BACKGROUND PAPER

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4 Awards—Hospitality Industry (General) Award 2010 and Restaurant Industry Award 2010—Substantive claims

(AM2017/57; AM2017/59) MELBOURNE, 23 NOVEMBER 2018

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

1. Background

[1] A number of substantive claims have been made to vary the *Hospitality Industry (General) Industry Award 2010* (the Hospitality Award) and the *Restaurant Industry Award 2010* (the Restaurant Award) as part of the 4 yearly review of modern awards (the Review). In accordance with the Statement[1] issued on 24 October 2017 and the Decision in [2018] FWCFB 1548,[2] a Full Bench has been constituted to deal with these substantive claims.

[2] Directions were issued on 21 May,[3] 19 September[4] and 14 November 2018.[5] Parties seeking variations were directed to file written submissions and any witness statements or documentary material in which they wished to rely on. Submissions and or evidence in support of, or in opposition to, proposed claims were filed by the following parties:

- Australian Business Industrial and the New South Wales Business Chamber (ABI);[6]
- Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn, Motel and Accommodation Association (collectively, the Associations);[7]
- Restaurant and Catering Industrial Association (RCI);[8] and

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[1] [2017] FWC 5530.

[2] [2018] FWCFB 1548 at para [396].

[3] [2018] FWC 2761. Amended directions also issued on 3 and 20 July 2018.

[4] [2018] FWC 5779.

[5] AM2017/57-59 Report and Directions.

[6] ABI and NSWBC submission in reply of 5 November 2018; submission in reply of 19 November 2018.

[7] AHA and others submission in reply of 18 September 2018; submission 25 July 2018; submission 8 February 2018; submission 24 November 2017; submission 13 October 2016.

- United Voice.[9]

[3] A Mention[10] was held on 9 November 2018 to consider the programming of the substantive claims made in relation to the Hospitality Award. A report was subsequently issued on 14 November 2018,[11] which outlined the claims that remained outstanding and proposed a process for determining the outstanding matters. In the report the Commission made the following directions:

- The Associations and United Voice were to file a joint report setting out the matters agreed to in respect of the Hospitality Award and a draft variation determination giving effect to that agreement;
- United Voice was to file any documentary material it wished to rely on in support of its tool allowance claim; and
- ABI was to file a short written submission outlining their position in respect of the claims being pressed by United Voice.

[4] The Associations and United Voice filed a joint report[12] on 20 November 2018 in accordance with the directions. United Voice indicated that it did not intend to file further documentary material in support of its tool allowance claims. ABI filed a submission[13] on 19 November 2018 outlining their position.

[5] The tool allowance claims made by United Voice are common to both awards and it is convenient to deal with them before turning to the other substantive claims in respect of each award.

2. The tool allowance claims

[6] Clause 21.1(b)(i) of the Hospitality Award provides that:

> '**(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.'

[7] Clause 21.1(j) of the Hospitality Award provides for the adjustment of expense-related allowances. The relevant adjustment factor for the tool allowance is the percentage movement in the 'Clothing and footwear group' within the Consumer Price Index.

[8] The comparable provisions in the Restaurant Award are at clauses 24.3(a) and 24.5. The tool allowance provisions in the Restaurant Award are different in quantum, application and method of adjustment to those in the Hospitality Award. Clauses 24.3(a) and 24.5 of the Restaurant Award provide:

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[8] RCI correspondence of 13 July 2018; submission in reply of 18 September 2018.

[9] United Voice submission of 24 July 2018; submission in reply of 2 November 2018.

[10] Transcript of Proceedings 9 November 2018.

[11] Report to the Full Bench - Restaurant and Hospitality Award, 14 November 2018.

[12] Joint Report, 20 November 2018.

[13] ABI submission, 19 November 2018.

'**24.3 (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…

24.5 At the time of any adjustment to the standard rate, each expense related allowance will 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 Price Index figure
Meal allowance	Take away and fast foods sub-group
Tools allowance	Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group'

[9] The background to the current tool allowance provisions in these awards is set out at **Attachment A**.

[10] The claims advanced by United Voice seek to align the tool allowance provisions in these two awards: to increase the quantum of the allowance and to vary the indexation factor.

[11] The claim to vary the indexation factor in the Hospitality Award from the clothing and footwear group to the tools and equipment group is not opposed.

[12] The indexation factor for the tool allowance provision in the Hospitality Award was not the subject of any contest or detailed consideration during the award modernisation process.

[13] Clothing and footwear is one of the 11 groups in the CPI ('clothing CPI'). This group includes expenditure on clothing, footwear, accessories such as watches and jewellery and services such as dry cleaning and shoe repair services.[14]

[14] Tools and equipment for house and garden is an expenditure class in the sub-group of Household appliances, utensils and tools (within the Furnishings, household equipment and services group) ('tools CPI'). Items in this expenditure class include motorised and hand tools such as electric drills, saws, lawnmowers, screwdrivers, wrenches and spanners; garden tools such as wheelbarrows, spades, shovels; ladders; door fittings (hinges, handles and locks).[15]

[15] A summary of the tool allowance provisions in various other modern awards is at Annexure A to United Voice's submission of 24 July 2018. Almost all of the tool allowances referred to in Annexure A are varied according to movements in the 'Tools, equipment' component of the CPI. The exceptions are the *Registered and Licensed Clubs Award 2010*

[14] ABS, *Consumer Price Index, Concepts Sources and Methods, Australia, 2017*, Catalogue No. 6461.0, p. 61.

[15] ABS, *Consumer Price Index, Concepts Sources and Methods, Australia, 2017*, Catalogue No. 6461.0, p. 68.

which is in similar terms to the Hospitality Award, and the *Building and Construction General On-site Award 2010*, which is varied in accordance with movements in the Eight Capitals CPI.

[16] There does not appear to be any rational justification for varying an allowance relating to kitchen tools by reference to movements in the clothing and footwear component of the CPI.

Question: Does any party take a different view?

[17] The second element of United Voice's claim concerns the scope of the tool allowance provisions.

[18] At present, the tool allowance in the Hospitality Award is only paid to cooks, not apprentice cooks. Conversely, in the Restaurant Award, the allowance is only paid to *apprentice* cooks, not cooks. United Voice seeks to vary the awards such that the tool allowance is paid:

> 'where a cook or apprentice cook is required to use their own tools…'

[19] United Voice submits that the tool allowance is intended to compensate for the disutility experienced by an apprentice cook or a cook when directed to use their own tools at work, including:

- Maintenance and sharpening;
- Managing the risk of theft and replacement.

[20] United Voice also submits:

> '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.'[16]

[21] The Associations and ABI do not oppose United Voice's claim regarding the scope of the tool allowance clauses. RCI takes a different view; it opposes the variation sought on the basis that United Voice has not advanced any evidence to justify the proposed variations.

Questions to RCI:

1. *Why does the tool allowance only apply to cooks in the Hospitality Award and why does it only apply to apprentice cooks in the Restaurant award?*

2. *Is there any logical basis for the different approach taken in each award?*

[22] The final aspect of United Voice's tool allowance claim concerns the quantum of the allowance. The quantum of the allowances in the two allowances are different:

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[16] United Voice submission, 24 July 2018 at para 36.

Hospitality Award: '$1.55 per day or part thereof, up to a maximum of $7.60 per week'

Restaurant Award: '$1.73 per day or part thereof, up to a maximum of $8.49 per week'.

[23] United Voice seeks a common, increased, quantum in both awards; '$2.55 per day or part thereof up to a maximum of $11.20 per week'. As to the justification for such an increase, United Voice submits:

> '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'.[17]

[24] Untied Voice relies on the quantum of the tool allowances in Annexure A to its submission of 24 July 2018 to support its claim to increase the quantum of these allowances in the Hospitality and Restaurant Awards.

[25] As to aligning the quantum of the allowances in the two awards, United Voice submits:

> '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.'[18]

[26] United Voice's claim to increase the quantum of the tool allowance in these awards is opposed by the Associations, ABI and RCI.

[27] The Associations submit that United Voice has not demonstrated how the current amount does not meet the modern awards objective and nor has it provided any evidence in support of the increase in quantum sought. At [7] to [9] of its submissions of 18 September 2018 the Associations submit:

> 'Despite submitting that their claim is not "*picking out of thin air*" an amount, the logic to the increase sought seems to be an arbitrary reckoned amount based on a range of tool allowances from various modern awards which are not true comparators (see [53] of United Voice's Submissions dated 24 July 2018).

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[17] Ibid at para 30.

[18] Ibid at para 38.

The only 'like-for-like' tool allowance contained in the modern awards referred to, is the tool allowance provided for in the *Hair and Beauty Award 2010*, which provides ***both*** a weekly amount ***and*** a requirement to reimburse the cost of tools.

The other awards provide for an allowance in circumstances where there is no provision for reimbursement, which in our submission provides a basis for the higher amounts, *or* provide an alternative between reimbursement and the payment of a weekly allowance (see clause 21.2 (a) of the *Plumbing and Fire Sprinkler Award 2010*).'[19]

[28] ABI submits[20] that the claim will result in a significant change and is not supported by a sufficient merits case. ABI further submits that its position is supported by the following observations:

'(a) United Voice was a key participant in the development of the Hospitality Award during AMOD;

(b) The tool allowance entitlement in that Award reflects the wording in a draft award filed by United Voice;

(c) Had there been an issue with the application of the entitlement at the time of modernisation, United Voice could have agitated the issue at that time, but did not do so;

(d) United Voice also had the opportunity (albeit relatively curtailed) to agitate the same issue in respect of the Restaurant Award entitlement at the time of modernisation, and did not do so;

(e) The Commission is entitled to conclude that both Awards fulfilled the modern awards objective at the time they were made, which is supported by the historical basis for the different entitlements from the relevant precursor instruments;

(f) It does not appear that the clauses were the subject of any variation application during the 2012 review; and

(g) Some six years have passed before United Voice considered it necessary to file applications to vary the tool allowance clauses.'[21]

[29] In opposing the claim, RCI submits:

'RCI opposes the claim to increase the amount of the tool allowance in clause 21.1(b)(i) of the Hospitality Award and clause 24.3(a) of the Restaurant Award. United Voice have not advanced any evidence to demonstrate that employees are being disadvantaged by the current amount of the tool allowance…

It is also relevant that clause 21.1(b)(x) of the Hospitality Award and clause 24.3(i) of the Restaurant Award stipulate that where the employer requires an employee to provide and use certain tools, the employer must reimburse the employee for the costs of purchasing such equipment. Employees are therefore reimbursed in full for any costs related to purchasing the tools and also receive a separate tool allowance for having to use the tools in the course of their employment'.[22]

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[19] AHA and others submission in reply, 18 September 2018 at paras 7-9.

[20] ABI submission, 5 November 2018

[21] Ibid at 5.15(a)-(g).

[22] RCI submission in reply, 18 September 2018 at paras 14-15.

Question: What is the justification for the differences in the quantum of the tool allowance in these two awards?

[30] It may be of interest to look at the change in the tool allowance provision in the Hospitality Award had the 'tools and equipment for house and garden' been used to adjust the allowance'.

[31] The base period in which to compare increases in the CPI is the June quarter 2008.[23] Because the CPI for the June quarter is not published until late July, allowances are updated each year using the CPI for the March quarter. Table 1 shows the increase in the CPI over each year to the March quarter for both CPI categories. The table compares the allowance adjusted in accordance with the clothing CPI with the allowance if it were adjusted using the tools CPI. The table also compares the Clothing, equipment and tools allowance from the Hospitality Award with the Tools and equipment allowance in the Restaurant Award which is also indexed to the tools CPI.

[32] The allowance will only increase if the CPI index has increased from the previous year and is higher than the base year. Otherwise there is no change to the allowance

[33] For example, even though the clothing CPI increased by 1.4 per cent over the year to the March quarter 2012, the index for the March quarter 2012 (98.6 points) was below the index for the base period, which is the June quarter 2008 (101.0 points). In this case, no upward adjustment was made to the allowance.

[34] As the clothing CPI in the March quarter of each year has been below the index in the original base period of the June quarter 2008, the Clothing, equipment and tools allowance from the Hospitality Award has never been adjusted.

[35] If the relevant index for the tools allowance was the tools CPI, the allowance in the Hospitality Award would be 7 cents higher per day, or 33 cents higher per week (i.e. $1.62 per day, $7.93 per week).

[23] [2010] FWA 3857.

Table 1: Change in the tools allowance in the Hospitality Award and Restaurant Award, CPI for Tools and equipment and Clothing and footwear

	Hospitality Award								Restaurant award			
	Clothing and footwear				Tools and equipment				Tools and equipment			
	Annual CPI change (%)	Index	Allowance ($)		Annual CPI change (%)	Index	Allowance ($)		Annual CPI change (%)	Index	Allowance ($)	
			Week	Day			Week	Day			Week	Day
Jun-08		101.0				95.9				95.9		
Mar-10	–	98.4	7.60	1.55	–	103.0	8.16	1.66	–	103.0	8.16	1.66
Mar-11	–1.2	97.2	7.60	1.55	–2.0	100.9	8.16	1.66	–2.0	100.9	8.16	1.66
Mar-12	1.4	98.6	7.60	1.55	–0.6	100.3	8.16	1.66	–0.6	100.3	8.16	1.66
Mar-13	–1.5	97.1	7.60	1.55	–0.5	99.8	8.16	1.66	–0.5	99.8	8.16	1.66
Mar-14	0.5	97.6	7.60	1.55	0.7	100.5	8.16	1.66	0.7	100.5	8.16	1.66
Mar-15	–0.7	96.9	7.60	1.55	0.0	100.5	8.16	1.66	0.0	100.5	8.16	1.66
Mar-16	–0.8	96.1	7.60	1.55	4.4	104.9	8.31	1.69	4.4	104.9	8.31	1.69
Mar-17	0.3	96.4	7.60	1.55	2.2	107.2	8.49	1.73	2.2	107.2	8.49	1.73
Mar-18	–3.5	93.0	7.60	1.55	–0.2	107.0	8.49	1.73	–0.2	107.0	8.49	1.73
Change Mar-10 to Mar-18	**–5.5%**		**$0.00**	**$0.00**	**3.9%**		**$0.33**	**$0.07**	**3.9%**		**$0.33**	**$0.07**

Source: ABS, *Consumer Price Index, Australia, Sep 2018*, Catalogue No. 6401.0; MA000009; MA000119.

3. Hospitality Award

3.1 The Hospitality sector

[36] The information below presents an update on the profile of the Hospitality Industry as published in the 4-yearly review of modern awards – Penalty rates – Hospitality and Retail sectors decision (the *Penalty Rates decision*).[24]

[37] The ABS data of direct relevance to the Hospitality Award are limited.

[38] A paper[25] by Commission staff provides a framework for 'mapping' modern award coverage to the ANZSIC. Using this framework, the Hospitality Award is mapped to six separate ANZSIC industry classes:

- 4400—Accommodation;
- 4511—Cafes and restaurants;
- 4513—Catering services;
- 4520—Pubs, taverns and bars;
- 9201—Casino operation; and
- 4123—Liquor retailing.

[39] The aggregation of these industry classes will be referred to as the Hospitality industry.

[40] The Census is the only data source that contains all of the employment characteristics in Table 1 for the Hospitality industry.

[41] The most recent data, for August 2016, show that there were around 446 000 employees in the Hospitality industry. Table 1 compares certain characteristics of employees in the Hospitality industry with employees in 'all industries'.

Table 1: Employee characteristics of Hospitality industry, 2016

	Hospitality industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	200 868	45.1	4 438 604	50.0
Female	244 835	54.9	4 443 125	50.0
Total	445 703	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	179 036	41.9	5 543 862	65.8
Part-time	248 077	58.1	2 875 457	34.2

[24] [2017] FWCFB 1001 at [760] – [765].

[25] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.

	Hospitality industry		All industries	
	(No.)	(%)	(No.)	(%)
Total	427 113	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	311 158	70.6	5 985 652	68.1
Year 11 or equivalent	42 638	9.7	856 042	9.7
Year 10 or equivalent	63 600	14.4	1 533 302	17.4
Year 9 or equivalent	14 980	3.4	273 180	3.1
Year 8 or below	6593	1.5	112 429	1.3
Did not go to school	2001	0.5	26 356	0.3
Total	440 970	100.0	8 786 961	100.0
Student status				
Full-time student	105 696	23.9	715 436	8.1
Part-time student	27 712	6.3	491 098	5.6
Not attending	309 672	69.9	7 618 177	86.3
Total	443 080	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	61 894	13.9	518 263	5.8
20–24 years	100 154	22.5	952 161	10.7
25–29 years	73 998	16.6	1 096 276	12.3
30–34 years	55 260	12.4	1 096 878	12.3
35–39 years	36 683	8.2	972 092	10.9
40–44 years	29 689	6.7	968 068	10.9
45–49 years	26 812	6.0	947 187	10.7
50–54 years	23 551	5.3	872 485	9.8
55–59 years	19 257	4.3	740 822	8.3
60–64 years	12 168	2.7	469 867	5.3
65 years and over	6234	1.4	247 628	2.8
Total	445 700	100.0	8 881 727	100.0
Average age	32.3		39.3	
Hours worked				
1–15 hours	102 363	24.0	977 997	11.6
16–24 hours	80 810	18.9	911 318	10.8
25–34 hours	64 906	15.2	986 138	11.7
35–39 hours	64 105	15.0	1 881 259	22.3
40 hours	45 732	10.7	1 683 903	20.0
41–48 hours	30 648	7.2	858 120	10.2
49 hours and over	38 556	9.0	1 120 577	13.3
Total	427 120	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

Source: ABS, *Census of Population and Housing*, 2016

[42] The profile of Hospitality industry employees differs from the profile of employees in 'All industries' in five aspects:

- Hospitality industry employees are more likely to be female (54.9 per cent, compared with 50 per cent of all employees);

- over half (58.1 per cent) of Hospitality industry employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with only 34.2 per cent of all employees;
- around one quarter (24.0 per cent) of Hospitality industry employees work 1–15 hours per week compared with only 11.6 per cent of all employees;
- over one third (36.4 per cent) of Hospitality industry employees are aged between 15 and 24 years compared with only 16.6 per cent of all employees; and
- around three in ten (30.1 per cent) Hospitality industry employees are students (23.9 per cent are full-time students and 6.3 per cent study part time) compared with 13.7 per cent of all employees.

3.2 Items not opposed

[43] The Associations and United Voice have had productive discussions in relation to a number of the substantive claims. As a result of those discussions the Associations and United Voice have agreed that the Hospitality Award be varied to give effect to the following claims (collectively, the agreed position):

(i) Item 3 – Definition of 'junior employee'

[44] The Associations sought the insertion of a definition of 'junior employee' in clause 3.1 (Definitions) in the following terms:[26]

> '**junior employee** means an employee under the age of 20 who is not undertaking a nationally recognised traineeship or apprenticeship'.

(ii) Item 7 – Progression arrangements and pay scales for apprentices

[45] The Associations sought to introduce a competency based pay scale for apprentices, as new clause 14.12, in the following terms:

> '14.12 Competency based progression
>
> (a) For the purpose of competency based wage progression in clause 20.4 an apprentice will be paid at the relevant wage rate for the next stage of their apprenticeship if:
>
> (i) competency has been achieved in the relevant proportion of the total units of competency specified in clause 20.4 for that stage of the apprenticeship. The units of competency which are included in the relevant proportion must be consistent with any requirements in the training plan; and
>
> (ii) any requirements of the relevant State/Territory apprenticeship authority and any additional requirements of the relevant training package with respect to the demonstration of competency and any minimum necessary work experience requirements are met; and

[26] Submission, 13 October 2017.

(iii) either:

(A) the Registered Training Organisation (RTO), the employer and the apprentice agree that the abovementioned requirements have been met; or

(B) the employer has been provided with written advice that the RTO has assessed that the apprentice meets the abovementioned requirements in respect to all the relevant units of competency and the employer has not advised the RTO and the apprentice of any disagreement with that assessment within 21 days of receipt of the advice.

(b) If the employer disagrees with the assessment of the RTO referred to in clause 14.12(a)(iii)(B) above, and the dispute cannot be resolved by agreement between the RTO, the employer and the apprentice, the matter may be referred to the relevant State/Territory apprenticeship authority for determination. If the matter is not capable of being dealt with by such authority it may be dealt with in accordance with the dispute resolution clause in this award. For the avoidance of doubt, disputes concerning other apprenticeship progression provisions of this award may be dealt with in accordance with the dispute resolution clause.

(c) For the purposes of this clause, the training package containing the qualification specified in the contract of training for the apprenticeship, sets out the assessment requirements for the attainment of the units of competency that make up the qualification. The definition of "competency" utilised for the purpose of the training packages and for the purpose of this clause is the consistent application of knowledge and skill to the standard of performance required in the workplace. It embodies the ability to transfer and apply skills and knowledge to new situations and environments.

(d) The apprentice will be paid the wage rate referred to in clause 14.12(a) from the first full pay period to commence on or after the date on which an agreement or determination is reached in accordance with clause 14.12(a)(iii) or on a date as determined under the dispute resolution process in clause 14.12(b).

(e) If the apprentice disagrees with the assessment of the RTO referred to in clause 14.12(a), and the dispute cannot be resolved by agreement between the RTO, the employer and the apprentice, the apprentice may refer the matter to the relevant State/Territory apprenticeship authority for determination. If the matter is not capable of being dealt with by such authority it may be dealt with in accordance with the dispute resolution clause in this award. For the avoidance of doubt, disputes concerning other apprenticeship progression provisions of this award may be dealt with in accordance with the dispute resolution clause.'

(iii) Item 18A – Fork-lift driver allowance

[46] The Associations seek to amend the fork-lift driver allowance at clause 21.2(a), which is currently expressed as either a weekly rate for full-time employees or a daily rate for part-time or casual employees, to be expressed as an all purpose allowance.

(iv) Insertion of new apprentice wages clause

[47] The Associations seek to delete clause 20.4 of the current Hospitality Award and a new provision relating to apprentice wages be inserted. The new provisions would include

competency based wage progression and amendments to terminology such as replacing references to 'standard weekly rate' with 'standard hourly rate'.

[48] A draft determination giving effect to the agreed position is set out at **Attachment B**.

Questions:

1. *Is the list of unopposed items accurate?*
2. *Does any party take a different view?*

Note: The Associations and United Voice are requested to make a joint oral submission in support of the unopposed items at the commencement of the hearing on Tuesday 27 November 2018.

3. Opposed items

[49] In the joint report the Associations and United Voice advised the following claims are opposed:

(i) Item 2 – Multi-hire arrangements

[50] The Associations sought to introduce a new clause that would allow permanent employees to work casual shifts, via multi-hire arrangements. The Associations[27] sought a variation to clause 11 of the award to incorporate additional wording in the description of full-time employment to allow for the provision of multi-hiring. The Associations' claim would allow a full-time employee to request casual work, in addition to full-time hours, in a different stream or area of the employer's business.

[51] The variation sought by the Associations is highlighted in red:

11. Full-time employment

11.1 A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

11.2 Full-time employees may also be engaged on a casual basis for duties in a separate engagement in a separate section of the workplace. Such engagements shall be subject to the following conditions:

(a) the work required to be performed in the separate engagement is not within the usual job description of the employee concerned;

(b) the separate engagement is to meet a specific purpose

(c) the separate engagement enables the employee to attain additional remuneration and/or skills;

[27] Associations' submission of 13 October 2016; submission of 24 July 2018.

(d) the separate engagement must be at the instigation of the employee and be subject to mutual agreement between the employer and the employee concerned;

(e) the separate engagement is not designed to avoid overtime obligations but genuinely meets the tests set out in clause 11.2(a) to (d);

(f) the separate engagement is limited to a maximum of 12 hours per week.

[52] The issue of multi hiring was the subject of an application to vary a predecessor award, pursuant to s.113 of the *Workplace Relations Act 1996* (Cth) (the WR Act). The application was heard in late 1996 and 1997. A decision dismissing the application was published on 9 October 1997.[28]

[53] The Associations submit that the legislative framework has changed since the AIRC decision, notably with the introduction of the *Fair Work Act 2009*.

[54] The Associations' submission in support of the proposed variation is set out at [31] to [69] of its 24 July 2018 submissions and may be summarised as follows:

- While the Commission may have regard to the 1997 decision it must consider the proposed variation in the context of its obligations under the FW Act;
- The variation proposed in the present proceedings differs from the variation rejected in 1997, in particular under the current proposal an employee must instigate a request for multi hiring and it is subject to a cap of 12 hours per week;
- It is not practical or viable for many hospitality employers to engage in collective bargaining. In particular, small and medium size businesses rely on modern awards to provide flexibility as they face practical barriers to accessing collective bargaining;
- Some employers now covered by the Hospitality Award were covered by pre reform awards which provided for multi hiring (see Hotels, Motels, Resorts and Accommodation Award – State (excluding S E Queensland) Award 2005, clause 2.4; Hotels, Resorts and Certain Other Licensed Premises Award – State (excluding S E Queensland) Award 2003, clause 4.4);
- Employers are utilising labour hire arrangements rather than hiring additional staff or paying existing staff at overtime rates. Labour hire arrangements have some negative features (citing the Finance and Administration Committee, Parliament of Queensland, *Inquiry into the practices of the labour hire industry in Queensland* (2016)). The proposed multi hiring clause could reduce the level of labour hire within the hospitality industry, reduce turnover, provide greater flexibility, improve services and skill acquisition. The Associations also submit that multi hiring would provide an opportunity for employees to be cross trained and earn additional income. The provision may also lead to an increase in full time employment;
- The *Alpine Resorts Award 2010* has a multi hiring provision (at clause 19.3),:

'**19.3 Multi-hiring arrangement**

[28] Print P5546; (1998) 77 IR 425.

(a) As an alternative, or in addition to, dual-role employment, an employee may by agreement be engaged on a multi-hiring arrangement.

(b) If an employer and an employee enter into a multi-hiring arrangement, the parties must agree on the primary role of the employee.

(c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within Schedule B—Classification Definitions that they are qualified for, provided that:

(i) any non-primary role is to be undertaken, and paid for, on a casual basis; and

(ii) any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role.

(d) Where clause 19.3 applies, clause 19.1 does not apply.'

- The Associations submit that seasonality and fluctuation is also an aspect of the hospitality industry, as is regional and isolated locations, on-site staffing arrangements and venues that offer a wide mix of services;
- The proposed term is not a term that must not be included in a modern award (Subdivision D of Division 3 of Part 2-3);
- The variation of the award to include the multi hire clause would achieve the following:
    - Provide flexibility for employers to engage existing employees under a separate contract for a different role within their business to fulfil their labour requirements;
    - Provide clear guidelines on the implementation of such arrangements to protect both the employer and the employee;
    - Provide the ability for employees to increase their participation in the workforce and to earn additional income, which would otherwise be unavailable to them in the primary role/position with the employer;
    - Provide ability for employees to learn new skills and knowledge to increase their job satisfaction as well as increase their ability for career progression.
- The proposed variation is consistent with the modern awards objective (see particularly s.134(1)(d) and (f)) and with the object of the FW Act.

Note: The Associations and United Voice are currently engaging in discussions regarding the multi hiring claim.

(ii) Item 19 – Payment of wages

[55] The Associations seek to amend clause 26 to allow salaries to be averaged in accordance with the hours of work averaging system by inserting a new sub-clause that would apply to employees who perform work under an arrangement where their ordinary hours are averaged over a period of greater than one week. The new sub-clause would result in relevant employees being paid the average of 38 hours per week for each week in a 4 week cycle.

[56] The variation sought is as follows:

'26.6 A full-time employee who works an average of 38 hours per week in accordance with an averaging arrangement as specified in clause 29.1(a), may be paid as if the employee worked 38 hours each week, irrespective of whether the employee worked more or less hours, provided that, subject to clause 33.4, at the end of the averaging period, the employee shall receive payment for all overtime worked.'

[57] The Associations' submission in support of the proposed variation is set out at paragraphs [131] to [160] of its submission of 24 July 2018, as follows:

'131. The Associations seek a variation to clause 26 of the HIGA.

132. The variation sought relates to the payment of wages to full-time employees employed as per an arrangement of hours in accordance with clause 29.1(a) that averages ordinary hours of work over a period of more than one week.

133. Those averaging arrangements are:

- 152 hours each four week period with a minimum of eight days off each four week period;
- 160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off;

134. The Associations have proposed, at Item 21, two additional averaging arrangements that would also represent an arrangement of hours that averaged ordinary hours of work over a period of more than one week.

135. The Associations seek the introduction of a new sub clause in clause 26 that would apply to a full-time employee being paid wages and working their hours in accordance with one of the mentioned averaging arrangements outlined in clause 29.1(a).

136. The proposed additional sub clause, clause 26.6, is as follows:

> 'A full-time employee who works an average of 38 hours per week in accordance with an averaging arrangement as specified in clause 29.1(a), may be paid as if the employee worked 38 hours each week, irrespective of whether the employee worked more or less hours, provided that, subject to clause 33.4, at the end of the averaging period the employee shall receive payment for all overtime worked'.

137. The effect of this new sub clause would be that a relevant employee is paid the average of 38 hours per week for each week of a 4 week cycle, as demonstrated in the below example for a full-time employee:

Week	**Hours Worked**	**Hours Paid**
1	35	38
2	45	38
3	30	38
4	42	38
Total hours	152	152

138. An example for a part-time employee who has a guarantee of 20 hours per week:

Week	**Hours Worked**	**Hours Paid**
1	25	20
2	10	20

3	18	20
4	27	20
Total hours	80	80

139. The Associations submit that new sub clause 26.6 provides clarity and simplicity of payment where an average of hours in excess of an average of one week is worked.

140. It is noted that clause 26 of the HIGA is subject to the Payment of Wages Common issue (AM2016/8), however the Associations submit that the variation sought is not inconsistent with the purpose and intent of the matters being considered in AM2016/8.

141. In its decision handed down on 1 December 2016, the Full Bench of the Fair Work Commission [2016] FWCFB 8463 (AM2016/8), proposed at Paragraph 34, a provisional model term for timing of payment of wages:

> ***[34]*** *Our provisional 'payment of wages and other amounts' model term is as follows:*
>
> ***X. Payment of wages and other amounts***
>
> ***x.1 Pay periods and pay days***
>
> *(a) The employer must pay each employee no later than 7 days after the end of each pay period:*
>
> *(i) the employee's wages for the pay period; and*
>
> *(ii) all other amounts that are due to the employee under this award and the NES for the pay period.*
>
> *(b) An employee's pay period may be:*
>
> *(i) one week;*
>
> *(ii) two weeks; or*
>
> *(iii) subject to paragraph (e), one month.*
>
> *(c) The employer must notify each employee in writing of their pay day and pay period.*
>
> *(d) Subject to paragraph (e), the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.*
>
> *(e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.*
>
> *(f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.*
>
> ***x.2 Method of payment***
>
> *Payments under clause x.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee, or by cash or cheque.*

142. In its further decision handed down on 17 July 2018, the Full Bench of the Fair Work Commission [2018] FWCFB 3566 (AM2016/8) finalised the 'Payment on termination of employment' model term.

143. The Associations submit that the proposed variation does not detract from or contradict the model terms.

144. The Commission stated at Paragraph 47 of the 1 December 2016 Decision that:

> **[47]** Our provisional view is that there would be benefit in either replacing the existing provision for payment in all modern awards with the model term (once finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements. Following are two examples of how the provisional model term might possibly be adapted to existing arrangements.

145. In its 1 December 2016 decision the Commission provisionally indicated that the model term does not have to be unconditionally applied to each modern award.

146. The Associations note that as is reflected in a summary of submissions regarding the payment of wages issue, posted on the Commission's website on 30 November 2017, most parties support the adaptation of the model clause on an award by award basis.

147. It is submitted that the Hospitality Industry consists of diverse working arrangements that arise as a result of hours of work that encompass late nights, weekends and periods of trade that can fluctuate due to seasonal demand.

148. The HIGA, through the averaging arrangements provided for in clause 29.1(a), provides for working arrangements that differ to the traditional 5 day 38 hour working week.

149. Accordingly, it would be appropriate, having regard for the Commission's views and the existing arrangements in the industry, for the HIGA to feature an adapted model term consisting of the variation proposed in these submissions.

150. The remaining issues arising from the 1 December 2016 Decision relates to accrual of wages.

151. In its 1 December 2016 decision the Commission addressed accrual of wages at paragraphs [123-136].

152. The Commission in its Statement and Directions of 19 September 2017 FWCFB [2017] 4817 sought submissions from the parties having regard for the submission of Irving and Stewart on the payment of wages model term and how wages are accrued.

153. The Irving and Stewart submission discusses how and when wages are accrued and seeks the introduction of the term 'accrued' into the model clause with respect to when wages are due.

154. In the 17 July 2018 Decision, the Full Bench stated at paragraph 66;

> "**[66]** We propose to deal with the issue of accrual of wages in the course of finalising the provisional 'Payment of wages and other amounts' model term. We will consider whether to insert 'accrued' into paragraph (a)(i) of the model term at that time."

155. Although this issue has not yet been determined, the Associations submit that the proposed variation to Clause 26 of the HIGA would not be inconsistent with the submission put forward by Irving and Stewart.

156. Where an employee performs their ordinary hours of work in a manner that averages hours of work over a period of more than 1 week, overtime is determined having regard for the total hours worked over that roster cycle, therefore, any overtime payment is only accrued in the final week of the roster cycle.

157. Further, an agreement between an employer and employee to perform the ordinary hours of work as an averaging arrangement is an agreement to perform an average of 38 ordinary hours per week.

158. Accordingly, the Associations submit that an employee accrues an entitlement to payment of 38 ordinary hours each week, therefore, the Associations proposed variation that an employee be paid 38 hours per week of a roster cycle irrespective of fluctuations in the actual ordinary hours worked is consistent with the Irving and Stewart submission.

159. The Associations submit that the proposed variation has a benefit for the employees that it would apply to.

160. The proposed variation would result in a stable and consistent payment of wages each week, providing applicable employees with more certainty in relation to managing their financial commitments, and may alleviate the impact of any excessive taxation in a particular pay week.'

[58] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 38 to 47 of United Voice's submission in reply of 18 September 2018, as follows:

'38. Payment of wages matters are being addressed generally within AM2016/8 - Payment of Wages. The variation sought is inconsistent with the provisional model payment of wages term handed down in *4 yearly review of modern awards - Payment of Wages* [2016] FWCFB 8463[29], which requires that the employer must pay each employee no later than 7 days after the end of each pay period the employee's wages for the pay period.

39. The variation proposed would, in some circumstances, delay the payment due to the employee for a period beyond 7 days.

40. Further, in the award specific review, it is essential that consideration is given to matters specific to the *Hospitality Award*.

41. The variation sought is inconsistent with s134 (1) (a). Employees covered by the *Hospitality Award* are generally low paid, and it is not uncommon, or controversial, that many low paid employees live *'week to week'*. Any delay in receiving wages can result financial distress for low paid employees. As such, the variation sought does not meet the needs of the low paid.

42. An averaging of wages clause is likely to result in an increase in non-compliance with the *Hospitality Award*.

43. Hospitality is an industry in which there are already significant compliance issues. A July 2018 Report by the Fair Work Ombudsman ***(FWO)*** found that 72% of businesses audited in the industry were non-compliant.[30] This is an astonishing level of non-compliance with minimum award standards.

44. Hospitality is an industry in which it is common for employees to work fluctuating hours of work, and commonly includes periods of work in the evening and across weekends. These are hours of work that attract (differing) penalty rates. An averaging out mechanism would create complexity for both employers and employees. Employers must comply with the award in ensuring that each hour worked is paid at the correct penalty rate, and an averaging out provision is likely to create additional complexity in ensuring this occurs. It will also create additional complexity for employees trying to assess if they have been paid the correct rate of pay for their hours of work.

45. In paragraph [156] of the AHA submission, it is stated that overtime is only accrued in the final week of the roster cycle. Overtime *also* accrues on a daily basis, i.e. a full time employee cannot work more than 11.5 ordinary hours in one day (clause 29.1(b) (i)). Introducing an averaging out provision is likely to result in complexity and increased non-compliance in the payment of overtime.

46. In this respect, the variation sought by the AHA is inconsistent with s134 (1)(da) in that the practical effect of such a variation is likely to result in increased non-compliance with the

[29] [2016] FWCFB 8463.

[30] Fair Work Ombudsman, Food Precincts Activity Report, July 2018, page 3.

Hospitality Award, and is likely to result in a reduction of remuneration for employees working overtime, unsocial hours, on weekends and on shifts.

47. The variation sought by the AHA should be rejected.'

(iii) Items 20 and 28 – Public holidays

[59] The Associations seek a variation of clause 27.2(c) to allow an employer and employee to extend the period in which an employee classified as managerial staff can take time off in lieu for time worked on a public holiday. Clause 27.2(c) currently provides:

'**(c)** An employee being paid according to clause 27.2(a) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday. This time is to be taken within 28 days of accruing it.'

[60] The Associations' proposed variation is highlighted in red below:

'**(c)** An employee being paid according to clause 27.2(a) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday. This time is to be taken within 28 days of accruing it, or at other such time as agreed by the employer and the employee'.

[61] The Associations also seek the insertion of a new sentence in clause 32.2(a) to clarify the minimum hours provisions on public holidays refer to all hours worked during a shift and not only the hours worked on the public holiday. Clause 32.2(a) currently provides a minimum engagement of four hours;

'(a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work.'

[62] The variation sought is as follows (variation highlighted in red):

'(a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work. Hours of work performed on the day immediately before or immediately after a public holiday and that form part of one continuous shift are counted as part of the employee's minimum payment.'

[63] The Associations' submission in support of the proposed variations is set out at paragraphs [162] to [182] of its submission of 24 July 2018, as follows:

'162. The nature of the changes sought to these respective clauses are materially the same.

163. Clause 27.2(c) applies to employees classified as Managerial Staff (Hotels) as per the definition at Schedule D.2.9, who are in receipt of a salary that is at least the amount specified in clause 27.2(a).

164. Clause 27.2(c) states:

'(c) An employee being paid according to clause 27.2(a) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday. This time is to be taken within 28 days of accruing it.'

165. The Associations note the Annualised Salaries Common Issue [AM2016/13] proceedings before the Commission, and submit that the amendment proposed to the existing HIGA clause 27.2(c) does not materially affect the progress of the Common Issue.

166. Clause 32.2(b) applies to employees (other than casual employees) entitled to the payment of penalty rates in accordance with clause 32.1 and that have agreed, in accordance with clause 32.2(b), to substitute the payment of penalty rates with the entitlement provided for in accordance with clause 32.2(b).

167. Clause 32.2(b) states:

'(b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due'.

168. The variation sought with respect to both clause 27.2(c) and clause 32.2(b) relate to the 28 day period in which the time worked on a public holiday to be taken as time off.

169. The Associations submit is that the words 'or at other such time as agreed by the employer and the employee' be added to clause 27.2(c) and 32.2(b) in relation to the 28 day period.

170. Clause 27.2(c) would, upon variation, read as:

> '(c) An employee being paid according to clause 27.2(a) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday.
>
> This time is to be taken within 28 days of accruing it, or at other such time as agreed by the employer and the employee.'

171. Clause 32.2(b) would, upon variation, read as:

> '(b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due, or at other such time as agreed by the employer and the employee '.

172. The Associations submit that the effect of the amendments to clauses 27.2(c) and 32.2(b) is to allow an employee who has accrued paid time off to agree with their employee to take that time off at a time beyond the 28 day timeframe.

173. The Associations submit that operationally, the existing 28 day timeframe can be impractical as it may not be possible for time off to be taken, for example, during busy work periods.

174. The Associations also submit that the current 28 day timeframe may also be impractical for employees who would rather take the time off in conjunction with a planned period of leave that is beyond the 28 day period immediately after accruing the paid time off.

175. For example, some States and Territories prescribe four public holidays each year in the period between Good Friday and Easter Monday.

176. This is often followed by a prescribed public holiday on 25 April (Anzac Day) and in some states and/or territories, a prescribed public holiday in early May (labour or May day).

177. For example, in 2019 Anzac Day will fall three days after Easter Monday.

178. Where an employee works on a number of these public holidays, this cluster of public holidays can make it difficult for employers to meet its ongoing operational requirements while complying with the 28 day period, and providing an employee with his or her normal rostered days off.

179. The Associations submit that the variation provides additional flexibility for both employers and employees, and would enable this accrued paid time to be taken at a later time if that later time was more suitable.

180. It is also submitted that by making the extension beyond the 28 day period contingent on mutual agreement, the employee is not disadvantaged by the variation.

181. An employee would retain the right to be provided with that paid time off within the 28 day period.

182. Accordingly, the Associations submit that the proposed variations meet the modern awards objective, specifically, Section 134 1(d).'

[64] United Voice opposes the proposed variation of clauses 27.2(c) and 32.2(b) to increase the period of time in which time off accrued at work on a public holiday must be taken. United Voice submits that:

> 'The time period of 28 days is a sufficient period of time for that time off to be taken. It ensures that the employees receive the benefit of having worked that public holiday within a reasonable period of time…
>
> The AHA has not demonstrated why it is necessary to increase the time period.'[31]

(iv) Item 21 – Ordinary hours of work – Full time and part-time employees

[65] The Associations seek to vary clause 29.1(a) of the Hospitality Award by introducing two new methods by which hours of work can be averaged. The first variation sought is for the average of 38 hours per week to be worked as '76 hours over a two week period'. The second variation sought is for the average of 38 hours per week to be worked by 'averaging the hours worked over a 26 week period'.

[66] Clause 29.1(a) currently provides:

'**(a)** The average of 38 hours per week is to be worked in one of the following ways:

- a 19 day month, of eight hours per day;
- four days of eight hours and one day of six hours;
- four days of nine and a half hours per day;
- five days of seven hours and 36 minutes per day;
- 152 hours each four week period with a minimum of eight days off each four week period;
- 160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off;
- any combination of the above.'

[31] United Voice submissions in reply, 18 September 2018 at paras 51-52.

[67] The Associations' submission in support of the variation is set out at paragraphs [184] to [204] of its submission of 24 July 2018 as follows:

> '184. Clause 29.1(a) provides for the different ways in which the average of 38 ordinary hours per week can be performed by a full-time employee.
>
> 185. Clause 29.1(a) states:
>
> '29.1 Full-time employees
>
> (a) The average of 38 hours per week is to be worked in one of the following ways:
>
> • a 19 day month, of eight hours per day;
>
> • four days of eight hours and one day of six hours;
>
> • four days of nine and a half hours per day;
>
> • five days of seven hours and 36 minutes per day;
>
> • 152 hours each four week period with a minimum of eight days off each four week period;
>
> • 160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off;
>
> • any combination of the above'.
>
> 186. The variation sought by the Associations is to include two additional ways in which an average of 38 hours per week can be worked.
>
> 187. The first additional averaging way is:
>
> • 76 hours over a two week period;
>
> 188. It is submitted that an averaging arrangement of this nature is permitted by section 63(1) of the FW Act, and is consistent with section 134(1)(d) of the modern awards objective.
>
> 189. The HIGA allows employers to pay employees on a fortnightly basis at clause 26.2, and rostering practices to enable a full time employee to average their hours over a two week period complements this fortnightly payment basis.
>
> 190. The Associations submit that many hospitality employers use a fortnightly pay cycle.
>
> 191. The Associations submit that this arrangement simply creates an option between the arrangements currently available that average hours of a four week cycle and those that provide for the performance of work over a single week.
>
> 192. The introduction of this arrangement has no impact on other entitlements or protections available to an employee in accordance with the HIGA nor does it have an impact on the HIGA meeting the modern awards objective, specifically s.134 (1) (da).
>
> 193. The second additional averaging way sought is:
>
> • by averaging the hours worked over a 26 week period;
>
> 194. Many hospitality employers operate within the Tourism industry either solely, or in addition to, the corporate and leisure markets.
>
> 195. For hospitality employers reliant on international and domestic tourism, such as hospitality operators located in regional or semi regional areas, hours of work can fluctuate significantly over the course of a day, week, and a season.
>
> 196. This results in periods of substantially increased trade and periods of substantially reduced trade.

197. Substantial fluctuations in trade will influence in increased or decreased demands on labour.

198. The Associations believe that it is appropriate for the HIGA to feature an averaging arrangement that is greater than the current maximum of 4 weeks, and submits that the FW

Act at section 63(1) enables a modern award to contain averaging of hours terms, and further, as per section 64(1) effectively restricts an averaging mechanism to 26 weeks in duration.

199. A copy of section 63 is below:

> 63 Modern awards and enterprise agreements may provide for averaging of hours of work
>
> (1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:
>
> (a) for a full-time employee—38 hours; or
>
> (b) for an employee who is not a full-time employee—the lesser of:
>
> (i) 38 hours; and
>
> (ii) the employee's ordinary hours of work in a week.
>
> (2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

200. With regard to 63(1), the Associations propose to insert a 26 week averaging period is not inconsistent with this section, as the Associations are not seeking to vary the average to be any greater than 38 hours per week for a full-time employee.

201. The FW Act at section 64 provides for the averaging of hours of work for award/agreement free employees may be for a period that does not exceed 26 weeks:

> 64 Averaging of hours of work for award/agreement free employees
>
> (1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:
>
> (a) for a full-time employee—38 hours; or
>
> (b) for an employee who is not a full-time employee—the lesser of:
>
> (i) 38 hours; and
>
> (ii) the employee's ordinary hours of work in a week.
>
> (2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with an agreed averaging arrangement (whether the arrangement complies with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62.

The averaging arrangement will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

202. Read together, the Associations submit that an averaging period of 26 weeks is permitted by section 64(1), and, via section 63(1), can be an averaging mechanism in the HIGA.

203. The Associations submit that averaging periods of greater than four weeks are already characteristics of several modern awards due to the circumstances of the businesses covered by each award.

204. It would be appropriate for an averaging mechanism in excess of four weeks to be inserted in the HIGA due to the unique circumstances of hospitality employers whose workload demands are driven by external forces such as tourism.'

[68] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 56 to 59 of United Voice's submission in reply of 18 September 2018, as follows:

'56. The first variation sought is for the average of 38 hours per week to be worked as *'76 hours over a two week period'*. The *Hospitality Award* already provides 6 different ways in which hours of work can be averaged out. There are already sufficient options available for an employer to enable them to roster appropriately for the business.

57. This proposed variation is unnecessary.

58. The second variation sought is for the average of 38 hours per week to be worked by *'averaging the hours worked over a 26 week period'*.

59. United Voice also opposes this variation.'

(v) Item 27 – Penalty rates – public holidays

[69] The Associations seek to vary clause 32.2(b) to increase the period of time in which time off in lieu for work on a public holiday must be taken. Clause 32.2(b) provides:

'(b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due.'

[70] The Associations' proposed variation is highlighted in red below:

'**(b)** Employees who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due or at other such time as agreed by the employer and the employee'.

[71] The Associations' submission in support of the variation is set out at paragraphs [207] to [214] of its submission of 24 July 2018 as follows:

'207. Clause 32.2(a) proscribes a minimum number of hours for payment in relation to work performed on a public holiday. Further, an employee is entitled to the minimum number of hours payment specified in clause 32.2(a) even where they do not work those minimum hours.

208. Clause 32.2(a) does not state that the payment must be either four hours' (for permanent employees) or two hours' (for casual employees) at the applicable public holiday hourly rate.

209. The Associations submit that where an employee performs work immediately prior to a public holiday and continues to work on the actual public holiday, or performs work immediately after a public holiday after having started work on the actual public holiday, the work performed on the non-public holiday is counted toward the minimum number of hours for payment.

210. For example, an employee commences work at 10pm on Thursday, 25 January 2018. The following day is Australia Day; a public holiday, and the employee works until 2am on 26 January. The employee will receive four hours payment for work performed, with only two of the hours paid at the applicable public holiday rate.

211. The Associations seek to vary clause 32.2(a) to provide clarity on the operation of this clause.

212. The Associations propose that clause 32.2(a) be deleted and the following be inserted:

'An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work. Hours of work performed on the day immediately before or immediately after a public holiday and that form part of one continuous shift are counted as part of the employee's minimum payment'.

213. It is submitted that by clarifying the operation of clause 32.2(a), the proposed variation makes this clause more efficient and effective.

214. Accordingly, the Associations submit that the proposed variation meets the modern awards objective having regard to section 134.1(g).'

[72] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 78 to 80 of United Voice's submissions in reply of 18 September 2018, as follows:

'78. Clause 32.2(a) provides a benefit for employees in ensuring that an employee will receive adequate hours of payment for the disutility of working on a public holiday.

79. The variation proposed by the AHA reduces the actual minimum engagement period for employees on public holidays, and would have the effect of weakening the benefit that clause 32.2(a) currently provides for employees working on public holidays. This is inconsistent with s134 (1) (da) (iii) of the modern awards objectives.

80. The variation sought by the AHA should be rejected.'

(vii) Item 34 – Public holidays – additional arrangements for full-time employees

[73] The Associations seek to insert a new subclause in clause 37.1(b), which provides additional arrangements for full-time employees whose rostered day off falls on a public holiday. Clause 37.1 currently provides:

'37.1 National Employment Standards

(a) Public holidays are provided for in the NES

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in s.115 of the Act.

(b) Additional arrangements for full-time employees:

(i) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 32.2, either:

- be paid an extra day's pay; or
- be provided with an alternative day off within 28 days; or
- receive an additional day's annual leave.

(ii) A full-time employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day.

(c) Arrangements for part-time employees

Part-time employees are entitled to public holidays prescribed in s.115 of the Act without loss of pay if those public holidays fall on days on which hours of work are rostered under clause 12.5. Part-time employees who work on a public holiday must be paid in accordance with clause 32.'

[74] The Associations seek to insert a new subclause (ii) at 37.1(b) (and the subsequent renumbering of the current subclause (ii) to (iii)) in the following terms:

'(ii) Where an employee performs their ordinary hours of work between Monday and Friday, a public holiday falling on a Saturday or Sunday shall not be recognised as a public holiday for the purposes of clause 37.1(b)(i).'

[75] The Associations' submission in respect of this issue is set out at paragraphs [215] to [217] of its submission of 24 July 2018 as follows:

'215. The Associations note that the content of clause 37.1 (b) is replicated at clause 34.3 (a) of the *Registered and Licensed Clubs Award 2010*.

216. The Associations also note that Clubs Australia Industrial have applied to remove this provision as part of the Public Holidays Common Issue (AM2014/301).

217. The Associations support the removal of clause 37.1(b) from the HIGA or any composite modern award that might arise from AM2017/39.'

[76] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 83 to 88 of United Voice's submissions in reply of 18 September 2018, as follows:

'83. The Clubs Australia Industrial (CAI) application to remove this clause in the Public Holidays Common Issue was made only in respect of the *Registered and Licensed Clubs Award 2010* ***(Clubs Award)***.

84. The CAI application was heard by the Full Bench on 24 and 25 July 2017. The Full Bench acknowledged that there were separate proceedings in AM2017/39 in regards to the revocation of the Clubs Award, and stated in paragraphs 147 -148 of the transcript dated 24 July 2017[32]:

> PN147
>
> In those circumstances, we consider that the Bench which is hearing that matter should fully hear and determine that matter, including, if it arises, the circumstance in which that coverage should be subsumed into the Hospitality Award. So, we would not issue a decision in relation to the claim at least until the outcome of those proceedings is known and if the Registered Clubs Award is to be abolished, we would not issue a decision in relation to the claim at all.
>
> PN148
>
> The only circumstances in which we consider it appropriate to issue a decision in relation to the claim would be if the Clubs Award was ultimately not subsumed into the Hospitality Award but survived as an independent award, that is that United Voice was successful in its position.

85. A decision in respect of clause 37.1(b) of the *Clubs Award* will only be made if United Voice is successful in opposing the application of CAI in AM2017/39 and the *Clubs Award* is not revoked. In those circumstances, any such change, if successful, will apply to the *Clubs Award*.

86. Section 156 of the Act requires that each award must be reviewed in its own right. A decision in respect of the *Clubs Award* in the Public Holidays Common Issue cannot automatically be reproduced in the *Hospitality Award* without any consideration of how the clause operates within this modern award.

87. The AHA has not, in their submission, provided any submissions or evidence as to the effect of clause 37.1(b) within the *Hospitality Award*.

88. The variation sought by the AHA should be rejected.'

(viii) Item 36A – Deductions for provision of employee accommodation and meals

[77] The Associations sought the variation of clause 39 to enable an employer to deduct $8.37 per meal instead of per week. Clause 39 provides (deductions for services other than meals omitted):

> '**39.1 Right to make deductions**
>
> When an employer provides their employees with accommodation, meals or both, then the employer may deduct an amount of money from the employee's wages in accordance with this clause.
>
> **39.2 Adult employees**
>
> The amounts set out in the table below may be deducted from the wages of an adult employee for the provision of accommodation, meals or both by their employer. The same amounts may be deducted from the wages of a junior employee in receipt of adult wages.
>
> | **Service provided** | **Deduction $ per week** |
> |---|---|

[32] Transcript of proceedings, AM2014/301 Four yearly review of modern awards: Public Holidays Common Issue, 24 July 2017.

A meal	8.37

NOTE: The 'Single room and 3 meals a day' amount is calculated at 25% of the standard weekly rate. The following internal relativity is then applied:

	%
A meal	1% of the standard weekly rate

39.3 Junior employees receiving junior rates

The amounts set out in the table below may be deducted from the wages of a junior employee who is being paid junior rates of pay for the provision of accommodation, meals or both by the employer. The amount which may be deducted depends on the age of the employee.

Service provided	**Age**	**Deduction**	**Deduction per week**
		% of adult deduction	**$**
A meal	Same rate all ages	—	8.37

39.4 Deductions for meals

An employer may deduct an amount from an employee's wages for providing the employee with a meal only if:

(a) the employee does not live in accommodation provided by the employer; and

(b) the meal is provided during the employee's normal working hours.'

[78] The Associations' submission in support of the proposed variations is set out at paragraphs [218] to [232] of its submission of 24 July 2018 as follows:

'218. Clause 39 of the HIGA permits an employer to deduct an amount of money from an employee's wages for the provision of accommodation, meals or both.

219. While the amount an employer can deduct may differ depending upon the nature of the service provided, and whether or not the employee is paid adult or junior rates, the amount that can be deducted for the provision of a meal is the same for all employees.

220. It is the Associations' view that the amount that may be deducted for the provision of a meal is $8.37 per meal, subject to the qualifications in clause 39.4 of the HIGA.

221. However, the tables in clause 39.2 and 39.3 of the HIGA place the amount of $8.37 under a heading "Deduction $ per week". The Associations submits this is an error and that the deduction for a meal should read $8.37 per meal.

222. In support of this view the Associations provide the following historical overview.

223. Clause 35.2 of the Hotels, Resorts and Hospitality Industry Award 1995 (Print M2100) contained the following table:

Service Provided	*Deduction*
1. Single room and 3 meals a day	*$119.30/week*
2. Shared room and 3 meals a day	*$118.70/week*
3. Single room only; no meals	*$114.70/week*
4. Shared room only; no meals	*$113.90/week*

5. A meal	***$4.34/meal***

(emphasis added)

224. That provision was replicated in The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 ("the 1998 Award"), with the deductible amounts remaining unchanged until an application was made by the Australian Hotels Association in 2004 ("the 2004 Application").

225. The 2004 Application was determined by consent order of the Australian Industrial Relations Commission ("the AIRC") on 31 August 2004 (see PR949495)[33] which varied the 1998 Award to update the deductible amounts, as well as incorporate a mechanism to ensure the amounts were automatically adjusted as part of the annual safety net wage reviews.

226. The rationale for the automatic adjustment mechanism was explained in the proceedings before the AIRC, which made it clear the deductible amount for a meal was 1% of the trade rate (see Matter C2004/4556 Transcript dated 31 August 2004 at PN30-PN38).

227. The Associations submit that during the Award Modernisation process, the reproduction of clause 35.2 from the 1998 Award into the HIGA resulted with the current concern of the Associations, being the reformatting of the service provided and deductions table and removal of '/meal' after the deductable amount for a meal.

228. The reproduction error is displayed below:

The 1998 Award		**HIGA**	
Service Provided	**Deduction $ per week**	**Service Provided**	**Deduction $ per week**
1. Single room and 3 meals per day	$140.30/week	2. Single room and 3 meals per day	$209.35
2. Shared room and 3 meals a day	$136.70/week	2. Shared room and 3 meals a day	$204.12
3. Single room only; no meals	$133.30/week	3. Single room only; no meals	$198.88
4. Shared room only; no meals	$129.80/week	4. Shared room only; no meals	$193.65
5. A meal	$5.60/meal	5. A meal	$5.60/meal

229. As can be noted from the above table, specific reference to a deduction in the 1998 Award was per week or per meal. The HIGA changed the specific reference to a general deduction per week heading in the table at clause 39.2.

230. At the time the HIGA was made, there were no submissions from any parties to vary the application of the meal deduction, and it appears the change in the reference from per meal to per week arose from a drafting error.

231. The Associations submit this error be rectified for clarity within the HIGA to ensure this provision is simple and easy to understand and apply, consistent with the modern awards objective.

232. The Associations seek to vary clause 39.2 by deleting the table and replacing it with the below table:

[33] AIRC Print P913, 31 August 2004 (The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 – Consent Order).

Service Provided	**Deduction** **$ ~~per week~~**
1. Single room and 3 meals a day	209.35 per week
2. Shared room and 3 meals a day	204.12 per week
3. Single room only; no meals	198.88 per week
4. Shared room only; no meals	193.65 per week
5. A meal	8.37 per week

[79] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 89 to 96 of United Voice's submissions in reply of 18 September 2018, as follows:

> '89. The AHA seeks to vary clause 39 of the *Hospitality Award* to enable an employer to deduct the amount of $8.37 per meal instead of per week.
>
> 90. It is alleged by the AHA that the current entitlement was a result of a drafting error during award modernisation.
>
> 91. Whilst conditions under pre-modern awards may have some relevance, modern awards are not merely a reflection of pre-modern awards. The relevance of 2004 proceedings on the *Hospitality Industry –Accommodation, Hotels, Resorts and Gaming Award 1998* to a modern award in 2018 is questionable.
>
> 92. Modern awards are safety net instruments that must meet the modern awards objective in s 134 and *'provide a fair and relevant minimum safety net of terms and conditions*.'
>
> 93. Increasing the meal deduction from a weekly basis to a per meal amount would have a significant financial impact on employees. As stated in paragraph [67] of this submission, a substantial number of employees under the *Hospitality Award* are low paid and consideration must be given to s134(1)(a) of the modern objectives. For employees earning $19.47 per hour (Level 1), a per meal deduction of $8.37 will cause financial difficulty.
>
> 94. The deduction proposed by the AHA is not equivalent and excessive when considered against the cost of providing a meal to an employee within a hospitality enterprise.
>
> 95. Further, increasing the meal deduction to a per meal amount would result in inconsistencies across the relativities in clause 39.2 of the *Hospitality Award*. When a single room and 3 meals a day are provided, the deduction permitted is $209.35 per week. When a single room and no meals are provided, the deduction permitted is $198.88 per week. The difference in the two amounts is $10.47, and that is for the provision of 21 meals. Similarly, when a shared room and 3 meals a day are provided the deduction permitted is $204.12 per week. When a shared room and no meals are provided the deduction permitted is $193.65 per week. The difference in the two amounts is again $10.47. To increase the deduction for meals from a per week amount to a per meal amount would result in the cost per meal being excessive when compared with the other permitted deductions.
>
> 96. The variation sought by the AHA should be rejected.'

(ix) Item 38 – Classifications

[80] The Associations seek to vary the classification definition for 'Food and Beverage Attendant Grade 2' in Schedule D.2.1 by inserting the words 'taking reservations, greeting and seating guests' as a new duty.

[81] The current 'Food and Beverage Attendant Grade 2' classification at Schedule D.2.1 is as follows:

> '**Food and beverage attendant grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:
>
> - supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
> - assisting in the cellar or bottle department;
> - undertaking general waiting duties of both food and/or beverage including cleaning of tables;
> - receipt of monies;
> - attending a snack bar; and
> - engaged on delivery duties.'

[82] The Associations submit that the variation sought is 'not a material one, but rather is reflective of the actual duties likely to be performed by an employee employed as a F & B 2'. The Associations also note that the comparable classification in the Restaurants Award includes 'taking reservations, greeting and seating guests'. The inclusion of this aspect of the classification definition in the Restaurant Award was the subject of an appeal decision[34] in which the Full Bench said:

> **'[153]** We are satisfied on the evidence that the taking of reservations and greeting and seating guests is a function which may ordinarily be expected to be performed by persons who would otherwise be classified as a Food and Beverage Attendant Grade 2, and that the failure to include this work function in the definition of that classification means that such persons may have to be paid at the higher rate for a Food and Beverage Attendant Grade 3 for that reason alone. Mr Taylor, a United Voice official from South Australia and a former worker in the industry, gave evidence that as a consequence of this, as well as the issue of the classification of the receipt of monies function, waiting staff are unlikely to be classified as a Food and Beverage Attendant Grade 1 or 2, and that those two classifications have little significance for the restaurant industry. That cannot be a practical result that was intended by the award modernisation Full Bench which made the Restaurant Award. The purpose of the Food and Beverage Attendant Grade 3 classification was not, we consider, to provide a higher rate of pay just for waiting staff who take reservations and greet and seat guests; as earlier explained the main justification for the Grade 3 classification was that, unlike Grade 2, it applies to a person who has "*achieved the appropriate level of training*", being (as the definition of "*appropriate level of training*" in clause 3.1 makes clear) the completion of relevant AQF Certificate II qualifications. Because the Restaurant Award has classifications which cannot in practical terms be utilised by employers, we conclude that it is clearly not operating effectively because of an anomaly arising from the award modernisation process, and we further find that the Restaurant Award is not meeting the modern awards objective in that it is not providing a "*relevant*" minimum safety net of terms and conditions. We will vary the Restaurant Award to include the work function of "*Taking reservations, greeting and seating guests*" in the definition of the classification of Food and Beverage Attendant Grade 2 in clause B.2.2. Again, that variation will make it clear that no existing employee can have his or her classification

[34] [2014] FWCFB 1996.

reduced as a result of the variation. The variation shall take effect on 1 July 2014.' (footnote omitted)

[83] The Associations submit that the level 2 classifications in the Hospitality and Restaurant Awards are similar and, further,:

> 'it is not practical or realistic for those tasks and the seating of guests to only be assigned to Grade 3 employees given that this duty, and exclusion of this duty from the F & B 2 classification is inconsistent with the modern awards objective'[35]

Question to the Associations:

On what basis is it said that the exclusion of this duty from classification Food and Beverage 2 is inconsistent with the modern awards objective?

[84] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 99 to 104 of United Voice's submission in reply of 18 September 2018, as follows:

> '99. We disagree with the characterisation of this proposed change as immaterial.
>
> 100. The proposed variation, if made, will lead to employees who are currently classified as Food and Beverage Attendant Grade 3 being demoted to Grade 2, with the associated loss of wages.
>
> 101. Taking reservations, greeting and seating guests is properly recognised in the *Hospitality Award* as a higher level duty which requires a greater level of skill than tasks such as general waiting duties, attending a snack bar and delivery duties.
>
> 102. In *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, evidence was adduced about the work performed by Food and Beverage Attendants under the *Restaurant Industry Award 2010* ***(Restaurants Award)***. The decision was made on the evidence before the Commission and specifically in relation to the *Restaurants Award*.
>
> 103. Section 156 of the Act requires that each award must be reviewed in its own right and the AHA has not placed probative evidence before the Commission regarding the work of Food and Beverage Attendants under the *Hospitality Award* that justifies the variation sought.
>
> 104. The variation sought by the AHA should be rejected.'

(x) Item 39 – Classifications

[85] The Associations also seek to vary the classification definition for Clerical Grade 3 employees at Schedule D.2.4 – Administration stream. The existing classification definition Clerical Grade 3 is as follows:

> **'Administration stream**
>
> **Clerical grade 1** means an employee who is required to perform basic clerical and routine office duties such as collating, filing, photocopying and delivering messages.
>
> **Clerical grade 2** means an employee who is engaged in general clerical or office duties, such as typing, filing, basic data entry and calculating functions.

---

[35] AHA submission, 24 July 2018 at para 247.

Clerical grade 3 means an employee who has the appropriate level of training and who performs any of the following:

- operates adding machines, switchboard, paging system, telex machine, typewriter or calculator;
- uses knowledge of keyboard and function keys to enter and retrieve data through computer terminal;
- copy types at 25 words per minute with 98% accuracy;
- maintains mail register and records;
- maintains established paper-based filing/records systems in accordance with set procedures including creating and indexing new files, distributing files within the organisation as requested, monitoring file locations;
- transcribes information into records, completes forms, takes telephone messages;
- acquires and applies a working knowledge of office or sectional operating procedures and requirements;
- acquires and applies a working knowledge of the organisation's structure and personnel in order to deal with inquiries at first instance, locates appropriate staff in different sections, relays internal information, responds to or redirects inquiries, greets visitors;
- keeps appropriate records; and
- sorts, processes and records original source financial documents (e.g. invoices, cheques, correspondence) on a daily basis; maintains and records petty cash; prepares bank deposits and withdrawals and does banking.

And who has the appropriate level of training and also performs any of the following:

- operates computerised radio telephone equipment, micro/personal computer, printing devices attached to personal computer, dictaphone equipment, typewriters;
- produces documents and correspondence using knowledge of standard formats, touch types at 40 words per minute with 98% accuracy, audio types;
- uses one or more software application package(s) developed for a micro/personal computer to operate and populate a database, spreadsheet/worksheet to achieve a desired result; graph previously prepared spreadsheet; use simple menu utilities of personal computer;
- follows standard procedures or template for the preceding functions using existing models/fields of information;
- Creates, maintains and generates simple reports;
- uses a central computer resource to an equivalent standard;
- uses one or more software packages to create, format, edit, proof read, spell check, correct, print and save text documents, e.g. standard correspondence and business documents;
- takes shorthand notes at 70 wpm and transcribes with 95% accuracy;
- arranges travel bookings and itineraries, makes appointments, screens telephone calls, follows visitor protocol procedures, establishes telephone contact on behalf of executive;

- applies a working knowledge of the organisation's products/services, functions, locations and clients;
- responds to and acts upon most internal/external inquiries in own function area;
- uses and maintains a computer-based record management system to identify, access and extract information from internal sources; maintains circulation, indexing and filing systems for publications, reviews files, closes files, archives files; and
- maintains financial records and journals, collects and prepares time and wage records; prepares accounts queries from debtors; posts transactions to ledger.

Clerical supervisor means an employee who has the appropriate level of training including a supervisory course and who co-ordinates other clerical staff.

[86] The Associations propose the following classification definition for Clerical Grade 3 employees:

'**Administration stream**

Clerical grade 1 (wage level 2) means an employee who is required to perform basic clerical and routine office duties such as collating, filing, photocopying and delivering messages.

Clerical grade 2 (wage level 3) means an employee who is engaged in general clerical or office duties, such as typing, filing, basic data entry and calculating functions.

Clerical grade 3 (wage level 4) means an employee who has the appropriate level of training and who performs any of the following:

- general administrative or secretarial or stenographic duties;
- clerical duties of an advanced nature;
- maintains operational and financial records and journals, including time and
- wages records;
- prepares accounts, posts transactions to ledgers and other similar duties.

Clerical supervisor (wage level 5) means an employee who has the appropriate level of training including a supervisory course and who co-ordinates other clerical staff.'

[87] The Associations submit that the existing definition is outdated and too long. It is submitted that the new wording does not change the structure or scope of the classification definition but is broad enough to cover those employees presently covered by the existing definition. It is submitted that the proposed classification definition does not affect the level or complexity of the tasks and duties required to be undertaken at this level.

Question to the Associations:

Are there any other provisions of Schedule D the Associations seek to vary? (the submissions refer to both Front Office Grade 1 and Clerical Grade 3)

[88] United Voice opposes the proposed variation. The relevant submissions are at paragraphs 107 to 112 of United Voice's submission in reply of 18 September 2018, as follows:

'107. The AHA states in paragraph [256] that the proposed variation does not change the structure or the scope of the classification.

108. We disagree. The proposed variation introduces several requirements that the Clerical Grade 3 perform at an *'advanced'* level, including:

- *'Clerical duties of an advanced nature.'*
- *'Advanced use of office equipment including a personal computer, devices attached to a personal computer, photocopiers and any other like equipment;'*
- *'Advanced use of one or more computer software packages, whether general or specific to the employer;*
- *'Use of advanced keyboard functions.'*

109. There is no requirement in the current *Hospitality Award* classification in D.2.4 that a Clerical grade 3 employee perform any *'advanced'* functions.

110. The introduction of such a concept is not neutral. *'Advanced'* performance of duties requires a higher level of skill than what is currently required for a Clerical grade 3 employee. If the proposed variation is given effect, it will result in more employees being classified at the grade 2, and create additional barriers for employees to classification as a grade 3.

111. The variation proposed by the AHA is a significant and substantive change. The introduction of advanced duties changes the structure and scope of the classification. The AHA have not provided any evidence relating to the current duties of Clerical grade 3 employees and why these duties should be amended in the manner they have proposed.

112. The variation sought by the AHA should be rejected.'

[89] The Associations and United Voice advised they are currently engaging in discussions relating to items 2 and 23.

(xi) Item 47A – Working away from usual place allowance

[90] This issue concerns clause 21.1(h) of the Hospitality Award, which is in the following terms:

'**21.1 Expenses incurred in the course of employment**

(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.'

[91] The Plain Language version of clause 21.1(h), as at 8 August 2018, is in the following terms:

'**26.10 Working away from usual place of work**

(a) Clause 26.10 applies to a full-time or part-time employee who is required to work at a place that is more than 80 kilometres from their usual place of work.

(b) The employer must pay the employee an amount equal to the amount reasonably spent by the employee on fares to travel from their usual place of work to the new place of work.

(c) However, the employer may recover any amount paid to an employee under clause 26.10 if the employee leaves their employment, or is dismissed for misconduct, within 3 months after receiving that payment.'

[92] United Voice submits that clause 21.1(h) is an 'objectionable term' and must be deleted. The submissions advanced in support of this proposition are set out at paragraphs 12 to 21 of its submissions of 24 July 2018, as follows:

'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 151which 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: directly or indirectly for the benefit of the employer, or a party related to the employer; and 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.'

[93] The Associations do not oppose United Voice's claim.[36]

[94] ABI and RCI oppose United Voice's submissions. ABI's submissions are set out at paragraphs 4.1 to 4.14 of its submissions in reply of 5 November 2018, as follows:

'4.1 Clause 21.1(h) of the Hospitality Award currently provides for the payment of an expense-related allowance 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. [emphasis added]

4.2 The United Voice claim relates to the portion of the clause emphasised **above**.

4.3 Our clients filed a submission dated 8 June 2017 in respect of the plain language exposure draft of the Hospitality Award, which dealt briefly with this clause at [9]. In short, our clients expressed the view that the provision may require review but otherwise reserved their position.

4.4 The relevant enquiry is firstly whether or not the FW Act contains a source of power which permits the Commission to include the last sentence of this clause in a modern award. Our clients do not accept the position advanced by United Voice that the Commission has no jurisdiction to include the term, for the reasons set out below.

4.5 Section 139

4.6 Section 139 of the FW Act provides a general list of terms which may be included in modern awards.

4.7 Clause 21.1(h) is a term which is about "allowances" for the purpose of subsection 139(g); specifically, allowances in respect of "expenses occurred in the course of employment" (subsection 139(g)(i)). Relevantly:

> (a) the substantive portion of the clause - that is, providing for reimbursement of fares when an employee is required to work away from their usual place of work - confers the allowance (the **entitlement provision**); and
>
> (b) the last sentence of the clause permits the recovery of the allowance from an employee in certain circumstances (the **recovery provision**).
>
> 4.8 There does not appear to be any controversy as to whether the Commission has the power to include the entitlement provision in the Hospitality Award, as it is evidently 'about' an allowance which is payable in circumstances contemplated by subsection 139(g)(i).

[36] AHA submission, 18 September 2018 at paras 11-12; Joint Report, 20 November 2018 at para 4.

4.9 The recovery provision only has work to do if an allowance has been paid to an employee in accordance with the entitlement provision. If the allowance is not paid, there is no entitlement to recovery. Accordingly, our clients consider that it is also 'about' the allowance in the manner contemplated by section 139.

4.10 On this basis, the Commission is empowered to include the clause in the Hospitality Award.

Permitted deduction

4.11 As our clients consider that the Commission has jurisdiction to include the clause in its entirety is permitted to be in the Hospitality Award, the next question is whether the recovery provision falls foul of section 326 of the FW Act. The relevant test is:

> (a) is it directly or indirectly for the benefit of the employer or a party related to the employer; and
>
> (b) is it unreasonable in the circumstances.

4.12 Our clients submit that the answer to the first of these queries is in the affirmative, as the ability to recover an amount previously paid to an employee is clearly beneficial in the employer's favour.

4.13 Our clients also submit that the recovery of amounts paid will not be unreasonable in <u>all</u> circumstances. However, it is acknowledged that the amount of the deduction is also not referable to the actual loss or cost incurred by the employer when an employee's employment ceases for the reasons specified in the clause.

4.14 On this basis, our clients concede that the recovery provision <u>may</u> be unreasonable in <u>some</u> circumstances, and its removal is not opposed if the Commission is so minded.'

[95] RCI's submissions are set out in paragraphs 3 to 13 of its submissions in reply of 18 September 2018, as follows:

'3. RCI disagrees with a number of United Voice's submissions in respect of clause 21.1(h) (or clause 24.10(c) of the Plain Language Exposure Draft of the Hospitality Award).

4. Clause 21.1(h) of the Hospitality Award requires an employer to pay the employee an amount equal to the cost of fares incurred by the employee in travelling from the employee's usual place of work to the new place of work. However, the provision permits an employer to recover an amount paid to the employee if the employee leaves their employment or is dismissed for misconduct within three months of receiving the payment.

5. The provision does not explicitly stipulate that the employer is entitled to deduct this amount from an amount payable to the employee, simply that the employer may recover that amount.

6. United Voice make a number of submissions challenging the operation of clause 21.1(h) on the basis that the clause permits deductions from amounts payable to employees. Whilst RCI does not agree with all of these submissions (see further below), RCI notes that United Voice have made no submissions which challenge the validity of the clause in so far as it allows an employer to recover an amount paid to the employee generally.

7. RCI therefore submits that even if the Commission agrees with United Voice's submissions in respect of the operation of the law regarding deductions from amounts payable to employees, this should not affect the validity of clause 21.1(h).

8. Turning to United Voice's specific submissions in respect of deductions from amounts payable to employees, United Voice submit that clause 21.1(h) is problematic because of the operation of section 326 of the Fair Work Act 2009 (Cth) ('the Act').

9. RCI notes that section 326(1) of the Act provides that a modern award has no effect to the extent that it provides for a deduction from an amount that is payable to an employee in relation to the performance of work, if the deduction is: (a) directly or indirectly for the benefit of the employer or a party related to the employer; and (b) unreasonable in the circumstances.

10. Section 326(2) of the Act provides that the regulations may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable. RCI notes that the circumstances outlined in Regulation 2.12 of the Fair Work Regulations 2009 (Cth) ('the Regulations') are non-exhaustive.

11. On the question of reasonableness, RCI's view is that it is not reasonable or expected that employers cover the cost of travel to and from work for its employees. Clause 21.1(h) (or clause 24.10(c) of the Plain Language Exposure Draft of the Hospitality Award) provides an employee a benefit of being reimbursed for travel costs where employees work more than 80km away from their usual place of work. RCI submits that it is not unreasonable for an employer to be entitled to recover these costs if the employee subsequently leaves employment within a short time of receiving such a benefit.

12. RCI also disagrees with United Voice's submission that clause 21.1(h) is problematic in light of section 139 of the Act. Section 139(g) states that modern awards may include terms about matters including "(g) allowances, including for any of the following: (i) expenses incurred in the course of employment;". RCI considers it is implicit that this means modern awards can include terms that deal with all matters relating to allowances, including when they may be recovered (or deducted) from amounts paid to an employee.

13. This view is supported by the operation of section 326 of the Act which deals with when deductions from amounts payable to employees have no effect. Clearly then, the Act envisages that modern awards may, in some circumstances, include terms dealing with deductions from amounts payable to employees.'

4. Restaurant Award

4.1 The Restaurant sector

[96] The information below presents an update on the profile of the Restaurant sector as published in the *Penalty Rates decision*.[37]

[97] Using the paper[38] by Commission staff that provides a framework for 'mapping' modern award coverage to the ANZSIC, the Restaurant Award 2010 is 'mapped' to the Cafes and restaurants industry class.

[98] The ABS data of direct relevance to the Cafes and restaurants industry class is also quite limited.

[99] The Census is the only data source that contains all of the employment characteristics for the Restaurant Award.

[100] The most recent data from the Census, for August 2016, show that there were around 213 000 employees in the Cafes and restaurants industry. Table 2 compares certain

[37] [2017] FWCFB 1001 at [1018]-[1022].

[38] Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.

characteristics of employees in the Cafes and restaurants industry with employees in 'all industries'.

Table 2: Employee characteristics of Cafes and restaurants, 2016

	Cafes and restaurants		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	92 412	43.5	4 438 604	50.0
Female	120 134	56.5	4 443 125	50.0
Total	212 546	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	68 760	33.6	5 543 862	65.8
Part-time	135 713	66.4	2 875 457	34.2
Total	204 473	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	152 829	72.6	5 985 652	68.1
Year 11 or equivalent	20 387	9.7	856 042	9.7
Year 10 or equivalent	24 786	11.8	1 533 302	17.4
Year 9 or equivalent	7659	3.6	273 180	3.1
Year 8 or below	3518	1.7	112 429	1.3
Did not go to school	1376	0.7	26 356	0.3
Total	210 555	100.0	8 786 961	100.0
Student status				
Full-time student	70 356	33.3	715 436	8.1
Part-time student	15 229	7.2	491 098	5.6
Not attending	125 950	59.5	7 618 177	86.3
Total	211 535	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	45 276	21.3	518 263	5.8
20–24 years	54 329	25.6	952 161	10.7
25–29 years	37 718	17.7	1 096 276	12.3
30–34 years	25 789	12.1	1 096 878	12.3
35–39 years	14 643	6.9	972 092	10.9
40–44 years	10 229	4.8	968 068	10.9
45–49 years	8452	4.0	947 187	10.7
50–54 years	6766	3.2	872 485	9.8
55–59 years	5115	2.4	740 822	8.3
60–64 years	2932	1.4	469 867	5.3
65 years and over	1290	0.6	247 628	2.8
Total	212 539	100.0	8 881 727	100.0
Average age	28.6		39.3	
Hours worked				
1–15 hours	61 797	30.2	977 997	11.6
16–24 hours	45 020	22.0	911 318	10.8
25–34 hours	28 899	14.1	986 138	11.7
35–39 hours	25 653	12.5	1 881 259	22.3
40 hours	17 293	8.5	1 683 903	20.0
41–48 hours	12 073	5.9	858 120	10.2
49 hours and over	13 734	6.7	1 120 577	13.3
Total	204 469	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

Source: ABS, *Census of Population and Housing*, 2016

[101] The profile of Cafes and restaurants employees differs from the profile of employees in 'All industries' in five aspects:

- Cafes and restaurants employees are more likely to be female (56.5 per cent compared to 50 per cent of all employees);
- around two-thirds (66.4 per cent) of Cafes and restaurants employees are employed on a part-time basis (i.e. less than 35 hours per week), compared with only 34.2 per cent of all employees;
- around three in ten (30.2 per cent) of Cafes and restaurants employees work 1–15 hours per week compared with only 11.6 per cent of all employees;
- almost half (46.9 per cent) of Cafes and restaurants employees are aged between 15 and 24 years compared with only 16.6 per cent of all employees; and
- around four in ten (40.5 per cent) Cafes and restaurants employees are students (33.3 per cent are full-time students and 7.2 per cent study part time) compared with 13.7 per cent of all employees.

4.2 The Claims

[102] Two claims by RCI are being advanced in these proceedings.[39]

(i) Item 4 – Junior employees serving liquor

[103] RCI[40] originally sought the removal of that part of clause 15.1 which covers the requirement to pay junior employees at the full adult rate for liquor service. The changes initially sought by the RCI appear in red below:

'**15. Junior employees**

15.1 Junior employees will be paid in accordance with clause 20.3. Where the law permits, junior employees may be employed in the bar or other places where liquor is sold. ~~Junior employees working as liquor service employees must be paid at the adult rate of pay in clause 20.1 for the classification for the work being performed~~.

15.2 An employer may at any time demand the production of a birth certificate or other satisfactory proof for the purpose of ascertaining the correct age of a junior employee. If a birth certificate is required, the cost of it must be borne by the employer.

15.3 No employee under the age of 18 years will be required to work more than 10 hours in a shift.'

[39] RCI also sought the payment of wages provisions be varied to allow for payment on all days of the week. This claim has been referred to the Payment of Wages common issue Full Bench for determination.
[40] RCI submissions of 2 March 2015; submission of 12 October 2016; 24 July 2018.

[104] RCI amended their original claim and now seek an amendment in respect to the definition of a liquor service employee. RCI's claim seeks to make it clear that junior employees who simply deliver liquor and do not dispense liquor, are paid at junior rates for all time worked. The variation sought by the RCI appears in red below:

> **2. Definitions**
>
> …
>
> **Liquor service employee** means a person employed to sell or dispense liquor in bars, bottle departments or shops and includes a cellar employee. This does not include employees who only deliver liquor to customers and do not sell or dispense liquor behind the bar.

[105] We note that clause 15.1 of the Restaurant Award provides that 'Junior employees working as liquor service employees must be paid as an adult in accordance with Table 2 … Minimum rates at the classification rate for the work being performed.'

[106] A summary of legislative provisions relating to the service of alcohol by juniors is set out at **Attachment C**.

Question: Does any party take issue with the summary of relevant legislative provisions at Attachment C?

[107] In a submission filed on 24 July 2018 RCI advances the following points in support of its proposed variation:

- The PLED is ambiguous: RCI witnesses will give evidence that they are confused about how to pay a junior who takes alcohol from a serving or dispensing point to a table. The Award appears to provide that a junior must be paid adult wages for the whole of the shift if they deliver alcohol to a customer. The ambiguity needs to be resolved so it is clear that a junior who simply delivers liquor, and does not dispense liquor, is paid at junior rates for all time worked;
- The amendment proposed 'is in line with the modern awards objective';
- The amendment is not designed to allow juniors to dispense alcohol but merely to be able to deliver it to the tables of customers;
- Training opportunities will open up for young employees as businesses will be encouraged to hire junior employees;
- The evidence discloses that the liquor beverage may be only be one of out the three or four taken to a table and it is unreasonable to stop a junior taking a range of beverages if one is alcoholic.

Questions for RCI:

1. *On what basis is it put that the proposed variation 'is in line with the modern awards objective'?*
2. *If a junior delivers an alcoholic beverage to a customer at a table is the junior required to be RSA certified?*

[108] United Voice opposes the claim. The relevant submissions are at paragraphs 29 to 45 of United Voice's submission in reply of 2 November 2018, as follows:

> '29. Clause 15.1 of the Restaurant Award states in part that 'Where the law permits, junior employees may be employed in the bar or other places where liquor is sold. Junior employees working as liquor service employees must be paid at the adult rate of pay in clause 20.1 for the classification for the work being performed.'
>
> 30. This is reflected in similar terms in clauses 13.4 and 13.5 of the Restaurant Award PLED:
>
> > *13.4 Where the law permits, junior employees may work in a bar or other place where liquor is sold or dispensed.*
> >
> > *13.5 Junior employees working as liquor service employees must be paid as an adult in accordance with Table 2—Minimum rates at the classification rate for the work being performed.*
>
> 31. As part of the plain language proceedings a definition of 'liquor service employee' has been inserted into clause 2 of the Exposure Draft.
>
> 32. The definition states:
>
> > *'**Liquor service employee** means a person employed to sell or dispense liquor in bars, bottle departments or shops and includes a cellar employee.'*
>
> 33. The addition of a definition of 'liquor service employee' does not alter the obligation on an employer.
>
> 34. The requirement to pay junior employees working as liquor service employees the adult rate is in recognition that the service of alcohol carries with it specific obligations and responsibilities, no different to those placed on adult employees.
>
> 35. There are 5 categories of junior employee under clause 20.3 of the Restaurant Award. Junior employees 16 years and under receive 50% of the adult wage, employees 17 years and under receive 60% of the adult wage, employees 18 years of age receive 70%, employees 19 years of age receive 85% and employees 20 years of age receive 100% of the adult wage.
>
> 36. The age at which an employee may serve alcohol varies by state. In NSW, Victoria, South Australia, the Northern Territory and Western Australia the general rule is that an employee must be 18 years old to serve alcohol . In Tasmania employees must be at least 16 years of age to serve liquor and must be 18 years old in some circumstances. In the ACT, an employee under the age of 18 cannot supply alcohol in adults-only areas of licensed premises. In Queensland, there is no minimum age requirement in the Liquor Act 1992.
>
> 37. All states and territories require that employees serving, selling or supplying alcohol acquire and maintain specific qualifications and skills. For example, Responsible Service of Alcohol training is mandatory for everyone in NSW who sells serves and supplies alcohol. Similarly, completing a Responsible Service of Alcohol program is mandatory for staff selling, offering or serving liquor in Victoria.
>
> 38. There are significant penalties for breaching responsible service of alcohol requirements.
>
> 39. For example, in NSW, an employee can face up a fine to $11,000 for supplying alcohol to an intoxicated person.
>
> 40. There is no difference in the qualifications and skills required for the service or supply of liquor between junior employees and adult employees (where junior employees are permitted by law to serve alcohol), and both junior employees and adult employees are subject to significant penalties if they breach their responsibilities under state legislation for the responsible service of alcohol. The current Restaurant Award recognises this by ensuring that junior employees working as liquor service employees must be paid at the adult rate.

41. RCI contend that an employee who serves alcohol by waiting on a table should be paid a lower wage, on the basis that employees who deliver alcohol to tables are somehow performing a lessor duty than employees who pour and serve alcohol at a bar.

42. This is incorrect.

43. An employee serving alcohol to tables is still required to hold any relevant Responsible Service of Alcohol requirements, and would still be subject to penalties if they were to breach the requirements.

44. There is no justifiable reason as to why junior employees who serve alcohol to tables should not be paid the full adult rate, as any other liquor service employee would receive.

45. The variation sought should be rejected.'

(ii) Item 9 – Meal breaks

[109] RCI originally sought a variation to clause 32 by deleting sub-clauses 32.3 and 32.4.[41] RCI subsequently varied this claim, and now seeks to amend the meal breaks provision to allow breaks to be the subject of individual flexibility agreements.[42]

[110] Clause 32 provides:

'**32.1** If an employee, including a casual employee, is required to work for five or more hours in a day the employee must be given an unpaid meal break of no less than 30 minutes. The break must be given no earlier than one hour after starting work and no later than six hours after starting work.

32.2 If the unpaid meal break is rostered to be taken after five hours of starting work, the employee must be given an additional 20 minute paid meal break. The employer must allow the employee to take this additional meal break no earlier than two hours after starting work and no later than five hours after starting work.

32.3 If an employee is not given the unpaid meal break at the time the employer has told the employee it will be given, the employer must pay the employee 150% of the employee's ordinary base rate of pay from the time the meal break was to commence until either the meal break is given or the shift ends.

32.4 If clause 32.3 does not apply and an employee is not given a meal break in accordance with clause 32.1 the employer must pay the employee 150% of the employee's ordinary base rate of pay from the end of six hours until either the meal break is given or the shift ends.

32.5 If an employee is required to work more than five hours after the employee is given the unpaid meal break, the employee must be given an additional 20 minute paid break.

32.6 If a full-time or regular part-time employee is required to work more than 10 ordinary hours in the day, the employee will be given two additional 20 minute paid breaks. In rostering for these breaks, the employer must make all reasonable efforts to ensure an even mix of work time and breaks.

32.7 If an employee is required to work more than two hours' overtime after completion of the employee's rostered hours, the employee must be given an additional 20 minute paid break.'

[111] RCI seeks the insertion of the following provision in clause 32:

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[41] RCI submissions of 2 March 2015 at para 13; submission of 12 October 2016 at para 25.

[42] RCI submissions of 24 July 2018 at para 5.

'The award flexibility clause can be utilised to permit variations to this clause by agreement between the employer and employees.'

[112] The award flexibility clause, renamed and substituted effective 1 November 2018,[43] provides for individual flexibility arrangements:

'**7. Individual flexibility arrangements**

7.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

7.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

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[43] PR610285.

7.8 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.'

[113] In a submission filed on 24 July 2018 RCI advances the following points in support of its proposed variation:

- The amendment proposed 'is in line with the modern awards objective';
- The proposed variation is found in a like award – the *General Retail Industry Award 2010*;
- The evidence will indicate that there are sound and valid operational reasons for the variation, particularly the inconvenience of the break during hours of service;
- The variation will make the break more flexible and satisfy employee and employer needs.

[114] The relevant provision in the *General Retail Industry Award 2010* is at clause 31.1, Breaks during work periods:

'31.1 Breaks during work periods

(a) Breaks will be given as follows:

Hours worked	**Rest break**	**Meal break**
Work less than 4 hours	No rest break	No meal break
Work 4 hours or more but no more than 5 hours	One 10 minute rest break	No meal break
Work more than 5 hours	One 10 minute rest break	One meal break of at least

Hours worked	Rest break	Meal break
but less than 7 hours		30 minutes but not more than 60 minutes.
Work 7 hours or more but less than 10 hours	Two 10 minute rest breaks, with one taken in the first half of the work hours and the second taken in the second half of the work hours.	One meal break of at least 30 minutes but not more than 60 minutes.
Work 10 hours or more	Two 10 minute rest breaks, with one taken in the first half of the work hours and the second taken in the second half of the work hours.	Two meal breaks each of at least 30 minutes but not more than 60 minutes.

(b) The timing of the taking of a rest break or meal break is intended to provide a meaningful break for the employee during work hours.

(c) An employee cannot be required to take a rest break or meal break within one hour of commencing or ceasing of work. An employee cannot be required to take a rest break(s) combined with a meal break.

(d) No employee can work more than 5 hours without a meal break.

(e) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award.

(f) Rest breaks are paid breaks and meal breaks (except for shiftworkers) are unpaid breaks.

(g) The award flexibility clause can be utilised to permit variations to this clause by agreement between the employer and employees.'

Question for RCI: On what basis is it put that the proposed variation 'is in line with the modern awards objective'?

[115] United Voice opposes the claim. The relevant submissions are at paragraphs 4 to 16 of United Voice's submission in reply of 2 November 2018, as follows:

'1. RCI states that this provision is found in a *'like'* award, the *General Retail Industry Award 2010* ('Retail Award').

2. The retail sector and the restaurants sector are not like sectors. The RCI have not provided any probative material to base a finding that the Retail Award is a similar award to the Restaurant Award.

3. That IFAs can be utilised to vary meal breaks under the Retail Award is of little relevance to the Commission in determining whether employees covered under the Restaurant Award should be treated in the same manner.

4. Meal breaks are important in reducing fatigue in the workplace and provide an opportunity for employees to rest, recover and eat a meal.

5. A distinguishing feature of the sector covered by the Restaurant Award is that restaurants provide meals and beverages at defined service times: breakfast, lunch and dinner. Work

under this award often concerns quite specific service periods which will be particularly busy for relatively short periods. It is not uncommon for there to be a few hours where employees are '*run off their feet*.' Split shift are common under this award and relate to the periodicity of the intensity of work and that there are well defined and knowable busy periods. This is not the case with retail work.

6. The periodicity of the intensity of work covered by the Restaurant Award is a compelling reason to maintain meal breaks as a fixed part of the award safety net.

7. Allowing meal breaks to become the subject of IFAs could result on employees missing out on meal breaks altogether, or with employees not receiving adequate meal breaks.

8. Whilst IFAs are intended to result in the employee "*being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to*" in accordance with clause 7.3(b), the reality is IFAs are not monitored appropriately and there is no guarantee that the employee will be better off under an IFA.

9. This must be considered in light of the high levels of non-compliance in the hospitality industry (including restaurants).

10. A July 2018 Report by the Fair Work Ombudsman (FWO) found that 72% of businesses audited in the industry as part of FWO's food precinct activities were non-compliant.[44] This is an astonishing level of non-compliance with minimum award standards.

11. The FWO found that the non-provision of meal breaks was a common breach in the food precinct audit.[45]

12. Given the high level of non-compliance with the award already, there is a real risk that expanding the IFA provisions to include meal breaks will result in employees being worse off than under the Restaurant Award.

13. The variation sought should be rejected.'

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[44] Fair Work Ombudsman, Food Precincts Activity Report, July 2018, page 3. Note: This figure includes employees covered by the *Restaurant Industry Award 2010, Hospitality Industry (General) Award 2010* and the *Fast Food Industry Award 2010*, accessed at https://www.fairwork.gov.au/reports/food-precincts-activities-report/download-pdf

[45] Fair Work Ombudsman, 'FWO's Food Precincts campaign returns $471,904 in wages owed to hospitality workers', 11 July 2018, accessed at https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/july-2018/20180711-food-precincts-mr

List of Attachments

Attachment A: Background to the current tool allowance provisions in the Hospitality and Restaurant Awards

Attachment B: Draft determination giving effect to the agreed position in relation to the Hospitality Award

Attachment C: Summary of legislative provisions relating to the service of alcohol by juniors

ATTACHMENT A

Tools allowance in the *Hospitality Industry (General) Award 2010*

In [2008] AIRCFB 1000, the Full Bench decided to insert the following clause on the Consumer Price Index (CPI) into all modern awards and stated that the CPI is to be adjusted in accordance with the specified index at the time of any general wage adjustment:

> **'[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 references 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 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" |
>
> **[75]** In order to ensure that those covered by each award have access to the current amount, arrangements will be made for the expense-related allowances to be updated in accordance with the specified index at the time of any general wage adjustment.'
> (emphasis added)

A description of the CPI group, sub-group and expenditure classes relevant to the tools allowance for the *Hospitality Industry (General) Award 2010* is provided below.

The following pre-modern awards to the *Hospitality Industry (General) Award 2010* (Hospitality Award) contained 'clothing, equipment and tools' clauses:

- *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*
- *Hotels, Resorts and Certain Other Licensed Premises Award - State (Excluding South-East Queensland) 2003*
- *Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998*
- *Liquor Trades Hotels (Australian Capital Territory) Award, 1998*
- *Motels, Accommodation and Resorts (State) Award.*

In addition, the predecessors to the *Restaurant Industry Award 2010*: *Airport Catering Award 2002* and *Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998* contained 'clothing, equipment and tools' clauses.

These clauses are extracted in the attached table.

Award modernisation consideration

Award modernisation decisions on the Hospitality Award do not discuss the 'clothing, equipment and tools allowances. In the Exposure Draft dated September 2008 there is the 'clothing, equipment and tools' clause.

There will be no discussion on the provisions in the *Restaurant Industry Award 2010* as it used the Hospitality Industry Award as a base document.

Tables showing clothing, equipment and tools' allowance clauses in predecessor awards to the *Hospitality Industry (General) Award 2010* and *Restaurant Industry Award 2010*

Premodern award	Reference	Allowance Clause
Restaurant Industry Award		
Airport Catering Award 2002	AP818292	**17.9 Uniform, protective clothing and tools allowance** **17.9.1** Where an employer requires any employee to wear any special uniform, dress or clothing, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. [17.9.2 varied by PR959224 PR974894 PR978383; PR984018 ppc 01Oct08] **17.9.2** Unless such uniform, dress or clothing is laundered by the employer the employee shall be paid laundry allowance of $6.15 per week. **17.9.3** Where it is necessary that waterproof or other protective clothing such as waterproof boots, aprons or gloves be worn by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. Where protective clothing is supplied without cost to the employee, it will remain the property of the employer. **17.9.4** Where the employer requires an employee to provide and use any aprons, towels, tools, brushes, knives, choppers, implements, utensils, or other materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause do not apply where the employer supplied such items without cost to the employee.
Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998	AP787016	17.9 Uniform, protective clothing and tools allowance 17.9.1 Where an employer requires any employee to wear any special uniform, dress or clothing, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer.

Premodern award	Reference	Allowance Clause
		[17.9.2 varied by PR959224 PR974894 PR978383; PR984018 ppc 01Oct08] 17.9.2 Unless such uniform, dress or clothing is laundered by the employer the employee shall be paid laundry allowance of $6.15 per week. 17.9.3 Where it is necessary that waterproof or other protective clothing such as waterproof boots, aprons or gloves be worn by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. Where protective clothing is supplied without cost to the employee, it will remain the property of the employer. 17.9.4 Where the employer requires an employee to provide and use any aprons, towels, tools, brushes, knives, choppers, implements, utensils, or other materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause do not apply where the employer supplied such items without cost to the employee.
Hospitality Industry (General) Award 2010		
Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998, The	AP783479	23.3 Clothing, equipment and tools [23.3.1 varied by R6139 from 02Jun99] 23.3.1 Where a Cook is required to use his or her 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. 23.3.2 Where the employer requires an employee to wear any special clothing such as coats, dresses, caps, aprons, cuffs and any other articles of clothing, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. 23.3.3 Where the employee is responsible for laundering the special clothing the employer must reimburse the employee for the demonstrated costs of laundering it. 23.3.4 The employer and the employee may agree on an arrangement under which the employee will wash and iron the special clothing for an agreed sum of money to be paid by the employer to the employee each week. In the event of dispute as to an appropriate

Premodern award	Reference	Allowance Clause
		allowance under such an arrangement, the amount may be determined by a Board of Reference. 23.3.5 Black and white attire (not being dinner suit or evening dress), shoes, hose and/or socks is not special clothing. 23.3.6 Where it is necessary that an employee wear waterproof or other protective clothing such as waterproof boots, aprons, or gloves, the employer must reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not apply where the special clothing is supplied to the employee at the employer's expense. Where protective clothing is supplied without cost to the employee, it will remain the property of the employer. In the event of dispute, the necessity for the provision of protective clothing may be determined by a Board of Reference. 23.3.7 An employer may require an employee on commencing employment to sign a receipt for item/s of uniform and property. This receipt must list the item/s of uniform and property and the value of them. If, when an employee ceases employment, the employee does not return the item/s of uniform and property (or any of them) in accordance with the receipt, the employer will be entitled to deduct the value as stated on the receipt from the employee's wages. 23.3.8 In the case of genuine wear and tear, damage, loss or theft that is not the employee's fault the provisions of clause 23.3.7 will not apply. 23.3.9 Any disagreement concerning the value of item/s of uniform and property and any other aspect of this clause may be determined by a Board of Reference. 23.3.10 Where the employer requires an employee to provide and use any towels, tools, ropes, brushes, knives, choppers, implements, utensils and materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause shall not apply where the employer supplies such items without cost to the employee.
Hotels, Resorts and Certain Other Licensed Premises Award - State (Excluding South-East Queensland) 2003	AN140148	10.3 CLOTHING, EQUIPMENT AND TOOLS 10.3.1 Uniforms

Premodern award	Reference	Allowance Clause
		(a) Where the employer requires any special clothing such as coats, dresses, caps, aprons, cuffs and any other articles of clothing to be worn by the employee they shall be purchased and laundered at the employer's expense. By agreement the employee may be required to wash and iron the special clothing and an agreed sum of money shall be paid to the employee each week by the employer. Black and white attire (not being dinner suit or evening dress), shoes, hose and/or socks shall not be regarded as special clothing. (b) Where it is necessary that waterproof or other protective clothing such as waterproof boots, aprons, or gloves be worn by an employee, such clothing shall be supplied without cost to the employee and shall remain the property of the employer. 10.3.2 Washing clothes Employers shall permit any of the employees who live in, the use of a laundry to do their washing, and shall supply the employee with good facilities and equipment for the laundering of their clothes.
Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998	AP787016	23. ALLOWANCES 23.1 Clothing,equipment and tools 23.1.1 Where the employer requires an employee to wear any special clothing such as coats, dresses, caps, aprons, cuffs and any other articles of clothing, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. [23.1.2 varied by R5758 PR905573 PR959246 PR974949 PR978435; substituted by PR983525 ppc 01Oct08] 23.1.2 Where the employee is responsible for laundering the special clothing the employer must pay the employee an additional $11.10 per week. 23.1.3 An employer may require an employee on commencing employment to sign a receipt for item/s of uniform and property. This receipt must list the item/s of uniform and property and the value of them. If, when an employee ceases employment, the employee

Premodern award	Reference	Allowance Clause
		does not return the item/s of uniform and property (or any of them) in accordance with the receipt, the employer will be entitled to deduct the value as stated on the receipt from the monies due to the employee on termination. 23.1.4 In the case of genuine wear and tear, damage, loss or theft that is not the employee's fault the provisions of 23.1.3 will not apply. 23.1.5 Where the employer requires an employee to provide and use any towels, tools, ropes, brushes, knives, choppers, implements, utensils and materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause shall not apply where the employer supplies such items without cost to the employee.
Liquor Trades Hotels (Australian Capital Territory) Award, 1998	AP787018	21. ALLOWANCES 21.1 Clothing, equipment and tools 21.1.1 Where the employer requires an employee to wear any special clothing such as coats, dresses, caps, aprons, cuffs and any other articles of clothing, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is paid for by the employer. 21.1.2 Where the employee is responsible for laundering the special clothing the employer must reimburse the employee for the demonstrated costs of laundering it. 21.1.3 The employer and the employee may agree on an arrangement under which the employee will wash and iron the special clothing for an agreed sum of money to be paid by the employer to the employee each week. In the event of dispute as to an appropriate allowance under such an arrangement, the amount may be determined by a Board of Reference. 21.1.4 Black and white attire (not being dinner suit or evening dress), shoes, hose and/or socks is not special clothing. 21.1.5 Where it is necessary that an employee wear waterproof or other protective clothing such as waterproof boots, aprons, or gloves, the employer must reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not

Premodern award	Reference	Allowance Clause
		apply where the special clothing is supplied to the employee at the employer's expense. Where protective clothing is supplied without cost to the employee, it will remain the property of the employer. In the event of dispute, the necessity for the provision of protective clothing may be determined by a Board of Reference. 21.1.6 An employer may require an employee on commencing employment to sign a receipt for item/s of uniform and property. This receipt must list the item/s of uniform and property and the value of them. If, when an employee ceases employment, the employee does not return the item/s of uniform and property (or any of them) in accordance with the receipt, the employer will be entitled to deduct the value as stated on the receipt from the employee's wages. 21.1.7 In the case of genuine wear and tear, damage, loss or theft that is not the employee's fault the provisions of clause 21.2.6 will not apply. 21.1.8 Any disagreement concerning the value of item/s of uniform and property and any other aspect of this clause may be determined by a Board of Reference. 21.1.9 Where the employer requires an employee to provide and use towels, tools, ropes, brushes, knives, choppers, implements, utensils and materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause shall not apply where the employer supplies such items without cost to the employee.
Motels, Accommodation and Resorts (State) Award	AN120349	16.6 Clothing, equipment and tools 16.6.1 Where it is necessary that an employee wear waterproof or other protective clothing such as waterproof boots, aprons, or gloves, the employer must reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not apply where the special clothing is supplied without cost to the employee. Where protective clothing is supplied without cost to the employee , it will remain the property of the employer. In the event of a dispute, the necessity for the provision of protective clothing may be determined by the Motels, Accommodation and Resorts, &c., Employees (State) Industrial Committee. 16.6.2 Where the employer requires an employee to provide and use any tools, brushes,

Premodern award	Reference	Allowance Clause
		knives, choppers, implements, utensils and materials, the employer must reimburse the employee for the cost of purchasing such equipment. The provisions of this clause shall not apply where the employer supplied such items without cost to the employee. 16.6.3 An employer may require an employee on commencing employment to sign a receipt for item/s of uniform and property. This receipt must list the item/s of uniform and the value of them. If, when an employee ceases employment the employee does not return the item/s of uniform and property (or any of them) in accordance with receipt the employer will be entitled to deduct the value as stated on the receipt from the employees wages. 16.6.4 In the case of genuine wear and tear, damage, loss, or theft that is not the employee's fault the provision of 16.6.3 will not apply. 16.6.5 Any disagreement concerning the value of item/s of uniform and any other aspect of this clause shall be determined by the Motels, Accommodation and Resorts, &c., Employees (State) Industrial Committee.

ATTACHMENT B

MA000009 PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards
(AM2014/272)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010
[MA000009]

Hospitality industry

JUSTICE ROSS, PRESIDENT MELBOURNE, XX MONTH 2018

4 yearly review of modern awards – award stage – Hospitality Industry (General) Award 2010

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2018 [46], the above award is varied as follows:

A. It is ordered that the Hospitality Industry (General) Award 2010 be varied as follows:

1. In clause 3.1, inserting the following definitions:

> "**junior employee** means an employee under the age of 20 who is not undertaking a nationally recognised traineeship or apprenticeship".

2. By inserting a new sub clause 14.12:

14.12 Competency based progression

(a) For the purpose of competency based wage progression in clause 20.4 an apprentice will be paid at the relevant wage rate for the next stage of their apprenticeship if:
  (i) competency has been achieved in the relevant proportion of the total units of competency specified in clause 20.4 for that stage of the apprenticeship. The units of competency which are included in the relevant proportion must be consistent with any requirements in the training plan; and

[46] {2018] FWCFB XXXX

(ii) any requirements of the relevant State/Territory apprenticeship authority and any additional requirements of the relevant training package with respect to the demonstration of competency and any minimum necessary work experience requirements are met; and

(iii) either:

(A) the Registered Training Organisation (RTO), the employer and the apprentice agree that the abovementioned requirements have been met; or

(B) the employer has been provided with written advice that the RTO has assessed that the apprentice meets the abovementioned requirements in respect to all the relevant units of competency and the employer has not advised the RTO and the apprentice of any disagreement with that assessment within 21 days of receipt of the advice.

(b) If the employer disagrees with the assessment of the RTO referred to in clause 14.12(a)(iii)(B) above, and the dispute cannot be resolved by agreement between the RTO, the employer and the apprentice, the matter may be referred to the relevant State/Territory apprenticeship authority for determination. If the matter is not capable of being dealt with by such authority it may be dealt with in accordance with the dispute resolution clause in this award. For the avoidance of doubt, disputes concerning other apprenticeship progression provisions of this award may be dealt with in accordance with the dispute resolution clause.

(c) For the purposes of this clause, the training package containing the qualification specified in the contract of training for the apprenticeship, sets out the assessment requirements for the attainment of the units of competency that make up the qualification. The definition of "competency" utilised for the purpose of the training packages and for the purpose of this clause is the consistent application of knowledge and skill to the standard of performance required in the workplace. It embodies the ability to transfer and apply skills and knowledge to new situations and environments.

(d) The apprentice will be paid the wage rate referred to in clause 14.12(a) from the first full pay period to commence on or after the date on which an agreement or determination is reached in accordance with clause 14.12(a)(iii) or on a date as determined under the dispute resolution process in clause 14.12(b)

(e) If the apprentice disagrees with the assessment of the RTO referred to in clause 14.12(a), and the dispute cannot be resolved by agreement between the RTO, the employer and the apprentice, the apprentice may refer the matter to the relevant State/Territory apprenticeship authority for determination. If the matter is not capable of being dealt with by such authority it may be dealt with in accordance with the dispute resolution clause in this award. For the avoidance of doubt, disputes concerning other apprenticeship progression provisions of this award may be dealt with in accordance with the dispute resolution clause.

3. By deleting clause 20.4 and inserting the following:

20.4 Apprentice wages

(a) Apprentices other than Waiting apprenticeship

(i) A person who has completed a full apprenticeship for which there is a trade qualified classification provided for in this award, must be paid no less than the standard hourly rate for each hour worked.

(ii) Except where clause 20.4(a)(iii) is applicable an employee will be paid the percentage of the standard hourly rate for each hour worked, in accordance with the following table:

Year	**%**
First	55
Second	65
Third	80
Fourth	95

(iii) Competency based wage progression

Where the relevant apprenticeship legislation allows competency based progression and the training contract does not specify otherwise, an employee apprenticed in a trade after <insert date of the Determination> will be paid the percentage of the standard hourly rate for each hour worked, in accordance with the following table:

(A) Four year apprenticeship (nominal term)

Stage of apprenticeship	**Minimum training requirements on entry**	**% of the standard hourly rate**
Stage 1	On commencement and prior to the attainment of the minimum training requirements specified for Stage 2	55
Stage 2	On attainment of 25% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 12 months after commencing the apprenticeship, whichever is the earlier.	65
Stage 3	On attainment of 50% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 12 months after commencing Stage 2, whichever is the earlier.	80
Stage 4	On attainment of 75% of the total competencies specified in the training plan for the relevant AQF Certificate III	95

qualification; or 12 months after commencing Stage 3, whichever is the earlier.

(B) Three year apprenticeship (nominal term)

Stage of apprenticeship	Minimum training requirements on entry	% of the standard hourly rate
Stage 1	On commencement and prior to the attainment of the minimum training requirements specified for Stage 2	55
Stage 2	On attainment of 25% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 9 months after commencing the apprenticeship, whichever is the earlier.	65
Stage 3	On attainment of 50% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 9 months after commencing Stage 2, whichever is the earlier.	80
Stage 4	On attainment of 75% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 9 months after commencing Stage 3, whichever is the earlier.	95

(b) Waiting apprenticeship

(i) Any person who has completed a full apprenticeship as a qualified tradesperson must be paid not less than the standard hourly rate for each hour worked.

(ii) Except where clause 20.4(b)(iii) is applicable, an employee apprenticed in the waiting trade will be paid the relevant percentage or portion of the standard hourly rate for each hour worked, in accordance with the following table:

First six months	70%
Second six months	85%
Third six months	Midway between the total rate prescribed for food and beverage attendant grade 2 (waiter) in clause

	20.1 and the standard weekly rate; and
Fourth six months	Midway between the total rate prescribed for third six months, above, and the standard weekly rate.

(iii) Where the relevant apprenticeship legislation allows competency based progression and the training contract does not specify otherwise an employee apprenticed in the waiting trade after <insert date of the Determination> will be paid the percentage of the standard hourly rate for each hour worked, in accordance with the following table:

(A) Two year waiting apprenticeship (nominal term)

Stage of apprenticeship	**Minimum training requirements on entry**	**% of the standard hourly rate**
Stage 1	On commencement and prior to the attainment of the minimum training requirements specified for Stage 2	70
Stage 2	On attainment of 25% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 6 months after commencing the apprenticeship, whichever is the earlier.	85
Stage 3	On attainment of 50% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 6 months after commencing Stage 2, whichever is the earlier.	Midway between the total rate prescribed for food and beverage attendant grade 2 (waiter) in clause 20.1 and the standard hourly rate
Stage 4	On attainment of 75% of the total competencies specified in the training plan for the relevant AQF Certificate III qualification; or 6 months after commencing Stage 3, whichever is the earlier.	Midway between the total rate prescribed for stage 3, above, and the standard hourly rate

(c) Proficiency payments—cooking trade

(i) Application
Proficiency pay as set out in clause 20.4(c)(ii) will apply to apprentices who have successfully completed their schooling in a given year.
(ii) Payments
(iii) Apprentices must receive the standard hourly rate during the latter half of the fourth year of the apprenticeship where the standard of proficiency has been attained on one, two or three occasions on the following basis:

(1) one occasion only:
- for the first nine months of the fourth year of apprenticeship, the normal fourth year rate of pay;
- thereafter, the standard hourly rate.

(2) on two occasions:
- for the first six months of the fourth year of apprenticeship, the normal fourth year rate of pay;
- thereafter, the standard hourly rate.

(3) on all three occasions:
- for the entire fourth year, the standard hourly rate.

(d) Proficiency payments—waiting trade

(i) Application
Proficiency pay as set out in clause 20.4(d)(ii) will apply to level 2 apprentices who have successfully completed their schooling in the first year.

(ii) Payments
Apprentices who have attained the standard of proficiency in their first year must receive the standard hourly rate for each ordinary hour worked during the latter half of the second year of apprenticeship.

(e) Adult apprentices

(i) The minimum hourly wage for an adult apprentice who commenced on or after 1 January 2014 and is in the first year of their apprenticeship must be 80% of the minimum hourly wage for Level 4 in clause 20.4(a) or 20.4(b), or the rate prescribed by clause 20.4(a) or 20.4(b) for the relevant year or stage of the apprenticeship, whichever is the greater.

(ii) The minimum hourly wage for an adult apprentice who commenced on or after 1 January 2014 and is in the second and subsequent years of their apprenticeship must be the rate for the lowest adult classification in clause 20.1, or the rate prescribed by clause 20.4(a) or 20.4(b) for the relevant year or stage of the apprenticeship, whichever is the greater.

(iii) A person employed by an employer under this award immediately prior to entering into a training agreement as an adult apprentice with that employer must not suffer a reduction in their minimum hourly wage by virtue of entering into the training agreement, provided that the person has been an employee in that enterprise for at least six months as a full-time employee or twelve months as a part-time or regular and systematic casual employee immediately prior to commencing the apprenticeship. For the purpose only of fixing a minimum wage, the adult apprentice must continue to receive the minimum wage that applies to the classification specified in clause 20.1 or 20.3 in which the adult apprentice was engaged immediately prior to entering into the training agreement.

4. By deleting clause 21.1(b)(i), and inserting the following:

"Where a cook or apprentice 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."

5. By deleting the second row of the table in clause 21.1(j) and replacing it with the following:

Clothing allowance	Clothing and footwear group
Equipment and tools allowance	Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group

6. By deleting clause 21.1(h) and inserting the following:

(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.

7. By deleting clause 21.2(a) and inserting the following:

(a) Fork-lift driver

(i) In addition to the wage rates set out in clause 20.1, a fork-lift driver must be paid an additional hourly allowance equal to 1.5% of the standard weekly rate divided by 38 for all purposes.

(ii) A part-time or casual fork-lift driver who was employed immediately prior to <insert date of the Determination> must, in addition to the wage rates set out in clause 20.1, be paid an additional allowance, per day, equal to 0.3% of the standard weekly rate, to a maximum of 1.5% of the standard weekly rate per week. A part-time or casual employee in receipt of the daily fork-lift driver allowance under this subclause may elect to receive the fork-lift driver allowance under subclause (i).

B. This determination comes into operation from XX Month 2018. In accordance with s.163 of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX Month 2018

PRESIDENT

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ATTACHMENT C

State	Legislative provision	Effect of provision
Queensland	*Liquor Act 1992* (Qld)	
	s.155 (4)(b)(ii)	A minor (ie a person under the age of 18 years old, section 17 of the *Law Reform Act 1995*) may be on licensed premises if they are performing duties as an employee of the owner or occupier, or training for employment or work experience (no minimum age specified).
	141C (1)(b)	Member of staff of licensed premises who is involved in the sale or supply of liquor must have a current training course certificate, which is a certificate given to a person for satisfactorily completing an approved training course, or; a statement of attainment of a specified training unit issued within 3 years before the commencement of the Act (s 274). Applies from 30 days after the person becomes a staff member.
NSW	*Liquor Act 2007 No 90* (NSW)	
	Section 119	A licensee must not cause or allow a minor (person under age of 18 years, s 4) to serve liquor on the licensed premises except with the approval of the Authority.
	Liquor Regulation 2018, Regulation 63	A staff member of licensed premises who serves liquor must hold a recognised competency card with a current industry RSA endorsement.
Western Australia	*Liquor Control Act 1988* (WA)	
	s.121 (10)	It is an offence to employ or engage a juvenile (person under 18 yo, s 3) in the sale, supply or serving of liquor on or from a licensed premises.
	s.121 (11)	Section 121(10) does not apply if: a) the juvenile is of or above the age of 16 years; and b) the juvenile's employment or engagement is approved by the Director of Liquor Licensing; and c) the work carried out by the juvenile is supervised at all times; and d) either — (i) the work will be assessed for the purposes of a prescribed training course being undertaken by the

	Liquor Control Regulations 1989, reg 14AD(3)	juvenile; or (ii) the juvenile has successfully completed a prescribed training course the assessment for which included an assessment of the juvenile's work while employed or engaged to serve liquor ancillary to a meal. A person employed or engaged in the service of liquor on or from licensed premises is required to complete successfully, within 4 weeks, a course of training or an assessment, approved by the Director of Liquor Licensing in responsible practices in the sale, supply and service of liquor.
Victoria	*Liquor Control Reform Act 1998* (Vic) Section 122 108AB and 108AC	 Licensee must not permit a person under the age of 18 to supply liquor unless the person is engaged in a training program approved by the Commission, and supplying the liquor in accordance with any conditions to which the Commission has determined that the training program is subject. Licensee must ensure every person who serves alcohol on the licensed premises has completed an RSA course within 3 years of starting, or completes within one month of starting, and a refresher course every 3 years.
South Australia	*Liquor Licensing Act 1997* (SA) Section 107 Section 42	 It is an offence for a licensee to employ a minor (under the age of 18, s 4) to sell liquor on a licensed property, unless: the minor is of or above the age of 16 years, a child of the licensee or a responsible person for the licensed premises and: • resident on the premises; or • the licensing authority, on application, approves the employment of the minor for that purpose. It is a condition of every licence that the licensee must comply with the Commissioner's codes of practice (Code), which requires a licensee to ensure that all staff involved in the service or supply of liquor on the licensed premises complete nationally accredited responsible service of alcohol training within three months (Part 2, Section 7 of the Code).
Northern Territory	*Liquor Act* (NT) Section 117	 A licensee must not employee a child (younger than 18, s 4) to sell liquor on a licensed premises unless permitted to do so by the Attorney-General as an employee or someone undergoing employment training (which may be given generally or on

		application by the licensee). The NT.Gov website states that 'any person involved in the service of alcohol in the Northern Territory must have a responsible service of alcohol (RSA) certificate. Employees need to have an RSA certificate within one month of starting work at a licensed premise', see https://www.nt.gov.au/industry/hospitality/serve-alcohol-responsibly, however I have not been able to locate the legislative basis for this.
ACT	*Liquor Act 2010* (ACT) 118 101	It is an offence for a licensee or permit-holder to employee a child or young person (under 18 years old, s 11 and 12 *Children and Young Person Act 2008*) to supply liquor in an adults-only area of the licensed premises. It is an offence for an employee of a licensee or commercial permit-holder to supply liquor on a licensed premises without holding an RSA.
Tasmania	*Liquor Licensing Act 1990* (Tas) 46A 46B	(1) A licensee must not allow a person to sell or serve liquor on the licensed premises unless the person: (a) has successfully completed an approved course (being a course of instruction or training in the service of liquor, approved by the Commissioner (s 46A(4)); or (b) has been an employee of the licensee for, in aggregate, less than 3 months and is – (i) undertaking an approved course; or (ii) formally enrolled in an approved course that is scheduled to start within 3 months from the day on which the person is permitted to serve the liquor. A licensee or permit holder must not allow a person to sell or serve liquor on the licensed premises or permit premises unless that person is at least 16 years of age or such younger age as is determined by the Commissioner in relation to that person (Liquor Licensing Regulations 2016, reg 9), and at least 18 years old if supplying liquor in a 'prohibited area' (reg 10). For an example of an approved course, see https://www.accessallareastraining.com.au/courses/tasmania/alcohol-training/rsa-tas-online, an online course that takes approximately 6 hours to complete.