[2021] FWC 6608

The attached document replaces the document previously issued with the above code on 23 December 2021.

Paragraphs [109] and [143] have been amended.

Isobelle Saville
Associate to Deputy President Anderson

Dated 31 December 2021

FairWork Commission

DECISION

Fair Work Act 2009
Section 229 - Application for a bargaining order; Section 238 - Application for a scope order

Application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (Re Utilities Management Pty Ltd)
(B2021/1013)

Application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (Re Utilities Management Pty Ltd)
(B2021/1048)

Application by the Association of Professional Engineers, Scientists and Managers, Australia (Re Utilities Management Pty Ltd)
(B2021/1052)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 23 DECEMBER 2021

Application for a bargaining order and applications for a scope order – protracted bargaining for an agreement covering whole of workforce – second NERR issued by employer covering sub-set of workforce – whether larger group fairly chosen – whether sub-set fairly chosen – whether breach of good faith bargaining obligations – groups both fairly chosen – whether reasonable in circumstances to make scope order – not reasonable to compromise extant bargaining – scope application dismissed - no breach of good faith by employer – bargaining application dismissed

[1] This decision concerns three applications:

- by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) on 18 October 2021 for a bargaining order under s 229 of the *Fair Work Act 2009* (Cth) (FW Act) (B2021/1013)[1];

- by the CEPU on 28 October 2021 for a scope order under s 238 of the FW Act (B2021/1048)[2]; and

[1] F32 dated 15.10.21
[2] F31 dated 27.10.21

- by the Association of Professional Engineers, Scientists and Managers, Australia (Professionals Australia[3]) on 29 October 2021 for a scope order under s 238 of the FW Act (B2021/152)[4].

[2] In this decision I refer to the CEPU and Professionals Australia as the applicant unions.

[3] The respondent to each of the applications is Utilities Management Pty Ltd (Utilities Management) trading as SA Power Networks (SAPN).

[4] The applications concern common issues relating to bargaining for an agreement (referred to as the replacement agreement) to replace the *Utilities Management Pty Ltd Enterprise Agreement 2018* (the Agreement). By consent, I directed they be heard and determined concurrently.

[5] The Australian Municipal, Administrative, Clerical and Services Union (ASU) appeared in support of the CEPU and Professionals Australia applications. The unions were jointly represented (joint unions).

[6] An independent bargaining representative (Mr Fielder) appeared. Mr Fielder did not advance evidence or make submissions.

[7] I conducted conciliation on the CEPU bargaining order application on 27 October 2021. It did not resolve. The CEPU sought interim orders and that the matter be arbitrated.

[8] On 27 October 2021 I refused the CEPU's application for interim orders with leave reserved for a fresh application if the need arose.[5]

[9] I issued directions on 27 and 29 October and 15 November 2021.

[10] I granted permission for the joint unions and Utilities Management to be represented.[6]

[11] On 12 November 2021 the CEPU applied for a production order. Utilities Management produced documents in response to the application.[7] The production application was not further pressed at a directions hearing on 17 November 2021.

[12] A Statement of Agreed Facts was filed.[8]

[13] I heard the substantive applications on 18 November 2021 and 2 December 2021.

[14] On 15 December 2021 I invited the parties to make submissions on the issues canvassed at paragraphs [81] to [94] of this decision. Further brief written submissions were filed.[9]

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[3] Also referred to as APESMA in the agreed facts and some evidentiary materials
[4] F31 dated 29.10.21
[5] Reasons on transcript 27.10.21
[6] Directions hearing 27.10.21 and email from Chambers-Anderson DP 15 November 2021
[7] CEPU3 Bundle of documents EMA Legal 16 November 2021
[8] CEPU1 including further facts agreed in email correspondence 16 and 17 November 2021
[9] Further Written Submissions of Joint Unions 21 December 2021; Submissions of Utilities Management Pty Ltd (by email 21 December 2021)

Evidence

[15] I received evidence from sixteen persons:

- Benjamin Jewell, Branch Organiser South Australia, CEPU (called by CEPU; two statements)[10];
- Jason Harrison, Site Supervisor (called by CEPU; one statement)[11];
- Jason Lailey, Electrical Powerline Worker (called by CEPU; one statement)[12];
- Max Mawby, Electrical Connect Officer (called by CEPU; two statements)[13];
- Michelle Vlachos, Field Technician (called by CEPU; one statement)[14];
- Sarah Andrews, Director Professionals Australia (SA/WA) (called by Professionals Australia; one statement)[15];
- Liam Mallamo, Electrical Engineer (called by Professionals Australia; one statement)[16];
- Rick Amadio, Electrical Engineer and Union Delegate (called by Professionals Australia; one statement)[17];
- Scott McFarlane, Energy Sector Organiser ASU (SA/NT) (called by ASU; two statements)[18];
- Gianfranco Verdini, Substation Designer (called by ASU; one statement)[19];
- Jake Goodwin, Workplace Relations Manager Utilities Management (called by Utilities Management; one statement)[20];
- Douglas Schmidt, General Manager Network Management Utilities Management (called by Utilities Management; one statement)[21];
- Richard Amato, Executive General Manager (Enerven) (called by Utilities Management; one statement)[22];

[10] CEPU 5; CEPU6
[11] CEPU7
[12] CEPU8
[13] CEPU9; CEPU10
[14] CEPU11
[15] PA1
[16] PA2
[17] PA3
[18] ASU1; ASU2
[19] ASU3
[20] SAPN2
[21] SAPN3
[22] SAPN4

- George Hristopoulos, Commercial and Risk Manager Utilities Management (called by Utilities Management; one statement)[23];

- Chris Woodard, Commercial and Contracts Manager (Enerven) (called by Utilities Management; one statement)[24]; and

- Fiona Nation, Senior Marketing Consultant (Enerven) (called by Utilities Management; one statement)[25].

[16] Messrs Jewell, McFarlane, Goodwin, Schmidt and Amato were required for examination.

[17] Utilities Management raised objection to certain content in the statements of the union witnesses (other than Ms Andrews). The objections were varied, including on the grounds of hearsay, opinion and relevance.[26]

[18] The joint unions raised a qualified objection to a certain portion of the statement of Mr Hristopoulos on the ground of opinion and hearsay.[27]

[19] The approach I take to these objections and the evidence as a whole is as follows.[28]

[20] In a matter such as this where there is a wide expanse of material concerning commercial, operational and industrial matters it is understandable that oral, written and documentary evidence includes elements of hearsay drawn from what a witness has been told, understood or read. I do not disregard this evidence, especially where it is not contested. Where it concerns contested facts, I give a higher level of weight to evidence borne of direct observation or knowledge or sourced from established business records.

[21] It is also not surprising in a matter such as this that elements of the evidence include opinion and submission. This arises because matters in issue concern questions such as whether bargaining conduct has been unfair or whether a bargaining group has been fairly chosen. Whilst those questions fall to be objectively determined, a number of witnesses express views that include subjective opinion. I have regard to opinions expressed in this context. I take them into account as a part of the overall submission advanced by the party calling that witness.

[22] I do not take into account prejudicial or irrelevant material, though there is little of this given that I provide a wide berth to what is relevant having regard to the multiple applications and the broad way in which the respective cases have been framed.

[23] Although certain facts have been agreed, there are evidentiary disputes particularly with aspects of the evidence of those who were called for examination. The most material of those factual disputes concern the working arrangements of persons who work in both the SAPN and

[23] SAPN5
[24] SAPN6
[25] SAPN7
[26] SAPN1
[27] SAPN5 paragraph 30
[28] See also transcript PN50 - 53

Enerven arms of Utilities Management's operations. I make findings on those matters in the body of this decision.

[24] I make some general observations with respect to the oral evidence. I do so noting that the Commission has been greatly assisted by all who gave evidence (and those instructing) particularly having regard to the short time frames I directed for the preparation of evidence and hearing of the matter.

[25] Mr Jewell gave evidence clearly. He displayed good recall of bargaining events and timeframes. Whilst his evidence included opinion, his factual narrative was consistent with the written record. He made reasonable and appropriate concessions.

[26] Mr McFarlane was firm and precise in giving evidence and in recall especially of bargaining events and timeframes. Whilst his evidence included both fact and opinion, it was reliably presented.

[27] Mr Goodwin gave evidence in a considered manner but was cautious in making concessions. Some evidence was confusing and inconsistent. Whilst generally reliable, I apply caution where inconsistencies emerged.

[28] Mr Schmidt was an impressive witness. He was clear, direct and willing to accept propositions concerning the SAPN business even where they tended to qualify Utilities Management's position or constitute a concession to the joint union position.

[29] Mr Amato gave reliable evidence relating to the business operations of Enerven but his evidence was defensive and he tended to reframe questions. I give Mr Amato's evidence weight on matters concerning business operations but apply a degree of caution where it strayed into submission or opinion.

[30] A substantial volume of evidence was documentary. The documentary material, including matters relating to the regulated and non-regulated arms of Utilities Management's operations, was largely not in dispute.

[31] I take into account all evidence and submissions before me. Given the breadth of materials, in these reasons I specifically deal with matters that are most relevant to arriving at a decision. Some evidence and submissions are not referenced, not because I have not considered them, but because doing so would add excessive length to these reasons.

Facts

[32] The agreed facts are as follows:

> "1. The *Utilities Management Pty Ltd Enterprise Agreement 2018* ("the Agreement") is an enterprise agreement within the meaning of the *Fair Work Act 2009.*
>
> 2. The Agreement was approved by the *Fair Work Commission* ("the Commission") on 28 August 2018.

3. The nominal expiry date of the Agreement was 31 December 2020.

4. The Agreement was made by Utilities Management Pty Ltd T/A SA Power Network and certain employees identified in the scope provision therein.

5. The Agreement further covers:

   5.1 The Association of Professional Engineers, Scientists and Managers, Australia;

   5.2 the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU);

   5.3 the Australian Workers Union;

   5.4 the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;

   5.5 the Construction, Forestry, Mining and Energy Union; and

   5.6 the Australian Services Union.

6. On or about 5 June 2020 SAPN issued a Notice of Employee Representational Rights ("NERR") to 2131 people, replicating the coverage of the Agreement.

7. Since issuance of the 5 June 2020 NERR the parties have met on approximately 22 occasions to discuss an agreement with the scope described therein.

8. On or about 16 September 2021 SAPN issued a further NERR covering 409 employees that are South Australia based who provide major infrastructure, energy and telecommunications work in the competitive market for Enerven Energy Infrastructure Pty Ltd covered by the classification structure in the *Enerven Enterprise Agreement 2021*.

9. Since issuance of the 16 September 2021 NERR the parties have met on approximately 4 occasions to discuss an agreement with the scope described therein.

10. Since January of 2019:

    10.1 of the 80 Enerven Secondments, 26 workers have been seconded from SAPN to Enerven, while there have been 54 internal Enerven secondments;

10.2 of the 319 SAPN Secondments, 10 workers have been seconded from Enerven to SAPN, while there have been 209 internal SAPN secondments.

11. Persons who perform SAPN work and persons who perform Enerven work are employees of Utilities Management Pty Ltd.

12. SAPN has balloted three versions of a replacement agreement. The results of employees who participated in those ballots were:

12.1 In the ballot conducted in September 2020, 62.81% submitted a no vote;

12.2 In the ballot conducted in December 2020, 58.84% submitted a no vote;

12.3 In the ballot conducted in June 2021, 62.37% submitted a no vote.

13. On 1 March 2021 the Commission granted a Protected Action Ballot Order to the CEPU, ASU and APESMA.

14. On and from 1 April 2021 members of the CEPU, ASU and APESMA have been taking protected industrial action in support of claims advanced in bargaining for the 5 June 2020 NERR. The Unions have given notice of intended industrial action as follows:

14.1 1 April 2021 – CEPU:

14.1.1 Stoppage for up to 4 hours;

14.1.2 Indefinite ban on the performance of work:

14.1.2.1 On scheduled RDOs;

14.1.2.2 Outside an employee's role description/indicative tasks and all safe work procedures.

14.2 8 April 2021 – ASU:

14.2.1 Indefinite ban on the performance of work outside:

14.2.1.1 An employee's role description/indicative tasks and all job safe procedures;

14.2.1.2 Ordinary hours (unless in emergency situations);

14.2.2 Amending and issuing work related emails with link to website www.sapowernetworkers.com.au.

14.3 14 April 2021 – ASU:

14.3.1 Indefinite ban on the performance of work outside:

14.3.1.1 An employee's role description/indicative tasks and all job safe work procedures;

14.3.1.2 Ordinary hours (unless in emergency situations);

14.3.2 Amending and issuing work related emails with link to website www.sapowerworkers.com.au.

14.4 14 April 2021 – CEPU:

14.4.1 Indefinite ban on the performance of:

14.4.1.1 Temporary higher class duties;

14.4.1.2 Temporary secondment roles;

14.4.1.3 Work in clothes worn at work on which stickers, badges, slogans and messages are not attached, within the bounds of workplace safety;

14.4.2 Amending and issuing of work-related emails with the link to the website www.sapowerworkers.com.au.

14.5 19 April 2021 – APESMA:

14.5.1 Indefinite ban on:

14.5.1.1 Unlimited stoppages of work for up to and including 4 hour period;

14.5.1.2 Unlimited stoppages of work for up to and including 8 hour period;

14.5.1.3 Unlimited indefinite or periodic bans on temporary higher class duties;

14.5.1.4 Unlimited indefinite or periodic bans on temporary secondment roles;

14.5.1.5 Unlimited indefinite or periodic bans on work outside ordinary hours (unless emergency situations);

14.5.2 Amending and issuing of work-related emails with the link to the website www.sapowerworkers.com.au.

14.6 22 April 2021 – CEPU:

14.6.1 8 hour stoppage on performance of work (except in emergency);

14.6.2 Ban on performance of LIVE work, including switching during ordinary hours on 22 April 2021 (except in emergency);

14.6.3 Ban on work outside of hours for a 24 hour period, starting at 6am on 22 April 2021;

14.6.4 Ban on performance of 'disconnection for non-payment' on 22 April 2021 from 6am to 6pm;

14.6.5 Ban on signing off third-party damage jobs as chargeable on the touchpad and supporting paperwork.

14.7 6 May 2021 – ASU:

14.7.1 Stoppage of work for up to 4 hour period (unless in emergency);

14.7.2 Stoppage of work for up to 8 hour period (unless in emergency);

14.7.3 Work in clothes worn at work on which stickers, badges, slogans and messages are not attached, within the bounds of workplace safety.

14.8 6 and 8 May 2021 – CEPU:

14.8.1 4 hour stoppage on performance of work, commencing 4 hours before the end of ordinary hours (except in emergency;

14.8.2 Ban on work outside of ordinary hours, starting at 6am on 6 May 2021 and concluding at 6am on 8 May 2021;

14.8.3 Ban on performance of LIVE work, including switching, starting at 6am on 6 May 2021 and concluding at 4pm on 6 May 2021 (except in emergency).

14.9 20 May 2021 – CEPU:

14.9.1 8 hour stoppage of work (except in emergency);

14.9.2 Ban on the performance of disconnections for non-payment;

14.9.3 Ban on signing off third party damage jobs as chargeable on the touchpad and supporting paperwork.

14.10 8 June 2021 – CEPU:

14.10.1 Indefinite ban on the performance of work outside of ordinary hours starting at 3pm on 8 June 2021 (except in emergency).

14.11 1 July 2021 – ASU:

14.11.1 Stoppage for up to and including 4 hour period (except in emergency);

14.11.2 Stoppage for up to and including 8 hour period (except in emergency).

14.12 1 July 2021 – CEPU:

14.12.1 4 hour stoppage of work, commencing from the start of ordinary hours on 1 July 2021 (except in emergency);

14.12.2 8 hour stoppage of work, commencing from the start of ordinary hours on 1 July 2021 (except in emergency).

14.13 30 July 2021 – CEPU:

14.13.1 Suspension of industrial action in the form of 'an unlimited number of indefinite or periodic bans on the performance of work outside of ordinary hours (except in emergency).

14.14 11 November 2021 – ASU:

14.14.1 A stoppage on the performance of work for up to and including a 4 hour period (except in emergency) on 11 November 2021;

14.14.2 A stoppage on the performance of work for up to and including a 8 hour period (except in emergency) on 11 November 2021.

14.15 11 November 2021 – CEPU:

14.15.1 4 hour stoppage on the performance of work, commencing at the start of ordinary hours on 11 November 2021 (except in emergency);

14.15.2 8 hour stoppage on the performance of work on 11 November 2021 (except in emergency).

15. The parties have been unable to reach agreement as to the terms or scope of a replacement agreement."

[33] Other relevant facts or inferences to be drawn from facts emerge from the evidence. These in particular concern the Enerven business, the terms of regulatory separation between

Enerven and SAPN imposed by the competition regulator, circumstances relevant to the making and communication by Utilities Management of its decision to issue the 16 September 2021 NERR and the manner in which bargaining is proceeding under both the June 2020 and September 2021 NERRs.

[34] Where necessary, I make findings on these matters in the body of this decision.

Matters in issue

[35] It is appropriate at this juncture to identify in broad terms the matters in issue and relief sought.

[36] The matters in issue are twofold.

[37] Firstly, the joint unions contend that the scope of the proposed replacement agreement being bargained for under the NERR of 5 June 2020 was fairly chosen and that the scope of a proposed separate agreement covering the Enerven business being bargained for by Utilities Management under the NERR of 16 September 2021 was not fairly chosen.

[38] In support of these propositions the joint unions seek an order under s 238 that the scope of the proposed replacement agreement covering the Utilities Management workforce as a whole is fairly chosen.

[39] Secondly, the joint unions contend that Utilities Management has not been bargaining in good faith for a replacement agreement because the NERR it issued on 16 September 2021 for a separate agreement covering the Enerven business was a "capricious and unfair attempt to divide the cohort into two"[29].

[40] In respect of this alleged breach of good faith bargaining, the joint unions seek an order under s 230 requiring Utilities Management to withdraw the NERR of 16 September 2021, to not progress bargaining for a separate agreement and to resume bargaining in good faith for a replacement agreement under the NERR of 5 June 2020.

Submissions

[41] Submissions have been filed by the joint unions and Utilities Management and submissions in reply have been filed by the unions, and made orally.

[42] They can be summarised as follows.

Joint unions

[43] Having issued a NERR in June 2020 for a replacement agreement for the whole of its workforce Utilities Management unilaterally and without notice to any of the unions severally and jointly issued a second NERR in September 2021 for a separate agreement covering its Enerven business.

[29] Submissions 3.11.21 paragraph 32

[44] Doing so was capricious and unfair.

[45] The effect of cleaving its workforce in two was to gain an industrial advantage, sow division amongst employees and weaken the collective bargaining power of employees and their representatives. Doing so was the antithesis of bargaining in good faith. Utilities Management issued the second NERR with this intention; and even if not intended, that is the consequence.

[46] Utilities Management's conduct was capricious and unfair because it could have but chose not to negotiate for a varied scope inside the bargaining process for the replacement agreement nor advance any proposals inside that process specific to its Enerven or SAPN businesses.

[47] Bargaining under the second NERR compromises the fair and efficient conduct of bargaining for the replacement agreement under the June 2020 NERR because it will, amongst other effects, result in duplication of meetings and dialogue including for bargaining representatives and organised labour.

[48] Bargaining under the second NERR will compromise the fair and efficient conduct of bargaining for the replacement agreement because it alters established industrial practice developed over multiple generations of agreement-making.

[49] Bargaining under the second NERR will compromise the fair and efficient conduct of bargaining for the replacement agreement because it will, amongst other effects, result in confusion as to who is to be covered by which agreement and who is entitled to participate in which bargaining process.

[50] As a matter of both law and practice this confusion arises.

[51] Confusion arises as a matter of law because Enerven is not an employer of any employee to be covered by either the replacement agreement or Utilities Management's proposed separate agreement. Utilities Management is the employer in both respects, not Enerven or SAPN. Enerven and SAPN are simply business units operated by Utilities Management.

[52] Confusion arises as a matter of practice because the Enerven business chooses, at its discretion, to source additional labour from persons working for SAPN when it needs, and vice versa; thus, some persons employed by Utilities Management perform work on the same day for both Enerven and SAPN, literally by changing work apparel, hats and motor vehicle logos.

[53] Operationally the Enerven and SAPN businesses are not separate and discrete because employees operate under common policies, common payroll systems, common information technology systems and common human resource management.

[54] The applicant unions meet all of the pre-conditions in s 238 for making a scope order.

[55] The proposed scope of the replacement agreement under the June 2020 NERR, being the Utilities Management workforce as a whole, is fairly chosen because that group has been

covered by a single agreement applying to the whole workforce over multiple generations of agreement-making, and the group has successfully bargained for those agreements.

[56] That a replacement agreement has not yet been reached is the consequence of robust bargaining, unreasonable conduct by Utilities Management and the collectively expressed views by employees that proposals advanced to date by Utilities Management have been inadequate or unreasonable.

[57] In contrast, the proposal by Utilities Management for a separate agreement covering its Enerven business under the September 2021 NERR is not a fairly chosen group because it is neither geographically, operationally or organisationally distinct, and in any event is not a group reasonably chosen. Certain bargaining representatives for that agreement are, according to the joint unions, representatives of the employer.

Utilities Management

[58] Utilities Management has bargained in good faith for fifteen months for a replacement agreement and continues to do so. It continues to convene bargaining meetings with bargaining representatives and actively assesses and considers its position and positions put. Evidence of this is the twenty-two bargaining meetings and that on three occasions (September 2020, December 2020 and June 2021) Utilities Management submitted proposed replacement agreements to its workforce. These proposals were not supported by the unions jointly or severally.

[59] It is not appropriate to make a scope order with respect to bargaining agreements proposed under the June 2020 NERR because that would compromise bargaining under the September 2021 NERR and Utilities Management does not contend that the scope of a replacement agreement covering the workforce as a whole would not also be fairly chosen.

[60] A group for bargaining purposes may be fairly chosen even though a different group may also be fairly chosen. That the scope of the replacement agreement being bargained for under the June 2020 NERR is fairly chosen does not mean that the scope of the proposed separate Enerven agreement is not fairly chosen.

[61] In any event, no scope order under s 238 as sought by the joint unions could operate to set aside bargaining under the September 2021 NERR.

[62] It was both lawful and reasonable for Utilities Management to issue a fresh NERR in September 2021 for a separate agreement covering its Enerven business.

[63] It was lawful to do so because the September 2021 NERR complies with the requirements of the FW Act and is required by the Act to commence bargaining. Its validity is not challenged by the joint unions. A bargaining representative, including an employer, is entitled to seek separate agreements for a sub-set of employees including during the course of established bargaining. The required mechanism for doing so is by issuing a separate NERR, which is what Utilities Management have done.

[64] It is reasonable for Utilities Management to propose a separate agreement for its Enerven business because bargaining for a replacement agreement under the June 2020 NERR covering its workforce as a whole has become protracted, is at a stalemate, is heavily disputed, has seen three agreements proposed by Utilities Management rejected by employee vote, and is the subject of industrial action.

[65] It is reasonable for Utilities Management to propose a separate agreement for its Enerven business because that business is fairly chosen in that it is geographically, operationally or organisationally distinct from the SAPN business.

[66] The Enerven business is geographically, operationally or organisationally distinct for reasons that include the fact that the relevant competition regulator, the Australian Energy Regulator (AER) mandates this by law. It compels legal and operational 'ring-fencing'.

[67] Enerven is a business which operates in a contestable market and whose clients include not just SAPN but other major owners of electrical infrastructure.

[68] In contrast, SAPN is a regulated monopoly with a 99-year lease over electricity poles and wires providing monopolistic electricity supply to 700,000 residential and business customers throughout the State of South Australia. Its services and revenues (including maximum revenues from distribution) are dictated by the competition regulator.

[69] It would be inconsistent with the Commission's role to facilitate bargaining if it were to enter the arena of bargaining and directly or indirectly disrupt bargaining under the September 2021 NERR. That would be the effect of the bargaining orders sought by the joint unions.

[70] The applications under s 229 and s 238 should be dismissed.

Statutory provisions

Bargaining orders

[71] Section 229 of the FW Act provides:

> **"229 Applications for bargaining orders**
>
> *Persons who may apply for a bargaining order*
>
> (1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.
>
> *Multi-enterprise agreements*
>
> (2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:

(a) has concerns that:

(i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) has given a written notice setting out those concerns to the relevant bargaining representatives; and

(c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so." (notes omitted)

[72] Section 228 of the FW Act provides:

"**228 Bargaining representatives must meet the good faith bargaining requirements**

(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement." (notes omitted)

[73] Section 230 of the FW Act provides:

"**230 When the FWC may make a bargaining order**

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:

(a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

(b) a majority support determination in relation to the agreement is in operation;

(c) a scope order in relation to the agreement is in operation;

(d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:

(a) that:

(i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).” (notes omitted)

Scope orders

[74] Section 238 provides:

“238 Scope orders

Bargaining representatives may apply for scope orders

(1) A bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement) may apply to the FWC for an order (a ***scope order)*** under this section if:

(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and

(b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

No scope order if a single interest employer authorisation is in operation

(2) Despite subsection (1), the bargaining representative must not apply for the scope order if a single interest employer authorisation is in operation in relation to the agreement.

Bargaining representative to give notice of concerns

(3) The bargaining representative may only apply for the scope order if the bargaining representative:

(a) has taken all reasonable steps to give a written notice setting out the concerns referred to in subsection (1) to the relevant bargaining representatives for the agreement; and

(b) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(c) considers that the relevant bargaining representatives have not responded appropriately.

When the FWC may make scope order

(4) The FWC may make the scope order if the FWC is satisfied:

(a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements; and

(b) that making the order will promote the fair and efficient conduct of bargaining; and

(c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and

(d) it is reasonable in all the circumstances to make the order.

Matters which the FWC must take into account

(4A) If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (4)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Scope order must specify employer and employees to be covered

(5) The scope order must specify, in relation to a proposed single-enterprise agreement:

(a) the employer, or employers, that will be covered by the agreement; and

(b) the employees who will be covered by the agreement.

Scope order must be in accordance with this section etc.

(6) The scope order:

(a) must be in accordance with this section; and

(b) may relate to more than one proposed single-enterprise agreement.

Orders etc. that the FWC may make

(7) If the FWC makes the scope order, the FWC may also:

(a) amend any existing bargaining orders; and

(b) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by the FWC, or take such other actions, as the FWC considers appropriate."

Consideration

Application for a scope order

[75] The principles governing the application of s 238 have recently been summarised by Deputy President Asbury in *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Thiess Pty Ltd T/A Thiess*[30]:

"[**12]** It is apparent, and sometimes misunderstood, that s.238 is directed to the fair and efficient conduct of bargaining and not a generalised power in the Commission to determine the scope of proposed agreements. Fairness and reasonableness are relevant in the exercise of the discretion under s.238 of the Act but the purpose of a scope order

[30] [2021 FWC 5921 at [12] to [17] (*Thiess*) 4 November 2021

is to promote the fair and efficient conduct of bargaining.[31] The precondition to the exercise of the discretion requires that the Commission is satisfied that the making of the order will promote the fair and efficient conduct of bargaining.[32] It is not necessary that a finding be made that the bargaining is inefficient or unfair, but the Commission should be satisfied that if a scope order is made the bargaining will at least be fairer or more efficient or both than it would be if no order was made.[33]

[13] The potential power imbalance between a minority and a majority group of employees may be relevant but is not determinative and may be affected by considerations such as the group's special interests and potential disadvantage, the impact on the interests of other bargaining parties, the history of the conduct in bargaining and the stage of bargaining.[34] The efficiency of bargaining may be impacted by the duplication created in bargaining for two agreements when compared with a single agreement[35] and there is no statutory bias in favour of an enterprise agreement that covers as much of the employer's enterprise as possible.[36]

[14] The views of employees are a significant factor when considering reasonableness and carry greater significance than the subjective views of the employer although an alternate conclusion may be appropriate in particular circumstances.[37]

[15] The Commission must be satisfied that the group of employees specified in the proposed scope order was fairly chosen. In this regard, s. 238(4)(c) must be read in conjunction with s.238(4A), which is similarly worded to ss.186(3) and (3A), in relation to the approval of enterprise agreements. The Explanatory Memorandum to the *Fair Work Bill 2009* states in relation to the question of whether a group of employees is "fairly chosen" for the purposes of considering whether an enterprise agreement should be approved that:

> "It is intended that in assessing whether a group of employees is fairly chosen, FWC might have regard to matters such as:
>
> - the way in which an employer has chosen to organise its enterprise; and
> - whether it is reasonable for the excluded employees to be covered by the agreement having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the Agreement."[38]

[16] In relation to these provisions a Full Bench of the Commission held in *Australian Maritime Officers' Union v Harbour City Ferries Pty Ltd*[39] that the Commission is not required to make a positive finding or express satisfaction that a group is geographically, organisationally or operationally distinct, but rather, take this into account.

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[31] LexisNexis Butterworths, Workplace Law - Fair Work, Vol 1 Service 73 [80,730]
[32] FW Act s.238(4)(b)
[33] *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 913 IR 293 at [54] – [55]; *BRB Modular Pty Ltd v AMWU* [2015] FWCFB 1440 at [6]-[15]
[34] *National Union of Workers v Linfox Australia Pty Ltd* [2013] FWC 9851 at [59]
[35] *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2015] FWC 1591 at [145]-[148]
[36] *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293
[37] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* (2014) 242 IR 238
[38] Explanatory Memorandum to the *Fair Work Bill 2009* at [777]
[39] [2016] FWCFB 1151 at [31]

[17] The case law dealing with the approach to considering an application for a scope order was comprehensively summarised by Deputy President Sams in *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union; Australian Workers' Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited t/a Qantas* as follows:

> "[165] Perhaps a useful starting point is the general approach framed by the Full Bench in *BRB Modular v AMWU* in the following passage found at paras 53-54:
>
> > [53] The scope of an agreement is an open question in many enterprise bargaining exercises. It is frequently a topic of competing claims, discussion and negotiation. Rarely will it be possible to say that one scope proposal is wrong and another correct. There may be justifications for a preference one way or another. Hence it is usually the case that the scope is left to the bargaining parties to determine in the context of the overall enterprise bargaining framework. The reasonableness of making a scope order should be considered against that background.
> >
> > [54] As we have said above, a consideration of reasonableness requires a full consideration of all of the circumstances and a level of satisfaction that the order requiring the parties to adopt a particular scope of an enterprise agreement in their ongoing bargaining is objectively justified. We are not satisfied that the applicant has established that it is reasonable in all the circumstances to make the scope order. We are satisfied that bargaining can continue and it remains open to the parties to continue to consider the scope of the agreement in the overall context.
>
> [166] A number of other general principles have been developed in the body of jurisprudence dealing with scope order applications. These include the following:
>
> > 1. By the inclusion of the word 'may' in the heading to s 238(4) of the Act, the Commission is to exercise its discretionary powers after determining whether all of the criteria in ss (a)-(d) are satisfied. As all of the criteria must be satisfied (by use of the disjunctive word 'and' separating each criterion), it must follow that if one of the criterion is not met, then a scope order cannot be made. The converse is true; that is, if all of the ss (4) criteria are met, the Commission may make a scope order.
> >
> > 2. The scope of a proposed enterprise agreement is a matter that can itself be the subject of bargaining by the parties for their agreement. …
> >
> > 3. Consideration of the views of employees may be taken into account. However, this does not mean that such views are given any greater weight than the other factors to be considered by the Commission under the other subsections. In *UFU v MFESB*, the Full Bench of Fair Work Australia said at para 53:
> >
> > > [53] As recorded above, it was submitted by the UFUA and the ACTU that particular weight should be given to the views of employees because of, for example, legislative policy imperatives concerning freedom of association. While we

> generally agree with that submission it requires some qualification. The power to make a scope order is predicated on disagreement between bargaining representatives. The discretion to resolve that disagreement is to be exercised as provided for in ss.238(4) and (4A). While those provisions do not assign priority to the views of employees, in applying the provisions it is necessary to have regard to the overall context. The legislative scheme supports collective bargaining principles and the Fair Work Act encourages freedom of association and collective bargaining. It may be implied from the legislative scheme that the collective choice of employees is significant. It must be said, however, that while weight should be given to the views of the employees potentially affected, it may be that a proper consideration of the matters specified in ss.238(4) and (4A) in a particular case may make it appropriate to make a scope order contrary to the views of the employees potentially affected. (My emphasis)
>
> See also: *TWU v Chubb.*

4. It is improper to use a scope order application to address a bargaining representative/s' good faith bargaining concerns, which are more properly considered under s 228 of the Act. In *BRB Modular v AMWU* a Full Bench of the Commissions said at para 52:

> [52] We have made the observation above that the major complaints raised by the AMWU go to the conduct of the Respondent in the negotiations and that they are, in essence, allegations that the Respondent was not engaging in good faith bargaining. It is apparent, therefore, that the Appellant was attempting to use the vehicle of a scope order application to address good faith bargaining concerns. It was an improper vehicle to ventilate those concerns.

5. The onus rests on the moving party to demonstrate that the making of a scope order will encourage and facilitate bargaining which is fairer and more efficient than if no order is made. In *UFU v MFESB*, the Full Bench said at para 55:

> [55] The relevant consideration under s.238(4)(b) is whether the order will promote the fair and efficient conduct of bargaining. The implication is that the tribunal should be satisfied that if an order is made the bargaining will at least be fairer or more efficient or both than it would be if no order were to be made. The relevant consideration under s.238(4)(c) is whether the specified group is fairly chosen. It may be that a number of groupings might be fair – what this criterion requires is that the group which is included in the scope order is fairly chosen. This issue is also dealt with in s.238(4A), which we discuss shortly.
>
> See also: *Tasmanian Water* at 158.

6. Issues of mere inconvenience or preference with the bargaining process are not decisive to whether a bargaining process is fairer or more efficient. In *Shinagawa* I said at para 28:

> [28] Mr Stewart deposed, and it was not disputed, that the negotiations for the 2008 agreements were conventional, without any disputation or angst over the outcome of two separate agreements. Moreover, the respondent's management in 2005 had made no complaint when the two agreements concept was proposed. In my view, this history relevantly demonstrates that any perceived difficulties arising from two agreements on site, is largely speculative and is probably little more than an inconvenience, rather than a real impediment to securing appropriate and fair industrial outcomes.
>
> See also: *Royal District Nursing v HSU* at para 53 and *Tasmanian Water* at paras 115-120.

7. Evidence which is said to support the making of a scope order which is speculative, hypothetical or presupposes outcomes of bargaining, is unhelpful to the task of determining whether a scope order should be made. In *APESMA v Red Cross*, Hampton C said at para 70:

> [70] On balance, I am not persuaded that the granting of the scope order would promote fairer or more efficient negotiations in this matter. The evidence reveals that at this point in time many of the considerations supporting the application are largely speculative, and weighing up all of the considerations it has not been demonstrated that the making of a scope order would meet the requirements in s.238(4)(b) of the Act given all of the circumstances of this matter.
>
> See also: *FSU v BWA* at 54.

8. The history of bargaining between the parties is a relevant consideration to whether a scope order should or should not be made (status quo). In *TWU v Chubb*, Asbury DP said at para 69:

> [69] I have also given consideration to the following circumstances, which in my view, weigh against the making of a scope order in this case. The status quo is that there are separate agreements to cover each of Chubb's Queensland Depots. The TWU is seeking to alter the status quo. I do not accept the argument that because Chubb has not filed a competing application for a scope order, that less weight should be placed on the maintenance of the status quo. This is not a case where the issue of the scope of the proposed agreement is causing disputation and has stalled the negotiations. On the case advanced by the TWU, the granting of a scope order will increase disputation by strengthening the capacity of Nerang AVOs to take protected industrial action, presumably with the involvement of Moorooka AVOs.

> See also: *Shinagawa*; *TWU v Chubb* at 26, *NUW v Linfox* at 60, *FSU v BWA* at 101-104 and *Tasmanian Water* at 157-158.

9. Seeking leverage by increasing the bargaining power by weight of numbers is not a valid basis to make a scope order. In *TWU v Chubb*, Asbury DP at 60:

> [60] In relation to s.238(4)(b), I am unable to be satisfied in the circumstances of this case that making a scope order will promote the fair and efficient conduct of bargaining. It is apparent from the evidence that the TWU is seeking a scope order principally for the purpose of strengthening the bargaining position of Nerang AVOs by reducing the capacity of Chubb to use AVOs from Moorooka to cover any periods of protected industrial action taken by Nerang AVOs. The view of the TWU and its members that this will increase the fairness of bargaining is subjective and I do not accept that enhancing the bargaining strength of Nerang AVOs to assist them to take more effective protected industrial action against Chubb, is a valid basis upon which I could find that bargaining would be fairer or more efficient if a scope order was made."

[76] I now turn to the application of s 238 and these principles to the applications before me.

[77] An unusual feature of these proceedings is that neither the joint unions nor Utilities Management dispute that a scope of a proposed replacement agreement being bargained for under the June 2020 NERR applying to Utilities Management's workforce as a whole would not be fairly chosen. This however belies the underpinning dispute. What is in clear disagreement is the reasonableness of Utilities Management issuing the September 2021 NERR by which it signalled an intention to commence bargaining for a separate agreement covering the Enerven business only. The joint unions are seeking an order that the scope of the proposed replacement agreement covering the Utilities Management workforce as a whole and being bargained for under the NERR of 5 June 2020 is fairly chosen.

[78] I will shortly return to this point.

[79] The formal (non-discretionary) requirements for making a scope order are set out in ss 238(1) and (3).

[80] I am satisfied that the formal requirements of s 238 have been met. Each applicant union is a bargaining representative. Each holds concerns that bargaining is not proceeding efficiently following the September 2021 NERR being issued and each has taken reasonable steps by written notice setting out those concerns and provided a reasonable time for Utilities Management to respond, and each considers the employer's response inappropriate.

[81] An issue arises as to whether s 238(1) is met. This was the subject of final submissions requested by the Commission.

[82] It is a pre-condition to applying for a scope order under s 238(1) that:

> "(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and
>
> (b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover."

[83] The requirement in s 238(1)(a) is met. Each of the applicant unions has concerns that bargaining for the replacement agreement is not proceeding efficiently or fairly because Utilities Management has now commenced a separate bargaining process for a narrower cohort of its workforce.

[84] Section 238(1)(b) requires that "concern" to be because the applicant union "considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover."

[85] Is this requirement met?

[86] The scope applications were triggered when in September 2021 Utilities Management issued a NERR for a separate agreement covering persons working in the Enerven business. However, the relief sought concerns the proposed replacement agreement. At para 2.1.1 of the CEPU scope application, in response to the question "explain how bargaining for the agreement is not proceeding fairly or efficiently because the scope of the agreement does not cover appropriate employees or will cover employees that it is not appropriate for the agreement cover" the CEPU stated:

> "Employees that are employed by Utilities Management Pty Ltd and whose classifications are covered by Appendix 1A and Appendix 1B of Attachment 2 of the *Utilities Management Pty Ltd Enterprise Agreement 2018*."

[87] At 2.1.1 paragraph 11 and 2.1.3 the CEPU stated the relief sought:

> "An order that the scope be as outlined in 2.1.1 would resolve these issues."
>
> "We are seeking that the scope of the proposed agreement would cover employees that are employed by Utilities Management Pty Ltd and whose classifications are covered by Appendix 1A and Appendix 1B of Attachment 2 of the *Utilities Management Pty Ltd Enterprise Agreement 2018*."

[88] On a narrow construction of s 238(1)(b) it could be said this is not the case with respect to extant bargaining for the proposed replacement agreement because each applicant union considers that the proposed replacement agreement being bargained for would cover employees that it is appropriate to cover, being Utilities Management's workforce as a whole.

[89] It would follow that if reference to "the agreement" in s 238(1)(b) is, in the context of this matter, only the replacement agreement proposed by the applicant unions being bargained

for under the June 2020 NERR (being an agreement covering the Utilities Management workforce as a whole) and the subject of the order then s 238(1)(b) would not be made out.

[90] Applying ordinary principles of construction, "the agreement" for the purposes of s 238(1)(b) is the same "agreement" referred to in s 238(1)(a). In context, it is also the same agreement referred to as "the proposed single-enterprise agreement" in the chapeau to s 238(1).

[91] I agree with the joint union submission that "the agreement" for these purposes is the proposed agreement or agreements the subject of extant bargaining:[40]

> "Our position is that a scope order is operative upon the bargaining and not any particular NERR, and that the effect of a scope order, as provided by the Act would be to imbue the Commission a discretion not to approve an enterprise agreement inconsistent with the scope.";
>
> "The scope order need only refer to, in the context of extant bargaining, bargaining for a replacement agreement or agreements, the scope shall be as per the current agreement."; and
>
> "The term "the agreement" refers to any agreement resulting from the extant bargaining without reference or confinement by any NERR. In this sense, it encompasses the cohorts covered by both NERRs."

[92] The bargaining process under the June 2020 NERR is impacted by the September 2021 NERR and vice versa. The proposed agreement the subject of extant bargaining under the June 2020 NERR is now not simply that originally proposed by Utilities Management and supported by the joint unions (an agreement covering the workforce as a whole). It now includes the proposition advanced by Utilities Management that a separate agreement should be made for its Enerven business and consequentially that the replacement agreement being bargained for under the June 2020 NERR not include persons working for Enerven but rather cover its SAPN business only.

[93] As the applicant unions consider that a SAPN-specific agreement would not cover employees of Utilities Management that it would be appropriate to cover (it would omit the employees working in the Enerven business) then s 238(1)(b) is made out.

[94] The formal requirements of s 238 have been met. I now deal with the discretionary considerations in s 238(4).

Good faith bargaining (s 238(4)(a))

[95] Are the bargaining representatives of the applicant unions meeting good faith bargaining requirements?

[96] This is not in dispute. There is no contention and no evidence that either the CEPU or Professionals Australia bargaining representatives are not bargaining in good faith.

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[40] Transcript 18.11.21 PN12; Audio 2.12.21 3.42pm; Further Written Submission of Joint Unions 21 December 2021 paragraph 12

[97] The evidence is and I find that bargaining for the replacement agreement has been protracted (fifteen months), disagreeable, heavily disputed, disrupted, litigious and more recently accompanied by the use of heavy bargaining artillery such as protected action (on the union side) and notification of access periods preceding three unsuccessful ballots (on the employer side).

[98] That said, there is no evidence that the applicant union bargaining representatives have not attended bargaining meetings, advanced claims or responded to propositions advocated by the employer.

[99] The use of statutory tools that I have described as heavy bargaining artillery is part of the FW Act's collective bargaining scheme and are not uncommonly used in robust and contested bargaining. That they are used is not evidence of a lack of good faith.

[100] Section 238(4)(a) is made out.

Promoting fair and efficient bargaining (s 238(4)(b))

[101] Would making the scope order promote the fair and efficient conduct of bargaining?

[102] It is not necessary to find that bargaining is not operating fairly or efficiently in order to conclude that making a scope order would promote the fair and efficient conduct of bargaining.

[103] Although bargaining for a replacement agreement during the past fifteen months has been protracted, disagreeable, heavily disputed, disrupted and litigious the issues in dispute until the September 2021 NERR were not issues concerning the scope of the proposed replacement agreement. The entrenched disagreements concerned more orthodox industrial matters such as wages and conditions of employment.

[104] Whilst making a scope order in the terms sought does not bear in any respect on future terms and conditions of employment being bargained for, it would have utility in that it provides guidance to the bargaining representatives that a replacement agreement covering the Utilities Management workforce as a whole would be a fairly chosen scope.

[105] To that limited extent and in the abstract a scope order may promote fair and efficient bargaining by allowing a re-focus on settling disputed future terms and conditions of employment.

[106] However, in the context of this matter the utility of a scope order should not be overstated. Firstly, given that past generations of agreements covering Utilities Management have similarly covered the workforce as a whole, an order in the terms sought is not a novel proposition. Secondly, for reasons mentioned below, it does not follow that because a replacement agreement covering the Utilities Management workforce as a whole is fairly chosen that some other scope (such as a narrower scope now advocated by Utilities Management) is not also fairly chosen. It is well established that more than one proposed scope can be fairly chosen.

[107] Further, the parallel bargaining processes in place since the September 2021 NERR was issued are interrelated. For reasons (considered below) when weighing whether it is reasonable to make the scope order sought there is material compromise to the extant bargaining in these parallel processes should an order be made.

[108] Whilst in the abstract a scope order may re-focus attention on settling future wages and conditions of employment, it would not promote fair and efficient bargaining given the reality that exists: a lawful process for bargaining for a separate agreement with its Enerven business has been commenced by Utilities Management and a critical issue to the making of an agreement (or agreements), being coverage, is now disputed.

[109] Given that scope is a legitimate subject matter for bargaining, for reasons common with the conclusion (below) that it is not reasonable in the circumstances to make the order sought I am not satisfied that such an order would promote the fair and efficient conduct of bargaining. It would materially compromise bargaining by tilting the scales over whether scope should include the whole of the Utilities Management workforce or conversely the separate businesses conducted by the employer.

[110] Section 238(4)(b) is not made out.

Fairly chosen (s 238(4)(c)

The proposed replacement agreement

[111] Is the group of employees who would be covered by the proposed replacement agreement and to be covered by the scope order the applicant unions seek fairly chosen?

[112] The group for these purposes is employees that are employed by Utilities Management Pty Ltd and whose classifications are covered by Appendix 1A and Appendix 1B of Attachment 2 of the *Utilities Management Pty Ltd Enterprise Agreement 2018*. That is, the group employed under the scope of the currently expired but still operating agreement – a group I have (for ease of reference) referred to in this decision as 'the whole of Utilities Management's workforce' (though it does not include all employees such as executive managers and does not include non-employees such as contractors). In practice, it is the group covered by the existing agreement who work for both SAPN and Enerven.

[113] As noted, an unusual feature of this matter is that neither the joint unions nor Utilities Management dispute that the scope of the proposed replacement agreement being bargained for by the applicant unions under the June 2020 NERR applying to Utilities Management's workforce as a whole is not fairly chosen.

[114] In this respect, the proposition in s 238(4)(c) on which the Commission needs to be satisfied is not contested.

[115] Noting the views of the parties, and considering the evidence and materials before the Commission, I am satisfied that the group of employees who would be covered by the proposed scope order was fairly chosen. I make this finding for the following reasons.

[116] Firstly, past generations of collective agreements between Utilities Management and its employees, (including dating back to Utilities Management's predecessors in the pre-privatised Electricity Trust of South Australia days) have covered the workforce as a whole in a single industrial instrument. There is no evidence before me that such coverage has been considered unfair by either the employer or representatives of employees or (until recently) the subject of dispute. As noted, such coverage is not, in terms of the relevant industrial history, a novel proposition.

[117] Secondly, the history of bargaining for the replacement agreement proceeded, albeit in a disruptive and disagreeable manner, for fifteen months under the terms of the June 2020 NERR without contention over scope. An inference can be drawn from this that for an extended period the bargaining representatives (employee and employer) considered the group to have been fairly chosen.

[118] Thirdly, whilst the group is large and persons in the group work for different businesses (SAPN and Enerven) there remains one employer only. Hence, the proposed agreement remains a single enterprise agreement for the purposes of the FW Act. The notion of an agreement covering the whole of the Utilities Management workforce being fairly chosen is consistent with the fact that there is a single employer of that workforce.

[119] Fourthly, the group is in certain respects geographically, operationally and organisationally distinct though (for reasons considered below) this is not the case for all purposes.

[120] Fifthly, the regulatory changes imposed on Utilities Management's operations by the competition regulator (considered below) and which came into effect shortly prior to and during the life of the currently expired but still operating agreement are significant and material. However, they do not of themselves mean that a proposed replacement agreement covering the workforce as a whole is not fairly chosen. The regulator has imposed no requirement that SAPN and Enerven be independent employers or that persons working for SAPN and Enerven be engaged under different industrial instruments.

[121] Sixthly, I give weight to the fact that an agreement with the Utilities Management workforce as a whole is a collective choice of relevant employees, as expressed through their union bargaining representatives. Those views are significant though not determinative.[41]

[122] Section 238(4)(c) is made out.

The proposed Enerven agreement

[123] In making this finding it does not follow that because the group to be covered by an agreement proposed by the applicant unions was fairly chosen that the narrower group proposed by Utilities Management in bargaining under the September 2021 NERR is not also fairly chosen. As noted, it is well established that more than one proposed scope can be fairly chosen.[42]

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[41] *United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board* [2010] FWAFB 3009 at [53], [71]; *Australian Workers Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at [31]

[42] *National Union of Workers v Cotton On Group Services Pty Ltd* [2014] FWC 6601 at [30]

[124] The September 2021 NERR triggered the current applications and is the underpinning issue in dispute in these proceedings. I now consider whether the scope proposed by Utilities Management for a separate agreement covering the Enerven business (and consequentially a replacement agreement left to cover SAPN only) is fairly chosen. Doing so is relevant to whether it is reasonable in the circumstances to make the order sought (considered below).

[125] In considering whether a group is fairly chosen it is appropriate to examine whether the group to be covered is geographically, operationally or organisationally distinct. That is not a decisive consideration, and issues of reasonableness are also relevant.

[126] Enerven's business is different to the business of SAPN. This is necessarily a consequence of obligations imposed on Utilities Management by the competition regulator (AER) as well as other regulators (the Office of the Technical Regulator and the Essential Services Commission of South Australia). SAPN operates as a regulated monopoly whereas Enerven operates in a competitive and contestable market. SAPN operates and maintains substations, poles and wires in order to provide electrical supply to hundreds of thousands of residential and business customers. Enerven in contrast, competes with third party specialist service providers for electrical, telecommunications and renewable energy infrastructure development and maintenance work. It undertakes this work for both regulated network service providers (such as SAPN via competitive tender) and third party renewable generators, commercial customers and telecommunication service providers. A primary function of Enerven is the construction and maintenance of substations, distribution networks and transmission assets. Only about ten per cent of the work Enerven performs is to SAPN and SAPN also engages other contractors apart from Enerven to undertake electricity infrastructure construction and maintenance. SAPN's remit is restricted to South Australia whereas Enerven, whilst primarily operating in South Australia, is able to expand into other jurisdictions.[43]

[127] SAPN's separation from Enerven is mandated, independently audited and reported annually to AER.

[128] Enerven (Enerven Energy Infrastructure Pty Ltd) is a separate legal entity from SAPN yet both are owned by Utilities Management. Neither is a separate employer. Neither is the employer of persons who would be covered by agreements being bargained for under either the June 2020 or September 2021 NERRs. In both respects, Utilities Management is the sole employer in these parallel bargaining processes.

[129] Thus, persons working for Enerven work for the same employer but in a different business unit to those working for SAPN. SAPN is the larger business using the metric of employee numbers. Approximately 1,700 persons work for SAPN; approximately 400 persons work for Enerven.

[130] However, these distinctions only go so far. There are persons who work for both SAPN and Enerven. This is because whilst a core group of persons work solely in the Enerven business, Enerven uses SAPN as a source of additional labour (whilst also sourcing labour from external providers), and vice versa. As a consequence, some persons working for SAPN also work for Enerven for temporary periods and vice versa. This may be for months, weeks or days.

[43] SAPN4 Mr Amato paragraph 12

At one extreme of that spectrum it is not uncommon that a person may perform work for both SAPN and Enerven on the same day. In those circumstances, the obligation for organisational separation of businesses imposed by the competition regulator can require such persons to literally change shirts (with different logos) or change hard hats (with different logos) or substitute magnetic signs (with different logos) on the one work vehicle.[44]

[131] Geographical distinctiveness is concerned with separate worksites or locations and not different buildings on the same site.[45]

[132] The nature of the two businesses, the coverage of both business activities throughout the State of South Australia (including in regional and remote areas), the relatively large number of persons working for both businesses and the unpredictable locations at which SAPN work is performed mean that persons working for Enerven are both geographically proximate but also geographically distinct from persons working for SAPN. The mere fact a person works alone at a remote or at scattered locations does not necessarily mean they are geographically distinct from others.[46]

[133] The incidence of geographical distinctiveness is material largely because Enerven work is generally performed at known major infrastructure locations whereas, to a greater degree, work in the SAPN business is at different or variable and unpredictable locations. This is a finding I make from the evidence as a whole but it is not without exception. The evidence also reveals a material incidence of geographical proximity particularly when persons working in both businesses work alongside others performing similar work. The evidence of Mr Harrison, Mr Lailey, Mr Mawby and Ms Vlahos is that from time to time whilst working for SAPN they work or train alongside persons in the Enerven business.

[134] Whilst there is a material incidence of geographical proximity I do not find it so commonplace that persons working for Enerven are not, considered overall, geographically distinct. The evidence is that separate work locations exist at which the business of Enerven is conducted including commonly but not without exception on different infrastructure in different locations. Considered overall and on balance, I find a material level of geographical separation such that a finding of geographical distinctiveness can be made.

[135] As to operational distinctiveness, the term "operational" refers to an industrial or productive activity.[47] The performance of a different role, task, skill or function is not sufficient to establish operational distinctiveness.[48]

[136] The types of employment activity performed by persons working in both the Enerven business and SAPN is diverse. This includes (without being exhaustive) engineers, technicians, linespersons, designers, managers and administrative staff. Numerically more persons work in the SAPN business and whilst the evidence on this point was not extensive, a larger proportion of the SAPN workforce include certain categories. This is not surprising given the different business activities. Thus there is overlap but also differences of degree in the business activities undertaken by persons working for SAPN and Enerven.

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[44] see for example evidence of Ms Vlachos CEPU11 paragraph 11; Mr Verdini ASU3 paragraph 13
[45] *Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at [13]
[46] *QGE Pty Ltd v Australian Workers Union* [2017] FWCFB 1165 at [47]
[47] *QGC v Australian Workers' Union* [2017] FWCFB 1165 at [44]
[48] Ibid at [44]; see also *Aerocare Flight Support Pty Ltd v Transport Workers Union of Australia* [2017] FWCFB 5826 at [27]

[137] Materially, the activities are performed to a relevant extent on different infrastructure. Persons working for Enerven are commonly working on large infrastructure owned by private interests and at least in those respects that is not infrastructure worked on by persons working for SAPN. Enerven's customer and client base is not the same as SAPN's. It sources work from and markets to different entities. It does so because it operates in a contestable and competitive market. Its revenues are derived from different contracts and different activities. There are some regulatory barriers to labour interchange between Enerven and SAPN. For example, the AER prohibits SAPN from sharing employees with Enerven where those employees would have access to particular information.[49] That said however, the fact I have found that from time to time persons working for SAPN work alongside persons working for Enerven is illustrative of the fact that it is not uncommon for the same or similar activities to be performed by persons working in both businesses. The incidence of secondments and labour swapping between SAPN and Enerven and vice versa is not a daily occurrence but not immaterial (see agreed fact 10). That Enerven sources labour from SAPN and vice versa as and when required weighs somewhat against a finding of operational distinctiveness but not strongly so.

[138] Considered overall and on balance, I find material operational distinctiveness.

[139] As to organisational distinctiveness, the term "organisation" refers to the manner in which an employer has organised its enterprise in order to conduct operations.[50] Performance of duties by a group of employees which are qualitatively different from duties performed by other employees may weigh in favour of a conclusion that the group is organisationally distinct; however, the mere performance by a group of employees of different tasks or roles to others may not be sufficient to render it organisationally distinct where the employees work in an integrated way with other employees to perform a particular business function.[51]

[140] The evidence clearly establishes organisational distinctiveness. The employer's business is substantially divided ('ring-fenced') into two between SAPN and Enerven other than common 'back of house' support functions such as payroll, information technology, training, legal and senior governance (a common board and chief executive of Utilities Management).

[141] This organisational separation was imposed on Utilities Management by the competition regulator from 1 January 2018 and remains a continuing obligation.[52] It first occurred shortly prior to the life of the expired but still operational agreement. Since regulatory separation was mandated in January 2018, the regulator has further tightened the rules for separation.

[142] A significant issue to be taken into account when considering organisational distinctiveness is that Enerven is not an employer of persons working for it, and Utilities Management has chosen to remain the employer of persons working for both Enerven and SAPN. This, together with the fact of common ownership, a common board and a common chief executive (albeit separate senior executive structures) weighs against a finding of operational distinctiveness. However, Enerven's labour rates are not subject to regulatory

[49] SAPN3 Mr Schmidt paragraph 30
[50] Ibid at [44]
[51] Ibid at [44]; *Aerocare Flight Support Pty Ltd v TWU* (2017) IR 385 at [27]
[52] SAPN8 chart at document 2; documents 6, 7 and 8

scrutiny whereas the AER approves labour rates for SAPN (including on-costs and overheads) and approves SAPN's proposed operating expenditure across regulatory periods.

[143] Considered overall, the evidence concerning organisational distinctiveness is significantly more clear-cut than in the case of geographical or operational distinctiveness. Even taking into account the factors that weigh against (including material commonality of shared back of house services) I find that Enerven is organisationally distinct from the business of SAPN.

[144] In considering whether a group is fairly chosen I have noted that it is not necessary for the group to be each of geographically, operationally and organisationally distinct. Relevant statutory provisions[53] refer to geographically, operationally or organisationally distinct.

[145] My findings concerning the Enerven business satisfy this test.

[146] However, even if a finding of geographical, operational or organisational distinctiveness is made, there may be other good reasons to support a conclusion that the group was not fairly chosen or that it is not reasonable in all the circumstances to make the order sought.[54]

[147] The joint unions submit that, aside from issues of geographic operational or organisational distinctiveness, the Enerven-specific group is not fairly chosen because its selection is arbitrary and discriminatory and is the product of capricious or unfair conduct designed to or having the effect of undermining collective bargaining and diluting the strength of the workforce as a whole.

[148] These issues overlap with the grounds on which the CEPU is seeking bargaining orders. I consider these issues below in the context of that application.

[149] I conclude that the Enerven business is organisationally distinct and that, on balance, it is also operationally and geographically distinct though the case for making the latter finding is not as strong. An Enerven-specific agreement, if made, would be with a group that is fairly chosen.

[150] This conclusion does not disturb the finding I have made that a replacement agreement covering the Utilities Management workforce as a whole would have a scope that is fairly chosen.

Reasonableness (s 238(4)(d))

[151] I have found that a replacement agreement covering the Utilities Management workforce as a whole would have a scope that is fairly chosen. I am satisfied that the applicant unions have met the formal requirements of s 238(1) and (3) and the discretionary considerations in s 238(4)(a) and (c).

[152] Is it reasonable in all the circumstances to make the order sought?

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[53] S 238(4A); s 186(3A)

[54] *QGC Pty Ltd v* [2017] FWCFB 1165 at [42]; *Kuhle Pty Ltd v Bus and Coach Drivers Association Incorporated* [2020] FWCFB 5505 at [34]

[153] In addition to the aforementioned, weighing in favour is that a proposed replacement agreement to cover the workforce as a whole is not arbitrary or discriminatory, has a logical and rational basis and is not inconsistent with either historical practice of agreement making between the bargaining representatives or the history (until September 2021) of bargaining for a replacement agreement.

[154] However, four factors weigh against an order being reasonable in the circumstances.

[155] Firstly, an agreement made with persons working in the Enerven business only would also be an agreement with a scope that is fairly chosen. This is not a matter where only the scope sought by the applicant unions is fairly chosen. That which is proposed in bargaining by the employer is also fairly chosen.

[156] Secondly, the effect of a scope order would be that any replacement agreement made by Utilities Management is required to cover its workforce as a whole. This would materially compromise extant bargaining. It would have the effect that if Utilities Management makes a replacement agreement with its employees working in its SAPN business then it must also make that agreement with persons working in its Enerven business. It also compromises the utility of the employer advancing the proposition that separate replacement agreements should be made for its Enerven and SAPN businesses.

[157] Thirdly, whilst the joint unions correctly observe that "the evident purpose of such an order is to quell the controversy as to scope"[55] the scope order sought would not set aside the parallel bargaining process commenced under the September 2021 NERR. The parallel bargaining process (being one for a separate agreement) could lawfully continue but would be shadowed by a Commission order that compromised the utility of (but did not set aside) bargaining for a separate agreement. This is capable of adding confusion rather than quell the controversy. There is a material risk that a scope order is interpreted as the Commission sanctioning or giving preference to the scope proposed by the union bargaining representatives to the exclusion of other fairly chosen scopes, and that the Commission's order itself becomes a subject of controversy and misunderstanding. There is also the risk of reducing the incentive for the employer to bargain for an agreement covering the 1,700 persons working in its SAPN business because once it does so that agreement must also cover the Enerven workforce, irrespective of whether a separate Enerven agreement is being bargained for.

[158] The joint unions submit this consequence is addressed by s 187(2) which requires the Commission to not approve an agreement that is inconsistent with a scope order. However, that itself requires the controversy to be freshly litigated if an Enerven-specific agreement is made and submitted for approval. It also sits at odds with the conclusion that both positions advanced in these proceedings propose agreements with fairly chosen scopes. A scope order as sought may have the effect of precluding the approval of an Enerven-specific agreement (if made) notwithstanding the group being fairly chosen.

[159] Fourthly, whilst bargaining for a replacement agreement has been protracted, the proposition that separate agreements should cover the SAPN and Enerven businesses is

[55] Further Written Submission of Joint Unions 21 December 2021 paragraph 9

relatively recent. Whilst there have been four bargaining meetings under the September 2021 NERR relating to that proposal (with, to their credit, union bargaining representatives attending despite believing the employer has not acted in good faith), a principal response by the joint unions has been to litigate the issue through these proceedings. In circumstances where the Commission has concluded that a fairly chosen scope exists with respect to both propositions, the limited bargaining that has occurred to date over these contested propositions should not be distorted by a Commission order.

[160] These are significant discretionary factors weighing against making a scope order.

[161] It was observed by a full bench in *BRB Modular v AMWU*:[56]

> "[53] The scope of an agreement is an open question in many enterprise bargaining exercises. It is frequently a topic of competing claims, discussion and negotiation. Rarely will it be possible to say that one scope proposal is wrong and another correct. There may be justifications for a preference one way or another. Hence it is usually the case that the scope is left to the bargaining parties to determine in the context of the overall enterprise bargaining framework. The reasonableness of making a scope order should be considered against that background.
>
> [54] As we have said above, a consideration of reasonableness requires a full consideration of all of the circumstances and a level of satisfaction that the order requiring the parties to adopt a particular scope of an enterprise agreement in their ongoing bargaining is objectively justified. We are not satisfied that the applicant has established that it is reasonable in all the circumstances to make the scope order. We are satisfied that bargaining can continue and it remains open to the parties to continue to consider the scope of the agreement in the overall context."

[162] These observations are pertinent to this matter. Considered overall, it is not reasonable to make the order sought given its impact on the extant bargaining. The reasonable course is to permit the merits of the respective scope propositions advanced in these proceedings to be the subject of further bargaining by duly appointed bargaining representatives. This decision and its reasons can inform that process whereas making the order sought materially compromises that process. I am satisfied, to paraphrase the full bench in *BRB Modular v AMWU*, that bargaining can continue and it remains open to the parties to continue to consider the scope of the agreement in that overall context.

[163] Put another way, the Commission's proper role under s 238 is to guard against general unfairness, not to pick a winner between two fairly chosen scopes being lawfully bargained for. As observed by a full bench in *Construction, Forestry Mining and Energy Union v ResCo Training and Labour Pty Ltd*:[57]

> "[35] In most enterprises there is unlikely to be only one fair manner of selecting the class of employees to be covered by an enterprise agreement. Different scope provisions may be equally described as fair in the sense that no manifest unfairness arises from their application. That is not to say that the parties may have a particular preference or view

[56] [2015] FWCFB 1440

[57] [2012] FWAFB 846

> about the scope and favour a different formulation. The tribunal's task however is not to determine the scope clause. Its task is to guard against unfairness by being satisfied that the group can be described, in all the circumstances, as fairly chosen."

[164] As I have not found unfairness (considered below) and as bargaining for the contested scope propositions has commenced consequent on the September 2021 NERR, an order would compromise rather than promote fair or efficient bargaining over the respective merits of the contested scope proposals. It is not reasonable in the circumstances to make the order sought.

[165] Section 238(4)(d) is not made out.

Application for a bargaining order

[166] The CEPU, supported by Professionals Australia and the ASU, seek a bargaining order under s 229 of the FW Act. The order sought is multifaceted:

- that Utilities Management has breached good faith bargaining obligations;
- that Utilities Management retract the September 2021 NERR;
- that Utilities Management refrain from advancing claims for a separate agreement for persons covered by the June 2020 NERR; and
- that Utilities Management resume bargaining in good faith.

[167] The grounds on which these orders are sought relate to the issuing of the September 2021 NERR. In particular the joint unions submit that in doing so Utilities Management failed to disclose relevant information within the meaning of s 228(1)(a) and engaged in "capricious or unfair conduct" within the meaning of s 228(1)(e) in that it was conduct designed to or having the effect of undermining collective bargaining and diluting the strength of the collective force and collective vote of the workforce as a whole.

[168] I now deal with these issues.

Failure to disclose relevant information

[169] The joint unions submit that Utilities Management withheld from the unions its intention to seek an Enerven-specific agreement.

[170] The evidence (and in particular that of Mr Goodwin) establishes that:

- Utilities Management made a decision to seek a separate agreement between ten and fourteen days before disclosing it to employees or the union bargaining representatives; and

- Utilities Management disclosed the information to employees by general broadcast approximately five minutes before it advised the union bargaining representatives at a scheduled bargaining meeting held on 16 September 2021.

[171] I do not consider Utilities Management's conduct in either respect to constitute a failure to disclose relevant information.

[172] Clearly a bargaining representative needs to make a decision before being required to disclose its intention. This is particularly so where, as in this matter, Utilities Management's decision was both an operational and strategic one borne in part from its concern and frustration that bargaining for a replacement agreement covering its workforce as a whole was protracted and mired in conflict and disputation. I make a finding to this effect.

[173] Having made its decision, a process by which the employer was permitted by the FW Act to give it effect was to prepare a NERR, to circulate that NERR to relevant employees and to then seek to bargain on that NERR. The NERR created by Utilities Management was dated 16 September 2021.

[174] Irrespective of whether Utilities Management made its decision ten or fourteen days before disclosing its hand, there was a rational basis for not doing so until 16 September 2021. That was the next date scheduled for dialogue with union and independent bargaining representatives at an already planned bargaining meeting.

[175] Nothing occurred in that ten or fourteen day period that undermined bargaining. There is no obligation on a bargaining representative to disclose their hand other than in a reasonably timely manner and to not mislead when doing so. A time frame adopted which has a rational basis and does not unduly delay bargaining it is not a breach of good faith. Further, Utilities Management went to the 16 September 2021 bargaining meeting not simply with information about its recently formed intention to seek an Enerven-specific agreement, but also, at that meeting, tabled a revised offer for a replacement agreement. Whilst clearly the advice it provided to the meeting about the second NERR constituted material and important information that impacted the views of bargaining representatives, it was an act of disclosure, not a failure to disclose.

[176] I also do not consider the employer's decision to inform employees working in the Enerven business a matter of minutes before informing the bargaining representatives to be a failure to disclose. No prejudice arose to the bargaining representatives in those minutes. Utilities Management was not expecting and did not require the bargaining representatives to express views on the second NERR at the 16 September 2021 meeting let alone expect the union bargaining representatives to have instructions from members on that question.

[177] I do not consider that Utilities Management adopted inappropriate time frames relating to the disclosure of its intention to seek an Enerven-specific agreement.

[178] This ground on which bargaining orders are sought is rejected.

Capricious or unfair conduct

[179] Section 228(1)(e) provides that it is a good faith bargaining requirement to refrain from "capricious or unfair conduct that undermines freedom of association or collective bargaining".

[180] In considering what constitutes capricious or unfair conduct in a bargaining context the Commission has observed (footnotes omitted):[58]

- "Capricious conduct is conduct which is unaccountable, whimsical, irregular or unpredictable or conduct that is not valid, defensible or well founded;

- Conduct that is unfair is conduct that is not equitable or honest or not impartial or according to the rules;

- To undermine collective bargaining or freedom of association means to injure or damage including by secret or insidious means."

[181] It is relevant to note that for a breach of good faith bargaining obligations of this type, s 228(1)(e) requires that either the act of caprice or unfairness has a particular consequence - that it undermines freedom of association or collective bargaining.

[182] The joint unions advance the proposition that issuing the second NERR was an act of caprice or unfairness having this effect because:

- it came without notice;
- it came during a well-established bargaining process under an already existing NERR;
- it came without Utilities Management having sought to bargain inside the existing NERR for a varied scope or for separate terms applicable to persons working for Enerven (and consequentially SAPN alone); and
- it cleaved the workforce in two such that it would weaken the collective bargaining power of the whole.

[183] The joint unions submit that these factors individually and collectively constitute a breach of s 228(1)(e).

[184] I have dealt with the issue of disclosure. Absent misleading conduct, there is no general obligation on a bargaining representative to disclose its intention within a set period other than in a timely way. The employer did not mislead. That the second NERR was not issued and notified by Utilities Management until 16 September 2021 was neither an act of caprice nor unfairness. It was the consequence of a decision made by the employer no more than two weeks prior.

[185] The joint unions correctly submit that the second NERR came during a well-established bargaining process under an already existing NERR. However, that alone does not constitute capricious or unfair conduct particularly when viewed in context. The relevant context was that bargaining for a replacement agreement had become protracted, disputed and disagreeable. On three occasions (September 2020, December 2020, and June 2021) Utilities Management had put proposed agreements with a scope covering the whole of its workforce to a vote and on each of those occasions the workforce, by majority, had (as was its right) voted down the proposals. Whilst the protracted nature of bargaining was, in part, a consequence of earlier unreasonable conduct by Utilities Management in which I found that it had wrongly asserted that bargaining

[58] *CFMEU v Anglo Coal (Capcoal Management) Pty Ltd T/A Capcoal* [2016], FWC 8847; *CFMEU v Oaky Creek Coal Pty Ltd* [2017] FWC 5380; *Re Castlemaine Perkins Pty Ltd* [2018] FWC 2979

had ceased[59], sixteen bargaining meetings had been held in the fifteen months prior to issuing the September 2021 NERR. The evidence does not support a finding other than that Utilities Management was generally responsive to views put by others and advanced proposals of its own.

[186] It is well established that bargaining representatives, whether union bargaining representatives, independent bargaining representatives or employers, are entitled to advance their best interests in bargaining including by considering and reviewing their position and strategic options. As noted by a full bench of the Commission:[60]

> "In and of itself, a bargaining representative making a particular strategic choice which is permissible under the bargaining scheme established by the Act, is not a basis on which to conclude that the bargaining representative is not genuinely trying to reach an agreement or that the bargaining representative has some extraneous intent or purpose."

[187] Strategic options include who should be covered by or not covered by an agreement being bargained for. That this may give rise to positions strongly objected to by other bargaining representatives is unremarkable. Such conduct is in the nature of robust bargaining and, absent something more, it is not capricious or unfair. As I observed in earlier proceedings involving this same bargaining round:[61]

> "The concept of genuinely trying to reach agreement in collective bargaining is one which recognises that positions and strategies ebb and flow. This may be particularly so in a somewhat complex situation such as the present bargaining context where a single bargaining unit of multiple Unions each responding to a diverse membership within the employer's business is the bargaining vehicle."

[188] In this matter, the decision by Utilities Management to issue a further NERR on 16 September 2021 was in part strategic in the sense of a strategy to try to break a fifteen month impasse. It was intended to introduce a different dynamic to bargaining and explore an option that had not, to that point, been the subject of bargaining. Given that the Enerven business is at least organisationally distinct, in objective terms it was a strategic position also in part based on the employer's view of what was in the best future interest of its Enerven business. It was not the expression of a new bargaining dynamic simply for difference sake or for an impermissible or extraneous reason, object or purpose. It had a rational basis: regulatory separation between SAPN and Enerven had been mandated by the competition regulator shortly prior to and since making the currently operating agreement covering both workforces. Evidence by Enerven's Executive General Manager[62] that he hoped an Enerven-specific agreement could provide flexibilities and in some instances reduce labour costs understandably generated a strong counter view from the joint unions but is an entirely unremarkable bargaining posture for a business to adopt.

[189] Further, whilst issuing the September 2021 NERR was an example of deploying heavy statutory artillery to the bargaining process, it wasn't the first such move in this protracted

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[59] *CEPU, ASU and Professionals Australia v Utilities Management Pty Ltd* [2021] FWC 1080 at [73] to [74]
[60] *Maritime Union of Australia v Swire Pacific Management (Australia) Pty Ltd* [2014] FWCFB 2587 at [73]
[61] I2021] FWC 1080 at [69]
[62] SAPN 4 Mr Amato paragraphs 14 and 15

bargaining round. Heavy statutory artillery in the form of protected action had been deployed in April, May, June and July 2021 by the joint unions and, as I have observed, Utilities Management had done so by thrice providing an access period and putting agreements to the vote despite not having the support of the union bargaining representatives. Deploying a lawful statutory option such as issuing a new NERR had a rational basis in the bargaining context Utilities Management found itself, its business operations and was not inconsistent with the legislative scheme.

[190] That the second NERR came during a well-established bargaining process under an already existing NERR was not capricious or unfair.

[191] The joint unions submit that the second NERR came without Utilities Management having sought to bargain inside the existing NERR for a varied scope or for separate terms applicable to persons working for Enerven.

[192] A term of an industrial instrument includes its scope. Scope is a matter capable of being the subject of bargaining. A bargaining representative is not constrained in bargaining to the coverage expressed by a NERR, even one they themselves issued.

[193] It was therefore open to Utilities Management to advance proposals for a SAPN-specific scope (that is, one which excluded persons working for Enerven) during any of the fifteen bargaining meetings that preceded the September 2021 NERR. Utilities Management did not do so. No prior bargaining over scope had occurred, either at the initiative of Utilities Management or other bargaining representatives.

[194] The proposition advanced by the joint unions is that because Utilities Management could have bargained for separate agreements but did not, then introducing its proposal for an Enerven-specific agreement by issuing the September 2021 NERR was an act of caprice or unfairness.

[195] I do not agree.

[196] Activating its recently formed view that an Enerven-specific agreement should be bargained for via a NERR was the exercise of a right available to the employer under the statutory scheme. It was lawful conduct in the same way that activating that proposal by way of dialogue inside the then extant bargaining would have likewise been lawful.

[197] That two lawful pathways exist to achieve an objective does not mean that deciding to invoke one but not the other is of itself unfair; much less capricious. This is particularly so where the lawful pathway chosen had an objectively rational basis.

[198] Finally, the joint unions submit that the second NERR cleaved the workforce in two such that it would weaken the collective bargaining power of the whole, and that this was capricious or unfair and it undermined freedom of association or collective bargaining.

[199] The concepts of freedom of association and collective bargaining are interrelated and integral to the statutory scheme under Part 2-4 of the FW Act and derive from core international conventions ratified by Australia.[63]

[200] The September 2021 NERR did not substitute for the bargaining that Utilities Management was required to undertake in good faith under the June 2020 NERR. Utilities Management continued to bargain in that regard. The employer advanced revised proposals at the 16 September 2021 bargaining meeting and sought a response by 24 September. That Utilities Management's decision to issue the September 2021 NERR may have further hardened views against it or made it harder to secure agreement for a replacement agreement was a forensic risk it took in adopting the approach it did.

[201] The collective bargaining rights of union and independent bargaining representatives for the replacement agreement remained intact, as did the freedom of Utilities Management's employees to join unions and have those unions collectively represent their interests in the parallel bargaining processes.

[202] At the heart of the joint union submission is the proposition that collective bargaining is an expression of employee strength in numbers, and that collective bargaining is necessarily undermined by a large group of employees being divided in two; in this instance a group of approximately 2,100 employees are said to be separated into two groups of approximately 1,700 (SAPN) and 400 (Enerven) workers.

[203] There are circumstances where one could conceive that bargaining power of a large group is diminished by an agreement being made with a smaller sub-set, thus leaving the larger group to advance its interests without the combined numerical force of that smaller sub-set. However, the proposition that collective bargaining is necessarily undermined by a change in numbers does not automatically follow. Strength in numbers is itself a relative concept. Further, numerical strength is one metric only. Without being exhaustive, other considerations such as the merit of views put, the extent to which there are multiple collectives or diverse employee views inside the collective can also impact the ebb and flow of collective bargaining. Other circumstances, including legal and statutory rights are also relevant.

[204] Regard may also be had to the risk that collective bargaining inside a large cohort is, in the abstract, also capable of diminishing the voice of a smaller group of employees who may consider themselves having distinct interests or who believe their interests are not being given the level of priority they seek or not supported by a collective majority. In those circumstances a smaller collective sub-set may form a view that continuing bargaining inside a larger cohort fails to give full expression to their collective voice and undermines their collective interests. Union bargaining representatives and officials commonly use their practical experience to resolve these complex and fluid bargaining dynamics inside employee cohorts. However, it is for these reasons, amongst others, that the scheme of the FW Act recognises multiple collective bargaining representatives alongside independent bargaining representatives.

[205] In this matter, there is evidence that some persons working for Enerven support a separate agreement but there is no evidence to suggest that persons working for Enerven have been dissatisfied with bargaining within the larger cohort. The second NERR was an employer,

[63] International Labour Organisation Conventions 87 and 98

not employee, initiative. The evidence indicates that bargaining representatives exist in the Enerven-specific bargaining stream. This includes union and independent bargaining representatives and that four meetings have been held to date. The evidence suggests that confusion existed, at least in the early weeks, over which employees would be entitled to participate in bargaining under the September 2021 NERR. This is consistent with my finding of material cross-over between some SAPN and Enerven workers. Further, at least one bargaining representative was confused whether they, in light of their managerial position, could be a bargaining representative for employees or for the employer.[64]

[206] I take into account that some of the bargaining representatives in the bargaining process created by the September 2021 NERR would necessarily be different persons from those in the extant bargaining for the replacement agreement; for example, a person working for SAPN exclusively would not have standing to bargain in their own right under the September 2021 NERR for a proposed agreement that would not cover them. However that person retains full rights inside the extant bargaining under the June 2020 NERR for the replacement agreement to form a view on any proposed variation to the scope of the agreement being bargained for. They retain full rights to withhold their consent individually or by collective voice for any Utilities Management proposal, for example, that the replacement agreement be SAPN-specific only.

[207] I also take into account that a parallel channel of bargaining for an Enerven-specific agreement has the effect of requiring collective bargaining representatives (including union officials advising those representatives) to spread their attention across two bargaining processes and this adds to imposts on time, strategic thought and responsiveness. These bear somewhat on efficiency of bargaining for the replacement agreement but not to the extent that bargaining could fairly be re-characterised as not proceeding efficiently; much less that collective bargaining is "undermined" on that basis.

[208] In the current matter it is relevant that the legally enshrined bargaining rights of the larger collective (that is, the group bargaining under the June 2020 NERR) remain unaltered. Further, the size of that collective would not be reduced unless and until a smaller sub-set made a separate agreement with Utilities Management and then withdrew from bargaining.

[209] The joint unions also rely on the evidence that a significantly greater percentage of persons working in the Enerven business are employed on fixed term contracts compared to those working in the SAPN business. The joint unions submit that this makes the Enerven group more vulnerable and thus their collective interests are likely to be undermined when bargaining for a separate agreement. I do not accept this submission. Firstly, the evidence of employee views includes that of independent bargaining representatives working in the Enerven business. Some of those views support a separate agreement. Other collective views, such as those put by the joint unions do not. Secondly, there is no evidentiary basis to conclude that the Enerven group is more vulnerable simply because of their employment arrangements. There is no sufficient evidence as to the nature of those employment arrangements on which such a finding could be made.

[210] Considered overall, whilst the employer's action in issuing the September 2021 NERR had and was likely to have an impact on positions adopted by bargaining representatives and

[64] Email Mr Hristopoulos 20 September 2021 at court book page 2098-2099

likely to diminish the immediate prospects of reaching agreement on a replacement agreement I do not conclude that it relevantly undermined freedom of association or collective bargaining.

[211] For these reasons, I do not consider that Utilities Management has failed to meet its statutory good faith bargaining obligations. Nor do I conclude that bargaining is not proceeding efficiently or fairly because multiple bargaining representatives exist.

[212] In these circumstances the mandatory prerequisite for making a bargaining order in s 230(3)(a) is not made out. The bargaining order sought cannot be made.

Conclusion

[213] There are two fairly chosen scopes at issue in these proceedings.

[214] The joint union position seeking a scope for the proposed replacement agreement covering the Utilities Management workforce as a whole is fairly chosen. However, for discretionary reasons it is not reasonable to make the order sought. As ss 238(4)(b) and (d) are not made out a scope order cannot be made.

[215] An agreement with a scope covering persons working for the Enerven business alone (and consequentially a replacement agreement left to cover SAPN only), as sought by Utilities Management in the NERR issued on 16 September 2021, would also be fairly chosen.

[216] In issuing the NERR on 16 September 2021 Utilities Management did not breach its good faith bargaining obligations under the FW Act.

Disposition

[217] An order[65] will be issued in conjunction with the publication of this decision dismissing the applications for a scope order B2021/1048 and B2021/1052.

[218] An order[66] will be issued in conjunction with the publication of this decision dismissing the application for a bargaining order B2021/1013.

DEPUTY PRESIDENT

Appearances:

[65] PR736800
[66] PR736800

P Dean, *with permission*, for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, the Australian Municipal, Administrative, Clerical and Services Union and the Association of Professional Engineers, Scientists and Managers, Australia

A Denton, *with permission*, for Utilities Management Pty Ltd trading as SA Power Networks

Hearing details:

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Final written submissions:

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, the Australian Municipal, Administrative, Clerical and Services Union and the Association of Professional Engineers, Scientists and Managers, Australia – 21 December 2021

Utilities Management Pty Ltd trading as SA Power Networks – 21 December 2021

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