Submission to the Senate Education and Employment Legislation Committee's Inquiry into the Fair Work Amendment (Bargaining Processes) Bill 2014

SUBMISSION OF: 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 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 a not for profit incorporated association, funded by voluntary member subscriptions, grants and fee for service activities, whose mission is to provide leadership and services which underpin the sustainability and competitiveness of members' wine business.

SAWIA 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. Where possible, SAWIA works with the national Winemakers Federation of Australia and state counterparts in the wine industry

SAWIA has a strong track record as an industry leader and innovator in many areas. SAWIA pro-actively represents members and the greater wine industry with government and related agencies in all aspects of business in the wine sector.

Overview

SAWIA is pleased to have the opportunity to provide a submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Amendment (Bargaining Processes) Bill 2014* (the Bill).

The Bill was introduced in the House of Representatives by the Leader of the House and Minister for Education (the Minister) on 27 November 2014 and on 4 December 2014 was referred by the Senate to the Committee for inquiry.

In the second reading speech to the Bill the Minister referred to the fact that the Bill was giving effect to specific policy commitments of Coalition's Industrial Relations Platform - "The Coalition's Policy to Improve the Fair Work Laws" which was released prior to the 2013 Federal election.

The policy platform contained a number of specific commitments that included:

- requiring productivity improvements to be discussed during enterprise bargaining negotiations;
- reversing the current "strike first, talk later" approach by ensuring that protected industrial action can only be taken once proper and meaningful discussions have been held; and
- ensuring that protected industrial action cannot be taken to advance claims that are exorbitant, excessive or that would adversely affect productivity.

The Bill contains the following three key amendments to the *Fair Work Act 2009* (the Act):

- an additional approval requirement for enterprise agreements through new subsection 187(1A), requiring the Fair Work Commission (FWC) to be satisfied that productivity improvements have been discussed;

- clarifying that the FWC must only approve an application under section 443(1) for a protected action ballot where the applicant has been, and is, genuinely trying to reach agreement with the employer, having regard to all relevant circumstances including four specific matters included in new subsection 443(1A); and

- inserting a new requirement that FWC must not approve an application under section 443(1) for a protected action ballot where it is satisfied that the claim, or taken as a whole, the claims are *"manifestly excessive"* or would have a *"significant adverse impact on productivity at the workplace"* through substituted subsection 443(2).

Enterprise bargaining and award-flexibility

Since the introduction of enterprise bargaining in the Federal and South Australian industrial relations jurisdictions in the early 1990s, employers in the South Australian 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:

- removing impediments to part-time and casual employment;
- allowing part-time and casual employees to be employed for shorter minimum engagements;
- providing for a greater span of ordinary hours, including weekend work in ordinary time;
- 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;
- providing for multiskilling and skills acquisition;
- implementing formal mechanisms and structures to drive continuous improvement; and
- allowing substitution of public holidays.

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 a view that due to the relatively small scale of the operations and small number of employees it is not worthwhile negotiating a comprehensive enterprise agreement, the inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test or that collective enterprise bargaining is too complex and time-consuming and not a realistic, practical and suitable arrangement for a small business.

Prior to the enactment of the Act, the ability to negotiate Individual Flexibility Agreements 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 bureaucracy attached to those agreements."*[1]

- *"An award flexibility clause will enable arrangements to meet the genuine individual needs of employers and employees"*[2]

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;

[1] 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.
[2] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Policy Implementation Plan", August 2007, p. 11.

- section 341 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[3].

The industrial relations framework, including the Act, should reflect the actual industrial landscape in 2015 and support the requirements of a modern, vibrant economy. However, that is not the case today. The Act is based on the assumption that a majority of employees are members of a union, wish to act and bargain collectively and emphasises union involvement and consultation. In reality only a small proportion of employees have elected to join a union. The overall proportion of employees who are union members has declined from 46% in 1986 to 17% in 2013 and among private sector employees only 12% are union members.[4]

SAWIA's position is that the workplace relations system must reflect this reality and provide a greater range of options and mechanisms for negotiating mutually beneficial arrangements both collectively and individually to improve workplace productivity. These are discussed further below.

Specific provisions of the Bill

Productivity Improvements

According to the Minister's Second Reading Speech the intent behind new subsection 187(1A) is to "*put productivity back on the bargaining agenda"* by making sure *"that parties have at least considered how productivity in their workplace could be improved"*.

SAWIA agrees that in a globally competitive environment it is vital that both the private sector and the Government remain focused on driving productivity improvements in the economy. However, addressing labour productivity requires more than adding an additional approval requirement for enterprise agreements. Simply mentioning the term productivity or agreeing that it is important to lift productivity does not in itself lead to productivity improvements.

If the intent of the legislation is to contribute to lifting labour productivity, before solutions and remedies are developed it would seem more rational to collect data and analyse to what extent productivity is discussed already and indeed addressed in existing enterprise agreements. In the absence of such data it is not possible to determine whether the root cause of low labour productivity is a lack of focus on productivity improvements in the enterprise bargaining process or whether other more complex issues of public policy, including comprehensive reforms to the workplace relations system, would need to be addressed.

Proposed subsection 187(1A) could be viewed as being more symbolic than intended to result in practical, tangible outcomes. For example, one would have expected some oversight to ensure compliance with the new requirement.

[3] 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.

[4] Australian Bureau of Statistics 1996, Trade Union Members, Australia, Catalogue No. 6325.0; Australian Bureau of Statistics 1994, The Labour Force Australia, December 1994, Catalogue No. 6203.0; Australian Bureau of Statistics 2013, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Catalogue No. 6310.0

However, as demonstrated by item 9 of the Explanatory Memorandum to the Bill, the FWC neither will consider the merit of the productivity improvements discussed, the detail of the matters discussed, the outcome of the discussions nor whether it would be reasonable for the proposed enterprise agreement to include certain terms and conditions relating to productivity. By mentioning this, SAWIA is not necessarily advocating that the FWC has a role to play in assessing the merits of productivity discussions.

If an applicant seeking approval for an enterprise agreement simply can demonstrate compliance with new subsection 187(1A) by ticking an additional box on the FWC's "Form 16 – Approval of an enterprise agreement", all that subsection 187(1A) will achieve is adding to the administrative requirements and potentially prolonging the agreement-making process without having any positive impact on labour productivity.

SAWIA, on behalf of its members, submits that instead of symbolism what is required are practical reforms to the workplace relations system to support employers implementing smarter, more efficient, productive work practices and remove impediments and barriers to labour productivity. Such reforms should include:

- refocusing the Modern Award system on being a genuine minimum safety net of core terms and conditions rather micromanaging and regulating the employment relationship in detail;

- enabling weekends to be worked within the ordinary hours of work;

- aligning the penalty structure in Modern Awards with the realities of the 24/7 economy;

- providing greater options in enterprise bargaining, including statutory individual agreements and genuine non-union agreements;

- simplifying and streamlining the agreement-making process;

- enabling a greater number of award terms to be varied by IFAs; and

- providing clearer rules on permitted matters in enterprise agreements to ensure unions cannot take protected industrial action to advance claims that do not directly relate to the employment relationship, e.g. restrictions and barriers to outsourcing and the engagement of independent contractors and labour hire employees, payroll deductions of union fees, union involvement in employee inductions, trade union training leave and union picnic days.

While SAWIA's members are constantly considering ways of ensuring that they remain globally competitive, including improving labour productivity, without reforming the workplace relations system there is a limit to what can be achieved in terms of labour productivity improvements within the current workplace relations framework.

Genuinely trying to reach agreement

The Federal Court decision in *JJ Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53* demonstrated that under the Act unions could adopt a "strike first, talk later" approach and take protected industrial action even before engaging in any genuine bargaining.

The decision caused major concerns among employers who had trusted the previous Labor Government's statements and assurances prior to the 2007 Federal election that there would be no expansion of the right to take protected industrial action under the Act. Certainly

employers did not take any of the following statements and references to "tough rules" to mean that the new laws would allow unions to strike first and talk later.

- *"Labor will be tough on industrial action in breach of Labor's laws."*[5]
- *"Labor's new industrial relations system will not permit industrial action being taken outside our clear, tough rules."*[6]
- *"Industrial action will only be protected from legal sanction if it is taken during a bargaining period for a collective agreement."*[7]
- *"Under Labor, protected industrial action will be available during good faith bargaining, but only in accordance with Labor's clear, tough rules."*[8]
- *"They will not be able to strike unless there has been genuine good faith bargaining."*[9]

Unsurprisingly when the previous Government's Fair Work Act Review was announced the issue of "strike first, talk later" attracted a lot of attention and numerous submissions addressed the issue in detail, calling on the Review Panel to give serious consideration to recommending amendments to the Act.

In its report, the Review Panel made the following observations regarding the "strike first, talk later" issue:

"While the law is now settled, we do not think this is the appropriate outcome from a policy perspective. Given the legislature has sought to codify the circumstances in which an employer can be positively required to bargain, we consider it incongruous for industrial action to be available to bring pressure to bear on an employer to bargain outside of those circumstances.

The mechanism to compel bargaining under the good faith bargaining provisions, a majority support determination, requires the support of a majority of the employees to be covered by a proposed agreement. In contrast, industrial action can be taken by a minority of employees to be covered by a proposed enterprise agreement. Viewed this way, the capacity for protected industrial action to be taken to persuade an unwilling employer to bargain tends to undermine the majority support determination provisions, and represents a clear 'disconnect' with the new bargaining regime in the FW Act."[10]
[Emphasis added]

The Review Panel put forward recommendation 31 proposing an amendment to the Act to ensure that an application for a protected action can only be made where bargaining has commenced.

Despite the major expansion in the ability to take protected industrial action following the *JJ Richards Case* the previous Labor Government seemed unwilling to deal with the issue, even after receiving the Review Panel's recommendation above.

SAWIA strongly supports the proposed amendments to subsection 443(1), including the insertion of new subsection 443(1A) to clarify what it means to "genuinely trying to reach an agreement". SAWIA is satisfied that the amendments will ensure that protected industrial

[5] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Policy Implementation Plan", August 2007, p. 21
[6] Ibid
[7] Ibid
[8] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces", April 2007, p. 16
[9] Kevin Rudd MP 2007, Address to the National Press Club, 17 April 2007
[10] Fair Work Act Review Panel 2012, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", p. 177

action once again becomes a matter of last resort rather than taken upfront, before genuine bargaining has commenced.

Manifestly excessive or significant adverse impact on workplace productivity
It is well-published that unions in the resources and maritime industries have taken protected industrial action to obtain wages and conditions that a reasonable person would consider unrealistic, unreasonable and unsustainable.

Industrial action is relatively rare in the wine industry and generally employers and employees have a reasonably harmonious relationship. However, the industry is not immune from excessive wage claims. In the past a member of SAWIA was faced with a 76% wage increase claim and the union sought a protected action ballot to further advance their claim. There is also a risk that if unions in the resources and maritime industries are allowed to continue to take protected industrial action to advance exorbitant, excessive, extreme and unrealistic wage claims, in the long run this could spread to other industries.

SAWIA supports the proposed amendment to subsection 443(2) to ensure that protected industrial action cannot be taken for claims that are manifestly excessive or that would have a significant adverse impact on workplace productivity. However, to ensure that the amendment is interpreted as intended and not intentionally or unintentionally watered down, the Act should provide specific guidance on the intended meaning of “manifestly excessive” and “significant adverse impact”.

Conclusion

SAWIA broadly supports the introduction of the Bill. It contains important measures in relation to protected industrial action. However, SAWIA questions whether proposed subsection 187(1A) will have any positive impact on labour productivity.

SAWIA submits that the Government should consider more comprehensive reforms to the workplace relations system to support employers implementing smarter, more efficient, productive work practices and remove impediments and barriers to labour productivity.