



Submission into the Provisions of the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004

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Executive Summary

1. The National Farmers' Federation (NFF) supports and commends the *Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004*.
2. NFF believes it is critical that this legislation is enacted to reinstate the small business exemption from redundancy payments that has been removed from Federal Awards following a recent decision of the Australian Industrial Relations Commission (AIRC).
3. NFF was a party to the AIRC case and opposed the removal of the exemption.
4. NFF strongly disagrees with the reliance by the AIRC on the ability of small business to pursue an incapacity to pay claim if they cannot afford to pay redundancy.
5. NFF has significant experience in dealing with incapacity to pay claims. On the basis of available evidence it is clear that the current procedures used by the AIRC for demonstrating incapacity to pay effectively render the provision as inaccessible for small business.
6. Due to the lack of productivity increases as an offset to the increase in employee entitlements, the requirement to pay redundancy may affect the capacity of farmers to employ or re-employ.
7. NFF believes there is substantial evidence to warrant the enactment of this Bill.
8. NFF strongly urges the Senate to support the Bill.

1. Introduction

9. NFF supports and commends the *Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004* (the Bill).
10. NFF believes it is appropriate for the Bill to seek to enshrine in legislation the protection of small business from redundancy payments.
11. NFF understands the premise of the Bill is to restore the exemption of small business from redundancy payments following the removal of the exemption from Awards by the Australian Industrial Relations Commission (AIRC) earlier this year.
12. NFF was an intervening party to the AIRC *Termination and Redundancy Test Case (C 2002/4607 – 4611, 4659 – 4660, 4740 and 4772)*. NFF opposed the application by the ACTU to remove the small business exemption from the test case standard.
13. NFF's general approach to issues involving increasing employee entitlements is to support such increases if they are based on corresponding increases in productivity at the workplace to compensate for those additional costs. There is no evidence that the costs associated with the provision of redundancy payments for employees of small business can be offset by productivity gains at the workplace.
14. In the Termination and Redundancy Test Case decision (*PR032004*), the Full Bench of the AIRC removed the small business exemption but capped the maximum pay out to 8 weeks' pay. This pay scale is the equivalent to the old scale in operation prior to this decision. The new scale for non-small businesses extends to 16 weeks' pay.

15. The Bench also determined that if a small business had difficulty in paying redundancy it could seek a variation to the redundancy provision on the basis of its incapacity to pay. NFF argued during the proceedings and maintains, that it is all but impossible for small business to successfully prosecute an incapacity to pay claim. That is, the evidentiary and procedural requirements are so onerous that it results in substantial stress and significant administrative and cost burdens on a small business, which effectively precludes the use of this provision by small business. NFF submits, therefore, that incapacity to pay claims cannot be regarded as an effective fallback provision for small business.
16. The AIRC, by removing the small business exemption, ignored the submissions of employers, of many State Governments, the Australian Government, a recent decision in the Queensland Industrial Relations Commission and the previous AIRC Termination and Redundancy Test Case Decision.
17. Given these circumstances, it is critical that the *Workplace Relations Amendment (Protecting Small Business Employment) Bill* is enacted as quickly as possible in the interests of small business employment.

2. Nature of Farming Business

- 18. Farming enterprises are predominately deemed to be small businesses.

- 19. The Australian Bureau of Statistics (ABS) does not provide specific information as to how many agricultural businesses employ less than 15 employees. ABS statistics utilised to define an agricultural small business are based on a measure of the Estimated Value of Agricultural Operations. ABS determined that agricultural small businesses are those businesses, which have an EVAO of between \$22,500 and \$400,000. In using that measure, ABS has estimated that of the 105,500 agricultural businesses in 1999-2000, 86% of agricultural businesses are deemed to be small business. (*p 80, ABS, Small Business in Australia 2001, Cat No 1321.0*)

- 20. Recent ABS figures estimate that in March 2004 agricultural businesses employed 370,500 people including seasonal casual workers. These figures can be compared to the previous March quarters.

1999	430,000
2000	444,000
2001	440,000
2002	427,000
2003	370,000
2004	370,500

(ABS, *The Labour Force, Australia, Cat No 6291.0*).

These figures reflect the significant downturn in employment in this sector predominantly due to the drought.

- 21. A recent agricultural industry research study (*NSW Farmers' Association, 2002*) into NSW farm businesses found that 92.8% of respondents to the survey employed less than 20 employees and 53.8% of respondents employed 4 or fewer employees.

22. ABS characterises the agricultural industry in the following terms:

“The structure and characteristics of agricultural businesses can be quite different to those in other industries. Agricultural businesses tend to be dominated by owner operated family businesses, engage few regular employees; and show greater income volatility over time than businesses in other industries.” (p 79, ABS, Small Business in Australia, Cat No 1321.0, 2001)

23. Many rural communities depend on agriculture for their prosperity. Agriculture contributes more than 30% of employment in 66% of small non-coastal towns and contributes more than 50% of total employment in 28% of small coastal towns (p 38, ABARE, Country Australia).
24. Given these characteristics of agricultural industries, it can be concluded that, prior to the decision of the AIRC to remove the small business exemption, the vast majority of farm business would not have been required to pay redundancy in the unfortunate situation of making an employee redundant.

3. Financial Vulnerability of Rural & Regional Businesses

25. NFF submits that small businesses are particularly affected by cost impacts, to the extent that any additional cost burdens may have adverse consequences on a business and its capacity to employ. Small business, in general, has a lesser ability than larger business, to accommodate the costs associated with the provision and/or payment of redundancy pay due to the lower profitability of small business, the relative cost impact of a redundancy pay out and a reduced ability to offset such costs against capital. This is particularly prevalent to rural and regional business including farming businesses.
26. In terms of rural & regional businesses, the data highlights the differences.
27. In 1999-2000 the average revenue for rural businesses was only 76% of the average for city businesses (*Professor Philip Lewis, A Report on the Effect of Raising Minimum Wages on Rural Business for the National Farmers' Federation – the Lewis Report*). Professor Lewis states that:
- “This supports the view that rural businesses are not able to reap the economies of scale of urban businesses. Revenue streams are most likely to be limited by population size and growth in rural towns” (paragraph 21 of the Lewis Report).*
28. Further, average profits for rural businesses are only 59% of non-rural businesses (paragraph 23 of the Lewis Report).
29. In terms of debt, metropolitan businesses are less in debt than those in rural Australia. Metropolitan businesses have \$1.82 of assets to each \$1 of liability while rural businesses have \$1.02 assets to each \$1 of liability (paragraph 26 of the Lewis Report).

30. Another recent report that highlights the difficulties faced by rural Australia is the *Regional Business: A Plan for Action Report* (Regional Business Report) published by the Department of Transport and Regional Services. The Report stems from the recommendations of the Regional Business Development Analysis Panel in 2003. A key fact of the importance of rural Australia to the Australian economy is highlighted in the Report:

“Australia’s regional communities are a major source of the nation’s export strength and economic wealth. Non-metropolitan Australia generates about half of Australia’s export revenue and employs more than one-third of the nation’s workforce.” (page 12)

31. The Regional Business Report states that:

“Regional Australia can only survive on the back of strong, growing businesses that create strong vibrant communities. It has been highlighted to us that regional small and medium businesses are the wealth creators and job providers for regional Australia. More than half a million businesses operate in regional Australia, and in many respects they are the backbone of their communities. These businesses are important employers, wealth creators and significant global exporters. Our research shows that there remains unrealised potential in regional Australia with regional small businesses growing more slowly than metropolitan businesses and on average being half as profitable as metropolitan small businesses.” (Regional Business – A Plan for Action, 2003, DOTARS, page 4)

32. The Regional Business Report considered the income and expenses of regional businesses in comparison to metropolitan businesses. The Report states that

“Despite gross figures seeming to indicate that it is cheaper to operate a regional business, when costs are considered in terms of the number

of dollars spent for every dollar of profit, the costs of regional business are considerably higher than in metropolitan areas. Over the five years until 2000, the expenditure for every dollar profit increased for the average regional business by almost 8%, while in the cities, it became 11% lower. Regional businesses are not as profitable as their metropolitan counterparts and the gap is widening". (Page 12)

33. The Regional Business Report also found that, in general, regional business face greater hurdles to access finance than metropolitan businesses (Chapter 2).

Vulnerability of Farming Small Businesses

34. While farming small business are incorporated into the regional business analysis, as described above, there can be some differences and some specific farming issues that need to be taken into account when considering problems for small business meeting the costs associated with an increase in entitlements particularly when those entitlements maybe required at a time when there are financial strains on the business.
35. The publication, *Financial Performance of Australian Broadacre Agriculture [Financial Performance Report]*, (Australasian Agribusiness Services for Rural Industries Research and Development Corporation, Research Paper No 97/40, 1997) outlines problems associated with farmers accessing capital. The report was commissioned with the objective to “*examine and develop innovative ideas on how to overcome capital and equity problems in agriculture*”.
36. Key findings highlighted in the introduction of the *Financial Performance Report* include:
 - *99.6% of Australian broadacre farm enterprises can be classified as family businesses.*

- *The Australian agricultural sector is predominantly financed by owner/operators using private capital and retained earnings.*
- *A substantial proportion of smaller farms are dependent on off-farm income for survival.*
- *The average owner equity was 87% across broadacre industries. The reasons for the high equity ratio included the high levels of risk in farming, the volatility of farm income, inability to consistently meet loan-servicing costs.*
- *Underlying profitability of most farms is so low that they cannot afford to take on even comparatively low levels of debt.*
- *Agriculture, like small business enterprises in other sectors, has difficulty accessing equity markets.*
- *Australian agriculture is inherently risky because of such factors as climatic variability, high dependence on world commodity markets, external economic factors influencing demand, cost of funds, availability of labour and rates of inflation.*

37. As farmers consider expanding their business, the *Finance Performance Report* concluded that they often face difficulties in financing growth plans without risking long-term financial viability. The principal conclusions were as follows:

- *“Broadacre agriculture cannot sustain high debt levels.*
- *To finance expansion farmers have a choice of debt and equity.*

- *Debt finance is readily available but only sustainable in low gearing ratios.*
- *Equity finance is less readily available due to the lack of attractiveness of agriculture as an investment.”*

38. A recent publication by abareconomics (ABARE) also highlights trends regarding farm size and productivity (*Farm Size and Productivity: Where are the Trends taking us? Vol.9, No.3, September quarter 2002, pp 495-500*). ABARE acknowledged that ownership of Australian farms is overwhelmingly dominated by family businesses.

39. ABARE identified the problem associated with lack of access to funding:

“Not having access to equity funding, the capacity of family farms to expand it’s limited by the profits they can generate and the funds they can borrow. Expansion for small and even medium sized family farms is often slow and, in many cases, impractical”.

40. The difficulties faced by farmers to ensure the survival of the farm business is no more evident than the conclusions contained in a RIRDC publication, *Government Responses to Farm Poverty 1989-1998: The policy development process (Farm Poverty Report)*.

41. The *Farm Poverty Report* acknowledged in the executive summary that:

“Poverty can occur as a result of temporary stresses on the farm such as drought or low commodity process, it can result from inadequate resources such as in areas where properties may be undersized and it can result from the long term structural changes within an industry. The asset-rich, income-poor status of many farm families can deny them access to the general social security safety net and can make the identification of true hardship problematic (page vi).”

42. The inability for farm businesses to readily access capital is highlighted in the *Farm Poverty Report*:

“The standard social security safety net is not tailored to deal with either the self-employed or the asset-rich/income poor. Farmland is generally low-yielding investment and is not easily liquidated. Selling off part of a property to overcome low income problems is not a realistic option as reducing the size of the land holding is likely to reduce further the farmer’s long-term viability. In addition, finding a buyer for very small parcels of land is problematic, particularly during a downturn (page 4).”

43. Under drought conditions, farm incomes are highly vulnerable. For example, in *ABARE, Australian Commodities, vol 9, no 4, December quarter 2002* at page 567 (relevant extract is attached and marked Attachment B), it was reported that:

“Farm Business profit – a measure of longer term farm profitability – is projected to fall by even more than farm cash income. Farm business profit incorporates changes in the value of trading stocks held on farms. ... Farm business profits on broadacre farms are projected to fall from around \$51 800 in 2001-02 to a loss of around \$54,000 in 2002-03. In real terms, broadacre farm business profits are forecast to decline to around the 1982-83 drought affected outcome. Dairy farm business profits in 2002-2003 are forecast to fall by a similar amount to the falls in the broadacre sector.”

44. Drought is one of the largest contributors to employment reduction in the agriculture industry. This relates to all facets of agricultural employment and has down and up stream impacts.
45. The adverse impact of drought and drought recovery on the farming industry is significant with mass reductions in income leading to many farming

businesses being required to access government assistance at the same level as unemployment benefits to meet basic needs during drought periods.

46. Drought imposes pressures and constraints on farm businesses that are not experienced elsewhere in the business community. Farming is a highly seasonal activity and vulnerable to climate change.
47. The Australian farm sector exports almost 70 per cent of production. In world commodity markets, intense competition and the corrupt trading environment make it impossible for Australian farm product to pass on higher costs of production into higher prices.
48. The variability of farm incomes together with the inability of farmers to pass on higher costs means that there is very limited scope for farmers to absorb redundancy costs.
49. The cost/price squeeze is such that imposing redundancy costs on farmers would be a significant disincentive for farmers to employ and would also impose undue pressure on farm businesses doing it tough.

4. Workplace Relations Act and Small Business

50. The capacity of small business in respect to both the cost implications and administrative difficulties of dealing with employee entitlements is already recognised in the *Workplace Relations Act 1996* in respect to unfair dismissal provisions. For example, in determining whether a termination is harsh, unjust or unreasonable in s170CG(s) the Commission must have regard to (*inter alia*):

- (da) *the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
- (db) *the degree to which the absence of dedicated human resource management specialists or service would be likely to impact on the procedures followed in effecting the termination.*

Further, in determining an order that provides for a remedy in arbitration the Commission is required pursuant to s170CH(2)(a) to have regard to (*inter alia*) “*the effect of the order on the viability of the employer's undertaking, establishment or service*”. This provision is also to be taken into account in the calculation of an amount in lieu of reinstatement in s170CH(7).

5. Incapacity to Pay Claims

51. In removing the small business exemption, the AIRC concluded that if a small business could not afford to pay redundancy at the time an employee was being made redundant, then they could seek relief from the requirement to pay by filing an incapacity to pay claim in the Commission.
52. It is the NFF's position that the Commission's current procedures for considering incapacity to pay claims are unacceptable.
53. NFF strongly argues, therefore, that the AIRC's view that small business can seek relief from redundancy provisions by demonstrating incapacity to pay is flawed.
54. The AIRC, in a number of cases, has recognised that there are some difficulties for business in establishing an incapacity to pay claim. For example, an AIRC Full Bench in the Safety Net Review Decision of 2003 (PR002003) stated

“we have some sympathy for the NFF argument to the effect that, for individual farmers and associated small business mounting an economic incapacity case is a formidable task”.

55. The Commission also stated in the Redundancy Test Case itself that

“we recognise that any incapacity to pay case may present the applicant or applicants with difficulties. Almost by definition an employer's resources to conduct such a case are under serious strain. However, the Commission is experienced in these matters and has sat out of hours, on site, and has assisted both employers and employees who may not be represented. An example of an approach adopted by

the Commission is provided by a recent matter involving the Pastoral Industry Award 1998”.

56. The NFF submits that despite the conclusions reached by the AIRC, the current incapacity to pay process does not address the issues raised by the Commission itself. The true nature of the problems and frustrations for small business in pursuing incapacity to pay claims has never been rectified. The current process is so frustrating, cumbersome and unfair that small businesses are simply not interested in even contemplating the process.
57. Under the current AIRC incapacity to pay process there are two usual circumstances where an employer can argue incapacity to pay. First, pursuant to the Statement of Principles, an employer can seek to reduce, postpone or phase in an increase to wages flowing from a national wage case. Secondly, which is relevant to this Bill, an employer can seek to waive the requirement to pay redundancy. The process to pursue an incapacity to pay claim is the same in both circumstances. While NFF experience relates to national wage increases, NFF evidence of the problems with incapacity to pay claims is just as relevant to redundancy incapacity to pay applications.
58. To argue an incapacity to pay case an individual employer is required to collate and file substantial financial records in the Commission, which are then available to the relevant union to examine, regardless of whether there is a union member at the workplace or not. The employer is then required to attend a Commission hearing to substantiate their case and be the subject of questioning from the Commission and the union. This is a time consuming, costly and potentially intimidating experience for a small business operator.
59. NFF over the past 20 years has fought to create a more simplified and effective process for farmers to argue incapacity to pay. In all of these instances with the exception of the recent drought-related case, NFF has sought an industry wide incapacity to pay provision because of the problems faced by individual farmers in undertaking such cases. Our attempts have

been unsuccessful. In the most recent drought-related case, NFF argued for an automatic exemption to pay based on certain criteria so that individual farmers did not have to tackle the process themselves.

60. In the recent drought-related case, NFF sought a simplified incapacity to pay process to delay the 2003 national wage increase for farmers. NFF sought that evidence of Exceptional Circumstances Relief Payments (ECRP) under Federal Government Policy should automatically entitle a farmer to a delay in payment of the wage increase. NFF was partially successful in that claim. NFF was granted a somewhat streamlined process for drought-affected farmers although the procedures established by the AIRC were more restrictive than the process sought by NFF. Therefore, it was evident very quickly there were still significant hurdles to be faced by small business (PR940769).
61. The streamlined process, in general terms, allowed drought-affected farmers who were in receipt of ECRP to provide evidence that they were in receipt of ECRP and to provide financial records for the last 3 years. These documents plus a completed application form were to be filed with the Commission and the union. If there was no objection to the application it was automatically granted without the need for a hearing. If the union objected then a hearing was required but at a place convenient to the farmer rather than in a capital city. The union had the onus of proving why the application should not be granted.
62. This supposedly simplified process was only provided on the basis that a farmer was receiving ECRP. ECRP is only granted after the farmer has been subject to vigorous financial scrutiny through Centrelink to justify a claim for financial assistance. Yet the Commission process still required an additional consideration of financial records regardless of evidence that the farmer had already satisfied the strict requirements of ECRP. This, to the NFF, does not seem necessary and is a duplication of a process by two different jurisdictions. In our view, once farmers have met the stringent and tight criteria to access

ECRP, they should not have to undergo yet another demonstration of their hardship through the AIRC.

63. In this case, NFF, therefore, disagrees with the requirement to supply financial records on the basis that Centrelink had already assessed the farmers.
64. While the streamlined incapacity to pay process approved by the AIRC in the drought case was publicised to farmers, NFF was always aware of potential opposition to the process due to the requirement to provide private financial records, the fact that the financial documents would be available to the union and that there was the provision for a hearing to be held which could require farmers to be cross examined by the union. These aspects significantly reduced the number of farmers who were interested in applying for the delay in wage increases after the decision was publicised. The first two applicants experienced significant difficulties in the process and ultimately withdrew their applications for incapacity. As a consequence, other farmers withdrew their interest in making an application.
65. Farmers expressed particular concern regarding the ability of the union to access and scrutinize their financial records. It is not appropriate that a union with no union membership on site has the right to access the records and question the business operator regarding those records.
66. NFF is obviously extraordinarily frustrated with the limitations of the system in proving incapacity to pay.
67. NFF's position to support this Bill is particularly predicated on the fact that the current incapacity to pay process is fundamentally flawed. The NFF urges that the Bill be supported, otherwise, as explained earlier, farmers' ability to absorb the costs of redundancy is extremely limited and will result in adverse employment consequences.

68. NFF will also continue its 20-year efforts in the Commission on necessary reforms to the incapacity to pay process on a general level. It is imperative that the incapacity to pay process is eventually overhauled for all employers and to cover all circumstances where incapacity to pay claims are appropriate including wage increases.

69. Due to the inherent problems with the incapacity to pay process coupled with the restrictions of a centralised industrial system, it is critical that Parliament pursue legislative provisions to ensure that there are fair and equitable mechanisms to assist small businesses that are otherwise ignored. This Bill is designed to meet the special needs of small business and protects their capacity to employ.

6. Conclusion

70. The decision by the AIRC to require small business to meet redundancy payments was unreasonable in consideration of the all the circumstances.
71. The decision ignored the significant cost implications on a small business and just as importantly ignored the indirect ramifications such as impact on small business employment.
72. The decision ignores the complexities and costs of pursuing incapacity to pay claims that renders the incapacity to pay provision as inaccessible.
73. The removal of the small business exemption creates a downward pressure on employment in the bush. For example, at the height of the recent drought, agricultural employment figures dropped by nearly a quarter (70,000). It is likely that many of those jobs losses could be defined as redundancies (no research information on specific numbers is available). Given those circumstances, what would have been the impact on those farming businesses if they were required to pay redundancy? Would we have seen a substantial number of businesses going bust that may have otherwise weathered out the drought and re-employed?
74. NFF does support fair and reasonable increases to employee entitlements when they have been justified and when there are corresponding productivity increases at the workplace to cover those additional costs. This was not the case with the removal of the small business exemption from Federal Award redundancy provisions.
75. NFF strongly urges the Senate to pass the *Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004*.