Give them the BOOT:
Negotiating enterprise agreements with existing employees for a 'new enterprise'

Vanja Bulut reports on *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* (2017) 350 ALR 381; (2017) 92 ALJR 33; (2017) 270 IR 459; [2017] HCA 53

The High Court has determined that an enterprise agreement to cover employees at a new enterprise can be made by a vote of current employees who have agreed to work, but are not at that time actually working, as employees in the new enterprise.

The court also considered the approach to be taken by the Fair Work Commission in determining whether an enterprise agreement will meet the 'better off overall test' (the BOOT) for the purposes of s 186(2)(d) *Fair Work Act 2009* (Cth) (the Act). The court concluded that when a full bench of the commission is determining an appeal it is engaged in a rehearing and as such it can find error based on additional evidence even though the primary decision was correct at the time it was made.

Facts

This decision concerned an application made by ALDI Foods Pty Limited (ALDI) for the approval of its proposed enterprise agreement, *ALDI Regency Park Agreement 2015* (the SA Agreement).

ALDI operates retail stores in various regions of New South Wales, Queensland and Victoria. ALDI's operation in each geographical region is treated as a separate enterprise, each covered by a separate enterprise agreement.

In early 2015, ALDI was in the process of establishing a new undertaking in Regency Park in South Australia and sought, from its existing employees in its stores in other regions, expressions of interest to work in the Regency Park undertaking. Seventeen existing employees accepted offers to work in the new region and ALDI commenced a process of bargaining with these 17 employees for an enterprise agreement to cover the work to be done there.

Neither of the two relevant unions, the Transport Workers' Union of Australia (TWU) nor the Shop, Distributive and Allied Employees Association (SDA) were involved as bargaining representatives for the new agreement.

ALDI put the SA Agreement to a vote of the 17 employees. 16 employees cast a valid vote, and 15 voted in favour.

Fair Work Commission application and appeal

On 4 August 2015, ALDI applied to the commission for approval of the Agreement. Deputy President Bull approved the SA Agreement without the participation of the two unions.

The TWU and the SDA filed notices of appeal against the decision of Bull DP to the full bench of the commission. Relevantly, it was contended that the SA Agreement:

> a) 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; and
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> b) the SA Agreement did not pass the BOOT.

The full bench (Watson VP, Kovacic DP and Wilson C) rejected these contentions, and dismissed the appeal.[1]

Full Court of the Federal Court decision

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 of the commission.

The Full Court, by majority (Katzmann and White JJ, Jessup J dissenting), upheld the SDA's contentions and issued writs of certiorari and prohibition.[2]

The majority of the Full Court focussed upon the perceived difficulty posed by the requirement of s 186(2)(a) of the Act for the SA 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 SA Agreement.[3]

The majority of the Full Court also upheld the SDA's argument that the full bench misapplied the provisions of the Act in being satisfied that the SA Agreement passed the BOOT for the purposes of s 186(2)(d) of the Act, without resolving the issue raised by the new evidence.[4]

Having considered Part 2-4 of the Act, the High Court found that the word 'employed' in s 172(2)(b)(ii) of the Act ... should not be taken to mean 'employed in that new enterprise', as argued by the SDA, as the new enterprise does not yet exist.

The High Court decision

The High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) unanimously upheld ALDI's appeal in relation to the coverage issue but dismissed its appeal in relation to the BOOT issue. In a separate judgment, Justice Gageler provided an additional observation concerning the coverage issue.

The High Court ordered that the matter be

remitted back to the full bench of the Fair Work Commission to determine whether the SA Agreement passed the BOOT, according to law.

The coverage issue

Citing the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court noted that the material provisions of the Act must be understood, if possible, as parts of a coherent whole.[5]

Having considered Part 2-4 of the Act, the High Court found that the word 'employed' in s 172(2)(b)(ii) of the Act (which deals with the making of a 'greenfields agreement' in circumstances where the employer has 'not employed any of the persons who will be necessary for the normal conduct of that enterprise') should not be taken to mean 'employed in that new enterprise', as argued by the SDA, as the new enterprise does not yet exist. Rather, the High Court concluded that 'employed' simply means 'employed' by that employer.[6]

The High Court concluded that the ordinary and natural meaning of the terms of Pt 2–4 of the Act establish that 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 vote who are to be covered by the agreement.[7]

Justice Gageler added that the words 'employees covered by the agreement' in s 186(3) and (3A) of the Act cannot be read as limited to employees to whom the agreement will apply immediately on coming into operation. Rather, like the words 'employer' and 'employers' in s 172(2)(b) and (3)(b), the words are without temporal significance.[8]

The BOOT issue

With respect to the BOOT issue, the High Court found that the majority of the Full Court was correct to conclude that the full bench did not address the correct question as the full bench did not engage in any comparison between the SA Agreement and the relevant modern award.[9]

The High Court noted that the appeal to the full bench provided under the Act is an appeal by way of rehearing and, accordingly, further evidence may be admitted on an appeal. The High Court found that 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'.[10]

The High Court affirmed that, on a rehearing, having regard to the further evidence, error may be demonstrated in the outcome even though the primary decision was correct at the time it was made.[11]

END NOTES

1 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267.
2 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155.
3 *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* (2017) 350 ALR 381 at [15].
4 Ibid, [65].
5 Ibid, at [16].
6 Ibid, at [24].
7 Ibid, at [82].
8 Ibid, at [107].
9 Ibid, at [95]-[96].
10 Ibid, at [100].
11 Ibid, at [101].