IN THE FAIR WORK COMMISSION

Fair Work Act 2009

ALDI Stapylton Agreement - AG2017/1943

ALDI Prestons Agreement - AG2017/1925

SUBMISSIONS
OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

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Introduction

1) In September 2017, applications for approval of a number of enterprise agreements were referred to a Full Bench. The applications raise important issues of general interest about the application of the better off overall test (BOOT) to loaded rates agreements, particularly for casual and part-time employees who do not work reasonably predictable hours.

2) On 24 October, the Full Bench invited the Commonwealth and Peak Industry Councils to make submissions on the matters of general importance raised by the applications. A hearing took place on 15 November 2017. On 28 June 2018, the Full Bench issued a decision on the five remaining applications for approval of enterprise agreements (**Full Bench Decision**).[1] The Full Bench found that three agreements failed the BOOT in relation to casual employees not assigned to a specified roster pattern; and issued further directions for the two remaining ALDI agreements.

3) The ACTU sought and has been granted leave to make submissions on the matters of general importance raised by the Decision and the Commission's ongoing consideration of the two ALDI agreements. These submissions should be read in conjunction with the ACTU's submissions dated 9 November 2017.

General propositions concerning the application of the BOOT

4) The ACTU notes the Full Bench's confirmation and clarification of the following general propositions concerning the application of the BOOT to loaded rates agreements:

   a) *Every* award covered employee or prospective employee must be better off overall, and if any such employee is not better off overall, the relevant enterprise agreement does not pass the BOOT. 'Thus, in an agreement containing loaded rates in whole or partial substitution for award penalty rates, it is not sufficient that the majority of employees - even a very large majority - are better off overall if there are any employees at all who would not be better off overall'.[2]

   b) If classes of employees are used to apply the BOOT (s 193(7)), the agreement must affect all the members of the class in the same way. This means that under a loaded rate agreement which permits a variety of roster patterns, some of which attract penalty rates and some of which do not, sub-classes might be needed based on common patterns of working hours, taking into account weekend

[1] [2018] FWCFB 3610
[2] Full Bench Decision at [100]

work and overtime etc. This requires 'an examination of existing roster patterns worked by various categories of employees at the test time'.[3]

c) Applying the BOOT in relation to *prospective* employees involves a level of conjecture - it involves 'sensible predictions' about the basis on which prospective employees will be employed. This task is easier when this information is 'actually knowable' or at least 'readily forseeable', in the sense that the employees will be fitted into an existing business with existing work patterns. The task is more difficult when it involves an agreement with 'a scope of coverage, classification structure and hours of work provisions which have a potential operation that is significantly wider than the existing workforce'.[4]

d) If 'useful predictions' as to future employment patterns cannot be drawn from the existing workforce, the starting point is an examination of the terms of the agreement to determine the 'nature and characteristics' of the employment which the agreement 'provides for or permits'. In this context, it is not appropriate to ignore certain provisions of an agreement simply because the employer asserts that it does not currently, and does not intend to, utilise them. Such an assertion can only be sustained if there is 'objective evidence' that something in the agreement 'cannot in fact be done or is extremely unlikely to be done', such as a law prohibiting work at certain hours, which is 'not likely to be a common circumstance'.[5]

e) The distinction made by AIG between the *terms* of an agreement and the *practices and working arrangements* that may flow from those terms is 'illusory'. Consistent with the approach taken in *Hart v Coles Supermarkets Pty Ltd*,[6] where an agreement has a different pay structure than the award, including a loaded rate structure, 'no meaningful comparison can be conducted without applying the loaded rates to the working hours and patterns actually worked or reasonably capable of being worked under the agreement'. This requires 'examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement'.[7]

f) It is not appropriate for the Commission to adopt a 'don't ask, don't tell' policy when assessing agreements. For loaded rates agreements, the Commission 'will consider the possible outcomes for

[3] Full Bench Decision at [102]
[4] Full Bench Decision at [103] and [105]
[5] Full Bench Decision at [106]
[6] [2016] FWCFB 2887
[7] Full Bench Decision at [107]

employees and prospective employees working or being required to work a variety of roster patterns which are permitted by the terms of the agreement in assessing the BOOT.' In order to meet its statutory duty, the Commission may require information about the 'patterns of working hours of current and prospective employees in order to assess whether the agreement passes the BOOT. If such information is not provided in the Form F17 statutory declaration (noting that the prescribed form does not in terms require the inclusion of such information), it may be necessary for the Commission to request the production of such information - even if no party appears before the Commission in opposition to the approval of the agreement'.[8]

g) The requirement to assess an agreement in relation to both existing and prospective employees requires the Commission to consider not only the operational circumstances of the employer at the test time, but also an assessment of how classifications, occupations and work locations, that are not part of the employer's operations at the test time, would apply in practice to future employees.[9]

h) Non-monetary benefits, benefits which are available at the employee's choice, or monetary benefits which are contingent upon a specified event occurring must be taken into account for the purposes of the BOOT, although assigning a value to them can be difficult. An assumption 'cannot readily be made' that non-monetary or contingent entitlements have the same value to all employees. For agreements involving loaded rates, 'it is not likely that a non-monetary or contingent benefit will compensation for any significant detriment in direct remuneration for all affected existing or prospective employees'.[10]

i) 'Make good' provisions (such as the one at clause 14 of the ALDI agreements) will not answer BOOT concerns, because not all employees will apply to have their pay assessed, and even those that do are only entitled to a 'shortfall', not to be better off overall.[11]

j) Where an agreement seeks to provide a single loaded rate at a given classification level, and also allows employees to be directed to work various rosters, the loaded rate needs to be high enough to compensate for the worst-case scenario for an employee under the various rostering possibilities. Alternatively, appropriate rostering protections would have to be contained in the agreement.[12]

[8] Full Bench Decision at [110]
[9] Full Bench Decision at [111]
[10] Full Bench Decision at [112] and [114]
[11] Full Bench Decision at [139]
[12] Full Bench Decision at [120]

Casual employment

5) The Full Bench observes that it is difficult to envisage a loaded rate for 'on call' casual employees that is capable of passing the BOOT, because such employees have no guarantee of work on any specified days or for any specified duration. It will always be possible for an 'on call' casual to work only at times which attract higher rates under the award, such as weekends and nights, and not at any other times. Therefore, any agreement which provides a loaded rate less than the highest penalty rate under the award will fail the BOOT for these employees.[13]

Comparator for part-time employees in the ALDI agreements

6) The Full Bench decided that 'the system of part-time employment' operated by ALDI did not meet the definition of part-time employment in the General Retail Industry Award (**the award**), and therefore the appropriate point of comparison for part-time employees under the agreements for BOOT purposes is not part-time employment, but *casual employment* under the award. The relevant paragraphs of the Full Bench Decision are set out below:

> *[135] As to the second issue, the critical question which arises is whether the point of comparison for the purpose of assessing the BOOT in relation to part-time employees is with part-time employment under the Retail Award, or casual employment under that award. As has been submitted by the SDAEA and the NUW, significant detriments under the Aldi Agreement would need to be taken into account if the comparison was with part-time employment under the Retail Award, in particular the lack of guaranteed and identifiable hours of work in each week or pay period and the lack of entitlement to overtime penalty rates for all work in excess of contracted hours (as provided for in clause 29.2(b) of the Retail Award). However, we do not accept that part-time employment under the Retail Award is the appropriate point of comparison. It is clear that the system of part-time employment operated by Aldi in the Prestons and Stapylton regions and for which the Aldi Agreements provide would not constitute part-time employment under the Retail Award if it applied to those regions. Clauses 12.1-12.3 of the Retail Award provide:*
>
> 12.1 A part-time employee is an employee who:
>
> (a) works less than 38 hours per week; and

[13] Full Bench Decision at [121]

(b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

o the hours worked each day;

o which days of the week the employee will work;

o the actual starting and finishing times of each day;

o that any variation will be in writing;

o minimum daily engagement is three hours; and

o the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

[136] Having regard to the relevant provisions of the Aldi Agreements and the evidence of Paul Joyner, it is clear that Aldi's system of part-time employment is inconsistent with the above provision, in that it does not involve reasonably predictable hours of work; does not require agreement at the commencement of employment upon a regular pattern of work specifying the days of work, the hours to be worked on each day or the starting and finishing times; and does not require any change to this to be by agreement with the employee. However it does not follow from this that Aldi's part-time employment system is simply not permitted by the Retail Award and is for that reason alone to be regarded as failing the BOOT. Clause 12.6 of the award provides:

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.

[137] Thus the Retail Award allows an employer to pay as a casual employee any employee who is not a full-time employee and does not fit its definition of a part-time employee. It follows, we consider, that where an enterprise agreement in the retail sector provides for a form of employment that does not constitute full-time or part-time employment as

contemplated by the Retail Award, the appropriate point of comparison for the purpose of the BOOT is the catch-all of casual employment under the award.

7) The ACTU is concerned about the implications of this aspect of the Full Bench's decision for a number of reasons, including that it:

i) potentially enables agreements which deny employees award protections to pass the BOOT;

ii) calls into question the ability of employees to genuinely agree to an agreement in these circumstances;

iii) appears inconsistent with the recent *Workpac v Skene*[14] decision, which treats permanent employment (full-time and part-time) and casual employment as mutually exclusive.

Potential unintended consequences

8) As previously submitted by the ACTU,[15] the BOOT assessment conducted by the Commission is, for many employees, the only means by which their right to a minimum safety net of terms and conditions is ensured. The provisions of the FW Act relating to the BOOT are beneficial provisions intended to prevent employees from falling below applicable minimum standards. The modern award objective in s 134 requires the Commission to ensure that modern awards and the NES provide 'a fair and relevant minimum safety net of terms and conditions'. One of the overarching objectives of the FW Act (s 3(b)) is to ensure 'a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES, modern awards and national minimum wage orders'. The approval requirements in the FW Act are an important part of the statutory scheme aimed at protecting the integrity of the minimum employment safety net. Under s. 186(1) of the FW Act, the Commission must approve an enterprise agreement if it is satisfied that the agreement has been 'genuinely agreed to' by the employees covered by the agreement (s 186(2)(a)), that it does not exclude any provision of the National Employment Standards (s 186(2)(c)), and that it passes the BOOT (s 186(2)(d)). As the Explanatory Memorandum for the *Fair Work Bill 2008* states:

[14] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131
[15] ACTU Submissions dated 17 November 2017

The requirements relating to genuine agreement, the guarantee concerning the application of the NES and the operation of the better off overall test in relation to modern awards means that the safety net cannot be undermined by the terms of an enterprise agreement.[16]

9) The award provides part-time employees with important and valuable protections, including a right to guaranteed hours and days of work, start and finish times, and rostering protections. The ACTU is concerned that the approach to the comparator question taken by the Full Bench in this matter may allow for the displacement or exclusion of terms and conditions contained in the minimum employment safety net. An employer's failure to provide terms and conditions required by the award cannot be permitted to determine the comparison point for the purposes of the BOOT. As noted by the SDA, the question of whether or not ALDI is employing people in a manner which may or may not breach their obligations under the employment safety net is separate and unrelated to the task of the Commission in applying the BOOT. The approach to the comparator question adopted by the Full Bench may have the unintended consequence of allowing employers to avoid or disregard award entitlements without providing compensation, simply by designating employees to be members of a certain category but failing in practice to afford them minimum award entitlements – an outcome completely at odds with the statutory purpose of the better off overall test.

Mutually exclusive employment categories

10) Clause 10.1 of the award states that all employees must be employed in <u>one</u> of the categories of full-time, part-time or casual employment. Clause 10.2 of the award imposes an obligation on the employer at the time of engagement to 'inform each employee of the terms of their engagement and, in particular, whether they are to be full-time, part-time or casual'. The Full Court of the Federal Court in *Workpac v Skene* observes at [177] that 'in their ordinary conceptions, casual employment and full-time and part-time employment are mutually exclusive categories of employment. An employee cannot be both a casual employee and full-time or part-time employee at the same time in the same employment.' The Full Bench's decision to designate a part-time employee as a casual for the purposes of the BOOT test appears inconsistent with this conception of mutually exclusive categories of employment.

[16] At [773]

11) The longer-term implications of this type of 'temporary reclassification' are also uncertain, including in relation to the calculation of individuals' entitlements under the National Employment Standards for example, and the future conduct of bargaining between the parties.

Genuinely agreed to

12) Section 185(2)(a) of the FW Act requires the Commission to be satisfied that the agreement has been 'genuinely agreed to' by the employees covered by the agreement. Section 188 provides that an agreement has been genuinely agreed to if the Commission is satisfied that the pre-approval steps have been complied with, voted up by a majority of employees and there are no other 'reasonable grounds' for believing that the agreement has not been genuinely agreed to. Under s 180(5), an employer must take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to the relevant employees.

13) It is correct that the description of the nature of an employee's employment on commencement will not be permanently dispositive of the true nature of the employee's employment on an ongoing basis. It may well be that the description does not accurately reflect the reality of the employment relationship on an ongoing basis because, for example, the character of the employment changes over time, or because the employer has intentionally or inadvertently mis-described the nature of the engagement. However, such provisions are significant in the present context because they are *'intended to confirm and provide some record of the nature of the employment that has been agreed to between the employee and the employer and the terms of engagement that are applicable'*.[17] An employee cannot 'genuinely agree' to terms unless they understand which terms are intended to apply to them. An employee designated by the employer as 'part-time' agrees on commencement that they will be afforded the terms and conditions applicable to a part-time employee under the agreement, subject to the agreement meeting the requirements for approval. This does not mean that an employee who is misclassified on commencement or subsequently would be prevented from making a claim for unpaid entitlements – these are separate matters.

14) The purpose of provisions such as clause 10.2 of the award, requiring an employer to advise an employee on commencement of their employment status, is to clarify what is being agreed to. The subsequent re-categorisation of certain employees for the purposes of applying the BOOT test means that ALDI's part-time employees have in effect been denied the opportunity to properly inform themselves about the benefits and disadvantages arising from the agreement before voting

[17] *Workpac v Skene* at [220]

on it. As noted by the SDA, the 'make good provision' in clause 14 of the agreement provides a clear example of this unfairness. It states:

> *Where an Employee considers they are not better off overall under this Agreement than under the relevant Modern Award they may request a comparison of the benefits received for a nominated period of time under this Agreement and the benefits which would otherwise be provided under the relevant Modern Award. Any shortfall in total remuneration which would otherwise be payable under the Modern Award will be paid to the Employee in the next pay period after the review is completed.*

15) An employee informed on commencement that they are employed as a part-time employee would reasonably assume that they would compare their benefits for the purposes of this provision to those applicable to a part-time employee under the award, not those applicable to a casual employee. The Commission's 'temporary reclassification' of these employees for the purposes of the BOOT has the effect that reasonable steps have cannot been taken to explain the effect of the terms of the agreement on the employees, and the Commission cannot be satisfied that the agreement was genuinely agreed to.