National Farmers Federation

The National Farmers' Federation

Submission to the Senate Legal and Constitutional Affairs Legislation Committee on

the *Migration Amendment (Strengthening Employer Compliance) Bill* 2023

21 July 2023

NFF Member Organisations

AGFORCE

ACGC
Australian Chicken Growers' Council

Australian Dairy Farmers

Australian Forest Products Association

ALEC
AUSTRALIAN LIVESTOCK EXPORTERS COUNCIL

ALPA

Australian Organic

AUSTRALIAN Pork

AVA
AUSTRALIAN VETERINARY ASSOCIATION

BEECHWORTH HONEY

CANEGROWERS AUSTRALIA

CA CATTLE AUSTRALIA

COTTON AUSTRALIA

farmers for climate action

GICA
Goat Industry Council of Australia

GrainCorp

Grain Growers

National Farmers Federation | Horticulture Council

KIAA

NSWIC
NEW SOUTH WALES IRRIGATORS' COUNCIL

nsw FARMERS

The Pastoralists' Association of West Darling

PRIMARY EMPLOYERS TASMANIA

ppsa PRIMARY PRODUCERS SA

RGA
RICEGROWERS' ASSOC. of Australia Inc

SHEEP PRODUCERS AUSTRALIA

SoilsForLife

Tasmanian Farmers and Graziers Association
TFGA

Victorian Farmers Federation

WAFARMERS

WOOLPRODUCERS AUSTRALIA

National Farmers Federation

The National Farmers' Federation (**the NFF**) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

Social >

In 2019-20, there are approximately 87,800 farm businesses in Australia, the vast majority of which are wholly Australian owned and operated.

Economic >

In 2019-20, the agricultural sector, at farm-gate, contributed 1.9 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production is forecast to reach $78 billion in 2021-2022.

Workplace >

In 2021, the agriculture, forestry and fishing sector employ approximately 313,700 people, including over 215,800 full time employees.

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 26 per cent of the employed workforce is casual.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 49 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.79 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.

In 1989, the National Farmers' Federation together with the Australian Conservation Foundation was pivotal in ensuring that the emerging Landcare movement became a national programme with bipartisan support.

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Executive Summary

The *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (**the Bill**) will, inter alia:

- Establish new sanctions where a person unduly influences, unduly pressures, or coerces a non-citizen to breach a work-related condition of their visa or accept exploitative work arrangements to meet those conditions.
- Introduce new mechanisms to prohibit a person/business from employing a non-citizen where that person/business has contravened migrant-worker related laws.
- Increase penalties associated with a breach of those and other laws related to engaging migrant-worker.

The Bill responds to the key recommendations of the Migrant Workers Taskforce report in 2019 and longstanding concerns about underpayment and exploitation of migrant workers by unscrupulous business, and related practices such as withholding passports and visas, compelling migrants to participate in work outside their visa restrictions and threatening to report them for breaching their conditions.

The NFF has previously stated its support for the Migrant Workers Taskforce and the recommendations it made in its report, and for the *Migration Amendment (Protecting Migrant Workers) Bill 2021* which lapsed at the dissolution of the 46th Federal Parliament.

The NFF maintains that position in supporting this Bill and its aims to improve work conditions for migrant workers and punish bad actors.

We note, however, that some aspects of the Bill raise questions/considerations with the NFF, including the following:

- The Bill may disproportionately affect farmers and agriculture, given their reliance on a migrant workforce to meet work needs.
- Similarly, we would be wary of the Bill having effect beyond its stated purpose of establishing protections in the employer/employee circumstances.

We encourage the Committee to consider whether the Bill requires amendments to address the sharper end of these concerns and ensure it is clearer and effectively targets exploitation of migrant workers.

In addition, the NFF calls for the government to consider introducing educational or guidance programs to ensure employers — including farmers — understand their obligations under the new regulations and hence can comply. If the government aims to lift compliance, then, in addition to passing new laws, it should be mindful of practical aspects of enforcement and education. This essential work is too often ignored or under-resourced in the rush to create new laws, an exercise which is largely futile (at best) without adequate education and enforcement.

Migrant Workers and the Agricultural Industry

The capacity to engage overseas workers is of paramount importance to the agricultural sector. Indeed, while it is rote to say that industry would prefer to hire locals, the reality is that Australian farmers are more-or-less dependent on migrant workers. Despite the fact that farming and farmers are generally held in high esteem by the general public, many Australians do not look favourably on agricultural work. And while the sector has and will continue to support programs to cultivate a sustainable domestic workforce[1], it is not entirely hyperbolic to say that, at least in relation to lower skilled work, those efforts are "pushing against the tide".

Part of our challenge lies in the fact that many agricultural roles are seasonal and transient, a fact which means that the roles may not lend themselves to steady, long-term work or a secure income. Another part of the problem is that most of agricultural jobs are situated in remote, rural and regional areas with lower populations and therefore smaller labour markets which, in turn, means that many roles will only suit workers who are mobile and flexible. But the biggest challenge is probably even more intractable. It is a result of historical forces and shifting cultural and social values. Indeed, the movement away from careers in agriculture is not a new phenomenon. As developed nations have urbanised the average citizen has gravitated away from agrarian to towards specialized technical and white-collar trades. As a result, OECD nations have come to rely on migration programs to supplement their farm workforces. England introduce the first migrant farmworker program in 1945, and today as much as 90% of the United Kingdom's fruits and vegetables are picked and packed by overseas workers. In Canada, the Seasonal Agricultural Workers Program dates from 1966 and draws in workers from the Caribbean and Mexico, and the USA relies heavily on seasonal agricultural workers from Mexico.

COVID served as a severe case study in what happens when that pool dries up. Over 2020/21, with an historically high unemployment rate and Australian farms *begging* for employees, the solution seemed obvious: displaced Aussies workers should take up farm work. In principle, there was no reason why a redundant waiter or baggage handler — not to mention a chef or airline pilot — shouldn't take up work picking mangos, driving harvesters, or cleaning shearing sheds. It should have been a 'win-win' proposition, and the NFF was vocal in promoting that solution. However the (in retrospect, not entirely surprising) reality was that displaced Aussies were reluctant to leave the cities and suburbs, to relocate to rural and regional Australia to perform physical work in what are (to the broader community) non-traditional working hours.

This reliance on overseas labour means that agriculture needs to be especially sensitive to issues and phenomenon effecting the migrant workforce. It follows that

[1] Greener Future.

we condemn any practices, isolated or endemic, which seek to deprive workers of entitlements or deny them their rights. We further oppose any use or violation of the visa system that would breach limitations on the right to perform paid work in Australia or any other visa conditions. We are aware that agriculture has been identified as a priority industry for addressing the issue of migrant worker exploitation. As the national peak body representing Australian farmers, we are fully prepared to continue engaging with the government and other stakeholders to ensure that all reasonable steps are being taken to address these and related concerns in a timely and proportionate manner.

Indeed, recent steps that the NFF has taken to collaboratively raise the issue of migrant worker exploitation and ensure that all agricultural workers are granted their full rights and entitlements include:

- Staunch support for the 'Fair Farms' program, the horticulture industry owned[2] workplace/social compliance training and certification program.[3]
- Ongoing engagement with government and other stakeholders to develop a national labour hire regulation framework.
- Ongoing work to address worker mistreatment and exploitation through the NFF Workforce Committee and Horticulture Council.
- Consistent calls for adequate resourcing of enforcement bodies such as the Fair Work Ombudsman and the Australian Border Force.

Indeed, the NFF has also been actively engaged in the Agricultural Workforce Working Group (**AWWG**) that was established at the 2022 Jobs and Skills Summit. As part of that process we joined the Federal Government, the Unions representing farmworkers, and other industry bodies to decry migrant worker exploitation.

> *The Working Group acknowledges that temporary migrant workers are vulnerable to exploitation, including by unscrupulous operators. This is due to cultural and language barriers, low awareness of workplace rights and entitlements, visa requirements that make them dependent on employers and barriers to accessing assistance. Combined with a strong desire to stay in Australia, this creates a power imbalance between workers and employers.*
>
> *Reports of exploitation negatively affect the ability of the agriculture and its processing sector to attract and retain workers. The reputation and social license of the agriculture and its processing sector more broadly can also be negatively impacted. Ensuring all workers are treated fairly promotes a level playing field for employers who do the right thing, supports attraction and retention, and has positive flow-on impacts at the individual, family, community and industry levels.*
>
> *The Working Group considers that Australia's migration system should be designed to better protect and prevent the exploitation of migrant workers, including by being*

[2] and Fair Work Ombudsman supported.

[3] Fair Farms - https://www.fairfarms.com.au/

simpler and easier to navigate and supporting enforcement and compliance activities against those who seek to exploit migrant workers.

Support for the Bill

With that context, it goes without saying that the NFF welcomes measures to reinforce migrant worker protections. We support positive moves to penalise those who engage in mistreatment of visa workers, and misuse and abuse the migration system. And we support measures which will deny persons and businesses with a record of mistreatment any opportunity for further exploitation by denying them the capacity to engage migrant workers.

It follows that we are broadly supportive of the Bill and its objective/intention to deter the exploitation and mistreatment of migrant workers.

Indeed, in addition to the primary moral benefit of protecting vulnerable persons, effective implementation and enforcement of the Bill will have the additional benefit of "leveling the playing field" in the labour marketplace. It will deprive unscrupulous businesses of any commercial advantage they can/could obtain in underpaying workers. With labour costs ranging from 10% to 35% (depending on the sector and size of the farm)[4] of the operating costs of an agricultural business, even relatively small discounts may make a significant difference to the cost of production and the price the farm charges retailers and, by extension, consumers. It follows that farms which achieve illegal discounts to those labour costs have a significant commercial advantage over neighbouring farms which are (incurring higher wage and administrative expense) 'doing the right thing". It is the job and responsibility of the government to ensure that this cannot and does not happen.

In short, the concerns which follow notwithstanding, the NFF supports the passage of the Bill, just as we supported the Migration Amendment (Protecting Migrant Workers) Bill in 2021.

Impact on Agriculture

Our support notwithstanding, the government should be aware and mindful of the impact which the new powers and sanctions which the Bill contemplates may have on individual farming businesses.

Given agriculture's reliance on migrant workers, the exercise of a power to declare a farm to be a "prohibited employer" — and thereby deny them capacity to employ migrant workers — could be devastating. Unlike other (city-based) enterprises who can access domestic workers, if a regional/farming business is banned from engaging migrant workers they may have to cease trading or operate at a highly reduced — and perhaps unsustainable — capacity. While we accept that, alone, this concern is not a reason to object to the Bill in its entirety, it is a matter which the government must bear in mind in the delivery of the Act. It is essential that the

[4] ABARES, *Labour use in Australian agriculture: Analysis of Survey Results 2021–22.* https://www.agriculture.gov.au/abares/research-topics/labour

Minister and his delegates use their new regulatory powers in a considered manner, ensuring that the outcomes are always fair, just and proportionate. Farms should not, for example, be barred from accessing workers for simple, inadvertent payroll misunderstandings which can be easily corrected and are not part of a conscious pattern of conduct. The powers must be used in a way which bears in mind the actual consequences of those powers, and the consequences must be balanced and in keeping with the nature of the contravention. While bad actors must be punished accordingly, those that are trying to do the right thing must be allowed to carry on in their business once their mistakes are corrected and made good.

Furthermore, in principle, the NFF welcomes the introduction of compliance notices as a 'less-punitive' way in which the government can enforce the law and clearly set out conditions which will enable employers to return to compliance. As a general statement, a notice which has legal consequences (if it is ignored) but otherwise provides a clear pathway to good practices is a sensible measure. It can be used to assist employers who are engaging in inadvertent, 'lower-level', or occasional non-compliance without draconian consequences. Of course, we will withhold final judgement until we see the way in which those powers are exercised. If there are used too loosely or without sufficient rigor, then we will be less supportive.

The Role of Labour Hire

We note that labour hire operations present a special case when it comes to migrant workers. In the agriculture sector, labour hire is often utilised to access migrant workers especially to respond to occasional, peak labour requirements. It allows (smaller, in particular) farms to engage workers on a short term basis without having to manage the administrative requirements associated with taking on new employees, requirements which are particularly onerous when engaging the non-citizen workforce. Labour hire allows the business to avoid committing the resources or developing the technical know-how necessary to directly enter into employment and/or temporary work visa arrangements. It also enables ready access to a labour pool in regions where there is a lack of local workforce availability as is common in regional areas. The labour hire operators should manage these arrangements for them. And where the labour hire operators do not properly manage the arrangements then consequences should follow. Those consequences may include, in the case of migrant workers, the sanctions contemplated by the Bill including — in addition to the increased civil and criminal penalties — restrictions on employing migrant workers.

However, we note the potential for labour hire providers to "phoenix" to avoid that consequence. Unlike farmers, who have significant financial and emotional investment into their business, labour hire companies are capable of operating with little if any capital investment or start-up costs. This means, where they are anticipating legal consequences, they may simply wind-up one business and then (re)establish, trading again with a new legal identity, name and ABN. That "structural agility" would make it relatively easy for an individual who is operating a labour hire company which has been declared a "prohibited employer" to dissolve that declared

company, establish a new company, and then get back to exploiting migrant workers.

While it would appear that the Bill enables the Minister to issue prohibitions on an *individual* who runs an employer-business, given the sheer number of small labour hire enterprises and the limited government oversight of the sector, we are concerned about the capacity for operators to hide in the shadows and/or 'slip between the cracks'. As such, while it is perhaps a peripheral consideration in the context of the Bill, we would note that these circumstances highlight once again the need — as was also recommended by the Migrant Workers Taskforce back in 2019 — for National Labour Hire Regulation. The federal government has been promising such a program since before it took office but, disappointingly, has yet to even threaten to deliver in any meaningful way. It is grossly disappointing that the government has spent so much energy on 'worker protections' but has all but ignored this vital reform which has been supported for many years by both sides of government, unions, civil society groups, and industry.

Drafting and Breadth of the Bill

While principally supportive of the Bill and the regulatory measures it establishes, we are concerned that some of those measures lack specifics or detail and could have a practical effect that is broader than intended or warranted.

For example, most of the offences apply where the 'accused person' has coerced, etc, a migrant worker to accept an "*arrangement in relation to work*". There is no detail, either in the Bill or its Explanatory Memorandum, to explain or establish limits on what may be considered an "arrangement in relation to work". On its face, the expression is very broad. An "*arrangement in relation to work*" would probably include, at a minimum, those relating to training, accommodation, and transport. Similarly, the Bill imposes obligations in relation to a person who engage a migrant under "*a contract for services*". That expression refers to commercial (not employment) contracts.

We generally accept the policy rationale for making the ambit of the Bill quite broad, and it may be that the breadth contemplated by the Bill is appropriate. Indeed, as noted above, we are concerned about the principal operators of labour hire (and other) providers escaping liability within a corporate structure. We therefore support measures enabling the regulator to penetrate that "corporate veil" in at least those circumstances. However, we would be wary of the Bill having effect beyond its stated purpose of establishing protections in the employer/employee circumstances and straying into more standard commercial arrangements. While there may be need to cover pseudo-employment to capture avoidance arrangements — and it may therefore not be inappropriate — we think greater care is warranted.

The Bill also applies to dealings and arrangements which have an "*adverse effect on [the worker's] continued presence in Australia*".[5] Again, the phrase is not expressly

[5] E.g. sections 245AAA(1) and 245AYC.

defined, and there is no guidance provided by the Bill or Explanatory Memorandum. The expression is exceedingly vague. Given that the persons effected by the conduct *may* have limited language skills or familiarity with Australian legal and social frameworks, we can accept that tying the consequences to visa status may be too restrictive. And the fact that the outcome (i.e. the adverse effect) has to result from coercing, etc, limits the reach of the expression to generally objectionable conduct. Nonetheless, the use of untested phrases as broad as "adverse effect" and "continued presence" seems, prima facie, ill-advised.

Finally, we note that there is no express limitation on the action which can be mandated in a compliance notice.[6] If an authorised officer reasonably believes that a work sponsor has contravened the relevant laws then they can specify action that the person must take (within a reasonable time) to address the contravention. While the scope of the "action which may be specified" in the notice is impliedly limited (in accordance with usual administrative law principles) by the nature of the alleged breach, it would be preferable for the Bill to expressly state those limitations, especially given there is no requirement for the "authorised officer" who enjoys the power to have any particular skills or qualifications or suffer any consequences for its misuse (intentional or inadvertent).

Lifting Compliance

The NFF notes that the penalties for breach of migrant-worker related laws will increase significantly: Part 3—Aligning and increasing penalties for work-related breaches. We have no objection to this increase, in principle. However, an increase in penalties — not to mention the introduction of new laws — is a futile and meaningless gesture if they are not adequately enforced. As such, the regulatory agencies, including Australian Border Force and the Fair Work Ombudsman, should be encouraged to work in coordination and increase compliance activities.

Clearly, those compliance activities should involve greater investigation and enforcement. However, it should also include enabling an increase in the awareness and understanding of the laws. The government cannot *make* employers comply with laws they do not know or understand. As such, the NFF calls on the government to provide further educational or information services regarding the new provisions and sanctions that this Bill introduces. Businesses need to be appropriately supported to fully understand the provisions and the practical effects it will have on their business and hiring practices, therefore increasing uptake and compliance across all sectors. Additionally, informing migrant workers of their rights and the new provisions will allow workers to feel confident to have conversations with their employers regarding it or report bad behaviour, thus improving compliance and work conditions for migrant workers.

[6] section 140RB — Compliance notices.

Conclusion

As stressed throughout this submission, the NFF supports the Bill and the government's aims in ensuring that bad actors who are taking advantage of migrant workers are properly penalised and/or prevented from hiring further non-citizens. In addition to looking out for and protecting vulnerable people, it is important to ensure that Australian employers are on a 'level playing field' and that the reputation of industry and the nation as a whole are not compromised by the poor treatment of migrant workers by some employers.

Nonetheless, we encourage the Committee to consider the potential for agriculture to be disproportionately impacted by the Bill, given the sector's reliance on international labour.

We would also encourage the government to consider the need to ensure the Bill is effective, including by the post-haste roll out of national labour hire licensing, and the provision of educational materials to ensure widespread comprehension of the new provisions thereby increasing compliance and, ultimately, improved conditions for non-citizen workers in Australia.