Article Information

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How to ensure loaded rates of pay pass the BOOT

In June 2018, the Fair Work Commission handed down its decision in *Loaded Rates Agreements* [2018] FWCFB 3610 (*"the Loaded Rates in Agreements Case"*). Following the decision, on 16 October 2019, the Fair Work Commission approved the ALDI Foods enterprise agreements for ALDI's Prestons and Stapylton sites, which both contain loaded rates.

In October 2017, 8 applications for approval of enterprise agreements were referred to a Full Bench of the Fair Work Commission. The applications raised issues concerning how the "better off overall test" ("**BOOT**") should be applied to agreements which roll up penalty rates and other benefits into loaded rates of pay. The Full Bench issued its decision, the *Loaded Rates in Agreements Case*, which clarifies how the BOOT is conducted when an agreement contains loaded rates.

Following the *Loaded Rates in Agreements Case*, on 16 October 2019, the Fair Work Commission approved the ALDI Foods enterprise agreements for ALDI's Prestons and Stapylton sites, which contain loaded rates and provisions for banking hours.

Most fundamentally, in the *Loaded Rates in Agreements Case*, the Commission reiterated that the BOOT does not involve a line-by-line analysis of the agreement against the terms of the relevant modern award. Rather, agreements can include loaded rates of pay which compensate for benefits provided for in the relevant modern award. If an agreement contains loaded rates, the loaded rates must be sufficiently high to compensate for the absence of the award benefits that an employee would otherwise receive for the work. Additionally, the loaded rate must reflect the actual and potential working arrangements of employees. For example, if an employee could be required to regularly work on weekends, the loaded rate must be increased to take into consideration the weekend penalties to which the employee would otherwise be entitled under the Award.

In the case of existing employees, the Commission may examine the roster patterns worked by various classes of employees as at the test time. In the case of existing and prospective employees, the assessment will necessarily involve some conjecture. 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 don't yet exist, the Commission will closely consider the terms of the agreement to determine what patterns of work are permitted by the agreement.

The assessment required by the BOOT is 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. Where loaded rates result in financial detriment for existing or prospective employees compared to the relevant modern award, it is unlikely that non-monetary, selective or contingent entitlements under an agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT.

By way of example, the ALDI agreements which were lodged with the Commission provided that salaried employees are not entitled to overtime and penalty rates, with no additional payments made for reasonable additional hours of work performed by the employees, or for work performed on Saturdays, Sundays and Public Holidays. The agreements also provided for a unique "Bankable Hours Arrangements". Under the Bankable Hours Arrangements, employees receive a consistent payment each fortnight, regardless of the hours the employee actually works. If an employee does not perform their full contract hours in the week, the employee's banked hours will have a negative balance. All negative banked hours "*need to be made up using the Employee's future excess hours*" before excess hours will be banked or paid.

The Commission sought evidence of ALDI's rostering arrangements, including rosters evidencing work performed by

employees across different classifications. The Commission also invited ALDI to make undertakings in respect of the BOOT issues raised by the Commission. ALDI produced rosters and provided a number of undertakings, including to cap the negative balance which an employee can reach under the Bankable Hours Arrangement. The Commission determined that "*no roster was submitted in evidence that demonstrated a situation whereby the loaded rates contained in each respective agreement would be lower than what employees would stand to receive*" under the applicable awards. Further, in relation to undertakings, ALDI undertook (among other things) that a maximum of 20 minus Bankable Hours can be accrued by an employee, unless the employee requests in writing the option of accruing more than 20 minus hours. In light of ALDI's evidence and undertakings, the Commission approved the ALDI Prestons and Stapylton enterprise agreements.

Employers who lodge agreements containing loaded rates of pay must ensure that the rates are high enough to compensate employees for the award entitlements which employees are forgoing. Particularly where loaded rates compensate for penalties or entitlements to overtime, employers should be prepared to provide the Commission with evidence, and possibly undertakings, to address the Commission's concerns.

By way of summary, the following takeways can be drawn from the *Loaded Rates in Agreements Case:*

- The Fair Work Commission must apply the better off overall test ("**BOOT**") to every enterprise agreement which is lodged for approval. In applying the BOOT, the Commission will have regard to both existing and future employees.
- Where an agreement contains loaded rates, the Commission will closely consider the patterns of work which are permitted by the terms of the agreement, that could be applied to existing or prospective employees.
- If extreme interpretations are available on the face of an agreement, employers should be prepared to provide evidence, and possibly undertakings, to address the Commission's concerns.

Before giving any undertakings, employers should give full consideration to the potential consequences, including whether the undertaking could stymie future rostering arrangements.