



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT DEAN

RE2023/262

s.483AA - Application for an order to access non-member records

Application/Notification by Shop, Distributive and Allied Employees Association

Canberra

10.00 AM, FRIDAY, 16 JUNE 2023

Continued from 06/04/2023

PN1

THE DEPUTY PRESIDENT: Good morning.

PN2

Mr Guy, you can hear me?

PN3

MR GUY: Yes, I can, thank you, Deputy President.

PN4

THE DEPUTY PRESIDENT: Thank you.

PN5

Ms Perigo, you can hear me?

PN6

MS PERIGO: Yes. Thank you, Deputy President.

PN7

THE DEPUTY PRESIDENT: All right, thank you.

PN8

Mr Guy, over to you.

PN9

MR GUY: Thank you, Deputy President. Deputy President, and I also thank the Commission for the court book, it seems a lot easier.

PN10

The application that's before the Commission today, Deputy President, you'll see, at pages 3 to 8 of the court book there, the relevant page, however, starts at page - or the relevant section starts at page 9 which is the draft order. This is an application, as you'd be aware, Deputy President, for a permit holder of the Shop Distributive and Allied Employees Association, Mr Worsley, who is also in the room with me today, to enter and inspect, or have copies made, of records relating to non-members who are employed by ALDI and covered by some eight enterprise agreements.

PN11

Now, from the outset, Deputy President, and this is made clear at court book page 140. The order would, as we can see, need to be modified so that employees who are covered by what's known as schedule 4 of all of those enterprise agreements, they are transport and distribution employees, are excluded. And I can have my solicitors send through some amended orders at the conclusion of the hearing, but it would be to have all retail and warehouse employees records be made available for inspection and copying by Mr Worsley.

PN12

Now, these records that my client is seeking are, as you'll see there on page 9 at the bottom, 3i, rosters - if you just bear with me for a moment, rosters, payslips, sign-on and sign-off records, timesheet adjustments and exception records for the

period between 1 April 2017 and 26 March 2023. Now, Deputy President, I won't go into this in too much detail now but rather, deal with it in closing after the evidence has been heard, but in short, my client requires these records to investigate suspected contraventions of three sections of the Fair Work Act, that being section 50, section 323 and section 557A.

PN13

And again, Deputy President, unless you want me to go into now, but perhaps it might be easier once the evidence has been heard, it's a submission of the SDA that those records are from - the records sought from both members and non-members and required for Mr Worsley to properly investigate suspected contraventions that he has of those three sections of the Act.

PN14

THE DEPUTY PRESIDENT: Sorry, Mr Guy, you just said members and non-members then.

PN15

Can you just - - -

PN16

MR GUY: Yes. Well, it's - sorry, no. For non-member records, yes.

PN17

THE DEPUTY PRESIDENT: All right.

PN18

MR GUY: So Deputy President, unless there are any specific questions, that's just the case in a nutshell. I have Mr Worsley here; he has put down two statements in respect of the matter. I understand Ms Perigo wishes to cross-examine him on his evidence and there are a number of objections that I've received this morning in respect of his evidence. And unless there's a different proposed course I would call him, and deal with the evidence that way.

PN19

THE DEPUTY PRESIDENT: All right.

PN20

Mr Guy, just one thing I would like you to deal with, not necessarily now, but perhaps before you close is the objections of the respondent on the basis that certain records can't be produced, or certain things can't be produced, because they're reports that would need to be created.

PN21

MR GUY: Yes, Deputy President, I will deal with that in closing on Wednesday.

PN22

THE DEPUTY PRESIDENT: All right.

PN23

Yes. Well, if Mr Worsley's there, we'll issue an affirmation and we'll deal with his evidence.

PN24

THE ASSOCIATE: Mr Worsley, please state your full name and address.

PN25

MR WORSLEY: Mitchell Luke Worsley, (address supplied).

<MITCHELL LUKE WORSLEY, AFFIRMED [10.05 AM]

EXAMINATION-IN-CHIEF BY MR GUY [10.05 AM]

PN26

MR GUY: Thank you, Deputy President. And just because of the forum in which we're using, and I just don't know how you're all viewing it, everybody can see Mr Worsley clearly?

PN27

THE DEPUTY PRESIDENT: Yes, thank you.

PN28

MR GUY: Thank you, Deputy President.

PN29

Mr Worsley, you have prepared - sorry, I'll take it this way.

PN30

Could you please state for the record your full name?---Mitchell Luke Worsley.

PN31

Yes. And your business address?---Level 3, 8 Key Street, Haymarket.

PN32

Thank you, Mr Worsley. And what is your occupation?---I'm an industrial officer employed by the SDA New South Wales branch.

PN33

Thank you. And you're the permit holder mentioned in the draft application in these proceedings, correct?---Yes, I am.

PN34

Thank you. Now, you've prepared two witness statement in respect of these proceedings?---I have.

PN35

And the first one, for the benefit of those with the electronic court book, it's behind tab 3 commencing on page 11.

PN36

Now, Mr Worsley, that's a document that is titled:

*** MITCHELL LUKE WORSLEY

XN MR GUY

PN37

Witness statement of Mitchell Luke Worsley in support of an application to access non-member record.

PN38

?---Yes.

PN39

And that's a document of some 30 paragraphs in court book pages 11 to 15?---Yes.

PN40

And it has three annexures at court book page 16 to 39?---Yes.

PN41

And you have a copy of that before you?---I do.

PN42

And that document is true and correct to the best of your knowledge and belief?---It is, yes.

PN43

And you have no changes you wish to make to that document?---No changes, no.

PN44

I tender the statement of Mitchell Luke Worsley, behind tab 3 of the electronic court book, Deputy President.

PN45

THE DEPUTY PRESIDENT: All right.

PN46

Ms Perigo, let's deal with your objections. Firstly, thank you for the heads up, although I haven't had much of an opportunity to look at it. My normal practice, and it's by no means a definitive must or always or never, but my normal practice is, for objections based on hearsay or opinion, I tend to allow the material and you could make whatever submissions you wish to make in terms of weight.

PN47

Although as I just said, I haven't looked at these specifically, so happy for you to take us through each of them, if you'd like to do that, otherwise - - -

PN48

MS PERIGO: Deputy President, I'm aware of the Commission's position and your position, in relation to this type of evidence. If we were in another place, if we were in a court, the evidence would not be admissible. The objections are on the basis of hearsay and opinion. I wanted to make those objections formally and have them noted, which they have been.

*** MITCHELL LUKE WORSLEY

XN MR GUY

PN49

I expect, given your comments just then, Deputy President, that you will admit the evidence and give it the appropriate weight.

PN50

THE DEPUTY PRESIDENT: Well, then you should make - if there's any ones that you particularly wish to press, I'm very happy to have a look at them.

PN51

MS PERIGO: They're all of very similar nature, Deputy President. So I think if your practice is to allow it and give it the appropriate weight, I can make some submissions in relation to that, but I do want the objections noted.

PN52

THE DEPUTY PRESIDENT: All right, thank you.

PN53

Well, I'll mark that first statement exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF MITCHELL LUKE WORSLEY

PN54

MR GUY: If the Commission pleases.

PN55

Now, Mr Worsley, if you can go to tab 4 of the court book? It commences on page 40 if that assists?---I've got the statement.

PN56

All right. Now, that's a document titled:

PN57

Supplementary witness statement of Mitchell Luke Worsley.

PN58

?---Yes.

PN59

And that is some 27 paragraphs long?---Yes.

PN60

And it contains some 10 annexures marked MLW04 to MLW14, fourteen?---Yes.

PN61

And that document is true and correct to the best of your knowledge and belief?---It is.

PN62

And you have no changes you wish to make to that document?---No changes, no.

*** MITCHELL LUKE WORSLEY

XN MR GUY

PN63

I tender the statement of Mitchell Luke Worsley, dated 8 May 2023 and behind tab 4 of the electronic court book, Deputy President.

PN64

THE DEPUTY PRESIDENT: Ms Perigo, I note there's two paragraphs again that are hearsay opinion.

PN65

Do you want to treat those any differently than what we've treated the last lot?

PN66

MS PERIGO: No. Exactly the same, Deputy President, would be suitable.

PN67

THE DEPUTY PRESIDENT: All right, thank you.

PN68

I'll mark that exhibit 2.

EXHIBIT #2 WITNESS STATEMENT OF MITCHELL LUKE WORSLEY DATED 08/05/2023

PN69

MR GUY: If the Commission pleases.

PN70

Now, Deputy President, I just have on one question that I just seek leave to ask Mr Worsley. It's entirely in reply of the statement Ms Gagler - Gallagher-Hill, sorry, I apologise.

PN71

THE DEPUTY PRESIDENT: Leave's granted, thank you.

PN72

MR GUY: If the Commission pleases.

PN73

Mr Worsley, if you just go to court book page 175, the affidavit of Ms - well, sorry, the statement of Ms Gallagher-Hill, behind tab 7, court book page 165?---Sorry, which page?

PN74

165?---Yes, I have it.

PN75

You'll see there at paragraph 10 there is a statement by Ms Gallagher-Hill that there was a method - sorry:

*** MITCHELL LUKE WORSLEY

XN MR GUY

PN76

I am also aware that the employees who work in selection and in the Prestons distribution centre who performed the same pre commencement tasks the court found to constitute work were paid an amount on a method agreed between ALDI and the SDA in the court proceedings.

PN77

Do you see that there?---Yes, I do.

PN78

Are you aware of the method that was arranged between ALDI and the SDA?---Yes, I am.

PN79

All right. And can you inform the Commission what that method was?---The - in the liability decision, the judge found that the employees had been directed to - or had been found to be doing 10 minutes of unpaid work. And so the method that was used to calculate the amount that would be paid to them, to those employees, was that they would be paid 10 minutes extra per shift or from the time between they signed on and when their rostered shift time was, whichever was the least. That was the method that was used.

PN80

All right. Thank you, Mr Worsley.

PN81

There's nothing further in-chief.

PN82

THE DEPUTY PRESIDENT: Thank you.

PN83

Ms Perigo?

CROSS-EXAMINATION BY MS PERIGO

[10.12 AM]

PN84

MS PERIGO: Thank you, Deputy President.

PN85

I've only got a few questions, Mr Worsley. Mr Worsley, you're employed as an industrial officer with the SDA?---I am.

PN86

And there are organisers also employed by the SDA, aren't there?---Yes, that's right.

PN87

And it's the organiser's role to visit the workplaces?---Yes, typically.

*** MITCHELL LUKE WORSLEY

XXN MS PERIGO

PN88

Yes. And typically, their role to have a discussion with an employees, isn't it?---Yes, that's right.

PN89

And those duties aren't part of your role as an industrial officer, are they?---Not on a day-to-day basis, but from time-to-time I do visit stores, yes.

PN90

Thank you. Mr Worsley, you have, in exhibit 2, some evidence you put forward in relation to a survey, where you asked questions about performance and pay, that's at paragraph 11 of your statement. Do you have that in front of you?---Is this the supplementary statement?

PN91

Yes. So exhibit 2?---Yes.

PN92

Thank you. And you say that the people that responded to the survey, or the classification of the people responding to the survey, and they're set out in paragraph 17 of exhibit 2?---Yes.

PN93

Yes. Now, if we have a look at those classifications, store manager, assistant store manager and store management trainees, they're full-time employees, aren't they?---I don't know off the top of my head whether they are all full-time employees.

PN94

All right. Mr Worsley - - -?---But typically, they would be, yes.

PN95

I'm sorry?---Typically, they would be full-time.

PN96

I'm quite happy to take you to page 68 of the court book, if you have that in front of you?---Sorry. Yes.

PN97

All right. And that's schedule 1 of the Prestons Agreement - - -?---Yes, it is, yes.

PN98

- - - we're looking at? Thank you. And that deals with store management employees?---Yes.

PN99

And you'll see at clause 2 it talks about store manager employees, assistant store manger and store manager trainees being employed as full-time?---Yes.

PN100

Yes. And they're also salaried employees, aren't they?---Yes.

*** MITCHELL LUKE WORSLEY

XXN MS PERIGO

PN101

All right. And as a full-time, salaried - excuse me. As a full-time, salaried employee they could work reasonable additional hours if they worked before or after their rostered start time. That's right; isn't it?---Well, if it's allowed by the enterprise agreement, yes.

PN102

Have you had a look at clause 4 on the bottom of the same page?---Yes, (indistinct), yes, that's right.

PN103

So if they worked before or after their shift and it was reasonable additional hours, there wouldn't be a separate payment for that; would there?---I don't know. I'd have to consider that. I haven't considered that.

PN104

Employees, the three classifications that we're dealing with, they also are able to avail of a time off in lieu arrangement; aren't they?---That's my understanding, yes.

PN105

Time off in lieu, that doesn't involve a separate payment either; does it?---No, it does not.

PN106

No, and the other classifications you've got in clause 17, Mr Worsley, they're typically - well, they are - what Aldi call hourly rate employees?---Yes.

PN107

Yes, and the warehouse employees, so that would be the employees from subparagraph (f) down to (j), they don't have a rostered finish time; do they?---No, that's my understanding, warehouse employees don't have a rostered finish time.

PN108

Thank you. And if they're hourly rate employees, they're able to avail of what Aldi has in its agreement as a bankable hours arrangement; don't they?---I think they have it. It's an option, from what I understand.

PN109

Yes?---I'm happy to double-check that, but - - -

PN110

If you want to have a look, Mr Worsley, at page 53 of the court book, which is still part of the Preston's agreement?---Yes.

PN111

It deals with the bankable hours arrangement. And so essentially, Mr Worsley, an employee if they have or if they are availing of the bankable hours arrangement, they get time that they can use at a later time. They don't get payment. That's right; isn't it?---I just need a minute to read that.

*** MITCHELL LUKE WORSLEY

XXN MS PERIGO

PN112

Yes, of course?---I think it's an option that it can be banked, yes.

PN113

Yes, and if it's banked, there's no additional payment; is there?---No, you take time off in lieu.

PN114

Mr Worsley, at the last paragraph of your supplementary statement, so at paragraph 27, you talk there about a letter dated 20 March 2020 that the SDA wrote to Aldi?---Yes.

PN115

Now, I don't think that letter's in evidence, Mr Worsley, but that's the letter that the SDA wrote to Aldi prior to commencing the proceedings in the Federal Circuit and Family Court; isn't it?---That's right.

PN116

Right, and do you remember if Aldi responded to that letter?---They did, yes.

PN117

Yes, and Aldi defended those proceedings, Mr Worsley; didn't they?---They did.

PN118

So, Mr Worsley, it's not true to say Aldi didn't do anything about it; is it?---Well -
--

PN119

Which is in the third paragraph - the third line in your paragraph?---In the sense that they didn't take any action to remedy the situation that we alleged.

PN120

Well, they challenged the situation, Mr Worsley; didn't they?---They did. They defended it.

PN121

Thank you. I don't have any further questions, Deputy President.

PN122

THE DEPUTY PRESIDENT: Thank you. Anything arising, Mr Guy?

PN123

MR GUY: No, Deputy President.

PN124

THE DEPUTY PRESIDENT: Thank you, Mr Worsley. That concludes your evidence?---Thank you.

<THE WITNESS WITHDREW

[10.19 AM]

*** MITCHELL LUKE WORSLEY

XXN MS PERIGO

PN125

MR GUY: That also, Deputy President, concludes the evidentiary case of the applicant. Short and sweet.

PN126

THE DEPUTY PRESIDENT: Very short and sweet. Ms Perigo, is Ms Gallagher-Hill available?

PN127

MS PERIGO: She is. She is in a separate location to Ms McNaughton and I, so if we could just have a minute to get her to log in?

PN128

THE DEPUTY PRESIDENT: Yes, thank you.

PN129

MS PERIGO: Thank you. And, Deputy President, I note Mr Guy made a brief opening, and I don't plan to. I think the material's been provided to the Commission. But I do want to say this. Mr Guy said that the application was made on the basis that we suspect a contravention of section 50 (indistinct) and section 557A. There's - nowhere in the application is there any mention of section 557A of the Fair Work Act. We say that's just an afterthought and it's not a matter that's been put formally in the application or as part of the draft orders, if it pleases.

PN130

THE DEPUTY PRESIDENT: Thank you.

PN131

THE ASSOCIATE: Ms Gallagher-Hill, can you hear me, please?

PN132

MS GALLAGHER-HILL: Yes, I can.

PN133

THE ASSOCIATE: Thank you. Please state your full name and address.

PN134

MS GALLAGHER-HILL: Caitlin Jennifer Gallagher-Hill, 1 Sargents Road, Minchinbury, New South Wales 2770.

<CAITLIN JENNIFER GALLAGHER-HILL, AFFIRMED [10.20 AM]

EXAMINATION-IN-CHIEF BY MS PERIGO [10.20 AM]

PN135

MS PERIGO: Thank you, Deputy President.

*** CAITLIN JENNIFER GALLAGHER-HILL

XN MS PERIGO

PN136

Ms Gallagher-Hill, can you state your full name and your work address and occupation, please?---Caitlin Jennifer Gallagher-Hill, 1 Sargents Road, Minchinbury, New South Wales 2770. And my job title is Executive Manager Logistics Projects.

PN137

Thank you. And, Ms Gallagher, you've prepared a statement for the purposes of today's proceedings?---Yes.

PN138

Do you have a copy of that statement in front of you?---Yes, I do.

PN139

Thank you. Are there any corrections or amendments that you wish to make to that statement?---No.

PN140

Ms Gallagher-Hill, that statement runs to 23 paragraphs over five pages?---That's correct.

PN141

With two annexures?---Yes.

PN142

Thank you. And is that statement true and correct to the best of your knowledge and belief?---Yes.

PN143

I seek to tender that statement, Deputy President.

PN144

THE DEPUTY PRESIDENT: Any objections, Mr Guy?

PN145

MR GUY: There are just two, Deputy President, and again I am content for them just to be noted, as is the position of the Commission. Just paragraphs 22 and 23 on the basis that they are hearsay and, in addition, 23 is particularly vague.

PN146

THE DEPUTY PRESIDENT: All right. I'll allow it. Make whatever submissions you wish to make in terms of weight, and I'll mark that statement exhibit 3.

EXHIBIT #3 WITNESS STATEMENT OF CAITLIN JENNIFER GALLAGHER-HILL

PN147

MR GUY: The Commission pleases.

*** CAITLIN JENNIFER GALLAGHER-HILL

XN MS PERIGO

PN148

MS PERIGO: I have no further questions, Commissioner - Deputy President, sorry.

PN149

THE DEPUTY PRESIDENT: Thank you. Mr Guy.

CROSS-EXAMINATION BY MR GUY

[10.22 AM]

PN150

MR GUY: Thank you, Deputy President.

PN151

Ms Gallagher-Hill, bear with me for a moment. Your job title, you're the Executive Manager Logistics Projects at Minchinbury. That's correct?---Yes.

PN152

Just so I'm clear, that role relates to the management of transport and distribution employees. That's correct?---In my current role it's project work in relation to some of those topics, yes.

PN153

Do you have any day-to-day interaction or management of store employees?---No.

PN154

Do you have day-to-day and direct management of - sorry, day-to-day management, rather, I'll take it in parts, of warehouse employees?---No.

PN155

Thank you. Now, just so I'm clear as well, the present role is not a national role? It's based solely out of Minchinbury?---It is a national role. I am based in Minchinbury, but my role covers all eight regions in Australia.

PN156

Thank you. Previous to this role you've worked as the executive manager logistics?---Yes.

PN157

Yes, and again that role related to transport and distribution employees; didn't it?---Transport and warehouse employees, yes.

PN158

Sorry. Right. So you did have some day-to-day management of warehouse employees?---Yes.

PN159

But you didn't have day-to-day management of store employees?---Not during that time, no.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN160

However, previously, and in fairness to you, you were a graduate executive manager store operations. I assume in that role you had some involvement with store employees?---Yes, that's correct.

PN161

Thank you. Now, at paragraph 4 of your statement, which is at page 163, you deal with the eight regions that Aldi has, and that each region operates autonomously and has its own managing director and group of operational directors. That's correct?---Yes.

PN162

Now, there appears to be reporting in respect of, as I understand it, finance and administration. That's correct?---Sorry, can you repeat that for me, please?

PN163

There's reporting from each of those centres to, as I understand it, a national office or a national operations centre. Is that how it works?---With respect to cost centres, each region has its own cost centre, and then that's centrally coordinated by National Finance.

PN164

National Finance. Right. And is National Finance, just so I'm clear, responsible for payroll?---Yes, that's one of the subsets of National Finance, yes.

PN165

So just so I am clear, payroll is managed centrally and to put it perhaps in colloquial terms, the pay run is dealt with by the national centralised finance unit. Is that correct?---Broadly speaking, yes.

PN166

So each individual region doesn't run its own payroll team, for example?---Not the pay run itself. They are responsible for managing the payroll data that goes into the system, so each of their operational units. But beyond that it's managed by the centralised team in terms of actually paying employees.

PN167

Thank you. Now, as I understand it, and just so we're clear, you weren't in any way involved in the - sorry, I'll take it in parts. You're aware of the decision or the case between the SDA and Aldi that was run, well, last year and into this year, about underpayments at the Prestons distribution centre?---Yes, I am.

PN168

You weren't directly in any way involved in those proceedings; were you?---No.

PN169

Have you been involved yourself in the negotiation of paying the employees who participated in that case?---No.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN170

Have you been involved in the calculation of payments to distribution centre workers in other distribution centres?---No.

PN171

Now, but you are nevertheless broadly aware of what the - how underpayment calculations were made to distribution centre workers?---Yes.

PN172

Is it your understanding that the distribution centre workers were paid either 10 minutes for each shift they worked or a lesser amount, minute amount, based on their sign-in/sign-out records? Is that your understanding?

PN173

MS PERIGO: Deputy President - - -

PN174

THE WITNESS: No.

PN175

MS PERIGO: - - - I do object to the question. Mr Guy hasn't explained which distribution centres he's referring to or which - whether he's referring to the people who are subject to the Federal Circuit Court proceedings or to anybody else. And I think the question needs to be a bit more specific in relation to that.

PN176

MR GUY: I'll rephrase the question. Perhaps I'll take it this way. At paragraph 11 of your statement there, you say that, 'Following the decision' - and just so I'm clear, that's the SDA and Aldi Prestons underpayment matter; that's correct?---Yes. Yes.

PN177

Yes. There was a process of consultation with employees employed in the other warehouse functions at the Prestons distribution centre. That's correct?---Yes.

PN178

Now, correct me if this is not your understanding, this relates to employees who worked in other functions other than selections in that distribution centre?---That's my understanding.

PN179

And those sections - and I'm sorry, I'm thinking back to the case - it's something like specials and there are a couple of other - what are the sections, sorry, just if you can tell the Commission that? So I think there's specials, there's selections, and the other two escape me, sorry?---We have a variety of departments. So there's cold handling, goods in, selection, specials, and maintenance - off the top of my head.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN180

Right. Thank you. And so this was consultation with the employees in cold handling, maintenance and the other division that you referred to. What was the

nature of that consultation?---The executive managers of logistics. So my colleagues in that region spoke to each employee about the proceedings and about the process that we would follow thereon, in terms of calculating – if any back payment was payable – and how that would be done.

PN181

Right. So your understanding is the purpose of the process of that consultation was to determine if any payment should be made to those employees for work they had completed but not been paid for?

PN182

MS PERIGO: Commissioner, again, I object to the question. The Commission's role here is to see whether or not there's a suspicion in relation to a contravention. Not to delve into the positions of the parties. We say there isn't. The union says there it's a reasonable suspicion. Where Mr Guy is going, I think, Deputy President is to a matter that's not a matter the Commission needs to make a decision about in relation to these proceedings.

PN183

MR GUY: Well, Deputy President, if the respondent puts into evidence that there has been a process of consultation and I don't know what the evidence is going to be but that payments may have been made, this very much goes to whether my client has a reasonable suspicion. It's looking very much like – well, sorry – I won't go any further than that. The witness can answer the questions if I am permitted to ask them. But the position has been made. My client has a reasonable suspicion. Statement has been made in response to that that include – that apparently a consultation process was undertaken. My questions go to what was the nature of that consultation process. It may very well, depending on what (indistinct) form the basis of additional submissions I may make at the end of these proceedings as to how reasonable that suspicion is. If it falls from the ALDI witnesses because they've given evidence to that effect well, so be it. They just put on the evidence this way.

PN184

THE DEPUTY PRESIDENT: I'll allow it thanks.

PN185

MR GUY: So, Ms Gallagher-Hill, your previous answer if I recall correctly, and correct me if I am wrong, was that there was consultation with the employees outside of the selections area to see what, if any, payments needed to be made?---While they're speaking, yes.

PN186

And those payments that may have been needed to be made to them was for work that they undertook for ALDI but had not been paid for?---Not necessarily. It was to understand the whole picture. The whole picture. What work practises were being undertaken, at what points in time they were being undertaken.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN187

Right. Now, as you understand it off the basis of this consultation period with employees outside of the selections area have payments been made to employees for work undertaken at ALDI but to which they weren't paid for? And other employees? And other departments? Has payment been made to them?---We identified at the end of last year following that consultation that payments were due to be made by Aldi to some employees in some sections at varying times and they were paid just before Christmas last year.

PN188

And was that, to your knowledge, because Aldi had identified that they had performed work to which they had not been paid?---We identified that some employees were undertaking tasks between the time that they clocked on and when they actually commenced their shift, that they were within the criteria of the previous decision we have talked about and that we would pay them for that.

PN189

And you'd agree with me, wouldn't you, that that previous decision was that they were performing work prior to the commencement of their shift and they had not been paid for that work.

PN190

MS PERIGO: I object, Deputy President. The decision is a decision of the circuit court. It's not up to this witness to provide her interpretation of the decision.

PN191

THE DEPUTY PRESIDENT: Mr Guy, I'm not sure if Ms Gallagher-Hill might help me or not.

PN192

MR GUY: Thank you. Now, so paragraph 14 of your statement there, Ms Gallagher-Hill?---Yes.

PN193

This is in respect of retail employees. Correct?---Yes. Our store operations employees.

PN194

Right. Store operations and just to be clear about that?---Sorry. One second. Sorry, let me just double-check that.

PN195

Certainly?---Yes. It's in relation to store operations employees.

PN196

Right. And just so we're clear store operation employees are people who work – I'll just put it simply – behind checkouts and I know Aldi doesn't have shelves – but stacking shelves?---Yes. Any of our store employees.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN197

Now at paragraph 15 you speak there about the fact that there was a consultation that occurs between – sorry, Aldi has consulted with its employees. This consultation with retail employees?---Yes.

PN198

Right. And, again, was this – the nature of this consultation was to see if employees were performing work prior to their rostered shift time? Was that the nature of the consultation?---It was to understand what work practises were occurring in comparison to rostered shift times, what preparation activities may or may not have been occurring and to inform our staff as well about changes we've made moving forward to our payment systems or our clock-on and clock-off systems.

PN199

Right. And following that consultation, Aldi, you say here is voluntarily making payments to its employees in its retail stores. Correct?---We're in the process of calculating where payments may need to be made.

PN200

Right. And your – the basis of that is because – and this is to the extent of your understanding, that from time to time, you have identified that the employees were performing work prior to their rostered shift times. Is that the view of Aldi?---We have identified that there are some work practises that saw employees undertaking activities that may be construed as work prior to their rostered start time. But after they had punched in.

PN201

Right. And that they had previously not been paid for that period?---I probably can't speak to that. I was not part of the ins and outs of the store consultation.

PN202

Thank you. Now, you've said this here. You're aware of the categories of records that the SCA is seeking in these proceedings. That's correct?---Yes.

PN203

Right. And the first of those is rosters?---Yes.

PN204

Right. Now, as I understand it, the rosters are stored on a database known as MyAldi, is that correct?---No. We store them on our payroll system. MyAldi is a conduit.

PN205

Right. But the records, are they not capable of being viewed on MyAldi. Correct?---They are able to be viewed but they're not stored in MyAldi.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN206

Right. And they're also printed and posted in the stores?---That's my understanding. However, it's been several years since I have been a part of the store operations management.

PN207

And just so I'm clear employees can access their rosters through the portal known as MyAldi. Correct?---Yes.

PN208

And they can do that at any time, can't they?---That's my understanding. Once the roster has been posted they should be able to view it.

PN209

Right. And can managers view rosters through MyAldi?---They can view their own roster, but not other people's rosters.

PN210

Right. So if a store manager needed to view a roster how would they do it?---They log into the PC at the store or at the distribution centre and use the Kronos program.

PN211

Right. So the rosters are stored on the Kronos program?---That's correct.

PN212

Is the Kronos program the payroll program?---No.

PN213

What is the - - -?---It's the - - -

PN214

What is the payroll program?---So we use Kronos for timekeeping and as for actual payroll we use a program called Chris21 or iChris. I could be getting that terminology wrong.

PN215

Perhaps could you spell that – just for the record – because it's hard to hear?---Yes. My understanding is the payroll system is called 'Chris' as in the name – C-h-r-i-s – 21 – 2-1.

PN216

Thank you. So Chris21. Okay?---I believe so.

PN217

So just so I am clear rosters can be accessed through by an employee through MyALDI?---Yes. For themselves. Yes.

PN218

Yes. And – sorry?---Yes. An employee can access their own roster in MyALDI – yes.

PN219

Right. And managers can access rosters through Kronos?---Yes.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN220

And that stands outside the payroll system Chris – C-h-r-i-s – 21?---That's my understanding, yes.

PN221

THE DEPUTY PRESIDENT: I think Chris stands for 'Complete Human Resource Information System'.

PN222

MR GUY: Thank you, Deputy President. I did not know that?---Nor did I.

PN223

THE DEPUTY PRESIDENT: Happy to be of assistance.

PN224

MR GUY: I'm indebted. Right. So that's the rosters. Now, the rosters are stored – are you aware of how long the rosters are stored in Kronos for?---Not off the top of my head, no.

PN225

But, at least, in your experience you can view past rosters through Kronos?---Yes.

PN226

Now, the sign-in and sign-out records they are also sought on Kronos, correct?---Yes.

PN227

And they are accessible, again, to managers?---Yes.

PN228

And to your knowledge they are stored for a period of time – or previous – sorry – sign-in/sign-out records are stored for at least a period of time. Correct?---Yes.

PN229

Now, pay slips they are stored in MyALDI. Correct?---They're not stored. Similarly, to the rosters the MyALDI allows an employee to view them but they're stored in the payroll system. So Chris, itself, is my understanding.

PN230

Right. So the payslips are stored in Chris that's just so we're clear?---I believe so. But I would be stepping outside my exact knowledge of those sorts of things. That's really a function that sits with our payroll department.

PN231

Right. And, again, the previous pay slips are accessible on Chris? They're stored and accessible?---I don't know. I couldn't answer that one.

*** CAITLIN JENNIFER GALLAGHER-HILL

XXN MR GUY

PN232

Are you, in any way, involved in the record keeping of pay slips? Sorry, I'll take it – I withdraw the question. Are you aware that pay slips are required to be kept

for a period of time under the Fair Work Act? Do you have any knowledge of that?---No.

PN233

Okay. Now, time adjustment sheets, you're aware of those documents. Correct?---We – they don't necessarily exist within the system. That's not sort of the way it's designed so that that is available in one document.

PN234

Right. So perhaps for the – just for the benefit of the Commission and me – what is the time adjustment sheet? Like is it a hard copy form? Is it completed electronically? How does it work?---It's generally electronically managed in our Kronos system and it would be managed person to person in their individual profile.

PN235

Right. Thank you. And, again, it's entered by a manager?---Yes. Store manager or section leader.

PN236

Right. No problems. And that's managed through the Kronos system did you say?---Yes.

PN237

Right. And to your knowledge are the time adjustment sheets, are they stored in the Kronos system, at least, for a period of time?---Yes. But not in – they're not titled 'Time Sheet Adjustments' or anything like that. It would simply be if I looked for a particular employee, I could see if there were any adjustments made.

PN238

Right. So each time adjustment entry – I'll just call it that if I could for a moment? Each time adjustment entry is assigned to that individual employee's sort of Kronos profile?---Yes. That's recorded.

PN239

Sorry, I just needed an audible answer for the recording. Now, finally, exception reports they are stored on Kronos as well?---Again, similarly to the timesheet adjustments. There's no such thing as an exception report per se. We manage them exception by exception, again, in the employee's individual profile.

PN240

Right, okay – and again, however, they are to the best of your knowledge stored for a period of time on that person's profile?---Yes, you can go back in time, yes.

PN241

Thank you. Now, I think we've covered this before but just for the abundance of caution: we have Kronos which is a system separate from Chris, correct?---Yes.

PN242

Now, Chris – again, to use a colloquialism – does the pay roll run, correct?---Yes.

PN243

So it is from data inputted into Kris that sort of prompts Aldi to pay each of its employees in the pay roll run?---The data is captured – the timekeeping is captured in Kronos. That gets fed into Chris21. Chris21 is then responsible – well, not responsible but is the system we use to pay the employees.

PN244

Right, and the Kronos system, is it constantly feeding this data into Chris? Is that how it works?---No. I am not 100 per cent sure how and exactly when it feeds in. But it's – we pay our store and distribution staff fortnightly so it would be at a minimum once per fortnight.

PN245

And at least to your knowledge, there is no down time between Chris and Kronos where the systems are unavailable because the pay roll system is running?---I couldn't speak to that. I'm not sure. I don't know.

PN246

But at least in your experience you haven't – you don't get a weekly note saying Chris and/or Kronos is unavailable because we're doing the pay roll run, do you?---That's not occurred in my experience, no.

PN247

And as I understand it, provided the person obviously has the correct authorisation, a manager can access the Kronos system and access individual employee profiles, correct?---Within their work location, yes.

PN248

Within their work location?---Yes.

PN249

Right, and again, with the correct authorisation they can access profiles in Chris?---No. So access to Chris21 is exclusively with our pay roll department sitting in finance.

PN250

And where does finance operate from?---Our Minchinbury head office.

PN251

Thank you. Now, you say at paragraph 22 of your statement there that you've made inquiries of the – well, the pay roll director's advised you that it will take an estimated nine months to generate rosters, pay slips and sign-on, sign-off records from Aldi's timekeeping and pay roll system, that's correct?---That's my understanding. That's the advice that was provided to me, yes.

PN252

But nevertheless, you'd agree with me, wouldn't you, that at least rosters and sign-on, sign-off records could be accessed through Kronos, using a computer terminal,

correct?---With the appropriate access, yes, but again, you are limited by your work location.

PN253

Thank you. And pay slips, as you're aware – at least to your knowledge – are otherwise retained on Chris, that's correct?---I'm not sure on that. I'm not sure where they're stored.

PN254

So just so I'm clear – and sorry to go back on this – but to access an employee's pay slip as the manager, that's not ordinarily done as a manager?---No.

PN255

And you just have no knowledge as to how one accesses a pay slip as a manager?---To access the pay slip of an employee would need a very good reason to do that, generally being the employee has requested a copy, in which case we'd request that from our pay roll department and that would go straight to the employee. It doesn't cross the manager.

PN256

But the manager may do it as a conduit, for example?---They would make the request but they wouldn't receive the pay slip.

PN257

Do you have any knowledge as to roughly how long it takes for a pay slip to go – after a request is made – to go to that employee?---For a single pay slip, several days.

PN258

Now, just finally, you make a note there at paragraph 23 that the pay roll director has advised you there may be need to engage staff to produce reports?---Yes, that's the advice I received.

PN259

You don't know how many employees would be needed, however, would you?---No, I wasn't give those specifics, no.

PN260

And again, it was put to you as there may be a need. You don't know for certain if there will be?---I don't know but my personal thought would be based on other experience with the pay roll department and other project work that they would need those additional resources. They're fully scoped as they currently are to do only the work that they do.

PN261

But that's only speculation on your part, isn't it?---That would be speculation, yes.

PN262

Thank you. Nothing further, thank you, Deputy President.

PN263

THE DEPUTY PRESIDENT: Thank you, sorry. Anything further, Ms Perigo?

RE-EXAMINATION BY MS PERIGO

[10.51 AM]

PN264

MS PERIGO: Just two questions, Deputy President. Ms Gallagher-Hill, can you explain what My Aldi is?---My Aldi is the app we have available for our employees, that they can have on their personal devices to access basic information on their employment, so things like pay slips, rosters, but also access just general Aldi information; so for example, the employee systems program.

PN265

Thank you. You were asked some questions about the pay run and other systems. When the pay roll runs, do you know whether the other systems can be accessed or not?---We can continue to manage time keeping in Kronos. As for the other systems, I couldn't advise.

PN266

No further questions, Deputy President.

PN267

THE DEPUTY PRESIDENT: Thank you, Ms Gallagher-Hill, that concludes your evidence and you're free to go?---Thank you very much.

<THE WITNESS WITHDREW

[10.52 AM]

PN268

Do the parties – we might just take a short break. Can I say to both of you, I have to say I'm still unclear about the systems, what reports are reports and what are records, so I'm just going to flag that now so you can both address that at some point in your submissions.

PN269

MR GUY: Thank you, Deputy President. Deputy President, how long would you propose for the - - -

PN270

THE DEPUTY PRESIDENT: How long would you both like?

PN271

MR GUY: Well, my learned friend and I have had brief discussions about how long we'll be. Perhaps in light of Your Honour's questions, I'd ask to 11.30 but I say that with relative confidence, of course, as counsel should, that we'll still be done by lunch with that break, unless Ms Perigo has a position to the contrary. I can't imagine we'd be particularly long, each of us.

PN272

THE DEPUTY PRESIDENT: Mr Guy, could you also please send through just again, in case I have any questions, the draft order that you're proposing? I know you said there was an amended version.

PN273

MR GUY: Yes, I'll have that attended to immediately.

PN274

THE DEPUTY PRESIDENT: Thank you, all right. Ms Perigo, 11.30, is that okay with you?

PN275

MS PERIGO: Yes, thank you.

PN276

THE DEPUTY PRESIDENT: All right, we'll stand adjourned until 11.30, thanks.

SHORT ADJOURNMENT

[10.54 AM]

RESUMED

[11.31 AM]

PN277

THE DEPUTY PRESIDENT: Thank you, Mr Guy. I've got the amended draft order. Ms Perigo, did you receive that a few minutes ago?

PN278

MS PERIGO: Yes. Thank you, Deputy President.

PN279

THE DEPUTY PRESIDENT: Can I just confirm that the changes are the underlined – it seems to be the parts that are underlined, so paragraph 1, so for the employees in schedule 4?

PN280

MR GUY: That's correct.

PN281

THE DEPUTY PRESIDENT: And some changes in 3 in terms of how the documents sought are referenced?

PN282

MR GUY: Yes, that's correct. So the changes, you are correct, Deputy President, are in paragraph 1, paragraph 3(iv) and paragraph 3(v).

PN283

THE DEPUTY PRESIDENT: All right. Thank you.

PN284

MR GUY: Actually I'll take this – I'll come back to that in a very brief moment. Perhaps this is the best way to describe this. As I opened, Deputy President, this is about whether Mr Worsley has a reasonable suspicion about a number of contraventions, and they are section 50 and section 323 of the Fair Work Act.

PN285

Now, in addition to that, Mr Worsley is seeking these non-member records on the basis that he suspects that the contraventions by ALDI are serious contraventions, as defined by section 557A of the Fair Work Act - and I do apologise, I misspoke as to the fact that that in of itself is a contravention. It won't be pleaded as such if that ever comes to fruition, but rather they are serious contraventions by virtue of the definition of a serious contravention in 557A(1) and (2) of the Act.

PN286

Now, the respondent, in my respectful submission, is on notice in respect of that, and they were on notice of that from 8 May this year at the very latest by virtue of the fact that Mr Worsley makes that statement in paragraph 27 of his supplementary witness statement, which is at page 44 of the court book.

PN287

So that's the contraventions we're talking about, the nature of them, and that obviously influences the way in which the Commission goes about, if it is minded to grant an order, making such an order.

PN288

Deputy President, I'll approach your question first in respect of records, because what I apprehend – well, first of all you have questions about it and it's relevant to the way in which any order is made.

PN289

You'll see from the applicant's amended draft, which we've just discussed, it's an order applying to non-member records and/or documents by ALDI Foods in relation to all employees save for employees in schedule 4 of the agreements listed below.

PN290

That is, as I described in my opening, Deputy President, in respect of transport employees, and they are not covered by the SDA. For the avoidance of doubt, there is no desire to have those records.

PN291

Deputy President, you raised before what is the nature of the records that are being sought, and I want to make abundantly clear in respect of that, the non-member records and/or documents that my client is seeking are rosters.

PN292

Now, I don't think there is much of a dispute there as to what a roster is. So my client is after rosters, pay slips – they are obviously defined by the Act and obviously ALDI has obligations to keep them for a period of time, again uncontroversial; sign-on and sign-off records.

PN293

Deputy President, it fell from the witness in respect of these last three records, which I think are perhaps the more contentious ones in respect of, well, how are they produced and what are they.

PN294

The sign-on, sign-off records, they are records that in my submission exist in Kronos. They are there to be viewed. They are records which, as far as certainly I can understand it and apprehend, are records that may be produced by ALDI, and again they exist in Kronos.

PN295

So that is the record that the applicant is seeking, and I'll deal with this in a bundled-up sense once I go through the other two in respect of the concern about report as well.

PN296

In addition to that, roster adjustment records again are records, as I certainly understand it from what the witness said from ALDI, that exist in Kronos. These records, and again if I recall correctly, are attached to the individual's profile and are stored for some time.

PN297

THE DEPUTY PRESIDENT: So what I wasn't clear about, Mr Guy, was the roster adjustment record simply adjusted the roster and it was the roster that was kept, or is it a separate record?

PN298

MR GUY: My understanding is that it's a separate record, and that separate record, as I understood it from the witness, exists on that individual employee's Kronos file, or profile, if I may.

PN299

THE DEPUTY PRESIDENT: Right. Ms Perigo, any questions I'm asking Mr Guy, can you make sure you're dealing with as well? Thank you.

PN300

MS PERIGO: Yes.

PN301

MR GUY: And also similarly these exception records. These are, Deputy President, records that exist that are stored on a database, in this case Kronos, that are available and accessible to ALDI, and by extension can be made accessible to a right of entry permit holder.

PN302

In respect of that, they are records to which a permit holder may attend a premises and inspect and make copies of that record, as they are, as I understand it from what the witness said, available at Minchinbury and accessible by computer, and if they aren't, well then they would be available at other sites and accessible by computer there.

PN303

So they are records that are available in the sense they exist under 482 of the Act. It is certainly not the submission, and the case law says this - my client is not attempting to extend or gain further rights than they would otherwise have

under 482, but rather these are records that exist, that can be accessed, and if required copies made of.

PN304

In addition to that, they are also records that may be accessed later under 483. They are records to which Mr Worsley may by written notice require ALDI to produce or provide access to.

PN305

There is no suggestion that there needs to be, you know, reports generated or anything that's sought, and perhaps it was ineloquence and it's on me in my drafting of the order that reports were mentioned, but rather what it really is is its records.

PN306

I don't think, and I don't mean to put words in my learned friend's mouth or in the respondent's mouth, but if there is any dispute that these records don't in of themselves exist, then they can't be accessed, at least in some form, and there are other arguments about how long that's all going to take and things like that.

PN307

As a threshold issue these records exist, they are accessible, and they are records to which Mr Worsley would have the right, if they were member records, to access or require later access for, and so an order is made on that basis – or, sorry, an application is made for non-member records on that basis.

PN308

I know this issue was - - -

PN309

THE DEPUTY PRESIDENT: I'm curious about why there's been a request for non-member records, but it doesn't seem to have been a request for member records, or is that just - - -?

PN310

MR GUY: Well, the order, Deputy President, is in relation to all employees.

PN311

THE DEPUTY PRESIDENT: But it's made under 483AA, is it?

PN312

MR GUY: It is.

PN313

THE DEPUTY PRESIDENT: And that doesn't deal with member records?

PN314

MR GUY: No, it does not, but it covers the field in respect of all employee records.

PN315

THE DEPUTY PRESIDENT: How can I make an order extending beyond non-member records under that section of the Act under this application? What am I missing?

PN316

MR GUY: Yes. Mr Worsley would make – so it's giving Mr Worsley the power to make a notice to inspect non-member records, and then he would also be entitled to make an application to inspect member records at the same time, would be the effect of that order.

PN317

THE DEPUTY PRESIDENT: In your submission, does – obviously Ms Perigo will deal with this as well – how does ALDI know who are the non-members?

PN318

MR GUY: Well, again, the effect of the order is allowing access to all records.

PN319

THE DEPUTY PRESIDENT: Well, how can it do that? It's an application under 483AA. I'm not sure what I'm missing, Mr Guy. 483AA deals with an application to access non-member records. How does ALDI know which employees are non-members of the union? Would you like some time to have a think about that, for both of you?

PN320

MR GUY: Yes. If you just bear with me for a brief moment, Deputy President.

PN321

THE DEPUTY PRESIDENT: Do you want 10 minutes?

PN322

MR GUY: Well, perhaps five will be appropriate.

PN323

THE DEPUTY PRESIDENT: All right. Let's resume at 11.50.

PN324

MR GUY: If the Commission pleases.

PN325

THE DEPUTY PRESIDENT: Thank you.

SHORT ADJOURNMENT

[11.43 AM]

RESUMED

[11.50 AM]

PN326

MR GUY: Thank you for the time, Deputy President.

PN327

THE DEPUTY PRESIDENT: Thanks.

PN328

MR GUY: Deputy President, my apologies for my confusion (indistinct). Deputy President, Mr Worsley - assuming the order is made, the order would be made in respect of non-member records, correct? That's the nature of the order.

PN329

So Mr Worsley, and I'll take this in parts, can then issue a notice to inspect member records. Sorry, non-members records rather. In addition to that, Mr Worsley can issue a notice to inspect member records, so people who are members of the SDA. Those two notices combined will cover the field of every employee affected by order and that the SDA covers.

PN330

So the order need not specify for non-members nor need Mr Worsley specify the members of the SDA. There is no dispute the SDA has members. So if the SDA has members, there'll be a notice to inspect records in respect of contraventions of its members. There will also be an order in place to allow Mr Worsley to inspect records of non-members. Those two combined will entitle Mr Worsley to inspect the entirety of the records of all employees covered by the award.

PN331

THE DEPUTY PRESIDENT: (Indistinct).

PN332

MR GUY: Is there any further questions on that, (indistinct). If the Commission please.

PN333

Now, Deputy President, the submissions of the applicant are made out in paragraphs 31 really to 34, which is at court book page 155 to 156 of the - sorry, of the court book. Now, as you'd be aware, Deputy President, in order to - the Commission is provided with a wide discretion to make this order. It is a discretion - it is ultimately a discretion of the Commission, but it is - the only requirements legislatively is that the Commissioner is satisfied with the order as necessarily to investigate the suspected contravention and before making such an order the Commission must have regard to any conditions imposed on the permit holder's entry permit.

PN334

Now, again, it's not in issue, Mr Worsley has a permit, there are no conditions, so I'd submit that that is satisfied, and I don't think any point is taken in respect of that. What then the Commission must concern itself with is that the documents are necessary. Now, Deputy President, there are - has been quite a fair degree of consideration on this point and most recently it was dealt with by, if I recall correctly, it was - sorry, it was the Deputy President Beaumont, in Untied Workers Union, that's the [2023] Fair Work Commission 513 decision, and that is at page 137, commencing, sorry, at page 137 of the applicant's electronic authorities bundle.

PN335

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.

PN336

Now, paragraph 30 - sorry, 69 of the United Workers' Union decision, and that is at electronic court book - sorry, authorities bundle page number 146. In that decision the Deputy President highlights the focus that this Commission has on the necessity of the documents being a key focus. And in my submission, Deputy President, in the present matter, these documents are necessary for a number of reasons. The first is that the SDA has a reasonable basis for the contraventions themselves, and a well-founded and reasonable basis.

PN337

There is, of course, first of all the finding of the Federal Circuit and Family Court in *SDA v ALDI*, that's in Mr Worsley's affidavit at MLW02, but for the record, it's [2022] volume 318 of the Industrial (indistinct) 206. In particular, there was a finding by his Honour, Humphreys, at paragraph 31 and that's extracted at court book (indistinct) 2, that there was a finding of implicit direction to perform prestart duties, certainly in respect of selections employees of Prestons, and I'll expand on that in a moment.

PN338

In addition to that, his Honour found, at paragraph 39 of that decision and it's court book 24, that those duties were work and that the time taken to complete the prestart duties/work was 10 minutes per shift. And then his Honour then went on to make a declaration at paragraph 53 of his decision, that's court book page 26, that ALDI had contravened section 50 and 323 of the Fair Work Act. Now, expanding on that, Deputy President, is the fact that these section 50 and 323 contraventions did not solely relate to the four representative employees that the SDA put up in that matter. They weren't all employees that the representative employees, as your Honour would be aware of, in industrial cases that's often how they go.

PN339

The contraventions did not solely relate to those employees and we - and the Commission has seen that today through the fact that there has been agreement with ALDI and the SDA to pay employees in distribution centres outside of the Prestons centre, and in addition to that, outside of the departments - outside of the selections department. All selection employees have had payment made to them and that is dealt with in the penalty decision, which is at MLW03, which is [2023] Federal Circuit and Family Court (Division 2) 190 at paragraph 18, and that can be found at court book 34.

PN340

There is mention there that payment had been made to all employees working in selections, and we also heard from Ms Gallagher-Hill, and it is, indeed, at her - in her, sorry, evidence at paragraphs 10 to 12, court book page 165, that there have been payments made to a wider group. Now, Deputy President, in my submission this gives rise to a well-founded reasonable suspicion by the permit holder, and the permit holder makes this statement (indistinct) as an opinion, which he's entitled to do, that there is continuing contraventions of section 50 and 323 - or sorry, there are more contraventions rather, not necessarily continuing, contraventions of section 50 and 232 of the Fair Work Act.

PN341

And they, again, seem to be widespread and systematic to a standard that, in my submission, gives rise to a serious contravention of the Act under section 557A. So in respect of those employees who work in the warehouse, that is reasonable suspicion and the reason why that category of employee, the SDA submits, it is necessary to obtain documents, or the records, that are sought. Similarly, in respect of retail or store employees, that the SDA covers.

PN342

There is a reasonable suspicion that arises based on, and it is throughout Mr Worsley's affidavit - sorry, statements, that he has, in respect of conversations that he has with SDA organisers, in respect of conversations that he has - in correspondence that he's received from employees as well about the fact that those employees - sorry, and it is also worth mentioning the survey that was conducted by the SDA. That gives rise to quite a compelling reasonable suspicion in respect of Mr Worsley's role as an industrial officer that there are contraventions again of section 50 and 323 of the Fair Work Act, in respect of the retail employees.

PN343

Now, again, considering the numbers that are in the - and if one is to look at page 131, which is MLW07 of the court book, there are some approximately 844, I think, if my maths is correct which it usually isn't, responses to the survey that the SDA put out, answering those questions. Now, again, Deputy President, one needs to apply the rest that this is a suspicion. This is not - my client need not establish a prime - even a prime facie case here, they need to have a reasonable suspicion that the contraventions are occurring.

PN344

Now, a survey which has been conducted by my client that covers some 800-odd employees, where they are providing the answers that say, 'Yes' to the question:

PN345

Have you performed work before or after your shifts at ALDI?

PN346

And (2):

PN347

When performing the work, have you always been paid for this time?

PN348

We have some 800 responses from a variety of departments within ALDI. They are saying, 'Yes' to the first question, that they have performed the work, and 'No', they haven't always been paid. In my respectful submission, that is in of itself a reasonable suspicion. We've got 791 supermarket employees say that that is the case.

PN349

In addition to that - - -

PN350

THE DEPUTY PRESIDENT: It isn't clear, Mr Guy, from that survey, and again, I don't know the extent to which is the bankable hours arrangements that were referenced earlier, but it isn't clear from that survey, is it, about whether people received a different benefit as opposed to being paid?

PN351

MR GUY: Yes, that's correct, Deputy President. But Deputy President, and as is always the case when approaching these types of cases, for the inspection of the records, this is to investigate a suspected contravention. Now, Mr Worsley may very well get there. Receive all the documents, spend all the time getting everything ready, and find that well, his suspicion was wrong. And nothing is done about it.

PN352

And the Commission does not arrive at it's decision incorrectly or fall into any sort of error, in making an order and the ultimately finding - it's on the permit holder, and if the permit holder, you know, may get to the end of all of it and think, 'Well, although it was a reasonable suspicion, it was wrong'. 'But I had the records and I made the inquiry and away we go.'

PN353

So I would say in response to that, Deputy President, that certainly my submission is that the Commission need not trouble itself much with bankable hours and anything like that. It is solely the question, 'Is there a suspicion here that gives rise to these contraventions'. And certainly, on Mr Worsley's evidence, I would say there is.

PN354

THE DEPUTY PRESIDENT: Thank you.

PN355

MR GUY: Now, in respect of - in addition to that we - there is also the evidence of Ms Gallagher-Hall, sorry if I've said her name wrong, sorry, Gallagher-Hill, that there has been the consultation process and some payments made to retail employees as well. Now, in respect of that, the submission of the - my submission in respect to that is again, looking at this as an overall matrix, this again is giving rise to further suspicion - justifiably so - that there are contraventions. Now, Aldi may be - they haven't said it, that's fine and they don't have, but that may be recognising that there are underpayments or contraventions that are occurring. This is not a place for us to have them admitted but they may be recognising it. That again gives rise to a suspicion on the part of my client that

they're occurring. They should be inspecting records to see if those contraventions are occurring and then again, Deputy President, if they see fit going and running whatever cases in respect of contravention of the Fair Work Act that they think appropriate.

PN356

Now, again, Deputy President, I'll cover this here. My client may find that there are no contraventions, even if the order is made. My client may also disagree with the payments that have been made and run a case for further payments or my client may very well just go and run a penalty claim if they so desire but nevertheless, irrespective of what ultimately my client does with the information, the Commission only need satisfy itself that there is reasonable suspicion for the contravention and it is in my submission that the evidence of Ms Gallagher-Hill indeed, if anything, bolsters that position.

PN357

Now, I'll just come back to this now briefly as well: it is obvious, in my submission, that the records sought by the SDA or by Mr Worsley for inspection or alternatively later production are in the possession of Aldi. Again I think I have sufficiently - and if I haven't, please let me know, Deputy President - addressed you on that, that there is no application for further reports to be produced for anything of the sort; just access to those records as they exist. There is certainly in my submission no evidence to suggest the records don't exist at least in some form and that it's appropriate to make the order in that circumstance.

PN358

Now, these documents again are necessary for the SDA to investigate the contraventions. As I've submitted previously, the records on the whole are of particular importance to examine the extent of what my client suspects is a serious contravention as defined by section 557. Moving beyond that, my client has of course - and as had been a consideration in cases such as the UWU case - made a request for the records and has been denied access to them. I don't think that there is any doubt about that, but it is nevertheless made out in the second statement of Mr Worsley in MLW12 to 14 and that's court book 139 to 148. Now, in addition to that the SDA has certainly in its opinion a strong basis for their members' fear of reprisal and again, that is in Mr Worsley's first and second statements: in his first statement at 29 to 30, which is court book 14 to 15, and at 26 of his second statement, which is paragraph 26, 43 to 44, court book pages.

PN359

Now, there is also a - at least this is Mr Worsley's understanding - at paragraph 30 of his first statement he makes mention that organisers from the New South Wales branch of the SDA and the national branch have been informed - and he verily believes it to be true - that Aldi is offering to make payment to them as compensation of unpaid pre-start, post-finish work continuant on the employee signing a deed of release. There may be - and again I can only put it as high as this, Deputy President, I'm not putting it any higher than the statement, the hearsay statement that Mr Worsley is relying on - but that in my submission as well gives rise to the fact that there may be issues in respect of deed that may or may not be signed if employees are otherwise expected to hand documents over.

PN360

And so there may be issues that arise as to whether somebody has contravened a deed, if the SDA wishes to further prosecute the matter. And it has been made in the respondent's submissions that there isn't sufficient fear of reprisal. In the applicant's submission, there is and that is well made out in a number of areas that I've taken Your Honour to. In addition to that – and this is perhaps a separate position – the documents in any event, irrespective of fear of reprisal or that consideration – are directly relevant to, again, I know I've raised this a number of times, the SDA investigating and understanding properly the extent of whether the contravention fits within 557A of the Act.

PN361

And so getting the documents there is – in my submission it doesn't really matter whether there's a fear of reprisal there but rather it's needed for another purpose, which is to determine the extent of what my client would say if the documents bore certain information out, a serious contravention. Finally, Deputy President, the documents are all directly relevant to determining the contraventions and the extent of them that the union needs. Ultimately in obtaining the records this will provide the union or permit holder the ability to compare the sign-in, sign-out records as opposed to the roster and what they were paid - that is on a higher level - and then determine on a case-by-case basis whether there has been underpayment and then where there's an underpayment, whether it's been remedied and also the extent of that underpayment to determine, again, Deputy President, whether there is a serious contravention. Now, Deputy President, that is all I wish to say in respect of closing unless there was a specific question that Your Honour had.

PN362

THE DEPUTY PRESIDENT: Questions, plural – let's start with what Aldi is saying, there's just shy of 13,000 current employees. I can't remember the exact number. Any dispute about that being approximately the current number of employees?

PN363

MR GUY: No, Deputy President.

PN364

THE DEPUTY PRESIDENT: Right – and in terms of seeking records for a period of six years from, whatever, April '17 till whatever date it was in March 2023 – 26 March or something – is that for current employees only?

PN365

MR GUY: No, Deputy President – that will in respect of all employees.

PN366

THE DEPUTY PRESIDENT: All employees in that period?

PN367

MR GUY: Yes.

PN368

THE DEPUTY PRESIDENT: So in all likelihood that's going to be significantly exceeding 13,000 people, is that correct? Would you agree with that?

PN369

MR GUY: It may very well be, yes, Deputy President. Actually, Deputy President, I would only caveat that the number is large, I'll concede that. I'm not going to cavil with that. All I would say is that I think that 13,000 is based on – that would include those transport workers that we have now not included. I'm happy to be corrected on that. But it is a large number, I accept that, Deputy President.

PN370

THE DEPUTY PRESIDENT: Can you go to the draft order?

PN371

MR GUY: Yes.

PN372

THE DEPUTY PRESIDENT: So if we start from the beginning, paragraph 1, saying the order applies to non-members, blah blah blah, in relation to all employees, save for schedule 4.

PN373

MR GUY: Yes.

PN374

THE DEPUTY PRESIDENT: 'To whom the following agreements apply'.

PN375

MR GUY: Yes.

PN376

THE DEPUTY PRESIDENT: The earliest – I don't know the dates, I haven't looked at them – of those agreements is a 2019 date.

PN377

MR GUY: Yes.

PN378

THE DEPUTY PRESIDENT: How can there be employees prior to 2019 to who these agreements apply?

PN379

MR GUY: I see the issue there, Your Honour, in respect of the drafting. We would or I would submit that it would relate to the predecessor agreements as well – that cover those employees back to 2017.

PN380

THE DEPUTY PRESIDENT: That's not what the draft order says, though.

PN381

MR GUY: It is not what the draft order says, Deputy President, and again that is an oversight on my part and in respect of that I'd seek leave to circulate a draft order that these agreements have predecessor agreements. Aldi has been in this country for a period of time. I don't think that there is any dispute that there were predecessor agreements to this, to the agreements that are listed there. And that can be remedied by way of redrafting the order to include the predecessor agreements.

PN382

THE DEPUTY PRESIDENT: Why shouldn't I just – if I was inclined to make the order, why should I not just make it to current employees who are covered by the current agreements?

PN383

MR GUY: Deputy President, the reason for that – and again, it relates to the extent to which these contraventions have occurred – in my instructions my understanding is that the SDA, Mr Worsley as its permit holder, believe that these contraventions have been going on for a very long period of time. And that's the reason why they're going back as far as they can and it relates to every employee in distribution centres and its stores and the nature and the extent of those contraventions should be explored and if its suspicion is proven, with respect, it would be a large contravention prosecution if my client is so minded to do that. And to fully appreciate that, Deputy President, one needs to go back as far as they possibly can.

PN384

THE DEPUTY PRESIDENT: I don't think there was any evidence that Mr Worsley had a different level of suspicion of a contravention between one or any of the eight areas or regions or – is there?

PN385

MR GUY: No.

PN386

THE DEPUTY PRESIDENT: And given the numbers and the numbers of employees, why would it not be reasonable for me to make the order, say, for one or two of the regions and if it turns out that there are – because I imagine they're going to have similar issues across the board. That seems to be your case. But I wouldn't make it for – pick any random two – make the order for two for them and, you know, if there are issue found then that would be, I would have thought, a fairly good basis for requiring the remaining records, thereby balancing what will no doubt be a very extensive piece of work for Aldi in terms of getting – I'd take a guess – well, in excess of 13,000 employee records for a six-year period.

PN387

MR GUY: Well, again, Deputy President, it does get to the – it goes to the extent of it. I understand what you're saying in respect of – I don't mean to be putting words into your mouth, Deputy President. But effectively as I understand it you're saying, 'Well, why don't we take a sample and see where we end up and then (indistinct)'?

PN388

THE DEPUTY PRESIDENT: Yes.

PN389

MR GUY: Well, we may very well be doubling up the work, in the sense that it -
- -

PN390

THE DEPUTY PRESIDENT: How would it be double?

PN391

MR GUY: Well, there would be a need for another application. I would have to make – my client would have to make another application for further (indistinct) the records if you are to make a narrower order. And in addition to that, again, this – and I can only put it this way – that it really does go to my client wants a proper understanding of the total extent of what has occurred here. And it has a – certainly in my submission – a reasonable suspicion that it's national and it's been going on for a long time.

PN392

THE DEPUTY PRESIDENT: So in terms of the draft order, what's the time – as it's currently drafted, Mr Guy – what's the timeframe in which Aldi are meant to have these records ready for your client?

PN393

MR GUY: Deputy President, if you just bear with me – there would also of course just so I could make this point, just to circle back and I'm looking at Mr Worsley here to give me some indication in a moment as to the timeframe of what my client's thinking – but while he's doing that, just to come back to something that you raised as well in the wider order, there is an interesting question that arises as to certainly because my client suspects that there is a – these contraventions are wide-reaching and have been going on for a long period of time – obviously the statute of limitations is catching up to those at the end of the six-year period, as one can appreciate and so the why of the order – I haven't considered this, as to whether this action engages with limitation periods and what the effect of this application is – whether it's the commencement of proceeding in respect of those matters.

PN394

But certainly as soon as my client has an appreciation for the extent, it's going to have to move quickly if it wants to prosecute in respect of some of the later matters. So that is a relevant consideration as well. Now, if you just bear with me for a moment, I will just quickly mute and see whether I have some instructions on time periods.

PN395

THE DEPUTY PRESIDENT: Just before you do, then, in terms of time periods, even if I imagine Mr Worsley was working 12 hours a day, six days a week on this, he's only going to be able to get through so many employee records each day even if 13,000 employees or more than 13,000 employees who are going to have multiple records were all made available at a particular point in time, what do you

realistically expect that Mr Worsley is going to be able to get through in terms of reviewing those records?

PN396

MR GUY: Inspecting and copying, yes – if you just bear with me for a moment -
- -

PN397

THE DEPUTY PRESIDENT: Sure.

SHORT ADJOURNMENT

[12.22 PM]

RESUMED

[12.23 PM]

PN398

MR GUY: Thank you for the indulgence, Deputy President. Deputy President, you'll see there in the order it says - a lot of it depends on how the data is, and we don't know that at this point in time. My instructions are to say a period of three months in respect of timeframe, and obviously if that's insufficient, well, it may be cause for another application. But, again, Deputy President - - -

PN399

THE DEPUTY PRESIDENT: In which case we circle back to why wouldn't it be reasonable in the circumstances given the volume of records that we're talking about and number of people we're talking about, for me to make an order in respect of two of the areas?

PN400

MR GUY: Yes, Deputy President. I will take some instructions briefly on what you've raised in a moment about that, perhaps while Ms Perigo is addressing you, and I'll see where my client's at in respect of that.

PN401

THE DEPUTY PRESIDENT: All right.

PN402

MR GUY: Was there anything further, Deputy President?

PN403

THE DEPUTY PRESIDENT: Probably not at this point.

PN404

MR GUY: The Commission pleases.

PN405

THE DEPUTY PRESIDENT: Thank you. Ms Perigo.

PN406

MS PERIGO: Thank you, Deputy President. Deputy President, the parties have provided written submissions. The parties aren't in dispute about the legal principles that apply, and the leading authority is the *Independent Education Australia v Australian International Academy of Education*, a decision of Jessup

J, [2016] FCA 140. Deputy President, we've provided a number of authorities, and I just wanted to refer you to one of those, which is at page 153 of our bundle.

PN407

It's the *CEPU v Primo Group Proprietary Limited* [2019] FWC 5925. It refers to Jessup's decision and the principle that the records must be necessary, and the notion of necessary carries with it the meaning that the investigation could not properly take place, or the issue could not be properly investigated with the exclusion of the non-member records in place.

PN408

In the CEPU decision at paragraphs 16 and 17, the Commission sets out or the Commissioner sets out - sorry, the Deputy President set out his thoughts in relation to, and his findings in relation to an application made under the same section, and deals with at paragraph 26, why the order was not made. And the first point the Deputy President raises in this decision is the - sorry, Deputy President, I'll just go back.

PN409

One of the first points Deputy President Anderson makes in this decision at paragraph 17 is the issue of the suspicion. A view is not needed to be expressed either way. The issue in this case - the CEPU case - was all about annual leave compliance. The Deputy President accepted the union had a concern, he also accepted that the employer believed that its practices were lawful and non-discriminatory.

PN410

At paragraph 26 he then goes through the reasons why the order should not be made, and this is relevant to the case before you this morning. The obligations in that case, which were the obligations to pay annual leave under the agreement and NES, applied regardless of whether the person was a member of the union or not, and there was no reason to conclude on the material that the Deputy President had, that an inspection by a permit-holder of time and wage records of members would not provide the union with a basis to form its view.

PN411

There was also no evidence that led the Deputy President to conclude that any apprehension about union members having the information or their identities disclosed, would result in discriminatory treatment. And an expression of concern or fear is - more than an expression of concern or fear is required. The Deputy President also talked about the language of 483AA(2) had to be given effect, which goes back to this notion of necessary.

PN412

So, Deputy President, in this case the union's seeking access to all non-member records. And I'll get to the issue of records and the path that the union have suggested we take if an order was made. The agreements operate Australia-wide. The agreements named in the order - yes, there are predecessor agreements those. There are eight regions. Each region has an agreement. Each region has one distribution centre, so there are eight.

PN413

The distribution centre has warehouse and transport employees, and then the region has the stores that are serviced by that distribution centre. So the total number of stores in Australia currently in Ms Gallagher-Hill's statement, 583. And that's a total of 10,419 current employees approximately as at today. In the warehouse - - -

PN414

THE DEPUTY PRESIDENT: Yes, just for the stores, yes.

PN415

MS PERIGO: That was just the stores.

PN416

THE DEPUTY PRESIDENT: Yes.

PN417

MS PERIGO: So 10419 just in retail stores. And, Deputy President, in a retail store you'll have a store manager, you'll have assistant store manager, a store manager, a trainee. And all those managerial roles are covered by the enterprise agreement. So pretty much everyone in the store is covered by the agreement. In the warehouse - and this is again evidence that Ms Gallagher-Hill gives - there are 2464 warehouse employees.

PN418

Now, that's at paragraph 6 of her statement, at exhibit 3. And that's just warehouse employees; not transport. I see that the union's carved out their need to have transport records. So that is just the warehouse and, again, currently employees. They're also seeking access for six years. And, as you pointed out earlier in your questioning of my learned friend, Deputy President, there's no way to identify who a non-member is of those current employees.

PN419

Now, you've been taken to the decision of Humphreys J in the Federal Circuit and Family Court, and it's in the materials in front of you, I don't need to take you to that, other than Mr Guy made the submission that they're contraventions, and he talked about the payments that were made and what came out of the liability decision, which is the four people who were employees who gave evidence or were named in those proceedings, were paid in accordance with the judgment. And there was evidence there that other people in the selections area were also paid.

PN420

But Mr Guy talked about contraventions. The only contravention the court found were in relation to the four named employees. That's the only contravention from that decision. In terms of the evidence that the union's given in these proceedings - and I'll come to this a bit later as well, Deputy President, but one of the things that the union has put in their evidence is a survey. So they've said, 'We've gone and surveyed our members. We've gotten a number of responses back, and of those responses there are employees who say that they have performed work, but they have not been paid.'

PN421

Now, Deputy President, in the cross-examination of Mr Worsley we went to the types of classifications that that survey covered, and so they say that 842 respondents answered 'Yes' to the question that they performed work before or after their shifts, but 'No' to the second question. Those classifications of store manager, assistant store manager and store manager trainee, don't get another payment if they perform work before their shift or after their shift. That's the provision of the agreement. So that casts doubt on the outcome of the survey.

PN422

Similarly, employees who are hourly rate employees, which are the other classifications listed in paragraph 17 of Mr Worsley's statement, exhibit E2, they are hourly rate employees who are able to bank their hours. So they can put - they don't get paid, but they put those hours away in a bank and they can use that at some other point in time. So it very well may be that people who have worked before or after their shift and haven't been paid, fall into those categories, so there is some doubt as to the outcome of that survey, Deputy President.

PN423

The orders sought by the union in the proceedings, they say that they want the order to - for all non-member records, save for employees in schedule 4 of the agreements listed. Schedule 3 of the enterprise agreement includes employees, and this is the Prestons agreement. The agreements are similar, Deputy President, but in the Prestons agreement it sets out at schedule 3 the people who are warehouse. The schedule 1 is the store management employees, schedule 2 is the store employees, schedule 3 is the warehouse employees.

PN424

And of those warehouse employees there are people who we say would not fall within the union's rules. For example, the warehouse mechanic and the warehouse caretaker which is if the person is purely performing caretaker duties in the warehouse as opposed to assisting somebody who is a warehouse operator which is the store person typically. So the order as it's currently drafted, we say probably does cover or attempts to cover people that the union's rules don't cover, and that hasn't been remedied in the amended draft provided to you.

PN425

The documents that are being sought, Deputy President, in these proceedings, the roster is a work group as a whole. So there would be a roster for a store or a roster for a section of the warehouse, which would be a document that would have a very - a number of names who may or may not be union members. Payslips and sign-on and sign-off records are individual records.

PN426

The issue that you've raised with my learned friend in terms of the other two, which are now roster adjustment records and exception records, the statement of Ms Gallagher-Hill deals with those, and she dealt with those as well in her evidence. If we take what the unions call a roster adjustment record, the union had written to Aldi - and this is the first annexure to Ms Gallagher-Hill's statement.

PN427

The union had written to Aldi on 13 April asking for some clarification in relation to the records. I'm not sure I heard my learned friend; I thought he may have said that that was a request for the documents. As I understand that correspondence it's not a request for documents, it's a request for some information in relation to documents that are being sought. So there hasn't been a request by the SDA to just hand over records, if that's what my learned friend - the submission my learned friend made.

PN428

The SDA have asked in there for timesheet adjustments. Ms Gallagher-Hill has annexed the response provided which talks about when a timesheet is adjusted. So if an employee is rostered on and a member of the - and they advise a member of the store management that they cannot attend work - so if they can't attend work because they are ill - the employee is placed on leave and that goes on the employee's leave record. And then if the shift is replaced, someone else comes in and the roster's adjusted. So the record, Deputy President, is the roster. As I am instructed, there's nothing else.

PN429

In terms of what the union talks about as exception reports, which was exception records, Ms Gallagher-Hill gave some evidence in relation to that in her statement at paragraphs - and she was cross-examined on this - at paragraphs - well, paragraph 20. So, Deputy President, if - and this is as she said in her evidence, an online record.

PN430

So if the employee is asked to come in before their shift by the manager - and I'll use this as an example. If the employee's asked to come in 15 minutes early, prior to the beginning of their shift, they will be signing on 15 minutes early. So at a quarter to 7, as opposed to 7 o'clock. So the punch data or the sign-in record will show 6.45; the roster will show 7. The manager will see an exception to that and will either accept it or reject it, which is done online.

PN431

So you can see on the screen of the computer in the particular store, if we use it as an example in the retail store, the exception will be flagged and the manager will click the part of the system to change the pay data, so that the person will get paid on the basis of the start time, not the roster time. And then the roster - in that case, the punch data or the sign-on data becomes the relevant record for the purposes of the pay.

PN432

If it's rejected, then the data for pay comes from the roster. So when Mr Guy or my learned friend talked about a 'record', there is a screen. As Ms Gallagher-Hill said, there is a screen that shows that information for an employee.

PN433

As I am instructed, to get that information for an employee would require the screen, which would be a pay period, so that's a 14-day pay period, that screen for

14 days for one person for six years. That's the data it appears the union are pursuing.

PN434

And it's not – there was talk about a report. I accept what my learned friend says, they're not requesting ALDI to produce reports, get some sort of program in to create reports. So the exception record would be a screenshot of that – for a particular person, for a particular pay period.

PN435

THE DEPUTY PRESIDENT: Ms Perigo, is there any reason why as opposed to having to provide that in paper format, for want of a better word, that Mr Worsley couldn't be provided with view only access and look at it himself?

PN436

MS PERIGO: One of the issues, Deputy President, that we haven't grappled with, and we resist the application - - -

PN437

THE DEPUTY PRESIDENT: I understand that.

PN438

MS PERIGO: - - - (indistinct) I appreciate that – my client's position. There's also personal information that would be involved in its employees' records and there would need to be – we resist the application and we say it shouldn't be made, but there's obviously personal privacy issues attached to this type of application as well where people's names, dates of birth, addresses, those types of things being provided to a third party when ALDI has obligations in relation to privacy issues.

PN439

One thing when you asked me, Deputy President, about how it would work, it is still unclear how the union, if the order was made, would take the order and any other application Mr Worsley made and then go about trying to get the documentation, whether there would be an expectation that ALDI would just ream off thousands and thousands and thousands of pages, or how that would effectively work.

PN440

So it's not clear in practice how the union intend, if an order was to be granted, to put that order into effect given the vastness of what we're dealing with and the issues that we're dealing with.

PN441

Deputy President, we say that the union haven't made out their case. We say that it is not necessary for the investigation of any suspected contravention that the union may have. There's a disputes procedure in every single of those ALDI agreements. None of those have been enacted by anybody, as I am instructed, in terms of concerns that the union may have in relation to payment.

PN442

There's been no notification by the SDA to date to inspect any records. They may or they may not have member records. Mr Worsley gives no evidence of any member records. There's no reason why it's six years. We say it's fishing.

PN443

The timeframe that the union put in the case before Humphreys J was a period of four years. No idea why they've decided to go back six years. It's an enormous burden on the organisation to have to, if the Commission ordered, to go and deal with the records of over 13,000 employees where we've got issues in relation to personal information and do that employee-by-employee.

PN444

The union have given no reason why inspecting members' records will not be sufficient to deal with their issue, and they concentrate – the submissions both in writing and today, Deputy President, concentrated on what they say is a suspected contravention, and the Commission appreciates we resist that, but not one of the member records are necessary.

PN445

The records they're seeking will show the time someone clocked in, their rostered start time, their rostered finish time, where they have a rostered finish time - the hourly rate employees in the warehouse don't have a rostered finish time - and the time they left.

PN446

That's all those records are going to show, Deputy President, and the contravention that the union say, or the suspicion that they say they have is employees working, or performing work before or after rostered shifts without payment. The records they've given, we say, an inadequate explanation as to why these records are necessary to investigate what they say is a suspected contravention.

PN447

In terms of not dealing with just member records, they've put forward some hearsay evidence in relation to what Mr Worsley says member or organisers have told him. Mere concern or fear is not enough. The evidence is not sufficient.

PN448

The submissions that they make in relation to a serious contravention we say is an afterthought. It's not in the application. It's in the supplementary statement, not the first statement that was filed with the application, and in any event it's not a relevant consideration.

PN449

We mentioned the last time we were before you, Deputy President, we've had discussions, and we're happy to continue to have those discussions. It's not clear who the order would apply to. I've dealt with the issues of personal information, and Deputy President, we say the application should be dismissed.

PN450

THE DEPUTY PRESIDENT: Thanks, Ms Perigo. Mr Guy, anything in reply?

PN451

MR GUY: Yes, just a few brief points, Deputy President, just in respect of one comment you, your Honour, made in respect of the way in which the order was drafted, and I made comment that, or responded by saying in respect of these enterprise agreements and the dates of the enterprise agreements.

PN452

It certainly relates to whom the following agreements apply. Now, if an employee has worked for ALDI pre-dating those agreements, certainly my submissions – the order covers those records going back before the agreement.

PN453

The only issue that would arise would be that – because an employee currently employed – I'm just using, for example, the Minchinbury Agreement at the moment, right. Let's assume we are talking about an employee who works at the ALDI Minchinbury depot, they are a warehouse worker, they have worked at ALDI for 10 years let's say, for argument's sake; they are nevertheless covered by the ALDI Minchinbury Agreement presently, in the correct category, and so the order would cover their records going back the six years.

PN454

I'm just trying to allay the concern that you have there - - -

PN455

THE DEPUTY PRESIDENT: My concern is, if I started in whatever year, 2000-and – what was it – 17, is that where it was starting?

PN456

MR GUY: Yes.

PN457

THE DEPUTY PRESIDENT: And I finished in 2018.

PN458

MR GUY: Yes.

PN459

THE DEPUTY PRESIDENT: How - - -

PN460

MR GUY: Yes, I was just about to get onto that, Deputy President. The order will need to reflect previous agreements in respect of former employees who did not work in the period in which those agreements started. I accept that.

PN461

Now, moving beyond that, an issue was raised in respect of warehouse caretakers and warehouse mechanics. My instructions are that the union rules do indeed cover warehouse employees generally speaking, and otherwise would cover those people in those positions.

PN462

In any event, this is a request for non-member records generally speaking, and we don't see that the Commission will have any impediment in respect of that.

PN463

Now, there was also an issue raised that the union hasn't directly asked for the records. As I understand it, this application is posed – I think that the long and the short of it is, Deputy President, that the Commission – and I'm sure my learned friend will correct me if I'm wrong – the respondent is not willing to hand over the records. We've danced around the issue for long enough. This application has been brought because there has been an opposition to providing the records. It certainly is in my submission - - -

PN464

THE DEPUTY PRESIDENT: I'm not sure what basis any employer could hand over non-member records without an order.

PN465

MR GUY: Indeed.

PN466

THE DEPUTY PRESIDENT: Does it matter whether there was a request or not?

PN467

MR GUY: Thank you, Deputy President. I'd certainly say in that respect there isn't. Similarly, in that same vein in respect of the dispute resolution provisions, again that is, with respect, not relevant to the present application.

PN468

When, where and how my client runs its disputes is a matter for it. It has a right under the Act here to inspect member and non-member records, and in this application it is seeking to do so. The fact that it has or hasn't raised this through a dispute resolution process, in my respectful submission, is irrelevant.

PN469

Now, in respect of the way in which the records are presented, certainly the record in and of itself is a piece of data. How it's presented, the parties will have to work on how that will be presented, if the order's made, and the manner in which Mr Worsley views it - - -

PN470

THE DEPUTY PRESIDENT: Mr Guy, I'm pretty uncomfortable about making an order when the parties aren't clear about how it could be complied with.

PN471

MR GUY: Well, yes, Deputy President. If the – on that basis, Deputy President, if – well, as would be the ordinary course, I would say, Deputy President, the - - -

PN472

THE DEPUTY PRESIDENT: I be concerned if the Commission's regularly making orders that is – that aren't clear for people in terms of having to comply with them, Mr Guy.

PN473

MR GUY: Absolutely, Deputy President, and no court would be doing that as well, the war tribunal, for that matter. What I would say to that, Deputy President is, at the moment, this is a question of – the first question to be answered is – should the order be made, if you, Your Honour is satisfied, then the order can be made. The terms of that order and the practicalities of that order and the way in which this Commission works, could be subject and is certainly within the remit of the Commission to do this, to hold another conference to ensure that the parties are on the same page as to the nature and content of the ability for the parties to – to give proper effect to that order because Deputy President, you – certainly, in my respectful submission, the Commission should not simply refuse to make an order because it's not clear as to how the parties are to execute it.

PN474

If the Commission is satisfied that there is – that the applicant has a reasonable suspicion and it is necessary and they should access the records, then the order can be made, if the Commission remains unclear as to the terms of the orders, I'd say two things in – or has concerns in respect to the way (indistinct) orders are, I'd say two things in respect to that. The first is, both my client and the respondent are large complex organisations that have a lot to do with each other indeed, it was referred to by my learned friend that there have been discussions and I'm sorry, if I've misheard that the discussions may indeed be ongoing, about their relationship.

PN475

There certainly could be an order of the Commission for parties to work out a regime, as is often the case as certainly in this Commission, those orders are often made as is made in the courts as well. And if that doesn't work, to – to come to the Commission to have the matter resolved. Or alternatively the Commission could just make an order saying well, call you back and we'll have a conference to sort it out. So I can understand the concern that the Commission has had, it is – the Commission has raised that concern, I can understand it. But that should not in of itself, Deputy President, be an impediment to making the threshold order that yes, you can get the records.

PN476

Now, moving beyond that, I only have two more points to make. The documents that – there was a reference made by my learned friend as I understand it, the documents show sign in and sign out records and the roster, but also show, and this is key, there will also be records of pay slips so it can be determined as to whether these employees were paid for the times in which they worked. So that's why it is all necessary. That is why it all works in together. This is why the categories of documents as a collective are sought.

PN477

THE DEPUTY PRESIDENT: Mr Guy, just going back to – so the question I asked you about and then I've asked – and Ms Perigo had also dealt with it. It would seem that the fourth one, roster adjustment records (indistinct) adjust the roster and so if you had the roster done and then you've got effectively what people did work.

PN478

MR GUY: Yes.

PN479

THE DEPUTY PRESIDENT: I.e., including any adjustments that were made to it.

PN480

MR GUY: Yes.

PN481

THE DEPUTY PRESIDENT: And so it would seem that that's unnecessary.

PN482

MR GUY: I can't say anything more to that, yes, Deputy President. Yes, I'm content with that – that course.

PN483

THE DEPUTY PRESIDENT: And it would seem similarly, for the exception records.

PN484

MR GUY: No, the position in respect of exception records are different for this reason, Deputy President. As I understand it, they show – there are often situations where somebody works less than the – I think it was a 10 minute period, if I recall correctly. And they need to be actioned. So the effectively the yes, no, answer on an exception record is relevant to determine whether somebody's been paid or not for that.

PN485

THE DEPUTY PRESIDENT: Yes, but so it would seem from – again, I just want to be clear about this.

PN486

MR GUY: Yes.

PN487

THE DEPUTY PRESIDENT: It would seem from the evidence that if there's that situation where someone's clocked in and there's a difference between the time they've clocked in and their rostered start time, that whatever they – whatever way that was resolved, i.e. they were paid from their rostered start time or they were paid from the time that they were signed in, that they signed in, was available. That information is available on or between rosters, payslips and sign on, sign off records.

PN488

MR GUY: If you just bear with me for a moment, I want to be clear on this too, Deputy President. Yes.

PN489

THE DEPUTY PRESIDENT: Yes.

PN490

MR GUY: I could put it this way, Deputy President that these are my instructions that the exception report will – yes, (indistinct) the exception report, you see whether it's been paid or not, but it is – it goes certainly in my submission to the nature of the breach in so far as the fact that there was a decision from management or whoever, somebody – an exception report authorisation level to either approve or deny that additional leave. So it goes to the nature of the breach, that's as high as I can put it.

PN491

THE DEPUTY PRESIDENT: But again, doesn't that same information become obvious between those first three sets of documents, so I'm either – if I start at quarter to 7 and I'm rostered to start at 7, and I haven't been paid from quarter to 7, then isn't the clear implication that that wasn't approved? That someone's had to make a decision not to pay from that period of time?

PN492

MR GUY: That would be implied, yes, Deputy President.

PN493

THE DEPUTY PRESIDENT: Right.

PN494

MR GUY: Yes. Now, finally, Deputy President, I'll just say this. Your Honour has made references to a – alluded to a narrow order, not as many locals or the agreements. All I would say to that, Deputy President is that it is within your discretion to amend the order as you see fit. And I'll say nothing more on that.

PN495

THE DEPUTY PRESIDENT: All right. Ms Perigo, I might just check in with you, because there were some matters, obviously that I'd asked Mr Guy about that had come up in reply, but if there's anything – without wanting to make this into a tennis match, if there's anything that came – that arises from your perspective that you wish to say in relation to those matters?

PN496

MS PERIGO: Only very briefly, Deputy President. Mr Guy has said that even if it's not clear what the parties would be required to do under an order that could be made, Deputy President, if an order is made, there are serious consequences if the order is not complied with and if it's unclear that an order would be made or if it's unclear as to what would happen and how that would – could be complied with, it has to be a consideration for the Commission, we say it's still a situation where it's not necessary in line with the authorities that we've taken you to, that document's been provided. And the last point, Deputy President, the exception report, it seemed that there is a difference between the parties as to what exception record, as to what that actually is. And again, if an order is made that a document be provided and the parties have different views on what that document looks like, that also, I think, would be a matter the Commission needs to take into account. If it pleases.

PN497

THE DEPUTY PRESIDENT: All right. Well, if there's nothing further, than thank you both for the way you've presented the evidence and the submissions. I will give consideration to all of the material and a decision will be issued in due course. Thank you. Now, we'll adjourn.

ADJOURNED INDEFINITELY

[12.58 PM]

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