Submission to the Senate Education and Employment Committee's Inquiry into the *Fair Work Amendment (Protecting Australian Workers) Bill 2016*

SUBMISSION OF: SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION INCORPORATED

ABN: 43 807 200 928

ADDRESS: First Floor, Industry Offices
National Wine Centre
Botanic Road
ADELAIDE SA 5000

TELEPHONE: (08) 8222 9277

FACSIMILE: (08) 8222 9276

EMAIL: admin@winesa.asn.au

WEB: www.winesa.asn.au

DATE: 4 April 2016

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 transitionally recognised 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.

SAWIA provides expert employment relations support, advice, training and consulting services to wine industry employers in South Australia and interstate. This includes advice in relation to rates of pay and award entitlements, NES, employment contracts, work health and safety, discrimination, bullying, and the engagement of labour hire staff and independent contractors. 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.

SAWIA have established good working relationships with State and Federal regulatory agencies, including Safework SA, ReturntoWorkSA and the Fair Work Ombudsman.

We are pleased to have the opportunity to provide a submission to the Senate Education and Employment Committee's inquiry into the Private Member's Bill – the *Fair Work Amendment (Protecting Australian Workers) Bill 2016 (*the Bill)

The South Australian wine industry

The South Australian wine industry, comprising 18 wine regions from Southern Flinders Ranges in the North to Mount Gambier in the South, Kangaroo Island in the West to Riverland in the East, is internationally recognised as a premium wine producer. 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 exports[1]. The value-add effect of the wine industry has seen many rural economies prosper with new housing, services and local employment opportunities.

The Australian wine industry consists of 65 wine regions across the six states and one territory (ACT). The industry is predominately is based in rural and regional Australia. Applying the Australian Bureau of Statistics' "Australian Statistical Geography Standard Remoteness Structure"[2] which classifies Australia into five classes – major cities, inner regional, outer regional, remote and very remote, 89% of the wine regions and zones are located in regional areas.

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

[2] ABS 2011, Australian Statistical Geography Standard (ASGS): Volume 5 – Remoteness Structure, Maps, Australia, July 2011, Catalogue 1270.0.55.055, http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/EB3374C05104D74ACA257D1E00128192/$File/1270055005_2011_remoteness_structure_maps.pdf

Purpose of the Bill

Underpayment of wages and entitlements

According to the second reading speech to the Bill *"illegality and exploitation of workers is beginning to flourish"* and the penalties in the *Fair Work Act 2009* (the Act) "*are clearly an inadequate deterrent given the brazen and systemic underpayment we have seen in the last 12 months*".[3]

SAWIA does not accept this description of the level of compliance by wine industry employers. The examples referred to in the factsheet are not representative of the wine industry. It is unfortunate that the contraventions by a handful or national firms are being used to taint the good record and practices of the overwhelming proportion of employers who comply and seek to comply.

SAWIA submits that the investigations, audits and associated court action by the Fair Work Ombudsman (FWO) whether in fresh food industries, retail or fast food, demonstrates that there are already adequate powers in the Act to enforce the law, including action for accessorial liability.

SAWIA is unaware of any examples of judges expressing a frustration with the current levels of penalties under the Act in relation to underpayment of wages and entitlements or that the current Act does little to discourage repeat offences by unethical employers. However, it should be noted that several judgements of the Federal Court have expressed a frustration with the repeated unlawful behaviour by one particular industrial organisation.[4]

Sham contracting

The Bill seeks to increase penalties for sham contracting and for a statutory definition of independent contracting to be developed. There are already strong protections in the Act against sham contracting and penalties for engaging in sham contracting. Further there is extensive case law on how to distinguish an employee from an independent contractor.

As found by the Productivity Commission's (PC) Final Report[5] on the workplace relations system, there are numerous problems with providing a statutory test for independent contracting. This includes:

> *First, it is not clear the extent to which the prevalence of sham contracting reflects uncertainty in the definition, compared with the desire for the parties to conceal a relationship (however defined) that confers advantages to one or both of them. The critical question is whether a statutory provision would make much difference to the prevalence of some agreed definition of sham contracting. This is unknown.*
>
> *Second, there remains a quandary about how any alternative definition would be tested for its validity. The common law definition has evolved to capture a subtle set of factors shaping different employment relationships. No single element of the multi-factor test is decisive. Subtlety is closely related to ambiguity, and getting rid of the latter may also eliminate the former. So, for example, while many independent contractors have the ability to choose their own hours, not all do. Similarly, not*

[3] Ibid, p. 3

[4] Tracey J in Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 353; Mansfield J in Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845; Jessup J in Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 1173

[5] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p. 812-813

providing their own tools is not a plausible indication of sham contracting in clerical services where the contractor often works in the office of the client and, as a result, is not required to bring their own computer to work. However, it may be a much stronger sign of sham contracting if the worker is a carpenter.

Without a set of characteristics common to all independent contractors, the development of a definition to accurately categorise workers becomes less feasible. Were one implemented, it could lead to classification errors. Too narrow a definition of an 'independent contractor' would exclude genuine arrangements, while too broad a definition would encompass arrangements that are actually 'sham'.

Such classification errors could have perverse efficiency effects. For example, it might have the effect of dissuading employers and genuine contractors from including certain mutually beneficial terms in the contract in order to better comply with what is set out in the legislation. For example, if a definition specified that a worker was an independent contractor only if they had a reasonably diversified list of clients (reflecting one part of the personal services income test in the ITA Act), it might discourage relationships that otherwise might be efficient. Alternatively, independent contractors might turn down work that they could reasonably undertake at the lowest cost to avoid breaching a threshold in the legislation.

There is also a presumption in shifting away from the common law approach that either:

(a) the outcomes of a carefully drafted statute would reach the same conclusion as that found through a court's subtle judgments based on the common law, but at a lower cost.

(b) the common law definition somehow deviates from a 'true' definition of independent contracting.

Testing (a) would require judges to confirm that for a wide spectrum of cases, the outcome of the common law and some ideal statute gave the same result. It would be useful to apply that test were any change to be envisaged.

The Commission has not seen any evidence of (b), and an inherent problem would be that different interest parties would pressure government for a version of truth that suited their interests.

Finally, a further potential drawback of a statutory approach to the regulation of what are inherently ambiguous employment relationships is that once they are formally elaborated in legislation, loopholes invariably are found and exploited. This issue is common to many rule or law based regulatory approaches and reflects the difficulty of drafting legislation that addresses all the features of the employment relationship. Workers and employers that are intent on disguising an employment relationship as independent contracting may shape their arrangements to meet the criteria in the legislation. As long as their arrangements met those conditions, they could be a sham in other ways.

The current common law approach avoids the above pitfalls. Since they can examine the entirety of the relationship, judges are in a position to assess the aspects of an arrangement that are most indicative of its true nature. And since this may vary from contracting relationship to contracting relationship, they have the flexibility to change the importance they place on these aspects on a case by case basis.

> *In conclusion, while a statutory definition is superficially attractive, there would be considerable difficulties and risks associated with a policy shift involving the rigid adherence to such a definition, and all to solve a problem of unknown dimensions.*

[In text references removed] [Emphasis added]

Phoenixing

In relation to "phoenixing" whereby a company is stripped of all assets to avoid paying employee entitlements that are due, SAWIA notes that the PC made the following comments and recommendation in their report on Business Set-up, Transfer and Closure:

- *"The Commission considers that rather than crafting new offences, improvements in the detection and enforcement of existing laws are likely to be the best option for creating a genuine disincentive for directors contemplating phoenix action."*[6]

- *"One basic requirement for enforcement is verifying the identity of those involved. While s117 of the Act requires that the application for registration of a company includes the name and address of the directors, little is done to verify this information. As one participant put it during the Commission's consultations 'it is easier to become a company director than it is to rent a movie'. The Commission considers that the adoption of a 'director identity number' (DIN) would enable better tracking of directors of failed companies and prevent the use of fictitious identities. This would ensure that directors of companies that enter external administration can be clearly identified; and would assist in investigations of a director's involvement in what may be repeated unlawful phoenix activity."*[7]

[In text references removed] [Emphasis added]

Temporary overseas workers

Any policy response to the deliberate underpayment of unlawful non-citizens must be designed so that it does not encourage or reward people to become unlawful non-citizens for the purposes of the *Migration Act 1958* or allow the exploitation of such persons.
The PC has found that there *"is confusion and inaccurate information about whether the FW Act applies to migrant workers working in breach of their visa conditions. Neither the Migration Act nor the FW Act specify whether or not the FW Act applies to migrants under these circumstances, and different ruling bodies have demonstrated different interpretations."*[8]

Consequently, the PC recommended that the "*Australian Government should amend the Fair Work Act 2009 (Cth) to clarify that, in instances where migrants have breached the Migration Act 1958 (Cth), their employment contract is valid and the Fair Work Act 2009 (Cth) applies."*

While SAWIA supports this recommendation by the PC, we note that the PC has not recommended the introduction of a new criminal offence relating to the deliberate underpayment of a "t*emporary overseas worker*" as proposed in the draft bill.

Section 559A of the draft bill defines a "*temporary overseas worker*" as "an individual who:
(a) is the holder of a temporary visa (within the meaning of the Migration Act 1958); and
(b) may perform work in Australia in accordance with the visa:
    (i) without restriction; or
    (ii) subject to one or more conditions.

---

[6] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Inquiry* Report, Canberra, p. 425
[7] Ibid, p. 426
[8] Productivity Commission 2015, *Workplace Relations Framework,* Final Report, Canberra, p. 930

Section 30 of the *Migration Act 1958* in turn defines a "temporary visa as:
A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:

a) during a specified period; or
b) until a specified event happens; or
c) while the holder has a specified status.

The following visa classes are classified as temporary by the Department of Immigration and Border Protection (DIBP):[9]

- Temporary Work (Short Stay Activity) visa (subclass 400);
- Temporary Work (Long Stay Activity) visa (subclass 401);
- Training and Research visa (subclass 402);
- Temporary Work (International Relations) visa (subclass 403);
- Special Program visa (subclass 416);
- Working Holiday visa (subclass 417);
- Temporary Work (Entertainment) visa (subclass 420);
- Special Category visa (subclass 444);
- Temporary Work (Skilled) visa (subclass 457);
- New Zealand Citizen Family Relationship (Temporary) visa (subclass 461);
- Work and Holiday (Temporary) visa (subclass 462);
- Skilled — Recognised Graduate visa (subclass 476);
- Temporary Graduate visa (subclass 485); and
- Superyacht Crew visa (subclass 488).

While the intent of the proposed section 559A appears to be providing additional protection for employees deemed particularly vulnerable, it would have some unexpected application, particularly in relation to New Zealand citizens. As of 30 September 2015 there were close to 662,000 New Zealand citizens in Australia, of which 99.9% held one of the following two temporary visas - Special Category visa (subclass 444) or New Zealand Citizen Family Relationship (Temporary) visa (subclass 461)[10].

Given the strong cultural ties between Australia and New Zealand, shared language, similar culture and living standards, not too dissimilar level of employment regulation and the fact that many New Zealander may be long term residents of Australia, it is unclear why holders of a Special Category visa (subclass 444) or a New Zealand Citizen Family Relationship (Temporary) visa (subclass 461) are deemed to require any greater labour market protection than permanent residents or Australian citizens.

SAWIA is not convinced that it is appropriate to treat an underpayment of temporary overseas labour differently to the underpayment of Australian citizens or permanent residents, in particular where such underpayment relates to a long-term resident holding a Special Category visa (subclass 444) or New Zealand Citizen Family Relationship (Temporary) visa (subclass 461).

[9] DIBP 2014, *Discussion Paper: Reviewing the Skilled Migration and 400 Series Visa Programmes, September 2014*; DIBP 2015a, "Temporary Work Visa", http://www.border.gov.au/Trav/Work/Work/Temporary-work-visa ;
DIBP 2015b, "Find a Visa", http://www.border.gov.au/Trav/Visa-1/visa-finder?Purpose=Work+in+Australia&Nationality=All&ApplyFrom=All&Age=All&Stay=Temporary&Length=All&Family=All&Sponsor=All; http://www.border.gov.au/Trav/Visa-1/visa-finder?Purpose=Visit+Australia&Nationality=All&ApplyFrom=All&Age=All&Stay=Temporary&Length=All&Family=All

[10] Department of Immigration and Border Protection 2015, 'Temporary entrants and New Zealand citizens in Australia, As at 30 September 2015, https://www.border.gov.au/ReportsandPublications/Documents/statistics/temp-entrants-newzealand-sept15.pdf

Conclusion

For the reasons above SAWIA opposes the Bill being passed. While there may be a need for greater cooperation and sharing of information between Federal and State regulators as well as increased education this should not require legislative change.