DECISION

Fair Work Act 2009
s.604—Appeal of decision

Shop, Distributive and Allied Employees' Association
v
ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) t/a ALDI
(C2023/4513)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT CROSS

SYDNEY, 28 NOVEMBER 2023

Appeal against decision [2023] FWC 1671 of Deputy President Dean at Canberra on 11 July 2023 in matter number RE2023/262 – permission to appeal granted – appeal dismissed.

Overview

[1] The Shop, Distributive and Allied Employees' Association (the Appellant) lodged an appeal against a Decision[1] issued by Deputy President Dean (the Deputy President) on 11 July 2023. In the Decision, the Deputy President was not persuaded that an order pursuant to s.483AA of the *Fair Work Act 2009* (Cth) (the Act), allowing access to non-member records was necessary (the Application), and dismissed the Application at first instance.

[2] The Appellant and ALDI Foods Pty Ltd as General Partner of ALDI Stores (A Limited Partnership) t/a ALDI (the Respondent) sought permission to be legally represented in the appeal. The Full Bench granted the parties' applications for permission to be represented pursuant to s 596(2) of the Act. The hearing of the appeal occurred on 19 September 2023.

The Application at First Instance

[3] On 24 March 2023, the Appellant sought an order pursuant to s.483AA of the Act to access certain non-member records held by the Respondent. The nominated Applicant was Mr Luke Worsley, a permit holder and an officer of the Appellant.

[4] The suspected contraventions outlined in Part 2.1 of the Application were:

> *1. From March 2017 and continuing, ALDI Foods Pty Ltd (ALDI) required its employees working in its supermarkets and distribution centres across Australia to perform work before and after rostered shift times, without payment.*

2. As a consequence of the above, the Applicant suspects the following contraventions of the Fair Work Act 2009 (Cth) (the FW Act) are occurring or have occurred:

a. ALDI has contravened hours of work, breaks, overtime and minimum rates of pay provisions of enterprise agreements that covered and applied to ALDI and its employees. A contravention of an enterprise agreement is a contravention of section 50 of the FW Act; and

b. By failing to pay employees wages for work performed before and after rostered shift times, ALDI failed to pay employees wages in full, in contravention of section 323 of the FW Act.

[5] Further specification of suspected contraventions was provided in the grounds and reasons in support of the Application, as follows:

6. The SDA has been informed employees of ALDI that they have been directed to:

a. attend work before their rostered start time and perform work; and

b. sign-off at the end of their rostered finish time but continue to perform work, without being paid to perform such work.

7. The significant number and geographic spread of ALDI employees informing the SDA of these practices leads the SDA to suspect that the contraventions are systematic and widespread across ALDI's supermarkets and distribution centres.

[6] Finally, in specifying the need for the production of non-member records, the Application provided:

8. It is necessary to obtain non-member records as the suspected contraventions effect most or all employees of ALDI. As a registered employee association, the SDA has a role in the enforcement of minimum entitlements. Obtaining non-member records may assist the SDA to enforce employees' minimum entitlements.

9. It is also necessary to obtain non-member records so the SDA can protect the anonymity of its members, who are a minority of employees, and may be at risk of reprisals from the employer.

The Legislative Framework

[7] The relevant part of the Act to this appeal is Part 3-4 Right of Entry. Section 480 outlines the objects of the Part as:

Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:

(i) this Act and fair work instruments; and

(ii) State or Territory OHS laws; and

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

[8] Sections 482(1)(c) and 483(1) specifically exclude a permit holder from inspecting, copying, or seeking later access to non-member records. Section 483AA provides, however:

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] For completeness, we note that Rule 34A of the *Fair Work Commission Rules 2013* provides:

> ***34A Application for an order for access to non-member records***
>
> *(1) This rule applies if an application under section 483AA of the Act for an order in relation to non-member records is served on an occupier or affected employer.*
>
> *(2) At the time the application is served on the occupier or affected employer, it must be accompanied by a notice that sets out the effect of subrule (3).*
>
> *(3) The occupier or affected employer must, within 24 hours after being served with the application:*
>
> *(a) display the application at the occupier's or the affected employer's premises at a location where notices to employees are generally displayed; or*
>
> *(b) make a copy of the application available to employees through the usual means that are adopted by the occupier or affected employer for communicating with employees.*

The Decision

[11] While not specified in the Application itself, it was apparent from the evidence before the Deputy President that the Application arose from proceedings which had been brought by the Appellant in the Federal Circuit Court and Family Court of Australia in matter number SYG2219/2020 (the FCCA Proceedings). In the FCCA Proceedings, the Appellant alleged that the Respondent had expressly or impliedly directed certain employees at their Prestons Distribution Centre to attend work in advance of their shift start time and perform *"pre-start"* duties without remuneration and thereby contravened the relevant enterprise agreement and the Act.

[12] In *Shop, Distributive and Allied Employees' Association v Aldi Foods Pty Ltd* (2022) 318 IR 206 (the FCCA Decision), the Court found that relevant employees had been subject to an implied direction to arrive early, prior to the shift commencing, in order to undertake pre-commencement tasks. The Court found further that those tasks constituted *"work"* for which the employees were entitled to be paid and, as a result of failing to pay employees for that time, the Respondent had contravened ss 50 and 323 of the FW Act. The Respondent was subsequently ordered to pay a penalty of $80,000 with respect to the contraventions identified in the FCCA Decision.

[13] The Deputy President noted that arising from the FCCA Proceedings, Mr Worsley (the relevant permit holder) suspected that the Respondent had and was contravening ss 50 and 323 of the Act with respect to pre-start duties at the Prestons Distribution Centre and other distribution centres.

[14] The Appellant also conducted a survey of current and former employees in relation to the performance of pre-start and post-finish duties. The Appellant also corresponded with the Respondent in relation to non-payment of pre-start and post-finish work. Having regard to the responses to the survey and the other information available to him, Mr Worsley suspected that the contraventions arising from the failure to pay employees for pre-start and post-finish duties constituted a systematic pattern of conduct and thereby were serious contraventions for the purposes of s 557A of the Act.

[15] The Deputy President accepted that Mr Worsley held a suspicion that a contravention occurred by reason of the Respondent requiring its employees in stores and distribution centres to perform work before and after shift times without payment. However, the Deputy President was not satisfied that the order sought was necessary to investigate the suspected contravention.

[16] The notion of 'necessary' in s.483AA(2) was held by the Deputy President to carry the meaning that the suspected contravention could not otherwise be properly investigated. The Deputy President found the evidence did not support a finding that Mr Worsley was unable to properly investigate the alleged contravention without having access to the non-member records that were sought, and there was no evidence about why the inspection of member records would not be sufficient to investigate the suspected contravention.

[17] The Deputy President also considered the extensive nature of the materials and the time involved in producing the records sought. At [31] the Deputy President observed:

> *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.*

[18] The Deputy President noted that the Appellant called no evidence as to the breakdown of its membership compared to non-union membership at ALDI, and that such evidence may have established the requisite 'necessity' for non-member records if the Appellant's membership was low.

[19] The Deputy President declined to exercise her discretion to grant the order sought as access to non-member records was not necessary to enable the investigation of the suspected contravention to be properly undertaken. The Deputy President also had regard to the volume of work and time involved in producing the records sought by the Appellant.

Appeal grounds and submissions

[20] The Appellants' appeal filed on 31 July 2023 outlined the following grounds:

1. The Deputy President erred in finding that the making of the order sought was not necessary to investigate the suspected contravention for the purposes of s 483AA(2) of the Fair Work Act 2009 (Cth) (the FW Act) in circumstances in which:

(a) the production or inspection of the non-member records was necessary to investigate whether the suspected contravention constituted a serious contravention for the purposes of s 557A of the FW Act; and

(b) the production or inspection of member records is not likely to be sufficient to investigate whether the suspected contraventions with respect to members were part of a systematic pattern of conduct.

2. The Deputy President erred in finding that the making of the order sought was not necessary to investigate the suspected contravention for the purposes of s 483AA(2) the FW Act in circumstances in which:

(a) the nature of the contraventions found in *Shop, Distributive and Allied Employees' Association v ALDI Foods Pty Ltd* [2022] FedCFamC2G 799 involved a finding that employees were subject of an implied direction to perform pre-start duties; and

(b) the non-member records sought are directly relevant to whether there was a common occurrence of performing work prior to an employee's rostered start so as to support an inference of an implied direction to perform such work.

3. The Deputy President failed to address a substantial submission advanced by the SDA to the effect that it suspected ALDI had engaged in a serious contravention of the FW Act and the production or inspection of the non-member records was necessary to investigate the suspected serious contravention.

4. The Deputy President erred in regarding the fact that the order sought extended to classifications of employees, such as Store Managers, who are entitled to access time in lieu of overtime as a basis for refusing to make any order for the production or inspection of the non-member records rather than at most narrowing the order to be made.

5. The Deputy President erred in regarding the alleged work and time involved in producing the records sought by the SDA as a basis for refusing the making any order for the production or inspection of the non-member records.

Appellant's Submissions

(a) Grounds 1 and 3

[21] The Appellant contended that the first and third grounds of appeal arose from the finding that the making of the order sought was not necessary to investigate the suspected contravention for the purposes of s 483AA(2) in circumstances in which the production or inspection of the non-member records was necessary to investigate whether the suspected contravention constituted a serious contravention for the purposes of s 557A of the Act.

[22] The Appellant submitted the suspected contraventions are contraventions of ss 50 and 323 arising from the suspected non-payment of pre-start and post-finish work as well as an allegation that those contraventions are serious contraventions for the purposes of s 557A. The Appellant has identified the relevant proscribed conduct being a contravention of ss 50 and 323 of the Act, and considered and formed the view that the conduct involved the Respondent knowingly contravening the Act.

[23] The Appellant submitted that in considering s 483AA(2), the Deputy President failed to address a substantial submission advanced by the Appellant that the production or inspection of the non-member records was necessary to investigate the suspected contraventions because they involved serious contraventions.

(b) Ground 2

[24] The Appellant submitted the Deputy President erred in finding that the making of the order sought was not necessary to investigate the suspected contravention for the purposes of s 483AA(2), having regard to the nature of the contraventions found in the FCCA Decision.

[25] Given the nature of the contraventions found in the FCCA Decision, namely, that the contraventions arose from a finding of an implied direction to perform pre-start duties, it was necessary for Mr Worsley to be able to access and inspect non-member records in order to properly investigate whether the same contraventions arose with respect to other employees of the Respondent.

(c) Ground 4

[26] The Appellant noted the fourth ground of appeal concerned the Deputy President's consideration that the order sought extended to classifications of employees, such as Store Managers, who are entitled to access time in lieu of overtime as a basis for making any order for the production or inspection of non-member records.

[27] The Appellant submitted the Deputy President erroneously posed the test as being whether the evidence demonstrated that employees are entitled to payment for pre-start duties when the question was whether Mr Worsley had a reasonable suspicion.

[28] The Appellant further submitted that the Deputy President erred in not permitting the Appellant to require the production of or to be provided access to any records at all, or in part, on the basis of the assertion that the suspected contraventions did not affect some, but not all, classes of employees.

(d) Ground 5

[29] Finally, the Appellant submitted that the Deputy President erred by considering the alleged work and time involved in producing the records sought as a basis for refusing to make any order under s 483AA with respect to non-member records. The Appellant submitted further that the consequence of the Deputy President's reasoning, if correct, would be that a permit holder, who reasonably suspects a contravention of the Act or an instrument has occurred or is occurring, can be denied access to non-member records or documents which are directly

relevant to the suspected contravention (and are necessary to properly investigate the contravention) on the grounds of the burden on the suspected contravener. That approach was submitted to find no support in the text of the sections and was inconsistent with the statutory scheme.

Respondent's Submissions

[30] Regarding grounds 1 and 3 of the Appeal, the Respondent submitted that whether the suspected contravention fits within the definition of a serious contravention as found in section 557A of the Act is not relevant. The test is whether it is necessary, for the proper conduct of the investigation that the permit holder have access to non-member records. In this case, the test is whether, in investigating the suspected contraventions of section 50 and 323 of the Act, non-member records were necessary to conduct a proper investigation.

[31] Regarding ground 2 of the Appeal, the Respondent noted the similarity to ground 3, and submitted that the test is not the nature of the suspected contravention. The test is whether access to non-member records is necessary for the investigation of the suspected contravention. The Appellant had the onus to demonstrate that access was necessary. The Court made findings and declarations in the FCCA Decision. Those findings were relevant to three employees of the Respondent. Any contravention relevant to those employees had been resolved by the Court's decision.

[32] Regarding ground 4 of the Appeal, the Respondent submitted that the Commission's role was to make a decision on the application it had before it. The Appellant sought an order that covered all employees covered by the Respondent's enterprise agreements, with the exception of transport employees. The draft order reflected that position. If the Appellant sought to revise its application and draft order to exclude classifications, it was a matter for it however it chose not to do so.

[33] Finally, in response to ground 5, the Respondent submitted that section 483AA provides that the order sought may include requiring the employer to allow the permit holder to inspect and make copies of specified non-member records or documents, and to require the employer to produce or provide access to specified non-member records or documents. The nature of the order sought, using the words of the section, required the employer to produce records or documents. Having sought an order including those terms, the Commission, in exercising its discretion as to whether or not to make the order, is able to consider the effect of such an order on the Respondent.

The Respondent's Notice of Contention

[34] By a draft notice of appeal, the Respondent provided the Appellant with a Notice of Contention that, in the event the Commission finds error in the Decision as contended by the Appellant in this appeal, the Respondent contended that there was no evidence before the Deputy President to satisfy the jurisdictional prerequisite that there was a suspected contravention of the Act or a term of a Fair Work Instrument that related to or affected a member of the permit holder's organisation.

[35] In reply submissions, the Appellant addressed the Notice of Contention, and submitted:

(a) Holding a reasonable suspicion involves the formation of *"a state of conjecture or surmise"* based on *"sufficient grounds reasonably to induce that state of mind"* and is something falling well short of certainty and may be based on hearsay material or materials which may be inadmissible in evidence. It was not put to Mr Worsley in cross-examination that he did not hold that suspicion or that there was not a basis for a reasonable suspicion and no submission was advanced to that effect at first instance.

(b) It was not contended by the Respondent that the Appellant does not have members who are employed by the Respondent in its supermarkets and distribution centres to whom the suspected contraventions relate, or who would be affected by the suspected contraventions.

(c) The Respondent's assertion of lack of particularisation and that no evidence of specific conduct alleged against the Respondent relevant to a member of the Appellant's organisation is not a relevant consideration of either the Deputy President at first instance, or the Full Bench. Sections 482 and 483 require only that the permit holder hold a reasonable suspicion that a contravention has occurred and not that a permit holder prove that a contravention has in fact occurred.

Submissions on Privacy Act

[36] In the hearing of the Appeal, an issue raised briefly before the Deputy President[2], being the application of the *Privacy Act 1988* (Cth), was the subject of greater scrutiny. The Appellant and the Respondent subsequently filed further submissions regarding the application of the *Privacy Act 1988* (Cth).

[37] Having determined, as we do below, that the Decision was not affected by appealable error as urged by the Appellant, it is not necessary to deal with the issues regarding the *Privacy Act 1988* (Cth). We further do not consider it appropriate to do so as any observations we make would necessarily be *obiter* given that the appeal can be disposed of on the aforementioned basis.

Permission to Appeal

[38] There is no right of appeal and an appeal may only be made with permission of the Commission. If permission is granted, the appeal is by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[3] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[4] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[39] The decision under appeal is of a discretionary nature. As the majority of the High Court held in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[5]

> *"'Discretion' is a notion that 'signifies a number of different legal concepts. In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result.' Rather, the decision maker is allowed some latitude as to the choice of the decision to be made. The*

> *latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision maker is required to make a particular decision if he or she forms a particular opinion or value judgement."*
>
> (Citations omitted)

[40] The majority in that decision also held that a decision maker charged with making a discretionary decision has some latitude as to the decision to be made, and given this, the correctness of the decision can only be challenged by showing error in the decision-making process.[6] Such error has also been described as the discretion not being exercised correctly.[7] It is not open to an appeal bench to substitute its view on the matters that fell for determination before the Member at first instance in the absence of appealable error. The classic statement as to the approach to be taken in relation to whether there is error in a discretionary decision was stated by the High Court in *House v The King* as follows:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed, and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."*

[41] In addition to the grounds of appeal above, the Appellants submitted that it is in the public interest for permission to be granted for the following reasons:

(a) The appeal raises matters of general importance in respect of the appropriateness of orders relating to the inspection of records concerning serious contraventions of the Act (s.557A).

(b) The decision at first instance manifests an injustice to the Appellant as the Appellant cannot properly investigate the suspected serious contraventions of the Act without an order from the Commission.

(c) The decision at first instance is disharmonious with decisions dealing with similar matters.

[42] For the reasons that follow we have decided to grant permission to appeal on the basis that the appeal raises issues of importance and general application in relation to the granting of orders relating to access to non-member records for the purpose of investigating contraventions of the Act, and the relevant considerations in the exercise of s.483AA.

Consideration

[43] Sub-division A of Division 2 of Part 3-4 of the Act provides for entry to investigate suspected contraventions. Sections 482 and 483 of the Act operate only where there is a suspicion of contravention that relates to or affects a member of a permit-holder's organisation, where the organisation is entitled to represent the industrial interests of that member, and the member works on the premises concerned.

[44] The exception to the ability to inspect, or later access, records applies where the record is a non-member record or document as defined in section 482(2A). Non-member records are subject to section 483AA. Section 483AA of the Act provides for a permit holder to make an application for an order to:

> (a) Require an 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); and/or
>
> (b) Require an employer to produce or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).

[45] Sub-section (2) of s.483AA provides the Commission may make such an order if it is satisfied that the order is necessary to investigate the suspected contravention.

[46] As was observed by the Appellant, the Respondent, and the Deputy President, in *Independent Education Union of Australia v Australian International Academy of Education Inc*,[8] Jessup J addressed the interpretation of s.483AA and the meaning of the words *'necessary to investigate'*. His Honour found:

> *"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 recognized 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)[sic. –s.482(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."*
>
> [Emphasis added]

[47] The satisfaction by the Commission that it is necessary, for the proper conduct of the investigation or a suspected contravention relating to or affecting a member, that specified non-member records be inspected or copied, is a jurisdictional fact that must be satisfied before an order pursuant to s.483AA can be contemplated.

Grounds 1 and 3

[48] The Deputy President, correctly in our view, found that the concept of being necessary also carried with it the meaning that the investigation of the suspected contravention could not properly be conducted without access to the particular non-member records sought. The Deputy President also correctly found that the evidence did not support a finding that the Appellant was unable to properly investigate the alleged contravention without having access to the non-member records that are sought.

[49] Insofar as the Appellant now asserts that the Deputy President erred in failing to consider whether the non-member records sought were necessary to investigate whether the suspected contraventions constituted serious contraventions for the purposes of s.557A of the Act, we note that no reference to that provision was made in the Application,[9] and only limited reference was made in proceedings.[10] Finally, the submission of the Appellant at first instance was:[11]

> *Now - I'm terribly sorry, the overall submission, obviously, of the applicant is that there is - that these documents that are sought are necessary for Mr Worsley to investigate the contraventions of section 50 at 323 of the Fair Work Act. And in addition to that, and importantly, to consider and understand the extent and the nature of those contraventions, particularly in circumstances where Mr Worsley has a reasonable suspicion that these contraventions are widespread and would satisfy the definition of a serious contravention under section 557A (1) and (2) of the Act.*

[50] The issue of s.557A goes to the extent of the asserted contravention, and whether it meets the definition of serious contravention, not whether it is necessary for the proper conduct of the investigation that the permit holder have access to non-member records. In answering that latter relevant question, it was unnecessary to consider s.557A.

[51] While the Deputy President found *"There is no evidence, for example, about why the inspection of member records would not be sufficient to investigate the suspected contravention"*,[12] it became additionally apparent in the hearing of the appeal that there had been no call at all for the records of members of the Appellant. In light of that fact, it would be impossible to find that inspection of member records would not be sufficient to investigate the suspected contravention. Further, as the Deputy President correctly pointed out, at paragraph [32] of the Decision, absent any evidence as to the breakdown of the Appellant's "*membership compared to non-union membership at ALDI*", a finding of necessity could be made. For example, if 95% of the relevant group of employees were members of the Appellant, it would not be necessary for the Appellant to inspect non-member records in order to investigate the suspected contravention.

[52] We therefore reject these grounds of appeal.

Ground 2

[53] The Appellant's reliance on the FCCA Decision did not advance the Appellant's case regarding necessity. The Appellant submitted that, given the nature of the contraventions found in the FCCA Decision, *"…it was necessary for Mr Worsley to be able to access and inspect non-member records in order to properly investigate whether the same contraventions arose with respect to other employees of the Respondent"*.[13] That submission again ignores the Appellant's failure to seek production and inspection of member records.

[54] Rather than seeking records or documents directly relevant to a suspected contravention which the permit-holder suspected, being one which related to or affected a member, the Appellant impermissibly sought general production from some 13,000 employees,[14] without the distinction between members and non-members.[15] The sheer breadth of the proposed order, and its focus on other than suspected contraventions involving members, highlighted its failure to conform with the requirements of s.483AA. We reject this ground of appeal.

Grounds 4 and 5

[55] The Deputy President's consideration that the order sought extended to classifications of employees, such as Store Managers, who are entitled to access time in lieu of overtime, as a basis for not making any order for the production or inspection of non-member records was unremarkable, and consistent with the objects of Part 3-4 of the Act. As noted above, s.480 of the Act provides:

> *The object of this Part is to establish a framework for officials of organisations to enter premises that balances:*
>
> > *(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*

> *(i) this Act and fair work instruments; and*
>
> …
>
> *(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.*

[56] Whether it was the consideration of individual groups of employees, such as Store Managers, or the broader grouping of all 13,000 employees who would have been the subject of the proposed order, the Deputy President was correct in the exercise of her discretion to consider the effect of the proposed order on the Respondent. That effect was estimated to be that the Respondent would require nine months to generate the information sought by the Appellant, and the Appellant would require three months to review that information. In those circumstances, it was unremarkable that the Deputy President had regard to the volume of work and time involved in producing the records sought by the Appellant in not granting the order sought.

[57] We further do not accept that the Deputy President erred in not ordering the production of part of the documents sought on the basis of the assertion that the suspected contraventions did not affect some, but not all, classes of employees. While the possibility of different groupings and exemplars was explored, the Deputy President's conclusion that the evidence did not support a finding that the Appellant was unable to properly investigate the alleged contravention without having access to the non-member records rendered any refinement of the order sought as otiose.

[58] We therefore reject these grounds of appeal.

Conclusion

[59] As this matter raises issues of importance and general application in relation to the appropriateness of orders relating to access to non-member records for the purpose of investigating contraventions of the Act, and the relevant considerations in the exercise of s.483AA, we grant permission to appeal.

[60] Upon a considered analysis of the parties' submissions on appeal, we are not satisfied that the Appellant has identified any instance of appealable error in the Decision. We consider that the Deputy President's approach to dealing with the Appellant's application was correct. Having found no errors with respect to the Deputy President's determination of the matter, we dismiss the appeal.

[61] We order that permission to appeal is granted but dismiss the appeal.

VICE PRESIDENT

Appearances:

Mr M *Gibian*, of Senior Counsel, and Mr A Guy of Counsel for the Appellant.
Mr GJ *Hatcher*, of Senior Counsel, and Ms A Perigo of Counsel for the Respondent.

Hearing details:

2023.
Sydney.
19 September.

Final written submissions:

Appellants submissions on the Privacy Act dated 27 September 2023.
Respondents' submissions on the Privacy Act dated 3 October 2023.

Printed by authority of the Commonwealth Government Printer

<PR766419>

---

[1] *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Limited* [2023] FWC 1671.

[2] Transcript 16 June 2023, at PN 438 and 449

[3] *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[4] *Wan v Australian Industrial Relations Commission and Another* (2001) 116 FCR 481 at [30].

[5] (2000) 203 CLR 194, at [19] per Gleeson CJ, Gaudron J and Hayne J.

[6] Ibid at [21].

[7] *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ

[8] [2016] FCA 140

[9] Transcript 16 June 2023, at PN 129.

[10] Transcript 16 June 2023, at PN 12, 285, 335, 341 and 360.

[11] Transcript 16 June 2023, at PN 335.

[12] Decision at [28].

[13] Appellant's Submission at [31].

[14] Transcript 16 June 2023, at PN 362.

[15] Transcript 16 June 2023, at PN 310 to 330.