SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

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Via Email: eewr.sen@aph.gov.au

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

We have taken up the invitation to make a submission about the Fair Work Bill 2008 on behalf of our members.

Background to the South Australia Wine Industry Association

The South Australia Wine Industry Association Incorporated (SAWIA) has a membership comprising wine producers and wine grape growers in South Australia. In South Australia SAWIA represents about 96% of the grapes crushed and approximately 36% of the hectares planted to wine grapes in South Australia.

SAWIA's members comprise a variety of differing sized companies ranging from global companies with interests in Australia and overseas, Australian based companies with assets and facilities in multi wine regions throughout Australia and smaller to medium companies domiciled in one regional area. For the purposes of this submission SAWIA is representing its' members interest with regard to the federal industrial relations jurisdiction.

SAWIA Submission regarding the Fair Work Bill 2008

We would note that the Transitional Bill is yet to be released and may provide further clarification or issues of concern however in its absence we have reviewed the Bill and have concerns with the following aspects:

1. **Low-Paid Bargaining** – Chapter 2, Part 2-4, Division 9, Clauses 241 – 246)

   The most noticeable thing about this Division is the fact that there is no definition or means of ascertaining whether employees are 'low-paid' or not. According to the Explanatory Memorandum that is a matter for Fair Work Australia (FWA) having regard to all relevant circumstances when deciding whether to make a low-paid authorisation under Clause 243[1].

   The fact that there is not a definition provides employers with no certainty as to who fits the category of an employee who is low-paid. Invariably does it mean employees who are receiving the national minimum wage within the community, low-paid within an industry, within a single enterprise or business, or indeed being an employee receiving the base rate of pay payable in each grade or the lowest grade rate under a modern award? There are people already considering innovative interpretations so employees can be defined as 'low-paid' in order to access these provisions.

[1] Paragraph 993 at page 157 of the Explanatory Memorandum

The Australian Fair Pay Commission has an understanding of the term the 'low paid' in order to make its wage setting decisions – so is this a suitable definition to adopt? In time 'yes' we will see case law providing some definable parameters as to its meaning however certainty (if that can be achieved) via this means can take some time to develop. Therefore we would submit that the proposed Act include a definition of the term 'low-paid' employees, one which is reflective of Parliament's intention behind the provisions proposed.

On a plain reading of the words of Division 9 the gate is left wide open for applications to be made under this Part without there ever being a hint of enterprise bargaining historically and therefore without employers being given the opportunity to discuss that option before an application is filed. For example words like those used in Clause 243(2)(a), namely "*low-paid employees who **have not had access** to collective bargaining ….*", are so broad that it is conceivable that it would not be necessary for FWA to satisfy itself (or indeed for the applicant to demonstrate) that collective bargaining for the proposed low-paid employees (covered by the application) had ever been genuinely explored or attempted at the workplace with the employees themselves or the employer. Therefore the ability to make such an application has the potential, in some circumstances, to create proceedings before the FWA and additional costs that could be avoided or unnecessary.

It should be said that currently collective bargaining is something that is available or accessible to **all** employees (low-paid or not) and employers (subject to the applicable statutory requirements being met) whether it has actually been accessed or not is another thing altogether and would appear to be irrelevant.

Based on the above reasoning we would submit that as a prerequisite to the FWA making an order to facilitate bargaining for enterprise agreements for 'low-paid' employees (as defined in the proposed Fair Work Act (the proposed Act)) there should be 'evidence' provided to demonstrate that there has been a genuine attempt at bargaining between the employees (whether represented by an employee organisation or not) and the employer and such bargaining has not been successful because the employees (or the employer) at the particular workplace has faced substantial difficulty bargaining at the enterprise level.

2. **Workplace Rights** – Chapter 3, Part 3-1, Division 3, Clauses 340 – 345

Overall Division 3 is very broad and has potential overlap with other rights or protections for persons who are 'discriminated' against or adversely treated as a result of responsibilities they hold or actions they take. SAWIA is supportive of the fact that discrimination or adverse treatment in the employment relationship should be capable of protection but would note that such workplace protections are often already catered for and should not create yet another avenue of prosecution or the implication of a fine against the 'perpetrator' of the offence. At the very least only one avenue should be available to an applicant to address an issue of discrimination or adverse treatment.

To provide an example of the issue we are raising we refer to the Illustrative examples provided for in the Explanatory Memorandum[2] for Division 3.

[2] Under paragraph 1364 at page 217 of the Expanatory Memorandum

1364. The inclusion of 'role or responsibility' in paragraph 341(1)(a) is intended to provide protection for persons who perform a representative function in the workplace that is recognised under a workplace law, workplace instrument or order of an industrial body.

Illustrative examples

A workplace has an enterprise agreement in place that provides for the appointment of a harassment officer. An employee performing this role is protected against adverse action in relation to carrying out that role.

The *Workplace Health and Safety Act 1995* (Qld) makes provision for the appointment of workplace health and safety representatives in the workplace. An employee performing this role is protected against adverse action for fulfilling that role.

The second example given (in the box) is that an employee performing the role of workplace health and safety representative is protected against any adverse action for fulfilling that role under Clause 341(1)(a) of the Bill. However in South Australia, our *Occupational Health, Safety and Welfare Act 1986* at Section 56 provides for that very same protection to an employee who is performing the functions of a health and safety representative or a member of a health and safety committee. We would assume that the Queensland *Workplace Health and Safety Act 1995* would have a similar provision.

Secondly Clause 341(3) extends the rights to *prospective employees* and yet there is no guidance as to who might be a *prospective employee*. For reasons of clarity it is our submission that the term should mean someone who has been identified as the preferred candidate and has been offered employment by an employer or independent contractor (be that verbal or in writing) but should not mean those persons who have been short listed as candidates for a particular job.

3. **Right of Entry** - Chapter 3, Part 3-4, Division 2, Subdivision A, Clauses 481 – 483

This Division represents an increase in the power of a permit holder's organisation to have access to workplaces to investigate suspected contraventions or breaches of the (proposed) *Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation*.

It is acknowledged that the right to investigate by the permit holder is limited to a suspected contravention which can only relate to, or affect a member of the permit holder's organisation.

The proposed right of entry clause 482(1)(b)(i) gives a permit holder the ability to interview <u>any</u> person about the suspected breach, subject to the person agreeing <u>and</u> being a person whose industrial interests can be represented by the permit holder's organisation. Further under clause 482(1)(c) they can inspect, make copies of <u>any</u> record or document, provided it is relevant to the suspected contravention but this could potentially mean any record or document relating to any employee or third party, not just an employee or third party whose industrial interests the permit holder's organisation is entitled to represent.

Whilst Clause 482(a)(c) 'authorises' the permit holder to inspect and make copies of any records or documents relevant to the suspected contravention if at the time of the entry there is disagreement about what is relevant then there is limited means of being able to

deal with the issue expediently and this could be problematic. Any questioning by an occupier or *affected employer* that a particular document or record is not relevant to the suspected contravention may result in them contravening the requirement[3], as indeed would the non-provisions of any relevant record or document. However any record or document inspected and / or copied by the permit holder that is not relevant to the suspected contravention is a 'contravention' itself of the right of entry however it does not appear to be an offence under Clause 482 or indeed Division 4 Prohibitions, Clauses 500 - 504. It would appear that the only means of redress is to make an application to FWA to deal with any dispute under Part 3-4, Division 5.

Further, it should be noted that the rights able to be exercised by the permit holder (under Subdivisions A and B) extend (subject to the statutory limitations) to all employers and employees whether they are employers and employees within the national system definitions or not[4] - subject to the permit holder's organisation being entitled to represent the industrial interests of the relevant employee(s).

We would also comment on the requirement for the permit holder to provide notice of entry for the purposes of Subdivisions A and B at Clause 487 are different. Notice for entry to hold discussions (Subdivision B) the permit holder only has to give the occupier of the premises notice and not the affected employer. On the other hand notice for entry to investigate suspected contravention requires notice to be given to both the occupier and the affected employer. We would submit that the requirements for notice of entry must be given to both the occupier of the premises and any affected employer.

Overall we would submit that any rights exercised by the permit holder to interview, to inspect and / or copy records or documents relating to employees who are non-members of the organisation is a privilege in excess of the permit holder's organisation role. This is the very role of the inspectorate working under direction of the Fair Work Ombudsman[5] and would advocate that should be the only entity an employer has to deal with. Whilst we acknowledge that officials of employee organisations are entitled to represent and defend their members it is unacceptable in our view that the Bill provide for permit holders who are de-facto inspectors under the proposed legislation for those persons beyond their members.

4. **Transfer of Business** - Chapter 2, Part 2-8, Division 2, Sections 307 - 320

The provisions relating to transfer of business are significantly wider, more onerous and complex than those currently in place under the *Workplace Relations Act 1996*. The traditional concept of transfer of business entailed the 'business' (or part thereof) of the old employer being taken over by a new employer. What is being proposed under the Bill is a focus on whether there has been a transfer of work between two employers and the reason for the transfer[6] as opposed to a transfer of business. Further as we understand it there will be no ability to have the 'transaction' or 'transfer' legally tested under the proposed Bill.

We have the following particular concerns with the Bill:

[3] Clause 482(3)
[4] Meaning what we would currently know as all employers, be they constitutional or non-constitutional corporations
[5] Chapter 5, Part 5-2, Division 3, Subdivision D
[6] Paragraph 1206 at page 191 of the Explanatory Memorandum

Clause 311 – When does a transfer of business occur

Sub-clause 311(1)(c) – *Perform the same, or substantially the same, work*

It is our understanding that the Explanatory Memorandum is a guide only as to how the provisions operate and is not to be taken as providing a legal interpretation. However in the absence of anything else to take meaning from we believe it is necessary to make comment about the provisions in light of the Explanatory Memorandum. The following is an extract from it in relation to sub-clause 311(1)(c):

1217. Under paragraph 311(1)(c), the transferring employee must perform the same, or substantially the same, work for the new employer as she or he performed for the old employer. It is intended that this provision not be construed in a technical manner. It recognises that, in a transfer of business situation, **there may well be some minor differences between the work performed for the respective employers**. However, **the requirement is satisfied where, overall, the work is the same or substantially the same – even if the precise duties of the employees, or the manner in which they are performed, have changed**.

1218. Further, although paragraph 311(1)(c) is framed in terms of the work undertaken by an individual employee, in many instances a transfer of business occurs and a group of employees is engaged by the new employer. In this circumstance, **it may be possible to categorise the work more generally**. For example, if the old employer runs a supermarket and sells the supermarket to the new employer, **the work might be characterised generally as retail work in a supermarket. The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee**.

NOTE: The **bolding** emphasis has been made by SAWIA.

The very broad approach (indicated by the example given above[7]) as to what constitutes *performing the same or substantially the same work* and the fact the clause is not intended to be technically applied leaves very little scope for employers to restructure their business. Given certainty within the proposed Act would assist an employer to restructure with certainty. Looking at the skills applied by an employee when carrying out the work (described in the example given) there is a difference between an employee stacking shelves and an employee working the checkout. We would say that the skills the employee applies in each position are not the same or substantially the same.

Certainly what is the *same or substantially the same* is that the work being performed is within the retail industry but this takes the term *substantially the same* to a whole new level for which the application of these provisions can be incredibly broad. Using this application in the context of work across the wine industry (or indeed any industry), for example, demonstrates an outcome that we would submit, could be ludicrous.

Wine industry example: let's say, subject to satisfying the requirements of sub-clause 311(1), an old employer running a wine business (that is they are growing grapes and then processing, making and selling wine) decides to sell the vineyard part of their business to a new employer. Two of the employees of the old employer transfer to the new employer. The two transferring employee worked in cellar door for the old employee but when they go to work for the new employer they will work in the vineyard. Whilst exercising vastly different skills, and not the *same or substantially the same work*, the

[7] Paragraph 1218 at page 193 of the Explanatory Memorandum

transferring employee remains within the wine industry and presumable this would be caught by the provisions of Part 2-8, despite the transferring employee applying completely different skills in each position. Further such provisions have the potential to sideline and confuse the application of the classification system contained in awards.

Sub-clause 311(4) – *Outsourcing (in-sourcing)*

This clause covers the outsourcing (and in-sourcing) of work by an old employer to a new employer who engages the employees of the old employer (transferring employees). The expansion of the transfer of business provisions under the proposed Act to include outsourcing will see a greater number of transactions being subject to greater industrial regulation and costly process as a result of what is being proposed and which we canvass below relating to transferring industrial instruments.

The proposed content of the Bill places an increasing emphasis on collective bargaining yet with outsourcing by one employer to another employer attracting the proposed new transfer of business provisions this will have an effect on whether it is a readily viable option in future.

Clause 313 – Transferring employees and new employer covered by transferable instrument

The result of this clause sees a new employer if they employ the transferring employees (it has employed from the old employer and who are performing the same or similar type work) under the transferable instrument despite the fact that the new employer already has an enterprise agreement or named employer award in place governing his/her workforce. This is despite the fact that the enterprise agreement or named employer award is capable of covering the transferring employees on its terms[8]. Further the transferring instrument applies despite the fact that the transferring employees might be better off or worse off than the existing employees of the new employer – such disparity can be disruptive and fractious to the workforce.

Whilst, in essence this result is not different from the current provisions under transfer of business, it is significantly restrictive on the part of the employer by the fact that there is no deemed end period for which the transferring instrument continues for (whereas under the current rules it is limited to 12 months). Unless an application[9] is made to the FWA under Clause 318(1)(b) for it to make an order that an enterprise agreement or named employer award that covers the new employer covers or will cover the transferring employee. Then the FWA must consider the application in light of the considerations outlined in sub-clause 318(3), including whether any employees[10] would be disadvantaged by the order in relation to their terms and conditions of employment – which in the majority of cases will be a reality.

Clause 319 – Orders relating to instruments covering new employer and non-transferring employees

Proposed clause 319 creates some interesting outcomes from a practical perspective. It has the potential to see orders being made by FWA resulting in complex employment arrangements where some non-transferring employees (that is the existing employees of

[8] Paragraph 1232 at page 196 of the Explanatory Memorandum
[9] Form a number of parties including the new employer or likely new employer
[10] Presumable both the transferring employees and the existing employees

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the new employer) are covered by the transferring instrument and their existing enterprise agreement is 'switched-off'[11] even though they bargained, voted on it and gained approval for it. The industrial administration of working out what employee is covered by what industrial instrument could become overly complicated and confusing.

Many of the proposed orders that can be made by FWA about which instrument applies to what employees are capable of being achieved in the course of industrial bargaining: the rules relating to making and terminating enterprise agreements and the application of the No Disadvantage Test for new enterprise agreements. However under the proposed Act the usual course of industrial bargaining is curbed by the fact that a transferring instrument (from a transfer of business transaction) does not have an end life consistent with the current Act (despite having a nominal expiry date). Without any statutory end date for the application of the transferring instrument in the new employment setting the employer is afforded no control in streamlining their workforce, a situation which we would submit is onerous and imbalanced. In the future any such streamlining will require an order from FWA under the proposed Act which adds time and takes the matter away from the determination of the primary parties, being the employer and employees.

It should be noted that all the applications capable of being made to FWA under Division 3 (Powers of FWA) do not appear to be limited by any timeframe. Therefore an employer could have completed their transfer of business transaction and yet have hanging over them indefinitely the fact that an application can be made by a transferring employee or employee organisation at any time following the transaction. This is not an acceptable situation and a time limit should be placed on the ability to make an application under Part 2-8, Division 3. Further it is our submission that a new clause should be included ensuring that FWA deal with any application made under Part 2-8, Division 3 expeditiously, in any transfer of business transaction, time is of the essence and delays due to the outcome of such an application simply provide uncertainty for an employer.

We would submit that for the reasons highlighted above the transfer of business provisions increase employer costs significantly. The costs arise as a result of added due diligence investigations, canvassing whether to make an application to FWA or indeed respond to an application[12] made by another party to FWA, and contemplation of what negotiations are necessary to streamline the two diverging workforces[13] – all of which impact on productivity, a further cost. Also there are the administrative costs to consider, with the new employer's payroll functions having to manage and be familiar with another industrial instrument, set of pay rates and different terms and conditions.

Such added costs under these proposed provisions have the potential to constrain the ability for Australian businesses to restructure. By way of example that might be by the fact that the industrial costs under the proposed transfer of business provisions (the application of transferring instruments etc) may or may not make the transaction viable. Alternatively a business that has to restructure due to necessity may have to downsize its workforce as a result of the added cost of restructuring under the proposed transfer of business provisions.

[11] Whatever the practical application of that term 'switched-off' means as cited in the Explanatory Memorandum at page 203
[12] By an employee who is likely to be a transferring employee or an employee organisation – Clause 318(2)(b), (c) and (d)
[13] Negotiations which could potentially be drawn out increase risk of industrial action.

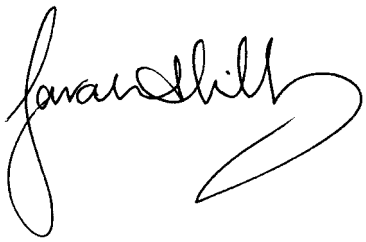
We would submit that the transfer of business provisions should be reviewed from the point of their practical application and the impact it will have on business. In particular (1) the breadth of the term: *same or substantially the same* should be limited by having some basis in the skills being applied by the employee and (2) the application of transferring instruments and application before FWA need to be re-thought and limited.

This concludes our comments about the proposed Act except to say that given more time we would have sort to explore more of the practical implications of the Bill, which will allude to more issues for employers.

We look forward to having the opportunity to expand on or provide greater clarity to our comments at the upcoming Senate Enquiry hearings.

Should have any queries in the interim please do not hesitate to contact the undersigned or Brian Smedley at SAWIA.

Yours sincerely,



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