The future of the BOOT and Loaded Rates in Enterprise Agreements

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Around one-third of all employees in the Australian labour market are covered by enterprise agreements.[1]

Enterprise bargaining is a central feature of the *Fair Work Act* 2009 (Cth) (**FW Act**), and is regulated by Part 2-4. The objects of the Part include to provide a simple, flexible and fair framework that enables collective bargaining in good faith, and to enable the Fair Work Commission (**FWC**) to facilitate good faith bargaining.[2]

Between 2011 and 2013, the FWC had 15,652 applications for approval of enterprise agreements. Of those, 14,921 were approved. Only 608 applications were withdrawn.[3]

Contrast this with the figures between 2014 and 2015, where there were 11,451 applications for approval, and 1,002 of those applications were withdrawn.[4]

Triage

In October 2014, the FWC piloted an agreement triage process, which the FWC said was to promote greater consistency and improve timeliness in enterprise agreement approval decisions.[5] The triage process involves a team of administrative staff analysing agreements, including by completing a checklist developed by FWC members for the purposes of the BOOT.

Initially, the triage process was confined to enterprise agreements in a few 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.

However, more often than not issues with approvals of agreements are related to the "Better Off Overall Test" (**BOOT**). The BOOT provides a wider scope for the FWC to reject agreements at the approval stage when compared with the former "no-disadvantage test", because it requires an employer to show the agreement passes the BOOT.

BOOT

Before approving an enterprise agreement, the FWC must be satisfied that the agreement passes the BOOT.[6] An enterprise agreement passes the BOOT if the FWC is satisfied, as at the 'test time', that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement

[1] ABS 2016 Employee Earnings and Hours survey December quarter 2017
[2] FW Act s 171
[3] Fair Work Annual Report 2012-2013, page 25
[4] Fair Work Commission submission to Education and Employment References Senate Committee Inquiry into penalty rates, page 18
[5] Fair Work Annual Report 2016-2017, page 57

[6] FW Act s 186(2)(d)

applied to the employee than if the relevant modern award applied to the employee.[7]

The High Court has held that the BOOT 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.[8]

The BOOT has recently come under scrutiny where loaded rates in enterprise agreements are concerned. Loaded rates of pay generally appear as compensation for benefits under the relevant modern award that are not separately provided for by the agreement. Typical award benefits that could be incorporated into a loaded rate include:

- shift allowances;
- weekend penalties;
- payment for reasonable additional hours;
- payment for overtime (which may include overtime rates for work performed in addition to the total of ordinary hours to be worked under the award each week and for work outside the span of ordinary working hours under the award); and
- work-related allowances.

How do you apply the BOOT where loaded rates are used?

On 28 June 2018, the Full Bench handed down its decision in the *Loaded Rates Case*.[9] In short, the Full Bench confirmed that it is only possible in some circumstances for loaded rate structures to pass the BOOT.

Helpfully, the *Loaded Rates Case* set out several principles regarding the operation of the BOOT in respect of loaded rates in enterprise agreements, and as a result the position is well settled. The principles set out by the Full Bench are summarised as follows.[10]

- 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 overall, the agreement does not pass the BOOT.
- Section 193(7) of the FW Act permits the FWC to assume that if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, then the employee would be better off overall absent evidence to the contrary. However, it will only be of utility if the agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome. If the FWC is not satisfied on the evidence that an existing or prospective award covered employee is not better off overall, the FWC cannot approve the agreement, at least not without undertakings or in the confined circumstances set out in s 189 of the FW Act.
- The application of the BOOT to a loaded rates agreement 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, considering evening, weekend and/or overtime hours worked.
- The starting point for the assessment 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 enterprise 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.
- In the case of existing employees, this may involve an examination of existing roster patterns worked by various classes of employees as at the test time. An effective comparison method could be to use sample rosters to compare remuneration produced by a loaded rates pay structure compared to the modern award. There may be objective evidence that a particular pattern of working hours or roster pattern permitted by an enterprise agreement is not practicable, or cannot or is unlikely to be worked.
- In the case of prospective employees, the assessment will involve conjecture. With an enterprise operating at a defined workplace or workplaces, the FWC may be in a position to make sensible predictions about the basis upon which prospective employees might be engaged based on the roster patterns worked by existing employees.

[7] FW Act s.193(1). In the case of a greenfields agreement the test is applied only in respect of each prospective award covered employee for an agreement (s.193(3))
[8] *Re Armacell Australia Pty Ltd (*2010) 202 IR 38 at [41], confirmed by the High Court in *Aldi v SDA* [2017] HCA 53 at [92] (***Aldi***)
[9] *Loaded Rates Agreements* [2018] FWCFB 3610
[10] *Ibid* at [115]

However, if a business is small and/or still at the development stage, or the agreement would cover a wider range of classifications, work locations and/or roster patterns not in existence as at the test time, useful predictions may not readily be drawn from how the existing workforce operates. In that situation the assessment will require an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment which the agreement provides for or permits.

- If the information concerning patterns of working hours needed to assess whether a loaded rates agreement passes the BOOT is not contained in the employer's Form F17 statutory declaration accompanying the approval application, it may be necessary for the FWC to request or require the production of such information.

- The BOOT involves making an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements which are more and less beneficial to the employee than under the relevant award.

- The overall assessment required will be a mathematical one where the terms being compared relate directly to remuneration. The assessment will be more complex where the agreement contains superior entitlements which are non-monetary in nature, accessible at the employee's option or which are contingent upon specified events occurring.

- In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees. With a contingent benefit, it will be necessary to make a realistic assessment about the likelihood of the benefit crystallising during the period in which the agreement will operate.

- Where a loaded rates agreement results in significant financial detriment for existing or prospective employees compared to the relevant award, it is unlikely that a non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT.

The Full Bench noted the BOOT becomes more difficult for casual employees. Principally this is because the casual loaded rate must account for the theoretical possibility a casual could be required to work weekends only. In those circumstances, unless the casual ordinary loaded rate matches the weekend penalty rates (which would be uneconomical), the agreement will not pass the BOOT.

Conclusion

It is fair to say the statistics already show a decline in enterprise bargaining. The *Loaded Rates Case* demonstrates the difficulties with agreements that load up rates of pay to account for award penalty rates.

With the FWC's application of the BOOT becoming increasingly technical, there has never been greater uncertainty over the utility of enterprise bargaining. If your business is on the "enterprise bargaining merry go round", it may be time to consider, is there another way?

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