DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Aldi Foods Pty Limited As General Partner Of Aldi Stores (A Limited Partnership) T/A Aldi Stores

(AG2024/713)

COMMISSIONER WILSON MELBOURNE, 14 JUNE 2024

Application for approval of the ALDI Derrimut Agreement 2024

[1] An application has been made for approval of an enterprise agreement known as the *ALDI Derrimut Agreement 2024* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the FW Act). It has been made by ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) (ALDI or the Applicant). The Agreement is a single enterprise agreement.

[2] Following preliminary consideration of the Agreement, my Chambers sent correspondence to the parties named in the initiating application setting out the concerns I held in relation to the Agreement in respect of the agreement signatories, pre-approval requirements, mandatory terms, the National Employment Standards (NES), and the Better Off Overall Test (BOOT).

[3] ALDI provided an initial response to the matters set out in the correspondence and provided a further response including a set of draft undertaking in compliance with the filing directions.

[4] The Shop, Distributive and Allied Employees' Association (SDA) and the United Workers Union (UWU) are bargaining representatives for the Agreement and gave notice under s.183 of the Act that they want the Agreement to cover them, although as set out in this decision, the SDA raised broader concerns.

[5] The application was the subject of a hearing on Wednesday 1 May 2024. Mr Garry Hatcher SC with Ms Anna Perigo of Counsel appeared for ALDI, instructed by Ms Meg McNaughton of Enterprise Law, solicitors. Mr Ben Bromberg of Counsel, instructed by Mr Daniel Victory of Maurice Blackburn, solicitors, appeared for the SDA. The UWU did not appear at the hearing. Permission for representation by lawyers was granted by me pursuant to the provisions of s.596(2)(a).

[6] After consideration of all relevant matters, I find that while the Agreement is not genuinely agreed it may be approved through the provision of an undertaking given pursuant

to s.190 of the FW Act in addition to another undertaking already provided by ALDI in relation to a separate concern.

BACKGROUND

The Commission's concerns

[7] As part of its consideration process, on 20 March 2024 the Commission wrote to ALDI expressing a number of concerns inviting its concerns be addressed either through the provision of submissions that would persuade the Commission the expressed concern did not require further consideration or through the provision of an undertaking that would ensure the concern is removed. ALDI's response to the Commission satisfied each of the inquiries made of the applicant as well as providing an undertaking dealing with the subject of the employment of caretakers. The proposed undertaking, which is acceptable to the Commission, is in these terms:

> "ALDI DERRIMUT ENTERPRISE AGREEMENT 2024
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> ALDI offers the following undertaking to the Fair Work Commission in relation to the ALDI Derrimut Enterprise Agreement 2024
>
> ALDI does not currently employ Caretakers in the Derrimut Region. Should Caretakers be employed and are regularly required to work on Sundays and public holidays, they will be defined as shiftworkers for the purposes of clause 6 of Schedule 3 of the Agreement and will be entitled to 5 weeks of annual leave per annum in accordance with clause 33.3 of Schedule 3 of the Agreement".[1]

[8] The concerns identified by the Commission dealt with a difference between the coverage of the Agreement as made and that as set out within the Notice of Employee Representation Rights; the absence of a consultation term; a query about the definition of shift worker, for the purposes of determination of the additional leave entitlement; and matters associated with the Better Off Overall Test (BOOT). Matters dealing with the BOOT included the content of a reconciliation clause; the bankable hours provision; contracted hours; amendments to rosters clarification of hourly rates payable to store employees including when they work shift work or over time.

[9] As the Commission's concerns in these regards have been resolved and there is no contest by any bargaining representative to these matters, they do not require setting out in detail in this decision.

The SDA's objections

[10] At the time the Commission identified its concerns, a Form F18 (Declaration of employee organisation) from the UWU had been received, however the Form F18 by the SDA setting out its objections to approval of the Agreement had not been received. The UWU's Form F18 advised it supported approval of the Agreement.[2] The SDA's Form F18 was received on 28 March 2024 and set out several objections, including that it sought for the Commission to require further information on the role and duties of the Store Delivery Driver classification and

that the BOOT was not passed in several respects. It also stated the following in response to the form's question "Is the Union of the view that the Agreement passes the better off overall test?":

> "5. The insertion of casual rates of pay in Schedules 3 and 4 has been done to circumvent the application of the Same job, Same Pay provisions of the Fair Work Act. Fair Work Legislation Amendment (Closing Loopholes) Act 2023, Part 6 - Closing the labour hire loophole. The current Aldi Derrimut Agreement does not have casual rates of pay for warehouse, transport and distribution workers. The casual rates that are included in the new Agreement are not the equivalent of the permanent hourly rate plus a casual loading of 25%, the standard calculation for casual workers in Awards. The Commission should not approve an Agreement that doesn't not have casual rates of pay based on the rates of pay paid to permanent employees in the Agreement plus a loading of a minimum of 25%, unless a higher loading is determined by the Fair work Commission."[3]

[11] While couched as an objection about casual rates of pay, scrutiny of the relevant schedules shows the objection to be about how labour hire employees would be affected by the Agreement if approved.

[12] The SDA did not, in its later written and oral submissions further deal with its Form F18 objection about the role and duties of the Store Delivery Driver classification or a failure of the Agreement to pass the BOOT.

CONSIDERATION

[13] Correspondence from the Commission to the parties on 2 April 2024 advised that my preliminary view was that notwithstanding the concerns raised by the SDA I considered the Agreement to be capable of approval.

[14] The SDA sought to be heard over its concerns which crystallise to an objection over the inclusion of two labour hire clauses, in Part F of Schedule 3 and Part F of Schedule 4. Shortly stated Schedule 3 applies to Warehouse employees and Schedule 4 to Transport and Distribution employees.

[15] The following are the application term of each Schedule and the disputed part of each Schedule:

> **SCHEDULE 3 – Warehouse Employees**
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> > **"PART A – Operation of the Schedule**
> >
> > **1 Application of this Schedule**
> >
> > 1.1 This Schedule applies to all Employees employed to work in ALDI's Distribution Centre or Supplementary Warehousing Facilities (Warehouse Employees), specifically Section Leaders, Assistant Section Leaders, Warehouse Operators, Warehouse Mechanics, Warehouse Caretakers, Warehouse Checkers, Palletisers and Warehouse Labourers.

1.2 If there is any inconsistency between the Agreement and this Schedule, the provisions of this Schedule will apply".

"**PART F – Casual Employment Terms and Protected Rates of Pay – Labour Hire**

37 Application of this Part

37.1 As noted in Clause 18.3 of the Agreement, ALDI will not employ casual employees under this Schedule.

37.2 The terms and conditions of employment that would apply to a casual employee under this Schedule are set out in this Part. Should a regulated labour hire arrangement order be made by the Fair Work Commission that covers labour hire workers performing work under this Schedule, this Part will apply to any labour hire workers so covered."

[Clauses 38 and 39 have been omitted.]

SCHEDULE 4 – Transport and Distribution Employees

"**PART A – Operation of the Schedule**

1 Application of this Schedule

1.1 This Schedule applies to all Employees employed to work in ALDI's Transport and Distribution function ("Transport Employees"), specifically Section Leaders, Assistant Section Leaders, Transport Operators, Transport Drivers and Store Delivery Drivers.

1.2 If there is any inconsistency between the Agreement and this Schedule, the provisions of this Schedule will apply".

"**PART F – Casual Employment Terms and Protected Rates of Pay – Labour Hire**

29 Application of this Part

29.1 As noted in Clause 18.3 of the Agreement, ALDI will not employ casual employees under this Schedule.

29.2 The terms and conditions of employment that would apply to a casual employee under this Schedule are set out in this Part. Should a regulated labour hire arrangement order be made by the Fair Work Commission that covers labour hire workers performing work under this Schedule, this Part will apply to any labour hire workers so covered."

[Clauses 30 and 31 have been omitted.]

[16] The term "Employee" is defined in a Definitions clause in the Agreement as being "an Employee of ALDI who is covered by this Agreement".[4]

[17] The Application clause of each Schedule refers to casual employees not being employed under the Schedule "As noted in Clause 18.3 of the Agreement". As context to that reference that clause provides:

> "18.3 Casual employees may be employed under Schedule 2 of the Agreement only and will receive the rates of pay and terms and conditions of employment for casual employees set out in that Schedule."

[18] The two Parts F, both entitled "Casual Employment Terms and Protected Rates of Pay – Labour Hire" are the disputed terms and referred to me in this decision as the Labour Hire Clauses.

[19] The SDA submits two forms of objection to approval of the Agreement; first that the disputed clauses are invalid and second that for several reasons inclusion of the terms should lead to a finding that the Agreement is not genuinely agreed.

Repugnancy

[20] The SDA's first position is that the Commission should find the Labour Hire Clauses are invalid for reason of being repugnant to the scheme of the FW Act, with that finding not preventing approval of the Agreement. The union argues the Commission is able to form opinions about legal matters and that such a finding would be a step in the exercise of its functions.[5]

[21] At the core of the SDA's objection is its claim that the Labour Hire Clauses have been inserted in order to circumvent the application of the "Same Job, Same Pay" provisions of the FW Act. The clauses would do this by setting rates of pay for labour hire employees performing work for ALDI under a future regulated labour hire arrangement order (Arrangement Order) to be made by the Commission which may be made under Part 2 – 7A of the Act. That Part, enacted by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* has commenced however orders made under the Part may not come in force until 1 November 2024.[6]

[22] The SDA submitted about the operation of the Part:

> "10. Part 2 – 7A is a new scheme under the FW Act regulating certain labour hire arrangements.
>
> 11. Under s 306E of the scheme, the Commission is empowered to make a 'regulated labour hire arrangement order' (an Arrangement Order). If the Commission makes an Arrangement order, employers that supply labour to a host and are covered by the order are required to ensure (subject to some exemptions) that employees working as part of the arrangement are paid no less than the rate at which they would be paid under the host employer's enterprise agreement if they were directly employed.

> 12. Under s 306F of the FW Act, where an Arrangement Order is in force, an employer of a regulated employee must pay the regulated employee no less than the 'protected rate of pay'.
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> 13. The protected rate of pay is defined in clause 306F(4) as 'the full rate of pay payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee'.
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> 14. A failure to pay the protected rate of pay is a contravention of a civil remedy provision and attracts civil penalties.
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> 15. The purpose of Part 2-7A is explained in the explanatory memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Closing Loopholes EM). Relevantly, the following passage makes it clear that the intention of the scheme is to:
>
> > "enable employees and organisations entitled to represent their industrial interests, as well as host businesses, to apply to the FWC for an order that would require labour hire employees to be paid no less than what they would receive if they were directly employed by the host business and paid in accordance with the host's enterprise agreement or other employment instrument. These provisions would therefore enable labour hire employees to be paid at least the same as their directly employed counterparts who are performing the same work and paid under the host's enterprise agreement. Labour hire workers who are paid higher rates than directly employed workers would not be affected."
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> 16. In this way, an Arrangement Order under the scheme is intended to protect bargained rates in enterprise agreements that host businesses have negotiated with their employees from being undercut by the use of labour hire."[7] (footnotes omitted; underlining in original)

[23] The SDA see an evident purpose in the Labour Hire Clauses, being to set rates of pay for labour hire employees working at ALDI under a future Arrangement Order, pointing to this statement in ALDI's Form F17B (Employer's declaration):

> "Casual rates of pay have been included for employees in warehousing and transport covered by Schedules 3 and 4 of the Agreement respectively. ALDI has undertaken not to employ casual employees under these Schedules, but the rates of pay may be used to align labour hire rates should a labour hire arrangement order be made by the Fair Work Commission that covers labour hire workers performing work under these Schedules."[8] (underlining added)

[24] Through this provision "ALDI is seeking to achieve by including the Labour Hire Clauses is to set a rate of pay in the Proposed Agreement, as a reference point for the Commission to set a "protected rate of pay" under an Arrangement Order. That is the only purpose for its inclusion, ALDI does not intend to employ casual employees under schedules 3 or 4."[9] The SDA submits that if ALDI's intended effect is achieved the provisions of the enterprise agreement would set a significantly reduced rate of pay for labour hire employees. If

the provisions do not have operative effect such employees would be paid the same as ALDI employees, subject of course to any arrangement order and its terms.

[25] The SDA considers the Labour Hire Clauses will operate to undercut the hourly rates of pay for labour hire employees. It argues this potential outcome would be inconsistent with the purpose of Part 2 – 7A. Further, inclusion of the Labour Hire Clauses in an approved agreement would it is said, be repugnant to the scheme of the Act and invalid to the extent of the inconsistency.

[26] The SDA relies for its repugnancy argument on the judgement of the Full Court of the Federal Court in the matter of *Toyota Motor Corporation Australia Limited v Marmara*.[10] The SDA submitted that the Full Court in that judgement "concluded that a clause of an enterprise agreement will be invalid or void on account of inconsistency with, or repugnancy to, the Act under which the Agreement was approved, and which gives it its legal efficacy".[11]

[27] ALDI dispute the motives attributed to it by the SDA submitting that the two schedules were not a device for the purposes seen by the SDA, but instead "simply a means of preserving the best position, in the event application is made for an order, under Part 7A".[12] Further, ALDI argues that while it disputes what is said by the SDA about the validity of the Labour Hire Clauses since the SDA accepts the clauses should not be included in the Agreement, such as through an undertaking being accepted by the Commission, any issues raised by the SDA about the terms will fall away.[13]

[28] While Counsel for each party in these proceedings accepted that I could determine the question of invalidity as a step towards my final determination, consideration of the provisions of Part 2 – 4 of the FW Act, within which are the enterprise agreement approval provisions, does not lead to such a finding. To make such a finding would not of itself determine whether the Agreement may be approved or not. Instead the provisions within the Part, and especially ss.186 – 187 are self-contained inviting determination by the Commission on the matters expressed within each section, and a finding of repugnance would not determine any of the elements set out in the sections.

[29] The closest point at which a determination of invalidity for reason of repugnancy could be critical in determination of whether an agreement may be approved or not is the combination of s.186(4) which requires the Commission to be satisfied before approval that an agreement does not include any unlawful terms and s.194 which sets out the meaning of "unlawful term". There is no contention in this matter that the Labour Hire Clauses or any other provision of the Agreement are unlawful terms.

[30] I therefore do not make the finding invited by the SDA of invalidity for reason of repugnance.

Genuine agreement

[31] The SDA's second objection is that if the Commission does not make the invited finding of invalidity then the Commission is unable to be satisfied of genuine agreement on the part of those who participated in the ballot for the making the Agreement. In short this is said because of an inadequate explanation being given to employees when they were asked to approve the

Agreement, as well as that the employees had an insufficient interest in the terms they were asked to approve and were insufficiently representative of the employees the agreement is expressed to cover.

[32] Section 186(2) of the FW Act requires that the Commission be satisfied that a single-enterprise agreement which is not a greenfields agreement "has been genuinely agreed to by the employees covered by the agreement".

[33] The requirement in s.188 that the Commission be satisfied before approval that an enterprise agreement has been genuinely agreed requires consideration of the provisions in s.188, which in turn has several parts. Of relevance to this matter, the Commission must take into account the Statement of Principles made under s.188B (s.188(1)); it cannot be satisfied of genuine agreement unless satisfied that the employees requested to approve the agreement by voting for it had a sufficient interest in the terms of the agreement (s.188(2)(a)) and that those employees are sufficiently representative, having regard to the employees the agreement is expressed to cover (s.188(2)(b)). Satisfaction about genuine agreement also requires the Commission to be satisfied the explanation of terms required by s.180(5) has been complied with (s.188(4A)).

[34] While other parts of s.188 may have application to this matter, I confine my analysis to the mentioned subsections.

[35] In relation to the Statement of Principles, I consider that Principles 8, 9 and 10 (dealing with the explanation given to employees of the terms of the agreement and their effect) and Principle 17 (dealing with other relevant matters) require consideration. Those principles set out the following:

> "**Explaining to employees the terms of a proposed enterprise agreement and their effect**
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> 8. Section 180(5)(a) of the Fair Work Act requires the employer to take all reasonable steps to explain the terms of a proposed enterprise agreement, and the effect of those terms, to employees employed at the time who will be covered by the agreement. This should include at a minimum explaining to employees how the proposed agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this, subject to paragraph 9:
>
> > (a) where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:
> >
> > > (i) the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement, and
> > >
> > > (ii) the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award provisions that have been varied since the existing agreement was made (including award variations that have not yet come into effect), or

> (b) where a proposed enterprise agreement will not replace an existing enterprise agreement—it will generally be necessary to explain the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award.
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> 9. In explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment, there is usually no need to explain trivial differences between the proposed agreement and an existing enterprise agreement or modern award that have no effect on employees' entitlements or obligations.
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> 10. Section 180(5) will generally not be satisfied if the employer makes an incorrect representation or misleads employees (by words, action or otherwise) about a significant term of the proposed enterprise agreement or its effect.
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> …
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> **Other matters considered relevant**
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> 17. In considering whether employees have a sufficient interest in the terms of an enterprise agreement as required by section 188(2)(a) of the Fair Work Act, and whether the employees are sufficiently representative as required by section 188(2)(b), the FWC may take into account:
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> (a) whether the employees entitled to vote on the enterprise agreement are to be paid the rates of pay provided for in the agreement, and
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> (b) the extent to which the employees entitled to vote on the enterprise agreement are employed across the full range of:
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> (i) classifications in the agreement
>
> (ii) types of employment in the agreement (for example, full-time, part-time and casual)
>
> (iii) geographic locations the agreement covers, and
>
> (iv) industries and occupations the agreement covers."

[36] I will consider the Statement of Principles elements in tandem with the other provisions of s.188 requiring sufficient interest and representation, and explanation of the agreement terms.

[37] The Agreement was made on 27 February 2024 when a majority of employees voting for the agreement voted in favour of it being made. 1397 employees out of 1984 who voted cast votes in favour of the Agreement being made. The Agreement covered 2125 employees employed at the time of the vote.

[38] ALDI argued the following of relevance about who was invited to vote in the ballot when it lodged its application for approval of the Agreement:[14]

> "Casual rates of pay have been included for employees in warehousing and transport covered by Schedules 3 and 4 of the Agreement respectively. ALDI has undertaken not to employ casual employees under these Schedules, but the rates of pay may be used to align labour hire rates should a labour hire arrangement order be made by the Fair Work Commission that covers labour hire workers performing work under these Schedules."
>
> and
>
> "Types of Employment
>
> With the exception of the new classifications listed above, employees entitled to vote on the agreement are employed across the full range of classifications and types of employment in the agreement, being full-time and part-time.
>
> Industries and Occupations
>
> Employees entitled to vote on the agreement were in all the industries and occupations the agreement covers."

[39] The material filed by ALDI with its application includes various explanatory material for employees, including three impact statements, directed at different parts of its workforce, Store Employees, Warehouse Employees and Transport Employees. Each document puts the employees on notice that an enterprise agreement has been concluded through negotiation and that they will shortly be requested to approve the agreement. The impact statements then say the following about the Labour Hire Clauses:

> "Labour Hire Rates
>
> ALDI does not employ casual employees in the Warehouse or Transport, but may use labour hire workers employed on a casual basis by a third party. Labour hire orders may be made by the Fair Work Commission to link labour hire rates of pay to the rates that would be paid to comparable employees under the Enterprise Agreement. These casual rates of pay have been included to provide this link. No casual employees will be employed by ALDI under Schedules 3 or 4."[15]

[40] The Full Court in *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd*[16] considered at length the centrality of enterprise bargaining in the scheme established by the Fair Work Act and matters of "authenticity" and "moral authority". Central to these matters is a requirement for consideration by the tribunal of the explanation given to employees:

> "In order to reach the requisite state of satisfaction that s 180(5) had been complied with, the Commission was required to consider the content of the explanation and the terms in which it was conveyed, having regard to all the circumstances and needs of the employees and the nature of the changes made by the Agreement. It is true that the Act

does not expressly say that. But the question of whether an administrative decision-maker is required to consider a matter is not determined only by the express words of the Act; it may also be determined by implication from the subject-matter, scope and purpose of the Act".[17]

[41] The requirements in ss.180(5) and (6) are these:

"Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement."

[42] At the core of these provisions is the obligation for the employer to take all reasonable steps to explain to employees the terms of the agreement and the effect of those terms. The obligation is in respect of the employees employed at the time who will be covered by the agreement.

[43] In *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* (ALDI v SDA), the High Court considered what is meant in relation to a person being covered by an agreement, drawing a distinction between persons employed at a relevant time, and those whose jobs may be covered at a later point:

"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."[18]

[44] Section 53 of the FW Act sets out the primary proposition that an enterprise agreement "covers an employee or employer if the agreement is expressed to cover (however described) the employee or the employer".

[45] Clause 5 of the Agreement is the coverage term:

"**5 How this Agreement operates**

5.1 ALDI's Derrimut Region operates exclusively within the area described and depicted in maps in Schedule 5.

5.2 This Agreement will apply to the Derrimut Region and will apply to the Distribution Centre and stores in the Derrimut Region, any new ALDI Stores opening during the life of this Agreement and any Supplementary Warehousing Facilities operated by ALDI which are located within the area, as described and depicted in maps in Schedule 5.

5.3 ALDI is currently progressing plans for the introduction of ALDI-operated, automated distribution and warehousing facilities (Automated Future State Facilities). This Agreement will not apply to any Automated Future State Facilities that may open in the area described and depicted in maps in Schedule 5. ALDI will not, during the nominal term of this agreement, start using the Automated Future State Facilities to supply any ALDI stores.

5.4 This Agreement applies to and covers the following classification of ALDI Employees employed in, or operating from, any ALDI operations as defined in PART 1 - clause 5.2:

(a) Store Employees employed as Store Managers, Assistant Store Managers, Duty Store Managers and Store Assistants;

(b) Warehouse Employees employed as Section Leaders, Assistant Section Leaders, Warehouse Operators, Warehouse Mechanics, Warehouse Caretakers, Warehouse Labourers, Warehouse Checkers and Palletisers;

(c) Transport and Distribution Employees employed as Section Leaders, Assistant Section Leaders, Transport Operators, Transport Drivers and Store Delivery Drivers; and

(d) Any other ALDI employee engaged to work in ALDI's operations as defined in PART 1 - clause 5.2 with the exception of Executive Managers, Directors and Office employees."

[46] Relevant to the operation of the Labour Hire Clauses and the content of a future Arrangement Order, sections 306F(4) and (5), within Part 2 – 7A of the FW Act deal with the things that may be included in an Arrangement Order:

"*Meaning of protected rate of pay*

(4) Unless subsection (5) applies, the protected rate of pay for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.

(5) If the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the protected rate of pay for the regulated employee is the full rate of pay that would be payable to the employee if:

(a) the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee; and

(b) the base rate of pay that would be payable to the employee, in the circumstances referred to in paragraph (a), were increased by 25%."

[47] I draw from the language of s.306F that the intention of the provisions is to have a labour hire worker, not being employed by the host employer, entitled to a payment of "the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee" (subject to the qualifications set out in s.306F(5)). Whether, how and when this intention is achieved is obviously not a matter for this decision. Even so, it is foreseeable from the drafting of the Labour Hire Clauses that ALDI either expected in the past when it drafted the term or expects now, that the provisions within the Labour Hire Clauses would be the thing provided for in ss.306F(4) – (5), namely a determination of "the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee" or alternatively the entitlements set out in s.306F(5).

[48] Consideration of these provisions leads to the view that while an Arrangement Order may distil enforceable benefits in the form of a protected rate of pay from an instrument that applies within a host workplace, such as the *ALDI Derrimut Agreement 2024*, the order will not of itself prescribe that the instrument ***covers*** the labour hire employees.

[49] It follows that because of the coverage arrangements of this Agreement and the expressed mechanism for the making of an Arrangement Order a finding is not available that the Agreement will ever cover employees of labour hire firms contracted to ALDI.

[50] As a result, the distinction in *ALDI v SDA* between persons employed at a relevant time, and those whose jobs may be covered at a later point has limited utility in the matter presently being considered. The persons to whom the Labour Hire Clauses may apply, if an applicable Arrangement Order is made, are not employees of ALDI and never will be unless they become directly employed by ALDI at some other time, and will instead be employees of other entities, the identify of which is at this time entirely unknown.

[51] An apparent difficulty in application of s.188(2) and the Principles to the facts of this case is that each requires an examination of there being a sufficient interest or representation within the confines of those the agreement is expressed to cover. In this case it is not argued either that the employees requested to vote for the Agreement did not have a sufficient interest in its terms or that they were insufficiently representative having regard to "the employees the agreement is expressed to cover", at least as that phrase is ordinarily understood to apply. Instead, the concern is that those covered by the Agreement at the time it was made were insufficiently representative, etc of those to whom the provisions could have application, albeit not because they were covered by the Agreement.

[52] The Agreement comes to be considered for approval by the Commission for reason of s.172 which allows for the making of enterprise agreements about "permitted matters" the meaning of which is set out within the section and, relevant to this application, "matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement" (s.172(1)(a)). Section 253 then provides that a term of an enterprise agreement "has no effect to the extent that … it is not a term about a permitted matter".

[53] Whether the Labour Hire Clauses are or are not permitted matters was not debated before me and so I make no findings in relation to the subject.

[54] Instead, at the core of this matter is that employees were asked to approve an agreement which may impact employees at some future time "whose jobs are described by the terms of the agreement". Leaving aside the question of whether the Labour Hire Clauses could be construed as being other than "permitted matters", the minimum the Commission must expect in considering whether the obligation under s.180(5) has been discharged is for an explanation to be given which enables "employees to know what they are being asked to agree to, and to understand how their wages and working conditions might be affected by voting in favour of an agreement".[19] It may be said as well that employees asked to approve an agreement should also understand how the proposed agreement may affect the wages and working conditions of others who may be covered by the agreement at some future time.

[55] In response to the SDA's objections, on 18 April 2024 ALDI advised that while it disputed the basis of the SDA's objections it would put forward an undertaking that it will not rely on or utilise either of the Labour Hire Clauses.[20] Whereas its submissions on the subject said ALDI would not "rely on or utilise" the clauses, its undertaking is that it "will not utilise" them. The proposed labour hire undertaking is this:

> "ALDI offers the following undertaking to the Fair Work Commission in relation to the ALDI Derrimut Enterprise Agreement 2024.
>
> ALDI will not utilise clauses 37 to 39 inclusive of Part F Casual Employment Terms and Protected – Labour Hire in Schedule 3 – Warehouse Employees of the ALDI Derrimut Enterprise Rates of Pay Agreement 2024.
>
> ALDI will not utilise clauses 29 to 31 inclusive of Part F Casual Employment Terms and Protected – Labour Hire in Schedule 4 – Rates of Pay Transport and Distribution Employees of the ALDI Derrimut Enterprise Agreement 2024."[21]

[56] In the course of the hearing Mr Hatcher SC for ALDI indicated a preparedness to amend the proposed undertaking so as to explicitly state that ALDI will not have any reliance on the provisions instead of not utilising them.[22]

[57] Undertakings for enterprise agreements may be sought and given under s.190 of the Act where the Commission holds a concern that an agreement does not meet the requirements of s.186 and 187. The undertaking provisions though are not an opportunity at large to cure drafting or procedural defects associated with an enterprise agreement. The circumstances in which the Commission may seek and receive an undertaking in the course of consideration an application for approval of an enterprise agreement are limited.[23]

[58] In this case consideration of the Commission's concerns identifies each has been met, either through submissions or the provision of the undertaking set out above, dealing with the subject of the employment of caretakers in the Derrimut region. Consideration of approval therefore turns to the question of whether the SDA's Labour Hire Clauses concerns may or can be dealt with through undertakings.

[59] The Agreement is lengthy, covering 60 pages, in 7 parts and with 5 schedules. The Labour Hire Clauses start on pages 46 (Schedule 3 – Warehouse Employees) and 55 (Schedule 4 – Transport Employees). The Labour Hire Clauses themselves run for 3 pages in the case of Schedule 3 and 2 pages in the case of Schedule 4. The effect of those terms is, as submitted by the SDA, to provide for rates of pay for employees of labour hire contractors that are lower than for ALDI employees:

> "7. Relevantly, the rates of pay set out in those clauses are significantly less than the rates of pay payable to an employee employed on a full time or part time basis, performing the same work, under the Proposed Agreement.
>
> 8. By way of example, under schedule 3 a casual Warehouse Operator working a day shift will earn $32.96 per hour, as compared with a permanent Flexible Warehouse Operator - Level 1 who will earn $37.19 per hour. That disparity is more pronounced where a permanent Flexible Warehouse Operator is classified level 2 or 3. Similarly, under schedule 4 a casual delivery driver working night shift will earn $39.81 per hour, as compared to a permanent Flexible Store Delivery Driver who will earn $41.17 per hour."[24]

[60] The extent of ADLI's explanation to employees asked to approve the Agreement is set out above and to the effect that while not employing casual employees in Warehouse or Transport it may bring in such employees through labour hire contractors, and "Labour hire orders may be made by the Fair Work Commission to link labour hire rates of pay to the rates that would be paid to comparable employees under the Enterprise Agreement". ALDI puts forward that between 8 and 15 February 2024 it met with employees individually and in small groups to explain the terms and conditions of the Agreement,[25] without putting forward information of a type that would suggest anything greater was said to employees than in the impact statements.

[61] ALDI's statement was not linked to an explanation that the effect of the proposed term would be that labour hire employees would be paid significantly less than those directly employed by ALDI even if performing the same work. This has two implications. First, those who voted may likely not have understood that their own bargained wages and conditions could, if an Arrangement Order was issued, be undercut directly and as a result of their bargaining by a class of worker performing the same work as themselves but employed by a third party and not ALDI. It is likely that with that information some employees may have been inclined to vote against making the Agreement.

[62] Second, the employees who voted were denied an opportunity for altruism, in the sense that they may have been inclined to vote against making the agreement if they knew another (future) class of worker had the potential to be paid less than them for the same work.

[63] A more detailed explanation of the terms of the Agreement and the effect of those terms could and should have been provided by ALDI to employees asked to vote for the making of the Agreement. The effect of the Labour Hire Clauses is quite simple and does not require an elaborate or complex explanation.

[64] Whereas s.188(2) requires I be satisfied that the employees requested to approve the agreement by voting for it had a sufficient interest in the terms of the agreement were sufficiently representative, having regard to the employees the agreement is expressed to cover I do not hold a concern about those matters. In both respects, having regard to the employees the agreement is expressed to cover, the group chosen to consider approval of the Agreement was appropriately constructed. The same may be said about Principle 17.

[65] The explanation requirements of s.180(5) and Principles 8, 9 and 10 though have not been sufficiently met for the reasons set out above.

[66] It follows that I am not satisfied that the Agreement has been genuinely agreed to by the employees covered by the Agreement.

[67] Having found that the Agreement is not genuinely agreed, but only in the very limited manner referred to for reason of the two Labour Hire Clauses, the Agreement may nonetheless be the subject of an undertaking from ALDI and received by the Commission pursuant to s.190. Under that section the Commission may receive undertakings if it "has a concern that the agreement does not meet the requirements set out in sections 186 and 187" (s.190(1)(b)) and if it is satisfied that an undertaking accepted under s.190(3) "meets the concern" (s.190(2)).

[68] In this regard, the concern I hold stems from s.186(2) which requires the Commission before approval of an enterprise agreement to be satisfied that "the agreement has been genuinely agreed to by the employees covered by the agreement".

[69] As set out above, and separate to its earlier undertaking dealing with the employment of caretakers, ALDI have provided an undertaking for my consideration on the subject of the Labour Hire Clauses, to the effect that it "will not utilise" the two terms and, in the course of submissions Senior Counsel advised his client was disposed to undertake to provide an alternative undertaking stating that ALDI "will not have any reliance on the provisions".

[70] While grateful for these proposals I consider that neither sufficiently meets the concern now held. Despite the sentiments expressed by ALDI in its proposals the possibility remains that a third party, rather than ALDI, may seek to utilise or rely upon the Labour Hire Clauses, in which case the lack of explanation on the subject to voting employees will not have been removed. I consider instead that an undertaking should be given in the following terms:

> "ALDI offers the following undertaking to the Fair Work Commission in relation to the ALDI Derrimut Enterprise Agreement 2024.
>
> The following clauses are deleted and are taken to have no effect;
>
> 1. Clauses 37 to 39 inclusive of Part F Casual Employment Terms and Protected – Labour Hire in Schedule 3 – Warehouse Employees; and
>
> 2. Clauses 29 to 31 inclusive of Part F Casual Employment Terms and Protected – Labour Hire in Schedule 4 – Rates of Pay Transport and Distribution Employees."

[71] I am satisfied that all other relevant requirements for the approval of an enterprise agreement have been met and that the Agreement passes the BOOT. I am satisfied as well that if accepted neither the original caretakers undertaking or the amended Labour Hire Clauses undertaking would either cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement (s.190(3)).

[72] Pursuant to s.190(4) I now seek the views of the Applicant and each bargaining representative about this proposed undertaking, as well as the one by ALDI dated 17 April 2024, dealing with the employment of caretakers. Any such views must be provided to the Commission and all other bargaining representatives by no later than **4 PM, Friday 21 June 2024**, after which my final consideration for approval of the Agreement will be given.

COMMISSIONER

Appearances:

Mr G. Hatcher SC with *Ms A. Perigo* of Counsel for the Applicant
Mr B. Bromberg of Counsel for the SDA

Hearing details:

2024.
Melbourne (via videoconference);
1 May.

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[1] Proposed Undertaking, filed 18 April 2024, appearing at Digital Court Book (DCB), p.177.

[2] UWU, *Form F18 – Declaration of employee organisation in relation to an application for approval of an enterprise agreement*, filed 13 March 2024, appearing at DCB, p.220.

[3] SDA, *Form F18 – Declaration of employee organisation in relation to an application for approval of an enterprise agreement*, filed 28 March 2024, appearing at DCB, p.182.

[4] The clause is unnumbered, appearing after Clause 43 and before Schedule 1.

[5] Transcript, PN 249.

[6] See: https://www.fwc.gov.au/about-us/closing-loopholes-acts-whats-changing#key-commencement-dates

[7] *SDA Outline of Submissions*; filed 12 April 2024, appearing at DCB, pp.198 – 199.

[8] *Form F17B – Employer's declaration in support of an application for approval of a single-enterprise agreement*, filed 12 March 2024, Question 27; appearing at DCB, p.33.

[9] *SDA Outline of Submissions*; filed 12 April 2024, [19]; appearing at DCB, p.199.

[10] [2014] FCAFC 84.

[11] *SDA Outline of Submissions*; filed 12 April 2024, [27]; appearing at DCB, p.200.

[12] Transcript, PN 307

[13] *ALDI Outline of Submissions*, filed 18 April, [15]; appearing at DCB, p.174.

[14] *Form F17B – Employer's declaration in support of an application for approval of a single-enterprise agreement*, filed 12 March 2024, Question 27; appearing at DCB, 33.

[15] ALDI Impact Statements, filed 14 March 2025, appearing at DCB, pp.140, 146, 151.

[16] [2017] FCA 1266.

[17] Ibid, [112].

[18] *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* [2017] HCA 53, [77], per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ.

[19] *Appeal by Ausdrill Pty Ltd*, [2022] FWCFB 223, [26].

[20] *ALDI Outline of Submissions*, filed 18 April, [8]; appearing at DCB p.174.

[21] Proposed Undertaking, filed 18 April 2024, appearing at DCB, p.177.

[22] Transcript, PN 264, 288 and 308.

[23] See for example, *CFMMEU v C&H Acquisition* [2020] FWCFB 3134.

[24] *SDA Outline of Submissions*; filed 12 April 2024, appearing at DCB, p.198.

[25] *Form F17B – Employer's declaration in support of an application for approval of a single-enterprise agreement*, filed 12 March 2024, Question 22; appearing at DCB p.27.