FEDERAL COURT OF AUSTRALIA

Broadspectrum (Australia) Pty Ltd v United Voice [2018] FCAFC 139

File number:	WAD 474 of 2017
Judges:	**BROMBERG, MORTIMER AND LEE JJ**
Date of judgment:	27 August 2018
Catchwords:	**INDUSTRIAL LAW** – Pt 2-4 of the *Fair Work Act 2009* (Cth) ("FW Act") – the process for the making and approval of a single-enterprise agreement which is not a greenfields agreement ("single-enterprise (non-greenfields) agreement") under Div 4 of Pt 2-4 of the FW Act – approval of a single-enterprise (non-greenfields) agreement by the Fair Work Commission ("FWC") under s 186(1) of the FW Act – the nature of the requirement under s 172(2)(a) of the FW Act that an employer may make a single-enterprise (non-greenfields) agreement "with employees who are employed at the time the agreement is made and who will be covered by the agreement" – the requirement under s 186(2) of the FW Act that in approving a single-enterprise (non-greenfields) agreement the FWC be satisfied that "the agreement has been genuinely agreed to by the employees covered by an agreement" – the nature and content of the statutory task of the FWC under s 186(2)(a) of the FW Act – whether the FWC fell into jurisdictional error in assessing whether the relevant single-enterprise (non-greenfields) agreement ("Agreement") had been "genuinely agreed to" within the meaning of s 186(2)(a) of the FW Act by taking into account an irrelevant consideration, namely whether or not employees were "covered" by the Agreement at the time it was made in accordance with s 172(2)(a) of the FW Act – whether the FWC misconstrued s 186(2)(a) in determining that the relevant employees were not "covered" by the Agreement
Legislation:	*Fair Work Act 2009* (Cth), Pt 2-4, ss 50, 51, 52, 53, 54, 57, 172, 182, 185, 186, 187, 188, 189, 190, 191, 192
Cases cited:	*Aerocare Flight Support Pty Ltd v Transport Workers' Union of Australia* [2018] FCAFC 74 *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Ors* [2016] FCAFC 169

	Australian Postal Corporation v D'Rozario [2014] FCAFC 89 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155
Date of hearing:	6 March 2018
Registry:	Western Australia
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	44
Counsel for the Applicant:	Mr S Wood QC with Mr J Snaden
Solicitor for the Applicant:	KHQ Lawyers
Counsel for the First Respondent:	The First Respondent filed a submitting notice
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice
Counsel for the Intervener:	Mr M Gibian
Solicitor for the Intervener:	Transport Workers' Union of Australia

ORDERS

WAD 474 of 2017

BETWEEN:	**BROADSPECTRUM (AUSTRALIA) PTY LTD** Applicant
AND:	**UNITED VOICE** First Respondent
	FAIR WORK COMMISSION Second Respondent
	TRANSPORT WORKERS' UNION OF AUSTRALIA Intervener
JUDGES:	**BROMBERG, MORTIMER AND LEE JJ**
DATE OF ORDER:	**27 AUGUST 2018**

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 Part 2–4 of the *Fair Work Act 2009* (Cth) ("**FW Act**") provides for the making of enterprise agreements between employers and their employees and employers and employee organisations registered under the FW Act. Enterprise agreements have statutory force (ss 50-54 of the FW Act) and prevail over any applicable modern award (s 57 of the FW Act). An enterprise agreement applies to an employee, employer or employee organisation if "the agreement is in operation" (s 52(1)(a)) and the agreement "covers" that person (s 52(1)(b)). An enterprise agreement "covers" an employee or employer "if the agreement is expressed to cover (however described) the employee or the employer" (s 53(1)). With these provisions in mind, in ***ALDI*** *Foods Pty Limited v Shop, Distributive and Allied Employees Association* [2017] HCA 53 (at [30]) Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ said that "[t]o speak of an employee being covered by an agreement is to speak of the agreement providing terms and conditions for the job performed by, or to be performed by, the employee". Their Honours went on to say that an agreement "covers" the employee, "in the sense contemplated by s 53 [of the FW Act] because it is expressed to cover the jobs described as being within its scope…" (at [42]).

2 Section 172 identifies the three kinds of enterprise agreements provided for by Pt 2-4 of the FW Act. These are a single-enterprise agreement, a multi-enterprise agreement and a greenfields agreement. A single-enterprise agreement may be made by an employer with employees or alternatively with one or more relevant employee organisations (s 172(2)).

3 For present purposes, it is only necessary to further outline the statutory framework in so far as it deals with the process for the making of a single-enterprise agreement made between an employer/s and its employees; that is, a single-enterprise agreement which is not a greenfields agreement ("**single-enterprise (non-greenfields) agreement"**). In that respect, s 172(2)(a) relevantly provides:

> (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):
>
> (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement;

4 Section 172(6) provides that an enterprise agreement "cannot be made with a single employee". Accordingly, a single-enterprise (non-greenfields) agreement must be made with at least two employees.

5 Division 3 of Pt 2-4 of the FW Act deals with bargaining for an enterprise agreement and associated representational rights. Division 4 provides for the making and approval of enterprise agreements.

6 Section 182 provides for when an enterprise agreement is made; a matter emphasised by the s 12 definition of the bolded word "**made**" which appears in each of s 182(1), (2), (3) and (4). Of particular relevance is s 182(1) which provides that if the employees "that will be covered by a proposed [single-enterprise (non-greenfields) agreement] have been asked to approve the agreement under s 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement". Section 185(1) requires that if an enterprise agreement is made, a bargaining representative for the agreement must apply to the Fair Work Commission ("**FWC**") for approval of the agreement. Where such an application is made, s 186(1) requires that "the FWC must approve the agreement under this section if the requirements set out in this section and s 187 are met".

7 In relation to the FWC's approval of a single-enterprise (non-greenfields) agreement, s 186(2)(a) provides that the FWC must be satisfied that "the agreement has been genuinely agreed to by the employees covered by the agreement".

8 When an enterprise agreement has been "genuinely agreed to" within the meaning of s 186(2)(a), is specified by s 188 in the following terms:

> **When employees have genuinely agreed to an enterprise agreement**
>
> An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
>
> (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
>
> (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

9 In this proceeding, the applicant ("**Broadspectrum**") applies for orders in the nature of certiorari and mandamus in relation to a decision of a Deputy President of the FWC (**"Deputy President"**) dismissing an application made under s 185(1) by Broadspectrum for the approval of an agreement called the "JBU Enterprise Agreement 2016" ("**Agreement**").

10 In late 2015, Broadspectrum established a division of its business known as the Justice Business Unit ("**JBU**") for the purpose of procuring and operating facilities management work within correctional and court premises.

11 In May and June 2016, Broadspectrum engaged four persons to work in the JBU. Two of the employees were new employees engaged on a part-time basis and the other two were existing employees who had previously been working for Broadspectrum on Nauru. Although the business was in its infancy, and was yet to secure any contracts for work at correctional or court premises of the kind for which the JBU was established, Broadspectrum initiated bargaining for the Agreement with the four employees employed in the JBU. Voting in relation to the Agreement occurred on 4 and 5 July 2016. Three of the four employees voted and each of those employees voted to approve the Agreement.

12 The Agreement was expressed to "cover and apply" to Broadspectrum and employees of Broadspectrum engaged with the JBU to work in Australia in the classifications (ie. the job descriptions) listed by the Agreement.

13 As noted above, at the time the Agreement was made, Broadspectrum did not conduct facilities management work at any correctional or court premises in Australia. It first secured a contract for such work in October of 2016 and first commenced to perform work under that contract in March 2017.

14 On 12 July 2016, Broadspectrum applied to the FWC for the approval of the Agreement. The Agreement was initially approved by a Commissioner of the FWC. That decision was quashed by a Full Bench of the FWC on 15 February 2017 on procedural fairness grounds and the application for approval was then remitted to the Deputy President.

15 By a decision of 31 March 2017 (*Broadspectrum (Australia) Pty Ltd T/A Broadspectrum* [2017] FWC 1818), the Deputy President dismissed the application for approval. The issue in contest on the application for approval was "whether or not the Commission can be

satisfied that s 186(2)(a) of the Act, which requires that the Agreement has been genuinely agreed to by the employees covered by the Agreement, is met" (emphasis in original) (at [26]). In dealing with the question of coverage, and by reference to the job classifications in the Agreement, the Deputy President assessed whether the work or employments of each of the four employees of Broadspectrum who were invited to vote on the Agreement was regulated by the terms and conditions of the Agreement. The Deputy President determined that they were not and dismissed the application, concluding at [38] that he was "not satisfied that the Agreement was genuinely agreed to as required by s.186(2)(a) on the basis that the employees who made the Agreement were not covered by the Agreement at the time it was made".

16 Broadspectrum sought permission to appeal from the decision of the Deputy President. On 8 August 2017, a Full Bench of the FWC ("**Full Bench**") refused permission to appeal (*Broadspectrum Limited t/a Broadspectrum v United Voice* [2017] FWCFB 3202).

17 By this application, Broadspectrum seeks judicial review, but only of the decision of the Deputy President.

18 By an order made by consent on 6 December 2017, the Intervenor, the Transport Workers' Union of Australia ("**TWU**"), was granted leave to intervene in the proceeding. A Submitting Notice was filed by the First Respondent, United Voice and also by the Second Respondent, the FWC.

19 The ground for relief set out in the affidavit supporting Broadspectrum's application alleges that the "Deputy President erred in finding that the Agreement did not cover the four employees who voted to make it with Broadspectrum". Greater specificity was given by the written submissions of Broadspectrum where the alleged jurisdictional error was said to be that, in assessing whether the Agreement had been "genuinely agreed to by the employees covered by the agreement" under s 186(2)(a) to the FW Act, the Deputy President took into account that "the people who consented to the [Agreement's] making were *not* covered by it". Broadspectrum contended that that consideration – whether or not the employees were covered by the Agreement – was not germane to the task of the Deputy President because it "had no bearing upon the genuineness of the approval given" by those employees who were covered by the Agreement. The nature of the jurisdictional error alleged was said by the written submissions of Broadspectrum to be the taking into account of matters irrelevant to the state of satisfaction referred to in s 186(2)(a). By its oral submissions, Broadspectrum

described the nature of the jurisdictional error as a misunderstanding of the nature of the opinion which the Deputy President was obliged to form.

20 The taking into account of an irrelevant consideration, prohibited from being taken into account (which is the meaning of irrelevant consideration in this context), constitutes jurisdictional error: *Aerocare Flight Support Pty Ltd v Transport Workers' Union of Australia* [2018] FCAFC 74 at [26] (Jagot, Bromberg and Rangiah JJ). Jurisdictional error would also be established if the Deputy President misunderstood the nature of the opinion that he was required to form: *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 (Gleeson CJ, Gaudron and Hayne JJ).

21 Broadspectrum contended that there is a circularity to the Deputy President's reasoning. It said that s 186(2)(a) stipulates, as a condition precedent to approval, that a single-enterprise (non-greenfields) agreement be genuinely agreed to by the employees that it covers. If the employees with whom Broadspectrum purported to make the Agreement were, in truth, not covered by that agreement, then, so Broadspectrum contended, the genuineness or otherwise of the decision of those not covered is irrelevant. Broadspectrum contended that s 186(2)(a) is directed only to the character of the approval given by those who are covered by the agreement and not those who are not.

22 In our view, Broadspectrum's contentions misconstrue the nature and content of the statutory task required of the FWC by s 186(2)(a).

23 The task required by s 186(2)(a) of determining whether "the agreement has been genuinely agreed to by the employees covered by the agreement", is given content by s 188 which describes the circumstances that the FWC must be satisfied of in order to be able to conclude that an agreement being considered for approval has been "genuinely agreed to by the employees covered by the agreement" (see *ALDI* at [51]). There are a number of matters set out in s 188, but for present purposes it is only necessary to focus on the content of s 188(b) which requires that the FWC be satisfied that "the agreement was made in accordance with whichever of sub-sec 182(1) or (2) applies…". For a single-enterprise (non-greenfields) agreement, as in this case, s 182(1) is applicable. The terms of s 182(1) are important to the resolution of this issue and it is necessary that they be fully set out. Section 182(1) provides:

> (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve

the agreement.

24 By virtue of s 182(1), a single-enterprise (non-greenfields) agreement is "made" when a majority of those employees who will be covered by the agreement cast a valid vote to approve the agreement: *ALDI* at [34] and [42]. Section 186(2)(a) speaks of an agreement that has been made "as referred to in sub-s (2)(a) of s 172": *ALDI* at [47].

25 Section 172 "provides for the circumstances in which an enterprise agreement may be made": *ALDI* at [20]. The provision identifies whom it is that may make a single-enterprise (non-greenfields) agreement. An agreement of that kind is an agreement made by an employer (or two or more employers that are single interest employers) with "the employees who are employed at the time the agreement is made and who will be covered by the agreement". Unless an agreement is made by those persons, there being at least two employees (s 172(6)), it is not a single-enterprise (non-greenfields) agreement as defined by s 172.

26 By reason of s 186(2)(a), read with s 188(b), it is a condition of approval of a single-enterprise (non-greenfields) agreement that the FWC is satisfied that an agreement, as referred to in s 172(2)(a), has been "made" and was made in accordance with the requirements of s 182(1). The requirements of ss 172(2)(a) and 182(1) fix upon the participation in the making of the agreement of the employees who "will be covered by" the agreement when it is made. Section 182(1) requires particular participation by such persons, including the vote of a majority to approve the agreement. It is apparent then, that whether the employees who participated in the making of an agreement in the manner contemplated by ss 170(2)(a) and 182(1), were employees who will be covered by the agreement when made, is not only a permissible consideration, but is a necessary consideration in the performance of the statutory task required of the FWC in forming the state of satisfaction specified by s 186(2), as to whether or not "the agreement has been genuinely agreed to by the employees covered by the agreement".

27 The Deputy President considered whether the three employees who voted to approve the Agreement were covered by the Agreement and concluded that they, as well as the fourth employee (who did not vote), were not. That consideration was relevant to the statutory task required of the Deputy President and, the taking of that consideration into account, involved no misunderstanding of the nature of the opinion that the Deputy President was required to form.

28 Broadspectrum also characterised the jurisdictional error of the Deputy President as a failure to determine the coverage issue at an earlier stage than the approval stage addressed by ss 186-192 of the FW Act. Broadspectrum contended that the question of whether the employees who participated in the making of the Agreement were covered by it arose at a preliminary stage– "at the point of s 172(2)(a)".

29 The nature of s 172(2)(a) has already been referred to. The provision does not provide for the coverage issue to be determined at a particular stage or juncture in the process of the FWC's consideration of an application for the approval of an enterprise agreement. Its character is definitional.

30 As Broadspectrum contended, if the FWC is satisfied that the purported single-enterprise (non-greenfields) agreement before it is not such an agreement because it does not meet the requirements of s 172(2)(a), the application for approval of the agreement may be dismissed pursuant to the FWC's general power to dismiss applications (s 587(1)). A threshold application for dismissal would constitute a stage preliminary to the approval stage dealt with by ss 186-192.

31 However, that the coverage issue raised by s 172(2)(a) may be relevant to the consideration and determination of a threshold application for dismissal, does not mean that the coverage issue may not be relevant at the substantive stage of an application for approval in circumstances where no threshold application was made.

32 In relation to a single-enterprise (non-greenfields) agreement, the coverage issue is relevant to the FWC's approval process because s 186(2)(a) in combination with s 182(1) make it so. The FWC must consider whether "the agreement is made". The "agreement" referred to in both s 186(2)(a) and s 182(1) is a single-enterprise (non-greenfields) agreement as defined by s 172(2)(a). Accordingly, the requisite statutory task necessarily entails a consideration of s 172(2)(a) and the coverage requirement raised by that provision.

33 If those requirements are not satisfied because the employees who made the agreement before the FWC will not be covered by it, then the FWC will not be satisfied in accordance with s 186(2)(a) and the application for approval of the agreement must be dismissed. Dismissing an application for approval at that point and for that reason does not involve the FWC exceeding its jurisdiction, even if a dismissal for the same reason could have been effected at an earlier stage of the FWC's disposition of an application for approval.

34 Contrary to the contentions of Broadspectrum, there is nothing in the judgment of the High Court in *ALDI* or of the Full Court in ***Shop, Distributive and Allied Employees Association*** *v ALDI Foods Pty Ltd* (2016) 245 FCR 155 in support of the proposition that a consideration of the coverage issue is beyond the scope of the task contemplated by s 186(2)(a). That issue was not directly addressed by either judgment. In so far as any indication is found in those judgments, the indicators favour the conclusion that the coverage issue forms part of the statutory task in s 186(2)(a) (see *ALDI* at [47] and [77] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) and [111] (Gageler J), and *Shop, Distributive and Allied Employees Association* at [21] (Jessup J) and [134], [144] and [177] (White J)).

35 In the course of its submissions, Broadspectrum also contended that whether an agreement had been made of the kind required by ss 172(2)(a) and 172(6) was a jurisdictional fact in the narrow or conventional sense of that term. That is, a fact the objective existence of which is a condition precedent to the exercise of jurisdiction rather than a criterion that the administrative decision maker must be satisfied of in order to enliven the exercise of the statutory power: *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 at [98] (Bromberg, Katzmann and O'Callaghan JJ); *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89 at [95]-[101] (Bromberg J). Where the existence of a fact is a precondition to the exercise of jurisdiction, an administrative decision will be affected by jurisdictional error where the reviewing court finds that no such fact existed and the decision-maker nevertheless purported to exercise jurisdiction or, alternatively, where the jurisdictional fact did exist but the decision-maker refused to exercise jurisdiction.

36 It follows that if Broadspectrum is correct, and a finding as to whether an agreement is made in conformity with the requirements of ss 172(2)(a) and 172(6) is a finding of a jurisdictional fact in the conventional sense, the objective existence or non-existence of that fact is susceptible to judicial review and is to be determined by the reviewing court. However, Broadspectrum did not assert jurisdictional error on this basis. To the contrary, Broadspectrum expressly rejected the suggestion that the relevant fact – whether a single-enterprise (non-greenfields) agreement made in conformity with s 172 existed – ought to be authoritatively determined on this application. In the circumstances, it is not necessary for us to determine whether the objective existence of an agreement made in conformity with the requirements of s 172 is a condition precedent to the exercise of the FWC's approval function or alternatively, whether the FWC's satisfaction as to the existence of such an agreement

suffices to enliven its jurisdiction. That question is best left for another occasion where the issue is squarely raised.

37 Broadspectrum also contended that the Deputy President erred in determining that the four employees were not covered by the Agreement. The error was said to be constituted by the Deputy President determining that question consistently with the approach to construction taken by the Full Court in *Shop, Distributive and Allied Employees Association* rather than the correct approach expressed by the High Court in *ALDI*. The contention was made in the course of a submission which sought to pre-empt a submission of the TWU that, if jurisdictional error was found, as a matter of discretion, relief should be denied because its grant would be futile. Given that we have not found jurisdictional error, we need not address the argument that Broadspectrum pre-emptively sought to resist. However, in the oral reply submissions made by Broadspectrum, it was suggested (for the first time) that the application by the Deputy President of the approach propounded in *Shop, Distributive and Allied Employees Association* rather than the approach identified in *ALDI*, itself constituted jurisdictional error involving the misconstruction of s 172 of the FW Act.

38 Although the TWU had some opportunity to address what the Deputy President did in the course of the response given to Broadspectrum's submission about discretion, we would not permit Broadspectrum to raise a new allegation of jurisdictional error without leave. No such leave was sought.

39 Furthermore and in any event, for the reasons given by the TWU in its submissions, we would not accept that the Deputy President confined his analysis to the approach to construction adopted by the Full Court in *Shop, Distributive and Allied Employees Association*. Although the Deputy President determined the application before him after the publication of the judgment of the Full Court and before the publication of the judgment of the High Court in *ALDI*, it is apparent from [35]-[37] of the Deputy President's reasons for judgment, that the question of coverage was considered in a manner not inconsistent with the High Court's conclusion that the expression "employees who are covered by the agreement" in s 186(2), is not confined to employees who are, on the making of the agreement, "actually employed under its terms" (*ALDI* at [77]).

40 The Deputy President did not confine his assessment to the question of whether the four employees were, at the time the Agreement was made, actually performing work regulated by the Agreement. He considered the purpose of those employments and did so by reference to

the likelihood that at a later time the employees would transition into performing work that was regulated by the Agreement. A fair reading of [35] of the Deputy President's reasons suggests that, despite his finding that the employees were not performing work regulated by the Agreement at the time of its making, if the principal purpose of those employments at the time the Agreement was made was the performance of such work, the Deputy President would have held that the employees were covered by the Agreement. The reasoning in *ALDI* does not support a conclusion that the reasoning of the Deputy President involved a misconstruction of s 186(2)(a).

41 Finally, as noted earlier, the Full Bench of the FWC refused Broadspectrum's application for permission to appeal the decision of the Deputy President. That refusal is not the subject of Broadspectrum's application for judicial review. The TWU did not contend that the Deputy President's decision was not amenable to judicial review by reason of the Full Bench's refusal to grant permission to appeal. The TWU accepted, as Broadspectrum had contended, that consistently with the observations made in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Ors* [2016] FCAFC 169 at [45] (Barker, Rangiah and Wigney JJ), in circumstances where the Full Bench did not grant permission to appeal, "there is no appellate decision which stands and which is conclusive and operative". It follows that the conclusive and operative decision made by the FWC was that of the Deputy President and, as a matter of jurisdiction, there is no impediment to Broadspectrum's application for judicial review.

42 However, the TWU contended that, as a matter of discretion, and in circumstances where in considering whether permission to appeal should be granted the Full Bench had the benefit of full argument and gave a considered decision, the relief sought by Broadspectrum ought to be refused.

43 We accept that the circumstances relied upon by the TWU may give rise to the exercise of the Court's discretion to refuse the grant of relief. However, as we have determined that there is no basis for the grant of relief we need not consider whether, if there had been, relief should be refused on discretionary grounds.

44 For all those reasons Broadspectrum's application for judicial review must be dismissed. No order for costs is sought and no such order should be made.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bromberg, Mortimer and Lee

Associate:

Dated: 27 August 2018