IN THE FAIR WORK COMMISSION

MATTER NO: AG2017/1925 Aldi Prestons Agreement
AG2017/1943 Aldi Stapylton Agreement
AG2017/3027 Workpac Pty Ltd Manufacturing Agreement 2017

OUTLINE OF SUBMISSIONS - AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

A. Introduction

1. The Australian Chamber of Commerce and Industry (Australian Chamber) thanks the Full Bench for the opportunity to make submissions in this matter.

2. In making these submissions we have approached our task as one of assisting the Fair Work Commission (Commission) in identifying principles to guide its application of the Better Off Overall Test (BOOT) prescribed by section 193 of the *Fair Work Act 2009* (Cth) (FW Act) when assessing enterprise agreements generally. We have not engaged with the individual agreements subject of these proceedings in detail.

3. In summary, our submissions conclude that a proper application of the BOOT:

    - should not require inquiry into the circumstances of every individual employee to be covered by the agreement and indeed this would be impossible in terms of future employees. Rather the test should entail a comparison of the circumstances a class of employees if the award applied to them relative to the circumstances of that class under the enterprise agreement;
    - should take a 'global' approach, assessing the net impact of an agreement on the whole rather than a 'line by line' comparison with the award;
    - should take into account both monetary and non-monetary benefits.

4. We have also made suggestions for ways to improve the efficiency of an assessment process where a more complex exercise of discretion is required.

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B. The relevant statutory context

5. In making these submissions we are guided by the objects of the FW Act including:

- "achieving productivity and fairness through an emphasis on **enterprise-level collective bargaining**" as set out in the FW Act's primary objects;[1] and

- the objects of Part 2-4 of the FW Act as set out in section 171 which are:

  *(a) to **provide a simple, flexible and fair framework** that enables collective bargaining in good faith, **particularly at the enterprise level, for enterprise agreements that deliver productivity benefits**; and*

  (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

  (i) making bargaining orders; and

  (ii) dealing with disputes where the bargaining representatives request assistance; and

  *(iii) **ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.***

6. The FW Act promotes a collectivist approach, particularly when reconciled with the object of "ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system".[2]

7. It is also clear from the above objects that the framework for agreement making was intended to be:

- simple;

- fair;

- flexible;

- enterprise focussed;

- concerned with delivering productivity;

- conducive to an efficient approval process where agreements have been made.

[1] *Fair Work Act 2009* (Cth), s 3(f).
[2] *Fair Work Act 2009* (Cth), s 3(c).

8. It would be an unfortunate anomaly if the test underpinning enterprise agreement making was intended to be applied in a manner inconsistent with these principles.

9. However for some time there has been suggestion that the administration of the test is indeed failing to deliver on the objects of bargaining. For example:

- In terms of delivering productivity, the Productivity Commission observed that with regard to the retail sector "[p]*rovisions governing the making and approval of enterprise agreements, in particular the 'every worker must be better off overall' test, are also said by employers to be increasing the cost and complexity of negotiating enterprise agreements thus making productivity improvements more difficult to achieve*";[3]

- In terms of simplicity and efficiency of the approval process, the Productivity Commission also observed that "[i]*t has also been stated that it is administratively costly to determine with any confidence whether an agreement will satisfy the better off overall test and that approval processes are complex. The better off overall requirement can make the negotiation of agreements less attractive to employers and employees can potentially miss out on the opportunity to support acceptable trade-offs of pay and conditions*".[4]

10. More recently, the Productivity Commission conducted an inquiry into the workplace relations framework and made the following recommendation, finding that the BOOT was having the practical effect of discouraging enterprise bargaining:[5]

> *RECOMMENDATION 20.5*
>
> *The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.*
>
> *The no-disadvantage test would be conducted by the Fair Work Commission. It would assess that, at the test time, each class of employee, and each prospective class of employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).*[6]

11. The Productivity Commission noted that the NDT that operated before 2006 was cited by numerous employers as a "desirable model for future changes"[7] and proceeded to articulate the characteristics of its recommendation for an NDT that would replace the BOOT. By way of summary it suggested that the test should:

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[3] Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, p. xxx, 313, 368.
[4] Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, p. 368.
[5] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 695.
[6] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 700.
[7] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 696.

- "base comparisons with the award on how an EA would affect each class of employees, rather than each individual, to be covered by the agreement";[8]

- "take a 'global' approach, assessing the net impact of an agreement on the whole rather than a 'line by line' comparison with the award";[9]

- "take into account both monetary and non-monetary benefits".[10]

12. In making its recommendation the Productivity Commission stated:

> *Further, while the difference between these two tests should be marginal in theory, a NDT is likely to be more workable in practice. This is because in order to approve an agreement, the BOOT requires the FWC to be positively satisfied that an agreement will make all employees better off than the relevant award. This provides a wider scope for agreements to be rejected at the approval stage when compared with a NDT, which would require the FWC to identify how an agreement makes a class of employees worse of overall in order to reject an agreement. Some participants noted that there is a lack of hard evidence that a BOOT is harder to meet than a NDT, but did concede that there could be a symbolic difference that may incline FWC members to treat the BOOT as setting a slightly higher bar (Stewart, McCrystal and Howe, sub. DR271).*[11]

13. We acknowledge that it is not the role of the Commission to fix any deficiencies that might arise from the statute however, given contested views regarding the need for reform, closer analysis of the BOOT is needed to see how it can be administered in a manner that best reflects the objects as set out within the FW Act and applied in a consistent and workable way. It also seems worthwhile to consider:

- how far the Parliament intended to depart from the NDT that operated prior to 2006; and

- whether the proper administration of the BOOT departs from the principles espoused in the Productivity Commission's recommended design of a NDT as summarised above.

In the Australian Chamber's submission the application of the test should not depart from these principles and there is nothing in the legislature suggesting a requirement to do so.

14. The BOOT is set out in section 193 of the FW Act as follows:

> ***Passing the better off overall test***
>
> *When a non-greenfields agreement passes the better off overall test*

[8] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 696.
[9] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 697.
[10] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 697.
[11] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 695.

(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.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

(3) A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Award covered employee

(4) An award covered employee for an enterprise agreement is an employee who:
- *(a) is covered by the agreement; and*
- *(b) at the test time, is covered by a modern award (the relevant modern award) that:*
  - *(i) is in operation; and*
  - *(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and*
  - *(iii) covers his or her employer.*

Prospective award covered employee

(5) A prospective award covered employee for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:
- *(a) would be covered by the agreement; and*
- *(b) would be covered by a modern award (the relevant modern award) that:*
  - *(i) is in operation; and*
  - *(ii) would cover the person in relation to the work that he or she would perform under the agreement; and*
  - *(iii) covers the employer.*

Test time

(6) The test time is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

FWC may assume employee better off overall in certain circumstances

(7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

15. Before this a 'no-disadvantage test' (NDT) applied under the predecessor legislation and now repealed *Workplace Relations Act 1996* (Cth)(WR Act). The NDT was introduced via an amendment to the WR Act as contained in the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Transition Act). The NDT applied to agreements and variations made from its introduction (effective 28 March 2008).

16. Divisions 5A of the WR Act dealt with the no-disadvantage test and section 346D provided:

(1) An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement under any reference instrument relating to the employee

(2) A collective agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that the agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement under any reference instrument relating to one or more of the employees.

17. The Workplace Authority published an NDT Policy Guide which set out guidance regarding how it applied the test in practice. Of note, the following principles were set out in the NDT Policy Guide:

Under the Transition Act every workplace agreement must be assessed by the Workplace Authority Director to ensure the agreement passes the no-disadvantage test (NDT).

The NDT is an assessment of whether a workplace agreement results, on balance, in a reduction of an employee's overall terms and conditions of employment when compared with the reference instrument (see glossary for a definition of a reference instrument).

The NDT is a global test that assesses the overall outcome for the employee or employees.

….

A collective agreement will pass the NDT if the Workplace Authority Director is satisfied that the agreement does not result (or would not result), on balance, in a reduction in the overall terms and conditions of employment of the employees subject to the agreement under any reference instrument relating to one or more of the employees. A collective agreement will not pass the NDT if one or more employees is disadvantaged by the agreement.

The test is conducted by reference to the terms and conditions in the reference instrument that applied at the time the agreement was lodged.

The Act requires the Workplace Authority Director to compare a workplace agreement against the whole of the reference instrument for the classification relevant to the employee to be covered by the agreement. A reference instrument will usually contain terms and conditions that an employee covered by that instrument would be entitled to receive based on their patterns of work and/or their type of employment (for example full-time, part-time or casual).

If the Workplace Authority Director is satisfied that, on balance, the agreement does result in a reduction in an employee's overall terms and conditions of employment under the reference instrument, the agreement does not pass the NDT.[12]

18. The administration of the NDT during this period was in practice, highly problematic and the requirement that a "collective agreement will not pass the NDT if one or more employees is disadvantaged by the agreement" was of particular concern to the Australian Chamber.[13]

19. In submissions made to inquiry into the *Fair Work Bill 2008* (Cth) the Australian Chamber said:

> *159. Employers have very significant concerns at delays in agreement approval over recent years. The system has gone backwards in its capacity to rapidly translate terms agreed at the workplace level into a properly accepted, operative and enforceable legal instrument.*
>
> *160. Employers are looking to the new Act and the new test, to perform significantly better than the situation following WorkChoices. The delays of the past three years are not acceptable, are at odds with sound administration and effective compliance, and need to be fixed.*
>
> *161. Employers, employees and unions are entitled to a system capable of providing rapid, reliable and consistent answers on whether particular agreement terms can be approved, and one which turns agreements around rapidly and reliably. These are the standards against which agreement making under the Fair Work Act will be assessed.*
>
> ***Key Problems***
>
> *162. The key problem is ant test that requires an unduly detailed assessment for each individual employee to be covered by an agreement, which may be thousands.*
>
> *163. An unduly detailed and prescriptive test, required to be applied on an individual basis, slows agreement approval to a trickle, leading to a backlog of agreements, uncertainty for employers and employees and significant compliance problems.*

[12] Workplace Authority, *Agreement making and no-disadvantage test policy guide,* April 2008, p. 13.
[13] Workplace Authority, *Agreement making and no-disadvantage test policy guide,* April 2008, p. 13.

164. Section 193 of the Bill appears to raise just such a concern, notwithstanding the Explanatory Memorandum stating an intention to the contrary.

ACCI Proposal

Include appropriate clarification in the Act that the test will be applied to classes of employees or indicative rosters in preference to requiring a detailed examination of any agreement again each and very award covered employee….[14]

20. The Australian Chamber elaborated on these concerns in Part II of its submission stating:

371. It is welcome that the Explanatory Memorandum provides the following clarification:

> *818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the contest of the approval off enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances.*

372. Despite the assurances of the Explanatory Memorandum that FWA could apply the test to "classes of employees", the words of s. 193 require FWA to be assured that " each award covered employee, and each prospective award covered employee … would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee". (emphasis added).

373. ACCI prefers the position adopted between 1993 and 2005, whereby the AIRC approved agreements on the basis of a global NDT. Unfortunately, neither the current Act nor the Bill achieves that.

374. The Bill uses different wording under former s.170XA of the pre-WorkChoices Act which stated: "An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment".

375. As such, the AIRC did not inquire into each and every individual employee to determine whether they were disadvantaged. The potential consequence of the Fair Work Act is that agreement making and approval will take more time, become more uncertain and fewer agreements will pass the test.

376. As this is an area where there is a level of suspicion and fear that agreements will not be approve without satisfying the test for each individual employee. This may assisted by the following.

Recommendation 22-4(4).9

[14] Australian Chamber of Commerce and Industry, Submission to the Senate Education Employment and Workplace Relations Committee Inquiry into the *Fair Work Bill*, Part 1, p. 45.

Paragraph 818 of the Explanatory Memorandum be incorporated into the Act as a statutory note to s. 193.

21. It is evident that some consideration was given to concerns expressed regarding the BOOT during the inquiry process and subsection 193(7) was included by way of amendment. Following amendments to the *Fair Work Bill 2008* (Cth), including the addition of subclause 193(7), a Supplementary Explanatory Memorandum provided further clarification regarding how the BOOT was intended to operate. In particular, it stated:

> ***Item 1 – Clause 193***
>
> *122. This item inserts subclause 193(7) into the Bill to clarify how the better off overall test operates. Subclause 193(7) ensures that in satisfying itself that each employee is better off overall FWA may consider the circumstances of classes of employees. Subclause 193(7) establishes an evidentiary presumption that, in the absence of any evidence to the contrary, the better off overall test does not require FWA to enquire into each employee's individual circumstances.*
>
> *123. Subclause 193(7) is intended to recognise that, although the enterprise agreement must pass the better off overall test in relation to each employee and prospective employee, FWA may group employees into classes in order to apply the test. It ensures that the test provides a guarantee that the agreement does not undercut the safety net but is also able to be applied by FWA efficiently and without causing undue delay in the agreement approval process.*
>
> *124. The phrase 'class of employees' is intended to refer to a group of employees covered by the enterprise agreement who share common characteristics that enable them to be treated as a group when FWA applies the better off overall test. An example is where the employees are in the same classification, grade of job level, with the same working patterns.*

22. The Supplementary Explanatory Memorandum provides the following example:[15]

> ***Illustrative Example***
>
> *Wreck Resolve Limited (WRL) is a chain of automotive repairers. WRL makes an enterprise agreement that covers employees working in its workshops and head office. WRL seeks approval of the agreement from FWA. Amongst the employees covered by the agreement are mechanics of different levels of qualification whose classifications under the agreement align with three classifications in the relevant modern award. The agreement covers employees within each of these classifications in the same way. Accordingly, all of the employees falling within each classification may be considered as a 'class of employees' by FWA when it assesses whether the agreement passes the better off overall test. In the absence of any evidence to the contrary, FWA is not therefore required to enquire into the individual circumstances of each employee within the class.*

[15] Supplementary Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), p. 22.

23. It is apparent that the amendment was intended to make abundantly clear that a proper application of the BOOT did not require an inquiry into the circumstances of every individual employee. It is also apparent that the Parliament had not intended for the test to depart significantly from the No Disadvantage Test (NDT) that applied from 1996 to 2006. This NDT was set out in section 170XA of the WR Act which provided:

> *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*.

24. In 2012 a Government appointed panel (FW Act Review Panel) released its report arising from its evaluation of the Fair Work legislation (Panel Report) after two years of operation.[16] The Panel Report states:

> *The BOOT was intended to address problems associated with previous tests for measuring proposed agreement content against the relevant safety net. It is important to emphasise that the BOOT serves quite a different purpose in this context than it does in relation to IFAs, which we have already discussed. Indeed, it is unfortunate that the same language is used to describe the test in what are materially different contexts. The BOOT was intended to operate so that enterprise agreements would 'not need to comply with every condition in the relevant award' but could be approved by FWA 'as long as the agreement means employees are better off overall against the safety net'. It is distinguishable from the fairness test that existed under the latter part of Work Choices, 'which only required that an employee be compensated for the modification or removal of a limited range of protected award conditions'.* ***It was anticipated that the BOOT would be applied by FWA using a 'broadly similar approach to that taken by the AIRC in their administration of the no-disadvantage test that applied from 1996 to 2006*** (emphasis added, footnotes omitted).[17]

25. In support of its findings about the anticipated operation of the BOOT, the FW Act Review Panel referenced the submissions of the Department of Education, Employment and

[16] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012).
[17] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012), p. 164, with reference to DEEWR submission to the FW Bill Inquiry, pp. 25-66.

Workplace Relations (DEEWR) during the inquiry into the *Fair Work Bill 2008* (Cth) which stated:

> *3.73 An enterprise agreement passes the better off overall test if FWA is satisfied at the time of the test that the agreement makes each employee better off overall when compared to the terms and conditions of the relevant modern award. This is different to the Fairness Test that existed under the WR Act as amended by the Workplace Relations Amendment (A Stronger Safety Net) Act 2007 which only required that an employee be compensated for the modification or removal of a limited range of protected award conditions.* ***The Department anticipates that FWA would take a broadly similar approach to that taken by the AIRC in their administration of the No Disadvantage Test that applied from 1996 to 2006.*** *Under the AIRC's application of the No Disadvantage Test, an agreement could not pass the test if one or more employees (including future employees) were disadvantaged* (emphasis added, footnotes omitted).
>
> *3.74 The better off overall test ensures that no employee to be covered by an agreement can be disadvantaged compared to the safety net. The test is assessed at the point in time the agreement is made. However, to ensure that employees are not disadvantaged over the life of an agreement, if minimum wages specified in awards or national minimum wage orders are increased to be more beneficial than the wages specified in the agreement, then the employer must pay those higher wages. This is consistent with the concept of a true safety net – no employee is able to be disadvantaged by the making of an enterprise agreement.* ***However, as an agreement will generally apply the same conditions to a class of employees (for example, casuals, checkout operators), FWA will generally be able to apply the better off overall test to such groups of employees, rather than investigating the circumstances of every individual employee*** (emphasis added, footnotes omitted).

26. While there are some notable differences in the drafting of the No Disadvantage Test that applied from 1996 to 2006 as observed in the Australian Chamber's submission to the inquiry into the *Fair Work Bill 2008* (extracts reproduced above) there are some principles that can be drawn which would see the BOOT applied in a manner which diverges less from the NDT than seems presently the case.

27. A Full Bench of the Commission has given some consideration to the extent to which the BOOT departs from predecessor tests. In *Re Solar Systems Pty Ltd* [2012] FWAFB 6397 a Full Bench gave consideration to the comparison that the Commissioner at first instance drew between the NDT and the BOOT noting:

> [7] In his decision the Commissioner commenced by considering the approach to the BOOT in s.193 of the Act. He analysed differences between the BOOT and the no-disadvantage test in the Workplace Relations Act 1996 and determined not to follow the approach to the BOOT adopted by Deputy President Bartel in Re Top End Consulting Pty Ltd. He said:

"[11] The difference between the above two tests is not a subtle difference, it is real and substantial.

[12] The earlier NDT focussed on the overall terms and conditions of employment and the focus was on the respective instruments, ie the agreement and the award. The current BOOT does not focus on the respective instruments but rather on the employee and whether the employee is better off overall. The BOOT requires that FWA have regard to the position of the employee if an award applied to the employee against the position of the employee if an agreement applied to the employee.

[13] Whether an award or an agreement applies to an employee, the award or agreement is not the only source of workplace rights and entitlements of the employee. The BOOT is concerned with having regard to all of the workplace rights and entitlements because only by having regard to all of the rights and entitlements can an assessment be made as to whether the employee is Better Off Overall.

[14] The Full Bench in Bupa was required to focus on the instruments as that was the intent of the legislative provision which applied at that time. The BOOT however has a focus which is not limited to the respective instruments.

[15] I note the decision in Top End Consulting which said in relation to the BOOT that "the intentions of the parties as to working arrangements which may flow from" the terms of the enterprise agreement are to be disregarded. I agree that the intentions of the parties are to be disregarded when applying the BOOT. What cannot be disregarded for BOOT purposes is what the terms of the Agreement permit to be done. What is permitted by the terms of the enterprise agreement may not be intended to be acted upon, but if it is permitted then it may be acted upon. The same applies in relation to the Award which is to be considered for the purposes of the BOOT. An employer may not have the intention of using the breadth of the ordinary hours of work permitted by the award, but it is not what the employer intends that is relevant for the BOOT but what is permitted by the award."

28. The Full Bench found:

[11] The Commissioner's comments regarding the two tests are set out above. For our part we do not agree that the differences in the tests are as substantial as suggested by the Commissioner. Both tests require a comparison of the position of employees under respective instruments. There are differences in the wording. The BOOT requires a finding that each employee would be better off. The no-disadvantage test required a finding that there was no reduction in terms and conditions of "the employees." In our view the approach of Deputy President Bartel was not incorrect and we affirm generally the approach to the BOOT adopted by the Full Bench in the Armacell Case. There is a danger, in our view, in seeking to place a gloss on the legislative test beyond the words of the section. The task is best expressed as applying the words in s.193.

29. In the matter of *Top End Consulting Pty Ltd* [2010] FWA 6642 referred to above, the Deputy President found:

> *[30] The assessment as to whether an agreement passes the Better Off Overall Test is a global one. While I am satisfied that the voluntary hours provisions of the Agreement are less beneficial to the employees than the terms of the modern awards, I am required to form a view as to whether the Agreement provisions that the employer has identified as more beneficial to the employees than the reference instruments results in them being better off overall*.

30. This notion of the BOOT being a 'global' test and the Armacell case are dealt with in further detail in this submission.

C. The BOOT does not require inquiry into the circumstances of every individual employee

31. While the wording of the BOOT requires "*each award covered employee, and each prospective award covered employee, for the agreement would be better off overall"* this does not require the Commission to inquire into the circumstances of every individual employee.

32. This position is confirmed by the Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) (Explanatory Memorandum) which states:

> *817. Subclause 193(1) provides that an agreement that is not a greenfields agreement passes the better off overall* (sic) *if FWA is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better offer* (sic) *overall if they were employed under the agreement than under the relevant modern award.*
>
> *818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees.* ***In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances*** (emphasis added)***.***

33. The Explanatory Memorandum goes on to provide the following illustrative example:[18]

> ***Illustrative example***
>
> *Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement and the agreement*

[18] Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), p. 129.

affects each employee within a classification in the same way, FWA could group employees together when assessing the employees against the better off overall test. It is intended that FWA could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

If FWA were satisfied that the agreement affected each employee within the classification in the same way, and that the agreement passed the better off overall test for the hypothetical employee within the classification, FWA could be satisfied that the agreement passed the better off overall test for each award covered employee and prospective award covered employee within that classification.

34. As noted above, following amendments to the *Fair Work Bill 2008* (Cth), including the addition of subclause 193(7), a Supplementary Explanatory Memorandum provided further clarification regarding how the BOOT was intended to operate and further provide that "*Subclause 193(7) establishes an evidentiary presumption that, in the absence of any evidence to the contrary, the better off overall test does not require FWA to enquire into each employee's individual circumstances"*:[19]

35. This approach has been confirmed in the jurisprudence. The Full Bench in *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163 found:

> *[46] The test, as the name implies, requires an assessment of the overall benefit to an employee employed under an enterprise agreement as compared to the relevant award. This consideration does not require an assessment of the circumstances of each individual employee but, as s. 193(7) allows, "…if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant award applied to that class. FWA is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee".*

36. The FW Act Review Panel did however draw distinction between the BOOT and previous tests as well as a distinction between 'class' and the 'group' of employees covered by an agreement stating:

> *However, the BOOT is not a 'collective' test in the sense of permitting the impact on employees to be assessed as a group. Instead, it requires each employee or prospective employee to be better off overall. In this regard,* ***the BOOT arguably differs from the tests under previous industrial laws for measuring agreements against the safety net****,* ***which were interpreted to allow the assessment of advantage or disadvantage to be made on the group of relevant employees as a whole. However, in making its assessment, FWA is not required to investigate each employee's individual circumstances but can consider a class of employees and, in the absence of evidence to the***

[19] Supplementary Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), p. 22.

contrary, assume that each employee in that class would be better off overall (emphasis added, references omitted).[20]

37. The use of the term 'arguably' in the statement above does suggest that the extent to which the BOOT departs from the NDT that was prescribed by section 170XA of the WR Act may be contested and we accept that this may be the case.

38. However it does confirm our understanding that assessing whether or not an agreement passes the BOOT does not require a consideration of the circumstances of every individual to be covered by an agreement. This would not be possible in the circumstances of 'prospective employees'.

39. The FW Act Review Panel also suggested:

> *It was submitted that the change from applying a 'collective' test has made it substantially more difficult to apply the BOOT than it was to apply the no-disadvantage test, which has been a disincentive to agreement making. We are concerned that this may be the case, and note that some individual examples have been provided in submissions to this effect. We are concerned that the change between the BOOT and the no-disadvantage test may mean that employers are now required to meet a more rigid standard, as agreements are no longer permitted to disadvantage certain employees where the group of employees is, as a whole, advantaged. We have considered whether there should be additional flexibility in the BOOT such that not every relevant award-covered employee must be better off in appropriate circumstances. However, we are unaware of the widespread impacts of this issue and accordingly are reluctant to recommend change at this stage.*[21]

40. This ultimately led to the FW Act Review Panel making the following recommendation:

> ***Recommendation 25:*** *The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.*[22]

41. In the matter of *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo, The Australian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887 (Hart) the Full Bench stated:

> *It is well established that the test requires the identification of terms which are more beneficial for an employee, which are less beneficial for an employee, and an*

[20] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012), p. 165.
[21] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012), p. 165.
[22] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012), p. 165.

> *overall assessment of whether an employee would be better off under the agreement*.[23]

42. This 'global' nature of the assessment is explored further below. However the Full Bench in Hart ultimately found that "the application of the BOOT requires satisfaction, as at the test time, that each Award covered employee and each prospective employee, would be better off overall under the Agreement".[24] It was immaterial that the vast majority of employees were better off.

43. The outcome in Hart gave credence the earlier expressed concern of the Productivity Commission when it stated:

> *"[i]n practice, the FWC has typically used the BOOT in relation to a given class of employees, but there remains a risk that a single employee's complaint might sink an agreement. Statutory change to ensure that the test be for a class of employees would address this problem*".[25]

44. We accept that a legislative provision that expressly permits assessment of advantage or disadvantage to be made on the group of relevant employees as a whole may better encourage collective bargaining relative to applying an assessment of a class.

45. However this does not mean that the Commission cannot assess agreements within the current framework with consistency and adopting a principled approach so that an employer and its employees can have some degree of certainty as to whether it is going to pass.

46. Furthermore, it does not mean Commission cannot adopt a procedure in the assessment of agreements that is efficient and pragmatic. For example, the Commission has shown an inclination to consider the common working patterns in an industry when it comes to assessing an agreement against the BOOT.[26] Absent information from an applicant that would warrant a different approach, this approach is far better aligned to the objects of Part 2.4 than an approach that would require a consideration of rosters for *all* employees *within* a particular class of employees or which requires the applicant to provide a BOOT assessment for each individual employee.

47. The objects of the FW Act do not suggest it was intended that the assessment process be administered with a level of prescription and forensic analysis that puts people off altogether. Assessment should instead be focussed on delivering a simple, fair and efficient approach supportive of an agreement making system where wages and conditions are linked to productivity, enhancing flexibility as well as employee and employer circumstances at the enterprise concerned.

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[23] *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo, The Australian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887at [6].
[24] *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo, The Australian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887 at [15].
[25] Productivity Commission, *Workplace Relations Framework - Overview,* 2015, p. 35.
[26] See for example *Construction, Forestry, Mining and Energy Union v Levent Paining Pty Ltd t/a Levent Altintas* [2017] FWCFB 3911 at [5].

D. The BOOT does not require a "line by line assessment" but should instead operate as a "global assessment"

48. On the surface, bargaining presents an opportunity to displace the 'one size fits all' character of the award structure and to instead implement a mix of wages and conditions which are more relevant to the employer and employees in a particular enterprise and which may drive productivity.

49. The Australian Chamber therefore submits that the BOOT was not intended to operate in a manner that would see each individual entitlement in an enterprise agreement assessed against the corresponding entitlement in an award but was intended to instead operate as a global assessment.

50. This position accords with the Commission's own guidance as expressed in its *Benchbook: Enterprise Agreements* (Benchbook) in which it is stated:

> *The better off overall test considers the advantages and disadvantages to employees in an agreement, compared to the terms in the relevant modern award.*
>
> *The better off overall test requires the identification of agreement terms which are more beneficial, and the terms which are less beneficial, and then an overall assessment is made as to whether employees would be better off under the agreement than under the relevant award.*
>
> *The better off overall test is not applied as a line by line analysis. It is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees. The application of the better off overall test therefore requires the identification of the terms of an Agreement which are more beneficial to employees when compares to the relevant modern award, and the terms of an Agreement which are less beneficial and then an overall assessment of whether an employee would be better off overall under the Agreement.*
>
> *…*
>
> *An agreement may pass the test even if some award benefits have been reduced, as long as overall those reductions are more than offset by the benefits of the agreement.*[27]

51. The FW Act Review Panel shared this view noting that:

> *The BOOT is a 'global' test in the sense that it does not require each provision of the agreement to result in employees being better off overall than they would have been under the award. Rather, it permits agreements that disadvantage employees in some respects and advantage them in others to be approved, provided that the advantages outweigh the disadvantages. In this respect it is similar to the no-*

[27] Fair Work Commission, *Benchbook: Enterprise Agreements*, pp. 127 - 128.

disadvantage test which applied under the WR Act (emphasis added, references omitted).[28]

52. In drawing this assessment both the Benchbook and the FW Act Review Panel relied on the matter of *Armacell Australia Pty Ltd and others* [2010] FWAFB 9985. In this matter the Full Bench opted against a 'line by line' approach and instead found:

> *The BOOT, as the name implies, requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement…*[29]

53. Also of note, the Full Bench in *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163 found:

> *It is trite to observe that awards typically contain both monetary and non-monetary terms and conditions. Obviously enough, the BOOT calls for an overall assessment…*[30]

and

> *[47] As His Honour was well aware the Agreement contained some provisions which may be considered inferior to the counterparts provision in the Awards and provisions which were superior. There is nothing unusual about that. What he needed to satisfy himself of was whether, weighing the Agreement provisions as a whole within those in Awards, an employee is better off over all. This, in our opinion, is clearly what His Honour did.*

54. The approach in Armacell was subsequently affirmed in *Re Solar Systems Pty Ltd* [2012] FWAFB 6397 [31]where it was found that the Commissioner had erred at first instance in determining that the agreement did not pass the BOOT. The Full Bench found:

> *…the Commissioner's approach of identifying certain areas of "concern", finding that they were not more beneficial than the Award, and then elevating them to disadvantages compared to the Award such that they were found to outweigh the advantages of the Agreement undermined his approach to the BOOT. In order to be relevant to the BOOT a matter needs to be advantageous or disadvantageous. It is then a matter of balancing the items that fall within the two categories to come to an overall view. When the Commissioner's decision is viewed as a whole it is not clear that be actually did this.*[32]

55. In quashing the decision and remitting the matter for determination (at which stage the agreement was ultimately approved) the Full Bench stated:

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[28] *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation* (2012), p. 165.
[29] *Armacell Australia Pty Ltd and others* [2010] FWAFB 9985 at [41]
[30] *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163 at [96.
[31] *Re Solar Systems Pty Ltd* [2012] FWAFB 6397 at [11].
[32] *Re Solar Systems Pty Ltd* [2012] FWAFB 6397 at [15].

> *It appears to us that the Commissioner adopted an unsympathetic approach to the Agreement from the start. He raised a number of concerns in the hearing of 16 January. Although these concerns were partly addressed in the hearing and in further written submissions, in his decision over four months later, the Commissioner did not adequately or fairly apply the BOOT to the terms of the Agreement. He appeared to place little weight on the higher wages and the further wage increases provided for in the Agreement. His approach was to seek to extract additional benefits or demonstrate possible disadvantage from the operation of the provisions without properly seeking undertakings to address these concerns. He made findings that in certain respects there was no net benefit, and then apparently used those findings to justify a conclusion that overall employees were not better off. In doing so the claimed benefits were not fairly and appropriately considered against the very minor disadvantages in the Agreement, some of which were unintentional and able to be remedied. We also consider that in the context of this matter the delay in handing down his decision was inconsistent with the intention of the legislation that agreement approval applications are resolved expeditiously.*[33]

56. The principle arising from Armacell was also relied on in *AKN Pty Ltd t/a Aitkin Crane Services* [2015] FWCFB 1833. The Australian Chamber does not consider there to be any reason for the Commission to depart from it in applying the BOOT.

E. Both monetary and non-monetary benefits should be taken into account in conducting an assessment

57. The Australian Chamber submits that non-monetary benefits should be taken into consideration when applying the BOOT. The Explanatory Memorandum contemplates that non-monetary benefits may in fact result in an employee being better off, stating

> *…in Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test…*[34]

58. However there is uncertainty around this position. Decisions involving the approval of enterprise agreements have applied inconsistent treatment in the assessment of agreements containing clauses which would displace an entitlement to higher rates under the award in exchange for flexibility in working hours.[35]

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[33] *Re Solar Systems Pty Ltd* [2012] FWAFB 6397 at [27].

[34] Explanatory Memorandum, *Fair Work Bill 2008* (Cth), 867.

[35] *Re Milbag Pty Ltd Enterprise Agreement* [2010] FWAA 1834 (4 March 2010); *P & A Securities Pty Ltd* [2010] FWAA 3639, *Sylvan Lodge Trust [2010]* FWAA 2243 at [3]–[5]; *Anable Pty Ltd [2010]* FWAA 3407. at [3]–[6]; 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); *Fanoka Pty Ltd t/as Fairview Orchards re Fanoka Pty Ltd Agreement 2009* [2010] FWAA 2139 (16 March 2010); *Bupa Care Services, ANF and ASU Enterprise Agreement 2009* (2010) 196 IR 1; [2010] FWAFB 2762 (15 April 2010); *Samphie Pty Ltd t/as Black Crow Organics re Black Crow Organics Enterprise Agreement* 2009 [2010] FWAA 5060 (8 July 2010); *Top End Consulting Pty Ltd re Top End Consulting Enterprise Agreement* 2010 [2010] FWA 6442 (24 August 2010).

59. Of particular note, the FW Act Review panel also made reference to the decision of the Full Bench in *Bupa Care Services Pty Ltd* [2010] FWAFB 2762 which considered the NDT under the Transition Act. Applications to approve two agreements were rejected by Commissioner Smith at first instance on the basis that clauses that gave employees the capacity to work their preferred hours on the trade-off that they would not receive the penalty rates prescribed by the award meant the agreement did not pass the NDT.[36] The Full Bench in affirmed the decision on appeal referring to the matter of *MSA Security Officers Certified Agreement* (2003), PR 937654, in which the majority stated "[w]e fail to see how the distinction between hours performed beyond ordinary hours at the employer's direction and hours performed with the voluntary agreement of the employee is available for the purpose of applying the no-disadvantage test, given the terms of the Award".

60. We do not accept that this approach was intended with regard to the operation of the BOOT under the FW Act, noting its departure from the approach set out in the Explanatory Memorandum.

61. We appreciate that in bargaining for an enterprise agreement the value placed on a non-financial benefit may be more difficult to assess in comparison to an Individual Flexibility Arrangement where the assessment can considered subjectively with regard to one individual. The assessment process where non-monetary benefits are involved may require a more complex exercise of discretion. However it should not be discounted that some employees to be covered by an agreement may value access to some form of flexibility over a higher rate of pay.

62. In *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163 the Full Bench found:

> *It is trite to observe that awards typically contain both monetary and non-monetary terms and conditions. Obviously enough, the BOOT calls for an overall assessment. Comparing monetary terms and conditions is, at the end of the day, a matter of arithmetic. There is an obvious problem of comparing apples with oranges when it comes to including changes to non-monetary terms and conditions into the "overall" assessment that is required by the BOOT. In such circumstances the Tribunal must simply do its best and make what amounts to an impressionistic assessment, albeit by taking into account any evidence about the significance to particular classes of employees covered by the Agreement of changes to particular non-monetary terms that render them less beneficial than the equivalent non-monetary term in an award. In my view, it may also be relevant to consider the terms of any existing agreement and whether there is a relevant change of position when compared to that existing agreement.*[37]

63. From the above it can be observed that conducting an "overall assessment" of an agreement against the BOOT is not limited to a financial comparison but rather a consideration of both the monetary and non-monetary benefits in the agreement. Benefits should not be disregarded merely because they are difficult to quantify in terms of financial value. Importantly however, the BOOT only requires comparison against the modern award, not against any previous or existing agreement.

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[36] *Bupa Care Services Pty Ltd [2010]* FWA 16 [11].
[37] *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163 at [96]

64. We note the example provided by the Aldi Foods Pty Ltd (Aldi) in submissions these proceedings regarding the practice of split shifts:

> *In recent proceedings before the Commission in relation to another of the ALDI Agreements, the SDA pointed out that split shifts were not proscribed under the relevant agreement. ALDI responded that it was not part of the ALDI method of operation to conduct split shifts and the absence of an express prohibition was not an indication that ALDI desired to operate in that way. The SDA were able to identify a few employees who were engaged on split shifts. ALDI immediately prohibited the practice and gave an undertaking (later being incorporated in other agreements) as a proscription on the practice that employees would not be engaged on split shifts. This led to some consternation at the relevant store where, in accordance with ALDI's rostering practices whereby rosters are worked out at the store level having regard to the needs of employees and employer, the split shifts had been included in the roster at the request of employees who were involved in university studies and were wanting to organise their working hours around their lecture commitments. So far as these employees were concerned, they were distinctly worse off after the practice was prohibited than before, albeit they were no worse off than if they were covered by the awards.*[38]

65. We submit that it should be open to an employer to treat employees who make requests about their working hours to suit their personal circumstances that divert from an award or who have the ability to nominate their preferred hours collectively in undertaking an assessment of the BOOT. We also support Aldi's submission that the likelihood of the employee to have chosen the arrangement should be a relevant consideration.[39] In some cases this may be apparent from the face of the agreement and in other cases this may be discernible from the representations or undertakings of an applicant.

66. In circumstances where an applicant's case for passage of the BOOT rests on the treatment of non-monetary benefits there may be benefit in some variation to the current administrative process that is applied to the assessment of enterprise agreements.

67. We note the Fair Work Commission's recently published 2016-17 Annual Report in which it states:

> *In 2016–17, the Commission met the target of a median of 32 days for enterprise agreement approval times. In 2016–17, the Commission finalised 5,606 applications for approval of an enterprise agreement, an increase of 157 applications from the previous year.*
>
> *The increase in approval times in 2016–17, compared to 2015–16, is partly attributable to the rigorous process undertaken by the agreement triage team for determining whether statutory requirements are met. One impact is that a significantly higher number of enterprise agreements are being approved with written undertakings than in previous reporting periods. It takes the Commission longer, on average, to approve agreements with written undertakings, which often involve extensive communication with the applicant. In addition, internal resourcing*

[38] Submissions of ALDI at [41].
[39] Submissions of ALDI at [44].

pressures for staff who assist the Commission in assessing enterprise agreement approval applications contributed to delays in the approval process, but these issues have now been addressed

68. Timely agreement assessments are important in delivering on the object of "ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay". There is, however, a risk that those administering the triage process may approach the task line by line and face difficulties with characterising non-monetary benefits. They do not have the statutory capacity to form an impression overall.

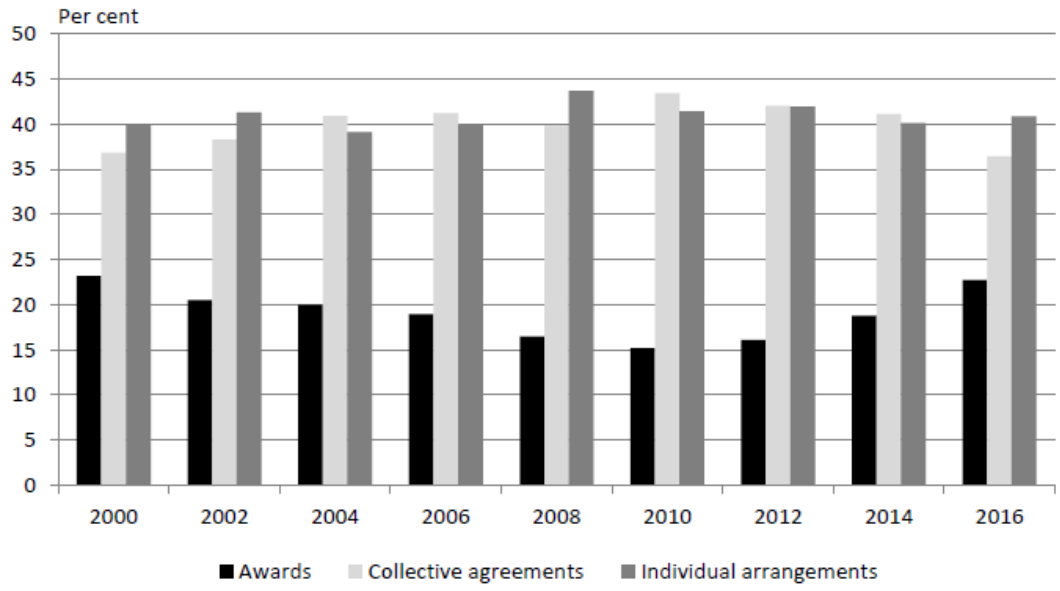
69. Consideration could be given to enabling an applicant to bypass the triage process in more complex applications e.g. where they require consideration non-monetary benefits, contingent benefits or of a wide diversity of classes. Such assessments may require a more complex level of discretion best reserved for a member of the Commission. In these cases the approval process may benefit from a more direct dialogue and information sharing leading to an understanding beyond what a paper-based, desk-top analysis may permit. A Full Bench of the Commission has found that :

[28] The application of the BOOT is a matter that involves the exercise of discretion, and it involves a degree of subjectivity or value judgement. [40]

F. Concluding comments

70. The Australian Chamber is concerned that longitudinal data on method of pay setting demonstrates a sustained increase in award reliance and a decrease in the percentage of employees covered by collective agreements since 2010. This suggests that there is a problem with the agreement making system.

Chart: Method of setting pay



[40] *Transport Workers' Union of Australia v Jarman Ace Pty Ltd T/A Ace Buses* [2014] FWCFB 7097 at [28] citing *ALDI Foods Pty Ltd v Transport Workers' Union of Australia (2012) 227 IR 120, 123–4.*

Note: As defined by the ABS, individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses.

Source: Fair Work Commission Statistical Report drawing from ABS, *Employee Earnings and Hours, Australia,* various, Catalogue No. 6306.0.

71. The Australian Chamber does not consider it a coincidence that this trend has emerged after the commencement of the FW Act. The FW Act introduced new procedures and steps for the making of an approvable enterprise agreement which have proved to be highly prescriptive, too open to technical breach and discouraging. Similarly, the operation of the BOOT has proved to be poorly defined for purpose.

72. We acknowledge that is beyond the role of the Commission to address flaws in the statute and that uncertainty in the application of the BOOT is likely to be in part operating as a disincentive to enterprise bargaining. In the Australian Chamber's submission, these proceedings represent an opportunity to provide greater certainty within the statutory constrraints.

73. Where the Commission is able to exercise its discretion in a manner that best supports the object of Part 2-4 of the FW Act we consider it should do so.

74. In our submission a simple, flexible and fair framework and which ensures applications to the Commission for approval of enterprise agreements are dealt with without delay will be better delivered by confirming that the BOOT:

    - should not require inquiry into the circumstances of every individual employee to be covered by the agreement; rather the test should entail a comparison of the circumstances a class of employees if the award applied to them relative to the circumstances of that class under the enterprise agreement;

    - should take a 'global' approach, assessing the net impact of an agreement on the whole rather than a 'line by line' comparison with the award;

    - should take into account the overall balance of monetary and non-monetary benefits.