



SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

23 February 2017

The Associate to Honourable Justice Ross AO, President
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

Via Email: amod@fwc.gov.au

Dear Associate

Re: AM2016/15 – Plain Language Modern Award Pilot

Background

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 the oldest wine industry organisation in Australia and has existed, albeit with various name changes, since 1840. 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*.

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.

Our interest in relation to Modern Awards primarily is focused on the *Wine Industry Award 2010* and therefore we have not participated in the proceedings on the Pharmacy Industry Award 2010 - Plain Language Pilot to date.

However, we have been made aware of a matter raised in the Full Bench hearing on the Pharmacy Industry Award 2010 - Plain Language Pilot (AM2014/209 and AM2016/15) on Wednesday 22 February 2017 which potentially would have ramifications for all Modern Awards, including the *Wine Industry Award 2010*. The matter relates to the discussion in paragraph [77] of the Full Bench Decision [2017] FWCFB 344 (20 January 2017) whether a business to whom labour-hire staff is provided needs to be an employer covered by a Modern Award.

During peak operational periods in the wine industry, including pruning and vintage (harvest), it is very common for wineries not only in South Australia, but also nationally to rely on labour hire providers for temporary labour. The wine industry therefore has a key interest in the coverage of labour hire staff and the host businesses to whom labour is provided.

Clause 4 – Coverage and on-hire

At paragraph [77] of their decision, the Full Bench poses the following question:

[77] The proposed change will achieve the objective of ensuring that the legal effect has not changed. However, we would observe that it is difficult to determine from the terms of the current award whether the person to whom labour is supplied needs to be an employer covered by the Pharmacy Award by virtue of employing other employees in the community pharmacy industry or acquires that status by being supplied with the labour. The definition of on-hire does not provide

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any assistance in that regard. We invite submissions as to whether the intention of the current provision is that the person to whom labour is supplied is also to be an employer covered by the award, or if some other outcome is intended. [Emphasis added]

In response to the question above and as posed in the hearing on 22 February 2017, SAWIA submits the following:

Clause 4.1 of the Wine Industry Award 2010 provides that the award “*covers employers throughout Australia in the wine industry and their employees in the classifications in this award to the exclusion of any other award*”. [Emphasis added]

In the absence of any definition of “employer” for the purposes of the Modern Award, the term “employer” must be given its ordinary meaning under industrial law. SAWIA submits that a non-employing business could not be taken to be an employer under Clause 4.1 and would not be covered by the Modern Award even if their business operations are within the wine industry as defined in the Modern Award.

Clause 4.5 extends award-coverage to employers and their employees who are not within the industry as defined in the Modern Award, where such an employer supplies labour on an on-hire basis to a business and to the labour hire staff within the classifications covered by the Modern Award. In the context of the wine industry and performance of work in the wine industry, this means that a labour hire agency (requested by a wine industry operation to provide, for example, casual vineyard workers) and their employees (the labour hire workers) would be covered by the *Wine Industry Award 2010* whilst the casual labour hire vineyard workers performed this work.

While labour hire staff commonly are brought in to complement / supplement the winery’s or wine grape growers’ own employees, it is not uncommon that a small winery / wine grape grower who is a non-employing business (and where any work not performed by the owner/sole trader) would engage labour hire workers provided by an external agency. For example this could be the case, where the wine grapes are crushed and the wine made on a contract basis with another winery or independent winemaker.

In relation to a small independent wine grape grower this could involve any vineyard work being solely performed by the owner / sole trader throughout the year, with exception in peak periods (e.g. pruning and vintage (harvest)) where such work may be performed by either, casual employees directly employed by the small independent wine grape grower or labour hire workers engaged through an external labour hire agency.

SAWIA submits that clause 4.1 and 4.5 does not require or intend that the person to whom labour is supplied via a legitimate labour hire arrangement is an employer covered by the Modern Award. The mere fact that a business is supplied with labour through a labour hire agency does not make the business an employer under the Modern Award. This is because the employment relationship exists between the labour hire firm (on-hire employer) and the labour hire employee (on-hired employee).

The host business is a merely a client of the labour hire firm and the place where the labour hire employee is required by their employer - the labour hire firm to perform the work. No employment relationship exists between the host business and the labour hire employee.

SAWIA is aware that Business SA has made submissions in this matter and SAWIA supports those submissions.

For further information please contact Sarah Hills, Business Services Manager, or Henrik Wallgren, Business and Workplace Adviser on 08 8222 9277.

Yours sincerely

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