A CHANGE IN DIRECTION ON FAIR WORK COMMISSION DECISION UNLIKELY

Fruit Growers Tasmania has filed its response to the Fair Work Commission's Decision to introduce a floor into the piece rate arrangements within the Horticulture Award.

After engaging an experienced barrister and a thorough review of the specifics of the Commission's 176 page decision, and consultation with other employer groups, it became clear that the Commission was not open to consider submissions against the introduction of a minimum floor.

Advice received indicates the basis for an appeal is not strong, but that avenue cannot be explored until the Commission's decision is final.

Accordingly, and in line with the Commission's decision, our submission focused on the specific application of the floor and revisions to the piece rate arrangements, the application of a minimum hourly rate, and very importantly, the operative date for the decision, which in our view must be no earlier than 1 July 2022.

Why FGT believes the Commission's Decision is Wrong

While no system is perfect, the opportunity was available to the Commission to improve the workings and clarity of the piece rate arrangements within the Horticulture Award.

Is there non-compliance with the Award – yes there is. But in what system or award are there no compliance issues?

Was there clear evidence of "widespread underpayment" – not that we saw.

The definitive source of evidence about non-compliance and underpayment in our view must be the Fair Work Ombudsman. The only definitive information available from the Fair Work Ombudsman is its 2018 "Harvest Trail Inquiry Report". But this only focused on 638 employers or 8% of the some 8,000 employers utilizing the Award. This was in no way a comprehensive or representative inquiry.

Our industry is committed to compliance with the Award and to the concept of a fair day's pay for a fair day's work. In return our industry deserves there to be ongoing surveillance and compliance efforts on the part of the Fair Work Ombudsman. It is our growers' job to comply but the Ombudsman's job to police compliance.

As we submitted to the Commission FGT had direct information from 9 individual significant fruit growing employers, employing some 4,000 workers annually, that the Fair Work Ombudsman had conducted investigations/audits of each of these employers and found them to be compliant with their application of piece rates under the Award.

We found no cases where the Ombudsman had found non-compliance.

We Disagree with the Assessment of the Commission Against the Criteria set out in the Fair Work Act 2009

The Fair Work Act requires the Commission to consider 9 criteria in its determinations to meet the modern awards objective.

In summary the Commission was satisfied that:

- 5 of these considerations weighed in favour of the variation;
- 1 weighed against the variation; and
- 3 were neutral.

FGT does not agree. We would argue that:

- 1 of these considerations weighed in favour of the variation;
- 5 weighed against the variation; and
- 3 were neutral.

It is clear we have a diametrically different view to the Commission. Undoubtedly there are some shades of grey with some of these assessments. More detail on 4 of these key criteria is provided in the Attachment.

As stated by the Commission "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."

We acknowledge this is a complex task and that the Commission has a greater level of experience and knowledge than FGT.

We also acknowledge that the current "safety net" within the piece rate arrangements within the Award is not normal. It is currently not a 'strict' nor 'completely clear' safety net as it consists of the requirement that:

> **"15.2(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. "

In fact, the Award also states:

> **"15.2(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."

Undoubtedly a minimum floor as determined by the Commission will provide greater clarity.

But it comes at a cost to workers (through being excluded from participating in the industry) and employers through higher costs and lower productivity.

In any event, as far as the Commission is concerned, that door is now closed.

The FGT Submission to the Fair Work Commission

The Commission has indicated it will be introducing a floor, based on the relevant hourly rate, and there will be consequential time recording provisions. And they have reworded the "15% Uplift Term" that requires piece workers to be paid 'above' the hourly rate, as well as including a definition of a "competent" piece worker.

Given the effective restrictions placed on our submission to the Commission, FGT focused on those areas that would ensure:

- Clarity
- Practicability
- Ease of compliance
- A reasonable time to implement

As a result, our submission focused on the following.

1. The definition of a 'competent' piece rate worker
2. The realistic, practicable and clear application of the minimum hourly floor
3. The appropriate and clear application of the 15% "Uplift Term" for piece rates; and
4. A necessary Operative Date of 1 July 2022.

Our full November 2021 Submission provides our response to each of these matters, with an overview as follows.

The definition of a 'competent' piece rate worker:

FGT submitted that an amendment to this proposed clause 15.2(a)(iii) is required by inserting the words "with their current employer" after the word "experience", hence reading:

> "pieceworker competent at the piecework task means a pieceworker who has at least 2 weeks' experience **with their current employer** performing the task (for example, picking apples, picking strawberries or pruning grape vines)"

The aim of the addition is to provide fairness and operational clarity to both employers and employees, and promote ease of compliance, by clarifying that:

a) 'relevant' "experience" is "experience" undertaking the piecework tasks actually undertaken by the current employer; and

b) the employer has no need to verify, and the employee no need to prove, claims of previous experience that may or may not be relevant.

The realistic, practicable and clear application of the minimum hourly floor:
The proposed clause 15.2(f) defines the guarantee of minimum earnings as follows.

> "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."

The Commission explains in its Decision that "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."

We submitted that the suggested application of the minimum wage floor to each and every hour of the day is unreasonable as it:

a) involves an excessive administrative and technical burden for employers;

   i. Larger employers have anywhere between 500 and 1,000 pieceworkers. In the case of the largest, the suggested requirement to apply the minimum wage floor on every hour would require some 8,000 sets of calculations, comparisons and associated payments every day.

   ii. The smaller employers, often operating with only 1 or 2 employees on a normal day, will during harvest and with the engagement of 20 pieceworkers, be required to undertake some 160 sets of calculations, comparisons and associated payments every day.

b) does not cater for the structural issues relating to piecework 'lumpiness' which would cause employers to pay twice for work undertaken.

   i. The apple industry is a case in point, where the piecework units (bins) are typically 400-450kg each. If a pieceworker is expected to complete 4 bins in an 8 hour period, the pieceworker would have 4 hours where they earned twice the award rate (because they completed a 'piece' by filling a bin), and another 4 hours where they earned nothing (because they did not complete filling a bin in those hours). In this case, under the Commission's current draft clause 15.2(f), employers would be required to supplement the pieceworker's wages for 4 hours out of 8, despite the excess payments in the remaining 4 hours.

The effect of this is to require the employer to pay for a proportion of the same work twice. That cannot be intended.

Accordingly, and to assist in providing clarity of the intent and application of the minimum wage floor, we proposed that the following 'definition' be added to draft clause 15.2(a).

> (iv) The **average hourly rate of a pieceworker** for the payment period means the calculated value of adding all payments made to the pieceworker using piece rates, and dividing this by the total hours worked by the pieceworker for the payment period in pieceworker tasks.

In addition, we proposed that draft clause 15.2(f) be amended as follows.

> "Despite any other provision of clause 15.2 **the average hourly rate of a pieceworker for the payment period** must be no less than if paid for each hour worked at the hourly rate for the pieceworker."

The amendment of this clause in line with the above provides a workable application of the minimum wage floor and would ensure every pieceworker would be in no worse position than if they had been on hourly rates for each period of payment.

The appropriate and clear application of the 15% "Uplift Term" for piece rates:

The Commission has proposed to replace the existing clause 15.2(b) and re-define the 'Uplift Term' with the new clause 15.2(d) as follows.

> "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. "

FGT submitted that this clause is NOT more simple at all, and in fact is open to multiple interpretations based upon:

a) whether the intent is that piecework rates are to be set individually or collectively across all pieceworkers competent at the piecework task;

b) the process by which a piecework rate is to be determined to "enable" a pieceworker to attain the 'Uplift';

c) the nature of worker selection to test whether a particular piecework rate is compliant with this clause for the basis of adjustment or enforcement.

FGT submitted that to achieve these aims the draft clause 15.2(d) must be explicit in including some form of averaging across all of the employer's pieceworkers competent at the piecework task, with a definition of the relevant period over which this averaging is to be calculated. By doing so the fundamental intent of the 'Uplift Term' that pieceworkers competent at the piecework task will 'on average' earn 15% above the hourly rate for the pieceworker can be tested, and shown to be compliant or not.

Accordingly, we proposed that the following definitions be added to clause 15.2(a).

> (v) The **average hourly rate of an individual pieceworker competent at the piecework task** for the payment period means the calculated value of adding all payments made to the pieceworker over the payment period using piece rates, and dividing this by the total hours worked by the pieceworker for the payment period in pieceworker tasks.
>
> (vi) The average hourly rate of all pieceworkers competent at the piecework task for the payment period means the calculated value of:
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> - adding the average hourly rates of all individual pieceworkers competent at the piecework task for the payment period; and
> - dividing this by the number of pieceworkers competent at the piecework task for the payment period.

In addition, we proposed that draft clause 15.2(d) be amended as follows.

> "The employer must fix the piece rate at a level which **ensures that the average hourly rate of all pieceworkers competent at the piecework task for the payment period is** at least 15% more than the hourly rate for the pieceworker. "

A necessary Operative Date of 1 July 2022:

The Commission recognised that the Decision introduces:

- many new considerations;
- consequential time recording provisions;
- the requirement to make many associated calculations; and
- the possible need to make adjustments to the pay slip advice and earnings of pieceworkers.

This is the case even if the amendments we suggested are implemented. However, this would be multiplied many times over if those amendments are not implemented.

In short, the Decision will cause a significant change to the way employers will recruit, dismiss, monitor, record, analyse, supervise, manage and remunerate their pieceworkers, if they are to comply with the new draft clause 15.2.

Accordingly, the Decision will require employers to design, construct and implement comprehensive and cost-effective 'smart' systems, employ new employees or at the very least train current employees, to be able to ensure they comply with draft clause 15.2. Not to do so would make the new requirements impossible and result in employers being not compliant. To do so will take time.

The development of smart systems will require employers to investigate and assess systems and technological options, implement supporting processes and infrastructure and integrate these systems with existing payroll systems or develop (or source from third parties) and install new systems and software. This will need to be undertaken in an efficient and commercially cost-effective manner, which will again take time.

We strongly submitted that the appropriate operative date of the new clause 15.2 is 1 July 2022, which is logical, realistic and in accordance with the 'default' position under s 166 of the Act.

To require an earlier operative date than 1 July 2022 would be unworkable and would seriously compromise the objective of improving compliance that the Decision aims to achieve.

Fruit Growers Tasmania
2 December 2021

ATTACHMENT

Further discussion on the Commission's consideration of 4 of the criteria in its determinations to meet the modern awards objective.

(c) The need to promote social inclusion through increased workforce participation:
We actually agree with the Commission that this consideration weighs against the variation. In fact, it is the Commission's repeated statement that "It is also likely that underperforming pieceworkers will be dismissed" that we are in most disagreement with the decision.

This decision will knowingly lead to less productive workers being effectively excluded from our industry. At least the Commission is not arguing this is "fair"!

(d) The need to promote flexible modern work practices and the efficient and productive performance of work:
The Commission stated that they "are satisfied that the introduction of a minimum wage floor will promote the efficient and productive performance of work.

We still cannot see how the variation to the Award "will promote the efficient and productive performance of work" and it:

- removes the direct link to productivity for those earning below the minimum hourly rate;
- blurs the direct link to productivity for those earning just above the minimum hourly rate; and
- effectively removes less productive workers from performing work.

(f) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden:
The Commission stated that the variation "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". "On balance we think the proposed variation will increase productivity."

For the same reasons as argued above, and as we argued in our original submission, we are strongly of the view that the variation will decrease productivity, and agree with the Commission that it will increase employment costs and regulatory burden.

Any suggestion that this will increase productivity, except through removing less productive people from the workforce, just makes no sense. Even the less productive workers still contribute to the harvest, and hence to production.

(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:
The Commission stated that "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."

This distinction between the 'national economy' and 'sectoral impact' is an inappropriate and misleading distinction. The primary if indeed the only way an individual industry can influence the national economy is through a sectoral impact.

The Commission further states "We are not persuaded that the variation proposed will have a material impact on the national economy. This consideration is neutral."
There is no requirement in the Fair Work Act provisions for any test of a "material impact".

The Decision will:

- restrict employment growth and perhaps even reduce employment;
- increase costs hence supporting inflation;
- question the sustainability of some growers due to the higher employment costs and regulatory burden;
- reduce performance through reduced production if insufficient 'productive' workers can be sourced; and
- decrease competitiveness through increased costs.