IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M33 of 2017

BETWEEN: ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP)
Appellant

and

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION
First Respondent

FAIR WORK COMMISSION
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: The Issues

2. Whether it is within the Fair Work Commission's (the "**Commission**") jurisdiction to determine whether a group of employees who have voted on a single enterprise agreement are within the coverage of that agreement for the purposes of Part 2- 4 of the Fair Work Act (the "**Act**").

3. Does "coverage" for the purposes of s.186 of the Act mean "the whole class of employees to whom the agreement might in future apply".

4. Can it be said that a finding that the ALDI Regency Park Agreement satisfied the Commission as to its compliance with the Better Off Overall Test displayed legal unreasonableness.

5. If the Commission was in error in law, but such was within its jurisdiction to err, does such error appear in "the record".

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6. If the Commission made such an error and it was within the record is it appropriate to grant certiorari, given the legislative scheme.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

7. The appellant certifies that it has considered whether a notice should be given under s. 78B of the *Judiciary Act* 1903 (Cth) and that no notice needs to be given.

Part IV: Judgments Below

8. The judgment of the Full Court of the Federal Court of Australia is reported as *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd* [2016] FCAFC 161 ("**Judgment**").

9. The judgment of the Full Bench of the Commission is reported as *Transport Workers Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248; [2016] FWCFB 91 ("**Full Bench decision**").

10. The judgment of the single member of the Commission is reported as *ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership), ALDI Regency Park Agreement 2015* [2015] FWCA 6373.

Part V: Facts

11. ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) ("**ALDI**") operated retail stores organised in regions as distinct undertakings in New South Wales, Victoria and Queensland.[1]

12. In April 2015, ALDI sought expressions of interest to work in the Regency Park Region in South Australia from its existing employees. In late May 2015, ALDI made written offers of employment to some of those who had provided an expression of interest and 17 employees accepted the offer.[2]

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[1] Judgment at [2] and [76] - [77]. Full Bench decision at [12].
[2] Judgment at [78].

13. ALDI then commenced the process of bargaining with the 17 employees under the provisions of Part 2 – 4 of the Act for an agreement to cover the Regency Park Region.[3] The Shop, Distributive & Allied Employees Association (the "**SDA**") was not a bargaining representative for the new agreement.[4]

14. The employees voted on the ALDI Regency Park Agreement in the period 17 to 21 July 2017.[5]

15. At the time the vote for the ALDI Regency Park Agreement was conducted, the Distribution Centre at Regency Park was still under construction and no stores in the region had commenced trading.[6]

16. On 4 August 2015, ALDI applied to the Commission pursuant to section 185 of the Act for approval of the ALDI Regency Park Agreement.[7]

17. The application was listed for eHearing in chambers before Deputy President Bull of the Commission.[8] The Deputy President approved the ALDI Regency Park Agreement operative from 29 September 2015.[9]

18. The agreement was in relevantly similar form and substance to six agreements previously approved by the Commission with the support of the SDA. Bull DP had approved two of those agreements.

19. Both the SDA and the Transport Workers Union of Australia (the "**TWU**") filed notices of appeal in the Commission against the decision of Bull DP.[10]

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[3] Judgment at [83].
[4] Statement of Agreed Facts, Application Book Part A Tab 9 at [9] in the Full Federal Court proceedings and Judgment at [20].
[5] Judgment at [83].
[6] Statement of Agreed Facts Application Book Part A Tab 9 at [11]. Also see Judgment at [87].
[7] Judgment at [84].
[8] Full Bench decision at [4].
[9] [2015] FWCA 6373 per Bull DP at [13].
[10] Judgment at [88].

20. The Full Bench characterised the grounds of appeal advanced by the SDA as follows:

    (a) *The purported agreement should have been made as a greenfields agreement under s 172(2)(b) of the Act because ALDI was/is establishing a new enterprise and had not, and has not, employed any of the persons who would be necessary for the normal conduct of the enterprise;*
    (b) *The employees who were selected to approve the agreement were not fairly chosen; and*
    (c) *The agreement does not pass the better off overall test ("**BOOT**").*[11]

21. The Full Bench found, relying on the decision of *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd,*[12] (*John Holland*) that the first ground of appeal must fail, stating that the "*employees who accepted on-going employment in the Regency Park region were employed by ALDI at the time the agreement was made. Further as their employment comprehended work within the scope of the Regency Park Agreement they were covered by the Agreement. It was legitimate and necessary for them to be included in the group of employees asked to approve the agreement. The resultant agreement was made under s.182(1). It was a single enterprise agreement available to be made under s. 172(2)(a). The Agreement has been genuinely agreed to by the employees covered by the Agreement*".[13]

22. In dismissing the second ground of appeal, the Full Bench held that the test under s.186(3) of the Act as to whether the group of employees covered by the Agreement was fairly chosen "*requires consideration of the employees covered by the agreement – not the employees who vote for the agreement at the time it is made*".[14] The Full Bench again placed reliance on the decision in *John Holland*.

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[11] Full Bench decision at [17].
[12] (2015) 228 FCR 297; [2015] FCAFC 16 (Besanko, Buchanan and Barker JJ).
[13] Full Bench decision at [42].
[14] Full Bench decision at [55].

23. The Full Bench also dismissed the third ground of appeal with respect to the BOOT.[15]

24. The SDA made application for judicial review of the decision of the Full Bench. The relevant issues formulated by the SDA in the Court below were that:

    (a) The agreement was not validly made under the Act and could not be approved by the Commission because it had not been made with employees employed at the time who would be covered by the agreement within the meaning of s.172(2)(a);

    (b) The Commission, at both levels, misapplied the provisions of the Act in being satisfied that the agreement passed the BOOT for the purposes of s.186(2)(d).[16]

25. Regarding the first ground, the majority[17] found that there is an inherent requirement in ss. 186(2)(a) and 188 of the Act that there be persons covered by the agreement whose genuineness in agreeing to it can be assessed by the Commission and that "*persons who will become covered by the agreement only at some time in the future do not answer that description, even if they did, by some means vote to approve it*".[18]

26. Further, the majority accepted that the expressions "will be covered" and "covered by" used in Part 2 – 4 of the Act are counterpoints and that the expression "who will be covered by the agreement" is a reference to "those who, upon the making of the agreement, are covered by it and is not a reference to those who, at some future time will be covered by it".[19] The consequence being, as found by the majority, that neither Bull DP nor the Full Bench undertook the tasks required by s.186(2)(a) in the way it required.[20]

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[15] Full Bench decision at [58].
[16] Judgment at [6].
[17] White and Katzmann JJ, Jessup J dissenting.
[18] Judgment at [134].
[19] Judgment at [135].
[20] Judgment at [144].

27. The majority also found that the Full Bench's reliance on *John Holland* was not appropriate.[21]

28. Jessup J., in dissent, found that the question for the Commission was "*whether the agreement covered the 17 employees of ALDI who had contracted to work, but who had not commenced working, in the region*"[22] and that the issue of coverage of an agreement is a matter for the specialised tribunal.[23] That is, it is a matter within the jurisdiction of the Commission and any error, if an error was made, is an error within jurisdiction.

29. With respect to the second ground, the majority found that the Full Bench did not address the criterion required by s.193(1) of the Act with respect to the BOOT.[24] As the Full Bench did not engage in an analysis of the matters relevant to s.193, the majority found that this "*warrants the conclusion that the Full Bench did not address the correct question or, alternatively, that if it did, the conclusion it reached by reference to the make-good clause is legally unreasonable*".[25]

30. Jessup J., in dissent, found that whether an enterprise agreement passes the test set out in s.193(1) of the Act is a matter of satisfaction of the Commission. His Honour did not accept the characterisation of the reconciliation provision put forward by the SDA and found that the Full Bench was satisfied that the agreement passed the BOOT independently of the provision. The reasoning of the Full Bench was simply the Full Bench addressing issues raised before it in its decision.

31. The third matter considered by the Full Court was the SDA's contention that the Notice of Employee Representational Rights departed from the prescribed form. The Court decided that, as a matter of discretion, relief

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[21] Judgment at [129].
[22] Judgment at [20].
[23] Judgment at [24].
[24] Judgment at [167].
[25] Judgment at [168].

would not be given with respect to this ground. This matter does not form part of this appeal.

Part VI: Argument

Meaning of "Coverage"

32. White J., in delivering the majority judgment as to the definition of "coverage" for the purposes of s.186(2) of the Act moved, it is respectfully submitted, from a false premise.

33. His Honour found (at [128]) that the interpretation adopted by the Full Bench required that all employees who might be covered by the proposed agreement at some time in the future must genuinely agree to it.

34. The section directs attention to employees, not prospective or future employees. Thus, any existing employees who will fall within the coverage of the agreement must genuinely agree, a class the Commission can readily determine. His Honour's judgment does not reflect any attention to the Full Bench Decision in this regard (at [40] - [42]).

35. Moreover, his Honour's analysis does not reflect the overall statutory scheme. The enterprise agreement has no coverage clause expressed as such. There is a clause which identifies to whom the agreement applies.

36. Section 52 of the Act deals with when an agreement "applies" to an employee. It is relevantly identical to the definition of coverage except that the agreement must be in operation. That is, an agreement covers an employee when it is not in operation, but can only apply to an employee when it is in operation.

37. Section 143 of the Act, which deals with coverage for the purposes of awards, tells us that employees must be specified by inclusion in a particular class or classes (subsection (5)) described by reference to a particular

industry or part of an industry or particular kinds of work (subsection (6)). No such restriction exists in relation to coverage under an agreement.

38. If we then consider the context against which coverage is relevant to the enterprise agreement, we might note firstly that the default position is that an agreement will be made for the entirety of an enterprise's undertakings and operations. All present and future employees are covered, regardless of their occupation, or the kind of work they are performing. The fact that all employees are expected to be covered may be discerned from the conjunction of ss. 14, 170 and 172 of the Act.

39. To depart from the default position an employer must satisfy the Commission that, if all employees of the employer are not covered by the agreement, the group of employees who were chosen was fairly chosen, taking in to account whether the group is "geographically, operationally or organisationally distinct" (s.186 (3A)).

40. The agreement can be made with two or more employees, so long as they are the only employees employed at the time of the vote who will be covered by the agreement. It matters not that the agreement may, in due course, come to cover hundreds or even thousands of employees. Accordingly, it is wrong to attempt to introduce notions of good faith bargaining, as the majority did (at [146]) in understanding the provision.[26]

41. Another provision warranting attention is s.172 which provides that an agreement can only be made in accordance with the section, and in turn allows for agreements, be they single enterprise or multi enterprise, between employers and employees subject to one exception, "Greenfields Agreements".

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[26] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297 per Buchanan J at [72] – [74], Besanko J at [3]; [2015] FCAFC 16.

42. "Greenfields Agreement" is a term defined in s.172(4) of the Act by reference to s.172(2)(b). The conditions stated may be briefly put. It must be a genuine new enterprise that is being established **or to be established** and the employer must not at the time employ any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement (our emphasis).

43. Plainly the operation of the prospective "will be necessary" and "will be covered by the agreement" in s.172(2)(b) does not contemplate the time of making the agreement. If the expression "will be covered by the agreement" refers to an agreement operating upon its making, the expression could have no application to an enterprise "to be established".

44. Similarly, when one turns to s.207, which concerns itself with variation of an enterprise agreement, a procedure is set forth allowing agreements to be varied by further agreement with employees. Subsection (4) is in the following terms:

> "*Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.*"

45. A number of matters may be observed in relation to the above provision which cannot readily be reconciled with the interpretation urged by the first respondent. Firstly, the provision utilises the present perfect tense "have been" presumably to identify that the employee(s) were not employed at the time the agreement was made, consistent with the interpretation the appellant urges to s.172(4).

46. More particularly, the conjunction of the future perfect tense of "will be necessary" with the present tense "are covered" makes clear that the

legislature did not contemplate that coverage required an employee to be working under the terms of the agreement at the time.

47. Further, the need to condition the expression "are covered" with the qualifying "have been employed" presumably means that the legislature understands that coverage of an enterprise agreement is wider than existing employees, consistent with the approach of the Full Federal Court in *John Holland.*[27]

48. The meaning of the expression "are covered" was considered in some detail by the Full Federal Court in *John Holland* in relation to s186(3), where it was determined to mean the "*whole class of employees to whom the agreement might in future apply*". Were that meaning to be read into subsection (2), it might read "those persons currently employed who fall within the whole class of employees to whom the agreement might in future apply". Such an interpretation would conveniently cover the present situation and would be harmonious with earlier authority. It is also consistent with the plain legislative intent. It is the approach which found favour with the Full Bench.[28]

Jurisdictional Error

49. Even were the Commission wrong in its approach to the question of coverage, there would be an issue as to the consequence of this error. White J. deals with the consequence, it is respectfully submitted, somewhat pithily (at [177]).

50. It may be readily conceded that a failure to address the question required of an inferior tribunal falls within the characterisation of classes of error labelled "jurisdictional" within both *Craig v The State of South Australia*[29] and *Kirk v Industrial Court,*[30] however the nomination of the question required is somewhat more problematic.

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[27] (2015) 228 FCR 297 per Buchanan J at [34] – [41], Besanko J at [1] – [2]; [2015] FCAFC 16
[28] Full Bench decision at [40] – [42].
[29] (1995) 184 CLR 163; [1995] HCA 58.
[30] (2010) 239 CLR 531; [2010] HCA 1.

51. In *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union and Another*[31] (*Teys No 1*) and *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union and Another* [32] (*Teys No 2*), Katzman J. joined in judgments declaring that the question of coverage was a matter within the power of the Commission to determine, yet in the judgment below, her Honour, without explanation, joined in White J.'s analysis that the Commission must correctly determine the question of coverage. Similarly, Buchanan J. gave the leading judgment in *Teys No.1* where he held that, notwithstanding that, on his view, the Full Bench were wrong on the question of the coverage of the Agreement in question, they had jurisdiction to err. Subsequently his Honour found in *MI&E Holdings v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[33] (at [44]) that the Full Bench's finding as to coverage indicated that the Full Bench had "*initially misdirected itself about the statutory scheme in a way which sufficiently demonstrates jurisdictional error*".

52. A useful explanation of jurisdictional error is provided in a paper by Gageler J., written prior to his appointment.[34] His Honour said: "*The terminology of "invalidity" or "jurisdictional error" therefore signifies that there has been a breach of the legal rules that mark out the limits of a repository's power or which constitute a condition of its valid exercise (at p.284.8)".*

53. Brennan J. expressed it as: "*The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise."*[35]

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[31] (2015) 230 FCR 565; [2015] FCAFC 11.
[32] (2015) 234 FCR 405; [2015] FCAFC 105.
[33] (2015) 228 FCR 483; [2015] FCAFC 15
[34] S Gageler SC "The Legitimate Scope of Judicial Review" November 2001 21(3) Australian Bar Review 279 – 291.
[35] *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at page 36.3; [1990] HCA 21.

54. In order to determine the extent of the power one must examine the legislation conferring the power and attempt to understand what the legislature intended would be the conditions on its valid exercise.[36]

55. In approaching this task it would seem appropriate to adopt the precept that the legislature intended the legislation to operate reasonably as well as to have the power exercised reasonably.

56. The legislation relevantly envisages that employers who would otherwise be bound by a modern enterprise award might agree with their employees to instead enter an agreement. On the analysis above, the Act contemplates that the predominate form of agreement will be enterprise wide and will cover all employees of the enterprise, whatever the duties they be engaged to perform. It can be entered when the employer has engaged more than one employee who will be necessary for the ordinary operation of the enterprise, even before the enterprise has commenced operations on our analysis. On the approach adopted by White J., the agreement can be entered as soon as the employer has two employees working in the enterprise.

57. The Agreement is then presented for approval. Whilst there are a number of matters to be considered, the principle is the satisfaction of the Commission that the agreement provides conditions such that all employees who may, during the currency of the agreement, fall to have their employment regulated by its terms will be better off than had their conditions of employment been regulated by award ("**the BOOT test**").

58. If the agreement is not to cover all employees of the employer, then the particular area of the enterprise to be regulated must be organisationally, operationally or geographically distinct. At this point coverage might have some relevance, though only to the question of which agreement might regulate which part of the employer's business.

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[36] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at [69]; [1998] HCA 28.

59. The critical question of coverage arises when the Commission applies the BOOT test. The question of coverage here is not whether employees voting for the Agreement are covered, but rather the coverage of all employees who may in future have their conditions regulated by it. Coverage is relevant to the question of which Modern Award might otherwise apply.

60. It is at the stage of the application of the BOOT test that it might be thought fundamental rights are affected. A finding by the Commission that the Agreement passes the BOOT results in persons who come to be covered by the Agreement losing recourse to the minimum conditions afforded by modern awards. Given the broad and unfettered discretion conferred on the Commission by the legislature in relation to the application of the BOOT, it would seem unusual that the legislature intended that an incorrect decision on coverage, which has virtually no significance, could result in invalidity, while the decision on the BOOT is largely unfettered.

61. Assuming the Agreement is then approved, it attains statutory force, applying to that class of employees who voted against the agreement, who weren't employed and did not know about the agreement at the time it was made, and to employees of employers to whose operations there is a transfer of the business of the employer party to the Agreement.[37]

62. The Object of the part of the Act regulating enterprise agreements is 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*".

63. One might then wonder how simple and flexible might be thought a framework whereby one is bound to apply the provision of an approved enterprise agreement (Section 50) on pain of civil penalty and yet some nine

[37] See ss. 312 and 313 *Fair Work Act 2009.*

years after the agreement is approved (six year limitation period)[38] a court can determine that the Commission was in error in determining the coverage of the employees then employed by the employer and accordingly quashes the agreement.

64. The Agreement may well have provisions of benefit to employees which are inconsistent with the award. For instance, the Agreement may provide for a 15 minute paid rest break after every four hours whereas the award provides for an unpaid 10 minute rest break after three hours work. The employer is now in breach of the award in respect of each employee employed whilst the agreement was in operation. The employer has simply complied with their obligation under the statute, and yet a subsequent determination exposes the employer to substantial penalties and potentially payments.

65. It is submitted such an outcome is patently unfair and unreasonable and, accordingly, is unlikely to reflect the legislative intendment.

66. As Jessup J. observed (at [24]): "*The requirements of s 53 are not terminologically prescriptive: they allow for the coverage of an agreement to be identified in ways other than by reference to an explicit statement of coverage in terms. In putting the matter this way the legislature has, in my view, shown a tolerance for the different, and at times idiosyncratic, formulae which employers and employees tend to use when articulating the bases of the agreements which they reach. To identify the "coverage" of an agreement made in such a legislative and institutional environment is, in my view, pre-eminently a matter for the specialised tribunal.*"

Better Off Overall Test

67. The judgment of White J. summarises the SDA submissions in support of their challenge to the Full Bench decision regarding the Better Off Overall Test as follows:

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[38] See s. 544 *Fair Work Act* 2009.

"(i) although section 193(1) required the Commission to be satisfied that each employee would be better off overall if the Regency Park Agreement applied than he or she would be under the Award, the Full Bench had not addressed that matter, illustrated by the fact that it had not engaged with the further evidence bearing on it;

(ii) the Full Bench's reliance on the make good clause was unreasonable in the legal sense;

(iii) the Full Bench had misconceived and accordingly not discharged its appellate task – its reception of further evidence had meant that the fate of the appeal did not turn on whether the SDA had established appealable error by Bull DP (at [159] – [161])."

68. White J. found that the first two "contentions had some force" (at [162]) and that the SDA "had made good the contention that the decision of the Full Bench concerning the BOOT was affected by jurisdictional error" (at [174]).

69. The Full Bench "engaged" with the fresh evidence at [56]. The Full Bench characterise the evidence in the same fashion as the first respondent's written submissions had before them. It would be difficult to afford them much weight. The "analysis" did not represent the hours to be worked by employees under the agreements, important components of the payments of employees were omitted, employees were classified for the purposes of the comparison at substantially higher classifications than employees doing the same work under a substantially similar agreement that had recently been approved with the support of the SDA. Indeed, the first respondent's contentions were directly contrary to a recently executed statutory declaration provided by the SDA for the purpose of supporting another ALDI agreement to which they were party. It is apparent that the Commission did not find the analysis persuasive.

70. Moreover, each of the preceding six agreements had a clause in identical terms to the so characterised "make good" clause in the agreement at hand. There was no evidence of any employee, or the first respondent, ever having

activated the provisions of the clause, notwithstanding the extravagant claims of shortfall made by the first respondent in the proceedings.

71. The submission advanced by the first respondent before the Full Bench in relation to the "make good" clause was that the Commission should follow an earlier decision of a Full Bench which held that an undertaking proferring an annual reconciliation in the face of an apparent failure to meet the BOOT was unsatisfactory.[39] In the case at hand, the Agreement was tested without recourse to the make good clause. It is expressly premised on the basis that the agreement otherwise passes the BOOT. It confers an entitlement on individual employees who believe they are falling behind, whether because the award has moved since test time, or a belief that their duties now fall under a different award classification, to access a simple mechanism to redress their grievance. Importantly there is no legal entitlement to such redress for an agreement employee short of such a provision. Once an agreement is approved, it is the agreement which is the sole source of employee entitlement (subject of course to the National Employment Standard, which is not here relevant).

72. The Full Bench decision engages directly with the submission before it. It makes no further pronouncement than to, properly, reject the submissions advanced by the first respondent. That is an exercise of its power, rather than an abuse of it.

73. It is perhaps unsurprising that the first respondent did not advance a submission before the specialist tribunal akin to that which found favour with White J.. The BOOT requires a comparison of the benefits afforded under the agreement with the award **as it applies at the test time**[40] (our emphasis). Accordingly, a provision which ensures that employees can receive at least an amount equal to the award at all times during the currency of the agreement ensures that those employees will receive an amount equal to or

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[39] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Main People Pty Ltd* (2015) 252 IR 340; [2015] FWCFB 4467.
[40] See section 193(6) *Fair Work Act* 2009.

higher than an award employee at the test time, the relevant criterion for the Commission's consideration.

74. White J., in delivering the majority judgment (at [165]), apparently infers that the Full Bench *"proceeded on the basis that the entitlement and means of redress for which the make good clause provides made it unnecessary for it to engage in the kind of analysis"* that identified detriment and made an assessment as to whether counterbalancing features may warrant the conclusion that employees were better off. Quite why such an inference might be drawn is not apparent.

75. What the Full Bench says, in the context of evidence advanced to establish that rosters relied upon were not in operation and open ended provisions reserving a discretion to the employer left open a question as to the operation of the BOOT, is that they are satisfied that "*the Deputy President properly considered the BOOT and reached a decision based on a sound analysis".*

76. In the appellant's respectful submission, the more appropriate inference to be drawn is that the Full Bench rejected the evidence in question to the extent that it went beyond the SDA submission identified. Having regard to the evidence that supported the submissions identified, the Full Bench was not satisfied that there was error in the Tribunal below.

77. White J. characterises this approach as an error of law, apparently also rising to the height of jurisdictional error, in that it is said that: "*In my respectful opinion, these passages indicate that the Full Bench misunderstood its function. Once it had received the further evidence, the exercise of its appellate function was not constrained by the need to identify error by Bull DP. (at [170]).* Reference was made to *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[41] at [14] - [15]". Those passages do not support his Honour's analysis. In those passages the High Court referred to the earlier judgment of *Allesch v Maunz*[42] a case which had been raised by the Full Bench in the proceedings before it.

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[41] (2000) 203 CLR 194; [2000] HCA 47.
[42] (2000) 203 CLR 172; [2000] HCA 40.

78. The High Court in *Allesch* described the difference between an appeal by way of rehearing and a hearing de novo as: *"In the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error."*[43]

10 ***Legal Unreasonableness***

79. In any event the appellant submits that it is singularly inappropriate to proceed to find legal unreasonableness on the basis of an inference that the inferior tribunal reasoned in a particular way.

80. It may be accepted that the High Court has moved some distance in relation to the test for legal unreasonableness since Brennan J equated it with an abuse of power in *Attorney General (NSW) v Quin.*[44]

81. In *Minister for Immigration and Citizenship vi Li*[45] the then Chief Justice,
20 French CJ. observed: "*the requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision maker.*"[46]

82. Plainly a decision to approve an agreement or dismiss an appeal is within the range of decision available to a Full Bench. What appears to have taken this case out of the range from the perspective of the majority, was the inferred focus by the Full Bench on the make good clause and the view of the
30 majority that the Full Bench misunderstood the operation of the provision.

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[43] (2000) 203 CLR 172 per Gaudron, McHugh, Gummow and Hayne JJ at [23]; [2000] HCA 40.
[44] (1990) 170 CLR 1 per Brennan J at 36.4; [1990] HCA 21.
[45] (2013) 249 CLR 332; [2013] HCA 18.
[46] (2013) 249 CLR 332; [2013] HCA 18 at [30].

83. For the reasons enunciated above, the appellant submits that the majority criticism flows from a misunderstanding of the operation of the make good clause in conjunction with the legislation. Apart from anything else, the Clause notes that the agreement is set to ensure employees are paid higher than the award and if they feel they are not, they can challenge it and obtain an amount equal to the award. It is a rather arid exercise in semantics to insist that the clause itself only entitles the employee to the reconciliation. It is not, with respect, the level of error that ought occupy Courts concerned with legal unreasonableness. It has all the hallmarks of a merits review.

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84. In *Minister for Immigration and Multicultural Affairs v Eshetu*[47] the Full Federal Court had divided, in relatively strong terms, on whether the decision of the Refugee Review Tribunal displayed legal unreasonableness. The High Court concluded that the Tribunal "*was criticised on the ground that it gave inadequate weight to certain considerations and undue weight to others. Its ultimate decision was said to have been based upon a process of reasoning flawed in those respects. This is not a case of* ***Wednesbury*** *unreasonableness....*".[48]

20 85. The Court then considered whether there was an error of law apparent in the Tribunal's reasoning:

> *"The ultimate question was whether the Tribunal was satisfied about something.* ***The approach adopted by the Tribunal does not manifest a legally erroneous view as to what it was about which it needed to be satisfied****. (our emphasis) For the Tribunal to conclude that, although it was satisfied that Mr Eshetu feared persecution, an examination of the reasons he advanced as to why he held that fear failed to satisfy the Tribunal that the fear was well-founded, does not reflect any*
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> 30 *misunderstanding as to the meaning of the concept of a well-founded fear.*

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[47] (1999) 197 CLR 611; [1999] HCA 21.

[48] (1999) 197 CLR 611 per Gleeson CJ and McHugh J at [45]; [1999] HCA 21.

No error of law was shown. What emerged was nothing more than a number of reasons for disagreeing with the Tribunal's view of the merits of the case. The merits were for the Tribunal to determine, not the Federal Court."[49]

Part VII: Applicable Constitutional and Statutory Provisions

See attached Annexure to these submissions.

Part VIII: Orders Sought

10

1. Appeal Upheld.

2. The First Respondent's application under s.39B of the *Judiciary Act* 1903 (C'th) is dismissed.

3. The writ of certiorari issued by the Federal Court in the matter appealed from is quashed.

4. Costs

20

Part IX: Time for Oral Argument

It is estimated that the appellant's oral argument will take no more than a half day.

Dated 10 April 2017

30

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[49] (1999) 197 CLR 611 per Gleeson CJ and McHugh J at [55] – [56]; [1999] HCA 21.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M33 of 2017

BETWEEN: ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP)
Appellant

and

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION
First Respondent

FAIR WORK COMMISSION
Second Respondent

ANNEXURE – APPLICABLE LEGISLATIVE PROVISIONS

1. *Fair Work Act 2009* (Cth) ss 12 (definition of enterprise), 52, 53, 143, 170, 180, 181, 188, 207, 256A, 312, 313 and 544 as in force from 1 January 2015 and still in force, in the form reproduced in this annexure, as at the date of the submissions.

2. *Fair Work Act 2009* (Cth) ss 14 as in force from 1 January 2015, as amended by the *Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015* (No. 126, 2015) from 5 March 2016 and as amended by the *Territories Legislation Amendment Act 2016* (No. 33, 2016) from 1 July 2016 and still in force as at the date of the submissions.

3. *Fair Work Act 2009* (Cth) ss 172, 182, 185, 186, 187, 193 as in force from 1 January 2015 and as amended by the *Fair Work Amendment Act 2015* (No. 156, 2015) from 27 November 2015 and still in force as at the date of the submissions.

1. *Fair Work Act 2009* (Cth) ss 12 (definition of enterprise), 52, 53, 170, 180, 181, 188, 207, 256A, 312, 313 and 544 as in force from 1 January 2015 and still in force, in the form reproduced in this annexure, as at the date of the submissions.

12 The Dictionary

enterprise means a business, activity, project or undertaking.

52 When an enterprise agreement *applies* to an employer, employee or employee organisation

When an enterprise agreement applies to an employee, employer or organisation

(1) An enterprise agreement ***applies*** to an employee, employer or employee organisation if:
  (a) the agreement is in operation; and
  (b) the agreement covers the employee, employer or organisation; and
  (c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Enterprise agreements apply to employees in relation to particular employment

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment.

53 When an enterprise agreement *covers* an employer, employee or employee organisation

Employees and employers

(1) An enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.

Employee organisations

(2) An enterprise agreement ***covers*** an employee organisation:
  (a) for an enterprise agreement that is not a greenfields agreement—if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
  (b) for a greenfields agreement—if the agreement is made by the organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
  (a) a provision of this Act or of the Registered Organisations Act;

(b) an FWC order made under a provision of this Act;
(c) an order of a court.

(4) Despite subsections (1), (2) and (3), an enterprise agreement does not ***cover*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:
(a) another provision of this Act;
(b) an FWC order made under another provision of this Act;
(c) an order of a court.

Enterprise agreements that have ceased to operate

(5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not ***cover*** an employee, employer or employee organisation.

Enterprise agreements cover employees in relation to particular employment

(6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

143 Coverage terms of modern awards other than modern enterprise awards and State reference public sector modern awards

Coverage terms must be included

(1) A modern award must include terms (***coverage terms***) setting out the employers, employees, organisations and outworker entities that are covered by the award, in accordance with this section.

Employers and employees

(2) A modern award must be expressed to cover:
(a) specified employers; and
(b) specified employees of employers covered by the modern award.

Organisations

(3) A modern award may be expressed to cover one or more specified organisations, in relation to all or specified employees or employers that are covered by the award.

Outworker entities

(4) A modern award may be expressed to cover, but only in relation to outworker terms included in the award, specified outworker entities.

How coverage is expressed

(5) For the purposes of subsections (2) to (4):
(a) employers may be specified by name or by inclusion in a specified class or specified classes; and
(b) employees must be specified by inclusion in a specified class or specified classes; and

(c) organisations must be specified by name; and

(d) outworker entities may be specified by name or by inclusion in a specified class or specified classes.

(6) Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.

Employees not traditionally covered by awards etc.

(7) A modern award must not be expressed to cover classes of employees:

(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

Modern enterprise awards

(8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Transitional Act), or employers in relation to those employees.

(9) This section does not apply to modern enterprise awards.

State reference public sector modern awards

(10) A modern award (other than a State reference public sector modern award) must be expressed not to cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Transitional Act), or employers in relation to those employees.

(11) This section does not apply to State reference public sector modern awards.

170 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

180 Employees must be given a copy of a proposed enterprise agreement etc.

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of the agreement etc.

(2) The employer must take all reasonable steps to ensure that:

(a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;

(ii) any other material incorporated by reference in the agreement; or

(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;

(b) the voting method that will be used.

(4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement.

181 Employers may request employees to approve a proposed enterprise agreement

(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

188 When employees have genuinely agreed to an enterprise agreement

An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
  (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
  (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

207 Variation of an enterprise agreement may be made by employers and employees

Variation by employers and employees

(1) The following may jointly make a variation of an enterprise agreement:
  (a) if the agreement covers a single employer—the employer and:
    (i) the employees employed at the time who are covered by the agreement; and
    (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC;
  (b) if the agreement covers 2 or more employers—all of those employers and:
    (i) the employees employed at the time who are covered by the agreement; and
    (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC.

Note: For when a variation of an enterprise agreement is ***made***, see section 209.

(2) The employees referred to in paragraphs (1)(a) and (b) are the ***affected employees*** for the variation.

Variation has no effect unless approved by the FWC

(3) A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211.

Limitation—greenfields agreement

(4) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

256A How employees, employers and employee organisations are to be described

(1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by an enterprise agreement or other instrument.

(2) The employees may be specified by class or by name.

(3) The employers and employee organisations must be specified by name.

(4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:

(a) a particular industry or part of an industry;

(b) a particular kind of work;

(c) a particular type of employment;

(d) a particular classification, job level or grade.

312 Instruments that may transfer

*Meaning of **transferable instrument***

(1) Each of the following is a ***transferable instrument***:

(a) an enterprise agreement that has been approved by the FWC;

(b) a workplace determination;

(c) a named employer award.

*Meaning of **named employer award***

(2) Each of the following is a ***named employer award***:

(a) a modern award (including a modern enterprise award) that is expressed to cover one or more named employers;

(b) a modern enterprise award that is expressed to cover one or more specified classes of employers (other than a modern enterprise award that is expressed to relate to one or more enterprises as described in paragraph 168A(2)(b)).

Note: Paragraph 168A(2)(b) deals with employers that carry on similar business activities under the same franchise.

313 Transferring employees and new employer covered by transferable instrument

(1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:

(a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

(b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.

(2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.

(3) This section has effect subject to any FWC order under subsection 318(1).

544 Time limit on applications

A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:

(a) a civil remedy provision;

(b) a safety net contractual entitlement;

(c) an entitlement arising under subsection 542(1).

Note 1: This section does not apply in relation to general protections court applications or unlawful termination court applications (see subparagraphs 370(a)(ii) and 778(a)(ii)).

Note 2: For time limits on orders relating to underpayments, see subsection 545(5).

2. *Fair Work Act 2009* (Cth) ss 14 as in force from 1 January 2015, as amended by the *Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015* (No. 126, 2015) from 5 March 2016 and as amended by the *Territories Legislation Amendment Act 2016* (No. 33, 2016) from 1 July 2016 and still in force as at the date of the submissions.

As at 1 January 2015

14 Meaning of *national system employer*

(1) A ***national system employer*** is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the endorsement, revocation or amendment.

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

As at 5 March 2016

14 Meaning of *national system employer*

(1) A ***national system employer*** is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

As at 1 July 2016 and still in force as at the date of the submissions

14 Meaning of *national system employer*

(1) A ***national system employer*** is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or

(b) supplies or distributes gas; or

(c) provides services for the supply, distribution or release of water; or

(d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

3. *Fair Work Act 2009* (Cth) ss 172, 182, 185,186,187, 193 as in force from 1 January 2015 and as amended by the *Fair Work Amendment Act 2015* (No. 156, 2015) from 27 November 2015 and still in force as at the date of the submissions.

As at 1 January 2015

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

(1) An agreement (an ***enterprise agreement***) that is about one or more of the following matters (the ***permitted matters***) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Multi-enterprise agreements

(3) Two or more employers that are not all single interest employers may make an enterprise agreement (a ***multi-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and

(ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a ***greenfields agreement***.

Single interest employers

(5) Two or more employers are ***single interest employers*** if:

(a) the employers are engaged in a joint venture or common enterprise; or

(b) the employers are related bodies corporate; or

(c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

Requirement that there be at least 2 employees

(6) An enterprise agreement cannot be made with a single employee.

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

(2) If:

(a) a proposed enterprise agreement is a multi-enterprise agreement; and

(b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and

(c) those employees have voted on whether or not to approve the agreement; and

(d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is ***made*** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

185 Bargaining representative must apply for the FWC's approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a greenfields agreement, the application must be made by:

(a) an employer covered by the agreement; or

(b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) If the agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or

(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

(4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

(5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

187 When the FWC must approve an enterprise agreement—additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, the FWC must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement.

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(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.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

(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.

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:

(a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the ***relevant modern award***) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Prospective award covered employee

(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.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under section 185.

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.

As at 27 November 2015 and still in force as at the date of the submissions

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

(1) An agreement (an ***enterprise agreement***) that is about one or more of the following matters (the ***permitted matters***) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Multi-enterprise agreements

(3) Two or more employers that are not all single interest employers may make an enterprise agreement (a ***multi-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and

(ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a ***greenfields agreement***.

Single interest employers

(5) Two or more employers are ***single interest employers*** if:

(a) the employers are engaged in a joint venture or common enterprise; or

(b) the employers are related bodies corporate; or

(c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

Requirement that there be at least 2 employees

(6) An enterprise agreement cannot be made with a single employee.

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

(2) If:

(a) a proposed enterprise agreement is a multi-enterprise agreement; and

(b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and

(c) those employees have voted on whether or not to approve the agreement; and

(d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is ***made*** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

(4) If:

(a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and

(b) there has been a notified negotiation period for the agreement; and

(c) the notified negotiation period has ended; and

(d) the employer or employers that were bargaining representatives for the agreement (the ***relevant employer or employers***) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and

(e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

185 Bargaining representative must apply for the FWC's approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a multi-enterprise agreement that is a greenfields agreement, the application must be made by:

(a) an employer covered by the agreement; or

(b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) If the agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or

(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

(4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

(5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

Single-enterprise agreements that are greenfields agreements

(6) This section does not apply to an agreement made under subsection 182(4).

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

187 When the FWC must approve an enterprise agreement—additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, the FWC must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement.

(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(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.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility

arrangement for the purposes of determining whether the agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

(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.

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:

(a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the ***relevant modern award***) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Prospective award covered employee

(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.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

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.