SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

21 December 2015

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

Via email: eec.sen@aph.gov.au

Re: Inquiry into the provisions of the *Fair Work Amendment (Remaining Measures) Bill 2015*

We refer to the resolution by the Senate on 3 December 2015 to refer the *Fair Work Amendment (Remaining Measures) Bill 2015* (the Bill) to the Education and Employment References Committee for inquiry and report.

The South Australian Wine Industry Association (SAWIA) is an industry association representing the interests of wine grape growers and wine producers throughout the state of South Australia. SAWIA membership represents approximately 96% of the grapes crushed in South Australia and about 36% of the land under viticulture. Our membership includes businesses that have operations across Australia.

SAWIA is a registered association of employers under the South Australian *Fair Work Act 1994* and is also a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009.*

SAWIA is pleased to be given the opportunity to make a submission to the inquiry.

The Bill was introduced in the House of Representatives by the Assistant Minister for Science on 3 December 2015. According to the second reading speech the Bill reintroduces the six remaining measures from the *Fair Work Amendment Bill 2014* that failed to attract sufficient support in the Senate in October 2015.

SAWIA notes that five out of the 6 measures of the Bill were recommended by the Fair Work Review Panel's (the Review Panel) report "*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation".* The review panel was established by the Former Gillard Labor Government on 20 December 2011. The panel was required to amongst other things *"examine and report on […] areas were the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation."*

SAWIA submits that measures of the Bill are modest, pragmatic and practical and would improve the operation of the *Fair Work Act 2009* consistent with the overall objects and spirit of the Act.

Specific measures of the Bill:

Untaken annual leave to be paid out as provided by the applicable industrial instrument

Section 90(2) of the Act has been interpreted by the Fair Work Ombudsman (FWO) and more recently

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by the Courts[1] to mean that where an industrial instrument provides for annual leave loading such loading must also be provided upon termination regardless of whether the industrial instruments states the contrary. This has led to the absurd situation where 29 Modern Awards[2], equivalent to 26% of the Modern Awards that contain annual leave loading are in breach of the Act given that they specifically exclude annual leave loading on termination.

This in turn may lead to a bizarre outcome where an employer who has complied with their Modern Award provision on annual leave loading in good faith risks prosecution and penalties for simply complying with a clear and explicit provision of their Modern Award.

SAWIA submits that this is an unacceptable situation that requires immediate legislative attention

The Review Panel noted that the traditional and historic approach by industrial tribunals has been that annual leave loading is not payable on termination of employment and recommended that:

"*Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees."*[3]

The effect of the wording of section 90(2) is that decades of settled legal precedent in relation to annual leave loading has been overturned. The FWC and its predecessors over the last decades and as recent as when the Modern Award system was created in 2010 determined that it is appropriate for Modern Awards to specify that annual leave loading is not payable on termination of employment.

Therefore, it is disappointing that parties and stakeholders that often and loudly praise the independence of the FWC seem unable to accept the FWC's decision that annual leave loading is not payable on termination of employment and instead continue to insist on retaining section 90(2) which has the effect of invalidating the FWC's decisions.

SAWIA submits that the Review Panel's observations and recommendations are as valid today as they were when their report was published in August 2012.

Accordingly, SAWIA supports the proposed amendment to Clause 90(2).

Accrual of annual leave during periods of workers compensation

Under section 130(1), an employee is not entitled to take or accrue annual leave while being absent from work due to workers compensation. However, section 130(2) provides that this exclusion does not apply where a State or Territory compensation law allows for accrual or annual leave during periods of workers compensation.

Section 130 as currently structured is confusing and potentially misleading as it requires an employer to refer to the relevant State or Territory workers compensation law. For employers with operations in more than one State or Territory this creates additional issues of red tape and inconsistencies.

In this context, the Review Panel made the following observation:

"Advice from the FWO is that only the Commonwealth's and Queensland's workers' compensation laws unequivocally allow the accrual of annual, personal and long service leave, and that Queensland is the only jurisdiction that allows workers to take all of these leave types while on workers' compensation. Tasmania is the only other state that unequivocally allows workers to take leave (annual and long service) while on workers' compensation.

[1] Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union [2015] FCAFC 100 (23 July 2015)
[2] Evidence from the Fair Work Ombudsman to the Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates 2010-2011, p. 47
[3] Fair Work Review Panel 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation.,* p. 100

The situation for the remaining jurisdictions is that the accrual or taking of leave is either equivocal or not permitted. […] This is confusing for affected parties and may involve costs—for example, in obtaining legal advice."[4] [Emphasis added]

In South Australia, section 50(2) and 50(3) of the *Return to Work Act 2014* states the following in relation to accrual of annual leave:

"If a worker is absent from employment in consequence of a work injury, the period of absence must for the purposes of computing the worker's entitlement to annual leave or sick leave under any Act, award or industrial agreement, be counted as a period of service in the worker's employment.

If a worker has received weekly payments in respect of total incapacity for work over a period of 52 weeks or more, the liability of the employer to grant annual leave to the worker in respect of a year of employment that coincides with, or ends during the course of, that period will be taken to have been satisfied."

An employee is South Australia therefore will continue to accrue annual leave up until a period of 52 weeks of total incapacity. Where the employee has received weekly payments for total incapacity for a period of 52 or more weeks, annual leave will no longer continue to be accrued.

Given that national system employees derive their annual leave from either the Act or an industrial instrument, for simplicity and clarity and reduce confusion and uncertainty, the reference to State or Territory workers compensation law in section 130(1) should be removed so that the rules on accruing and taking annual leave is fully covered by the Act.

SAWIA agrees with the Fair Work Review Panel that section 130 should be amended to clarify that annual leave cannot be accrued while absent from work and in receipt of workers' compensation payments.

Individual Flexibility Terms

Since the early 1990s employers in the Wine Industry have negotiated enterprise agreements to obtain greater flexibility and more productive working arrangements appropriate to their individual company's operations and workplace.

This has included, but has not been limited to the following provisions:

- providing for a greater span of ordinary hours, including weekend work in ordinary time;
- reducing penalty in rates in exchange of higher ordinary rates of pay;
- removing restrictions on the performance of certain tasks and jobs;
- providing for time off in lieu of overtime;
- allowing greater flexibility regarding meal and rest breaks; and
- providing for multiskilling and skills acquisition.

Whereas larger employers in the wine industry tend to be covered by enterprise agreements, smaller employers are less likely to engage in enterprise bargaining and more commonly remain covered by their Modern Award. There may be several reasons for this, including:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being too complex, costly and time-consuming and therefore not a realistic, practical and suitable ongoing proposition for a small business.

Prior to the enactment of the Act, the ability to negotiate Individual Flexibility Agreements (IFA) was promoted as being a great opportunity for employers and award-covered employees to negotiate flexible arrangements on an individual basis. Employers were told that:

- *"A simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory employment agreements and the associated complexity and*

[4] Fair Work Review Panel 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation.,* p. 88

bureaucracy attached to those agreements."[5]

- *"An award flexibility clause will enable arrangements to meet the genuine individual needs of employers and employees"*[6]

However, in reality small businesses with award-covered employees rarely view IFAs as a meaningful and effective means to negotiate working arrangements that are more suitable to the individual company or workplace. The effectiveness of IFAs is severely restricted for a number of reasons, including:

- the very limited scope of IFAs with only five specified matters capable of being varied;
- section 341(3) of the *Fair Work Act 2009* preventing IFAs from being offered as a condition of employment;
- the lack of stability as IFAs can be unilaterally terminated by either party giving thirteen weeks' notice;
- the inability of IFAs from stopping employees taking industrial action; and
- that IFAs can be overridden by a subsequent enterprise agreement.

Given these restrictions it is hardly surprising that only a very small proportion, 8% of employers, utilise IFAs as demonstrated by the FWC's study in November 2012[7]. The Productivity Commission estimates that approximately 2% of employees have an IFA[8].

Very few employers would be prepared to enter into an IFA that offers no long term stability as the employee can give notice and unilaterally cancel the agreement.

In addition, under the current provisions of the Act unions are able to stall enterprise bargaining negotiations and refuse to sign an enterprise agreement unless it contains a flexibility provision which effectively prevents an IFA from providing any meaningful flexibility.

An IFA already is able to provide non-monetary benefits. For example, the illustrative example on page 137 of the Explanatory Memorandum to the *Fair Work Bill 2008,* describes a situation where an employee voluntarily and at their initiative foregoes penalty rates in order to obtain a non-monetary benefit.

However, paragraph 868 on page 138 of the Explanatory Memorandum then goes on to say that *"it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged."*

Therefore, it is unclear how non-monetary benefits in an IFA would be assessed and the extent to which a non-monetary benefit would leave an employee better off overall.

The Bill proposes the following five changes in relation to IFAs:

- the introduction of an employee genuine needs statement;
- the introduction of thirteen weeks' notice for unilateral termination of an IFA;
- the introduction of a legislative note to clarify that an IFA can provide for non-monetary benefits;
- the introduction of a defence against a contravention of flexibility term where the employer reasonably believes that the requirements were complied with; and
- ensuring that an enterprise agreement cannot reduce the scope of an IFA.

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[5] Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, 2008, Second Reading Speech, Workplace Relations Amendment (Transition to Forward with Fairness), 13 February 2008.

[6] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Policy Implementation Plan", August 2007, p. 11.

[7] Fair Work Commission 2012, "The Fair Work Commission's General Managers Report into the extent to which Individual Flexibility Arrangements are agreed to and the content of those arrangements 2009-2012", November 2012, p. 39.

[8] Productivity Commission 2015, Workplace Relations Framework – Draft Report, p. 600

SAWIA supports the proposed changes to IFAs as they will clarify the application of non-monetary benefits and make IFAs a more realistic alternative to collective enterprise bargaining, particularly for small businesses.

The proposed Genuine Needs Statement in section 144(4)(c) and the legislative note to section 144(4) may offer some additional certainty where an employee requests non-monetary benefits through an IFA. Section 203(6)(a) aligns the notice period of unilateral termination of an IFA under an enterprise agreement with the notice period in the model IFA clause as developed by the FWC and inserted in Modern Awards.

Other provisions

SAWIA also supports the proposed amendments to the transfer of business, right of entry and FWC hearings and conferences.

Overall, SAWIA supports the introduction of the Bill as it contains a number of measures to better balance the requirements under the Act and to provide greater clarity and certainty.

Yours faithfully,

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Business Services Manager