[2026] FWC 2 [Note: An appeal pursuant to s.604 (C2026/23) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.185 - Application for approval of a single-enterprise agreement

Aldi Foods Pty Limited As General Partner Of Aldi Stores (A Limited Partnership) Trading AS Aldi Stores

(AG2024/4407, AG2025/972 & AG2025/1118)

DEPUTY PRESIDENT SLEVIN SYDNEY, 2 JANUARY 2026

Application for approval of the ALDI Prestons Agreement 2024 - Application for approval of the ALDI Jandakot Agreement 2025 - Application for approval of the ALDI Stapylton Agreement 2025 – concern about better off overall test – s. 191A - Agreement approved with amendments.

Introduction

[1] ALDI Foods Pty Ltd as General Partner of ALDI Stores (**ALDI**) has made three applications for the approval of enterprise agreements known as the ALDI Stapylton Agreement 2025 (**Stapylton Agreement**), ALDI Prestons Agreement 2024 **(Prestons Agreement**), and the ALDI Jandakot Agreement 2025 (**Jandakot Agreement)** (together the **Agreements**). Each Agreement is a single enterprise agreement and the Commission must approve each Agreement if the requirements in ss. 186 and 187 of the Act are met. The Applications were dealt with together and the question of whether the Agreements meet the requirements in ss. 186 and 187 was dealt with an earlier decision[1].

[2] In the earlier decision I found that each Agreement failed to meet the requirement in s. 186(2)(d), the better off overall test (**BOOT**). My finding in that regard was that part-time warehouse employees would not be better off overall if the Agreements applied to them than if the *Storage Services and Wholesale Award 2020* (**SSW Award**) applied to them due to the uncertainty associated with the employment arrangements for part-time warehouse employees.

[3] I expressed the view that the Agreements could still be approved as the BOOT concern could be addressed by specifying amendments to each Agreement pursuant to section 191A, which provides that if the Commission has a concern that an agreement does not meet the BOOT it may approve the agreement if satisfied that an amendment is necessary to address the concern. Section 191B provides that where the Commission specifies an amendment in approving the agreement the agreement is taken to be amended by the amendment.

[4] The specific concern raised in the earlier decision was that Hourly Rate part-time warehouse employees will not be better off overall due to the unpredictable nature of their hours of work. The hours provisions in the Agreements made work hours for these employees

unpredictable due to the requirement that the employees be available to work on any day of the week and the lack of a requirement to inform employees in advance of the time they were required to be at work on any given day.

[5] In the earlier decision I proposed to exercise the discretion in s 191A to approve the Agreements and stated an intention to specify an amendment as follows:

> **[68]** I propose to exercise the discretion and to specify an amendment that the Agreements provide for ALDI to reach agreement with each of its Hourly Rate part-time employees on a regular pattern of work, specifying at least, the hours worked each day, which days of the week the employee will work, and the actual starting and finishing times each day and to record that agreement in writing. Consequential changes will also be necessary to ensure that the rosters reflect the terms of the agreed regular pattern of work.

[6] Where the Commission intends to specify an amendment, s. 191A(3) requires it to seek the views of the employer, the employees and the bargaining representatives to the agreement. Directions were issued requiring ALDI to inform the employees of my intention to specify an amendment to the Agreements and provide them an opportunity to express their views. ALDI and the bargaining representatives were afforded the opportunity to file material and a hearing was held.

[7] The submissions and views of the parties went to two matters; the proper construction of s. 191A and whether an amendment should be specified.

Construction

[8] The Australian Council of Trade Unions (**ACTU**) sought permission to appear in the proceedings to address the Commission on the construction of s. 191A as the provision is relatively new and has limited precedents in contested proceedings. The ACTU highlighted its role as the sole national employee organisations' peak council, representing approximately 2 million workers through its affiliates, three of which, the SDA, UWU and TWU, are bargaining representatives in the proceedings. The ACTU submitted that the construction of section 191A and the Commission's exercise of its powers under the section are of significant interest to its affiliates and their members. That interest was not confined to the unions appearing in these proceedings.

[9] The ACTU also submitted that it has been granted permission to intervene in previous significant cases before the Commission, particularly where the interpretation of new provisions was at issue.

[10] ALDI opposed the ACTU's intervention, arguing that section 191A(3) only requires the Commission to seek the views of the employer, award-covered employees, and bargaining representatives directly affected by the agreements. ALDI contended that the ACTU does not fall into these categories and that its intervention was unnecessary, as its affiliate unions were already involved in the proceedings and could provide relevant submissions. The SDA and UWU supported the ACTU’s intervention and adopted the written submissions filed by the ACTU prior to the hearing.

[11] I granted the ACTU permission to appear in the proceedings on the basis that as a peak council recognised under the FW Act, it, along with all of its affiliates, has an interest in the approach taken by the Commission in construing recent amendments to the Act. The ACTU's submissions were confined to the operation of s. 191A. I accept ALDI's submission that the ACTU is not identified as a party that I must seeks the views about the specified amendment for the purpose of s. 191A(3). However, that does not otherwise constrain the power pursuant to s.590 of the FW Act for the Commission to inform itself in relation to any matter before it in such manner as it considers appropriate. Nonetheless I confined the ACTU to making submissions on the construction point only. I have not taken into account the views of the ACTU on the specified amendment.

[12] Section s.191A reads:

> **191A FWC may approve an enterprise agreement with amendments**
>
> (1) This section applies if:
>
> (a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and
>
> (b) the FWC has a concern that the agreement does not meet the requirement set out in paragraph 186(2)(d) (better off overall test).
>
> (2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an amendment specified by the FWC is necessary to address the concern.
>
> (3) If the FWC intends to specify an amendment under subsection (2), the FWC must seek the views of the following:
>
> (a) the employer or employers that are covered by the agreement;
>
> (b) the award covered employees for the agreement;
>
> (ba) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—those employees;
>
> (c) a bargaining representative for the agreement.

[13] I was taken to a number of cases setting out the principles of statutory interpretation as well as cases of this Commission where s. 191A has been referred to, albeit in circumstances where the was no contest about its construction or application. On statutory interpretation the parties agree that the starting point is the text of the provision noting that regard is to be had to its context and purpose[2].

[14] In *Australian Municipal, Administrative, Clerical and Services Union v City of Darebin, Australian Nursing and Midwifery Federation and Association of Professional Engineers, Scientists and Managers Australia* [2024] FWCFB 381 the Full Bench made the following observation about s191A at [45]:

> … Section 191A applies if the Commission has a concern that the agreement does not meet the better off overall test set out in s 186(1)(d). The application of the section does not depend on whether, in fact, an enterprise agreement does not meet the better off overall test. It applies if the member of the Commission forms a state of mind, namely, a concern that the agreement does not meet the better off overall test. Furthermore, the better off overall test requires a global or overall comparison between the various terms and conditions of the agreement and the relevant modern award. Merely comparing one term of an agreement with the equivalent term

> of the relevant modern award could not give rise to a concern that the agreement does not meet the better off overall test.

[15] The different approaches taken by the parties to the construction of s. 191A goes to the role context and purpose have to play in shaping the meaning of the provision and the way it is to applied.

[16] ALDI, supported by Ms McNaughton, contended that that the purpose and context of section 191A is to facilitate the approval of agreements made between employers and employees, not to determine the content of those agreements. It stated that the section was introduced to reduce delays and simplify the approval process, not to allow the Commission to impose amendments that fundamentally alter agreements.

[17] ALDI contended that section 191A is constrained in its operation by its purpose which is evident from the object of the Act in section 3, which includes at 3(f):

> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action

[18] ALDI also relied upon the objects of Part 2-4 at s. 171 which read:

> **171 Objects of this Part**
>
> The objects of this Part are:
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
> (i) making bargaining orders; and
> (ii) dealing with disputes where the bargaining representatives request assistance; and
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[19] ALDI contended that it would be inconsistent with these objects to read section 191A as granting the Commission the power to amend the content of an agreement that has already been agreed upon by the employer and employees, especially when there is opposition to the proposed amendment and the amendment will not lead to productivity benefits.

[20] ALDI also took me to the *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Revised Explanatory Memorandum**). In dealing with the insertion of new sections 191A and 191B the memorandum concluded:

> 773. These provisions are intended to operate similarly to the process for accepting undertakings in existing sections 190–191, while being more direct and reducing delays.

[21] ALDI submitted that the section was introduced to reduce delays and simplify the approval process, not to allow the Commission to impose amendments that fundamentally alter the agreements.

[22] Contextually, ALDI contended that section 191A was intended to operate similarly to section 190, which deals with undertakings, but in a more direct manner to reduce delays. ALDI submitted that the limitations on undertakings in section 190, such as the requirement that undertakings not cause financial detriment or substantial changes to an agreement, should also apply to section 191A. It also pointed to new provisions for intractable bargaining determinations, which allow the Commission to intervene in the bargaining process and determine terms and conditions of employment only in limited circumstances when parties cannot reach an agreement. ALDI argued that it would be inconsistent for section 191A to allow the Commission to determine content of an agreement at the approval process where there are other provisions that permit the Commission to do so but only in a limited way.

[23] ALDI also submitted that the Commission must specify amendments with sufficient precision and only to the extent necessary to address the BOOT concern. ALDI argued that the amendment specified in the earlier decision was not necessary and would impose significant operational challenges and fundamentally change the nature of the Agreements.

[24] The ACTU, supported by the SDA and UWU, submitted that s.191A is a beneficial provision designed to enable the approval of enterprise agreements while addressing concerns related to the BOOT. The ACTU submitted that purpose of the provision is evident from the text of s.191A which is clear and unambiguous, stating that the Commission's power to amend an enterprise agreement arises only when there is a concern that the agreement does not meet the BOOT. The Commission may approve the agreement if it is satisfied that a specified amendment is necessary to address that concern. Its purpose is to ensure that employees are not worse off under an agreement.

[25] The ACTU submitted that section 191A is textually and functionally distinct from section 190. While section 190 allows employers to offer undertakings from employers to address concerns, including a concern that the BOOT is not met, section 191A gives the Commission the discretion to specify amendments directly. The ACTU argued that the limitations in section 190, such as ensuring undertakings do not cause financial detriment to employees or substantial changes to an agreement, do not apply to section 191A. The discretion in s. 191A is broader and allows the Commission to address BOOT concerns more directly and efficiently. It was submitted that the proximity of s.190 to s. 191A and the contrast between the wording of those sections make it clear that the Act does not intend the Commission’s specified amendment to be constrained in the same way that the acceptance of an undertaking must be. The Revised Explanatory Memorandum describes the provisions as similar, not the same.

[26] The ACTU submitted that the provision is consistent with the objects of the Act including by permitting the Commission to approve agreements with amendments that would otherwise not be approved. It submitted this was consistent with the Revised Explanatory Memorandum by ensuring agreements meet the BOOT while facilitating their approval.

[27] The ACTU acknowledged that the Commission's power under section 191A is constrained. The Commission can only specify amendments that are necessary to address the

BOOT concern, and the amendments must be tailored specifically to resolve the identified BOOT issue. The ACTU submitted that the Commission's evaluative judgment of what is necessary should be informed by the statutory scheme, the objects of the Act, the terms of the agreement, the views of the parties, and any other relevant evidence.

[28] The ACTU submitted, contrary to ALDI's argument, section 191A should not be interpreted narrowly. It submitted ALDI's submissions to the effect that the content of agreements should be the exclusive domain of the parties should be rejected. It pointed to provisions where the Act operates either directly, or empowers the Commission to amend agreements reached by the parties including:

- s. 55 and 56 which operates such that a term of an agreement cannot oust a national employment standard;
- s. 202 where the model flexibility term is inserted into agreements that do not have a complying term;
- s. 205 where the model consultation term is inserted into agreements that do not have a complying term s. 217 - variation of an enterprise agreement to remove an ambiguity or uncertainty;
- s. 205A where the delegates rights term in a modern award is inserted into agreements that do not have a complying term;
- s. 217 which permits variation to remove an ambiguity or uncertainty;
- s. 218 which permits a variation of an enterprise agreement on referral by Australian Human Rights Commission;
- 218A where an enterprise agreements may be varied to correct or amend errors, defects or irregularities;
- s.253 which provides that a term of an agreement does not operate if it is not about permitted matters; and
- s. 320 which provides for the variation of transferable instruments to remove an ambiguity or uncertainty about how a term of the instrument operates.

[29] I consider ALDI's approach construes s.191A too narrowly. In effect ALDI contends that the discretion to make a specified amendment under s191A(2) can only be exercised where the employer and employees who made the agreement consent. ALDI's reliance on the objects of the Act to promote enterprise-level collective bargaining and facilitate the approval of agreements made between employers and employees does not lead to the conclusion that the intention was that the discretion be limited to circumstances where all parties consent.

[30] The Full Federal Court addressed a similar argument about freedom of contract in enterprise agreements in *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84. The Court rejected the notion making the following observation:

> [89] In his reasons, the primary Judge said that "Toyota contended and it was not disputed, that an enterprise agreement made under the FW Act is a form of delegated legislation". It appears that that contention was made in the context of Toyota's submission based on s 46 of the AI Act to which we have referred. However, although the FW Act provides that an enterprise agreement is "made" otherwise than by the Commission, the Act does more than merely impose conditions upon, and give additional legal effect to, an agreement made between private parties. The effect of the legislation is to empower the employer and the relevant majority of its employees to specify terms which will apply to the employment of

> all employees in the area of work concerned. The legal efficacy of those terms will arise under statute, not contract, and, as mentioned above, will be felt also by those who did not agree to them. Someone, such as an employee subsequently taken on, who had nothing to do with the choice of the terms or the making of the agreement, will be exposed to penal consequences under s 50 if he or she should happen to contravene one of the terms. When viewed in this way, it is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character.
>
> [90] An enterprise agreement is a statutory artefact made by persons specifically empowered in that regard, and under conditions specifically set down, by the FW Act. It is enforceable under that Act, and not otherwise. There is, in the circumstances, no reason to approach the question of legislative intent with a predisposition informed by notions of freedom of contract

[31] The Court pointed to the distinction between the agreement being made by the parties and it being approved by the Commission. The *basic rule* for approval is found in s. 186(1):

> (1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

[32] The rule is that an agreement made by parties can only be approved by the Commission if the Commission is satisfied that the requirements in s. 186 and s. 187 are met. The BOOT in s. 186(2)(d) is one of the requirements. Section 191A, however, permits a departure to the *basic rule* allowing an agreement to be approved where the Commission is concerned that the BOOT requirement is not met. It permits the Commission to approve the agreement by specifying an amendment to the agreement that meets the concern. If an amendment is specified s. 191B operates to amend the agreement in the terms of the specified amendment.

[33] Section 191A does not require the parties who made the agreement consent to the amendment. It does require the Commission to seek the views of the parties, but that is as far as it goes. It may be that the views of the parties convince the Commission that no amendment should be specified. The views of the parties may be that an undertaking under s. 190 is preferable. The parties may take the view that the agreement should not be approved. Consequently I reject ALDI's contention that the Commission is not empowered to alter the content of an agreement made by the parties without their consent.

[34] Other provisions of the Act referred to by the ACTU demonstrate that the Act operates to alter an agreement of the parties in a number of circumstances. Those circumstances include where the agreement departs from the national employment standards or is not about permitted matters. Where this is the case the offending terms of the agreement will not operate. At the approval stage the Act deems that specific terms going to individual flexibility, consultation and delegates rights which depart from legislated standards are to be replaced with terms that do. The Commission may also vary agreements to remove an ambiguity or uncertainty, on referral by Australian Human Rights Commission, or to correct or amend errors, defects or irregularities. Each of these provisions change the agreement reached by the parties, none of them are contingent upon the consent of the parties

[35] Section 190 is also a provision where the terms of an agreement made may be altered by the Commission at the point of approval. Where there is concern that a requirement in s. 186

or s. 187 is not met the Commission may accept an undertaking from the employer that addresses the concern. Once an undertaking is accepted, s. 191 operates so that the undertaking is taken to be a term of the agreement. Section 190 and 191 are described in the Revised Explanatory Memorandum as similar terms to ss. 191A and 191B.

[36] Section 191A is similar to s. 190 but it is more confined in its scope. ALDI relies on s. 190, which requires that the Commission be satisfied that undertakings not cause financial detriment to employees or result in substantial changes to agreements as contextual guidance that suggests that the Commission is also so constrained in the amendment it specifies under s. 191A. While the provisions are similar in that they permit the approval of agreements where the basic rule in s. 186(1) is not met, the provisions are also different. Section 190 allows undertakings to address a broader range of concerns than s. 191A. It is not confined like s. 191A to addressing a concern that the BOOT is not met. Section 190 allows the employer to make the undertaking to meet the concern. It requires that the Commission be satisfied that there is not financial detriment to employees arising from the undertaking and that it not result in substantial changes to the agreement. It also requires the Commission to seek the views of the bargaining representative for the agreement. Consent is not required from the bargaining representatives and if there is opposition the Commission must decide to accept the undertaking in circumstances where there is no consent.

[37] By contrast s. 191A only applies to a concern about the requirement in s. 186(2)(d). It allows the Commission to approve the agreement if it is satisfied that a specified amendment is necessary to address the concern. It requires that the Commission to seek the views of the employer, the employees and the bargaining representatives. Because the specified amendment can only address the BOOT concern it can be expected that it will not result in a financial detriment to employees, so this aspect of the provision is similar to s. 190. Section 191A however departs from s. 190 by making no mention that the specified amendment must not result in substantial changes to the agreement. Consequently, I also reject the suggestion by ALDI that I am constrained in specifying an amendment by a requirement that the amendment does not result in substantial changes to the agreement.

[38] I accept the submissions of all parties that should I specify an amendment it should be confined to addressing the concern expressed in the earlier decision that the Agreements do not meet the BOOT.

The Amendment

[39] In the earlier decision I indicated that I intended to exercise the discretion in s. 191A to specify an amendment to each of the Agreements to provide that ALDI agree in writing with each of its Hourly Rate part-time employees a regular pattern of work by specifying, at least, the hours worked each day, which days of the week the employee will work, and the actual starting and finishing time on each day.

[40] Subsection 191A(3) relevantly provides that if the Commission intends to specify an amendment to an agreement it must seek the views of the following: the employer or employers that are covered by the agreement; the award covered employees for the agreement; a bargaining representative for the agreement. To obtain those views, directions were issued. The directions required ALDI and the bargaining representatives to file and serve their views on the specified amendments. The directions also required ALDI to provide a copy of the earlier

decision and a request that employees who wished to provide views do so by email. The means of communicating the request to the employees was ALDI's internal messaging system MyALDI App. This was the means used by ALDI to communicate with employees when the Agreements were made.

[41] Seventeen employees provided views. Thirteen expressly supported the proposed amendments. Comments were made by these employees that the lack of scheduled finish times and rostered days creates significant difficulties in planning medical appointments, family and social events, school pickups, and supplementary employment. The four who did not expressly support the amendments did not oppose them either. Those responses focussed on matters other than the specified amendment.

[42] Submissions were received from ALDI and the following bargaining representatives: the Shop, Distributive and Allied Employees' Association (**SDA**); the United Workers Union (**UWU**) and Ms McNaughton. Ms McNaughton was a bargaining representative for ALDI. The Transport Workers Union of Australia (**TWU**), also a bargaining representative did not provide a submission but indicated in correspondence that it supported the views of the SDA. There were a number of individual employee bargaining representatives identified in the applications. They were provided with the directions and ALDI confirmed that they also had access to the MyALDI App request for views. They did not provide a view.

[43] ALDI opposed the proposed amendments. The company argued that the amendments would significantly change the employment arrangements in the Agreements and impose restrictions on the flexibility that is central to its operations. ALDI contended that flexibility in rostering is essential for meeting operational requirements, such as managing fluctuating workloads and ensuring timely delivery of goods to stores. The company also argued that the amendments would be impractical and uncertain, as they would require reaching agreements with a large number of employees, which could disrupt its operations, particularly if agreement could not be reached. Additionally, ALDI stated that the proposed changes would impose arrangements that employees had not approved and that the company had not agreed to during bargaining, fundamentally altering the terms of the Agreements to the extent that they would no longer represent the agreements made.

[44] ALDI maintained that the current flexible employment arrangements are beneficial to employees, as they allow for higher pay rates compared to the relevant modern award. Ms McNaughton adopted and supported the view of ALDI. ALDI and Ms McNaughton urged the Commission not to exercise the discretion to specify amendments to the Agreements.

[45] The SDA supported the proposed amendment. The SDA submitted that the amendment would address the BOOT concern identified by the Commission, as it would provide predictability and stability for employees, allowing them to plan their lives outside of work. The UWU also supported the proposed amendment. The UWU argued that the amendment would provide much-needed clarity and certainty for part-time employees, resolving issues such as unpredictable finish times and hours of work. It contended that the amendments would address detriments associated with the hours arrangements in the Agreements, including difficulties in planning personal commitments, increased exposure to fatigue-related risks, and the perception among employees that they feel pressured into working additional hours without proper consultation. The UWU also contended that the amendment would reduce disputes over

the reasonableness of additional hours and improve the ability of employees to plan their lives outside of work.

[46] At the hearing I was provided with evidence from ALDI, the SDA, and the UWU. ALDI relied on witness statements of Ms Margaret McNaughton its bargaining representative and Ms Caitlin Gallagher-Hill ALDI's Director of Warehouse Operations.

[47] Ms McNaughton objected to the proposed amendments. She stated that the amendments would significantly alter the employment arrangements under the enterprise agreements and depart from previous agreements. She contended that ALDI requires flexibility in employee work hours and days to meet operational needs, and this flexibility is reflected in the agreements. ALDI pays higher rates of pay to employees due to the flexible nature of their employment arrangements. She stated that ALDI offers competitive pay rates to attract employees to work under these flexible terms, which differ from those generally offered in the storage services and wholesale industry. Ms McNaughton described the current working arrangements of part-time warehouse employees as ongoing employment and said ALDI does not employ casual workers in warehouse operations. The employees typically work 40-60 contract hours per fortnight, and additional hours are worked during peak periods rather than using casual labour. ALDI prioritises offering permanent employment to provide employees with job security and certainty of ongoing work

[48] Ms McNaugton contended that the proposed amendments would impose arrangements on employees and ALDI that neither party had agreed to. The amendments would require ALDI to reach further agreements with potentially 1,256 employees, which she claims is impractical and uncertain. Ms. McNaughton also provided a detailed history of enterprise agreements across ALDI's regions, noting that the terms and conditions of employment have remained consistent since the first agreement was approved in 2015.

[49] Ms Caitlin Gallagher-Hill has been employed by ALDI for approximately 9 years holding various roles including Executive Manager Logistics and Graduate Executive Manager Store Operations. She is currently the Director of Warehouse Operations Projects, based in the ALDI Minchinbury Region, and previously worked in the Stapylton Region. Ms Gallagher-Hill has responsibilities in ALDI's warehousing operations across all eight distribution centres in Australia. She said ALDI's operations and workforce are arranged to ensure flexibility by rostering employees to meet operational requirements, and the proposed amendment would significantly impact this flexibility.

[50] Ms Gallagher-Hill described the rostering arrangements at ALDI. Rosters are prepared 4-6 weeks in advance based on volume forecasts, past order history, upcoming events (e.g., Easter, Christmas), and an assumed 6-hour shift per person. Adjustments are made for employees on leave, those with individual flexibility arrangements, and other factors. Rosters are published 2-3 weeks before the start of the roster period, and any changes after publication are made by agreement. Warehouse employees have set start times but no set finish times. While shifts typically average 6 hours, they can be shorter or longer depending on operational needs. Employees are informed of the expected finish time at the beginning of each shift, and breaks are scheduled based on the expected shift length.

[51] Ms Gallagher-Hill said ALDI operates on a just-in-time ordering basis, requiring flexibility in employee work hours to meet fluctuating demand and ensure timely delivery of goods to stores. During peak periods or unexpected disruptions, such as delayed inbound deliveries, absences, or IT issues, employees may need to work longer shifts to complete orders.

[52] Ms Gallagher-Hill explained that ALDI's rostering arrangements were less flexible during the COVID-19 pandemic when ALDI implemented fixed rosters to minimize the risk of disease spread. This led to operational challenges, including cancelled store orders and dissatisfaction among employees due to lack of flexibility.

[53] Ms Gallagher-Hill said ALDI prioritises offering permanent employment to warehouse employees rather than casual labour, providing job security and the opportunity to earn additional income by working above their contract hours. Under current arrangements employees agree on the minimum number of contract hours to be worked per fortnight, ranging from 21 to 70 hours, and are typically rostered to work these hours as an average each fortnight. ALDI allocates weekend work across all employees to ensure fairness and provide opportunities to earn penalty rates. Employees can request individual workplace flexibility arrangements to accommodate personal commitments, such as appointments or family obligations.

[54] Ms Gallagher-Hill said the proposed amendment would restrict ALDI's ability to maintain flexibility in rostering employees, which is critical for meeting operational requirements. Fixed rosters would make it difficult to balance fluctuating work demands and could lead to inefficiencies, such as idle employees during low-demand periods or unfulfilled store orders during high-demand periods.

[55] Ms Gallagher-Hill provided data on the shift lengths worked from June to November 2025. The data gave average shift lengths and total employee hours worked in the Prestons, Stapylton, and Jandakot distribution centres. It showed average shift lengths at the Prestons centre of between 5.7 and 6.45 hours, average hours as Stapylton of between 6.16 and 6.5 hours per shift, and average hours of between 5.62 hours and 5.91 hours at Jandakot. Across the centres shift lengths averaged between 5.6 and 6.5 hours, total hours fluctuated monthly based on demand, and daily hour requirements varied with Friday and Saturday requiring the most hours and Sunday the least.

[56] The SDA relied on a witness statement of Liam Betham an organiser with its Western Australian Branch. Mr Betham worked as a part-time warehouse operator at ALDI Jandakot Distribution Centre from October 2023 to August 2025 under the *ALDI Jandakot Agreement 2020*. He was contracted for 50 hours per fortnight, but typically worked 55-60 hours per fortnight. He was an SDA Union Delegate from February 2025. Mr Betham described his shifts at ALDI as lacking predictability in hours to be worked and finish times giving rise to difficulty in planning personal commitments, second jobs, studies, and family responsibilities. He also described challenges in applying for loans as banks only considered contracted hours, not actual hours worked. He said that workers felt pressured to work overtime and would face disciplinary action or be labelled "not team players" if they refused to stay longer than their notional shift lengths. He described students and parents facing challenges balancing work with studies or childcare. Workers often could not attend classes or pick up children due to sudden changes in shift lengths.

[57] Mr Betham supported the amendments. He said predictable finishing times would enable better planning for studies, childcare, and personal commitments. He said overtime should be a choice rather than an obligation. The amendment will allow ALDI to plan work hours more fairly, catering to individual employee needs. Workers will feel less pressure to stay beyond their nominal shifts. Planning hours and having rostered end times will reduce disciplinary actions and improve fairness.

[58] The UWU provided a statement from Penelope Alice Vickers who is logistics organiser based in the Brisbane metropolitan region which includes ALDI's Stapylton Warehouse. She consulted employees about the proposed amendments. Ms Vickers described employees concerns about the way they currently work. These included frustration about not knowing how many hours they would work each day and feeling pressured to work additional hours beyond their agreed contract hours. She said the lack of set finishing times and predictable hours negatively impacts their ability to plan personal commitments, such as family, study, and social activities. Some employees reported working all their agreed fortnightly hours in one week and being expected to work additional hours the following week and feared negative consequences if they refused to work extra hours. Ms Vickers stated there is uncertainty about what constitutes "reasonable overtime" under the Agreements, leading to potential disputes. Ms Vickers said unpredictable hours increase exposure to fatigue-related work health and safety risks. Employees struggle to prepare for long shifts or cumulative long hours over a week or fortnight.

[59] Ms Vickers stated employees at the Stapylton Distribution Centre support the proposed amendment. Employees believe the amendment would resolve long-standing issues and provide stability, allowing them to plan commitments outside of work.

[60] Prior to the hearing I circulated Draft Amendments to give the parties the opportunity the make submissions on the best way to frame the specified amendment for each Agreement. The Draft Amendments deleted the provision in the Agreements that: allow the employees to be rostered to work at any time on any day in a week from Monday to Sunday; and, require the employees to work on average up to five shifts per week averaged over a fortnight. Those provisions were to be amended to provide that an agreement be reached with with each employee that specified the hours to be worked each day, the days the employee is to work, and the starting and finishing times each day. Provision would also be made for variation to hours by written agreement. The Draft Amendments also proposed an amendment to the overtime provision to change the times at which overtime applied from more than 9 hours in a day and 80 hours in a fortnight to all hours outside of the agreed hours.

[61] During the course of the hearing I indicated that I did not believe the change to overtime was contemplated in the amendments specified in the earlier decision and that, in any event, I did not believe it was necessary to make the change to address the concern that the Agreements did not meet the BOOT requirement in s. 186(2)(d).

[62] Section 191A only permits the Commission to specify an amendment necessary to address the BOOT concern. That concern was expressed in the earlier decision as being the failure of the higher rates of pay to compensate for the non-monetary detriment created by the lack of certainty in working hours. My concern is that Hourly Rate part-time employees will not be better off overall under the Agreements compared to the SSW Award due to the unpredictable nature of their hours of work. The hours are unpredictable due to the requirement

that they be available to work on any day of the week, and the employees not knowing prior to commencing a shift the time they are required to be at work. I am satisfied that an amendment to the Agreements can address that concern.

[63] After hearing from the parties and considering their views and evidence I am of the view that the Agreements should be approved and the concern should be addressed by a specified amendment. The views expressed by the employees confirmed the findings in the earlier decision that the uncertainty associated with the hours provision for part-time warehouse employees created uncertainty and were a relevant detriment. ALDI submitted that because there was a small number of employees who gave views they should not be considered persuasive. It also led evidence that employees enjoyed the flexibility the arrangements provided. I prefer the views provided by the employees on employee preference. Those views however are consistent with the views of the employee bargaining representatives, the SDA and the UWU. Mr Betham has direct experience working under the arrangements alongside other workers who shared his view. Ms Vickers represents workers at ALDI and consulted with them. Those workers also confirmed the detriment associated with uncertain rosters. Those views support specifying of the amendment as proposed.

[64] I am not convinced by ALDI's submission that the specified amendment is a fundamental departure from the agreement reached or would provide operational difficulties to the extent stated in those submissions. The Agreements already make provision for minimum hours over a fortnight and notional shift hours based on those minimum contract hours. While ALDI will lose some flexibility when the new Agreements take effect, I do not consider the operational impact associated with that loss to outweigh the need to address the uncertainty. Ms Gallagher-Hill's evidence suggest that ALDI has sufficient data to inform it of its labour needs such that providing fixed rosters to its part time employees is not a significant burden. The spread of daily hours worked by employees at each warehouse is not significant. Those numbers were averages. I consider that managing the daily fluctuations will be a matter of more careful planning. Such planning has occurred in the past. Ms Gallagher-Hill described the use of fixed rosters during the COVID-19 pandemic which demonstrates that ALDI is capable of accommodating such arrangements. The arrangements that will be needed to accommodate the amendments will be more flexible than the COVID arrangements described by Ms Gallagher-Hill. They can include requests that employees work reasonable additional hours.

[65] Ms Gallagher-Hill's evidence was that additional hours were not available during COVID as it would involve members of one shift mingling with members of the next. The FW Act provides for the working of additional hours at s. 62. That provision will apply to permit ALDI to request or require an employee to work more than their agreed hours in in a week where the additional hours are reasonable. Employees will be entitled to refuse such a request in accordance with s. 62(2) applying the criteria in s.62(3) including to meet personal circumstances, including family responsibilities and the notice given by ALDI of any request or requirement to work the additional hours.

[66] I do not accept ALDI's submission that the amendments amount to a fundamental change in the Agreements. The Prestons Agreement covers 3,488 employees, the Jandakot Agreement covers 1,170 employees, and the Stapylton Agreement covers 1,825 employees. Giving a total of 6,483 employees. The amendments only apply to 1,256 employees of the total of 6,483 employees which is less than 20% of the workforces. ALDI already has agreed

minimum hour arrangements including notional shift lengths. The change will affect flexibility in rostering of around 20% of the employees but I do not consider that the number of employees impacted and the nature of the changes necessary to give effect to the amendments amount to a fundamental change in the bargain struck.

[67] ALDI also raised the difficulty of reaching agreement with all of its employees should the Agreements be amended given that the amendments will apply to 656 employees at the Prestons warehouse, 210 employees at the Jandakot warehouse, and 390 employees at the Stapylton warehouse. ALDI declined to engage with a suggestion that the amendments might include a period of time in which to reach these agreements. Despite this, I will include in the specified amendments that the agreements with employees must be finalised within eight weeks of the Agreements commencing. ALDI also raised a concern that there may be difficult in reaching agreements with some employees. I do not consider this to be a reason to not make the amendments. The employees have already agreed on minimum hours. The additional agreement on when hours are worked does not present as a significant challenge. It can be expected that both ALDI and employees will be act reasonable and not withhold agreement unreasonably. Should disputes arise each Agreement has a dispute resolution procedure that can be accessed by either party that provides for access to conciliation and arbitration by the Commission.

[68] For these reasons, despite my concern that the BOOT is not met, I will approve each Agreement pursuant to s. 186 and as permitted by s. 1091A. Separate approval decisions[3] will issue for each Agreement.

DEPUTY PRESIDENT

Appearances:

Ms A Perigo of Counsel for the Applicant
Mr A Amin for the SDA
Dr A Orchiston for the UWU

Hearing details:

17 December 2025
Sydney

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[1] [2025] FWC 3130

[2] See eg. *Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 2)* [2021] FCA 412 at [31] – [32] and the references contained therein.

[3] [2026] FWCA 1 (Prestons); [2026] FWCA 2 (Jandakot); [2026] FWCA 3 (Stapylton).