

Fair Work Commission Determines ‘*Proper*’ Requirements for EBAs containing “*Loaded Hourly Rates*”.

By Michael Taylor – Principal Consultant, HMT Consulting, July 2018.

Introduction:

On 28th June 2018, a Full Bench of the *Fair Work Commission* (FWC) headed by the President, Justice Ross, handed down a decision concerning appeals relating to five applications for approval of enterprise agreements (EBAs); the common feature of the five is that they “*provide for “loaded” or higher rates of pay which are intended to incorporate, in part or whole, penalty rates and other monetary benefits for which separate provision is made in the applicable modern awards.*”

This Full Bench decision arose as a result of an earlier case, wherein a first instance decision to approve an agreement applying to a major Australian retailer and its employees was quashed on appeal. The Full Bench in that matter found that the agreement did not pass the ‘*Better Off Overall Test*’ (BOOT) because the loaded rates in the agreement disadvantaged those employees who worked primarily at times which attracted lower penalty rates under the agreement as compared to the appropriate award.

A significant number of Outdoor Recreation Organisations have put in place EBAs over the past eight years (since the *Fair Work Act 2009*, came into operation on 1st January 2010), which contain ‘*averaging*’ provisions, providing higher (loaded) hourly rates for all ordinary hours worked, regardless of if they are worked outside the requirements of the various Modern Awards covering ‘*Outdoor Leaders*’ (e.g; on weekends, public holidays or early or late finishes). Therefore the views expressed by Justice Ross’ colleagues have significance to those operators who are either considering renewing their EBAs or establishing an Agreement for the first time.

General submissions:

Due to the general importance of the issues being canvassed, the Full Bench received submissions from not only the companies party to each of the five agreements being appealed, but concurrently, from peak bodies such as the ACTU, Australian Chamber of Commerce and Industry, and the Australian Industry Group.

Employer groups expressed concerns that in applying the *BOOT* the Commission often took into account theoretical circumstances that were extremely unlikely to arise given the nature of the employer’s operations. They urged the FWC to adopt a ‘*practical approach*’ – pointing out that Commission members in the past “*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 analysis.*”

Further, it was contended, that previously the Commission generally applied 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.

For its part, the ACTU acknowledged that an agreement could include increased rates which compensated for award entitlements which would otherwise apply, however they submitted that:

- It was the role of the Commission to conduct an assessment in accordance with the Act in each case to ensure that wage increases adequately compensated for the terms and conditions being offset;
- The onus was on the employer to provide to the Commission complete and accurate information about the way in which loaded rates were calculated and in particular what entitlements had been rolled up and how their value was assessed and compensated; and
- The *BOOT* required an assessment of the actual terms and conditions of the agreement, not its perceived benefits, so the availability of mere opportunity or chance to achieve a promotion or work more hours was not relevant.

The Commission was faced with two well-established propositions concerning the application of the *BOOT*:

- That it requires a finding that each award covered employee and prospective employee would be better off under the agreement than the relevant Modern Award. Thus, in an agreement containing *loaded rates* in the whole or partial substitution for award penalty rates, it is not sufficient that the majority of employees – even a very large majority – are better off overall if there are any employees at all who would not be *'better off overall'*.
- The second proposition is that the *BOOT* requires an overall assessment to be made. This requires the identification, and an overall assessment of whether an employee would be better overall. Where the terms required to be compared bear directly upon remuneration of employees, the assessment is essentially a mathematical one.

The Full Bench's findings:

The 151 page decision can be summarised as follows; the following principles apply to the application of the *BOOT* to a loaded rates agreement:

- The *BOOT* requires every existing and prospective award covered employee to be better off overall under the agreement for which approval is sought than under the relevant Modern Award. If any such employee is not better off the agreement does not pass the *BOOT*;
- The application of the *BOOT* to loaded rates agreements will, in order for a meaningful comparison to be made, require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement. This will likely require classes to be identified based on common patterns of working hours, taking into account evening, weekend and /or overtime hours worked;

- The starting point will necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment for which the agreement provides or permits. For example if an agreement makes express provision for employees to be required to work ordinary hours on weekends, those provisions cannot be ignored for *BOOT* purposes simply because the employer asserts it does not currently utilise those working hours or roster patterns;
- The overall assessment required will be a mathematical one where the terms being compared relate directly to remuneration;
- Non-monetary, optional or contingent entitlements (e.g; blood donor leave, defence service leave) in an agreement, the assumption cannot readily be made that they have the same value for all employees;
- Where a loaded rates agreement results in significant financial detriment for existing or potential employees, it is unlikely that non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees.

Modern Awards covering Outdoor Leaders:

In recent times significant debate has taken place in relation to precisely which Modern Award (or awards) mandate the minimum terms and conditions of '*Outdoor Leaders*'. Despite the assistance of the *Office of the Fair Work Ombudsman* over the past 12 months, this debate has not been resolved. This impasse makes it even more problematical for employers and their workforce to undertake fruitful enterprise bargaining.

A major point of concern is the extended periods of '*in the field work*' undertaken by largely casualised teams, undertaking duty of care activities and responsibilities 24/7, often in remote locations. Conventional 'award-based' penalty and rostering requirements place great economic pressure on the viability of catering for this style of program.

By moving from an assessment of a '*class of employee*' to an assessment of the entitlements of '*current*' and '*potential*' individual casual employees makes the task of gaining approval by the FWC incredibly difficult.

However, agreements intended to regulate wages and conditions relating to **weekly employees** (including part-time, fixed-term and salaried), will have to be carefully drafted taking into consideration all points covered in the Commission's decision.

Employers seeking to make or renew/replace existing EBAs will now have to provide greater details of their current and possible (future) operational requirements, as well as redrafting some of their existing employment conditions.

The FWC has raised the bar on what it requires for the making of a successful application for approval of Agreements. Some may well be dissuaded from attempting Enterprise Bargaining, whilst others will find significant gains, provided that both content and process meet the expectations laid down in this decision.