

[2023] FWC 1671 [Note: An appeal pursuant to s.604 (C2023/4513) was lodged against this decision - refer to Full Bench decision dated 28 November 2023 [[\[2023\] FWCFB 164](#)] for result of appeal.]



DECISION

Fair Work Act 2009
s.483AA—Right of entry

Shop, Distributive and Allied Employees Association

v

ALDI Foods Pty Limited
(RE2023/262)

DEPUTY PRESIDENT DEAN

CANBERRA, 11 JULY 2023

Application for an order to access non-member records – application dismissed

[1] This decision concerns an application made by Mr Mitchell Luke Worsley of the Shop, Distributive and Allied Employees Association (SDA or Applicant) under s.483AA of the *Fair Work Act 2009* for an order to access non-member records held by ALDI Foods Pty Limited (ALDI or Respondent). Mr Worsley is an Industrial Officer of SDA and holds an entry permit issued by the Commission without condition.

[2] The SDA seeks orders to access non-member records with respect to certain employees of ALDI who perform work under the following enterprise agreements:

1. *ALDI Brendale Enterprise Agreement 2020*
2. *ALDI Dandenong Enterprise Agreement 2020*
3. *ALDI Derrimut Enterprise Agreement 2019*
4. *ALDI Jandakot Agreement 2020*
5. *ALDI Minchinbury Agreement 2020*
6. *ALDI Prestons Agreement 2020*
7. *ALDI Regency Park Agreement 2019*
8. *ALDI Stapylton Agreement 2020*

[3] The records sought to be accessed cover the period 1 April 2017 to 26 March 2023 and include the following:

1. Rosters;
2. Payslips;
3. Sign on and sign off records;
4. Time sheet adjustments; and
5. Exception reports.

[4] The Applicant advances that the reason for the application relates to suspected contraventions of sections 50 and 323 of the Act by the Respondent, in that ALDI required its employees to perform work in excess of their rostered start and finish times without payment.

[5] The application is opposed by ALDI.

[6] The application was listed for a hearing by video on 16 June 2023. At the hearing, Mr A Guy of Counsel appeared for SDA and Ms A Perigo of Counsel appeared for ALDI.

[7] For the reasons set out below, I decline to make the Order sought.

Relevant law

[8] Section 483AA provides that a permit holder may apply to the Commission for access to non-member records. It provides:

Application to the FWC for access to non-member records

- (1) The permit holder may apply to the FWC for an order allowing the permit holder to do either or both of the following:
 - (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
 - (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).
- (2) The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.
- (3) If the FWC makes the order, this Subdivision has effect accordingly.
- (4) An application for an order under this section:
 - (a) must be in accordance with the regulations; and
 - (b) must set out the reason for the application.

[9] The meaning of 'non-member record or document' is provided for in s.482(2A) and is in the following terms:

- (2A) A non-member record or document is a record or document that:
 - (a) relates to the employment of a person who is not a member of the permit holder's organisation; and

- (b) does not also substantially relate to the employment of a person who is a member of the permit holder's organisation;

but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

[10] In *Independent Education Union of Australia v Australian International Academy of Education Inc*¹ Jessup J addressed the interpretation of s.483AA and the meaning of the words 'necessary to investigate'. He said:

- “109. It is apparent that the extent of a permit-holder's right to inspect and to copy documents which related only to employees who were not members of the relevant organisation has, over the years, been a sensitive question at the policy level. The balance which the legislature sought to achieve in Pt 3-4 was the subject of observation by Flick J (Tracey J concurring) in *Australasian Meat Industry Employees' Union v Fair Work Australia* (2012) 203 FCR 389, 405-406 [56]-[59]. The provisions are beneficial ones, and should be construed with an eye on the important role of organisations in protecting their members against contraventions of statutory and award provisions. But the particular provisions with which I am concerned in this case have been the subject of very detailed attention by the legislature, and involve some rather fine discriminations which, the history shows, were consciously made.
110. Returning to the terms of Pt 3-4 of the FW Act itself, s 482 operates only where there is a suspicion of contravention which relates to, or affects, a member of the permit-holder's organisation (and then only where the organisation is entitled to represent the industrial interests of that member, and the member works on the premises concerned). The section permits the permit-holder to inspect any work, process or object that is relevant to the suspected contravention. Insofar as this provision relates to work, it is not limited to work done by the member concerned – nor even, for that matter, by a member – but it must be relevant to the suspected contravention. Under para (b) of subs (1), the person who may be interviewed is not limited to a member of the organisation (but is limited in other ways). And, absent the passage in parenthesis, the right to inspect and to copy a record or document would not be so limited either, but the record or document has to be directly relevant to the suspected contravention and be kept on the premises or accessible from a computer kept on the premises.
111. But the passage in parenthesis places a further limit on the range of records and documents that may be inspected and copied under para (c) of subs (1). So, even a document which is kept on the premises and which is directly relevant to the suspected contravention may not be inspected or copied if it falls within the definition of 'non-member record or document' in subs (2A). It is only with such a document that s 483AA is concerned.

112. Section 483AA shows that the legislature recognised that there may be situations in which, for the proper investigation of the suspected contravention, it was necessary for the parenthetical exclusion in s 483(1)(c) to be lifted. The notion of ‘necessary’ in s483AA(2) carries the meaning that the investigation could not be properly investigated with that exclusion in place. Whether or not that would be so in a particular case was a matter for the satisfaction of FWA (as the Commission was called at the time of the facts of the present case). Absent the availability of a conventional ground of administrative law challenge (such as that made by the respondents here), the question whether a s 483AA order was necessary in a particular case would not be justiciable elsewhere.
113. As a measure of how limited is the process for which s 483AA provides, FWA was required to consider the matter of necessity not in the broad, but only in relation to ‘specified non-member records or documents’. Thus, although under s 482(1)(c) in its primary operation it was a matter for the permit-holder (at least in the first instance) to identify the records or documents sought to be inspected and copied, in the operation of the paragraph as extended by an order made under s 483AA it was a matter for FWA to specify the non-member records or documents that might also be inspected and copied.
114. Whatever order might have been made in a particular case under s 483AA, the permit-holder’s right to require inspection and copying of non-member records or documents could not travel beyond the other limits imposed in s 482(1)(c). Put another way, even with the assistance of such an order, he or she could never have a right to require inspection and copying of non-member records or documents more extensive than his or her right to require inspection and copying of other records or documents. Specifically in the context of the respondents’ point in the present case, those records or documents had to be directly relevant to the contravention – being one which related to or affected a member – which the permit-holder suspected.
115. It follows, in my view, that the question which FWA was required to address under s 483AA was whether it was necessary, for the proper conduct of the investigation, that the documents which the permit-holder was entitled to require to be inspected or copied under s 482(1)(c), as being directly relevant to the contravention, included non-member records and documents as defined.”

[11] In *United Workers Union*², Deputy President Beaumont stated that:

“[83] The suspected contravention in this case is a breach of s 50 of the Act. The ‘suspected contravention’ and what is ‘necessary to investigate’ that same contravention, are critical considerations in determining whether the Commission exercises discretion to grant the order sought. Section 483AA provides the means to enable a proper investigation of the suspected contravention by lifting the exclusion in s 481(1)(c). That ‘proper investigation’ is centred on the breach and the question to be asked is whether the non-member records or documents are necessary not in the broad, but only in relation to the ‘specified non-member records or documents’.” (citations omitted)

[12] Commissioner Hampton (as he then was), in *Paul Scudds (Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia)*³ usefully summarised the general principles to be applied as follows:

“[23] Accordingly, the general principles to be applied in this case include:

- The FW Act does not provide for entry holders to access non-member records except by Order of the Commission;
- There is a balance reflected in provisions of s.438AA which are beneficial, and should be construed with an eye on the important role of organisations in protecting their members against contraventions of statutory and award provisions, but also require some rather ‘fine discriminations’ and limitations which deliberately reflect other considerations;
- The requisite jurisdictional fact permitting an Order to be made under s.483AA of the FW Act is that the Commission must be satisfied that it is necessary, for the proper conduct of the investigation of a suspected contravention related to or affecting a member, that the specified non-member records (as defined) be inspected or copied;
- The records must be materials of a class which the permit-holder would be entitled to require to be inspected or copied under s 482(1)(c), and the concept of ‘necessary’ imports the notion that these records are directly relevant to the suspected contravention;
- The concept of being ‘necessary’ also carries the meaning that the investigation of the suspected contravention could not properly be conducted without access to the particular non-member records sought; and
- If satisfied on the jurisdictional fact, a discretion exists to make an order providing the permit holder with access to (and/or copies of) the relevant non-member records or parts of such records.”

[13] I add that the onus rests with the Applicant to satisfy the Commission that the non-member records are necessary to be able to investigate the suspected contravention.

Case for the SDA

[14] Mr Worsley gave evidence and provided a witness statement in support of the application. His evidence included the following:

- a. SDA commenced a claim against ALDI in 2020 concerning underpayment of employees performing work in the ‘Selections’ section of the ALDI Distribution Centre in Prestons, NSW. It was alleged that ALDI had directed employees to attend work in advance of their shift start time and perform unpaid ‘pre-start’ duties which took about 15 minutes to complete.
- b. ALDI denied that the ‘pre-start’ duties were work and filed a cross claim that if the ‘pre- start’ duties were work, the time spent at the conclusion of their shift which was paid but not worked could offset any time worked at the commencement of their shift.

- c. In a decision⁴ issued on 30 September 2022, the Federal Circuit Court (as it then was) found that ALDI implicitly directed employees to perform ‘pre-start’ duties and such duties were work which took 10 minutes per shift to complete.
- d. The Court found ALDI had contravened sections 50 and 323 of the Act and in a further decision⁵ ordered ALDI pay \$80,000 to SDA in penalties for the contraventions.
- e. ALDI has since paid current employees at the Prestons Distribution Centre for the ‘pre-start’ duties.
- f. However, he suspects ALDI has continued to contravene sections 50 and 323 of the Act by:
 - i. not paying employees in its distribution centres across Australia who perform ‘pre-start’ duties; and
 - ii. not compensating former employees of the ‘Selections’ section at the Prestons Distribution Centre who had performed unpaid ‘pre-start’ duties.
- g. His suspicion is based on the following circumstances:
 - i. He has been informed by organisers of the SDA and employees of ALDI that employees in other sections at the Prestons Distribution Centre “have been contacted about their ‘pre-start’ duties by ALDI with a view to resolving any disputes” and that they “are not provided with verifiable documents to establish how many shifts they worked and were not paid for their ‘pre-start’ duties”.
 - ii. He has been informed by officials of SDA that the issue of ‘pre-start’ duties being worked but not paid has occurred in distribution centres across Australia.
 - iii. It was revealed during the Court proceedings that ALDI did not pay former ‘Selections’ section employees for their ‘pre-start’ duties unless they contact ALDI directly.
- h. Since the Court decisions the SDA has been informed by members and non-members of ALDI that they have been required to perform unpaid ‘pre-start’ and ‘post-finish’ work. The SDA has been informed that ALDI has left it to the employees to report the number of these additional times worked to be assessed for payment.
- i. Based on the information provided to the SDA it is further suspected that ALDI has contravened sections 50 and 323 of the Act by not paying employees at their supermarkets in addition to the distribution centres who perform ‘pre-start’ and ‘post-finish’ work.

- j. ALDI has since approached its employees directly in an attempt to settle underpayment claims by providing a payment in return for a deed of release.

[15] In his supplementary witness statement Mr Worsley stated the following:

- a. The eight enterprise agreements relevant to this application cover ALDI and employees who work in supermarkets and distribution centres around Australia. They contain almost identical terms and apply to employees of each supermarket or distribution centre operated by ALDI.
- b. The SDA undertook a survey of current and former employees of ALDI on or around 1 April 2023 which returned 959 valid responses. Of those 959 responses, 842 employees said 'yes' to the question 'Have you ever had to perform work before or after any of your shifts at ALDI?' and said 'No' to the question 'When performing work before or after your shift, have you always been paid for this time?'
- c. All employees who participated in the survey perform work falling within the classifications of the agreements whose interests the SDA is entitled to represent.
- d. Members of the SDA fear for consequences if ALDI were to find out they are union members. This can be demonstrated by meetings with members being held off-site out of their work hours so they were not seen to meet with SDA organisers.
- e. Based on the result of the survey, the suspected contraventions of the enterprise agreements involve a 'systemic pattern of conduct relating to one or more ALDI employees' and are 'serious contravention as defined by s557A of the FW Act'.

[16] In cross examination, Mr Worsley confirmed that Store Managers, Assistant Store Managers, and Store Manager Trainees were salaried employees who could work reasonable additional hours without a separate payment. Additionally, time off in lieu arrangements were available for those employees, which if accessed mean no separate payment would be applicable for such time worked. Mr Worsley also confirmed that Aldi's 'hourly rate employees' could avail themselves of a 'bankable hours arrangement' which is similar to time off in lieu, and if this was accessed then no additional payment would be applicable for that time.

[17] The SDA submitted that access to non-member records was necessary for the union to investigate suspected contravention and the records and documents sought are directly relevant to the suspected contraventions.

[18] It submitted that the evidence of Mr Worsley showed that he had a compelling suspicion that Aldi had engaged in widespread and significant contraventions of ss.50 and 323 across multiple classifications of employees employed under every agreement listed in the draft Order.

[19] The SDA contended that the Order is necessary to investigate the suspicion because:

- a. The SDA does not have records in their possession that would allow for the proper investigation of the suspected contraventions;
- b. Any records that the SDA may have certainly are not sufficient to conduct an investigation into the contraventions on the scale of what is suspected;
- c. Although there is evidence that ALDI has made some payments to the affected employees, the nature, extent, and whether the payments made are sufficient compensation for each employees is unknown;
- d. The entitlement to remuneration for “pre-start” and ‘post-finish’ work has been determined by the Court and no appeal has been made; and
- e. There is clear evidence that union members fear reprisal if their membership is disclosed.

[20] In closing submissions, Counsel for the SDA agreed that the survey conducted by the SDA did not demonstrate the extent to which employees may have accessed the bankable hours arrangements or time off in lieu.

Case for ALDI

[21] ALDI’s objection to the application was supported by a statement of Ms Caitlin Gallagher-Hill. Ms Gallagher-Hill has been employed by ALDI for approximately 6.5 years. She is the Executive Manager Logistics – Projects based in the ALDI Minchinbury Region and has been in this role for about 12 months. Her evidence included the following:

- a. ALDI operates eight Regions across Australia. Each Region has a Distribution Centre and a number of stores that are serviced by it. Each Region operates autonomously and has its own Managing Director and group of operational directors responsible for Store Operations and Warehouse Operations and Services. Each Region operates and reports as an independent profit centre. The centralised functions outside of each Region include National Buying, National Finance and Administration, National Supply Chain, National Real Estate and National IT.
- b. The enterprise agreements relevant to this application cover employees of each of the eight regions in ALDI’s Distribution Centres, Transport and Stores.
- c. ALDI has 8 Distribution Centres which employ approximately 2,464 warehouse employees. Each Distribution Centre contains within the Warehouse function different sections which include: Selection, Goods In, Cold Handling, Produce, Short Life, Specials, Damaged Specials, Maintenance and Inventory.
- d. ALDI currently has about 583 stores employing approximately 10,419 stores employees (ie excluding transport employees).
- e. The claim made by SDA resulting in the Court Decision related to employees in the Prestons Distribution Centre who worked in the Selection Section.
- f. Following the Court Decision, all employees working in ALDI’s Distribution Centres were required to clock onto the ‘KRONOS’ clock by their rostered start time and were not to perform any work prior to their rostered start time.

- g. Employees named in the Court proceedings were subsequently paid an amount “based on a method agreed between ALDI and the SDA”.
- h. Following the decision, there was a process of consultation with employees employed in the other warehouse functions in the Prestons Distribution Centre. Consultation also occurred with employees in the Minchinbury Distribution Centre and the other Distribution Centres in the other Regions.
- i. Following the consultation, ALDI voluntarily made payments to employees in the distribution centres on or around 23 December 2022. Payments varied between distribution centres and also between sections within the distribution centres. Following further consultation with Prestons Distribution Centre employees, further voluntary payments have been foreshadowed.
- j. By reason of the combination of these payments, ALDI is satisfied all employees have been appropriately paid.

[22] Ms Gallagher-Hill also gave evidence about ALDI’s timekeeping systems. She said that given the number of employees and the volume of records requested, it was estimated that it would take nine months to generate all of the documents from ALDI’s timekeeping and payroll systems and would likely require the engagement of additional staff to produce the requested documents within that timeframe.

[23] In its submissions, ALDI highlighted the following matters concerning the Order sought by the SDA which included that:

- a. The SDA seek records for a period of 6 years, from 1 April 2017 to 26 March 2023 for a total of approximately 12,883 current employees. The SDA has also not identified with any precision if they are also seeking the records for former employees for this period.
- b. The records the SDA seek are rosters, payslip, sign in sign out records, timesheet adjustments and exception reports.
- c. With respect to time sheet adjustment records, where an employee is absent from work unexpectedly, the employee, following contact with their manager, is allocated leave based on the nature of their absence and their leave record adjusted accordingly. If their shift needs to be replaced, another employee is added to the roster. The roster is then updated. The roster is the relevant record.
- d. With respect to exception reports, in retail stores prior to 20 March 2023, where an employee was required by their manager to work hours in addition to their rostered hours, and so punched in more than 10 minutes before the start of their rostered shift, and/or punched out more than 10 minutes after the end of their rostered shift, KRONOS flagged an exception to the employee’s rostered hours. This exception, if the time worked was authorised, was accepted by the employee’s manager in the online system and their hours of work were adjusted accordingly. Payment was then

made based on the punch times rather than the roster. The relevant records are the sign in sign out records and the roster.

- e. The SDA is only able to access records for employees covered by their Rules.
- f. Certain records kept by ALDI and sought by the SDA contain personal information such as dates of birth, and it is not possible to separate this information without having to prepare reports, which ALDI is not required to do.

[24] In its submissions, ALDI also noted the Court decisions related to four employees only.

[25] ALDI highlighted that Mr Worsley's evidence did not go to what if any member records the SDA currently had access to. Further, it stated that the SDA had given no reason why the inspection of member records would not be sufficient to investigate the suspected contravention.

Consideration

[26] I am satisfied Mr Worsley has standing to make this application and that the application has been made in accordance with the Act.

[27] The suspected contravention here is that ALDI required its employees working in its stores and distribution centres to perform work before and after shift times without payment. Given the Court proceedings and related decisions, and the fact that ALDI has made payments to a number of employees as a result of those proceedings, I am satisfied that Mr Worsley holds a suspicion that such a contravention may have occurred.

[28] I am, however, not satisfied on the evidence before the Commission that the Order is necessary to investigate the suspected contravention. As set out earlier, the notion of 'necessary' in s.483AA(2) carries the meaning that the suspected contravention could not otherwise be properly investigated. The evidence in my view does not support a finding that Mr Worsley is unable to properly investigate the alleged contravention without having access to the non-member records that are sought. There is no evidence, for example, about why the inspection of member records would not be sufficient to investigate the suspected contravention.

[29] While there is an assertion about a concern that identifying members would lead to reprisals by ALDI, there is no evidence to support this assertion. Something more than an expression of reprisal is required.

[30] As noted earlier, the onus is on the Applicant to demonstrate that the non-member records are necessary.

[31] I note the Order sought is extensive. It extends to a number of classifications of employees, such as Store Managers, who have access to time off in lieu arrangements and who may otherwise be required to work reasonable additional hours. The survey conducted by the SDA in my view does not assist its case because the employees who responded may have accessed the time off in lieu arrangements. It does not demonstrate they are entitled to payment for pre-start duties.

[32] The SDA called no evidence as to the breakdown of its membership compared to non-union membership at ALDI. Such evidence may have established the requisite ‘necessity’ for non-member records if the SDA’s membership was low. However it could be the case (and without evidence it is impossible to know) that the union membership is very high in which case non-member records would not be necessary.

[33] In deciding not to exercise my discretion to grant the Order sought, I have also had regard to the volume of work and time involved in producing the records sought by the SDA.

[34] Overall, I am not on balance persuaded that an order allowing access to non-member records is necessary to enable the investigation of the suspected contravention to be properly undertaken. As a result, there is no basis to make the Order sought.

[35] The application is dismissed.

The image shows a handwritten signature in cursive script to the left of a circular official seal. The seal features the text 'THE SEAL OF THE FAIR WORK COMMISSION' around the perimeter and 'AUSTRALIA' at the bottom. In the center of the seal is the Australian coat of arms, which includes a kangaroo and an emu flanking a shield, topped with a seven-pointed star.

DEPUTY PRESIDENT

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Appearances:

A Guy of Counsel for the Shop, Distributive and Allied Employees Association.

A Perigo of Counsel for the ALDI Foods Pty Limited.

Hearing details:

2023.

By video:

June 16.

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<PR764091>

¹ [2016] FCA 140.

² [\[2023\] FWC 513](#).

³ [\[2019\] FWC 6465](#).

⁴ 318 IR 206.

⁵ [2023] FedCFamC2G 190.