National Farmers'
FEDERATION

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Senate Education and Employment Legislation Committee
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Dear Committee,

Fair Work Amendment (Remaining Measures) Bill 2015

Thank you for the opportunity to make this submission to the Senate Education and Employment Legislation Committee in support of the Fair Work Amendment (Remaining Measures) Bill 2015 (the Bill).

The National Farmers' Federation (NFF) strongly supports the Bill and its passage through the Senate, to maintain momentum toward workplace relations reform which began when an independent panel (the Fair Work Review Panel) was appointed to conduct the post-implementation review of the *Fair Work Act 2009* (FW Act) in December 2011.

The rewriting of federal workplace relations legislation in 2008-09 through the FW Act was an enormous task, which introduced new law on a number of issues and consolidated old law on others, including for the purpose of a legislated safety net of National Employment Standards (NES). While it has many positive aspects, there are gaps emerging in the interpretation of the new law, and there are a number of unintended consequences which have created new disputes over what were otherwise long settled matters.

We set out below in brief our comments on the remaining measures which the Bill proposes to implement.

Payment for annual leave

Minimum award conditions and the legislative safety net of minimum terms and conditions of employment were substantially varied from 2010 following completion of the award modernisation process and commencement of the NES.

Controversy over the interpretation of subsection 90(2) of the FW Act only arose after that time, when the Fair Work Ombudsman (FWO) published an opinion on the meaning of the provision. A subsequent report on the FW Act by the Fair Work Review Panel noted that the

FWO's interpretation means that "longstanding arrangements under awards and enterprise agreements have been disturbed".[1]

The consequences of the FWO's opinion, if correct, are significant. Employers who until 2010 were not required to pay annual leave loading on termination, were subject to an immediate increase in labour costs despite the commitment from the Government of the time that the award modernisation process was not intended to increase costs for employers. Those employers were all of a sudden at serious risk of being found to be in contravention of the NES by relying on inoperative terms in the relevant modern award. As the Fair Work Review Panel noted[2], these consequences were most negative for small businesses (who make up the majority of farm businesses in Australia). Affected employees, meanwhile, have gained the benefit of an entitlement never previously held.[3]

The Fair Work Review Panel recommended changes to subsection 90(2) of the FW Act to ensure that annual leave loading is only payable to employees where a relevant modern award or enterprise agreement expressly provides to that effect.[4]

The Bill, if passed, will implement the Fair Work Review Panel's recommendation by reverting to the pre-FW Act position. This is an outcome that the NFF strongly supports.

Taking or accruing leave while receiving workers' compensation

The Fair Work Review Panel also recommended a change to the FW Act to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments. The recommendation was made to address unfairness arising from discrepancies in State and Territory workers' compensation legislation, and having regard to the fact that workers' compensation is one of a number of compensatory mechanisms that are now available, in addition to accident compensation schemes, the National Disability Insurance Scheme and social security support.

It is also worth noting that efforts to harmonise State and Territory workers' compensation schemes to address discrepancies such as this have all but stalled since they began, and there remains no positive sign of a shift toward nationally consistent arrangements. In the absence of this initiative, the NFF supports implementation of reform in relation to leave accruals on workers' compensation, as set out in the Bill.

Individual flexibility arrangements

Under the FW Act, individual flexibility arrangements (IFAs) can only be made once employment starts and can be terminated at any time on notice. The short term nature of IFAs undermines business certainty, as there is no way of knowing the period during which agreed arrangements will operate. The content of IFAs is limited to certain prescribed matters, determined by the Fair Work Commission. The restrictions on IFA content limit their value

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[1] Fair Work Review Panel *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation,* page 100.
[2] As above.
[3] As above.
[4] Fair Work Review Panel: Recommendation 6.

as a mechanism to deliver mutually beneficial terms and conditions of employment tailored to the workplace.

For example, under the Pastoral Award 2010, IFAs might usefully deal with arrangements for shearing, including numbers of sheep to be shorn, allotment of stands, or transport to and from the shearing shed, except that the modern award does not permit it. IFAs also provide no solution in relation to the 3 hour minimum engagement in the dairy industry, where milking is a 2 hour job but the modern award provides for a 3 hour minimum start. Milking is an activity that must be done twice a day, and the prospect of paying an employee 6 hours pay to do a 4 hour job means that many farmers choose to do the work themselves as they cannot justify the cost. In one Tasmanian Dairy, milking times vary depending on the time of the year. They milk 450 cows twice a day, every day. For 2 months of the year, milking takes 2.75 hours, for the next 8 months, it takes 2 hours, and for the remaining 2 months it takes about 1 hour, twice a day. In one example, a casual employee was employed to do the milking. The man was a single dad, who lived approximately 10 kilometres away, and it took him about 10 minutes to get to work. Milking suited him as it meant he could go home for breakfast with his children and then come back to work later in the day. He would come and go from the Dairy three or four times a day. The arrangement was flexible for the business and for the employee. When the 3 hour minimum engagement was introduced, the arrangement was unable to continue and the man got another job.[5]

This example highlights the various difficulties with IFAs as they currently stand. There is no certainty that reduced labour costs associated with milking would be seen to leave the employee 'better off overall', or what weight could be given to the subjective preferences of the employee. IFA terms contain strong safeguards for employees, including the better off overall test (BOOT) and the requirement that they meet the genuine needs of the parties. In our submission, IFAs should be capable of being offered as a condition of employment and should be able to deal with any modern award matter. To promote certainty, the fact that the BOOT can be met on the basis of an employee's subjective preferences should be clarified and a minimum 12 month period should be possible by agreement.

The NFF supports the reform measures in the Bill dealing with IFAs, and encourages the Committee to consider whether a 13 week notice of termination for IFAs is sufficient to provide certainty for the parties.

Transfer of business

The FW Act codified transfer of business rules for the first time, moving away from the established 'character of the business' test to a 'connections' based approach. The provisions simplify understanding of when a transfer of business has occurred, but the breadth in scope is a disincentive to employment and requires adjustment.

The Bill proposes a minor amendment to displace the transfer of business rules where an employee voluntarily seeks to move to another business within a corporate group, for example, to take advantage of a promotion. There is no disadvantage to either the employer or employee in the arrangement, but there are regulatory implications for the business if

[5] Details can be provided on request.

facilitating the move which can deter them from acting to the benefit of the employee under the current rules.

The NFF supports the reform measures in the Bill dealing with transfer of business.

Right of entry

The right of entry provisions in the FW Act have substantially expanded right of entry beyond what they were prior to 2010. Unions now have relatively unfettered access to the workplace for discussion purposes, and parties can agree to broaden the scope of right of entry even further in enterprise agreements. One of our members in the horticulture industry had 97 union right of entry visits in 2015 alone, each time for discussion purposes and in many cases accompanied by persons without permits.

Allowing parties to substitute their own right of entry rules for the right of entry framework in the FW Act undermines the policy intent. It renders limits on right of entry largely meaningless in organisations where enterprise agreements permit broad access. In our view, rights of entry should be limited to those in the FW Act and there should be no right of entry other than in accordance with the Act. Permits should be required to be produced at the point of entry unless the requirement is waived by the occupier.

Recent amendments[6] to the FW Act compel occupiers of remote premises to enter into arrangements to which they do not consent, so that union officials can enter the premises and exercise right of entry powers under the FW Act.

In prescribed circumstances, including that the occupier does not consent to the arrangement, subsection 521C(2) of the FW Act provides that :

> the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Similarly, subsection 521D of the FW Act provides that:

> the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

The Fair Work Commission has the power to deal with the dispute, including by arbitration.[7]

These requirements are extraordinary in the sense that they authorise what would otherwise be the tort of trespass. Occupiers (usually employers) bear all the risks of having a visitor on their premises, including in relation to workplace health and safety and their capacity in these circumstance to control the work environment is undermined.

There is nothing unreasonable about asking visitors to a workplace to conduct their activities in a particular place, or to take a particular path to get there. Employers have broad duties to keep both employees and visitors safe in the workplace, and penalties for non-compliance are significant. In this context, employers need to be able to manage risks at their premises and to provide quiet facilities for employees who just want to be left alone to eat their lunch. If 9 out of 10 employees in the private sector choose not to be union members, their choice should be

[6] Division 7, Part 3-4 of the FW Act.
[7] Section 505 of the FW Act.

respected, and right of entry rules rebalanced accordingly. The NFF supports the reform measures dealing with right of entry in the Bill.

Unfair dismissal

The NFF supports reform to improve the capacity of the Fair Work Commission to dismiss unfair dismissal claims in appropriate cases. In our view this power should also be available in relation to unfair dismissal appeals, which are increasingly common and rarely successful. In 2013-14, there were 79 appeals against unfair dismissal decisions, representing a 36 per cent increase from the previous year. [8] Appeals were dismissed in 62 per cent of matters.[9]

The reality is that the current unfair dismissal framework encourages 'go away money' where the cost benefit analysis of defending claims simply does not stack up. In most cases involving unfair dismissal, relationships break down and trust is destroyed. Parties then face a choice between long, expensive and potentially embarrassing hearings or a quick and confidential settlement equivalent to the average amount of compensation awarded in proceedings of this kind. A legislative focus on reinstatement will not overcome concerns about 'go away money' – in 2013-14, there were 14,648 unfair dismissal claims dealt with by the Fair Work Commission.[10] Of these, 150 claims resulted in an award of compensation while only 34 reinstatement orders were made.[11] 67 per cent of claims were resolved for an amount of compensation of less than $15,000.[12] By contrast, there were 701 applications under the new workplace bullying regime, which does not provide for compensation, and only one application granted.[13] These figures suggest that the only way to avoid a system that promotes 'go away' money is to severely constrain either the scope of the protection or the availability of compensation. Data from 2011 suggests that 71 per cent of people looking for work did so for less than 26 weeks, and that 53 per cent of these were looking for work for between 4 and 13 weeks.[14]

In the meantime, greater scope to dismiss applications on the papers after providing an opportunity to the parties to be heard is a positive step, and the NFF supports this element of the Bill.

Conclusion

The NFF welcomes the introduction of the Bill into the House of Representatives and encourages the Committee to recommend that the Bill be passed.

Yours sincerely,

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[8] Fair Work Commission Annual Report 2013-14, p42.
[9] Fair Work Commission Annual Report 2013-14, p42.
[10] Fair Work Commission Annual Report 2013-14, p125.
[11] Fair Work Commission Annual Report 2013-14, p127-8.
[12] Fair Work Commission Annual Report 2013-14, p127-8.
[13] Fair Work Commission Quarterly Reports Jan – Dec 14.
[14] ABS *Labour Force Experience, Australia* Cat. 6206.0, February 2011