

Summary of Decision

3 November 2021



Application to vary the Horticulture Award 2021

AM2020/104

[\[2021\] FWCFB 5554](#)

1. Background

[1] On 15 December 2020, the Australian Workers' Union (AWU) made an application to vary the *Horticulture Award 2020* (the Horticulture Award) (the Application). The Application seeks to vary clause 15.2 of the Horticulture Award, which deals with pieceworker rates.

[2] 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 entirely contingent on their productivity.

[3] 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.’

[4] 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.

[5] The Application was supported by the United Workers' Union, the State Governments of Queensland, Victoria and Western Australia, Australian Council of Social Service, the Uniting Church of Australia and 88 Days and Counting.

[6] The Australian Fresh Produce Alliance, the Australian Industry Group, the National Farmer's Federation, Fruit Growers Tasmania, Lucaston Park Orchards and Payne's Farm Contracting oppose the Application.

[7] The hearings of evidence took place on 13, 15, 16, 20 and 30 July 2021.

[8] On 3 November 2021, the Full Bench issued a decision in relation to the AWU's claim.

2. The Decision

[9] Consideration of the claims is set out at [13] to [29] of the decision.

[10] Based on the evidence set out in sections 3 and 4 of the decision, the Full Bench made the findings set out below.

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 *Fair Work Ombudsman v Hu (No 2)*¹ and *Fair Work Ombudsman v Hu*²;
- 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 pieceworker³, 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 Working Holiday Makers in particular, earn less per hour than the National Minimum Wage (\$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 15.2.⁴

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.

¹ [2018] FCA 1034.

² [2019] FCAFC 133.

³ See the employer lay witness evidence at [300] of the decision; the McClintock data at [315] to [32]; and the Kelly data at [321] to [326].

⁴ See Dr Howe’s qualitative data at [160] and [164] of the decision; 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].

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 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.⁵

[11] The Full Bench expressed the view that 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. The Full Bench was 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.

[12] The Full Bench was further 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 (s.284). The Full Bench also noted that the requirements of s.157(2) were met. Accordingly, the Full Bench decided to vary the Horticulture Award to insert a minimum wage floor with consequential time recording provisions in clause 15.2.

[13] The Full Bench considered the amendments to clause 15.2 proposed by the AWU in the Application and also an alternative piece work clause proposed by the AFPA, which is set out at Attached F to the decision. The Full Bench acknowledged that the AFPA clause would be an improvement on the current clause 15.2 but expressed the view that the AFPA clause was far too complex.

⁵ Exhibit NFF 1 at [36]

[14] The Full Bench accepted that if the Horticulture Award was varied as proposed by the AWU, significant issues would remain. The Full Bench noted that 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.

[15] The Full Bench set out a draft clause addressing some of the deficiencies in the current clause 15.2 for the consideration of the parties. The Full Bench noted 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, as interpreted by the Federal Court in *Hu (No.2)* and the *Hu Appeal*.

[16] The Full Bench expressed the *provisional* view that it is necessary to vary the Horticulture Award in the terms of the draft clause. A draft variation determination is set out at Attachment A to this summary.

3. Next Steps

[17] The Full Bench issued the following directions to provide interested parties with an opportunity to comment on the proposed draft variation determination and the *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.

This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.

- ENDS -

ATTACHMENT A - 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

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____