National Farmers' Federation

Submission to the Senate Standing Committee on Education and Employment

on the

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

9 February 2021

Prepared by Thomas Cullen

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

CATTLE COUNCIL OF AUSTRALIA

COTTON AUSTRALIA

FCA
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

PET
PRIMARY EMPLOYERS TASMANIA

ppsa
PRIMARY PRODUCERS SA

RICEGROWERS' ASSOCIATION 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.

1. Social >

There are approximately 85,000 farm businesses in Australia, 99 per cent of which are wholly Australian owned and operated.

2. Economic >

In 2018-19, 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 in 2018-19 is estimated to have reached $62.2 billion.

3. Workplace >

The agriculture, forestry and fishing sectors employs approximately 318,600 people, including full time (239,100) and part time employees (79,500).

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.

4. Environmental >

Australian farmers are environmental stewards, owning, managing, and caring for 51 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.4 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. Executive Summary 7
2. Introduction 8
3. Overview of the Effectiveness of the Current IR System 12
4. Casual Employees 14
5. Enterprise Agreements 16
6. Compliance and Enforcement 20
7. Flexible Work 23
8. Other Matters 26
9. Conclusion 28

1. Executive Summary

This submission considers the current industrial relations model in Australia in light of:

a) proposed changes to the *Fair Work Act* (**the Act**); and

b) key changes that the NFF considers necessary to lift productivity by reducing compliance costs and restoring balance to the workplace relations framework.

Key elements include an overview of the current state of the Australian Industrial Relations (**IR**) system, reflection upon recent reforms (such as the recently concluded review of the modern awards system) and a detailed assessment of key changes contained within the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (the Bill) currently before the Committee, including:

- Changes to the classification of casual employment through the introduction of a new legislative definition of "casual employee".
- Insertion of a new offsetting provision allowing employers who have paid casual loading to employees, who are subsequently found by a court to have been permanent employees, to offset loading already paid retrospectively against leave entitlements.
- Changes intended to make the application and approval process for enterprise agreements more efficient and timelier.
- Introduction of new and increased penalties for underpayment and non-payment of wages, including criminal penalties in serious cases.
- Insertion of new provisions extending the option to issue 'flexible work directions' for certain 'distressed' industries.

The NFF is generally supportive of the proposed amendments and/or accepts the policy basis for the proposed changes.

In particularly, we strongly endorse changes which will resolve the present chaos in relation to the classification of 'casual employment'. Of course, the ideal change would be a firm definition of 'casual employee'. However, the NFF accepts that taken as a whole the package — both the criteria for making and accepting offers of casual employment and the 'double dipping protections — constitutes a reasonable compromise.

Our organisation harbours some reservations in relation to the expansion of penalties for misconduct relating to underpayment or non-payment of wages out of concern that these provisions may be misapplied. Support for increased penalties

is far from universal, and understandably opposed by some of our Members. They may also unfairly target sections of the agriculture industry (such as pastoral producers) where underpayment and non-payment of wages is not a prevalent issue. That said, in principle, we are fully supportive of any changes which would protect workers, act as a deterrent to genuine malfeasance, and punish those who engage in illegal practices in relation to underpayment or non-payment of wages. However, we are more inclined to support measures that aid farmers in addressing underlying factors which will ensure that such breaches do not occur in the first instance.

In the interests of our Membership and our commitment to a strong, prosperous, and fair agriculture sector - underpinned by an efficient and flexible IR system - the NFF supports the passage of this Bill.

2. Introduction

Increasing the productivity of Australian agriculture means making the most out of our available resources: our land and our people.

The National Farmers' Federation has set a goal for the Australian agricultural sector - to exceed A$100 billion in export value by the year 2030. Our strategy for achieving this lofty target, the 2030 Roadmap, is built upon 5 pillars:

1. Customers and the Value Chain
2. Growing Sustainably
3. Unlocking Innovation
4. Capable People, Vibrant Communities
5. Capital and Risk Management

The NFF envisions a future where agriculture is recognised as a rewarding and aspirational career choice for people of all skill levels and backgrounds. We aspire to be an industry that attracts and develops the human capital needed to match the needs of the sector and adapt to the shifting conditions of the future. These will be the leaders, critical thinkers, technical experts, and those who work with skilful hands in the regions of tomorrow.

To this end, it is vital that we strive to attract, develop, and retain phenomenal human talent. Doing so requires an industrial relations system that is flexible, efficient, and fit-for-purpose. It must provide clear and adequate safety nets for employees while also providing mechanisms that account for the extremely broad range of working conditions within primary industries, including agriculture.

A flexible workforce is critical to productivity[1]. Agricultural productivity rates have been consistent over many years, with higher labour productivity growth in Australia than both the United States and Canada. However, our sector faces a number of challenges that need to be addressed if we are to remain competitive in the long term, including high labour costs, inflexible business regulation and a shortage of skilled agricultural workers. For many farm businesses, labour is their single biggest cost. The current workplace relations framework is expansive and broad in reach. In many respects it works as intended, but in others it is uncertain, unbalanced, and labyrinthine – particularly for those who are not comprehensively versed in workplace relations law and the instruments that shape it. It is these elements of

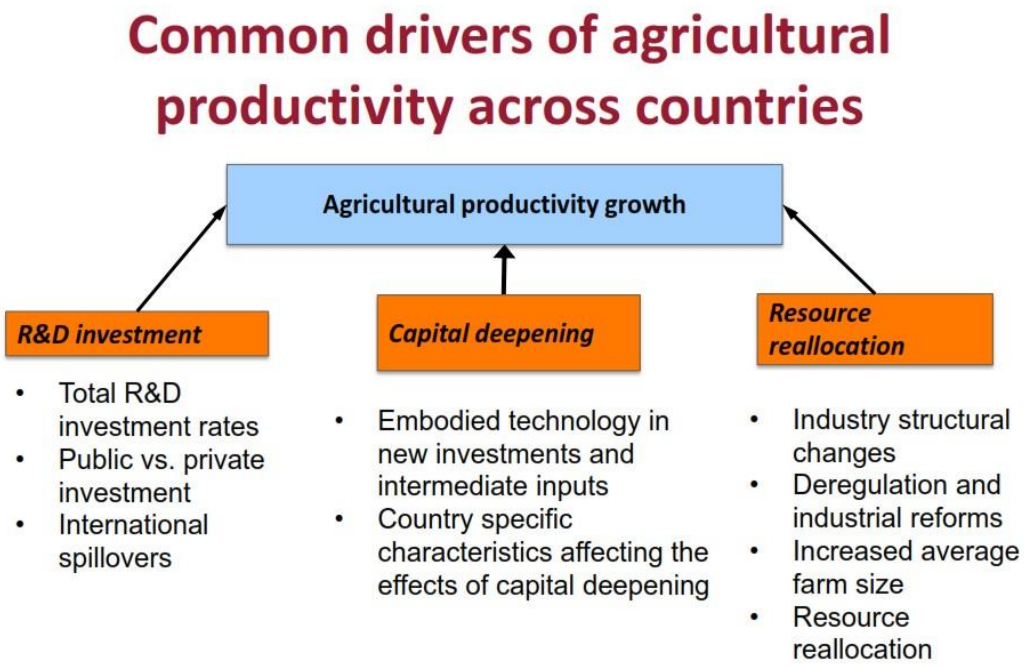
[1] Advisory, Conciliation and Arbitration Service (ACAS) (UK), *Flexibility in the Workplace: Implications of Flexible Work Arrangements for Individuals, Teams and Organisations*, University of Manchester. 2017, https://archive.acas.org.uk/media/4901/Flexibility-in-the-Workplace-Implications-of-flexible-work-arrangements-for-individuals-teams-and-organisations/pdf/Flexibility-in-the-Workplace.pdf

the scheme that are out of balance and require reform, and with which we are most concerned in this submission.

Thriving in an increasingly global and competitive marketplace requires the ability to adapt as things change. Undue restraints on business decision-making impede growth and innovation, while complexity and uncertainty stand to drive up compliance costs and place considerable stress on both employers and employees. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.

Any reform must be both fair and reasonable while also recognising economic realities. Businesses must be able to adapt quickly in response to market signals, while individuals must be empowered through opportunity, underpinned by safeguards to facilitate a decent standard of living for all.

The NFF welcomes the opportunity to present its views on this important amending instrument to Australia's industrial relations framework. This submission follows a number of contributions on the subject of reform and future development of the Australian IR system that the NFF has made in recent years, advising the Government of changes that we consider critical to improve productivity and employer-employee relations in the agriculture sector.



Sheng Yu *Comparing agricultural total factor productivity across countries: the case of Australia, Canada and the United States* 57th AARES Conference, Sydney, 5-8 February 2013

The Productivity Commission has noted that productivity growth "arises from many small, everyday improvements within organisations to improve the quality of

products, service customers better, and reduce costs"[2]. More than any other industry, small businesses in the agriculture sector must account for a large number of highly variable factors in determining how to adjust their business practices and day-to-day operations in order to reduce costs and maintain profitability in a highly competitive buyer's market. This includes broad consideration of volatility of weather and climate, worker availability, and domestic and international market conditions, as well as matters of health and safety, employee welfare, skills training, land management, equipment purchase and maintenance, and business innovation – all of which can be unique to individual farm businesses and properties. As a result, Australian farms make up an incredibly diverse set of workplaces within Australia, with little uniformity present even between those with similar commodity outputs. In addition to this, farms are large workplaces where close-contact supervision of employees is often not possible for long periods. Farms are frequently isolated with a lack of access to services and developed infrastructure, and generally have an approach to work culture that is distinct from that found in other industry areas. This serves to further complicate staffing and IR issues as employment conditions and the nature of work undertaken on each farm are highly variable and access to external support networks may be constrained. Naturally, the added complexity of the employment landscape in agriculture also carries a significant financial cost. These complicating factors makes the task of crafting an IR framework that is universally applicable while also meeting the needs of individual farm businesses (a complex task even in the case of more rigidly structured industries) very difficult indeed.

One way that many farms are seeking to manage the inherent complexities and high costs of employment and IR issues is through an embrace of new technologies and farming practices that incorporate a higher degree of mechanisation and automation. Increasingly, drones, satellite imaging, LIDAR, and AI-assisted data processing are being implemented on farms in a range of roles and utilities – including animal herding and crop surveys, land management, maintenance of boundary lines and equipment, pest control, and monitoring of production outputs. While this has been a major boon for some farmers, these technologies remain highly cost-prohibitive, requiring substantial investment capital that many farmers (particularly those running small businesses or those with very slim profit margins) simply cannot afford at this time.

In addition to investment in research, development and new technologies, a key driver of agricultural productivity is deregulation and industrial reform. It is estimated that coverage by the provisions of the Act extends to approximately 96% of employees within the private sector[3].

[2] Productivity Commission, *Annual Report* 2007–08, 2008.

[3] https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf, p78

The takeaway from this is that economic productivity at-scale is substantially tied to businesses' capacity to act with flexibility and confidence in order to adapt to changing conditions without inadvertently engaging in conduct that is noncompliant or potentially at odds with the principles and provisions of the Act and the IR framework more broadly. An ongoing process of industry consultation and fine-tuning of the legislative instruments and Awards that govern industrial relations is critical to ensuring that conditions conducive to growth and productivity are established and maintained in the agricultural sector.

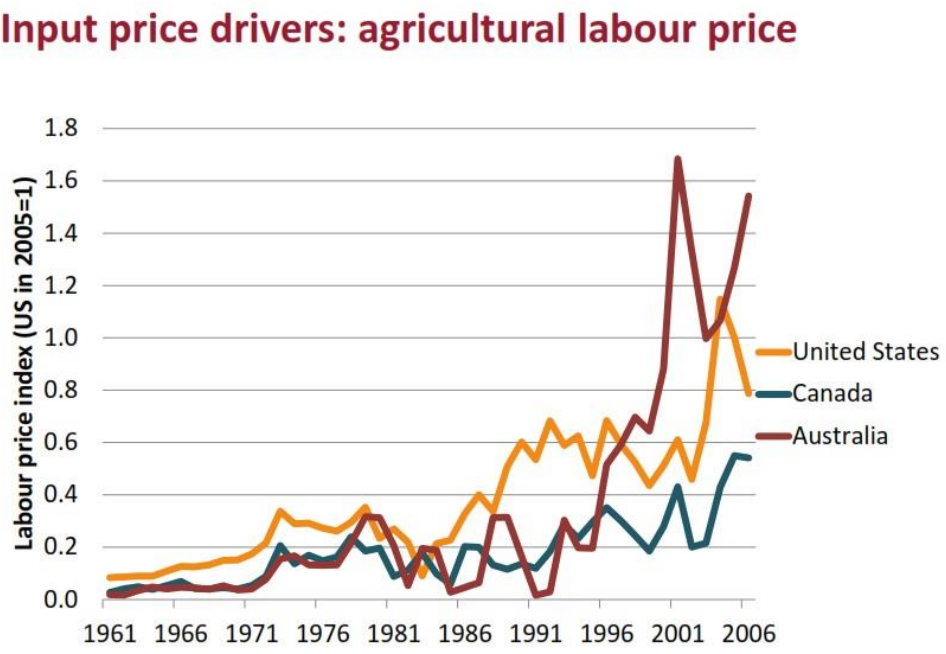
The Bill currently before the Committee contains a number of commendable amendments that address persistent concerns the NFF has raised in relation to key protections and processes legislated under the *Fair Work Act* and the modern Awards system. These will be considered in detail in the sections below. While more can certainly be done to address the specific concerns of our sector, there is little in this Bill that would suggest a negative impact on productivity and IR issues in our industry.

3. Overview of the Effectiveness of the Current IR System

While the Australian IR system has, by and large, been adequate in guiding and facilitating workplace relations in the agriculture sector, there are key areas in which uncertainty and inefficiency are persistent issues.

The Bill currently under consideration was at least notionally generated in the spirit of collaboration and compromise which emerged with the outbreak of the COVID 19 pandemic and its potential ravaging of the economy. Ideally, we will continue to see a shift towards a system that emphasises cooperation and flexibility; mutual agreement over a costly and adversarial approach that minimalizes benefits to either side.

In the agriculture sector, labour cost pressures are especially evident. The agricultural labour price has risen sharply since the late 1990's. Furthermore, as the table below shows labour costs in Australian agriculture are significantly higher than both the USA and Canada.



Yu *Comparing agricultural total factor productivity across countries: the case of Australia, Canada and the United States* 57th AARES Conference, Sydney, 5-8 February 2013

It is exceedingly difficult to safely identify total employment in the agriculture sector. Conventional wisdom is that the numbers as a percentage of population have been steadily declining for almost 20 years[4]. However, that "conventional

[4] https://tradingeconomics.com/australia/employment-in-agriculture-percent-of-total-employment-wb-data.html

wisdom" — which is usually derived from ABS data — tends to ignore the growth in the sector over the past half-decade, and may omit important cohorts of workers such as migrant labour, on-farm support (e.g. contract and labour hire) labour, and undocumented (including illegal and uncredited family) workers, so should be treated with considerable scepticism. Nevertheless, economic push-factors relating to the cost of hiring and maintaining a large workforce are no-doubt driving some employers to invest in technologies that reduce their reliance on farm labour. The remaining small and family-owned farms who cannot afford to invest in technological stopgaps have/will simply remove themselves from the IR system altogether by hiring no employees at all. This can lead to high levels of stress and risk of injury that places significant pressure on individuals and families within an already taxing industry. Regrettably, the nation's farmers continue to be one of the most high-risk demographics for work-related injuries and fatalities, mental health issues, and suicide. This may be considered one of the hidden costs of ongoing inadequacies of the current IR system.

In addition, farmers face additional financial pressure as a result of their position at the very beginning of the supply chain. Every cost passed down the supply chain affects farmers' terms of trade, with cumulative increases threatening the viability of primary production. For this reason, even more so than in other industries, small regulatory adjustments in the IR framework which make it easier to operate a business can make a large difference in overall farm profitability and productivity. Of course, the converse is also true: adjustments which make it more difficult for business to operate will place proportionally greater pressures on farms.

Ultimately, the objective of any future amendment to the rules governing industrial relations and the employer-employee relationship must be to ensure that excessively burdensome regulations and a lack of flexibility do not hamper productivity and employment growth, while ensuring the system remains fair, balanced, and accessible for both sides. For Australian farms to thrive and remain competitive against comparable overseas markets with lower labour costs, the business environment must support innovation and responsiveness, through a skilled workforce and flexible labour regulation.

4. Casual Employees

Schedule 1 of the Bill inserts a number of provisions concerning casual employees.

Meaning of casual employee

Critically, the Bill aims to provide a legislative definition of 'casual employee' in order to address persistent uncertainties as to the classification of certain workers and the pay and entitlements they are owed. This is a matter of key interest to the NFF, as recent legal disputes have highlighted the vulnerability of the common law definition to reinterpretation, misunderstanding and financial exploitation. As was demonstrated in the recent *Workpac* cases, there is a substantial possibility that employers who have not taken great pains to ensure and reinforce an employee's casual status may be subject to claims for entitlements that could be described as 'double dipping' – i.e. in cases where the employee was paid a casual loading and subsequently claims leave entitlements. Given the already very tight financial margins faced by farm owners, and the fact that labour remains one of the most substantial expenses faced by most farm businesses, this is a very serious and highly troubling consideration.

Even smaller farms — who seasonally employ a large number of casual workers for set periods during the year, frequently on a recurring basis over several years — may run afoul of the common law element (articulated in in *Workpac v Rossato*) of a firm advance commitment as to the duration or the employee's employment of the days/hours the employee will work.

Although still permitting some ambiguity, this provision of the Bill provides employers and employees with a relatively clear understanding of the circumstances in which a worker will be classified as a casual employee. Despite lengthy consideration in numerous high-profile proceedings, the common law definition remains somewhat cloudy and subject to further development. Furthermore, it is incapable of providing employers with long-term certainty that they will not ultimately be accused of withholding entitlements from someone they had genuinely engaged as a casual. In particular, subs (3) and (4) provide surety that patterns of and/or changes to work routines will not run the risk of triggering lengthy and expensive court proceedings.

We note that it is a relatively common practice for casual employees to be engaged as casuals and paid at a casually loaded rate *without* the casual loading being separately identified. For this reason, we seek inclusion of an additional subclause to Section 545A which would read:

"*To avoid doubt, when a person is paid at the applicable casual rate of pay prescribed by the relevant fair work instrument, the casual loading as specified in the fair work instrument is considered as an identifiable loading amount.*"

Prioritising the significance of the original employment agreement in determining casual status is appropriate and aligns with common sense. Indeed, provided it is fully informed and reached without coercion, the agreement should be decisive. An employee should expect that having explicitly agreed to be hired as a casual employee, they will continue to be considered as such in the eyes of the law barring some serious defect or deviation. An employer should also be entitled to rely on that agreement. The present position, which allows a casual to metamorphosises into a permanent employee is a quirk if law which flies in the face of both commons sense and basic principles of business. In such cases, the possibility of conversion to full or part-time work has been provided for under s5.

Orders relating to casual loading amounts

The decision of the Federal Court in *Rossato* made it difficult for employers to offset entitlements supposedly owed to a mis-classified employee by factoring in casual loadings already paid. For many employers, the best approach to protecting against the possibility of 'double-dipping' in such cases would require the inclusion of a restitution clause in an employment agreement that clearly and specifically identifies the amount and severability of any casual loading paid.

To address this, the Bill inserts a new provision that explicitly permits employers who have paid a casual loading to employees who are subsequently found by a court to have been permanent employees, to offset the loading already paid retrospectively against leave entitlements. The NFF strongly support this addition. Farmers should not have to be concerned about contingent liabilities for unpaid entitlements.

Although the effectiveness of these provision in practice is yet to be seen, this is an appropriate companion provision to 15A. It provides employers with an additional safety net for circumstances in which a worker has been genuinely misclassified, allowing for fair restitution that acknowledges the relationship between casual loadings and part-time/full-time allowances and entitlements.

The NFF consider the insertion of these provisions to be fair, appropriate, and practical. They are effective in providing certainty and minimise the risk of accidental misunderstanding and promote an employer-employee relationship built on trust and mutual agreement.

5. Enterprise Agreements

One of the stated aims of the Bill is to drive wage growth and productivity by increasing the number of Australians covered by enterprise agreements. It aims to achieve this by streamlining the agreement-making and approvals process for both employers and employees while maintaining a balance between flexibility and fairness.

Enterprise bargaining in Australia has long been seen as a means of lifting productivity by tailoring employment conditions to the particular needs of the workplace or business.[5] In reality, this objective has often been undermined by factors including the use of template-style agreements, a lack of skill or knowledge in managing workplace relations and/or power imbalances affecting the capacity to deal with aggressive bargaining tactics.[6] As noted in the explanatory memorandum to this Bill, enterprise bargaining under the Act in its current form is too heavily focused on procedural and technical requirements and is not perceived as a practical process for arriving at a mutually beneficial agreement in a timely or cost-effective manner.

The agricultural sector has traditionally not made widespread use of enterprise agreements, with the vast majority of employees being covered under the Awards system. At the conclusion of the September quarter for 2020, just 173 agreements were in place covering 14,900 employees for the entirety of the agriculture, forestry and fishing industries[7]. However, the NFF considers that by restoring the voluntary nature of enterprise bargaining and increasing its attractiveness for employers, the gains in efficiency and balance may yield significant increases to productivity across the sector as a whole. Indeed, wider spread use of enterprise agreements which are tailored to the needs of individual business and their employees would obviously be beneficial not just to farm business and productivity, but also to workers and the economy generally. It must be encouraged.

Changes to enterprise agreements are introduced under Schedule 3 of the Bill.

The 'Better Off Overall Test' (BOOT)

The single greatest obstacle to a greater adoption of enterprise agreements is the BOOT test.

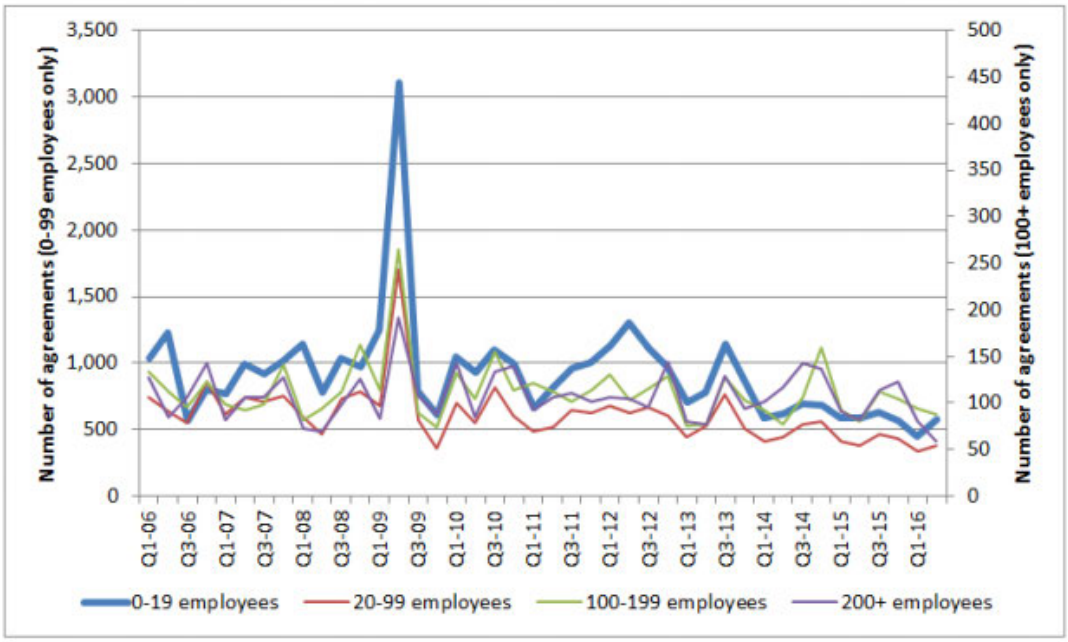
[5] The objects of Part 2-4 of the FW Act include "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits".
[6] Department of Employment and Workplace Relations' Workplace Agreements Database, 1 Jan 2002 – 30 June 2003

[7] www.ag.gov.au/system/files/2020-12/trends-in-federal-enterprise-bargaining-report-september-2020.pdf

The FW Act currently operates to ensure that enterprise agreements can never set base rates of pay that are lower than those set by modern awards.[8] This is a fair and reasonable requirement. Nevertheless, as an additional safeguard intended to protect employees from being put in a disadvantageous position, the Act requires a proposed enterprise agreement to pass the Better Off Overall Test (BOOT): agreements are considered against the employee's current work patterns and benefits. Under the BOOT, employees must be better off overall under an enterprise agreement than they would be under the relevant modern award.

The BOOT sets a higher bar than the 'no-disadvantage test' that applied to agreements made under the former Workplace Relations Act 1996 (before it was amended by the Work Choices legislation). It was not attached to any requirement for increased costs that are necessary to meet the BOOT to be met through innovation or increased productivity. The result was a spike in the making of enterprise agreements, across all industries — and within the Agriculture Forestry and Fisheries sector specifically — between over 2008 and 2010, when the Work Choices framework was in effect with the 'no disadvantage' test.[9] The introduction of the BOOT saw the number of enterprise agreements return to pre-Work Choices rates, with just 4.5% of employees in the Agriculture Forestry and Fishing sector covered by EAs.

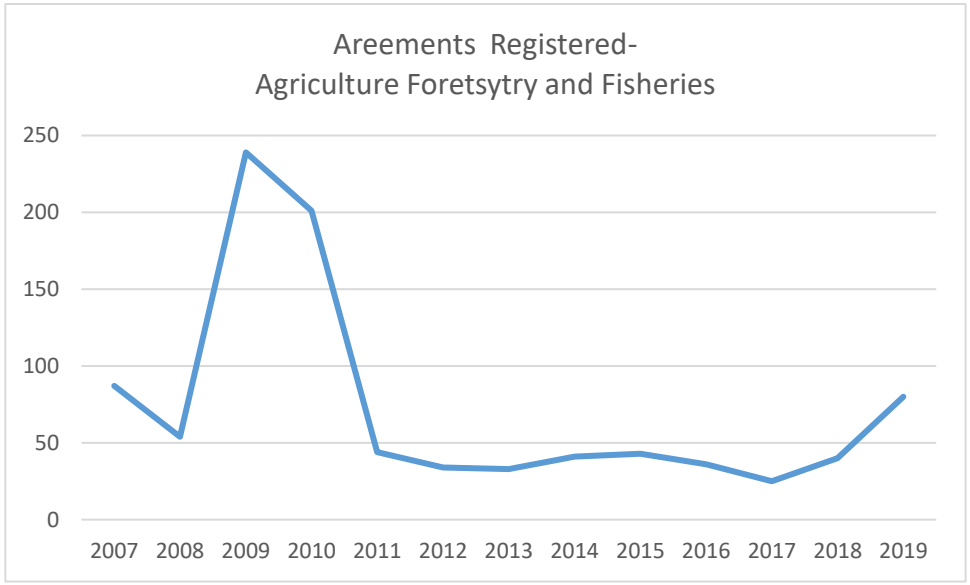
Chart 4: Private sector agreements by agreement size and quarter of approval, 2006-2016



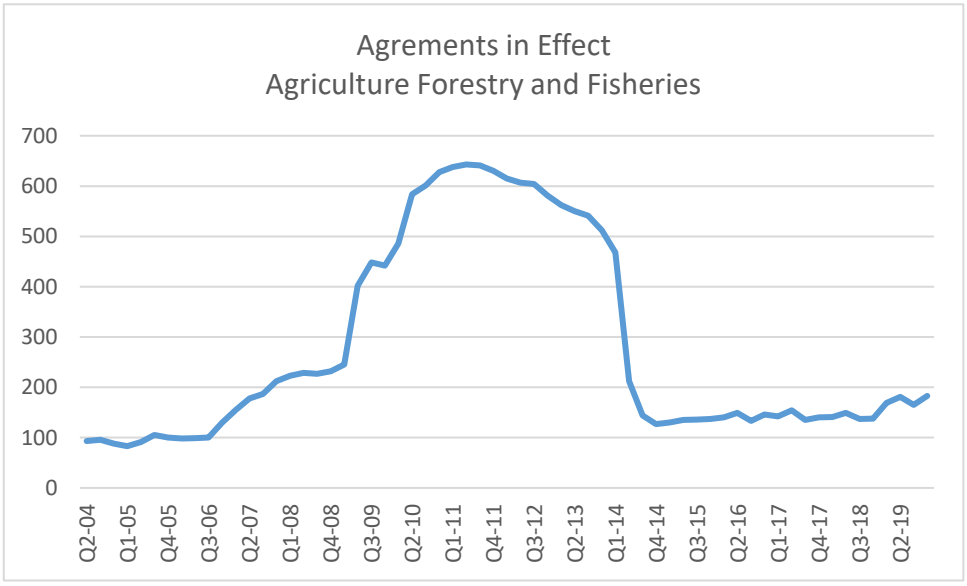
Department of Employment, *Report On Enterprise Bargaining*, February 2017

[8] S. 206

[9] There was a slight surge in EA in 2018/19 as a result of fears about the impact of certain changes the Fair Work Commission introduced as part of the Four Yearly Review of Modern Awards.



Attorney General's Department, private request, data provided 16 June 2020



Attorney General's Department, *Historical Trends data – Current by quarter*, 18 December 2020

Schedule 3, Part 5 of the Bill modifies the application of the BOOT to limit the ways in which the FWC can speculate on patterns of work and forms of employment in order to make an assessment on their current status. This includes an insertion of a new s193(8) which clarifies 'relevant and irrelevant' matters for consideration in applying the BOOT.

Critically, the proposed insertion of s193(8)(b) would allow the FWC to take consideration of the "overall benefits (including non-monetary benefits) an award covered employee or prospective award-covered employee would receive under the agreement when compared to the relevant modern award". The NFF is strongly

supportive of this addition. For many farm businesses flexibility is key when, for example, responding to the needs of their crops or livestock. Similarly, for many agricultural employees working in remote areas or in a specialised sector it may be significantly more advantageous to negotiate non-monetary benefits under an agreement that facilitates a greater degree of comfort, flexibility, and efficiency in how their work is conducted than it would be to simply strive for a greater overall monetary benefit. For example, workers in remote regions who do not have ready access to family or childcare may need to work hours which would otherwise be classified as 'overtime' to enable them to care for children.

The Bill also modifies the 'exceptional circumstances' under which the FWC may approve agreements in the public interest that do not pass the BOOT (to sunset automatically 2 years from commencement).

Factors which the FWC may take consideration include the views of the parties covered by the agreement, the circumstances of those parties and any additional parties who have given notice under subsection 183(1), and the affect that approval is likely to have on those parties, the impact of COVID-19 upon the enterprise or enterprises to which the agreement relates, and the extent of employee support for the agreement as expressed by the voting process under s181(1). The inserted provisions allow the FWC to approve an agreement in such circumstances where, taking account these factors, such an approval would not be contrary to the public interest. This is particularly advantageous given the enormous impact that COVID-19 has had upon ordinary patterns of work across all sections of the economy and is an important step towards acknowledging that enterprise agreements should be functional tools that prioritise mutuality between the parties and the high-demand for flexibility and efficiency in how they are formed.

Pre-approval requirements

Schedule 3, Part 3 of the Bill aims to minimise prescriptive pre-approval requirements for enterprise agreements, which will significantly reduce the investment of time and energy required to negotiate and enter into an agreement, making it a more accessible, and therefore more externally appealing, option.

These amendments, while not as extensive as they might have been, are reasonable and fair changes that trim away arbitrary requirements which do little else but add to the practical challenges of entering into an agreement. The rules requiring that an employer provide employees with a fair and reasonable opportunity to consider whether or not to approve an agreement under s180 have been streamlined and simplified – enabling an employer to focus their efforts only on those relevant employees to whom the agreement will apply. This is massively advantageous for those with large or specialised workforces that work across multiple areas, which is frequently the case in agricultural workplaces.

6. Compliance and Enforcement

As with most other industries, the NFF acknowledges that there have been instances within some parts of the agriculture sector, such as horticulture, and particularly in labour hire arrangements, in which employees have been subjected to underpayment or non-payment of wages. We unequivocally condemn such instances of misconduct.

The NFF accepts that increased penalties for such misconduct (including criminal penalties in the worst cases) are— together with initiatives that assist awareness, increase understanding, and enable proper application of IR rules and requirements — one among many other factors in addressing this issue. However, care must be taken that such penalties are not disproportionate or prone to misapplication in circumstances where reasonable mitigating circumstances exist.

It is important to note that while some improvements have been made to the Awards framework and the IR System more broadly, they remain highly complex prescriptive structures that are often all but impenetrable to employers. Efforts directed at simplification and education would be significantly more effective at improving compliance outcomes in the long-term than simply doubling down on punitive measures after the fact.

Increased civil penalties

Part 1 of Schedule 5 of the Bill introduces amendments to Part 4-1 of the Act to increase the maximum civil penalties that a court may impose for 'remuneration-related contraventions.

The increased penalties are set out in the table inserted at subsection 546(2).

These increases are substantial but — provided they are part of a suite of measures intended to support employers and reduce push-factors towards non-compliance — the NFF can support them. As noted above, underpayment and non-payment of wages do occur in some sections of the agriculture sector. This is particularly so in situations involving labour hire operators, where the obligations of the employer may be less apparent to the farm business. Similarly, farmworkers are members of vulnerable groups, such as working holidaymakers and demographics for whom linguistic or cultural differences can make the complaints process particularly challenging. Not only is this deeply harmful to those whose entitlements to be paid is infringed upon, it causes major reputational damage to the agricultural industry as a whole, and creates an uneven playing field as farm business who do not honour their worker's entitlements enjoy a commercial advantage.

The introduction of an option for courts to order that a penalty may be based upon the 'value of the benefit' of the contravention by the insertion of s546A, although

only applicable in circumstances where the contravening party is a body-corporate, serves the interests of proportionality.

In the interests of preventing future instances of remuneration-related contraventions and ensuring that those that do occur are dealt with in a just manner, the NFF supports increasing civil penalties in line with those changes laid out above. We do note, however, that support for this position is not universally shared by our Membership and that our preference for measures which support farmers to prevent the likelihood of noncompliance in the first instance stands.

Criminal penalties

Part 7 of Schedule 5 introduces provisions criminalising conduct in which an employer dishonestly engages in a systematic pattern of underpaying one or more of their employees.

The substantive elements of the offence are set out in Section 46 of Schedule 5 Part 7. Critically, the key fault element identified in the new offence relating to underpayments is that of 'dishonesty'. Section 42 of Schedule 5 Part 7 defines 'dishonesty'.

The element of 'dishonesty' is considered under subsections (4)-(6). The formula does not appear to include an 'intention element'; that is, did the employer intend to systematically underpay their employee(s)? Although the dishonesty element seems to preclude 'strict liability', and it may be that given an employer needs to know their conduct is dishonest, it is difficult to conceive of a circumstance in which the employer could fall afoul of the provisions without intentionally underpaying. Nonetheless, a note in the provisions to preclude any creative interpretations, either at the bench or from ill-informed employer/employee representative — would provide the comfort and assist with the proper application of the provision.

This element is significant, as it presumably is intended to ensure that criminal penalties will not apply to those who may have inadvertently engaged in remuneration-related contraventions through honest mistake. The NFF would consider criminal penalties in such cases to be excessive. Our understanding is that the mental element of 'dishonesty' effectively imposes requirements for informed knowledge (i.e. that underpayment or non-payment is occurring) and intent before a criminal penalty can be imposed.

In principle, the NFF will not object to the proposed penalties or elements introduced above. That said, it is not clear to us whether "underpayment" is limited to payment of wages or may extend to other entitlement. If for example, it extends to tool allowance, which may occasionally be paid in kind, then the likes of subs(2)(b) and (3) are problematic. Similarly, there is some concern as to whether the amounts referred to in subsection (2) would also extend to non-monetary

benefits negotiated as part of an enterprise agreement or other instrument affecting the terms of the employment relationship. The provision would benefit from further clarification.

7. Flexible Work

Flexible Work Directions

One of the most important set of amendments for the agricultural sector included in this Bill are those relating to flexible work directions introduced through Schedule 2, Part 2.

The introduction of Schedule 2 Part 2 is intended to address the major disruptions to ordinary patterns of work as a result of the COVID-19 pandemic. Accordingly, the provisions are set to cease operation after a period of two years, by which time it can be hoped they will no longer be necessary in this context. Unfortunately, the provision will only operate with respect to "identified awards". That is, awards covering employees of employers in those 'distressed sectors' which the COVID 19 economic downtown has affected most intently. As agriculture is not deemed to be a 'distressed sector' the changes will not impact the agricultural awards, including the Pastoral, Horticulture, Sugar Industry and Silvicultural Awards

It is the NFF's position that this myopic conclusion is too narrow, under-estimating the impact of the virus on the Australian economy generally. Admittedly, unlike restaurants and airlines, farms have not been forced to 'shut down' as a result of the virus. However, COVID-19 has impacted the agriculture sector in a wide variety of ways. The state and international border closures intended to control the pandemic have also had a devastating effect on worker availability in the agricultural sector. In particular, the unskilled and semi-skilled migrant workers who make up a significant proportion of agriculture's seasonal workforce: more than 80% of harvest labour in fruit and vegetable sectors and up to 20% of the workforce in other commodities. The directions would also assist producers and growers to properly manage work flows to ensure they their limited workers can go when and if the business requires.

The pandemic has also had an effect on the way farmers manage supply chains and working conditions in circumstances where many employees share a confined space – such as packing rooms and shearing sheds. It is therefore vital that employers seeking to minimise risk to their employees and businesses are able to act swiftly and decisively to establish conditions in which the risk of infection is minimised, and safety is prioritised, while still allowing for vital work to continue. Issuing flexible work directions is an effective means to provide a workforce with the necessary safety and confidence to do so at short notice, and to keep pace with the effects of the spread of the virus and any Government directions that may follow.

For that reason, it is our submission that the agricultural awards should be included as an 'identified award'. Any concerns that the provision will be abused by farmers are unfounded given that the extensive safeguards written into the provisions at ss 789GZJ to 789GZN. Indeed, the limited scope of the provision means that there is

limited ways that they could actually be abused; e.g. a dairy farmer is unlikely to direct an inseminator to do milking when they would have to pay double what he/she could pay a farm hand for the work

The directions that may be issued take two forms under the amendments proposed in the Bill: 'flexible work duties directions'; and 'flexible work location directions.

Putting aside our concerns that the provisions do not actual cover the farm industry, the NFF does not raise any objection to the substantive content of these provisions.

The new s789GZJ introduces a requirement the direction not be 'unreasonable in all of the circumstances. A further Note provides that 'A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.' Given the wide variety of work performed within the agriculture sector and the range of commitments that individuals may have while working across large areas that may intersect state borders, a more thorough provision as to the limits of 'reasonability' may be necessary.

Additionally, 789GZK provides that a flexible work direction will have no effect unless the employer 'has information before the employer that leads the employer to reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.' Given the requirement for consultation under s789GZL and that a direction be issued in writing under s789GZM, it may be necessary to clarify whether the information before the employer must be set out to employee, either in the consultation process or the written directions. This would avoid circumstances in which a direction is disputed by the employee on the basis that the employee this information is asserted to either not exist or is insufficient to warrant the issuing of the direction.

Beyond the matters raised above, the NFF considers that the amendments introduced under Schedule 2, Part 2 are appropriate for facilitating flexibility and survivability of farm businesses for the period over which they are proposed to have effect.

Individual Flexibility Arrangements

Individual Flexibility Arrangements (IFAs) are an extremely useful tool for employers within the agricultural sector. IFAs enable an employer and an employee, by agreement, to enter into an arrangement to vary specific Award terms – such as overtime and hours of work provisions – provided that the employee is better off overall under the IFA than they would have been under the award.

IFAs are commonly used by grain, dairy, sheep, and cattle producers to enable employers to pay a flat rate of pay for all hours worked which accommodates overtime and other rates/allowances without the need to account for these separately. Currently, the Pastoral Award 2020 only provides for overtime to be

payable once 152 hours have been worked over a consecutive 4-week period. In practice this means that the average Farm and Livestock Hand in the dairy industry working an average 50-hour week (due to chronic skilled labour shortages) will earn ordinary time earnings for the first 152 hours which will occur in the first 3 weeks of the month and then overtime payments for all hours in the 4th week. The IFA enables the payment of a flat rate of pay for all hours worked and effectively evens out the weekly wages. It also saves on bookwork for the farmer.

Clause 5.3 of the Pastoral Award 2020 provides that "a) and agreement may only be made after the individual employee has commenced employment with the employer". In practice, this means that if the employer is planning to offer a loaded flat rate of pay which in reality will be greater than the award minimum the farmer cannot advertise this rate of pay nor offer it to the employee until the employee has already been engaged at the award rate. Many producers struggle to understand having to undergo a needlessly complicated two-step process when a far more practical pathway is available.

The NFF submits that the Bill should include an amendment that would remove or circumvent the requirement under Cl5.3(a), enabling employers to engage an employee and enter into an IFA in a single step. This would yield considerable benefits in the savings of time, effort, and expenditure gained by both employers and employees, as well as improving overall compliance outcomes.

8. Other Matters

Additional hours for part-time employees

The amendments in the Bill relating to additional hours for part-time employees are not intended to apply to the Agricultural awards, and provide for certain other industries to enable flexibility to respond to 'ad hoc' demand.

Part time arrangements are common in the agricultural industry, but casual arrangements are more common due to the rigidity of the award provisions regarding overtime. For example, with regards to the diary sector, the Pastoral Award 2020 provides in clause 10.4 as follows:

> *All time worked in excess of the hours mutually arranged will be overtime and paid for at the appropriate overtime rate.*

Part time and casual employees are commonly engaged for milking which occurs 2 or 3 times per day. Part time and casual employees are also commonly engaged for calf feeding which occurs multiple times per day. The average time for a milking is 2 to 4 hours. Calf feeding varies and may be for shorter periods of time. The Pastoral Award 2020 provides for a minimum engagement of 3 hours (with an exception for secondary school students in the dairy industry) for part time and casual employees.

Part time employees may be needed, without notice, to work in addition to the agreed part time hours in circumstances where there is machinery breakdown or absence of a fellow worker. The chronic skilled labour shortage in the dairy industry means that there is not currently a pool of local skilled workers for the farmer to draw on in such circumstances. Currently, if the part time worker is required to perform extra work outside the agreed part time hours, they must be paid overtime.

The Pastoral Award 2020 does provide for changes in hours to be made by agreement between the employer and the employee (clause10.3) but the application of this provision is unclear and whether overtime payments are still required is also unclear. The practical effect of the award provisions is that employers are discouraged from engaging part time employees in favour of casual employees.

The Explanatory Memorandum states on page xxix as follows:

> *these provisions differ in their complexity and efficacy in meeting the business* ***needs where employers commonly need to respond to ad hoc demand****, especially in service-based industries, and adjust their operations quickly" (emphasis added)*

The agricultural industry is characterised by a high level of small businesses without the resources to devote to enterprise bargaining, so they are effectively unable to build in the flexibilities they need through this process.

The agricultural industry can be characterised as an industry which needs the flexibility to respond to changes in employment requirements quickly and at short notice not unlike the retail and hospitality industries. The status quo is currently not meeting the needs of the dairy industry in respect of part time arrangements.

A significant additional benefit for workers under this arrangement would be that employers will be more able and willing to convert casual workers to permanent part time workers. One of the principal reasons that farm employers use casual employment arrangements is because of the flexibility in terms of work hours which casual employment enables. If part-time hours can also be varied, then this novel advantage of casual employment falls-away. Furthermore, there will be no drawback to this change given that employees must consent to any variations.

The NFF agrees that Option 2 would be the most workable solution for introducing flexibility for the dairy industry, in a targeted and proportionate manner which will assist in reducing reliance upon casual employees. We submit that the Pastoral Award 2020 should therefore be included in the list of proposed awards to which the amendment will apply.

9. Conclusion

In summary, this Bill introduces a number of important amendments to the Fair Work Act that will significantly increase the capacity of employers to conduct business and engage with their employees in a manner that is fair, flexible, and efficient. That it does so is particularly important in light of the fact that all sectors of the Australian economy are facing immense and unprecedented pressures upon their ordinary patterns of business as a result of COVID-19. This has placed considerable pressure upon the employer-employee relationship, and so it is vital that these amendments are passed into law as quickly as feasible.

As has been expressed in this submission, it is the position of the NFF that some of these amendments should be modified so that the full benefits that they enable may be passed on to the agriculture sector. There are also a number of matters that could be further clarified to improve their efficiency in application with only minor changes. The NFF would endorse making said changes in the interests of improving ease and accessibility for employers and employees seeking to familiarise and make better use of these changes – saving time, money, and stress for both sides.

The NFF endorses the Bill and looks forward to further engagement with the Committee on these and related issues in future.