

**OUTLINE OF SUBMISSION
TO FAIR WORK AUSTRALIA**



**C2010/5569, C2010/5571 and C2010/5574
Appeals by Armacell and Others against decisions [[2010]
FWA 8283 and others] of Commissioner Ryan**

 **AUSTRALIAN INDUSTRY GROUP**

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STRUCTURE OF THIS SUBMISSION

This submission is structured as follows:

Part A: Overview, Leave to Appeal, the Decisions and Related Proceedings and the Nature of the Appeal

Part B: Matters of relevance to all of the appeals

Part C: Additional matters of relevance to the appeal by Armacell Australia

Part D: Additional matters of relevance to the appeal by Direct Paper Supplies

Part E: Additional matters of relevance to the appeal by Downer EDI Works

PART A: OVERVIEW, LEAVE TO APPEAL, AND THE NATURE OF THE APPEAL

A1. Overview

1. This is an appeal against three decisions of Commissioner Ryan ([2010] FWA 8283, [2010] FWA 8314 and [2010] FWA 8333) in which the Commissioner refused to approve the following enterprise agreements:
 - *Armacell Australia Enterprise Agreement 2010*;
 - *Direct Paper Supplies Enterprise Agreement 2010*; and
 - *Downer EDI Works (Tamworth) Enterprise Agreement 2010*
2. In these proceedings Ai Group is representing Armacell Australia Pty Ltd, Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust trading as Direct Paper Supplies and Downer EDI Works Pty Ltd. A notice of appeal has been filed by Ai Group on behalf of each company.
3. In addition to appearing on behalf of the three companies, Ai Group seeks leave to make submissions in the proceedings in its capacity as a registered organisation with a significant interest in the outcome of these proceedings (see Section A2 below).
4. Ai Group submits that the decisions of Commissioner Ryan are each affected by relevant errors, many of which were made in the decision concerning the *Armacell Australia Enterprise Agreement 2010* and then applied in the decisions relating to the *Direct Paper Supplies Enterprise Agreement 2010* and *Downer EDI Works (Tamworth) Enterprise Agreement 2010*.

5. These errors include:

- The Commissioner erred in finding that, as a result of the operation of the cashing out of annual leave clauses in the three agreements each agreement failed to pass the Better Off Overall Test (“BOOT”) in accordance with s.186 of the *Fair Work Act 2009* (“the FW Act”).
- 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 each agreement.
- The Commissioner erred in failing to apply the BOOT in a global manner as required by the FW Act.
- The Commissioner considered matters which were irrelevant to the applications before the Tribunal and these considerations resulted in errors in each decision.
- 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.
- 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.
- The Commissioner erred in failing to recognise that the prime responsibility for determining employment conditions for employers and employees covered by enterprise agreements rests with the parties at the enterprise.

6. In respect of the decisions relating to Armacell and Direct Paper Supplies:

- The Commissioner erred in requiring an undertaking in relation to Clause 6 – Dispute Settlement Procedure in each agreement.
- The Commissioner incorrectly concluded that the key principle in the Full Bench’s decision in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010 FWA FB 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.
- The Commissioner erred in finding that as a result of the operation of the cashing out of long service leave provisions in the agreements, the agreements failed to pass the BOOT.

7. For these reasons, we submit that the decisions should be overturned and the three agreements approved by the Full Bench.

A2. Leave to Appeal

8. Section 604(1) of the FW Act identifies that a person who is aggrieved by a decision of FWA may, with the permission of FWA appeal that decision.
9. Section 604(2) provides that without limiting the grounds upon which FWA may grant permission to appeal, FWA must grant permission if it is satisfied that it is in the public interest to do so.
10. Ai Group has made applications to appeal on behalf of each of the employers whose agreement was refused by Commissioner Ryan. We submit that each of the three employers is clearly a person aggrieved by the decision of Commissioner Ryan.
11. In *Australian Postal Corporation v CEPU* ([2009] FWA 599) the Full Bench considered the meaning of s.604 of the FW Act and specifically the notion of 'person aggrieved':

“[8] The ability of a person aggrieved by a decision to institute an appeal was a feature of predecessor legislation to the FW Act, namely s.45(3)(d) of the Industrial Relations Act 1998 (Cth) and s.120(3)(g) of the Workplace Relations Act 1996 (Cth).

*[9] The term “person aggrieved” in s.45(3)(d) of the Industrial Relations Act 1988 (Cth), which was relevantly similar to s.120(3)(g) of the Workplace Relations Act 1996 (Cth), was considered by the Industrial Relations Court of Australia in *Tweed Valley Fruit Processors Pty Ltd v Ross and Others*¹¹. The Tweed Valley case concerned an enterprise flexibility agreement that Tweed Valley Fruit Processors Pty Ltd (Tweed Valley) had reached with its employees. The agreement was approved by a single member of the Commission. A union bound by an award binding Tweed Valley but not bound by the agreement sought leave to appeal against the member’s decision to approve the agreement on the ground that the single member had failed to exercise his jurisdiction. The appeal was allowed by a Full Bench of the Commission. Tweed Valley then sought prerogative relief in the form of writs of prohibition and certiorari to quash the Full Bench decision.*

[10] In the Tweed Valley case, Wilcox CJ and Marshall J said:

"There is no doubt that, in determining whether a person is a "person aggrieved" for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context. Gibbs CJ said as much in Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 184-185; 39 ALR 417. His Honour there referred to cases in which it had been held "that a person is 'aggrieved' by an act which operates in restraint of what would otherwise have been his legal rights". But he also mentioned Attorney-General (Gambia) v N'Jie [1961] AC 617 at 634 in which the Judicial Committee of the Privy Council said that the words "person aggrieved" should not be subjected to a restricted interpretation; "they ... include a person who has a genuine grievance because an order has been made which prejudicially affects his interest".

In Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 36 ALR 64; 54 FLR 421, Ellicott J at FLR 437 interpreted the description "a person who is aggrieved" in s 5 of the Administrative Decisions (Judicial Review) Act as extending, at least, to "a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public". He went on to say at FLR 437-8 that, in many cases, that grievance will be shown because the decision affects his or her existing or future rights but in other cases it may be less direct; it "may affect him or her in the conduct of a business or ... affect his or her rights against third parties".

Gummow J followed Tooheys in Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124; 71 ALR 73 in holding that the applicant, a registered industrial organisation with members serving in ships of the relevant class, had standing to seek reasons for a manning notice given by the respondent. At FCR 133 his Honour pointed out, first, that the applicant had among its interests or objects the obtaining and maintenance of reasonable conditions of employment of its members; secondly, that it had been invited to participate in the relevant Manning Committee and had made submissions in regard to the manning notice and, thirdly, that the issue was one of safety and was "fertile ground for an industrial dispute".

The decision of Commissioner Redmond did not affect AFME/PKIU's legal interests. But the union had an interest in the decision beyond that of an ordinary member of the public. Its position was much like that of AIMPE in the case heard by Gummow J: it was concerned with the maintenance of members' conditions of employment, it had participated in the decision complained of by making submissions (pursuant to a statutory right: see s 170NB(2) of the Industrial Relations Act) and the decision was one containing potential for industrial disputation.

Having regard to these decisions, and the other authorities discussed by the judges who made them, it seems to us that the formula "person aggrieved" covers the position of AFME/PKIU in this case, unless there is something about this particular statute that indicates otherwise. The only thing mentioned by counsel is the restriction in s 45(3)(baa). But we do not see the existence of that restriction as an indication that Parliament wished the courts to interpret s 45(3)(d) more narrowly than they might otherwise have done. Section 45(3)(baa) deals with the right to pursue a merits appeal against a refusal

decision. Section 45(3)(d) relates to the entitlement to raise a question as to whether a Commission member has acted within jurisdiction. These are different questions. There is room for the view that a wider category of people has a legitimate interest in ensuring that the Commission acts within its jurisdiction than those who are directly affected by a particular decision, and so allowed to agitate its merits.”

[11] *We were satisfied this authority is relevant to the meaning of the phrase “a person who is aggrieved” in s.604(1) of the FW Act. Further, we were satisfied Australia Post was a person who was aggrieved by Senior Deputy President Drake’s decision and, therefore, had standing to appeal against that decision.“*

12. In reference to the additional requirement under s.604 of the FW Act that a person aggrieved seek permission of FWA for an appeal to be heard, we contend that such permission should be granted. Under s.604(2), FWA must grant permission to appeal if FWA is satisfied that it is in the public interest to do so. We submit that it is in the public interest that an appeal be heard for the following reasons:

- The appeal raises important issues about the statutory purpose and application of s.93 of the FW Act. Section 93 is yet to be considered by a Full Bench of FWA and the Commissioner’s decisions stand to undermine the operation of the section.
- The appeal raises important questions about the application of s.193 of the FW Act, in particular whether s.193 permits FWA to consider matters other than the relevant modern award to determine whether an enterprise agreement passes the BOOT.
- The Commissioner applied the BOOT in a manner inconsistent with the global approach required by the FW Act and in a manner inconsistent with Full Bench authority.
- The Commissioner’s decisions apply a prejudicial characterisation to cashing out of leave provisions within enterprise agreements. This characterisation is inconsistent with the legislative intent and unless overturned would operate to severely limit the ability of employees and employers to agree upon cashing out of leave arrangements.

- The Commissioner’s decisions are inconsistent with a legislative scheme which primarily vests the responsibility for enterprise agreement terms with the bargaining parties.
- The decision is affected by relevant error and should not be allowed to stand.

Ai Group’s application to make submissions in its own right

13. Section 590 of the FW Act gives FWA the power to inform itself in relation to any matter before it, in such manner as it considers appropriate. This includes granting a party with a substantial interest in the outcome the right to make submissions.
14. Ai Group seeks leave to make submissions in these proceedings in its own right on grounds which include the following:
 - Ai Group is a major registered organisation which represents employers in a wide range of industries including manufacturing, construction, aviation, chemicals, ICT, automotive, printing, transport, labour hire and numerous others.
 - Ai Group is a “peak council” within the meaning of the term defined in the FW Act and is formally recognised as a State Peak Council in the NSW Industrial Relations System.
 - The statutory construction of s.55, 186 and 193 of the FW Act are central elements of Australia’s enterprise bargaining system.
 - Section 93 is an important provision which provides important benefits and options to bargaining parties.

- The proceedings are of relevance to thousands of employers who either have enterprise agreements in place or who may wish to bargain in the future.
- A large number of Ai Group members are currently bargaining.

15. This Outline of Submissions is lodged on behalf of the three companies as well as on behalf of Ai Group in its own right.

A3. The Decisions and related proceedings

Re. Armacell Australia Pty Ltd [2010] FWA 8283

16. In accordance with the statutory requirements, the following key events occurred:
- On 4 June 2010, Armacell Australia Pty Ltd gave its employees a Notice of Representational Rights and a memorandum advising the employees that the company wished to enter into an enterprise agreement. (See pp. 159-160 in the appeal book).
 - All employees received a copy of the proposed agreement and an explanatory document on 8 June 2010. (See PN11 of the transcript on p. 25).
 - Between 8 June and 23 June 2010 meetings were held to explain the terms of the proposed agreement to the employees.
 - The employees approved the agreement on 28 June 2010 and the agreement was made that day.
 - On 5 July 2010, an application for approval of the agreement was filed with FWA.
17. On 16 August 2010, Commissioner Ryan conducted a hearing to deal with various concerns which he had about the agreement. (See Transcript – pp. 23-75 of the appeal book).
18. On 13 September 2010, the company made undertakings to address the issues of concern raised by Commissioner Ryan. (See pp. 131-139 of the appeal book).

19. In response to further concerns expressed by Commissioner Ryan regarding the provisions of the agreement relating to the cashing in of annual leave and long service leave, on 18 September 2010 a written submission was filed on behalf of the company. (See pp. 118-130 of the appeal book).
20. On 28 October 2010, Commission Ryan handed down a decision ([2010] FWA 8283) refusing Armacell's application to approve the agreement.

Re. Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust
[2010] FWA 8314

21. In accordance with the statutory requirements, the following key events occurred:
 - On 3 June 2010, Direct Paper Supplies gave its employees a Notice of Representational Rights and a memorandum advising the employees that the company wished to enter into an enterprise agreement. (See pp.110-111 in the appeal book).
 - All employees received a copy of the proposed agreement and an explanatory document on 7 or 8 June 2010.
 - Between 8 June and 24 June 2010 meetings were held to explain the terms of the proposed agreement to the employees.
 - As a result of the discussions with employees, some amendments were made to the agreement. The final proposed enterprise agreement was provided to all employees on 17 June with a memorandum explaining the changes.
 - The employees approved the agreement on 25 June 2010 and the agreement was made that day.

- On 5 July 2010, an application for approval of the agreement was filed with FWA.
22. On 16 August 2010, Commissioner Ryan conducted a hearing to deal with various concerns which he had about the agreement (Transcript – pp. 12-40 of the appeal book).
 23. On 15 September 2010, the company made undertakings to address the issues of concern raised by Commissioner Ryan (pp. 88-92 of the appeal book).
 24. In response to further concerns expressed by Commissioner Ryan regarding the provisions of the agreement relating to the cashing in of annual leave and long service leave, on 17 September 2010 a written submission was filed on behalf of the company (pp. 77-87 of the appeal book).
 25. On 28 October 2010, Commission Ryan handed down a decision ([2010] FWA 8314) refusing Direct Paper Supplies' application to approve the agreement.

Re. Downer EDI Works Pty Ltd [2010] FWA 8333

26. In accordance with the statutory requirements, the following key events occurred:
 - On 23 September 2009, Downer EDI Works gave its employees a Notice of Representational Rights.
 - On 11 January 2010 all employees were provide with a copy of the proposed agreement.
 - On 11 January the company's Human Resources Adviser for NSW and the ACT met with each employee group to explain the terms of the proposed agreement to the employees.

- The employees approved the agreement on 19 January 2010 and the agreement was made that day.
 - On 29 January 2010, an application for approval of the agreement was filed with FWA.
27. On 17 June 2010, Commissioner Ryan wrote to the employer raising a number of concerns about the enterprise agreement and seeking clarification on various procedural aspects. (See pp. 53-58 of the appeal book).
28. On 20 July 2010, the company made written submissions and offered undertakings in response to the matters raised by Commissioner Ryan (pp. 59-84 of the appeal book) plus provided a Statutory Declaration from its NSW / ACT Human Resources Adviser. (See pp. 87-89 of the appeal book).
29. On 28 October 2010, Commission Ryan handed down a decision ([2010] FWA 8333) refusing Downer EDI Work's application to approve the agreement.
30. On 4 November 2010, Downer EDI Works wrote to Commissioner Ryan requesting that he defer issuing a decision in relation to an enterprise agreement applicable to the company's traffic management operations, until the appeal in relation to the Tamworth agreement has been determined. (See pp. 85-86).

A4. Modern award coverage of each employer

31. The modern awards which cover Armacell and the employees to whom the agreement would apply are:
- Manufacturing and Associated Industries and Occupations Award 2010 (“Manufacturing Modern Award”);
 - Clerks Private Sector Award 2010 (“Clerks Modern Award”); and
 - Commercial Sales Award 2010 (“Commercial Sales Modern Award”).
32. The following modern awards cover Direct Paper Supplies and the employees to whom the agreement would apply:
- Graphic Arts, Printing and Publishing Award 2010 (“Graphic Arts Modern Award”);
 - Clerks Modern Award;
 - Commercial Sales Modern Award; and
 - Road Transport and Distribution Award 2010 (“Road Transport Modern Award”).
33. The modern awards which cover Downer EDI Works and the employees to whom the agreement would apply are:
- Asphalt Industry Award 2010 (“Asphalt Modern Award”); and
 - Building and Construction General On-site Award 2010 (“Building and Construction Modern Award”).

A5. The nature of the appeal and establishing error

34. The appeals are to a Full Bench of FWA and, as such, involve an appeal by way of rehearing. See *McDonald's Australia Pty Ltd and SDAEA* [2010] FWAFB 4602 at paragraph [8]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) HCA 47 at paragraph [13]; and the Explanatory Memorandum to the *Fair Work Bill 2008* ("the Explanatory Memorandum") at paragraphs [2320] and [2321].
35. The powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker. See *McDonald's Australia* at paragraph [9], *Coal and Allied Operations* at paragraph [14], and the Explanatory Memorandum at paragraph [2322].
36. FWA must approve an enterprise agreement if the requirements set out in ss.186 and 187 are met. The term "*must be satisfied*", as used in paragraphs 186(2), (3), (4), (4A), (5) and (6) is an important one in determining how much discretion a particular FWA Member has in applying the statutory requirements.
37. The concept of a Tribunal Member being "*satisfied*" was the subject of a great deal of focus in *Coal and Allied Operations* and in the related decisions of the AIRC and Federal Court.
38. In their majority Judgment, Gleeson CJ, Gaudron and Hayne JJ stated:
- "18. *The Full Court was in error in thinking that the nature of an appeal under s 45 differs according to the nature of the decision under appeal. However, it was correct to hold that, in the case of a discretionary decision, the exercise by a Full Bench of the Commission of its powers under s 45(7) of the Act depends on the decision at first instance being attended by appealable error. That being so, it is necessary to consider the manner in which the Full Bench determined the appeal from Boulton J. Before doing so, however, it is convenient to say something as to the concept of "a discretionary decision".*

19. "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.
20. In the present case, the decision by Boulton J to terminate the bargaining period involved, in effect, two discretionary decisions. The first was as to his satisfaction or otherwise that the industrial action being pursued posed a threat for the purposes of s 170MW(3) of the Act. Although that question had to be determined by reference to the facts and circumstances attending the industrial action taken in support of claims with respect to a certified agreement, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision. And if Boulton J was satisfied that there was a threat for the purposes of s 170MW(3), that necessitated the making of a further discretionary decision as to whether the bargaining period should be terminated.
21. Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in House v The King in these terms:
- "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."
22. The members of the Full Bench considered whether there was error in the decision-making process in which Boulton J engaged. In this regard, it is sufficient to refer to the decision of the President, Giudice J. As already noted, his Honour's decision was adopted by Larkin C subject to one reservation. That reservation bore neither on the question whether the decision of Boulton J was attended with error nor on the final disposition of the appeal to the Full Bench. Rather, the stated reservation was concerned to endorse the view expressed by Munro J that because negotiating parties could not be put back in the same bargaining position even though an order setting aside a bargaining period was quashed, there was a need for principles stated by the Bench to be observed in future applications under s 170MW(1) of the Act. Accordingly, the decision of Giudice J is to be treated as the decision of the Full Bench.

23. *In the view taken by Giudice J, the decision of Boulton J to terminate the bargaining period involved error in a number of respects. For present purposes, it is sufficient to note only one, namely, that, "on the material and evidence ... no positive finding could properly be made pursuant to s 170MW(3)." Giudice J identified a number of respects in which the evidence was deficient.*
24. *So far as concerns the satisfaction of Boulton J that industrial action was threatening the welfare of a part of the population, namely, the population of the Hunter Valley, Giudice J noted that there was no evidence of "the size of its workforce, the number of contractors the mine regularly engaged compared with the number of contractors in the region, the number of businesses effected [sic] compared with the number of businesses within the region, or the size of the regional economy." And so far as concerns the finding that the action was threatening significant damage to the economy of Australia or an important part of it, Giudice J noted that there was "[n]o data concerning the size of the economy of the region ... the size of the economy of New South Wales or any other data which would have enabled relevant quantifications to be made".*
25. *Notwithstanding that Giudice J found error on the part of Boulton J, set out the statement of principle in House v The King and stated his conclusion in terms indicating observance of that principle, the Full Court held that that approach involved a constructive failure to exercise the appellate jurisdiction conferred by s 45 of the Act. In concluding that the Full Bench of the Commission constructively failed to exercise its jurisdiction, the Full Court described the approach taken by Giudice J in these terms:*
- " What his Honour appears, in substance, to have done was to characterise, correctly, the nature of the power conferred by s 170MW(1) and identify, correctly, the scope of the grounds upon which its exercise could be impugned but also to lay a foundation for some wider basis for reviewing the exercise of the power by Boulton J having regard to 'the supervisory function' of a Full Bench. That this was the approach of [Giudice J] is apparent from his later detailed analysis of Boulton J's reasons for decision and criticisms of it. It resulted in [Giudice J] misconceiving the nature of the power exercised by Boulton J and identifying errors that, in truth, were not errors but incidents of the proper exercise of [his] power[s]".*
26. *In thus characterising the approach taken by Giudice J, the Full Court analysed the decision of Boulton J and concluded that there were no errors in his Honour's approach. That being so, in the view of the Full Court, the Full Bench had proceeded on the basis that "an appeal against the exercise of a discretionary power of the type conferred by s 170MW(1), was by way of rehearing and that [it] was not only competent, but obliged, to determine for itself whether it is satisfied that a circumstance within the meaning of s 170MW(3)(a) existed at the time of Boulton J's decision". And that, in the view of the Full Court, "[was] not error within jurisdiction" but "a constructive failure to exercise the jurisdiction conferred ... by s 45".*
27. *For reasons that will be given shortly, it is not necessary to decide whether the Full Bench of the Commission was correct in ascribing error to Boulton J. However, it may conveniently be noted that the process by which the Full Court*

concluded that Giudice J "[identified] errors that, in truth, were not errors" is not beyond criticism. For example, the Full Court considered that Giudice J mistook the nature of the exercise involved in forming the satisfaction that industrial action is threatening "to cause significant damage to the Australian economy" for the purposes of s 170MW(3)(b) of the Act because he implied "that a measurable likely effect on the economy must be identified and then an assessment made whether that was 'threatening ... to cause significant damage'." In the view of the Full Court, Giudice J was in error because all that was necessary was that "there [be] some material that might reasonably found that satisfaction".

28. As already explained, the nature of the threat as to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment. A decision under that sub-section would involve appealable error if, for example, regard was had to irrelevant material, relevant material was disregarded, or, although there was some factual material by reference to which the decision-maker might be satisfied, he or she mistook those facts. If the Full Court intended to suggest otherwise, it was wrong. More to the point, however, is that a decision under s 170MW(3)(b) that industrial action is "threatening ... to cause significant damage to the Australian economy or an important part of it" (emphasis added) is not simply a matter of impression or value judgment. The presence of the words "significant" and "important" in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question. That was the point of the observations of Giudice J with respect to the absence of economic data.

(Emphasis added and endnotes not included)

39. In *Australian Industry Group v Pacific Brands Limited trading as Dunlop Foams* [2010] FWA 4337, the Full Bench said:

"The approach on appeal

[24] It is necessary to say something about the nature of an appeal pursuant to s.604 of the Fair Work Act. In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*, the High Court considered the nature of an appeal pursuant to s.45 of the Workplace Relations Act 1996. That section was in similar terms to s.604 of the Fair Work Act. The majority of the Court held that an appeal under s.45 is an appeal by way of rehearing and that an appeal bench can only exercise its powers if there is error on the part of the primary decision-maker. The reasoning applies equally to the exercise of powers by an appeal bench under s.604. Depending on the nature of the decision under appeal, questions may arise concerning the type of error amenable to correction on appeal. With that potential in mind we turn to the nature of the decision in this case.

[25] On an application for approval of an enterprise agreement, if Fair Work Australia is satisfied that each of the requirements specified in ss.186 and.187 are met, it must approve the agreement. Because the relevant requirements are not expressed in absolute terms, it may be argued that the sections confer a discretion on Fair Work Australia. If that is the case, the principles to be applied in an appeal from a discretionary decision set out in *House v R* are directly relevant.

[26] Although the relevant passage has been referred to many times, it is appropriate to set it out once again:

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.”

[27] It may be observed that the various matters specified in ss.186 and 187 of which Fair Work Australia must be satisfied are not all of the same nature. Some may involve the exercise of a broader discretion than others. Whether an agreement has been genuinely agreed to by the relevant employees, a question posed by ss.186(2)(a) and (b), is a matter on which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result.” By contrast, the question posed by s.186(4) is primarily a question of law. We have no doubt that if a decision involves an error of law a Full Bench may exercise powers under s.604 to correct the error. Accordingly, whether it is correct to describe a decision under s.186(4) as a discretionary one is of no real significance.

(Emphasis added)

40. Ai Group submits that a decision by an FWA Member to reject an enterprise agreement because the Member was not “satisfied” that the requirements of s.186(2), (3), (4), (4A), (5) and/or (6) have been met, can be overturned on appeal if the Member has made an error of the type identified in *House v The King* (1936) 55 CLR 488, namely:

- acted upon a wrong principle;
- been guided by irrelevant factors;
- mistaken the facts; or
- failed to take some material consideration into account.

41. Ai Group also submits that, as identified by the Full Bench in *Australian Industry Group v Dunlop Foams*, a number of the matters specified in ss.187 and 187 are primarily questions of law, notwithstanding the fact that the relevant sections are drafted in terms of a requirement for FWA to “be satisfied”.

42. It is Ai Group’s contention that in the three decisions which are the subject of these appeals, Commission Ryan made a number of errors of law, as well as other errors of the type referred to in *House v The King*.

PART B: MATTERS OF RELEVANCE TO ALL OF THE APPEALS

B1. Objects of the Act and FWA's role in agreement-making

43. The FW Act is designed to encourage employers and employees to enter into collective agreements.
44. Modern awards and the NES provide a safety net but the Act encourages employers and employees to implement wages and conditions which suit their particular needs.
45. Numerous sections of the FW Act support this goal including:
 - Sub-section (3)(f), which recognises the vital role of collective bargaining in achieving improvements in productivity and fairness;
 - Paragraph 171(a), which states that the collective bargaining framework is to be simple, flexible and fair to enable enterprise agreements to be reached that deliver productivity benefits; and
 - Paragraph 171(b), which emphasises the important role of FWA in facilitating agreements.
46. In the Second Reading Speech for the *Fair Work Bill 2008*, the then Minister for Employment and Workplace Relations, the Hon Julia Gillard MP said:

“The bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities. The bill delivers:

- *a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away;*
- *a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity;*
- *protections from unfair dismissal for all employees;*
- *protection and hope for a better future for the low paid;*
- *a balance between work and family life; and*
- *the right to be represented in the workplace.*

These rights are guaranteed by the legislation and overseen by a new industrial umpire, Fair Work Australia, that will operate with independence and balance.” (Emphasis added)

47. As explained in the Minister’s speech to Parliament, enterprise bargaining is at the heart of the FW Act.
48. FWA has a number of important roles in relation to enterprise bargaining. One such role is approving agreements.
49. The Tribunal’s role in approving enterprise agreements was explained in the majority decision of Hamberger SDP and McCarthy DP in *Newlands Coal v CFMEU* [2010] FWAFB 7401. The following extracts are relevant:

“THE ACT

[29] *The Act provides that if an application for the approval of an enterprise agreement is made under s.185, then FWA must be satisfied of various matters before approving the agreement.*

[30] *An enterprise agreement that is about permitted matters may be made in accordance with Part 2.4 of the Act. The guide to Part 2.4 of the Act describes an enterprise agreement as an agreement made at the enterprise level and provides terms and conditions for those employees to whom it applies.*

[31] *An enterprise agreement is made when a majority of employees who cast a valid vote approve the agreement. A valid vote is a vote by persons that the employer requests to approve the agreement. Those persons must be persons employed at the time who will be covered by the agreement.*

[32] *If an application is lodged that meets these requirements, then FWA has a valid application before it. If an application is lodged that does not meet these requirements, then the tribunal does not have a valid application before it.*

[33] *FWA does not have a general discretion under the Act to determine whether an enterprise agreement should be approved. Rather, s.186 imposes an obligation on the tribunal to approve an agreement if a valid application for approval of the agreement is made under s.185 and the requirements of ss.186 and 187 are met.*

[34] *Broadly, the directions of s.187 involve examining the steps followed in the making of the agreement and the lodging of the application. Section 186 broadly involves the content of the agreement. Essentially, the role is one of examining whether the procedures followed leading up to the agreement being made were in accordance with what the Act requires and whether the content of the agreement satisfies certain conditions that the Act imposes.*

[35] *There is also a requirement for FWA to consider whether the agreement contains unlawful matters. What is an unlawful matter is defined by s.194. Additionally, and despite the requirements of s.186, Fair Work Australia may refuse to approve an agreement if a term of the agreement would mean compliance with that term would involve a breach of a Commonwealth law (s.192). There is no general role for the Tribunal to examine the validity of provisions in the agreement.*

[36] *The tribunal has no general nor specific power to rectify matters in the agreement if the terms of the agreement do not meet the requirements of the Act. The tribunal can accept undertakings but those undertakings can only be accepted if they are regarding concerns over the meeting of the requirements of s.186 and s.187.*

[37] *In summary, the role of FWA is to decide on whether the prescribed rules for conduct and procedures have been followed in the making of the agreement and if an agreement is made did the parties agree to things which an agreement can be about and are the terms agreed sufficient to satisfy the tests set out in the Act.”*

50. Consistent with FWA's role, as described above, we submit that Commissioner Ryan needed to recognise that it is the parties at the enterprise level who are best-placed to decide what enterprise agreement terms suit their needs. The role of FWA Members is to ensure that any agreement approved complies with the FW Act, not to make broad value judgements about what they themselves regard as fair or appropriate.
51. Parliament has decided upon the statutory requirements for enterprise agreements. Commissioner Ryan was required to apply those requirements. The requirements are designed to ensure fairness and consistency. Employers, employees and their representatives need FWA Members to take a consistent approach when considering applications which have been made to approve agreements. If an inconsistent approach is taken by different FWA Members, it becomes impossible for employers, employees and their representatives to understand and apply the statutory requirements for agreement-making.
52. Enterprise agreement-making is very worthwhile, but it is also often time-consuming, disruptive and expensive. It is unfair for employers, employees and their representatives to be subjected to the cost and disruption associated with the rejection of their enterprise agreement by an FWA Member, if the agreement meets the requirements of the FW Act.
53. As will be developed in the sections which follow, Commissioner Ryan erred in the three decisions. He made errors of law, he acted upon wrong principles, he was guided by irrelevant factors, and he failed to take material considerations into account.

54. Commissioner Ryan in some respects also did not meet the requirements under s.577 of the Act whereby FWA must perform its functions and exercise its powers in a manner that *“is quick, informal and avoids unnecessary technicalities”*.
55. Paragraph [768] of the Explanatory Memorandum states that *“It is intended that FWA will usually act speedily and informally to approve agreements with most agreements being approved on the papers within 7 days”*. The Downer EDI Works agreement was made on 19 January 2010 and lodged on 29 January. The decision of Commissioner Ryan to reject the agreement was not handed down until 28 October 2010.

B2. The BOOT does not apply to s.55(2) terms or other NES terms

56. As set out above, ss.186 and 187 of the FW Act identify the mandatory requirements which must be satisfied for an enterprise agreement to be approved by FWA. In reference to the requirements relating to the safety net, section 186(2) provides:

“Requirements relating to the safety net etc.

- (2) FWA must be satisfied that:
 - (a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and
 - (b) if the agreement is a multi-enterprise agreement:
 - (i) the agreement has been genuinely agreed to by each employer covered by the agreement; and
 - (ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and
 - (c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and
 - (d) the agreement passes the better off overall test.

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

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

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

57. It can be seen from s.186(2) that the requirement for FWA to be satisfied that the terms of the agreement do not contravene s.55 is separate to the requirement for FWA to be satisfied that the agreement passes the Better Off Overall Test (BOOT).

58. Section 186(2) does not define the manner in which FWA should be satisfied that an enterprise agreement passes the BOOT. The meaning to be derived from the phrase *“better off overall”* is found in s.193 as follows:

Subdivision C—Better off overall test

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 FWA 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.

FWA 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, FWA 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 FWA 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 FWA was made under section 185.

FWA 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, FWA 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.

(Emphasis Added)

59. The emphasised passage from section 193(1) makes clear that the benchmark for assessing whether an employee is better off overall is an assessment measured against the terms of the relevant modern award.
60. This assertion is supported by the terms of the Explanatory Memorandum where in relation to section 193 it states:

“Clause 193 – Passing the better off overall test

816 *This clause provides when an enterprise agreement passes the better off overall test.*

817 *Subclause 193(1) provides that an agreement that is not a greenfields agreement passes the better off overall if FWA is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better offer overall if they were employed under the agreement than under the relevant modern award.”*

(Emphasis Added)

61. The regulatory analysis in the Explanatory Memorandum also aligns with this assertion, where in relation to the explanation of the process for approval of agreements it provides:

“r.159 FWA will apply the BOOT to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award. The use of modern awards as reference instruments will further simplify the

approval process in comparison to the current, complex minimum standards arrangements.

... ..

r.192 *The BOOT will simplify agreement processing. Enterprise agreements will be assessed ‘on the papers’ against modern awards, providing for a simpler comparison compared to the current assessment against the old award system. The BOOT will also be a point in time assessment.”*

(Emphasis Added)

62. Furthermore, the Minister’s Second Reading Speech to Parliament regarding the *Fair Work Bill* makes it clear that the BOOT involves a comparison between the terms of the agreement, and that the NES requirements are separate:

“Approval of Agreements

The bill provides that Fair Work Australia must not approve an agreement that includes terms that are inconsistent with unfair dismissal, right of entry, National Employment Standards and the general protection provisions of the act. Fair Work Australia must also be satisfied that:

- *the employer and a valid majority of the employees to whom the agreement will apply genuinely agree to the agreement; and*
- *each employee would be better off overall under the agreement in comparison to the relevant modern award.*

(Emphasis added)

63. Neither the terms of the FW Act or the Explanatory Memorandum make any reference to the BOOT having any application to the NES.

64. Different statutory requirements apply to agreement content which relates to the NES, as opposed to agreement content that is relevant for the purposes of the BOOT. Whilst Commissioner Ryan did not refuse to approve the agreements for reasons of their compliance with the NES, as stated above compliance with s.55 is an essential element for approval.
65. The test which applies to content in agreements which relates to matters in the NES is very different to the test which applies to content which is subject to the BOOT. A term-by-term test applies to content which is subject to s.55, whereas a global test applies to content which is subject to the BOOT.
66. With regard to agreement content relating to the NES, different statutory requirements apply depending upon whether the term is of the kind specified in s.55(2) or the kind specified in ss.55(4) or (5).
67. Section 55(2) states:

“A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.”

68. An example of a s.55(2) term is a term about the cashing out of paid annual leave, as provided for in s.93 (Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave).
69. We submit that the use of the term “may” in s.55(2) is intended to reflect the fact that the inclusion of these terms is an option for bargaining parties to include in their enterprise agreement if they wish to. If the use of the word “may” was intended to give FWA any discretion to decide whether bargaining parties should be permitted to include such terms, then logically this role for

FWA would be identified in s.55(2) or in the specific sections which relate to the terms referred to in s.55(2) (including s.93).

70. The General Protections, in particular clause 344, are designed to ensure that the inclusion of any of the terms referred to in s.55(2) are genuinely agreed. Clause 344 relevantly provides:

“Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

...

- (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2);*

...”

71. The Explanatory Memorandum confirms the important role of clause 344 in relation to the terms referred to in s.55(2) of the Act, as follows:

“254. The general protections set out in Part 3-1 of the Bill, and in particular clause 344 which prohibits the exertion of undue influence and undue pressure, apply when an employer and employee enter into an averaging arrangement under a term included in a modern award or enterprise agreement. This is designed to ensure that averaging arrangements are genuinely consensual.

72. Subsection 55(3) states that the *“National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection(2)”*.

73. Subsection 55(4) goes on to deal with some different kinds of terms to those referred to in s.55(2); that is, terms that are ancillary or incidental to the operation of an entitlement under the NES, and terms that supplement the NES. The use of the phrase *“A modern award or enterprise agreement may*

also include the following kinds of terms” clearly distinguishes the terms referred to in s.55(2) from those in ss.55(4) and (5). The exclusion of s.55(2) terms from the provisions set out in s.55(6) and (7) also emphasises that s.55(2) terms operate differently under the Act.

74. The requirement that s.55(4) terms not be “detrimental to an employee in any respect, when compared to the National Employment Standards” does not apply to s.55(2) terms. This test is necessary with s.55(4) terms because the nature of such terms is not specified. In contrast, s.55(2) terms are expressly identified in the Act and the relevant conditions and requirements are set out. Also, as explained above, s.344 in the General Protections expressly applies to s.55(2) terms.
75. None of the relevant modern awards contain provisions dealing with the cashing out of annual leave.
76. The cashing out of leave terms in the three enterprise agreements are not relevant for the purposes of the BOOT. They are s.55(2) terms. Commissioner Ryan erred in applying the BOOT to the s.55(2) terms in the three enterprise agreements.
77. Commissioner Ryan also erred in not applying the correct test when assessing an agreement which contains one or more s.55(2) terms. The correct test (as specified in s.186(2)(c) of the Act) is to decide whether the relevant term/s contravene s.55 of the Act.
78. In *Armacell Australia Pty Ltd* [2010] FWA 8283 (“*Armacell*”), at paragraphs [32] and [39], the Commissioner states that the BOOT applies to any provision in an enterprise agreement which provides for the cashing out of annual leave and that the BOOT applies to the whole of the statutory minimum conditions of employment. These conclusions are not correct and led the Commissioner to make an error of law.

79. In *Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust trading as Direct Paper Supplies* [2010] FWA 8314 ("*Direct Paper Supplies*"), at paragraphs [10] and [11], the Commissioner adopted paragraphs [9] to [49] in *Armacell*. This is an error of law.
80. In *Downer EDI Works Pty Ltd* [2010] FWA 8333 ("*Downer EDI Works*"), at paragraph [12], the Commissioner adopted the approach which he took in *Armacell* in applying the BOOT. This is an error of law.

B3. The BOOT is a global test

81. The language of section 193(1) makes it plain that the “*better off overall test*” requires an ‘overall’ assessment of the conditions prescribed by the enterprise agreement measured against the terms the relevant modern award. It is not a line-by-line test.
82. We submit that whilst the language is slightly modified the essential elements of the BOOT are equivalent to the ‘no disadvantage test’ under the former *Workplace Relations Act 1996*. Such an assessment is supported by the decision of Deputy President Bartel in *Top End Consulting Pty Ltd: re Top End Consulting Enterprise Agreement 2010* [2010] FWA 6442 (“*Top End Consulting*”) where the Deputy President stated:

“[26] The Better Off Overall Test is in slightly different terms to the no-disadvantage test in that the comparative assessment to be undertaken is not described by reference to the terms and conditions specified in an agreement and the reference instrument(s), but by reference to whether the employee would be better off overall under the agreement than the reference instrument(s). Notwithstanding this change in the wording, I am satisfied that the proper approach to the Better Off Overall Test also requires that reference be made to the terms and conditions of the relevant instruments, for the following reasons. Part 3 of the Form F17 Employer Declaration deals with comparison data and seeks information on the terms and conditions of the agreement and of the relevant reference instruments. The explanatory note at the commencement of Part 3 is as follows:

“[FWA must apply the better off overall test to the agreement by reference to relevant instrument(s): see s. 193 of the Fair Work Act 2009 and item 18 in Schedule 7 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009. ...]”

[27] There is nothing in s. 193 to suggest that the Better Off Overall Test is to be assessed by matters extraneous to the terms and conditions of the relevant instruments. The test still requires that the status of the employees as better off

overall , or otherwise, is to be assessed on the basis of the application of each instrument to the employee and not the intentions of the parties as to working arrangements which may flow from those terms.

[28] In addition, the assessment of the Better Off Overall Test is to be undertaken at a particular point in time, being the “test time”. The test time is the time at which the application for approval of the agreement is made to Fair Work Australia. This reinforces that it is a comparison between the terms and conditions of employment that is to be assessed, rather than the practices and working arrangements that may flow from those terms, since the agreement cannot commence until after approval by FWA.

[29] I have therefore concluded that the reasoning in Bupa should be adopted in assessing the Better Off Overall Test.

[30] The assessment as to whether an agreement passes the Better Off Overall Test is a global one. ...”

(Emphasis added)

83. This characterisation of the BOOT and its analogy with the former ‘no disadvantage test’ has also been identified in the recent decision of Commissioner Simpson in *Hilton Hotels of Australia Pty Ltd T/A Hilton Brisbane re Hilton Brisbane Enterprise Agreement 2010* [2010] FWAA 5384, where the Commissioner held that the BOOT “could be viewed similarly to the no disadvantage test when considering the natural meaning of the word ‘overall”.
84. In his decision Commissioner Simpson referred to the Full Bench decision of *Bupa Care Services Pty Ltd v P & A Securities Services as trustee of the D’Agostino Family Trust T/as Michel’s Patisserie Murwillumbah and others* [2010] FWAFB 2762 (“Bupa Care”), whereby the Full Bench “discussed the nature of the no disadvantage test and that the test is a global, rather than a line by line test.”

85. Commissioner Ryan appears to have acknowledged in passing the need to take a global approach to the BOOT insofar as he concedes that when applying the BOOT the agreement must be assessed “*in that real global sense*” (see PN233 on page 54 of the Armacell appeal book). However, Commissioner Ryan took a contrary approach by looking line-by-line at the terms of each agreement, in particular at what he assessed as various disadvantages, and then requiring undertakings to remedy these perceived deficiencies.
86. We submit that the correct approach to applying the BOOT is, firstly to make a global assessment of the enterprise agreement against the modern award(s), secondly to determine whether the agreement passes the BOOT, and thirdly to invite the employer to make undertakings to enable the agreement to pass the BOOT. The approach adopted by Commissioner Ryan was entirely contrary to this. The Commissioner assessed individual clauses of each agreement against the corresponding award provision. Where an agreement provision was found, in the Commissioner’s view, to be less advantageous to the employees than the corresponding provision in the relevant modern award/s the Commissioner directed or asked the employer to provide an undertaking to remedy the perceived deficiency.
87. We contend that this approach is a miscarriage of the statutory test and is not reflective of a global approach but instead perceives the BOOT as requiring an employee to be better off against each modern award condition. Such an approach is clearly erroneous.
88. In applying this approach there are, in our view, strong similarities between the decisions of Commissioner Ryan and the decision of Commissioner McKenna in *McDonald’s Australia Pty Limited on behalf of Operators of McDonald’s Outlets re: McDonald’s Australia Enterprise Agreement 2009* [2010] FWA 1347 where the Commissioner refused to approve an enterprise agreement for reasons including failure to pass the No Disadvantage Test.

89. The matter was referred to a Full Bench of FWA and in upholding the appeal, ([2010] FWA FB 4602), the Full Bench noted:

"[50] We consider that the Commissioner's conclusion in this regard is unsustainable. The changes regarding minimum engagement periods should have been considered as a whole. For junior employees, the additional income that is likely to arise for each engagement is significant. On the other hand, the voluntary attendance at crew meetings, even if it involves a reduction in entitlements, is far outweighed by the more beneficial entitlements. Any balanced consideration of these provisions would determine that the Agreement contains advantages to employees in this regard.

[51] The Commissioner used her conclusion on this point as a factor leading to her conclusion that the Agreement represents an emphatic diminution in overall terms and conditions. Because of the errors in the examples we have given, which are only examples of the matters raised before us, we believe that the Commissioner erred.

[52] We agree that these are fundamental errors. It is not necessary to consider all of the other alleged errors in order to determine whether to allow the appeal. In our view the conclusion on no-disadvantage is attended by errors of approach and in its underpinning reasoning. We will determine whether the Agreement passes the no-disadvantage test on the material before us.

[55] We have considered the comparative material which explains the relevant advantages and disadvantages to employees and have concluded that the Agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the Agreement under reference instruments applying to the employees."

(Emphasis Added)

90. We submit that the Commissioner failed to consider the above award benefits contained within each agreement and the manner in which these benefits influence the operation of the BOOT.

91. We contend that, in assessing the three agreements which were before the Tribunal, Commissioner Ryan made an error of approach. The Commissioner failed to apprehend the essential character of the BOOT and accordingly mistakenly applied the test to the terms of the agreements.

92. The large number of undertakings that each of the three companies was required to give to satisfy the Commissioner's concerns, together with the exchanges recorded on transcript in the Armacell and Direct Paper Supplies proceedings, plus the letter which the Commissioner sent to Downer EDI Works on 17 June 2010, confirms the error of approach.

B4. Consideration of irrelevant matters when applying the BOOT

93. As argued above, the BOOT involves a comparison of the terms of the agreement with the terms of the relevant modern award. However, Commissioner Ryan took a contrary approach by relying on irrelevant and extraneous material in his assessment of the BOOT. The Commissioner, in taking this approach, failed to validly exercise the power conferred on him by sections 186 and 193 of the FW Act.
94. In determining whether the Armacell agreement passed the BOOT, Commissioner Ryan erred by taking into account the following:
- The history of annual leave in Australia (Decision – paragraphs [9] to [19]);
 - The history of annual leave usage and cashing out at Armacell under previous enterprise agreements with different annual leave provisions to those which were in the new agreement (Transcript PN260 – PN265, Decision – Paragraph [52] – [59]); and
 - The terms of the Explanatory Memorandum for the WorkChoices Bill in relation to an illustrative example for the cashing out of annual leave (Decision – Paragraph [22] – [25]).
95. In determining whether the Direct Paper Supplies agreement passed the BOOT, Commissioner Ryan erred in his application of the BOOT by considering the following:
- The history of annual leave in Australia (Decision – paragraphs [10] and [11]);

- The history of annual leave usage at Direct Paper Supplies (Transcript PN155, Decision – Paragraph [14] – [17] and [25]); and
- The terms of the Explanatory Memorandum for the WorkChoices Bill in relation to an illustrative example for the cashing out of annual leave (Decision – Paragraphs [10] and [11]).

96. In determining whether the Downer EDI Works agreement passed the BOOT, Commissioner Ryan erred in his application of the BOOT by considering the following:

- The history of annual leave in Australia (Decision – paragraph [12]); and
- The terms of the Explanatory Memorandum for the WorkChoices Bill in relation to an illustrative example for the cashing out of annual leave (Decision – Paragraph [12]).

97. The FW Act makes it clear that the relevant modern award is the only factor to be considered in determining whether an enterprise agreement passes the BOOT.

98. In *Re. MSA Security Officers Certified Agreement 2003* PR937654, a Full Bench of the AIRC considered the jurisdiction of the Commission in applying the no disadvantage test:

“[101] The no-disadvantage test requires an analysis of the terms and conditions of the Award as against the Agreement. Any grounds for non-satisfaction arising from this assessment might be addressed by relevant undertakings “in relation to the operation of the agreement.”⁶¹”

[103] In this respect, in our view, Polites SDP misdirected himself concerning the nature and purposes of the no-disadvantage test. Further, it is our view this led to him

taking into account irrelevant considerations which led to his jurisdiction miscarrying. The submissions concerning the capacity of employers to “fiddle” rosters were irrelevant to the no-disadvantage test both generally and particularly because of the parallel effects of the terms of the Award and the Agreement for the establishment under each instrument of the obligation to pay the night shift penalty amounts prescribed respectively. The subject of “fiddling rosters” can be described as the rostering practices of employers under the terms of the Award. Employer rostering practices which comply with the requirements of the Award are irrelevant to the no-disadvantage test prescribed by the Act.

[104] Section 170XA refers to an “overall reduction in the terms and conditions of employment” under “(a) relevant awards or designated awards”. The application of the no-disadvantage test does not include an analysis of the rostering practices of employers bound by relevant or designated awards in accordance with the terms of such awards. The only relevant matter for the purposes of the no-disadvantage test was the difference in the penalty rates concerned. That is a 15% night shift penalty under the Award and a 10% night shift penalty under the Agreement.

[105] To the extent that SDP Polites directed himself to the rostering practices mentioned he made an error of a jurisdictional nature, a constructive error such that his conclusion about the terms of the Award and the Agreement in this respect for the purposes of the no-disadvantage test was never properly formed.”

(Emphasis added)

99. *Re. MSA Security Officers* is authority for the proposition that employer practices are irrelevant to the no-disadvantage test in the previous legislation and irrelevant to the BOOT under the FW Act.
100. Furthermore, in *Top End Consulting* [2010] FWA 6442, Deputy President Bartel held that:

“[27] There is nothing in s.193 to suggest that the Better Off Overall Test is to be assessed by matters extraneous to the terms and conditions of the relevant instruments.”

“[28] ... the assessment of the Better Off Overall Test is to be undertaken at a particular point in time, being the “test time”. The test time is the time at which the application for approval of the agreement is made to Fair Work Australia. This reinforces that it is a comparison between the terms and conditions of employment that is to be assessed, rather than the practices and working arrangements that may flow from those terms, since the agreement cannot commence until after approval by FWA.” (Emphasis added)

101. In relation to the three agreements, Commissioner Ryan placed great weight on what could conceivably happen under the terms of the agreement. Such an approach underpinned his numerous directions and requests for undertakings to be given about particular clauses in each agreement. For example, in relation to the Direct Paper Supplies agreement, at paragraph PN31 of the transcript (page 16 of the appeal book) the Commissioner said:

“The difficulty with looking at past practice doesn’t necessarily give me any indication as to what might happen, what’s intended to happen or what’s possible to happen under the terms of the agreement. I need to be focussing on what is possible. To the extent that undertakings cut back on the possibilities and set the parameters, then it’s the parameters that are set which I will use then to determine whether or not the agreement passes the BOOT.”

102. Here, Commissioner Ryan incorrectly assessed the BOOT by considering the future effect of the agreement as opposed to assessing the BOOT at the test time specified under subsection 193(1) of the FW Act, with reference to the relevant modern award/s.
103. We submit that the approach adopted by the Commissioner represents an error of law and misapplication of the correct statutory tests in applying the BOOT in accordance with s193.

104. In the case of *House v The King* (1936) 55 CLR 488, the High Court held a decision maker's determination is reviewable where, in the making of his or her determination, he or she considers extraneous or irrelevant matters.

"... If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. ..."

(Emphasis added)

B5. Cashing out of annual leave as a general proposition

105. In determining that the terms of each agreement failed to satisfy the BOOT Commissioner Ryan used as his starting point the proposition that the cashing out of annual leave as a general proposition was detrimental to employees. Such an assessment is clear from the following extract from *Armacell* which was adopted in *Direct Paper Supplies* (at paragraph [11] and reflected in comments made in *Downer EDI Works* (at paragraph [13]):

“[48] The effect, in my view, is that the cashing out of annual leave as a general proposition operates to the significant disadvantage of employees. What the cashing out clause in this agreement permits is very different from the example that was given in the Explanatory Memorandum to the Work Choices legislation which identified that there can be circumstances where employees with large amounts of accrued leave planning to take a holiday use a portion of their accrual to fund a holiday and in doing so that would promote relaxation, renewal, reinvigoration of the employee to enable them to continue on with their working life.” (Emphasis Added)

106. We submit that this conclusion was not reasonably open to Commissioner Ryan.
107. The operation of cashing out provisions which comply with the statutory safeguards are, in the context of the broader legislative framework from which they are derived, beneficial to employees and do not operate to their detriment. A cashing out term can only be included in an enterprise agreement if the employees vote to approve the agreement and if an individual employee genuinely agrees to cash out his or her annual leave. Only annual leave in excess of four weeks accrued leave can be cashed out and the General Protections (particularly s.344) operate to ensure genuine consent. In this context, an annual leave cashing out term in an agreement, which is genuinely supported by the employees, provides a tangible and important benefit to those employees.

108. In reference to the operation of the provisions within the NES which provide for modern awards and enterprise agreements to include cashing out provisions, the Explanatory Memorandum states:

“378. Subclauses 93(1) and 93(2) permit a modern award or enterprise agreement to include terms for the cashing out of paid annual leave. In recognition of the importance of employees taking leave for the purposes of rest and recreation, the cashing out terms in an award or agreement must require that:

- the employee retain a minimum balance of four week’s accrued annual leave after the cash out;*
- each cashing out arrangement be a separate agreement in writing between the employer and the employee; and*
- the employee receive at least the full amount that would be payable so the paid annual leave cannot be cashed out at a lower rate than the employee would have received had the employee taken the leave.*

379. The effect of cashing out paid annual leave is that the payment the employee receives for cashing out paid annual leave is in addition to the payment that the employee would be entitled to receive for working during the period covered by the cash out.”

(Emphasis Added)

109. We submit that the emphasised passage of the Explanatory Memorandum clearly reveals the nature of the benefit which an employee derives should they choose to exercise an option to cash out annual leave. The notion that receipt of cash in lieu of a portion of an employee’s annual leave can operate beneficially is also evident from an analysis of the genesis of such provisions in federal workplace relations legislation.

110. In *Armacell*, at paragraphs [22] to [31], Commissioner Ryan discusses the cashing out of annual leave provisions which were introduced into the *Workplace Relations Act 1996* by the WorkChoices amendments.
111. The Australian Fair Pay and Conditions Standard (“AFPC Standard”) introduced by the WorkChoices amendments to the *Workplace Relations Act 1996* introduced statutory federal regulation of annual leave and the ability, with certain safeguards, for an employee to elect to cash out a portion of their accrued leave. We submit that this flexibility was incorporated in the legislation so as to provide beneficial flexibility to employees. The Explanatory Memorandum to the *Workplace Relations Amendment (WorkChoices) Bill 2005* (“the WorkChoices EM”) supports this assessment through the Illustrative Example included (on p. 110) with reference to annual leave cashing out provisions:

“Illustrative Example

Antonia is employed by Steve at Belissimo Bread Bakery Pty Ltd. The collective agreement permits the cashing out of the equivalent of two weeks of annual leave every 12 months. Antonia would like to cash out two weeks of her leave so she can prepare for her upcoming trip to Italy which she has been diligently saving for. Antonia knows she will have enough annual leave credits for when she takes the trip, so she would like some extra cash now to buy some new suitcases.

Antonia provides her request to Steve in writing as required by the collective agreement. Steve agrees. Her next pay includes payment for the additional two weeks on top of her ordinary salary”

(Emphasis Added)

112. Additionally, the regulation impact statement contained within the WorkChoices EM under the heading “*Costs and benefits to employees*” regarding introduction of the AFPC Standard specifically identifies the introduction of annual leave cashing out provisions stating:

“In addition, under the NDT all conditions of employment are tradeable, whereas under the Standard these conditions will be enshrined in legislation and in general cannot be traded off as part of an agreement. An exception to this rule is the entitlement to four weeks annual leave, of which, two weeks may be cashed out per year, solely at an employee’s request.” (Emphasis Added)

113. Given the clear beneficial intent revealed in the above extracts behind the introduction of annual leave cashing out provisions in the *Workplace Relations Act 1996*, the retention of provisions which are largely analogous within the FW Act (with additional safeguards for employees) must be seen in a similar light.
114. The Commissioner placed substantial weight on developments in the 1930-40s (see paragraphs [9] to [19] in *Armacell*), developments under the WorkChoices legislation, and a 1997 decision of Commissioner Whelan relating to very different legislation which did not contain cashing-out of annual leave provisions (see paragraph [40] in *Armacell*), to conclude that “*cashing out of annual leave as a general proposition operates to the substantial disadvantage of employees*” (refer to paragraph [48] in *Armacell*).
115. Such a conclusion is not consistent with the legislative schema under which Commissioner Ryan was required to discharge his functions. Commissioner Ryan’s findings and approach can be accurately described as acting upon the wrong principle, being guided by irrelevant factors, mistaking the facts and failing to take material considerations in account. (Refer to *House v The King*)

B6. Award modernisation developments relating to cashing out of annual leave

116. If Commissioner Ryan's conclusion that the cashing out of annual leave disadvantages employees is permitted to stand, the freedom of employers, employees and their representatives to bargain over a matter which is expressly permitted in the FW Act will be undermined.
117. Further, if the three decisions of the Commissioner are allowed to stand, the intentions which the Tribunal expressed during the award modernisation process, will be frustrated.
118. Sections 92 and 93 of the FW Act permit modern awards and enterprise agreements to include terms relating to the cashing out of annual leave, subject to certain conditions.
119. During the award modernisation process, Ai Group and other employer representatives pressed for the inclusion of a model clause permitting the cashing out of annual leave in modern awards. While the Tribunal decided not to include a model cashing out of leave clause in modern awards, the Full Bench emphasised that cashing out of annual leave is an appropriate matter for bargaining. In its Award Modernisation Decision of 19 December 2008 ([2008] AIRC 1000), the Full Bench stated:

"[99] A number of employer interests sought provisions for cashing out of annual leave by agreement. Such arrangements are apparently included in many Australian Workplace Agreements (AWAs) and workplace agreements. Should cashing out of annual leave become widespread it would undermine the purpose of annual leave and give rise to questions about the amount of annual leave to be prescribed. We think some caution is appropriate when dealing with this issue at the safety net level. We do not intend to adopt a model provision. Consistent with our approach to annual leave provisions

generally we shall be influenced mainly by prevailing industry standards, and the views of the parties, in addressing this issue.

[100] It has also been suggested that if awards do not provide for cashing out of annual leave it will not be legally permissible to make workplace agreements which provide for cashing out. In our opinion cashing out arrangements are an appropriate matter for bargaining. If, when the legislative regime is settled, it is apparent that workplace agreements cannot provide for cashing out of annual leave unless there is a relevant provision in a modern award it may be necessary to revisit the question."

(Emphasis added)

120. The above extract supports the view that the cashing out of annual leave, within the limits of section 92 and 93 of the FW Act, does not disadvantage employees. We submit that the Full Bench would not have expressly supported cashing out of annual leave being dealt with during the bargaining process if it regarded the concept as one which disadvantages employees as a general proposition.
121. Furthermore, the Full Bench's approach to the cashing out of annual leave supports the argument that the parties to an enterprise agreement should be free to determine the terms and conditions of employment at their workplace within the confines of the FW Act. Commissioner Ryan's failure to recognise this is contrary to the intention and purpose of the FW Act.

PART C: ADDITIONAL MATTERS OF RELEVANCE TO THE APPEAL BY ARMACELL AUSTRALIA

C1. Dispute settlement

122. The proposition that, once error has been established within the decision below, an appeal under s.604 of the FW Act proceeds by way of rehearing is detailed within section A5 of this submission. We submit that should the Full Bench exercise its appellate jurisdiction and commence to rehear the application, the issue of undertakings provided at first instance can also be reviewed and it is open for an employer subject to the appeal to offer new undertakings or modify or resile from undertakings made in the original hearing of the matter.
123. On 13 September 2010, Armacell provided to Commissioner Ryan 16 undertakings in response to issues identified by the Commissioner during proceedings on 16 August 2010.
124. Armacell in respect of these appeal proceedings is willing to advance all undertakings provided (see pp. 131-135 of the appeal book) except Undertaking 3 – Dispute Settlement.
125. In relation to Undertaking 3 – Dispute Settlement, Commissioner Ryan’s statements and approach during the hearing on 16 August 2010 led to the company feeling compelled to give this undertaking.
126. In identifying that the absence of access to arbitration within Clause 6 of the Armacell agreement created questions regarding the BOOT Commissioner Ryan stated:

“PN85

THE COMMISSIONER: If you go to the agreement itself the dispute resolution clause I note only provides for the involvement of Fair Work Australia up to the stage of mediation. It doesn't include conciliation, it doesn't include arbitration. Given that the award clause at least has conciliation as an automatic process and the possibility of arbitration on a consent basis this is a boot test issue of whether employees better off overall under the terms of this agreement than they would be if they stayed under the terms of the award. At least the award guarantees a process higher than mediation because it goes to conciliation, and the award at least provides the very real prospect of arbitration, even if it is consent arbitration.

PN86

My tendency in these matters is that the further you depart from the award and lock up all terms of conditions of employment in your agreement, and where these agreements have been drafted not by necessarily legal experts and I have got no idea who actually drafted this agreement. They are not necessarily drafted on the basis of legal expertise then it seems to me that there is a need to have access to arbitration as of right rather than being vetoed by either party as a mechanism of being able to sort out disputes that arise under the terms of an agreement where the terms of the agreement are so significantly different from the terms of the award that it will replace. In any event it is a boot issue and I raise it as such.

(Emphasis Added)

127. We submit that the Commissioner ignored the legislative intent, confirmed by a Full Bench of FWA in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464 (“*Woolworths*”), that bargaining parties are free to include dispute resolution provisions within agreements which do not include access to arbitration.
128. Additionally, the Commissioner erroneously characterised the absence of dispute resolution through arbitration as a disadvantage to employees and misinterpreted the terms of clause 6 of the agreement in concluding that there was an absence of access to arbitration by consent. It was these conclusions

that caused the company to provide an undertaking which, but for the Commissioner's errors, it would not have felt compelled to provide.

The *Woolworth's* decision

129. In *Woolworth's* a Full Bench of FWA considered the requirements of section s.186(6) of the FW Act to determine whether access to arbitration was a prerequisite to approval of an enterprise agreement. Ai Group was granted leave to intervene in the proceedings and made detailed submissions.
130. In arriving at a conclusion that arbitration was not a prerequisite to the approval of an agreement the Full Bench analysed a number of important elements of the statutory scheme which informed the reading of s.186(6) stating:

[17]... Section 595 sets out Fair Work Australia's power to deal with disputes generally and ss.738 and 739 set out Fair Work Australia's powers to deal with dispute resolution terms in, relevantly, enterprise agreements.

[18] Section 595 of the Fair Work Act reads:

"595 FWA's power to deal with disputes

(1) FWA may deal with a dispute only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.

(2) FWA may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:

(a) by mediation or conciliation;

(b) by making a recommendation or expressing an opinion.

(3) FWA may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if FWA is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to FWA arbitrating a bargaining dispute (see subsection 240(4)).

(4) In dealing with a dispute, FWA may exercise any powers it has under this Subdivision.

Example: FWA could direct a person to attend a conference under section 592.

(5) To avoid doubt, FWA must not exercise any of the powers referred to in subsection (2) or (3) in relation to a matter before FWA except as authorised by this section.”

[19] The section is concerned with the powers the tribunal may exercise in dealing with disputes. Section 595(1) provides that Fair Work Australia may only deal with a dispute if it is expressly authorised to do so. Section 595(2) provides that the tribunal may deal with a dispute by mediation, conciliation, making a recommendation or expressing an opinion subject to the qualification that it may not deal with the dispute by arbitration. Section 595(3) permits the tribunal to arbitrate if it is expressly authorised to do so. Section 595(4) operates to confer procedural powers. It seems to us clear enough from the text of these provisions that the legislature intended that Fair Work Australia can deploy voluntary methods of dispute resolution without the consent of the parties to the dispute, provided the dispute is one with which it is authorised to deal, but can only arbitrate if it has been specifically empowered to do so.

[20] Sections 738 and 739 are also directly relevant...

[21] Section 738 specifies the type of dispute resolution terms to which the division applies. Section 738(b) makes it clear that the division applies in relation to a dispute resolution procedure of the kind described in s.186(6). Section 739(1) provides that the section applies if a term in s.738 requires or allows Fair Work Australia to deal with a dispute. Section 739(2) is not relevant. Section 739(3) provides that a dispute resolution term can limit the powers available to Fair Work Australia to settle a dispute. Section 739(4) sets out the circumstances in which Fair Work Australia may arbitrate a dispute, providing that if the parties have agreed that Fair Work Australia may arbitrate, Fair Work Australia may do so. It appears to us that s.739(4) strongly implies the negative stipulation that if the parties have not agreed, Fair Work Australia has no power to arbitrate.

[22] The operation of these provisions in relation to dispute resolution terms in enterprise agreements is specifically referred to in the Explanatory Memorandum to the Fair Work Bill 2008. We refer first to paragraph 2290. That paragraph deals with the relationship between s.595 and s.739. It reads:

“2290. Subclause 595(4) ensures that, when FWA is dealing with any of these disputes, FWA can exercise any of its powers under Subdivision B. For example, FWA could direct a person to attend a conference under clause 592. However, there is an exception for Part 6-2 disputes. The procedure in the modern award, enterprise agreement, workplace determination or contract of employment can limit the powers that FWA can exercise in dealing with the dispute (see subclause 739(3)).”

[23] This paragraph repeats the direct indication in s.739(3) that a dispute resolution term might limit the powers otherwise available to Fair Work Australia. It appears from the reference to s.595(4) that the paragraph is primarily referring to the procedural powers conferred by Subdivision B rather than the power to arbitrate Relevantly, however, the concluding sentence of the paragraph supports the implication in the words of s.739(4) that in the absence of agreement Fair Work Australia has no power to arbitrate. If the legislature has specifically provided for limits upon the use of arbitral power pursuant to dispute resolution procedures, it is difficult to see how the conclusion could be sustained that “arbitration is a prerequisite to the approval of an agreement.” (Emphasis Added)

131. We submit that the Full Bench decision in *Woolworth's* makes it clear that the terms of the FW Act do not require the powers of arbitration to be conferred on FWA to satisfy the requirements of s.186(6). We also contend that the structure of s.186, and the discreet manner in which the requirements for a dispute resolution term are dealt with by s.186(6) indicates a clear legislative intention that the requirements within s.186(6)(a) and s.186(6)(b) are those against which a dispute resolution procedure is to be assessed – not the BOOT.

132. This assessment is supported by the terms of the Explanatory Memorandum which states:

“2729. In order to be approved by FWA, an enterprise agreement must contain a procedure for the settlement of disputes about matters arising under the agreement and in relation to the NES (See subclause 186(6)). Such a term:

- Must provide for FWA or another person who is independent of the parties to deal with a dispute; and*
- Must provide for representation of employees in the dispute settlement process.”*

133. The Explanatory Memorandum makes no reference to the notion of the terms of the dispute resolution procedure also needing to pass the BOOT. We contend that this omission is significant.

134. We submit that consideration of clause 6 of the Armacell agreement in the context of the BOOT by Commissioner Ryan was a misapplication of the relevant tests contained within the FW Act in reference to dispute resolution procedures within enterprise agreements. Such an approach was in error. Furthermore, the Commissioner's reasoning originated with a premise that was not reasonably open to him and inconsistent with the intent of the Act,

namely that absence of arbitration for dispute resolution operates to the disadvantage of employees.

Arbitration and disadvantage

135. In PN85 and PN86 of the transcript, as reproduced above, the Commissioner asserts that the absence of access to arbitration within clause 6 of the Armacell agreement created questions regarding the BOOT.
136. Not only does Ai Group reject the line by line analysis which is inherent in the Commissioner's reasoning but moreover, we reject the pejorative characterisation of mediation in lieu of arbitrated dispute resolution. Whilst the Commissioner seemingly identifies access to arbitration as the best outcome, we would submit that there is nothing in the FW Act that supports such a value judgement and indeed, the structure of the FW Act, which does not require dispute resolution through arbitration runs contrary to this presumption.
137. There are many circumstances where resolution of a dispute through arbitration would not operate to the benefit of an employee, the most obvious of these being where an issue in dispute is not resolved in favour of the employee. A further example may be where as a result of access to arbitration the parties to a dispute do not actively participate in mediation of the dispute, believing that they will achieve success through arbitration. This reality confirms that the characterisation of arbitration as a benefit to employees was not one which was reasonably open to the Commissioner and accordingly one which was in error.

Misinterpretation of terms of the Agreement

138. In addition to incorrectly applying the BOOT to clause 6 rather than simply assessing the clause for compliance with s.186(6), Commissioner Ryan made another error. He incorrectly characterised clause 6 of the Armacell agreement as less beneficial than the terms of the modern award.

139. The basis for this submission is that contrary to the assessment made by the Commissioner, clause 6 of the Armacell agreement, much like the terms of the modern award, does allow for conciliation and arbitration where the parties in dispute have consented to such an arrangement. We contend that this entitlement is clear from the terms of clause 6.3 of the agreement which states:

“6.3 If the matter cannot be resolved in discussion between the parties as part of the steps set out in Clause 6.1 and 6.2, the matter may be referred to an agreed private independent mediator for mediation. The agreed private independent mediator shall have only those powers to mediate or such other powers as expressly agreed by the parties to the dispute.”

(Emphasis Added)

140. We submit, that in much the same way as consent arbitration is available under the dispute resolution provisions of the modern award, so too would the emphasised passage of clause 6.3 allow for the independent mediator to exercise powers of arbitration should the parties to the dispute expressly agree.

C2. Cashing out of long service leave

141. The *Armacell Australia Enterprise Agreement 2010* contains long service leave provisions in clause 37. The provisions deal with:

- 37.1 – Accrued long service leave
- 37.2 – Proportionate long service leave on termination of employment
- 37.3 – Amount of long service leave
- 37.4 – Continuous service
- 37.5 – Cashing in long service leave

142. Subclause 37.5 is worded as follows:

“Cashing in long service leave

An Employee who has been employed by Armacell for no less than 7 years may apply in writing to cash in their long service leave entitlement (or part thereof) in exchange for payment. Armacell may, in its discretion, grant this application.”

143. It can be seen that subclause 37.5 is drafted to provide an option to any individual employee who chooses to apply to the company to cash out some long service leave. It does not give the company any right to require an employee to cash out his or her long service leave.

144. The company’s previous collective workplace agreement (which applied only to its manufacturing employees in Victoria) included long service leave provisions but did not include a cashing out provision.

145. Subsection 27(1)(c) of the FW Act provides that s.26 (Act excludes State or Territory industrial laws) does not apply to a law of a State or Territory insofar as the law deals with any non-excluded matters.

146. Subsection 27(2) identifies the following non-excluded matter:

“(g) long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave.”

147. Section 29 allows an enterprise agreement to prevail over a State or Territory law, but not as far as is covered by s.27(1)(b), (c) or (d).

148. The situation at Armacell is complicated because some of the employees are *“entitled under Division 9 of Part 2-2 to long service leave”* and some are not. Also, the employees covered by the agreement are employed in Victoria, New South Wales, Queensland and Western Australia.

149. The company’s manufacturing employees are covered by the Manufacturing Modern Award, and previously many of them were covered under the *Metal, Engineering and Associated Industries Award 1998* (Metals Award 1998). The provisions of Part IV – Long Service Leave of the Metals Award 1998 are *“Applicable award-derived long service leave terms”*, as provided for in s.113 of the FW Act. Such terms apply as terms of the NES to the employees of Armacell who were covered by Part IV of the Metals Award 1998 prior to the Manufacturing Modern Award coming into operation.

150. The relevant State long service leave legislation applies to the other employees of Armacell.

151. In paragraph [65] of *Armacell*, Commissioner Ryan states that:

“In considering whether or not the agreement passes the BOOT I have, in relation to long service leave, considered the fact that if the employees are employed under the terms of the modern award and the NES then cashing out of long service leave would not be permitted, due to the operation of the relevant State legislation.”

152. The finding of Commissioner Ryan, as expressed in paragraph [65], is an error of law. The BOOT involves a comparison between the terms of the enterprise agreement and the terms of the relevant modern award/s. The BOOT does not involve a comparison between the terms of the enterprise agreement and the terms of State laws, nor does it involve a comparison with the terms of the NES. Also, cashing out is permitted under the State legislation in QLD and Western Australia, where some of the company's employees are located.
153. For the manufacturing employees of Armacell, who were previously covered under Part IV of the Metals Award 1998, the BOOT has no relevance to the determination of whether Clause 37 meets the requirements of the Act. The relevant tests and other requirements are found in s.113, s.55(4), (5), (6) and (7), together with s.186(2)(c). Ai Group contends that Clause 37 meets these requirements because:
- The accrual rate is the same as the rate in the Metals Award 1998;
 - Payment for proportionate leave on termination applies after 7 years of service, rather than 10 years under Part IV of the Metals Award 1998; and
 - Whilst subclause 6.3 of Part IV states that *“Such leave shall be granted and taken and, except as expressly permitted by this Part of the award, payment in lieu thereof shall not be made or accepted”*, subclause 37.5 supplements the NES and *“is not detrimental to an employee in any respect, when compared to the National Employment Standards”*. (See s.55(4). Here, it is relevant that:
 - Subclause 37.5 has been included in the agreement with the support of the employees;
 - Subclause 37.5 is only able to be accessed if an individual employee applies to cash out some long service leave;
 - Subclause 37.5 allows an employee to cash out leave after 7 years of service whereas under Part IV of the Metals Award 1998 an

employee cannot take leave until 15 years of service and is only entitled to payment for proportionate long service leave on termination after 10 years of service; and

- The effect of cashing out paid long leave is that the payment the employee receives for cashing out leave is in addition to the payment that the employee would be entitled to receive for working during the period covered by the cash out (see paragraph 379 of the Explanatory Memorandum where this benefit is outlined regarding cashing out of annual leave).

154. With regard to the other employees of Armacell, to whom State long service leave laws apply, again Commissioner Ryan made an error of law in applying the BOOT. The BOOT involves a comparison with the relevant modern award/s, not State laws.
155. The coverage of the agreement is drafted to apply to all employees of the company regardless of what State or Territory the employees are located in. The employees covered by the agreement are employed in Victoria, New South Wales, Queensland and Western Australia.
156. The State long service leave Acts in South Australia, Western Australia, Queensland and Tasmania permit cashing out by agreement between an employer and an employee (some conditions apply).
157. In modern times community attitudes and practices relating to long service leave and the cashing out of it have changed. Nowadays a large proportion of employees do not take their long service leave but rather cash it out on termination (or earlier if they have an ability to do so).
158. The history and rationale for long service leave in Australia was set out in a January 2004 decision of Senior Deputy President Lacy (*Re. Office of the Chief Electrical Inspector Enterprise Agreement 2003*, PR942414), as follows:

“[8] It appears from my own research that the entitlement to long service leave generally originated in the colonial service administration of the colonies of South Australia and Victoria. It gained statutory recognition throughout the several States of Australia commencing with New South Wales in 1951. Since that time there has been little change to the structure of long service leave. It is generally regarded now as an opportunity for an employee to take some respite from a long period of service in the one business”.

159. In deciding that a proposed certified agreement under which employees were able to access additional annual leave in lieu of accruing any long service leave, passed the No Disadvantage Test, the Senior Deputy President went on to state:

“[11] It seems that the rationale for a period of respite from a long period of service is no longer a valid assumption. The world today is a much smaller place than it was in colonial times. People are inclined to be far more mobile now than then. In addition to the fading of the tyranny of distance there has been significant change in the pattern of work that raises some questions about the relevance of long service leave as a benefit in employment.”

160. The cashing out of long service leave as a general proposition cannot legitimately be regarded as detrimental to employees. If it was, then four States would not have provisions in their long service leave Acts permitting cashing out by agreement between an employer and an employee.
161. Substantial changes were made to the *Fair Work Bill 2008* during the Parliamentary process, in relation to the interaction between State and Territory laws and, more particularly, in relation to long service leave provisions in agreements. Therefore, it would not be safe to rely upon the Explanatory Memorandum for the original Bill.

162. The Supplementary Explanatory Memorandum includes the following section which explains the provisions of the FW Act which are of relevance to long service leave:

“LONG SERVICE LEAVE

Item 1 – Clause 12

Item 7 – Clause 113

37. Item 7 amends the NES entitlement to long service leave. The amendment set out in this item replaces clause 113 in the Bill. Subclauses 113(1)-(3) are to the same effect as existing clause 113.

38. An employee is entitled to long service leave under clause 113 in accordance with applicable award-derived long service leave terms (subclause 113(1)).

39. This clause preserves the effect of long service leave terms in pre-modernised awards (i.e., awards as they stood immediately before commencement of the NES).

40. The legislative note after this subclause explains that the Bill does not exclude State and Territory laws dealing with long service leave, except in relation to employees entitled to long service leave under the NES.

41. To determine whether there are applicable award-derived long service leave terms, it is necessary to consider the award that would have applied to the employee’s current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)). (This test applies to existing employees and employees that start employment after commencement of the NES.)

42. When making the assessment under paragraph 113(3)(a), the effect of the types of agreements, and other instruments, referred to in subclause 113(2) on the award-derived entitlement is ignored.

43. The fact that an employee’s award-derived entitlement does not apply because of the operation of subclause 113(2) does not mean that the employee does not have an award-derived NES entitlement (and such an employee could not, for example, become covered by an agreement-derived NES entitlement under subclause 113(4)).

44. The legislative note after subclause 113(2) explains that where an agreement or instrument referred to in this subclause ceases to apply, the employee will be entitled to long service leave in accordance with any applicable award-derived long service leave terms.

45. Subclauses 113(4) to (6) are new provisions, and have been included to establish a process under which agreement-derived long service leave terms may be preserved as an employee’s long service leave NES entitlement in certain limited circumstances.

46. The effect of clauses 27 and 29 of the Bill, in relation to long service leave, is that new enterprise agreements must comply with legislation in any State or Territory in which the agreement applies. This is a new requirement. Currently, long service leave can be dealt with in agreements in a way that is inconsistent with such legislation and

the terms in the agreement prevail over the State/Territory legislation. The standards that have applied in State/Territory legislation have varied over the years.

47. Some employers that operate in more than one State or Territory have developed collective agreement-based long service leave arrangements, which have been able to operate nationally.

48. The new provisions inserted by this item are intended to allow existing collective agreement-based long service leave arrangements to form an employee's NES entitlement if:

- the terms are included in a collective agreement that applies beyond a single State or Territory;
- there are no award-derived long service leave terms for the employee (meaning that State or Territory long service leave legislation would otherwise apply); and
- FWA has made an order that it is satisfied that the long service leave arrangements in the agreement are, considered overall, no less beneficial to employees than the long service leave entitlements that would otherwise apply under State or Territory law – this is intended to be a global (rather than line by line) test.

49. This mechanism is only available where such a scheme exists in a collective agreement before commencement of the NES. This approach reflects the transitional nature of the NES long service leave arrangements, which will apply pending development of a national long service leave scheme.

50. Item 1 makes a consequential amendment to insert a definition of applicable agreement-derived long service leave terms that directs readers to subclause 113(5).

Item 7 – New clause 113A

51. Item 7 also inserts a new clause 113A. Clause 113A provides for the situation where an employee is covered by a collective or individual agreement, or other specified instrument (such as a workplace determination), on commencement of the NES that expressly excludes the employee's long service leave entitlements.

52. Long service leave entitlements are based on an employee's length of service – they do not allow for 'discounting' of any periods during which an agreement or other instrument excludes the entitlement. In effect, this means that where an agreement or other specified instrument that excluded long service leave ceases to operate, the terms of the scheme then begin to apply (e.g., under State or Territory legislation) and operate to provide a full entitlement to the employee, despite the purported period of exclusion.

53. Clause 113A provides a one-off opportunity for an enterprise agreement made after commencement of the NES (referred to in clause 113A as the 'replacement agreement') to recognise in an ongoing way the effect of the exclusion of long service leave in an agreement, or other specified instrument, that applied on commencement (referred to as the 'first instrument'). It does this by allowing a replacement agreement to provide that some or all of the period of service during which the first agreement applied does not count as service for the purposes of determining long service leave entitlements.

54. In relation to this provision:

- the ability for a replacement agreement to discount periods of service does not apply where long service leave entitlements may have been excluded by implication – the exclusion must be in express terms;
- the period of service that may be discounted in an enterprise agreement may not exceed the period during which the first instrument applied (i.e., the effect of previous agreements cannot be included);
- the replacement agreement must commence immediately after the first instrument for the exclusion to have effect.

55. Where an enterprise agreement includes such a provision, the period of service is taken not to count, and never to count, for the purpose of determining long service leave entitlements under either the NES or under State or Territory law, despite clauses 27 and 29 (which provide for the continued effect of State and Territory long service leave legislation). However, a period of service that is taken never to count for calculation of long service leave entitlements can be reinstated by subsequent agreement. This agreement need not be by way of an enterprise agreement but could occur, for example, through a contract of employment.

The following summarises the operation of the long service leave (LSL) NES and the rules for how LSL is dealt with in enterprise agreements after commencement of the NES.

The LSL NES preserves pre-commencement award-derived LSL entitlements.

The LSL NES also establishes a process under which employees' agreement-derived LSL entitlements may be preserved as their NES entitlements. (The intention is to enable parties to preserve genuine and fair agreement-based national LSL schemes.)

If an employee does not have an award or agreement-derived entitlement, then applicable State and Territory LSL legislation applies. (This is the effect of the coverage provisions in the Bill – see clauses 27 and 29.)

LSL terms in agreements that are in operation at the time the NES commences are not disturbed by the commencement of the NES and will continue to apply until the agreement is terminated or replaced.

Where an enterprise agreement is made after commencement of the NES:

- the agreement cannot exclude the LSL NES, but may supplement the NES subject to the requirement that such terms not cause any detriment to an employee (see clause 55 of the Bill);
- for employees without an award or agreement-derived entitlement, enterprise agreements will operate subject to State/Territory LSL laws (see clauses 27 and 29 of the Bill).

An enterprise agreement may include terms that 'discount' the period of service that is counted for the purposes of determining long service leave entitlements in limited circumstances, namely:

- where the enterprise agreement replaces an agreement (or other specified instrument) that applied when the NES came into operation;
- where the agreement being replaced expressly excluded long service leave.

163. With regard to Clause 37, the approach which Commissioner Ryan was required to take was to:
- Decide whether the requirements of ss.186 and 187 had been met, particularly s.186(2)(c) which requires that the terms of the agreement not contravene s.55; and
 - Decide whether it is appropriate to refuse to approve the agreement because the agreement would result in a person committing an offence under a law of the **Commonwealth** (refer to s.192).
164. The fact that the agreement may result in the employer committing an offence under some but not all State long service leave laws which apply to its employees (eg. the *Long Service Leave Act 1992 (Vic)*) is a fact that the company would logically be very conscious of in deciding whether or not to agree to an application made by an employee under subclause 37.5. Logically the employer would decline any request which resulted in a breach of a law, eg. a request from a Victorian employee who is not covered by “applicable award derived long service leave terms”.
165. Subclause 37.5 is not unlawful in itself. Also, the clause would not lead to unlawful behaviour so long as the company ensures that in respect of those employees who are covered under State long service leave laws which prohibit cashing out, requests to cash out are declined, as is the company’s right under subclause 37.5.
166. Subclause 37.5 is clearly not an “unlawful term”, as defined in s.194.
167. Commissioner Ryan erred concluding that subclause 37.5 led to the agreement not passing the BOOT. If the Commissioner had highlighted the offence which the employer would commit if it permitted cashing out for

employees covered by those State long service leave laws which prohibit cashing out, the company no doubt would have been open to giving an undertaking that subclause 37.5 would not apply to those employees who are not covered by “applicable award-derived long service leave terms” or State laws which permit cashing out.

168. It is well established that an appeal to a Full Bench of FWA proceeds by way of rehearing. Accordingly, if the Full Bench finds that Commissioner Ryan has erred in any respects in *Armacell* it is open to the Full Bench to invite the company to give an appropriate undertaking to address any concerns which the Full Bench may have regarding subclause 37.5 of the agreement. We submit that an undertaking which altered the effect of subclause 37.5, as discussed above, would not constitute a substantial change to the agreement (refer to s.190(3)(b)).

PART D: ADDITIONAL MATTERS OF RELEVANCE TO THE APPEAL BY DIRECT PAPER SUPPLIES

D1. Dispute settlement

169. The proposition, that once error has been established within the decision below, an appeal under s.604 of the FW Act proceeds by way of rehearing is detailed within section A4 of this submission. We submit that should the Full Bench exercise its appellate jurisdiction and commence to rehear the application, the issue of undertakings provided at first instance can also be reviewed and it is open for an employer subject to the appeal to offer new undertakings or modify or resile from undertakings made in the original hearing of the matter.
170. On 15 September 2010, Direct Paper Supplies provided to Commissioner Ryan 15 undertakings in response to issues identified by the Commissioner during proceedings on 16 August 2010.
171. Direct Paper Supplies in respect of these appeal proceedings is willing to advance all undertakings provided (see pp. 88-92 of the appeal book) except Undertaking 3 – Dispute Settlement.
172. In relation to Undertaking 3 – Dispute Settlement, Commissioner Ryan’s statements and approach during the hearing on 16 August 2010 led to the company feeling compelled to give this undertaking. (Refer to Transcript PN3 and PN6, where the Commissioner confirmed the views which he had expressed at the Armacell hearing earlier in the day).
173. In relation to Direct Paper Supplies, we adopt the submissions made in section C1 above regarding Armacell.

D2. Cashing out of long service leave

174. The *Direct Paper Supplies Enterprise Agreement 2010* contains long service leave provisions in clause 32. The provisions are very similar to those in the Armacell enterprise agreement.
175. Subclause 32.5 in the Direct Paper Supplies agreement is identical to subclause 37.5 in the Armacell agreement with the exception of the references to the name of the company.
176. The company has not had an enterprise agreement in the past.
177. The employees covered by the Direct Paper Supplies agreement are employed in Victoria and Queensland. It appears that there are no “applicable award-derived long service leave terms” because the long service leave provisions in the *Graphic Arts – General – Interim Award 2000* had limited application and did not apply to Direct Paper Supplies.
178. The relevant State long service leave legislation applies to the employees of Direct Paper Supplies.
179. In paragraph [22] of *Direct Paper Supplies*, Commissioner Ryan repeated paragraph [65] of *Armacell*. As stated in section C2 above, the finding of Commissioner Ryan, as expressed in this paragraph, is an error of law. The BOOT involves a comparison between the terms of the enterprise agreement and the terms of the relevant modern award/s. The BOOT does not involve a comparison between the terms of the enterprise agreement and the terms of State laws, nor does it involve a comparison with the terms of the NES.

180. Also, cashing out is permitted under the State legislation in QLD (where the company operates in addition to Victoria) and the company has plans to expand its operation into other States. The State long service leave Acts in Western Australia and Tasmania permit cashing out.
181. The coverage of the agreement is drafted to apply to all employees of the company regardless of what State or Territory the employees are located in.
182. For the reasons set out in detail in section C2 above regarding *Armacell*, the approach which Commissioner Ryan was required to take with regard to clause 32 in the Direct Paper Supplies decision was to:
- Decide whether the requirements of ss.186 and 187 had been met, particularly s.186(2)(c) which requires that the terms of the agreement not contravene s.55;
 - Decide whether it is appropriate to refuse to approve the agreement because the agreement would result in a person committing an offence under a law of the **Commonwealth** (refer to s.192).
183. The fact that the agreement may result in the employer committing an offence under some but not all State long service leave laws which apply to its employees (eg. the *Long Service Leave Act 1992 (Vic)*) is a fact that the company would logically be very conscious of in deciding whether or not to agree to an application made by an employee under subclause 32.5. Logically the employer would decline any request which resulted in a breach of a law, eg. a request from a Victorian employee.

184. Subclause 32.5 is not unlawful in itself. Also, the clause would not lead to unlawful behaviour so long as the company ensures that in respect of those employees who are covered under State long service leave laws which prohibit cashing out, requests to cash out are declined, as is the company's right under subclause 32.5.
185. Subclause 32.5 is clearly not an "unlawful term", as defined in s.194.
186. Commissioner Ryan erred in concluding that subclause 32.5 led to the agreement not passing the BOOT. If the Commissioner had highlighted the offence which the employer would commit if it permitted cashing out for employees covered by those State long service leave laws which prohibit cashing out, the company no doubt would have been open to giving an undertaking that subclause 32.5 would not apply to those employees who are not covered by State laws which permit cashing out.
187. It is well established that an appeal to a Full Bench of FWA proceeds by way of rehearing. Accordingly, if the Full Bench finds that Commissioner Ryan has erred in any respects in *Direct Paper Supplies* it is open to the Full Bench to invite the company to give an appropriate undertaking to address any concerns which the Full Bench may have regarding subclause 32.5 of the agreement. We submit that an undertaking which altered the effect of subclause 32.5, as discussed above, would not constitute a substantial change to the agreement (refer to s.190(3)(b)).

PART E: ADDITIONAL MATTERS OF RELEVANCE TO THE APPEAL BY DOWNER EDI WORKS

188. The matters in Parts A and B of this submission are of direct relevance to the appeal by Downer EDI Works.
189. No further issues relating to the Decision of Commissioner Ryan in *Downer EDI Works* are raised in this Outline of Submission, but there may be some additional issues which we seek to raise at the hearing.