



## **National Farmers' Federation**

### **Submission to the Senate Education and Employment Legislation Committee**

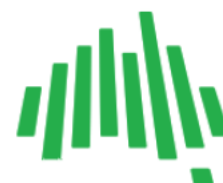
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## NFF Member Organisations

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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**

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Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

### **Social >**

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In 2019-20, there were approximately 87,800 farm businesses in Australia, the vast majority of which are wholly Australian owned and operated.

### **Economic >**

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In 2019-20, the agricultural sector, at farm-gate, contributed 1.9 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production is forecast to reach \$78 billion in 2021-2022.

### **Workplace >**

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In 2021, the agriculture, forestry and fishing sector employed approximately 313,700 people, including over 215,800 full time employees.

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 >**

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Australian farmers are environmental stewards, owning, managing and caring for 49 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.79 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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## Executive Summary

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The National Farmers' Federation commends the Government's intent in introducing the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022. We are acutely aware of the impact of family and domestic violence, and remain extremely concerned that women in regional, rural, and remote communities, where most farming businesses are located, are 24 times more likely to be hospitalised for domestic violence than women in major cities. We welcome action to address this horrific situation.

However, we maintain concerns about the content of the Bill and the scheme which it establishes. Most significantly, the Bill would fail a significant proportion of the community. As a *leave* entitlement, by design, it provides no assistance to job seekers, the self-employed, and many small businesses. Furthermore, by making the employer assess and manage the entitlement, it will discourage many victims/survivors from accessing the leave — especially those farm workers in small close-knit regional communities where the perpetrator and employer may be part of the same social network or, in some cases, even the same person.

Furthermore, while we are supportive of the Fair Work Commission's provisional decision, we are concerned that the Bill goes further. We see merit in expanding the definition of "family and domestic violence" to include violence which is perpetrated by members in a shared household. However, there will be significant administrative and practical difficulties in extending the entitlement to casual employees and conferring the leave in full at the commencement of employment. To small farming businesses who already operate with tight margins, the unknown costs of a paid family and domestic violence leave entitlement is concerning. Our industry relies on a seasonal casual workforce and many of our members do not have capacity to administer complex and sensitive leave arrangements.

For these reasons, in our submission, the Bill should be amended taking heed of the broader perspective and potential implications. The NFF asks the Committee to consider recommending the following.

- The development of a universal government scheme — perhaps akin to the Paid Parental Leave scheme — which is approved and paid for by the Government but may be processed through the employer's payroll; or
- A small business scheme that offers a government scheme to those who the Bill would miss (e.g. the self-employed) and those employed by small businesses which do not have the resources to manage paid FDV leave; or
- If neither of those proposals are acceptable, simply return to the provisional model proposed by the Fair Work Commission Full Bench.

The first recommendation is clearly the more desirable as it would provide universal coverage, while the third would establish a scheme which continues to exclude a number of potential victims/survivors but would at least avoid some of the administrative and cost implications which the FWC expressly sought to avoid.

## Introduction

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Family and domestic violence (**FDV**) is an insidious social ailment, with long lasting effects for victims/survivors and those witnessing FDV. As an industry working to increase gender awareness and diversity, and modernise and professionalise employment standards, we believe that provision of adequate support for victims/survivors of FDV to escape such debilitating circumstances should be supported.

The National Farmers' Federation (**NFF**) thanks the Senate Education and Employment Legislation Committee for inviting us to share the concerns of our industry. The NFF supports the intentions of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (**the Bill**) and acknowledges the sensitivity of addressing the continued challenge. However, we are concerned that the Bill will fail to make any meaningful change to the outcomes for victims/survivors or reconcile the awful reality with the impact on farmers and the challenge of running a small business. Furthermore, it will fail a large segment of the population. Whilst we commend the intention of the Bill it does not provide cover to all workers; e.g. those who are sole traders, partnerships, or in a family business. It also places an additional administrative burden on farmers with limited HR experience or resources, particularly at peak periods of labour demand. This would not only increase the pressure on employers at times of peak stress levels, but potentially cause even more grief to the victim. It is the NFF's view that the Federal Government, which is far better placed to administer and fund such programs, should assume responsibility.

If, however, the Government intends on proceeding with a paid FDV scheme, the NFF notes that the Fair Work Commission (**FWC**) proceedings, which were effectively an extensive and consultative review process, received submissions from peak industry groups and unions and balanced the best available evidence. The FWC concluded that, as the cost to business of an FDV leave scheme was unclear, a measured approach was warranted. Importantly, it limited the leave to ongoing employees and allocated the entitlement progressively rather than up front. Unfortunately, the Government has abandoned this considered approach without providing reasons. As such, we recommend that the Government return to the FWC provisions, limit the entitlement to non-casual employees and, rather than making the entitlement available in full on commencement, allow it to accrue progressively. That said, the NFF supports expanding the definition of family and domestic violence "to include conduct of a current or former intimate partner of an employee, or a member of an employee's household". We acknowledge that victims/survivors of these forms of FDV also require support and access to suitable pathways out of the violent situations. As such, while we note that the expanded definition may become problematic in the context of farm workers in shared quarters (such as



PALM<sup>1</sup> workers), without more evidence and specific incidents of problems arising we would not object on that basis alone.

## **Universal Scheme**

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The NFF believes that there will be greater social and economic value in a universal program which is managed by government, rather than a scheme that is the sole responsibility of the employer. We recognise that work and the workplace is a vital resource for victims/survivors of FDV, and fundamental to changing their circumstances. Nonetheless, we remain of the view the Government is better equipped to administer and underwrite a universal scheme to address what is ultimately a social issue.

An employer managed and funded system is exclusionary by design. Leave entitlements are meaningless to the self-employed who make up anywhere from 10% to 17% of Australia's population. As such, a paid FDV leave scheme does not assist them. More than 95% of farms are small and family businesses, and many Australian farmers are self-employed operating as sole traders or in a partnership where they may not receive any salary of any kind. While the Bill is of little to no assistance to these people, they could and should be covered by a universal government scheme. Indeed, the entitlement should extend to contractors, the self-employed, job seekers, and those who are working in a family business or in a partnership with the perpetrator. These workers will be left behind by an employer based FDV leave, and so would be denied a critical mechanism to maintain financial security while dealing with the awful effects of and hopefully escaping FDV.

Furthermore, a properly designed government managed model would be administered by an impartial and dedicated bureaucracy that can maintain the victims/survivors' privacy and dignity and hopefully provide meaningful support. Rather than requiring the victim to share intimate details of their personal lives with managers, peers, and colleagues — a fact which, in addition to creating potential social problems, would discourage the employee from accessing leave — they will deal with an anonymous government agency or a professional support service who can mediate for them. This is especially crucial in rural and regional Australia where social networks are small and the dividing lines between the workplace and community can be blurred. It is likely that perpetrators of domestic violence will know and even count victims/survivors' employers amongst their social groups, a fact which could (1) discourage the victims/survivors' from approaching their employers and (2) place the employers in a difficult circumstance within the community. Additionally, and sadly, in the worst of cases where the employer knows the perpetrator, they may actually discourage the victim from addressing the FDV or even disclose to the perpetrator that the victim is claiming leave, a fact which would likely exacerbate the situation horribly. Again, a scheme which is managed by the Government should not create this problem.

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<sup>1</sup> Pacific Australia Labour Mobility Scheme

A government scheme would remove the employer from the equation and install it into a dedicated public service, one which is specifically trained and experienced to manage FDV matters. It would also relieve employees in small and interconnected communities of the burden of sharing deeply personal information with their employers.

The design and implementation of such a scheme is of course a matter for the Government, but in a broad sense the NFF would envisage a model akin to the current publicly funded and administered Paid Parental Leave scheme. The critical point is that it would share the costs of a societal ill across all society rather than burdening a single small employer.

Finally, if the Government decides to adopt an employment-based scheme, it must recognise that simply requiring additional employer obligations for paid leave is not a sufficient response to the insidious issue of FDV. It would be ill-considered to involve employers in the management of FDV cases, without providing them with the necessary training and understanding of the surrounding issues, to facilitate understanding and support. Therefore, any new entitlement should be accompanied by public funding for industry training that addresses topics like what FDV is, how to recognise it, notice and evidence requirements, and employer's legal obligations. It is critical that employers be provided with the tools to best assist their employees suffering from FDV.

### **Small Businesses Scheme**

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In recognition of the proportionally greater administrative and financial burden small businesses will bear under the new scheme, the Bill currently allows small businesses an increase (additional six months) of lead-in time before the new scheme takes effect. Whilst this small concession is welcomed, it does not adequately reflect the disparity between small and large businesses and is not sufficient to address or off-set the proportionally greater difficulties it will impose on small business.

Indeed, that commencement date aside, we are concerned that the rationale for much of the Government's (and FWC's) decision making has been framed in relation to the impact on large businesses. The proportionally greater impact on small business — who make up the vast majority of the agricultural sector — has essentially been overlooked in the evidence. For example, the Duncan and Stanford reports which were considered by the FWC in the FDV leave proceedings, estimated the cost of 10 days Paid FDV leave entitlement at an award and economy wide scale:

- The Duncan Report concluded that it would cost the between \$13.1 million and \$34.3 million per annum to cover award-based employees; and

- At an economy wide scale, the Stanford Report estimated this will cost less than \$200 million per year.

However, this analysis misses the fact that the effect of an employee utilising the entitlement may be negligible to a big business with thousands of employees but would be substantial to a small business with just three employees. In this way a macro economic analysis gives a biased account.

Indeed, while evidence submitted in the FWC proceedings demonstrates the rise in the availability of paid FDV leave over the past 5 years, the availability of paid FDV leave varied significantly with business size. Only 20.7 per cent of organisations with one to 5 employees provided paid FDV leave, compared to 35.5 per cent of organisations employing more than 100 employees. The lower rate of availability for paid FDV leave afforded by small business owners is not due to a lack of compassion nor care toward their employees. In fact, the relationship between employer and employee is generally much closer in small farming operations than in most conventional big businesses. Employers are typically sensitive to the personal issues of their employees, and act with compassion, doing all they reasonably can to help their workers deal with FDV. The lack of a formal right to paid FDV leave is not a result of a callous attitude of small business employers. The rate of availability is lower because they do not have the capacity to offer a codified entitlement to paid FDV leave.

As such, in the absence of an overarching universal scheme, we recommend the Government consider introducing a small business scheme. While big business would continue to offer paid FDV leave, the Government would take responsibility for providing support to the employees of small business. The scheme would also extend to cover most (or indeed all) of those victims/survivors which the Bill currently overlooks, such as the self-employed and job seekers.

In the agriculture sector, victims/survivors of FDV are more likely than not to be employed in a small, family business. Indeed, by almost any measure the vast majority of Australian farms are small businesses. Roughly 95% have a turnover of less than \$2m per annum, and 60% have a turnover of less than \$500k per annum. Less than 1% of farms have 20 (or more) permanent employees, while most rely on casual labour during seasonal peaks. These are small businesses, 'price takers' who operate on very tight margins with minimal cash flow and limited capacity to find replacement workers on short notice. They cannot afford any additional operational expenses, and the cost of paid leave cannot be absorbed or easily managed. The extension to casual employees under the proposed Bill is especially worrying to our members, many whom rely on a seasonal workforce during periods of peak labour demand such as harvest, planting or pruning. Working Holiday Makers are required to perform 88 days of specified (i.e. farm) work in order to renew their visa. These workers are generally employed in large numbers over the harvest period on a truly casual basis. Indeed, in the horticulture sector they may have extremely flexible

working arrangements, arriving and leaving at odd hours and at their own discretion. They may arrive at the farm with no pre-existing offer of employment, work a few hours or days, and then continue along the harvest trail. Trying to manage entitlements within this context would be truly dizzying. However, this is not an unusual circumstance, and illustrative of the type of casual employment farmers rely on. It demonstrates the far more variable nature of labour demand in our industry compared to most, and the consequential difficulties farming employers would have administering the entitlement.

The Full Bench of the FWC stated that they “accept that the provision of paid leave will increase costs to employers and that given the lack of data, the impact on employers of that increase in costs is difficult to assess.” Furthermore, while the FWC Full Bench accepted “that the introduction of paid FDV leave will be of some benefit to employers” they went on to concede the following:

*But the evidence before us is insufficient to quantify that benefit with any level of confidence or to conclude that the benefits would ‘largely offset’ the cost.*

These quotes give voice to our concerns that the Bill — which, again, goes further than the FWC decision — has been introduced without a thorough understanding of the cost to business. This is heightened in the case of agriculture as a labour-intensive industry with a reliance on a casual seasonal workforce made up predominantly by small and family businesses. This ambiguity is a solid reason for government to bear the cost (and risk) of the program, especially when it comes to small farming businesses with fine margins and a reliance on a seasonal and casual workforce. Indeed, it is noteworthy that in other policy areas such as redundancy, unfair dismissal and taxation law the disparity in impact resulted in separate small business schemes. We would suggest the Government adopt a similar approach with respect to FDV leave.

## **Return to the Fair Work Commission Provisional Model**

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In addition to accepting the introduction of an NES entitlement to unpaid FDV leave in 2018, the NFF has not objected to the provisional decision made by the FWC in May 2022 to grant paid leave to permanent employees. The FWC reached its decision following an exhaustive set of proceedings, and whilst it features many of the concerns we have with respect to the Bill (such as, for example, leaving the self-employed and job seekers behind) — and we maintain that a government led scheme would be the most effective approach — as a third option we would support a return to that model.

The principal difference between the FWC provisional decision and the Bill is that the decision did not include casual employees. The FWC referred to the definition of ‘casual employee’ which was recently added to s. 15A of the FW Act, and the newly established NES entitlements to casual conversion. These changed the landscape of casual employment, ensuring those who should be employed on a permanent basis are. They addressed situations where casual employment was

used by businesses as a ‘loop-hole’ to avoid paying entitlements to ongoing employees. We should ensure that casual employees who effectively work on a permanent basis can, if they choose and enjoy the same rights as a permanent employee.

The requirement of a genuine casual workforce on farms is unavoidable. They provide extra support during peak periods such as harvest and planting seasons and/or to provide ad hoc occasional support. These will typically be highly busy and stressful periods, with farmers operating under enormous pressures. As noted above, the administration of FDV leave applications at this time under these conditions will be incredibly difficult. Small farming businesses, often mum and dad partnerships, operate without a dedicated HR department found in large corporates. The financial aspect will be compounded by the need to support, document, and if necessary, report what is an incredibly sensitive and delicate situation. The ability to handle such a situation with the appropriate level of care and discretion is exceedingly problematic without a dedicated HR service.

We were pleased to see that the FWC acknowledged the challenge of casual employment in its decision, stating:

*It is likely that any term framed to address the various operational difficulties would be complex and create particular challenges for small and medium sized businesses.*

This point is fundamental to small farming businesses and explains why at the very least a return to the FWC provisional model is important.

Another point of distinction between the FWC’s proposal and the Bill is that employees should be paid their base rate of pay when accessing the leave. Under both personal and carers leave, the employee is paid at the base rate, however the Bill would require employers to pay employees amounts that include penalty rates, overtime rates and various other allowances upon accessing the FDV leave entitlement. Calculating this will create increased complexity and administrative challenges, of which the difficulties in the agriculture sector have been well discussed.

The FWC stopped at the decision it did for a reason, noting that the cost to businesses was not well understood. Ultimately the FWC decided on a different model that considered the evidence and provided a balanced and workable paid FDV leave scheme that, in the absence of a government scheme, should be followed.

Those concerns noted, however, the NFF does not object to the Bill extending the definition of FDV beyond the definition in the FWC decisions. Including “a former intimate partner of an employee, or a member of an employee’s household” amongst the potential perpetrators is sensible. Victims/survivors of perpetrators who are not close family members also require access to suitable pathways out of

violent situations. That said, it is not uncommon for farm workers to live under the same roof, especially during harvest/seasonal roles, e.g. under the PALM scheme workers tend to share quarters, or live in a group home. Indeed, the implications relating to FDV if the PALM scheme is broadened to allow families and dependents are unclear. In these situations, the extended definition may have broader consequences and may need to be revisited.

## **Conclusion**

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The NFF agrees that a paid FDV leave scheme is necessary to provide an opportunity for those experiencing FDV to address and change their circumstances. Paid FDV leave provides empowerment and resources that alleviate the financial constraints brought on by absenteeism or loss of employment. We understand that this is just one step to help address this insidious issue. However, we do not believe that the current Bill before the committee represents the best approach to do so.

The NFF sees greater social and economic utility in a universal government scheme. The scheme would ideally be administered by a specialised, professional team trained to manage the sensitive nature of family and domestic violence. It would also be more discreet and afford victims/survivors increased anonymity. Small businesses are particularly limited in their capacity to administer such a leave scheme, and we remain concerned that the direct dealings with employers will discourage and actually disadvantage victims/survivors. This concern is heightened for those in regional, rural and remote areas where the dividing lines of the workplace and the community are often blurred.

We encourage the Government to reconcile the need to address FDV with an appropriate consideration for the impact on small farming businesses. This is especially the case for small farming businesses with tight margins and a reliance on a seasonal casual workforce, with limited capacity for dedicated 'human resources' management. A return to the FWC provisional model would provide a reasonable and workable outcome for both farmers and employees.

The NFF would like to thank the Senate Education and Employment Legislation Committee for allowing us to share the concerns of our industry.