

**Form F7—Notice of Appeal**  
(Rule 12, Fair Work Australia Rules 2009)

**IN FAIR WORK AUSTRALIA**

*FWA use only*

**FWA Matter No.:**

**NOTICE OF APPEAL**  
*Fair Work Act 2009—s.604*

**Appellant**

<b>Name:</b>	Armacell Australia Pty Ltd				
<b>Address:</b>	13 – 17 Nathan Road				
<b>Suburb:</b>	Dandenong	<b>State:</b>	VIC	<b>Postcode:</b>	3175
Where the Appellant is a company or organisation:					
<b>Contact person:</b>		<b>ABN:</b>	32 089 316 638		
Contact details for the Appellant or contact person (if one is specified):					
<b>Telephone:</b>		<b>Mobile:</b>			
<b>Facsimile:</b>		<b>Email:</b>			

**Appellant's representative (if any)**

<b>Name:</b>	The Australian Industry Group		<b>ABN:</b>	[If applicable] 76 369 958 788	
<b>Address:</b>	51 Walker Street				
<b>Suburb:</b>	North Sydney	<b>State:</b>	NSW	<b>Postcode:</b>	2060
<b>Contact person:</b>	Stephen Smith, Director – National Workplace Relations and Michael Mead, Principal National Advocate				
<b>Telephone:</b>	02 9466 5566	<b>Mobile:</b>			
<b>Facsimile:</b>	02 9466 5599	<b>Email:</b>	<a href="mailto:stephen.smith@aigroup.asn.au">stephen.smith@aigroup.asn.au</a> and <a href="mailto:michael.mead@aigroup.asn.au">michael.mead@aigroup.asn.au</a>		

**1. Decision appealed:**

The Appellant, being a person aggrieved, gives notice of an appeal against a decision made in a matter as follows:

Matter number: AG2010/11703

Applicant: Armacell Australia Pty Ltd

Decision maker: Commissioner Ryan

Decision appealed: [2010] FWA 8283: Refusal to approve the Armacell Australia Enterprise Agreement 2010

Date of decision: 28 October 2010

## 2. Grounds:

- 2.1 The Commissioner erred in refusing to approve the *Armacell Australia Enterprise Agreement 2010* (“the Agreement”).
- 2.2 The Commissioner erred in finding that, as a result of the operation of clause 32.7 (Cashing in of Annual Leave), the Agreement failed to pass the Better Off Overall Test (“BOOT”) in accordance with section 186 of the *Fair Work Act 2009* (“the FW Act”).
- 2.3 The Commissioner erred in finding that as a result of the operation of clause 32.7 (Cashing in Long Service Leave), the Agreement failed to pass the BOOT.
- 2.4 The Commissioner incorrectly applied and mischaracterised the operation of the BOOT in finding that the BOOT applies to the statutory minimum conditions of employment which apply to employees who are covered by the Agreement [Decision – Paragraphs [32] and [39]].
- 2.5 The Commissioner erred in failing to apply the BOOT in a global manner as required by the FW Act, including erring in:
  - (a) concluding that specific clauses did not pass the BOOT as opposed to assessing the total effect of those clauses on the Agreement;
  - (b) requiring undertakings on a “line-by-line basis” to address issues of concern to him, rather than, firstly, applying the global BOOT, and then, secondly, making a finding that the agreement does not pass the BOOT, and then, thirdly, inviting the employer to make undertaking/s to enable the agreement to pass the BOOT.
- 2.6 The Commissioner considered matters which were irrelevant to the application before the Tribunal and these considerations resulted in errors in the decision. The irrelevant matters which were considered included:
  - (a) the history of annual leave usage under previous enterprise agreements with different annual leave provisions to those which were in the Agreement [Transcript PN260 – PN265, Decision – Paragraph [52] – [59]]; and
  - (b) the terms of the Explanatory Memorandum to the *Workplace Relations – WorkChoices Bill 2005* in relation to an illustrative example for the cashing out of annual leave.
- 2.7 The Commissioner erred in arriving at conclusions which were not reasonably open to him and which were inconsistent with the legislative scheme of the FW Act, such as
  - (a) the cashing out of annual leave as a general proposition operates to the “*significant disadvantage of employees*” [Decision – Paragraph [48]]; and
  - (b) the Agreement “*is not about providing real and tangible benefits to employees which enhance their leave entitlements but is about reducing leave accruals through cashing out leave entitlements*” [Decision – Paragraph [68]].

- 2.8 The Commissioner erred in requiring an undertaking from the Appellant in relation to Clause 6 – Dispute Settlement Procedure. In this regard, the Commissioner incorrectly concluded that:
- (a) the terms of Clause 6 were less beneficial than the terms of the relevant modern award/s for the purpose of the BOOT [Transcript PN85];
  - (b) for employees covered by the agreement “*there is a need to have access to arbitration as of right rather than being vetoed by either party*” [Transcript PN86]; and
  - (c) the key principle in the Full Bench’s decision in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010 FWAFB 1464], (that is, the parties are free to decide whether they wish to give arbitration powers to FWA to deal with disputes which arise under their enterprise agreement) operates subject to the views of individual Tribunal Members about whether or not a particular dispute resolution procedure in an agreement passes the BOOT [Transcript PN85 – PN91].
- 2.9 The Commissioner erred in failing to have regard to the Objects of the FW Act (as set out in sections 3 and 171) and sections 577 and 578 of the FW Act.
- 2.10 The Commissioner erred in failing to recognise that:
- (a) the prime responsibility for determining employment conditions for employers and employees covered by enterprise agreements rests with the parties at the enterprise; and
  - (b) employers, employees and their representatives are entitled to decide what employment conditions are in their interests and that Tribunal Members should only require undertakings which modify agreed terms, and/or refuse to approve enterprise agreements which have been made, if it is clear that the agreement made between the parties does not meet the requirements of the FW Act.
- 2.11 Such other grounds as the Full Bench considers appropriate.
- 3. Public interest in permitting the appeal:**
- 3.1 The appeal raises important issues about the statutory purpose and application of section 93 of the FW Act. The Commissioner’s decision undermines the operation of section 93 of the Act.
- 3.2 Cashing out of annual leave clauses are a popular provision in enterprise agreements which are supported by many employees and employers. The Commissioner’s decision, unless overturned, would operate to severely limit the ability of employees and employers to agree upon cashing out of annual leave arrangements.
- 3.3 The appeal raises important questions about the application of section 193 of the FW Act, in particular whether section 193 permits FWA to consider information other than the relevant Modern Award to determine whether an enterprise agreement passes the BOOT.
- 3.4 The appeal raises important issues about the statutory interpretation of sections 190, 598 and 604 of the FW Act, including whether a requirement by FWA that an employer give an undertaking in order for its agreement to be approved, amounts to a ‘decision of FWA’ under section 598 capable of being appealed under section 604.

- 3.5 The Commissioner's decision, unless overturned, would have significant and widespread negative implications for the making of enterprise agreements in Australia.
- 3.6 The Commissioner's decision is affected by relevant error and should not be allowed to stand.
- 3.7 It is in the public interest that the issues raised by the appeal be determined by a Full Bench.

**4. Stay under s.606:**

4.1 Is a stay of the decision sought?

Yes

No


**5. Extension of time:**

If this Notice of Appeal is lodged later than 21 days after the decision or order under appeal was given or made, application should be made for an extension of time within which to institute this appeal.

5.1 Is an extension of time sought?

Yes

No

<b>Date:</b>	18 November 2010
<b>Signature:</b>	
<b>Name:</b>	Stephen Smith
<b>Capacity/Position:</b>	Director – National Workplace Relations

**Service requirements**

This Notice of Appeal must be served on the other parties (and any interveners) in the matter at first instance as soon as practicable after this Notice is lodged with FWA.

Note: Rules 9 and 10 deal with service.