262 Argyle Street
Hobart TAS 7000
Tel: 03 6169 2059
peter@fruitgrowerstas.org.au
www.fruitgrowerstas.org.au

Fair Work Commission

Fair Work Act 2009 (**Act**)

s. 158 – Application to vary a modern award

AM2020/104 – Horticulture Award 2020

Submission of Fruit Growers Tasmania as to draft variation determination in [2021] FWCFB 5554

1. Fruit Growers Tasmania (**FGT**) make this submission in response to the Draft Determination of the Full Bench of the Fair Work Commission set out at Attachment D to the decision of 3 November 2021[1] (**Decision**), in accordance with the directions given in paragraph [586] thereof.

2. FGT appreciates the Commission's aim as stated in the Decision[2] that "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".

3. It is in the context of this aim that FGT offers the following comments on the draft clause, and also the appropriate operative date of the draft clause as mentioned in B of ATTACHMENT D – DRAFT DETERMINATION.

Defining a competent pieceworker

4. The proposed clause 15.2(a)(iii) defines **pieceworker competent at the piecework task** as follows:

> "**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)"

[1] [2021] FWCFB 5554
[2] At [561]

5. In [564] of the Decision the Commission identifies that "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."

6. This clause raises issues of how employees can be reliably expected to demonstrate evidence of prior experience in previous workplaces, whether that experience is in "performing the task", and how employers are to determine the veracity of these claims.

7. FGT submits 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)"

8. 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.

Defining the guarantee of minimum earnings

9. 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."

10. At [574] of the Decision the Commission explains 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."

11. FGT respectfully submits that the suggested application of the minimum wage floor is unreasonable and is not a 'fair and relevant minimum safety net' as required by the Modern Awards Objective in s 134 of the Act.

12. As the Commission itself notes at [467] of the Decision, "Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question."

13. FGT contends that this is not fair from the employer perspective for two reasons, as it:

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

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

14. In relation to incurring an excessive administrative and technical burden, the implementation of the proposed clause would require employers to:

    a) separately identify and record the amount of 'pieces' picked, pruned or otherwise undertaken for every hour of every day for every worker;

    b) cross-match every hour of every worker on every day, with the amount of 'pieces' picked, pruned or otherwise undertaken for every hour of every day for every worker, to determine whether, in any one individual hour, the piece rates that were paid did not meet this test;

    c) identify and make up every individual shortfall in piece rate up to the hourly rate for the pieceworker; and

    d) provide all of this documentation on the pay slip details for each employee.

15. This excessive administrative and technical burden applies to both large and small employers alike.

    a) Larger employers who are members of FGT have, over the weeks of peak season, 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.

    b) 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.

16. The above requirements are in addition to all the other additional administrative activities associated with the new record keeping requirements. They are onerous, and will make compliance more difficult.

17. Piecework 'lumpiness' is a structural issue where the remuneration is concentrated into fewer, larger piecework units, resulting in an uneven distribution of piecework earnings. The result of this lumpiness is periods where the recorded piecework earnings of pieceworkers varies between being less than or greater than the average hourly earnings.

18. 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.

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

20. These burdensome and unfair requirements of draft clause 15.2(f) are contrary to the stated aim of the Commission expressed in [561] of the Decision quoted above, as they manifestly increase regulatory burden, are unfair to the employer and will likely promote non-compliance instead of compliance.

21. Accordingly, and to assist in providing clarity of the intent and application of the minimum wage floor, we propose 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.

22. In addition we propose 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."

23. 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.

24. Further, this amended clause is absolutely in line with the Commission's stated aim in [561] of the Decision, as well as meeting the fairness considerations of the Modern Award Objective.

25. Due to the relevance of the application of the minimum floor rate to the application of the 'Uplift Term', we recommend that the order of 15.2(d) and 15.2(f) be reversed.

Defining the 'Uplift Term'

26. The concept that the piece rate must be set to enable a competent pieceworker to earn 15% more than the minimum hourly rate is covered by the existing clause 15.2(b) of the Award and referred to by the Commission in [3] of the Decision as the 'Uplift Term'. Existing clause 15.2(b) reads as follows.

> **"**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."

27. 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. "

28. FGT appreciates the complexities involved in the existing 'Uplift Term' and the impractical nature of the hypothetical average competent picker. However, the draft clause 15.2(d) must also be clear in its intent and application; capable of being complied with by growers; enforceable by the Fair Work Ombudsman; not burdensome; and fair, if it is to achieve its purpose.

29. Although the Commission in [569] of the Decision states that "The fixing of the piece rate under draft clause 15.2(d) is simpler than under existing award clause 15.2(b)." FGT and its members are concerned 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.

30. As a result, the effect of this clause is contrary to the Commission's stated aim at [561] of the Decision that "The draft clause is intended to make the pieceworker term simpler and easier to understand; to reduce regulatory burden, and to promote compliance".

31. FGT submits 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.

32. Accordingly, and to assist in providing clarity of the intent and application of the 'Uplift Term', it is 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:
>
> - 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.
>
> NOTE: For the purposes of the above calculation, the average hourly earnings of any pieceworker competent at the piecework task can be no less than the hourly rate for the pieceworker as defined in clause 15.2(a)(i), as the employer is required to pay a pieceworker no less than this rate under clause 15.2(f).

33. Accordingly, it is 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. "

34. It may be noted that the above approach is closely comparable to the Commission's own analysis of employer lay witness evidence presented at [319] and presented in Table 2 of the Decision.

35. It is important to recognise a number of desirable features of these proposed changes to the draft clause.

a) It changes the word “enables” to “ensures” thereby creating greater clarity and certainty and hence will ‘promote compliance’; and

b) the full explanation of the intent of the clause through the inclusion of the additional definitions, although by necessity involving a slightly greater level of detail, will also be ‘simpler and easier to understand’;

thereby meeting the Commission’s stated aims in [561] of the Decision.

Operative Date

36. Section 166 of the Act reads as follows.

> **166 When variation determinations setting, varying or revoking modern award minimum wages come into operation**
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> *Determinations generally come into operation on 1 July*
>
> (1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:
> (a) on 1 July in the next financial year after it is made; or
> (b) if it is made on 1 July in a financial year—on that day.
>
> Note: Modern award minimum wages can also be set, varied or revoked by determinations made in annual wage reviews. For when those determinations come into operation, see section 286.
>
> *FWC may specify another day of operation if appropriate*
>
> (2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.
>
> (3) The specified day must not be earlier than the day on which the determination is made, unless:
> (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
> (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

37. As recognised by the Commission throughout, the Decision introduces:

    a) many new considerations;

    b) consequential time recording provisions;

    c) the requirement to make many associated calculations; and

    d) the possible need to make adjustments to the pay slip advice and earnings of pieceworkers.

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

39. In addition, and again as the Commission at [356] of the Decision has recognised "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. It is also likely that underperforming pieceworkers will be dismissed." This in turn not only requires employers to undertake more activities, but to engage employees to undertake these activities and/or train employees to perform these tasks.

40. 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 draft clause 15.2.

41. As the Commission states at [524] of the Decision "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".

42. 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.

43. 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.

44. As an industry association FGT is committed to work with its members to identify and introduce these systems, and support their upskilling to manage them. FGT is also committed to work with the Fair Work Ombudsman to ensure these systems will deliver compliance and to support the Fair Work Ombudsman's compliance objectives.

45. FGT and its members are committed to compliance. As an industry, fruit growing employers want to ensure their employees are appropriately remunerated, and that employers operate and compete on a level playing field. This is considered an important part of the social licence of our industry.

46. But to achieve compliance with the revised requirements of the Award, fruit growing employers need time.

47. Accordingly, FGT strongly submits 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.

48. 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.

DATED: 26 November 2021

Peter Cornish
Chief Executive Officer
Fruit Growers Tasmania