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

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FIRST RESPONDENT'S SUBMISSIONS

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I CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

II STATEMENT OF ISSUES

2. The issues raised by this appeal are:

   (a) Can the Fair Work Commission only approve a non-greenfields agreement under s 186 of the *Fair Work Act 2009* (Cth) (**the Act**) if there are employees covered by the agreement when the agreement is made, or is it sufficient that there will be employees covered by the agreement at some time in the future?

   (b) Did the Full Bench of the Fair Work Commission (**Full Bench**) make a jurisdictional error in concluding that the ALDI Regency Park Agreement 2015 (**the Agreement**) passed the better off overall test without comparing the Agreement with the relevant modern award and by relying on a clause of the Agreement which allowed an employee to request a comparison of the benefits under the Agreement and the award and to recover any shortfall between the two?

3. The First Respondent raises a further issue by notice of contention which arises if the Court concludes that the Full Bench committed an error of law that is not a jurisdictional error. In that event, is the error of law apparent on the face of the record?

III SECTION 78B NOTICES

4. The First Respondent considers that notices are not required under s 78B of the *Judiciary Act 1903* (Cth).

IV STATEMENT OF CONTESTED MATERIAL FACTS

5. The Appellant's statement of facts in paragraphs 11 to 31 is materially incomplete. To that statement of facts should be added the following:

   (a) it was common ground, at least before the Full Court, that clauses 3 and 5 of the Agreement set out whom the Agreement will cover, albeit the language used in clause 5 in particular is "apply" – the apparent suggestion to the contrary in **AS [35]** represents a departure from how the case was run below;

   (b) it was conceded, at least before the Full Court, that no employees were covered by the Agreement at the time it was made,[1] or indeed at the time of the

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1 See Reasons at [143] (White J). See also Transcript of the hearing before the Full Court at page 80 lines 30-43 and page 87 lines 43-47.

application for approval to the Fair Work Commission or at the time of approval;

(c) in hearing and determining the appeal from the decision of Bull DP, the Full Bench received new evidence from the First Respondent, comprising an analysis of the actual work rosters of the employees who voted to approve the Agreement and a comparison of their wages under the award and the Agreement[2].

V APPLICABLE PROVISIONS

6. The provisions of the Act applicable as at the time of the Full Bench's decision are annexed to these submissions.

VI ARGUMENT

1. Ground One

7. The issue raised by the first ground of appeal is whether an employer can apply to have the Fair Work Commission approve a non-greenfields agreement under s 186 of the Act where there is no employee "covered" by the agreement at the time it is made.

8. The majority of the Full Court (White J, Katzmann J agreeing) held[3] that there must be an employee covered at the time the agreement is made. The First Respondent supports their Honours' conclusion and reasoning in this appeal. Jessup J in dissent did not expressly disagree. Rather, his Honour held[4] that the Full Bench found that employees were covered at the time the agreement was made, and that any error by the Full Bench on that count was a factual error made within jurisdiction.

9. The Appellant maintains a different view. In its submission, it is sufficient that there are "persons currently employed who fall within the class of employees to whom the agreement might in future apply" (**AS [48]**).

10. The resolution of this issue depends on construction of the Act according to principles which have been repeated by this Court on several occasions. The task begins and ends with the statutory text, read in context.[5] That context includes the general purpose and

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2 Witness Statement of Rebecca Patena and Annexure 4 to SDA submissions.

3 *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd* [2016] FCAFC 161 at [54] (Katzmann J), [131]-[132], [143]-[144], [150] (White J) (**Reasons**).

4 Reasons at [25].

5 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539 [47]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57].

policy of the provision under consideration,[6] which purpose is to be derived from the statutory text and not from any assumption about the desired or desirable operation of the provision.[7]

1.1 The legislative scheme

11. The Act contains several mechanisms for regulating employees' entitlements to wages, leave and other benefits. "The main terms and conditions come from the National Employment Standards, modern awards, enterprise agreements and workplace determinations" (s 41).

12. Part 2-2 contains the National Employment Standards, which are minimum standards that apply to ten specified matters (s 61). Part 2-3 provides for the Fair Work Commission to make, vary and revoke modern awards, which set minimum terms and conditions in particular industries and occupations. Part 2-4 provides for enterprise agreements, which are made at the enterprise level and contain terms and conditions for those employees to whom the agreement applies. Part 2-5 provides for workplace determinations, which may be made in specific situations and which provide terms and conditions for those employees to whom the determination applies.

13. The scheme of National Employment Standards and modern awards establish a national safety net of minimum wages and working conditions. An award applies unless there is an enterprise agreement or workplace determination in place which is applicable to an employee (s 57). Usually an enterprise agreement can only be approved if the Fair Work Commission is satisfied that employees will be better off under it than they would be under an otherwise applicable modern award.

1.2 Enterprise agreements

14. The objects of Part 2-4 in relation to enterprise agreements are "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" and "to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements" (s 171). The Act provides a framework for bargaining between employers and employees (Part 2-4 Division 3). Employee organisations are the default

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6 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at 516 [41].

7 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]-[26]; *Deal v Father Pius Kodakkathanath* (2016) 90 ALJR 946 at 955 [37].

bargaining representatives for employees unless a different bargaining representative is appointed (s 176).

15. An enterprise agreement can be made about one or more of the following matters: the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement; the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement; deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and how the agreement will operate (s 172(1)). An employer cannot make an enterprise agreement with a single employee (s 172(6)).

16. An enterprise agreement can be a "single enterprise agreement", which will usually mean that it is an agreement between one employer and its employees, or a "multi-enterprise agreement" between two or more employers and their employees (s 172(2), (3)). There is a further distinction between "non-greenfields agreements" and "greenfields agreements". A non-greenfields agreement is an agreement of the employer or employers "with the employees who are employed at the time the agreement is made and who will be covered by the agreement" (s 172(2)(a), (3)(a)). A greenfields agreement is one which relates to a genuine new enterprise that the employer or employers are establishing or propose to establish and where the 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. A greenfields agreement may be made with one or more relevant employee organisations (s 172(2)(b), (3)(b), (4)) that is, employee organisations entitled to represent the industrial interests of the employees who will be covered by the agreement in relation to work to be performed under the agreement (s 12) .

17. An employer who intends to introduce an enterprise agreement in an existing enterprise (that is, not a greenfields agreement) must take all reasonable steps to notify each employee who "will be covered by the agreement" and is employed at the time of his or her right to be represented by a bargaining representative (s 173(1)). The content of the notice is governed by s 174, and who may be a bargaining representative is governed by ss 176-178.

18. At least 21 days after a notice has been given under s 173, "the employer may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it" (s 181(1). But the employer must take all reasonable steps to ensure that, within seven days prior to employees being asked to approve a proposed enterprise agreement by voting on it, the employees "employed at the time

who will be covered by the agreement" are given a copy of and access to certain materials about the proposed agreement. And the employer must also take all reasonable steps to notify such employees of details about the vote and to ensure that the terms of the proposed agreement are explained to them (s 180).

19. In the case of a single enterprise agreement that is not a greenfields agreement, it is made when a majority of the employees who will be covered by the agreement cast a valid vote to approve it (s 182(1)). A greenfields agreement is made under s 182(3) when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover.

20. An enterprise agreement does not come into operation on the day it is made. Rather, it comes into operation seven days after it has been approved by the Fair Work Commission, or otherwise on any later day specified in the agreement itself (s 54(1)). To that end, a bargaining representative for the agreement (which includes the employer) must apply to the Commission for approval of the agreement within 14 days, or such other time as the Commission permits (s 185). The Commission must approve the agreement if the requirements of ss 186 and 187 are met.

21. Relevantly for present purposes, the Commission must be satisfied, in the case of a non-greenfields agreement, that "the agreement has been genuinely agreed to by the employees covered by the agreement" (s 186(2)(a)), that "the agreement passes the better off overall test" (s 186(2)(d)) and that "the group of employees covered by the agreement", who may not include all the employees of the employer, "was fairly chosen" (s 186(3)). An agreement will have been genuinely agreed to if the relevant requirements of ss 180 to 182 were complied with and "there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees" (s 188). And s 193(1) provides that:

> An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time [being the time the application for approval of the agreement is made], 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.

An "award covered employee" is an employee who "is covered by the agreement" and "at the test time, is covered by a modern award" that is in operation and covers the employee in relation to the work that he or she is to perform under the agreement and the employer (s 193(4)). A "prospective award covered employee" is a person who

would be covered by both the agreement and the award if he or she were an employee at the test time (s 193(5)).

1.3 Construction of the Act

22. In the First Respondent's submission, the text, context and purpose of the Act supports the conclusion of the majority in the Full Court that there must be employees covered by an agreement which is not a greenfields agreement at the time it is made in order for the Fair Work Commission to approve it under s 186 of the Act.

23. As to the statutory text. *First*, there is a discernible pattern of grammatical usage in the Act which is so consistent that it can only be regarded as deliberate and significant. Sections 172-182 of the Act, which are about steps to be taken prior to the making of an enterprise agreement under s 182, use the expression "will be covered". Once the agreement has been made, in so far as non-greenfields agreements are concerned, the Act then changes its pattern of usage to refer instead to employees "covered by" the agreement which, *ex hypothesi*, has now been "made" under s 182.

24. The point to be discerned from the statutory text is as White J described it in the Full Court:

> The change in terminology occurs because the work done by the term "will be covered" is complete. Because the two expressions are counterpoints, the expression "who will be covered by the agreement" is a reference to those who, upon the making of the agreement, are covered by it and is not a reference to those who, at some future time will become covered by it.[8]

25. *Second*, s 193, which explains when an enterprise agreement is taken to pass the better off overall test, clearly operates on the assumption that there are employees covered at the time the application for approval is made. The Fair Work Commission must be satisfied that each employee who "is covered by the agreement" at the time the application for approval is made would be better off under the agreement. In respect of persons who may be employed in the future, or whose employment an agreement might apply to in the future, it is still relevant to ask whether, at the time the application for approval is made, the person would be better off on the basis that the agreement applied to him or her at that time. The definition of prospective award covered employees directs attention to that same point in time. As Katzmann J has observed, "[t]he purpose of the BOOT is to guarantee the benefit of its superior terms to employees who at that time are covered by the agreement and prospective employees

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8 Reasons at [135] (White J).

who would be covered".[9] According to the Explanatory Memorandum accompanying the Fair Work Bill 2008 (Cth), "[t]he better off overall test also refers to prospective award covered employees because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time".[10] It follows, by way of contrast, that award covered employees are those actually engaged at the test time.

26. *Third*, other provisions of the Act further reinforce this construction. They appear to contemplate that, from time to time and at all times over the life of the enterprise agreement, there would be employees covered by that agreement. It is those persons, for example, who can agree to a variation (s 207) or a termination of the agreement (s 219). This view is consistent with the Explanatory Memorandum accompanying the Fair Work Bill 2008 (Cth).[11]

27. *Fourth*, s 53(1), to which Jessup J referred in dissent as the "starting point",[12] requires no different conclusion. That sub-section 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." All this provision does is give employers and employees flexibility as to how to express the scope or coverage of the enterprise agreement, subject to s 53(6), which provides that the coverage must be "in relation to particular employment". The Fair Work Commission's task was to assess, having regard to how the parties to the agreement have expressed the agreement's scope or coverage, whether the employees covered by the agreement when it is made are better off overall.

28. *Fifth*, contrary to the Appellant's submission [**AS [43]**], there is no reason why s 172(2)(b)(ii) cannot be read as contemplating the time of making the agreement. At that time, the employer must not have employed anyone who will be necessary for the normal conduct of the enterprise which the employer is establishing or proposing to establish and who will be covered by the agreement.

29. *Sixth*, s 207(4) provides no assistance to the Appellant [**AS [44]-[47]**]. The syntax of that sub-section is explicable and unexceptionable when it is noted that it is concerned only with greenfields agreements, which are available only when there are no employees at the time the agreement is made.

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9 *Construction, Forestry, Mining and Energy Union v Deputy President Hamberger* (2011) 195 FCR 74 at 92 [91].

10 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 130 [824].

11 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 33 [203].

12 Reasons at [20].

30. Far from supporting the Appellant's contentions, s 207(4) is consistent with the construction adopted by the majority in the Full Court. Section 207(1) allows for variation of agreements. Section 207(4) provides that a greenfields agreement can only be varied if two conditions are met. First, a person or persons necessary for the conduct of the new enterprise must have been employed. Secondly, they must actually be covered by the agreement, that is, they must be employed in a classification that falls within the scope of the agreement. The legislature does not allow for variation of the agreement if a necessary employee has been employed and he or she *will* be covered by the agreement (cf s.172(2)); the employees must presently be covered by the agreement. This suggests that the use of the expression "will be covered" in s 172(2) refers to the future because at the time of negotiation and voting no-one can be covered by the agreement because it does not exist. However, once the agreement is made, actual coverage is necessary if an employee is to participate in variation of the agreement.

31. Section 207(1) supports this further. It allows for variation by joint application of an employer and employees who are covered and employees who will be covered if a variation is approved. Persons who will be covered in the future because they have entered into an arrangement which will commence in the future are not "affected employees" (s 207(2)) and thus are not entitled to vote on any variation under s 209(1). So, none of the employees who voted to approve the Agreement in this case would have been able to vary that Agreement under s 207(1) after the Agreement was made under s 183, because none of them were "covered by the agreement" at the time. There is no reason why the prospective employees should be able to vote on a new agreement (as contended by the Appellant) but not on a variation to it (as is clear from s 207(1)).

32. As to legislative purpose. Requiring there to be employees covered by the enterprise agreement at the time it is made does not undermine the purpose of providing "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" (s 171(a)). It is a matter for the parties to the enterprise agreement, and wholly within their control, to articulate its coverage.

33. Moreover, adopting the majority's construction of employees "covered" by an enterprise agreement allows Part 2-4 to operate effectively and as a coherent whole. Where the employer has employed persons in an enterprise, that employer must, if it wishes to make an enterprise agreement, bargain with those employees and enter into an enterprise agreement with them. Where it is a genuine new enterprise for which the employees have not yet been employed (the present case, as the Regency Park Region

had not yet commenced and the employees were working elsewhere), a greenfields agreement can be made. In this, Part 2-4 follows the scheme of Part VIB of the *Workplace Relations Act 1996* (Cth), which provided at the time for certified agreements. Under the statute then in force, the Full Court of the Federal Court held that "an agreement regulating terms and conditions of employment in a proposed single business, made with employees who may, in the future, be employed in that business but are not yet so employed [did not qualify] as an agreement that may be certified under the Act".[13]

34. As to Full Court authority. The Appellant relies upon [**AS at [48]**] the decision of the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*, which held that the reference in s 186(3) to "the group of employees covered by the agreement" was "a reference to the whole class of employees to whom the agreement might in the future apply, rather than the group of employees which actually voted on whether to make the agreement".[14] This decision does not, however, support the Appellant's construction. The Full Court in that case distinguished between potential coverage and present coverage of an enterprise agreement. The Full Court acknowledged that, while s 186(3) and (3A) looked to potential coverage, other provisions of the Act are concerned with present coverage, which is to be understood in the sense of coverage at the time the agreement is made.[15]

1.4 Jurisdictional error by the Full Bench

35. At least by the time these proceedings came before the Full Court, it was common ground that there were no employees "covered by" the Agreement at the time it was made.[16] That concession by the Appellant was inevitable, for the clauses by which the Agreement set out its coverage were expressed in the future tense, and they looked forwards to a time when the Regency Park Region was in operation. That time had not yet come when the application to the Fair Work Commission was made.

36. Nonetheless, 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 Regency Park Agreement". The Full Bench can only have reached this conclusion by regarding it as sufficient to bring employees within the present coverage of an agreement that they would likely be covered at some point in

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13 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1999) 93 FCR 317 at 356 [121] (Wilcox and Madgwick JJ). The reasoning of the joint judgment at 356-357 [122]-[127] applies equally to the present circumstances.

14 (2015) 228 FCR 297 at 299 [2] (Besanko J), 306-307 [34]-[41] (Buchanan J), 315 [87] (Barker J).

15 See (2015) 228 FCR 297 at 299 [2] (Besanko J), 306-307 [37]-[39] (Buchanan J), 315 [87] (Barker J).

16 Reasons at [143] (White J).

the future, namely when the Regency Park Region came into operation. By so doing, the Full Bench must have asked itself the wrong question or misunderstood the test which it was to apply.[17] Had it asked itself the right question or applied the right test, the conclusion which it must have arrived at is the conclusion that there were no employees covered at the time the Agreement was made.

37. In these circumstances, the majority was right to conclude[18] that the Full Bench committed a jurisdictional error of the classic kind identified by the plurality in *Coal and Allied v Australian Industrial Relations Commission*, in that it failed to apply itself to the question posed or misunderstood the nature of the opinion which it was to form.[19] In so far as there is no "rigid taxonomy of jurisdictional error",[20] to permit the Full Bench to err so fundamentally as to how the class of persons covered by an enterprise agreement is to be identified is to allow the development of "distorted positions"[21] in central provisions of the Act.

38. The Appellant's fall-back argument that the Full Bench's error fell short of jurisdictional error should be rejected.

39. The boundary between jurisdictional error and non-jurisdictional error is to be determined by construction of the Act with an eye to understanding the statutory limits on the Fair Work Commission's jurisdiction to decide to approve an enterprise agreement. As Hayne J explained in *Re Refugee Review Tribunal; Ex parte Aala*, "[t]he former kind of error [namely jurisdictional error] concerns departures from limits upon the exercise of power. The latter [namely non-jurisdictional error] does not."[22]

40. To this extent, the Appellant's submissions have it right [**AS at [51]-[54]**]. Those submissions do not, however, advance any persuasive reason why an error as to when employees must be "covered" by an agreement for the purposes of deciding whether to approve an enterprise agreement does not overstep the limits upon the Commission's jurisdiction. To adapt and adopt what was said by McHugh, Gummow and Hayne JJ in a different context, "[n]othing in the Act suggests that the [Commission] is given authority to authoritatively determine [this question of law] or to make a decision otherwise than in accordance with the law".[23]

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17 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

18 See Reasons at [89], [144] (White J). White J's reasoning is not confined to [179] as asserted by the Appellant [**AS at [49]**].

19 (2000) 203 CLR 194 at 208-209 [31] (Gleeson CJ, Gaudron and Hayne JJ).

20 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 573 at 574 [73].

21 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 573 at 570-571 [64], 581 [99], 590 [122].

22 (2000) 204 CLR 82 at 141 [163].

23 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82].

41. *First*, the Appellant's suggestion [**AS at [60]**] that coverage "has virtually no significance" is incorrect. As the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) explained, "[e]ven though coverage of a modern award or enterprise agreement does not necessarily determine who has enforceable entitlements and obligations under those instruments, coverage of the instrument can be significant for a variety of other reasons".[24] For example, it is persons covered by an agreement who can agree to a variation (s 207) or a termination of the agreement (s 219).

42. *Second*, the Appellant accepts that coverage is relevant to the better off overall test, but then submits that the Commission has a "broad and unfettered discretion" in applying that test, which according to the Appellant suggests that misunderstanding an important integer of that test (whom does the agreement cover) should not result in jurisdictional error [**AS at [57]-[60]**]. The Appellant's submission appears to embrace a concept foreign to Australian law; here, there is no place for "the notion of 'unbridled discretion'".[25] In any event, this submission fails to recognise the importance of the better off overall test. That test is a critical safeguard of the legislative scheme. Subject to a public interest exception, it is only if each employee covered by the agreement is better off overall compared to under a modern award that the agreement will be approved so as to displace the safety net of the modern award.[26]

43. *Third*, the Appellant complains [**AS at [62]-[65]**] that it would be "patently unfair and unreasonable" to permit a decision to approve an enterprise agreement to be quashed on judicial review on account of the Commission applying the wrong test for determining coverage of the agreement, because in the interim the employer will have been conducting itself on the basis that the agreement, and not the relevant modern award, applies. This submission proves too much, for it is tantamount to a protest against judicial review of the Commission's decisions at all on any ground. Given that the Act, unlike its statutory predecessors, does not contain a privative clause, there is simply no basis for the suggestion. In any event, the Appellant overstates the extent to which the availability of judicial review undermines certainty for employers. An application for judicial review of a decision of the Full Bench under s 39B of the

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24 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 33 [203].

25 *Wotton v Queensland* (2012) 246 CLR 1 at 10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

26 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 122 [773], 130 [824].

Judiciary Act 1903 (Cth) must be brought within a reasonable time. Delay[27] and any reliance upon the decision by third parties[28] are discretionary factors for refusing relief.

44. *Fourth*, the decisions of the Full Court to which the Appellant points [**AS at [51]**] are of no relevant assistance. *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union [No 1]* was a case of a mistaken conclusion rather than identification of a wrong issue or the asking of a wrong question.[29] Likewise *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union [No 2]*.[30] As the decision in *MI&E Holdings Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* illustrates, it is important to consider the nature of the error, rather than merely notice that it has to do with the subject of coverage.[31] There is a fundamental difference between, say, erring in finding that Person A is covered by an enterprise agreement and finding that Person A is covered only because of a misunderstanding of the very legislative scheme.

45. *Finally*, the Appellant relies upon [**AS at [66]**] the reasons of Jessup J in dissent, who held that "[t]o identify the 'coverage' of an agreement made in such a legislative and institutional environment is, in my view, pre-eminently a matter for the specialised tribunal".[32] This begs, with respect, the relevant question. Unless it be suggested that any question touching upon the subject matter of coverage is in fact non-justiciable — which Jessup J's reasons come close to suggesting[33] but which is inconsistent with this Court's review jurisdiction under s 75(v) of the Constitution — the issue is whether, in determining a question touching upon coverage, the Full Bench exceeded the limits upon its jurisdiction. As the High Court explained in *Kirk v Industrial Court of New South Wales*, in terms applicable to inferior courts but which remains useful in the present context:

> If "authoritative" is used in the sense of "final", a decision could be described as "authoritative" only if certiorari will not lie to correct error in the decision.

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27 In relation to injunctions, see, eg, *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339 (Kirby P). In relation to declaratory relief, see, eg, *Falkingham v Peninsula Kingswood Country Golf Club Ltd* (2015) 318 ALR 140 at 154 [76]-[77], 155 [84]. In relation to mandamus, see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400. In relation to certiorari, see, eg, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 421-422 [108] (McHugh J). In relation to prohibition, see, eg, *R v Williams; Ex parte Lewis* [1992] 1 Qd R 643 at 658.

28 See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 592 [165] (Gummow and Hayne JJ).

29 (2015) 230 FCR 565 at 595 [158] (Katzmann J)

30 (2015) 234 FCR 405 at 420 [70].

31 (2015) 228 FCR 483 at 493-495 [37]-[45] (Buchanan J).

32 Reasons at [24].

33 Cf Reasons at [21].

> To observe that inferior courts generally have authority to decide questions of law "authoritatively" is not to conclude that the determination of any particular question is not open to review by a superior court. Whether a particular decision reached is open to review is a question that remains unanswered. The "authoritative" decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by "jurisdiction" and "jurisdictional". It suggests that the observation that inferior courts have authority to decide questions of law "authoritatively" is at least unhelpful.[34]

10 46. For these reasons, the first ground of appeal should be rejected. The Full Bench made a jurisdictional error in misconceiving the statutory scheme in so far as the identification of employees "covered" by the enterprise agreement is concerned, and the majority of the Full Court was right so to hold.

2. Ground Two

2.1 The issue

47. Section 186(2)(d) requires the Fair Work Commission to be satisfied that the enterprise agreement "passes the better off overall test" before approving it. Section 193(1) provides, in respect of a non-greenfields agreement, that it will do so if, at the time of the application for approval, each employee covered by the agreement and each
20 prospective employee who would be covered by the agreement would be better off overall if it applied than if the relevant modern award applied.

48. The Full Bench noted the First Respondent's submissions as well as the Appellant's reliance upon a clause which permitted employees to "request a comparison of the benefits received" under the Agreement as against a modern award and to receive any shortfall found. It then concluded that Bull DP had not erred in concluding that the Agreement passes the better off overall test,[35] as "[t]his 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."[36]

49. A majority of the Full Court held that the Full Bench made three jurisdictional errors.
30 First, it did not engage in any assessment of the benefits and detriments alleged by the parties before it that were also the subject of evidence.[37] Second, its conclusion was legally unreasonable or otherwise revealed a misconception as to the criterion to be

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34 (2010) 239 CLR 531 at 573 [70].
35 Full Bench Reasons at [58].
36 Reasons at [163]-[164] (White J).
37 Reasons at [167]-[168] (White J).

applied.[38] And third, the Full Bench misunderstood its appellate function in circumstances where it had admitted new evidence that was not before Bull DP.[39]

50. In dissent, Jessup J held that the better off overall test "is entirely a matter for the satisfaction of the Commission" absent jurisdictional error.[40] That begs the relevant question, although the implicit gravamen of his Honour's reasons must be that the First Respondent failed to demonstrate, in his Honour's view, any jurisdictional error in the Full Bench's approach.

2.2 Approach to the Better Off Overall Test

51. It is well established by authorities of the Fair Work Commission and its predecessor, Fair Work Australia, that the better off overall test "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".[41] What is involved is a comparison between the terms and conditions under the enterprise agreement and the terms and conditions under the modern award.[42]

52. In this case, the Full Bench did not engage in any such comparison between the Agreement and the modern award. All it did was summarise some of the First Respondent's submissions, refer to a clause that permitted an employee to request a comparison of the benefits under the Agreement and the award and to recover any shortfall between the two, and then conclude that the agreement passed the better off overall test. The omission from the Full Bench's reasons of any kind of reasoned consideration of the First Respondent's submissions and the evidence (including new evidence) which was before the Full Bench allows an inference to be drawn that the Full Bench failed to engage in the kind of comparative task called for by s 193 of the Act.[43] It therefore constructively failed to exercise its appellate jurisdiction, including by not considering the First Respondent's (the appellant before the Full Bench) contentions.

53. While the Fair Work Commission is not expressly obliged to give reasons (s 601(2)), the usual expectation and practice is that it does so "for all decisions of significance", which usually includes anything but "a procedural decision".[44] Given the importance

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38 Reasons at [169]-[170] (White J).
39 Reasons at [170] (White J).
40 Reasons at [33].
41 *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at 49 [41] (Giudice J, Acton SDP and Lewin C).
42 *Top End Consulting Pty Ltd re Top End Consulting Enterprise Agreement 2010* [2010] FWA 6442 at [26]-[29].
43 Cf *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at 773 [97].
44 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 352 [2310].

of the better off overall test to the legislative scheme, the Full Bench's reasons or decision should indicate the reasoning which led the Full Bench to conclude that there was no error in the Deputy President's decision. It is therefore appropriate to have regard to what was said and what was not said by the Full Bench in order to form a judgment about whether it misunderstood its task in applying the better off overall test.[45] Merely to summarise some of the First Respondent's submissions and to do no more is not in truth to discharge the Full Bench's functions.[46] This is not to take issue with the conclusion which the Full Bench reached.[47] Rather, its cursory treatment of the better off overall test "warrants an inference that [the Full Bench] has failed in some respect to exercise its powers according to law".[48]

54. The majority of the Full Court were therefore correct to conclude that the Full Bench's reasons justify "the conclusion that the Full Bench did not address the correct question".[49]

55. The Appellant's submissions in this Court should not be accepted. The explanation it proffers [**AS at [69]-[71]**] for why the First Respondent's submissions, and the new evidence upon which it relied, before the Full Bench were unpersuasive is not to the point even if it were correct (a matter which this Court need not determine). The point is that the Full Bench did not engage in the very analysis which the Appellant now produces in this Court, which is the very kind of analysis one would expect if the Full Bench had approached the better off overall test correctly.

56. The brevity of the Full Bench's analysis might have been explicable and justifiable if, as the Appellant now contends [**AS at [72]**], that analysis was reflective of how the First Respondent put its case to the Full Bench. But the Full Bench's analysis does not demonstrate any active consideration or engagement with the First Respondent's submissions or evidence before the Full Bench. The First Respondent had submitted, based on evidence, that the "typical rosters" presented to Bull DP were inconsistent with the actual work rosters in evidence before the Full Bench. And the First

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45 Cf *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197 at 204 [25], 211 [72]; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605-606 [31]-[33], 615-618 [66]-[73]; *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 448 [51]-[52]; *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at 294-295 [53]-[55].

46 See generally *Commissioner of Taxation v Pham* (2013) 134 ALD 534 at 544 (Katzmann J).

47 Cf *Minister for Immigration and Citizenship v SZSSJ* (2010) 243 CLR 164 at 174-176.

48 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348-349 [75].

49 Reasons at [168].

Respondent undertook a comparison of wages and a comparison entitlements and allowances mandated by the award and the position under the Agreement.[50]

57. Finally, the Appellant invites [**AS [75]-[76]**] the Court to infer that the Full Bench engaged in the sort of analysis which the Appellant's submissions to this Court provide an example of from the Full Bench's conclusory statement that "the Deputy President [at first instance] properly considered the BOOT and reached a decision based on a sound analysis". The Appellant reads too much into that statement. After all, Bull DP's reasons at first instance were limited to the following statement: "I am satisfied that each of the requirements of ss 186, 187 and 188 of the Act as are relevant to this application for approval have been met." Bearing in mind that the Deputy President's decision was made on the papers without hearing from any contradictor to the application for approval, it is unsurprising that this was all that was said.[51]

58. In the end, whether to draw an inference that the Full Bench did or did not engage in a full analysis of the better off overall test may turn on whether, or to what extent, the Parliament can be taken to have intended the Full Bench's reasons to reflect its reasoning fully. It may be accepted that the Act is not as explicit or prescriptive about the contents of the Commission's reasons as, for example, s 430 of the *Migration Act 1958* (Cth). But the Court should conclude that the Commission is expected to be at least as fulsome in its reasons as, for instance, the Administrative Appeals Tribunal in migration matters, in that those reasons should set out its reasons, material findings of fact and the evidence upon which those findings are based. It would be conducive to the development of "distorted positions"[52] in the Act if the Commission had broad freedom to err in the exercise of its jurisdiction without being obliged to provide a careful explanation, in its decision or in any reasons, for how it decided to exercise that jurisdiction.

2.3 The reasons for the Full Bench's conclusion

59. The majority of the Full Court also found jurisdictional error in the reasons provided for concluding that the agreement passed the better off overall test because the shortfall clause "creates an enforceable right to payments to employees equal to or higher than those contained in the award". The First Respondent supports the majority's conclusion and their Honours' reasons for so concluding.

60. In terms, the better off overall test requires the employees covered by the agreement to be "better off" under the Agreement compared to a modern award. This can be

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50 See Witness Statement of Rebecca Patena and Annexure 4 to SDA submissions.

51 See Full Bench Reasons at [4]; Reasons at [84] (White J).

52 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 573 at 570-571 [64], 581 [99], 590 [122].

contrasted with the "no disadvantage" test which was the legislative predecessor of the better off overall test.[53] The shortfall clause was only apt to ensure that an employee could make a request for payments to be equalised as between the agreement and an award. By definition, that equalisation does not leave the employee better off under the Agreement. Especially is that so because the employee must go through the process of requesting and demonstrating an entitlement to that equalisation.

61. For the Full Bench to rely only on this shortfall clause, without adverting to any other consideration, demonstrates, as the majority held, jurisdictional error.[54] In focusing only on the shortfall clause, its reasons do not reveal an "intelligible justification"[55] for the decision reached. For it to rely solely on this clause shows that it must have asked itself the wrong question.[56]

62. The Appellant's submission that the Full Bench's reasons were "expressly premised on the basis that the agreement otherwise passes the BOOT" [**AS at [71]**] does not reflect the Full Bench's reasons. There is nothing in the reasons to suggest, for example, that irrespective of the shortfall clause employees were better off under the Agreement than under the modern award, such that it could possibly be said that the Agreement as a whole (as opposed to this clause in particular) secures employees payments "equal to or higher than those contained in the award".

63. Further, contrary to the Appellant's submissions [**AS at [79]-[85]**], this is not to traverse into the merits of whether, in fact, employees are better off overall under the Agreement than under the modern award. The gravamen of the majority's conclusion, and the First Respondent's submissions, is that the Full Bench's reasons do not provide an intelligible justification for its conclusion, given the statutory test it was to apply.

2.4 The Full Bench's jurisdiction

64. Finally, the majority of the Full Court correctly held that the Full Bench erred in considering that it could not exercise its appellate powers unless it were first demonstrated that there was appealable error in the Commission's decision at first instance on the better off overall test.

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

54 Reasons at [168] (White J).

55 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76] (Hayne, Kiefel and Bell JJ), 375 [105] (Gageler J). See also *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 446-447 [47] (Allsop CJ, Robertson and Mortimer JJ); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at 5 [10] (Allsop CJ).

56 *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at 772 [90].

65. In an appeal by way of rehearing, an appellate body must ordinarily find error in the primary decision before interfering with the decision.[57] The First Respondent accepts this to be so, and that an appeal to the Full Bench against a decision of the Commission is an appeal by way of rehearing.

66. However, as the plurality observed in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:

> Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker.[58]

67. This case fits within the exception in the above passage, and the Full Bench was wrong to approach its task as if it were enough that Bull DP had "properly considered the BOOT and reached a decision based on a sound analysis". The Full Bench admitted new evidence that went to the application of the better off overall test. It was incumbent upon the Full Bench to decide the appeal "by applying to the circumstances as they exist, when the appeal is dealt with, the law which then operates to determine the rights and liabilities of the parties".[59] In considering the new evidence, "the further evidence may demonstrate error in the outcome" even though the primary decision was correct at the time it was made.[60] By concluding that "[i]t has not been demonstrated that there is any appealable error in the decision under appeal", seemingly 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".[61]

Costs

68. Contrary to the Appellant's submissions [**AS at 20**], no order as to costs should be made whatever the result of the present appeal. Section 570(1) of the Act provides that costs may only be ordered in accordance with ss 569, 569A and 570(2) "in relation to a matter arising under this Act". While the Court is exercising appellate jurisdiction under s 73 of the Constitution, it is doing so in proceedings in relation to a matter arising under

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57 See, eg, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57].

58 (2000) 203 CLR 194 at 203 [14] (Gleeson CJ, Gaudron and Hayne JJ).

59 *Victorian Stevedoring and General Contracting Co Pty Ltd* (1931) 46 CLR 73 at 107 (Dixon J); *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111].

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

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

the Act in that the approval of the Agreement owes its existence to the Act. None of ss 569, 569A or 570(2) warrants the making of a costs order.

VII NOTICE OF CONTENTION

69. If the Court concludes that the Full Bench did err in its construction of those employees "covered" by an enterprise agreement or in its conclusion that this Agreement passed the better off overall test, but then concludes that those errors are within the Full Bench's jurisdiction, the First Respondent's notice of contention has work to do. By that notice of contention, the First Respondent submits that the Full Bench committed errors of law on the face of the record.

70. The construction of "covered" is plainly a question of law, as is the application of a statutory term to facts as found[62] and any question as to how the Full Bench went about reasoning to its conclusion that the Agreement passed the better off overall test.

71. The critical question, therefore, is whether these errors of law are apparent on the face of the "record" for the purposes of the grant of certiorari. The First Respondent submits that these errors are apparent on the face of the Full Bench's reasons, and that the reasons constitute the relevant record for the purposes of this case.

72. The Act requires the Full Bench to provide its decision in relation to an appeal in writing (s 601(1)(c)). That is what the Full Bench did, in its reasons which are also headed "Decision". Because no other document exists which can be said to comprise its decision so as to discharge its statutory obligation to record its decision in writing, it is that document which must be taken as the record for the purposes of judicial review. This case does not call for any reconsideration of this Court's decision in *Craig v South Australia* that reasons do not generally form part of the "record".[63]

73. The decision of the Full Court of the Federal Court in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* stands as authority against the First Respondent's submission about the "record", but that decision should be disapproved.[64] The Full Court in that case paid insufficient regard to the Commission's obligation to record its decision in writing (s 601), as the Full Bench did in this case by way of the document headed "Decision". In so far as the Full Court was expressly or implicitly motivated by an assumption that the frequency

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62 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 352 [84]; *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8-10.

63 (1995) 184 CLR 163.

64 (2015) 235 FCR 305 at 343 [95] (Dowsett, Tracey and Katzmann JJ).

of reviews should be limited,[65] it is inconsistent with the absence of any privative clause in the Act, which is a departure from decades of previous industrial relations legislation. And ultimately, the Full Court went beyond decisions[66] of this Court in insisting that an inferior court or tribunal could incorporate by reference only that which permitted an "identification of the issues raised for determination and the outcome of the process".[67]

VIII ESTIMATE OF TIME

74. The First Respondent estimates that it will require a total of two hours for the presentation of oral argument.

Date: 10 May 2017

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65 (2015) 235 FCR 305 at 343 [94] (Dowsett, Tracey and Katzmann JJ).

66 See, eg, *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667 (Gibbs CJ); *Craig v South Australia* (1995) 184 CLR 163 at 181-182.

67 (2015) 235 FCR 305 at 343 [94] (Dowsett, Tracey and Katzmann JJ).