Submission to the Senate Education and Employment Legislation Committee

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

6 April 2017

NFF Member Organisations

The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

Social >

There are approximately 124,000 farm businesses in Australia, the overwhelming majority of which remain Australian family owned and operated.

Each Australian farmer produces enough food to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 per cent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2.6 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2016-17 is forecast at a record $63.8 billion –17.3 per cent higher than the average over the past 5 years.

Together, the food and agribusiness sector makes a significant contribution to the economies of regional areas through employment, business and service opportunities.

Workplace >

The agriculture, forestry and fishing sector employs approximately 300,000 employees.

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 40 per cent of the employed workforce is casual.

Approximately 60 per cent of farm businesses are small businesses. More than 50 per cent of farm businesses have no employees at all.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 52 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 94 per cent of Australian farmers actively undertaking natural resource management.

The NFF was a founding partner of the Landcare movement, which recently celebrated its 20th anniversary.

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Executive Summary

The NFF, its members and supply chain partners have been actively working to combat organised exploitation of overseas workers in the horticulture industry. This has been a genuine effort but there is more to do. The poor actions of a few reflect on the entire industry, damaging our reputation in domestic and export markets and increasing pressure on governments to increase the regulatory burden, as this bill would do.

The NFF supports the underlying purpose of the bill, not least because it aligns with our own push to lift standards and compliance with workplace laws. However, the bill is not appropriately targeted to dealing with community concerns. Instead, it makes a number of changes that are disproportionate, and will unreasonably burden the Australian business community.

Doubling penalties for all record keeping and pay-slip breaches is unreasonable, given the complexity of workplace laws and the multiple layers of regulation.

Making companies liable for the activities of their subsidiaries will significantly increase the regulatory burden on business, and is appropriate only where there is a clear pattern of avoidance of workplace laws.

The proposal to grant new compulsory evidence gathering powers to the FWO is inconsistent with the privilege against self-incrimination, a fundamental freedom in our democracy. It is intrinsically linked to a push to expand "accessorial liability" provisions under the FW Act, and the Parliament should proceed cautiously before expanding the powers of a regulator so actively working to expand the scope of laws within its remit, rather than simply enforcing them.

The bill should be amended so that:

1. there is no doubling of penalties for all record-keeping and payslip breaches;

2. liability of holding companies is limited in relation to their subsidiaries, except in the most serious of cases; and

3. new compulsory evidence-gathering powers are not delegated to the FWO, or at the very least, limited to the most serious of cases where their exercise is a proportionate and necessary regulatory response.

1. Introduction

Our vision is that Australian agriculture will be a $100 billion industry by 2030.

Agriculture is a source of strength in the Australian economy, well positioned to capitalise on future and growing global demand for safe, quality food and fibre.

To achieve our vision, the farm sector needs regulatory and public policy settings that foster growth and productivity; innovation and ambition. We need leadership that supports business to reach its full potential, and an approach that favours good regulation and a lighter regulatory burden.

In 2014, then Parliamentary Secretary to the Prime Minister, the Honourable Josh Frydenberg MP wrote:

> "Regulation can have benefits, but businesses, community organisations and families pay the price of poor regulation."[1]

On 1 March 2017, the Government introduced the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. The NFF supports measures to protect vulnerable workers, but key elements of the bill go far and above what is required to address community concerns.

In its current form, the Vulnerable Workers Bill is not good regulation. Its purpose may be sound, but it is neither a targeted nor proportionate response.

The bill will take away the right to silence in almost every workplace in Australia – be they employers, employees, contractors or bystanders.

It will double penalties for record keeping and payslip errors in every case – not just the most serious.

And it will significantly increase the regulatory burden on business, requiring all franchisors and holding companies to have mechanisms in place to supervise the day to day activities of their subsidiaries.

The NFF urges the Parliament to amend the bill so that it becomes good regulation, which has broad support in the Australian community. The bill must protect the most vulnerable, but it must do so in a way that recognises the important economic role business plays and the need to support the business community, rather than encumber them with increasingly punitive and unreasonable laws.

[1]The Australian Government Guide to Regulation, March 2014

2. What is good regulation?

In 2003, the Chair of the Productivity Commission spoke of nine key features of good regulation,[2] as set out below.

1. It must actually do good – which means having a sound rationale and having a net benefit for society, after costs and benefits are weighed.

2. It must be better than any alternative regulatory or policy tool. Filling a legislative void is not enough.

3. It must be robust to errors – anticipating what could go wrong and having mechanisms to respond when something does.

4. It should contain the seeds of its own destruction, so that society can continue to assess whether the benefits outweigh the costs.

5. It should say what it will do, with measurable performance indicators. If workers are to be protected because of it, how many, and in what way?

6. It should be clear and concise, so that everyone affected can understand what it means for them.

7. It should be consistent with other laws, agreements, and international obligations to avoid division, confusion and waste.

8. It must be enforceable, but only in a way that is reasonable, underpinned by adequate resources.

9. It must be administered by accountable bodies, in a fair and consistent manner. This includes not just reporting to the Minister or the Parliament, but also rights of appeal, clear guidelines, transparent processes and decisions, and accessibility to the public.

Each of these criteria remains relevant today.

3. What will the bill do?

The bill proposes change to a number of aspects of the workplace relations framework. In summary terms, it will:

Increase penalties

- create a new penalty regime for "serious contraventions" of the FW Act (covering any breach of the National Employment Standards, a modern

[2]Banks, G *The good, the bad and the ugly: economic perspectives on regulation in Australia* Productivity Commission, Address to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October 2003

award or enterprise agreement, as well as rules about payment of wages, unreasonable deductions and record keeping). A serious contravention would be one that is deliberate and part of a systematic pattern of conduct. The penalty for serious contravention would be ten times the current penalty ($108,000 for an individual and $540,000 for a company). A Commonwealth penalty unit is currently $180 after an increase to this amount in the 2015-16 Budget. From 1 July 2018, this amount will be indexed each three years according to the Consumer Price Index.

- double the penalties for record keeping and pay slip errors, to $10,800 per contravention for an individual and $54,000 per contravention for a company.
- triple the penalties for false or misleading employee records or payslips, to $10,800 per contravention for an individual and $54,000, with potential imprisonment of up to 12 months under the Criminal Code.

Expand legal liability of franchisors and holding companies

- make Australian (but not overseas) franchisors responsible and jointly liable for the activities of their franchisees, in addition to existing "accessorial liability" – discussed later in this submission. Being "jointly liable" means that both the franchisor and franchisee can be fined separately for the same offence.
- Make holding companies responsible and jointly liable for the activities of their subsidiaries in addition to existing "accessorial liability".

Prevent 'cashbacks' from employees

- Prohibit employers from paying wages to employees and then unreasonably requiring them to pay it back. Penalties will generally be up to $10,800 per contravention for an individual and $54,000 per contravention for a company, but could be as much as $108,000 and $540,000 respectively.

Give new coercive powers to the FWO

- Give new powers to the FWO so that it can compel any information it believes is relevant to an investigation on notice, either in writing or in person. This will include enforceable powers of questioning for the first time, with significant penalties ($108,000 for an individual and $540,000 for a company) applying to those who refuse or fail to answer questions. The powers will allow FWO to force witnesses to testify, whether or not they wish to do so. If a person has been asked to produce a document, and they do not have it, they (not the FWO) must prove it does not exist or is not in their possession).
- Allow people who have provided information to the FWO to be prosecuted under the FW Act, or for perjury or misrepresentation, but not under any other law based on the information they provide.

- Take away the privilege against self-incrimination for individuals who are compelled to provide information to the FWO.
- Limit legal professional privilege to the production of documents.

4. Doubling penalties for all record keeping breaches

Australia has a highly regulated workplace relations system. Record keeping and payslip rules in Australia are detailed and prescriptive, because they require records to be produced detailing an employee's entitlements under a complex network of workplace rules and regulations.

The FWO lists the type of records an employer must keep under the FW Act on its website (modified only to improve readability below).

What records have to be kept and what needs to be in them?

Certain information needs to be kept for each employee.

Here is a list of the records that an employer has to keep and what information has to be in the record.

General

- employer's and employee's name
- employer's Australian Business Number (ABN) (if any)
- employee's commencement date
- whether the employee is full-time, part time, or casual
- whether the employee is permanent or temporary.

Pay

- pay rate paid to the employee
- gross and net amounts paid
- any deductions from the gross amount
- details of any incentive-based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement paid.

Hours of work

- any penalty rates or loadings paid to employees for overtime hours worked, including:
  - the number of overtime hours worked by an employee during the day
  - when the employee started and finished the overtime hours
- the hours an employee works if the employee is:
  - a casual or irregular part-time employee who is paid based on time worked
  - a pieceworker
- a copy of the written agreement if an employer and employee have agreed to an averaging of the employee's work hours.

Leave

- any leave taken
- how much leave an employee has.
- a copy of any agreement to cash out the amount of leave
- a record of how much was paid, the amount of leave cashed out and when the payment was made.
- Any agreement for leave to be taken in advance, including the amount of leave taken and the day the leave starts

Superannuation contributions

- amount paid
- pay period
- date(s) paid
- name of super fund
- reason the employer paid into the fund (eg a record of the employee's super fund choice and the date they made that choice).

Individual flexibility agreements

- a copy of any written agreement
- a copy of any notice or agreement to terminate the flexibility agreement.

Guarantee of annual earnings

- the guarantee
- the date the guarantee was cancelled (where applicable).

Ending employment

- how the employment was terminated e.g.by agreement, summarily, or in some other way (specifying details)
- if notice was provided and, if so, how much
- the name of the person who terminated the employment.

Transfer of business

- records of any transferring employee.

In addition, an employer must provide payslips to employees. The FWO website outlines the minimum mandated payslip content:

Pay slips must contain details of the payments, deductions, and superannuation contributions for each pay period. The following information must be included on all pay slips issued to each employee as prescribed by the *Fair Work Act 2009* and the Fair Work Regulations 2009.

A pay slip must include all of the following:

- the employer's name
- the employer's ABN (if any)
- the employee's name
- the date of payment
- the pay period
- the gross and net amount of payment
- any loadings, monetary allowances, bonuses, incentive-based payments, penalty rates, or other separately identifiable entitlement paid.

Additionally, where relevant, a pay slip must include any of the following:

- If the employee is paid an hourly pay rate, the ordinary hourly pay rate and the number of hours worked at that rate and the amount of payment made at that rate
- If the employee is paid an annual rate of pay (salary), the rate as at the last day in the pay period
- Any deductions made, including the name, or the name and number, of the fund or the account of each deduction
- If the employer is required to make superannuation contributions for the benefit of the employee:

- the amount of each contribution the employer made or is required to make during the pay period
- the name, or name and number, of any superannuation fund into which the contributions were made or will be made.

Records and payslips must be accurate, and record every entitlement an employee has under the relevant contract, National Employment Standard (NES), award, enterprise agreement or workplace determination. If they are altered, there are rules about how this must be done. The NES covers 71 sections of the FW Act, while the Pastoral Award 2010 contains 110 pages of terms and conditions of employment. Enterprise agreements can range anywhere from a few pages, incorporating the relevant award, or hundreds of pages.

By any measure, there is enormous scope for error given the level of prescription in workplace instruments. This explains why record keeping and payslip breaches are so commonly a feature of FWO compliance activity.

According to the FWO Annual Report 2015-16:

> "In 2015–16, we initiated 50 civil penalty litigations. The majority (66%) concerned wages and conditions and, of these, 30% also alleged pay slip and record-keeping contraventions."

While it is not clear from the Annual Report, it is likely that the proportion of cases involving record-keeping and payslip issues was much higher than 30% overall. Doubling penalties for inadvertent breaches of record keeping and payslip rules goes far beyond the policy intent of the bill. It affects every business in Australia, not just those trying to exploit the system. It will scare small and medium businesses into settling claims, whether or not they are validly made.

Litigation is an 'end of the line' activity –pursued by the FWO to secure compliance with the FW Act when earlier attempts to resolve a concern have failed. Steps taken by the FWO before litigation is initiated could involve site visits, letters of inquiry, infringement notices or invitations to enter into a compliance deed or enforceable undertaking.

Small business in particular can feel intimidated by a regulator turning up on their doorstep, or notifying them of an audit, or a complaint. This feeling is heightened once written notices are issued by the FWO, outlining penalties that might apply if they refuse to cooperate fully. Most businesses encountering the FWO for the first time will not have any sense that maximum penalties are unlikely to be awarded, or that a penalty 'per contravention' only rarely means that penalties are applied cumulatively according to the number of errors or employees involved.

Instead, most small businesses will read a letter from the FWO advising that they could be liable for the maximum penalty "per contravention" with alarm. Take the example of a business with 5 employees, who receives a letter of demand from the FWO alleging that it has failed to pay employees correctly for a public holiday. The actual amount FWO seeks to recover is approximately $1000, but the

maximum penalty is up to $270,000 (one contravention per employee, or five times the maximum penalty of $54,000).

This highlights how, by implication, the FWO holds significant leverage in "early intervention" discussions with employers about the settlement of claims. It is rarely in an employer's interest to resist such claims by asking the FWO to test its theories in court, because the cost of paying out a negotiated amount is much lower than the risks associated with penalties being applied if things turn sour during a day in court.

Importantly, despite assurances in the Explanatory Memorandum to the bill that the "increase in the penalties is not designed to target those employers who genuinely overlook record-keeping requirements", there is no exception in the bill so that the higher penalties do not apply in cases of that kind. Leniency instead is left to the discretion of the FWO and the Courts, and in practice what this means is an increasing reliance upon the threat of higher penalties in settlement negotiations, as well as much more serious consequences for business viability if litigation eventuates.

5. Expanding corporate liability for holding companies

It is uncontroversial that under Australian workplace law, employers are responsible for the wages and conditions of their employees. The FW Act does not extend liability up the supply chain, except where a person is "knowingly involved" in breaking the law. This is called "accessorial liability".

Accessorial liability provisions allow regulators to cast their nets more widely, so that parties who have not themselves broken the law, but were knowingly involved in conduct in breach of the law, can also be held liable. For this to occur, they must have been intentionally involved in the contravention. As the High Court[3] said,

> "A person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention….
>
> "[A] person could only be properly said to be a "party to" a "contravention" if his participation was in the context of knowledge of the essential facts constituting the particular contravention in question.
>
> "…a party to a contravention [must] be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention."

This sets the bar high. The prosecutor must prove that the person knew what they were doing, and intended to be involved. This is a question of fact. It is not enough to have been in the wrong place at the wrong time.

[3] *Yorke v. Lucas* (1985) 158 CLR 661, 3 October 1985

Under the bill, holding companies will become liable for the activities of their subsidiaries where they knew, or should reasonably have known, that the subsidiary had fallen foul of the FW Act, or was likely to, and could reasonably have taken action to prevent it.

The new law will build on, rather than replace, existing "accessorial liability" provisions in the FW Act. It will effectively expand the scope of accessorial liability, as the FWO has been seeking to do over the past twelve months.

On 27 May 2016, the FWO addressed the Australian Labour and Employment Relations Association National Conference and said this:

> "We are pushing the boundaries of the accessorial liability provisions contained in the FW Act. This is how Coles ended up in court. So far this financial year nearly every matter we have filed in court— 94% in fact—has also roped in an accessory. We are increasingly pursuing a broader range of accessories, including accountants and human resources managers."

On 28 October 2016, the FWO gave an address to the Law Institute of Victoria. Lawyers in the room were told:

> "We have been active in our patch, we have been testing the law and of course we are open about it."
>
> "…businesses, and their advisors, need to look more broadly than just their obligations under the law. You need to consider the impact your advice or actions could have on your reputation or the reputation of your clients."
>
> "We actively and appropriately use the media to promote our compliance work, including our court matters. We do this to ensure that we send a strong message that those who engage in deliberate exploitation of workers or fail to cooperate with the regulator will face visible consequences – legal and reputational.

On 10 March 2017, in a presentation to the law firm Lander and Rogers, the FWO continued with this theme:

> "And you are on notice. It's time to get your house in order. Whether it's record keeping practices or your approach to procuring labour in low skill markets. The community will not stand for deliberate and ongoing exploitation of workers.
>
> And it will judge you by association with no care for the technicalities of which entity is the employer at law."

The FWO noted that 46 of 50 matters it took to court in 2015-16 (or 92%) involved an allegation of accessorial liability. Figures for 2016-17 were said to be "tracking along similar lines". These same figures were used in the FWO's most recent Annual Report:

> "Encouraging businesses to take responsibility for their supply chains and networks, and fully utilising our accessorial liability provisions are essential tools in building a culture of compliance with workplace laws. Nearly every matter we filed in court—92%—roped in an accessory (a party other than the employer who

> played a role in the exploitation of workers). In 2015–16 this included accountants and human resource managers.
>
> By pursuing accessories, we can seek penalties from individuals involved in the conduct, irrespective of whether the corporate employer is still operating, or has money in the bank. And after the recent precedent-making case of *FWO v Step Ahead Security Service Pty Ltd & Anor*, we can now also recoup back-payments from accessories, making them directly accountable for underpayments in which they were involved."

What is not clear from the FWO's annual report is how many "accessorial liability" prosecutions were successful. Anecdotally, the number appears to be small. This is unsurprising, because as the High Court said, the bar is set high.

This is important, because under the law, which is no mere technicality, employers are not generally liable for all workers in their supply chain. Except in the appropriately limited case of intentional misconduct, they are liable for the wages and conditions of their employees and other employers are responsible for their own employees.

The bill creates an expectation that holding companies should take reasonable steps to make sure their subsidiaries comply with the FW Act. Examples of reasonable steps are set out in the bill, and include:

- ensuring that business arrangements require subsidiaries to comply with workplace laws;
- providing subsidiaries with a copy of the FWO's Fair Work Handbook;
- encouraging subsidiaries to cooperate with any audits by the FWO;
- establishing a contact or phone number for employees to report any potential underpayment to the business; and
- auditing of companies in the network.

There will be a reverse onus on companies to show they took reasonable steps to prevent contraventions by their subsidiaries, or that there were no reasonable steps they could have taken. Companies will be able to prosecuted independently of their subsidiaries, or jointly with them. If a company outlays an amount to cover underpayments by its subsidiary, the amount paid will not automatically become a debt due to the company but rather a right to sue the subsidiary.

The measure will significantly increase the red tape burden for business. By implication, it will create an expectation on companies to actively monitor and/or audit each of their related entities and keep records of subsidiary activities in case something goes wrong and they become liable.

In other words, it is a step toward "piercing the corporate veil", and one that will undermine the efficient structuring of operations and act as a further drag on our international competitiveness. Literally hundreds of thousands of valid corporate structures developed over the years to meet individual business needs will require review, and in many cases, recalibration. More resources will become tied up in administrative oversight, reducing productivity and efficiency.

The measure goes beyond what is needed to achieve the policy intent and should be narrowed. It should only apply in circumstances where there is a serious case of non-compliance, such as that which arose in relation to 7-Eleven.

6. New coercive powers for the workplace regulator

The most concerning aspect of the bill is its grant of new coercive powers to the Fair Work Ombudsman (FWO), justified by the fact that such powers are available to other regulators under a range of other Commonwealth laws.

The FWO already has a range of coercive powers it can use when exercising compliance functions under the *Fair Work Act 2009* (FW Act). These include:

- power to enter premises (without force) and undertake specified activities; limited to premises where work is being or has been done;
- power to require a person to provide their name and address;
- power to require a person to produce a record or document and keep the record or document; and
- power to issue compliance notices.

Penalties apply to individuals and companies who fail to comply with a requirement imposed by the FWO.

In 2010, the Commonwealth Ombudsman reviewed the exercise of these powers by the FWO after a high number of complaints in previous years. It found that while generally its powers were used appropriately, there was room for improvement in areas including:

- notices issued to employers prior to an investigation;
- adequacy of guidance in relation to type and volume of document requests;
- absence of formal guidance for determining time frame for compliance with notices;
- type of information provided to interviewees before and during an interview; and
- internal service standards for liaison with employers who are the subject of a claim.

The Commonwealth Ombudsman also made a number of recommendations to ensure that the exercise of the FWO's powers was in line with principles established in the 2008 Administrative Review Council report, *The Coercive Information-Gathering Powers of Government Agencies* (ARC report). These were that the FWO:

- review the Field Operations Manual to ensure that the burden placed on an employer by a notice to produce documents is taken into consideration by Fair Work Inspectors when determining the type and volume of documents that are requested during an investigation.

- provide explicit guidance to Inspectors about when consideration should be given to issuing a 'notice to produce' documents with a compliance period

longer than the 14-day minimum statutory period and that formal guidance be given about what is a reasonable basis for failing to comply with a 'notice to produce' document.

- review the script used before and during recorded interviews to ensure that it reflects the voluntary status of interviews.

- develop an internal service standard that specifies the time periods within which contact should be made with employers during the course of an investigation.

Each of these recommendations were made in the context of the FWO conducting only voluntary interviews. Interviews would no longer be voluntary under the bill, and accordingly, greater protections will be necessary if the bill is to strike an appropriate balance between compliance and regulatory burden.

How do the proposed coercive powers compare?

The issue of coercive powers was hotly contested in 2016 in the context of the Australian Building and Construction Commission (ABCC) Bill. That bill eventually became law, but not before the coercive powers were significantly modified to improve oversight and transparency.

Issue	ABCC	FWO
Use of powers	Only if authorised by Administrative Appeals Tribunal	At FWO discretion
Transparency	Notifies Commonwealth Ombudsman when powers are used	Reports to the Minister, annual report tabled in Parliament
Penalties	Civil and criminal, 6-12 months jail	Civil and criminal, up to 12 months jail

In the construction industry, there was indisputable evidence to justify a stronger 'cop on the beat'. The Trade Union Royal Commission found widespread misconduct. Creation of false invoices and destruction of documents, secret payments, kickbacks and blackmail were but some of the concerns highlighted over 189 days of hearing and 505 individual witnesses, leading to over 100 prosecutions.

There is no equivalent wealth of evidence to justify new evidence-gathering powers in every workplace and every industry in Australia. The consequences of granting powers of this kind to the workplace regulator are painted in their best light in the Explanatory Memorandum to the bill, but it is incumbent on the Parliament to fully comprehend how these powers will be applied in practice before it proceeds with such a significant intrusion into every corner of the economy.

Privilege against self-incrimination and the right to silence

Former High Court Justice Kirby described privilege against self-incrimination as "necessary to preserve the presumption of innocence", and "to ensure that the burden of proof remains on the prosecution".[4] It is perhaps the second point that is most revealing, because granting compulsory evidence gathering powers to the FWO will undoubtedly make it easier for the FWO to succeed in court.

The ARC Report[5] discussed above considered the privilege against self-incrimination in the context of principles to guide the use of coercive powers by government agencies. Many of those principles are referred to in the bills' Explanatory Memorandum, but Principle 17, which is not, says this:

> "Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.

According to the bill's Explanatory Memorandum, a person attending a place to answer questions of the FWO may choose to be represented by a lawyer. What it does not say is that they cannot choose whether to answer questions that are asked, or whether to provide information on oath if requested. They cannot choose to stay silent, or even to have their lawyer speak for them. Faced with interrogation by senior lawyers employed by the FWO, most participants in compulsory interrogation will be at a serious disadvantage. Information they give must be absolutely true, with no omissions. Sworn evidence can be required under threat of both civil and criminal sanctions.

In 2015, the Australian Law Reform Commission[6] recommended further review of self-incrimination rules under Commonwealth laws, including whether taking away the privilege against it in more than 40 laws has been sufficiently justified, and if so, what type of immunity is appropriate.

Rather than undertaking a review, the bill sets about to remove this fundamental freedom in every workplace in Australia. It builds on recent reforms that have increased the ability of government agencies to share information, without making clear how protections and limits on the use of coercive powers will be preserved. This is of concern, given Principle 19 of the ARC Report, which provides that the same protections and limits on the use of coercive powers should apply to inter-agency disclosure of information obtained with coercive powers.

[4] *Cornwell v The Queen* (2007) 231 CLR 260
[5] *The coercive information gathering powers of government agencies*
[6] ALRC, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws* December 2015 https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf

7. Is the bill good regulation?

The criteria for assessing whether regulation is 'good regulation' was outlined earlier in this submission. It is discussed in turn below in relation to the bill.

1. *It must actually do good – which means having a sound rationale and having a net benefit for society, after costs and benefits are weighed.*

   For the most part, the bill has sound rationale, but the costs to society are much greater than the benefits that will flow from higher costs of doing business in Australia, enforced by a disproportionately powerful 'cop on the beat'.

   Under the bill, interview participation would no longer be voluntary, and the burden of compliance on employers and individuals will be significant.

   Ultimately, the bill will have a net cost on our society because it is inconsistent with our values, including respect for the freedom and dignity of the individual.

2. *It must be better than any alternative regulatory or policy tool. Filling a legislative void is not enough.*

   To a large degree, the matters the bill seeks to deal with are already regulated under the FW Act. Employers are required to keep records and give payslips, and penalties apply if they do not. Accessorial liability operates in appropriate cases where a third party is involved in the contraventions of another. The FWO has a range of coercive powers, which require the production of documents, and prohibit false and misleading representations.

   A proportionate legislative response would deal with the most serious of cases, where there is a clear pattern of avoidance of workplace and migration obligations. It would not penalise every employer in Australia for the sins of a few.

3. *It must be robust to errors – anticipating what could go wrong and having mechanisms to respond when something does.*

   Compulsory evidence gathering powers are likely to largely go unchecked under the bill, as the FWO will only be required to report to the Minister and otherwise will have a significant level of discretion.

   As happens in the case of vulnerable workers, errors are most likely to arise where there is a significant imbalance of power. The FWO will have extraordinary power if the bill is passed in its current form. This will have ramifications for the way it engages with stakeholders – particularly those of limited capacity or resources.

Greater transparency and oversight is necessary if such powers are to be applied, so that there is a genuine and fair mechanism for dealing with concerns when things go wrong. A better approach would be to limit the scope of the powers so that they only operate where justifiable given the seriousness of the case.

4. *It should contain the seeds of its own destruction, so that society can continue to assess whether the benefits outweigh the costs.*

   There is no obvious mechanism for the new measures to be reviewed either on a 'one off' or ongoing basis. Only a change in policy followed by new legislation will act as a catalyst for change.

5. *It should say what it will do, with measurable performance indicators. If workers are to be protected because of it, how many, and in what way?*

   It is not clear how the effectiveness of the new measures will be quantified. Revenue from penalties will certainly increase, as will the regulatory burden, which is notoriously difficult to measure. Any exercise of new powers should be accompanied by some mechanism that allows the community to assess their value. For example, the FWO does not currently publish litigation outcomes which means there is no benchmark from which to track the effectiveness of the proposed new powers. This should be considered if the bill is to proceed.

6. *It should be clear and concise, so that everyone affected can understand what it means for them.*

   The bill is framed in technical 'compliance' language, which is likely to be clear to employment law experts, but less likely to be accessible to the ordinary person At the very least, a comprehensive outline of the FWO's new powers, how this affects the right to silence and to legal representation, the right to have legal costs reimbursed and the consequences of failing to comply, should be made available in plain language to the broader community.

7. *It should be consistent with other laws, agreements, and international obligations to avoid division, confusion and waste.*

   The bill will extend compulsory evidence gathering laws to a new regulatory framework, in a way that is said to be consistent with other laws. However, there are some fundamental differences including in relation to the ABCC bill that go to the consistency of application of such powers in the workplace context.

8. *It must be enforceable, but only in a way that is reasonable, underpinned by adequate resources.*

   The bill will be enforceable, but not in a way that is reasonable, as this submission has outlined in detail above.

9. *It must be administered by accountable bodies, in a fair and consistent manner. This includes not just reporting to the Minister or the Parliament, but also rights of appeal, clear guidelines, transparent processes and decisions, and accessibility to the public.*

   The bill provides for reporting to the Minister and to the tabling of reports in the Parliament. However, it is otherwise left to the concerned stakeholder to undertake their own research in a bid to find out how to make a complaint to the Commonwealth Ombudsman, and then to do so.

   Information about how to deal with concerns about the exercise of compulsory interrogation powers will need to be made available as a supplementary resource to the bill, particularly if it is to proceed in its current form.

On balance, it is clear that the bill in its current form is not good regulation. It meets few of the tests outlined above, and is likely to have an overall net cost to society rather than a benefit.

8. Conclusion and Summary of Recommendations

The NFF supports the underlying purpose of the bill, but in its current form it goes far beyond what is intended and it does so in an unreasonable and punitive way.

The NFF supports	The NFF does NOT support
Higher penalties for employers who deliberately and systematically break the law	Double record keeping or payslip penalties for all national system employers
New offences for forcing employees to repay their wages	Holding companies being effectively liable for subsidiary breaches
Establishment of the Migrant Workers Taskforce and an extra $20 million for the Fair Work Ombudsman (FWO)	New coercive powers for the FWO

The bill should be amended so that it no longer seeks to:

1. double the penalties for all record-keeping and payslip breaches;
2. extend liability to holding companies in relation to their subsidiaries; and
3. grant new compulsory evidence-gathering powers to the FWO. At the very least, the bill should limit the exercise of such new powers to cases where there is a serious pattern of non-compliance with the FW Act.

Any increase in the FWO's powers should be reasonable and proportionate. Transparency and oversight should be increased through appropriate public reporting and appeal mechanisms.

We take the opportunity to thank the Committee for the opportunity to make this submission.

Sections 137.1 and 137.2 of the Criminal Code

Division 137 -- False or misleading information or documents

137.1 False or misleading information

(1) A person commits an offence if:

(a) the person gives information to another person; and

(b) the person does so knowing that the information:

(i) is false or misleading; or

(ii) omits any matter or thing without which the information is misleading; and

(c) any of the following subparagraphs applies:

(i) the information is given to a Commonwealth entity;

(ii) the information is given to a person who is exercising powers or performing functions under, or in connection with, a law of the Commonwealth;

(iii) the information is given in compliance or purported compliance with a law of the Commonwealth.

Penalty: Imprisonment for 12 months.

(1A) Absolute liability applies to each of the subparagraph (1)(c)(i), (ii) and (iii) elements of the offence.

(2) Subsection (1) does not apply as a result of subparagraph (1)(b)(i) if the information is not false or misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

(3) Subsection (1) does not apply as a result of subparagraph (1)(b)(ii) if the information did not omit any matter or thing without which the information is misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3). See subsection 13.3(3).

(4) Subsection (1) does not apply as a result of subparagraph (1)(c)(i) if, before the information was given by a person to the Commonwealth entity, the Commonwealth entity did not take reasonable steps to inform the person of the existence of the offence against subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (4). See subsection 13.3(3).

(5) Subsection (1) does not apply as a result of subparagraph (1)(c)(ii) if, before the information was given by a person (the ***first person***) to the person mentioned in that subparagraph (the ***second person***), the second person did not take reasonable steps to inform the first person of the existence of the offence against subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (5). See subsection 13.3(3).

(6) For the purposes of subsections (4) and (5), it is sufficient if the following form of words is used:

"Giving false or misleading information is a serious offence".

137.2 False or misleading documents

(1) A person commits an offence if:

(a) the person produces a document to another person; and

(b) the person does so knowing that the document is false or misleading; and

(c) the document is produced in compliance or purported compliance with a law of the Commonwealth.

Penalty: Imprisonment for 12 months.

(2) Subsection (1) does not apply if the document is not false or misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

(3) Subsection (1) does not apply to a person who produces a document if the document is accompanied by a written statement signed by the person or, in the case of a body corporate, by a competent officer of the body corporate:

(a) stating that the document is, to the knowledge of the first-mentioned person, false or misleading in a material particular; and

(b) setting out, or referring to, the material particular in which the document is, to the knowledge of the first-mentioned person, false or misleading.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3). See subsection 13.3(3).