

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



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1. INTRODUCTION

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

The South Australian Wine Industry Association (SAWIA) is an industry association representing the interests of wine grape growers and wine producers throughout the state of South Australia. SAWIA is the oldest wine industry organisation in Australia and has existed, albeit with various name changes, since 1840. SAWIA is recognising its 175 years of service to the South Australian wine industry in 2015.

SAWIA is a registered association of employers under the South Australian *Fair Work Act 1994* and is also a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009*.

SAWIA is a not for profit incorporated association, funded by voluntary member subscriptions, grants and fee for service activities, whose mission is to provide leadership and services which underpin the sustainability and competitiveness of members' wine business.

SAWIA membership represents approximately 96% of the grapes crushed in South Australia and about 36% of the land under viticulture. Each major wine region within South Australia is represented on the board governing our activities. Where possible, SAWIA works with the national Winemakers Federation of Australia and state counterparts in the wine industry.

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

WFA is formally recognised as the industry's voice under the *Primary Industries and Energy Research and Development Act 1989* and the *Australian Grape and Wine Authority Act 2013*. WFA is incorporated under the *SA Associations Incorporation Act 1985*.

WFA membership represents some 80% of the national wine grape crush, with more than 370 winery members who directly fund the organisation's national and international activities.

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

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

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

2. SUBMISSION OVERVIEW

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

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

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

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

3. GENERAL COMMENTS ON DRAFT REPORT

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

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

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

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

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

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

Such reforms include:

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

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

termination and redundancy pay, some introduced 60-70 years ago¹ and others in the last 20-30 years².

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

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

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

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

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

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

4. SUMMARY OF DRAFT REPORT RECOMMENDATIONS

| No | Draft Recommendation | Response |
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| 3.1 | The Australian Government should amend the Act to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division. | Partially supported. Substantive reforms of the Modern Award system are required. The recommendation is not adequate in isolation. |
| 3.2 | The Australian Government should amend s. 629 of the Act to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President. Current non judicial Members should also be subject to a performance based review. | Supported |
| 3.3 | The Act should be amended to change the appointment of FWC members. <ul style="list-style-type: none"> • an independent expert appointment panel should be established by the Australian Government and state and territory governments • members of the appointment panel should not have had previous direct roles in industrial representation or advocacy • the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4 • the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General. | Supported |
| 3.4 | Amend the Act to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1. Members of the Minimum Standards Division should have well developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines. Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions. A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas. | Partially Supported. Changes to the appointment process to ensure that members appointed are viewed as unbiased are supported. The specific criteria need further attention. For example it would be appropriate for some members of the Minimum Standards Division to have a legal background and/or business experience. |
| 3.5 | The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. | Supported |
| 4.1 | The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the Fair Work Act 2009 (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards. | Partially Supported. The FWC would be under no obligation to consider and/or give effect to the recommendation. Reword 4.1 to make it more robust. |

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| 4.2 | The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays. | Partially Supported. The sentiment of the recommendation is supported to limit the number of public holidays attracting paid leave and penalty rates. However, Part 6 of these submissions discusses more appropriate and effective amendments. |
| 4.3 | Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated trade-off between wage increases and extra paid leave. | Partially Supported. Any increase in annual leave should not result in additional costs, but be offset by reductions in other entitlements. As discussed in part 4 of these submissions, one option could be to allocate some of the public holidays to annual leave. |
| 5.1 | The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes. | Supported |
| 5.2 | Change the penalty regime for unfair dismissal cases so that <ul style="list-style-type: none"> • an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct • procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties. | Supported |
| 5.3 | The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Act. | Supported |
| 5.4 | Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Act. | Supported |
| 6.1 | The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5. | Supported |
| 6.2 | Modify section 341 of the Act which deals with the meaning and application of a workplace right. The provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. The Act should also require that complaints are made in good faith; and that the FWC must decide this via a | Supported |

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

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

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| | recommended in draft recommendation 15.4).To encourage compliance the Fair Work Ombudsman should: <ul style="list-style-type: none"> • provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements • examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT. | |
| 16.3 | The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives. | Partially Supported. FWO should work in association with the existing network of industry associations to educate employers on this. |
| 19.1 | Amend section 443 of the Act clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination. | Supported |
| 19.2 | Amend section 423(2) of the Act such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than both parties (as is currently the case). | Supported |
| 19.3 | Amend the Act so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response. | Supported |
| 19.4 | Amend the Act to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic. | Supported |
| 19.5 | Amend the Act so that so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either: deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay. | No position |
| 19.6 | The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community. | Supported |

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

5. SUMMARY OF WINE INDUSTRY RECOMMENDATIONS

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

Institutions

Recommendation 1:

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

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

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

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

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

Recommendation 2:

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

- Delete section 576(2)(aa) relating to promoting cooperative and productive workplace relations and preventing disputes;
- Delete section 590(2)(g) relating to undertaking or commissioning research; and
- Delete section 653 relating to review and research of IFAs, enterprise agreements et cetera.

Recommendation 3:

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

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

Recommendation 4:

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

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

President:

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

Member:

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

Recommendation 5:

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

Safety Nets

Recommendation 6:

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

Recommendation 7:

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

134 The modern awards objective

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

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

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

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

- (d) the need for reducing the regulatory burden on business, including compliance costs; and*
- (e) the need for economically sustainable modern awards for business, including small and large business; and*
- (f) the likely impact of Modern Awards on business and employment cost; and*
- (g) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment and national and international competitiveness; and*
- (h) the need to reduce complexity and ensure that modern awards are simple, easy to understand and expressed in plain English; and*
- (i) the special needs and requirements of small business.*

This is the modern awards objective

Recommendation 8:

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

139 Terms that may be included in modern awards—general

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

- (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply, and:*
- (b) classifications; and*
- (c) incentive-based payments, piece rates and bonuses; and*
- (d) exemption rates to ensure that employees paid in excess of a specified amount in the Modern Award are exempted from the application of the Modern Award; and*
- (e) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and*
- (f) ordinary hours of work, notice periods, rest breaks and variations to working hours; and*
- (g) notice of termination by employees and conditions in the event the required notice has not been provided; and*
- (h) overtime rates; and*
- (i) penalty rates; and*
- (j) annualised wage arrangements that provide an alternative to the separate payment of wages and other monetary entitlements.*

Recommendation 9:

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

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

Recommendation 10:

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

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

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

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

Recommendation 11:

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

Non-allowable award matters

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

- (a) conversion from casual employment to another type of employment;*
- (b) restrictions on the engagement of casual employees, including limiting the engagement of casual employees to particular circumstances or for a specific period of time;*
- (c) the maximum or minimum hours of work for regular part-time employees;*
- (d) dispute resolution training leave;*
- (e) annual leave loading;*
- (f) frequency and method of payment of wages;*
- (g) rostering, including conditions on setting and and varying rosters;*

(h)superannuation;

(i)supplementary and ancillary NES terms;

(j)allowances; and

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

Recommendation 12:

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

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

Recommendation 13:

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

Recommendation 14:

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

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

The Bargaining Framework

Recommendation 15

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

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

Recommendation 16:

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

172 Making an enterprise agreement

Enterprise agreements must only include permitted matters

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

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

(b) how the agreement will operate.

Recommendation 17:

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

172A Prohibited Content

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

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

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

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

(d) restrictions on outsourcing;

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

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

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

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

(i) a provision that directly or indirectly requires a person:

(i) to encourage another person to become, or remain, a member of an industrial association; or

(ii) to discourage another person from becoming, or remaining, a member of an industrial association;

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

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

- (l) a provision that requires or permits payment of a bargaining services fee;*
- (m) deductions from the pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues;*
- (n) the provision of payroll deduction facilities for the subscriptions or dues referred to in paragraph (m);*
- (o) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union;*
- (p) employees bound by the agreement receiving paid leave to attend meetings (however described) conducted by or made up of trade union members;*
- (q) the rights of an organisation of employers or employees to participate in, or represent an employer or employee bound by the agreement in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;*
- (r) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement; and*
- (s) a matter specified in the regulations.*
- (2) An employer must not lodge an enterprise agreement containing prohibited content*
- (3) An employer contravenes this subsection if:*
 - (a) the employer lodges an enterprise agreement (or a variation to an enterprise agreement); and*
 - (b) the enterprise agreement (or the enterprise agreement as varied) contains prohibited content; and*
 - (c) the employer was reckless as to whether the enterprise agreement (or the enterprise agreement as varied) contains prohibited content.*
- (4) Subsection (3) is a civil remedy provision.*
- (5) A term of an enterprise agreement is void to the extent that it contains prohibited content.*

Recommendation 18:

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

172B Seeking to include prohibited content in an enterprise agreement

(1) A person contravenes this subsection if:

(a) the person seeks to include a term:

- (i) in a workplace agreement in the course of negotiations for the agreement; or*
- (ii) in a variation to a workplace agreement in the course of negotiations for the variation; and*

(b) that term contains prohibited content; and

(c) the person is reckless as to whether the term contains prohibited content.

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

172C Misrepresentations about prohibited content

(1) A person contravenes this subsection if:

- (a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and*
(b) the person is reckless as to whether the term contains prohibited content.

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

Recommendation 19:

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

Recommendation 20:

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

- remove the requirement that an enterprise agreement is approved by the FWC;
- remove the role of FWC in assessing enterprise agreements;
- require enterprise agreements that have been approved by the employees concerned to be included in a public register;
- at the lodgement of the enterprise agreement for inclusion in the register require the employer to complete an on-line check to ensure all mandatory requirements are met;
- continue the requirement that the employer and the bargaining representatives complete a statutory declaration at the time of lodging the enterprise agreement;
- enable the FWO to conduct random audits and checks of enterprise agreements on to public register to ensure compliance with statutory requirements.

Employee Protections

Recommendation 21:

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

- increase the minimum employment period to 12 months for business other than a small business and 24 months for a small business employer;
- change the definition of a small business employer to a business with less than 20 employees (excluding related entities), including casual employees engaged by the employer on a regular and systematic basis for at least 12 months;
- permanently exclude micro-businesses, defined as a business employing 10 or less employees (excluding related entities), from the unfair dismissal regime; and

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

Recommendation 22:

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

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

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

6. CHAPTER 3: INSTITUTIONS

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

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

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

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

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

Recommendation 2:

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

- Delete section 576(2)(aa) relating to promoting cooperative and productive workplace relations and preventing disputes;
- Delete section 590(2)(g) relating to undertaking or commissioning research; and
- Delete section 653 relating to review and research of IFAs, enterprise agreements et cetera.

Restructuring the FWC

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

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

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

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

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

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

Appointment of FWC members

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

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

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

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

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

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

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

For example, a major case during the transitional modern award review in 2012 involved claims by various unions for new and substantially increased entitlements for and regulation of apprentices⁴. The case not only involved questions on entitlements under the Act, but its interaction with State and Territory training laws. Members of a Minimum Standards Division may be appropriately qualified to quantify and assess the financial impact on business, including future engagement of apprentices, of various aspects of the claim. However, it is less certain whether members with little or no experience in employment law would be equipped to make an informed decision about whether Modern Awards under the Act would be capable of imposing conditions already contained in the Training Contract and/or in State and Territory training. The issue needs closer consideration.

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

In addition, it appears that expertise and experience in small business would not qualify for appointment to any of the divisions. This is despite that the overwhelming number of the nation's 821,610 employing businesses are small and micro businesses as set out below⁵:

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

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

Appeals of FWC decisions

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

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

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

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

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

In New Zealand, the equivalent of the FWC, the Employment Relations Authority⁶ 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 Court⁷.

In the United Kingdom the Employment Tribunal⁸ 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 Tribunal⁹.

In the Republic of Ireland, the Labour Relations Commission¹⁰ is responsible for investigating, determining, mediating and conciliating disputes in relation to a number of matters, including unfair dismissals, parental leave, payment of wages, minimum wages, carer's leave and working time. Depending on the matter in dispute, recommendations or decisions by the Labour Relations Commission may be appealed either to the Employment Appeals Tribunal¹¹ or the Labour Court¹², both independent of the Labour Relations Commission.

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

SAWIA Recommendation 4:

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

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

⁷ *Ibid*, section 179

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

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

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

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

¹² *Ibid*

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

President:

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

Member:

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

7. CHAPTER 4: NATIONAL EMPLOYMENT STANDARDS

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

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

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

Public Holiday Substitution

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

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

Additional Public Holidays

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

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

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

Option 1 – limit public holidays to eight

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

Option 2 – reduced public holidays and additional annual leave

As an alternative, some public holidays could be rolled into extra annual leave. It appears that not all public holidays are valued equally. While for example Christmas Day, ANZAC Day, New Year's Day, Boxing Day and Australia Day are viewed as family holidays for the majority of Australians, few Australians would feel the same attachment to other public holidays such as Queen's Birthday, Labour Day and Adelaide Cup Day (in South Australia). The different relative value placed on specific public holidays is evident from a recent study undertaken by Professor John Rose of the Institute for Choice at the University of South Australia¹³.

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

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

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

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

8. CHAPTER 5: UNFAIR DISMISSAL

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

Application fee model

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

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

The Draft Report seeks further views on possible changes to the lodgement fee for unfair dismissal claims.

The Wine Industry Associations maintain that an appropriately designed application fee structure could result in reducing frivolous and vexatious claims and applications lacking in merit while partially recovering the costs of conducting conciliation and arbitration.

In setting the quantum of the fee, international examples should be considered as well as the fee structure of Federal and State tribunals and lower level courts.

As demonstrated in the initial submission, the application fee for claims in the Employment Tribunals in the United Kingdom is equivalent to \$480 and \$1,800 if proceeding to arbitration. Further, in New Zealand the filing fee for a claim the Employment Court is \$NZD204.44 with an additional hearing fee for each half day of hearing after the first day of \$ NZD250.44¹⁴ (equivalent to approximately \$A185.15 and \$A226.81).

In relation to minor civil claims, in South Australia on commencement of minor civil action a fee of \$138 is payable.¹⁵ The fees for small civil claims in other States are as follows¹⁶:

- Tasmania: \$111;
- Queensland: \$108.70 (claims for more than \$1000, but less than \$10,000);
- Victoria: \$138.70 (claims for up to \$1,000), \$289.70 (claims for up to \$7,500)
- New South Wales: \$95
- Western Australia: \$106

The Wine Industry Associations submit that the fee structure for unfair dismissal claims could be designed so that employees with lower incomes pay a lower filing fee with the fee

¹⁴ Employment Court of New Zealand 2015, "Forms and Fees", <http://www.justice.govt.nz/courts/employment-court/forms-and-fees>

¹⁵ Magistrates Court of South Australia 2015, Fees, <http://www.courts.sa.gov.au/ForLawyers/Pages/Magistrates-Court-Fees.aspx#civil>

¹⁶ Magistrates Court of Tasmania 2015, "Court Fees (effective from 1 July 2015)", http://www.magistratescourt.tas.gov.au/nested_content/fees; Queensland Civil and Administrative Tribunal 2015, "Fees and Allowances", <http://www.qcat.qld.gov.au/using-qcat/fees-and-allowances>; Magistrates Court of Victoria 2015, "Fees and Costs Ready Reckoner", http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Court%20Fees%20and%20Costs%20Ready%20Reckoner_1%20Jul%2015%20v2.pdf; New South Wales Local Court 2015, "Fees", http://www.localcourt.justice.nsw.gov.au/Pages/forms_fees/fees.aspx; Magistrates Court of Western Australia 2015, "Court Fees", http://www.magistratescourt.wa.gov.au/files/Magistrates_Court_Fees.pdf

increasing as the employee's income increases as a proportion of the high income threshold (\$136,700 as of 1 July 2015).

Application fee

- \$100 for employees with an annual income up to \$34,175 (25% of high income threshold);
- \$200 for employees with an annual income ranging from \$34,176 to \$68,350 (up to 50% of high income threshold);
- \$250 for employees with an annual income ranging from \$34,177 to \$82,000 (up to 60% of high income threshold)
- \$320 for employees with an annual income in excess of \$82,000

Hearing Fee

In the event the matter was not settled through conciliation, an additional hearing fee of \$178 could be payable which would be equivalent to half of the full cost of the conciliation (356.20¹⁷).

The fees proposed above would balance the need for discouraging claims with no reasonable prospect of success, contributing to the cost of conciliating and hearing claims, while at the same time not being prohibitive for employees with lower incomes with genuine claims. The ability of FWC to waive the application fee in cases of serious financial hardship should be retained.

¹⁷ Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 231

9. CHAPTER 10/11: ROLE OF AWARDS/REPAIRING MODERN AWARDS

Modern Awards in the wine industry

Wine industry employers predominately are covered by the Wine Industry Award 2010 which covers vineyard staff, cellar door staff, production, laboratory, warehousing and bottling staff.

However, two additional Modern Awards commonly apply to wine industry employers, Clerks – Private Sector Award 2010 for clerical and administrative employees and Manufacturing and Associated Industries and Occupations Award 2010 for trade qualified maintenance employees.

In order to enhance the cellar door experience an increasing numbers of wineries are offering additional products and services in the cellar door which may be covered by additional Modern Awards. This could include coffee making, basic food service such as light meals to operating a full service restaurant with chefs, kitchen hands, and waiting staff. As a result in addition to the above Modern Awards, the Restaurant Industry Award 2010 may apply.

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

While Modern Awards contain a standard provision on multiple award coverage, in reality, which Modern Award provides the most appropriate coverage may vary over time it may well be that in any given day in the case of a cellar door employee a person may predominately perform coffee making and food service work while next day they may predominately perform wine tasting.

Multiple Award Coverage – model provision

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.¹⁸

While the Award Modernisation Process under the WRA and the Act resulted in a numerical rationalisation of the award system, it is incorrect to claim that the Modern Award system is operating effectively and efficiently and does not need any substantial changes.

The Award Modernisation Process on many occasions resulted in the preservation of provisions in previous Federal awards, rather than fulfilling the Modern Awards objective of promoting “flexible modern work practices” and “the efficient and productive performance of work”.

The Draft Reports ignores a number of issues faced by particularly small business in the wine industry, including:

- businesses being required to navigate and comply with multiple Modern Awards;
- uncertain and ambiguous coverage in Modern Awards;

¹⁸ Wine Industry Award 2010

- extensive and detailed provisions on consultation;
- lack of clarity of expression in the interaction of base rates, loadings and penalties;
- inflexible part-time provisions mandating a written pattern of work and any variations to the working pattern to be in writing;
- requiring casual employees to be paid for a minimum of four hours' work on each occasion;
- the provision of 15 different types of allowances for undertaking certain jobs;
- requiring the payment of a higher rate of pay for a whole day where the employee performs 2 hours of work at a higher classification level;
- imposing arbitrary rules on which default superannuation funds to be utilised;
- limiting ordinary hours of work to Monday to Friday 6am-6pm (except for vintage during which time these are extended to 5.00am-6.00pm Monday to Saturday for some employees), thus failing to recognise that in primary production employers do not have the same control over which days of the week work is required;
- imposing excessive costs through penalty payments of 200% and 250% for working Sundays and Public Holidays respectively.

There is insufficient recognition in the Draft Report of any of the issues above. In addition even in the few instances where the Draft Report highlights adverse outcomes of the Modern Award system, it does not provide any recommendation or even a discussion on how such issues should be rectified or simply assumes that the FWC will address any adverse outcomes.

For example, in relation to allowances the Draft Report states that “*The number of allowances is a good example of the role that history plays in current awards*”, but that “*the FWC has committed to monitor allowances to make sure that awards only contain those that continue to be relevant.*”¹⁹ We disagree with this observation. The FWC has had opportunities both during the Award Modernisation as well as during the interim review in 2012 to remove redundant and outdated allowances and the basis for providing a separate allowance for a particular type of work. We are unaware of any comprehensive review having occurred and the rationalisation and removal of any allowances in relation to the Modern Awards wine industry employers have an interest in.

Too much detail

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

[Emphasis added]

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

In many instances the Modern Award system attempts to micro manage the employment relationship. For example, a common provision in many Modern Awards, including the Clerks – Private Sector Award 2010 requires the employer and a part-time employee at the time of engagement to “*agree in writing on a regular pattern of work, specifying at least the numbers of hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.*”²⁰ Further, in the event the employee wishes to vary

¹⁹ Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 412

²⁰ Clerks – Private Sector Award 2010, Clause 11.3

their hours, a discussion with their employer, team leader or co-workers to either permanently or temporarily swap their hours would not suffice, instead *“Changes in hours may only be made by agreement in writing between the employer and employee.”*²¹

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

This is because under the relevant award provision *“All time worked in excess of the hours as agreed under clause 11.3 or varied under clause 11.4 will be overtime and paid for at the rates prescribed in clause 27— Overtime rates and penalties (other than shiftworkers).”*²²

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

The Wine Industry Associations submit that these issues require attention and action.

Duplication and inconsistency

Modern Awards also place additional regulatory requirements on top of already legislated standards. For example as recently as on 18 August 2015 the FWC decided to introduce yet another Modern Award provision which is inconsistent with and overrides relevant State and Territory legislation. In its decision [2015] FWCFB 3523²³ the Transitional Provisions Full Bench introduced a model provision in Modern Awards which requires employers to disregard relevant State and Territory workers compensation and during the first 26 weeks an employee is in receipt of workers compensation payments maintain the employee’s pre-injury wage.

Another example relates to superannuation contributions. The circumstances in which employers are required to make compulsory superannuation contributions are set out in the *Superannuation Guarantee (Administration) Act 1992* and relevant Australian Taxation Office Rulings, including SGR 2009/2 on “ordinary time earnings” and “salary and wages”.

However, Modern Awards such as the Manufacturing and Associated Industries and Occupations Award 2010 and the Restaurant Industry Award 2010 require employers to disregard the accepted definition of ordinary time earnings and make superannuation contributions where *“the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements”*²⁴.

²¹ Clerks – Private Sector Award 2010, Clause 11.4

²² Clerks – Private Sector Award 2010, Clause 11.6

²³ Fair Work Commission 2015, 4 yearly review of modern awards—transitional provisions (AM2014/190), 18 August 2015, [2015] FWCFB 3523, <https://www.fwc.gov.au/documents/decisionssigned/html/2015FWCFB3523.htm>

²⁴ Manufacturing and Associated Industries and Occupations Award 2010, Clause 35.5; Restaurant Industry Award 2010, Clause 30.5

Further, under section 27(2) of the *Superannuation Guarantee (Administration) Act 1992* employers are not required to make superannuation contributions where the employee earns less than \$450 in a calendar month. Yet, under the Restaurant Industry Award 2010, employers are required to disregard this as the threshold has been lowered to \$350 or more as outlined below:

30.2 Employer contributions

(a) An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

(b) The employer must make contributions for each employee for such month where the employee earns \$350.00 or more in a calendar month.

[Emphasis added]

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

The Draft Report does not address the issue of duplication and inconsistency and it is therefore unclear whether the PC views the duplication and inconsistency described above as being good public policy.

Proposed mechanism to “repair” Modern Awards unlikely to be effective

The Wine Industry Associations disagree with the finding in Chapter 11 of the Draft Report that the Modern Award system works well and does not need more than minor changes.

A major weakness is that the Draft Report does not contain any discussion or does not seem to have any view on the substantive content of Modern Awards, including the type of matters that reasonably could be viewed to form part of a safety net and the matters that do not.

For example, there is no discussion on whether it is necessary and desirable that up to 23 discreet matters either must or may be included in Modern Awards under section 139-149D of the Act. Also there is no discussion on whether these matters are the most appropriate matters to regulate in Modern Awards.

Given that the Draft Report states that the “*The current [award] system works*”²⁵ it is reasonable to expect that this would be based on an assessment of at least the substantive provisions of the Modern Awards covering the largest proportion of award-covered employees. However, given the absence of such discussions in the Draft Report it is unclear on what basis the Draft Report has arrived at this conclusion.

For example, is the PC of the view that the following matters are either necessary for the operation of the safety net or indeed desirable to regulate in Modern Awards?

- Frequency of pay provisions which prevent an employer from determining the most appropriate frequency of pay (subject to the requirements in section 323 of the Act);²⁶

²⁵ Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 425

²⁶ Wine Industry Award 2010, Clause 26

- Rostering arrangements which in the case of an emergency mandate that a part-time employee's roster may only be changed by giving at least 48 hours' notice²⁷;
- Requirements that superannuation contributions are made in relation to payments that otherwise would not attract superannuation contributions;²⁸
- Minimum engagement provisions which prevent employers and employees from agreeing to working shifts that are shorter than 4 hours;²⁹
- The prescription of 53 different allowances;³⁰
- Special compensation for damaging dentures for warehouse and wholesale employees;³¹

The recommendations in Chapter 12 of the Draft Report are predominately focused on the process and institutional structure for reviewing and varying Modern Awards. The Wine Industry Associations understand that the aim of establishing a Minimum Standards Division responsible for reviewing and varying Modern Awards as proposed in recommendations 3.1 and 12.1 is to apply a more evidence-based and objective analysis of award conditions.

However, given the experience of previous reviews including award simplification, award modernisation and the interim modern award review in 2012, the award system has proven to be inherently conservative with a tendency to preserve rather than modernise and simplify. This has resulted in awards that are still complex, legalistic, restrictive, duplicate legislative provisions and provide unnecessary detail.

The Wine Industry Associations therefore are not hopeful that recommendation 12.1 will be any more successful in removing redundant, outdated, unnecessarily prescriptive and detailed provisions in Modern Awards than what has been the case during previous rounds of award simplification and award modernisation.

The structural changes to the Fair Work Commission as proposed are not sufficient to deliver the necessary simplification and modernisation. What is required are legislative amendments to address the content of Modern Award and confine the award system to matters that are necessary for providing a genuine minimum safety net of terms and conditions.

Substantive changes are necessary

In order to ensure that the adverse consequences of the current award system are appropriately addressed so that the red tape and the compliance burden on employers are reduced, the ability for employers to flexibly manage and engage with their employees is increased and the needs of small business taken into account, the Wine Industry Associations submit that substantive changes to the Modern Award system is required.

To achieve this outcome the Initial Submission of the Wine Industry Associations on 27 March 2015 canvassed two options. Neither option would result in the wholesale deregulation of the workplace relations system, but would continue to provide significant employee entitlements and safeguards. However, importantly the options balance the need for employee protections with the need for removing duplication and inconsistency with other laws, reducing red tape and compliance costs and remove provisions that achieve in nothing more than micro-managing the employment relationship and create obstacles to workplace flexibility.

²⁷ General Retail Industry Award 2010, Clause 12.8

²⁸ Clerks – Private Sector Award 2010, Clause 24.5; Restaurant Industry Award 2010, Clause 30.2

²⁹ Wine Industry Award 2010, Clause 13.3

³⁰ Manufacturing and Associated Industries and Occupations Award 2010

³¹ Storage Services and Wholesale Award 2010, Clause 16.6

Under Option 1 of the Wine Industry Associations' Recommendation 6, industry and occupationally-based minimum entitlements through the Modern Award system will be replaced with an expanded legislated minimum safety net through the NES. The NES will be expanded to incorporate terms of Modern Awards that make up a genuine safety net of terms and conditions. Providing one set of minimum legislated standards would protect core conditions of employment while at the same time provide greater certainty and stability to business, allowing greater workplace flexibility and significantly reduce compliance costs and red-tape.

As outlined in more detail in the Initial Submission, the expanded NES would incorporate the following additional entitlements:

- Minimum wages with a four level classification structure;
- Junior rates of pay;
- Saturday, Sunday and Public Holiday compensation;
- Shiftwork compensation;
- Overtime compensation;
- Casual minimum engagement; and
- Unpaid meal breaks.

Option 2 on the other hand involved the retention of the Modern Award system, but subject to significant simplification by limiting the matters 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. This would be achieved by the following:

Recommendation 7:

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

134 The modern awards objective

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

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to protect the competitive position of young people, apprentices, trainees and people with disabilities in the labour market, through appropriate wage provisions; and*
- (c) the need for improved productivity through flexible and modern work practices and arrangements; and*
- (d) the need for reducing the regulatory burden on business, including compliance costs; and*
- (e) the need for economically sustainable modern awards for business, including small and large business; and*
- (f) the likely impact of Modern Awards on business and employment cost; and*
- (g) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment and national and international competitiveness; and*

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

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

This is the modern awards objective

Recommendation 8:

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

139 Terms that may be included in modern awards—general

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

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

(b) classifications; and

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

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

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

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

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

(h) overtime rates; and

(i) penalty rates; and

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

Recommendation 9:

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

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

Recommendation 10:

To ensure that Modern Awards are focused on the needs of the low paid, an additional mandatory term of the Modern Awards in section 143 of the Act should be prescribed, requiring all Modern Awards to contain an exemption rate to ensure that employees paid in

excess of a certain classification in the Modern Award are exempted from the application of the Modern Award as follows:

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

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

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

Recommendation 11:

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

Non-allowable award matters

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

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

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

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

(d) dispute resolution training leave;

(e) annual leave loading;

(f) frequency and method of payment of wages;

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

(h) superannuation;

(i) supplementary and ancillary NES terms;

(j) allowances; and

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

Recommendation 12:

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

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

The Wine Industry Associations submit that in order to reduce the compliance burden and give employers an increased ability to flexibly manage and engage with their employees, changes to the award system must be pursued.

10. CHAPTER 14: WEEKEND PENALTY RATES

The Wine Industry Associations welcome the Draft Report's discussion and findings on the implication of weekend penalty rates on service industries, including hospitality and retail and we agree with the sentiment of recommendation 14.1 that the Sunday penalty rate be aligned with the Saturday penalty rate.

However, the focus in the Draft Report on traditional services industries including hospitality, entertainment, retailing, restaurant and cafes industries (referred to as HERRC industries in the Draft Report) fails to recognise the wine industry's seven day operations providing a tourism and food and wine experience in the Cellar Doors located in rural and regional Australia and the impact of excessive Sunday penalty rates on the industry.

The wine industry is a seven day industry

Most wineries operate a cellar door to attract interest in their wines, build their brand, encourage direct sales and for tourism purposes. For regional areas, the wine industry's contribution to local tourism and associated services such as hospitality, restaurants and retailing cannot be underestimated. The Wine industry generates substantial revenue to the tourism industry, attracting close to 700,000 international visitors and generating revenue of \$8.2 billion from domestic and international tourism³².

Apart from traditional wine tasting and wine sales, cellar doors are increasingly providing a number of other services and products to attract visitors, including tutored tastings, tours of cellars and production facilities, tasting plates, degustation, coffee and tea, merchandise, functions and lunches.

Given that most domestic visitors are only able to visit cellar doors during their weekends or public holidays, cellar doors must be open and available on Saturdays and Sundays and Public Holidays. A national wine industry survey conducted in January 2015 demonstrated that over 75% of all respondents trade seven days a week.

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

In order to ensure that cellar doors can continue to provide a tourism and food and wine experience seven days a week, the industry needs a weekend penalty rate structure which does not make Sunday trading unviable.

Case Study 1: Cellar door operations and weekend penalties

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

³² See Winemakers' Federation, Snapshot of Australian Wine Industry table on page 14 of this submission

Case study 2: Cellar door operations and weekend penalties

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

Penalty arrangements in the wine industry

The following table sets out the penalty rates under the predecessor awards that were replaced by the Wine Industry Award 2010:

Table 1 **Penalty rate arrangements for selected modern awards**

| | Permanent | | | Casual | | |
|--|-----------------------------------|------------|------------|-----------------------------------|------------|------------|
| | Percentage of permanent base rate | | | Percentage of permanent base rate | | |
| | Base rate | Sat. | Sun. | Base rate | Saturday | Sunday |
| | % | % | % | % | % | % |
| Wine Industry Award 2010 | 100 | 125 | 200 | 125 | 150 | 225 |
| Restaurant Industry Award 2010 | 100 | 125 | 150 | 125 | 150 | 150 (175) |
| General Retail Industry Award 2010 | 100 | 125 | 200 | 125 | 135 | 200 |
| Hospitality Industry (General) Award 2010 | 100 | 125 | 175 | 125 | 150 | 175 |
| Amusement Events and Recreation Award 2010 | 100 | 100 | 150 | 125 | 125 | 175 |
| Fast Food Industry Award 2010 | 100 | 125 | 150 | 125 | 150 | 175 |
| Pharmacy Award 2010 | 100 | 125-150 | 200 | 125 | 150-175 | 225 |
| Hair and Beauty Industry Award 2010 | 100 | 133 | 200 | 125 | 133 | 200 |

Wine industry employers providing a cellar door experience and service on a weekend pays a substantially higher Sunday penalty than the Saturday penalty. In addition, none of the seven HERRC industries above pays a higher Sunday penalty rate for casual employees than the wine industry.

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

More robust recommendation required

While the Wine Industry Associations strongly support the sentiment behind recommendation 14.1, namely that the level of the Sunday penalty is aligned with the Saturday penalty, as currently drafted the recommendation would have little or no direct impact on the penalty rates in these industries. Given that FWC is an independent tribunal, tribunal members would be under no obligation to consider any recommendation of the PC.

The Wine Industry Associations submit that if there are reasons for changing current policy then in order to give effect to the recommendation legislative change should be recommended. Recommendation 14.1 should be more robust so that if adopted, the recommendation will make a difference. A possible amendment could be to require the FWC to set the Sunday penalty rate at the level of the Saturday penalty in industries or Modern Awards prescribed by the regulations. This would enable a Regulation to be made to prescribe the industries or awards the FWC would need to consider.

The Wine Industry Associations note that during the Part 10A Award Modernisation Process the then Minister for Employment and Workplace Relations exercised her powers under section 576C(1) of the WRA on eight occasions to direct the then AIRC to take certain steps. This included directing the AIRC to create a separate restaurant industry award and *“establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry’s core trading times”*³³. We note that the use of these powers attracted very little public controversy or criticism.

Therefore, the power of the Minister to give specific directions to the FWC in relation to Modern Awards is not without precedence and could provide an effective means to resolve this issue.

³³ Gillard J 2009, Minister for Employment and Workplace Relations, Variation of Award Modernisation Request under Section 576C(4), 29 May 2009.

11. CHAPTER 15: ENTERPRISE BARGAINING

Enterprise bargaining in the wine industry

Whereas larger employers in the wine industry tend to be covered by enterprise agreements, smaller employers are less likely to engage in enterprise bargaining and more commonly remain covered by their Modern Award. There may be several reasons for this, including:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being too complex and time-consuming and not a realistic, practical and suitable arrangement for a small business.

The Wine Industry Associations welcome recommendations 15.1, 15.2 15.3 and 15.5 regarding the approval process of enterprise agreements, flexibility terms of enterprise agreements, the nominal term and the number bargaining representatives. These recommendations could simplify the bargaining process and/or make enterprise agreements a more suitable alternative, particularly for small business.

The Wine Industry Associations strongly support recommendation 15.4 to replace the current BOOT with a new No Disadvantage Test (NDT). The BOOT has proven to be problematic since its introduction and there has been too much uncertainty and confusion how it is applied. The No Disadvantage Test is widely understood, having first appeared in the *Industrial Relations Act 1988*.

Content of agreements

The Draft Report provides an extensive discussion on the content of enterprise agreements and finds that “While, in principle, *it is undesirable that non-permitted matters be able to linger on in agreements, the removal of them by legislation or FWC scrutiny may have undesirable consequences.*”³⁴

The Wine Industry Associations do not agree with this finding and maintain that the rules on enterprise agreement content must be made more robust to ensure that enterprise bargaining is focused on improving productivity and flexibility rather than being allowed to be used as a means to extract manifestly excessive benefits under the threat of industrial action. Clearer and stricter rules must be provided to ensure that enterprise agreements are focused on matters that directly relate to the employment relationship rather than matters of a peripheral nature that simply create barriers to productive and efficient work.

While not making any recommendations on the content of enterprise agreements in Chapter 15, Chapter 20 gives examples of how enterprise agreements are being used to limit and restrict the use of labour hire workers and contractors. This includes “jump up” clauses “*which ensure that the terms and conditions of an independent contractor or labour hire worker’s engagement are no less favourable than those of ongoing workers.*”³⁵

³⁴ Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 565

³⁵ Productivity Commission 2015, Workplace Relations Framework, Draft Report, August 2015, p. 565

The Draft Report points out that in some instances “*where there is an imbalance of bargaining power, businesses may have little alternative but to cede some authority over the use of alternative forms of employment to the unions.*”³⁶

Recommendation 20.1 of the Draft Report provides that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Act. While the Wine Industry Associations support the sentiment of the recommendation, we submit that the recommendation is inadequate.

While FWC must be satisfied that an agreement does not include unlawful terms, section 253 illustrates that in the event unlawful terms are contained within an enterprise agreement the consequence is simply that the unlawful term will not have any effect.

There is no real consequence by deliberately or by negligence including unlawful terms. Therefore, the Wine Industry Associations maintain that it is necessary to make the provision on unlawful terms a civil remedy provision so that parties are deterred from including such terms.

³⁶ Ibid

12. CHAPTER 16: INDIVIDUAL ARRANGEMENTS

The Wine Industry Associations strongly support recommendations 16.1 and 16.2 to make Individual Flexibility Agreements (IFA) a viable alternative to enterprise bargaining and ensure that the scope of IFAs cannot be limited in Enterprise Agreements.

In particular, the Wine Industry Associations are pleased that under recommendation 16.1 the maximum notice period for an IFA could be up to 1 year. The fact that an IFA currently can be terminated unilaterally by giving 13 weeks' notice is one of the reasons why the take-up of IFAs is so low.

It is also pleasing that under recommendation 15.2 of Chapter 15 an IFA would be able to deal with all matters under the enterprise agreement and there would be no capacity for enterprise agreements to restrict the scope of IFAs.

However, the Draft Report neither discusses nor provides any recommendation to address the key weakness of IFAs, that is, the very limited scope of IFAs. While recommendation 15.2 would extend the scope of IFAs under enterprise agreements to all matters of the enterprise agreement, there is no such recommendation to increase the scope of IFAs under Modern Awards.

The model award flexibility term under Modern Awards restricts IFAs to the following five matters:

7. Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

- (a) arrangements for when work is performed;
- (b) overtime rates;
- (c) penalty rates;
- (d) allowances; and
- (e) leave loading.

This means that for example an employee and their employer is unable to vary for example the minimum engagement for casuals or part-time employees.

In order to ensure that IFAs, particularly for small business, are viewed as meaningful and effective means to negotiate working arrangements that are more suitable to the individual company or workplace, the restrictions on the scope of IFAs must be removed.

13. CHAPTER 17: THE ENTERPRISE CONTRACT

The need for alternatives to collective bargaining

The Draft Report points out that there is a gap in agreement options for small and medium sized businesses. Many small and medium sized business do not have the human resources and workplace relations expertise to navigate the requirements relating to enterprise bargaining.

While there is a need for more flexible and productive working arrangements, for many small and medium sized businesses collective enterprise bargaining is not viewed as being feasible. There may be several reasons for this, including:

- not worthwhile negotiating a comprehensive enterprise agreement for a small operation with few employees;
- inability to compensate with higher rates of pay than the Modern Award to pass the Better Off Overall Test; and
- enterprise bargaining being too complex and time-consuming and not a realistic, practical and suitable arrangement for a small business.

The Enterprise Contract

The Wine Industry Associations welcome the discussion on the so called Enterprise Contract in Chapter 17 of the Draft Report and would strongly support its introduction.

The Enterprise Contract canvassed in the Draft Report is an interesting model for several reasons, including:

- recognising the need for simplified, individual arrangements;
- recognising that collective enterprise bargaining may not be a viable option for small business; and
- a streamlined and simplified negotiation and lodgement process that is easy to understand and comply with for a small business.

The proposed process balances the need for simplicity with safeguards for employees.

- While it does not require FWC approval the fact that it can be terminated unilaterally by the employee after 12 months would ensure that an employee would not be locked into arrangements that did not meet their needs;
- The lodgement and access to existing Enterprise Contracts would guide employers and employees on appropriate content;
- The requirement on the Enterprise Contract passing the new NDT would also ensure that employees could not be disadvantaged; and
- FWO could take samples of Enterprise Contracts having been lodged and inspect compliance.

As a means of further ensuring that employees are not worse off under the Enterprise Contract, the Draft Report discusses that the Enterprise Contract may be varied upon complaint by an employee that it does not meet the NDT. In addition, it is discussed whether FWO should be able to order that other Enterprise Contracts containing similar provisions be varied to ensure the NDT is met.

While the Wine Industry Associations would support the FWO having a role in providing advice and information on the Enterprise Contract and investigating complaints, we would not support FWO being able to “order” or direct an employer to take certain steps in relation to the Enterprise Contract.

The FWO is already able to recommend that an employer rectifies underpayments, but would need to commence legal action against an employer if they failed to take any corrective action. The Wine Industry Associations submit that this approach should also apply to the Enterprise Contract.

Given that neither the FWO nor the FWC would have had any role in assessing the Enterprise Contract to start with, it would not be appropriate to give either of these bodies the power to make legally binding orders in respect of the Enterprise Contract.

In addition, assessing a complaint that an Enterprise Contract does not pass the NDT would require an overall assessment of the terms and conditions of the Enterprise Contract compared to the relevant Modern Award. It would involve a number of judgements as to the scope of the Enterprise Contract and the application of the NDT. Such questions should be tested and determined by the Courts and be open to appeals, rather than determined by a statutory agency.

Required changes to process and application

To ensure that the Enterprise Contract operates as intended, the Wine Industry Associations submit that the following issues would need to be addressed in the Act:

- ***No protected industrial action during the nominal life of Enterprise Contract***
 - To ensure consistency with enterprise agreements section 414 and section 417 of the Act must be amended to specify that protected industrial action cannot be taken during the nominal life of the Enterprise Contract;
- ***No approval by persons not covered by the Enterprise Contract***
 - To ensure that the approval process of the Enterprise Contracts remains simple and easy to follow and avoid the risk of third parties interfering with the Enterprise Contract the Act must be amended to specify that the Enterprise Contract must not require the approval or consent of a person other than the employer and the employee or employees that will be subject to the Enterprise Agreement;
- ***Protection of privacy where Enterprise Contract covers one employee only***
 - Given that an Enterprise Contract may cover either an individual employee or a group or classes of employees to protect the privacy of an individual employee, the Act must be amended to provide different rules on the disclosure and publication of Enterprise Contracts where the Enterprise Contract covers an individual employee only.
 - It would be appropriate for Enterprise Contracts covering more than an individual employee to be published and publically available and consistent with the existing disclosure of Enterprise Agreements on the FWC website.
 - However, in the event the Enterprise Contract covers one individual employee only the publication and disclosure of the individual employee's terms and conditions of employment would be an incursion of their privacy which could actively dissuade an employee from entering into an Enterprise Contract. The Act therefore needs to ensure that the employee's privacy is appropriately protected and that details of the Enterprise Contract are not published where it covers a single employee only.
 - Enforcement agencies, including the FWO should have full access to all details of the Enterprise Contracts.

- In addition, to further protect the privacy of an individual employee covered by an Enterprise Contract, the PC should consider inserting the privacy protections that applied to Australian Workplace Agreements under section 165 of the WRA in the Act.
- ***No restrictions in Enterprise Agreements on the negotiation of Enterprise Contracts***
 - In order to ensure that employees and employers are able to negotiate an Enterprise Contract when suitable, section 194 of the Act must be amended to make terms that directly or indirectly restricts the ability of a person covered by the Enterprise Agreement to offer, negotiate or enter into an Enterprise Contract an unlawful term under the Act.
- ***Online check of mandatory requirements***
 - To assist parties to understand and comply with any mandatory requirements regarding the Enterprise Contract, including that it passes the NDT, that it is signed by the employees covered etc., upon lodgement with FWC the employer could be required to complete an on-line check to ensure all mandatory requirements are met.

14. CHAPTER 19: INDUSTRIAL DISPUTES AND RIGHT OF ENTRY

Industrial action

The Wine Industry Associations strongly support recommendation 19.1 to ensure that protected action can only be taken where bargaining has commenced. This will reverse the decision in the *JJ Richards case* which confirmed that under the Act unions could adopt a “strike first, talk later” approach and take protected industrial action even before engaging in any genuine bargaining.

In addition, we support recommendation 19.2 to enable FWC to suspend or terminate industrial action where it is causing or likely to cause significant economic harm to the employer or the employees, recommendations 19.3 and 19.4 regarding aborted strikes and recommendation 19.6 regarding increased penalties for unlawful industrial action.

15. CONCLUSION

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

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

While some of the recommendations of the Draft Report will lead to modest improvements of the current system for example on relation to unfair dismissal claims, enterprise agreements and industrial action, the overarching theme of the draft report is the preservation and maintenance of the current system with a disproportionate emphasis on history and precedence.

The Wine Industry Associations submit that more robust recommendations are required, in particular in relation to the Modern Award system to ensure that the Inquiry does not become a lost opportunity.