National Farmers' Federation

Fair Work Amendment Bill 2013

Submission to the Senate Education Employment and Workplace Relations Legislation Committee

Submission to the House of Representatives, Standing Committee on Education and Employment

15 April 2013

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AGFORCE


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Dairy Farmers


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Content

1. EXECUTIVE SUMMARY

The National Farmers' Federation ('NFF') represents agricultural employers in all States and Territories, and across all major agricultural and horticultural commodities. The NFF has a long and involved history in advocacy relating to industrial relations within the agricultural sector, and has represented agriculture on the National Workplace Relations Consultative Council (NWRCC) and the Committee On Industrial Legislation (COIL), in particular throughout consultations on the current raft of reforms.

The proposed *Fair Work Amendment Bill 2013* ('Bill'), introduced into Parliament on 21 March 2013, in our view deserves rigorous scrutiny before it is proceeded with, as agriculture employers are understandably concerned as what may be framed as 'family and workplace friendly' amendments may be inherently unfair on agriculture employers.

Since 2009 when the *Fair Work Act* ('Act') commenced we have seen two tranches of changes to the Act introduced into Parliament, to purportedly implement the Government's response to the recommendations made by the Fair Work Review Panel in its June 2012 report on the operation of the Act. The first tranche, which was operative from 1 January this year, implemented mainly technical changes, which neither unions nor employers particularly objected to. The second tranche, introduced into Parliament last month, is different. The *Fair Work Amendment Bill 2013* is very lopsided. It does not even attempt to strike a balance in addressing issues of concern to employers and unions.

The Bill fails to strike the right balance in achieving fairness for employees and employers, and ensuring a flexible and productive agriculture workplace. The NFF opposes the expansion of entitlements of employees and unions in areas such as: union right of entry, workplace bullying, award penalty rates, the right to request flexible work arrangements, parental leave, hours of work and rosters. All of which if adopted in its present form, has the potential to significantly affect agriculture employers. The NFF views the Bill as reducing workplace flexibility and increasing red tape compliance obligations on agriculture employers.

The NFF is of the view that the proposed amendments are unbalanced, pro union and regressive. The Parliament should not pass the legislation in its current form. The Bill if passed will put stress on farming businesses and risk jobs, job prospects and is likely have a detrimental effect on the Australian economy. Our principle concerns relate to:-

- Inadequate response to issues associated with right of entry of trade union representatives and location of meetings with trade union representatives;
- Requiring that award and agreements include a provision that employers consult with employees and their unions before changing rosters or working hours;
- Taking legislative action to entrench penalty and shift loadings in the cost of the labour market; and
- Using the Fair Work Commission (FWC) as a way to address workplace bullying.

The Bill works against a workplace relations system being conducive to developing an employment relationship that is based on trust, mutual respect and maximisation of productivity. Instead, the proposed amendments are paternalistic and curtail an approach to workplace best practice in respect to human resource management.

2. INTRODUCTION

The National Farmers' Federation (NFF) seeks to provide information to the Senate Education, Employment and Workplace Relations Legislation Committee and the House of Representatives, Standing Committee on Education and Employment Inquiries into the *Fair Work Amendment Bill 2013* ('Bill'). The Bill seeks to amend the *Fair Work Act 2009* ('Act') in the following areas:-

- provide that any period of unpaid special maternity leave taken by an eligible employee does not reduce that employee's entitlement to unpaid parental leave;
- increase the maximum period of concurrent unpaid parental leave from three to eight weeks;
- allow that leave to be taken in separate periods within the first 12 months of the birth or adoption of a child;
- expand access to the right to request flexible working arrangements;
- require employers to consult with employees about changes to regular rosters or ordinary work hours;
- enable pregnant employees to transfer to a safe job regardless of their period of service;
- require the Fair Work Commission (FWC) to take into account the need to provide additional remuneration for certain employees;
- enable an employee who is bullied at work to apply to the FWC for an order to stop the bullying;
- establish a framework under which permit holders may enter premises for investigation and discussion purposes; and
- expressly confer on the FWC the function of promoting cooperative and productive workplace relations and preventing disputes; and make technical amendments.

The NFF appreciates the opportunity to participate in the Inquiries being conducted by the Committees into the Bill. In reviewing the Bill, the NFF has confined its comments against those matters it regarded as within its members' areas of concern.

3. PROFILE OF THE AGRICULTURE SECTORS

The National Farmers' Federation (NFF) was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The general profile[1] of the industry is as follows:-

- Australia's Agrifood industry comprises five (5) major sectors: agriculture, horticulture and conservation land management; food, beverage and pharmaceutical manufacturing; meat processing and retail; seafood and racing.
- 880,000 people are employed in Agrifood whereas Agriculture, Forestry and Fishing is a relatively small industry, employing approximately 332,000 full time and part time workers, which is around 2.9 per cent of the total workforce (August 2011).[2]
- The largest contributor to employment in the industry is the Sheep, Beef Cattle and Grain Farming sector, employing 117,600 workers (or 43.3 per cent of industry employment). Fruit and Tree Nut Growing employed a further 32,700 (12.0 per cent), followed by Dairy Cattle Farming (25,600 or 9.4 per cent).
- The number of Australian farmers has fallen by over 100,000 in the three decades since 1981, yet the value of Australian agricultural exports in this time has grown from $8.2 to $42.6 Billion in 2011-12.
- Employment in the Agriculture, Forestry and Fishing industry is concentrated in regional Australia, with the largest employment in Northern and Western NSW (30,300 workers), Darling Downs-South West (21,200), and Remainder-Balance WA (20,700).
- Employment in the industry overall has decreased 27.2 per cent in the last ten years, the largest decline of any industry in Australia over this period.
- In the medium term (over the past five years) employment has declined in nine of the 15 sectors, at a rate of 1.2 per cent per annum. The largest decline was recorded in the Fruit and Tree Nut Growing sector followed by the Sheep, Beef Cattle, Grain Farming and Mushroom and Vegetable Growing sectors.
- While overall employment in the industry has declined, some sectors have recorded employment gains. The largest growth was recorded in the Dairy Cattle sector (up by 54.6 per cent) followed by Poultry Farming (25.9 per cent).

Employers

- The Agrifood industry comprises over 130,000 enterprises, ranging from large multinational companies through to small family owned enterprises, the majority of whom are located in regional Australia.
- The number of farms in Australia fell by more than 100,000 between 1981 and 2011, which is a 40 per cent decrease over the last 30 years.

[1] AgriFood Skills Australia, *Environmental Scan*, 2012.
[2] DEEWR, Industry Report Agriculture, Forestry and Fishing, August 2011.

- Half of all farmers work more than 49 hours per week and more than half (56 percent) are self-employed owner managers.
- The ownership structures in the agriculture sector range from owner operators and family farms to sovereign wealth funds and multinationals.

Employees

- 72 percent of Australian farmers are male, 89 percent of farmers were born in Australia, and the average farmer is 53 years old.
- More than two thirds of the Agriculture, Forestry and Fishing industry are male.
- Part-time employment for males in the industry has increased by 9.7 per cent over the last five years whereas full-time male employment has decreased by 5.2 per cent.
- Female part-time employment decreased by 7.3 per cent over the same period, while full-time employment decreased by 1.6 per cent.
- The median age for workers in the industry is 48 years; the oldest of any industry (compared with the median of 39 years for all industries) and median earnings are around $878 per week (before tax).

Accordingly, the NFF is of the view that the importance of the sector should be recognised and elevated. Agriculture and food are essential aspects of the day-to-day lives of the Australian community. It is our view that issues such as the ongoing capacity of the nation to continue producing food and fibre for not only Australians but also the global community needs to be linked with other key government priorities such as the state of the economy and the Fair Work Act 2009.

4. NFF COMMENTS ON THE BILL

Key Provisions of Draft Bill	National Farmers' Federation Comments
Schedule 1 – Family- friendly measures Part 1 - Special maternity leave Part 2 - Parental leave Part 3 – Right to requst flexible working arrangements Part 4 – Consultation about changes to rosters or working hours Part 5 – Transfer to a safe job	**Schedule 1 – Family-friendly measures** There are three (3) key amendments in this Bill that impact on pregnant women and new parents generally:- 1. Special maternity leave taken will now not reduce the period of parental leave, allowing women who suffer illness during their pregnancy to access unlimited unpaid leave during pregnancy without there being any impact on their parental leave period; 2. Concurrent parental leave for employee couples is now able to be taken for up to 8 weeks and in "separate periods", rather than a single 3 week period; and 3. Transfer to a safe job is an entitlement for all pregnant employees, regardless of their access to parental leave. Where there is no entitlement to parental leave, then "unpaid no safe job leave" will be provided to those employees. The Bill contains a series of amendments to the Act, seeking to implement the three major changes listed above. As a general comment, some consideration should be given to the desirability of female workers of a reproductive age in the job market. Two candidates who differ only on gender will present a different potential cost to the prospective employer, and in order to encourage the objects of the new measures introduced into the Act, some practical efforts such as education and support will need to be taken so that the practical consequence of the new measures is not to ultimately make the hiring of female employees of a reproductive age financially or administratively undesirable. If an employee is on a special maternity leave (that is not deducted from the unpaid maternity leave period), there should be an automatic transfer to an unpaid maternity leave period 6 weeks prior to the expected date of birth without having to go through the procedures set out in s. 73(2)(a)(b)&(c).

	Overall, the changes will impact employers in a significant way. The NFF suggests that resources should be made available for appropriate education and awareness campaigns, so that the objects of the amendments and improvement to the wellbeing of employed parents can be achieved. **Part 1 - Special maternity leave** The Bill provides that any period of special maternity leave will not reduce the employee's unpaid parental leave. As a practical matter for employers, this has the effect of providing unlimited unpaid leave for pregnant employees for the duration of their pregnancy. For employers this means there is a reduced ability to budget for the total cost impact of the pregnancy on their business as there is no longer a single maximum period of leave, but rather a combination of special maternity leave and parental leave. During pregnancy, an employee appears to have the option as to whether they take special maternity leave or personal/carer's leave. The NFF notes that before taking special maternity leave there is no requirement to first use up all accrued paid personal/carer's leave (as is the case with access to unpaid carer's leave under s. 103(3) of the Act). The NFF also notes that during a period of special maternity leave the employee will not accrue leave-requiring adjustments to be made to the accruals register for that period. The NFF recommends that adequate guidance should be provided for employers so that they can administer special maternity leave for their employees easily and appropriately. NFF opposes the changes to extent concurrent parental leave up to 8 weeks in total due to the following reasons:- 1. No adequate considerations for the extension. This was not part of the recommendations by the expert panel. 2. The 3 weeks of concurrent leave has been thoroughly considered when the Fair Work Act was passed and it was deemed as a suitable period to adequately provide support to their partner who has the primary care giving responsibility.

	The NFF observes that Items 8 and 11 of this Part insert 'Notes' that specifically clarify a matter, which was previously unclear, that is a pregnant employee may elect whether to take special maternity or personal/carer's leave. It is unclear whether this is the case for all illness that a women suffers whilst she is also pregnant, or only for pregnancy-related illness. Further, it is not clear why special maternity leave should be so different from unpaid carer's leave in that accrued personal/carer's leave should not first be exhausted to access it, and the merit of leaving the discretion with the employee as to whether the leave be unpaid or paid where there are such accruals. **Part 2 - Parental leave** The Items in this Part adjusts the Act to increase the access to concurrent parental leave (both adoption and birth) for employee couples. As a result of these amendments, the consequences for employers of employee couples are significant:- • There is an increase in the concurrent leave that is required to be allowed to employee couples of more than double the existing amount – from three weeks to eight. The eight weeks will be able to be taken in separate periods (of at least two weeks, unless a shorter period is agreed) at any time within the first twelve (12) months of the birth or adoption of a child. Concurrent leave can presently only be taken when a child is born or placed. • The periods (other than the initial period) may be taken at any time during the primary carer's parental leave period at the election of the employee who must only provide notice to, rather than seek the agreement and approval of, the farm employer; • The notice that periods of concurrent leave will be taken (other than the initial period), if not provided in advance, can be provided as soon as practicable (similarly to personal/carers leave). In the case of concurrent leave there is no guidance as to what sorts of circumstances might make the immediate taking of such leave acceptable. There may not be any appropriate relevant evidence, like a medical certificate, which would assist in establishing the need for immediate leave. This increases the lack of clarity for all parties and reduces the farm employer's ability to adequately plan for the leave. • There are between one and four periods of concurrent leave that the farm employer must make alternative arrangements for, of at least two and at most eight weeks.

	In the existing text of the Act, it is currently unclear what the position is where the employee is, for instance, the partner of a woman who has given birth. What are the obligations on that employer to provide unpaid leave to such an employee on a concurrent basis? Is the employer able to refuse a two week period of parental leave (after the initial period) where the employee provides them with the relevant notice and it is within the eight week total? If not, what sorts of reasons will be acceptable for the employee in the same circumstance giving no notice (i.e. simply informing the employer on the first morning of their two week parental leave period that they have commenced that leave, and it was not practicable to provide notice prior to that point)? **Part 3 - Right to request flexible working arrangements** The proposed amendments would expand access to the right to request flexible working arrangements to more groups of employees and also sets out a partial list of what might constitute "reasonable business grounds" for an employer refusing a request made under the Part. The proposed amendment to s. 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances listed at (1A) then that employee may request a change in working arrangements; the reason for the change is because of the circumstances of the employee. The proposed s. 65(1A) sets out the circumstances related to a request, being that the employee:- • is the parent, or has responsibility for the care, of a child who is of school age or younger; • is a carer (within the meaning of the Carer Recognition Act 2010); • has a disability; • is 55 or older; • is experiencing violence from a member of the employee's family; or • provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family. A new provision (1B) also expressly provides that an employee who is a parent or has responsibility for the care of a child and is returning to work after taking leave in relation to the birth or adoption of the child may request to work part-time to assist the employee to care for the child.

	The proposed amendment would extend a right to request to an employee who is a parent of a school age child (at present s. 65(1)(a) is limited to care of a child under school age) as well as to those 55 and older, among others. The addition of these two classes significantly widens the scope of the right to request provision and the NFF opposes this amendment. The formal requirements (that the request be in writing and set out details of the change sought and the reasons for the change) remain, as does the requirement on the employer to give the employee a written response within 21 days stating whether the request is granted or refused. Currently, an employer may refuse the request "only on reasonable business grounds" (s. 65(5)). The Bill also introduces a non-exhaustive definition of "reasonable business grounds" for employers considering whether to grant an employee's request for flexible working arrangements. These include:- • that the new working arrangements requested would be too costly for the employer; • that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested; • that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested; • that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity; • that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service. Employers may refuse a request only on "reasonable business grounds". It is apparent that the proposed list at s. 65(5A) is not exhaustive but also that it specifies the kind of grounds by inclusion. There is a qualitative judgment to be made as to whether the circumstances of the kind listed are met; for instance whether the new working arrangements are "too costly" or would result in "a significant loss in efficiency or productivity" or have "a significant negative impact on customer service". The NFF is of the view that the circumstance of being over 55 years is somewhat inconsistent with the rest of the categories and the NFF recommends that a general provision providing for "other business grounds" is more appropriate due to the aging Australian population. The population is

	ageing and the share of the total population that is past working age has already been rising for some time and is set to rise further in the years ahead:- • In 2010 13.5 per cent of the population was aged over 65; • In thirty years, this proportion will be closer to 23 per cent. Additionally, the NFF believes having a disability should not automatically afford an employee the right to request, especially when the employees have had the same disability when they initially commenced employment and accepted the conditions attached to the employment. Whilst we appreciate the complexities involved in a domestic violence situation and the sensitive nature of such regrettable situations, we cannot see how having a flexible working arrangement may assist someone who is experiencing domestic violence. Currently the affected employee has access to annual leave or personal leave to take time off from work as required. There is no requirement for employees to prove their situation when making a request for flexible working arrangement. How can employers substantiate any request being made to them? Whilst it is appreciated that some of the qualifying circumstances are sensitive situations where it will be difficult for employees to produce relevant evidence (e.g. how can an employee show that they are experiencing domestic violence?), without appropriate checks and balances, this provision could easily be exploited. In Victoria, the Equal Opportunity Act 2010 has provision for flexibility and consequently there is no need to amend the Fair Work Act. The NFF is of the view that extending the right to request flexible working arrangements to (amongst others) employees with disabilities, who have caring responsibilities, who are over 55 years of age or older or who are experiencing domestic violence from a family member could be easily exploited and consequently the NFF opposes these provisions. **Part 4 - Consultation about changes to rosters or working hours** The Bill provides for insertion in awards and agreements of new "genuine consultation" requirements for changes to rosters or working hours. For agreements made after the passage of the legislation, it would amend the current consultation term requirement at s. 205 by introducing a

	new s. 205(1)(a)(ii) obligation to consult employees on "a change to their regular roster or ordinary hours of work". The Explanatory Memorandum says that as a result of the change, it will be mandatory for employers to consult on proposals to change hours or rosters that don't amount to a "major workplace change" under the terms of s205(1)(a)(i).[3] A new provision, s. 205(1A), provides that to comply with the new requirements, employers must- • give the employees information about the change; and • invite the employees to air their views about the effect of the change, including on their family or caring responsibilities; and • consider the employees' views. The changes to the award provisions insert a similar provision, to take effect on January 1, 2014. The Explanatory Memorandum notes that "regular roster" in new s. 145A(1)(a) isn't defined and that there is no intention to trigger the consultation obligation where employees have "irregular, sporadic or unpredictable" hours.[4] The Explanatory Memorandum includes an "illustrative example" in which "Gabrielle" has for several years worked four days a week, and her employer is aware she cares for her elderly mother on her day off on Wednesdays. Her employer has decided to change its rosters so she will no longer be able to have the day off. "Before changing her regular rostered hours of work, in accordance with the consultation term included in the applicable modern award, Gabrielle's employer will be required to provide information to her about the proposed change, give her an opportunity to raise with her employer the impact of the proposed change on her (including in the context of her family and caring responsibilities) and require the employer to consider Gabrielle's views on that impact before making any changes."[5]

[3] Page 21 of the Explanatory Memorandum
[4] Page 20 of the Explanatory Memorandum
[5] Page 20 of the Explanatory Memorandum

	This illustrative example demonstrates that the provision is overly restrictive especially in relation to an agriculture workplace where the workflow is unpredictable at most times, depending on the weather and market. Farm businesses are generally family run and in our view, these amendments are unnecessary due to current flexible working arrangements being adequate. **Part 5 - Transfer to a safe job** The Items in this Part amend the Act to incorporate the concept of unpaid no safe job leave for those employees who do not otherwise have access to parental leave. The implications for employers are essentially that now all pregnant employees must be considered for transfer to a safe job where circumstances arise, and not just those who have an entitlement to parental leave. The only difference is whether or not the employee will be paid whilst on no safe job leave. For agriculture employers who traditionally do not have employees that would ordinarily gain access to parental leave, especially those with a reliance on casual, seasonal or fixed-term arrangements with employees, this will increase the compliance burden where an employee exercises their rights under these amendments. It could result in an increase in termination or adverse action type claims where the proper process is not followed. The Bill fails to address some existing uncertainty in the Act, and consideration should be given to clarification of:- • Whether there needs to be a written notice provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave. Currently, it is only necessary that the employee provide "evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her current position…". This could give rise to a great many circumstances where it may be clear to one party but not the other, either at the time or in hindsight, that such access should have been given. A requirement for a written request, similar to the request for flexible working arrangements, may assist in resolving this issue.

	• The definition of an appropriate safe job is critical to the operation of this provision but "safe job" is not defined, rather it is assumed to be known. Further detail as to the nature of what an alternative "safe job" might be would assist parties to understand what sorts of measures should be put in place to enable the transfer to take place. • Whether there should there be a requirement for the employee to define what specifically they are advised would be safe, and not safe, to assist the employer in determining whether there are any appropriate safe jobs within the workplace. • What would happen to the employee's entitlements if the appropriate safe job was a "higher duty" rather than the assumed lesser role. Whilst there is protection for the employee's wages when placed on lower duties for the risk period, there is no contemplation of whether that same employee would be entitled to any higher duties pay if in the opposite position. If no safe job exists, the employee will be entitled to unpaid "no safe job" leave (the leave is paid if an employee has twelve (12) months' service). Based on a review panel recommendation, the Bill will also provide that taking unpaid special maternity leave does not reduce an employee's entitlement to unpaid parental leave. The NFF is of the view that these amendments will increase the regulatory burden upon agriculture employers and impede safe work practices. It is for these reasons that the NFF is of the view that these amendments should be rejected.
Schedule 2 - Modern awards objective	The Bill inserts a new modern award objective to protect penalty rates and requiring the FWC to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions taking into account (amongst other things) the need to provide additional remuneration for employees working overtime, employees working unsocial, irregular or unpredictable hours, employees working on weekends or public holidays or working shifts. Penalty rates for certain work hours and conditions have been properly and thoroughly considered during the award modernisation process in 2009, and in the transitional award review process currently underway in the FWC. The applicability of penalty rates should be considered in the context of the industry, it should not be a blanket objective for all industries, especially when certain industries operate predominantly during overtime, unsocial hours or weekends and the specified rates have already contemplated the nature of their work hours.

	It was more widely accepted in the 1980s when the opening of Australia's economy to international competition (and, thus, best practice productivity levels) exposed the true cost of rigidities embedded in labour laws and work practices that had evolved through the era of so-called 'protection all round'. Since the move to enterprise bargaining under the Hawke-Keating Governments, the industrial landscape has become more accommodating of diversity and change among firms and across regions. This not only contributed to the 1990s productivity surge, but also to the comparative resilience of employment in subsequent downturns (notably the GFC) and the avoidance of a generalised 'wage breakout' during the mining boom. It has to be said, however, that most of the labour market reforms from the 1980s to the early 2000s were essentially 'no brainers' - redressing obvious anti-productivity features of a highly centralised, prescriptive and adversarial system. While the changes faced political obstacles, there was widespread recognition of the need for reform. This changed with the reforms under 'Work Choices', the justifications for which were neither adequately explained nor widely understood by the public. Industrial relations policy has been a 'war zone' ever since, with reasoned public discussion about fairness/productivity trade-offs the biggest casualty. It would therefore be astonishing if those trade-offs had been properly accounted for. The NFF is of the view that productivity improvements are the main means by which we can raise our living standards. Productivity improvements give us the luxury of having a wider range of choices and higher levels of material and non-material well-being. Multi-factor productivity did not grow at all between 2003-04 and 2007-08; and between 2007-08 and 2010-11, it actually fell at an annual average rate of 1.0%. The NFF is of the view that the amendments fail to take into account the macroeconomic effect upon the economy. It is not an appropriate time to implement legislative action to entrench penalty and shift loadings into the cost of the labour market. We view the proposal as unbalanced and counterproductive to trade exposed businesses like farms, which have come under great competitive strain in recent years.

Schedule 3 - Anti-bullying measure	The Bill, as foreshadowed, creates a new Part 6-4B in the Fair Work Act to give workers the right to seek rapid remedies from the FWC for bullying at work. It provides that a worker is "bullied at work" if an individual or group of workers "repeatedly behaves unreasonably" toward them and the conduct creates a health and safety risk. The Explanatory Memorandum notes that the *Workplace Bullying: "We just want it to stop"* report by a Senate inquiry says that "repeated behaviour" refers to its persistent nature and that "unreasonable behaviour" might include victimisation, humiliation, intimidation and threats. However, the Bill specifically provides, as flagged by Minister Shorten, that "reasonable management action carried out in a reasonable manner" doesn't constitute bullying in the workplace. The Explanatory Memorandum says the above inquiry found that provision needed to be made for managers to be able to manage their staff. "For example, it is reasonable for employers to allocate work and for managers to give fair and constructive feedback on a worker's performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated," the Explanatory Memorandum says.[6] Part 6-4B intends to have a wide coverage similar to the *Work Health and Safety Act 2011*, using similar terminology such as 'Person Conducting Business and Undertaking and Workers', however the definition of bullied at work in s.789FD is limited to a constitutionally covered business which is similar to the coverage of the *Workplace Relations Act.* This leads to a situation where PCBUs that are not constitutional corporations and are currently in the national system due to the states referral of IR powers will not be covered. The FWC must begin dealing with a bullying at work application within fourteen (14) days. A statutory note to the Bill's s. 789FE says this might involve the FWC commencing under s. 590 of the Fair Work Act to inform itself of the matter, conducting a conference under s. 592 or holding a

[6] Page 29 of the Explanatory Memorandum

	hearing under s. 593. FWC will have the power to make an order to prevent the worker being bullied at work. The Explanatory Memorandum says that for the tribunal to make an order there must also be a risk that the worker will continue to be bullied. It says orders are not confined to the worker's workplace, but could also apply to co-workers and visitors to the workplace. "Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to the workplace," the Explanatory Memorandum says.[7] Orders, according to the Explanatory Memorandum, might involve:- • stopping a group or individuals from continuing the bullying conduct; • monitoring conduct; • requiring compliance with the employer's workplace bullying policy; • requiring the employer to review their workplace bullying policy; and • directing the employer to provide information and extra support and training to workers. The Explanatory Memorandum notes that orders cannot provide for reinstatement or compensation. The Explanatory Memorandum says that to provide for any compliance action being taken by the employer or an OHS regulator, the FWC will also have to take into account before making an order:- • results – final or interim – of any investigation of the bullying; • procedures available to the worker to resolve grievances or disputes; • outcomes from any such procedures to resolve grievances or disputes; and • any other matters. The Bill provides that the anti-bullying measures override restrictions under s. 115 of the Work

[7] Page 30 of the Explanatory Memorandum

	Health and Safety Act that would otherwise prohibit a proceeding under the Fair Work Act. It provides for courts, on application by a bullied worker, a union or employer association, or an inspector to seek that a court impose penalties of up to 60 penalty units on an individual. The NFF is of the view that the proposed amendments will encourage forum shopping, when the same subject matter is currently already dealt with under the umbrella of health and safety. We view this amendment as adding to the regulatory burden of time and resource poor farmers predominately running small to medium enterprises (SMEs). All employers are already obliged to investigate any bullying claim and take appropriate measures to prevent and/or ameliorate any incident of bullying, there is no utility to involve FWC in this process. By way of example, in Victoria the Occupational Health and Safety Act covers bullying and WorkSafe Victoria have spent vast resources on bullying issues, such as training investigators. While the NFF supports anti-bulling measures, it does not support this proposed amendment in its current form. This new avenue of complaint for employees will potentially have very significant implications for agriculture employers. We anticipate that, given the matters the FWC is required to consider in making an order and the types of orders it may make, it will be critical for agriculture employers to:- • quickly and objectively respond to bullying complaints; • have a formal workplace bullying policy in place; • have effective complaint handling and investigation procedures in place; • ensure staff are adequately trained in handling investigations and complaints; • be able to demonstrate that applicable policies and investigation procedures have been followed; and • to reduce the prospect of the Commission finding it necessary to intervene and make orders in response to a complaint. The NFF is concerned with the potential for increased cost associated with defending claims against disgruntled employees "shopping" to get the best legal payout either under the consolidated legislation, the Act's 'adverse action' provisions or under state and territory anti discrimination laws. All of which have different tests, compensation thresholds and legislative

	jurisprudence, which makes it difficult for agriculture employers to effectively comply with multiple and overlapping sets of laws.

Schedule 4 - Right of entry	As outlined by the Minister during the second reading speech to Parliament, the Bill provides that, in the absence of an agreement on where unions will hold meetings for discussions purposes, they will be able to use workplace lunchrooms, a measure to which farm employers strongly object. The Bill also gives the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes. The FWC will be able to make any order it considers appropriate if satisfied that the frequency of visits by permit holders from the one union would require an unreasonable diversion of the employer's critical resources. In another measure, the 'right of entry' changes obliges employers to facilitate permit holders' access to travel and accommodation to remote locations that aren't otherwise reasonably accessible. The Bill, according to its Explanatory Memorandum, gives the FWC the capacity to deal with disputes over accommodation and transport arrangements and to ensure "appropriate conduct" by permit holders under such arrangements. The NFF notes the following within the Explanatory Memorandum:- "For example, if public transport is available to the location, or access can reasonably be achieved via travel on public roads in the permit holder's own vehicle or one provided by the permit holder's organisation, the provisions would not generally apply."[8] "In the case of an agricultural property, if it is accessible by road, it would generally be reasonable to expect the permit holder to drive to the premises in their own vehicle, or one provided by the permit holder's organisation."[9] The NFF considers that it is appropriate and good public policy that a definition of 'remote and regional' be included within s. 12 of the Act. The NFF is also of the view that accommodation and transport arrangements for union representatives in remote areas could place an excessive burden on farmers, as farming by its very nature is undertaken in regional and remote Australia. If the Governments intention is to exempt remote and regional agriculture employers from these

[8] Page 36 of the Explanatory Memorandum
[9] Page 37 of the Explanatory Memorandum

	provisions, it has to be within the provision of the Act. A short comment in the Explanatory Memorandum is not acceptable. The NFF is of the view that the current 'right of entry' provisions are adequate and there is no need for these amendments. The permit holder should have his or her own accommodation and travel arrangements resourced and not involve the occupier. As is traditionally the case, the union should cover the costs and arrangements and not expect the employer to seek a refund from the union for the provision of travel and accommodation.

5. CONCLUSION

Once again, the National Farmers' Federation (NFF) thanks the Senate Education, Employment and Workplace Relations Legislation and the House of Representatives, Standing Committee on Education and Employment Committees for the opportunity to provide comment in relation to the *Fair Work Amendment Bill 2013*. We believe the changes in the Bill will have a significant impact for agriculture employers if implemented.

The Bill expands the entitlements of employees and unions in numerous areas including: union right of entry, workplace bullying claims, award penalty rates, the right to request flexible work arrangements, parental leave, hours of work and rosters. Agricultures issues of concern are not addressed in the Bill, and the absence of any attempt to achieve a balance by addressing some of them is glaring. In addition, many of the Bill's provisions are problematic and would have significant impact on agriculture enterprises and jobs. The position that the NFF adopts is that in its current form the Bill should be rejected.

Rushing important industrial relations legislation through in the lead up to a Federal Election is not appropriate. Instead of this Bill, what is needed is legislative change to achieve a more flexible, productive and fair workplace relations system; a system that would better meet Australia's needs for the long-term prosperity of all Australians.