

Oxymoronic or Employer Logic? Preferred Hours under the Fair Work Act

Craig Cameron*

Preferred hours clauses have featured in enterprise agreements covering retail, agricultural, fast food, hospitality and aged care workplaces. The employee elects to work different or additional hours to their ordinary work pattern, hours which would otherwise attract overtime or penalty rates, but is paid at the ordinary rate of pay. This article examines, through the lenses of flexibility and the safety net, preferred hours under the new Fair Work regime. It then makes recommendations designed to clarify the limited circumstances in which an individual flexibility arrangement can incorporate a preferred hours clause.

Introduction

Commissioner Cambridge in Margin Brothers Pty Ltd (t/as Campbell IGA Friendly Grocer) observed that:

the concept of 'preferred' hours represents the antithesis of industrial regulation. It seems to me to be oxymoronic to create prescriptions for governing the arrangements for work and then permit individuals to agree to disregard those prescriptions.¹

The concept is that the employee elects to work different or additional hours — hours which would ordinarily trigger penalty and overtime payments — but is paid at a lower rate under an enterprise agreement because the employee volunteers or prefers to work those hours. 'Preferred hours' is a controversial concept because it brings into direct conflict two objectives of the Fair Work Act 2009 (Cth) (FW Act); flexibility and the safety net of employment conditions. The union position is that preferred hours clauses undermine the 38 hour working week and employees who work beyond the 38 hour week should be compensated with overtime payments. Employer organisations support the preferred hours clause in cases where the employee volunteers to work overtime in the interests of flexibility and for personal and financial reasons.² Despite recent judicial scrutiny in the area of enterprise bargaining, the impact of preferred hours clauses under the FW Act remains a complex issue.

This article examines, through the lenses of flexibility and the safety net,

^{*} Lecturer, Griffith Business School, Griffith University. I would like to thank the anonymous referees for providing their insightful comments. Any errors are my own.

^{1 [2010]} FWA 2105 at [28].

² E Hannan, 'Workers Can't Sell Off Overtime Rights, Tribunal Rules', *The Australian* (Sydney), 16 April 2010, at http://www.theaustralian.com.au/business/workers-cant-sell-off-overtime-rights-tribunal-rules/story-e6frg8zx-1225854291706 (accessed 15 February 2012); B Schneiders, 'Union Appeal on Overtime', *The Age* (Melbourne), 31 March 2010, available at http://www.theage.com.au/national/union-appeal-on-overtime-20100330-rbii.html (accessed 15 February 2012).

preferred hours under the new Fair Work regime.3 It commences with a definition of the term 'preferred hours clause', an assessment of the various types of such clauses in enterprise agreements, and an introduction to the statutory objectives underpinning industrial instruments that may incorporate these arrangements. Following a brief review of applications for approval of enterprise agreements before Fair Work Australia (FWA), three 'preferred hours' cases are examined, including the seminal Full Bench decision of Bupa Care Services.⁴ These cases reveal the employer logic for and the judicial approach to assessing preferred hours clauses under the following approval requirements: the Better Off Overall Test (BOOT), the No-Disadvantage Test (NDT) and the Public Interest Test. The author argues that the Bupa decision effectively clarified the method by which preferred hours clauses are assessed. As a consequence, the 'public interest' represents a test of last resort for approving a preferred hours arrangement in an enterprise agreement. The article then explores the likely impact of the preferred hours concept on employment contracts, individual flexibility arrangements (IFAs) and the National Employment Standards (NES), particularly maximum weekly working hours and the request for flexible working arrangements. While the inclusion of preferred hours clauses in enterprise agreements is oxymoronic in the terms suggested by Commissioner Cambridge, the concept is not necessarily the antithesis of the FW Act. The article concludes with proposed amendments to the regulatory framework governing IFAs which are designed to balance the statutory objectives of flexibility and the safety net.

Preferred Hours: Definition, Types and Statutory Context

Preferred hours, also known as 'voluntary additional hours' and 'voluntary hours', has no universal definition. The Australian Chamber of Commerce and Industry (ACCI) is critical of affixing the label 'preferred hours' to each type of clause because it implies that all clauses operate in the same manner or have the same effect and suggests that clauses need to be assessed on a case by case basis. Nevertheless, two general types of clauses can be discerned. Under the first type ('different hours'), the employee elects to work different hours to his or her usual work pattern (ie, as set out in a roster or contract). These different hours, such as ordinary hours worked on a Saturday, Sunday or at night during the week or hours worked outside the spread of ordinary hours, would typically attract penalty or overtime rates. Under the second type ('additional hours'), the employee elects to work hours in excess of their maximum ordinary hours prescribed in the enterprise agreement, hours which would ordinarily attract overtime rates. The common feature of both types of clauses

³ For an examination of safety net provisions through the lens of flexibility refer J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era' in A Forsyth and A Stewart (Eds), Fair Work: The New Workplace Laws and the Work Choices Legacy, Federation Press, Sydney, 2009, p 40.

⁴ Bupa Care Services, ANF and ASU Enterprise Agreement 2009 (2010) 196 IR 1; [2010] FWAFB 2762 (15 April 2010) (Bupa).

⁵ Ibid, at [4]; Transcript of Proceedings, *Bupa Care Services Pty Ltd* (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [406].

is that the employee is paid at a lower rate than what would otherwise be paid under the enterprise agreement because he or she volunteers or prefers to work the additional or different hours. The two types are collectively termed 'preferred hours' in this article unless the context indicates otherwise. The author suggests this is a sensible approach given that many preferred hours clauses in enterprise agreements incorporate both types.

Although individual preferred hours clauses can operate in a different manner, there are three recurring themes. First, employers seek to justify the inclusion of preferred hours clauses in the agreement. Preferred hours represent an opportunity to earn 'extra income',6 to achieve 'flexible and efficient work practices'7 and to meet personal circumstances, such as family and/or carer's responsibilities and the employee's financial situation.8 Second, the pay rate for working preferred hours is typically the ordinary rate of pay.9 Third, many enterprise agreements require the employee to complete a written application or declaration, located at the back of the enterprise agreement, as evidence of the agreement to work preferred hours.¹⁰ These applications can be so detailed as to require the employee to nominate preferred hours, days and times. For example, one enterprise agreement, which appears to be based on a template prepared by the National Retailers Association (NRA), enables an employee to nominate public holidays, Saturday and Sunday as their preferred hours by placing their signature against those items in the application.¹¹ Employees usually have the freedom to withdraw from the agreement at any time¹² or by giving notice.¹³

The sections which follow examine preferred hours clauses in light of the statutory objectives underpinning industrial instruments that may incorporate such arrangements. Identifying the relevant objectives is therefore necessary. The general object of the FW Act is to provide a 'balanced framework for cooperative and productive workplace relations'. Henterprise agreements, awards and the NES are industrial instruments used to achieve productivity and fairness within this balanced framework. Balance operates on a number of levels including between the interests of unions and business, between

⁶ International Workforce Pty Ltd; re International Workforce Pty Ltd Enterprise Agreement 2009 [2010] FWAA 4003 (26 May 2010) at cl 9.7.

⁷ Ranann Pty Ltd re Security Enterprise Agreement 2009 [2010] FWAA 1582 (5 March 2010) (Attachment B).

⁸ Rooty Hill RSL Club Ltd; re Rooty Hill RSL Club Enterprise Agreement 2009 [2010] FWAA 3421 (29 April 2010) at [2].

⁹ For an exception, see Woolworths Ltd; re Woolworths National Supermarket Agreement 2009 [2010] FWAA 3820 (20 May 2010) at cl 2.6.1.

¹⁰ Sylvan Lodge Trust; re Statewide Monitoring Services Enterprise Agreement [2010] FWAA 2243 (22 March 2010) at cl 4.11, Attachment B.

¹¹ P & A Securities Pty Ltd as Trustee for D'Agostino Family Trust; re P & A Securities Pty Ltd as Trustee for D'Agostino Family Trust Enterprise Agreement [2010] FWAA 3639 (6 May 2010) at Sch 1.

¹² Chamber of Commerce and Industry Queensland; re Adventure and Recreation Activities Employees' Enterprise Agreement 2009 [2010] FWAA 1898 (5 March 2010) at cl 4.6.1(d).

¹³ Anable Pty Ltd as Trustee for Nable Family Trust; re Bambu Cafe Enterprise Agreement [2010] FWAA 3407 (29 April 2010) at cl 4.3.4.

¹⁴ FW Act s 3.

¹⁵ FW Act ss 3(f), 171(a) (enterprise agreements), s 134(1) (awards and NES).

work and family and between fairness and flexibility.¹⁶ In the particular context of industrial instruments, this balanced framework requires inter alia: a guaranteed safety net of employment conditions; a safety net that is not undermined by statutory individual employment agreements; and flexibility in working arrangements so that employees can balance their work and family responsibilities.¹⁷ Flexibility and the safety net are two key components of a balanced regulatory framework governing industrial instruments. It is not suggested that these are the only components but they do provide a satisfactory basis to examine preferred hours clauses.

Flexibility as a value is difficult to define and is often misconceived as being 'inescapably positive'. 18 The FW Act offers procedural flexibility with respect to employment conditions. Stewart defines procedural flexibility as the 'adoption of regulatory mechanisms which facilitate ongoing change'. 19 IFAs, through varying the application of modern awards and enterprise agreements, the NES, by enabling changes to working hours and arrangements and enterprise agreements, by changing underlying award conditions, facilitate procedural flexibility. Preferred hours arrangements reveal the negative side of flexibility through its direct conflict with the safety net. While preferred hours clauses in an industrial instrument offer flexibility in working arrangements, it is also an arrangement between an individual employee and their employer which displaces two safety net provisions: overtime and penalty rates. It represents a mechanism that employers may wish to exploit for the purpose of reducing labour costs. A key issue addressed in this article is how preferred hours clauses, when examined through the lenses of flexibility and the safety net, can be part of a balanced regulatory framework.

Preferred Hours: Approval Tests

Introduction

The benchmark and authorities responsible for assessing collective arrangements have been the subjects of regulatory change and academic scrutiny since the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices).²⁰ FWA is now responsible for approving enterprise agreements. As part of the approval process, FWA must assess the agreements against the employees' safety net of terms and conditions, which includes the NES²¹ and any applicable award. The relevant assessment mechanism depends on the time the enterprise agreement was made. The NDT applied to

¹⁶ A Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 AJLL 3 at 45–6.

¹⁷ FW Act s 3(c)-(e).

¹⁸ A Stewart, 'Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation' (1992) 5 *AJLL* 101 at 102.

¹⁹ Ibid, at 103 (emphasis altered).

²⁰ C Sutherland, 'Making the "BOOT" Fit: Reforms to Agreement-Making from Work Choices to Fair Work' in A Forsyth and A Stewart (Eds), Fair Work: The New Workplace Laws and Their Work Choices Legacy, Federation Press, Sydney, 2009, p 111.

²¹ FW Act s 186(2)(c).

all agreements made between 1 July 2009 and 31 December 2009.²² This was known as the 'bridging period', that is the period between the repeal of Work Choices and the operative date for the remaining elements of the FW Act (minimum wages, NES and modern awards). Under the NDT, FWA must be satisfied that the 'agreement does not, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the agreement under any reference instrument relating to one or more of the employees'.23 While very few (if any) cases will now be assessed using the NDT as a result of the transition to the FW Act, much of the jurisprudence on preferred hours addresses the NDT and hence an understanding of the test is important. For agreements made on or after 1 January 2010, the FW Act prescribes the BOOT.²⁴ Under the BOOT, FWA must be satisfied that each employee 'would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee'.25 The global nature of both assessment mechanisms facilitates flexibility by enabling agreements to replace award entitlements with monetary benefits (eg, above award wage rates). Nevertheless the NDT and BOOT regulates this flexibility by using the safety net as the relevant comparator for assessing agreements.

FWA can still approve an enterprise agreement even it does or may fail the BOOT or NDT. A written undertaking by the employer to FWA, which subsequently forms part of the agreement, is designed to alleviate FWA concerns about the agreement not meeting the relevant test. FWA can only accept the undertaking if it is not likely to cause financial detriment to the employees concerned or result in substantial changes to the agreement.²⁶ Alternatively, FWA may approve an agreement that does fail the NDT or BOOT 'if FWA is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest (public interest test).²⁷ A similar exception existed prior to Work Choices.²⁸ Agreements accepted under the public interest test have a maximum nominal term of 2 years, which differs from the 4 year period for agreements that pass the BOOT or NDT.²⁹

Preferred hours clauses: approach of FWA

FWA has adopted various, and at times, conflicting, approaches to preferred hours clauses in enterprise agreements. Some enterprise agreements have passed the NDT without any undertakings.³⁰ For example, the *Milbag Pty Ltd Enterprise Agreement*, which covers two Eagle Boys Pizza outlets, was

²² Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) Sch 7, Pt 2. Item 2(1).

²³ Ibid, Item 4(1).

²⁴ FW Act s 186(2)(d).

²⁵ Ibid, s 193(1).

²⁶ Ibid, ss 190(2) and 190(3).

²⁷ Ibid s 189(2)

²⁸ Workplace Relations Act 1996 (Cth) s 170LT(3)(b).

²⁹ FW Act s 186(5).

³⁰ International Workforce Pty Ltd [2010] FWAA 4003.

balance, disadvantaged.³⁷

accepted by FWA in March 2010.³¹ Nevertheless, identical or very similar preferred hours clauses intended to cover fast food industry employees were rejected by FWA in May 2010.³² Other enterprise agreements were approved on the undertaking that the preferred hours clause would not operate during the life of the agreement,³³ the offending clause would be deleted from the agreement³⁴ or the preferred hours would be paid at a higher rate of pay.³⁵ FWA has also rejected a number of agreements, primarily involving the retail industry, because the preferred hours clause either displaces the employee's entitlement to higher rates under the award³⁶ and/or the agreement does not

provide other more beneficial entitlements so that the employee is not, on

Preferred hours clauses drew particular legal and media attention in Fanoka Pty Ltd t/as Fairview Orchards re Fanoka Pty Ltd Agreement 2009.³⁸ Fanoka involved 102 single enterprise agreements covering employees in the agricultural industry that contained a similar preferred hours clause. In approving the agreements (subject to undertakings in respect of matters other than preferred hours), Senior Deputy President Richards held that the preferred hours clause represented a benefit to employees and thereby passed the NDT because: employees could volunteer to work hours and earn more than they would otherwise have earned; earning additional income would offset periods when their work hours decreased; it reduced transaction costs (eg, tax free threshold and withholding tax) associated with a transient workforce moving to new employers to seek more hours; and it facilitated greater flexibility in hours of work.³⁹

Three significant cases have emerged from the 'state of flux'⁴⁰ created by FWA's early approach to preferred hours arrangements. *Bupa*⁴¹ was the first FWA Full Bench decision that considered preferred hours clauses in enterprise agreements. *Samphie Pty Ltd t/as Black Crow Organics re Black Crow Organics Enterprise Agreement 2009*⁴² was the first FWA decision that applied the public interest test to approve an agreement containing a preferred hours clause. Finally, the decision of *Top End Consulting Pty Ltd re Top End*

³¹ Milbag Pty Ltd; re Milbag Pty Ltd Enterprise Agreement [2010] FWAA 1834 (4 March 2010).

³² P & A Securities Pty Ltd [2010] FWAA 3639.

³³ Sylvan Lodge Trust [2010] FWAA 2243 at [3]–[5]; Anable Pty Ltd [2010] FWAA 3407 at [3]–[6].

³⁴ Undertaking of Hudaks Bakery Pty Ltd (15 April 2010) at [5], attached to Hudaks Bakery Pty Ltd; re HB Enterprise Agreement 2009 [2010] FWAA 3512 (3 May 2010).

³⁵ Chamber of Commerce and Industry Queensland [2010] FWAA 1898 at [4]-[5].

³⁶ Bendy Q Pty Ltd [2009] FWA 1869 (22 December 2009).

³⁷ DJ Swag Pty Ltd [2010] FWA 4968 (6 July 2010) at [8].

^{38 [2010]} FWAA 2139 (16 March 2010) (Fanoka).

³⁹ Ibid, at [33].

⁴⁰ Transcript of Proceedings, Application by Chateau Elan Hospitality as Trustee for the Chateau Elan Management Unit Trust (Fair Work Australia, AG2010/66, Sams DP, 25 February 2010) at [110]. See also Chateau Elan Hospitality as trustee for the Chateau Elan Management Unit Trust re Vintage Complex Enterprise Agreement 2009 [2010] FWAA 1942 (15 March 2010).

^{41 (2010) 196} IR 1; [2010] FWAFB 2762.

^{42 [2010]} FWAA 5060 (8 July 2010) (Black Crow Organics).

Consulting Enterprise Agreement 2010⁴³ is significant because it was the first reported decision in which FWA applied the BOOT to a preferred hours clause and it also provided FWA with an opportunity to consider all the approval tests in light of *Bupa* and *Black Crow Organics*. These decisions are discussed in the sections that follow.

Preferred Hours: Key Cases

Bupa

The enterprise agreement in *Bupa* involved employees in the aged care sector. The preferred hours clause, being an 'additional hours' type arrangement, was subject to a trial and review period of 6 months after which time any unresolved issues could be referred to FWA according to the dispute resolution procedure in the agreement. During submissions, the employer and union logic for the preferred hours clause were revealed. According to the employer, such a clause would reduce the employer's reliance on labour hire staff and give preference to existing staff for additional shifts. The benefit was characterised in terms of labour cost savings but also a patient benefit through maintaining consistency in the delivery of aged care services.⁴⁴

Commissioner Smith at first instance rejected the agreement on the basis it failed the NDT. The preferred hours clause was a cost saving to the employer, not a benefit. The alleged benefit, being that an employee would receive additional work that they may not otherwise have been given, was characterised by Commissioner Smith as a 'gift of employment' at a 'discounted rate from the safety net'. His Honour noted that 'it would be difficult to suggest that an employee would see the benefit in being paid less than that which would otherwise apply'. He

The employer lodged an appeal on the grounds that Commissioner Smith erred in applying the NDT and for not providing the employer with a reasonable opportunity to give an undertaking to address Commissioner Smith's concerns that the agreement did not pass the NDT. On appeal, the Full Bench of FWA cited with approval the decision of *Re MSA Security Officers Certified Agreement 2003*⁴⁷ which rejected a clause enabling an employee to work overtime at ordinary rates by agreement with the employer. A majority of the Full Bench in that case held that the comparison under the NDT was between the terms and conditions of employment in the agreement and the relevant award. The operational possibility of the employer to provide an employee with additional work hours was irrelevant because the applicable award made no distinction between voluntary working hours and hours directed by the employer.⁴⁸ As in the *Security Officers* case, FWA was required to make a textual comparison between the enterprise agreement and the

^{43 [2010]} FWA 6442 (24 August 2010) (Top End Consulting).

⁴⁴ See Transcript of Proceedings, *Bupa* (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [405].

⁴⁵ Bupa Care Services Pty Ltd [2010] FWA 16 (5 January 2010) at [17] per Smith C.

⁴⁶ Ibid.

^{47 (}Unreported, AIRCFB, PR937654, Watson SDP, Blain DP, Lewin C, 15 September 2003).

⁴⁸ Ibid, at [79]–[81].

relevant award and assess, on a global basis, whether the agreement resulted in a reduction in employment terms and conditions. In particular:

the 'no-disadvantage test' does not involve an analysis of matters other than the terms and conditions of the enterprise agreement against those in any relevant reference instrument. The effect the terms and conditions may have on the actions of an employer or employee is not relevant to the 'no-disadvantage test'.⁴⁹

The agreement failed the NDT because the preferred hours clause represented at least one term or condition of employment that was less beneficial than the awards that applied to the employees.⁵⁰ Despite this, the Full Bench held that Commissioner Smith did make an appealable error by not giving the employer an opportunity to provide a written undertaking to alleviate concerns about the agreement.⁵¹ The appeal was upheld, the decision of Commissioner Smith quashed and the application for approval of the agreement referred to Senior Deputy President Acton. The enterprise agreement was subsequently approved subject to an undertaking that the preferred hours clause would not be referred to, relied on or applied during the operation of the agreement.52

Black Crow Organics

In Black Crow the employer was the operator of a potato farm with a peak season of May to late November each year. Three main reasons for approval of the enterprise agreement containing an 'additional hours' type arrangement were proffered by the employer. First, Bupa was not authority for the proposition that all agreements with preferred hours clauses would fail the NDT. Second, a number of similar agreements had been approved by the Australian Industrial Relations Commission (AIRC) and FWA, including those in Fanoka. Third, if the agreement failed the NDT, the agreement should be approved under the public interest test. Costs dominated the employer logic for the preferred hours clause. It was submitted that the employer would otherwise have to increase its casual workforce to cover the additional hours because it could not afford to pay penalty rates to regular seasonal employees. This would be to the detriment of those regular seasonal employees seeking to work as many hours as possible during peak season to maximise their income, would increase administrative costs and raise workplace health and safety issues for the employer.⁵³

Commissioner Asbury agreed that the effect of Bupa was not that all preferred hours clauses in enterprise agreements would fail the NDT.54 However, Bupa did not change the global approach taken to applying the NDT, namely, the identification and balancing of more beneficial and less

⁴⁹ Bupa (2010) 196 IR 1; [2010] FWAFB 2762 at [25].

⁵⁰ Ibid, at [36].

⁵¹ Ibid, at [54].

⁵² Undertaking of Bupa Care Services Pty Ltd (23 March 2010), attached to Bupa Care Services Pty Ltd; re Bupa Care Services, ANF and HSU Enterprise Agreement 2009 [2010] FWAA 3238 (22 April 2010).

⁵³ Black Crow Organics Enterprise Agreement 2009 [2010] FWAA 5060 at [11].

⁵⁴ Ibid, at [20].

beneficial provisions compared to the reference instrument (ie, the award).⁵⁵ Commissioner Asbury concluded that the preferred hours clause had the identical effect to that in Bupa and, despite the seasonal nature of the agricultural industry and fluctuating work hours, this was not a basis for distinguishing Bupa. On a global approach, the agreement failed the NDT because the preferred hours clause, being less beneficial than the relevant award which applied to the employees, was not offset by more beneficial provisions.56

The enterprise agreement was however accepted under the public interest test. There were two exceptional circumstances. First, the employer was in a seasonal industry which had a detrimental effect on regular casual employees who had to accumulate sufficient savings during peak season to offset their lack of earnings outside peak season. Without a preferred hours clause, the employees would be unable to maximise their income during peak season. Second, similar agreements were generally approved under the FW Act prior to Bupa and at the time the enterprise agreement was made, the Workplace Authority had referred to a preferred hours clause as an example of meeting the NDT in its policy.⁵⁷ The approval of the preferred hours clause was subject to an undertaking that it would only operate during the peak season each year (1 May to 30 November).

Top End Consulting

The employer was a labour hire company providing services to the agricultural, retail and hospitality industries located in the Kimberley region of Western Australia and the Northern Territory. The employer logic for including both 'different hours' and 'additional hours' arrangements in the proposed enterprise agreement was that it enabled employees to maximise their income during peak periods by working hours which would not otherwise be available to them because of the employer's liability to pay overtime and penalty rates.⁵⁸ Deputy President Bartel differentiated the BOOT and NDT, finding that the BOOT required a higher standard because employees must be 'positively better off'.59 Although the BOOT was a different test, Deputy President Bartel acknowledged that a textual comparison between the agreement and the reference instrument remained the proper approach to approving the enterprise agreement:

There is nothing in s 193 to suggest that the Better Off Overall Test is to be assessed by matters extraneous to the terms and conditions of the relevant instruments. The test still requires that the status of the employees as better off overall, or otherwise, is to be assessed on the basis of the application of each instrument to the employee and not the intentions of the parties as to working arrangements which may flow from those terms.60

Deputy President Bartel cited with approval Bupa and distinguished

⁵⁵ Black Crow Organics [2010] FWAA 5060 at [21].

⁵⁶ Ibid, at [23].

⁵⁷ Ibid, at [26].

⁵⁸ Top End Consulting [2010] FWA 6442 at [11] and [17].

⁵⁹ Ibid, at [22].

⁶⁰ Ibid, at [27].

Fanoka on the ground that a different approach to the assessment of the NDT was adopted.⁶¹ On a global assessment, the agreement did not pass the BOOT because the more beneficial provisions of the agreement did not outweigh the preferred hours clause.62

In the alternative, the employer submitted that the agreement should be approved under the public interest test. Her Honour held that the nature of a labour hire business — supplying labour which enables a client employer to handle peaks in activity and its short term and highly casualised workforce was not an exceptional circumstance. Black Crow Organics was also distinguished on the basis that the employees covered by that agreement were regular casuals, who were dependent on additional income in peak periods to cover for periods where work was limited, whereas the Top End Consulting employees were a transient population, moving to other locations when the work ceased.⁶³ Nevertheless, there were exceptional circumstances, being 'the convergence of the profile of the employees, the provision of labour to seasonal industries (as opposed to the provision of labour to cover the regular peaks and troughs of activity that occurs in many businesses) and the employer's business operating predominantly within the tropical areas'.64

The preferred hours clause was not contrary to the public interest in respect of seasonal industries. Her Honour was prepared to approve the agreement on an undertaking which restricted the operation of the preferred hours clause to seasonal industries.

Preferred Hours: Case Discussion

NDT and BOOT

The cases reveal that the dominant employer logic for preferred hours clauses is labour costs or is driven by labour costs. For example, an 'additional hours' type of clause is justified to give the employee an opportunity to work additional hours that would otherwise have been allocated to new, casual or labour hire staff. The employer logic here is cost-driven — the hours would not be available because of the increased labour costs (eg, overtime rates) associated with offering those hours to the employee. FWA though has made it clear that labour costs and the opportunity to work different or additional hours for financial or family reasons are irrelevant when applying the NDT and BOOT.

FWA's position is entirely appropriate, given that the flexibility in labour allocation offered by a preferred hours clause is susceptible to exploitation by the employer. For instance the employer's first preference in allocating labour that would otherwise be paid at overtime or penalty rates is likely to be the employees who have nominated preferred hours, their second preference casuals and perhaps labour hire staff and their third preference permanent staff who have not nominated preferred hours. Herd behavior, also known as the 'bandwagon effect' and 'informational cascades', may ensue. Herd behaviour

⁶¹ Ibid, at [24]–[25].

⁶² Ibid, at [35].

⁶³ Ibid, at [42].

⁶⁴ Ibid, at [43].

occurs when an individual decides to follow the behaviour of a preceding group of individuals, regardless of his or her own information.⁶⁵ While the individual's decision-making process may be rational, herd behaviour can lead to undesirable outcomes.66 For example, Employee A (a permanent employee) enters an 'additional hours' type arrangement. Employee B (a permanent employee) needs to work overtime hours to meet financial commitments. The employer is more likely to offer Employee A (a first preference employee) overtime hours than Employee B (a third preference employee). Equipped with this information, Employee B decides to follow Employee A and enter a preferred hours arrangement. As the herd of first preference employees grows, it provides a stronger signal to third preference employees such as Employee C and D to nominate preferred hours because it becomes increasingly unlikely that the employer will offer third preference employees overtime hours. While the decision-making process is rational, the 'herd' of employees is worse off because the additional hours are paid at ordinary rates. The preferred hours arrangement has the effect of undermining the employees' safety net entitlement to overtime payments. Fortunately, labour law regulates the potential exploitation of flexibility and protects safety net entitlements by recognising preferred hours clauses as a detriment under the NDT or BOOT.

There was some debate prior to the FW Act about the operation of the BOOT compared to the NDT.67 The decision in Top End Consulting suggests that FWA will apply the BOOT in the same manner as the NDT. Further, the BOOT does set a higher standard for approving agreements than the NDT, but the difference is not significant. Bupa reveals a two step process in assessing agreements. The first step is to identify the benefits and detriments of the agreement vis-a-vis the relevant award, which can only be achieved by comparing the terms of the agreement and award. This textual comparison is consistent with the intention of the legislature when formulating the BOOT.⁶⁸ Matters such as flexibility, transaction costs, earning additional income, family responsibilities or the opportunity to work additional or different hours cannot be a benefit for the purpose of the BOOT because they represent the potential effects of the preferred hours clause on the employee. The term of the agreement is the preferred hours clause and it represents a detriment vis-a-vis the award because the additional or different hours are paid at a lower rate than the award rate. The second step of the BOOT is to assess, on a global basis, whether the benefits identified outweigh the detriments in respect of each employee or, where appropriate, each class of employees.⁶⁹ The employee will not be better off unless the detriment of the preferred hours clause is outweighed by corresponding benefits in the agreement. The agreements

⁶⁵ S Bikhchandani, D Hirschfleifer and I Welch, 'A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades' (1992) 100 *Jnl of the Political Economy* 992 at 994–5; A V Banerjee, 'A Simple Model of Herd Behaviour' (1992) 107 *The Quarterly Jnl of Economics* 797 at 798.

⁶⁶ Ibid.

⁶⁷ M Pittard and R Naughton, Australian Labour Law: Text, Cases and Commentary, 5th ed, LexisNexis Butterworths, Sydney, 2010, pp 739–42; R Bargary cited in 'BOOT Tougher than the NDT, Says AIG; ACTU Disagrees', Workplace Express, 28 November 2008.

⁶⁸ Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, rr 159 and 160.

⁶⁹ FW Act s 193(7).

reviewed by the author do not provide such benefits.

Public interest test

The public interest test represents the employer's only fallback position should the enterprise agreement fail the BOOT or NDT. This was demonstrated in both *Top End Consulting* and *Black Crow Organics*. FWA was satisfied that approval of both agreements was not contrary to the public interest because of the exceptional circumstances associated with a seasonal industry. FWA did not however identify the 'public interest' considerations relevant to the enterprise agreements being assessed, which is part of a common trend in agreement approval decisions studied by the author. Both cases raise two important questions: Are there other exceptional circumstances that would enable an enterprise agreement to satisfy the public interest test? What could represent the 'public interest' with respect to the approval of enterprise agreements?

The case law makes clear that exceptional circumstances are not limited to seasonal industries. The employer's financial position (in administration and receivership) was an exceptional circumstance in *ABC Learning Centres and LHMU Enterprise Agreement 2009*. Overseas competition, as opposed to labour cost competitiveness within an Australian industry, and be exceptional circumstances. For example in *Metro Velda Pty Ltd Peterborough Enterprise Agreement 2009*, an exceptional circumstance was fierce competition in the Australian horsemeat industry from South America. Despite concerns about the agreement not meeting the award safety net, FWA agreed that approving the agreement would ensure continuing employment through the ongoing processing and export of horse meat to Europe. Exceptional circumstances have also included the funding constraints of not-for-profit organisations and the remote location of the workplace. An enterprise agreement incorporating a preferred hours arrangement could be approved in any of these circumstances.

The 'public interest' has been a feature of Australian labour law, most notably in test cases brought before the industrial tribunal.⁷⁶ It is considered in a variety of contexts under the FW Act including the termination of enterprise agreements.⁷⁷ The leading case concerning the public interest test in the approval and termination of agreements is *Kellogg Brown & Root v Esso Australia Pty Ltd re Bass Strait (Esso) Onshore/Offshore Facilities Certified*

^{70 [2010]} FWAA 1687 (ABC Learning Centres).

⁷¹ Douglas Labour Services Pty Ltd [2010] FWA 555 (10 February 2010).

^{72 [2010]} FWAA 2622 (1 April 2010) (Metro Velda).

⁷³ Ibid, at [10].

⁷⁴ Community Living & Respite Services Inc; re Community Living & Respite Services Inc Enterprise Agreement [2010] FWAA 2290 (19 March 2010).

⁷⁵ Milingimbi & Outstations Progress Resource Association; re Milingimbi & Outstations Progress Resource Association Enterprise Agreement [2011] FWAA 1431 (22 February 2010)

⁷⁶ R Owens and J Riley, The Law of Work, Oxford University Press, Melbourne, 2007, pp 90–3.

⁷⁷ FW Act s 226.

Agreement 2000.⁷⁸ The Full Bench observed that '[t]he notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards'.⁷⁹

The Full Bench also acknowledged that ascertaining the public interest may involve the balancing of competing public interests. Applying *Kellogg Brown* the 'public interest' would, in the context of agreement approvals, include maintaining the safety net of employment conditions, being a 'proper industrial standard'. Approving an enterprise agreement that does not satisfy the BOOT or NDT is clearly not in the public interest because it undermines the safety net. However the failure to approve such an agreement may lead to negative public outcomes associated with unemployment (*Metro Velda*), underemployment (*Black Crow Organics*) or the shutdown of all or part of an employer's business (*ABC Learning Centres*). The final outcome is also recognised by the FW Act which provides an example of an agreement that may pass the public interest test: 'the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer'.81

On the author's interpretation, 'exceptional circumstances' trigger competing public interest considerations to the safety net which satisfies the public interest test. A logical reason for this interpretation is that without a competing public interest consideration, the agreement is clearly contrary to the public interest. For example, the Black Crow Organics enterprise agreement undercut the safety net, but the exceptional circumstances associated with fluctuating hours in a seasonal industry triggered another public interest consideration — underemployment. Protecting the safety net of employment conditions no longer represented the sole 'public interest' consideration because of the exceptional circumstances. In light of a competing public interest consideration, approving the agreement would 'not be contrary to the public interest', which Deputy President Bartel noted in Top End Consulting is a lower test than 'in the public interest'.82 The validity of the author's interpretation is open for debate. Nevertheless it may explain why industrial tribunals have placed greater emphasis on ascertaining the 'exceptional circumstances' rather than ascertaining where the 'public interest' lies. It is also an interpretation consistent with a balanced regulatory framework. The public interest test affords FWA with the flexibility to override the safety net protection of the NDT and BOOT, but only in exceptional circumstances which trigger other public interest considerations.

Preferred Hours: Impact on Industrial Instruments

FWA's position on preferred hours clauses is clear — an enterprise agreement will not be approved unless: there is a corresponding benefit(s) elsewhere in

⁷⁸ Unreported, AIRCFB, Guidice P, Ross VP and Gay C, PR955357, 31 January 2005 (*Kellogg Brown*).

⁷⁹ Ibid, at [23].

⁸⁰ Ibid, at [26].

⁸¹ FW Act s 189(3).

⁸² Top End Consulting Pty Ltd [2010] FWA 6442 at [46].

the agreement that outweighs the detriment of the preferred hours clause; or approval of the agreement would not be contrary to the public interest perhaps because exceptional circumstances exist. But are there other legal outlets for the preferred hours arrangement to subsist in the employment relationship? This section addresses the potential impact of the preferred hours concept on the contract of employment, the NES and individual flexibility arrangements.

Employment contract

The common law contract of employment can incorporate a preferred hours clause, but its operation is still subject to any award or enterprise agreement that applies to the employee. For employees not covered by either of these industrial instruments or an award employee with a guarantee of annual earnings,83 the preferred hours clause is free from the award safety net of employment conditions. While the NES provide a legislated safety net for the vast majority of private sector employees in Australia known as 'national system employees',84 it does not include overtime or penalty rates for working additional or different hours. Alternatively, an employer in a workplace covered by industrial instruments may attempt to circumvent their operation by signing employees up to individual employment contracts containing a preferred hours clause which include wage payments above industrial instrument pay rates. Nevertheless the employer remains at risk of breaching the relevant industrial instrument unless the higher payment can be used to offset and does offset the loss of penalty and overtime rates. An analysis of the employer's capacity to offset is beyond the scope of this article but has been discussed elsewhere.85

National employment standards

The NES expands on the legislated safety net first introduced under Work Choices. Many of the additional conditions, including notice of termination and redundancy pay, are re-packaged versions of AIRC test cases or Work Choices provisions.86 Nevertheless the NES is significant because it represents a legislated safety net for all national system employees, it cannot be excluded by an enterprise agreement or award,⁸⁷ and together with awards, the NES restores the protective function of the safety net that was compromised under Work Choices. 88 It is also significant that the FW Act attempts to complement the legislated safety net with flexibility. As Murray and Owens note, the NES should not be seen as monolithic and uniform but are imbued with a particular principle of flexibility.89 This flexibility is revealed in the maximum hours of work standard and right to request flexible working arrangements.

⁸³ FW Act Pt 2-9 Div 3.

⁸⁴ Ibid, ss 13 and 30C.

⁸⁵ A Stewart, Stewart's Guide to Employment Law, 2nd ed, Federation Press, Sydney, 2009,

⁸⁶ M Pittard, 'Reflections on the Commission's Legacy in Legislated Standards' (2011) 53 JIR 698; Murray and Owens, above n 3, p 49.

⁸⁷ FW Act s 55.

⁸⁸ Pittard and Naughton, above n 67, Ch 10; Owens and Riley, above n 76, pp 337-41.

⁸⁹ Murray and Owens, above n 3, p 54.

The first employment condition in the NES is that an employer must not request a full time employee to work more than 38 hours per week unless the additional hours are reasonable. While the preferred hours clause is not in breach of the NES because the employee and not the employer is requesting additional hours, it could be seen as undermining the concept of a 38 hour week. The additional hours that employees prefer to work are treated as ordinary hours for all intents and purposes because they are paid at the ordinary rate. This contradicts a fundamental principle in labour law that award-based employees receive overtime pay for overtime hours. The preferred hours clause may be contrary to the spirit of the NES, but it is not a breach of the NES.

An alternative method by which an 'additional hours' type arrangement can be incorporated into an enterprise agreement is by averaging weekly hours. The NES states that an enterprise agreement or award can provide for the averaging of hours of work so that the employee works on average a 38 hour week over a specified period.⁹² The more prevalent industries seeking approval of agreements with preferred hours clauses are retail, fast food, agriculture, aged care and hospitality. From a review of their respective awards, only the retail industry permits an averaging of ordinary hours beyond a 4 week period, and only by agreement between the employer and employee.93 In applying the BOOT, any enterprise agreement with an averaging of ordinary hours beyond 4 weeks when an award prescribes a 4 week maximum would, on a textual comparison, constitute a detriment to the employee. For example, an employee works 40, 36, 34, 42, 34 and 42 hours over a 6 week period. If the proposed enterprise agreement enabled the employer to average ordinary hours over a 6 week period, the employee suffers a detriment because they would be entitled to overtime payments in week six under the award. Unless the relevant award provides for a long term averaging of hours, the ability of employers to use averaging of hours as an 'additional hours' type of arrangement is limited to short term fluctuations in labour requirements. The averaging hours mechanism cannot work as a de facto 'additional hours' clause where the employees are already working their maximum ordinary hours each week nor does it release the employer from paying penalty rates for ordinary hours worked.

The NES also provides that an employee may make a request to their employer for a change in their working arrangements to assist the employee to care for a child in their capacity as a parent or care giver.⁹⁴ A request can only be refused by the employer on reasonable business grounds.⁹⁵ This request for flexible working arrangements appears to allow a 'different hours' type of arrangement by another name, but significant restrictions exist in its operation. The employee must be a long term casual employee or have at least 12 months continuous service with the employer and the child must be under

⁹⁰ FW Act s 62(1).

⁹¹ Bupa Care Services Pty Ltd [2010] FWA 16 at [14]-[16].

^{92.} FW Act s 63(1).

⁹³ General Retail Industry Award 2010 (1 January 2010) cl 28.1.

⁹⁴ FW Act s 65.

⁹⁵ Ibid, s 65(5).

school age or under 18 with a disability.96 Further, the request for flexible working arrangements cannot vary the application of an industrial instrument to provide for ordinary rates of pay. For example, the employer is liable to pay penalty rates if as a consequence of the request the employee's changed hours are subject to penalty rates under the applicable industrial instrument. Conceivably this liability may be used by the employer as a 'reasonable business ground' to refuse the request. The FW Act does not define 'reasonable business grounds' but the Explanatory Memorandum suggests it includes the financial impact on the employer's business.⁹⁷ Given these circumstances, the employee may seek or the employer may encourage an IFA.

Individual flexibility arrangements

The FW Act incorporates a different measure of individual flexibility in awards and enterprise agreements than has previously existed in Australian labour law. The Workplace Relations Act 1996 (Cth) introduced statutory individual agreements in 1996 known as Australian Workplace Agreements (AWAs). This legislation also marked the beginning of an award simplification process. As part of this process, the AIRC was required to ensure that awards, where appropriate, contained 'facilitative provisions'.98 Employees, individually or collectively, could agree with their employer about how particular award matters would operate in the workplace.⁹⁹ Work Choices then restricted facilitative provisions to individual agreement. 100 The FW Act subsequently abolished AWAs on the basis that statutory individual employment agreements 'can never be part of a fair workplace relations system'.101 Nevertheless the FW Act authorises individual agreements known as IFAs.

All enterprise agreements and awards must include a flexibility term that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement or award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.¹⁰² The flexibility term must set out the terms of the industrial instrument the effect of which can be varied by the IFA.¹⁰³ A model flexibility term is taken to form part of an enterprise agreement if none exists in the enterprise agreement.¹⁰⁴ Both the model flexibility term for enterprise agreements and the model flexibility term devised by the AIRC for inclusion in awards enable the IFA to vary the effect of arrangements in the industrial instrument about when work is performed, overtime rates and penalty rates. The subsequent IFA, which has effect as a term of the industrial instrument, must result in the employee being better off

⁹⁶ Ibid, ss 65(1) and (2).

⁹⁷ Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, at [267].

⁹⁸ Workplace Relations Act 1996 (Cth) ss 143(1B) and (1C).

⁹⁹ Owens and Riley, above n 76, pp 340-1.

¹⁰⁰ Workplace Relations Act 1996 (Cth) s 521.

¹⁰¹ FW Act, s 3(c).

¹⁰² Ibid, s 144 (awards); s 202 (enterprise agreements).

¹⁰³ Ibid, s 144(4)(a) (awards); s 203(2)(a) (enterprise agreements).

¹⁰⁴ Ibid, s 202(4).

overall than if there was no IFA.¹⁰⁵ Unlike an enterprise agreement, the IFA is not lodged with and assessed by FWA. The employer is responsible for ensuring that the employee is better off overall under the IFA.¹⁰⁶

IFAs bring the statutory objectives of flexibility and the safety net into direct conflict. The primary concern is that the flexibility in IFAs can be exploited in much the same way as AWAs during the Work Choices regime to vary and displace the award safety net through individual bargaining. ¹⁰⁷ Preferred hours clauses in an IFA do just that, displacing overtime payments and/or penalty rates. The apparent lack of FWA scrutiny of IFAs not only magnifies these concerns, ¹⁰⁸ but makes it difficult for FWA to resolve the issue as to whether an IFA can incorporate a preferred hours clause. No judicial authority will be forthcoming until FWA adjudicates a dispute about the IFA pursuant to the dispute settlement procedures in an industrial instrument ¹⁰⁹ or an employee claims that the IFA containing the preferred hours clause was not properly made. A failure to meet the requirements of an IFA, including the BOOT, constitutes a breach of the industrial instrument which made provision for the IFA. ¹¹⁰

The ACCI revealed the source of the present confusion, namely, the operation of the BOOT to IFAs, during the Bupa proceedings. It submitted that the decision at first instance undermined the employer's ability to use preferred hours clauses in an IFA, contrary to the examples of preferred hours arrangements in IFAs given in the Explanatory Memorandum to the Fair Work Bill and the Fair Work Ombudsman's (FWO) Best Practice Guide.111 The ACCI's concerns are valid. The Commonwealth Government intended that employers and employees could enter IFAs to vary working hours for reasons of flexibility, work life balance and family responsibilities. But on application of the principles in Bupa, an IFA containing a preferred hours clause would fail the BOOT because the non-financial reasons for entering an IFA are disregarded. Therefore if the statutory objective of flexibility is to be upheld in IFAs, Bupa was either wrongly decided or IFAs are subject to different requirements under the BOOT compared to enterprise agreements. The former conclusion is incorrect for the reasons previously addressed in this article and there is no evidence in the FW Act or extrinsic materials to suggest the latter.

The present confusion arises because the FW Act does not strike a fair balance between individual flexibility and the safety net with respect to IFAs. Two recommendations designed to achieve a balanced regulatory framework will now be assessed: the establishment of 'genuine need' as a condition precedent to a valid IFA and a revised BOOT that considers non-financial benefits to employees. The circumstances in which preferred hours clauses in

¹⁰⁵ Ibid, s 144(4)(c) (awards); s 203(4) (enterprise agreements).

¹⁰⁶ Ibid, s 144(4)(c) (awards); s 203(4) (enterprise agreements).

¹⁰⁷ Murray and Owens, above n 3, pp 60-1.

¹⁰⁸ Pittard and Naughton, above n 67, pp 856-7.

¹⁰⁹ FW Act s 139(1)(j) (awards); s 189(6) (agreements).

¹¹⁰ Ibid, ss 50, 202(3)(b) and 204(3) (enterprise agreements); ss 45; 144(2)(b) and 145(3) (awards).

¹¹¹ Bupa (2010) 196 IR 1; [2010] FWAFB 2762; Transcript of proceedings, Bupa (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [423] and [437].

an IFA can be part of this new regulatory framework are then explored.

Recommendations

Condition precedent

The first recommendation is to make the existence of a genuine need, which cannot be met by the relevant industrial instrument, a condition precedent to a valid IFA. IFAs were designed to facilitate greater flexibility in employment relationships. 112 An employee and employer enter this special arrangement in order to meet their genuine individual needs because the industrial instrument does not afford such flexibility. The condition precedent therefore gives legal effect to the unique purpose of an IFA. It also responds to concerns about employers exploiting the flexibility of IFAs in a similar manner to AWAs by providing a mechanism in addition to the BOOT which regulates flexibility. Employers subject to this additional requirement have less flexibility to 'contract out' of award and enterprise agreement provisions which can be varied by the IFA. The recommendation can be implemented by amending ss 144(4) (modern award) and 203 (enterprise agreements) of the FW Act dealing with flexibility terms to include the provisions in Table 1. In the case of enterprise agreements, this may also necessitate an additional clause in the model flexibility term requiring the employer to provide details of the needs of the employee and employer that cannot be met by the enterprise agreement.113

Table 1: Amendments to flexibility term provisions of FW Act

Enterprise Agreement

Requirement for Genuine Need

The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term is in order to meet the genuine needs of the employee and employer which cannot be met by the enterprise agreement.

Modern Award

Requirement for Flexibility Terms

The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term is in order to meet the genuine needs of the employee and employer which cannot be met by the modern award.

Operation of BOOT

The BOOT is a regulatory mechanism which balances flexibility and the safety net in both IFAs and enterprise agreements. Employers have the flexibility to vary the award safety net in enterprise agreements but that same safety net is used to underpin the agreement in order to achieve positive collective outcomes. IFAs offer a different kind of flexibility to enterprise agreements. An individual employee and their employer can vary the effect of particular conditions in the industrial instrument to meet their individual

¹¹² Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, r 151.

¹¹³ Fair Work Regulations 2009 (Cth) Sch 2.2(3)(d).

genuine needs because the industrial instrument (which covers a collective group of employees) does not have the flexibility to do so. This individual flexibility was intended to provide employees with non-financial benefits that result from meeting that genuine need. For instance the FW Act states that flexible working arrangements are part of a balanced regulatory framework by 'assisting employees to balance their work and family responsibilities'. 114 The Explanatory Memorandum to the Fair Work Bill provides an example of an IFA to demonstrate the non-financial benefits resulting from a preferred hours arrangement. 115 Josh, a gym membership consultant, wishes to coach an under-12s football team 2 days per week. Josh's employer needs him to work from 9 am to 5:30 pm but Josh wants to start work at 7:30 am and finish at 4:00 pm on the 2 days. A 7:30 am start attracts penalty rates under the enterprise agreement. The parties enter an IFA which varies the effect of terms in the enterprise agreement dealing with hours of work and penalty rates. The Explanatory Memorandum then suggests that Josh's personal circumstances can be considered in assessing whether Josh is better off overall on the basis that it is an individual arrangement. Josh is better off overall because the non-financial benefit (work-life balance) arising from the genuine need (coaching an under-12's football team) outweighs the failure to receive penalty rates. In this example Josh's individual circumstances reveal his genuine need, and the non-financial benefit is the result of meeting that genuine need in an IFA.

The BOOT, as applied in Bupa, would hinder the individual flexibility intended by the FW Act for IFAs. A preferred hours clause in an IFA designed to accommodate the employee's individual circumstances such as family responsibilities (a non-financial benefit) would be considered a matter extraneous to the strict textual comparison of the industrial instrument (as varied by the IFA) against the industrial instrument (without the IFA) and therefore fails the BOOT. The IFA of Josh the gym consultant in the Explanatory Memorandum fails the BOOT for the same reason. This does not mean the interpretation of the BOOT in Bupa is incorrect or that the BOOT should be removed as a statutory requirement for assessing IFAs. As previously discussed in the context of preferred hours arrangements, the BOOT maintains the integrity of the employees' safety net of conditions in enterprise agreements by preventing employers from exploiting employee preferences to reduce labour costs. What is required is a revised BOOT for IFAs which is more attuned to the statutory objective of facilitating individual flexibility.

The second recommendation is therefore to amend the FW Act, perhaps at ss 144(4) (modern award) and 203 (enterprise agreements), to recognise non-financial benefits as a benefit under the BOOT. The revised BOOT could be renamed, to avoid confusion with the BOOT for enterprise agreements, and drafted in the following terms: In determining whether the employee is better off overall, the employer may have regard to any benefits (financial or non-financial) that the employee receives as a result of the IFA meeting the employee's genuine needs.

¹¹⁴ FW Act s 3(d).

¹¹⁵ Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, at [867].

The critics of IFAs would argue that this revised BOOT gives employers more flexibility to replace safety net employment conditions. This is a valid argument and one which is supported by the example of Josh the gym consultant in the Explanatory Memorandum. But the FW Act is not solely directed at maintaining the safety net of employment conditions. Individual flexibility is also part of the balanced regulatory framework. To achieve balance, the regulatory framework must engage in one or more trade-offs where statutory objectives conflict, as is the case with individual flexibility and the safety net. An IFA may undermine the employee's safety net of employment conditions, but this is traded off against the non-financial benefits that the employee receives as a result of the IFA meeting their genuine individual needs, needs which could not have been met by the safety net governing the collective. The revised BOOT mediates the trade-off in a way which the present BOOT cannot.

Preferred hours

A revised BOOT and the condition precedent of 'genuine need' would limit the circumstances in which an IFA can incorporate a preferred hours clause. The distinction between 'additional hours' and 'different hours' type arrangements becomes relevant here. If an employer has a need for staff to work additional hours, then the industrial instrument already meets that genuine need by enabling the employer to request the employee to work overtime hours, provided that the hours are reasonable according to the NES. The employer may baulk at the prospect of paying overtime rates and instead elect to hire permanent, casual or labour hire staff to work those hours, but this does not detract from the fact that the employer's genuine needs can be met by the industrial instrument. An IFA containing an 'additional hours' clause would therefore be invalid because it does not satisfy the condition precedent. Similarly, a 'different hours' clause fails to comply with the condition precedent if the employer has a genuine need for staff to work particular ordinary hours, irrespective of the employees' own needs. The industrial instrument meets the employer's genuine need by enabling the employer to develop a roster requiring employees to work those particular hours.

A 'different hours' clause would satisfy the condition precedent for a valid IFA where the employee has a genuine need to work particular hours for family or personal reasons and the employer does not require the employee to work those hours. This is subject to the clause varying the effect of the industrial instrument. Josh, the gym membership consultant, provides a useful example. Recall that Josh wants to start work at 7:30 am. The 'different hours' clause would not comply with the content requirements for a valid IFA if the span of ordinary hours under the enterprise agreement (ie, hours that do not attract penalty rates) was sufficiently broad to cover Josh's preferred hours. This is because the clause would not vary the effect of penalty rate provisions in the enterprise agreement — Josh would be paid at the same ordinary rate whether he started work at his preferred time of 7:30 am or his current time of 9:00 am. Now assume that the span of ordinary hours under the relevant enterprise agreement is 8:00 am to 6:00 pm. Josh's genuine need to work different hours cannot be met by the industrial instrument. In other words, the industrial instrument cannot force an employer to roster hours to suit the employee's circumstances when the employer does not require the employee to work those hours. To do otherwise would expose the employer to payment of penalty rates for preferred hours worked at nights and on weekends and overtime rates for employees who prefer to work outside the prescribed span of ordinary hours. As in Josh's case, a 'different hours' clause which varies the effect of penalty rates and/or overtime provisions in the industrial instrument would meet the genuine needs of the employee by enabling the employee to work their preferred hours. The employer's business needs are also met because the employee still performs the work required by the employer (albeit at different times) and no additional wage costs are incurred by agreeing to change the employee's working arrangements.

The revised BOOT is then applied to the IFA should the 'different hours' clause comply with the condition precedent. The employer must first identify the benefits and detriments of the IFA vis-à-vis the relevant industrial instrument. The non-financial benefits received as a result of the IFA meeting the genuine need can be considered a benefit under the revised BOOT. The second step involves a self-assessment of whether the benefits outweigh the detriments of an IFA. This step will be particularly problematic for employers when assessing the non-financial benefits because they cannot be objectively measured. The employee places a value on the non-financial benefit, but the employer is ultimately responsible for determining that value. An employee will be better off overall with the IFA provided that the value assigned by the employer outweighs the financial detriment of being paid at ordinary and not penalty rates. It is clear that employers will need guidance from the Fair Work Ombudsman on how to approach this difficult task of self-assessment.

Conclusion

There are two sides to flexibility under the FW Act. As Flora Gill points out '[f]lexibility is not intrinsically virtuous. It can be a virtuous agent when in the service of a virtuous cause, but it can also be a euphemism for a desire to attain the flexibility necessary for pure and naked exploitation of newly found economic bargaining power.'117

This article has demonstrated that the preferred hours clause, when examined through the lenses of flexibility and the safety net, cannot generally be part of a balanced regulatory framework because of its oxymoronic effect. It is a mechanism which offers flexibility in working arrangements, but enables employers to exploit that flexibility to reduce labour costs to a level below the safety net of employment conditions. Preferred hours arrangements do have limited scope through the NES and contract of employment, but their impact will likely be greater in enterprise agreements approved under the public interest test and in IFAs. A balanced framework, in both circumstances, is achieved through a trade-off involving the safety net. Under the public interest test, there is a trade-off between employment conditions below the safety net in an enterprise agreement and exceptional circumstances which trigger other public interest considerations such as unemployment,

¹¹⁶ Ibid, at [868].

¹¹⁷ F Gill, 'Labour Market Flexibility — To What End?' (1989) 61 Australian Quarterly 456 at 461, referred to in Stewart, above n 18, at 102.

underemployment and business shutdown. With IFAs the recommended amendments to the FW Act strike a fairer exchange between the safety net and the flexibility of an IFA to meet an individual employee's genuine needs. The public interest test and the revised BOOT for IFAs mediate the trade-offs so that flexibility remains a virtuous agent for a virtuous cause — cooperative and productive workplace relations.