



SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

Fair Work Commission

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

SUBMISSION OF: SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION
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1. INTRODUCTION

In accordance with the Directions of the Casual and Part-time Employment Full Bench dated 1 September 2016 and the extension granted on 6 September 2016, the South Australian Wine Industry Association (SAWIA) makes this final submission in support of SAWIA's claim to reduce the casual minimum engagement in the **Wine Industry Award 2010** from four to two hours. This submission deals with the evidence of each of SAWIA's witnesses in support of the claim and the evidence by AWU in opposition to claim heard by the Full Bench in July and August 2016.

The South Australian Wine Industry Association (SAWIA) is an industry association representing the interests of wine grape growers and wine producers throughout the state of South Australia. SAWIA is the oldest wine industry organisation in Australia and has existed, albeit with various name changes, since 1840. Our membership range from Australia's largest wine producers to small, boutique wine producers and independent wine grape growers.

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]

3. BACKGROUND

SAWIA's claim in relation to the casual minimum engagement in Clause 13.3 of the Wine Industry Award 2010 was submitted through a determination dated 17 July 2015 and written submissions in support on 12 October 2015.

The specific wording of the variation reads as follows:

1. By deleting clause 13.3 and inserting the following:

13.3 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of two hour's work.

The following witness statements were filed by SAWIA in support of the claim:

- a) Jeremy Dineen;
- b) Steven Todd;
- c) Anthony Grundel;
- d) Richard van Ruth; and
- e) Fred Peacock.

AWU on 22 February 2016 filed the following witness statements in reply to SAWIA's claim:

- a) Adam Algate; and
- b) Ron Cowdery.

On 11 July 2016 the Full Bench heard evidence from Mr Todd, Mr Grundel and Mr Peacock for SAWIA and Mr Algate and Cowdery for AWU. The evidence by Mr Dineen and Mr van Ruth for SAWIA was heard by the Full Bench on 17 August 2016.

4. CASUAL EMPLOYMENT IN THE WINE INDUSTRY

The wine industry is 'vertically integrated', spanning agriculture (growing wine grapes), wine processing and production (winemaking) direct sales and tasting (cellar door) to the general public and sales to retailers and agents domestically and into a global marketplace.

Vineyard

Casual employees are predominately engaged in the vineyard during vintage and pruning and in the cellar door throughout the year.

The wine industry is highly seasonal in nature. During peak operational periods, including vintage (harvest) and pruning the industry relies on a large number of casual employees. The evidence demonstrates that there is a significant increase in the number of casual employees in the vineyard during these peak periods:

- Increasing a threefold from 4-6 casual employees to 18 casual employees¹; and
- Increasing from nil to 80 casual employees².

The length and timing of vintage period varies from region to region and from year to year. In South Australia the vintage may commence in late January to early March and finish in late May, in Tasmania it commonly runs from February-May³ and March-May⁴. The length of vintage may also vary from year to year and region to region spanning from 20 days to 106 days.

The wine industry is subject to a great deal of variability in relation to weather and climate on the basis of season and region. Being a rural industry – where work is dictated by the weather events and the state of the crop, the wine industry does not enjoy the level of stability and predictability enjoyed by for example manufacturing industries and other factory operations.

In such industries work can be more easily be predicted and planned ahead and unless there are significant breakdowns work is significantly less likely to be interrupted or ceasing prior to the completion of the actual job or task. A four hour minimum engagement therefore may not be as problematic to factory based operations as it is to wine industry which is rural based industry engaged in the growing and harvesting of wine grapes.

It should also be noted that despite the highly unpredictable and variable nature of vineyard operations of the wine industry, the casual minimum engagement in the Wine Industry Award 2010 is significantly higher than other Modern Awards covering primary production as set out in the table below:

¹ Evidence of Fred Peacock, Transcript 11 July 2016, PN590-592

² Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2058; Exhibit 298 (Jeremy Dineen) at 5-6

³ Exhibit 181 (Fred Peacock) at 7

⁴ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2061

Modern Award	Clause	Minimum Engagement
Horticulture Award 2010	10.4	None
Pastoral Award 2010	10.4	3 hours
Aquaculture Industry Award 2010	10.3	None
Sugar Industry Award 2010	11.3	3 hours

None of the above Modern Awards have a 4 hour casual minimum engagement. In fact whereas a grower of table grapes could engage casual employees for picking, pruning and spraying table grapes, a grower of wine grapes would be required to provide a 4 hour casual minimum engagement.

In a regional area the same person may undertake casual harvesting and pruning for a grower of table grapes during one period of the year, while for a different period of the year undertaking casual vineyard work involving harvesting a pruning for a winery or wine grape grower.

SAWIA argues that there is nothing to justify the significantly higher casual minimum engagement in the Wine Industry compared to the industries above. There are no rational reasons why a wine industry employer has to provide a 4 hour casual minimum when harvesting and pruning wine grapes while a grower of table grapes does not have to provide any minimum engagement.

Cellar door sales

Given the unpredictable nature of cellar door visits and the fluctuation in visitor number depending on season and days of the week, cellar door employees commonly are engaged on a casual basis.

The unpredictable nature of cellar door visits and the relatively short duration of each visit 30-45 minutes means that it is difficult to guarantee 4 hours of work. Where coach/group bookings are accepted a tasting session commonly runs for 1.25-2.5 hours including preparation time and cleaning up.⁵

For a casual employee specifically engaged to deliver a tasting session for a coach/group there may be little if no additional work after the group tasting session has been completed.

The 4 hour minimum engagement has resulted in that large tour bookings regularly are declined and that the number of employees in the cellar door are kept at a bare minimum, resulting in a lower level of service to visitors during peak times.

There is a need additional assistance with washing dishes, picking up glasses, cleaning up and covering lunch breaks. These jobs of relatively short duration, no more than 2 hours, could provide additional income and work experience for local residents (including school students). However, the current 4 hour minimum engagement means that these jobs are simply not provided to additional casual employees.

⁵ Exhibit 180 (Steven Todd) at 7; Exhibit 299 (Richard Van Ruth) at 6

It should be noted that despite the highly unpredictable and variable nature of the cellar door operations, the casual minimum engagement in the Wine Industry Award 2010 is significantly higher than other Modern Awards covering industries engaged in hospitality-themed and direct consumer sales services that are equally unpredictable and variable in nature, as set out below:

Modern Award	Clause	Minimum Engagement
Restaurant Industry Award	13.2	2 hours
Hospitality Industry (General) Award 2010	13.2	2 hours
Amusement, Events and Recreation Award 2010	10.4(e)	3 hours
General Retail Industry Award 2010	13.4	3 hours

None of the above Modern Awards have a 4 hour casual minimum engagement. In fact the difference in minimum engagement for casual employees would appear to be rather arbitrary, which can be illustrated from the following example.

A wine industry employer operating a cellar door facility offering wine tasting and tasting platters with matching local produce is required to provide a minimum of four hours work or pay to a casual employee. However, if their visitors would then visit a café, restaurant or hotel for a glass of wine and a tasting platter of local produce, then the café, restaurant or hotel operator would be subject to a minimum casual engagement of only 2 hours. Similarly, if the customer then decided to visit a bottle shop to purchase a few more of the winery's product, the retailer selling the wine would be subject to a 2 hour minimum engagement.

SAWIA argues that there is nothing to justify the significantly higher casual minimum engagement in the Wine Industry compared to the industries above. There are no rational reasons why a wine industry employer has to provide a 4 hour casual minimum when serving and selling work at the cellar door, yet only 2 hours has to be provided by a restaurant, café or hospitality employer when serving the same bottle of wine to their guests or when a bottle sells the same bottle to a customer.

General

In their submission of reply on 22 February 2016 the Australian Workers' Union (AWU) submits that the four hour minimum engagement for casual employees is appropriate on the basis that it was contained in one of the predecessor awards – *Wine Industry Award – AWU – Award 1999* which together with the *Wine and Spirit Industry (South Australia) Award NAPSA* was acknowledged by AWU, United Voice and SAWIA to form the starting point for the award modernisation process⁶.

SAWIA together with AWU and United Voice provided a draft Wine Industry Award 2010 to the Award Modernisation Full Bench in the Part 10A Award Modernisation Process. However, the casual minimum engagement was never agreed between the parties, indeed as demonstrated by the extract

⁶ AWU Submissions and Evidence In Reply, Commission issue proceedings – Casual and Part-time employment, [84-85]

below the parties' draft award below it contained two proposals - 4 hours by AWU and United Voice and 3 hours by SAWIA⁷:

- 13.8 An employer is required to roster a casual employee for a minimum of [Unions] four (4)⁴ [SAIWA three (3)] consecutive hours per shift.

The Award Modernisation Full Bench took the need for flexibility and the seasonal variability into account when setting a minimum engagement in range of 0-2 hours for other rural industries, including the pastoral and horticulture industries, and other hospitality-themed industries, including the restaurant and hospitality industries. However, SAWIA submits that the wine industry ended up with a casual minimum engagement much more restrictive than other rural and hospitality-themed industries.

SAWIA submits that it has provided probative evidence to demonstrate that the current 4 hour minimum engagement results in the Wine Industry Award 2010 not meeting the Modern Awards Objective, in particular considering "*the need to promote flexible modern work practices and the efficient and productive performance of work*"⁸ and "*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*"⁹.

⁷ Parties Draft (SAWIA, AWU, LHMU) WINE INDUSTRY AWARD 2010, 6 March 2009, http://www.airc.gov.au/awardmod/fullbench/industries/awardmoddocument.cfm?award=liquor_manufacturing&document=Draft

⁸ Fair Work Act 2009, section 134(1)(d)

⁹ Fair Work Act 2009, section 134(1)(f)

5. SAWIA'S EVIDENCE

We here consider the evidence of SAWIA's witnesses.

Fred Peacock

Fred Peacock is the Chief Executive Officer and Proprietor of Bream Creek Vineyard Pty Ltd since 1990, based in Bream Creek approximately 55 kilometres east of Hobart. In addition to managing the Bream Creek Vineyard. Mr Peacock operates Fred Peacock Viticulture and Consulting, a small vineyard labour hire agency to undertake mainly hand pruning, handpicking and bird net application and retrieval.

Mr Peacock has been involved in the Tasmanian wine industry for 40 years in a number of positions. In the mid-1970s he was employed by the Tasmanian State Government to assist with the establishment and development of the modern Tasmanian wine industry. In the early 1980s, Mr Peacock was appointed the Tasmanian State Government's first Viticultural Officer and remained in that role until 1989.

Mr Peacock was called by SAWIA to give evidence in support of SAWIA's claim to reduce the casual minimum engagement from 4 hours to 2 hours. Mr Peacock provided an affidavit on 19 October 2015¹⁰ and was cross-examined by United Voice on 11 July 2016.

Under cross-examination Peacock explained that although his evidence related to Tasmania, handpicking and hand pruning is much the same operation across the country.¹¹

During the peak operational periods of vintage and pruning from February to September, the number of casual employees commonly increase to 18 staff from 4-6 during off peak seasons¹².

Based on Mr Peacock's extensive experience in the wine industry, he explained that the 4 hour minimum casual engagement is very problematic for a business which undertakes hand pruning and hand picking in a climate subject to sudden changes in weather¹³.

Further, while he takes great care in assess the weather forecast, the Bureau of Meteorology is unable to provide a forecast with any high degree of certainty¹⁴, meaning that there may be very little forewarning of weather changes¹⁵.

Therefore, Mr Peacock must commence harvesting hoping that the weather will not rapidly change. However, if there is rain then work must stop which can happen after only two hours of work¹⁶.

¹⁰ Exhibit 181 (Fred Peacock)

¹¹ Evidence of Fred Peacock, Transcript 11 July 2016, PN586

¹² Evidence of Fred Peacock, Transcript 11 July 2016, PN590-592

¹³ Exhibit 181 (Fred Peacock) at 7

¹⁴ Exhibit 181 (Fred Peacock) at 9

¹⁵ Evidence of Fred Peacock, Transcript 11 July 2016, PN600

Mr Peacock explained that:

We cannot endure a situation where 4 hours in wages are paid for work not completed for long before the crop gets written off due to the escalating and non-productive costs. Once the crop is written off then none of the casuals get the harvesting work. In order to reduce the cost of not meeting the minimum engagement we have had to reduce the number of casual employees we engage at any one time.¹⁷

This could have severe financial implications as the company has to return to the vineyard and take another risk that they may not again meet the four hour minimum engagement, resulting in the company potentially having to pay up to 8 hours of wages for no more than 4 hours of productive work¹⁸.

However, being a rural industry, the wine industry does not have the luxury to decide when vintage commences and when the grapes are picked, this is dictated by climate and weather which in turn determines the maturity of the grapes. Mr Peacock's affidavit and evidence in the proceedings before the Full Bench demonstrates that wineries try to take advantage of any opportunity to pick the grapes during the vintage season even when there is a risk of rain:

It is imperative that in adverse seasons we take every opportunity to hand harvest the grapes whilst they are dry and still in acceptable condition.¹⁹

Yes, we have to take advantage of every available envelope during harvest time, and unfortunately at harvest time our decision to start at 8 am in the morning normally has to be made between 6 am and 6.30 am when Tasmania with daylight saving - and given that we pick later in the season - is often still dark, so it is very difficult for us to get that information to the best of our ability, and we have been caught out many a time. But we do need to take every opportunity to pick, because you don't often get that many opportunities down here in adverse seasons.²⁰

The current 4 hour minimum engagement is not only problematic taking the variable weather into account, but it has a direct impact on employment opportunities in rural and regional areas. Under cross-examination it was put to Mr Peacock that there would little interest amongst potential employees to work for 2 hours only, however Mr Peacock demonstrated that was an incorrect claim:

In the circumstances that you've indicated that there might be some benefits of engaging people on a two-hour engagement to do some of those additional tasks, so irrespective of the weather concerns, would you agree that in many cases it would not be viable for an employee to only work for two hours - only be provided with two hours' work?---I can completely understand that that may be the case with some employees, particularly if they had a distance to travel, but the comment was more made in relation to

¹⁶ Exhibit 181 (Fred Peacock) at 9

¹⁷ Exhibit 181 (Fred Peacock) at 11

¹⁸ Exhibit 181 (Fred Peacock) at 10

¹⁹ Exhibit 181 (Fred Peacock) at 8

²⁰ Evidence of Fred Peacock, Transcript 11 July 2016, PN623

local employees in areas where we work, where most of them are maybe only five minutes or a maximum of 10 minutes by car from a block; and in fact we have employees at our disposal that we sometimes don't hire because we don't have that minimum four hours available.²¹

[Emphasis added]

I can outline incidents where in this last season, since I made the affidavit, where we were desirous of getting employees during mid-afternoon when we had more fruit than we expected, but we also had to consider that they might only be there for two to three hours to help us finish and we would fall foul of the four-hour minimum.²²

[Emphasis added]

It is often hard to predict how long it will take to complete the harvesting of a block of wine grapes in a vineyard as this is dependent on a number of variables. Hence, there is a need to be able to call in additional vineyard workers to complete the harvest on time. The current 4 hour minimum engagement makes that unviable where the additional work would be less than the 4 hour minimum engagement.

Unfortunately with harvesting it's often very difficult to calculate the expected finish time. It's not until one starts to pick into the crop that the rate of progress becomes apparent, and that can be affected by, for example, the number of leaves on the vines, the volume of the fruit, how the canopy or the vines have been trained, in other words how easy it is to get to the fruit to pick. It can also be governed by the length of the rows and the time it might take to empty buckets, and also if there is a requirement to, for example, remove any diseased fruit, and that can slow the picking up considerably, as can weather conditions if it is particularly hot, particularly windy, or indeed particularly cold and showery even.²³

[Emphasis added]

Under cross-examination it was put to Mr Peacock that these variables could be predicated, which Mr Peacock in his response demonstrated was an incorrect claim:

So a number of those variables would be able to be predictable though, wouldn't they?---Not very many of them. Despite our best efforts in estimating crops, which we need to do for winery capacity, I'm afraid even after my experience it never ceases to amaze me sometimes how far we are out, but I also have to say that there are times when I'm very happy to report that we get fairly close. But in those instances we're not looking for extra labour because the maths works out fine. It's the circumstances where we find that 3 o'clock in the afternoon, for example, when we start to assess the situation, we realise that we have got very little chance of completing that crop with the current crew before knock off or before dark or whatever other circumstance, for example, the truck needing to leave the site.²⁴

[Emphasis added]

²¹ Evidence of Fred Peacock, Transcript 11 July 2016, PN611

²² Evidence of Fred Peacock, Transcript 11 July 2016, PN613

²³ Evidence of Fred Peacock, Transcript 11 July 2016, PN614

²⁴ Evidence of Fred Peacock, Transcript 11 July 2016, PN616

It was further put to Mr Peacock under cross-examination that where additional staff was needed with short notice it would not be possible to simply call in additional staff, a claim once again demonstrated Mr Peacock to be inaccurate:

In those sort of circumstances you wouldn't have the capacity to just pick up the phone and get extra staff at short notice, would you?---Yes, we do. Most rural areas, there are a number of people that we know that have worked for us in the past that either work small hobby farms or are semi-retired, and quite a few of them are quite happy, in fact they rather enjoy coming and picking and meeting the new pickers of the season, and this year in fact we did that on a couple of occasions. We called in at Bream Creek - we were picking on the Bream Creek Vineyard site and we called in a casual at 1.30 from Hobart, who was very happy to come down and had worked with us regularly in the past.²⁵

Although there are staff who are willing and able to come to the vineyard with short notice to perform additional harvesting work, if there is a risk that they would not be able to meet the 4 hour minimum engagement for example if there is less than 4 hours of remaining daylight in the afternoon then the final rows of fruit of would simply not get picked.²⁶

The consequence of having to leave the grapes unpicked was made clear by Mr Peacock's response to the following question by Vice President Hatcher²⁷:

VICE PRESIDENT HATCHER: So in that scenario, with what consequence? That is, when were they done?---I beg your pardon, your Honour?

You said you'd decided not to call them in and leave the final rows of fruit, so what's the consequence of that? That is, when was that work done?---The final rows of fruit weren't picked.

At all?---No, because when we pick the fruit for the winery we normally have to have a minimum batch size, which means if that fruit couldn't be added to the batch we were picking, then it would fall below the minimum batch size that the winery would accept.

[Emphasis added]

²⁵ Ibid

²⁶ Ibid

²⁷ Evidence of Fred Peacock, Transcript 11 July 2016, PN617-PN619

Jeremy Dineen

Jeremy Dineen is the Chief Winemaker and General Manager of Josef Chromy Wines, located in Relbia approximately 12 kilometres from Launceston in Northern Tasmania. Mr Dineen has held his current position for 10 years and has been working in the wine industry for 18 years.

Mr Dineen was called by SAWIA to give evidence in support of SAWIA's claim to reduce the casual minimum engagement from 4 hours to 2 hours. Mr Dineen provided a statutory declaration on 7 October 2015²⁸ and was cross-examined by United Voice on 17 August 2016.

During the peak operational periods of vintage from March to May and during pruning the winery employs up to 80 casual vineyard workers.²⁹

While the winery try to use existing casual staff from other parts of the business for vineyard work where appropriate, Mr Dineen explained that only a very small amount of staff from other parts of the business have the required skills, experience and interest in undertaking pruning and harvest work in the vineyard.³⁰

Mr Dineen's evidence establishes that the current 4 hour minimum engagement period is particularly problematic for cool climate vineyards with variable weather. Given that the pruning and harvesting are the major cost activities and are at risk of inclement weather and unexpected weather events, the winery no longer call in casual vineyard workers if there is any risk of rain. The winery cannot bear the risk that 60-80 casual employees have to be paid for 4 hours for only 2 hours of actual work.³¹

During the pruning season there are 5-10 days where up to 30 casual employees and during the harvest season 3-7 days where up to 60 casual employees have to be sent home early due to inclement weather and unexpected weather event³², equivalent to up to \$20,000 in wages for work not being performed.³³

In response to a question from Vice President Hatcher on how common it is that staff is sent home prior to the completion of the 4 hour minimum engagement, Mr Dineen provided the following evidence:

VICE PRESIDENT HATCHER: So how many cases have you actually had to send them home before they had done the four hours work to earn the four hours pay?---Recently none because we don't bring them in. So, for instance, last Monday, I think it was, we had rain forecast for late morning and late morning would potentially have arrived before the four-hour minimum engagement, so we didn't call any

²⁸ Exhibit 298 (Jeremy Dineen)

²⁹ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2058-PN2061

³⁰ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2063-2065

³¹ Exhibit 298 (Jeremy Dineen) at 8

³² Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2111-PN2012

³³ Exhibit 298 (Jeremy Dineen) at 11

pickers in. As it turned out, it didn't rain until 1 pm, so we could quite easily have had pickers in for five or five and a half hours. But previously we have had many occasions where the rain comes earlier than expected or completely unexpectedly and have sent people home after two and certainly three hours.³⁴

[Emphasis added]

Under cross-examination it was put to Mr Dineen that unless it rained above a certain amount, harvesting would not be precluded. The evidence by Mr Dineen demonstrates that even light rain is highly problematic given that all vineyards are on slopes making it slippery and potentially dangerous, particularly where there is machinery present in the vineyard.³⁵

So there are sort of occupational health and safety reasons for not picking in rain of any type?---Correct.³⁶

Apart from the safety aspect there are additional issues that precludes harvesting in rain – the potential for significant dilution of the grapes³⁷ and rainwater sitting in the bottom of each harvest bin adding to the weight – and as explained by Mr Dineen *“certainly no customer is going to want to pay for water when they're expecting to get high quality wine grapes.”*³⁸

Further Mr Dineen's evidence below demonstrates that rain is an equal disruption during the pruning season:

Just teasing that out, so it's the absence of the presence of machinery which means you can tolerate more sort of rain and more slipperiness pruning as compared with harvesting?---Well, there's less of a danger of the machinery/human interaction in terms of any either machinery slippage or one of the staff slipping in front of machinery there. But it's still even with a millimetre of rain at the moment the ground becomes quite muddy, quite difficult, and of course in the climate we're in, it's also quite cold and miserable and you can't really, when you're doing intricate jobs like cane pruning and wrapping and tying the cane down, you can't wear gloves to keep your fingers warm. So I suspect that many of the pruners would say they would far rather not work in any rain at all.³⁹

Presumably, even in pruning, there comes a point where you simply can't work effectively in rain?--- Correct, and that's only a few millimetres here.⁴⁰

Mr Dineen's evidence establishes that there has been a substantial reduction in hand harvesting from 60% prior to 2010 and now less than 35%.⁴¹ This is despite that the company would prefer for more grapes to be handpicked as it is preferable to the quality and the types of grapes grown as

³⁴ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2115

³⁵ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2127-PN2128

³⁶ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2129

³⁷ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2133, PN2142

³⁸ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2142

³⁹ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2131

⁴⁰ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2132

⁴¹ Exhibit 298 (Jeremy Dineen) at 9

demonstrated by the question from Vice President Hatcher and United Voice.

VICE PRESIDENT HATCHER: Sorry, Mr Blewett.

Is there any logistical reason why, for example, your operation couldn't harvest all the grapes mechanically?---We specialise in making sparkling wines and particularly using red grapes for sparkling wine you want to minimise any juicing or damage to minimise the pick-up of colour and phenolics which are the things that give you bitterness in sparkling wine or with any wine. So we generally will harvest the vast majority of sparkling by hand and we would prefer to harvest more table wine, Pinot, by hand as well.⁴²

Yes, but does the composition of that range of wines have an influence on the extent to which you machine harvest?---It can do to an extent, but all of those wines, our preference would be to have - in the winery - would be to have more hand-picked grapes.⁴³

[Emphasis added]

Under cross-examination potential reasons for the increase in machine harvesting and consequential reduction in hand-harvesting was put to Mr Dineen, including “maturing of the vines”⁴⁴, the vintage period being compressed⁴⁵, global financial crisis⁴⁶, price pressure⁴⁷. The evidence by Mr Dineen demonstrate that the above factors have had no role in the decision to reduce hand harvesting, but that the 4 hour casual minimum which commenced in 2010 has been the substantial reason for the increase in machine harvesting⁴⁸.

In response to a direct question on whether the company would undertake more hand harvesting with a lower minimum engagement, Mr Dineen’s evidence demonstrate that it would and that a lower minimum engagement would be a significant benefit:

I guess, would there be greater hand picking by your business if you had more flexibility engaging casual labour?---I think there would be, yes. Certainly we would prefer to pick more grapes by hand, particularly for sparkling wine. But even in those sort of early days of harvest, we're still getting significant amounts of rain days and, for us, the importance of picking time is - I mean, I stated earlier that we have got, perhaps, a wider window than other regions, but if the winery is fully booked for a week or two weeks and that time of harvest changes, the advantage of having even a portion of a pick into the winery before the rain comes, can be significant.⁴⁹

⁴² Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2082-2083

⁴³ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2098

⁴⁴ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2075

⁴⁵ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2076

⁴⁶ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2092

⁴⁷ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2092-PN2095

⁴⁸ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2103

⁴⁹ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2143

Steven Todd

Steven Todd is the General Manager for Kay Brothers, a small family winery in McLaren Vale, South Australia, founded in 1981. Steven Todd has been a General Manager for a number of SME companies for the last 12 years and has been with Kay Brothers since 2014.

Mr Todd was called by SAWIA to give evidence in support of SAWIA's claim to reduce the casual minimum engagement from 4 hours to 2 hours. Mr Todd provided an affidavit on 8 October 2015⁵⁰ and was cross-examined by United Voice on 11 July 2016.

Kay Brothers employs 13 staff in total, 4 whom are casual employees in the cellar door sales area⁵¹. Apart from 2 staff members, including Mr Todd, all staff members live locally approximately 15 minutes travel from the winery.⁵²

Mr Todd's evidence demonstrates that the 4 hour casual minimum engagement limits the ability for the company to provide staff training and development. When the company recently implemented a new health and safety system, the casual cellar door employees had to be called in on an extra day to accommodate other staff engagements and commitments and the fact that some of the staff only work on weekends for Kay Brothers.⁵³ Mr Todd explained that *"like any system like that we refresh it and have to have refreshment training. So it's not a case of one off and that's it, we would redo certain amounts of training every now and then."*⁵⁴

Under cross-examination it was put to Mr Todd that the difficulties with arranging staff training and development were very rare events and only a small issue. Mr Todd's evidence demonstrates that important staff training, development and meetings are directly impeded by the 4 hour minimum engagement and that the company has to limit such activities:

The circumstances you set out in your statement where you say you've had some difficulties at times where you've had to call casual staff to come in and do short training sessions. They're very rare events, aren't they?---No, no - - -⁵⁵

It's not a huge problem?---No, I don't agree with that. I think it's a huge problem. The difficulty is it's a catch 22. So I want to have what I consider good management practices which is trying to get the staff in to have that communication, tell them what's going on in the business, it's the same as I'm talking about, the staff training, that was just one example of that. So every time I want to try and get my casual staff in I have the same problem that I might want to talk to them for two hours, because four hours is a huge long

⁵⁰ Exhibit 180 (Steven Todd)

⁵¹ Exhibit 180 (Steven Todd) at 5

⁵² Evidence of Steven Todd, Transcript 11 July 2016, PN517-PN518

⁵³ Exhibit 180 (Steven Todd) at 5; Evidence of Steven Todd, Transcript 11 July 2016, PN561-PN563

⁵⁴ Evidence of Steven Todd, Transcript 11 July 2016, PN555

⁵⁵ Evidence of Steven Todd, Transcript 11 July 2016, PN556

session, and the four hour requirement naturally makes it - you (indistinct) time to do that. So I probably don't talk to my casual staff as a group as often as I would like to, just because there is that financial pressure if you like to not have to do it. The safety example was one of those where there was a lot of training to do in one - one go, so it probably made it - while it was essential because we had to do it, but probably easier than I would do in other ones, but I would like to do more discussions, more training, get the staff more involved in a group than I do now.⁵⁶

One event per year?---No, it's not one event per year, it's each event. I would like there to be more of them. What I'm saying is it might be one event per year now because we have that natural restriction to not want to do it.

[Emphasis added]

In relation to the cellar door sales operations, the 4 hour minimum engagement directly limits the ability for group bookings to be accepted to the extent that otherwise would be the case. Under cross-examination it was put to Mr Todd that he would have no difficulty finding enough work for a 4 hour engagement.⁵⁷ The evidence by Mr Todd demonstrates that the company struggles to find enough work for the minimum engagement, due to the unpredictability of the number of visitors to the cellar door in any given day.⁵⁸

While the company would like to accept all group bookings, with the current 4 hour minimum it is not viable to accept group bookings unless they are run consecutively or sequentially.⁵⁹ A group tasting session takes approximately 2.5 hours to run, for a small company like Kay Brothers it is not financially viable to roster an additional casual employee for 4 hours for only 2.5 hours of actual work.⁶⁰

While the company tries to manage the timing of group bookings, the evidence demonstrates that they do not have a large degree of control over the timing, as illustrated by the following question from Deputy President Kovacic:

In terms of - just if I take you to paragraph 7 of your witness statement you say you can't necessarily get consecutive bookings. Is that largely because it depends on what time the group wishes to visit the winery or can you say, "Look we can't do 2 o'clock but we can do 3 o'clock for this reason", and do you have any degree of control over it?---No, it's first in best dressed situation. So if somebody's already booked one at 2 o'clock and somebody rings up for 2 o'clock then you will try and negotiate either side, because that's convenient for them, so obviously around about that time, but that's the only control you've got.⁶¹

[Emphasis added]

⁵⁶ Evidence of Steven Todd, Transcript 11 July 2016, PN557

⁵⁷ Evidence of Steven Todd, Transcript 11 July 2016, PN524

⁵⁸ Evidence of Steven Todd, Transcript 11 July 2016, PN524-PN525

⁵⁹ Exhibit 180 (Steven Todd) at 8; Evidence of Steven Todd, Transcript 11 July 2016, PN544

⁶⁰ Exhibit 180 (Steven Todd) at 7-8

⁶¹ Evidence of Steven Todd, Transcript 11 July 2016, PN543

I suppose what I am getting at is to what extent can you say, well try and make them consecutive in terms of the timing, just sort of say we can't do that particular time, but if you came at this time we can accommodate you?--The situation you just explained it's a request, but it's not really - I wouldn't put it that we can control it. We can try and manage it when we get the request at the time, but if - if somebody rang up and wanted a booking at 11 o'clock and we said yes, the next person rings up and wants one at 2 o'clock we don't try and persuade them to come at 12, we'll say, "Yes we can do 11, we can 2". It's only when they conflict that you try and manipulate the time either side.⁶²

Mr Todd went on to explain that when making a group booking potential customers already have plans for the rest of day, giving the winery little control over the exact timing of the group session:

Most people have got in their head a plan of what they want to do today, so they'll be visiting cellar door X, Y, then (indistinct), or they're going somewhere for lunch and then doing something else and planning the day out.

Yes?--And they start making the phone calls, and depending where you are on that list of phone calls is where they go, because other people, I assume, are the same as us. So I can't do that, but I can do this, and they'll swap around and the only one that doesn't get moved is lunch. That's always the first phone call, so that's the fixed time. And so you're trying to, you know, to organise around them. I mean, it just depends where you are on that list of how flexible they can be. So you could be lucky and you say, "Well, I can't do that, but I can do 22". Ok great, we'll see you first. If you can't it's a case of no.⁶³

[Emphasis added]

The evidence by Mr Todd demonstrates that the current 4 hour minimum engagement prevents the company from running group sessions concurrently, but that a 2 hour engagement would address this:

The problem it restricts what extra you can do. So my problem with that is that you then say, well, okay, I've only got that staff member available so if I've got an extra visit that visit can't accommodate it timewise we lose that visit, we lose that custom, they don't come - - -

You mean if an unexpected visit?--No, even somebody rings up and says, "I want to be there at 2 o'clock" or "I want a special 10 person trip", and we say, "Well, we haven't got the 2 o'clock because somebody else is there, can you move?" "No, I can't. Okay, I'll go somewhere else." So I have no flexibility to say, "Well I can, but I can get somebody else to come in and serve you."⁶⁴

[Emphasis added]

And if it was the case that you could engage someone for two hours, would that mean that you might be able to take two bookings- - -?--Yes. - - -at the same time?--Yes.⁶⁵

⁶² Evidence of Steven Todd, Transcript 11 July 2016, PN544

⁶³ Evidence of Steven Todd, Transcript 11 July 2016, PN569-570

⁶⁴ Evidence of Steven Todd, Transcript 11 July 2016, PN547-PN548

⁶⁵ Evidence of Steven Todd, Transcript 11 July 2016, PN571-PN572

Anthony Grundel

Anthony Grundel is the General Manager for Murray Street Vineyards and has been with the company for 8 years, of which 2 years has been served in the current position. Murray Street Vineyards is a small winery founded in 2001 and based in Barossa Valley, approximately 70 kilometres north of Adelaide.

Mr Grundel was called by SAWIA to give evidence in support of SAWIA's claim to reduce the casual minimum engagement from 4 hours to 2 hours. Mr Grundel provided an affidavit on 8 October 2015⁶⁶ and was cross-examined by United Voice on 11 July 2016.

Murray Street Vineyards employ 4 casual employees across the winery, cellar door and functions and employ 3 additional casual employees in the winery from January to June to assist with vintage.⁶⁷

While there are jobs of less than 2 hours of duration that need to be done and could be offered to for example people living locally, Mr Grundel's evidence demonstrates that the current 4 hour minimum engagement makes it unviable to do so.⁶⁸

The issue starts when you have enough hours in the shift – enough work in the shift for four hours, but you've really got other little blocks of work where it's only two hours or three hours or things like that, not four, not enough for four, so rather than bringing in another person for four hours, you basically make the two that are working stay later, work longer, which is the reason why we're open till 7.00 – they can stay there till 7 o'clock at night, because they're still cleaning things up.⁶⁹

[Emphasis added]

In relation to group bookings, with a 2 hour minimum engagement it would be possible to bring in an additional staff member to cover off a large group booking.⁷⁰ Mr Grundel's evidence is that would be beneficial as currently they turn away large groups on the weekend.

From our point of view, we're happy to put extra staff on on the weekend. We'll run between two-and-a-half to three-and-a-half to four equivalent on a Saturday and Sunday for the extra foot traffic that we're likely to get; however, the ability just to bring in an extra staff member for a short period of time to look after the large groups, because at the moment we'll turn away large groups on a weekend, and a pre-booking on the weekend, just because we don't want to run the risk to our reputation at the end of the day, or dilute our experience because we can't deliver a premium experience to four groups of people that have walked in sort of unannounced because we've got all our staff tied up doing a - I don't have any spare staff because I don't have anyone allocated just to doing the large group that we've already pre-booked in. So it's all about managing people and time, and for us it's

⁶⁶ Exhibit 179 (Anthony Grundel) at 9-10

⁶⁷ Exhibit 179 (Anthony Grundel) at 5; Evidence of Anthony Grundel, Transcript 11 July 2016, PN438

⁶⁸ Exhibit 179 (Anthony Grundel) at 7-9;

⁶⁹ Evidence of Anthony Grundel, Transcript 11 July 2016, PN470

⁷⁰ Evidence of Anthony Grundel, Transcript 11 July 2016, PN473

about making sure that we always deliver the premium experience to everyone that walks into the cellar door.⁷¹
[Emphasis added]

In response to a question from Vice President Hatcher on the type of person who would be interested in able to come for a two hour work engagement with relatively short notice, Mr Grundel provided the following evidence:

VICE PRESIDENT HATCHER: Mr Grundel, could I just ask you this question? What's the profile of a person who would be able to do a cellar door shift at fairly short notice for two hours? What sort of person is that? Presumably it's not a school student?---Sorry, repeat the question, sorry.

Yes, I'm just looking at the sort of profile of the sort of person who might want to or would be able to come in at fairly short notice to do two hours of doing a cellar door activity. What sort of person is that?--
-From previous history from employing staff in cellar door there, quite often they're either people wanting to learn more about the wine industry, so they're keen to just get experience and work in cellar door and get a hands-on role; they're semi-retirees, so we've got, for example, I have a lady that works for me at the moment, one of my casuals who's a retired school teacher, and she just loves engaging with people, so she's happy to work casual shifts for us on a needs basis. The other side of it is we've had parents that just want a couple of afternoons in a shift just to work around sporting commitments and things like that. So there's an interesting mix of demographics that we have working for us.

[Emphasis added]

A 2 hour minimum engagement would also enable the winery to provide valuable work experience to local secondary school students and develop the required skills to work in the wine industry as demonstrated by Mr Grundel's evidence below:

But it's part of that developing the next pool of staff to come up in through the ranks, so to speak, so by doing that we can give them - whilst they're working in the kitchen, maybe preparing food platters and cleaning glasses, because every glass needs to be washed, cooled, polished before it goes back in the glass and checked to make sure it doesn't smell like cleaning fluid before you put wine in it, that's a very labour-intensive purpose. But what you also, in teaching the new staff, is the disciplines that come with running a cellar door and offering a premium experience. The sooner you can teach people that the better, and at the moment the ability to work with them in an intense short period - and again it's the ability to be able to teach them during the week, because quite often on a Saturday or Sunday you just don't have time to sit down and - -⁷²

⁷¹ Evidence of Anthony Grundel, Transcript 11 July 2016, PN479

⁷² Evidence of Anthony Grundel, Transcript 11 July 2016, PN483

Richard van Ruth

Richard van Ruth is the General Manager for Primo Estate in McLaren Vale, South Australia and has 20 years' experience in the wine industry. In addition to his position with Primo Estate, Mr van Ruth is also a board member of the McLaren Vale Grape Wine & Tourism Association and member of the South Australian Wine Industry Association (SAWIA) Executive Committee.

Mr van Ruth was called by SAWIA to give evidence in support of SAWIA's claim to reduce the casual minimum engagement from 4 hours to 2 hours. Mr van Ruth provided an affidavit on 12 October 2015⁷³ and was cross-examined by United Voice on 17 August 2016.

Primo Estate employs 6 casual employees in the cellar door and employs 3 additional casual employees in the winery during vintage.⁷⁴

Under cross-examination Mr van Ruth was asked about the specific tasks of a cellar door employee and it was put to Mr van Ruth that even if a staff member is called in specific group tasting session there would be little difficulty meeting the 4 hour minimum engagement. Mr van Ruth's evidence demonstrates that in an incorrect claim:

What I want to suggest is that given all of those tasks that are involved in cellar door tasting, isn't it likely that on most occasions there will be sufficient work to keep a staff member, even if they are called in for one 'Josef tasting' to be productively employed for the full four hours of a minimum engagement?--No, I'd disagree with that and I think paragraph 6 refers specifically to group bookings. So if we separate out, you know, walk-in traffic, you know, groups of maybe a couple, four, six, eight, who wander into the cellar door without a booking and would like to - decide to do the 'Josef Experience Tasting', our normal core cellar door staff will be able to facilitate that throughout their sort of shift of work. We do regularly get enquiries for larger group bookings which you can see that from our website on our private events pack. We have just reviewed that to scale it back because we found it very hard to accommodate the larger group bookings, you know, with the minimum engagement of four hours because, in reality, looking at a large group booking in insolation, we can set them up in a separate space to the normal cellar door set-up for the tasting, execute the tasting, pull it down, clean all the glasses, put it all away, that certainly doesn't take four hours to do.⁷⁵

[Emphasis added]

It was then put to Mr van Ruth that it would be difficult to identify a particular two-hour period where a casual employee could be engage if the minimum engagement was reduced. The evidence by Mr van Ruth demonstrates that is incorrect and that a two hour minimum engagement would appropriate for the pre-booked group tastings:

⁷³ Exhibit 299 (Richard van Ruth)

⁷⁴ Exhibit 299 (Richard van Ruth) at 4

⁷⁵ Evidence of Richard van Ruth, Transcript 17 August 2016, PN2196

So I take it it follows from that that identifying a particular two-hour period where you could engage a casual if the minimum engagement were lowered, would be a difficult exercise?---Only from the sense of walk-in customers. But, as you have alluded to just previously, when we have booked Josef Experience tastings and we can see there is a cluster of them coming in a particular window or we might have a group of 16 which is to do with the entire Josef seating area for us, we know when those people are going to arrive, we know how long they're going to stay. We know that's less than four hours. So in those circumstances, it would be useful for us to be able to employ someone just for two hours to come in, execute that group, and then leave us to get on with the rest of the day.⁷⁶

[Emphasis added]

⁷⁶ Evidence of Richard van Ruth, Transcript 17 August 2016, PN2251

6. AWU WITNESSES

We here consider the evidence of each of the AWU's lay witnesses. Their evidence demonstrates that:

- Neither of these witnesses are currently employees within the wine industry;
- All hearsay with no direct evidence provided from AWU members who are employees to support the statement they are not willing to work less than 4 hours on a shift⁷⁷;
- No statistical evidence provided about employment numbers in the wine industry, casual or otherwise, nor any comparison with previous years;
- Whilst casual employment is a legal and legitimate form of employment, the AWU does not support this form of employment;
- There is a mechanism within the *Wine Industry Award 2010* to allow casual employees to convert to part-time or full time where there is ongoing work available.

Adam Algate

Mr Algate has worked in the wine industry in Victoria and New South Wales as an employee at companies that are in the top 5 of Australia's largest wine companies by wine-grape intake, Treasury Wine Estates and Australian Vintage⁷⁸.

At paragraph 4 of Mr Algate's statement he tells us that he has never come across employees at a winery being sent home after they start work due to rainfall because there is plenty to do⁷⁹. Yet Mr Algate bases this on his experience having worked in and being an AWU organiser for AWU members who are employed at some of the largest wineries in Australia⁸⁰, with large scale operations across cellar production, packaging, maintenance and lab streams⁸¹. Mr Algate's evidence does not provide us with any direct evidence from employees let alone support the situation for employees in medium to small businesses, or work performed in vineyards and cellar doors at big, medium or small companies.

Mr Algate has provided no statistical information within his statement nor from the witness box to support the statements he makes at paragraphs 12 and 13. In fact throughout his statement Mr Algate provides guesstimates, he is unable to provide any factual numbers of employees within either the wine industry or more specifically from AWU membership as to who is employed as a casual versus who is employed part-time or full-time.

The Commission cannot place any reliance on Mr Algate's evidence in circumstances where it is statements about what he has noticed about the casual nature of employment in the wine industry.

⁷⁷ Page 13 2016 Australian and New Zealand Wine Industry Directory, Winetitles Media, Wine Industry Solutions

⁷⁸ Page 13 2016 Australian and New Zealand Wine Industry Directory, Winetitles Media, Wine Industry Solutions

⁷⁹ Evidence of Adam Algate, Transcript 11 July 2016, PN664

⁸⁰ Ibid 62 – 21 wineries are listed as Australia's largest wine companies by wine-grape intake: within the 21 appears Zilzie Wines, Treasury Wine Estates, Qualia Wines, Accolade Wines and Australian Vintage.

⁸¹ Evidence of Adam Algate, Transcript 11 July 2016, PN660-PN661

Ron Cowdery

Mr Cowdery has worked as a union organiser with the AWU in South West region of New South Wales. Within that region the AWU has members at companies that are in the top 11 of Australia's largest wine companies by wine-grape intake⁸².

Mr Cowdery's evidence does not provide us with any direct evidence from employees let alone support the situation for employees in medium to small businesses, or who perform work in vineyards (with some exceptions⁸³) and cellar doors (with the exception of De Bortoli) at big, medium or small companies⁸⁴.

Mr Cowdery makes the statement at paragraph 7 that farmers and wineries watch the weather closely and would always know well in advance of any rainfall that would allow them the ability to cancel work before anyone comes in. SAWIA witness Mr Fred Peacock gave evidence that he certainly does watch the weather closely but it does come with varying degrees of uncertainty, and therefore is not always accurate enough to make a call on labour requirements, that is to roster or not to roster⁸⁵. Later Mr Cowdery does concede that weather forecasts are not always 100% accurate and there can be variables such as forecasting more or less rain than actually falls.

Further in relation to vineyard work it must be pointed out that Mr Cowdery's evidence, that inclement weather does not necessarily affect work requirements, is based primarily on mechanical harvesting⁸⁶ and not hand picking of grapes as is the case for SAWIA witnesses Mr Peacock and Mr Jeremy Dineen.

Mr Cowdery's evidence regarding casual engagement at paragraph 9 supports the fact that if there was a two hour engagement casuals would still get the same amount of hours, they work predominantly 12 hour shifts⁸⁷.

⁸² Page 13 2016 Australian and New Zealand Wine Industry Directory, Winetitles Media, Wine Industry Solutions

⁸³ Evidence of Ron Cowdery, Transcript 11 July 2016, PN747

⁸⁴ Evidence of Ron Cowdery, Transcript 11 July 2016, PN735-PN747

⁸⁵ Evidence of Fred Peacock, Transcript 11 July 2016, PN600

⁸⁶ Evidence of Ron Cowdery, Transcript 11 July, PN752-PN753

⁸⁷ Evidence of Ron Cowdery, Transcript 11 July, PN771-PN778

7. STAND DOWN UNDER THE FAIR WORK ACT 2009

During the cross-examination of SAWIA witnesses' Fred Peacock and Jeremy Dineen it was put to them that they could rely on the stand down provisions in section 524 of the *Fair Work Act 2009*, as an alternative to a reduced minimum engagement. In particular it was suggested by United Voice that wine industry employers would be able to send home vineyard employees during vintage and pruning without pay where there was rainfall. However, United Voice did not refer to any case law or otherwise any relevant supporting documents to substantiate their claim in relation to the application of section 524.

Relevantly section 524 read as follows:

524 Employer may stand down employees in certain circumstances

- (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
 - (a) industrial action (other than industrial action organised or engaged in by the employer);
 - (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
 - (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

[Emphasis added]

In the Explanatory Memorandum to the *Fair Work Bill 2008*, there is some guidance on the application of section 524(1)(c). However, there is nothing to suggest that section 524 could be invoked on each occasion vineyard work is called off due to inclement weather or unexpected weather events which in the professional opinion of the wine industry employers makes it unsafe or otherwise inappropriate for the vineyard work to continue.

SAWIA submits that seeking to rely on section 524 on each occasion has to be called off due to for example heavy rain other significant weather is likely to result in industrial disputation and subsequent tribunal or court action. A much better approach is to set the casual minimum engagement on a level which is workable for the wine industry.

In response to a specific question by Deputy President Bull on the application of section 524, Mr Dineen explained why it questionable why section 524 would apply to weather events in the wine industry.

DEPUTY PRESIDENT BULL: Mr Dineen, are you aware of the stand down provisions under the Fair Work Act?---I have recently made aware of those stand down provisions.

Are they applicable in your circumstances or not?---Well, that's the reason that I have struck out paragraph 12 of that declaration. It's certainly applicable to machinery breakdowns, but when poor weather is forecast but you can't determine the exact timing of it within a day, I would be hesitant to say that that's applicable.⁸⁸

[Emphasis added]

⁸⁸ Evidence of Jeremy Dineen, Transcript 17 August 2016, PN2117-2118

8. CONCLUSION

SAWIA submits that the evidence demonstrates that the current 4 hour minimum engagement cause significant difficulty for the wine industry both in the relation to vineyard work and cellar door sales work. The current 4 hour minimum engagement does not cater for the variation and variability of the wine industry, particularly in relation to weather factors and the unpredictability of visitors and bookings in the cellar door.

SAWIA submits that it has provided probative evidence to demonstrate that the current 4 hour minimum engagement results in the Wine Industry Award 2010 not meeting the Modern Awards Objective, in particular considering “*the need to promote flexible modern work practices and the efficient and productive performance of work*”⁸⁹ and “*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*”⁹⁰.

SAWIA submits that a change in the minimum engagement for casual employees will not materially affect the safety net provided by the Wine Industry Award 2010. Casual employees would continue to be entitled to a number of minimum terms and conditions, including overtime and penalties, rest and meal breaks and casual conversion.

During pruning and harvest, weather permitting, there will be an ongoing need for casual employees to work 4-8 hours in the vineyard, or longer where necessary. In the cellar door there will be an ongoing need for casual employees to 4-8 hours. During the peak operational period of vintage casual cellar (production) employees will continue to be engaged to work shifts of up to 12 hours to complete the grape crush.

However, importantly with a 2 hour casual minimum engagement the wine industry will be able to carry out vineyard work even if there is a risk of inclement weather and ensure that a greater portion of the grapes that are ready to be picked end in production and are not left unpicked on the vines. It will also facilitate additional employment to casual employees to assist in the cellar door with group tasting sessions, covering of breaks, washing dishes and cleaning the cellar door.

⁸⁹ Fair Work Act 2009, section 134(1)(d)

⁹⁰ Fair Work Act 2009, section 134(1)(f)