



National Farmers'
F E D E R A T I O N

A fair and reasonable framework

**Submission to the
Productivity Commission Inquiry into the
Workplace Relations Framework**

13 March 2015

NFF Member Organisations



Australian Chicken Growers' Council Ltd



CANEGROWERS



Goat Industry Council of Australia Inc.



NEW SOUTH WALES IRRIGATORS' COUNCIL





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 132,000 farm businesses in Australia, 99 per cent of which are 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 2.4 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2012-13 was 47.9 billion – a 3 per cent increase from the previous financial year.

Yet this is only part of the picture. When the vital value-adding processes that food and fibre go through once they leave the farm are added in, along with the value of all economic activities supporting farm production through farm inputs, agriculture's contribution to GDP averages out at around 12 per cent (over \$155 billion).

Workplace >

The agriculture, forestry and fishing sector employs approximately 323,000 employees, including owner managers (174,800) and non-managerial employees (148,300).

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. Almost 10 per cent of all workers are independent contractors and more than 50 per cent of farmers are self-employed owner-managers.

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

The sector is largely award-reliant. Enterprise bargaining is not widespread: in September 2014, there were only 145 current enterprise agreements covering a total of 6,300 employees in the agriculture, forestry and fishing sector.

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

Increasing the productivity of Australian agriculture means making the most out of our resources: our land and our people.

A flexible and skilled workforce is critical to productivity. Agricultural productivity rates have been consistent over many years, with higher labour productivity growth in Australia than both the United States and Canada. However, the sector faces a number of challenges that need to be addressed if we are to remain competitive in the long term, including high labour costs, inflexible business regulation and a shortage of skilled agricultural workers.

In 2014, the NFF undertook a Farm Business Survey to better understand critical employment and labour-related issues affecting the agriculture sector. Approximately 500 businesses responded to the Survey, with results painting a consistent picture of the labour issues faced by a typical small Australian farm business. One in two businesses expected profitability and growth to improve over the next three to five years, but only one in five expected to expand their workforce. Almost 50 per cent of respondents said that they cannot afford to employ additional workers, with the same number indicating that a shortage of skilled and committed labour was the greatest impediment to their business. Of the challenges ahead, survey respondents were most concerned about financial viability, government regulations and skill and labour shortages.

For many farm businesses, labour is their single biggest cost. The current workplace relations framework is comprehensive and broad in reach. In many respects it works, but some elements of the scheme are out of balance and require reform. As a Vice President of the Fair Work Commission recently commented, “This is supposed to be the new sort of fair, simple version and I look at it and scratch my head as to how that description could ever be given the legislation.”¹

Thriving in an increasingly global and competitive marketplace requires the ability to adapt as things change. Undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.

Of course, any reform must be both fair and reasonable. Businesses must be able to adapt quickly in response to market signals, while individuals must be empowered through opportunity, underpinned by safeguards to facilitate a decent standard of living for all.

This submission outlines changes that the NFF considers will lift productivity in the Australian economy by reducing compliance costs and restoring balance to the workplace relations framework. Key elements of the submission include reforming the modern award review process, restoring the voluntary nature of enterprise bargaining and making

¹ *Application by Olmgrove Pty Ltd (AG2014/8289)* 14 January 2015, PN48.

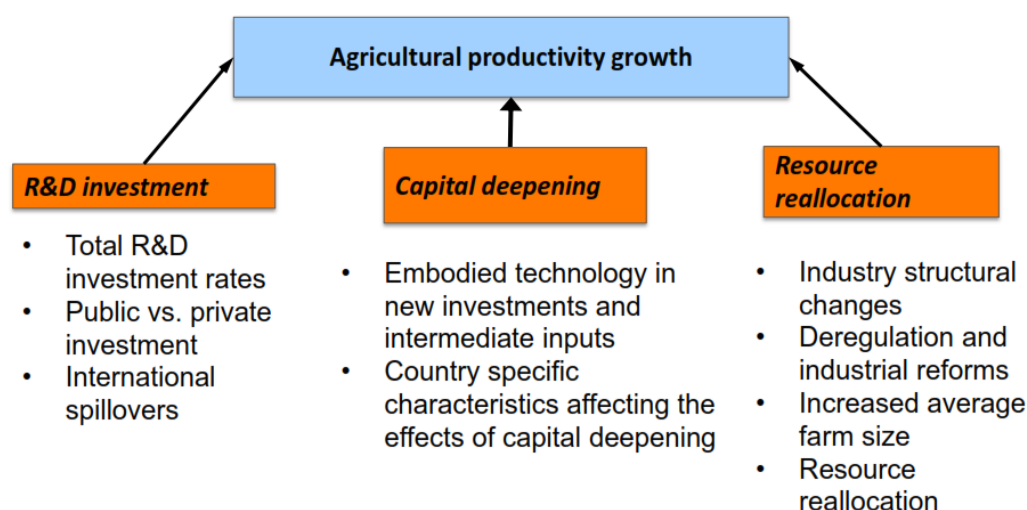
it more attractive for employers, narrowing the scope of transfer of business rules, rebalancing the general protections, extending the Fair Dismissal Code to all businesses (not just small businesses), improving the right of entry rules (including reversal of changes requiring remote employers to provide travel and accommodation for union officials) and abandoning the workplace bullying regime.

1. Introduction

The NFF welcomes the opportunity to contribute to this review of Australia's workplace relations framework. In the Agricultural Competitiveness Green Paper, the NFF supported the need for an independent, economic assessment of the *Fair Work Act 2009* (FW Act) and associated regulations. The review is an important opportunity to shift debate in Australia from polarised political point-scoring to mature debate about what will deliver the long-term competitiveness of the Australian economy.

As the Productivity Commission has previously noted, productivity growth “arises from many small, everyday improvements within organisations to improve the quality of products, service customers better, and reduce costs”.² In addition to investment in research, development and new technology, a key driver of agricultural productivity is deregulation and industrial reform.

Common drivers of agricultural productivity across countries

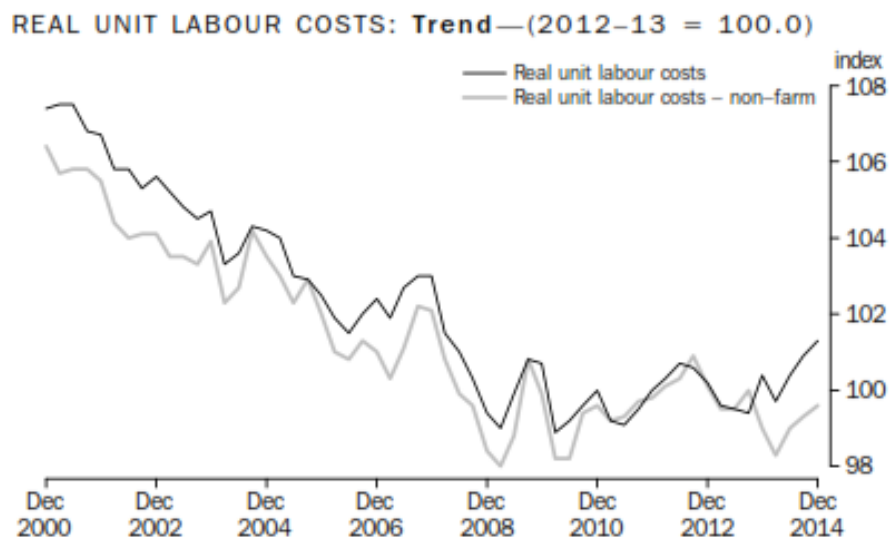


Sheng Yu *Comparing agricultural total factor productivity across countries: the case of Australia, Canada and the United States* 57th AARES Conference, Sydney, 5-8 February 2013

Recent National Accounts figures show a correlation between the introduction of the FW Act, which shifted the focus of industrial relations regulation in a number of respects, and real unit labour costs. In the graph below, the trend in real unit labour costs shows a clear shift from negative to positive growth from 2009, coinciding with the introduction of the FW Act and indicating increasing labour cost pressure in the economy from that time.³

² Productivity Commission, *Annual Report 2007–08*, 2008.

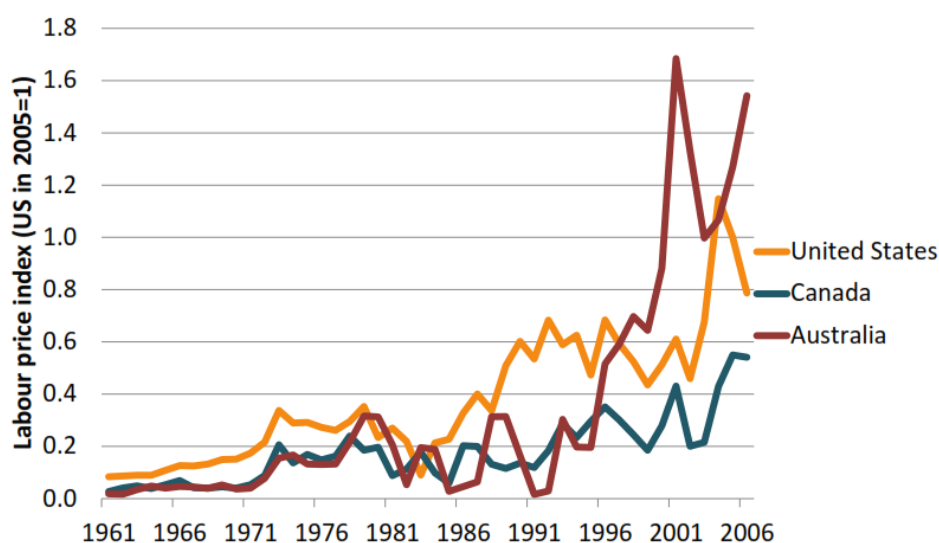
³ ABS *Australian National Accounts, National Income, Expenditure and Product* Cat. 5206.0 4 March 2015, p.15.



ABS *Australian National Accounts, National Income, Expenditure and Product* Cat. 5206.0 4 March 2015

In the agriculture sector, labour cost pressures are even more evident. The agricultural labour price has risen sharply since the late 1990's, as the table below shows. Labour costs in Australian agriculture are significantly higher than both the USA and Canada.

Input price drivers: agricultural labour price



Sheng

Yu *Comparing agricultural total factor productivity across countries: the case of Australia, Canada and the United States* 57th AARES Conference, Sydney, 5-8 February 2013

Total employment in the agriculture sector has been declining for almost 15 years, and is currently forecast to decline a further 0.9 per cent by 2018, compared to the all industries projected rate of employment growth of 7.2 per cent.⁴ Investing in new technology has allowed the sector to reduce its reliance on farm labour, but a heavy regulatory burden means that for many farmers, the risks associated with employment can outweigh the

⁴ Department of Employment *Industry Outlook Agriculture, Forestry and Fishing* September 2014

likely benefits. Many self-employed farmers choose to do the work themselves: in 2011, the majority of agricultural businesses had no employees at all.⁵

High business running costs are an ever-present concern. Farmers face costs at every turn because of their position at the very beginning of the supply chain. Every cost passed down the supply chain affects farmers' terms of trade, with cumulative increases threatening the viability of primary production. For this reason, even more so than in other industries, small regulatory adjustments designed to make it easier to operate a business can make a large difference in overall productivity.

The challenge is to ensure that Australian minimum wages and conditions do not deter business investment and employment growth. For Australia to compete against comparable overseas markets with lower labour costs, the business environment must support innovation and responsiveness, through a skilled workforce and flexible labour regulation.

⁵ Reserve Bank of Australia *Small Business: An Economic Overview*
<http://www.rba.gov.au/publications/workshops/other/small-bus-fin-roundtable-2012/pdf/01-overview.pdf>

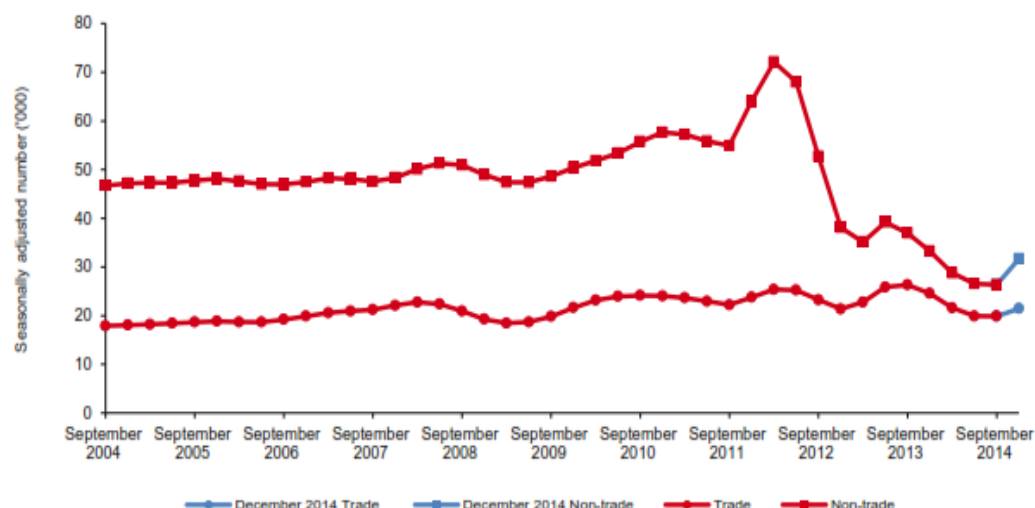
2. Safety nets

The role of minimum wages

Minimum wages are an important element of a fair society. Australian minimum wages are relatively high by international standards⁶, but so is our standard of living. The cost of living increases each year, with very few exceptions.⁷ The task is to preserve fairness while at the same time encouraging job creation. A framework that encourages employment should be a central policy priority, accommodating the particular needs and circumstances of those often considered less productive (for example, young workers, those over the age of 50, workers from disadvantaged backgrounds and people with disabilities).

Following a decision in August 2013 to lift apprenticeship wages⁸, the number of apprentice and trainee commencements rates declined, as the table below shows. While the trend appears to have stabilised, this demonstrates how wage-based decisions can affect decisions to invest in skills.

Figure 1 Trade and non-trade commencements, seasonally adjusted, September 2004 – December 2014



Australian Government NCVER *Apprentices and Trainees Early Trend Estimates December 2014*

In Australia, the national minimum wage is only one part of a complex web of support mechanisms for families with working parents. In addition to tax relief and child care subsidies, the safety net for employees is comprehensive and wide-reaching. Most employees are covered by modern awards, supplementing the National Employment Standards (NES). The wages of entry level employees are set at the national minimum wage in many modern awards, with other employees paid higher wages according to their level of responsibility, skill and experience. The FW Act operates to ensure that

⁶ OECD Statistics http://stats.oecd.org/index.aspx?datasetcode=ULC_EEQ

⁷ ABS, 6467.0 - Selected Living Cost Indexes, Australia, Dec 2014

⁸ Fair Work Commission *Transitional Review of Modern Awards —Apprentices, Trainees and Juniors: Common Claims* AM2012/135 and 15 others, 22 August 2013

enterprise agreements can never provide wage levels that are lower than those set by modern awards.⁹

Modern award wages increase in line with annual increases in the national minimum wage in July each year. Minimum wage increases are all but guaranteed, increasing by an average of 3.3 per cent since 2000, with no increase awarded only once in the past thirty years.¹⁰ Decisions about the appropriate level of wage increase under the FW Act take into account the various submissions of the parties, but in the end are discretionary decisions with no clear science behind them. This means that the rationale for wage increases may vary from year to year, but the factors considered relevant in particular year, and the weight given to them, are not always readily ascertainable. In a sophisticated labour market, there is merit in considering whether a simpler wage adjustment process for national minimum wages is now warranted. Such a process could, for example, link wage adjustments to inflation, the cost of living index or the labour price index, so that minimum wages maintain their real value while significantly reducing the resources invested each year in the Annual Wage Review.

The National Employment Standards (NES)

The NES contains ten minimum standards for the employment of employees. For the most part, these reflect employment standards that have evolved in Australian workplaces over many years. However, some of the NES provisions warrant review, as set out in the **Attachment A** to this submission.

The most pressing issue in relation to the NES is the absence of a national long service leave standard. Before 2009, long service leave entitlements were determined by State and Territory legislation. Federal enterprise agreements could displace State long service leave laws to the extent of inconsistency.¹¹ This meant that national employers could simplify their obligations in relation to long service leave by implementing a single national long service leave regime for their employees across Australia. The following table shows the number of enterprise agreements containing long service leave provisions immediately before commencement of the FW Act.

Current at 30 Jun 2009	Agreements	%Agreements	Employees	%Employees
Agriculture, forestry and fishing	41	10.2%	1533	12.9%
All agreements	4434	19.9%	670678	32.7%

Department of Employment, *Workplace Agreements Database*, 4 March 2015.

The fact that one in five enterprise agreements, covering more than 30 per cent of employees, adopted a national long service leave regime suggests a value proposition for business in the arrangement. Regrettably, the FW Act reversed the approach to long service leave in federal workplace arrangements, by making enterprise agreements

⁹ FW Act, s.206

¹⁰ Workplace Info *History of National Increases* <http://workplaceinfo.com.au/payroll/wages-and-salaries/history-of-national-increases>

¹¹ Section 109 of the Constitution.

operate subject to State and Territory long service leave laws.¹² As a result, it is no longer possible for employers to streamline their processes on the issue by implementing a national long service leave regime. Business is at the mercy of federal and State government relations, awaiting agreement through the Council of Australian Governments on the progression of a national long service leave standard. The lack of progress on this initiative to date suggests that the perceived difficulty of the task is a significant barrier.

The table below outlines the different leave entitlements in each jurisdiction.

Table 42.3: qualifying period for long service leave and length of leave

Jurisdiction	Section/clause	Qualifying period in years	Period of leave
New South Wales	Section 4(2)(i)(B) of <i>Long Service Leave Act 1955</i> (NSW)	5	1 month
Victoria	Section 56 of the <i>Long Service Leave Act 1992</i> (Vic)	5	1 month
Queensland	Section 43(2) of the <i>Industrial Relations Act 1999</i> (Qld)	5	1 month
South Australia	Section 5(1) of the <i>Long Service Leave Act 1987</i> (SA)	1	1.3 weeks
Western Australia	Section 8(2)(b) of the <i>Long Service Leave Act 1958</i> (WA)	5	4 1/3 weeks
Tasmania	Section 8(2)(a)(ii) of the <i>Long Service Leave Act 1976</i> (Tas)	10	8 2/3 weeks
Northern Territory	Section 8(3) of the <i>Long Service Leave Act 1981</i> (NT)	5	6.5 weeks
Australian Capital Territory	Sections 3(2) and 4 of the <i>Long Service Leave Act 1976</i> (ACT)	1	0.2 month

Nightingale, M *Long Service Leave* Australian Master Human Resources Guide 2010, CCH

Adoption of a national long service leave standard should be a priority, to reduce complexity and compliance costs. As a minimum standard, it should reflect the most common entitlement of one month's leave for each five years of service, with a qualifying period of 7 years and standardised rules about pro-rata payment in relation to serious misconduct and resignation for reasons other than illness, injury or domestic or pressing necessity. These minimum standards can then be supplemented as appropriate through enterprise bargaining.

Modern awards

Award reliance in the agriculture sector is not generally captured by ABS data. To get a sense of the level of award reliance, it is instead necessary to look at the incidence of enterprise bargaining together with the rates of self-employment. In September 2014, there were only 145 enterprise agreements, covering 6 300 employees, in the entire

¹² This is achieved through the combined effect of sections 26, 27 and 29 of the FW Act.

agriculture, forestry and fishing sector.¹³ In a sector that employs over 148,300 non-managerial employees¹⁴, this is a very low figure. This mean that a substantial proportion of agricultural employees are likely to be covered by modern awards, which have broad coverage across a range of industries and occupations.

In our submission, changes are required to provisions dealing with modern awards to improve productivity and reduce the regulatory burden on all stakeholders. These changes are set out in **Attachment A**. Significant areas of concern for the NFF include the approach to regulating individual flexibility arrangements and the four yearly review of modern awards.

Individual flexibility arrangements (IFAs)

Under the FW Act, 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 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 are not a useful tool to address disproportionate penalty rates in any coordinated way. An IFA that reduces labour costs under a modern award or enterprise agreement is only possible if the employee has a subjective belief that despite a reduced monetary benefit, particular circumstances will leave them better off overall. This effectively means that employers must rely on employees to initiate IFAs that convert penalty rates to other benefits, and then hope that the circumstances of the employee do not change along the way. More commonly, IFAs are used for the benefit of employees, to facilitate flexible working arrangements. IFAs would be more effective as a business tool if the BOOT was replaced with a no-disadvantage test, so that entitlements could be traded as long as the employee was not disadvantaged overall.

An example of a scenario where IFAs would not be useful is in relation to the 3 hour minimum engagement in the dairy industry. Milking is not always a 3 hour job – for many businesses, the average time for milking is closer to 2 hours. Milking is an activity that must be done twice a day. 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

¹³ Department of Employment *Trends in Federal Enterprise Bargaining September 2014*

¹⁴ ABS, *Australian Labour Market Statistics Cat. 6105.0*

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.¹⁵

This example highlights the difficulty with IFAs in relation to the BOOT. 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 BOOT and the requirement that IFAs 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.

Four yearly modern award review

The requirement to review all 122 modern awards every four years is excessive. The process itself is likely to take almost four years, with the result that modern awards are now in a perpetual state of review. This is no exaggeration: the current modern award review process began in January 2014. By March 2015, decisions from the first of four phases of the review have begun to filter through¹⁶ - suggesting that the process for each award will take approximately 14 months. The review of Group 2 awards has begun, and the review of Group 3 and 4 awards is scheduled to commence with a conference on 30 March 2015. In the meantime, at least 7 separate ‘common issues’ proceedings are underway, necessitating the involvement of parties in both these proceedings and the proceedings relevant to their particular award grouping. The result is an extraordinary allocation of resources from all interested parties to what is essentially an adversarial process, which acts as a catalyst for arbitration of claims that few actually want, most could live without or could achieve through enterprise bargaining, and that more often than not increase labour costs.

In our view, the four yearly review should be abandoned in favour of a system of variation on application from interested parties. If necessary, a statutory review of modern awards could be undertaken every 10 years to ensure that there are no obsolete or outdated terms, although the scope of such a review should be limited to ensure that it does not become a substitute forum for dealing with changes that could be sought at any time on application.

Penalty rates

Penalty rates can be a deterrent to employment, particularly when combined with rules around minimum engagement of employees. In the pig breeding and raising industry,

¹⁵ Details can be provided on request.

¹⁶ For example, *Security Services Industry Award 2010* [2015] FWCFB 620, 2 March 2015.

Saturday and Sunday work is generally considered overtime, outside the ordinary spread of hours, unless otherwise agreed.¹⁷ Together, penalty rates and the 3 hour minimum engagement¹⁸ mean that:

- one hour's work on a Saturday attracts 4.5 hours pay;
- one hour's work on Sunday attracts 6 hours pay; and
- one hour's work on a public holiday attracts 7.5 hours pay.

On a Sunday, the combined effect of these provisions for one hour's work is equivalent to \$100 per hour. This is disproportionate to the inconvenience to the employee and a significant disincentive to employment. As the dairy example provided earlier shows, many farmers choose to undertake this work themselves because they cannot justify the cost. Ultimately, this dampens productivity by causing fatigue among farm owners and stifling job creation. As one dairy farmer told the NFF:

“You do question if you can do it yourself and we only employ staff when necessary. It means dairy farmers do more themselves. They work very long hours and do not have any time for family activities.”¹⁹

In the horticulture industry, reliance on casual employees varies but peaks during summer and winter months. One tomato and capsicum grower in Victoria operates a business that has grown in size from 1300m² in 1993 to 260,000m² in 2015. Its crops are grown on an annual cycle that commences in winter with growth through the summer. In the growth cycle, plants are tended up to seven times per week, in addition to crop maintenance and picking, harvest, processing, quality check and packing. Growth cycles create a demand for more labour during the summer months from September to March, depending on environmental conditions. Spikes in production, together with higher summer demands can only be met through a flexible casual labour workforce that supplements the business' core 160 employees.

Labour is the single largest overhead for the business, at an annual cost of more than \$13,000,000. A recent claim in the modern award review which would introduce overtime rates for casual employees is estimated to increase business overheads by 10 per cent (or \$1,300,000). An increase of this magnitude would have a significant impact on the business.

¹⁷ Clauses 35.1, 36.1, 36.2, 37.1 and 37.2 of the Pastoral Award 2010

¹⁸ Clauses 10.3(e) and (f) of the Pastoral Award 2010

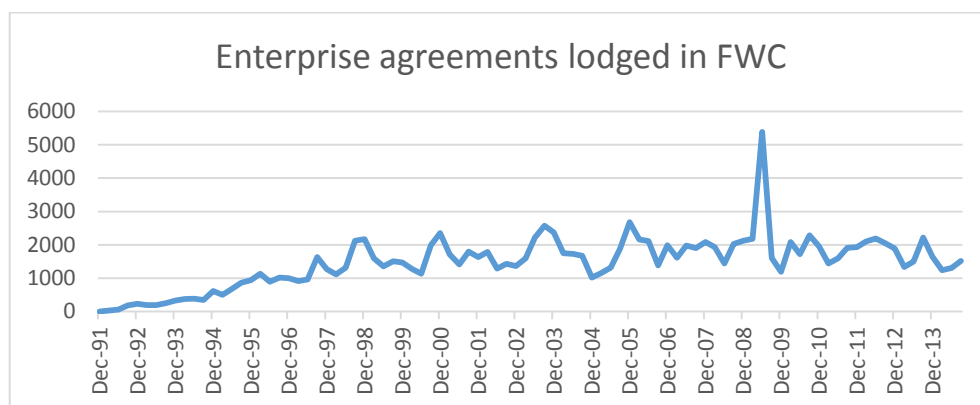
¹⁹ Details can be provided on request.

3. The bargaining framework

Enterprise bargaining is not widespread in the agriculture sector, which is at least partly explained by the high incidence of small business. As discussed above, in September 2014, there were 145 enterprise agreements, covering 6 300 employees, in the entire agriculture, forestry and fishing sector.²⁰ This is a substantial reduction even in relative terms, from 641 agreements, covering 16,400 employees, in September 2011. This trend appears to flow through to other sectors of the economy as well. The number of current agreements in the Retail Trade sector declined from 1961 to 345 over the same three year period.²¹ In the Accommodation and Food services industry, there was a decline from 1705 to 470 current agreements.²² While it seems that some sectors are insulated from this trend, there appears to be a shift away from bargaining toward modern awards in certain parts of the economy.²³ In our view, this is the combined effect of a workplace relations framework which now provides for a comprehensive legislative safety net (the NES and modern awards) and an approach to enterprise bargaining that gives primacy to improving the position of employees through the better off overall test (commonly referred to as the BOOT).

The better off overall test

Under the BOOT, employees must be better off overall under an enterprise agreement than they would be under the relevant modern award. The BOOT sets a higher bar than the ‘no-disadvantage test’ that applied to agreements made under the former *Workplace Relations Act 1996* (before it was amended by the Work Choices legislation). It is not attached to any requirement for increased costs that are necessary to meet the BOOT to be met through innovation or increased productivity. The result has been a slow decline in the number of enterprise agreements overall, as the table below shows.



Department of Employment *Trends in Federal Enterprise Bargaining, Historical table: All wage agreements, by ANZSIC division, lodged in the quarter: December quarter 1991 - June quarter 2014*²⁴

²⁰ Department of Employment *Trends in Federal Enterprise Bargaining September 2014*

²¹ As above.

²² As above.

²³ As above.

²⁴ The spike in the June 2009 quarter coincides with the imminent commencement of the FW Act, when a record 5386 agreements were lodged in the quarter.

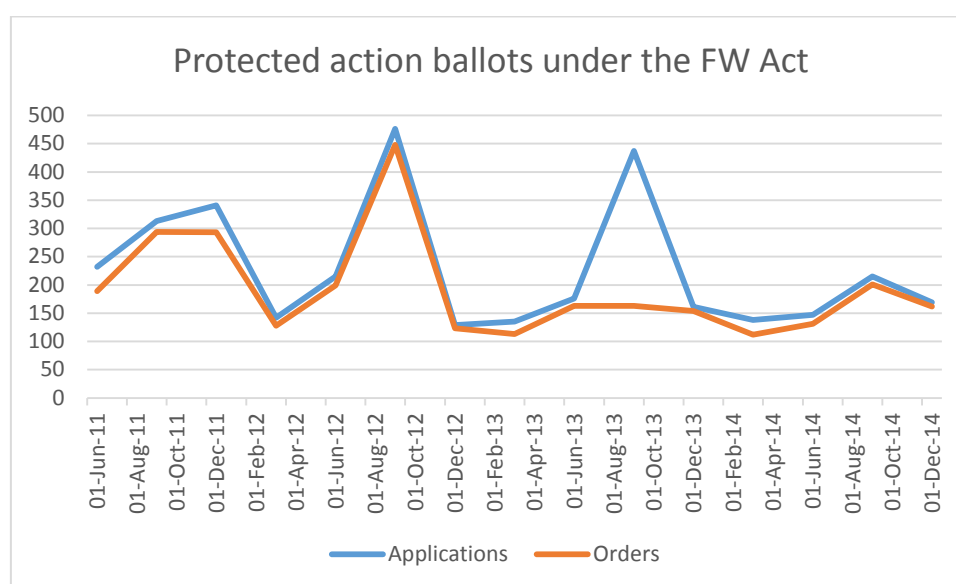
Enterprise bargaining in Australia has long been seen as a means of lifting productivity by tailoring employment conditions to the particular needs of the workplace or business.²⁵ In reality, this objective has often been undermined by factors including the use of template-style agreements²⁶, a lack of skill or knowledge in managing workplace relations and/or power imbalances affecting the capacity to deal with aggressive bargaining tactics.

The NFF considers that changes are required to the bargaining framework, as outlined in **Attachment A**. Key issues for the NFF include the threshold for protected action ballots and the capacity of third parties to seek a suspension or termination of industrial action.

Protected action ballots

Industrial disputes, measured by the number of days lost, has been declining in recent years. Under the FW Act, the emphasis appears to have shifted from industrial action to threatened industrial action, and an emerging phenomenon of strikes cancelled at the last minute, to maximise inconvenience to the employer without employees losing pay.

The following graph shows how protected action ballots are used as a tool in the bargaining process, with spikes in activity in the period from August to October each year (likely to coincide with the expiry of agreements in particular sectors of the economy).



Fair Work Commission *Quarterly Reports* June 2011 – Dec 2014

As can be seen from this table, protected action ballot orders are relatively easy to obtain. Most applications for protected action ballot orders are granted. The ‘genuinely trying’ requirement sets a very low threshold – all that is required is that the initiating party has

²⁵ The objects of Part 2-4 of the FW Act include “to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits”.

²⁶ Evidence given to a Senate inquiry in 2002/03 included data from the Department of Employment and Workplace Relations’ Workplace Agreements Database, showing that of the federal wage and non-wage agreements certified between 1 January 2002 and 30 June 2003, 3865 (or 80 per cent) were identified as pattern agreements covering approximately 34 400 (or 66 per cent) of employees.

advised the other party of their wish to bargain for an agreement and the general nature of their claims.

Under the FW Act, most ballot costs are met by the Commonwealth.²⁷ This means that protected action ballots make sense as a bargaining tactic – they are free, they are easy to get, and they can threaten serious disruption to a business. In our submission, there is a need to lift the bar so that protected action ballots are used only when necessary to break a deadlock in bargaining.

Suspension and termination of industrial action – harm to third parties

Unlike other provisions dealing with suspension or termination of industrial action, to address significant harm to third parties in connection with protected industrial action, the the Fair Work Commission can only:

- suspend the action; and only
- if the action is being engaged in at the time the matter is heard by the Fair Work Commission.

Almost every year, industrial action takes place at one of the sugar mills in Queensland. In 2013, the Mulgrave Central Mill was the target of a range of protected industrial action during the cane harvesting and raw sugar production season. At the outset of the season, it was estimated that 1,298,000 tonnes in the Mulgrave area would be harvested, delivered and processed into sugar during the season (approximately 10,000 tonnes each day). The Mill operates on a continuous crushing mode (processing 24/7) during the season. To ensure delivery of sufficient cane for continuous crushing, rostered harvesting by growers takes place 7 days a week. Season length and the timeliness of harvest and delivery of cane are critical to the optimum returns for the industry as a whole and its constituent parts. Delays impact on industry returns, in some instances meaning the difference between harvesting all available cane and not harvesting all of the available cane. If a grower has to leave standover cane in the field, this represents a total loss of income in respect of the standover cane for that particular season. The 2013 action meant that milling operations either ceased or were interrupted, causing delays in crushing and harvesting operations affecting cane growers across the Mulgrave region, estimated at a daily cost of \$360,000.²⁸

The Queensland Cane Growers Association sought orders in the Fair Work Commission for the suspension of protected industrial action at the Mill to the end of the crushing season.²⁹ The action was ongoing when the application was made, but by the time of the hearing in the Fair Work Commission, no actual industrial action was being taken. Accordingly, the Fair Work Commission determined that there was no jurisdiction to make the orders sought and dismissed the application.

²⁷ FW Act, s464.

²⁸ Statement of Peter Flanders, 27 August 2013 to the Fair Work Commission in the matter below.

²⁹ Application by Queensland Cane Growers' Association, Union of Employers for the Fair Work Commission to Suspend Protected Industrial Action (B2013/1164) 27 August 2013

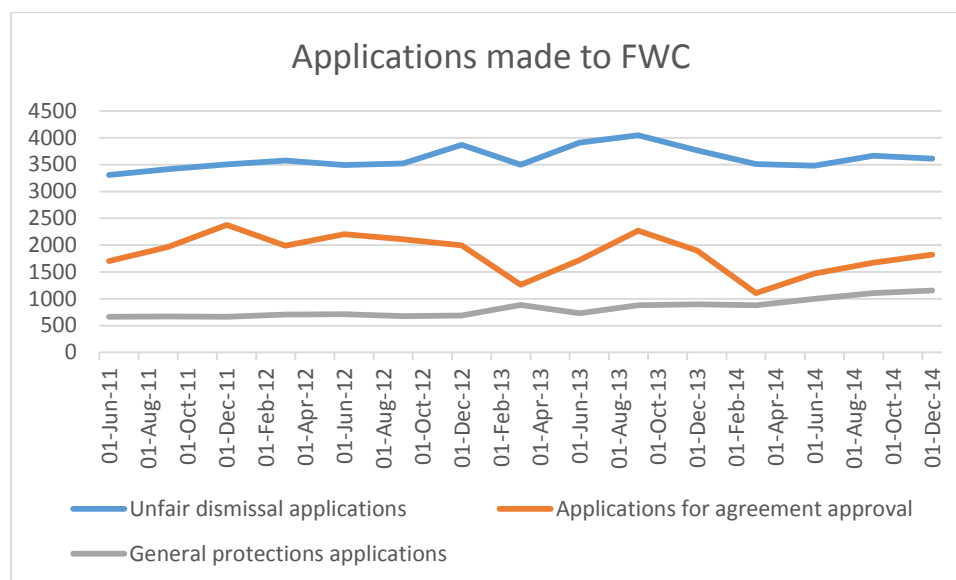
Under section 426 there is only limited scope for the Fair Work Commission to deal with industrial action that has a significant effect on third parties. Other similar provisions (for example, section 424) provide for orders in circumstances of protected industrial action that is being engaged in, or is threatened, impending or probable. The requirement that industrial action is “being engaged in” under section 426 severely restricts the opportunity for third parties to seek to mitigate the effects of industrial action by others on their business. The Fair Work Commission has no power to terminate the action, meaning that third parties can only obtain temporary relief. The economic consequences for third parties, their clients and suppliers, arising from a situation over which they have no control, can be significant.

In our submission, the FW Act should be amended so that orders can be made to suspend or terminate action causing significant harm to third parties, including if the action is threatened, impending or probable. If industrial action is to recommence after a period of suspension under section 426, notice to affected third parties should be required. The Fair Work Commission would retain the discretion as to whether to make the orders at all, on the basis of the evidence before it.

4. Employee protections

Unfair dismissal

More unfair dismissal claims are made to the Fair Work Commission each year than any other type of claim, representing a significant drain on the resources of the Fair Work Commission.



FWC Quarterly Reports, June 2011 – December 2014

Appeals of unfair dismissal decisions are increasingly common: in 2013-14, there were 79 appeals against unfair dismissal decisions, representing a 36 per cent increase from the previous year.³⁰ Appeals were dismissed in 62 per cent of matters.³¹

A feature of the current unfair dismissal framework, and one that is probably unavoidable, is 'go away money'. 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.³² Of these, 150 claims resulted in an award of compensation while only 34 reinstatement orders were made.³³ 67 per cent of claims were resolved for an amount of compensation of less than \$15,000.³⁴ By contrast, there were 701 applications under the new workplace bullying regime, which does not provide for compensation, and only one application granted.³⁵ 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

³⁰ Fair Work Commission Annual Report 2013-14, p42.

³¹ Fair Work Commission Annual Report 2013-14, p42.

³² Fair Work Commission Annual Report 2013-14, p125.

³³ Fair Work Commission Annual Report 2013-14, p127-8.

³⁴ Fair Work Commission Annual Report 2013-14, p127-8.

³⁵ Fair Work Commission Quarterly Reports Jan – Dec 14.

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.³⁶

A key difficulty with unfair dismissal proceedings has always been the element of procedural fairness. The concept is one that is very difficult to comply with in a practical sense, because there will always be more that could have been done. In response to concerns about the unfair dismissal regime, the FW Act introduced the Small Business Fair Dismissal Code. The Fair Dismissal Code reflects commonly accepted elements of a procedurally fair dismissal: warnings, an opportunity to respond, and a valid reason to dismiss. These elements apply equally to small and large businesses and there is no logical reason for imposing higher standards of fairness on some businesses compared to others. The fact that a business can afford dedicated human resources managers and external legal counsel does not mean they should have to allocate substantial resources to risk management associated with termination of employment. These are resources that could be concentrated on business growth and development. The Fair Dismissal Code reflects Parliament's view of a fair process for termination of employment, based on case law developed over many years. Compliance with the Code, whether a business is small or large, should be sufficient.

The "genuine redundancy" exception in relation to unfair dismissal requires review. Under the FW Act, a redundancy is taken not to be genuine if there is a failure to consult as required by the modern award or enterprise agreement, or if the Commission considers that the person could have been redeployed. In either of these circumstances, what would ordinarily be a genuine redundancy is treated as an unfair dismissal, with associated cost and time imposts. To compound the situation, employers become liable for an award or agreement breach in addition to unfair dismissal.

Employers are best placed to make decisions about who does what in their business. These decisions need to be fair, and if they are, they should be allowed to stand. The discretion given to the Fair Work Commission to supplant its own views for business decisions about whether a person should be redeployed is a fetter on productivity. It disregards the fact that it is the job, not the person, which becomes redundant. In our submission, striking a better balance on unfair dismissal will deliver productivity benefits for business and the Fair Work Commission. These can be achieved by extending the Code to all businesses, capping the availability of compensation for unfair dismissal at 13 weeks' pay, restoring the longstanding and accepted definition of redundancy and removing the capacity of the Fair Work Commission to facilitate the redeployment of individuals.

Workplace bullying

A key test of good regulation is that the benefits outweigh the costs. There is a real question as to whether this test is met in relation to the workplace bullying regime. While practical measures to address bullying in the workplace are to be commended, the

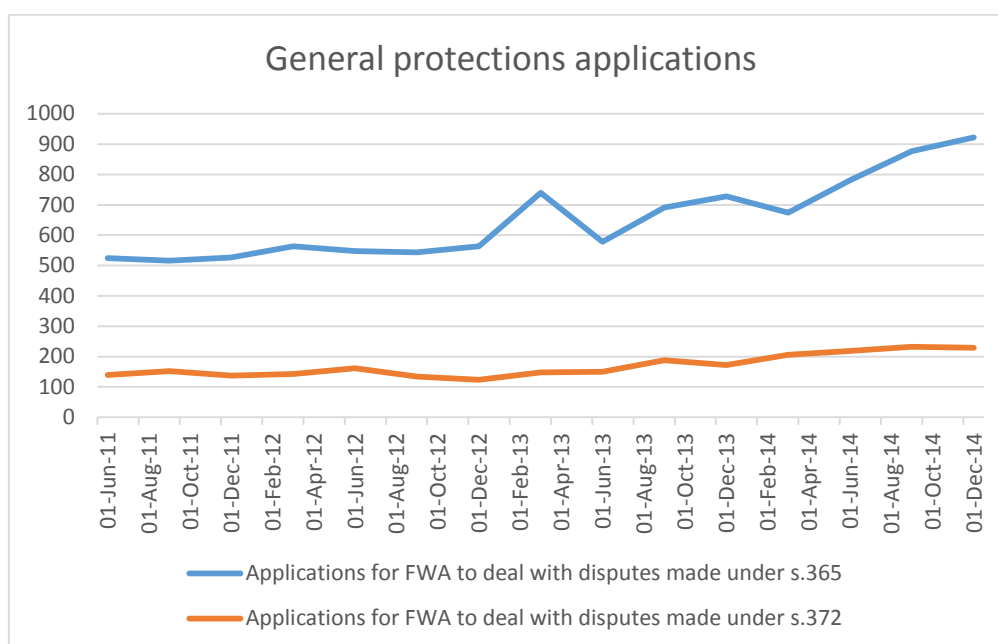
³⁶ABS *Labour Force Experience, Australia* Cat. 6206.0, February 2011

statistics to date suggest that the bullying regime introduced into the FW Act from 1 January 2014 has been overwhelmingly ineffective. Despite “more than 100 000 website inquiries and more than 3500 telephone inquiries” received to June 2014³⁷, Fair Work Commission quarterly reports show that of a total of 701 applications made in the period up to December 2014, only one application was granted.³⁸ While the complete picture is not yet apparent, in the first six months after establishment of the regime, more than 270 conferences and hearings were held, in addition to mediations, community presentations and the development of information resources and benchbooks.³⁹ For the benefit of one person, this seems an excessive allocation of resources.

The low level of applications compared to inquiries, as well as the rate of withdrawals and dismissals, suggests that the scope of the regime (limited to current matters in the workplace) as well as the absence of compensation are significant deterrents to uptake. In 2013-14, only 22 per cent of bullying applications were resolved.⁴⁰ This is in contrast to the high number of unfair dismissal claims settled each year (79 per cent of claims lodged in 2013-14).⁴¹ In our view, the bullying regime is an unproductive and resource intensive element of the workplace relations framework which should be removed.

General protections

The scope of the general protections is not yet fully realised, although they clearly have broad application to a range of conduct. The number of applications involving a dismissal is slowly increasing, as the table below shows.



FWC *Quarterly Reports*, June 2011- December 2014

Unlawful dismissal

³⁷ Fair Work Commission Annual Report 2013-14, p4.

³⁸ Fair Work Commission Quarterly Reports Jan-Dec 14.

³⁹ Fair Work Commission Annual Report 2013-14, p70.

⁴⁰ Fair Work Commission Quarterly Reports Jan-Dec 14.

⁴¹ Fair Work Commission Annual Report 2013-14, p41.

The FW Act contains a process for dealing with the transition of unlawful dismissal claims from the Fair Work Commission to the Federal Court. The Fair Work Commission must issue a certificate that conciliation has failed before a court application is made, but there is no requirement for the Fair Work Commission to assess the merits of the claim, or whether it has reasonable prospects of success. This is a major omission, which puts parties to significant and often unnecessary cost in defending federal court proceedings that should never have been commenced (such as an unfair dismissal claim that is alleged to be, but not in fact, a dismissal in breach of the law). Having gone to the effort of acquiring knowledge of the facts of a particular case, it makes sense to have the Fair Work Commission assess whether a case has reasonable prospects of success before engaging the further resources of the parties and the Federal Court. In our submission, court applications in relation to unlawful dismissal should be made contingent on the Fair Work Commission certifying that a particular case has reasonable prospects of success.

Anti-discrimination

The scope of the discrimination protection in the FW Act is not yet fully understood. There is debate about whether it has the same effect as other, separate federal discrimination laws – for example, whether discrimination includes ‘indirect discrimination’, and what ‘discrimination’ means in the FW Act context.⁴² There is also overlap with the adverse action protection, which prevents a person from taking adverse action (including action that discriminates against a person) because the person has a workplace right.⁴³ The scope of the protection requires clarification, to promote certainty for both employers and employees. In our submission, in the absence of express terms to that effect, conduct that does not discriminate directly, but may have that effect, is not caught by the general protections and is instead left to the remit of federal anti-discrimination law. This should be made clear in the FW Act, and a broader review of discrimination law undertaken to minimise duplication and overlap of federal laws.

Attachment A sets out other issues of balance and complexity in relation to employee protections under the FW Act which, in our view, are inconsistent with a productive workplace relations framework.

⁴² Andrades, C *Intersections between ‘General Protections’ under the Fair Work Act 2009 (Cth) and Anti-discrimination law: Questions, quirks and quandaries* Centre for Employment and Labour Relations Law The University of Melbourne December 2009 Working Paper No. 47

⁴³ FW Act, s340.

5. Other workplace relations issues

The institutions

The Fair Work Commission

For almost as long as Australia has had a workplace relations framework, it has had an industrial umpire. The Fair Work Commission is the latest in successive iterations of this institution. It is an accepted element of the workplace relations framework. When parties cannot resolve their disputes privately, there is role for an independent third party to assist in achieving a resolution.

Independence is critical to the credibility of the institution, and concerns about bias or impartiality should be dealt with in a considered way. Such concerns ordinarily arise in connection with conflicting decisions and/or decisions that seek to find, in general industrial principles, an outcome that should be preferred over the words of the statute. Even the Fair Work Commission acknowledges that “different members take different approaches [to enterprise agreement approval]”.⁴⁴ Certain concepts in the FW Act are more likely to give license to decisions of this kind, including preservation of the safety net, good faith bargaining and the ‘fairly chosen’ requirement.

In one decision⁴⁵ last year, the Fair Work Commission refused to certify an agreement after finding that the group of employees was not ‘fairly chosen’. The scope of the agreement was agreed between the employer and the relevant union and reflected the historical approach to industrial regulation at the business. No issue of coverage arose either during the negotiations or in connection with the application for approval of the concluded agreement. There was no evidence before the Fair Work Commission that coverage of employees under the enterprise agreement was in any way unfair. And yet, the Fair Work Commission refused to approve the agreement, relying on the scope of its discretion to instead substitute its own views of fairness for those of the parties, when there was no call for intervention. This was an unnecessary intrusion, undermining a key purpose of Part 2-4 of FW Act to facilitate the making of enterprise agreements.⁴⁶ It left the business and its employees back at square one, faced with a choice between starting the negotiation process all over again or withdrawing from the process entirely and instead operating under the old industrial agreement. This is counter-productive: primarily, the role of the industrial umpire is to support agreement making and resolve disputes. It is inconsistent with this role for the Fair Work Commission to create industrial disputes of its own volition, and inappropriate for it to re-open matters that have long since been resolved.

Inconsistent decisions in relation to the issue of loaded rates in enterprise agreements undermine confidence in the integrity of the agreement-making framework. In *Hull-Moody Finishes Pty Ltd*⁴⁷, a Full Bench of the Fair Work Commission approved an

⁴⁴ *Application by Olmgrove Pty Ltd* (AG2014/8289) 14 January 2015, PN92.

⁴⁵ *OneSteel Recycling Pty Limited T/A OneSteel Recycling* [2014] FWC 5783.

⁴⁶ FW Act, s171.

⁴⁷ [2011] FWAFB 6709

enterprise agreement which prepaid annual leave in loaded rates of pay. This decision was followed in one decision⁴⁸, and not followed in two others. One single member decision⁴⁹ decided not to follow the Full Bench decision and instead adopt analogous reasoning (in relation to personal/carer's leave) by a single judge of the Federal Court.⁵⁰ Another single member decision refused to follow *Hull-Moody*, declaring the Full Bench to have "made a simple but fundamental error of statutory interpretation".⁵¹ The question was eventually resolved in another matter on appeal to a Full Bench⁵², through the ordinary process.

Appeals are the avenue through which the Fair Work Commission can depart from earlier decisions it considers were wrongly decided. Private disagreements over how the FW Act should apply are one thing, but when single members of the Fair Work Commission openly disagree with Full Bench decisions that have precedent value (because they have not yet been overturned), it is reasonable for the workplace relations community to express concern.

The issue of cashing out of annual leave highlights how sometimes the Fair Work Commission has difficulty reconciling its own views with those of the Parliament. In 2008, during the award modernisation process, a seven member Full Bench of the Fair Work Commission decided that cashing out of annual leave "would undermine the purpose of annual leave".⁵³ From 1 January 2010, section 93 of the FW Act permitted modern awards and enterprise agreements to contain cashing out terms. In three separate decisions in 2010, the Fair Work Commission decided not to approve enterprise agreements with cashing out terms,⁵⁴ after finding that the prospect of employees not taking annual leave from work would frustrate the purpose of annual leave. Even though the terms were found to comply with section 93, the Fair Work Commission found them so disadvantageous to employees that the agreements could not pass the BOOT.

These decisions were overturned on appeal.⁵⁵ A Full Bench of the Fair Work Commission confirmed that enterprise agreements can include cashing out terms that comply with section 93 of the FW Act, noting the safeguards in that section in recognition of the importance of employees taking leave for the purposes of rest and recreation.⁵⁶ Employer parties then sought to insert cashing out terms in modern awards in the 2012 Modern Award Review, relying on section 93 (which applies to modern awards and enterprise agreements in the same way). That attempt was rebuffed, with the Fair Work Commission finding that "variations sought in respect of cashing out of paid annual leave may be more appropriate for consideration in the four year review".⁵⁷ Employers applied again for annual leave cashing out terms in the four yearly modern award review. The application

⁴⁸ *Robjohn Enterprises Pty Ltd* [2013] FWCA 6685

⁴⁹ *BM & KA Group as trustee for BM & KA Group Unit Trust* [2013] FWC 3654

⁵⁰ *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* [2012] FCA 45

⁵¹ *Fortress Systems Pty Ltd* [2013] FWC 3789

⁵² *Canavan Building Pty Ltd* [2014] FWCFB 3202

⁵³ *Award modernisation* [2008]AIRC FB 1000 at paragraph 99.

⁵⁴ *Armacell Australia Pty Ltd* [2010] FWA 8283; *Direct Paper Supplies Agreement* [2010] FWC 8314; *Downer EDI Works Pty Ltd* [2010] FWC 8333.

⁵⁵ *Armacell & Ors* [2010] FWAFB 9985

⁵⁶ Explanatory Memorandum to the *Fair Work Bill 2008* at para 378.

⁵⁷ *Annual Leave Decision* [2012] FWCFB 6266 at paragraphs 49-50.

was the subject of hearings over three days in August and October 2014. The Fair Work Commission indicated that it was still considering whether the safeguards introduced by Parliament were sufficient, with President Ross commenting: “it’s envisaged within the safety net there might be this flexibility, but it then becomes a debate about in what circumstances and with what safeguards.”⁵⁸ No decision has yet been issued, but the point is this: having finally accepted that the FW Act permits enterprise agreements to include cashing out terms, and having noted the safeguards in section 93, parties remain put to the test in relation to whether such terms should operate in the modern award context. This demands a significant investment of both time and resources, five years after Parliament’s intention was made clear. These are resources that could be put to much more productive use and in the meantime, the capacity of employers and employees to reach agreement on the issue remains frustrated.

In our submission, the only true measure of impartiality in relation to decisions of the Fair Work Commission is an analysis of decisions by type of decision, member(s) and outcome. Such an analysis, undertaken in an open and transparent manner, can restore confidence in the system by providing the evidence to either demonstrate or deflect concerns about bias.

The Enterprise Bargaining Unit

The Fair Work Commission has established an Enterprise Bargaining Unit within the Fair Work Commission, whose task it is to conduct analysis of enterprise agreements to inform assessment of the BOOT by a member of the Fair Work Commission. In some cases, the quality of analysis is poor, contributing to negative assessments of enterprise agreement in relation to the BOOT.

In a recent example, the Fair Work Commission was asked to approve an enterprise agreement covering a large cattle station in the Northern Territory. The agreement was similar in terms to other agreements, approved by the Fair Work Commission and its predecessors, over many years. It provided for wages to be paid by the day, rather than by the hour or the week, with daily rates calculated to compensate for work outside ordinary hours in accordance with the modern award.

The Enterprise Bargaining Unit assessed the agreement against the modern award, drawing certain adverse conclusions, including that the failure of the agreement to provide for a maximum number of hours of work each day or week “may” contravene the NES. This led the Fair Work Commission to conclude that the enterprise agreement did not pass the BOOT. The Vice President concerned spoke directly to the employer about the enterprise agreement, indicating his view about what was required to remedy the concern:

⁵⁸ *Four yearly review of modern awards* (AM2014/47) Transcript of 21 August 2014 per Ross J, PN1108.

“What the agreement needs to do is it needs to specify the standard start time and finish time for the five and a half days a week and then note that you can require people to work more than that.”⁵⁹

This is despite there being no standard start and finishing times, or maximum weekly hours in the modern award, because of the nature of work in the pastoral industry and the provision instead for averaging of 152 ordinary hours of work over a four week period.⁶⁰

The Vice President encouraged the employer to withdraw the enterprise agreement application and start again. He suggested that in the meantime, the employer “do the right thing”⁶¹ and pass on higher wages agreed under the enterprise agreement to employees, despite concluding that the enterprise agreement could not be approved. It is likely that the outcome may have been very different if the Enterprise Bargaining Unit had understood how the modern award operates in relation to hours of work and conducted its analysis by comparing the actual terms of the modern award against those in the enterprise agreement.

In our submission, it is important for the Fair Work Commission to have material before it on which to base an objective assessment of enterprise agreements against the modern award. Crucially, if that material is to be developed in-house, independently of the parties, it is incumbent on the Fair Work Commission to ensure that the material accurately reflects the terms of the modern award and enterprise agreement. Otherwise, there is a real prospect that the Fair Work Commission will act on the basis of wrong information. This undermines its capacity to facilitate the making of enterprise agreements, denies employees benefits they have agreed to, and drives up compliance costs for employers.

The Fair Work Ombudsman

In recent years, the Fair Work Ombudsman has shifted focus toward greater stakeholder engagement. This has been a welcome initiative, aligning with the Regulator Performance Framework⁶² and fostering the development of productive working relationships that have in the past been more adversarial in nature.

Nevertheless, some of the processes adopted have increased the compliance burden on employers. The process for dealing with underpayment claims has seen an increased reliance on mediation.⁶³ Before this shift in focus, the practice of the Fair Work Ombudsman was to exercise investigative powers and make recommendations in a bid to encourage resolution of claims. With the advent of mediation, the Fair Work Ombudsman no longer provides a legal opinion on the merit of employee claims until after mediation. While there are no figures in the most recent annual report, anecdotal evidence from NFF

⁵⁹ *Application by Olgrove Pty Ltd* (AG2014/8289) 14 January 2015, PN104.

⁶⁰ *Pastoral Award 2010*, clause 30.

⁶¹ *Application by Olgrove Pty Ltd* (AG2014/8289) 14 January 2015, PN100.

⁶² <https://www.cuttingredtape.gov.au/regulator-performance-framework>

⁶³ The Fair Work Ombudsman first trialled mediation as means of resolving workplace disputes in 2009, and adopted it as a core dispute resolution service in 2012. In 2013 the Fair Work Ombudsman resolved 4625 matters through mediation, increasing to 6294 in 2014: <http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/february-2015/20150213-mediation-release>

members suggests that the absence of advice or merits assessment before mediation makes it more difficult to resolve claims. This is attributable in part to the fact that employees participating in mediation may not have a good understanding of their legal position. The process also increases employer costs, because claims that have no reasonable prospects of success still undergo mediation, with the associated resource burden imposed on all concerned. As one member commented:

“The current process means that employers must automatically undertake due diligence every time a claim is made. There is no preliminary assessment of the claim, and the Fair Work Ombudsman does not give their view. Without an itemised claim, it is very difficult for employers to respond. Employers may end up having to go to Court more often.”⁶⁴

In our submission, there should be a preliminary assessment of claims and a provisional view provided before a matter is sent into mediation. This will support a more efficient approach to resolution of claims and reduce the regulatory burden on employers.

A separate issue relates to the involvement of the Fair Work Ombudsman in the four yearly modern award review. The Fair Work Ombudsman is not a party to modern awards (although nor are most stakeholders under the new model) and is not an active participant in the proceedings. However, it chooses to provide information to the Fair Work Commission in connection with the proceedings. This has the effect of imposing new layers of complexity to a process that is already under enormous strain. The information is apparently provided to assist the Fair Work Commission (for example, to outline the nature of complaints received over a period, or to identify areas where modern awards are unclear) but it is hard to escape the weight given to protecting the position of employees inherent in its approach. In a “Research Paper” on the NES filed in the Fair Work Commission on 4 April 2014⁶⁵, the Fair Work Ombudsman identified 25 instances of potential inconsistencies between the NES and modern awards. In each case, dealing with the perceived inconsistencies would maintain employee entitlements under the NES. The Research Paper did not identify any inconsistencies that were detrimental to employers, and which were later identified in up to 11 modern awards.⁶⁶

More recently, the Fair Work Ombudsman filed a series of tables setting out issues it considers require clarification in the review. In relation to the Horticulture Award 2010, the Fair Work Ombudsman raises the issue of whether there is uncertainty for parties about whether casuals are entitled to overtime. This is despite a clear statement on the issue in 2011, to the effect that casuals are not entitled to overtime, in a joint Fact Sheet between the Fair Work Ombudsman and the NFF:

“Under the Horticulture Award 2010 there is no specific entitlement to overtime for casual employees as there is for full-time, part-time and shiftworker

⁶⁴ NSW Farmers, details can be provided on request.

⁶⁵ Fair Work Ombudsman *Research Paper – National Employment Standards*
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141-corr-FWO-040414.pdf>

⁶⁶ Fair Work Commission *Background paper - NES issues - category 5*
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/FWCPaper-NES-Category-5-140115.pdf>

employees. Therefore casual employees are not entitled to overtime under this modern award.”⁶⁷

The result is increased uncertainty for stakeholders about whether they can rely on advice provided by the Fair Work Ombudsman in a Fact Sheet, as well as a heavier regulatory burden on industrial parties who, in addition to dealing with direct party claims, must now address issues that the Fair Work Ombudsman is prepared to raise in the Fair Work Commission, but is not prepared to debate.

Compliance costs

Business costs are imposed in a variety of forms, every day, and in many cases in ways that provide no capacity for the business to constrain those costs. The regulatory burden on the agriculture sector is no exception.⁶⁸ In the labour market context, the only effective way to reduce compliance costs is to reduce employment or avoid it altogether.

As successive governments strive for better regulatory frameworks, the regulatory impost grows. In 2007/08, Australia ranked 68th in terms of burden of government regulation. By 2013/14, our ranking had fallen to 128th.⁶⁹ An analysis in 2012, by NFF member AgForce Queensland, found that just at a state level, Queensland farm businesses are covered by more than 55 Acts and regulations (over 9,000 pages), in addition to local government by-laws, associated codes and federal legislation.⁷⁰ In 2013, the Tasmanian Department of Economic Development, Tourism and the Arts released conservative estimates showing that the cost of red tape in the agriculture, forestry and fishing sector is equivalent to 16.2 per cent of its gross value of production.⁷¹ That is, one dollar in every six is spent on compliance at the farm, fishery or forest gate.

This submission makes recommendations to reduce compliance costs that arise in a variety of contexts, ranging from procedures for dealing with unfair and unlawful dismissal to coastal shipping regulation. Compliance costs in relation to the workplace relations framework include direct and indirect costs. Direct costs include payroll, taxation, payslips, time and wages records, workers compensation, superannuation (choice of super, Superstream), modern award compliance, provision of the Fair Work Information Statement, the good faith bargaining requirements and the notice of employee representational rights, right of entry, work health and safety, visa compliance, training and management of training programs, and the list goes on. Indirect costs are built in through the supply chain, including higher freight costs due to coastal shipping

⁶⁷ Fair Work Ombudsman and National Farmers’ Federation *Horticulture Award 2010 Fact Sheet* <http://www.nff.org.au/read/1955/pastoral-horticulture-awards-2010.html>

⁶⁸ Productivity Commission *Annual Review of Regulatory Burdens on Business: Primary Sector 2007* <http://www.pc.gov.au/inquiries/completed/regulatory-burdens/primary-sector/report/primarysector.pdf>

⁶⁹ World Economic Forum *The Global Competitiveness Report 2012-13* http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

⁷⁰ AgForce Queensland *Submission to Queensland Competition Authority: Reducing the Burden of Regulation 2012* <http://www.qca.org.au/files/OBPR-AQ-sub-MeasuringReducingBurdenRegulation-0812.pdf>

⁷¹ *Measuring Red Tape: Understanding compliance burden on Tasmanian businesses, a study for the Tasmanian Department of Economic Development, Tourism and the Arts*, January 2013 http://www.business.tas.gov.au/__data/assets/pdf_file/0015/3363/Measuring-Red-Tape-Report.pdf

and road safety remuneration legislation as well as changes in currency value and commodity prices.

If farmers are to improve profitability and support jobs growth in the agriculture sector, they must be able to manage their businesses effectively and they must be able to operate in an environment where they can focus on their core business and get their products to market in an affordable way. Reducing the regulatory burden on business will go a long way to delivering on this objective.

Competition law

There is a conflict of purpose between sections 45E and 45EA of the *Competition and Consumer Act 2010* (which seek to promote competition) and section 172 of the FW Act (to the extent that it permits enterprise agreements to contain trading restrictions).

Trading restrictions were considered in *Australian Industry Group v Fair Work Australia*⁷² in the form of what are commonly known as ‘job security terms’. Under the FW Act, these terms can be included in enterprise agreements.⁷³ Similar trading restrictions requiring the use of particular products or suppliers can also be validly included in enterprise agreements if it can be shown that they relate to the ‘job security’ of employees.

While the terms may be lawful under the FW Act, they clearly have the capacity to hamper competition and efficiency. By way of an example, a term that requires contractors to be paid ‘site rates’, so that employees and contractors are all paid at the same level, eliminates any competitive advantage which might be gained by outsourcing work to a contractor. Not only that, the compliance costs are significant: all persons under a site rates obligation must then undertake due diligence in relation to every other person on site to ensure that wages and conditions are at least equivalent to those of direct employees (even if the contractor comes to the site for one day).

Businesses should generally be free to supply and acquire goods and services as they choose. The conflict of purpose discussed above should, and could, be resolved through legislative amendment to prohibit trading restrictions in enterprise agreements. This could be done by extending the concept of ‘unlawful term’ in section 194 to include terms that restrict the capacity of a person to supply or acquire goods or services.

Other forms of employment

Sham contracting

In many cases, individuals choose to offer their services as contractors rather than as employees, because the arrangement offers them greater independence and higher hourly rates.⁷⁴ There is no strong policy rationale for denying the individual this choice based on views about the primacy that should be given to employment. There is also confusion about what is a contractor, due in part to the common law approach which involves a

⁷² *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108, 14 August 2012

⁷³ FW Act, s.172

⁷⁴ <http://www.wisebread.com/8-good-reasons-to-become-a-contractor>

complex weighing up of various factors including the level of control⁷⁵ as well as the ATO “80/20 rule for taxation of personal services income (PSI), sometimes seen as delineating employees from contractors.⁷⁶ Neither ‘contractor’ nor ‘independent contractor’ are defined terms in the FW Act, even though there are three separate offences relating to the engagement of contractors.⁷⁷ These provisions create a perception of risk for employers, and uncertainty for employees. Employers may have agreed arrangements undone at some future point, while employees using the Fair Work Ombudsman’s checklist on the difference between a contractor and an employee⁷⁸ may question the validity of their arrangements. Ultimately, the provisions undermine business confidence. In our submission, there is merit in considering whether the sham contracting provisions should be replaced with a statutory definition of contractor, to make it easier for ordinary users of the framework to understand and to clearly delineate the scope of the FW Act as compared to the *Independent Contractors Act 2006*.

Labour hire

Employees of labour hire companies are entitled to the same benefits and protections as other employees under the FW Act. The issues raised in this submission apply to the employment of labour hire employees in the same way as they apply to others operating under the workplace relations framework.

Sponsored foreign workers

In our view, the effect of the workplace relations framework is neutral in relation to foreign workers. Whether a person is employed under the FW Act, or under a particular modern award or enterprise agreement, does not depend on their status as a citizen, permanent resident or visa holder. Any such approach would be likely to raise serious concerns in relation to discrimination.

The agriculture sector faces particular challenges in terms of labour and skills shortages which are likely to worsen relative to other industries over time.⁷⁹ Foreign workers often fill essential on-farm roles that cannot be filled from the domestic labour force. The 457 visa subclass is important to the farm sector: of a total number of 457 visas granted Australia wide in 2012-13 (68,480) 2 per cent (1,390) were granted to applicants in the agriculture, forestry and fishing industries.⁸⁰ Strongest growth in demand by industry was recorded in accommodation and food services (125 per cent), retail trade (83.5 per cent) and agriculture, forestry and fishing (63 per cent).

The 457 visa subclass allows Australian farmers to import the skills they cannot readily source in Australia. A good example is the pork industry, where serious skills shortages in

⁷⁵ *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (13 February 1986)

⁷⁶ <https://www.ato.gov.au/Business/Employee-or-contractor/How-to-determine-if-workers-are-employees-or-contractors/Mistakes-to-avoid/>

⁷⁷ FW Act, sections 357-9.

⁷⁸ Fair Work Ombudsman *Contractors and employees - whats the difference?*

<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/rights-and-obligations/contractors-and-employees-whats-the-difference>

⁷⁹ NFF, National Agricultural Workforce Development Plan, June 2014.

⁸⁰ Subclass 457 State/Territory summary report 2012-13 to 30 June 2013, Table 1.10.

Australia were recently addressed through the implementation of a Pork Industry Labour Agreement. Under the Agreement, Senior Stockpersons with experience in overseas, more established, pork industries (such as the United Kingdom) can come to Australia on a 457 visa. While the 457 program has limitations, it was recently the subject of recommendations for change to improve its value overall.⁸¹

The Seasonal Worker Program holds as much, if not more, potential value for the farm sector than the 457 visa subclass. An evaluation of the Program in 2011 found that it can fill unmet demand for seasonal workers and provide a consistent, reliable, returning workforce that improves workforce planning and increases productivity.⁸² Anecdotal evidence also suggests that the Program is working well. Employers have continued to report significantly improved efficiencies by having access to a returning workforce with low levels of absenteeism, staff turnover and less need for supervision and training.

Initial productivity outcomes of the SWP for the farm sector are strong and have important implications for building future industry productivity, efficiency, investment and growth. One grower, who halved the number of employees required to pick the same amount of fruit over a five year period through the use of seasonal workers, recently described the Program as an “excellent solution to the problem of labour shortages”.⁸³ An ABARES study in December 2013 found that seasonal workers were, on average, significantly more efficient than working holiday makers. Seasonal workers earned on average 22 per cent more than working holiday makers and returning seasonal workers earned \$2.80 an hour (12 per cent) more on average than new workers. Unsurprisingly, seasonal workers who returned for another season were more efficient than new workers.⁸⁴

Reliable and productive labour is a key enabler of industry confidence and sustainability. Demand for workers under the SWP is now at the point of outstripping the number of visas available.⁸⁵ The NFF supports changes to promote greater use of the Seasonal Worker Program, as outlined in our submission to the Agricultural Competitiveness White Paper. In addition, the NFF recommends:

- an increase in the number of visas available under the Program, to provide industry with the flexibility to fill seasonal labour shortages and expand productivity gains; and
- comprehensive productivity analysis of the Program to inform future industry workforce development strategies.

⁸¹ Azarias J, Lambert J, McDonald P and Malyon K *Robust New Foundations A Streamlined, Transparent and Responsive System for the 457 Programme An Independent Review into Integrity in the Subclass 457 Programme* September 2014

⁸² TNS Social Research *Final evaluation of the Pacific Seasonal Worker Pilot Scheme* September 2011

⁸³ Ironbark Citrus, Presentation to the Seasonal Worker Conference, Gold Coast, 7-8 August 2014.

⁸⁴ Leith, R and Davidson, A *Measuring the efficiency of horticultural labour: Case study on seasonal workers and working holiday makers* Department of Agriculture, December 2013

⁸⁵ Ball, R *Pacific Labour Mobility & Australia's Seasonal Worker Program: Opportunities, Impediments and Potential*, February 2015 <http://ips.cap.anu.edu.au/publications/pacific-labour-mobility-australias-seasonal-worker-program-opportunities-impediments>

While the industry invests heavily in programs to recruit, train and retain skilled workers within Australia, closing the gap from the local workforce will take time and may never be fully realised. High rates of youth unemployment in areas where tourism and agriculture are key industries, such as Cairns, suggest that availability of entry-level work is not enough on its own to address labour shortages. A coordinated effort is required to deliver greater investment in skills, attract more people to work in sectors of the economy where labour shortages exist and rebalance the workplace relations framework in a way that delivers productivity benefits across the economy.

Other elements of the WR framework

Coverage of ships in the coastal trade

Affordable shipping is an important issue for Australian agriculture and for the wider economy. All commercial produce is transported from the farm gate to market and approximately two-thirds of all Australian produce is exported. For many farmers, shipping is an essential link in the supply chain. Australian products must be able to move quickly from the farm gate into domestic and overseas markets at a price that delivers a reasonable return to the farmer.

Workplace relations law is an important factor in businesses decision making in the shipping industry, because of its impact on labour costs and productivity. Foreign ships in the Australian coastal trade were not covered by the previous workplace relations framework. Interestingly, as the table below shows, during this period there was an

Table 5.1 Number of ships in the Australian trading fleet

Financial year	Major trading fleet						Major Australian registered ships with Coastal Trade Licences/ General Licences ^a	
	Coastal trading		International trading		Minor trading fleet			
	Australian registered	Overseas registered	Australian registered	Overseas registered	Australian registered	Overseas registered		
	(number)							
2003-04	31	6	11	41	18	8	115	37
2004-05	35	3	7	41	16	5	107	36
2005-06	32	3	9	38	18	5	105	33
2006-07	30	7	9	38	17	4	105	30
2007-08	28	14	10	37	16	3	108	27
2008-09	29	15	7	36	17	2	106	27
2009-10	28	16	7	41	17	3	112	23
2010-11	26	20	8	37	16	1	108	21
2011-12	23	17	6	36	19	3	104	21
2012-13	20	18	6	33	16	3	96	13 b
Average per cent change	(%)							
1 year	-13.0	5.9	0.0	-8.3	-15.8	0.0	-7.7	-38.1
5 years	-6.8	5.4	-7.9	-1.9	0.8	0.3	-1.9	-12.1

a Data for 2003-04 to 2011-12 were based on extracts from the Coastal Trade Licences and Permits (COTLAP) system. 2012-13 results were based on extracts from the Coastal Trade Licensing System (CTLS).

b In 2012-13, there was one Australian registered ship with a General Licence that was not licensed in 2011-12, six previously licensed vessels were decommissioned or changed from being Australian registered, and three vessels had a Coastal Trade Licence in 2011-12 were active in 2012-13 but did not hold a General licence.

Note: Blank cells mean no data was recorded for the categories.

Sources: LJI (2014), Infrastructure (2013, 2014), Shipping companies (various) – personal communications.

Bureau of Infrastructure, Transport and Regional Economics (BITRE) *Australian Sea Freight 2012/13*

increase in the number of ships from 35 (2006/07) to 46 (2010/11).

From 1 January 2011, permit ships became covered by both the FW Act and the Seagoing Industry Award 2010. For the first time, Australian wages and conditions applied to all workers on foreign ships in the Australian coastal trade. The result was immediate: the number of ships in the coastal trade decreased to 38.

What these figures show is that opening up access to the coastal trade to foreign flagged ships increases the number of vessels trading around the Australian coast. This bucks the overall trend of declining numbers in the Australian trading fleet from 115 to 96 since 2003. It is the only initiative that appears to have generated increased activity around the Australian coast.⁸⁶ Fair Work Regulations extending the FW Act to temporary licensed ships and majority-Australian crewed ships should be replaced with new regulations excluding ships engaged in the coasting trade from FW Act coverage. These measures will support increased productivity by reducing shipping costs and increasing competition and efficiency.

Right of entry in remote areas

Right of entry provisions require review, as outlined in **Attachment A**. 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 amendments⁸⁷ 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.⁸⁸

These requirements are extraordinary in the sense that they authorise what would otherwise be the tort of trespass. Occupiers (usually employers) bear the risks involved in having persons on their premises, including in relation to compliance with workplace

⁸⁶ Bureau of Infrastructure, Transport and Regional Economics (BITRE) *Australian Sea Freight 2012/13*

⁸⁷ Division 7, Part 3-4 of the FW Act.

⁸⁸ Section 505 of the FW Act.

health and safety rules. The provisions infringe the fundamental common law right of a person in possession to exclude others from their premises⁸⁹ in a way that is unreasonable, and should be repealed.

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.

As currently drafted, a transfer of assets can occur when any asset is transferred and used in connection with the transferring work, no matter how small. This broadens the reach of the transfer of business rules beyond the policy intent. In our submission, there is a need to clarify that transferred assets must be necessary for the performance of the transferring work, not only used ‘in connection with’ it.

Outsourcing and in-sourcing of work is commonly a decision made to increase business efficiency. Transferring industrial instruments in connection with outsourcing and in-sourcing undermines the capacity to improve efficiency by importing or exporting the work rules and culture of one business to another. It acts as a disincentive to employment of transferring employees and may discourage the use of labour hire employees. In our view, outsourcing and in-sourcing of work should not be a ‘connection’ that triggers a transfer of business for the purposes of the FW Act.

Road Safety Remuneration regulation

The *Road Safety Remuneration Act 2012* increases rates of pay for transport workers (employees and contractors), makes end users (often small businesses) responsible for conduct of others in the supply chain, whether or not they have any capacity to control outcomes, significantly increases the paperwork burden on small business and broadens the scope of the general protections in the FW Act so that it covers contractors as well as employees.

The Act is fundamentally flawed.⁹⁰ It protects major transport and logistic providers against commercial risk by transferring that risk along the supply chain. In this respect, it does not do what it seeks to do; that is, to safeguard small contractors at risk of exploitation or unfair treatment. In our view, the regulatory framework is anti-competitive, inefficient and expensive. It does not meet the test of ‘good regulation’ because the costs of compliance far outweigh the benefits of sector-specific rules of this kind, and there is no evidence to justify the continued operation of the laws. The Act should be repealed.

⁸⁹ *Coco v The Queen* (1994) 179 CLR 427.

⁹⁰ NFF submission to the Review of the Road Safety Remuneration System

6. Conclusions

A flexible and skilled workforce is critical to productivity. Agricultural productivity rates have been consistent over many years, but the sector faces challenges including high labour costs, inflexible business regulation and a shortage of skilled agricultural workers.

The current workplace relations framework is comprehensive and broad in reach. In many respects it works, but some elements of the scheme are out of balance and require reform.

For many farm businesses, labour is their single biggest cost. Thriving in an increasingly global and competitive marketplace requires the ability to adapt as things change. Undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.

Reforms must be both fair and reasonable. Businesses must be able to adapt quickly in response to market signals, while individuals must be empowered through opportunity, underpinned by safeguards to facilitate a decent standard of living for all. Most importantly, we must not lose the opportunity for reform on the back of recent political history. It is time for a mature debate about the small adjustments needed to the workplace relations framework to support Australia's long term productivity and growth.

Attachment A: Productivity Commission Inquiry into the Workplace Relations Framework - Summary of NFF recommendations

Subject matter	FW Act provision	Problem	Solution	Category
Introduction				
Objects of the Fair Work Act	3(c)	Restricts the capacity of the workplace relations framework to evolve over time. AWAs were an accepted element of federal workplace relations law long before 2006. With appropriate safeguards, they can be effective.	Delete the object.	BARRIER
Definitions – ‘associated entity’	12, 311(6)	The definition is imported from the <i>Corporations Act 2010</i> , where it has a particular function and purpose. The definition is not suitable for the purpose of the FW Act, and is more complex than necessary.	Adopt a ‘stand-alone’ definition of ‘associated entity’ that is fit for purpose in relation to the FW Act.	COMPLEXITY
Definitions – ‘lock out’	19, 411	Employers can only take industrial action in response to employee action, and when they do, their only option is to lock employees out completely. Employees have unlimited range in terms of the industrial action they can take. This means that employer response action is either not taken or criticised as disproportionate.	Expand the type of industrial action employers can take to cover other restrictions on the performance of work. Ensure that employer action does not include action taken that is agreed to by employees or in connection with performance management.	BALANCE
Definition – ‘small business employer’	23	Workforce numbers fluctuate in businesses that rely on casual employment. A business might be a ‘small business’ one day and not a ‘small business’ the next. The current rules create uncertainty about the rules that apply to businesses of this kind.	Exclude casuals other than long-term casuals (those who have been employed on a regular and systematic basis over a period of 12 months or more).	COMPLEXITY
Interaction rules – long service leave (LSL)	27, 29; 113A, 155	The current framework was designed in anticipation of a national LSL standard. No progress has been made on this issue in more than five years. At the same time, business has lost the capacity to implement national long service leave schemes through enterprise bargaining and casual loadings can no longer factor for long service leave. Many casual	Permit enterprise agreements to prevail over State and Territory LSL laws to the extent of inconsistency	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
		employees gained a windfall when they became entitled to LSL for the first time, with retrospective effect. Employers were hit with this cost overnight without any phasing-in or transitional arrangements.		
Coverage – coastal shipping	Part 1-3, Div 3	Under the former WR Act, an exemption from coverage led to an increase in ships trading around the Australian coast. This position was reversed by the FW Act, which covered foreign ships in the coastal trade for the first time. The change reduced the number of ships trading around the coast, significantly increased shipping costs and introduced unworkable complexity. Freight that should be carried by sea is now being carried by road.	Restore the exemption of foreign ships in the coastal trade from FW Act coverage.	BARRIER
Interaction rules – enterprise agreements and modern award	57	While an enterprise agreement applies, a modern award does not apply. As a result, enterprise agreements must be comprehensive in scope in order to pass the BOOT. This is a disincentive to bargain - the scope of issues cannot be confined to issues of particular concern to the workplace.	Clarify that an enterprise agreement applies, and a modern award does not apply, to the extent of inconsistency.	BARRIER
The National Employment Standards				
Flexible work arrangements	66	Current provisions permit State and Territory laws to undermine national policy in relation to requests for flexible working arrangements.	Cover the field in relation to requests for flexible working arrangements	COMPLEXITY
Annual leave	88	There is no capacity for employers to direct the taking of leave. Employees who do not agree to take leave can accrue it indefinitely, undermining the policy intent of providing regular rest and recreation. Employers cannot unreasonably refuse to agree to a leave request, but employees have no equivalent responsibility.	Give employers the right to direct the taking of leave where attempts to reach agreement have failed, with appropriate safeguards. Alternatively, require employees not to unreasonably refuse a request to take leave.	BALANCE
Annual leave – loaded rates	88(1)	FWC decisions have interpreted this provision as preventing pre-payment of annual leave (eg. in loaded rates) despite time off for leave being given at a later time. Inconsistency of approach in FWC has created uncertainty and the FWC approach has reduced flexibility.	Provide for flexibility as to when leave is paid for and taken, subject to appropriate safeguards.	BARRIER
Annual leave –	90(2)	The current provision is ambiguous, causing significant	Clarify that the provision simply	COMPLEXITY

Subject matter	FW Act provision	Problem	Solution	Category
proportionate leave payment on termination		confusion over what annual leave payments must be paid to an employee on termination of employment. On one interpretation, the provision requires the payment of pro rata annual leave loading on termination, despite any contrary modern award term.	requires payment of untaken accrued annual leave on termination but does not deal with any other payments such as leave loading, which are dealt with in modern awards and enterprise agreements.	
Compassionate leave	104	2 days paid leave is available each time a member of an employee's family or household 'contracts or develops' an illness that poses a serious threat to life. The entitlement is triggered, for example, when a person is diagnosed with terminal illness, whether or not the threat is imminent and regardless of whether the person requires care or support.	Confine the paid leave entitlement in relation to illness that poses a 'serious <u>and imminent</u> ' threat to life.	BALANCE
Long service leave	113, 155	As discussed above, the current framework was designed in anticipation of a national LSL standard. No progress has been made on this issue in more than five years. Business requires certainty at a national level about the LSL rules that apply. Casual loadings are unable to be paid in lieu of LSL, despite longstanding historical provisions to this effect.	A national LSL standard should be developed without delay or the proposal abandoned, with interaction rules reversed so that the matter can be resolved through enterprise bargaining. Modern awards must be permitted to deal with LSL or payment in lieu of LSL for casuals.	BARRIER
Public holidays	114	Employers have no right to direct work on a public holiday and employees can refuse any such request. This tips the balance too far – in many industries, including agriculture, there is work to be done on public holidays and employers need the capacity to manage their business.	Enable employers to require work on public holidays by advance notice to employees.	BALANCE
Redundancy – variation for other employment	120	The ability to reduce redundancy pay obligations where retrenched employees gain other employment is too narrow. If an employer creates the opportunity that leads to an employee accepting another job, they should be able to seek a reduction in redundancy pay, whether or not they actually "obtained" that employment for the employee.	Extend eligibility to apply for reduced pay to employers who facilitate an offer of employment that is accepted by the employee.	BALANCE
Redundancy – small	121	The current wording permits modern awards to undermine	Make clear that small business	COMPLEXITY

Subject matter	FW Act provision	Problem	Solution	Category
business exception		national policy through the implementation of redundancy pay for small business.	employers cannot be required to pay redundancy pay under the NES or modern awards.	
Accrual of annual leave on workers' compensation	130	The current provision results in different approaches applying in different jurisdictions. In some cases, State legislation is unclear as to the position, creating uncertainty and confusion.	Adopt a national approach, so that NES leave entitlements do not continue to accrue while absent on workers compensation.	COMPLEXITY
Modern awards				
The modern awards objective	134(1)(da)	This provision requires FWC to take into account the need to provide additional remuneration for work outside ordinary hours. Dissenting FWC decisions interpret this as a statutory requirement for modern awards to include penalty rates. This was not the intention of the provision and needs to be clarified. The broader issue of penalty rates requires in-depth consideration.	The provision should be repealed or revised so that the words "the need to provide" are replaced with "the provision of".	BARRIER
Modern awards – flexibility terms	144	IFAs can only be made once employment starts and can be terminated at any time on notice. They are limited in content to prescribed matters, determined by the FWC with no capacity for Ministerial direction. It is difficult to negotiate wider IFA flexibility in enterprise bargaining. These restrictions limit the value of IFAs as a mechanism to deliver mutually beneficial terms and conditions of employment tailored to the workplace, despite strong safeguards in place for employees including the BOOT and the requirement that IFAs meet genuine needs.	Provide for IFAs to be: <ul style="list-style-type: none"> • offered as a condition of employment; • made about any term or condition of employment in a modern award; and • operative for a minimum 12 month period. 	BARRIER
Modern awards – content	151, 324	There is no provision for employers to deduct overpayments from an employee's final pay on termination of employment. This results in a windfall for employees who can simply choose not to agree to a proposed deduction.	Permit modern awards to include terms about recovery of overpayments on termination of employment.	BALANCE
Modern awards – 4 yearly review	156	The requirement to review all awards every four years is excessive. The process takes almost four years, meaning that both FWC and the parties are in a perpetual cycle of review. The result is an extraordinary allocation of resources to a process of identifying and advocating for changes that few	Abandon the 4 yearly requirement and revert to changes on application (perhaps with a statutory requirement to update awards every 10 years) to	BARRIER, RED TAPE

Subject matter	FW Act provision	Problem	Solution	Category
		actually want, most could live without or achieve through enterprise bargaining, and that more often than not increase labour costs.	maintain currency.	
Modern awards – 4 yearly review of default terms	156A	As discussed above, a requirement to review terms every 4 years is a constant state of review. This is a significant impost on all participants in the workplace relations framework both in terms of time and resources.	A new, issues-based, process is required: 1. APRA notifies FWC if a fund's eligibility for default fund status is in question; 2. Notification of proposal to vary list of affected awards published by FWC; 3. Interested parties make submissions; 4. FWC determines on the papers.	RED TAPE
Modern awards – standing	158, 160	Standing to apply to vary, revoke or make a modern award is limited to certain individuals and registered organisations.	Anyone with an industrial interest in a modern award should have standing to make an application in relation to the award.	RED TAPE
Enterprise bargaining				
Agreement content	172	The FW Act broadened the scope of agreement content to include matters pertaining to the relationship between employers and unions. As a result, so called 'job security terms' have become increasingly common in enterprise agreements. These terms artificially inflate labour costs and restrict competition in the labour market.	The scope of agreement content should be limited to matters pertaining to the employment relationship. Terms that restrict trade or commerce should be unlawful terms.	BARRIER
Agreements with one employee ⁹¹	172(6)	Since 2013, enterprise agreements can no longer be made with a single employee. It is said that this measure promotes collective bargaining. In reality, the effect is to bar small businesses and those in development phases from securing a period of certainty for the business of up to four years.	The restriction on agreements with one employee should be repealed.	BARRIER

⁹¹ In *AMWU v Inghams* (2011) 212 IR 351, a Full Bench of FWC found that agreements with one employee were not inconsistent with the objects of Part 2-4 of the Act, dealing with enterprise agreements.

Subject matter	FW Act provision	Problem	Solution	Category
Greenfields agreements – when they can be made	172(2)	Recent FWC decisions have considered whether a newly acquired business can make a greenfields agreement. The issue is whether the business is a ‘genuine new enterprise’. The definition of ‘enterprise’ is broad and includes an undertaking. It should be possible to make a greenfields agreement for a new business that was previously operated by an unrelated entity. This will promote certainty and jobs creation by permitting terms and conditions to be settled before work gets underway.	Clarify that a greenfields agreement can be made with a newly acquired business.	BARRIER
Notice of representative rights	173	The notice of representational rights must only include certain prescribed content. Failure to meet this requirement invalidates the entire agreement making process. This is an unnecessarily strict approach with severe consequences for employers who must start all over again if found not to have correctly issued the notice. Form has triumphed over substance and reform is needed to restore the emphasis on facilitating the making of enterprise agreements.	Provide that substantial compliance with the notice requirements is sufficient where the defect does not materially affect the capacity of employees to make an informed decision when they cast their vote.	RED TAPE
Agreement making process	180(2)(a)	Currently, employees must be given access to the proposed agreement and any other relevant materials during the ‘access period’. Agreements have been refused because employees received their materials at an earlier time (eg when the notice of representational rights was issued). The underlying principle is that employees should have the information they need to cast an informed vote on an enterprise agreement in sufficient time before the vote is held. It does not, and should not, matter, that the information is provided to them at the outset of bargaining or in the intervening period, as long as there is sufficient time for them to consider the material before the vote.	Promote efficiency and the making of enterprise agreements by allowing relevant agreement materials to be provided at any time from the issue of the notice of representative rights to 7 days before a vote is held to approve the agreement.	RED TAPE
Bargaining representatives	183	Bargaining representatives are entitled to be covered by an enterprise agreement on the giving of notice to FWC after the agreement is made. It does not matter whether they were involved in bargaining or not. Bargaining representatives who have been active in the process and devoted significant resources to supporting those they represent should have	Confer coverage rights only on bargaining representatives who acted as such during bargaining for the agreement.	BALANCE

Subject matter	FW Act provision	Problem	Solution	Category
		priority of representation under the agreement.		
Application for approval	185(1)	Once an agreement is made, an employer 'must' apply for its approval. An employer whose circumstances have changed and who no longer seeks agreement approval must nevertheless apply, but then discontinue the application under s588. This is form over substance. An employer should not be compelled to seek approval of an agreement in every case and employee representatives should not be able to apply for agreement approval absent the consent of the employer.	Facilitate, but do not require, the making of applications for agreement approval. In the case of applications by employee bargaining representatives, require consent of the employer upon filing of the application.	RED TAPE
Agreement approval – the BOOT	186(2)(d), 193	The BOOT is a disincentive to bargaining because it seeks to improve the position of employees at the expense of employers. The BOOT drives up labour costs without any requirement for productivity measures or offsets, despite the objects of the Part 2-4 which support enterprise agreements that deliver productivity benefits. The no-disadvantage test was more workable – it preserved the position of employee's overall, but there was greater scope for trading of rights and responsibilities without increasing overall costs.	<ul style="list-style-type: none"> • Restore the no-disadvantage test in preference to the BOOT. • Make workplace productivity a key objective. • Prohibit pattern bargaining. 	BARRIER
Fairly chosen requirement	186(3)	This requirement is sometimes used as a device to reject innovative enterprise agreements. Employees must approve an agreement before it is made – this is the safeguard to ensure that employees support the making of the agreement. Allowing FWC to dictate the scope of agreements or reject agreements because of their own preferences for how an employer should structure their business is an unreasonable fetter on flexibility.	The fairly chosen requirement should be removed.	BARRIER
Greenfields agreements – approval	186(5)	Greenfields agreements can only be approved if they are in the public interest. This sets the bar too high, as the private interests of the parties are insufficient to meet the test. In contrast, agreements that fail the BOOT can nevertheless be approved as long as approval is not contrary to the public interest.	Provide for greenfields agreements to be approved if it is not contrary to the public interest.	BARRIER
Unlawful terms	194	There is much confusion and uncertainty about the types of terms that are unlawful, particularly in relation to right of	Revise the list of unlawful terms, to include:	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
		entry. Case law has developed to the point where the restriction on terms dealing with right of entry is almost meaningless. The FW Act should determine the scope of unfair dismissal protections and rights of entry. Terms that restrict the capacity of business to innovate and grow should be prohibited.	<ul style="list-style-type: none"> • terms dealing with unfair dismissal, • terms dealing with right of entry • terms that restrict the capacity of a person to supply or acquire goods or services, and • terms that require employers to impose workplace conditions on unrelated third parties. 	
Flexibility terms	202, FW Regs Sch 2.2	Enterprise agreements can dictate the scope of IFAs. However, in practice it is difficult to negotiate wider IFA flexibility in enterprise bargaining. These restrictions limit the value of IFAs as a mechanism to deliver mutually beneficial terms and conditions of employment tailored to the workplace, despite strong safeguards in place for employees including the BOOT and the requirement that IFAs meet genuine needs.	Provide for IFAs to be: <ul style="list-style-type: none"> • offered as a condition of employment; • made about any term or condition of employment in an enterprise agreement; • operative for a minimum 12 month period. 	BARRIER
Consultation over change	205(1)(a)	Recent amendments require formal consultation over every change to regular rosters and ordinary hours is onerous and overly prescriptive in what the consultation must involve. Changes that are made in accordance with the relevant modern award or enterprise agreement are within the discretion of the employer. Employers need to be able to manage their business without undue delay.	Require formal consultation only in relation to major workplace change.	BARRIER; RED TAPE
Variation and termination	Div 7, Part 2-4	Enterprise agreements can only be varied or terminated in limited circumstances, usually by agreement of the parties or with FWC's approval after the nominal expiry date. This is unduly restrictive. Parties can make a substandard enterprise agreement to deal with a short-term crisis in the business, but they cannot seek to vary or terminate an agreement in similar circumstances. There is a public interest in supporting business viability, not least because of the potential for job losses if the business fails.	Provide for applications to vary or terminate enterprise agreements before or after the NED where there is a threat to the viability of the business if the agreement remains in place.	BARRIER
Good faith bargaining	228, 231(2),	There is considerable uncertainty about where the limits of	Allow the good faith bargaining	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
	255	good faith bargaining lie. While the Act expressly states that there is no requirement to make concessions or reach agreement, the decision in <i>Endeavour Coal</i> found that compliance with GFB requires genuine attempts to reach a concluded agreement and ordered the company to concede terms that it would accept in an enterprise agreement. This effect of the decision is that there is a live question about whether parties can ever ‘walk away’ from negotiations.	requirements to cease, on the giving of notice, once reasonable efforts have been made to reach agreement and no agreement has been reached.	
Majority support determinations	236	Majority support determinations compel employers to bargain. Doing away with the voluntary nature of bargaining goes beyond ILO obligations and undermines the legitimacy of the bargaining process. In a practical sense it requires employers to embark on a process of driving up labour costs, with no obligation to offset those costs through increased productivity.	Majority support determinations should no longer be a feature of the FW Act. If they are to be retained, there should be a requirement for the agreement to include measures to boost productivity at the workplace.	BARRIER
Scope orders	238	Scope orders give FWC the power to dictate to an employer, at the initiative of an employee or their representative, how it must organise its internal business structures. This is an unreasonable intrusion into the business affairs of employers. It can have significant consequences for employers, both in relation to labour costs and harmonious workplace relations.	Scope orders should no longer be a feature of the FW Act. FWC could have the capacity to conciliate disputes over agreement scope, but should not have the power to decide them.	BARRIER
Low-paid bargaining	Div 9, Part 2-4	This process sits on the premise that productivity improvements will flow from bargaining in award-reliant sectors of the economy. As discussed above, this is a false premise in the context of bargaining designed to increase labour costs without any requirement to change work practices to improve productivity and service delivery.	The objects of improving productivity and service delivery can best be achieved through professional advice on how current workplace practices can be improved or streamlined. FWC is not best placed to provide this advice. Employers who are compelled to engage in low-paid bargaining should have access to professional advice at no cost, to support the enterprise agreement design processes.	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
Minimum wages				
Wage setting process	285	Annual wage reviews are conducted by FWC and are decided on discretionary factors in response to a resource-intensive process of public submissions. Traditionally, the outcome falls somewhere between what is claimed by union and employer groups, at an average of 3.3%. There is no link to inflation or other relevant indicator such as the labour price index.	Consideration should be given to abandoning the annual wage review process in favour of a streamlined, automatic minimum wage increase (including zero level increases) linked to a quantifiable and relevant measure.	BARRIER
National minimum wage	297(1)	Retrospective wage increases are bad public policy. They undermine business certainty and lead to budgetary shortfalls.	Statutory wage increases should operate prospectively.	BARRIER
Transfer of business				
Transfer of assets	311(3)	As currently drafted, a transfer of assets can occur when any asset is transferred and used in connection with the transferring work, no matter how small. This broadens the reach of the transfer of business rules beyond the policy intent.	Clarify that transferred assets must be necessary for the performance of the transferring work, not only used 'in connection with' it.	BARRIER
Outsourcing and insourcing	311(4)-(5)	Outsourcing and in-sourcing of work is commonly a decision made to increase business efficiency. Transferring industrial instruments in connection with outsourcing and in-sourcing undermines the capacity to improve efficiency by importing or exporting the work rules and culture of one business to another. It acts as a disincentive to employment of transferring employees.	Outsourcing and in-sourcing of work should no longer be a relevant 'connection' that triggers a transfer of business.	BARRIER
Orders to vary transfer of business rules	318/9	FWC has broad discretion to determine which industrial instrument should apply at a workplace in a transfer of business situation. This can lead to outcomes that are not consistent with business decisions to improve efficiency.	Limit FWC's discretion so that default rules apply unless otherwise agreed between the employer and employees.	BARRIER
Other terms and conditions of employment				
Permitted deductions	324	As discussed above, there is no provision for employers to deduct overpayments from an employee's final pay on termination of employment. This results in a windfall for employees who can simply choose not to agree to a proposed deduction despite having received the benefit without accruing an entitlement.	Permit modern awards to include terms about recovery of overpayments on termination of employment.	BALANCE

Subject matter	FW Act provision	Problem	Solution	Category
Guarantee of annual earnings	Div 3, Part 2-9	There is no provision to terminate a guarantee of annual earnings on notice. This is of particular concern where there is a transfer of business and the guarantee transfers to the new employer.	Provide for the termination of a guarantee of annual earnings on sufficient notice to the employee, either generally or in connection with a transfer of business. Once terminated, the employee will revert to the relevant modern award.	BARRIER
General protections				
Scope of protections	341(3)	The general protections extend to the workplace rights of ‘prospective employees’. In part, this is explained as a way of ensuring that IFAs cannot be made a condition of engagement. While the drafting may be legally correct, the provision is opaque and its effect is not clear for most users. In any event, there is a real question as to why IFAs should not be permitted to be made a condition of engagement, particularly where it leads to higher wages and more flexible working conditions. The strong safeguards in relation to IFAs reinforce the merit of promoting IFA use more widely.	Ensure that IFAs can be offered as a condition of engagement.	BARRIER, RED TAPE
Adverse action	342	The range of employer action that is ‘adverse’ is much broader than the range of employee / independent contractor ‘adverse’ action. This is out of balance and means that employers have limited remedies to deal with wilful conduct intended to damage their business other than expensive contractual / common law litigation.	Extend to cover action by employees / independent contractors intended to damage the employer or bring it into disrepute.	BALANCE
Adverse action – exceptions	342(3)	The exception to adverse action does not cover action taken in accordance with a modern award or enterprise agreement.	Action taken in accordance with a valid modern award or enterprise agreement term should not be capable of being ‘adverse action’.	BALANCE
Discrimination	351	The scope of the discrimination protection in the FW Act is not yet fully understood. There is debate about whether it has the same effect as other, separate federal discrimination laws – for example, whether discrimination includes ‘indirect discrimination’, and what ‘discrimination’ means in the	Review the discrimination protection and clarify that it only deals with direct discrimination. Exclude workplace discrimination from the scope of other federal	COMPLEXITY

Subject matter	FW Act provision	Problem	Solution	Category
		WR context. There is also overlap with the adverse action protection. Clarity is required for business and employee certainty and to avoid forum shopping.	anti-discrimination laws.	
Sham contracting	357	Sham contracting provisions have more effect on perceptions than on the position of individuals in the labour market – perhaps with some exception in particular industries. This is exacerbated by reliance on the common law meaning of ‘contractor’, involving a complex test and the weighing up of various factors. The potential ramifications of a ‘sham contracting’ prosecution undermine business confidence in entering into particular contractual arrangements.	Replace ‘sham contracting’ provisions with a new definition of independent contractor.	COMPLEXITY
Burden of proof	361	A reverse onus of proof offends the common law presumption of innocence and undermines confidence in the judicial process.	Restore the common law presumption of innocence to the general protections.	BALANCE
Unlawful dismissal	365, 370, 375	The current process for dealing with unlawful dismissal requires review. Court applications require FWC to have issued a certificate that conciliation has failed, but there is no requirement to certify that the claim has reasonable prospects of success. As a result, parties are put to significant and unnecessary costs in connection with federal court proceedings when unfair dismissal claims are wrongly made as unlawful dismissal claims.	Require FWC to certify as to whether a case has reasonable prospects of success and make a court application contingent on having reasonable prospects of success.	BALANCE
Unfair dismissal				
Small Business Fair Dismissal Code	388	There is no reason to treat small and large businesses differently in relation to the Code. Just because a business can afford dedicated human resources managers and external legal counsel does not mean they should have to – in the end these are substantial business costs that are diverted away from more productive endeavours. The Code reflects Parliament’s view of a fair process for termination of employment, based on case law developed over many years. Compliance with the Code, whether a business is small or large, should be sufficient.	Extend the Code to all businesses.	BARRIER
Genuine redundancy	389	A genuine redundancy is taken not to be genuine if there is	Restore the longstanding and	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
		either a breach of a consultation provision in a modern award or enterprise agreement or FWC considers it would have been reasonable to redeploy the person. Technical breaches of consultation provisions mean that genuine redundancies can be challenged as unfair dismissal, with the associated procedural and compensation costs. It also creates double jeopardy – a business will be liable for the process leading up to dismissal both as a breach of the award or agreement and as an unfair dismissal. The discretion given to FWC to supplant business decisions with its own views about whether redeployment would have been reasonable overlooks the fact that it is the ‘job’, not the person, which becomes redundant. Employers, not FWC, are best placed to make decisions about who does what in a particular business.	accepted definition of redundancy and remove capacity of FWC to decide whether redeployment would have been reasonable.	
Compensation	390	‘Go away money’ is a reality of the current unfair dismissal framework, and sadly, probably unavoidable. 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 for around the same amount that is likely to be awarded in the hearing. A legislative focus on reinstatement will not overcome this concern. Recent experience with the new workplace bullying regime suggests that the only way to avoid a system that promotes ‘go away’ money is to severely constrain the scope of the protection or the availability of compensation.	Remove compensation as a remedy or limit it to only where absolutely necessary and capped at 13 weeks’ pay.	BARRIER
Hearings	399	Despite a shift in focus toward dealing with unfair dismissal claims on the papers, hearings remain common and costs high.	Require parties to prepare a statement of agreed facts to narrow issues for hearing.	RED TAPE
Appeals	400	Unfair dismissal decisions are largely discretionary and appeals rarely succeed. In the meantime, parties are put to significant cost and effort in relation to proceedings.	There should be no appeals from unfair dismissal decisions.	RED TAPE
Costs	401(1A)	Costs can be awarded against a representative who encourages a person to respond to a claim that has no reasonable prospects	Remove references to ‘response’ to claims.	RED TAPE

Subject matter	FW Act provision	Problem	Solution	Category
		of success. This is inconsistent with FWC Rule 14A, which requires a response to be filed.		
Industrial action				
Employer response action	411	Employers can only take industrial action in response to employee action, and when they do, their only option is to lock employees out completely. Employees have unlimited range in terms of the industrial action they can take. This means that employer response action is either not taken or criticised as disproportionate. When it is taken, the action has economic consequences: shutting down a business also affects its consumers and supply chain.	Expand the type of industrial action employers can take to cover other restrictions on the performance of work. Ensure that employer action does not include action taken that is agreed to by employees or in connection with performance management.	BALANCE
Pattern bargaining	412	Enterprise bargaining will only deliver productivity benefits if tailored to the workplace concerned. Template agreements undermine enterprise bargaining and taint perceptions of the bargaining process. They impose uniform, often unaffordable, terms and conditions on small business and deter workplace bargaining where unsuitable agreements have already been adopted.	Prohibit pattern bargaining	BARRIER
Unprotected industrial action	418-420	Recent decisions have found that orders to stop unprotected industrial action can only be made against organisations who are in the process of organising the action. Once action is taken, no orders can be made against the organisers of that action. This undermines the value of orders intended to prohibit industrial action unless it is taken in accordance with the FW Act.	Bargaining representatives involved in bargaining and whose members take unprotected industrial action should be within the scope of 'stop orders' in the same way as their members.	BALANCE
Significant harm to third parties	426,430	Unlike other similar provisions, orders to address significant harm to third parties in connection with protected industrial action can only: <ul style="list-style-type: none"> • suspend the action; and • be made if the action is being engaged in. This means third parties cannot take preventative steps to mitigate the effects of industrial action on their business. They must instead endure those effects (perversely) hoping that by	Permit orders made on application by an affected third party to suspend <u>or terminate</u> action, and also be made if the action is <u>threatened, impending or probable</u> . If industrial action is to recommence after a period of	BARRIER

Subject matter	FW Act provision	Problem	Solution	Category
		the time their application is heard by FWC, the action is still being taken so that stop orders can be made. FWC can only suspend, not terminate, the action, meaning that third parties can only obtain temporary relief. This is a significant economic impost on third parties, their clients and suppliers.	suspension under s.426, require notice to the third parties concerned.	
Protected action ballots				
Ballot process	436	The objective is a 'fair, simple and democratic' process, but the reality is anything but simple. This means parties are tied up in procedural matters rather than resolving the dispute at hand.	Streamline provisions to clearly identify: <ul style="list-style-type: none"> • who can vote to strike; and • who can strike. 	COMPLEXITY
Genuinely trying to reach agreement	443(1)	The 'genuinely trying' requirement sets a very low threshold – all that is required is that contact has been made expressing a desire to bargain. In addition, most ballot costs are met by the Commonwealth. As a result, protected action ballots are commonly used as a bargaining tactic – they are free, they are easy to get, and they threaten the other party with serious disruption.	Lift the bar to reduce the incentive to seek protected action ballots so that they are only used where industrial action is necessary to break a deadlock in bargaining.	BARRIER
Strike pay				
Strike pay	470	The principle of no payment for industrial action is sound. The strike pay rules, however, are complex and open to manipulation. Employers are likely to find it difficult to prove that an employee's <u>refusal</u> to work overtime contravened the award, agreement or contract: most instruments do not require employees to work overtime, but employees are paid for the prospect nevertheless. Calculating pay reductions in relation to partial work bans is highly complex. FWC can overrule the approach taken by the employer. This diverts significant attention from productive work.	Simplify the strike pay rules by adopting the principle in legislation and leaving the calculation to the parties. A dispute about payment of entitlements can be dealt with in an eligible court.	COMPLEXITY, RED TAPE
Partial work bans	471(4), 472(3)(b)	To avoid calculating reductions in pay, employers can give notice of refusal to accept partial work and then withhold pay for the entire period of the ban. Regulations prescribe the form of the notice, its content, and how it can be given. This is highly complex, despite intending to make things easier for employers. If the notice is not given correctly, the employer is	Simplify the strike pay rules. Provide for a Statement of Rights to be issued by the ballot agent at the time the protected action ballot order is issued. The Statement can summarise the	RED TAPE

Subject matter	FW Act provision	Problem	Solution	Category
		back to square one. The process requires simplification.	prospect of loss of pay due to strike action so that employees are aware of their rights.	
Right of entry				
Right of entry	481, 482	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.	<ul style="list-style-type: none"> • Limit rights of entry to those in the FW Act. • Make clear that there is no right of entry other than in accordance with the Act. • Require permits to be produced at the point of entry unless the requirement is waived by the occupier. 	BARRIER
Notice of entry	487(3)	24 hours' notice of entry to investigate suspected contraventions is very short: employers will need to undertake their own inquiries, notify employees where entry is for discussion purposes, determine what information about any suspected contravention exists and where it is kept, and seek legal advice about their own rights in relation to right of entry. Prioritising union right of entry over other business priorities is unproductive and in most cases, unnecessary.	Require a minimum notice period of 3 days unless an exemption certificate is granted.	RED TAPE
Location of discussions	492	Unions can insist on holding meetings in the lunch room by simply withholding agreement from the employer about other places to meet employees. This is an unreasonable and disruptive intrusion into the workplace. Employers must have control over their own premises – they bear the risk of what happens on their sites.	Allow employers to determine where meetings are held.	BARRIER
WHS rights	Div 3, Part 3-4	There is a comprehensive WHS framework setting out processes for dealing with safety concerns. Duplicating these processes in workplace relations framework is unnecessary. It confuses what are two distinct areas of law, encouraging safety to be used as a tool in the industrial armoury.	Remove WHS rights of entry from the WR framework.	COMPLEXITY
FWC powers	505	FWC's otherwise broad powers in relation to right of entry are confined by prescriptive rules about orders that can be made	Permit FWC to deal generally with right of entry disputes.	COMPLEXITY

Subject matter	FW Act provision	Problem	Solution	Category
		in favour of employers. In practice, permits are rarely revoked.		
Restricting rights	508	FWC can restrict rights in cases of misuse, but only on its own initiative or on application by an inspector. This limits the effectiveness of the provision where FWC and FWO are not involved in a right of entry dispute.	Employers should have standing to apply for orders about misuse of rights of entry.	BALANCE
Revoking or suspending permits	510	This provision sets out the circumstances where a permit holder should no longer have the privilege of right of entry. The circumstances are serious: they largely involve unlawful conduct. It is in the public interest that these rules not be watered down by FWC discretion.	Remove the 'harsh or unreasonable' exception.	BALANCE
Accommodation and travel	Div 7, Part 3-4	New requirements for employers to provide unions with accommodation and travel in remote areas are extraordinary in the sense that they amount to forced contractual arrangements – or put another way – statutory trespass. Employers have the right to control their premises and to exclude persons from them, as they bear all the risk, including in relation to WHS and public liability.	Remove obligations for employers to provide travel and accommodation to unions in remote areas. Employers should not bear any costs associated with union travel to their workplace.	BARRIER
Stand down				
Definition	524(1)	Only 'stoppages' of work are covered – in many instances there will be a disruption to work preventing a section of employees from working, despite other work continuing at the business.	Extend definition to cover other disruptions to work beyond the control of the employer resulting in no work for the employee concerned.	BARRIER
Standing	526(3)	There is no capacity for employers to apply to FWC to deal with a dispute over stand down.	Employers should have capacity to apply.	RED TAPE
Notice and consultation				
Notification to Centrelink	530	The case for notifying Centrelink of redundancies has not been revisited for some time. This is a largely procedural requirement of questionable value, triggering FWC's power to prevent dismissal.	The requirement should be removed or reviewed. Modern awards already require consultation.	RED TAPE
Notification to unions	531	The requirement to notify relevant unions also requires review. It creates practical compliance difficulties where	The requirement should be removed or reviewed. Modern	RED TAPE

Subject matter	FW Act provision	Problem	Solution	Category
		employers do not know which employees are union members.	awards already require consultation.	
Pay slips				
Payslips	536	Many employees are paid the same amount, by EFT, every pay period. Employers are required to ensure payslips are issued within a one day period each time, whether or not this is what the employee wants. This is a regulatory burden.	Where there is predictability of pay, permit parties to agree that payslips will be provided on request.	RED TAPE
Compliance and standing				
Standing	540	There is a question about whether unions should have standing to bring applications where they have no members, given the trend of declining membership. Employer organisations can only bring an application on behalf of their members (see eg. s540(5)). The same approach should apply to employee organisations.	Employee organisations should only be able to bring claims on behalf of their members.	BALANCE
Orders for hurt and humiliation	545(2)(b)	Orders for hurt and humiliation are generally not a feature of the workplace relations framework and nor should they be. The effect is to substantially increase costs and incentivise claims.	Prohibit orders for hurt and humiliation.	BARRIER
Accessorial liability	550	The scope of this provision is too broad. Rogue operators can disappear, leaving FWO with few options but to prosecute host employers for contraventions of the FW Act by another.	Liability through the supply chain should be reconsidered – fundamentally, responsibility for unlawful conduct should rest with the person breaking the law.	BARRIER
Workplace bullying				
Workplace bullying	Part 6-4	A key test of good regulation is that the benefits outweigh the costs. There is a real question as to whether the test is met in relation to the bullying regime. The statistics to date suggest that the new bullying regime has been overwhelmingly ineffective. Only one claim was granted to the end of 2014.	Remove the bullying regime from the workplace relations framework.	BARRIER

Attachment B: Farm Sector Survey

In 2014, the NFF undertook an Agriculture Workforce - Farm Sector Employer Survey in order to better understand critical employment and labour-related issues affecting the agriculture sector. The survey was conducted over a four week period from 23 January 2014 to 20 February 2014. The survey sought to canvass the views of farm sector employers that have, have attempted to or normally do engage rural and related workers, including farm managers and overseers to assist with the operation of their agricultural and horticultural enterprises. Business names and identifiers were not collected. Information was analysed on a collective basis. While the number of survey respondents is statistically small, survey results were generally consistent and paint an indicative (rather than wholly representative) picture of the labour issues faced by a typical small Australian farm business. A copy of the survey results is included at **Attachment C**.

Summary of survey results

Over 500 farm sector employers responded to the survey. Of these, 80 per cent were operating within a single jurisdiction and one in two were operating at a single site. Approximately 70 per cent were engaged across Mixed farming, Livestock and Cropping. Almost 85 per cent were owner/operators, with over a third of these (30 per cent) being primarily family farms.

The age of workers employed by respondents was broken down as follows:

Ages 16 – 24	12 per cent
Ages 25 – 50	68 per cent
Over 50 years	20 per cent

85 per cent of workforces were predominately male and only 15 per cent were predominately female.

Employment and type of engagement

Of the family farms, the average number of employees was 1.5 – 2 (full-time) and 1.4 – 1.9 (part-time). Over two thirds (70 per cent) employed 0-5 employees. 53 per cent employed full time employees and 65 per cent employed casual employees; around 24 per cent engaged part-time, contract and/or seasonal workers.

70 per cent of businesses reported having employed someone in the last twelve months, with 30 per cent filling vacancies within one month and 42 per cent filling vacancies within two months.

1 in 2 respondents indicated that it is difficult to source skilled, trained and committed personnel and when recruiting, they may advertise themselves. Most respondents (75 per cent) relied on word of mouth to source farm labour. 70 per cent of respondents indicated that they would not need additional staff in next two to five years.

Most respondents (around 80 per cent) use contractors to perform a wide variety of tasks with between 30-40 per cent using contractors for fencing/yard work, spraying,

harvesting and shearing. Only 10 per cent of respondents indicated that they used contractors due to difficulties recruiting skilled workers.

Skill levels required

In terms of labour workforce requirements, 59 per cent of employers required semi-skilled and skilled workers, 15 per cent were able to employ new entrants and trainees, 18 per cent of employers needed supervisory staff and 15 per cent required farm managers. Of currently employed workers, 38 per cent were semi-skilled, 44 per cent were skilled and 18 per cent were highly skilled. Around 1 in 5 had tertiary qualifications, although 35 per cent could not nominate the highest qualification held by their employee/s.

The top six skills required for mixed farming, livestock and cropping businesses were (in order of priority need):

Full-time workers- tractor driving and heavy machinery, animal husbandry, OHS, chemical handling and application, mustering horse and motorbike, supervisory skills.

Part-time workers- tractor driving and heavy machinery, animal husbandry, OHS, mustering horse and motorbike, chemical handling and application, fencing and yard work.

Casual workers - tractor driving and heavy machinery, OHS, animal husbandry, mustering horse and motorbike, chemical handling and application, fencing and yard work.

Use of migrant workers

Among respondents, the main source of foreign labour was working holiday makers (backpackers), as well as workers on 457 visas and workers on the Seasonal Worker Program.

- Only about 9 per cent of respondents had considered using the permanent employer sponsored option and of these, only 1 in 2 had done so successfully.
- Around 12 per cent had looked to use workers on 457 visas and around 3 out of 4 had done so successfully.
- Around 27 per cent had looked to use workers on Temporary Working Holiday visas with 19 out of 20 successfully securing workers under this scheme.
- Around 4 per cent of respondents had looked to use the Seasonal Worker Program and of these, there was a success rate of approximately 70 per cent.

Training and workforce development

Almost 45 per cent of survey respondents had not used or applied any strategies to identify, develop or foster skills training and personnel development.

Almost half of farm businesses only assessed labour, skills and workforce development requirements as the need arises.

Business confidence

1 in 2 respondents expected profitability and growth to improve over the next three to five years, but only 1 in 5 expected that they would need to expand their workforce.

Almost 14 per cent (or 1 in 7) indicated they may leave the industry.

Almost 1 in 2 said that they cannot afford to employ additional personnel, and the same number indicated that the greatest impediment to their business was a shortage of skilled and committed labour.

Of the greatest challenges ahead, the concerns were ranked in the following order:

- financial viability (65 per cent)
- government regulations (42 per cent) and
- skill and labour shortages (36 per cent).