DECEMBER 2008

FAIR WORK BILL 2008

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

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Introduction

1. The National Farmers' Federation ("NFF") represents agricultural employers in all States and Territories, and across all major agricultural commodities. The NFF is the peak national body representing agriculture in matters of workplace relations, and has a long history of industrial advocacy and workplace policy development for farm workplaces.

2. The NFF's current member organisations are Victorian Farmers' Federation, New South Wales Farmers' Association, Agforce Queensland, Northern Territory Cattlemen's Association, Tasmanian Farmers' and Graziers' Association, Australian Canegrowers' Association, Cattle Council of Australia, Australian Dairy Farmers Limited, Australian Dried Fruits Association, Cotton Australia, Ricegrowers' Association of Australia, Sheepmeat Council of Australia and Woolproducers.

3. Australian agriculture has faced many challenges in recent decades, not the last of which has been the worst drought in the country's history. However, national policy issues such as managing our water, climate variability, international trade, infrastructure, global financial turmoil and drought policy have each been central to the future of our vital agricultural industry.

4. The challenge of the agricultural industry's leadership on these issues is fundamentally pinned to the people that make up the sector, including the 320,000 employees employed in the industry. In February 2008, employment inagriculture plummeted to a mere 294,000. This decline represented well over 30,000 workers since 1999. However, notwithstanding climate variability, persistent drought, the global financial crisis and domestic fears

that unemployment would rise, employment in agriculture had increased by 19,000 in August 2008[1].

5. The trough in levels of employment in late 2007 was a driving force behind the NFF releasing its *2008 Labour Shortage Action Plan*, an industry-wide strategy analysing labour and skills shortages on farms, and setting out a pervasive and strategic raft of solutions. The NFF's plan to resolve critical labour and skills shortages is achieving its bold objective of filling an additional 100,000 jobs in agriculture in the next three or four years – but there are still over 80,000 jobs the industry must fill, and Federal Government predictions suggest that 19,700 additional jobs with arise in the next five years, to approach levels of employment in 2002[2]. This aligns with the NFF's research, based on returning to the pre-drought levels of employment in 1999.

6. The competition for labour and skills on the jobs market has meant that the capacity to bargain on the part of employers has become increasingly important. Many smaller farm businesses have plunged into severe hardship, meaning that they rely heavily on flexible arrangements at the workplace, in order to retain staff and maintain a productive workplace.

7. Modern farming has kept abreast of growing and changing consumer demands and global trends in the provision of vital primary produce. The industry requires a new raft of skilled professionals to continue to meet the high standards for which it is well known. The industry must also look at how traditional farm occupations interrelate with the changing needs of modern farming.

[1] ABS Australian Labour Market Statistics, 6105.0, October 2008 – using 85% of the agriculture, forestry and fisheries figure to extrapolate services to agriculture, silviculture and other non-traditional industries included in this statistical category.
[2] Australian Jobs 2008, Department of Education, Employment and Workplace Relations

8. In competing for valuable labour and skills for farm workplaces, the changing nature of family and community life has further advanced the need for greater flexibility from an employee's perspective. Workplaces across the nation continue to experience a broader range of values among employees, many at odds with one another. This is a compelling reason to ensure that modern awards, and a modern safety net, are in fact modern in how they accommodate these diverse values, for both employers and employees.

9. Farm business are presently consumed with red tape, confusion and complexity when it comes to engaging the wide range of staff required in all kinds of agriculture. The confusing industrial relations systems of Australia presents a serious obstacle to agricultural businesses operating streamlined workplace arrangements.

10. The introduction of the *WorkChoices* legislation created significant concerns for rural employers, in that 90 – 95 per cent of farm business are not Constitutional corporations, nor is it ever likely to be in their commercial interests to incorporate yet a predominant number of agricultural workplaces had relied on the federal industrial relations system for nearly 100 years. The concern was minimised with the inclusion of the Federal Transitional Award System (for a period of 5 years) that enabled continuation of federal award coverage for unincorporated entities but those businesses were not eligible to implement workplace agreements. The continuation of federal coverage by unincorporated entities is the priority for the NFF in these submissions. This is a major concern for the industry, and the NFF reiterates its caution to the Federal Government that should harmonisation, fail to occur, *Forward with Fairness* will fail in its primary objective and will have significant cost implications for the agricultural industry.

11. It is noted that, the NFF is a member of the National Workplace Relations Consultative Council ("NWRCC"), and participated in the Committee on Industrial Legislation in October 2008. The NFF provided feedback to the Federal Government addressing the legislation at the time. Our core concerns raised during the Committee process remain.

12. The NFF wishes to address three core concerns with the *Fair Work Bill* 2008 ("the Bill"), focusing on application of the bill, technical concerns and finally, policy concerns. Whilst the bill reflects a generally balanced approach to reforming the national workplace relations system, and the Federal Government has carried out extensive consultation in preparing the draft bill, many concerns of the agricultural industry have not been resolved. Similarly, some provisions will not, in the view of the NFF, achieve their intended policy objectives, based on the current version of the bill. The NFF is therefore pleased to make these submissions.

Application of the Bill

13. The NFF's predominant concern with the Bill is the likelihood that the legislation will not in fact be national if referral does not occur and as a consequence will have significant cost implications and reduce existing workplace flexibility for a large majority of Australian agricultural employers. Further or in the alternative, it may not uniformly apply, if States refer their powers on different terms, or indeed should they elect to alter their position on the legislation into the future.

14. Approximately 90 – 95 per cent of farm businesses operate through unincorporated trusts or partnerships. Following the introduction of the *WorkChoices* legislation, also reliant on s 51 (xx) of the Constitution, the NFF commissioned extensive analyses on the commercial implications of farm businesses contemplating changing to an incorporated entity. The considerable costs, succession planning considerations and general work associated with such a change make this change entirely unviable.

15. The NFF is gravely concerned that the legislation will not only repeat the most fundamental flaw of *WorkChoices* for the agricultural sector, but will potentially cause more severe implications for the industry, if a referral of powers is not unanimous among the States or does not occur. The Federal Government's headline commitment in developing *Forward with Fairness* was the implementation of a truly national workplace relations system.

16. If there is no across the board referral of power and the Federal Government does not maintain the Federal Transitional Award System then a predominant

number of agricultural employers will be forced into a State Award system which in many instances is so inflexible and costly that it could create cost increases up to thirty (30) per cent.

17. The Federal Government's broad statements that neither employers nor employees should be worse off must be construed to capture this kind of negative implication on industry.

18. Consequently, the NFF submits that this legislation, or the savings and transitional legislation, must provide for a lengthy if not indefinite period in which current transitional awards may be maintained, much as they are at present.

19. The issue facing unincorporated entities with existing federal award coverage is a priority concern for the NFF and as such seek the support of the Senate Committee to ensure that there is the maintance of the Federal Transitional Award system if referral does not eventuate in some or all remaining States.

Definitions

Base Rate of Pay and Full Rate of Pay

20. The base rate of pay is established for the predominant purpose of calculating entitlements under the National Employment Standards ("NES") for eligible leave days taken by employees. By contrast, the full rate of pay is relevant to two NES entitlements only, that is, transfer to safe work entitlements, and payment in lieu upon termination[3].

21. The overwhelming majority of pieceworkers are seasonal or casual staff, who do not accrue any of the leave entitlements to whom the definitions of the base rate of pay or full rate of pay apply.

22. Piecework is invariably defined as payment based on output, such as a bin rate in horticulture. It is a consent arrangement between the employer and employee. Piecework rates are calculated such that, based on the ordinary time it takes for any picker to harvest a given number of bins, they can earn a premium amount over those engaged on periodic rates of pay. Employees opting to be remunerated in this fashion typically earn considerably more, as a result of the incentive motivator – the trade off is that they are only rewarded for output.

23. The NFF strongly submits that the legislation should clarify how the base rates of pay and full rates of pay for the purposes of the NES operate with

[3] *Fair Work Bill* 2008 Explanatory Memorandum, p 12

respect to piecework arrangements. Any permanent piecework staff, estimated to be miniscule in number, may simply revert to periodic rates for the purposes of leave, and be paid under NES entitlements.

24. The NFF also considers that the legislation, rather than merely the explanatory memorandum, should clearly stipulate that the base rate of pay is not a safety net for those employees who do not achieve a reasonable harvest and thus fall short of earnings equivalent to the periodic minimum rate.

Definition of Piecework

25. Guaranteed minimum periodic rates in such circumstances would make any bin-based rate of remuneration an incentive-based payment and not a piecework rate. Employers would be unlikely to offer piecework rates if required to bay the minimum periodic rate. Employees greatly value the incentive-motivation of piece rates.

26. The definition of pieceworker at s 21 is insufficient. Legislating that a pieceworker can be defined by a modern award defies the fundamental and clear definition of piecework, in particular as it contrasts to incentive-based payments and allowances. Piecework should be clearly defined in the legislation as work allowing for an employer and employee to agree upon remuneration arrangements based on output, in lieu of *any* periodic rate of pay.

27. Piecework arrangements continue to be the leading incentive for employees. Pieceworkers conservatively earn around $1,000 per week, as opposed to those on periodic rates of pay, who would earn considerably less when paid on an hourly rate for the same work done. Disincentives to pay piecework

rates of pay will inevitably impact negatively on the many employees attracted to those arrangements and concurrently, increase the already serious impact of seasonal labour shortages within many sectors of agriculture, particularly the horticultural sector.

28. Piecework has a lengthy history within the agricultural sector, and is a popular and commonly agreed employment condition in the industry. In fact, shearers *must* be paid as pieceworkers, an arrangement which has been strongly supported by woolgrowers and shearers alike throughout history. Other sectors of agriculture offer piece rates as an alternative to periodic rates, in particular the horticultural sector. Under the current federal *Horticultural Industry Award*, employers and employees can agree that piece rates are paid *in lieu* of *any* periodic rates. They must be paid such that a satisfactory worker can earn 12.5% more than someone working on an hourly rate, over the standard working hours. In reality, pieceworkers often take home twice the amount that those on periodic rates do.

29. The Bill discusses in many parts, in particular, for the purposes of the NES, the base rate of pay and full rate of pay. This is described as relevant to calculating NES entitlements only. Almost all pieceworkers are in fact seasonal and therefore casual staff, who do not have such entitlements. However, the Bill does not clearly define the difference between periodic rates of pay, piece rates of pay and incentive-based payments. Periodic rates are simply conventional wages tied to hours worked. Bonuses are once-off payments given at the discretion of an employer, or in accordance with a specific target being met. Piece rates at all times exclude any fall-back, safety net or other payments. Incentive based payments involve a fixed, guaranteed rate of paycoupled with ongoing and structured bonus amounts tied to output. Incentive based payments are common within the real estate industry, and also exist in a small number of agricultural occupations.

30. The base rate of pay for pieceworkers is the same as the equivalent base rate of pay applying to workers on periodic rates of the same classification. The NFF clearly interprets this to be relevant only for the purposes of calculating leave entitlements, which in almost all cases, do not apply to pieceworkers in any event. It is essential that nothing in the legislation introduces a fall-back payment for workers not earning the equivalent of those on periodic rates.

31. Piecework is predominantly justified on the grounds of incentive, and is a popular and sought-after arrangement in sectors such as horticulture. If the legislation were to consciously or inadvertently require the payment of a minimum fall-back each week, there would be vastly less incentive for employers to agree to piece rate arrangements at all, removing a valued opportunity for workers. It is essential that piece rates are at all times defined as such, particularly given an employee may at any time opt out (and with the employer's agreement, back in) to piecework arrangements. In this regard, it is important to consider the obligation of employers to pay employees to whom a minimum wage order applies *the base rate of pay that equals at least the national minimum wage*. The NFF seeks confirmation that the base *rate* of pay for piece workers will not be deemed an hourly amount for the hours worked, but will remain at all times the amount per output.

32. The NFF further interprets s 294 (2) (a) of the Bill such that the premium afforded to pieceworkers means that the National Minimum Wage does not in fact apply to them. In addition, their take home rates of pay across time are statistically well above the current periodic minimum wage for standard working hours in any event. In essence, s 294 (2) would not apply to pieceworkers under present arrangements.

Terms and Conditions of Employment

Modern Awards – Coverage Terms

33. A modern award should be permitted to cover one or more specified organisations *or industrial associations*, in relation to all or specified employees or employers covered by the award. This reflects the broader stakeholder input that has underpinned the award modernisation process, and provide for coverage of industrial associations, which may not be organisations under the definitions set out within the Bill. It is noted that subsection (c) of the definition of *industrial association* would ensure that an *industrial association* is defined as one where a principal purpose of such an association is "the protection and promotion of [employers'] interests in matters concerning employment and/or independent contractors." The threshhold and applicable test in this regard should be high in order to ensure that only associations with the appropriate competencies, history of involvement and connexion with the industry and employers covered may meet it.

34. Classes of employers covered by a modern award should be ascertainable with reference to the question of whether they employ staff which fall into any of the classifications in a given modern award, performing the tasks and functions envisaged by those classifications.

35. The mandatory stipulation of base and full rates of pay for pieceworkers will collapse, given there is no relevance to casuals, yet the requirement is in place. As highlighted in earlier submissions, this would be more effectively treated by stating that any permanent pieceworkers revert to the equivalent periodic rate for any periods in which calculations for the purposes of the NES are required.

Four Yearly Reviews of Modern Awards

36. The Bill provides for a variation to minimum wages at the four yearly reviews to take place in respect of modern awards. This provision is applies in addition to the annual Fair Work Australia Minimum Wage Determinations, but may only be conducted where *work value reasons* justify it. The NFF is concerned that the criteria to justify such a review exclude aspects such as the value of developing advanced skills, the needs of the economy and most importantly, the capacity of the relevant industry to pay. The nature and objectives of the minimum safety net are considered further in themselves in a subsequent section of these submissions, as well as the section addressing the role of bargaining.

37. The justification criteria for *work value reasons* should contemplate the extent to which the annual wage-fixing function of Fair Work Australia has or has not adequately addressed the need for a further, additional review of minimum wages. More broadly, the threshhold for decisions to proceed with an extraordinary review should be set such that it accommodates only extreme or unusual circumstances.

Enterprise Agreements

38. The NFF believes that the role of bargaining at the workplace plays a particularly vital role in attracting and retaining staff, in a climate of severe labour shortages. Conversely, the role of bargaing is equally as important where there is an abundance or surplus of jobseekers on the labour market, to ensure the maintenance of a safety net and sound terms and conditions of employment.

39. Enterprise agreements give farm employers the important scope to cater to the many and varied needs and wishes of employees and prospective employees, in negotiating and securing valuable labour during severe labour and skills shortages. The spectrum of those needs and wishes makes it imperitive that agreements may contain flexibility clauses. The NFF commends the facilitation of such clauses in Parts 2 – 4, Division 5 of the Bill.

40. In recent years, the NFF has noted many mutually beneficial arrangements between farm employers and their staff, meeting both their mutual and individual needs during drought, which continues to impact on regional and rural Australia. Broadly speaking, the NFF is concerned that any reform to workplace relations accommodates these arrangements flexibly and pragmatically, whilst preserving an important safety net for employees. The NFF strongly submits that the bargaining position of many farm businesses, which are small family businesses, cannot be overstated. Competition with mining, and the labour and skills shortage which continues to impact on most sectors of the economy, only further their bargaining position. The legislation must reflect these realities, rather than relying on outdated assumptions that there is an inequality of bargaining power in favour of all employers.

41. The NFF is concerned with the broad requirements required by s 228 (1) (a) – (e) of the Bill. For instance, in ss 228 (1) (a), the requirement to attend at

reasonable times could be interpreted in a variety of ways – farmers, most of which are small to medium businesses, are often tied to windows of opportunity for shearing periods, harvests, and a myriad of other seasonal restrictions. Furthermore, a large majority are situated in remote locations, making physical attendances at such meetings particularly difficult.

42. The requirement in ss 228 (1) (b) that the parties disclose relevant information is also liable to be broadly interpreted. The NFF believes this should be confined in a more targeted way to information directly relevant to the positions covered by the agreement, and that there should be parallels in the kinds of information and employer and employee are obliged to disclose.

43. The intent of ss 228 (1) (e) appears to ensure full and genuine participation in the bargaining process, rather than using inappropriate tactics as leverage during this time. The NFF is concerned that protected action can jut as easily assume this character, and that employers should be entitled to make any interim arrangements during protected action (not amounting to the permanent replacement of employees taking the action) to mitigate losses to their business. Due to the considerable importance of key seasonal times to many agricultural employers, this would reflect a more proper balance, given the intent of the provisions – that is, to ensure that genuine negotiations and bargaining occur between the parties.

44. Permnanently replacing staff would clearly be inconsistent with good faith bargaining requirements applying to employees engaging in protected action. Mitigating the immediate, short-term interests of farm businesses given their seasonal nature, in no way suggests a refusal to bargain in good faith, nor is capricious, nor unfair in this regard. The NFF subits that the legislation should be drafted more clearly to reflect this, and treat the definitions of ‘capricious’ and ‘unfair’ for the purposes of these provisions. At the very least, the NFF strongly believes that these requirments must be reflected to

apply in a parallel fashion to employers and employees. Furthermore, the NFF strongly believes that there are overwhelming strengths behind the cooperative, community-focused approach of workplaces in regional Australia during times of hardship, which have served all stakeholders infinitely better than the more hostile and adversarial alternatives.

Low Paid Barrrgaining Stream

45. The NFF considers it the policy intent of the Bill in respect of low paid bargaining is to ensure both employees and employers are are encouraged to explore the benefits of bargaining where they have not previously, contribute to productivity and the specific needs of enterprises and to address constraints on the capacity of both employers and employees to bargain.

46. The matters Fair Work Australia must take into account in deciding whether to make a low-paid bargaining order should place a paramount importance on the capacity to bargain, as opposed to a raw comparison of rates of pay within an industry, or across multiple industries. Further, it should focus on incentives for employers to deliver formal training and other benefits, which are likely to assist the low-paid progress along a career path to higher duties. This is consistent with the aim of this section in assisting improvements to productivity at workplaces.

47. There should be a clearer emphasis on bargaining for mutual benefits. As indicated earlier in the NFF's submission, many farm employers are small family businesses, which have frequently been hit by drought, and furthermore, have grappled with chronic labour shortages for some years in many parts of Australia. The NFF notes that the relative bargaining strength between the relevant employers and employees is one criterion that Fair Work Australia must consider when deciding to make a low-paid bargaining

order. Like many other components of the Bill, this provision could be widely interpreted, notwithstanding that it appears to contemplate varying levels of inequality of bargaining power.

48. The NFF submits that in general terms, bargaining for the low paid plays an important part in attracting entry-level staff into farm workforces. It is important to acknowledge that although a special stream of bargaining might initially cater to those on lower rates of pay, that its focus is on improving such employees' capacity to contribute to productivity at the workplace, creating a path for reward for their efforts and occupational development.

Right of Entry

49. The right of entry provisions contained within the Bill, in particular, s 484, and the corresponding provision, s 760 of the current legislation, appear largely similar. The former entitles union right of entry to old discussions with workers on premises so wishing, *whose industrial interests the permit holder's organisation is entitled to represent*. The latter (current legislation) only provided for right of entry where a union was bound by the award – this did not differ markedly from the pre-*WorkChoices* provisions – the main difference being that prior to *WorkChoices*, collective agreements did not exclude the operation of awards, whereas under *WorkChoices* they did.

50. The current provisions continue to operate with the conciliation power as a base, if not technically, conceptually. The relationship of a union with employers or their representatives, arose from the negotiation, dispute and arbitration processes in relation to the employment relationship. The employment relationship was at the heart of the entitlement to right of entry, whereas under the Bill, it is premised on a statutory entitlement, namely the

definitions of *organisation* and *industrial association* at the beginning of the Bill.

51. The NFF is concerned that the Bill represents a fundamental shift away from focusing on the employment relationship in that it goes beyond facilitating a representational role on the part of employees who so chose, to creating a statutory, direct obligation flowing from employers to unions. Section 484 (a) – (c) clearly stipulate that a workforce need not have any union members, an existing employment relationship binding a union, or an existing employment relationship in which the union has been engaged as the employee's representative. This is particularly concerning given the low percentage of union membership across the agricultural industry.

52. The NFF is concerned that the authority documents required for production to evidence the entitlement of right of entry are clear and easy for employers to associate with the individual attending and presenting them, and claiming a right of entry. Furthermore, the NFF believes that such permits should not be issued more than once in respect of a particular incident, and that the requirement of reasonable belief there has been a contravention continue right up to entry of the premises – should a representative knowingly or recklessly proceed with entry after having sufficient information to hand refuting the suspected breach, employers should have a recourse, set out in the Bill.

Minimum Wages

53. The NFF believes that remueration at agricultural workplaces is a vital reflection of the vital contribution farm employees make to the industry, and indeed to regional Australia. Competitive remuneration is just one of the many facets of best practice human resource management farm employers

can utilise to more effectively attract and retain staff, particularly during severe labour and skills shortages within the industry.

54. The interlinkage of reward for effort is a fundamental incentive for employers to contribute to the education of training of staff. In turn, it encourages those staff to pursue career paths and the development of skills. Conversely, where employers face extraordinary strains on their business, as many have throughout the current drought, it is important that a robust safety net exists for the protection of the interests of rural workers. However, notwithstanding a difficult period for the industry, many farm employers have sought to be innovative, constructive and generous with remueration packaging, despite the fiscal component comprising the award rates of pay.

55. In essence, the NFF submits that good minimum wages policy maintains the role of minimum wages as a safety net, rather than reflecting the market rates of pay which apply to given positions, in given industries. The variance between these two different concepts establishes fertile bargaining ground. During labour and skills shortages, there is impetus on employers to be more generous with their rates of pay; on the other hand, where unemployment is high, there is impetus on jobseekers to undertake further training, and accept minimum rates of pay, particularly in positions which give them the opportunity to develop skills and gain further experience.

56. The frameworks underpinning federal minimum wage setting changed considerably under the *WorkChoices* reforms. The NFF strongly supports the consultative and inquisitorial approach formulated by the Australian Fair Pay Commission ("AFPC") to the conduct of federal minimum wage reviews. The approach of the AFPC was not only transparent, but allowed for a far broader range of stakeholders to make submissions in relation to wage adjustments. The NFF acknowledges that s 24 (1) of the current legislation

allows considerable breadth in terms of the manner, scope, timing and commencement of decisions pursuant to the wage-setting functions it grants to the AFPC. Theoretically, this broad scope in the manner wage reviews may be conducted could allow for other less consultative and transparent modes of adjusting minimum wages.

57. Section 289 of the Bill seeks to adopt into the legislation the approach of the AFPC. The NFF acknowledges that in doing so, it is not adopting the legislative approach of *WorkChoices*, but rather, the approach settled upon by the AFPC in the conduct of wage reviews since 2006. Similarly, s 290 allows investigations and inquisitorial processes to be instigated by Fair Work Australia. This is particularly important to resolve longstanding concerns surrounding the adversarial and potentially theatrical nature of quasi court proceedings. It will also allow the President and other Members of Fair Work Australia to fully explore areas of their particular expertise, making inquiries as they see fit in this regard, rather than the over-reliance on making determinations purely on the case presented to them, whether written, oral or otherwise.

58. The matters Fair Work Australia must have regard to in fixing minimum wages continue to reflect economic, as well as social criteria, as set out in s 284 of the Bill. The NFF accepts that minimum wage setting requires the consideration of a broad range of issues, and how they interrelate. However, in affording breadth to the process, the NFF is concerned that the function will be overly centralised.

59. By way of illustration, s 284 (1) (a) requires Fair Work Australia to take into account *the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth*. The distortionary effects of a small number of boom industries' contribution to the national economy leaves behind industries

which may be experiencing difficulties, yet which make and equal of not more vital contribution to the nation and the world, economic or otherwise. This illustration reflects recent experiences as between the mining and agricultural industries. Interestingly, it is unlikely increases to minimum wages would have much or even any impact on the remuneration of employees in the mining industry. On the other hand, it is further important to note that the mining and agricultural industries share a common problem giving rise to labour shortages – the depletion of regional populations. The NFF believes that s 284 (1) (a) should be supplemented with a further subsection requiring Fair Work Australia to take into account the *performance and competitiveness of individual sectors and regions of the national economy, with regard to their varied and unique contributions to the national economy and wellbeing*.

60. The matters set out at s 284 (1) (a) – (e) of the Bill are unquestionably interlinked, and most of these matters have underpinned debate over the level of wages through the greater part of Australia's history since federation. The NFF considers that it is vital that the determinations have regard to the interrelationship of the matters set out in s 284 (1) (a) to (e).

61. Flowing from the NFF's submission that over-centralisation jeopardises a balanced and sensible wage-fixing parameters, the NFF notes that s 287 (2) precludes a minimum wage order from being deferred from commencing on a date other than the first pay period on or after 1 July, as provided for in s 286. However, the NFF notes that in exceptional circumstances, a later commencement date may be awarded. The NFF seeks to clarify that such exceptional circumstances might include drought. Following the award of a deferral of the 2007 wage increase by the AFPC and AIRC, the NFF strongly advocates that, whilst undesirable, later commencement dates may assist farm employers in temporary hardship, who would otherwise terminate staff

at such times. This was confirmed empirically following the award of the deferral in 2007. The NFF acknowledges the difference between deferring an increase, and fixing a commencement date later than 1 July 2008.

Unfair Dismissal

62. The NFF is comfortable with the Fair Dismissal Code ("the Code"), developed by the Small Business Advisory Group, and to be given effect as a legislative instrument despite our continued support of a small business exemption (15 or less employees) as the preferred model. In particular, the NFF supports the scope the Code allows in how a variety of different dismissal circumstances can be flexibly but fairly accommodated. The NFF strongly supports the apparent scale the Code allows in terms of the severity of reasons for dismissal – that is, less serious but perhaps persistent matters would require a more comprehensive compliance with the Code, whereas criminal conduct would not. The NFF's predominant concern, as with much of the Bill on the whole, is how this interreacts with the legislation, and in practice, with Fair Work Australia.

63. Section 385 of the Bill defines unfair dismissal as a termination where Fair Work Australia is satisfied that:

(a) the person has been dismissed; *and*
(b) the dismissal was harsh, unjust or unreasonable; *and*
(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; *and*
(d) the dismissal was not a case of genuine redundancy.

64. The current legislation predominantly prohibits terminations that are held to be harsh, unjust or unreasonable, in addition to those held to be unlawful

terminations. The NFF supports the additional requirements to establish unfair dismissal, in particular, establishing that the Code has not ben complied with. The NFF notes that the wording of s 385 of the Bill requires *all* four to be met before a dismissal is capable of being found unfair.

65. The NFF considers that the onus of proving non-compliance with the Code should fall on the employee – this counterbalances the compliance measures employers must meet in respect of the Code and any dismissal they effect. The Code itself requires employers to meet the core requirements of procedural fairness and natural justice, including but not limited to fair notice and an employee's right to be heard ahead of an imminent, adverse decision which will impact upon them. This is based in the *audi alteram partem* maxim which underpins natural justice.

66. In considering natural justice, the employer as a decision-maker, is obliged to act in good faith and without bias. Their obligations arguably also include ensuring they make informed, fair decisions on the evidence. Applications alleging unfair dismissal therefore carry the preliminary burden of proving a failure to comply with the Code, at s 396 (c).

67. Although the detail of the process is unclear, as it would occur between the matters set out in ss 396 and 397, it appears that a conference proceeds where there is a question as to whether the employer has complied with the Code. Conferences should not take place where Fair Work australia determines that compliance has been adequate. At that point, the employee as had the right to be heard by their employer, in addition to the right to have the matter heard by a third party, consistent with the *nemo iudex in causa sua* maxim of natural justice. The NFF believes that the requirement for facts to be in dispute, should be limited to facts asserted regarding compliance with the

Fair Dismissal Code, the limitation date for applications alleging unfair dismissal or the extent to which a purported redundancy is genuine.

68. Conversely, s 400 removes any right of appeal in relation to decisions made under Part 3 of the Bill. Decisions made following a conference or hearing have afforded the parties the right to be heard before an independent third party. However, a decision made where there is no conference or hearing, in particular, that the Code has not been complied with, should carry a right to be heard by the employer – this is vital to ensurea balanced access to natural justice for both parties, namely the right to be heard.

69. Where the administrative arm of Fair Work Australia to make decisions on compliance with the Code not only raises concerns around an employer's right to be heard ahead of a decision adversely affecting them (a separate decision to their initial decision to terminate staff). Perhaps a more notable concern is the manner in which fair, consistent and thorough assessments of claims can be delivered by those charged with the function within Fair Work Australia. It is impossible to determine how readily such claims will be determined, or how effectively they will be managed. Given a favourable benefit of the Code is to ensure a useful guide to considerations for employers to ensure their decision to terminate, the benefit would be negated where broad and differing opinions underpinned an assessment of compliance with the Code within Fair Work Australia, to the extent such decisions could be made without a hearing or conference.

70. Like the rest of the Bill, the unfair dismissal provisions will continue to rely on employers covered operating as Constitutional corporations. This is of particular concern for the agricultural industry.

Conclusion

71. The NFF has participated extensively through its membership of the *National Workplace Relations Consultative Council*, the *Committee on Industrial Legislation*, its involvement in award modernisation and more broadly, through its history of contribution to agricultural workplace relations.

72. The potential for a significant number of farmers, in the worst case, over 90 per cent of farm employers, not to access a uniform and simple system, is the most concerning issue. The NFF believes that there are theoretical and practical measures to achieve this, aligning completely with the Government's stated objective of harmonisation, and referral of powers. However, the NFF strongly believes that for too long, multiple systems have caused confusion within industry, and prevented a unified focus on developing modern workplace relations regulatory frameworks.

73. The NFF has conveyed a view on alternative or additional arrangements which could be utilised to give effect to a national system. Whilst noting that the passage of the Bill federally is relevant to the States signing off on the version to receive assent, the NFF is gravely concerned that a serious issue will not be resolved or clarified until such a late stage, well into 2009.

74. The NFF primary submission to Government is therefore that its key promise at the 2007 election was to introduce the first truly national workplace relations system in Australia. The NFF urges that this commitment be met. There is nothing fair about leaving an industry behind that is vital to all Australians, through its leadership on key challenges like water and climate variability, trade and making an resolving global food shortages. Unless truly

national coverage is achieved, modern agriculture will be left with an industrial relations system decades out of date.