

**4 yearly review of modern awards**

**Family friendly work arrangements**

**AM2015/2**

**NATIONAL FARMERS' FEDERATION**

**SUBMISSION IN REPLY**

Date: 30 October 2017

**A. Introduction**

1. The National Farmers' Federation (**NFF**) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. These submissions respond to a claim by the Australian Council of Trade Unions (**ACTU**) and are made pursuant to the direction of the Fair Work Commission (**the Commission**) for parties to file submissions and evidence in reply by 4:00pm on Monday, 20 October 2017.
3. The ACTU seeks orders varying all awards to introduce a new clause (**the Proposed Clause**) which entitles employees to work family friendly work hours (**FFWHs**) and subsequently to revert to their former/pre-FFWH hours.
4. The effect of the Proposed Clause will be to enable an employee with parental or carer obligations to unilaterally decide what hours he/she works. The NFF is concerned that the clause could allow employees to lock employers into working arrangements that do not address their labour needs, could have drastic consequences on the viability and long term survival of the farms, and could have significant consequences for animal welfare and the safety and well-being of the other employees.
5. The NFF's submission is that:
  - a. The Proposed Clause is inconsistent with the modern award objective because, put very briefly, it fails to recognize the realities of running a farming business and the

responsibilities — to the business, staff and livestock, and the other persons— which entail.

b. Furthermore, the ACTU has not established why this new clause is “necessary” as required by s. 157 of the Fair Work Act 2009 (FW Act)

6. For those reasons, in the NFF’s submission the application should be denied.

## **B. The Legal Framework**

7. Under s. 156 of the *Fair Work Act 2009* (FW Act), the Commission is required to review each modern award in its own right every four years.

8. In *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*<sup>1</sup> (**Preliminary Decision**) the Commission confirmed that the 4 yearly review of modern awards would be conducted on the basis that, prima facie, the modern awards achieved the modern awards objective at the time they were made.

9. The Commission also found that, pursuant to s. 138 of the FW Act, the modern awards objective applies to the 4 yearly review of modern awards, and the Commission may only include terms in an award to the extent necessary to achieve that objective.<sup>2</sup> The modern award objective, which is found at s. 134 of the FW Act, is for modern awards to provide a ‘fair and relevant minimum safety net of terms and conditions’ of employment taking into account the criteria set out in subsection 134(1).

10. The Commission also held that the proponent of a variation to a modern award has the burden of demonstrating that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary<sup>3</sup> to achieve the modern awards objective.<sup>4</sup> The party seeking the variation must also advance merit arguments in support of the proposed variations. The extent of the merit argument required will depend on the circumstances, but where a significant change is proposed, it must be supported by submissions addressing the relevant legislative provisions and be accompanied by

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<sup>1</sup> [2014] FWCFB 1788 (17 March 2014), paragraph 60.

<sup>2</sup> [2014] FWCFB 1788 (17 March 2014), paragraph 29.

<sup>3</sup> As to which see paragraph 32 below.

<sup>4</sup> [2014] FWCFB 1788 (17 March 2014), paragraph 36.

probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>5</sup>

11. In *Re Security Services Industry Award 2010*<sup>6</sup>, the Commission stated that “the more significant the change, the more detailed the case must be.” This will usually require detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it, and the likely impact of the proposed changes.
12. Finally, in the *4 Yearly Review of Modern Awards —Transitional Provisions*<sup>7</sup> decision the Commission adopted an approach whereby “the characteristics and circumstances of the industries and parties covered by modern awards vary and the application of the modern awards objective may result in different outcomes between different awards.”

### **C. General concerns over ACTU proposal**

13. The NFF supports increased workforce participation by parents and carers, and women in particular, and believes that businesses should proactively work toward facilitating that workforce participation. Indeed, as the evidence demonstrates, given the unique labour needs of farmers and the frequent difficulty they face in addressing those needs, farmers go to great lengths to encourage and enable that participation.<sup>8</sup>
14. However, the NFF does not consider that a new clause in all awards is necessary and considers that it may have a significant adverse impact on farming businesses. We detail in Parts D and F of these submissions the reason why, in the NFF’s view, the ACTU’s application does not satisfy the statutory requirements and therefore should fail. However, as a threshold consideration the NFF submits that the Proposed Clause is unrealistic and, in operation, potentially very damaging to the farming sector in particular.
15. Farmers must negotiate particular challenges which are faced by employers in few, if any, other sector. The most significant of such challenges is inherent in the nature of the commodities that farms produce: crops and, to a lesser extent, animal products, are highly susceptible to variances in weather and temperature; harvest times are irregular; the needs

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<sup>5</sup> [2014] FWCFCB 1788 (17 March 2014), paragraph 60.

<sup>6</sup> [2015] FWCFCB 620 (2 March 2015).

<sup>7</sup> [2015] FWCFCB 3523 (18 August 2015).

<sup>8</sup> [8] to [15] of the statement of Deborah Platts dated 27 October 2017; [6] and [17] to [19] of the statement of Edwina Beverage dated 29 September 2017.

of animals and crops are not suspended during inconvenient hours and farms are, to greater or lesser extent, 24 hours a day, 7 days a week businesses<sup>9</sup>; yield volumes and the rate at which produce and product matures will fluctuate; the product — whether fruit, vegetable, grain or animal — is highly perishable and sensitive to both time and the ways in which it is handled. All of this means that the labour needs on farm, while intense on occasion, are highly unpredictable. In a horticulture or broadacre cropping operation, for example, there can be limited time off provided during sowing and harvest when it's "all hands on deck" and permanent employees take on important supervisory roles for a seasonal, casual workforce. At this time it is critical that the crops are harvested before they perish or are exposed to damaging weather conditions.

16. To reduce the impact of this unpredictability, the farmer must have the ability to plan along with the flexibility to make changes. Critical to that capability is the power to have the final say in the composition and working hours of their workforce. Farmers must be able to rely on its workforce and to organize when and where they will be available.
17. Furthermore, much of farming work involves dealing with animals. This, in turn, means that farmers and their staff must be available as and when the animal needs them; not as and when their caring responsibilities allow. This is not simply a commercial consideration, it is an important matter of animal welfare; and animal welfare is a concern that has grown in the public consciousness over the past decade and in fact looms much larger now than during award modernisation. For example, in the dairy industry milking must occur at the same time each day; a cow which is not milked on time will probably develop mastitis.<sup>10</sup> While this has a commercial impact, given that the cow cannot produce milk, it is also a concern for the health and wellbeing of the animal. Similarly, pigs become distressed if husbandry activities are performed during the heat of the day or by unfamiliar attendants.<sup>11</sup>
18. In addition, much of farm work is outdoors. As such, farmers may have to schedule work around times of day which are most suitable to exposure to climate and weather even if they are inconvenient or do not fit into other responsibilities. For example, employees working in the remote northern regions cannot pick melons, cucumbers, or zucchini in

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<sup>9</sup> [4] to [5] of the statement of Deborah Platts dated 27 October 2017.

<sup>10</sup> [11] to [12] of the statement of Deborah Platts dated 27 October 2017. See also [10] of the Statement of Lucinda Corrigan dated 30 October 2017.

<sup>11</sup> [13] of the statement of Edwina Beverage dated 29 September 2017.

40 degree heat; i.e. in the middle of the day and at the height of summer when the crop is mature. For their own benefit, and those of their co-workers, farm employees have to be available to work at night and at odd hours of the day.

19. Finally, the ageing population and remote rural location of farms means that farmers face critical labour shortages and considerable difficulty securing a reliable, available workforce.<sup>12</sup> As a consequence, it is difficult to ‘back-fill’ vacancies — particularly if those vacancies are only for a short period like one half-day per week — such as those which may be created by FFWH. This concern is heightened by the fact that much of farm work is team based out of physical necessity and the attendant WHS concerns<sup>13</sup>; if one employee in the team is unavailable then the team as a whole is ineffective.<sup>14</sup>

20. The responses to the Joint Employer Survey field by the Australian Industry Group generally illustrate the concerns raised above, but to quote just a few.

a. “If a casual staff member had to be called in we are required to pay a minimum of 3 hours then more often than not, the casual would not be required for the whole 3 hours, resulting in a loss for the employer.”<sup>15</sup>

b. “Our business operates in the agriculture sector. Tasks are often defined by a window of opportunity to actually perform them. Therefore there are occasions where work must be performed at a certain time of day. If it is not performed at that time then the business can suffer a significant loss of income. For example, there are situations where crops need to be sprayed for a fungal outbreak. There is typically only a small window of time during the day that this task can be actually performed due to weather conditions. If this window of opportunity is missed, the crop could attract a significant yield penalty or complete loss”<sup>16</sup>

“[Our] dairy manager is on a 457 visa as we found it impossible to employ a local person with the necessary skills. If either of these positions were modified to involve decreased hours of work or restricted to only working on weekdays, for instance, it would have a huge impact on the efficiency and safety of our business.

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<sup>12</sup> [12] and [16] of the statement of Edwina Beveridge dated 29 September 2017. [12] of the statement of Lucinda Corrigan dated 30 October 2017.

<sup>13</sup> As opposed to office work where team based collaboration is may be desirable but is not absolutely necessary.

<sup>14</sup> [8] to [10] statement of Edwina Beverage dated 29 September 2017. See also Joint Employer Survey, Attachment JES21 – *Pastoral Award* 2010, response 977.

<sup>15</sup> Joint Employer Survey, Attachment JES79 – *Pastoral Award* 2010, response 951.

<sup>16</sup> *Ibid*, response 1130.

Asking inexperienced staff to cover for skilled employees if the skilled worker has chosen not to work at the usual times is likely to result in dangerous mistakes and situations.”<sup>17</sup>

- c. “80% of work activities require a team effort. If a member of the work team is not there then the job cannot get done. Given the 75km distance to the nearest town, casual workers are not readily available to fill in any team deficits”<sup>18</sup>
- d. “If for example our crops are not seeded early enough, we will miss the rain and their yield will be reduced. If the crop is not sprayed at the right time, the pest will not be controlled and the yield will be reduced. If the crop is not harvested quickly it will be exposed to the weather and the yield and quality will be reduced. If the sheep are not drenched or crutched in a timely manner they will get worms or fly blown and this impacts severely on both their welfare and our ability to produce wool and meat. All of these factors add up to a financial deficit for our business which would reduce our ability to employ staff in the first place. There are also environmental (soil erosion, herbicide resistance) and animal welfare considerations of not farming in a timely manner.”<sup>19</sup>
- e. “Due to the seasonal and weather dependant nature of agriculture, allowing employees to nominate the hours they want to work would have significant impact on my business. If this requirement became law then I would alter my current practices and consider using contractors in place of employing staff directly.”<sup>20</sup>
- f. “Many tasks performed by our casual employees are time critical. Common examples are stock work wherein early starts are required in hotter weather to reduce impacts of high daytime temperatures on both livestock and people, and other work performed in support of contractors who work fixed hours, such as shearing or crutching teams. An employee who had the right to modify their work hours in the above scenarios would have negative impacts on many aspects of our business, including increasing costs of supervision, disrupting related contractors, and critically, extending the livestock handling periods. In our industry, people's

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<sup>17</sup> Ibid, response 2521.

<sup>18</sup> Ibid, response 626.

<sup>19</sup> Joint Employer Survey, Attachment JES79 – Pastoral Award 2010, response 1062.

<sup>20</sup> Joint Employer Survey, Attachment JES79 – Pastoral Award 2010, response 1461.

hours of work are determined by the needs of livestock, not the other way around.”<sup>21</sup>

- g. “[If an employee has FFWH which means he/she can] only start work at 10am everyday, in Summer time this would have the whole team working in the heat of the day including animals. WHS and Animal Welfare would be a major concern to our business. Our business would have no concern if it was a one off or for a week/month and there was flexibility - for example I can't start until 10am but I can go through until 6pm or similar. Or making themselves available on weekends. In our type of occupation you cannot work at night or safely in summer during the middle of the day. If they state they wish to work weekends, does that mean we are required to pay extra wages?”
- h. “The chickens lay when the sun comes up and a person is required to be in that particular shed from the time the shed commences lay until its conclusion. Flexibility is just not possible under the circumstances from a business perspective.”<sup>22</sup>

21. Finally, although by no means limited to the sector, most farmers are very small, family run businesses.

- a. the average return on business investment for farmers is comparable to the rate of return on a term deposit: broadacre farmers make 2.4% and vegetable farmers make just 3.6% <sup>23</sup>
- b. the vast majority of farms, over 96%, have a turnover of less than \$2 million per annum;
- c. Indeed, the majority of farms, more than 60%, have a turnover of less than \$200,000.00 per annum.<sup>24</sup>

22. Farmers can offer flexibility in many circumstances and regularly do so where their business operations permit it. However, as a sector comprised largely of small family

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<sup>21</sup> Joint Employer Survey, Attachment JES79 – Pastoral Award 2010, response 1534.

<sup>22</sup> Joint Employer Survey, Attachment JES79 – Pastoral Award 2010, response 3855.

<sup>23</sup> ABARES, Australian vegetable growing farms: an economic survey, 2014–15 and 2015–16, viewed 18 October 2017 < <http://agriculture.gov.au/abares/research-topics/surveys/farm-survey-data#aagis-region-mapping--files> >

<sup>24</sup> Australian Bureau of Statistics, 2017, Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016, cat. no. 8165.0, viewed 18 October 2017: < <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8165.0main+features1Jun%202012%20to%20Jun%202016> >

businesses that operate on small margins, there are many circumstances in which an employee's needs cannot reasonably be accommodated.

23. In short, FFWH — particularly in circumstances where the employer is not able to tailor the hours to the farm's needs and other responsibilities — would have a significantly adverse impact on business productivity. Fruit may rot if employees are not available to pick it, animals may be distressed or develop disease if employees are not available to attend to them, employees<sup>25</sup> may have to work alone in piggeries or under hazardous conditions.
24. Indeed, the regrettable reality is that should the Commission grant the variation then the inability to negotiate working arrangements will mean that many farmers will consider whether they have capacity to employ someone with parenting or caring responsibilities.<sup>26</sup>

#### **D. No demonstrated “need” for new clause**

##### *Request for FFWH arrangement are typically allowed*

25. It is clear that despite the ACTU's concerns, request for FFWH are rarely denied outright by employers. They tend to be allowed to the extent they business needs permit.
  - a. The majority of respondents to the Joint Employer Survey have agreed to requests to change hours of work in the past (48.64%), or have agreed to some and not to others (48.24%).<sup>27</sup> A good portion of requests were agreed to without any modification.<sup>28</sup>
  - b. The witness statements, even those submitted by the ACTU, indicate that the employee was typically granted a request for FFWH albeit occasionally after some negotiation and compromise.<sup>29</sup>

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<sup>25</sup> Or the farmers themselves.

<sup>26</sup> See for example Joint Employer Survey, Attachment JES73 – *Horticulture Award 2010*, response 759; [16] of the statement of Lucinda Corrigan dated; [7] of the statement of Chris Kemp dated 30 October 2017.

<sup>27</sup> Joint Employer Survey, question a6.

<sup>28</sup> Ibid, question a8.

<sup>29</sup> See Deborah Platts at [15]



- c. Indeed, the ACTU's own expert witness, Dr. Jill Murray<sup>30</sup>, reports that the majority of requests for flexible work arrangements are approved in full, while some are approved with amendments. Only a small proportion are completely refused.
26. The evidence from the Joint Employer Survey shows that where a farmer is concerned that a request cannot be met by the business, they will talk to the employee and try to reach a mutually agreeable alternative arrangement that caters for the needs of an agricultural business:
- a. "If it doesn't fit with production requirements we originally reject the change but always sit with the employee concerned to ascertain their reasons for the request. We usually come to some mutual agreement without causing any precedents which is likely to cause an avalanche of future request"<sup>31</sup>
- b. "Our current employee lives in town, half an hour from our property and since almost school recommenced at the beginning of the year has been arriving for work most days after 9 am on account of having to get a child to school, then travel to our property. We have discussed the issue from time to time, and he is able to make alternative arrangements when it is necessary for him to start earlier, such as mustering time etc. We have been paying him above award wages including overtime rates since he commenced his employment. With him not arriving until after 9, this means that it takes many more days to complete tasks, and our other employee or and/ or one of us often waiting around for him to arrive to commence jobs that are mostly away from the homestead. During summer, it is beneficial to commence work early, with a longer break during the heat of the day when possible. He is always agreeable to extend his day, and work on a weekend when required. We have a good working relationship with him."<sup>32</sup>
- c. "Made it so it didn't coincide with other employees working in that same area having the same day/time off and that we had adequate skill sets to cover the days activities"<sup>33</sup>

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<sup>30</sup> ACTU Expert Witness Statement of Dr Jill Murray, [46] -- [48].

<sup>31</sup> Joint Employer Survey, Attachment JES21 – *Pastoral Award 2010*, response 4606.

<sup>32</sup> Joint Employer Survey, Attachment JES791 – *Horticultural Award 2010*, response 888.

<sup>33</sup> Joint Employer Survey, Attachment JES50 – *Pastoral Award 2010*, response 541.

- d. “We came to an agreement that work hours could be shortened to allow pickup of kids from school on a few specified days of the week, but at particularly busy periods of the year, like harvest or shearing, they would make other arrangements for their kids.”<sup>34</sup>
- e. “We operate a family friendly workplace. As long as the required work is completed, we don't stipulate the timing of that work. Our staff understand that at high pressure times - harvest and cropping which involve long days and nights including weekends, flexibility can be more difficult but we aim to support their needs. Additional staff at these times allows greater flexibility. Spraying is often done during the night anyway, so we need to be flexible. The use of [time of in lieu] supports the flexible work conditions. It suit[s] management and has the strong support of our staff.”

*Section 65 – requests for flexible working arrangements*

- 27. More significantly, the right to request FFWH is currently enshrined in s. 65 of the FW Act. In the NFF’s contention, that section properly and adequately balances the needs of the business and the needs of employees with carer responsibilities. There is no reason for the Commission to extend the legal safety net by amending all awards to include the Proposed Clause.<sup>35</sup>
- 28. Nevertheless, the ACTU cites a number of reasons why they believe s. 65 is inadequate. In the NFF’s submission those reason are flawed and/or unpersuasive.
  - a. Firstly, the ACTU are concerned that there is a lack of enforcement for employees whose request for FFWH under s. 65 are refused. This concern is misplaced.
    - i. While it is true that s. 44(2) of the FW Act prevents the Commission (or judiciary) from reviewing the employer’s reasons for denying a request, nonetheless s. 65 does give the employee an enforceable workplace right to make the request without fear of repercussion.<sup>36</sup> If the employer persecutes the employee for merely making the request, the employer would likely be subject to an adverse action claim.

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<sup>34</sup> Joint Employer Survey, Attachment JES50 – *Pastoral Award 2010*, response 1212.

<sup>35</sup> Although it may be bargained for at an enterprise (or individual) level.

<sup>36</sup> *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185.

- ii. Furthermore, the section provides the employee with an enforceable right to be given reasons by the employer for its decision. This in turn means that the employer must give the employee's request due consideration. Indeed, it may be that if the reasons given by the employer are inadequate then they do not reach the standard of "reasons" for the purpose of s. 65 and, it follows, the employer has complied with s. 65<sup>37</sup> thus giving the employee a cause of action.
  - iii. In short, the aim of the section is to enable employer and employee to discuss the possibility of flexible working arrangements and to place a framework around that discussion. The section accomplishes this aim. The ACTU's concern is therefore unfounded.
- b. The ACTU also cites a number of discrete factors in their attempt to show that the clause is not assisting employees to balance their work and family responsibilities. In the NFF's view those discrete reasons do not assist the ACTU's arguments. The reasons outlined by the ACTU show that there may be some steps that could be taken to increase the awareness and use of s. 65, but do not show that the clause itself is not operating as intended or has unsatisfactory results.
- i. *ABS data shows that 1.8 million Australians would prefer to work fewer hours.*

However, the ACTU establish no causal link between the fact that (according to the data) Australians would prefer to work fewer hours and the alleged inadequacy of s. 65. There are a number of reasons why these Australians may not be taking action to obtain fewer work hours. For example, employees may make the rational choice not to reduce his/her hours as this would inevitable result in less take home pay.

- ii. *A small quantity of requests are made each year.*

Again, the ACTU has not demonstrated a causal link between the small quantity of requests and the inadequacy of s. 65. Indeed, there are a number of reasons for the lack of request which are more plausible than a conclusion that the section is ineffective. For example, employees may simply not be aware that they have the

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<sup>37</sup> In that he/she/it has not actually provided "reasons".

right under s. 65<sup>38</sup> or they may make the request informally and be satisfied with the employer's response. Furthermore, the Proposed Clause does little to actually address the low number of requests. Given that employees already have a statutory right to make the request, there is no basis in logic for concluding that a statutory right to have the request granted will inevitably increase the quantity of requests.

*iii. There is a low awareness of s. 65.*

This concern would be more appropriately addressed through education rather than legal reform.

*iv. Requests are concentrated in certain sectors, industries and business sizes.*

Working arrangements and the level of flexibility will inevitably vary between industries and business sizes. There are certain types of work and industry which have limited capacity to offer flexibility, and employees may be deterred from making certain requests where they believe that their employer will not be able to accommodate it. This does not mean that s. 65 is inadequate. Rather it reflects the need for further education about different options available to employees to negotiate work arrangements.

*v. Very few men request flexible work or reduced hours.*

It is unclear how the Proposed Clause will address the issue, which is a matter of social norms rather than a flaw in the current flexible work provisions. The ACTU have not demonstrated or provide any evidence in support of the notion that an enshrined right to FFWHs means more men (or less women) will seek to exercise the right.

*vi. While the majority of employees who make a request have it granted, a portion of employees do not ask.*

As outlined above, the reasons why these employees do not make a request need to be analysed in further detail.

- c. Finally, the ACTU have raised concerns about the requirement that employees must work for 12 months to be eligible to make a request for FFWH. A period of 12 months is the standard period of employment required for eligibility for a

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<sup>38</sup> As to which see the subsequent paragraph of these submissions.

number of FW Act entitlements.<sup>39</sup> There is no reason to depart from this standard: 12 months is an appropriate period for an employee to settle in to the workplace and to build trust with their employer. In any event, as the evidence advanced by the ACTU suggests, a significant number of requests are occurring informally outside of s. 65.<sup>40</sup> Those informal requests can occur at any stage of employment.

#### *Individual flexibility arrangements*

29. At paragraph 146 of their submissions the ACTU raises concerns about the option for the employee to enter into an individual flexibility arrangement.
30. A key reason given by the ACTU is the apparent low uptake by employees and a lack of awareness of their availability. As outlined above, low awareness and low uptake do not necessarily mean that the clause itself is inadequate. The ACTU do not provide reasons for the lack of awareness and uptake, or address how the Proposed Clause will be more effective than the current arrangements.
31. Furthermore, the ACTU raise concerns that employees are required to “trade off rights” by sacrificing pay or conditions when they enter into individual flexibility arrangements. This claim is not justified given that any individual flexibility arrangement must pass the better off overall test before it can be entered into.

#### **E. A new entitlement is not “necessary” to meet the modern award objective**

##### *Is the proposed clause “necessary”?*

32. Finally, but perhaps most significantly, the NFF notes that in order for the Commission to have power to grant the application and make the variation sought by the ACTU, the Commission must first be satisfied that it is necessary to meet the modern award objective<sup>41</sup>. In the NFF’s submission the ACTU has not discharged this burden.
33. In the Preliminary Decision the Commission observed that whether a particular right or requirement is necessary for the purposes of s. 157 is a value judgment based on an assessment of the considerations in s. 134(1) and having regard to the submissions and

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<sup>39</sup> See, for example, ss 67 and 121 of the FW Act.

<sup>40</sup> [5] of the report to the Fair Work Commission which is annexure D to the statement of Dr Jill Murray dated 6 May 2017.

<sup>41</sup> s. 157 of the FW Act.

evidence directed to those considerations.<sup>42</sup> Nevertheless, his honor Tracey J accepted in *Shop, Distributive And Allied Employees Association v National Retail Association And Fair Work Australia* that, while reasonable minds may differ on when a thing is necessary:

*a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.*<sup>43</sup>

34. As outlined above at paragraphs 25 and 26, there is little or no reason to conclude that the amendments “must be done”. On the contrary, given the potentially significant adverse consequences, in the NFF’s submission it must not.

*Proposed Clause does not meet modern award objective*

35. The ACTU outlines at Part D of their submissions why the Commission should be satisfied that the variation is “necessary” to meet the modern award objectives. For the reasons which follow, in the NFF’s submission the ACTU’s analysis is flawed and should not be accepted by the Commission.

36. Indeed, given the evidence is that most requests are (sometimes following negotiation and with some compromise) allowed, it may follow that the Proposed Clause would only have “work to do” where the request was unreasonable or unworkable and would be denied on that basis.<sup>44</sup>

37. *s. 134(a) — relative living standards and the needs of the low paid*

At paragraph 215 the ACTU’s contends that:

- a. the majority of award reliant employees are probably “low-paid”;
- b. employees with carer responsibilities often have to “suffer occupational downgrading” which has a direct effect on their earnings;
- c. FFWH are “far less available to lower paid, lower skilled casually employed award reliant employs working in smaller workplaces”;

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<sup>42</sup> [2014] FWCFB 1788 (17 March 2014), paragraph 36.

<sup>43</sup> [2012] FCA 480 at [46].

<sup>44</sup> [20] of the statement of Deborah Platts dated 27 October 2017.

- d. Women are overrepresented amongst the low-paid and award dependent and constitute a majority of carers and will “be assisted by greater access” to FFWH.

Irrespective of whether these contentions are accurate, the NFF submits that they are irrelevant. The submission is, in essence, that low paid persons would benefit from the proposal because they do not have the same salary and occupational progression of those without caring responsibilities. This may or may not be correct, but it is irrelevant as it does not go to their “relative living standard” or “needs”, and therefore does not make the substantive enquiry required by subs (a).

38. *s. 134(b) — the need to encourage collective bargaining*

The ACTU’s submission at paragraph 222 and 223 is that, following the logic expressed by the Commission in paragraph 142 of the *Fire Fighting Award Decision*, the inclusion of the Proposed Clause would incentivize collective bargaining. However the submission is not supported by any rationale or justification and should be rejected as without foundation. Indeed, in the NFF’s submission the opposite is true: the fact that there is currently no statutory right to challenge an employer’s decision in respect of an employee’s request for FFWH may encourage employees to bargain collectively with the aim of obtaining that right under an enterprise agreement. Ironically, perhaps, this present application actually demonstrates that fact, albeit in the context of an award review rather than a collective bargaining process.

39. *s. 134(c) — the need to promote social inclusion through increased workforce participation*

The ACTU’s submission at paragraph 224 to 227 is that the Proposed Clause will increase the participation of women in the workforce. This may be correct. However, the clause will also help to reinforce the imbalanced position of women as primary carers. If a (female) employee can nominate whatever hours she requires so that she is able to bear the full brunt of the carer responsibilities, then she has less incentive to minimise the responsibilities she bears — and therefore less incentive to share/redistribute those responsibilities with other/potential (male) carers — to minimise the impact on work and the FFWH she needs to request of her employer. Indeed, it may even be that rather than forcing society to address the cultural imbalance and inequity inherent in requiring women to bear the majority of carer duties it will enable women to bear those duties and thereby entrench the position.

40. *s. 134(d) — the need to promote flexible modern work practices and the efficient and productive performance of work*

- a. The ACTU submits that “section 134(1)(d) is significant in the context of the ACTU application”. Presumably because the Proposed Clause would entitle employees to “flexible modern work practices”.
- b. However, it is the NFF’s submission that, on its correct analysis, the opposite is true. The practices which the Proposed Clause would enable are “flexible” only when viewed from the narrow perspective of the specific individual employee with carer responsibilities. From the perspective of the whole of the business — including that of other employees with their own responsibilities — the clause would result in inflexible work practices, given that there is no scope for the employer to address or consider the needs of its business, of other employees, or other concerns such as health and safety and animal welfare. Indeed, unlike s. 65 of the FW Act — which promotes discussion and compromise — the ACTU’s Proposed Clause would side-line the employer and marginalise its capacity to participate in determining appropriate arrangements. The decision on the nature of the arrangements is, in effect, unilateral on the part of the employee. While this arrangement will undoubtedly allow that employee great flexibility, it is at the expense of the flexibility of the employer and the balance of the workforce.
- c. Furthermore, in the NFF’s submission the “efficient and productive performance of work” is contingent on the constitution of the workforce. If the employer is unable to determine the time at which employees work then the employer is unable to determine the constitution of its workforce at any given time, a circumstance which would be inconsistent with the “efficient and productive performance of work”.

41. *s. 134(e) — the principle of equal remuneration for work of equal or comparable value*

The ACTU submits that the lack of an entitlement to FFWH arrangements contributes to gender pay inequity. However, if an employee takes advantage of the right to work short hours she (or he) will naturally receive less pay. It follows that if, as the ACTU submits at paragraphs 225 and 232, that women are more likely than men to make use of the Proposed Clause, and women are therefore working fewer hours, then women (as a collective) will be paid less and the gap is more likely to grow than shrink.



42. *s 134(f) — the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*

For the reasons outlined above, the exercise of the right to FFWH, particularly in circumstances where the employer is not able to tailor the right to its business needs and other responsibilities, would have a significantly adverse impact on the farm's productivity. See these submission at Part C above.

Furthermore, the employment costs and regulatory burden will increase where employers have to engage additional staff — probably in the form of casuals, contractors, or labour-hire workers — to back-fill the short term vacancies created by FFWH arrangements. In addition to the typically greater hour-to-hour labour/wage cost of contractors, casuals and labour-hire workers, additional staff may result in additional administrative responsibilities and 'flow-on' costs such as training and inductions, tailoring the worksite to the specifics of the new employee, and lost profitability due to the lower productivity of inexperienced workers.<sup>45</sup>

43. *s 134(h) — the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

We refer to our submissions above at paragraph 24. The evidence demonstrates that if the application is granted employers are less likely to take on employees, given that it would effectively deprive them of the right to decide when and how they use them.<sup>46</sup> As such, the clause would have a negative effect on "employment growth" and for that reason — and for the reason given above at paragraph 42 — the clause would have a negative effect on inflation and the national economy

44. *s 134(g) — the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*

The ACTU submits that a "common entitlement across all modern awards will be simpler and easier to understand than a piece meal approach." Even if this argument is correct, it is moribund as it is true of any common issue matter. In the NFF's submission, this is a neutral consideration.

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<sup>45</sup> [19] of the statement of Deborah Platts dated 27 October 2017.

<sup>46</sup> See for example Joint Employer Survey, Attachment JES73 – Horticulture Award 2010, response 759; [16] of the statement of Lucinda Corrigan dated 30 October 2017; [7] of the statement of Chris Kemp dated 30 October 2017.

## **F. Concerns over ACTU's proposed FFWH clause**

45. As is clear from the proceeding, in the NFF's submission the Proposed Clause is not only unnecessary, it is impractical, unworkable, commercially unrealistic, and inconsistent with the modern award objective. It should therefore be denied at that conceptual level.
46. However, those concerns aside, the NFF also has concerns about specific drafting of the Proposed Clause. At best it is a clumsy attempt to resolve a complex and delicate issue — which, it is argued, can best be resolved by sort of discussions which the current s. 65 of the FW Act anticipates.

### *What is a "responsibility"*

47. Under the Proposed Clause, an employee has access to FFWH arrangements if the employee has "responsibility" for the care of a child or another individual. However, what constitutes a "responsibility" is unclear. Presumably any parent automatically has "responsibility (whether solely or jointly) for the care of a child". But does that responsibility exist if the parent is divorced and does not have custody of the child? Does that responsibility exist if the other parent does not work? Similarly, does any child automatically have responsibility for an elderly parent? What if the child's sibling could but chooses not to participate in the elderly parents care? What if the "responsibility" may be discharged by another or in another way?

### *Does the extent of the "responsibility" inform the type of FFWH*

48. Furthermore, and on a related issue, the hours which the employee on FFWH works is not tied in any way to the (nature or gravity) of the employee's care responsibilities. It is effectively a threshold question: that is, once the threshold has passed — i.e. if the employee has "responsibilities" — then the employee has an unfettered right to determine his/her hours irrespective of the nature or gravity of that responsibility, let alone the needs of the business, his/her co-workers, or the context in which he/she works.

### *Cessation of the right to revert to former working hours*

49. The Proposed Clause gives employees on FFWH the right to revert to their former working hours for an extended period of time.<sup>47</sup> That right could have a significant

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<sup>47</sup> Where the employee is a parent until the children are school aged. Where the employee is a carer then from two years after he/she commenced FFWH.

impact on businesses if, as seems to be the case, the time periods accumulate. Thus, if an employee was to have 3 or 4 children in succession, they would be entitled to FFWH for 15 or 20 years while retaining the right to revert to original hours.

50. That potential length of time together with the fact that — within certain very large parameters<sup>48</sup> — the actual length is largely at the discretion of the employee would make forward planning and budgeting very difficult for the employer. Furthermore, it could create significant disruption amongst employees who have to accommodate the carer employee, both while on FFWH and when they wish to return.

*Lack of capacity for employer to refuse the family friendly work arrangement*

51. As noted in detail above, the lack of capacity for an employer to refuse or to negotiate the family friendly working hours is a serious concern and unworkable in practice. Each request should be assessed on a case-by-case basis. It is very important that farmers have capacity to refuse a request for family friendly arrangements or negotiate an alternative.
52. The NFF also submits that the Commission should not ‘partially’ admit the ACTU’s application by varying Awards to include a “compromise” clause which, for example, reserves the employer’s right to deny the request where inconsistent with business needs or it is generally unreasonable. Ultimately, the employer is best placed to know what its business’ needs are and when a request is unreasonable. The obligation to take those considerations into account is already built into the s. 65. Building similar requirements into the Awards so that the employer’s discretion may be tested by the commission creates an unreasonable fetter on the employer’s business judgment.
53. In short, the Commission need not and should not grant employees the right to FFWH which extends beyond that currently contemplated by s. 65 of the FW Act.

*Period of employment required for eligibility*

54. For the reasons given above at paragraph 28(c) the NFF maintains that the requirement under s 65 of the FW Act for a 12 month period of service required before an employee is eligible to make a request for FFWH is reasonable.

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<sup>48</sup> i.e. up to the time the child reaches school age or three years.



**Ben Rogers**

**General Manager, Workplace Relations and Legal Affairs**

**National Farmers Federation**

**IN THE FAIR WORK COMMISSION**

**The Fair Work Act — s. 156 (4 yearly Review of Modern Awards)**

Matter No.: AM2015/2

Re: Family Friendly Working Arrangements

Filed by: National Farmers' Federation

**STATEMENT OF CHRIS KEMP**

1. I am a cattle, sheep and broadacre crop producer from Merriwa in New South Wales. I have been farming for 35 years and am a Director of the Sheepmeat Council of Australia, on the Executive Council of NSW Farmers, on the Advisory Council of the Local Land Services and Deputy Captain of the local Rural Fire Service.
2. I have one full time employee who works on my farm and has been employed full time for 6 months. We have not had a full-time employee for the past 15 years and instead relied on contractors.
3. We do not have a rigid, formal flexible work arrangement however, we have lots of flexibility in our operation. The employee often leaves early on a Friday or on other days for his hobbies.
4. In the past we have had employees take time off during usual work hours to attend swimming carnivals and other family responsibilities.
5. Some flexibility in our operation means that employees can balance this out by working extra hours at other times.
6. If we had an employee who asked for reduced work hours, we would find it very difficult to grant this in full as there are certain times of the year such as shearing and harvest where we would need that employee to be available full time. We would instead try to negotiate with that employee to give them the flexibility they need while still making sure that they are available at those critical times of the year.
7. If employees had an unfettered right to set their work hours, we look to rely on contractors again instead.
8. It is very important that we are able to negotiate with the employee to work out an arrangement that suits both parties. The level of flexibility that can be provided is assessed on a case by case basis.

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Chris Kemp /

30-10-17 .....

Date

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IN THE FAIR WORK COMMISSION

The Fair Work Act — s. 156 (4 yearly Review of Modern Awards)

Matter No.: AM2015/2

Re: Family Friendly Working Arrangements

Filed by: National Farmers Federation

STATEMENT OF DEBORAH PLATTS

1. I am a dairy farmer running a family farm with my husband, Richard, in Bega in the south-east of New South Wales.
2. I have been farming for 18 years and have a degree in Agricultural Science. My husband, Richard is a second-generation farmer and has farmed for 42 years, his entire working life.
3. We have 700 dairy cows on 3,000 acres, a total of nine staff, and employ seven non-family staff to operate the business. – This includes full time, part-time and casual employees.
4. Unlike white collar or retail work places, the farm cannot close after business hours or on weekends and public holidays. A dairy farm is always working and its demands are regular and constant.
5. The cows have to be milked twice per day, seven days a week, every day of the year.
6. While this is a basic part of the dairy business (i.e. in terms of producing the commodity), it is also a matter of animal welfare. A dairy cow that is not milked will become ill and may develop mastitis, an inflammation and infection in the udder which is potential fatal.



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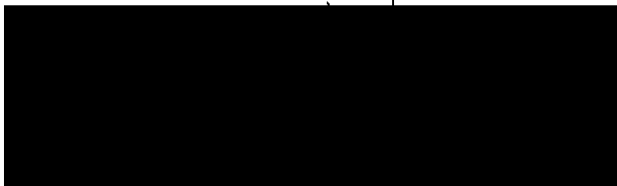
7. To manage this requirement, we schedule the milking of our cows daily into two 'time blocks': the morning milking from 5 am to 9 am and the afternoon milking from 1 pm to 5 pm.
8. Our staff are very important to us. They are vital to the efficient and profitable operation of our farm. They would be difficult to replace if they resigned, particularly given that our farm is in a regional area with a relatively small population and therefore limited source of labour.
9. For that reason we make significant efforts to retain our staff and accommodate their needs and preferences.
10. In addition to providing some food and housing, we pay them at a rate which is significantly (from \$100 to \$250 per week) higher than the award rate.
11. We also have a 'rolling' fortnightly roster which is designed to enable our staff to have time off and be with their families on alternative weekends without neglecting the daily milking schedule.
12. Indeed, the milking schedule represents a compromise between the farm's business needs, the cows' welfare, and the personal life of our family and staff. Ideally, there would be a twelve hour gap between each milking so that (rather than 1 pm to 5 pm) the second milking of the day would actually occur in the evening/night from 5 pm to 9 pm. However we schedule the afternoon timeslots so that work ends at the typical 'close of business' to allow staff to be at home with their families at the customary time.
13. Furthermore, we endeavour to accommodate our staff's reasonable requests for flexibility. For example, although we would prefer that she worked full-time, one of our staff is employed part-time because the only farm work she wants to do is milking the cows and part-time hours enables her to pick-up shifts at the local supermarket. Indeed, we have one casual employee on our books solely to "fill gaps", so that we can accommodate staff who are not available to work.
14. We have another employee who is a retired ex-serviceman and only wants to work 10 hours per week, so we accommodate his skills as a maintenance operator and he attends





the business twice a week. This is a valuable relationship that has been ongoing for approx. 14 years.

15. In short, we always have and always will attempt to accommodate any reasonable or workable request for flexible working arrangements. To date we have never denied any such request, irrespective of the inconvenience to us or the farm.
16. This is demonstrated by the fact that all our staff have been with us for a relatively long period. Most of our staff have been with us for over two years, with some as many as 7 and 14 years.
17. However, the nature of the dairy business and the needs of our cows would constrain our ability to consent to any and all requests for flexible working arrangements.
18. Critically, we need staff to be able to work the milking schedule; that is, to be available to work at the times of the morning and afternoon milking. As described above, we have already built as much flexibility into that schedule as possible. Furthermore, we could not assign the employees to alternative duties as there is very little other productive work for them to do (i.e. at other times of the day).
19. Furthermore, employing additional staff to co-ordinate shifts around a variety of non-standard working arrangements is not an option for us. Even if we could find the additional staff — which as stated above would be difficult — as a small family business, we do not have the capacity to absorb any additional administrative or financial costs (i.e. beyond salaries) which that would entail.
20. Finally, as noted above, we allow flexible arrangements for our employees to the extent the nature of our farms operations allows. It follows that, at least in our business context, the clause proposed by the ACTU could only operate where an employee's request is unworkable or unreasonable and cannot be granted for operational reasons. For example, if the staff member could only work during school hours and we were unable to make up those hours from another employee.
21. For that reason, if the ACTU's application was granted it could be catastrophic for our business.



21-10-2017



[Name]

27-10-2017

Date

**IN THE FAIR WORK COMMISSION**

**The Fair Work Act — s. 156 (4 yearly Review of Modern Awards)**

**Matter No.:** AM2015/2

**Re:** Family Friendly Working Arrangements

**Filed by:** National Farmers Federation

**STATEMENT OF EDWINA BEVERIDGE**

1. I am a farmer from South West Slopes region of New South Wales, I have been farming professionally for 16 years. I have a Bachelor of Commerce from the University of Sydney, have qualified as a Chartered Accountant, and am a Graduate of the Australian Institute of Company Directors. I was the runner up NSW/ACT RIRDC Rural Woman Award in 2014.
2. I am co-owner, with my husband, Michal Beveridge, of the farming business trading as Blantyre Farms Pty Ltd.
3. Blantyre Farms is a 2,200 sow intensive piggery. It also includes approximately 10,000 acres of mixed farming of sheep, cattle and winter cropping.
4. At present we employ 39 permanent staff, one casual cleaner. We also engage shearers on a casual, seasonal basis.
5. Our staff work standard hours at the piggeries of 6:00 am to 2:30 pm and, for the mixed farming, 7:30 am to 4:00 pm.
6. We value our staff highly and believe that they are an important part of our business and endeavour to be flexible in order to ensure they are happy, healthy and productive.
7. However, there are significant limits on the flexibility that we are able to offer.

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8. Many of the tasks in the piggeries operation are performed on a daily basis and intertwine or require multiple staff to be completed safely and efficiently.
9. For example after weaning, sows are moved from the farrowing house to the dry sow shed, this task normally requires three people. Once the sows have been removed from the farrowing house, the farrowing crate must be pressure washed, disinfected and given time to dry before the next sows are placed into the farrowing house. If moving sows is delayed the whole cycle is disrupted, if pens are not adequately cleaned and dried animal welfare of new born piglets may be threatened.
10. Staff working with pigs are required to work on weekends. It can be challenging to ensure we have enough people rostered on every weekend to provide adequate care for our pigs, particularly given that, although it is not always possible, we try to minimise the times staff work alone in pig sheds. We are flexible where we can be with staff swapping weekends and accommodating leave and weekend requirements, however this is not always possible.
11. We put the welfare of our animal at the centre of our business. This means that the animals must be attend to daily and we, in turn, rely on our staff to provide that attention; to check on the animal's health and wellbeing, and ensuring that they have adequate feed and water.
12. Indeed, the model *Code of Practise for the Welfare of Animals 2008*<sup>1</sup>, which establishes the standard competency for stock-persons (who care for pigs on a day-to-day basis), provides that:

*Pigs must be cared for by personnel who are skilled in pig husbandry and are competent to maintain the health and welfare of the animals in accordance with the Standards listed in this code, or are under direct supervision of such personnel.*<sup>2</sup>

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<sup>1</sup> CSIRO Publishing, May 2008, ISBN: 9780643094789 at page 2

<sup>2</sup> Ibid at paragraph 2.2

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The guidelines for that standard provides that:

*The suggested level of skills from training and competency for supervisors is at Certificate III in Agriculture – Pig Production, or an equivalent qualification.*<sup>3</sup>

We rarely find job applicants with pig skills, we train staff to acquire a Certificate III, and ensure we have a reasonable number of “competent” staff employed.

13. Furthermore, there are significant limitations on the time at which much of the work can be done. For example, sows need to be bred on the day that they cycle. Stock may become stressed if husbandry activities are performed during the heat of the day, work plans are structured to minimise strenuous activities for the pigs during hot weather. Furthermore, animals (and pigs in particular) are prone to illness and the effectiveness of their treatment will be compromised if the timing of the vet’s treatment plans are not followed. Crops have to be sown, sprayed, and harvested all within a very small windows. In addition, our support businesses, such as the delivery of feed, the collection of semen, and transport of sale animals are all time critical.
14. If our employees had discretion to determine their own working hours it may be difficult if not impossible to ensure the work gets done, the animals are not neglected or unduly distressed, and the business is not compromised.
15. Furthermore, as we are situated in a rural area with a relatively small population we simply do not have a large labour pool to draw upon. This means that we would find it difficult to ‘back-fill’ any labour shortages which will be created by any flexible working arrangements that we would be forced to accept.
16. It also means that replacing employees is a significant challenge and as such, we make an effort to ensure our employees are happy and not inclined to look for alternative employment.
17. To that end we provide flexibility where possible and have a number of non-standard working arrangements in place. For example:

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<sup>3</sup> Ibid at paragraph 2.5

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- a. Some of our piggery staff work an 11 days on and 3 days off roster;
  - b. Two of our staff work part time hours.
  - c. Several former employees only worked during school hours.
  - d. Staff typically start early on Christmas Day, at 4 or 5 am, to allow them to completed the work and get home to their families by mid to late morning.
  - e. For approximately two years we have held open the position of one staff member who has been very ill so that he has been able to return on and off as his health permits.
18. We entered into all of these arrangements at the election/behest of the employee(s) concerned to accommodate their non-work, family, or social needs. However, they were all arrived at in discussion with the employee without compromising the needs of the farm.
  19. In addition to offering flexible working arrangements where possible, to demonstrate how much we value our employees we pay experienced staff above award wages and also have a bonus system based on production KPIs which enable staff to earn a significant amount. Furthermore, we train all our staff internally and externally and regularly hold staff barbeques and dinners.
  20. In the last two to three years we have had very low staff turnover, we are very proud of this, are grateful to our staff and work hard to achieve it.
  21. All of that being said, while we value our staff as our most important resource and would like to be able to continue to tailor our flexibility arrangements for each staff member, we obviously need to be able to ensure that any such arrangements fits with the requirements of our animals' welfare, and the efficiency and profitability of our business.

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22. In short, there are limits on what we can do to accommodate our employee's requests while remaining a viable business which does not compromise the welfare of its animals. I am very concerned that having to accept any arrangements which an employee proposes will have a significantly detrimental and even critical effect on our farm.

[Redacted]

..... 29 September 2017 .....

[Name]

[Redacted]

Date

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