Restructuring bargaining arrangements: what is the role, if any, for scope orders?

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The scope of an enterprise agreement is of the utmost importance to its making and practical operation: it determines which employees are to be covered by the agreement, and who is entitled to vote in a ballot for its approval. Just like any other term of the agreement, its scope is a matter for negotiation between the parties, subject only to the requirement that the group of employees to be covered by the agreement be 'fairly chosen'.[1]

There is no presumption that existing scope arrangements be retained and no limitation on the capacity of parties to pursue coverage arrangements that suit their needs. The *Fair Work Act 2009* (**FW Act**) does, however, recognise that negotiating parties may disagree about the scope of a proposed agreement and accordingly makes provision for the resolution of disputes about this issue through the making of 'scope orders' (**SO**s or **Order**) by the Fair Work Commission (**FWC** or **Commission**), for a 'scope order'.

The Commission's role in determining applications for SOs, and the effect of such orders on the bargaining process, are complex and the subject of considerable debate. That said, formal applications for SOs are quite rare, and the jurisprudence in relation to them is not fully developed.

Hence this **Insight**. The majority decision of a Full Bench in *CEPU v Utilities Management Pty Ltd* (***Utilities Management***)[2] examines a number of key issues in relation to the making of SOs and points to some potentially interesting impacts upon the capacity of businesses to restructure their bargaining arrangements. The fact that there is a powerful dissent in this case means that the key issues and competing considerations are well framed.

What is a Scope Order?

Division 8 of Part 2-4 of the FW Act is headed 'FWC's General Role in Facilitating Bargaining', and identifies five areas in which the Commission can regulate enterprise bargaining:

- making Bargaining Orders;
- making Serious Breach Declarations;
- making Majority Support Determinations (**MSDs**);
- making Scope Orders; and
- dealing with bargaining disputes.

1 *Fair Work Act 2009* (Cth) (**FW Act**), section 186(3).

2 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Utilities Management Pty Ltd* [2022] FWCFB 42.

In simple terms, the provisions relating to SOs enable a bargaining representative for a single-enterprise agreement to apply to the FWC for an Order if (section 238(1)):

a. the representative has 'concerns' that bargaining for the agreement is not proceeding 'efficiently or fairly'; and
b. the reason for this is that the representative considers that the agreement 'will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.[3]

It is irrelevant for this purpose whether the applicant is representing employers or employees, although on the evidence available it appears that the great majority of applications are made by employee representatives. This is likely because it is the employer who most often sets the initial scope of a proposed agreement through its distribution of Notices of Employee Representation Rights (**NERRs**) to employees, whom it proposes will be covered by the proposed agreement and who are employed by it at the relevant time.[4]

Section 238(3) requires that before applying for a SO, a representative must first:

a. take all 'all reasonable steps' to give a written notice of the concerns to all bargaining representatives for the agreement;
b. give the relevant representatives a 'reasonable time' to respond; and
c. consider that the relevant representative(s) have 'not responded appropriately.

Assuming that these preconditions are satisfied, section 238(4) provides that the FWC has a discretionary power to make a SO if it is satisfied that:

a the applicant bargaining representative is meeting the good faith bargaining requirements that are set out in section 228 of the FW Act;
b. making the order 'will promote the fair and efficient conduct of bargaining';
c. the group of employees who will be covered by the proposed agreement was 'fairly chosen'[5]; and
d. it 'is reasonable in all the circumstances to make the order'.

It is important to appreciate that SOs do not create binding legal obligations. This means that contravention of a SO is not unlawful. This in turn means that parties can continue to press claims in the bargaining for a scope clause which is different to a SO. This is a recognition of a broader principle that the FWC has no role is determining the contents of enterprise agreements, unless all bargaining representatives consent.[6]

Despite this, the making of a SO may be of considerable practical significance – for example:

- the making of a SO will give rise to a 'notification time', with the consequence that if it has not already done so, the employer would need to issue a NERR;
- the making of a SO will trigger the operation of the good faith bargaining obligations in relation to any employees that have been added to the scope;
- failure to observe the good faith bargaining obligations towards all bargaining representatives identified in a SO would enable them to seek a bargaining order under section 229 of the FW Act (although that of course is always the case, whether an SO has been made or not). A breach of any such order is a civil penalty provision[7]; and
- if an agreement is made in circumstances where a SO is in place and the scope of the agreement differs from that specified in the SO then the FW will be not be able to approve the agreement unless it is satisfied that doing so 'would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives' for the agreement.

Scope Order provisions in operation

According to the Annual Reports of the FWC, there were a total of 174 applications for SOs between 2011 and 2021, with just 23 Orders being made in that time. In other words, there has been an average of 17.4 applications and 2.3 Orders each year since the commencement of the FW Act. Furthermore, the number of applications and Orders has declined markedly in recent years, as evidenced by the fact that since 2016 there have been just 65 applications, with 14 Orders made, at averages of 13 and 2.8 per annum.[8]

3 It should be noted that SOs cannot be made in relation to negotiations for greenfields agreements (section 238(1)), or in situations where a single interest employer authorisation is in operation in relation to the agreement (section 238(2)).
4 FW Act, section 173(1).
5 If the agreement to be specified in a SO would not cover all employees to be covered by the agreement then, in determining whether the group of employees to be covered was 'fairly chosen' the FWC must 'take into account whether the group is geographically, operationally or organisationally distinct' (section 238(4A)).
6 See for example see for example section 228(2)
7 See further the majority opinion in *Utilities Management* at [75].
8 The figures are somewhat skewed by 2016, when there were 21 applications, and 11 Orders made. This means that only three orders were made out of 44 applications in the period 2017-2021 – that is, there have been an average of 0.75 Orders each year since 2017 is 0.75!

By way of comparison, there have been a total of 272 applications for MSDs since 2011 (at an average of 87.3), and with only 12 applications being refused over that time. In contrast to SOs, the number of MSD applications has increased markedly in recent years, with an average of 98.6 per annum since 2016.

Utilities Management

Utilities Management Pty Ltd (**Utilities**) operates in the electrical power industry in South Australia. It carries on two businesses through subsidiary corporate entities: SA Power Networks (**SAPN**) and Enerven. The first is the monopoly power distributor in South Australia and operates subject to regulation by a public regulator. Enerven 'engages in electrical, telecommunications and renewable energy infrastructure development and maintenance' and operates in a competitive market. Utilities is the employer in both businesses and some employees worked in both businesses from time to time. Historically employees in both businesses have been covered by a single enterprise agreement – most recently the *Utilities Management Pty Ltd Enterprise Agreement 2018* (**2018 Agreement**).

The 2018 Agreement expired on 31 December 2020. In early June 2020 Utilities issued a NERR (**First NERR**) to the employees who worked in both SAPN and Enerven, indicating that it intended to negotiate for a single agreement to cover its employees in both businesses.

Employees were represented by CEPU and by Professionals Australia[9]. Negotiations 'proved to be difficult and protracted' and members of both Unions took protected industrial action on a number of occasions.

On 16 September 2021 Utilities issued a further NERR (**Second NERR**) – but only to employees in the Enerven business – and announced that it had formed the view that there should be two agreements, one covering employees in the SAPN business and one covering employees in the Enerven business. The Second NERR indicated that Utilities was bargaining in relation to the proposed 'Enerven Enterprise Agreement 2021' (**Enerven Agreement**) and that the proposed agreement was to cover 'employees that are South Australia based who provide major infrastructure, energy and telecommunications work in the competitive market for Enerven…covered by the classification structure in this agreement'. The Second NERR did not include, and was not accompanied by, 'any draft agreement or other document which permitted identification of the classification structure' referred to in the NERR.

Negotiations for the proposed Enerven Agreement commenced shortly after the issue of the Second NERR. Both CEPU and Professionals Australia participated in these negotiations as bargaining representatives, as did some 22 individuals (including members of Enerven management) who had been nominated by themselves and/or other employees as bargaining representatives. Negotiations for the agreement referred to in the First NERR also continued, although Utilities considered that that agreement would now cover only the SAPN business.

Just a month later, in mid-October 2021, CEPU filed an application for a bargaining order, alleging breach by Utilities of the good faith bargaining requirements and also wrote to Utilities raising concerns about the progress of bargaining arising from the Second NERR. Professionals Australia and the Australian Services Union (**ASU**) wrote to Utilities in similar terms. In due course CEPU and Professionals Australia applied for SOs to the effect that the proposed agreement should cover essentially the same employees as the 2018 Agreement, whilst CEPU and the ASU applied for bargaining orders.[10]

Decision of Deputy President Anderson

The applications were heard by Deputy President Anderson in November and December 2021 and he handed down his decision on 23 December of that year.

The Deputy President found that the requirements of section 238(1)-(3) as described above were satisfied and indeed that that issue was not in contention in the matter before him.[11] He also found that the applicants were meeting the good faith bargaining requirements as stipulated by section 238(4)(a).[12] However, his Honour was not satisfied that the making of the order sought would 'promote the fair and efficient conduct of bargaining' for purposes of section 238(4)(b) or that it was 'reasonable in all the circumstances to make the order' as required by section 238(4)(d).[13]

As concerns the 'fairly chosen' requirement in section 238(4)(c), his Honour was satisfied that the group of employees to be covered by the agreement contemplated by the First NERR was 'fairly chosen', and indeed that was not in contention in the proceedings before him. However, that was not necessarily the end of the matter:

9 Association of Professional Engineers, Scientists and Managers, Australia.
10 The foregoing account is based on that in the opinion of the majority of the Full Bench at [2022] FWCFB 42, [3]-[17].
11 [2021] FWC 6608, [111]-[122].
12 [2021] FWC 6608, [95]-[100].
13 Respectively, [2021] FWC 6608, [101]-[110] and [151]-[165].

> [I]t does not follow that because the group to be covered by an agreement proposed by the applicant unions was fairly chosen that the narrower group proposed by Utilities Management in bargaining under the September 2021 NERR is not also fairly chosen…[I]t is well established that more than one proposed scope can be fairly chosen.[14]

Having examined the nature of the Enerven business, and the question of whether the employees in that business could be said to be 'geographically, operationally or organisationally distinct' the Deputy President concluded that:

> Considered overall, the evidence concerning organisational distinctiveness is significantly more clear-cut than in the case of geographical or operational distinctiveness. Even taking into account the factors that weigh against (including material commonality of shared back of house services) I find that Enerven is organisationally distinct from the business of SAPN.
>
> In considering whether a group is fairly chosen I have noted that it is not necessary for the group to be each of geographically, operationally and organisationally distinct. Relevant statutory provisions refer to geographically, operationally or organisationally distinct.
>
> My findings concerning the Enerven business satisfy this test.[15] [Emphasis in original]

The Unions appealed to the Full Bench of the Commission against this decision. By a majority of two (Vice President Hatcher and Commissioner Bisset) (**Majority**) to one (Deputy President Colman) the Full Bench allowed the appeal.

The Majority decision

The Majority started by reviewing the nature and purpose of sections 238 and 239, and in doing so placed particular emphasis upon the discretionary nature off decisions concerning the making of SOs, even where the formal requirements of section 238 were satisfied.[16] They then went on to consider the significance that ought to be attached to the wishes of employees who would be affected by the making of a SO. In that context, they noted the suggestion by a Full Bench of the Commission in *Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* that 'it is implicit in the right to bargain collectively that the preferences of employees as to the appropriate collective should be respected unless there is some good reason under the legislation to decide otherwise'.[17]

They did not endorse that approach, but did observe that:

> It is sufficient to say for present purposes that the required consideration under s 238 of the need to facilitate good faith collective bargaining will necessitate giving significant weight to the collective views of employees as to their preferred coverage scope.[18]

They focussed instead on the nature and validity of concerns about fairness and efficiency of bargaining:

> The need to give central consideration to the applicant bargaining representative's concerns will necessarily involve an assessment of the validity of those concerns - that is, whether the identified scope issue exists and whether it is causing bargaining not to proceed efficiently or fairly. Where the concerns are assessed to be valid, that will be a powerful factor weighing in favour of the making of a scope order. In particular, if bargaining has reached an impasse because of competing proposals as to the scope of coverage of the proposed agreement, a scope order is likely to be necessary in order to "break that impasse".[19]

Turning to the decision of Deputy President Anderson, the Majority determined that he had erred in four respects:

- his consideration of the 'fairly chosen' issue;
- his consideration of the 'consequences and utility' of making an Order;
- his assessment of the efficiency of the current bargaining process; and
- his approach to the powers of the Commission under section 238.[20]

As concerns the 'fairly chosen' issue, the Majority considered that the Deputy President had erred by proceeding on the basis that 'the second NERR had specified the coverage for the proposed Enerven agreement as applying to employees in the Enerven business generally and that this was the "choice" of coverage which he assessed to be fair'. According to the majority 'this is simply not the case',[21] and they then proceeded to analyse the description of the employees to be covered by reference to the three criteria set out in the Second NERR (see above).[22]

14 [2021] FWC 6608, [123].
15 [2021] FWC 6608, [143]-[145].
16 [2022] FWCFB 42, [61], [78].
17 [2014] FWCFB 1476, [29].
18 [2022] FWCFB 42, [73].
19 [2022] FWCFB 42, [74].
20 [2022] FWCFB 42, [80].
21 [2022] FWCFB 42, [83].
22 [2022] FWCFB 42, [84]-[96].

They concluded:

> In summary, the picture which emerges is that Utilities Management wants to divide the existing coverage of the 2018 Agreement into two new agreements, but has not yet determined the boundary of coverage between the two agreements in a such a way that the coverage of either of them can be said to have been "chosen". An assessment of the fairness of any such coverage is therefore not possible or reasonably available to be made. The Deputy President erred by proceeding on the factual premise that such a choice had been made, and further erred by characterising that choice as being between an Enerven-only agreement and a SAPN-only agreement when the evidence indicated that this was not the intended outcome.[23]

As to the 'fairness and efficiency of the current bargaining process' the Majority accepted the appellants' submissions that Deputy President Anderson had erred in failing to take into account 'the identical or similar nature of the work performed by workers in the competing scopes, the overlap between the two groups being bargained for, and the inefficiency associated with the separate bargaining processes for two agreements'.[24] They continued:

> Utilities Management accepted in its submissions that it remains bound to comply with the good faith bargaining requirements in respect of the first NERR. That means that it is required to bargain in good faith for a single agreement which covers its entire workforce, including employees in the Enerven business. At the same time, the result of the issuance of the second NERR is that Utilities Management is also separately conducting bargaining in respect of employees in the Enerven business (howsoever defined). This means that, on paper at least, bargaining for an agreement that covers employees in the Enerven business is occurring *simultaneously* in two separate bargaining processes. The detrimental implications for efficiency and fairness arising from this situation are patently obvious.[25]

In conclusion, the Majority found that Deputy President Anderson's characterisation of the 'proper role' of the Commission as being 'to guard against general unfairness, not to pick a winner between two fairly chosen scope being lawfully bargained for' constituted 'an incorrect statement of principle which caused the Deputy President's exercise of his discretion to miscarry'.[26]

According to the Majority, this characterisation of the Commission's role was 'in error in at least three respects':

1. The Commission's role in section 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.
2. Whether the scope of coverage proposed in the scope order that is sought is fairly chosen is a mandatory consideration under section 238(4)(c). However, there is no requirement in the section to consider, let alone treat as determinative, the consideration of whether any competing coverage proposal is 'fairly chosen'. Although this may be a relevant consideration, the Deputy President treated as determinative and a bar to the making of a scope order any finding to the effect that two competing scope proposals are fairly chosen. This approach finds no support in the text of the provision and is inconsistent with authority. When a disagreement about scope has caused inefficiency or unfairness in bargaining, it may be necessary to make a scope order to 'break the impasse' notwithstanding that the competing scope proposals may both be fairly chosen.
3. The Full Bench decision in *CFMEU v ResCo* is completely inapposite to section 238.[27] The decision was concerned with whether an enterprise agreement which had been made and for which an application for approval had been lodged met the 'fairly chosen' requirement for approval in section 186(3) of the FW Act. The consideration required under section 186(3), the purpose of which provision is to ensure that an agreement has not been made as a result of an arbitrary, discriminatory or manipulated choice as to the group of employees covered by it, is entirely distinct from that required under section 238 which…is concerned with whether a disagreement about scope has caused bargaining not to proceed efficiently or fairly.[28]

23 [2022] FWCFB 42, [94].
24 [2022] FWCFB 42, [98].
25 [2022] FWCFB, [99].
26 [2022] FWCFB 42, [101].
27 *CFMEU v ResCo Training and Labour Pty Ltd* [2012] FWAFB 8461.
28 Ibid.

Deputy President Colman's dissent

Deputy President Colman delivered a robust and compelling dissenting opinion.

His Honour agreed with the Majority's 'general observations' concerning the making of SOs, but took issue with the proposition that the collective views of employees should invariably be given 'significant' weight in approaching the exercise of the Commission's discretion as to scope: rather, in the opinion of Deputy President Colman, the collective views of employees should be accorded 'appropriate' weight in this context. This reflected his view that the text and context section 238 tells against there being any 'default' position as to whose views should be taken into account in the decision-making process.[29]

As to the 'fairly chosen' issue, his Honour found there was nothing unusual about the Second NERR referring to a yet to be negotiated classification structure, and it certainly could not be said that no 'choice' about coverage had been made for that reason. He also found that the Appellants' reliance upon the ability of the employer to deploy employees to work in the two business from time to time was irrelevant to the 'fairly chosen' question. In the Deputy President's opinion, these concerns related to the application of the proposed agreement, rather than to its scope.[30]

He also departed from the position adopted by the Majority in finding that part of the Commission's role in dealing with SO applications is indeed to 'guard against general unfairness' in the way it approaches the exercise of its discretion. Turning to Deputy President Anderson's assumption that the Commission's role was 'not to pick a winner between two fairly chosen scopes being bargained for' Deputy President Colman observed that:

> In my view, the import of the Deputy President's remark was that in a case such as the one before him, where it was not otherwise reasonable to make an order, he did not consider it appropriate to pick a winner as between two fairly chosen scopes. Such an approach to the exercise of discretion was open to the Deputy President.[31]

In a particularly helpful passage, the Deputy President agreed with the Majority as to the force and effect of a SO, in particular that it does not prohibit bargaining for a different scope, or 'set aside' any existing bargaining process.[32]

Deputy President Colman was of the clear view that most of the issues upon which the Majority based their decision were not properly before the Full Bench because they were not directly raised in the Appellants' notice of appeal and the Appellants had not made any application to amend their notice of appeal as contemplated by Fair Work Commission Rules.[33]

The Deputy President further considered that even if the matters had been properly before the Commission many of the Majority's findings were factually and/or jurisprudentially unsound[34] and noted that Deputy President Anderson had in fact done many of the things that the Appellants and/or Majority said he had not done.[35]

In summary, as Deputy President Colman saw the matter:

> The respondent commenced bargaining for an enterprise agreement that would apply to employees working in both of its business units. This had been the practice in the past. But the bargaining was protracted and difficult. The respondent decided to negotiate a separate agreement for one of its business units. The appellants wanted to continue negotiating for a single agreement. The Deputy President considered the appellants' proposed scope to be fairly chosen. He concluded that the applicant bargaining representatives had been bargaining in good faith. He was not persuaded however that the making of an order would promote the fair or efficient conduct of bargaining, or that it was reasonable in all the circumstances to make an order. These conclusions were open to him. Having reached those conclusions, he properly dismissed the application. The appeal has not established any error in the Deputy President's decision.[36]

What does the decision mean?

As noted earlier, the jurisprudence concerning the operation of sections 238 and 239 of the FW Act is somewhat underdeveloped. Despite the not entirely convincing reasoning in places, the decision in *Utilities Management* does provide helpful clarification in relation to the meaning and effect of the statutory provisions including:

- The decision serves to highlight the fact that it is the employer that initially establishes the scope of a proposed agreement by the cohort to whom it distributes the NERR;

29 [2022] FWCFB 42, [113].
30 [2022] FWCFB 42, [119].
31 [2022] FWCFB 42, [128].
32 [2022] FWCFB 42, [132].
33 See, e.g., [2022] FWCFB 42, [117], [118], [120], [122], [125], [126], [129], [130], [132], and [134].
34 See, e.g., [2022] FWCFB 42, [121]-[122], and [124].
35 See [2022] FWCFB 42, [115], [116], [134], and [135].
36 [2022] FWCFB 42, [136].

- The majority's concern that the Second NERR did not disclose any 'choice' about the precise nature of the cohort to which it referred warrants careful attention when drafting NERR's. Although Deputy President Colman disagreed, it would be prudent to review the common practice of referring to classification structures, or other matters not yet agreed. It may be, for example, that it would be appropriate to include in the NERR greater clarity about the intended scope of the proposed agreement.
- In light of the Full Bench decision, it now seems clear that SOs:
  - do not require parties to agree on the basis of the scope ordered;
  - do not prevent continuing negotiations for agreements with different scopes from what may be set out in the SO;
  - do not give rise to any entitlement to a subsequent bargaining order where negotiations continue for an agreement with a different scope;
  - do not prevent the approval by the FWC of agreements with different scopes, unless a definitive finding is made that doing so would 'be inconsistent with or undermine good faith bargaining'.
- Despite Deputy President Colman's views to the contrary, 'significant weight' will be given to employees' preference as to scope. Following the Majority decision, it is inevitable unions will argue that they should be given more weight than employers preferences;
- The practice of issuing a 'second NERR' should be carefully reviewed, and likely not utilised other than where the employer wishes to increase the scope of a proposed agreement. Deputy President Colman thought it unnecessary and the Majority thought it led to inefficiency and unfairness as it meant there were on foot two simultaneous bargaining processes.
- More broadly, employee representatives (most likely unions) might try to use SOs as a way to resist attempts by businesses to restructure their bargaining arrangements – as was the case in *Utilities Management*.
- Unions may also try to use SOs to extend the reach of bargaining to sectors of the workforce which are presently outside the scope of bargaining. Most often this would be done through applications for MSDs which, if made, would require employers to engage in bargaining – although of course they are not obliged to enter into agreements, other than through the entirely unused provisions relating to serious breach declarations and bargaining-related workplace determinations.[37]
- SOs could also be used to extend the scope of bargaining in some circumstances – for example where part of a workforce is covered by bargaining arrangements and part is not – especially where the covered and uncovered sectors of the workforce are doing the same or similar work at different geographical locations. But it remains clear in light of the decision that the employer can do this by issuing further NERR's and might not need to resort to any proceedings in the Commission. Although, as indicated, the comments made about the second NERR here will need careful attention.
- By the same token, employers may see utility in using SOs to facilitate a restructuring of their bargaining arrangements. Indeed it would have been open to the employer in *Utilities Management* to do just that – so long as it was able to satisfy the requirements of section 238 in general and in section 238(4) in particular. On the evidence available, the behaviour of the three unions in that case was such that an application by the Company might well have been successful.
- It is also important to bear in mind that even where all of the formal requirements of section 238 have been met, the making of a SO is in the final analysis entirely at the discretion of the FWC – subject to the rules relating to reviewable error.[38] This means that employers who are contemplating applying for an SO, or who apprehend that they may be subject to such an application, should endeavour to tailor their strategies in such a way as to maximise the likelihood of the Commission electing to exercise its discretion in their favour – or, put differently, to minimise the risk of it being exercised to their disadvantage.
- In developing a bargaining restructuring strategy it should also be borne in mind that employers can apply for both bargaining orders and SOs and that in some circumstances they can play a constructive role in implementing such a strategy.[39] In other words, in this context at least, what is sauce for the goose truly may also be sauce for the gander.

37 FW Act sections 234-235 and 269-271A.

38 Such as where the decision-maker was guided by extraneous or irrelevant facts or reached a decision that was manifestly unreasonable.

39 For obvious reasons employers cannot apply for MSDs.

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