FAIR WORK COMMISSION

Matter No. AM2015/2

FAMILY FRIENDLY WORK ARRANGEMENTS

OBJECTIONS TO EVIDENCE AND OUTLINE OF SUBMISSIONS REGARDING THE EMPLOYER VACC SURVEYS BY THE AUSTRALIAN COUNCIL OF TRADE UNIONS

1. These objections and the accompanying submissions have been prepared in accordance with the direction made on 30 November 2017 that the parties exchange and confer regarding any objections to evidence by Friday 8 December 2017.

2. The parties have been unable to reach agreement on a number of objections, and accordingly, the ACTU provides notice to the Full Bench of the objections to three lay witness statements, and to the survey evidence sought to be tendered through Jeremy Lappin (of AIG) and Kevin Hoang (of VACC), and an outline of submissions concerning the admissibility of the surveys.[1]

3. The objections are:

Statement	Called by	Paragraph/part	Ground
Janet O'Brien	AIG	20	Irrelevant, opinion
Peter Ross	AIG	14, last sentence	Irrelevant, hearsay, opinion
Benjamin Norman	AIG	83	Irrelevant
		84	Hearsay, speculation, irrelevant
Jeremy Lappin	AIG, ACCI, the NFF	Whole statement	Not the author of the joint employer survey; tender of the survey would constitute a denial of procedural fairness to the ACTU and/or be unfair or unfairly prejudicial; survey has no probative value.
Kevin Hoang	VACC	Whole statement	The VACC survey has no probative value; survey is irrelevant.

[1] The ACTU will address the objections to lay evidence before those witnesses give evidence.

The employer surveys

4. By the reply submissions of the ACTU dated 27 November 2017, at the hearing before Gooley DP on 30 November 2017, and by letter dated 6 December 2017, the ACTU confirmed that it objects to the tender of the joint employer survey and the VACC survey (together, **the surveys**).

5. The Australian Industry Group (**AIG**) seeks to tender a survey described as the 'joint employer survey', and attached to the statement of Jeremy Lappin. The joint employer survey is described as a survey of members of and "various other employer associations",[2] and is the subject of extensive submissions by AIG.[3] Other employer parties including ACCI,[4] and the NFF[5] rely on the joint employer survey. The VACC seeks to tender a survey attached to the statement of Kevin Hoang of various motor trades organisations.

6. The employers' submit that the joint employer survey provides "an important and valuable insight into the considerations and issues that are pertinent to specific industries and occupations,"[6] and "a unique understanding of the manner in which [small] businesses deal with request for flexible working arrangements and the potential impact of the ACTU's claim".[7] Further, the joint employer survey "should be accepted as evidence of the experience of businesses in accommodating requests".[8] The survey results are described by the employer parties, variously, as constituting "significant probative value",[9] "statistical data" and "statistical results",[10] and the results are relied upon in support a number of key propositions that are central to the employer associations' objection to the ACTU's claim.[11] The VACC has not filed any submissions regarding the conclusions to be drawn from the VACC survey (or any other matter).

7. While the VACC proposes to call evidence from Mr Kevin Hoang, who was involved in drafting and co-ordinating the survey, AIG has declined to identify the person or persons who was responsible for designing and conducted the joint employer survey. Not only is this highly unorthodox, it prevents the ACTU from being able to test the reliability of the survey

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2 AIG submissions, [503].
3 AIG submissions, 178–270.
4 ACCI submissions, 51–63.
5 NFF submissions, [20], [23]–[26], [43].
6 AIG submissions, [515].
7 AIG submissions, [517].
8 ACCI submissions, [9.62].
9 AIG submissions, [511].
10 ACCI submissions, [9.55], [9.56].
11 See AIG submissions, [614]–[615]; ACCI submissions, [9.54]; NFF submissions, [20], [23]–[26], [43].

results through cross-examination, a position which is compounded by the substantial deficiencies in the evidence before the Commission about the survey methodology.

8. The ACTU objects to the receipt into evidence of the joint employer survey in this review. The primary basis of the objection is the employer parties' failure to identify crucial matters relevant to the design and conduct of the survey, and to call evidence establishing these matters. The ACTU contends that this failure should render the joint employer survey inadmissible, because:

   (a) the Commission has regularly described the principles and standards by which it will assess the probative value of a member survey of this nature. There is no information about the design and conduct of the survey that would indicate compliance with these principles and standards, meaning its probative value is low or nil; and

   (b) the ACTU is not able to test by cross-examination the reliability of the survey results, which are sought to be used against it by the employer parties. To allow the tender of the joint employer survey in such circumstances would constitute a denial of natural justice and procedural fairness to the ACTU.

9. The ACTU objects to the receipt into evidence of the VACC survey on the same ground as in (a) above.

The problems with the joint employer survey

10. In its submissions dated 27 November 2017, the ACTU identified a number of problems with the material before the Commission about the joint employer survey. These matters are:

   (a) The person or persons who conducted the survey are not identified. The AIG submissions state that AIG "joined with various other employer associations (many of whom are affiliated with ACCI) to conduct a survey of their respective members…".[12] The 'various other employer associations' are not identified.

   (b) The person or persons who designed the survey, including drafting the questions, and the reasons for including particular questions or forms of questions, is not identified. The AIG submissions simply state that the survey questions "were drafted by AIG and ACCI", but the individuals, and their qualifications, experience, and training, are not identified.[13]

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12 AIG submissions, [500].

13 AIG submissions, [507].

(c) Similarly, while reference is made to 'survey logic' in the AIG submissions, there is no evidence about what that expression means, whether it constitutes some or all of the survey methodology, or how it is relevant to this survey.[14]

(d) There is no evidence about who the survey was distributed to, and the basis for selecting the participants. The AIG submissions state that "the survey was sent by email to members of participating employer organisations on 3 August 2017", but as stated above, the participating employer associations are not identified.[15]

(e) Consequently, there is no evidence about the identity, number, or representativeness of the respondents, including (i) the identity of the 'participating employer organisations'; (ii) the number of members of the participating employer organisations; (iii) the qualifications for membership of the employer organisations (iv) if the survey was sent to all members or just a portion of the membership; and (v) the representativeness of the membership group or survey population compared with employers more broadly.

(f) The person or persons who drafted the text of the email sending the survey to participants is not identified. AIG submit that the text of the emails was "*carefully crafted by AIG and ACCI to ensure that its recipients properly understood the context and purpose of the survey without expressing a view about the merits of the ACTU's case*", but the 'careful crafters' are not identified.[16]

(g) There is no evidence of any quality control measures designed or applied to the collection of data, the analysis of responses, or any other relevant matter.

(h) No information is provided about the survey instrument other than that the software is called 'LimeSurvey' and it is "regularly utilised by AIG for many of the surveys it conducts".[17]

The problems with the VACC survey

11. Many of the problems with the joint employer survey afflict the VACC survey. In particular:

(a) There is no evidence about who the survey was distributed to, and the basis for selecting the participants. While Mr Hoang gives evidence that the VACC survey was

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14 AIG submissions, [508], [510];
15 AIG submissions, [505].
16 AIG submissions, [505].
17 AIG submissions, [503].

sent to 13,398 members, there is no evidence that this constitutes the total number of members of the Motor Trades Organisations.

(b) Consequently, there is no evidence about the identity or representativeness of the respondents, including (i) the number of members of the participating employer organisations; (ii) the qualifications for membership of the organisations (iii) if the survey was sent to all members or just a portion of the membership; and (iv) the representativeness of the membership group or survey population compared with employers more broadly.

(a) There is no evidence about the survey methodology applied to the design of the VACC survey.

(b) There is no evidence identifying or describing the survey instrument.

(c) There is no evidence of any quality control measures designed or applied to the collection of data, the analysis of responses, or any other relevant matter.

12. Further:

(a) Mr Hoang states that the was 'involved' in drafting and co-ordinating the VACC survey, but does not identify the other persons so involved.

(b) The relationship between the VACC survey and the joint employer survey is not explained.

(c) There are no submissions addressing the purpose for which the Commission is being asked to consider the VACC survey. Accordingly, the relevance of the VACC survey is unclear.

The relevant principles

Survey evidence in the Fair Work Commission

13. The Commission has regularly considered and ruled on the admissibility and weight of surveys, and in particular, of member surveys conducted by employer associations.

14. The Commission does not take an overly rigid or binary approach to the assessment of survey evidence, and has acknowledged that most survey evidence has methodological limitations.[18] However, that does not mean that survey evidence should not adhere to recognised and

[18] *Penalty Rates Decision* [2017] FWCFB 1001 (***Penalty Rates Decision***), [1097].

appropriate standards. The central issue for the Commission in assessing the reliability and probity of a particular survey will be "the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data".[19] This naturally requires an understanding of the methodology used to design and conduct the survey.

15. The principles which follow have been regularly applied by the Commission in conducting its mandatory regulatory functions (including the four yearly review):

(a) Surveys conducted by employer associations of their members will only be useful "where there is evidence of good survey practice and a respectable match between past predictions and actual outcomes. It is only in these circumstances that such surveys provide a reliable representation of the issues at hand."[20]

(b) Surveys of members of employer associations where there is limited or no information provided in relation to the survey methodology, response rates and results, or how the survey sample is constructed will be of limited or no assistance,[21] and cannot be regarded as providing anything more than "some indicative anecdotal data, rather than anything that can be said to be representative …".[22]

(c) Findings from surveys of member associations conducted by employer parties have been rejected where the survey respondents are "small in number, self-selected, and not representative of employers generally."[23]

(d) If the Commission is to be confident that the findings from member surveys are accurate and reliable, the "well-understood rules about the conduct of surveys… need to be followed".[24] These rules include:

i. The sample size or proportion sampled must be large enough;

ii. The sample for the survey must be selected on a random basis;

iii. If a membership list is used as the basis for a survey, then it is essential that those that respond are properly representative of the entire membership base;

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19 *Penalty Rates Decision* [526], [1097].
20 *Annual Wage Review 2015–2016* [2016] FWCFB 5000, [196].
21 *Penalty Rates Decision*, [364], [372], [1068]–[1069].
22 *Penalty Rates Decision*, [364].
23 *Annual Wage Review 2011–2012* [2012] FWAFB 5000, [202]–[203].
24 *Annual Wage Review 2012–2013* [2013] FWCFB 4000, [441].

iv. The answers of members should be checked against reliable data such as from the ABS, to ensure that members are representative of the employer population more broadly.[25]

(e) In order to evaluate the reliability of survey evidence, the Commission will look for an account of:

i. the nature of the survey population;

ii. the method of collecting responses;

iii. the response rate and total number;

iv. evidence that the respondents are a true random sample (or close enough) of the survey population;

v. testing of findings against comparable aggregates produced by the ABS or other known reliable sources; and

vi. the questions asked.[26]

(f) To the extent that member surveys by employer groups fail to address the concerns and requirements identified by the Commission, the survey material can only be viewed as a form of "anecdotal information", and the Commission "cannot be confident that the survey results provide a reliable representation of the issues at hand, including economic conditions."[27]

16. The principles articulated by the Commission over the years about the reliability, representativeness, and probative value of survey evidence, are consistent with the principles set out in the *Survey Evidence Practice Note* issued by the Federal Court of Australia (***Practice Note***), which prescribes the approach to be taken by parties wishing to adduce survey evidence in Federal Court proceedings. While the procedural requirements of the *Practice Note* are not applicable to proceedings in the Fair Work Commission, nevertheless the *Practice Note* is based on a number of general principles and propositions concerning good survey practice, many of which are directly consistent with the practice in this jurisdiction. These are:

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25 Ibid.

26 Ibid, [442].

27 *Annual Wage Review 2013–2014* [2014] FWCFB 5000, [226].

(a) Allowing a party to remedy problems arising out of poor design or execution of a survey at a late stage of the proceeding "may be unfairly prejudicial to the other party and/or unduly disrupt the proceeding."[28]

(b) "Any party seeking to adduce such evidence has a responsibility to take appropriate steps to ensure that the survey that is proposed to be conducted will be properly designed and executed and that the data obtained will be properly recorded and analysed." A party that fails to satisfy the Court that it has done these things may find the survey evidence is excluded or given little or no weight.[29]

(c) Lawyers should only be involved with survey design to the extent needed to ensure that relevant questions are directed to the relevant population. Similarly, lawyers should, wherever practicable, not participate in the survey administration or the data analysis.[30]

(d) Survey reports should provide an appropriate level of detail about the survey, including, relevantly:

i. a definition of the target population;

ii. a description of the sampled population;

iii. a description of the sample design;

iv. calculations and estimates of sampling error;

v. quality control measures; and

vi. details of any unforeseen problems encountered in the course of the survey work that might reasonably be expected to have an impact upon the quality or reliability of the data or results.

(e) Potential problems that should be considered, and if possible avoided by the initiating party include, relevantly:

i. use of biased or leading questions, preambles and/or excessive use of probing;

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28 Federal Court of Australia, *Survey Evidence Practice Note* (GPN-SURV), DATE (***Practice Note***), [2.1].

29 *Practice Note*, [2.2].

30 *Practice Note*, [4.5].

ii. use of questions open to different interpretations and/or poorly defined or ambiguous terms or concepts;

iii. use of a sample frame not sufficiently representative of the target population;

iv. use of an inadequate sample size;

v. excessive non-response and/or non-completion rates;

vi. inappropriate or poor quality data analysis; and

vii. lack of adequate quality controls (eg. failure to review data for evidence of problems with participants' understanding of questions and/or the reliability of recording / coding of responses).

Procedural fairness and the rules of evidence

17. The fact that the Commission is not bound by the rules of evidence does not mean that those rules are irrelevant.[31] Whilst the Commission is able to inform itself in such a manner as it considers appropriate[32] and is not bound by the rules of evidence,[33] it is well established that the rules of evidence "provide general guidance as to the manner in which the Commission chooses to inform itself".[34] This is because the rules of evidence represent, as explained by Evatt J in *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 288 at 256:

> …the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.

18. These principles have been frequently applied by the Commission.[35]

19. The rules act as an important guide in assisting the Commission to ensure that natural justice is afforded to the parties that appear before it. In certain circumstances, "fairness may require

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31 See, eg, *King v Freshmore (Vic) Pty Ltd*, Print S4213, 17 March 2000, [61]; *PDS Rural Products Ltd v Corthorn* (1998) 19 IR 153, 155.

32 FW Act s 590.

33 FW Act s 591.

34 *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354 at [50] per Ross VP, Duncan SDP and Bacon C; *AMIEU v Dardanup Butchering* (2011) 209 IR 1 at [28] per Lawler VP, Hamberger SDP and Gay C.

35 See, eg, *WA Meat Commission v Australasian Meat Industry Employees Union, Industrial Union of Workers WA Branch,* Matter No. 890 of 1993, 5 August 1993, WAIRC per Sharkey P, Coleman C and Gregor C, at page 7 per Sharkey P (citations omitted). The statement of Sharkey P was expressly agreed by the Full Bench in *Hail Creek*: [48], [50].

that evidence be excluded".[36] Considerations of fairness and justice are central to the Commission's performance of its functions and exercise of its powers.[37]

20. In considering whether fairness requires the exclusion of certain evidence, the Commission may be guided by the application of comparable evidentiary principles. The matters considered by the Courts when exercising the discretion to exclude or limit evidence under ss 135 and 136 of the *Evidence Act 1995* (Cth) and its equivalents, are particularly relevant. These principles are addressed in more detail below.

The surveys

21. The application of the principles set out at paragraphs 13 to 20 above to an assessment of the material before the Commission about the surveys demonstrates that both surveys are so lacking in fundamental information as to their design and conduct that no reliable evidence can be drawn from them for the purposes of the Commission's task.

22. In addition, the ACTU will suffer procedural unfairness and a denial of natural justice should the joint employer survey be admitted.

Procedural fairness and natural justice

23. The admission of the joint employer survey into evidence will deprive the ACTU of substantive procedural fairness. This would be highly prejudicial in light of the fact that the joint employer survey is the principal piece of evidence sought to be used by the employer parties against the merits of the ACTU proposal.

24. The ACTU is not able to test the reliability of the joint employer survey through cross-examination, because the person or persons responsible for designing and conducting the survey (referred to here as the authors) are not identified, and will not be called.

25. The inability of a party to test evidence by cross-examination may legitimately be 'unfair prejudice' within the meaning of s 135 of the *Evidence Act*, even where that evidence is otherwise admissible. In *Seven Network Ltd v News Limited (No 8)* [2005] FCA 1348 (***Seven Network***), Sackville J held that 'unfair prejudice' within the meaning of s 135–137 of the *Evidence Act* can include a procedural disadvantage, depending on the circumstances of the relevant case.[38]

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36 *4 Yearly Review of Modern Awards – Penalty Rates* [2016] FWCFB 965, [12].

37 Per s 577(a) of the FW Act.

38 At [20].

26. The comments of Sackville J in *Seven Network* followed his consideration of the obiter comments of McHugh J in *Papakosmas v R* (1999) 196 CLR 297. In that case, McHugh J suggested, without expressing a concluded view, that previous discretionary rulings by trial judges to exclude admissible hearsay evidence[39] because the opposing party could not cross-examine the maker of representation had perhaps been made by "learned judges… too much influenced by the common law attitude to hearsay evidence" without giving sufficient weight to the changes to the rules of evidence that made hearsay evidence admissible in certain circumstances.[40]

27. The balance of authority has distinguished the comments of McHugh J in *Papakosmas*. In *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 10)* [2013] FCA 322 (***Air New Zealand***), Perram J said in relation to s 135 and s 136 of the *Evidence Act*:

> [59] The expression "unfairly prejudicial" is not defined in the Act. Despite some obiter remarks of McHugh J to the contrary in *Papakosmas v R* (1999) 196 CLR 297 at 325 at [93] it has been accepted at an intermediate appellate level that unfair prejudice can include an inability to cross-examine: *Bakerland Pty Ltd v Colridge* [2002] NSWCA 30 at [55] per Giles JA (Heydon JA and Grove J agreeing). A series of first instance judgments in this court are to the same effect: see the authorities collected by Sackville J in Seven Network v News Ltd (2006) 224 ALR 317 at [20].
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> [60] On the other hand, a number of decisions have held that some circumspection should be exercised in judge-alone trials where the risk of the unfairness is more readily ameliorated: see, for eg, *Seven Network* at [21].

28. In *Air New Zealand*, Perram J was considering an application to revoke directions limiting the use of hearsay evidence by one witness (Ms Liu) about comments made by another (Mr Hernig). Pursuant to s 136 of the *Evidence Act*, Perram J directed that Ms Liu's evidence could only be admitted as evidence that Mr Hernig had made the comments, not that they were true.[41] The respondents sought the revocation of the direction on the basis that any unfairness arising from the inability to cross-examine Mr Hernig (who the respondents did not intend to call) could be addressed by, relevantly, Perram J's consciousness that the evidence was hearsay in nature.

29. Ultimately, Perram J held that:

> [83] Prejudice will be unfair under s 135 (and s 136) in at least two situations. The first, will be those situations where the Tribunal of fact may handle the evidence irrationally. The second, supported by the cases referred to above at [59]–[60], will involve deprivation of procedural entitlements such as loss of the right of cross-examination.

30. As to the first scenario, Perram J held that the unfairness arising from the ability to cross-examine could not be ameliorated by his Honour's awareness of the hearsay nature of the

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39 ie, admissible under one of the objections to the hearsay rule.

40 *Papakosmas v R* (1999) 196 CLR 297, [93].

41 See [67]–[68].

statements attributed to the Mr Hernig. Further, the disputed evidence "concerned an important issue in the case". The opportunity of the ACCC to make submissions about the matters (including documents) with which Mr Hernig might have been cross-examined was not an adequate substitute for seeing the witness tested on the material.[42]

31. The same considerations should apply here. The centrality of the joint employer survey to the employer parties' case, coupled with the inability to test the material, is a factor strongly in favour of its exclusion.

32. As to the second ground of unfair prejudice identified by Perram J, there can be no dispute that by admitting the joint employer survey, the ACTU will be unable to cross-examine the author of the survey or to test the reliability of the survey results in any way. Accordingly, the ACTU will suffer prejudice of the kind described in *Seven Network Ltd* and *Air New Zealand*.

33. The ACTU will suffer prejudice even applying the more robust analysis averted to by McHugh J in *Papakosmas*, because the circumstances described there are distinguishable from the facts in this case. In *Papakosmas*, McHugh J considered that trial judges had too hastily rendered admissible hearsay evidence inadmissible because the evidence was unable to be challenged, which was inconsistent with the policy of the legislative changes which established new exceptions to the hearsay rule. Here, there is no policy, legislative or otherwise, that would remedy the deficiencies in the joint employer survey. Admission of the joint employer survey would be inconsistent with the longstanding practice and approach of the Commission with respect to member surveys, and there are no special features in this case to warrant any such departure.

34. Further, the ACTU's complaint is more fundamental than the fact that it is deprived of the opportunity to test the reliability of the survey by cross-examination of the author. This is because even if the authors of the survey were to be called, there is insufficient material or detail to enable any cross-examination to be effective. In *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants* [2011] FCAFC 4, Finkelstein J (with whom Jacobson and Besanko JJ agreed) acknowledged that there may be a handful of cases where the discretion to refuse evidence should be exercised because 'effective' cross-examination was impossible.[43] The Full Court held that the trial judge in *La Trobe Capital* did not err in refusing to exclude the evidence, because the evidence was straightforward, not unusual, presented no risk of ambush, and could easily be challenged.[44]

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42 At [72].

43 At [62].

44 See [62] and [70]–[73].

35. By contrast, in this case, there is *no* evidence about the authorship and methodology of survey, and no challenge can be mounted because there is no witness responsible for the survey available to challenge.

36. The survey is sought to be tendered through Jeremy Lappin. Mr Lappin is a law student who has been employed by AIG as a law clerk for approximately six months. He states that he was not responsible or involved in the design or conduct of the survey. Rather, his evidence explains that he arranged for the production of certain reports from the software used by AIG and others to conduct the survey, and describes some work with the data using Excel. His statement annexes the survey questions,[45] a full record of responses from those who completed the survey (2,616 out of 5,610 respondents),[46] some calculations performed by him in Excel,[47] and the reports referred to above.[48] It is not possible to effectively cross-examine Mr Lappin about the survey methodology or its execution, because he expressly states that he was not involved or responsible for these matters.

37. There can be no assertion from any of the employer parties that the objection has taken those parties by surprise, given that they are each experienced participants in regulatory proceedings before the Commission including the *Annual Wage Review*, and were given notice of the ACTU's objection in the reply submissions dated 27 November 2017, in which they were invited to file evidence directed at these matters. This was repeated at the directions hearing before Gooley DP on 30 November 2017. No further evidence has been filed, and AIG have offered no explanation of their failure to call evidence from the authors of the survey. The time for filing additional evidence without causing substantial procedural unfairness has now passed, and the employer parties cannot be permitted (if they wished) to file evidence addressing the numerous deficiencies in the survey without an adjournment of the hearing. In these circumstances, the Commission refuse to permit the tender of the joint employer survey.

8 December 2017

Kate Burke

Counsel for the Australian Council of Trade Unions

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45 At Attachment A.

46 At Attachment B.

47 At Attachment C.

48 At Attachments D to ZF.