HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP) APPELLANT

AND

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION & ANOR RESPONDENTS

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association
[2017] HCA 53
6 December 2017
M33/2017

ORDER

1. *Appeal allowed in part.*

2. *Set aside orders 1, 2(b) and 3 of the Full Court of the Federal Court of Australia dated 29 November 2016 and, in their place, order that:*

   (a) *the applicant's originating application for relief under s 39B of the* Judiciary Act *1903 (Cth) be allowed in part; and*

   (b) *a writ of mandamus issue directed to the second respondent, requiring it to determine the first respondent's appeal from the decision and orders of Deputy President Bull made on 22 September 2015 in matter number AG2015/3510 according to law.*

On appeal from the Federal Court of Australia

Representation

G J Hatcher SC with A L Perigo for the appellant (instructed by Enterprise Law)

W L Friend QC with A M Duffy and C J Tran for the first respondent (instructed by AJ Macken & Co)

Submitting appearance for the second respondent

CATCHWORDS

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association

Industrial law (Cth) – *Fair Work Act* 2009 (Cth) – Enterprise agreements – Approval of enterprise agreements by Fair Work Commission – Where employer in process of establishing new undertaking – Where existing employees in other undertakings of employer accepted offer of employment in new undertaking – Where enterprise agreement made with those employees before new undertaking commenced operations – Whether agreement required to be made as "greenfields agreement" pursuant to s 172(2) and (4) of *Fair Work Act* – Where Commission may approve non-greenfields agreement under s 186 of *Fair Work Act* only where satisfied agreement genuinely agreed to by employees covered by agreement – Whether employees "covered by" agreement from time agreement made or from time employees commence working under agreement.

Industrial law (Cth) – *Fair Work Act* 2009 (Cth) – Enterprise agreements – Approval of enterprise agreements by Commission under s 186 of *Fair Work Act* – Where Commission, before approving agreement, required to be satisfied that each award-covered employee would be "better off overall" under agreement than under relevant modern award – Where Commission considered agreement passed better off overall test because clause in agreement entitled employees to payment of any shortfall in entitlement under agreement as compared with entitlement under modern award – Whether Commission failed to engage in comparison between agreement and modern award.

Words and phrases – "applies", "better off overall test", "covers", "employees covered by the agreement", "greenfields agreement", "will be covered by the agreement".

Fair Work Act 2009 (Cth), ss 51, 52, 53, 54(1), 58(1), 172, 173(1), 176, 180(2)(a), 181(1), 182, 185, 186, 187(5), 188, 193, 207.

1 KIEFEL CJ, BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ. This appeal concerns the operation of provisions of the *Fair Work Act* 2009 (Cth) ("the Act") relating to enterprise agreements. The parties agitated four issues. The first issue concerns the power of the Fair Work Commission ("the Commission") under s 186(2)(a) of the Act to approve an enterprise agreement for a new enterprise made with existing employees of the employer who have agreed to work, but are not at that time actually working, as employees in the new enterprise ("the coverage issue"). The second issue was whether error by the Commission in relation to the coverage issue amounts to jurisdictional error amenable to judicial review.

2 The third issue concerns whether the Commission fell into jurisdictional error in being satisfied that the enterprise agreement in this case passed the "better off overall test" ("the BOOT") for the purposes of s 186(2)(d) of the Act ("the BOOT issue"). The fourth issue, raised by notice of contention, was whether the decision of the Commission on the BOOT issue was amenable to correction by certiorari on the ground of error of law on the face of the record, in the event that such an error were held to fall short of jurisdictional error.

3 The Full Court of the Federal Court of Australia determined the coverage and BOOT issues against the appellant. As to the coverage issue, the Full Court held that approval of the agreement was beyond the jurisdiction of the Commission under the Act because the agreement had not been agreed to by the employees "covered by the agreement", in that the employees who voted in favour of the agreement were not at that time actually working under its terms[1]. The Full Court determined the BOOT issue on the basis that the Full Bench of the Commission misapplied the statutory test as to whether the BOOT was satisfied, and so misconceived the jurisdiction conferred on it by the Act.

4 For the reasons that follow, it should be held that the Full Court erred in its determination of the coverage issue, but decided the BOOT issue correctly. In those circumstances, it was not necessary for the Full Court, and it is not necessary for this Court, to determine the second and fourth issues.

5 It is necessary to begin with an understanding of the industrial and procedural background relevant to both the coverage and BOOT issues.

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1 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [143], 190 [177].

Background

6 ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) ("ALDI") operates retail stores organised as distinct undertakings in various regions of New South Wales, Queensland and Victoria[2]. ALDI's undertaking in each geographical region is treated as a separate enterprise[3].

7 In early 2015, ALDI was in the process of establishing a new undertaking in Regency Park in South Australia ("the Regency Park region"). In April 2015, it sought, from its existing employees in its stores in other regions, expressions of interest to work in the Regency Park region. In late May 2015, ALDI made written offers of employment to some of those employees who had provided an expression of interest[4]. Each offer commenced with the words:

> "I am pleased to advise that Aldi Stores ... wishes to offer you ongoing employment as [position] in our new Regency Park region in South Australia, commencing when the new region opens. … [W]e anticipate this will occur around October 2015 … You will continue to be employed until that date in your current region and will be covered by that region's enterprise agreement."

8 Seventeen employees accepted the offer[5]. ALDI then commenced a process of bargaining with these 17 employees under the provisions of Pt 2-4 of the Act for an enterprise agreement to cover the Regency Park region[6]. Neither the Transport Workers' Union of Australia ("the TWU") nor the Shop,

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2 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 172 [76]-[77]; *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 252-253 [12].

3 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 255 [25].

4 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 172 [77]-[78].

5 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 172 [78].

6 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 173 [83].

Distributive and Allied Employees Association ("the SDA") were involved as bargaining representatives for the new agreement[7].

9 At ALDI's request, pursuant to s 181(1) of the Act, these employees voted on the ALDI Regency Park Agreement 2015 ("the Agreement")[8]. Clause 5 of the Agreement stated, among other things, that it would "apply to the following classifications of Employees of ALDI employed in the Regency Park Region", with various job descriptions then being set out. Sixteen of the employees cast a valid vote, with 15 in favour[9]. At the time the vote was conducted, the Distribution Centre at Regency Park was still under construction, and trading in the region had not commenced[10].

10 On 4 August 2015, ALDI applied to the Commission for approval of the Agreement[11]. The application for approval stated that the Agreement covered 17 employees based on an 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[12]. The application was listed for determination by Bull DP[13]. The

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7 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 252 [8].

8 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 158 [5].

9 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 158 [5].

10 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 173 [87].

11 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 173 [84].

12 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 252 [8].

13 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 251 [4].

Deputy President approved the Agreement as operative from 29 September 2015[14].

11 Both the SDA and the TWU ("the unions") filed notices of appeal against the decision of Bull DP to the Full Bench of the Commission. Because the unions had not participated in the proceedings before Bull DP, the issues agitated before the Full Bench, the Full Court, and now in this Court, had not been raised at that earlier stage[15]. Relevantly, for present purposes, it was contended that the Agreement should have been made as a "greenfields agreement" under the Act because ALDI was establishing a new enterprise and had not employed *in that new enterprise* any of the persons who would be necessary for the normal conduct of the enterprise. In addition, it was argued that the Agreement did not pass the BOOT[16]. The Full Bench (Watson VP, Kovacic DP and Wilson C) rejected these contentions, and dismissed the appeal[17].

12 The SDA then applied to the Full Court of the Federal Court for judicial review of the decisions of both Bull DP and the Full Bench[18]. The Full Court, by majority, upheld the SDA's contentions and issued the writs of certiorari and prohibition sought by the SDA[19].

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14 *ALDI Regency Park Agreement 2015* [2015] FWCA 6373 at [13].

15 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 173 [86].

16 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 254 [17].

17 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [60].

18 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 157 [1].

19 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 190 [179].

13 ALDI was granted special leave to appeal to this Court against the decision of the Full Court[20].

14 The Commission, the second respondent to the current appeal, filed submitting appearances both in this Court and in the Full Court[21].

15 The reasons of the Full Bench and the Full Court reveal different approaches to the construction of material provisions of the Act in relation to the coverage issue. The difference in approach reflects a difference in focus in relation to the provisions of the Act. In the reasons of the Full Bench, the focus was principally upon s 172 of the Act, whereas in the Full Court the focus was upon the perceived difficulty posed by the requirement of s 186(2)(a) for the Agreement to have been "genuinely agreed to by the employees covered by the agreement" when no employees were, at that time, actually working under the Agreement.

16 The material provisions of the Act must be understood, if possible, as parts of a coherent whole[22]. Such an understanding is not only possible but compelling. In the interests of clarity of analysis and coherence in exposition, it is desirable to set out that understanding before turning to discuss further the competing views of the Full Bench and the Full Court.

The Act

17 The Act contains several mechanisms for regulating employees' entitlements to wages, leave and other benefits. Two such mechanisms are modern awards and enterprise agreements. Where there is an enterprise agreement in place which applies to an employee, a modern award does not apply[23].

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20 [2017] HCATrans 048.

21 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 158 [1].

22 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28.

23 *Fair Work Act* 2009 (Cth), s 57.

18 Part 2-4 of the Act deals with enterprise agreements. One stated object of Pt 2-4 is 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"[24]. The term "enterprise" is defined in s 12 of the Act to mean "a business, activity, project or undertaking".

19 The provisions of Pt 2-4 that are material for present purposes deal with the following topics: the availability of a greenfields agreement; the rights of employees to be represented by a bargaining representative for a proposed enterprise agreement; the making of an enterprise agreement; the approval of an enterprise agreement by the Commission; and the requirements for approval by the Commission, such as the need for genuine agreement by employees and for the agreement to pass the BOOT. The provisions of the Act in relation to each of these topics may now be noted.

The availability of a greenfields agreement

20 An enterprise agreement may be either a single-enterprise agreement or a multi-enterprise agreement[25]. Section 172 stands at the forefront of Pt 2-4: it is the only section in Div 2 of Pt 2-4, which is the first substantive Division of that Part. Section 172 provides for the circumstances in which an enterprise agreement may be made. It deals with both single-enterprise agreements and multi-enterprise agreements. We are here concerned only with single-enterprise agreements. In particular, we are concerned with whether the Agreement is a "greenfields agreement". Whether an enterprise agreement is a greenfields agreement or not affects the operation of many provisions of Pt 2-4 of the Act. In particular, as will be seen, s 186(2)(a) operates only in respect of an agreement that is not a greenfields agreement.

21 Whether or not an enterprise agreement is a greenfields agreement depends upon the terms of s 172, which fix upon the circumstances of its making. Section 172 provides relevantly as follows:

> "(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):

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24 *Fair Work Act* 2009 (Cth), s 171(a).

25 *Fair Work Act* 2009 (Cth), s 12.

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

…

Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b) … is a ***greenfields agreement***.

...

(6) An enterprise agreement cannot be made with a single employee."

22 It can readily be seen that s 172 does not contemplate that an enterprise agreement is a greenfields agreement simply because it relates to a new enterprise. Moreover, s 172 does not require that an enterprise agreement related to a new enterprise be made as a greenfields agreement. Section 172 divides the universe of single-enterprise agreements into two categories. Of these two categories, only the second, which comprises those agreements made as referred to in sub-s (2)(b) of s 172, encompasses greenfields agreements, as sub-s (4) makes plain.

23 The remaining category of enterprise agreements consists of those that are not greenfields agreements: they are made as referred to in s 172(2)(a). Such agreements are those made in circumstances where the employer already

employs employees who are not then, but will be, covered by the enterprise agreement then in contemplation. Section 172(2)(a) and (b)(ii) expressly contemplate that employees "will be covered" by the proposed agreement, even though the employees are also currently employed under another enterprise conducted by the employer under another agreement.

24 It is necessarily implicit in s 172(2)(b)(ii) that an employer engaged in establishing a new enterprise may have in its employ at that time persons who will be necessary for the conduct of the new enterprise. Because such an enterprise is one that, as s 172(2)(b)(i) provides, is to be established at some future time, the word "employed" in s 172(2)(b)(ii) should not be taken to mean "employed *in that new enterprise*", as the SDA argued: the new enterprise, ex hypothesi, does not yet exist. Rather, "employed" simply means "employed" by that employer. An enterprise agreement cannot be made as a greenfields agreement with persons who are already employees of the employer because s 172(2)(b)(ii) allows such an agreement to be made only where none of the persons who will be necessary for the normal conduct of the new enterprise have been employed. Such an agreement, with persons currently employed, must necessarily be made under s 172(2)(a) of the Act.

25 At this point, reference should be made to provisions of Pt 2-1 of the Act, which make general provision for the coverage and application of an enterprise agreement. It is evident from these provisions of the Act that an enterprise agreement may "cover" an employee even though it does not yet "apply" to that employee in the sense of imposing obligations on the employee and the employer. An enterprise agreement imposes obligations on employees and employers covered by it only when it applies to such persons. Section 51 of the Act provides that an enterprise agreement does not give a person an entitlement, nor does it impose obligations on a person, unless the agreement "applies" to the person.

26 Section 52 of the Act deals with when an agreement "applies" to an employee. Importantly, ss 52 and 53 expressly indicate that an enterprise agreement may *cover* an employee when it is not in operation, but it can only *apply* to an employee when it is in operation.

27 Section 52(1) sets out when an enterprise agreement applies to an employee, employer or employee organisation. It provides:

> "An enterprise agreement ***applies*** to an employee, employer or employee organisation if:

(a) the agreement is in operation; and

(b) the agreement covers the employee, employer or organisation; and

(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation."

28 Section 53(1) provides that "[a]n enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer."

29 Section 53(6) provides:

"A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment."

30 Because an employee may be covered by more than one agreement at one time, s 58(1) of the Act provides that only one enterprise agreement can *apply* to an employee at a particular time. That is because only one set of rights and obligations can be in operation in relation to the work actually performed by the employee at that time in relation to particular employment. Given the terms of ss 52 and 53, it is apparent that an employee may be covered by an agreement that applies to him or her, and by an agreement that does not, at that time, apply to him or her. Furthermore, an employee may be covered by more than one agreement at any one time. To speak of an employee being covered by an agreement is to speak of the agreement providing terms and conditions for the job performed by, or to be performed by, the employee.

31 In this context, the natural meaning of the reference in s 53(6) to "particular employment" of an employee is to the description of the employee's job in the agreement. In this regard, the terms of cl 5 of the Agreement refer to the job descriptions of employees whose employment the Agreement will regulate when it comes into operation. It is a natural and ordinary use of language to speak of the Agreement as covering these employees.

32 That an employee may be covered by the terms of more than one agreement at any one time was recognised in *Construction, Forestry, Mining and*

Energy Union v John Holland Pty Ltd[26] ("*John Holland*"). That the Act allows that to occur is hardly surprising: that very possibility was expressly contemplated in the Explanatory Memorandum which accompanied the Bill for the Act[27].

33 Section 54(1) provides:

"An enterprise agreement approved by the [Commission] operates from:

(a) 7 days after the agreement is approved; or

(b) if a later day is specified in the agreement – that later day."

34 An enterprise agreement comes into operation in the sense of creating rights and obligations between an employer and employees in relation to the work performed under it only after it has been approved by the Commission. After that time the agreement applies to the employers and employees who are covered by it. But before that time, as will be seen, by virtue of s 182(1) of the Act, a non-greenfields enterprise agreement is "made" when a majority of those employees who will be covered by the agreement cast a valid vote to approve the agreement. As will be seen, once the agreement is made in accordance with s 182(1), the agreement is treated by the Act as covering the employers and employees to whom it refers.

Rights to be represented

35 Where an agreement is not made under s 172(2)(b) of the Act, the employees, being the employees referred to in sub-s (2)(a), are entitled to representation under s 173.

36 Section 173(1) of the Act requires an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement to take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

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26 (2015) 228 FCR 297 at 303 [22].

27 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 34 [205].

"(a) will be covered by the agreement; and

(b) is employed at the notification time for the agreement."

37 Section 176 sets out the persons who are the bargaining representatives for a proposed enterprise agreement that is not a greenfields agreement. Employee organisations, such as the SDA, are the default bargaining representatives for these employees[28].

38 These provisions serve to ensure that the employees referred to in s 172(2)(a) are able to call upon the negotiating skills and bargaining strength of employee organisations should they so choose in order to minimise the inequalities of bargaining power that might otherwise adversely affect the outcome of their negotiations with their employer.

Making an enterprise agreement

39 Under s 180(2)(a) of the Act, the employer must take all reasonable steps to ensure that "the employees … employed at the time who will be covered by the agreement" are given a copy of the agreement and certain other material.

40 By s 181(1) of the Act:

"An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it."

41 As to when a single-enterprise agreement is made, s 182 of the Act provides relevantly:

"(1) If the employees of the employer … that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

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28 *Fair Work Act* 2009 (Cth), s 176(1)(b).

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover …

(4) If:

(a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and

…

(e) the relevant employer or employers apply to the [Commission] for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the [Commission] for approval of the agreement."

42 It can be seen that an agreement that is not a greenfields agreement, ie one that has not been made under s 172(2)(b), is made upon approval by the employees who will be covered by the agreement. When it is made, those employees are accurately described as being covered by it, even though it does not yet apply to them in the sense of being in operation so as to create rights and liabilities in relation to work actually performed under it. It covers them in the sense contemplated by s 53 of the Act because it is expressed to cover the jobs described as being within its scope; it is the charter of rights and duties for those who actually enter into employment under its terms.

43 Under s 185(1), if an enterprise agreement is made, a bargaining representative for the agreement, whether for the employer or employees, must apply to the Commission for approval of the agreement.

Approval by the Commission

44 At the time that approval is sought from the Commission, the agreement will have already been made, in the case of a non-greenfields agreement, by the employees who made it under s 182(1) of the Act.

45 Section 186(1) of the Act requires the Commission, on an application for approval of an enterprise agreement under s 182(4) or s 185, to approve the agreement "if the requirements set out in this section and section 187 are met."

46 Under s 186(2), the Commission must be satisfied relevantly that:

> "(a) if the agreement is not a greenfields agreement – the agreement has been genuinely agreed to by the employees covered by the agreement; and
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> …
>
> (d) the agreement passes the better off overall test."

47 One may note that s 186(2)(a) is necessarily speaking of an enterprise agreement that is made, not as referred to in sub-s (2)(b) of s 172, but as referred to in sub-s (2)(a) of s 172.

48 Section 186(2)(a) requires, in respect of a non-greenfields enterprise agreement, that the Commission be satisfied that the agreement has been genuinely agreed to by the employees "covered by" the agreement. Such an agreement is, as has been seen from s 182(1), an agreement that has been made. The Full Bench in this case was correct when it said[29]:

> "In our view the concepts of 'coverage' and 'application' in ss 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."

49 The Full Bench was also correct when it went on to say that, in determining whether, for the purposes of s 186(2), the employees "will be

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29 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [38].

covered by the agreement after it is made", "[a]pplication of the agreement is not relevant."[30]

50 Section 186(3) provides, in relation to both greenfields agreements and non-greenfields agreements, that the Commission must be satisfied that the group of employees "covered by" the agreement was fairly chosen. In this regard, s 186(3A) relevantly provides:

> "If the agreement does not cover all of the employees of the employer … covered by the agreement, the [Commission] must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct."

51 Section 188 of the Act states the circumstances in which the Commission may be satisfied that an enterprise agreement "has been genuinely agreed to by the employees covered by the agreement".

52 Section 187(5) contains an additional requirement in respect of a greenfields agreement. It is the only provision of Pt 2-4 which does not neatly accommodate the view that an agreement covers employees when it is made, so that they are then employees who are covered rather than employees who will be covered. It provides:

> "If the agreement is a greenfields agreement, the [Commission] must be satisfied that:
>
> (a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and
>
> (b) it is in the public interest to approve the agreement."

53 Section 187(5) is not a sufficient warrant to disregard the scheme otherwise followed in Pt 2-4. It is evident that Parliament did not draw a

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30 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [41].

significant distinction by the change of tense from "covered" to "will be covered" in s 187(5). It may be noted here that s 187 is expressed to set out "additional requirements" for the approval of agreements to the "general requirements" contained in s 186. In this regard, s 186, which also applies to greenfields agreements, uses the present tense in sub-ss (2)(a), (2)(b)(i), (3), (3A) and (6)(a) notwithstanding that the agreement is yet to be approved by the Commission. Parties to a greenfields agreement, too, are covered by an agreement when it is made and before it is approved, as is apparent from sub-ss (3) and (4)(g) of s 182.

The BOOT

54 Section 193(1) of the Act explains when a non-greenfields agreement passes the BOOT for the purposes of s 186(2)(d). It provides:

> "An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the [Commission] 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."

55 Section 193(6) provides that the "test time" is the time "the application for approval of the agreement by the [Commission] was made under subsection 182(4) or section 185."

The Full Bench

Coverage

56 The Full Bench concluded that:

> "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. … 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."[31]

57 The Full Bench noted that, in *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* ("*Cimeco*")[32], a Full Bench of the Commission had proceeded on the basis that the expression "will be covered" in s 182(1) of the Act referred to those employees:

> "actually falling within the coverage clause [in the agreement being put to 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. …
>
> [T]he expression 'will be covered by the agreement' in s 182(1) does not indicate future likelihood but rather expresses a determinate or necessary consequence."

58 In the present case, the Full Bench declined to follow *Cimeco* in relation to s 172(2)(a)[33]. Rather, in order to give a consistent meaning to common phrases in the Act, it followed the suggestion of the Full Court of the Federal Court in *John Holland*[34] that the phrase "the group of employees covered by the agreement" in s 186(3) meant "the whole class of employees to whom the agreement might in the future apply"[35]. The Full Bench held that the question before it entailed two elements: first, a determination whether the persons are employees; and secondly, a determination whether the employees will be covered

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31 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [42].

32 (2012) 219 IR 139 at 151-152 [50]-[51].

33 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 257-260 [35]-[42].

34 (2015) 228 FCR 297.

35 See *John Holland* (2015) 228 FCR 297 at 299 [1]-[2], 306-307 [34]-[41].

by the agreement after it is made. It was held that whether or not the agreement applied was not relevant to the resolution of the question before it[36].

The BOOT

59 The Full Bench received new evidence from the SDA in relation to whether the BOOT was passed. This new evidence included reference to the work rosters of employees who voted to approve the Agreement, and a comparison of their wages under the award and the Agreement[37]. The comparisons were between the entitlements of 10 of the 17 relevant employees who had signed the Agreement and those employees' entitlements under the General Retail Industry Award 2010 ("the GRIA"), the relevant modern award for the purposes of s 193(1) of the Act. The SDA's contention based on the new evidence was that 40 per cent of employees would receive less by way of remuneration under the Agreement than they would receive under the GRIA[38].

60 In response, ALDI argued that the BOOT was satisfied because the Agreement contained the following provision as part of cl 13 ("the comparison clause")[39]:

> "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

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36 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [41].

37 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 266-267 [56]; *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 186 [155].

38 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 186 [155].

39 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [57].

> 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."

61 The Full Bench concluded[40]:

> "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. … 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."

62 The Full Bench said no more in relation to its decision upon the BOOT issue.

The Full Court of the Federal Court

63 On the SDA's application for judicial review, the Full Court, by majority (Katzmann and White JJ, Jessup J dissenting), held that the Full Bench's decision was vitiated by jurisdictional error, and issued the writs of certiorari and prohibition sought by the SDA[41].

64 The majority upheld the SDA's argument that the Agreement could not be approved by the Commission under s 186(2)(a) because it had not been agreed to by the employees "covered by the agreement" as the Agreement was not then in operation[42].

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40 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [58].

41 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 190 [179].

42 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 182-185 [132]-[147].

65 The majority of the Court also upheld the SDA's argument that the Full Bench misapplied the provisions of the Act in being satisfied that the Agreement passed the BOOT for the purposes of s 186(2)(d), without resolving the issue raised by the new evidence, by relying on the comparison clause[43].

Coverage

66 White J, with whom Katzmann J relevantly agreed, accepted the SDA's submission that it was necessary to focus upon the "change in terminology" used in ss 186 and 188 compared with that used in ss 172 to 181[44]. It was said that the use of the present tense "covered by" in s 186 and the fact that the Commission is obliged to consider whether employees have genuinely agreed to the enterprise agreement, in contrast to the use of the prospective terminology "employees who will be covered by" in ss 172 to 181, indicates "a requirement that there be at least some employees actually (and not prospectively) covered by the enterprise agreement at the time it is made."[45]

67 White J held that s 186(2)(a) of the Act requires that there be persons covered by the agreement whose genuineness in agreeing to it can be assessed by the Commission and that "[p]ersons who will become covered by the agreement only at some time in the future do not answer that description, even if they did, by some means, vote to approve it."[46] His Honour concluded that "there were no employees actually 'covered by' the Regency Park Agreement at the time it was made, at the time of the application to the [Commission], or at the time the agreement was approved"[47]. White J reached these conclusions because:

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43 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 187-189 [163]-[174].

44 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 182 [135]-[136].

45 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 182 [131].

46 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 182 [134].

47 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [143].

> "at the relevant times, there were no employees actually in [the positions referred to in cl 5 of the Agreement]. The 17 employees were then occupying other positions in other enterprises which were within the coverage of other enterprise agreements."[48]

68 White J considered that the Full Bench erred in applying the reasoning in *John Holland* in construing s 186(2)(a)[49]. His Honour held that "neither Bull DP nor the Full Bench undertook the task required by s 186(2)(a) in the way it required." On that basis, it was held that the Full Bench had exceeded its jurisdiction in proceeding on an erroneous view to the contrary[50].

69 White J was influenced in reaching his conclusion by the consideration that it would be "very difficult, if not impossible", for the Commission to be satisfied that:

> "the employees 'covered by the agreement' have genuinely agreed to it … if the employees in question are the whole class of employees to whom the agreement might apply in the future. It is not readily to be expected that the Parliament intended that the [Commission] had to be satisfied that all employees who might during the life of an enterprise agreement become covered by it had genuinely agreed to it."[51]

The BOOT

70 The majority of the Full Court noted that s 193(1) requires the Commission to be satisfied that each award employee would be "better off

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48 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [142].

49 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 181 [129].

50 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [144].

51 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 181 [128].

overall" under the Agreement, and not just "no worse off"[52]. The majority held that the Full Bench was required to assess the detriments alleged by the SDA[53].

71 White J observed that the Full Bench characterised the comparison clause as creating an enforceable right to payments equal to or higher than those contained in the award, without explaining how that could be so. White J pointed out that the comparison clause, at best, created an enforceable entitlement to the *shortfall* between the employee's entitlement under the Agreement and the employee's corresponding entitlement under the GRIA – it did not create an entitlement to payment under the Agreement which was superior[54]. An entitlement to a payment which was no more than *equal to* the award entitlement could not, by definition, satisfy the statutory condition contained in s 193(1)[55].

72 White J also held that the Full Bench misunderstood its function in concluding that the SDA had not demonstrated any "appealable error" in Bull DP's decision[56]. His Honour held that once it had received the further evidence, the exercise of its appellate function was not constrained by the need to identify error by Bull DP – instead, it was required to reach its own decision on

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52 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 186 [153].

53 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 188-189 [167]-[168].

54 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 188 [166].

55 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 188 [167].

56 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 189 [169]-[170].

the evidence before it[57]. It was held that by misunderstanding its task in this way, the Full Bench did not exercise its jurisdiction as required by law[58].

The coverage issue

73 In this Court, the SDA argued that the proposed enterprise agreement was, in truth, a greenfields agreement because the employees who were already working for ALDI in other regions were not relevantly "employed" for the purposes of s 172(2)(a) as they were not actually doing the work under the proposed agreement. In its insistence that it is impossible to be "covered" by an agreement under which work has not yet actually begun, this argument amounts to a contention that "coverage" and "application" are synonymous, and that one can disregard the distinction deliberately drawn by ss 52 and 53 between the two terms.

74 The SDA's argument, and the reasoning of the majority of the Full Court, cannot accommodate the distinction expressly drawn by ss 52 and 53 of the Act between coverage and application.

75 In the course of argument in this Court it was suggested on behalf of the SDA that s 53(6) of the Act, in speaking of "the agreement covering the employee in relation to particular employment", is speaking exclusively of a case where the employee is actually performing work under the agreement at that time. That understanding of s 53(6) requires one to read into the provision words that are not there. Read without the SDA's proposed gloss, it is apparent that the provision is simply referring to the employee's job as described in the agreement rather than to the actual performance by the employee of the tasks involved in that job. This understanding accords with the Explanatory Memorandum for the Bill, which treats "particular employment" as synonymous with a "job"[59].

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57 See *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14]-[15]; [2000] HCA 47.

58 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 189 [170], [174].

59 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 34 [205].

76 The SDA's argument, and the reasoning of the majority of the Full Court, cannot stand with the plain and ordinary meaning of s 172(2) and (4) of the Act. Those provisions, as mentioned, contemplate the making of non-greenfields agreements with persons already employed. In addition, while s 186 operates on the assumption that there are employees covered by the agreement at the time the application for approval is made, it does not follow that the agreement must apply to them in the sense of operating to fix their rights and obligations in the work actually being performed by them at that time.

77 The question of coverage that arises when the Commission asks whether the agreement has been genuinely agreed to for the purposes of s 186(2)(a) is not whether the employees voting for the agreement are actually employed under its terms, but rather whether the agreement covers all employees who may in future have the terms and conditions of their jobs regulated by it. At the stage of considering whether an enterprise agreement is available to be made under s 172 of the Act, ie when no agreement has as yet been made, it is a natural and ordinary use of language to speak of the employees whose jobs are within the scope of the proposed agreement as employees who "will be covered" by the agreement. At the stage of considering whether an enterprise agreement, which has been made (by virtue of s 182(1)), should be approved pursuant to s 186(2)(a), it is a natural and ordinary use of language to speak of the employees, whose jobs are described by the terms of the agreement which has been made, as employees who "are covered" by the agreement.

78 The Full Court erred in acceding to the SDA's invitation to give the change in tense between ss 172 to 181 and ss 186 and 188 an effect which overrides the distinctions drawn by s 172 and ss 52 and 53 of the Act. The change in tense is of no greater significance than to recognise that an agreement is not capable of covering an employee in any meaningful sense until it has been made. A coverage clause in an enterprise agreement may expressly provide that it covers every job description that may, at some time, be necessary to the work regulated by it, but the agreement is not available as a charter of the terms and obligations apt to effect that regulation until it has been made[60]. That this is so should hardly be surprising. An enterprise agreement when made has the same effect, so far as coverage is concerned, as a modern award, which, when made,

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60 Cf *National Tertiary Education Industry Union v Swinburne University of Technology* (2015) 232 FCR 246.

affords those who thereafter accept employment under its terms a charter of their rights and duties in that employment[61].

79 It is noteworthy that s 207(1)(a) of the Act provides for the variation of an enterprise agreement by the employer and:

> "(i) the employees employed at the time who are covered by the agreement; and
>
> (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the [Commission]".

80 Section 207(4) provides:

> "Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed."

81 The provision made by s 207(4) utilises the present perfect tense "have been" to reflect the circumstance that greenfields agreements may only be made where no employees were employed at the time the agreement was made. Further, the collocation of the future tense "will be necessary" with the present tense "are covered" makes it clear that the idea of coverage does not require an employee to be actually working under the terms of the agreement at the time he or she is said to be covered. In addition, the need to condition the expression "are covered" with the qualifying words "have been employed" confirms that the coverage of an agreement is wider than existing employees. That a greenfields agreement could have been made covering the Regency Park operations with persons who were not then employed by ALDI is beside the point, as noted by the Full Bench[62]. That is because the Agreement was made, as the Act allows, as a non-greenfields agreement.

82 In light of the ordinary and natural meaning of the terms of Pt 2-4 of the Act, a non-greenfields enterprise agreement can be made with two or more employees, so long as they are the only employees employed at the time of the

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61 Cf *Fair Work Act* 2009 (Cth), s 143.

62 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 256-257 [33].

vote who are to be covered by the agreement. It does not matter that the agreement may, in due course, come to apply to many more employees. That understanding is consistent with the approach of the Full Court in *John Holland*[63].

83 In *John Holland*, the expression "the group of employees covered by the agreement" in s 186(3) was held to relate to the "whole class of employees to whom the agreement might in the future apply"[64]. As was said in *John Holland*, the expression "covered by" in s 186(3) extends to any person who will, in the future, be engaged as an employee to whom the agreement will apply. To the extent that a different view was taken in *Cimeco*, it should not be followed. Consistently with the view of s 186(3) taken in *John Holland*, the references in sub-s (2) to "covered by" may be read as "those persons currently employed who fall within the whole class of employees to whom the agreement might in future apply". That was the approach which found favour with the Full Bench[65]. That approach is correct. It recognises that s 186(2), unlike s 186(3), is concerned exclusively with agreements that are not greenfields agreements. The employees covered by agreements that are not greenfields agreements presented to the Commission for approval are necessarily those employees with whom the agreements have been made under s 182(1).

84 The conclusion indicated by the ordinary and natural meaning of these provisions of the Act is not brought into question by the concern, identified by White J, that there is something implausible in the legislature accepting that a small group of employees may be able to fix the terms and conditions of employment for all the employees who may be employed in the enterprise in the future. That concern was adverted to and rejected in *John Holland*[66]. It is a concern that does not warrant the adoption of an understanding of the Act that is contrary to the ordinary and natural meaning of its text. Indeed, the concern is addressed, and largely allayed, by the protective provisions of the Act relating to

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63 (2015) 228 FCR 297 at 299 [1]-[2], 306-307 [34]-[41].

64 (2015) 228 FCR 297 at 299 [2].

65 See *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [40]-[42].

66 (2015) 228 FCR 297 at 306-307 [34]-[41].

the right to representation, the "fairly chosen" provisions of sub-ss (3) and (3A) of s 186, and, most importantly, the need to pass the BOOT.

85 On the approach of the majority of the Full Court, the concern that a decision affecting only a few in the present may bind many in the future is one that is only to be remedied in the case of new enterprises, notwithstanding that it may equally arise in relation to already existing ones.

86 On any construction, s 172(2)(a) may be used to make an enterprise agreement with two or more employees for an already existing enterprise. In the case of a small but already existing enterprise, it is uncontroversial that the votes of a few original employees may eventually bind a much larger group as the enterprise grows. The construction of the majority of the Full Court does nothing to remove that possibility, nor could it.

87 Yet, in relation to new enterprises, the approach of the majority of the Full Court treats that possibility as unacceptable. Rather than countenance the possibility, expressly contemplated by s 172(2)(a), that a few original employees may make an agreement in relation to a proposed new enterprise that will later bind a larger group, the majority of the Full Court ignored the language of s 172 and adopted a strained construction of s 186(2)(a). That strained construction had the effect of denying those employees the capacity to make an agreement capable of receiving approval. Presumably it was because of the involvement of employee organisations in the making of greenfields agreements that the majority of the Full Court saw its concern as remedied by that construction. However, given that employees involved in making a non-greenfields agreement might, if they wished, appoint an employee organisation as a bargaining representative, and given the additional protections of sub-ss (3) and (3A) of s 186, and the need to pass the BOOT, no good reason, in terms of the purpose of the Act, justifies that strained construction.

Should special leave be revoked?

88 In the course of argument, it was submitted on behalf of the SDA that ALDI's grant of special leave should be revoked because ALDI's argument in relation to the coverage issue had altered in a material respect. In this regard, the SDA argued that before the Full Court, ALDI conceded that there were no

employees "covered by" the Agreement at the time it was made[67] even though the Full Bench had concluded that the employees who voted in favour of the Agreement were "covered by" it because "their employment comprehended work within the scope of the ... Agreement"[68].

89 It may well be that ALDI's concession should fairly be understood as having been predicated upon the SDA's contention as to the construction of "coverage" being correct. If it was, then the concession was no more than that, since the employees in question had not yet commenced work at the Regency Park undertaking, they were not yet covered by the Agreement[69].

90 Whatever the effect of the concession, however, it is clear that ALDI at no stage abandoned its reliance upon s 172 of the Act. The error in the Full Court stemmed principally from a failure to come to grips with the terms of s 172. In addition, the coverage issue is a matter of public importance which should not be allowed to stand wrongly decided merely because of an ill-advised and plainly erroneous concession upon a matter of law by a party to the proceeding[70]. Accordingly, the SDA's application for the revocation of the grant of special leave should be refused.

The BOOT

91 ALDI submitted that the new evidence adduced by the SDA before the Full Bench could not be accorded much, if any, weight, as that evidence did not reflect the hours to be worked by employees under the Agreement, important components of the payments of employees were omitted, and employees were

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67 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [143].

68 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 260 [42].

69 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 184 [142].

70 Cf *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 241; [1978] HCA 8; *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 304-305 [66]; [2008] HCA 48.

classified for the purposes of the comparison at substantially higher classifications than employees doing the same work under a substantially similar agreement that had recently been approved with the support of the SDA. ALDI submitted that it is apparent from the reasons of the Full Bench that it did not find the new evidence persuasive and acted upon that view.

92 The SDA submitted that the BOOT "requires an overall assessment to be made", which in turn "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"[71]. What is involved is a comparison between terms and conditions under the agreement and the terms and conditions under the modern award[72]. That submission must be accepted.

93 The majority of the Full Court was correct to identify jurisdictional error in the conclusion of the Full Bench that the Agreement passed the BOOT because the comparison clause "creates an enforceable right to payments to employees equal to or higher than those contained in the award"[73]. The BOOT expressly requires that the employees be "better off" under the Agreement compared to the award; it may be contrasted with the "no disadvantage" test which was the legislative predecessor of the BOOT[74]. The comparison clause was apt only to ensure that an employee could make a request for payments to be equalised as between the Agreement and an award. The right to equalisation, after a process initiated by the employee, does not of itself leave the employee better off under the Agreement at the test time.

94 The paragraphs excerpted above from the reasons of the Full Bench in relation to the BOOT issue are all that was said upon this issue by the Full Bench. There is nothing in the reasons of the Full Bench to suggest that, irrespective of the comparison clause, the employees were found to be better off

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71 *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at 49 [41].

72 *Top End Consulting Pty Ltd re Top End Consulting Enterprise Agreement 2010* [2010] FWA 6442 at [26]-[29].

73 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [58].

74 See *Workplace Relations Act* 1996 (Cth), ss 170LT, 170VPB, 170XE.

under the Agreement, such that it could possibly be said that the Agreement as a whole secures employees payments "equal to or higher than those contained in the award"[75].

95 Before the Full Court, there was a difference between the parties as to whether the Full Bench had actually exercised its power under s 607(2)(a) of the Act to receive the new evidence adduced by the SDA. As to this, White J noted[76] that the Full Bench at par [3] of its reasons seemed to suggest that it had granted leave to adduce the new evidence; and White J went on to conclude that the "Full Bench reached its decision on the basis that all the further evidence had been received." In this Court, there was no challenge to this conclusion of White J. It may be taken to be the case that the new evidence was received by the Full Bench. And so it may be said that, although the new evidence was received by the Full Bench, the factual issues which it raised were not expressly resolved by the Full Bench. The majority of the Full Court was correct to conclude that the Full Bench's reasons justify "the conclusion that the Full Bench did not address the correct question"[77].

96 On a fair reading of the reasons of the Full Bench, it did not engage in any comparison between the Agreement and the modern award. Rather, it summarised ALDI's submission upon the comparison clause, and accepted that submission as showing that the Agreement passed the BOOT. It may be, of course, that the new evidence adduced by the SDA before the Full Bench can be shown to be deserving of little weight in the evaluative assessment required by s 193, but the Full Bench fell into jurisdictional error in failing to determine whether or not that was so.

97 It was also argued on behalf of ALDI that the majority of the Full Court failed to appreciate that the comparison clause serves to ensure that employees covered by the Agreement will become entitled to the benefit of favourable movements in the award after the BOOT has been satisfied. That argument does

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75 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [58].

76 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 189 [171]-[172].

77 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 189 [168].

not meet ALDI's difficulty. No doubt, the benefit to employees of this updating provision is something that might properly be taken into account in assessing whether the BOOT is satisfied at the test time. But to say this does not answer the point that the Full Bench's reasons do not show how the BOOT is satisfied at the test time given that the comparison clause assures employees of no more than that they may take steps in the future with a view to ensuring that they are not worse off than under the award.

98 In any event, by failing to carry out the evaluative assessment required to resolve the issue raised by the new evidence received by it, the Full Bench misconceived its role and so fell into jurisdictional error[78].

99 Whether the Full Bench was satisfied that an employee was better off overall under the Agreement than under the award required an evaluative assessment after consideration of the provisions of the award and the Agreement that may have been more beneficial to employees and those that may have been less beneficial[79]. This assessment is a matter of the kind which has been described in other contexts as:

> "a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."[80]

100 The appeal to the Full Bench for which the Act provides is an appeal by way of rehearing[81]. Section 607(2) allows the Full Bench to admit further evidence on an appeal to it in order to determine the matter upon that rehearing.

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78 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31].

79 *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at 49 [41].

80 *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201, cited with approval in *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532; [1985] HCA 34.

81 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [13]-[14]; *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23]; [2000] HCA 40.

Using that further evidence, the Full Bench may find that the decision the subject of appeal was an incorrect decision even though, on the evidence before the Commission, its decision was not demonstrably erroneous. The Full Bench was wrong to approach its task as if it were enough to conclude that Bull DP had "properly considered the BOOT and reached a decision based on a sound analysis"[82].

101 The Full Bench did not deal with the appeal to it as an appeal by way of rehearing. On any view of what a rehearing entails[83], once the Full Bench admitted the new evidence which challenged the satisfaction of the BOOT, it was incumbent on it to decide the appeal "upon the facts and in accordance with the law as it exists at the time of hearing the appeal."[84] That is because "the further evidence may demonstrate error in the outcome" even though the primary decision was correct at the time it was made[85]. By concluding that "[i]t has not been demonstrated that there is any appealable error in the decision under appeal", because "the Deputy President properly considered the BOOT and reached a decision based on a sound analysis", the Full Bench did not "hav[e] regard to all the evidence now before the appellate court"[86].

Conclusions and orders

102 In the result, ALDI's appeal to this Court succeeds in relation to the coverage issue and fails in relation to the BOOT issue.

103 It was common ground between the parties that in the event that the appeal to this Court should succeed in relation to the coverage issue but fail in

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82 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [58].

83 Cf *Warren v Coombes* (1979) 142 CLR 531 at 551; [1979] HCA 9.

84 *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111]; [1998] HCA 67. See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107; [1931] HCA 34.

85 See *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64 at 75 [41].

86 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23].

relation to the BOOT issue, the latter issue should be remitted to the Commission to be determined according to law. While the parties were at one in speaking in terms of an order to remit to the Commission the question whether the BOOT has been satisfied, the better course, given that the decision of the Full Bench was affected by jurisdictional error which must be formally corrected, is to order that it be quashed by a writ of certiorari and that a writ of mandamus issue requiring that the Full Bench proceed to determine the appeal to it according to law.

104 The appeal to this Court should be allowed in part. That part of the orders of the Full Court of the Federal Court of Australia dated 29 November 2016 relating to the decision of Bull DP under s 186 of the *Fair Work Act* 2009 (Cth) should be set aside. A writ of certiorari should be issued to quash the decision of the Full Bench of the Fair Work Commission, and a writ of mandamus should issue requiring the Full Bench of the Fair Work Commission to determine according to law whether the ALDI Regency Park Agreement 2015 passes the better off overall test set out in s 193 of the *Fair Work Act* 2009 (Cth). That part of the first respondent's originating application to the Full Court of the Federal Court of Australia for relief under s 39B of the *Judiciary Act* 1903 (Cth) concerned with the decision of Bull DP under s 186 of the *Fair Work Act* 2009 (Cth) should be dismissed.

105 GAGELER J. I agree with the orders proposed by the plurality and I agree with the reasons given by the plurality for making those orders. By way of amplification, I add one observation concerning the "coverage issue".

106 The Full Court of the Federal Court correctly concluded in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*[87] that the "group" of "employees covered by the agreement" to which s 186(3) and (3A) refer is the whole class of employees to whom the agreement might in the future apply. That conclusion is compelled by the consideration that the requirements of s 186(3) and (3A) must be met in order to approve a greenfields agreement in the same way as those requirements must be met in order to approve an agreement that is not a greenfields agreement.

107 Given that a greenfields agreement, as defined in s 172(4) by reference to s 172(2)(b) and (3)(b), is an agreement made by an "employer" or "employers" who "have not employed any of the persons who … will be covered by the agreement", the reference in s 186(3) and (3A) to "employees covered by the agreement" cannot be read as limited to employees to whom the agreement will apply immediately on coming into operation. The word "employees" in s 186(3) and (3A), like the words "employer" and "employers" in s 172(2)(b) and (3)(b), is without temporal significance. The "group" to which s 186(3) and (3A) refer is the totality of persons who might at any time during the operation of the agreement meet the description of employees covered by the agreement.

108 The word "employees" in s 186(2)(a) is similarly without temporal significance. The reference to "employees covered by the agreement" in s 186(2)(a) is similarly not limited to employees to whom the agreement will apply immediately on coming into operation.

109 But the employees to whom s 186(2)(a) refers cannot extend, as does the "group" in s 186(3) and (3A), to the totality of persons who might at some time in the future meet the description of employees covered by the agreement. To read s 186(2)(a) as extending to the totality of those persons would give rise to a difficulty of the kind which evidently troubled the majority of the Full Court of the Federal Court in the decision under appeal[88]. To the extent that some persons within the totality of persons who might at some time in the future meet the description of employees covered by the agreement might not yet have been employed and might not yet even be known, it would be impossible to be satisfied at the time of approval that the agreement "has been genuinely agreed to". The result would be that, except in the case of an agreement confined to

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87 (2015) 228 FCR 297.

88 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155 at 181 [128].

covering a closed class of persons who were already employed at the time the agreement was made, the requirement could not be met.

110 The difficulty is overcome when it is recognised that s 186(2)(a), in contrast to s 186(3) and (3A), sets out a requirement that needs to be met only in the case of an agreement that is not a greenfields agreement. Read in light of the descriptions in s 172(2)(a) and (3)(a) of an agreement that is not a greenfields agreement, and against the background of the procedure established by ss 180(1) and 181(1) for the making of an agreement that is not a greenfields agreement, the reference in s 186(2)(a) to "employees covered by the agreement" needs to be understood as confined in its operation to a particular subclass of employees covered by the agreement. The subclass comprises those who were employed at the time the agreement was made and became covered by the agreement as a result of it having been made.

111 What s 186(2)(a) therefore requires, in the case of an agreement that is not a greenfields agreement, is satisfaction that the agreement has been genuinely agreed to by those employees who were employed at the time the agreement was made and who became covered by the agreement as a result of the agreement being made. That the agreement might not apply to those employees until a time in the future is not to the point.

112 Accordingly, in the case of the ALDI Regency Park Agreement 2015, the employees within the scope of s 186(2)(a) were limited to the 17 existing employees of ALDI who at the time of making that Agreement had already contracted to work in the Regency Park region in the future.