IN THE FAIR WORK COMMISSION

LOADED RATES IN AGREEMENTS CASE

(AG2017/1925, AG2017/1943, AG2017/2228, AG2017/3027, AG2017/2569, AG2017/2558)

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN INDUSTRY GROUP

A. THE FWC'S DIRECTIONS

1. The Australian Industry Group (**Ai Group**) files these submissions as a Peak Council pursuant to Directions contained within correspondence received from the Fair Work Commission (**FWC**) on 9 October 2017 in the following terms:

> "Your attention is drawn to the above applications for the approval of single-enterprise agreements.
>
> These applications have been referred by the President of the Commission to a Full Bench for hearing. These applications all raise issues of general importance concerning how the Better Off Overall Test (BOOT) should be applied to an agreement which rolls up penalty rate payments and other benefits into loaded rates of pay. Accordingly, the Commonwealth and Peak Industry Councils are invited to make submissions in the matters.
>
> The applications and the accompanying documents will be sent to you in 6 separate emails due to their size.
>
> If you wish to make a submission, any such submission must be made in writing and filed by **5.00pm Wednesday 1 November 2017**
>
> In addition, if you wish to make oral submissions, you may do so at the hearing of the matters at **10.00am Wednesday 15 November 2017.**"

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B. THE NEED FOR THE FWC TO AVOID ADOPTING AN OVERLY THEORETICAL APPROACH WHEN ASSESSING ENTERPRISE AGREEMENTS

2. In Ai Group's view, in recent times the FWC has often adopted an overly theoretical approach when assessing enterprise agreements at the approval stage.

3. The adopting of a less theoretical and more practical approach would be:

   a. In the interests of employers and employees;

   b. Consistent with the objects of the *Fair Work Act 2009* (**FW Act**);

   c. Consistent with relevant statutory interpretation principles; and

   d. Consistent with the approach that the FWC and its predecessors adopted from 1993 up until the past few years.

4. The FWC's current often overly theoretical approach to assessing enterprise agreements is particularly pronounced when it deals with applications for the approval of enterprise agreements containing loaded rates, but the current problems are by no means limited to such agreements.

5. Concerns are very regularly expressed to Ai Group by Member companies about the FWC's current approach to assessing enterprise agreements. Problems which are frequently identified include:

   a. When assessing the BOOT, the FWC often takes into account theoretical circumstances that are extremely unlikely to arise given the nature of the employer's operations, the types of employees that are employed, and the work patterns of the relevant employees; and

   b. Requiring that employers give undertakings in a high proportion of cases, often because the FWC has carried out an overly theoretical BOOT analysis.

6. In Ai Group's experience, the FWC's current approach to assessing enterprise agreements is imposing a barrier to agreement-making. While some of the current problems that are occurring are due to problematic drafting of various provisions of the FW Act (e.g. s.193 – Passing the better off overall test), and the absence of an express provision in the Act which allows the FWC to overlook minor procedural defects in the agreement-making process, many of the current problems are due to the overly theoretical approach that the FWC is often taking when assessing enterprise agreements.

7. Ai Group urges the Full Bench to make a decision in these proceedings that will facilitate the adoption of a practical approach by the FWC when agreements are assessed.

C. Relevant statistics

8. Over the past few years there has been a very substantial decrease in the number of enterprise agreements being made, the number of current agreements in force, and the number of employees covered by current agreements. These trends are well-known and have been the subject of much public debate about the reasons for the decline.

9. It would of course be unfair and wrong to attribute all of the recent decline in agreement-making to the approach that the FWC has taken over the past three years when assessing enterprise agreements at the approval stage, but in Ai Group's view this is one of a number of relevant factors.

10. The statistics in the FWC's 2016-17 Annual Report point to a substantial change over the past three years in the FWC's approach to assessing enterprise agreements.

11. In the past three years there has been a substantial increase in the number of enterprise agreement applications that have been withdrawn, and a substantial increase in the number of agreements approved by the FWC with undertakings.

12. The number of enterprise agreement applications withdrawn has more than doubled in the past three years, as highlighted in the following table:

Enterprise agreement applications withdrawn					
2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
294	314	294	407	595	709

13. In Ai Group's experience, applications are typically withdrawn at the invitation of the FWC after the applicant is advised that the relevant enterprise agreement is unlikely to be approved.

14. Also, the number of enterprise agreements approved with undertakings has more than doubled over the past three years as highlighted by the following extract from page 57 of the FWC's 2016-17 Annual Report:

> "The proportion of agreement applications that are withdrawn has increased, rising from 4 per cent in 2013–14 to 12.4 per cent in 2016–17, with a spike of 17 per cent withdrawn in January–June 2017 (as shown in Figure 6).
>
> Between January–June 2014 and January–June 2017 the proportion of agreements approved with undertakings increased, from 20 per cent to 43 per cent, while the proportion of agreements approved without undertakings decreased significantly, from 74 per cent to 39 per cent.
>
> As Figure 6 illustrates, in January–June 2017, for the first time, more agreements were approved with undertakings than without."

15. It cannot seriously be argued that the enterprise agreements lodged for approval in 2016-17 are more poorly drafted than those lodged in 2013-14. The change in outcomes demonstrates that the FWC has changed its approach.

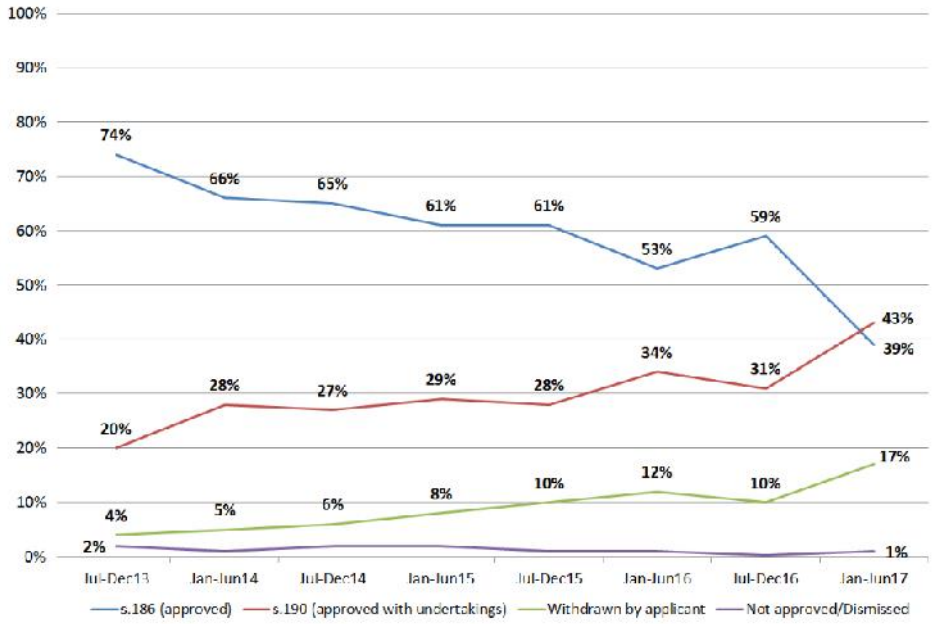
16. The statistics are in line with the experiences of Ai Group and our Members. That is, over the past three years the FWC has adopted a less practical, more theoretical approach when assessing enterprise agreements, particularly in respect of the application of the BOOT.

17. The change in the FWC's approach coincides with the implementation of an Agreement Triage Process in October 2014. The following extract from the FWC's submission to the Senate Education and Employment References Committee Inquiry into Penalty Rates in July 2017 explains the changes:

> **Agreement Triage Pilot**
>
> 49. Until October 2014 all enterprise agreement approval applications were allocated directly to Commission Members to deal with and determine as they deemed appropriate. (Some specialist administrative support was available to Members, for example, to provide some analysis regarding the BOOT. Members sought this assistance in approximately 5 per cent of applications.)
>
> 50. In October 2014 the Commission piloted an 'agreement triage process' to promote greater consistency and improve timeliness in enterprise agreement approval decisions. The triage process involves a team of legally qualified staff conducting a comprehensive analysis of agreements lodged for approval. The analysis includes completion of the detailed checklist at **Attachment B**. This analysis assists the Commission Member dealing with the application, in making their decision under the FW Act. At all times the decision as to whether to approve an agreement is made by a Member.
>
> 51. In May 2015, the triage pilot was independently reviewed by Inca Consulting in association with Dr George Argyrous, Senior Lecturer in Evidence-Based Decision Making, University of NSW. The review reported:
>
> > It was noted that the centralised triage approach provided for "a simpler, more consistent process for assessing agreements." In particular, it was noted that greater consistency could be achieved through using a small and dedicated team rather than the work being performed in a more dispersed way through Members' chambers.
> >
> > Importantly, the pilot approach has allowed for the detection of some trends in the lodgment of new enterprise agreements. For example, common errors made by applicants have been detected that delay the approval of agreements (or result in them being withdrawn). Observing these trends and identifying the types of employers or industries where 'mistakes' commonly occur has allowed FWC to embark on some 'early intervention' or 'outreach' work. For example, the Notice of Employee Representational Rights Guide has been developed to hopefully see fewer agreements withdrawn on a technicality.
> >
> > The report of the review of the agreement triage pilot is available on the Commission's website at Agreement triage pilot independent review May 2015.
>
> 53. Initially the triage process was confined to enterprise agreements in a small number of industries and states, but was progressively expanded. By the end of November 2016, the triage process was applied to all applications for approval of agreements.

54. The chart below contains a breakdown of agreement matters by result since the commencement of the triage process. It shows the percentage over time of applications for approval of single enterprise agreements that have been granted, granted with undertakings, withdrawn by the applicant, and dismissed. Prior to the triage pilot, 74% of applications for approval of single enterprise agreements were approved without undertakings compared to 39% in the first six months of 2017. Twenty per cent of applications prior to the pilot were approved subject to one or more undertakings, compared to 43 per cent in 2017, and 4 per cent of applications were withdrawn by the applicant compared to 17 per cent in 2017. The increase in the number of undertakings suggests that the triage process has identified potential shortcomings in agreements lodged with the Commission for approval.

Chart 1 – Agreements by result type



55. At all times the judgment as to whether an agreement should be approved or not is made by Members, to be exercised in accordance with their oath of office and the requirements of the FW Act. The triage process has, however, assisted Members exercise their function in a consistent and rigorous way.

56. In recent months there has been media commentary about a number of enterprise agreements approved by the Commission under the FW Act and predecessor legislation. A list of many of those agreements is at Attachment C. All but one of these agreements were approved before the triage process outlined above was in place. In the case of the Coles agreement, analysis was given to the Member that based on the agreement as lodged, it may not pass the BOOT. The agreement was subsequently approved with four undertakings. The decisions were based on the material the Member had before them at the time, including the agreement signed by the employer and employee representative and the accompanying statutory declaration.

18. Ai Group has a number of concerns about the above developments.

19. **Firstly,** the Methodology that Inca Consulting and Dr Argyrous used to conduct the independent review, did not involve any consultation with employers, employees, employer associations or unions. The methodology was as follows (as extracted from page 3 of the review report):

> **2. METHODS**
>
> The review commenced on 13 April 2015. The following was undertaken:
>
> - In-depth interviews with two of the Member Support Team and two Commission Members, nominated by FWC
> - A detailed briefing by the Manager of the Member Support Team
> - A review of relevant parts of the Fair Work Act 2009, written procedures for the pilot, pilot progress reports and other background documents
> - A review of two example FWC case files including agreement lodgements, FWC analysis and correspondence between FWC and applicants
> - A review of administrative data relating to processing times for enterprise agreements considered by the Members Support Team (ie the pilot) and Commission Members (ie non-pilot).

20. **Secondly,** while the ultimate judgement on whether an enterprise agreement is approved is made by an FWC Member, no doubt the analysis conducted by the Member Assist Team influences the decisions that FWC Members make.

21. **Thirdly,** the design of section 5 (Better Off Overall Test) of the *Single Enterprise Agreement Legislative Checklist* that the staff in the FWC Member Assist Team use when assessing enterprise agreements, increases the chances of an enterprise agreement failing the BOOT, because it is structured in a manner which is likely to result in inadequate weight being given to benefits included in an enterprise agreement that do not fall within one of the 10 categories listed in the Checklist.

22. The full Checklist can be found at **Attachment A** to this submission.

23. Section 5 of the Checklist is reproduced below:

Section 5 — Better off overall test	
Relevant award(s)	
Award incorporated into agreement or read in conjunction with agreement?	
Do the agreement classifications align with the award?	
Has the employer provided classification matching?	

Pay rate comparison

Modern award classification	Agreement classification	Modern award rate	Agreement rate	Percentage difference

Entitlements table

	Agreement	Relevant modern award(s)
Hours		
Part-time employees		
Casual employees		
Shift penalties		
Weekend penalties		
Public holiday penalties		
Overtime		
Annual leave loading		
Allowances		

Better off overall test summary (s.186(2)(d), s.193)

24. It can be seen that section 5 of the Checklist identifies the following 10 matters for comparison between the agreement and the modern award:

a. Pay rates;

b. Hours;

c. Part-time Employees;

d. Casual Employees;

e. Shift Penalties;

f. Weekend Penalties;

g. Public Holiday Penalties;

h. Overtime;

i. Annual Leave Loading; and

j. Allowances.

25. The Checklist does not canvass (or even include a space to insert) numerous other benefits that are commonly found in enterprise agreements which do not fall within the 10 categories identified in the Checklist, including the following:

- More generous redundancy entitlements than those in the NES;
- More generous annual leave entitlements than those in the NES (e.g. additional annual leave or leave paid at a higher rate than the 'base rate');
- More generous personal/carer's leave entitlements than those in the NES;
- More generous long service leave than the entitlements in State and Territory laws or the NES;
- Paid maternity leave;

- Paid paternity leave;
- Paid domestic violence leave;
- Paid blood donor leave;
- Paid defence force reserves leave;
- Paid community service leave;
- Study leave;
- Employee discounts on company products;
- More generous superannuation contributions than those required under the Superannuation Guarantee;
- Income protection insurance benefits;
- Job security provisions;
- Access to salary packaging;
- Trade union training entitlements;
- Facilities for union delegates;
- Contributions to worker entitlement funds;
- Accident make-up pay;
- Access to training and development opportunities; and
- Access to particular forms of flexibility valued by employees.

26. The items listed above are just a few examples. There are a very large number of employee benefits often included in enterprise agreements that do not fall within the 10 categories that are included in the FWC's Checklist.

27. As mentioned above, in Ai Group's view, the design of the Checklist is likely to result in more agreements being rejected than would occur if the Checklist was more appropriately designed, because inadequate weight is likely to be given to matters that do not fall within the 10 categories listed on the Checklist.

28. Also, as referred to above, in Ai Group's experience when staff members of the FWC's Member Assist Team carry out BOOT analyses, many of them adopt an overly theoretical and mathematical approach.

29. Instead of focussing their analysis on the employees covered by the agreement and those employees likely to be employed under the agreement, their analyses often take into account circumstances that are extremely unlikely to arise given the nature of the employer's operations, the types of employees that are employed, and the work patterns of the employees. We have formed this view, partially on the basis of the undertakings that are being very frequently proposed to Members of Ai Group by the Member Assist Team, based upon their BOOT analyses.

30. The FWC current approach to assessing enterprise agreements at the approval stage appears to have significantly reduced the role of FWC Members in deciding whether or not the employees covered by a proposed enterprise agreement are better off overall. Once the FWC's Member Assist Team has presented the relevant FWC Member with a detailed BOOT analysis concluding that an enterprise agreement does not pass the BOOT, it would appear unlikely that in most circumstances the FWC Member would decide that a different conclusion is warranted.

31. In the past, FWC Members drew extensively on their experience and judgement when assessing enterprise agreements at the approval stage, rather than just carrying out detailed mathematical calculations or theoretical analyses, or relying upon detailed calculations and analyses carried out by others. While not perfect, in Ai Group's view the past system worked much better from the perspective of both employers and employees than the current system.

32. The BOOT requires judgements to be made based on experience. It cannot be reduced to a simple mathematical calculation or theoretical analysis.

33. In Ai Group's view, the BOOT needs to be carried out from start to finish by FWC Members.

34. Section 627 of the FW Act requires that FWC Members have appropriate qualifications and experience. This experience is very relevant when applying the BOOT because important judgements need to be made. For example, an enterprise agreement may include a very generous redundancy scheme providing for three weeks' pay per year of service with no ceiling on payments. An experienced FWC Member might reasonably adopt the view that the generous redundancy scheme is no doubt a highly valued entitlement by the employees covered by the agreement and should be given significant weight for the purposes of the BOOT. However, if an overly theoretical, mathematical approach is taken when evaluating this entitlement, it is possible that little or no weight may be given to the entitlement in circumstances where no employees have been made redundant in the past few years.

35. The making of an enterprise agreement is often an expensive, disruptive and time-consuming process for a business. Therefore, it is important that the FWC's approval process facilitates the approval of enterprise agreements, rather than placing unnecessary impediments in the path of employers and employees who have made enterprise agreements.

36. In Ai Group's view, the FWC's recently changed approach to assessing agreements at the approval stage is proving to be a negative development for employers, employees and the broader community. In Ai Group's view, the adoption of a less theoretical approach when applying the BOOT would be fairer for all parties, and more aligned to the objects of the FW Act.

37. Recommendation 25 of the 2011-12 Fair Work Act Review was:

> The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.

38. In 2012 when the above recommendation was made, Ai Group had not detected a significant problem with the BOOT being implemented in a *"too rigid manner or resulting in agreements being inappropriately rejected".* We have a different view nowadays and the problem that the Review Panel was concerned about, in our view, has unfortunately come to fruition.

39. Ai Group urges the Full Bench in these proceedings to enunciate a set of principles for applying the BOOT with the aim of facilitating the adoption of a more practical, less theoretical approach to assessing enterprise agreements.

40. The proposed principles are relevant for all enterprise agreement applications but they are even more important in circumstances where an enterprise agreement contains loaded rates.

41. Where an agreement contains loaded rates the risk of the FWC adopting an overly theoretical approach increases. For example, an agreement may state that the loaded rate is payable for all hours worked. It may be obvious that the loaded rate will leave employees better off if they work 38, 40, 50 or even 60 hours in a week. The fact that the loaded rate would not leave employees better off if they worked 70, 80 or 90 hours in a week should not be relevant unless there is any evidence that the employees are likely to work such extreme hours. The FWC should not require employers to give undertakings to deal with circumstances that are extremely unlikely to arise.

42. The BOOT needs to be applied in a practical, "real world" manner, consistent with the objects of the Act. The principles below are aimed at achieving such an outcome.

C. PROPOSED PRINCIPLES FOR THE APPLICATION OF THE BOOT

43. In the section that follows, Ai Group proposes a set of principles for applying the BOOT, that we urge the Full Bench to adopt in these proceedings.

44. It enterprise agreement matters, it is not unusual for Full Benches of the Commission to formulate principles to assist individual FWC Members with decision-making and to facilitate the achievement of greater consistency. For

example, in *AMIEU v Golden Cockerel* [2014] FWCFB 7447, a Full Bench of the Commission enunciated a set of 10 principles that apply to the construction of an enterprise agreement.

45. The principles for the application of the BOOT that are proposed by Ai Group below:

- Are consistent with the objects of the FW Act;
- Are consistent with relevant statutory interpretation principles;
- Are consistent with a number of key authorities of the Commission;
- Would result in the BOOT being applied by the Commission in a more practical and less theoretical manner; and
- Would assist in ensuring that the BOOT is applied in a manner that is fair for employers and employees.

<u>Principle 1</u>: The BOOT should be applied in a manner that is consistent with the objects in ss.3 and 171 of the FW Act

46. Included in any set of principles should be the uncontroversial proposition that the BOOT needs to be applied by the FWC in a manner that is consistent with the objects of the FW Act, including:

- The following objects in s.3: (emphasis added)

  3(f) <u>achieving productivity and fairness</u> through an emphasis on enterprise-level collective bargaining….

  3(g) <u>acknowledging the special circumstances of small and medium-sized businesses</u>

  and

- The following objects in Part 2-4 – Enterprise Bargaining: (emphasis added)

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> **(a)** to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> **(b)** to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> **(i)** making bargaining orders; and
>
> **(ii)** dealing with disputes where the bargaining representatives request assistance; and
>
> **(iii)** ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

47. Paragraph 768 of the Explanatory Memorandum for the *Fair Work Bill 2008* states that *"It is intended that FWA will usually act speedily and informally to approve agreements with most agreements being approved on the papers within 7 days".*

48. Similarly, in *McDonald's Australia Pty Limited on behalf of Operators of McDonald's Outlets re: McDonald's Australia Enterprise Agreement 2009* [2010] FWA 1347 (***McDonald's***), a Full Bench of the Commission stated: (emphasis added)

> **[13]** The appellants emphasised the facilitative aspects of these objectives. We agree that these objectives place the primary role for making enterprise agreements on the parties to those agreements and their representatives and that the role of Fair Work Australia (FWA) includes facilitating the making of enterprise agreements. In general we believe that the requirements for approval should be considered in a practical, non-technical manner and that reasonable efforts should be made to clarify matters with the parties and consider undertakings to clarify or remedy concerns to the extent that these may be available under s 190 of the Act.

49. Accordingly, proposed Principle 1 should be included in the set of principles.

<u>Principle 2</u>: The BOOT requires that an overall assessment is carried out by the FWC Member. The BOOT is not a line-by-line test.

50. This principle reflects a central element of the legislative scheme.

51. In *Armacell Australia Pty Ltd and others* [2010] FWAFB 9985 (***Armacell***), a case in which Ai Group represented the three Appellants, a Full Bench of the Commission relevantly stated: (emphasis added)

> [41] <u>The BOOT, as the name implies, requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement</u>. The approach adopted by the Commissioner includes an identification of terms which might, on his view of the term, be less beneficial for an employee. There is nothing on the face of the Commissioner's decision to indicate what account if any he took of any terms which might be more beneficial for an employee. He obtained a large number of undertakings from all three employers in relation to terms which he considered undermined existing entitlements. It may be that if we applied the BOOT ourselves we might come to different conclusions to the Commissioner in relation to the number and nature of the undertakings required. To follow that course, however, would require each of the applications to be considered afresh with the necessary delay that would entail."

52. In *Tweed Valley Fruit Processors Pty Ltd v Australian Industrial Relations Commission* [1996] IRCA 149, the Full Court of the Federal Court concurred with the following views expressed by a Full Bench of the AIRC in *Enterprise Flexibility Agreements Test Case May 1995* (1995) 59 IR 430 about the "No Disadvantage Test" in previous legislation: (emphasis added)

> Given the need to balance a range of factors the determination of whether or not the no disadvantage test has been met in a particular case will <u>largely be a matter for the impression and judgment of the Commission member at first instance</u>.

53. The above principle is equally applicable under the FW Act.

54. In *Top End Consulting Pty Ltd: re Top End Consulting Enterprise Agreement 2010* [2010] FWA 6442 (***Top End Consulting***) Bartel DP compared the "No Disadvantage Test" with the BOOT and made the following comments about similarities in the two tests:

> "[26] The Better Off Overall Test is in slightly different terms to the no-disadvantage test in that the comparative assessment to be undertaken is not described by reference to the terms and conditions specified in an agreement and the reference instrument(s), but by reference to whether the employee would be better off overall

> under the agreement than the reference instrument(s). Notwithstanding this change in the wording, I am satisfied that the proper approach to the Better Off Overall Test also requires that reference be made to the terms and conditions of the relevant instruments…

55. The approach to the BOOT adopted by Bartel DP in *Top End Consulting* was endorsed by a Full Bench of the Commission in *Solar Systems Pty Ltd* [2012] FWAFB 6397 (***Solar Systems***). Ai Group represented the Appellant in this appeal case. The Full Bench relevantly stated: (emphasis added)

> **[11]** The Commissioner's comments regarding the two tests are set out above. For our part we do not agree that the differences in the tests are as substantial as suggested by the Commissioner. Both tests require a comparison of the position of employees under respective instruments. There are differences in the wording. The BOOT requires a finding that each employee would be better off. The no-disadvantage test required a finding that there was no reduction in terms and conditions of "the employees." In our view the approach of Deputy President Bartel was not incorrect and we affirm generally the approach to the BOOT adopted by the Full Bench in the *Armacell Case*. There is a danger, in our view, in seeking to place a gloss on the legislative test beyond the words of the section. The task is best expressed as applying the words in s.193.

56. The similarity between the BOOT and the "No Disadvantage Test" was also identified in a decision of Simpson C in *Hilton Hotels of Australia Pty Ltd T/A Hilton Brisbane re Hilton Brisbane Enterprise Agreement 2010* [2010] FWAA 5384, where the Commissioner held that the BOOT *"could be viewed similarly to the no disadvantage test when considering the natural meaning of the word '**overall**'"*.[1]

57. Accordingly, the BOOT requires a balancing of factors and will *"largely be a matter for the impression and judgment of the Commission member at first instance".* Such important impressions and judgements should be made by FWC Members, drawing on their extensive experience and uninfluenced by mathematical calculations or theoretical analyses carried out by staff of the FWC's Member Assist Team.

58. Accordingly, proposed Principle 2 should be included in the set of principles.

[1] *Hilton Hotels of Australia Pty Ltd T/A Hilton Brisbane re Hilton Brisbane Enterprise Agreement 2010* [2010] FWAA 5384 at [28].

Principle 3: The BOOT is a point-in-time test. The relevant point-in-time is the date when the application for approval of the agreement was made.

59. This proposed Principle reflects a key aspect of the legislative scheme, as reflected in the following provisions of s.193: (emphasis added)

> *When a non-greenfields agreement passes the better off overall test*
>
> **s.193(1)** An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.
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> - - -
>
> *When a greenfields agreement passes the better off overall test*
>
> **s.193(3)** A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.
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> - - -
>
> **s.193(6)** The *test time* is the time the application for approval of the agreement by the FWC was made under section 185.

60. Accordingly, proposed Principle 3 should be included in the set of principles.

Principle 4: The BOOT should only take into account the provisions of the proposed agreement and the provisions of the relevant modern award; not extraneous matters

61. This principle was outlined by DP Bartel in *Top End Consulting*:

> [27] There is nothing in section 193 to suggest that the Better Off Overall Test is to be assessed by matters extraneous to the terms and conditions of the relevant instruments.

62. As mentioned above, the approach to the BOOT adopted by Bartel DP in *Top End Consulting* was endorsed by a Full Bench of the Commission in *Solar Systems*. The Full Bench relevantly stated: (emphasis added)

> **[10]** Solar Systems submits that in declining to follow the decision of Deputy President Bartel, the Commissioner was adopting an approach which took his analysis away from the application of the relevant terms of the instruments and drew inappropriate distinctions between the BOOT and the previous no-disadvantage test.
>
> **[11]** The Commissioner's comments regarding the two tests are set out above. For our part we do not agree that the differences in the tests are as substantial as suggested by the Commissioner. Both tests require a comparison of the position of employees under respective instruments. There are differences in the wording. The BOOT requires a finding that each employee would be better off. The no-disadvantage test required a finding that there was no reduction in terms and conditions of "the employees." In our view the approach of Deputy President Bartel was not incorrect and we affirm generally the approach to the BOOT adopted by the Full Bench in the *Armacell Case*. There is a danger, in our view, in seeking to place a gloss on the legislative test beyond the words of the section. The task is best expressed as applying the words in s.193.

63. Proposed Principle 4 deals with an important issue and should be included in the set of principles.

Principle 5: The BOOT is a comparison between the terms in the enterprise agreement and the relevant award, not the practices and working arrangements that may flow from those terms

64. This is an important principle that needs to be reinforced given the problems that are commonly arising at present when agreements are assessed by the FWC at the approval stage.

65. When applying the BOOT, the FWC should only consider the terms of the enterprise agreement and the terms of the relevant modern award; not the myriad of practices and working arrangements (e.g. rosters) that could conceivably flow from those terms.

66. This important principle was outlined by DP Bartel in *Top End Consulting*: (emphasis added)

> [28] … the assessment of the Better Off Overall Test is to be undertaken at a particular point in time, being the "test time". The test time is the time at which the application for approval of the agreement is made to Fair Work Australia. This reinforces that it is a comparison between the terms and conditions of employment that is to be assessed, rather than the practices and working arrangements that may flow from those terms, since the agreement cannot commence until after approval by FWA.

67. The FWC should not be seeking that employers provide indicative rosters of the hours that employees will work when assessing agreements, as these are typically work arrangements that flow from the terms of the enterprise agreement rather than terms of the agreement itself.

68. Many businesses do not have a standard or indicative roster. For example, an enterprise agreement (say, in the fast food or retail industries) may cover tens of thousands of employees who work a diverse range of shifts in numerous locations. The shifts worked are often heavily based on the individual work preferences and individual study commitments of the employees.

69. If an application is made for the termination of an enterprise agreement after its nominal expiry date under s.226 of the Act, it may be appropriate in some circumstances for the FWC to obtain indicative rosters for the employees covered by the agreement in order to decide whether or not it would be "contrary to the public interest to terminate the agreement". However, an application for the approval of an enterprise agreement is an entirely different type of matter with different statutory requirements.

70. At the approval stage, the enterprise agreement should be assessed by the FWC as quickly and simply as possible based on the evidence before it. The FWC's decision should usually be made on the materials lodged with the application. All applications for approval are made available on the FWC's website in order to give any parties with an interest the opportunity to seek to make a submission or to provide evidence.

71. For the above reasons, proposed Principle 5 should be included in the set of principles.

<u>Principle 6</u>: When considering the terms of the enterprise agreement for the purposes of the BOOT, only the classifications and types of work carried out by the employees who are employed at the time the agreement is made and those who are likely to be employed should be taken into account

72. Enterprise agreements that are not greenfields agreements are made between employers and their employees.

73. Paragraphs 172(2)(a) and (3)(a) of the Act state that such enterprise agreements cover *"the employees who are employed at the time the agreement is made and who will be covered by the agreement".*

74. It can be seen that an agreement is made between the employer and its employees. It is not made between the employer and employees who theoretically could be employed under the terms of the agreement, but are never actually employed. Employees that will never be employed obviously are not employees *"who will be covered by the agreement"*.

75. A somewhat related issue was considered by Richards SDP in a case in which the AWU objected to the approval of an enterprise agreement between Mirvac and the CFMEU ([2013] FWC 912). The agreement contained a large number of classifications, some of which the AWU submitted the CFMEU had no eligibility to cover. The company gave evidence that it only intended to employ forklift drivers under the agreement. Richards SDP decided that provisions in the agreement which imposed restrictions on the engagement of other classifications were arguably of no effect because they did not relate to the relationship between the employer and the employees covered by the enterprise agreement: (emphasis added)

> **[19]** In so far as clause 23 purports to operate in respect of any contractors or subcontractors engaged under classifications other than forklift driver (which is the only classification of employees to be employed under the Agreement), it would appear to me at least that the clause, arguably, would not comprise a permitted matter. This is because the clause would require the Company to extend to all contractors and subcontractors the terms and conditions under the Agreement in respect of classifications under which the Company does not employ any employees (other than forklift drivers).
>
> **[20]** That is, in so far as it purports to operate beyond a classification of forklift driver, the clause may not concern the relationship between the employer that will be covered by the Agreement and its employees who will be covered by the Agreement.

76. Consistent with the reasoning of Richards SDP, an enterprise agreement is not made between an employer and those persons who are in classifications that the employer has no intention to employ, notwithstanding the fact that the coverage clause of the agreement may be drafted in a wide manner.

77. The concept of what an enterprise agreement is and what it is not (as articulated in s.172) needs to be borne in mind by the FWC when the provisions of s.193 (Passing the Better Off Overall Test) are being applied. An enterprise agreement, as the word "agreement" implies, relates to an employer and a group of employees. This group of employees does not include persons who will never be employed.

78. Section 193 requires that the FWC consider each *"award covered employee"* and each *"prospective award covered employee".*

79. The term *"award covered employee"* is defined in s.193(4) of the Act. These persons are employees of the employer at the test time who are covered by the proposed agreement and covered by a modern award.

80. The term *"prospective award covered employee"* is defined in s.193(5) of the Act as follows:

> (5) A ***prospective award covered employee*** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:
>
> (a) would be covered by the agreement; and
>
> (b) would be covered by a modern award (the ***relevant modern award***) that:
>
> (i) is in operation; and
>
> (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
>
> (iii) covers the employer.

81. The Explanatory Memorandum for the *Fair Work Bill 2008* provides the following commentary about s.193(5): (emphasis added)

> 823. Subclause 193(5) defines a prospective award covered employee as an employee who, if she or he were employed at the test time, would be covered by the agreement and would be covered by the relevant modern award that is in operation and covers the employer. <u>The relevant modern award would need to cover the employee in relation the work that she or he would perform under the agreement</u>.
>
> 824. <u>The better off overall test also refers to prospective award covered employees because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time</u>. Extending the

application of the better off overall test to these types of employees guarantees the integrity of the safety net. Note that where an agreement covers a large number of classifications of employees in which no employees are actually engaged there may be a question as to whether the agreement has been genuinely agreed – see clause 188.

82. The word *"prospective"* is defined in the *Macquarie Dictionary*[2] in following manner:

> *adjective 1. of or in the future. 2. potential; likely; expected.*

83. The word *"prospective"* is defined in the *Concise Oxford Dictionary*[3] in following manner:

> *a. Concerned with or applying to the future…; expected, future, some day to be.*

84. Subsection 193(5) should be interpreted in a manner that accords with the objects of ss.3 and 171 of the Act. It would not be consistent with the objects of the Act or consistent with the Explanatory Memorandum for s.193(5) to be interpreted in a manner that includes every conceivable person that could theoretically be employed under the terms of a proposed enterprise agreement.

85. The following realistic example highlights the need for the FWC to adopt a practical approach when applying s.193(5) of the Act:

> **Example**
>
> A small metal fabrication business with five employees is located in suburban Sydney. The business manufactures posts, gates, hand-rails, beams, security screens and other similar metal items for houses. The employer enters into an enterprise agreement with its 4 employees. The employees consist of three boilermakers, one trades assistants and one apprentice covered by the Manufacturing Award. All employees are day workers.

86. Most likely the above enterprise agreement would be drafted in relatively simple terms, dealing only with those issues of relevance to the business and the employees. The fact that the agreement does not include an entitlement to the slaughtering yards allowance (clause 32.3(l)), the underground mine work allowance (clause 32.3(n)) or the ships in dock allowance (clause 32.3(p)) in

[2] *Macquarie On-line Dictionary*, accessed on 31 October 2017.

[3] Seventh Edition.

the Manufacturing Award is not validly taken into account when assessing the BOOT because it is extremely unlikely that any of the employees of the business will ever carry out work in a slaughtering yard, on a ship, or in an underground mine, while working for the business.

87. Theoretically, the business could hire hundreds of employees and set up a ship repair division or an underground coal mining repair division, but this is fanciful. Accordingly, it would be inappropriate for the FWC to interpret the phrase *"prospective award covered employee"* in a manner than includes all employees that could theoretically be covered by the enterprise agreement. A more practical and workable interpretation needs to be adopted.

88. The term *"prospective award covered employee"* in s.193(5) should be interpreted as including only employees who are reasonably likely to be employed under the enterprise agreement.

89. Such an interpretation accords with a common meaning of *"prospective",* as found in dictionaries (see above).

90. Such an interpretation is also consistent with the objects of the Act, as referred to in the context of proposed Principle 1 above.

91. In *J.J. Richards & Sons Pty Ltd v Fair Work Australia*,[4] Justice Flick of the Federal Court of Australia summarised some "long-established and fundamental principles of statutory construction", including the principle that: "*a construction of a statutory provision is to be preferred 'that would best achieve the purpose or object of the Act''* as required by s.15AA of the *Acts Interpretation Act 1901 (Cth).*

92. Section 15AA of the *Acts Interpretation Act 1901 (Cth)* states:

> **15AA Interpretation best achieving Act's purpose or object**
>
> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."

[4] [2012] FCAFC 53 at [49] – [53].

93. Section 40A of the FW Act states:

> **40A Application of the *Acts Interpretation Act 1901***
>
> (1) The *Acts Interpretation Act 1901*, as in force on 25 June 2009, applies to this Act.
>
> (2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Act.

94. Even if the FWC does not agree with the contention that the term *"prospective award covered employee"* should be interpreted as only including employees reasonably likely to be employed, it should be noted that s.193(1) refers to *"each prospective award covered employee, for the agreement".* As argued above, an agreement is made between an employer and its employees, and does not include persons who will never be employed.

95. The BOOT requires that experienced FWC Members make important judgements when applying the BOOT. One such judgement is deciding who should realistically be included as a *"prospective award covered employee, for the agreement".*

96. Accordingly, proposed Principle 6 should be included in the set of principles.

Principle 7: Undertakings should only be proposed by FWC Members, and only if necessary

97. This proposed principle flows from proposed Principle 6.

98. It surely could not have been perceived or intended by Parliament that the FW Act be applied in a manner that results in more than 50% of enterprise agreements being approved with undertakings (as is now occurring, based on the figures in the FWC's 2016/17 Annual Report) particularly when, in Ai Group's experience, the majority of enterprise agreements lodged for approval are very similar to previously approved agreements for the applicants.

99. Undertakings should only be proposed by the FWC if necessary, and should not be proposed to address theoretical circumstances.

100. Consistent with Principle 5, when applying the BOOT, the FWC should only consider the terms of the enterprise agreement and the terms of the relevant modern award; not the myriad of practices and working arrangements (e.g. rosters) that could conceivably flow from those terms.

101. For example, when considering the terms of an enterprise agreement that includes a loaded rate which leaves employees better off overall if they work, say, 38, 40 or 48 hours, the FWC should not be proposing that the employer give an undertaking that its employees will not work 50, 60 or 70 hours a week, in the absence of any evidence before it that this is likely. A Member of the Commission should carefully consider the terms of the agreement and the terms of the relevant modern award and make a judgement on whether employees will be better off overall.

102. As mentioned in the context of Principle 2, the BOOT requires a balancing of factors and the forming of important impressions and judgements. Such impressions and judgements should be made by FWC Members, drawing on their extensive experience, and uninfluenced by mathematical calculations or theoretical analyses carried out by staff of the FWC's Member Assist Team.

103. The staff in the FWC's Member Assist Team should not be proposing undertakings to employers to address issues that flow from the BOOT analyses which they have carried out.

104. Also, unworkable undertakings should not be proposed by the FWC. For example, where an employer has made an enterprise agreement covering thousands of employees who work a diverse range of shifts in numerous locations, it is typically unworkable for the employer to give an undertaking that they will carry out a regular audit (e.g. monthly or quarterly) to ascertain whether each employee is better off overall under the agreement than under the relevant award.

<u>Principle 8</u>: The FWC should generally apply the BOOT to classes of employees rather than individuals, in the absence of evidence that any individual is not better off under the proposed agreement.

105. This proposed principle is based upon s.193(7) of the FW Act which states:

> *FWC may assume employee better off overall in certain circumstances*
>
> (7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

106. The Explanatory Memorandum for the *Fair Work Bill 2008* relevantly states: (emphasis added)

> ***Subdivision C – Better off overall test***
>
> **Clause 193 – Passing the better off overall test**
>
> 816. This clause provides when an enterprise agreement passes the better off overall test.
>
> 817. Subclause 193(1) provides that an agreement that is not a greenfields agreement passes the better off overall if FWA is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better offer overall if they were employed under the agreement than under the relevant modern award.
>
> 818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, <u>it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances</u>.
>
> **Illustrative example**
>
> Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement and the agreement affects each employee within a classification in the same way, FWA could group employees together when assessing the employees against the better off overall test. It is intended that FWA could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

> If FWA were satisfied that the agreement affected each employee within the classification in the same way, and that the agreement passed the better off overall test for the hypothetical employee within the classification, FWA could be satisfied that the agreement passed the better off overall test for each award covered employee and prospective award covered employee within that classification.

107. Applying to BOOT to logical classes of employees, such as employees at each relevant classification level, is a logical and practical approach. This approach should generally be adopted in the absence of evidence that an individual employee is not better off.

108. If there is no evidence before the FWC that an individual is worse off, then the FWC should not go looking for such evidence and should apply the BOOT to logical classes of employees. As mentioned in the context of Principle 5, the enterprise agreement should be assessed by the FWC as quickly and simply as possible based on the evidence before it. The FWC's decision should usually be made on the materials lodged with the application. All applications for approval are made available on the FWC's website in order to give any other parties with an interest the opportunity to seek to make a submission or to provide evidence.

109. Accordingly, proposed Principle 8 should be included in the set of principles.

Principle 9: Individual flexibility arrangements must be disregarded when applying the BOOT

110. Proposed Principle 9 reflects s.193(2) of the Act, and is logically included in the set of principles.

Principle 10: The inclusion of a flexibility in an enterprise agreement should not be regarded as a negative when applying the BOOT in circumstances where the flexibility reflects a facilitative provision in the award

111. Problems have been arising in this area given the views that some staff members in the FWC's Member Assist Team apparently have on this issue.

112. The following example highlights the issue.

> **Example**
>
> An enterprise agreement includes a spread of hours of between 6am and 7pm.
>
> The relevant modern award includes a spread of hours between 7am and 7pm but includes a facilitative provision enabling the spread of hours to commence at 6am by agreement with either the majority of employees or with an individual employee.

113. In circumstances like the above, on occasions the FWC (or at least the Member Assist Team) have taken the view that the flexibility in the enterprise agreement needs to be accounted for as a disadvantage when applying the BOOT because the enterprise agreement was approved by a majority of employees, and there may be one or more individuals who do not support the change provided for in the award facilitative provision.

114. This is an overly theoretical and overly speculative approach to the application of the BOOT. The enterprise agreement has been approved by the employees in accordance with the Act and, for the purposes of the BOOT, it should be assumed that the employees support the implementation of the flexibility provided for in the award.

115. In circumstances like this, the enterprise agreement does not undercut the award, the agreement simply implements the flexibility provided for in the award.

116. This is an important issue that is currently causing problems in the agreement approval process. Accordingly, proposed Principle 10 should be included in the set of principles.

Principle 11: If the FWC is not satisfied that an enterprise agreement passes the BOOT, the FWC should consider whether the agreement should be approved, through the provisions of s.189 of the Act

117. This proposed principle is consistent with s.189 of the Act.

118. It would be a useful addition to the set of principles to assist in ensuring that enterprise agreements are not rejected before s.189 is considered.

D. CONCLUSION

119. Ai Group urges the Full Bench to:

a. Adopt Ai Group's proposed set of principles; and

b. Apply the principles to the applications that are before it.

ATTACHMENT A

Single enterprise agreement legislative checklist

Purpose of checklist

Under s.590 of the *Fair Work Act 2009*, when determining agreement approval applications Members of the Fair Work Commission (the Commission) can inform themselves through a range of sources, including research, analysis and/or material provided by parties. Members may also make additional requests for further information depending on the circumstances.

The single enterprise agreement legislative checklist is used by the Commission to assist Members when determining agreement approval applications.

The checklist is being published to provide parties with an overview of the requirements of agreement making, and to provide insight into the Commission's process for assessing agreement approval applications.

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This document is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.

Single enterprise agreement legislative checklist

Matter: AGyyyy/xxxx

Member prepared for:

Prepared by:

Lodgment date:

Date prepared:

Modern award(s):

Similar agreements (Q1.3):

Union support (Form F18):

Topic	Summary/Comments
Section 1 – Forms and signature requirements	
Section 2 – Pre-approval requirements	
Section 3 – Mandatory terms	
Section 4 – National Employment Standards (NES)	
Section 5 – Better off overall test (BOOT)	

Summary notes

Industry:	
State:	
Pay rates:	

Section 1 – Forms and signature requirements	
Form F16 application form (s.185, rule 24 FW Rules) Signed and dated by employer or bargaining representative (if bargaining representative, instrument of appointment must be provided)	
Form F17 employer statutory declaration (s.185, rule 24(1) and (2) FW Rules) Signed by employer and authorised witness (including full name, work/residential address and position/title/authority)	
Form F18 employee organisation statutory declaration (s.183, s.185, rule 24(3) FW Rules) or Form F18A employee representative statutory declaration (s.183, s.185, rule 24(4) FW Rules) Signed by employee organisation or employee representative and authorised witness (including full name, work / residential address and position/title/authority)	
Agreement (s.185(2), reg. 2.06A FW Regs) Signed by the employer and at least 1 employee/employee representative and includes full name, address and authority of each person	

Section 2 – Pre-approval requirements	
Time between notification time and last notice of representational rights (s.173(3)) (Q2.8) The employer provided the Notice of employee rep rights no later than **14 days** after notification time	
Time between making of agreement (date voting concluded) and lodging of application for approval of agreement (s.182(1), s.185(3)) (Q2.8 & 2.9) Agreement was lodged no later than **14 days** after it was made	
Notice of representational rights provided to all employees and in prescribed form (s.173, s.174, Sch 2.1 of FW Regs) (Q2.3) • The Notice of employee representational rights is in prescribed form; and • The employer took all reasonable steps taken to give the Notice to each employee covered by the agreement and employed at the time of notification	
Genuine agreement (s.181, s.186(2)(a), s.188) – Time between issuing of notice of representational rights and date voting commenced) (Q2.8) Employees provided with the Notice of employee rep rights at least **21 days** before commencement of voting	
Genuine agreement (s.186(2)(a), s.188) – Copy of agreement given to employees or employees given access to agreement (s.180(2)) (Q2.4) The employer took all reasonable steps to give a copy of the agreement or incorporated material to employees during the access period or provide employees with access to it by the start of access period	
Genuine agreement (s.186(2)(a), s.188) – Notification of time, place and method of voting (s.180(3)) (Q2.5) The employer took all reasonable steps to notify employees of time, place and method of vote by the start of the access period	
Terms of the agreement (s.180(5), s.180(6)) (Q2.6 & Q2.7) The employer took reasonable steps to explain the terms of the agreement and the effect of the terms while taking into account the particular circumstances and needs of relevant employees	

Genuine agreement (s.186(2)(a), s.188) – Majority voted to approve (s.182(1)) (Q2.10) Did a majority of employees who cast a valid vote approve the agreement	
Employees covered by agreement (s.186(3), s.186(3A)) (Q2.2) Does the agreement cover all employees – if not, was the group fairly chosen considering geographical, operational or organisational distinctness	
Nominal expiry date (s.186(5)) (Q2.1) Is the nominal expiry date more than 4 years after approval date	
Unlawful terms, and designated outworker terms (s.172, s.186(4), s.186(4A), s.194, s.195, s.253) (Q2.13 and 2.14) Does the agreement contain **only lawful** terms? Unlawful terms include: • discriminatory terms • objectionable terms • terms that provide for a method which an employee or employer may elect not to be covered by the agreement • terms about unfair dismissal • terms about industrial action • terms about right of entry • terms about superannuation	
Particular types of workers – shift workers (s.187(4), ss.196–200) (Q2.16) Does the Agreement define or describe an employee as a shift workers for the purposes of the NES	
Right of entry term (s.186(4), s.194(f) & s.194(g) (Q2.13) Does the agreement contain any terms that deal with the rights of officials or employees or employees of employee organisations to enter the employer's premises	
Superannuation term (s.186(4), s.194(h)) (Q2.14) If the Agreement specifies a superannuation fund, does the fund: • offer a MySuper product; or • an exempt public sector superannuation scheme; or • a fund of which a relevant employee is a defined benefit member of	

Section 3 – Mandatory terms	
Dispute settlement term (s.186(6), reg 6.01, Sch 6.1 of FW Regs) (Q2.15) The term must: 1) Allow for settlement of disputes in relation to NES; and 2) Allow for representation of employees	
Flexibility term (ss.202–204, reg 2.08, Sch 2.2 FW Regs) (Q2.15) Does the term contain a flexibility term that complies with the requirements in s.202 and s.203	
Consultation term (s.205, reg. 2.09, Sch 2.3 FW Regs) (Q2.15) The term must: 1) Require employer to consult with employees regarding major workplace change that is likely to have a significant effect on employees AND change to regular roster of ordinary hours of work; and 2) Allows for representation of employees for the purposes of that consultation Further in relation **to change to regular roster or ordinary hours of work** the term must: 1) Require the employer to provide information to employees about the change; and 2) Require the employer to invite employees to give their views about the impact of the change; and 3) Require the employer to consider any views given by employees about the impact of the change	

Section 4 – National Employment Standards **(s.55, s56, s.186(2)(c), s.196, s.253)**	
Maximum weekly hours of work (s.62 – s.64) 38 hours per week	
Request for flexible working arrangements (s.65 – s.66) Section 65(1A) FW Act	
Parental leave (s.67 – s.88) 12 months unpaid + right to request further 12 months	
Annual leave (s.86 – s.94) 4 weeks paid leave (5 weeks for shift workers)	
Personal/carer's leave (s.95 – s.107) 10 days paid leave + 2 days paid compassionate leave + 2 days unpaid leave when paid leave has been used	
Community service leave (s.108 – s.112) 10 days paid jury leave + unpaid emergency service leave	
Long service leave (s.113 – s.113A) as per pre-reform award or NAPSA, or is silent, in accordance with state long service leave legislation	
Public holiday (s.114 – s.116) paid day off for each public holiday (employer can request employee not work if such request is reasonable)	
Notice of termination and redundancy (s.117 – s.123) Up to 4 weeks' notice (5 weeks' if over 45 and in job for over 2 years) depending on years of service **AND** between 4-16 weeks redundancy pay depending on years of service	
Fair Work Information Statement (s.124 – s.125)	

Section 5 — Better off overall test	
Relevant award(s)	
Award incorporated into agreement or read in conjunction with agreement?	
Do the agreement classifications align with the award?	
Has the employer provided classification matching?	

Pay rate comparison

Modern award classification	Agreement classification	Modern award rate	Agreement rate	Percentage difference

Entitlements table

	Agreement	Relevant modern award(s)
Hours		
Part-time employees		
Casual employees		
Shift penalties		
Weekend penalties		
Public holiday penalties		
Overtime		
Annual leave loading		
Allowances		

Better off overall test summary (s.186(2)(d), s.193)
