National Farmers Federation

14 March 2025

REVIEW OF FAIR WORK ACT DEFINITION OF "SMALL BUSINESS EMPLOYER"

Dear Ombudsman,

The National Farmers' Federation (**the NFF**) thanks you for this opportunity to contribute to your review of the definition of "small business employer". We have considered the Consultation Paper you provided on 11 December 2024 (**the Paper**) and make these comments and recommendations in response.

FARMING, SMALL BUSINESS AND REGULATORY BURDEN

The 87,800 farm businesses in Australia — the vast majority wholly Australian owned and operated — are forecast to contribute in excess of $88 billion to the Australian economy in 2024-25.[1] Much of that revenue will be generated by small businesses, with the vast majority of farms — as high as 99% depending on the metric[2] — fitting that description. Furthermore, according to Australian Bureau of Statistics (**ABS**) data, small farming businesses account for around 80% of employment in the sector,[3] a significantly higher proportion than in any other industry.[4]

It follows that most farms grapple with the compliance and administrative burdens which the "small business employer" concession in the Fair Work Act 2009 (**FWA**) are meant to ease.

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[1] Department of Agriculture, Fisheries and Forestry, *Agricultural Outlook: December 2024* (Web Page, 2024) https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/december-2024#overview.

[2] Whether defined according to the Australian Bureau of Statistics (**ABS**) standard of fewer than 20 employees, or the Australian Tax Office (**ATO**) standard of turnover less than $10m

[3] Source: ABS, *Cat 8155.0 - Australian Industry, 2018-19*, May 2020.

[4] Small business in "Rental, hiring and real estate services" account for about 75% of employment, and 70% in "Construction". The next closest industry is "Professional, scientific and technical services" at 54%.

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While not specifically within scope, it bears mentioning that agriculture faces one of — if not the — highest regulatory burden of any industry. While we don't suggest that regulation in these areas is unwarranted, it is an important backdrop to these submissions. In November 2013 the Australian Bureau of Agricultural and Resource Economics and Sciences (**ABARES**) conducted a study, considering the regulatory challenges which the government imposes on Agricultural business.[5] Its report includes a table (annexed at "A" to these submissions) which helpfully identifies some (not all) areas in which a farm business deals with government regulation, oversight, or compliance rules — and where those rules overlap between jurisdictions. Those areas include (but are not limited to) environment, water, food safety and quality, employment, migration, and labour laws, animal welfare, land use and zoning, trade and export rules, financial and taxation reporting, and health and safety regulations.

It is not surprising, then, that the NFF strongly supports the FWA offering concessions to small business in recognition of their "special circumstances".[6]

Those circumstances are, in essence, a lack of resources required to adequately navigate the administrative and compliance burdens which the Act imposes on every employer but — because of time pressures, limits to financial and other resourcing, and economies of scale — are inherently more challenging for small businesses. To discharge those responsibilities, small businesses may need external or specialist advice which larger businesses have 'on-tap' and/or can absorb as ordinary operating costs — specialist advice that is not always accessible to farms which are frequently located in rural and remote areas.

That limitation has flow-on and interrelated consequences which justify the concessions, including:

- The person responsible for managing and discharging the duties which the FWA imposes will frequently be the same person — the farmer — responsible for running the business along with discharging all other compliance and administrative requirements.
- The compliance risk may discourage small businesses from hiring employees which will, in turn, stymy business growth and place additional burden on the existing workforce — often, again, the farmer— to cover labour needs.
- Small business owners frequently have personal relationships with their staff and can understand and empathize with their employees' needs in a way which large businesses can't comprehend. That familiarity means prescriptive requirements are less necessary and occasionally counterproductive.

[5] Review of Selected Regulatory Burdens on Agriculture and Forestry Businesses — Cheryl Gibbs, Keely Harris-Adams and Alistair Davidson — Research by the Australian Bureau of Agricultural and Resource Economics and Sciences — November 2013.

[6] The Paper at pg 3 – 5.

GENERAL OBSERVATIONS AND RECOMMENDATIONS

It follows that there is good reason for the FWA to feature a "small business employer" definition and associated exemptions and concessions.

However, as a threshold consideration, we note that these concessions merely tinker at the edges of a bigger issue. The relief which they provide is intended to address workplace relations complexity and the way in which it unfairly burdens smaller operators. However, as the Paper makes clear, the concessions amount to just nine changes to the FWA requirements. Four of those are arguably just procedural. A number of the remainder are reintroduced through the Awards system. And frequently the changes simply modify timing and implementation. In the end, only a handful of FWA requirements are subject to consistent and meaningful concessions. A few, barely significant changes to select provisions of the system hardly make a difference. It smacks of "tokenism", rather than meaningful support. If the problem, at its essence, is the complexity of the workplace relations system, then there's no clear reason, in principle, why some parts of that system (e.g. redundancy provisions) are modified in recognition of the "special circumstances" while others (e.g. flexible working arrangements) are not.

It follows that more fundamental change is necessary. This review presents an opportunity to explore that change. In our submission, it should recommend a comprehensive and meaningful reevaluation of the FWA — including the Modern Awards and Award framework — with a focus on the regulatory burden which it creates for small business.

Recommendation 1 — Conduct a thorough review of the regulatory burden and outcomes of the FWA, and consequences for employees, individual businesses, and the national economy.

In addition to — or in the absence of — a comprehensive review and reform of the system, we would strongly recommend more practical, meaningful support for small business. The FWO provides a wealth of workplace relations resources, education and guidance. Many businesses will be technically sophisticated enough to identify the correct resource and adapt it to their particular circumstances. However, many — especially smaller — businesses will not. What they need is tailored support to provide "the answer" to a given problem in a timely fashion, rather than more documents and webpages which are general in nature and frequently just restate laws in slightly plainer language, but rarely get to the crux of an issue.[7] Something more specific is required, something which goes straight to the circumstances of the business and the issues they are managing.

[7] We must stress that this is not the fault of the FWO or their authors. It is simply the nature of the generalised "education and resources", and the task which the FWO has been set.

Notably, the Federal government does enable some tailored support for select parts of the business community through the Productivity, Education and Training Fund. However, the benefits of this program neglect the farm sector.[8] This is despite the fact that agriculture is frequently held out as a high-risk industry and "at significant risk or demonstrate[ing] a history of systemic non-compliance."[9] At the very least, these programs should be open to all small businesses, including farmers and the farming sector.

Recommendation 2 — Establish mechanisms for the provision of timely and tailored support to small business employers and the specifics of a given incident or circumstance.

It does not appear that there has ever been any significant consideration of whether employee levels were the best metric for "small business employer" or where those levels should be set. Indeed, the rationale for the adoption of a 'less than 15 employees' demarcation in the FWA appears to have been that *"it was good enough for NSW in 1984, so it must be good enough in a federal context in 2009 (and 1993 and 1996)*." But even if 15 employees was an appropriate threshold in 1984 — or indeed 2009[10] —the economic and working circumstances 40 years ago are very different to the circumstances today. It follows that the definition needs to be reconsidered.

Ideally, it would be set at a level consistent with the *actual* cost of compliance — e.g. per employee — to small business. There should also be hard evidence of any impact of those concessions on employees. That is, rather than blunt ABS statistics of the number of employees of small businesses, look at the number of employees who have had a different experience or outcome because of the small business concessions and the nature and extent of that difference.[11]

However, in place of that analysis the best measure is community norms and expectations. Considered against those criteria, the FWA's cap is clearly too low. It is significantly less than broader community sentiment,[12] informed recommendations[13], or other regulatory or administrative thresholds e.g. the ABS metric of 19 employees, the ATO metric of $10m p.a. in turnover, the OECD metric

[8] Given that the industry organization who PET funding is made available to — through a closed tender process — do not represent the agricultural sector in any meaningful way.

[9] https://www.fairwork.gov.au/about-us/our-role-and-purpose/our-priorities

[10] Or earlier, putting aside the fact that the circumstances in NSW are not identical to the whole of Australia.

[11] e.g. how many employees have experience worse outcomes because the "small business' concession prevented them from accessing redundancy or unfair dismissal provisions.

[12] e.g. https://www.abc.net.au/news/2024-12-05/teal-mps-push-for-changes-to-small-business-definition/104686700.

[13] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/025002/toc_pdf/FairWorkLegislationAmendment(SecureJobs,BetterPay)Bill2022%5bProvisions%5d.pdf;fileType=application%2Fpdf

of fewer than 50 employees, or the ASBEFO metric of 100 employees. In our submission the number should be lifted to at least the lowest of those levels — subject to the comments which follow regarding FTE and headcount — of 20 employees, noting that we see merit in the views of others who would suggest higher at 25[14] or even 50[15] employees.

Recommendation 3 — Increase the number of employees which a "small business employer" employs to at least 20.

The definition of a small business employer requires employment levels to be assessed by headcount: a part time or regular casual employee working one shift a week has the same weighting as a full-time employee working 38 hours a week or indeed a part time employee working three, five-hour shifts. Stakeholders have argued that this approach is artificial, and a more sophisticated approach would be to assess by "full time equivalent" employee count (**FTE**).[16] We agree.

Nonetheless, it appears that the 'headcount' approach has been preferred, traditionally, because of its apparent simplicity. Indeed, the majority of the Senate Education and Employment Legislation Committee patronizingly observed in 2022 that "a 'full-time equivalent' measure may be *confusing* for small businesses."[17] Anyone who has attempted to manage a small business would immediately see the flaw in that argument. While simplicity is clearly an aspiration we applaud, we really don't think that an FTE approach is any more "confusing" than a headcount approach given that:

(1) most small businesses will think in terms of FTE when managing rosters and payrolls; and

(2) in any case, it's a simple matter of swapping fulltime hours for employee numbers in the calculus.

It's really not as "confusing" as the senators might imagine.

But the absurdity of this line of argument is even clearer when considering the requirements to factor in "regular casuals", a concept which is inherently ambiguous, and fluid. At best, the assessment is only possible for a workplace relations practitioner who is familiar with the relevant case law — and even then, the application to specific circumstances will vary, depending on the views of the regulator, lawyer, judge, and/or other advisor/decision-maker. The notion that the

[14] https://acci.com.au/Web/Web/News/Articles/2024/Support-grows-for-small-business-change.aspx

[15] https://www.cosboa.org.au/post/a-line-in-the-sand-clear-and-comprehensible-ir-required-to-support-small-business

[16] e.g. https://www.zalisteggall.com.au/zali_steggall_moves_amendments_to_fair_work_legislation

[17] Senate Education and Employment Legislation Committee, *Inquiry report Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]*, para 2.180 — emphasis added.

average farmer will always be able to confidently predict where the line will be drawn is absurd — see our observation below regarding seasonal workers. It would be much more sensible and simpler to base the calculation on the FTE[18] of all (non-seasonal) employes.

If law makers were genuinely concerned about "confusing" small business, then they would adopt, rather than dismiss, the FTE approach.

Furthermore, the "headcount" approach disregards the realities of the business and the circumstances of employees. The capacity of a business to absorb the Act's compliance requirements — not to mention the economic footprint of the business — is better assessed by looking at the total number of work hours which the business requires and invests in. That investment is reflected in the FTE of the business' workforce, not the headcount. Objectively, a business with 16 part-time employees each working one hour per week — or 0.4 FTE — is smaller and less resourced than a business with 10 full-time employees — or 10 FTE.

Just as the FTE approach provides a more accurate reflection of a business's capacity and resourcing, it also offers a clearer measure of the actual impact of employment-related entitlements on individual employees. The consequences of changes to FWA entitlements, such as redundancy provisions, are best understood in relation to the number of hours an employee works rather than simply counting employees equally, regardless of their work arrangements.

For instance, consider how redundancy concessions would affect the following employees if they were retrenched:

- Rowan, a part-time employee working 15 hours per week;
- Lisa, a full-time employee working 40 hours per week; and
- Lee, a full-time employee who regularly works 55 hours per week with overtime.

Clearly, the impact of redundancy is not the same for each of these employees— Lee's loss of income and stability would be significantly greater than Lisa's, and Lisa's would, in turn, be more substantial than Rowan's. However, the current 'small business employer' test take a blunt, binary approach, giving each employee an equal weighting in the process.

Accordingly, a test that accounts for FTE rather than a simple numerical headcount would provide a more representative and appropriate measure of the impact of small business employer concessions on employees. By considering the actual working hours invested by employees, the FTE approach ensures that both

[18] Within the given week, payroll/roster period, or perhaps annualized.

business-capacity and employee entitlements are assessed in a way that is fairer and more reflective of real-world employment structures.

Prima facie, it follows that any meaningful assessment the definition should have regard to the FTE equivalent.

Recommendation 4 — The definition should be based on FTE (i.e. "full time equivalent") rather than the current arrangement which calculates by headcount.

Similarly, the definition should expressly exclude seasonal employees. At present, it would include short-term workers who may only be employed by the farm in a 'non-ongoing' capacity for a fixed but relatively brief duration. While fruit picking and packing is an obvious example, many farms experience some form of regular annual labour spike e.g. during lambing, calving, and shearing. A cotton farm's workforce expands by approximately 10% during the crop production season for irrigation purposes. If these employees are engaged in non-ongoing full or part-time positions then they would be factored into the employee headcount, artificially expanding the size of the workforce. In addition, while many seasonal workers are engaged in casual roles, those roles may be filled by the same worker on a regular, annual basis. For example, there is often the hope — of both worker and employer — that PALM[19] workers will return year-on-year to the same farm doing the same or similar jobs. In those cases, it is at least possible that they are "employed by the employer on a regular and systematic basis" even between deployments. [20] They may therefore be counted for the purpose of determining whether the employer is or is not a small business. This should not be possible.

Recommendation 5 — The definition of "employee" should expressly exclude seasonal workers, irrespective of whether those workers return for (temporary) stints year on year.

DISCUSSION QUESTIONS

> *Question 1 — Whether the small business employer definition in section 23 of the Fair Work Act sufficiently acknowledges the special circumstances of small businesses in the workplace relations context.*

As a threshold issue, the compliance "eco-system" which small farming businesses exist within is highly complex and imposes a significant burden on the

[19] Pacific Australia Labor Mobility Scheme; see https://www.palmscheme.gov.au/

[20] Noting that the count may include workers based overseas: *Pretorius v Gardens of Italy Pty Ltd* (2016) FWC 2503

conduct of the business. The FWA system contributes to that burden to no small degree, potentially stifling growth and productivity. While "small business employer" concessions may help negotiate that burden, they are not a particularly meaningful or sustainable solution. They are at best a band-aid. To properly address the issue, we would need a comprehensive review of the system — i.e. the workplace relations landscape, and the FWA and Award framework — in particular.

Failing that, we recommend tailored advice be available to small business (however defined) to navigate that landscape.

In addition, the definition of "small business employer" should be expanded to reflect the realities and conditions of small business. The number of employees needed to qualify an enterprise as a "small business employer" should be increased to at least 20, calculated by FTE, excluding seasonal employees.

> *Question 2 — Whether the current definition, particularly the number of employees, provides a reasonable balance between recognising the special circumstances of small businesses and reducing regulatory burden, and the needs, rights and entitlements of employees.*

The number of employees has no apparent basis in reason or evidence, the experience of business, or community expectations. It appears to have been adopted from the state of NSW law in 1984 — which itself was established largely as a "split the difference" compromise between stakeholders. In our opinion that is a very unsound way to address what is a complex problem, and does not reflect the realities of doing business, or indeed employment, in 2024. Subject to comments above regarding a comprehensive review of workplace relations, ideally a thorough analysis would establish a number which provides the necessary relief without unduly prejudicing employees. However, in the absence of such a consideration, we suggest the definition follow community expectations which, prima facie, would mean it is set at a figure of at least 20 employees by FTE.

> *Question 3 — Whether the current definition of 'small business employer' is easy to apply from the perspective of both the employer and employee. In considering that response, what improvements could be made to the definition if the goal is reducing regulatory burden for employers while balancing entitlements of employees.*

The current practice of calculating by headcount rather than FTE has the one **apparent** advantage of, superficially, being easy to apply. However, that apparent advantage quickly falls away once you get into the detail:

- Identifying the critical time and corresponding headcount is not always clear or easy.

- The process becomes more complicated when attempting to factor in employees of “associated entities” — while justifiable as an anti-avoidance provision, this nuance shatters any notion that the test is “easy to apply”.[21]
- However, the biggest issue is the requirement to establish whether a casual employee is employed “on a regular and systematic basis”. At best, that’s a highly technical question. At worst, it’s a coin toss.

Ease of application would be achieved with certainty, and certainty would be achieved if the number is calculated by FTE rather than headcount. And despite comments to the contrary, every small business knows or can readily identify its FTE.

> *Question 4 — Whether the section 23 definition of small business employer presents any practical challenges given that there are different definitions of small business employer used, for example by the ABS and the ATO. Is there a practical need for interoperability with other definitions or is there another reason why consistency would be desirable?*

Subject to the views we express above regarding the correct number and community norms, the NFF’s membership generally accepts the notion that the definition should be tailored to the circumstances. While one definition across government has a superficial appeal, it is probably too ambitious to expect a single definition to be applicable and relevant across all regulation and administrative situations. The better way to address any challenge would be to ensure each use of the expression — i.e. in this case the definition in the FWA— is clear and easy to apply.

We again thank you for the opportunity to provide these observations.

Yours Sincerely

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[21] We note that an approach which groups "related bodies corporate" for the purpose of calculating employee numbers does not reflect the real-world independence of many related businesses. A more nuanced test — such as assessing financial interdependence, centralized control, or shared HR functions — would ensure that only genuinely integrated businesses are captured. While mindful of endorsing anything complex being a part of the FWA, we note that an internal definition which captures these (real world nuances) is less complex than a test which is established with refence to external piece of legislation (the Corporations Act).

ANNEXURE A[22]

Table 1 Agriculture value chain and the impact of regulations

Key Australian Government involvement/regulation	Key stages of agricultural cycle	Key state/territory government involvement/regulation
- Aboriginal land rights/native title environmental protection and biodiversity conservation	**Acquisition of arable land**	- land use and planning regulation - Aboriginal land rights/native title
- Aboriginal and Torres Strait Islander cultural heritage - natural heritage, world heritage - international treaties and conventions covering natural and cultural heritage - licensing and approval of chemicals, fertilizers and pesticides - environmental protection and biodiversity conservation	**Preparation of land**	- land use and planning regulation - native vegetation legislation - water regulation - weed and vermin control regulation - laws relating to Aboriginal and Torres Strait Islander cultural heritage, archaeological and Aboriginal relics, sacred sites - use of chemicals, fertilizers and pesticides - natural heritage - environmental protection/assessment - building regulations
- chemical and pesticide supply and registration - access to drought support - fuel tax regulation - national pollutant inventory - biosecurity regulation - immigration regulation - water access and regulation - research and development funding and support	**Farming** **- cropping** **- animal husbandry**	- animal welfare regulation - transport regulation impacting on use of farm machinery - vehicle and machinery licensing regulation - livestock regulation and identification - access to drought support - OHS regulation - fire control regulation - weed and vermin control regulation - livestock disease control regulation - livestock movement regulation - water access and regulation - chemical and pesticide use
- export certificates - industrial relation regulations - immigration regulation - environmental regulation - industrial relations regulation -national pollutant inventory	**On-farm processing**	- building regulations - machinery operations - certification and labelling - industrial relations regulation - OHS regulation
- national land transport regulatory frameworks - shipping and maritime safety laws - international maritime codes and conventions - competition laws/access regimes - animal welfare	**Transport and logistics**	- transport regulations - government owned public/private transport infrastructure - access regimes
- marketing legislation (mandatory - codes and acquisition) - food safety regulation - quarantine regulation - export controls - export incentives - WTO obligations - market access and trade agreements - taxation	**Marketing** **- boards** **- customers**	- interstate certification arrangements - taxation

[22] *Review of Selected Regulatory Burdens on Agriculture and Forestry Businesses* — Cheryl Gibbs, Keely Harris-Adams and Alistair Davidson — Research by the Australian Bureau of Agricultural and Resource Economics and Sciences — November 2013 at page 25