

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

**Agency - Fair Work Commission**

**Department of Employment Question No. EMSQ15-000349**

**Senator Lines provided in writing.**

#### **Question**

##### **FWC - Penalty rates**

How does the Fair Work Commission ascertain whether an employee is better off overall when penalty rates are traded away?

What are the considerations taken into place?

How many agreements have penalty rates in them?

How many agreements have traded penalty rates away for things such as a higher base pay?

#### **Answer**

*How does the Fair Work Commission ascertain whether an employee is better off overall when penalty rates are traded away? What are the considerations taken into place?*

Section 193 of the *Fair Work Act 2009* provides that an enterprise agreement that is not a greenfields agreement passes the better off overall test (BOOT) if the Fair Work Commission (the Commission) is satisfied that each award covered employee and each prospective award covered employee will be better off overall under the proposed enterprise agreement than if the relevant modern award applied.

Parties must ensure that the terms and conditions included in the proposed enterprise agreement satisfy the BOOT for each award covered employee or prospective employee in order for the agreement to be approved under section 186.

In *Solar Systems P/L* [2012] FWAFB 6397

([www.fwc.gov.au/documents/decisionssigned/html/2012fwafb6397.htm](http://www.fwc.gov.au/documents/decisionssigned/html/2012fwafb6397.htm)) the Full Bench made the following points with regard to the BOOT (paraphrased):

- The words in section 193 should be given their ordinary meaning (at Paragraph [11]);
- The test requires a 'global approach' to weighing up the terms in an agreement (at Paragraph [12]); and
- The test involves identifying the more beneficial entitlements under an agreement, such as higher wages, balancing those benefits against the perceived disadvantages and then making an overall assessment of where the scales fall (at Paragraph [13]).

The Commission applies this test in considering whether an employee is better off overall under an agreement. In the case of a reduction or removal of penalty rates in an agreement, the BOOT would be applied to see if benefits conferred by other terms in the agreement are able to balance this detriment.

*How many agreements have penalty rates in them? How many agreements have traded penalty rates away for things such as a higher base pay?*

The Department of Employment maintains the Workplace Agreement Database. It has advised that the Database does not have data on all agreements that contain penalty rates.

The Workplace Agreement Database does have data on the number of agreements approved from 1 January 2014 onwards which partially or completely roll their weekend penalty payments into a loaded wage rate.

594 agreements, accounting for 7.4 per cent of enterprise agreements approved between 1 January 2014 and 30 June 2015, have partially or completely rolled their weekend penalty payments into a loaded wage rate.