[2023] FWC 133 [Note: An appeal pursuant to s.604 (C2023/1754) was lodged against this decision and associated orders arising from this decision.]

DECISION

Fair Work Act 2009
s.238 - Application for a scope order

Australian Workers' Union, The
v
Santos Ltd
(B2022/1240)

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
v
Santos Ltd
(B2022/1304)

DEPUTY PRESIDENT HAMPTON ADELAIDE, 9 MARCH 2023

Applications for scope orders – related matters heard together – applications granted.

1. Introduction

[1] This decision concerns two related applications seeking bargaining scope orders under s.238 of the *Fair Work Act 2009* (**Act**). The Australian Workers' Union (**AWU**) and "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**) have each sought that the Commission make orders, in effect, to combine the scope of 2 bargaining processes that are presently underway regarding certain employees of Santos Ltd (**Santos** or **Respondent**).

[2] Santos has a very large oil and gas exploration and production acreage in Australia and is Australia's largest domestic gas supplier. Through its subsidiaries, it owns and operates five key gas and oil assets or operating areas that produce liquefied natural gas (LNG), liquefied petroleum gas (LPG), domestic gas and ethane, condensates and crude oil for sale to domestic and international buyers. Most relevant to this application, this includes assets in the Cooper Basin, and production and related facilities in Northern South Australia.

[3] The Cooper Basin is Australia's largest onshore oil and gas field development. It is located on the borders of northeast South Australia and southwest Queensland. It produces natural gas, gas liquids and crude oil.

[4] The AWU and AMWU (collectively the **Unions**) are bargaining representatives for members who are employed by Santos across various sites and facilities in the Respondent's Cooper Basin and related operations. The Unions are currently engaged in bargaining with Santos over two proposed enterprise agreements – one covering workers employed at the Port Bonython and Moomba processing plants (**Midstream**) and one covering workers across oil and gas fields in the Cooper Basin (**Upstream**). At present, the employees are all covered by the *Santos Ltd Cooper Basin Enterprise Agreement 2019* (**2019 Agreement**). The Unions seek that one bargaining process be undertaken for both groups of employees on the basis that the current negotiations are not proceeding in a fair and efficient manner and that a change in the scope of the negotiations would promote both of those objectives.

[5] The Unions' proposed scope orders would confirm the scope of bargaining in the same terms as the coverage of the 2019 Agreement. That coverage is presently defined as:

> "**1.4 APPLICATION**
> This Agreement applies to the Company's operations in the Cooper Basin, Port Bonython and the Regional Distribution Centre (RDC)."[1]

[6] The relevant terms are defined in clause 1.2 Definitions of the 2019 Agreement as follows:

> **"Cooper Basin"** refers to all of the Company's operations anywhere within the Cooper Basin.
>
> **"Moomba"** refers to all of the Company's operations situated at or around Moomba.
>
> **"Port Bonython"** means the Company's operation at Port Bonython in South Australia.
>
> **"RDC"** means the Regional Distribution Centre at the Company's operation at Port Adelaide in South Australia.

[7] Both Unions are covered by the 2019 Agreement.[2]

[8] In practice, the 2019 Agreement covers employees working in production, processing, maintenance and warehouse functions in Upstream and Midstream operations. More particularly, it covers employee classifications in relation to its operations in the Cooper Basin, Port Bonython, and the Regional Distribution Centre (which is now outsourced). The employee classifications are as follows:

- Process Operators working at Port Bonython;
- Process Operators working at Moomba; Production Operators;
- Utility persons;
- Metal trades (fitters, mechanics, boilermakers/welders); and
- Material Controllers working in logistics (although Santos no longer employs any employees in this classification).

[9] The **Proposed Upstream Agreement** as sought by Santos would cover approximately 119 Upstream and Logistics employees in the classifications of Production Operator, Operator

Maintainer, Utility, and Metal Trades. The areas covered are Central Fields, Northern Fields, Cross Border Fields, South West QLD Oil (Qld) and Southwest QLD Gas (Qld).

[10] The **Proposed Midstream Agreement** as sought by Santos would cover approximately 79 Midstream employees in the current classifications of Process Operator, Utility Person and Metal Trades and involve employees engaged to work at the Moomba and Port Bonython facilities.

[11] Santos opposes the applications and contends that the Unions have not demonstrated that the present bargaining process is unfair or not proceeding efficiently. Further, Santos contends that it would not be appropriate to make the orders sought given the different nature of the operations and staffing arrangements concerned, the recent change in operational and reporting arrangements, and the circumstances of each bargaining process.

[12] The applications were heard together by consent of the parties and subject to a hearing in mid-December 2022. After the decision was reserved, the parties jointly requested that the Commission not proceed with the decision pending some further without prejudice negotiations. On 9 February 2023, the parties jointly requested that the Commission proceed to issue this Decision. Given the understanding reached between the parties as to the status of those negotiations, I have placed no weight upon the development but simply note that this occurred as part of the context of the matter.

[13] Ultimately for reasons that follow, I have determined to make the Orders sought.

2. The immediate statutory framework

[14] The present applications have been made under s.238 of the Act. This provision is found in Division 8 of Part 2-4 of Chapter 2 of the Act. Division 8 provides for the Commission to facilitate bargaining by making bargaining orders, serious breach declarations, majority support determinations and scope orders.

[15] The objects for Part 2-4 of the Act are provided in s.171 in the following terms:

> "**171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
> (ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay."

[16] The broad object of the Act found in s.3 is also a relevant consideration.[3]

[17] The capacity for the Commission to make scope orders is established by the Act as follow:

"**238 Scope orders**

Bargaining representatives may apply for scope orders

(1) A bargaining representative for a proposed single-enterprise 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 must have given notice of concerns

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

(a) has given 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."

[18] There is no doubt that the AWU and AMWU are relevant bargaining representatives and no party has contended that the requirements of s.238(1), (2), (3) and (4) (a) and (c) of the Act have not been met or create an impediment. The material before the Commission also establishes that compliance. This includes that the group of employees who would be covered by the agreement proposed to be specified in the scope orders was fairly chosen, taking into account the factors identified in s.238(4A) of the Act. In that regard, the proposed scope reflects that found by the Commission to be fairly chosen as part of the approval of the 2019 Agreement. Although there are some management and organisational changes within the business of Santos, there remains geographical and operational elements which are distinct and provide a basis for that finding in this present context.

[19] The issues in dispute in these matters ultimately concern the requirements of s.238(4)(b) to determine whether the Orders will promote the fair and efficient conduct of bargaining and s.238(d) to determine whether it is reasonable in all the circumstances to make the Orders sought. To grant the applications, the Commission must also be satisfied that each of these requirements has been met given the conjunctive provisions of subsection (4).

3. The cases advanced by the parties

[20] In general terms, the Unions presented common cases and relied upon the evidence and submissions advanced by each other. Accordingly, the summaries below are only intended to canvass the major elements of each party's case and all positions have been considered in determining these matters.

3.1 The AWU

[21] The AWU contends that the Orders sought would promote the fairer and more efficient conduct of bargaining and are appropriate in all of the circumstances. The basis of that position includes the following propositions:

- The Agreements proposed by Santos effectively split the coverage of the Current Agreement into two separate agreements – one agreement to cover the 'midstream division assets' of the Cooper Basin and Port Bonython operations and another agreement to cover the 'Cooper upstream facilities of the onshore division.' This was done unilaterally and not by bargaining for a change in scope.

- The bargaining that has occurred to date has reflected the scope of the Santos Proposed Agreements – that is, separate bargaining meetings have been held for the Midstream Agreement and the Upstream Agreement.

- The AWU (and the AMWU) employee bargaining representatives have actively disputed Santos' unilateral decision to split the scope of the Current Agreement into two separate enterprise agreements. The AWU (and the AMWU) propose a scope that reflects that of the 2019 Agreement.

- Bargaining for the Santos Proposed Agreements has not progressed and has effectively reached an impasse primarily due to the dispute between the parties regarding the scope of the agreement to replace the Current Agreement.

- The scope of an enterprise agreement is a feature that can be the subject of bargaining and if Santos wanted to pursue a different scope than that in the Current Agreement (or the first Notice of Employee Representational Rights (**NERR**) that it had issued), it should have been a claim by Santos within the bargaining process.

- It is unfair to force the AWU (and the AMWU) to engage in two duplicate bargaining processes to represent the interests of their members. This is particularly so when the negotiations are progressing largely on the basis of the same claims.

- There is a real possibility that employees who may be covered by one of the Santos Proposed Agreements during negotiations but at a later date would be covered by the other Santos Proposed Agreement, potentially for a significant period. Such an outcome is inherently unfair as it prevents an employee from having any input into the terms and conditions of employment that applies to them.

- Recent changes to Santos' policy regarding access to sites within the coverage of the Current Agreement has resulted in the AWU having reduced access to employees covered by the Current Agreement. These policy changes take the form of the revocation of assistance in air travel, accommodation, and road travel to and between these sites. The reduced access to employees covered by the Current Agreement is exacerbated by bargaining proceeding on the basis of the Santos Proposed Agreements; that is, there are twice as many bargaining meetings to report on to members, and less opportunities to do so.

[22] In terms of efficiency, the AWU relies on the following propositions:

- It has been held by the Commission that the efficiency of bargaining may be affected by the duplication created bargaining for two agreements when compared to a single agreement.[4] The detrimental implications for efficiency in these circumstances are patently obvious.

- The current bargaining process is plainly inefficient. The claims of AWU members in the negotiation for both the Midstream Agreement and the Onshore Agreement are identical. This is also true for the claims of Santos. The AWU is effectively being forced to attend twice as many bargaining meetings as required to discuss and negotiate the parties' claims. Additionally, the meetings for the Santos Proposed Agreements are held on separate days, adding to the overall inefficiency of the bargaining process.

- The Commission can be satisfied that granting the scope order as sought by the AWU will remove the inefficiency inherent in the current bargaining process and promote the fair conduct of bargaining.

[23] The AWU also contend that there are a number of factors relevant to the exercise of the discretion in s.238 is the Commission's role in facilitating good faith bargaining in accordance with s.171(b) of the Act. These include:

- The scope order sought by the AWU seeks to maintain the status quo that has existed for the employees covered by the Current Agreement for over three decades. This has been given weight by the Commission in other matters.

- The scope order sought by the AWU is consistent with the views of employees. The AWU is the bargaining representative for the majority of the employees covered by the Current Agreement. The Commission has held[5] that it is reasonable for the Commission, in considering employee views for the purpose of a scope order, to infer the views of the employees from those of their representatives and to give weight to their bargaining preference.[6]

- The concerns of the AWU are reasonable and logical and not fanciful or asserted merely for the purpose of attracting jurisdiction under s.238. The inefficiencies and unfairness in the current bargaining process are patently obvious.

- There is no prejudice to Santos if the scope order is made. The operation of the scope order as sought by the AWU does not prevent Santos from pursuing its desire for two separate enterprise agreements within the bargaining process. Santos is not prevented from pursuing the scope it desires or forced to compromise in its claim for that scope.

- The issue of scope is the primary cause of an impasse in bargaining between the parties. The AWU seeks to remove this issue so that bargaining between the parties can progress fairly and efficiently.

[24] In relation to the existence of individual bargaining representatives associated with each proposed Agreement, the AWU contends that the small number of issues which concern only one group could be dealt with in meetings where employee representatives of the "disinterested" group do not attend. In any event, it would be difficult to quantify what, if any, inefficiency arises from bargaining for a single agreement in such a case.[7]

[25] The AWU relied upon the approach taken by the majority of the Full Bench of the Commission in *CEPU v Utilities Management Pty Ltd*.[8]

[26] The AWU relied upon evidence from Mr Gary Henderson, Assistant Branch Secretary, SA Branch of the AWU.[9]

3.2 AMWU

[27] The AMWU supported and adopted the submissions of the AWU. The AMWU further contended that:

- It had been bargaining with Santos since September 2021 across the two enterprise agreements and there are still a substantial number of claims made by the AMWU that are yet to be resolved across both proposed agreements. In many cases, the outstanding claims are similar and sometimes identical, across both proposed agreements.

- By splitting the workers into Onshore and Upstream groups, the bargaining is basically AMWU and AWU officials, supported by relevant delegates, putting what are largely common claims for one set of workers to the Santos representatives and then having the same AMWU and AWU officials putting the same claims to the same Santos representatives to cover the other set of workers. This was "repetitive and time wasting for those involved in negotiations".

[28] The AMWU also submits that even if there were still difficulties in reaching agreement between the parties, a single enterprise agreement would reduce the amount of time and resources that it, the AWU and Santos would need to spend in bargaining to achieve a similar result.

[29] Further, it contends that a single enterprise agreement made in accordance with its proposed scope may avert problems that could potentially arise where workers may need to work outside the proposed "Midstream" and "Upstream" divide. Maintenance workers based at the Moomba plant are responsible for maintenance at Moomba as well as oil and gas fields that are close to the Moomba Plant. It is not clear whether this could have an impact on their conditions; or whether the "flying squad" of maintenance workers covered under the Upstream Agreement will have different conditions for such work.

[30] The AMWU also submits that the current state of negotiations is at an impasse on several matters, which has led to orders being obtained for protected industrial action and that this is not assisted by the duplication of negotiations across the agreements. At the very least, the proposed Orders would reduce the number of meetings and resources currently being used in bargaining as only one meeting will be needed to be held, rather than two on each occasion.

[31] Further, it contends that by reference to previous negotiations for enterprise agreements used as a guide, negotiations occurred over a period of about four months and dealt with major issues and the single bargaining unit consisted of a large number of representatives, with "everyone was able to put forward their views". In contrast, if no order was made, it contends that there that there would not be any change to the way the present bargaining is conducted, meaning that there will be continual and ongoing duplication of union resources.

[32] This, it submits would promote[10] (further or encourage) fairness and efficiency.

[33] Finally, the AMWU contends that it has met the requirements set out in s.238 of the Act and the Commission should grant the application for a scope order in the terms set out in the application.

[34] The AMWU relied upon evidence from the following witnesses:

- Stuart Gordon, Assistant State Secretary, SA Branch of the AMWU[11]; and
- Troy Holt, process operator, Moomba processing facility.[12]

3.3 Santos

[35] Santos contends that there are objectively justifiable reasons why it is seeking to bargain to replace the 2019 Agreement with the two Proposed Agreements. Furthermore, it submits that collapsing bargaining back into a single stream would itself create unfairness and inefficiency.

[36] The basis for its proposition includes:

- To succeed in respect of the s 238(4)(b) criterion, the Unions must establish that the process of bargaining has become inefficient and/or unfair "**because** of a scope issue."[13]

- Bargaining is continuing and there is no impasse in bargaining that needs to be broken by a scope order.

- There is no meaningful evidence filed by the Unions to suggest that the issue of scope is intractable and bargaining on this aspect remains open.

- There is little duplication arising from the separation in bargaining, and the claims being pursued in respect of the Midstream cohort are distinct from those being pursued in respect of the Upstream cohort.

- There is no evidence advanced by the Unions to demonstrate the existence of any actual unfairness arising as a result of bargaining for two separate agreements. Rather the evidence of Ms Peters (a senior Santos representative) is that negotiating for two Proposed Agreements is in fact conducive to a process of fair bargaining for reasons that include:

    - the key differences between the Midstream and Upstream cohort are able to be recognised and subject to specific discussion and consideration;

  - the Upstream employees are not capable of "holding Midstream employees to ransom" in any negotiation by reason of their weight of numbers; and
  - by separating bargaining the number of attendees at meetings is substantially reduced, thereby reducing the risk of unwieldy and disorderly discussion.

- The facts associated with the decision of the Full Bench decision relied upon by[14] the Unions are entirely distinguishable.

- Santos has recently introduced a new organisational structure, and its operations and infrastructure in the Cooper Basin asset are now formally divided. Its gas and liquid production in the Cooper Basin's Upstream facilities will form part of the "Upstream Gas and Liquids" business, whilst the Cooper Basin's midstream infrastructure (i.e. the Moomba Processing Plant and the Port Bonython Plant) will form part of the "Santos Energy Solutions" business.

- The Upstream and Midstream operations are overseen by separate management structures, with management for Midstream in Adelaide and management for Upstream centred in Brisbane. Further, they have separate budgets, and business performance objectives, targets and business reviews are managed separately.

- There is a significant operational, organisational and geographical distinction between the Midstream and Upstream workforces, including different hours of work, shift patterns, skillsets, and training/induction requirements.

- Santos has continued to revise its proposals, and matters the subject of discussion in bargaining meetings have varied between the Upstream and Midstream bargaining meetings.

- The issue of "dual coverage" of instruments applying to the same employees has nothing to do with the process of bargaining. Therefore, it should have no bearing on the Commission's consideration of s.238(4)(b). In any event, there is no risk that Midstream employees who perform work on Upstream assets would be covered by the terms of the Proposed Upstream Agreement and the Unions' case on this point is wholly undeveloped and the majority coverage approach[15] proposed by Santos would clearly provide a division between the 2 enterprise agreements.

- The present bargaining has not reduced access to members or sites arising from the scope of the Proposed Agreements.

- To the extent that is relevant, there can be no criticism levelled at Santos for holding bargaining meetings via MS Teams. Holding bargaining meetings by video conference is appropriate given the number and location of bargaining representatives involved.

- The industrial history in this case carries minimal weight given the changes in operational and related circumstances.

[37] Santos also contends that in particular cases it may be appropriate to make a scope order contrary to the views of employees potentially affected. Further, the Unions here have not advanced any probative evidence in respect of the views of employees, but in any event, the Commission should find that it is appropriate to refuse the scope orders sought.

[38] Santos also contends that the Unions, without foundation, raised the notion that the creation of the separate businesses was a precursor to the selling of some assets. In addition, Santos relied upon the indication given by the Unions in September 2021 that they were not "necessarily against the notion of two separate enterprise agreements".

[39] Santos relied upon evidence from the following witnesses:

- Amelia Peters, Senior ER/IR Partner[16];and
- Michele Bardy, Vice President, Midstream Infrastructure – Production Operations.[17]

4. Observations on the evidence

[40] In general terms, there is little dispute on the objective facts. There are different perspectives and each of the witnesses have a different role.

[41] I found that each of the witnesses gave their evidence truthfully and sought to assist the Commission.

[42] There are elements in most of the witness statements that rely upon information provided by others, and I have taken this into account in assessing the weight to be given to such. Given this, I have placed most weight upon the facts evident from direct sources.

[43] There are also elements of opinion in many statements, including about matters that are to be determined by the Commission, and I have treated these aspects as submissions.

[44] The AWU sought to rely upon a petition of employees to inform the Commission as to the views of the employees. A draft (not completed) copy of the petition was provided.[18] However, there is no detailed evidence about when and how this was conducted, what information beyond the petition was provided to the employees, and the names and employee details were not before the Commission in any form. In those circumstances, I place no weight upon the petition itself. However, the AWU represents a considerable proportion of the employees concerned and this was confirmed in the evidence of Mr Henderson. I am also satisfied that the AWU has consulted its membership and the views of the Unions more generally, represent the views of their members.

5. Findings about the context for, and operation of, the present bargaining process

5.1 The relevant operations of Santos

[45] The broad operations of Santos relevant to these matters has been set out earlier in this Decision.

[46] Santos has recently announced a new organisational structure, which separates the organisation into what it has described as two businesses. The evidence reveals that these are, in effect, separate business units with individual budgets and reporting arrangements but that Santos remains the legal entity which employees all of the employees involved in these matters. Each business unit also reports through to the same senior management and board. The units are now "Upstream Gas and Liquids" and "Santos Energy Solutions". This commercial separation has occurred as part of a broader strategy to transition to what Santos has described as "cleaner energy", including via Carbon Capture and Storage (CCS) projects. Its gas and liquid production in the Cooper Basin's Upstream facilities form part of the "Upstream Gas and Liquids" business, while the Cooper Basin's midstream assets (i.e. the Moomba Processing Plant and the Port Bonython Plant) forms part of the "Santos Energy Solutions" business. This organisational change commenced on 1 July 2022 and has resulted in the Midstream infrastructure part of the Cooper Basin being organisationally separated from the Upstream. The business units are however operationally connected and largely interdependent.

[47] Santos' Midstream Operations involve the processing aspect of oil and gas operations in the central part of the South Australian section of the Cooper Basin. This includes assets and infrastructure at the Moomba Plant, the liquids pipeline to Port Bonython and the Port Bonython Plant. There are no Cooper Basin Midstream assets in Queensland.

[48] The Moomba Plant forms the central gathering and processing hub for oil and gas produced from fields located in the Cooper and Eromanga Basins. It will also begin processing CO2 volumes for the Moomba CCS project from 2024. At Moomba, the infrastructure consists of structures such as splitter towers, fractionation towers, absorber towers, boilers, cryogenic compression, pumps, mercury removal units, water treatment facilities.

[49] The Port Bonython Plant is located adjacent to Point Lowly on the shores of Spencer Gulf, approximately 11 kilometres (35 kilometres by road) to the north-east of Whyalla in South Australia. The facility processes liquid hydrocarbons from the Cooper and Eromanga Basins in South Australia and Queensland, and the Amadeus Basin in Northern Territory to produce propane, butane, naphtha and crude oil for sale to overseas and Australian customers. The facility incorporates a fractionation plant, tank farm, cryogenic systems, mercury removal, and ship and truck loading facilities.

[50] In total, there are approximately 113 full-time equivalent positions at the Moomba Plant, and 50 full-time equivalent positions at the Port Bonython Liquids Plant. This includes both positions covered by the Proposed Midstream Agreement and non-agreement staff positions.

[51] The Moomba Plant and the Port Bonython Liquids Plant each operate on a 24/7 basis.

[52] In addition to Santo's own supplies, the Upstream Operations received product from some other oil and gas producers. It also operates part its oil and gas field assets in a joint venture with another corporation.

[53] Midstream Operations connect to external supply systems including:

- east coast domestic gas markets;
- the pipeline from Moomba that supplies ethane to Qenos' Port Botany plant;
- distribution of LPG and crude oil on ships from Port Bonython; and
- distribution of products (e.g. propane) by truck from Port Bonython for use by third parties including mines and regional hospitals.

[54] Upstream operations cover employees that work principally in areas described as Central Fields (SA), Northern Fields (SA), Cross Border Fields (SA and Qld), South West QLD Oil (Qld) and Southwest QLD Gas (Qld). These areas encompass a range of assets including but not limited to wells, flow lines and processing facilities across the Cooper Basin.

[55] Upstream employees are responsible for the safe and efficient operation of all Upstream plant and equipment from the wellhead to the inlet of the Moomba processing facility.

[56] The Cooper Basin Upstream operations team typically work a span of hours between 6.00am to 6.00pm. There are limited exceptions to this standard work pattern. For example, where there are planned shutdowns, employees may work outside of these hours to complete maintenance.

[57] There are approximately 119 Santos employees working in Upstream Operations who would be covered by the Proposed Upstream Agreement. In addition, there are contractors who either support the maintenance teams, supplement labour, or provide specialist capability where required.

[58] There are some other differences between the Midstream and Upstream assets and operations that may bear upon this matter. These include:

- The nature and role of the facilities means that Midstream and Upstream employees are exposed to different operational scenarios;

- The skill set and range of competencies for an operator working in Midstream is typically higher than that required in Upstream, due to the fact the employees are working in a "major hazard facility"[19] with multiple complex interlinking systems;

- The scale of the work can be different between Midstream and Upstream operations. For example, process unit/equipment operation and maintenance in a plant environment (Midstream) requires management of the accumulation of product volume in order to minimise the large impacts on supply. In Upstream, employees are required to manage smaller, discrete equipment and satellites with smaller product volumes; and

- Response times between Midstream and Upstream are also different. By virtue of Moomba Plant (Midstream) being a major hazard facility, there is a requirement that employees rapidly respond to issues as and when they occur. Consequently, employees are generally required to reside relatively close to the plant. In the case of Port Bonython, which is also part of the Midstream business unit, the nearest major

township or city is Whyalla, some 35 kilometres by road. Upstream operations has a range of strategies to deal with response times and employees are not required to live close by.

[59] Although not defined as major hazard facilities, the Upstream operations involve various hazards including the nature of the products being extracted and piped and the nature of the work itself, including the isolated workplaces often involved.

[60] Midstream employees typically work at one location (Moomba Processing Plant or Port Bonython) whereas Upstream employees generally perform work across a number of sites across the 2 different States, and cover large distances (which could be up to 250km in a day). Upstream employees can also be moved between locations to meet operational needs.

[61] Some Midstream employees also perform ship loading at Port Bonython which is not performed by Upstream employees and requires specific training. There is, of course, no ship loading performed at Moomba.

[62] There is a small team of approximately 9 Midstream employees who work predominantly at the Moomba Processing Plant (formally described as the "**Rotating Equipment Team**" and sometimes as a flying squad). This team has specialist turbomachinery maintenance capability. Specifically, they perform scheduled servicing and reactive/corrective maintenance on turbo machinery (e.g. turbines and centrifugal compressors). If a piece of turbomachinery breaks down on an Upstream site, Upstream management will consider whether it can bring in contractor resources to perform maintenance work, or alternatively, will engage the Midstream team on a service provision basis (whereby the Midstream business charges Upstream for the work). Currently, there is no one on the relevant maintenance team in Upstream with the skills to perform turbomachinery work.

[63] The balance of the evidence is consistent with the notion that there is otherwise not any significant cross-utilisation of employees between the Midstream and Upstream operations.

[64] Some Upstream employees and Midstream employees based at the Moomba facility, transit to Moomba together and many are located within the same site accommodation facilities at the Moomba site.

[65] Santos is the employer of all of the employees concerned with this matter.

5.2 The bargaining to date

[66] The 2019 Agreement reached its nominal expiry date on 4 July 2021. On 31 May 2021, Santos distributed a Notice of Employee Representational Rights (NERR) for a single enterprise agreement to replace the Agreement with a scope that, in effect, reflected the 2019 Agreement.[20] Clause 1.10 of the 2019 Agreement committed the parties to commence bargaining for the "renegotiation" of that instrument at least 3 months prior to the nominal expiry date.

[67] Bargaining, in the sense that the parties met and exchanged views, commenced on 9 September 2021. At this first bargaining meeting for the proposed renegotiated agreement,

Santos immediately announced its intention to split the Current Agreement into two separate enterprise agreements; being what became the proposed Midstream and Upstream[21] Agreements. Santos explained the broad basis for that intention through a PowerPoint presentation. The thrust of the presentation was that "Upstream and Midstream are separate businesses with their own unique challenges, work plans, budgets, organisational structures, shift patterns, joint venture arrangements and associated regulatory issues. The presentation posited that having separate enterprise agreements would support "Santos' strategy to ensure the ongoing sustainability of its Cooper Basin operations and allows each business to make specific, tailored decisions about their operations."[22] During the meeting, the Unions strongly voiced their objections to that course of action.

[68] Also on 9 September 2021, Santos issued new NERRs for two separate enterprise agreements to replace the 2019 Agreement – the proposed Santos Ltd Cooper Basin Midstream Enterprise Agreement 2021[23] and the proposed Santos Ltd Cooper Basin Onshore Enterprise Agreement 2021[24] (now entitled the Upstream Agreement) respectively.

[69] It is clear from the above process that despite initially issuing a single NERR for the entire group of employees, Santos did not seek to bargain about or secure agreement with the Unions or any other employee bargaining representative prior to the issuing of the new replacement NERRs.

[70] Approximately 200 employees of Santos are covered by the 2019 Agreement and the Santos Proposed Agreements. Of these, approximately 130 are members of the AWU. The AMWU also has membership amongst both groups of employees.

[71] As at the hearing of this matter, there have been 23 bargaining meetings with Santos for the Santos Proposed Agreements – 12 bargaining meetings for the Midstream Agreement and 11 for the Upstream Agreement. Each of these meetings is being conducted on different days.

[72] At the time of the initial hearing of this matter, there was a bargaining meeting scheduled on 15 December 2022 in respect of the Midstream cohort of employees.

[73] The bargaining meetings have been conducted in Adelaide with MS Teams links for those attending from elsewhere. Subject only to operational coverage being maintained, if one of the employee bargaining representatives is rostered to be on duty at the time of a bargaining meeting, Santos releases the employee (without loss of pay) for the duration of the meeting. Where the employee bargaining representative is not rostered at the time of the meetings, they are not paid for their attendance and do so in their own time. Unlike previous bargaining rounds, Santos has not flown the Unions' officials to, or accommodated them, on the various work sites at Moomba or those located elsewhere in the Cooper Basin. There are very limited private transport and accommodation options in the Cooper Basin and large distances are involved between many of the work locations. The unions have requested Santos to continue the previous practices in terms of these logistical matters and this has been rejected. As at the hearing of this matter, the Unions had not offered to reimburse Santos for the costs that would be involved, and Santos has not proposed such an approach.

[74] There are a number of bargaining representatives that have participated in negotiations in relation to the Proposed Agreements. In relation to the Proposed Midstream Agreement, the attendees in bargaining meetings have been:

- On behalf of Santos: Ms Amelia Peters, Mr Zev Costi (an external consultant engaged to assist Santos with bargaining), Mr Mick Little (Moomba Plant Manager), Ms Gillian Hood (People Business Partner);
- On behalf of the AWU: Mr Gary Henderson;
- On behalf of the AMWU: Mr Stuart Gordon or Mr Steve McMillan; and
- Approximately 14 individual bargaining representatives – who are employed only in the Midstream operations and attend in that capacity.

[75] In relation to the Proposed Upstream Agreement, the attendees in bargaining meetings have been:

- On behalf of Santos: Ms Amelia Peters, Mr Zev Costi, Mr Adriaan Breytenbach (Production Manager Cooper Basin Upstream), and Ms Briony McNeil (General Manager People & Culture Upstream);
- On behalf of the AWU: Mr Gary Henderson;
- On behalf of the AMWU: Mr Stuart Gordon or Steve Mr McMillan; and
- Approximately 13 individual employee bargaining representatives who are employed only in the Upstream operations and attend in that capacity.

[76] The individual bargaining representatives do not presently attend the (other) bargaining meetings not related to their representative roles and the numbers attending each meeting may fluctuate from meeting to meeting and be subject to revocations of bargaining authority from time to time. It was Ms Peters' evidence that combining the bargaining meetings may involve 19 (individual) bargaining representatives and a total of 25 persons attending.[25]

[77] Despite the many bargaining meetings over the course of more than a year, bargaining has not progressed to the point where there is any immediate likelihood of agreement between the Unions and Santos, or based upon present indications, an agreement likely to be approved by the majority of employees in each business unit. Indeed, there has been very little progress in reaching agreement on the substantive bargaining issues between the major bargaining representatives.

[78] On 9 September 2021, the Unions jointly tabled their log of claims. They have continued to express in bargaining meetings that their members' wish to retain all of the current conditions in the 2019 Agreement, plus their combined log of claims and pay increases. The Unions are also seeking that the bargaining and the final agreement reflect the coverage of the 2019 Agreement.

[79] Santos has advanced proposals for the 2 proposed Agreement, with some major issues being broadly common to each. There are differences in the 2 proposals, however these differences are largely connected with the fact that the Midstream employees are involved in

24-hour operations with consequential shift work arrangements and there are some different classifications and skill levels involved.

[80] On 22 September 2021, the AWU tabled a further log of claims. Some of the additional claims applied to both proposed agreement but other issues concern Midstream matter such as residential transport arrangements, Port Bonython jetty handover, Port Bonython roster matrix, travel allowance and RDOs for Process Operators at Port Bonython.

[81] On 23 September 2021, Santos received joint correspondence from the Unions. This included:

> "… …
>
> **Scope of the proposed enterprise agreement**
>
> The first and only bargaining meeting to date took place on 9 September 2021 (Bargaining Meeting), during which Santos advised that, rather than renegotiating the terms contained in the 2019 Agreement as contemplated by cl 1.10, it seeks to negotiate two separate enterprise agreements covering the Cooper Basin Upstream (Proposed Onshore Agreement) and Moomba/Port Bonython (Proposed Midstream Agreement).
>
> Based on the PowerPoint presentation circulated and presented during the Bargaining Meeting, it appears that the salient reason behind Santos' desire to negotiate two separate enterprise agreements, rather than one, is because it would enable Santos to more easily sell off the area of the business covered by the Proposed Midstream Agreement. As you will understand, the notion that Santos is contemplating selling of this area of the business gives rise to serious concerns with respect to job security on the part of our members.
>
> Notwithstanding these concerns, the Unions are not necessarily against the notion of two separate enterprise agreements. However, we require more information in order to form a view as to whether we are amenable to negotiating two separate enterprise agreements. In this respect, we request that all bargaining representatives from the Single Bargaining Unit (SBU) that would be covered by the Proposed Onshore Agreement and the Proposed Midstream Agreement be invited to attend the next bargaining meeting scheduled for 12 October 2021 to allow the Unions to consolidate their views and fully understand Santos' proposal. During that meeting, we request that Santos presents the following information to assist the Unions in understanding Santos' proposal:
>
> 1. A statistical breakdown of the numbers and types of members, job classifications and specific work sites that would be covered by the Proposed Onshore Agreement and Proposed Midstream Agreement; and
> 2. Complete details pertaining to the prospects of selling the area of the business covered by the Proposed Midstream Agreement, as well as Santos' proposals to ensure our members' employment remains safeguarded.
>
> As set out in the meetings notes for the Bargaining Meeting, Santos is yet to respond to the Unions' log of claims. However, we request that the above meeting scheduled for

12 October 2021 take place prior to Santos responding to our log of claims, given that, in circumstances where there is not agreement between the parties as to the scope of the enterprise agreement(s), there would be little utility in proceeding with substantive discussions regarding the terms contained in such agreements.

Payment for attending bargaining meetings

Previously, our delegates were entitled to be paid in accordance with the attached document to this letter entitled 'Payments and Expenses for Delegate (sic) for attending EA meeting' for the purposes of the 2019 Agreement. Delegates have been paid in this manner for at least the past 10 years.

Accordingly, we request that those individuals who form part of the SBU continue to be paid in accordance with this longstanding practice. If Santos intends to adjust how the SBU is to be paid for future enterprise agreements, these discussions can be had during the upcoming bargaining meetings.

Configuration and recognition of the SBU

We note that cl 1.11 of the 2019 Agreement provides that:

> *'The Parties agree that the current configuration of the SBU is acknowledged, however for the purpose of effective meetings, it is agreed that those SBU members who are in the field will utilise facilities such as teleconferencing to promote such effectiveness. Other methods may be agreed to between the Parties as required.'*

The 2019 Agreement remains operative and, as a corollary, so too does cl 1.11 with respect to the recognition of the SBU. The Unions are content for the SBU to participate in negotiations as configured for the purposes of negotiations for the 2019 Agreement, and request that Santos continue to recognise the SBU as required under the 2019 Agreement."[26]

[82] On 5 October 2021, Santos replied, and this included:

"… …

Scope of and justification for the proposed enterprise agreements

Your letter contends that one of the key reasons for Santos' preference to negotiate two enterprise agreements is to enable Santos to more easily "sell off" the area of the business covered by the proposed Midstream business. This is not accurate. Santos has been very clear publicly that we don't plan to "sell off" the Midstream part of our business.

As communicated by Santos during the first bargaining meeting on 9 September 2021, we need modern agreements for the distinct operating divisions of Midstream and Onshore. Midstream and Onshore are separate businesses with different challenges, work plans, budgets, organisational structures, shift patterns, joint venture arrangements and regulatory issues. Two enterprise agreements would appropriately reflect these

differences and facilitate each business to make specific, tailored decisions for their operations and employees.

You have asked us to present certain information at a proposed bargaining meeting on 12 October 2021. We do not propose to hold another bargaining meeting with a combined group of Onshore/Logistics and Midstream bargaining representatives. As notified to you during the first bargaining meeting, Santos intends to hold separate bargaining meetings as follows:

- Onshore/Logistics meeting to be held at 1.00pm on 19 October 2021; and
- Midstream meeting to be held at 1.00pm on 21 October 2021.

In response to the questions raised in your letter, we provide the following:

1. We are not aware of the identity of all union members in the Cooper Basin. However, we can provide the following information:

    - the proposed Onshore agreement would cover approximately 129 Upstream and Logistics employees in current classifications Production Operator, Utility Person, Metal Trades and Logistics Material Controller. The specific work sites covered would include Central Fields, Northern Fields, Cross Border, Jackson and Ballera; and
    - the proposed Midstream agreement would cover approximately 76 Midstream employees in current classifications Process Operator, Utility Person and Metal Trades. The specific work sites covered would be Moomba Plant and Port Bonython.

As stated, Santos has no current intention of selling out of the area of business covered by the proposed Midstream agreement. As Santos CEO, Kevin Gallagher has said at a number of public forums, Santos will continue to own and control its own infrastructure, as infrastructure is what delivers value in the oil and gas industry. However, Santos may choose to sell down its equity in parts of the Midstream business.

Payment for attending bargaining meetings

The document titled ‘Payments and Expenses for Delegate (sic) for attending EA meeting’ you have referenced related to the payments Santos chose to provide to delegates in respect of bargaining for the Santos Ltd Cooper Basin Enterprise Agreement 2019 (2019 EA) and it ceased operating at the conclusion of those negotiations in 2019. We do not accept that delegates have been paid in this way for at least the last ten years.

It is no longer necessary for employee bargaining representatives to travel to Adelaide as bargaining is proceeding successfully using MS Teams. This is consistent with Santos’ approach to non-essential travel in a COVID-19 world. We have also provided training and support so that off-roster employees are able to dial in to MS Teams from home.

Santos has now issued updated guidelines for payment to employee and bargaining representatives in respect of the 2021 negotiations. The updated guidelines document titled ‘Guidelines on Payment for Employee Representatives’ will apply to bargaining

> in 2021. The updated guidelines are consistent with our approach at other Santos operations.
>
> **Employee bargaining representatives**
>
> Santos accepts that the 2019 EA remains in operation. However, in our view, the meaning of clause 1.11 is unclear. It is not clear what the 'current configuration' of the SBU means, particularly when 'SBU' was not defined in the 2019 EA. Nor is it clear the purpose/s for which the SBU was 'acknowledged'. It cannot be the case that Santos agreed to bargain exclusively with the SBU, as under the good faith bargaining requirements in the Fair Work Act, Santos is required to recognise and bargain with all bargaining representatives for a proposed agreement.
>
> As Santos has communicated previously, we require that any employee who wishes to participate in bargaining meetings is duly appointed as an employee bargaining representative under the relevant provisions of the Fair Work Act. Consistent with its obligations, Santos will recognise and bargain with all duly appointed employee bargaining representatives.
>
> We look forward to progressing bargaining for the proposed two enterprise agreements with you and the other bargaining representatives for each proposed agreement.[27]

[83] In terms of this exchange, I observe that Santos corrected what it saw as the Unions' unfounded views about the potential to sell off some of the assets. Further, the indication from the Unions that they were not necessarily against the notion of 2 agreements was consistent with their good faith bargaining obligations[28] and must also be seen in the context of the correspondence as a whole.

[84] At a bargaining meeting for the Midstream cohort on 21 October 2021, Santos tabled a proposed Midstream Agreement. At the bargaining meeting for the Upstream cohort on 25 October 2021, Santos tabled a proposed Upstream Agreement.

[85] On 30 November 2021, the AWU advanced two further claims in respect of the Upstream employees, being claims for job security and further consultation. On 2 December 2021, the AWU advanced (largely) the same two claims in respect of the Midstream cohort.

[86] In bargaining meetings on 1 April 2022 and 4 April 2022, Santos tabled amendments to the Proposed Upstream and Midstream Agreements respectively. At the Upstream bargaining meeting on 1 April 2022, Santos also made a revised Total Fixed Remuneration (**TFR**) and bonus offer (which was communicated to all Upstream employees by email on 22 March 2022) that was contingent upon the Proposed Upstream Agreement being voted up at the first ballot.

[87] An offer largely in the same terms was communicated to Midstream employees by email on 23 March 2022 and tabled at the Midstream bargaining meeting on 4 April 2022.

[88] In late April and May 2022, Santos requested employees who would be covered by the Upstream Agreement to vote to approve an offer from Santos, in the form of a proposed enterprise agreement. The proposed agreement was not supported by the AWU or AMWU and 77 % of those employees who voted rejected the proposal.[29] Shortly after, Santos also requested employees who would be covered by the Midstream Agreement to vote to approve an

agreement proposed Santos. The proposed agreement was also not supported by the AWU or AMWU and was rejected by 98 % of the employees who voted.[30]

[89] Since May 2022, bargaining has continued separately in connection with both the Upstream and the Midstream streams.

[90] At various bargaining meetings following on from the ballots, Santos has advanced somewhat different proposals to the Upstream and Midstream bargaining agents, including the Unions. For the Upstream bargaining stream, Santos's proposals have included a revised guaranteed TFR and bonus proposal, amendments to the proposed work cycles provision and revised site transfer arrangements. No equivalent offer was made in respect of the Midstream Agreement.

[91] Proposals concerning bargaining for the Proposed Midstream Agreement have focused on the "at risk" shift allowance component of remuneration, the terms of the commute allowance. Santos is also seeking additional discretion around rostering given the need to accommodate 24/7 operations and Santos' proposed removal of the 'Process Operator Roster Hours Matrix' in clause 5.4.2 of the 2019 Agreement and the fifth week of annual leave for Moomba and Port Bonython Process Operators.

[92] Competency-based training is relevant to both Proposed Agreements although its practical application may vary. However, the Agreements proposed by Santos would state that employee competency is determined by Santos in accordance with its competency framework, as amended from time to time (clause 7 of the Proposed Midstream Agreement and clause 7 of the Proposed Upstream Agreement).

[93] The Unions have also advanced some site-specific claims.

[94] At present, the major elements dividing the bargaining representatives include:

- The dispute about the scope of the proposed agreements/agreement;
- The Santos proposal to introduce the TFR concept and what it describes as "simplified" agreements with less express terms and reduced access to the arbitration of disputes; and
- The Unions proposals not to lose any existing conditions and entitlements as a basis for a new agreement(s).

[95] In summary terms, these major elements are common to both sets of negotiations. There are also other issues in common between the 2 sets of negotiations such as what the Unions describe as "job security" and enhanced consultation obligations. However, there are claims and issues that relate only, or predominately, to one of the presently proposed agreements. This arises from, amongst other factors, the different nature of the operations including the 24/7 nature of the midstream operations which is reflected into particular shift work provisions.

5.3 The bargaining concerns raised by the Unions

[96] Consistent with their obligations under s.238(3) of the Act, in late April 2022, the Unions wrote to Santos and each of the other bargaining representatives involved in both bargaining streams and gave notice of their concerns about the scope of the proposed Onshore (Upstream) and Midstream Enterprise Agreements. Those concerns were summarised as being that "bargaining for an agreement or agreements to replace the 2019 Agreement is not proceeding efficiently or fairly" and "the reason for this is that the Unions consider that the agreements will not cover appropriate employees, or will cover employees that it is not appropriate to cover."[31]

[97] The Unions also contended that the basis upon which those concerns were founded included the alleged inefficiency of the process and the unfairness associated with the requirement to attend and resource 2 parallel bargaining processes. The Unions also contended that the status quo of a single agreement should be reinstated and that this approach had the support from a majority of the employees involved.

[98] Santos responded to these concerns on 9 May 2022 and amongst other matters, stated that it was "surprised to receive notice of [its] concerns in relation to the bargaining periods at such an advanced stage of bargaining"[32] and rejected each of the propositions advanced by the Unions.

[99] As set out earlier, I accept the Unions' actions summarised above have met the requirements of s.238(3) of the Act. I also observe that all parties have been bargaining in good faith.

6. The general approach to be adopted to the other requirements of s.238(4)

[100] Section 238(4)(b) provides that the Commission must be satisfied that making a scope order will promote the fair and efficient conduct of bargaining. Having regard to that requirement, the objects of the Act and the authorities cited by the parties,[33] I consider that this assessment should be based upon the following approach.

[101] It is not necessary that the present bargaining be considered to be unfair or inefficient. However, findings to that end would clearly be relevant and would be conducive to a finding that the requirements of this provision may be met by an alternative scope for bargaining.

[102] The applicant for a scope order must demonstrate that the making of the order would promote, that is encourage and facilitate, bargaining that is fairer and more efficient than if no order was made. The scope order if made must address, at least in part, the unfairness and inefficiency. That assessment is to take into account the interests of all relevant parties who are subject to the bargaining process, including those who are seeking the order, the other party (in this case the employer) and other bargaining representatives, and involve the weighing up of the relevant considerations touching upon the issue.

[103] the need to facilitate good faith collective bargaining under s.238 will necessitate giving significant weight to the collective views of employees as to their preferred coverage scope.[34]

However, a proper consideration of the matters specified in ss.238(4) and where relevant (4A), may make it appropriate to make a scope order contrary to the view of the employees affected.[35]

[104] In terms of the interests of the employees, this will include consideration of the extent of common issues, the divergence of circumstances and apparent interests, and the consequences of the various proposals in relation to the scope of the negotiations. Where minority interests are said to be involved, this will involve consideration of whether those interests are sufficiently different and whether they are at risk of being overridden by the majority who have different interests. An objective basis for those concerns is important.[36]

[105] The relevant considerations may also include the disadvantage to the interests of other bargaining parties if the scope order was to be made,[37] the progress of negotiations and their status at the time of making the decision, and the history of industrial regulation in relation to the employees subject to the bargaining process.[38]

[106] In relation to the proper approach to s. s.238(4)(b) in determining whether the Orders will promote the fair and efficient conduct of bargaining, the Unions rely upon the following observations from the Full Bench in *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board*[39] (*UFU v MFESB*) to suggest that "it is not a requirement of the Act for the applicant to demonstrate that the scope order will promote both fairness and efficiency."[40]

> "[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."

[107] Santos contends that the Full Bench in *UFU v MFESB* did not conclusively determine that the word "and" in between the words "fair" and "efficient" was capable of being read disjunctively and that the proper approach is to give the expression its ordinary and natural meaning.[41] On that basis, it contends that the Commission must be satisfied that a scope order in the terms sought by the Unions will promote both the fair **and** efficient conduct of bargaining.

[108] The extract from *UFU v MFESB* relied upon by the Unions was cited by the majority in the more recent Full Bench in *CEPU v Utilities Management*.[42] The full context for that reference is as follows:

> [61] Before we directly address the appellants' grounds of appeal and contentions of error, we propose to make some general observations about s 238 and the purpose and function of scope orders in the scheme for enterprise agreements established by Pt 2-4 of the FW Act. It may be accepted consistent with the submissions made by Utilities Management that, subject to the satisfaction of the prerequisites contained in subsections (1)-(3) of s 238, the power conferred in s 238(4) to make a scope order involves the exercise of a discretion. There are (at least potentially) two decision-making

steps required under s 238(4). The first is that the Commission must be "satisfied" as to each of the matters in paragraphs (a)-(d). Because the judgment to be made about each of these matters "involves a degree of subjectivity" and there is "some latitude as to the choice of decision to be made",33 it is discretionary in nature. The exercise of the discretion in respect of paragraph (c) of s 238(4) is guided by the requirement in s 238(4A) to take into account the matter there specified. The second decision-making step required, dependent on satisfaction as to all of the four matters in paragraphs (a)-(d) of s 238(4), is to determine whether the overall discretion (signified by the word "may" in the chapeau) should be exercised in favour of making a scope order.

[62] Apart from s 238(4A), s 238 does not prescribe the relevant matters to be taken into account in the discretionary decision-making process just described; accordingly such matters, and any limitations upon them, are to be inferred from the subject matter, scope and purpose of the legislative scheme. These may be gleaned from the text of the relevant provisions and the relevant objects of the legislation. Additionally, in the context of the FW Act specifically, s 578(a) requires that the Commission take into account the objects of the FW Act or of the relevant part of the FW Act in performing its functions and exercising its powers.

[63] We have earlier set out the relevant objects of the FW Act. That part of the overall object of the FW Act in s 3(f), insofar as it refers to the bargaining process, emphasises collective bargaining at the enterprise level underpinned by simple good faith bargaining obligations, and the specific object in s 171 likewise emphasises collective good faith bargaining. Section 171(b) addresses the role of the Commission in bargaining, being to facilitate good faith bargaining. It may be inferred from the objects, therefore, that the facilitation of good faith collective bargaining is a necessarily relevant consideration in the exercise of the Commission's functions and powers under s 238.

[64] The specific purpose of s 238 may be gleaned from the prescription in subsection (1) as to the circumstances in which an application for a scope order may be made. An application may be made if, by reason of an issue about which employees should appropriately be covered by a proposed agreement, a bargaining representative has concerns that bargaining is not proceeding "efficiently or fairly". The use of the disjunctive "or" indicates that the concern may be about either efficiency or fairness and not necessarily both. Subsection (1) therefore points to the purpose of scope orders as constituting the means by which such concerns, if substantiated, may be resolved. In other words, scope orders are the remedy for bargaining that has become inefficient or unfair because of a scope issue. This purpose is reinforced by subsection (3), which requires as a prerequisite for a valid application that the bargaining representative has given notice of the concerns to the other relevant bargaining representatives and has not received what is considered to be an appropriate response within a reasonable time. This points to the centrality of the applicant's concerns as a consideration under s 238(4). As the Full Bench put it in UFUA v MFESB:

> "The power to make a scope order is predicated on disagreement between bargaining representatives. The discretion <u>to resolve that disagreement</u> is to be exercised as provided for in ss.238(4) and (4A)." (underlining added)"

> [65] In relation to the four matters about which satisfaction is required under s 238(4), little needs to be said about paragraph (a) (since there is no issue about it in this appeal) beyond that it is apparently intended to ensure that an applicant for a scope order has "clean hands" in respect of the bargaining process. In respect of paragraph (b), we note that to "promote" something, on its ordinary meaning, is to further its growth, development or progress or to encourage it. In UFUA v MFESB, the Full Bench said in respect of paragraph (b) "[t]he 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". (Footnotes omitted)

[109] Later in that decision, the majority of the Full Bench emphasised the Commission's role as follows:

> "[101] … …
>
> 1. The Commission's role in s 238 is not properly characterised as being "to guard against general unfairness". Its role is to determine whether the remedy of a scope order should be granted in accordance with requirements of the section in response to the concerns of a bargaining representative that bargaining for a proposed agreement is not proceeding efficiently or fairly. The consideration as to whether those concerns are objectively justified is necessarily central to the Commission's consideration, and those concerns may relate only to efficiency and not to fairness. There is no requirement for a finding of "general unfairness" in order for a scope order to be made."

[110] I observe that ultimately, the particular point contended here was not decisive before either of the Full Benches as each found that the order sought "would promote the fair and efficient conduct of bargaining."[43] Although there may be cases where this issue could be decisive, this is not one of those. As a result and as would generally be expected, I have applied, the approach set out by the Full Bench in *CEPU v Utilities Management*, noting that for reasons that will become clear, it is not necessary for me to further consider the particular issue advanced by Santos on this aspect of the requirements.

[111] Section 238(4)(d) requires satisfaction that the making of the scope order sought is "reasonable in all the circumstances." The provision requires the exercise of a broad judgment, subject only to the requirement to take into account all the relevant circumstances and is concerned with the identification of a sound rational basis for the making of the scope order sought rather than the more general question as to whether a scope order should be made.[44]

[112] The application of all of the considerations outlined above is also to be informed by a construction of the Act that would promote the statutory objects,[45] including those applicable to the relevant part[46] of the Act.[47] These objects include collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.

[113] The Commission should also be mindful of the consequences of making a scope order. These were helpfully summarised, at least in part, by the majority of the Full Bench in *CEPU v Utilities Management*:

> "[75] It will also be relevant, in considering whether to exercise the discretion to make a scope order, to consider the consequences that will flow from the making of such an order. A scope order is not enforceable under the FW Act and does not itself impose any binding obligation on any bargaining representative. Such an order will have three potential direct consequences under Pt 2-4 of the FW Act:
>
> 1. The coming into operation of the order will give rise to a notification time in relation to a proposed agreement within the meaning of s 173(2)(c), and thus enliven the obligations upon the employer under s 173(1) and (3) to issue a NERR within 14 days (unless such a notice has already been given a reasonable time beforehand). It may be presumed, although it is nowhere stated, that the description of the coverage of the proposed agreement in the NERR must align with the terms of the scope order. This consequence will be of significance if the employer has previously refused to bargain for a proposed agreement with the scope of coverage identified in the scope order. Once the NERR is issued, the good faith bargaining requirements in s 228 will be applicable.
> 2. The prerequisite for the making of a bargaining order in s 230(2) will be satisfied (see paragraph (c)). However, this will have less significance if the employer has already agreed to or initiated bargaining for an agreement with the same scope as that specified in the scope order, since the prerequisite in s 230(2) will already be satisfied (see paragraph (a)).
> 3. If an agreement is ultimately made with a scope different to that specified in the scope order, then the agreement will be incapable of satisfying the approval requirement in s 187(2) unless the Commission is satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed agreement with the coverage specified in the scope order. The Commission might not be so satisfied if, for example, the employer had refused to bargain in respect of an agreement with the coverage specified in the scope order and had made the agreement in disregard of any such bargaining.
>
> [76] The making of a scope order may also, indirectly, facilitate the making of a bargaining order if a bargaining representative does not meet the good faith bargaining requirements in respect of a proposed agreement with the coverage specified in the scope order. It is not possible to exhaustively describe the circumstances in which this might, in practice occur but, as an example, if the employer refused to meet and bargain with bargaining representatives for an agreement with the specified scope, that would be likely to constitute non-compliance with the good faith bargaining requirements in s 228(1)(a), (c), (d) and/or (f). In that circumstance, a bargaining order might require the employer to take certain steps, or cease to do certain things, in order to achieve compliance with the requirements of s 228. Such an order is enforceable.

> [77] However, a scope order does not, by itself, require the employer (or any bargaining representative) to make an agreement with the coverage specified in the scope order, or prohibit the making of an agreement with a different scope. Subject to the bargaining representatives complying with the good faith bargaining requirements, a scope order is not determinative of the scope of coverage of the agreement which may be bargained for.
>
> [78] Section 238(7) authorises the Commission to make further orders consequential upon the making of a scope order. This may include (in paragraph (a)) amending any existing bargaining orders and (in paragraph (b)) making or varying other such orders, determinations or other instruments made by the Commission, or take such other actions, as the Commission considers appropriate. Paragraph (b) is expressed in very broad terms, but its operation must be understood as limited in at least two respects. First, because paragraph (a) deals specifically with bargaining orders, and allows only for the amendment of an existing bargaining order, we do not consider that paragraph (b) can be read as authorising the making of a bargaining order. The provision is not to be read an extending the power to make a bargaining order beyond the circumstances prescribed by s 230. Second, we do not consider that the capacity to take "such other actions" as considered appropriate can be read in an unconfined way; to give it a sensible scope of operation, it must, we consider, be read as referring to actions that the Commission is otherwise empowered to take under the FW Act."

[114] In terms of the consequences of a bargaining order, I also raised with the parties how this might inform any discretion that might arise in this case during the proceedings, noting that there were 2 potential outcomes of each application; namely, Scenario 1 – not to make Orders or Scenario 2 – make the Orders. In doing so, I observe that if a scope order is made, it would be necessary for Santos to issue a new NERR given the import of s.173(2)(c) of the Act and, amongst other considerations, the lapse of time since the original (single agreement) NERR was issued. It is also common ground that the good faith bargaining obligations would apply to this scope. However, I sought to test the practical import of the common contention that the final scope of any enterprise agreement or agreements was ultimately a matter for bargaining. In this latter respect, this could lead to a different scope being agreed from that which was specified in the relevant NERRs.

[115] The Unions contended under scenario 1 although the good faith bargaining obligations would apply to the scope of each existing NERR, no new NERR would be required if the parties ultimately agreed that a single enterprise agreement would be made. Further, under scenario 2, should the parties ultimately agree that a different scope should apply, such as 2 agreements, it would also not be necessary for a new NERR to be issued.

[116] Santos contends that under scenario 1 and where a single agreement was ultimately agreed it was feasible that the parties as a matter of practicability could issue a revised NERR with the support of the bargaining representatives. In that regard, it submitted that such may ultimately not be required but would not in any event represent an impediment to the agreed outcomes. In relation to scenario 2, Santos contended that should the parties ultimately reach an agreement to have 2 enterprise agreements made, no new NERR would need to be issued given the nature of statutory purpose of that notice. However, applying an approach recently adopted by the Commission,[48] the making of the scope orders might prevent Santos putting out

2 proposed agreements for employee approval without the support of bargaining representatives. This, it contended, meant that the issuing the scope order could lead to an intractable dispute. In that regard, Santos submitted that under recently enacted intractable bargaining dispute provisions of the Act,[49] the making of the scope orders would delay the availability of such an avenue. This is because the provisions require that 9 months of bargaining have taken place and the scope orders,[50] if made, would reset the notification time and the commencement of that 9-month period.

[117] I observe that at the time of this decision, the intractable dispute and related bargaining provisions of the Act are not yet in operation.

[118] Accordingly, there is some speculation and some difference between the parties as to the potential requirement to issue a new NERR under at least one of the scenarios where a different scope is ultimately agreed. I do not consider that it is necessary or appropriate for me to determine this aspect as part of this Decision. I also note the potential implication for access to the soon to be operational intractable dispute jurisdiction of the Commission; however, this implication is somewhat speculative and would depend upon the actual conduct of the future negotiations. Further, whilst not operating on the same basis, there are other avenues available to the parties in this case to seek the Commission's assistance to advance bargaining. [51]

[119] In relation to the limitation on an employer subsequently unilaterally putting out a proposed enterprise agreement to employees that did not reflect the scope orders if issued, I observe that some limitations on that conduct might be expected given the scheme of the Act. In relation to the decision relied upon by Santos to support the limitation, I also observe that such involved findings that the employer in that case was not breaching good faith bargaining orders by strenuously continuing to pursue 2 agreements as part of the single bargaining process.[52] Further, whilst making an adverse finding associated with the employer's decision to unilaterally put a proposed enterprise agreement out to only one of the groups of employee covered by the scope order, the Deputy President expressly did not deal with the circumstances as to whether agreement was required from all of the bargaining representatives to avoid a finding that that the conduct undermined collective bargaining, and rejected the notion that this gave the bargaining representatives a right of veto over the vote.[53] I also observe that in that matter, the employer concerned did not advance (as part of that process at the time) a proposed enterprise agreement to the other group of employees who formed part of the scope determined by the Full Bench.

[120] I will return to the consequences of any order as part of my consideration of the discretion in this matter.

[121] As is clear above, the parties have placed reliance upon various decisions of the Commission concerning other scope order applications. To the extent that this was done in pursuit of the same outcomes in those decisions, I make it clear that each case must be considered in its own circumstances. The outcome in this case follows the evidence and the relevant considerations.

7. Consideration

[122] Given the circumstances of this matter, the positions of the parties and the earlier jurisdictional findings of the Commission, which are not in dispute, there are 2 remaining matters that must be considered and determined in disposing of the applications.

7.1 Will making the proposed Orders promote the fair and efficient conduct of bargaining?

[123] Fairness and efficiency are different notions, but they are not unrelated in the context of bargaining. That is, for example, fairness in the present context is associated with notions of equity, recognition of roles and rights and having the capacity for legitimate interests to be considered. Efficiency is associated with the overall timeframes and the best use of resources, including the avoidance of unnecessary duplication. The relationship comes from the fact that in a bargaining scenario, an inefficient process may also be unfair to the bargaining representatives depending upon their resources and circumstances.

[124] The history of bargaining here provides some implications for the present question. Firstly, despite the differences between the operations and the working arrangements of the Midstream and Upstream business units, both a common bargaining process and a single enterprise agreement can reasonably deal with those differences. This is evident from, amongst other matters, the manner in which the 2019 Agreement reflected different provisions for the different groups and operational arrangements, within the single process and instrument. In my view, this remains the case despite the organisational separation that Santos has implemented with the 2 business units. Secondly, previous bargaining rounds have been much more efficient than the current processes. Although the duplication of the bargaining processes is, and is likely to remain, a significant factor in the absence of the orders, the different positions being advanced here, particularly by Santos, is also likely to be a relevant factor. Santos is seeking relatively fundamental change to the terms of the 2019 Agreement and is doing so by adopting a strategy with far less accommodations for the Unions. This "tough bargaining" is open to it and I make no criticism in the present context. As a result, whilst the duplication is a significant factor, the long and as yet unresolved bargaining process in this case is not an indicator of efficiency solely associated with the scope dispute and the 2 processes presently involved.

[125] There is a broad consistency in the bargaining claims of the major bargaining representatives and the major issues preventing progress are predominately the same. In making this finding, I have had regard to the substance of the claims and positions, rather than a numerical assessment. Further, as outlined above, there are differences between the operations and working arrangements and some important claims for each group, but these are in general terms capable of being dealt with under either approach.

[126] There is no general interchange of employees between groups and each group of employees is clearly defined. Indeed, the only employees who work outside of their business units are the Rotating Equipment Team who do specific duties in the upstream operations from time to time. This is relevant as these employees may wish to bargain for the upstream arrangements to apply to them during those periods. As a result, it may be fairer and more efficient for the bargaining process to be common for these employees. I also observe that any coverage issues ultimately created are also capable of being dealt with in terms of the final coverage of the 2 agreements (if made) by applying a majority work rule as proposed by Santos. Equally, the parties might agree that some or all the Upstream arrangements performed by this

team might apply to the work in question and this can be accommodated through either a single agreement or 2 agreements with an express comity arrangement. A single bargaining process is however preferable as a matter of fairness and efficiency given the circumstances and the statutory considerations.

[127] In terms of the change adopted by Santos to the logistical assistance provided to the Unions as part of the current round of bargaining, it has not been suggested that this is a breach of the good faith bargaining obligations or that the assistance is required to be provided under the terms of the Act. In that context, this is not, of itself, directly relevant. However, to the extent that the Union Officials need to duplicate the processes of attending meetings and consulting their membership for each separate bargaining process, this implication is a relevant consideration at least in terms of attending the Cooper Basin facilities, given their distance from Adelaide and each other, and the absence of convenient transport and accommodation options other than those provided by Santos. This has implications for both fairness and efficiency of the present duplicated process.

[128] In general terms, I consider that the 2 parallel processes have led, and would continue to lead, to a less efficient bargaining process. There are some different circumstances, issues and representatives involved in the 2 proposed agreements. However, there is almost self-evident duplication of attendances, claims and counterclaims and negotiations between the 2 processes and this involves both the Unions and many of the Santos representatives. Given my earlier findings about the capacity to deal with these differences in the joint process, this is supportive of the necessary findings sought by the Unions.

[129] There are however, some competing considerations about efficiency associated with the size and composition of the bargaining groups. This includes the total number of employee bargaining representatives involved in each of the present bargaining processes and the combined number of representatives that would be relevant in a single process.

[130] A combined scope would involve a larger group meeting and some of the representatives (Santos line management and the individual employee bargaining representatives) not having a direct interest in some issues applicable to certain workers. However, this is common in enterprise agreement negotiations and the major issues in dispute here are relevant to all bargaining representatives. Further, genuinely individual or sectorial issues are capable of being fairly and efficiently dealt with in separate sessions of the one overall bargaining process. The Full Bench in *AWU v BP Refinery (Kwinana) Pty Ltd*[54] observed:

> "[27] It is true that bargaining for one agreement might see a greater cost in productive time lost on account of employee bargaining representatives from both groups attending bargaining meetings that deal only with issues relating to the other group. That need not be so if issues that concern only one group are dealt with in meetings where employee representatives of the disinterested group do not attend. In any event, it will typically be difficult to quantify what, if any, inefficiency arises from bargaining for a single agreement in such a case."

[131] Despite the different circumstances of this case, the above finding is apt.

[132] Further, as outlined above, in terms of the discussion of the major common issues and the attendance of those with broad interests (Santos HR and external consultant and the Unions) there would clearly be an efficiency in reducing the existing duplication of meetings and discussions.

[133] Santos has contended that combining the employee groups would create the capacity for the larger group (Upstream) to override the interests of the smaller group (Midstream). This is of course a mathematical possibility and Mr Holst (AMWU delegate) acknowledged in evidence that this would not be desirable. However, no meaningful suggestion was advanced for the basis of such a concern and the fact that they have some different operational and employment conditions, and the parties have made some different proposals to the 2 groups, does not provide any objective basis to suspect that the majority will conspire against the others. Further, I note that the Unions have relevant membership across the 2 groups.

[134] On balance, I am satisfied that the change in scope as proposed would lead to fairer and more efficient bargaining when all of the circumstances and the interests of all parties are taken into account.

7.2 Is it reasonable in all the circumstances to make the Orders?

[135] The views of Santos are a relevant contrary consideration.

[136] For reasons outlined earlier, I do not have direct evidence about the views of all employees who are covered by the present bargaining. However, I am satisfied that the Unions have consulted with their membership and that the views expressed in this case are representative of those members. The evidence is also that the 2 unions combined have significant membership across the employees in question. The AWU alone, has some 130 members across the approximate 200 employees concerned. As a result, I am satisfied that there is a significant block of employees, supported by their unions, which has a strong preference for a single bargaining process. This is to be given appropriate weight.

[137] Also, for reasons outlined earlier, I am satisfied for present purposes that the making of the scope orders would not in practice materially impact upon the parties' capacity to genuinely bargain over, and potentially agree, a different scope of any final enterprise agreement(s).

[138] To the extent that the scope of bargaining impacts on the capacity of the parties to pursue productivity improvements within the operations of Santos, I do not consider that the single bargaining process has any material impact upon that ability. Indeed, I consider that the making of the Orders will promote collective bargaining in good faith, particularly at the enterprise level, for an enterprise agreement(s) that may deliver productivity benefits.

[139] The bargaining process has been underway for a long period and many meetings have been conducted. However, given the absence of real progress on many of the major issues between the parties, there is a substantial bargaining process ahead and what progress has been made need not be lost. Accordingly, the making of the scope orders at this stage is appropriate.

[140] Having regard to all of the circumstances of the matters, including the views and conduct of the parties, I consider that the considerations leading to the earlier findings, in the context of

the approach required to applications of this kind, also provide a sound and rational basis for the making of the Orders sought.

8. Conclusions and orders

[141] I have found that the jurisdictional prerequisites for the granting of the applications and the making of the Orders sought have been met.

[142] I have also found that the making of the Orders would lead to a fairer and more efficient bargaining process and that it is appropriate to make the orders.

[143] The Orders[55] are being issued in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:

Z Duncalfe for The Australian Workers' Union.

M O'Loughlin with *S Gordon* for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

M Minucci (of counsel) with *P Lawler* of Ashurst Lawyers, with permission, for Santos Ltd.

Hearing details:
2022
December 12, 13.
Adelaide.

Final submissions:
2023
February 9.
Respondent.

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[1] Santos Ltd Cooper Basin Enterprise Agreement 2019 [AE506914]

[2] Confirmed in the approval decision [2020] FWCA 475 and noted in clause 1.3 of the 2019 Agreement.

[3] This was amended by the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022*, which commenced on 6 December 2022 and applies to the present application – s.57(1) of that Act. No party contended that this particular amendment impacted upon the proper approach to be taken in this matter.

[4] By reference to *TWU v Coles Supermarkets Australia P/L* [2015] FWC 1591 at [145]-[148]; *CEPU and Ors v Utilities Management Pty Ltd* [2022] FWCFB 42 at [98]; *CEPU and Ors v Utilities Management Pty Ltd* [2022] FWCFB 42 at [99].

[5] *BRB Modular v AMWU* [2015] FWCFB 1440.

[6] *AWU v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at [29] and *CEPU and Ors v Utilities Management Pty Ltd* [2022] FWCFB 42 at [73].

[7] Relying upon the observations of the Full Bench in *AWU v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476.

[8] [2022] FWCFB 42.

[9] Exhibit AWU 1.

[10] Relying upon the Macquarie Dictionary definition.

[11] Exhibit AMWU 1.

[12] Exhibit AMWU 2.

[13] Relying upon *CEPU v Utilities Management Pty Ltd* [2022] FWCFB 42 at [84].

[14] *CEPU v Utilities Management Pty Ltd* [2022] FWCFB 42.

[15] Santos propose that the agreement coverage would be defined in this context by reference to the majority (or substantial nature) of work performed by the employees in question.

[16] Exhibit Santos 1.

[17] Exhibit Santos 2.

[18] Attached to Mr Henderson's witness statement – exhibit AWU1.

[19] In all Australian jurisdictions, including South Australia, major hazardous facilities are subject to additional and specific regulations which require, amongst other matters, licensing, comprehensive formal safety cases, and additional notification, assessment and planning obligations.

[20] GH-1 attached to exhibit AWU 1.

[21] Originally described as the Onshore Agreement.

[22] Ms Peter's Statement at 37– exhibit Santos 2.

[23] GH – 2 attached to exhibit AWU 1.

[24] GH – 3 attached to exhibit AWU 1.

[25] Exhibit Santos 2 – para 78 as amended – transcript PN1024 and PN1026.

[26] Attachment AP-2 to the witness statement of Ms Peters (Exhibit Santos 2)

[27] Attachment AP-3 to the witness statement of Ms Peters (Exhibit Santos 2)

[28] Section 228 of the Act.

[29] Statement of Gary Henderson 11 November 2022 (exhibit AWU1) par 19.

[30] Ibid.

[31] Attachment 1 to the AWU's originating application.

[32] Attachment 4 to the AWU's originating application.

[33] Including *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* [2010] FWAFB 3009 and the majority decision in *CEPU v Utilities Management* [2022] FWCFB 42.

[34] *CEPU v Utilities Management* [2022] FWCFB 42 at [73].

[35] *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at par [53].

[36] See *Royal District Nursing Service Limited v Health Services Union of Australia and Australian Nursing Federation* [2012] FWAFB 1489 and the decision at first instance - *Health Services Union of Australia and Australian Nursing Federation* v *Royal District Nursing Service Limited* [2011] FWA 8033 at pars [56] to [70].

[37] See *National Union of Workers v Linfox Australia Pty Ltd* [2013] FWC 9851 at [59].

[38] This is drawn from my decision in *The Australian Workers' Union v Sodexo Remote Sites Australia Pty Limited* [2013] FWC 6892.

[39] (2010) 193 IR 293.

[40] AWU outline of submissions 11 November 2022 at 38.

[41] Relying upon *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110 at [27], [36].

[42] [2022] FWCFB 42 at [65].

[43] *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at [70]; *CEPU v Utilities Management* [2022] FWCFB 42 at [105].

[44] *CEPU v Utilities Management* [2022] FWCFB 42 at [70].

[45] *Fair Work Act 2009* (Cth) s3.

[46] Ibid s171.

[47] *Acts Interpretation Act 1901* s15AA.

[48] *CEPU v Utilities Management* [2022] FWC 1981.

[49] New section 235 introduced by the *Fair Work Legislation (Secure Jobs, Better Pay) Act 2022*.

[50] Section 235(5) and (6).

[51] Including s.240 of the Act.

[52] *CEPU v Utilities Management* [2022] FWC 1981 at [128] to [151].

[53] Ibid at [184] to [189].

[54] [2014] FWCFB 1476.

[55] PR760121 and PR760129.