National Farmers Federation

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Submission on the discussion paper

"Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance"

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NFF Member Organisations

AGFORCE

ACGC

Australian Dairy Farmers

AUSTRALIAN FOREST PRODUCTS ASSOCIATION
afpa
TREES | WOOD | PAPER

Australian Livestock Exporters' Council
ALEC

ALPA

Australian Blueberry Growers' Association

Australian Organic

AUSTRALIAN Pork

AVA
AUSTRALIAN VETERINARY ASSOCIATION

PURE BEECHWORTH HONEY
100% Pure Australian Honey

CANEGROWERS

CATTLE COUNCIL OF AUSTRALIA

COTTON AUSTRALIA

driedfruits australia

FCA
FARMERS FOR CLIMATE ACTION

Goat Industry Council of Australia inc.

GrainCorp

Grain Growers

National Farmers' Federation
Horticulture Council

NEW SOUTH WALES IRRIGATORS' COUNCIL

nsw FARMERS

NORTHERN TERRITORY CATTLEMEN'S ASSOC. NTCA

The Pastoralists' Association of West Darling

PRIMARY EMPLOYERS TASMANIA
PET

PRIMARY PRODUCERS SA
ppsa

AGRICULTURAL EXCELLENCE & SUSTAINABILITY
RICEGROWERS' ASSOCIATION OF AUSTRALIA INC

SHEEP PRODUCERS AUSTRALIA

SoilsForLife
AN OUTCOMES AUSTRALIA PROJECT

Summerfruit AUSTRALIA

Victorian Farmers Federation

WAFARMERS

WOOLPRODUCERS AUSTRALIA

National Farmers Federation

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 88,000 farm businesses in Australia, 99 per cent of which are wholly Australian owned and operated.

Economic >

In 2017-18, the agricultural sector, at farm-gate, contributed 2.4 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2017-18 is estimated to have reached $60.1 billion.

Workplace >

The agriculture, forestry and fishing sector employs approximately 323,000 people, including full time (236,700) and part time employees (84,300).

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 26 per cent of the employed workforce is casual.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 51 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.4 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.

In 1989, the National Farmers' Federation together with the Australian Conservation Foundation was pivotal in ensuring that the emerging Landcare movement became a national programme with bipartisan support.

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Introduction

The National Farmers' Federation has set a goal for the Australian agricultural sector to exceed A$100 billion in export value by the year 2030. Our strategy for achieving this lofty target, the 2030 Roadmap, is built upon 5 pillars:

1. Customers and the Value Chain
2. Growing Sustainably
3. Unlocking Innovation
4. Capable People, Vibrant Communities
5. Capital and Risk Management

The aim of pillar four, put very simply, is for a future where agriculture is recognised as a rewarding and aspirational career choice for people of all skill levels and backgrounds. We aspire to be an industry that attracts and develops the human capital to match the needs of the sector and adapt to the shifting conditions of the future. These will be the leaders, critical thinkers, technical experts, and those who work with skilful hands in the regions of tomorrow.

It is vital that we strive to attract phenomenal human talent, not only from Australia, but from around the globe. To this end, potential employees — whether they are experts, students, labourers, graduates, etc — must see work in agriculture as a desirable option, and it is singularly important for farms to be recognised as employers of choice who embrace fair labour practice: a solid day's work for a solid day's pay.

This is not a new aspiration. History demonstrates that, as a sector, agriculture is prepared to operate in a regulated labour market[1]. And today, the mostly small and family businesses that make up the bulk of Australia's agricultural sector do their utmost to comply with an ever-increasing regulatory burden, including heavily regulated workplaces and a tightly controlled industrial relations environment.

That said, we acknowledge that there are valid concerns about non-compliance and deviant behaviour within the sector.

Sometimes that non-compliance is a simply a result of a mistake, inadvertence, or ignorance. Certainly, there should be consequences for the employers in that case; consequences which are designed to encourage diligence and recognises the loss which has been suffered by the aggrieved employee.

However, it must also be acknowledged that workplace laws are complex, often confusing, sometimes archaic, and occasionally counterintuitive. The recent Full Court decision in the *Workpac v Skene* is a clear case-in-point; as a result of that decision a casual loading may be paid while leave entitlements accrue because an employer is unaware of the obscure legal principles which the court adopted in that decision in contradiction to the legal position established by the Fair Work Commission. No right thinking person could call that a "fair" outcome. Few farms are big enough, have sufficient turnover, and/or enough (permanent) staff to warrant a dedicated business manager, let alone HR team, with the time and training to

[1] As one of the first industries to accept a regulated labour market, with the introduction of the first Pastoral Award in 1907

understand all of the nuances and to keep abreast of changes to wage laws. Again this is not an excuse for noncompliance, but it means farmers inevitably make errors.

Another reality, however unpalatable, is that workplace laws dictate, to greater or lesser extent, the way employers run their business; e.g. by restricting working hours. While, in principle, this is both reasonable and necessary, it is nonetheless a part of the context which should inform the government's thinking in this space. It means that mistakes will happen. While never victimless or wholly excusable, inadvertent contraventions of workplace law are always possible even with the best of intent.

That being said, it must also be acknowledged that in addition to the cases of inadvertent non-compliance, there are often far more serious cases of farms and farm businesses who choose to do the wrong thing or are callously indifferent to its practice, often for their own benefit. Given that public attention tends to blur industries and responsibilities[2], the extent of the problem for the sector as a whole can be overstated. Nonetheless, it is a very significant issue.

The NFF does not hide from this problem and is committed to constantly lifting employment standards. We have developed best practice employment guidelines, engaged with government and our members on measures to address the issue, and support industry lead initiatives such as Fair Farms and StaffSure. This is not merely an issue of civil rights and human decency, it also has significant commercial ramifications. A "level playing field" denies unscrupulous producers a financial advantage — a smaller wage bill — over the vast majority of farms who will freely obey the law. An appropriate and properly enforced regulatory setting will prevent a "race to the bottom". To that end, not only should farmers who break the law be suitably penalised, they must bear responsibility where they are (in whole or part) the knowing beneficiaries of exploitation.

Producers have a right — indeed an obligation — to get on with the business of farming, without being bogged down in red tape and peripheral obligations. Thus, while they must not use contractors who they know or should know fail to properly compensate their staff, that should not bear a duty to thoroughly interrogate the propriety of every third party contractor they engage or use. They should not be made 'de facto' regulators. It is for government to strike the right balance in that regard.

Finally, it is rote to say that Australia has some of the highest labour costs in the world, with one of the highest average[3] and real minimum[4] wages in the OECD. That trend seems to have exacerbated, at least in part, by the FW Act: National Accounts figures show a real unit labour

[2] i.e. the whole farming sector being held responsible where hostels take advantage of backpackers, or fruit and veg growers set piece rates which are too low, or labour hire operators who charge the grower an appropriate rate fail to pay award wages on to their workers.

[3] Organisation for Economic Co-operation and Development (OECD), (2015); *Average Annual Wages* <http://stats.oecd.org/Index.aspx?queryname=343&querytype=view>.

[4] OECD (2015), *Real Minimum Wages*, <http://stats.oecd.org/Index.aspx?queryname=343&querytype=view>.

costs shift from negative to positive growth in 2009, coinciding with the introduction of the FW Act and indicating increasing labour cost pressure in the economy from that time.[5]

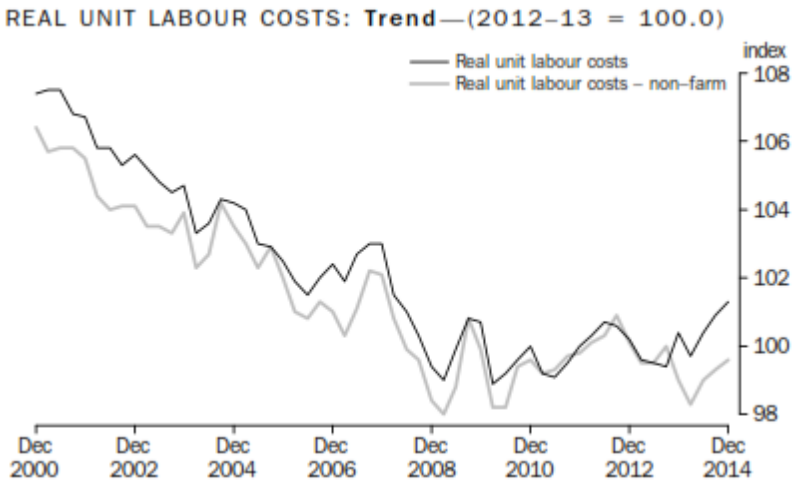

FIGURE 1: ABS AUSTRALIAN NATIONAL ACCOUNTS, NATIONAL INCOME, EXPENDITURE AND PRODUCT CAT. 5206.0 4 MARCH 2015

In the agriculture sector, labour cost pressures are even more pronounced. The agricultural labour price has risen sharply since the late 1990's, as outlined in the graph below. According to a 2014 Rabobank Report Australian farm labour costs are the highest in the world, significantly higher than its competitors in Europe, USA and Canada. Not only does this illustrate the relative difficulty of running a commercially viable farm in Australia, it places clear and significant pressure on the viability of Australian agriculture as an export commodity.

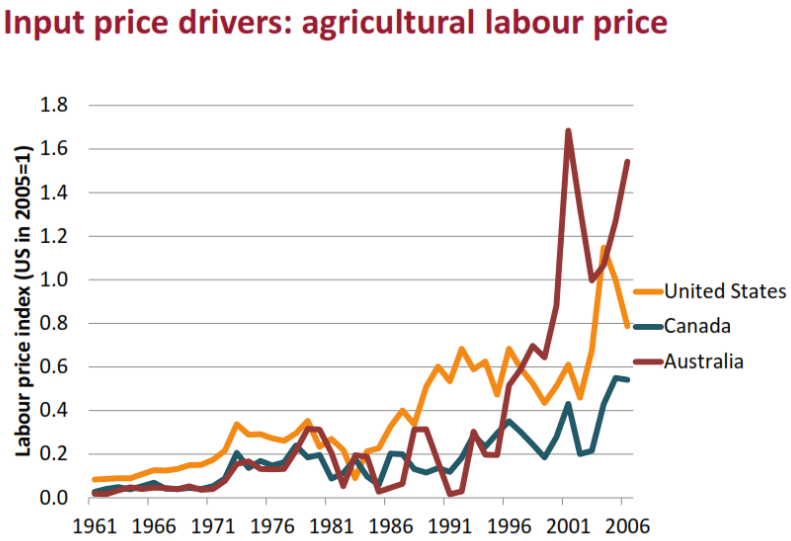

FIGURE 2: SHENG YU COMPARING AGRICULTURAL TOTAL FACTOR PRODUCTIVITY ACROSS COUNTRIES: THE CASE OF AUSTRALIA, CANADA AND THE UNITED STATES 57TH AARES CONFERENCE, SYDNEY, 5-8 FEBRUARY 2013

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

High business running costs are an ever-present concern for farmers. They face costs at every turn because of their position at the very beginning of the supply chain. Indeed, every expense passed down through the supply chain affects farmers' terms of trade, with cumulative increases threatening the viability of primary production. For this reason, even more than in other industries, small regulatory adjustments can have massive impacts for growers. Where those adjustments frustrate production, they make it exponentially harder for farms to operate. But where they are designed to make it easier to operate a business, it can make a large difference to overall productivity.

The challenge is to ensure that Australian labour laws safeguard employees while, at the same time, promoting business and encouraging investment. For Australia to compete against comparable overseas markets with lower costs, the business environment must support innovation and responsiveness, through a skilled workforce and flexible labour regulation.

NFF supports regulation which is targeted and proportionate and does as much, but no more than is necessary to fix a problem. To that end, the labour law should also be structured on the basis that there are degrees (a "sliding scale") of non-compliance, and the consequence of non-compliance at the lower end of the scale should be directed towards correcting misunderstandings, ignorance, and mistakes, rather than punishing crimes.

Furthermore, it can't be assumed that regulation has failed or is ineffective *only* because it is too lenient, and the solution is therefore to make it even more heavy-handed. The approach must be more sophisticated. Both compliant and noncompliant behaviour should be scrutinised to determine what it is the best way to address the problem. Thus, if underpayments have continued despite increased penalties established by the 'protecting vulnerable worker' amendments to the FWA and additional funding to the workplace regulator, then perhaps education and training, additional tools to help with compliance, or a simpler wage system is the answer, rather than just increasing the size of the penalties.

Part I: Civil penalties in the Fair Work Act

Current approach to determining penalties

It's naive to think that greater penalties will automatically translate into compliance. Although it could influence the conduct of those groups of employers who see the current penalties as a commercially viable alternative to paying the correct entitlements (i.e. a business cost which they can absorb), for the most part those employers who do the wrong thing will continue to gamble with the system. Given that there have already been numerous increases to penalty rates in the recent years, there is little reason to think another increase will result in significant change. Indeed, if government accepts (as it has in principle) that truly egregious forms of "wage theft" should be criminalised, an increase to civil penalties is almost redundant and unlikely to result in a marked increase in compliance.

One of (if not *the*) most significant causes of the problem is the complexity of the Fair Work system, which mean that knowing what is required can be difficult. Ignorance of the law is not an excuse, but distinctive features of the sector — such as remoteness, massive workforce fluctuations and turnover, and reliance on labour hire — means that there can be considerable confusion about the requirements.

Consideration should be given to whether funding for measures which assist compliance (education and tools) would be a more efficient use of public resources. Indeed, the best option may be streamlining of the Fair Work system so that rights and obligations are easy to understand. While this may have been one of the aims of the Fair Work Commission's (current) 4 yearly review process, whether the Commission succeeded in this aspiration remains to be seen. The NFF is not optimistic. Indeed, far from simplifying matters our concern is that they have been made significantly more complicated. Case in point is the outcome of the overtime for casuals proceeding for the Horticulture Award.[6] That was initiated, not by a complaint raised by any of the parties or as a result of real experiences, but from a general observation of concern made by the Fair Work Ombudsman. In addition to significantly adding to the fruit and vegetable grower's wage bill with little to no consideration of the economic impact, the outcome is a complicated formula which most small growers have found very difficult to administer.

In the NFF's view there is little justification for industrial relations laws to adopt a strict formula for determining a penalty. Irrespective of the commentary in the Migrant Worker Taskforce Report, a change (be it an increase or otherwise) in penalty ranges does not warrant mandating a formula for establishing the specific amount of a penalty in a particular case. To do so would deprive judges (or other decision makers) of discretion to impose a tailored penalty which is appropriate in the specific case taking into account all relevant factors, including not just degree of complicity but broader implications for other employees and business in the supply lines, etc. Any formula would be a "blunt instrument.

It may also be noted that, to the extent they are relevant, judges already have discretion to take into account the factors which provide a basis for these formulas; e.g. the benefit which the employer enjoyed from the breach and degree of fault. If the view is that these factors aren't given sufficient weight then perhaps the better solution is to express them in sentencing guidelines rather than legislation.

As regards the proposal to adopt the formula expressed in consumer laws, presumably that formula was designed to address the problem which the consumer laws sought to address.[7] The problem of underpayments is different, and as such simply applying that formulation is misguided, effectively using a round peg to fill a square hole. The ATO's approach of making the amount referable to the degree of culpability makes better sense but, again, is arguably just a codification of the usual procedure a court adopts for assessing a penalty; arguably the ATO

[6] Clause 22.2, which provide for different loadings depending on the time of day being worked, the day of the week, the number of hours worked over the course of a day and/or worked over an 8 week period.

[7] Such as marketplace fraud, etc.

has adopted this system because base level public servants aren't to be afforded the same independence and discretion as judges.

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

The passage of these — and other laws relating to mistreatment of the labour force[8] — in the past 24 months have undoubtedly raised awareness amongst producers and growers. That has translated into action, as can be demonstrated by the increased willingness to acknowledge the issue and embrace assurance programs such as Fair Farms.

That aside, the first thing which must be said is that the "protecting vulnerable worker" laws were enacted and came into effect in response to problems which were being considered/identified by the Migrant Worker Taskforce. It follows, then, that amendment to make those laws tougher in response to the Taskforce' report would be redundant.

More importantly, given that the new legislation only recently took effect, there has not been sufficient time for them to take effect or influence behaviour. Time should be allowed for the laws to take root and given an opportunity to have an impact. Furthermore if — at such time it can be conclusively concluded — government decides that the laws have not been effective, then consideration must be given to whether increased regulation is the answer, or if other solutions need to be identified such as increased guidance and tools to facilitate — and in some cases enable — compliance. Ultimately, it may be that the only answer is wholesale industrial reform.

As indicated above and for those reasons, it seems unlikely that the "serious contravention" penalty will have a significant detrimental effect. In all likelihood those employers who are intentionally or recklessly underpaying their employees will continue to do so, wagering that the savings they make in underpaying their employees is worth the risk of being caught and subject to a penalty (however high).

Extending Liability

Proposals to adjust the level of knowledge and involvement to successfully enliven the accessorial liability provisions of the FWA are in reality attempting to address evidentiary issues; i.e. lowering the bar so that liability is easier to prove. While the "devil is in the details", this approach appears to be misguided as a matter of principle, attacking a symptom rather than the core problem. Adjusting the wrong settings in such a way may have unintended consequences. The better way to address the majority of problems which are associated with complex third party and outsourcing arrangements would be to introduce appropriate labour hire regulation.

The nature of agriculture means that many farmers experience intense, short term peaks and troughs in their labour needs. They are often required to access a (proportionately) very large workforce for periods such as harvest season, seeding, calving, etc. Given that employment is very complex and time-consuming, and given the intensity of the farm work during these

[8] E.g. the Modern Slavery Act, labour hire licensing, etc

periods, there is limited capacity to devote to human resource tasks such as recruitment and selection, processing of payroll, etc. As such, many farm businesses use contractors and labour hire companies to meet this intense need. They enable the farm to secure a very large, short term workforce while "outsourcing" human resource duties.

It follows, that labour hire providers and the use of labour hire is a very important resource for farmers. It is to the benefit of the farming sector to have access to a mature, robust and reliable sources of labour hire.

As such, we are supportive of an appropriate form of labour hire regulation which imposes liability on entities who use forms of "illegitimate" labour hire. We would also support legislative arrangements which penalise businesses which benefit from another person's/body's contravention — e.g. using contractors who underpay their workers — in circumstances where they knew or ought reasonably to have known of that contravention.

However, there must be balance. A system which automatically and without more requires the farmer to bear the liabilities of the labour hire contractors they use would be unacceptable. Furthermore, legislation which "passes the buck" to farms by requiring them to fully interrogate the relationship between the labour hire contractor and its employees before it can consider engaging the contractor — effectively making them the de facto regulator — would be unreasonable.

Businesses which knowingly enable and facilitate criminal operators should be held accountable, but in other cases the business should be able to rely on government to do its job. Indeed, if a regulator with coercive powers and government funding at its disposal is unable to properly oversight these businesses, it is thoroughly unreasonable to expect small family farmers to do so.

Notably, a number of states have introduced their own labour hire regulation. If a national scheme is introduced, then it **must** displace those existing state-based systems. Allowing the state system to endure would result not just in over regulation and an unreasonable cost burden, but competing obligations and confusion as to what conduct is expected and what must be done to comply.

In short, the NFF supports national labour hire regulation which prohibits the operation and use of unregistered labour hire providers and features mechanisms to defeat avoidance arrangements. However the system must be measured, proportionate, and targeted.

Sham Contracting

The NFF's position in relation to sham contracting is the same as that in relation to workplace regulation in general. That is: regulation should be targeted and proportionate. Given that there are already offences for sham contracting, the best way to address ongoing cases of sham contracting would be to fortify the enforcement of those provisions. That said, we note the additional budget allocation to the Fair Work Ombudsman (FWO) in May 2018. If that allocation did not have the intended impact then (1) perhaps it was inadequate and should be increased or (2) perhaps more time is needed to give the FWO an opportunity to determine how to best make use of it or (3) consideration should be given as to why the FWO has been ineffective despite additional funding. However, a separate offence for more serious cases of

sham contracting seems unnecessary. Of course, if penalties are to increase for breaches of the Fair Work Act, then those penalties will increase for breaches of the sham contracting provision.

Part II: Criminal sanctions

As a general statement, provided the conduct which these sanctions catch is indeed the most egregious and unpardonable and the usual principles of criminal law apply — particularly in relation to burdens and standards of proof — then there is little to object to. That said, as a matter of principle we are concerned about the continued layering of regulation. The discussion paper gives little indication of exactly what offences will be caught, and how they are not already caught and/or adequately dealt with by existing sanctions. As such, to a large extent we must reserve judgement until more detail (e.g. an exposure draft of amending legislation) is available.

If criminal sanctions were to be adopted *and* they were to apply to the worst forms of "wage theft" then only intentional conduct should be caught. Even recklessness in this context — i.e. underpayments rather than, for example, conduct resulting in physical harm — would be setting the bar too low. Indeed, in respect of what is effectively an administrative task, it is difficult to conceive of how "recklessness" — as it is traditionally understood — could reach the fault standard which is usually applicable in the criminal context.

Most farms are very small, family businesses. Where the farm has adopted a corporate structure, typically the managing director is also the chief executive, principle employee/worker, and guiding mind of the company. Attributing fault in that context is not a complex affair. It would be virtually if not totally impossible for the most egregious forms of wage theft to occur without the farmer knowing. As such, in our submission to the extent that a special provision needs to be made, it need only impose liability on that person.

Furthermore, the NFF would strongly oppose provisions which impose liability where "the company failed to create and maintain a corporate culture that required compliance". It may be possible to argue that the farmer should be liable if they intentionally created a culture of noncompliance but, again, an unintentional omission would never fit the category of 'most egregious acts'.