DECISION

Fair Work Act 2009
s.238—Scope order

Community and Public Sector Union, The
v
Australian Unity Home Care Service Pty Ltd
(B2018/1071)

COMMISSIONER JOHNS SYDNEY, 4 JUNE 2019

Application for a scope order.

[1] This decision involves an application for a scope order which was made pursuant to s.238 of the *Fair Work Act 2009* (Cth) (**FW Act**). The application was made on 16 November 2018 by the Community and Public Sector Union (**CPSU**). The Respondent is Australian Unity Home Care Service Pty Ltd (**AU Home Care Service or the employer**).

[2] On 22 November 2018 the matter was programmed for hearing. On 4 December 2018 that program was amended. Proceedings in this matter commenced before the Fair Work Commission (**Commission**) on 26 February 2019 and continued on 18 and 27 March 2019.

[3] The Commission granted permission for the parties to be represented. I was satisfied that the matter was invested with sufficient complexity such that I would be assisted in the efficient conduct of the matter if I allowed the parties to be represented. Permission was granted pursuant to s. 596 of the FW Act. At the hearing Mr M Gibian of Senior Counsel, appeared for the CPSU, and Mr K Brotherson appeared for AU Home Care Service.

[4] During the hearing the CPSU adduced evidence from three witnesses all of whom had made written statements in support of the application. They made themselves available for cross-examination. The CPSU witnesses were as follows:

a) Jessica Moore, Industrial Officer, Public Service Association of NSW (**PSA**),
b) Tania Shipman, Service Coordinator, Australian Unity Home Care Service Pty Ltd (a transferred employee), and
c) Michael Laetsch, Allocations Coordinator, Australian Unity Home Care Service Pty Ltd (a non-transferred employee).

[5] AU Home Care Service also provided witness evidence from two individuals each of whom had made witness statements in support of AU Home Care Service's opposition to the application for a scope order. They too made themselves available for cross-examination. The AU Home Care Service witnesses were:

a) Hayley Taylor, Senior ER Consultant, Australian Unity Group Service Pty Ltd (**AUGS**) (a subsidiary of Australian Unity Limited (**AU**)).

b) Dean Chesterman, General Manager, AUGS and Acting Executive General Manager Home and Disability Service.

[6] In coming to this decision I have had regard to the witness evidence and the following exhibits:

a) Exhibit #A1 - Outline of Submissions for the CPSU.

b) Exhibit #A2 - Statement of Jessica Moore dated 20/12/2018.

c) Exhibit #A3 - Statement of Michael Laetsch dated 20/12/18.

d) Exhibit #A4 - Statement of Tania Shipman dated 20/12/2018.

e) Exhibit #A5 - Statement in Reply of Tania Shipman dated 25/02/2019.

f) Exhibit #A6 - Statement in Reply of Jessica Moore dated 14/02/2019.

g) Exhibit #A7 - Statement in Reply Michael Laetsch dated 12/02/2019.

h) Unmarked - Reply Submissions for the CPSU dated 14/02/19.

i) Exhibit #R1 - Outline of Submissions for the Respondent dated 31/01/2019.

j) Exhibit #R2 - Statement of Dean Chesterman dated 31/01/19.

k) Exhibit #R3 - Statement of Hayley Taylor dated 31/01/19.

l) Exhibit #R4 - Second Statement of Hayley Taylor dated 13/03/19.

Relevant Background

[7] The following matters were either agreed or not contested. Consequently, I make the following findings of fact:

a) Australian Unity is an established provider of aged care, retirement and home care services. It has for many years (and well prior to February 2016), had in particular, operations in Victoria, New South Wales and Queensland. For home care services, those operations, had, and in large part continue to operate, through a number of subsidiaries.

b) For many years the NSW Government provided care and assistance to aged and disabled persons in their homes or in the community. The NSW Government did this through the Home Care Service of NSW.

c) The Home Care Service of NSW employed administrative employees and home care workers.

d) The administrative employees were covered by an Award of the NSW Industrial Relations Commission known as the *Crown Employees (Home Care Service of New South Wales- Administrative Staff) Award.*

e) The home care workers were covered by the *Care Worker Employees – Department of Ageing, Disability and Home Care (State) Award*.

f) On 19 February 2016 the NSW Government transferred ownership of the Home Care Service of NSW to Australian Unity.

g) At the same time staff of the Home Care Service of NSW were transferred from the NSW public service to employment with AU Home Care Service. The transfer occurred by way of a determination made under the *National Disability Insurance Scheme (NSW Enabling) Act 2013* (NSW).[1]

h) By operation of the NSW Enabling Act, certain conditions of employment were guaranteed, including maintenance of existing Award terms and conditions for a period of two years for permanent employees and for six months for temporary or casual employees.[2]

i) Under the FW Act a copied State Award was taken to come into operation for both administrative employees and separately the care workers as follows:

    i. For the administrative staff the copied State Award contained the same terms as the *Crown Employees (Home Care Service of New South Wales-Administrative Staff) Award 2012*.[3]

    ii. For the care worker employees the copied State Award contained the same terms as the *Care Worker Employees – Department of Ageing, Disability and Home Care (State) Award.*

j) Following the transfer the CPSU changed its rules to allow for continuing coverage of administrative employees (now employed in the private sector by AU Home Care Service).[4]

k) Following the transfer, Australian Unity made an enterprise agreement to cover home care workers known as the *Australian Unity Home Care Service NSW Enterprise Agreement 2017* (**2017 Agreement**). The nominal expiry date of the 2017 Agreement was 15 March 2019. United Voice is covered by the 2017 Agreement.

l) The 2017 Agreement did not cover transferred administrative employees.

m) Since the transfer of employees AU Home Care Service has recruited new employees. As such the cohort of employees employed by AU Home Care Service includes transferred employees and non-transferred employees.

n) Non-transferred employees undertaking administrative duties are covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Modern Award**).

o) The Modern Award will also apply to transferred employees when the copied State Award lapses and ceases to have effect in February 2021.

p) By reason of the above history AU Home Care Service has employees employed under multiple arrangements i.e.:

    i. home care workers – the 2017 Agreement;

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[1] Statement of Jessica Moore, para 3-4.

[2] *National Disability Insurance Scheme (NSW Enabling) Act* 2013 (NSW), ss 14-15.

[3] *Fair Work Act* 2009 (Cth), s.768AI.

[4] [2016] FWC 985.

ii. administrative employees, variously:

A. the State Award;

B. the Modern Award; and

C. contracts underpinned by the 2014 AU Agreement.

q) AU Home Care Service currently has approximately 4,290 employees:

i. 3,740 as home care workers, and

ii. 550 in administrative roles, including 32 Branch Managers and Service Centre Managers.

r) In terms of the 550 administrative employees, approximately

i. 362 are employed under the State Award,

ii. 156 are covered by the Modern Award, and

iii. 32 are covered by the 2014 AU Agreement.

s) Aside from classifications and wage rates, most core conditions of employment are already standard across the various industrial arrangements, including leave provisions and types of employment.

t) The most significant difference in conditions of employment for the 362 administrative employees under the State Award compared with other employees of AU Home Care Service are the span of ordinary hours and access to flexi-time.

u) AU Home Care Service operates under a Branch Operating Model divided into 5 regions. Within each region, Branch Managers or Service Centre Managers (effectively for larger centres), manage at their respective centre an integrated team of Allocations Coordinators, Service Coordinators, Administration Assistants and home care workers in providing services to clients.

v) On or around 28 June 2018, AU Home Care Service served notices of employee representational rights initiating bargaining for a new enterprise agreement to be known as the *Australian Unity Home Care Enterprise Agreement 2018* ("**Proposed Agreement**").[5]

w) AU Home Care Service wants the Proposed Agreement to cover both:

i. home care workers who provide care and assistance to clients in their homes and in the community; and

ii. administrative staff involved in rostering, human resources, client management and financial administration.

x) Bargaining has involved United Voice and the CPSU as default bargaining representatives, together with a number of employee appointed representatives. There have been 11 bargaining meetings.

[5] Statement of Jessica Moore, para 12.

y) On 4 July 2018 and 27 August 2018, the CPSU wrote to AU Home Care Service objecting to the administrative employees being included with the home care workers in a single enterprise agreement.[6]

z) The CPSU contends that administrative and support staff classifications (excluding nurses, health professionals and care workers) carrying out work in AU Home Care Service's NSW operations would be more appropriately covered by a separate enterprise agreement.

aa) On 8 August 2018 the CPSU served a log of claims.

bb) The CPSU attended bargaining meetings and workshops on 24 July 2018, 5 September 2018, 19 September 2018, 4 October 2018 and 16 October 2018.[7]

cc) On 16 November 2018 the CPSU made the present claim.

dd) AU Home Care Service has determined Service Centre Managers and Branch Managers should not be covered by the Proposed Agreement.

ee) On 27 November 2018 AU Home Care Service conceded a number of CPSU claims. AU Home Care Services now proposes minimal changes to the terms found in the copied State Award. AU Home Care Service no longer proposes to remove flex-time nor increase the span of ordinary hours.

The Case Advanced by the CPSU

[8] The CPSU submitted (**Exhibit A1**) that,

"…

11. The CPSU has concerns that the bargaining for the proposed agreement is not proceeding efficiently or fairly by reason of the scope of the proposed agreement. The CPSU gave notice of its concerns in relation to the bargaining process in its correspondence dated 4 July 2018 and 27 August 2018[8] and provided an opportunity for Australian Unity to respond to those concerns so as to satisfy the requirements of s 238(3). Accordingly, the CPSU has properly made an application for the making of a scope order for the purposes of s 238(1) of the FW Act.

12. Section 238(4) of the FW Act sets out the matters in relation to which the Commission must be satisfied in order to make a scope order. The Commission can be satisfied with respect to each of the matters referred to in s 238(4), namely, that the CPSU has met and is meeting the good faith bargaining requirements, that the making of the order will promote fair and efficient bargaining, that the group of employees to be covered if the order is made is fairly chosen and that, in addition, it is reasonable in all the circumstances to make the order sought.

Good faith bargaining requirements

13. Section 238(4)(a) of the FW Act provides that the Commission may make a scope order if satisfied that the bargaining representative who made the

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[6] Statement of Jessica Moore, para 13 and 16 and Annexures "JM4" and "JM6".

[7] Statement of Jessica Moore, para 14, 17, 19, 20 and 21.

[8] Statement of Jessica Moore, para 13 and 16 and Annexures "JM4" and "JM6".

application "has met, or is meeting, the good faith bargaining requirements." The good faith bargaining requirements are set out in s 228(1) of the Act as follows:

> Bargaining representatives must meet the good faith bargaining requirements
>
> (1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
>
> (a) attending, and participating in, meetings at reasonable times;
>
> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
>
> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement.

14. Section 228(2) makes clear that to meet the good faith bargaining requirements does not require a bargaining representative to make concessions during bargaining or to reach agreement on the terms to be included in an agreement.

15. Australian Unity initiated bargaining for the proposed agreement in late June 2018.[9] The CPSU has been actively and appropriately involved in the bargaining since that time. The CPSU promptly raised the issue of coverage in its correspondence dated 4 July 2018[10] and provided a log of claims to Australian Unity on 8 August 2018.[11] CPSU representatives have attended bargaining meetings and workshops on 24 July 2018, 5 September 2018, 19 September 2018, 4 October 2018 and 16 October 2018.[12]

16. During the bargaining process, the CPSU has responded to proposals made by Australian Unity, communicated the feedback it has received from members in relation to Australian Unity's proposals and provided reasons for the positions it has put forward.[13] There is no basis upon which it could be suggested that the CPSU has not met, or is not meeting, the good faith bargaining requirements.

Fair and efficient bargaining

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[9] Statement of Jessica Moore, para 12.

[10] Statement of Jessica Moore, para 13 and Annexure "JM4".

[11] Statement of Jessica Moore, para 15 and Annexure "JM5".

[12] Statement of Jessica Moore, para 14, 17, 19, 20 and 21.

[13] Statement of Jessica Moore, para 13-23.

17. Section 238(4)(b) of the FW Act provides that the Commission may make a scope order if satisfied that making the order will promote the fair and efficient conduct of bargaining. The Commission can also be satisfied that the making of the scope order sought will promote fair and efficient bargaining for the purposes of s 238(4)(b) of the FW Act.

18. Although the view is not uncontroversial, the Full Bench has expressed the view that the Commission should generally be satisfied that bargaining will be fairer or more efficient or both than it would be if no order were made: *United Firefighters Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at [55]; *Royal District Nursing Service Ltd v Health Services Union* (2012) 218 IR 276 at [6].

19. In assessing the "fairness" of the bargaining process, the Commission will have regard to whether the scope of the proposed agreement permits employees to meaningfully participate in the bargaining process and whether there is the potential for employees to have their voice heard. The objects listed in s 3 of the Act include:

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

20. The objects of Part 2-4 of the Act listed in s 171 include:

> *(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*

21. The scheme of Part 2-4 makes clear that the intent of the FW Act is that employees have the opportunity to meaningfully participate in bargaining for the making of an enterprise agreement setting conditions of employment applying to their employment. The FW Act does so by permitting an employee to appoint a bargaining representative (s 176), receive a copy of a proposed agreement (s 180) and vote on the proposed agreement (s 181) and by requiring that bargaining representatives comply with the good faith bargaining requirements (s 228).

22. The making of the scope order sought by the CPSU in this matter will promote fair and efficient bargaining having regard to the following matters:

    a. The work of employees performing administrative roles and covered by the Administrative Staff copied State Award is separate and distinct from that of care workers engaged in the field in that they undertake office-based administrative, rostering and supervisory roles, including the recruitment, supervision and management of care workers.[14]

    b. The administrative staff are, and have for many years, been covered by an entirely different set of conditions of employment derived from the Administrative Staff copied State Award whereas care worker employees were covered by a different State Award and are now covered by the Care Workers enterprise agreement.

[14] Statement of Jessica Moore, para 25; Statement of Tania Shipman, para 17-32.

c. The bargaining process has become complex, inefficient and confusing as a result of Australian Unity endeavouring to negotiate a single enterprise agreement with a single set of conditions to cover two groups of employees with different arrangements with respect to hours of work, classifications, rates of pay and other conditions of employment.[15]

d. The administrative employees represent a minority of the employees to be covered by the proposed agreement and have a limited capacity to influence the bargaining process. The approach of Australian Unity has the effect that the administrative staff are denied the opportunity to meaningfully influence the outcome of the bargaining and the distinct interests of the administrative staff will be neglected in the bargaining process.

23. The making of the order sought would promote fair and efficient bargaining by permitting the administrative staff to meaningfully participate in and influence the bargaining process and avoiding the complex and inefficient process brought about by the inclusion of two groups of employees with historically different conditions of employment.

Fairly chosen

24. The Commission must further be satisfied that the group of employees who will be covered by the agreement proposed to be specified in the scope order is fairly chosen for the purposes of s 238(4)(c) of the FW Act.

25. The assessment of whether a group of employees proposed to be covered by an agreement was fairly chosen will turn on the facts and circumstances of each case: *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* (2012) 219 IR 139 at [46]. The Commission is to take into account whether the group of employees is geographically, operationally or organisationally distinct albeit that matter is not necessarily decisive: *Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at [11]. The Commission will have regard to whether the criteria for selecting the group of employees reflect the criteria in s 238(4A) or some other legitimate characteristic: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 241 IR 439 at [33].

26. The assessment the Commission is required to make for the purposes of s 238(4)(c) of the FW Act is whether it is satisfied that the group of employees who will be covered by the agreement under the scope order sought by the CPSU is fairly chosen: *United Firefighters Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at [55]. The criterion in s 238(4)(c) is satisfied unless the Commission concludes that the group of employees specified in the scope order application were unfairly chosen.

27. The group who will be covered by the enterprise agreement if the scope order sought were made, is fairly chosen. The administrative staff performing work in relation to the Home Care service are geographically, operationally and organisationally distinct from the care workers employed by Australian Unity

[15] See, for example, Statement of Jessica Moore, para 14-21; Statement of Tania Shipman, para 35-38.

and there are no other reasons to suggest that the group is not fairly chosen in that:

a. The administrative staff perform work in an office environment in the regional service centres whereas the care workers perform work in the field at client's homes and residences or assisting clients in the community with shopping, attending appointments and other tasks.[16]

b. The administrative staff, particularly service coordinators and allocations coordinators, undertake duties involving the recruitment, supervision and management of care workers, including job interviews, orientation and induction, management and approval of leave, supervision, support and management of tasks and management of complaints or performance issues.[17]

c. The administrative staff and care workers have historically been governed by different industrial instruments with different sets of conditions, classifications and rates of pay. Care workers are generally casual or part-time employees and have very different arrangements with respect to hours of work, travel, breaks and rostering.[18]

28. The coverage proposed by the CPSU has been selected on a legitimate and objective basis, namely, that the administrative staff perform a different type of duties to care workers and have historically been covered by a different set of employment conditions. There are no grounds upon which it could be concluded that the group of employees to be covered under the proposed scope order is not fairly chosen.

Reasonable in all the circumstances

29. Finally, section 238(4)(d) of the FW Act provides that the Commission may make a scope order if satisfied that it is reasonable in all the circumstances to make the order. The Commission should conclude that it would be reasonable in all the circumstances to make the order sought by the CPSU for reasons including the following:

a. The making of the scope order would permit administrative staff to properly participate in the bargaining process, provide those employees with an opportunity to meaningfully influence the outcome of the bargaining and foster a genuine examination of the terms and conditions of employment of those employees.

b. The existing terms and conditions of administrative staff working in the regional service centres are markedly different from those applying to employees engaged in the provision of care and support to clients in their homes or in the community and it has historically been considered appropriate for those two groups of employees to be covered by different industrial instruments.

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[16] Statement of Tania Shipman, para 20-32.

[17] Statement of Tania Shipman, para 20-23.

[18] Statement of Tania Shipman, para 24-33.

c. The bargaining process has become complex, inefficient and confusing as a result of Australian Unity endeavouring to negotiate a single enterprise agreement with a single set of conditions to cover two groups of employees with different arrangements with respect to hours of work, classifications, rates of pay and other conditions of employment

30. There is nothing to suggest that it would not be reasonable in all the circumstances for the Commission to make the scope order sought by the CPSU.

Conclusion

31. For these reasons, the Commission should make a scope order in the form sought by the CPSU."

The Case Advanced by AU Home Care Service

[9] In opposing the scope and the order sought by the CPSU, AU Home Care Service submitted (**Exhibit R1**) that,

"…

Commission approach

6 The Commission may make a scope order where it is satisfied of the matters specified in s238(4) of the FW Act, and having taken account of the matters in s238(4A) of the FW Act i.e.

…

7 An application should, as far as possible be made early in the bargaining process: *Australian Rail, Tram and Bus Industry Union v Australian Rail Track Corporation* [2012] FWC 6329.

8 On the issue of fairly chosen, a full bench of the Commission in *Cimeco Pty Ltd v CFMEU and Ors* (2012) 219 IR 139 at [21] stated:

> *[19] Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was not geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen.*
>
> *[20] It is important to appreciate that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.*
>
> *[21] It is not appropriate to seek to exhaustively identify what might be the other relevant considerations. They will vary from case to case and will need to be demonstrated to the satisfaction of the tribunal. The word 'fairly' suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be*

> *unlikely to be fair. Similarly, selection based on criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair. It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen. In this regard, it is not only the interests of the employees covered by the agreement that are relevant; the interests of those employees who are excluded from the coverage of the agreement are also relevant….*

9 That a particular group of employees may be numerically small will not in itself be a reason to warrant a scope order excluding them from a wider group of employees fairly chosen, including where they may be represented by "*competent and experienced union officials*" (*APT Management Services Pty Limited & Anor v the AMWU & Ors* [2015] FWC 699 at [60] and [73]; see also *Paterson v Police Federation of Australia and others* [2011] FWA 7357 at [46]-[47]).

10 The possibility of conflicts of interest arising where senior employees may have responsibility for directing, or even disciplining other employees to be covered by a proposed agreement, has also been considered in a number of cases and accepted that it can be a basis for excluding those senior employees (*UFA v Metropolitan Fire and Emergency Services Board* [2010] FWAFB 3009 at [67]-[68]).

Home Care Service - background

…

25 The evidence of Home Care Service confirms the movement to an integrated business structure, and that home care workers and administrative employees do not operate in silos. Aspects of this include:

a. Administration employees are a common first point of contact for both home care workers and clients. In the case of clients this includes for initial engagement, but also for changed service requirements;

b. The Procura system is used by both home care workers and administration employees for recording rostering and client information;

c. Allocations Coordinators are required to liaise with home care workers over rostering and time-keeping. Rostering is a "*live*" activity which requires ongoing monitoring and adjustment to deal with issues such as unplanned absences, late cancellations etc;

d. Service Coordinators have a client portfolio and are required to liaise with their clients. This includes on-boarding, an annual service review and any other risk reviews as required. These steps should involve visits to the client's home or otherwise a telephone discussion. Such functions necessarily involve interaction with home care workers and allied health professionals;

e. The expectation is that Service Coordinators will in the future spend increasing time in the field with staff and clients;

f. Particularly, in the case of Allocations Coordinators and Service Coordinators it is necessary that they understand the needs of clients, and the availability and suitability of home care workers;

g. It is common that home care workers progress into administrative roles. Mr Laetsch, now an Allocations Coordinator and one the CPSU witnesses is an example of that. Further, 7 of the 34 current Branch Managers started their employment as home care workers.

26 The integration of the operations of Home Care Service also extends into the wider Australian Unity business. For example, functions such as training, payroll and client billing are managed centrally across Australian Unity by group services.

Australian Unity – wider home care operations

…

28 It is acknowledged that the former operations of Home Care NSW now represent the majority of the home care services provided by Australian Unity in New South Wales, and that the employing entity for that is the respondent in these proceedings, Home Care Service.

29 The home care operations of Australian Unity described in [27] above, have been subject to a number of enterprise agreements made pursuant to the FW Act. In February 2016 that agreement was the 2014 AU Agreement, which was succeeded by the *Australian Unity Home Care Enterprise Agreement 2017* (AG2017/6064 [2018] FWCA 2618) (2017 AU Agreement).

30 Both the 2014 AU Agreement and the 2017 AU Agreement cover both home care workers and administrative employees in the classifications of Allocations Coordinators, Community Liaison Officers, and Administration Assistants. These agreements have not covered employees at the level of Branch Managers and Service Centre Managers.

31 Elsewhere in the industry, other employers also have single enterprise agreements that cover both home care workers and administrative employees, but also typically do not to cover senior staff such Branch Managers or Service Centre Managers e.g. the *Anglican Care, NSWNA and HSU NSW Enterprise Agreement 2014 - 2017* (AG2014/9345 [2014] FWCA 8245) and the *Feros Care, NSWNMA, QNMA and HSU NSW Enterprise Agreement 2017 - 2020* (AG2017/5820 [2018] FWCA 287).

32 Branch Managers and Service Centre Managers throughout the businesses of Australian Unity, are senior employees with significant responsibilities. For example, in the case of Home Care Service, the Northern Sydney Branch has over 150 employees (including both home care workers and administrative employees) involved in servicing between 1100-1500 clients.

33 Typically within Australian Unity, employees in roles equivalent to Branch Manager and Service Centre Manager are employed under contracts of employment underpinned by the Modern Award. Over time the intention of Australian Unity would be to extend such arrangements to Branch Managers and Service Centre Managers in Home Care Service.

34 Within the Branch Operating Model, it is only Branch Managers and Service Centre Managers who have responsibility for decisions on recruitment and discipline, including termination of employment. This will usually be in conjunction with group human resources staff.

The Proposed Agreement

…

Bargaining for the Proposed Agreement

…

40 The issue of coverage of the Proposed Agreement has not been an impediment to bargaining, and relevantly the CPSU did not make its current application until 16 November 2018, by which time bargaining was well advanced.

41 A particular concern of Home Care Service is that this application really relates to the CPSU seeking to maintain its own position by the continuation of a silo approach to industrial regulation, rather than accepting the evolution of what was the public sector Home Care NSW into the integrated commercial business of Home Care Service that now exists.

Consideration

42 In terms of the pre-requisites for the Commission to be satisfied of in order to exercise its discretion to make a scope order, Home Care Service does not allege that to this point in bargaining, the CPSU has failed to meet the good faith bargaining requirements (s238(4)(a)).

43 However, Home Care Service maintains that making the order sought by the CPSU will not promote the fair and efficient conduct of bargaining (s238(4)(b)). In this respect:

a. As stated above, bargaining has to date proceeded in an unremarkable fashion and is well advanced. It has not been "*complex, inefficient and confusing*" as claimed at [22](c) of the CPSU Outline;

b. The differences in core conditions of employment between home care workers and administrative workers are not as significant as claimed by the CPSU;

c. The claims of the CPSU that the work of home care workers and administrative employees is separate and distinct is over-stated and should not be accepted. That claim disregards the Branch Operating Model, and the drive of Home Care Service to give effect to an integrated business to provide high quality service to clients;

d. Whilst a numerically smaller group than the home care workers, the CPSU represents the interests of administrative employees in the bargaining process. That representation involves Ms Moore, an Industrial Officer with the CPSU and 2 delegates. This group should be accepted as capable of properly representing the interests of administration employees (see *APT Management Services*);

e. Further, granting the order sought by the CPSU will only necessitate an additional round of bargaining for Home Care Service which would be

neither efficient nor fair on Home Care Service. It would also deny Home Care Service the efficiencies of a single agreement.

44 Home Care Service further submits that the Commission should not be satisfied that the group of employees who will be covered by the agreement, proposed to be specified in the scope, order is fairly chosen (s238(4)(c)). As the group of employees involved does not include all of the employees of Home Care Service, the Commission must "*take into account whether the group is geographically, operationally or organisationally distinct"* (s238(4A)).

45 Again, the effect of the Branch Operating Model across the 5 regions is that home care workers and administration employees are not "*geographically, operationally or organisationally distinct"*. Home care workers and administrative employees interact in meaningful ways to provide an integrated operation to best serve clients, and a single enterprise agreement will also more readily recognise career paths. Aspects of these issues are exampled at [25] above.

46 The administrative employees to be covered by the Proposed Agreement do not have responsibility for the hiring, discipline or termination of employment of staff. That responsibility rests with the Branch Managers and Service Centre Managers who it is no longer sought by Home Care Service should be covered by the Proposed Agreement.

47 The Commission cannot be satisfied that it is reasonable in all the circumstances to make the order sought by the CPSU (s238(4)(d)). Contrary to the claims at [29] of the CPSU Outline:

a. Administrative employees have been, and can continue to properly participate in bargaining;

b. The minority status of the administrative employees is not a basis for granting the order;

c. The existing terms and conditions of employment of administrative employees are not overall "*markedly different*" from other employees; and

d. For reasons already submitted, bargaining has not become "*complex, inefficient and confusing*".

48 Further, to grant the scope order sought by the CPSU would perpetuate the silo approach to employment regulation for Home Care Service and its workforce notwithstanding the substantial changes in operation since February 2016.

Conclusion

49 For all of the above reasons, and such other reasons as the Commission may consider appropriate, it should dismiss the application of the CPSU."

The CPSU reply

[10] By way of reply (Unmarked Exhibit dated 14/02/2019) the CPSU submitted that,
"Introduction

1. These are submissions in reply to the outline of submissions filed on behalf of Australian Unity dated 31 January 2019.

2. Australian Unity accepts that the CPSU has met and is meeting the good faith bargaining requirements (s 238(4)(a)). However, Australian Unity disputes whether making the scope order sought by the CPSU would promote fair and efficient bargaining (s 238(4)(b)), whether the group of employees proposed to be covered is fairly chosen (s 238(4)(c)) and whether it would be reasonable in all the circumstances for the order to be made (s 238(4)(d)).

Fair and Efficient Bargaining (s 238(4)(b))

3. Australian Unity resists the conclusion that the making of the scope orders sought by the CPSU would promote fair and efficient bargaining. The submissions appear to have two components: firstly, it is contended that the inclusion of a minority group of employees within a wider agreement does not render the bargaining unfair; and, secondly, the bargaining is not inefficient but seeks to streamline terms and conditions of employment and simplify Australian Unity's operations. Neither submission is persuasive.

Fairness

4. Administrative Staff represent a small minority of employees proposed to be covered by the new agreement. According to the information supplied by Australian Unity, there are 4,290 employees who will be covered by the proposed agreement of which 3,740 are Care Workers and 550 work in administrative roles.[19] Further, the Administrative Staff are split between transferred employees and existing or new employees who have commenced employment in the Home Care Service since the transfer of the Home Care Service to Australian Unity.

5. The Administrative Staff represent a distinct group of employees who, in light of their minority status, have a limited capacity to influence the bargaining or have their interests taken into account. Australian Unity submits that the fact a particular group of employees is numerically small does not "in itself" warrant the making of a scope order.[20] That may be correct so far as it goes. However, the fact that a minority group of employees, with a different history of industrial regulation, has been included in a broader agreement is capable of affecting the fairness of the bargaining process.

6. A small group of employees may be unable to bargain fairly and efficiently whilst they are obliged to be part of a larger bargaining group with which they had no common interests and who have no interest in assisting them to maintain their conditions: see, for example, *Australian Salaried Medical Officers Federation v Department of Human Services* (2011) 213 IR 213 at [24]. The different existing conditions of employment and differing interests of distinct groups of employees is relevant when assessing the fairness and efficiency of the bargaining process: *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at [65]-[68].

7. Australian Unity has changed course over the period of the bargaining for the proposed agreement in a manner that has recognised the unfairness of its initial

[19] Respondent's Submissions, para 21.

[20] Respondent's Submissions, para 9 and 43d.

proposals. From December 2018, Australian Unity has proposed that the agreement provide substantially different conditions for Administrative Staff and Care Workers. However, Australian Unity continues to propose conditions for transferred employees which depart from the State Award and propose that the Administrative Staff who are not transferred employees but perform the same work, will be covered by different rates of pay and conditions because they were not formerly employed by the NSW Government.

8. Australian Unity is pursuing an approach to bargaining which disadvantages Administrative Staff generally and would produce an ongoing disparity in pay and conditions of employment for Administrative Staff undertaking the same work. The inclusion of Administrative Staff within a wider agreement to cover Care Workers impairs the fairness of the bargaining process and the capacity of those employees and the CPSU to effectively bargain for fair and consistent conditions of employment.

Efficiency

9. The course of the bargaining has demonstrated the inefficiency of seeking to incorporate the large group of home care workers and administrative employees, with different conditions of employment and history of regulation, into the same enterprise agreement.

10. The approach to bargaining initially adopted by Australian Unity was to endeavour to force the different groups of employees onto the same set of wages and conditions of employment. After some months of bargaining, Australian Unity realised that approach was both unfair and unworkable in that it would result in an immediately reduction of conditions of employment that have applied to administrative employees for many years and which were guaranteed following the transfer from NSW Government employment.

11. Following the change of approach by Australian Unity in December 2018, Australian Unity has recognised there must be different conditions for Care Workers and Administrative Staff. Its proposals now attempt to create something of a Franken-agreement. It now proposes that the agreement cover three groups of employees each with different conditions being:

    (a) Care Workers;

    (b) Administrative Staff formerly employed by the NSW Government;

    (c) Administrative Staff not formerly employed by the NSW Government.

12. Whilst Australian Unity asserts that it wishes to streamline conditions of employment,[21] its own proposals involve substantial differences in the conditions of employment for those groups of employees. For example, there are different conditions proposed at least with respect to hours of work (clause 3.1 and 3.2), flexi-time (clause 4.6), span of hours and rostering (clause 5.1 and 5.2), wages and other benefits (clause 7), overtime (clause 8.2) and classifications and type of work (clause 10). There is no efficiency created by having a single agreement.[22] Such an arrangement is complex and inefficient.

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[21] Respondent's Submissions, para 37.

[22] Respondent's Submissions, para 43e.

13. It is not correct to say the most of the core conditions of employment are standard across the different groups of employees.[23] Whilst basic conditions derived from the National Employment Standards may be common, such as annual leave, personal leave and long service leave, the areas of any substantial contention in the bargaining involve different conditions for Care Workers and Administrative Staff. The bargaining process has involved long periods dealing with issues solely affecting Care Workers or Administrative Staff, respectively.

14. Nor it is correct to suggest that the granting of the scope order sought by the CPSU would necessitate an additional round of bargaining.[24] The bargaining has already been proceeding on the basis that there will be substantially different conditions for Care Workers and Administrative Staff. The scope order would not require returning to the commencement of the bargaining. Rather, a separate bargaining process for Administrative Staff would permit the future negotiations to be streamlined and directed at the issues actually affecting those employees.

15. The inclusion of groups of employees with different conditions and needs has rendered the bargaining lengthy and inefficient. Despite bargaining having being ongoing for many months, Australian Unity is still unable to even indicate what its position is with respect to increases in rates of pay.

Fairly Chosen (s 238(4)(c))

16. The submission that the group of employees who will be covered by the Agreement if the scope order sought by the CPSU is made is not fairly chosen must be rejected. The sole basis for the submission is an assertion that, as a result of the "Branch Operating Model", Care Workers and Administrative Staff are not "geographically, operationally or organisationally distinct". [25]

17. There are two observations which may be made in relation to that submission. Firstly, the Administrative Staff are plainly "geographically, operationally or organisationally distinct". The evidence contained in statements filed by the CPSU indicates that Administrative Staff work in an office environment physically separate from the working environment of Care Workers, which is very substantially on the road and visiting clients in their homes or other locations. The functions undertaken by Administrative Staff involve work which is distinct from the home care work undertaken by Care Workers and involves allocation and rostering of work, human resources functions and other administrative roles.

18. Secondly, and in any event, the question of whether the group of employees identified by a scope order is "geographically, operationally or organisationally distinct" is no more than one consideration which must be taken into account in an overall assessment as to whether the group is fairly chosen. It is but one matter to be taken into account and is not necessarily determinative: *Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at

[23] Respondent's Submissions, para 23.

[24] Respondent's Submissions, para 43e.

[25] Respondent's Submissions, para 44-46.

[11]; *Australian Maritime Officers' Union v Harbour City Ferries* [2016] FWCFB 115 at [31]. There may also be other legitimate characteristics for identifying a distinct group of employees: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 241 IR 439 at [33].

19. The submissions of Australian Unity do not even attempt to identify any basis upon which it could be suggested that an enterprise agreement covering Administrative Staff would not be fairly chosen. Administrative Staff engaged in work for the Home Care Service, including Service Coordinators and Allocations Coordinators, are at present and have been covered by different industrial instruments for many, many years under the New South Wales industrial relations system. This separate history of industrial regulation reflects the distinct work, interests and industrial representation of Care Workers and Administrative Staff.

20. Australian Unity itself chose to make an enterprise agreement in 2017 covering only Care Workers and not Administrative Staff engaged in the Home Care Service. The 2017 agreement could only have been approved if Australian Unity represented to the Commission and the Commission accepted, for the purposes of s 186(3), that it was fair to have a separate agreement for Care Workers and Administrative Staff. It could not now be unfair to maintain the existing and long-standing arrangement of having distinct industrial instruments applying to Care Workers and Administrative Staff.

Reasonable in all the Circumstances (s 238(4)(d))

21. The submissions of Australian Unity in relation to whether it would be reasonable in the circumstances to make the scope orders sought substantially overlaps with its submissions in relation to the fair and efficient bargaining issue.[26] The gist of its submissions appears to be that the existing instruments applying to its employees provide for disparate conditions of employment and that it wishes to rationalise the number of industrial instruments applying to its employees.[27]

22. It is a mistake to think that, as a matter of statutory construction, preference ought to be given to agreements that cover as much of an enterprise as possible: *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (2010) 193 IR 293 at [56]. The Commission should not approach an application for a scope order on the basis that the Act intends that an enterprise agreement covers all employees of an employer or even all employees within some operational area of the employer. Section 238 permits a scope order which does not apply to the whole enterprise.

23. In any event, Australian Unity is not actually pursuing a course which would integrate its workforce into a single agreement. The present position adopted by Australian Unity would involve separate arrangements for:

    (a) Employees involved in existing home care operations other than those transferred from the NSW Government under a separate agreement;

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[26] Respondent's Submissions, para 47.

[27] Respondent's Submissions, para 41.

(b) Employees working in the Home Care Service transferred from the NSW Government, other than Branch Managers and Service Centre Managers;

(c) Branch Managers and Service Centre Managers who are not proposed to be excluded from the proposed agreement.

24. Further, as discussed above, the agreement now proposed by Australian Unity does not integrate the conditions of employment of all employees but proposed distinct sets of conditions for Care Workers, transferred Administrative Staff and non-transferred Administrative Staff. The fact that Australian Unity itself recognises that different conditions should apply to Care Workers and Administrative Staff demonstrates the reasonableness of those employees being covered by different agreements.

25. The reasons given by Australian Unity for deciding to exclude Branch Managers and Service Centre Managers from the proposed agreement[28] support the proposition that it is reasonable for the other Administrative Staff not to be in the same enterprise agreement as Care Workers. As described in the evidence filed by the CPSU, Service Coordinators and Allocations Coordinators are also involved in rostering home care workers, allocating tasks to employees, supervision, support and management of home care workers, leave requests and the like."

Consideration

[11] In this case the CPSU has sought a scope order which would have the practical effect of separating those employees of AU Home Care Service who predominantly perform administrative duties from the remainder of its employees. This would include employees who transferred from the NSW public service and non-transferred employees.

[12] The application for a scope order was made on 16 November 2018 well after the commencement of bargaining and the conduct of at least 11 bargaining meetings. The delay in bringing the present scope application is regrettable. It could have been brought much earlier. The CPSU first raised the issue of scope on 4 July 2018. The issue of scope could have been heard and determined back then.

[13] The making of scope orders is governed by the provisions of ss. 238 and 239 of the FW Act which are in the following terms:

"**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

[28] Respondent's Submissions, para 3

(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.

Scope order must be in accordance with this section etc.

(6) The scope order:

(a) must be in accordance with this section; and
(b) may relate to more than one proposed single-enterprise agreement.

Orders etc. that the FWC may make

(7) If the FWC makes the scope order, the FWC may also:
(a) amend any existing bargaining orders; and
(b) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by the FWC, or take such other actions, as the FWC considers appropriate.

239 Operation of a scope order

A scope order in relation to a proposed single-enterprise agreement:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earliest of the following:
(i) if the order is revoked—the time specified in the instrument of revocation;
(ii) when the agreement is approved by the FWC;
(iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
(iv) when the bargaining representatives for the agreement agree that bargaining has ceased."

[14] Subsections (4) and (4A) of s.238 are the primary operative provisions in respect to the making of a scope order. In this instance, the opposition to the making of the scope order has primarily relied upon an alleged absence of satisfaction of sub-s (4) and (4A).

The Discretionary Factors for a Scope Order - ss.238(4) and (4A)

[15] There are four factors which can be extracted from an examination of the terms of subsections (4) and (4A) of s.238 of the FW Act all of which must be satisfied if any scope order is to be made.

[16] These four factors can be described as:

(1) Good Faith Bargaining; and,
(2) Promote Fair and Efficient Bargaining, and,
(3) Fairly Chosen, and,
(4) Reasonable in the Circumstances.

Good Faith Bargaining - s.238(4)(a)

[17] In this instance AU Home Care Service did not assert that the CPSU had not been bargaining in good faith. AU Home Care Service accepts that the CPSU has met and is meeting the good faith bargaining requirements (s 238(4)(a)) as outlined within s.228 of the FW Act.

[18] Consequently, the Commission, as presently constituted, is satisfied that the CPSU has met and is meeting the good faith bargaining requirements.

Promote Fair and Efficient Bargaining - s.238(4)(b)

[19] A clear and unavoidable consequence of the making of the scope order would be that the enterprise bargaining for an agreement to replace the 2017 Agreement would have to recommence. The bargaining would have to restart with separate Notices of Employee Representational Rights (**NERR**) being issued so that each NERR identified the altered scope.

[20] But that is an administrative issue only. It does not mean that the negotiations which were formally activated by the NERRs issued on 28 June 2018, and the bargaining that subsequently followed would be in vain. It would not be a waste of time and effort. Much has been achieved to date in the bargaining and it could be picked up with ease in moving forward.

[21] Ordinarily, if an application for a scope order is to be made, it would ideally be taken at an early stage of the bargaining process if it is to satisfy the requirement that it would promote efficient bargaining. In this instance, there would be some administrative requirements to be met, but I am not satisfied that there would be any particular inefficiency created if the scope order was granted and the bargaining had to recommence upon the altered scope terms. It is not as though bargaining has concluded and the employer is ready to proceed to a vote. AU Home Care Service have not (nearly 1 year after issuing the NERRs) put a wages offer to its employees.

[22] Further, having regard to how the bargaining has unfolded in this matter, it seems to me that it has not proceeded efficiently. Noting what has occurred in bargaining (e.g. the need to address the concerns of different groups of employees and the various changes in offers made by AU Home Care Service to accommodate the same) it seems to me that bargaining would have proceeded more efficiently had the administrative employees been carved out from the beginning. Therefore, I am satisfied that bargaining will likely proceed more efficiently if the scope order is granted. This is because the bargaining parties can, in respect of the employees to be covered by the scope order, focus exclusively on the needs of the administrative employees in the course of bargaining. There will be no further distraction caused by the home care workers being in the mix.

[23] In respect to the question of fairness, I accept the submission of the CPSU that regard should be had to the objects of the FW Act. I accept that it is the intent of the FW Act that employees participating in bargaining are able to do so meaningfully. The numbers of employees engaged in work performed by AU Home Care Service indicates that the employees performing administrative work (approximately 550 employees inclusive 362 transferred employees) are far outnumbered by employees who are home care workers. In this context the number of home care workers voting could swamp the votes of employees performing administrative work. It could deprive the administrative employees of a meaningful opportunity to engage in bargaining. That would be unfair.

[24] Further, the majority of administrative employees who have transferred from the NSW public service have traditionally had their terms and conditions of employment governed by the copied State Award. And although AU Home Care Service have made concessions to the CPSU in bargaining (especially around the ordinary span of hours and flextime), there would

be an unfairness attached to denying the administrative employees (particularly the transferred employees) from bargaining separately with the copied State Award as the instrument to be had regard to in the course of bargaining. While I accept that the administrative employees have been well represented in bargaining by the CPSU, if the scope order is granted, the CPSU will be better able to represent their members and more fairly participate in enterprise bargaining. Home care workers and administrative employees have traditionally had their terms and conditions governed by different instruments and that different history of industrial regulation is in my view relevant to the question of fairness and points in favour of granting the scope order.

[25] I am also concerned that there is an unfairness attached to the fact that transferred employees and non-transferring employees performing the same administrative duties are treated differently because of the underlying industrial instruments that apply. If the scope order is granted, employees doing the same work regardless of their transferred status will have a better opportunity to negotiate for terms and conditions of employment that are the same. This would be fair.

[26] Consequently, the Commission, as presently constituted, is satisfied that the making of the scope order would promote fair and efficient bargaining.

Fairly Chosen - s.238(4)(c)

[27] The factor in sub-s.(4)(c) regarding whether a group is fairly chosen is modified by sub-s.(4A) which introduces some specific requirements that must be considered in order to establish that a group, other than a group comprising all employees, has been fairly chosen. Subsection (4A) introduces into any assessment about whether or not a group has been fairly chosen, the consideration of whether the group is geographically, operationally or organisationally distinct.

[28] There have been numerous Decisions which have examined the approach to an assessment as to whether a group of employees is geographically, operationally or organisationally distinct. It is instructive to refer to a Full Bench Decision of Fair Work Australia in the case of *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (*Cimeco*).[29]

[29] The following extract from the Full Bench Decision in *Cimeco* is relevant:

> [19] Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that

[29] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2012] FWAFB 2206.

> the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was not geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen.
>
> [20] It is important to appreciate that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.
>
> [21] It is not appropriate to seek to exhaustively identify what might be the other relevant considerations. They will vary from case to case and will need to be demonstrated to the satisfaction of the tribunal. The word 'fairly' suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be unlikely to be fair. Similarly, selection based on criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair. It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen. In this regard, it is not only the interests of the employees covered by the agreement that are relevant; the interests of those employees who are excluded from the coverage of the agreement are also relevant.

[30] The first observation to make is that I am satisfied that the group proposed to be included in the scope order is not an arbitrary choice. It is not an illegitimate choice, nor a group based on a discriminatory basis. The Respondent also took no issue with the proposed characterisation of the group on any of these impermissible bases.

[31] The evidence in this matter establishes that, although there are some important linkages between the work performed by administrative employees and by home care workers, they are generally geographically distinct and, having regard to the work that they perform, they are generally operationally distinct. I accept that many administrative staff have come through the ranks of home care workers. However, once they are employed in administrative roles their work is operationally distinct from that of a home care worker. The Branch Operating Model provides a coherent organisational model, but it does not deprive the work undertaken by administrative staff of its essential operational differences from the work performed by home care workers. More often than not, administrative staff are geographically distinct (in offices) from home care workers (who perform their work in homes and in the community). And while I accept that the Respondent has a desire to have some administrative staff less office bound, at present, on the whole, administrative staff remain geographically distinct.

[32] And so, while I accept that there were logical, sound, business reasons for AU Home Care Service to want to have a single enterprise agreement that covered all of its employees working in home care in NSW, it is the case that the scope chosen by the CPSU has been fairly chosen.

[33] Consequently, the Commission, as presently constituted, is satisfied that the group of employees proposed to be specified in the scope order being those employees that were

predominantly engaged in administrative work, was a group of employees that has been fairly chosen.

Reasonable in the Circumstances - s.238(4)(d)

[34] The final factor of the legislative requirements for a scope order is that it be reasonable in all the circumstances. This factor is directed towards an overall evaluation of the various aspects which have been identified as part of the examination of the other factors, namely: whether the applicant for the scope order has been bargaining in good faith; and, whether the scope order would promote fair and efficient bargaining; and, whether the scope order identifies a group that was fairly chosen

[35] In addition, this factor provides for consideration of any other matters or particular circumstances which might be relevant and which should be given due consideration before any scope order is made or rejected.

[36] It should be noted that each of the paragraphs (a) – (d) of sub-s.238(4) of the FW Act are separated by the word "and". Therefore, these constituent elements are cumulative requirements for the making of any scope order. Consequently, even if I was to consider that some factor might establish that the scope order would be reasonable in all the circumstances, the order could not be made unless all the other factors were satisfied. However, I have already found that paragraphs (a) – (c) favour the making of the scope order.

[37] In deciding whether the making of the scope order is reasonable in all the circumstances, from the employees' perspective I was not directed to any particular considerations that had not already been advanced as relevant to ss.238(4)(b) and (c).

[38] Having regard to the interests of the employer I have already said above that I can understand why there might be some logic in having one enterprise agreement apply to all employees engaged by AU Home Care Service. There is likely some administrative convenience. However, that is as far as the utility goes in the present matter. I reject entirely the argument advanced by AU Home Care Service that having one enterprise agreement covering all employees will lead to cultural change within its home care operations. I see nothing in the draft agreement that would facilitate the same. On the contrary, there are still to be considerable differences between administrative employees and home care workers based on the most recent offer made by the Respondent. Neither of the Respondent's witnesses were convincing in advancing an argument about how an industrial instrument, like an enterprise agreement, can, in and of itself, lead to cultural change. Having all employees covered by the Proposed Agreement will not lead to a unified vision or facilitate the achievement of common goals. The Proposed Agreement is not a remedy to the "silo" mentality or mindset that the Respondent seeks to address.

[39] I have also had regard to the submissions made on behalf of AU Home Care Support that its competitors have enterprise agreements covering all of their employees. It is an interesting piece of information, but not persuasive. Nothing in the submission went further to suggest that or explain how not having a single enterprise agreement somehow leads to a competitive disadvantage.

[40] In this instance the Commission, as presently constituted, is satisfied that, in all of the circumstances, it is reasonable to make the scope order.

Conclusion

[41] The application has been considered and determined by reference to the four factors which I have extracted from the relevant operative provisions of the FW Act, namely, ss 238(4) and 238(4A). These four factors require that any scope order must: (1) be made only if an applicant has been bargaining in good faith; and, (2) promote fair and efficient bargaining; and, (3) specify a group to be covered that was fairly chosen; and, (4) be reasonable in the circumstances.

[42] In this instance the Commission, as presently constituted, is satisfied that:

a) the applicant has met the good faith bargaining requirements; and,
b) the scope order sought would promote both fair and efficient bargaining; and,
c) the group of employees was a group that was fairly chosen, as it is a group that is geographically, operationally or organisationally distinct, and finally, having regard for all of the circumstances; and,
d) it would be reasonable to make the scope order.

[43] Consequently, the legislative requirements for the making of the scope order have been met and in view of the conclusions that I have reached the application must be granted. A scope order will be issued separately and the matter is concluded accordingly.

COMMISSIONER

Appearances:

Mr M Gibian of Senior Counsel appeared for Community and Public Sector Union, the.

Mr K Brotherson of Counsel appeared for Australian Unity Home Care Service Pty Ltd.

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