National Farmers' Federation

Submission to the Senate Education and Employment Legislation Committee:

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

3 October 2023

NFF Member Organisations

AGFORCE

ACGC
Australian Chicken Growers' Council

Australian Dairy Farmers

Australian Forest Products Association

ALEC
AUSTRALIAN LIVESTOCK EXPORTERS COUNCIL

ALPA
AUSTRALIAN LIVESTOCK & PROPERTY AGENTS ASSOCIATION LTD

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

Corporate Agriculture Australia

Grain Growers

National Farmers Federation | Horticulture Council

KIAA

NSWIC
NEW SOUTH WALES IRRIGATORS' COUNCIL

nsw FARMERS

NORTHERN TERRITORY CATTLEMEN'S ASSOC. DARWIN ALICE SPRINGS NTCA

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 (**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.

Contents

1. Introduction and Summary.

The *Fair Work Legislation Amendment (Closing Loopholes) Bill* 2023 (**the Bill**) includes a number of measures which the NFF can support, subject to their practical implementation. Those changes include the Small Business Redundancy Exemption and Strengthening Protection Against Discrimination. And while it would not appear that amendments to the *Asbestos Safety and Eradication Agency Act* and the *Safety, Rehabilitation and Compensation Act* will greatly impact the farming sector, those changes appear reasonable at least in principle.

The NFF's support extends to the introduction of a criminal "wage theft" provision and increases to penalties for underpayments. However, that support is tempered with frustration at the missed opportunity to introduce a national labour hire licensing scheme — as Labor promised in the 2022 Federal election — and other measures to assist employers navigate the compliance trap which is the Australian industrial relations scheme.

That disappointment notwithstanding, if the Bill consisted only of those measures, then the NFF would be calling for its immediate passage. Unfortunately, however, the Bill is not limited to those sensible reforms and includes a number of changes which our members find deeply concerning.

A new definition of Employment and changes to the meaning of Casual Employee effectively wind back the position as recognised by the High Court, reinstating the approach erroneously adopted by the Federal Court. They will restrict flexibility in managing workplaces and deprive businesses of certainty without any clear rationalisation. And despite assurances that a transition from casual to full/part time employment will not be "self-executing", there is doubt whether at law or in practice its effect can actually be limited in that way.

The Bill will expand the reach, power, and role of unions at a cost to business. They will, inter alia, be able to drive and prosecute the 'casual employee choice' process, approve the repeal of Multi-Enterprise Agreements, apply for 'regulated labour hire' and alternate 'protected pay rates' orders, and prosecute the creation of regulated labour-hire arrangement avoidance measures. Furthermore, union delegates' rights will be enshrined — and in some cases funded by the employer. And most alarmingly, unions will have enhanced rights to enter farms unannounced, potentially intruding on personal privacy and creating biosecurity, animal welfare, and health and safety risks.

The Bill will give the Fair Work Commission power to make decisions reaching beyond traditional workplace arrangements, authorising it — a body established to administer the national workplace relations system and composed largely of

industrial relations professionals — to dictate commercial arrangements. Based on the historical experience,[1] the NFF is very concerned about the implications.

The Bill establishes a regime for dictating pay arrangements in labour hire — and other — circumstances which, despite claims to the contrary, will have a significant impact on the farming sector. It will directly impact large producers who make-up a significant part of the sector, while additional costs which are created within the supply chain — e.g. imposed on storage, packing and processing facilities — will flow down to smaller farms. In addition, the changes will extend beyond labour hire to impact service contract arrangements.

Finally, and perhaps most concerning, the changes generally will increase the complexity and obfuscate the industrial relations system, the risk and difficulty of small business compliance, and inflexibility in managing labour.

Given the raft of problematic aspects to the Bill, and given those problems are fundamental and cannot be fixed with minor amendment or tinkering, the best approach would be to pass a bill featuring only the sensible reforms. The more problematic aspects of the Bil should be abandoned.

2. Sundry reforms in which the NFF sees merit.

Prima facie, measures which avoid the small business exemption from extinguishing the redundancy rights of an employee who — for all intents and purposes — is not working for a "small business" are fair and reasonable. As such, subject to the way the measures are implemented in practice, the Small Business Redundancy Exemption has our support.

We would also support protecting the workplace rights of persons who are victims of family and domestic violence. As such, in principle, we support the Strengthening Protection Against Discrimination reforms. Again, our support is not unreserved, and we will withhold final judgement until we see how they operate in practice. However, in principle, the change is a reasonable measure.

We further note that there are a number of amendments which do not impact on our members in a significant way but are, prima facie, sensible. Initiatives which improve the way in which silica-related diseases are managed, and changes to the legal presumptions applying to first responders appear to have a very limited impact on the farming sector and, as such, are not matters on which the NFF would express a strong view. Save to note that they make sense in principle, we

[1] With the Road Safety Transport Tribunal.

do not take a position on the amendments to the *Asbestos Safety and Eradication Agency Act* or the *Safety, Rehabilitation and Compensation Act*.

3. Extending penalties and punishment for underpayments.

The NFF rejects the 'conventional wisdom', which some seem to delight in propagating[2], that the farming sector is one of — if not *the* — worst perpetrator of 'wage theft'. Indeed, according to media reports the "[s]ectors most at risk include construction, healthcare and social assistance, accommodation and food services and retail."[3] Not agriculture. Nonetheless, we accept that there are incidents of underpayment within the sector and that those incidents are not necessarily isolated. Indeed, many (but not most) farmworkers are members of vulnerable groups and demographics whose linguistic or cultural differences means they can find complaints and dispute resolution processes challenging. Those workers may be more susceptible to exploitation within the industry. Not only is this harmful to those whose entitlements are outstanding, it has caused major reputational damage to the agricultural sector as a whole. It also creates an uneven playing field, as the majority of farm businesses who heed their workers' rights and entitlements are at a commercial disadvantage to those, a small minority, who do not.

As such, the NFF supports penalties which deter underpayments, especially those which punish an employer which makes an informed decision to deprive its workers of rights and entitlements. The increased maximum civil penalties which the Bill features are substantial, but the NFF can support them given the seriousness of the behaviour across the economy. Similarly, the NFF supports the introduction of a "wage theft" offence which conforms to the traditional notions of "theft" and attaches to conduct which is identifiably "criminal". We support the introduction of an offence for intentional underpayments, especially those that would usually be over a sustained period and result in significant losses to the worker(s). That is the standard meaning of the words: "theft" and "thief". The general public would not expect those words to cover unintentional conduct or acts which the employer made in good faith and consistent with their understanding of the law i.e. a *thief* is not a person who fails to pay money which they don't understand they have to pay, even if that understanding is mistaken. This logic holds true for wage payments.

We further note that it is critical that there be just one "wage theft" regime operating across the nation. In addition to creating 'double jeopardy' situations,

[2] https://x.com/Tony_Burke/status/1699686377062047948?s=20. https://www.youtube.com/watch?v=VFjEnxS7M1Q https://x.com/abc730/status/1562738986157629440?s=20

[3] https://www.smh.com.au/money/planning-and-budgeting/unsavoury-and-difficult-instances-of-wage-theft-reach-record-highs-20230207-p5cil8.html

competing Federal and State schemes would create confusion in compliance and implementation. As such, the Federal offence should "cover the field" so that state/territory based criminal offences have no effect to the extent that they apply to the same conduct. Similarly, there should be no scope for concurrent proceedings within the Federal regime. Thus, where a criminal prosecution is commenced, any civil proceedings should be stayed or barred. And where an employer has been convicted of a criminal offence, there should be no scope for subsequent civil prosecution or vice versa. There should also be a mechanism for discouraging the regulator (or unions) from pursuing civil prosecution where a criminal prosecution fails or vice versa. While they are technically different regimes, the conduct under scrutiny is the same. It is therefore unreasonable and arguably an abuse of process if the employer were to endure two sets of proceedings for the same conduct. The regulator should be obliged to elect which form of prosecution is most appropriate and accept the outcome of that election.

Finally, without diminishing from our support for the criminalisation of wage theft, we also need the government to facilitate and enable compliance. And while it may be too much to suggest the government develop a simpler employment and industrial relations regime — see comments below — surely regulation which successfully targets a specific and widely accepted problem is not an outrageous proposition. It is widely accepted that unscrupulous labour hire operators are a significant part of the problem in agriculture. Indeed, in a speech decrying allegations of underpayment in the farm sector, the Minister for Workplace Relations made the point that:

> *I don't blame the farmers for this. I don't blame the horticulturalists themselves, because, principally, they've been paying rates to labour hire firms that they had a right to believe were properly paying people.*[4]

As such, we find it exceedingly frustrating that the government has so far failed to introduce a labour hire licensing system. Unlike many of the more far-reaching and alarming aspects of the 'Closing Loopholes' Bill, the introduction of a labour hire licensing regime was an election promise:

> *Labor will protect labour hire workers by establishing a national labour hire licensing scheme to regulate the labour hire industry.*[5]

Nonetheless, just like previous governments, Labor continues to delay, kicking the policy down the road, notionally in pursuit of a unicorn it calls 'harmonisation', and using — of all things — a need for consultation as an excuse for inaction. It is

[4] Commonwealth of Australia. House of Representatives. (28/11/2022). *Parliamentary Debates. (Official Hansard).* Accessed at https://aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/25523/&sid=0200

[5] https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf at p32.

galling to be a frequent target of impassioned outrage from a government which has so far failed to do the one thing which it promised to do, which could make a difference to our sector, and which we have been calling for *ad nauseum*.

4. Increased complexity and the risk of employing.

Non-compliance is inarguably a problem within the Fair Work system, just as it is within every regulatory regime. As indicated above, we support the government taking what are, objectively, severe measures to address the highly objectionable "worst case scenarios". That being said, it remains true that most non-compliance is a result of error or ignorance. As the Minister himself has said, "most underpayments are a mistake."[6]

Farm businesses are subject to a vast and complex array of oversight. This occurs at all stages of the supply chain as well as by every level of government. The burden compounds under the cumulative weight, and the impact on farm businesses is substantial. In addition to Fair Work Act requirements, Farmers who wish to engage staff — without outsourcing to labour hire or contractors — must be aware of the relevant Work Health and Safety Act and Regulations and any applicable codes, together with Income and Payroll tax requirements, state and territory employment laws (e.g. long service leave), and frequently laws, codes and contractual obligations relating to the engagement of migrant workers. However, those requirements are relatively simple when compared to the Federal Industrial Relations scheme, which expects a business to be at least familiar with the roughly 1,000 pages in the printed version of the Fair Work Act, 190 pages of Fair Work Regulations, and 61 pages per industrial instrument, each with its varying rates of pay, hours, allowances, penalties, leave and other entitlements. The scope and size of the requirements are stupefying. And, while they may be navigable for large businesses with dedicated management, personnel, finance, and legal teams, they are labyrinthine for a small business where the employer is frequently doing the work of the business in addition to being the HR and Accounts Departments. The pathway to compliance is a maze when it should be a highway. It is a situation which feeds into business planning — and, for example, in a farming context, it has a direct impact on decisions about the type of crops and size of plantings. It frustrates expansion thinking and business planning and creates headwinds for the sector and indeed the economy generally.

With other peak bodies and business organisations, the NFF has called on many (many) occasions for the government to address this complexity or at least meaningfully assist business to navigate it. Instead, it continues to add to the

[6] National Press Club Address 31 August 2023. Accessed here https://www.tonyburke.com.au/speechestranscripts/transcript-speech-national-press-club-thursday-31-august-2023#:~:text=Most%20underpayments%20are%20a%C2%A0mistake.

burden … and then bemoan and wring hands when non-compliance continues to escalate.

It is against that backdrop that the 278 pages of the 'Closing Loopholes' Bill is introduced, which will:

- increase the complexity of key aspects of the industrial relations system e.g. the new regime relating to casual employment, including new employee conversion, dispute resolution, and anti-avoidance provisions.
- escalate the risk and difficulty of small business compliance, including significant increases to penalties, complicate dealings with unions, and change the regimes for using contractors.
- limit flexibility in managing workflow e.g. in addition to complicating the management of casual staff, it will introduce an entirely new regime to deal with interactions with service contractors, the labour hire sector, road transport industry, and workers on virtual platforms.

The latter proposal is particularly ironic (and frustrating) given that businesses often resort to these sources of labour specifically to 'outsource' industrial relations complexity i.e. to minimise engaging with a system which is already too difficult and complicated.

The Bill will also introduce a new definition of employment which effectively winds back the position recognised by the High Court in the *Jamsec* decision, reinstating the erroneous approach adopted by the Federal Court. Rather than the terms of the agreement which the employee was offered and accepted, the focus will be on the "real substance, practical reality and true nature of the relationship" … whatever that means. However, this new definition and the changes it introduced will not have a universal application. The change will apply to some existing fair work relationships and instruments but will not affect accrued rights and will not be retrospective. And its operation will not extend beyond the Fair Work Act i.e. will not affect the "common law", contractual rights, superannuation, tax, WHS, etc. It follows that — as with the "casual employee" regime — this new definition will introduce arbitrariness, confusion and potentially conflict to workplace arrangements. In addition, it will restrict flexibility in managing workplaces, and deprive businesses of certainty without any clear rationalisation.

In short, it is not easy for the average farmer who does not have workplace relations or HR expertise to confidently interpret and apply all of the legal requirements to a particular set of factual circumstances on a consistent basis without ever falling into error. It is frustrating that, while understandably intent on addressing the systemic shortcomings which affect workers, the government has shown little inclination to address shortcomings in the system which impact employers. Instead, it continues to add to those shortcomings i.e. to increase complexity, a complexity which feeds *and* is a significant contributor to the

problems for workers. It is a cycle which victimises both parties, and could only make sense to politicians, unions, and bureaucrats.

5. Inflating the reach and power of unions.

The most striking feature of the Bill is the extent to which it seeks to empower and embolden the trade union movement. Indeed, there are very few elements of the Bill which don't gift unions additional power and influence. Within its first few pages, the Bill authorizes, enables and empowers unions to:

- Drive the 'casual employee choice' process.
- Bring legal action for a breach of the provisions.
- Gatekeep the repeal of Multi-Enterprise Agreements.
- Apply for 'regulated labour hire arrangement' orders.
- Apply for 'protected pay rates' orders.

Naturally, unions will also enjoy the power to prosecute alleged breaches of the new provisions which the Bill establishes. For example, they may prosecute the creation of 'regulated labour hire arrangement' anti-avoidance measures.

It is worth noting that, many of these new powers are not granted to the unions where they are actually speaking on behalf of an aggrieved worker. Indeed, if that were the case — when they expressly represent an individual — a legislative grant of authority to act would probably be unnecessary. Instead, many of these new powers are "at large", so that a union has a much more general right of intervention. They don't need to be responding to an actual complaint of affected workers who are within their membership. They are entitled to take action if they 'cover' the relevant industry irrespective of whether any employees at the relevant worksite are members or have raised any concern. A union may, for example, seek a "protected labour hire arrangement order" not just where they actually represent an employee of the labour supplier or the host business, but where they are "entitled to represent" one of those employees.[7]

In addition the role of union delegates will be enshrined in the legislation. Employers will be obliged to facilitate the exercise of that role and, where they fail to submit to that authority, may be subject to prosecution.

- Union delegates will have an express, explicit legal right to communicate with and represent their members.
- The employer may not (unreasonably) refuse to deal with delegates or hinder/obstruct the exercise of their duties.
- Employers will have to allow the delegate paid time to undertake (delegate) training.

[7] See *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55

Finally, and perhaps most alarming, union rights of entry will be significantly expanded. They may access worksites without notice where they "reasonably believe" underpayments may be occurring. This is a significant and unnecessary expansion to union powers — which was not part of an election mandate or raised at the 2022 "Jobs and Skills Summit" when the balance of the Bill's changes where ventilated. At present, a "permit holder" — i.e. the union representative — may enter any workplace for the purposes of investigating a suspected contravention of the Fair Work Act. Usually, they are obliged to provide 24 hours' notice to the owner of the premises/employer. However, that notice requirement maybe waived where the Fair Work Commission reasonably believes that giving notice would result in the destruction or alteration of evidence of the suspected contravention. The new provision will expand the circumstances in which notice may be waived, allowing entry without notice where the Union satisfies the Commission that they (the Union) believe the contravention involves an underpayment.

This establishes a low bar for entry without notice and is a substantial expansion to union powers. It has the potential to create significant risk, not just for the Union Member's own health and safety — given that they will be entering spaces occupied by unpredictable livestock, dangerous chemicals, heavy machinery, etc — but also for the welfare of skittish and/or timid animals in the premises. They are also creating a significant biosecurity risk where they enter without notice and are therefore unaware of biosecurity precautions which supervised visitors are required to take. If the farm is unattended, they will "explore" the premises unsupervised, potentially unaware that they need to use (for example) washdown facilities before and after leaving. If, prior to entering the farm — perhaps at a neighbour's property when they walked through waste — they may have picked-up a pathogen, which they will unwittingly distribute through the farm in the course of their wanderings.

It is also worth making the point that very often the farm is a family home. While the rights of entry do not enable the permit holder to access a premises that is used "mainly for residential purposes" there is no sharp distinction between the part of the farm which is used for business and that part of the farm which is "mainly residential". We refer not just to the home office — or the kitchen table — where the admin and bookkeeping is done, but to the dam which may be used by the kids for swimming or the back paddock which serves as a make-shift footy field. Where access is allowed without notice, there is no scope to set appropriate parameters and take necessary safeguards in advance of the permit holder entering the premises.

Taken as a whole, these new powers give the unions authority, not just to represent the workers — which is the popularly accepted role of the union — but to broadly regulate the industry to an extent generally reserved for government agencies. Unlike the public service, unions are not answerable to the community and parliament. They are not bound to follow codes of practice or rules for

modelling behaviour. And this is happening at a time when union membership is in historic decline and, in the farming sector, trivially low. According to ABS census data, trade union membership in the agricultural, forestry and fisheries sector in 2022 was, in total, just 1.3%. That's less than half the — still tiny — proportion of farm workers in unions in 2016 of 3.7%[8] and roughly less than one third the rate in 2006[9].

Given both the minuscule — some would say statistically insignificant — coverage within the sector, and the clear historical trajectory, one may query not just the motivation for introducing these changes but the extent to which the new powers can make a meaningful difference in the worksite. This scepticism is fuelled given that the government cut the Fair Work Ombudsman's funding in the 2023 budget by $15.8 million, at a time when some in the union movement are very vocal in their denunciation of that agency[10] and the agency is undergoing an external review.[11] In contrast, the NFF suggests that regulating should be left to the regulator, not to a private-sector body with mixed interests and motivations.

6. Redefining of "Casual Employment".

At present, the Fair Work Act defines a worker to be a "casual employee" largely by reference to the employment agreement which is offered, accepted and binds both employer and worker. In addition, the Act enables the worker to convert to full/part-time where the circumstances warrant the shift. These arrangements have the benefit of clarity and certainty, while balancing each parties' interests.

The new definition which the Bill proposes will introduce a much more amorphous concept. It will define casual employment to be a relationship which is "characterised" by an absence of a "firm advance commitment to continuing and indefinite work" as demonstrated by reference to a number of vague factors including the "real substance, practical reality and true nature of the employment relationship". It shifts the key consideration away from the express agreement of the parties, to emphasize on more nebulous questions of whether there is a "commitment to continuing and indefinite work", the "ability of the parties" to offer/accept/reject shifts, and projections about whether or not future and continuing work is "reasonably likely". In short, at present we have a well-defined and objective test with a result which is easily identifiable to all — i.e. the employment offer and acceptance. With the change we will have a position which

[8] https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/aug-2022

[9] https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6310.0Main+Features1Aug%202006?OpenDocument

[10] https://www.theaustralian.com.au/nation/politics/cfmeu-demand-toscrap-fair-work-ombudsman/news-story/a74f88796724d4dc94a93086aed1125a

[11] https://www.afr.com/work-and-careers/workplace/review-to-examine-fair-work-ombudsman-s-construction-remit-20230509-p5d719

is the subject of the arbitrary views and sentiments of the relevant decision maker — be that a worker, an employer, a union rep, a lawyer, a commissioner, a judge, or someone else — at any given time.

That is a significant concern, given that the natural evolution of a work relationship could affect the factors which determine employment status. For example, a worker who becomes progressively more trusted and more skilled — or is simply available in a tightening labour market — may be offered progressively more frequent or regular shifts. At some point, this could mean that the worker tips — in some post-facto observer's view — from casual to part-time as a consequence of the new definition, thereby changing rights and entitlements without either party's contemporaneous awareness.[12] This could obviously have significant ramifications for either or both parties, especially in terms of back or over-payments, given that the worker will cease to be entitled to the 25% loading but will be entitled to annual and personal (etc) leave.

Business groups have been expressing concerns about the potential for workplace rights and duties to shift as a consequence of the vague and capricious new definition and the way it may or may not apply as circumstances evolve. According to government pronouncements, a change of employment status is not intended to be "self-executing" or retrospective i.e. the employee can "invoke" the definition and notify their employer of their changed status, but until that happens there should be no change to legal rights. However, this will only be the case if the arrangement changes over time i.e. if, in a decisionmaker's judgment, the definition was inapplicable from commencement, then the worker cannot be casual from commencement. More worrying, there is only so much Parliament can do to limit the approach of a Court. While the Bill apparently limits the prerogative of the Fair Work Commission, query whether it can circumscribe judicial power to decide when a legal definition may apply in a given factual situation e.g. where the new s. 15A(5)(d) will operate.[13] Most significantly, the provisions penalise the employer for "misrepresentation", a penalty which carries a reverse onus of proof and very significant fines[14] of, at present, almost $100,000. This means an employer must be very wary of incorrectly characterising the relationship i.e. leading an employee to conclude that they continue to satisfy the definition of "casual employee". It is at least possible that irrespective of whether the employees choose conversion, the employer must treat the employee as full/part-time from the moment the 'casual employee' definition is no longer

[12] For abundant caution, it bears noting that under the current arrangement this employee could (1) negotiate a pay increase given they are in demand and/or (2) request casual conversion under current fair work rights.

[13] Could an "alternative offer of employment" be an offer of more regular shifts overtime, rather than a new role entirely?

[14] And may be prosecuted by a union.

satisfied and, as discussed above, knowing when that may be is in itself a "crapshoot".

Finally, the changes carry severe anti-avoidance consequences — e.g. an employer cannot mislead an employee, reduce/vary hours, change patterns of work, or terminate an employee to minimise exposure to the conversion entitlements. While objectively these provisions are understandable (although see the preceding paragraph) in practice they may limit the capacity of a business to manage casual employment or structure their workers' hours for fear of triggering 'anti-avoidance' consequences (or the threat of prosecution for breach of those the provisions). As such, while understandable in theory, we are concerned that in practice they will effectively problematize and discourage the use of casual employment as a legitimate business tool.

All of this may be acceptable if there was a cogent reason for the change. However, that is not the case. The existing definition, in conjunction with the process for casual conversion, reasonably balances interests and is fair for both businesses and employees. Indeed, there is little take-up of existing casual conversion rights i.e. less than 13% of employees who have been offered casual conversion (under current provisions) have accepted the offer. Instead, the change appears to be ideologically motivated given that the union movement would prefer to abolish casual employment entirely.[15]

7. Enabling the Commission to prescribe commercial arrangements.

The Bill will endow the Fair Work Commission with the power to make decisions in relation to relationships which are beyond its traditional industrial relations remit and expound on purely commercial arrangements.

Most significantly, the Commission will have jurisdiction to establish binding standards for those who work in the Road Transport Industry (**RTI**), as well as those who accept work via web-based platforms. In addition, the Commission will be able to make orders which vary "unfair" terms in service contracts. The Commission will also have jurisdiction to deal with disputes (including those which relate to discrimination, deactivation, and termination) and make orders including reinstatement, lost pay, and costs. In addition, it may introduce "collective agreements" if accepted and agreed to by the relevant union and the business which is covered. More concerningly, the Minister can make regulations which apply to "road transport contractual chain participants" — which may include granting the Fair Work Commission power to confer rights and impose obligations on the supply chain. That is, the Commission may be empowered to

[15] https://www.afr.com/work-and-careers/workplace/casuals-to-get-the-whip-hand-under-labor-s-six-month-conversion-test-20230724-p5dqr5#:~:text=ACTU%20secretary%20Sally,the%20first%20place

make decisions beyond the direct commercial relationship at issue and into other commercial dealings.

The Commission's jurisdiction is not unlimited. For example, the power to deal with service contracts will be limited to contracts below an as yet unspecified commercial value. When issuing Standards for the RTI, the Commission will have to take into account "commercial realities" and the impact on the "contract chain". It will also have to consider the views of an Advisory Group whose chief duty will be facilitating the engagement with workers and the industry. The introduction of those 'guardrails' suggest that the government is very sensitive to the history and fate of the Road Safety Remuneration Tribunal (**RSRT**). That body, which was introduced in 2013 to serve the same purpose as the Commission in this jurisdiction, had the ignoble fate of being disbanded at the demand of the people it was supposed to protect — the owner drivers — who marched on Parliament House to protest the commercial ignorance and naivety of its decisions. The NFF's concern is that these "guardrails" notwithstanding it seems probable that the Commission's decisions will restrict business flexibility and viability — the issue which made the RSRT decisions unworkable, impracticable, and naïve. Indeed, while better than nothing, these "guardrails" tend to demonstrate that the government recognises that the new provisions have capacity to extend beyond the (pseudo) employment context and into largely if not exclusively commercial arrangements.

This prospect is very concerning. The NFF is sympathetic to concerns about commercial relationships being used as a cover to exclude or avoid workplace rights and entitlements. As such, we accept the requirement for measures which prevent Sham Contracting and have not strenuously objected to the changes in the Bill which reverse the onus of disproving the existence of such arrangements.

However, empowering the Commission to regulate and oversight commercial deals goes too far. The Commission is a body which was formed in 2009 to establish minimum terms and conditions of employment and deal with industrial relations disputes i.e. to establish a national industrial relations framework. According to the Commission's website, its members are not from business and don't necessarily have a commercial understanding:

> *Current Commission Members come from a diverse range of **employment backgrounds** including the law, unions and employer associations, human resources and management, and the public service.*[16]

The risk is that it will see any dispute through an employment rubric and introduce concepts which are foreign and do not suit the commercial context, where the mutual understandings and obligations are significantly different. We

[16] https://www.fwc.gov.au/about-us/members-case-allocations (emphasis added).

saw this play out in 2016 with the RSRT. The RSRT failed to recognise the commercial environment in which owner drivers existed e.g. where significant business debt was tied up in a capital investment[17]. It disregarded the broader competitive environment and the realities of running an owner driver business, for instance owner-drivers are prime contractors one day and sub-contractors the next, and a single return trip can involve multiple customers and destinations. The decisions of the RSRT failed to consider fundamental aspects such as part- or mixed-loads, backloading, empty running between loading points, or rates on subprime freight corridors and 'side work' that happens to fit in with the primary contract or task being undertaken. The minimum rates the RSRT introduced did not take this complexity into account and, it was feared, would lead to increased confusion and disputes. Some trucks would have to run empty even when there was viable freight, such as part loads and backloads available because the proposed rates were too simplistic and far too high. The industry saw that this would undermine competitiveness and dilute owner-drivers' autonomy, effectively pricing them out of the market, and forcing a structural shift towards employee drivers. The big fleets would get bigger at the expense of smaller operators, many of whom would lose their business and personal assets as a result.

While the "guard-rails" ask the Commission to *have regard* to these factors, we have little confidence that it – again, an employment focused body – will give them the primacy they deserve. And we are concerned that the changes which the Bill proposes will create these sorts of issues, not just in relation to the RTI, but in relation the 'gig-economy' and more broadly into service contracts.

8. Increasing cost and complexity in relation to "hired labour".

The Bill will enable the Commission to issue a "protected rate order" (**a PR Order**) requiring a 'labour supplier' to pay its workers at a rate which is equivalent to the rate a host business must pay its direct employees under an enterprise agreement (**EA**).

It is difficult to know exactly how many EAs are operating within the agricultural sector. A list of all EAs provided by the Fair Work Commission indicates that roughly 1,500 have come into effect in the "Agricultral Industry" since 1994.[18] A filtered search of the Commission website indicates that it has approved roughly 600 EAs to Agricultural business. And statistics generated by DEWR indicate that there are 149 EAs operating in the Agriculture, Forestry and Fishing sector. It is anyone's guess which figure is accurate, although the latter number seems very low. And while we would not expect it to be all, or even half, of the roughly

[17] trucks, trailers, dollies, sheds/depots

[18] https://www.fwc.gov.au/documents/agreements/resources/agreementsfrom1994.xlsx

87,000 farms operating in the nation, we expect it to be in the upper range of those statistics. For example, a recent survey conducted by AUSVEG[19] indicates that more than one-third of respondents have EAs.

Whatever number is accurate, it is highly likely that the producers with EAs are the largest operators in the agricultural value chain. They will have the largest production volume and processing capacities in the farming sector, especially given many of these businesses are vertically integrated. As such, this change will have a significant impact on the commercial ecosystem in which all (even small) farms operate. There tends to be a high level of integration between the smaller farms and the larger operators; where, for example, a small family farm supplies raw produce to larger corporate farms or processing facilities to process, pack, store, and supply to a retailer, distributor, exporter, etc. If those large firms use labour hire in their facilities — which is quite likely — and that labour hire is subject to a PR Order, then it will pass the cost on to small farmers. In addition, any additional costs which a labour supplier incurs (i.e. in dealings with larger farms and other business) will be distributed across their client base, and therefore borne by small business within the cliental — businesses who will not have adequate bargaining power to refuse the new, increased costs. While smaller farms may not be *directly* impacted, it is clear that the changes would increase their cost and complexity of doing business.

In addition, a host business will have to answer requests from the labour supplier for "specified information" to enable the supplier to establish the rate which is payable under a PR Order. The host must either identify the rate or provide relevant information, and that information must be provided quickly i.e. in advance of the next pay period. Furthermore, a labour supplier's obligation to pay the correct rate under a PR Order is subject to the host providing incorrect information; it follows that where the host provides incorrect information it could be responsible for any underpayment whether as a primary breach to provide information or in the form of a contributory negligence claim.

Finally, while the focus of these provisions appears to be on conventional 'labour hire' arrangements, they will have broader ramifications, extending to service contracts. A reliance on independent contractors is a very common feature of modern farming. In addition to the providers a business may use for professional and technical services — bookkeepers, mechanics, etcetera — a farm may outsource regular work to fencing, harvest, and shearing contractors, etc. And while the Commission may decline to issue a PR Order relating to service contracts if so inclined — and having regard to a list of six described criteria — whether or not it does is ultimately a matter for the discretion of the Commission. It follows that, as much as providing a discretionary exemption,

[19] https://ausveg.com.au/

these provisions make it very clear that the Commission prima facie has jurisdiction to deal with service contracts where, in its view, it is appropriate to do so. In other words, the "exemptions" are a double-edged sword and provide the NFF with little comfort. We remain very concerned that the scheme will go beyond traditional labour hire arrangements to capture commercial service contracts.

Finally, it bears mentioning that labour-hire plays a very significant role in regional and rural areas particularly in labour intensive industries and/or where there are massive seasonal changes in labour needs i.e. there is no standing workforce within the local population to draw labour and skills from during surge periods. While not all businesses may be directly impacted by any change, they may all be impacted indirectly, and that indirect impact will be significant given their disproportionate reliance on labour-hire.

9. Conclusions.

The Bill proposes a number of changes which appear sensible — such as the small business redundancy reforms —and are supported by the NFF. And while we stress our frustration that nothing is done to assist compliance or target known intransigence — e.g. unscrupulous labour hire operations — our support extends to further penalties for the worst forms of underpayment. As an industry, we have long supported criminalisation of wage theft.

However, that support is not without reservation and does not offset our concerns about the more draconian or far-reaching changes. It does not enable the NFF to support the amendments as a whole. The Bill will increase uncertainty and obfuscate the industrial relations system, escalating the complexity and cost of engaging employees and increasing confusion and compliance risk. It significantly increases the influence and reach of unions in ways which are deeply concerning and without counterbalancing justification. It exponentially extends the authority of the Fair Work Commission and empowers it to pronounce upon and determine commercial arrangements. Those problems are fundamental and cannot be fixed with minor amendment or tinkering. For that reason, we encourage the Committee to recommend that the Senate pass a reformed Bill, one which features the sensible reforms and omits the more problematic aspects.