

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



SUBMISSION OF: SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION
INCORPORATED and the WINEMAKERS' FEDERATION OF
AUSTRALIA

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

TELEPHONE: (08) 8222 9277

FACSIMILE: (08) 8222 9276

EMAIL: admin@winesa.asn.au

WEB: www.winesa.asn.au

DATE: 27 March 2015

TABLE OF CONTENTS

1 INTRODUCTION	3
2 SUBMISSION OVERVIEW	4
3 SUMMARY OF RECOMMENDATIONS	5
4 WINE INDUSTRY OVERVIEW	7
5 ISSUES PAPER 5 – OTHER WORKPLACE RELATIONS ISSUES	9
6 ISSUES PAPER 2 – SAFETY NETS	19
7 ISSUES PAPER 3 – THE BARGAINING FRAMEWORK	39
8 ISSUES PAPER 4 – EMPLOYEE PROTECTIONS	49
9 CONCLUSION	52

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 to 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 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 Report*, 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 Wine Trade (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 1998⁶ and the 2005 decision took place in Melbourne over 5 days from December 2004 to April 2005⁷.

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 Authority⁹ 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 Court¹⁰.

In the United Kingdom the Employment Tribunal¹¹ 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 Tribunal¹².

In the Republic of Ireland, the Labour Relations Commission¹³ 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 Tribunal¹⁴ or the Labour Court¹⁵, 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 modernised¹⁶. 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 competitiveness¹⁷.

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 case¹⁸, the Federal Tribunal announced the “Restructuring and Efficiency Principle” which linked wage increases to award restructuring. This principle was remodelled in the 1988 wage case¹⁹ 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 improvements²⁰. 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 critical²¹.

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 concerned²³.

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 detail²⁴. The reviews were intended to result in an award system that was easier to apply, less prescriptive and more relevant to individual workplaces²⁵. 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 untouched²⁷. 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 employees²⁹.

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 occasions³⁰. 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 decision³² 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 reforms³³.

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 bargaining³⁶. 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 effect³⁸.

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 practices³⁹. 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 Relations⁴⁰.

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.

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).

Research⁴¹ 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/awardsmodernfour/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 is 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 awards⁵⁴. 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 *Employment 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 system⁵⁵.

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 3777⁵⁷ 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] FWA 6251⁵⁸. 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 Court⁵⁹ 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 legislation⁶³ 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 that 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 Acts⁶⁴, 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 than 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 study⁶⁹ 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 2012⁷².

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 case⁷⁴ 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 31⁸¹ 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 employees⁸⁴. According to the most recent data on agreement making there are more than 19,000 federal enterprise agreements, covering 37% of all employees⁸⁵. 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 2009⁸⁶.

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 department⁸⁷. 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.

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 FWC⁸⁸ which sets out 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 papers⁸⁹, the other member had significant issues with the agreement, including in relation to pre-approval requirements and the no-disadvantage test⁹⁰.

Further, a proposed enterprise agreement that would cover approximately 80,000 McDonald's employees was rejected⁹¹ 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 Bench⁹³ 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 hearing⁹⁵. 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 Statistics⁹⁷ defines a small business as a business with less than 20 employees, the Australian Taxation Office⁹⁸ 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 dismissed 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.