



DECISION

Fair Work Act 2009

s.185 - Application for approval of a single-enterprise agreement

Loaded Rates Agreements

(AG2017/1925 AG2017/1943 AG2017/3865 AG2017/4096 AG2017/4671)

VICE PRESIDENT HATCHER

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT GOSTENCNIK

SYDNEY, 28 JUNE 2018

COMMISSIONER LEE

COMMISSIONER HARPER-GREENWELL

Introduction and statutory framework

[1] This decision concerns five applications for the approval of enterprise agreements which share a common feature, namely they provide for “loaded” or higher rates of pay which are intended to incorporate, in part or whole, penalty rates and other monetary benefits for which separate provision is made in the applicable modern awards. The applications were referred to this Full Bench by the President, Justice Ross, for consideration as to how the better off overall test (BOOT), the satisfaction of which is a requirement for approval of an enterprise agreement under s 186(2)(d) of the *Fair Work Act 2009* (FW Act) (subject to ss 189 and 190), is properly to be applied to agreements containing loaded rates. This issue has become particularly pertinent since the Full Bench decision in *Hart v Coles Supermarkets Australia Pty Ltd*,¹ (*Hart*) in which a first instance decision to approve an agreement applying to a major Australian retailer and its employees was quashed on appeal. The agreement in question provided for loaded ordinary hourly rates which were higher than those in the relevant modern award and were intended to compensate for lower penalty rates for evenings, weekends and public holidays.² The Full Bench found that the agreement did not pass the BOOT because the loaded rates in the agreement disadvantaged those employees who worked primarily at times which attracted lower penalty rates under the agreement as compared to the award.³ We discuss *Hart* in greater detail later in this decision.

[2] Originally a total of eight agreement approval applications were referred to us, but three of the applications were discontinued after the applicants were informed of the Full Bench referral. The remaining agreements for which approval was sought were as follows:

¹ [2016] FWCFB 2887

² *Ibid* at [7]

³ *Ibid* at [33]

- (1) *Allied Security Management Enterprise Agreement 2017 (Allied Agreement)*⁴
- (2) *JWT Group Services Enterprise Agreement 2017 (JWT Agreement)*⁵
- (3) *PSA Security Pty Ltd Enterprise Agreement 2017 (PSA Agreement)*⁶
- (4) *ALDI Prestons Agreement 2017 (Aldi Prestons Agreement)*⁷
- (5) *ALDI Stapylton Agreement 2017 (Aldi Stapylton Agreement)*.⁸

[3] Enterprise bargaining is a central feature of the FW Act. The object of the FW Act set out in s 3 identifies a number of matters (in paragraphs (a)-(g)) which are intended to “*provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*”, one of which (in paragraph (f)) is “*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*”. However, significantly, another matter (in paragraph (b)) is “*ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders*”.

[4] The legislative scheme for enterprise bargaining is contained in Pt 2-4 of the FW Act. The objects of Pt 2-4 are set out in s 171 as follows:

171 Objects of this Part

The objects of this Part are:

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

⁴ AG2017/3865

⁵ AG2017/4096

⁶ AG2017/4671

⁷ AG2017/1925

⁸ AG2017/1943

[5] Division 4 Subdiv B of Pt 2-4 deals with the approval of enterprise agreements by the Commission. Section 186 sets out the general requirements for when the Commission must approve an enterprise agreement. The “*basic rule*” in this respect is set out in s 186(1) as follows:

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).

[6] Section 186(2) relevantly provides:

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

- (a) ...
- (b) ...
- (c) ...; and
- (d) the agreement passes the better off overall test.

...

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).

...

[7] The requirements for passing the BOOT referred to in s 186(2)(d) are set out in s 193, which provides:

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.

[8] Section 189 identifies the circumstances in which the Commission may approve an enterprise agreement that does not pass the BOOT:

189 FWC may approve an enterprise agreement that does not pass better off overall test--public interest test

Application of this section

(1) This section applies if:

(a) the FWC is not required to approve an enterprise agreement under section 186; and

(b) the only reason for this is that the FWC is not satisfied that the agreement passes the better off overall test.

Approval of agreement if not contrary to the public interest

(2) The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

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

(3) An example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

Nominal expiry date

(4) The **nominal expiry date** of an enterprise agreement approved by the FWC under this section is the earlier of the following:

(a) the date specified in the agreement as the nominal expiry date of the agreement;

(b) 2 years after the day on which the FWC approved the agreement.

[9] Section 190 sets out the circumstances in which an enterprise agreement may be approved with undertakings:

190 FWC may approve an enterprise agreement with undertakings

Application of this section

(1) This section applies if:

- (a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and
- (b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:

- (a) cause financial detriment to any employee covered by the agreement; or
- (b) result in substantial changes to the agreement.

FWC must seek views of bargaining representatives

(4) The FWC must not accept an undertaking under subsection (3) unless the FWC has sought the views of each person who the FWC knows is a bargaining representative for the agreement.

Signature requirements

(5) The undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

Allied Agreement

[10] The Allied Agreement covers Allied Security Management Pty Ltd (Allied), a contract security business, and its employees in Australia. The relevant modern award is the *Security Services Industry Award 2010 (Security Award)*. Clause 3.2.1 provides for the classifications and hourly base pay rates for employees under the Allied Agreement as at the date of approval as follows:

“3.2.1 What are the base rates of pay for the Job Levels set out in part 3.1 above?”

(a) The Base Rate of Pay to be paid to all Employees will be as set out below:

FULL-TIME AND PART-TIME EMPLOYEES HOURLY BASE RATES OF PAY* FROM THE DATE OF APPROVAL OF THE AGREEMENT BY FWC:

JOB LEVEL	NON-ROTATING DAY WORKER	ROTATING WEEKDAY/ WEEKNIGHT WORKER	NON-ROTATING WEEKNIGHT SHIFT WORKER	ROTATING WEEKDAY/ WEEKNIGHT / WEEKEND WORKER	ROTATING WEEKNIGHT/ WEEKEND WORKER
ASM Employee LEVEL 1	20.89	23.07	27.02	27.84	31.79
ASM Employee LEVEL 2	21.50	23.77	27.79	28.17	32.13
ASM Employee LEVEL 3	23.24	25.77	30.22	30.73	34.50
SECURITY MANAGER	26.05	28.22	31.80	32.56	35.90

*Note that the above Adult base rates of pay must always be equal to or above the modern award rate as determined by FWC from time to time.”

[11] The working patterns referred to in the above table are defined in clause 3.2.1 as follows:

“WORK PATTERN DEFINITIONS – hours averaged over up to 8 weeks cycle -

- **Non-Rotating Day Worker** - works between 0600 hrs to 1800 hrs, Monday to Friday.
- **Rotating Weekday / Weeknight Worker** - works Monday to Friday with less than half ordinary hours worked outside day worker hours.
- **Non-Rotating Weeknight Shift Worker** - works Monday to Friday, outside 0600 hrs to 1800 hrs only.
- **Rotating Weekday / Weeknight / Weekend Worker** – works weekdays, weeknights and weekends, but with at least a third of hours worked between 0600 hrs to 1800 hrs, Monday to Friday, and not more than 25% of hours worked on weekends.
- **Rotating Weeknight / Weekend Worker** - works weeknights and weekends, but with no more than 35% of hours worked on weekends.”

[12] Clause 3.2.1(b) provides that casual employees receive a 25% loading in addition to the above hourly rates, and clause 3.2.1(c) provides that the rates are to be increased by 2.5% from the first full pay period commencing on 1 July each year until the expiry of the agreement. Clause 3.2.2 provides that *“The base rates of pay set out in part 3.2.1 of this Agreement compensate the Employee for all financial entitlements arising under this Agreement, except as specifically provided elsewhere in the Agreement.”*

[13] Clauses 4.1.1, 4.1.2 and 4.1.3 relevantly provide that:

- full-time employees may be rostered for an average of 38 hours per week over an averaging period of up to 8 weeks, with a minimum of 7.6 hours per shift and a maximum of 12 hours per shift;
- for part-time employees, the arrangement of hours of work will be agreed in writing on commencement and implemented on the basis of a minimum of 4 hours per week and a maximum of 37 hours per week over an averaging period of up to 8 weeks, with a minimum of 4 hours per shift and a maximum of 12 hours per shift;
- casual employees may work a minimum of 4 hours per shift and a maximum of 10 hours per shift, which may be increased to 12 hours per shift in accordance with clause 21.2(b)-(d) of the *Security Award*.

[14] The Allied Agreement does not make provision for the payment of penalty rates for working on evenings or weekends, but clause 5.6.1 does provide for a loading of 250% of the non-rotating day workers hourly rate for permanent employees and 275% of the non-rotating day workers hourly rate for casual employees when working on public holidays.

[15] Clause 4.2.2 requires employees to work reasonable additional hours (that is, hours in addition to the hours specified in clauses 4.1.1, 4.1.2 and 4.1.3) upon the provision of 24 hours' notice (unless a lesser period of notice is mutually agreed), and clause 4.2.3 provides:

“4.2.3 Are Employees paid an additional payment for working reasonable overtime hours?”

All Employees who work overtime hours will be paid 50% in addition to the non-rotating day worker hourly rate for the first 2 hours of overtime and 100% in addition to their non-rotating day worker hourly rate for all hours worked thereafter. All overtime hours on a Sunday will be paid 100% in addition to their non-rotating day worker hourly rate. All overtime hours on a public holiday will be paid 150% in addition to their non-rotating day worker hourly rate.”

[16] The application for approval of the Allied Agreement was accompanied by a statutory declaration in the prescribed form (Form F17) made by Amer Awad dated 20 August 2017. The declaration disclosed that there are 41 employees covered by the agreement, including three females, 18 from non-English speaking backgrounds, one Aboriginal or Torres Strait Islander, 12 part-time employees, 8 casual employees, five employees under 21 years of age and 15 employees over 45 years of age. In answer to a question concerning the translation of classifications, the declaration stated that the ASM Employee Level 1 related to the classification of Security Officer Level 1 in the *Security Award*, Level 2 related to Security Officer Level 2, Level 3 related to Security Officer Level 3 & 4, and Security Manager to Security Officer Level 5.

[17] In response to the question whether the agreement contained any terms or conditions of employment that were more beneficial than the equivalent terms and conditions in the reference instrument (the *Security Award*), the declaration identified the following as more beneficial:

- “1. The basic hourly rate for Monday to Friday day time work is higher and more beneficial than the reference instrument which applies to all employees.

Job Level	Agreement	Reference Instrument
1	20.89	20.55
2	21.50	21.13
3	23.24	21.85
5	26.05	22.56

2. The agreement has a guaranteed 2.5% wage increase on 1 July each year for the life of the agreement which applies to all employees and is more beneficial than a potential wage increase.
3. Casual Loading (which applies to casual [sic] employees) is calculated on the higher agreement rates rather than the reference instrument basic hourly rate.
4. Annual leave loading of 17.5% is based on the non-rotating day worker rate, which is higher than the reference instrument.”

[18] In response to a question about whether the agreement contained any less beneficial terms and conditions than the equivalent in the reference instrument, the declaration answered:

- “1. The agreement does not confer the same specific percentage penalty rates for Saturday, Sunday, Night shift, and Public holiday that are provided in the reference instrument. Instead “work pattern” rates are applicable. These apply to all employees.
2. The agreement allows a uniform deposit to be deducted from the employee’s salary, to be refunded on return of the uniform, which is not conferred in the reference instrument. This applies to all employees.”

[19] A preliminary analysis as to whether the Allied Agreement satisfied the BOOT was undertaken by the Commission’s staff under the supervision of Commissioner Lee. The contents of that analysis were communicated to the applicant in correspondence from the presiding member’s chambers dated 24 October 2017. The correspondence relevantly stated:

“Specifically in relation to your application, the Agreement provides loaded rates of pay for different roster cycles which are intended to compensate employees for shift penalties, weekend penalties, annual leave loading, allowances and other Award entitlements not provided for in the Agreement.

The relevant roster cycles for which loaded rates are provided contain rostering restrictions at clause 3.2.1(a) of the agreement and are as follows:

- Non-Rotating Day Worker Roster – works between 0600hrs to 1800hrs, Monday to Friday;

- Rotating Weekday/Weeknight Worker Roster – works Monday to Friday with less than half ordinary hours worked outside day worker hours;
- Non-Rotating Weeknight Shift Worker Roster – works Monday to Friday, outside 0600hrs to 1800hrs only; and
- Rotating Weekday/Weeknight/Weekend Worker Roster – works weekdays, weeknights and weekends, but with at least a third of hours worked between 0600 hrs to 1800 hrs, Monday to Friday, and not more than 25% of hours worked on weekends.
- Rotating Weeknight/Weekend Worker Roster – works weeknights and weekends, but with no more than 35% of hours worked on weekends.

The loaded rates of pay under the agreement range from 1.68% to 59.15% above the applicable base rate of pay in the *Security Services Industry Award 2010* (*the Award*), depending on the roster pattern which the employee is working on. The Commission makes the following comments with respect to the BOOT.

If there is strict compliance with the rostering restrictions in the agreement, the Commission notes that employees under the agreement are marginally better off overall when considering only the absence of shift and weekend penalties from their loaded rates. This is illustrated by the model below for permanent Level 1 employees working a 38 hour week on the ‘Non-Rotating Day Worker Roster’:

Agreement Ordinary Rate		\$20.89	
	Hours	Loading	weekly total
NRDWR Rate	38	100%	\$793.82
Annual Leave	Yes		\$61.06
Leave Loading	Yes		\$10.69
Totals	38.00	Hrs	\$865.57

Award Ordinary Rate		\$20.54	
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$780.52
Annual Leave	Yes		\$60.04
Leave Loading	Yes		\$10.51
Totals	38.00	Hrs	\$851.07

However, the Commission is concerned that the better off overall assessment for these employees may be affected by the following reductions in entitlements under the agreement when compared with the Award:

- Part time provisions at clause 4.1.2 of the agreement appear to be less beneficial than their entitlements under clause 10.4 of the Award with respect to the setting of regular hours and the ability to vary the regular hours for part time employees. Additionally, part time employees do not appear to be entitled to overtime for work in excess of agreed hours.
- Rosters are provided 3 days in advance where practicable whereas the Award requires 7 days’ notice of roster.
- No job search entitlements on termination and redundancy
- Employees do not always appear to get paid rest breaks consistently with the Award under clause 4.4.3 of the agreement.
- Direction of annual leave provisions at clause 5.1.5 of the agreement are less beneficial than the provisions in the Award
- No maximum weekly hours for casuals in clause 4.1.3 of the agreement. As such casuals are not entitled to overtime for work in excess of 38 hours per week.

- Broken shift allowance under the agreement is a 2.5% loading on hours in the second part of the broken shift rather than the flat \$13.23 allowance under the Award. This may be less beneficial to employees depending on the structuring of the broken shifts. Additionally, it is unclear whether casual employees are entitled to broken shift allowance under the agreement.
- No 3 hour minimum payment for each part of the split shift.
- Clause 6.2 requires an employee to pay an unspecified uniform deposit which may be refunded on termination of employment. Under the Award an employer is to provide uniforms to employees or reimburse the employees for the cost of their uniform.
- Agreement does not provide that ordinary time shifts must be separated by a minimum break of not less than 8 hours or that there must be a minimum of 8 hours break after overtime work.
- Casuals do not appear to be entitled to the long break provisions at clause 21.4 of the Award.
- No call-back entitlement under the agreement.

Additionally, the Commission is concerned about the application of the rostering provisions in clause 3.2.1(a) of the agreement for casual employees given the interaction between clauses 3.2.1(a) and 4.1.3 of the agreement. This is of particular concern for casual employees given the nature of their employment is different to permanent employment whereby they are not provided with any fixed entitlement to hours of work. This could affect a casual employee's ability to work to a roster and thus fall neatly into one of the loaded rates under the agreement. For example if casuals only worked on weekends there would be no adequate loaded rate to compensate a casual employee for the absence of weekend penalties under the agreement.

Finally the Commission notes the following other concerns with the agreement which may impact on the BOOT:

- Clause 4.2.1 and 4.2.2 has inconsistent terminology with some provisions referring to "reasonable additional hours" and other provisions referring to "reasonable overtime hours"
- Clause 5.1.7(b) makes reference to a 'salaried rate.' However the agreement does not otherwise reference or provide for a salaried rate."

[20] The correspondence ended with a direction that any submissions about whether the Agreement passed the BOOT, and any undertaking that was proposed to address the identified concerns, be filed by a specified date

[21] In response to this correspondence, and in accordance with the directions of the Commission, Allied lodged a written submission and undertakings on 12 November 2017 addressing the identified issues. In summary, Allied submitted:

- in relation to the concerns about part-time employees, Allied had established client relationships that provided for reasonably predictable hours of work; any roster changes had to be agreed in writing (clause 4.1.2(b)); rosters once posted could only be changed by mutual agreement (clause 4.3.4); and any variation to the agreed

hours not made in advance of the release of the roster would be subject to overtime penalties (clause 4.1.2(c));

- in relation to the display of the roster and notice of a change to the roster, the *Security Award* only provided that once a roster was notified, it could not be changed without the payment of overtime or by giving seven days' notice;
- in respect of casual employees, an undertaking was proposed that casual employees would be paid the Non-Rotating Day Worker rates and applicable penalty rates under clause 22.3 of the *Security Award*; and
- in relation to the concern about the provision for an unspecified deposit to be paid for the issue of uniforms (clause 6.2), its purpose was to encourage the return of uniforms once employment ended, and an undertaking was proposed that would set an amount for the deposit.

[22] The text of the proposed undertakings was as follows:

“I, Amer Awad, hereby give an undertaking that the following clauses with respect to Allied Security Management Enterprise Agreement 2017 shall be read and applied as follows:

1.3.3 Does this Agreement exclude or modify Award conditions?

Whilst it remains in force, this Agreement shall operate to the exclusion of any other Agreement or Award that may have application to the Employees' employment now or in the future unless stated otherwise in the Agreement.

2.5.10 Job Search Entitlement

A job search entitlement shall be in accordance with clauses 11.3 and 12.4 of the Security Services Industry Award 2010.

3.2 WAGES

WORK PATTERN DEFINITIONS – hours averaged over up to 8 weeks cycle -

- **Non-Rotating Day Worker** - works between 0600 hrs to 1800 hrs, Monday to Friday.

- **Rotating Weekday / Weeknight Worker** - works Monday to Friday with less than half ordinary hours worked outside day worker hours.

- **Non-Rotating Weeknight Shift Worker** - works Monday to Friday, outside 0600 hrs to 1800 hrs only.

- **Rotating Weekday / Weeknight / Weekend Worker** – works weekdays, weeknights and weekends, but with at least a third of hours worked between 0600 hrs to 1800 hrs, Monday to Friday, and not more than 25% of hours worked on weekends.

- **Rotating Weeknight / Weekend Worker** - works weeknights and weekends, but with no more than 35% of hours worked on weekends.

*Note that where a casual Employee does not fall within the above work pattern definitions, they will be paid the Non-Rotating Day Worker rates and relevant penalty rates under clause 22.3 of the Security Services Industry Award 2010.

4.1.1 What are the hours of work for a full-time Employee?

(a) The arrangement of hours of work for a full-time Employee will be implemented as follows:

- An average of 38 hours per week over an averaging period of up to 8 weeks;
- Other than for unpaid breaks, a minimum of 7.6 hours per shift and a maximum of 12 hours per shift;
- All ordinary time worked to be within a span of 12 hours per day;
- 8 rostered days off per 4 week cycle;
- A maximum of 10 consecutive days may be worked with up to 4 rostered days off; and
- Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

4.1.2 What are the hours of work for a part-time Employee?

(a) The arrangement of hours of work for part-time Employees will be agreed in writing on commencement and implemented as follows:

- A minimum of 4 hours per week and a maximum of 37 hours per week over an averaging period of up to 8 weeks;
- Has reasonably predictable hours of work;
- Other than for unpaid breaks, a minimum of four (4) hours per shift and a maximum of 12 hours per shift;
- All ordinary time worked to be within a span of 12 hours per day;
- A maximum of 10 consecutive days may be worked with four (4) non-working days; and
- Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

(b) Any agreed variation to the hours of work for a part time Employee will be recorded in writing and is subject to the minimum and maximum hours limitations in (a) above.

(c) Any variation to the agreed hours in writing under part (a) & (b) not made in advance of the release of the roster will be subject to overtime penalties provided in part 4.2.3.

4.1.3 What are the hours of work for a casual Employee?

Other than for unpaid breaks, Casual Employees may work a minimum of four (4) hours per shift and a maximum of 10 hours per shift. The maximum of 10 hours per shift can be increased to 12 hours per shift if the provisions of 21.2(b)-(d) of the Security Services Industry Award 2010 are followed.

Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

4.2 OVERTIME

4.2.1 What are overtime hours?

Overtime hours are hours in excess of parts 4.1.1, 4.1.2, or 4.1.3 of this Agreement.

4.2.3 Are Employees paid an additional payment for working overtime hours?

All Employees who work overtime hours will be paid 50% in addition to the non-rotating day worker hourly rate for the first 2 hours of overtime and 100% in addition to their non-rotating day worker hourly rate for all hours worked thereafter. All overtime hours on a Sunday will be paid 100% in addition to their non-rotating day worker hourly rate. All overtime hours on a public holiday will be paid 150% in addition to their non-rotating day worker hourly rate.

4.2.2 Are Employees required to work overtime?

All Employees will be given at least 24 hours' notice of the Employer's requirement to work overtime unless both parties otherwise mutually agree to a lesser period of notice.

4.3.5 Break between shifts

Each ordinary time shift shall be separated from any subsequent ordinary time shift by a minimum break of not less than eight (8) hours.

4.3.6 Long breaks

Regardless of the roster cycle, any Employee on a roster cycle must not be required to work more than a total of 48 hours of ordinary time without a long break of at least 48 continuous hours.

4.4.3 Are Employees entitled to Rest Breaks?

A paid rest break (or breaks) must be allowed on shifts of more than 4 hours. A rest break of not less than 10 minutes on a shift of more than four hours, a rest time of not less than 20 minutes on an 8 hour shift and not less than 30 minutes on a 12 hour shift must be provided. The time must be allowed not earlier than four hours nor later than five hours after the time of commencement of each shift where it is reasonably practicable to do so.

4.4.5 Break between shifts

Each ordinary time shift shall be separated from any subsequent ordinary time shift by a minimum break of not less than eight hours.

4.4.6 Call back

Call back provisions are in accordance with clause 21.5 of the Security Services Industry Award 2010.

5.1.5 Can the Employer make a full-time/part-time Employee take accumulated annual leave?

Yes. Taking accumulated annual leave will be in accordance with clause 24.5 of the Security Services and Industry Award 2010.

5.1.7 Can accrued annual leave be cashed out?

All full-time/part-time Employees can forego an entitlement to annual leave credited to them during each 12 month period provided that:

- (a) The full-time/part-time Employee gives the Employer a written election to forgo the amount of annual leave on each occasion; and
- (b) The amount of annual leave forgone is paid at the full-time/part-time Employee's base rate of pay for the period forgone at the time the election is made; and
- (c) The Employer authorises the full-time/part-time Employee to forgo the amount of annual leave; and
- (d) That the Employee is not entitled to forego an amount of annual leave credited to the Employee that would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

6.2.3 Can Allied Security Management request a deposit if you are provided a uniform?

Yes, the Employer may deduct a deposit from your wage a sum up to the value of \$150, provided that the deposit may by agreement between you and the Employer be paid by you over an agreed number of pay periods.

6.2.5 What will happen if you do not return the uniform?

Allied Security Management may keep the deposit or deduct from any monies owed to you, an amount up to the dollar value for the uniform provided, if the uniform is not returned or not returned in good condition. Fair wear and tear is excepted.”

JWT Agreement

[23] The JWT Agreement covers JWT Group Services Pty Ltd (JWT), a security industry contract business, and its employees in Australia. The relevant modern award is the *Security Award*. It is apparent that the JWT Agreement was drafted using the same template as the Allied Agreement, since the two agreements are in all respects relevant to the BOOT, virtually identical. Clause 3.2.1(a) contains the same classification structure (except the classifications are described as “*JWT Group Services Level 1*” etc.) and the same rates of pay apply for the working patterns. Clause 3.2.1(b) provides for the same 25% casual loading, clause 3.2.1(c) provides for the same pay increases until the expiry of the agreement, and clause 3.2.2 is the same as clause 3.2.2 of the Allied Agreement as earlier set out. Clauses 4.1.1, 4.2.2 and 4.2.3 are to the same effect as the equivalent clauses in the Allied Agreement, as earlier summarised. The JWT Agreement likewise does not make any provision for the payment of penalty rates on evenings or weekends, but provides for public holiday penalty rates in clause 5.6 in the same way as clause 5.6 of the Allied Agreement. Clause 4.2.3 provides for overtime penalty rates in the same terms as clause 4.2.3 of the Allied Agreement, as earlier set out.

[24] The application for approval of the JWT Agreement was accompanied by a statutory declaration in the prescribed form made by Ihab Al Arnaout dated 6 September 2017. The declaration disclosed that the business had three employees, one of whom was part-time and none of whom was casual. The answer given to the questions on the prescribed form concerning the translation of classifications as between the JWT Agreement and the *Security Award*, and whether the agreement contained any terms or conditions of employment that were more or less beneficial than the equivalent terms and conditions in the reference instrument, were the same in substance as that given in respect of the Allied Agreement.

[25] A preliminary analysis as to whether the JWT Agreement satisfied the BOOT was undertaken by the Commission’s staff under the supervision of Commissioner Lee. The contents of that analysis were communicated to the applicant in correspondence from the presiding member’s chambers dated 24 October 2017. It is not necessary to reproduce the correspondence, since it raised the same concerns as the correspondence sent to Allied which we have earlier set out. JWT lodged a written submission and proposed undertakings on 12 November 2017 in response to this correspondence. The submission was in the same terms as the Allied submission which we have summarised above. The proposed undertakings were the same as for Allied, but for completeness we set them out in full below:

“I, Ihab Al Arnaout, hereby give an undertaking that the following clauses with respect to JWT Group Services Enterprise Agreement 2017 shall be read and applied as follows:

1.3.3 Does this Agreement exclude or modify Award conditions?

Whilst it remains in force, this Agreement shall operate to the exclusion of any other Agreement or Award that may have application to the Employees' employment now or in the future unless stated otherwise in the Agreement.

2.5.10 Job Search Entitlement

A job search entitlement shall be in accordance with clauses 11.3 and 12.4 of the Security Services Industry Award 2010.

3.2 WAGES

WORK PATTERN DEFINITIONS – hours averaged over up to 8 weeks cycle -

- **Non-Rotating Day Worker** - works between 0600 hrs to 1800 hrs, Monday to Friday.
- **Rotating Weekday / Weeknight Worker** - works Monday to Friday with less than half ordinary hours worked outside day worker hours.
- **Non-Rotating Weeknight Shift Worker** - works Monday to Friday, outside 0600 hrs to 1800 hrs only.
- **Rotating Weekday / Weeknight / Weekend Worker** – works weekdays, weeknights and weekends, but with at least a third of hours worked between 0600 hrs to 1800 hrs, Monday to Friday, and not more than 25% of hours worked on weekends.
- **Rotating Weeknight / Weekend Worker** - works weeknights and weekends, but with no more than 35% of hours worked on weekends.

*Note that where a casual Employee does not fall within the above work pattern definitions, they will be paid the Non-Rotating Day Worker rates and relevant penalty rates under clause 22.3 of the Security Services Industry Award 2010.

4.1.1 What are the hours of work for a full-time Employee?

(a) The arrangement of hours of work for a full-time Employee will be implemented as follows:

- An average of 38 hours per week over an averaging period of up to 8 weeks;
- Other than for unpaid breaks, a minimum of 7.6 hours per shift and a maximum of 12 hours per shift;
- All ordinary time worked to be within a span of 12 hours per day;
- 8 rostered days off per 4 week cycle;
- A maximum of 10 consecutive days may be worked with up to 4 rostered days off; and
- Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

4.1.2 What are the hours of work for a part-time Employee?

(a) The arrangement of hours of work for part-time Employees will be agreed in writing on commencement and implemented as follows:

- A minimum of 4 hours per week and a maximum of 37 hours per week over an averaging period of up to 8 weeks;
- Has reasonably predictable hours of work;
- Other than for unpaid breaks, a minimum of four (4) hours per shift and a maximum of 12 hours per shift;
- All ordinary time worked to be within a span of 12 hours per day;
- A maximum of 10 consecutive days may be worked with four (4) non-working days; and
- Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

(b) Any agreed variation to the hours of work for a part time Employee will be recorded in writing and is subject to the minimum and maximum hours limitations in (a) above.

(c) Any variation to the agreed hours in writing under part (a) & (b) not made in advance of the release of the roster will be subject to overtime penalties provided in part 4.2.3.

4.1.3 What are the hours of work for a casual Employee?

Other than for unpaid breaks, Casual Employees may work a minimum of four (4) hours per shift and a maximum of 10 hours per shift. The maximum of 10 hours per shift can be increased to 12 hours per shift if the provisions of 21.2(b)-(d) of the Security Services Industry Award 2010 are followed.

Broken shifts may be worked with a maximum of one break of more than 1 hour between work periods per day, in which case an additional \$13.23 loading will be paid on the hours worked after the break. A minimum payment of three hours for each period of duty shall apply.

4.2 OVERTIME

4.2.1 What are overtime hours?

Overtime hours are hours in excess of parts 4.1.1, 4.1.2, or 4.1.3 of this Agreement.

4.2.3 Are Employees paid an additional payment for working overtime hours?

All Employees who work overtime hours will be paid 50% in addition to the non-rotating day worker hourly rate for the first 2 hours of overtime and 100% in addition to their non-rotating day worker hourly rate for all hours worked thereafter. All overtime hours on a Sunday will be paid 100% in addition to their non-rotating day worker hourly rate. All overtime hours on a public holiday will be paid 150% in addition to their non-rotating day worker hourly rate.

4.2.2 Are Employees required to work overtime?

All Employees will be given at least 24 hours' notice of the Employer's requirement to work overtime unless both parties otherwise mutually agree to a lesser period of notice.

4.3.5 Break between shifts

Each ordinary time shift shall be separated from any subsequent ordinary time shift by a minimum break of not less than eight (8) hours.

4.3.6 Long breaks

Regardless of the roster cycle, any Employee on a roster cycle must not be required to work more than a total of 48 hours of ordinary time without a long break of at least 48 continuous hours.

4.4.3 Are Employees entitled to Rest Breaks?

A paid rest break (or breaks) must be allowed on shifts of more than 4 hours. A rest break of not less than 10 minutes on a shift of more than four hours, a rest time of not less than 20 minutes on an 8 hour shift and not less than 30 minutes on a 12 hour shift must be provided. The time must be allowed not earlier than four hours nor later than five hours after the time of commencement of each shift where it is reasonably practicable to do so.

4.4.5 Break between shifts

Each ordinary time shift shall be separated from any subsequent ordinary time shift by a minimum break of not less than eight hours.

4.4.6 Call back

Call back provisions are in accordance with clause 21.5 of the Security Services Industry Award 2010.

5.1.5 Can the Employer make a full-time/part-time Employee take accumulated annual leave?

Yes. Taking accumulated annual leave will be in accordance with clause 24.5 of the Security Services and Industry Award 2010.

5.1.7 Can accrued annual leave be cashed out?

All full-time/part-time Employees can forego an entitlement to annual leave credited to them during each 12 month period provided that:

- (a) The full-time/part-time Employee gives the Employer a written election to forgo the amount of annual leave on each occasion; and
- (b) The amount of annual leave forgone is paid at the full-time/part-time Employee's base rate of pay for the period forgone at the time the election is made; and
- (c) The Employer authorises the full-time/part-time Employee to forgo the amount of annual leave; and
- (d) That the Employee is not entitled to forego an amount of annual leave credited to the Employee that would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

6.2.3 Can JWT Group Services request a deposit if you are provided a uniform?

Yes, the Employer may deduct a deposit from your wage a sum up to the value of \$150, provided that the deposit may by agreement between you and the Employer be paid by you over an agreed number of pay periods.

6.2.5 What will happen if you do not return the uniform?

JWT Group Services may keep the deposit or deduct from any monies owed to you, an amount up to the dollar value for the uniform provided, if the uniform is not returned or not returned in good condition. Fair wear and tear is excepted."

PSA Agreement

[26] The PSA Agreement covers all employees of PSA Security Pty Ltd (PSA), a contract security business, in Australia who are classified under the agreement. The relevant modern award is the *Security Award*. The PSA Agreement is the same in most relevant respects to the Allied Agreement and the JWT Agreement, but does have some differences. Clause 3.2.1 sets out the classifications and wage rates as follows:

“3.2.1 What are the base rates of pay for the Job Levels set out in part 3.1 above?

- (a) The Base Rate of Pay to be paid to all Employees will be as set out below:

FULL-TIME AND PART-TIME EMPLOYEES HOURLY BASE RATES OF PAY* FROM THE DATE OF APPROVAL OF THE AGREEMENT BY FWC:

JOB LEVEL	NON-ROTATING DAY WORKER	ROTATING WEEKDAY / WEEKNIGHT WORKER	NON-ROTATING WEEKNIGHT SHIFT WORKER	ROTATING WEEKDAY / WEEKNIGHT / WEEKEND WORKER	ROTATING WEEKNIGHT / WEEKEND WORKER
PSA Level 1	20.82	22.98	26.91	27.72	31.63
PSA Level 2	21.43	23.68	27.67	28.05	31.97
PSA Level 3/4	22.92	24.87	28.63	30.04	32.90
PSA Level 5	25.95	28.10	31.64	32.40	34.54

*Note that the above Adult base rates of pay must always be equal to or above the modern award rate as determined by FWC from time to time.”

[27] The wage rate structure in the above table, which is based on identified work patterns, is the same as in the Allied Agreement and the JWT Agreement, but the rates of pay are slightly lower. The work patterns are subsequently defined in clause 3.2.1 in the same way as in the Allied Agreement and the JWT Agreement.

[28] The following provisions are the same as the equivalent provisions in the Allied Agreement and the JWT Agreement:

- clause 3.2.1(b) – casual loading;
- clauses 3.2.1(c) – wage increases;
- clause 3.2.2 – base rates compensate for all financial entitlements except as specifically provided for in the agreement;
- clauses 4.1.1, 4.1.2 and 4.1.3 – hours of work for full-time, part-time and casual employees respectively;
- clause 4.2.2 – requirement for employees to work reasonable additional hours;
- clause 4.2.3 – overtime penalty rates; and
- clause 5.6.1 – penalty rates for public holidays (with the agreement otherwise making no provision for penalty rates for work on evenings or weekends).

[29] The application for approval of the PSA Agreement was accompanied by a statutory declaration in the prescribed form made by Prabhjot Sawhney dated 3 October 2017. In his declaration Mr Sawhney disclosed that the primary activity of PSA Security was security services and that the business currently had three employees consisting of one part-time employee and two casual employees. In response to the question of what states and territories the agreement would be operating in, Mr Sawhney indicated all of the State and territories of Australia.

[30] Mr Sawhney stated that there was no difference in any of the classifications between the *Security Award* and PSA Agreement. In response to a question about whether the agreement contained any more beneficial terms and conditions than the equivalent in the reference instrument, the declaration answered that “*rates of pay are higher than the award*

rates” and the application stated that there were no terms and conditions that were less beneficial than the equivalent in the reference instrument.

[31] A preliminary analysis as to whether the PSA Agreement satisfied the BOOT was undertaken by the Commission’s staff under the supervision of Commissioner Lee. The contents of that analysis were communicated to the applicant in correspondence from the presiding member’s chambers dated 24 October 2017. The correspondence relevantly stated:

“Specifically in relation to your application, the Agreement provides loaded rates of pay for different roster cycles which are intended to compensate employees for shift penalties, weekend penalties, annual leave loading, allowances and other Award entitlements not provided for in the Agreement.

The relevant roster cycles for which loaded rates are provided contain rostering restrictions at clause 3.2.1(a) of the agreement and are as follows:

- Non-Rotating Day Worker Roster –works between 0600hrs to 1800hrs, Monday to Friday
- Rotating Weekday/Weeknight Worker Roster – works Monday to Friday with less than half ordinary hours worked outside day worker hours
- Non-Rotating Weeknight Shift Worker Roster – works Monday to Friday, outside 0600hrs to 1800hrs only
- Rotating Weekday/Weeknight/Weekend Worker Roster – works weekdays, weeknights and weekends, but with at least a third of hours worked between 0600 hrs to 1800 hrs, Monday to Friday, and not more than 25% of hours worked on weekends.
- Rotating Weeknight/Weekend Worker Roster – works weeknights and weekends, but with no more than 35% of hours worked on weekends.

The loaded rates of pay under the agreement range from 1.34% to 53.96% above the applicable base rate of pay in the *Security Services Industry Award 2010* (*‘the Award’*), depending on the roster pattern which the employee is working on. The Commission makes the following comments with respect to the BOOT.

If there is strict compliance with the rostering restrictions in the agreement, the Commission notes that employees under the agreement are marginally better off overall when considering only the absence of shift and weekend penalties from their loaded rates. This is illustrated by the model below for permanent Level 1 employees working a 38 hour week on the ‘Non-Rotating Day Worker Roster’:

Agreement Ordinary Rate		\$20.82	
	Hours	Loading	weekly total
NRDWR Rate	38	100%	\$791.16
Annual Leave	Yes		\$60.86
Leave Loading	Yes		\$10.65
Totals	38.00	Hrs	\$862.67

Award Ordinary Rate		\$20.54	
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$780.52
Annual Leave	Yes		\$60.04
Leave Loading	Yes		\$10.51
Totals	38.00	Hrs	\$851.07

However, the Commission is concerned that the better off overall assessment for these employees may be affected by the following reductions in entitlements under the agreement when compared with the Award:

- Part time provisions at clause 4.1.2 of the agreement appear to be less beneficial than their entitlements under clause 10.4 of the Award with respect to the setting of regular hours and the ability to vary the regular hours for part time employees. Additionally, part time employees do not appear to be entitled to overtime for work in excess of agreed hours.
- Rosters are provided 3 days in advance where practicable whereas the Award requires 7 days' notice of roster.
- No job search entitlements on termination and redundancy
- Employees do not always appear to get paid rest breaks consistently with the Award under clause 4.4.3 of the agreement.
- Direction of annual leave provisions at clause 5.1.5 of the agreement are less beneficial than the provisions in the Award
- No maximum weekly hours for casuals in clause 4.1.3 of the agreement. As such casuals are not entitled to overtime for work in excess of 38 hours per week.
- Unclear whether casual employees are entitled to broken shift allowance under the agreement.
- No 3 hour minimum payment for each part of the split shift.
- Clause 6.2 requires an employee to pay an unspecified uniform deposit which may be refunded on termination of employment. Under the Award an employer is to provide uniforms to employees or reimburse the employees for the cost of their uniform.
- Agreement does not provide that ordinary time shifts must be separated by a minimum break of not less than 8 hours or that there must be a minimum of 8 hours break after overtime work.
- Casuals do not appear to be entitled to the long break provisions at clause 21.4 of the Award.
- No call-back entitlement under the agreement.

Additionally, the Commission is concerned about the application of the rostering provisions in clause 3.2.1(a) of the agreement for casual employees given the interaction between clauses 3.2.1(a) and 4.1.3 of the agreement. This is of particular concern for casual employees given the nature of their employment is different to permanent employment whereby they are not provided with any fixed entitlement to hours of work. This could affect a casual employee's ability to work to a roster and thus fall neatly into one of the loaded rates under the agreement. For example if casuals only worked on weekends there would be no adequate loaded rate to compensate a casual employee for the absence of weekend penalties under the agreement.

Finally the Commission notes the following other concerns with the agreement which may impact on the BOOT:

- Clause 4.2.1 and 4.2.2 has inconsistent terminology with some provisions referring to “reasonable additional hours” and other provisions referring to “reasonable overtime hours”
- Clause 5.1.7(b) makes reference to a ‘salaried rate’. However the agreement does not otherwise reference or provide for a salaried rate.”

[32] The correspondence went on to direct that any submissions about whether the Agreement passed the BOOT, and any undertaking that was proposed to address the identified concerns, be filed by a specified date.

[33] In response to this correspondence, and in accordance with the directions of the Commission, PSA lodged a written submission on 2 November 2017 which stated as follows (formal parts omitted):

“PSA Security would like to provide the following submission-

PSA Security EA was taken as a Reference from the following approved Agreements-

- Australian Protective Services Pty Ltd Enterprise Agreement 2017 (AG2017/622). Approved by Commissioner Lee on 04 August 2017
- Security Force One Enterprise Agreement 2015 (AG2015/3438). Approved by Commissioner Gregory on 06 November 2015.
- ASF Protective Services Enterprise Agreement 2013-2017 (AG2014/90). Approved by Commissioner Gregory on 11 March 2014.

PSA would like to request the Department to consider the PSA agreement based upon the above approved Agreements.”

Aldi Prestons Agreement and Aldi Stapylton Agreement

[34] The Aldi Prestons Agreement and the Aldi Stapylton Agreement (Aldi Agreements) cover identified employees of ALDI Stores, a Limited Partnership, in the Prestons Region and Stapylton Region respectively. Aldi operates in regions each consisting of a distribution centre and stores supplied from that distribution centre. The two agreements are largely identical apart from their coverage provisions and some other terms which are not relevant for the purpose of the BOOT. We will refer to the provisions of the Aldi Prestons Agreement for the purpose of describing the principal features of both agreements and for the purpose of the BOOT assessment except where there are differences between the two agreements. The relevant modern awards in relation to which the BOOT must be assessed are the *General Retail Industry Award 2010 (Retail Award)*, the *Storage Services and Wholesale Award 2010 (Storage Award)*, the *Road Transport and Distribution Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Miscellaneous Award 2010*.

[35] Clause 6 of the Aldi Prestons Agreement provides that its coverage is as follows:

“This Agreement will cover ALDI’s employees engaged to work in the Prestons Region in the following classifications:

- Store Manager, Assistant Store Manager, Store Management Trainee, Store Assistant and Stock Replenisher;
- Warehouse Operator, Warehouse Mechanic, Warehouse Caretaker and Palletiser;
- Transport Operator;
- Any other employee engaged to work in the Prestons Region with the exception of Executive Managers, Directors and administration employees.”

[36] Clause 13, *Hours of Work* establishes four categories of employees: full-time, part-time, limited roster and casual. Clause 13 provides that full-time employees “*may be engaged as either Salaried Employees or Hourly Rate Employees*”. Clause 13 then provides:

“Full-time Employees will be required to work 38 hours per week plus reasonable additional hours, on any five (5) out of seven (7) days, Monday to Sunday.

Salaried Employees will not be entitled to overtime or penalty rates, and will be expected to work such hours as are necessary to meet the needs of the position, including work on Saturdays, Sundays and Public Holidays as required. No additional payments will be made for work performed on Saturdays, Sundays and Public Holidays. Each Employee’s salary will be set taking into account the average number of additional hours each Salaried Employee is expected to work.

Hourly Rate Employees will be entitled to overtime and penalty rates as set out in the Schedules to this Agreement. Leave will accrue and be taken as set out in the Schedules to this Agreement.

The reasonable additional hours to be worked by full-time employees over 38 per week are agreed with the Employee on commencement. It is ALDI’s policy to be flexible and receptive to requests from employees to reduce their working hours. Therefore, in accordance with the National Employment Standards, where an Employee wishes to reduce the hours they are required to work, the Employee will identify the basis on which the hours to be worked are unreasonable. ALDI will not unreasonably deny any Employee’s request to reduce their hours work. A pro rata salary will apply to Salaried Employees based on the proportion of a 50 hour week to the hours the Employee works. Hourly Rate Employees will receive the applicable hourly rate and overtime and penalty rates as set out in Schedules to this Agreement. If the Employee and ALDI cannot reach agreement on the hours of work to apply to the Employee’s position, the Resolution of Disputes provision of this Agreement will be followed and the parties will agree to the Fair Work Commission arbitrating and making a binding determination to resolve this matter.”

[37] In respect of part-time employees, clause 13 provides:

“Part-time employees

Part-time Employees will work fewer than 38 hours per week on average and may be engaged as either Salaried Employees or Hourly Rate Employees, and will receive pro rata entitlements under this Agreement, including pro rata salary payments.

On commencement of employment, Hourly Rate Part-time Employees will be advised of their Contract Hours and the maximum number of hours which will be paid at the

Bankable Hourly rate of pay for their classification. ALDI will vary these hours only by agreement with the Employee and will take effect from the first full pay period after agreement is reached.

It is ALDI's policy to be flexible and receptive to requests from employees to reduce their working hours. Therefore, in accordance with the National Employment Standards, where an Employee wishes to reduce the hours they are required to work, the Employee will identify the basis on which the hours to be worked are unreasonable. ALDI will not unreasonably deny any Employee's request to reduce their hours work.

If the Employee and ALDI cannot reach agreement on the hours of work to apply to the Employee's position, the Resolution of Disputes provision of this Agreement will be followed and the parties will agree to the Fair Work Commission arbitrating and making a binding determination to resolve this matter."

[38] Full-time hourly rate employees and part-time employees may be engaged on the basis of "*Bankable Hours Arrangements*". In this respect clause 13 provides:

"Bankable Hours Arrangements

Bankable Hours arrangements are available to be used by non-Casual Hourly Rate Employees.

Employees accrue towards their Contract Hours all hours actually worked, hours on authorised paid leave and unpaid leave, hours actually worked as overtime and on public holidays. Any hours in excess of the Contract Hours accrued in a pay period may be banked. Alternatively, the Employee may choose to have all Bankable Hours paid in each period.

Hours "banked" may be paid in subsequent pay periods if the Employee wishes, or may be used to reduce the number of Contract Hours worked in subsequent pay periods. Where the Employee works less than their Contract Hours, his/her "banked" hours will be used to pay the Employee the Contract Hours for the first pay period.

If the Employee does not accrue their full Contract Hours and does not have sufficient "banked" hours he/she will still be paid his/her Contract Hours. In this case the Employee's "banked" hours will go into minus. All minus "banked" hours will need to be made up using the Employee's future excess hours prior to these excess hours being "banked" or paid.

Overtime hours which attract an additional penalty payment and hours which attract a shift loading may be banked, however any additional overtime penalty payment or shift loading will be paid in the following pay period after the hours are worked. Banked Hours will be paid at the Employee's Bankable Hourly Rate."

[39] In respect of the third category of employees, namely those engaged on a "*Limited Roster basis*", clause 13 provides:

"Limited Roster Arrangements

Part-time Employees may be engaged on a Limited Roster basis. Limited Roster Employees will be required to nominate the days on which they are available to be rostered at any time. The Employee may be requested by their Direct Leader to work additional shifts as Ordinary Hours on other days not nominated by the Employee, but may refuse this request. Employees engaged on a Limited Roster will be able to take paid leave and receive payment for not working on a public holiday only on the agreed days on which they are usually available to be rostered.”

[40] Finally, in relation to casual employees, clause 13 provides:

“Casual Employees

Casual Store Assistants are the only Casual Employees employed under this Agreement.

Casual Employees may be rostered to work ordinary hours in shifts of at least three (3) hours at any time, Monday to Sunday inclusive. By the 15th of every month, a Casual Employee must indicate their availability to work within the span over the following month. ALDI will use this information to roster the Employee as required to meet business needs. Repeated refusal of shifts offered may result in ALDI not offering further engagements to the Employee.

Casual Employees are not entitled to paid public holidays, annual, personal/carer’s, compassionate or jury service leave. Casual Employees are entitled to unpaid carer’s leave and unpaid compassionate leave in accordance with the National Employee Standards and may be entitled to long service leave depending on applicable state legislation.”

[41] Limited roster employees and casual employees under the two agreements are reasonably comparable to part-time employees and casual employees respectively under the five relevant awards. Full-time salaried employees are paid on the basis of what may be characterised as a loaded annualised salary which displaces the payment of penalty rates that would be payable under the relevant award. Full-time hourly rate employees and part-time employees engaged on a bankable hours arrangement are a unique category. We discuss their reference point for the purpose of the BOOT later in this decision.

[42] Clause 14 provides, among other things, that where an employee considers they are not better off overall under the agreement than under the relevant modern award, they can request a pay comparison over a nominated period of time, and “*any shortfall in total remuneration which would otherwise be payable under the Modern Award will be paid to the Employee in the next pay period after the review is completed*”. Any dispute about the amount to be paid is to be dealt with under the Resolution of Disputes provision of the agreement, with Aldi agreeing to arbitration by the Commission to resolve the matter if necessary.

[43] Clause 19 contains the following provision with respect to payment for leave entitlements:

“Employees will be entitled to all leave entitlements in accordance with the National Employment Standards set out in the Act, as a minimum. The payment to Employees

taking leave will be at a rate of pay not less than that provided under the National Employment Standards.

Community Service Leave will be provided in accordance with the National Employment Standards, however the provisions of this Agreement in relation to attendance and payment for Jury Service will apply.”

[44] There are four separate schedules to the Aldi Prestons Agreement which establish hours of work and rates of pay for salaried store employees, hourly rate store employees, warehouse employees and transport and distribution employees respectively. Schedule 1, *Salaried Store Employees*, applies to Store Managers, Assistant Store Managers and Store Management Trainees. Part A of Schedule 1 provides, among other things, that such managerial employees are required to work:

- any five days out of seven, Monday to Sunday, as rostered;
- such hours as are necessary to meet the needs of the position, including work on Saturdays, Sundays and Public Holidays as required;
- 38 ordinary hours plus an average number of additional hours per week as agreed on the commencement of employment.

[45] Part B of Schedule 1 provides for the salaries for store management employees. The specified salaries are said to be minimum rates of pay for salaried employees “engaged to work 50, 45 or 40 hours per week”, but this is subject to the proviso that “Employees may be engaged to work a different number of hours per week, and would receive a pro rata payment of the 50 hour per week salary, based on the hours they are engaged to work”. The rates of pay for Store Managers are set out in Part B1.1 of Schedule 1 as follows:

“Rates prior to being allocated to a store to manage

Annual Salary (45 hours per week)	\$80,736.10
Annual Salary (40 hours per week)	\$71,745.73

Plus superannuation calculated in accordance with the requirements of Superannuation Legislation. No Business Review Payment is payable.

These rates are payable whilst the Employee completes initial training in the role of Store Manager. Employees will be allocated their own store within 6 months of commencing in the role of Store Manager, and will receive the following payments:

Takeover of own store

	On takeover of own store	Year 2	Year 3	Year 4	Year 7
Annual Base Salary (50 hours per week)	\$N/A	\$72,302.88	\$79,419.20	\$86,535.53	\$93,651.86
Annual Base Salary (45 hours per week)	\$58,728.68	\$65,085.25	\$71,441.83	\$77,823.73	\$84,180.30
Annual Base Salary	\$52,194.83	\$57,918.28	\$63,565.75	\$69,263.88	\$74,911.35

(40 hours per week)					
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Plus any Business Review Payment payable.

Plus superannuation calculated in accordance with the requirements of Superannuation Legislation.

Progression from one year to the next year occurs on the next full pay period after the anniversary of takeover of own store.”

[46] Part B1.2, *Business Review Payment*, provides for Store Managers to be paid a productivity bonus and a sales bonus calculated according to specified formulae. Relevantly to the application of the BOOT, it provides:

“The method used by ALDI to calculate the Business Review Payment may vary at ALDI's discretion, however for the purposes of the Better Off Overall Test, the Business Review Payment for Store Managers, upon placement in a home Store, will be a minimum of \$570.00 per Fortnight based on Store Managers working a 50 hour week.”

[47] The salaries for Assistant Store Managers are set out in Part B2.1 of Schedule 1 as follows:

“Rates prior to being placed at a home store

Annual Salary (45 hours per week)	\$66,022.28
Annual Salary (40 hours per week)	\$58,703.35

Plus superannuation calculated in accordance with the requirements of Superannuation Legislation. No Business Review Payment is payable.

These rates are payable whilst the Employee completes initial training in the role of Assistant Store Manager. Employees will be placed in a home store within 6 months of commencing in the role of Assistant Store Manager, and will receive the following payments

Rates payable from being placed at a home store

	On Placement	Year 2
Annual Base Salary (50 hours per week)	N/A	\$68,985.30
Annual Base Salary (45 hours per week)	\$57,741.00	\$62,071.58
Annual Base Salary (40 hours per week)	\$51,359.10	\$55,208.50

Plus any Business Review Payment payable

Plus superannuation calculated in accordance with the requirements of Superannuation Legislation.”

[48] The Business Review Payment Scheme for Assistant Store Managers in Part B2.2, which also consists of a productivity bonus and a sales bonus, provides for a minimum payment of \$440 per fortnight based on a 50 hour week.

[49] The salary rates for Store Management Trainees are provided for in Part B.3.1 as follows:

“The following rates of pay are set for Store Management Trainees working 40 hours per week, including time spent in training.

	Year 1	Year 2	Year 3
Annual Salary	\$53,050.00	\$55,450.00	\$59,450.00

...”

[50] Schedule 1 does not contain any provision requiring the payment of penalty rates for working on evenings, weekends or public holidays, or for overtime. Work on public holidays or in excess of the hours agreed on engagement are compensated for by time off in lieu (in addition to the normal salary payment). Where the employee works less than the agreed hours, this must be made up at a later time.

[51] Schedule 2 applies to Hourly Rate Store Employees. Part A establishes their span of ordinary hours as being 6.00am-11.00pm Monday to Friday and 6.00am-8.00pm on Saturday and Sunday, and provides that overtime will be paid for work in excess of 9 hours on any one day or 76 hours in a fortnight. Additionally, it provides that “*Except for Stock Replenisher, Limited Roster or Casual employees, all work required to be performed by Hourly Rate Employees outside the span of hours set out in Ordinary Hours above will be paid at the rate of time and a half of the applicable Bankable Hourly Rate set out in Part B*”. Part B of Schedule 2 sets out the hourly pay rates, which are said to be “... based on the requirement to work flexibly, and is inclusive of all allowances, including, but not limited to, laundry, meal, dairy-room and freezer-room allowances. Where applicable, the hourly rate also recognises the requirement to work on Saturdays and Sundays as needed”. The rates of remuneration in Part B are as follows:

“Remuneration

Bankable Rate Per Hour

	18 Years and Over (Adult Rate)
Store Assistant working any 5 out of 7 days at non-CBD Stores	\$24.30
Store Assistant working any 5 out of 7 days at CBD Stores	\$24.40

Limited Roster Store Assistant working at non-CBD Stores	18 Years and Over (Adult Rate)
7am-6pm Mon -Fri (Bankable Hourly Rate)	\$20.30
6pm-11pm Mon- Fri; 7am-8pm Sat	\$25.27
11pm-7am Mon- Sat; 8pm Sat-12am Sun; 12am- 7am Mon	\$30.25
All day Sunday (midnight to midnight)	\$40.19
Public Holidays	\$50.14

Limited Roster Store Assistant working at CBD Stores	18 Years and Over (Adult Rate)
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7am-6pm Mon -Fri (Bankable Hourly Rate)	\$20.50
6pm-11pm Mon- Fri; 7am-8pm Sat	\$25.27
11pm-7am Mon- Sat; 8pm Sat-12am Sun; 12am - 7am Mon	\$30.25
All day Sunday (midnight to midnight)	\$40.19
Public Holidays	\$50.14

Stock Replenisher working at non-CBD Stores	18 Years and Over (Adult Rate)
7am-6pm Mon -Fri(Bankable Hourly Rate)	\$20.30
6pm-11pm Mon- Fri; 7am-8pm Sat	\$25.27
11pm-7am Mon - Sat; 8pm Sat-12am Sun; 12am - 7am Mon	\$30.25
All day Sunday (midnight to midnight)	\$40.19
Public Holidays	\$50.14

Stock Replenisher working at CBD Stores	18 Years and Over (Adult Rate)
7am-6pm Mon -Fri (Bankable Hourly Rate)	\$20.50
6pm-11pm Mon- Fri; 7am-8pm Sat	\$25.27
11pm-7am Mon - Sat; 8pm Sat-12am Sun; 12am - 7am Mon	\$30.25
All day Sunday (midnight to midnight)	\$40.19
Public Holidays	\$50.14

Casual Store Assistant working at non-CBD Stores	18 Years and Over (Adult Rate)
7am - 11pm Mon- Fri (Bankable Hourly Rate)	\$25.30
11pm - 7am Mon- Sat; 11pm Sat- 12am Sun; 12am- 7am Mon	\$34.65
7am - 6pm Sat	\$27.12
6pm - 11pm Sat	\$30.61
All day Sunday (midnight to midnight)	\$40.08
Public Holidays	\$54.24

Casual Store Assistant working at CBD Stores	18 Years and Over (Adult Rate)
7am - 11pm Mon- Fri (Bankable Hourly Rate)	\$25.40
11pm - 7am Mon- Sat; 11pm Sat - 12am Sun; 12am- 7am Mon	\$34.65
7am - 6pm Sat	\$27.12
6pm - 11pm Sat	\$30.61
All day Sunday (midnight to midnight)	\$40.08
Public Holidays	\$54.24

...”

[52] Part B goes on to provide that “Casual rates of pay are inclusive of casual loading and payment in lieu of annual leave”. Junior rates are as follows:

“Junior Employees

Junior Employees are aged under 19 years and will receive Junior rates of pay.

	% of Adult Rate
Employees aged 16 years and under	70%
Employees aged 17 years	80%

Junior Employees will progress to the next pay rate in the next full pay period after their birthday.”

[53] Part B of Schedule 2 also provides for a \$9.00 per hour allowance when a Store Assistant deputises for a Store Manager, and a \$12.00 per hour Sunday Loading for employees who work on Sundays except for Stock Replenishers, Limited Roster and Casual employees.

[54] Schedule 2 does not otherwise make provision for the payment of penalty rates for working on evenings or weekends. In respect of public holidays, Part C provides:

“Except for Stock Replenisher, Limited Roster and Casual Employees, where Employees work on a public holiday, they will be paid at double the Bankable Hourly Rate set out in Part B. Stock Replenisher, Limited Roster and Casual Employees will receive the payment for Public Holidays set out in Part B. No overtime is separately payable on public holidays. If non-Casual Hourly Rate Store Employees do not work on a public holiday, the Employee will receive payment of their Notional Shift Hours at the Bankable Hourly Rate set out in Part B.”

[55] Schedule 3 applies to Warehouse Operators, Warehouse Mechanics, Warehouse Caretakers and Palletisers. Part A provides that such employees may be engaged as Hourly Rate Employees and may be required to work at any time on any day from Monday to Sunday, with their hours being averaged over a fortnight period. A shift worker under the Schedule is defined as being someone “*who is required to work regularly outside the hours of 5.00am and 6.00pm - i.e. they are in receipt of a shift loading for all shifts worked on Monday-Friday*”. Overtime is payable for all work in excess of 9 hours on any one day or 40 hours in one week, and “*will be paid at the rate of time and a half of the Bankable Hourly Rate as set out in Part B*”. Part B provides for the following rates of pay:

Hourly Rate Warehouse Employees

These rates include all allowances such as but not limited to, chiller allowance, dairy allowance, first aid allowance, meal allowance and laundry allowance, except any Additional Allowances payable as detailed below.

Warehouse Operator available to work any 5 out of 7 days – Bankable Hourly Rate

Rate per hour	Year 1	Year 2	Year 3	Year 4
Monday to Friday (5.00am-6.00pm)	N/A	\$32.60	\$33.20	\$35.00

Warehouse Mechanic available to work any 5 out of 7 days – Bankable Hourly Rate

Rate per hour	Year 1	Year 2	Year 3	Year 4
Monday to Friday (5.00am-6.00pm)	N/A	\$32.60	\$33.20	\$35.00

Palletiser available to work any 5 out of 7 days – Bankable Hourly Rate

Rate per hour Monday to Friday (5.00am-6.00pm)	\$28.60
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Warehouse Caretaker available to work any 5 out of 7 days – Bankable Hourly Rate

Rate per hour Monday to Friday (5.00am-6.00pm)	\$28.40
...	

[56] Part B also provides for additional allowances: Freezer Allowances (\$2.95 per hour), Section Leader Allowance (\$3.80 per hour), Assistant Section Leader Allowance (\$1.80 per hour) and Forklift Allowance (\$0.10 per hour). It also provides for shift loadings and penalty rates as follows:

“Shift loadings

Calculated based on Bankable Hourly Rate

Shift Loading – Monday to Friday (6.00pm – 12.00am)	+15%
Shift Loading – Monday to Friday (12.00am – 5.00am)	+20%
Shift Loading – all Saturday	+50%
Shift Loading – all Sunday	+100%

Penalty Rates

Calculated based on Bankable Hourly Rate

Penalty Rate – Public Holiday (excluding Good Friday and Christmas Day)	+100%
Penalty Rate – Good Friday and Christmas Day	+200%
...	

[57] Regarding public holidays, Schedule 3 states that where an Hourly Rate Warehouse Employee works on a public holiday they will be paid in accordance with Part B and that no overtime is separately payable on public holidays. It also states that if Hourly Rate Warehouse Employees do not work on a public holiday, the Employee will receive payment of their Notional Shift Hours, paid at the Bankable Hourly Rate and Employees who receive payment of a Section Leader allowance will receive those allowances.

[58] Schedule 4 applies to all employees “engaged to work in ALDI’s Transport and Distribution function”. Part A provides that “Employees engaged on an hourly basis (Hourly Rate Employees) may be required to work at any time on any day in a Week, Monday to Sunday. Hours of work will be averaged over a fortnightly period. Employees will work on average up to five (5) shifts in a week.” In respect of overtime, Part A provides:

“Overtime

All work performed in excess of:

10 ordinary hours in any one shift; or
 50 ordinary hours in one week, will be Overtime and will be paid at the rate of time and a half of the Bankable Hourly Rate as set out in Part B.”

[59] Part B of Schedule 4 provides for the following rates of pay:

“Hourly Rate Employees

Transport Operator employed to drive a Heavy Rigid (HR) Vehicle – Bankable Hourly Rate

Rate per hour	
Monday to Friday (5.00am-6.00pm)	\$30.95

This rate includes all allowances such as but not limited to, chiller allowance, freezer allowance, dairy allowance, fork-lift allowance, tail-gate allowance, first aid allowance, meal allowances, and laundry allowances, except any Additional Allowances payable as detailed below.

Progression to Transport Operator employed to drive a Heavy Combination (HC) Vehicle is based on completion of qualifications and Aldi offering a role to the Employee.

Transport Operator employed to drive a Heavy Combination (HC) Vehicle – Bankable Hourly Rate

Rate per hour	
Monday to Friday (5.00am-6.00pm)	\$32.60

This rate includes all allowances such as but not limited to, chiller allowance, freezer allowance, dairy allowance, fork-lift allowance, tail-gate allowance, first aid allowance, meal allowances, and laundry allowance, except any Additional Allowances payable as detailed below.

This rate is payable even where the Transport Operator employed to drive a Heavy Combination Vehicle drives an HR vehicle.”

[60] Part B of Schedule 4 also provides for a B-Double Allowance (\$1.35 per hour), a Section Leader Allowance (\$3.80 per hour) and an Assistant Section Leader Allowance (\$1.80 per hour). Shift loadings and penalty rates are provided for as follows:

“Shift loadings

Calculated based on Bankable Hourly Rate

Shift Loading – Monday to Friday (6.00pm – 12.00am)	+12.5
Shift Loading – Monday to Friday (12.00am – 5.00am)	+25
Shift Loading – all Saturday	+50%
Shift Loading – all Sunday	+100%

Penalty Rates

Calculated based on Bankable Hourly Rate

Penalty Rate – Public Holiday (excluding Good Friday and Christmas Day)	+100%
Penalty Rate – Good Friday and Christmas Day	+200%

...”

[61] Schedules 2, 3 and 4 provide, with respect to hourly rate employees, that they would be paid for each day of leave taken based on the “*Employee’s Notional Shift Hours*”. They each go on to provide in this respect:

“Employees taking Annual Leave or Personal/Carer’s Leave may request additional leave hours to be paid on a Leave Day where the Employee has sufficient accrued leave and where the expected shift for which they will be absent is greater than their Notional Shift Hours. The maximum leave hours to be paid per shift will not exceed the total hours which otherwise would have been worked on that shift.”

[62] The expression “*Notional Shift Hours*” is defined in clause 33 as follows:

“Notional Shift Hours are assigned based on Contract Hours for the purposes of calculating public holiday and Leave Day payments. Hourly Rate Employees entitled to payment when absent from work on a public holiday or Leave Day will receive payment of their Notional Shift Hours for that day.

Contract Hours per Fortnight	Notional Shift Hours
21 Contract Hours	4.0 hours
30 Contract Hours	4.75 hours
40 Contract Hours	5.25 hours
50 Contract Hours	5.5 hours
55 Contract Hours	6.0 hours
60 Contract Hours	6.5 hours
70 Contract Hours	7.25 hours
76 Contract Hours	8.0 hours
80 Contract Hours	9.75 hours
90 Contract Hours	9.75 hours
96 Contract Hours	10.0 hours

...”

[63] A preliminary analysis as to whether the Aldi Prestons Agreement and the Aldi Stapylton Agreement satisfied the BOOT was undertaken by the Commission’s staff under the supervision of Commissioner Lee. The contents of that analysis were communicated to Aldi in correspondence from the presiding member’s chambers dated 20 September 2017. The correspondence concerning the Aldi Prestons Agreement relevantly stated (formal parts omitted):

“Specifically in relation to your application, the Commission is concerned that employees do not appear to be better off overall under the Agreement because the loaded rates of pay do not appear to be high enough to compensate employees for a range of modern award entitlements not provided for in the Agreement. Specifically:

- Overtime entitlements for part-time employees
- In relation to *General Retail Industry Award 2010* (the GRIA)- covered employees:
 - The amount and nature of the Business Review Payment (BRP) payable under the Agreement
 - In relation to salaried employees and certain hourly rate employees, the following:
 - Agreed additional hours

- Time off in lieu (TOIL) entitlements
- Absence of overtime and penalty rates
- Expected hours of work
- Duties performed by Store Management Trainee (Year 3) employees
- The span of ordinary hours and penalty rate entitlements for Schedule 2-covered employees
- Meal and other allowances, including first aid, travelling, cold work and laundry allowances.

In addition to the concerns listed above, which have been raised in the Commission's previous correspondence to the parties, the Commission has the following further concerns in relation to the BOOT:

- **Notional Shift Hours:** The Commission notes that an Agreement covered employee is to be paid for a fixed number of hours (notional shift hours) per shift, rather than for that employee's rostered ordinary hours, when absent due to a public holiday or when on paid leave. The Commission notes that this may result in Agreement covered employees receiving payment for a lower number of hours than the number mandated by the National Employment Standards (NES). As modern award payments for leave and absence due to public holidays are generally calculated with reference to the NES, the Commission is concerned that the practice of paying employees only for notional shift hours may have negative BOOT implications.
- **Bankable Hours:** The Commission is concerned that the bankable hours provisions of the Agreement, in particular those contained in cl.13, may have negative BOOT implications. In particular, the Commission is concerned that the Agreement provisions:
 - do not appear to limit the number of negative or "minus" hours that an employee can accrue
 - may allow for ordinary hours of work to be averaged over an undefined and potentially lengthy period of time
 - may allow employees to be required to work a significant number of excess hours without additional payment
 - do not require that an employee be offered their full quantum of contract hours regardless of whether they have a negative bankable hours balance
- **Definition of bankable hourly rate:** The Commission notes that there appears to be some uncertainty in relation to the definition of Bankable Hourly Rate (BHR) in the Agreement. Clause 33 of the Agreement states that the BHR excludes all allowances, whereas Schedule 2, 3 and 4 state that the BHR's listed in those schedules are inclusive of several allowances.
- **Classification matching- Store Management Trainees:** The Commission notes that, in the response to q.3.3 of the Form F17 submitted to the Commission in this matter, the applicant has stated that:
 - Year 1 Store Management Trainees perform work equivalent to work performed by Level 1 employees under the GRIA
 - Year 2 Store Management Trainees perform work equivalent to work performed by Level 3 employees under the GRIA, and

- Year 3 Store Management Trainees perform work equivalent to work performed by Level 4 employees under the GRIA

The Commission seeks submissions in support of this statement, given that the Agreement does not appear to restrict the duties performed by Store Management Trainees in the first two years of their traineeships

The Commission notes that concerns in relation to the following issues were raised in the Commission's previous correspondence dated 8 August 2017:

- Agreement signature requirements
- Steps taken to notify employees of the time, place and method of the vote
- Dispute settlement term
- Definition of a shift worker for the purposes of the NES

The Commission notes that you have provided submissions and a revised signature page in response to these concerns.

In connection with the hearing of your application, you are directed to file in the Commission by **5.00pm on 18 October 2017**:

1. Any written submissions you wish to make concerning whether the Agreement passes the BOOT; and
2. Any undertaking you wish to propose to address the concerns identified above.

If undertakings are to be provided, they must be:

- provided in a form that can be published with the Agreement (for example, as a standalone document separate to any response given to these preliminary findings); and
- signed by the employer in accordance with the Regulations, in particular, regulation 2.07, which states: "*For subsection 190(5) of the Act, an undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking*".

You should also seek the views of all bargaining representatives regarding any proposed undertakings."

[64] Correspondence concerning the Aldi Stapylton Agreement was also sent to Aldi on 20 September 2017. That correspondence raised the same concerns in relation to the BOOT, as well as two procedural issues, which had also been raised in previous correspondence dated 8 August 2017, concerning the timely distribution of the Notice of Employee Representational Rights and the steps taken to notify employees of the time, place and method of the vote.

[65] On 25 October 2017, Aldi filed joint submissions in relation to the Aldi Agreements in response to the correspondence. Those submissions are summarised later in this decision. Aldi did not propose any undertakings to resolve the concerns raised in the correspondence.

General submissions

[66] Submissions addressing the broader issues arising in these proceedings were invited from the Peak Councils and the Commonwealth Minister. In addition, submissions were received from other interested organisations.

Australian Council of Trade Unions (ACTU)

[67] The ACTU submitted that the statutory framework applying to applications for approval of enterprise agreements focused upon the need to strike a balance in the workplace relations system between simplicity, flexibility and fairness. Equal emphasis was placed on achieving both productivity and fairness in bargaining, and the legislature clearly expressed the intention to ensure that the safety net was enforceable and guaranteed.

[68] The ACTU reviewed the legislative history concerning enterprise bargaining, including the development of the earlier “no disadvantage” test. It submitted in particular that the *Workplace Relations Act 1996* had, in relation to that test, introduced the concept of an “overall” or global assessment of whether or not an agreement reduced an employee’s terms and conditions of employment. In this respect, it provided that an agreement disadvantaged an employee only if its approval would result “on balance” in a reduction in the “overall terms and conditions” of employment of that employee under relevant designated awards or other relevant law. The Work Choices reforms in 2005 then abolished the “no disadvantage” test entirely, but subsequently the “fairness test” was introduced in 2007.

[69] In relation to the BOOT, the ACTU submitted that it adopted a somewhat different formulation to the earlier “no disadvantage” test. Rather than the negatively-framed concept of attempting to prevent or limit disadvantage to an employee, it adopted the positively-framed concept of seeking to ensure that the employee is “better off overall”. This evidenced an intention of the Parliament to encourage bargaining which delivers improved terms and conditions of employment in workplaces rather than bargaining which simply does not disadvantage employees compared with the safety net. Notwithstanding this, there were similarities between the two tests: both required a single point in time comparison between the terms of the proposed agreement and the relevant award, and required an overall assessment weighing both beneficial and less beneficial terms. The BOOT assessment conducted by the Commission was for many employees the only means by which their right to a minimum safety net of terms and conditions was ensured. The ACTU supported a rigorous and consistent approach to the BOOT which identified flaws in agreements, protected the integrity of the employment safety net and encouraged the parties to negotiate in good faith for terms and conditions which improved upon, rather than undermined, the minimum employment safety net.

[70] In relation to the BOOT, the ACTU submitted that the following principles were well established:

- The BOOT is an overall assessment involving the identification of terms which are more beneficial and those which are less beneficial. It is not a line by line analysis.
- The BOOT does not involve an analysis of matters other than the actual terms and conditions of the award compared with the agreement. The effect the terms and conditions may have on the actions of the employer or employee is not relevant.

- The correct approach is by reference to the terms and conditions of the competing instruments, i.e. a “comparison” or an “analysis” of such terms and conditions laid side by side.
- The BOOT requires the objective testing of the award against the agreement.
- The Commission must have some basis for its decision over and above generalised satisfaction. The Commission must form its view reasonably on the material before it.
- The Commission is not bound to only consider information provided by the parties; it can conduct its own modelling based on the terms of the agreement where appropriate.
- The Commission must decide matters such as the relevant awards for comparison purposes and other matters relevant to the application of the BOOT, and should put any modelling or assumptions to the parties for their submissions to enable the matters to be tested through cross-examination of witnesses if required.

[71] Specifically in relation to loaded rates of pay, the ACTU acknowledged that an agreement could include increased rates of this nature which compensated for award entitlements which would otherwise apply, and the ACTU was not opposed in principle to agreements containing wage increases which adequately compensated for reductions in other existing conditions, where such terms were genuinely agreed. However it was the role of the Commission to conduct an assessment in accordance with the requirements of the FW Act in each case to ensure that wage increases were adequate to compensate for the terms and conditions being offset. The onus was on the employer to provide the Commission with complete and accurate information about the way in which loaded rates were calculated for the purpose of the BOOT and, in particular, exactly what entitlements have been rolled up and how their value has been assessed and compensated. The BOOT required an assessment of the actual terms and conditions of the agreement, not its perceived benefits, so the availability of a mere opportunity or chance to achieve a promotion or work more hours was not relevant. “Preferred hours” and “reconciliation” clauses had been found not to meet the BOOT because they sought to exchange an opportunity of receiving a benefit for an actual entitlement to wages.

[72] Further, the ACTU submitted, the BOOT had to be applied based on the work arrangements that were in fact permitted by the terms of the agreement. This was pertinent to the assessment of loaded rate agreements which allowed for a wide or unlimited range of rostering possibilities, and evidence regarding the unlikelihood of such arrangements was not relevant. The test had to be applied to the agreement and what it allowed, not what the normal practice was. If a certain work arrangement was not likely to be required, this should be reflected in the terms of the agreement. The requirement that the assessment be carried out at “test time” did not restrict consideration of what work arrangements the agreement terms will permit in the future. If the agreement allowed for an indefinite or uncertain number of rostering possibilities, it could not meet the BOOT (unless appropriate and lawful undertakings were provided) because the Commission could not satisfy itself that each employee would be better off. The BOOT required satisfaction that each award covered employee and each prospective award covered employee would be better off overall. While it was clear that the Commission was not required to proactively inquire into the circumstances

of each individual employee who is or will be covered by an agreement, in circumstances where the Commission has been presented with evidence of even one employee who is not better off overall under an agreement, the Commission must find that the agreement in question does not meet the BOOT. Although not required to do so, the Commission was permitted by s 590 to make proactive inquiries when it considered it was appropriate to do so.

Australian Chamber of Commerce and Industry (ACCI)

[73] The ACCI submitted that a proper application of the BOOT:

- should not require inquiry into the circumstances of every individual employee to be covered by the agreement and indeed this would be impossible in terms of future employees, but should entail a comparison of the circumstances of a class of employees if the award applied to them relative to the circumstances of that class under the enterprise agreement;
- should take a “global” approach, assessing the net impact of an agreement on the whole rather than a “line by line” comparison with the award;
- should take into account both monetary and non-monetary benefits.

[74] The “no disadvantage” test which existed in the WR Act until 2006 was, in practice, highly problematic - in particular, the requirement contained in a Policy Guide published by the Workplace Authority that an agreement would not pass the test if one or more employees was disadvantaged by the agreement. The capacity in s 193(7) to assess the BOOT by reference to classes of employees was intended to make abundantly clear that a proper application of the BOOT did not require an inquiry into the circumstances of every individual employee, and it was otherwise apparent that it was not intended for the BOOT to depart significantly from the “no disadvantage” test that applied from 1996 to 2006. It would not be possible in any event to consider the circumstances of each prospective employee.

[75] The ACCI submitted that the Commission should adopt a procedure in the assessment of agreements that is efficient and pragmatic so that, for example, it was preferable to consider the common working patterns in an industry rather than to consider rosters for all employees within a particular class of employees, or to require an applicant to provide a BOOT assessment for each individual employee. The objects of the FW Act did not suggest, it was submitted, that the assessment process be administered with a level of prescription and forensic analysis that “*puts people off altogether*”, but rather it should be focused on “*delivering a simple, fair and efficient approach supportive of an agreement making system where wages and conditions are linked to productivity, enhancing flexibility as well as employee and employer circumstances at the enterprise concerned*”. Enterprise bargaining represented an opportunity to displace the “one size fits all” character of the award structure and to instead implement a mix of wages and conditions which are more relevant to the employer and employees in a particular enterprise and which may drive productivity. In that context the BOOT, it was submitted, was not intended to operate in a manner that would see each individual entitlement assessed against the corresponding entitlement in an award but was intended instead to operate as a global assessment. Such a global assessment should take into account non-monetary benefits, such as flexibility in working hours.

Australian Industry Group (Ai Group)

[76] The Ai Group submitted that the Commission had in recent times adopted an “*overly theoretical approach*” to the assessment of the BOOT, including in relation to enterprise agreements containing loaded rates. This had led to concerns amongst its members that the Commission often took into account theoretical circumstances that were extremely unlikely to arise given the nature of the employer’s operations, the types of employees that were employed and the work patterns of the relevant employees, and also that employers were being required to give undertakings in a high proportion of cases. This had proved to be a barrier to agreement-making which had caused a reduction in the number of enterprise agreements being made and an increase in the number of approval applications which had been withdrawn or approved subject to undertakings, and the Ai Group urged the adoption of a “*practical approach*” when agreements were assessed. The Commission’s administrative checklist for assessing BOOT compliance focused on ten matters - pay rates, hours, part-time employees, casual employees, shift penalties, weekend penalties, public holiday penalties, overtime, annual leave loading and allowances - and neglected numerous other benefits commonly found in agreements including more generous redundancy, annual leave and personal/carer’s leave entitlements than the NES, more generous long service leave entitlements than under State and Territory laws, paid maternity and paternity leave, paid domestic violence leave, paid blood donor leave, paid defence force reserves leave, paid community service leave, study leave, employee discounts on company products, higher superannuation contributions than the Superannuation Guarantee, income protection insurance benefits, job security provisions, access to salary packaging, trade union training entitlements, facilities for union delegates, contributions to worker entitlement funds, accident make-up pay, access to training and development opportunities and access to particular forms of flexibility.

[77] The Ai Group submitted that Commission members in the past “*drew extensively on their experience and judgment when assessing enterprise agreements at the approval stage, rather than just carrying out detailed mathematical calculations or theoretical analyses*”. The BOOT could not be reduced to a simple mathematical calculation or theoretical analysis. The making of an enterprise agreement was often an expensive, disruptive and time-consuming process for a business, and it was important that the Commission’s approval process “*facilitates the approval of enterprise agreements, rather than placing unnecessary impediments in the path of employers and employees who have made enterprise agreements*”. Where an agreement contained loaded rates, the risk of the Commission adopting an overly theoretical approach increased. For example, it might be obvious that the loaded rate will leave employees better off if they worked, 38, 40, 50 or even 60 hours in a week; the fact that the loaded rate would not leave employees better off if they worked 70, 80 or 90 hours in a week should not be relevant unless there was evidence that the employees are likely to work such extreme hours. The BOOT needed to be applied in a practical, “real world” manner consistent with the objects of the FW Act. The Ai Group proposed the adoption of the following set of principles to guide the Commission’s decision-making with respect to enterprise agreement approval applications:

- (1) The BOOT should be applied in a manner that is consistent with the objects in ss 3 and 171 of the FW Act.
- (2) The BOOT requires that an overall assessment is carried out by the FWC Member. The BOOT is not a line-by-line test.

- (3) The BOOT is a point-in-time test. The relevant point-in-time is the date when the application for approval of the agreement was made.
- (4) The BOOT should only take into account the provisions of the proposed agreement and the provisions of the relevant modern award, not extraneous matters.
- (5) The BOOT is a comparison between the terms in the enterprise agreement and the relevant award, not the practices and working arrangements that may flow from those terms.
- (6) When considering the terms of the enterprise agreement for the purposes of the BOOT, only the classifications and types of work carried out by the employees who are employed at the time the agreement is made and those who are likely to be employed should be taken into account.
- (7) Undertakings should only be proposed by Commission Members, and only if necessary.
- (8) The Commission should generally apply the BOOT to classes of employees rather than individuals, in the absence of evidence that any individual is not better off under the proposed agreement.
- (9) Individual flexibility arrangements must be disregarded when applying the BOOT.
- (10) The inclusion of a flexibility in an enterprise agreement should not be regarded as a negative when applying the BOOT in circumstances where the flexibility reflects a facilitative provision in the award.
- (11) If the Commission is not satisfied that an enterprise agreement passes the BOOT, the Commission should consider whether the agreement should be approved through the provisions of s.189 of the Act.

[78] In relation to the proposed principle 5, it was submitted that the Commission should not be seeking that employers provide indicative rosters of the hours that employees will work when assessing agreements, as these were typically work arrangements that flowed from the terms of the enterprise agreement rather than the terms of the agreement itself. Many businesses, particularly large businesses such as in fast food or retail, did not have standard or indicative rosters. At the approval stage, the enterprise agreement should be assessed by the Commission as quickly and simply as possible based on the evidence before it. The Commission's decision should usually be made on the materials lodged with the application, and all applications for approval should be made available on the Commission's website in order to give any parties with an interest the opportunity to seek to make a submission or provide evidence.

[79] In relation to proposed principle 6, the Ai Group submitted that non-greenfields agreements were made between an employer and its employees, not those who could theoretically be employed under the terms of the agreement but are never actually employed. The definition of "*prospective award covered employee*" should be interpreted only as employees who are reasonably likely to be employed under the enterprise agreement, not

those that could theoretically be employed. In relation to proposed principle 8, the Ai Group referred to s 193(7) of the FW Act and submitted that the application of the BOOT to logical classes of employees, such as employees at each relevant classification level, was a logical and practical approach. If there was no evidence before the Commission that an individual was worse off, then the Commission should not go looking for such evidence.

National Retail Association (NRA)

[80] The NRA submitted that the correct manner in which the Commission was to apply the BOOT involved the following requirements:

- a holistic weighing-up of the various beneficial and less beneficial provisions of the proposed agreement, avoiding attempts to quantify non-monetary benefits and instead relying on an impressionistic assessment taking into account the views of the affected individuals;
- where it is reasonable and practicable to do so, consideration of the agreement with respect to classes of employees and application of the evidentiary presumption under s 193(7);
- when considering classes of employees, the classes should not be so narrowly defined as to result in the Commission effectively considering individual circumstances;
- the Commission was to consider evidence which might displace the evidentiary presumption put to it by the duly-appointed bargaining representatives, but need not and must not act inquisitorially to seek out such evidence;
- regard for the relevant legislative, operational and personal circumstances as they stand at the test time; the Commission must not hypothesise about future legislative, operational or personal circumstances.

[81] In considering how to apply the BOOT to loaded rates of pay, the Commission should, the NRA submitted, take into account only the operational circumstances of the employer's business at test time, not at some hypothetical future point in time when these circumstances may have changed. If those operational circumstances at test time did not enliven certain provisions of the relevant modern award, then the lack of any operational need for such provisions ought to be taken into account in the BOOT assessment. The Commission should refrain from requiring loaded rates of pay to compensate employees for award entitlements to which the employees would not be entitled in the operational circumstances existing at the test time. It was naturally the case that the Commission had to be satisfied that the loaded rates actually compensate the relevant employees for the various monetary penalties and loadings to which they would otherwise be entitled under the relevant award. However, in relation to non-monetary benefits, the NRA submitted that the Commission ought avoid assigning these a monetary value for the purpose of the comparison, but rather should have paramount regard for the views of affected employees as put forward by their bargaining representatives in order to make an impressionistic assessment.

Australian Retailers Association (ARA)

[82] The ARA supported and adopted the submissions of the ACCI, and submitted that it was necessary for the establishment of principles concerning the application of the BOOT to agreements which contain loaded rates. Such principles were necessary because there had been a sharp decline in the number of enterprise agreement approvals in the retail industry, there was a clear difference between the way the BOOT was being applied prior to 2015 and currently, and there was inconsistency in the application of the BOOT to loaded rates agreements. The ARA identified the retail industry as a prominent user of loaded rates in enterprise agreements. The ARA's proposed principles were as follows:

- the Commission should conduct an assessment of overall benefits and detriments to classes of employees;
- those classes of employees should be broadly, and not narrowly or overly technically defined;
- the Commission should refrain from investigating the circumstances of individual employees unless it receives probative evidence that the circumstances of an individual employee are not consistent with the circumstances of the class to which that employee belongs;
- the Commission should only give consideration to information provided to it in relation to the benefits and detriments of a proposed enterprise agreement by parties and bargaining representatives, and should not give any weight to unsupported assertions from "strangers" to the bargaining process;
- the Commission should consider the overall benefits and detriments to employees over appropriately identified periods relevant to the class of employees in question in establishing whether those employees are better off overall;
- when disposing of its obligation to ensure prospective employees are better off overall, the Commission should presume that the working patterns of prospective employees will reflect those working patterns in place in the applicant employer's business at the test time;
- the BOOT should not involve a line by line assessment of benefits and detriments, but rather an overall assessment of employees' position under the proposed agreement when compared to the relevant modern award;
- the Commission should take into account the value of non-monetary benefits to employees and should take appropriate steps to apportion an appropriate value to those non-monetary benefits; and
- the evidence required by the Commission to establish that employees are better off overall should carefully balance the need for an appropriate level of certainty as to the circumstances of classes of employees and the object of avoiding delay in the processing of applications for approval of enterprise agreements.

[83] Specifically, the ARA submitted that the classes of employees for the purpose of s 193(7) might appropriately be identified by reference to classification levels or employment status (permanent or casual), and a more narrow approach to what constitutes a class of

employees would inevitably lead to the creation of further classes that were smaller and less readily identifiable, and thereby lead to delays in the approval process. The presumption in s 193(7) should only be set aside where there was probative evidence before the Commission which would cause it to conclude that the circumstances of individual employees differed materially from the circumstances of the class of employees to which they belonged. The procedural protections in the FW Act for individual employees should provide the Commission with comfort that such employees have a proper opportunity to advance probative evidence to rebut the s 193(7) presumption, and in the absence of any such evidence the Commission should accept the evidence of the employer and make its decision regarding the BOOT based on that evidence. “Strangers” to the bargaining process should not be permitted to interfere with the approval process unless they can provide the Commission with probative evidence which is likely to impact upon the Commission’s consideration of the application for approval. Such evidence would only be probative, the ARA submitted, if it was real evidence of the actual working patterns utilised in the operational structure of the employer’s business, and would not include bare assertions about potential detriment relating to working patterns which are hypothetical in nature.

[84] In assessing the BOOT in relation to loaded rates, the requirement to make the assessment at test time meant that it was to be made in the context of the operations of the employer’s business at test time, even in the case of prospective employees. Thus consideration was only required of rostering patterns used as at test time, not rostering patterns that were permissible under the agreement. Consideration of all rostering patterns could only mean that an enterprise agreement must result in higher rates of pay for employees at all times when they work, which would reduce productivity because the cost of labour must increase without any attached efficiency gain. The Commission should adopt an approach whereby prospective employees will work within the same working patterns as existing employees at the test time.

[85] However the BOOT assessment, the ARA submitted, needed to consider the circumstances of the relevant class of employees over an appropriate period of time. For permanent employees on a loaded rate, the effect of the loaded rate on annual and personal leave entitlements, for example, needed to be taken into account. For casual employees, account needs to be taken of working patterns over a period which reflects different trading periods in the industry.

Submissions concerning the Allied Agreement, the JWT Agreement and the PSA Agreement

United Voice

[86] United Voice made submissions jointly addressing whether the Allied Agreement, the JWT Agreement and the PSA Agreement passed the BOOT. In relation to the three agreements generally, United Voice submitted that the agreements could be used to tender for and apply to security work anywhere in Australia, including new workplaces, without any requirement to bargain with the workforce during their 4-year nominal terms. The agreements all contained a loaded rate structure that divided pay rates into five work patterns in substitution for the base rates, penalties and loadings under the *Security Award*, and did not contain any rigid rostering rules other than the general description of the work patterns given. Clause 4.3.1 of each agreement provided the employer with a wide managerial discretion as to the rostering of employees, and did not reference the work pattern descriptions on which the

rates of pay were based. Further, the roster could be posted only three days in advance of the commencement of the roster cycle, whereas the *Security Award* required seven days' notice of the roster.

[87] United Voice submitted a pay comparison for a casual employee classified at Level 2 under the Allied Agreement who is engaged to work one Sunday in a pay period for 10 hours. The calculation showed that under the Allied Agreement the employee would be entitled to \$401.62, but under the *Security Award* would be entitled to \$475.40, and thus was worse off under the agreement. The result was no different for the JWT Agreement. For the PSA Agreement, the employee would receive \$399.62 under the agreement compared to \$475.40 under the award. The agreements therefore did not pass the BOOT.

[88] The undertakings proposed by Allied and JWT to rectify the BOOT deficiencies should not, it was submitted, be accepted. They did not address the issue of the rostering and the employer discretion, and would alter the casual pay rates in a way which involved a fundamental change to the agreements.

Allied, JWT and PSA

[89] Except for the submissions made in response to the Commission's correspondence concerning its BOOT concerns, to which we have earlier made reference, Allied, JWT and PSA did not advance any written or oral submissions in support of the approval of their respective agreements.

Submissions concerning the Aldi Agreements

Aldi

[90] In relation to its applications for approval of the Aldi Prestons Agreement and the Aldi Stapylton Agreement, Aldi submitted that the objects of the FW Act as a whole and of Pt 2-4 specifically suggested that the legislation was directing the parties to push towards productivity in a way which was fair to employees, and the BOOT needed to be applied against this framework. It was uncontroversial that the Commission was required to make an overall assessment of the benefits and detriments associated with the agreement for which approval was sought, rather than a line by line analysis, and that the legislature had not directed that there be a direct financial comparison so that non-monetary benefits had to be brought into account in assessing the overall benefit and detriment. In conducting the analysis the Commission was entitled to assume, subject to evidence, that all members of a class will be better off if it appears the class is better off, which reinforced the notion that the Commission was to deal with realistic situations rather than "*simply musings by aggrieved employees or their representatives in relation to potential detriments*". Heed also had to be taken of affected employees' assessment of any relevant detriment.

[91] Aldi also submitted that it was wrong to apply the BOOT on the basis that enterprise agreements were simply formalised over-award arrangements, or to assume for the purpose of the BOOT comparison that the employer would organise its operations under the relevant award in a way which was inefficient.

[92] In response to the specific concerns raised in the Commission's correspondence of 20 September 2017, Aldi submitted:

- In relation to overtime entitlements for part-time employees, the Aldi Agreements provided in Schedule 2 that work in excess of contracted hours but not in excess of 9 hours per day or 38 hours per week was not paid as overtime, but could be paid or banked at the election of the employee. In performing the BOOT analysis, it would be wrong to assume that part-time employees would be paid for work in excess of their rostered hours, since the actual experience in the retail industry would be that casual employees would be engaged instead. Thus the rostering provisions were a distinct advantage for part-time employees.
- The Business Review Payments for employees engaged in store management constituted a benefit for employees compared to the *Retail Award*. The guaranteed component more than offsets any deficiency that might otherwise arise in comparison to payment under the *Retail Award*, and ensures store managers are always better off under the Aldi Agreements.
- In relation to salaried store managers, there are no standard fixed rosters since these are prepared at the store level having regard to the needs of the particular store and its employees. However a “worst case” roster showed that a store manager would be better off under the Aldi Agreements, except for Assistant Store Managers prior to being placed in their own stores. There were no employees engaged or likely to be engaged in this capacity under either agreement.
- Hourly Rate Store Employees working as fully flexible hourly rate employees should be assessed as against casual employees working the same roster under the *Retail Award*. Once the leave and public holiday entitlements of such employees under the Aldi Agreements were taken into account, such employees would be better off under the agreements than the *Retail Award*. Limited Roster employees under the Aldi Agreements were also better off than casual employees working the same roster under the *Retail Award*. Aldi part-time employees also had the benefit of a guaranteed income under the Aldi Agreements which casual employees under the *Retail Award* did not have. Additionally the clause 14 mechanism for making good shortfalls was relevant to the BOOT assessment.
- In respect of notional shift hours and leave entitlements, clause 19 provided that the payment to employees taking leave will not be less than that provided under the NES, and an employee taking annual or personal/carer’s leave would be paid on the basis of an “average” day - that is, their average shift length – which would sometimes be more than an employee would have received and sometimes less. When Salaried Store employees and employees in warehouse and transport classifications worked hours in excess of 38, the hours in excess were treated as ordinary hours and employees would have the benefit of those hours in all forms of leave, unlike under the relevant awards.
- The Bankable Hours provisions was considered by FWA (Boulton J) in his decisions approving three Aldi agreements in 2013,⁹ and were held not to contravene s 55 of the FW Act. They were analogous to provisions for averaging of hours in awards,

⁹ [2013] FWC 3495 at [56]

albeit more beneficial. Aldi had no incentive to allow employees to fall into large negative balances, and it was not entitled to recoup negative hours by any means other than rostering the employee to work additional hours. It was not correct that employees could work a significant number of excess hours without additional payment, since employees were paid their contract hours each fortnight.

- In relation to the definition of Bankable Hours, clause 33 sought to make clear that the Bankable Hourly Rate excluded shift loadings, penalties and allowances, but Schedules 2, 3 and 4 sought to make clear that in calculating the Bankable Hourly Rate, a component for the nominated allowances was included. Where there were additional allowances, penalty rates or shift loadings not included in the Bankable Hourly Rate, the Schedules separately identified them. Any incorporated penalties and allowances in the Bankable Hourly Rate made it an all-purpose payment which benefited the employee when taking leave.
- The matching of Store Management Trainees with the appropriate classification in the *Retail Award* had not been in dispute in previous proceedings for approval of regional Aldi enterprise agreements, and no employee had ever claimed they were not better off under these agreements. It was not the case that Trainee Managers were required to do more than employees in the corresponding classification in the *Retail Award*, and the duties performed by Trainee Managers fitted within the indicative duties set out in the relevant award classifications.

Shop, Distributive and Allied Employees Association (SDAEA)

[93] The SDAEA was a bargaining representative for the Aldi Agreements, but opposed the approval of the agreements on the basis that they did not pass the BOOT. In respect of the BOOT generally, the SDAEA submitted:

- the requirement to apply the BOOT at test time was presumably to ensure that there was no need to bring to account potential changes to the comparison award;
- however it was necessary for the Commission to also look forward because it had to test the agreement in respect of prospective employees;
- as such the agreement had to be examined not only in the context of the employer's current operations and current rostering procedures, but also in the context of possible rostering procedures;
- in exercising the discretion which the BOOT assessment involved, the most significant point of comparison between the award and the agreement was usually the wages paid, and if these were lower under the agreement in some circumstances then it was necessary to look at any beneficial terms and conditions of the agreement which might offset this;
- the BOOT analysis had to deal with the comparison between what is possible under the agreement and what is payable under the award, and there was nothing in s 193 or elsewhere in the FW Act which required only "*realistic situations*" to be considered, since what is realistic at the time the comparison is made may be quite

different to the position applying some years later while the agreement remained in operation.

[94] In relation to loaded rates, *prima facie* the reduction of award penalty and overtime rates in exchange for a higher ordinary hourly rate potentially benefitted only those employees whose rosters afforded them sufficient hours at the higher ordinary rate to compensate for the reduction when penalty/overtime hours were worked. The loaded rate may not be sufficient to offset reduced penalty rates, especially for employees whose work is predominantly undertaken during times which attract penalties, as the Full Bench decision in *Hart*¹⁰ demonstrated. However this issue could be addressed in numerous ways. Rosters could be mandated in such a way to ensure that the increase in ordinary rates outweighed the decrease in penalty rates, or penalty rates could be brought in line with or close to the award rates.

[95] In respect of the Aldi Agreements specifically, the SDAEA submitted:

- the hourly rate of pay for part-time employees under the Aldi Agreements was not sufficiently high to offset the disadvantage resulting from the fact that the agreements provided for overtime penalty rates for store assistants only after nine hours in a day or 76 hours in a fortnight, whereas the *Retail Award* provided for overtime penalties to be payable for all work in excess of the part-time employee's agreed hours and at a higher rate after three hours overtime;
- the minimum payment for the Business Review Payments did not apply to store managers and assistant store managers who did not have a home store, or to store manager trainees at all, and having regard to the hours they were likely to work, store manager trainees would earn less under the Aldi Agreements than under the *Retail Award*;
- the clause 14 mechanism was ineffective to remedy any BOOT deficiency, for the reasons explained in *SDAEA v Beechworth Bakery*;¹¹
- the Commission's concern about the use of notional shift hours for the purpose of leave entitlements was well founded given that Aldi had conceded that employees would sometimes be paid less than they would under the NES when taking leave;
- the bankable hours system allowed Aldi to roster employees for more hours than they were to be paid in a given pay period, or to roster them for fewer hours and then have them work the hours at a later date without pay, which constituted a detriment to employees;
- the provisions in the Aldi Agreements were unusual and complex, so that where there was doubt that they passed the BOOT, the Commission could not reach a state of satisfaction that they did; and

¹⁰ [2016] FWCFB 2887

¹¹ [2017] FWCFB 1664 at [41]-[46]

- trainee store managers did not have any indicative duties at all (unlike under the *Retail Award*), and might be called on to perform a very wide range of duties, which was a further reason for the Aldi Agreements to fail the BOOT.

[96] The SDAEA also contended that a comparative analysis of pay under the Aldi Agreements and the *Retail Award* showed that store managers, assistant store managers and store manager trainees would be worse off in certain scenarios even without taking into account other identified detriments. The mathematical basis for the analysis was disclosed in a statement made by Rebecca Patena, the SDAEA's National Industrial Officer. Aldi has not yet been given an opportunity to cross-examine Ms Patena or to adduce evidence in reply to her statement.¹²

National Union of Workers (NUW)

[97] The NUW, which was a bargaining representative for the Aldi Stapylton Agreement, opposed the approval of that agreement on the basis that it did not pass the BOOT at least in respect of Warehouse Employees. It submitted that the part-time employment arrangements were not wholly contemplated or submitted by the terms of the *Storage Award* and, even if an agreement with such arrangements was capable of passing the BOOT, the specific detriments in the Aldi Stapylton Agreement meant that it could not pass the BOOT. While the base rate for the Aldi Stapylton Agreement was higher than in the *Storage Award*, there were a number of terms that were less beneficial:

- the wider span of ordinary hours;
- the provisions relating to when overtime penalties are paid and the rate at which they are paid;
- how shift loadings were paid and the rate at which they were paid;
- the rate of weekend penalties;
- hours of work arrangements for part-time employees;
- the payment of annual leave loading; and
- the provision of breaks.

[98] In respect of the part-time employment arrangements with the use of Bankable Hours for warehouse employees, the NUW characterised this as "*security of tenure without security of hours*". The *Storage Award* provided fundamental protections for part-time employees: reasonable predictability of hours; an agreed, regular pattern of work and agreed hours of work; and a minimum daily engagement of three hours. However under the Aldi Stapylton Agreement, part-time employees had no reasonable predictability of hours, the hours of work were wholly determined by the employer without the need for agreement with the employee, there was no guaranteed finish time on any rostered day, and there was no minimum daily engagement at all. An arrangement of this nature was simply not envisaged by the *Storage Award*. While the loaded rates provided in Schedule 3 for a warehouse employee working on weekends were, in strict financial terms, superior to the *Storage Award*, once account was taken of the non-financial detriments of the lack of security and stability associated with the part-time arrangements, the Aldi Stapylton Agreement convincingly failed the BOOT.

¹² See transcript 15 November 2017 at PNs 77-91

[99] In support of its case, the NUW adduced evidence from Paul Joyner, a warehouse operator employed by Aldi at its Stapylton Distribution Centre. His evidence concerned the operation of part-time employment arrangements under the existing enterprise agreement, which were the same as those contained in the Aldi Stapylton Agreement, at the Distribution Centre in respect of warehouse employees. All such 160 employees were, to his knowledge, employed on such part-time arrangements. His evidence was that:

- he was contracted to work 130 hours per month;
- the highest contracted hours were 153 hours per month, and the majority of employees were contracted for 108 hours per month;
- the number of hours actually worked were not guaranteed, and varied depending on the needs of Aldi, although his pay remained the same in each pay period;
- in quiet periods he had been rostered up to 13 hours short of his contract hours, with the result that at one stage he had reached a negative balance of 78 hours;
- the rosters, which were usually published a week or two in advance, only showed a rostered day and start time, but did not show a finish time;
- usually he did not know his finish time until shortly before finishing work;
- usually he could reasonably expect to work a 6-hour day, but it was not unusual to be told to stay longer only minutes before the 6 hours was up, which caused difficulty in maintaining a work-life balance;
- he disagreed with the proposition that there was “*significant support from employees*” for the way Aldi rostered workers; and
- he had rejected an offer to reduce his contracted hours in order to reduce his negative balance of hours because this would reduce his fortnightly income.

Consideration – general propositions

[100] There are two well-established propositions concerning the application of the BOOT which may be derived from previous Full Bench decisions. The first, which is essentially a restatement of s 193(1), is that the BOOT requires a finding that each award covered employee and prospective employee would be better off under the agreement than under the relevant modern award.¹³ The requirement that “*each*” such employee and prospective employee be better off overall is a rigorous one. The ordinary meaning of “*each*” is “*every, of two or more considered individually or one by one*”.¹⁴ Thus, *every* award covered employee or prospective employee must be better off overall, with the corollary that if *any* such employee is not better off overall, the relevant enterprise agreement does not pass the BOOT. Thus, in an agreement containing loaded rates in whole or partial substitution for award

¹³ *Solar Systems Pty Ltd* [2012] FWA 6397 at [11]; *Hart v Coles Supermarkets Australia Pty Ltd* [2016] FWCFB 2887 at [6], [15]; *SDAEA v Beechworth Bakery* [2017] FWCFB 1664 at [11]

¹⁴ Macquarie Online Dictionary

penalty rates, it is not sufficient that the majority of employees - even a very large majority - are better off overall if there are any employees at all who would not be better off overall.

[101] In the case of anything other than small employers, it would be an exhaustive task to examine the circumstances of each individual employee to reach a state of satisfaction that the BOOT is passed. Section 193(7) substantially relieves the Commission of this burden by permitting it to assume, if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, that the employees would be better off overall in the absence of evidence to the contrary. Paragraph 818 of the *Explanatory Memorandum to the Fair Work Bill 2008* contains some information as to how this provision was envisaged to operate as follows (emphasis added):

“818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances.

Illustrative example

Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement *and the agreement affects each employee within a classification in the same way*, FWA could group employees together when assessing the employees against the better off overall test. It is intended that FWA could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

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

[102] Section 193(7) is not prescriptive as to the nature of the classes of employees that might be selected for the purpose of applying the BOOT, so that the Commission has to make an evaluative judgment in that respect. However the selection of a class for the purpose of s 193(7) will only be of utility if, as the emphasised parts of the above extract from the Explanatory Memorandum explain, the enterprise agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome. The example used is a class consisting of employees in a common classification, but in the case of an agreement providing for loaded rates this class would likely not be suitable if the employees in the classification worked a variety of roster patterns some of which attracted penalty rates under the relevant modern award and some of which did not. Such a class would have to be further divided into subclasses based on common patterns of working hours, taking into account evening, weekend and/or overtime hours worked, in order to apply the BOOT to a loaded rate

remuneration structure which incorporated compensation and supplanted modern award penalty rates which would otherwise be applicable. Thus the effective application of s 193(7) to existing employees would necessarily require an examination of existing roster patterns worked by various categories of employees as at the test time.

[103] Greater difficulty potentially arises with respect to the requirement to apply the BOOT to every prospective award covered employee. This requires consideration of the position of potential employees to whom the agreement might apply in the future, and thus necessarily involves a degree of conjecture. In the case of an agreement applying to a defined workplace or workplaces in a substantial and mature business - for example, a major supermarket chain - the degree of conjecture may be small because it is safe to assume that any future employees will be employed on a type of roster pattern already applied in the business to an existing class of employees. That is, the Commission will be in a position to make sensible predictions about the basis upon which prospective employees might be engaged. However the position will necessarily be different where the business is small and/or still in a developmental stage or the agreement for which approval is sought permits employees to be engaged in a wider range of classifications, work locations and/or roster patterns than the workforce existing as at the test time. In that situation the basis of employment of prospective employees will not readily be able to be extrapolated from the characteristics of any identifiable classes in the existing workforce.

[104] The task of applying the BOOT in respect of prospective employees was discussed in the Explanatory Memorandum as follows:

“824. The better off overall test also refers to prospective award covered employees because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time. Extending the application of the better off overall test to these types of employees guarantees the integrity of the safety net. Note that where an agreement covers a large number of classifications of employees in which no employees are actually engaged there may be a question as to whether the agreement has been genuinely agreed – see clause 188.

Illustrative example

The Moss Hardware and Garden Supplies Pty Ltd Enterprise Agreement 2010 covers the classification of Assistant Store Manager. At the test time for the better off overall test, Moss Hardware and Garden Supplies Pty Ltd does not employ any Assistant Store Managers. However, it has recently announced that it will restructure its staffing arrangements to introduce this new position. The Assistant Store Manager classification is covered by the relevant modern award. Assistant Store Managers employed after the agreement commences operation would therefore be prospective award covered employees. FWA would need to be satisfied that the agreement passed the better off overall test in respect of these persons.”

[105] The scenario described above may not present significant difficulty because the prospective employment of persons in a classification not currently utilised has partially crystallised to the extent that the basis upon which such persons will be employed is actually knowable, or is at least readily foreseeable in the sense that they will be fitted into an existing business with existing patterns of working hours. The assessment involved will be more difficult, however, where the agreement the subject of the application for approval is of the

type described in the Full Bench decision in *KCL Industries Pty Ltd*: “In summary, the position is that the Agreement covers a wide range of classifications most of which have no relevance to the work performed by KCL’s three existing employees, encompasses industries in which KCL does not currently operate, and contains rates of pay which, even in respect of those classifications relevant to the current employees, are not to apply to those employees.¹⁵ The agreement under consideration in *KCL Industries Pty Ltd* was held not to have been genuinely agreed to by the employees who made it for a range of reasons, but as was made clear in the Federal Court Full Court decision in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*¹⁶ and confirmed by the High Court in *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association*,¹⁷ there is no inherent reason why an agreement made with a very small number of employees working at a particular location which covers a much broader range of classifications and occupations with a wide geographic area, and which might in future cover a much larger number of employees, could not be approved under the FW Act (provided of course that the requirement for genuine agreement is satisfied¹⁸). In *John Holland*, Buchanan J interpreted the expression “*the group of employees covered by the agreement*” used in relation to the “*fairly chosen*” approval requirement in s 186(3) as referring to the “*whole class of employees to whom the agreement might in future apply*”, and said that this class “*may be very difficult to evaluate or assess, depending on the breadth of coverage specified by the terms of the agreement and, perhaps, the nature and complexity of the employer’s business*”.¹⁹ Buchanan J also referred to “*The virtual impossibility of knowing with certainty the composition of the whole group within the potential coverage of the agreement ...*”.²⁰ These observations are equally apposite to the task of applying the BOOT to prospective employees in respect of an agreement with a scope of coverage, classification structure and hours of work provisions which have a potential operation that is significantly wider than the existing workforce.

[106] Where a substantial disparity of this nature exists between the current workforce as at test time and the class of prospective employees to whom the agreement might apply in the future, such that useful predictions as to future employment patterns may not readily be drawn from the way in which the existing workforce operates, the starting point must necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment which the agreement provides for or permits. In accordance with established principles of the construction of agreements, the express provisions of an enterprise agreement may be approached on the basis that they were intended to establish binding obligations and have a practical field of operation and are not otiose.²¹ Thus, for example, if an enterprise agreement makes express provision for employees to be required to work ordinary hours on weekends, that provision cannot be ignored for BOOT purposes simply on the basis that the employer asserts that it does not currently, and does not intend to, make use of that provision. There may be objective evidence available which might support the conclusion that, notwithstanding an express provision of the agreement which apparently

¹⁵ [2016] FWCFB 3048 at [36]

¹⁶ [2015] FCAFC 16

¹⁷ [2017] HCA 53 at [84]

¹⁸ See the discussion in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 at [142]-[153]

¹⁹ *Ibid* at [34] – [35]

²⁰ *Ibid* at [36]

²¹ *National Tertiary Education Union v La Trobe University* [2015] FCAFC 142 at [108] per White J

permits something to be done, it cannot in fact be done or is extremely unlikely to be done. For example, a provision in an agreement applying to a retail business allowing for ordinary hours of work to be performed at identified unsociable hours might reasonably be disregarded for BOOT purposes if applicable laws concerning retail trading hours prohibits work being done at the relevant times. However this is not likely to be a common circumstance.

[107] The distinction made in the Ai Group’s submissions between the terms of an enterprise agreement and “*the practices and working arrangements that may flow from those terms*” is illusory and must be rejected. The primary, and often the only, consideration which arises in the assessment of the BOOT is a comparison between the total remuneration which would be earned by existing and prospective employees under the agreement as compared to the modern award. In the case of agreements which mimic the award structure of base hourly rates and penalty rates for working ordinary hours at unsociable times and for working overtime, the required BOOT comparison may be capable of being conducted simply by comparing the dollar amounts of the base rates and penalty rates in the agreement as compared to the award. However where the agreement has a different pay structure than the award, particularly a loaded rate structure which incorporates some or all of the penalty rates which would be payable if the award applied, no meaningful comparison can be conducted without applying the loaded rates to the working hours patterns actually worked or reasonably capable of being worked under the agreement. Such an exercise necessarily requires examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement.

[108] This was the approach taken by the Full Bench in *Hart*.²² *Hart* involved a challenge, on BOOT grounds, to the approval of an enterprise agreement which applied to Coles and Bi-Lo supermarkets across Australia, which may be regarded as constituting a large, well-established and mature business. The nature of the remuneration structure in the agreement under consideration was described in the following terms:

“[7] The parties understandably commenced their analysis with a consideration of the monetary benefits under the respective instruments for working at particular times of the day. The evidence deals with the comparison of payments under the instruments in isolation, as well as the impact of these comparisons on actual employee rosters over the period of the roster. Much of this evidence is non-contentious. In essence, the Agreement provides for a higher hourly rate than the relevant award rate, but applies lower penalty payments for evenings, weekends and public holidays.”

[109] The parties advanced their submissions, and the Full Bench determined the appeal, on the basis of a number of sample rosters worked by existing employees of the employer. The Full Bench described the approach it took as follows:

“[9] For the purposes of the analysis the parties led evidence regarding rosters and earnings comparisons for employees working actual rosters at the Coles Northcote and Benalla stores. Neither of these stores operates on a 24 hour basis, as some other stores do, but they can be regarded as generally representative of operating circumstances and rostering practices at most Coles stores. The data in relation to

²² [2016] FWCFB 2887

these stores is therefore a convenient basis on which to apply the BOOT and assess the relative entitlements under the Award and the Agreement from a practical perspective. It would only be necessary to consider other rosters which may be worked under the Agreement in the event that we consider that employees working under the Northcote and Benalla store rosters all pass the BOOT.

[10] Mr Hart and his representatives have selected seven employees from these stores for the purposes of more detailed analysis. It appears that these are the employees who are most disadvantaged on a wages basis because of the particular hours that they are rostered to work. In addition, Mr Hart has subjected his own rosters to the same detailed analysis – a roster issued in May 2015 and a new roster issued in September 2015. Coles had the relevant calculations checked by Mr Bruno Cecchini, a Partner with Ernst & Young. Mr Cecchini prepared a report and gave evidence on those calculations to the Commission. Apart from rounding differences, minor differences in annualising and the limited interpretive differences for Sundays and casuals, there is little difference in the outcomes from the respective analyses.

[11] As one would expect as a matter of simple logic, the more hours that are worked during times when the Agreement rates are higher, the better off an employee will be. Conversely, the more hours worked when the Award rates are higher, the worse off the employee will be compared to the Award. In other words, if an employee works predominantly at nights or on weekends, the higher base rate under the Agreement will be counterbalanced by lower penalties payable under the Agreement at these times.”

[110] No party before us submitted that the approach taken in *Hart* did not represent a proper application of the BOOT in accordance with s 193, nor was there any alternative approach suggested by which the BOOT might have been assessed in relation to an agreement of that nature. The Ai Group, as set out above, did submit that in assessing whether agreements passed the BOOT, the Commission should not require the employer to produce indicative rosters of hours that employees will work under the agreement but should rely on the materials lodged with the application for approval (that is, the standard Form F17 statutory declaration). That submission, which would amount to the Commission adopting a “don’t ask, don’t tell” policy, is rejected. The Commission has a statutory duty, subject to ss 189 and 190, to satisfy itself that an enterprise agreement meets the approval requirements specified in ss 186 and 187 before approving it. In the case of an agreement with a loaded rate remuneration structure, the Commission will consider the possible outcomes for employees and prospective employees working or being required to work a variety of roster patterns which are permitted by the terms of the agreement in assessing the BOOT. Also, for the reasons already explained, the Commission may require information about the patterns of working hours of current and prospective employees in order to assess whether the agreement passes the BOOT. If such information is not provided in the Form F17 statutory declaration (noting that the prescribed form does not in terms require the inclusion of such information), it may be necessary for the Commission to request the production of such information - even if no party appears before the Commission in opposition to the approval of the agreement.

[111] The submission made by the ARA that the requirement to assess the BOOT as at the “test time” (being the time at which the application for approval of the relevant agreement is made) means that only the operational circumstances of the employer (such as its work rosters) as at that time may be considered is also rejected. The requirement to assess the BOOT in respect of prospective as well as existing employees tells against the adoption of

such an approach. Because, as the Full Court decision in *John Holland* made clear, it is open to make an enterprise agreement covering classifications, occupations and work locations that are not part of the employer's operations as at test time, the requirement to assess the BOOT with respect to prospective employees who might fall within such future classifications, occupations and/or work locations must necessarily take into account how the agreement might in practice apply when such employees are engaged in the future. The application of the BOOT would be rendered nonsensical and ineffective with respect to such prospective employees if only the employer's existing operations, which did not involve the use of prospective employees in the categories permitted by the agreement, could be taken into account. The statutory purpose of the requirement to assess the BOOT as at the test time is, we consider, to permit rates of pay and other conditions of employment in the agreement and the relevant award to be compared at a fixed point of time when the terms of both are known. Absent such a temporal requirement, the application of the BOOT would require speculation about future changes to the provisions of the award, in circumstances where the agreement to be assessed may also involve agreed changes such as increases in rates of pay at defined intervals, and would involve the impossible task of making multiple comparisons for the whole of the period in which the agreement remains in operation.

[112] The second proposition is that the BOOT requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial, and an overall assessment of whether an employee would be better off under the agreement.²³ Where the terms required to be compared bear directly upon the remuneration of employees, the assessment is essentially a mathematical one. However the position becomes more complex when an agreement contains provisions superior to or not contained in the reference award conferring entitlements to non-monetary benefits, benefits which are accessible at the employee's choice, or monetary benefits which are contingent upon specified events occurring. While it is necessary to take such entitlements into account in the BOOT assessment, ascertaining the value they are to be assigned may be a difficult task. This difficulty was adverted to in the Full Bench decision in *National Tertiary Education Industry Union v University of New South Wales*²⁴ in the following terms:

“[96] There is an obvious problem of comparing apples with oranges when it comes to including changes to non-monetary terms and conditions into the ‘overall’ assessment that is required by the BOOT. In such circumstances the Tribunal must simply do its best and make what amounts to an impressionistic assessment, albeit by taking into account any evidence about the significance to particular classes of employees covered by the Agreement of changes to non-monetary terms that render them less beneficial than the equivalent non-monetary term in an award.”

[113] This issue arose for consideration in *Hart*, albeit in the limited context of whether benefits of these types were to be assigned sufficient value to outweigh detriments which the Full Bench had identified for certain categories of employees in respect of direct remuneration. The Full Bench said (emphasis added):

²³ *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* [2017] HCA 53 at [92]; *Armacell Australia Pty Ltd* [2010] FWAFB 9985 at [41]

²⁴ [2011] FWAFB 5163

“[19] Further, some other benefits under the Agreement are not necessarily received by all employees. Some are contingent on the choice of the employee such as:

- Pre-approved leave arrangements (clause 2.4.1.b),
- Blood donor leave (clause 5.4.5),
- Defence service leave (clause 5.7.3).

[20] *It would not be appropriate to attribute a value to these benefits on the assumption that all employees would access these benefits.* Coles submits that it is reasonable to assume that 50% of the benefit of accessing each form of leave once per year is a reasonable basis to value these benefits but provided no probative evidence to substantiate that assumption. In our view, this percentage is too high and overvalues the likely benefit to most employees. *There are some groups of employees who will receive no benefit from these provisions; for example those who cannot give blood or who choose not to give blood or those who are not permitted to join the defence reserve or who choose not to join the defence reserve.*

[21] Other benefits can be described as contingent on the circumstances that may occur. These include:

- Accident makeup pay (clauses 3.12.1-3.12.2),
- Carer’s leave (clause 5.5.3),
- Compassionate leave (clause 5.6.1),
- Emergency services leave (clauses 5.9.3 and 5.9.6),
- Natural disaster leave (clause 5.13.3),
- Redundancy pay (appendix G1.4.1).

[22] There was no evidence before us of the actual incidence of use of these provisions by Coles employees. Nor was there any evidence of the overall incidence in Australia of matters such as blood donation, joining the defence reserve, or utilising more than the NES standard in respect of carer’s leave. *We do not accept that we should value these benefits on the basis that all employees will access them every year.*

[23] *While we consider it appropriate to have regard to these benefits, we have some reservations about attributing a financial value to them because their take up is highly unlikely to be universal or uniform.* However, were a value to be attributed, we consider that the assessment should be based on an assumption of much less than a 10% access to each benefit in each year. *Again this is because the benefits will be greater for some groups of employees than others depending upon matters such as age and family circumstances.* The scale of the benefits provided by the particular provisions in respect of these matters, with the exception of accident makeup pay, in the Agreement when compared to the Award is generally small.

[24] Various other benefits are almost impossible to quantify but nevertheless should be taken into account. These include the four benefits identified by Ms Louise Rolland, an Executive Director at Ernst & Young in her report arising from various provisions of the Agreement. Those benefits were described by her as follows:

- i. Support to individual wellbeing (through the provision of entitlements that support work flexibility and surety) reducing the probability of unplanned and premature exit from the workforce ('Enhancing Wellbeing')
- ii. Support to undertake activities away from work (such as study) that may lead to increased earning potential ('Supporting Non-Work Activities')
- iii. Support to manage incidence of domestic and family violence reducing the likelihood of job loss ('Domestic Violence Support')
- iv. Support to manage care responsibilities while maintaining employment, reducing the likelihood of foregoing work hours to fulfill those care responsibilities ('Care Responsibility Support').

[25] When the capacity to determine and secure working hours and leave to meet study and caring responsibilities provided by the Agreement is compared with the relevant provisions in the Award, there are some aspects of the Award which provide greater flexibility and security for the employee than in the Agreement. Overall we consider the provisions in the Agreement to be beneficial for employees but the level of benefit is not large. We consider that the capacity to use personal leave for domestic violence leave is a benefit in the Agreement.

[26] Coles sought to rely on the quantification of these benefits by Ms Rolland. The values assessed by Ms Rolland amounted to the following amounts with respect to the 7 employees and Mr Hart:

T	\$5,727
JJ	\$1,429
U	\$6,936
G	\$7,238
Q	\$2,447
AA	\$4,310
EE	\$2,034
DHM	\$3,129
DHS	\$3,430

[27] In our view, these values are excessive and overvalue the benefits under the Agreement. We do not accept the assumptions which underpin the calculations. For example, we consider that relative benefits in the Agreement compared to the Award in respect to control of working hours and leave would probably only make a minor difference to the likelihood of:

- a Coles student employee competing a qualification; or

- a Coles employee being able to remain in employment whilst being a carer for others; or
- a Coles employee who is a victim of domestic violence remaining in employment; or
- an older Coles employee avoiding premature exit from employment.

[28] While it is appropriate to take into account these benefits, in our view, the value is not easily quantifiable and is much lower than Ms Rolland has estimated.

[29] Other benefits under the Agreement should be taken into account based on a realistic comparison with the terms of the Award. We have considered the tables of these matters which were provided by Coles, the SDA, and by Mr Hart. There are some benefits and some detriments, but overall the net benefit of matters not otherwise dealt with is small. We also note that provisions of the Agreement, such as payment to part-timers for additional hours worked could amount to a detriment.

[30] We accept the evidence of Mr David Baker that those employees who are volunteers with the Country Fire Authority would value the capacity to access leave which is provided for in the Agreement. However, there is no evidence about the incidence of access to the leave provisions at Coles. There is also no evidence that the leave provisions will affect the number of Coles employees who will remain or become volunteers with the Country Fire Authority.”

[114] What the emphasised passages in the above extract from *Hart* demonstrate is that the assumption cannot readily be made that non-monetary or contingent entitlements in an agreement have the same value to all employees, because that value may differ depending upon the personal circumstances of each individual employee. In some cases, it may be possible to precisely identify the categories of employees who do and do not benefit from a particular entitlement - such as the examples of leave for reservists, blood donors and bush fire brigade volunteers referred to in the *Hart* decision. In other cases, such as flexibility in working hours or time off in lieu of overtime, it will not be possible to precisely identify who will benefit, although it may be possible as in *Hart* to make some broad generalisations. A contingent benefit, such as enhanced redundancy pay, may provide a potential benefit for most or all employees, but a realistic assessment will need to be made about the likelihood of that benefit crystallising during the period in which the agreement for which approval is sought is likely to remain in operation. In all cases, even where the beneficiary of an enhanced entitlement in an agreement may be identifiable, it is likely to be difficult or impossible to assign any monetary value to the entitlement. Thus, where an agreement involving a loaded rate structure is involved, it is not likely that a non-monetary or contingent benefit will compensate for any significant detriment in direct remuneration for all affected existing or prospective employees.

[115] In summary, the following principles apply to the application of the BOOT to a loaded rates agreement:

- (1) The BOOT requires *every* existing and prospective award covered employee to be better off overall under the agreement for which approval is sought than

under the relevant modern award. If *any* such employee is not better off overall, the agreement does not pass the BOOT.

- (2) Section 193(7) permits the Commission to assume that if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, then the employee would be better off overall in the absence of evidence to the contrary. However the selection of class for the purpose of s 193(7) will only be of utility if the agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome. If the Commission is not satisfied on the evidence that an existing or prospective award covered employee is not better off overall, the Commission cannot approve the agreement, at least not without undertakings or in the confined circumstances set out in s 189.
- (3) The application of the BOOT to a loaded rates agreement will, in order for a meaningful comparison to be made, require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement. This will likely require classes to be identified based on common patterns of working hours, taking into account evening, weekend and/or overtime hours worked.
- (4) The starting point for the assessment will necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment for which the agreement provides or permits. For example if an enterprise agreement makes express provision for employees to be required to work ordinary hours on weekends, those provisions cannot be ignored for BOOT purposes simply because the employer asserts it does not currently utilise those working hours or roster patterns.
- (5) In the case of existing employees, this may involve an examination of existing roster patterns worked by various classes of employees as at the test time. The use of sample rosters to compare remuneration produced by a loaded rates pay structure compared to the relevant modern award may be an effective method of doing this. There may be objective evidence that a particular pattern of working hours or roster pattern permitted by an enterprise agreement is not practicable, or cannot or is unlikely to be worked.
- (6) In the case of prospective employees, the assessment will necessarily involve a degree of conjecture. In the case of an enterprise operating at a defined workplace or workplaces, the Commission may be in a position to make sensible predictions about the basis upon which prospective employees might be engaged based on the roster patterns worked by existing employees. However if a business is small and/or still at the development stage, or the agreement would cover a wider range of classifications, work locations and/or roster patterns that are not in existence as at the test time, useful predictions may not readily be drawn from the way in which the existing workforce operates. In that situation the assessment will require an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment which the agreement provides for or permits.

- (7) If the information concerning patterns of working hours needed to assess whether a loaded rates agreement passes the BOOT is not contained in the employer’s Form F17 statutory declaration accompanying the approval application, it may be necessary for the Commission to request or require the production of such information.
- (8) The BOOT involves the making of an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements which are more and less beneficial to the employee than under the relevant award.
- (9) The overall assessment required will essentially be a mathematical one where the terms being compared relate directly to remuneration. The assessment will be more complex where the agreement contains some superior entitlements which are non-monetary in nature, accessible at the employee’s option or which are contingent upon specified events occurring.
- (10) In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees. In the case of a contingent benefit, it will be necessary to make a realistic assessment about the likelihood of the benefit crystallising during the period in which the agreement will operate.
- (11) Where a loaded rates agreement results in significant financial detriment for existing or prospective employees compared to the relevant award, it is unlikely that a non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT.

[116] Having regard to the above principles, it is possible to give examples of the type of loaded rate structures which are capable, on proper analysis, of passing the BOOT. The examples below are based on the *Security Award* (the reference award for three of the five agreements for which approval is sought in these matters), and use the Security Officer Level 1 classification rate for which the base ordinary rate at 1 July 2018 is \$808.00 per week or \$21.26 per hour rounded to the nearest cent. In each case it is necessary to formulate a rate for a specific roster scenario. In no case is any amount of overtime incorporated into the loaded rate.

[117] Firstly, in respect of “permanent” (that is, non-casual) full-time employees, the following tables set out a loaded rate which would pass the BOOT on the identified roster scenario, assuming that there is no other provision in the agreement superior or inferior to the award which is required to be taken into account:

Roster Scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
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Roster Scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 1 – Full-time Employee working a 38 hour week. Roster made up as follows: <ul style="list-style-type: none"> • 1/7 of their ordinary hours worked on each day of the week • Mon-Fri work is split evenly between night shift and day shift. • 6 public holidays are worked each year for 7.6 hours. 	34%	\$28.49
Scenario 2 – Full-time Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	20%	\$25.51
Scenario 3 – Full-time Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 12 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	29%	\$27.43
Scenario 4 – Full-time Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	43%	\$30.40
Scenario 5 – Full-time Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 12 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	49%	\$31.68

[118] The above roster scenarios may also be adapted for part-time employees. If part-time employees work a proportion of the working hours specified for any of the above rosters consistent with the amount of hours they work each week, the loaded rate required to pass the BOOT will be the same. For example, in Scenario 1, if a part-time employee is engaged to work 1/7th of the contracted 30 hours per week each day Monday to Sunday, with the work split evenly between night shift and day shift, and 6 public holidays of 6 hours each are worked each year, the loaded rate necessary to pass the BOOT will remain at \$28.49.

[119] Alternatively, loaded rates for roster scenarios specific to part-time employees may be developed, such as the following:

Roster Scenario	% Rate Required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 6 – Part-time Employee working a 30 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 3 public holidays are worked each year for 7.6 hours. 	23%	\$26.15
Scenario 7 – Part-time Employee working a 30 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 3 public holidays are worked each year for 7.6 hours. 	45%	\$30.83
Scenario 8 – Part-time Employee working a 15 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 2 public holidays are worked each year for 7.6 hours. 	43%	\$30.40
Scenario 9 – Part-time Employee working a 15 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 2 public holidays are worked each year for 7.6 hours. 	57%	\$33.38

[120] Where an agreement seeks to provide for a single loaded rate at a given classification level, but also provides that employees may be directed to work hours which may fit into any of the above scenarios, then it will be necessary for the loaded rate to be at least as high as the highest rate from all of the scenarios above. Alternatively, the agreement might provide for employees to be assigned specific roster patterns which contain express limitations on the number or proportion of hours to be worked at certain times (such as on evenings or weekends) which would attract the payment of penalty rates under the relevant award. Thus if an agreement provided that a full-time or part-time employee, as the case may be, could be assigned to any one of the above roster scenarios at any given time, then the employee would only need to be paid the loaded rate for the scenario while on the roster in order for the agreement to pass the BOOT. As we discuss later, this is, broadly speaking, the methodology used in the Allied Agreement, the JWT Agreement and the PSA Agreement.

[121] The position becomes more difficult with respect to casual employees. As discussed in the *Casual and Part-time Employment Case*,²⁵ the contractual and practical incidents of casual employment under the FW Act may vary greatly. Casual employment may consist of

²⁵ [2017] FWCFB 3541, 269 IR 125 at [85]

engagement under hourly or daily fixed term contracts, and be used for the performance of short-term and/or intermittent work on an “on-call” basis. It may also consist of longer-term contracts or an ongoing contract of indefinite duration (terminable in either case on short notice), and be used for the performance of long term work with regular, rostered hours. In the former case, the casual employee is not guaranteed work on any specified days or for any specified duration. In an enterprise agreement which provides or permits casual employment of this nature, it is difficult to envisage how it would be possible to provide for a loaded rate for casual employees that was capable of passing the BOOT. This is because it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times. In that circumstance, if the agreement provided for a loaded rate which was less than the highest penalty rate provided for in the relevant award, the employee would necessarily be disadvantaged as compared to the award. This result could only be avoided if the agreement provided for some other benefit to the casual employee which offset the disadvantage, and/or or imposed some restriction on when a casual employee could be engaged to work, and/or required the hours of work of a casual employee to be balanced over time between hours which would attract the payment of penalty rates under the relevant award and hours which would not. Any such additional provisions would amount to a significant departure from the concept of the “on-call” casual.

[122] For an enterprise which utilises casual employees to perform regular and ongoing work (so that casual employment is simply used as an alternative payment and entitlement system rather than to describe engagement on a truly casual basis), an enterprise agreement might provide casual employees with an entitlement to guaranteed hours and rosters. In that circumstance it may be possible to construct a loaded rate for them, in the same way as for full-time and part-time employees above, which is capable of passing the BOOT based on particular prescribed rosters. For example, the following loaded rates (which are inclusive of the 25% casual loading) for Level 1 casual employees covered by the *Security Award* who work full-time hours would pass the BOOT if the agreement contained no offsetting disadvantageous provisions:

Roster Scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 10 – Casual Employee working a 38 hour week. Roster made up as follows: <ul style="list-style-type: none"> • 1/7 of their ordinary hours worked on each day of the week • Mon-Fri work is split evenly between night shift and day shift. • 6 public holidays are worked each year for 7.6 hours. 	59%	\$33.80
Scenario 11 – Casual Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	45%	\$30.83

Roster Scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 12 – Casual Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 12 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	54%	\$32.74
Scenario 13 – Casual Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	68%	\$35.72
Scenario 14 – Casual Employee working a 38 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 12 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	74%	\$36.99

[123] The following loaded rates (inclusive of the casual loading) would also pass the BOOT for casual employees working 30 hours or 15 hours per week, again assuming there were no offsetting disadvantages in the agreement):

Roster Scenario	% Rate Required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 15 – Casual Employee working a 30 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	50%	\$31.89
Scenario 16 – Casual Employee working a 30 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	72%	\$36.57

Roster Scenario	% Rate Required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 17 – Casual Employee working a 15 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 6 public holidays are worked each year for 7.6 hours. 	74%	\$36.99
Scenario 18 – Casual Employee working a 15 hour week. Roster is as follows: <ul style="list-style-type: none"> • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours. 	87%	\$39.76

[124] We emphasise that the above scenarios are not intended to be exhaustive of the possible roster scenarios, but to give examples of the way in which loaded rates capable of passing the BOOT might be constructed. The calculation methodology for each scenario is contained in Schedule A to this decision.

Consideration - Allied Agreement, JWT Agreement and PSA Agreement

[125] In respect of full-time and part-time employees, the structure of the Allied Agreement, the JWT Agreement and the PSA Agreement, by which separate loaded rates are established for each of the identified work roster patterns, is an effective mechanism to ensure that employees working such roster patterns are better off compared to the relevant award. As earlier discussed, this methodology ensures that a loaded rate can be quantified in such a way as to properly compensate an employee for the proportion of working hours which, under the relevant award, would attract the payment of penalty rates or other loadings. The Commission’s correspondence to Allied, JWT and PSA dated 24 October 2017, which we have earlier set out, stated the conclusions that assessed by reference to remuneration only, full-time and part-time employees would be better off under each agreement than under the *Security Award*. No submission made since that correspondence was issued has demonstrated error in those conclusions.

[126] There is substance to United Voice’s submission that the rostering provision in clause 4.3 of each agreement does not, in terms, interact with the work roster patterns upon which the loaded rate remuneration structure is based and, on one reading, allows the employer a broad discretion in the setting of work rosters. As the correspondence of 24 October 2017 to Allied, JWT and PSA made clear, the assessment that in terms of remuneration employees were better off under the agreements than under the *Security Award* assumed “*strict compliance with the rostering restrictions in the agreement*”. If that assumption could not be made because of the terms of clause 4.3 of each agreement, then the BOOT assessment would be vitiated. However, this is an issue which we consider could be remedied by an undertaking

to the effect that, in rostering full-time and part-time employees, employees could only be rostered to work according to the roster patterns identified in the pay rates table clause 3.2.1.

[127] The correspondence of 24 October 2017 identified a number of potential detriments in the three agreements which did not directly affect the remuneration of full-time and part-time employees but nonetheless needed to be taken into account in applying the BOOT. In the case of the Allied Agreement and the JWT Agreement, extensive undertakings were proposed in response to these concerns. These potential detriments, and the undertakings offered by Allied and JWT in response, would need to be the subject of detailed consideration were it not the case that the agreements were fundamentally defective in respect of the remuneration of casual employees.

[128] As earlier set out, casual employees under each agreement are to be paid “*the above hourly rates for full and part-time employees*” and in addition the 25% loading. The agreements do not make clear which of the various loaded rates are to be paid, nor do they require casual employees to be engaged in accordance with any of the specified work roster patterns. The Commission’s correspondence of 24 October 2017 to each employer identified this difficulty, and in particular pointed out that for casual employees who only worked on weekends, the loaded rates would not adequately compensate for the loss of award weekend penalty rates (with the result that the BOOT could not be passed). United Voice’s submissions, which we have earlier set out, illustrated the shortfall that would arise for casuals who only worked on Sundays. Neither Allied, JWT nor PSA submitted that there was any error in the conclusion that the agreements as they stood could not pass the BOOT because of the rates of pay for casual employees. This conclusion is an example of the general difficulty which we earlier identified in establishing a loaded rate structure for casual employees which is capable of passing the BOOT.

[129] We have earlier set out the undertakings proposed by Allied and JWT to meet this concern. It proposed that casuals who were not rostered in accordance with the work roster patterns provided for in the agreements would be paid the Non-Rotating Day Worker rates and relevant penalty rates under clause 22.3 of the *Security Award*. Clause 22.3 specified the night work, Saturday, Sunday and public holiday penalty rates payable under the award.

[130] This undertaking, if accepted, would resolve the BOOT difficulty which we have identified. However such an undertaking may only be accepted if it meets the conditions specified in s 190(3) of the FW Act, namely that it is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement. We do not consider that either condition is satisfied. It constitutes a fundamental change to the remuneration structure in the Allied Agreement and the JWT Agreement which was voted upon by their respective employees, in that it moves from a loaded rate structure to a more traditional base hourly rate and penalty rate structure. It may also leave some casual employees worse off. For example, for an employee who worked a rotating weekday/weeknight roster, but only worked a small proportion of hours outside day worker hours (6.00am to 6.00pm), the addition of the 21.7% night span penalty rate for that small proportion of hours would not compensate for the move from the rotating weekday/weeknight worker rate (\$23.07 for Level 1) to the non-rotating day worker rate (\$20.89 for Level 1). We therefore do not accept the undertakings proposed by Allied and JWT in this respect. As noted above, no undertaking was proposed by PSA in response to the Commission’s concern about this issue.

[131] The statutory declarations made in support of the applications for approval of the Allied Agreement and the PSA Agreement disclose that both Allied and PSA currently employ casuals. The JWT statutory declaration states that it had no casual employees at the date of its application, but the existence of provisions for casual employment in the JWT Agreement, the fact that it only had three employees who voted to approve the agreement but would undoubtedly require more to service any security contract, and our general understanding of patterns of employment in the contract security industry, would cause us to conclude that it will in future employ casual employees. There is therefore nothing hypothetical or unrealistic in taking casual employment into account in assessing the BOOT for each agreement.

[132] Each of the Allied Agreement, the JWT Agreement and the PSA Agreement fails the BOOT with respect to casual employees not assigned to a specified work roster pattern. Neither Allied, JWT nor PSA have proposed an undertaking to rectify this which is capable of acceptance under s 190(3). The applications for approval of the Allied Agreement, the JWT Agreement and the PSA Agreement must therefore be dismissed.

Consideration - Aldi Agreements

[133] The major issues for resolution in respect of the applications for approval of the Aldi Prestons Agreement and the Aldi Stapylton Agreement are whether:

- (1) the agreements pass the BOOT with respect to store managers, assistant store managers and trainee store managers covered by Schedule 1 of each agreement, having regard to the analysis of the loaded salary rates compared to the provisions of the Retail Award contained in the witness statement of Rebecca Patena and the range of duties required to be performed by trainee store managers;
- (2) the pay rates for part-time employees under the unique “bankable hours arrangements” under the agreements are capable of passing the BOOT;
- (3) the “make good” provision in clause 14 of the agreements provides an effective mechanism to remedy any BOOT concern that might arise; and
- (4) the use of “notional shift hours” in respect of the payment of leave entitlements excludes the NES in contravention of s 55 of the FW Act, and thus does not satisfy the approval requirement in s 186(2)(c).

[134] In respect of the first issue, it is sufficient to note that the witness statement of Rebecca Patena together with the submissions of the SDAEA have raised, at least on a *prima facie* basis, concern about whether the loaded salary rates for store managers, assistant store managers and trainee store managers are sufficient to pass the BOOT in respect of all realistically possible work scenarios. It will therefore be necessary to hear further from the parties as to this issue, which will include affording Aldi the opportunity to cross-examine Ms Patena and to adduce evidence in reply to her witness statements. Directions to facilitate the conduct of this further hearing are set out at the end of this decision.

[135] As to the second issue, the critical question which arises is whether the point of comparison for the purpose of assessing the BOOT in relation to part-time employees is with

part-time employment under the *Retail Award*, or casual employment under that award. As has been submitted by the SDAEA and the NUW, significant detriments under the Aldi Agreement would need to be taken into account if the comparison was with part-time employment under the *Retail Award*, in particular the lack of guaranteed and identifiable hours of work in each week or pay period and the lack of entitlement to overtime penalty rates for all work in excess of contracted hours (as provided for in clause 29.2(b) of the *Retail Award*). However, we do not accept that part-time employment under the *Retail Award* is the appropriate point of comparison. It is clear that the system of part-time employment operated by Aldi in the Prestons and Stapylton regions and for which the Aldi Agreements provide would not constitute part-time employment under the *Retail Award* if it applied to those regions. Clauses 12.1-12.3 of the *Retail Award* provide:

12.1 A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the hours worked each day;
- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

[136] Having regard to the relevant provisions of the Aldi Agreements and the evidence of Paul Joyner, it is clear that Aldi's system of part-time employment is inconsistent with the above provision, in that it does not involve reasonably predictable hours of work; does not require agreement at the commencement of employment upon a regular pattern of work specifying the days of work, the hours to be worked on each day or the starting and finishing times; and does not require any change to this to be by agreement with the employee. However it does not follow from this that Aldi's part-time employment system is simply not permitted by the *Retail Award* and is for that reason alone to be regarded as failing the BOOT. Clause 12.6 of the award provides:

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.

[137] Thus the *Retail Award* allows an employer to pay as a casual employee any employee who is not a full-time employee and does not fit its definition of a part-time employee. It follows, we consider, that where an enterprise agreement in the retail sector provides for a form of employment that does not constitute full-time or part-time employment as contemplated by the *Retail Award*, the appropriate point of comparison for the purpose of the BOOT is the catch-all of casual employment under the award.

[138] Such a comparison would need to take into account, from a direct remuneration perspective, the rates of pay, casual loading, and weekend and public holiday penalties payable under the *Retail Award* and the loaded rates of pay, Sunday work allowances, public holiday penalties and leave entitlements payable under the Aldi Agreements. Attached to this decision in Schedule B is a preliminary BOOT analysis of the Aldi Prestons Agreement undertaken by Commission staff under the supervision of Commissioner Lee which takes these matters into account. It shows that part-time employees under the agreement are better off overall than under the award on all of the scenarios modelled except where the part-time employee works only weekend shifts. In accordance with the directions set out at the end of this decision, Aldi, the SDAEA, the NUW and any other interested party will be invited to provide further evidence and submissions in response to this analysis going to the following matters:

- (1) whether the analysis is correct;
- (2) whether an analysis of the Aldi Stapylton Agreement would produce any different result;
- (3) whether there is any other non-financial element of the Aldi Agreements which needs to be taken into account in the BOOT analysis, in particular the fact that a part-time employee under the bankable hours system will receive the same pay each pay period regardless of whether they worked more or less than their contracted hours;
- (4) any undertaking which may be appropriate to address any identified BOOT deficiency; and
- (5) any other matter considered relevant to the application of the BOOT to part-time employees under the Aldi Agreements.

[139] In relation to the third issue, we consider that the “make good” provision in clause 14 of the Aldi Agreements does not provide any answer to any concern about passing the BOOT which may be identified, for the reasons explained in *SDAEA v Beechworth Bakery*.²⁶ In short, the provision firstly only operates upon an employee request for a pay comparison, so that if the employee for whatever reason makes no such request, the provision will have no work to do and any BOOT deficiency will remain unrectified and, secondly, even where an employee request is made, the provision does not provide for the employee to be better off overall, but only requires any “*shortfall*” in remuneration compared to the award to be paid.

[140] As to the final issue, there are two propositions which are relevant:

- (1) The NES will be excluded for the purpose of s 55 of the FW Act if the provisions of an enterprise agreement would in their operation result in an outcome whereby employees do not receive, in full or at all, a benefit provided for by the NES.²⁷

²⁶ [2017] FWCFB 1664 at [39]-[43]

²⁷ *Canavan Building Pty Ltd* [2014] FWCFB 3202 at [36]

- (2) Sections 90, 99 and 106 of the FW Act require that when an employee takes a period of annual leave, personal/carer's leave or compassionate leave respectively, the employee must be paid at the employee's base rate of pay for the employee's ordinary hours of work in the period for which the leave is taken.

[141] Clause 19 of the Aldi Agreements, as earlier set out, provides that employees taking leave will be paid at a rate of pay not less than that provided under the NES. Considered in isolation, this provision is entirely consistent with the NES. However the operative remuneration provisions are set out in Schedules A-C of the agreements and, in respect of non-salaried hourly rate employees, Schedules A-C provide that leave entitlements are to be paid, for each day of leave taken, on the basis of the employee's "*Notional Shift Hours*". The definition of this expression in clause 33 deems this to be a specified number of hours per shift depending on the employee's contract hours. This is the case irrespective of the number of hours the employee would have worked each day over the period of leave. Aldi's submissions properly concede that this may result in employees who take leave sometimes getting paid less hours (as well as sometimes getting paid more) than they would have received if they had not taken leave. Although the relevant leave payment provisions in the Schedules allow employees to "top up" their leave payments based on Notional Shift Hours to the level of paid hours they would have expected to have received if not on leave, it appears that this top up must come from an additional deduction from the employee's accrued leave.

[142] The NES requires entitlements to annual, personal/carer's and compassionate leave to be paid for in full when it is taken;²⁸ it does not contemplate that there may be some overall balancing of leave entitlements over time. It follows from this that, notwithstanding clause 19, the Aldi Agreements in their operation exclude in part ss 90, 99 and 106 of the FW Act.

[143] This difficulty may be addressed by an undertaking in appropriate terms. We propose to invite further submissions from Aldi, the SDAEA, the NUW and any other interested parties concerning this.

Conclusion

[144] As earlier stated, the applications for approval of the Allied Agreement, the JWT Agreement and the PSA Agreement are dismissed.

[145] The following directions are made with respect to the applications for approval of the Aldi Prestons Agreements and the Aldi Stapylton Agreement:

- (1) Aldi shall, within 14 days of the date of this decision, file and serve:
 - (a) any evidence in reply to the witness statement of Rebecca Patena;
 - (b) written submissions in reply to the SDAEA's submissions based on the BOOT analysis in Ms Patena's witness statement;

²⁸ Ibid

- (c) any evidence or written submission in response to the BOOT analysis in Schedule B to this decision addressing the matters identified in paragraph [132] above;
 - (d) any submissions, and any proposed undertaking, addressing the issue of payment for leave entitlements discussed in paragraphs [140]-[142] above.
- (2) The SDAEA, the NUW and any other interested party shall file and serve any evidence and written submissions in response to any evidence and material filed by Aldi pursuant to direction (1) within a further 14 days.

[146] This Bench will be reconstituted to consist of a single member of the Commission in respect of the further hearing and determination of the applications for approval of the Aldi Agreements. The parties will be advised of a further date for the hearing of the applications after the Bench has been so reconstituted.



VICE PRESIDENT

Appearances:

N Arends, solicitor on behalf of JWT Security and Allied Security Management.

G Hatcher SC with *A Perigo* of counsel for Aldi Food Stores.

W Friend QC on behalf of the Shop, Distributive and Allied Employees Association.

D Mujkic on behalf of the National Union of Workers.

S. Bull on behalf of United Voice.

S Ismail on behalf of the Australian Council of Trade Unions.

A Matheson on behalf of Australian Chamber of Commerce and Industry.

S Smith on behalf of the Australian Industry Group.

N Tindley, solicitor on behalf of the Australian Retailers Association.

A Millman on behalf of the National Retail Association.

Hearing details:

2017.

Sydney:

15 November

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SCHEDULE A

Methodology for Roster Scenarios 1 to 18

- (1) The loaded rate calculated in each of the roster scenarios 1 – 18 is the appropriate loaded rate that would be required to compensate employees for not receiving the following Penalty Rates contained in clause 22.3 of the *Security Services Industry Award 2010* when working on the stipulated roster in each scenario:
 - Night shift penalties of 21.7% for working between 6pm to 12am and 12am to 6am Monday-Friday
 - Permanent night shift penalty of 30% for working permanent nights under the Award. This means work performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary shifts include ordinary hours between 0000 hrs and 0600 hrs
 - Saturday penalties of 50%
 - Sunday penalties of 100%
 - Public holiday penalties of 150%
- (2) The loaded rates have been calculated assuming employees in the scenarios are not entitled to any award allowance including leading hand allowance, relieving officer's allowance and first aid allowance.
- (3) Employers must pay an employee their annual leave entitlements in accordance with clause 24.6 of the *Security Award*. The loaded rate may not adequately compensate employees for their annual leave entitlement under the *Security Award* if annual leave is paid at the loaded rate.
- (4) The loaded rate also takes into account the casual loading where applicable.
- (5) The loaded rates in the scenarios would only be appropriate for the relevant roster scenario to pass the BOOT if employees otherwise are entitled under the hypothetical agreement to other terms or conditions of employment which are the same as or at least equally beneficial to those in the *Security Award*, and the agreement does not contain any other provision not contained in the *Security Award* which would be detrimental to employees.
- (6) Where the model makes provision for public holidays it is assumed that the public holidays are worked on a weekday.
- (7) The 'loading' is the difference between the notional weekly rate under each scenario *plus \$10* and the award weekly minimum rate. This loading is converted to a percentage and rounded up to derive the loaded rate percentage, being the percentage the rate needs to be above the *Security Award* rate to ensure the loaded rate will adequately compensate employees under each roster scenario. The rounded percentage was then used to calculate the weekly loaded rate which was then verified in the models below.

- (8) Scenarios 1 to 18 use the *Security Award* ordinary rates effective from 1 July 2018. Both the pay rates and the hours worked have been calculated to two decimal places.

Modelling for Full-time Employees

Scenario 1

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- 1/7 of their ordinary hours worked on each day of the week
- Mon-Fri hours are evenly split between day shift work and night shift work
- Given public holidays are likely to be worked in the security industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. The figure in a weekly model to proportion the public holidays to the weekly model would approximately be represented by “6 days x 7.6 hours ÷ 52 weeks = 0.88 hours.”

Loaded Rate	\$28.49		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,082.62
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,082.62

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	13.13	100%	\$279.14
Mon-Fri Night	13.13	121.7%	\$339.72
Mon-Fri Perm Night	0	130%	\$0.00
Saturday	5.43	150%	\$173.16
Sunday	5.43	200%	\$230.88
Public Holiday	0.88	250%	\$46.77
Totals	38.00 Hrs		\$1,069.67

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 1 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 34%
Level 1	\$21.26	808.00	\$1,069.67	34%	\$28.49
Level 2	\$21.87	831.20	\$1,100.37	34%	\$29.31
Level 3	\$22.24	845.30	\$1,118.99	34%	\$29.80
Level 4	\$22.62	859.40	\$1,138.10	34%	\$30.31
Level 5	\$23.35	887.20	\$1,174.84	34%	\$31.29

* rounded up to nearest whole number

Scenario 2

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”

Loaded Rate	\$25.51		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$969.38
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$969.38

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	29.52	100%	\$627.60
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	0	130%	\$0.00
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.88	250%	\$46.77
Totals	38.00 Hrs		\$957.13

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 2 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 20%
Level 1	\$21.26	808.00	\$957.13	20%	\$25.51
Level 2	\$21.87	831.20	\$984.58	20%	\$26.24
Level 3	\$22.24	845.30	\$1,001.24	20%	\$26.69
Level 4	\$22.62	859.40	\$1,018.34	20%	\$27.14
Level 5	\$23.35	887.20	\$1,051.22	20%	\$28.02

* rounded up to nearest whole number

Scenario 3

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 12 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”
- Employee works two 12 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”
- Other hours are worked by the employee on day shift.

- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”

Loaded Rate	\$27.43		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,042.34
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,042.34

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	25.12	100%	\$534.05
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	0	130%	\$0.00
Saturday	6	150%	\$191.34
Sunday	6	200%	\$255.12
Public Holiday	0.88	250%	\$46.77
Totals	38.00 Hrs		\$1,027.28

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 3 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 29%
Level 1	\$21.26	808.00	\$1,027.28	29%	\$27.43
Level 2	\$21.87	831.20	\$1,056.75	29%	\$28.21
Level 3	\$22.24	845.30	\$1,074.64	29%	\$28.69
Level 4	\$22.62	859.40	\$1,092.99	29%	\$29.18
Level 5	\$23.35	887.20	\$1,128.27	29%	\$30.12

* rounded up to nearest whole number

Scenario 4

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$30.40		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,155.20
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,155.20

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	100%	\$0.00
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	29.52	130%	\$815.87
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.88	250%	\$46.77
Totals	38.00 Hrs		\$1,145.40

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 4 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 43%
Level 1	\$21.26	808.00	\$1,145.40	43%	\$30.40
Level 2	\$21.87	831.20	\$1,178.26	43%	\$31.27
Level 3	\$22.24	845.30	\$1,198.20	43%	\$31.80
Level 4	\$22.62	859.40	\$1,218.67	43%	\$32.35
Level 5	\$23.35	887.20	\$1,258.01	43%	\$33.39

* rounded up to nearest whole number

Scenario 5

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 12 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks =6”
- Employee works two 12 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$31.68		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,203.84
			\$0.00

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	100%	\$0.00
Mon-Fri Night	0	121.7%	\$0.00

			\$0.00	Mon-Fri Perm Night	25.12	130%	\$694.27
			\$0.00	Saturday	6	150%	\$191.34
			\$0.00	Sunday	6	200%	\$255.12
			\$0.00	Public Holiday	0.88	250%	\$46.77
Totals	38.00	Hrs	\$1,203.84	Totals	38.00	Hrs	\$1,187.50

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 5 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 49%
Level 1	\$21.26	808.00	\$1,187.50	49%	\$31.68
Level 2	\$21.87	831.20	\$1,221.57	49%	\$32.59
Level 3	\$22.24	845.30	\$1,242.24	49%	\$33.14
Level 4	\$22.62	859.40	\$1,263.46	49%	\$33.70
Level 5	\$23.35	887.20	\$1,303.24	49%	\$34.79

* rounded up to nearest whole number

Modelling for Part-time Employees

Scenario 6

A Level 1 part-time employee working a 30 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 3 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “3 days x 7.6 hours ÷ 52 weeks = 0.44”.

Loaded Rate	\$26.15		
	Hours	Loading	weekly total
Ordinary Time	30	100%	\$784.50
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	21.96	100%	\$466.87
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	0	130%	\$0.00
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.44	250%	\$23.39

Totals	30.00 Hrs	\$784.50
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Totals	30.00 Hrs	\$773.02
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The loaded rate for each *Security Award* classification for a part-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum rate for 30 hours	Scenario 6 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 23%
Level 1	\$21.26	\$637.80	\$773.02	23%	\$26.15
Level 2	\$21.87	\$656.10	\$795.20	23%	\$26.90
Level 3	\$22.24	\$667.20	\$808.64	23%	\$27.36
Level 4	\$22.62	\$678.60	\$822.46	23%	\$27.82
Level 5	\$23.35	\$700.50	\$849.02	23%	\$28.72

* rounded up to nearest whole number

Scenario 7

A Level 1 permanent employee working a 30 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 3 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “3 days x 7.6 hours ÷ 52 weeks = 0.44”.

Loaded Rate	\$30.83		
	Hours	Loading	weekly total
Ordinary Time	30	100%	\$924.90
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	30.00 Hrs		\$924.90

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	100%	\$0.00
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	21.96	130%	\$606.93
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.44	250%	\$23.39
Totals	30.00 Hrs		\$913.08

The loaded rate for each *Security Award* classification for a part-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum rate for 30 hours	Scenario 7 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 45%
Level 1	\$21.26	\$ 637.80	\$913.08	45%	\$30.83
Level 2	\$21.87	\$ 656.10	\$939.27	45%	\$31.71
Level 3	\$22.24	\$ 667.20	\$955.16	45%	\$32.25
Level 4	\$22.62	\$ 678.60	\$971.48	45%	\$32.80
Level 5	\$23.35	\$ 700.50	\$1,002.85	45%	\$33.86

* rounded up to nearest whole number

Scenario 8

A Level 1 part-time employee working a 15 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 2 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “2 days x 7.6 hours ÷ 52 weeks = 0.29”.

Loaded Rate		\$30.40	
	Hours	Loading	weekly total
Ordinary Time	15	100%	\$456.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	15.00 Hrs		\$456.00

Award Ordinary Rate		\$21.26	
	Hours	Loading	weekly total
Mon- Fri Day	7.11	100%	\$151.16
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	0	130%	\$0.00
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.29	250%	\$15.41
Totals	15.00 Hrs		\$449.33

The loaded rate for each *Security Award* classification for a part-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum rate for 15 hours	Scenario 8 weekly rate	(Scenario weekly rate + \$5 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 43%
Level 1	\$21.26	\$ 318.90	\$449.33	43%	\$30.40
Level 2	\$21.87	\$ 328.05	\$462.23	43%	\$31.27
Level 3	\$22.24	\$ 333.60	\$470.04	43%	\$31.80
Level 4	\$22.62	\$ 339.30	\$478.07	43%	\$32.35
Level 5	\$23.35	\$ 350.25	\$493.51	43%	\$33.39

* rounded up to nearest whole number

Scenario 9

A Level 1 permanent employee working a 15 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 2 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “2 days x 7.6 hours ÷ 52 weeks = 0.29”.

Loaded Rate	\$33.38		
	Hours	Loading	weekly total
Ordinary Time	15	100%	\$500.70
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	15.00 Hrs		\$500.70

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	100%	\$0.00
Mon-Fri Night	0	121.7%	\$0.00
Mon-Fri Perm Night	7.11	130%	\$196.51
Saturday	3.8	150%	\$121.18
Sunday	3.8	200%	\$161.58
Public Holiday	0.29	250%	\$15.41
Totals	15.00 Hrs		\$494.68

The loaded rate for each *Security Award* classification for a part-time employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum rate for 15 hours	Scenario 9 weekly rate	(Scenario weekly rate + \$5 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 57%
Level 1	\$21.26	\$ 318.90	\$494.68	57%	\$33.38
Level 2	\$21.87	\$ 328.05	\$508.87	57%	\$34.34
Level 3	\$22.24	\$ 333.60	\$517.47	57%	\$34.92
Level 4	\$22.62	\$ 339.30	\$526.32	57%	\$35.51
Level 5	\$23.35	\$ 350.25	\$543.31	57%	\$36.66

* rounded up to nearest whole number

Modelling for Casual Employees

Scenario 10

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- 1/7 of their ordinary hours worked on each day of the week

- Mon-Fri hours are evenly split between day shift work and night shift work
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. The figure in a weekly model to proportion the public holidays to the weekly model would approximately be represented by “6 days x 7.6 hours ÷ 52 weeks = 0.88 hours.”

Loaded Rate	\$33.80		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,284.40
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,284.40

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	13.13	125%	\$348.93
Mon-Fri Night	13.13	146.7%	\$409.50
Mon-Fri Perm Night	0	155%	\$0.00
Saturday	5.43	175%	\$202.02
Sunday	5.43	225%	\$259.74
Public Holiday	0.88	275%	\$51.45
Totals	38.00 Hrs		\$1,271.64

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 10 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 59%
Level 1	\$21.26	808.00	\$1,271.64	59%	\$33.80
Level 2	\$21.87	831.20	\$1308.14	59%	\$34.77
Level 3	\$22.24	845.30	\$1,330.27	59%	\$35.36
Level 4	\$22.62	859.40	\$1,353.00	59%	\$35.97
Level 5	\$23.35	887.20	\$1,396.66	59%	\$37.13

* rounded up to nearest whole number

Scenario 11

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$30.83		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,171.54
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,171.54

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	29.52	125%	\$784.49
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	0	155%	\$0.00
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	38.00 Hrs		\$1,159.09

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 11 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 45%
Level 1	\$21.26	808.00	\$1,159.09	45%	\$30.83
Level 2	\$21.87	831.20	\$1,192.36	45%	\$31.71
Level 3	\$22.24	845.30	\$1,212.53	45%	\$32.25
Level 4	\$22.62	859.40	\$1,233.24	45%	\$32.80
Level 5	\$23.35	887.20	\$1,273.05	45%	\$33.86

* rounded up to nearest whole number

Scenario 12

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 12 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”.
- Employee works two 12 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”.
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$32.74		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,244.12
			\$0.00
			\$0.00
			\$0.00
			\$0.00

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	25.12	125%	\$667.56
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	0	155%	\$0.00
Saturday	6	175%	\$223.23
Sunday	6	225%	\$287.01

			\$0.00	Public Holiday	0.88	275%	\$51.45
Totals	38.00	Hrs	\$1,244.12	Totals	38.00	Hrs	\$1,229.25

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 12 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 54%
Level 1	\$21.26	808.00	\$1,229.25	54%	\$32.74
Level 2	\$21.87	831.20	\$1,264.54	54%	\$33.68
Level 3	\$22.24	845.30	\$1,285.92	54%	\$34.25
Level 4	\$22.62	859.40	\$1,307.89	54%	\$34.83
Level 5	\$23.35	887.20	\$1,350.11	54%	\$35.96

* rounded up to nearest whole number

Scenario 13

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$35.72		
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,357.36
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00	Hrs	\$1,357.36

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	125%	\$0.00
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	29.52	155%	\$972.77
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	38.00	Hrs	\$1,347.37

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 13 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 68%
Level 1	\$21.26	808.00	\$1,347.37	68%	\$35.72
Level 2	\$21.87	831.20	\$1386.04	68%	\$36.74
Level 3	\$22.24	845.30	\$1,409.48	68%	\$37.36
Level 4	\$22.62	859.40	\$1,433.56	68%	\$38.00
Level 5	\$23.35	887.20	\$1479.83	68%	\$39.23

* rounded up to nearest whole number

Scenario 14

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- Employee works two 12 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”.
- Employee works two 12 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 12 hours ÷ 4 weeks = 6”.
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate		\$36.99	
	Hours	Loading	weekly total
Ordinary Time	38	100%	\$1,405.62
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	38.00 Hrs		\$1,405.62

Award Ordinary Rate		\$21.26	
	Hours	Loading	weekly total
Mon- Fri Day	0	125%	\$0.00
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	25.12	155%	\$827.78
Saturday	6	175%	\$223.23
Sunday	6	225%	\$287.01
Public Holiday	0.88	275%	\$51.45
Totals	38.00 Hrs		\$1,389.47

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 14 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 74%
Level 1	\$21.26	808.00	\$1,389.47	74%	\$36.99
Level 2	\$21.87	831.20	\$1429.35	74%	\$38.05
Level 3	\$22.24	845.30	\$1,453.52	74%	\$38.70

Level 4	\$22.62	859.40	\$1,478.35	74%	\$39.36
Level 5	\$23.35	887.20	\$1,526.08	74%	\$40.63

* rounded up to nearest whole number

Scenario 15

A Level 1 casual employee working a 30 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$31.89		
	Hours	Loading	weekly total
Ordinary Time	30	100%	\$956.70
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	30.00 Hrs		\$956.70

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	21.52	125%	\$571.89
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	0	155%	\$0.00
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	30.00 Hrs		\$946.49

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 15 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 50%
Level 1	\$21.26	\$ 637.80	\$946.49	50%	\$31.89
Level 2	\$21.87	\$ 656.10	\$973.66	50%	\$32.81
Level 3	\$22.24	\$ 667.20	\$990.13	50%	\$33.36
Level 4	\$22.62	\$ 678.60	\$1,007.04	50%	\$33.93
Level 5	\$23.35	\$ 700.50	\$1,039.55	50%	\$35.03

* rounded up to nearest whole number

Scenario 16

A casual employee working a 30 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$36.57		
	Hours	Loading	weekly total
Ordinary Time	30	100%	\$1,097.10
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	30.00 Hrs		\$1,097.10

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	125%	\$0.00
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	21.52	155%	\$709.15
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	30.00 Hrs		\$1,083.75

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 16 weekly rate	(Scenario weekly rate + \$10 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 72%
Level 1	\$21.26	\$ 637.80	\$1,083.75	72%	\$36.57
Level 2	\$21.87	\$ 656.10	\$1,114.86	72%	\$37.62
Level 3	\$22.24	\$ 667.20	\$1,133.71	72%	\$38.25
Level 4	\$22.62	\$ 678.60	\$1,153.07	72%	\$38.91
Level 5	\$23.35	\$ 700.50	\$1,190.29	72%	\$40.16

* rounded up to nearest whole number

Scenario 17

A Level 1 casual employee working a 15 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on day shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate		\$36.99	
	Hours	Loading	weekly total
Ordinary Time	15	100%	\$554.85
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	15.00 Hrs		\$554.85

Award Ordinary Rate		\$21.26	
	Hours	Loading	weekly total
Mon- Fri Day	6.52	125%	\$173.27
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	0	155%	\$0.00
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	15.00 Hrs		\$547.87

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 17 weekly rate	(Scenario weekly rate + \$5 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 74%
Level 1	\$21.26	\$ 318.90	\$547.87	74%	\$36.99
Level 2	\$21.87	\$ 328.05	\$536.60	74%	\$38.05
Level 3	\$22.24	\$ 333.60	\$573.13	74%	\$38.70
Level 4	\$22.62	\$ 339.30	\$582.91	74%	\$39.36
Level 5	\$23.35	\$ 350.25	\$601.73	74%	\$40.63

* rounded up to nearest whole number

Scenario 18

A Level 1 casual employee working a 15 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as “2 days x 7.6 hours ÷ 4 weeks = 3.8”.
- Other hours are worked by the employee on permanent night shift.
- Given public holidays are likely to be worked in the Security Industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as “6 days x 7.6 hours ÷ 52 weeks = 0.88”.

Loaded Rate	\$39.76		
	Hours	Loading	weekly total
Ordinary Time	15	100%	\$596.40
			\$0.00
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Totals	15.00 Hrs		\$596.40

Award Ordinary Rate	\$21.26		
	Hours	Loading	weekly total
Mon- Fri Day	0	125%	\$0.00
Mon-Fri Night	0	146.7%	\$0.00
Mon-Fri Perm Night	6.52	155%	\$214.85
Saturday	3.8	175%	\$141.38
Sunday	3.8	225%	\$181.77
Public Holiday	0.88	275%	\$51.45
Totals	15.00 Hrs		\$589.45

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	Award minimum hourly rate	Award minimum weekly rate	Scenario 18 weekly rate	(Scenario weekly rate + \$5 – award weekly rate) / award weekly rate*	Loaded Rate = award rate + 87%
Level 1	\$21.26	\$ 318.90	\$589.45	87%	\$39.76
Level 2	\$21.87	\$ 328.05	\$606.38	87%	\$40.90
Level 3	\$22.24	\$ 333.60	\$616.63	87%	\$41.59
Level 4	\$22.62	\$ 339.30	\$627.16	87%	\$42.30
Level 5	\$23.35	\$ 350.25	\$647.41	87%	\$43.66

* rounded up to nearest whole number

SCHEDULE B

ALDI Prestons Agreement – BOOT Analysis for part-time employees under the unique “bankable hours arrangements” under the ALDI agreements based on comparison with casual employment under the *Retail Award*

Classification Description

The “Store Assistant working any 5 out of 7 days non-CBD Stores” classification may work within the following span of hours:

- 6.00am – 11.00pm Monday – Friday
- 6.00am – 8.00pm Saturday
- 6.00am – 8.00pm Sunday

Employees working these hours receive the following penalties and allowances:

- 200% loading on Public Holidays
- \$12.00 per hour allowance for work performed on Sundays

Part-time v Casual Employment

As per ALDI’s submissions the Agreement rate for “Store Assistant working any 5 out of 7 days non-CBD Stores” has been compared against Level 1 of the General Retail Industry Award 2010 with casual loadings and penalties applied and no annual leave or leave loading.

As the Agreement was lodged on 29 May 2017 the pre-1 July 2017 Award rates and penalties have been used for the purpose of the below comparisons.

All scenarios modelled below appear to indicate a part-time employee under the Agreement is better off overall when compared to a casual employee under the Award. All models indicate an employee working a full 38 hour week.

Modelling

(1) The model below indicates that a “Store Assistant working any 5 out of 7 days non-CBD Stores” employee working ordinary hours Monday – Friday between 7am and 9pm is better off under the Agreement than the Award.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Ordinary Hours	38	100%	\$923.40
Annual Leave	Yes		\$71.03
Leave Loading	Yes		\$11.21
Totals	38.00	Hrs	\$1,005.64

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Ordinary Hours	38	125%	\$923.40
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	38.00	Hrs	\$923.40

Agreement Total Weekly Rate	\$1,005.64
Award Total Weekly Rate	\$923.40
Dollar / Actual Percentage Difference	\$82.24 8.91%

(2) The model below indicates that a “Store Assistant working any 5 out of 7 days non-CBD Stores” employee working 7.6 hours on four week days between 7am and 9pm and 7.6 hours on a Saturday between 7am and 6pm is better off under the Agreement than the Award.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Ordinary Hours	30.4	100%	\$738.72
Saturday	7.6	100%	\$184.68
Annual Leave	Yes		\$71.03
Leave Loading	Yes		\$11.21
Totals	38.00 Hrs		\$1,005.64

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Ordinary Hours	30.4	125%	\$738.72
Saturday	7.6	135%	\$199.45
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	38.00 Hrs		\$938.17

Agreement Total Weekly Rate	\$1,005.64
Award Total Weekly Rate	\$938.17
Dollar / Actual Percentage Difference	\$67.47 7.19%

(3) The model below indicates that a “Store Assistant working any 5 out of 7 days non-CBD Stores” employee working 7.6 hours on four week days between 7am and 9pm and 7.6 hours on a Sunday between 9am and 6pm is better off under the Agreement than the Award.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Ordinary Hours	30.4	100%	\$738.72
Sunday	7.6	100%	\$184.68
Allowances	Amount	Value	
Sunday	7.6	\$12.00	\$91.20
Annual Leave	Yes		\$71.03
Leave Loading	Yes		\$11.21
Totals	38.00 Hrs		\$1,096.84

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Ordinary Hours	30.4	125%	\$738.72
Sunday	7.6	200%	\$295.49
Allowances	Amount	Value	
Allowance			\$0.00
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	38.00 Hrs		\$1,034.21

Agreement Total Weekly Rate	\$1,096.84
Award Total Weekly Rate	\$1,034.21
Dollar / Actual Percentage Difference	\$62.63 6.06%

(4) The model below indicates that a “Store Assistant working any 5 out of 7 days non-CBD Stores” employee working 7.6 hours on three week days between 7am and 9pm as well as 7.6 hours on a Sunday between 9am and 6pm and 7.6 hours on a Saturday between 7am and 6pm is better off under the Agreement than the Award.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Ordinary Hours	22.8	100%	\$554.04
Saturday	7.6	100%	\$184.68
Sunday	7.6	100%	\$184.68
Allowances	Amount	Value	
Sunday	7.6	\$12.00	\$91.20
Annual Leave	Yes		\$71.03
Leave Loading	Yes		\$11.21
Totals	38.00 Hrs		\$1,096.84

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Ordinary Hours	22.8	125%	\$554.04
Saturday	7.6	135%	\$199.45
Sunday	7.6	200%	\$295.49
Allowances	Amount	Value	
Allowance			\$0.00
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	38.00 Hrs		\$1,048.98

Agreement Total Weekly Rate	\$1,096.84
Award Total Weekly Rate	\$1,048.98
Dollar / Actual Percentage Difference	\$47.86 4.56%

(5) The model below indicates that a “Store Assistant working any 5 out of 7 days non-CBD Stores” employee working three week days, Sunday, Saturday and all Public Holidays is better off under the Agreement than the Award. This model below is based on the following assumptions:

- 13 public holidays are worked during the year on a weekday. This is represented in the model as 1.9 which averages the public holidays worked over a year to a weekly model. The 1.9 is calculated by “7.6 hours x 13 days ÷ 52 weeks”
- Employees work 7.6 hours on a Sunday between 9am and 6pm every week
- Employees work 7.6 hours on a Saturday between 7am and 6pm every week
- Employees work 7.6 hours on 3 weekdays each week between 7am and 9pm every week.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Ordinary Hours	20.9	100%	\$507.87
Saturday	7.6	100%	\$184.68
Sunday	7.6	100%	\$184.68
Public Holidays	1.9	200%	\$92.34
Allowances	Amount	Value	
Sunday	7.6	\$12.00	\$91.20
Annual Leave	Yes		\$71.03
Leave Loading	Yes		\$11.21
Totals	38.00 Hrs		\$1,143.01

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Ordinary Hours	20.9	125%	\$507.87
Saturday	7.6	135%	\$199.45
Sunday	7.6	200%	\$295.49
Public Holidays	1.9	250%	\$92.34
Allowances	Amount	Value	
Allowance			\$0.00
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	38.00 Hrs		\$1,095.15

Agreement Total Weekly Rate	\$1,143.01
Award Total Weekly Rate	\$1,095.15
Dollar /	\$47.86
Actual Percentage Difference	4.37%

Further Issues

Under clause 29.1(a) of the Award at test time a casual employee is not entitled to overtime payments and under clause 30.1(a) a “Store Assistant working any 5 out of 7 days non-CBD Stores” would likely not be entitled to shift penalties as they are not specifically employed as a shift worker. Therefore it does not appear that casual employees would be entitled to any penalties for hours worked prior to 7.00am on any day and past 6.00pm on a Saturday. Due to these parameters it may not possible to adequately match all part-time roster patterns against a casual employee covered by the Award.

Modelling below indicates that an employee only working weekend shifts would be worse off when compared to a casual employee under the Award. Employees under this model work Saturdays between 7am to 6pm and Sundays between 9am to 6pm.

Agreement Ordinary Rate	\$24.30		
	Hours	Loading	weekly total
Saturday	7.6	100%	\$184.68
Sunday	7.6	100%	\$184.68
Allowances	Amount	Value	
Sunday	7.6	\$12.00	\$91.20
Annual Leave	Yes		\$28.41
Leave Loading	Yes		\$4.48
Totals	15.20	Hrs	\$493.45

Award Ordinary Rate	\$19.44		
	Hours	Loading	weekly total
Saturday	7.6	135%	\$199.45
Sunday	7.6	200%	\$295.49
Allowances	Amount	Value	
Allowance			\$0.00
Annual Leave	No		\$0.00
Leave Loading	No		\$0.00
Totals	15.20	Hrs	\$494.94

Agreement Total Weekly Rate	\$493.45
Award Total Weekly Rate	\$494.94
Dollar / Actual Percentage Difference	-\$1.49 0.30%