FLEXIBILITY DOWNWARDS:

WHY CHANGING THE BOOT WILL LEAVE WORKERS WORSE OFF

Since the move from centralised wage determination to enterprise bargaining in the early 1990s, large employers in the retail and hospitality industries have negotiated unlawful enterprise agreements that paid their employees sub-award penalty rates and loadings, leaving some thousands of dollars worse off. However, a 2016 decision of the Fair Work Commission which refused to approve an agreement of this kind on the grounds that it failed the better off overall test ('BOOT') sent ruptures throughout the sector, with dozens of agreements needing to be either terminated or replaced. This article will discuss the importance of the BOOT in maintaining the integrity of the award safety net and will contend that calls for it to be changed or replaced are a pretext for evading award minimums.

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INTRODUCTION

On 23 February 2017, the Fair Work Commission ('FWC'), Australia's federal industrial relations tribunal, announced reductions to weekend and public holiday penalty rates affecting workers primarily across hospitality, retail and fast food.[1] This included a reduction in Sunday penalty rates from 200 to 150 per cent (double time to time and a half) for permanent retail workers and from 150 to 125 per cent for fast food workers. The irony is that for a large number of these workers these reductions had no effect. For thousands employed in retail and fast food, their penalty rates had long ago been traded away in enterprise agreements that contained penalty rate structures that diverged substantially from award minimums.

Such arrangements are not necessarily prohibited by Australian law. Unique by international standards, minimum rates of pay and conditions are established in the Australian industrial relations system through both statute and a network of industrial awards. Awards, decisions of an industrial tribunal, now form a part of the safety net, in contrast to the central role they played in the conciliation and arbitration system by directly regulating wages and conditions, often across whole industries. The decentralisation of wage determination in the 1990s brought with it a system of enterprise bargaining, allowing for the negotiation of enterprise agreements between individual employers and their workers. However, such agreements are required by statute to leave workers better off than they would have been should they have been covered by the relevant award. The requirement that agreements pass the better off overall test ('BOOT') under section 193 of the *Fair Work Act 2009* (Cth) ('Act') effectively means that awards act as a floor upon which parties can bargain. Bargaining can always occur upwards from award minimums, but never downwards, at least to the extent that reductions in minimum award entitlements are not adequately compensated through the provision of other, usually financial benefits.

Whilst bargaining was never intended to occur downwards, reality speaks otherwise. For decades, retail and fast food giants have negotiated agreements, primarily with the Shop, Distributive and Allied Employees Association ('SDA'), that have severely reduced or entirely eliminated night, weekend and public holiday penalties in exchange for marginally higher base rates of pay. This practice is sometimes referred to as the 'rolling up' of penalties, with these higher 'rolled up' rates of pay intended to compensate workers for the loss of penalties either alone or alongside the provision of other benefits. However, in practice, the rolled up rate is rarely (if ever) high enough to sufficiently compensate workers for the substantial reductions in their penalty rates. In addition, non-monetary benefits provided in lieu of penalties, such as defence forces leave, are often illusory and not widely accessed. Such

[1] *4-Yearly Review of Modern Awards – Penalty Rates (Hospitality and Retail Sectors Decision)* [2017] FWCFB 1001 *(Penalty Rates Decision).*

arrangements are more akin to a contracting out of minimum award entitlements. Enterprise bargaining, therefore, has been widely abused as a mechanism by which employers have sought to avoid paying award penalties, which have grown to be ever more expensive for retailers and fast food restaurants who now trade later into the nights and longer on weekends than ever before. It was not until 2016 when this decade-long, industry-wide practice was to unravel. The successful application of a Coles trolley operator for the termination of an agreement that underpaid award penalties in *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* ('*Hart*')[2] meant dozens of enterprise agreements would also fail the BOOT.

Whilst there has been no shortage of complaints from business and conservative quarters that *Hart* created a more strictly interpreted BOOT, the fact that dozens of enterprise agreements have been incorrectly approved by the FWC since 1993 has largely been ignored. It should be noted, however, that Fairfax Media, through its former mastheads in *The Sydney Morning Herald* and *The Age*, were instrumental in investigating and uncovering the widespread underpayment of low-paid workers in retail and fast food under unlawful enterprise agreements. These investigations, including detailed analysis of rosters, were conducted alongside Josh Cullinan, then a part-time industrial researcher and now secretary of the SDA-rival Retail and Fast Food Workers Union ('RAFFWU'). Whilst instances of underpayment have been rife in recent years, with notable examples including the underpayment affecting 7-Eleven and the Rockpool Dining Group, this paper intends to exclusively analyse the underpayment that was effectively condoned by the FWC in their failure to adequately scrutinise enterprise agreements that failed the BOOT.

The purpose of this paper is primarily to respond to and reject claims that the BOOT has been the subject of a stricter interpretation by the FWC which has contributed to the decline of enterprise bargaining. The primary assertion it seeks to make is that complaints about a 'stricter' BOOT and calls for reform to it or its repeal to bolster labour market flexibility are disingenuous. It will be submitted that because large businesses can no longer engineer enterprise agreements that allow them to evade award penalty rates and significantly lower their labour costs, they are prosecuting a dilution of or replacement of the test to allow for the one-sided 'trade-offs' that occurred pre-*Hart*. Part I will discuss the history and purposes of enterprise bargaining, including precisely what kind of 'flexibility' it was intended to deliver. Part II will explore the differences between the BOOT and the no-disadvantage test ('NDT'), its predecessor, an important question given the abundance of calls for its reinstatement on the grounds that it imposes a lower threshold. Part III will consider claims that *Hart* created a stricter interpretation of the BOOT and will discuss the score of improperly approved pre-*Hart* enterprise agreements that were later rendered unlawful due to failing to pass the BOOT. Part IV will assess calls for reform, including those made recently by the Federal Government, and will assess whether *Hart* has created

[2] [2016] FWCFC 2887 ('*Hart*').

any genuine need for changes to the BOOT, or whether changes are merely a response to business desires to evade minimum award entitlements.

PART I

A *The History and Purposes of Enterprise Bargaining*

The elevation of Paul Keating to the prime ministership in December 1991 marked a significant turning point in the regulation of the Australian labour market system. Whilst formalised enterprise bargaining was reluctantly endorsed by the tribunal, the Australian Industrial Relations Commission ('AIRC'), in October 1991,[3] it was not until after the re-election of the Labor Government in March 1993 that the official departure from the system of conciliation and arbitration took place. With its central role for the industrial tribunal and awards, the system was the dominant force for most of the 20th century, and detailed federal or state awards covered the majority of the workforce. Arbitration was 'compulsory' in the sense that where disputes arose, the tribunal could compel the participation of parties, seek a resolution through conciliation and, where this failed, impose a settlement through arbitration.

A key characteristic of this centralised wage determination system were national wage cases, whereby the tribunal adjusted federal award wages in line with increases in inflation, a system known as wage indexation. Unions often sought a standard increase in wage rates across a number of awards, and, where successful, the increase would be used as a 'test case' whereby other unions would increase their wage claims accordingly. This led to a process coined as 'leap frogging', where wage increases in one occupation or industry could spread to another. Accelerating wage demands fuelled inflation, creating a wage-price spiral. According to the architect of Australia's enterprise bargaining system, Paul Keating, the 'key change' brought about through decentralisation was to prevent inflationary wage increases spreading through the economy.[4] The driving principle was to tie wage increases to increases in productivity through a system of collective bargaining at an enterprise level. It is a system that prioritises flexibility; both flexibility in terms of the freedom for parties to negotiate agreements suited to their individual requirements and flexibility in allowing for wages to rise faster in some businesses and slower in others. Whilst it is difficult to say with certainty whether decentralisation has improved productivity and economic outcomes,[5] real wage growth since the early 1990s has been robust (with the notable exception of recent stagnation), and the high inflation of decades past has largely been eliminated.[6]

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[3] Peter Waring and John Lewer, 'The No Disadvantage Test: Failing Workers' (2001) 12(1) *Labour & Industry* 65, 67.
[4] 'Rudd's IR policy doesn't wind-back my reforms: Keating', *The World Today* (ABC Radio National, 1 May 2007) https://www.abc.net.au/worldtoday/content/2007/s1911229.htm.
[5] Keith Hancock and Sue Richardson, 'Economic and Social Effects' in J Isaac & S Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, Melbourne).
[6] Productivity Commission, *Workplace Relations Framework*, (Final Report No 76, 30 November 2015), 993-995; Andrew Glassock, '70 Years of Inflation in Australia' (Web Page) abs.gov.au/websitedbs/d3310114.nsf/home/abs+chief+economist+-+70+years+of+inflation+in+Australia. It should be noted

A crucial but often overlooked principle that underpinned the decentralisation of wage determination is the notion that bargaining was conceived to occur only 'upwards' and 'outwards' with respect to award conditions. Awards continue to set minimum rates of pay and conditions, establishing the floor on which parties can bargain. It was not intended to occur downwards, in the sense that it precluded employers from using enterprise agreements as a mechanism via which they could avoid award entitlements and push down wages. Keating explained this point emphatically in a response during question time in October of 1992:

> '…hours of work, penalty rates and holiday loadings not only can be varied but are being varied… the only condition we impose, in all of this flexibility, upwards and sideways, is that the agreements don't leave employees worse off than they were before, and this is of course the condition the Honourable Member for Bennelong [John Howard] wishes to attack. He's not after flexibility up and out, he's after flexibility down…which is the one thing the Liberal Party wants, it wants to drive Australian wages down…'.[7]

Flexibility was available for parties with respect to every term of an award, with the ability to alter provisions providing for penalty rates or sick leave *on the condition that workers were no worse off*. This would necessarily require workers to be adequately compensated for any diversions from award minimums, with the most obvious way being through a sufficiently higher base wage or salary. The primary legal mechanism that, in theory, prevents parties from bargaining downwards, is the better-off overall test (and formerly the no-disadvantage test).

The former Senior Deputy President of the Fair Work Commission, Jonathan Hamberger, has suggested that enterprise bargaining is 'failing', partly because of an increasingly rigid application of the BOOT preventing agreements from being 'anything more than "award add-ons"'.[8] It appears here that Hamberger is implying that enterprise bargaining is restricted to bargaining upwards from the award, which in his opinion hinders flexibility and reduces the incentive to make agreements. He claims that in order to revive enterprise bargaining it must be realigned with the goals established for it by Keating, citing a 1993 speech given by the former prime minister to the Australian Institute of Company Directors.[9] In this regard it appears those initial goals have been misconstrued, at least to the extent that

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that recent stagnation in real wage growth, especially for low-paid workers, may call for a reassessment of wage determination mechanisms and relative bargaining power in Australia. For a detailed analysis of this point see Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, 2018).

[7] Commonwealth, *Australian Question Time*, House of Representatives, 24 October 1992 (Paul Keating) https://www.youtube.com/watch?v=OqQykOq6IJU&ab_channel=AusQuestionTime.

[8] Jonathan Hamberger, Reviving Australia's system of enterprise bargaining' (2020) 0(0) *Journal of Industrial Relations* 1, 15.

[9] Paul Keating, 'Speech to the Institute of Directors Luncheon', (Speech, Australian Institute of Company Directors, 21 April 1993).

he imputes to Keating a desire that enterprise bargaining achieve 'flexibility' by permitting bargaining downwards.

It is possible that Hamberger has misinterpreted the particular paragraph of Keating's speech in which he discusses the 'need to find a way of extending the coverage of agreements from being add-ons to awards, as they sometimes are today, to being full substitutes for awards'. Keating's employment of the phrase, however, was in the context of the move to the new system of enterprise bargaining, where bargains were few in number and coverage. It bore no connection to the NDT or the restriction on bargaining upwards or outwards, but rather bemoaned the fact that enterprise agreements at that time were not sufficiently comprehensive, a fact which has certainly changed. Whilst Hamberger suggests that a return to the NDT would restore flexibility, it is doubtful that the test, in practice, is substantially different to the BOOT.

PART II

A *Is there a practical difference between the NDT and the BOOT?*

It is unclear whether the differences between the NDT and BOOT are as substantial as some suggest. A product of the Keating Government, the original NDT was in fact a response to the 'unduly restrictive'[10] conditions placed around enterprise bargaining agreements by the AIRC in the October 1991 national wage case. A test calculated on revised grounds was retained in section 170NC(2) of the *Industrial Relations Reform Act 1993*, and the election of the Howard Government in March 1996 saw the passage of the *Workplace Relations Act 1996* and a similar but amended NDT in section 170XA:

> **170XA When does an agreement pass the no-disadvantage test?**
>
> (1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.
>
> (2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
>
> (a) relevant awards or designated awards; and
>
> (b) any other law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

The Howard Government's ideological aversion to the NDT was exemplified more than once during its 11 year term, with the Coalition unsuccessfully attempting to replace it with minimum statutory conditions in 1996[11] and successfully (albeit briefly) in 2006. The *Workplace Relations Amendment*

[10] Waring and Lewer (n 3) 67.
[11] Ibid 69.

(Work Choices) Act 2005 (Cth) removed the no-disadvantage test for registered agreements, and in May 2007 the government, facing political pressure and an upcoming election, announced amendments to that Act. This included a new 'fairness test' for workplace agreements aimed at ensuring 'fair compensation' for the loss of award conditions. However, the election of the Rudd Government in November 2007 saw the reinstatement of the NDT in March 2008,[12] and the passage of the *Fair Work Act 2009* saw the introduction of the BOOT, which to date remains unchanged in section 193:

> **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 the FWC 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.

The NDT and BOOT, irrespective of their differences, are directed towards the achievement of the same fundamental goal. That is, they both ensure that workers are left at least no worse off than if they were covered by the relevant award. Accordingly, a worker covered by an enterprise agreement should, in theory, never be better off under their applicable award. Unfortunately, this has not always been the case.[13]

There is significant disagreement as to whether the two tests effectively set the bar at the same level. It should be noted firstly that the difference between being at 'no disadvantage' and 'better off' is minor; the former would theoretically permit an enterprise agreement that was a copy of an award, whilst the latter would permit the same agreement so long as they contain terms (or even one term) fractionally more favourable than the award. Hamberger agrees that the difference is a 'relatively minor one',[14] and the Productivity Commission have stated it 'should be marginal in theory'.[15] However, both maintain that there exists a material difference in the operation of both tests.

The Productivity Commission, in their Workplace Relations Framework Inquiry Report, claim that the BOOT presents a greater disincentive to bargain for employers with arrangements at or close to the award level than the NDT, which they suggest is 'more workable in practice'.[16] Hamberger asserts that the BOOT is 'significantly more prescriptive' than the NDT, juxtaposing the current requirement that each and every employee be better off with the previous ability to have regard to whether employees in general were disadvantaged under the NDT. On this point, it should be acknowledged that the BOOT,

[12] Through the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).
[13] See Part III below.
[14] Hamberger (n 8) 12.
[15] Productivity Commission (n 6) 695.
[16] Ibid.

like the NDT, has been interpreted as requiring a 'global' approach, assessing the net impact of an agreement on the whole, with a line by line comparison with the award held to be inappropriate.[17] Additionally, Stewart, McCrystal and Howe, whilst acknowledging that it seems to have been more common for agreements to have been assessed on a generalised basis, claim that the NDT has previously been interpreted by the Australian Industrial Relations Commission ('AIRC') as only being satisfied if no employee was disadvantaged.[18] The authors additionally assert that 'undertakings were routinely extracted to ensure that no individual employee would be disadvantaged',[19] and maintain that there is an absence of evidence to suggest that the BOOT is a harder test to satisfy than the NDT.[20]

Stewart has also, and correctly in the author's opinion, suggested that 'in practice, it is hard to imagine a case where a Member inclined to assess an agreement as failing the BOOT would be prepared to say that it passed the NDT'.[21] Stewart, McCrystal and Howe do give one unlikely scenario where this may occur, being where an enterprise agreement exactly replicated the conditions from an award,[22] which would leave workers at no disadvantage but not better off vis-à-vis the award. However, this unusual scenario can hardly be said to constitute a substantive or meaningful difference in the tests that would warrant the replacement of one with the other. The better argument then appears to be that the BOOT and NDT are, both theoretically and in their practical application, far more similar than some suggest. Unsurprisingly, the Productivity Commission gave no examples of agreements that have failed the BOOT but would otherwise have passed the NDT.

B *Why the BOOT should be preferred*

Whilst the differences between the tests are relatively minor, there remains a compelling reason why the BOOT should be preferred. Primarily, this is because the BOOT expressly provides how it must be applied; that is, to *each* worker. Whilst this is arguably how the NDT was applied, which supports the notion that the tests are similar, the BOOT is far clearer in its intended application. It is not sufficient that a majority of employees are better off.[23] Whilst some may suggest that the interpretation of the BOOT became stricter post-*Hart*, this position is likely incorrect,[24] with the wording of the provision abundantly clear.

[17] *AKN Pty Ltd t/a Aitkin Crane Services* (2015) FWCFB 1833.
[18] Andrew Stewart, Shae McCrystal and Joanna Howe, Submission No DR271 to Productivity Commission, *Workplace Relations Framework* (September 2015) 12, citing *Re Bodyguard Security Services – Certified Agreement – with Employees 2003* [2004] AIRC 125.
[19] Ibid.
[20] Ibid.
[21] Andrew Stewart et al, *Creighton & Stewart's Labour Law* (The Federation Press, 6th ed, 2016) 397.
[22] Stewart, McCrystal and Howe (n 17) 12.
[23] *MJM Ventures Pty Ltd t/as Anchor Security* [2017] FWC 4570, [15].
[24] See Part IIIA.

The reason this clarity in application is important is because of the purpose the provision itself serves. As stated by the Productivity Commission, in the absence of the BOOT, 'the safety net could easily be undercut by enterprise agreements'.[25] The BOOT therefore plays a critical role in ensuring the integrity of the award safety net by preventing any erosion in minimum entitlements, or by ensuring that any reduction in entitlements is adequately offset by other benefits. If the BOOT ensures that awards can function as a hard 'floor' upon which bargaining occurs, there are compelling reasons why it should apply to each and every worker. Otherwise, if the test applied to, as the Productivity Commission suggested (for the NDT), classes of employees,[26] or indeed across employees as a whole, then it is inevitable at least some workers will be worse off than the award. The question then, becomes, what number of workers can be left worse off whilst still approving an agreement as passing the BOOT? It certainly would be a harsh outcome if enterprise agreements were permitted to leave a minority of workers at a disadvantage compared to the award.

The illogicality of such an approach is that the award safety net ceases to act as a safety net, or at least becomes a net riddled with holes. Put another way, what is the point of a safety net that allows some workers to fall through it? By requiring each employee to be better off, the BOOT preserves the integrity of the award system by ensuring that it can effectively function as a safety net through its establishment of minimum standards of pay and conditions in the labour market. However, there are those who suggest otherwise. Hamberger has advocated for a reinstated NDT that applies to employees as a collective, abandoning the requirement for every employee to be better off.[27] Whilst he acknowledges such an approach will be criticised as an attack on the safety net, he asserts it will improve flexibility and encourage 'win-win' agreements that will increase productivity, wages and better conditions for workers.[28] Hamberger does not substantiate exactly how a weaker test will achieve these outcomes. Effectively, the approach contemplates and tolerates the fact that some workers will be worse off, which appears to contradict sharply with his claim of increased wages for workers. Additionally, such an approach disregards the fact that the BOOT has not always been applied in the 'increasingly rigid' way that Hamberger suggests. *Hart* is a pertinent example of how the BOOT, when incorrectly applied, or when applied in the weaker way that Hamberger commends, can in fact depress the wages and conditions of low-paid workers. Rather than 'win-win' agreements, *Hart* is demonstrative of countless enterprise agreements in the retail and fast food industries could reasonably be considered a 'win' for only one party to the bargain.

[25] Productivity Commission (n 6) 694.
[26] Ibid 696-697
[27] Hamberger (n 8) 15.
[28] Ibid.

PART III

A *Hart did not create a stricter interpretation of the BOOT*

The decision of the Full Bench of the Fair Work Commission in *Hart* has generated much controversy, with some suggesting it led to a new, stricter interpretation of the BOOT.[29] Such suggestions, however, misconstrue the *Hart* decision and display a misunderstanding of the proper operation of the test. Complaints about *Hart* fail to recognise the fact that a substantial proportion of the Coles workforce were financially worse off due to the operation of the agreement. This strongly suggests that calls for a return to a more 'flexible' operation of the test are in fact better viewed as calls for the return to inadequate scrutiny of agreements by the FWC, which provided large employers with an opportunity to erode minimum award entitlements. It is submitted that the key takeaway of *Hart* is the fact that a base rate slightly higher than that under the award, combined with monetary benefits not accessed by a majority of employees, will not adequately compensate workers for the loss of penalties and loadings.

1 The Coles Enterprise Agreement

In 2015, Coles submitted to the FWC an application for approval of its *Coles Store Team Enterprise Agreement 2014-17* ('the Coles Agreement').[30] The Agreement exhibited a number of features characteristic of enterprise bargains negotiated by the Shop Distributive and Allied Employees' Association (SDA) with major retailers and fast food chains, most notably the trading off of weekend and night penalties for a higher base wage. At the time, the *General Retail Industry Award 2010* ('Award') provided that work after 6pm on a weeknight and all day on a Saturday attracted a 25% penalty rate, Sunday work attracted a 200% penalty rate (double-time) and a casual loading of 25%. However, the Coles Agreement provided no penalty for weeknight or Saturday work, a reduced Sunday penalty of 150% and casual loading of 20%, as well as no casual overtime rates and lower junior wages. The Agreement did, however, provide marginally higher base wage rates than the Award.

Identifying wage deficiencies, Commissioner Bull requested undertakings from Coles requiring them to increase the casual loading to 25% and increase junior wages as a percentage of adult wages to be in line with the Award. An undertaking was additionally sought for the provision of a reconciliation clause to allow employees a right to request back pay should their take home pay under the Agreement be less than what it would have been under the Award.[31] Coles provided undertakings in respect of the first two requests, but their undertaking in terms of the reconciliation mechanism was restricted to casual and junior (non-trades) employees only.[32] In a relatively short decision, and 'after taking into account the

[29] See, for example, Hamberger (n 8).
[30] *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd t/as Coles and Bi-Lo (Application for approval of a single-enterprise agreement)* [2015] FWCA 4136.
[31] Ibid [19].
[32] Ibid [23].

relatively higher rates of pay under the Agreement and the undertakings provided',[33] Commissioner Bull was satisfied that the Agreement resulted in employees being better off than under the Award and thereby satisfied the BOOT.

Respectfully, it is unclear how Commissioner Bull reached the conclusion that the Agreement provided 'relatively higher rates of pay' given it effectively eliminated night penalties, Saturday penalties, and cut Sunday penalties in half. The mathematics are not especially onerous. A part-time 21-year old Coles team member would, as at 1 July 2015, have earned a base rate of $21.29 under the Agreement. Applying the weekend penalties under the Agreement, if they worked a 7-hour daytime shift on Saturdays and Sundays, they would have earned $149.03 and $223.55 respectively, a total of $372.58. The absurdity is if that Agreement never existed, and the worker was covered by the Award, intended to be the minimum safety net, they would have earned $186.29 and $298.06, a total of $484.35. The team member is, therefore, $111.77 *worse off every week* under the Agreement than under the Award. Whilst this of course does not consider the fact that the worker may have worked weekday shifts attracting a marginally higher base rate than the Award, it is impossible that such a rate would compensate them for the significant sums they lost over the weekend. At 1 July 2015, the Award base rate was $18.99, meaning the Agreement rate was only $2.30 above the Award rate. Even if the worker worked 20 hours during the week on top of their weekend shift, their hourly weekday rate is only $46 higher than under the Award, meaning it does not even offset half of their losses on the weekend. The employee would still be worse off $65.77 each week. It certainly is no surprise that a base rate 12% higher than that under the Award does not adequately compensate workers for the loss of penalties in the range of 25 and 50%.

2 The *Hart* Appeal

Duncan Hart, a part-time Coles trolley operator, appealed alongside the Australasian Meat Industry Employees Union the Fair Work Commission's approval of the Agreement on the grounds that it did not pass the BOOT.[34] The Full Bench decision in *Hart* was a landmark case for the retail and fast food industries and for the low-paid workers employed in them. The Full Bench of the Fair Work Commission received evidence from Josh Cullinan, an industrial researcher and now secretary of the Retail and Fast Food Workers Union ('RAFFWU'),[35] and from Duncan Hart as to the effect of the Agreement. The rosters of 7 employees were provided to demonstrate the annual loss suffered by them under the Agreement, as well as two of Hart's own rosters. The average annual loss suffered by workers

[33] Ibid [29].
[34] *Hart* (n 2).
[35] The Retail and Fast Food Workers Union ('RAFFWU') was established as a new union to challenge the influence of the SDA in the sector. However, RAFFWU chose not to register as a traditional union, meaning it is not an 'employee organisation' for the purposes of the *Fair Work Act 2009*.

on the rosters cited in the decision was $2,201.56 per year, with the worst off worker at a loss of $3,506 per year compared to what they would have been entitled to under the Award.

Coles led evidence as to other benefits under the Agreement, including blood donor, defence service, emergency services and natural disaster leave. The Commission rejected Coles' submission that 'it is reasonable to assume that 50% of the benefit of accessing each form of leave once per year is a reasonable basis to value these benefits'[36] on the grounds that Coles 'provided no probative evidence to substantiate this assumption', stating the 'percentage is too high and overvalues the likely benefit to most employees'.[37] The Commission considered that access to each benefit would be much less than 10% in each year, noted that there was no evidence before them of the actual incidence of the use of the provisions and that whilst they were beneficial, the benefit was not large.[38] It appears completely reasonable that the Commission reached this conclusion. It is highly questionable how beneficial provisions for defence service and emergency services leave are for a workforce dominated by part-time and casual students and women, particularly mothers. The Commission noted that these benefits are contingent on the choice of the employee, whilst others such as 'support to individual wellbeing' through entitlements that support work flexibility were almost impossible to quantify.[39] It is far less ambiguous, however, that supermarket workers are likely to work in hours that attract penalties, with supermarkets trading late into the evenings, stock replenishment often occurring after 6pm or overnight, and the growth in weekend trade increasing the likelihood of weekend shifts. The Commission concluded that:

> 'Taking into account all of these matters we are not satisfied that the Agreement passes the BOOT. For some employees, particularly those who work primarily at times which attract lower penalty rates under the Agreement when compared to the Award, the loss in monetary terms is potentially significant… We are not satisfied that a consideration of all benefits and detriments under the Agreement results in each employee... being better off overall…'.[40]

The full bench decision in *Hart* has been subjected to criticism on the grounds that it created a 'stricter' or more rigid interpretation or application of the BOOT, including that it now required every worker to be better off.[41] However, the decision does not diverge from previous applications of the BOOT. The Commission expressly stated that it is 'well established that the test requires the identification of terms which are more beneficial for an employee, terms which are less beneficial for an employee, and an

[36] Hart (n 2) [20].
[37] Ibid.
[38] Ibid [22]-[25].
[39] Ibid [24].
[40] Ibid [33].
[41] See for example Hamberger (n 8); Jennifer Hewett, 'What happened to enterprise bargaining' *The Australian Financial Review* (Sydney, 11 July 2017); David Marin-Guzman, 'Retail union stands firm over BOOT: Industrial relations', *The Australian Financial Review* (Sydney, 29 May 2020) 8.

overall assessment of whether an employee would be better off under the agreement.'[42] There is no evidence to suggest that the FWC, in previous decisions or approvals, applied the BOOT in any other way. This explanation of the operation of the test was expressed by the Commission as early as 2010 in *Re Armacell Australia Pty Ltd.*[43] The test under section 193 of the Act explicitly provides that that *each* award covered employee be better off overall under an agreement. In this regard, Sutherland and Riley agree that 'it is difficult to see how the FWC's interpretation represents any shift in its approach',[44] particularly given the clear wording of the section. It appears highly likely that Stewart, who has suggested the law is 'crystal clear',[45] is correct in his assessment that:

> 'There have been complaints from some quarters that the decision in *Hart* was the product of new or overly strict interpretation of the Boot. But the real story seems to be that some FWC members had either been ignoring the need to ensure that *all* classes of employees were better off, or not doing enough to scrutinise claims about the overall effect of an agreement.'[46]

B *A Problem of Inadequate Scrutiny*

As opposed to *Hart* having engendered a stricter interpretation of the BOOT, it is far more likely that the FWC rather failed to adequately scrutinise agreements and apply a proper BOOT analysis. Sutherland and Riley express a similar opinion to Stewart regarding the effect of *Hart*, stating that 'the decision raises questions about whether the tribunal applied sufficient rigour to its assessment of agreements… in circumstances where both the union and a majority of employees have approved the arrangements'.[47] This line of argument appears to have much merit, particularly in an application to the initial approval of the Coles Agreement in 2015. As previously mentioned, Commissioner Bull failed to identify that weekend and night workers at Coles would be substantially worse off under the Agreement and his overall conclusion that the Agreement left workers better off than the Award. This fact suggests that the Commissioner failed to adequately inquire into the effect of Agreement on the large number of Coles workers that work shifts attracting penalties, either because he ignored the requirement that all classes of workers were required to be better off or because of a lack of proper scrutiny. In particular, the Commissioner notes that the written undertakings provided by Coles were 'substantially' in the form requested,[48] although it is not clear whether this suggests he accepted Coles' restriction of the reconciliation to casual and junior employees only. Whilst the Full Bench corrected the decision, it is troubling that an Agreement covering 77,507 employees was afforded inadequate

[42] Hart (n 2) [6].
[43] (2010) 202 IR 38, [41].
[44] Carolyn Sutherland and Joellen Riley, 'Major court and tribunal decisions in Australia in 2016' (2017) 59(3) *Journal of Industrial Relations* 340, 346.
[45] Ben Schneiders, Nick Toscano and Royce Millar, 'Sold out: quarter of a million workers underpaid in union deals', *The Sydney Morning Herald* (Sydney, 20 August 2016) ('Sold out').
[46] Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 6th ed, 2018) 158.
[47] Sutherland and Riley (n 43) 346.
[48] *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd t/as Coles and Bi-Lo (Application for approval of a single-enterprise agreement)* [2015] FWCA 4136, [22].

scrutiny to the extent that it was approved despite it being unlawful. A new Coles agreement came into effect in 2018 that reflected the minimum rates of the Award led to workers receiving increases in weekly take-home pay of up to $150.[49]

However, it may be unfair to lay responsibility with the Fair Work Commission alone. Representing retail and fast-food workers, the SDA, the largest private sector trade union in Australia, have also received criticism for negotiating dozens of agreements that left their low-paid members significantly worse off compared to the relevant award. The SDA shares an atypically close relationship with employers it negotiates with, operating with them under an agreement struck in 1971 whereby 'companies would sign up their staff as SDA members of the union's behalf'.[50] In return, the SDA pays commissions to employers for payroll deduction of SDA members' fees.[51] Of more concern however are suggestions that 'in return for moderate wage claims including concessions on penalties, companies have encouraged employees to join the SDA',[52] which appears credible in light of the large number of SDA deals that may have suppressed wages and negatively impacted low-paid employees.[53]

A Fairfax Media investigation in 2016 revealed that the SDA negotiated the *McDonald's Australia Enterprise Agreement 2013* which paid some McDonald's employees nearly one-third less than the award, leaving workers $50 million a year worse off nationwide.[54] Alongside Josh Cullinan, the industrial researcher involved in uncovering the Coles underpayments that led to the *Hart* appeal, Fairfax analysed hundreds of payslips, finding 63% of workers at one Sydney outlet were paid less than the award.[55] The McDonald's example is a particularly egregious one. Under the *Fast Food Industry Award 2010*, and prior to the penalty rate cuts in July 2017, Saturdays attracted a penalty of 125% and Sundays of 150%, with casuals entitled to 175% on Sundays.[56] However, the McDonald's Agreement provided no Saturday penalty and no Sunday penalty whatsoever. This led to the scenario where junior workers at McDonald's could be paid as little as $8.64 an hour, even on Saturdays and Sundays.[57] It was not until an application was made by a McDonald's crew trainer to the FWC to terminate the Agreement that McDonald's was forced, for the first time in decades, to pay full award penalty rates to

[49] Ben Schneiders and Royce Millar, 'Huge pay rise for Coles workers after scrapping of cosy union deal', *The Sydney Morning Herald* (Sydney 12 August 2018).
[50] Ben Schneiders and Royce Millar, 'Shopped Out', *Good Weekend, The Sydney Morning Herald* (Sydney, 3 September 2016) ('Shopped Out').
[51] Ben Schneiders and Royce Millar, 'Shoppies union pay Coles and Woolworths millions to boost membership', *The Age* (Melbourne, 2 May 2015).
[52] Schneiders, Toscano and Millar, 'Sold Out' (n 44).
[53] Stewart, Stanford and Hardy (n 6).
[54] Ben Schneiders, Nick Toscano and Royce Millar, 'Hamburgled: McDonald's, Coles, Woolworths workers lose in union pay deals', *The Age* (Melbourne, 19 May 2016).
[55] Ibid.
[56] Penalty rate cuts on 1 July 2017 progressively reduced the Sunday penalty under the *Fast Food Industry Award 2010* for Level 1 full and part-time employees only to 125%, aligning it with the Saturday rate. See (n 1).
[57] Zach Hope, 'Maccas workers win penalty rates in a ruling to end years-long saga', *The Sydney Morning Herald* (Sydney, 19 December 2019).

its workforce, with its workers reverted to the Fast Food Award in February 2020.[58] The national secretary of the SDA Gerard Dwyer said the decision was 'disappointing for… employees, who for many years reaped the benefits of improved wages… under enterprise agreements.'.[59] It is unclear precisely how Dwyer reached this conclusion, however, as the termination was expected to leave an average worker approximately $1300 a year better off.[60]

Somewhat unsurprisingly, the McDonald's Agreement was approved in July 2013 by Commissioner Bull, the same Commissioner who approved the Coles 2014-2017 Agreement that also failed the BOOT. In a decision spanning 8 paragraphs, or just over 1 page, the Commissioner approved the Agreement and was satisfied that it passed the BOOT despite paying no regard to the fact that the majority of employees would not be entitled to any weekend penalty rates. Whilst this again is indicative of the application of a severely inadequate level of scrutiny, it may be that the Commission was inclined to approve the Agreement given the employer and union, the SDA, agreed to it, on an erroneous assumption that the union was representing workers' interests.[61] However, until October 2014, enterprise agreement approval applications were managed directly by Commission Members, and Members only sought specialist administrative support, including BOOT analysis assistance, in 5% of applications.[62] This is arguably indicative of how the Commission approved so many agreements that failed the test, particularly given the fact that a BOOT analysis in a large employer can be rather complex. Since then, the FWC have employed an 'agreement triage process' to promote greater consistency in approvals, which 'involves a team a team of legally qualified staff conducting a comprehensive analysis of agreements lodged for approval.'[63]

A further Fairfax investigation in August of 2016 reported that a quarter of a million workers were underpaid more than $300 million a year under SDA negotiated deals, with 'every agreement analysed by Mr Cullinan and Fairfax Media reveal[ing] more than 50 per cent of workers were paid less than legal minimum rates'.[64] An analysis of rosters at one Melbourne Woolworths store found 63% of workers were paid less than the award, and analysis of rosters at KFC and Hungry Jack's led to the same findings.[65] The *Hart* decision effectively resulted in a complete upheaval of the decade-old and industry-wide practice of cutting night and weekend penalty rates, and undercompensating workers with a marginal base wage increase. Since *Hart*, Domino's, McDonald's and Bunnings have reverted to

[58] *Xzavier Kelly; Shop, Distributive and Allied Employees Association (Application to terminate the McDonald's Australia Enterprise Agreement 2013)* [2019] FWCA 8563.
[59] Hope (n 56).
[60] Ibid.
[61] Schneiders and Millar, 'Shopped Out' (n 49).
[62] Fair Work Commission, Submission No 14 to Senate Education and Employment Reference Committee, Parliament of Australia, *Penalty Rates* (July 2017) 10.
[63] Ibid.
[64] Schneiders, Toscano and Millar, 'Sold Out' (n 44).
[65] Ibid.

award coverage, and Woolworths, Coles, Big W, Kmart and Hungry Jack's have been forced to negotiate new, BOOT-compliant agreements. The extent to which workers for these companies were being underpaid under unlawful agreements is exemplified by the fact that the wave of new enterprise agreements (and presumably reversions to the award) was expected to increase pay in the industry by more than 6 per cent, with significant wage increases for workers, in particular those employed on weekends.[66]

PART IV MOVING FORWARD

A *Calls for Reform*

It is no surprise then, given the upheaval following *Hart* where dozens of agreements were correctly identified as being unlawful, that employers, their representatives and some commentators have been outspoken in their complaints about the operation of the BOOT. There has been no shortage in calls for the reinstatement of the previous test, the NDT, including from the Productivity Commission and the former Senior Deputy President of the FWC, Jonathan Hamberger.[67] The Business Council of Australia ('BCA') has claimed the current BOOT is 'unworkable',[68] with chief executive Jennifer Westacott labelling it a 'productivity killer'.[69] Arguing for the NDT to replace the BOOT, Westacott has claimed:

> 'The test was originally intended to mean that your workforce was better off overall than the award. In 2016 the Fair Work Commission found the test effectively meant that every individual worker and prospective worker had to be better off than the award'.[70]

This claim is demonstrably false. As discussed previously, the BOOT has always been expressed to apply to *each* award covered employee and *each* prospective award covered employee. The Full Bench in *Hart* did not suddenly decide that this is how the test was to operate; the fact is that agreements where employees were left worse off were erroneously being approved, likely due to insufficient scrutiny. Both the Australian Industry Group and Woolworths have also labelled the BOOT 'unworkable', with the AIG joining the chorus of voices seeking the return of the NDT.[71] Woolworths, in a submission to a Senate inquiry into penalty rates went as far as to suggest inconsistency in the operation of the BOOT 'is a significant risk to the economy'[72] that 'has the potential to significantly lessen (and potentially removes entirely) incentives for bargaining'.[73] It should be noted, however, that Woolworths signed a

[66] David Marin-Guzman, 'Rush of retail pay deals set to boost wage growth', *The Australian Financial Review* (Sydney, 5 November 2018).
[67] Hamberger (n 8).
[68] Business Council of Australia, *The state of enterprise bargaining in Australia* (Policy Paper, August 2019).
[69] Jennifer Westacott, 'Productivity matters and we need to lift it', *The Australian* (Sydney, 10 August 2019).
[70] Ibid.
[71] The Australian Industry Group, *Ai Group Policy Paper: Workplace Relations Reform* (Policy Paper, June 2020); Woolworths Group, Submission No 15 to Senate Education and Employment Reference Committee, Parliament of Australia, *Penalty Rates* (28 July 2017).
[72] Woolworths Group (n 69) 1.
[73] Ibid.

new, BOOT-compliant enterprise agreement in 2019. This agreement, whilst restoring award penalties, cut existing above-award base wages for new staff and capped wages increases for current staff to half those of current staff in order to bring them closer to the lower award minimum.[74]

B *Changes on the Horizon?*

On 26 May 2020, Prime Minister Scott Morrison announced that the Federal Government would pursue a working group process involving business, employer groups and unions to explore industrial relations reform.[75] One of these working groups was focused on enterprise agreements. Whilst business groups and unions failed to find consensus, Attorney-General and Industrial Relations Minister Christian Porter announced on October 2 that planned reforms will be part of an omnibus bill to be released later in 2020.[76] Expressing an unwillingness to replace the BOOT, Porter made the following comments to the Australian Financial Review:

> 'I think there is a recognition that you can actually achieve the ends that you want – which is to make the process simpler, quicker and more efficient – by working on improving the present test rather than replacing it.'
>
> 'The modification you can get to the BOOT might number between 10 and 15, and they have a cumulative effect.'
>
> 'If you move away from the essence of the test being about individual comparisons then it looks like a replacement of the test, but how you structure the process of considering individual comparisons is the question.'[77]

Porter also claimed as problems what he deemed were varying approaches to the BOOT, underemphasis on non-monetary benefits and the views of parties and overemphasis on hypothetical scenarios.[78] Firstly, it is doubtful that there are 'varying approaches to the BOOT', and Porter appears to have adopted the erroneous belief that *Hart* led to a stricter interpretation of the test. Secondly, whilst it now appears very unlikely that the BOOT will be replaced, the changes contemplated by Porter may have a much greater impact than otherwise would have been achieved by reinstating the NDT. It may be the case that the upcoming bill creates a significantly weakened version of the BOOT, with changes potentially facilitating the kinds of reduction in award entitlements dealt with in *Hart*. The ability to 'trade-off' entitlements, for example by rolling-up penalty rates into a higher base wage or salary, is a key aspect of flexibility inherent to enterprise bargaining (in comparison to relying on an award), but there have been many complaints that this is no longer possible post-*Hart*. However, these claims are

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[74] See *Woolworths Supermarkets Agreement 2018* Appendix C, C.3.3
[75] Attorney-General's Department, *Industrial relations* reform (Web Page, 26 May 2020) https://www.ag.gov.au/industrial-relations/industrial-relations-reform.
[76] Nick Bonyhady, 'Industrial overhaul to come in one big bill, making it harder to oppose', *The Sydney Morning Herald* (Sydney, 2 October 2020).
[77] David Marin-Guzman, 'Porter rules out replacing the workers' BOOT test: Exclusive', *The Australian Financial Review* (Melbourne, 3 October 2020).
[78] Ibid.

not well-founded. Trading off entitlements is no longer available as a mechanism to bargain downwards, as in *Hart*, but it remains a legitimate and flexible aspect of the enterprise bargaining system so long as it is a form of bargaining 'upwards' that leaves workers better off.

C *Is Trading-Off Still Possible After Hart?*

Jennifer Westacott, writing in The Australian, gives an example of a 24-7 workplace where permanent workers want to work on weekends and trade off their penalty rates for a higher salary overall.[79] She then states:

> 'But how do you balance this out for casuals who don't work 35 hours a week'. The problem with the way the BOOT is operating is that it prevents trade-offs'.[80]

It is not entirely clear what Westacott is suggesting in this regard. If she is suggesting that rolling up penalty rates into a higher base wage or salary may mean casuals who work weekends will be worse off than under the award, then she is correct that this 'trade-off' is prevented, and rightfully so. Under the BOOT, and, arguably under the NDT also, an enterprise agreement cannot leave any workers worse off than the award. The way to achieve the 'balance' Westacott seeks is simple: pay casuals the penalty rates they are entitled to, or pay them a sufficiently high hourly rate to compensate them for reduced penalties. The potential to 'trade-off' remains, but perhaps not in the way the BCA would like it, where the primary effect of a 'trade-off' is to reduce wage expenditures.

It remains the case, as it has been since the inception of enterprise bargaining in 1993, that award entitlements can be reduced in an enterprise bargaining agreement, in line with the intention expressed by Paul Keating at the time.[81] The Fair Work Commission has recognised that 'rolled up' wages or 'loaded rates' are a 'clearly legitimate option when looking to tailor arrangements'.[82] The only condition is that, overall, reductions in award entitlements are offset by more beneficial provisions of the agreement so as to leave workers better off than the reference award.[83] Flexibility remains, with the exception of flexibility downwards. The Full Bench in 2018 gave detailed examples of rolled up wages that passed the BOOT in *Loaded Rates Agreements*,[84] for a wide range of roster scenarios.[85] The purpose of such an exercise was to demonstrate that establishing separate loaded rates for identified work roster patterns ensures that the rate properly compensates the employee for their loss of penalties or other

[79] Westacott (n 66).
[80] Ibid.
[81] See above n 3.
[82] *Eagle Eyes Group Pty Ltd t/as Eagleyes Security* [2018] FWC 263, [34].
[83] *Re AKN Pty Ltd* (2015) 248 IR 129, [44]-[45].
[84] *Loaded Rates Agreements* [2018] FWCFB 3610 ('*Loaded Rates*').
[85] Ibid.

loadings.[86] In *Hart* it was held that the more hours worked during times when award rates are higher (for example nights and weekends), the worse off an employee will be.[87] On the contrary, *Loaded Rates* makes very clear through its detailed analysis that rolled up wage arrangements cannot be used to bargain downwards. Put simply, it is not a mechanism by which employers can seek to avoid minimum award penalties and loadings. The decision demonstrates that a rolled up wage will necessarily vary based on the proportion of hours an employee works that would otherwise attract loadings, and that for an agreement to be BOOT compliant any rolled up wage must leave a worker better off. This approach would make most sense for a business that had relatively consistent rostering, as specific rosters would attract specific rolled up rates.

D *Trading-Off Monetary & Non-Monetary Benefits*

A second important principle that can be drawn from *Loaded Rates* is the consideration given to non-monetary benefits in a BOOT analysis. Commenting on the difficulty of identifying precisely which employees will benefit for non-monetary or contingent benefits, the Full Bench concluded that the value of such benefits cannot be assumed to be equal.[88] For agreements involving loaded rate structures, the Full Bench held that:

> '…it is not likely that a non-monetary or contingent benefit will compensate for any significant detriment in direct remuneration for all affected existing or prospective employees.'[89]

It is submitted that the Full Bench in this regard have reached the correct conclusion. Whilst non-monetary and contingent benefits must be taken into account when applying the BOOT,[90] it is highly unlikely that non-monetary benefits could compensate for a loss of or reduction in penalties. A cynical view would suggest that non-monetary and contingent benefits have been included in some agreements with the primary intention of attempting to legitimise what otherwise is wage theft in the underpayment of award penalties and loadings. Like in *Hart*, an extensive 'shopping list' of non-monetary and contingent benefits ranging from defence service leave to emergency services leave should only be accorded weight on the basis of the actual incidence of use of the provisions and the associated benefit that accrues to workers. Any attempt by the government to force the FWC to artificially inflate the value of non-monetary benefits, as is the implication in Porter's comments above, must be resisted. In this regard, Stewart has rightly highlighted that changes that facilitate the trading off of financial entitlements for non-monetary benefits 'could well punch precisely the type of hole in the integrity of

[86] Ibid [125].
[87] *Hart* (n 2) [11].
[88] *Loaded Rates* (n 82) [114].
[89] Ibid.
[90] *Hart* (n 2) [23].

the award safety net that the FW Act was so important in repairing'.[91] The approach in *Hart* and in *Loaded Rates* is sensible and should be maintained, particularly in its attribution of weight to such benefits based on evidence of the true value of such benefits to workers. Fundamentally, any assessment must be based on how widely accessed benefits are in order for them to be properly taken into account. In this regard, and contrary to Porter's unsubstantiated comments of a failure by the FWC to place sufficient emphasis on non-monetary benefits, it is submitted that the FWC has in fact placed the right emphasis on such benefits, as exemplified by their approach in *Hart* and *Loaded Rates*.

E *Did Hart kill enterprise bargaining?*

There has been much suggestion that, in the wake of *Hart*, enterprise bargaining is broken or in decline, particularly in light of major companies like McDonald's, Domino's and Bunnings abandoning the system altogether.[92] Whilst it cannot be denied that enterprise bargaining coverage is declining, with the proportion of private sector workers covered by agreements declining from 22% to 11% from 2013 to 2018,[93] it is clear that the exit of large companies has played a role. Pennington has commented that the decision to terminate Coles' enterprise agreement in *Hart* disrupted agreement negotiation among other retail and fast food businesses. She has additionally stated that:

> 'Facing significant increases in labour costs to become compliant with award conditions, large retail and fast food firms became more resistant to enterprise bargaining.'[94]

Here, Pennington touches on what may be the true reason for the decline in enterprise bargaining. This paper has argued that *Hart* did not create a stricter interpretation of the BOOT and that the test has been abundantly clear all along, with employers taking advantage of lax scrutiny of agreements on the part of the FWC. Whilst employers and other commentators may lay the blame on *Hart*, the subtext of their complaints is that enterprise bargaining is no longer a viable mechanism by which they can effectively contract out of award penalty rates. Woolworths, for example, have reduced weekend and night penalties to levels lower than the award from as early as their 1995 enterprise agreement.[95] It is hard to view requests for increased 'flexibility' or for a return to the NDT as much more than the expression of a longstanding desire to bargain downwards. Sally McManus, Secretary of the Australian Council of

[91] Andrew Stewart and Mark Bray, 'Modern Awards under the Fair Work Act' (2020) 33 *Australian Journal of Labour Law* 52, 67.
[92] See, for example, David Marin-Guzman, 'McDonald's exit from enterprise bargaining marks system in decline', *The Australian Financial Review* (Sydney, 21 December 2019).
[93] Alison Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33 *Australian Journal of Labour Law* 68, 74.
[94] Ibid 76.
[95] See *Retail Supermarket Industry – Woolworths – NSW/ACT Agreement 1995* (ODN C No. 20643 of 1994) (Vice President Ross, Sydney, 22 December 1995).

Trade Unions, has suggested that the real reason some employers want to see the BOOT replaced is 'because of a desire to pay lower than the award'.[96]

Pennington correctly recognises that the termination of enterprise agreements that failed the BOOT has led to significant increases in labour costs, for the perverse reason that the award minimums were more generous than the negotiated terms. It is likely that this resistance to pay award wages is in effect the real reason for the decline of enterprise bargaining in the retail and fast food industries. If large companies can no longer use it as a vehicle by which they can avoid penalties and loadings, they may see little benefit in it. This undoubtedly says more about the behaviour and desire of business than the state of enterprise bargaining or the operation of the BOOT test. It is likely emblematic of the reasons for the current stagnation in real wage growth and the state of bargaining power of low-paid workers. Estimates by RAFFWU suggested that Woolworths workers were, under their enterprise agreement, $1 billion worse off between 2012 and 2017.[97]

What must be remembered in any assessment of the relationship between the BOOT and the decline in enterprise bargaining is the fact that retail and fast food agreements are at such a high risk of failing the test because they pay rates so close to those under the respective awards. It may be the case, as Stewart has commented, that businesses that pay rates close the award may be moving away from enterprise bargaining.[98] It must be noted that these arguments around the operation and application of the BOOT only exist because workers in these industries are, in some cases, paid as little as 1 cent above the award rate.[99] What is problematic then are comments made by the Attorney-General Christian Porter that the abandonment of enterprise bargaining by some employers 'must mean [workers are] missing out on better wages because they are not on an enterprise agreement which is meant to pay you more than an award'.[100] Porter's comments here are oblivious to the reality for hundreds of thousands of retail and fast food workers who have benefited from either the termination of unlawful enterprise agreements and reverting to the award, or through the negotiation of new BOOT-compliant agreements. The fact that this year McDonald's employees have been paid penalty rates for the first time in decades because of their reversion to award coverage is a testament to this reality. Porter's failure to understand the seismic changes in enterprise bargaining in the retail and fast food industries over the past 5 years suggests that any reforms he proposes should be treated with a degree of scepticism.

[96] David Marin-Guzman, 'Wage growth at risk in broken bargaining system', *The Australian Financial Review* (Sydney, 2 June 2020).
[97] Anna Patty, 'Woolworths workers claim alleged $1 billion in underpayments', *The Sydney Morning Herald* (Sydney, 23 August 2018).
[98] Marin-Guzman (n 90).
[99] David Marin-Guzman, 'Kmart's REST deal left workers worse off', *The Australian Financial Review* (Sydney, 3 September 2019).
[100] Marin-Guzman (n 94).

CONCLUSION

The importance of the award system and an NDT or BOOT in guarding the pay and conditions of the low-paid is easily forgotten, particularly since much time has elapsed since the last serious attack was launched against them. However, their role could not be more indispensable. In 2006, after the Howard Government was successful in abolishing the NDT and introducing individual agreements, the retailer Spotlight drafted agreements that abolished penalty rates and paid rest breaks in exchange for a 2 cent hourly increase in wage rates. These are precisely the 'trade-offs' that the NDT and BOOT exist to prohibit. The point here is not to cast blame on business for this kind of behaviour, but rather to demonstrate that the BOOT, and the NDT before it, are effectively the only thing standing between the natural instinct of business for profit maximisation and the minimum wages and conditions of low-paid workers. Legislation exists to protect workers and to balance the rights and interests of employees and employers. Unfortunately, there have been far too many occasions where non-compliance with the requirements of the legislation have effectively gone under the radar, at the expense of the low-paid.

It cannot be denied that enterprise bargaining is on the decline. The question then becomes, therefore, what role the decision of the FWC in *Hart* has to play in this phenomenon. The primary submission of this paper is that *Hart* did not create a new interpretation of the BOOT. The BOOT, unchanged since its drafting, is crystal clear; every worker must be better off compared to the award. However, for over 2 decades since the inception of enterprise bargaining, retail and fast food giants have abused the system in negotiating agreements that allowed them to contract out of minimum award entitlements. A passive industrial tribunal in the FWC and its predecessors for many years failed to adequately scrutinise these agreements, possibly on the false assumption that a bargain struck between an employer and a union must be beneficial for workers. Whilst this has now changed, the termination of agreements covering hundreds of thousands of supermarket and fast food workers was not because of a new or reinterpreted BOOT, but rather because of a correctly applied BOOT. It may well be the case that some employers are now avoiding the bargaining system altogether because they can no longer have agreements approved that serve the primary purpose of lowering their wage expenditures.

Calls for the BOOT to be replaced with the NDT, whilst having grown in strength since 2015, have effectively been extinguished by the Federal Government. However, a dilution of the BOOT as opposed to its replacement may be equally, if not more, dangerous. The current approach of the FWC to the trading off of monetary and non-monetary benefits is both equitable and sensible. It is hard to imagine how contingent benefits like blood donor or defence forces leave could ever adequately compensate supermarket workers for a loss in penalties or other loadings. As it currently operates, the BOOT serves as a guarantee that every worker employed by a business cannot be worse off under an agreement they negotiate with their employer. The logic of such a requirement is simple. It would make little sense if

enterprise agreements were permitted which left only a majority of workers better off than the award. If awards constitute a safety net, what can be said of their effectiveness if some workers, even if few in number, are allowed to fall through it? If awards truly are intended to constitute a floor for bargaining, the requirement under the BOOT that every worker be better off than the award properly fulfils this intention. Proposed amendments to the BOOT should be rejected to the extent that they inhibit it from preserving the integrity of the safety net, and to the extent that they permit the approval of agreements like the one dealt with by the FWC in *Hart*.

It appears then that the majority of calls for 'flexibility' by business are, in fact, calls for bargaining downwards. The Australian industrial relations system does not preclude trading off, meaning award penalty rates and conditions may always be reduced or eliminated entirely. The only condition imposed on such arrangements is that they are not used by business as a means to reduce their labour costs by evading award entitlements. There is nothing inherently wrong with arrangements that 'roll up' penalty rates and other loadings into a higher base wage, so long as that base wage is high enough to adequately compensate employees for their loss of entitlement to those loadings. A cynical view would suggest, however, that businesses are only inclined to favour such arrangements when it is they who are better off, and not their employees.

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