

*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)

#### Submissions in Reply

1. This submission is filed by the Australian Fresh Produce Alliance (**AFPA**) in response to the submissions filed by the Australian Workers' Union (**AWU Submission**) and the United Workers Union (**UWU Submission**) on 25 October 2024 as they relate to the Horticulture Award 2020.

#### AFPA's Primary Position

2. The AWU Submissions (at [6]-[7]) and the UWU Submissions (at [3]) each do not grapple with the views expressed by the Commission that it is not appropriate for ongoing employees to remain indefinitely at the C14 classification.<sup>1</sup>
3. The primary position expressed by AFPA in its submissions of 27 September 2024 is consistent with the *confirmed view*, which as a first proposition identifies that the lowest classification rate in any modern award applicable to ongoing employment should be at least the C13 rate.<sup>2</sup> The remainder of the *confirmed view*, including the mechanics of any transition from a classification rate in a modern award which is below the C13 rate (including the C14 rate) to the C13 rate must be read in the context of, and in conjunction with, this first proposition.
4. In determining its *provisional view* in relation to the Horticulture Award 2020, the Commission has considered the specific nature of the horticulture industry.<sup>3</sup> AFPA's primary position takes into account these matters.
5. At [10] of the UWU Submissions, it is suggested that AFPA's primary position would have the effect that a cohort of workers are "*excluded from the basic safety net of provisions...*". This is simply not the case. The Horticulture Award 2020 continues to apply to this cohort of seasonal workers who remain entitled to (among other things) minimum wages, penalty rates, allowances, overtime rates, and piece rates as set out in the award, and AFPA's primary position is thus not inconsistent with the modern awards objective.<sup>4</sup>

<sup>1</sup> See [2023] FWCFB 3500 at [8] and [173]; [2023] FWCFB 168 at [8]; [2024] FWCFB 213 at [131].

<sup>2</sup> [2024] FWCFB 213 at [7].

<sup>3</sup> Summarised in the Submissions filed by AFPA on 27 September 2024 at [5].

<sup>4</sup> *Fair Work Act 2009 (Cth)* section 143.

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6. The AWU Submissions at [4] suggest that AFPA's primary position cannot be "justified" based on the features of the industry. This was a matter specifically noted by the Commission when it said:

*...We consider that the confirmed view should be applied to this award so as to allow automatic progression from Level 1 to Level 2 in prescribed circumstances. However, there is some difficulty associated with the application of the confirmed view having regard to both the seasonal and itinerant nature of fruit and vegetable picking work and the diversity of skills that might be required to pick different types of crop.<sup>5</sup>*

[emphasis added]

7. AFPA submits that its primary position is consistent with the Commission's analysis of the horticulture industry and represents the prescribed circumstances in which an employee should transition from Level 1 to Level 2, consistent with the *confirmed view*.

### **AFPA's Alternative**

8. The Commission ought not accept paragraph [9] of the AWU Submissions which does not follow the preceding paragraphs and is stated without further explanation.
9. To the extent that the AWU (AWU Submissions at [16]) and the UWU (UWU Submissions at [16]) each submits that experience by reference to a particular crop would be unnecessary or would create more uncertainty and disputation, AFPA submits that given the matters set out and determined by the Commission in the *Piece Rates Decision*,<sup>6</sup> such a submission could not be accepted by this Commission.

### **AFPA's Further Alternative**

10. At [11] of the UWU Submissions, the UWU suggests that employers would structure their recruitment patterns in a way to avoid progression. There is simply no probative evidence of this before the Commission and the Commission should not accept the opinion expressed at paragraph [18] of the witness statement of George Alexander Raphael Roberston dated 25 October 2024 which is given without foundation.
11. In response to paragraph [12] of the UWU Submissions, AFPA notes the comments made by the Commission in confirming the *confirmed view* that the selection of the timeframe for a transitional entry level classification is "necessarily arbitrary"<sup>7</sup> and submits that while a 12 month period in which experience is considered may also be "arbitrary", it is necessary to apply a time limitation to ensure that experience is relevant, proximate, and applicable.
12. The AWU, at [10] of the AWU Submissions does not explain why AFPA's proposed amendments are "*wholly unnecessary*" and ought to be rejected.

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<sup>5</sup> [2024] FWCFB 213 at [131].

<sup>6</sup> *The Australian Workers' Union to vary clause 15 of the Horticulture Award 2020* [2021] FWCFB 5554

<sup>7</sup> [2024] FWCFB 213 at [29].

## **Conclusion**

13. AFPA continues to press for the primary position set out in its submissions of 27 September 2024.

**Kingston Reid**

**5 November 2024**