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6 October 2016

Associate to Vice President Hatcher
Fair Work Australia

By Email: chambers.hatcher.vp@fwc.gov.au; amod@fwc.gov.au

Dear Associate

**4 Yearly Review of Modern Awards - AM2014/197 – Casual Employment
Wine Industry Award 2010**

We refer to the directions of the Commission on 1 and 6 September 2016 in respect of the South Australian Wine Industry Association's proposal for variation of the Wine Industry Award to reduce the minimum engagement requirements in respect of casual employees.

Please find enclosed the submissions of United Voice in this matter.

If you have any queries please contact Industrial Officer, Simon Blewett on 08 8352 9341. Any correspondence to our office regarding this matter should be marked for the attention of Simon Blewett.

Yours faithfully



SIMON BLEWETT
Senior Legal Officer

IN THE FAIR WORK COMMISSION AUSTRALIA

4 yearly review of modern awards – Casual employment and Part-time employment

(AM2014/196 and AM2014/197)

**PROPOSED VARIATION OF WINE INDUSTRY
AWARD 2010**

SUBMISSIONS OF UNITED VOICE

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Introduction

1. These submissions are filed pursuant to the directions of the Commission made on 1 September 2016 and 6 September 2016, in respect of the proposal by the South Australian Wine Industry Association (“SAWIA”) to vary the Wine Industry Award 2010 (“the Award”). They respond to the submissions filed by the SAWIA on 12 October 2015, and the final submission filed by SAWIA on 16 September 2016.
2. The SAWIA seeks that the Award be varied such that a casual employee’s entitlement to be paid for a minimum of four hours work upon each engagement, and the corresponding obligation upon an employer, be reduced to 2 hours.
3. United Voice opposes the variation. The variation represents a substantial reduction in the entitlements of casual employees; it would potentially affect a substantial number of casual employees; and the SAWIA has simply failed to make an evidentiary case that could support such a variation.

Modern Award Review Principles

4. The Commission will be familiar with the principles to be applied in respect of an application to vary an award in the context of the four-yearly review of the modern awards. The principles relevant to the determination of this application can be briefly stated:
 - 4.1 The role of the Commission in the four-yearly review is to ensure that an award, together with the national employment standards, meets the modern awards objective, in that it provides a fair and relevant minimum safety net of terms and conditions, taking into account the matters set out in Section 134(1) of the Act;¹
 - 4.2 The relevant question for the Commission where a variation is proposed as part of the review is whether the variation sought is *necessary* to achieve the modern awards objective;²

¹ See Section 134(1); *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision* [2014] FWC FB 1788, at [60]

² See Section 138

- 4.3 In determining this question, the Commission is to proceed on the basis that prima facie the award achieved the modern awards objective at the time that it was made;³
- 4.4 For this reason, any variation to an award should be founded upon merit-based arguments addressing the relevant legislative provisions accompanied by probative evidence directed to the facts in support of the claim. The extent of the argument and evidence required will depend upon the significance of the variations sought.⁴ In this regard, the remarks of the Full Bench in re *Security Services Industry Award 2010*⁵ are apposite:

“In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change.” (emphasis added)

5. In essence, the SAWIA must persuade the Commission that the current minimum engagement provision means that the Award does not provide a fair and relevant minimum safety net of terms and conditions, and that its proposed variation is necessary for the Award to achieve that objective. It must do so by making a persuasive case based on evidence.

Award History

6. The four hour minimum engagement provision has existed in the award since its commencement on 1 January 2010.
7. Prior to the commencement of the Award, a variety of awards applied to the wine industry in Australia. The awards provided for a minimum engagement for casual employees of between two hours and four hours.⁶ The awards which were principally relied upon in

³ See *Preliminary Jurisdictional Issues decision*, at [60]

⁴ *Ibid*

⁵ [2015] FWCFB 620 at [8]

⁶ Although it should be noted that two State based awards which may still have had some coverage prior to 1 January 2010 had no minimum engagement requirement; see the *Wine Industry Consolidated (State) Award NSW* and the *Fruit and Vegetable Growing Industry Award – State 2002 (Queensland)*.

developing the Award were the *Wine and Spirit Industry (South Australia) Award*, and the *Wine Industry – AWU – Award 1999*. The South Australian Award provided for a minimum engagement of two hours; the AWU award provided for a minimum engagement of four hours.

8. In the award modernisation proceedings, the parties jointly submitted a draft Wine Industry Award on 6 March 2009.⁷ That draft award represented an agreed position in almost all respects.
9. However, in respect of minimum engagement for casual employees, the draft provided two alternatives, which reflected the SAWIA's position on the one hand, and the union parties' position on the other. The SAWIA position was that the minimum engagement be three hours; the union parties' position was that the minimum engagement be four hours.⁸
10. On 22 May 2009 the Full Bench of the Australian Industrial Relations Commission issued a statement in respect of the award modernisation process, and published an exposure draft for the Wine Industry Award 2010, which largely reflected the draft submitted by the parties.⁹ However, the exposure draft provided for a four hour minimum engagement for casual employees.
11. In submissions dated 12 June 2009, the SAWIA proposed an alternative position to that which it had put in the joint draft award, and that which was set out in the exposure draft. In those submissions the SAWIA proposed a two hour minimum engagement for casual employees, but only in that which it called the vineyard and cellar door streams of the proposed award. It appeared to have resiled from its opposition to a four hour minimum engagement for casual employees engaged outside those streams.¹⁰
12. On 4 September 2009 the AIRC Full Bench delivered the decision making a number of modern awards, including the Wine Industry Award 2010. The Award retained the

⁷ See draft Award available through http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=liquor_manufacturing

⁸ Ibid, at clause 13.8

⁹ See *Award Modernisation Statement*, [2009] AIRCFB 450, at [109] and attachment A, http://www.airc.gov.au/awardmod/databases/liquor_manufacturing/Exposure/wine.pdf, clause 13.3

¹⁰ See SAWIA Submissions, 12 June 2009, at paragraph 13, available at http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=liquor_manufacturing

provision for a four hour minimum engagement for casual employees which had been contained in the exposure draft.¹¹

13. It appears from this award history that the award modernisation Full Bench made a considered decision to implement the four hour minimum engagement provision; and that it rejected both the SAWIA's initial proposal for a three hour minimum engagement provision, and its alternative proposal for a two hour minimum engagement confined to the vineyard and cellar door streams.
14. Most significantly for these proceedings, at no stage in those proceedings did the SAWIA seek the two hour minimum engagement, for all casual employees, that it is now seeking.

The South Australian Wine Industry Association Case

15. The SAWIA's case rests on four arguments:
 - 15.1 That the four hour minimum engagement provision is inconsistent with minimum engagement provisions in other awards in similar industries;
 - 15.2 That the four hour minimum engagement creates difficulties in respect of casual employees engaged to perform harvesting and/or pruning work in vineyards because of uncertainties arising from inclement weather;
 - 15.3 That the four hour minimum engagement causes difficulties in respect of engagement of employees in the cellar door operations, in particular in respect of the management of large group visits;
 - 15.4 That a 2 hour minimum engagement provision may lead to greater employment of casuals for short jobs in relation to cellar activities;
16. The SAWIA submits that because of these matters, the award does not meet the modern awards objective, and in particular militates against "the need to promote flexible modern work practices and the efficient and productive performance of work", and has an adverse

¹¹ See *Award Modernisation Decision*, [2009] AIRCFB 826, at [7], [148] - [50], and Attachment A, <http://www.airc.gov.au/awardmod/awards/wine.pdf>, clause 13.3

effect on “the likely impact of any exercise and modern award powers on business, including on productivity, employment costs and the regulatory burden”.¹²

The Evidence – Introduction

17. The SAWIA has failed to meet the evidentiary burden required of it in this matter.
18. It has adduced evidence from five owners and/or managers of wineries – three in South Australia, and two in Tasmania. It has adduced no evidence in respect of the industry generally. There is no evidence as to the number or proportion of casual employees engaged in the industry; and there is no evidence in the nature of survey evidence or economic analysis regarding the difficulties associated with the four hour minimum engagement, or the benefits of a two hour minimum engagement, in the industry generally. It has adduced no evidence about the impact of the proposed variation on either employers or employees in the industry generally.
19. Rather, the SAWIA seeks that the Commission infer from the experience of five individual winery operators that their experience is representative of the industry generally, and therefore forms a safe basis from which to draw conclusions about the industry generally. This invitation should be rejected.
20. For instance, in respect of the difficulties associated with the four hour minimum engagement in respect of harvesting and/or pruning in the vineyard by virtue of the uncertainties created by inclement weather, the SAWIA relies solely on the evidence of operators from two relatively small vineyards in Tasmania. Tasmania represents a tiny fraction of the grape crush in Australia¹³ and therefore presumably employs a tiny fraction of the workers in the industry engaged in vineyard harvesting and/or pruning work. The witnesses accepted that there were weather factors peculiar to the industry in Tasmania which did not pertain to the industry on the mainland. There is therefore simply no basis upon which the Commission could infer that the experience in Tasmania is in any way representative of the experience of wineries in mainland Australia.

¹² See Sections 134(1)(d) and (f), and SAWIA final submission 16 September 2016, at page 10

¹³ See SAWIA submissions 12 October 2015, figure 3 on page 8

21. Similarly, in respect of the cellar door aspect of the claim, the evidence was confined to that of the owners and/or managers of 3 relatively small wineries in South Australia. There is no basis upon which the Commission could infer that their experience was representative of those operating cellar doors throughout Australia. This is particularly the case given that one of the witnesses relied upon the SAWIA, described a business practice in which the winery invites the public to make group bookings for wine tasting, and then rejects each and every one of those applications for a group booking, apparently on the basis of the four hour minimum engagement provisions. This is such a peculiar and self-defeating business model that, even if the evidence were credible, the Commission could not be satisfied that it represents an approach to business adopted by the industry more broadly.
22. We address each of the SAWIA arguments for variation in detail below. However, in doing so we maintain that the evidentiary case mounted by the SAWIA is simply incapable of satisfying the Commission's requirement for detailed, probative evidence of the facts supporting its case.

Common Awards

23. In both its initial submissions and its final submission the SAWIA refers to other modern awards, relating to primary production and "hospitality-themed and direct consumer sales services".¹⁴ These other awards provide for minimum engagement for casual employees from between zero and three hours.
24. No evidence has been adduced by the SAWIA as to the similarities or differences between the way in which work is undertaken in the wine industry, or the conditions under which it is worked, compared with the way work is undertaken or the conditions under which it is worked in respect of the industries covered by these other awards. Therefore, the argument is reduced to the bare assertion that there exist other awards in possibly comparable industries with lesser minimum engagement provisions, and that because those lesser minimum engagement provisions exist, the minimum engagement provision in the Award should be reduced.

¹⁴ See submissions, at pages 13 to 14; final submissions, at pages 7 to 9.

25. This argument should be rejected. It should be rejected for four reasons.
26. First, no sensible rationale has been provided as to why any of these awards provide a suitable comparator in the absence of any evidence as to the conditions under which work in these industries is performed;
27. Second, no evidence, or even argument, has been provided as to why the two hour minimum engagement is some of these comparator awards should be preferred to the three hour minimum engagement in other of those comparator awards;
28. Third, the argument based on comparability flies in the face of the SAWIA's own assertion that "the wine industry is both unique and complex in nature".¹⁵ There is force in this assertion. The wine industry cannot sensibly be compared with primary production, given that it extends far beyond primary production. And it cannot sensibly be compared with hospitality or retail, given that these aspects form only a small part of the industry.
29. Finally, the SAWIA omits from its list of comparable awards the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010*, both of which provide casual minimum engagement periods of four hours. There is no discernible reason why either of those awards provide any lesser comparative value than any of the awards relied on by the SAWIA.
30. Put simply, the Commission simply has no sensible basis upon which it can form the conclusion that the mere fact that there exist lower minimum engagement provisions in some other awards, applying to industries which might be regarded as similar to discrete parts of the wine industry, should be applied in the wine industry.

Vineyard Work

31. The SAWIA asserts that the four hour minimum engagement creates difficulty, and leads to loss of production and employment, in relation to vineyard work. The SAWIA assertion is that employers do not engage employees (or face the risk of paying for work not done) where the possibility of inclement weather means that four hours work may not be able to be obtained from those employees.

¹⁵ See SAWIA submissions, page 11

32. The sole evidence to support this assertion comes from the operators of two relatively small vineyards, both of which are in Tasmania.
33. The evidence of Jeremy Dineen of Josef Chromy Wines is that in his experience there are between 5 and 10 days in the pruning season where casual employees are sent home early; and 3 to 7 days in the harvesting season when casual employees are sent home early. However, on only "some" of those days have casual employees been sent home earlier than the four hour minimum,¹⁶ and indeed, more recently, there have been no occasions when casual employees have been sent home early.¹⁷
34. Critically, Mr Dineen provides no evidence that any production is lost as a result of the minimum engagement provisions. He gives no evidence that there is any impact on the business from the minimum engagement provision in so far as it affects pruning. In relation to harvesting, the window for picking grapes at his winery is between two or three days and a week.¹⁸ Therefore, if grapes are unable to be picked on one day due to inclement weather, they can be picked on any of a number of days thereafter.
35. However, the essence of Mr Dineen's evidence is that since 2010 there has been a decrease in hand picking from 60% to 35%. Mr Dineen maintained that the substantial reason for this change was the four hour minimum engagement,¹⁹ and that he would prefer to pick more grapes by hand.²⁰ Therefore, by inference, should the minimum engagement be reduced, there would be an increase in handpicking, and therefore an increase in employment.
36. The Commission should not find that the substantial reason for movement to machine picking is the four hour minimum engagement provision. First, prior to the Award the winery was covered by an award which provided for a three hour minimum engagement.²¹ It seems unlikely that the change from a three hour to four hour could lead to such a dramatic change in reliance upon machine harvesting. Mr Dineen conceded in answering a question of Hatcher VP that the actual efficiency of being able to pick grapes on time, coupled with the difficulty of getting enough casual labour during harvest time, were other

¹⁶ See transcript, 15 August 2016 at PN2133 to 2155

¹⁷ See transcript 15 August 2016 at PN2115

¹⁸ See transcript 15 August 2016 at PN2090

¹⁹ See Dineen statement, paragraphs 8 to 9, transcript 15 August 2016 at PN2102 to 2104

²⁰ See transcript, 15 August 2016, at PN 2098

²¹ See Dineen statement, paragraph 7

reasons for the move to machine picking.²² The Commission should find that these were in fact the substantial reasons for this change.

37. The other evidence in support of this part of the SAWIA's case is provided by Fred Peacock, of Bream Creek Vineyards and Fred Peacock Viticulture and Consulting.
38. Mr Peacock's evidence is that he takes care to ensure that he has a four hour window for picking grapes, but that "in some seasons with atmospheric instability" the Bureau of Meteorology does not give a reliable forecast, which can lead him to commence harvesting and then stop it "in as short a time as after two hours".²³
39. Mr Peacock's evidence is that if the above phenomenon were to be repeated then it would not be long before the crop gets written off.²⁴ However, Mr Peacock gives no evidence that any crop has in fact been written off in these circumstances.
40. The only circumstance in which Mr Peacock gives evidence that production has been affected, in the sense that fruit was left on the vines, was an occasion on which he had made a decision one afternoon not to bring in an additional staff member; instead he decided to take a chance and if necessary leave the final rows of fruit on the vine.²⁵
41. Mr Peacock gives no evidence to the effect that the four hour minimum engagement has led to an increased reliance upon the use of machinery for picking or pruning.
42. Therefore, the evidence in support of this aspect of the SAWIA's argument is that at one winery the minimum engagement has played a role in increasing the volume of harvesting grapes undertaken by machine; in association with another winery/contracting business, the minimum engagement has led to occasional decision-making which has resulted in some rows of grapes going unpicked; and that in each business the operators were careful not to call in casual employees to work if inclement weather was forecast.
43. This evidence is insufficient to support a case that the minimum engagement period should be reduced.

²² See transcript 15 August 2016 at PN2104 to 2105

²³ See Peacock's statement, paragraphs 8 to 9

²⁴ See paragraph 10

²⁵ See transcript 11 July 2016 at PN616 to 618

44. First, it is confined to two wineries in Tasmania. The Commission has been given no basis for any finding that machine harvesting has increased since 2010 outside of Josef Chromy vineyards, or that to the extent that it has, the minimum engagement provisions have had anything to do with any increase. The Commission has been given no basis for any finding that grapes have been left unpicked, because of the minimum engagement provisions, beyond the borders of Bream Creek Vineyards.
45. Further, the Commission has been given no basis for any finding that any of the phenomena identified by the SAWIA witnesses, including the care taken not to call in casual employees where inclement weather is possible because of the four hour minimum engagement, arise outside Tasmania.
46. We note that none of the witnesses called by the SAWIA in South Australia provide any evidence to the effect that vineyard work is adversely affected by the four hour minimum engagement provision. Presumably, if that were the case, they would give that evidence. In addition, the evidence of the AWU witnesses, who organise the industry in parts of New South Wales and Victoria, was that the four hour minimum engagement had never been raised as an issue by employers,²⁶ and that sending casual employees home early due to rainfall would be an extremely infrequent event.²⁷
47. Therefore, at the most the Commission should find that the circumstances of the occasional difficult interaction between the four hour minimum engagement and vineyard work is peculiar to Tasmania. Therefore, it can provide no basis for reducing the minimum engagement from four hours to two hours for all casual employees, employed in all forms of work in the wine industry, in all States and Territories.
48. Further, the evidence would not support the reduction in the minimum engagement even if it were regarded as representative of the industry throughout Australia.
49. First, even accepting that there are some occasions where harvesting of grapes is stopped earlier than four hours after commencement, it is likely that those occasions would be covered by Section 524 of the *Fair Work Act*. Section 524 allows an employer to stand down an employee, without compensation, in various circumstances, including where there is a stoppage of work "for any cause for which the employer cannot

²⁶ See Adam Algate's statement paras 7 and 10

²⁷ See Adam Algate's statement, paras 4 to 5 and Ron Cowdery statement at paras 5 to 7

reasonably be held responsible".²⁸ It is very likely that in all circumstances where the occurrence of rain genuinely makes harvesting impractical (either because the rain would dilute the fruit and make the ultimate wine inferior or where it would make the work unsafe, due to slippery conditions) then this would be a cause of stoppage of work for which the employer could not reasonably be held responsible.²⁹ When Section 524 was brought to the attention of Mr Peacock, he agreed that "that would greatly assist in terms of the inclement weather, yes, certainly."³⁰ Mr Dineen conceded that the provision would assist where rain had not been forecast, but was unsure whether it would assist in circumstances where rain had been forecast at some point on the relevant day.³¹

50. Alternatively, the evidence of Mr Dineen and Mr Peacock, if regarded as representative of the experience of the industry generally, might provide some justification for some form of inclement weather provision, which provided for the rights and entitlements of employers and employees where the types of weather events referred to in the evidence of Mr Dineen and Mr Peacock occurred. However, this is not the claim made by the SAWIA. That is, the solution proposed by the SAWIA for the problem identified by Mr Dineen and Mr Peacock, goes well beyond that which is necessary to address that problem. Therefore, even taken at its highest, the evidence does not support the variation proposed by the SAWIA.³²
51. For all these reasons, the Commission should find that the evidence relating to the impact of the four hour minimum engagement provisions on vineyard operations in Tasmania does not provide support for the proposed variation sought by the SAWIA.

Cellar Door Operations

52. The SAWIA asserts that the four hour minimum engagement creates difficulties in relation to cellar door operations, and leads to cellar doors refusing potential clients.

²⁸ See s. 524(1)(c)

²⁹ There might be argument as to the applicability of Section 524 where rain was forecast to fall, but an employer determined to take a chance that sufficient picking could be performed prior to the rain falling. However, in most actual circumstances, Section 524 would be applicable.

³⁰ See transcript 11 July 2016 at PN603

³¹ See transcript 15 August 2016 at PN2117 to 2125

³² In response to the invitation to do so made by the Commission on 15 August 2016, United Voice has provided a without prejudice draft of an inclement weather provision to the SAWIA in conjunction with these submissions.

53. The evidence regarding these assertions is confined to that of three managers of wineries in South Australia.
54. Steven Todd is the general manager of Kay Brothers winery, a small winery in the McLaren Vale south of Adelaide. His evidence relating to the difficulties occasioned by the four hour minimum engagement relates essentially to the management of group bookings.
55. In this regard, the evidence provided through his written statement is to the effect that unless the winery can arrange two consecutive group bookings it is not viable to run group tastings.³³ However this assertion is contradicted by his oral evidence, which makes clear that that the winery routinely accepts non-consecutive group bookings.³⁴ His oral evidence is that where circumstances allow, the winery may seek that someone arranging a group booking at a time which is non-consecutive come at a slightly different time. But there is no assertion in that evidence that non-consecutive bookings are refused.³⁵ Further, to the extent that group bookings are not arranged so that they coincide, that appears to be because of limited space, rather than anything to do with the four hour minimum engagement.³⁶
56. Ultimately, the evidence of Mr Todd provides little support for the assertion that the minimum engagement provisions have any effect on cellar door operations.
57. Anthony Grundel is the general manager of Murray Street Vineyards, a small winery in the Barossa Valley. His evidence in respect of the impact of the four hour minimum engagement on cellar door operations also primarily focusses upon group bookings.
58. His evidence is that it would assist the management of group bookings at the cellar door if the winery were able to bring in an extra staff person to cover a larger group tasting, and that this cannot be done because there is insufficient work associated with the group tasting to sustain an employee in work for four hours. Further, his evidence is that the inability to do so has led to the turning away of large groups on a weekend and even pre-

³³ See Todd statement, paras 7 to 8

³⁴ See transcript, 11 July 2016, PN539, 543-4

³⁵ See transcript 11 July 2016 at PN539 to PN544

³⁶ See transcript 11 July 2016 at PN533

bookings on the weekend.³⁷ However Mr Grundel concedes that better staggering of staff might address this issue up to a point.³⁸

59. While Mr Grundel also asserts that a reduced minimum engagement might enable the winery to call in additional staff where an unexpected group arrived, this evidence should not be accepted. The acceptance of a large group, on the off chance that the winery may then be able to call in someone willing to work for two hours and who is available immediately, seems an unlikely business model for a winery that aspires to excellent service provision, as Murray Street Vineyards clearly does.
60. Richard van Ruth is the general manager of Primo Estate winery, a winery based both in Virginia, north of Adelaide, and the McLaren Vale. His evidence also focusses on the difficulties arising from the four hour minimum engagement in respect of the management of group bookings.
61. His evidence is that these difficulties have led the winery to regularly decline large group bookings.³⁹ His oral evidence in this regard was startling. The effect of it is that, if true, Primo Estate invites members of the public, including through its website, to make group bookings for an experience called the Josef Tasting, and then almost inevitably declines every booking. His evidence is that the winery declines each booking where it is not consecutive with another booking, and he accepts that the logic of that evidence is that bookings are almost never accepted.⁴⁰
62. This evidence should not be accepted. Even if accepted as accurate, it is such a strange business model that the Commission could not find that it represents the experience of any other operator in the wine industry, let alone that of the wine industry generally.
63. None of these witnesses give any substantial evidence that, other than in relation to the management of group bookings, the four hour minimum engagement creates difficulties in cellar door operations. That is, it poses no problems in relation to the rostering of staff to cater for non-booked visits by the public. Indeed the rostering practices at each of the

³⁷ See transcript 11 July 2016 at PN473, 479

³⁸ See transcript 11 July 2016 at PN479

³⁹ See paragraphs 5 to 7

⁴⁰ See transcript 15 August 2016 at PN2256 to PN2267

wineries are that casual employees are generally rostered for substantially longer than the minimum engagement period.⁴¹

64. Taken collectively, this evidence supports a finding that in two (or possibly three) wineries in South Australia, the four hour minimum engagement provision causes some complexity in managing group bookings. However, the evidence is insufficient to support the proposal made by the SAWIA.
65. First, the evidence is confined to two (possibly three) wineries in South Australia. There is no evidence about the industry generally to suggest that this is a concern experienced outside the regions in which the particular wineries are located. The Commission has been given no information about the circumstances of visitations to cellar doors in the rest of Australia, or the use of casual employees in those cellar door operations. For instance, the Tasmanian witnesses called by the SAWIA provide no support for the assertion that the four hour minimum engagement causes any problems for cellar door operations in that state.
66. Further, the evidence of the witnesses regarding the qualities and skills required of cellar door employees, means that a provision allowing for a two hour minimum engagement would be unlikely to attract the type of employee required in the cellar door.
67. Both Mr Grundel and Mr Van Ruth give evidence that it is difficult to find good cellar door employees.⁴² Mr van Ruth sets out the attributes expected of a good cellar door employee,⁴³ which demonstrates why they might be difficult to attract and retain. In addition, while some employees work locally, a number of employees have to travel quite some distance to get to their workplaces.⁴⁴ The reduction of the minimum engagement from four hours to two hours would surely exacerbate these problems of attraction and retention.
68. Finally, there is no evidence that there are many potential employees who would be willing or available to work for two hour shifts in the cellar door. These were obviously not suitable jobs for school children. The only evidence regarding any such a person was

⁴¹ See transcript 15 August 2016, at PN2243 to 2245 (van Ruth), transcript 11 July 2015 at PN546 (Todd).

⁴² See transcript 11 July 2016 at PN455 to 456 (Grundel), transcript 15 August 2016 at PN2166(van Ruth)

⁴³ See transcript 15 August 2016 at PN2167 to PN2181

⁴⁴ See for instance transcript 15 August 2016 at PN2288 to 2290

provided by Mr Grundel who refers to a retired school teacher, but even in respect of that person his evidence is qualified:

“She is probably more likely to be able to come in than some of our other staff, I couldn’t say quantitatively that yes she could.”⁴⁵

69. For all the above reasons, the Commission should not be persuaded that the cellar door experience of the above three wineries in South Australia justifies the reduction in the minimum engagement of casual employees in the cellar door. More significantly, the marginal benefit to these employers in respect of their cellar door operations from a reduced minimum engagement provision, provides no basis for reducing the minimum engagement for all casual employees, in whatever operations in the wine industry, in all States and Territories.

Cellar Hand Work

70. The only evidence that the four hour minimum engagement has an effect on operations outside the vineyard or the cellar door comes from Anthony Grundel. His evidence is that the four hour minimum engagement precludes the winery offering short-duration cellar hand jobs to casual employees.⁴⁶
71. In the absence of any other evidence suggesting that short duration cellar hand jobs could be offered to other employees at any other winery business in Australia, this evidence is insufficient to provide any support for the SAWIA proposed variation.
72. In any event, Mr Grundel’s evidence is that these jobs are performed by other employees. He does not suggest that the four hour minimum engagement was precluding increased employment in this regard, but rather that some of the work undertaken by existing employees could instead be allocated to new casual employees, if the minimum engagement were reduced.⁴⁷ That is, there is no net increase in employment. This is no basis for making the variation sought by the SAWIA.

⁴⁵ See transcript 11 July 2016 at PN492

⁴⁶ See Grundel’s statement at paras 8-9 and 13

⁴⁷ Ibid, at paragraph 10

Impact of the Proposed Variation

73. There is no substantial evidence upon which the Commission could determine the impact of the proposed variation on the casual employees engaged in the Wine Industry.
74. There is very limited evidence regarding the employment of casual employees in the industry. The SAWIA adduced evidence from its five witnesses regarding the number of casual employees employed in their wineries, or parts of their wineries. The proportion of casual employees engaged varied between those wineries. K Brothers employs 13 employees, four of whom are casual; Murray Street Vineyards has 12 full time employees, eight casual employees, and a further three casual employees engaged between January and June; Primo Estate has eight full time employees plus six casual staff in the Cellar Door and three additional casual production staff during vintage; Bream Creek Vineyards and/or Fred Peacock Viticulture and Consulting has four permanent employees in the vineyard and 18 additional casual employees during peak operational periods from May to September and February to May; and Josef Chromy Wines has 21 full time employees, three to four casual employees engaged at periods throughout the year, six casual employees engaged in the winery during harvest (March to May) and up to 80 casual employees working in the vineyard at peak times of harvest and pruning.
75. The other evidence about the prevalence of casual employees can be derived from the evidence of the AWU witnesses Adam Algate and Ron Cowdrey. Mr Algate organises in the wine industry in the north west Victoria. He estimates that the wineries he organises employ approximately 1,500 to 2,000 employees⁴⁸ and that approximately 50% of these are casual employees.⁴⁹
76. Mr Cowdrey organises in the wine industry in the south west region of New South Wales, essentially around Griffith. His evidence is that the use of casual employees is primarily confined to the harvest period, albeit with a sprinkling of casuals throughout the year amongst the permanent workforce. He provides no evidence of absolute numbers.⁵⁰

⁴⁸ See transcript 11716 at PN658

⁴⁹ See Algate statement exhibit 182 at paragraph 13, transcript 11716 PN693

⁵⁰ See Cowdrey statement exhibit 183 at paragraph 8, transcript 11716 PN765

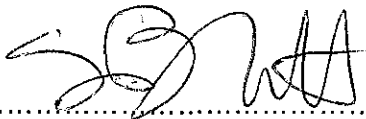
77. That is the sum total of the evidence the Commission has regarding the prevalence of casual employment in the industry. Despite the paucity of that evidence, the Commission can safely find that it is likely that a substantial number of casual employees are engaged in the industry throughout Australia, particularly as a supplement to the workforce during harvest or vintage times. Therefore, the Commission can safely find that the proposed variation would potentially affect a substantial number of employees.
78. In respect of the potential impact of the proposed variation on that substantial group of casual employees, the ACTU has provided a volume of evidence about the consequences for casual employees of a two hour minimum engagement across a number of industries.
79. That evidence discloses that for many employees, a two hour engagement would reduce their income to below the work-day rate of the Newstart allowance. Once travel costs, clothing, and child-care costs are factored in, for many employees engaged under the Wine Industry Award, working for two hours would simply be uneconomic. Moreover, there are substantial other deleterious effects for casual employees working short-duration shifts, which could be expected to be experienced by employees in the wine industry if the minimum engagement were to be reduced.⁵¹
80. Therefore, in considering whether the proposed variation is necessary to meet the modern awards objective, the Commission should consider the significant potential negative effects of the proposed variation on the substantial number of employees who may be affected. In weighing up these potential negative effects on employees, with the marginal benefits to employers suggested by the evidence of the SAWIA witnesses, the Commission should find that the proposed variation should not be made.

Conclusion

81. The SAWIA proposes that the Award be varied by reducing the minimum engagement from four hours to two hours.

⁵¹ See ACTU Submissions, 19 October 2015, especially at paragraphs 98 – 102.

82. Its case rests on four arguments. None of those arguments are supported by evidence capable of sustaining findings which would, in turn, support the reduction in the minimum engagement. For that reason the variation should not be made.
83. This is all the more the case given the potential detriment to casual employees that would arise if the reduction in the minimum engagement were effected.
84. In terms of the question to be addressed in matters of this sort, it cannot be said, on the material before the Commission, either that the Award, by providing for a four hour minimum engagement for casual employees, is failing to meet the modern awards objective, or that a reduction in the minimum engagement is *necessary* to meet the modern awards objective.

A handwritten signature in black ink, appearing to read 'Simon Blewett', written over a horizontal dotted line.

Simon Blewett