National Farmers Federation

17 June 2025

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

Dear Ombudsman,

The National Farmers' Federation (**NFF**) thanks you for the opportunity to further contribute to your review of the definition of "small business employer", following the consultation questions received via email on 5 June 2025. Below, we provide responses to each consultation question, supported by evidence and analysis to inform the NFF's recommendations.

Question 1: Headcount Definition and Flexible Work Options

Does the current employee headcount-based definition of a 'small business employer' disincentivise flexible work options (e.g., part-time or casual employment)?

Yes. By basing the definition purely on a headcount of fewer than 15 employees, the law effectively treats a part-time or casual employee the same as a full-time.[1] This approach can disincentivise small businesses from offering flexible or part-time roles, because taking on multiple part-time staff will inflate the headcount faster than equivalent full-time hires. A small business owner knows that exceeding 14 employees triggers the loss of important legal concessions – for example, having to pay redundancy entitlements and exposure to standard unfair dismissal rules (after 6 months service, rather than 12 months).[2] Employers may therefore avoid hiring an extra casual or two, or may consolidate several part-time roles into one full-time position, solely to keep their total "count" under 15.

[1] National Farmers' Federation (NFF), *Review of Fair Work Act Definition of "Small Business Employer"* (Submission, 14 March 2025)
[2] Bowden McCormack Lawyers & Advisers, *What is a "Small Business Employer"?* (Web Page, 2024) https://www.bowden-mccormack.com.au/news/what-is-a-small-business-employer/.

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This undermines workplace flexibility and job opportunities for those who need part-time hours.

Under the headcount rule, any employee on the books counts as "1" regardless of hours worked.[3] Algebraically, if a business has F full-time staff and P part-time staff (each working 50% of full-time hours), the headcount is $H = F + P$. The law deems $H < 15$ to be "small." This means a firm with $F=10$ full-timers ($H=10$) is safely small, but a firm with $F=5$ and $P=10$ (5 full-time and 10 half-time employees, totalling 10 FTEs but $H=15$ individuals) would be excluded from small business status. The latter firm faces the same workload as 10 full-timers, yet loses small-business protections due to the larger headcount. This example is not hypothetical – NFF members report that a part-time or seasonal worker who does a few hours a week "has the same weighting as a full-time employee working 38 hours" under the current test.[4] The Fair Work Act thus penalizes businesses who engage staff flexibly or seasonally. It encourages an inefficient outcome where owners may prefer one person on 38 hours to two people on 19 hours each, simply to keep the count down. Several stakeholders have noted this "artificial" result and urged a more sophisticated approach (such as FTE counting).[5]

Question 2: Thresholds as a Barrier to Business Growth

To what extent does the current definition of "fewer than 15 employees" act as a barrier to business growth? Is there data or evidence demonstrating this impact? Should business growth be measured solely by employee numbers?

The 15-person threshold creates a psychological and financial barrier for growing businesses. As an enterprise nears 15 employees, it faces a sudden jump in compliance obligations once the threshold is crossed. These include liability for redundancy pay (typically not required for small businesses), a shorter minimum employment period for unfair dismissal claims (6 months instead of 12) and other procedural requirements.[6] The prospect of these added costs and risks at employee #15 can discourage entrepreneurs from expanding their workforce beyond 14. In effect, some businesses choose to "stay small to stay safe." The NFF submission noted that "compliance risk

[3] NFF (2025), n. 1.
[4] Ibid.
[5] Ibid.
[6] Bowden McCormack Lawyers & Advisers (2024), n. 2.

may discourage small businesses from hiring employees which will, in turn, stymie business growth".[7] In November 2024, a group of federal MPs wrote to the Minister for Workplace Relations arguing that increasing the Fair Work small business definition from 15 to 25 employees would "make it easier for small businesses to create jobs" and allow owners to focus on growth rather than being bogged down in compliance as they scale.[8] They cited survey data that 82% of small businesses were struggling with regulatory compliance, with many considering closing – a situation exacerbated as firms grow beyond micro size.[9]

While it can be difficult to isolate in official statistics, there is some evidence of "bunching" of businesses just below the 15-employee mark. Nearly all Australian agricultural firms are small: by ABS counts, about 98% of agricultural businesses employ fewer than 20 people.[10] Those with 15–19 employees comprise a very small slice – likely on the order of 1–2% of all firms.[11] It stands to reason that if the regulatory threshold were higher (say 20), more of those 15–19 employee businesses would feel free to expand further. The absence of firms in the 15+ range, relative to those just below, suggests some are halting growth to avoid tipping into the "larger employer" category. International experience and research on regulatory thresholds support this – whenever a new layer of regulation applies beyond a certain size (be it 15 employees for Fair Work, or thresholds in other laws like 20 for unfair dismissal in some jurisdictions), a discontinuity in firm size distribution often appears.

[7] NFF (2025), n. 1.
[8] Department of Employment and Workplace Relations, *Letter to Allegra Spender MP and Senator the Hon Murray Watt Regarding Increasing the Small Business Threshold in the Fair Work Act* (Correspondence, 20 March 2024) https://www.dewr.gov.au/download/16874/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/39627/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/pdf.
[9] Allegra Spender MP et al, *Letter to Senator the Hon Murray Watt Regarding Increasing the Small Business Threshold in the Fair Work Act* (17 November 2024) https://www.dewr.gov.au/download/16874/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/39627/letter-allegra-spender-mp-senator-hon-murray-watt-regarding-increasing-small-business-threshold-fair/pdf.
[10] Australian Bureau of Statistics (ABS), *Counts of Australian Businesses, including Entries and Exits, July 2020 – June 2024* (Publication No 8165.0, 27 August 2024) https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release.
[11] Ibid.

Data on business survival rates by size also illustrates how challenging it is for the smallest firms to grow and sustain. Figure 1 below shows the four-year survival rates of firms started in 2020, by their initial employment size:

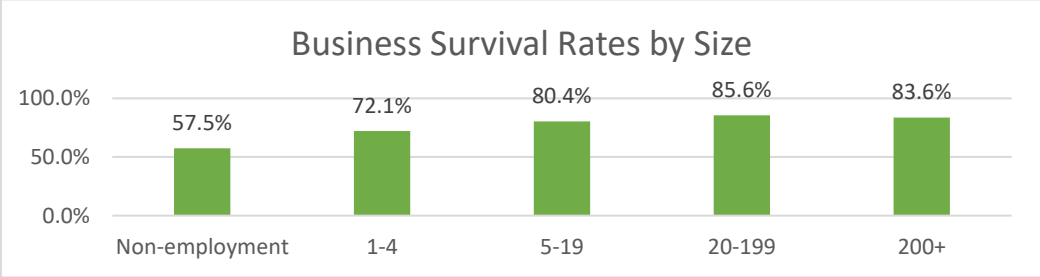

Figure 1: Four-year survival rates (2020–2024) of businesses by initial size. Smaller firms are far less likely to survive or grow over four years, highlighting the challenges in scaling up.[12]

As seen above, non-employing businesses had only about a 57% chance of surviving four years, whereas those that started with 5–19 employees had around 80% survival. This gap suggests that many micro-businesses struggle to make the jump into the larger small-business category. Regulatory burdens are a contributing factor – a sole trader or tiny firm may not hire their first employees, or may not move from 10 to 16 staff, if doing so significantly increases complexity. By raising the threshold and easing the transition into being a medium-sized operation, the law can mitigate one of the obstacles on the growth path. It is noteworthy that businesses with just a handful of employees (1–4) also have a lower 4-year survival (~72%) than those with 5–19 (~80%). This suggests benefits of scale within the "small" range – firms that manage to grow to ~5+ employees tend to be more resilient.[13] The current Fair Work threshold, however, kicks in at 15, potentially preventing firms in the 10–14 range from making the next leap to 20+ which could improve their robustness. In short, the <15 rule may be dampening the natural progression of successful small ventures into larger entities by introducing sharp new risks at that point.

The question also asks whether business growth should be measured solely by employee numbers. We argue it should not. Headcount is a blunt metric of business size or growth. Revenue and output are also critical measures. For example, a tech startup might generate millions in revenue with 10 highly skilled employees; meanwhile a labour-intensive farm might have 20

[12] Ibid.
[13] Ibid.

employees but modest turnover. Which is "larger"? By economic footprint, the startup might be – yet by headcount, the farm is. The Fair Work Act's focus on employee count is understandable (as it deals with employment obligations), but it risks equating size with number of bodies on the payroll, ignoring capacity and resources. The Australian Tax Office (**ATO**) defines small businesses by turnover (under $10 million annual turnover).[14] Many businesses meet one criterion but not the other. Ideally, a small business definition in workplace law would consider a combination or choose the metric that best correlates with the firm's ability to absorb regulatory costs. Employee numbers alone can be misleading – e.g., a company with 10 employees and $50 million revenue versus one with 10 employees and $1 million revenue. The second is far "smaller" in practical terms. Indeed, the NFF advocates introducing a turnover test or alternate metric as a supplement could be beneficial.[15] For instance, a business might be deemed "small" if it has <15 employees or <$X million turnover, whichever criteria better indicates its scale. This would capture cases where a firm has a slightly larger headcount but operates on thin margins and limited capital – a scenario common in agriculture where multiple hands are needed seasonally, yet profit margins are low. In our view, using employee count plus additional measures would paint a fuller picture of growth. At the very least, we submit that moving to an FTE basis (discussed next) would measure staff growth in terms of actual labor input rather than a crude headcount.

Question 3: Full-Time Equivalent (FTE) vs Headcount – Viability and Practicality

Is using a full-time equivalent (FTE) measure instead of headcount a viable alternative? Do employers consider it more practical for payroll and rostering?

Absolutely – an FTE-based definition is not only viable but highly desirable. The NFF strongly supports moving to an FTE measure for determining a "small business employer." Under an FTE test, a business's size would be calculated by the total aggregate hours its employees work, expressed as equivalent number of full-time workers (typically 38 hours/week = 1.0 FTE). This change directly addresses the distortions of the current headcount method (as discussed in Q1).

[14] NFF (2025), n. 1.
[15] Ibid.

Firstly, it reflects actual size and capacity of businesses. FTE provides an accurate indication of a business's workforce investment. "The capacity of a business to absorb compliance requirements… is better assessed by looking at the total number of work hours… That investment is reflected in the FTE of the workforce, not the headcount."[16] As noted earlier, a firm with 16 one-day-per-week employees (total 16 hours of labor) is objectively much smaller than a firm with 10 full-time employees (380 hours of labor), yet headcount would label the former "bigger." Using FTE corrects this absurdity.[17] It ensures that a business is only reclassified as "large" when it genuinely employs a larger volume of labor (and presumably has more resources to handle extra obligations).

Secondly, it is easy for employers to calculate: most small business operators are already familiar with the concept of FTE. They budget wages and roster shifts in terms of hours. In payroll systems, calculating FTE is straightforward – e.g. an employee working 19 hours in a 38-hour standard week is 0.5 FTE. Indeed, "every small business knows or can readily identify its FTE".[18] The suggestion by some (in 2022 Senate debates) that FTE is too confusing for mom-and-pop shops underestimates the capability of business owners.[19] If anything, the headcount test is more confusing in practice, given the nuance of who to count (regular casuals, associated entities, etc.). An FTE approach would involve a simple sum of hours worked (or average FTE over a period) – conceptually no harder than counting heads, and far more consistent. Many small businesses already report headcount and hours to agencies (e.g., for superannuation or workers' comp insurance), so deriving FTE is a familiar exercise.

Thirdly, it is practical for payroll and rostering as employers already manage staffing in terms of hours, particularly when coordinating part-time and casual shifts. Many small business payroll software systems can readily report "average FTE", or total hours worked per period. From a human resources perspective, thinking in FTE is second nature when comparing workloads. For example, if an owner knows they have two part-timers each working 20 hours (that's 1 FTE together) and one full-timer (1 FTE), they know they have roughly a 2 FTE team. It's intuitive and directly tied to wage costs. In contrast, a headcount of 3 tells a less useful story. The argument that FTE might fluctuate more than headcount (as raised by the Senate

[16] NFF (2025), n. 1.
[17] Ibid.
[18] Ibid.
[19] Ibid.

Committee20) is only marginally true and can be managed by setting the test at a particular date or averaging. Businesses already deal with fluctuation under headcount as well (e.g., a seasonal influx of casuals can suddenly change headcount). FTE actually provides a more gradual change – adding a few hours here or there inches you toward the threshold rather than suddenly jumping when you hire "one more body." In this sense, FTE could reduce the cliff effect – e.g., a business might exceed 15.0 FTE only when it truly has significantly grown, rather than by the single act of hiring a 15th person.

The NFF's position is unequivocal that the definition "should be based on FTE rather than the current headcount". This has been echoed by others: for instance, a federal MP proposed amendments in 2022 to count employees in FTE terms, and Council of Small Business Organisations Australia (**COSBOA**) in 2024 released a blueprint calling for the definition to be updated to "50 full-time equivalent employees, excluding casuals" to better align with international norms. While COSBOA's suggestion of 50 FTE is ambitious, it underscores a consensus that FTE is the right metric.

Question 4: "Regular Casual" Employees – Challenges and Impact

Is determining 'regular casuals' a significant challenge? What is the extent of this challenge and its impact on small business employers?

Yes. Figuring out which casual employees count toward the 15-employee threshold is one of the most vexing technical challenges of the current definition. Under s.23(2) of the Fair Work Act, a casual is not counted "unless, at that time, the employee is a regular casual employee of the employer." A "regular casual employee" is further defined (via s.12 and case law) as a casual employed on a regular and systematic basis.[21] In practice, this requires examining the pattern and frequency of a casual's work and whether there is an ongoing expectation of employment. For a small business owner (often without dedicated HR staff), this is a highly confusing and fluid test.[22] The Ombudsman's guidance and courts have provided some indicators – for example, a clear weekly pattern or a fixed roster over time suggests "regular and systematic," whereas ad hoc shifts might not.[23] But borderline cases abound. As the NFF submission bluntly put it: "the

[20] Senate Education and Employment Legislation Committee (2022), n 15.
[21] Bowden McCormack Lawyers & Advisers (2024), n. 2.
[22] NFF (2025), n. 1.
[23] Bowden McCormack Lawyers & Advisers (2024), n. 2.

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." This uncertainty undermines the very simplicity the headcount test was supposed to offer.

Virtually every small employer who engages casuals faces this issue once they approach the threshold. Do you count that seasonal picker who returns each year for 8 weeks? What about the university student who works most Fridays (but not every Friday)? If you miscalculate and exclude someone who later is deemed "regular," you might incorrectly think you're under 15 when you're not – which could, for instance, invalidate an attempted reliance on the Small Business Fair Dismissal Code or an exemption from redundancy pay. The stakes are high: a mistaken headcount can lead to costly litigation or penalties. Conversely, some businesses might over-count to be safe, effectively treating themselves as above 15 when in reality they could claim the small business status. This cautious approach might lead them to incur compliance costs (like paying redundancy to all or not utilizing the 12-month unfair dismissal minimum period for new hires) that they legally might have avoided.

The ambiguity around casual counting has been litigated in unfair dismissal cases. For example, in a 2024 case involving a circus company, the Fair Work Commission had to carefully dissect the workforce: they included 14 individuals as employees (counting even performers on contract as employees for this purpose), but excluded a casual who was not deemed a "regular casual," as well as certain contractors running their own business.[24] The company narrowly came in under 15 and was thus a small business, which ultimately led to the dismissal claim being barred (since the employee hadn't met the 12-month minimum with a small business).[25] This case illustrates how complicated it can be to determine the count – requiring legal analysis of each person's working arrangements. For a small business owner without legal training, doing such an analysis in real time is virtually impossible. Many are likely unaware of the nuanced "regular casual" concept at all, let alone how to apply it.

Some employers might restrict how they engage casuals to avoid creating a "regular" pattern. This could mean using labor hire or rotating individuals to

[24] Paulinet Tamaray, *Counting Employees: How to Know if You're a Small Business Employer*, HRD Australia (Web Page, 20 July 2024) https://www.hcamag.com/au/specialisation/employment-law/counting-employees-how-to-know-if-youre-a-small-business-employer/498032.
[25] Ibid.

deliberately prevent any one casual from having continuity. Such strategies can reduce efficiency and the quality of work (since experienced casuals aren't retained regularly), and they deprive willing workers of steady engagement. In agriculture, for instance, farmers might hesitate to invite the same reliable seasonal worker back each year, or limit the duration of engagement, for fear that person could count toward the threshold. As NFF noted, many farms have "regular annual labour spikes" (harvest, shearing, etc.) and often the same seasonal hands return each year.[26] Currently, those returning workers likely meet "regular and systematic" criteria, thus counting toward headcount and "artificially expanding the size of the workforce." This is ironic – a farm that provides a few months' work to seasonal crews isn't fundamentally larger than one that doesn't, yet it can be pushed over the 15 threshold. The risk is farmers might turn away repeat seasonal workers (harming both parties) just to keep their count low or might outsource the hiring to labour-hire firms to dodge the count, adding cost and complexity.

The ambiguity exposes small businesses to disputes and litigation. An employee claiming unfair dismissal may argue the employer was not a small business because certain casuals should have been counted. There have been cases where FWC had to evaluate if a casual had a "reasonable expectation of continuing employment" (a related test for unfair dismissal eligibility), which overlaps with regularity. Different tribunals or courts could reach different conclusions on similar facts – it's inherently fact-specific.[27] This means even a well-intentioned employer won't know for sure if they had 13, 15, or 17 employees at a given time until a legal determination is made after the fact. Such uncertainty is anathema to business planning. It also undermines one supposed benefit of the headcount approach: simplicity. Instead of simply counting bodies, employers must grapple with legal tests drawn from case law (e.g. Chandler v Bed Bath N' Table on what constitutes regular roster patterns, or Gu v Geraldton Fishermen's Co-op on the effect of contract disclaimers on casual expectation).[28] This is far beyond the reach of a typical small business owner without specialist advice.

To reduce confusion and improve compliance, the NFF recommends the FWO issue clearer, binding guidance on how casual employment status is

[26] NFF (2025), n. 1.
[27] Hall Payne Lawyers, *Casual Employees' Entitlement to Unfair Dismissal Protection* (Web Page, 9 July 2023) https://www.hallpayne.com.au/blog/2023/july/casuals-unfair-dismissal-protection/.
[28] Ibid.

determined for the purposes of small business headcount thresholds. In particular, employers in agriculture often struggle to document whether and when a casual employee is considered "no longer employed." This is especially critical where casuals work seasonally or intermittently across years.

We recommend that the FWO explicitly clarify:

- Whether a casual employee not rostered for several months, or outside a defined seasonal period, is deemed "no longer employed" for headcount purposes.
- What documentation or record-keeping (e.g. last payslip, roster, end-of-season notice) is sufficient to confirm the end of engagement.

This clarification would help ensure that employers are not penalised for genuinely temporary engagements and can confidently assess their compliance status. In agriculture, where workforce needs rise and fall predictably but briefly, employers should not be subject to legal uncertainty about whether a returning worker from the previous harvest still "counts" toward this year's employee number.

The NFF also reiterates the need for a simpler and more coherent regulatory framework for defining small business employers. Current laws use inconsistent definitions across Commonwealth and state instruments. For example:

- The Fair Work Act uses a headcount threshold of fewer than 15 employees.[29]
- The ATO defines small businesses by an annual turnover under $10 million.[30]
- The ABS defines small businesses as those with fewer than 20 employees, which influences economic reporting and state program design.[31]

[29] Fair Work Act 2009 (Cth) s 23(1)
[30] Australian Taxation Office, *Small Business Entity* (Web Page) https://www.ato.gov.au/forms-and-instructions/capital-gains-tax-concessions-for-small-business-guide-2015/basic-conditions-for-the-small-business-cgt-concessions/small-business-entity.
[31] Australian Small Business and Family Enterprise Ombudsman, *Number of Small Businesses in Australia* (Web Page, August 2024) https://www.asbfeo.gov.au/small-business-data-portal/number-small-businesses-australia.

- Most states and territories use a headcount threshold of fewer than 20 employees for statistical or program eligibility purposes.[32]

These inconsistencies create unnecessary complexity and compliance burdens for small businesses that operate across jurisdictions or must comply with multiple schemes. The FWO and the legislature should acknowledge these divergences and work to reduce confusion and unintended consequences.

A harmonised approach—such as consistent use of FTE thresholds or supplementary turnover-based criteria—would improve regulatory certainty, reduce red tape, and support better long-term workforce planning for agriculture businesses who are often small-sizes.

The NFF again appreciates the opportunity to contribute to this review.

Yours sincerely,

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[32] NSW Small Business Commissioner, *About NSW Small Businesses* (Web Page) https://www.smallbusiness.nsw.gov.au/about-nsw-small-businesses. ; Business Victoria, *Small Business in Victoria, by the Numbers* (Web Page) https://business.vic.gov.au/learning-and-advice/hub/small-business-in-victoria-by-the-numbers. ; Business Queensland, *Small Business Wellness Coaches* (Web Page) https://www.business.qld.gov.au/running-business/support-services/wellbeing/wellness-coaches. ; Business South Australia, *Women in Business Foundations Program – Guidelines* (Web Page) https://business.sa.gov.au/programs/women-in-business/wib-foundations-guidelines. ; Business Tasmania, *Thinking of Starting a Small Business? A Practical Guide* https://www.business.tas.gov.au/__data/assets/pdf_file/0009/253485/Thinking_of_Starting_a_Small_Business_A_Practical_Guide.pdf. ; Northern Territory Government, *Business Count Statistics June 2015* https://business.nt.gov.au/__data/assets/pdf_file/0006/404268/business-count-infographic-201506.pdf. ; Small Business Development Corporation, Small Business Landscape (Web Page) https://www.smallbusiness.wa.gov.au/about/small-business-landscape. ; Standing Committee on Economy and Gender and Economic Equality (ACT), *Inquiry into Micro, Small, and Medium Business in the ACT Region* (Report No 11, August 2024) https://www.parliament.act.gov.au/__data/assets/pdf_file/0009/2559060/EGEE-Report-11-Inquiry-into-micro%2C-small-and-medium-business-in-the-ACT-region.pdf.

Appendix: Recommendations

- Increase the Employee Threshold: Amend the Fair Work Act definition in s.23 to apply to businesses with fewer than 20 employees (at a minimum), up from the current 15. This aligns with common small business metrics and reduces the growth disincentive as firms approach 15 staff. Consider an even higher threshold (e.g. 25 or 50) in light of international standards and stakeholder.

- Adopt an FTE-Based Count: Replace the pure headcount test with a full-time equivalent measurement of employees. For example, count each employee proportional to their hours (e.g. a 0.5 FTE casual counts as 0.5) rather than "1" regardless of workload. An FTE test more accurately gauges business size and capacity and is no more difficult for employers to apply than headcount.

- Clarify and Exclude Irregular Casuals: Clarify when casual employees, particularly seasonal or intermittent workers in agriculture, are deemed "no longer employed" for headcount purposes. Guidance should also specify what records (e.g. final payslip, roster, or seasonal notice) are sufficient to evidence the end of engagement. In addition, only casuals with ongoing, regular engagement should count toward the threshold. Truly ad-hoc or seasonal workers should be excluded to prevent small businesses from unintentionally breaching the limit.

- Address Regulatory Inconsistencies Across Jurisdictions: Acknowledge and work to reduce confusion caused by differing definitions of "small business" (e.g. <15 employees under the Fair Work Act, <20 in state programs, <$10 million turnover under ATO rules).

- Provide Certainty and Support: In tandem with definitional changes, the FWO and legislature should ensure small businesses have clear guidance and support. This includes plain-language criteria or checklists for counting employees (especially casuals across associated entities), and possibly a safe-harbor for employers who make reasonable counting mistakes. Enhanced outreach and the Small Business Fair Dismissal Code should be maintained and updated to reflect any new definitions.