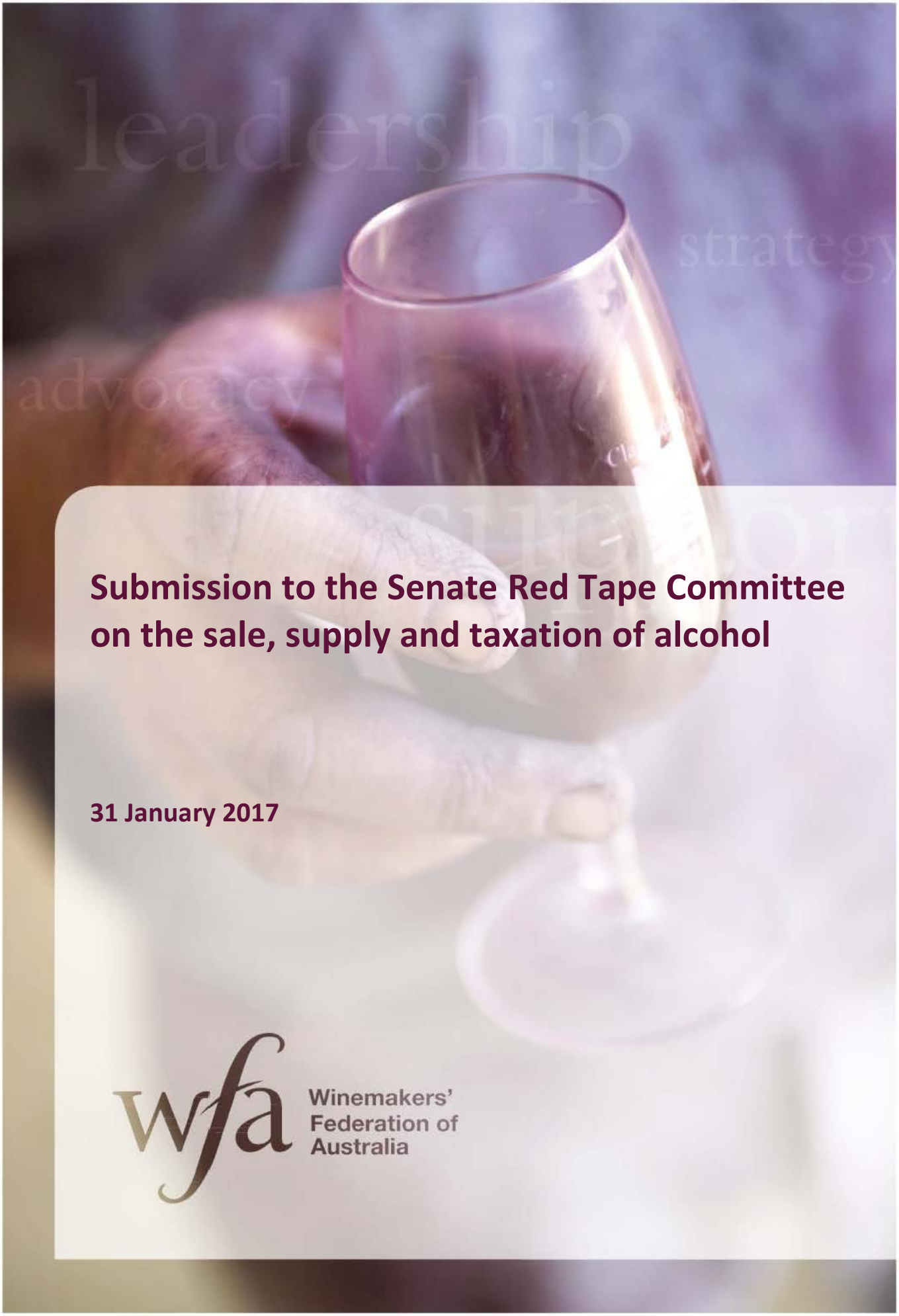

Submission to the Senate Red Tape Committee on the sale, supply and taxation of alcohol

31 January 2017

wfa Winemakers' Federation of Australia

Contents

1. Introduction

On 11 October 2016, the Senate resolved to establish the Select Committee on Red Tape known as the 'Red Tape Committee'. The committee was established to inquire into effect of restrictions and prohibitions on business (red tape) on the economy and community. The committee is currently examining the effect of red tape on the sale, supply and taxation of alcohol, in particular:

- the effects on compliance costs (in hours and money), economic output, employment and government revenue;
- any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions;
- the impact on health, safety and economic opportunity, particularly for the low-skilled and disadvantaged;
- the effectiveness of the Abbott, Turnbull and previous governments' efforts to reduce red tape;
- alternative institutional arrangements to reduce red tape, including providing subsidies or tax concessions to businesses to achieve outcomes currently achieved through regulation;
- how different jurisdictions in Australia and internationally have attempted to reduce red tape; and
- any related matters.

2. Winemakers Federation of Australia

The Winemakers' Federation of Australia (WFA) is the national peak body for Australia's winemakers. Our objective is to represent the interests of Australian winemakers and grape growers of all sizes on national and international issues affecting the Australian wine industry, through a single organisation.

Government recognition of WFA as a representative organisation is on the basis WFA represents the entire Australian wine industry, including members and non-members. WFA is recognised as a representative organisation under the *Australian Grape and Wine Authority (AGWA) Corporation Act*. WFA is incorporated under the *SA Associations Incorporation Act 1985.*

WFA membership represents around 80 per cent of the national wine grape crush. WFA represents small, medium and large winemakers from across the country's wine-making regions, with each having a voice at the Board level. WFA Board decisions require 80 per cent support so no one category can dominate the decision-making process. In practice, most decisions are determined by consensus. WFA works in partnership with the Australian Government and our sister organisation, Australian Vignerons (AV), to develop and implement policy that is in the wine industry's best interests.

WFA's activities are centred on providing leadership, strategy, advocacy and support that serves the Australian wine industry now and into the future.

3. Overview

An effective and credible regulatory system is important for the Australian wine industry to ensure our product is safe for consumption, has product integrity and meets national and international requirements relating to sale and export. The Australian wine industry is accustomed to such regulation and has also adopted self-regulatory practices in relation to environmental sustainability, packaging waste, health labelling, business conduct and marketing to achieve specific objectives that enhance value for consumers, the industry and communities.

However, while regulation in these areas is important, there is significant room for improvement in the way that regulations are administered or applied by the public sector. There is also a continuing imperative to regularly assess the benefits delivered by each regulatory requirement compared with the compliance costs.

Across the economy, Deloitte claims that federal, state and local government rules and regulations cost $27 billion a year to administer, plus $67 billion a year in compliance[1]. The 2016 Red Tape Survey conducted by the NSW Business Chamber (which included wine industry businesses) stated that individual businesses reported that regulation cost an average $58,000 per annum and that most businesses were not able to pass on the full cost to customers.[2] Nationally, the Australian Chamber of Commerce and Industry reported in their 2015 Red Tape Survey that 30 percent of businesses spent between $10,000 - $50,000 on regulatory compliance with ten percent of businesses spending more than $100,000 per annum.[3]

It is often difficult to split the costs of compliance between that which is necessary and that which is unreasonably burdensome. In this submission, WFA has highlighted some specific areas of regulation where there are difficulties in administration, compliance or reporting and made some general recommendations to the Committee for action.

WFA welcomes this review by the Senate's Red Tape Committee and urges the Australian Government to act on its report.

Regulation in the Australian wine industry

The nature of wine making, extending across the full production and supply chain including agricultural production, on-site manufacturing, on-site packaging, food handling, export, seasonal workforce, transport and logistics, cellar door sales and restaurant/café services, mean it is one of the most regulated industries in Australia.

The production of one bottle of Australian wine has been subject to regulations relating to the following issues, noting this is not an exhaustive list:

- Water licenses, use and reporting
- State and local levies
- Grape research levy, the wine export charge, the wine grapes levy
- Grape supply contracts
- Details of contract wine making at a processing establishment
- Production management (chemical use – reporting, management, training)
- National Greenhouse Energy Reporting Scheme
- National Pollution Inventory reporting
- Biosecurity (certificates related to the movement of grapes between and within states)
- Label Integrity Program and other labelling requirements
- Geographical Indications requirements
- Food Standards Code(additives, production, traceability)
- Local Government permits related to development, events etc

[1] https://www2.deloitte.com/au/en/pages/media-releases/articles/rules-eat-up-250-billion-a-year-271014.html
[2] Making it easier to do business: 2016 Red Tape Survey, NSW Business Chamber, 2016
[3] 2015 National Red Tape Survey, Australian Chamber of Commerce and Industry

- Food safety and handling certificates
- Tax reporting (payroll, income, WET, GST)
- Liquor licensing approvals and renewals
- Insurance, Workplace health and safety
- Seasonal Labour Hire Requirements
- Permanent Workforce (leave, superannuation, entitlements, gender reporting)
- Export approvals and import requirements in other countries(certificates of origin, labelling, Free Trade Agreement documentation, UK anti-bribery laws and Modern Slavery Act)
- Consumer Law regulations (marketing, pricing, promotion, competitions)
- ASX compliance.

In addition, many wine businesses operate across international, state and/or territory borders and the jurisdictional variations within these categories add a complex dimension to business operations.

The following issues have been raised by the wine industry as priority areas for reform to reduce compliance costs related to regulations applicable to the wine industry, as well as broader regulations.

4. Issues

WORKPLACE RELATIONS

Recommendations 1: ***That the Australian Government accept and implement the recommendations of the Productivity Commission's report on the Workplace Relations Framework, and that this Red Tape Inquiry consider the submissions from that Inquiry as they relate to the red tape burden on employers.***

That the Australian Government prioritise the workplace relations framework as a key sector for red tape reform.

The Productivity Commission's report on the Workplace Relations Framework was presented to the Australian Government on 30 November 2015. Part of that broad ranging inquiry included an impact assessment of '*red tape and the compliance burden for employers*'.[4]

The South Australian Wine Industry Association (SAWIA) and WFA made a joint national submission, incorporating the concerns of all state wine industry associations, to that inquiry (Annex A) and a further submission on its Draft Report (Annex B). While the industry was disappointed that the final recommendations did not go far enough by recommending significant changes, there were some recommended improvements supported by industry. The Government is yet to respond to the Productivity Commission's Report or to implement its recommendations.

As noted above, the nature of wine industry operations means that a business manages employees working in significantly different environments, including agricultural production, wine manufacturing, cellar door sales and often hospitality services. One of the issues referenced in the Productivity Commission's final report was SAWIA and WFA's example of the complexity and inflexibility of the Modern Award system which led to significant compliance costs in time spent administering award conditions.

[4] Workplace Relations Framework: Productivity Inquiry Report, Overview and recommendations, Productivity Commission 2015

> *A wine industry employer must be able to determine which of the 122 Modern Awards may or may not apply to their business, understand at what point the provision of an additional service may result in additional coverage and the expertise and skills to manage instances of overlapping Modern Award coverage. From a practical perspective this means managing instances where an employee may perform work under multiple Modern Awards, ensuring compliance under both Modern Awards, reconciling often conflicting requirements.*[5]

The Business Council of Australia's submission to the Productivity Commission's inquiry supported this concern by noting that the Fair Work Ombudsman also found that only 5 of the 122 Modern Awards were clear about penalty rates and that only 12 were clear about when overtime applies.[6]

This leads to significant red tape costs in administration by the employer and often in costs seeking advice from industrial relations experts.

More recently, our members have also raised concerns about managing enterprise agreements.

> *The difficulty of registering an enterprise agreement and demonstrating that the 'no disadvantage ' test has been met under the new Fair Work regulations has the effect of our company continuing with the old Howard Government regulations Enterprise Agreement which was first approved in 2006. This agreement has no flexibility provisions and therefore we cannot introduce any productivity or employee benefits without ceasing the agreement and going through the onerous process of negotiating and submitting a completely new agreement.*[7]

The reliance on a seasonal workforce, usually through labour hire contractors, also results in additional compliance costs for wine businesses.

> *We find that the unfair onus put on Companies to ensure that the Contractors are paying fair award based wages and entitlements results in extra time spent checking and auditing contractor's processes.*[8]

This compliance burden has also meant that industry associations, such as the South Australian Wine Industry Association, have developed additional tools and advice for its members to help manage national and state legislation[9]. While this is an important tool for wine businesses, the industry should not have to direct scarce funds to supplementing the administration of government legislation.

WFA strongly supports its original recommendations and comments on reform of the workplace relations framework as submitted to the Productivity Commission to reduce red tape costs for businesses.

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[5] Workplace Relations Framework: Productivity Inquiry Report, Overview and recommendations, Productivity Commission 2015
[6] Submission to the Productivity Commission's Workplace Relations Inquiry, Business Council of Australia, 2015.
[7] Member comments via email to WFA, 23 January 2017
[8] Member comments via email to WFA, 23 January 2017
[9] http://www.winesa.asn.au/members/new/member-news/2016/dona-t-get-stung-formalise-your-labour-hire-and-contractor-arrangements/

JURISDICTIONAL INCONSISTENCIES

Responsible Service of Alcohol (RSA)

Recommendation 2: ***That the Australian Government work with State and Territory Governments to achieve national recognition of RSA qualifications across all jurisdictions.***

That the Australian Government raise this issue with Tourism Ministers to continue to make progress under the Tourism 2020 Strategy.

In general, States and Territories across Australia require employees associated with the selling of alcohol to hold Responsible Service of Alcohol (RSA) qualifications. Despite the widespread recognition and reference to the national competency *Provide Responsible Service of Alcohol*, a qualification achieved in one jurisdiction is not easily or fully recognised in all others. For example, workers holding a Statement of Attainment under the national competency cannot have that recognised in the ACT, NSW or Victoria if it was gained in any other state or territory and are required to do refresher or bridging courses. In the case of Victoria, this must be done through face-to-face training, not on-line like all other jurisdictions.

The requirements also vary regarding scope (functions/role), renewals (no expiration date, three-year renewals, five-year renewals), record keeping, identification, registers and costs. Some jurisdictions recognise the Statement of Attainment that may have been provided by the training provider for another jurisdiction but all require workers moving between states to go through a process to determine and then act to have their existing qualifications recognised, repeated or refreshed depending on the jurisdiction.

All Tourism Ministers in all States and Territories announced in 2013 that as part of Tourism 2020, all jurisdictions had measures in place, or were introducing, measures to recognise interstate RSA certificates. This has not been achieved in a way that minimises costs to industry or facilitates the mobility of workers.

While this issue affects wine industry workers, it has a much larger economic impact. It affects all those involved in the service of alcohol, and in many jurisdictions, involves other venue staff such as security personnel. The hotel industry is a significant employer, with more than 188,000 persons employed in the pub sector, [10] most of these requiring RSA qualifications.

As Australia gears up to capitalise on the growth of in-bound tourism, there is an opportunity for the Australian Government, through either the Tourism Ministerial forums or other national industry and skills bodies, to effect significant and practical improvements by removing red tape for hospitality workers in the liquor industry.

Container Deposit Schemes

Recommendation 3: ***That the Australian Government closely monitors the implementation of CDS in other jurisdictions and facilitates national efficiencies by working with State and Territory Governments to minimise costs to businesses.***

That wine containers remain outside the scope of these schemes as they do not contribute to the away-from-home public litter stream.

[10] PricewaterhouseCoopers (2009) *Australian hotels: More than just a drink and a flutter*

Container Deposit Schemes (CDS) are currently in place in South Australia, the Northern Territory and soon to be introduced in New South Wales, Queensland and Western Australia. The objective of a CDS is to reduce litter in the away-from-home litter stream. Most wine containers are currently excluded as they are not common in public litter. In New South Wales, wine bottles and bladders make up less than one per cent of the litter stream. In South Australia, the KESAB litter report[11] found that of the 10,735 litter items counted, 0.03 percent was classified as wine and spirits.

Currently, there are minor variations in the scope of wine containers (related to size) excluded from the schemes between jurisdictions. The administrative costs of inconsistencies between the exclusion of various wine containers lead to considerable administrative costs as most winemakers sell product in more than one State or Territory.

While this is currently a jurisdictional issue, there will be a role for the Australian Government if national coordination eventuates, which will likely bring benefits for the scheme in regulation consistency, but also potentially pressure jurisdictions to increase the scope and include wine containers, which would significantly add to costs through regulation red tape.

The administration requirements of label changeover and reporting requirements would be prohibitive for the large number of small wine businesses which are selling small volumes direct to consumers. There are relatively few drinks producers with products that currently fall within the various CDS legislation for example, large soft drink manufacturers and brewers, compared with 2,700 wineries. In comparison to beer and spirits, the Australian wine industry operates on smaller profit margins and is significantly more capital intensive.

WFA will continue to work closely with States and Territories to ensure they are cognisant of the significant impact of a CDS on the wine industry. WFA will also continue to advocate against the inclusion of wine containers under any CDS in any jurisdiction and for consistency in scope and product definitions.

Biosecurity (Wine grape transport between states)

Recommendation 4: ***That the Australian Government support State and Territory Governments and industry to improve jurisdictional harmonisation of interstate wine grape movement documentation.***

The wine industry has identified inconsistencies in regard to proof of origin documentation required between states when transporting wine grapes over state borders. States vary in their pest status relevant to wine grapes and each state has its own regulator responsible for fruit movement into their state.

Individual wine businesses also have their own systems for tracking the origin and movement of wine grapes between of the vineyard and processing site. Wine grape loads moving interstate or intrastate for processing are typically accompanied by a document referred to as a “cart note” containing basic information about the origin of the load, variety, quantity and signature/endorsement. For wine grape movement between some states, cart notes alone are acceptable proof of origin documents.

However, in some instances additional regulation is applied when moving wine grape loads between states. For example - movements between South Australia and Victoria require each wine grape load to be accompanied by either a Plant Health Certificate (PHC) issued by the state regulator or by a Plant Health Assurance Certificate (PHAC) issued by the grower under an interstate certificate assurance scheme called ICA-33

[11] WAVE 69 – May 2015 Report, Keep South Australia Beautiful (KESAB)

Movement of Wine Grapes (Phylloxera and Fruit Fly) where both the grower and the receiving winery must be accredited to send and receive the wine grapes.

A review of these regulations is currently being undertaken by VineHealth Australia in consultation with relevant state regulators and industry. These efforts should be supported to ensure that our biosecurity safeguards maintain their integrity and are streamlined to aide business efficiency.

BUSINESS OPERATIONS

Digital Transformation

Recommendation 5: ***That the Australian Government prioritise the implementation of a digital platform for wine industry businesses that streamlines reporting and administration across all agencies, including linkages to state and territory jurisdictions.***

The Digital Transformation Office should work with the wine industry on a pilot program basis to develop a digital platform for wine businesses.

The Government's Digital Transformation Office (DTO) is responsible for coordinating and implementing digital platforms for whole-of-government services. One of their Stage One projects includes '*New services for businesses*' which '*will provide a streamlined user experience and reduce the regulatory burden for businesses. It also means that businesses will be able to interact with government in one place rather than via a variety of digital, face-to-face, or telephony channels across multiple agencies*'.[12]

The development of this capacity for wine businesses is critical, where it could incorporate the full range of services related to levy payments, BAS returns, WET rebate, environmental reporting and a range of other regulatory requirements. This would be a practical and meaningful reduction of compliance burden on businesses.

One of our members suggested the value of combining these functions in one place.

> "…*Modify the BAS to collect information on the value of the period's wine sales (direct to consumer, wholesale, export) and include all the data the government needs for wine and grape levies on the BAS so we only have to complete one form," and*
>
> *"Incorporate the proposed cellar door rebate into the monthly or Quarterly BAS. Government should be able to data match on a file they could get regularly from state governments containing ABN and Producer/Wholesaler license details to automatically qualify the taxpayer for the additional grant."*[13]

The DTO should consider working with wine industry businesses to trial a pilot program tailored to suit wine industry businesses which are required to deal with multiple agencies across local, state and national jurisdictions.

[12] https://www.dta.gov.au/what-we-do/budget/new-services-for-business/
[13] Wine industry business via Hunter Valley Wine and Tourism Association, 23 January 2017

Services for Exporters

Our members have also noted that some Australian Government services in state jurisdictions have recently been changed to require formal appointments, rather than providing walk-in services. For example, the Department of Foreign Affairs and Trade previously provided trade related document authentication services promptly and efficiently at their offices in Adelaide. Now a formal appointment is required for this service, which adds an additional level of red tape for businesses and less flexibility.

Environmental Reporting

Recommendation 6: ***Redesign the reporting template and web interface for the National Pollution Inventory and simplify the information requirements.***

Consult with businesses to determine the type and form of feedback that would provide business benefit.

Remove the requirement for greenhouse gas emissions reporting under the National Greenhouse Energy Reporting Scheme.

The Australian wine industry has identified a number of issues concerning the inefficiencies and irrelevance of some mandatory reporting requirements imposed through Australian government programs. The industry is well accustomed to a range of voluntary and mandatory reporting requirements across state, federal and international bounders. Duplication, inefficacies or perceived lack of value in reporting data significantly reduces business efficiency.

Two such mandatory programs are the National Pollution Inventory (NPI) and the National Greenhouse Energy Reporting Scheme (NGERS).

The website and reporting templates for NPI reporting are highly time consuming, outdated and not user friendly. The methodologies and assumptions used within this program are overly complex to obtain information that could be sourced much more simply and to a higher level of accuracy. One member noted that the legislation, emissions factors and manuals were complex, and difficult to understand. Industry also considers the outputs and repointing that are provided through this program to be of little to no value, lacking any ability to benchmark or utilise this information to assist business.

NGERS was established by the Australian Government under carbon tax policy as a mechanism for reporting greenhouse gas emissions for businesses which exceeded the recommended threshold. Despite the carbon tax being abolished the reporting requirement remains. The reporting is considered to be time consuming and provides little value in return for businesses that are required to report. Industry has also questioned the need for the reporting and its use given the abolition of the carbon tax.

The industry has shown its support and investment for voluntary environmental reporting when the return involves useful information that can be used to benchmark and assist continuous improvement. This is evidenced through the creation of the wine industry's national environmental assurance program (Entwine Australia) and the development of the Australian Wine Industry Carbon Calculator. Both of these are being used by industry to benchmark business efficiency and assist with continuous improvement of business.

Food Standards Code

Recommendation 7: ***That the Australian Government remove the costs to businesses of interpretations of the Food Standards Code***

State, Territory and Local Governments are primarily responsible for implementing and enforcing food standards although the Australian Government, through the Department of Agriculture, has a role in enforcing the Australia New Zealand Food Standards Code at the border. In 1998, the Blair Review recommended Australia adopt an integrated and coordinated food regulatory system with nationally uniform laws and a co-regulatory approach. Following this, Australian, State and Territory Governments agreed to move towards a national system.

An Intergovernmental Food Regulation Agreement (FRA), signed by COAG in 2000, included the Model Food Act as a template for developing consistent legislation in each state and territory. The FRA also established the (now) Australia New Zealand Ministerial Forum on Food Regulation. Membership comprises Ministers responsible for food regulation from all States and Territories, and the Australian and New Zealand Governments. Its role is to develop Australian food regulation policy using powers to adopt, amend, reject or request the review of food standards.

Despite an overarching national approach, inconsistent regulation remains due to the autonomy of State and Territory Governments in determining whether to implement national standards and their interpretation. FSANZ will not provide interpretation for the food standards they develop unless they receive payment. Small businesses cannot afford to seek this advice, with costs multiplying where it is necessary to contact regulatory bodies in each jurisdiction to ensure compliance with their interpretation of standards.

This is an untenable situation, as poorly drafted food regulation has differing interpretations between enforcement jurisdictions, increasing costs and raising uncertainty for businesses trying to comply with the law. WFA seeks the Government's commitment to provide free interpretations of the Food Standards Code to provide greater regulatory certainty.

SELF-REGULATORY ACTIONS

Pregnancy Warning Labelling

Recommendation 8: ***That the Australian Government continues to support the industry-led Pregnancy Warning Labelling Program and does not introduce additional mandatory regulation to achieve the same outcome.***

In 2012, the alcohol industry supported an industry-led voluntary initiative, designed and managed by DrinkWise, to place pregnancy warning labels on products. In 2014, following evaluation of this initiative by the Legislative and Governance Forum on Food Regulation (now Ministerial Forum on Food Regulation), Ministers agreed to support the voluntary program by industry and review the need for mandatory labelling in two years. The Australian Government Department of Health is now repeating the 2014 evaluation to inform Ministers' consideration of this issue later this year.

WFA's own audit in late 2016 of wine products in the top 75 per cent of market share, sold through major retailers, found that 90 per cent of Australian wine products carried a pregnancy warning label. This is a continued improvement on previous audits and the industry is aiming for 100 per cent uptake. WFA will repeat the audit at the end of 2017.

These very positive results have been achieved through a voluntary regulatory program and demonstrate that industry and governments can work cooperatively to achieve common goals without the need for mandatory regulation and red tape. A case could not be made that additional regulation is needed beyond that already being voluntarily administered and implemented by industry.

5. Conclusions

In general, the issues raised above fit within four areas:

- Workplace relations;
- Inconsistent jurisdictional legislative and administrative requirements;
- Business operations; and
- Self-regulatory efforts by industry.

Workplace relations are a key area of red tape for wine industry businesses. A significant amount of information has been provided to the Government on these issues via the Productivity Commission Inquiry as noted above and at appendices to this report. Issues such as administering the Modern Award system, managing seasonal labour through labour hire contractors and weekend trading remain important issues.

Jurisdictional inconsistencies relating to Container Deposit Schemes, biosecurity and Responsible Service of Alcohol qualifications deliver unnecessary administrative complexity as most of the 2,700 wine makers trade across jurisdictions. This ultimately results in additional costs and deters investment and growth of smaller businesses, as the administrative requirements increase in complexity as product is sold across multiple jurisdictions.

Common to many businesses is the general administrative requirements regarding tax, reporting and documentation management. There are clear gains to be made in streamlining these processes and further investment in digital solutions, including bringing together agencies from different levels of government in the one interface should be made.

The wine industry has taken a leading role in self-regulation, particularly in relation to health warning labelling and information. It is critical that where the industry has demonstrated positive benefits and has delivered policy outcomes that the Government does not then impose additional red tape to reach the same outcome.

The recommendations are listed below.

Recommendation 1: ***That the Australian Government accept and implement the recommendations of the Productivity Commission's report on the Workplace Relations Framework, and that this Red Tape Inquiry consider the submissions from that Inquiry as they relate to the red tape burden on employers.***

That the Australian Government prioritise the workplace relations framework as a key sector for red tape reform.

Recommendation 2: ***That the Australian Government work with State and Territory Governments to achieve national recognition of RSA qualifications across all jurisdictions.***

That the Australian Government raise this issue with Tourism Ministers to continue to make progress under the Tourism 2020 Strategy.

Recommendation 3: ***That the Australian Government closely monitors the implementation of CDS in other jurisdictions and facilitates national efficiencies by working with states and territories to minimise costs to businesses.***

That wine containers remain outside the scope of these schemes as they do not contribute to the away-from-home public litter stream.

Recommendation 4: ***That the Australian Government support State and Territory Governments and industry to improve jurisdictional harmonisation of interstate wine grape movement documentation.***

Recommendation 5: ***That the Australian Government prioritise the implementation of a digital platform for wine industry businesses that streamlines reporting and administration across all agencies, including linkages to state and territory jurisdictions.***

The Digital Transformation Office should work with the wine industry on a pilot program basis to develop a digital platform for wine businesses.

Recommendation 6: ***Redesign the reporting template and web interface for the National Pollution Inventory and simplify the information requirements.***

Consult with businesses to determine the type and form of feedback that would provide business benefit.

Remove the requirement for greenhouse gas emissions reporting under the National Greenhouse Energy Reporting Scheme.

Recommendation 7: ***That the Australian Government remove the costs to businesses of interpretations of the Food Standards Code.***

Recommendation 8: ***That the Australian Government continues to support the industry-led Pregnancy Warning Labelling Program and does not introduce additional mandatory regulation to achieve the same outcome.***

Winemakers' Federation of Australia

January 2017

APPENDIX A

Submission to the Productivity Commission's Inquiry into the Workplace Relations Framework

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1. INTRODUCTION

This submission is as a result of the collaborative efforts of the South Australian Wine Industry Association Incorporated and the Winemakers Federation of Australia to provide a national wine industry position, resulting in support and contributions from Wine Industry Tasmania, Wines of Western Australia and the New South Wales Industry Association (collectively referred to as "the Wine Industry Associations)":

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

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

The Winemakers' Federation of Australia (WFA) is the peak body for the nation's winemakers. WFA represents and protects their interests, speak on their behalf and help them maximise opportunities so they can build resilient businesses and a profitable and sustainable industry that continues to win praise at home and around the world.

WFA is formally recognised as the industry's voice under the *Primary Industries and Energy Research and Development Act 1989* and the *Australian Grape and Wine Authority Act 2013*. WFA is incorporated under the *SA Associations Incorporation Act 1985.*
WFA membership represents some 80% of the national wine grape crush, with more than 370 winery members who directly fund the organisation's national and international activities.

WFA equally represents small, medium and large winemakers from across the country's wine-making regions. Each group has an equal voice at the Board level. WFA Board decisions require 80% support so no one sector can dominate the decision-making process. In practice, most decisions are determined by consensus.

WFA works in partnership with the Australian Government and our sister organisation, Wine Grape Growers Australia (WGGA), to develop and implement national policy that is in the wine sector's best long-term interests.

WFA's activities are centred on providing leadership, strategy, advocacy and support that serves the entire Australian wine industry, now and into the future.

2. SUBMISSION OVERVIEW

The Wine Industry Associations are pleased to have the opportunity to provide a submission to the Productivity Commission's Inquiry into the Workplace Relations Framework (the Inquiry).

According the Terms of Reference of the Inquiry released by the Federal Treasurer, the Honourable Joe Hockey MP, on 19 December 2014, the Inquiry will assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net
- small businesses
- productivity, competitiveness and business investment
- the ability of business and the labour market to respond appropriately to changing economic conditions
- patterns of engagement in the labour market
- the ability for employers to flexibly manage and engage with their employees
- barriers to bargaining
- red tape and the compliance burden for employers
- industrial conflict and days lost due to industrial action
- appropriate scope for independent contracting.

To assist interested parties responding to the Inquiry and to facilitate discussion, the Productivity Commission (PC) has released 5 Issues Papers on the following broad topics:

- Issues Paper 1: The Inquiry in Context;
- Issues Paper 2: Safety Nets;
- Issues Paper 3: The Bargaining Framework;
- Issues Paper 4: Employee Protections; and
- Issues Paper 5: Other Workplace Relations Issues.

While this submission addresses Issues Papers 2-5, it does not respond to each and every question or topic contained therein, but focuses on the questions and matters of particular relevance to the Wine Industry. However, the absence of a response to a particular question or in relation to a particular topic should not be interpreted as support for the current provision unless specifically expressed.

Throughout this submission, the *Fair Work Act 2009* is referred to as "the Act", the *Workplace Relations Act 1996* as "the WR Act", the Fair Work Commission as "the FWC" and the Fair Work Ombudsman as "the FWO".

3. SUMMARY OF RECOMMENDATIONS

Issues Paper 5 – Other Workplace Relations Issues

- Refocus the functions of the Fair Work Ombudsman (FWO) on enforcement and compliance;

- Refocus the functions of the Fair Work Commission (FWC) on dispute resolution;

- Transfer the wage-setting powers of the Fair Work Commission to a stand-alone independent authority;

- Transfer the appeals-mechanism currently undertaken by a Full Bench of the Fair Work Commission to a stand-alone independent panel;

- The current workplace relations system is highly complex resulting in substantial compliance costs in relation to Modern Awards, leave entitlements, performance management and termination of employment; and

- The provisions on transfer of business, particularly in relation to transfer of enterprise agreements, create disincentives to industry consolidation.

Issues Paper 2 – Safety Nets

- The Modern Award system is complex, inflexible and unnecessarily prescriptive despite numerous reforms to simplify the award system over the last 30 years;

- The first reform option is to replace the award system with an expanded legislated minimum safety net through the National Employment Standards (NES);

- A second reform option is to refocus the Modern Award system on being a genuine minimum safety net by reducing the number of award matters and removing matters classified as non-allowable;

- Ensure that the flexibilities under the NES currently available to award-free employees is extended to award-covered employees;

- Clarify that annual leave loading is only payable on termination of employment where expressly provided for in a Modern Award or enterprise agreement;

- Remove the requirement that employers make up for the shortfall in any compensation provided by the courts system for jury duty and the employee's base rate of pay; and

- The level of weekend and public holiday penalty rates are a major concern to the industry, disadvantaging the industry during the vintage period and other peak operational periods compared to equivalent wine businesses overseas.

Issues Paper 3 – The Bargaining Framework

- Individual Flexibility Agreements (IFAs) are rarely used, mainly given their limited scope and lack of stability. To address this all matters of the awards should be allowed to be varied through an IFA and IFAs being able to be offered as a condition of employment;

- Enterprise bargaining should be used as a vehicle to increase labour productivity and flexibility, rather than extracting manifestly excessive benefits under the threat of industrial action;

- Only matters that directly relate to the employment relationship should be permitted matters in enterprise agreements;

- Matters that do not directly relate to the employment relationship should be deemed prohibited content.

- Protected industrial action should not be allowed to be taken to advance claims about matters that are not permitted, or which are about prohibited content or unlawful terms;

- On average only 1% of all enterprise agreements lodged with the FWC are refused approval, yet the FWC continues to invest substantial resources into assessing all enterprise agreements lodged for approval; and

- FWC's assessment and approval of enterprise agreements should be discontinued, a valid and legally enforceable enterprise agreement should come into operation when approved by the employees.

Issues Paper 4 – Employee Protections

- The payment of "go away money" is common, even where an application for unfair dismissal lacks merit;

- Not enough is being done to identify and deal with frivolous and vexatious claims at an early stage;

- The minimum employment period should be increased to 24 months for a small business employer and 12 months for other businesses;

- Align the definition of a "small business employer" for the purposes of the minimum employment period with the small business definition used by the Australian Bureau of Statistics "a business with less than 20 employees" (excluding related entities);

- Permanently exclude micro-business employers with 10 or less employees (excluding related entities) from unfair dismissal;

- Unfair dismissal claims not to be made if the employment was terminated for "genuine operational reasons" or reasons that include "genuine operational reasons"; and

- Increase the unfair dismissal application fee to discourage frivolous and vexatious applications and applications lacking in merit.

4. WINE INDUSTRY OVERVIEW

The Wine Industry in Australia

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. In 2014 the industry exported 700 million litres of wine, generating export revenue of $1.82 billion to the Australian economy.[1] The value of domestic sales was $2.36 billion in in 2012-2013.[2]

Apart from contribution to the nation's overall export revenue, the Wine industry also generates substantial revenue to the tourism industry, attracting close to 700,000 international visitors and generating revenue of $8.2 billion from domestic and international tourism.[3]

From 1991 to 2007, the Australian Wine industry enjoyed considerable success, tripling in size from less than 400 million litres of production to 1.2 billion litres and growth in export from $212 million to $3 billion. Close to 100% of the growth was exported into key markets, including the United Kingdom, United States and Canada.[4]

However, from 2007 the Australian Wine industry has been under significant pressure commencing with the global financial crisis (GFC) in August 2007. From 2007 to 2012 wine exports fell significantly, by 64 million litres (8% fall) in volume and by $1.15 billion (38%) in value. The key factors contributing to this fall were a higher Australian dollar, falling demand for Australian wine in key markets, particularly the United Kingdom, United States and Canada, increased competition from other export countries, including France, Italy, Chile, Argentina, Spain and South Africa, and higher costs.[5]

The industry is expected to be under significant pressure for a number of years. While the recent fall in the Australian dollar will contribute to improving the competitiveness of Australian wine exports it is only one factor and it will take a long time to return to the pre-GFC export-levels in terms of volume and value.

[1] Australian Grape and Wine Authority 2015, *Wine Export Approval Repor*t, Moving Annual Total (MAT) to December 2014.
[2] See Winemakers' Federation, Snapshot of Australian Wine Industry table on page 8 of this submission.
[3] Ibid
[4] Winemakers ' Federation 2013, Expert Report on the Profitability and Dynamics of the Australian Wine Industry
[5] Ibid

Snapshot of the Australian Wine Industry			
Wine Producers			
Wineries		Value	% change over last 12 months
2013	number	2,573	0.0%
# Increase	number	1	
Wineries by Size of Crush (2013)			
< 500 tonnes	number	2,244	0.04%
500-4,999 tonnes	number	177	-2.3%
5000-9,999 tonnes	number	14	-12.5%
>=10,000	number	28	-9.7%
Unspecified	number	110	0.9%
Direct Employment			
2014-15	number	16 186	0.4%
Viticulture			
Winegrape Crush			
2014	'000 tonnes	1 700	-7.4%
Winegrape Price			
Australian average, all varieties (2014)	$A	441	-11.6%
Environment			
Water Use (2012-13)			
Megalitres per hectare	ML	2.52	21.7%
Beverage Wine Production			
2014	million litres	1 202	-2.4%
Sales & Trade			
Domestic Sales - Volume			
2013	million litres	459	1.0%
Domestic Sales - Value (wholesale,using fob prices)			
2012-13	$A million	2 369	-5.0%
Imports - Volume			
2013	million litres	83	-1.2%
Imports - Value			
2013	$A million	610	9.0%
Exports - Volume			
2014	million litres	700	2.0%
Exports - Value			
2014	$A million	1 820	2.0%
Exports - Value per Litre			
2014	$A/litre	$2.60	0.0%
Wine as % of total value of crops export (fob)			
2013-14	%	8%	
Wine Exports' Ranking on major agricultural, fisheries and forestry commodities exports			
2012-13	ranking	6th	
Australian Wine's Contribution to Value of World WineTrade (2012)			
Ranking	ranking	4th	
%	%	6%	
Tourism			% market share
International visitors to wineries (year ending Sep 2014)	no.of people	696 602	11.0%
Domestic visitor overnight trips to wineries (year ending Sep 2014)	no. of trips in million	3	4.0%
Estimated tourism revenue generated from international and domestic visits (year ending Sep 2014)	$A billion	8.20	
Consumption			
Wine Consumption Per Capita			
2012-13	litres	29.11	-2.30%
Taxation			
Net Wine Equalisation Tax 2013-14	$A million	766	3.0%

Sources: *ABARES Commodity Statistics, Australian & New Zealand Wine Industry Directory, IBISWorld Industry Report, Tourism Australia, Entwine Member Database, ABS Domestic Sales and Import Statistics and Wine Australia Export Approval Database via Winefacts Statistics; ABS Catalogue No: 1329.0 Australian Wine and Grape Industry, ABS Catalogue No: 8504.0 Shipments of Wine and Brandy in Australia by Australian Winemakers and Importers, , ABS Catalogue No: 4307.0.55.001 Apparent Consumption of Alcohol ,Wine Australia and Treasury (Budget and Mid-year Economic and Fiscal Outlook), Aztec Report; Australian Taxation Office, Taxation Statistics; WFA analysis*

5. ISSUES PAPER 5 – OTHER WORKPLACE RELATIONS ISSUES

Executive Summary

- Refocus the functions of the Fair Work Ombudsman (FWO) on enforcement and compliance;

- Refocus the functions of the Fair Work Commission (FWC) on dispute resolution;

- Transfer the wage-setting powers of the Fair Work Commission to a stand-alone independent authority;

- Transfer the appeals-mechanism currently undertaken by a Full Bench of the Fair Work Commission to a stand-alone independent panel;

- The current workplace relations system is highly complex resulting in substantial compliance costs in relation to Modern Awards, leave entitlements, performance management and termination of employment; and

- The provisions on transfer of business, particularly in relation to transfer of enterprise agreements, create disincentives to industry consolidation.

Government Institutions and Agencies

The main government institutions and agencies within the Federal workplace relations system are the Office of the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC).

Office of the Fair Work Ombudsman

According to section 682 of the Act, the FWO has the following functions:

- *to promote harmonious, productive and cooperative workplace relations; and compliance with this Act and fair work instruments; including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;*

- *to monitor compliance with this Act and fair work instruments;*

- *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*

- *to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;*

- *to refer matters to relevant authorities;*

- *to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;*

- *any other functions conferred on the Fair Work Ombudsman by any Act.*

The Wine Industry Associations accept the need for an enforcement and compliance agency which provides advice and information and where required initiates court proceedings for serious and repeated contraventions of the Act. However, we are concerned that the role of the FWO has been vastly expanded from being primarily focused on enforcement and provision of information to assist legislative compliance, to now being responsible for promoting "*harmonious, productive and cooperative workplace relations*" and "*producing best practice guides to workplace relations or workplace practices*".

As discussed further under the section relating to the FWC, there appears to be an increasing overlap in responsibilities of the FWO and FWC and increased uncertainty about the limits of FWO's responsibilities and functions.

FWO's responsibilities of promoting "*harmonious, productive and cooperative workplace relations*" and "*producing best practice guides to workplace relations or workplace practices*" are so broad and fuzzy that it enables the FWO to further expand its taxpayer funded services and products in direct competition with the private sector. While there is a place for publically funded information and guidance to assist compliance the Wine Industry Associations submit that the FWO should not be competing with the services, products and expertise provided by private sector organisations, including not-for profit industry and employer associations. We question whether it is a wise use of public money for the FWO to undertake work where there is no demonstrated market failure, i.e. where private providers already provide high quality information, assistance and advice.

Further, we do not think it is appropriate for the FWO to produce "best practice guides", the role of the FWO should be to ensure legislative compliance, not to raise the standard beyond the minimum set out in legislation. By producing best practice guides FWO are giving employers the impression that meeting legislative and regulatory compliance is not adequate, but only best practice standards will suffice. Instead the funds allocated to producing best practice guides and information materials that go beyond ensuring minimum legislative compliance should be discontinued and could be better allocated to compliance and enforcement-based activities, such as visits, audits and investigations.

The current functions of the FWO should be contrasted with the functions and responsibilities of its predecessor, the Office of the Workplace Ombudsman (WO), established in 2007 under the *Workplace Relations Act 1996* (the WR Act). The WO had the following functions under section 166B of the WR Act:

- *to assist employees and employers to understand their rights and obligations under Commonwealth workplace relations legislation;*

- *to promote compliance with Commonwealth workplace relations legislation, including by providing assistance and advice and disseminating information;*

- *to monitor compliance with Commonwealth workplace relations legislation;*

- *to investigate suspected contraventions of Commonwealth workplace relations legislation;*

- *to inquire into any act or practice that may be contrary to Commonwealth workplace relations legislation;*

- *to refer matters to relevant authorities;*

- *to institute proceedings to enforce Commonwealth workplace relations legislation;*

- *to appoint workplace inspectors;*

- *to give, as necessary, directions relating to the exercise or performance of appointed workplace inspectors' powers or functions;*

- *to represent employees who are, or might become, a party to proceedings under this Act, in situations where the Workplace Ombudsman considers that representing the employees will promote compliance with Commonwealth workplace relations legislation;*

- *any other functions conferred on the Workplace Ombudsman by Commonwealth workplace relations legislation.*

The Wine Industry Associations submit that the WO had a much clearer role and mandate, focusing on compliance and enforcement rather than fuzzy objectives such as "*harmonious, productive and cooperative workplace relations*".

Recommendation 1:

In order to refocus the FWO on compliance and enforcement activities it is proposed that section 682(1)(a) be amended as follows:

Delete section 682(1)(a) and substitute with:

(a) to assist employees, outworkers, employers, outworker entities and organisations to understand their rights and obligations under this Act.

Insert new section 682(1)(b) as follows and renumber of accordingly:

(b) to promote compliance with this Act and fair work instruments.

Fair Work Commission

A Federal workplace relations tribunal has been in existence in various forms and under various names since the establishment of the Commonwealth Court of Conciliation and Arbitration in 1904.

The core functions of the (FWC) are set out in section 576 of the Act. The Wine Industry Associations accept there is a role for a Federal tribunal in relation to unfair dismissal, right of entry, industrial action and dispute resolution. However, we are concerned that with the commencement of the Act in 2009, the role of the FWC has been expanded into a number of other areas of questionable value to the public and areas that overlap with the functions of the FWO.

This includes research activities under section 653 and 590(2)(g) of the Act. While it may be justified to undertake limited research to assist FWC members to carry out their statutory responsibilities, we question the need for research under section 653 for example in relation to IFAs and enterprise agreements. We also question whether extensive research projects commissioned under section 590(2)(g) is a wise use of taxpayers' money and appropriate given that it could indirectly support the interest, agenda and arguments of one group of stakeholders. For example, it appears that the research by the FWC's Pay Equity Unit will mainly benefit those parties arguing for the making of an Equal Remuneration Order, whereas those opposing the claim will have to finance their own research.

In relation to overlapping responsibilities, we are concerned that the functions and responsibilities of the FWC appear too similar to those of the FWO. For example, in section 576(2)(aa) of the Act the FWC is responsible for "*promoting cooperative and productive workplace relations and preventing disputes*", this is very similar to the FWO's responsibility "*to promote harmonious, productive and cooperative workplace relations*". These statements not only create a large degree of overlap, but also are very broad and enable both organisations to branch out and engage in activities that may only be remotely connected to their core responsibilities.

Recommendation 2:

In order to refocus the FWC on its core responsibilities it is proposed that the following amendments are made to the Act:

- Delete section 576(2)(aa) relating to promoting cooperative and productive workplace relations and preventing disputes;

- Delete section 590(2)(g) relating to undertaking or commissioning research; and

- Delete section 653 relating to review and research of IFAs, enterprise agreements et cetera.

FWC's wage setting powers

The FWC's wage setting powers are outlined in Chapter 2, Part 2-6 of the Act. The wage setting process in the Act is an improvement to the pre-2006 arrangements that were of a court-like and adversarial nature and often conducted over several days. For example, the 1998 proceedings took place in Melbourne over 9 days from November 1997 to March 1998[6] and the 2005 decision took place in Melbourne over 5 days from December 2004 to April 2005[7].

However, there is scope for further simplifying the process, increasing transparency, enabling a wider range of organisations to participate and more clearly link the wage setting to economic parameters rather than arbitrating claims.

Under section 284, in setting and adjusting minimum wages, the FWC must consider the minimum wages objective, which includes the following parameters:

- *the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth;*

- *promoting social inclusion through increased workforce participation;*

- *relative living standards and the needs of the low paid;*

- *the principle of equal remuneration for work of equal or comparable value;*

- *providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.*

From 2006 to 2009 the Australian Fair Pay Commission (AFPC) was responsible for setting and adjusting minimum wages. In doing so, the AFPC was required under section 23 of the WR Act to consider the following parameters:

[6] Australian Industrial Relations Commission 1998, Safety Net Review April 1998, Dec 457/98 M Print Q1998
[7] Australian Industrial Relations Commission 2005, Safety Net Review June 2005, PR002005

- *the capacity for the unemployed and low paid to obtain and remain in employment;*

- *employment and competitiveness across the economy;*

- *providing a safety net for the low paid;*

- *providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.*

The Wine Industry Associations submit that section 23 of the WR Act more clearly set out the requirements and parameters for reviewing minimum wages compared to the current minimum wages objective in section 284 of the Act. For example, it is not clear what the intention is of the minimum wages objective of *"promoting social inclusion"* and "*the principle of equal remuneration for work of equal or comparable value"* and how the FWC is meant to apply them in practice when reviewing minimum wages.

With the commencement of the Act in 2009 the AFPC was abolished and the wage-setting powers returned to the Federal tribunal (FWC) with the establishment of an "expert panel" to conduct the annual wage review. However, rather than retaining the structure of the AFPC with all members independent from the FWC, a majority of panel members are also FWC members.

To be appointed to the AFPC a person had to have a *"high level of skills and experience in business or economics"* if appointed as the Chair and if appointed as a AFPC Commissioner "*experience in one or more of the following areas: business, economics, community organisations and workplace relations."*[8]

The Wine Industry Associations see a number of benefits of the AFPC structure for setting and adjusting minimum wages compared to the current panel structure:

- Independence from the arbitral function of the FWC;
- Members with a wider range of expertise represented;
- More informal processes and consultation with a wider group of stakeholders; and
- A less adversarial approach to setting of minimum wages.

In this context it should be noted that in the United Kingdom, the Low Pay Commission, an independent body advising the Government about the National Minimum Wage has operated since 1998. Under Schedule 1 of the *National Minimum Wage Act 1998*, the Low Pay Commission comprise of a Chair and eight other members. In appointing members, the relevant Minister must have regard to the desirability of securing a balance of:

- members with knowledge or experience of, or interest in, trade unions or matters relating to workers generally;
- members with knowledge or experience of, or interest in, employers' associations or matters relating to employers generally; and
- members with other relevant knowledge or experience.

[8] Workplace Relations Act 1996, section 29; 38

Recommendation 3:

The Wine Industry Associations recommend that the wage setting powers of the FWC be transferred to an independent body (the Minimum Wage Commission) with similar powers, structure, composition and parameters as the AFPC.

Members appointed to the Minimum Wage Commission must be independent of the FWC, with no dual appointments allowable. Further, to ensure its independence the Minimum Wage Commission should employ its own staff.

Appeals of FWC decisions

Under section 604 of the Act a person who is aggrieved by a decision by the FWC may seek leave to appeal the decision to a Full Bench of the FWC. Under section 618 of the Act a Full Bench must comprise at least three members, including at least the President, a Vice President or a Deputy President, to be chosen by the President.

The Federal Government in December 2013 sought the views of employer associations and unions on whether to retain the current appeals mechanism or whether to establish a separate appeals body to hear and determine appeals of decisions by the FWC. Disappointingly, the Federal Government has failed to progress this matter any further.

The Wine Industry Associations submit that there is merit to transferring the appeals mechanism from the FWC to a separate body independent of the FWC with members exclusively hearing appeals. While the current appeals mechanism within the FWC is similar to the mechanism that applied to its predecessors under the previous principal industrial relations legislation, including the *Conciliation and Arbitration Act 1904, Industrial Relations Act 1988* and the WR Act, there is scope for improving the current process by having specialised members hearing appeals. In addition, an appeals structure with members fully independent from the FWC could increase public confidence in the appeals process.

In other jurisdictions with similar or comparable judicial systems and tradition of labour market regulation, including New Zealand, United Kingdom and the Republic of Ireland appeals are heard by a separate body rather than by peers assembled on an ad-hoc basis.

In New Zealand, the equivalent of the FWC, the Employment Relations Authority[9] is responsible for hearing and determining disputes about employment agreements, collective bargaining, industrial action, unfair dismissal, discrimination in employment and freedom of association. Decisions of the Employment Relations Authority may be appealed without the need for leave to the Employment Court[10].

In the United Kingdom the Employment Tribunal[11] is responsible for hearing complaints about a range of matters relating to the employment relationship, including complaints of unlawful deductions from wages, working time disputes, disputes regarding carer's leave and parental leave, unfair dismissal and redundancy pay. Decisions of the Employment Tribunal are appealable to a separate body – the Employment Appeal Tribunal[12].

In the Republic of Ireland, the Labour Relations Commission[13] is responsible for investigating, determining, mediating and conciliating disputes in relation to a number of

[9] *Employment Relations Act 2000 (NZ),* Section 161 and 103
[10] Ibid, section 179
[11] *Employment Rights Act 1996 (UK); Employment Tribunals Act 1996 (UK)*
[12] *Employment Tribunals Act 1996 (UK),* section 21
[13] The Labour Relations Commission, Government of the Republic of Ireland "More on Rights Commissioner Service", <http://www.lrc.ie/document/More-on-the-Rights-Commission/4/745.htm>

matters, including unfair dismissals, parental leave, payment of wages, minimum wages, carer's leave and working time. Depending on the matter in dispute, recommendations or decisions by the Labour Relations Commission may be appealed either to the Employment Appeals Tribunal[14] or the Labour Court[15], both independent of the Labour Relations Commission.

Recommendation 4:

The Wine Industry Associations recommend that the Act be amended to establish a separate appeals panel with members independent of the FWC to hear and determine appeals currently dealt by a Full Bench. The appeals panel would have 5-7 members, including a President of the Panel, appointed by the Governor-General. To ensure the independence of the Panel, members of the Panel would not be allowed to be serving members of the FWC.

To ensure panel members have the skills, experience and expertise to hear appeals, the following qualification requirements should apply:

President:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

Member:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; or
-has had experience at a high level in industry or commerce in the service of a peak council or another association representing the interests of employers or employees or in the service of government or an authority of government; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

Compliance costs

The PC correctly points out in its Issues Paper No. 5 that the current workplace relations system is highly complex leading not only to substantial compliance costs, but also instances of non-compliance.

Wine industry employers face different compliance costs depending on business size and level of sophistication in relation to human resources and workplace relations expertise. The extent to which a regulatory requirement is viewed as a minor or major obstacle, impediment or cost is also associated with size of the employer.

For a large employer with a sophisticated payroll system and dedicated payroll expertise the effort involved in interpreting awards or agreements to determine the applicable rates of pay, including penalties, loadings, overtime and allowances may be relatively small. However, for a family-operated small winery business carrying out the relevant wages calculations may involve considerable effort, time and resources.

[14] Department of Jobs, Enterprise and Innovation, Republic of Ireland, Workplace Relations, "How to make an appeal", <http://www.workplacerelations.ie/en/Appeals/How_to_make_an_appeal/How_to_make_an_appeal.html>
[15] Ibid

At the same time larger employers may face an even more complex industrial environment which may involve managing:

- multiple industrial instruments, including several separate enterprise agreements and Modern Awards;
- award-free employees engaged under common law contracts;
- award-covered employees paid an annualised salary under an annualised salary provision in a Modern Award, IFA or a common law contract;
- matters pertaining to enterprise bargaining;
- industrial action,
- claims of unfair dismissal and/or adverse action; and
- transfer of business.

The Wine Industry Associations conducted a survey in February 2015 of their members to determine the issues with the workplace relations system that are of most concern to wine industry employers. Asking to nominate the aspects of the workplace relations system that are the main sources of the organisation's compliance costs, wine industry employers listed the following top four issues:

- Modern Awards;
- Leave entitlements;
- Redundancy; and
- Termination for poor performance.

Asking to explain what impact, if any, compliance costs had on their employment practices, 66% of the respondents explained that the compliance costs discourage employment of more staff. 57% of the respondents in turn explained that as a result there is an incentive to utilise more labour hire staff and independent contractors.

The following two case studies provide an illustration of the views of wine industry employers on compliance costs.

Case study 1: Compliance costs

As a result of its complexity it is not easy for employers and employees to follow the framework. Compliance costs include management time to interpret and determine what the statutory requirements actually mean and require. There is a need to seek legal advice, and also guidance from my employer association on a frequent basis to ensure compliance in the spirit of the Award. There is also management time to ensure employees abide by prescriptive requirements (eg breaks), and cost of payroll administration time in deciphering payments required following what has transpired by way of time worked and breaks taken and penalties that are applicable.

Our current payroll system is not capable of processing the complex contingencies within the Award. The prescriptive working arrangements, labour costs, overtime, penalty payments and allowances inhibit business competitiveness. The framework is a distraction from our core business.

Case study 2: Compliance costs

Time management, access to specialised knowledge and skills comes at a cost, loss of productive time due to the time needed by management and staff to understand complex and often changing rules, reticence to grow the business to a place that requires more staff.

Transfer of Business

According to section 311 of the Act, a transfer of business occurs where:

- the employment of an employee of the old employer has terminated;
- within 3 months after the termination, the employee becomes employed by the new employer;
- the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
- there is a connection between the old employer and the new employer such as a transfer of assets, outsourcing, insourcing or the new employer is an associated entity of the old employer.

Over the last 10-15 years the Wine Industry has been going through a period of consolidation. However, the current transfer of business provisions create a disincentive to further consolidation due to their complexity and ambiguity. In addition, the requirement that any enterprise agreement covering the old employer transfers to the new employer may actively discourage the acquisition of another business due to the incompatible, unworkable and unproductive and inefficient working conditions that could flow on to the owner of the business.

The following case study illustrates the experiences of a wine industry employer with the transfer of business provisions and the extensive work required to vary the old employer's enterprise agreement, even where all employees consented to the variation.

Case Study 3: Transfer of Business

A large wine industry employer acquired a vineyard in Tasmania from a wine producer operating sites in multiple states. The vineyard had a very small workforce, all engaged as vineyard workers. At the time of acquisition the vineyard workers were covered by an enterprise agreement applying to their employer's diverse operations. Due to the incompatibility of the old employer's enterprise agreement with the new employer's operations, ongoing employment with the new employer was conditional upon the enterprise agreement being varied.

The issues related to differences in payroll processing and calculations, including accrual of rostered days off and pay frequency as well as differences in working arrangements, culture and philosophy.

All of the transferring employees agreed to the variations and an application was made to the FWC to vary the old employer's enterprise agreement. The application was accompanied by a sworn witness statement, employee statements, exhibits and an application. Legal advice and representation was required to progress the application in a timely manner.

The variation was eventually approved by the FWC prior to the settlement date, enabling the new employer to provide ongoing employment to the transferring employees.

In the experience of the Wine Industry Associations the transmission of business provisions in place prior to the commencement of the Act were more appropriate. Under Part 11 of the WR Act, an enterprise agreement covering transmitting employees continued to operate for a maximum period of 12 months. This enabled the new employer to treat the transferring

instrument as an interim arrangement and commence processes to replace the interim with permanent arrangements.

Recommendation 5:

The Wine Industry Associations recommend that in line with the Part 11 of the WR Act a transferring instrument cease to apply after 12 months of the transfer of business occurring.

6. ISSUES PAPER 2 – SAFETY NETS

Executive Summary

- The Modern Award system is complex, inflexible and unnecessarily prescriptive despite numerous reforms to simplify the award system over the last 30 years;

- The first reform option is to replace the award system with an expanded legislated minimum safety net through the National Employment Standards (NES);

- A second reform option is to refocus the Modern Award system on being a genuine minimum safety net by reducing the number of award matters and removing matters classified as non-allowable;

- Ensure that the flexibilities under the NES currently available to award-free employees is extended to award-covered employees;

- Clarify that annual leave loading is only payable on termination of employment where expressly provided for in a Modern Award or enterprise agreement;

- Remove the requirement that employers make up for the shortfall in any compensation provided by the courts system for jury duty and the employee's base rate of pay; and

  The level of weekend and public holiday penalty rates are a major concern to the industry, disadvantaging the industry during the vintage period and other peak operational periods compared to equivalent wine businesses overseas.

The Modern Award system

Despite reforms, the Award system is still complex and inflexible

Feedback from wine industry employers demonstrates that the Modern Award is the major source of the compliance costs associated with the workplace relations system. Even a task as fundamental as calculating an employee's wages is time consuming and complex.

While Awards have been "restructured", "simplified" and "modernised" by the Federal tribunal under the direct or indirect instruction of successive Federal Governments over the last 30 years, many businesses still find awards highly complex and ill-suited to their operations.

The Federal Labor Government in the mid-1980s recognised that the Federal award system had become out of date and were unsuitable to a modern economy and had to be restructured and modernised[16]. This was echoed by a wide range of parties with different ideological agendas who all recognised that restructuring and modernising the Federal award system was essential to protect Australia's long-term prosperity and international competitiveness[17].

[16] Willis R 1988, Minister for Industrial Relations, Second Reading Speech, Industrial Relations Bill 1988, House of Representatives, Official Hansard, 28 April 1988.

[17] National Labour Consultative Committee 1987, *Labour Market Flexibility In The Australian Setting,* Australian Government Publishing Service, Canberra; Willis R 1988, Minister for Industrial Relations, *Labour Market Reform: The Industrial Relations Agenda*, Department of Industrial Relations, Government Publishing Service, Canberra; Blandy R.J and Sloan J 1988, 'Escape from the Banana Republic: Labour Market Reforms', *Working Paper No 98,* National Institute of Labour Studies, Flinders University; Blandy R.J 1989, 'The Industrial Relations Revolution', *Working Paper No 105*, National Institute of Labour Studies, Flinders University; Keating P 1989b, Treasurer, *1989-90 Budget Paper No. 1, Budget Statements 1989-90,* Australian Government Publishing Service, Canberra; Australian Council of Trade Unions/Trade Development Council 1987, *Australia Reconstructed*, Australian Government Publishing Service, Canberra

Accordingly, in the 1987 wage case[18], the Federal Tribunal announced the "Restructuring and Efficiency Principle" which linked wage increases to award restructuring. This principle was remodelled in the 1988 wage case[19] into the Structural Efficiency Principle emphasising the removal of impediments to enhanced workplace productivity, efficiency and multi-skilling.

The restructuring and modernisation process involved unions, employers and employer associations reviewing the award to establish skill-related career paths, eliminate impediments to multi-skilling, establish flexible work patterns in exchange for wage increases and enabling the award to be varied on the workplace level. However, progress was slow and the Federal tribunal remarked that the parties' narrow focus on classifications and training *"cause us grave concern"* as it ignored productivity and efficiency improvements[20]. The tribunal was not alone in its assessment; other findings indicated that changes were mainly centred around classifications and training, rather than in areas where changes were most critical[21].

The Federal Labor Government in 1993 introduced the *Industrial Relations Reform Bill 1993*. The Government explained that the changes should assist in making awards *"more streamlined and modern, with detailed prescription about the organisation of work increasingly being a matter for agreements"*[22]. The legislation emphasised that the award system should support effective work practices and provide skill-based career-paths, directed the Federal tribunal to develop and incorporate enterprise flexibility provisions in awards to enable the employer and the employees to vary award terms to better suit the needs of the enterprise and the employees concerned[23].

In addition, the tribunal was directed to review awards every three years to identify and remedy 'deficiencies', which included terms that were obsolete or needed to be updated, provisions that were not written in plain English or easy to understand or that provided unnecessary detail[24]. The reviews were intended to result in an award system that was easier to apply, less prescriptive and more relevant to individual workplaces[25]. The Government expected the tribunal "*to drive the process by establishing a firm program of reviewing awards which would provide the encouragement and impetus necessary to ensure that real progress occurs in their reform"*[26].

The process was required to be completed by 22 June 1997. However six months before the intended completion date not more than 37 matters had been dealt with, leaving the vast majority of the thousands awards making up the federal award system untouched[27]. The

[18] Australian Conciliation and Arbitration Commission 1987, National Wage Case March 1987, 10 March 1987, Dec 110/87 M Print G6800

[19] Australian Conciliation and Arbitration Commission 1988, National Wage Case August 1988,12 August 1988, Dec 640/88 M Print H4000

[20] Australian Industrial Relations Commission 1991, National Wage Case April 1991, 16 April 1991, Dec 300/91 M Print J7400, p. 22.

[21] Sloan J and Wooden M 1990, 'The Structural Efficiency Principle in Action – Management Views', *Australian Bulletin of Labour*, Vol 16, No. 3, pp. 199-223; Sloan J 1992, 'Until the End of Time: Labour Market Reform in Australia', *The Australian Economic Review,* Vol 100, No 4, pp. 65-78; Hilmer F.G, Anguin M, Layt, J, Dudley, G, Barratt, P and McLaughlin P 1993*, Working Relations: A Fresh Start for Australian Enterprises*, The Business Library, Melbourne.

[22] Brereton L 1993, Minister for Industrial Relations, Second Reading Speech, Industrial Relations Reform Bill 1993, House of Representatives, Official Hansard, 28 October 1993

[23] Brereton L 1993, Minister for Industrial Relations, Industrial Relations Reform Bill, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives.

[24] Ibid

[25] Department of Industrial Relations 1995, *Review of Wage Fixing Principles April-August 1994, Commonwealth Government Submissions,* Australian Government Publishing Service, Canberra.

[26] Keating P 1994, Prime Minister, *Working Nation, Policies and Programs,* Australian Government Publishing Service, Canberra.

[27] Australian Industrial Relations Commission 1995, Third Safety Net Adjustments and Section 150A Review October 1995, 9 October 1995, Dec 2120/95, M Print M5600.

Federal Coalition Government elected in 1996 continued the legislative path of award restructuring and modernisation with the enactment of the *Workplace Relations Act 1996*.

The new Federal Government made it clear that award restructuring and modernisation was a key priority of the WR Act and that "*reforms to awards will deliver critical changes that were acknowledged by the previous government as necessary, but which it failed to put into place because of the straitjacket of its accord relationship with the ACTU*"[28].

The legislation provided new objectives for the award system, limiting the numbers of matters that could be included and specifically prescribing matters that could not. Existing awards on the other hand were subject to an eighteen month transitional period during which parties could apply to have an award modified so that it would only incorporate allowable award matters. This came to be known as the Award Simplification Process. At the end of the eighteen month period, any matters that had not been modified would be unenforceable.

In varying the award to ensure that it only covered allowable matters, the tribunal was also required to ensure that the award complied with additional criteria, including ensuring that the language and structure of the award was simple to understand and that obsolete provisions were removed.

Throughout the process a number of award matters were removed, including restrictions on the number of apprentices and junior employees engaged, restrictions on the number of casual and part-time employees engaged and union approval for the engagement of casual employees[29].

While the Tribunal was responsible for carrying out the simplification process, the Government actively exercised its rights under section 109(1) of the WR Act to request a Full Bench review of single member decision, if in the Minister's view the decision was contrary to the public interest.

The Minister sought a Full Bench review of award simplification decisions by individual commissioners on sixty occasions[30]. According to the Minister, award simplification was too important to be left entirely in the hands of award respondents and the Government would *'not automatically accept deals done between the employers and the unions on award simplification'*[31].

Less than seven months after the Federal tribunal handed down its Test Case decision[32] on the Award Simplification Process which provided detailed guidance on allowable and non-allowable award matters, the Government indicated that there was a need for further legislative reforms[33].

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[28] Reith P 1996, Minister for Industrial Relations, Second Reading Speech, Workplace Relations and Other Legislation Amendment Bill 1996, House of Representatives, Official Hansard, 23 May 1996.

[29] Australian Industrial Relations Commission 1997, Award Simplification Decision, 23 December 1997, H0008 Dec 1533/97 M Print P7500; Australian Industrial Relations Commission 1999, Workplace Relations Act 1996, s.109 applications for review by Minister for Workplace Relations and Small Business, 12 March 1999, Dec 218/99 V Print R2700.

[30] Australian Industrial Relations Commission 1998, *Annual Report of the President of the Australian Industrial Relations Commission 1 July 1997 to 30 June 1998,* Commonwealth of Australia, Melbourne; Australian Industrial Relations Commission 2001 *Annual Report of the President of the Australian Industrial Relations Commission 1 July 2000 to 30 June 2001,* Commonwealth of Australia, Melbourne.

[31] Reith P 1998, Minister for Employment, Workplace Relations and Small Business, *24 July 1998, Transcript, Doorstop Interview - Grand Hyatt Hotel, Melbourne*, available from PANDORA - Australia's web archive, National Library of Australia, <http://pandora.nla.gov.au>.

[32] Australian Industrial Relations Commission 1997, Award Simplification Decision, 23 December 1997, H0008 Dec 1533/97 M Print P7500.

[33] Reith P 1998, Minister for Employment, Workplace Relations and Small Business, *24 July 1998, Transcript, Doorstop Interview - Grand Hyatt Hotel, Melbourne*, available from PANDORA - Australia's web archive, National Library of Australia, <http://pandora.nla.gov.au>.

Consequently, after the re-election of the Federal Coalition Government in 1998, the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* was introduced to tighten allowable award matters to *"clarify the original intent of the legislation and maintain the statutory rigour of the allowable matters provisions"*[34]. However, the Government was unable to attract sufficient support in the Senate to pass the legislation.

After the re-election of the Federal Government in 2001, the *Workplace Relations Amendment (Award Simplification) Bill 2002* was introduced in November 2002 to further *'tighten'* and *"clarify allowable award matters"*[35].The Government argued that a large number of awards continued to contain matters that preserved inflexible and inefficient work practices and prescribed matters that more appropriately should be addressed through enterprise bargaining[36]. Once again the legislation failed to attract sufficient support in the Senate.

The re-elected Federal Government in 2005 announced that further reforms to the award system were required and stated that "*progress has been made in reducing the complexity and overly prescriptive nature of awards. However, awards continue to be complex and difficult for workers and their employers to understand*"[37]. With the enactment of *Workplace Relations Amendment (Work Choices) Bill 2005* new objects for the award system were introduced, the number of allowable award matters further reduced and matters specifically deemed non-allowable ceased having effect[38].

During the 2007 Federal election, Labor undertook to create a new award system comprising of industry-based awards that would be easy to understand and that would support efficient and productive work practices[39]. The newly elected Federal Labor Government introduced the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* which amended the WR Act. The legislation inserted a new part to the WR Act requiring the tribunal to carry out the Award Modernisation Process under the instructions of the Award Modernisation Request issued by the Minister for Employment and Workplace Relations[40].

Further, new objects were prescribed for the Modern Award system in new section 576A of the WR Act, the first being that Modern Awards *"must be simple to understand and easy to apply, and must reduce the regulatory burden on business".* Other objects included that Modern Awards *"must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work".*

New section 576B required the Tribunal to consider a number of factors in carrying out the Award Modernisation Process, including promoting job creation, high levels of productivity, low inflation, high employment and labour force participation. However, it is not apparent how, if all, these factors and objectives affected the actual content of Modern Awards.

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[34] Reith P 1999, Minister for Employment, Workplace Relations and Small Business, Second Reading Speech, Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, House of Representatives, Official Hansard, 30 June 1999.

[35] Abbott T 2002, Minister for Employment and Workplace Relations, Second Reading Speech, Workplace Relations Amendment (Award Simplification) Bill 2002, House of Representatives, Official Hansard, 13 November 2002.

[36] Abbott T 2002b, Minister for Employment and Workplace Relations, Workplace Relations Amendment (Award Simplification) Bill 2002, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives.

[37] Howard J.W 2005, Prime Minister, Ministerial Statement: Workplace Relations Reform, House of Representatives, Official Hansard, 26 May 2005

[38] Andrews K 2005, Minister for Employment and Workplace Relations, Workplace Relations Amendment (Work Choices) Bill 2005, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives; Andrews K 2005, Minister for Employment and Workplace Relations Workplace Relations Amendment (Work Choices) Bill 2005, Supplementary Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives.

[39] Rudd K and Gillard J 2007, *Forward with Fairness Labor's plan for fairer and more productive Australian workplaces*, *April 2007*

[40] Gillard J 2008, Minister for Employment and Workplace Relations, Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives.

For the Wine industry, the separate Wine Industry Award 2010 replaced the following 9 Pre-Reform Federal Awards, Transitional Awards, Notional Agreements Preserving State Awards (NAPSAs) and instruments:

Title	**Type**	**Operation**
Wine Industry - AWU - Award 1999	Pre-Reform Federal/ Transitional	Federal
Wine & Spirit Industry (South Australia) Award	NAPSA	SA
Wine Industry Consolidated (State) Award	NAPSA	NSW
Wine and Spirit Stores Award - South-Eastern District 2002	NAPSA	QLD
Wine Industry (WA) Award 2005	NAPSA	WA
Farming and Fruit Growing Award	NAPSA	TAS
Manufacturing Industry Sector Minimum Wage Order - Victoria 1997	Pre-Reform Federal Wage Instrument	VIC
Rural Traineeships (State) Award	NAPSA	NSW
AWU National Training Wage (Agriculture) Award 1994	NAPSA	WA

While the consolidation of the awards and instruments above created important synergies for wine industry employers operating in multiple States, despite the rhetoric and promises it did not result in an award system supporting efficient and productive work practices. Rather than modernising provisions, the tribunal on many occasions focused on preserving provisions in previous Federal awards.

This has resulted in a number of overly prescriptive provisions in the Wine Industry Award 2010 that neither "*promotes flexible modern work practices", "the efficient and productive performance of work"* nor are *"simple to understand", "easy to apply"* and "*reduce the regulatory burden on business".*

This includes, but is not limited to the following:

- extensive and detailed provisions on consultation;
- lack of clarity of expression in the interaction of base rates, certain loadings and penalties;
- inflexible part-time provisions mandating a written pattern of work and any variations to the working pattern to be in writing;
- requiring casual employees to be paid for a minimum of four hours' work on each occasion;
- the provision of 15 different types of allowances for undertaking certain jobs;
- requiring the payment of a higher rate of pay for a whole day where the employee performs 2 hours of work at a higher classification level;
- imposing arbitrary rules on which default superannuation funds to be utilised;
- limiting ordinary hours of work to Monday to Friday 6am-6pm (except for vintage during which time these are extended to 5.00am-6.00pm Monday to Saturday for some employees), thus failing to recognise that in primary production employers do not have the same control over which days of the week work is required;

- penalty payments of 200% and 250% for working Sundays and Public Holidays respectively.

Modern Awards contain too much detail and duplication

The overarching objective of Modern Awards as set out in section 134 of the Act, is "*to ensure that Modern Awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*".
[Emphasis added]

Hence, the Modern Award system together with the NES is intended to provide core minimum terms and conditions, not provisions that can be obtained through other means, including enterprise bargaining, or provisions that are not a required component of the safety net. However, in reality a number of Modern Award provisions appear to have simply been copied and pasted from predecessor awards, whether former Pre-reform Federal Awards or Notional Agreements Preserving State Awards (NAPSAs).

Research[41] commissioned by the FWC and published in August 2014 demonstrates that for the main "users" of Modern Awards – small businesses the current system is far from being easy to understand and simple to apply. Modern Awards are found to be:

- Convoluted: "*Too long and unwieldy*".[42]

- Complex: *"The language was difficult to understand, with "legalese" and jargon."*[43]

"I bumble my way through. I think the whole thing is written in lawyer's language, not normal plain English."[44]

"It's a document written for the person who wrote it… lawyers – not the person who will actually use it. Not small business owners like me."[45]

- Ambiguous: *"Information provided was not clear, requiring too much interpretation."*[46]

"There's still a lot of grey area that is open to interpretation, as opposed to having it written in plain English in a contract."[47]

- Not for them: *"Written for the benefit of "bureaucrats and lawyers", with no consideration of end-user needs or capability."*[48]

In many instances the Modern Award system attempts to micro manage the employment relationship. For example, a common provision in many Modern Awards, including the Clerks – Private Sector Award 2010 requires the employer and a part-time employee at the time of engagement to "*agree in writing on a regular pattern of work, specifying at least the numbers of hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day*."[49] Further, in the event the employee wishes to vary

[41] Hodges J and Bond M 2014, Sweeny Research, "A Qualitative Research Report on Citizen Co-Design with Small Business Owners, Ref No. 24210, 13th August 2014, V1", available from https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf
[42] Ibid, page 6
[43] Ibid
[44] Ibid, page 17
[45] Ibid, page 21
[46] Ibid, page 6
[47] Ibid, page 22
[48] Ibid, page 6
[49] Clerks – Private Sector Award 2010, Clause 11.3

their hours, a discussion with their employer, team leader or co-workers to either permanently or temporarily swap their hours would not suffice, instead "*Changes in hours may only be made by agreement in writing between the employer and employee.*"[50]

On some occasions an employer may be able to offer a part-time employee an opportunity to work additional hours on a once off basis. In order to increase their income part-time employees may be willing to work additional hours up to 38 hours in a week. However, under many Modern Awards a verbal agreement between the employer and the employee to do so would not suffice. Unless agreed to in writing, any additional hours worked by a part-time employee would attract overtime rates.

This is because under the relevant award provision "*All time worked in excess of the hours as agreed under clause 11.3 or varied under clause 11.4 will be overtime and paid for at the rates prescribed in clause 27— Overtime rates and penalties (other than shiftworkers).*"[51]

In the past, part-time employment has been viewed as providing a flexible working arrangement, particularly for employees seeking to balance employment with family and caring responsibilities. However, anecdotal evidence suggests that provisions similar to those contained in the *Clerks – Private Sector Award 2010* discourage the employment of part-time employees. Instead, casual employment commonly is viewed as a better alternative as it provides greater flexibility in relation to rostering and working hours and does not mandate numerous written agreements whenever working hours are varied.

In other instances, Modern Awards place additional regulatory requirements on top of already legislated standards. For example, the circumstances in which employers are required to make compulsory superannuation contributions are set out in the *Superannuation Guarantee (Administration) Act 1992* and relevant Australian Taxation Office Rulings, including SGR 2009/2 on "ordinary time earnings" and "salary and wages".

However, Modern Awards such as the Manufacturing and Associated Industries and Occupations Award 2010 and the Restaurant Industry Award 2010 require employers to disregard the accepted definition of ordinary time earnings and make superannuation contributions where *"the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements"*[52]*.* Further, under section 27(2) of the *Superannuation Guarantee (Administration) Act 1992* employers are not required to make superannuation contributions where the employee earns less than $450 in a calendar month. Yet, under the Restaurant Industry Award 2010, employers are required to disregard this as the threshold has been lowered to $350 or more as outlined below:

30.2 Employer contributions

> **(a)** An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.
>
> **(b)** The employer must make contributions for each employee for such month where the employee earns $350.00 or more in a calendar month.
> [Emphasis added]

[50] Clerks – Private Sector Award 2010, Clause 11.4
[51] Clerks – Private Sector Award 2010, Clause 11.6
[52] Manufacturing and Associated Industries and Occupations Award 2010, Clause 35.5; Restaurant Industry Award 2010, Clause 30.5

The inclusion of Modern Award provisions on superannuation that are inconsistent with other legislation cause confusion and could also lead to inadvertent contraventions. It is also questionable on what basis superannuation contributions in excess of legislated minima have been deemed to be an essential part of the safety net for some award-covered employees.

While there have been numerous attempts by successive Federal Governments to simplify and restructure the Federal Award system, as set out above, it is clear that awards are still complex, legalistic, restrictive, duplicate legislative provisions and provide unnecessary detail. It appears that the award system in inherently conservative and whenever successive Governments has tasked the Federal tribunal and parties to overhaul the system there has been a tendency to simply preserve rather than modernise provisions. As a result often redundant, outdated, unnecessarily prescriptive and detailed provisions have been retained to the detriment of both employers and employees.

In addition, there appears to be different standards of evidence required by parties seeking to remove a provision from a Modern Award compared to those seeking to raise the standards. In this context we note the recent submission to the Inquiry by Mr Brendan McCarthy, former Senior Deputy President of the AIRC/FWA/FWC 2001-2004 who made the following observations:

"The unaccountability is worsened by the different approach the FWC appears to have for the establishment or raising of standards compared to the repeal or variation to standards. For a standard to be established or increased the FWC seems to accept expert opinion of consequences and effects of the change. However for applications seeking variations through more flexibility or reduction of those standards the approach seems to be to require more substantial proof. The proof required usually involves extensive evidence."[53]
[Emphasis added]

The Wine Industry Associations submit that the time for additional award reviews, simplification and restructuring processes has passed, an alternative approach is required.

Recommendation 6:

In order to provide a genuine safety net of core employee entitlements that is simple to understand and apply, promotes workplace flexibility and productivity and does not duplicate or are inconsistent with other legislative provisions two alternative options should be considered. Option 1 involves replacing the Modern Award system with an expanded NES. Option 2 involves legislating to transform the Modern Award system to a genuine safety net without detailed prescription.

Option 1 – Expanded NES

Under this option, industry and occupationally-based minimum entitlements through the Modern Award system will be replaced with an expanded legislated minimum safety net through the NES. As a result Modern Awards will cease to operate as legally enforceable instruments and the powers of the FWC in relation to making and varying Modern Award will end. The NES will be expanded to incorporate terms of Modern Awards that make up a genuine safety net of terms and conditions.

Similar reforms were implemented in New Zealand in 1991 by the National Party Government through the enactment of the *Employment Contracts Act 1991 (NZ)*. This reform abolished a system of approximately 200 industry and occupationally-based awards in favour of legislated minima, collective agreements and individual employment contracts. While

[53] McCarthy B 2015, "Submission to Productivity Commission Inquiry into Workplace Relations, 10 March 2015"

many of the reforms were controversial at that time, the then Labour Party Opposition indicated that it would not seek a return to national awards[54]. Indeed when the New Zealand Labour Party won government in 1999 the decentralised industrial relations system was largely retained.

While subsequent legislative reforms, including the introduction of the E*mployment Relations Act 2000 [NZ]*, placed a greater emphasis on collective bargaining, union representation and increased or new minimum standards, no attempts were made to re-established the award system[55].

The Wine Industry Associations propose that the following additional entitlements are incorporated into the NES.

- ***Minimum Wages:*** A four level Federal Minimum Wage and Classification Structure, based on the current the *Miscellaneous Award 2010* as follows*:*

    - Level 1: $640.90 per week or $16.87 per hour (has been employed for a period of less than three months and is not carrying out the duties of a level 3 or level 4 employee);

    - Level 2: $684.70 per week or $18.02 per hour (has been employed for more than three months and is not carrying out the duties of a level 3 or level 4 employee);

    - Level 3: $746.20 per week or $19.64 per hour (has a trade qualification or equivalent and is carrying out duties requiring such qualifications); and

    - Level 4: $814.20 per week or $21.43 per hour (has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee).

This provision would replace the plethora of complex, lengthy and prescriptive classification structures and associated minimum wages currently provided in Modern Awards and the National Minimum Wage. The provision of a simplified four level structure and associated minimum wages would provide some certainty and guidance particularly to small businesses in determining an appropriate wage for their employees.

While the Classification Structure and the requirement to pay at least the relevant minimum wage for the appropriate classification would be part of the NES, the actual minimum wages would form part of the National Minimum Wage Order made and varied by the new Minimum Wage Commission.

In addition, casual employees would be guaranteed a 20% casual loading and special minimum wages would be provided for apprentices, trainees and supported wage system employees. The special minimum wages should be based on Special national minimum wage 1, Special national minimum wage 2, Special national minimum wage 4 and Special national minimum wage 5 that form part of the current National Minimum Wage Order.[56]

[54] Department of the Parliamentary Library, Parliament of the Commonwealth of Australia, 1993, "Background Paper Number 5 1993 Labour Market Deregulation: The New Zealand Experience

[55] Haworth N, Rasmussen E & Wilson M 2009, "Radical employment relations reforms: their influence on New Zealand's economic performance", paper presented at the Fifteenth World Congress of the International Labour and Employment Relations Association, Sydney Australia 24-28 August 2009.

[56] National Minimum Wage Order 2014, Annual Wage Review 2013-2014, (C2014/1)

- ***Junior rates of pay:*** Provide that junior employees are entitled to a set percentage of the applicable National Minimum Wage as set out below:

Age	% of relevant National Minimum Wage
Under 16 years	45
16 years	50
17 years	60
18 years	70
19 years	80
20 years	95

This entitlement is drawn from junior rate provisions in Modern Awards covering industries that engage a relatively large portion of junior employees, including the Restaurant Industry Award 2010, Hospitality Industry (General) Award 2010 and General Retail Industry Award 2010.

- ***Saturday, Sunday and Public Holiday compensation:*** Additional compensation for working ordinary hours on a Saturday, Sunday and Public Holidays at 25%, 50% and 100% respectively. However, such compensation would not be payable to employees earning in excess of $814.20 per week or $42,338 per annum (paid in excess of Level 4 of the proposed National Minimum Wage).

  In addition, there should be an express provision allowing the employer and the employee to agree in writing to incorporate the Saturday, Sunday and Public Holiday compensation into a higher hourly or weekly rate or an annual salary or to vary the rates of compensation through an enterprise agreement.

This provision would provide a standardised level of additional compensation for working on Saturdays, Sundays and Public Holidays. However, it would ensure that employees who traditionally have never had an entitlement to additional compensation for working weekends or public holidays either because they are award-free or paid an annual salary above the applicable minimum award wage would not suddenly become entitled to such additional compensation. It would also provide flexibility to agree to alternative arrangements to paying separate compensation for weekend and public holiday work.

- ***Shiftwork compensation:*** Requiring the payment of compensation for shiftwork. Unless alternative arrangements are agreed to in an enterprise agreement, the following maximum compensation would be payable.

  - Early morning shift: any shift commencing between 3.00am and 6.00am and paid 12.5% extra for such shift.

  - Afternoon shift: any shift finishing after 6.00 pm and at or before midnight and paid 15% extra for such shift.

  - Night shift: any shift finishing after midnight and at or before 8.00 am or any shift commencing between midnight and 3.00 am and paid 15% extra for such shift.

  - Paid 20% extra where the employee during a period of engagement on shift, works night shift only or remains on night shift for a longer period than four consecutive weeks or works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift in each shift cycle. However, this additional compensation should not be payable where the employee requests

in writing to work night shifts only. In such cases only the regular 15% night shift penalty should be payable.

The shift spans and penalties above have been developed taking into account the common arrangements in the wine industry. The Wine Industry Associations appreciate that the shift spans and penalties above may need to be adjusted to ensure that they are appropriate and suitable to the wide range of industries that utilise shiftwork on a regular basis.

This provision would ensure that shift engagements and the associated compensation would continue to apply and that employees working such shifts would continue to be entitled to additional compensation.

- ***Overtime compensation:*** Requiring the payment of compensation for overtime worked in excess of 38 ordinary hour per week, which may include time off in lieu, additional paid leave, granting a special allowance or loading, or taking overtime into account when setting the remuneration.

This provision would ensure that employees would receive compensation for working hours in excess of the maximum weekly ordinary hours, while maintaining flexibility in how such compensation is provided. It would also ensure that employees that traditionally have never been entitled to separate compensation for working overtime due to their seniority and remuneration level would not suddenly have an entitlement to additional compensation.

- ***Casual minimum engagement:*** Provide for a minimum engagement or payment of 2 hours on each occasion the casual employee is required to attend work. Provided the minimum engagement period is 1 hour and 30 minutes for an employee who is a full-time secondary student and who agrees to work a shorter period than 2 hours.

This provision would provide a guaranteed minimum engagement per shift for casual employees, while at the same time recognising the need for relatively short engagements to be performed. For the Wine industry this is particularly important in relation to cellar door work where the current casual minimum engagement is 4 hours. This has resulted in owner-operators working longer engagements rather than engaging casual employees on a relief basis for short engagements.

Shorter casual minimum engagements also is important to enable full-time secondary school students to work a shorter shift after finishing school. This was recognised in FWC's Decision [2011] FWA 3777[57] in June 2011 to reduce the casual minimum engagement for full-time secondary students from 3 hours to 1.5 hours in the General Retail Industry Award 2010 and later confirmed by the Full Bench in its September 2011 Decision [2011] FWAFB 6251[58]. The decision was appealed to the Federal Court by the Shop, Distributive and Allied Employees Association who claimed that the decision was affected by jurisdictional errors and discriminatory. However, the Federal Court[59] dismissed the appeal.

- ***Unpaid meal breaks:*** Provide an employee with an entitlement to unpaid meal and rest breaks as per suggested wording below:

  Entitlement to rest and meal breaks

  An employer must provide an employee with rest and meals breaks where at least five hours have been worked, that –

[57] National Retail Association (AM2010/226)
[58] Shop, Distributive and Allied Employees Association (C2011/4864).
[59] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) [2012] FCA 480 (11 May 2012)*

(a) provide the employee with a reasonable opportunity during the employee's work period, for rest and refreshment; and

(b) are appropriate for the duration of the employee's work period.

Timing and duration of rest and meal breaks

The rest and meal breaks must be taken at times and for the duration agreed between the employee and the employer, but in the absence of such agreement, at the reasonable times for the reasonable duration specified by the employer.

Compensatory measures

(a) An employer is exempt from the requirement to provide rest and meal breaks to the extent the employer and the employee agree that the employee is to be provided with compensatory measures; or

(b) to the extent that the employer cannot reasonably provide the employee with rest breaks and meal breaks.

Compensatory measures may include:
(a) time off work at an alternative time;
(b) later start time;
(c) earlier finishing time;
(d) accumulation of time of work; or
(e) any other alternative measure agreed to between the employer and the employee.

The Wine Industry Associations submit that the provision above appropriately balances the entitlement to unpaid meal and rest breaks while at the same time avoiding unnecessary detail and prescription. The proposed wording above is drawn from the recent amendments made by *Employment Relations Amendment Act 2014*[60] to the New Zealand *Employment Relations Act 2000.*

Apart from New Zealand the entitlement to an unpaid meal break is currently provided for in the industrial legislation in other countries with a comparable judicial system and level of labour market regulation, such as United Kingdom, Ireland and Canada. In the United Kingdom the *Working Time Regulations 1998*[61] provides for an unpaid rest break of 20 minutes where the working time is more than six hours. However, the regulations do not prescribe when the break is to be taken and/or the arrangements for doing so, but leaves the decision to the employee and the employer concerned.

In Ireland under the *Organisation of Working Time Act 1997*[62] employees are entitled to a rest break of 15 minutes where the working time is more than 4 hours and 30 minutes and a rest break of 30 minutes, which may include the 15 minutes rest break above, where the working time is more than 6 hours.

The various industrial legislation[63] of the Provinces of Canada provide for an unpaid meal break of 30 minutes where the working time is 5-6 hours.

[60] Section 69ZC, 69ZD, 69ZE, 69ZEA, 69ZEB
[61] Section 12
[62] Section 12
[63] Employment Standards Code, RSA 2000, Chapter E-9 (Alberta); Employment Standards Act [RSBC 1996] Chapter 113 (British Columbia); The Employment Standards Code, CCSM Chapter E110 (Manitoba); Occupational Health and Safety Act (O.C. 91-1035) (New Brunswick); Labour Standards Act, RSNL 1990, Chapter L-2, (Newfoundland and Labrador); Labour Standards Code, RSNS 1989, Chapter 246 (Nova Scotia); Employment Standards Act, 2000, SO 2000, Chapter 41 (Ontario);

Option 2 – Simplified Modern Award system

Under this option the Modern Award system is retained, but significantly simplified by limiting the matters than can be included in Modern Awards to those that are necessary for a genuine minimum safety net. In addition, the Modern Awards will be amended to ensure that Modern Awards are focused on core entitlements only and do not damage flexibility and productivity.

The FWC will be required to urgently remove matters that are not allowable under the Act. The Act and the Regulations should provide specific guidance and instructions on what may or may not be included in Modern Awards. This should eliminate the need for prolonged proceedings in the FWC, test cases and Full Bench appeals and for parties to invest significant resources completing submissions and attending hearings.

Recommendation 7:

To focus the Modern Award system on being a genuine minimum safety net, the Wine Industry Associations propose that the Modern Awards objective in section 134 of the Act be replaced as follows:

134 The modern awards objective

The FWC must ensure that modern awards, together with the National Employment Standards, provide a safety net of basic minimum wages and terms and conditions of employment, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to protect the competitive position of young people, apprentices, trainees and people with disabilities in the labour market, through appropriate wage provisions; and

(c) the need for improved productivity through flexible and modern work practices and arrangements; and

(d) the need for reducing the regulatory burden on business, including compliance costs; and

(e) the need for economically sustainable modern awards for business, including small and large business; and

(f) the likely impact of Modern Awards on business and employment cost; and

(g) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment and national and international competitiveness; and

(h) the need to reduce complexity and ensure that modern awards are simple, easy to understand and expressed in plain English; and

(i) the special needs and requirements of small business.

This is the modern awards objective

Employment Standards Act, RSPEI 1988, Chapter E-6.2 (Prince Edward Island); An Act Respecting Labour Standards, CQLR Chapter N-1.1 (Quebec); The Saskatchewan Employment Act, Chapter S-15.1 (Saskatchewan).

Recommendation 8:

Further, in order to cut back on detail, move from micromanaging the employment relationship to providing genuine minimum entitlements and only include provisions that are necessary, it is proposed that the award matters in section 139 be reduced as follows:

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply, and:

(b) classifications; and

(c) incentive-based payments, piece rates and bonuses;and

(d) exemption rates to ensure that employees paid in excess of a specified amount in the Modern Award are exempted from the application of the Modern Award; and

(e) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and

(f) ordinary hours of work, notice periods, rest breaks and variations to working hours; and

(g) notice of termination by employees and conditions in the event the required notice has not been provided; and

(h) overtime rates; and

(i) penalty rates; and

(j)annualised wage arrangements that provide an alternative to the separate payment of wages and other monetary entitlements.

This provision would mean that the following matters no longer would be allowable in Modern Awards:

- rostering;
- allowances (whether for expenses incurred in the course of employment, responsibilities or skills that are not taken into account in rates of pay or disabilities associated with the performance of particular tasks or work in particular conditions or locations);
- leave, leave loadings and arrangements for taking leave;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

Recommendation 9:
In addition, the following mandatory terms should be removed to further simplify the Modern Awards:

- section 145A regarding consultation about changes to rosters or hours of work;
- section 146 regarding terms about settling disputes;
- section 147 regarding ordinary hours of work;
- section 149B regarding avoidance of liability to pay superannuation guarantee charge; and
- section 149C and 149D regarding default fund terms.

Recommendation 10:

To ensure that Modern Awards are focused on the needs of the low paid, an additional mandatory term of the Modern Awards in section 143 of the Act should be prescribed, requiring all Modern Awards to contain an exemption rate to ensure that employees paid in excess of a certain classification in the Modern Award are exempted from the application of the Modern Award as follows:

(1) A modern award must contain an exemption rate which excludes employees who are paid in excess the minimum award rate for a certain classification in the modern award from the application of the modern award.

(2) The regulations may prescribe the amount of the exemption rate/rates for the purpose of subsection (1).

It is vital that the exemption rate is realistic and not artificially inflated to so that it becomes meaningless. Prior to the commencement of Modern Awards some awards contained an exemption rate. For example under clause 29 of the New South Wales *Clerical and Administrative Employees (State) Award NAPSA*, employees paid in excess of 15% of weekly wage for the highest grade/classification in the award were exempted from the application of the award. A similar exemption level would appear reasonable.

While it may be appropriate for Modern Awards to contain incidental and machinery terms, this also provides an opportunity to include provisions that may only be remotely associated with a term in section 139 and/or is not necessary for the safety net. Therefore to ensure that a simplified Modern Award system remains focused on being a genuine safety net and simple and easy to understand and apply, it is necessary to specifically list a number of matters as being non-allowable.

Recommendation 11:

It is proposed that the following section is inserted in the Act:

Non-allowable award matters
(1) For the purpose of subsection 139(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:

(a) conversion from casual employment to another type of employment;

(b) restrictions on the engagement of casual employees, including limiting the engagement of casual employees to particular circumstances or for a specific period of time;

(c) the maximum or minimum hours of work for regular part-time employees;

(d) dispute resolution training leave;

(e)annual leave loading;

(f) frequency and method of payment of wages;

(g) rostering, including conditions on setting and and varying rosters;

(h)superannuation;

(i)supplementary and ancillary NES terms;

(j)allowances; and

(k)transfer of business, including recognition of continuous service.

Recommendation 12:

A new section should be inserted to ensure that matters that are not allowable cease to have effect, as follows:

Immediately after the commencement of this subsection, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters.

National Employment Standards

The Wine Industry Associations have not experienced any major difficulties with the NES. However, in order to ensure a more practical and reasonable operation the following amendments should be made to the NES:

Community Service Leave

In accordance with Chapter 2, Part 2-2, Division 8 of the Act, community service leave is an unpaid entitlement except for jury service. Under section 111, where an employee is absent from work due to jury service, the employer must continue paying the employee their base rate of pay for up to ten days with the amount payable to the employee reduced by any jury service pay the employee has received from the courts system.

Serving on a jury is a civic duty that may be required of any Australian citizen. Employers must release their employees to attend for jury service and under various State and Territory Acts[64], it is unlawful terminating the employee's employment or otherwise injure the person in his or her employment for performing jury service.

The Wine Industry Associations support accommodating employees who have been called in for jury service and we accept that the inconvenience and the cost of staff absences due to jury service is an inevitable feature of the judicial system.

However, we do not accept that employers should have to make up the shortfall in any compensation received by the employee from the courts system. Providing appropriate financial support to assist persons who are employed to attend for jury service should be a matter for the respective State and Territory Governments. Section 111 of the Act simply entrenches cost shifting from State and Territory Governments to employers.

Recommendation 13:

The Wine Industry Associations recommends that section 111 be removed from the Act.

Flexibilities under the NES

In light of our proposals above to reform the safety net by either expanding the NES or restructuring the Modern Award system, we submit that the NES should be further amended to remove the difference in treatment of award-covered and award-free employees. This would ensure that the flexibilities currently available to award-free employees would be fully

[64] Jury Act 1977, section 69; Juries Act 1957, section 56; Juries Act 2000; s 83; Juries Act 2003, section 56

extended to award-covered employees in the event the Modern Award system would be retained.

Recommendation 14:

Section 64 should be amended to ensure that all employees regardless of whether award/agreement-covered or award/agreement-free would be able to agree to an averaging agreement over not more than 26 weeks.

Sections 92, 93 and 94 should be amended to ensure that all employees regardless of whether award/agreement-covered or not, are able to cash out a portion of their annual leave and able to be directed to take a portion of their annual leave.

Payment for annual leave

The question whether annual leave loading is payable on termination of employment has been an major issue of contention since the FWO expressed a non-authoritative view in December 2010 that if an employee is entitled under an industrial instrument to leave loading when they take annual leave it must be included in the amount paid on termination for untaken leave.

However, this was not universally accepted as correct and numerous submissions were made to the Fair Work Act Review Panel's evaluation of the Fair Work legislation in 2012. The Panel accordingly, recommended that "*s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect."*[65]

An amendment to this effect has been incorporated into the *Fair Work Amendment Bill 2014*. Recently, the Federal Court handed down its decision in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 136*, essentially confirming the position previously expressed by the FWO in relation to section 90(2) of the Act. However, at this point it is unclear whether an appeal will be lodged.

The decision by the Federal Court demonstrates the importance that section 90(2) be amended to ensure that the traditional approach to annual leave loading on termination is protected.

Penalty rates

The Wine Industry Award 2010 provides the following penalties:

- Saturdays: Ordinary hours (cellar door employees throughout the year and vineyard workers during vintage only) paid at 125%.[66]

- Sundays: Ordinary hours (cellar door employees only throughout the year) paid at 200%.[67]

- Public holidays: Ordinary hours for all employees paid at 250%[68].

[65] Fair Work Act Review Panel 2012, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", p. 99, http://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf

[66] Wine Industry Award 2010, Clause 28.2(c), 28.2(d)(i), 28.2(g)(i)

[67] Wine Industry Award 2010, Clause 28.2(c), 28.2(g)(i)

[68] Wine Industry Award 2010, Clause 28.2(g)(ii)

In relation to penalty payments, the Sunday and Public Holiday penalties are of most concern to the wine industry. The Wine Industry covers the primary production of wine grapes, including growing and harvesting, the actual production of wine, including crushing, fermentation, blending and bottling, and the sales and education through cellar doors.

The harvest of wine grapes referred to as "vintage" commences when the grapes are sufficiently ripe to harvest. This in turn is determined by measuring sugar, acid and pH levels. Where levels are deemed optimal vintage commences. This means that vintage may commence at any time of the day or any day of the week with little or no ability to roster vintage workers on weekdays only to avoid the payment of weekend penalty rates. Yet, the Modern Award system penalises the industry for performing work on weekends.

The case studies below demonstrate the impact of the weekend penalties under the Wine Industry Award 2010 on the harvest operations.

Case Study 4: Sunday penalty and harvest operations

Currently we avoid any harvest operation on a Sunday due the prohibitive labour costs. This can be particularly difficult if the weather conditions on a Sunday is fair and suitable for picking but several weekdays are wet and unsuitable for harvest operations.

Case Study 5: Sunday penalty and harvest operations

We are often required to deliver grapes on Monday morning and that means we have to pay our harvest contractor the penalty rates that they are required to pay their employees for working Sunday to facilitate that delivery. The extra harvest costs are passed down the line to us.

Case Study 6: Penalties and cash flow

Being a small producer, cash flow plays a major role in keeping our head above water. Due to the increased work around peak periods and penalties applying it is incredibly hard to keep a positive cash flow which is needed to pay creditors.

Case Study 7: Weekend penalties and harvest operations

During vintage, days of week have no real meaning. if grapes need to be picked or pressed on a weekend then it needs to be all hands on deck. We also do work for other vineyards and when work is done on weekends the rate doesn't change however we pay a higher rate than the charge out. This impacts our bottom line through higher wage costs. Further, our grape costs are increased for any work done on the weekend.

Case study 8: Weekend penalties and harvest operations

The high value Tasmanian wine sector is based on wine quality. With many small vineyards and constant pressure on profitability, the penalty rates are impacting on people's decisions as to when to harvest fruit. People are either altering optimal harvest timeframes to work around penalty rates, thereby impacting on quality, or are incurring higher penalty rates to harvest when needed, which of course are not reflected in wine pricing. Other awards (eg Horticulture) recognise the need to harvest fresh produce when it is necessary, not based on avoiding Sundays or public holidays.

Case study 9: Weekend penalties and harvest operations

Due to the high cost of penalty rates we currently organise the entire work week to try to avoid doing as much work as possible on Sundays. This is a big concern when we're at peak vintage and we have a lot of red ferments to work.

We also will avoid picking on some days if it means that we have to process fruit on weekends. It means that while there is a big impact on quality there is also pressure put back on the vineyards to pick extra fruit during busy periods and to avoid fruit coming in on weekends. Essentially, we are busier and have more pressure because of the cost of labour on weekends, especially Sundays.

At the same time, costs for picking on weekends and especially Sundays means that we have not been able to afford to pick fruit when it has been at optimum ripeness. This is compounded when weather is bad and we aren't able to pick during the normal Monday to Friday work week. We are picking less and getting worse quality now then if the awards were able to allow more sustainable wages and let us harvest according to what the season and weather allows.

Similarly, cellar door operations have also been negatively affected by the imposition of excessive penalty rates.

Most wineries operate a cellar door to attract interest in their wines, build their brand, encourage direct sales and for tourism purposes. Apart from traditional wine tasting, cellar doors are increasingly providing a number of other services and products to attract visitors, including tutored tastings, tours of cellars and production facilities, tasting plates, degustation, coffee and tea, merchandise, functions and lunches. A cellar door visit involving wine tasting on average lasts for 30-45 minutes.

A recent study[69] demonstrates the positive contribution a cellar door can make to a winery in relation to changes in the wine consumption of visitors. For example, six months after visiting a cellar door 42% of visitors to a cellar door reported a change in their wine consumption to that of the region of origin where the cellar door is located. 47% of visitors reported an increase in the quantity of wine consumed from that region. However, of particular significance is that 83% of visitors recommended a wine of the visited winery to someone else within six months of the visit. 54% of visitors purchased and/or repurchased the wine brand within six months of the visit.

While wineries are aware of the potential benefits of operating cellar doors, in reality during weekends and public holidays the employment costs are prohibitive. This has resulted in a reduction in trading hours of cellar doors, owner operators working weekends and public holidays rather than employed staff and wineries coordinating their opening hours by taking turns operating on weekends and public holidays.

Case Study 10: Cellar door operations and weekend penalties

Even when busy we struggle to meet costs on Sundays directly as a result of the penalties. Being owner-operators we work the weekends rather than rostering our staff as we can't afford paying the weekend penalties. If we could reduce the weekend penalty rates, we would employ more staff and would also be able to operate profitably on these days.

[69] Bruwer J, Lockshin L, Saliba A & Hirche M 2015, "Trial-purchase-repurchase of the brand: How does a cellar door visit impact future sales?, *Wine & Viticulture Journal,* Vol 3, No. 1, pp. 56-59.

Case study 11: Cellar door operations and weekend penalties

We used to be open from 10am-5pm on weekends and public holidays. However, due to the increased weekend penalties we had to reduce our hours to 12 noon -5pm. As we sometimes do not even cover our labour costs on a weekend, we are now considering reducing our weekend trading hours even further, 12 noon-4pm.

7. ISSUES PAPER 3 – THE BARGAINING FRAMEWORK

Executive Summary

- Individual Flexibility Agreements (IFAs) are rarely used, mainly given their limited scope and lack of stability, to address this all matters of the awards should be allowed to be varied through an IFA;

- Enterprise bargaining should be used as a vehicle to increase labour productivity and flexibility, rather than extracting manifestly excessive benefits under the threat of industrial action;

- Only matters that directly relate to the employment relationship should be permitted matters in enterprise agreements;

- Matters that do not directly relate to the employment relationship should be deemed prohibited content;

- Protected industrial action should not be allowed to be taken to advance claims about matters that are not permitted, or which are about prohibited content or unlawful terms;

- On average only 1% of all enterprise agreements lodged with the FWC are refused approval, yet the FWC continues to invest substantial resources into assessing all enterprise agreements lodged for approval; and

- FWC's assessment and approval of enterprise agreements should be discontinued, a valid and legally enforceable enterprise agreement should come into operation when approved by the employees.

Enterprise bargaining in the wine industry

Since the early 1990s employers in the 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;
- reducing penalty in rates in exchange of higher ordinary rates of pay;
- 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:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being 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 (IFA) 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."*[70]

- *"An award flexibility clause will enable arrangements to meet the genuine individual needs of employers and employees"*[71]

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;

- section 341(3) 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[72].

Recommendation 15

To ensure that IFAs are meaningful and worthwhile to individual employees and their employers, a number of the current restrictions on their content and operations must be removed.

This should include enabling the employer and the employee to vary any provision of the applicable Modern Award or enterprise agreement, allowing IFAs to be offered as a condition of employment and increasing the notice period for terminating an IFA from the current 13 weeks to at least 26 weeks.

[70] 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.
[71] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Policy Implementation Plan", August 2007, p. 11.
[72] 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.

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.[73] 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.

Content of agreements

The Federal Government introduced the *Fair Work Amendment (Bargaining Processes) Bill 2014* on 27 November 2014. The bill was passed by the House of Representatives on 9 February 2015 and is yet to pass through the Senate. One of the key provisions of the bill relates to productivity improvements, requiring productivity improvements to be discussed in the course of the negotiations. This would be achieved by inserting a new subsection 187(1A) in the Act. 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"*.

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.

The Wine Industry Associations submit that in order to improve labour productivity practical reforms of the workplace relations system are required to support and enable employers implementing smarter, more efficient, productive work practices and remove impediments and barriers to labour productivity. In addition, there is a need to ensure that enterprise bargaining is focused on improving productivity and flexibility rather than being allowed to be used as a means to extract manifestly excessive benefits under the threat of industrial action.

In relation to the content of enterprise agreements clearer and stricter rules must be provided to ensure that enterprise agreements are focused on matters that directly relate to the employment relationship rather than matters of a peripheral nature that simply create barriers to productive and efficient work. Matters that do not directly relate to the employment relationship should be deemed prohibited content.

Recommendation 16:

It is proposed that section 172 of the Act be amended as follows:

172 Making an enterprise agreement

Enterprise agreements must only include permitted matters

[73] 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

(1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement; and

(b) how the agreement will operate.

Recommendation 17:

To ensure that enterprise agreements are focused on matters that directly relate to the employment relationship, a new subsection 172A dealing with prohibited content should be inserted as follows:

172A Prohibited Content
(1) For the purposes of this Act, each of the following is prohibited content:

(a) a provision that requires or permits any conduct that would contravene Part 3-1, Division 4 (industrial activities)

(b) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;

(c) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

(d) restrictions on outsourcing;

(e)restrictions on the engagement of casual employees, fixed-term employees and seasonal employees;

(f) restrictions or bans on workplace and organisational changes without union agreement;

(g) the provision of information about employees bound by the agreement to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law;

(h) the provision of information about independent contractors or labour hire workers engaged by the employer to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law;

(i) a provision that directly or indirectly requires a person:
- *(i) to encourage another person to become, or remain, a member of an industrial association; or*
- *(ii) to discourage another person from becoming, or remaining, a member of an industrial association;*

(j) a provision that indicates support for persons being members of an industrial association;

(k) a provision that indicates opposition to persons being members of an industrial association;

(l) a provision that requires or permits payment of a bargaining services fee;

(m) deductions from the pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues;

(n) the provision of payroll deduction facilities for the subscriptions or dues referred to in paragraph (m);

(o) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union;

(p) employees bound by the agreement receiving paid leave to attend meetings (however described) conducted by or made up of trade union members;

(q)the rights of an organisation of employers or employees to participate in, or represent an employer or employee bound by the agreement in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;

(r) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement; and

(s) a matter specified in the regulations.

(2) An employer must not lodge an enterprise agreement containing prohibited content

(3) An employer contravenes this subsection if:
(a) the employer lodges an enterprise agreement (or a variation to an enterprise agreement); and
(b) the enterprise agreement (or the enterprise agreement as varied) contains prohibited content; and
(c)the employer was reckless as to whether the enterprise agreement (or the enterprise agreement as varied) contains prohibited content.

(4) Subsection (3) is a civil remedy provision.

(5) A term of an enterprise agreement is void to the extent that it contains prohibited content.

Recommendation 18:

To enforce the provision on prohibited content, it is recommended that following subsections are inserted:

172B Seeking to include prohibited content in an enterprise agreement
(1) A person contravenes this subsection if:

(a) the person seeks to include a term:
(i) in a workplace agreement in the course of negotiations for the agreement; or
(ii) in a variation to a workplace agreement in the course of negotiations for the variation; and

(b) that term contains prohibited content; and
(c) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

172C Misrepresentations about prohibited content

(1) A person contravenes this subsection if:
(a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and
(b) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

A matter related to the issue of content of enterprise agreements is the ability to take protected industrial action for claims that are not permitted matters or matters that are prohibited content. A recent case[74] by a Full Bench of the FWC held that unions pursuing non-permitted matters are not automatically excluded from seeking protected action ballots.

The decision by the FWC is of great concern to the Wine Industry Associations as it allows unions to engage in industrial action in relation to claims that are about non-permitted matters.

Recommendation 19:

The Act should be amended to expressly set out that a protected action ballot order must not be made if the claim is not about a permitted matter, is about prohibited content, is about including an unlawful term of the agreements or is part of a course of conduct which is pattern bargaining.

Bargaining Process

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."*[75]

- *"Labor's new industrial relations system will not permit industrial action being taken outside our clear, tough rules."*[76]

- *"Industrial action will only be protected from legal sanction if it is taken during a bargaining period for a collective agreement."*[77]

[74] *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); The Australian Workers' Union (AWU) [2015] FWCFB 210*
[75] Kevin Rudd MP and Julia Gillard MP 2007, "Forward with Fairness: Policy Implementation Plan", August 2007, p. 21
[76] Ibid
[77] Ibid

- *"Under Labor, protected industrial action will be available during good faith bargaining, but only in accordance with Labor's clear, tough rules."*[78]

- *"They will not be able to strike unless there has been genuine good faith bargaining."*[79]

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."[80]
[Emphasis added]

The Review Panel put forward recommendation 31[81] proposing an amendment to the Act to ensure that an application for a protected action ballot 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.

The *Fair Work Amendment (Bargaining Processes) Bill 2014* seeks to insert a new subsection 443(1A) to clarify what it means to "genuinely trying to reach an agreement" to ensure that industrial action once again becomes a matter of last resort rather than taken upfront, before genuine bargaining has commenced. It is essential that the Act is amended to put an end to the ability to strike first and talk later.

Approval Process

Chapter 2, Part 2-4, Division 4 of the Act prescribes the requirements for approval of enterprise agreements. Under section 185 of the Act an enterprise agreement must be approved by the FWC, taking into account a number of factors, including whether the agreement passes the better-off-overall test.

[78] 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
[79] Kevin Rudd MP 2007, Address to the National Press Club, 17 April 2007
[80] Fair Work Act Review Panel 2012, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", p. 177
[81] Ibid

The requirement that enterprise agreements must be formally approved by the Federal Tribunal has been in place ever since enterprise agreements became available as an alternative to awards. For example, section 170MB and 170MC of the *Industrial Relations Act 1988* required parties to apply to the then Australian Industrial Relations Commission for certification of an agreement and required the Federal tribunal to certify the agreement subject to a number of conditions.

These requirements largely have stayed in place under successive reforms of the industrial relations system, including the *Industrial Relations Reform Act 1993,* the WR Act and under the current Act. However, past practice is not a reason in itself to retain the current approval requirements. The Wine Industry Associations submit that the approval requirements should only be retained if they can be justified on public policy grounds.

While there might have been reasons in past for a Government tribunal assessing and formally approving enterprise agreements, including a lack of experience of enterprise bargaining and a lack of understanding of the formal requirements involved, the Wine Industry Associations submit that no such reasons exist today. The current industrial relations landscape is significantly different, compared to 1993 when the then Keating Federal Labor Government introduced the *Industrial Relations Reform Bill 1993* to "*accelerate the spread of enterprise agreements and make formal workplace bargaining more widely accessible*"[82] and continue "*our move as a nation from a centralised to a decentralised industrial relations system, to a system based primarily on bargaining at the workplace"[83].*

In 1993 there were 1,200 workplace agreements in place, covering 37% of federally award covered employees[84]. According to the most recent data on agreement making there are more than 19,000 federal enterprise agreements, covering 37% of all employees[85]. In addition, 28% of all employees are subject to individual arrangements, of which of portion may be Australian Workplace Agreements/Individual Transitional Employment Agreements entered into up until 31 December 2009[86].

Hence, enterprise agreements are more common today than in 1993, with many companies having engaged in enterprise bargaining for more than 20 years. Overall, employers and employees are much more familiar with the concept of enterprise agreements, their content and the process to negotiate enterprise agreements.

In New Zealand there is no formal government approval and assessment process of enterprise agreements, but simply a requirement to register the enterprise agreement with the relevant Government department[87]. The Wine Industry Associations submit that the conditions in Australia are not materially different from New Zealand to justify continued Government intervention in the approval process.

The Wine Industry Associations also question whether it is a rational and effective use of taxpayers' money to require all enterprise agreements to be assessed and approved by a member of the FWC. In our experience the approval process rarely results in any value-adding to the employer and employees covered by the enterprise agreement. Rather, if there are concerns by the FWC they tend to be of a minor nature.

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[82] Brereton L 1993, Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters, Second Reading Speech, Industrial Relations Reform Bill 1993, House of Representatives, 28 October 1993, p. 2777

[83] Ibid

[84] Ibid

[85] Australian Workplace Relations Study 2015, Fair Work Commission, 29 January 2015.

[86] Ibid

[87] *Employment Relations Act 2000 (NZ),* section 59

The knowledge and experience of employers and employees in relation to enterprise bargaining has advanced to the point where enterprise agreements are refused approval only in rare circumstances. This is demonstrated by the most recent annual report by the FWC[88] which sets of the number of enterprise agreements approved and refused approval over the last 3 years.

Year	No EA lodged	No EA refused	% EA refused
2011-2012	8,565	83	1%
2012-2013	7,087	63	0.9%
2013-2014	6,754	103	1.5%
TOTAL 2011-2014	22,406	249	1.1%

On average only 1.1% of all enterprise agreements lodged with FWC over the last 3 years have been refused approval. Given this very low number, it does not seem cost-effective to continue allocating a significant amount of the FWC's time and taxpayers' money to conduct a detailed assessment of each and every enterprise agreement. Further, given the very low risk of enterprise agreements being non-compliant with the Act, the current workplace relations system invests a disproportionate amount of resources into the approval stage, where such funds could be better allocated to enforcement and compliance activities.

In addition, the current process of FWC members assessing enterprise agreements has resulted in inconsistent decisions and outcomes for employers and employees. For example in 2010 an enterprise agreement inadvertently was allocated to two FWC members for assessment. Whereas one of members approved the agreement on the papers[89], the other member had significant issues with the agreement, including in relation to pre-approval requirements and the no-disadvantage test[90].

Further, a proposed enterprise agreement that would cover approximately 80,000 McDonald's employees was rejected[91] by a FWC member on the basis that:

- *"it would represent an emphatic diminution in overall terms and conditions for the employees who would be subject to its proposed operation.";*

- *the applicant's evidence in relation to the pre-approval steps was in "disarray" and "unreliable";*

- *"the applicant still has not provided information about a wide range of matters that must be addressed by an applicant in support of an application for the approval of an enterprise agreement."*

The FWC member also proposed *"to direct that a copy of this decision be forwarded to the Fair Work Ombudsman, given the evidence suggesting the applicant or its licensees, or both, may have been underpaying some employees."*[92]

However, the refusal to approve the enterprise agreement was appealed to the Full Bench by both the employer and union involved in the negotiations. On appeal the Full Bench[93] found

[88] Fair Work Commission 2014, "Delivering Public Value: Annual Report 2013-2014, Australia's National Workplace Relations Tribunal, p. 58-59.
[89] Riverina Division of General Practice and Primary Health Enterprise Agreement 2009, Decision [2010] FWAA 1185, Commissioner Thatcher, 19 February 2010
[90] Application for approval of a single-enterprise agreement Riverina Division of General Practice and NSW Nurses' Federation (AG2009/23491), Transcript of Proceedings, Commissioner McKenna, Tuesday 19 January 2010; Wednesday 3 February and 16 February 2010.
[91] McDonald's Australia Pty Ltd on behalf of Operators of McDonald's outlets, Decision [2010] FWA 1347, Commissioner McKenna, 23 April 2010
[92] Ibid

that the FWC member had committed *"fundamental errors"* and overturned FWC member's initial decision to refuse approval of the agreement.

Recommendation 20:

The following amendments should be made to the Act in relation to approval making:

- remove the requirement that an enterprise agreement is approved by the FWC;

- remove the role of FWC in assessing enterprise agreements;

- require enterprise agreements that have been approved by the employees concerned to be included in a public register;

- at the lodgement of the enterprise agreement for inclusion in the register require the employer to complete an on-line check to ensure all mandatory requirements are met;

- continue the requirement that the employer and the bargaining representatives complete a statutory declaration at the time of lodging the enterprise agreement;

- enable the FWO to conduct random audits and checks of enterprise agreements on to public register to ensure compliance with statutory requirements.

[93] McDonald's Australia Pty Ltd (C2010/3643) Shop, Distributive and Allied Employees' Association (C2010/3668), Decision [2010] FWAFB 4602, 21 July 2010

8. ISSUES PAPER 4 – EMPLOYEE PROTECTIONS

Executive Summary

- The payment of "go away money" is common, even where an application for unfair dismissal lacks merit.

- Not enough is being done to identify and deal with frivolous and vexatious claims at an early stage;

- The minimum employment period should be increased to 24 months for a small business employer and 12 months for other businesses;

- Align the definition of a "small business employer" for the purposes of the minimum employment period with the small business definition used by the Australian Bureau of Statistics "a business with less than 20 employees" (excluding related entities);

- Permanently exclude micro-business employers with 10 or less employees (excluding related entities) from unfair dismissal;

- Unfair dismissal claims not to be made if the employment was terminated for "genuine operational reasons" or reasons that include "genuine operational reasons"; and

- Increase the unfair dismissal application fee to discourage frivolous and vexatious applications and applications lacking in merit.

Unfair dismissal

Where an employee has been dismissed for poor performance or for serious misconduct, employees may lodge a claim for unfair dismissal under Chapter 3, Part 3-2 of the Act.

Out of the 14,818 unfair dismissal applications lodged in 2013-2014, 74% or 10,972 were referred to conciliation. 79% of the matters referred to conciliation were then settled. The most common result, 76% of all settlements included the provision of a monetary payment. 57% of all monetary settlements involved the payments in the range of $2000-7999. Only 22% of all settlements involved payments of less than $2000.[94]

The high settlement rate should not be interpreted as evidence of the unfair dismissal jurisdiction operating satisfactorily, efficiently and effectively. Rather, it demonstrates how entrenched the payment of "go-away money" has become. In the experience of the Wine Industry Associations there is a perception among employers that regardless of how stringent and professional their performance management and termination practices are and regardless of the merit of the claim, they will be required to make a monetary payment when faced with a claim.

Further, given the very low application fee of lodging an application (currently $67.20) there is hardly any incentive for an aggrieved employee to consider the merit of their case prior to lodging an application. This means that applications lacking in merit or which are frivolous and vexatious are progressed through the system.

[94] Fair Work Commission 2014, "Delivering Public Value: Annual Report 2013-2014, Australia's National Workplace Relations Tribunal, pp. 39-43; Fair Work Commission 2014, "Results & Outcomes", available from https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes

The current application fee could be contrasted with the fee structure payable by employees claiming unfair dismissal in the United Kingdom where applicants are required to pay an application fee of £250 (approximately $A480) and a further fee of £950 ($A1,800) if the matter is progressed to a hearing[95]. To ensure that applicants seriously consider the merit of their case prior to making an application, the application fee must be increased.

It is also necessary to increase the threshold on who is eligible to make an application in relation to unfair dismissal. While the minimum employment period of 6 months for businesses with 15 or more employees and 12 months for businesses with less than 15 employees, provide some protection against unfair dismissal claims, the Wine Industry Associations submit that an increase in the minimum employment period is required.

In the United Kingdom all employees have to serve a minimum employment period of two years before being eligible to lodge a claim for unfair dismissal.[96]

The definition of a "small business employer" in section 23 of the *Fair Work Act 2009* for the purposes of the minimum employment period is inadequate as it is lower than many of the small business definitions used by the Federal Government for other purposes. For example the Australian Bureau of Statistics[97] defines a small business as a business with less than 20 employees, the Australian Taxation Office[98] defines a small business as business with an annual turnover of less than $2 million (excluding GST). On the other hand, under section 6D of the *Privacy Act 1988* a small business is defined as having an annual turnover of $3 million or less.

Recommendation 21:

To create a better balance in the unfair dismissal jurisdiction, the following changes are proposed:

- increase the minimum employment period to 12 months for business other than a small business and 24 months for a small business employer;

- change the definition of a small business employer to a business with less than 20 employees (excluding related entities), including casual employees engaged by the employer on a regular and systematic basis for at least 12 months;

- permanently exclude micro-businesses, defined as a business employing 10 or less employees (excluding related entities), from the unfair dismissal regime; and

- increase the application fee for unfair dismissal applications to $250-$500 to discourage frivolous and vexatious applications and applications lacking in merit.

Redundancy

An employee who has been dismissed as a result redundancy is eligible to lodge a claim for unfair dismissal if the dismissal does not meet the definition of a "genuine redundancy" in section 389(1)(b) and 389(2) of the Act as set out below:

[95] Government of the United Kingdom, GOV.UK, "Make a claim to an employment tribunal", https://www.gov.uk/employment-tribunals/make-a-claim

[96] The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, Statutory Instruments 12 No. 989

[97] Australian Bureau of Statistics 2002, 1321.0 - Small Business in Australia, 2001.

[98] Australian Taxation Office 2013, Small business entity concessions, https://www.ato.gov.au/Business/Small-business-entity-concessions/In-detail/Eligibility/Am-I-eligible-for-the-small-business-entity-concessions-/?page=10

389 Meaning of genuine redundancy

(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer.

The implication of sections 389(1)(b) and 389(2) is that even where the employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise and has no other option but to make the employee redundant, unfair dismissal compensation may still be payable.

While employee consultation regarding major workplace change may be a good practice, ultimately employee consultation and feedback is unlikely to have any effect on the employer's decision. The decision to make employees redundant only occurs after extensive analysis, consideration of alternative options and implementation of other cost-cutting and efficiency measures such as shorter shifts and job sharing. Yet the Act seeks to penalise employers for making the inevitable decision.

Recommendation 22:

Where an employee is dismissed for "genuine operational reasons" or for reasons that include genuine operational reasons, there should be no right to make an application for unfair dismissal. Insert a definition of genuine operational reasons as "reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business."

To ensure that any application for unfair dismissal that includes genuine operational reasons are dealt with prior to progressing them any further, the FWC should be required to determine whether such reasons are relied on by the employee and to dismiss the application.

Where a respondent seeks to have an unfair dismissal application dismissed on the grounds that the dismissal was for genuine operational reasons or for reasons that include genuine operational reasons, the FWC must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application. If the FWC is satisfied that the employee was dismissal was for genuine operational reasons or for reasons that include genuine operational reasons, the unfair dismissal application must be dismissed.

9. CONCLUSION

The Wine Industry Associations submit that the recommendations above are essential to achieve a better balance between employee protections and entitlements and the right and ability of employers to manage their business and compete internationally.

Crucially the recommendations would reduce the regulatory burden on business and associated compliance costs and contribute to increased productivity by enabling employers and their employees either individually or collectively to agree on the most appropriate and suitable working arrangements.

While the system outlined in the sections above would provide more flexibility to employers and employees, it should be noted that the system would continue to provide significant employee protections and generous entitlements, particularly when compared to countries with equivalent legal systems.

APPENDIX B

Submission on the Productivity Commission's Draft Report on the Inquiry into the Workplace Relations Framework

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1. INTRODUCTION

This submission on the Productivity Commission's Draft Report is as a result of the collaborative efforts of the South Australian Wine Industry Association Incorporated and the Winemakers Federation of Australia to provide a national wine industry position, resulting in support and contributions from Wine Industry Tasmania, Wines of Western Australia and the New South Wales Industry Association (collectively referred to as "the Wine Industry Associations)":

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

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.

The Winemakers' Federation of Australia (WFA) is the peak body for the nation's winemakers. WFA represents and protects their interests, speak on their behalf and help them maximise opportunities so they can build resilient businesses and a profitable and sustainable industry that continues to win praise at home and around the world.

WFA is formally recognised as the industry's voice under the *Primary Industries and Energy Research and Development Act 1989* and the *Australian Grape and Wine Authority Act 2013*. WFA is incorporated under the *SA Associations Incorporation Act 1985.*
WFA membership represents some 80% of the national wine grape crush, with more than 370 winery members who directly fund the organisation's national and international activities.

WFA equally represents small, medium and large winemakers from across the country's wine-making regions. Each group has an equal voice at the Board level. WFA Board decisions require 80% support so no one sector can dominate the decision-making process. In practice, most decisions are determined by consensus.

WFA works in partnership with the Australian Government and their sister organisation, Wine Grape Growers Australia (WGGA), to develop and implement national policy that is in the wine sector's best long-term interests.

WFA's activities are centred on providing leadership, strategy, advocacy and support that serves the entire Australian wine industry, now and into the future.

2. SUBMISSION OVERVIEW

The Wine Industry Associations are pleased to have the opportunity to provide a submission on the Productivity Commission's Draft Report (Draft Report) on the Inquiry into the Workplace Relations Framework (the Inquiry). The purpose of this submission is to respond to the draft recommendations and Information Requests of the Draft Report and to provide additional information to inform the final report of the Inquiry.

The Wine Industry Associations lodged our initial submission on the Inquiry on 27 March 2015. Our submission contained 22 recommendations aimed at simplifying the national workplace relations system, reducing compliance costs and red tape and increasing flexibility and productivity.

Throughout this submission, the *Fair Work Act 2009* is referred to as "the Act", the *Workplace Relations Act 1996* as "the WR Act", the Fair Work Commission as "the FWC", the Fair Work Ombudsman as "the FWO" and the Productivity Commission as the "PC".

The submission below follows the structure of the Draft Report and responds to the recommendations and information requests under the same chapter headings as used in the Draft Report.

3. GENERAL COMMENTS ON DRAFT REPORT

As demonstrated by the terms of reference, the Inquiry has been requested to assess the impact of the workplace relations system on a range matters, including:

- unemployment, underemployment and job creation
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net
- small businesses
- productivity, competitiveness and business investment
- the ability of business and the labour market to respond appropriately to changing economic conditions
- patterns of engagement in the labour market
- the ability for employers to flexibly manage and engage with their employees
- barriers to bargaining
- red tape and the compliance burden for employers
- industrial conflict and days lost due to industrial action
- appropriate scope for independent contracting

The Inquiry presents a unique opportunity to not only evaluate the current system, but more importantly to be innovative and creative and design the most rational, effective and efficient workplace relations system.

The focus should be to design a new workplace relations system which on one hand balances the need for "*fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net"* with the need for reducing "*red tape and the compliance burden for employers",* enabling *"employers to flexibly manage and engage with their employees"* and encouraging *"productivity, competitiveness and business investment".*

While some of the recommendations of the Draft Report will lead to modest improvements of the current system for example in relation to unfair dismissal claims, enterprise agreements and industrial action, the overarching theme of the Draft Report is the preservation and maintenance of the current system with a disproportionate emphasis on history and precedence. This is evident in the recommendations relating to the Modern Award system where the Draft Report proposes to largely leave the Modern Award system untouched.

Modern Awards are too prescriptive and attempt to micro-manage the employment relationship. This creates barriers to flexible working conditions, red-tape and compliance costs. Substantive reforms to the Modern Award system are required and have been outlined in the Wine Industry Associations' Initial Submission in March 2015 and reiterated in Part 9 of these submissions.

Such reforms include:

- setting a new Modern Awards Objective in section 134 of the Act;
- reducing the Modern Award matters in section 139 of the Act to those genuinely required for a minimum safety net; and
- providing an exemption rate to ensure that employees paid in excess of a certain classification are exempted from the application of the Modern Award.

The Wine Industry Associations recognise that the design and content of regulatory systems are influenced by history, tradition and culture. Accordingly, the recommendations in our initial submission did not seek any changes to the core conditions of employment, including the entitlement to and quantum of annual leave, personal leave, parental leave, notice of

termination and redundancy pay, some introduced 60-70 years ago[1] and others in the last 20-30 years[2].

Governments should seek to minimise unnecessary disruption and transition costs when undertaking significant change. However, this should not come at the cost of avoiding reforms that will reduce compliance costs and red-tape and lift workplace productivity and flexibility. Important workplace relations reforms over the last 20-30 years, including enterprise bargaining and the creation of National Workplace relations system would not have been implemented had successive governments been predominately focused on minimising disruption.

The nature of some of the recommendations in the Draft Report is problematic. Rather than recommending specific amendments to the Act to ensure that the proposed change is implemented, the practical effect of some recommendations is questionable. For example, even if recommendations 4.1, 12.1 and 14.1 on public holiday substitution variations to Modern Awards and penalty rates were adopted by the Government they would have no effect as they are all dependent on the FWC taking the required action. Given that FWC is an independent tribunal, tribunal members would be under no obligation to implement them. This could mean that for example penalty rate reductions and public holiday substitution may never be considered.

It is positive that the Draft Report recognises the implication of weekend penalty rates on service industries and the sentiment of recommendation 14.1 to align the Sunday penalty rate with the Saturday penalty rate is supported. However, the focus in the Draft Report on traditional services industries including hospitality, entertainment, retailing, restaurant and cafes industries (referred to as HERRC industries in the Draft Report) fails to recognise the wine industry's seven day operations providing a tourism and food and wine experience in the Cellar Doors located in rural and regional Australia and the impact of excessive Sunday penalty rates on the industry.

The Wine Industry Associations therefore urge the PC to look beyond the HERRC industries nominated in the Draft Report and extend its reasoning on Sunday penalty rates to the Wine Industry.

[1] *The Printing and Allied Trades Employers Federation of Australia and Others v. The Printing Industry Employees Union of Australia and Others (1936) 36 CAR 738, Dethridge CJ, 18 June 1936*; Annual Holidays Act 1944 (NSW); Industrial Arbitration (Amendment) Act 1951 (NSW)

[2] Termination, Change and Redundancy Case 1984, 8 IR 34, Mis 250/84 MD Print F6230; The Clothing and Allied Trades Union of Australia v Australian Confederation of Apparel Manufacturers – N.S.W. (Division of the Chamber of Manufacturers of New South Wales) & Others (Adoption Leave Test Case) (1985) 298 CAR 321; The Federated Miscellaneous Workers Union of Australia v Angus Nugent and Son Pty Ltd & Others (Paternity Leave Case), Print J3596, 26 July 1990

4. SUMMARY OF DRAFT REPORT RECOMMENDATIONS

No	Draft Recommendation	Response
3.1	The Australian Government should amend the Act to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.	Partially supported. Substantive reforms of the Modern Award system are required. The recommendation is not adequate in isolation.
3.2	The Australian Government should amend s. 629 of the Act to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President. Current non judicial Members should also be subject to a performance based review.	Supported
3.3	The Act should be amended to change the appointment of FWC members. • an independent expert appointment panel should be established by the Australian Government and state and territory governments • members of the appointment panel should not have had previous direct roles in industrial representation or advocacy • the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4 • the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.	Supported
3.4	Amend the Act to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1. Members of the Minimum Standards Division should have well developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines. Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions. A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.	Partially Supported. Changes to the appointment process to ensure that members appointed are viewed as unbiased are supported. The specific criteria need further attention. For example it would be appropriate for some members of the Minimum Standards Division to have a legal background and/or business experience.
3.5	The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes.	Supported
4.1	The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the Fair Work Act 2009 (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.	Partially Supported. The FWC would be under no obligation to consider and/or give effect to the recommendation. Reword 4.1 to make it more robust.

4.2	The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.	Partially Supported. The sentiment of the recommendation is supported to limit the number of public holidays attracting paid leave and penalty rates. However, Part 6 of these submissions discusses more appropriate and effective amendments.
4.3	Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated trade-off between wage increases and extra paid leave.	Partially Supported. Any increase in annual leave should not result in additional costs, but be offset by reductions in other entitlements. As discussed in part 4 of these submissions, one option could be to allocate some of the public holidays to annual leave.
5.1	The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.	Supported
5.2	Change the penalty regime for unfair dismissal cases so that • an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct • procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.	Supported
5.3	The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Act.	Supported
5.4	Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Act.	Supported
6.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.	Supported
6.2	Modify section 341 of the Act which deals with the meaning and application of a workplace right. The provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. The Act should also require that complaints are made in good faith; and that the FWC must decide this via a	Supported

	preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.	
6.3	Exclusion should be inserted for frivolous and vexatious applications for adverse action claims.	Supported
6.4	Compensation gap to be included for adverse action claims.	Supported
6.5	Schedule 5.2 of the Regulations to be amended to require the FWC to report more information about general protections matters. Adequate resourcing should be provided to the FWC to improve its data collection and reporting processes in this area.	Supported
8.1	In making its annual national wage decision, the FWC should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.	Partially Supported. While the intent is supported, the FWC is not required to consider the recommendation.
9.1	The Act should be amended so that the FWC is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.	Supported
9.2	Australian Government to commission a comprehensive review into Australia's apprenticeship and traineeship arrangements, including assessing role of the current system within the broader set of arrangements for skill formation; the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency based pay progression and factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.	Not Supported
12.1	Amend the Act to remove the requirement that the FWC's conducts four yearly reviews of modern awards and add the requirement that the Minimum Standards Division of the FWC review and vary awards as necessary to meet the Modern Awards Objective. To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division use robust analysis to set issues for assessment prioritised on the basis of likely high yielding gains and obtain public guidance on reform options.	Partially Supported. The recommendation is inadequate to address the failings of the Modern Award system.
12.2	The Act to be amended so that the Minimum Standards Division of the FWC has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.	Partially Supported While the establishment of the Minimum Standards Division is not opposed, the recommendation is inadequate to address the failings of the Modern Award system.
14.1	Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries. Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them. Unless there is a clear rationale for departing from this principle, weekend penalty rate for casuals in these industries should be set	Partially Supported. While it is positive the the negative impact of Sunday penalties are recognised, the recommendation fails to recognise the impact of excessive Sunday

	so that they provide neutral incentives to employ casuals over permanent employees.	penalty rates on the wine industry's seven day operations.
14.2	The FWC should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.	Partially Supported. Recommendation must be more robust as FWC is not required to either consider or give effect to the recommendation.
15.1	Amend Division 4 of Part 2 4 of the Act to allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement and extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.	Supported
15.2	Amend section 203 of the Act to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.	Supported
15.3	Amend section 186(5) of the Act to allow an enterprise agreement to specify a nominal expiry date that • can be up to five years after the day on which the Fair Work Commission approves the agreement, or • matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.	Supported
15.4	Amend the Act to replace the better off overall test for approval of enterprise agreements with a new no disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.	Supported
15.5	Amend the Act so that a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted and a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.	Supported
16.1	Amend the Act so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.	Supported
16.2	Amend the Act to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as	Supported

	recommended in draft recommendation 15.4).To encourage compliance the Fair Work Ombudsman should: • provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements • examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT.	
16.3	The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.	Partially Supported. FWO should work in association with the existing network of industry associations to educate employers on this.
19.1	Amend section 443 of the Act clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.	Supported
19.2	Amend section 423(2) of the Act such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than both parties (as is currently the case).	Supported
19.3	Amend the Act so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response.	Supported
19.4	Amend the Act to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.	Supported
19.5	Amend the Act so that so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either: deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.	No position
19.6	The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.	Supported

19.7	Repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources. Require the Fair Work Commission to take into account: – the combined impact on an employer's operations of entries onto the premises, – the likely benefit to employees of further entries onto the premises and – the employee representative's reason(s) for the frequency of entries.	Partially Supported. While it is positive that the Draft Report recognises the negative impact of excessive visits on a business, the recommendation is inadequate.
19.8	Amend the Act so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.	Partially Supported. While it is positive that the Draft Report recognises the negative impact of excessive visits on a business, the recommendation is inadequate.
20.1	Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).	Partially Supported. While it is positive that the Draft Report recognises the negative impact of provisions that restrict the engagement of contractors, the recommendation is inadequate.
21.1	The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the Migration Act 1958 (Cth)).The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.	Partially Supported. Is there a need for additional resources? Why could this not occur by reprioritising existing resources?
22.1	Amend the Act so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.	Partially Supported. The recommendation is inadequate to address the adverse impact of the transfer of business provisions.

5. SUMMARY OF WINE INDUSTRY RECOMMENDATIONS

The following is a summary of the recommendations of the Wine Industry Associations' Initial Submission to the Inquiry in March 2015:

Institutions

Recommendation 1:

In order to refocus the FWO on compliance and enforcement activities it is proposed that section 682(1)(a) be amended as follows:

Delete section 682(1)(a) and substitute with:

(a) to assist employees, outworkers, employers, outworker entities and organisations to understand their rights and obligations under this Act.

Insert new section 682(1)(b) as follows and renumber of accordingly:

(b) to promote compliance with this Act and fair work instruments.

Recommendation 2:

In order to refocus the FWC on its core responsibilities it is proposed that the following amendments are made to the Act:

- Delete section 576(2)(aa) relating to promoting cooperative and productive workplace relations and preventing disputes;

- Delete section 590(2)(g) relating to undertaking or commissioning research; and

- Delete section 653 relating to review and research of IFAs, enterprise agreements et cetera.

Recommendation 3:

The Wine Industry Associations recommend that the wage setting powers of the FWC be transferred to an independent body (the Minimum Wage Commission) with similar powers, structure, composition and parameters as the AFPC.

Members appointed to the Minimum Wage Commission must be independent of the FWC, with no dual appointments allowable. Further, to ensure its independence the Minimum Wage Commission should employ its own staff.

Recommendation 4:

The Wine Industry Associations recommend that the Act be amended to establish a separate appeals panel with members independent of the FWC to hear and determine appeals currently dealt by a Full Bench. The appeals panel would have 5-7 members, including a President of the Panel, appointed by the Governor-General. To ensure the independence of the Panel, members of the Panel would not be allowed to be serving members of the FWC.

To ensure panel members have the skills, experience and expertise to hear appeals, the following qualification requirements should apply:

President:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

Member:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; or
-has had experience at a high level in industry or commerce in the service of a peak council or another association representing the interests of employers or employees or in the service of government or an authority of government; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

Recommendation 5:

The Wine Industry Associations recommend that in line with the Part 11 of the WR Act a transferring instrument cease to apply after 12 months of the transfer of business occurring.

Safety Nets

Recommendation 6:

In order to provide a genuine safety net of core employee entitlements that is simple to understand and apply, promotes workplace flexibility and productivity and does not duplicate or are inconsistent with other legislative provisions two alternative options should be considered. Option 1 involves replacing the Modern Award system with an expanded NES. Option 2 involves legislating to transform the Modern Award system to a genuine safety net without detailed prescription.

Recommendation 7:

To focus the Modern Award system on being a genuine minimum safety net, the Wine Industry Associations propose that the Modern Awards objective in section 134 of the Act be replaced as follows:

134 The modern awards objective

The FWC must ensure that modern awards, together with the National Employment Standards, provide a safety net of basic minimum wages and terms and conditions of employment, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to protect the competitive position of young people, apprentices, trainees and people with disabilities in the labour market, through appropriate wage provisions; and

(c) the need for improved productivity through flexible and modern work practices and arrangements; and

(d) the need for reducing the regulatory burden on business, including compliance costs; and

(e) the need for economically sustainable modern awards for business, including small and large business; and

(f) the likely impact of Modern Awards on business and employment cost; and

(g) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment and national and international competitiveness; and

(h) the need to reduce complexity and ensure that modern awards are simple, easy to understand and expressed in plain English; and

(i) the special needs and requirements of small business.

This is the modern awards objective

Recommendation 8:

Further, in order to cut back on detail, move from micromanaging the employment relationship to providing genuine minimum entitlements and only include provisions that are necessary, it is proposed that the award matters in section 139 be reduced as follows:

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply, and:

(b) classifications; and

(c) incentive-based payments, piece rates and bonuses;and

(d) exemption rates to ensure that employees paid in excess of a specified amount in the Modern Award are exempted from the application of the Modern Award; and

(e) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and

(f) ordinary hours of work, notice periods, rest breaks and variations to working hours; and

(g) notice of termination by employees and conditions in the event the required notice has not been provided; and

(h) overtime rates; and

(i) penalty rates; and

(j)annualised wage arrangements that provide an alternative to the separate payment of wages and other monetary entitlements.

Recommendation 9:
The following mandatory terms should be removed to further simplify the Modern Awards:

- section 145A regarding consultation about changes to rosters or hours of work;
- section 146 regarding terms about settling disputes;
- section 147 regarding ordinary hours of work;
- section 149B regarding avoidance of liability to pay superannuation guarantee charge; and
- section 149C and 149D regarding default fund terms.

Recommendation 10:

To ensure that Modern Awards are focused on the needs of the low paid, an additional mandatory term of the Modern Awards in section 143 of the Act should be prescribed, requiring all Modern Awards to contain an exemption rate to ensure that employees paid in excess of a certain classification in the Modern Award are exempted from the application of the Modern Award as follows:

(1) A modern award must contain an exemption rate which excludes employees who are paid in excess the minimum award rate for a certain classification in the modern award from the application of the modern award.

(2) The regulations may prescribe the amount of the exemption rate/rates for the purpose of subsection (1).

It is vital that the exemption rate is realistic and not artificially inflated to so that it becomes meaningless. Prior to the commencement of Modern Awards some awards contained an exemption rate. For example under clause 29 of the New South Wales *Clerical and Administrative Employees (State) Award NAPSA*, employees paid in excess of 15% of weekly wage for the highest grade/classification in the award were exempted from the application of the award. A similar exemption level would appear reasonable.

Recommendation 11:

It is proposed that the following section is inserted in the Act:

Non-allowable award matters
(1) For the purpose of subsection 139(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:

(a) conversion from casual employment to another type of employment;

(b) restrictions on the engagement of casual employees, including limiting the engagement of casual employees to particular circumstances or for a specific period of time;

(c) the maximum or minimum hours of work for regular part-time employees;

(d) dispute resolution training leave;

(e)annual leave loading;

(f) frequency and method of payment of wages;

(g) rostering, including conditions on setting and and varying rosters;

(h)superannuation;

(i)supplementary and ancillary NES terms;

(j)allowances; and

(k)transfer of business, including recognition of continuous service.

Recommendation 12:

A new section should be inserted to ensure that matters that are not allowable cease to have effect, as follows:

Immediately after the commencement of this subsection, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters.

Recommendation 13:

The Wine Industry Associations recommends that section 111 be removed from the Act.

Recommendation 14:

Section 64 should be amended to ensure that all employees regardless of whether award/agreement-covered or award/agreement-free would be able to agree to an averaging agreement over not more than 26 weeks.

Sections 92, 93 and 94 should be amended to ensure that all employees regardless of whether award/agreement-covered or not, are able to cash out a portion of their annual leave and able to be directed to take a portion of their annual leave.

The Bargaining Framework

Recommendation 15

To ensure that IFAs are meaningful and worthwhile to individual employees and their employers, a number of the current restrictions on their content and operations must be removed.

This should include enabling the employer and the employee to vary any provision of the applicable Modern Award or enterprise agreement, allowing IFAs to be offered as a condition of employment and increasing the notice period for terminating an IFA from the current 13 weeks to at least 26 weeks.

Recommendation 16:

It is proposed that section 172 of the Act be amended as follows:

172 Making an enterprise agreement

Enterprise agreements must only include permitted matters

(1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement; and

(b) how the agreement will operate.

Recommendation 17:

To ensure that enterprise agreements are focused on matters that directly relate to the employment relationship, a new subsection 172A dealing with prohibited content should be inserted as follows:

172A Prohibited Content
(1) For the purposes of this Act, each of the following is prohibited content:

(a) a provision that requires or permits any conduct that would contravene Part 3-1, Division 4 (industrial activities)

(b) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;

(c) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

(d) restrictions on outsourcing;

(e)restrictions on the engagement of casual employees, fixed-term employees and seasonal employees;

(f) restrictions or bans on workplace and organisational changes without union agreement;

(g) the provision of information about employees bound by the agreement to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law;

(h) the provision of information about independent contractors or labour hire workers engaged by the employer to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law;

(i) a provision that directly or indirectly requires a person:
(i) to encourage another person to become, or remain, a member of an industrial association; or
(ii) to discourage another person from becoming, or remaining, a member of an industrial association;

(j) a provision that indicates support for persons being members of an industrial association;

(k) a provision that indicates opposition to persons being members of an industrial association;

(l) a provision that requires or permits payment of a bargaining services fee;

(m) deductions from the pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues;

(n) the provision of payroll deduction facilities for the subscriptions or dues referred to in paragraph (m);

(o) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union;

(p) employees bound by the agreement receiving paid leave to attend meetings (however described) conducted by or made up of trade union members;

(q)the rights of an organisation of employers or employees to participate in, or represent an employer or employee bound by the agreement in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;

(r) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement; and

(s) a matter specified in the regulations.

(2) An employer must not lodge an enterprise agreement containing prohibited content

(3) An employer contravenes this subsection if:
(a) the employer lodges an enterprise agreement (or a variation to an enterprise agreement); and
(b) the enterprise agreement (or the enterprise agreement as varied) contains prohibited content; and
(c)the employer was reckless as to whether the enterprise agreement (or the enterprise agreement as varied) contains prohibited content.

(4) Subsection (3) is a civil remedy provision.

(5) A term of an enterprise agreement is void to the extent that it contains prohibited content.

Recommendation 18:

To enforce the provision on prohibited content, it is recommended that following subsections are inserted:

172B Seeking to include prohibited content in an enterprise agreement
(1) A person contravenes this subsection if:

(a) the person seeks to include a term:
(i) in a workplace agreement in the course of negotiations for the agreement; or
(ii) in a variation to a workplace agreement in the course of negotiations for the variation; and

(b) that term contains prohibited content; and
(c) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

172C Misrepresentations about prohibited content

(1) A person contravenes this subsection if:
(a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and
(b) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

Recommendation 19:

The Act should be amended to expressly set out that a protected action ballot order must not be made if the claim is not about a permitted matter, is about prohibited content, is about including an unlawful term of the agreements or is part of a course of conduct which is pattern bargaining.

Recommendation 20:

The following amendments should be made to the Act in relation to approval making:

- remove the requirement that an enterprise agreement is approved by the FWC;

- remove the role of FWC in assessing enterprise agreements;

- require enterprise agreements that have been approved by the employees concerned to be included in a public register;

- at the lodgement of the enterprise agreement for inclusion in the register require the employer to complete an on-line check to ensure all mandatory requirements are met;

- continue the requirement that the employer and the bargaining representatives complete a statutory declaration at the time of lodging the enterprise agreement;

- enable the FWO to conduct random audits and checks of enterprise agreements on to public register to ensure compliance with statutory requirements.

Employee Protections

Recommendation 21:

To create a better balance in the unfair dismissal jurisdiction, the following changes are proposed:

- increase the minimum employment period to 12 months for business other than a small business and 24 months for a small business employer;

- change the definition of a small business employer to a business with less than 20 employees (excluding related entities), including casual employees engaged by the employer on a regular and systematic basis for at least 12 months;

- permanently exclude micro-businesses, defined as a business employing 10 or less employees (excluding related entities), from the unfair dismissal regime; and

- increase the application fee for unfair dismissal applications to $250-$500 to discourage frivolous and vexatious applications and applications lacking in merit.

Recommendation 22:

Where an employee is dismissed for "genuine operational reasons" or for reasons that include genuine operational reasons, there should be no right to make an application for unfair dismissal. Insert a definition of genuine operational reasons as "reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business."

To ensure that any application for unfair dismissal that includes genuine operational reasons are dealt with prior to progressing them any further, the FWC should be required to determine whether such reasons are relied on by the employee and to dismiss the application.

Where a respondent seeks to have an unfair dismissal application dismissed on the grounds that the dismissal was for genuine operational reasons or for reasons that include genuine operational reasons, the FWC must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application. If the FWC is satisfied that the employee was dismissal was for genuine operational reasons or for reasons that include genuine operational reasons, the unfair dismissal application must be dismissed.

6. CHAPTER 3: INSTITUTIONS

The Draft Report finds that the institutions, including the (FWO) and (FWC) are operating well and effectively and does not recommend any substantive changes to their responsibilities or structure.

The Wine Industry Associations submit that the assessment of the institutions and their responsibilities in the Draft Report has failed to fully consider the overlapping responsibilities of the FWO and the FWC.

One of FWO's many responsibilities as set out in section 682(1)(a)(i) of the Act includes "*to promote harmonious, productive and cooperative workplace relations".* The FWC on the other hand under section 576(2)(aa) of the Act has very similar responsibilities for "*promoting cooperative and productive workplace relations and preventing disputes*". These statements not only create a large degree of overlap, but also are very broad and enable both organisations to branch out and engage in activities that may only be remotely connected to their core responsibilities.

FWO's responsibilities of promoting "*harmonious, productive and cooperative workplace relations*" are so broad and fuzzy that it enables the FWO to further expand its taxpayer funded services and products in direct competition with the private sector. While there is a place for publicly funded information and guidance to assist compliance the Wine Industry Associations submit that the FWO should not be competing with the services, products and expertise provided by private sector organisations, including not-for profit industry and employer and employee associations. We question whether it is a wise use of public money for the FWO to undertake work where there is no demonstrated market failure, i.e. where private providers already provide high quality information, assistance and advice.

The Wine Industry Associations submit that there is nothing controversial about removing regulatory overlap and clarifying the roles and responsibilities of the FWO and FWC, but simply a matter of the most efficient use of taxpayer funding a good management. Therefore the Wine Industry Associations are reiterating Recommendation 2 from our initial submission as set out below:

Recommendation 2:

In order to refocus the FWC on its core responsibilities it is proposed that the following amendments are made to the Act:

- Delete section 576(2)(aa) relating to promoting cooperative and productive workplace relations and preventing disputes;

- Delete section 590(2)(g) relating to undertaking or commissioning research; and

- Delete section 653 relating to review and research of IFAs, enterprise agreements et cetera.

Restructuring the FWC

A key function of the FWC is to vary and make Modern Awards. In relation to the Modern Award system the Draft Report finds that "*the current system works*" and that the "*current system does not, despite its potential to do so, appear to be producing highly adverse outcomes*."[3]

[3] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 424

This finding in turn has affected the Draft Report's proposed course of action in relation to changes to the institutions.

Contrary to the findings of the Draft Report, the Wine Industry Associations submit that the Modern Award system produces a number of adverse outcomes, including:

- a single business being covered by multiple Modern Awards, having to manage dissimilar and sometimes conflicting requirements;
- ambiguous and unclear coverage for businesses covered by more than one Modern Award.
- the work of an employee potentially being covered by multiple Modern Awards, requiring the employer to determine when and how each Modern Award will apply;
- Modern Awards micromanaging the employment relationship preventing employees and employers from agreeing to more suitable, mutually beneficial arrangements;
- Modern Awards containing provisions that have little or no relevancy today;
- Modern Awards containing highly technical and legalistic language making it difficult for particularly small businesses to determine their obligations;
- a proliferation in allowances, loadings, penalties, special rates and additional payments that apply in addition to the base rate of pay adding to the complexity to determine an employee's applicable rate of pay;
- provisions that conflict with/or overrides other legislative and regulatory requirements, resulting uncertainty and confusion.

In light of the above, the Wine Industry Associations maintain that cosmetic changes to the Modern Award system and changes to the internal machinery of the FWC are not sufficient. However, if the choice is between doing nothing to the Modern Award system and adopting the modest changes to the Modern Award system proposed in recommendation 3.1 of the Draft Report, the Wine Industry Associations would support some action over none.

Appointment of FWC members

In order to increase public confidence in the FWC and that their members will act in an impartial and unbiased manner, it is important that not only the appointment process and eligibility criteria are changed, but also that appointments are limited in time.

Under the current process, depending on their age of appointment theoretically a member of the FWC could serve for more than 45 years and with little or no ability for the public to hold members to account for their performance and general conduct over the life of their appointment.

The Wine Industry Associations therefore support recommendation 3.2 regarding the introduction of 5-year terms for FWC members and a mandated performance review.

Recommendation 3.3 is aimed at removing the often partisan nature of the appointments to the FWC. While there appear to be different views on whether one side of politics has favoured appointing members with a certain background, there are examples of FWC members having been appointed directly from being a senior industrial advocate. The extent to which their background impacts their decision-making is a matter of debate. However, the mere fact that there is a perception that the background of a member could influence their decision is a problem for a body where impartiality and independence are key requirements. The Wine Industry Associations therefore support recommendation 3.3

If the FWC is divided into a separate Minimum Standards Division and Tribunal Division, the Wine Industry Associations support the introduction of separate eligibility criteria as proposed in recommendation 3.4. In particular we endorse the proposal that a person recommended for appointment must be widely seen as being unbiased. In relation to the eligibility criteria for

the Minimum Standards Division, while many of them appear relevant and appropriate it is questionable whether it would be practical and appropriate to limit the criteria to economics, social science or equivalent disciplines and not include for example law.

This is because in order to make a decision on whether to vary an award entitlement (whether to increase, reduce, remove or introduce a new entitlement) it would be necessary to understand the jurisdictional basis for the variation which may be contested. In addition, Modern Awards do not operate in a vacuum but directly affect businesses and employees, therefore the members making the decision must have a proper understanding of the practical implications of their decision.

For example, a major case during the during the transitional modern award review in 2012 involved claims by various unions for new and substantially increased entitlements for and regulation of apprentices[4]. The case not only involved questions on entitlements under the Act, but its interaction with State and Territory training laws. Members of a Minimum Standards Division may be appropriately qualified to quantify and assess the financial impact on business, including future engagement of apprentices, of various aspects of the claim. However, it is less certain whether members with little or no experience in employment law would be equipped to make an informed decision about whether Modern Awards under the Act would be capable of imposing conditions already contained in the Training Contract and/or in State and Territory training. The issue needs closer consideration.

A noticeable omission in the eligibility requirements of members of both the Minimum Standards and the Tribunal Divisions relate to practical experience. For example, a human resources or workplace relations executive would be likely to have more practical experience of enterprise bargaining, dispute resolution, industrial disputes, and unfair dismissal and adverse claims than for example an academic, yet would be unlikely to fit the eligibility criteria for appointment under recommendation 3.4.

In addition, it appears that expertise and experience in small business would not qualify for appointment to any of the divisions. This is despite that the overwhelming number of the nation's 821,610 employing businesses are small and micro businesses as set out below[5]:

- 70.6% (580,177) employed 1-4 people;
- 23.0% (189,023) employed 5-19 people;
- 6.0% (48, 958) employed 20-199 people; and
- 0.4% (3,452) employed over 200 people.

The Wine Industry Associations submit that the PC consider the issue of professional background of FWC members more closely, to ensure that members of the proposed Minimum Standards Division would have the professional expertise and experience to make decisions in relation to minimum standards.

Appeals of FWC decisions

The Draft Report does not support the establishment of a separate appeals mechanism for FWC decision. Given the importance of the issue of appeals and the extensive submissions that have been made by a number of stakeholders, including comparisons of equivalent schemes overseas it is unfortunate that the Draft Report deals with this issue in three paragraphs only.

[4] Fair Work Commission 2013, Modern Awards Review 2012 – Apprentices, Trainees and Juniors, [2013] FWCFB 5411

[5] Australian Bureau of Statistics, Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014 (Table 13), cat. no. 8165.0.

While recommendations 3.2-3.4 of the Draft Report seeks to address the issue of accountability and independence of FWC members, the Wine Industry Associations submit that the merit of those recommendations are separate from the issue of a dedicated appeals mechanism. Even if recommendations 3.2-3.4 were to be adopted this will still result in the allocation of FWC members with generalist rather than specialist knowledge to hear and determine often complex matters of law.

The Wine Industry Associations submit that there is merit to transferring the appeals mechanism from the FWC to a separate body independent of the FWC with members exclusively hearing appeals. In other jurisdictions with similar or comparable judicial systems and tradition of labour market regulation, including New Zealand, United Kingdom and the Republic of Ireland, appeals are heard by a separate body rather than by peers assembled on an ad-hoc basis.

In New Zealand, the equivalent of the FWC, the Employment Relations Authority[6] is responsible for hearing and determining disputes about employment agreements, collective bargaining, industrial action, unfair dismissal, discrimination in employment and freedom of association. Decisions of the Employment Relations Authority may be appealed without the need for leave to the Employment Court[7].

In the United Kingdom the Employment Tribunal[8] is responsible for hearing complaints about a range of matters relating to the employment relationship, including complaints of unlawful deductions from wages, working time disputes, disputes regarding carer's leave and parental leave, unfair dismissal and redundancy pay. Decisions of the Employment Tribunal are appealable to a separate body – the Employment Appeal Tribunal[9].

In the Republic of Ireland, the Labour Relations Commission[10] is responsible for investigating, determining, mediating and conciliating disputes in relation to a number of matters, including unfair dismissals, parental leave, payment of wages, minimum wages, carer's leave and working time. Depending on the matter in dispute, recommendations or decisions by the Labour Relations Commission may be appealed either to the Employment Appeals Tribunal[11] or the Labour Court[12], both independent of the Labour Relations Commission.

Therefore, the Wine Industry Associations are reiterating recommendation 4 from the Initial Submission.

SAWIA Recommendation 4:

The Wine Industry Associations recommend that the Act be amended to establish a separate appeals panel with members independent of the FWC to hear and determine appeals currently dealt by a Full Bench. The appeals panel would have 5-7 members, including a President of the Panel, appointed by the Governor-General. To ensure the independence of the Panel, members of the Panel would not be allowed to be serving members of the FWC.

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6 *Employment Relations Act 2000 (NZ),* Section 161 and 103

7 Ibid, section 179

8 *Employment Rights Act 1996 (UK); Employment Tribunals Act 1996 (UK)*

9 *Employment Tribunals Act 1996 (UK),* section 21

10 The Labour Relations Commission, Government of the Republic of Ireland "More on Rights Commissioner Service", <http://www.lrc.ie/document/More-on-the-Rights-Commission/4/745.htm>

11 Department of Jobs, Enterprise and Innovation, Republic of Ireland, Workplace Relations, "How to make an appeal", <http://www.workplacerelations.ie/en/Appeals/How_to_make_an_appeal/How_to_make_an_appeal.html>

12 Ibid

To ensure panel members have the skills, experience and expertise to hear appeals, the following qualification requirements should apply:

President:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

Member:
-Is or has been a Judge of a Court of the Commonwealth, State or Territory; or
-has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; or
-has had experience at a high level in industry or commerce in the service of a peak council or another association representing the interests of employers or employees or in the service of government or an authority of government; and
-has skills and experience in the field of industrial relations to make the person suitable for appointment.

7. CHAPTER 4: NATIONAL EMPLOYMENT STANDARDS

The Draft Report finds that the National Employment Standards (NES) have attracted little controversy. Accordingly, the Draft Report does not propose other than minor amendments to the NES in relation to public holidays. The Wine Industry Associations do not oppose this approach.

The Draft Report provides a detailed discussion on the future regulation of public holidays, including whether it would be an option to simply roll the number of public holidays into the pool of annual leave so that employees have more flexibility and choice when such leave is to be taken.

In addition, the Draft Report discusses the significant costs to society and business where additional public holidays are declared.

Public Holiday Substitution

Recommendation 4.1 of the Draft Report states that the FWC as part of the four yearly review of Modern Awards should incorporate terms in all Modern Awards to enable public holiday substitution. The Wine Industry Associations support the ability for employers and their individual employees to agree on public holiday substitution. While many Modern Awards contain provisions on public holiday substitution already, these are predominately, if not all, dependent on majority agreement, thereby preventing individualised solutions.

However, recommendation 4.1 is inadequate. It has no practical implication, even if adopted by the Government. Given the FWC's standing as an independent tribunal, unless directed by legislation or regulation to take a certain course of action, the FWC would be under no obligation to consider the recommendation, let alone vary the Modern Awards to give effect to recommendation. Recommendation 4.1 therefore must be reworded to make it more robust.

Additional Public Holidays

As discussed in the Draft Report the costs associated with declaring additional public holidays are significant.

Recommendation 4.2 of the Draft Report seeks to limit the number of public holidays attracting penalty rates and paid leave to those already declared. This will ensure that the cost of new public holidays will not be passed on to the vast majority of private sector employers covered by the National Workplace Relations system. However, it would not to prevent States and Territories to declare new public holidays for the purposes of NES entitlements and penalty rates prior to any amendment.

While the Wine Industry Associations support the intent behind recommendation 4.2, two alternative options should be explored.

Option 1 – limit public holidays to eight

Under this option, section 115 of the Act would be amended by limiting the number of public holidays recognised under the Act to those specifically mentioned in section 115(1)(a). Further, section 115(1)(b) would be removed which currently enables State and Territories to declare or prescribe additional days or part-days. This would result in only the 8 public holidays listed in section 115(1)(a) attracting penalty rates and paid leave. This would result in the removal of 5-6 public holidays.

Option 2 – reduced public holidays and additional annual leave

As an alternative, some public holidays could be rolled into extra annual leave. It appears that not all public holidays are valued equally. While for example Christmas Day, ANZAC Day, New Year's Day, Boxing Day and Australia Day are viewed as family holidays for the majority of Australians, few Australians would feel the same attachment to other public holidays such as Queen's Birthday, Labour Day and Adelaide Cup Day (in South Australia). The different relative value placed on specific public holidays is evident from a recent study undertaken by Professor John Rose of the Institute for Choice at the University of South Australia[13].

Therefore, "core" public holidays with historic and cultural significance could be preserved in section 115(1)(a). Under this alternative, section 115(1)(a) could be amended to prescribe the following seven public holidays:

- 1 January (New Year's Day);
- 26 January (Australia Day);
- Good Friday;
- Easter Monday;
- 25 April (Anzac Day);
- 25 December (Christmas Day);
- 26 December (Boxing Day).

Section 115(1)(b) should be removed to ensure that any public holidays declared over and above the seven above would have no application for the purposes of the Act and Modern Award. Given that 6 of the 8 States and Territories provide 5-6 public holidays over and above the NES, as a trade-off for removing public holidays an additional week of annual leave could be provided as compensation.

[13] Prof J Rose 2015, Value of Time and Value of Work Time during Public Holidays, Institute for Choice, University of South Australia, https://www.fwc.gov.au/sites/awardsmodernfouryr/AM2014305-report-rose-ABIandanor-030715.pdf

8. CHAPTER 5: UNFAIR DISMISSAL

The Wine Industry Associations welcome the Draft Report's recommendations to create a better balance in the unfair dismissal regime. Recommendations 5.1-5.4 will ensure that the costs associated with unfair dismissal claims, particularly frivolous, vexatious and claims lacking in merit are reduced and that minor procedural errors do not give rise to costly claims.

Application fee model

In the Initial Submission on 27 March 2015, the Wine Industry Associations recommended (Recommendation 21) that the application fee for unfair dismissal claims be increased to $200-$500 to discourage frivolous and vexatious claims and applications lacking in merit.

The Draft Report discusses the costs of conducting conciliation and arbitration and that some cost recovery could reduce claims with little or no merit. The Draft Report discusses a potential two tier model whereby the application cost is linked to the income levels at the time of application and that an additional fee may be introduced for cases proceeding to arbitration.

The Draft Report seeks further views on possible changes to the lodgement fee for unfair dismissal claims.

The Wine Industry Associations maintain that an appropriately designed application fee structure could result in reducing frivolous and vexatious claims and applications lacking in merit while partially recovering the costs of conducting conciliation and arbitration.

In setting the quantum of the fee, international examples should be considered as well as the fee structure of Federal and State tribunals and lower level courts.

As demonstrated in the initial submission, the application fee for claims in the Employment Tribunals in the United Kingdom is equivalent to $480 and $1,800 if proceeding to arbitration. Further, in New Zealand the filing fee for a claim the Employment Court is $NZD204.44 with an additional hearing fee for each half day of hearing after the first day of $ NZD250.44[14] (equivalent to approximately $A185.15 and $A226.81).

In relation to minor civil claims, in South Australia on commencement of minor civil action a fee of $138 is payable.[15] The fees for small civil claims in other States are as follows[16]:

- Tasmania: $111;
- Queensland: $108.70 (claims for more than $1000, but less than $10,000);
- Victoria: $138.70 (claims for up to $1,000), $289.70 (claims for up to $7,500)
- New South Wales: $95
- Western Australia: $106

The Wine Industry Associations submit that the fee structure for unfair dismissal claims could be designed so that employees with lower incomes pay a lower filing fee with the fee

[14] Employment Court of New Zealand 2015, "Forms and Fees", http://www.justice.govt.nz/courts/employment-court/forms-and-fees

[15] Magistrates Court of South Australia 2015, Fees, http://www.courts.sa.gov.au/ForLawyers/Pages/Magistrates-Court-Fees.aspx#civil

[16] Magistrates Court of Tasmania 2015, "Court Fees (effective from 1 July 2015), http://www.magistratescourt.tas.gov.au/nested_content/fees; Queensland Civil and Administrative Tribunal 2015, "Fees and Allowances", http://www.qcat.qld.gov.au/using-qcat/fees-and-allowances; Magistrates Court of Victoria 2015, "Fees and Costs Ready Reckoner", http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Court%20Fees%20and%20Costs%20Ready%20Reckoner_1%20Jul%2015%20v2.pdf; New South Wales Local Court 2015, "Fees", http://www.localcourt.justice.nsw.gov.au/Pages/forms_fees/fees.aspx; Magistrates Court of Western Australia 2015; "Court Fees", http://www.magistratescourt.wa.gov.au/_files/Magistrates_Court_Fees.pdf

increasing as the employee's income increases as a proportion of the high income threshold ($136,700 as of 1 July 2015).

Application fee

- $100 for employees with an annual income up to $34,175 (25% of high income threshold);
- $200 for employees with an annual income ranging from $34,176 to $68,350 (up to 50% of high income threshold);
- $250 for employees with an annual income ranging from $34,177 to $82,000 (up to 60% of high income threshold
- $320 for employees with an annual income in excess of $82,000

Hearing Fee

In the event the matter was not settled through conciliation, an additional hearing fee of $178 could be payable which would be equivalent to half of the full cost of the conciliation (356.20[17]).

The fees proposed above would balance the need for discouraging claims with no reasonable prospect of success, contributing to the cost of conciliating and hearing claims, while at the same time not being prohibitive for employees with lower incomes with genuine claims. The ability of FWC to waive the application fee in cases of serious financial hardship should be retained.

[17] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 231

9. CHAPTER 10/11: ROLE OF AWARDS/REPAIRING MODERN AWARDS

Modern Awards in the wine industry

Wine industry employers predominately are covered by the Wine Industry Award 2010 which covers vineyard staff, cellar door staff, production, laboratory, warehousing and bottling staff.

However, two additional Modern Awards commonly apply to wine industry employers, Clerks – Private Sector Award 2010 for clerical and administrative employees and Manufacturing and Associated Industries and Occupations Award 2010 for trade qualified maintenance employees.

In order to enhance the cellar door experience an increasing numbers of wineries are offering additional products and services in the cellar door which may be covered by additional Modern Awards. This could include coffee making, basic food service such as light meals to operating a full service restaurant with chefs, kitchen hands, and waiting staff. As a result in addition to the above Modern Awards, the Restaurant Industry Award 2010 may apply.

This means that a wine industry employer must be able to determine which of the 122 Modern Awards may or may not apply to their business, understand at what point the provision of an additional service may result in additional coverage and the expertise and skills to manage instances of overlapping Modern Award coverage. From a practical perspective this means managing instances where an employee may perform work under multiple Modern Awards, ensuring compliance under both Modern Awards, reconciling often conflicting requirements.

While Modern Awards contain a standard provision on multiple award coverage, in reality, which Modern Award provides the most appropriate coverage may vary over time it may well be that in any given day in the case of a cellar door employee a person may predominately perform coffee making and food service work while next day they may predominately perform wine tasting.

Multiple Award Coverage – model provision

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.[18]

While the Award Modernisation Process under the WRA and the Act resulted in a numerical rationalisation of the award system, it is incorrect to claim that the Modern Award system is operating effectively and efficiently and does not need any substantial changes.

The Award Modernisation Process on many occasions resulted in the preservation of provisions in previous Federal awards, rather than fulfilling the Modern Awards objective of promoting "*flexible modern work practices" and "the efficient and productive performance of work".*

The Draft Reports ignores a number of issues faced by particularly small business in the wine industry, including:

- businesses being required to navigate and comply with multiple Modern Awards;
- uncertain and ambiguous coverage in Modern Awards;

[18] Wine Industry Award 2010

- extensive and detailed provisions on consultation;
- lack of clarity of expression in the interaction of base rates, loadings and penalties;
- inflexible part-time provisions mandating a written pattern of work and any variations to the working pattern to be in writing;
- requiring casual employees to be paid for a minimum of four hours' work on each occasion;
- the provision of 15 different types of allowances for undertaking certain jobs;
- requiring the payment of a higher rate of pay for a whole day where the employee performs 2 hours of work at a higher classification level;
- imposing arbitrary rules on which default superannuation funds to be utilised;
- limiting ordinary hours of work to Monday to Friday 6am-6pm (except for vintage during which time these are extended to 5.00am-6.00pm Monday to Saturday for some employees), thus failing to recognise that in primary production employers do not have the same control over which days of the week work is required;
- imposing excessive costs through penalty payments of 200% and 250% for working Sundays and Public Holidays respectively.

There is insufficient recognition in the Draft Report of any of the issues above. In addition even in the few instances where the Draft Report highlights adverse outcomes of the Modern Award system, it does not provide any recommendation or even a discussion on how such issues should be rectified or simply assumes that the FWC will address any adverse outcomes.

For example, in relation to allowances the Draft Report states that "*The number of allowances is a good example of the role that history plays in current awards*", but that "*the FWC has committed to monitor allowances to make sure that awards only contain those that continue to be relevant*."[19] We disagree with this observation. The FWC has had opportunities both during the Award Modernisation as well as during the interim review in 2012 to remove redundant and outdated allowances and the basis for providing a separate allowance for a particular type of work. We are unaware of any comprehensive review having occurred and the rationalisation and removal of any allowances in relation to the Modern Awards wine industry employers have an interest in.

Too much detail

The overarching objective of Modern Awards as set out in section 134 of the Act, is "*to ensure that Modern Awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*".
[Emphasis added]

Hence, the Modern Award system together with the NES is intended to provide core minimum terms and conditions, not provisions that can be obtained through other means, including enterprise bargaining, or provisions that are not a required component of the safety net. However, in reality a number of Modern Award provisions appear to have simply been copied and pasted from predecessor awards, whether former Pre-reform Federal Awards or Notional Agreements Preserving State Awards (NAPSAs).

In many instances the Modern Award system attempts to micro manage the employment relationship. For example, a common provision in many Modern Awards, including the Clerks – Private Sector Award 2010 requires the employer and a part-time employee at the time of engagement to "*agree in writing on a regular pattern of work, specifying at least the numbers of hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day*."[20] Further, in the event the employee wishes to vary

[19] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 412
[20] Clerks – Private Sector Award 2010, Clause 11.3

their hours, a discussion with their employer, team leader or co-workers to either permanently or temporarily swap their hours would not suffice, instead "*Changes in hours may only be made by agreement in writing between the employer and employee.*"[21]

On some occasions an employer may be able to offer a part-time employee an opportunity to work additional hours on a once off basis. In order to increase their income part-time employees may be willing to work additional hours up to 38 hours in a week. However, under many Modern Awards a verbal agreement between the employer and the employee to do so would not suffice. Unless agreed to in writing, any additional hours worked by a part-time employee would attract overtime rates.

This is because under the relevant award provision "*All time worked in excess of the hours as agreed under clause 11.3 or varied under clause 11.4 will be overtime and paid for at the rates prescribed in clause 27— Overtime rates and penalties (other than shiftworkers).*"[22]

In the past, part-time employment has been viewed as providing a flexible working arrangement, particularly for employees seeking to balance employment with family and caring responsibilities. However, anecdotal evidence suggests that provisions similar to those contained in the *Clerks – Private Sector Award 2010* discourage the employment of part-time employees. Instead, casual employment commonly is viewed as a better alternative as it provides greater flexibility in relation to rostering and working hours and does not mandate numerous written agreements whenever working hours are varied.

The Wine Industry Associations submit that these issues require attention and action.

Duplication and inconsistency

Modern Awards also place additional regulatory requirements on top of already legislated standards. For example as recently as on 18 August 2015 the FWC decided to introduce yet another Modern Award provision which is inconsistent with and overrides relevant State and Territory legislation. In its decision [2015] FWCFB 3523[23] the Transitional Provisions Full Bench introduced a model provision in Modern Awards which requires employers to disregard relevant State and Territory workers compensation and during the first 26 weeks an employee is in receipt of workers compensation payments maintain the employee's pre-injury wage.

Another example relates to superannuation contributions. The circumstances in which employers are required to make compulsory superannuation contributions are set out in the *Superannuation Guarantee (Administration) Act 1992* and relevant Australian Taxation Office Rulings, including SGR 2009/2 on "ordinary time earnings" and "salary and wages".

However, Modern Awards such as the Manufacturing and Associated Industries and Occupations Award 2010 and the Restaurant Industry Award 2010 require employers to disregard the accepted definition of ordinary time earnings and make superannuation contributions where *"the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements"*[24]*.*

[21] Clerks – Private Sector Award 2010, Clause 11.4
[22] Clerks – Private Sector Award 2010, Clause 11.6
[23] Fair Work Commission 2015, 4 yearly review of modern awards—transitional provisions (AM2014/190), 18 August 2015, [2015] FWCFB 3523, https://www.fwc.gov.au/documents/decisionssigned/html/2015FWCFB3523.htm
[24] Manufacturing and Associated Industries and Occupations Award 2010, Clause 35.5; Restaurant Industry Award 2010, Clause 30.5

Further, under section 27(2) of the *Superannuation Guarantee (Administration) Act 1992* employers are not required to make superannuation contributions where the employee earns less than $450 in a calendar month. Yet, under the Restaurant Industry Award 2010, employers are required to disregard this as the threshold has been lowered to $350 or more as outlined below:

> **30.2 Employer contributions**
>
> **(a)** An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.
>
> **(b)** The employer must make contributions for each employee for such month where the employee earns $350.00 or more in a calendar month.
> [Emphasis added]

The inclusion of Modern Award provisions on superannuation that are inconsistent with other legislation cause confusion and could also lead to inadvertent contraventions. It is also questionable on what basis superannuation contributions in excess of legislated minima have been deemed to be an essential part of the safety net for some award-covered employees.

The Draft Report does not address the issue of duplication and inconsistency and it is therefore unclear whether the PC views the duplication and inconsistency described above as being good public policy.

Proposed mechanism to "repair" Modern Awards unlikely to be effective

The Wine Industry Associations disagree with the finding in Chapter 11 of the Draft Report that the Modern Award system works well and does not need more than minor changes.

A major weakness is that the Draft Report does not contain any discussion or does not seem to have any view on the substantive content of Modern Awards, including the type of matters that reasonably could be viewed to form part of a safety net and the matters that do not.

For example, there is no discussion on whether it is necessary and desirable that up to 23 discreet matters either must or may be included in Modern Awards under section 139-149D of the Act. Also there is no discussion on whether these matters are the most appropriate matters to regulate in Modern Awards.

Given that the Draft Report states that the "*The current [award] system works*"[25] it is reasonable to expect that this would be based on an assessment of at least the substantive provisions of the Modern Awards covering the largest proportion of award-covered employees. However, given the absence of such discussions in the Draft Report it is unclear on what basis the Draft Report has arrived at this conclusion.

For example, is the PC of the view that the following matters are either necessary for the operation of the safety net or indeed desirable to regulate in Modern Awards?

- Frequency of pay provisions which prevent an employer from determining the most appropriate frequency of pay (subject to the requirements in section 323 of the Act);[26]

[25] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 425
[26] Wine Industry Award 2010, Clause 26

- Rostering arrangements which in the case of an emergency mandate that a part-time employee's roster may only be changed by giving at least 48 hours' notice[27];
- Requirements that superannuation contributions are made in relation to payments that otherwise would not attract superannuation contributions;[28]
- Minimum engagement provisions which prevent employers and employees from agreeing to working shifts that are shorter than 4 hours;[29]
- The prescription of 53 different allowances;[30]
- Special compensation for damaging dentures for warehouse and wholesale employees;[31]

The recommendations in Chapter 12 of the Draft Report are predominately focused on the process and institutional structure for reviewing and varying Modern Awards. The Wine Industry Associations understand that the aim of establishing a Minimum Standards Division responsible for reviewing and varying Modern Awards as proposed in recommendations 3.1 and 12.1 is to apply a more evidence-based and objective analysis of award conditions.

However, given the experience of previous reviews including award simplification, award modernisation and the interim modern award review in 2012, the award system has proven to be inherently conservative with a tendency to preserve rather than modernise and simplify. This has resulted in awards that are still complex, legalistic, restrictive, duplicate legislative provisions and provide unnecessary detail.

The Wine Industry Associations therefore are not hopeful that recommendation 12.1 will be any more successful in removing redundant, outdated, unnecessarily prescriptive and detailed provisions in Modern Awards than what has been the case during previous rounds of award simplification and award modernisation.

The structural changes to the Fair Work Commission as proposed are not sufficient to deliver the necessary simplification and modernisation. What is required are legislative amendments to address the content of Modern Award and confine the award system to matters that are necessary for providing a genuine minimum safety net of terms and conditions.

Substantive changes are necessary

In order to ensure that the adverse consequences of the current award system are appropriately addressed so that the red tape and the compliance burden on employers are reduced, the ability for employers to flexibly manage and engage with their employees is increased and the needs of small business taken into account, the Wine Industry Associations submit that substantive changes to the Modern Award system is required.

To achieve this outcome the Initial Submission of the Wine Industry Associations on 27 March 2015 canvassed two options. Neither option would result in the wholesale deregulation of the workplace relations system, but would continue to provide significant employee entitlements and safeguards. However, importantly the options balance the need for employee protections with the need for removing duplication and inconsistency with other laws, reducing red tape and compliance costs and remove provisions that achieve in nothing more than micro-managing the employment relationship and create obstacles to workplace flexibility.

[27] General Retail Industry Award 2010, Clause 12.8
[28] Clerks – Private Sector Award 2010, Clause 24.5; Restaurant Industry Award 2010, Clause 30.2
[29] Wine Industry Award 2010, Clause 13.3
[30] Manufacturing and Associated Industries and Occupations Award 2010
[31] Storage Services and Wholesale Award 2010, Clause16.6

Under Option 1 of the Wine Industry Associations' Recommendation 6, industry and occupationally-based minimum entitlements through the Modern Award system will be replaced with an expanded legislated minimum safety net through the NES. The NES will be expanded to incorporate terms of Modern Awards that make up a genuine safety net of terms and conditions. Providing one set of minimum legislated standards would protect core conditions of employment while at the same time provide greater certainty and stability to business, allowing greater workplace flexibility and significantly reduce compliance costs and red-tape.

As outlined in more detail in the Initial Submission, the expanded NES would incorporate the following additional entitlements:

- Minimum wages with a four level classification structure;
- Junior rates of pay;
- Saturday, Sunday and Public Holiday compensation;
- Shiftwork compensation;
- Overtime compensation;
- Casual minimum engagement; and
- Unpaid meal breaks.

Option 2 on the other hand involved the retention of the Modern Award system, but subject to significant simplification by limiting the matters than can be included in Modern Awards to those that are necessary for a genuine minimum safety net. In addition, the Modern Awards will be amended to ensure that Modern Awards are focused on core entitlements only and do not damage flexibility and productivity. This would be achieved by the following:

Recommendation 7:

To focus the Modern Award system on being a genuine minimum safety net, the Wine Industry Associations propose that the Modern Awards objective in section 134 of the Act be replaced as follows:

134 The modern awards objective

The FWC must ensure that modern awards, together with the National Employment Standards, provide a safety net of basic minimum wages and terms and conditions of employment, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to protect the competitive position of young people, apprentices, trainees and people with disabilities in the labour market, through appropriate wage provisions; and

(c) the need for improved productivity through flexible and modern work practices and arrangements; and

(d) the need for reducing the regulatory burden on business, including compliance costs; and

(e) the need for economically sustainable modern awards for business, including small and large business; and

(f) the likely impact of Modern Awards on business and employment cost; and

(g) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment and national and international competitiveness; and

(h) the need to reduce complexity and ensure that modern awards are simple, easy to understand and expressed in plain English; and

(i) the special needs and requirements of small business.

This is the modern awards objective
Recommendation 8:

Further, in order to cut back on detail, move from micromanaging the employment relationship to providing genuine minimum entitlements and only include provisions that are necessary, it is proposed that the award matters in section 139 be reduced as follows:

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply, and:

(b) classifications; and

(c) incentive-based payments, piece rates and bonuses;and

(d) exemption rates to ensure that employees paid in excess of a specified amount in the Modern Award are exempted from the application of the Modern Award; and

(e) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and

(f) ordinary hours of work, notice periods, rest breaks and variations to working hours; and

(g) notice of termination by employees and conditions in the event the required notice has not been provided; and

(h) overtime rates; and

(i) penalty rates; and

(j)annualised wage arrangements that provide an alternative to the separate payment of wages and other monetary entitlements.

Recommendation 9:
The following mandatory terms should be removed to further simplify the Modern Awards:

- section 145A regarding consultation about changes to rosters or hours of work;
- section 146 regarding terms about settling disputes;
- section 147 regarding ordinary hours of work;
- section 149B regarding avoidance of liability to pay superannuation guarantee charge; and
- section 149C and 149D regarding default fund terms.

Recommendation 10:

To ensure that Modern Awards are focused on the needs of the low paid, an additional mandatory term of the Modern Awards in section 143 of the Act should be prescribed, requiring all Modern Awards to contain an exemption rate to ensure that employees paid in

excess of a certain classification in the Modern Award are exempted from the application of the Modern Award as follows:

(1) A modern award must contain an exemption rate which excludes employees who are paid in excess the minimum award rate for a certain classification in the modern award from the application of the modern award.

(2) The regulations may prescribe the amount of the exemption rate/rates for the purpose of subsection (1).

It is vital that the exemption rate is realistic and not artificially inflated to so that it becomes meaningless. Prior to the commencement of Modern Awards some awards contained an exemption rate. For example under clause 29 of the New South Wales *Clerical and Administrative Employees (State) Award NAPSA*, employees paid in excess of 15% of weekly wage for the highest grade/classification in the award were exempted from the application of the award. A similar exemption level would appear reasonable.

Recommendation 11:

It is proposed that the following section is inserted in the Act:

Non-allowable award matters
(3) For the purpose of subsection 139(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:

(a) conversion from casual employment to another type of employment;

(b) restrictions on the engagement of casual employees, including limiting the engagement of casual employees to particular circumstances or for a specific period of time;

(c) the maximum or minimum hours of work for regular part-time employees;

(d) dispute resolution training leave;

(e)annual leave loading;

(f) frequency and method of payment of wages;

(g) rostering, including conditions on setting and and varying rosters;

(h)superannuation;

(i)supplementary and ancillary NES terms;

(j)allowances; and

(k)transfer of business, including recognition of continuous service.

Recommendation 12:

A new section should be inserted to ensure that matters that are not allowable cease to have effect, as follows:

Immediately after the commencement of this subsection, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters.

The Wine Industry Associations submit that in order to reduce the compliance burden and give employers an increased ability to flexibly manage and engage with their employees, changes to the award system must be pursued.

10. CHAPTER 14: WEEKEND PENALTY RATES

The Wine Industry Associations welcome the Draft Report's discussion and findings on the implication of weekend penalty rates on service industries, including hospitality and retail and we agree with the sentiment of recommendation 14.1 that the Sunday penalty rate be aligned with the Saturday penalty rate.

However, the focus in the Draft Report on traditional services industries including hospitality, entertainment, retailing, restaurant and cafes industries (referred to as HERRC industries in the Draft Report) fails to recognise the wine industry's seven day operations providing a tourism and food and wine experience in the Cellar Doors located in rural and regional Australia and the impact of excessive Sunday penalty rates on the industry.

The wine industry is a seven day industry

Most wineries operate a cellar door to attract interest in their wines, build their brand, encourage direct sales and for tourism purposes. For regional areas, the wine industry's contribution to local tourism and associated services such as hospitality, restaurants and retailing cannot be underestimated. The Wine industry generates substantial revenue to the tourism industry, attracting close to 700,000 international visitors and generating revenue of $8.2 billion from domestic and international tourism[32].

Apart from traditional wine tasting and wine sales, cellar doors are increasingly providing a number of other services and products to attract visitors, including tutored tastings, tours of cellars and production facilities, tasting plates, degustation, coffee and tea, merchandise, functions and lunches.

Given that most domestic visitors are only able to visit cellar doors during their weekends or public holidays, cellar doors must be open and available on Saturdays and Sundays and Public Holidays. A national wine industry survey conducted in January 2015 demonstrated that over 75% of all respondents trade seven days a week.

While wineries are aware of the potential benefits of operating cellar doors, in reality during weekends and public holidays the employment costs are prohibitive. This has resulted in a reduction in trading hours of cellar doors, owner operators working weekends and public holidays rather than employed staff and wineries coordinating their opening hours by taking turns operating on weekends and public holidays.

In order to ensure that cellar doors can continue to provide a tourism and food and wine experience seven days a week, the industry needs a weekend penalty rate structure which does not make Sunday trading unviable.

Case Study 1: Cellar door operations and weekend penalties
Even when busy we struggle to meet costs on Sundays directly as a result of the penalties. Being owner-operators we work the weekends rather than rostering our staff as we can't afford paying the weekend penalties. If we could reduce the weekend penalty rates, we would employ more staff and would also be able to operate profitably on these days.

[32] See Winemakers' Federation, Snapshot of Australian Wine Industry table on page 14 of this submission

Case study 2: Cellar door operations and weekend penalties

We used to be open from 10am-5pm on weekends and public holidays. However, due to the increased weekend penalties we had to reduce our hours to 12 noon -5pm. As we sometimes do not even cover our labour costs on a weekend, we are now considering reducing our weekend trading hours even further, 12 noon-4pm.

Penalty arrangements in the wine industry

The following table sets out the penalty rates under the predecessor awards that were replaced by the Wine Industry Award 2010:

Table 1 **Penalty rate arrangements for selected modern awards**

	Permanent			Casual		
	Percentage of permanent base rate			Percentage of permanent base rate		
	Base rate	Sat.	Sun.	Base rate	Saturday	Sunday
	%	%	%	%	%	%
Wine Industry Award 2010	**100**	**125**	**200**	**125**	**150**	**225**
Restaurant Industry Award 2010	100	125	150	125	150	150 (175)
General Retail Industry Award 2010	100	125	200	125	135	200
Hospitality Industry (General) Award 2010	100	125	175	125	150	175
Amusement Events and Recreation Award 2010	100	100	150	125	125	175
Fast Food Industry Award 2010	100	125	150	125	150	175
Pharmacy Award 2010	100	125-150	200	125	150-175	225
Hair and Beauty Industry Award 2010	100	133	200	125	133	200

Wine industry employers providing a cellar door experience and service on a weekend pays a substantially higher Sunday penalty than the Saturday penalty. In addition, none of the seven HERRC industries above pays a higher Sunday penalty rate for casual employees than the wine industry.

The Wine Industry Associations therefore urge the PC to look beyond the HERRC industries nominated in the Draft Report and extend its reasoning on Sunday penalty rates to the Wine Industry.

More robust recommendation required

While the Wine Industry Associations strongly support the sentiment behind recommendation 14.1, namely that the level of the Sunday penalty is aligned with the Saturday penalty, as currently drafted the recommendation would have little or no direct impact on the penalty rates in these industries. Given that FWC is an independent tribunal, tribunal members would be under no obligation to consider any recommendation of the PC.
The Wine Industry Associations submit that if there are reasons for changing current policy then in order to give effect to the recommendation legislative change should be recommended. Recommendation 14.1 should be more robust so that if adopted, the recommendation will make a difference. A possible amendment could be to require the FWC the set the Sunday penalty rate at the level of the Saturday penalty in industries or Modern Awards prescribed by the regulations. This would enable a Regulation to be made to prescribe the industries or awards the FWC would need to consider.

The Wine Industry Associations note that during the Part 10A Award Modernisation Process the then Minister for Employment and Workplace Relations exercised her powers under section 576C(1) of the WRA on eight occasions to direct the then AIRC to take certain steps. This included directing the AIRC to create a separate restaurant industry award and "*establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times*"[33]. We note that the use of these powers attracted very little public controversy or criticism.

Therefore, the power of the Minister to give specific directions to the FWC in relation to Modern Awards is not without precedence and could provide an effective means to resolve this issue.

[33] Gillard J 2009, Minister for Employment and Workplace Relations, Variation of Award Modernisation Request under Section 576C(4), 29 May 2009.

11. CHAPTER 15: ENTERPRISE BARGAINING

Enterprise bargaining in the wine industry

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:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being too complex and time-consuming and not a realistic, practical and suitable arrangement for a small business.

The Wine Industry Associations welcome recommendations 15.1, 15.2 15.3 and 15.5 regarding the approval process of enterprise agreements, flexibility terms of enterprise agreements, the nominal term and the number bargaining representatives. These recommendations could simplify the bargaining process and/or make enterprise agreements a more suitable alternative, particularly for small business.

The Wine Industry Associations strongly support recommendation 15.4 to replace the current BOOT with a new No Disadvantage Test (NDT). The BOOT has proven to be problematic since its introduction and there has been too much uncertainty and confusion how it is applied. The No Disadvantage Test is widely understood, having first appeared in the *Industrial Relations Act 1988.*

Content of agreements

The Draft Report provides an extensive discussion on the content of enterprise agreements and finds that "While, in principle, *it is undesirable that non-permitted matters be able to linger on in agreements, the removal of them by legislation or FWC scrutiny may have undesirable consequences."*[34]

The Wine Industry Associations do not agree with this finding and maintain that the rules on enterprise agreement content must be made more robust to ensure that enterprise bargaining is focused on improving productivity and flexibility rather than being allowed to be used as a means to extract manifestly excessive benefits under the threat of industrial action. Clearer and stricter rules must be provided to ensure that enterprise agreements are focused on matters that directly relate to the employment relationship rather than matters of a peripheral nature that simply create barriers to productive and efficient work.

While not making any recommendations on the content of enterprise agreements in Chapter 15, Chapter 20 gives examples of how enterprise agreements are being used to limit and restrict the use of labour hire workers and contractors. This includes "jump up" clauses *"which ensure that the terms and conditions of an independent contractor or labour hire worker's engagement are no less favourable than those of ongoing workers."*[35]

[34] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 565
[35] Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 565

The Draft Report points out that in some instances *"where there is an imbalance of bargaining power, businesses may have little alternative but to cede some authority over the use of alternative forms of employment to the unions."*[36]

Recommendation 20.1 of the Draft Report provides that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Act. While the Wine Industry Associations support the sentiment of the recommendation, we submit that the recommendation is inadequate.

While FWC must be satisfied that an agreement does not include unlawful terms, section 253 illustrates that in the event unlawful terms are contained within an enterprise agreement the consequence is simply that the unlawful term will not have any effect.

There is no real consequence by deliberately or by negligence including unlawful terms. Therefore, the Wine Industry Associations maintain that it is necessary to make the provision on unlawful terms a civil remedy provision so that parties are deterred from including such terms.

[36] Ibid

12. CHAPTER 16: INDIVIDUAL ARRANGEMENTS

The Wine Industry Associations strongly support recommendations 16.1 and 16.2 to make Individual Flexibility Agreements (IFA) a viable alternative to enterprise bargaining and ensure that the scope of IFAs cannot be limited in Enterprise Agreements.

In particular, the Wine Industry Associations are pleased that under recommendation 16.1 the maximum notice period for an IFA could be up to 1 year. The fact that an IFA currently can be terminated unilaterally by giving 13 weeks' notice is one of the reasons why the take-up of IFAs is so low.

It is also pleasing that under recommendation 15.2 of Chapter 15 an IFA would be able to deal with all matters under the enterprise agreement and there would be no capacity for enterprise agreements to restrict the scope of IFAs.

However, the Draft Report neither discusses nor provides any recommendation to address the key weakness of IFAs, that is, the very limited scope of IFAs. While recommendation 15.2 would extend the scope of IFAs under enterprise agreements to all matters of the enterprise agreement, there is no such recommendation to increase the scope of IFAs under Modern Awards.

The model award flexibility term under Modern Awards restricts IFAs to the following five matters:

7. Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

This means that for example an employee and their employer is unable to vary for example the minimum engagement for casuals or part-time employees.

In order to ensure that IFAs, particularly for small business, are viewed as meaningful and effective means to negotiate working arrangements that are more suitable to the individual company or workplace, the restrictions on the scope of IFAs must be removed.

13. CHAPTER 17: THE ENTERPRISE CONTRACT

The need for alternatives to collective bargaining

The Draft Report points out that there is a gap in agreement options for small and medium sized businesses. Many small and medium sized business do not have the human resources and workplace relations expertise to navigate the requirements relating to enterprise bargaining.

While there is a need for more flexible and productive working arrangements, for many small and medium sized businesses collective enterprise bargaining is not viewed as being feasible. There may be several reasons for this, including:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being too complex and time-consuming and not a realistic, practical and suitable arrangement for a small business.

The Enterprise Contract

The Wine Industry Associations welcome the discussion on the so called Enterprise Contract in Chapter 17 of the Draft Report and would strongly support its introduction.

The Enterprise Contract canvassed in the Draft Report is an interesting model for several reasons, including:

- recognising the need for simplified, individual arrangements;
- recognising that collective enterprise bargaining may not be a viable option for small business; and
- a streamlined and simplified negotiation and lodgement process that is easy to understand and comply with for a small business.

The proposed process balances the need for simplicity with safeguards for employees.

- While it does not require FWC approval the fact that it can be terminated unilaterally by the employee after 12 months would ensure that an employee would not be locked into arrangements that did not meet their needs;
- The lodgement and access to existing Enterprise Contracts would guide employers and employees on appropriate content;
- The requirement on the Enterprise Contract passing the new NDT would also ensure that employees could not be disadvantaged; and
- FWO could take samples of Enterprise Contracts having been lodged and inspect compliance.

As a means of further ensuring that employees are not worse off under the Enterprise Contract, the Draft Report discusses that the Enterprise Contract may be varied upon complaint by an employee that it does not meet the NDT. In addition, it is discussed whether FWO should be able to order that other Enterprise Contracts containing similar provisions be varied to ensure the NDT is met.

While the Wine Industry Associations would support the FWO having a role in providing advice and information on the Enterprise Contract and investigating complaints, we would not support FWO being able to “order” or direct an employer to take certain steps in relation to the Enterprise Contract.

The FWO is already able to recommend that an employer rectifies underpayments, but would need to commence legal action against an employer if they failed to take any corrective action. The Wine Industry Associations submit that this approach should also apply to the Enterprise Contract.

Given that neither the FWO nor the FWC would have had any role in assessing the Enterprise Contract to start with, it would not be appropriate to give either of these bodies the power to make legally binding orders in respect of the Enterprise Contract.

In addition, assessing a complaint that an Enterprise Contract does not pass the NDT would require an overall assessment of the terms and conditions of the Enterprise Contract compared to the relevant Modern Award. It would involve a number of judgements as to the scope of the Enterprise Contract and the application of the NDT. Such questions should tested and determined by the Courts and be open to appeals, rather than determined by a statutory agency.

Required changes to process and application

To ensure that the Enterprise Contract operates as intended, the Wine Industry Associations submit that the following issues would need to be addressed in the Act:

- ***No protected industrial action during the nominal life of Enterprise Contract***
    - To ensure consistency with enterprise agreements section 414 and section 417 of the Act must be amended to specify that protected industrial action cannot be taken during the nominal life of the Enterprise Contract;

- ***No approval by persons not covered by the Enterprise Contract***
    - To ensure that the approval process of the Enterprise Contracts remains simple and easy to follow and avoid the risk of third parties interfering with the Enterprise Contract the Act must be amended to specify that the Enterprise Contract must not require the approval or consent of a person other than the employer and the employee or employees that will be subject to the Enterprise Agreement;

- ***Protection of privacy where Enterprise Contract covers one employee only***
    - Given that an Enterprise Contract may cover either an individual employee or a group or classes of employees to protect the privacy of an individual employee, the Act must be amended to provide different rules on the disclosure and publication of Enterprise Contracts where the Enterprise Contract covers an individual employee only.

    - It would be appropriate for Enterprise Contracts covering more than an individual employee to be published and publically available and consistent with the existing disclosure of Enterprise Agreements on the FWC website.

    - However, in the event the Enterprise Contract covers one individual employee only the publication and disclosure of the individual employee's terms and conditions of employment would be an incursion of their privacy which could actively dissuade an employee from entering into an Enterprise Contract. The Act therefore needs to ensure that the employee's privacy is appropriately protected and that details of the Enterprise Contract are not published where it covers a single employee only.

    - Enforcement agencies, including the FWO should have full access to all details of the Enterprise Contracts.

  - In addition, to further protect the privacy of an individual employee covered by an Enterprise Contract, the PC should consider inserting the privacy protections that applied to Australian Workplace Agreements under section 165 of the WRA in the Act.

- ***No restrictions in Enterprise Agreements on the negotiation of Enterprise Contracts***
  - In order to ensure that employees and employers are able to negotiate an Enterprise Contract when suitable, section 194 of the Act must be amended to make terms that directly or indirectly restricts the ability of a person covered by the Enterprise Agreement to offer, negotiate or enter into an Enterprise Contract an unlawful term under the Act.

- ***Online check of mandatory requirements***
  - To assist parties to understand and comply with any mandatory requirements regarding the Enterprise Contract, including that it passes the NDT, that it is signed by the employees covered etc., upon lodgement with FWC the employer could be required to complete an on-line check to ensure all mandatory requirements are met.

14. CHAPTER 19: INDUSTRIAL DISPUTES AND RIGHT OF ENTRY

Industrial action

The Wine Industry Associations strongly support recommendation 19.1 to ensure that protected action can only be taken where bargaining has commenced. This will reverse the decision in the *JJ Richards case* which confirmed 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.

In addition, we support recommendation 19.2 to enable FWC to suspend or terminate industrial action where it is causing or likely to cause significant economic harm to the employer or the employees, recommendations 19.3 and 19.4 regarding aborted strikes and recommendation 19.6 regarding increased penalties for unlawful industrial action.

15. CONCLUSION

The Inquiry presents a unique opportunity to not only evaluate the current system, but more importantly to be innovative and creative and design the most rational, effective and efficient workplace relations system.

The focus should be to design a new workplace relations system which one hand balances the need for "*fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net"* with the need for reducing "*red tape and the compliance burden for employers",* enabling *"employers to flexibly manage and engage with their employees"* and encouraging *"productivity, competitiveness and business investment".*

While some of the recommendations of the Draft Report will lead to modest improvements of the current system for example on relation to unfair dismissal claims, enterprise agreements and industrial action, the overarching theme of the draft report is the preservation and maintenance of the current system with a disproportionate emphasis on history and precedence.

The Wine Industry Associations submit that more robust recommendations are required, in particular in relation to the Modern Award system to ensure that the Inquiry does not become a lost opportunity.