

Fair Work Act 2009 s.157— FWC may vary etc. modern awards if necessary to achieve modern awards objective

Review of certain C14 rates in modern awards

Australian Fresh Produce Alliance

(Interested Party)

Reply Submissions for AFPA

1. The following parties have filed materials in relation to the Horticulture Award 2020 (**Horticulture Award**) and the Nursery Award 2020 (**Nursery Award**) – the awards in which members of the AFPA have an interest:
 - (a) Australian Business Industrial and the NSW Business Chamber (**ABI & BNSW**), filed on 3 November 2023.
 - (b) Australian Industry Group (**AiG**), filed on 6 November 2023.
 - (c) Australian Workers Union (**AWU**), filed on 3 November 2023.
 - (d) National Farmers Federation (**NFF**), filed on 3 November 2023.
 - (e) United Workers Union (**UWU**), filed on 10 November 2023.
2. The AFPA responds to the materials filed by those parties.

Horticulture Award

3. AFPA supports the submissions of ABI & BNSW and AiG in respect of the correctness of the *provisional view* to the terms of Horticulture Award.
4. It is apparent that the Level 1 classification in the Horticulture Award is not, and was never intended to be, transitional to Level 2 after a period of time. AFPA relies on its submissions filed on 10 November 2023 in this regard.

AWU "Option 1"

5. The AWU, supported by the UWU, seeks a variation to the Horticulture Award and the Nursery Award in a manner that goes beyond what might be required to meet the Commission's *provisional view* in seeking that the minimum wages are increased for Level 1 and Level 2 employees under the Horticulture Award.

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6. At [5] of the AWU's submissions, it is suggested that such an approach is necessary in accordance with section 157(1) of the *Fair Work Act 2009 (Cth)* (**FW Act**). With respect, this is incorrect. Section 157(1) provides:

(1) The FWC may:

- (a) make a determination varying a modern award, **otherwise than to vary modern award minimum wages** or to vary a default fund term of the award; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

(emphasis added)

7. The AWU's "Option 1" seeks to vary the modern award minimum wages. Such a variation is subject to the provisions of section 157(2), and subsequently subsection (2A)¹ which provide:

(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).

(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.

8. As the note in section 157(2) sets out, the minimum wages objective applies. The minimum wages objective is set out in section 284(1) as follows:

(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

¹ Section 157(2B) appears to be not relevant in this matter.

- (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; 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*.

9. The AWU does not make out that case.
10. The Commission cannot be satisfied on the evidence or submissions before it that making the variation sought by the AWU in “Option 1” is either justified by work value reasons or is necessary to achieve the modern awards objective.
11. The matters set out in paragraph [9] of the AWU’s submissions are not relevant to any consideration of work value reasons or the minimum wages objective. Further, the AWU leads no evidence relevant to any of the factors the Commission must consider in varying modern award minimum wages outside of the annual wage review.
12. As to paragraph [10] of the AWU’s submissions, neither the comments of the annual wage review Expert Panel in the *Annual Wage Review Decision 2022-2023 [2023]* FWCFB 3500, nor the Full Bench in the September Statement, support the variation of the minimum rates of pay in the Horticulture Award for a number of reasons:
 - (a) the Expert Panel was not required to consider work value reasons;
 - (b) the Expert Panel did not consider the minimum rates of pay in the Horticulture Award in varying the modern award minimum wages;
 - (c) the Expert Panel had no regard to the particular kind of work being performed by the employees at Level 1 and Level 2.
13. At paragraphs [11] to [13] of the AWU’s submission, an increase to the Level 2 rate of pay is sought. For the reasons set out above there is no basis upon which the Commission can vary the Horticulture Award in this way. f
14. As an initial matter, the Commission ought to determine that it cannot make the variation to the Horticulture Award sought by the AWU in “Option 1”.

AWU “Option 2”

15. The AWU’s “Option 2” seeks that the Commission vary the Level 1 classification in the Horticulture Award to provide that an employee transitions from Level 1 to Level 2 after 76 hours in the industry.
16. The evidence relied on by the AWU in support of its submissions is largely irrelevant to the variations sought by the AWU and the task presently before the Commission. To the extent that any of the AWU’s evidence is relevant, it does not provide sufficient basis for the Commission to make the variation. The evidence of Carl Phillips in his statements of 10 November 2023 and 1 December 2023 is much more probative and

should be given greater weight that the unsupported opinions of the union officials relied on by the AWU.

17. The AWU relies on the findings of the Fair Work Commission in *Application by The Australian Workers' Union to vary clause 15 of the Horticulture Award 2020* [2021] FWCFB 5554 (**First Piece Rates Decision**) and *Application by The Australian Workers' Union to vary clause 15 of the Horticulture Award 2020* [2022] FWCFB 4 (**Second Piece Rates Decision**). Other than in respect of general observations in relation to the horticulture industry, the First Piece Rates Decision and Second Piece Rates Decision cannot be relied on to support a variation to the classifications of the Horticulture Award.
18. The First Piece Rates Decision and Second Piece Rates Decision dealt with an application made by the AWU to vary the Horticulture Award to provide a minimum rate floor for pieceworkers.
19. Firstly, it is not open to the Commission to determine that the findings in the First Piece Rate case as to “work value reasons” can simply be applied in respect of the matter presently before the Commission, particularly noting the Commission’s conclusions in the First Piece Rate case were limited as follows:

[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).

[emphasis added]

20. The AWU relies on the definition of “pieceworker competent at the piecework task” of 76 hour’s experience in performed a piecework task in clause 15.2(a)(i) which was inserted into the Horticulture Award by the Commission in the Second Piece Rate Decision in relation to the 15% uplift of piece rates in clause 15.2(d). A number of observations must be made about the variations made to the Horticulture Award following the Second Piece Rate Decision:
 - (a) the inclusion of the definition of “pieceworker competent at the piecework task” was a variation proposed at the Commission’s initiative;²
 - (b) the purpose of the inclusion of the definition was to address the findings of the Commission 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...*³
 - (c) the outcome of the variation in the Second Piece Rate Decision is not to guarantee a rate of pay to an employee after 76 hours experience, but rather to provide for the mechanism by which a piece rate must be set;

² First Piece Rates Decision at [561].

³ First Piece Rates Decision at [429].

- (d) in the First Piece Rates Decision, the Commission considered the issue of compliance with the Horticulture Award finding:

[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:

'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.'

[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] ...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.

...

[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) 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. In contrast, draft clause 15.2(d) requires the employer to fix the piece rate at a 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.

...

(footnotes omitted)

- (e) in the Second Piece Rates Decision, the Commission considered:

[99] However, in light of the recent submissions there would be benefit in rewording the minimum piece rate requirement under draft cl. 15.2(d) by reference to the average

productivity of pieceworkers competent at the piecework task. We think this will set the minimum piece rate more precisely and at a level more closely aligned to the rate required under cl.15.2(b) of the Award as it is at present. We will also include a definition of average productivity...

[100] We envisage the process of fixing a piece rate under the reworded cl.15.2(d) will be similar in some respects to that required under the existing cl.15.2(b) as explained by the Court in Hu (No 2) and the Hu Appeal, but will be simpler. It will be simpler because competence is clearly defined and it will generally not be necessary for an employer to contemplate any of the attributes of a hypothetical competent employee other than their productivity. The minimum level of the piece rate will have been met during a pay period if the rate is fixed so that any pieceworker working at the average productivity during the pay period of the pieceworkers competent at the piecework task, will earn at least 15% more than their hourly rate under the Award. If the employer has no competent employees performing the piecework task, the average productivity will need to be estimated on the basis of the productivity of the competent employees available or potentially available to the employer.

- (f) an employee's piece rate earnings may be less than the minimum hourly rate based on their productivity, and in this case, the employer is obliged to provide the employee with payment of at least the minimum hourly rate for the hours worked each day.⁴

21. Paragraphs [20] and [21] of the AWU's submission should be treated with caution. The AWU purports to rely on a finding of the Commission in the First Piece Rates Decision by reference to paragraph [415] of that decision. Paragraph [415] is simply a summary of the submissions made by the AWU in that matter in relation to the issue of payments below the minimum hourly rate for the work.⁵ The conclusion at paragraph [27] of the AWU's submission therefore does not follow.

22. As to paragraph [32] of the AWU's submission, while the Commission in the Second Piece Rates Case was "not attracted" to the proposition that for the purpose of considering the 15% uplift of piece rates, experience with an employer should be considered because:

...such an amendment could result in employers failing to recognise the competence of pieceworkers⁶

the Commission considered the requirement to keep piece rate records could allow an employer to establish the relevant experience of a pieceworker. No consideration or regard was had to employees who are not pieceworkers.

23. The AWU has not established that it is appropriate, and necessary to meet the modern awards objective, that an employee with 76 hours experience in the industry should automatically progress from Level 1 to Level 2.⁷

24. It should also be borne in mind that progression of a piece worker from Level 1 to Level 2 will still entitle to the pieceworker to the 15% uplift (on the Level 2 rates) in accordance

⁴ Horticulture Award clause 15.2(d).

⁵ Similarly, the footnote to paragraph [31] of the AWU's submission is a reference to submissions made by 88 Days and Counting extracted in the Second Piece Rate Decision.

⁶ Second Piece Rates Decision at [74]

with clause 15.2 of the Horticulture Award, where presently a pieceworker earning piece rates at the 15% uplift level is earning above the Level 2 rate in any event.⁸

25. For these reasons, the AWU has not made out a case in support of its “Option 2” and the Commission cannot be satisfied that the variations proposed by the AWU are necessary to meet the modern award objective.
26. APFA accepts, however, consistently with its submissions of 10 November 2023, that if the Level 1 of the Horticulture Award is to be varied to be a transitional level, further consideration should be given as to the necessary amendments to the classification structure, including to Level 2.

Nursery Award

27. AFPA understands the AWU’s primary position to be that the Grade 1A rate of pay in the Nursery Award should be increased to the C13 rate of pay.
28. There is no material, submissions or evidence, before the Commission that would allow the Commission to make the variation sought as the AWU’s primary position.
29. The Commission ought to determine that it cannot make the variation sought by the AWU in respect of the Nursery Award.

Conclusion

30. Primarily, the *provisional view* is not consistent with, nor appropriate to apply to the Horticulture Award and no variation is therefore required.
31. The proposal by the AWU to vary the minimum rates of pay in the Horticulture Award and the Nursery Award is not supported by any cogent evidence or submission that would allow the Commission to be satisfied that such a variation is necessary to meet the modern awards objectives, work values reasons, or the minimum wage objectives.
32. The Commission ought to determine, as an initial matter, that it cannot make the variation proposed by the AWU and supported by the UWU.
33. As to the alternative position advanced by the AWU in relation to Level 1 in the Horticulture Award, the amendments sought to meet the *provisional view* are not supported by the evidence and go further than is necessary to meet the *provisional view* and the modern awards objective.
34. If the Commission is minded to vary the Horticulture Award in line with the *provisional view* the period of transition should be three months experience with the employer performing the task. In that circumstance, the classification structure of the Horticulture Award requires further review to ensure that Level 1 is truly transitional.

Kingston Reid

**Solicitors for AFPA
1 December 2023**

⁸ And presently above the Level 4 rate.

Fair Work Act 2009 s.157 –FWC may vary etc. modern awards if necessary to achieve modern award objectives

Australian Fresh Produce Alliance
(Interested Party)

**WITNESS STATEMENT OF CARL JOHN
PHILLIPS**

I, Carl John Phillips, Chief People Officer at Costa Group Holdings Ltd, of Level 5, 818 Bourke Street, Docklands, Victoria, state:

1. I make this statement based on my own direct observations and knowledge, or on the basis of information provided to me which, to the best of knowledge and belief, is correct.

Background

2. On 10 November 2023, I made a statement in these proceedings (**November Statement**).
3. I have read the Australian Workers' Union's Submissions (**Submissions**) and the statements of Mr Shane Roulstone (**Roulstone Statement**), Mr Anthony Bevan (**Bevan Statement**) and Mr Steven Carter (**Mr Carter**) (collectively, the **Statements**) filed in these proceedings on 3 November 2023.
4. I make this statement in response to the matters raised in the Statements and the Submissions. In this statement I adopt the meaning of the terms I defined in my first statement.

Training

5. At paragraph 23 of the Roulstone Statement, Mr Roulstone states that horticulture workers are typically expected to work productively from the first day or two of their employment.
6. At paragraph 17 the Bevan Statement, Mr Bevan states that the only training that pickers receive is induction training or on-arrival briefings and that the training typically goes on for a few hours and never exceeds one day. At paragraph 18, Mr Bevan goes on to say that pickers usually receive no training beyond their first induction session.

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7. At paragraph 23 of the Carter Statement, Mr Carter states that pickers do not receive structured training.
8. These statements are not an accurate representation of Costa's operations, or the training provided to workers. When fruit pickers commence work for Costa, they are firstly required undertake comprehensive induction training. During the induction, workers are trained in health and safety requirements, fruit picking methodology and technique, quality specifications, facilities management and employment expectations including employment related policies. Where workers' first language is not English other steps are taken to provide support and ensure workers understand the requirements outlined.
9. After the induction is complete and workers commence in the field, they receive ongoing training and coaching. On the job training is largely in relation to picking methodology and technique. In my experience, workers are usually not fully capable of picking fruit immediately after completing induction training. These skills often require refining which is done through coaching and mentoring once they start in the role.
10. Additionally, workers receive ongoing training and education around produce quality and standards and how to pick fruit in order to meet these specifications. It is necessary that this training is provided on an ongoing basis as supermarkets specifications regarding produce quality often fluctuate and the produce can be affected by different factors (for example frost) as the season goes on.
11. With regards to expectations around productivity, Costa does not expect that workers will operate at maximum productivity immediately following their induction. As I set out at paragraph 32 of my November Statement, it can take anywhere between 3 to 12 months for a worker to become proficient in picking any one type of produce. Accordingly, it would be unreasonable for Costa to expect workers to be proficient immediately. For example, Costa does not consider a mushroom picker to be highly proficient until after a period of 12 to 18 months.

Returning Workforce

12. At paragraph 15 of the Roulstone's Statement, Mr Roulstone states that a minority of casual horticulture employees return to their employer each year. At paragraph 16, Mr Roulstone goes on to say that most casual employees will need to move from farm to farm in search of good employers meaning that the majority of casual pickers never develop a mutually productive employment relationship in horticulture.
13. At paragraph 11 of the Carter Statement, Mr Carter states that the majority of workers engaged in harvest roles, move from farm to farm searching for a fair rate but eventually leave the industry within 12 months.
14. These statements do not accurately reflect Costa's experience in relation to return workers and do not provide the appropriate context as to why workers may leave and not return to the industry.
15. When engaging fruit pickers each season, Costa's primary goal is to utilise the greatest number of returning workers as possible. For example, Costa's currently aims for 80% of workers engaged through the PALM program to return from season to season. It is always preferable to utilise returning workers as they usually understand from their previous experience Costa's expectation on safety, quality, employment as well as picking methodology inclusive of Costa's systems and processes.

16. Currently, Costa's aim is for 80% of its workforce to have been employed by or have worked for Costa previously. At the moment, Costa is halfway to meeting this aim across domestic Australian operations with approximately 40% being returning workers. This figure changes depending on what seasons are currently in harvest. For example, in our tomato glass house operations, which is a more consistent workforce, the workforce is made up of approximately 69% returning workers. In the CY24 season we expect to move this number to over 90% with a small number of workers in the long-term PALM class engaged by labour hire.
17. In some instances, fruit pickers engaged by Costa move between Costa Farms. For example, in the past we have had fruit pickers move from Emerald in Central Queensland at the end of the citrus season to Corindi in New South Wales for the start of the berry season. Facilitating the relocation between farms enables international workers, usually either backpackers or PALM workers, to further their skillset and maximise their earning capacity while in Australia.
18. As majority the fruit pickers are international workers, their exit from the industry is typically associated with the conditions attached to their visa. Where the worker is residing in Australia on a Working Holiday Visa, they are required to complete 88 days farm work to extend their time in the country. As a result, these workers tend to leave the industry as soon as they have completed the requisite number of days.
19. PALM workers can work in Australia up to 9 months each year. These workers would usually return to their home country and families at the end of that period, although in my experience, some will return earlier because it is a long time for them to be away from their families and communities. As I set out above, Costa aims to have at least 80% of its PALM workers return each year. Again in my experience, PALM workers will only return for a limited number of years until they decide that they do not want to keep working away from their families and communities.

Cost impact

20. In their Submissions, the Australian Workers Union (**AWU**) proposes that Level 1 employees under the Horticulture Award 2010 (Award) be paid a C13 rate with an increase also to the Level 2 rate of pay, or in the alternative Level 1 employees progress to a Level 2 classification after completing 76 hours work in the industry.
21. An increase to the Level 1 and Level 2 rates of pay or the varying of the Level 1 classification to transitional classification will have a significant cost impact on Costa and other growers. In my experience, growers, including Costa plan their workforces and associated costs and budgeted 6 months in advance with labour making up 75% of Costa's current expenditure. Consequentially, current financial planning has not accounted for the significant cost increases associated with changes to the Level 1 classification.
22. Where the Level 1 classification is made transitional or the rate of pay is increased, Costa will be required to offset the cost impact elsewhere within its business. It is likely that these offsets will be via a reduction in worker numbers. As I set out in my November Statement it is not easy for Costa to pass on cost increases to its customers, and in my experience, end-consumers are unhappy with price increases being passed onto them.

23. The proposed changes will also require companies such as Costa to give greater consideration to cost effective methods of picking such as the use of machinery and automation.



Carl Phillips

1 December 2023