



12 September 2014

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Inquiry and report on the Fair Entitlements Guarantee Amendment Bill 2014

We refer to the above matter which is currently before the Senate Education and Employment Legislation Committee for inquiry and report by 24 September 2014.

The National Farmers' Federation (NFF) is the peak national body representing Australian farmers. The NFF represents farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups. For 35 years, the NFF has actively worked to identify, develop and deliver policy outcomes for the benefit of Australian agriculture. Policy priority areas include, but are not limited to, workplace relations, trade and market access, innovation and natural resource management.

The NFF supports the Fair Entitlements Guarantee Amendment Bill 2014. In our submission, the current level of government funding for redundancy pay under the *Fair Entitlements Guarantee Act 2012* (FEG Act) encourages negotiating parties to agree to enterprise bargaining claims for generous redundancy pay entitlements, even though payment of those entitlements may not be within the means of a private employer, because the entitlements are secured by government funds. When difficulties arise, employees may consider that they are in a better position if they lose their jobs than if they work toward a solution that will allow the business to continue trading.

Capping the entitlement to redundancy pay at 16 weeks will also help align provisions of the FEG Act with the National Employment Standards in the *Fair Work Act 2009* (Fair Work Act). In our submission, the Committee should consider more broadly whether there is merit in reviewing the FEG Act so that it operates effectively in relation to the Fair Work Act. For example, section 16 of the FEG Act excludes amounts relating to payment in lieu of notice of termination and redundancy pay in the event of a transfer of business. However, the term 'transfer of business' is not defined in the FEG Act. Subsection 16(2) provides as follows:

- (2) However, do not include in the total the amount worked out under Division 2 for the person's payment in lieu of notice entitlement or redundancy pay entitlement if:
- (a) the business in which the employer employed the person is transferred to someone else (the *transferee*) other than the bankruptcy trustee of the employer; and
 - (b) within 14 days of the end of the person's employment by the employer, the transferee offers to employ the person:
 - (i) to do work that is the same, or substantially the same, as the work the person did for the employer; and
 - (ii) on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the person's terms and conditions of employment with the employer immediately before the end of that employment.

In contrast, the Fair Work Act includes a statutory definition of 'transfer of business' (section 311). A person is not entitled to more than one period of notice of termination (or payment in lieu thereof) in connection with a period of service (subsection 22(6)). Similarly, a person is not entitled to redundancy pay in a transfer of business in certain circumstances. Section 122 of the Fair Work Act provides as follows:

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Subdivision) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

Employee not entitled to redundancy pay if refuses employment in certain circumstances

(3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the *first employer*) if:

(a) the employee rejects an offer of employment made by another employer (the *second employer*) that:

(i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and

(ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and

(b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

(4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

The approach to excluded amounts in section 16 of the FEG Act does not sit well with provisions in the Fair Work Act dealing with transfer of business, notice of termination and redundancy pay. This has two consequences:

- it creates doubt about the meaning of terms in the FEG Act that are used to determine entitlements to notice of termination and redundancy pay; and
- it may lead to inconsistent outcomes: an employee might be entitled to payments from Consolidated Revenue under the FEG Act in circumstances where there would be no equivalent entitlement under the Fair Work Act in the absence of an insolvency event, and vice versa.

Thank you for the opportunity to contribute to the Senate inquiry.

Yours sincerely,

TONY MAHAR
ACTING CHIEF EXECUTIVE OFFICER