> The agri-visa proposal simply feeds into and amplifies the broader uncertainty about the composition of the horticulture workforce in the future.’<sup>49</sup>

[58] In our view, the finding proposed by the AFPA is purely speculative and we do not propose to take the ‘agri-visa proposal’ into account, for the reasons set out above.

### 3.2 Pieceworker Rates

[59] Time-based remuneration, under which employees are remunerated by reference to the number of hours worked and the time when work is performed is standard in modern awards. Some modern awards, including the Horticulture Award, provide that employees may be remunerated by reference to the work tasks they perform rather than the time spent working – such employees are commonly referred to as pieceworkers.

[60] The Commission published an [Information Note](#) on ‘Piecework’ on 7 July 2021.

[61] The AFPA addresses the history of piecework provisions in awards in Section D.1 of its submission, noting that piecework arrangements have a long history in Australia.<sup>50</sup>

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<sup>45</sup> (1935) 54 CLR 230.

<sup>46</sup> (1935) 54 CLR 230 at 253.

<sup>47</sup> Transcript, 13 July 2021 at PN708 (cross-examination of Dr Howe); Department of Home Affairs, *Working Holiday Maker visa program report* (Report BR0110, 30 June 2021) at CB947.

<sup>48</sup> Australian Fresh Produce Alliance, ‘AFPA’s closing submissions on the evidence’, Submission in *Horticulture Award 2020*, AM2020/104, 26 July 2021 at [16] (‘AFPA closing submission, 26 July 2021’).

<sup>49</sup> Australian Fresh Produce Alliance, ‘AFPA’s response to further questions from the Commission’, Submission in *Horticulture Award 2020*, AM2020/104, 30 July 2021 at [11]. The NFF advance a similar position, see Transcript of Proceedings, *Horticulture Award 2020* (Fair Work Commission, AM2020/104, Ross J, Catanzariti VP and Riordan C, 30 July 2021) at PN386–398.

<sup>50</sup> See, eg, *Amalgamated Engineering Union v Metal Trades Employers Association* (1930) 28 CAR 923 at 936–7; *Galvanised Iron Manufacturers (Lysaght’s Newcastle Works Ltd, Newcastle) Award* [1937] AR (NSW) 598 at 600.



[62] The AFPA submits that the early decisions that declined to guarantee pieceworkers the minimum weekly rates prescribed for timeworkers justified that conclusion by, among other things:<sup>51</sup>

- ‘the sources from which seasonal labour is recruited and ... the fact that frequently previous experience is not possessed or required’, leading to ‘remarkable’ ‘variation in quantities picked by different pickers’ (citing *AWU v Young and District Producers Co-Operative Society* (1939) 41 CAR 285, 323 and 334); and
- the fact that guaranteeing weekly earnings for pieceworkers ‘would remove a most useful incentive to efficient work’ (citing *Grazier’s Association of New South Wales v AWU* (1927) 25 CAR 626, 644).

[63] The AFPA submits that over the century that followed, despite significant changes in the Australian industrial relations landscape, awards continued to provide for piecework with no guaranteed weekly or hourly earnings, as was the case with the *Horticultural Industry (AWU) Award 2000*,<sup>52</sup> on which the current Horticulture Award is largely based.<sup>53</sup> The AFPA submits that the Award was in turn a successor of a long line of awards that have, since 1939, provided for piecework engagement with no weekly or hourly ‘floor’.

[64] The extent to which the AFPA’s submission accurately reflects the history of piecework provisions in awards is contested.<sup>54</sup> As far as the Commission is concerned, the AFPA’s summary of the award regulation of piecework only provides a partial picture. It fails to mention the importance industrial tribunals have attached to the adoption of protective measures to ensure that piecework does not ‘bring about excessive toil for a very moderate wage’.<sup>55</sup>

[65] The early arbitral history regarding piecework is summarised by Beeby J in *Amalgamated Engineering Union v Metal Trades Employers Association*,<sup>56</sup> in which his Honour observed:

‘Industrial Courts and Board have consistently held that, so long as payment of the minimum wage fixed for each class of labour is ensured, employers and employees shall be free to bargain for any system of wage payment.’<sup>57</sup> [Emphasis added]

[66] As the AFPA mentions, since 1939 fruit growing awards have permitted piecework, without prescribing a minimum wage floor. In 1939, O’Mara J determined a dispute between the AWU and about 4000 employers in New South Wales (NSW), Victoria and South Australia, concerning the wages and conditions of workers in the fruit-growing and packing industry. In

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<sup>51</sup> Australian Fresh Produce Alliance, ‘AFPA’s submission’, Submission in *Horticulture Award 2020*, AM2020/104, 11 June 2021 at [23] (‘AFPA submission, 11 June 2021’).

<sup>52</sup> Fair Work Commission, *Horticultural Industry (AWU) Award 2000*, AP784867, cls. 15.5, 18.4, 24.2.4.

<sup>53</sup> *Re Horticulture Award 2010* (2009) 193 IR 163 [6], [13].

<sup>54</sup> Australian Workers’ Union, ‘Outline of Submissions for the Australian Workers’ Union in Reply’, Submission in *Horticulture Award 2020*, AM2020/104, 2 July 2021 at [10]–[12] (‘AWU submission in reply, 2 July 2021’).

<sup>55</sup> *Amalgamated Engineering Union v Metal Trades Employers Association* (1930) 28 CAR 923 at 938, citing *Re An application by the Stove and Piano Frame Moulders and Stove Employees Union* (Heydon J).

<sup>56</sup> (1930) 28 CAR 923.

<sup>57</sup> (1930) 28 CAR 923 at 937.

*AWU v Young and District Producers Co-operative Society*,<sup>58</sup> his Honour removed the minimum time work rate guarantee which Higgins J had imposed in permitting piecework in 1920.<sup>59</sup> But it is important to appreciate that the piecework clause determined by his Honour permitted ‘the employer and the Union to fix piecework rates.’<sup>60</sup> [Emphasis added]

[67] The reasons given by O’Mara J for not providing a minimum wage guarantee are as follows:

‘I do not propose to provide for a guaranteed wage in the case of piece-workers. I have had regard to the sources from which seasonal labour is recruited and to the fact that frequently previous experience is not possessed or required and I am not satisfied that a guaranteed wage is justified or that it would not lead to imposition in some cases. The rates will be arranged by the Union which is quite capable of protecting its members.’<sup>61</sup> [Emphasis added]

[68] It is apparent that his Honour did not consider that it was necessary to retain the minimum wage guarantee in circumstances where pieceworker rates were set by agreement between the employer and the Union.

[69] The relevant award clause was in the following terms:

‘Piece-work rates for work other than that for which piece-work rates have been prescribed in this award may be fixed by an employer and the Union at such rates as will enable the average employee working the ordinary hours prescribed by this award to earn at least 10 per cent above the prescribed time rate. Such rates shall, when fixed, be paid in lieu of the said time rate.’

[70] An award clause in the same terms was maintained in a later, 1944, judgment of O’Mara J in *The AWU v The Angaston Fruitgrowers’ Co-operative Society Ltd.*<sup>62</sup> The 10% ‘uplift’ factor was increased to 12½% in 1956, while the balance of the award clause was maintained.<sup>63</sup> A clause in these terms also formed part of the *Fruit Growing Industry (Consolidated) Award 1976* made by Sharp J.<sup>64</sup>

[71] The impression given by the AFPA submission that the imposition of a minimum guarantee fell out of arbitral favour in the 1930s is inaccurate. The minimum wage guarantee has been retained as a protective mechanism in the piecework provisions in a number of modern awards.

[72] It is also convenient to deal here with the AFPA’s characterisation of the existing piecework provisions in the Horticulture Award, as follows:

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<sup>58</sup> (1939) 41 CAR 285.

<sup>59</sup> See *Australian Workers’ Union v Hans Irvine & Ors; Australian Workers’ Union v W. Arthur & Ors* (1920) 14 CAR 204 at 221.

<sup>60</sup> (1939) 41 CAR 285 at 334.

<sup>61</sup> Ibid.

<sup>62</sup> (1945) 55 CAR 704.

<sup>63</sup> *The AWU v T. Abbott and Others* (1965) 109 CAR 679.

<sup>64</sup> (1977) 186 CAR 801.

‘The Horticulture Award allows employees to be engaged not only on the basis of hourly rates (timeworkers) but also as pieceworkers for whom the Award’s safety net is based on a minimum piecework rate rather than a minimum hourly rate. Clause 15.2(b) of the Award requires that the minimum piecework rate must be set such that an average competent pieceworker earns 15% more per hour than the minimum hourly rate prescribed for an equivalent timeworker (Uplift Term). The quid pro quo for giving average competent pieceworkers, as a minimum, an opportunity to earn a 15% uplift on the minimum earnings of timeworkers is that pieceworkers are not guaranteed a minimum hourly rate. The Award thus creates a performance-based safety net that contains an element of risk and reward. In other words, it strikes a risk-reward bargain for pieceworkers. The availability of this mode of remuneration has been enshrined in a long history of awards regulating employment in agriculture dating back to the early 20th century.’<sup>65</sup>

[73] The AFPA’s characterisation of clause 15.2 as providing ‘a performance-based safety net that contains an element of risk and reward’ and as constituting a ‘risk-reward bargain’, is misconceived. The practical operation of the provision, discussed in section 4.5.2, makes clear that it is the employee who bears all of the risk and that piece rates are set unilaterally by the grower and presented to the employee on a ‘take it or leave it’ basis, rather than being the product of any genuine negotiation. In no sense is it accurate to describe the current piece work provisions in the Horticulture Award as a ‘risk-reward bargain’.

[74] The Piecework Information Note identified 10 modern awards which included task-based remuneration provisions:

- *Building and Construction General On-Site Award 2020* (see clause 19.6)
- *Market and Social Research Award 2020* (see clause 14.5)
- *Meat Industry Award 2020* (see clause 18)
- *Pastoral Award 2020* (see clause 51)
- *Real Estate Industry Award 2020* (see clause 16.7)
- *Silviculture Award 2020* (see clause 15.2)
- *Sugar Industry Award 2020* (see clause 17.3)
- *Timber Industry Award 2020* (see clause 13)
- *Wine Industry Award 2020* (see clause 17)
- *Wool Storage, Sampling and Testing Award 2020* (see clause 16.3).

[75] The Information Note observes that of those 10 awards, 6 provided pieceworkers with a minimum guaranteed wage:

- *Building and Construction General On-Site Award 2020*
- *Meat Industry Award 2020*
- *Pastoral Award 2020*
- *Silviculture Award 2020*
- *Sugar Industry Award 2020*
- *Wool Storage, Sampling and Testing Award 2020.*

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<sup>65</sup> AFPA submission, 11 June 2021 at [2]

[76] The AFPA contends that only 9 modern awards contain a provision for piecework;<sup>66</sup> but, even on the AFPA's characterisation, 4 of the 9 modern awards which provide for piecework also make provision for a minimum wage guarantee.<sup>67</sup>

[77] Further, other safeguards are commonly incorporated into the task-based remuneration provisions, for example:

- an obligation on the employer to take measures to ensure an employee with limited English understands the proposed agreement (see clause 17.9 of the *Wine Industry Award 2020*).
- an obligation on the employer to provide an assurance that the remuneration offered to a commission-only employee is comparable to the remuneration received by a comparable employee on a similar project being remunerated on a time-basis, plus a contingency margin (see clause 14.5 (b) of the *Market and Social Research Award 2020*).
- an obligation on the employer requiring that the information upon which payments under an incentive system are calculated, and all payments made and other benefits provided to employees under a system be recorded in writing in the time and wages records of the employer kept in accordance with the requirements of the Act (see clause 18.5 of the *Meat Industry Award 2020*).
- limitations on entering a commission-only remuneration arrangement based on age, demonstrated earning experience, seniority, years of experience, or where a required annual review shows the minimum income threshold amount has not been received (see clause 16.7 of the *Real Estate Industry Award 2020*).
- level of piecework rates prescribed by the modern award (see clauses 51.7(a) and 51.9(b) of the *Pastoral Award 2020*).
- an employee's right to unilaterally terminate the piecework agreement if remuneration received over 3 consecutive shifts is below what would have been received under time-based remuneration arrangements (see clause 15.2(b) of the *Silviculture Award 2020*).
- an obligation to review the piecework agreement to ensure the employee receives full entitlements owed (see clause 17.3(b) of the *Sugar Industry Award 2020*); and
- a requirement that working under a piecework agreement must not disadvantage the employee in relation to their terms and conditions of employment (see clause 16.3(d) of the *Wool Storage, Sampling and Testing Award 2020*).

[78] A review of the history of piecework award provisions shows the enduring relevance of protective measures (such as a guaranteed minimum wage) as a guard against exploitation. Such

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<sup>66</sup> AFPA submission, 11 June 2021 at [22].

<sup>67</sup> Ibid.

considerations are reflected in the variety of protective measures in piecework provisions in modern awards. It is also apparent from those provisions that there is no inherent discordance between piecework remuneration and the provision of a guaranteed minimum wage.

### 3.3 Relevant Award History

[79] The Horticulture Award was made pursuant to s.576E of the *Workplace Relations Act 1996* (Cth) and a Request made by the then Minister for Employment and Workplace Relations that the Australian Industrial Relations Commission (AIRC) undertake an award modernisation process.<sup>68</sup>

[80] As initially published by the AIRC on 3 April 2009,<sup>69</sup> clause 15.6 provided:

‘15.6 In no case will a full-time, part-time or casual employee working under a piecework agreement be paid less than the prescribed ordinary rate payable to the employee for the hours of worked performed.’

[81] In August 2009, following a direct appeal by the NFF to the Minister for Employment and Workplace Relations,<sup>70</sup> the Minister issued an amended Award Modernisation request (Amended Modernisation Request). The Amended Modernisation Request relevantly directed that in regards to the Horticulture Award, the Commission ‘should enable employers in the horticulture industry to continue to pay piecework rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.’<sup>71</sup> [Emphasis added]

[82] On considering the Amended Modernisation Request, the AIRC noted that ‘clause 15.6 [as previously published] is inconsistent with ... the consolidated request’ and granted the joint application by the NFF and Ai Group to vary the newly made modern Horticulture Award to include what is now clause 15.2. The relevant parts of the Full Bench’s decision are as follows:

‘Clearly the applications must be considered in light of the terms of cl.50 and 51 of the consolidated request. Clause 50 states that the Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment. Clause 51 states that the Commission should have regard to the perishable nature of the produce grown by particular sectors of the industry when setting hours of work and to provide for arrangements which accommodate seasonal demands and restrictions caused by weather. In a letter to the President of the Commission which accompanied the relevant variation to the consolidated request, the Minister referred to existing award arrangements in the industry. The following passage is relevant:

“I note that the majority of federal awards and NAPSAs in the horticulture sector have long provided for piece rates for casual employees, rather than the minimum wage and incentive payment system as included in the modern award made by the Commission.”

<sup>68</sup> *Re Request for the Minister for Employment and Industrial Relations – 28 March 2009* (2009) 181 IR 19.

<sup>69</sup> *Ibid.*

<sup>70</sup> See Exhibit NFF 3 at [15], Annexure C.

<sup>71</sup> See *National Farmers’ Federation and the Australian Industry Group* [2009] AIRCFB 966 at [2].

The NFF and AiGroup contended that the principal award was the Horticulture Award 2000. That award has three schedules, designated A to C respectively. The schedules contain different conditions of employment. The award was made primarily by reference to the provisions applying to Schedule A respondents, a position advanced in the consultations by the AWU. In these proceedings the AWU accepted that Schedules B and C have more extensive geographic and industrial application. It agreed with the NFF and AiGroup that it would be more appropriate if the modern award were to be based on the conditions in those schedules rather than the conditions in Schedule A. The HAC submitted that its application was based on the provisions in 11 instruments – two pre-reform awards and nine NAPSAs.

There is no single existing instrument which could be said to apply generally in the industry. Further, it is necessary, when considering the various provisions, to have regard to the totality of the provisions in any particular instrument. There is no definitive information as to the application of the individual awards or NAPSAs. Whilst the provisions of all of the instruments are relevant to some degree, we think greatest weight should be given to the Horticulture Award 2000. That award is a major award. It operates, with respect to Schedule A, in Victoria, South Australia and New South Wales, with respect to Schedules B and C to named employers in Victoria and members of two Victorian employer associations, the Tasmanian Farmers and Graziers Association and the AiGroup.

...

As we have already indicated, there are two parts of the joint application relating to pieceworkers which the AWU opposes. The first relates to the guaranteed minimum payment which presently appears in the modern award. The second concerns the amount of the piecework loading.

In relation to the first matter, the AWU submitted that the provision in cl.15.6 of the modern award that piecework employees receive a guaranteed minimum payment equal to the wage they would have earned for the hours actually worked should not be altered. We note, however, that there is no equivalent provision in the Horticulture Award 2000, or in any of the schedules to that award. As we have previously noted, that award is the main award in the industry and its provisions carry great weight. Furthermore, it appears to us that cl.15.6 is inconsistent with cl.50 of the consolidated request. We grant this part of the joint application.<sup>72</sup>

**[83]** The submissions of a number of the employer parties rely on the fact that, in its present form, clause 15.2 was made as part of the award modernisation process and consistently with the Amended Modernisation Request from the then Minister for Employment and Workplace Relations.<sup>73</sup>

**[84]** It is variously submitted by employer parties that the historical background is a ‘significant motivating factor against the application’,<sup>74</sup> or that the ‘provisions should not be altered to satisfy the Unions’ disagreement with the amended Request’,<sup>75</sup> or that the ‘variations proposed by the AWU would make the Horticulture Award inconsistent with the Award

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<sup>72</sup> *National Farmers’ Federation and the Australian Industry Group* [2009] AIRCFB 966 at [11]–[13], [19]–[20].

<sup>73</sup> Australian Industry Group, ‘Reply Submission’, Submission in *Horticulture Award 2020*, AM2020/104, 1 June 2021 [45]–[53] (‘Ai Group submission, 1 June 2021’); National Farmers Federation, ‘Submission of the National Farmers Federation’, Submission in *Horticulture Award 2020*, AM2020/104, 11 June 2021 at [15]–[16] (‘NFF submission, 11 June 2021’).

<sup>74</sup> NFF submission, 11 June 2021 at [16].

<sup>75</sup> Ai Group submission, 1 June 2021 at [6].

Modernisation Request which was varied specifically to avoid the outcome which the Union seeks to achieve.’<sup>76</sup>

[85] The AWU and UWU (the Union parties) submit that the decision of the AIRC in *Re Horticulture Award 2010* does not stand in the way of acceptance of the Application.<sup>77</sup>

[86] The UWU responds to the various employer submissions as follows:

‘To the extent that these submissions suggest that the FWC's power under s 157 to vary an award is limited or constrained by the history of that award, or the presumption that applied to the (now abolished) four yearly review of modern awards that a modern award met the modern awards objective at the time it was made, or that the varied award modernisation request is dispositive of this application, they are incorrect. The FWC is entitled to and should take into account all of those matters which it might properly consider to be relevant. That includes matters that have emerged since the making of the Award - including evidence of the operation of the modern award clause - that now justify the Award variation.’<sup>78</sup>

[87] As mentioned earlier, in our consideration of the Application it is appropriate that we take into account previous decisions relevant to any contested issue and that we proceed on the basis that *prima facie* the Horticulture Award achieved the modern awards objective at the time it was made. The extent of a previous Full Bench’s consideration of a contested issue is relevant to our assessment of the weight to be attributed to that decision.

[88] It is apparent from an examination of the relevant decision that the Award Modernisation Full Bench did not undertake a detailed or considered review of the piecework arrangements in the Horticulture Award.

[89] The AIRC decision not to include a minimum wage floor for pieceworkers was plainly a consequence of the constraints imposed by the Amended Modernisation Request and the Full Bench’s assessment of the piecework provisions in the pre-reform instruments and, in particular, the Horticulture Award 2000. As the UWU submits,<sup>79</sup> the ‘critical point’ is that the Amended Modernisation Request expressly directed the AIRC to remove any minimum rate floor from the Horticulture Award.

[90] In these circumstances, we do not propose to give any weight to the decision of the AIRC in *Re Horticulture Award 2010*.<sup>80</sup> We agree with the Union parties’ submission that the decision does not stand in the way of acceptance of the Application.

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<sup>76</sup> Ibid at [53].

<sup>77</sup> Australian Workers’ Union, ‘Outline of Submissions for the Australian Workers’ Union’, Submission in *Horticulture Award 2020*, AM2020/104 at [23] (‘AWU submission, 19 March 2021’); United Workers Union, ‘Reply Submissions of the United Workers Union’, 5 July 2021 at [20], [22] (‘UWU submission in reply, 5 July 2021’).

<sup>78</sup> UWU submission in reply, 5 July 2021 [22].

<sup>79</sup> United Workers Union, ‘Final Submissions of the United Workers Union’, Submission in *Horticulture Award 2020*, AM2020/104, 26 July 2021 at [17].

<sup>80</sup> *National Farmers’ Federation and the Australian Industry Group* [2009] AIRCFB 966.

[91] We also agree with the observation of the Full Bench in *Re Restaurant & Catering Industrial*,<sup>81</sup> that ‘the constraints that the Minister’s Award Modernisation Request placed on the AIRC as to the terms it could include in modern awards do not apply to variations to modern awards under the Act.’<sup>82</sup>

### 3.4 Clause 15.2 of the Horticulture Award

[92] Clause 15 of the Horticulture Award is titled ‘Minimum rates’. Clause 15.1(a) sets the classifications and minimum rates for an adult employee by reference to minimum weekly rates (for full-time employees) and minimum hourly rates. Clause 15.3(a) sets minimum rates for junior employees by reference to a percentage of the adult rate. Clause 15.2 is titled ‘Pieceworker rates’ and provides, relevantly:

#### ‘15.2 Pieceworker rates

- (a) An employer and a full-time, part-time or casual employee may enter into an agreement for the employee to be paid a piecework rate. An employee on a piecework rate is a pieceworker.
- (b) **The piecework rate fixed by agreement between the employer and the employee must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee.** The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement.
- (c) The calculation of piecework rates in clause 15.2(b) for casual employees will include the casual loading prescribed in clause 11.2(a).
- (d) **An agreed piecework rate is paid instead of the minimum rates specified in clause 15.**
- (e) The following clauses of this award do not apply to an employee on a piecework rate:
  - (i) Clause 13—Ordinary hours of work and rostering arrangements;
  - (ii) Clause 18.3(c)—Meal allowance; and
  - (iii) Clause 21—Overtime.
- (f) The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress.
- (g) The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee.

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<sup>81</sup> [2021] FWCFB 4149.

<sup>82</sup> [2021] FWCFB 4149 at [91].



- (f) The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.
- (g) **Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate in this award for the type of employment and the classification level of the employee, as the employee's earnings are contingent on their productivity.** [Emphasis added]

[93] Clause 15.2(a) permits an employer and employee to enter an agreement for the employee to be paid a piecework rate. The piecework rate fixed by agreement must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate to comply with clause 15.2(b). Clause 15.2(i) provides that nothing in the Horticulture Award guarantees that an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate in the Award.

[94] Clause 15.2 of the Horticulture Award was considered by the Federal Court in *Fair Work Ombudsman v Hu (No 2)*<sup>83</sup> (*Hu (No 2)*) and *Fair Work Ombudsman v Hu*<sup>84</sup> (the *Hu Appeal*). The UWU submits<sup>85</sup> that the following key principles can be drawn from these judgments:

1. Clause 15.2 is a protective provision designed to provide a safeguard for pieceworkers.<sup>86</sup>
2. While clause 15.2 requires the piecework rate to be fixed by agreement, in practical terms, this will almost invariably mean that the employer fixes the rate, and the employee decides whether to accept it.<sup>87</sup>
3. The clause requires the minimum piecework rate to be determined by the following method:
  - (i) Ascertain the hourly rate prescribed under the Award for the type of employment and the classification level of the employee (including, for example, casual loading if applicable) and then add 15% to that amount.
  - (ii) The hypothetical 'average competent employee' must be identified.
  - (iii) Identify the hypothetical hourly pick rate of the 'average competent employee' performing the work at the particular place of work at that particular time.
  - (iv) Divide the hourly rate plus 15% by the hourly pick rate of the hypothetical 'average competent employee' or, where an employer has already set a

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<sup>83</sup> [2018] FCA 1034 (*'Hu (No 2)'*).

<sup>84</sup> [2019] FCAFC 133 (*'Hu Appeal'*).

<sup>85</sup> United Workers Union, 'Submissions – United Workers Union', Submission in *Horticulture Award 2020*, AM2020/104, 19 March 2021 at [22] ('UWU submission, 19 March 2021').

<sup>86</sup> *Hu (No 2)* at [24], [140]; *Hu Appeal* at [74], [75] (Bromberg J).

<sup>87</sup> *Hu (No 2)* at [25]; see also Exhibit UWU 2 at [12]; Exhibit UWU 6 at [10].

piecework rate, the employer can compare the hourly pick rate of the ‘average competent employee’ against the calculation performed at paragraph i above.<sup>88</sup>

4. The determination of the pick rate of the ‘average competent employee’ is not an arithmetical exercise, but rather a predictive, theoretical exercise made by reference to the workforce that is available or potentially available to the employer.<sup>89</sup> For example, for fruit or vegetable pickers, the hourly pick rate of the ‘average competent employee’ would be dependant upon the average quantity of fruit or vegetables such an employee would pick per hour.
5. The ‘average competent employee’ is not necessarily ‘proficient’ but at least ‘suitable, sufficient for the purpose, adequate’ and must be selected from the pool of hypothetical competent employees.<sup>90</sup> An employee who is not competent, for example, an employee who is still in training, must be excluded when determining the ‘average competent employee’.<sup>91</sup>
6. To determine what such a hypothetical employee will be able to earn, factors both personal and external to the hypothetical employee must be considered. These factors include:
  - (i) personal characteristics, such as diligence, aptitude, and experience; and an assumption that training and induction has been provided;
  - (ii) personal characteristics such as age, strength, and stamina (which while not relevant, on the evidence, in the case of picking mushrooms, may be relevant in relation to ‘some other types of horticulture’);
  - (iii) the general level of experience of the available workforce considered as a whole; and
  - (iv) external factors which may include density, quality, size of the product, the prevalence of unhealthy product which may be affected by growing conditions, as well as the nature and quality of the equipment provided.<sup>92</sup>

**[95]** Further in *Hu (No 2)* the Court held that to be compliant with clause 15.2 of the Award, a piecework rate must not only be at a level which would allow the average competent employee to earn at least 15% more than the minimum hourly rate at the time the agreement is entered into, but must also be adjusted by the employer if the piecework rate later becomes inadequate:

‘the requirements to fix and pay at least minimum piecework rates are protective of employees, and cl 15.2 should be construed in light of that protective purpose. Where the piecework rate was adequate when the agreement was entered, but becomes inadequate during the term of the agreement, it is a contravention of cl 15.2 of the Award for an employer to continue to pay only the agreed, inadequate piecework rate.’<sup>93</sup>

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<sup>88</sup> *Hu (No 2)* at [26]–[27].

<sup>89</sup> *Ibid* at [28]–[29], [34].

<sup>90</sup> *Ibid* at [31].

<sup>91</sup> *Ibid* at [30], [85].

<sup>92</sup> *Ibid* at [33]–[38].

<sup>93</sup> *Ibid* at [140].

[96] It is also convenient to deal here with Ai Group’s submissions that in *Hu (No 2)*, Rangiah J ‘confirms that the protections outlined in cl 15.2 are consistent with ss.134 and 138 of the *Fair Work Act 2009*.’<sup>94</sup>

[97] The passage from *Hu (No 2)* to which Ai Group refers is as follows:

‘Clause 15.2 of the Award provides a safeguard for pieceworkers. That safeguard is the prescription of a method of calculation of a minimum piecework rate. Clause 15.2 requires that the minimum piecework rate must “enable the average competent employee to earn at least 15% more per hour than the rate prescribed in this award”. That is consistent with s 576L of the *Workplace Relations Act 1996* (Cth) (repealed) and s 134 and 138 of the FWA, which require that modern awards must provide a fair minimum safety net of terms and conditions. However, the safeguard that cl 15 provides is limited. It is concerned with fixing minimum piecework rates, but not minimum earnings. As cl 15.9 makes clear, employees’ earnings depend upon their productivity and there is no guarantee that they will earn any minimum amount or hourly rate.

Clause 15.2 requires the piecework rate to be fixed by agreement. In practical terms, this will almost invariably mean that the employer fixes the rate and the employee decides whether or not to accept it.

The piecework rate must be fixed at the time the employment agreement is entered. An employer proposing to fix a particular piecework rate must assess the adequacy of the rate by first ascertaining the hourly rate prescribed under the Award for the type of employment and the classification level of the employee and then adding 15% to that amount. The employer must then assess the hourly rate an “average competent employee” is able to earn performing the work to be done under the agreement at the proposed piecework rate. The employer must make a comparison of the two rates to ensure that the latter equals or exceeds the former.’<sup>95</sup>

[98] Contrary to Ai Group’s submission, his Honour did no more than observe that the provision of safeguards for pieceworkers was consistent with the requirement to provide a fair safety net of terms and conditions. To the extent that it may be said that his Honour’s observations go further we would, respectfully, note that the statutory directive in s.134 to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant safety net of terms and conditions, is directed at the Commission not the Court.

[99] The *Hu Appeal* also dealt with the legal consequences of non-compliance with clause 15.2 and held that a piecework rate which is set at a rate less than the rate required by the operation of clause 15.2 is a breach of the Award and a contravention of the Act.<sup>96</sup>

[100] In the *Hu Appeal* their Honours Flick and Reeves JJ held that an employee subject to a non-compliant piecework agreement does not, by result of the breach, become entitled to the ‘non piecework provisions’ of the Award, such as the minimum hourly rate of pay.

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<sup>94</sup> Ai Group submission, 1 June 2021 at [23].

<sup>95</sup> *Hu (No 2)* at [24]–[26].

<sup>96</sup> *Fair Work Act 2009* (Cth), s.45.

### **3.5 Record Keeping Requirements**

**[101]** The Horticulture Award does not require records of hours worked to be kept for pieceworkers. For instance, clause 15.2 (h) requires that a copy of the ‘piecework agreement’ be kept ‘as a time and wages record’.

**[102]** Sections 535 and 536 of the Act respectively require employee records to be kept and pay slips to be given. Their content is prescribed in the *Fair Work Regulations 2009* (Cth) (the Regulations) regs.3.32–3.34 and 3.46:

#### **‘3.32 Records—content**

For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:

- (a) the employer’s name; and
- (b) the employee’s name; and
- (c) whether the employee’s employment is full-time or part-time; and
- (d) whether the employee’s employment is permanent, temporary or casual; and
- (e) the date on which the employee’s employment began; and
- (f) on and after 1 January 2010—the Australian Business Number (if any) of the employer.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

#### **3.33 Records—pay**

- (1) For subsection 535(1) of the Act, a kind of employee record that an employer must make and keep is a record that specifies:
  - (a) the rate of remuneration paid to the employee; and
  - (b) the gross and net amounts paid to the employee; and
  - (c) any deductions made from the gross amount paid to the employee.
- (2) If the employee is a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked, the record must set out the hours worked by the employee.
- (3) If the employee is entitled to be paid:
  - (a) an incentive-based payment; or
  - (b) a bonus; or

- (c) a loading; or
- (d) a penalty rate; or
- (e) another monetary allowance or separately identifiable entitlement;

the record must set out details of the payment, bonus, loading, rate, allowance or entitlement.

**Note:** Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

### **3.34 Records—overtime**

For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:

- (a) the number of overtime hours worked by the employee during each day; or
- (b) when the employee started and ceased working overtime hours.

### **3.46 Pay slips—content**

- (1) For paragraph 536(2)(b) of the Act, a pay slip must specify:
  - (a) the employer's name; and
  - (b) the employee's name; and
  - (c) the period to which the pay slip relates; and
  - (d) the date on which the payment to which the pay slip relates was made; and
  - (e) the gross amount of the payment; and
  - (f) the net amount of the payment; and
  - (g) any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement; and
  - (h) on and after 1 January 2010—the Australian Business Number (if any) of the employer.
- (2) If an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid.
- (3) If the employee is paid at an hourly rate of pay, the pay slip must also include:
  - (a) the rate of pay for the employee's ordinary hours (however described); and

- (b) the number of hours in that period for which the employee was employed at that rate; and
- (c) the amount of the payment made at that rate.’

**[103]** The employee record requirements do not include keeping a record of hours worked by pieceworkers. Regulation 3.33(2) requires a record of hours worked to be kept for ‘a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked’. The Explanatory Statement indicates that this requires a record of hours worked to be kept for casuals or irregular part-timers who are ‘paid by reference to ... a period of time worked’.<sup>97</sup>

**[104]** Similarly, the pay slip requirements do not require an employer to report hours worked by pieceworkers, noting that pieceworkers will not fall within reg.3.46(3) as they are not ‘paid at an hourly rate of pay’.<sup>98</sup>

**[105]** *Fair Work Ombudsman v Seasonal Farm Services*<sup>99</sup> is also relevant, as it concerned the determination of pecuniary penalties for breaches of the Act arising from a failure to keep required records and a failure to pay workers their proper entitlements under the Horticulture Award. In that case, Vasta J made the following observation about the absence of record-keeping obligations under the Award and the implications for the FWO’s compliance activities:

‘The problem for the Fair Work Ombudsman was that there were no records as to the hours worked for the piece rate employees and that also impacted those workers who were on the mixed type of employment because, for the piece rate part of their component of their wages, there were no records. This made the investigation extremely difficult. Now, whilst that does mean that there is no evidence as to what was worked, it means that there is no way of ascertaining whether or not the breaches of the Fair Work Act 2009 (Cth) [...] were even more blatant than what the investigation discovered.’<sup>100</sup>

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<sup>97</sup> Explanatory Statement, Fair Work Regulations 2009 (Cth) at [180].

<sup>98</sup> Ibid at [224].

<sup>99</sup> [2017] FCCA 1020.

<sup>100</sup> *Fair Work Ombudsman v Seasonal Farm Services* [2017] FCCA 1020 at [11].

## 4. EVIDENCE

### 4.1 Overview

[106] A list of witnesses who were called to give evidence during the hearings is attached at **Attachment B**.

[107] It is convenient to note here that the principal parties (AWU, UWU, NFF and AFPA) reached an agreed position in relation to the issue of evidentiary objections:

‘The agreed position is that the parties will not raise objections to each other’s evidence on the basis that each party will be free to make submissions that a piece of evidence will be given little weight or no weight (irrespective of whether the relevant witness was cross-examined).’<sup>101</sup>

[108] The case proceeded on the basis agreed by the principal parties.

[109] The evidence consisted of a range of reports; the evidence of lay witnesses and the evidence of 3 expert witnesses: Dr Howe, Professor Underhill and Mr Houston.

### 4.2 The Expert Evidence

#### 4.2.1 General Observations

[110] We begin by making some general observations about survey evidence and qualitative research.

[111] In the Background Paper published on 26 July 2021, we drew the parties’ attention to a number of Full Bench decisions which have commented on the task of assessing the probative value of survey evidence and qualitative research.<sup>102</sup>

[112] As observed by the Expert Panel in the *2012-13 Annual Wage Review* decision:<sup>103</sup>

‘There are well-understood rules about the conduct of surveys that need to be followed if the results of a survey of a sample of a particular population are to accurately represent the picture that you would get if you obtained the same information from that entire population. These rules include that the sample size or proportion sampled must be large enough. Most important, the sample for the survey must be selected on a random basis. If a membership list is used as the basis for a survey, then it is essential that those that respond are properly representative of the entire membership base (e.g. by firm size, form of ownership, industry sector, geographic location). Where this is not the case, then the responses become more like case studies or anecdotes—accounts of the situation of those who did respond, but not to be taken as representative of the survey population (e.g. the membership) as a whole. Even where the survey is representative of the membership, it needs additional evidence to show that it is representative of, for example, employers more broadly.

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<sup>101</sup> Email from the Australian Workers’ Union to the Fair Work Commission, 9 July 2021.

<sup>102</sup> See Background at Paper at [67], citing *Penalty Rates Decision* at [1063]–[1104] and [1184]–[1264]; *Annual Wage Review 2012-13* [2013] FWCFB 4000 at [442]–[446]; *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383 at [168]–[173].

<sup>103</sup> [2013] FWCFB 4000.

...

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. It would also assist to provide a record of the questions asked.<sup>104</sup>

[113] We adopt these observations.

[114] Further, as Mr Houston observes in his 11 June 2021 Expert Report:

‘the ability to make inferences from sample data in relation to the underlying population from which the sample is drawn depends on the extent to which that sample reflects (or can be weighted to reflect) the underlying population of interest.’<sup>105</sup>

[115] We accept this aspect of Mr Houston’s evidence. We also accept Mr Houston’s evidence that a robust sampling methodology involves a random sampling from the population such that everyone in the population has the same chance of ending up in the sample.<sup>106</sup>

[116] In addition to the sampling frame and response rates, other factors can affect the reliability of survey evidence.

[117] Non-response bias is theoretically possible in any survey without a 100 percent response rate. Non-response bias refers to the potential for answers given by those who responded to the survey (or to a question within the survey) to be different from the answers that would have been given by those employees who either did not complete the survey (had they done so), or who responded to the survey but did not answer particular questions. Non-responses do not necessarily introduce bias and the fact and effect of non-response bias cannot be readily tested. Non-response bias may mean that the responses of the survey respondents are not representative of the survey population.<sup>107</sup>

[118] Surveys may also be affected by self-selection bias. As Mr Houston observes:

‘Self-selection occurs when respondents decide themselves whether or not to be surveyed. Self-selection introduces bias when the characteristics of those who opt-in are different from those who do not opt-in.’<sup>108</sup>

[119] We conclude by observing that evidence, and in particular survey evidence, is rarely perfect. In assessing the evidence, part of our task is to determinate the probative value of that evidence. As observed by the Full Bench in the *Penalty Rates Decision*:

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<sup>104</sup> [2013] FWCFCB 4000 at [441]–[442].

<sup>105</sup> Exhibit AFPA 6 at [34].

<sup>106</sup> Exhibit AFPA 6 at [37].

<sup>107</sup> *Penalty Rates Decision* at [1203].

<sup>108</sup> Exhibit AFPA 6 at [49].



‘The assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. Most survey evidence has methodological limitations – be it sample related the nature of the questions put or the response rate. The central issue is the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data.’<sup>109</sup>

[120] In reaching that conclusion, the Full Bench referenced an observation by the Productivity Commission in its *Workplace Relations Framework: Productivity Commission Inquiry* report,<sup>110</sup> regarding the stringent tests of survey reliability proposed by a Dr Bartley, who provided an expert report at the request of the Shop, Distributive and Allied Employees Association. Dr Bartley also provided an expert report to the Full Bench in the *Penalty Rates Decision*.

[121] It seems to us that aspects of Mr Houston’s evidence bear a striking similarity to that of Dr Bartley: they both amount to a counsel of perfection, in a context where perfection is not a realistic prospect.

[122] We also agree with the observation of the Full Bench in the *Penalty Rates Decision* that ‘the methodological problems associated with some survey evidence may mean that rather than dismiss the evidence the results are accepted as indicative or anecdotal, rather than definitive.’<sup>111</sup>

[123] The expert opinions of Dr Howe and Professor Underhill rely, in part, on qualitative focus group research.

[124] Qualitative research often attempts to identify themes emerging from focus group discussions or interviews with individuals. Such research cannot usually be said to be representative of the views or experiences of *all* employees in the cohort from which the participants are drawn.

[125] As a Full Bench of the Commission recently observed, ‘the validity of qualitative research ... is widely accepted.’<sup>112</sup>

[126] The Commission had regard to evidence of this nature in the *Penalty Rates Decision*, in which the Full Bench observed:

‘Despite the limitations of qualitative research it can provide more detail and context to assist in gaining a deeper understanding about a particular issue.’<sup>113</sup>

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<sup>109</sup> *Penalty Rates Decision* at [1097].

<sup>110</sup> (Report No.76, 30 November 2015).

<sup>111</sup> *Penalty Rates Decision* at [1069].

<sup>112</sup> *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims* [2021] FWCFB 2383 at [168].

<sup>113</sup> *Penalty Rates Decision* at [1617].

#### 4.2.2 *Dr Howe's evidence*

[127] The UWU asked Dr Howe to provide a statement in relation to the Application (the First Statement).<sup>114</sup> Dr Howe is an Associate Professor of Law at the University of Adelaide; her main area of research expertise is in respect of the legal regulation of temporary labour migration.

[128] The AFPA engaged Mr Greg Houston to prepare an expert report (the First Houston Report),<sup>115</sup> that reviews and critiques the expert reports of both Dr Howe and Dr Underhill, including the methodology, assumptions and conclusions in each report. Mr Houston's analysis of Dr Howe's First Statement is set out in section 3 of the First Houston Report.<sup>116</sup>

[129] Dr Howe provided a statement in response to the First Houston Report (the Howe Reply)<sup>117</sup> and Mr Houston provided a reply to the Howe Reply (the Houston Reply).<sup>118</sup>

[130] At [19] of the First Statement, Dr Howe says:

'The data from my research outlined at [6] has supported a finding that piece rates are generally set at levels which mean that workers who are on a piece rate don't earn at least Award minimum rates, in fact they are paid well below Award minimum rates, generally earning less than \$15 an hour.' [Emphasis added]

[131] At [6] of the First Statement, Dr Howe states:

'Over a three year period from 2016–18, I led an interdisciplinary research project investigating labour practices in the horticulture sector. This involved interviews and focus groups with 121 growers, 124 workers and 110 other stakeholders from industry associations, trade unions, labour hire, local, state and federal government, accommodation providers and community groups. The Report including collection of data in relation to underpayment of wages and the use of piece rates in employment of working holiday makers. The Report was called "Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry". Attached to this statement and marked "JH-1" is a copy of this report.'

[132] The finding at [19] of the First Statement was the focal point of the challenge to Dr Howe's evidence.

[133] At [155] to [157] of the First Houston Report, Mr Houston addresses the finding at [19] of the First Statement and says:

'Research report JH-1 does not appear to quantify the average pay received by piece rate workers or the proportion of piece rate workers that earn an hourly rate below the minimum wage.'

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<sup>114</sup> Exhibit UWU 7.

<sup>115</sup> Exhibit AFPA 6.

<sup>116</sup> Exhibit AFPA 6 at [148]–[177].

<sup>117</sup> Exhibit UWU 8.

<sup>118</sup> Exhibit AFPA 7. The Houston Reply also responded to the Underhill Reply

Rather, Dr Howe's conclusion that piece rate workers generally earn an hourly rate that is 'well below the Award minimum rates' appears to be based on outcomes of the focus group and findings from two other relevant reports, which I note at paragraph 150 above.

It is not clear how Dr Howe reaches the conclusion that workers who are on a piece rate earn 'less than \$15 an hour' based on the research report JH-1.' [Footnotes omitted]

[134] Research Report JH-1 is the report *Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (the Durable Future Report).<sup>119</sup> It was the product of a 3-year national study into the conditions of work in the horticulture industry, was funded by industry and commissioned by VegetablesWA (an industry body for vegetable growers in Western Australia). The study was undertaken by an interdisciplinary research team consisting of 5 scholars across 2 universities. Dr Howe was the project leader on the study and the lead author on the final report.

[135] Before turning to the evidence of Dr Howe and Mr Houston, it is convenient to deal first with the AFPA's submission that Dr Howe 'lacked objectivity and impartiality as an expert' and that 'the Commission should carefully scrutinise Dr Howe's opinion and the data on which they are based and should not accept any of her *ipse dixit* evidence.'<sup>120</sup>

[136] The AFPA submits:

'Dr Howe was an unimpressive expert. Her reports and cross-examination demonstrated that she lacked objectivity and impartiality as an expert. Dr Howe used her evidence as a platform to advance a cause that she pursues in her academic research work — improving regulation of the pay and working conditions of temporary migrants. She did not charge a fee for her work, confirming that she had other motivations to become a witness.'<sup>121</sup> [Footnotes omitted]

[137] In support of the proposition that Dr Howe lacked objectivity and impartiality, the AFPA submit that Dr Howe was not prepared to concede errors and limitations in her work, did her utmost to avoid directly answering any questions where the answer looked unhelpful to the perspective she wanted to present, and refused to make even the most obvious and necessary concessions. The AFPA refers to the following examples in support of its submissions:

- The Howe Growers Survey formed part of the '[t]he data' to which Dr Howe referred in [19] of the Howe Primary Statement as 'support[ing]' the Howe \$15 Finding. But Dr Howe made no mention of the Howe Growers Survey in her primary statement and, as explained above, omitted the appendices to the Durable Future Report that would have enabled the reader of her statement to easily find the survey. This omission (deliberate or otherwise) was a serious problem that made the \$15 finding at [19] substantially misleading. Dr Howe ought to have acknowledged this, as soon as the problem was revealed in Mr Houston's report. But Dr Howe was unrepentant,

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<sup>119</sup> Joanna Howe et al, 'Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry' (Research Paper, University of Adelaide, January 2019).

<sup>120</sup> AFPA closing submission, 26 July 2021 at [93]–[95].

<sup>121</sup> Ibid at [93].

both in her reply report and in cross-examination. She refused to even concede that the Howe Growers Survey did not ‘support’ the Howe \$15 Finding.<sup>122</sup>

- At one point, Dr Howe refused to directly concede that undocumented migrants are the most vulnerable cohort in the horticulture industry and insisted on trying to qualify this proposition, even though the proposition reflected verbatim a finding that she herself had made in the Durable Future Report. Eventually, Ross P was forced to intervene to direct Dr Howe to ‘just answer the question that’s put’.<sup>123</sup>
- Another stark example of her preparedness to deny the obvious when it did not suit her was her response to the question about the proper classification of the Howe \$15 Finding. Despite volunteering that ‘quantitative’ research is primarily concerned with the ‘What?’ questions whereas ‘qualitative’ research is primarily concerned with the ‘Why?’ or ‘How?’ questions,<sup>124</sup> Dr Howe refused to concede that her finding that pieceworkers generally earn less than \$15 per hour is a quantitative finding.<sup>125</sup> Her cross-examination is replete with other examples of this behaviour.<sup>126</sup>

**[138]** The AFPA advances 3 broad lines of argument in support of the proposition that Dr Howe adopted a partisan approach to her evidence:

1. The appendices to the Durable Future Report were not filed with the First Statement.
2. During cross-examination Dr Howe was not prepared to concede errors and limitations in her work or to make obvious concessions.
3. Dr Howe’s failure to reference to the OmniPoll Survey in the First Statement.

**[139]** The Appendices to the Durable Future Report were not included in the report which was attached to the First Statement. Relevantly, Appendix A deals with the methodology underpinning the report and Appendix C deals with the OmniPoll national survey of vegetable growers (the OmniPoll Survey).

**[140]** We take it that the inference sought to be drawn from the non-inclusion of the Appendices in her statement is that Dr Howe did not meet her obligation as an expert witness to include all of the matters of significance that might bear upon the findings or opinions postulated in her witness statement.<sup>127</sup>

**[141]** Dr Howe was cross-examined in respect of this issue<sup>128</sup> and explained that she was not seeking to ‘hide this survey or the methodology’ and that:

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<sup>122</sup> Exhibit UWU 8 at [34]–[37]; Transcript, 13 July 2021 at PN897–905 (cross-examination of Dr Howe).

<sup>123</sup> Transcript, 13 July 2021 at PN722–7 (cross-examination of Dr Howe).

<sup>124</sup> Exhibit UWU 8 [8]; Transcript, 13 July 2021 at PN789–97 (cross-examination of Dr Howe).

<sup>125</sup> Transcript, 13 July 2021 at PN798–805 (cross-examination of Dr Howe).

<sup>126</sup> Transcript, 13 July 2021 at PN906–9.

<sup>127</sup> See Transcript, 13 July 2021 at PN785–7.

<sup>128</sup> Transcript, 13 July 2021 at PN886–96.

- 2 versions of the report were produced, one with only the substantive report and the other with the report *and* the appendices. Dr Howe was not able to attach the second version to her statement because of the file size and the limitations of the University's server;
- the report itself includes references to the Appendices;
- various horticulture industry participants, including the NFF, were provided with a full copy of the report (including the Appendices); and
- the full copy of the report, including the Appendices is available on the internet.<sup>129</sup>

[142] We accept Dr Howe's explanation. We also note that the table of contents in the report filed by Dr Howe clearly references the Appendices; it cannot be said that there was any attempt to hide this material. The AFPA's reliance on the non-inclusion of the Appendices is without substance.

[143] The second line of argument contends that Dr Howe's cross-examination reveals an unwillingness to concede errors or limitations in her work or to make obvious concessions.

[144] Based on a careful review of the transcript and our own recollections of the manner in which Dr Howe gave her evidence, we reject the proposition advanced. On occasion Dr Howe sought to qualify the answer given under cross-examination, rather than simply providing a yes or no answer. But nothing flows from this; it simply reflects the complexity of the issues raised and the need for a nuanced answer rather than simply accepting the proposition put by counsel. We would also observe that Mr Houston adopted a similar approach, on a number of occasions.<sup>130</sup>

[145] Finally, we turn to the OmniPoll Survey point. It was put to Dr Howe during cross-examination that her failure to refer to the OmniPoll Survey results in the First Statement was 'reflective of a partisan approach' to her evidence. This proposition was firmly rejected by Dr Howe:

'And you've turned your face against the OmniPoll survey of growers that contradicts that finding. You don't even mention it in your statement. Can I suggest to you that that's reflective of a partisan approach to your witness evidence in this case. Do you accept that?---Absolutely not. I strongly reject that. I did not include the survey because I did not think it was appropriate, and that in terms of feeding into my expert assessment about the \$15 an hour as a general assessment. The survey was discounted based on the small sample size and the cautions that OmniPoll themselves gave us about that question and the response rate for it. So I absolutely reject that. And I've received funding from industry to do this research, as well has [sic] having worked with unions, and I consider myself to be as objective as anyone can be in this kind of research. So I really do strongly reject your last statement.'<sup>131</sup>

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<sup>129</sup> Ibid at [828]–[835].

<sup>130</sup> For example, see Transcript of Proceedings, *Horticulture Award 2020* (Fair Work Commission, AM2020/104, Ross J, 20 July 2021) at PN3829–82; PN3881–97; PN3926–31; PN3942–3; PN3961–8; PN3995–8; PN4058–9 and PN4105–6 (cross-examination of Mr Houston) ('Transcript, 20 July 2021').

<sup>131</sup> Transcript, 13 July 2021 at PN989 (cross-examination of Dr Howe).

[146] We discuss the OmniPoll Survey further in section 4.4 of this decision where, among other limitations in the data, we note that the sample size in respect of growers engaging pieceworkers is quite small and that the report of the survey results (the OmniPoll Report) contains a warning to that effect. Suffice to say here that we accept Dr Howe’s explanation as to why she did not refer to the survey in the First Statement.

[147] We also note Dr Howe’s unprompted evidence that this was the first time she had written an expert statement;<sup>132</sup> that she did not receive payment for preparing her expert statements,<sup>133</sup> and that the statement was ‘very brief’ because of her teaching load at the time.<sup>134</sup> It is also relevant to note that the Durable Future Report – of which Dr Howe was a lead author – was commissioned by *employer* interests in the horticulture industry. These matters tell in favour of Dr Howe’s impartiality.

[148] For the reasons given we reject the proposition that Dr Howe lacked objectivity and impartiality as an expert.

[149] We now turn to the substance of Dr Howe’s evidence.

[150] As mentioned earlier, the focus of the challenge to Dr Howe’s evidence was her opinion, at [19] of the First Statement, that pieceworkers are ‘in fact ... generally earning less than \$15 an hour’.

[151] At [19] of the Howe Reply, Dr Howe states:

‘in response to paragraph 160 in the HoustonKemp report, in my first statement where I state at paragraph 19 that “the data from my research” is the basis for my view that piece rate workers are “paid well below the Award minimum rates, generally earning less than \$15 an hour”, I am making this statement as a general, expert assessment formed through my extensive and robust mixed methodology research of labour practices in the horticulture industry over many years.’ [Emphasis added]

[152] The AFPA submits that Dr Howe’s finding at [19] of the First Statement ‘is not valid and has no probative value’.<sup>135</sup> At [98] of its closing submissions, the AFPA submits:

‘A bare assertion of this kind is not a tenable basis for making qualitative findings about earnings in an industry and has no probative value.’

[153] In a recent decision<sup>136</sup> a Full Bench attached very little weight to particular opinions in an expert report where the basis of the opinion was not expressed, noting that:

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<sup>132</sup> Ibid at [783].

<sup>133</sup> Ibid at [787].

<sup>134</sup> Ibid at [773].

<sup>135</sup> AFPA closing submission, 26 July 2021 at [102]

<sup>136</sup> *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383.

‘A bare expression of opinion, absent any sufficient explanation of the basis of that opinion, is normally given little weight. As observed in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh*.<sup>137</sup>

‘the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.’<sup>138</sup>

**[154]** There is considerable force in the AFPA’s submission. Dr Howe’s opinion at [19] of the Howe Reply does have the appearance of ‘an oracular pronouncement’, and the evidence upon which Dr Howe relies does not support a finding of the breadth and generality proposed. But it is not necessary for us to finally resolve this question as the UWU ultimately eschewed reliance on Dr Howe’s opinion to support a finding that pieceworkers earned less than \$15 an hour. As counsel for the UWU put it in the course of closing oral argument:

‘... the Full Bench asked the UWU to address the weight that should be attributed to the evidence of Dr Howe in her first statement at paragraph 19. That statement needs to be understood in its proper context, and the purpose for which the UWU is relying on it. The UWU does not submit that the Commission should find as a matter of fact that piece workers earned less than \$15 an hour... it is not necessary for the Commission to make a finding of the precise mathematical amount by which pickers and horticultural workers are underpaid in order to vary the award.

The finding that the Commission is asked to make on the basis of Dr Howe’s report and other evidence is that piece rates are generally set at levels which means that workers do not earn at least minimum award rates. In his first statement Mr Houston stated his conclusion that the Towards a Durable Future report does not quantify in the mathematical or qualitative sense the average pay received by piece rate workers. That is of course correct, and neither the UWU nor Dr Howe contended that to be the case

...

The conclusions in Towards a Durable Future are soundly based on the research which underpin it, and that includes qualitative data. Data of course does not mean just numbers. Mr Houston again states that qualitative data can’t be relied on to draw quantitative conclusion with statistical confidence, and again no one is contesting the proposition, it’s a strawman argument. But that is not to say that qualitative research is not an accepted, valuable method of social science research, and that conclusions cannot be drawn from the research.’<sup>139</sup>

**[155]** As we have mentioned, the Durable Future Report is the product of a 3-year national study into the conditions of work in the Australian horticulture industry. The research project used ‘a three phase mixed methodological approach to analyse the nature of labour supply and regulation issues in Australian horticulture’ combining ‘a literature review, a quantitative survey and extensive qualitative research’.<sup>140</sup>

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<sup>137</sup> [1953] SC 34 at [40] (Lord President Cooper).

<sup>138</sup> *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383 at [172].

<sup>139</sup> Transcript 30 July 2021 at PN165–6, PN169.

<sup>140</sup> Exhibit UWU 8 at [7]

[156] The qualitative data to which the UWU's counsel referred (see [154] above) is summarised at [21]–[28] of the Howe Reply.

[157] The qualitative phase of the project involved interviews and focus groups with a total of 355 individuals across 13 regions located in 6 Australian states and territories. The table below summarises the number and location of interview and focus group participants in Phase Three of the project.<sup>141</sup>

Location	Interviewee Participants	Focus Group Participants	Participant Roles
Binningyup, WA	-	12	Growers, workers
Bundaberg, Qld	17	-	Growers, workers, recruitment agents, hostel managers, industry association, trade union official, government representative
Darwin, NT	1	15	Growers focus groups, industry association, workers
Gingin, WA	1	33	Growers, workers, labour hire contractor
Griffith, NSW	14	-	Growers, undocumented worker, Accommodation/labour providers, harvest recruitment office, industry association, government agency, local council, hospital social workers, church, community organisations
Lockyer Valley, Qld	2	4	Growers, industry representative
Katherine, NT	3	23	Growers, workers, labour hire contractor
Mildura and Robinvale, Vic	21	-	Local business, workers; community group, growers, hostel owner, union official, church representative, labour contractor, local government official, state government official, health worker
Orange, NSW	1	12	Growers, workers, labour hire contractor
Stanthorpe, Qld	24	6	Growers, workers, accommodation/labour providers, harvest recruitment office, police, local council, Mayor
Virginia, SA	13	12	Growers, workers, training provider, industry association
Wanneroo, WA	6	40	Growers, community representatives/legal aid
Wide Bay- Burnett, Qld	11	-	Growers, worker, local government officials, accommodation providers,

<sup>141</sup> Ibid at [12].



			industry representative, church representative
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[158] Dr Howe notes that the 13 case study locations share a number of similar characteristics as well as key characteristics that made them suitable for comparison, ‘resulting in a rich study’:

‘In all cases, horticulture was among the largest industries in the local economy in terms of its contribution to gross regional product and employment. However, differences were present in relation to crop variety, distance from major cities, labour flows, distribution markets, local infrastructure, eligibility of the region’s postcode for the 417 visa extension for working holiday makers, and its attraction as a tourist destination.’<sup>142</sup>

[159] To verify the information from the case study interviews and focus groups, primary documents provided by stakeholders and reports from local media, industry and government were also analysed. Additional interviews and focus groups were undertaken with 51 key stakeholders with particular knowledge of the horticulture industry and 2 additional WHM focus groups were held (in Sydney and Melbourne).<sup>143</sup>

[160] The qualitative data analysis software NVivo was used to organise and manually code the interview and focus group transcripts. At [15] of the Howe Reply, Dr Howe says:

‘This is an accurate and established method for analysing qualitative data in the Social Sciences used for the making of generalisations drawn from patterns observed in case studies. It is a ‘systematic approach to review participant views collected from an experience in order to allow patterns and themes to emerge over multiple passes through the data.’

[161] Dr Howe references a number of sources in support of the above observations and was not cross-examined in respect of this part of her evidence.

[162] The qualitative phase of Dr Howe’s project used a semi-structured interview method with a set of core questions. Interviewees were asked a series of questions in relation to remuneration.<sup>144</sup> At [22] of the Howe Reply, Dr Howe says that the following extracts from the data ‘are a representative sample of the types of responses we received about workers’ pay on piece rates. These indicate extremely low wages for piece rate workers involved in the study’:

Interviewees	Response
WHMs focus group, Darwin	“We worked in the same place and the cherries was very bad this year with the weather and so because of the rains they all cracked and so for the pickers, we had to check cherry by cherry ... so you can’t make money and so you make like <b>\$5 per hour.</b> ”
	“So for one day, I’ve done like <b>20 bucks in 7 hours.</b> ”

<sup>142</sup> Ibid at [13].

<sup>143</sup> Ibid at [14].

<sup>144</sup> Ibid at [22].

	<p>“The piece-rate, the thing is that they, in my experience on the farm, it was a group effort, so if the group was good then everyone got paid alright but if you have one really hard worker and you are stuck in a group with two other people, then it’s not great because they average it out for all three of you. <b>I think that’s kind of like you’re throwing the wolves together and then you see what comes out, and that’s how the farmer can get away with not paying the hourly rate.</b>”</p>
WHMs focus group, Gingin	<p>“I work before on a farm in Carnarvon, it was piece-rate, it was 15 kilo of beans for \$12 ... so <b>\$7 an hour.</b>”</p>
WHMs focus group, Katherine	<p>“Like you just work for <b>\$5 an hour</b> because the bucket price was just rubbish.”</p>
	<p>“We had 12 days of picking raspberries and it was terrible, I mean piece-rate, you get 80 cents per punnet ... <b>For the first week we probably earnt just over \$200 and we were doing 8, 9 hours a day.</b> The first day’s paycheque was \$28 for a 7-hour day and they charged you for your equipment so they took \$20 off that.”</p>
	<p>“You’re being forced to work piece rate but the crops wouldn’t be very good, so they’d say, ‘Don’t pick any of these because it’s diseased’ and you’d spend all day walking up and down and looking for fruit to pick and you’d be expected to do all of that in your own time. <b>Yes, just \$3 a bucket would take you half an hour, 40 minutes for the bucket because the crop’s just not there.</b>”</p>
WHMs focus group, Melbourne	<p>“You <b>just can’t make the minimum wage.</b> You can’t get it when you’re paid piece rate where you’ve got to be really fast ... it’s impossible to pick it when you’re being told to go and pick bad fruit to clean the rows, when you’re supposed to be picking the good stuff, you don’t get paid for the bad fruit when you’re getting sent back to clean the rows.”</p>
	<p>“I worked for 3 different farms. The first one was piece-rates and it was terrible. They like didn’t pay, they had like no fruit bushes and so <b>I worked for 8 hours and I think made 40 bucks</b> and that was really – I stayed for 3 days and they didn’t want to pay us, so we left. And then the next farm that I found paid <b>\$9 per hour</b> when the minimum wage was 24 and that was the one that we weren’t sure how they count the days. But I did a lot of work with him just because he had steady work and then eventually I found like a blueberry farm and they paid the minimum wage at the time which I think was \$20 or \$21 an hour and they had breaks.”</p>
	<p>“I got 12 cents per tree so I needed to plant a lot of trees. <b>I made about \$15 an hour, \$100 a day.</b>”</p>
	<p>“Yes, I also worked for 3 days at a tomato farm and we earned on piece rates what ended up being <b>\$5 an hour</b> for 6 kg of the little cherry tomatoes.”</p>
	<p>“Yes definitely. I had a piece rate job where most of the workers didn’t even get <b>\$10 per hour.</b> The farms don’t care if people leave after a few</p>

	<p>days, because there are always new backpackers, who try the job or even stay with the bad money, because they can't find something else."</p> <p>"Oh there was nothing – <b>no piece rate agreement</b>, you just showed up and they just verbally told you at the end of the day what <b>the rate was and it changed every day, every single day.</b>"</p>
WHMs focus group, Orange	"10 hours, \$10. <b>\$1 an hour</b> ... We had no choice as well... because we need to get 88 days first... We do anything because there's no choice."
WHMs interviews, Stanthorpe	<p>"We two are working in salads, you have to work as a team and you get paid one box \$1.40. So actually for every box you do it's like 70 cents per person and it's impossible to actually [sic] so many boxes that you can earn anything. They say on the papers you sign, they say, 'Oh you can make 15% plus than the hourly wage'. But it's just impossible. Like really ... Yeah, even the people working there for now a couple of weeks. They do for two people like about 180 box a day. It's just nothing, like <b>you don't earn even \$120 in eight hours.</b>"</p> <p>"<b>\$3 an hour we worked.</b> But the price was actually really wrong. Like we got \$27 for a thing of oranges. But his farm, I don't know why but they had a really bad season."</p>
Grower interview, Stanthorpe	"There's a couple here that worked at a strawberry farm for two or three days, they're from Ireland. They made <b>\$160 in four days I think on a contract piece rate</b> and they just said that nobody in the crew could achieve the output that was required to make a minimum wage. I said I'd give them support if they wanted to take it further but he was like I'm here for a good time, not for something like that and that's how farmers get away with it because the people that are here for a good time are not going to follow through. They move on. The people that are desperate put up with the unfairness."
WHMs focus group, Stanthorpe	<p>"Raspberry picking – we worked eight or more hours but we get <b>\$30 or \$40 for the day.</b>"</p> <p>"We called the harvest office and she said, 'this is going to be one of the best jobs, people are queuing for it.' So we were just like, 'yeah, this is going to be great, we're going to earn loads of money'. <b>Day 1 we earned \$31.50 for the entire day</b> ... seven hours work but we worked out to be paid like \$20 an hour we'd have to fill four bins up each but it's just no possible... and like have you seen the size of the bin? They're like big crate things. They're bigger than us, they're literally probably like this with the tables and chairs, about this high... no-body in the whole place even came close to making the minimum wage."</p> <p>"It was a contract piece rates job... <b>whole 2 weeks under \$200 dollars for 8 hours a day.</b>"</p>
Local worker interview, Stanthorpe	"You had to do a whole row for \$16 and I got maybe a quarter of the way down the row and it took me like over an hour so I'm working on <b>\$4 an hour</b> . I can sit at home – I don't want to. I can sit at home on Centrelink and get \$500, \$600 a fortnight and someone wants to pay me \$4?! I'm Australian, I don't need to – I'm no-one's slave."

WHMs focus group, Virginia	“Let’s just say, 8 o’clock you’d go to your farm and then they have let’s say a hundred bins that they’ve got to do. So whoever is, you know quick gets the more bins. Obviously there was two of us, so we decided to do a bin together just for morale and make it look like it goes up quicker. So, you know, you could have one day could be trees this high with oranges the size of footballs and it would take, let’s say, 30 minutes to fill up and there was one instance where we got a little bit late to the farm and there was only like one bin left and there was only about three oranges on each tree and he wanted every orange off the tree, so you know, you spend two minutes going up and down, so I think we were there for about four or five hours, so it worked to be like <b>\$3 each an hour.</b> ”
	“ <b>I got like 5 bucks. It was six hours.</b> Still not \$3 but [laughs] an hour.”
	There was one pay cheque that I <b>only got \$40</b> ...I went to make my 88 days. I was constantly looking for another farm and I had lined up to do cherry picking with a really nice family, it seemed like an excellent place and because of the weather it got delayed for three or four weeks and I finally gave up on that as I had spent all this time waiting.
WHMs focus group, Wanneroo	“Not when I was early picking, especially at the start it was difficult to do more than one row a day. Sometimes I was getting <b>\$90 a day ... for 7 hours.</b> ”
	“You would get \$8 a rack and if you’re a good picker it’s \$150 a day. I made <b>\$100 a day for nine and a half hours.</b> ”
	“I did get paid less at the end because <b>you’re forced to work in orchards where 75 per cent is already picked</b> so you really looking to find cherries so you don’t get much pay. But it’s the only way.”
WHMs focus group, Melbourne	“I think on this farm there was like 5 of us who weren’t willing to leave until we got paid and he kind of realised he had to come back with the money. So we did get paid in the end, but, yeah, it was like, I think like <b>\$40 for 8 hours of work</b> on piece rates.”
WHMs focus group, Sydney	“The pear farm was \$30 a bin – a massive crate that took a whole day to fill! The second farm was a woofing farm so we got our accommodation and food for free in order to work for our days to be signed off. The third farm we got paid per box, <b>I think it was \$4 or \$5 a box.</b> ”
	“I got paid piece-rate on one farm, hourly on another. <b>The piece rate agreement was very vague and I felt I was hugely underpaid.</b> ”

**[163]** At [23] of the Howe Reply, Dr Howe says that the study found that ‘there were a number of factors why piece rate workers received low pay and appeared to accept low pay. For WHMs, the reason for the latter was because of the need to complete an 88-day period of specified work in order to earn a visa extension.’ Dr Howe goes on to state that the following extracts are a representative sample from the data:

Interviewees	Response
WHMs focus group, Darwin	Participant: Because we have to, yeah, to do the values of the farm days and <b>we have not choice</b> to try to make some money and to do that....it is very hard to find farm jobs.
WHMs focus group, Katherine	“No choice. Just for, <b>I was just staying for my visa days</b> , to get the 88 days.”
	“It’s kind of hard to get farm work, so it’s like, what do you do, because if you get kicked off that one, then it’s really hard finding work. ... <b>You are forced to work there</b> , because you can’t afford to move anywhere else and you’re just trapped.”
WHMs focus group, Melbourne	“Even one of the girls I knew, like the guy told her, if she had sex with him he would sign off on her 88 days that day and I was like, ‘Call in and tell them’ but she was like, ‘I’m working on his farm, I just want to get my 88 days and be done with it’ and so she didn’t do anything, she didn’t report it, she just found a different farmer to work for but I didn’t know who he was really, so I didn’t feel like I could call in. Like I don’t think they want to hear third-party reports about a farmer, like how do they believe that?”
	“ <b>It’s the only way to get the 2<sup>nd</sup> year visa</b> . If I had had a choice I would not have done it or stuck it out being paid a pittance as long as I did. So, ultimately I would not recommend it to anyone.”
Local government official interview, Griffith	“The thing is, we’re encouraging a program or a body of people to come to the country and the only reason they’re coming to rural Australia is because they have to do their 88 working days to stay the extra year. You know, so we’re almost putting a noose to their head saying, ‘If you don’t do this, you can’t stay’. Because we have no trouble, like saying the solar farms that would come to the area, they have no trouble attracting people to that kind of work when they know they’re going to be earning \$30 an hour. So maybe half the problem too with horticulture is this piece rate.”
Community stakeholder interview, Griffith	“The 88 days costs them [WHMs] a fortune. Most of them, the general view is now, you don’t go unless you’ve got \$2000 in the bank because <b>it’s going to cost you money to do the 88 days</b> . This is not a time when you make money, it’s a time when you lose money so you can get an extra year on your visa.”
FWO official interview, Stanthorpe	“ <b>The ones that are more likely to be underpaid or exploited are ones where the employer, whether it’s a contractor or grower, has some sort of hold over them. The 88 days are a big driver of that. It’s really important to a 417 visa holder to do their 88 days.</b> Now, sometimes their planning is very poor and they tend to leave that towards the end of their first year that they’re here on a 417 visa, because they’ve got to do their 88 days within, you know, a specified time. Now if they’ve left it to, say, the last few months before their first year expires, there’s a great deal of urgency to do that in 88 days. Some rogue operators know the level of, I guess, stress that that causes and the urgency to do the 88 days and get that signed off and then approach immigration with your documentation. In some cases they’ll underpay you and say, ‘Well I f you want a second year,

	you're only getting this much as a rate of pay. Or worse, you have to pay me to sign off that visa documentation.' So what we're seeing is, with visa holders, the 88 days is worth more to them than the correct rate of pay."
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[164] At [24] of the Howe Reply, Dr Howe says that the study 'also found that the 88-day period meant that it was very difficult for WHMs to obtain the standard of average competency set by the grower because they had no prior experience in horticultural work and only worked in the industry for the minimum period required to earn a visa extension.' Dr Howe goes on to state that the following extracts from the data are a representative sample of the types of responses received about the interaction between the costs of training and the use of pieceworker rates:

Interviewees	Response
Accommodation operator interview, Stanthorpe	<p>"It's hard to know with underpayment who's right and who's wrong because if some people are working on piece rates, there is no bottom figure that somebody can work for a farmer. I had a guy in here this morning and he said he'd been working in [name of farm omitted] and the money was just terrible on piece rates. I said to him, 'you wouldn't have made any money in one day and you won't on any contract piece rates job for probably two weeks, which is how long it can take to build up to the speed for an average competent worker. To me, average would probably be 60 to 70% of the people that are working there, should be capable of earning X amount of dollars. You might get some that are 10% or between 5 and 10% normally at the top who will earn extraordinary money."</p> <p>"On big farms, farmers can't be standing behind every single worker. They have to go contract or they couldn't possibly make any money if they were paying an hourly rate on a huge farm that employs 50 or 100 people or something. They have to do contract because people can't be trusted to work, especially backpackers, they'll just sit under a tree if you were paying them hourly, or they'd take 40 minutes for lunch instead of half an hour. It happens all the time...If they're hourly, it's all down to the supervisor."</p>
WHMs focus group, Stanthorpe	"Some ladies making \$90 a day and others who're making \$40 an hour because they've been doing it for 10 years. You can't expect that of backpackers who just come here for the first year and have their first experience on a farm. We just can't make anything."
WHMs interviews, Stanthorpe	"We've been doing the thinning for weeks and he said 'you'll be slow at first but you'll pick it up, you'll get faster, you'll earn more money' but we didn't seem to pick it up fast but we thought we would get better. But we're really struggling to pick up the pace so we're not earning much – I think the last couple of pays worked out we were working about \$10 an hour and the first few days was much less. Even now, last pay, I got paid like \$450 and we worked 51 hours so that's less than...and it was the hardest days' work we've ever done in our lives, slashes all over hands, blisters."

Griffith local government official	“We’ve still got to have a workforce that is productive and I’m not sure that our locals and our backpackers are job ready yet. The whole thing with horticulture is the skill set has never really caught up with other industries where they train internally. You don’t hear about too many farmers or big businesses out there associated with horticulture that supply training. A lot of the training is on the job but certainly don’t see too much tertiary or education towards that side.”
Registered labour hire contractor interview, NSW	“The biggest problem with your backpackers of today is they don’t like piece rates. It’s just one thing that they can’t, you know, do it for long enough to get the skills to be any good at the game. That’s one of the reason why it’s hard for legitimate operators like me to market myself up against some of other contractors because they’ll just take a group of Malaysians and all they want to do is work and they’re not too fussed about what they’re getting paid.”
Growers focus group, Gingin	For us the 88 day thing is a pain in the butt because we get so many staff who are only here to do the 88 days. So, you’ve got someone sitting in a paddock and with my industry it’s so competitive we can’t pay hourly rates to pick fruit, we’re paying piece rates.
Accommodation provider interview, Griffith	“They’re usually around 18 cents or 13 cents a tree. An average person, if they do well, they can do a minimum of \$150 a day, on an eight-hour day. If you do better, some people are earning two to three hundred dollars a day. If the employer sees that the person is too slow and not making quota, then basically they would let them go. The same thing with the broccolini packing shed, which is the other contract base we’ve got. We say to them, ‘Look we’ve got this happening and we would like to say to you, if you’re not making money, let them go again.’ Orange picking, we discourage people to do orange picking. I did it myself. Unless you’re working there a week, you won’t make anything. When people go and pick oranges, I say to them, ‘Be prepared to work for at least a week before you can see any benefit’.”

**[165]** At [27] of the Howe Reply, Dr Howe says that the study found that:

‘... the piece rates provision in the Horticulture Award is challenging to enforce in an industry which is geographically dispersed and heavily reliant on temporary migrants and labour hire contractors. In addition, as each farm operation is different, the study found that assessment of whether a piece rate worker was being paid according to an accurate assessment of average competency typically required on-site inspection, which is difficult to achieve in practice.’

**[166]** Dr Howe goes on to state that the following extracts are a representative sample from the data:

Interviewees	Response
Fair Work Ombudsman interview	<p>“So you’re not meant to just arbitrarily pluck a figure out of the fair that you’re going to pay a kilo or a punnet ... You have to ensure that that rate complies with the provisions of the modern award. So that’s where we spend a lot of time in discussions, in education, checking and trying to check that the piece rate meets that average competent employee provision of the award. <b>Every farm is different.</b> There’s no industry standards about what an average worker does because you could work in a certain crop but farms differ from farm to farm because there’s different conditions of working, how fast or slow you can pick and pack and all of that sort of thing. <b>So that [piece rates] is probably the most problematic area of the horticulture award for us to enforce when we do our work.</b>”</p>
Union official interview, NSW	<p>“It’s hard for the Fair Work Ombudsman to get on site. They can rock up to the site and the farmer’s still got the right to refuse them entry and they do regularly ... Yes we too really struggle on sites with the dodgy employers and we’ve got competent organisers in all the regions and they know who the dodgy employers are and we inform the Fair Work Ombudsman. We’re not the only people that inform the Fair Work Ombudsman. We know that good farmers inform the Fair Work Ombudsman, and we know that community groups inform the Fair Work Ombudsman. But they [the FWO] have limited resources and powers.”</p>
Grower interview, Bundaberg	<p>“<b>I just prefer to get someone else to work it out [the piece rate]. Yeah, I just want ten people to turn up, pick and they must leave and then I just write a cheque to that crowd [the contractor] and they sort it out.</b> Because you’ve got to train them and you’ve got to make sure they’ve done their inductions. You’ve got to pay their wages into all their separate bank accounts. You’ve got to then pay all their super into all their – and that’s a lot of paperwork when you’re trying to pick and pack and everything else. So it’s much easier to just pay someone to sort out all that stuff.”</p>
Industry association official interview, Queensland	<p>“I’ve seen products in the supermarket, grown by growers who I know have been done by Fair Work three or four times. So those people, and this particular grower I’m thinking of, runs around the countryside saying he builds the costs of the fines into his cost of doing business because it’s still cheaper than paying his workers correctly.”</p>
Growers focus group, Orange	<p>“It’s a legal requirement. If they’re going to be supplying the packing shed then they have to supply the payslips. <b>But there’s many loopholes.</b> The 50 people that are on the books, you know there’s another 50 out there. I can’t prove if they have 60 or 70 and whether the other 10 were illegals, that could be cash out the back.”</p>
Labour hire contractor interview, Mildura	<p>“The grapes is the one that will cost to clean up. I’ll be brutally honest about that one. Because they’re so many small farms – they’re small family growers all paying piece rates. They’re 150 different growers in Mildura/Robinvale. Yeah, you’d virtually have to knock on every door to see, you know, ask them to look at their books. Even if you look at their books, you won’t necessarily get to the bottom of them. I’ll give you an</p>



	example, like ... [name omitted], he's a big grower and he's got 7 different ABN numbers. <b>It's impossible to get to the bottom of it.</b> "
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[167] Finally, at [28] of the Howe Reply, Dr Howe says that the study found that 'very few workers have the power to negotiate piece rates. Piece rates were largely arbitrarily set by growers and could be subject to change because of supply chain pressures.' Dr Howe goes on to state that the following extracts from the data are a representative sample on this point:

Interviewees	Response
WHMs focus group, Stanthorpe	"On this strawberry farm, there was a lady there, ... – she was like 50 odd years old, picking strawberries all day – every day – and she made \$200 a day easy and then there was this English guy, built like a first grade football player. Like you'd think, fit, hardworking, he struggled to make \$50 a day for a 10 hour day but it was his first season doing it though... On your contract it says the average worker should be able to earn minimum wage or more but that doesn't happen. <b>Last year I was an average strawberry picker, I did not make \$20 an hour. I made maybe \$13, \$14 or \$15 on average. I was the average picker. This year I was faster but I still can't get the minimum wage and I've been there six months.</b> "
WHMs focus group, Darwin	"I think the worst aspect is that there's more than one way to pay. It's the piece rate obviously. I think there is incentive, yes. They say, 'Oh you can make a lot of money' but if you're a newbie, a new person, you are not going to make a lot of money right away. It takes time. So the employer, in a way, doesn't have to really pay the money. I think the fact that a lot of the <b>employers can essentially say things to you like, "Oh well, you know, there's caravans coming up all day, people looking for jobs. If you don't like the piece rates here you can just leave."</b>
Community stakeholder interview, Griffith	"Woolies and Coles, their buyers, their main buyers are standing up on a pedestal going 'Everyone has to be doing the right thing here, everyone has to be moral about what they do and all the rest of it, they don't give a shit frankly. <b>They really don't care, so long as they're getting their product at the lowest price.</b> They're making all those noises but they really don't care. I mean they were still buying [name omitted], they were still buying his tomatoes after he was raided and he flooded the market so all the small growers who were doing the right thing couldn't even get their tomatoes to market. It's just such an ugly scene."
WHMs focus group, Katherine	"And the thing is really, <b>we're working to the price of punnets which was going up or down every day....</b> so some days we would go and the price of punnets would be 80 cents but then other days it would be over a dollar and then it would be back down to 80 cents."
Growers focus group, Wanneroo	" <b>If you get rid of the undocumented, I tell you now Coles and Woolies will only have half their produce.</b> And as much as they've got their ethical sourcing and everything, they do turn a blind eye."
Grower interview, Mildura	"So vegetable prices are very low, tomatoes are five bucks a box, you know, top of \$12 I think for a ten kilo box. All the vegies are, you know, as

	<p>low as they can go. They [growers] can't sell them all. Strawberries are about to reach a glut stage, I dare say, and every year you look and you say, 'well, at \$5 a box if you're shipping it away, the box costs you \$1.50 just for the box, how do people do it?' <b>I know from here if I wasn't paying proper piece rates I'd be losing a lot of money."</b></p> <p>"The growers aren't paying correct wage rates...it's the same in Chinese veg you know. I mean, they're one, you know, they keep on producing at \$1 a bunch or three bunches for \$1 some times and the maths doesn't add up unless there's something dodgy. It's a big problem if you're trying to compete in the market and you are doing the right thing. <b>Well it's almost like you can't compete unless you do the wrong thing – I think that's where the industry's got to...It's bad for competition, totally.</b> Yeah, it doesn't drive efficient, it doesn't drive innovative things. All it drives is that we have to reduce our wages, what we're paying."</p>
Grower interview, Stanthorpe	<p>"I think a lot of [visa holders] get into situations where they need money. They haven't got a very good understanding of English and so they are open for exploitation. I've got this young Aussie guy, he was working for a contractor previously and he was doing something with strawberries, the rate was set he said when he went in there. He worked out a way he could do the job quicker and he started making 30% above what the award rate was. <b>The contractor came in and changed the rate. It was the same job, he just changed the rate.</b> To me, that's exploitation. It's as simple as that...Moving the goal posts. He ended up getting \$16 an hour."</p>
WHMs interviews, Stanthorpe	<p><b>"The farmer said our supervisor could fill a bin in 45 minutes and we said we wanted to watch him do it. I mean no-one could do that.</b> That would mean he would have to pick 77 apples per minute and load them in carefully...I just can't live on \$8 a day."</p>
WHMs focus group, Perth	<p>"I did get paid less on piece rates because you're forced to work in orchards where 75% is already picked so you're really looking to find cherries to pick. So you don't get much pay but it's the only way to get your 88 days."</p>
Growers focus group, Wanneroo	<p>"We pay piece rates and our piece rate is irrespective of the price I'm getting. The piece rate is set by us to do it in a fair way. So every day we're looking at it and if there's less fruit and the workers are slow you've got to pay more. That's how it is. <b>But some guys don't do it that way. If the price is cheap, then they drop the rate."</b></p>
	<p>"They're not supposed to get the minimum wage. If you read it properly and this is the thing, it's the average competent employee. Now I've been to Fair Work several times and what determines an average competent employee, they can't tell you. They won't give you a determination. <b>I know growers who have 200 workers and they set their piece rate so one person on the farms makes \$22 plus 25% so it's like 25 bucks. But they work it out so one person makes the money. But to me that's not right,</b> you've got to have a fair percentage of the farm but what this, Fair Work, won't tell you."</p>

Accommodation provider interview, Griffith	<p>“Picking oranges is probably our next biggest problem here in Griffith because it’s getting harder to find the pickers because of the piece rate. Because they pay per bin. I think they pay – now I could be wrong – generally from \$30 to \$35 a bin. I think it’s three bins of oranges to a tonne...If they’re going to get \$300 or \$400 a tonne and they’ve got to pay the person to pick it well. Then they have to pay for water and electricity. It gets to the point where the farmer hasn’t made anything ...</p> <p><b>It’s not a very good job. It’s a shit job, up and down the tree all day picking oranges carrying this heavy bag around on the front of you. It’s a bad job, they’re not getting enough pay for it.</b> And the farmers are paying too much and not getting anything...It’s almost impossible. Impossible because everybody’s just importing juice from the other side of the world which is cheaper than what they can do here and that comes to the pay rate too, doesn’t it, in the end?”</p>
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**[168]** The AFPA’s submissions about the deficiencies in Dr Howe’s qualitative data are set out at [100]–[101] of the AFPA’s closing submission, in summary the ‘deficiencies’ are:

1. The ‘data’ is in effect a collection of anecdotes and stories told in focus groups and interviews.
2. The sample size at individual locations and overall is small (total sample size of 50-70 being comparable or smaller than the sample size of 64 for the set of pieceworker employers in the Howe Growers Survey that Dr Howe dismissed as being so small as to be not even worth mentioning).
3. There is an overwhelming preponderance of WHMs (28 anecdotes out of 30).
4. The results are affected by self-selection bias of unknown extent.
5. Dr Howe failed to provide the complete sample of responses coded to the ‘pay’ node (or at least a numerical analysis of all such responses), instead providing a hand-picked sub-sample with an ipse dixit assertion that this sub-sample is ‘representative’.<sup>145</sup>

**[169]** The AFPA concedes that Dr Howe’s qualitative data:

‘does evidence earnings of WHMs to some extent but, even in relation to that cohort, it has only minimal probative value due to the other deficiencies summarised above and explained in more detail at [100]–[101] of the AFPA Closing Submission’.<sup>146</sup>

**[170]** At [51] of the Houston Reply, Mr Houston says:

‘Dr Howe’s response does not cause me to alter the opinions I express in para 155-157 of my first expert report has not changed after reviewing Dr Howe’s report. My reasoning is that:

- a. Dr Howe’s reply report confirms that her opinion is based on outcomes of interviews and focus groups – it follows that the evidence Dr Howe seeks to rely on is qualitative

<sup>145</sup> Australian Fresh Produce Alliance, ‘AFPA’s response to further questions from the Commission’, Submission in *Horticulture Award 2020*, AM2020/104, 30 July 2021 at [2] (‘AFPA’s response to further questions from the Commission, 30 July 2021’).

<sup>146</sup> Ibid at [4]

in nature and so cannot be used to draw quantitative conclusions with any degree of statistical confidence;

- b. the extracts presented by Dr Howe indicate that the vast majority of responses on low hourly earnings from piece rates are from working holiday makers (WHMs) which, alone, are not representative of the horticultural workforce. I note that:
  - i. of the 30 extract responses on low earnings from piece rates, 28 are from WHM interviews or focus groups; and
  - ii. of the 28 responses from WHMs, six did not contain information on hourly earnings from piece rates.
- c. furthermore, participation in the interviews and focus groups is likely to suffer from self-selection bias, where those WHMs that do participate in the interviews/focus group are different to those who have not participated – for example, dissatisfied workers, including those that are underpaid, would be more likely to participate in the interviews and focus groups.’ [Emphasis added, footnotes omitted]

[171] Mr Houston describes himself as a ‘consulting economist’ and a ‘competition economist’,<sup>147</sup> and states that his primary area of expertise is in the economic analysis of markets.<sup>148</sup> In the course of cross-examination Mr Houston acknowledged that he had not undertaken any primary empirical research involving a survey or focus group research in the past 10 years.<sup>149</sup>

[172] Mr Houston’s practical experience in conducting surveys is quite limited. Over 10 years ago, Mr Houston had an involvement in consumer surveys in relation to water services in the ACT and the valuation of intellectual property.<sup>150</sup>

[173] In relation to the valuation of intellectual property Mr Houston was engaged to analyse and critique survey work which had been done by a third party, as opposed to having any involvement in the conduct of the survey.<sup>151</sup>

[174] In relation to the study of household consumers of water services in the ACT Mr Houston was the project leader and in that capacity worked ‘with people who took special or particular responsibility for the design of the survey, and the choices that needed to be made about sample sizes, and all aspects of the project’<sup>152</sup> but that:

‘the actual task ... of running the focus groups and the actual on the ground undertaking of the survey work was done by parties contracted from outside.’<sup>153</sup>

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<sup>147</sup> Transcript, 20 July 2021 at PN3708 (cross-examination of Mr Houston).

<sup>148</sup> Transcript, 20 July 2021 at PN3709 (cross-examination of Mr Houston).

<sup>149</sup> Transcript, 20 July 2021 at PN3719 (cross-examination of Mr Houston).

<sup>150</sup> Transcript, 20 July 2021 at PN3721 (cross-examination of Mr Houston).

<sup>151</sup> Transcript, 20 July 2021 at PN3723 (cross-examination of Mr Houston).

<sup>152</sup> Transcript, 20 July 2021 at PN3734 (cross-examination of Mr Houston).

<sup>153</sup> Transcript, 20 July 2021 at PN3737 (cross-examination of Mr Houston).

[175] Mr Houston's evidence does not disclose any particular experience or expertise in respect of qualitative research.

[176] Turning to the 'deficiencies' in the qualitative data identified by the AFPA and Mr Houston, it is uncontroversial that nearly all of the employee interviewees were WHMs; a point acknowledged by Dr Howe in cross-examination.<sup>154</sup>

[177] Similarly, it is not seriously disputed that the results *may* have been affected by self-selection bias, to an unknown extent. However, the point advanced by the AFPA overstates the matter – it submits that the results '*are* affected by self-selection bias'. In our view the submission advanced is too definitive. The project team took a number of steps to minimise self-selection bias in the interviews and focus groups, in particular:

- the recruitment advertisements were neutrally phrased and only asked 'Have you worked on a farm in Australia';
- participants were provided with a \$25 Woolworths or Coles voucher to turn up to a focus group interview; and
- the project team worked closely with growers.

[178] In relation to the last point, Dr Howe's evidence was that the researchers' engagement with growers may have led to self-selection bias of a quite different nature to that suggested by the AFPA:

'I think the self-selection bias may have been workers who growers themselves arranged for us to meet. For example, in many of the locations that I went to, the growers were very helpful in enabling us to meet in their lunch room and to conduct a focus group with workers. ...

Growers are very busy people, so they don't tend to want to do those things. So the growers that self-selected into our research tended to be more compliant growers, I would say. And they themselves extended the invitation to their workers, to say, 'In your lunch break, would you like to do this focus group? ...

So if anything, the self-selection may have been the other way, so we took that into account in our research as well. And we also actively sought to interview local Australian workers, and also permanent residents as well, to ensure that we weren't just getting one particular cohort. But as was acknowledged in the cross-examination, working holiday makers certainly formed a substantial part of the respondents.'<sup>155</sup>

[179] The AFPA's submission that the qualitative research 'is in effect a collection of anecdotes and stories'<sup>156</sup> is just a pejorative characterisation intended to undermine the probative value of the research without advancing a substantive critique. As we have mentioned, the validity of qualitative research is widely accepted. Further, Dr Howe's unchallenged evidence was that the methodology used to organise and code the interview and focus group transcripts 'is an accurate and established method for analysing qualitative data in

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<sup>154</sup> Transcript, 13 July 2021 at [980]

<sup>155</sup> Ibid at [1008]–[1010].

<sup>156</sup> AFPA's response to further questions from the Commission, 30 July 2021, at [2(a)].

the Social Sciences used for the making of generalisations drawn from patterns observed in case studies.<sup>157</sup>

[180] The AFPA also submits that the ‘sample size at individual locations and overall is small and smaller than the pieceworker employers in the OmniPoll survey. Mr Houston advances a related point – that the evidence is qualitative in nature and ‘cannot be used to draw quantitative conclusions with any degree of statistical confidence’. These points are misconceived. The AFPA conflates the Durable Future qualitative research with survey based quantitative research – the 2 methodologies are quite different. Mr Houston’s point is, as counsel for the UWU put it, a straw man argument.<sup>158</sup> No one is contending that quantitative conclusion with any degree of statistical confidence can be drawn from this evidence. But that is not to say that qualitative evidence has no probative value.

[181] The final point advanced by the AFPA is that Dr Howe only provided a ‘hand picked sub sample’ of the complete sample of responses with an ‘*ipse dixit*’ assertion that this sub sample is representative’.<sup>159</sup>

[182] The validity of conclusions based upon qualitative research can be challenged by calling for the records of the discussions in question. This was done in the *Penalty Rates Decision* in respect of Dr MacDonald’s qualitative study.<sup>160</sup> In the present proceedings, the AFPA could have taken this course in respect of the qualitative research relied upon by Dr Howe and called for all of the interview and focus group transcripts, but chose not to do so. The AFPA cannot now be heard to complain that all of the records were not produced. Nor did the AFPA cross-examine Dr Howe as to the basis of her assertion that the examples provided were representative of the complete sample of responses coded to the ‘pay’ code. We accept Dr Howe’s evidence as to the representative nature of the examples provided.

[183] Contrary to the submission advanced by the AFPA we have concluded that the qualitative research referred to in the Howe Reply has probative value and we have given it appropriate weight in arriving at our findings.

#### **4.2.3 Professor Underhill’s Evidence**

[184] The AWU asked Dr Underhill to provide a written report providing her opinions on the composition of the workforce in the horticulture industry and the average earnings of employees engaged as pieceworkers in the horticulture industry (Underhill Report).<sup>161</sup>

[185] The Underhill Report presents data from Dr Underhill’s own data on piecework rates paid to horticulture workers, referred to as Research Project 1 and Research Project 2.

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<sup>157</sup> Howe Reply [15]

<sup>158</sup> Transcript 13 July 2021 [169]

<sup>159</sup> AFPA’s response to further questions from the Commission, 30 July 2021, at [2(e)].

<sup>160</sup> *Penalty Rates Decision* at [595]–[609].

<sup>161</sup> Exhibit AWU 16.

[186] Research Report 1 is the subject of a published article by Professor Underhill and Malcolm Rimmer titled *'Layered Vulnerability: Temporary migrants in Australian horticulture'*.<sup>162</sup>

[187] Research Report 2 is the subject of an article by Professor Underhill and others titled *'Using social media to improve temporary migrant workers' access to information about their employment rights'*.<sup>163</sup>

[188] The Underhill Report states that Research Project 1 found pieceworkers earned, on average, significantly less than hourly paid employees.<sup>164</sup> A similar pattern was found in Research Project 2.<sup>165</sup>

[189] As mentioned earlier, the AFPA engaged Mr Houston to prepare an expert report that reviewed and critiqued the Underhill Report. Mr Houston's analysis of the Underhill Report is set out in section 2 of the First Houston Report.

[190] Dr Underhill provided a statement in response to the First Houston Report (the Underhill Reply). The Houston Reply includes Mr Houston's reply to the Underhill Reply.

[191] The AWU contends that the evidence shows pieceworkers in the horticulture industry 'commonly earning hourly rates well below the minimum hourly rate prescribed by the Award for the type of employment and classification level.'<sup>166</sup>

[192] The AWU accepts that Dr Underhill's research targeted a particular segment of the horticulture workforce (WHM picking workers in 'picking regions') and that approximately 90% of the respondents were WHMs.<sup>167</sup> Further, at [28] of the Underhill Reply, Dr Underhill says:

'The publications based on our two surveys do not claim to be representative of the entire population of horticultural workers.'<sup>168</sup>

[193] In his critique of Dr Underhill's survey methodology Mr Houston's principal observations are that:<sup>169</sup>

- the sampling methodology results in a non-representative sample, undermining its ability to generalise findings to horticulture workers in Australia, and

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<sup>162</sup> Elsa Underhill and Malcolm Rimmer, 'Layered vulnerability: Temporary migrants in Australia horticulture' (2016) 58 *Journal of Industrial Relations* 5, 608-626. See also CB2207.

<sup>163</sup> Elsa Underhill, Sherry Huang, Sohoon Yi and Malcolm Rimmer, 'Using social media to improve temporary migrant workers' access to information about their employment rights' (2019) *Journal of Australian Political Economy* 84, 147-174. See generally, Transcript, 15 July 2021 at PN1120-1128.

<sup>164</sup> Exhibit AWU 16 at [24], Table 3.

<sup>165</sup> Exhibit AWU 16 at [26], Table 4.

<sup>166</sup> Australian Workers' Union, 'Submissions for the AWU RE Factual Findings Urged by the Applicant', Submission in *Horticulture Award 2020*, AM2020/104, 26 July 2021 at [2(c)] ('AWU submission, 26 July 2021').

<sup>167</sup> AWU submission, 26 July 2021 at [51].

<sup>168</sup> Exhibit AWU17, Reply Report of Dr Underhill at [28]; also see Transcript, 15 July 2021 at PN1341.

<sup>169</sup> Exhibit AFPA6, Expert Report of Greg Houston at [32].

- the research suffers from self-response bias.

[194] At [35] of the Houston Reply (addressing the Underhill Reply), Mr Houston states:

‘the presently available data can only properly be described as presenting pay outcomes for WHM workers, and cannot be extrapolated to a wider population of all horticultural workers, of which WHMs are only a subset.’

[195] At [50] of its closing submissions, the AWU submits:

‘In cross-examination, Mr Houston confirmed that in his reports he was not criticising the studies undertaken by Dr Underhill or the conclusions and opinions drawn in those studies, but rather was critical of her drawing conclusions having regard to those studies that he described as being “much broader than the conclusions in the studies themselves”. Ultimately, the primary criticism made by Mr Houston of Dr Underhill’s conclusions was that the research projects were directed at WHMs in particular, rather than the horticulture workforce as a whole and, for that reason, might not be representatively of the workforce as a whole.’ [Footnotes omitted]

[196] The AWU submits that it is not necessary for the Commission ‘to make a specific finding of fact that the mean or median hourly rate dollar figures calculated for pieceworkers by Dr Underhill are in fact reflective of the entire population of the horticulture industry in Australia.’<sup>170</sup>

[197] The AFPA contends that it is open to the Commission to find that some employers in the industry set their pieceworker rates and/or time rates at inappropriately low levels or otherwise underpay their workers; but it is not open to make any findings as to what proportion of employers do so.<sup>171</sup> As to Dr Underhill’s evidence, the AFPA accepts that:

‘Dr Underhill’s data is probative of the Underhill *Relational* Earnings Finding in relation to WHMs (that is, probative of the proposition that the median earnings of WHMs working in horticulture are lower for WHMs engaged on a piecework basis compared to those engaged on hourly rates). Even in relation to that finding, its probative value is diminished by the defective design of the questions, which is likely to skew down the reported pay outcomes for pieceworkers.’<sup>172</sup>

[198] In her expert report, Dr Underhill compares the hourly earnings of employees on an hourly rate with an estimate for the hourly rate equivalent wage for employees on a pieceworker rate. In making this comparison, Dr Underhill relies on the findings from Research Project 1 and Research Project 2.

[199] Research Project 1 is the only major academic survey to collect data on pieceworker earnings in horticulture in Australia. The second research project collected data from a smaller number of horticulture workers. Research Project 1, conducted in 2013/2014, found

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<sup>170</sup> AWU submission, 26 July 2021 at [52].

<sup>171</sup> AFPA closing submission, 26 July 2021 at [27(b)].

<sup>172</sup> Australian Fresh Produce Alliance, ‘AFPA’s submission addressing the Campbell Article (AWU-30)’, Submission in *Horticulture Award 2020*, AM2020/104, 30 July 2021 at [8].



pieceworkers earned, on average, significantly less than hourly paid workers. The table below is derived from Table 3 at [24] of the Underhill Report (Exhibit AWU 16).

**Table 1: Underhill Research Project 1**  
**Average hourly earnings for harvest workers, 2014 (n=278)**

<b>Payment method</b>	<b>Mean</b>	<b>Median</b>	<b>Minimum</b>	<b>Maximum</b>	<b>Award minimum</b>
Paid by the hour (time wages) (n=158)	\$16.20	\$18.00	\$3.00	\$28.25	\$16.87
Paid piece rates (n=120)	\$11.69	\$12.00	\$2.00	\$30.00	\$19.40*

t(276)= 7.589, p = 0.000 \*average competent worker

[200] On the basis of this data Dr Underhill states:

‘Piece rate average earnings are well below the earnings of hourly paid workers, and only 60% of the amount an “average competent worker” would be expected to earn. There is also high variance in hourly earnings, with the lowest average hourly rate for piece rates being \$2.00 and the maximum \$30.00 per hour. A range of factors impact the productivity of harvest workers, such as experience, equipment, and the type and quality of the product picked. However, the low average pay of piece workers suggests that farmers and contractors fix piece rates too low on the basis of exaggerated performance expectations of the “average competent worker”.’<sup>173</sup>

[201] A similar pattern was found in Research Project 2 conducted in 2017/18. The table below is derived from Table 4 at [26] of the Underhill Report (Exhibit AWU 16).

**Table 2 Underhill Research Project 2**  
**Average hourly earnings for harvest workers, 2018 (n=81)**

<b>Payment method</b>	<b>Mean</b>	<b>Median</b>	<b>Minimum</b>	<b>Maximum</b>	<b>Award minimum</b>
Paid by the hour (time wages) (n=53)	\$21.03	\$22.13	\$10.00	\$26.00	\$22.86
Paid piece rates (n=28)	\$16.28	\$15.00	\$5.00	\$25.00	\$26.29*

t(35.51)= 4.156, p = 0.000 \*average competent worker

[202] It is not necessary for us to traverse all of Dr Underhill’s evidence.

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<sup>173</sup> Exhibit AWU 16 at [25]

[203] We acknowledge that there are limitations in the data presented in the Underhill Report, as contended by the AFPA. Despite these limitations, the data supports a finding that the median earnings of WHM's working in horticulture are significantly lower for WHM's engaged on a piecework basis compared to those engaged on hourly rates. Further, we think it likely that the mode of engagement is one reason for the disparity, along with other factors, such as experience.

#### 4.3 The NFF Survey and Employee Questionnaire

[204] The NFF conducted a survey between 16 April 2021 and 10 June 2021 (the NFF Survey). The NFF Survey questions were prepared by Mr Ben Rogers, General Manager Workplace Relations for the NFF.<sup>174</sup> The survey was distributed to State-based farming bodies and commodity groups, who in turn distributed it to their farmer members.

[205] There was a media release about the NFF Survey on the NFF's website<sup>175</sup> and it was promoted in an NFF newsletter.<sup>176</sup>

[206] The NFF document also contains the following statement:

'The AWU has recently launched an application in the Fair Work Commission to effectively abolish piece rates, raising concerns among some growers that they will be forced to massively reduce the number of workers they employ during peak seasons or else consider selling up entirely.' [Emphasis added]

[207] We return shortly to the characterisation of the Application.

[208] The NFF Survey could be completed via a link on the NFF's website and NFF social media sites (Facebook and Twitter).

[209] One of the documents distributed by the NFF is titled 'Growers and farm workers asked to help protect piece rates';<sup>177</sup> that document concludes with a link to the survey, as follows:

'If you are a worker or grower in the horticulture sector who has paid or been paid by piece-rate, we want to hear from you. Please consider completing the survey here <https://www.surveymonkey.com/r/58BT8Y5> and sharing it with your networks and industry contacts.' [Emphasis added]

[210] It is not possible to identify the number of persons to whom the NFF Survey link was sent. Some 196 survey responses were received; but not all respondents answered every question. The NFF Survey results are set out at Attachment F to Mr Rogers' witness statement.<sup>178</sup>

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<sup>174</sup> Exhibit NFF 3 at [21].

<sup>175</sup> Transcript, 16 July 2021 at PN1858–59 (cross-examination of Mr Rogers).

<sup>176</sup> Transcript, 16 July 2021 at PN1861 (cross-examination of Mr Rogers).

<sup>177</sup> Exhibit AWU 19.

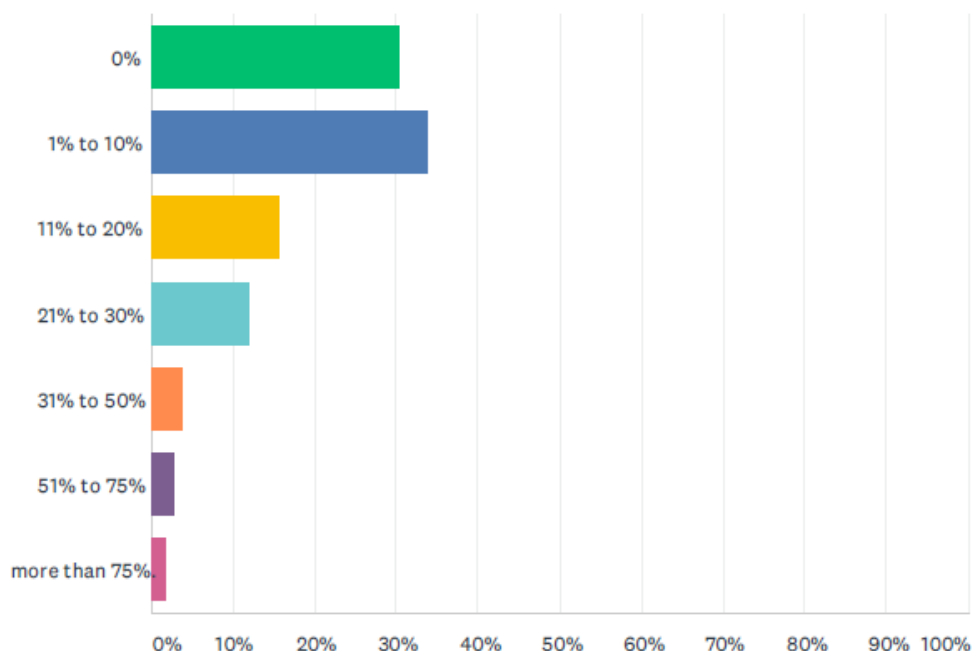
<sup>178</sup> Exhibit NFF 3.

[211] Questions 11, 12 and 13 of the NFF Survey are directed to growers and ask questions relating to the earnings of pieceworkers on the grower's farm.

[212] Question 11 asks 'What is the average weekly earning of a piece-rate worker on the farm?' No data is provided as to the number of hours worked to attain the 'average weekly earning' and hence the responses to this question provide no indication of the average *hourly* earnings.

[213] Question 12 asks 'What is the proportion of piece-rate workers who make less than \$24.80 an hour?' The casual rate for a level 1 employee under the Horticulture Award is \$24.80 an hour. Of the 196 total responses to the survey, there were 109 responses to this question and 87 survey respondents chose not to answer. The results are shown in Chart [1] below:

**Chart 1: Responses to Q12 of the NFF Survey**  
(Proportion of piece rate workers who make less than \$24.80/hr)



Source: Exhibit NFF3, Witness Statement of Ben Rogers, Attachment 'F'.

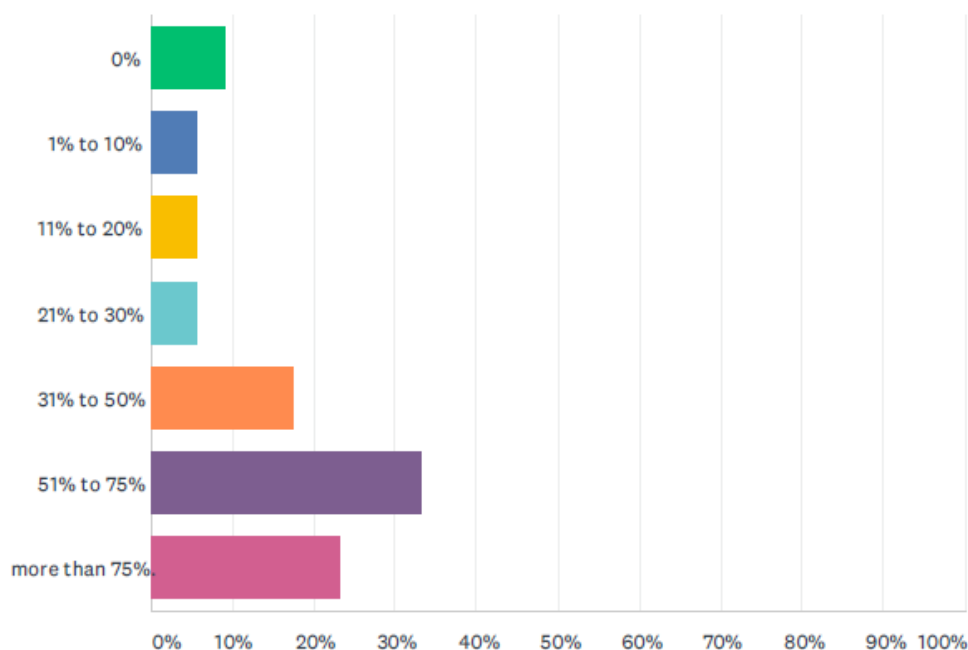
[214] The amount of \$24.80 an hour corresponds to the minimum hourly rate for a Level 1 casual employee under the Horticulture Award at the time the NFF Survey was conducted. About 30% of those who answered the question indicated that none of their pieceworkers earned less than \$24.80 per hour. The remaining growers (69.72%) responded that a proportion of their pieceworkers earned *less than* \$24.80 an hour. Just over 20% of the responses report that more than 1 in 5 of their pieceworkers earn less than \$24.80 an hour.

[215] Question 13 asks 'What is the proportion of piece rate workers who make more than \$28.00 an hour?' The amount of \$28.00 an hour does not correspond to any particular minimum hourly rate under the Horticulture Award. The piecework rate prescribed by clause 15.2(b) for the average competent Level 1 casual employee is \$28.52 per hour.

[216] During cross-examination Mr Rogers explained the \$28 an hour amount was intended to approximate the casual rate for a Level 1 employee plus 15 percent but that the clause 15.2(b) piecework rates were lower when the NFF Survey was being drafted as it was before the increase determined in the *2020-21 Annual Wage Review* decision.<sup>179</sup> We note that contrary to Mr Rogers’ assertion the clause 15.2(b) piecework rate for the average competent Level 1 casual employee was \$28.52 at the time the NFF Survey was distributed.

[217] Of the 196 total responses to the survey, there were 108 responses to this question and 88 survey respondents chose not to answer. The results are shown in Chart [2] below:

**Chart 2: Responses to Q13 of the NFF Survey**  
(*Proportion of piece rate workers who make more than \$28/hr*)



Source: Exhibit NFF3, Witness Statement of Ben Rogers, Attachment ‘F’.

[218] 10 of the 108 (9.26%) responses to this question said that *none* of their pieceworkers make more than \$28 per hour. The remaining growers (90.74%) responded that a proportion of their pieceworkers earned *more than* \$28 per hour.

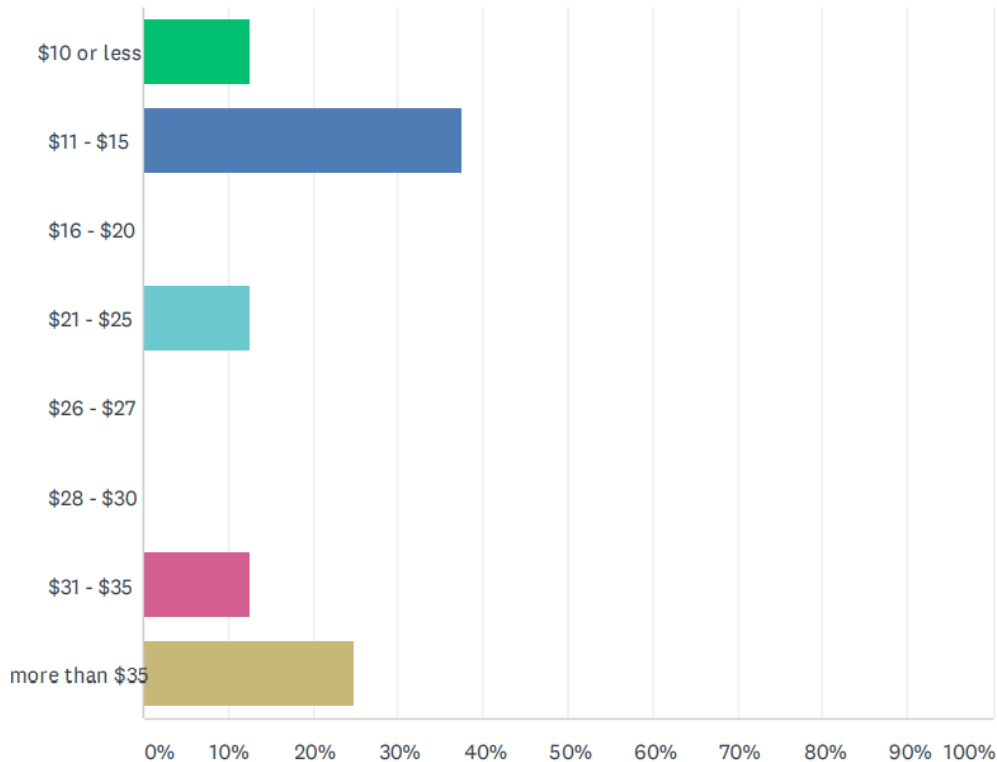
[219] About half of the growers who answered this question (61/108: 56%) reported that more than half of their pieceworkers earned more than \$28 per hour. A limitation with this data is that we don’t know how *much more* than \$28 per hour these pieceworkers earned. They may have earned substantially more; or alternatively, *only* marginally more than \$28 per hour (indeed a proportion may earn more than \$28 per hour but less than \$28.52 per hour).

[220] Question 18 asks ‘As an employee paid by piece-rate, what are your typical weekly earnings per hour?’

<sup>179</sup> Transcript, 15 July 2021 at PN1958.

[221] Some 8 employees answered this question. The results are shown in Chart 3 below:

**Chart 3: Responses to Q18 of the NFF Survey**  
*(As a piece rate worker what are you typically hourly earnings)*



*Source: Exhibit NFF3, Witness Statement of Ben Rogers, Attachment 'F'.*

[222] Five of the 8 employee responses reported earning less than \$25 per hour when paid by pieceworker rates; 4 of those 5 earned less than \$15 per hour.

[223] As mentioned earlier, it is not possible to identify the number of persons to whom the NFF Survey link was sent. Accordingly, it is not possible to identify the response rate. This is one limitation on the data.

[224] Further, there is nothing before us to suggest that the responses to the NFF survey were drawn from a random sample of the population of interest (that is all growers and pieceworkers in the horticulture industry). The NFF has adduced no evidence about the extent to which the sample data from its survey reflects the population of interest, namely all horticultural workers and growers.

[225] In addition, non-response bias may have affected the survey results. Potential respondents could choose whether to participate in the NFF Survey, and therefore not all of those who were aware of the survey may have responded. And, of those who did respond some chose not to answer all survey questions. Non-response bias may mean that the responses of the survey respondents are not representative of the Survey population.

[226] The NFF Survey may also be affected by self-selection bias. The note at the beginning of the NFF Survey stating that the NFF is opposing the Application could also possibly lead those with stronger views on the subject to respond to the Survey.

[227] Finally, the NFF Newsletter titled *Growers and farm workers asked to help protect piece rates* states that the aim of the NFF Survey is ‘to confirm the importance of pieceworker rates as a payment model.’<sup>180</sup> The Newsletter also mischaracterises the Application, stating that ‘the AWU has recently launched an application in the Fair Work Commission to effectively abolish piece rates’. As we mentioned, this statement is misleading. These contextual considerations may also have affected the results and heightened the rate of self-selection bias.

[228] The NFF contends that the NFF Survey results ‘should be given considerable weight given that it is a voluntary anecdotal statement from those who were motivated to participate’.<sup>181</sup>

[229] In its closing submission on the evidence, the AFPA submits that the NFF Survey ‘suffers from issues such as self-selection bias’ and is of ‘limited probative value’.<sup>182</sup>

[230] The NFF Survey was distributed to State-based farming bodies and commodity groups, who in turn distributed it to their farmer members. The link to the NFF Survey could be forwarded and shared with others who could then complete the survey – indeed the NFF encouraged its members to do so. Accordingly, it is not possible to identify the number of persons to whom the NFF Survey link was sent, and nor is it possible to identify the response rate.

[231] The NFF does not suggest that the NFF Survey was of a random stratified sample of the relevant population. Nor is it suggested that the results can be extrapolated to the horticulture industry as a whole.

[232] The NFF Survey results provide some indicative anecdotal data but cannot be said to be representative of the views of all of those in the horticulture industry.

[233] In addition to the NFF Survey, the NFF emailed its members and a number of growers the document (the NFF Employee Questionnaire) as set out below [Emphasis added]:

**AWU – Horticulture Award 2020  
Application to install a ‘piece rate floor’**

**Employee Questions**

The Australian Workers Union has made an application to the Fair Work Commission which will effectively eliminate piece work arrangements under the Horticulture Award.

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<sup>180</sup> Exhibit AWU 19.

<sup>181</sup> National Farmers’ Federation, ‘NFF’s Submissions as to Evidence’, Submission in *Horticulture Award 2020*, AM2020/104, at [11(c)] (‘NFF submission, 26 July 2021’).

<sup>182</sup> AFPA closing submission, 26 July 2021 at 18.

The NFF is contesting this application. The AWU's essential claim is that piece rates are a tool to exploit fruit and veg' farmworkers. That's just not right. Although we know that some workers are underpaid – whether on pieces rates or not – we also know that many workers earn great money on piece rates, better than hourly rates.

The NFF's focus will be on the farm and the effect which the change could have on farm businesses, but we think the Commission should also be aware of the negative impact it could have on workers. Crucially, it may result in the removal of the requirement for growers to set a piece rate which enables pieceworkers to earn 15% more than the minimum wage. That is, if the AWU succeeds employees may be guaranteed \$24.80 per hour but not have access to a piece rates which allow them to earn at least \$27.78 per hour (and potentially much more).

If you work on piece rates and can provide a statement which includes information about how much you earn and whether you would prefer hourly rates, with or without the 15% loading, please contact Ben Rogers at [contact details omitted].

**1. Background**

*Name, age, education, farming work experience.*

---



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**2. Example of roles where you were paid piece rates.**

*Location and crops of farm, work title and duties.*

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**3. Piece Rate Earnings.**

*Typical hourly and weekly earnings while on piece rates,*

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**4. Piece Work.**

*Why you do or do not prefer piece work/rates to hourly work/rates.*

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**5. Personal Response.**

*What would you do if you could not earn piece rates and/or your hours were capped?*

---



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**6. Reaction to Change.**

*Would you be happy with the change?*

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[234] This document was drafted by Mr Rogers.<sup>183</sup> It was intended that growers/employers would provide it to their employees; to be completed and, presumably, returned to the NFF.

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<sup>183</sup> Transcript, 15 July 2021 at PN1831–38.

Two of the NFF witnesses in these proceedings have attached completed responses by employees.<sup>184</sup>

[235] The way the NFF Employee Questionnaire is framed and the way it was distributed are both problematic.

[236] The preamble to the questions provides the context – that the AWU has made an application to vary the Horticulture Award and the NFF is contesting that application. The purpose of the NFF Employee Questionnaire is made apparent by the third paragraph of the preamble – to make the Commission ‘aware of the negative impact it [i.e. the AWU’s application] could have on workers’. Plainly, the language used is intended to elicit responses which illustrate the ‘negative impact’ the Application could have on workers.

[237] The preamble also mischaracterises the Application. It says that the Application:

- will effectively eliminate piecework arrangements under the Horticulture Award, and
- may result in the removal of the requirement for growers to set a piece rate which enables pieceworkers to earn 15% more than the minimum wage.

[238] Mr Rogers was cross-examined in respect of these issues,<sup>185</sup> and he confirmed that he drafted the NFF Employee Questionnaire, including the preamble.<sup>186</sup> Mr Rogers conceded that the Application does not seek to prohibit piece rates,<sup>187</sup> and that it is not part of the Application to remove the request for piece rates so as to enable the average competent pieceworkers to earn 15% more than the minimum wage.<sup>188</sup> Despite these concessions, Mr Rogers denied the statements to the contrary made in the preamble to the NFF Employee Questionnaire were not true and did not accept that the preamble was materially misleading:<sup>189</sup>

‘And in those two respects you were making statements in this questionnaire descriptive of the application which were not true. Correct?---No.

All right?---I didn't say that that was the application, I said that that may be the result, which is still to my mind a possibility.

Could I just put to you that you were - that these questions were - sorry, the introduction to the questions was materially misleading as to what the AWU was seeking to achieve in the application?---Don't accept that, no.’

[239] This aspect of Mr Rogers’ evidence is wholly unconvincing and, in any event, Mr Rogers’s opinion of the statements made in the preamble to the NFF Employee Questionnaire is not relevant. We can determine for ourselves whether the statements made were misleading or untrue, by simply reading the document and the Application.

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<sup>184</sup> Exhibit NFF 9, Attachment A; Exhibit NFF 13, Attachment C.

<sup>185</sup> Transcript, 15 July 2021 at PN1831–56

<sup>186</sup> Transcript, 15 July 2021 at PN1838.

<sup>187</sup> Transcript, 15 July 2021 at PN1847.

<sup>188</sup> Transcript, 15 July 2021 at PN1853.

<sup>189</sup> Transcript, 15 July 2021 at PN1854–56.



[240] In our view, the first statement set out at the first dot point in [236] above is misleading and the statement set out at the second dot point in [236] is purely speculative.

[241] As to the first statement, the expression ‘effectively eliminate’ is vague. It is unclear if it is speaking of the legal effect of the Application, or what may be perceived to be the practical outcome if the Application is granted. It plainly has the potential to mislead. It was understood by at least one of the recipients of the NFF email — Ms Distill, an orchardist from Tasmania — that the Application was intended to *prohibit* the use of pieceworker rates.<sup>190</sup>

[242] The second statement is mere speculation. No party is contending for the removal of the requirement for growers to set a pieceworker rate enabling pieceworkers to earn 15% more than the minimum wage.

[243] The way in which the NFF Employee Questionnaire was distributed is also problematic. Ms Distill’s evidence is relevant in this regard.

[244] Ms Distill employs 27 ongoing employees on her Tasmanian orchard, and her seasonal workforce can increase to about 160 employees over the course of the season when up to 120 are employed at any one time.<sup>191</sup> About 40% of Ms Distill’s seasonal harvest employees are local residents who return year-on-year, and the remaining are backpackers/WHMs and itinerant workers.<sup>192</sup>

[245] Six completed NFF Employee Questionnaires are attached to Ms Distill’s witness statement. The NFF Employee Questionnaire was given to employees by Ms Distill’s orchard supervisor. Ms Distill was asked if it was given to all the workers and she replied:

‘So, you identified those workers who wanted to, as you put it, write a letter in support of piece rates?---Not necessarily. We didn’t go out specifically asking that. We put it out to our workers what was happening and, yes, most of them were quite happy to (audio malfunction).’<sup>193</sup>

[246] Later Ms Distill sought to qualify that answer:<sup>194</sup>

‘So, you say you put it out to the workers. How did you communicate to the workers that you wanted them to complete this survey document?---We gave it to the orchard supervisor.

So, you gave them to the orchard supervisor. That was the extent of your direct involvement; is that right?---That’s correct, yes.

What did you tell the orchard supervisor to do?---Just asked him if he would talk to the workers of the orchard and anybody that was happy to do what we’ve done and they gave it - they took it from there.

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<sup>190</sup> Transcript, 16 July 2021 at PN3005.

<sup>191</sup> Exhibit NFF 13 at [15]–[16].

<sup>192</sup> Exhibit NFF 13 at [18].

<sup>193</sup> Transcript, 16 July 2021 at PN2995.

<sup>194</sup> Transcript, 16 July 2021 at PN2996–9.

All right. That is, you were telling them to ask the workers to fill in this survey if they were supporting you; is that right?---No, it was not a directive or anything like that, it was - it was, "If you would like to fill this out, feel free to fill it out; is you don't want to fill it out or don't want to do anything with it, you don't need to."

[247] Plainly not all employees were given a copy of the NFF Employee Questionnaire by Ms Distill's orchard supervisor. We note that letters of support accompany the completed NFF Employee Questionnaires attached to Ms Distill's statement. We think it is a reasonable inference from the evidence that only those employees who agreed to write a letter supportive of pieceworker rates were given a copy of the NFF Employee Questionnaire to complete.

[248] Some 16 completed NFF Employee Questionnaires are attached to Mr Moss' witness statement.<sup>195</sup> Mr Moss' evidence was that he provided the Questionnaire to some of his employees but could not recall the date on which he did so.<sup>196</sup> All of the employees were SWP employees.

[249] Mr Moss did not direct the employees as to how they were to answer the NFF Employee Questionnaire and could not recall if he explained his understanding of the Application to the employees when he provided them with the Questionnaire. Mr Moss did not see the employees answer the NFF Employee Questionnaire and did not know if they answered the Questionnaire together.<sup>197</sup>

[250] The contextual issues discussed above have led us to attribute no weight to the NFF Employee Questionnaire. The overall impression created by the preamble is that the Application will eliminate piecework arrangements and that workers will not be able to be engaged on pieceworker rates and hence be unable to earn more than the minimum wage. The Application seeks to do no such thing.

[251] It is reasonable to assume that the employees who completed the survey may have been influenced by the misleading statements in the preamble and gave their answers accordingly.

[252] Further, the NFF Employee Questionnaires attached to Ms Distill's statement may have been affected by self-selection bias given that only those employees who agreed to write a letter supportive of pieceworker rates were given a copy of the Questionnaire to complete.

[253] Finally, in respect of the 16 completed NFF Employee Questionnaires attached to Mr Moss' statement, we do not know if these Questionnaires were even completed by horticulture workers as Mr Moss did not see the employees answer the Questionnaire.

[254] It is convenient to deal here with the employee letters of support attached to Ms Distill's statement. One of the letters states:

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<sup>195</sup> Exhibit NFF9, Attachment A.

<sup>196</sup> Transcript, 16 July 2021 at PN2754-5.

<sup>197</sup> Transcript, 16 July 2021 at PN2765-9.

‘TO WHOM IT MAY CONCERN

My name is [redacted] I have worked for Spreyton Fresh for over a decade on a seasonal basis picking both cherries and applies, on piecework rates.

As an experienced picker my average is 5-6 bins of apples per day. Picking on piece work rates has always enabled me to earn well above award wages throughout the apple & cherry seasons. Working in this way has given me the flexibility to work at my own pace and be able to run a household and juggle other family commitments.

This has enabled me to contribute to our family’s overall income with no need to work on a fulltime basis.

If the Award is changed, and pickers who are under performing are getting topped up to the daily award rate, essentially being paid for being on site, not for the work they have done. There will no longer be an incentive for me to pick fruit.

If you require further information from me, I can be contacted on the numbers above and would be happy to speak with you if required.’<sup>198</sup>

**[255]** The next 4 letters follow the same format – the first paragraph sets out the employee’s name and that they have picked fruit on Ms Distill’s orchard, on piecework rates. The letters next set out the employee’s satisfaction with the piecework arrangements. Three of the letters use the following words:

‘... piece work rates enables me to earn above award wages throughout the harvest seasons. This increases my total income for the year and allows me to be financially independent...’

**[256]** The highlighted paragraphs in the first letter are common to the first 5 letters of support. These letters were all typed in the office at Ms Distill’s orchard. Ms Distill described the process during her cross-examination:<sup>199</sup>

‘Firstly, the first stage in the process was that some employees completed the questionnaire. You then brought them into the office, did you, and spoke to them?---We had a meeting, yes, we had a group meeting and it was discussed because a lot of - well, some of the people that we employ don't have access to computers or don't have access to that type of thing, so it was a meeting and we spoke about what the questions had been asked and then we drafted the letters, they went back out to the pickers and we made changes if they needed to be made and then they were signed.

When you say "We drafted the letters", that is, did you do that?---We drafted the letters together collectively, the people that had filled out the questionnaires and myself.

I'll take it one step at a time. There was a group meeting of all the people who had filled out the questionnaires; is that right?---That's correct, yes.

At which you suggested that they sign a letter as well; is that right?---I asked them if they were prepared to do that and they said, yes, they would. So, then we discussed about - then we discussed what we were going to put in the letter and that's essentially what we have done.

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<sup>198</sup> Exhibit NFF 13, Attachment C; CB3037.

<sup>199</sup> Transcript, 16 July 2021 at PN3024–31.

So you then went back to the office and typed up a letter and some changes were made and you printed out the appropriate one for each person and they signed it; is that right?---Yes.

There's some marginal differences between some of them, but generally they're much the same; is that right?---Yes, that's correct.

The particular concern that you understood the workers had was that if they no longer had access to piece rates and could only earn hourly rates, that they might not work as hard; is that right?---Yes.

They wanted to continue to have the opportunity to do piece rates and to earn more than the hourly rate of pay?---That's correct, yes.'

[257] The last employee letter of support is in a different format and states, relevantly, 'Being on piecework rates suited me. I was averaging 4 bins per day, then had the flexibility to finish up early to work casual shifts hairdressing which worked very well.'<sup>200</sup>

[258] We do not propose to attribute any weight to the employee letters of support attached to Ms Distill's statement given the manner in which the employees were selected and the misleading information provided to them about the Application. As we have mentioned the last employee letter of support is in a different format but does not say anything about the quantum of pieceworker rates paid to the writer and says nothing of relevance to the Application.

#### 4.4 OmniPoll Survey

[259] Appendix C to the Durable Future report sets out the results the OmniPoll Survey,<sup>201</sup> a national survey of vegetable growers undertaken between 17 August and 6 September 2016.<sup>202</sup>

[260] OmniPoll started by obtaining the contact details of 1,552 vegetable growers from peak industry associations. After excluding businesses that were not vegetable growers and businesses that could not be contacted or who did not complete their interviews, OmniPoll was left with 401 confirmed vegetable grower contacts.<sup>203</sup>

[261] The OmniPoll Survey asked a question about the hourly rates paid for ordinary time and for an average competent pieceworker. Data was collected from interviews completed with 252 growers who had hired or paid pickers, packers or graders in the past 5 years. There were 63 responses from growers who employed pieceworkers.

[262] In respect of pieceworkers, the respondents were asked to state the hourly rate they pay 'to an average competent adult worker'.

[263] The method for determining whether the respondent was paying above or below award rates is explained in the OmniPoll Report:

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<sup>200</sup> Exhibit NFF 13, Attachment C; CB3047.

<sup>201</sup> Exhibit AFPA 1, Appendix C, OmniPoll, *Vegetable grower practices, experiences and views concerning employment of seasonal farm labour* (Report no. 160820, August/September 2016) at 9 ('OmniPoll Report').

<sup>202</sup> Ibid at 8, 17.

<sup>203</sup> Ibid at 8–9, 16–17.

‘Assuming that (i) respondents provided accurate rates, and (ii) the rates related to the full time, part time or casual workers they report as ‘mostly’ employing, it can be determined if a given grower pays below the award. The criteria used for paying below the award were (i) under \$17 for full/part time workers; (ii) under \$22 for casuals.’<sup>204</sup> (Emphasis added)

**[264]** As mentioned above, respondents were asked to state the hourly rate paid to an ‘average competent adult’ pieceworker. Clause 15.2(b) of the Horticulture Award provides the pieceworker rate must enable the average competent worker to earn at least 15% more per hour than the minimum hourly rate. At the time the OmniPoll Survey was conducted the Level 1 ‘average competent’ casual pieceworker award rate was \$25.44; the minimum hourly rate for a Level 1 employee was \$17.70 for a full time and part time employee and \$22.13 for casuals.<sup>205</sup>

**[265]** Based on the methodology referred to above, 17% of the respondents were classified as paying below the award for hourly rates and 15% of the respondents for piece rates, as shown in Table 3 and Chart 4 below.

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<sup>204</sup> Ibid at 39, 47.

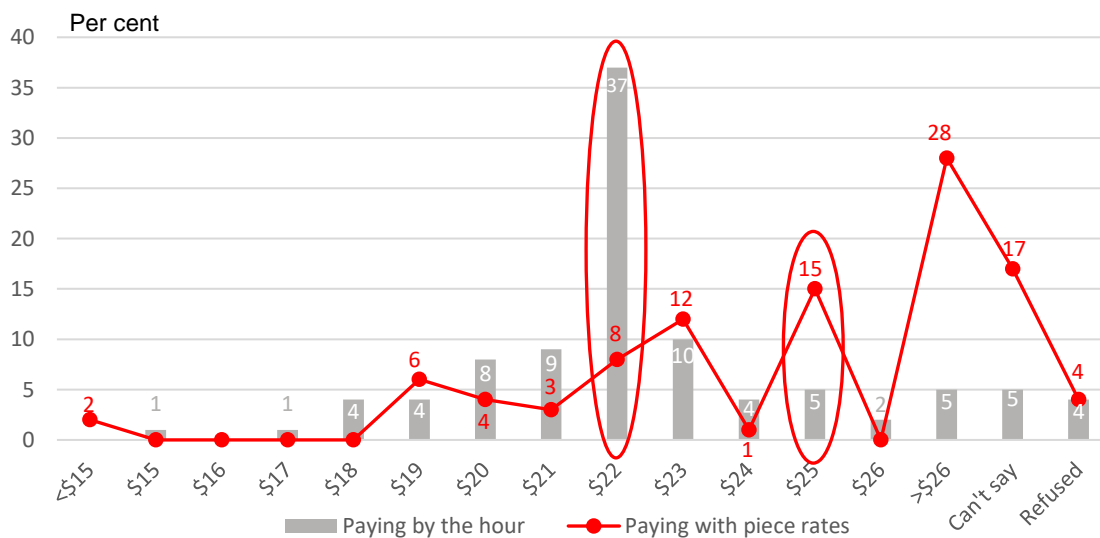
<sup>205</sup> PR579790.

**Table 3: Growers who pay/hire pickers, packers or graders with piece rates<sup>206</sup>**

Paying with piece rates  
Caution: small sample sizes!

		NO. EMPLOY IN PEAK SEASON	
	TOTAL	<20	20+
(Sample size n=)	(63)	(30)	(33)
	%	%	%
Pay below award	15	24	5
Pay award or higher	65	56	74
Not determined	20	20	21
Total	100	100	100

**Chart 4: Piece rates and rates paid per hour<sup>207</sup>**



[266] Four things may be said about these results:

1. The sample size in respect of growers engaging pieceworkers is quite small and the OmniPoll Report contains a warning note to that effect.
2. The 15% of growers paying pieceworkers less than the minimum hourly rate for a Level 1 casual employee may understate the extent of non-compliance. The 15% figure is based on the proportion of respondents paying less than \$22 an hour. The relevant minimum award rate is \$22.13 an hour. Depending on the rounding rules applied by OmniPoll (which are not disclosed) a further 8% of respondents (i.e. 23% in total) may have paid their pieceworkers less than the minimum award rate.
3. The results may be affected by non-response bias. Some 20% of responses are categorised as 'not determined'. It cannot be assumed that this 20% could be distributed

<sup>206</sup> OmniPoll Report at 39, 47.

<sup>207</sup> Ibid.

in the same way as the distribution of the sample for which an answer could be determined (i.e. 65% paying the award rate or higher). Growers would be reluctant to answer questions that might incriminate them and hence it is more likely that a significant proportion of the non-responses were from those growers paying below award rates; a point we return to shortly.

4. Depending on the rounding rules, some 51% of respondents were paying pieceworkers \$25 an hour or less, which is below the ‘average competent’ pieceworker rate at the relevant time (\$25.44 an hour).

[267] The OmniPoll Survey also asked growers using piece rates the following question: ‘when you pay piece rates, do you have a written agreement with workers that specifies the rate of payment for them in writing?’<sup>208</sup>

[268] About half of the 63 growers paying piece rates (48%) claimed to have a written agreement with workers that specifies the rate for them in writing, with a written document more likely to be provided by businesses employing more than 20 employees.<sup>209</sup>

[269] There are significant limitations in the OmniPoll data.

[270] In cross-examination, and in the Howe Reply, Dr Howe identified numerous limitations with the OmniPoll Survey, including that OmniPoll noted that due to the small sample size of respondents to this question, results should be treated with caution; that OmniPoll advised Dr Howe and her research team that that particular finding was not robust; and that ‘it is well known that survey respondents typically don’t answer surveys in a way that incriminates them.’<sup>210</sup>

[271] Dr Howe states that the OmniPoll Survey of vegetable growers is ‘not particularly useful’ for ascertaining wages received by pieceworkers, because, in summary terms:<sup>211</sup>

- the Survey has limitations, which are typical of most survey research;
- the nature of the industry (seasonality, geographical dispersion, reliance on contractor, largely temporary migrant workforce, presence of undocumented workers) means it is difficult to quantify piece rates or undertake a representative survey;
- it would be difficult to use a quantitative survey to assess whether piece rate workers are being underpaid as this hinges upon average competency – even if a survey found that a large proportion were being paid under the award hourly rate, this does not necessarily mean that these workers were paid in breach of the award;
- the small sample size in relation to the piece rate question limits the meaningfulness of the Survey results;

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<sup>208</sup> Ibid at 38, 46.

<sup>209</sup> Ibid.

<sup>210</sup> Transcript, 13 July 2021 at PN903 (cross-examination of Dr Howe); Exhibit UWU 8 at [27]–[28].

<sup>211</sup> Exhibit UWU 8 at [29]–[36].

- survey respondents are unlikely to self-report non-compliance with the requirements of the Award; and
- the Survey does not include labour hire contractors, which are prevalent in the sector and where problems of non-compliance are concentrated.

[272] Mr Houston agreed with Dr Howe’s identification of the limitations of the OmniPoll Survey,<sup>212</sup> and that the Survey was not representative of horticulture growers because it excluded fruit growers.<sup>213</sup> There was no dispute between Dr Howe and Mr Houston that the Omni Poll survey has significant limitations.

[273] The AFPA submits that the OmniPoll Survey is, despite its limitations, ‘the least bad piece of evidence in this case’ and that:

‘This data source is less unrepresentative of the industry as a whole than the other data sets and shows that the pieceworker earnings in the industry are likely to be much better than the Union Parties’ evidence suggests.’<sup>214</sup>

[274] We do not accept the AFPA’s characterisation of the OmniPoll survey as the ‘least bad piece of evidence about pieceworker earnings’. The use of different methodologies in the various surveys and qualitative research to which the AFPA referred renders such a comparison meaningless — the AFPA is comparing apples with oranges.

[275] We acknowledge that the OmniPoll Survey has limitations. As the OmniPoll Survey Report authors themselves noted in respect of the limitations of the data:

‘the sample frame covered only a particular subset of the entire vegetable grower population of around 4000. It is unknown how this subset may differ from the entire population. Consequently, the survey should be considered as a survey of this population subset, rather than a survey of the entire population.’<sup>215</sup>

[276] The limited sample size in respect of the data referred to above is an additional significant limitation.

[277] Further, it is likely that the growers surveyed would be reluctant to answer questions which may incriminate them and hence the robustness of the results of the pay rate question may be affected by non-response bias.

[278] In this context we note that the OmniPoll Survey also asked the 252 growers who paid or hire pickers, packers or graders about their perceptions about the prevalence of growers paying below the award rate and whether they had paid below the award rate themselves. The question asked was:

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<sup>212</sup> Exhibit AFPA 6 at [165]; Exhibit AFPA 7 at [54]–[55].

<sup>213</sup> Transcript, 20 July 2021 at PN4082 (cross-examination of Mr Houston).

<sup>214</sup> AFPA closing submission, 26 July 2021 at [47].

<sup>215</sup> OmniPoll Report at 8, 16.



‘Some farmers have said that, for a variety of different reasons, they pay pickers, packers or graders below the award rate. Would you say it is **very** common, **quite** common or **not** common for farmers in your industry to pay below the award?’<sup>216</sup>

In the last 5 years, have there been any occasions when you’ve paid below the award rate yourself?’<sup>216</sup>

[279] A quarter of growers believed it was very or quite common for farmers in their industry to pay below the Award, but only 5% admitted to doing so themselves in the previous 5 years.<sup>217</sup>

#### 4.5 Piecework in Horticulture

[280] The characteristics of the horticulture workforce render it vulnerable to exploitation. As mentioned in section 3.1 of this decision, work in the horticulture industry is labour intensive and seasonal. There is a high proportion of casual and contract labour; workers engaged during harvesting season are likely to be remunerated by pieceworker rates. Temporary migrant workers constitute just over half of the total workforce and *more* than half of the seasonal harvesting workforce.

[281] In this section we canvass the lay employee and employer witness evidence concerning piecework in the horticulture industry, in particular:

- the remuneration of pieceworkers;
- the practical operation of clause 15.2 of the Horticulture Award; and
- the consequences of granting the Application.

##### 4.5.1 Piecework remuneration

#### A Employee Lay Witnesses

[282] The Union parties tendered evidence from a number of employee lay witnesses. The witnesses describe their experience either working in the Australian horticulture industry, or as union officials representing such workers. The evidence presents a picture of significant underpayment of pieceworkers in the horticulture industry. A number of employee lay witnesses have spoken of their own experiences:

- Chee Sing Ee<sup>218</sup>, who worked in the Australian horticulture industry from 2016 to 2019,<sup>219</sup> states:

‘I did grape leaf-plucking in Mildura from November 2016 till January 2017. It was a piece-rate job, and I was paid \$0.40 for completing one tree. At the end of the day, I should have been paid about \$25. However, I was not paid at all in the beginning ...

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<sup>216</sup> Ibid at 39, 47.

<sup>217</sup> Ibid.

<sup>218</sup> Exhibit AWU 1.

<sup>219</sup> Ibid at [3].

... my pay was not even enough to pay for the accommodation and transport. Therefore, the contractor did not pay me at all in the first six weeks. The contractor said he would not pay me until my salary exceeds the rent and bills.<sup>220</sup>

Between January and April 2017, Ms Ee picked grapes:

‘My remuneration for grape-picking was based on a piece rate of \$2.10 per box. A box is 10 kilograms of grapes. During this period, I could make between \$60 to \$80 per 9-hour day. I was paid cash with no payslip or superannuation. Some workers made a bit more money because they had years of experience in picking. But only about 10% of them could earn more than \$20 per hour.’<sup>221</sup>

Ms Ee also picked grapes between January and May 2018:

‘My picking skill progressed so that I could earn approximately \$200 in cash per 10-hour day. Half of my co-workers earned less than \$100 per day, and the other half made between \$100 and \$200 per day.’<sup>222</sup>

Between November and December of 2018, Ms Ee picked grapes in St George, Queensland but due to the high temperatures ‘could only make about \$60 per day’.<sup>223</sup>

In 2019 Ms Ee worked as an orange picker in Mildura. The pieceworker rate was \$25 per bin; about 800 kilograms of oranges:

‘I could earn barely \$50 per 10-hour day in the first few months. The maximum I could earn was \$140 per day at the end of the period, not only because my skill progressed but also because the amount of fruit increased.’<sup>224</sup>

- Hsu<sup>225</sup> describes working as a pieceworker picking oranges in Renmark South Australia and being paid \$25 per 800kg bin.

‘In the beginning, I could only gather a bin of oranges, so my daily income was \$25. I had to pay rent of \$110 and bills at the same time. To save money, my friends and I did dumpster diving after the closure of supermarkets.

I became quick after three months so I could earn about \$120 a day.’<sup>226</sup>

- Niko Karhu<sup>227</sup> was paid \$36.75 for a day’s work picking tomatoes, which worked out to be \$5.25 per hour. The following day he picked chillies:

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<sup>220</sup> Ibid at [7], [9].

<sup>221</sup> Ibid at [10].

<sup>222</sup> Ibid at [11].

<sup>223</sup> Ibid at [12].

<sup>224</sup> Ibid at [13].

<sup>225</sup> Exhibit AWU 3.

<sup>226</sup> Ibid at [8], [9].

<sup>227</sup> Exhibit UWU 5.

‘After about an hour of picking I asked the other workers how many buckets they had, and it turned out that we were all picking at around the same rate, with only a couple of workers with one more bucket than me. I was paid \$38.40 for that day’s work, which works out to \$7.68 per hour.’<sup>228</sup>

- Rodney McDonald<sup>229</sup> describes his experience as a pieceworker as follows:

‘When I was pruning for a piecerate in 2019, the most I ever made in a day was \$160, working 7 hours, which works out to be about \$22.85 per hour. That was the best day but it was only one day. The worst full day I made \$76.20 working 7 hours, which works out to \$10.80 per hour. I made under \$80 or less a day on thirteen different days during that time. My best week that winter I earned \$768, but that week included 2 eight hour days working hourly. My next best week – where I was just doing piecerate work – was \$460, working three days...

In the seven weeks that I kept a diary when I was doing work at the medium sized farm in 2018, the best day I had was during the second week where I strip picked 8 bins of peaches at \$34.75 per bin for a total \$278. That was also the best week I did, where I made \$684 working 5 days. But when we moved to pears, it was really hard to pick more than a couple of bins per day, and I was regularly working the whole morning and only getting one or two bins. I calculated using my log of hours and the amount I was paid that I was earning between \$9.48 and \$21.06 per hour over that month of picking pears. I earned \$18 or less on eleven days during that month.’<sup>230</sup>

- Xueliang Wang’s<sup>231</sup> first job was picking blueberries in Coffs Harbour:

‘I was paid a piece rate of \$5.20 per 2-kilogram bucket. I could gather about 13 buckets every 6-hour day. Therefore, my daily income was about \$65. However, I did not receive any payslips or superannuation payments.’<sup>232</sup>

He describes picking grapes in Mildura as a pieceworker on \$2.20 to \$3.00 (depending on the variety) per 9kg tray of grapes:

‘At the beginning and the end of that season I could barely make \$50 per 9 hour day because there were not many grapes. I could make about \$100 per day during the middle few weeks because more grapes were on the tree.’<sup>233</sup>

He also worked at a tomato farm in Coffs Harbour as a pieceworker. He was never told the pieceworker rate and was paid \$400 for a week’s work; he worked 12 hours a day, 7 days a week.<sup>234</sup>

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<sup>228</sup> Ibid at [15].

<sup>229</sup> Exhibit UWU 2.

<sup>230</sup> Ibid at [43], [51].

<sup>231</sup> Exhibit AWU 2.

<sup>232</sup> Ibid at [4].

<sup>233</sup> Ibid at [8]–[9].

<sup>234</sup> Ibid at [12].

- Lachlan Wakefield<sup>235</sup> worked in horticulture between 2018 and 2020 and gave evidence about the earnings of blueberry farm workers:

‘Most of the blueberry farm workers told me that they were struggling to make \$100 dollars a day. The well-paid ones would make about \$160 per day.’<sup>236</sup>

- ‘Witness 1’<sup>237</sup> describes picking avocados in 2020:

‘This was a group pick, where 12 people would pick together and the total would be paid equally between 12 of us. We were paid \$27/bin. If there was good fruit we could pick 24 bins/day and earn around \$100 each. Usually the fruit is not good quality so I could only make \$60-70/day. I would usually work 7 days a week. My work hours would be from about 7:00AM to 5:00PM, depending on weather. If it is hot I would finish at about 1:00PM.’<sup>238</sup>

From about August 2020 until about October 2020 the witness worked at the same farm picking mandarins over winter:

‘As a group we were paid \$30/bin. The total bins picked will be split between a group of 12 as well. I would earn about \$120 per day working in this group size. I would usually work from about 7:00AM to about 5:00PM.’<sup>239</sup>

Witness 1 also described undertaking work for no pay:

‘When I picked avocados and mandarin at the farm, the supervisor would sometimes say to my co-workers and me: “You missed fruit. Go Back, check and pick again until they are cleared out from the trees”. I did not get paid for this. This job was ‘cleaning the trees’. Sometimes it would take up to 2 hours just to check, go through all the leaves and trees. I found it to be hard work for no pay. I saw other co-workers complain and the supervisor would yell at them, so I did not say anything.’<sup>240</sup>

Witness 1 ultimately left piecework because:

‘the weekly pay is too low, it’s hard to make more than \$900/week. Even with experience and working more than 12 hours a day I found it is hard to make enough. I am now working in an hourly paid job on a farm.’<sup>241</sup>

**[283]** Various AWU and UWU officials also gave evidence regarding the underpayment of pieceworkers:

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<sup>235</sup> Exhibit UWU 4.

<sup>236</sup> Ibid at [15].

<sup>237</sup> Exhibit UWU 6.

<sup>238</sup> Ibid at [12].

<sup>239</sup> Ibid at [13].

<sup>240</sup> Ibid at [14].

<sup>241</sup> Ibid at [32].

- Suliman Ali<sup>242</sup>, an AWU Organiser, describes visiting a member in Gingin who said she was being underpaid:

‘She told us that she had been working at Costa Berries for about 3 months. She provided us with piece-rate payslips. And her rostered hours...

When we returned to the office we calculated her hourly rate based on the number of punnets of blueberries picked. We calculated she was paid \$5 per hour.’<sup>243</sup>

- Anthony Beven<sup>244</sup>, an AWU Organiser, gave evidence that some ‘picking workers’ he had dealt with:

‘have earned good wages via piece rates, up to around \$1,000 NET before deductions for accommodation, transport, insurance etc.

... I have also seen workers left with around \$80 per week after these deductions. That would equate to around \$350 NET for a full working week.

On average, the workers I have observed are earning well below the minimum rate for an average competent piecework employee under the Horticulture Award – which is the permanent award rate plus the 25% casual loading plus the 15% piecework loading. There are very few workers reaching this level of earnings despite being competent and experienced.’<sup>245</sup>

- Darren Cameron,<sup>246</sup> a Union Organiser - Snowy Mountains and Canberra with the AWU, gave evidence that he has ‘regularly been approached by backpackers who have sought help after working a 38-hour week and making less than one or two hundred dollars.’<sup>247</sup>
- Steven Carter,<sup>248</sup> a NSW North Coast Organiser with the AWU, lives within the local blueberry industry area and says:

‘I regularly interact with countless backpackers who are engaged with Costa and other co-operative blueberry farms through the area.

In those discussions, I have asked about their rates of pay. Arrangements I have observed include:

\$10 cash per hour;

Piece rate arrangements which result in \$10 to \$20 an hour.’<sup>249</sup>

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<sup>242</sup> Exhibit AWU 12.

<sup>243</sup> Ibid at [10].

<sup>244</sup> Exhibit AWU 4; Exhibit AWU 5.

<sup>245</sup> Exhibit AWU 4 at [21]–[23]

<sup>246</sup> Exhibit AWU 6.

<sup>247</sup> Exhibit AWU 6 [15].

<sup>248</sup> Exhibit AWU 10; Exhibit AWU 11.

<sup>249</sup> Exhibit AWU 10 at [44]–[45].

- Ron Cowdrey<sup>250</sup>, a Vice President and Organiser with the AWU (NSW Branch), gave evidence that he had witnessed:

- ‘workers picking onions being paid \$45 per crate which totals 60 buckets that could take up to three to four hours to pick;
- workers picking citrus in Hillston for a contractor, Prasard Management, receiving weekly wages of \$325.50 for the week then being taxed;
- workers being paid \$25 per bin to pick oranges in Griffith and completing 2 bins per day.’<sup>251</sup>

- Philip Gourlay<sup>252</sup>, a Mildura Area Organiser with the AWU, gave evidence that he had recently spoken with a local worker about issues with his current employer:

‘The worker explained that in a previous job, he was being paid piece rates for picking table grapes and earning a total of \$30 for 10 hours of work.’<sup>253</sup>

- George Robertson<sup>254</sup>, a National Coordinator with the UWW, gave evidence that the ‘overwhelming majority’ of piece rate workers he had met ‘have been paid less than the minimum wage, equivalent hourly rate of pay for their level, and less than the amount that would “enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the award for the type of employment and the classification level of the employee”’.<sup>255</sup>

[284] In his statement Mr Robertson records that between April and May 2019, the UWW undertook a survey of over 650 farm workers across Victoria and NSW (the UWW Survey). Most of the respondents were working in either the Sunraysia region or the Goulburn Valley during the main grape, apple, pear and stone fruit harvest season in those regions. The results of this survey were released by the union in a report called the *UWW Speak Up Report*, published in 2019. The UWW Report is attached to Mr Robertson’s statement and marked ‘GR-1’.

[285] The average hourly pay of all workers surveyed was \$14.80; the lowest reported hourly wage was \$4.60 and the highest was \$37.50. About two-thirds (64.2%) of workers reported earning less than the equivalent hourly rate, which at the time the UWW Survey was conducted was \$23.66.

[286] The average daily pay and average hourly pay for each region is set out in the following table:<sup>256</sup>

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<sup>250</sup> Exhibit AWU 8.

<sup>251</sup> Ibid at [12]–[14].

<sup>252</sup> Exhibit AWU 7.

<sup>253</sup> Ibid at [18].

<sup>254</sup> Exhibit UWW 1.

<sup>255</sup> Ibid at [7].

<sup>256</sup> Ibid at [11].

**Table 4**

	Average Daily Pay	Average Hourly Pay
Total	\$128	\$14.48
Sunraysia	\$109.50	\$14.30
Goulburn Valley	\$122	\$15.50
Riverina	\$60	\$18.50
Melbourne	\$140	\$23.66

- Shane Roulstone<sup>257</sup>, a National Organising and Campaigns Director with the AWU, gave evidence that in his discussions with piece rates workers:

‘the vast majority of piece rates workers are paid between \$8 and \$12 per hour.’<sup>258</sup>

[287] A number of the Union employee lay witnesses were cross-examined as to whether they had made a complaint regarding the underpayment or non-payment of their wages. Similarly, a number of the Union officials who gave evidence were cross-examined regarding the manner in which they dealt with member complaints about underpayment.

[288] We accept that the various employee lay witnesses did not lodge complaints – with the FWO or anyone else – regarding underpayment or non-payment of wages. But in our view the failure to lodge a complaint does not detract from the cogency of the evidence. The witnesses provided plausible explanations for their failure to file such a complaint, including:

- they believed that the non-payment or underpayment was ‘a normal practice at that time by everybody’;<sup>259</sup>
- they were unaware that they had an entitlement to lodge a complaint or a claim;<sup>260</sup>
- the absence of proof as to the number of hours they had worked;<sup>261</sup> and
- language barriers.<sup>262</sup>

[289] Similarly, we accept that the evidence of the various Union organisers suggests that few complaints are pursued through enforcement mechanisms; the witnesses gave evidence as to the difficulties of formally pursuing underpayment complaints on behalf of pieceworkers, due to the current award provisions.<sup>263</sup>

[290] In its ‘Submissions on Evidentiary Weight’, the NFF challenges aspects of the employee lay witness evidence called by the Unions. In essence, the NFF contends that the Commission ‘is not assisted by evidence that is not a direct statement of the particular witness’, and that evidence which consists of hearsay, opinion or conclusion ‘should be given little or no weight

<sup>257</sup> Exhibit AWU 9.

<sup>258</sup> Ibid at [11].

<sup>259</sup> Transcript, 13 July 2021 at PN163 (cross-examination of Chee Sing Ee).

<sup>260</sup> Ibid at PN165 (cross-examination of Chee Sing Ee), PN218 (cross-examination of Hsu).

<sup>261</sup> Ibid at PN527 (cross-examination of Rodney McDonald).

<sup>262</sup> Ibid at PN190 (cross-examination of Xueliang Wang).

<sup>263</sup> See, e.g., Transcript, 13 July 2021 at PN416 (cross-examination of Steven Carter).

in the Commission's deliberations.<sup>264</sup> Further, the NFF challenges aspects of the statements of certain Union officials on the basis that they amount to 'an aggregation of out-of-court statements' or 'an aggregation of some impression not set out in the statement'.

**[291]** The AFPA submits that the employee and employer lay witness evidence is 'from a small number of witnesses hand-picked by interested parties' and 'has almost no probative value' and 'ought to be put to one side'.<sup>265</sup> We note here that despite advancing this general submission the AFPA relies on aspects of the lay witness evidence in support of various findings it advances.<sup>266</sup>

**[292]** We have given very little weight to the hearsay evidence of the employee and employer lay witness. We also accept that the lay witness evidence is necessarily limited to the personal experience of the particular witness and cannot be extrapolated to the horticulture industry as a whole. Taking account of this limitation we have given the lay witness evidence some weight in arriving at our findings.

**[293]** The NFF also submits that we should adopt 'as a whole' the evidence of Mr Leleiga Fetui and Ms Akata Uata. In respect of this evidence the NFF submits:

'Each is a powerful statement, from a picker's perspective about the negative consequences of granting the AWU/UWU application.'<sup>267</sup>

**[294]** Mr Fetui is employed under the SWP 'mostly picking apples and pears'.<sup>268</sup> Depending on the tasks he is performing, Mr Fetui is either paid an hourly rate or a piece rate:

'When I am doing any work other than picking, I will be paid hourly rates of \$24.80 as a Level 1 worker under the Horticulture Award 2020. On those wages I earn roughly \$800 to \$900.00 a week.

When I am picking fruit, I am paid piece rates. In a typical week working about 38 hours, on piece rates I earn roughly \$1,500.00 per week depending how I am feeling.'<sup>269</sup>

**[295]** Two payslips are attached to Mr Fetui's witness statement, one for the week ending 4 October 2020 (when he was paid hourly rates and earned \$967.07) and the other for the week ending 2 May 2020 (when he was paid piece rates and earned \$1575.00).

**[296]** At [12] of his statement, Mr Fetui says:

'I would definitely not be happy if I was not able to earn piece rates for the picking or if the number of hours I could work each week or day was to be capped.'

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<sup>264</sup> NFF Submission on Evidentiary Weight, 29 July 2021 [3](c).

<sup>265</sup> AFPA's closing submission on the evidence at [43]

<sup>266</sup> For example see *ibid* at [31]

<sup>267</sup> National Farmers' Federation, 'NFF's [11(b)].

<sup>268</sup> Exhibit NFF 10.

<sup>269</sup> Exhibit NFF 10[5]–[6].



[297] Contrary to the NFF's submission, this is not a powerful statement about the negative consequences of granting the Application. Granting the Application will not stop Mr Fetui from being paid piece rates for picking fruit, nor would it cap the number of hours he can work.

[298] Ms Uata is a volunteer member of the Multicultural Council of Griffith. She used to work on farms in Griffith after school 'from time to time', but doesn't do farm work anymore.<sup>270</sup> Ms Uata states that she has 'extended family and friends who work on the farms':

'An individual can earn decent income, more than minimum wage, from fruit picking work when they are competent.'<sup>271</sup>

[299] Ms Uata also asserts that those who work on farms doing fruit picking 'might not have many other opportunities to do work elsewhere', and that:

'For example, I know a lot of workers from my Tongan community in the area who are slower in their pace of working, either due to their age, physical ability or other reasons. Farm work is their only option as they would not be suitable for other work.

Should the minimum payment by hourly rate be implemented, these workers will lose the ability to participate in work as the farmers will likely stop employing them.'

[300] Ms Uata's evidence does not speak to her direct experience as a horticulture worker. It seems to us that the evidence is similar in character to aspects of the Union's evidence which was challenged by the NFF. In short, it is either opinion evidence or is conclusory in nature based on the aggregation of hearsay. We adopt the same approach that we took to the Unions' evidence of this nature and give it little weight.

## **B Employer Lay Witnesses**

[301] The employer interests tendered evidence from the following employer lay witnesses:

- Matthew Benham;<sup>272</sup>
- Reginald Brown;<sup>273</sup>
- Michelle Distill;<sup>274</sup>
- Richard Eckersley.<sup>275</sup>
- Gaetano Gaeta;<sup>276</sup>
- Anthony Kelly;<sup>277</sup>
- Nicholas King;<sup>278</sup>

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<sup>270</sup> Exhibit NFF 15.

<sup>271</sup> Exhibit NFF 15 [23].

<sup>272</sup> Exhibit NFF 12.

<sup>273</sup> Exhibit NFF 11.

<sup>274</sup> Exhibit NFF 13.

<sup>275</sup> Exhibit NFF 14.

<sup>276</sup> Exhibit NFF 7.

<sup>277</sup> Exhibit NFF 2.

<sup>278</sup> Exhibits AFPA 2 and AFPA 3.

- Brent McClintock;<sup>279</sup>
- Jonathan Moss;<sup>280</sup>
- Anne Reardon;<sup>281</sup>
- Ben Rogers;<sup>282</sup>
- Han Shiong Siah;<sup>283</sup>
- Catherine Silverstein;<sup>284</sup> and
- Glenn Trewin.<sup>285</sup>

[302] Some of this evidence concerned the earnings of pieceworkers:

- Mr Trewin stated that, based on pick rate records for the current financial year, the average competent picker would have earned \$27.78 per hour if they were on a piece rate of 24.6 cents per bunch of baby broccoli stalks and that Bulmer Farms currently pays 40 cents per bunch: ‘which is well in excess of the rate which the average worker would be on to earn \$27.78 per hour.’<sup>286</sup>
- Mr Gaeta: ‘It is not uncommon for a large portion of our workers to pick double the set pick quantity (used to calculate the piece rates) and therefore earning double what they would have earned on hourly rates. A competent picker can easily earn more than \$250 for around 8 hours of work.’<sup>287</sup>
- Mr Han: ‘During harvest the workday is roughly 9 hours long, although the Pickers tend to select the exact start, finish, and break times which suit them best. A daily pay rate of \$200-300 or considerably more is not uncommon.’

Annexed and marked ‘B’ to Mr Han’s statement are copies of the anonymised payslips which were provided to all of his Pickers for the 6-day week commencing 25 September 2020. All of the Pickers earned considerably more than they would have earned on hourly rates (assuming a 54 hour week at \$24.80/hour): ‘These payments are representative of the amounts, and the difference in earnings, which are paid to piece workers throughout harvest season.’<sup>288</sup>

- Mr Moss: ‘Most of our experienced SWP workers are motivated to work and make money and have a number of years’ experience are actually much faster than me. Their minimum hourly earnings on a less productive day is \$30 and they will make \$60 on a good day.’<sup>289</sup>

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<sup>279</sup> Exhibit NFF 4.

<sup>280</sup> Exhibit NFF 9.

<sup>281</sup> Exhibit NFF 1.

<sup>282</sup> Exhibit NFF 3.

<sup>283</sup> Exhibit NFF 8.

<sup>284</sup> Exhibit NFF 5.

<sup>285</sup> Exhibit NFF 6.

<sup>286</sup> Exhibit NFF 6 at [23]–[24].

<sup>287</sup> Exhibit NFF 7 at [11].

<sup>288</sup> Exhibit NFF 8 at [13], [32].

<sup>289</sup> Exhibit NFF 9 at [33].

- Mr Brown: ‘the top 25% of our currently employed pickers earn at least \$300 per day, with the most productive workers earning in excess of \$400.’<sup>290</sup>

**[303]** During the course of proceedings, the Commission issued a number of orders for the production of documents, records and information from certain NFF and AFPA witnesses.<sup>291</sup> The orders primarily sought:

- Pay slips or other pay records;
- Any documents recording the hours and/or days of work;
- Any documents recording the average hourly earnings; and
- Any documents recording the assessment or monitoring of piece rates paid.

**[304]** On 23 July 2021 the Commission published an Information Note on the piece rate payment data provided by Mr McClintock and Mr Kelly;<sup>292</sup> and an [Additional Information Note](#) on 29 July 2021.

**[305]** The parties were invited to comment on the Information Notes published on 23 and 29 July 2021. On 6 August 2021, the NFF filed a submission in respect of this material in which it contends:

‘5. In broad compass, the only findings available to the tribunal in relation to the Kelly-McClintock evidence is that each has complied with their respective notices to produce, by producing to the union parties the exhibits which have now entered into evidence.

6. Any other conclusion or finding of fact faces the difficulty (which is outlined below) that other evidence which may explain the contents of the Kelly-McClintock evidence either was not provided to the tribunal; or else was not put to the witnesses in a way which allows them the opportunity to deal with that puttage.

...

12. The NFF does not dispute the accuracy of the Commission’s assessment of the piece rate data.

13. In circumstances where the party tendering the documents did not suggest otherwise to either witness, or even suggest any assessment of exhibits AWU#18 and AWU#21, little in the way of conclusions can be drawn beyond what is outlined in the notes.

14. Any attempt at further assessment is in the nature of speculation, as it requires either evidence not tendered, or further evidence beyond the exhibits AWU#18 and AWU#21.’<sup>293</sup>

**[306]** The NFF contends that absent any cross-examination of Mr Kelly and Mr McClintock, the use to which the Commission can put Exhibits AWU 18 and AWU 21 ‘is limited’. Exhibit

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<sup>290</sup> Exhibit NFF 11 at [25].

<sup>291</sup> See *Statement* [2021] FWC 3838.

<sup>292</sup> See Exhibit NFF 4; Exhibit AWU 21; Transcript, 15 July 2021 at PN1977–2120; Exhibit NFF2; AWU18; Transcript, 15 July 2021 at PN1684–779.

<sup>293</sup> NFF Submission, 6 August 2021 [5]–[6], [12]–[14].

AWU 18 is the bundle of documents produced by Mr McClintock and Exhibit AWU 21 is the bundle of documents produced by Mr Kelly.

**[307]** Two arguments are advanced in support of this contention:

1. The rule in *Browne v Dunn* prevents any conclusions being drawn from the raw piece rate payment data, including any inferences, absent further evidence. The NFF submits that ‘the effect of not suggesting a particular characterisation or interpretation of exhibits AWU 18 and AWU 21 [to the witnesses] leaves any explanation (or expansion) which either witness may have given as an open question’; and
2. Absent further explanation by the witnesses, no inference can be drawn from the contents of Exhibits AWU18 and AWU 21. The High Court’s judgement in *G v H* is referred to in support of this submission.<sup>294</sup>

**[308]** For the reasons that follow, we reject the NFF’s submission regarding the use to which we can put this material.

**[309]** At the outset it needs to be clearly understood that the Information Notes were prepared by Commission staff based on the data on piece rate payments provided by Mr Kelly and Mr McClintock in response to the notices to produce. The Information Notes put this data into an understandable format. The NFF does not dispute the accuracy of the Information Notes.

**[310]** The NFF’s submissions are misconceived. The rule in *Browne v Dunn* has no application in the circumstances. The rule was described in *MWJ v The Queen*<sup>295</sup> in the following way:

‘The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person’s witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party’s or a witness’ credit.’<sup>296</sup>

**[311]** Contrary to the NFF’s submissions, we make no imputation in respect of the conduct or credit of Mr Kelly and Mr McClintock. Nor do the Information Notes draw any inferences from the data – they simply set out the results of calculations based on data provided by Mr Kelly and Mr McClintock.

**[312]** The Commission is not bound by the rules of evidence and may inform itself in relation to any before it in such manner as it considers appropriate (ss.590 and 591 of the Act).

**[313]** Interested parties were provided an opportunity to comment on the Information Notes published on 23 and 29 July 2021. No party contests the accuracy of material contained in those Information Notes and we propose to rely on that material, which is summarised below.

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<sup>294</sup> [1944] HCA 48; 181 CLR 387.

<sup>295</sup> [2005] HCA 74. See also *City of Stirling v Kevin Emery* [208] FWCFB 2279; *Andrew Hill v Peabody Energy Australia PCI Pty Ltd* [2017] FWCFB 4944.

<sup>296</sup> [2005] HCA 74 [38].

*Data from Mr Brent McClintock*

[314] The piece rate payment was derived by aggregating the total value of the bins collected for each worker. The hourly piece rate is calculated by dividing the total daily piece rate payment by the number of hours worked.<sup>297</sup>

[315] The Level 1 casual rate in the Horticulture Award for these periods were:

- \$23.66 in 2018–19;
- \$24.36 in 2019–20; and
- \$24.80 in 2020–21.

[316] Table 5 shows the number of piece rate employees in the data provided by Mr McClintock.

**Table 5: Number of piece rate employees covered in the data provided by Mr McClintock**

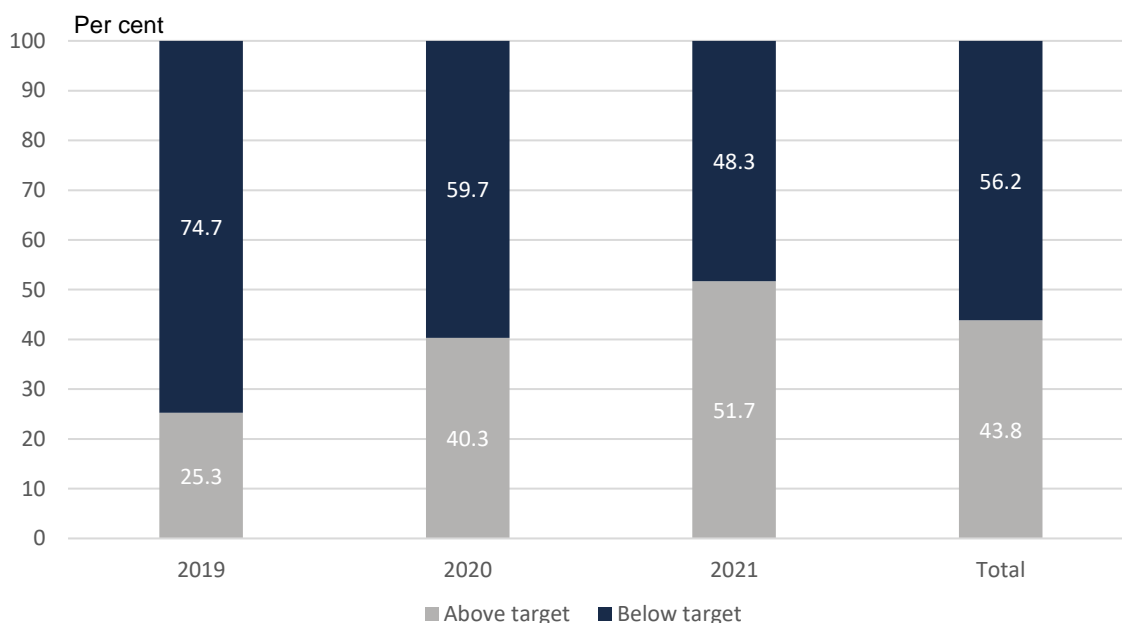
	2019	2020	2021	Total
<b>Employees</b>	80	95	166	336

Note: Total is lower than the sum of the employees between 2019 and 2021 as some employees work across more than 1 year.

[317] An analysis of the data provided by Mr McClintock for the 3,350 days worked, covering 22,490 hours worked, shows that over half of piece rate payments (56%) were below the piece rate target (the Level 1 casual rate plus 15%: clause 15.2(b)):

- In 2019, there were 534 days worked by the 80 employees covering 3,531.5 hours, with around three-quarters of payments below the target rate—the highest proportion in the period.
- In 2020, there were 1,079 days worked by the 95 employees covering 7,121.3 hours, with around 6 in 10 payments below the target rate.
- In 2021, there were 1,737 days worked by the 166 employees covering 11,837.4 hours, with less than half (48%) of payments below the target rate.

<sup>297</sup> Section 15.2 (a) of the *Horticulture Award* states that the piecework rate fixed by agreement between the employer and the employee must enable the average competent employee to earn at least 15 per cent more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee.

**Chart 5: Proportion of piece rate payments above the piece rate target**

Source: Fair Work Commission calculations based on data provided by Brent McClintock.

**[318]** Average and median hourly piece rates from the data provided by Mr McClintock are compared with the relevant target hourly rates for 2019, 2020 and 2021 in Table 2.

**[319]** Both the average and median hourly piece rates were below the target hourly rate in 2019 and 2020. However, this was not the case in 2021, where both the average and median were above the target hourly rate (Table 2).

**Table 2: Hourly piece rate, 2019 to 2021**

	<b>2019</b>	<b>2020</b>	<b>2021</b>
	(\$)	(\$)	(\$)
Average hourly rate	23.69	27.22	30.71
Median hourly rate	22.44	25.60	29.03
Target hourly rate	27.21	28.01	28.52

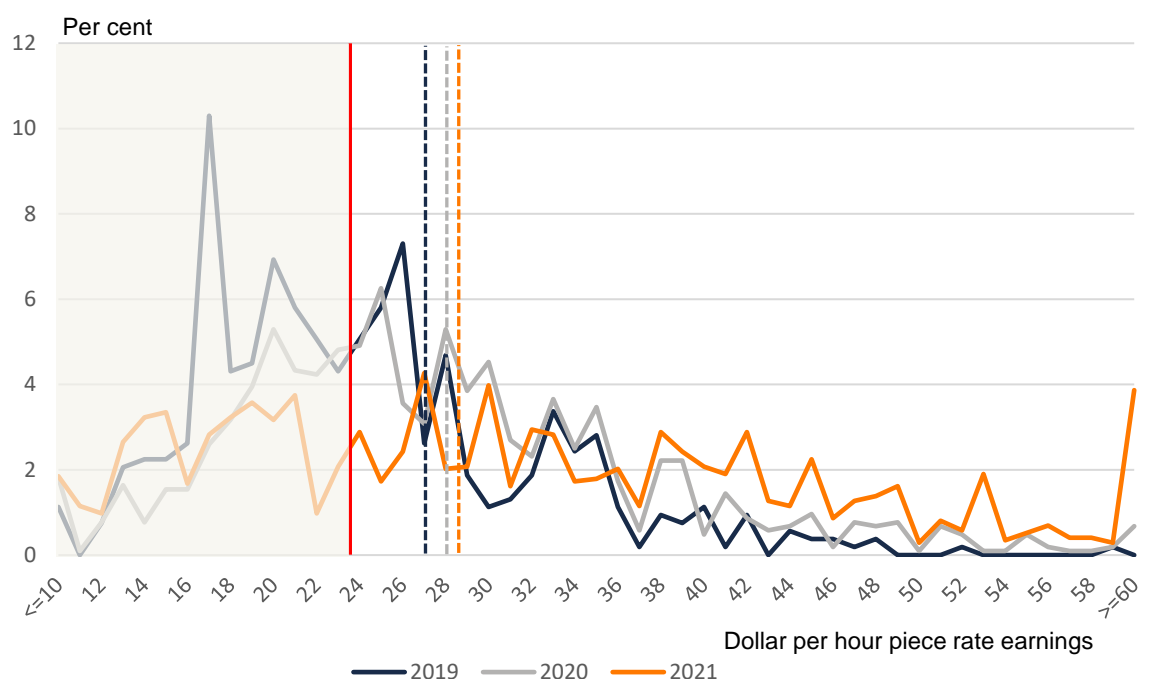
Source: Fair Work Commission calculations based on data provided by Brent McClintock.

**[320]** The level 1 casual rate in the Horticulture Award was \$23.66 in 2018–19. This was equivalent to the national minimum wage (NMW) (\$18.93) plus the casual loading of 25%.

**[321]** Chart 6 compares the distribution of hourly piece rate earnings across each year. While the earnings distribution was more concentrated below the respective target hourly rates in 2019 and 2020, this was not the case in 2021 where the distribution was relatively uniform.

[322] The NMW plus the casual loading in 2018–19 is noted by the vertical red line and the hourly piece rate earnings below this rate are shaded in grey. The chart shows that a significant proportion of hourly piece rate earnings fall below this rate.

**Chart 6: Distribution of hourly piece rate earnings, 2019 to 2021**



Note: The vertical red line shows the NMW (including the casual loading) in 2018–19. The dotted lines show the target hourly rate for 2019, 2020, and 2021.

Source: Fair Work Commission calculations based on data provided by Brent McClintock.

### *Data from Mr Anthony Kelly*

[323] Mr Kelly provides data for 3 groups of workers covering different weeks in March 2021.

**Table 6: Number of piece rate employees covered in the data provided by Anthony Kelly (March 2021)**

	Group 1 (9–16 March)	Group 2 (17–22 March)	Group 3 (23–31 March)	Total (all groups)
<b>Employees</b>	22	31	48	56

Note: Total (all groups) is lower than the sum of groups 1–3 as some employees work across 2 or more groups.

[324] For Group 1 workers (covering the period from 9 to 16 March 2021) – there were 116 shifts worked,<sup>298</sup> covering 784 hours, with 77% of piece rate shifts paid above the target.

<sup>298</sup> Workers may work more than 1 shift.

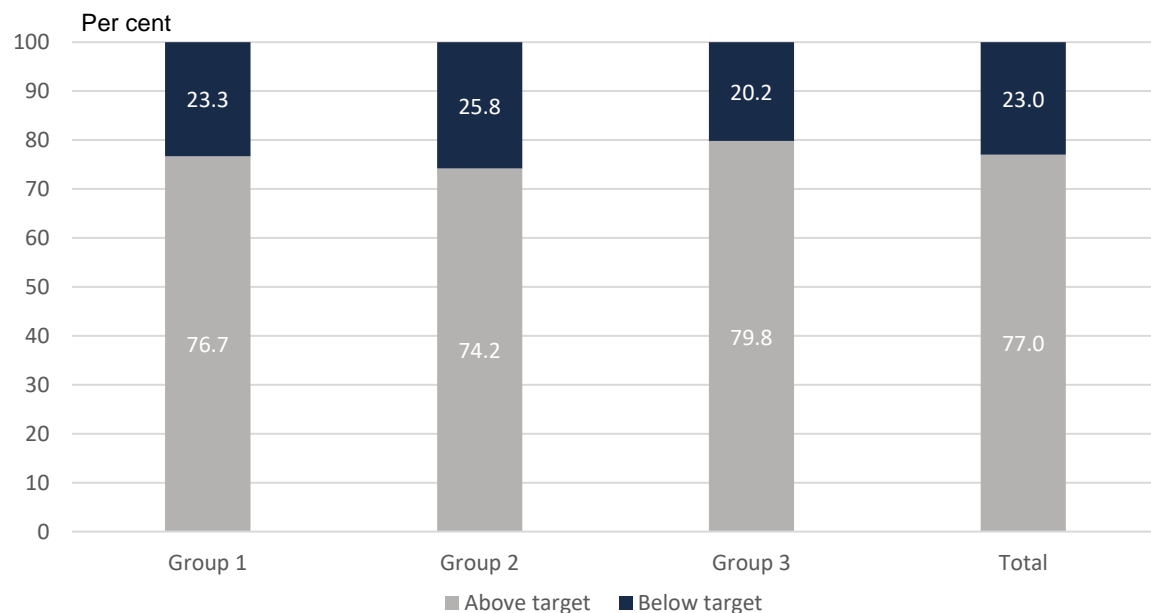
[325] For Group 2 (covering the period from 17 to 22 March 2021) – there were 186 shifts worked covering 873.3 hours, with 74% of piece rate shifts paid above the target.

[326] For Group 3 (covering work from 23 to 30 of March 2021) – there were 193 shifts worked covering 1146 hours, with 77% of piece rate shifts paid above the target.

[327] This differs from Mr Kelly’s calculations as 6 piece rate shifts from 31 March 2021 are excluded from his analysis. Commission calculations revealed that 4 of these shifts were below the target rate. When all groups are combined, Commission staff find that 77% of piece rate shifts were paid above the target rate (see [Information Note](#)).

[328] The data is set out in Chart 7 below.

**Chart 7: Proportion of piece rate payments above the piece rate target, Groups 1 to 3 and total**



Source: Fair Work Commission calculations based on data provided by Anthony Kelly.

[329] The data from Mr McClintock and Mr Kelly supports findings that we make later in this decision that some pieceworkers can earn significantly more than the ‘target rate’ for the average competent pieceworker, but that a significant proportion of pieceworkers earn less per hour than the NMW and a substantial proportion earn less than the ‘target rate’ for the ‘average competent pieceworker’ prescribed in clause 15.2

#### ***4.5.2 The practical operation of clause 15.2***

[330] On the basis of the employer lay witness evidence, the NFF submits that we should find that in its present form the Horticulture Award ‘is capable of grower compliance’.



[331] As a theoretical proposition it may be accepted that in its present form clause 15.2 of the Horticulture Award is ‘capable of grower compliance’, but that is not the relevant issue. The real issue is the extent of *actual* compliance. In this part of our decision we find that, in practice, piecework agreements are not ‘genuinely made’ by the employer and individual employee (as required by clause 15.2(f)). Piece rates are dictated by the grower and are not the subject of negotiation between the employer (which may be the grower or, more commonly, a labour hire provider) and the worker. Further, many growers do not set piece rates in the manner required by clause 15.2 and pieceworkers are often not provided with a copy of their piecework agreement.

[332] As discussed in section 3.4 of the decision, clause 15.2 requires that the minimum rate for piecework be determined by the following method:

- (i) Ascertain the hourly rate prescribed under the Award for the type of employment and the classification level of the employee (including, for example, casual loading if applicable) and then add 15% to that amount.
- (ii) The hypothetical ‘average competent employee’ must be identified.
- (iii) Identify the hypothetical hourly pick rate of the ‘average competent employee’ performing the work at the particular place of work at that particular time.
- (iv) Divide the hourly rate plus 15% by the hourly pick rate of the hypothetical ‘average competent employee’ or, where an employer has already set a piecework rate, the employer can compare the hourly pick rate of the ‘average competent employee’ against the calculation performed at paragraph (i) above.<sup>299</sup>

[333] Further, as noted by the Federal Court the ‘average competent employee’ is not necessarily ‘proficient’ but at least ‘suitable, sufficient for the purpose, adequate’ and must be selected from the pool of hypothetical competent employees.<sup>300</sup> An employee who is not competent, for example, an employee who is still in training, must be excluded when determining the ‘average competent employee’.<sup>301</sup>

[334] The evidence supports a finding that many growers do not determine piece rates in accordance with the method prescribed by clause 15.2.

[335] Clause 15.2 contains a number of other provisions which may be characterised as protective in nature, in particular:

- the piecework agreement must have been ‘genuinely made’ by the employer and individual employee ‘without coercion or duress’;<sup>302</sup>

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<sup>299</sup> *Hu (No 2)* at [26]–[27].

<sup>300</sup> *Ibid* at [31].

<sup>301</sup> *Ibid* at [30], [85].

<sup>302</sup> cl.15.2(f).

- the piecework agreement must be in writing and signed by the employer and employee;<sup>303</sup> and
- the employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.<sup>304</sup>

[336] The evidence presents a very different picture of the practical application of these protective measures. Rather than being the product of any genuine negotiation between the employer and an employee, the evidence supports a finding that piece rates are unilaterally determined by the grower and presented to the employee on a ‘take it or leave it’ basis. The evidence also discloses that employees are not always provided with a copy of the piecework agreement. These matters are discussed further below.

***Piece rates are set and varied unilaterally***

[337] In *Hu (No 2)* his Honour Rangiah J, noted the ‘limited’<sup>305</sup> protection afforded by clause 15 of the Horticulture Award and observed:

‘Clause 15.2 requires the piecework rate to be fixed by agreement. In practical terms, this will almost invariably mean that the employer fixes the rate and the employee decides whether or not to accept it.’<sup>306</sup>

[338] The evidence before us is entirely consistent with his Honour’s observations. In practice piece rates are dictated by the grower and are not the subject of any negotiated agreement between the employer (which may be the grower or, more commonly, a labour hire provider) and the worker.

[339] The evidence of the employer and union witnesses discloses that piece rates are:

- commonly set prior to or at the commencement of the harvesting season, without reference to employees, and are not the subject of any negotiation;
- communicated to employees at the time they are required to sign a pieceworker agreement, or when the employee commences work; and
- are adjusted unilaterally by the grower and any adjustment are not the subject of negotiation.

[340] The evidence of growers was that they simply inform workers (or labour hire contractors) of the piece rate they have determined.<sup>307</sup> Even those growers who routinely

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<sup>303</sup> cl.15.2(g).

<sup>304</sup> cl.15.2(h).

<sup>305</sup> *Fair Work Ombudsman v Hu (No.2)* (2018) 279 IR 162 [24]

<sup>306</sup> *Fair Work Ombudsman v Hu (No.2)* (2018) 279 IR 162 [25]

<sup>307</sup> See, e.g., Transcript, 15 July 2021 at PN 1655 (cross-examination of Ms Reardon), PN 1710–14 (cross-examination of Mr Kelly), PN 2162–63 (cross-examination of Ms Silverstein); Transcript, 16 July 2021 at PN 2530 (cross-examination of Mr Gaeta), PN2677 (cross-examination of Mr Siah), PN2683 (cross-examination of Mr Siah), PN 2854 (cross-

adjusted the piecework rate to accommodate the circumstances of the work, and informed their employees of the adjusted rates, did not give evidence that would amount to a finding that the employee and employer genuinely agreed to make a piecework agreement.<sup>308</sup>

**[341]** The relevant employer evidence is summarised below.

- Ms Michelle Distill,<sup>309</sup> operates an orchard in Spreyton, Tasmania on which she grows apples and cherries. The orchard's seasonal pickers are all pieceworkers. When they arrive at the orchard, workers are told what the work is, what the piece rate is, and they sign a pieceworker agreement. They are inducted on site at the same time,<sup>310</sup> and start work that day.<sup>311</sup>
- Mr Richard Eckersley,<sup>312</sup> owner and operator of Yambellup Estate, (a citrus, avocado and grape operation in Harvey, Western Australia) employs '20 to 30 temporary workers as pickers', mostly through labour hire operators, and 'about 10 temporary packers on a seasonal basis' who are directly employed.<sup>313</sup> When the piece rate changes, the business does not enter into a new piecework agreement and but just tells the employees that the piece rate is changing.<sup>314</sup>
- Mr Gaetano Gaeta,<sup>315</sup> an apple and cherry grower in NSW, has a seasonal workforce that is engaged as casuals, with the picking work being paid on piece rates and packing work on hourly rates.<sup>316</sup> Historically, Mr Gaeta's farm employed labour directly, but this season relied heavily on labour hire. In past years, having determined what the rate should be, he would write the rate into the piecework agreement and give it to the workers when they turned up at the farm.<sup>317</sup> He had an agreement with the labour hire agency, which he understood would then have a pieceworker agreement with the workers.<sup>318</sup> Mr Gaeta described monitoring the picking work and adjusting the picking rate for the day.<sup>319</sup> If the picking rate was changed workers were told 'straight away',<sup>320</sup> 'when they get there',<sup>321</sup> which could be at the start of the day or during the course of the day.<sup>322</sup>

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examination of Mr Benham), PN 3100–01 (cross-examination of Mr Eckersley), PN 3515–20 (cross-examination of Mr King).

<sup>308</sup> See, e.g., Exhibit NFF4 at [21]; Transcript, 16 July 2021 at PN 2042–8.

<sup>309</sup> Exhibit NFF 13; Transcript, 16 July 2021 at PN2938–3034.

<sup>310</sup> Transcript, 16 July 2021 at PN2965 (cross-examination of Ms Distill).

<sup>311</sup> Ibid at PN2968 (cross-examination of Ms Distill).

<sup>312</sup> Exhibit NFF 14; Transcript, 16 July 2021 at PN3043–3129.

<sup>313</sup> Exhibit NFF 14 at [12]–[13].

<sup>314</sup> Transcript, 16 July 2021 at PN3100–1 (cross-examination of Mr Eckersley).

<sup>315</sup> Exhibit NFF 7; Transcript, 16 July 2021 at PN2491–2592.

<sup>316</sup> Exhibit NFF 7 at [9].

<sup>317</sup> Transcript, 16 July 2021 at PN2529–30 (cross-examination of Mr Gaeta).

<sup>318</sup> Ibid at PN2514–2515 (cross-examination of Mr Gaeta).

<sup>319</sup> Ibid at PN2545 (cross-examination of Mr Gaeta).

<sup>320</sup> Ibid at PN2546 (cross-examination of Mr Gaeta).

<sup>321</sup> Ibid at PN2547 (cross-examination of Mr Gaeta).

<sup>322</sup> Ibid PN2546–PN2547 (cross-examination of Mr Gaeta).

- Mr Anthony Kelly,<sup>323</sup> the Chief Financial Officer for N&A Group, comprising of apple and berry farms in Batlow, NSW describes the peak season harvesting and pruning workforce in their enterprise as being split 60/40 in favour of labour hire.<sup>324</sup> The pickers and pruners are paid piece rates.<sup>325</sup> Pieceworkers, whether they be directly employed or sourced through a labour hire agency, are provided a written pieceworker agreement as part of their ‘on-boarding process’.<sup>326</sup>
- Mr King,<sup>327</sup> National Capital/Operational Projects Manager at Costa Group, gave evidence that the workforce is informed of the ‘minimum rate’ when they start with the business ‘during their induction’,<sup>328</sup> with the piece rate fluctuating day to day. Workers (whether employed directly or through a labour hire agency)<sup>329</sup> are told their piece rate ‘when they turn up for work each day.’<sup>330</sup> He considered that by signing ‘a sign on sheet’ when they turned up to work, ‘[t]hat they’re happy to have the rate change’.<sup>331</sup>
- Mr McClintock,<sup>332</sup> General Manager, Tasmania Operations for Pinnacle Fine Foods, gave evidence that Pinnacle sources all of their picking workforce through labour hire.<sup>333</sup> Pinnacle entered into an agreement with the labour hire agency about the piece rate (the ‘minimum rate that we will pay for the job’).<sup>334</sup> That rate is determined at the beginning of the season,<sup>335</sup> and is adjusted ‘at the beginning of each workday on the basis of difficulty, weather conditions etc.’<sup>336</sup> Workers are told the rate for the day ‘as they start’.<sup>337</sup> Pick rates are monitored during the day and workers are told the next day if there is going to be a change in the rate.<sup>338</sup>
- Mr Siah,<sup>339</sup> a farm manager at Tropical Primary Products (or TPP Australia) in the Northern Territory. Mr Siah described a calculation he did in his head (not documented or written down)<sup>340</sup> to determine the appropriate piece rate for picking mangoes on his farm, based around what he believed a ‘hypothetical competent and

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<sup>323</sup> Exhibit NFF 2; Transcript, 15 July 2021 at PN1684–779.

<sup>324</sup> Transcript, 15 July 2021 at PN1704–1707 (cross-examination of Mr Kelly).

<sup>325</sup> Exhibit NFF 2 at [15], [21]; Transcript, 15 July 2021 at PN1708 (cross-examination of Mr Kelly).

<sup>326</sup> Transcript, 15 July 2021 at PN1710–4 (cross-examination of Mr Kelly).

<sup>327</sup> Exhibit AFPA 2; Exhibit APFA 3; Transcript, 16 July 2021, PN3122–3613.

<sup>328</sup> Transcript, 16 July 2021, PN3518 (cross-examination of Mr King).

<sup>329</sup> Transcript, 16 July 2021, PN3526–3528 (cross-examination of Mr King).

<sup>330</sup> Transcript, 16 July 2021, PN3516 (cross-examination of Mr King).

<sup>331</sup> Transcript, 16 July 2021, PN3524 (cross-examination of Mr King).

<sup>332</sup> Exhibit NFF 4; Transcript, 15 July 2021 at PN1977–2120.

<sup>333</sup> Transcript, 15 July 2021 at PN1992 (cross-examination of Mr McClintock); Exhibit NFF 4 at amending paragraph [12].

<sup>334</sup> Transcript, 15 July 2021 at PN2014, PN2016 (cross-examination of Mr McClintock).

<sup>335</sup> Exhibit NFF 4 [21]; Transcript, 15 July 2021 at PN2029.

<sup>336</sup> Exhibit NFF 4 [21]; Transcript, 15 July 2021 at PN2029.

<sup>337</sup> Transcript, 15 July 2021 at PN2040–2041 (cross-examination of Mr McClintock).

<sup>338</sup> Ibid at PN2043–7 (cross-examination of Mr McClintock).

<sup>339</sup> Exhibit NFF 8; Transcript, 16 July 2019, PN2620–2717.

<sup>340</sup> Transcript, 16 July 2021 at PN2678–83 (cross-examination of Mr Siah).

reasonably productive worker’ could undertake.<sup>341</sup> Workers are given a written pieceworker agreement when they arrive at the farm,<sup>342</sup> and the rate in that agreement is set for the season and remains the same throughout the season ‘most of the time’.<sup>343</sup> The piece rate is adjusted depending on conditions and performance,<sup>344</sup> and he generally provides a new piecework agreement when that happens.<sup>345</sup>

- Ms Catherine Silverstein,<sup>346</sup> an orchardist in Goulburn Valley, Victoria, sets the piece rate for the year at the start of the season by reference to the piece rate recommended by the Industrial Committee of the Victoria Farmers Federation and Fruit Growers Victoria, and then adjusted: ‘we will usually add a further \$5 per bin, plus a further bonus of \$1 to \$5 per bin depending on the quality of the produce picked without damage’.<sup>347</sup> That rate is maintained throughout the season.<sup>348</sup> Ms Silverstein tells the labour hire company what the rate will be, and the relationship between the labour hire agency and the worker is a matter the labour hire company works out.<sup>349</sup>

**[342]** The evidence led by the AWU and UWU also supports a finding that piecework rates are unilaterally set by the employer, :

- Mr Anthony Beven, an Organiser with the AWU, has never observed piece rates being set in consultation with the workers:

‘My experience has been that the farmer or labour hire provider sets the piece rates and communicates this to the worker – it is not open for discussion.’<sup>350</sup>

- Mr Carter, AWU Northern NSW Region Organiser, observed in his experience guidelines developed by the Fair Work Ombudsman to assist in setting a fair piece rate are:

‘ignored by all companies within the berry industry’, rather ‘Companies have their own piece rate setting procedure without any inclusion or genuine agreement of any affected employee.’<sup>351</sup>

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<sup>341</sup> Exhibit NFF 8 at [28(d)].

<sup>342</sup> Transcript, 16 July 2021 at PN2666–7 (cross-examination of Mr Siah).

<sup>343</sup> Transcript, 16 July 2021 at PN2670 (cross-examination of Mr Siah).

<sup>344</sup> Transcript, 16 July 2021 at PN2671–2 (cross-examination of Mr Siah).

<sup>345</sup> Transcript, 16 July 2021 at PN2675–6 (cross-examination of Mr Siah).

<sup>346</sup> Exhibit NFF 5; Transcript, 15 July 2021, PN2139–2272.

<sup>347</sup> Exhibit NFF 5 [27]

<sup>348</sup> Transcript, 15 July 2021, PN2181–2182 (cross-examination of Catherine Silverstein).

<sup>349</sup> Transcript, 15 July 2021, PN2161–2162 (cross-examination of Catherine Silverstein).

<sup>350</sup> Exhibit AWU 4 at [28].

<sup>351</sup> Exhibit AWU 10 at [20].

- Chee Sing Ee,<sup>352</sup> who worked in the Australian horticulture industry from 2016 to 2019,<sup>353</sup> ‘was never given an alternative between being paid piece rate or hourly rate’ during that time.<sup>354</sup>
- Hsu,<sup>355</sup> who worked as a pieceworker in the Australian horticulture industry between 2018–2021 says: ‘When I did piece rate jobs in Australia, the farmers or the contractors never gave me an alternative of being paid an hourly rate’.<sup>356</sup>
- Rodney McDonald gave evidence about his experience as a pieceworker in the Australian horticulture industry:<sup>357</sup>

‘In about February 2018 I started working at a medium sized growers’ farm picking peaches and apples for a piece rate. Shortly after I started, the grower held a group meeting in the morning with all the new pickers who had been sent by MADEC. He told us what the rates per bin would be and said words to the effect of “there’s a copy of the rates on the wall to look at if you want.” I took a photo of the rate sheet, which was from the industry association. Attached to this statement and marked “RM-1” is a copy of the rate sheet I photographed in about February 2018.

In about November 2018 I started working at a large apple and pear grower, working for a contractor and it was during the thinning season. Shortly after I started a supervisor at the farm - who was working directly for the grower - asked workers to sign a piecework agreement, including those people like me who were working for a contractor. I just looked at the figure on the paper and signed it. I remember seeing others doing the same. I felt at the time there was no other choice - I either signed this and started working, or if I didn’t sign it and I thought I would be sent home. I never got a copy of the agreement.’<sup>358</sup>

- Mr Robertson, Lead Organiser for the UWU, observed that in his experience:

‘...there is no genuine negotiation between employer and employee over the piece rate. Instead, the piece rate is fixed by the employer, and the employee is offered the opportunity to accept that rate (and therefore work) or decline it and lose the work – on a “take it or leave it basis”.’<sup>359</sup>

### ***Methodology for determining piece rates***

**[343]** A number of the employer lay witnesses gave evidence regarding the method they employed to set piece rates. In most instances the method employed did not confirm with the requirements of clause 15.2 (as interpreted by the Federal Court in *Hu (No.2)* and the *Hu Appeal*. For example:

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<sup>352</sup> Exhibit AWU 1.

<sup>353</sup> Ibid at [3].

<sup>354</sup> Ibid at [5].

<sup>355</sup> Exhibit AWU 3.

<sup>356</sup> Ibid at [10]

<sup>357</sup> Exhibit UWU 2.

<sup>358</sup> Ibid at [11]–[12].

<sup>359</sup> Exhibit UWU 1 at [24].

- Mr Kelly determines the piece rate for apples ‘by consultation with senior supervisors who has an extensive history with the industry and is knowledgeable of the crop, the terrain, and the conditions in the field on a given day’.<sup>360</sup>
- Mr McClintock sets the piece rate at the beginning of each session based on ‘what we believe to be a rate which complies with the Horticulture Award, informed by our knowledge and experience and the guidance which is published by industry bodies such as Primary Employers Tasmania.’<sup>361</sup>
- Ms Silverstein adjusts the piece rate each year ‘depending on the recommendation of the Industrial Committee at the VFF and Fruit Growers Victoria. On top of this recommended amount, we will usually add a further \$5 per bin, plus a further bonus of \$1 to \$5 per bin depending on the quality of the produce picked without damage.’<sup>362</sup>
- Mr Gaeta sets the piece rate based on what he can pick in an hour.<sup>363</sup>
- Mr Benham states that in setting a piece rate he relied on his ‘expertise and understanding of what different fruits are worth and our output to determine the rate payable per bin. If the quality of our output improves, we will adjust the rate upwards as necessary.’<sup>364</sup>
- Ms Distill sets the piece rate for apple picking having regard to guidance material published by Primary Employers Tasmania ‘although we do not follow it religiously and will vary it (usually up) if we don't believe the rate is high enough.’<sup>365</sup>
- Mr Eckersley’s evidence was that the piece rates are initially ‘established with reference to what we have paid in previous seasons, what is industry standard, as well as our own experience and knowledge of what is achievable for an average competent worker.’<sup>366</sup> The rate initially set is advised to the labour hire company at the start of the season,<sup>367</sup> and they ‘tend not to change [the piece rate] on a daily basis if we can help it’, but sometimes there might be a change.<sup>368</sup>

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<sup>360</sup> Exhibit NFF 2 [18].

<sup>361</sup> Exhibit NFF 4 at [21](a).

<sup>362</sup> Exhibit NFF 5 at [27]; also see Transcript, 15 July 2021 at PN2180–217.

<sup>363</sup> Exhibit NFF 7 at [10]; also see Transcript, 16 July 2021 at PN2524–2529.

<sup>364</sup> Exhibit NFF 12 at [14]

<sup>365</sup> Exhibit NFF 13 at [23]

<sup>366</sup> Exhibit NFF 14 at [24].

<sup>367</sup> Transcript, 16 July 2021 at PN3079 (cross-examination of Mr Eckersley).

<sup>368</sup> Ibid at PN3078-82 (cross-examination of Mr Eckersley).

***A written piecework agreement is not always provided.***

[344] None of the employee lay witnesses called in these proceedings describe having been provided a written piecework agreement by their employer.<sup>369</sup> Similarly, Mr Robertson,<sup>370</sup> Lead Organiser for the UWU, gave evidence that in his experience it was common for pieceworkers, particularly those working for labour hire contractors, to not be provided with a copy of the written piecework agreement they had signed.<sup>371</sup> Other evidence in these proceedings is consistent with the Union lay witness evidence.

[345] The OmniPoll Survey of vegetable growers asked the growers using pieceworker rates the following: ‘When you pay piece rates, do you have a written agreement with workers that specifies the rate of payment for them in writing?’

[346] About half of the 63 growers using pieceworker rates claimed to have a written agreement with workers that specified the rate of payment in writing. Written documentation was more likely to be provided by larger businesses employing more than 20 employees.<sup>372</sup> As a matter of logic, those growers who did not have a written agreement could not have complied with the terms of clause 15.2(h) of the Horticulture Award in that they could not have provided a copy of the piecework agreement to their pieceworkers.

[347] Of the 626 employers involved in the 2018 FWO *Harvest Trail Inquiry*<sup>373</sup> (more than a third of which were paying pieceworker rates or a combination of pieceworker rates and hourly rates), ‘over 100 of those employers were not engaging pieceworkers correctly by having no written piecework agreement or having an invalid piecework agreement.’<sup>374</sup>

**4.5.3 *Consequences of granting the Application***

[348] The NFF submits that we should accept the unchallenged evidence of the NFF lay employer witnesses as to the consequences of granting the Application. Similarly, the AFPA submits that granting the Application will have a number of ‘direct effects’.<sup>375</sup>

[349] Much of the employer lay evidence is speculative in nature and of limited probative value. That said, we accept that the introduction of a minimum wage floor to underpin pieceworker rates will affect how horticulture workers, particularly pickers, are managed, and is likely to increase employment costs.

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<sup>369</sup> For example: Mr McDonald describes picking peaches and applies for a piece rate in 2018: ‘the grower held a group meeting in the morning with all the new pickers ... He told us what the rates per bin would be and said words to the effect of “there’s a copy of the rates on the wall to look at if you want”. Later that year, working for a contractor on a large apple and pear farm, he signed a piecework agreement but ‘never got a copy of the agreement’: Exhibit UWU 2 at [11], [12]

<sup>370</sup> Exhibit UWU 1.

<sup>371</sup> Ibid at [39(c)].

<sup>372</sup> OmniPoll Report at 39, 47: subject to a caution caveat about the very small sample sizes.

<sup>373</sup> Fair Work Ombudsman, *Harvest Trail Inquiry* (Report, 2018).

<sup>374</sup> Ibid at 29–30.

<sup>375</sup> AFPA closing submission, 26 July 2021 at [31].



[350] The evidence is that pieceworker rates are currently used as a management tool. Mr Kelly describes it as a ‘model of self-managed productivity’,<sup>376</sup> he uses pieceworker rates because ‘they remove the need to supervise the productivity of our pickers’:

‘We are happy for them to work at their own rate and are comfortable if they are not picking at a rate we would consider competent, although we are also confident that they will generally work in their own interest at a good rate of productivity and that those who do not meet this standard will not incur excessive expense.’<sup>377</sup>

[351] Mr King puts it this way:

‘the reality is that, at any given point in time, a substantial proportion of the workforce does not perform at a competent level. The use of piecework engagement without a minimum hourly ‘floor’ allows growers to cope with this substantial cohort of unproductive workers by paying them an amount that is proportionate to their productivity.’<sup>378</sup>

[352] The short point is that under the existing piecework arrangements pieceworkers are only paid for what they pick and hence employers have no need or economic incentive to manage slow or unproductive pickers.

[353] A minimum wage floor creates an economic incentive to manage unproductive workers, as Mr King puts it:

‘In order to manage the increase in labour costs, Costa would need to introduce a lot stricter standards and expectations in its recruitment and in training and monitoring new starters, as well as more proactively monitoring underperforming workers, ultimately retaining only the strongest performers and accepting a higher rate of turnover (including as a result of terminating the employment of casual employees who do not perform strongly).

I expect that Costa, like any other grower, would consider doing this by introducing a minimum required output level, such that employees who are unable or unwilling to meet those minimum volumes may ultimately have their casual piecework employment terminated...

I anticipate that this approach would be feasible because at present approximately 80% of Costa’s product is picked by around 60% of our workforce of pickers. This means that Costa could significantly reduce its workforce size, retaining its best performers, without substantially reducing its production output.’<sup>379</sup>

[354] Other employer witnesses expressed similar views:

- Mr Kelly: ‘we would need more supervision in the orchard, to check on the progress of pickers ... in some instances, to terminate those employees who were not productive.’<sup>380</sup>

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<sup>376</sup> Exhibit NFF 2 at [28].

<sup>377</sup> Ibid at [25].

<sup>378</sup> Exhibit AFPA 2 at [50].

<sup>379</sup> Ibid at [59]–[61].

<sup>380</sup> Exhibit NFF 2 [32].

- Mr Moss: ‘I would have to be much more selective about the backpackers I engage ... I would have to let workers go who are not working as productive’.<sup>381</sup>
- Mr Benham: ‘If the farm ... needs to add backpackers or other visa holders to our labour mix, we will have to assess how these workers perform, in order to dismiss employees who are not performing.’<sup>382</sup>
- Ms Distill: ‘If a minimum floor were introduced, then we would have to let go any person who had not picked a single full bin by morning ‘smoko’ (around 10am) because our business simply could not afford to employ any picker who was not at least at that level of proficiency’.<sup>383</sup>
- Mr Eckersley: ‘it is highly likely that we would need to assess (and if necessary cease to employ) those employees who are not able to quickly achieve a high rate of productivity ... it would require some greater degree of supervision of work productivity, including examining how much work each individual picker is performing’.<sup>384</sup>

**[355]** There was also some evidence that if the Application was granted some growers would make greater use of automation. In her evidence, Ms Reardon, who runs a farm growing apples and cherries, said:

‘If the AWU application to install a floor on piece rates was successful, we would probably look at using more automation. For example, we would start using picking platforms which cost about \$150,000 each hour but would allow us to use much fewer pickers who we would be able to pay by the hour. We would also be much less tolerant of less-productive workers’.<sup>385</sup>

**[356]** We think it likely that the introduction of a minimum wage floor will lead employers to take more active steps in the recruitment, supervision and management of pieceworkers. It is also likely that underperforming pieceworkers will be dismissed. The impact of such a change will be mitigated somewhat by the fact that some growers already actively manage employer productivity; as is evident from the employer lay witness evidence:

- Ms Reardon: ‘The Farm monitors the rate at which the Farms' pickers work. If they are being too slow then a supervisor will draw it to their attention and suggest how they may increase their work rate. For example, if they are being more careful than is required then the supervisor would let them know that the level of caution should not be necessary.

If they are still working too slow then we will usually suggest they move on to work, for example, in one of the local packing sheds.’<sup>386</sup>

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<sup>381</sup> Exhibit NFF 9 [40]–[41].

<sup>382</sup> Exhibit NFF 12 [22].

<sup>383</sup> Exhibit NFF 13 [28].

<sup>384</sup> Exhibit NFF 14 [34].

<sup>385</sup> Exhibit NFF1 at [36]

<sup>386</sup> Ibid at [29]–[30].

- Mr McClintock: ‘In the case of underperformance or lower-than-desirable productivity, we will provide oversight and retraining to ensure employees receive the necessary attention to be capable of earning at a higher rate. Those who are not capable of doing so are generally offered an option to remain or leave.’<sup>387</sup>
- Ms Silverstein: ‘We trial ‘unplanned’ workers such as backpackers, so that if they haven’t picked a bin by lunch time then we ask them to move on. If we ask them to move on then we pay them an hourly rate for the time they’ve worked, 4 or so hours.’<sup>388</sup>

[357] A corollary of Mr King’s evidence referred to earlier is that introducing a minimum wage floor will provide an incentive to reduce the current ‘substantial cohort of unproductive workers’, thus *increasing* productivity.

[358] A number of the employer lay witnesses expressed the opinion that introducing a minimum wage ‘floor’ would *both* ‘demotivate underperforming employees from lifting their performance *and* ‘disincentivise’ pieceworkers currently earning more than the minimum award rate.

[359] We accept the first proposition — at least in respect of some underperforming employees; but note that underperformance can be managed, for example by setting proficiency targets. We do not accept the second proposition, for the reasons which follow.

[360] A consistent theme in the employer evidence is that piecework is an attractive option for workers because it provides an opportunity to earn substantially more than the minimum hourly rate:

- Mr King: piecework ‘is an effective way of attracting, motivating and retaining workers as the piece rate rewards performance and has no ceiling on earnings’.<sup>389</sup>
- Ms Reardon: piecework is used to ‘promote productivity’ as employees are ‘incentivised’ to work faster’.<sup>390</sup>
- Mr McClintock: ‘Piece rates are used and favoured because they attract motivated workers with a high rate of retention due to the high potential for earning when compared to the ordinary hourly rate’.<sup>391</sup>
- Ms Silverstein: ‘We also use piece rates because the worker benefits and it creates an incentive for them to earn more money than on hourly rates.’<sup>392</sup>

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<sup>387</sup> Exhibit NFF 4 at [22].

<sup>388</sup> Exhibit NFF 5 at [32]

<sup>389</sup> Exhibit AFPA 2 at [49].

<sup>390</sup> Exhibit NFF 1 at [34].

<sup>391</sup> Exhibit NFF 4 at [23].

<sup>392</sup> Exhibit NFF 5 [33]

- Mr Gaeta: ‘Payment by piece rate is suitable to motivate workers to work efficiently as their earning is dependent on their productivity’.<sup>393</sup>
- Mr Han: ‘When harvest season ends we occasionally offer the best Pickers further employment in the packing shed, where they will be paid hourly rates, but they usually reject the offer because they know they can earn much better money going to do harvest work on other farms earning piece rates.’<sup>394</sup>

[361] We accept that appropriately set pieceworker rates can provide an incentive for workers to increase their output, as their earnings will increase. We are not persuaded that introducing a minimum wage floor will ‘disincentivise’ pieceworkers currently earning more than the minimum award rate. It seems to us that such an outcome is inherently unlikely.

#### 4.6 Key Findings

[362] On the basis of the evidence canvassed in sections 3 and 4 of this decision we make the following findings:

##### *General*

1. In the horticulture industry, crop growth is seasonal and each crop has its own distinct picking season. The window of time during which produce is at its optimal ripeness or size varies by crop and must be harvested during this window of optimum size or ripeness for the grower to be able to sell the produce as first-grade fresh produce. The price of lower-grade / outgrade produce is much lower than first-grade produce.
2. Work in the horticulture industry is labour intensive and predominantly seasonal. The workforce size and composition varies substantially over the course of the year, and from region to region. There is a high proportion of casual and contract labour in the horticulture industry.

##### *Piecework*

3. A substantial proportion of the seasonal harvesting workforce are engaged on piecerates and *more* than half of the seasonal harvesting workforce are temporary migrant workers. These characteristics render the seasonal harvesting workforce vulnerable to exploitation.
4. There is widespread non-compliance with clause 15.2 of the Horticulture Award:
  - many growers do not determine pieceworker rates in accordance with the method prescribed by clause 15.2, as interpreted by the Federal Court in *Hu (No.2)* and the *Hu Appeal*;

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<sup>393</sup> Exhibit NFF 7 at [8]

<sup>394</sup> Exhibit NFF 8 at [34]

- pieceworker rates are set unilaterally by the grower and presented to the employee on a ‘take or leave it’ basis, rather than being the product of any genuine negotiation between the employer and employee;
  - pieceworker rates are adjusted unilaterally by the grower and adjustments are not the subject of negotiation; and
  - pieceworkers are usually not provided with a written piecework agreement.
5. Some pieceworkers earn significantly more than the ‘target rate’ for the average competent pieceworker<sup>395</sup>, prescribed in clause 15.2(b), but the totality of the evidence presents a picture of significant underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate.
  6. A significant proportion of pieceworkers, and WHM’s in particular, earn less per hour than the NMW (\$20.33 per hour; which is also the minimum hourly rate for a level 1 employee in the Horticulture Award) and a substantial proportion earn less than the ‘target rate’ for the ‘average competent pieceworker’ prescribed in clause 15.2.<sup>396</sup>

#### *Consequences of granting the Application*

7. Pieceworker rates are currently used as a management tool; pieceworkers are only paid for what they pick and hence employers have no need or economic incentive to manage slow or unproductive pickers.
8. Introducing a minimum wage floor will provide an incentive to reduce the current cohort of unproductive workers, thus *increasing* productivity. A minimum wage floor would create an economic incentive to manage unproductive workers and it is likely that the introduction of a minimum wage floor will lead employers to take more active steps in the recruitment, supervision and management of pieceworkers. The impact of such a change will be mitigated somewhat by the fact that some growers currently actively manage employee productivity. It is also likely that underperforming pieceworkers will be dismissed.
9. The introduction of a minimum wage floor may demotivate some underperforming employees and reduce productivity; but such underperformance can be managed, for example by setting proficiency targets. A minimum wage floor may also provide an incentive to reduce the current cohort of unproductive workers, thus increasing productivity.
10. Appropriately set pieceworker rates can provide an incentive for workers to increase their output, as their earnings will increase. It is inherently unlikely that

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<sup>395</sup> See the employer lay witness evidence at [300]; the McClintock data at [315] to [32]; and the Kelly data at [321] to [326].

<sup>396</sup> See Dr Howe’s qualitative data at [160] and [164]; the NFF survey, Chart 3 at [218]; OmniPoll survey at [262] to [264]; Employee lay evidence at [280] to [284]; McClintock data at [314] and [319].

introducing a minimum wage floor will ‘disincentivise’ pieceworkers currently earning more than the minimum award rate.

11. If a minimum wage floor was introduced it is likely that some employers will make greater use of automation and machinery to reduce labour costs.<sup>397</sup>

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<sup>397</sup> Exhibit NFF 1 at [36]

## 5 SUBMISSIONS

[363] This section of our decision summarises the submissions received in respect of the Application.

### 5.1 Union submissions

[364] The essence of the argument advanced by the AWU in support of the Application is that the current piecework provisions in the Horticulture Award ‘fail to provide for an equitable scheme or ensure proper protection against the abuse of piecework arrangements’ and ‘thereby fail to provide a fair and relevant minimum safety net’.<sup>398</sup> In particular the AWU submits that the current piecework provisions have ‘failed to prevent the pieceworker arrangements resulting in employees frequently earning substantially below the minimum rates set by the Horticulture Award.’<sup>399</sup>

[365] In addition, the AWU submits that the characteristics of the workforce are also relevant to the assessment of what is necessary to provide a fair and relevant safety net of terms and conditions and that:<sup>400</sup>

‘The variations sought are necessary to achieve the modern awards objective of ensuring that the modern award, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.’<sup>401</sup>

[366] The AWU submits that the evidence supports the conclusion that the piecework provisions do not ensure adequate minimum conditions are maintained in the absence of provision for a minimum guaranteed payment, having regard to following considerations:

1. Various government reports and academic studies ‘overwhelmingly demonstrate that the majority of workers in horticulture who are paid piecework rates receive well below the minimum hourly rates of pay in the Horticulture Award and below the national minimum wage.’<sup>402</sup>
2. The protection intended to be provided by clause 15.2(b) is ‘insufficient and simply not working’,<sup>403</sup> in particular:
  - Clause 15.2(b) relies on an assessment of what piecework rate is necessary to enable an ‘average competent employee’ to earn 15% more than the minimum hourly rate; an assessment of the piecework rate required to achieve that objective is ‘complex, subjective and difficult to enforce’.<sup>404</sup>

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<sup>398</sup> AWU submission, 19 March 2021 at [3].

<sup>399</sup> AWU submission, 19 March 2021 at [3].

<sup>400</sup> Ibid at [21].

<sup>401</sup> Ibid at [5].

<sup>402</sup> Ibid at [22(a)].

<sup>403</sup> Ibid at [22(b)].

<sup>404</sup> Ibid at [22(b)].

- Clause 15.2(b), together with the statement in clause 15.2(f) that a piecework agreement must be made without coercion or duress ‘is inadequate as the sole protective measure to ensure that piecework rates are not utilised in a manner intended to, or having the effect of, undermining the minimum rates set by the Horticulture Award.’<sup>405</sup>
3. The operation of clauses 15.2(a), (b) and (f) relies on there being a realistic capacity for the employer and employee to reach a genuine agreement on a piecework rate that will enable the employee to earn at least 15% more than the applicable hourly minimum rate. But the characteristics of the workforce makes it inherently unlikely that a system reliant upon genuine agreements being reached between employers and employees will be adequate, in particular:
- the horticulture workforce is commonly transient with a high level of temporary migrant workers, and
  - workers frequently have limited English language skills, are poorly informed about their employment conditions and legal entitlements, and are vulnerable to coercion and duress (including as a result of isolation, financial pressures and visa conditions).
4. The majority judgment in *Fair Work Ombudsman v Hu*<sup>406</sup> revealed a deficiency in clause 15.2 of the Horticulture Award. The majority found that, if an employer and employee enter into a piecework agreement under clause 15.2(a), the employee does not have the benefit of the weekly or hourly rates in what is now clause 15.1 even if the piecework rate does not comply with clause 15.2(b).<sup>407</sup>
5. The following modern awards contain piecework provisions which include a guaranteed minimum payment:
- *Building and Construction General On-site Award 2020*<sup>408</sup>
  - *Silviculture Award 2020*<sup>409</sup>
  - *Sugar Industry Award 2020*<sup>410</sup> and
  - *Wool Storage, Sampling and Testing Award 2020*.<sup>411</sup>

[367] The UWU supports the AWU’s proposed variation and submits that the Commission can be satisfied that it is necessary to achieve the modern awards objective, for the following reasons:<sup>412</sup>

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<sup>405</sup> Ibid at [22(b)].

<sup>406</sup> [2019] FCAFC 133; (2019) 289 IR 240.

<sup>407</sup> *Fair Work Ombudsman v Hu* [2019] FCAFC 133; (2019) 289 IR 240 at [27]–[30].

<sup>408</sup> Clause 19.6(e).

<sup>409</sup> Clauses 15.2(a) and (b).

<sup>410</sup> Clauses 17.3(a) and (b).

<sup>411</sup> Clause 16(d).

<sup>412</sup> UWU submission, 19 March 2021 at [8].



1. The operation of clause 15.2 ‘frequently results in employees covered by the Award being paid a wage that is less than the equivalent of the relevant modern award hourly minimum wage.’<sup>413</sup>
2. The operation of clause 15.2 ‘frequently results in employees covered by the Award who are average competent employees and who are pieceworkers being paid less than at least 15% more per hour than the minimum hourly rate prescribed in the award for the type of employment and the classification level of the employee.’<sup>414</sup>
3. Clause 15.2 is ‘frequently misapplied and is unworkable.’<sup>415</sup>
4. Clause 15.2 fails to take account of changes in community standards and expectations in relation to paying workers low and unliveable wages.<sup>416</sup>
5. The uncertainty in the operation of clause 15.2 ‘results in circumstances where even an employer attempting to comply with the Award in setting piecework rates, faces strong likelihood that their rates are not Award compliant.’<sup>417</sup>

**[368]** The UWU contends that the existing piecework provisions do *not* provide a fair and relevant minimum safety net and submits that the pieceworker rate concept ‘is based on the idea that an employee is given an opportunity to earn more than a minimum rate of pay, in exchange for higher productivity, but could be paid less than a minimum rate of pay as a result of lower productivity.’<sup>418</sup> The UWU contends that in order for such a clause to be ‘fair’ it:<sup>419</sup>

- must provide the employee with a fair opportunity to earn more than the minimum rate
- should not result in employees earning less than the minimum rate, on a frequent basis, and
- should not result in employees rarely or never earning more than the minimum rate.

**[369]** The UWU submits that the operation of clause 15.2 frequently results in employees engaged on a casual basis to perform, for example, fruit or vegetable picking and packing, thinning or pruning being paid less than the relevant award minimum rate which applies from time to time.<sup>420</sup>

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<sup>413</sup> UWU submission, 19 March 2021 at [8(a)].

<sup>414</sup> UWU submission, 19 March 2021 at [8(b)].

<sup>415</sup> UWU submission, 19 March 2021 at [8(c)].

<sup>416</sup> Fair Work Bill 2008 (Explanatory Memorandum) at [518].

<sup>417</sup> UWU submission, 19 March 2021 at [8(e)].

<sup>418</sup> Ibid at [28].

<sup>419</sup> Ibid at [29].

<sup>420</sup> Ibid at [30].

[370] The UWU acknowledges that if the Application is granted the difficulties associated with the ‘average competent employee’ assessment will remain but submits that the variation proposed ‘removes the unfairness that is currently being borne by employees as a result of operation of the clause...Thus alleviating the effect of exploitative piecework rates that are prevalent throughout the industry.’<sup>421</sup>

[371] The UWU submits that the proposed variation requiring the keeping of records is ‘warranted and justified’ because there is currently no requirement to do so, and consequently, there is a ‘common tendency’ for employers covered by the Horticulture award not to keep records.<sup>422</sup> The UWU submits that this is ‘a factor that inhibits the ability of an employee to determine whether they are being paid at least the minimum required under clause 15.2 of the Award’.<sup>423</sup>

## **5.2 Other submissions in support of the Application**

[372] The State Governments of Queensland, Victoria and Western Australia made submissions which were supportive of the Application.

[373] ACOSS, the Uniting Church of Australia and 88 Days and Counting also support the Application.

## **5.3 Employer Associations**

[374] The AFPA, Ai Group, the NFF and Fruit Growers Tasmania oppose the Application.

### *(i) AFPA*

[375] The AFPA opposes the Application. Its primary position is that the Union parties have not made out a merits case for this significant change to ‘a very long-standing award-based mode of remuneration in the horticultural industry’ and on that basis, no variation to the Horticulture Award is warranted.

[376] If contrary to AFPA’s primary position, the Commission were satisfied that an amendment to the Horticulture Award is required to ensure a fair and effective safety net, the AFPA submits that the variation proposed by the Union Parties ‘would be unnecessary and inappropriate having regard to the circumstances of the horticultural industry.’

[377] The AFPA advances 3 broad lines of argument in support of its position:<sup>424</sup>

1. The case advanced by the Union parties - that there is a widespread industry practice of setting the piecework rate too low, in breach of clause 15.2(b), resulting in pieceworkers being overwhelmingly paid less than the minimum hourly rates applicable to timeworkers - is significantly overstated. The Union

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<sup>421</sup> Ibid at [34].

<sup>422</sup> Ibid at [9(b)].

<sup>423</sup> Ibid at [35].

<sup>424</sup> AFPA submission, 11 June 2021 at [6].

parties have not adduced reliable evidence concerning the earning outcomes of pieceworkers to satisfy the Commission that the variation they seek is necessary.

2. The issues raised by the Union parties are ‘about whether the existing safety net is being appropriately *implemented*’ and while those issues do not justify the variation sought by the Union parties, they ‘might warrant improvements to the implementation machinery of the piecework provisions of the Award.’ The AFPA notes that while clause 15.2(b) requires the piecework rate to be set so that the average competent worker receives a 15% uplift, the Horticulture Award does not prescribe any specific process or mechanism for ensuring that this objective is actually achieved:

‘In particular, the Award does not provide any express guidance as to how to identify the cohort of competent employees, how to calculate the initial piecework rate and what, if any, variables to include in that calculation, and how and when the piecework rate should be reviewed and updated to ensure compliance with the Uplift Term. The safety net could be improved to provide more clarity around this, requiring employers to follow a particular approach to setting the rate. This would make it easier to monitor compliance and close avenues for abuse by unscrupulous employers.’<sup>425</sup>

3. If the Commission were satisfied that the safety net requires variation, the solution would not be to ‘eviscerate the piecework-based safety net by throwing out the risk-reward bargain [which] would run the significant risk of causing disruption to the industry with adverse outcomes for many growers and the labour market.’ The AFPA submits that a ‘more cautious, measured and balanced approach could achieve substantial practical improvements to the safety net.’

**[378]** In section D.2 of its submission the AFPA submits that ‘there are sound reasons why piecework remains an essential mode of engagement for some tasks’, particularly picking:<sup>426</sup>

1. Growers require a workforce that is both seasonal, large in peak periods (to ensure that all the ripe produce is picked before it overripens or spoils) and varying in size over the course of the season. Fresh produce harvesting is generally seasonal, with produce being available to be harvested only during particular months or weeks of the year. The volume of product that ripens varies over the season, increasing from the start to the middle of the season and then dropping off until the end of the season. Further, even within the season, the produce needs to be harvested very quickly after it reaches the right level of ripeness and/or size. For example, mushrooms grow so quickly that there is only an 18-hour window to pick them at their optimum size and condition. Similarly, the picking window for raspberries and blackberries is only one day.
2. The inherent seasonality and unpredictability of the demand for picking labour has always meant that the workforce included a substantial proportion of inexperienced workers. But in recent years, the decline of professional ‘picking

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<sup>425</sup> Ibid at [6(b)].

<sup>426</sup> Ibid at [24].

gangs’ means that (under normal conditions prevailing before the pandemic) much of the workforce is drawn from backpackers with no prior experience and often poor motivation. A substantial minority of pickers start the job, decide that the job is not for them and leave in a matter of days and sometimes on the first day. A majority leaves within eight weeks.

3. Picking is not rocket science, but it does require some experience to achieve a basic level of competence. Depending on the type of produce, it takes a novice several weeks of experience to become a competent picker and it can take longer than that to achieve an average level of competence.
4. Given the time it takes to achieve competency and the nature of the picking workforce described above, there is usually a substantial proportion of the workforce who have not yet achieved basic competence and many employees leave before they become competent. The output of these not-yet-competent employees is very low compared to the cohort of competent workers.

**[379]** The AFPA submits that piecework engagement provides an ‘attractive option for both employers and employees’:<sup>427</sup>

- For the employers, the labour cost of the substantial proportion of employees with low productivity is kept commensurate with their productivity until they achieve basic competence:

‘This allows employers not to be discerning in selecting and retaining their pickers and to continue engaging pickers found to have low productivity. It also means that novice employees are incentivised to learn the job and achieve competence as quickly as reasonably possible and more experienced employees are incentivised to maximise their productivity, while receiving the commensurate reward.’<sup>428</sup>

- Employees also benefit from the arrangement:

‘Unskilled and unmotivated individuals with no experience, who would otherwise make unattractive candidates, can obtain employment. Pickers who are not motivated to be productive and maximise their remuneration (eg backpackers who are only doing the job to satisfy visa requirements or “grey nomads” who pick as a lifestyle choice) can pick at a pace that suits them but still retain their employment.’<sup>429</sup>

**[380]** The AFPA contends that the Horticulture Award currently offers the choice of 2 alternative modes of engagement with different safety nets — engagement as a timeworker and engagement as a pieceworker. It submits that: ‘The effect of the variation proposed by the AWU would effectively remove this choice, disadvantaging both employers and employees.’<sup>430</sup> This is said to be so for 3 reasons:<sup>431</sup>

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<sup>427</sup> Ibid at [25].

<sup>428</sup> Ibid at [25(a)].

<sup>429</sup> Ibid at [25(b)].

<sup>430</sup> Ibid at [26].

<sup>431</sup> Ibid at [27]–[33].

1. The ‘logical consequence’ of the proposed variation would be that the 15% uplift for pieceworkers should be removed. The AFPA submits that the uplift is justified by the absence of a guaranteed hourly rate for pieceworkers as,:

‘The requirement that an average competent pieceworker earn more than a timeworker doing the same work is the quid pro quo for the risk of earning less than the timeworker if the pieceworker underperforms. This is the risk-reward bargain. If pieceworkers are to be guaranteed the same hourly earnings as timeworkers, the main downside of piecework is removed and the upside is with the pieceworker — the opportunity to earn more than a timeworker. It is then difficult to see what justification would remain for requiring the piecework rate to be set so that the average competent pieceworker earns more than the time worker performing the same work. Hence, the 15% uplift would no longer be “necessary to achieve the modern awards objective”.’<sup>432</sup>

The AFPA submits that if pieceworkers are to be guaranteed the hourly rates of timeworkers but also retain the benefit of clause 15.2(b), this would make the pieceworker mode of engagement unattractive for employers:

‘This is because an employer engaging someone as a pieceworker would then face the double whammy of both the minimum hourly rates and the Uplift Term. In contrast, if the employer were to engage someone as a timeworker, they can avoid the Uplift Term but can still incentivise high productivity by paying unregulated above-award performance-based bonuses.’<sup>433</sup>

2. It is said to follow that the practical effect of the variation would be to abolish the piece-work safety net and replace it with a safety net based on hourly rates. This is because clause 15.2(b) would no longer be “necessary” to maintain a fair and effective safety net. The uplift would have to go and the piecework provisions would then no longer provide any additional earnings for pieceworkers. The AFPA submits that ‘this would be a fundamental change to the safety net.’
3. Such a change would create real difficulties for employers and poses the risk of substantially disrupting the industry based on the structural reality of its labour market. Indeed, it could push some growers into non-compliance with the Award and other employee entitlements and ‘would reduce the economic productivity of the sector (relevantly here, the amount of produce picked per hour worked) by de-incentivising substantial parts of the workforce.’<sup>434</sup> The AFPA also submits that such a change would also disadvantage many employees, particularly competent pieceworkers who currently benefit from the uplift provided that the piecework rate is set appropriately, and poorly-performing employees as the requirement to pay everyone the minimum hourly rates regardless of performance ‘will force employers to become much more strict in culling workers with low productivity.’

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<sup>432</sup> Ibid at [27].

<sup>433</sup> Ibid at [28].

<sup>434</sup> AFPA submission, 11 June 2021 at [33] (footnotes omitted).

[381] The AFPA does not challenge the proposition that *some* employers set their piecework rates at inappropriately low levels but submits that the Union parties' evidence of widespread exploitation 'suffers from fundamental methodological flaws that make it an unreliable guide as to the level of compliance'.<sup>435</sup>

[382] The AFPA submits that 'at its highest', all that the Unions' evidence shows is that:

'the practical application of the current piecework provisions may disadvantage employees because piecework rates are, in practice, being set too low. But that is not a reason to throw out the whole concept of a piecework-based safety net, rather it is a reason to vary clause 15 to provide mechanisms that will improve the *implementation* of the concept.'<sup>436</sup>

[383] The AFPA also notes that the characteristics of the workforce on which the Union Parties rely to justify the variation are not new:

'Indeed, the fundamental characteristics of the horticulture industry and its workforce that make piecework engagement so critical have been recognised in arbitral decisions going back as far as the 1920s and 1930s. The rise of backpackers as a major component of the workforce merely exacerbated an old problem of inexperienced labour and in any event pre-dates the making of the Award. What is new, however, are the recent regulatory schemes for licensing labour hire providers. These will presumably improve the level of compliance with workplace laws by labour hire providers.'<sup>437</sup> [Footnotes omitted]

[384] The AFPA submits that the *concept* of a piecework-based safety net with a 15% uplift is 'sound and meets the unique needs of the horticulture industry, where product is often highly perishable and must be picked within a narrow time window to maximise yield, quality and pricing. If any amendment were necessary, it would be to improve the practical implementation of that concept through additional machinery provisions.'<sup>438</sup>

[385] In section 3 of its submission the AFPA proposes an alternative variation for the Commission's consideration if the Commission were to form the view that the current piecework provisions in the Horticulture Award need to be varied. The proposed alternative variation preserves the concept of a piecework-based safety net with an uplift of earnings for competent pieceworkers compared to timeworkers, but provides additional implementation machinery to support the transparent and consistent application of piecework rates. We return to the AFPA's proposed alternate variation shortly.

[386] During the course of his closing oral submissions senior counsel for the AFPA narrowed the issues somewhat, as between the AFPA and the Unions. In particular, the AFPA:

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<sup>435</sup> Ibid at [6(a)].

<sup>436</sup> Ibid at [40].

<sup>437</sup> Ibid at [37].

<sup>438</sup> Ibid 2021 at [41].

- acknowledges that the ‘protective’ mechanisms in clause 15.2(f), (g) and (h) ‘do not of themselves provide much protection in practice; they are only going to be as good as the protections in the mechanism for fixing piece rates’<sup>439</sup>;
- does not contest the proposition that the standard of ‘average competent worker’ is ‘subjective and open to abuse’<sup>440</sup>;
- submits that the current ‘average competent worker’ standard is problematic in 2 respects:
  1. the test is not documented in the Horticulture Award, you have to look at the case law, in particular the *Hu* litigation, to find the test which ‘makes it more difficult for both workers and farmers to even know what the test is, whether it exists and what it involves’<sup>441</sup>, and
  2. the test ‘leaves a lot of room to the discretion of the employer in terms of arriving at the threshold of competence’ which ‘makes it more difficult for workers, unions and the Fair Work Ombudsman to verify compliance and to enforce clause 15.2, particularly given that there’s no express obligation on an employer ... to record the hours worked’<sup>442</sup>, and;
- agreed with the proposition that the imposition of an explicit obligation on an employer to keep records of the hours worked would *not* impose an unreasonable additional administrative burden on employers.<sup>443</sup>

[387] On the basis of the above concessions the AFPA accepts that ‘there are problems with the existing clause’<sup>444</sup> and ultimately contends that if we are satisfied that a variation is necessary ‘the real issue ... is crafting the most appropriate variation necessary to achieve the safety net objectives’.<sup>445</sup> In this regard the AFPA contends that its proposal is to be preferred to that advanced by the AWU, and submits that the AWU proposal:

‘leaves the current concept of average competent employee in the award completely unchanged, does nothing to improve or refine it. Employers will still be required to set piece rates so that an average competent employee can earn at least 15 per cent more than the minimum hourly rate in exactly the same way as they are doing now, without any further guidance.

All of the problems associated with the current regime to which the union points ... the vague nature of the test of average competence; the fact that the test leaves much to the employer's discretion; the provision is hard to enforce; the fact that the test is not even spelled out in the clause; all of those problems remain unaddressed under the AWU's variation.

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<sup>439</sup> Transcript, 30 July 2021 at [266]

<sup>440</sup> Ibid at [268]

<sup>441</sup> Ibid at [268]

<sup>442</sup> Ibid at [270]

<sup>443</sup> Ibid.

<sup>444</sup> Ibid at [303]

<sup>445</sup> Ibid at [312]

Instead of fixing the problems in the piece worker safety net, their proposal just adds another safety net, leaving the original first safety net intact, but on the basis implicitly that it's simply irrelevant or less important for some classes of workers... So that's not really a solution to the problems they've identified, and it's certainly not the sole possible appropriate variation.<sup>446</sup>

(ii) *Ai Group*

**[388]** Ai Group opposes the Application and submits that the option of paying piecework rates rather than minimum hourly rates 'is a fair and appropriate condition for the horticulture industry which enables employees to earn well above what would otherwise be the minimum hourly rate.'<sup>447</sup>

**[389]** Ai Group submits that there are significant safeguards present in the Horticulture Award to ensure that any vulnerabilities to which employees are exposed do not cause detriment.<sup>448</sup>

- The piecework rate must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the Horticulture Award for the type of employment and the classification level of the employee (cl. 15.2(b))
- The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement (cl. 15.2(b))
- The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress (cl. 15.2(f))
- The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee (cl. 15.2(g)), and
- The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record (cl. 15.2(h)).

**[390]** As to the Unions' contention that the safety net currently provided by clause 15.2 is inadequate or not working, Ai Group submits that these arguments 'are less relevant to the issue of whether there currently is an adequate safety net than they are to the issue of adequate enforcement of existing provisions in the Award'<sup>449</sup> and that:

'An amendment which is founded on an alleged failure of some employers to apply current provisions should not be made. Enforcement of existing provisions is a separate issue outside the purview of the Commission.'<sup>450</sup>

**[391]** As to the awards that the AWU submit contain piecework provisions, Ai Group submits:

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<sup>446</sup> Ibid at [309]–[311]

<sup>447</sup> Ai Group submission, 1 June 2021 at [9].

<sup>448</sup> Ibid at [22].

<sup>449</sup> Ibid at [18].

<sup>450</sup> Ibid at [13].



‘The guarantee of payment at an equivalent hourly rate of pay in these provisions should be seen as a substitute for the more generous safeguard which already exists in cl. 15.2(b) of the Horticulture Award which guarantees payment at a rate which enables the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the Award for the type of employment and the classification level of the employee. None of the Awards utilised for comparison purposes in the AWU’s submission guarantees payment of the equivalent minimum hourly rate of pay in addition to a requirement that the rate set for piecework be such as to enable an average competent worker to earn a specified minimum percentage above the minimum hourly rate. The AWU’s application would unnecessarily apply two safeguards and dramatically reduce the incentive on the employer’s part for utilising the piecework rates at all.’<sup>451</sup>

[392] Ai Group submits that the AWU’s proposed variation would *not* satisfy the need to ensure a simple, easy to understand, stable and sustainable modern award. As to the arguments raised by the Union parties regarding uncertainty around the operation of clause 15.2(b), Ai Group contends such issues are not resolved by the Application.

[393] In respect of the ability of employees to make ‘genuine agreements’, Ai Group submits that asserted or actual non-compliance with an award provision should not be considered justification for adding additional entitlements to comply with:

‘Any failure to comply with the present conditions mandated under the Horticulture Award is appropriately met with an enforcement response. As discussed above, the Australian Government and the FWO have taken numerous steps to increase compliance with workplace obligations, both generally and in respect of the horticulture industry...Existing safeguards are adequate.’<sup>452</sup>

[394] Ai Group submits that, contrary to the AWU’s suggestion, asserted growth in the labour hire industry should have no bearing whatsoever on the Commission’s decision in determining the Application, noting:<sup>453</sup>

- Engagement of labour hire is a legitimate and essential option for many companies
- Labour hire employees are afforded the same protections under the Act and modern awards as other employees, and
- Labour hire operators are subject to greater regulation in some jurisdictions, with labour hire licensing schemes in place in Victoria, Queensland, South Australia and the Australian Capital Territory.

[395] Ai Group submits that the AWU’s submission in respect of the impact of a recording of hours requirement is ‘misguided’.<sup>454</sup> Ai Group submits that an employer would need to take the steps outlined at [26]–[38] of Rangiah J’s decision in *Hu (No 2)*, which involve identifying the characteristics of the hypothetical average competent employee and predicting the pick rate of that employee and that:

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<sup>451</sup> Ibid at [38].

<sup>452</sup> Ibid at [65]–[66].

<sup>453</sup> Ibid at [70]–[71].

<sup>454</sup> Ibid at [75].

‘At most, this would require reassessment of the hourly rate an average competent employee is able to earn performing the work to be done under the agreement at the proposed piecework rate each time a relevant variable that could impact that rate changes.’<sup>455</sup>

[396] Ai Group contends that it is unclear how a failure to provide employees with a record of their working hours inhibits their capacity to determine whether they are being paid correctly pursuant to clause 15.2(b), as the minimum piecework rate is not determined on the basis of an individual’s hours of work.<sup>456</sup>

(iii) *NFF*

[397] The NFF opposes the Application and advances 3 broad lines of argument:<sup>457</sup>

1. The proposed variation will not serve the intended purpose; it will not make the safety net ‘appropriate’:

‘the application is attended by a series of negative consequences which are likely to affect employees engaged by horticulture producers and growers, to change the balance of workers seeking work there; and are likely to render the industry less productive’<sup>458</sup>

2. The proposed variation will result in changes to the types of employees who will obtain work in the future; the engagement and utilisation of technology or alternative means of farming and dismissing or not hiring unproductive workers.
3. The proposed variation will put economic pressure on growers.

[398] The NFF submits that the ‘safety net currently provided under clause 15.2 is appropriate and sufficient for the horticulture industry.’<sup>459</sup>

[399] The NFF submits that the Commission should find that the AWU’s Application and evidence relied upon do not warrant varying the Horticulture Award, and that the AWU has failed to demonstrate a causative link between its submissions and evidence. The NFF submits that if there is a ‘cure needed’, the Application may not address that complaint and that non-compliance is a matter to be dealt with under the existing facilities of the Act.<sup>460</sup> As to the last point the NFF submits:

‘This is an approach which is misconceived, on several levels. The first level involves the consideration of non-compliance. If there be wide-scale [non-compliance] (which NFF submits is not made out, whether from the AWU’s material nor from any other direct source) then such a compliance matter is dealt with under the existing facilities of the FW Act. That is only a minor

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<sup>455</sup> Ibid at [75].

<sup>456</sup> Ibid at [76]–[77].

<sup>457</sup> NFF submission, 11 June 2021 at [3].

<sup>458</sup> Ibid at [3].

<sup>459</sup> Ibid at [4].

<sup>460</sup> Ibid at [27]–[28].

point in favour of an award variation and substantially outweighed by countervailing considerations.

In particular, the conclusions of the AWU in relation to compliance have the aspect of a hypothetical solution to an unspecified and unexplained problem. The Commission should conclude (on the basis of the NFF's statements) that [the] vast majority of employees whose pay and wage records are specified in the NFF's material earn greater than 15% above the Award minima. A significant portion of those employees (such as annexed to the Kelly statement (at exhibit 'A')) earn significantly above this sum.<sup>461</sup>

(iv) *Fruit Growers Tasmania*

**[400]** Fruit Growers Tasmania (FGT) is a not-for-profit association with over 80 members who grow fruit across all 3 regions of Tasmania. FGT represents growers who directly employ around 1,500 people in on-going roles and over 8,000 people in seasonal roles in the peak of the season. It opposes the Application.

**[401]** FGT submits that the AWU is 'wrongly conflating the very serious issue of the underpayment of workers with merits of a legitimate payment system' and contends that the underpayment of workers is *not* simply a pieceworker rate issue.<sup>462</sup>

**[402]** FGT submits that pieceworker rates benefit both the worker and the employer by driving productivity and providing flexibility and incentives for the worker. FGT submits that the Application will undermine the fairness and effectiveness of pieceworker rates, contending:

- The AWU's argument that the 'majority of casual pieceworkers earn well below the minimum hourly rate' is factually incorrect with respect to the Tasmanian industry.<sup>463</sup>
- The AWU's argument that current arrangements are impossible for employees to understand is not correct; 'many thousands of employees in the Tasmanian fruit industry happily work to the current arrangements', including those with English as a second language, foreign workers, international students and those on SWPs.<sup>464</sup>
- Pieceworker rates without a floor do not create a loophole in the modern award 'safety net'; clause 15.2(b) constitutes a safety net and Tasmanian fruit growers set their piece rates to comply with this requirement. FGT submits that 'just because some workers earn lower "effective" hourly rates does not in itself imply a loophole in any 'safety net[']', without further investigation and justification.<sup>465</sup>

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<sup>461</sup> Ibid at [29]–[30].

<sup>462</sup> Fruit Growers Tasmania, 'Fruit Growers Tasmania's Response to the AWU Submission to Fair Work Australia Regarding the Variation of Pieceworker Rates in the Horticulture Award', Submission in *Horticulture Award 2020*, AM2020/14, 31 May 2021, at 7 ('FGT submission, 31 May 2021').

<sup>463</sup> Ibid at 3.

<sup>464</sup> Ibid.

<sup>465</sup> Ibid at 4.

- The introduction of a minimum hourly rate as a floor would break the current direct relationship between productivity and rate of pay and make the system ‘less productive’ – all workers would be paid the same irrespective of productivity.<sup>466</sup>
- Employers will be incentivised to recruit workers who are sufficiently productive, which would be costly for employers. Growers will be attracted to recruiting experienced workers, who are typically international workers.<sup>467</sup>
- The AWU’s argument that Australians would be attracted to work in horticulture if a floor was set is misplaced; such opportunities already exist and are not pursued by Australians and an incentive already exists by virtue of clause 15.2(b) of the Horticulture Award.<sup>468</sup>

[403] FGT also submits that the Application would deny ‘young, young at heart people, and other workers who currently participate happily and freely in fruit picking work’ the opportunity to work at pieceworker rates lower than the suggested floor. In particular:<sup>469</sup>

- pieceworker rates encourage workers of many different skills, physical capabilities and commitment levels and under the current system, all persons undertaking the same work are rewarded equally, with productivity being the sole factor in determining the rate.
- inexperienced workers, older workers and those with impaired capabilities or aptitudes will be excluded from participating because, despite being ready, willing and able, growers will not be able to afford to pay the equivalent of higher per-unit costs for workers whose productivity is less than the floor price.

## 5.4 Individual Businesses

### (i) *Payne’s Farm Contracting Pty Ltd*

[404] Payne’s Farm Contracting Pty Ltd (Payne’s) opposes the Application.

[405] Payne’s offers specialist pruning services to growers in Sunraysia, and prior to the COVID-19 pandemic, worked in eastern Victoria, southern NSW and South Australia.

[406] Payne’s asserts that over the last few years it has lost business to competitors who undercut them, but claims that it is not because of misuse of the pieceworker rate provisions:

- “• The most popular method employed by our competitors is to classify their workers as ‘part time’ when in fact they are actually casual. This allows a significant reduction in the hourly rate charged. If the AWU is concerned about the incorrect use of Piece Rate then I would suggest that this is equally rife.

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<sup>466</sup> Ibid.

<sup>467</sup> Ibid at 5.

<sup>468</sup> Ibid at 6.

<sup>469</sup> Ibid at 6–7.

- Our competitors seem to have a much larger supply of workers than we've ever been able to attract even though our pay rates are higher. How is this? Their workers are either illegal or are (in one region a large community who arrive at the site with their whole extended families [including grandparents and small children] and pool their work, are already in receipt of welfare payments and are paid in cash for their work).
- Other competitors have a number of sub-contractors who dilute the takings at each stage and blur the lines of command, use illegal workers and again – pay in cash.
- The preference for cash of course means that there will be no paper trail and the contractor avoids the expense and admin associated with paying WorkCover, Superannuation, PAYG and GST – all of which take its toll on our company. And given that the government withholds 65% of superannuation paid to backpackers – who can blame them?<sup>470</sup>

[407] Payne's primary submission is that better enforcement of current laws is required, rather than more regulation. Payne's submits that 'changes to the Piece Rate arrangements will not improve the situation or effect [sic] those operating outside of the law'.<sup>471</sup>

(ii) *Lucaston Park Orchards*

[408] Lucaston Park Orchards (LPO) opposes the AWU application.

[409] LPO is a family business growing raspberries, cherries and apples and submits that many of its pickers earn well in excess of the hourly award rates, with some earning up to \$540 per day picking cherries and \$420 per day picking apples.

[410] LPO submits that:

- Introducing a floor price would remove incentive and reward for effort which are 'the two cornerstones of piecework' and will exclude a whole demographic of slower workers.<sup>472</sup>
- The focus of the Application is misplaced:  
  

'Perhaps there needs to be more emphasis on prosecuting non-compliant employers, rather than a knee-jerk reaction to the perhaps 5% who are not doing the right thing and, in the process, penalising the 95% of employers in our industry who are seeking to abide by the Award.'<sup>473</sup>
- Employers in this industry operate in a 'tight labour market' and could not 'add the extra cost onto what our product sells for'.<sup>474</sup>

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<sup>470</sup> Payne's Farm Contracting Pty Ltd, 'Submission to the Fair Work Commission to the AWU's application to vary clause 15.2 Pieceworker Rates in the Horticulture Award 2020', Submission in *Horticulture Award 2020*, AM2020/104, 21 May 2021 at 1.

<sup>471</sup> Ibid at 1.

<sup>472</sup> Lucaston Park Orchards, 'Re: Horticultural Award and Piece work rates', Submission in *Horticulture Award 2020*, AM2020/104, 19 April 2021 at 1.

<sup>473</sup> LPO submission, 19 April 2021, p 2.

<sup>474</sup> Ibid at 4–5.

[411] LPO submits that ‘if there needs to be a trade-off, to keep the existing arrangements, then the 88-day farm work requirement to extend Working Holiday Visas should be scrapped’<sup>475</sup>:

‘When it was first introduced, it appeared to be a good thing to help farmers. However now it is apparent that it can put backpackers in a vulnerable situation with unscrupulous employers who have no intention of doing the right thing under the Award.’<sup>476</sup>

[412] LPO submits that the Commission should ‘leave the Horticulture Award as it now stands’, as well as doing the following:

- ‘1. Push for scrapping the 88-day requirement to work on farms in order to extend working holiday visas.
2. Encourage prosecution of non-compliant operators.
3. Do not do anything to penalise the majority because of a minority, who will not abide by the rules no matter what the rules say.
4. Understand that the answer to the small amount of non-compliance, is not more rules.’<sup>477</sup>

## 5.5 Union Submissions in Reply

AWU

[413] The AWU addresses 3 merit arguments in its reply submissions.

- (i) *Employees who are not competent (within the meaning of clause 15.2)*

[414] The AWU notes that some submissions suggest that the existing pieceworker provisions are justified by the fact that horticultural workers may take a period of time to learn the skills involved and become competent to pick produce at a reasonable rate and that it would be unfair and/or undesirable for employers to be required to pay employees at least the minimum hourly rate whilst being inducted or trained or in the period it may take for an employee to work at the average rate.

[415] In reply, the AWU says that these submissions should not be accepted for 3 reasons:

1. The concern is overstated; evidence of multiple growers indicates that it can take as little as a day or 2-3 days before a worker is able to start picking at the rate of a competent worker.<sup>478</sup> The AWU submits that a: ‘short period of familiarisation

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<sup>475</sup> Ibid at 5.

<sup>476</sup> Ibid at 5.

<sup>477</sup> Ibid at 6.

<sup>478</sup> Exhibit NFF 1 at [18]; Exhibit NFF 4 at [16]; Exhibit NFF 2 at [13], [22]; Exhibit NFF 14 at [19].

with the work hardly justifies payment below minimum rates for the type of work.’<sup>479</sup>

2. The basis upon which it is said to be fair for an employee, whilst expending time and effort being trained and acquiring skills to benefit the employer, should be paid at below the minimum hourly rate is not identified. The AWU submits that the Level 1 rate is set as the proper rate for a new employee undertaking ‘induction training’.<sup>480</sup> Even if there is a period during which a new employee is trained and acquires skills on the job, the proper and fair rate for the employee to be remunerated is the Level 1 rate. The AWU submits:

‘If an employee continues to fail to perform work to a reasonable level of competence, the employer is under no obligation to retain the employee in employment, particularly where the employees are engaged as casuals. The evidence indicates that employers will not engage or will let go or reassign employees who persistently fail to reach a reasonable level of competence.’<sup>481</sup> This is unsurprising given the evidence put forward as to the urgency of the harvesting task. It is inconsistent with the asserted urgency of the picking and harvesting task to assume that employers would retain a substantial cohort of employees who fail to reach a reasonable degree of competence.’<sup>482</sup>

3. Some of the submissions also suggest that some groups of employees wish to work slowly and to earn lower rates of remuneration, including backpackers and ‘grey nomads’.<sup>483</sup> In reply, the AWU submits that the evidence in support of these submissions is ‘unconvincing’:

‘Much of the evidence suggests that producers will not engage inefficient workers or require a worker who is not picking at a reasonable rate to move on even if they are being paid on piece rates. The Commission could not be satisfied, on the evidence, that this issue is one of substance. In any event, the willingness of a small cohort of employees to work for below minimum rates, even if established by evidence, provides no basis for the Commission to fail to provide a fair and relevant safety net. Minimum rates are set as appropriate for the type of work involved and cannot be contracted out of.’<sup>484</sup> [Footnotes omitted]

(ii) *Compliance/enforceability*

**[416]** The AWU notes that a number of the submissions suggest that the variation should not be made because the true complaint by the AWU is that there is widespread non-compliance with the existing pieceworker provisions and that non-compliance should be addressed through the enforcement provisions of the Act. In reply, the AWU contends that these submissions overlook 2 considerations:

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<sup>479</sup> AWU submission in reply, 2 July 2021 at [15].

<sup>480</sup> *Horticulture Award*, sch.A cl.A.1.2.

<sup>481</sup> Statement of Moss at [36]; Statement of Kelly at [27]; Statement of Reardon at [30].

<sup>482</sup> AWU submission in reply, 2 July 2021 at [17].

<sup>483</sup> AFPA submission, 11 June 2021 at [25(b)]; Ai Group submission, 1 June 2021 at [103].

<sup>484</sup> AWU submission in reply, 2 July 2021 at [18].

1. The nature and structure of an award obligation may affect the ease of its enforceability and compliance with the minimum standards. The AWU submits that the difficulty in enforcing the existing piecework provisions arises from, or at least is contributed to, by the nature of the award provision:

‘The fact the minimum rate for a pieceworker is not set by reference to a certain and clear minimum exacerbates the risk of exploitation of vulnerable workers and the prevalence of non-compliance. Award provisions which are dependant on discretionary and subjective assessments to be made by the employer lack objectivity, transparency, simplicity and enforceability.’<sup>485</sup> The inclusion of a floor of remuneration for employees engaged on piecework agreements calculated by reference to an easily ascertainable hourly rate of pay would provide a straightforward mechanism for individual employees to know whether they are being appropriately paid and for inadequate piecework arrangements to be detected and sanctioned.’<sup>486</sup>

The AWU submits that ‘the uncertain and subjective assessment required to apply clause 15.2(b) of the Horticulture Award inevitably provides a substantial barrier to individual employees being able to assess whether they are being paid correctly and to effective enforcement of the Award by employees, unions or the Ombudsman.’<sup>487</sup>

The AWU also submits that the ‘bald statement’ in clause 15.2(f) that the employer and the individual employee must have ‘genuinely made the piecework agreement without coercion or duress’ provides:

‘little more than an aspirational standard. It is unlikely to prevent an employer offering employment on the basis that the employee accept the proffered piece rate on a take it or leave it basis or provide the basis for employees to meaningfully negotiate in relation to the piecework rate.’<sup>488</sup>

2. The objects of the Act include the object of ‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.’ Further, the Commission is required, by s.134(1)(g), to ensure that the modern award system is ‘simpl[e], easy to understand, stable and sustainable’. The AWU submits that ‘Award provisions that lack objectivity, transparency, simplicity and enforceability will not achieve the modern awards objective, particularly for vulnerable groups of workers.’<sup>489</sup>

The AWU also submits that the assertion that legal reforms and compliance initiatives from the FWO ‘have gone a long way to tackling non-compliance with

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<sup>485</sup> See *Re 4 Yearly Review of Modern Awards — Supported Employment Services Award 2010* [2010] FWCFB 8179; (2010) 293 IR 1 at [341]–[342], [366].

<sup>486</sup> AWU submission in reply, 2 July 2021 at [22].

<sup>487</sup> Ibid at [20]. In support, the AWU relies on the observations of Bromberg J in the *Hu Appeal* at [98].

<sup>488</sup> AWU submission in reply, 2 July 2021 at [21].

<sup>489</sup> Ibid at [23].



horticulture industry employers’ obligations to their workers’<sup>490</sup> is ‘entirely unsupported by evidence’:

‘The continued focus of the Ombudsman on the industry demonstrates its ongoing concern in relation to compliance. Further, the presence of licensing schemes for labour hire providers in some states and territories provides no basis for the Commission to refrain from addressing difficulties in the horticulture industry.’<sup>491</sup>

(iii) *Requirement to retain a record of hours worked*

[417] The AWU submits that the complaints advanced by some employer parties<sup>492</sup> that the requirement to maintain a record of hours for pieceworkers would impose an administrative burden on employers are ‘not persuasive’:

‘The only additional administrative task suggested is the requirement to maintain records of the hours of work of employees. The Commission would not consider any additional regulatory burden to be a substantial factor in its consideration, particularly where it is an effective means of ensuring there was no employee disadvantage by reason of pieceworker arrangements.

Proper compliance with the obligation to set a piecework rate that enables the average competent employee to ear[n] at least 15% more per hour than the minimum hourly rate would require monitoring of the hours of work of pieceworkers in any event. The evidence suggests that many producers already claim to track or monitor the hours of work of pieceworkers and, as such, would experience little (if any) additional burden. Further, the alternative proposal advanced by the AFPA positively suggests that employers ought to be required to maintain records of hours worked by pieceworkers.’<sup>493</sup>

*UWU*

[418] In its reply submission the UWU deals with 4 merit arguments.

(i) *Employees covered by the Horticulture Award who are pieceworkers are frequently paid less than the equivalent of the award hourly rate*

[419] The UWU submits that the application of clause 15.2 ‘frequently results in employees being paid a wage that is less than the equivalent of the Award hourly minimum rate’. The UWU notes that the AFPA submits that none of the evidence relied on by the Unions constitutes ‘a reliable quantitative assessment of the level of industry compliance’ such as to persuade the Commission that the variation is necessary. In reply the UWU submits:

‘In making this submission, the AFPA seeks to elevate a particular (undefined) standard of quantitative evidence as the only acceptable source of evidence that could justify the application. Simultaneously, the AFPA and other opposing parties fail to address that the overwhelming

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<sup>490</sup> Ai Group submission, 1 June 2021 at [36].

<sup>491</sup> AWU submission in reply, 2 July 2021 at [25], citing *Re 4 Yearly Review of Modern Awards — Annualised Wage Arrangements* [2019] FWCFB 1289; (2019) 285 IR 152 at [36] in support.

<sup>492</sup> NFF submission, 11 June 2021 at [25(a)], [26(b)]; Ai Group submission, 1 June 2021 at [80].

<sup>493</sup> AWU submission in reply, 2 July 2021 at [27]–[28].

preponderance of the evidence supports the unions' case that pieceworker rate agreements often result in workers earning far less than the minimum wage to which every other award-covered employee in Australia is entitled.

The AFPA has not produced any evidence, quantitative or otherwise, in support of the proposition that pieceworker rates are functioning as a 'safety net' for workers. This is not surprising, given that the AFPA effectively concedes by its proposed variation that clause 15.2 is unworkable in its present form.<sup>494</sup>

**[420]** The UWU also submits that:

‘The industrial reality is that clause 15.2 is frequently used to attempt to legitimise a wage which is less than the equivalent of the relevant minimum wage, and which has resulted in large-scale under-award payments.

Perfect compliance (which is impossible in relation to this clause) would still result in employees frequently being paid below the relevant modern award hourly minimum rate. This is inconsistent with the notion of a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.<sup>495</sup>

(ii) *Clause 15.2 is frequently misapplied and is unworkable*

**[421]** The UWU contends that clause 15.2 is ‘frequently misapplied and is unworkable’:

‘This unworkability frequently results in employees who are "average competent employees" and who are pieceworkers being paid less than at least 15% more per hour than the minimum hourly rate. Further, the uncertainty in the operation of the clause results in circumstances where even an employer attempting to comply with the award in setting piecework rates faces a strong likelihood that their rates are not Award compliant.

...

A key challenge is that to apply clause 15.2 correctly, the calculation as to what the "average competent worker" can earn requires constant adjustment for variables (such as seasonal factors, adjustments in underlying minimum rates etc). The evidence filed by interested parties *opposing* the variation shows this rarely happens (in addition to various other flaws in the methodology). This is not a case in which the classification of a complex clause and/or an enhanced compliance regime is sufficient. This is a broken provision. The insertion of a minimum rate guarantee would ensure that employers and employees are able to predict their base-line costs/earnings in a manner more consistent with the simple, easy to understand and *stable* modern award system envisaged by section 134(1)(g).<sup>496</sup> [Footnotes omitted]

(iii) *The purpose of pieceworker provisions*

**[422]** The UWU contends that the requirement in clause 15.2 to fix and pay at least minimum piecework rates is ‘intended to be protective of employees, and to guarantee employees an adequate rate’ and ‘the provisions are simply not achieving the intended purpose.’<sup>497</sup>

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<sup>494</sup> UWU submission in reply, 5 July 2021 at [5]–[6].

<sup>495</sup> Ibid at [8].

<sup>496</sup> Ibid at [10].

<sup>497</sup> Ibid at [15].

(iv) *No material impact on employment, employment costs, productivity, or regulation*

[423] The UWU notes that some of the employer submissions argue that if the variation is made, then employers will cease using pieceworker rates, because they will otherwise be exposed to higher than expected employment costs. For example, the AFPA argues that the variation if made would mean that pieceworker engagement becomes unattractive for employers, because employers would then face "the double whammy" of both the minimum hourly rates and the 15% uplift.

[424] In reply the UWU submits that this is 'not a relevant detriment':

'This argument proceeds from the assumption that employers who engage workers under clause 15.2 are not presently paying both the minimum hourly rate and the 15 per cent uplift. However, a proper pieceworker rate arrangement should have that effect. It follows that the 'harm' identified by the AFPA is simply the obligation to pay wages in accordance with the terms of the Award.'<sup>498</sup>

[425] Some of the employer parties argue that if employers cease using pieceworker rates, then employees will be deprived of the opportunity to earn more than the minimum award rate. In response, the UWU submits:

'This submission is entirely speculative and, even if the speculation was borne out, is in any event unsustainable. It cannot be said that a consideration of the relative living standards and the needs of the low paid weighs in favour of the retention of a provision which results in some (or many) employees being paid less than the award minimum rate, simply to retain the ability for some others to earn more than the minimum rate. This is especially so given that employees are frequently paid less than the equivalent of the award minimum.

Further, even if an employer was to cease using pieceworker rates, they could and may well still offer employees bonuses for higher performance - particularly if such incentives are as effective as driving productivity as some parties submit is the case.'<sup>499</sup>

[426] As to regulatory burden, the UWU submits that:

'any increase in the regulatory burden by the requirement to keep a record of hours worked is not substantial, and when compared to the records that employers should be keeping if engaging workers on pieceworker rates, is not a net increase in the regulatory burden.'<sup>500</sup>

[427] The UWU notes that the variation proposed by the AFPA includes a record-keeping requirement similar to that proposed by the AWU.

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<sup>498</sup> Ibid at [24].

<sup>499</sup> UWU submission in reply, 5 July 2021 at [26]–[27].

<sup>500</sup> Ibid at [34].

## 6. CONSIDERATION

### 6.1 *Merit Arguments*

[428] As mentioned in section 2 of this decision, variations to modern awards must be justified on their merits and the Commission may only vary a modern award if satisfied that the variation is ‘necessary to achieve the modern awards objective’.

[429] A summary of our key findings is set out at section 4.6. The evidence supports a finding that the characteristics of the seasonal harvesting workforce in the horticulture industry render it vulnerable to exploitation. A substantial proportion of the seasonal harvesting workforce are engaged on piece rates and there is widespread non-compliance with clause 15.2 of the Horticulture Award. The industrial reality is that piece rates are not determined in accordance with the method prescribed by clause 15.2; they are set and varied unilaterally by the grower and offered to employees on a take it or leave it basis (rather than being the product of genuine negotiation and agreement) and pieceworkers are usually not provided with a written piecework agreement. Further, a significant proportion of pieceworkers earn less per hour than the National Minimum Wage.

[430] In short, the existing pieceworker provisions in the Horticulture Award are not fit for purpose; they do not provide a fair and relevant minimum safety net as required by s.134 of the Act.

[431] Two alternative variations were advanced in the proceedings; the Application by the AWU to insert a minimum wage floor into clause 15.2 and the AFPA’s proposal. It is convenient to turn first to the AFPA’s proposal.

[432] In its opening submission, the AFPA proposed an alternative variation if the Commission were to form the view that the current piecework provisions need to be varied.<sup>501</sup> That alternative variation is said to be designed to preserve the concept of a piecework-based safety net with an uplift of earnings for competent pieceworkers compared to timeworkers, but provide additional implementation machinery to support the transparent and consistent application of piecework rates.<sup>502</sup> A ‘possible draft implementation’ of this proposal is set out at Appendix D to the AFPA’s submissions<sup>503</sup> and is reproduced at Attachment F to this decision.

[433] The AFPA’s alternate proposal, as set out in its opening submission, has 5 major elements:

1. It prescribes a specific process to determine the piecework rate, as follows:<sup>504</sup>
  - (a) The employer must identify the cohort of competent employees, with ‘competent employee’ to be defined as someone who is suitable, sufficient or adequate to perform the work. The definition would also

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<sup>501</sup> AFPA submission, 11 June 2021, section E.

<sup>502</sup> Ibid at [42].

<sup>503</sup> AFPA closing submission. 26 July 2021 at 41.

<sup>504</sup> AFPA submission, 11 June 2021 at [44].

make it clear that the employee need not be ‘proficient’ to be competent. This part of the variation will provide specific guidance to employers as to how to set the competence threshold having regard to the complexity of the work and other factors. Importantly, an employee would be *deemed* to be competent after they have been performing the task for a prescribed period (indicatively, 4 weeks as a catch-all outer limit);

- (b) The employer must calculate (or, in the case of the initial setting of the piecework rate, estimate):
    - (i) the total output<sup>505</sup> of the cohort of competent employees in a relevant period (**Total Output**) and
    - (ii) the total combined hours of work of this cohort during the same relevant period (**Total Hours**)
  - (c) The employer must divide the Total Output by Total Hours to obtain the **Average Hourly Output of a Competent Worker**, and
  - (d) For each applicable classification and type of employment, the employer must take the applicable minimum hourly rate, add 15% and then divide by the Average Hourly Output of a Competent Worker. The result is the minimum piecework rate.
2. The employer is required to review and adjust the piecework rate at prescribed intervals (say, every pay period) to make sure that it is set appropriately.<sup>506</sup>
  3. To provide further protection to novice employees who have not yet become competent, the employer is required to pay these employees at the level of the slowest competent employee.
  4. The employer is required to keep a record of all hours worked by a pieceworker, as well as the calculations set out above.
  5. The employer is required to pay a pieceworker at the applicable minimum hourly rate (instead of the piecework rate) for any work that does not yield any piecework output and is not an inherent part of the piecework.

**[434]** The AFPA submits that, if the Commission finds it necessary to consider AFPA’s proposal, it should find that the proposal is likely to:

- make it easier for growers to correctly set piece rates;
- make it easier for workers, unions and the FWO to enforce the Uplift Term;
- increase the earnings of pieceworkers who are currently paid less than the minimum hourly rate; and

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<sup>505</sup> Measured in an appropriate unit, such as punnet, bucket, kilogram, etc.

<sup>506</sup> AFPA submission, 11 June 2021 at [44].

- largely avoid the adverse consequences of the AWU's proposed variation set out in the previous section of the submission.<sup>507</sup>

[435] Further, the AFPA submits that its alternate proposal 'addresses the issues raised by the Union Parties while preserving and continuing the concept of a piecework-based safety net with an uplift, which is important to both employers and employees in the horticulture industry.'<sup>508</sup>

[436] In its reply submission, the AWU responds to the AFPA's alternate proposal as follows:

'The alternative proposal advanced by the AFPA does not adequately address the fundamental problem with the current pieceworker provisions of the Horticulture Award, namely, that the standard set by clause 15.2(b) is subjective and uncertain and that an individual employee will have little practical ability to assess whether the proposed rate is properly set. Furthermore, the proposal would fail to ensure that employees are not required to work for below the properly set minimum hourly rate. The alternative proposal would also involve a substantially greater administrative burden on employers than the variation sought by the AWU.'<sup>509</sup> [Footnotes omitted]

[437] In its reply submission, the UWU supports the intention behind the AFPA's alternate proposals but submits 'they do not go far enough':

'The proposals on their own will not resolve the fundamental inconsistency between clause 15.2 and the concept of a fair and relevant minimum safety net of terms and conditions, given the frequency with which employees covered by the Award are paid less than the equivalent of the Award minimum for work performed.'<sup>510</sup>

[438] In terms of transparency and fairness, the AFPA's proposed clause is an improvement on the current clause 15.2; but it is far too complex and such complexity would be a barrier to compliance. There is some substance to the AWU's critique; the proposal does not ameliorate the complexity inherent in the current term and nor does it adequately address the subjectivity inherent in the selection of a 'competent pieceworker'. This complexity is illustrated by clause 15.2(k) of the AFPA's possible draft implementation of their proposal, which sets out the process for calculating the minimum piecework rate for a particular task, as follows:

k) Each pay period, the employer must, for each group of pieceworkers performing a particular piecework task specified in the piecework agreement, calculate the minimum piecework rate for that task in that pay period in accordance with the following steps:

i) calculate:

- the total output of the competent pieceworkers in the group in the pay period (**Total Competent Output**); and

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<sup>507</sup> AFPA final submission, 26 July 2021 at [35]

<sup>508</sup> Ibid at [49].

<sup>509</sup> AWU submission in reply, 2 July 2021 at [26].

<sup>510</sup> UWU submission in reply, 5 July 2021 at [14].

- the total combined hours of work of the competent pieceworkers in the group during the pay period (**Total Competent Hours**);
- ii) divide the Total Competent Output by Total Competent Hours to obtain the **Average Hourly Output of a Competent Worker**;
- iii) take the applicable minimum hourly rate, add 15% and then divide by the Average Hourly Output of a Competent Worker.

[439] Proposed clause 15.2(l) then defines a ‘competent pieceworker’ as follows:

- l) A competent pieceworker for the purposes of this clause is an employee who, in the reasonable opinion of the employer, is suitable, sufficient or adequate to perform the task or tasks assigned to the relevant group. An employee is deemed to be competent at a particular task or set of tasks after he or she has been performing these task(s) for 20 working days.

[440] For the reasons given, we do not propose to adopt the AFPA proposal. We now turn to the AWU’s proposal.

[441] The employer interests advance 3 broad lines of argument against the introduction of a minimum wage floor:

- it undermines the efficacy of piecework;
- underpayment and other forms of non-compliance do not provide a basis for varying the Award; and
- a range of adverse consequences will result.

[442] As to the first line of argument, the AFPA contends that introducing a minimum wage floor will ‘eviscerate the piecework-based safety net by throwing out the risk-reward bargain.’

[443] As we state at [73] above, the AFPA’s characterisation of the existing piecework provisions as a ‘risk-reward bargain’ is misconceived. The evidence as to the practical operation of the existing provisions makes clear that it is the employee who bears all the risk.

[444] We accept that introducing a minimum wage floor will have consequences, but one of them is not ‘the evisceration of the piecework-based safety net’.

[445] The essence of the second line of argument is that the issues raised with respect to underpayment and non-compliance ‘go to the enforcement of the award and should not ground a variation’.<sup>511</sup> In particular, Ai Group contends:

‘The Unions raise issues with the capacity of an employee to genuinely reach agreement as required under cl. 15.2 on an appropriate piecework rate. Such issues are a red herring. The Horticulture Award prohibits coercion of an employee into making an agreement. Any contravention of the Award would expose an employer to an appropriate penalty. Altering the

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<sup>511</sup> Ai Group submission, 1 June 2021 [5].

Award as proposed by the AWU would not make non-compliant employers more likely to apply the provisions of the Award ...<sup>512</sup>

**[446]** In support of this submission Ai Group advances 2 broad points. First, it says that there are ‘significant safeguards’ in the current award term ‘to ensure that any vulnerabilities to which relevant employees are exposed do not cause a detriment’,<sup>513</sup> in particular:

- ‘The piecework rate must enable the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in the Award for the type of employment and the classification level of the employee (cl. 15.2(b));
- The piecework rate agreed is to be paid for all work performed in accordance with the piecework agreement (cl. 15.2(b));
- The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress (cl. 15.2(f));
- The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee (cl. 15.2(g)); and
- The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record (cl. 15.2(h)).<sup>514</sup>

**[447]** Second, Ai Group submits that ‘[n]umerous efforts geared towards improving compliance in workplaces nationwide have been implemented over the last four years’ and that.<sup>515</sup>

‘The full impact of some of these has not yet been felt and it is premature to seek reform of a modern award to tackle an issue which is best addressed through compliance and enforcement.’<sup>516</sup>

**[448]** In this context, Ai Group refers to:

- ‘Failure to pay employees correctly can potentially result in an individual receiving a penalty of \$13,320 (\$66,600 in the case of a corporation).’<sup>517</sup>
- The *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth) amended the Act ‘to introduce the concept of a ‘serious contravention’ of a workplace law. This applies where there is a ‘knowing’ contravention or the contravention formed part of a systematic pattern of conduct involving one or more persons. In such a case, the maximum penalties rise to \$666,000 for a corporation.’<sup>518</sup>

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<sup>512</sup> Ibid at [8].

<sup>513</sup> Ibid at [22].

<sup>514</sup> Ibid.

<sup>515</sup> Ibid [26].

<sup>516</sup> Ibid.

<sup>517</sup> Ibid at [27].

<sup>518</sup> Ibid at [28].



...

- ‘In addition, a reverse onus of proof was implemented for circumstances where an employer fails to comply with the pay record and pay slip requirements in the FW Act. In such circumstances, if an employee makes a claim for unpaid entitlements, the employer is required to disprove the employee’s claim in Court, rather than the employee bearing the onus of proof. The Amendments came into operation on 15 September 2017.’<sup>519</sup>
- ‘Workers who believe that they have not received their correct entitlements under the Act have a number of options to achieve redress. Applications may be made to the Industrial Magistrates Courts, the Federal Circuit Court or the Federal Court of Australia.’<sup>520</sup>

[449] In the context of FWO’s enforcement activities, Ai Group refers to:<sup>521</sup>

- The FWO role is to monitor compliance with, and investigate breaches of, the FW Act and fair work instruments (including modern awards and enterprise agreements). The FWO is a very well-resourced and effective regulator.
- In June 2019, the FWO announced that the FWO’s 2019/20 Compliance and Enforcement priorities would include Horticulture and the Harvest Trail.<sup>522</sup> Horticulture and the Harvest Trail were also included in the FWO’s 2020/21 Compliance and Enforcement priorities.<sup>523</sup>
- The FWO strengthened its compliance and enforcement posture in mid-2019 following an internal capability review.<sup>524</sup> Over the FWO’s last reporting period, the FWO issued 952 compliance notices, more than 3 times the number issued in the 2018/19 reporting period and recovered nearly 8 times the monies recovered in that reporting period.<sup>525</sup>
- With a view to educating and assisting entities in the horticultural sector specifically, the FWO has established a new Horticulture Showcase including education videos on key topics.<sup>526</sup>
- The FWO has continued to implement its ‘Horticulture Strategy’ which involves:<sup>527</sup>
  - building a culture of compliance in the horticulture sector, based on engagement, education and enforcement activities;
  - running communications campaigns to educate employers and employees in the horticulture industry;
  - initiating compliance activities in key regions

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<sup>519</sup> Ai Group Submission, 1 June 2021 at [30].

<sup>520</sup> Ibid at [29].

<sup>521</sup> Ai Group Submission, 1 June 2021 [31]–[35].

<sup>522</sup> Fair Work Ombudsman, ‘FWO launches 2019-20 priorities’ (Media Release 3 June 2019).

<sup>523</sup> Fair Work Ombudsman, ‘FWO launches 2020-21 priorities’ (Media Release, 13 July 2020).

<sup>524</sup> Fair Work Ombudsman, *Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2019-2020* (Report, 18 September 2020) 1.

<sup>525</sup> Ibid 1.

<sup>526</sup> Ibid 15.

<sup>527</sup> Ibid 19.

- revisiting non-compliant employers; and
- monitoring the Seasonal Worker Programme (SWP).
- The FWO's compliance efforts have included translating relevant educational materials into 36 languages.<sup>528</sup>

[450] Ai Group submits:

‘The significant number of legal reforms and compliance initiatives from the FWO have gone a long way to tackling non-compliance with horticulture industry employers’ obligations to their workers. Varying the Horticulture Award to provide yet another layer of regulation will not encourage compliance. Any issues with the current safety net not being enforced are not addressed by the AWU’s proposed reforms.’<sup>529</sup>

[451] Similarly, the NFF submits:

‘the reason given for non-enforcement does not rise to the point of making out a case for amendment of the Horticulture Award. Put simply, an enforcement question is only part of the equation. Amending the Award is not (and could not be) a panacea for the enforcement of horticulture industry wages. The AWU’s evidence (in particular) does not rise to the point of making out this case. It is akin to making a hopeful gesture, in effect seeking *some change* on the part of the Horticulture Award would lead to greater enforcement and reduced adverse consequences.’<sup>530</sup>

[452] Two things may be said about these submissions.

[453] First, the proposition that there is some sort of disjunct between the Commission’s task under s.134 and promoting compliance with the terms of a modern award is incorrect. In considering the variation of a modern award, the Commission is entitled to have regard to the objective of promoting compliance with the award’s terms. Indeed, one of the objects of the Act is ensuring ‘a guaranteed safety net of fair relevant *and enforceable* minimum terms and conditions through ...modern awards’ [Emphasis added].<sup>531</sup>

[454] In carrying out the statutory directive in s.134 of ensuring that modern awards and the NES provide a fair and relevant safety net of terms and conditions, the Commission is not confined to a consideration of the matters set out in s.134(1)(a) to (h). The range of matters in a particular case is determined by the subject matter scope and purpose of the Act. In our view, promoting compliance with the terms of a modern award is one such relevant matter.

[455] Further, one of the considerations we are required to take into account in ensuring that modern awards, with the NES, provide a fair and relevant minimum safety net of terms and conditions is:

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<sup>528</sup> Ibid 15.

<sup>529</sup> Ai Group submission, 1 June 2021 at [36].

<sup>530</sup> NFF submission, 26 July 2021 [5](d).

<sup>531</sup> The Act, s.134.

‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.’<sup>532</sup>

[456] In *Re Restaurant Industry Award 2020*,<sup>533</sup> the Commission had regard to the desirability of promoting compliance with the terms of a modern award in deciding to include exemption rates in the award:

‘Non-compliance is an issue in the hospitality sector and the most common breaches relate to under/non-payment of penalty rates. The reasons given for non-compliance by employers include paying flat hourly rates to save on administration costs but failing to adequately compensate employees for their full entitlement. We would expect that the inclusion of an exemption rate proposal would promote compliance – by specifying the rate which must be paid to ‘exempt’ an employee from the specified award entitlements; rather than leaving it to employers to ‘guess’ at an appropriate loaded hourly rate.’<sup>534</sup>

[457] Second, the ‘significant’ clause 15.2 safeguards identified by Ai Group are, in practice, illusory. As mentioned above non-compliance is widespread. Nor does enforcement of the current award term provide a practical solution.

[458] As Rangiah J observed in *Hu (No 2)*:

‘Clause 15.2 of the Award provides a safeguard for pieceworkers. That safeguard is the prescription of a method of calculation of a minimum piecework rate. Clause 15.2 requires that the minimum piecework rate must “enable the average competent employee to earn at least 15% more per hour than the rate prescribed in this award”... However, the safeguard that cl 15 provides is limited. It is concerned with fixing minimum piecework rates, but not minimum earnings. As cl 15.9 makes clear, employees’ earnings depend upon their productivity and there is no guarantee that they will earn any minimum amount or hourly rate.

Clause 15.2 requires the piecework rate to be fixed by agreement. In practical terms, this will almost invariably mean that the employer fixes the rate and the employee decides whether or not to accept it.’<sup>535</sup>

[459] The *Hu Appeal* dealt with the legal consequences of non-compliance with clause 15.2 and held that paying a piecework rate which is less than the rate required by clause 15.2 is an award breach. It was also held in the *Hu Appeal* that an employee subject to a non-compliant piecework agreement does not, as a result of the breach, become entitled to the minimum hourly rate of pay specified in the Award. The only remedy for the employee is that they are instead entitled to an award of compensation calculated as the difference between the piecework rate that was paid and the piecework rate that ought to have been paid.

[460] The absence of record keeping obligations also makes enforcement problematic, as noted by Vasta J. in *Fair Work Ombudsman v Seasonal Farm Services*.<sup>536</sup>

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<sup>532</sup> The Act, s.134(1)(g).

<sup>533</sup> [2021] FWCFB 4149.

<sup>534</sup> *Re Restaurant Industry Award 2020* [2021] FWCFB 4149 at [110].

<sup>535</sup> *Hu (No 2)* at [24]–[25].

<sup>536</sup> [2017] FCCA 1020; see [103] above

[461] The final limb of the employers' arguments against the introduction of a minimum wage floor speaks to the consequences of such a change.

[462] The evidence of the employer lay witnesses was that granting the Application will adversely impact business in a number of ways, in particular:

- it will demotivate and disincentivise workers;<sup>537</sup>
- it will reduce worker productivity;<sup>538</sup>
- it will invariably increase labour costs;<sup>539</sup>
- it will necessitate stricter standards of recruitment, or employers will look to employ certain types of workers (for example, Pacific Island Workers) or use labour hire;<sup>540</sup>
- it will require more robust training and monitoring of new starters and underperforming workers;<sup>541</sup>
- it will cause a movement away from certain produce, including 'sensitive produce' (i.e. – produce with a narrow harvesting timeframe), produce that is less labour intensive or produce that yields less profit; and<sup>542</sup>
- it will exclude workers who are happy to earn less and work at their own pace.<sup>543</sup>

[463] As noted in section 4.5.3 of this decision, much of this evidence is speculative in nature and of limited probative value. That said, the evidence supports a number of findings which are set out at 4.6. In short, the evidence suggests that the introduction of a minimum wage floor will have the following consequences:

1. It will create an economic incentive to manage unproductive workers, leading employers to take more active steps in the recruitment, supervision and management of pieceworkers.
2. It is likely that underperforming pieceworkers will be dismissed.
3. It may demotivate some underperforming employees and reduce productivity; but such underperformance can be managed, for example, by setting productivity targets.

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<sup>537</sup> Exhibit AFPA 2 at [57]; Exhibit NFF 11 at [32]; Exhibit NFF 8 at [36], [38]; Exhibit NFF 6 at [26]; Exhibit NFF 4 at [23]; Exhibit NFF 2 at [30].

<sup>538</sup> Exhibit NFF 14 at [29]–[30], [34]; Exhibit NFF 11 at [31]; Exhibit NFF 13 at [30]; Exhibit NFF 12 at [21]; Exhibit NFF 9 at [39]; Exhibit NFF 8 at [36]; Exhibit NFF 6 at [26]; Exhibit NFF 4 at [27]; Exhibit NFF 2 at [30]; Exhibit NFF 1 at [35].

<sup>539</sup> Exhibit NFF 14 at [33]; Exhibit NFF 13 at [28]; Exhibit NFF 12 at [22]–[23]; Exhibit NFF 8[39]; Exhibit NFF 7 at [14].

<sup>540</sup> Exhibit AFPA 2 at [59], at [62]; Exhibit NFF 11[31], at [34]; Exhibit NFF 9 at [40], at [43].

<sup>541</sup> Exhibit AFPA 2 at [59]; Exhibit NFF 14 at [34]; Exhibit NFF 4 at [28]; Exhibit NFF 2 at [32].

<sup>542</sup> Exhibit NFF 14 at [30], at [35]; Exhibit NFF 13 at [32]–[33]; Exhibit NFF 8 at [40]; Exhibit NFF 4 at [29]–[30].

<sup>543</sup> Exhibit NFF 7 at [9]; Exhibit NFF 9 at [42]; Exhibit NFF 11 at [33].

4. To the extent that a minimum wage floor will require employers to pay underperforming employees the minimum hourly rate, it will increase employment costs.

[464] We have taken these consequences into account.

[465] In our view, the merits favour the insertion of a minimum wage floor, with consequential time recording provisions, into the piecework clause in the Horticulture Award. We now turn to consider the modern awards objective and the minimum wages objective.

## 6.2 Modern Awards Objective

[466] The modern awards objective is in s.134 of the Act and provides:

*‘What is the modern awards objective?’*

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours; or
  - (iii) employees working on weekends or public holidays; or
  - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.’

This is the **modern awards objective**.

*When does the modern awards objective apply?*

(2) The modern awards objective applies to the performance or exercise of the FWC’s **modern award powers**, which are:

(a) the FWC’s functions or powers under this Part; and

(b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).’

[467] The modern awards objective is very broadly expressed.<sup>544</sup> It is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h) (the s.134 considerations).<sup>545</sup> Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.<sup>546</sup>

[468] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.<sup>547</sup> No particular primacy is attached to any of the s.134 considerations,<sup>548</sup> and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[469] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.<sup>549</sup> Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated — many of them may be characterised as broad social objectives.<sup>550</sup> In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the matters in ss.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

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<sup>544</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 [35].

<sup>545</sup> (2017) 265 IR 1 [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

<sup>546</sup> [2018] FWCFCB 3500 at [21]–[24].

<sup>547</sup> *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

<sup>548</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

<sup>549</sup> *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106].

<sup>550</sup> See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]–[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review.

### 6.2.1 s.134(1)(a): relative living standards and the needs of the low paid

[470] In successive Annual Wage Reviews, the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a).<sup>551</sup>

[471] The most recent data for the ‘low paid’ threshold is set out below:<sup>552</sup>

<i>Two-thirds of median full-time earnings</i>	<i>\$/week</i>
Characteristics of Employment survey (Aug 2020)	953.33
Employee Earnings and Hours survey (May 2018)	973.33

[472] All classification levels in the Horticulture Award are below both measures of two-thirds of median earnings, and on that basis may be regarded as ‘low paid’ for the purpose of s.134(1)(a).

[473] The AWU submit that the current piecework terms fail to properly take into account relative living standards and the needs of the low paid because they ‘result in employees systematically being paid below the minimum award rates’.<sup>553</sup> The provision for guaranteed minimum earnings ‘will ensure that piecework arrangements cannot result in employees being paid less than the national minimum wage.’<sup>554</sup>

[474] The UWW submits that the current arrangements result in an ‘untenable situation’ where competent and experienced horticulture workers are paid piecework rates that do not enable them to earn their equivalent minimum hourly rate and have resulted in significant adverse consequence for workers.

[475] The UWW submits that the proposed variation ensures employees paid piecework rates have at least an adequate standard of living.

[476] Ai Group submits that s.134(1)(a) is either a neutral consideration, or weighs against the Application. Ai Group submits that when applied correctly, the piecework rates mandated under clause 15.2(b) do not diminish the living standards of those paid pursuant to that provision, rather, the current provision provide an avenue for employees to earn a great deal more than they would otherwise earn through time rates of pay.

[477] The NFF submits that contrary to the Unions’ position:<sup>555</sup>

<sup>551</sup> Ibid at [34], [362], [419].

<sup>552</sup> MA000028; Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020* (11 December 2020); Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2018* (22 January 2019).

<sup>553</sup> Australian Workers’ Union, ‘AWU Application to Vary the Horticulture Award 2020 – Minimum Rates of Pay for Pieceworkers - Grounds for Application’, Submission to *Horticulture Award 2020*, AM2020/104, 15 December 2020 at [36] (‘AWU Application, 15 December 2020’).

<sup>554</sup> AWU submission, 19 March 2021 at [25].

<sup>555</sup> NFF submission, 11 June 2021 at [18].

- The present Award terms enable the average (competent) pieceworker to earn 15% more than the amount which the Commission has assessed as adequate for a reasonable living standard
- Most pieceworkers are productive and receive well above the minimum wage, and
- The Application would restrict growers hiring experienced and productive workers, jettisoning or not hiring those who are less productive.

[478] We are satisfied that this consideration weighs in favour of varying clause 15.2 to insert a minimum wage floor. There is widespread underpayment of pieceworkers in the horticulture industry and, further, a significant proportion of pieceworkers earn less than the National Minimum Wage. The proposed variation will assist in rectifying this situation.

[479] The submissions advanced to the contrary, by Ai Group and the NFF, are unpersuasive. Ai Group's submission is predicated on the proposition that the piecework rates prescribed by clause 15.2(b) are 'applied correctly'. The evidence demonstrates the fallacy of this premise. Similarly, the NFF's contention that 'most pieceworkers' earn 'well above the minimum wage' is not reflected in the evidence. The NFF's contention that the variation would restrict the employment opportunities of the less productive is relevant to the s.134(1)(c) consideration, but not to the needs of the low paid.

#### **6.2.2 s.134(1)(b) the need to encourage collective bargaining**

[480] It is common ground that there is a low incidence of collective bargaining in the horticulture industry.

[481] The AWU submits that at present, there is little incentive for employers to engage in collective bargaining.<sup>556</sup>

[482] The UWW submits that situations in which employees can be paid below minimum award wages create a disincentive to bargain and that efforts to make enterprise bargaining agreements have been 'extremely challenging'.<sup>557</sup> The UWW submits that as the minimum piece rate payable changes throughout the life of an agreement, formulating a collective bargaining agreement that requires employees to be 'better off overall' is 'incredibly problematic'.<sup>558</sup>

[483] Ai Group and the NFF submit that s.134(1)(b) is a neutral consideration,<sup>559</sup> and the NFF submits that 'there is no evidence that a "floor" in the minimum hourly rate would lead to any consequence at all, such as bargaining'.<sup>560</sup>

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<sup>556</sup> AWU submission, 19 March 2021 at [27].

<sup>557</sup> UWW submission, 19 March 2021 at [36(b)].

<sup>558</sup> Ibid.

<sup>559</sup> AI Group submission, 1 June 2021 [98]–[101]; NFF submission, 11 June 2021 [19].

<sup>560</sup> NFF submission, 11 June 2021 [19].



[484] Section 134(1)(b) requires that we consider ‘the need to *encourage* collective bargaining’. We are not persuaded that the proposed variation would encourage collective bargaining. It follows that this consideration does not provide any support for the variation proposed.

**6.2.3 *s.134(1)(c) the need to promote social inclusion through increased workforce participation***

[485] The use of the conjunctive ‘through’ makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively ‘*through* increased workforce participation’. That is, obtaining employment is the focus of s.134(1)(c).<sup>561</sup>

[486] The AWU submits that the proposed variation has ‘the potential’ to increase the ‘attractiveness’ of work in the horticulture industry which in turn has ‘the potential’ to increase workforce participation.<sup>562</sup>

[487] The UWU submits that the current circumstances are a disincentive to workforce participation:

‘The prospect of working in difficult conditions both environmentally and physically, in circumstances where it is difficult to earn even the equivalent of the award minimum wage, is a disincentive in relation to workforce participation ... The variation to the award that is sought by this Application would incentivise workforce participation in this sector of the industry.’<sup>563</sup>

[488] Ai Group submits that the Union submission that the proposed variation would increase workforce participation ‘should be viewed in the light of the potential disemployment effect’ that making the proposed variation would have:

‘The significant numbers of ‘grey nomads’ and backpackers who enter the horticulture industry on a seasonal basis should be taken into account in determining whether the proposed amendments would indeed attract more entrants to the industry. Such workers are unlikely to have a background in horticulture and, in the case of elderly retirees, they are often using their employment in the industry to assist in financing their travels, and may not wish to work at the speeds required to meet the equivalent time rate of pay.

If employers are required to pay all pieceworkers at least at the equivalent minimum hourly rate of pay, this would require such employees to perform a quantity of work and meet productivity levels which would meet the cost of their labour. It is unlikely that employers would be capable of retaining many such employees were the AWU’s proposed amendments to be made.

Taking this into consideration, there is a likelihood that any incentive which a ‘floor’ in the minimum piecework rate would have for new entrants to the industry would be counterbalanced by the inability of employers to retain less productive staff.’<sup>564</sup>

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<sup>561</sup> *Penalty Rates Decision* at [179].

<sup>562</sup> AWU Application, 15 December 2020 at [42]; AWU submission, 19 March 2021 at [28]–[29].

<sup>563</sup> UWU submission, 19 March 2021 at [36(e)].

<sup>564</sup> Ai Group submission, 1 June 2021 at [103]–[105].

[489] The NFF submits that this consideration weighs against the Application because:<sup>565</sup>

- an hourly rate will reduce the employability of those who are not productive, and
- it will result in increased supervision and selective hiring.

[490] The UWU submits that there are significant problems with the logic in the employer submissions, namely:

1. Picking and packing fruit and vegetables has to be done by someone;
2. It cannot be said that employees who are presently being paid less than the equivalent Award minimum will refuse to work or be less inclined to seek out the work if they are paid more money;
3. Employers could continue to employ the people who are presently being engaged in this work, on at least the equivalent minimum rate;
4. A significant majority of workers who are performing work in the industry are doing so because:
  - (i) they are sponsored by a horticultural industry employer and are limited by their visa conditions to continue to work for that employer in the horticulture industry (for example, Seasonal Worker Program (SWP) and Pacific Labour Scheme (PLS) participants); or
  - (ii) they are seeking to extend their visa by fulfilling a requirement to work for a specified period of time in a rural or regional area (eg. Working Holiday Makers (WHM)); and
5. Because of these visa settings, and the industry's structural reliance on them, temporary migrant workers (including WHM and SWP workers) will continue to seek employment in the industry. Employers are likely to continue to engage these workers, particularly considering labour supply constraints and shortages in the industry which have been exacerbated by the COVID-19 pandemic.

[491] The UWU also refers to its submissions and evidence in support of the contention that the 'prospect of working in difficult conditions both environmentally and physically, in circumstances where it is difficult to earn even the equivalent of the award minimum wage is a disincentive in relation to workforce participation.'<sup>566</sup> The UWU submits that this submission has not been contradicted.

[492] As we mentioned above, we accept that introducing a minimum wage floor will create an incentive for employers to more actively manage unproductive workers; it is also likely that underperforming pieceworkers will be dismissed. As Mr King says in his witness statement:

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<sup>565</sup> NFF submission, 11 June 2021 at [20].

<sup>566</sup> UWU submission, 19 March 2021 at [36(c)(i)].

‘In order to manage the increase in labour costs, Costa would need to introduce a lot stricter standards and expectations in its recruitment and in training and monitoring new starters, as well as more proactively monitoring underperforming workers, ultimately retaining only the strongest performers and accepting a higher rate of turnover (including as a result of terminating the employment of casual employees who do not perform strongly).

I expect that Costa, like any other grower, would consider doing this by introducing a minimum required output level, such that employees who are unable or unwilling to meet those minimum volumes may ultimately have their casual piecework employment terminated ...

I anticipate that this approach would be feasible because at present approximately 80% of Costa’s product is picked by around 60% of our workforce of pickers. This means that Costa could significantly reduce its workforce size, retaining its best performers, without substantially reducing its production output.’<sup>567</sup>

**[493]** While the introduction of a minimum wage floor may increase the attractiveness of work in the horticulture industry and hence increase workforce participation; may well be outweighed by the negative employment consequences of introducing a minimum wage floor.

**[494]** On balance, this consideration weighs against varying the Horticulture Award to insert a minimum wage floor.

**6.2.4 s.134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work**

**[495]** The AWU submits that the requirement to pay pieceworkers at least the minimum award rates may encourage farmers to adopt more flexible and modern work practices, and that there is no reason to believe that a guaranteed minimum rate of earnings for pieceworkers would impede the efficient and productive performance of work.’<sup>568</sup>

**[496]** The UWU submits that the current clause could not have been intended to promote efficient and productive performance of work because it disincentivises workforce participation by remunerating employees below the minimum award rate and employers who attempt to comply with the clause are required to engage in an ‘onerous and multi-factor assessment which must be reviewed every time there is a change in one of the many variables that make up its composition’.<sup>569</sup>

**[497]** Ai Group submits that the Commission should not accept that the current piecework provisions encourage employers to drive down labour costs and submits that the imposition of a ‘floor’ would likely discourage employers utilising the piecework provisions as the productivity of higher performing employers would not offset the cost of lower performing workers.

**[498]** Ai Group rejects the UWU’s submissions that complying with the clause is onerous, stating:

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<sup>567</sup> Exhibit AFPA 2 at [59]–[61]

<sup>568</sup> AWU submission, 19 March 2021 at [30]–[31]; AWU Application, 15 December 2020 at [44].

<sup>569</sup> UWU submission, 19 March 2021 at [36(d)].

‘The imposition of a ‘floor’ below which minimum piecework rates may not fall would not remove any of the difficulties in determining the minimum piecework rate.’<sup>570</sup>

[499] The NFF submits that this consideration weighs against the Application because:<sup>571</sup>

- a reduction in positions and reduction in offers to ‘slower’ workers weigh against this consideration; and
- there is no evidence that piece-rates in the horticulture industry discourages workers.

[500] Contrary to the submissions of Ai Group and the NFF we are satisfied that the introduction of a minimum wage floor will promote the efficient and productive performance of work. It is likely that it will create an incentive for employers to manage unproductive workers and to take more active steps in the recruitment supervision and management of pieceworkers in order to increase their productivity. Some employers may make greater use of automation and machinery to reduce labour costs.

[501] This consideration weighs in favour of varying the Horticulture Award to insert a minimum wage floor.

**6.2.5 *s.134(1)(da) the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays, or shifts.***

[502] In the *Penalty Rates Decision*, the Full Bench made 5 observations about s.134(1)(da).<sup>572</sup>

1. Section 134(1)(da) speaks of the ‘need to provide additional remuneration’ for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv). An assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:
  - (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
  - (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through ‘loaded’ minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
  - (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

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<sup>570</sup> Ai Group submission, 1 June 2021 at [109].

<sup>571</sup> NFF submission, 11 June 2021 at [21].

<sup>572</sup> *Penalty Rates Decision* at [188].

The expression ‘additional remuneration’ in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as ‘ordinary hours’, that is reasonably predictable hours worked Monday to Friday within the ‘spread of hours’ prescribed in the relevant modern award. Such ‘additional remuneration’ could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays.

2. The expression ‘the need for additional remuneration’ must be construed in context. The context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances. Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which the Commission is required to take into account.

The requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which the Commission is required to take into account.

3. Section 134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not.
4. Section 134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive ‘or’ makes it clear that the provision is dealing with separate circumstances: ‘unsocial, irregular or unpredictable hours’. Section 134(1)(da)(ii) requires that the Commission take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression ‘unsocial ... hours’ would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. ‘Irregular or unpredictable hours’ is apt to describe casual employment.
5. Section 134(1)(da) identifies a number of circumstances in which the Commission is required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working ‘unsocial ... hours’ is one such circumstance (s.134(1)(da)(i)) and working ‘on weekends or public holidays’ (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances means that it is not necessary to establish that the hours worked on weekends or public holidays are ‘unsocial ... hours’.

**[503]** The AWU submits that this is a neutral factor.<sup>573</sup> Ai Group and the NFF also submit that this consideration is neutral.<sup>574</sup>

**[504]** The UWW notes that pieceworkers are not provided with additional remuneration for working overtime, unsocial, irregular or unpredictable hours, on weekends, on public holidays or shifts.<sup>575</sup>

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<sup>573</sup> AWU Application, 15 December 2020 at [45]; AWU submission, 19 March 2021 at [32].

<sup>574</sup> Ai Group submission, 1 June 2021 at [114]; NFF submission, 11 June 2021 at [22].

<sup>575</sup> UWW submission, 19 March 2021 [36(e)].

[505] We think there is some substance to the UWU's submission; clauses 13 'Ordinary hours of work and rostering arrangements'; and 21 'Overtime', do not apply to an employee on piecework rates (see clause 15.2(d)).

[506] Contrary to the position put by the AWU, Ai Group and the NFF, this is not a neutral consideration. The proposed variation will ensure that pieceworkers receive at least the relevant minimum rate of pay for working overtime and unsocial hours. This consideration weighs in favour of varying the Horticulture Award to insert a minimum wage floor.

**6.2.6 *s.134(1)(e) the principle of equal remuneration for work of equal or comparable value***

[507] The 'Dictionary' in s.12 of the Act states, relevantly: 'equal remuneration for work of equal of comparable value: see subsection 302(2).'

[508] The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'. Hence, the appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that, in giving effect to the modern awards objective, the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.<sup>576</sup>

[509] It is common ground that this consideration is a neutral factor;<sup>577</sup> we agree.

**6.2.7 *s.134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden***

[510] Section 134(1)(f) is expressed in very broad terms. The Commission is required to take into account the likely impact of any exercise of modern award powers 'on business, including' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.

[511] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schwepes Australia Pty Ltd v United Voice – Victoria Branch*:

'... we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

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<sup>576</sup> *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [192].

<sup>577</sup> AWU Application, 15 December 2020 [46]; Ai Group submission, 2 June 2021 [118]; NFF submission, 11 June 2021 at [23].

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.<sup>578</sup>

[512] While the above observation is directed at the use of the word ‘productivity’ in s.275, it is also apposite in the context of s.134(1)(f).

[513] As to the impact on productivity, the AWU submits that the Application does not seek to remove the capacity of employers to utilise piecework agreements, provided that pieceworkers receive total remuneration at least equivalent to the hourly rate:

‘Employers can continue to offer piece rates as an incentive for productive work. Properly set pieceworker arrangements will continue to offer an average competent employee the opportunity to earn at least 15% more than the hourly rate. The Commission would not be satisfied that the variation would have any substantial impact on productivity where piece rates remain available. There is no evidence that the presence of a minimum payment guarantee in other awards destroys the utility or effectiveness of piece rates. The speculative assertions of the producers who express concern that productivity will be affected should not be accepted.’<sup>579</sup>

[514] The AWU concedes that the proposed variation will impose some additional regulatory burden, but submits that such imposition is slight and does not represent a persuasive factor in the assessment of the application given the following considerations:<sup>580</sup>

1. An employer engaging employees on piecework rates is already required by clause 15.2(b) of the Horticulture Award to ensure that the piecework rate enables the average competent employee to earn at least 15% more per hour than the minimum hourly rate. As a practical matter, the employer would need to maintain records of hours worked and pay received by employees to demonstrate compliance with that obligation.
2. Other modern awards provide for the payment of piecework rates but also provide for a guaranteed minimum payment by reference to the minimum hourly or weekly rates of pay and allowances including awards covering similar industries such as sugar silviculture and wool. This necessarily requires employers to maintain records of hours and time worked by employees being paid piecework rates, and conduct a comparison between the entitlements of each employee under alternative payment arrangements. The Commission, in making those awards, has not regarded the requirement to maintain such records as imposing an unreasonable burden.
3. The Horticulture Award itself does not regard the imposition of a requirement to maintain records of an alternative payment arrangements as an unreasonable burden. Clause 17.2 requires that an annualised wage be no less than the amount the employee would have received under the Award for the work performed,<sup>581</sup> that the employer must calculate the amount of remuneration that would have been payable under the Award each year and compare it with the annualised wage,<sup>582</sup> and that the employer

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<sup>578</sup> [2012] FWAFB 7858 at [45]–[46].

<sup>579</sup> AWU submission in reply, 2 July 2021 at [13].

<sup>580</sup> AWU submission, 19 March 2021 at [36].

<sup>581</sup> cl.17.2(a).

<sup>582</sup> cl.17.2(b).

must keep a record of starting and finishing times and breaks for the purposes of making that calculation.<sup>583</sup>

**[515]** The UWU submits that the proposed variation will not adversely impact on business because:<sup>584</sup>

- the incentivisation that comes from the prospect of earning more than the minimum award rate through a piecework rate is retained;
- the disincentive in relation to workforce participation that results from the likelihood that the pieceworker is going to engage in physically and environmentally difficult work for less than the equivalent minimum award wage is removed; and
- the regulatory burden is eased, as a provision which requires at least the minimum award wage to be paid provides a simple mechanism to allow for compliance.

**[516]** The UWU concedes that the insertion of a provision ensuring that all pieceworkers are paid at least the award minimum would increase employment costs, but submits that this must be measured against an improvement in productivity, the easing of regulatory burden and the other factors which make up the modern awards objective and weigh in favour of the variation sought.<sup>585</sup>

**[517]** As to productivity, the UWU submits that:

‘the employer parties submit that piecework rates incentivise workers, either because employees are fearful of earning less money or through the hope of earning more. But a productivity incentive based on motivating workers by fear they will earn less than the minimum rate if not "productive" is fundamentally inconsistent with the concept of a fair and relevant minimum safety net. And a productivity incentive based on motivating productivity through the possibility of earning more remains a feature of the piece rates model if varied in the manner proposed. The variation would not prevent such incentivisation from occurring.

Further ... employees who know they are guaranteed at least the equivalent of the minimum award hourly rate for the work performed are likely to be incentivised to be productive in order to retain the employment that will give them the ability to earn money at this rate. And the disincentive to be productive in circumstances where an employee has little hope of earning at least the minimum rate for the work performed is removed. Cast in this way, the impact of the proposed variation on productivity is not neutral - it is positive.’<sup>586</sup>

**[518]** The AFPA submits that granting the Application would increase employment costs and submits that ‘the change would reduce the economic productivity of the sector (relevantly here, the amount of produce picked per hour worked) by de-incentivising substantial parts of the workforce.’<sup>587</sup>

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<sup>583</sup> cl.17.2(c).

<sup>584</sup> UWU submission, 19 March 2021 at [36(f)].

<sup>585</sup> Ibid at [36(f)(iii)].

<sup>586</sup> UWU submission in reply, 5 July 2021 [32]–[33].

<sup>587</sup> AFPA aide memoire, 29 July 2021 at [A.14].



**[519]** Ai Group submits that this consideration weighs against making the proposed variation and that the AWU's argument is unpersuasive:

'A piecework rate set pursuant to cl. 15.2(b) has the potential for high performing employees to earn substantially over the equivalent time rate for their classification. The corollary to that effect is that low performing employees may earn under the equivalent time rate. Requiring unproductive employees to earn an amount which exceeds the value of their labour would result in a cost increase for employers. The quantum of this increase is as yet unknown. However, it should be regarded as axiomatic that a variation which would impose a floor in the minimum piecework would result in a cost increase for relevant employers in the horticulture industry.'<sup>588</sup>  
[Footnotes omitted]

**[520]** Ai Group rejects the UWU's submission that the proposed variation would improve productivity:

'Contrary to the UWU's argument at paragraph [36](f)(i)(2) of its submission, the proposed variation would not improve productivity. Even if the Commission accepts the UWU's argument that the amendments would remove a disincentive in relation to workforce participation and engagement, this has little relevance to productivity in the horticulture sector. As the Full Bench stated in the Penalty Rates Decision, the conventional economic meaning of productivity is the number of units of output per unit of input. The UWU's argument should therefore be rejected.

Moreover, as stated above, considering the limited incentive for employers to engage pieceworkers where the costs of engaging low performing employees would increase, the disemployment effect may be substantial.'<sup>589</sup> [Footnotes omitted]

**[521]** Ai Group submits that the regulatory burden imposed by a requirement to record hours of work also weighs against making the proposed variations and submits that the Commission should reject the AWU's argument that an employer engaging employees on piecework rates needs to maintain records of hours worked and pay received to demonstrate compliance with clause 15.2(b):

'In order to comply with cl. 15.2(b), the employer would need to take the steps outlined in paragraphs [26] – [38] of Rangiah J's decision in *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034. As outlined above, this involves identifying of the characteristics of the hypothetical average competent employee and predicting the pick rate of such an employee. It does not involve continuous monitoring of the hours of each individual employee.'<sup>590</sup> [Footnotes omitted]

**[522]** Ai Group also submits that the proposed variations will not ease regulatory burden, that 'making the proposed variation will not enable employers to simply remunerate pieceworkers according to the equivalent hourly rate of pay':

'Even if the proposed variations are made, employers who fail to apply cl. 15.2(b) correctly and set the piecework rate too low will still need to compensate relevant employees by calculating the difference between the rate they were paid and the applicable piecework rate rather than the equivalent hourly rate for the employees' classification.'<sup>591</sup>

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<sup>588</sup> Ai Group submission, 1 June 2021 at [120].

<sup>589</sup> Ibid at [121]–[120].

<sup>590</sup> Ibid at [123].

<sup>591</sup> Ibid at [126].

[523] The NFF submits that this consideration weighs against the Application because:<sup>592</sup>

- the additional of an hourly rate as an alternative to the 15% loading in the Horticulture Award will have a significant impact on productivity; some growers will not offer piece rates, others will selectively hire, others will employ technology to reduce labour costs;
- the proposed variation is ‘vastly less efficient’; keeping additional records and supervising employees will require more staff; and
- the inclusion of a ‘floor’ will not militate towards compliance.

[524] The insertion of a minimum wage floor and consequential time recording provisions in the piecework clause in the Horticulture Award is likely to have a negative impact on business, by increasing employment costs and regulatory burden for those businesses that engage pieceworkers. Such a variation is also likely to create an economic incentive to manage slow or unproductive pickers and to reduce the cohort of unproductive workers, thus *increasing* productivity. Conversely, the introduction of a minimum wage floor may demotivate some underperforming employees and *reduce* productivity, although such underperformance can be managed, for example by introducing a minimum required output (as suggested by Mr King<sup>593</sup>). Further, some employers may make greater use of automation and machinery to reduce labour costs and, as a consequence, increase productivity. On balance we think the proposed variation will increase productivity.

[525] Taken as a whole this consideration weighs against the insertion of a minimum wage floor and consequential time recording provisions, although not strongly. The likely increase in employment costs and regulatory burden is offset to some extent by the expected increase in productivity.

**6.2.8 *s.134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards***

[526] The AWU submits the proposed variations would provide a certain and easily calculated guaranteed minimum payment for pieceworkers which would assist in making the Horticulture Award comprehensible and easier to apply.<sup>594</sup>

[527] The UWU submits that the current clause is not simple, stable and sustainable and is not easy for people to understand.<sup>595</sup>

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<sup>592</sup> NFF submission, 11 June 2021 at [24].

<sup>593</sup> Exhibit AFPA 2 at [60]

<sup>594</sup> AWU submission, 19 March 2021 at [38]–[39].

<sup>595</sup> UWU submission, 19 March 2021 at [36(g)].

[528] Ai Group submits that this consideration is neutral and rejects the AWU's proposition, submitting that any uncertainties in applying clause 15(2)(b) of the Horticulture Award are not ameliorated by imposing an additional 'floor' in the piecework rate.

[529] The NFF submits that this consideration weighs against the Application because:<sup>596</sup>

- the additional administrative burden is neither simple, nor easy to understand, and
- the addition of an hourly rate as an alternative to piece rates does not ensure or encourage compliance.

[530] Contrary to the NFF's submission, we think the introduction of a minimum wage floor will increase compliance by providing an easily calculated minimum payment. The proposed variation is simple and easy to understand. In our view, this consideration weighs in favour of the insertion of a minimum wage floor, although not strongly.

**6.2.9 *s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.***

[531] We note that the requirement to take into account the likely impact of any exercise of modern award powers on 'the sustainability, performance and competitiveness *of the national economy*' (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

[532] The AWU submits this is a neutral consideration; that there is no reason to believe that the proposed variation would have any identifiable impact on the national economy.<sup>597</sup>

[533] The UWU submits that the proposed variation would not adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy, because:<sup>598</sup>

- employees will have a greater incentive to work as they will be fairly remunerated;
- providing employees with a fair payment will mean they have more money to spend in the Australian economy; and
- by ensuring all pieceworkers are paid at least the minimum hourly rate applicable, labour costs will be fair across the board, encouraging fair competition amongst employers in the horticulture sector.

[534] Ai Group submits that to the extent that the proposed amendments are inconsistent with ss.134(1)(d), (f) and (g), they will also have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

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<sup>596</sup> NFF submission, 11 June 2021 at [25].

<sup>597</sup> AWU submission, 19 March 2021 at [40].

<sup>598</sup> UWU submission, 19 March 2021 at [36(h)].

[535] The NFF submits that this consideration weighs against the Application because:

- labour costs, access to labour and productivity will be negatively affected, and
- growers may turn to altered planting of crops, use of technology and selective hiring in response to the additional administrative burden arising out of the Application.

[536] As mentioned above, this consideration focusses attention on the impact of the exercise of modern award powers on the ‘national economy’, as opposed to any sectoral impact. There is no probative evidence before us as to the impact on the national economy of the proposed variation. We are not persuaded that the variation proposed will have a material impact on the national economy. This consideration is neutral.

[537] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)–(h). We have taken into account those considerations insofar as they are presently relevant and we are satisfied 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.

### **6.3 Minimum Wages Objective**

[538] As mentioned in section 2 of this decision, the Application seeks to set modern award minimum wages for pieceworkers, which enlivens ss.157(2) and 284 of the Act. It is convenient to deal first with s.157(2).

[539] Section 157(2) provides:

‘(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and
- (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).’

[540] The Application plainly seeks to set the minimum wage applicable to a particular category of employees (pieceworkers). It follows that we must be satisfied that the variation proposed in the Application is justified by ‘work value reasons’ and that the variation is necessary to achieve the modern awards objective.

[541] Section 157(2A) provides:

‘(2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.’

[542] Ai Group (and others) submits that the AWU has failed to demonstrate how the variation proposed is justified for ‘work value reasons’ and that it would be unjust to impose a ‘floor’ on the rate set under clause 15.2(b) where the value to the employer of the work performed has not increased.<sup>599</sup> The AFPA also submits that the Union parties ‘have not explained why the inevitable increase in remuneration for the substantial cohort of workers in the industry who are not competent can be justified by work value reasons.’<sup>600</sup>

[543] Section 157(2A) does not import a requirement that the work value considerations consist of identified changes in work value measured from a fixed datum point. The ‘work value reasons’ must relate to the nature of the work performed, the level of skill or responsibility involved or the conditions under which the work is done.

[544] The Application seeks to insert a minimum rate for pieceworkers being the ‘rate payable for the employee’s classification and type of employment’ under the Horticulture Award. Relevantly, the minimum hourly rates in clause 15.1 have already been set for the same work as that undertaken by pieceworkers.

[545] For example, a ‘Level 1 employee’ is one who:<sup>601</sup>

- undertakes induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow workers, training and career opportunities, plant layout, work and documentation procedures, work health and safety, equal employment opportunity and quality control/assurance;
- performs routine duties essentially of a manual nature and to the level of their training;
- exercises minimal judgment;
- works under direct supervision;
- is responsible for the quality of their own work; and
- is a new employee; or is an existing employee performing work within this grade who is undertaking training so as to enable advancement to Level 2.

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<sup>599</sup> Ai Group submission, 1 June 2021 at [87]–[90].

<sup>600</sup> AFPA submission, 11 June 2021 at [38].

<sup>601</sup> *Horticulture Award*, sch.A cl.A.1.2.

[546] Indicative duties of a Level 1 employee are:<sup>602</sup>

- performing general labouring duties;
- fruit or vegetable picking, thinning or pruning;
- operating small towing tractor engaged in transfer of produce bins and other containers during harvest;
- performing a range of housekeeping tasks in premises and grounds;
- sorting, packing or grading of produce where this requires the exercise of only minimal judgment;
- performing basic recording functions related to work performed at this level;
- providing assistance within the scope of this level to other employees as required; and
- undertaking structured training so as to enable advancement to Level 2. [Emphasis added]

[547] Pieceworkers undertake the same work as those engaged on minimum hourly rates and perform that work under the same conditions; it is only the method of remuneration that differs. In these circumstances we are satisfied that the variation proposed, being the extension of the minimum hourly rate of pay to pieceworkers, is justified by ‘work value reasons’ as required by s.157(2)(a).

[548] The decision of a Full Bench of the AIRC in *Re Federal Meat Industry [Processing] Award 1996* supports our conclusion in respect of s.157(2)(a).<sup>603</sup> In that matter, the AIRC was reviewing the Federal Meat Industry (Processing) Award 1996, pursuant to Item 51 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*. In the course of that review, the AIRC decided to replace the existing ‘tally’ provision in the award with ‘a flexible and simplified safety net prescription permitting payment systems based on incentives’<sup>604</sup> and in determining the nature of the proposed incentive payment system the Full Bench said:

‘Under the new provision daily hire employees engaged on incentive payment systems will be entitled to minimum rates based on the appropriate timework rate plus a 20% incentive loading and a 10% daily hire loading. The AMIEU submitted to Commissioner Leary that employees on daily hire should be entitled to have the 10% daily hire loading calculated on the timework classification rate plus the 20% incentive loading. This was put forward on the basis that the 20% incentive loading should form part of the base rate for all purposes of the award. The NMA opposed this and pointed out that it would result in the daily hire loading being increased from 10% to 12% of the timework classification rate. It is not our intention to establish a separate minimum rate of pay for employees engaged on incentive systems. There should only be one

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<sup>602</sup> Ibid, sch.A cl.A.1.2.

<sup>603</sup> [2000] AIRC 276 at [7].

<sup>604</sup> [Print S9669](#), 1 September 2000 at [2] (Guidice P, Munro J and Leary C).

minimum rate for each classification. The work value of the classification does not alter because of the nature of the engagement of the employee. The value of the work is the same whether it is performed by an employee on timework, a casual employee, an employee engaged on daily hire or an employee working on an incentive system. The approach adopted in our decision is one which involves a loading referable to the nature of the engagement. The AMIEU's proposal is inconsistent with that approach and we do not intend to adopt it.<sup>605</sup> [Emphasis added]

[549] Further, for the reasons given in section 6.2, we are also satisfied that making such a variation determination outside the system of annual wage review is necessary to achieve the modern awards objective, as required by s.157(2)(b). It follows that the requirements of s.157(2) have been met. We now turn to the terms of the minimum wages objective.

[550] Section 284(2) provides that the minimum wages objective applies to the Commission's functions or powers under Part 2-3 of the Act so far as they relate to, relevantly, setting or varying modern award minimum wages. The minimum wages objective is set out in s.284(1):

‘(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.’

[551] There is a significant degree of overlap between the s.134 considerations and the matters set out in ss.284(1)(a) to (e).

[552] The AFPA submits that 3 of the matters in s.284(1) overlap with the modern awards objective factors, but that s.284(1)(a) prescribes one additional factor that is presently relevant. The consideration at s.284(1)(a) states:

‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’

[553] Contrary to the AFPA's submission, there is a significant overlap between the consideration in s.284(1)(a) and that in s.134(1)(h), which states:

‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.’

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<sup>605</sup> Ibid at [7] (Guidice P, Munro J and Leary C)..

**[554]** The extent of the overlap between the ss.134 and 284 considerations has been the subject of comment by the Expert Panel in a number of AWR decisions. In the 2014–15 AWR decision the Expert Panel observed:

‘there is a degree of inconsistency in the expression of the economic considerations that the Panel is required to take into account under either s.284 or s.134. As ACCI pointed out in its submissions:

- employment growth and inflation are mentioned as separate considerations under the modern awards objective (s.134(1)(h)), but in the minimum wages objectives these factors appear to be subsidiary to the performance and competitiveness of the national economy (s.284(1)(a)); and
- the modern awards objective requires the Panel to take into account “the likely impact of any exercise of modern award powers on...the *sustainability*, performance and competitiveness of the national economy” (s.134(1)(h)), whereas the “sustainability” of the national economy is not mentioned in the minimum wages objective.

Despite these textual differences, we accept the thrust of ACCI’s submission, that the underlying intention of the various economic considerations referred to in ss.284 and 134 is that the Panel take into account the effect of its decisions on national economic prosperity and in so doing give particular emphasis to the economic indicators specifically mentioned in the relevant statutory provisions. Such an approach is supported by the object of the Act.’<sup>606</sup> [Footnotes omitted]

**[555]** Further, as the Expert Panel observed in the *2018-19 AWR decision*:

‘the underlying intention of the various economic considerations referred to in ss 134 and 284 is that the Panel takes into account the effect of its decisions on national economic prosperity and in so doing gives particular emphasis to the economic indicators specifically mentioned in the relevant statutory provisions.’<sup>607</sup>

As to the minimum wages objective, the only additional consideration identified in the submissions is the requirement to take into account “the performance and competitiveness of the national economy, including business competitiveness and viability, inflation and economic growth.” That consideration appears to overlap, at least significantly, with the matter referred to in s 134(1)(h).’<sup>608</sup>

**[556]** In any event, no probative evidence has been advanced to suggest, much less demonstrate, that the introduction of a minimum wage floor in clause 15.2 would have any appreciable impact on the performance and competitiveness of the national economy.

**[557]** We are 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. As already mentioned, the requirements of s.157(2) have also been met. Accordingly, we have decided to vary the Horticulture Award to insert a minimum wage floor with consequential time recording provisions in clause 15.2.

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<sup>606</sup> *Annual Wage Review 2014-15* [2015] FWCFB 3500 at [88]–[89].

<sup>607</sup> *Annual Wage Review 2018-19* [2019] FWCFB 3500 at [12].

<sup>608</sup> AWU submission in reply, 2 July 2021 at [7]–[8].



[558] But that is not the end of the matter. As the AFPA submits, if the Horticulture Award is only varied to insert a minimum wage floor, with consequential time recording provisions as proposed by the AWU, then significant issues remain:

‘To the extent that the current drafting of clause 15.2 of the Award creates difficulties in correctly setting the piece rate for the average competent employee, or enforcing the Uplift term, these difficulties will remain unaddressed.’<sup>609</sup>

[559] We address these issues in the next section.

#### 6.4 New Piecework Clause – *Provisional View*

[560] As mentioned in section 4.6 of this decision, there is widespread non-compliance with clause 15.2; in particular:

- many growers do not determine piece rates in accordance with the method prescribed by clause 15.2, as interpreted by the Federal Court in *Hu (No.2)* and the *Hu Appeal*;
- piece rates are set unilaterally by the grower and presented to the employee on a ‘take or leave it’ basis, rather than being the product of any genuine negotiation between the employer and employee;
- piece rates are adjusted unilaterally as required and are not the subject of negotiation; and
- pieceworkers are usually not provided with a written piecework agreement.

[561] Subject to according interested parties procedural fairness, we are not required to make a decision in the terms sought in an application. A draft clause addressing some of the deficiencies in the current clause has been prepared for the consideration of the parties. The draft clause is intended to make the pieceworker term simpler and easier to understand; to reduce regulatory burden, and to promote compliance. In particular, the draft clause removes the requirement for piecework arrangements to be the product of genuine negotiation and agreement, and removes the requirement for piecework rates to be determined in accordance with the method presently prescribed by clause 15.2, as interpreted by the Federal Court in *Hu (No.2)* and the *Hu Appeal*.

[562] The proposed draft clause is set out below and is followed by an explanation of its terms:

#### 15.2 Piecework rates

(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;

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<sup>609</sup> AFPA Closing Submissions on the evidence at [33]

- (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:
  - (i) 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.
  - (ii) 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.

[563] A proposed Schedule I – Piecework Record is set out at **Attachment E**.

[564] Draft clause 15.2(a) contains definitions, which include:

- The ‘hourly rate for a pieceworker’ is the minimum hourly rate under the Award for the pieceworker’s classification, plus the 25% casual loading prescribed in clause 11.3 for a pieceworker engaged as a casual employee.

It is intended that this definition accord with the hourly rate used in the existing award clause 15.2(b) to set the piece rate (see existing clauses 15.2(b) and 15.2(c)).

This definition is used in prescribing the minimum level at which the piece rate must be set (draft clause 15.2(d)), the hourly rate to be paid to a pieceworker when performing non-piecework tasks (draft clause 15.2(e)) and the hourly rate that underpins the minimum payment to be made to a pieceworker (draft clause 15.2(f)).

- A pieceworker is ‘competent at the piecework task’ if the pieceworker has at least 2 weeks’ experience performing the task. Different piecework tasks might comprise, for example, picking apples, picking strawberries or pruning grape vines. While picking different types of fruit may constitute different piecework tasks for this purpose, picking different varieties of the same type of fruit would not.

This definition is used in prescribing the minimum level at which the piece rate must be set under draft clause 15.2(d).

**[565]** Draft clause 15.2(b) identifies the clauses of the Award that do not apply to pieceworkers. It is to the same effect as existing award clause 15.2(e).

**[566]** Draft clause 15.2(c) provides for an employer to pay a full-time, part-time or casual employee a piece rate for performing a task. The term ‘piece rate’ (rather than ‘piecework rate’ as presently used in the Award) is used for consistency with the Act. It is proposed that ‘Piecework rate’ in award clause 27.3 also be changed to ‘piece rate’ for consistency.

**[567]** The draft clause does not include provision equivalent to existing award clause 15.2(d) (to the effect that a piece rate is paid instead of minimum hourly rates under the Award), as this appears unnecessary and may cause confusion.

**[568]** Unlike existing award clause 15.2(a), draft clause 15.2(c) does not require the employer to conclude an agreement with an employee to pay a ‘piece rate’. Similarly, draft clause 15.2(d) provides for the employer to fix the amount of the piece rate, rather than requiring the employer to agree to the piece rate with the employee (as under existing award clause 15.2(b)). This reflects the reality that payment of a piece rate and the setting of the piece rate is often not the product of agreement with an existing employee.

**[569]** The fixing of the piece rate under draft clause 15.2(d) is simpler than under existing award clause 15.2(b). Existing clause 15.2(b) requires the piece rate to be fixed so as to enable the ‘average competent employee’ to earn at least 15% more than the applicable minimum hourly rate under the Horticulture Award. As explained in *Fair Work Ombudsman v Hu (No 2)*<sup>610</sup> this requires the piece rate to be set by reference to the performance of the hypothetical average competent employee in the workforce available or potentially available to the employer.<sup>611</sup> In contrast, draft clause 15.2(d) requires the employer to fix the piece rate at a

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<sup>610</sup> [2018] FCA 1034.

<sup>611</sup> Ibid at [30]–[34].

level that enables a ‘pieceworker competent at the piecework task’ concerned to earn at least 15% more than the applicable hourly rate.

**[570]** As mentioned above, for the purpose of setting the piece rate for a task under draft clause 15.2(d), a ‘pieceworker is competent at the piecework task’ if they have at least 2 weeks’ experience performing the task.

**[571]** A note under draft clause 15.2(d) draws attention to a pieceworker’s entitlement under award clause 27.3 to twice the usual piece rate for work on a public holiday.

**[572]** Existing award clause 15.2(b) provides that the piece rate is to be paid for ‘all work performed in accordance with the piecework agreement’. Under draft clause 15.2(d), the piece rate is paid for performance of a particular piecework task. That task must be described in the ‘piecework record’ the employer is required to make under draft clause 15.2(h).

**[573]** Draft clause 15.2(e) has no counterpart in existing award clause 15.2. It provides that if a pieceworker does any work in addition to a task for which they are being paid a piece rate then they must be paid for that additional work at the applicable hourly rate. Such additional work might include, for example, cleaning up a work area at the end of a day’s work.

**[574]** Draft clause 15.2(f) also has no counterpart in existing award clause 15.2. It requires that a pieceworker be paid ‘no less than the amount they would have received if paid for each hour worked at the applicable hourly rate’. If a pieceworker would receive less in total in piece rates for any hour’s work than the applicable hourly rate, then draft clause 15.2(f) requires that the pieceworker be paid the amount of the applicable hourly rate for that hour’s work. The employer’s record-keeping obligations under draft clause 15.2(j) include keeping a record of all hours worked by the pieceworker. In effect, draft clause 15.2(f) is the guarantee of minimum earnings that is disavowed by existing award clause 15.2(i). Draft clauses 15.2(f) and (j) give effect to our decision to vary the Horticulture Award to insert a minimum wage floor with consequential time recording provisions.

**[575]** As mentioned above, draft clause 15.2(g) is intended to make clear that the prescription of rates in draft clauses 15.2(d), 15.2(e) and 15.2(f) does not exclude additional entitlements to allowances.

**[576]** Draft clause 15.2(h) requires the employer to make a ‘piecework record’. Similarly to a ‘piecework agreement’ under existing award clauses 15.2(g) and 15.2(h), a piecework record must be in writing and signed by the employer, a copy must be given to the pieceworker before they start the piecework task, and a copy must be kept by the employer as an employee record (draft clauses 15.2(h) and 15.2(j)).

**[577]** Draft clause 15.2(h) requires the piecework record to state: the date and time the piecework is to commence; the task for which the piece rate will be paid, and the amount of the piece rate. The piecework record includes the time the piecework is to commence in case the employer proposes to change the piece rate after the pieceworker has commenced work.

**[578]** Draft clause 15.2(i) requires that if the employer proposes to change the piece rate for a task, or change the piecework task, then the employer must first give the pieceworker a further

piecework record including the new rate or task. This would correspond to making a new piecework agreement, or a written variation of a piecework agreement, for the purposes of existing award clause 15.2.

**[579]** As a measure to promote compliance, draft clause 15.2(h) also requires that the piecework record include a statement in prescribed terms as to the pieceworker's minimum payment entitlement pursuant to draft clause 15.2(f) and the pieceworker's hourly rate for the purposes of that minimum payment entitlement. The prescribed statement is:

‘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).’

**[580]** A note under draft clause 15.2(h) draws attention to the example piecework record that would be set out in a new Schedule I to the Award. As with the example agreements in Schedules E–G<sup>612</sup>, an employer would not be obliged use the form of record in the new Schedule.

**[581]** Draft clause 15.2(j) requires the employer to keep as employee records a copy of each piecework record given to the pieceworker, and a record of all hours worked by the pieceworker and the applicable piece rate at the time those hours were worked. The requirement to keep a record of hours worked has no counterpart in existing award clause 15.2. The further new requirement to record the applicable piece rate at the time the hours were worked, is intended to promote compliance and compliance verification in circumstances where a piece rate may change during a working day or otherwise in the course of a pieceworker's employment.

**[582]** Draft clause 15.2(k) provides for determination of a pieceworker's ‘base rate of pay’ and ‘full rate of pay’ for the purposes of the NES, as required by Act s.148. The wording of the draft clause is based on *Fair Work Regulations 2009* regulation 1.09, which provides for determination of the base rate of pay for an award/agreement free pieceworker. The ‘full rate of pay’ under draft clauses 15.2(k)(ii) and (iii) accords with the ‘base rate of pay’ under regulation 1.09.

**[583]** It is our *provisional* view that it is necessary to vary the Horticulture Award in the terms set out above. A draft variation determination is set out at **Attachment D**. We will provide the parties with an opportunity to comment on the proposed variation and our *provisional* view.

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<sup>612</sup> Schedules E–G relate respectively to time off instead of payment for overtime, annual leave in advance and cash out of annual leave.

## 7. CONCLUSION AND NEXT STEPS

[584] We are satisfied that the insertion of a minimum wage floor in clause 15.2 is ‘justified by work value reasons’ and is necessary to achieve the modern awards objective. Accordingly, we have decided to vary the Horticulture Award to insert a minimum wage floor with consequential time recording provisions in clause 15.2.

[585] Further, as mentioned above, it is our *provisional* view that it is necessary to vary the Horticulture Award in the terms set out at Attachment D.

[586] We make the following directions to provide interested parties with an opportunity to comment on the proposed draft variation determination and our *provisional* view:

1. Submissions in response to the proposed draft variation determination and our *provisional* view should be filed by no later than **4.00pm** on **Friday 26 November 2021**.
2. Submissions in reply are to be filed by no later than **4.00pm** on **Friday 10 December 2021**.
3. Any request for an oral hearing is to be made by no later than **4.00pm** on **Monday 13 December 2021**. Absent a specific request for an oral hearing, the matter will be determined on the papers. If a hearing is required, it will be held at **9:30am** on **Thursday 16 December 2021**.
4. If no submissions are filed opposing our *provisional* view, we will issue a variation determination in the same terms as the draft determination at **Attachment D**.
5. All submissions to be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

[587] The submissions to be filed in accordance with the above directions are *not* an opportunity to seek to reagitate a matter which has been determined; in particular, we have decided to vary the piecework clause in the Horticulture Award to insert a minimum wage floor, with consequent time recording obligations, and do not seek further submissions in respect of these issues. Rather, it is an opportunity to comment on the balance of the draft determination and our *provisional* view in respect of it.

## PRESIDENT

### *Appearances:*

*M Gibian SC* for the Australian Workers’ Union with *T Howell* and *S Crawford*.

*K Burke* for the United Workers Union with *B Redford*, *L Ablett* and *G Robertson*.

*R Dalton SC* for the Australian Fresh Produce Alliance with *D Ternovski* and *L Crossman*.  
*T Donaghey* for the National Farmers Federation with *B Rogers*.  
*A Bretherton* for 88 Days and Counting with *C Stenseth* and *A Sabaratnam*.

*Hearing details:*

2021.

Melbourne, Sydney (via video):

July 13, 15, 16 and 20.

*Appearances:*

*M Gibian SC* for the Australian Workers' Union with *T Howell* and *S Crawford*.

*K Burke* for the United Workers Union with *B Redford*, *L Ablett* and *G Robertson*.

*R Dalton SC* for the Australian Fresh Produce Alliance with *D Ternovski* and *L Crossman*.

*T Donaghey* for the National Farmers Federation with *B Rogers*.

*A Bretherton* for 88 Days and Counting with *C Stenseth* and *A Sabaratnam*.

*H Harrington* for Ai Group.

*Hearing details:*

2021.

Melbourne, Sydney (via video):

July 30.

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**ATTACHMENT A – LIST OF EXHIBITS***AWU Exhibits*

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
AWU 1	13 July 2021	AWU	Witness Statement of Ms Chee Sing Ee	CB7	PN150
AWU 2	13 July 2021	AWU	Witness Statement of Mr Xueliang Wang	CB12	PN185
AWU 3	13 July 2021	AWU	Witness Statement of Ms Hsu	CB10	PN210
AWU4	13 July 2021	AWU	Witness Statement of Anthony Beven	CB17	PN232
AWU 5	13 July 2021	AWU	Reply Witness Statement of Anthony Beven	CB14	PN235
AWU 6	13 July 2021	AWU	Witness Statement of Darren Cameron	CB40	PN275
AWU 7	13 July 2021	AWU	Witness Statement of Philip Gourlay	CB43	PN305
AWU 8	13 July 2021	AWU	Witness Statement of Ronald Cowdrey	CB49	PN338
AWU 9	13 July 2021	AWU	Witness Statement of Shane Roulstone	CB53	PN368
AWU 10	13 July 2021	AWU	Witness Statement of Steven Carter	CB124	PN399
AWU 11	13 July 2021	AWU	Reply Witness Statement of Steven Carter	CB121	PN407
AWU 12	13 July 2021	AWU	Witness Statement of Suliman Ali	CB167	PN439
AWU 13	13 July 2021	AWU	Wage Theft: The Shadow Market: Part Two: The Horticultural Industry	CB216	PN577
AWU 14	13 July 2021	AWU	No Worker Left Behind: Support equal access to welfare for temporary migrants: Survey Results	CB241	PN585

AWU 15	13 July 2021	AWU	Working for \$9 a day: Wage Theft and Human Rights Abuses on Australian Farms	CB290	PN588
AWU 16	15 July 2021	AWU	Report of Dr Elsa Underhill	CB475	PN1112
AWU 17	15 July 2021	AWU	Reply Report of Dr Elsa Underhill	CB321	PN1117
AWU 18	15 July 2021	AWU	Email from Alison Cooper to Tony Kelly and others dated 17 March 2021 (being page 1 of the bundle of documents produced by Anthony Kelly in response to an Order to Produce)	-	PN1787
AWU 19	15 July 2021	AWU	NFF Media Release, 'Growers and farm workers asked to help protect piece rates'	-	PN1875
AWU 20	15 July 2021	AWU	Survey Monkey: List of questions	-	PN1967
AWU 21	15 July 2021	AWU	Bundle of documents submitted by Brent McClintock in response to an Order to Produce	-	PN2135
AWU 22	15 July 2021	AWU	Bundle of documents submitted by Catherine Silverstein in response to an Order to Produce	-	PN2278
AWU 23	15 July 2021	AWU	Payslips from Bulmer Farms Pty Ltd (being pages 1 – 5 of the bundle of documents produced by Glenn Trewin in response to an Order to Produce)	-	PN2413
AWU 24	16 July 2021	AWU	Bundle of documents submitted by Gaetano Gaeta in response to an Order to Produce	-	PN2616
AWU 25	16 July 2021	AWU	Bundle of documents submitted by Han Shiong Siah in response to an Order to Produce	-	PN2727
AWU 26	16 July 2021	AWU	Pages 1-7 of bundle of documents submitted by Matthew Benham in response to an Order to Produce	-	PN2933

AWU 27	16 July 2021	AWU	3 pages of bundle of documents submitted by Richard Eckersley in response to Order to Produce	-	PN3138
AWU 28	16 July 2021	AWU	Bundle of documents submitted by Nicholas King in response to an Order to Produce	-	PN3616
AWU 29	20 July 2021	AWU	Dr Underhill document, 'Distribution of Average Hourly Earnings, Horticulture Workers'	-	PN3641

### *UWU Exhibits*

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
UWU 1	13 July 2021	UWU	Witness Statement of George Robertson	CB2327	PN473
UWU 2	13 July 2021	UWU	Witness Statement of Rodney McDonald	CB2669	PN514
UWU 3	13 July 2021	UWU	Reply Witness Statement of Rodney McDonald	CB2666	PN520
UWU 4	13 July 2021	UWU	Witness Statement of Lachlan Wakefield	CB2410	PN551
UWU 5	13 July 2021	UWU	Witness Statement of Nicholas Karhu	CB2659	PN597
UWU 6	13 July 2021	UWU	Witness Statement of Witness 1 attaching email from Lyndal Ablett dated 13 July 2021 setting out instructions from Witness 1	CB2647 <sup>613</sup>	PN626
UWU 7	13 July 2021	UWU	Witness Statement of Dr Joanna Howe	CB2449	PN642
UWU 8	13 July 2021	UWU	Reply Witness Statement of Dr Joanna Howe with correction	CB2413	PN653
UWU 9	26 July 2021	UWU	Witness Statement of Lyndal Catherine Ablett	-	-

### *AFPA Exhibits*

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<sup>613</sup> Note that the CB does not include the attached email.

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
AFPA 1	15 July 2021	AFPA	Bundle of material used in cross-examination of Dr Howe	-	PN3623
AFPA 2	16 July 2021	AFPA	Witness Statement of Nicholas King	CB3102	PN3166
AFPA 3	16 July 2021	AFPA	Second Witness Statement of Nicholas King	-	PN3208
AFPA 4	15 July 2021	AFPA	Bundle of material used in cross-examination of Dr Underhill <sup>614</sup>	-	PN3625
AFPA 5	20 July 2021	AFPA	Witness Statement of Elizabeth Tan	-	PN3677
AFPA 6	20 July 2021	AFPA	Expert Report of Greg Houston	CB3118	PN3693
AFPA 7	20 July 2021	AFPA	Expert Report in Reply of Greg Houston		PN3700

*NFF Exhibits*

EXHIBIT NO.	DATE TENDERED	TENDERED BY	DESCRIPTION	COURT BOOK REF.	TRANSCRIPT REFERENCE
NFF 1	15 July 2021	NFF	Witness Statement of Anne Reardon	CB2773	PN1608
NFF 2	15 July 2021	NFF	Witness Statement of Anthony Kelly	CB2779	PN1692
NFF 3	15 July 2021	NFF	Witness Statement of Ben Rogers with correction	CB2787	PN1808
NFF 4	15 July 2021	NFF	Witness Statement of Brent McClintock with corrections	CB2956	PN2005
NFF 5	15 July 2021	NFF	Witness Statement of Catherine Silverstein	CB2961	PN2147

<sup>614</sup> This exhibit was originally marked as AFPA 1 (see Transcript, 15 July 2021 at PN1503), but subsequently marked as AFPA 4 (see Transcript, 16 July 2021 at PN3620-3625).

NFF 6	15 July 2021	NFF	Witness Statement of Glenn Trewin	CB2966	PN2290
NFF 7	16 July 2021	NFF	Witness Statement of Gaetano Gaeta	CB2970	PN2501
NNF 8	16 July 2021	NFF	Witness Statement of Han Shiong Siah <sup>615</sup>	CB2978	PN2630
NNF 9	16 July 2021	NFF	Witness Statement of Jonathan Moss	CB2996	PN2740
NNF 10	16 July 2021	NFF	Witness Statement of Leleiga Fetui	CB3018	PN2778
NNF 11	16 July 2021	NFF	Witness Statement of Reginald John Brown	CB3049	PN2781
NNF 12	16 July 2021	NFF	Witness Statement of Matthew Benham with corrections	CB3022	PN2812
NFF 13	16 July 2021	NFF	Witness Statement of Michelle Distill with corrections	CB3026	PN2954
NFF 14	16 July 2021	NFF	Witness Statement of Richard Eckersley	CB3054	PN3051

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<sup>615</sup> Although there were no corrections to this witness's statement, the witness did provide a 'note' in respect of paragraphs [13] and [32](a) of his statement as follows: 'So basically paragraph 13 (indistinct) they work roughly nine hours a day. However, we give our workers the freedom to start and stop and choose their own breaks. So they could work nine hours a day or they could work six hours a day, based on their personal preference and they're meeting their goals.'

**ATTACHMENT B – LIST OF WITNESSES**

#	DATE	PARTY	WITNESS	TRANSCRIPT REFERENCE
1.	13 July 2021	AWU	Ms Chee Sing Ee	XN: PN132-150 XXN: PN151-168 RXN: PN169-176
2.	13 July 2021	AWU	Mr Xueliang Wang	XN: PN183-185 XXN: PN186-193
3.	13 July 2021	AWU	Ms Hsu	XN: PN203-210 XXN: PN211-222
4.	13 July 2021	AWU	Mr Anthony Beven	XN: PN228-236 XXN: PN238-263
5.	13 July 2021	AWU	Mr Darren Cameron	XN: PN270-274 XXN: PN276-288 RXN: PN290-293
6.	13 July 2021	AWU	Mr Philip Gourlay	XN: PN300-304 XXN: PN306-321 RXN: PN324-326
7.	13 July 2021	AWU	Mr Ronald Cowdrey	XN: PN333-337 XXN: PN339-353 RXN: PN355-357
8.	13 July 2021	AWU	Mr Shane Roulstone	XN: PN363-367 XXN: PN369-380 RXN: PN383-388
9.	13 July 2021	AWU	Mr Steven Carter	XN: PN393-406 XXN: PN408-421 RXN: PN423-424
10.	13 July 2021	AWU	Mr Suliman Ali	XN: PN435-439

				XXN: PN440-447
11.	13 July 2021	UWU	Mr George Robertson	XN: PN466-474 XXN: PN476-488 Question from the Bench: PN491-496
12.	13 July 2021	UWU	Mr Rodney McDonald	XN: PN504-521 XXN: PN523-531
13.	13 July 2021	UWU	Mr Lachlan Wakefield	XN: PN543-550 XXN: PN552-565
14.	13 July 2021	UWU	Dr Joanna Howe	XN: PN633-653 XXN: PN657-990 RXN: PN1002-1011
15.	15 July 2021	AWU	Dr Elsa Underhill	XN: PN1103-1129 XXN: PN1130-1503 RN: PN1507-1542
16.	15 July 2021	NFF	Ms Anne Reardon	XN: PN1601-1610 XXN: PN1611-1672 RXN: PN1673-1679
17.	15 July 2021	NFF	Mr Anthony Kelly	XN: PN1684-1693 XXN: PN1695-1779
18.	15 July 2021	NFF	Mr Ben Rogers	XN: PN1796-1809 XXN: PN1818-1966
19.	15 July 2021	NFF	Mr Brent McClintock	XN: PN1977-2006 XXN: PN2007-2120
20.	15 July 2021	NFF	Ms Catherine Silverstein	XN: PN2139-2148 XXN: PN2150-2264 RXN: PN2269-2272

21.	15 July 2021	NFF	Ms Glenn Trewin	XN: PN2283-2291 XXN: PN2292-2405
22.	16 July 2021	NFF	Mr Gaetano Gaeta	XN: PN2491-2502 XXN: PN2503-2592
23.	16 July 2021	NFF	Mr Han Shiong Siah	XN: PN2620-2644 XXN: PN2645-2717
24.	16 July 2021	NFF	Mr Jonathan Moss	XN: PN2731-2741 XXN: PN2743-2770
25.	16 July 2021	NFF	Mr Matthew Benham	XN: PN2788-2811 XXN: PN2813-2923
26.	16 July 2021	NFF	Ms Michelle Distill	XN: PN2938-2955 XXN: PN2957-3034
27.	16 July 2021	NFF	Mr Richard Eckersley	XN: PN3043-3052 XXN: PN3054-3129
28.	16 July 2021	AFPA	Mr Nicholas King	XN: PN3158-3172 XXN: PN3122-3543 (AWU) XXN: PN3548-3581 (88 Days) RXN: PN3584-3613
29.	20 July 2021	AFPA	Mr Greg Houston	XN: PN3684-3701 XXN: PN3704-4042 (AWU) XXN: PN4051-4116 (UWU) RXN: PN4119-4131



## ATTACHMENT C – LIST OF PIECE RATE CASES

1. *Australian Workers' Union v Hans Irvine & Ors* (1920) 14 CAR 204
2. *AWU v The Pastoralists Federal Council of Australia* (1922) 16 CAR 375
3. *Australian Saddlery, Leather, Sail, Canvas, Tannery, Leather Dressing, and Allied Workers Trades Employees Federation and Davis Gelatine (Australia) Limited* (1926) 23 CAR 58
4. *Graziers Association of New South Wales v Australian Workers' Union* (1927) 25 CAR 626
5. *Federated Felt Hatting Employees Union of Australasia v United Felt Hats Pty Ltd* (1928) 27 CAR 52
6. *Amalgamated Engineering Union v Metal Trades Employers Association* (1930) 28 CAR 923
7. *AWU v Young and District Producers Co-Operative Society* (1939) 41 CAR 285
8. *AWU v The Angaston Fruit-growers Co-Operative Society Ltd* (1945) 55 CAR 704
9. *Variation – Food Preservers Award* [1958] 91 CAR 3
10. *AWU v Abbott (Fruit Growing Industry Award, 1965)* (1965) 109 CAR 679
11. *Fruit Growing Industry (Consolidated) Award 1976* (1977) 186 CAR 801
12. *Re Horticulture Award 2010* (2009) 193 IR 163

**ATTACHMENT D - DRAFT DETERMINATION**

MA000119 PRXXXXXX



# DRAFT DETERMINATION

*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

**Australian Workers' Union**

(AM2020/104)

## HORTICULTURE AWARD 2020

[MA000119]

Agricultural industry

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT CATANZARITI  
COMMISSIONER RIORDAN

PLACE, XX MONTH 2021

*Horticulture Award 2020 – Pieceworker rates – minimum hourly rate.*

A. Further to the decision [[2021] FWCFB XXXX] issued by the Fair Work Commission on XX MONTH 2021, the above award is varied as follows:

1. By deleting clause 15.2 and inserting the following:

### **15.2 Pieceworker rates**

(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; and
- (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 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:
    - (i) 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.
    - (ii) 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.
2. By replacing ‘piecework rate’ in clause 27.3 with ‘piece rate’.
3. By inserting a new Schedule I—Piecework record as set out in the attachment to this determination.
4. By updating the table of contents accordingly.
- B. This determination comes into operation on XX MONTH 2021. In accordance with s.166(5) of the *Fair Work Act 2009*, this determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after XX MONTH 2021.

PRESIDENT

**ATTACHMENT E**

**SCHEDULE I—Piecework record**

Link to PDF copy of Piecework Record

Name of pieceworker: \_\_\_\_\_

Name of employer: \_\_\_\_\_

The piecework will commence on: \_\_\_\_/\_\_\_\_/20\_\_\_\_ at: \_\_\_\_\_ am/pm

The piecework task is: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

The pieceworker will be paid for the piecework the amount of \$\_\_\_\_\_ per \_\_\_\_\_

**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).**

The pieceworker's hourly rate under the Award is \$\_\_\_\_\_ per hour.

Name of employer representative: \_\_\_\_\_

Signature of employer representative: \_\_\_\_\_

Date signed: \_\_\_\_/\_\_\_\_/20\_\_\_\_

## ATTACHMENT F

### AFPA Proposed Clause 15.2

#### 15.2 Piecework rates

- a) An employer and a full-time, part-time or casual employee may enter into an agreement for the employee to be paid a piecework rate. An employee on a piecework rate is a **pieceworker**.
- b) Subject to clause 15.2(n), all work performed in accordance with the piecework agreement must be paid at the piecework rate fixed by that agreement or the **minimum piecework rate** calculated in accordance with clause 15.2(k) (whichever is higher).
- c) The calculation of the minimum piecework rate in clause 15.2(k) for casual employees will include the casual loading prescribed in clause 11.3(a).
- d) Subject to clause 15.2(n), an agreed piecework rate is paid instead of the minimum rates specified in clause 15
- e) The following clauses of this award do not apply to an employee on a piecework rate:
  - i. Clause 13—Ordinary hours of work and rostering arrangements;
  - ii. Clause 18.3(c)—Meal allowance; and
  - iii. Clause 21—Overtime.
- f) The employer and the individual employee must have genuinely made the piecework agreement without coercion or duress.
- g) The piecework agreement between the employer and the individual employee must be in writing and signed by the employer and the employee.
- h) The employer must give the individual employee a copy of the piecework agreement and keep it as a time and wages record.
- i) Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly rate or hourly rate in this award for the type of employment and the classification level of the employee, as the employee's earnings are contingent on their productivity.
- j) For the purposes of the NES:
  - i. The base rate of pay for a pieceworker is the base rate of pay as defined in the NES.

- ii. The full rate of pay for a pieceworker is the full rate of pay as defined in the NES.
- k) Each pay period, the employer must, for each group of pieceworkers performing a particular piecework task specified in the piecework agreement, calculate the minimum piecework rate for that task in that pay period in accordance with the following steps:
  - i. calculate:
    - the total output of the competent pieceworkers in the group in the pay period (**Total Competent Output**); and
    - the total combined hours of work of the competent pieceworkers in the group during the pay period (**Total Competent Hours**);
  - ii. divide the Total Competent Output by Total Competent Hours to obtain the **Average Hourly Output of a Competent Worker**;
  - iii. take the applicable minimum hourly rate, add 15% and then divide by the Average Hourly Output of a Competent Worker.
- l) A competent pieceworker for the purposes of this clause is an employee who, in the reasonable opinion of the employer, is suitable, sufficient or adequate to perform the task or tasks assigned to the relevant group. An employee is deemed to be competent at a particular task or set of tasks after he or she has been performing these task(s) for 20 working days.
- m) In calculating the piecework pay under this clause for an employee who is not yet competent, the employer must pay the employee on the basis of their actual output or the average rate of output of the slowest competent worker in the group during the pay period, whichever is higher.
- n) If an employer requires a pieceworker to perform work that does not yield any piecework output and is not an inherent part of the agreed piecework:
  - i. the time spent performing this work is to be excluded for the purposes of all calculations under this clause; and
  - ii. the employer must pay the employee at the applicable minimum hourly rates for this work
- o) The employer must keep a record of the following:
  - i. the groups of employees (including the composition of the group and the tasks assigned to the group);

- ii. the hours worked by all pieceworkers; and
- iii. the calculations required by clauses 15.2(k) and 15.2(m).