

Submission to the Senate Education and Employment Legislation Committee's Inquiry into the following Bills:

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 ***Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017***



SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

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Introduction

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 (as it is known today) was established in 1840 as the *Society for the Introduction of Vines*. SAWIA recognised its 175 years of service to the South Australian wine industry in 2015.

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

Our membership represents approximately 96% of the grapes crushed in South Australia and about 36% of the land under viticulture. Each major wine region within South Australia is represented on the board governing our activities. Our membership range from Australia's largest wine producers to small, boutique wine producers and independent wine grape growers.

SAWIA has a long standing interest in employment, immigration and related policy areas and provides expert employment relations support, advice, training and consulting services to wine industry employers in South Australia and interstate. Over a long period of time, the wine industry has seen the importance of education and the importance of understanding the legal requirements they have to comply with. On a national level, SAWIA is the only wine industry organisation to provide specialist services, advocacy and representation in this area.

We are pleased to have the opportunity to provide a submission to the Senate Education and Employment Legislation Committee's inquiry into the following Bills:

- *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017;*
and
- *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.*

Wine industry: Australia and South Australia

The Australian wine industry consists of 65 wine regions across the six states and one territory (ACT). While wine grape growing and wine production occurs in the six States and the ACT, South Australia is the single largest State with 51% of the total wine grape crush.¹

The Australian Wine industry makes an important contribution to the Australian economy. According to the 2011 Australian Census the industry, including wine producers and wine grape growers, provides direct employment to 22,000 Australians.

75% of Australia's premium wines are produced in South Australia and South Australia makes up 60% of Australian wine exports. South Australia generated \$1.86 billion in Gross Wine Revenue of which approximately \$1.2 billion were generated through exports².

The value-add effect of the wine industry has seen many rural economies prosper with new housing, services and local employment opportunities.

¹ Winemakers' Federation of Australia 2016, Vintage Report, July 2016 <http://www.wfa.org.au/assets/vintage-reports/Vintage-Report-2016.pdf>

² PIRSA 2013, Wine: A Partnership 2010-2015, 2013 Update; PIRSA 2014a, Wine Opportunities in South Australia; PIRSA 2014b, Food and Wine ScoreCard 2013-2015;

The Bills

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

Overview

The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* (the Repeal Bill) was introduced by the Minister for Immigration and Border Protection in the House of Representatives on 1 March 2017.

According to the Minister's second reading speech the bill responds to "*a number of sensible recommendations made by the Productivity Commission inquiry into the workplace relations framework.*" *"The bill will:*

- *repeal the requirement for four-yearly reviews of modern awards;*
- *provide the Fair Work Commission the ability to overlook minor or technical procedural errors made during enterprise bargaining, where it is satisfied that an error or defect is not likely to have disadvantaged employees".*

The Minister continued that there is "*broad support for reforms to repeal four-yearly reviews*" and that in relation the Fair Work Commission's (FWC) approval process of enterprise agreements "*proscriptive, inflexible rules set out in the Fair Work Act mean that inconsequential procedural or technical errors made during bargaining prevent it from approving an enterprise agreement.*"

Procedural requirements in enterprise bargaining

Schedule 2 of the Repeal Bill introduces a new subsection 188(2) in the *Fair Work Act 2009* (the Act) to enable FWC in their assessment of the enterprise agreement to hold that the employees have genuinely agreed to the agreement even if there are minor procedural or technical problems in relation to pre-approval steps, time of voting and the Notice of Employee Representational Rights (NERR).

SAWIA would like to commend the Government for taking a common sense approach in seeking to resolve the issues with the NERR and in particular the Minister for Employment for amending the NERR effective from 3 April 2017.

Over the years several of our members who are involved in enterprise bargaining have reported a frustration with the rigid application of the requirements of the NERR and the lack of discretion/ flexibility to approve enterprise agreements where there are minor technical issues with the NERR.

For example various wine industry employers have reported that their enterprise agreements were refused approval by the FWC due to the NERR containing any the following:

- A reference to the Fair Work Commission "Help Line" instead of "Infoline";
- A reference to the FWC website instead of FWO;
- A reference to the former FWA website instead of FWO;
- Date when the notice was issued;
- The name and number of the Human Resources contact of the company in the event anyone had any questions; and
- A sentence encouraging union members to notify the company of their intention of who they elect as a bargaining representative.

SAWIA is aware that the FWC have also refused approval of other enterprise agreements for seemingly trivial reasons pertaining to the content and form of the NERR, including:

- Two additional pages stapled to the NERR; *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWC 2042
- Reference to the wrong website - FWC instead of FWO; *Re Transit (NSW) Services Pty Ltd* [2016] FWC 2742
- A reference to a timeframe for nominating a bargaining representative; *Cement Australia Pty Limited* [2011] FWA 6917
- The wrong telephone number being included; *The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics (C2016/4902)*; *The Maritime Union of Australia v DOF Management Australia Pty Ltd (C2016/4903)*; *The Maritime Union of Australia, v Smit Lamnalco Australia Pty Ltd (C2016/4904)* [2017] FWC 660

SAWIA notes that the Productivity Commission's final report into the Workplace Relations Framework³ recommended that the FWC be given wider discretion to overlook minor procedural or technical errors when approving an agreement and that the scope of discretion is extended to minor errors or defects relating to the issuing and content of a NERR.

The amendment to section 188 of the Act would ensure that common sense can prevail by making "*procedure a servant, not the king*"⁴ in relation to enterprise agreement approval. SAWIA strongly supports this aspect of the Repeal Bill as it would resolve a major frustration of the wine industry regarding the approval process of enterprise agreements.

End of 4-yearly Modern Award Reviews

The Award system has undergone major changes over the last 8 years and SAWIA has participated in and spent considerable resources ensuring that the needs of the wine industry has been known to and taken into account by the FWC in hearing applications and submissions for making or varying awards of importance to the wine industry through the following processes:

- Part 10A Award Modernisation Process (2008-2010);
- Modern Award variations under section 157-160 (2009-ongoing);
- Modern Awards Review 2012 (2012-2014); and
- 4 Yearly Review (2014-ongoing).

The mere fact that the 4 Yearly Modern Awards Review now is in its 3 year with the majority of the 122 Modern Awards yet to be formally reviewed and a number of common claims yet to be heard or completed is an indication of the substantial demands placed on both the parties and the FWC by the requirements of the 4 Yearly Review.

If the requirement for the FWC to carry out 4-yearly Reviews is repealed there will still be open for parties to seek variations to Modern Awards under sections 157-160.

SAWIA supports this aspect of the Bill.

³ Productivity Commission 2015, Workplace Relations Framework, Inquiry Report, No. 76, 30 November 2015

⁴ Ibid, p. 663

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Overview

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Vulnerable Workers Bill) was introduced by the Minister for Immigration and Border Protection in the House of Representatives on 1 March 2017.

The Bill seeks to give effect to the Government's election commitment to address serious contraventions by franchisees and subsidiaries by extending the responsibility of franchisors and holding companies, increasing penalties and making it an explicit contravention of the Act by requiring employees to enter into a "cashback arrangement" where the employee is required to pay their salary to their employer.

One of SAWIA's key functions and responsibilities is to advice, assist and educate wine industry employers on all aspects of industrial relations and human resource management. This amongst other things involves delivering seminars and presentations to wine industry employers across South Australia's 18 wine regions and to interstate partners. In addition, SAWIA has developed and delivered seminars, guides, checklists and specific information on the engagement of labour hire staff and migrant workers and the practices and procedures to be implemented to assist compliance with industrial, migration, work health and safety and anti-discrimination laws.

SAWIA has good working relationships with State and Federal agencies, including the Fair Work Ombudsman, Australian Taxation Officer, SafeWorkSA and ReturnToWorkSA.

SAWIA is proud of the record of the South Australian wine industry and the proactive role played by our members in striving for compliance with workplace laws.

It is welcomed that the Federal Government has sought to improve the cooperation and information sharing between Federal and State agencies involved in regulating and enforcing the laws in relation to employment and in particular the work undertaken to date by Taskforce Cadena, the Phoenix Taskforce and the Migrant Workers' Taskforce.

However, it is important that in seeking to capture the small number of businesses that deliberately are breaching workplace laws, the Government does not simply to add more regulation and increase the compliance costs of those already doing the right thing in the hope that it will capture the small minority of businesses that are not.

Increased penalties

The Vulnerable Workers Bill seeks to double the penalty for contraventions of the record-keeping and payslip requirements in section 535 and 536 of the Act with the particulars set out in the *Fair Work Regulations 2009*. Further, the Explanatory Memorandum at [15] explains that the increase in penalties also applies to false or misleading records which the employer knows to be false or misleading.

This means that an employer who may have overlooked to include one piece of information, for example the ABN number on the payslip as required by regulation 3.46, potentially could be exposed to a maximum penalty of up to \$10,800 for an individual and \$54,000 for a corporation.

According to the Minister's second reading speech states that the changes in the Vulnerable Workers Bill "*will not hold companies liable for mistakes*" and that the "*Fair Work Ombudsman is required to act as a model litigant and will pursue prosecution only in cases*

where penalties are appropriate.” Further, the Explanatory Memorandum at [16] sets out the following:

“This increase in the penalties is not designed to target those employers who genuinely overlook record-keeping requirements. Rather, it is aimed at deterring the small minority of employers who deliberately fail to keep records as part of a systematic plan to underpay workers and disguise their wrongdoing.”

However, these assurances are of little comfort. There is nothing other than the Fair Work Ombudsman’s internal policy position that will guide whether a business that has made an honest mistake in relation to record-keeping will be subject to prosecution or not.

If indeed it was the intention of the Government that only deliberate or serious contraventions or contraventions involving false or misleading records or payslips would be subject to increased penalties there would be no need for a blanket increase of the penalties in relation to employee records and payslips.

This is because the serious and deliberate contraventions of record-keeping and payslip requirements would be subject to the new concept of “serious contravention” under new section 557A with penalties of up to \$108,000. Further, false and misleading records and payslips have been specifically in the amendments to sections 535 and 536 and could be assigned the higher penalty without increasing the penalty for contraventions of a less serious nature.

SAWIA therefore oppose the blanket increase in the penalties for record and payslip contraventions that would not qualify as serious under section 557A or that would not be taken to false or misleading where this is known by the employer.

Prohibition against “cashback” arrangements

While SAWIA is aware of allegations in the media of cashback arrangements whereby an employer is required to return their whole or part of the wage to their employer for their employer’s benefit in other industries, there is no evidence of any South Australian wine industry employer engaging in such practices.

SAWIA does not oppose the clarification of sections 325 and 326 of the Act to make it explicit that cashback arrangements are unlawful and that appropriate penalties would apply.

Self-incrimination

New section 713 seeks to abrogate the privilege against self-incrimination. According to the Explanatory Memorandum at [16] this fundamental change is required *“to ensure the FWO has all the available, relevant information to properly carry out its statutory functions”* and to prevent *“a culture of non-compliance becoming entrenched across a business, a business network or even more broadly”*.

This is an unsatisfactory and inadequate justification for removing the privilege against self-incrimination and in the absence of any specific evidence or data appears to be based on what might happen in the future.

The Bill raises the following questions:

- Is there any evidence that investigations have stalled or fallen apart due to the inability of the FWO to collect the necessary evidence to commence court proceedings involving for example flagrant and substantial underpayments?

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- If so, what is the proportion of investigations or proceedings where this has occurred?
- Why the other measures of the Vulnerable Workers Bill in relation to the powers of the FWO would not adequately prevent “*a culture of non-compliance*”?
- What other measures have other Federal investigate and enforcement agencies implemented?

SAWIA submits that the expanded powers of the FWO provided for elsewhere in the Vulnerable Workers Bill, including expanded provisions regarding hindering or obstructing an investigation and penalties for providing false or misleading information or documents already go a long way in further assisting the FWO in their investigate and enforcement role.

SAWIA strongly opposes the proposed removal of the privilege against self-incrimination and would urge the Senate to remove this aspect of the Vulnerable Workers Bill.