DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Transport Workers' Union of Australia & Anor
v
ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership)
(C2015/6904 and C2015/6909)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT KOVACIC
COMMISSIONER WILSON

MELBOURNE, 22 FEBRUARY 2016

Appeal against decision [2015] FWCA 6373 of Deputy President Bull at Sydney on 22 September 2015 in matter number AG2015/3510 – permission to appeal – standing – single enterprise agreement or greenfields agreement – fairly chosen – better off overall test – Fair Work Act 2009, ss.52, 53, 172, 182, 185,186, 604.

Introduction

[1] This decision concerns an application for permission to appeal by the Transport Workers' Union of Australia (TWU) and the Shop, Distributive and Allied Employees Association (SDA) against a decision of Deputy President Bull handed down on 22 September 2015.[1] The decision of the Deputy President under s.185 of the *Fair Work Act 2009* (the Act) was to approve the *ALDI Regency Park Agreement 2015* (the Agreement).

[2] At the hearing of the matter on 20 November 2015 Mr G Hatcher, SC, and Ms A Perigo of counsel appeared on behalf of ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) (ALDI). Mr W Friend QC appeared on behalf of the SDA with Mr D Macken and Mr J Tierney. Mr D Blair appeared by video link from Adelaide on behalf of the TWU.

[3] At the hearing of the matter the SDA, the TWU and ALDI sought and were granted leave to adduce fresh evidence that was not before Deputy President Bull. That evidence comprised witness statements and documents concerning the operations covered by the Agreement and the engagement of employees in those operations.

Background

[4] ALDI made an application for approval of the Agreement on 4 August 2015. The matter was listed for "eHearing", in chambers, before Deputy President Bull on 21 September 2015. Any party wishing to be heard in the matter was to contact the chambers of Deputy President Bull prior to the hearing and the matter would be listed for an attendance hearing.

No such contact was made and on 22 September 2015 Deputy President Bull approved the Agreement on receiving an undertaking from ALDI concerning the hourly rate of pay for one of the classifications in the Agreement.

[5] The scope of the Agreement covers employees of ALDI in ALDI's Regency Park Region in South Australia (and parts of NSW and Victoria). Clause 5 of the Agreement contains the following explanation of its scope:

> "ALDI operates Regions based on a Distribution Centre and stores within that Region.
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> The Regency Park Region is defined as the Distribution Centre operated by ALDI in Gallipoli Drive Regency Park ("The Distribution Centre"), and all ALDI Stores which operate in South Australia and the Broken Hill City Council Local Government Area in New South Wales and the Rural City of Mildura Local Government Area in Victoria.
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> At the time of commencement of this Agreement, the Regency Park Region will include the stores listed in Schedule 5. This Agreement will apply to these stores and any new stores which open in the Regency Park Region as defined in this clause."

[6] Schedule 5 provides:

> As at the commencement of this Agreement, the following stores are in the Regency Park Region. Additional stores which open within the boundaries of the Regency Park Region as defined in Clause 5 of the Agreement will also form part of the Regency Park Region.

City	Address
Seaford Heights	Cnr Robinson Road and Vista Parade. Seaford Heights SA
Parafield Gardens	88-94 Lavender Drive, Parafield Gardens SA

[7] The classifications of employees covered by the Agreement are described in clause 5 as:

> "This Agreement will apply to the following classifications of Employees of ALDI employed in the Regency Park Region:
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> - Employees engaged in a retail store operated by ALDI ("a Store") in the positions of Store Manager, Assistant Store Manager, Store Management Trainee, Store Assistant. and Stock Replenisher;
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> - Employees engaged in the Distribution Centre operated by ALDI in the positions of Warehouse Operator, Warehouse Mechanic, Warehouse Caretaker, and Palletiser; and
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> - Employees engaged in the transport and distribution operations of ALDI ("Transport and Distribution") in the position of Transport Operator operating from the Distribution Centre."

[8] The Agreement identifies 16 employee signatories to the Agreement. The application for approval of the Agreement states that it covers 17 employees based on agreement by a postal ballot of the employees at which 16 employees cast a valid vote, 15 of which were in favour of the Agreement. Neither the SDA nor the TWU were involved in the making of the agreement or in its approval.

[9] The additional evidence led by the parties establishes that at the time the Agreement was voted on, the Distribution Centre at Regency Park was still under construction and no stores in the region had commenced trading. The employees who voted for the Agreement were employed by ALDI at other locations. They appear to have each submitted an expression of interest to transfer into the Regency Park Region and accepted a written offer of employment to work in the Regency Park Region. Acceptance of the offer was on the express premise that they would be able to participate in the enterprise agreement voting process for an enterprise agreement to cover the Regency Park Region. The offer of employment also stated that the date of transfer to the new region would be notified subsequently and in the meantime the terms and conditions applying to their current roles would continue to apply. Each of contracts contained the following introductory paragraph:

> "I am pleased to advise that Aldi Stores (a limited partnership) wishes to offer you ongoing employment as [position] in our new Regency Park region in South Australia, commencing when the new region opens. At this stage, we anticipate this will occur around October 2015, however you may be invited to commence in the new region earlier than this time, depending on the need to train new employees. You will continue to be employed until that date in your current region and will be covered by that region's enterprise agreement."

[10] Under the heading "Leave Entitlements" the letter provides:

> "The hours you have accrued as entitlements to annual, personal/carer's and long service leave will transfer with you to the new region…"

[11] The operations of ALDI throughout Australia are organised on a regional basis. Various other Agreements covering operational regions have been approved by the Commission.[2] On 3 June 2013, the Commission approved the *ALDI Minchinbury Agreement 2012,* the *ALDI Stapylton Agreement 2012* and the *ALDI Derrimut Agreement 2012.*[3]

[12] In the 2013 decision, Boulton J provides a summary of the evidence given with respect to the operational characteristics of ALDI:

> "**[22]** On the evidence in the proceedings, ALDI has traditionally operated each of its regions as distinct undertakings. Each region has its own Managing Director and group of operational directors, and operates and reports as an independent profit centre. The only national function is the buying function, except in relation to fresh produce which is sourced locally by each region. ALDI's business development plan, applied internationally as well as in Australia, is to start with a distribution centre in an area and then to grow the number of stores serviced by that distribution centre."

[13] The *ALDI Brendale Agreement 2015* was approved and commenced on 6 July 2015.[4] The region was created by the transfer of a number of retail stores out of the Stapylton Region

together with the establishment of a new distribution centre. The new distribution centre had not commenced at the time of the commencement of the Agreement.

Nature of the Appeal

[14] The decision to approve the Agreement involves the application of a number of statutory tests, many of which involve the exercise of discretion as described by the High Court in *Coal and Allied v AIRC*.[5] In that case Gleeson CJ, Gaudron and Hayne JJ said[6]:

> ""Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment." (references omitted)

[15] Discretionary decisions are subject to review on the grounds expressed by the High Court in *House v The King*[7]:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[16] Insofar as any aspect of the decision is not properly considered a discretionary decision we are required to determine whether the decision is correct[8].

The Grounds of Appeal

[17] The grounds of appeal advanced by the SDA may be divided into three categories:

- the purported agreement should have been made as a greenfields agreement under s.172(2)(b) of the Act because ALDI was/is establishing a new enterprise and had not, and has not, employed any of the persons who would be necessary for the normal conduct of the enterprise

- the employees who were selected to approve the agreement were not fairly chosen, and

- the agreement does not pass the better off overall test (BOOT).

[18] The grounds of appeal advanced by the TWU are essentially that the Agreement should have been negotiated as a greenfields agreement.

[19] Both the TWU and the SDA submit that it is in the public interest for the Commission to grant permission to appeal for a number of reasons, including the following:

- the issues in the appeal are likely to have significance to the practice of industrial relations beyond the parties to the proceedings, as they put in issue the extent to which a prospective employer of the employees can avoid the enterprise bargaining protections afforded by s.172(2)(b) of the Act

- the decision is attended with sufficient doubt, and actual appealable error, to warrant its consideration on appeal and substantial injustice would result if permission to appeal was not granted, particularly for those employees affected

- if permission to appeal is not granted the Agreement will deprive potentially large numbers of employees from the benefits of the Act and will undermine the system of award and agreements which are underpinned by the Act.

Standing

[20] ALDI challenges the standing of the SDA and TWU to institute an appeal as neither appeared before the Commission at the time the Agreement was approved. ALDI submits that neither the SDA nor the TWU is a "person aggrieved" for the purposes of s.604 of the Act and so neither have standing to appeal against the decision. ALDI submits that the two relatively recent Full Bench decisions cited by the SDA in support of their proposition are plainly wrong, and accordingly, should not be followed by this Full Bench.

[21] The SDA submits that despite the fact that it was not involved in the making of the agreement or in the approval of it, it has standing to bring the appeal.[9] The TWU generally adopted the SDA's submissions on this point.

[22] In similar circumstances as the present, Full Benches of the Commission have accepted the standing of organisations to appeal against decisions to approve agreements.[10] In *CEPU v Main People*, neither union was a bargaining representative for the Agreement and nor was there any evidence that any employee of the respondent at the time of the vote to approve the Agreement was a member of either union. Further there was no evidence that any subsequent employees of the respondent had asked the appellants to represent their interests in relation to the Agreement. Nevertheless the Full Bench determined that the unions were persons aggrieved and had standing to institute the appeal. It said:

> "**[7]** The appellants have the right to represent employees under the terms of the Agreement. Moreover, given the nature of the respondent's business, and the industry within which it operates, we are satisfied that it is likely that some members of the appellants will be employed by the respondent in the future, in classifications covered

> by the Agreement. In the circumstances of this case we consider that this gives the appellants an interest in the decision to approve the Agreement beyond that of an ordinary member of the public. Accordingly, we are satisfied that the appellants have standing to appeal the decision to approve the Agreement."

[23] In this matter we have formed a similar view. We find that the unions have standing to institute the appeal.

Single enterprise agreement or greenfields agreement

[24] The SDA and TWU submit that the circumstances of voting and approval of the Agreement in advance of commencement of the operations is inconsistent with the scheme of the Act. They submit that the Act demonstrates a clear intention to allow employers to have terms and conditions of employment set before they start a new enterprise. It does this by providing a protection for the position of future employees by requiring that an agreement must, in those circumstances, be made with a relevant employee organisation. Once an employee who will be necessary for the normal conduct of the new enterprise has been employed a greenfields agreement is not available.

[25] The SDA and TWU submit that the first question is whether the new stores constitute a genuine new enterprise. They submit that they do because they represent the commencement of a significant new operation. It is submitted to be uncontroversial that the respondent's business model operates on the basis of separate, discrete geographical enterprise locations or regions and that ALDI regards each individual region as a separate enterprise. The unions rely on clause 5 of the Agreement to establish this proposition.

[26] The SDA and TWU submit that the new evidence discloses that the relevant workplaces are presently nothing more than construction sites, and were not operating in any sense at the time the agreement was purportedly made.

[27] The SDA and TWU dispute ALDI's contention in its employer's statutory declaration that 17 employees have been employed. The SDA and TWU submit that while it may be the case that each of the 17 employees who voted is an employee of ALDI, it appears that none of them were employed to work in the new enterprise at the time because the new enterprise had not commenced to operate.

[28] The SDA and TWU submit that it is clear that the circumstances involve:

- the construction of new stores which were in no way complete at the time the offers of employment were made
- offers of new employment which was expressly stated not to commence until the new stores opened
- the continuation of existing employment in the existing positions of the employees in the existing regions pursuant to the provisions of existing enterprise agreements pending the transfer to the new region.

[29] The unions submit that in these circumstances the Act only permits the approval of a Greenfields agreement, with the necessary involvement of at least one employee organisation.

[30] ALDI submits that these submissions should be rejected. It relies on the definition of Greenfields agreement in the Act. Section 172 essentially defines a Greenfields agreement as one that relates to a genuine new enterprise that the employer is establishing or proposing to establish and the employer has not employed any of the persons who will be necessary for the normal conduct of the enterprise. The term 'enterprise' is defined in section 12 as a business activity, project or undertaking.

[31] ALDI submits that the Act gives priority to single enterprise agreements and does not permit an agreement to be made with organisations unless the limited circumstances in s.172 exist. It submits that conducting its traditional operations in a new geographical area is not a genuine new business, and employees have been employed in the enterprise covered by the Agreement.

[32] Section 172 is properly construed as an enabling provision that sets out the circumstances in which an agreement can be made in accordance with the Enterprise Agreement Part of the Act. Although different types of agreements can be made in different circumstances it should not be assumed that an agreement can be made in all circumstances or that the categories are necessarily mutually exclusive. When the two alternatives in s.172(2) are compared however it is clear that the employee factor is highly unlikely to be satisfied for both alternatives at the same time. If there are employees employed at the time the agreement is made, a single enterprise agreement can be made with them. If the employer has not employed any of the persons who will be necessary for the normal conduct of that enterprise and who will be covered by the Agreement, and the other criterion is satisfied, a Greenfields agreement can be made with an employee organisation. This provision sets up a regime in which agreements with employees are available in the normal situation of an existing enterprise with existing employees and only when no such employees are employed in a genuine new enterprise can the alternative of a Greenfields agreement be made.

[33] The Agreement was purported to be made as a single enterprise agreement with employees rather than a Greenfields agreement. The critical question is whether the criterion for a single enterprise employee agreement is satisfied – not whether an agreement could have been made as a Greenfields agreement with an employee organisation. The essential requirements are whether the employees who voted to approve the agreement are "employees who are employed at the time the agreement is made and who will be covered by the Agreement" (s.172(2)) and whether the employees who voted were "employees of the employer… that will be covered by the agreement" (s.182(1)). In our view the concepts are relevantly identical. Two elements are involved. The employees must be employed at the time the agreement is made and they must be covered by the agreement. Both elements involve questions of fact.

[34] In this case employees of ALDI engaged in the Eastern Seaboard States were canvassed to see if they wished to transfer to South Australia (and Western Australia). Some employees who expressed an interest in a transfer to South Australia received a letter of offer of on-going employment in the new Regency Park Region commencing when the new region opens. The employees who accepted that offer were permitted to vote for the agreement. There were no other employees working at Regency Park at the time as the distribution centre and the stores had not commenced to operate.

[35] In *Cimeco v CFMEU*[11] a Full Bench considered the situation of an agreement made with employees some of whom had not been "mobilised" to the new area of operation at the time a vote was taken. The Full Bench considered the meaning of the phrase 'the employees…that will be covered by a proposed single enterprise agreement' in s.182(1) of the Act. It said:

> **"[49]** As we have already noted, fourteen Cimeco employees voted to approve the Midwest Agreement on 16 September 2011. Hence, in the usual course, the agreement would be taken to have been 'made' on 16 September 2011. But at the time the Midwest Agreement was purportedly made four of the Cimeco employees who voted to approve the agreement did not fall within the area and scope of the Midwest Agreement as set out in clause 3(a) of that agreement.
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> **[50]** Counsel for the appellant contended that the task of identifying who will be covered by the agreement is 'in a sense a factual exercise'. The four Cimeco employees employed on the Marandoo Project were included in the vote because at that time they had been 'mobilised' to go to the De Grussa Copper Plant. It was put to counsel that the expression 'will be covered' means those actually falling within the coverage clause at the time of the vote as opposed to those it was anticipated would be covered by the agreement on the basis that they had been 'mobilised' to perform work in the region covered by the agreement. Counsel responded to this suggestion in the following terms:
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> > "One runs the risk then of an argument that there's not been a genuine agreement because you've actually excluded people from the voting process, people that you've identified who are going to be because - they're mobilising. If you know these people are going to - they will be covered and you exclude them from the vote, then you run into an argument that the agreement hasn't been properly made, there's no genuine agreement because you've excluded a group of people who are to be covered. Just from a factual point of view, in our respectful submission, the suggestion which appears to have been taken up by his Honour that because it was anticipated that at a future point, employees who were working on other projects, who were employees of this company working on other projects outside of the area - the fact that at some future point they are to be deployed, mobilised in and work at Meekatharra - that, in no way, could affect, in our respectful submission, either of the two questions: namely, was the group that was geographically distinct fairly chosen and it would not affect in any way the genuine making of the agreement because all those persons who had been identified as who would be covered participate in the agreement-making process."
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> **[51]** We do not find counsel's submission persuasive. As we have previously mentioned the expression 'will be covered by the agreement' in s.182(1) does not indicate future likelihood but rather expresses a determinate or necessary consequence.
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> **[52]** It follows that the four employees working on the Marandoo agreement were not entitled to vote to approve the Midwest Agreement because at the time of the vote they did not fall within the area and scope of the agreement."

[36] Since that Full Bench decision the Federal Court has been called on to consider aspects of the reasoning of this and other Full Bench decisions and the overall interpretation of the relevant provisions of the Act. In *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*[12] (John Holland) a Full Court of the Federal Court adopted a different interpretation to the phrase 'covered by the agreement' in the context of the fairly chosen test in s.186(3). Buchanan J (with whom Barker J agreed) said:

> "**A question of construction**
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> 34. One question which has troubled me is whether it is correct to accept, as appears to have been the case, that the reference in s 186(3) to "the group of employees covered by the agreement" is a reference to the whole class of employees to whom the agreement might in future apply, rather than the group of employees which actually voted on whether to make the agreement.
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> 35. It may at once be observed that the second-mentioned group is fixed in time and known, whereas the wider, potential group is not fixed at any point in time and may be very difficult to evaluate or assess, depending on the breadth of coverage specified by the terms of the agreement and, perhaps, the nature and complexity of the employer's business.
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> 36. The virtual impossibility of knowing with certainty the composition of the whole group within the potential coverage of the agreement, compared with the complete certainty about those to whom a vote is in fact offered, makes the choice of the first alternative construction an attractive one unless such a construction is excluded by the terms of the statute. However, that is not the construction which has so far been accepted and there appear to be sound reasons for preferring the other, wider construction.
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> 37. First, the traditional concepts of application and coverage, which are now reflected in ss 52 and 53 of the FW Act, recognise the difference between actual application (i.e. to then present employees) and potential coverage (extending to the whole class of employees at any point in time). The procedural steps required for making an agreement with employees focus, of necessity, on the need for majority support by those present employees who will be covered by the agreement but once an agreement is made the matters which require consideration by the FWC in relation to whether an agreement must be approved are not necessarily confined in the same way.
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> 38. Secondly, there are other indications in the FW Act that a distinction must be made between the group of present employees who will be covered by an agreement and the wider group who will be covered if the agreement is made. Indications of that sort may be seen in the procedures to assist "good faith bargaining", whereby a bargaining representative (which may be a union – s 176(1)(b)) may apply to the FWC for a "majority support determination" or a "scope order". In either case, the FWC must address the question (similarly to s 186(3) and (3A)) whether "the group of employees who will be covered by the agreement was fairly chosen" and whether the group is geographically, operationally or organisationally distinct (s 237(2)(c), (3A); s 238(4A)). In context, it appears clear that this is a wider group (corresponding to potential coverage) than the group of present employees who wish to bargain or whose immediate interests are those being represented.

> 39. Thirdly, and perhaps most decisively, as counsel for the respondent pointed out in the present case, s 186(3) and (3A) apply to both greenfields agreements and agreements made with employees. They would have no context or operation in relation to a greenfields agreement unless the wider view was taken.
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> 40. That wider view is the one which has been taken by the FWC, and it was accepted by all parties to the present appeal.
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> 41. One reason I have spent some time examining the correctness of the common assumption about this issue is that upon the view that the group to be considered under s 186(3) and (3A) reflects potential (not present) coverage it will often (perhaps usually) be impossible to state with much precision or certainty what that coverage might entail in a practical sense in the years to come, or how the group might at any particular point in time be composed. However, that seems to me to be the consequence of the legislative scheme. The evaluation which the legislature has committed to the FWC must therefore be carried out with that consequence being understood and accepted. That is relevant to an examination of some of the findings of the Full Bench."

[37] Besanko J said:

> 1. I have had the advantage of reading in draft the reasons for judgment of Buchanan J. I agree with his Honour that the appeal should be dismissed. Subject to two matters, I agree with his Honour's reasons.
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> 2. First, I did not share his Honour's doubts about whether the reference in s 186(3) of the *Fair Work Act 2009* (Cth) ("the Act") to "the group of employees covered by the agreement" was a reference to the whole class of employees to whom the agreement might in the future apply, rather than the group of employees which actually voted on whether to make the agreement. In my opinion, the former construction is clearly the correct one. That was the basis upon which this matter has proceeded, and I did not understand either party on the appeal to argue to the contrary. It is the approach taken in previous cases dealing with s 186(3) of the Act. More to the point, it is the construction which accords with the other provisions in the Act. Section 53(1) of the Act provides that an enterprise agreement covers an employee or employer, if the agreement is expressed to cover (however described) the employee or the employer, and is to be contrasted with when an enterprise agreement applies to an employee (s 52(1)). I agree that the other two matters identified by Buchanan J (paragraphs 38 and 39) support the construction which I think is the correct one.

[38] In our view the concepts of 'coverage' and 'application' in sections 52 and 53 of the Act provide the key to the interpretation of the phrase 'who will be covered by the agreement' in s.172(2)(a) and s.182(1). An enterprise agreement covers an employee if it is expressed to cover the employee. An enterprise agreement applies to an employee in relation to particular employment if the agreement covers them and the agreement is in operation.

[39] It is also relevant to consider the terms of s.186(2). In order to approve a single enterprise employee agreement the Commission must be satisfied that the agreement has been "genuinely agreed to by the employees covered by the agreement."

[40] Ascertainment of the correct interpretation might be assisted by considering the following hypothetical example. Twenty employees from an existing operation are offered on-going employment at a new location of the business. Twenty new employees are also engaged for that business and commence employment prior to the existing employees commencing employment in the new business. The twenty new employees are asked to vote to approve an enterprise agreement and by majority they do so. The existing employees are not given an opportunity to vote. It is unlikely in these circumstances that the Commission could be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement because half of the current employees covered by the agreement were not permitted to vote. It is not relevant that the agreement does not apply to them at the time of the vote.

[41] Hence for the purposes of giving logical and consistent meaning to common phrases in the Act we consider it appropriate to apply the approach adopted by the Federal Court in relation to the fairly chosen test. That approach, in over view, supplants the approach adopted in *Cimeco*. The Federal Court's approach entails two elements. The first involves determining whether the persons are employees, while the second entails determining whether the employees will be covered by the agreement after it is made. Application of the agreement is not relevant.

[42] In the facts of this case we are of the view that the employees who accepted on-going employment in the Regency Park region were employed by ALDI at the time the agreement was made. Further, as their employment comprehended work within the scope of the Regency Park Agreement they were covered by the Agreement. It was legitimate and necessary for them to be included in the group of employees asked to approve the agreement. The resultant agreement was made under s.182(1). It was a single enterprise agreement available to be made under s.172(2)(a). The Agreement has been genuinely agreed to by the employees covered by the Agreement. The first ground of appeal must therefore fail.

Fairly Chosen

[43] The SDA submits that the selection of the group was unfair because it undermined collective bargaining in a manner which was not compatible with Part 2–4 of the Act and was contrary to the purpose and policy of the Act. The basis for the submission is that a group of seventeen employees were selected to make an agreement for a much larger group of employees.

[44] The SDA submits that there is no indication in the materials filed with the application for approval that the employees are appropriately representative of the employees ultimately to be covered by the agreement, that is that they comprise a group which includes a representative sample of those who are to be covered. The SDA submits that it is noteworthy that seven of the seventeen selected by the employer to vote on the Agreement are Managers or Assistant Store Managers. One is a Deputy Manager. The balance is made up of two store assistants, three warehouse operators and three transport operators. The SDA submits that in the circumstances, the Commission cannot be satisfied that the group of employees had been fairly chosen.

[45] The SDA submits that to the extent that its arguments are inconsistent with the Full Court judgement in John Holland, it submits that the decision is wrong and should not be followed.

[46] Further and in the alternative, the SDA submits that to the extent that John Holland is correct, regard should be had to Buchanan J's comments at [33]:

> "There is no requirement that employees who vote to make an agreement must have been in employment for any length of time, and there is no requirement that they remain in employment after the agreement is made. Presumably, the presently employed members of such a group will act from self-interest, rather than from any particular concern for the interests of future employees. The potential for manipulation of the agreement-making procedures is, accordingly, a real one. However, no suggestion of that kind is made in the present case and the possibility may therefore be put to one side for the purpose of the discussion. That is an important consideration because it suggests, as the primary judge thought, that determination of whether the group of employees was fairly chosen in the present case needed to bring to account the business rationale for the choice, as well as deal with any possibility of unfair exploitation. It was not irrelevant in that assessment to bear in mind, as the primary judge said, that the agreement provided benefits, not detriments, for those to whom it would apply."

[47] The SDA submits that there was no evidence before the Deputy President which would enable the Commission to determine whether there was a legitimate business rationale for choosing the 17 employees. The Deputy President seems to have been informed, and arguably proceeded upon the assumption, that the number of employees to be covered by the agreement was only 17. The SDA submits that this is clearly incorrect. The SDA submits that the use of past and present tense in the employer's statutory declaration, for instance that there are employees who are already "engaged in a retail store operated by ALDI…" arguably was to convey the impression to the Deputy President that there was an existing enterprise employing existing employees, and appears calculated to mislead.

[48] ALDI submits that permission to appeal ought not be granted in relation to the "fairly chosen" issue. It contends that the SDA urges the Full Bench to depart from the law as explained by the Full Court in John Holland. It says that this is an invitation to error which must be rejected. It submits further that the SDA appears to concede that John Holland is an insurmountable obstacle to success on the "fairly chosen" issue. This being so, permission to appeal on this ground ought to be rejected.

[49] ALDI further submits that even more persuasive, if not compelling, is the fact that the Commission has already expressly dealt with the way in which ALDI has organised its operations and Agreements, in proceedings to which the SDA was a party. On 3 June 2013, the Commission approved the *ALDI Minchinbury Agreement 2012,* the *ALDI Stapylton Agreement 2012* and the *ALDI Derrimut Agreement 2012.*[13]

[50] ALDI contends that given the above, it becomes apparent why ALDI did not see what transpired in relation to the approval of the present agreement as controversial.

[51] ALDI submits that the requirements of ss.186(3) and (3A) of the Act have been met with respect to the Agreement and this ground of appeal must fail.

[52] John Holland concerned judicial review of a Full Bench decision of this Commission that found that an agreement made with three employees for a project that was expected to employ many more employees in the future did not pass the fairly chosen test. The decision applied an approach to the Fairly Chosen test adopted in various other Full Bench decisions commencing with Cimeco. At first instance Siopis J said:[14]

> 25 At the heart of the applicant's complaint in relation to its first broad ground of review, was the contention that the Full Bench fell into jurisdictional error by reason of a misconstruction of s 186(3) and s 186(3A) of the Fair Work Act.
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> 26 In my view, for the reasons which follow, the Full Bench fell into jurisdictional error because it misconstrued s 186(3) and s 186(3A) and so misconceived its task in applying those two subsections.
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> 27 The statutory scheme proceeds on the basis that the power to make an agreement to which s 186(3) applies, resides in the parties to the agreement, namely, in this case, the employer and the employees covered by the agreement who were employed at the same time that the agreement is made (s 172(2) of the Fair Work Act). Sections 180, 181(1) and 182(1) specifically recognise that an agreement is "made" when the majority of the employees covered by the agreement who are employed at that time, vote in favour of the agreement.
>
> 28 The Fair Work Act goes on to provide that Fair Work Australia must, nevertheless, approve the agreement made by those persons. Section 186 and s 187 of the Fair Work Act set out the matters in respect of which Fair Work Australia must be satisfied. One of these matters is that the agreement has been genuinely agreed to by the employees covered by the agreement. This, of course, refers back to the employees who are covered by the agreement and were employed at the time that the agreement was made. Also, importantly, Fair Work Australia must be satisfied that the agreement met the better off overall test.
>
> 29 It is in this context that the requirement under s 186(3) that Fair Work Australia be satisfied that the group of employees covered by the agreement was fairly chosen, arises. The content of the matters in respect of which Fair Work Australia is to be satisfied under s 186(3) is, of course, informed by a proper construction of the Fair Work Act.
>
> 30 First, it is appropriate to observe that s 186(3) calls upon Fair Work Australia to be satisfied that the group of employees covered by the agreement "was" fairly chosen. It is of significance that the past tense "was" is used. This directs Fair Work Australia to have regard to the conduct of those persons who made the agreement and the content of that agreement. In other words, the question is whether the parties that made the agreement acted fairly in choosing those employees to be covered by the agreement. The question of fairness of choice arises because those employees who are "chosen" to be covered by the agreement will, ex hypothesi, be the better off overall than those employees who were not "chosen" to be covered by the agreement. Thus, for example, if only some of a group of employees doing the same work and in the same location were chosen to be covered by an agreement on the basis of their place of birth or their support of a particular political party, the group of employees chosen to

be covered by the agreement would not have been fairly chosen. In this regard, it is also of some interest to observe that s 186(3) follows immediately after s 186(2)(d), which is the provision in the Fair Work Act which requires that the agreement satisfy the better off overall test.

31 In my view, it is also necessary in determining the task to be undertaken by Fair Work Australia in applying s 186(3) to have regard to the terms of s 186(3A). Of particular significance is the characterisation of the specific criteria prescribed in s 186(3A) as mandatory considerations to which regard is to be had in assessing whether the group of employees covered by an agreement has been fairly chosen, when not all the employees of a single employer are covered by the agreement.

32 Each of the three criteria mentioned as mandatory considerations describes a legitimate business related characteristic. The reason for this, in my view, is to preclude approval of an agreement which excludes an employee or number of employees from the benefit of being covered by an agreement for an extraneous characteristic of the kind referred to at [30] above.

33 The Fair Work Act contemplates, therefore, that in applying s 186(3) and s 186(3A), Fair Work Australia will, by reference to the coverage clause, undertake an examination of the criteria by which the group of employees was chosen. In determining whether the group was fairly chosen, Fair Work Australia will have regard to whether the criteria reflect the criteria identified in s 186(3A) or some other like legitimate business related characteristic, rather than an extraneous characteristic of the kind referred to at [30] above.

34 In my view, there is nothing in the language of s 186(3) and s 186(3A) of the Fair Work Act which conditions the exercise by Fair Work Australia of the power under s 186(3) to approve an agreement, upon Fair Work Australia being satisfied as to the number of employees who will, or may, during the term of the agreement, be covered by the agreement.

35 Accordingly, in my respectful view, in finding that it was unable to make the assessment of whether the group of employees was fairly chosen because it could not say with any certainty how many employees would, or may, be covered by the agreement throughout its term, the Full Bench misapprehended its statutory task and fell into jurisdictional error.

36 It was common cause that there were no agreements of the kind referred to in cl 1.2 in existence at the time that the agreement was made. There was nothing unfair in including a clause which contemplated that circumstances may arise when employees who would otherwise have been covered by this agreement may be covered by a different agreement. However, in my view, the inclusion of a clause which contemplated a potential change in circumstances did not affect the fairness of the criteria chosen as identifying a group of employees who were, in the absence of such circumstances, to be covered by the agreement. In other words, the inclusion of cl 1.2 did not preclude Fair Work Australia from embarking upon an assessment of the fairness of the fundamental criteria specified by the makers of the agreement.

37 Further, in my view, the words “was fairly chosen” in s 186(3) are not to be construed as “was chosen in a manner which would not undermine collective

bargaining". Notwithstanding the patient argument of Mr Reitano at the hearing, I am of the view that s 578(a) of the Fair Work Act does not support giving that construction to the words of s 186(3).

38 Section 578(a) relevantly provides that Fair Work Australia must, in exercising its powers, take into account any objects of the Fair Work Act and the objects of any part of the Act. However, I am of the view that the general words in s 578(a) do not permit Fair Work Australia to imbue the words of the statute with concepts which are not to be found in those words when properly construed. In my view, the proper construction of s 186(3) is informed by s 186(3A). That section prescribes the nature of the considerations to which Fair Work Australia is to have regard in exercising its power under s 186(3). Therefore, in my view, Fair Work Australia is not at liberty to exercise its s 186(3) powers on some other basis in reliance upon the general provisions in s 578(a) of the Fair Work Act. In other words, the general words in s 578(a) must yield to the specificity embodied in s 186(3A) in relation to the proper construction of the words "was fairly chosen" in s 186(3).

39 Further, there are specific provisions in Pt 2-4 of the Fair Work Act which give Fair Work Australia powers to withhold approval on grounds which reflect conduct inconsistent with the objects of Pt 2-4 identified in s 171. Thus, for example, s 187(2) permits Fair Work Australia to withhold approval for an agreement if approval would not be consistent with, or would undermine, good faith bargaining. It is significant, therefore, that there is no similar provision permitting Fair Work Australia to withhold approval on the grounds that it is of the view that the approval of the agreement would undermine collective bargaining. In the absence of that power having been conferred expressly on Fair Work Australia, it is, in my view, not open to Fair Work Australia to exercise such a power under the rubric of s 186(3) of the Fair Work Act.

40 Plainly, the Full Bench was of the view that there was something wrong with three employees being able to make an agreement which covered work classifications other than their own. However, if there is a lacuna in the Fair Work Act, on which I express no view, then the remedy would appear to lie in legislative amendment.

41 In light of the conclusion to which I have come, it is unnecessary for me to deal with John Holland's second argument under the first broad ground of review, nor its second ground of review based on procedural fairness.

[53] On appeal from that decision, Buchanan J (with whom Barker J agreed) said:

62. Although it is important to give full weight to the independent discretion of the FWC, and the Full Bench, I have come to the view that the findings of the primary judge with regard to each of the jurisdictional errors which he concluded that the Full Bench had made should not be disturbed.

63. The first error is revealed by [25] of the Full Bench decision set out earlier. It is an inevitable consequence of the fact that s 186(3) and (3A) are addressed to coverage in the wider sense I earlier identified, over a period of up to four years, that there will be very many cases where it will not be possible to meet the test posed by the Full Bench. In my respectful view, that test involved a misconstruction and misapplication of the statutory principles.

64. It was not relevant to an assessment of the question posed by s 186(3) that the Full Bench did not know how many employees would, or might, in future be covered by site specific agreements and hence excluded from the operation of the enterprise agreement. The possibility that the agreement might not apply to unknown future employees on unknown future sites did not alter the "coverage" of the agreement even though it might have an effect on whether the agreement "applied" to particular employees at particular sites. The criticism made by the Full Bench would apply with equal force to any agreement with the capacity to operate at future sites or projects not in existence, or actual contemplation, when the agreement was made. The extent of application of the agreement could not be known with certainty. In the words of the Full Bench, it would not be possible to make "any definitive finding" about that matter. However, in my respectful view that is a different position from the ascertainment of the "group of employees to be covered", a task which involves an appreciation of the nature of the work to be regulated and rewarded by the agreement rather than how many employees may, in the years to come, carry out the work, or where.

65. I therefore agree with the primary judge that the Full Bench made a jurisdictional error about this issue.

66. The second error found by the primary judge is crystallised in the following passages in the Full Bench decision:

> **[30]** ... In this case three employees on one site have bargained and agreed on an agreement with potentially very wide application to other employees who have not engaged in bargaining under Part 2-4 of the Act and will not be given the opportunity to bargain. ...
>
> ...
>
> **[34]** ... We also consider that the operation of the Agreement, as made with the three employees, would undermine collective bargaining by other employees in a manner not compatible with the objects of Part 2-4, ...

67. Although the Full Bench was directed by s 578(a) to take into account the objects of Part 2-4 (as stated in s 171) it is far from clear how the Full Bench was able to conclude that an agreement made with three employees could "undermine" collective bargaining, or that it was relevant to state any conclusion in such broad terms.

68. It is not correct, with respect, to say (or suggest or infer) as the Full Bench did in [30], that there were in fact other employees who had been denied a chance to bargain. The "other employees" referred to were potential (and unknown) possible future employees who would never have a chance to bargain unless there was no agreement in place when they were engaged. Deprivation of that opportunity would arise in the case of any employee engaged during the term of an agreement.

69. It should be noted that the statutory objective in s 171(a) (which I set out earlier) refers to "collective bargaining in good faith", but it is apparent that this

statutory objective, and the reference in s 171(b) to "good faith bargaining", must be understood in the overall context set by Part 2-4 of the FW Act.

70. Neither "collective bargaining" nor "good faith" is defined by the FW Act. There are, however, a number of procedural directions and discretions in the FW Act which concern "good faith bargaining requirements" (see s 228 and following). They include facilities for bargaining representatives to seek bargaining orders, majority support determinations and scope orders. None of those procedures was relevant to the present case.

71. It has not been suggested that it was impermissible for three employees to be asked to make an agreement or vote to do so. The FW Act permits such an agreement to be made and requires that it be approved if the statutory tests are met. Unless the proposed agreement failed to meet a relevant statutory test there could be no basis for introducing a further, more general, requirement of the kind adopted by the Full Bench.

72. In my respectful view, the criticism expressed by the Full Bench in [30] and [34] of its decision which I set out earlier was misplaced. The "employees" to whom the Full Bench referred were future employees. It was not to the point that an agreement was made before some employees were engaged: that was a feature of the process. It would be the inevitable result also of any greenfields agreement when no employee covered by the agreement would have an opportunity to vote to accept its terms. Ironically, in a sense, the agreement did provide the possibility of collective bargaining on a site by site or project by project basis but the Full Bench appeared to think this a disabling rather than meritorious feature.

…

84. I agree with the conclusion of the primary judge that the Full Bench made a second jurisdictional error in its reliance upon its specific finding that the agreement would undermine collective bargaining, for the reasons which it gave.

[54] Besanko J said:

3. Secondly, I think the concept of collective bargaining will have quite a limited role in determining whether the group of employees covered by the agreement was fairly chosen. It is true that enterprise-level collective bargaining is referred to in the object of the Act (s 3(f)), and that s 578(a) requires the Fair Work Commission to take into account the objects of the Act in performing functions or exercising powers in relation to a matter under the Act. Furthermore, the special expertise of the Fair Work Commission must be acknowledged. Nevertheless, it was not argued by the appellant that an agreement voted on by employees falling within the particular job classifications could not cover other job classifications. To apply a criterion of collective bargaining in those circumstances involves a comparison between the number of employees who voted on the agreement, and the number who might be covered by the agreement. Reasonable minds not only might differ but are likely to differ as to when the comparison is such that collective bargaining is engaged as a relevant consideration under s 186(3). That suggests, to my mind, that if the concept

> of collective bargaining has a role in the determination of the issue posed by s 186(3) of the Act, it is quite a limited one.

[55] In our view the submissions of the SDA on this point are misconceived. The test under s.186(3) as to whether the group of employees covered by the Agreement is fairly chosen requires consideration of the employees covered by the agreement – not the employees who vote for the agreement at the time it is made. The arguments proceed on an erroneous premise and seek to elevate concerns about the objects of the Act in a way that has been expressly overruled by a single judge and unanimously by a Full Court of the Federal Court. In our view the second ground of appeal must fail.

Better Off Overall Test (BOOT)

[56] The SDA submits that the BOOT was not properly applied because rosters that were submitted as typical were not in operation at the relevant operations because they had not, at that time commenced. It submitted an analysis of entitlements which it submitted established that open ended provisions reserve a discretion in the employer that raise questions as to whether the agreement passes the BOOT.

[57] ALDI submits that the Agreement, as with other ALDI Agreements contains the following clause that it submits contains a mechanism for ensuring that it meets the BOOT:

> "The remuneration paid for each classification has been set to ensure employees are better off overall under this Agreement than under the relevant Modern Award which would otherwise apply. Where an Employee considers they are not better off overall under this Agreement than under the relevant Modern Award, they may request a comparison of the benefits received for a nominated period of time under this Agreement and the benefits which would otherwise be provided under the relevant Modern Award. Any shortfall in total remuneration which would otherwise be payable under the Modern Award will be paid to the Employee in the next pay period after the review is completed. If the Employee and ALDI cannot reach agreement on the remuneration which should be paid, the Resolution of Disputes provision of this Agreement will be followed and the parties will agree to the Fair Work Commission arbitrating and making a binding determination to resolve the matter."

[58] This clause creates an enforceable right to payments to employees equal to or higher than those contained in the award. There is no limitation on its availability. The position is clearly distinguishable from the undertaking considered by a Full Bench in *CEPU v Main People.*[15] In our view the Deputy President properly considered the BOOT and reached a decision based on a sound analysis. It has not been demonstrated that there is any appealable error in the decision under appeal. We dismiss this ground of appeal.

Conclusions

[59] Given the important interpretation issues arising from the grounds of appeal we have decided to grant permission to appeal.

[60] As we have decided that each ground of appeal must fail we dismiss the appeal.

VICE PRESIDENT

Appearances:

Mr G Hatcher, SC and *Ms A Perigo*, counsel on behalf of Aldi.

Mr W Friend, QC on behalf of the SDA, with *Mr D Macken* and *Mr J Tierney*.

Mr D Blair on behalf of the TWU.

Hearing details:

2015.
Melbourne—Video Link to Adelaide.
20 November.

Final written submissions:

SDA on 30 October 2015.
TWU on 30 October 2015.
ALDI on 13 November 2015.

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[1] [2015] FWCA 6373.

[2] [2013] FWC 3495, [2013] FWCA 4028, [2013] FWCA 8632, [2015] FWCA 4363.

[3] [2013] FWC 3495 per Boulton J.

[4] [2015] FWCA 4363.

[5] *Coal and Allied v AIRC* [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 (31 August 2000).

[6] *Coal and Allied v AIRC* [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 (31 August 2000) at [19].

[7] *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ.

[8] *Pawel v AIRC* (1999) 94 FCR 231.

[9] *CEPU v Main People* [2014] FWCFB 8429 at [5]-[7]; *CEPU v Sustaining Works* [2015] FWCFB 4422 at [18].

[10] *CEPU v Main People* [2014] FWCFB 8429 at [5]-[7]; *CEPU v Sustaining Works* [2015] FWCFB 4422 at [18].

[11] [2012] FWAFB 2206.

[12] [2015] FCAFC 16.

[13] [2013] FWC 3495 per Boulton J.

[14] [2014] FCA 286.

[15] [2015] FWCFB 4467.