

4 yearly review of modern awards

Hospitality Industry (General) Award 2010

Restaurant Industry Award 2010

Submission

Substantive claims

United Voice

1. This submission is made pursuant to the amended direction of the Fair Work Commission ('the Commission') on 3 July 2018 requiring any 'party' to file written submissions and any witness statements concerning outstanding substantive claims in relation to the 4 yearly review of the *Hospitality Industry (General) Award 2010* ('the Hospitality Award') and the *Restaurant Industry Award 2010* ('Restaurant Award') (collectively: 'the 2 awards').
2. This is our submission in relation to the remaining substantive matters for the award specific review of the 2 awards. We are not filing any witness statements.
3. We make this joint submission in relation to the 2 awards as there is some overlap in the claims in terms of relevant submissions.
4. On 6 October 2016, we filed draft determinations in relation to the 2 awards and we continue to rely on these determinations.

Background

5. We refer to the Commission's most recent summary document titled '*Proposed variations raised by each Party*' ('the Hospitality Summary') for the Hospitality Award dated 2 November 2017 and republished on 22 May 2018.
6. Likewise, we refer to the Commission's most recent summary document titled '*Proposed variations raised by each Party*' ('The Restaurant Summary') dated October 2017 and updated on 14 November 2017.
7. We refer here to the item numbers attributed to specific claims in each summary.
8. We have the following outstanding substantive claims:

Hospitality Award		
Item number	clause	Description of claim
46	Clause 21.1(b)	Our claim seeks an increase in the amount of the tool allowance. Pressed

47	Clause 21.1(b)(i)	Our claim seeks that the tool allowance the insertion of the words ‘ <i>or apprentice cook</i> ’ after the words [W]here a cook’ to include to those engaged as apprentices within the eligibility for the allowance. Pressed
51	Clause 27.1(e)	Variation dealing with annualised salary holders and access to records. Withdrawn. This claim concerns annualised salary holders and this issue is being dealt with in the annualised salary common issue.
53A	Clause 29.2(d)	The claim seeks a variation of spread of hours for part time employees. Withdrawn. This claim, or matters substantially similar, was traversed in the now concluded part time and casual common issue proceedings (AM2014/196 & 197).
54	Clause 30	This claim seeks a variation to the rostering clause to ensure casuals are formally included within the roster. Withdrawn. We note our comments concerning item 53A.
Restaurant Award		
12	Clause 13.2	This claim seeks a change to minimum engagement for casuals. Withdrawn. We note our comments above

		concerning the now concluded part time and casual common issue proceedings (AM2014/196 & 197).
13	Clause 24.3(a)	This claim seeks a variation to the tool allowance by the insertion of the words ‘ <i>cook or</i> ’ before the words ‘ <i>apprentice cook</i> ’ to include those engaged as cooks within the eligibility for the allowance. Pressed. Albeit with the qualification that the claim properly includes an increase in the amount of allowance payable in accordance with item 46 in relation to the Hospitality Award.
14	Clause 28	This claim concerns annualised salary holders and its reconciliation mechanism. Withdrawn. This claim is being dealt with in the annualised salary common issue
15	Clause 31.2(a)	This claim concerns reducing the maximum engagement of casual employees. Withdrawn. We note our comments above concerning the now concluded part time and casual common issue proceedings (AM2014/196 & 197).

9. In addition, in the Hospitality Award, there is a further substantive claim that has been transferred from the plain language redrafting proceedings¹ concerning clause 21.1(h) of the Hospitality Award titled ‘*Working away from usual place of work.*’ We deal with this matter first.

Hospitality Award

Clause 21.1(h) - working away from usual place of work

¹ 4 yearly review of modern awards – Restaurant Industry Award 2010 – Hospitality Industry (General) Award 2010 [2018] FWC 2761.

10. This is a substantive claim which has arisen in the plain language redrafting proceedings for the Hospitality Award. The claim concerns the substance of the current clause.

11. Clause 21.1(h) reads

(h) Working away from usual place of work

This clause applies where an employer requires an employee other than a casual to work at a place more than 80 kilometres from the employee's usual place of work.

In these circumstances the employer must pay the employee an amount equal to the cost of fares reasonably spent by the employee in travelling from the employee's usual place of work to the new place of work. However, the employer may recover any amount paid to an employee under this clause if the employee concerned leaves their employment or is dismissed for misconduct within three months of receiving such a payment.

12. This provision permits an employer to recover an amount paid to an employee who has incurred expenses by travelling at the employer's direction simply because they have left their employment within an arbitrary period of time. We rely on our submission filed on 8 June 2017 and for convenience reiterate the salient points made.

13. Clause 24.10(c) does not comply with the Act in a number of ways and on proper analysis is an objectionable term and must be deleted.

14. Clause 24.10(c) is not a term that may be included in a modern award.

15. Further, clause 24.10(c) is not a term that must be included in a modern award under Subdivision C.

16. Further, there is no provision in Subdivision B that permits the inclusion of a clause like clause 24.10(c). Section 139 of the Act provides for the types of terms that may be included in modern awards. Clause 24.10(c) is not a term that may be included in modern awards according so section 139 of the Act. That section makes no provision for terms that create liabilities for the employee to the employer.

17. Clause 24.10(c) contravenes subsection 326(1) and is a term that must not be included in a modern award under section 151 which prohibits certain terms about payments and deductions for benefits by employers from an employee. The clause is problematic as it permits an employer to deduct a sum from an employee's pay.

18. Section 326(1) provides that a term of a modern award has no effect to the extent that the term permits an employer to deduct an amount that is payable to an employee in relation to performance of work if the deduction is both unreasonable in the circumstances and directly or directly for the benefit of the employer. Section 326(1) provides as follows:

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

if either of the following apply:

(c) the deduction or payment is:

(i) directly or indirectly for the benefit of the employer, or a party related to the employer; and

(ii) unreasonable in the circumstances;

(d) if the employee is under 18--the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

19. Section 326(2) provides that the regulations ‘*may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable*’.

20. Regulation 2.12 of the *Fair Work Regulations 2009* (Cth) (‘the Regulations’) lists a number of circumstances in which a deduction is reasonable for the purposes of s 326(1) of the Act. The recovery of fares paid to the employee is not one of the circumstances prescribed by regulation.

21. Further, clause 24.10 (c) is unreasonable in any circumstance. It is unreasonable to permit an employer to recover an amount paid to an employee who has incurred expenses by travelling at the employer’s direction simply because they have left their employment within an arbitrary period of time. The employee has travelled, performed work and incurred expenses at the direction of the employer. How long their employment continues after the termination of their duties has not rational connection to reimbursement for that travel. The only beneficiary of clause 24.10(c) is the employer.

Tool allowance claims

22. We group here 3 claims that concern the tool allowances in the 2 award.

23. The current clause 21.1(b)(i) of the Hospitality Award reads:

(i) Where a cook is required to use their own tools, the employer must pay an allowance of \$1.55 per day or part thereof up to a maximum of \$7.60 per week.

24. On 6 October 2016, we filed a draft determination concerning item 46 and 47 of the Hospitality Summary which reads:

[2] Delete clause 21.1 (b) (i) and insert a new clause 21.1 (b) (i) as follows:

'Where a cook or apprentice cook is required to use their own tools, the employer must pay an allowance of \$2.25 per day or part thereof up to a maximum of \$11.20 per week.'

25. The current clause of the Restaurant Award 24.3(a) reads:

(a) Where an apprentice cook is required to use their own tools (and is not in receipt of a tool allowance), the employer must pay an allowance of \$1.73 per day or part thereof up to a maximum of \$8.49 per week.

26. Also on 6 October 2016, we filed a draft determination concerning this claim. The relevant part of the draft determinations reads:

Delete clause 24.3(a) and insert a new clause 24.3(a) as follows:

'Where a cook or apprentice cook is required to use their own tools, the employer must pay an allowance of \$2.25 per day or part thereof up to a maximum of \$11.20 per week.'

27. The *Registered and Licenced Clubs Award* 2010 has a tool allowance which is identical to the allowance in the Hospitality Award. We note that the future of the Clubs Award is indeterminate.

28. Our claims seek to align the allowances in the 2 awards. If the Commission accepts our submissions the result of this review will be that the 2 awards will have the same entitlement for apprentice cooks and cooks to a tool allowance when they are directed to use their own tools by their employer.

29. There is currently substantial similarity between the tool allowances in the 2 awards but significant and unjustified differences that warrant review.

30. Both are tool allowances and what is sought to be compensated is materially very similar. There is a degree of arbitrariness as to the amount of any such allowance and this is why the standard in other modern awards is the most relevant consideration. A historical approach

whereby award histories are reviewed with a view to extracting some scientific or mathematical justification as to what is a proper amount is unhelpful and otiose. A comparison of what comparable modern awards provide now is the most useful practical guide in this review.

31. Any concern that our claim is '*picking out of thin air*' an amount should be qualified by the amounts of money involved, the circumstances of the entitlement and the demonstrable fact it is entirely comparable with other tool allowances in other modern awards.
32. For the Restaurant Award, its tool allowance currently provides a maximum of \$407.52 per year to an apprentice assuming the apprentice takes 4 weeks annual leave and for the remaining 48 weeks is directed to use their own tools at work. Our claim would increase this amount to \$537.60 per year.
33. Lastly, the amounts sought will still be at the lower end of the amounts a tool allowance provides within other comparable modern award. Coffin makers covered by the *Funeral Industry Award 2010* are the least well provided for, their possession and use of coffin making tools receiving only \$5.17 per week. Stone masons covered by the *Building and Construction General on-site Award 2010* are the most generously compensated and receive \$31.69 per week.
34. A tool allowance seeks to provide some compensation for the disutility that an apprentice or cook experiences when directed to use their own tools at work. The disutility concerns the initial cost of the tools, some component for wear and tear and the employee owning and maintaining a tool essential for the performance of work that the employer directs the employee to do. Both clauses of the 2 awards provide that where the employer '*requires an employee to provide ... tools, knives, choppers, implements, utensils and materials, the employer must reimburse the employee for the cost of purchasing such equipment.*'² The initial cost of the tools is not necessarily excluded by the allowance as employees who are engaged with their tools and then directed to use them will not be compensated for the cost of purchase necessarily. Accordingly, the tool allowance is partly the amortisation of the initial cost of a collection of tools but deals with the more unquantifiable costs and benefits associated with an employee rather than an employer providing and maintaining specialist trade tools.
35. The employee is responsible for the tools replacement and keeping the tools in usable condition. A chef's knife must be periodically sharpened. The employee also manages the risk of theft and replacement. Part of the utility of a tool allowance for an employer is that the allowance absolves the employer from these ongoing responsibilities.

² Hospitality Award, clause 21(b)(ix); Restaurant Award, clause 24.3(i).

36. There is also the incentive such an allowance creates for the development and maintenance of trade skills and efficiencies which benefit both the employee and the employer. There are efficiencies associated with the worker using good quality tools that he or she is familiar with. We elaborate on this matter below.
37. When reviewing tool allowances in other modern awards, it is impossible to say that the low rate of the tools allowance in the 2 awards is due to the requirement that the employer must pay for the tools if the employee is directed to use their own tools. Some modern awards contemplate reimbursement, others do not. The absence of a clear provision in a modern award stating that an employer must reimburse an employee when directed to buy tools and use those own tools does not resolve the issue. There would be a clear question as to the reasonableness of any direction made by an employer to an award reliant employee to buy an expensive set of tools for work for effectively the exclusive short term use for the employer's work. In practise, it is likely employers would be reimbursing employees directed to buy expensive tools. Having to 'prove' what is the industrial practice across all relevant modern awards here concerning tools of trade is inappropriate.
38. The current tool allowances in the 2 awards are by any reasonable assessment discordant with each other. For what should be broadly similar allowances, in related modern awards, they provide for the payment of different amounts, the basis of eligibility is different and the CPI factor applied is different. There does not appear any discernible rational justification for these differences and resolution of such anomalies is an appropriate object of 'review' within a 4 yearly review. Modern award factors 134(1)(e) and (g) are relevant to harmonising the tool allowance for persons working as cooks and apprentices in restaurants and hospitality.
39. In award modernisation, the Hospitality Award was 'made' within the context of the Australian Industrial Relations Commission's ('the AIRC') treatment of the catering industry, liquor & accommodation industry, restaurants (including Clubs) as a priority industry. It is unnecessary here to explain why the Restaurant Award was made later.
40. On 12 September 2008, in the initial exposure draft of the Hospitality Award³ released by the AIRC, there was a clothing equipment and tool allowance at clause 21.1(b) in identical terms to current clause and providing \$1.55 per day and a maximum \$7.60 per week. There is a note under the draft clause in the exposure draft that reads:

[Note: This allowance appears out of date. It is intended that it be brought up to date and converted to a percentage of the standard rate]

³ http://www.airc.gov.au/awardmod/databases/hospitality/Exposure/Hospitality_Exposure_Draft.pdf

41. On 19 December 2008, the Award Modernisation Full Bench⁴ noted in its decision making the Hospitality Award:

Allowances

[74] The consolidated request requires the Commission to include an appropriate method or formula for automatically adjusting relevant allowances when minimum wages are adjusted. The exposure drafts included provisions which expressed allowances as a percentage of a standard rate. This would ensure that where the standard rate was altered allowances were adjusted accordingly. The draft provision applied to all allowances, including those that are expense-related. In relation to allowances which are expense-related, it is obvious that adjustment by reference to wage increases would not directly reflect increases in relevant price levels. Given the relative magnitude of the increases, however, the differences would not be great. Any significant disadvantage could be addressed in periodic award reviews. Expressing expense-related allowances as a percentage of the standard rate would ensure that allowances would not need updating in the normal course. Almost without exception, the main union and employer representatives are opposed to the adjustment of expense-related allowances in line with wages. For that reason we have decided to provide for the adjustment of expense-related allowances by reference to the Consumer Price Index. The terms of the provision will be standard, allowing for changes in each allowance by reference to the change in a specified index. We set out as an example the provision which appears in the Hospitality Industry (General) Award 2010:

“Adjustment of expense-related allowances

At the time of any adjustment to the standard rate, each expense-related allowance shall be increased by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.

The applicable index figure is the index figure published by the Australian Bureau of Statistics for the Eight Capitals Consumer Price Index (Cat No. 6401.0), as follows:

Allowance

Applicable Consumer

⁴ Award Modernisation (AM2008/1-2) [2008] AIRCFB 1000 at [74].

Price Index figure

Meal allowance

*Take-away and fast foods
sub-group*

*Clothing, equipment and
tools allowance*

*Clothing and footwear
group*

Vehicle/travel allowance

*Private motoring sub-
group*

42. The issue of what should be the indexation factor for the Award's tool allowance was not a subject of any contest in the making of the instrument. We have been unable to find any rational justification as to why in the Hospitality Award an allowance related to kitchen tools is indexed to clothing and foot wear.
43. A summary of the tool allowances in various other modern awards, relevant extracts and the indexation factor used is attached at annexure marked 'A'. Almost all other tool allowances are indexed to the CPI that the Australian Bureau of Statistic ('ABS') generates for 'tools and equipment for (the) house and garden component of household appliances, utensils and tools sub-groups' ('tool CPI'). The exceptions are the Clubs Award which as noted is in similar terms to the Hospitality Award and the allowances in the *Building and Construction General on-site Award 2010* which apply a city CPI rate.
44. In predecessor awards for the Hospitality Award and in modern awards generally contained a tool allowances, the indexation factor used was a measure related to tools and, in the past, was sometimes explicitly chef's tools. This appears logical as an allowance related to a particular thing should be indexed according to the value of the item notwithstanding that the allowance is not an amortisation of the cost of the thing.
45. The tool allowance in the Hospitality Award is the only such allowance that is indexed by reference to the price of clothing and footwear. This appears to be a mistake and occasioned by the placement of the allowance in a clause that also deals with clothing.
46. Since the Hospitality Award was made and to date, the amounts payable under clause 21(b)(i) has remained static. The same amount is paid today as was noted on 19 December 2008 when the award was made.
47. Since 2010, the CPI for clothing and footwear has been consistently negative whereas the CPI for tools and equipment has been more generally positive. The difference in the CPI factors alone does not appear to completely account for the lack of change in the tool allowance in the Hospitality Award and it may have simply not been indexed. A copy of the quarterly CPI

made by the ABS for clothing and footwear; and for tools and equipment is attached at annexure marked 'B'.

48. The Restaurant Award was made in stage 4 of award modernisation due to the sector being part of the variation of award modernisation request under section 576C(4) on 28 May 2009.
49. The AIRC did address the tool allowance or more correctly the draft clause in which it appears and noted in a statement issued on 25 September 2009⁵ concerning the exposure draft of the Restaurant Award the '*clothing, equipment and tools (allowance), which we included in the form proposed by the R&CA (Restaurant and Catering Association) with one minor modification.*'⁶
50. In reviewing the draft *Restaurant and Catering Industry Award 2010* lodged by the Restaurant and Catering Association ('RCA') on 24 July 2009 the main discernible difference between clause 14.1 which contains the tool allowance in the RCA draft and clause 24 of the exposure draft published by the AIRC on 25 September 2009 is that in the RCA draft the applicable consumer price index figure for the clothing, equipment and tools allowance is the clothing and footwear group CPI whereas in the AIRC's exposure draft uses the tools component of the household appliances utensils and tools sub-group CPI. This appears to be the minor correction made by the AIRC that took place when it otherwise adopted the RCA draft of the clause.

Item 46 of the Hospitality Summary and Item 13 of the Restaurant Summary review of the amount of the allowance.

51. In the exposure draft published on 12 September 2008 of the Hospitality Award, the AIRC identified that the current amounts of the tool allowance as '*out of date*' and requiring updating. The same amount was initially applied to the Restaurants Award and due to the use of a more appropriate indexation factor, the amount has risen. The statement by the AIRC in 2008 that the amounts are '*out of date*' applies equally to the both awards today. We note that intention appears to have been to link the allowance to the standard rate which would have meant that the indexation factor would have been related to wages. This would have resulted in indexation well above any CPI measure.
52. The modern award standard is relevant and while what the tool allowance compensates for is esoteric, the fact that the allowance in both awards is now clearly below what is paid in other modern awards invites review.

⁵ Statement - Award Modernisation [2009] AIRCFB 865.

⁶ AS above at [212].

53. We summarise below some relevant tool allowances and the CPI applied.

<i>Aged Care Award 2010</i>	\$11.45 (chefs and cooks) Tools CPI
<i>Building and Construction General on-site Award 2010</i>	Stone masons \$31.69 Plasterers \$26.20 Bricklayers \$22.49 Roof tilers \$16.60 Sign writers \$7.61 Eight Capitals CPI
<i>Funeral Industry Award 2010</i>	\$5.17 Tools CPI
<i>Gardening and Landscaping Services Award 2010</i>	\$13.52 (tradesperson) Tools CPI
<i>Hair and Beauty Industry Award 2010</i>	\$8.99 (employee, not specified) Tools CPI
<i>Health Professionals and Support Services Award 2010</i>	\$11.45 (chefs and cooks) Tools CPI
<i>Higher Education Industry General Staff Award 2010</i>	Reimbursement
<i>Local Government Industry Award 2010</i>	\$19.00 Tools CPI
<i>Manufacturing and Associated Industries Award 2010</i>	\$15.29 (trade persons) Tools CPI
<i>Plumbing and Fire Sprinkler Award 2010</i>	\$22.50 Tools CPI
<i>Oil Refining and Manufacturing Award 2010</i>	\$15.29 Tools CPI

54. The task that the Commission is performing in reviewing these allowances is determining whether the allowances are within the context of the modern award provides a fair and relevant safety of terms and conditions. The allowances are not a critical term or condition but significant and worth preserving as a term of both modern awards.

55. In terms of the modern awards objective such an allowance is characterised as a matter that is apt to ‘*promote flexible modern work practices and the efficient and productive performance of work.*’⁷ Applying a more traditional analysis, the allowance is in aid of the trade skills of cooks, the transportable nature of those skills and the dependence of those trade skills on good tools of trade. For example, knife skills are a component of skilled cookery and dependent on the cook’s facility with a good knife.
56. Since 2010, the CPI for clothing and footwear has been consistently negative where the CPI for tools and equipment has been more generally positive. The difference in the CPI factors does not appear to completely account for the lack of change in the tool allowance in the Hospitality Award and it may have not been indexed. There was discussion in award modernisation about making these allowances wage related. Had this been done, these allowances would now be worth considerably more.
57. The use of an indexation factor related to clothing and foot wear for the Hospitality Award tools allowance is inappropriate and not justifiable.
58. Both allowances are, from our review, close to the least generous of comparable tool allowances in other modern awards. For the reasons noted above, the Commission should in this review amend the allowances in line with our draft determinations. The statement by the AIRC on 12 September 2008 that the current amounts in the Hospitality Award were ‘*out of date*’ is something of considerable significance that should now invite review. The statement is more than marginalia in the context of later statements in award modernisation concerning the standard rate and a review now of other tool allowances now indicates the paucity of the allowances and that the allowances continue to be ‘*out of date*’.
59. The error whereby the wrong CPI factor is applied in the Hospitality Award also invites review.

Item 47 – inclusion of apprentices in the Hospitality Award tool allowances

60. What is item 47 in the Hospitality Summary concerns an aspect of our draft variation that seeks to include apprentices within the class of persons who are eligible to be paid the allowance. The following matters are noted in support of this claim.
61. The provisions of clause 21.1(b) dealing with special clothing and laundry expenses already applies to apprentices as the entitlement is phrased broadly in terms of an ‘*employee*’.
62. The allowance is paid to a cook who is required by the employer to use tools. The allowance is only payable in the limited circumstances where the possession of certain tools is a condition of employment and in effect a direction by the employer to the employee.
63. An apprentice is paid the least, usually young, and if directed to use an expensive tool of trade, the employee who is most deserving of some compensation for the direction. Further,

⁷ Paragraph 134(1)(d).

there is utility in encouraging an apprentice to develop in their trade by providing support for the maintenance of professional tools of trade.

64. The Restaurant Award only entitles apprentices to a tool allowance which appears to recognise the utility in assisting those commencing their careers as cooks.

Item 13– inclusion of cooks in the Restaurant Award tool allowance.

65. Item 13 of the Restaurant Award Summary concerns the insertion of the ‘*cooks or*’ in clause 24.3(a) of the Restaurant Award. Discordantly, with the Hospitality Award, the Restaurant Award only provides a tool allowance to apprentices.

66. Most tool allowances relate to working trades people perform and not only apprentices.

67. In terms of the plausible justification of a tool allowance as an aid in encouraging and maintaining trade skills, the inclusion of cooks is justified.

68. As noted above, the allowance is only payable effectively if the employer chooses to direct an employee to use their own tools.

69. The absence of ‘cooks’ within the entitlement appears anomalous and should be corrected in this review.

Merit review

70. As noted, we have not filed any witness statements. The comments here are principally directed to our submission concerning the tool allowance in the 2 awards.

71. The 4 yearly review is not an *inter partes* process but a ‘*review*’ that the Act requires the Commission to perform. The use of the term ‘*parties*’ is an administratively appropriate concept in ensuring stakeholders participation but nothing else. Further, a concept like ‘*a party has failed to make out its case*’ has limited practical application as ‘*the case*’ is always a merit one within the provenance of the Commission.

72. The Full Federal Court in *Shop, Distributive and Allied Employees Association and Anor v The Australian Industry Group and others*⁸ (‘the Federal Court Penalty Rates judgment’) observed:

The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2)(a). In that context “review” takes its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”. Consequential upon a review the FWC may exercise the powers in s 156(2)(b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2)(a).

⁸ [2017] FCAFC 161.

73. We have not here supplied expert evidence concerning the cost of tools now as opposed to 2010 or the award histories of other tool allowances in other modern awards. Not unsurprisingly, this type of evidence is hard to locate. Contextualising, what the allowance is, its relative significance within the overall safety net of terms and conditions: it can and should be beneficially updated without the need for additional justification. More probative evidence should be properly required for a variation for a more critical term or condition such as penalty rates or when the Commission is considering whether to abolish a long standing category of award regulation. With something like a tool allowance, the Commission can and should act decisively and apply its skill and status as a specialist tribunal.
74. At the end of Federal Court Penalty Rates judgment, the Full Federal Court notes under the heading ‘*Another observation*’:

In the context of the present decision-making statutory regime, judicial recognition can be given to the expertise of the FWC, especially in circumstances where the legislature has expressly left to the FWC the task (for example) of “ensur[ing] that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions” (s 134(1)). The task of ensuring that modern awards comply with the standards set by s 134(1) and the task of making a judgment as to what is “fair and relevant” is not entrusted by the legislature to this Court.

Whilst retaining ultimate judicial oversight of decisions of statutory decision-makers, “great weight” can be given to the factual assessments made by the Full Bench in the present matter.⁹

75. In terms of merits review, there is ample material on which the Commission can now make a determination to vary the allowance in the 2 awards so that it provides an amount more, rationalises the entitlements and ensures that an appropriate indexation factor is applied.

United Voice

24 July 2018

⁹ As above at [111] and [112]

Annexure A

Award	Amount	Linked to		
<i>Hospitality Industry (General) Award 2010</i>	\$7.60 (cook)	CPI, Clothing and footwear group		
<i>Restaurants Industry Award 2010</i>	\$8.49 (apprentice cook)	CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group		
<i>Aged Care Award 2010</i>	\$11.45 (chefs and cooks)	CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group		
<p><i>Aged Care Award 2010</i></p> <p>Clause 15.6 Tool allowance</p> <p>A tool allowance of \$11.45 per week for the supply and maintenance of tools will be paid to chefs and cooks who are not provided with all necessary tools by the employer.</p>				
<i>Building and Construction General on-site Award 2010</i>	Stone masons \$31.69 Plasterers \$26.20 Bricklayers \$22.49 Roof tilers \$16.60 Sign writers \$7.61	Eight Capitals Consumer Price Index		
<p><i>Building and Construction General on-site Award 2010</i></p> <p>20.1 Tool and employee protection allowance</p> <p>(a) A tool allowance must be paid for all purposes of the award in accordance with the following table:</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 70%;">Classification</td> <td style="width: 30%;">Tool</td> </tr> </table>			Classification	Tool
Classification	Tool			

	allowance \$ per week
Artificial stoneworker, carpenter and/or joiner, carpenter-diver, carver, bridge and wharf carpenter, floor sander, letter cutter, marble and slate worker, stonemason or tilelayer	31.69
Caster, fixer, floorlayer specialist or plasterer	26.20
Refractory bricklayer or bricklayer	22.49
Roof tiler, slate-ridger or roof fixer, tradespersons in the metals and engineering construction sector	16.60
Signwriter, painter or glazier	7.61
<p>(b) The above allowance does not include the provision of the following tools or protective equipment. Where the following tools or protective equipment are provided by the employee then the employee must be reimbursed for the cost of such tools or protective equipment by the employer, or alternatively the employer may elect to provide such tools or protective equipment:</p>	
<p>(i) Bricklayers:</p> <ul style="list-style-type: none"> ▪ scutch comb; ▪ hammers (excepting mash and brick hammers); ▪ rubber mallets; and/or ▪ T squares. 	
<p>(ii) Carpenters and joiners:</p> <ul style="list-style-type: none"> ▪ dogs and cramps of all descriptions; ▪ bars of all descriptions; ▪ augers of all sizes; ▪ star bits and bits not ordinarily used in a brace; ▪ hammers, except claw hammers; 	

- glue pots and glue brushes,
- dowell plates;
- trammels;
- hand and thumb screws;
- spanners; and/or
- soldering irons.

(iii) Stonemasons:

- all cutting tools, except mash hammers, squares, pitching tools and straight edges up to four feet (1.2 metres) in length. On completion of engagement the cost of having all cutting tools sharpened; and/or
- jet sprays or some other suitable device for keeping the stone wet when using pneumatic surfacing machines and lathes.

(iv) Plasterers:

- all floating rules, trammels, centres, buckets and sieves. Stands for plasterers' mortar boards not less than 76 centimetres from the ground or where practicable and safe from a scaffold level; and/or
- overalls and the approved brush and roller to perform the work when required to brush on to walls and ceilings, bondcrete, plasterweld or similar substances.

(v) Tradespersons in the metals and engineering construction sector:

- power tools, special purpose tools, and precision measuring instruments for the use of tradespersons and for sheetmetal workers, snips used in the cutting of stainless steel, monel metal and similar hard metals.

A tradesperson will replace or pay for any tools supplied by their employer if lost through their negligence.

(vi) Civil construction employees:

- waterproof protective clothing required by an employee for particular tasks being performed;

- gloves, overalls, basil aprons and other appropriate protective clothing for employees using toxic substances, bitumen, tar, green timber, second-hand timber or bricks;
- a light coat or jacket with high visibility red markings for employees engaged on road work and/or railway work where traffic is not excluded by the use of continuous barriers or fences; and/or
- adequate detergents and solvents for the removal of excessive dirt, bitumen, emulsions, paint and similar substances from the employee's person.

Mess personnel will be reimbursed for the cost of purchasing at least three sets of appropriate clothing which will be laundered and maintained by the employer. These items will include shorts, shirts, trousers, aprons and caps. The provisions of this subclause do not apply where the items of clothing are provided free of charge by the employer. The items will remain the property of the employer.

(vii) All employees:

- all power tools and steel tapes over six metres;
- gloves and hand protective paste for employees engaged in handling hot bitumen, creosote, oiled formwork, refractory repair work and in washing down brickwork;
- protective clothing for employees required to use muriatic acid;
- suitable material and/or coloured glass for the protection of employees working on oxyacetylene or electric arc welding;
- suitable screens to protect employees from flash where electric arc operators are working;
- gas masks for employees engaged upon work where gas is present; and/or
- hand protective paste for any painter, signwriter, plasterer or glazier who requires its use.

(viii) All employees other than refractory bricklayers

Where employees are required either by the employer or by legislation to wear steel toe capped safety boots the employer will reimburse employees for the cost of purchasing such boots on commencement of work. Subject to fair wear and tear, boots will be replaced each six months if required and sooner if agreed.

(c) An employee required to use toxic substances covered by clause 22.2(i) in surroundings where there is an absence of adequate natural ventilation must be provided with:

- (i) an approved type of respirator and/or an approved type of hood with airline attached;
- (ii) protective clothing as approved by the relevant safety authority;
- (iii) soap and washing materials;
- (iv) pneumatic rubber tyred wheelbarrow for loads of bricks and materials;
- (v) overalls where necessary, when bricklayers are engaged on work covered by clauses 22.2(m) and 22.2(n).

(d) Special conditions to apply to bricklayers engaged on construction or repairs to refractory brickwork

The following special conditions will apply to bricklayers engaged on construction or repairs to refractory brickwork instead of clause 20.1(b)(viii) dealing with safety boots:

- (i) after six weeks employment, and on request from the employee, an allowance of \$89.59 must be provided for the purchase of boots. The same allowance must be provided to cover the cost of replacement boots, provided that the allowance need not be paid more than once in any six month period dating from the time the allowance is first provided. The allowance is not payable where the employer provides boots; and/or
- (ii) employees provided with the allowance, or the boots, will accrue credit at the rate of \$4.48 per week from the date of the request. An employee leaving, or being dismissed, before 20 weeks' employment after the date of the request will repay the difference between the credit accrued and the \$89.59; and
- (iii) an employer must reimburse an employee for an x-ray once every six months, if requested by an employee engaged in refractory brickwork, or working in a tuberculosis home or hospital. Such x-rays may be taken during

working hours and count as time worked. An employee who ceases work in a tuberculosis home or hospital may also request an x-ray on cessation of work.

....

20.3 Compensation for clothes and tools

(a) An employee whose clothes, spectacles, hearing aids or tools have been accidentally spoilt by acid, sulphur or other deleterious substances, fire, molten metal or corrosive substances, must be paid such amount to cover the loss suffered by the employee as may be agreed upon between the employee and the employer.

(b) An employee must be reimbursed by the employer to a maximum of \$1838 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer’s direction in a room or building on the employer’s premises, job or workshop or if the tools are lost or stolen while being transported by the employee at the employer’s direction, or if the tools are accidentally lost over water or if tools are lost or stolen during an employee’s absence after leaving the job because of injury or illness, or where the employee does not report for work because of illness or accident and has advised the employer of such absence.

(c) An employee transporting their own tools must take all reasonable care to protect those tools and prevent theft or loss.

(d) When an employer requires an employee to wear spectacles with toughened glass lenses the employer must pay the cost of the toughening process.

(e) For the purposes of this clause:

(i) only tools used by the employee in the course of their employment will be covered by this clause;

(ii) the employee will, if requested to do so, furnish the employer with a list of tools so used;

(iii) reimbursement will be at the current replacement value of new tools of the same or comparable quality; and

(iv) the employee will report any theft to the police prior to making a claim on the employer for replacement of stolen tools.

<i>Gardening and Landscaping Services</i>	\$13.52 (tradesperson)	CPI, Tools and equipment for house and garden component of
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<i>Award 2010</i>		the household appliances, utensils and tools sub-group
<p><i>Gardening and Landscaping Services Award 2010</i></p> <p>15.3 Tool allowance</p> <p>(a) Tradespersons must be paid a tool allowance of \$13.52 per week, for all purposes of the award.</p> <p>(b) This allowance does not apply where the employer provides all the tools reasonably required by the tradesperson to perform all the functions of the tradesperson’s employment.</p> <p>(c) An employee provided with tools of the trade by the employer is not responsible for the loss of such tools if outside the control of the employee.</p> <p>(d) An employee provided with tools of the trade by the employer will replace all or any tools of trade lost due to negligence of the employee.</p>		
<i>Hair and Beauty Industry Award 2010</i>	\$8.99 (employee, not specified)	CPI, Tools and equipment for house and garden component of household appliances, utensils and tools sub-group
<p><i>Hair and Beauty Industry Award 2010</i></p> <p>21.10 Tool allowance</p> <p>(a) The employer must reimburse the employee for the cost of all electrical equipment necessary for carrying out their work. This provision does not apply where electrical equipment is provided at the employer’s expense.</p> <p>(b) Where an employee is required to use their own tools the employer must pay to the employee a tool allowance of \$8.99 per week.</p>		
<i>Health Professionals and Support Services Award 2010</i>	\$11.45 (for chefs and cooks)	CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group

Health Professionals and Support Services Award 2010

18.12 Tool allowance

A tool allowance of \$11.45 per week for the supply and maintenance of tools will be paid to chefs and cooks who are not provided with all necessary tools by the employer.

*Higher Education Industry
General Staff Award 2010*

Reimbursed full cost of purchasing/suppling tools (Storage services; grounds/gardeners/farm staff; maintenance staff; and trades staff).

N/A

Higher Education Industry General Staff Award 2010

Schedule C

Tools Storage services; grounds/gardeners/farm staff; maintenance staff; and trades staff.

Reimbursed full cost of purchasing/supplying tools

Will be fully reimbursed for the cost of purchasing or supplying tools required by the employer in the course of work

Allowance does not apply if such tools are provided by the employer

*Local Government Industry
Award 2010*

\$19.00

CPI, tools and equipment for house and garden component of the household appliances, utensils and tools sub-group

Local Government Industry Award 2010

15.3 Tool allowance—tradespersons and apprentices

(a) Where the employer requires a tradesperson or an apprentice tradesperson to

supply and maintain tools ordinarily required by the employee in the performance of their duties as a tradesperson, the employee will be paid an additional weekly amount of \$19.00.

(b) This provision will not apply where the employer provides the tradesperson or apprentice with the required tools or while employees are absent from work.

*Manufacturing and
Associated Industries
Award 2010*

\$15.29 (tradesperson)

CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group

Manufacturing and Associated Industries Award 2010

(c) Tool allowance—tradespersons and apprentices

Clause 32.1(c) and (d) provides:

(c) Tool allowance—tradespersons and apprentices

(i) Except as provided elsewhere in clause 32.1(c), a tradesperson must be paid \$15.29 per week extra for supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(ii) The allowance in clause 32.1(c)(i) does not apply to an employer who had a practice as at 5 November 1979 of providing all tools required by a tradesperson or an apprentice in the performance of their work. Such an employer is entitled to continue this practice.

(iii) In relation to an employer not referred to in clause 32.1(c)(ii), such an employer may reach agreement with an individual tradesperson or apprentice to provide all of the tools required in the performance of their work. In such circumstances, the tool allowance is not payable.

(iv) The allowance in clause 32.1(c)(i) applies to an apprentice on the same percentage basis as set out in Column 1 of clause 25.5 or Column 1 of clause 25.6 as applicable.

(v) An employer is to provide for the use of a tradesperson or an apprentice all necessary power tools, special purpose tools, precision measuring instruments and, for a sheet metal worker, snips used in the cutting of stainless steel, monel

metal and similar hard metals.

(vi) A tradesperson or apprentice is to replace or pay for any tools supplied by their employer which are lost as a result of negligence on the part of the employee.

(vii) The provision of tools under the Federal government **tools for your trade scheme** does not constitute the provision of all tools by the employer for the purposes of clauses 32.1(c)(ii) and (iii).

(d) Tool allowance—carpenter or joiner or shipwright/boatbuilder

A carpenter or joiner or shipwright/boatbuilder must be paid a tool allowance of \$28.94 per week extra.

Clause 31 reads:

31. Employer and employee duties

31.1 An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the classification structure of this award provided that such duties are not designed to promote de-skilling.

31.2 An employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment.

31.3 Any direction issued by an employer under clause 31—Employer and employee duties must be consistent with the employer's responsibilities to provide a safe and healthy working environment.

*Plumbing and Fire Sprinkler
Award 2010*

\$22.50 per week

CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group

Plumbing and Fire Sprinkler Award 2010

21.2 Expenses incurred in the course of employment

(a) Tool allowance

Where an employer requires an employee to provide tools, other than basic consumables, the employer will reimburse the employee the cost of providing the tools or pay the employee a weekly allowance of \$22.50 to compensate for the purchase and maintenance in efficient working order of tools required for the performance of work.

(b) Meals

An employee required to work overtime for at least one and a half hours after working ordinary hours must be paid by their employer an amount of \$13.16 to meet the cost of a meal, plus an additional \$13.16 for each subsequent four hours worked. The employer may provide a meal or meals instead of paying any such allowance.

21.3 Work uniforms, protective clothing and equipment

(a) Where employers require employees to wear uniforms the employers must provide the uniform. Any replacement uniform will be provided as necessary by the employer.

(b) Employee to return uniform upon termination of employment.

(c) Where an employee is required to wear protective clothing and/or use protective equipment as stipulated by the relevant law operating in a State or Territory covered by this award, the employer must supply the clothing and/or equipment or reimburse the employee for the cost of such protective clothing and/or equipment.

21.4 Compensation for tools and clothes

(a) An employee whose clothes, spectacles, hearing aid, or tools have been accidentally spoilt by acid, sulphur or other substances must be paid such amount to cover the loss suffered by the employee in relation to any such items not supplied by the employer as may be agreed upon between the employee and the employer.

(b) An employee will be reimbursed by their employer to a maximum of \$1,308.10:

- for loss of tools or clothing by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop;
- if the tools are lost or stolen while being transported by the employee at the employer's direction;

- if the tools are accidentally lost over water; or
- if tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

An employee transporting their own tools will take all reasonable care to protect those tools and prevent theft or loss.

(c) Where an employee is absent from work because of illness or accident and has advised the employer, the employer will ensure that the employee's tools are securely stored during their absence. In the event that these tools are lost or stolen, clause 21.4(b) applies.

(d) When an employer requires an employee to wear spectacles with toughened glass lenses the employer will pay for the toughening process or the cost of the new lenses.

(e) For the purposes of this clause:

- (i) only tools used by the employee in the course of their employment will be covered by this clause;
- (ii) the employee will, if requested to do so, furnish the employer with a list of tools so used;
- (iii) reimbursement will be at the current replacement value of new tools of the same or comparable quality; and
- (iv) the employee will report any theft to the police prior to making a claim on the employer for replacement of stolen tools.

<i>Oil Refining and Manufacturing Award 2010</i>	\$15.29 per week	CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group
<p><i>Oil Refining and Manufacturing Award 2010</i></p> <p>(b) Tool allowance</p> <p>An employee who is required by the employer to supply and maintain tools ordinarily required in the performance of work will be paid an allowance of \$15.29 per week.</p>		

<i>Funeral Industry Award 2010</i>	\$5.17 per week	CPI, Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group
<p><i>Funeral Industry Award 2010</i></p> <p>15.6 Tool allowance</p> <p>Where an employer requires an employee engaged in coffin manufacturing to use their own tools and/or equipment, the employee must be paid a weekly tool allowance of \$5.17 except where:</p> <p>(a) the employer provides an employee with all the tools reasonably required to perform all the functions of the employee’s employment; or</p> <p>(b) the employer reimburses the employee the cost of providing the tools and/or equipment.</p>		

Annexure B

Percentage change from corresponding quarter of previous year:

Percentage change from corresponding quarter of previous year:

Clothing and Footwear.

Tools and Equipment for House and Garden.

Mar-2010	-1.8	7.3
Jun-2010	-3.8	2.8
Sep-2010	-2.8	1.2
Dec-2010	-4.8	-0.5
Mar-2011	-1.2	-2.0
Jun-2011	1.1	-1.8
Sep-2011	1.3	-2.6
Dec-2011	2.6	-1.9
Mar-2012	1.4	-0.6
Jun-2012	0.5	-1.4
Sep-2012	-0.8	0.6
Dec-2012	0.6	-0.1
Mar-2013	-1.5	-0.5
Jun-2013	-0.3	-0.2
Sep-2013	0.6	-0.5
Dec-2013	-1.3	0.0
Mar-2014	0.5	0.7

Jun-2014	-0.6	0.9
Sep-2014	-2.7	0.8
Dec-2014	-1.5	0.4
Mar-2015	-0.7	0.0
Jun-2015	-0.9	0.7
Sep-2015	-1.0	2.6
Dec-2015	0.5	3.3
Mar-2016	-0.8	4.4
Jun-2016	-0.2	4.5
Sep-2016	1.2	4.0
Dec-2016	-0.9	2.8
Mar-2017	0.3	2.2
Jun-2017	-1.9	1.7
Sep-2017	-3.2	0.7
Dec-2017	-3.0	0.8
Mar-2018	-3.5	-0.2

Source: Data request to ABS by United Voice, 17 July 2018 (available on request).