IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M33 of 2017

BETWEEN: **ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP)**
Appellant

and

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION
First Respondent

FAIR WORK COMMISSION
Second Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION

1. I certify that this reply is in a form suitable for publication on the internet.

Part II: REPLY

2. The appellant joins issue with the first respondent and, where not specifically addressed in this response, the appellant relies upon its principal submission.

Statement of Contested Material Facts

3. Contrary to the first respondent's submissions. The case was not run differently below. The appellant conceded that there were no employees working under the terms of the Agreement. This was plainly the case.
4. The appellant further conceded that if coverage meant working under the Agreement then the employees weren't presently covered, if that was the test. The appellant submitted that was not the test, as it does in this Court.
5. The "comparison" relied upon by the first respondent, did not compare the employees with the entitlements they would receive under the award. For reasons, unexplained (and undisclosed), the "comparison" treated at least some of the employees as if they were engaged in a substantially higher classification than the first respondent had agreed was appropriate in other proceedings mere weeks beforehand. It ignored certain agreement entitlements. It was unreliable and was not tendered to establish that employees were not better off, only that the Commission should not rely upon

Enterprise Law
20/19 Bolton Street
Newcastle NSW 2300

Telephone: (02) 4929 5160
Fax: (02) 4929 1376
Email: meg_mcnaughton@enterprise-law.com.au
Ref: Meg McNaughton

a Schedule provided to the Commission by the appellant in relevantly identical terms to Schedules which had earlier been provided to the Commission in related proceedings to which the first respondent was party, by consent. It was apparent that the Deputy President, in the proceedings below, had not relied solely upon the Schedule.

ARGUMENT

Ground One

6. The first respondent engages in a rather arid exercise of semantics in attempting to characterize the appellant's contention at [8] and [9]. As the first respondent correctly submits at [10], it is a question of the construction of the statute. If, as the first respondent apparently contends, coverage is simply a synonym for apply, and one can safely disregard the apparent care with which the legislature distinguished the two terms, then the first respondent must succeed.

7. The frailty in the first respondent's argument as to statutory purpose might be seen by the following simple example. An Agreement might expressly provide that it covers every employee of the employer who may, at some time, be required to perform work regulated by it. Alternatively, it might, as in *National Tertiary Education Industry Union v Swinburne University of Technology*[1] cover academics employed for the future academic term. It cannot apply to them until that term arrives, but they are nonetheless expressed to be, and are, covered.

8. If these be legitimate coverage clauses, as it is submitted they plainly are, then the statutory interpretation called in aid by the first respondent, reliant as it is upon the need for employees to be actively engaged in the undertaking, must fail.

9. The first respondent's submission, at [28], displays the true error of interpretation. If employees must be actually working in the undertaking, how can it be an undertaking "the employer proposes to establish".

10. Similarly, the device employed by the first respondent of asserting without analysing does not assist. If the Full Court were correct in *Construction,*

[1] (2015) 232 FCR 246; [2015] FCAFC 98 (Jessup, Pagone and White JJ).

Forestry, Mining and Energy Union v John Holland Pty Ltd[2] (*John Holland*), the expression "covered" extends to any person who will, in the future, have the agreement apply to them. This construction operates as harmoniously with s.207 of the *Fair Work Act 2009* as it does with s.186(2). To the extent that the first respondent submits otherwise (at [34]) their submission is in error and does not reflect the passages cited.

11. The first respondent submits (at [33]) that a greenfields agreement could have been made covering the appellant's Regency Park operations. As the Full Bench noted, this is not to point.[3] In any event, there were plainly persons employed who would be necessary for the normal conduct of the enterprise and would be covered by its operation. Again the first respondent asserts a greenfields agreement could be made without analysing how that might be so under the legislation.

12. The first respondent points (at [35]) to the concession made below by the appellant that, to the extent the agreement has a provision that might be thought to concern coverage, it deals in terms of work actually being done, and that none of the employees were actually doing work under the agreement. So much was an agreed fact. Accordingly, if the legislation means by its reference to coverage to have regard to work actually being done, then clearly the employees were not covered but would be covered. It was contended this was enough. Whether one gets there by a route of statutory construction which notes and relies upon the continued statutory formulation of employees who will be covered, or whether one has regard to the Full Court's formulation in *John Holland* that the very term "covered" for the purposes of the legislation is prospective, one comes to the same result. Either way, it is a matter of statutory construction and the appellant can no more be bound by an erroneous statutory construction, than the first respondent can rely upon any concession in such regard.

13. The first respondent reveals (at [43]) an alarming lack of understanding of the consequence of their submissions. If they be correct in the submission that an error by the Commission in determining the coverage of an agreement

---

[2] (2015) 228 FCR 297; [2015] FCAFC 16 (Besanko, Buchanan and Barker JJ).
[3] *Transport Workers Union of Australia v ALDI Foods Pty Ltd* (2016) 225 IR 248; [2016] FWCFB 91 (**Full Bench decision**) at [33].

goes to its jurisdiction to approve the agreement, it goes to the validity of the agreement so approved. As the first respondent correctly notes, the long standing privative provisions of the legislation have been removed. Accordingly, there is no protection afforded to invalid agreements, if there ever could have been. Whatever may be the discretionary constraints on the grant of judicial review, in any enforcement proceedings the validity of the agreement can be challenged. Thus, in the face of an employee complaining that they were not paid in accordance with the award, the employer would be faced with an argument as to the validity of the agreement, on the basis that the employee contends that there were no relevant employees covered by the agreement at the time the agreement was made. The consequence of an adverse finding would be that the award applied, which would entail a large number of inconsistent provisions now creating entitlements.

14. Intriguingly, the first respondent points (in [44]) to *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union [No 1]*[4] (*Teys*) as a case where there was "a mistaken conclusion rather than identification of a wrong issue or the asking of a wrong question". In *Teys* the Full Court was critical of the Full Bench for having found that it was necessary for employees to be working under the terms of an agreement rather than employed to do work under the terms of the agreement in order to be covered by the agreement. A rather similar issue to the matter at hand. One of the (many) difficulties in the area of jurisdictional error is the ease with which particular mistakes can be characterized in one fashion or another, depending upon the desired result.

Ground Two

15. The first respondent appears to regard the Full Bench as dealing with the matter at first instance. The first respondent contends (at [51]) that the Full Bench had to involve itself in a "comparison between the terms and conditions under the enterprise agreement and the terms and conditions under the award". That is erroneous. On appeal the Full Bench must determine whether there was error. The first respondent had contended that the Schedule filed in support of the application for approval of the agreement

---

[4] (2015) 230 FCR 565; [2015] FCAFC 11 (Buchanan. Logan and Katzmann JJ).

could not be relied upon. This was not the central issue before the Tribunal at first instance, rather it was whether the Agreement passed the better off overall test. A conclusion one way or the other on this point did not establish error.

16. It is apparent (at [52]) that the first respondent confuses what the Full Bench of the Fair Work Commission did, with what is described in its reasons. The Full Bench had jurisdiction to determine an appeal. This it did. In the exercise of that jurisdiction, it was required to find error if it was to proceed. It asked itself this question. This is apparent on the face of the record, even if the record includes the reasons.

17. The reliance by the first respondent on s.430 of the *Migration Act 1958* (at [58]) and cases decided thereunder is misplaced. That legislation has its own scheme dealing directly with the provision of reasons.

18. The first respondent complains (at [62]) that the appellant's submission (at AS[71]) that the Full Bench's reasons were expressly premised on the basis that the Agreement otherwise passes the BOOT is said to be not reflective of the Full Bench reasons. The Full Bench say "In our view the Deputy President properly considered the BOOT and reached a decision based on a sound analysis". The Deputy President did not refer to the "make good" clause. The Full Bench accepted that the agreement otherwise passed the BOOT. It is difficult to otherwise deal with the first respondent's assertion.

Notice of Contention

19. As the first respondent has neither identified the particular errors of law it addresses, nor nominated the passages in the reasons said to be relied upon to reflect the record in relation to those asserted errors, the appellant is unable to further assist the Court.

Dated: 23 May 2017

Garry J Hatcher SC
Frederick Jordan Chambers/
Cullinane Chambers
T (02) 9229 7329/(07) 4413 2062
F (02) 9232 2652
E hatcher@fjc.net.au

Anna Perigo
Frederick Jordan Chambers

T (02) 9229 7322
F (02) 9210 0580
E anna.perigo@fjc.net.au