



**SOUTH AUSTRALIAN WINE INDUSTRY**  
ASSOCIATION INCORPORATED

*Fair Work Commission*

*4 Yearly Review of Modern Awards -  
AM2014/196 and AM2014/197 – Part-time and Casual  
Employment  
Final Submission in reply*

**SUBMISSION OF:** SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION  
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## **1. INTRODUCTION**

In accordance with the Directions of the Casual Employment and Part-Time Employment Full Bench issued on 9 March 2016, the South Australian Wine Industry Association (SAWIA) makes these submissions in reply to the claims by the Australian Council of Trade Unions (ACTU) in relation to casual and part-time employment in the Wine Industry Award 2010.

These submissions follow SAWIA's earlier submission in reply dated 22 February 2016.

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 recognised 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.

## 2. 4 YEARLY REVIEW OF MODERN AWARDS

The Fair Work Commission (FWC) is required to conduct a review of all Modern Awards on a four yearly basis (the Review) in accordance with section 156 of the Fair Work Act (the Act).

A Full Bench of the Fair Work Commission considered the legislative context to the Review in its decision *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* AM2014/1 FWCFB 1788 dated 17 March 2014 (the Preliminary Decision).

The Preliminary Decision (at [23]) held that the Review is broader in scope than the 2012 Transitional Review and that the FWC in conducting the Review must ensure that Modern Awards meet the Modern Awards Objective in section 134 of the Act. Under the Modern Awards Objective the FWC must ensure that Modern Awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid;
- (b) the need to encourage collective bargaining;
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (da) the need to provide additional remuneration for:
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours; or
  - (iii) employees working on weekends or public holidays; or
  - (iv) employees working shifts;
- (e) the principle of equal remuneration for work of equal or comparable value;
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

Given the wide considerations set out in section 134 of the Act above, the Decision discussed how these considerations should be taken into account as follows:

*[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' taking into account the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.*

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

Further, section 138 is also relevant to the review and the Decision discussed how the requirements of section 138 would be taken into account:

[36] We deal later with the terms which may or must be included in a modern award. Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.

In addition, the Decision noted the observations of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (SDA v NRA (No 2))* (2012) 205 FCR 227 on the distinction between what is "necessary" and what is "desirable".

*"In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary."*

[Emphasis added]

The Decision (at [60]) held that the reference to stable modern award system in section 134(g) of the Act "suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."

[Emphasis added]

The Preliminary Decision also emphasised that the Review will be conducted on the presumption that the Modern Award achieved the Modern Awards Objective at the time it was made as demonstrated at [24] below:

*“The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”*

This in combination with the general approach by the FWC and its predecessors to follow previous Full Bench decisions suggests that the FWC will be guided by previous Full Bench decisions when considering whether to grant a variation to a Modern Award. This was discussed at [25]-[27] of the Preliminary Decision:

*“[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:*

*“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq.”*

*[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. 16 As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)17:*

*“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”*

*[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.”*

[Emphasis added]

While section 156 of the Act appears to provide wide procedural discretion to the FWC on how the Review is carried out, section 156(5) provides the following:

*Each modern award to be reviewed in its own right*

*(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.*

SAWIA submits that in accordance with section 156(5), in determining claims whether or not heard as a “common matter”, the Full Bench must be satisfied that any variation proposed is necessary to ensure a fair and relevant minimum safety net for each individual Modern Award subject to the proposed variation. SAWIA submits that this requires the provision of evidence in relation each Modern Award included in ACTU’s casual and part-time employment claim.

Further, given the significant change to part-time and casual employment in the wine industry that ACTU's claim would result in, in accordance with the Preliminary Decision, ACTU must provide "probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>1</sup>"

The part-time and casual employment provisions vary from Modern Award to Modern Award for a very good reason – the operations and requirements are very different from industry to industry. Some industries, including the wine industry are highly seasonal and require the ability to engage employees for specific periods of time with fluctuating hours. Other industries have more predictable and stable working hours and not experience any significant peak periods. SAWIA therefore submit that it would be unworkable and damaging to an industry like the wine industry if the FWC sought to adopt uniform part-time and casual provisions, thus ignoring the need for industry-specific provisions and the need for diversity.

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<sup>1</sup> Preliminary Decision, [60]

### 3. CASUAL AND PART-TIME EMPLOYMENT IN THE WINE INDUSTRY

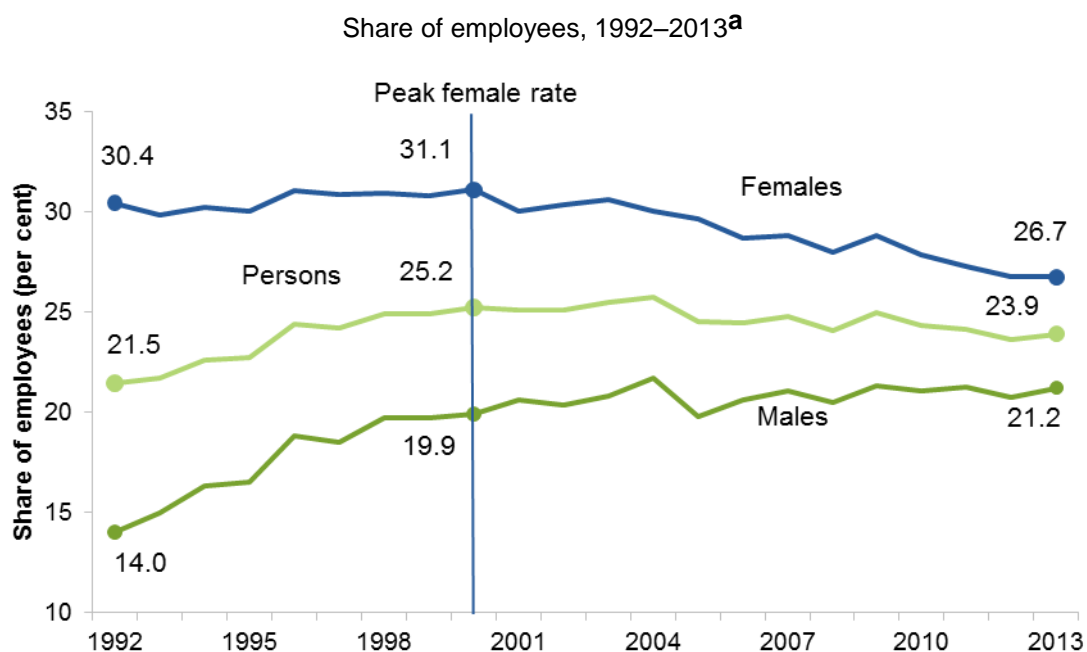
#### Casual employment has fallen and part-time employees given longer hours

SAWIA reiterates our position that Australia does not have a problem with “job insecurity” or “casualisation” of the workforce.

In fact as found by the Productivity Commission (PC) in their final report on the inquiry into the Workplace Relations Framework “*The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed*”.<sup>2</sup> Further, the PC observed that “*the share of female employees without leave entitlements — the most commonly used description of a casual worker — scarcely grew between 1992 and 2000, and has since dropped significantly*”<sup>3</sup>. In addition, “*While male casual rates grew strongly from 1992 to 2000, they have since stabilised*.”<sup>4</sup>

This development has been illustrated by the PC in the Figure below:

**Figure 2.8 The casual job share has been falling in recent years**



<sup>a</sup> Casual job status is identified as a person without paid leave entitlements. This is a commonly accepted definition, but there are others, including the existence of a leave loading or self-perceptions (Shomos, Turner and Will (2013)). The shares are based on August data from 1992 to 2007, and on November data from 2008 to 2013. Note that the difference between the casual share in this chart and in table 2.3 reflect that the former relates to the share of all employees and the former to the share of all employed. Source: ABS 2014, Australian Labour Market Statistics, Cat. No. 6105.0, released 8 July.

Figure source: Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 109

Figure source: Markey R, McIvor J & O'Brien M 2015, Supplementary Report: Casual and Part-Time Employment in Australia, Macquarie University, Centre for Workforce Studies, p. 7

<sup>2</sup> Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 109

<sup>3</sup> Ibid, p. 109

<sup>4</sup> Ibid, p. 109



The proportion of casual employment is lower than it was 10 years ago and only marginally higher than it was 20 years, being approximately 20% of the workforce. Contrary to the claims by the ACTU there have been no substantial changes in the extent of casual employment to warrant any increases to the casual minimum engagement or for the qualifying period for casual employment to be reduced from 12 months to 6 months.

Wine industry employers in South Australia have been subject to casual conversion requirements since the commencement of the Modern Award in 2010. However, wine industry employers have reported that when casual employees are offered the opportunity to convert, almost no casual employees choose to convert, but elect to remain as casual employees. The main reasons put forward is because the value the 25% loading and the flexibility provided to enable them to balance work with family or caring responsibilities or other commitments or interests such as studies.

In relation to part-time work, the PC has found that the proportion of employees working part-time hours grew quickly from 1970 to 2002 and growing at a slower rate from 2002-2014. In relation to working hours by employees working part-time hours, the PC has found that “Average working hours among those employed part-time has also progressively increased.”<sup>5</sup>

### **Part-time employment in the wine industry**

Wine industry employers predominately rely on a core group of full-time employees supplemented by casual employees during peak operational periods such as vintage (harvest) and pruning or in operations with seasonal and/or fluctuating and unpredictable staffing requirements, including cellar door sales and bottling.

Where part-time hours are worked under the Wine Industry Award 2010 this is commonly at the request of the employee for work-life balance reasons, including study commitments, balancing family or caring responsibilities or as a transition to retirement. The current part-time employment clause (Clause 12) in the Wine Industry Award 2010 reads as follows:

#### **12. Part-time employment**

**12.1** A part-time employee is an employee who:

- (a)** works up to 38 hours per week; and
- (b)** receives on a pro rata basis, equivalent pay and terms and conditions of employment to those of a full-time employee who does the same kind of work.

**12.2** At the time of engagement the employer and the part-time employee must agree in writing to a pattern of work. Any agreed variation to the pattern of work must be recorded in writing.

**12.3** A part-time employee must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly wage prescribed in clause 16—Classifications and adult minimum wages for the work performed.

**12.4** A part-time employee must be paid overtime rates in accordance with clause 30—Overtime and penalty rates for all time worked:

- (a)** outside of the spread of ordinary hours; and/or
- (b)** in excess of 38 ordinary hours per week; and/or
- (c)** in excess of the ordinary hours provided for in clause 28—Ordinary hours of work and rostering.

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<sup>5</sup> Ibid, p. 114



SAWIA submits that the current part-time provisions above operate effectively and provide part-time employees with a guaranteed pattern of work in writing without the imposition of excessive and unpractical administrative requirements. Clause 12 appropriately balances the need of part-time employees for predictability in working hours and working days and the need of wine industry employers to be able to vary such hours in response to customer bookings or visits to the cellar door or environmental and weather factors which may affect the vineyard or winery operations.

## **Casual employment in the wine industry**

### *Vineyard and cellar*

During vintage, employment in the vineyard and cellar could increase by 4-5 times and in some instances by a tenfold due to the engagement of a large number of casual employees and depending on whether grapes are harvested by hand or machinery.

In the vineyard and cellar casual employment predominately is limited to a sequence of periods not exceeding six months. During vintage and pruning, jobs are provided on a casual basis due to the fact that the job is of a seasonal and non-ongoing basis that working hours and working days are likely to fluctuate depending on weather.

As highlighted in SAWIA's submission in reply to ACTU's part-time and casual employment common claim, depending on region and weather and climate factors, the vintage period could run from 4 to 15 weeks.

The claim by ACTU ignores the operational reality of the wine industry as it wrongly assumes that most jobs performed by casual employees can be converted into permanent positions. The reality is that while the work periods of casual vineyard and cellar employees could add up to six months, there simply would not be any more work for these casual employees for the remainder of the year.

### *Cellar door sales and bottling*

Given that the cellar door operations are dependent on visitor numbers, group and event bookings which fluctuate and vary from week to week and from season to season, a majority of cellar door employees tend to be employed on a casual basis.

When given the option to convert to permanency, an overwhelming number of casual employees elect to remain as a casual employee. There are many different reasons why casual cellar door jobs are preferred by employees. Some cellar door employees have full-time jobs elsewhere but use their casual cellar door jobs as a way of earning even more money. Others employees are semi-retired but enjoy the interaction with customers and the opportunity to work in the wine industry while at the same time earning an income.

Some wineries operate a bottling facility to bottle the ready product. Depending on capacity, wineries may also undertake bottling services on a contract basis particularly for small wine industry clients. Contract bottling jobs are often sporadic, involves small quantities resulting in short jobs, may be unpredictable in nature and given with relatively short notice. Due to the irregular nature of the work wineries with bottling facilities commonly rely on casual employees. Employing such staff on a permanent basis would not be feasible given the uncertainty and unpredictability in work.

The claim by ACTU ignores the operational requirements and work patterns of the cellar door sales and bottling operations and the need for flexibility in relation to the number of employees engaged and the number of hours worked.

Given the seasonal nature of the wine industry and the substantial increase in the need for labour during peak operational periods such as vintage and pruning, casual employment is essential component of labour in the wine industry.

#### **4. PART-TIME EMPLOYMENT AND CASUAL CLAIMS**

ACTU's claim regarding a four hour engagement per day or shift for part-time employees affects 65 Modern Awards, including the Wine Industry Award 2010.

The Wine Industry Award 2010 is also included in ACTU's claims regarding:

- Casual conversion "election" clause – affecting 103 Modern Awards;
- Casual employment – engage and re-engage to avoid obligation, affecting 109 Modern Awards; and
- Prohibition on increasing number of casual and part-time employees, affecting 109 Modern Awards.

While ACTU has provided written submissions to support their common claim SAWIA notes that there are no specific submissions or evidence for either the part-time employment or casual employment claims in relation to the Wine Industry Award 2010. For example, all that ACTU has put forward is general assertions of the nature of part-time and casual employment, including the following:

- *"It is common for casual and part-time employees to be required to work short shifts of only 3 hours or less."*<sup>6</sup>;
- *"A significant proportion of employees in all industries had worked a shift of 3 hours or less in the last 3 months"*<sup>7</sup>;

However, ACTU has failed to produce any submissions and any evidence to demonstrate in what way the current part-time and casual employment provisions in the **Wine Industry Award 2010** fail to meet the Modern Awards objective and in what way the current provisions result in employees in the **wine industry** failing to obtain *"a fair and relevant minimum safety net of terms and conditions"*.<sup>8</sup>

In fact, ACTU's part-time and casual employment claims are little more than an indiscriminate blanket claim across 109, 103 and 65 Modern Awards respectively to establish a four hour part-time engagement as new industrial standard, require casual conversion after six months of employment and prevent employers from engaging casual and part-time employees as necessary in line with operational requirements.

To support their claims in relation to the 109, 103 and 65 Modern Awards, ACTU has produced witness statements from the following 21 witnesses<sup>9</sup>, however none of them are working in the wine industry as demonstrated below:

<b>Witness No</b>	<b>Name</b>	<b>Industry</b>
W001	Linda Rackstraw	Fast Food
W002	Scott Quinn	Disability Services
W003	Jan Paulsen	Nursing
W004	Vicky Stewart	Nursing
W005	Limasene Potoi	Disability Services
W006	Linda Gale	Higher Education

<sup>6</sup> ACTU Submission Casual and Part-time employment, 19 October 2015, p. 54

<sup>7</sup> Ibid, p. 54

<sup>8</sup> Fair Work Act 2009, section 134(1)

<sup>9</sup> Ibid, p. 74

W007	Jacque Dredge	Disability Services
W008	John Perry	Disability Services
W009	Natalie Lang	Union official - ASU
W010	Tracy Kemp	Disability Services
W011	Michael Rizzo	Union official – ASU
W012	Kyra Campbell	Retail
W013	Madeline Minervini	Retail
W014	Dianne Shakespeare	Retail
W015	Morgan Stan	Disability Services
W016	Narelle Jenks	Childcare
W017	Jack Torado	Hospitality
W018	Kylie Gray	Childcare
W019	Colin Aiton	Pallet manufacturing
W020	Michael Fisher	Pallet manufacturing
W021	Marian Brkic	Pallet manufacturing

There is therefore no evidence to demonstrate any of the following in relation to the **Wine Industry Award 2010**:

- that the lack of a minimum hourly engagement for part-time employees results in employees in the wine industry failing to obtain a fair and relevant safety net of terms and conditions;
- that the current casual conversion clause requiring casual conversion to be offered after 12 months results in employees in the wine industry failing to obtain a fair and relevant safety net of terms and conditions;
- that the proposed 6 month casual conversion threshold is appropriate and consistent with operations and seasonal nature of the wine industry;
- what has materially changed in the wine industry requiring casual conversion after 6 months since the 12 month casual conversion was inserted into the Wine Industry Award 2010 by the Full Bench in 2009;
- that the proposed 6 month casual conversion is appropriate for the diverse streams and operations of the wine industry – vineyard, cellar/production, laboratory, warehousing, bottling and cellar door sales;
- that the proposed four hour engagement for part-time employees is appropriate and consistent with the operations and seasonal nature of the wine industry;
- that the proposed four hour minimum engagement for part-time employees is appropriate for the diverse streams and operations of the wine industry – vineyard, cellar/production, laboratory, warehousing, bottling and cellar door sales;
- how the quantum of the proposed part-time engagement for the wine industry has been arrived at and how that quantum is necessary to achieve the Modern Awards objective;
- how the proposed four hour minimum engagement for part-time employees and the proposed variations to casual engagements, including but not limited to the 6 month casual conversion clause is consistent with the following considerations of the Modern Awards Objective:
  - o *the need to promote flexible modern work practices and the efficient and productive performance of work;*

- *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;*
- *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

SAWIA submits that given ACTU's failure to specifically address the wine industry in their submission and the lack of any evidence in relation to the wine industry, their claim in so far as it relates to the Wine Industry Award 2010 amount to little more than general assertions and opinions.

Hence, ACTU has failed to provide "*probative evidence properly directed to demonstrating the facts supporting the proposed variation*" as required by the Preliminary Decision.

In their submission on the July 2016 dated 22 July 2016 the ACTU seeks to shift the onus to provide evidence from the applicant to employers. For example, on page 3 of their 22 July 2016 submission, the ACTU states that "*No evidence was adduced by employer groups in reply to the ACTU common claims as they affect the Wine Industry Award 2010.*" This is an unacceptable and blatant attempt by the ACTU to cover up their failings to provide probative evidence and submissions to demonstrate firstly that there is a problem to start with in relation to part-time and casual employment in the wine industry and secondly that the variations proposed are necessary to remedy the problems identified.

SAWIA made submissions in opposition to the ACTU claims on 22 February 2016 setting out the nature of part-time and casual employment in the wine industry, the need for flexible engagements in the industry and how the current part-time clause and casual conversion clause already provide a sufficient safety net of terms and conditions of employment. There is no onus on SAWIA or indeed any other party opposing ACTU's claim in relation to the Wine Industry Award 2010 to provide evidence to demonstrate that the relevant provisions of the Wine Industry Award 2010 in their current form meet the Modern Awards Objective.

ACTU's submission clearly ignores the Preliminary Decision by the Full Bench at [24] that "*prima facie the modern award being reviewed achieved the modern awards objective at the time it was made*" and that it is for the applicant to lead evidence to rebut this presumption.

### **Matter has already been dealt with by a Full Bench**

During the Part 10A Award Modernisation Proceedings in 2008-2009, SAWIA entered into discussions with the two main unions in the wine industry, United Voice and Australian Workers Union regarding the content and structure of a separate Modern Award covering the wine industry.

As a result of the discussions, a Draft Wine Industry Award 2010 was provided by the above parties to the then Australian Industrial Relations Commission on 6 May 2009 [refer to Attachment A to these submissions].

The parties' Draft Wine Industry Award contained a casual conversion provision in clause 13.4 [refer to page 8 of Attachment A]. The clause read as follows:

- 13.4 A casual employee other than an irregular or seasonal casual employee, who has been engaged by a particular employer for a sequence of periods in the same designated work area on a particular site under this Award during a period of 12 continuous months may request in writing to have his/her contract of employment converted to full-time or part-time employment if the employment is to continue beyond the 12 month period in the same designated work area and site.  
[Emphasis added]

As demonstrated above the parties agreed on a casual conversion clause to be triggered after 12 months' continuous service. This provision in turn was based on the casual conversion provision in clause 12.3.9 of Pre-reform Federal Award Wine *Industry - AWU - Award 1999* (AP802322).

The AIRC issued an Exposure Draft Wine Industry Award 2010 on 22 May 2009 as per the Statement of the Full Bench, [2009] AIRCFB 450 [refer to page 1 and 19 of the Attachment B]. In its Statement, the Full Bench explained at [109] that "*The draft largely reflects a draft award submitted by the South Australian Wine Industry Association Incorporated, the AWU and the LHMU.*"

While that was largely correct, in relation to the casual conversion clause the Exposure Draft contained a casual conversion provision in clause 13.5 triggering casual conversion after six months [Refer to Attachment D]. The casual conversion clause in the AIRC's Exposure Draft caused a great deal of concern to the wine industry and accordingly SAWIA made submissions to ensure that any final Modern Award for the wine industry took the seasonal nature of the industry into account and provided casual conversion after 12 months as reflected in the parties' draft award.

The final version of the Wine Industry Award 2010 was made by the Full Bench in Decision [2009] AIRCFB 826 on 4 September 2009 [refer to Attachment C]. At [148] of their Decision, the Full Bench stated:

*"We have made a number of changes to the exposure draft of the Wine Industry Award 2010. The award now provides that the casual loading is not payable during overtime except on Sundays and public holidays. This avoids a situation in which the overtime rate would be less than the ordinary time rate. The casual conversion clause has been altered to provide for casual conversion after 12 months' engagement because of the seasonal nature of the industry. Piecework rates similar to those agreed by the parties have been included in the modern award and the operation of some disability allowances has been clarified. Additional default funds have been added to the superannuation clause where they were named in relevant pre-reform awards or NAPSAs. The ordinary hours of work have been extended for employees rostered to perform work in the vineyard between November and April and shift definitions have been altered as requested by major employer groups to overcome potential anomalies. The rates for paid meal breaks have also been detailed."*  
[Emphasis added]

As demonstrated from the decision above, it is clear that the Full Bench actively considered the trigger point for casual conversion during the Part 10A Award Modernisation Process and made an active and conscious decision to change the threshold for casual conversion from the 6 months initially proposed in the AIRC's Exposure Draft to 12 months.

The claim by the ACTU ignores the history and background to how the Wine Industry Award 2010 was made and has made no submissions on why in their view the Full Bench Decision [2009] AIRCFB 826 on 4 September 2009 should be overturned. SAWIA submits that [25]-[27] of the Preliminary Decision is directly relevant to ACTU's claim in relation to casual

conversion and that the ACTU has failed to address these aspects of the Preliminary Decision in relation to their claim for the Wine Industry Award 2010.

### **Conclusion**

For the reasons stated above, the ACTU's claim to vary the part-time and casual provisions in the Wine Industry Award 2010 should not be granted. ACTU has failed to provide any specific submissions or evidence to support its claim in relation to the wine industry and seeks to overturn an earlier Full Bench decision in relation to casual conversion in the Wine Industry Award 2010 without providing any cogent reasons for doing so.

The claim by ACTU will damage the productivity and competitiveness of the Australian wine industry.





**PARTIES DRAFT ( SAWIA, AWU, LHMU) WINE INDUSTRY AWARD 2010**

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# Part 1—Application and Operation

## 1. Title

This award is the *Wine Industry Award 2010*.

## 2. Commencement date

This award commences on 1 January 2010.

## 3. Definitions and interpretation

3.1 **Act** means the [nee *Workplace Relations Act 1996* (Cth)] *Fair Work Act 2008* (Cth)

**Apprentice** means an employee, adult or junior, who is indentured under an apprenticeship declared or recognised by an apprenticeship authority (being a State or Territory training authority with the responsibility for the apprenticeship)

**Confined space** means an enclosed or partially enclosed space that is at atmospheric pressure during occupancy and is not intended or designed primarily as a place of work and is liable at any time to:

- have an atmosphere which contains potentially harmful levels of contaminant;
- have an oxygen deficiency or excess ; or
- cause engulfment ; and
- could have restricted means for entry and exit

**continuous service** provided for in the NES

**employee** has the same meaning as is in the Act

**employer** has the same meaning as is in the Act

**enterprise award** has the same meaning as is in the Act

**Fair Work Australia** [nee the AIRC] has the same meaning as is in the Act, also known as FWA.

**Junior** means a person aged 20 years or less.

NES means the National Employment Standards contained within Part 2-2 of the Act

**Temporary Vineyard Hand** means an employee who is additional to an employer's workforce specifically engaged for the vintage period within the vineyard.

**[Unions] Wet place** means a place where the employee's clothing becomes wet, or where the employee has to stand in water or slush so that the employee's feet become wet.<sup>1</sup>

**[SAWIA] Wet place** means a place where the employee's clothing becomes saturated or where the employee has to stand in water or slush so that the employee's feet become wet.

**3.2** Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

## **4. Coverage<sup>2</sup>**

**4.1** This industry award covers employers throughout Australia in the wine industry and their employees engaged in relation to work performed in the classifications within Schedule A. This award does not apply to:

- an employee excluded from award coverage by the Act.
- an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies; and
- an employer in respect of their operations or activities involving table or dried grapes.

**4.2** For the purposes of this clause **wine industry** means:

(a) the preparation of land for planting of wine grape vines, care, growing, treating, picking, harvesting, forwarding of wine grapes, and pruning of wine grape vines and other activities associated with a wine grape vineyard;

- **vineyard** means a place where wine grapes are grown for processing into wine; and / or

(b) processing wine grapes, producing wine juice or grape spirit, bottling, packaging, storage or dispatch of wine, brandy or other potable spirit, liqueurs, vinegar or grape juice and other activities associated with a winery or wine distillery including but not limited to cellar door sales, laboratories, coopers, machinists, labourers making or repairing barrels, vats, casks, and like articles;

- **winery** means a place where wine grapes are processed into wine and packaged for distribution; and
- **wine distillery** means a place where grape juice made from fresh or dried wine grapes or wine grape marc is distilled into spirits or brandy; and / or

<sup>1</sup> All relevant awards.

<sup>2</sup> Final coverage clause still to be finalised between the parties

(ii) Must be engaged for a minimum of 4 hours a day.<sup>3</sup>

(b) has reasonably predictable hours of work; and

(c) receives on a pro rata basis, equivalent pay and terms and conditions of employment to those of full-time employees who do the same kind of work.

12.2 At the time of commencement, the employer and the part-time employee will agree in writing to a pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

12.3 A part-time employee shall be paid overtime for all time worked:

- (i) outside of the spread of ordinary hours; and/or
- (ii) in excess of 38 ordinary hours per week; and/or
- (iii) in excess of the ordinary hours in accordance with Clause 29 (Hours of Work) of this Award.

12.4 A part-time employee must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly rate prescribed in Clause 21 of this Award, for the grade of work performed under the classification in Schedule A.

### 13. Casual employees

13.1 A casual employee is engaged and paid by the hour. A casual employee will be informed of the conditions clauses in 13.2 to 13.8 before being employed.

13.2 Subject to the Transitional Arrangements applicable to this award a casual employee will be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in Clause 21 of this Award, for the relevant grade of work being performed under the classification in Schedule A (being the 'base hourly rate') plus a casual loading of 25% for working ordinary hours.

13.3 A casual employee shall be paid overtime (in accordance with the overtime clause) calculated on their base hourly rate only (excluding the casual loading specified in clause 13.2 above) for all time worked:

- (i) Outside of the spread of ordinary hours; and/or
- (ii) In excess of 38 ordinary hours per week; and/or
- (iii) In excess of the ordinary hours in accordance with Clause 29 (Hours of Work) of this Award.

13.4 A casual employee other than an irregular or seasonal casual employee, who has been engaged by a particular employer for a sequence of periods in the same designated work area on a particular site under this Award during a period of 12 continuous months may request in writing to have his/her contract of employment converted to full-time or part-time employment if the employment is to continue beyond the 12 month period in the same designated work area and site.

<sup>3</sup> NSW Award – minimum engagement 4 hours per day. SA Award, Clause 4.1.2.3 minimum engagement 15 hours a week and two hours a day.

- 13.5 Where the employee requests to have his/her contract of employment converted as per 13.4, the particular employer will advise the employee in writing, within four (4) weeks of the request, as to whether the employer can consent to the request. Any dispute as to whether such a full-time or part-time position is available will be dealt with as far as practicable through the dispute resolution procedure.
- 13.6 Where such a conversion occurs then the details will be recorded in writing. Any dispute about the arrangements to apply to an employee converting from casual employment to full-time or part-time employment will be dealt with as far as practicable through the dispute resolution procedure.
- 13.7 Where the employer consents to such a conversion and subsequently the employee refuses the conversion such an employee foregoes the right to any future request to have his/her contract of employment converted as per 13.5.
- 13.8 An employer is required to roster a casual employee for a minimum of [Unions] four (4)<sup>4</sup> [SAIWA three (3)] consecutive hours per shift.
- 13.9 For the purposes of this clause:
- (a) A **designated work area** is defined as one of the following areas:
- (i) Vineyard;
  - (ii) Cellar;
  - (iii) Bottling/packaging;
  - (iv) Cellar door sales;
  - (v) Laboratory; and
  - (vi) Warehouse.
- [Designated work area - link to definitions by same term in definitions section]
- (b) An **irregular casual** is a casual employee who does not work on a regular and systematic basis; and
- (c) A **seasonal casual** is a casual employee who may be required to work during specific seasonal activities e.g. vintage, winter pruning etc., on a regular and systematic basis.
- (d) [Unions] A casual shall be informed of these conditions before he/she is employed.<sup>5</sup>

## 14 [Unions] Piece work employment

**14.1** A piece work employee means an employee who is engaged on piece work rates of pay which enable an average employee working ordinary hours to earn at least 20% above the prescribed time rate of pay.

**14.2** An employee working under a Piecework rate agreement:

<sup>4</sup> Federal Award, clause 12.3.5

<sup>5</sup> WA Award, clause 2.2(3)(d)





## STATEMENT

*Workplace Relations Act 1996*

s.576E—Procedure for carrying out award modernisation process

Request from the Minister for Employment and Workplace Relations—28 March 2008

### **Award Modernisation**

(AM2008/25–63)

JUSTICE GIUDICE, PRESIDENT

VICE PRESIDENT LAWLER

VICE PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT ACTON

COMMISSIONER SMITH

MELBOURNE, 22 MAY 2009

### INTRODUCTION

[1] This statement deals with award modernisation and in particular the exposure drafts for Stage 3. The statement should be read in conjunction with earlier statements and decisions but particularly the decisions relating to the making of the priority modern awards and the Stage 2 modern awards made on 19 December 2008 and 3 April 2009 respectively.<sup>1</sup>

[2] Stage 3 is by far the largest stage in award modernisation. It covers some 39 industries and occupations. We publish with this statement 50 draft awards. Proposals, submissions and other material in relation to the draft awards are to be lodged with the Commission by 12 June 2009. Material can be lodged by post, fax or email and all material lodged will be made available through the internet as soon as practicable. The Full Bench will sit to conduct consultations in relation to the Stage 3 awards for two full weeks between 22 June and 3 July 2009. In the week of 22 June the consultations will be in Melbourne. In the week of 29 June the consultations will be in Sydney. The primary method of dealing with the exposure drafts is by interested parties lodging their views in writing. The consultations are only intended to give parties an opportunity to respond to matters raised by others and not to restate or summarise the material already lodged. We reiterate the view, expressed in a number of statements and decisions, that parties should adhere to the timetable for lodgement. If they do not they run the risk that their contributions will be received too late to be given proper consideration by other parties or by the Commission. Before dealing with the individual exposure drafts there are some matters of general relevance which should be mentioned.

[3] First we think that it is important to reiterate the way in which the modernisation process operates and the purpose of the exposure drafts. Award modernisation is carried out by the Commission subject to the terms of Part XA of the *Workplace Relations Act 1996* (Cth) (the Act) and in accordance with a request from the Minister for Employment and Workplace Relations (the Minister). The request has been varied by subsequent amendments

[108] In submissions dated 8 May 2009, the AWU submitted an amended draft which contained greenkeeper classifications similar to but not identical to those which we have included in the exposure draft. In addition, they included other additional terms and conditions which, they submitted, were necessary to accommodate greenkeeping classifications in the award. These proposed amendments were advanced relatively late, with a limited opportunity for a response by other interested parties. We would welcome further comment on the structure contained in the exposure draft and the recent AWU proposals during the forthcoming consultations.

### **Liquor and accommodation industry (manufacturing)**

[109] We have developed an exposure draft Wine Industry Award 2010. The exposure draft covers the wine industry from the growing of wine grapes through to the despatching of wine or grape spirit from storage associated with a winery or wine distillery. The draft largely reflects a draft award submitted by the South Australian Wine Industry Association. It is opposed by the AWU and the LHMU. Interested parties should give further consideration to simplifying the classification structure in the exposure draft. The provision for piecework also requires careful consideration.

[110] While some urged us to include independent wine grape growing in the *Horticulture Award 2010*<sup>37</sup>, or at least apply some of the provisions of that modern award to independent wine grape growing, the extent to which current horticulture awards and NAPSAs actually apply to independent wine grape growing was not readily apparent. We invite further submissions on this issue.

[111] The brewing sector of the liquor and accommodation industry has already been dealt with in our consideration of the food, beverages and tobacco manufacturing industry.

### **Maritime industry**

[112] We publish three maritime awards, namely:

- Seagoing Industry Award 2010
- Dredging Industry Award 2010
- Maritime Offshore Oil and Gas Award 2010

[113] The draft Seagoing Industry Award 2010 reflects substantial agreement between the unions (the Maritime Union of Australia (MUA), the Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers Union (AMOU)) and employers represented by the Australian Mines and Metals Association (AMMA) and the Australian Ship Owners' Association (ASOA). The exposure draft also reflects the current *Maritime Industry Seagoing Award 1999*<sup>38</sup> with the necessary amendments and inclusions reflecting standard modern award provisions.

[114] The employers proposed the insertion of part-time and probationary employment. This proposal was opposed by the unions. The current award does not provide for part-time or probationary employment. Part-time employment is not a current employment practice in this industry and we have decided not to include provision for it at this stage. We have also decided not to insert a probation clause but observe that it is open to any employer to engage

[2009] AIRCFB 826

**ATTACHMENT C**[Download Word Document](#)**AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION****DECISION***Workplace Relations Act 1996*

s.576E—Procedure for carrying out award modernisation process

Request from the Minister for Employment and Workplace Relations—28 March 2008

**Award Modernisation**

(AM2008/25-63)

JUSTICE GIUDICE, PRESIDENT  
 VICE PRESIDENT LAWLER  
 VICE PRESIDENT WATSON  
 SENIOR DEPUTY PRESIDENT WATSON  
 SENIOR DEPUTY PRESIDENT HARRISON  
 SENIOR DEPUTY PRESIDENT ACTON  
 COMMISSIONER SMITH

MELBOURNE, 4 SEPTEMBER 2009

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certainty of work. In one case there is a single category of part-time employee with flexible hours and a loading.

[143] In terms of the significance of those diverse forms of regulation of part-time employment, Clubs Australia submitted that the majority of clubs are in New South Wales, as is the majority of employment by clubs. This point was conceded by the LHMU and is supported by Australian Bureau of Statistics data,<sup>46</sup> which shows:

- New South Wales accounts for just under half of all hospitality clubs (49.4%), while Queensland accounts for 22.4% and Victoria accounts for 13.5%;
- employment in New South Wales comprises 61.5% of all employment, while Queensland has 20.4% of all employment and Victoria has 10.2% of all employment.

[144] The weight of current regulation supports the adoption of the New South Wales NAPSA provision. However, that provision removes the essential characteristics of part-time employment of some degree of regularity and certainty of employment. It does not reflect a conventional concept of part-time employment as was conceded by Clubs Australia in submitting that “it is perhaps time to look at part-time in a different light and not with the conventional outlook of what is part-time.” The New South Wales provisions for part-time employees provide a bare guaranteed minimum of 32 hours over a four week period, no certainty beyond the roster as to when work is to be done and a capacity to alter the roster with 12 hours notice in cases of absences or shortages of staff. These part-time provisions give little predictability to part-time employees and do not appear to be consistent with “the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38.”<sup>47</sup> The concerns we expressed about variation of hours by consent in relation to the awards in the health and welfare services industry<sup>48</sup> apply equally in this context.

[145] Having regard to the significant departure from the conventional characteristics of part-time employment in the New South Wales provision and the diversity of current prescriptions, we are not prepared to apply the New South Wales provision across the licensed clubs industry, notwithstanding the predominance of club employment under the New South Wales NAPSA, without a fuller consideration of the issues raised through a more traditional arbitration, in advance of or as part of the two year review of modern awards, required by the Transitional Act.

[146] We have decided to maintain the part-time provision in the exposure draft, subject to the inclusion of a transitional provision for New South Wales, Queensland, South Australia, Western Australia and Tasmania, which will maintain the current arrangements for three years into the transitional period. This should accommodate the completion of the two year review. The transitional provision is in the following terms:

**“Transitional Provision – New South Wales, Queensland, South Australia, Western Australia and Tasmania**

An employer subject a NAPSA that applied in New South Wales, Queensland, South Australia, Western Australia or Tasmania immediately prior to 1 January 2010 which prescribed part-time employment provisions different from those in cl.10.4(a), may continue to apply those provisions. This transitional provision ceases to operate on 31 December 2012.”

**Liquor and accommodation industry (manufacturing)**

[147] The brewing sector of the liquor and accommodation industry is covered by the Food Modern Award.

*Wine Industry Award 2010*



[148] We have made a number of changes to the exposure draft of the *Wine Industry Award 2010*. The award now provides that the casual loading is not payable during overtime except on Sundays and public holidays. This avoids a situation in which the overtime rate would be less than the ordinary time rate. The casual conversion clause has been altered to provide for casual conversion after 12 months' engagement because of the seasonal nature of the industry. Piecework rates similar to those agreed by the parties have been included in the modern award and the operation of some disability allowances has been clarified. Additional default funds have been added to the superannuation clause where they were named in relevant pre-reform awards or NAPSAs. The ordinary hours of work have been extended for employees rostered to perform work in the vineyard between November and April and shift definitions have been altered as requested by major employer groups to overcome potential anomalies. The rates for paid meal breaks have also been detailed.

[149] With respect to the classification structure, it has been clarified that progression between Grade 1 and Grade 2 is automatic on passing the accredited assessment. Progression between Grade 2 and Grade 3 is also dependent on passing an accredited assessment. It has not been considered necessary to specify that other promotion is dependent on a position being available. If an employee has met the entry requirements for a grade and is performing the duties of the grade, they are entitled to the wage rate for that grade.

[150] Some other changes sought by parties have not been adopted having regard to the prevalent provisions of the relevant pre-reform awards and NAPSAs or the existence of a contrary agreement between the major representatives of employers and employees to be covered by the modern award.

## **Maritime industry**

### *Dredging Industry Award 2010*

[151] AiGroup sought to exclude employers covered by the Manufacturing Modern Award from this award. We have acceded to that proposal in part and the award will exclude maintenance contractors covered by the Manufacturing Modern Award.

[152] To provide clarity we have inserted definitions of remote areas and ports for the purposes of the shipkeeping allowances.

[153] The unions sought the deletion of the national training wage provision on the basis that specific industry arrangements already apply and are better suited. However, no details of these arrangements were provided and we therefore propose to retain the national training wage. Should a party wish to have a more industry specific provision apply this could be the subject of a further application.

[154] At the request of all parties we have decided to delete the classification definitions found in Schedule A of the exposure draft. We have done so on the basis that it is not practical to define classifications by reference to Maritime Orders as this provides insufficient differentiation. We are satisfied that the classifications set out in cl.14 are in terms which are well understood in the industry and there is no need for further definition.

[155] Finally, we have reconsidered our earlier decision not to insert an aggregate wage for fully operational vessels. The unions have provided further material to support such and we are now aware of a decision of a Full Bench of the Commission which endorsed the aggregate wage in this industry. We have therefore inserted relevant provisions which reflect those in the current award.

### *Maritime Offshore Oil and Gas Industry Award 2010*

[156] A number of alterations have been made to the exposure draft. At the request of the parties we have included a definition of "day" to accommodate the nature of maritime work which may extend over several time zones. We were urged by the unions to insert the existing award provisions as to termination of employment. In our view, at least in respect of an officer with more than five years service and who is over 45 years of age, the award provisions could operate to an employee's detriment by comparison with the terms of the NES. We have decided to retain the standard provision, which was in the exposure draft.

# ATTACHMENT D

Exposure Draft—May 2009

## Wine Industry Award 2010

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## 12. Part-time employment

- 12.1 A part-time employee is an employee who:
- (a) works up to 38 hours per week; and
  - (b) receives on a pro rata basis, equivalent pay and terms and conditions of employment to those of a full-time employee who does the same kind of work.
- 12.2 At the time of engagement the employer and the part-time employee must agree in writing to a pattern of work. Any agreed variation to the pattern of work must be recorded in writing.
- 12.3 A part-time employee must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly wage prescribed in clause 16—Classifications and adult minimum wages for the work performed.
- 12.4 A part-time employee must be paid overtime for all time worked:
- (a) outside of the spread of ordinary hours; and/or
  - (b) in excess of 38 ordinary hours per week; and/or
  - (c) in excess of the ordinary hours provided for in clause 26—Ordinary hours of work and rostering

## 13. Casual employment

- 13.1 A casual employee is an employee who is engaged and paid by the hour.
- 13.2 A casual employee must be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in clause 16—Classifications and adult minimum wages for the work being performed plus a casual loading of 25% for working ordinary hours.
- 13.3 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours' work.
- 13.4 A casual employee must be paid overtime in accordance with clause 28—Overtime and penalty rates, calculated on their base hourly rate only and excluding the casual loading specified in clause 13.2, for all time worked:
- (a) outside of the spread of ordinary hours; and/or
  - (b) in excess of 38 ordinary hours per week; and/or
  - (c) in excess of the ordinary hours provided for in clause 26—Ordinary hours of work and rostering.
- 13.5 **Casual conversion to full-time or part-time employment**
- (a) A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

**Exposure Draft (May 2009): Wine Industry Award 2010**

- (b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 13.5 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 13.5 if the employer fails to comply with clause 13.5(b).
- (c) Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.
- (d) Any casual employee who has a right to elect under clause 13.5(a), on receiving notice under clause 13.5(b) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.
- (e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.
- (f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 13.5(d), the employer and employee must, subject to clause 13.5(d), discuss and agree on:

  - (i) which form of employment the employee will convert to, being full-time or part-time; and
  - (ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 12—Part-time employment.
- (g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.
- (h) Following such agreement being reached, the employee converts to full-time or part-time employment.
- (i) Where, in accordance with clause 13.5(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.
- (j) By agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 13.5(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 13.5(a).

(k) For the purposes of clause 13.5, an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

13.6 An employee must not be engaged and re-engaged to avoid any obligation under this award.

## **14. Termination of employment**

14.1 Notice of termination is provided for in the NES.

### **14.2 Notice of termination by an employee**

The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

### **14.3 Job search entitlement**

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.

## **15. Redundancy**

15.1 Redundancy pay is provided for in the NES.

### **15.2 Transfer to lower paid duties**

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

### **15.3 Employee leaving during notice period**

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under clause 15—Redundancy had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.