DECISION

Fair Work Act 2009
s.248 - Application for a single interest employer authorisation

Association of Professional Engineers, Scientists and Managers, Australia
v
Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd
(B2023/1339)

DEPUTY PRESIDENT HAMPTON
DEPUTY PRESIDENT WRIGHT
COMMISSIONER MATHESON

ADELAIDE, 23 AUGUST 2024

Application by the Association of Professional Engineers, Scientists and Managers, Australia for a single interest employer authorisation.

1. Introduction

[1] This matter concerns an application by the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**)[1] under s.248 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a single interest employer authorisation (**Authorisation**). The Authorisation is sought in respect of bargaining for a proposed multi-enterprise agreement to cover certain employees (the **SIEA Employees**) engaged by a small number of employers operating in the black coal mining industry in New South Wales (**Industry**). In particular, in its current form, the application seeks authorisation for the commencement of bargaining with the following employers who operate underground black coal mines (collectively identified as the **Respondent Employers**):

(1) Peabody Energy Australia Coal Pty Ltd at Wambo Underground Coal Mine (**Peabody**);

(2) Ulan Coal Mines Ltd at Ulan No.3 Underground Coal Mine (**Ulan**);

(3) Whitehaven Coal Mining Ltd at Narrabri Coal Mine (**Whitehaven**); and

(4) Great Southern Energy Pty Ltd T/A Delta Coal at Chain Valley Colliery (**Delta Coal**).

[2] The Respondent Employers oppose the making of the Authorisation.

[1] APESMA largely operates through its division, known as The Collieries' Staff and Officials Association; however, APESMA is the registered organisation and the legal applicant in this matter.

[3] Wollongong Resources Pty Ltd (**Wollongong Resources**) was named in APESMA's original application. On 23 February 2024, during preliminary proceedings,[2] Wollongong Resources advised that its relevant operations at the Russell Vale Colliery were ceasing. APESMA formally advised that in light of that development, it would no longer be pursuing the matter in relation to Wollongong Resources and the application was amended accordingly.

[4] The SIEA employees to be covered by the Authorisation, and who are intended to be covered by the proposed enterprise agreement, are those engaged as:

(1) Deputies, including where known as Crew Supervisors;

(2) Undermanagers, including where known as Shift Undermanagers;

(3) Shift Engineers, including where known as Mechanical or Electrical Shift Engineers, Mechanical or Electrical Shift Supervisors, Mechanical or Electrical Supervisors, Trade Supervisors or Shift Trades Supervisors, Maintenance Supervisors, or Leading Hands at Chain Valley Colliery only; and

(4) Control Room Operators, including where known as Control Room Officers, Control Room Supervisors, Senior Control Room Officers or Senior Control Room Operators.

[5] Although the detailed functions of the respective SIEA Employees may vary from mine to mine, the following general descriptions reflect the roles performed by the SIEA Employees drawn from the position descriptions provided to the Commission by the Respondent Employers.[3]

[6] An Undermanager is responsible for managing the mining operations of the underground mine site. They provide for planning, coordination, control and the statutory compliance of activities for the whole of the mine site. They also lead and mentor all personnel working on the mine site, including the Deputy and Leading Hands.

[7] A Deputy is responsible for leading the underground mine's production team and ensuring site priorities are maintained. They are responsible for ensuring compliance with statutory obligations, attending pre and post shift meetings to plan and allocate resources, and managing and monitoring work crews. The Deputy reports to the Undermanager.

[8] A Shift Engineer is responsible for the maintenance and associated activities in the underground mine and for the shifts of employees undertaking that work. Their duties include assisting Deputies with establishing area plans with respect to trade priorities, shift reporting, shift technical support for trades and participating in pre and post shift planning and review processes. In general terms, the Leading Hands at the Chain Valley Colliery perform similar functions. As with all of the underground SIEA Employee positions, there is a strong emphasis upon work health and safety in these roles.

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[2] A Directions Conference conducted by Deputy President Hampton on behalf of the Full Bench.

[3] Exhibit 34 – Bundle of Position Descriptions for Ulan Underground, Exhibit 38 – Peabody Position Descriptions, Exhibit 39 – Bundle of Position Descriptions for Delta Coal, and Exhibit 16 – Grant Case Statement (*Case Statement*) Annexures A – D.

[9] Control Room Operators manage and control the day-to-day underground communication and reporting process. They are also responsible for the initial management and control of any emergency that occurs within the underground mine site.

[10] The Shift Engineer, Deputy and Undermanager roles are statutory functions under the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022* (NSW) (**WHS (Mines and Petroleum Sites) Regulation)**. Control Room Operators fulfil the function of the 'surface contact'[4] person under the WHS (Mines and Petroleum Sites) Regulation.

[11] The SIEA Employees are employed at the following underground black coal mines operated by the Respondent Employers or related entities:

- Wambo Underground Coal Mine (**Wambo Mine**) – Peabody
- Ulan No.3 Underground Coal Mine (**Ulan No.3**) – Ulan
- Narrabri Coal Mine (**Narrabri Mine**) – Whitehaven
- **Chain Valley Colliery** – Delta Coal.

[12] This application is the first significant contested application of this particular kind since the legislative amendments to the FW Act made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) commenced on 6 June 2023.

[13] On 5 March 2024, we granted permission[5] for both the Australian Council of Trade Unions (**ACTU**) and Minerals Council of Australia (**MCA**) to intervene. Intervention was generally limited to the making of submissions and/or filing of materials to enable the Commission to inform itself about the application.

[14] The ACTU supported the application. The MCA opposed the making of the application. Both the ACTU and MCA also made submissions regarding the approach that the Commission should adopt regarding the construction and application of the relevant provisions. The MCA also tendered evidence about the nature and impact of the Industry.

[15] At the commencement of the matter, the Respondent Employers were directed to file, by Friday 19 January 2024, a response to APESMA's application which included a response as to whether the following facts arising from the requirements for the making of the Authorisation were contested:

a. At 6 December 2023, it employed at least 20 employees.

b. At 6 December 2023, it employed at least 50 employees.

c. At 6 December 2023, it had not made an application for a single interest employer authorisation that had not yet been decided in relation to the SIEA Employees.

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[4] Defined in Reg 105 of the *WHS (Mines and Petroleum Sites) Regulation*.

[5] [2024] FWCFB 106.

d. At 6 December 2023, it was not named in a single interest employer authorisation or supported bargaining authorisation in relation to the SIEA Employees.

e. At 15 December 2023, it and the SIEA Employees were not covered by an enterprise agreement that had not passed its nominal expiry date.

f. It had not agreed in writing with any employee organisation that is entitled to represent the industrial interests of one or more of the SIEA Employees to bargain for a proposed single- enterprise agreement that would cover the employer and the SIEA Employees or substantially the same group of those employees.

g. That a majority of the SIEA Employees employed by it wished to bargain for the proposed enterprise agreement.

[16] With two exceptions, the Respondent Employers did not contest these propositions. All of the Respondent Employers, other than Delta Coal, contested proposition g. above. Further, Delta Coal contended that in its case, the SIEA Employees were covered by an enterprise agreement that had not passed its nominal expiry date.

[17] A number of materials filed in the Commission contained details that were claimed by the Respondent Employers to be confidential material. This included details of individual pay arrangements, operating costs and metrics of the mines involved, and related commercially sensitive materials. We observe that the nature of the statutory considerations and issues that arise in a contested application of this kind are likely to require the disclosure of commercially sensitive and otherwise confidential information. In this case, the confidential material was generally subject to a series of confidentiality orders[6] and other arrangements that still permitted APESMA, the Respondent Employers and the witnesses of each of these parties, to properly access the information and seek and confirm instructions and present their respective cases. Some of the proceedings were conducted in private.[7]

[18] Ultimately, we conducted six days of hearings on 29-30 April, 2-3 May, and 8-9 May 2024 (collectively, **the Hearing**).

[19] For the reasons set out below, we have decided to grant the application and make the Authorisation. However, we have excluded Delta Coal from the Authorisation in accordance with s.250(2) of the FW Act on the basis that we are not satisfied that all of the relevant requirements of s.249 have been met in its case.

2. The statutory framework

[20] The objects of Part 2-4 of the FW Act are set out in s.171 as follows:

"**171 Objects of this Part**

[6] Made under s.594 of the *FW Act* - PR771848 (28 February 2024); PR771846 (28 February 2024); PR771840 (28 February 2024); PR772242 (11 March 2024); PR772357 (19 March 2024); PR772850 (28 March 2024); PR773599 (17 April 2024); PR774317 (29 April 2024, revised on 2 May 2024); PR774672 (14 May 2024).

[7] *FW Act* s.593(3).

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and
(ii) dealing with disputes where the bargaining representatives request assistance; and
(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay."

[21] The FW Act has previously provided for single interest authorisations,[8] however the basis and operation of the authorisations was significantly amended by the SJBP Act.

[22] The SJBP Act introduced a mechanism for employers and bargaining representatives to make an application for a single interest employer authorisation. This amendment was intended '*to make it easier to obtain a single-interest authorisation*'.[9]

[23] Sections 248 to 250 of the FW Act now provide:

"248 Single interest employer authorisations

(1) The following may apply to the FWC for an authorisation (a ***single interest employer authorisation***) under section 249 in relation to a proposed enterprise agreement that will cover two or more employers:

(a) those employers;

(b) a bargaining representative of an employee who will be covered by the agreement.

(2) The application must specify the following:

(a) the employers that will be covered by the agreement;

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

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

249 When the FWC must make a single interest employer authorisation

Single interest employer authorisation

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[8] Sections 247 – 252 of the *FW Act* as it stood prior to the operation of the *SJBP Act*.

[9] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Revised Explanatory Memorandum* (***SJBP Revised EM***) at [43].

(1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

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

(b) the FWC is satisfied that:

(i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and

(ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and

(iii) if the application was made by 2 or more employers under paragraph 248(1)(a)—the requirements of subsection (1A) are met; and

(iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and

(v) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(vi) if the requirements of subsection (3) are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.

(1AA) If:

(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.

Additional requirements for application by employers

(1A) The requirements of this subsection are met if:

(a) the employers that will be covered by the agreement have agreed to bargain together; and

(b) no person coerced, or threatened to coerce, any of the employers to agree to bargain together.

Additional requirements for application by bargaining representative

(1B) An employer is covered by this subsection if:

(a) the employer employed at least 20 employees at the time that the application for the authorisation was made; and

(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and

(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and

(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and

(e) subsection (1D) does not apply to the employer.

(1C) For the purposes of paragraph (1B)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(1D) This subsection applies to an employer if:

(a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the authorisation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

Franchisees

(2) The requirements of this subsection are met if the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

Common interest employers

(3) The requirements of this subsection are met if:

(a) the employers have clearly identifiable common interests; and

(b) it is not contrary to the public interest to make the authorisation.

(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

(3AB) If:

(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of subsection (3) are met in relation to that employer, unless the contrary is proved.

Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1B)(a) or (3AB)(b):

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the employer at the time that the application for the authorisation was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Operation of authorisation

(4) The authorisation:

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

(b) ceases to be in operation at the earlier of the following:

(i) at the same time as the enterprise agreement to which the authorisation relates is made;

(ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

249A Restriction on making single interest employer authorisations

The FWC must not make a single interest employer authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

250 What a single interest employer authorisation must specify

What authorisation must specify

(1) A single interest employer authorisation in relation to a proposed enterprise agreement must specify the following:

(a) the employers that will be covered by the agreement;

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

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made;

(d) any other matter prescribed by the procedural rules.

Authorisation may relate to only some of employers or employees

(2) If the FWC is satisfied of the matters specified in subsection 249(2) or (3) (which deal with franchisees and common interest employers) in relation to only some of the employers that will be covered by the agreement, the FWC may make a single interest employer authorisation specifying those employers and their employees only.

(3) The FWC may make a single interest employer authorisation that does not specify one or more employers specified in an application for the authorisation, and the employees (the ***relevant employees***) of those employers specified in that application, if the FWC is satisfied that:

(a) the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees, or substantially the same group of the relevant employees; and

(b) the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers and the relevant employees, or substantially the same group of the relevant employees; and

(c) on the day that the FWC will make the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

(4) If the effect of subsection (3) is that no employers would be specified in the authorisation, the FWC may refuse the application for the authorisation."

[24] The revised Explanatory Memorandum to the SJBP Act stated the purpose of the amendments leading to these new provisions in the following terms:

"1006. Part 21 of Schedule 1 to the Bill would amend Division 10 of Part 2-4 of the FW Act to remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them, and facilitating bargaining by:

- removing the requirement for two or more employers with common interests who are not franchisees to obtain a Ministerial declaration before applying a single interest employer authorisation;

- providing for employee bargaining representatives to apply for a single interest employer authorisation to cover two or more employers, subject to majority support of the relevant employees;
- permitting employers and employee bargaining representatives to apply to vary a single interest employer authorisation to add or remove the name of an employer from the authorisation, subject to meeting specified requirements; and
- inserting new Subdivision AD—Variation of single interest employer agreement to add employer and employees, into Division 7 of Part 2-4 of the FW Act to permit employers and employee organisations to apply to the FWC for approval of a variation to extend coverage of an existing single interest employer agreement to a new employer and its employees, subject to meeting specified requirements."[10]

… …

"1066. New subsection 249(1) would delineate the requirements of which the FWC must be satisfied before making a single interest employer authorisation depending on whether the application for the authorisation was made by the employer and its employees, or an employee organisation. It would also clarify the requirements of which the FWC must be satisfied depending on whether the single interest employer authorisation is to operate in respect of two or more common interest employers or franchisees. The term 'common interest employers' would be introduced by these amendments and used to identify those employers who may be included in a single interest employer authorisation but who are not franchisees."[11]

[25] If a single interest employer authorisation is issued, the employers named in the authorisation are required to bargain together for an enterprise agreement that would cover a certain cohort of employees. The employers would, in effect, be obligated to bargain for a period of at least 12 months, or until an enterprise agreement to which the authorisation relates is made.[12] The 12 month period may also be extended upon application by a bargaining representative.[13] The Commission may vary the authorisation to extend the period if it is satisfied that there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period and it is appropriate in all the circumstances to extend the period.[14] In the course of bargaining, the parties are subject to the good faith bargaining requirements[15] and have access to a range of bargaining mechanisms under the FW Act. These include the potential for protected industrial action,[16] an intractable bargaining declaration,[17]

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[10] *SJBP Revised EM* at [1006].

[11] *SJBP Revised EM* at [1066].

[12] *FW Act* s.249(4).

[13] *FW Act* s.252.

[14] *FW Act* s.252.

[15] *FW Act* s.228.

[16] *FW Act* Div 2, s.437A.

[17] *FW Act* s.234.

bargaining orders[18] and the direct assistance of the Commission to deal with a bargaining dispute.[19]

[26] The FW Act also provides a scheme to add and remove employers from any Authorisation issued, and any multi-enterprise agreement that might be made. The parties subject to an authorisation may apply either jointly, or separately, to the Commission for the variation of an authorisation. Separate rules apply depending on whether the application is made by an employer or bargaining representative of an employee who will be covered by the proposed enterprise agreement.

[27] In very general terms, the requirements for an application to add an employer to an authorisation are largely the same as those that apply for the making of an authorisation.[20]

[28] Sections 251(1) to 251(4A) provide for the removal of an employer from an authorisation. The Commission must vary an authorisation to remove an authorisation if it is satisfied that an application has been made and either s.251(2A) or (2B) is satisfied. Section 251(2A) is satisfied if, amongst other things, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.[21] Section 251(2B) applies if an application is made by a bargaining representative, and the Commission is satisfied that, amongst other things, the employees employed by the relevant employer have approved the removal of the relevant employer's name by voting for the removal.[22]

[29] In very general terms, the requirements for approval by the Commission to add an employer to a single interest employer agreement are largely the same as those that apply for the making of a SIEA, and those that apply to the variation of an enterprise agreement more generally.[23] Amongst other requirements, if the application was made by an employer the Commission must also be satisfied that the variation has been genuinely agreed to by the affected employees. If the application is made by an employee bargaining representative, the employer must have at least 20 employees and the majority of the affected employees must want to be covered by the agreement. Further, the affected employees must not be covered by another enterprise agreement that has not passed its nominal expiry date.

[30] The requirements for approval to remove an employer from a single interest employer agreement are set out within Subdivision AE of Division 7 of Part 2-4 of the FW Act. Under these provisions, an employer and affected employees may jointly make a variation to a multi-enterprise agreement to cease being covered by the agreement. The affected employees are 'the employees employed at the time who will cease to be covered' if the Commission approves the variation.

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[18] *FW Act* s.229.

[19] *FW Act* s.240.

[20] *FW Act* ss.251(5) – (8).

[21] *FW Act* s.251(2A) applies to applications made by either an employer or bargaining representative of an employee.

[22] *FW Act* s.251(2B).

[23] *FW Act* ss.216D – 218.

[31] This matter has exposed competing positions about the proper construction of s.249 and related provisions of the FW Act. This involves both the general 'policy' arising from the objects of the legislation and the import of most of the key requirements for making an authorisation of this kind. These aspects are clearly linked, and we will for convenience deal with the general framework of the FW Act as context for the later conclusions.

Objects of the Act

[32] The Commission is required to approach the construction of s.249 by construing it in a manner that best promotes the legislative objects and purpose of the FW Act.[24] As such, we commence the task of construction by looking at the objects of the FW Act.

[33] The overall object of the FW Act is set out in s.3 as follows:

> "**3 Object of this Act**
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> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
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> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
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> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
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> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
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> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
>
> (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

[24] *Acts Interpretation Act 1901* (Cth) s.15AA.

(g) acknowledging the special circumstances of small and medium-sized businesses."[25]

[34] Accordingly, the overall object is to provide *'a balanced framework for cooperative and productive workplace relations' including by ' … 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*'.[26] (emphasis added)

[35] We earlier referred to s.171 of the FW Act which more specifically states the objects of Part 2-4 of the legislation, which contains the immediately relevant provisions.

[36] The immediate tension in the positions of the parties concerns the emphasis that is given by the objects to bargaining for and the making of single enterprise agreements, rather than multi-employer enterprise agreements.

APESMA and ACTU

[37] The ACTU ultimately submitted that the object of the FW Act to encourage bargaining was not limited to single (employer) enterprise bargaining.

[38] The ACTU contended that historically, federal industrial relations legislation had focused on centralised wage fixation. However, there was a gradual shift toward more decentralised wage fixation and later bargaining. The ACTU referred to the former *Industrial Relations Act 1988* (Cth) and noted that the object of the legislation prior to the 1993 reforms was a clear focus on centralised conciliation and arbitration and wage fixation by settlement of disputes. Enterprise bargaining was introduced to the federal industrial relations system following the enactment of the *Industrial Relations Reform Act 1993* (**1993 Act**). One of the objects of the relevant part within the 1993 Act (Part VIB) was to 'encourage the use of agreements, particularly at the workplace or enterprise level'.[27] The ACTU asserted that the *Workplace Relations Act 1996* (Cth) (**WR Act**) represented a "high water mark" of decentralised wage fixation. A principal object of the WR Act was to provide a framework for cooperative workplace relations by 'providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act'. Section 170L was introduced in the WR Act, which stated that the object of the certified agreements sub part was to 'facilitate the making, and certifying by the Commission, of certain agreements at the level a single business or part of a single business.

[39] Against that history, the ACTU submitted that the enactment of the FW Act represented a change in the focus between centralisation and enterprise level bargaining. It contended that Parliament had moved away from a focus on single enterprise level bargaining. As such, the reference to 'enterprise level' within the objects of the FW Act should not be understood to mean a single enterprise.

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[25] *FW Act* s.3.

[26] *FW Act* s.3(f).

[27] *Industrial Relations Reform Act 1993* s.170LA(1).

[40] The ACTU further submitted that there is no statutory presumption against the making of a single interest employer authorisation and that any such presumption would be inconsistent with the inclusion of a regime for multi-enterprise bargaining. The new multi-enterprise bargaining regime includes a number of presumptions in favour of an applicant. Further, there is an absence of any residual discretion once the statutory criteria are established and an absence of special circumstance criteria that might otherwise indicate a preference for single enterprise bargaining.

[41] APESMA largely adopted the submissions of the ACTU. It submitted that the object of the FW Act should be construed as being directed to collective bargaining which achieves productivity and fairness through collective bargaining at the level of the relevant enterprises.

The Respondent Employers

[42] The Respondent Employers noted that the objects and purposes of the FW Act include 'achieving productivity and fairness through an emphasis on enterprise level collective bargaining…'.[28] Specific to Part 2-4 of the FW Act, it is 'to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level ...'.[29] They contended that a multi-employer agreement would apply to multiple enterprises, so the collective bargaining process for such an agreement goes beyond the 'enterprise level'. In that light, they contended that the priority within the FW Act is given to single enterprise agreements underpinned by minimum award standards.

MCA

[43] The MCA submitted that despite the changes brought about by the SJBP Act, the FW Act continues to recognise the primacy of single enterprise bargaining in relation to the bargaining scheme. That is, the objects of the FW Act at ss.3(g) and 171(a) are directed at achieving productivity and fairness through an emphasis on single enterprise bargaining.

[44] The MCA further observed that whilst the collective bargaining scheme established under the FW Act generally proceeds on the basis that bargaining is a voluntary process initiated or entered into by employers willingly, this was not always the case. The consequences being that this exposes the employers to the risk of operational disruption arising from protected industrial action and the potential for an arbitrated outcome arising from an intractable bargaining declaration. In addition, the MCA noted there are several circumstances in which an authorisation cannot be granted. These circumstances include those where employers are bargaining for a single enterprise agreement, employers that have a history of effectively bargaining for single enterprise agreements and where employers are covered by an existing single enterprise agreement. The MCA submitted that the above exclusions point to Parliament's intention to retain the primacy of single enterprise bargaining. At the same time, the MCA also relied on the Revised Explanatory Memorandum and Second Reading Speech made in relation to the SJBP Act[30] to contend that it was Parliament's intention to retain the primacy of single enterprise bargaining.

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[28] *FW Act* s.3(f).

[29] *FW Act* s.171(a).

[30] PN5220 – PN5221.

Considerations arising from the statutory objects

[45] There is force in the propositions made by both the ACTU and the MCA/Respondent Employers. The FW Act and its objects should be understood as changing the emphasis from agreement making at the level of a single business or part of a single business to bargaining at an enterprise level. In that light, the inclusion and 'promotion' of multi-enterprise bargaining is consistent with the existing objects as understood in that way. There is also force in the proposition that some priority is given by the FW Act to single enterprise bargaining. This is evident from the limitations that are placed upon the making of multi-enterprise authorisations such as those set out in ss.249(1D) and 250(3) of the FW Act.

[46] As a result, we consider that the import of the objects of the FW Act for present purposes is that the legislation promotes collective bargaining which achieves productivity and fairness through collective bargaining at the level of the enterprise, including where authorised and subject to the express provisions giving some priority to single enterprise agreements, at a multi-enterprise level.

3. Context for the Application and the matters is dispute

[47] APESMA is seeking to bargain collectively with the Respondent Employers based upon what it states are the concerns of its membership, which include:[31]

- a desire to preserve the unique black coal industry condition of payment of accrued personal leave on termination of employment in certain circumstances;
- concerns regarding employer use of guarantees of annual earnings, with the consequence that conditions in the *Black Coal Mining Industry Award 2020* (**Black Coal Award**) do not apply;
- concern to maintain and improve entitlements to accident pay;
- protection of redundancy entitlements;
- concerns about unilateral changes to workplace policies and the impact of those changes on employment conditions;
- access to effective dispute resolution; and
- the desire to address those matters and otherwise protect terms and conditions by the making of an enterprise agreement.

[48] APESMA, on behalf of SIEA Employees, has previously made some attempts to obtain enterprise agreements on an enterprise-by-enterprise basis with some of the employers in the black coal mining industry.[32] These attempts have largely been unsuccessful. APESMA did not

[31] Exhibit 1 – Catherine Bolger Statement (*Bolger Statement*) at [20].

[32] *Bolger Statement* at [23].

approach any of the Respondent Employers or seek to bargain individually with any of them prior to engaging with its members about potentially making an application of this kind.

[49] There is presently no bargaining underway involving any the SIEA Employees and the Respondent Employers.

[50] Various local meetings with its membership have been conducted by APESMA to discuss matters in relation to bargaining and the SJBP Act reforms.

[51] More meetings between APESMA and the SIEA Employees were conducted on 28 April 2023, 19 May 2023, 11 August 2023, 20 October 2023 and 18 November 2023.

[52] In November 2023, APESMA engaged Vero Engagement and Voting Solutions Pty Ltd (**Vero Voting**) to conduct a ballot of SIEA Employees in relation to whether the employees supported bargaining for a multi-employer agreement (**Ballot**).[33] The Ballot question involved proposed bargaining with the following employers:

1. Wollongong Resources Pty Ltd at Russell Vale Colliery
2. Great Southern Energy Pty Ltd t/as Delta Coal at Chain Valley Colliery
3. Whitehaven Coal Mining Ltd at Narrabri Coal Mine
4. Peabody Energy Australia Coal Pty Ltd at Wambo Underground Coal Mine
5. Ulan Coal Mines Ltd at Ulan No. 3 Underground Coal Mine.

[53] The Ballot was subsequently conducted by Vero Voting between 24 November and 5 December 2023.[34] 143 of the 179 eligible voters voted 'yes' to bargaining for a single interest employer enterprise agreement.[35] It is also not contested that a majority of eligible SIEA Employees at each of the Respondent Employers, voted in favour of the proposed resolution.

[54] As a result of the Ballot results, on 5 December 2023, APESMA wrote to the Respondent Employers, proposing the negotiation of a multi-employer agreement.[36] Subsequently, APESMA made an application for the Authorisation, which is the subject of the current proceedings.

[55] We will return to the detail and implications of the pre-ballot information and other processes adopted by APESMA because they are in issue between the parties.

The Key Statutory Issues

[56] The requirements for making an authorisation under s.249 of the FW Act vary, depending upon the nature of the applicant and the circumstances of the respondents. In this case, the applicant is APESMA as a bargaining representative of employees who would be covered (s.248(1)(b)). This means that the "additional" requirements of s.249(1B) and related provisions apply, while the "additional" requirements of s.249(1A) do not apply.

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[33] Exhibit 7 – Robert Coluccio Statement at [15] – [20] (*Coluccio Statement*).

[34] *Coluccio Statement* at [21].

[35] *Coluccio Statement* at [26].

[36] *Bolger Statement* at [26].

[57] We are required to consider the following criteria in determining whether the Authorisation should be made in the present circumstances:

- whether a valid application has been made;[37]
- whether at least some of the SIEA Employees are represented by an employee organisation;[38]
- whether the parties have had the opportunity to express their views;[39]
- whether, given the absence of consent, each of the Respondent Employers employed at least 20 employees at the time that the application was made;[40]
- whether any Respondent Employer has made an application for a single interest employer authorisation that has not yet been decided in relation to the SIEA Employees;[41]
- whether a Respondent Employer is named in an existing single interest employer authorisation or supported bargaining authorisation in relation to the SIEA Employees;[42]
- whether a majority of the SIEA Employees who are employed by each Respondent Employer want to bargain for the proposed agreement;[43]
- whether s.249(1D), which concerns the existence of an 'in-term' enterprise agreement, applies to any of the Respondent Employers;[44]
- whether the requirements of s.249(3) have been met, that is:[45]
    I. whether the Respondent Employers have clearly identifiable common interests;[46] and
    II. whether it is not contrary to the public interest to make the Authorisation;[47]

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[37] *FW Act s.249*(1)(a).

[38] *FW Act* s.249(1)(b)(i).

[39] *FW Act* s.249(1)(b)(ii).

[40] *FW Act* s.249(1B)(a).

[41] *FW Act* s.249(1B)(b).

[42] *FW Act* s.249(1B)(c).

[43] *FW Act* s.249(1B)(d).

[44] *FW Act* s.249(1B)(e).

[45] *FW Act* s.249(1)(b)(v).

[46] *FW Act* s.249(3)(a).

[47] *FW Act* s.249(3)(b).

- if s.249(3) has been met, whether the operations and business activities of the Respondent Employer are reasonably comparable with those of the other Respondent Employers;[48]

- whether the circumstances contemplated in ss.250(3) and (4) – which in general terms contemplate that an authorisation would not be made where bargaining is already underway for an enterprise agreement that would cover the same employees – apply; and

- whether the proposed agreement covers employees in relation to general building and construction work, noting that if it does, the Authorisation cannot be made.[49]

[58] There was no dispute between the parties, and we are satisfied, about the following requirements for the making of the Authorisation:

- A valid application was made.[50]

- At least some of the employees who will be covered by the proposed agreement are represented by an employee organisation, namely APESMA.[51]

- Each party to the application has had an opportunity to express their views.[52]

- Each of the Respondent Employers employed at least 20 employees at the time that the application was made.[53]

- None of the Respondent Employers are named in a single interest employer authorisation or supported bargaining authorisation in relation to the SIEA Employees.[54]

- The proposed agreement will not cover employees in relation to general building and construction work.[55]

- The proposed authorisation specifies each of the matters required by s.250(1) of the FW Act.

- The circumstances contemplated in ss.250(3) and (4) do not apply.

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[48] *FW Act* s.249(1AA).

[49] *FW Act* s.249A.

[50] *FW Act* ss. 248 and 249(1)(a).

[51] *FW Act* s.249(1)(b)(i).

[52] *FW Act* s.249(1)(b)(ii).

[53] *FW Act* s.249(1B)(a).

[54] *FW Act* s.249(1B)(c).

[55] *FW Act* s.249A.

The major issues in dispute

[59] Given the positions of the parties and the relevant terms of the FW Act, the major issues in dispute in this matter ultimately concern the following:

- Whether a majority of the employees who are employed by each of the Respondent Employers at a time determined by the Commission and who will be covered by the agreement want to bargain for the agreement[56] – **Majority Support**.

- Whether each of the Respondent Employers have clearly identifiable common interests[57] - **Clearly Identifiable Common Interests**.

- Whether it is not contrary to the public interest to make the authorisation[58] - **Public Interest**.

- Whether the operations and business activities of each of the Respondent Employers are reasonably comparable with those of the other employers that will be covered by the agreement[59] - **Comparable Operations and Business Activities of Respondent Employers**.

- Whether Delta Coal and the SIEA Employees who will be covered by the proposed agreement are covered by an enterprise agreement that has not passed its nominal expiry date –**Delta Coal Agreement coverage**.

[60] Noting that each of the Respondent Employers employed 50 employees or more at the time the Application was made, the 'rebuttable presumptions' concerning the common interest and public interest requirements of s.249(3), and the reasonable comparability of operations and business activities of the employers under s.249(1)(b)(vi), apply.[60] The operation of these provisions was also in dispute and we will return to this shortly.

4. The Cases Advanced by the Parties

APESMA

[61] APESMA contended that the Commission would find that each of the statutory criteria under Part 2-4 Division 10 of the FW Act for the making of the Authorisation have been satisfied and that it should be issued to cover all of the Respondent Employers.

[62] In support of its application, APESMA relied upon the following evidence:

- Statement of Catherine Bolger, Director, Collieries Staff Division (**CSD**); [61]

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[56] *FW Act* s.249(1B)(d).

[57] *FW Act* s.249(3)(a).

[58] *FW Act* s.249(3)(b).

[59] *FW Act* s.249(1)(vi).

[60] *FW Act* ss.249(3AB), 249(3)(a)-(b), 249(1)(vi), 249(1AA), 249(3)(a)-(b), 249(3AB).

[61] *Bolger Statement*.

- Reply Statement of Ms Bolger;[62]
- Statement of Robert Coluccio, Senior Legal Officer, CSD; and[63]
- Supplementary Statement of Mr Coluccio.[64]

[63] Both Ms Bolger and Mr Coluccio were cross-examined during the Hearing.

[64] APESMA contends that the majority support criterion was satisfied on the basis that there was sufficient evidence that the Ballot had been properly conducted and that, as a result, there were a sufficient number of employees of each Respondent Employer who voted in favour of the SIEA. APESMA denies it misled the SIEA Employees during its campaign leading up to the Ballot.

[65] APESMA submits the rebuttable presumptions that apply to ss.249(3) and 249(1)(vi) had not been overcome by any of the Respondent Employers.

[66] APESMA contends that each of the Respondent Employers had clearly identifiable common interests on the basis that they each:

- operate underground coal mines;
- conduct their operations in New South Wales;
- employ workers for the operation of those coal mines who are all covered by the same modern award;
- are all covered by the Black Coal Award in respect of all SIEA Employees;
- are regulated in respect of the employment by common statutes, namely the FW Act and the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (**CMI (Long Service Leave) Administration Act**);
- have a common industry regulator, namely the Secretary of the Department of Regional New South Wales;
- must be licenced to, and comply with, the *Mining Act 1992* (NSW) (**Mining Act**) in order to operate their respective mines;
- are covered by the *Coal Industry Act 2001* (NSW) (**CI Act**) and in particular s.31 of the CI Act which requires employers in the coal industry to obtain and maintain workers compensation insurance for their employees. The approved insurer is currently Coal Mines Insurance. The Respondent Employers pay a premium in

[62] Exhibit 2 – Catherine Bolger Reply Statement (*Bolger Reply Statement*).

[63] *Coluccio Statement*.

[64] Exhibit 8 – Robert Coluccio Supplementary Statement (*Coluccio Supplementary Statement*).

exchange for workers compensation coverage and the premiums also support the provision of statutory services that protect workers' health and safety including coal industry specific obligations such as dust monitoring;

- are subject to compliance obligations set by the CI Act, including compliance with Order 34, which gives directions to the Respondent Employers about what is required in training schemes and management for health and safety; and

- are statutorily required to engage and do employ employees in regulated functions such as Undermanagers, Deputies, and Shift Engineers with the role of Control Room Officer often satisfying the requirement in Regulation 105 of the WHS (Mines and Petroleum Sites) Regulation to have competent persons at the surface in a state of readiness to respond to emergencies and alarms, and to switch power on and off.[65]

[67] APESMA contended the public interest presumption has not been rebutted. They argued that the Commission could not be satisfied that it would not be in the public interest to make the Authorisation given that, in doing so, the Commission would be facilitating a process which the Act explicitly permits and encourages. That is, the negotiation and making of an enterprise agreement. They further contend that it is irrelevant, for the purposes of this criteria, that the Respondent Employers may have a preference to avoid bargaining on a multi-employer basis because of a view that it would be deleterious to their interests.

[68] Further, APESMA submits that the operations and business activities of each of the Respondent Employers are reasonably comparable.

[69] APESMA further contended that the SIEA Employees employed by Delta Coal are not covered by the *Delta Coal Enterprise Agreement 2022* (**Delta 2022 Agreement**).

Peabody

[70] Peabody contended that the Commission would not be satisfied that each of the statutory criteria under Part 2-4 Division 10 of the FW Act for the making of the Authorisation have been satisfied and that contrary findings should be made in relation to each of the relevant contested major issues.

[71] In support of its position, Peabody relied upon the following witness statements:

- Statement of Malcolm Roberts, Chief Marketing Officer, Peabody Coalsales Pacific Pty Ltd;[66]

- Supplementary Statement of Mr Roberts;[67]

- Further supplementary statement of Mr Roberts;[68]

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[65] APESMA Submissions [53], Bolger Statement at [30].

[66] Exhibit 13 – Malcolm Roberts Statement (*Roberts Statement*).

[67] Exhibit 14 – Malcolm Roberts Supplementary Statement (*Roberts Supplementary Statement*).

[68] Exhibit 15 – Malcolm Roberts Further Supplementary Statement (*Roberts Further Supplementary Statement*).

- Statement of Michael Carter, Vice President of Technical Services, Peabody Energy Australia Coal Pty Ltd;[69]
- Supplementary Statement of Mr Carter; and[70]
- Further Supplementary Statement of Mr Carter.[71]

[72] Both Mr Roberts and Mr Carter were cross-examined during the Hearing.

[73] Peabody contended that the Commission could not be satisfied that there is majority support. They argued that the majority in the present circumstances was a facial majority, which is insufficient. Peabody argued that the SIEA Employees were not properly informed of the context, operation, benefits or consequences of a SIEA. As a result, Peabody argued that the SIEA Employees were misled by APESMA.

[74] Further, Peabody contended that the Respondent Employers did not have clearly identifiable common interests. It argued that there are fundamental differences in the economics of its Wambo Mine compared to the other relevant mines. As such, Peabody submitted each of the Respondent Employers would adopt a different approach to bargaining, including adopting a different agenda.

[75] Peabody further submitted that the Commission could not be satisfied that it is not contrary to public interest to make the Authorisation. It argued that the Commission would form the view that enterprise bargaining is unlikely to be facilitated in an efficient manner by the authorisation of the SIEA.

[76] Peabody also posited that the operations and business activities of each of the Respondent employers were not reasonably comparable. It contended that the mining operations and activities at the Wambo Mine are fundamentally different from Ulan No.3 and the Narrabri Mine. Peabody relied on a range of factors including differences in capitalisation of the respective mining operations, the size and scale of each mine, the expected mine life, and cost margins. Further, Peabody submitted that the Chain Valley Colliery operated by Delta Coal is an outlier because it supplies coal directly to its parent company and it does not sell coal to any other customer.

Whitehaven

[77] Whitehaven adopted the submissions of Peabody and advanced further grounds contending that the Authorisation should not be made.

[78] In support of its position, Whitehaven relied upon the following witness statements:

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[69] Exhibit 24 – Michael Carter Statement (*Carter Statement*).

[70] Exhibit 25 – Michael Carter Supplementary Statement (*Carter Supplementary Statement*).

[71] Exhibit 26 – Michael Carter Further Supplementary Statement (*Carter Further Statement*).

- Statement of Grant Case, General Manager, Narrabri Coal Operations Pty Ltd;[72]
- Statement of Ian Humphris, Executive General Manager – Operations, Whitehaven Coal Limited; and[73]
- Supplementary Statement of Mr Humphris.[74]

[79] Only Mr Case was cross-examined during the Hearing.

[80] Whitehaven submitted that the Commission cannot be satisfied that a majority of the SIEA Employees want to bargain for the proposed agreement on the basis that APESMA failed to properly inform the SIEA Employees of the course of action they were approving. Whitehaven posited that there was a lack of evidence that demonstrated the SIEA Employees were advised of the implications of bargaining for a multi-employer enterprise agreement.

[81] Further, Whitehaven noted that any majority support was only provided for an Authorisation covering all the Respondent Employers, including at the time Wollongong Resources. As such, noting that the Respondent parties have argued Delta Coal is a clear outlier, Whitehaven contended that it would not be open for the Commission to issue an Authorisation that did not include all Respondent Employers. Whitehaven submitted that it would create unfairness and that the SIEA Employees may have a different view if the composition of employees in the Authorisation differs from the group that was proposed at the time of the Ballot. We observe that Whitehaven noted that their proposition did not extend to the fact that Wollongong Resources were no longer a party to proceedings on the basis that Wollongong Resources no longer trades.

[82] Whitehaven contended that the Respondent Employers did not have clearly identifiable interests. It argued that the different geographical locations of the relevant mines gives rise to differences in mine economics such as quality of coal mined, yield and profit margins. Further, it argued that the different geographical locations also impact the employment and retention of employees.

[83] Whitehaven submitted that the Commission could not be satisfied that it is not contrary to public interest to make the Authorisation. Noting that each Respondent Employer has different commercial interests, Whitehaven argued that inherently inefficient bargaining would result from the Authorisation being made.

[84] Whitehaven contended that their operations and business activities are not reasonably comparable with the other Respondent Employers. It emphasised that their operational function is limited to its role as an employer and in contracting suppliers and other service providers. Whitehaven does not operate any coal mines. The operation of the Narrabri Coal Mine is managed by a wholly owned subsidiary of Whitehaven Coal Limited. On the other hand, Whitehaven noted that the other Respondent Employers' primary operational function is the operation of underground mines.

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[72] *Case Statement*.

[73] Exhibit 22 – Ian Humphris Statement (*Humphris Statement*).

[74] Exhibit 23 – Ian Humphris Supplementary Statement (*Humphris Supplementary Statement*).

Delta Coal

[85] Delta Coal ultimately contended that the Commission would not be satisfied that each of the statutory criteria under Part 2-4 Division 10 of the FW Act for the making of the Authorisation have been satisfied.

[86] In support of its position, Delta Coal relied upon the following witness statements:

- Statement of Joshua Cornford, Mine Manager, Delta Coal;[75]
- Supplementary Statement of Mr Cornford; and[76]
- Statement of Stuart Ambridge, Executive Manager, Delta Coal.[77]

[87] Both Mr Cornford and Mr Ambridge were cross-examined during the Hearing.

[88] Delta Coal did not contest the majority support issue.

[89] Delta Coal submitted that it does not have clearly identifiable common interests with the other Respondent Employers. Delta Coal premised its submission on the basis that it:

- is not part of the same nature of corporate group as the other Respondent Employers;
- does not have some common "ideological" approach with the other Respondent Employers;
- has a single interest that is solely supplying coal to its related company;
- has no interest or goal in producing, and exporting, a higher-quality thermal coal;
- has no interest in generating a profit for commercial gain;
- has a different geographical location to compared to the other Respondent Employers;
- has an acute interest in minimising environmental impacts of surface subsidence; and
- has not previously sought or negotiated terms and conditions for any of its employees in common with employees of the other Respondent Employers.

[90] Delta Coal contends that the Authorisation would result in the non-fulfilment of the objects of the FW Act. As such, it submits that the non-fulfilment would be a factor that makes it contrary to the public interest to make the authorisation.

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[75] Exhibit 27 – Joshua Cornford Statement (*Cornford Statement*).

[76] Exhibit 28 – Joshua Cornford Supplementary Statement (*Cornford Supplementary Statement*).

[77] Exhibit 35 – Stuart Ambridge Statement (*Ambridge Statement*).

[91] Delta Coal submitted that the operations and business activities of Delta Coal are not reasonably comparable with the other Respondent Employers for reasons that include:

- It uses significantly different machinery compared to the other Respondent Employers.
- Unlike the other Respondent Employers, Delta Coal utilises the bord and pillar method of mining.
- Each Respondent Employer extracts different amounts of coal.
- It does not undertake any activities of washing extracted coal
- Delta Coal supplies its extracted coal for the sole purpose of electricity generation, whereas the other Respondent Employers also supply their coal for the purpose of steel making.
- Delta Coal sells extracted coal directly to a related company.
- Delta Coal may be subject to legislation which does not apply to the other Respondent Employers, such as the *Essential Services Act 1988* (NSW*)* (**ES Act**).
- Mining at the Chain Valley Colliery does not involve any exploration, transportation or commercial marketing.
- Delta Coal does not employ Shift Engineers free from coverage of an existing enterprise agreement.

[92] Delta Coal also contended that s.249(1D) of the FW Act applies to its circumstances. That is, the Delta 2022 Agreement provides for "step-up allowances" that covers the work of one or more SIEA Employees and this means that there is an existing in-term enterprise agreement which would prevent the making of an authorisation including itself.

Ulan

[93] Ulan also contended that the Commission should not make the Authorisation.

[94] In support of its position, Ulan relied upon the following witness statements:

- Statement of Peter Ostermann, General Manager, Glencore Coal Assets Australia Pty Ltd;[78]
- Supplementary Statement of Mr Ostermann;[79] and
- Further Supplementary Statement of Mr Ostermann.[80]

[78] Exhibit 30 – Peter Ostermann Statement (*Ostermann Statement*).

[79] Exhibit 31 – Peter Ostermann Supplementary Statement (*Ostermann Supplementary Statement*).

[80] Exhibit 32 – Peter Ostermann Further Supplementary Statement (*Ostermann Further Supplementary Statement*).

[95] Mr Ostermann was cross-examined during the Hearing.

[96] Ulan contended that the majority support arising from the Ballot was influenced by misrepresentations and therefore, the consent of the SIEA Employees has been vitiated.

[97] Ulan submitted that it does not have clearly identifiable common interests with the other Respondent Employers. Ulan forms part of the Glencore Group, which is the world's largest producer and export of thermal coal. Ulan noted that the relevant mines are geographically dispersed, resulting in very real practical consequences such as differing environmental requirements and efficiency of coal delivery. Further, the terms and conditions of employment at Ulan differ, and are unique, compared to the other Respondent Employers.

[98] Ulan further submitted the making of the Authorisation would not be consistent with the objects and scheme of the Act. Ulan's position is that the object of the Act promotes bargaining at a single enterprise level rather than multi-enterprise level. Further, Ulan argued that it is in the public and community interest that it is not constrained in the flexibility it currently has in relation to its employment arrangements.

[99] Ulan also contended that the operations and business activities of the Respondent Employers were not reasonably comparable for a number of reasons, including:

- The differences in mining methods used.
- The differences in the yield from each relevant mine.
- Life of mine.
- Environmental aspects and stressors unique to each relevant mine.
- Mine production and capacity.
- Properties, and volume, of coal extracted at each relevant mine.
- Contribution to commercial market.
- Engagement surrounding communities.
- Engagement with the workforce.

ACTU

[100] The ACTU submissions in these proceedings were largely confined to the interpretation and construction of the FW Act. We will deal with these shortly. However, the ACTU also contended that the consequence of refusing to grant APESMA's application would be that no bargaining will occur between each Respondent Employer and APESMA.

MCA

[101] The MCA contended that the Authorisation should not be made.

[102] The MCA largely adopted and supported the submissions of the Respondent Employers.

[103] The MCA relied on the statement[81] of Mr Reuben Lawerence. Mr Lawrence is the principal of Lawrence Consulting. The MCA engaged Mr Lawrence to provide an expert report in relation to the economic and social impacts of the Industry on the New South Wales and Australian economies.

[104] Mr Lawrence was not required for cross-examination.

[105] MCA contended that majority support of the SIEA Employees was not obtained as the employees were unable to give free and informed support for bargaining for a multi-enterprise agreement. They contended that the phrase 'want to bargain' within s.249(1B)(c) of the Act imports a consideration of the employees' intent, or desire, which must be freely and genuinely given.[82] The MCA does not contend that s.249(1B)(c) imposes a statutory obligation on a union to provide a fulsome explanation of the Ballot process or the bargaining process. Instead, they posit that in circumstances where a union does give an explanation in order to obtain support for their campaign, the fact that the explanation contains material misrepresentations would be sufficient, in some cases, to vitiate consent given by the employees. Relevant to the present proceedings, the MCA contended that APESMA's campaign did involve the making of material misrepresentations.

[106] The MCA asserted that APESMA did not properly engage with the task required by the clearly identifiable common interest criterion. The MCA was of the view that APESMA merely addressed the criterion in general terms. The MCA noted that each of the Respondent Employers are located in NSW. However, it contended that without more, it does not say anything about the interests of each Respondent Employer. Further, it noted that there are different factors that impact the interests of each Respondent Employer.

[107] The MCA submitted the making of the Authorisation would not be consistent with the objects and scheme of the Act. The MCA emphasised that the object of the FW Act promotes bargaining at a single enterprise level rather than multi-enterprise level. Further, the MCA noted that there is a potential for additional employers to be roped into the bargaining process if the Authorisation was made.

[108] The MCA submitted that the operations and business activities of the Respondent Employers were not reasonably comparable. It submitted that, having regard to the evidence and submissions of the Respondent Employers, there are critical differences in the operations and business activities between each of the Respondents which together, displace the presumption in s.249(1AA) that the reasonably comparable criterion is satisfied for the purposes of s.249(1)(b)(v).

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[81] Exhibit 37 – Reuben Lawrence Statement (*Lawrence Statement*).

[82] The MCA referred the Commission to *AMWU v Kinkaid* [2009] FWA 1123 [13], *AMWU v Edlyn* [2011] FWA 7928 [7] and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v South32 Worsley Alumina Pty Ltd* [2021] FWC 3784 ('*South32*').

5. The circumstances of the Respondent Employers

[109] We will, where necessary, return to the detail of the Respondent Employers as part of our consideration of the relevant statutory tests. However, some broad findings about the nature of the Industry and the circumstances of the Respondent Employers are appropriate.

[110] In making these findings, we have had regard to the evidence of Mr Lawrence as providing a broad overview of the Industry. We have also considered the material provided by the Respondent Employers that relied on or referred to industry data provided by Wood Mackenzie. Wood Mackenzie is a data and analytics consultant that provides services to clients, particularly in the energy sector. This includes providing reports to and about the coal mining industry, including the operations and assets of mines such as those concerned here. It was of some contextual assistance.

[111] However, the Wood Mackenzie material was not provided to the Commission as expert evidence and was largely unable to be tested given that the authors and the detailed sources of the information relied upon were not made available. It is evident from a number of witnesses called on behalf of the Respondent Employers that the data provided to or used by Wood Mackenzie may come from that supplied by the businesses concerned or from publicly available materials. Although seeking to rely upon the reports, we observe that a number of the Respondent Employers sought to correct and qualify the data related to their business and also confirmed that any data that they had provided was unaudited and qualified. In these circumstances, we have placed little weight upon the detail flowing from or relying upon the Wood Mackenzie data except where it was supported by direct evidence from the employer concerned.

[112] Black coal is principally used to make coke for industrial purposes, combustion, power generation, general furnace heating and pulverised coal injection.[83]

[113] Black coal is a combustible sedimentary rock comprised mostly of carbon and other elements such as hydrogen, sulphur, water, oxygen, and nitrogen.[84] Coal from different deposits will have different quantities of the above elements. The composition of coal will determine its grade.

[114] Extracted black coal will comprise of properties to form either thermal coal, or metallurgical coal.[85] Metallurgical coal is sold at a higher price point because it is not capable of substitution.[86]

[115] Australia is the world's second largest exporter of thermal coal, having exported 182 million tonnes of thermal coal in 2022-23.[87]

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[83] *Roberts Statement* at [15].

[84] *Roberts Statement* at [14].

[85] *Roberts Statement* at [10] and [16].

[86] *Roberts Statement* at [16] – [17].

[87] *Roberts Statement* at [11].

[116] The Industry has a significant direct, and indirect, impact on the New South Wales and Australian economy. This includes by way of its contribution to national and state gross product.[88]

[117] Further, the Industry spends relatively significant amounts to operate and this includes making contributions to every relevant region across New South Wales, including Sydney, the Hunter Valley, Lake Macquarie and Central West.[89] In addition, royalties, rates and tax payments are significant. For instance, the Industry made a total of $64.4 million in payments to local governments and $5.6 billion was paid to the State government in 2022/23.[90]

[118] The Industry is also a significant employer. The total New South Wales workforce in the Industry in 2022/23 was comprised of 25,336 full-time equivalent workers, including direct employees and contractors.[91] The SIEA Employees are a small component of this overall workforce.

[119] There are generally various stages of mining within an underground coal mine site. The stages relevant to this application are the initial development, production and closure stages.

[120] The lifecycle of an underground black coal mine in Australia begins with the development phase, which encompasses exploration, feasibility studies, design, and construction. Initially, extensive geological surveys and feasibility studies are conducted to ascertain the viability of the coal deposit. This phase involves securing necessary permits and approvals from regulatory bodies, addressing environmental impact assessments, and engaging with local communities and stakeholders. During this period, the mine infrastructure is constructed, which includes the development of shafts and tunnels for access, ventilation systems, and surface facilities for processing and storage. The design and construction phase is critical in ensuring that the mine meets stringent safety standards and is capable of efficient operation. At this stage, operators of the underground coal mine make a large capital investment, induing for the provision of significant machinery and plant.

[121] Once the mine is operational, the production phase begins, characterised by the extraction of coal using methods such as longwall mining and bord and pillar mining. Throughout the production phase, continuous monitoring and maintenance are essential to ensure the safety and efficiency of the mining operations. This includes managing ventilation to control dust and gas levels, monitoring ground conditions to prevent collapses, and implementing robust safety protocols to protect workers. The environmental impact of mining activities, such as water management and waste disposal, is also rigorously controlled. There are reduced capital costs at this stage, and operational and employment costs become the main expenditure. The mine area continues to expand as existing and new seams of coal are opened up and mined. Equipment and infrastructure continues to be maintained and developed during this stage. It is at this stage that productivity and returns are likely to be at their highest.

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[88] *Lawrence Statement* RL-2.

[89] *Lawrence Statement* RL-2.

[90] *Lawrence Statement* RL-2 at page 6 and 18.

[91] *Lawrence Statement* RL-2 at page 5.

[122] The closure phase is a complex process that involves decommissioning the mine, rehabilitating the site, and managing long-term environmental and social impacts. Mine closure planning begins well before the cessation of operations, integrating environmental, social, and economic considerations. Decommissioning involves dismantling and removing infrastructure, sealing shafts and tunnels, and managing residual environmental risks such as acid mine drainage and subsidence. The site rehabilitation process includes reshaping the land, replacing topsoil, replanting vegetation, and monitoring the recovery of ecosystems. The aim is to return the land to a state that is safe, stable, and suitable for future use, whether for agriculture, conservation, or community development. Equipment is relocated or sold, where feasible. Employees are either redeployed or made redundant.

[123] The length of a mine's lifecycle generally depends on many factors including development approvals, the size and quality of the coal deposits, its development and operational costs and the revenue and profit that may be generated from the mining. The evidence also reveals that the mining may, in certain circumstances, be suspended, sometimes for many months or years, and then resume when circumstances make it profitable to do so.[92] For instance, in 2020, Peabody implemented a partial cessation of mining operations at the Wambo Mine.[93]

[124] There are two main methods used by Australian coal mine producers to extract coal from underground mines: longwall mining and bord and pillar mining. Most mines use a combination of these methods, at least in the case of roads and access in a longwall mining operation.

Longwall Mining

[125] The initial phase of longwall mining involves the use of a continuous miner to develop tunnels and coal panels in the underground mine.[94] During the coal extraction phase, a "shearer" is then used to cut the coal seam laterally across the width of the coal panel.[95] The coal is then deposited onto a conveyer belt system which carries the coal to the surface of the mine. The roof of the underground mine is temporarily supported by hydraulic support and is designed to collapse once extraction of coal in the relevant section is complete.[96] Longwall mining may also involve some bord and pillar mining.[97]

[126] The cost of procuring equipment to establish and operate a longwall mining operation is approximately $250 million.[98] The equipment takes approximately 18 months to be made and delivered to the mine.[99] Installation of the equipment takes approximately two months.

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[92] PN3232 to PN3234.

[93] PN3231; *Carter Statement* at [84] – [85].

[94] *Cornford Statement* at [30].

[95] *Carter Statement* at [30].

[96] *Carter Statement* at [30]; *Cornford Statement* at [49].

[97] *Bolger Reply Statement* at [28]; this method is adopted at the Mandalong Mine.

[98] *Carter Statement* at [34].

[99] *Carter Statement* at [34].

[127] The total time required to establish a longwall mining operation is approximately three to four years, assuming there is an existing basic mine structure.[100] The cost of labour and ancillary equipment[101] to establish a longwall mining operation is approximately $450 million.[102]

[128] It is generally accepted that a longwall mining operation requires a larger labour workforce than a bord and pillar mining operation. Roughly 50 individuals are required to operate the longwall itself.[103] An additional 350 individuals are required in various supporting roles such as development and outbye operations.[104]

Bord and Pillar

[129] Bord and pillar mining also involves the use of a continuous miner when establishing a new mining area.[105] During the initial phase, roadways (bords) are created parallel to each other into a coal seam.[106] They are then joined by driving cross roads into the seam, which creates 'cut throughs'.[107] The above process creates the pillars of uncut coal. During coal extraction, the coal is extracted from the pillars.[108] At the same time the pillars of untouched coal are left to support the roof of the underground mine.[109] The roof support and untouched pillars are designed in such a way to prevent roof collapse.[110]

[130] Delta Coal utilises the herringbone bord and pillar method at the Chain Valley Colliery Mine.[111] This method involves a continuous miner moving down a roadway and then mining at an angle to extract coal.[112] The miner is then withdrawn from the pillar and is moved down the roadway to the other side of the pillar before again mining at an angle.[113]

[131] Equipment to establish and operate a bord and pillar mining operation costs approximately $25 million.[114] The equipment takes approximately 12 months to be made, delivered and installed.[115]

[132] A bord and pillar mine takes approximately six months to be established. It costs around $30 million to establish the mine.

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[100] *Carter Statement* at [36].

[101] This includes conveyor systems, fans and support infrastructure but does not include the procurement costs.

[102] *Carter Statement* at [36].

[103] *Carter Statement* at [38].

[104] *Carter Statement* at [38].

[105] APESMA Reply Submissions at [51].

[106] Outline of Submissions of Delta Coal at [7].

[107] Outline of Submissions of Delta Coal at [7].

[108] *Carter Statement* at [31].

[109] *Carter Statement* at [31]; *Cornford Statement* at [46].

[110] *Carter Statement* at [31].

[111] *Cornford Statement* at [48].

[112] *Cornford Statement* [48].

[113] *Cornford Statement* at [48].

[114] *Carter Statement* at [35].

[115] *Carter Statement* at [35].

[133] A single bord and pillar unit requires roughly 50 workers to operate the unit itself.[116] An additional 35 workers are required for supporting roles.[117]

[134] It is appropriate to broadly outline the relevant mining operations of each of the Respondent Employers.

Peabody

[135] Peabody operates the Wambo Mine which is an underground mine forming part of a black coal mining complex (**Wambo Complex**) in Warkworth, New South Wales.[118]

[136] Peabody's current longwall operation at the Wambo Mine is 250 metres in width and 700 to 800 metres in length.[119] Three continuous miners are used at the Wambo Mine.[120] The majority of the longwall equipment used at the Wambo Mine was purchased in 2006.[121] This has impacted operating and maintenance costs and productivity.

[137] The Wambo Complex is located is located approximately 220 kilometres from Sydney, 100 kilometres from Newcastle and 25 kilometres from Singleton.[122]

[138] Production at the Wambo Mine commenced in 1969. Peabody acquired the Wambo Mine in 2006 and commenced the current longwall operations in 2007.[123] Since Peabody's acquisition of the mine, production has occurred continuously apart from a temporary closure in 2020.[124] Although there is some uncertainty and conjecture about this aspect, and there are some variables involved, the currently anticipated remaining mine life of the present operation is relatively short. The details of this are in the evidence before the Commission and have been taken into account, but we have not found it necessary to include such detail in this published Decision. On this basis, we will subsequently refer to this aspect as the **anticipated mine life** when referring to Peabody's Wambo mine.

[139] Peabody holds a mining lease under the Mining Act in relation to the Wambo Mine.[125] The mining lease grants Peabody the exclusive right to mine over a specific area of land.

[140] Extracted coal from the Wambo Mine is transported approximately 2.5 kilometres, by truck, to the Wambo Coal Handling and Preparation Plant (**CHPP**). At the CHPP, the coal is washed, crushed and sorted. Afterwards, the coal is transported, by train, to Port Waratah,

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[116] *Carter Statement* at [39].

[117] *Carter Statement* at [39].

[118] *Carter Statement* at [19].

[119] *Carter Statement* at [51] – [52].

[120] *Carter Statement* at [61].

[121] A continuous miner was purchased in 2019.

[122] *Carter Statement* at [21].

[123] *Carter Statement* at [22].

[124] *Carter Statement* at [23], [59] – [84].

[125] *Carter Statement* at [24].

Newcastle.[126] The round-trip journey between the Wambo Complex and Port Waratah is approximately 11.5 hours.[127] Any coal that cannot be sold is transported, by truck, to old pits within the Wambo Complex for storage and rehabilitation.

[141] There are currently geological challenges with the remaining coal at the Wambo Mine.[128] The remaining minable section is obstructed by a major regional dyke. The presence of the dyke, and faulting, results in a higher rock content in the material that is extracted from the coal seam. The obstruction increases the time required to extract coal as Peabody has to navigate its mining activities around the dyke. Further, a more onerous washing process is required at the CHPP. The higher rock presence also results in a lower yield of saleable coal.

[142] The coal produced from the Wambo Mine is predominately sold to customers in Asia.[129] The majority of the coal is sold in the branded market. This market segment is comprised of customers from Taiwan, Japan and Korea. This market is the most profitable for Peabody, as the customer is paying for coal from a known source and, based on their knowledge of and relationship with Wambo, is prepared to pay a premium in exchange for a perceived security in supply.[130] Any coal not sold on the branded market is then sold through the generic specification market or global coal specification market. Countries in those markets include Vietnam, China, South Korea and other Southeast Asian countries.[131]

[143] A substantial proportion of the coal produced at the Wambo Mine is sold on longer-term fixed contracts.

[144] As at February 2024, Peabody employed approximately 228 employees at the Wambo Mine.[132] Those employees are employed in various roles relating to production, engineering and mine preparation. There are also 133 non-employees who work at the Wambo Mine. The non-employees assist with various tasks such as building and maintaining supporting infrastructure.[133]

[145] Peabody employs its own operator and supervisory workforce at the Wambo Mine.[134]

[146] Peabody has experienced difficulty attracting and retaining employees for its Wambo Mine.[135] The Wambo Mine is not located near any residential centres or close to any attractive lifestyle factors such as the coast. Its workforce predominately commutes to work on a daily basis, with employees residing locally in the region. Peabody competes for key skilled labour with other producers, not just in the Hunter Valley region but throughout Australia given the

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[126] *Ostermann Statement* at [23].

[127] *Ostermann Statement* at [23].

[128] *Carter Statement* at [49].

[129] *Roberts Statement* at [53].

[130] *Roberts Statement* at [51] – [53].

[131] *Roberts Statement* at [54].

[132] *Carter Statement* at [76].

[133] *Carter Statement* at [76].

[134] *Carter Statement* at [77].

[135] *Carter Statement* at [81].

drive-in, drive-out (**DIDO**) or fly-in, fly-out (**FIFO**) nature of mining work.[136] Accordingly, this impacts Peabody's attitude towards recruitment and human resources matters more generally.

[147] Most employees at the Wambo Mine, including the SIEA Employees, are employed under contracts of employment and are covered by the Black Coal Award. [137] Those employees generally work a 3-4 roster with three days on, four days off, with 12-hour shifts.[138] Some employees are engaged on a guarantee of annual earning arrangement (**GAE arrangement**) which impact upon the application of the Black Coal Award.

[148] Wambo Mine has also had some difficulty attracting employees due to the fact that potential employees, and current employees, are aware of the anticipated mine life.

Ulan Coal Mines

[149] Ulan No. 3 is an underground mine which forms part of a black coal mining complex (**Ulan Complex**) in Ulan, New South Wales.[139]

[150] Ulan's current longwall operation at Ulan No.3 is 300 to 400 metres in width and 2.5 to 3.6 kilometres in length.[140] Due to an operational change in 2006, Ulan purchased and installed new mining equipment. Subsequently, Ulan has made significant capital investments in the maintenance and modernisation of its equipment.[141]

[151] The Ulan Complex is located approximately 45 kilometres from Mudgee and 25 kilometres from Gulgong. Mudgee is the largest town in the Mid-Western Regional Council Local Government Area with a population of approximately 13,000 people.

[152] Production at Ulan No.3 is expected to continue until 2033 subject to the approval of a mining extension application.[142]

[153] Ulan holds a mining lease under the Mining Act in relation to Ulan No.3. The mining lease grants Ulan the exclusive right to mine over a specific area of land.

[154] The Ulan Complex has an environmental protection licence issued under the *Protection of the Environment Operations Act 1997* (NSW) (**PEO Act**).[143]

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[136] *Carter Statement* [82].

[137] *Carter Statement* at [97].

[138] *Carter Statement* at [94].

[139] *Ostermann Statement* at [4].

[140] *Ostermann Reply Statement* [54] – [59]

[141] *Ostermann Reply Statement* at [46] – [48].

[142] *Ostermann Reply Statement* at [26].

[143] *Ostermann Reply Statement* at [28].

[155] Mining at Ulan No.3 is conducted using the longwall mining method. There is currently no bord and pillar operation at the Ulan Complex.[144] Only thermal coal is extracted at Ulan No.3.[145]

[156] Extracted coal from Ulan No.3 is transported, by train, to Port Waratah, Newcastle. The round-trip journey from the Ulan Complex and Port Waratah is approximately 22.7 hours.[146]

[157] There are currently operational challenges that affect mining at Ulan No. 3.[147] Strata conditions, such as stress magnitude and geology, interfere with the efficiency of mining operations. These factors affect the geotechnical stability of Ulan No.3. As such, production levels are reduced.

[158] The coal produced from Ulan No. 3 is sold to international markets. The majority of the coal mined at Ulan No.3 is sold to customers in South East Asia, and specifically, China and Japan.[148] Each of Ulan's customers require coal with certain specifications, pertaining to values such as calorific value and moisture content.[149]

[159] As at February 2024, the workforce at Ulan No.3 comprised of approximately 250 individuals, which includes employees and contractors.[150] 46 of those individuals are SIEA employees, broken down as follows:

(a) 5 Control Room Operators;
(b) 10 Shift Trade Supervisors;
(c) 26 Deputies; and
(d) 5 Undermanagers.

[160] Employees at Ulan No. 3 are employed either as 'wages staff'[151] or 'salary staff'.[152]Those employed as a wages staff are covered by the *Ulan Coal Mines Pty Limited Underground Enterprise Agreement 2021*. Salary staff are subject to individual employment contracts. All of the SIEA Employees receive annual earnings approximate to the 'high-income threshold' within the meaning of the FW Act.[153]

[161] Due to the Ulan Complex's close proximity to Mudgee, Ulan Coal Mines has an established community investment program.[154] The program involves investment and support in local initiatives such as sporting teams and education programs.[155]

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[144] *Ostermann Reply Statement* at [27].

[145] *Ostermann Statement* at [30].

[146] *Ostermann Statement* at [23].

[147] *Ostermann Statement* at [38] – [45].

[148] *Ostermann Statement* at [18].

[149] *Ostermann Statement* at [34].

[150] *Ostermann Statement* at [51].

[151] Wages staff are those employees involved with production and engineering.

[152] Salary staff are all other employees such as SIEA employees.

[153] *Ostermann Statement* – [54] – [55].

[154] *Ostermann Statement* at [71].

[155] *Ostermann Statement* at [71].

[162] The close proximity to Mudgee also means that a large proportion of the workforce at Ulan No.3 live locally. Ulan does not foster or encourage a DIDO workforce.[156]

[163] Further, Ulan has implemented a number of initiatives to attract and retain employees. These initiatives include study assistance and accommodation allowances.[157]

[164] Ulan has tailored its roster to meet development consent conditions, including a requirement that start and finish times not coincide with school bus travel times. [158] As a result day shifts commence at 6.45am and end at 4.45pm, afternoon shift commences at 2.30pm and night shift finishes at 8.30am.[159] Rosters have taken into account employee preference to work 10 hour shifts over four days rather than nine hours over five days.[160] Employees work pursuant to a fixed roster whereby full-time employees work four 10-hour fixed shifts per week or three 12 hour fixed shifts (which covers weekends).[161]

Whitehaven

[165] The Narrabri Mine is an underground mine located near Narrabri, New South Wales.[162] The Narrabri Mine is located 17 kilometres southeast of Narrabri, 70 kilometres from Gunnedah, approximately 380 kilometres from Newcastle and approximately 530 kilometres from Sydney.[163]

[166] The Narrabri Mine is 400 metres in width and 3.6 to 6 kilometres in length.[164]

[167] Production at the Narrabri Mine commenced in 2012.[165] The current anticipated mine life is expected to continue until 2044.[166]

[168] Mining at the Narrabri Mine is conducted using the longwall mining method.[167] Thermal coal is predominately extracted at the mine.[168] A small amount of pulverised coal injection coal is also extracted.[169] Exploratory drilling is not conducted at the Narrabri Mine.

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[156] *Ostermann Reply Statement* at [28] – [29].

[157] *Ostermann Reply Statement* at [33] – [35] and [51] – [63].

[158] Ostermann at [66].

[159] Ostermann at [66].

[160] Ostermann at [67].

[161] Ostermann at [67].

[162] *Carter Statement* at [19].

[163] *Humphris Statement* at [36] – [37]; *Case Statement* at [13(c)].

[164] *Carter Statement* at [51] – [52]; *Case Statement* at [47].

[165] *Humphris Statement* at [35]; *Case Statement* at [14].

[166] *Humphris Statement* at [35].

[167] *Case Statement* at [18(b)]: note that there is a small bord and pillar operation, which is operated by a third party, Mastermyne Group Limited.

[168] *Humphris Statement* at [39].

[169] *Case Statement* at [15(a)].

[169] Extracted coal from the Narrabri mine is processed at an onsite wash plant.[170] Afterwards, the coal is transported, by train, to Port Waratah, Newcastle.[171] The round-trip journey between the Narrabri Mine and Port Waratah is approximately 27 hours.[172] There are a number of difficulties that occur when transporting the extracted coal to Port Waratah, which includes the average slow speed the train must travel, and the need to go around the Great Dividing Range.[173] There is a 240-kilometre single rail line where loaded trains require bank engine assistance to haul over the Liverpool Range.[174]

[170] There are currently geological challenges affecting operations at the Narrabri Mine.[175] There are a number of stone intrusions that have presented in the coal seam where the longwall operation is occurring. This results in significantly lower productivity because the siltstone and sandstone is hard, and therefore, take longer to be sheared. The increased shearer cycle times also result in an increase in equipment maintenance costs as equipment becomes worn more quickly than if there were no stone intrusions.[176] Mr Case was of the opinion that the other Respondent Employers are not currently experiencing the above geological issue.[177]

[171] The coal produced from the Narrabri Mine is predominately sold to customers in Asia. The export market for coal extracted at the Narrabri Mine includes Japan, Korea, Taiwan and other countries in the Asian region.[178] For FY23, 58% of coal from Narrabri Mine was exported to Japan, 17% was exported to Korea, 16% was exported to Taiwan, and 9% was exported to other markets.[179]

[172] While Whitehaven Coal Limited sells a small amount of coal to domestic markets because it has been required to do so under the NSW Government's Domestic Coal Reservation Scheme, it does not otherwise sell to domestic markets. The scheme was legislated to end on 30 June 2024 and Whitehaven Coal Limited does not plan to sell domestically thereafter.[180]

[173] As at February 2024, the Narrabri mine consists of a workforce of between 470 to 530 individuals, comprising both employees and contractors.[181] The employees are employed by Whitehaven Mining. 43 of those employees are SIEA Employees, broken down as follows:

(a) 28 Deputies;
(b) 5 Undermanagers;
(c) 5 Shift Managers; and
(d) 5 Control Room Operators.

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[170] *Case Statement* at [18(c)].

[171] *Ostermann Statement* at [23].

[172] *Ostermann Statement* at [23].

[173] *Ostermann Statement* at [23].

[174] *Humphris Statement* at [38].

[175] *Case Statement* at [53(b)].

[176] *Case Statement* at [53(d)].

[177] *Case Statement* at [53].

[178] *Case Statement* at [20(a) – (b)].

[179] *Case Statement* at [20].

[180] *Humphris Statement* at [29].

[181] *Case Statement* at [23(a)].

[174] The workforce includes workers who live locally in the Narrabri and Gunnedah Local Government Areas, and 18 SIEA Employees who are DIDO workers who travel to the Narrabri Mine from other areas. There are also FIFO workers that travel to the Narrabri Mine from Wollongong, Newcastle and Brisbane, although these are generally managers and staff performing specialised roles. There are two Deputies who are FIFO workers.[182]

[175] There are ongoing challenges in attracting and retaining employees at the Narrabri Mine. The Narrabri Mine is remote and not local to any residential centres or attractive lifestyle factors.[183] This gives rise to challenges in attracting and retaining employees at the Narrabri Mine.

[176] There are 132 production employees who are covered by the *Narrabri Underground Operations Enterprise Agreement 2022.* Other employees, including the SIEA Employees, are employed under an individual contract of employment.[184] These employees at the Narrabri Mine are paid an annual salary which is intended to compensate them for reasonable additional hours, penalties, overtime, shift loadings, allowances, annual leave loading, travelling time, public holiday rates and all other disbursements.[185] Employees at the Narrabri Mine also have a GAE arrangement which has the effect that the Black Coal Award does not apply to their employment with Whitehaven.[186] Employees at the Narrabri Mine have a written contract of employment that outlines the terms and conditions of their employment with Whitehaven and also receive some employment-related benefits that are not addressed in their written contract of employment.[187] Some terms, conditions and benefits of employment are common across all of the classifications of employees at the Narrabri Mine and some terms, conditions and benefits of employment are specific to a particular classification, or classifications.[188]

[177] The SIEA Employees employed at the Narrabri Mine are eligible to participate in a short-term incentive program.[189] They also have the following benefits and entitlements:

- at least five weeks annual leave per year, although some have a more beneficial entitlement, including some Deputies, Undermanagers and Shift Engineers who work the '7/7' roster (explained below);
- three weeks of personal/carer's leave per year;
- 26 weeks of paid parental leave for primary carers in accordance with Whitehaven Coal Limited's Parental Leave Policy;
- up to six months of accident pay;
- income protection and life insurance;[190]

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[182] *Case Statement* at [23].

[183] *Case Statement* at [43].

[184] *Case Statement* at [25].

[185] *Case Statement* at [26(a)].

[186] *Case Statement* at [26(b)].

[187] *Case Statement* at [25].

[188] *Case Statement* at [26] – [38].

[189] *Case Statement* at [26(d)].

[190] *Case Statement* at [26], [28].

- Deputies, Undermanagers and Shift Engineers are entitled to an annual roster allowance depending on the type of roster they work.[191]

[178] The SIEA Employees employed at the Narrabri Mine are not entitled to long term incentives, retention bonuses or benefits relating to a motor vehicle, mobile phone or laptop.[192]

[179] Whitehaven's Narabri Mine operates 24 hours a day, seven days a week.[193] Rostering arrangements for the SIEA Employees employed at the Narrabri mine vary by role.

[180] In relation to the role of Deputy:

- these employees work on a full time basis;
- the Geotechnical Deputy and Ventilation Deputy work a 9-day fortnight rather than shiftwork;
- there are three Deputies who work a '7/7' shift pattern involving working seven sequential days and then having seven days off;
- the roster for other Deputies, who are Underground Deputies, operates on a '4/3' shift pattern pursuant to which some Deputies work four days per week and then have three days off and some Deputies work three days per week and have four days off;
- between two and six Deputies work on each shift;
- the roster for Deputies working the '4/3' roster is as follows:
    - Crew A works a fixed roster of four 10.5 hour weekday shifts from 6.30am to 5.00pm, Monday to Thursday totalling 42 hours per week.
    - Crews B and C work a rotating roster of four weekday afternoon and night shifts totalling 39 hours per week. The Crews work 9.75 hour shifts from 10.45pm to 8.30am, Tuesday to Friday, and 9.75 hour shifts from 3.00pm to 12.45am, Monday to Thursday.
    - Crew D works a fixed roster of three 12 hour weekend day shifts from 6.30am to 6.30pm, Friday to Sunday, totalling 36 hours per week.
    - Crew E works a fixed roster of three 12 hour weekend night shifts from 6.30pm to 6.30am, Saturday to Monday, totalling 36 hours per week.
    - Crew F works a fixed roster of three 10 hour shifts weekend day shifts from 6.30am to 4.30pm, Friday to Sunday, totalling 30 hours per week.
    - Crews G and H work a rotating roster of three weekend afternoon and night shifts totalling 30 hours per week. The Crew works 10 hour shifts from 2.00pm to 12.00am, Friday to Sunday, and 10 hour shifts from 10.30pm to 8.30am, Saturday to Monday.[194]

[181] Undermanagers work according to a '4/3' shift pattern with the roster split into five crews whose arrangements are as follows:

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[191] *Case Statement* at [27], [30], [34].

[192] *Case Statement* at [26].

[193] *Humphris Statement* at [39].

[194] *Case Statement* at [27].

- Crew A works a fixed roster of four 10.5 hour weekday shifts from 6.30am to 5.00pm, Monday to Thursday, totalling 42 hours per week.
- Crews B and C work a rotating roster of four weekday afternoon and night shifts totalling 39 hours per week. The Crew works 9.75 hour shifts from 10.45pm to 8.30am, Tuesday to Friday, and 9.75 hour shifts from 3.00pm to 12.45am, Monday Thursday.
- Crew D works a fixed roster of three 12 hour weekend day shifts from 6.30am to 6.30pm, Friday to Sunday totalling 36 hours per week.
- Crew E works a fixed roster of three 12 hour weekend night shifts from 6.30pm to 6.30am, Saturday to Monday, totalling 36 hours per week.[195]

[182] Shift Engineers also work according to a '4/3' shift pattern which is the same roster as those worked by Deputies.[196]

[183] Control Room Operators work a '7-day' roster, which means they work according to a roster cycle that includes any day of the week, including public holidays.[197]

[184] The roster has fixed 12-hour shifts of 5.00am to 5.00pm for the Day Shift, 5.00pm to 5.00am for the Night Shift.[198] Three of the Control Room Operators are rostered to work 48 hours per week, and two are rostered to work 36 hours per week.[199] The roster operates on a '4/3' basis, with three of the Control Room Operators working the 'Mid-Week' roster from Monday to Thursday and two of the Control Room Operators working the 'Weekend Shift' roster from Friday to Sunday.[200] The Mid-Week roster involves two of the Control Room Operators working the Day Shift and one of the Control Room Operators working the Night Shift.[201] The Weekend Shift roster involves one of the Control Room Operators working the Day Shift and one of the Control Room Operators working the Night Shift.[202]

[185] Employees are provided with accommodation related benefits.[203]

Delta Coal

[186] Delta Coal is wholly owned by Delta Electricity Pty Ltd (**Delta Parent Company**).[204]

[187] Delta Coal operates the Chain Valley Colliery, which forms part of the Chain Valley Complex. The Chain Valley Complex is located in Mannering Park, New South Wales.[205] It is

[195] *Case Statement* at [30].

[196] *Case Statement* at [34].

[197] *Case Statement* at [38].

[198] *Case Statement* at [38].

[199] *Case Statement* at [38].

[200] *Case Statement* at [38].

[201] *Case Statement* at [38].

[202] *Case Statement* at [38].

[203] *Case Statement* at [39].

[204] *Cornford Statement* at [11].

[205] *Cornford Statement* at [12].

located approximately 60 kilometres from Newcastle. It is in close vicinity to suburbs such as Mannering Park, Wyee Point, Kingfisher Shores and Lake Munmorah.[206]

[188] The mine is located within a couple of hundred metres of the Vales Point Power Station (**Vales Point Station**). The Vales Point Station is owned and operated by Delta Electricity, which is wholly owned by the Delta Parent Company.[207] Adjacent to the Chain Valley Colliery is the Mannering Colliery.

[189] Delta Coal's current mining operation extracts a 5.5 metre wide web of coal for each block. This is equivalent roughly 30% of the total coal in the block. [208] Five continuous miners are used at the Chain Valley Colliery.[209]

[190] Production at the Chain Valley Colliery commenced in 1962.[210] Given the unique circumstances of the Chain Valley Colliery, its operations are expected to cease once the life of the Vales Point Station comes to an end.[211] It is anticipated that the Vales Point Station will cease operations in 2033.[212]

[191] Delta Coal holds a mining lease under the Mining Act in relation to the Chain Valley Colliery. The mining lease grants Delta Coal the exclusive right to mine over a specific area of land.

[192] Mining at the Chain Valley Colliery is conducted using the bord and pillar method.[213] Only thermal coal is extracted at the mine. Exploratory drilling is not conducted at the Chain Valley Colliery.[214]

[193] Extracted coal from the Chain Valley Colliery is transported directly to the Vales Point Station, via the Mannering Colliery.[215] The extracted coal is often used immediately at the Vales Point Station.[216] Unlike in the longwall mining method, coal extracted at the Chain Valley Colliery is not washed and no beneficiation process is carried out.[217] There is no coal washery or coal preparation plant at the Chain Valley Complex.

[194] The coal produced from the Chain Valley Colliery is sold directly to the Vales Point Station.[218] Delta Coal does not supply extracted coal to any other consumer. There is a fixed

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[206] *Cornford Statement* at [22].

[207] *Cornford Statement* at [25].

[208] *Cornford Statement* at [51].

[209] *Cornford Statement* at [57].

[210] *Cornford Statement* at [23].

[211] *Cornford Statement* at [28] – [29].

[212] *Cornford Statement* at [29].

[213] *Cornford Statement* at [23].

[214] *Cornford Statement* at [30].

[215] *Cornford Statement* at [26] – [27].

[216] *Cornford Statement* at [27].

[217] *Cornford Statement* at [66].

[218] *Cornford Statement* at [25].

contract of supply between Delta Coal and Delta Electricity on fixed term basis.[219] Delta Coal is unable to vary the fixed price.[220] Delta Coal operates the Chain Valley Colliery at a loss as its operating costs outweigh its revenue from supplying coal to Delta Electricity.[221] It relies on a subsidy from Delta Electricity to meet operating costs.[222]

[195] As at February 2024, Delta Coal employed approximately 203 employees at the Chain Valley Colliery.[223] 41 of those are SIEA employees.[224] These employees work as part of production or maintenance crews in various roles, including operators and electricians.

[196] Delta Coal employees employed in production or maintenance roles including operators and electricians, are covered by Delta 2022 Agreement.[225] Delta Coal also employs staff under the relevant SIEA Employee classifications on a full-time basis, including Control Room Operators, Deputies and Undermanagers.[226] The SIEA employees are engaged on individual employment contracts under the Black Coal Award.[227] Delta Coal does not employ anyone in the role of 'Shift Engineer' but instead employs experienced tradespersons to work in the role of Leading Hands who Mr Cornford understands are covered by the Delta Agreement 2022.[228]

[197] Delta Coal does not employ any sales, marketing or business development employees and senior managers such as the Chief Operating Officer, Chief Financial Officer and General Counsel that support Delta Coal are employed by a separate entity and are not covered by the Delta 2022 Agreement or Black Coal Award.[229]

[198] Delta Coal has not previously entered into an enterprise agreement in respect of the SIEA Employees.[230] Under their contracts they are generally paid a base salary (in compensation for allowances, loadings and penalty rates),[231] superannuation contributions are made in line with superannuation guarantee contribution levels and these employees are eligible to participate in a variable and discretionary short term incentive program.[232] The SIEA Employees employed by Delta Coal do not participate in a long term incentive program.[233] Mr Cornford's evidence was that Delta Coal has not entered into a GAE arrangement with its SIEA Employees.[234]

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[219] *Cornford Statement* at [35].

[220] *Cornford Reply Statement* at [7].

[221] *Cornford Statement* [36] – [40].

[222] *Ambridge Statement* at [12].

[223] *Cornford Statement* at [14].

[224] *Cornford Statement* at [15] – [16]; *Coluccio Statement* at [27].

[225] *Cornford Statement* at [14], [84].

[226] *Cornford Statement* at [16].

[227] *Cornford Statement* at [84].

[228] *Cornford Statement* at [18]; [2023] FWCA 1498.

[229] *Cornford Statement* at [19].

[230] *Cornford Statement* at [92].

[231] *Cornford Statement* at [85].

[232] *Cornford Statement* at [85], [89].

[233] *Cornford Statement* at [89].

[234] *Cornford Supplementary Statement* at [14], [19].

[199] Some SIEA Employees employed by Delta Coal who work a night shift or on weekends are paid a roster allowance.[235] SIEA Employees who work day or night shift mid-week are provided with five weeks of annual leave per year and those who work shifts on weekends are provided with six weeks annual leave per year.[236] Delta Coal does not have a paid parental leave benefit and does not pay premiums for its employees to obtain income protection or life insurance.[237]

[200] SIEA Employees employed by Delta Coal are currently rostered on shifts that provide for an average of 36 ordinary hours of work over a one week roster cycle.[238] Shift lengths for Undermanagers and Deputies are currently 12 hours and are either fixed (not rotating) day shifts worked between 6.00am and 6.00pm or fixed night shifts worked between 6.00pm and 6.00am.[239] Undermanagers and Deputies work fixed mid-week shift patterns, working on Monday, Tuesday or Wednesday, or fixed weekend shift patterns, working on Friday, Saturday and Sunday.[240] Weekend Control Room Operators work the same shift patterns as Undermanagers and Deputies, being 12 hour day or night shifts, however the mid-week day shift Control Room Operator works 9 hour shifts Monday to Thursdays.[241] The afternoon and night shift Control Room Operators work 9 hour shifts Monday to Thursday, rotating between afternoon and night shift every fortnight.[242]

[201] Delta Coal has production crews of up to 12 employees that it arranges into production shifts, with three crews working a shift.[243] Delta Coal uses four production shifts on fixed shift patterns and is planning to use five production shifts later this year.[244] Delta Coal intends to increase its extraction in 2024 and is changing the production roster by introducing three 9.75 hour shifts, being morning, afternoon and evening shifts on Mondays, Tuesdays, Wednesdays and Thursdays, to increase the operating time at the Chain Valley Colliery.[245] Following this change, mid-week Undermanagers and Deputies will be rostered to work four fixed shifts of 9.75 hours across Monday to Thursday.[246] Three shifts, being night, day and afternoon shifts, will be rostered per day.[247] Shifts for Undermanagers and Deputies working weekends will remain 12 hours in duration.[248] Control Room Operators will be unaffected by the proposed roster changes and will continue to work 9 hour shifts (for mid-week) or 12 hour shifts (for weekends).[249]

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[235] *Cornford Statement* at [86]; *Cornford Supplementary Statement* at [15].

[236] *Cornford Statement* at [86]; *Cornford Supplementary Statement* at [20].

[237] *Cornford Supplementary Statement* at [20] – [21].

[238] *Cornford Statement* at [86].

[239] *Cornford Statement* at [86].

[240] *Cornford Statement* at [86].

[241] *Cornford Statement* at [87].

[242] *Cornford Statement* at [87].

[243] *Cornford Statement* at [52].

[244] *Cornford Statement* at [52].

[245] *Cornford Statement* at [41], [88].

[246] *Cornford Statement* at [88].

[247] *Cornford Statement* at [88].

[248] *Cornford Statement* at [88].

[249] *Cornford Statement* at [88].

[202] Delta Coal employs workers who live in, or around, the Chain Valley Colliery. It does not utilise a DIDO and FIFO workforce.[250]

[203] As employees are locally based, Delta Coal does not provide its Undermanagers, Deputies or Control Room Operators a regional allowance or accommodation allowance (or similar payments).[251] Peabody submits that Delta Coal's location provides it with a significant advantage in the recruitment and retention of key staff roles[252] and we accept that Delta Coal's location provides it with a competitive advantage in this respect.

6. Consideration of the major issues in dispute

6.1 The rebuttable presumptions

[204] Given that the other requirements for making of the Authorisation have been met, we will deal with the major contested issues. Before doing so, it is appropriate that we deal with the competing views about how the 'rebuttable presumptions' concerning the common interest and public interest requirements of s.249(3), and the test of reasonable comparability of operations and business activities of the employers under s.249(1)(b)(vi), applies.

[205] The Respondent Employers generally contended that the rebuttable presumption is displaced by adducing evidence to the contrary.

[206] Peabody submitted that the rebuttable presumptions operate in the absence of any evidence to the contrary.[253] That is, the presumption is displaced if there is evidence to the contrary. This, it contended, was consistent with the Court's approach in *McGrath v Aviation Naturalcare Products Pty Ltd*[254] (***McGrath***) when applying s.51A(2) of the *Trade Practices Act 1974* (Cth) (**Former TP Act**). Section 51A of the Former TP Act related to the making of representations regarding future matters and relevantly provided:

> (1) where a corporation makes a representation with respect to any future matter and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading;
>
> (2) in relation to any representation made by a corporation with respect to any future matter, the corporation shall, *unless it adduces evidence to the contrary*, be deemed not to have had reasonable grounds for making the representation (emphasis added)

[207] Peabody contends that there is no significance in the difference of wording between s.51A(2) of the Former TP Act and the relevant provisions of the FW Act. In *McGrath*, Allsop J found in relation to s.51A(2) that:

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[250] *Cornford Statement* at [21].

[251] *Cornford Statement* at [21]; *Cornford Supplementary Statement* at [16] – [17].

[252] *Peabody Outline of Submissions* at [23].

[253] Each of the other Respondent Employers broadly made submissions that align with the submissions of Peabody in relation to the rebuttable presumption.

[254] (2008) 165 FCR 230 ('*McGrath*').

> "… reflecting common sense, which reflects my understanding of the operation of this section, is the provision required evidence "to the contrary" to be adduced, that is evidence that tended to establish, or that admitted of the inference that there were, reasonable grounds for making the representation, before the deeming provision cease to operation".[255]

[208] APESMA contended that the threshold for displacing the rebuttable presumption under s.249(1AA) and s.249(3AB) of the FW Act is different to the threshold for displacing the presumption contained within s.51A of the former TP Act. That is, s.51A made it clear that upon adducing evidence to the contrary, s.51A does not operate. Further, APESMA contended that the relevant text of the FW Act imposes a persuasive burden on the party seeking to rebut the presumption. APESMA argued that whilst mere evidence to contrary is required to displace the presumption under s.51A of the former TP Act, s.249(3AB) requires the party to *prove* to the contrary.

[209] APESMA contends that the words of the relevant provisions means that the employers must prove the contrary proposition and that the onus is more than to demonstrate some evidence that may put it in issue.

Consideration of the rebuttable presumptions

[210] Section 249(1AA) of the FW Act provides that if:

> (a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and
>
> (b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;
>
> it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.

[211] Section 249(3AB) of the FW Act also provides that if:

> (a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and
>
> (b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;
>
> it is presumed that the requirements of subsection (3) – common interests and not contrary to the public interest - are met in relation to that employer, unless the contrary is proved.

[255] *McGrath* at [191].

[212] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* Supplementary Explanatory Memorandum (**SJBP Supplementary EM**) states (dealing with s.249(1AA):

> "70. New subparagraph 249(1)(b)(vi) would require the FWC to be satisfied that, in respect of each employer that is a common interest employer, the operations and business activities of that employer are reasonably comparable with those of other employers that would be covered by the proposed agreement that relates to the single interest employer authorisation.
>
> 71. Employers of very different size, scope and scale might, depending on all the circumstances, be found to have clearly identifiable common interests for the purpose of bargaining together. This amendment would ensure that the FWC must also be satisfied that the operations and business activities of an employer are reasonably comparable with the other employers. It may be open to the Fair Work Commission to conclude that despite two employers of a similar size, scope and scale operating in the same industry, they are not 'reasonably comparable' once the full extent of their business activities and operations are considered.
>
> 72. This amendment would also insert new subsection 249(1AA) that would provide that, if an application for a single interest employer authorisation is made by a bargaining representative under paragraph 248(1)(b) in respect of an employer that has 50 or more employees, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved.
>
> 73. The matters specified in subparagraph 249(1)(b)(vi) concern whether relevant employers are reasonably comparable in terms of their operations and business activities. Such evidence is likely to concern the nature and size of the employers, and their operations and business activities. While some of this information may be available - at least in part - to employees, particularly in smaller enterprises, much of it will only be known to the employer or to employees only as it pertains to their role, i.e. in a partial or fragmentary way. This is particularly acute in terms of the nature of the employer's enterprise, the employer's business activities and operations. In most cases, such information will be most readily available to employers or their bargaining representatives.
>
> 74. These are considerations which must be balanced in determining who should bear the burden of establishing that the relevant test is met or not met. Having regard to the burden that could be imposed on enterprises with 20 to 49 employees, it is appropriate in such cases to require employees and their bargaining representative/s to establish that the relevant test is met when making the application for the authorisation.
>
> 75. In respect of employers with 50 or more employees, due to their increased size and complexity of their operations, they are more likely to be in a position to provide the relevant evidence going to these matters. In such circumstances, it

> would also be much more difficult for employees and their representatives to provide sufficient evidence to establish that the test is met. It is appropriate therefore that the amendments provide for a rebuttable presumption and an opportunity for employers (with 50 or more employees) to establish that the relevant test is not met in relation to their business."[256]

[213] If the matters in s.249(1AA) and s.249(3AB) are satisfied, this creates a rebuttable presumption that the requirements in s.249(1)(b)(vi) and (3) are met unless the contrary is proved. The application was made by a bargaining representative under s.248(1)(b) and each of the Respondent Employers has conceded that as at the date of the application, being 6 December 2023, they employed 50 or more employees. In these circumstances the burden of proving the contrary proposition in each case lies with the party seeking to establish this; in this case, each of the Respondent Employers.

[214] We consider that the rebuttable presumption, which is stated as 'unless the contrary is proved', must be applied according to its own terms. That is, there is an onus on the Respondent Employers, to establish that the relevant test in each case has not been met. We will return to how this approach is to be applied to each of the relevant tests involved.

6.2 Majority Support

[215] The relevant issue here is whether a majority of the employees who are employed by each of the Respondent Employers at a time determined by the Commission and who will be covered by the agreement want to bargain for the agreement.[257]

[216] It is common ground that the Commission should adopt the date that it conducted the reconciliation process for the Ballot as the time to be determined for present purposes; namely 15 January 2024. Further, it is agreed that for each of the Respondent Employers, a majority of those who voted in the APESMA Ballot supported the motion set out earlier in this decision.

[217] However, the Respondent Employers, with the exception of Delta, contended, in effect, that the Ballot results should not be accepted as demonstrating the required majority support. The grounds for that proposition included that the process leading to the Ballot involved misrepresentations and that APESMA provided inaccurate, incomplete or one-sided information which invalidated the employees' apparent consent.

APESMA's Submissions on Majority Support

[218] APESMA submitted that the evidence before the Commission confirmed that a majority of the employees of each Respondent Employer want to bargain for the proposed agreement. That is, a clear majority of the employees of each Respondent Employer supported bargaining for the proposed agreement and this was confirmed in a table outlining the results of the Ballot.[258] Further, APESMA contended that the process and information leading to the Ballot provided a proper basis for the results to be accepted.

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[256] *SJBP Supplementary EM*.

[257] *FW Act* s.249(1B)(d).

[258] *Coluccio Supplementary Statement* at [4]; *Coluccio Statement* – Annexure RC – 3.

[219] APESMA contends that the Respondent Employers' position on this issue was largely based on speculation. Further, it submitted it was necessary for them to 'show something of such import that it calls into question the authenticity and moral authority of the [Ballot] responses.'[259]

[220] APESMA also contended that the mere fact that their communications did not provide employees with a highly selective analysis of the multi-enterprise bargaining provisions would not be sufficient to fall within the scope of misrepresentation. Further, the observations made about the relative benefits of having an enterprise agreement rather than individual contracts, whilst they could have been better worded, were based upon practical experience and fell well short of being misleading.

[221] Further, APESMA submitted that not making it explicit to their members that they would be 'shut out' from bargaining for a single enterprise agreement for twelve months if the proposed authorisation were granted, was fanciful. That is, there is no evidence to suggest that any of the Respondent Employers have sought to separately bargain for a single enterprise agreement. Further, APESMA noted the absence of evidence that any of the Respondent Employers have ever been a party to a single enterprise agreement with the relevant cohort of employees.

Peabody's Submissions on Majority Support

[222] Peabody submitted the Commission cannot be satisfied that a majority of the employees employed by each of the Respondent Employers want to bargain for the proposed agreement.

[223] Peabody contended that the employees did not have an adequate understanding of what they were being asked to approve in completing the Ballot. It further submitted that the SIEA mechanism was not explained to employees in the course of conducting the Ballot. It was noted that the two website links provided to the employees did not sufficiently explain the SIEA mechanism.

[224] Peabody also questioned APESMA's conduct in establishing support for its approach in seeking a SIEA. Amongst other matters, this included that APESMA only directed the attention of its members to the benefits of the SIEA mechanism and consequently that APESMA failed to engage in a balancing act by outlining the benefits and consequences of the mechanism.

[225] In relation to the contended misrepresentations, Peabody (and others) contended, in effect, that because Respondent Employers were not aware of the intended consultation and ballot, combined with the 'threat' contained in the motions endorsed by the APESMA meetings discouraging them from speaking to their employees, there was no chance to correct the misleading information.

Ulan's Submissions on Majority Support

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[259] *APESMA Outline of Submissions in Reply* at [91], citing *CFMEU v Australian Industrial Relations Commission* (1999) 93 FCR 317 at [126], [155].

[226] Ulan submitted that the Commission would need to be satisfied that the Ballot results relied upon by APESMA clearly establish that a majority of employees supported initiating bargaining for a SIEA, and that their support was not influenced by any misrepresentations by APESMA that could vitiate their consent.

[227] Ulan contended that there were a number of misrepresentations that did have that impact. They include the alleged misleading statements or events set out below:

- In the context of an email to the SIEA Employees APESMA stated: "This would mean that when change comes you have a better industry standard, locked into an enterprise agreement, to legally protect conditions."[260] Ulan contended that the representation drew legal conclusions and conveyed to the SIEA employees that an enterprise agreement is necessary to legally protect conditions. Further, without an enterprise agreement, current conditions would not be legally protected.

- In another email, APESMA stated "Individual contracts aren't good enough – we have seen too many examples where contracts can be changed or have loopholes."[261] Ulan contended that the representation mispresented the legal enforceability of individual contracts.

- In an email to SIEA Employees at Ulan, APESMA incorrectly stated the number of SIEA Employees involved and overstated the margin of support for the Ballot.

- In an email industry update, APESMA stated that "Staff on individual contracts are being pressured to sign new contracts or lose their jobs. Problem is the contracts contain inferior conditions such as losing their redundancy entitlement. This situation could happen especially when you are on an individual contract. This is relevant because having an EA means generally your locked in EA conditions would transfer to a new employer if they purchase the mine."[262] Ulan contended that the representation was misleading because it was incomplete and conveyed a message that individual contracts would contribute to loss of job security and that an enterprise agreement would not.

- It could be inferred that APESMA's conduct influenced SIEA Employees to vote in favour of bargaining for a multi-enterprise agreement. This included following up on employees who had not voted.

- It was inaccurate for APESMA to claim, in a number of flyers, that in effect, an enterprise agreement is necessary to secure conditions and that only an enterprise agreement can lock in pay, conditions and entitlements. Further, that it was misleading to state that "Is it important to you to have your conditions locked into an Enterprise Agreement so they can't be changed without your agreement?"[263] and

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[260] Exhibit 6 – APESMA Order for Production Bundle (*Production Bundle*) at pages 4, 26, 37 and 39: we note that the phrase 'legally protect your conditions' contained within the communications on pages 37 and 39 were bolded.

[261] *Production Bundle* at page 11.

[262] *Production Bundle at* page 45.

[263] *Production Bundle* at page 65.

> "When changes occur such as restructures, roster changes, mine sales or closures we need proper legal protections for members locked into an EA instead of individual contracts…"[264].

- Various representations[265] confirmed APESMA's "one sided campaign".
- APESMA's suggestion in communications that "… employers often use loopholes to avoid applying conditions",[266] was misleading, pejorative and highly prejudicial.
- The answers below contained within a frequently asked questions bank were misleading:
  - "Q. Will the EA reduce my pay or any other conditions?" and "A. No, the EA will raise industry standards, but your individual contracts will remain in place. This means that any beneficial conditions in your contract won't change unless the EA offers something better."[267]
  - "Q. Things are ok at my work site. Why would I need an EA?" and "A. To lock your arrangements in so you do not have to worry about them getting taken away."[268]
  - "Q. What is the process for Enterprise Bargaining?" and "A: First, we must ensure that we have strong membership and support for an EA. We will then elect bargaining representatives and vote to start negotiations. Our officials and reps will attend meetings with employers and negotiate for what is important to staff. Following negotiations, we will vote again and the EA will only come into place if the majority vote for it".

[228] Ulan submitted that we should apply the approach summarised in *CEPU v South32 Worsley Alumina Pty Ltd* (***South32***)[269] in relation to the consequences which flow from misrepresentations made to employees leading up to the Ballot. Although South32 related to an application for a majority support determination, Ulan contended that it was analogous to the present circumstances. In *South32*, a union official conceded that a misrepresentation was made to South32 employees.[270] Deputy President Beaumont observed:

> "I am satisfied that on any objective level these misrepresentations made by Mr Woodage, and thereafter left uncorrected, unequivocally communicated to the Electrical employees that there was precarity concerning their current contractual entitlements notwithstanding that this was not correct."[271]

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[264] *Production Bundle* at pages 127 and 130.

[265] *Production Bundle* at page 60.

[266] *Production Bundle* at pages 168 and 171.

[267] *Production Bundle* at pages 168 and 171.

[268] *Production Bundle* at pages 168 and 172.

[269] *South32*.

[270] *South32* at [119].

[271] *South32* at [130].

[229] As a consequence of the union's admitted misrepresentation, Deputy President Beaumont held:

> "… In circumstances where a union does decide to give an explanation in order to obtain support, the fact that the explanation contains material misrepresentation may be sufficient in some cases to vitiate any consent that the employees gave in signing the petition". [272]

[230] Ulan conceded that when cross-examined, Ms Bolger gave evidence that APESMA gave oral information to the SIEA Employees during various meetings in addition to the representations made in written communication from APESMA to SIEA Employees. Ulan contended that the oral information does not have a balancing effect on the alleged misrepresentations. Further, Ulan noted that it was not clear, on the evidence, as to the number of SIEA Employees who attended the various meetings. Further, Ulan contended that 'simply hearing something in a context of a meeting is no guarantee that a person absorbs what they hear'.[273] Ulan also contended that there was 'no guarantee that if they have written material in their possession which says something to the contrary, that they have a genuine balanced view of a situation.'[274]

[231] Ulan also contended that it was unrealistic for APESMA to expect the SIEA Employees to go to the Commission website and fact check the information on the website with the written communications sent by APESMA during its campaign without advising them to do so.[275] Further, Ulan contended there was nothing in the evidence before the Commission to demonstrate that APESMA made any attempt to clarify any confusion or inaccuracies in its written communications.

Whitehaven's Submissions on Majority Support

[232] Whitehaven submitted that, on the available evidence, the Commission cannot be satisfied that the SIEA Employees fully understood what they were lending their support to and that this mean that the relevant requirement had not been met.

[233] It further submitted that there was no evidence to suggest that the SIEA employees were advised that the SIEA mechanism would commit them to bargaining for a multi-employer agreement for a period of twelve months, that it precludes them from pursuing a single employer agreement for a similar period and that it commits them to a bargaining process in which a proposed agreement can only be put to a vote if all the Respondent Employers agree with that course.

[234] Whitehaven also contended that the SIEA Employees were providing apparent support for a multi-enterprise agreement to lift the Industry standard, rather than only a select number of employers in the Industry.

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[272] *South32* at [133].

[273] PN5063.

[274] PN5063.

[275] PN5067.

[235] Further, Whitehaven contended that if the Commission were to make an authorisation which did not include each of the Respondent Employers, then the majority support criterion would not be satisfied. Whitehaven noted that the SIEA Employees voted 'yes' to multi-enterprise bargaining with all five original employers named in the Ballot. Whitehaven posited that if any of the Respondent Employers were not included in the Authorisation, the effect of the support provided by the SIEA Employees would change.

[236] It distinguished the exclusion of Wollongong Resources from the potential exclusion of any of the other Respondent Employers by submitting that the effect of the majority support did not change given that APESMA was no longer pursuing the application in relation to Wollongong Resources because operations at the Russell Vale Colliery were ceasing.

Consideration of the majority support requirement

[237] The immediate question is whether we are satisfied that a majority of employees at each of the Respondent Employers want to bargain for the proposed agreement. The fact of a majority vote at each employer in support of the Ballot question is not in dispute. It is the pre-ballot information and other processes adopted by APESMA that have been brought into issue by the Respondent Employers. Further, although the point of time for the assessment of the majority in terms of the number of employees to be considered is set by the Commission, the determination of whether there is majority support is to be made as at the date of the decision using the available evidence. In this regard, we consider that the approach confirmed by the Full Bench in *Kantfield v The Australian Workers' Union*[276] in relation to majority support determinations[277] should generally be applied given the analogous statutory setting.

[238] As is the case in the provisions dealing with majority support determinations, the Commission has broad discretion to determine the method of working out whether a majority of employees want to bargain for the agreement as s.249(1D) of the Act provides that the Commission may use 'any method [that it] considers appropriate'. This same language is used in s.273(2) of the FW Act. In respect of s.273(2) of the FW Act the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) states:

> "It is at the discretion of FWA what method it uses to work out whether a majority of the employees want to bargain (subclause 237(3)). Methods might include a secret ballot, survey, written statements or a petition…"[278]

[239] In approaching our consideration of whether a majority of employees want to bargain, we accept that APESMA must satisfy the Commission of this requirement and that the rebuttable presumptions that operate for other requirements do not apply. That is, as the relevant terms of the FW Act requires satisfaction as to this matter, APESMA as the party seeking to invoke the jurisdiction bears the risk of failure if the material before the Commission is

[276] [2016] FWCFB 8372 at [35] to [37].

[277] *FW Act* s.237(2)(a).

[278] Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) para 979.

inadequate to permit the requisite state of satisfaction to be reached.[279] It is also the party with the access to the available evidence to inform the Commission. Further, we consider that the notion of the (majority of) employees wanting to bargain involves a consideration as to whether the evidence demonstrates that this is the case. In this regard, APESMA seeks to rely on the results of a ballot to establish majority support. In this regard, we note that reliance on ballots as a means of working out whether a majority of employees want to bargain is a common practice of the Commission in applications for majority support determinations and the Explanatory Memorandum suggests this was contemplated. Noting that the same language is used in s.249(1D) we see no reason to depart from such an approach, which accords with the objects of Part 2-4 of the Act to provide a "simple, flexible and fair framework that enables collective bargaining in good faith…" (s.171(a)) and is consistent with the requirement in s.577 that the Commission performs its functions and exercises its powers in a manner that is quick and informal, avoiding unnecessary technicalities.

[240] In the absence of requirements with s.248(1B)(d) akin to 'genuine' or 'informed' support,[280] we do not consider that these notions should be implied into the provision.[281] However, in this case the Respondent Employers contend that the process leading to the Ballot involved misrepresentations and that APESMA provided inaccurate, incomplete or one-sided information which invalidated the employees' apparent consent and it is appropriate to consider whether the Ballot here is an accurate reflection of the employees' desire to bargain. Consistent with the approach adopted by the Commission to the consideration of support for bargaining in a majority support determination application,[282] this may, where relevant and appropriate, involve an assessment as to whether the Ballot was falsely derived or the responses achieved by duress or coercion.[283] We add that there is no suggestion of the latter in this case. The notion of being falsely derived may include consideration as to whether any material misrepresentation was involved in garnering backing for the proposal that would vitiate the apparent support. That is, whether the otherwise apparent wish to bargain itself is vitiated, bearing in mind that the statutory test remains whether the majority wish to bargain. Matters relevant to the consideration of alleged misrepresentations, and potentially more generally, may include the nature of the information provided to the employees, the nature of the Ballot questions and what may reasonably be implied from an affirmative answer, taking into account the circumstances and nature of the employees involved.

[241] We do not intend to describe the entire process adopted by APESMA in consulting with its membership in the lead up to making this application. Of most immediate relevance, the evidence reveals the following facts relevant to the present issue.

[242] There were various local meetings conducted by APESMA with its members to discuss matters in relation to bargaining and the SJBP reforms.[284] APESMA conducted formal meetings

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[279] See *Retail and Fast Food Workers Union Incorporated v Coles Supermarkets Australia Pty Ltd T/A Coles Supermarkets* [2021] FWCFB 4414 at [16].

[280] See by contrast ss.186(2)(a) and 188 of the *FW Act*.

[281] See by analogy the approach of the Full Bench in *National Tertiary Education Industry Union v Curtin University* [2022] FWCFB 204 at [53].

[282] *FW Act* s.237(2)(a).

[283] See the summary of cases in *South32* at [88] - [94].

[284] *Bolger Statement* at [25].

with the SIEA Employees on 28 April 2023, 19 May 2023, 11 August 2023, 20 October 2023 and 18 November 2023.[285] The general purpose of the meetings was to inform members of matters concerning bargaining and the SJBP reforms.[286] Further, APESMA used these meetings to advance its campaign for a New South Wales underground multi-employer agreement.[287]

[243] At some point early in the campaign, APESMA issued a flyer[288] encouraging the SIEA Employees to join the campaign and stated, in effect, the objectives as being to 'unite staff', 'protect our conditions', lift industry standards' and 'secure our future'.

[244] An email was sent to workplace representatives and delegates at the various mine sites of the Respondent Employers on 10 May 2023.[289] The email contained a link to a flyer[290], which they were encouraged to distribute to the SIEA Employees.[291] The flyer's heading was "SECURE YOUR CONDITIONS" and it made statements which included:

> "Only an Enterprise Agreement Can Lock in Your Pay, Conditions and Entitlements"; and
>
> "Currently your employer can change policies like redundancy pay as they like, without consulting you. Costing you thousands of dollars. All it takes a change of manager or a corporate cost saving push."[292]

[245] The 10 May 2023 Flyer emphasised the objectives of the campaign as being to 'Protect your take home pay', 'Lock in redundancy pay' and 'ensure pay-out of sick leave'.

[246] In preparation for the 19 May 2023 meeting, organisers and delegates were provided with a draft FAQ.[293] The principal aim of the FAQ was to garner support of the SIEA Employees for APESMA's multi-employer enterprise agreement campaign.[294] The FAQ included the following questions and answers (amongst others):

> **FAQ – NSW On-Shift EA**
>
> **Q:** Why should I support the NSW Underground Staff EA?
> **A:** The EA has four main beneficial goals:
> 1. Unite staff
> 2. Protect our conditions
> 3. Raise industry standards
> 4. Secure our future.

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[285] PN406 – PN410 and PN498.

[286] PN498.

[287] PN500.

[288] *Production Bundle* at page 35.

[289] *Production Bundle* at page 167; PN532 – PN534; Exhibit No. 36 – Agreed Facts of Peabody and APESMA.

[290] *Production Bundle* at page 56.

[291] PN559 and PN589; *Production Bundle* at page 30.

[292] *Production Bundle* at pages 56 and 58.

[293] PN606 – PN620.

[294] PN619.

Q: Which conditions will the EA protect or improve?
A: The Coal Industry Award base rates are too low, and employers often use loopholes to avoid applying conditions.

The EA aims to:

1. Set a minimum base pay rate for each role that employers cannot go below.
2. Protect your redundancy entitlement at 3 weeks per year of service uncapped.
3. Maintain your payout of personal leave as an industry standard.

Q: Why would we pursue a NSW EA instead of an EA for only my site?
A: Workers now have the right to bargain across multiple sites/employers due to a recent change in the law. This gives us more bargaining power and the ability to improve conditions for the entire industry, including ourselves and those who come after us. This also means if you change sites, you can do so without losing conditions. Many important conditions that we enjoy today were won through industry bargaining by coal staff in the past.

Q: Will the EA reduce my pay or any other conditions?
A: No, the EA will raise industry standards, but your individual contracts will remain in place. This means that any beneficial conditions in your contract won't change unless the EA offers something better.

Q: Will my employer reduce my conditions if my mine starts bargaining?
A: In our experience, when we start bargaining, employers try to improve conditions to present a positive image of management. Making conditions worse during negotiations backfires on employers.

Q: Things are ok at my work site. Why would I need an EA?
A: To lock your arrangements in so you do not have to worry about them getting taken away. It's great that your conditions are good, but does your employer have to consult with you before changing your conditions? There are examples where companies have changed their policies affecting redundancy without consulting the workforce. We just want to lock them in so they can't be changed without consulting and you agreeing to it.

Q: What is the process for Enterprise Bargaining?
A: First, we must ensure that we have strong membership and support for an EA. We will then elect bargaining representatives and vote to start negotiations. Our officials and reps will attend meetings with employers and negotiate for what is important to staff. Following negotiations, we will vote again and the EA will only come into place if the majority vote for it.

Q: Why is it important to have a strong union membership?
A: To bargain effectively, staff need to be united and in support of the same general improvements. The only way we can build unity and represent you is through your active membership and participation in the Association.

> **Q:** How long does Enterprise Bargaining take?
> **A:** Employers often try to delay the process and bargaining for your first ever EA can take at least a year. Once we have an EA in place, renegotiating it will be faster.

[247] Although the evidence does not reveal when, we accept that the draft FAQ was subsequently provided to APESMA members in some form.

[248] We accept that APESMA had set itself a threshold target of 80% membership at each of the mine sites.[295] For example, on 15 June 2023, a message was sent from an APESMA official (CSOA) to other officials, which read:

> "Great meetings at Wambo the last two days. Guys are 100% behind the campaign and actively seeking to join up non members. Only a couple members away from 80%. Great work (redacted) in organising the meetings and in the signs ups.".[296]

[249] Amongst other similar communications, on 2 June 2023, APESMA sent Ulan members an invitation to an upcoming union meeting on either 15 or 16 June in Mudgee, NSW. The invitation included the following explanation for the meeting:

> "There have been some exciting changes to the law which means that union members have the opportunity for the first time in decades to bargain collectively alongside other sites for an industry agreement. This is how you and forefathers won some of the most important industry conditions such as 3 weeks per year redundancy and payout of personal leave, not just for themselves but for the miners who came after them."[297]

[250] On 20 July 2023, APESMA sent out email communications to its members, which contained a link to a feedback survey on a proposed APESMA log of claims.[298] As part of the survey, SIEA Employees were asked: "Is it important to you to have your conditions locked into an Enterprise Agreement so they can't be changed without your agreement?"[299]

[251] APESMA conducted a meeting of SIEA Employee members on 11 August 2023 and passed the following resolutions:[300]

> "State of play:
>
> "We note what a great job has been done so far to explain to members and non-members the benefits of a multi employer agreement and in garnishing support from the workplaces. We further encourage all sites to complete the work to achieve the 80% density mark in the coming weeks."
>
> Next Steps:

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[295] PN566 – PN569.

[296] *Production Bundle* at page 177.

[297] *Production Bundle* at page 41.

[298] *Production Bundle* at pages 4, 26, 37, 39; PN664.

[299] *Production Bundle* at page 65.

[300] PN645 – PN649; *Production Bundle* at page 60.

> "This meeting of representatives of members of the Collieries Staff and Officials Association endorses the continuation of legal work in the making of an application to the Fair Work Commission for a single interest employer authorisation to cover on-shift staff at the following sites:
>
> - Peabody Wambo Underground
> - Russell Vale Colliery
> - Narrabri Coal
> - Delta Coal – Chain Valley
> - Integra Underground
> - Ulan No.3".

[252] An email was subsequently sent by APESMA to SIEA Employees, which contained a link to an RSVP for a meeting to be conducted on 18 November 2023.[301] The email contained the following phrase: "Individual contracts aren't good enough – we have seen too many examples where contracts can be changed or have loopholes."[302]

[253] The purpose of the 18 November 2023 meeting was to launch the multi-employer enterprise agreement campaign which APESMA was wanting to pursue.[303] Although the notion of seeking single enterprise agreements was not on the agenda for the meeting, it was discussed.[304]

[254] Amongst other updates, a relatively comprehensive briefing was provided at the meeting[305] about the legal basis for an application of the kind that has been made here. This included a briefing on the difference between single and multi-enterprise bargaining and the changes and requirements of the FW Act as amended. The meeting also discussed the log of claims and the proposed timetable leading to the proposed ballot and the lodgement of this application.

[255] Two resolutions were carried during the 18 November 2023 meeting as follows:[306]

> "**<u>Motion 1.</u>**
>
> *We, the members representing the NSW Underground EA sites of Peabody Energy Australia Coal Pty Ltd (Wambo Underground Coal Mine), Wollongong Resources Pty Ltd (Russell Vale Colliery), Great Southern Energy Pty Ltd t/as Delta Coal (Chain Valley Colliery), Ulan Coal Mines Ltd (Ulan No.3 Underground Coal Mine) and Whitehaven Coal Mining Ltd (Narrabri Coal Mine), endorse the presented log of claims as the basis for the Collieries' Staff and Officials Association to commence negotiations with our employers for a proposed multi-employer agreement covering on-shift staff at those mine sites*

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[301] *Production Bundle* at page 11.

[302] *Production Bundle* at page 11.

[303] PN814.

[304] PN815.

[305] Exhibit No. 4 – CSOA PowerPoint.

[306] *Bolger Statement* at [25].

Motion 2.

We request that Management representing the NSW Underground EA sites of Peabody Energy Australia Coal Pty Ltd (Wambo Underground Coal Mine), Wollongong Resources Pty Ltd (Russell Vale Colliery), Great Southern Energy Pty Ltd t/as Delta Coal (Chain Valley Colliery), Ulan Coal Mines Ltd (Ulan No. 3 Underground Coal Mine) and Whitehaven Coal Mining Ltd (Narrabri Coal Mine) respect our right to collectively bargain, and do not have conversations with individuals designed to undermine the group decision to bargain.

Should any of those management not respect our right to collectively bargain by attempting to influence individuals, then we, the Deputies, Shift Engineers, Control Room Operators and Undermanagers of Peabody Energy Australia Coal Pty Ltd (Wambo Underground Coal Mine), Wollongong Resources Pty Ltd (Russell Vale Colliery), Great Southern Energy Pty Ltd t/as Delta Coal (Chain Valley Colliery),Ulan Coal Mines Ltd (Ulan No. 3 Underground Coal Mine) and Whitehaven Coal Mining Ltd (Narrabri Coal Mine), commit to each other that we will not individually respond to management and will immediately call a meeting of all Deputies, Shift Engineers, Control Room Operators and Undermanagers as part of the bargaining to discuss.

We request that our union provide a copy of this resolution to our respective mine management."

[256] Amongst other similar communications, on 28 November 2023, APESMA emailed Ulan SIEA Employees with an 'Industry Update'. The update read:

"Dear Ulan 3 members,

Industry Update:

QLD BHP Daunia and Blackwater mines are being sold to Whitehaven. Staff on individual contracts are being pressured to sign new contracts or lose their jobs. Problem is the contracts contain inferior conditions such as losing their redundancy entitlement. This situation could happen especially when you are on an individual contract. This is relevant because having an EA means generally your locked in EA conditions would transfer to a new employer if they purchase the mine …"

[257] In the lead up to the opening of the Ballot, APESMA encouraged its members to vote in favour of bargaining for a single interest employer authorisation. For example, in an email exchange between what appears to be an APESMA senior organiser and Ulan delegate, the senior organiser said:

" …
2. Talk to the people who haven't voted, and once they vote mark their name.

We are all hands on deck here trying to get on to people at Ulan as well.

…"

[258] On 24 November 2023, Vero Voting opened the Ballot. The Ballot closed on 5 December 2023. As part of the ballot, the SIEA Employees were provided with a link to both the Commission and Fair Work Ombudsman website in the following terms:

> "The Fair Work Commission provides some information explaining the process for making a single interest employer agreement. Click here to access this information.
>
> The Fair Work Ombudsman also publishes a helpful fact sheet about changes to Enterprise Bargaining. If you would like to view this fact sheet, you can do by clicking here."

[259] We observe that the Commission webpage provided an overview of the changes made to the FW Act on 6 June 2023 in relation to single interest employer agreements. It provided information on the requirements of the making of a single interest employer authorisation, as well as the requirements for varying a single interest employer authorisation.

[260] The Fair Work Ombudsman link directed members to a fact sheet about changes to enterprise agreements arising from the 6 June 2023 amendments to the FW Act.[307]

[261] The employees voting in the Ballot were also provided with a log of claims for a 'New South Wales Multi-Employer Agreement'.[308] This included the nature and some detail of the matters that APESMA would be pursing as part of any bargaining should that be authorised. We observe that the content of the log is consistent with the bargaining position and justification foreshadowed by APESMA in this matter.

[262] The ballot question was stated as follows:

> **"POSITION ON BARGAINING**
>
> Do you wish to bargain for a single interest employer enterprise agreement to cover all of the employees in the following roles or classifications (and the employers listed below): [309]
>
> **Deputies, including if this role is know as:**
>
> **…**
>
> **Undermanagers, including if this role is known as:**
>
> **…**

[307] PN856, PN865 and PN4321.

[308] *Coluccio Statement* - Annexure RC-2.

[309] The detailed position titles within the original document have not been included. Those positions are the positions of the SIEA employees identified earlier in this Decision.

Shift Engineers, including if this is known as

…

Control Room Operators, including if this role is known as

…

With the following employers at the coal mines listed?

1. Wollongong Resources Pty Ltd at Russell Vale Colliery
2. Great Southern Energy Pty Ltd t/as Delta Coal at Chain Valley Colliery
3. Whitehaven Coal Mining Ltd at Narrabri Coal Mine
4. Peabody Energy Australia Coal Pty Ltd at Wambo Underground Coal Mine
5. Ulan Coal Mines Ltd at Ulan No. 3 Underground Coal Mine

(tick if "yes" or "no")"[310]

[263] A majority of employees of each Respondent Employer voted 'yes' to the ballot question. The results of the Ballot were as follows:[311]

	Chain Valley Collery	Wambo Mine	Ulan No. 3 Underground Mine	Narrabri Coal Mine	Russell Vale Collery	Total
SIEA Employees	41	37	41	43	42	204
SIEA Employees Balloted	34	37	35	35	38	179
Voters in favour of bargaining	28	28	28	29	30	143
Voters opposed to bargaining	0	0	0	3	0	3
Percentage of Voting Employees in favour of bargaining	100%	100%	100%	82.86%	100%	97.95%
Percentage of SIEA Employees who voted in	68.29%	75.68%	68.29%	67.44%	71.43%	70.10%

[310] *Coluccio Statement* - Annexure RC-3.

[311] The numbers were subsequently confirmed by the Commission on 19 January 2024 following a process of comparison agreed to by the parties.

favour of bargaining						

[264] On 4 December 2023, an email was sent from Ms Bolger to what appears to be the SIEA Employees employed by Ulan. Contained within that email is the phrase: 'At Ulan 28/35 or 80% of members voted. 100% who voted were in favour'.[312] The actual number of SIEA employees at Ulan was subsequently confirmed to be 40. Other emails were sent to the other workplaces with the results confirmed.

[265] On 5 December 2023, APESMA sent a letter to the Respondent Employers[313], proposing the negotiation of a multi-employer agreement that would cover the Respondent Employers and SIEA Employees.[314] This correspondence set out the resolutions from the 18 November meeting – set out earlier in this Decision.

[266] We accept that the Respondent Employers were not aware that APESMA was conducting the Ballot that APESMA now relies on as establishing the majority support.[315]

[267] In assessing this aspect of the matter, we are mindful that the SIEA Employees involved are senior managers and others with significant responsibilities. Some of the managers involved have firsthand knowledge of enterprise bargaining and agreements as representatives of their employer and managers or supervisors of employees who are subject to those processes and instruments of that kind.

Findings in relation to alleged deficiencies in the Ballot and related processes

[268] In broad terms, the alleged features of the pre-ballot information and other processes adopted by APESMA brought in issue by the Respondent Employers, and our findings on each, are set out below. In making these findings we accept that some of the features are related and it remains for us to assess the overall impact of the campaign having regard to the previously outlined 'onus' on APESMA.

Advocating for the SIEA application rather than consulting with the membership about their views

[269] We accept that the leadership of APESMA, having considered the options made available by the changes to the FW Act brought about by the SJBP Act, promoted multi-employer bargaining with its relevant Industry membership. However, having regard to the context, including the nature of the SIEA Employees involved, and the entirety of the communications and information leading to the Ballot, we do not consider that this was undertaken in any manner that would undermine the apparent support for bargaining for the proposed multi-enterprise agreement here. Other options were considered and it is not unreasonable for the elected officials of a registered organisation to lead a decision making process in the manner evident here.

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[312] *Production Bundle* at page 16.

[313] PN480 – PN481; see letter sent to Delta Coal at *Bolger Statement* - Annexure CB-1.

[314] *Bolger Statement* at [26].

[315] PN488; see also *Ostermann Reply Statement* at [37].

Not providing sufficient or accurate information about the proposed bargaining process

[270] This involves the contention that APESMA did not advise the SIEA Employees that, if granted, the authorisation would lock them into a bargaining process of at least 12 months without recourse to single enterprise bargaining and that the making of a multi-enterprise agreement would ultimately require each of the named employers to agree to put the proposed agreement to a vote of its employees. Further, that APESMA suggested or implied that the bargaining process would be easy.

[271] We do not accept that, when the entirety of the communications and information leading to the Ballot is considered, APESMA suggested or implied that the bargaining process would be easy. The information provided at various meetings and the responses in the Q and A bank included material that points to a likely lengthy process with some risks involved.

[272] Based upon the evidence that is before the Commission, we do accept that the material directly provided by APESMA did not include any express reference to locking the employees into a multi-enterprise bargaining process for a period of at least 12 months. However, this information was available from the websites provided to the employees as part of the Ballot. Further, the anticipated duration of at least 12 months was disclosed as part of the Q and A bank and in any event, there is no reliable indication that the Respondent Employers would have willingly participated in single enterprise bargaining for the relevant employees. Although APESMA may have sought to compel the individual employers to the bargaining table,[316] we do not consider that the Ballot results are impugned by the absence of an express reference to this aspect.

[273] Based upon the evidence that is before the Commission, we also accept that the material directly provided by APESMA did not include any express reference to the requirement that, in order to obtain a multi-enterprise agreement with their employer, each of the relevant employers would have to agree to put a proposed agreement out for the approval of the employees. This is the effect of the enterprise agreement (employee) approval process of the FW Act.[317] The websites provided to the employees as part of the Ballot may have led to relevant information; however, we accept that ideally the detail of the bargaining process in this regard would have been made clear.

[274] However, even with what may be an omission in this respect, when the entirety of the communications and information leading to the Ballot is considered, we do not consider that the information provided to the SIEA Employees concerned was misleading or inaccurate. Further, this does not lead us to the view that the apparent support for bargaining for the proposed multi-enterprise agreement here is undermined to any material degree.

Misrepresenting that the outcome of enterprise agreement negotiations would result in raising industry standards

[316] Via a majority support determination under s.236 of the *FW Act*.

[317] See the scheme of the *FW Act* in Part 2-4 including ss.180A, 182 and 184.

[275] The communications about this matter were well short of any guarantee and would reasonably have been understood by the SIEA Employees involved to be the hopefully achievable objectives in launching the bargaining and seeking the proposed agreement.

Misrepresentations concerning common law contracts and the comparative benefits of an enterprise agreement

[276] This involves the contention that APESMA misrepresented that common law contracts of employment were not enforceable or contribute to the risk of loss of entitlements arising from the Black Coal Award, and job security. This is alleged to have been done in a manner that was unable to be corrected by the employers because they were unaware that APESMA was conducting the Ballot and attempts were made to limit the capacity for the Respondent Employers to engage with their employees after the Ballot.

[277] The context for this aspect is set in part by the operation of the Black Coal Award and the FW Act and the fact that many of the SIEA Employees are engaged on comprehensive common law contracts utilising those provisions.

[278] Under s.329 of the FW Act, an employee will be a "high income employee" if the employee has a "guarantee of annual earnings" for a guaranteed period, and the annual rate of the "guarantee of annual earnings" exceeds the prescribed high income threshold. Section 330 defines a "guarantee of annual earnings" as a written undertaking from an employer to pay an employee who is covered by a modern award, an amount of earnings in relation to the performance of work during a period of 12 months or more, which the employee accepts. The effect of a GAE arrangement is that under s.47(2) of the FW Act, a modern award (such as the Black Coal Award relevant here) does not apply to an employee who is a high income employee.

[279] In broad terms, a common law contract may meet this requirement if it:

- includes an undertaking that the employee will be paid an annualised rate which exceeds the high income threshold;
- confirms that the period to which the undertaking relates is at least 12 months; and
- advises that acceptance of the undertaking will mean that a modern award will not apply to the employee during the guaranteed period.[318]

[280] The evidence is that many of the SIEA Employees are, have, or may be subject to contracts that could invoke the operation of s.47(2) of the FW Act. This means that the potential for the award-based conditions and entitlements not applying is real. Further, the issues of the pay-out of sick leave and the retention of redundancy benefits (in excess of the NES and potentially those in the Black Coal Award) are relevant as they are not provided by the Black Coal Award and to the extent that they are contained in policies of the employers, may be more susceptible to unilateral changes – depending upon the terms of the contract involved. We also understand from the evidence that concerns for APESMA and its members do arise in practice

[318] See *Association of Professional Engineers, Scientists and Managers Australia v Peabody Energy Australia Coal Pty Ltd* [2022] FCA 945.

about such matters including in the context of promotions being offered and in the context of business changes.

[281] We have set out some of the statements made about the common law contracts above. We accept that the bold assertion that such contracts are not enforceable and can legally be unitality changed, without appropriate qualifications is not correct. However, the statements made must be considered both within the context of the entire communications and information, and the implications of such contracts in the relevant workplaces including those set out above.

[282] Further, although both forms of instrument are enforceable and disputes about them can be subject to enforcement proceedings, there are many relevant differences. These include that an enterprise agreement must be undertaken following a statutory collective employee approval process, must meet various safety net and other requirements, and does not operate without the approval of the Commission. Further, an enterprise agreement must contain an appropriate dispute resolution process and enforcement proceedings can more readily be undertaken on a collective basis.

[283] As a result, we accept that some of the material provided by APESMA comparing the enforceability of individual contracts and enterprise agreements could have been clearer. Both individual contracts and enterprise agreements are legally enforceable, albeit that the ease of enforceability differs significantly. However, it would be reasonably understood that what was being emphasised was the practical experience of APESMA rather than the strict legal position. Further, the desirability from the employees' perspective of having more of their conditions contained in a collectively negotiated and more readily enforceable instrument that could not be changed without, amongst other safeguards, the approval of the Commission, is clear enough and consistent with the themes of the campaign.

[284] Further, we note that the motions passed by the meeting of 18 November 2023 and communicated to the Respondent Employers on 28 November 2023 contained a statement to the effect that:

> "Should any of those management not respect our right to collectively bargain by attempting to influence individuals, then we, (the relevant SIEA Employees) commit to each other that we will not individually respond to management and will immediately call a meeting of all Deputies, Shift Engineers, Control Room Operators and Undermanagers as part of the bargaining to discuss."

[285] Although this was directed at "not respecting the rights to collectively bargain" by "attempting to influence individuals" we would accept that this would have had the impact that the Respondent Employers may have been reluctant to engage with their employees about the proposed bargaining and the basis of that approach. However, in light of the above findings, we do consider that this has materially impacted upon the process of providing employee support for the proposed bargaining.

In relation to Ulan specifically, APESMA misrepresented the number of SIEA employees who participated in the Ballot process.

[286] This occurred after the Ballot, and we do not consider that it played any material role in the apparent support of the SIEA Employees at Ulan or more generally.

Conclusions on majority support

[287] We find that the process and information leading to the Ballot did not involve material misrepresentation that would vitiate the majority support of the SIEA Employees.

[288] We also do not accept that the information provided by APESMA when considered as a whole was misleading or inaccurate. It did not attempt to describe the detailed operation of the proposed bargaining, but it did provide a broad overview with links to appropriate information. There is also no sound basis for a finding that the Ballot results were falsely derived or unsound, or anything to suggest that the views of the employees have changed after the conduct of the Ballot.

[289] Having considered all of the evidence about the process leading to and the conduct of the Ballot, we find that the Ballot results are an accurate reflection of the SIEA Employees' intention to want to bargain in the case of each of the Respondent Employers.

[290] There is also no indication of any subsequent developments that would impact upon that finding and we further find that the requisite majority employee support remains.

[291] We turn to Whitehaven's contention that a change to the scope of the employers to be covered by the Authorisation would, in effect, delegitimise the Ballot and the support of the majority of employees at each employer. We accept that the Ballot question posited an agreement with all of the employers originally listed in the application, including Wollongong Resources and Delta Coal.

[292] However, we do not consider that Whitehaven's proposition has substance for several reasons. The point of reference for the existence of majority support is what the employees at each of the employers were supporting, not what emerges from the application, which occurs later and is beyond their control. This arises from the precise requirements of s.249(1B)(d) of the FW Act, the reference to the point in time as determined by the Commission, and from the scheme of the legislation more generally. This is confirmed by the fact that under s.250(2) and (3) it is contemplated that the Commission would not include one or more of the employers, who would otherwise be covered, where certain circumstances apply. In our view, the legislation directly contemplates a change in the scope of the employers to be covered without undermining the consent of the employees to the bargaining process involving the remaining employers.

[293] As a result, we find that the (majority support) requirements of s.249(1B)(d) of the FW Act have been met in the case of each of the Respondent Employers.

6.3 Delta Coal Agreement Coverage

[294] Given our ultimate conclusions regarding Delta Coal, it is not necessary for us to determine this aspect. However, for reasons set out below, we do not consider that this issue would ultimately have prevented the inclusion of Delta Coal within the proposed Authorisation.

[295] Section 249(1D) of the FW Act applies to an employer if the employer and the employees that will be covered by the proposed agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the Commission will make the authorisation.

[296] Delta Coal contended that s.249(1D) applies as it, and a group of the SIEA Employees, are covered by the Delta 2022 Agreement at the time the Commission would make the authorisation. This is disputed by APESMA.

[297] Clause 2.3 of the Delta 2022 Agreement provides for payment of a "step-up allowance" to 'employees appointed to undertake the following duties:

> "2.3 Allowances
>
> The base rate of pay in clause 2.1 includes all allowances, annual leave loading, over award payments and special rates, other than the allowances referred in this clause.
>
> … …
>
> b) Step up allowances:
>
> (i) Employees appointed to undertake the duties of a Maintenance Leading Hand will be paid an additional 12% on the rates described in clause 2.1 for each shift whilst appointed to the role and undertaking the duties of a leading hand.
> (ii) Employees appointed to undertake the duties of a Deputy will be paid an additional 15% on the rates described in clause 2.1 for each shift whilst appointed to the role and undertaking the duties of a deputy.
> (iii) Employees appointed to undertake the duties of a Control Room Operator – will be paid an additional 12% on the rates described in clause 2.1 for each shift whilst appointed to the role and undertaking the duties of a CRO."

[298] It might be reasonably presumed that the work contemplated by the step-up allowance would include work that might otherwise be undertaken by one or more of the SIEA Employees. However, this does not mean that the Delta 2022 Agreement covers the SIEA Employees who would be covered by the proposed Authorisation.

[299] The Delta 2022 Agreement covers Delta Coal and the following:

> • employees engaged at Chain Valley and Mannering Collieries in classifications to which this Agreement applies; and
> • those unions that have given notice to s183 of the Fair Work Act 2009 (Cth) (the Act)."[319].

[319] *Delta 2022 Agreement* Cl 1.2.

[300] The classifications stated as those covered by the Delta 2022 Agreement are Trainee Tradesperson, Trainee Operator, Experienced Tradesperson, Experienced Operator and Coal Handling Plant Operator.[320] The classifications are not defined but the provision indicates that:

> "For the purpose of this clause, tradespersons shall be deemed to be experienced once appointed as a tradesperson by the relevant Manager of Engineering, and Operators shall be deemed to be experienced once appointed to work alone."[321]

[301] It is evident that these classifications are not equivalent to the SIEA Employees intended to be covered by the Proposed Agreement.

[302] The fact that the employees who are covered by the Delta 2022 Agreement may step-up to perform the relevant work does not make them a SIEA employee and there is no evident coverage of the SIEA Employees in that Agreement.

[303] Accordingly, s.249(1D) of the FW Act would not operate here to otherwise prevent Delta Coal being included within the Authorisation.

6.4 The requirements of either ss.249(2) or 249(3)

[304] In making a single interest employer authorisation, the Commission must be satisfied that the requirements of s.249(2) or (3) are met. In the current application, APESMA relies upon s.249(3) which provides:

> "(3) The requirements of this subsection are met if:
> (a) the employers have clearly identifiable common interests; and
> (b) it is not contrary to the public interest to make the authorisation."

[305] We deal with these below.

6.4.1 Clearly Identifiable Common Interests

[306] Section 249(3A) lists a number of matters which may be relevant in the Commission's determination as to whether the employers subject to the application have a common interest. It provides:

> (3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:
>
> (a) geographical location;
>
> (b) regulatory regime;
>
> (c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

---

[320] *Delta 2022 Agreement* Cl 2.1.

[321] *Delta 2022 Agreement* Cl 2.1.

[307] Section 249(3AB) of the FW Act provides that if:

> (c) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and
>
> (d) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;
>
> it is presumed that the requirements of subsection (3) – common interests and not contrary to the public interest - are met in relation to that employer, unless the contrary is proved.

[308] As each of the Respondent Employers employed 50 employees or more at the time that the application was made, it is presumed that the Respondent Employers have clearly identifiable common interests unless they can establish that this is not the case.

[309] For us to find that the requirements of s.249(3) are not met, we must be satisfied on the balance of probabilities, on the basis of the evidence before the Commission, that each of the Respondent Employers do not have clearly identifiable common interests with each of the other three Respondent Employers. If we find that some of the Respondent Employers have clearly identifiable common interests with each other but not the other Respondent Employer(s), it is open for us to find that the requirements of s. 249(3) are met only with respect to those Respondent Employers who are found to have common interests.

What are 'clearly identifiable common interests'?

[310] In *Independent Education Union of Australia v Catholic Education Western Australia Limited and Others* (***IEU v CEWA***)[322] the Full Bench adopted the following approach of the Full Bench in *Application by UWU, AEU and IEU* (***UWU & Ors***)[323]in relation to the meaning of the expression 'common interests' in ss.243(1)(b)(ii) and (2), given the commonality of language used in those provisions and in ss.249(3)(a) and (3A):

> "…the expression 'common interests' used in s 243(1)(b)(ii) in connection with the employers the subject of an authorisation application is one of wide import, and on its ordinary meaning extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers. The diversity of the non-exhaustive list of 'examples' of common interests in s 243(2) gives contextual support to the breadth of meaning which we assign to the expression. The common interests must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident."[324]

APESMA Submissions

[311] APESMA submitted that the approach of the Full Bench in the current application should follow that of the Commission in *IEU v CEWA* and *UWU & Ors*. APESMA contended

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[322] [2023] FWCFB 177 (*IEU v CEWA*).

[323] [2023] FWCFB 176 (*UWU & Ors*).

[324] *UWU & Ors* at [34].

that it follows that the Respondent Employers have common interests and will not rebut the presumption as they operate underground black coal mines, conduct their operations in New South Wales, and have the same regulation in respect of the employment of their employees and their operations.[325]

ACTU Submissions

[312] The ACTU submitted that although the list of matters that may be relevant to determining whether the employers have a common interest at s.249(3A) is non-exhaustive, it is indicative of what the phrase 'common interests' is intended to mean. It contains reasonably high-level considerations, which it submitted suggests that there is a relatively low bar to establishing that employers have common interests.[326] The ACTU acknowledged that the matters in s.249(3A) may be regarded as characteristics, but they can be interests too. The ACTU asserted that the higher the commonality of characteristics, the more likely there will be common interests, particularly in respect of industrial matters.[327] The ACTU submitted there is no textual indicator in s.249(3A) that requires uniformity in respect of common interests or even a particularly high number. It also submitted there is no indication of the degree of common interest required, except the plural indicates more than one.[328]

[313] The ACTU further submitted that the subphrase 'clearly identifiable' in s.249(3) indicates that some particularity is required and does not go further than a need to identify. The ACTU submitted that read together, the sections indicate what is required is that the interests are both common and clearly identifiable and this does not mean there cannot be differences, but it does mean that where a significant list of common characteristics or matters that impact or influence the organisation, the test is more likely to be satisfied.[329] The ACTU submitted that it will be sufficient if the Commission is satisfied that each entity will be affected by economic, regulatory or industrial movements within their subsector in the same or similar manner.[330]

MCA Submissions

[314] The MCA submitted that the FW Act does not define "common interest". Rather, s.249(3A) sets out three factual matters which "may be relevant" to determining whether employers have a common interest, including geographical location, regulatory regime, the nature of the enterprises and the terms and conditions of employment in those enterprises. However, these factors do not necessarily need to be considered by the Commission in every case, nor does the satisfaction of these factors necessarily indicate there is a common interest. For example, the fact that two employers may be covered by the same regulatory regime, by itself, says nothing about the extent to which their interests, as they relate or may be relevant to enterprise bargaining, are aligned or common.[331]

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[325] *APESMA Outline of Submissions* at [53].

[326] *ACTU Outline of Submissions in Reply* [21].

[327] PN4584.

[328] PN4585.

[329] PN4585.

[330] *ACTU Outline of Submissions in Reply* at [23].

[331] *MCA Outline of Submissions* at [15].

[315] The MCA submitted that the reasoning of the Full Benches in *UWU & Ors*[332]and *IEU v CEWA*[333] should not be taken to support a proposition that the Commission may be satisfied of a common interest based solely on a particular characteristic (or characteristics) in common existing.[334]

[316] The Full Bench in *UWU & Ors* also observed that the precursory term 'clearly identifiable' means plainly discernible or recognisable, therefore suggesting that any common interests must be sufficiently definitive to meet this threshold.[335]

[317] The SJBP Supplementary EM states that a determination of common interests will likely require evidence "on a range of characteristics". Moreover, the term "common interests" must be applied having regard to the context and purpose of the FW Act, including the object to provide a balanced framework for cooperative and productive workplace relations that promotes fairness, flexibility and economic prosperity, and the emphasis on enterprise-level collective bargaining.[336]

[318] The MCA submitted that when considered in this statutory context, the "common interests" criterion should involve a consideration of more than mere general characteristics such as geographic location and regulatory regime. Rather, the task should involve a consideration of:

(i) whether the Respondents have specific, identifiable shared or joint goals, objectives and concerns, which could include, without limitation:
   i. the Respondents' respective production profiles;
   ii. geological features of the Relevant Mines;
   iii. life of asset;
   iv. management structures;
   v. market conditions (including customer demand, location and pressures, export markets, demand for a particular type of product, and supply demands);
   vi. price volatility;
   vii. type and scale of mining, including metallurgical coal and thermal coal;
   viii. production method;
   ix. production capability;
   x. operational costs and pricing structures;
   xi. environmental constraints and restrictions; and
   xii. workforce profile (including recruitment incentives, remoteness of mine, accommodation and job security);

(ii) whether the goals, objectives or concerns (as applicable) of the Respondent Employers are common or shared; and

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[332] *UWU v Ors*.

[333] *IEU v CEWA*.

[334] *MCA Outline of Submissions* at [17].

[335] *MCA Outline of Submissions at* [18].

[336] *MCA Outline of Submissions at* [21].

(iii) whether the goals, objectives or concerns of each of the Respondent Employers are related to, or likely to be impacted by, the enterprise bargaining or proposed enterprise agreement.[337]

[319] The MCA submitted this evaluative exercise ensures that consideration is given to factors involving the goals, objectives and concerns, which constitute the "interests" of coal mining operations, rather than limiting the evaluation to a generic and superficial analysis of a limited number of general characteristics, which might be shared by innumerable employers. The general characteristics are relevant to and should be separately addressed under the reasonable comparability criterion in s.249(1)(b)(vi) of the FW Act.[338]

Peabody Submissions

[320] Peabody submitted that the inquiry about whether the Respondent Employers have clearly identifiable common interests is whether there are any such interests relevant to facilitation of enterprise bargaining. High level commonality such as being in New South Wales and being covered by industry wide legislation is of little or no relevance to determining this issue.[339]

[321] Peabody submitted the 'clearly identifiable common interests' criterion appears to have been derived from s.247(4) of the predecessor provision for Ministerial single interest employer declarations. Section 247(4)(b) of the predecessor provision stated: 'the interests of the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together'.[340]

[322] Peabody also submitted that the concept of 'clearly identifiable common interests' is distinct from the 'reasonably comparable' criterion, although the considerations relevant to each criterion may overlap. The word 'common' calls for an identification and comparison exercise involving identification of the 'interests' of the employers and a comparison of these interests to see whether they are clearly identifiable as common.[341]

[323] Peabody further submitted that the word 'interests' must be given meaning. In s.249(3)(a) the word 'interest[s]' is being used in the sense of a concernment. A characteristic is not the same as an interest, although a characteristic might help to identify or explain an interest. Each of the matters listed in s.249(3A) as potentially relevant to determining whether employers have a common interest is a characteristic, not an interest. If the common characteristic tends to explain an interest in common, then the matter will be relevant. Otherwise, it won't be.[342]

[324] The interests must be clearly identifiable, and they must be common to all the employers, viewed through the prism of the relevant context of facilitating enterprise

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[337] *MCA Outline of Submissions* at [22].

[338] *MCA Outline of Submissions* at [23].

[339] *Peabody Outline of Submissions* at [7].

[340] *Peabody Outline of Submissions* at [10].

[341] *Peabody Outline of Submissions* at [38]-[39].

[342] *Peabody Outline of Submissions* at [39].

bargaining. This involves identifying the organisational and/or economic interests of the employers that might rationally impact on the efficiency of the bargaining process. The requirement for clearly identifiable common interests suggests a level of homogeneity in the employer's bargaining objectives, priorities and tolerances, such that enterprise bargaining would be facilitated by a multi-employer bargaining path.[343]

Ulan Submissions

[325] Ulan submitted that the ordinary meaning of 'common' is shared, joint or united. 'Interests' means common business, concerns or cause.[344]

[326] The common interests when sought to be clearly identified have to be tested against the context of enterprise bargaining. In other words, there has to be some nexus or relevance to the proposed enterprise bargaining in respect of the alleged clearly identifiable common interests.[345]

[327] Ulan submitted that the Commission's comments about the meaning of 'common interests' in *UWU & Ors*[346] were in the context of an application for a supported bargaining authorisation, which has different provisions and requirements from those that apply to a single interest employer authorisation. A single interest employer authorisation has the additional and separate requirement that, where common interest is established, the Commission must consider whether the operations and business activities of each of the employers are reasonably comparable with those other employers that will be covered by the agreement. Therefore, the inquiry about the operations and business activities occurs after establishing a common interest and supports a construction of ss.249(3) and 249(3A) that, in assessing 'common interests', the Commission first must be satisfied that there are clearly identifiable concerns or causes shared, or held in common, by the Respondent Employers.[347]

[328] Ulan submitted that the Respondent Employers have a consistent view about the approach to establishing clearly identifiable common interests. The initial focus is on the commercial concern of the Respondent Employers, variously described by each of the Respondent Employers as a "concernment"; an inquiry at company or entity level; or the goals, principles and concerns of the employers. Further, the task requires a broad assessment, not limited to the non-exhaustive list of matters to which the Commission may have regard as identified in section 249(3A). The Commission should have regard to the context of the employer's enterprise beyond the mine site where the employees work.[348]

Whitehaven Submissions

[329] Whitehaven submitted that the inquiry as to whether the Respondent Employers have 'clearly identifiable common interests' is to be performed at the company or entity level

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[343] *Peabody Outline of Submissions* at [40].

[344] *Ulan Outline of Submissions* at [9].

[345] PN5023.

[346] *UWU & Ors.*

[347] *Ulan Outline of Submissions* at [12].

[348] *Ulan Reply Submissions* at [4].

including the operations and interests of the Respondent Employers beyond the mine site the subject of the application. It may also include the interests of the broader group of companies of which each of the Respondent Employers is a part, if the interests of the related companies are aligned or overlap. This has particular relevance to Whitehaven due to the corporate structure of the WHC group, and the operations of Whitehaven.[349]

[330] While s.249(3A) provides some guidance, the provision is clearly only intended to provide a non-exhaustive list of factors which "may be relevant" to determining whether the employers have a common interest.[350]

[331] Section 249(3A)(c) identifies one of the factors which "may be relevant" as "the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises." Section 12 of the FW Act defines 'enterprise' as 'a business, activity, project or undertaking'. This inquiry appears to relate to each of the mines specified in the application. Whitehaven submitted that given that s.249(3)(a) refers to 'the employers' the particular undertaking at each relevant mine must be considered in the broader context of the interests of the employers as a whole.[351] This may include its subsidiaries as well as the interest of its parent company to the extent that the interests overlap. In this regard, Whitehaven does not submit that it is excluded on the basis that it is the relevant employing entity and does not hold the mining license and does not operate a mine.[352]

[332] Whitehaven submitted that the interests must be ones that are relevant to the facilitation of enterprise bargaining. The inquiry may not be limited to just those factors, but the focus certainly ought to be on those common interests relevant to enterprise bargaining given the context in which the words are used in s.249.[353]

Delta Coal Submissions

[333] There is no definition of the phrase 'common interests' in the FW Act and Delta Coal submitted that in, the absence of a definition, the phrase should be afforded its ordinary meaning in the context of the FW Act. The word 'interests' has many ordinary meanings but includes goals, principles and business concerns. The word 'common' means shared or joint.[354]

[334] Delta Coal submitted that the phrase is additional to, and separate from, the requirement of reasonably comparable operations and business activities and thus should be construed to have a different effect to this requirement. In context the phrase includes shared or joint goals, principles and concerns of the employers the subject of the application and is distinct from shared operations and business activities.[355]

[335] The SJBP Supplementary EM provides:

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[349] *Whitehaven Outline of Submissions* at [12].

[350] *Whitehaven Outline of Submissions* at [13].

[351] *Whitehaven Outline of Submissions* at [14].

[352] PN4893.

[353] PN4901.

[354] *Delta Coal Outline of Submissions* at [32]-[36].

[355] *Delta Coal Outline of Submissions* at [37]-[38].

> 'Determining whether the relevant employers have clearly identifiable common interests will likely require evidence to be provided on a range of characteristics of the employers, including the nature, size and scope of operations, the terms and conditions of employment across the organisations, the relevant regulatory regime and geographical location' (see *SJBP Supplementary EM*, p12, item 79).[356]

[336] Delta Coal submitted that the phrase requires that the Commission considers in a detailed way the factual circumstances (including by reference to the specified relevant matters) of at least the goals, principles and concerns of the employers the subject of the application (as opposed to merely the operations and business activities of the employers).[357]

[337] Delta Coal acknowledged that the phrase has been interpreted to encompass any joint, shared, related or like characteristics, qualities, undertakings or concerns between the relevant employers Such an interpretation includes the notion of shared or joint goals, principles and concerns.[358]

Consideration of the clearly identifiable common interests requirement

[338] At the outset, we note that there is a difference in how the non-exhaustive lists of 'common interests' are expressed in s.243(2), which deals with supported bargaining authorisation applications, compared to s.249(3A). In s.243(2), examples of common interests that employers may have include a geographical location, the nature of the enterprises to which the agreement will relate, the terms and conditions of employment in those enterprises and being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory. However, s.249(3A) provides that geographical location, regulatory regime, the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises are matters that *may be relevant to determining* whether the employers have a common interest.

[339] The result of this is that the matters in s.243(2) such as geographical location are potential common interests in relation to a supported bargaining authorisation application. However, in the case of single interest employer authorisation applications, geographical location is not necessarily an interest but a matter relevant to determining whether the employers have a common interest. The distinction is important as it means that more is required to establish that employers have clearly identifiable common interests than demonstrating that they have matters in common with respect to each item listed in s.249(3A). This is not to say that the items in s.249(3A) cannot be interests, however the basis upon which a specific item is said to be an interest rather than simply an attribute or common circumstance would need be to be established.

[340] In relation to the expression 'common interests', the parties correctly identified that this term is not defined in the FW Act. In these circumstances, the term should be construed in accordance with its ordinary meaning within the context and purpose of the FW Act. In relation

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[356] *Delta Coal Outline of Submissions* at [39].

[357] *Delta Coal Outline of Submissions* at [40].

[358] *Delta Coal Outline of Submissions* at [41].

to the word 'common', the parties variously submitted that that the word means 'shared, joint, united' and 'shared or joint'. In our view, these meanings are consistent with the views expressed by the Full Bench in *UWU & Ors*[359] as applied in *IEU v CEWA*.[360] In relation to 'interests', the parties variously submitted that that the word means 'concernment', 'business, concerns or cause', 'goals, principles and business concerns', and 'characteristics or matters that impact or influence the organisation'. All of these notions of 'interests' are useful, at least at a conceptual level. We agree with the Full Bench in *UWU & Ors* that the expression is potentially one of wide import.

[341] Consistent with the approach of the Full Bench in *Application by UWU, AEU and IEU*[361] the common interests must be 'clearly identifiable', that is, plainly discernible or recognisable, but need not be self-evident. We will return to the notion of 'interests' in the present context shortly.

[342] In relation to the inquiry as to whether the employers have clearly identifiable common interests, we note that the employees who are the subject of the application are employed by one of four employers to work at a specific mine site and that the employers have other employees who may work at another site including a different mine. The interests of each employer are not limited to the specific mine where the employees work. In this regard, we accept Whitehaven's submission that the inquiry is to be performed at the company or entity level including the operations and interests of the Respondent employers beyond the mine site. However each mine is potentially relevant to determining the employers' interests given that s.249(3A)(c) identifies one of the factors which 'may be relevant' as 'the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises'. As 'enterprise' is defined in the FW Act as 'a business, activity, project or undertaking', this would include each of the mines specified in the application.

[343] Most of the Respondent Employers have urged the Commission to take into account enterprise bargaining when determining whether the employers have clearly identifiable common interests. Peabody submitted that the inquiry about whether the employers have clearly identifiable common interests is whether there are any such interests relevant to facilitation of enterprise bargaining. Ulan submitted that there has to be some nexus or relevance to the proposed enterprise bargaining in respect of the alleged clearly identifiable common interests. Whitehaven submitted that the inquiry may not be limited to the facilitation of enterprise bargaining, but the focus ought to be on those common interests relevant to enterprise bargaining given the context in which the words are used in s.249. Enterprise bargaining is not specifically referred to in s.249(3), however the purpose of a single interest employer authorisation is to authorise bargaining between one or more employers and their employees. In our view, the provisions in s.249 need to be construed recognising that purpose.

[344] As noted above, the SIEA Employees to be covered by the Authorisation, and who are intended to be covered by the proposed enterprise agreement in the current application are limited to those appointed to one of four senior, or relatively senior, roles that are either required by the relevant mining safety legislation or undertake functions that are required. It is therefore

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[359] *UWU & Ors.*

[360] *IEU v CEWA.*

[361] At [34].

necessary to have regard to the intended coverage of the enterprise agreement when examining the interests of the Respondent Employers.

[345] We conclude that the test that we are required to consider is whether the Respondent Employers have joint, shared, related or like characteristics, qualities, undertakings or concerns that will impact or influence them in relation to bargaining for an enterprise agreement that will cover the SIEA employees. The effect of ss.249(3) and 249(3AB) when read together is that this query is answered in the affirmative with respect to the Respondent Employers unless proven otherwise. As each of the Respondent Employers claim that they do not have common interests within the meaning of s.249(3) with any of the other Respondent Employers, we are required to assess the evidence that they each rely upon and determine firstly, whether the factors relied upon as interests have been demonstrated by the evidence, secondly whether they are in fact relevant interests in relation to bargaining for an enterprise agreement that will cover the SIEA Employees, and thirdly, whether these interests are common or different as between the Respondent Employers.

[346] It is likely that when notionally identifying interests amongst employers subject to an application of this kind, some interests will be common and some interests will not be common. It is possible that an employer will have some highly specific interests which are shared by no other employer. Similarly, the same employer may have, at least at the conceptual level, very broad interests which may be shared across many employers in a range of vastly different industries and circumstances. There is also no guidance in s.249(3) as to whether the identification of different interests negates such a finding.

[347] We consider that the mere existence of more than one common circumstance that could be relevant to an interest held between the relevant employers would not be sufficient to meet the terms of s.249(3)(a) of the FW Act. The requirement for the existence of common interests is intended to be a qualifier in the context of provisions that may result in multiple employers being required to bargain together under a single interest employer authorisation and it should be applied in a manner that gives effect to its purpose. It would, for example, not be intended that the consideration of 'common interests' was applied in a purely mathematical way such that being both a national system employer and subject to the FW Act, with the associated interests that arise from this, meant that employers have 'common interests' and should be compelled to bargain together. The provisions must also be applied in a manner consistent with the objects of the FW Act. The statutory framework has as its overall object the provision of 'a balanced framework for cooperative and productive workplace relations' including by ' … 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'.[362] In that light, it cannot have been contemplated, for example, that the fact of all employers being in the same industry and covered by the same modern award would be enough in itself to constitute 'common interests' for the purposes of making an authorisation of the nature sought in this application. Such an outcome would, for example, be discordant with a system that also provides for modern awards covering employees at the industry and occupational levels and reinforces that these (common) circumstances are not in themselves interests, at least for the purposes of a single interest employer authorisation application.

[362] *FW Act* s.3(f).

[348] We have earlier found that the legislation promotes collective bargaining which achieves productivity and fairness through collective bargaining at the level of the enterprise, including where authorised and subject to the express provisions giving some priority to single enterprise agreements, at a multi-enterprise level. Given the history of the provision and the intended purpose of the single interest employer authorisation process, the Commission must evaluate the evidence about the purported interests with a view to assessing whether the employers should be required (or permitted) to bargain together. This task extends beyond considerations at the macro or conceptual level and warrants close consideration of what the discernible interests of the parties are at the level of the enterprise, particularly those that are directly relevant to the proposed bargaining. Further, we consider that the Commission must take a broad, evaluative approach and undertake a qualitative assessment consistent with the objects of the FW Act in determining whether it can be found that each of the Respondent Employers shares relevant clearly identifiable common interests.

Do the Respondent Employers have clearly identifiable common interests?

[349] It is appropriate to consider the context in which the common or different interests are said to arise. We have earlier made various findings about the nature and context of each of the Respondent Employers. We will not repeat these here but observe that the following additional findings based upon the evidence should be read in conjunction with that material.

Geographical location

[350] As set out earlier in this Decision:

- Peabody's Wambo mine is situated within the Hunter Coalfield subdivision of the Sydney basin, approximately 220kms from Sydney, 100kms from Newcastle and 25kms from Singleton.[363]

- Ulan No. 3, and the Ulan Complex, is located in the Western coalfields, approximately 45 kms from Mudgee and 25 kms from Gulgong. Mudgee is the largest town in the Mid-Western Regional Council Local Government Area with a population of approximately 13,000 people.

- Whitehaven's Narrabri Mine is the most inland coal mine in New South Wales. It is situated within the Narrabri Local Government Area, 17 kilometres south-east of Narrabri and 70 kilometres north-west of Gunnedah.[364]

- Chain Valley Colliery operated by Delta Coal is located on the southern end of Lake Macquarie, approximately 60 kilometres south of Newcastle. The Colliery is in very close vicinity to the town of Mannering Park (less than 1 kilometre) and other suburbs like Wyee Point, Kingfisher Shores and Lake Munmorah.[365]

[351] Ulan, Peabody and Whitehaven all transport coal by rail to the Port of Newcastle (Port Waratah) for export. Narrabri Mine is located around 380 kilometres from the Port of

[363] *Carter Statement* at [21].

[364] *Humphris Statement* at [36].

[365] *Cornford Statement* at [22].

Newcastle. This is the longest haulage distance in the Hunter Valley Coal Chain, a rail transport chain that delivers coal from mines in the Hunter and Gunnedah Basins to the Port. As a result of this distance, rail and haulage costs are significantly higher than they would be for other coalmine operators that are closer to the Port.[366]

[352] The issues faced at Ulan No. 3 are different to those in other mining districts. Each mining district tends to share similar issues due to the formation of the coal. For instance, mines in the Western District (which includes Ulan No.3) typically have strata and water issues. Mines in the Hunter Valley (such as Wambo) typically have a higher gas contents and lower depths of cover. The Gunnedah district, which includes Narrabri mine, typically has windblast and gas issues.[367]

Regulatory regimes

[353] Consistent with earlier findings:

- The Respondent Employers are required to comply with the *Work Health Safety (Mines and Petroleum Sites) Act 2013* (**WHS (Mines and Petroleum Sites) Act**) and WHS (Mines and Petroleum Sites) Regulation which concern safety and the employment of employees in regulated functions. Further the Respondent Employers are subject to compliance obligations set by the CI Act, including maintenance of workers compensation insurance for employees and compliance with Order 34, which gives directions to the Respondent Employers about what is required in training schemes and management for health and safety.

- The Respondent Employers who operate mines are required to be licenced pursuant to, and comply with, the Mining Act. The Respondent Employers have a common regulator namely being the Secretary of the Department of Regional NSW.

Nature of the enterprises to which the Agreement will relate

Characteristics of each employer

[354] Peabody is the employing entity of the SIEA Employees at the Wambo Mine.[368] The Wambo Mine originally commenced production in 1969. Peabody acquired the Wambo Mine in 2006 and commenced the current longwall operations at the Wambo Mine in 2007.[369] Peabody operates eight thermal and metallurgical coal-producing assets across Queensland and New South Wales. It has both open cut and underground mines and produces a range of metallurgical and thermal coals for domestic and international markets.[370]

[355] Underground mining activities at the Wambo Complex have been intermittent throughout the life of the mine. At times operations have ceased, for short and long term periods,

[366] *Humphris Statement* at [37].

[367] *Ostermann Statement* at [42].

[368] *Carter Statement* at [20].

[369] *Carter Statement* at [22].

[370] *Roberts Statement* at [43].

as mining activities have moved into different areas. Most recently, the operations ceased in 2001, and then recommenced in 2006 following capital investment into mining a new area at the Wambo Complex. This operation has run continuously since 2006, apart from temporary closures in 2020 and 2021.[371]

[356] Peabody has a mining lease over the Wambo Mine under the Mining Act, which gives Peabody the exclusive right to mine over a specific area of land as dictated by the terms of the mining lease.[372] The Wambo Mine uses the longwall mining method to extract coal.[373]

[357] Ulan operates Ulan No.3 in the Western coalfields and employs the employees who work there. Ulan is a wholly owned subsidiary of Glencore Coal Pty Ltd and part of the global Glencore Group. There are 15 operating coal mines within the Glencore group in Australia that service Glencore's customers. The operating coal mines are located in the Hunter Valley and Western coalfields in New South Wales, and the Galilee Basin and Bowen Basin in Queensland.[374] Ulan uses the longwall mining method to extract coal.

[358] As the parent company of the operators of Ulan West and Ulan Surface Operations, Ulan holds all legal and beneficial titles to land and other assets and is the employing entity for staff employees who perform shared services for the Ulan Complex generally. Unlike the other Respondent Employers, Ulan is itself a party to coal sale and supply contracts with significant Asia-based customers and Ulan undertakes exploration activities, whereas the others do not. Part of Ulan's function and purpose is identifying any additional opportunities for mining operations.[375]

[359] Whitehaven has an indirect beneficial interest in certain coalmine operations and activities by reason of the beneficial ownership of a number of companies as follows:

a) a 77.5% beneficial interest in Narrabri Mine;
b) a 100% beneficial interest in Tarrawonga Mine;
c) a 100% beneficial interest in Werris Creek Mine; and
d) a 100% beneficial interest in Gunnedah CHPP.[376]

[360] The operational function of Whitehaven is primarily as an employer and in contracting suppliers and other service providers.[377] It sells some coal product on the export market. However, the value of the coal product that Whitehaven sells is only around 10% of the total value of the coal product that is sold by WHC directly and through its controlled entities.[378] Narrabri Mine uses the longwall mining method to extract coal. It also has a small bord and pillar operation which is operated by a third-party, Mastermyne Group Limited, and accounts

[371] *Carter Statement* at [23].

[372] *Carter Statement* at [24].

[373] Carter Statement at [25].

[374] *Ostermann Statement* at [17].

[375] *Ostermann Supplementary Statement* [8]-[14].

[376] *Humphris Statement* at [10].

[377] *Humphris Statement* at [12].

[378] *Humphris Supplementary Statement* at [7].

for less than 10% of production. Undermanagers, Control Room Operators and Shift Engineers have occasional involvement in the bord and pillar operation.[379]

[361] The Delta Coal Colliery first commenced underground mining in 1962 with the bord and pillar method.[380] The Colliery is located within a couple hundred metres of the Vales Point Station. The Vales Point Station is owned and operated by Delta Electricity. Delta Electricity is also wholly owned by the Delta Parent Company. The Colliery sells its coal exclusively to the Vales Point Station.[381]

Economics

[362] The cost to establish a longwall mine and to buy equipment for a longwall mine is greater than for a bord and pillar mine.[382] Given the scale and complexity of a longwall, a longwall mining operation has a higher minimum labour component than bord and pillar mining.[383]

[363] An essential part of the economic case for a mine is recovery of the cost of capital. Given the longwall mining operation involves a high capital outlay, the recovery of that capital requires there to be a projected mine life of many years at relatively high scale production. Mr Carter's evidence is that it takes a minimum of eight years to amortise the capital outlay of a longwall mining operation. In contrast, with a bord and pillar mining operation, the mine economics are very different. The required mine life can be a lot shorter and the scale of production much lower in order to recover capital outlay.[384]

[364] Mr Robert's evidence is that cost of production is affected by a range of factors including geology, the location and characteristics of the coal seam, the mining method adopted, the scale of the operation, and stage in the mine life cycle.[385] Production costs for black coal mines are comprised of both the costs related to the extraction and processing of coal (equipment, labour costs and transport costs attributable to particular output) and also costs that are incurred in the general operation or running of the mine that are not directly attributable to a particular shipment (such as corporate overheads, royalties and compliance costs, etc).[386]

[365] Mr Ostermann's evidence is that the international market for thermal coal is highly variable and influenced by a range of factors including:

(a) International demand, and relatedly demand for electricity.
(b) International supply as customers can, and do, source coal, particularly thermal coal, from Indonesia, Columbia, South Africa, Canada, the USA and other suppliers in Australia.

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[379] *Case Statement* at [18].

[380] *Cornford Statement* at [23].

[381] *Cornford Statement* at [24]-[25].

[382] *Carter Statement* at [33]-[35].

[383] *Carter Statement* at [38].

[384] *Carter Statement* at [42].

[385] *Roberts Statement* at [29].

[386] *Roberts Statement* at [30].

(c) Government regulations and policy, including the intervention of governments (such as the intervention of the Chinese government in 2021).
(d) The reshaping of the global energy market with a focus on alternative sources of energy supply and particularly the speed of transition to renewable energy sources.
(e) Geopolitical risks and related interventions by governments.[387]

Customers

[366] Peabody operates in the domestic Australian market and the international market, and specifically in the Asia region with respect to the coal produced from the Wambo Mine. Peabody aims to sell the majority of the coal from its Wambo Mine in the branded market to customers of Japan and Taiwan and to a lesser extent, Korea. This market represents the most profitable for Peabody, as the customer is paying for coal from a known source and, based on their knowledge of and relationship with Wambo, is prepared to pay a premium in exchange for a perceived security in supply.[388]

[367] The Hunter Valley has a reputation for producing some of the highest quality thermal coal. Customers in Japan have designed their generators and other systems specifically to operate on the high-quality coal produced from the Hunter Valley region.[389] Other international customers with different geographical and environmental profiles have generators and infrastructure that are more flexible in terms of the quality of the product that can be accepted (for example, in Vietnam, China, South Korea and other South-East Asian markets, where waste disposal is of a lesser concern compared to Japan). These customers are price sensitive.[390]

[368] Peabody has negotiated a number of longer term contracts from six to 36 months with major utilities customers in North Asia. A significant amount of the coal produced at Wambo is sold on these longer-term fixed contracts.[391]

[369] Peabody's main competitors in the market for coal of the type produced by Wambo are other thermal coal producers in the Hunter Valley region who produce thermal coal with similar characteristics. There are only approximately five or six other mines who would be able to produce comparable coal to the coal extracted from Wambo Mine including two open cut mine complexes located in the Hunter Valley owned by Glencore.[392]

[370] Glencore's customers are predominantly internationally based with coal exported to various nations including, but not limited to, Japan, China, South Korea, India and Taiwan. The primary destination of coal produced at Ulan No. 3 are customers based in South East Asia, China and Japan. All coal produced at Ulan No. 3 is sold on international markets.[393]

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[387] *Ostermann Statement* at [47].

[388] *Roberts Statement* at [51]-[53].

[389] *Roberts Statement* at [56].

[390] *Roberts Statement* at [57].

[391] *Roberts Statement* at [59].

[392] *Roberts Statement* at [62].

[393] *Ostermann Statement* at [18].

[371] Each customer of Glencore requires thermal coal with certain specifications in relation to ash content and volatile matter and moisture content.[394] Glencore is able to respond to customer requirements by providing coal to meet the customer's specifications through a process of "blending" coal from different mines.[395]

[372] Ulan No. 3 production is sold through both index linked (floating) and fixed price contracts. Ulan has no preference for fixed price sales to protect it from market volatility.[396]

[373] In FY23, WHC's managed sales were distributed to the following markets in the following proportions:

a) Japan - 63%;
b) Taiwan - 15%;
c) Korea - 9%;
d) Malaysia - 7%;
e) Europe -1%;
f) Other (including Indonesia, New Caledonia, Vietnam and Chile) - 5%.[397]

[374] Japan is the primary export market for coal produced at Narrabri Mine. For FY23, 58% of coal from Narrabri Mine was exported to Japan, 17% was exported to Korea, 16% was exported to Taiwan, and 9% was exported to other markets.[398]

[375] While WHC sells a small amount of coal to domestic markets because it has been required to do so under the NSW Government's Domestic Coal Reservation Scheme, WHC does not otherwise sell to domestic markets. The Scheme is legislated to end on 30 June 2024 and WHC does not plan to sell domestically thereafter.[399]

[376] The sole commercial purpose of Delta Coal (and the Colliery) is to supply thermal coal to Delta Electricity. The purpose of Delta Coal is not to make profits but to cover its costs of providing a reliable supply of thermal coal to Delta Electricity.[400] Delta Coal receives a fixed price per tonne of coal supplied. The price set for the supply of coal does not reflect the market price for coal from time to time and does not cover the operating costs of the Colliery.[401] The Colliery does not export coal and does not have any intention to export coal.[402]

Mine life

[377] We have earlier made findings about the anticipated mine life of the relevant mines. We do not repeat those findings here, but they are relevant for present purposes.

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[394] *Ostermann Statement* at [19].

[395] *Ostermann Statement* at [34].

[396] *Ostermann Supplementary Statement* at [67].

[397] *Humphris Statement* at [28].

[398] *Case Statement* at [20].

[399] *Humphris Statement* at [29].

[400] *Cornford Statement* at [31]-[32].

[401] *Cornford Statement* at [35]-[36].

[402] *Cornford Statement* at [38].

Geology

[378] The remaining section of the coal seam currently being mined by Peabody at the Wambo Mine is geologically complex as this section is obstructed by a major regional dyke (which is a vertical plug of rock running through the coal seam). The dyke and faulting results in a higher rock content in material that is extracted from the coal seam, which has consequences including the complexity of the mining operations, a more onerous washing process and a lower yield of saleable coal.[403]

[379] One of the reasons Peabody is unable to leverage the usual advantages of a longwall mining operation is because the Wambo Mine's unique geological limitations and complexities mean operations and production are limited and unable to be scaled as compared to many of the other longwall mines in Australia.[404]

[380] The anticipated mine life of the Wambo Mine has impacted upon both volumes and costs of production.[405]

[381] The only way the Wambo Mine can be accessed is by first driving across the surface of the open cut mine in a surface vehicle from the surface departure point.[406]

[382] When there is a storm, there is an increased risk of lightning strike and crew may either be delayed or prevented from travelling across the open cut mine or entering the underground mine. Work at the underground mine may also be impacted by lightning where equipment such as the conveyor, which travels from the underground mine to the surface, needs repairing or maintenance.[407]

[383] The complex and time-consuming nature of access and egress to the Wambo Mine negatively impacts production at the Wambo Mine, and adversely affects production margins. Additionally, in order to manage these hazards, there are bespoke training requirements for employees and contractors engaged to perform work at the Wambo Mine. There are also management plans in place for both risks to minimise exposure.[408]

[384] Production at Ulan No. 3 last year was less than in previous years because of deteriorating of strata conditions.[409]

[385] The Ulan Complex has an environmental protection licence issued under the PEO Act. There are strict environmental conditions that relate to water management (discharge and usage) and the location of the mine alongside a fresh water river. The type of environmental conditions that apply to the Ulan Complex include subsidence management of public infrastructure and designated conservation areas; rehabilitation; dust management; noise management; and

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[403] *Carter Statement* at [49].

[404] *Carter Statement* at [54].

[405] *Carter Statement* at [56].

[406] *Carter Statement* at [71].

[407] *Carter Statement* at [72].

[408] *Carter Statement* at [75].

[409] *Ostermann Statement* at [40].

biodiversity.[410] The Ulan Complex also provides payments that contribute to the maintenance and upgrade of the roads between the mine and each of Mudgee and Gulgong.[411]

[386] At Narrabri Mine a number of siltstone and sandstone intrusions have presented in the coal seam where the longwall operation is occurring. This affects productivity and increases operating costs because the siltstone and sandstone are harder than the coal and result in slower shearer cycle times. Another unique geological feature of Narrabri Mine is that there is a large conglomerate unit overlaying the coal deposit at the Mine which can cause substantial and significant roof collapses within the longwall operations. To address this risk, a pre-conditioning program has been implemented at Narrabri Mine which involves fracturing the conglomerate unit from the surface before mining operations commence. The coal deposit at Narrabri Mine is naturally high in in-situ carbon dioxide content, which presents several challenges, including risks of outbursts of coal and exposure of personnel to noxious gases within ventilated roadways. To mitigate these risks, Narrabri Mine has implemented an extensive drilling program which results in significant additional costs being incurred.[412]

Terms and conditions of employment in the enterprises

[387] As set out earlier, the Application covers the roles of Deputies, Undermanagers, Shift Engineers and Control Room Operators. Each of the Respondent Employers directly employs Deputies, Undermanagers and Control Room Operators. Peabody, Ulan and Whitehaven also employ Shift Engineers, however Delta Coal does not.

[388] The SIEA employees involve, either directly or indirectly, roles or functions that are subject to the WHS (Mines and Petroleum Sites) Act and/or the WHS (Mines and Petroleum Sites) Regulation.

Workforce Characteristics

[389] We have earlier set out details for each of the Respondent Employers concerning the overall numbers employed at each relevant mine, including the number and proportion represented by the SIEA Employees, and made some findings about the degree to which they rely upon DIDO and FIFO employees.

[390] These findings are not repeated here but are relevant to this consideration.

Attraction and retention issues

[391] Peabody, Ulan and Whitehaven gave evidence about attraction and retention issues. In recent years, the Wambo Mine has had difficulty in attracting and retaining employees, due to employees knowledge about anticipated mine life.[413] The Wambo Mine's location impacts Peabody's ability to attract and retain labour resources, with many employees preferring to work closer to residential centres (where there are, for example, prominent schools or other

[410] *Ostermann Statement* at [28].

[411] *Ostermann Statement* at [29].

[412] *Case Statement* at [53].

[413] *Carter Statement* at [80].

employment opportunities in the surrounding area) or in areas with more appealing lifestyles factors, such as being near the coast.[414] Peabody competes for key skilled labour with other producers not just in the Hunter Valley region, but throughout Australia given the DIDO or FIFO nature of mining work.[415] Ulan has also had difficulty attracting and retaining employees because of the remote location of the Ulan Complex and the tight labour market.[416] The remote location of Narrabri Mine and its distance from the coast and major townships makes it difficult to attract and retain staff. There are limited facilities and services, such as schools and health services, that make the surrounding local areas less desirable places of residence, particularly for those with families and who are raising children.[417] Further, the employees that Whitehaven is able to attract often travel long distances to attend work at Narrabri Mine and commonly drive past mine sites owned and operated by competing businesses where they may be able to obtain employment to similar positions.[418]

[392] Each of the Respondent Employers addresses attraction and retention issued in various ways. Employees employed at the Wambo Mine are currently eligible for a retention bonus. To receive the retention bonus, employees must remain employed by Peabody at the Wambo Mine and not be in their notice period (including termination by reason of resignation or dismissal) at the time of startup of a particular section of the Wambo Complex, which is yet to be mined, and where operations are currently expected to commence shortly.[419]

[393] Ulan provides SIEA Employees a Regional Allowance comprising an additional payment of between $12,000 and $16,000 depending on their role[420] and accommodation costs for new employees for the first three to six months (depending on the role) of their employment.[421] Consequently most of Ulan's employees live locally and only four of the SIEA employs are DIDO employees.[422] Ulan is also supporting 18 candidates for positions as a Deputy including the provision of study assistance for both the cost of the course and time spent at classes (where they would otherwise be working), benchmarking of industry practices to better understand the industry practices and assisting for exam preparation.[423] Ulan is working with the local community to develop the area and provide additional housing to the community by developing a parcel of land it owns, known as the Hollingsworth Estate located in the Mudgee region.[424]

[394] Whitehaven provides SIEA Employees accommodation related benefits to address the disincentive that long travel times present for many employees. All Undermanagers are provided free access to camp facilities operated by Whitehaven and located about 25 kilometres from the mine site, which includes accommodation and three meals a day on days they are

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[414] *Carter Statement* at [81].

[415] *Carter Statement* at [82].

[416] *Ostermann Statement* at [63].

[417] *Case Statement* at [57].

[418] *Case Statement* at [43(d)].

[419] *Carter Statement* at [103].

[420] *Ostermann Statement* at [63].

[421] *Ostermann Statement* at [65].

[422] *Ostermann Statement* at [63]-[64].

[423] *Ostermann Supplementary Statement* at [51].

[424] *Ostermann Supplementary Statement* at [33].

rostered to work because they are all DIDO workers who travel from Newcastle, the Hunter Valley, or regional New South Wales.[425] Deputies, Shift Engineers and Control Room Operators are entitled to up to three months, or six months in extenuating circumstances, of free access to camp facilities at commencements of employment. Following this initial period, Deputies are entitled to salary sacrifice the cost of camp up to $15,000 per year.[426] SIEA Employees at Narrabri Mine have more beneficial terms and conditions of employment than SIEA Employees at Chain Valley Colliery, Wambo Mine and Ulan No.3 Mine.[427]

Rostering

[395] Each of the Respondent Employers regard rostering arrangements as an important aspect of attracting and retaining employees and meeting operational requirements.

[396] Peabody has had a recent restructure which has resulted in SIEA Employees moving to a six-day production operation with four crews working twelve hours shifts either Monday to Wednesday or Thursday to Saturday.[428] Ulan has tailored its roster to meet development consent conditions including that start and finish shift times do not coincide with school bus travel times. The rosters at Ulan No. 3 also take into account employee preferences, specifically feedback from staff that they prefer to work 10-hour shifts over four days instead of nine hours over five days. Employee preferences were used to prepare a fixed roster whereby full-time employees work four 10-hour fixed shifts per week or three 12-hour fixed shifts (which covers weekends).[429]

[397] The roster arrangements at Narrabri Mine were set after consultation with production employees, including discussions at crew talks. Employees had a preference for a '4/3' roster as having three days off was considered ideal from a lifestyle perspective, however there is increasing interest in more flexible working arrangements, including potentially a '7/7' roster. The roster for each of the four roles of SIEA Employees operates on a '4/3' shift pattern. This means that some of the employees work four days per week and then have three days off, and some employees work three days per week and have four days off. There are also three Deputies who work a '7/7' shift pattern comprising seven sequential days of work followed by seven days off. There are eight Deputy crews and five Undermanager crews who work different rosters which are either fixed or rotating and comprise shift lengths of between 9.75 and 12 hours.[430] Control Room Operators work 12 hour shifts.[431]

[398] Mr Chase's evidence was that it is essential for Whitehaven to be able to remain agile and flexible to evolving labour market dynamics, including by varying roster arrangements to meet changes in preferences of current and prospective employees. By having the flexibility to

[425] *Case Statement* at [43(f)].

[426] *Case Statement* at [39].

[427] *Case Statement* at [57].

[428] *Carter Statement* at [86].

[429] *Ostermann Statement* at [67].

[430] *Case Statement* at [27], [30], [34].

[431] *Case Statement* at [38].

vary roster arrangements, Whitehaven is more likely to be able to attract and retain talent and ensure that operations can continue.[432]

[399] The Delta Coal SIEA Employees are currently rostered on shifts that provide for an average of 36 ordinary hours of work over a one week roster cycle. Shift lengths for the Undermanagers and Deputies are currently 12 hours and are either fixed (not rotating) day shift (6.00am to 6.00pm) or fixed (not rotating) night shift (6.00pm to 6.00am). Undermanagers and Deputies work fixed 'mid-week' shift patterns (Monday, Tuesday and Wednesday) or fixed "weekend" shift patterns (Friday, Saturday and Sunday). Control Room Operators currently work a different shift pattern compared to all other roles. Weekend Control Room Operators currently work the same shift pattern as the Undermanagers and Deputies (12 hour day shifts or 12 hour night shifts). Mid-week day shift Control Room Operator works Monday to Thursday in 9 hour shifts. Afternoon shift and night shift Control Room Operators work Monday to Thursday in 9 hour shifts but rotate (between afternoon shift and night shift) every fortnight.[433]

[400] Delta Coal is proposing to introduce three 9.75 hour shifts. Following the proposed roster change, mid-week Undermanagers and Deputies will be rostered to work four fixed shifts of 9.75 hours duration Monday to Thursday. For Undermanagers and Deputies working mid-week, three shifts (night shift, day shift and afternoon shift) will be rostered per day. For Undermanagers and Deputies working weekends, the shifts will remain 12 hours. Control Room Operators will be unaffected by the proposed roster changes and will continue to work 9 hour shifts (for mid-week) or 12 hour shifts (for weekends).[434]

Contracts of Employment

[401] The Respondent Employers all engage the SIEA employees on individual contracts of employment. 'Wages' employees comprising production and engineering employees are covered by enterprise agreements. The Peabody SIEA Employees are generally paid by way of annual salary which compensates them for all Award entitlements. Salaries are reviewed on an annual basis and may change to align with industry benchmarking and market rates.[435] Of the 39 SIEA employees, 21 have a contract of employment which has a clause providing for a GAE arrangement.[436] Peabody applies the Black Coal Award to all of the SIEA Employees, in that it applies the more favourable condition to the employee as between the Black Coal Award, and their contract of employment.[437]

[402] All Ulan SIEA Employees receive annual earnings above the 'high-income threshold' referred to in the FW Act. The gross earnings for the SIEA Employees, for the 2022-23 financial year ranged from $186,841 to $311,806.[438] Of the 46 SIEA Employees, at least 29 are subject to a GAE arrangement.

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[432] *Case Statement* at [57].

[433] *Cornford Statement* at [86]-[87].

[434] *Cornford Statement* at [88].

[435] *Carter Statement* at [99]-[100].

[436] *Carter Further Supplementary Statement* at [11(a)].

[437] *Carter Further Supplementary Statement* at [11(b)].

[438] *Ostermann Statement* at [52]-[54].

[403] Under the employment contracts, Ulan SIEA Employees receive a total fixed remuneration (also referred to as a 'TFR'), which is reviewed by Ulan every December on an annual basis. The contract includes a 'Notional Base Salary' (NBS) which is 80% of the SIEA employee's TFR, and reflects that the TFR compensates for a broad range of entitlements, some of which are not payable on termination of employment. These entitlements are:

(a) the employee's normal rate of pay;
(b) superannuation contributions;
(c) meal breaks;
(d) all disabilities, allowances and leave loadings;
(e) production bonuses; and
(f) payment for rostered and unrostered overtime. [439]

[404] Each of the Whitehaven SIEA Employees have a written contract of employment that outlines the terms and conditions of their employment.[440] Whitehaven SIEA Employees also receive some employment-related benefits that are not addressed in their written contracts including the provision of up to six months of accident pay to cover the difference between any workers' compensation payments they receive and the amount they would have received if they had been at work.[441]

[405] The Whitehaven SIEA Employees have some terms, conditions and benefits of employment that are common across all of the classifications of SIEA Employees including three weeks of personal/carers leave per year, 26 weeks of paid parental leave for primary carers per year, at least five weeks annual leave per year and income protection and life insurance.[442] There are however some terms, conditions and benefits of employment that are specific to a particular classification, or classifications.[443]

[406] The Whitehaven SIEA Employees are paid an annual salary which compensates them for any reasonable additional hours, penalties, overtime, shift loadings, allowances, annual leave loading, travelling time, public holiday rates and all other disbursements. The Whitehaven SIEA Employees also have GAE arrangements. The Whitehaven SIEA Employees are each paid superannuation at the rate of the superannuation guarantee legislation.[444] In addition, a number of Whitehaven SIEA Employees have 'grandfathered' conditions of employment specific to those individuals.[445]

[407] Delta Coal has a written contract of employment for each SIEA Employee under which they are paid a base salary which compensates for allowances, loading, and penalty rates. Delta Coal provides SIEA Employees with superannuation contributions (at the superannuation

[439] *Ostermann Statement* at [55], [58].

[440] *Case Statement* at [25].

[441] *Case Statement* at [26(d)].

[442] *Case Statement* at [26(e)-(g)].

[443] *Case Statement* at [25].

[444] *Case Statement* at [26].

[445] *Case Statement* at [27], [30], [34].

guarantee contribution levels).[446] Delta Coal has not entered into GAE arrangements with SIEA Employees.[447]

Shift allowances and payment for additional work

[408] Some Peabody SIEA Employees are entitled to separate and additional shift allowances or shift loadings when they perform shift work.[448] These employees are also paid for additional hours that they might work, such as non-rostered hours, at the following hourly rates:

(a) Deputies: $100.32
(b) Undermanagers: $125.40
(c) Shift Engineers: $100.32
(d) Control Room Operators: $90.29 per hour.[449]

[409] Ulan SIEA Employees may receive a shift/roster allowance of between 10% and 15% of their NBS depending on their work pattern.[450] In addition, Ulan SIEA Employees receive the benefit of an Additional Hours Policy which provides for payment for additional time worked to cover emergencies, training and/or leave coverage. The Additional Hours Policy provides for an additional payment of between $104 per hour to $134 per hour for each employee depending on their role. It also includes payment for public holidays worked that varies between $1,482 up to $2,613 depending on the role and shift length.[451]

[410] Whitehaven Shift Engineers, Deputies and Undermanagers are entitled to an annual roster allowance of $5,000 or $10,000 depending on the type of roster they work.[452] Deputies also receive overtime payments of $96 per hour where they work a full additional shift outside of their usual roster, excluding training.[453]

[411] Delta Coal Undermanagers, Deputies and Control Room Operators are paid for additional hours that they might work (such as non-rostered hours) at the respective hourly rates of $115.01, $95.84 and $83.07.[454]

Bonuses and Incentives

[412] Peabody SIEA Employees are entitled to an annual production bonus, (subject to meeting certain eligibility criteria) which is calculated by reference to both individual and business performance, as well as safety compliance metrics.[455]

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[446] *Cornford Statement* at [84]-[85].

[447] *Cornford Supplementary Statement* at [14].

[448] *Carter Statement* at [99]-[100].

[449] *Carter Supplementary Statement* at [14].

[450] *Ostermann Statement* at [61].

[451] *Ostermann Statement* at [62].

[452] *Case Statement* at [27], [30], [34].

[453] *Case Statement* at [27].

[454] *Cornford Statement* at [85].

[455] *Carter Statement* at [101].

[413] Ulan SIEA Employees are eligible to participate in a short-term incentive plan (STIP) which provides an additional payment of up to 15% to 20% of their total fixed remuneration depending on their role. The SIEA Employee's STIP targets a number of key business and personal performance measures. The STIP assessment is directed at achieving and exceeding budgeted and expected performance outputs over the 12 month calendar budget, both in terms of business and personal measures.[456]

[414] Whitehaven SIEA Employees may be entitled to a short-term incentive payment as part of WHC's Single Incentive Plan (SIP). Eligibility for an incentive payment under the SIP is assessed based on personal, site and company performance over a 12-month period.[457]

[415] Delta Coal SIEA Employees are eligible to participate in a variable and discretionary incentive program.[458] Delta Coal has a short term incentive scheme for the Undermanagers, Deputies and Control Room Operators. Undermanagers, Deputies and Control Room Operators do not participate in a long term incentive scheme.[459]

Additional Submissions of the parties

APESMA

[416] We have earlier set out the list of factors relied upon by APESMA as constituting, or providing the context for, the common interests of the Respondent Employers. We do not repeat them here.

[417] APESMA submitted that none of the Respondents' witnesses made any attempt to, in any meaningful way, contradict Ms Bolger's evidence about those common features or factors that are relevant to them, nor to distinguish the relevance of those factors to any one or more of the employers to demonstrate that those common factors create a different interest on the part of that employer in a particular circumstance.[460]

[418] APESMA submitted that the fact that not all of these employers are actually the operator of the mine does not make any relevant difference, and it does not follow, that because there might be one feature that is different between employers, that they don't also have clearly identifiable common interests. Once the clearly identifiable common interests have been identified, that is sufficient.[461]

[419] The Commission has heard evidence about the Respondent Employers operating in the same geographical area, operating in the same jurisdiction, being subject to the same body of laws that apply in respect of this industry, employing employees doing the same types of work in the same types of enterprises, and having an interest in the continued operation of their

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[456] *Ostermann Statement* at [59]-[60].

[457] *Case Statement* at [26].

[458] *Cornford Statement* at [84]-[85].

[459] *Cornford Statement* at [89].

[460] PN4363.

[461] PN4364.

enterprises and continued compliance with those regulatory and legislative regimes in order for their businesses to continue.[462]

[420] The mines in which the SIEA Employees work are subject to the controls, particularly in the WHS (Mines and Petroleum Sites) Act and WHS (Mines and Petroleum Sites) Regulation. They include for each mine the requirement to establish and implement a safety management system at regulation 18 and the requirement that the extraction of coal be supervised by a mining supervisor, which is defined in the legislation as a person with at least a deputy certificate of competency.[463]

[421] The Deputies are the largest group of all of the different groups of SIEA Employees referred to in the application. This is the most common role with the capacity to carry out the work of supervision when coal is being extracted. That requirement about the presence of a supervisor is in regulation 87A, and the statutory function is in schedule 10 clause 10.[464]

[422] Regulation 87B schedule 10 clause 6.1 requires that a person with at least an undermanager's certificate of competency be on duty where there are more than 15 persons underground or certain activities taking place concerning ventilation or secondary extraction. Regulation 105 provides a requirement for a competent person to be contactable at the surface when any person is underground and to monitor alarms which is fulfilled by the control room operators.[465]

[423] There is also the requirement that the workplaces are managed by the preparation and implementation of control plans for risk to health and safety associated with mechanical plant and the use of electricity. The shift engineers are required to be familiar with and ensure that work is being performed in accordance with those control plans.[466]

[424] That system of controls shape the fundamental duties of the SIEA Employees, the subject of this application, and although the legislation in the main imposes the obligations upon the operators of the coal mines, and not upon employers, no relevant distinction arises because of the corporate structures that are adopted by the Respondent Employers.[467]

[425] All of the employers rely in particular upon the SIEA Employees for the satisfaction of their legal obligations because they play important roles in supervising and overseeing the work that is being performed in accordance with the legislative requirements.[468] The obligations under the legislation may only really be discharged by work being carried out by the employees, including the SIEA Employees, in accordance with the systems and practices established at that mine which the employer requires them to comply with. That is the only way in which compliance can be achieved. Whether by the employer directly or by the mine operator makes

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[462] PN4365.

[463] PN4366.

[464] PN4367.

[465] PN4368.

[466] PN4369.

[467] PN4370.

[468] PN4371.

no difference to the requirements upon the employees.[469] All of the Respondent Employers have a common interest in engaging with the legislation in the way in which their employees perform their work.[470]

[426] Paragraphs 53, 55 and 71 of the SJBP Supplementary EM provides that employers of different sizes, scopes and scale may still have common interests. These interests are amply demonstrated in the current application notwithstanding the differing sizes. One striking feature in particular is that although the mines are of different dimensions and have different sizes of workforces they employ similar numbers of persons in the cohort of classifications that are dealt with the current application.[471]

Peabody

[427] Peabody submitted that there are fundamental differences in the economics of the Wambo Mine relative to the other mines. These differences suggest that the Respondent Employers are likely to approach bargaining from different perspectives, with different agendas, and constrained by different tolerances and sensitivities.

[428] Peabody submitted that the objective of Delta Coal's operations at the Chain Valley Mine is not to make a profit, but to cover its costs of providing a reliable supply of thermal coal to the adjacent power plant. As the commercial purpose of Delta Coal at the Chain Valley Mine is so fundamentally distinguishable from that of Peabody at the Wambo Mine, the employers cannot be said to have clearly identifiable common interests.

[429] Delta Coal's Chain Valley Mine is the long-term supplier of coal to a domestic power station owned by the same parent company, Chain Valley is therefore likely to be less sensitive than Peabody to increases in its labour cost base. Also, as Chain Valley is located on the coast, near a major regional centre, it does not face the same challenges as the other mines in recruiting and retaining key staff employees. Its interests are potentially served by a standardised set of terms and conditions in circumstances where it then has a comparative advantage in its ability to attract employees to perform the relevant roles.

[430] Peabody submitted that the Narrabri Mine is looking to further expand, the explication of the Ulan No. 3 Mine's role in contributing coal for blending as part of a broader integrated operation, and the Ulan No. 3 Mine's evidence of its greater capacity and preparedness to accept fluctuations in cost and disruption to production, underscore the different interests and priorities of each of the Respondent Employers.

[431] Peabody submitted that the Ulan No.3 and Narrabri Mines are entirely different economic propositions to the Wambo Mine. Considerations of scale, capitalisation, and geology mean that the Ulan and Narrabri Mines are less labour intensive and higher margin producers at mines with significantly longer remaining mine life. As a consequence, the Ulan and Narrabri Mines have a far greater tolerance to, and capacity to absorb, increases in labour costs than the

[469] PN4372.

[470] PN4373.

[471] PN4378.

remnant coal operation at the Wambo Mine. Differences in the nature and scale of the enterprise are contemplated as relevant under s 249(3A)(c).

[432] Peabody submitted that there are material differences in the terms and conditions of employment: different rosters, use of FIFO and/or DIDO, some use GAE arrangements and others do not, and the production bonus arrangements may be very different. There is also the additional complexity that the Ulan Mine is part of the Glencore Group, which also has material interests in both the HVO Mine and Mt Owen/Glendell Mine Complex in the Hunter Valley. Neither of those mines is covered by this application. Both of those mines produce coal that is sold into the same niche segment of the thermal coal market that purchases coal from the Wambo Mine. This leaves the clear potential for a conflict of commercial and industrial interests of Peabody with those of Ulan/Glencore during bargaining. Commercial benefits could flow to Ulan/Glencore if bargaining progresses in a way that weakens Wambo.

[433] Peabody submitted that the Narrabri Mine faces challenges in attracting and retaining staff employees, requiring it to offer more beneficial terms and conditions of its employment than its competitors. It submitted that this, coupled with the materially different terms, conditions, and labour arrangements that currently prevail at each of the mines, supports a conclusion that the respondents do not have clearly identifiable common interests.

Ulan Submissions

[434] Ulan submitted that it has little of significance in common with the other Respondent Employers. Ulan is wholly owned by Glencore Coal Pty Ltd and part of the Glencore Group, and as such, forms part of the world's largest producer and exporter of thermal coal. Its role is an important part of the Glencore Group's operations in that it contributes to the Glencore's Group's capacity to deliver thermal coal to the international coal market that meets customer specifications and demands.

[435] Ulan is an integral part of the Ulan Complex of two underground mines and one surface operation which operate in connection to produce thermal coal to meet the specifications of the customers of the Ulan Complex, specifically, and the Glencore Group more generally.

[436] The terms and conditions of employment reflect additional benefits that are specific to the Ulan Complex such as an Additional Hours Policy and an Ulan Complex Regional Allowance

[437] In assessing Ulan's interest, compared to that of the other Respondent Employers, it is not useful or sufficient to simply identify the industry within which they operate, nor that they are employers. What is necessary is to assess the interests of Ulan and whether those interests are common across the other Respondent Employers.

[438] Ulan's interest is to enable the Glencore Group to meet its customer and contractual commitments through the operation of Ulan No. 3 and ownership of the other operating entities within the Ulan Complex. The business of the Glencore Group spans exploration, mining and production, processing and refining, logistics and marketing and the export of coal produced in Australia is only one of many other commodities produced and traded by the Glencore Group.

Ulan, and the Ulan Complex, is a key part of the aggregation within the Glencore Group and operates at a different level to the other Respondent Employers. In particular:

a. Ulan's role is part of the broader Glencore Group, a global diversified commodity trading with a span of business activities.
b. The Glencore Group produces a variety of coal products that can be blended to customer specifications.
c. The Glencore Group is also the largest coal producer in Australia, and the Ulan Complex is one of the four material sites within the Glencore Group.
d. Ulan is the statutory-appointed operator of Ulan No. 3 and is responsible for all aspects of the mining operations of Ulan No. 3.
e. Ulan owns other entities that form part of the Ulan Complex, and the other operators within the Ulan Complex, namely Ulan West and USO.
f. Ulan is also the entity that enters into all contracts and arrangements for the Ulan Complex and a contracting party to customer and sales contracts.
g. As part of the Glencore Group, the Ulan Complex is able to blend its coal with the coal produced by other members of the Glencore Group to create a myriad coal products. The capacity to blend coal from different assets to meet customer specifications is not available to the other Respondents (or other coal producers).
h. Ulan contributes to the synergies and value accretive processes within the Glencore group.
i. Ulan is the holder of exploration licences and part of its function and purpose is identifying additional opportunities for mining operations.

[439] Ulan submitted its significant and broad interests, in the context of a global diversified natural resource company and the largest coal producer in Australia, are vastly different to the interests of the other Respondents.

[440] The material supplied by Delta Coal illustrates that Delta Coal is a subsidiary of its one and only customer, Delta Electricity Pty Ltd (Delta Electricity). Delta Coal's sole function and purpose is confined to the supply of thermal coal to Delta Electricity on a breakeven basis.

[441] The material supplied by Peabody suggests that Peabody holds the mining lease over the Wambo Mine, but does not operate the mine rather, it is the employing entity for the SIEA Employees. We observe that the clarification to the evidence suggests the mining operations and business activities are conducted through other entities within the Peabody group.

[442] Similarly, the material supplied by Whitehaven clearly indicates that it is an employing entity within the Whitehaven group, and it hold contracts for supply, with a limited operational function.

[443] Narrabri Mine is operated by Narrabri Coal Operations Pty Ltd, a wholly owned subsidiary of WHC. Whitehaven does not take an active role in operating coal mines or other projects. Its purpose is fundamentally different both internally (within the corporate group of which it is a part) and externally (to third parties).

[444] The geographical location of each of the Respondent Employers' operations is not suggestive of a common interest because:

- each Respondent Employer falls within a different mining district which comes with distinct mining conditions and/or issues (e.g. strata concerns, water issues, geology challenges);
- each Respondent Employer's employment terms and conditions are responsive to the operations' locations (e.g. the provision of favourable terms and conditions and location allowances); and
- each Respondent supports differing engagement models of staff (e.g. FIFO/DIDO/local) to attract and retain employees due to perceived challenges with the individual Respondents' locations.

[445] Chain Valley Mine is located very close to the coast and very close to significant centres of population and significant sources of labour. The Wambo mine, is geographically close to major centres such as Singleton and Cessnock with significant sources of available labour. Narrabri is in a remote regional community where there is very little availability of local labour with the consequence that the employment model that has been adopted at that mine, is on the basis of FIFO or DIDO.[472] Ulan on the other hand, is distinct from the other three. Ulan is in a regional centre adjacent to the regional town of Mudgee. Mudgee has established facilities but the availability of all grades of employees is something that Ulan had to take a close interest in. Contrary to what has been done at Narrabri, Ulan has not opted for a FIFO model or a DIDO model. Ulan has opted for a conscious suite of employment terms and conditions, conducive to fostering a locally resident workforce. Ulan has indirectly made financial contributions to benefit the resident workforce by means of direct contributions to local community initiatives.[473] The terms and conditions of employment offered by the Respondents, ranging from remuneration and incentives to specially designed rostering systems to cater to the workforce, do not support a common interest.

[446] Ulan also submitted the following example it says has meaningful relevance to the regulatory regime for the purposes of s.249(3A)(b). Ulan pointed to the transport industry where there is a range of regulation and statutory controls for example, the legislation that controls the heavy vehicle regulator impacts on the length of time that transport drivers can be behind the wheel, the rest breaks they are required to have and the number of days they can work in particular cycles.[474]

Whitehaven Submissions

[447] Whitehaven submitted that the inquiry under s.249(3A) is whether the geographical location of the employers gives rise to a common interest. A geographical location may or may not give rise to a common interest. The mere fact that employers fall within some geographical bounds is not itself a common interest. All employers will fall within some geographical bounds depending on how wide the net is cast.[475] In the present case there is no common interest with respect to geographical location as the employers, while all being in New South Wales are in very different corners of New South Wales.[476]

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[472] PN5027.

[473] PN5028-5029.

[474] PN5033.

[475] PN4878.

[476] PN4881.

[448] Whitehaven submitted that Delta Coal is located in the Lower Lake Macquarie area close to the Central Coast, Ulan No.3 is in Mudgee, Wambo is in the Hunter Valley and the Narrabri Mine is comparatively more regional. It is located near Narrabri in Gunnedah in the North West slopes of New South Wales. The various geographical locations in each of the mines give rise to relevant and very different issues, both in terms of the operations of the Respondent Employers and regarding the terms and conditions of employment.[477]

[449] The various locations of the mines impact the operations and the economics of each of the mines because of the life of mine issue, issues as to the quality of the coal, the saleability of material, and issues of yield. All of these impact the operational limits of mines, as well as the economic reach of the mines. The locations also give rise to unique employment issues in some instances.[478]

[450] For the Narrabri mine, attracting staff is a real issue because of the remote location and provision of various terms and conditions. This gives Narrabri a very unique position when compared to the others.[479]There is no large regional centre close by and approximately half of the relevant workforce live locally but the others are DIDO workers or FIFO workers.[480] Whitehaven submits the geographical location in the present application, far from giving rise to the common interest, demonstrates the different interests between each of the employers.[481]

[451] Whitehaven is the employing entity within the broader WHC group of companies. Whitehaven owns a number of companies, and by reason of that ownership, it has direct and indirect beneficial interest in certain coalmine operations and activities. Whitehaven is itself a wholly owned subsidiary of WHC and, as such, the direct and indirect beneficial interest in certain coalmine operations and activities is ultimately held by WHC. Whitehaven enters into contracts with suppliers and other service providers on behalf of the controlled entities of WHC that operate coalmines and other projects. Whitehaven sells some coal product on the export market, which represents some 10% of the total value of the coal product sold by WHC and its controlled entities.

[452] The above interests can be contrasted with those of the other Respondents as follows:

(a) Peabody operates eight thermal and metallurgical coal-producing assets across Queensland and New South Wales. That is, Peabody itself undertakes the operational activities at eight mines, including two thermal coal producing mines in New South Wales;
(b) Ulan, a wholly owned subsidiary of Glencore Coal Pty Ltd, owns and is the appointed statutory operator of the Ulan No. 3 Mine. Ulan also undertakes exploration activities; and
(c) Delta Coal operates the Chain Valley Colliery. Delta Coal also sells the coal from the Colliery exclusively to the power station owned and operated by its related

[477] PN4882.

[478] PN4883.

[479] PN4884.

[480] PN4885.

[481] PN4886.

entity. That is, Delta Coal does not participate in the sale of coal on the open market. It solely supplies coal to its related entity, in the domestic market.

[453] Considering the interests of the Respondents, it is clear that Delta Coal is an outlier. Its interests in coal production are entirely for the benefit of the power station owned and operated by its related entity. It does not sell coal to the broader domestic or export markets.

[454] Although Whitehaven does have direct and indirect beneficial interest in certain coalmine operations and activities, its interests are distinct from those of Peabody and Ulan. Unlike Peabody and Ulan, Whitehaven does not itself operate any mine, including Narrabri Mine. Its role within the WHC group of companies is distinct and different to that of Peabody and Ulan within their respective company structures.

[455] There are also clear differences in the operations of the mines the subject of the Application which impact the Respondent Employers' respective interests. These differences include:

(a) the different locations of the mines, with Narrabri Mine being the most inland mine. The location of the mine impacts production costs as distance from port impacts transport costs and presents other challenges;
(b) Narrabri Mine, Wambo Mine and Ulan No. 3 Mine engage in longwall operations, whereas the Chain Valley Colliery is engaged in bord and pillar operations. This impacts on cost of production, establishment and equipment costs and minimum labour components;
(c) the geology affecting each of the mine sites is distinct and unique. For Narrabri Mine, this includes stone intrusions in coal seam, conglomerate unit overlaying coal deposit and high in-situ carbon dioxide content. This impacts operations, costs and production;
(d) production levels vary significantly across the respective mines. Narrabri Mine is producing approximately twice as much as Wambo Mine and Ulan No. 3 Mine. Chain Valley Colliery is producing significantly less;
(e) mine life is different across the respective mines. Narrabri Mine has the longest potential mine life, with approval pending to operate until 2044 and the possibility of operations continuing beyond that date;
(f) travel to site is significantly longer at Wambo Mine and Ulan No. 3 Mine, which impacts production, productivity and rostering;
(g) coal pricing is varied across the respective mines. Due to its unique operation, Delta Coal's pricing does not reflect market price. Peabody and Ulan utilise fixed pricing, whereas Whitehaven is obtaining a better average price; and
(h) the coal produced by each respective mine is sold in different markets. Peabody sells in the domestic and international market. Whitehaven and Ulan sell in international markets (primarily Asia). Delta Coal only supplies to its related entity.

[456] The evidence before the Commission discloses that each of the Respondents has unique terms and conditions of employment that apply to the groups of employees at the respective mines who are captured by the application. This includes distinct shift and roster patterns (e.g. Delta Coal), and, in some more limited instances, terms and conditions of employment that are specifically agreed to by employees (Peabody), or are tailored to development consent conditions (Ulan).

[457] The workforce considerations at Narrabri Mine are unique, compared with the other respective mines the subject of the Application. The distance of Narrabri Mine from the coast and major townships means that it is difficult to attract and retain employees.

[458] Narrabri Mine (compared with the other mines) is located regionally and there are limited facilities and services in the local areas that make those areas desirable places of residence, particularly for those with families and who are raising children. For example, there are only limited options for schooling, employment, and health services in the areas local to the Mine.

[459] The employees that Whitehaven is able to attract often travel long distances to attend work at Narrabri Mine. It is common for employees to travel to work at the Mine by driving past mine sites owned and operated by competing businesses where they may be able to obtain employment to similar positions.

[460] Whitehaven submitted that the fact that the employers operate in a highly regulated industry, specifically with respect to safety, is not an irrelevant factor when considering common interests. Safety regulations and regimes have some relevance to enterprise bargaining because for example, they may impact on some contents of an enterprise agreement. They impact on the duties or responsibilities of the relevant employees employed in each of the mines. However, the mere fact that there is a heavily regulated industry with strict requirements as to duties and persons employed and requirements for safety management systems has low relevance (compared to other matters) to the facilitation of enterprise bargaining.[482]

[461] The differences in the operations of the respective mines, and in the workforces at each of the mines simply identify the limited nature of the common interests between the Respondents. Apart from the superficial commonality of the relative mines being underground coal mines, and the relevant employees being covered by the Black Coal Award, upon close examination of the evidence before the Commission, the Commission cannot be satisfied that the Common Interest Issue or test is met.

Delta Coal Submissions

[462] Delta Coal submits that the goals, principles and concerns of Delta Coal are not shared with the other Respondent Employers. Delta Coal is not part of the same corporate group as the other Respondent Employers. Delta Coal does not have some common ideological approach as the other Respondent Employers. Delta Coal has a goal and sole interest of supplying thermal coal to its related company Delta Electricity at a set price so that Delta Electricity may generate domestic electricity. Delta Coal has no interest or goal in producing a higher-quality thermal coal and exporting coal and or being part of or engaging in larger operations. Delta Coal has no interest in generating a profit or operating for commercial gain.

[463] Delta Coal submits that it has a different geographical location to the other Respondent Employers. The Chain Valley Colliery is in very close proximity to Mannering Park and other suburbs. The Chain Valley Colliery is in a different geographic region of NSW (the Central Coast region). Due to this proximity to the community and Lake Macquarie, Delta Coal has an

[482] PN4890.

acute interest in minimising environmental impacts of surface subsidence. Delta Coal has not previously sought or negotiated (or had a goal of achieving) terms and conditions of employment for any of its employees in common with (or at the same level as) employees of the other Respondent Employers.

[464] In considering in detail the goals, principles and concerns of Delta Coal compared to the goals, principles and concerns of the other Respondent Employers, Delta Coal does not have common interest with those employers. Further, in light of its different nature, size and scale of operations and business activities, Delta Coal does not have common interest with those employers.

[465] The terms and conditions of employment provided by it to its employees are not common with other Respondent Employers and thereby indicate that it does not have clearly identifiable common interests with the other Respondent Employers within the meaning of s.249(3)(a) of the FW Act. Delta Coal does not provide guarantees of annual earnings, does not provide regional or accommodation allowances and does not provide income protection or life insurance. Delta Coal also does not operate or manage, directly or indirectly, other mines or mining activities (unlike some of the other Respondent Employers).

[466] Noting that APESMA submitted that all of the Respondent Employers had an interest in complying with the regulatory regimes to enable them to continue their operations, Delta Coal contended that this statement could be said with respect of any employer. That is, this statement is not a point of distinction or an indicator of comparability, and nor is it an indicator of common interest.

Consideration of the clearly identifiable common interests requirement

[467] APESMA claims that the Respondent Employers have common interests because they operate underground black coal mines in NSW, are required to comply with the same regulatory regime, are statutorily required to engage and do employ employees in regulated functions such as Undermanagers, Deputies, Shift Engineers and Control Room Operators, and that these employees are covered by the Black Coal Award.

[468] The Respondent Employers do not dispute these factual matters but disagree that they are indicative of them having 'clearly identifiable common interests' for the purpose of s.249(3)(a). There is no requirement that consideration of common interests have regard to all or any of the matters in s.249(3A) however the submissions and evidence of APESMA largely approached the issue of 'clearly identifiable common interests' by addressing these matters.

[469] The evidence relied upon by each of the Respondent Employers sought to differentiate themselves from the other three Respondent Employers by reference to location, mine life, mining method, equipment, transport considerations, geology, customers, production and conditions of employment. We have made factual findings about these matters above. As a result, we first must consider whether each of these matters are interests and if not, whether they give rise to a relevant interest, within the context of the present statutory requirement. In making that assessment, we place significant weight upon interests where they are likely to impact or influence the Respondent Employers in relation to bargaining for an enterprise agreement that will cover SIEA Employees.

Terms and conditions of employment in those enterprises

[470] It is logical to commence our inquiry about matters which impact or influence the Respondent Employers in relation to bargaining by examining the current terms and conditions in the enterprises where the SIEA Employees work and whether they give rise to clearly identifiable common interests. APESMA submitted that the Respondent Employers have have clearly identifiable common interests because they have the same regulation in respect of the employment of their employees, including the SIEA Employees, namely by the FW Act, the CMI (Long Service Leave) Administration Act and the Black Coal Award. The Respondent Employers broadly submitted that the different terms and conditions at each of the mines are matters which weigh against a conclusion that the Respondent Employers have clearly identifiable common interests.

[471] The evidence of the Respondent Employers demonstrates that they have common concerns that impact or influence their respective organisations with respect to the engagement of employees. The first of these is the requirement that they employ Deputies, Undermanagers, Shift Engineers and a surface competent person to fulfil the statutory functions under the WHS (Mines and Petroleum Sites) Regulation. The Respondent Employers cannot operate their respective mines without such personnel. This is the case regardless of issues which may affect the profitability and productivity of the mines. To employ persons in these roles, the Respondent Employers must provide conditions of employment which will attract prospective employees and retain current employees.

[472] All of the Respondent Employers, apart from Delta Coal, provided evidence of the challenges in attracting and retaining employees, given the distance of the workplace from residential centres well serviced by schools and health services or with more appealing lifestyle factors. In Peabody's case, difficulties attracting and retaining employees also arose from the anticipated mine life of the Wambo Mine. Peabody's evidence is that it competes for key skilled labour with other producers not just in the Hunter Valley region, but throughout Australia given the DIDO or FIFO nature of mining work.

[473] The Respondent Employers proactively sought to address these issues by paying the accommodation costs of employees in the first three to six months of employment, in the case of Ulan and Whitehaven, and providing a retention bonus in the case of Peabody. Ulan sought to encourage employees to settle in the local community by providing an annual regional allowance and improving community facilities, services and infrastructure whereas Whitehaven sought to provide more favourable pay and conditions compared to the other Respondent Employers and to support FIFO and DIDO employees by making camp facilities available.

[474] Putting to one side the conditions of employment that are intended to address the challenges of attracting employees to work in regional and remote areas, the Respondent Employers demonstrated a common approach to conditions of employment in many respects. All of the Respondent Employers employed SIEA Employees pursuant to individual contracts of employment and their production and engineering employees pursuant to enterprise agreements. All of the SIEA Employees are paid an annual salary which is inclusive of most award entitlements and receive superannuation at superannuation guarantee contributions rates. All of the SIEA Employees are eligible to receive annual bonuses which are contingent on

specific conditions being met, which generally include business and personal performance measures. All of the Respondent Employers have arrangements in place to pay at least some of the SIEA Employees additional remuneration which recognises shift work and work performed in addition to the usual roster. All of the Respondent Employers, apart from Delta Coal, have GAE or similar arrangements with the majority of their SIEA Employees.

[475] All of the Respondent Employers have implemented rosters which aim to maximise the productivity of the mine and are attractive to employees. These rosters provide for employees to either work four days per week and then have three days off, or to work three days per week and have four days off. Some of the Respondent Employers provide for both of these types of roster and in one case a 7/7 roster. The rosters vary in shift length from between 9.75 and 12 hours and in starting and finishing times.

[476] The evidence establishes that for each of the Respondent Employers, terms and conditions of employment have not been set in a vacuum, but for the purpose of ensuring that each of the Respondent Employer employ sufficient numbers of SIEA Employees who are available to work throughout the times that the respective mines are operating to fulfil their statutory obligations. It follows that the specific terms and conditions of employment that the Respondent Employers apply to each of the SIEA Employees are not interests but means of achieving specific intentions or requirements of the Respondent Employers. It is these intentions or requirements of the Respondent Employers which are the interests that we are required to examine and consider whether they are likely to significantly impact or influence each of the Respondent Employers in relation to bargaining for an enterprise agreement that will cover the SIEA Employees.

[477] In our view, the evidence establishes that the Respondent Employers' approach to conditions of employment indicates that the Respondent Employers generally want to:

i. negotiate individually with employees in relation to significant aspects of their employment conditions such as annual remuneration by providing individual contracts of employment;
ii. incentivise employees to perform well both at an individual level and as part of the business they are working for by providing annual bonuses;
iii. incentivise employees to engage in shift work and work additional hours by compensating them for doing so;
iv. implement rosters which maximise the productivity of the mine, are attractive to employees and provide for employees to have at least three consecutive days off after each roster period.

[478] In addition, there was evidence that Peabody, Ulan and Whitehaven have a specific interest in overcoming attraction and retention challenges so they each have sufficient SIEA Employees to operate their respective businesses and to fulfil regulatory requirements. Peabody, Ulan and Whitehaven apply GAE arrangements to the majority of their SIEA Employees whereas Delta Coal does not. This suggests that Delta Coal has an interest in recognising and applying award conditions which may not be shared in the same manner by the other Respondent employers.

[479] We find that the intentions or wishes of the Respondent Employers as described above will impact or influence each of them in relation to bargaining for an enterprise agreement that

will cover SIEA employees, rather than the conditions of employment which are the means by which the Respondent Employers' intentions are achieved.

[480] Although specific terms and conditions may be different across organisations, we find that evidence of the Respondent Employers shows that they broadly have the same approach to terms and conditions which are underpinned by some interests which are common to each organisation and others which are common to Peabody, Ulan and Whitehaven only.

The nature of the enterprises to which the agreement will relate

[481] Each of the Respondent Employers employ SIEA Employees who work at a specific black coal mine which is the subject of the application. Delta Coal and Ulan operate the mine where their employees work. Peabody holds the mining lease over the mine where its employees work but does not operate the mine. Whitehaven does not operate the mine where its employees work but holds an indirect beneficial interest in the mine. Whitehaven submits that it has different interests compared to Ulan and Peabody as it does not operate a mine and its role within the WHC group of companies is distinct and different to that of Peabody and Ulan within their respective company structures. Ulan operates at a different level to the other Respondent Employers due to the expansive activities of the Glencore Group which include exploration, mining and production, processing and refining, logistics and marketing. The export of coal produced in Australia is only one of many other commodities produced and traded by the Glencore Group.

[482] We accept that the evidence establishes that Peabody and Whitehaven do not operate a mine and that the nature of Ulan's operations is wider than the other three Respondent Employers. These differences may give rise to specific interests that are different amongst the Respondent Employers. For example, Ulan articulates its interest as being to enable the Glencore group to meet its customer and contractual commitments through the operation of Ulan No. 3 and ownership of the other operating entities within the Ulan Complex. It is unlikely that this interest is shared by the other Respondent Employers. However, in assessing whether the Respondent Employers have proven that they do not have common interests for the purpose of s. 249(3), greater weight should be given to these interests which are relevant to bargaining for an agreement which would cover the SIEA employees. Whitehaven has not adduced evidence which establishes that its interests in relation to bargaining for an agreement which covers the SIEA Employees are different to one or more of the Respondent Employers because it does not own a mine. Similarly, Ulan has not adduced evidence which establishes that its interests in relation to bargaining for an agreement which covers the SIEA Employees are different because of its development and exploration activities.

[483] The Wambo mine operated by Peabody has the shortest mine life compared to the other three mines the subject of the application. Whitehaven, Peabody and Ulan employ the longwall method of mining at the mines which are the subject of the application whereas Delta Coal uses the bord and pillar method. Whitehaven also has a small bord and pillar operation at Narrabri which accounts for less than 10% of production. The establishment costs for a longwall mine is higher than a bord and pillar mine however once in operation, longwall have a higher rate of production compared to bord and pillar mines. These are attributes of the enterprises where the SIEA employees work rather than interests. Whitehaven submits that these matters impact upon production, establishment and equipment costs and minimum labour components. Despite

having similar markets for their coal, Peabody submits that its interests do not align with Ulan and Whitehaven as their mines are less labour intensive, have higher levels of production and longer remaining mine life, compared to Wambo. The Ulan and Narrabri Mines therefore have a far greater capacity to absorb increases in labour costs than the remnant coal operation at the Wambo Mine.

[484] Whitehaven, Peabody and Ulan all sell coal on the international market to customers in Japan, Taiwan Korea and other countries in Asia. They are all concerned with obtaining the best price for their coal, however Peabody's production costs are higher compared to the other Respondent Employers because the highest yielding sections of underground mines in the Wambo Complex have been extracted, and Peabody is now mining the last remaining section within the approved mining lease which has high rock content and is putting additional strain on Peabody's ageing equipment. Because of the high costs of production, relatively lower margins and stage of mine life, about 50 to 60% of the coal produced at Wambo is sold on longer-term fixed contracts. Ulan No. 3 production is sold through both floating and fixed price contracts. Whitehaven is obtaining a better average price compared to the other Respondent Employers.

[485] The sole commercial purpose of Delta Coal (and the Colliery) is to supply thermal coal to Delta Electricity. The purpose of Delta Coal is not to make profits but to cover its costs of providing a reliable supply of thermal coal to Delta Electricity. Delta Coal receives a fixed price per tonne of coal supplied. The price set for the supply of coal does not reflect the market price for coal from time to time and does not cover the operating costs of the Colliery.

[486] We understand the submissions of the Respondent Employers in relation to whether the nature of their respective enterprises give rise to a common interest to be broadly that their different production levels and margins establish that they do not have common interests. Production and profitability are influenced by location, mine life, mining method, equipment, transport considerations, geology, customers, production, all of which vary between the Respondent Employers and potentially lead to different interests. However, Ulan, Whitehaven and Peabody have not shown how their different circumstances with respect to production and profitability are relevant to bargaining with the SIEA Employees.

[487] We accept that there will be circumstances in which the commercial purpose of employers may be relevant to bargaining. However, the evidence does not establish that the Respondent Employers' commercial interests and activities have meaningfully influenced employment conditions for the SIEA Employees to date. Peabody provided evidence that its operations have affected some employment issues but not pay and other core conditions. There was evidence that Peabody partially ceased operations at Wambo for two months in 2020 then decided to recommence operations because of increased prices in coal. At that time, it commenced discussions regarding the implementation of an organisational restructure at the Wambo Mine resulting in a reduction of the Wambo Mine's operational days from seven days to six days and an increase to the duration of shift lengths. However, there was no evidence which established that the pay and core conditions of Peabody's SIEA Employees was reduced or altered in any way at that time or at any other time because of Peabody's operations.

[488] We do however acknowledge that conditions for SIEA Employees have not, to date, been determined through a process of bargaining which creates a different dynamic in the way

in which terms and conditions of employment are set. In this case, the bargaining proposed is in relation to a relatively small and distinct group of employees at each enterprise. The evidence demonstrates that the attraction and retention of these SIEA Employees is the overriding matter which has influenced pay and conditions amongst Ulan, Whitehaven and Peabody, not just commercial purpose, and it seems likely that this is an interest that will persist in a bargaining context. Delta Coal did however provide evidence of its different commercial purpose compared to the other three Respondent Employers and we accept that this is relevant to its priorities in bargaining because it is not subject to the same cost and price pressures experienced by Ulan, Whitehaven and Peabody arising from selling coal on the competitive international market for the purpose of making profit. Further, as we have earlier noted, Delta Coal's interests are different to those of the other Respondent Employers given their interest to overcome particular attraction and retention challenges that are not shared by Delta Coal, and which can be expected to influence their respective approaches in a bargaining context.

Geographical location and regulatory regime

[489] APESMA submitted that as the Respondent Employers all conduct their operations in New South Wales, this is indicative of them having clearly identifiable common interests. The Respondent Employers disagree, submitting that the mere fact that employers fall within some geographical bounds is not itself a common interest and that it is necessary to establish that the geographical location of the employers gives rise to a common interest. The Respondent Employers claim that the geographical location of each of the Respondents' operations is not suggestive of a common interest and point to each of the Respondent Employers operating within different mining districts with different geological issues, different conditions of employment which are responsive to the locations of their operations and different ways of addressing attraction and retention issues. They also submit that Peabody, Ulan and Whitehaven all transport coal to Newcastle Port by rail and that their varying distances from that location results in different time and costs involved which impact upon production.

[490] We accept the submissions of the Respondent Employers that their location in New South Wales does not, by itself, give rise to a common interest. However, the location of the Respondent Employers in New South Wales gives rise to a requirement that each of the Respondent Employers comply with relevant New South Wales legislation and that they have a common regulator, the Secretary of the Department of Regional NSW. Each of the Respondent Employers is required to comply with relevant New South Wales legislation, such as the WHS (Mines and Petroleum Sites) Act and Regulation, the Mining Act and the CI Act. In our view, some aspects of this legislation are relevant to bargaining for an agreement which covers SIEA Employees, most notably the WHS (Mines and Petroleum Sites) Act and Regulation which requires each of the Respondent Employers to employ Undermanagers, Deputies and Shift Engineers and competent persons at the surface, often employed as a Control Room Officer.

[491] The differences which the Respondent Employers point to which arise from geographical locations relate to employment conditions as well as geological features and transport costs which can alter the pace and cost of production. Although the Respondent Employers are located in different parts of New South Wales, two of the Respondent Employers, being Ulan and Whitehaven experience attraction and retention issues because of their remote and regional locations, so they have a common interest in overcoming these issues,

as noted above. Geological features and transport costs are relevant to the Respondent Employers' commercial interests and activities. We have already found that in the case of Ulan, Whitehaven and Peabody there is insufficient evidence to establish that differences in commercial interests and activities are sufficiently relevant to bargaining for an agreement which will cover the SIEA Employees so as to overturn the rebuttable presumption.

Conclusion on the clearly identifiable common interests requirement

[492] We have considered all of the evidence and submissions of the parties in relation to the requirements of s.249(3) and we are not satisfied that that Ulan, Whitehaven and Peabody have established that they do not have clearly identifiable common interests with each other in relation to bargaining for an enterprise agreement to cover the SIEA Employees. Ulan, Whitehaven and Peabody were unable to make the requisite connection between the (different) interests they identified and the facilitation of bargaining. In many cases where Ulan, Whitehaven and Peabody claimed differences between them, such as conditions of employment, a closer examination of these matters revealed them to be attributes, rather than interests, and gave rise to interests that are common. Our examination of the evidence revealed that Ulan, Whitehaven and Peabody have common interests arising from the terms and conditions of employment of the SIEA Employees and the regulatory regime which mandates their employment. However, in the case of Delta Coal, it has established that its sole commercial purpose is not to make profits but to cover its costs of providing a reliable supply of thermal coal to Delta Electricity which is comprehensibly different to the commercial purpose of Ulan, Whitehaven and Peabody. There is no evidence that Delta Coal experiences the same nature of attraction and retention issues as Ulan, Whitehaven and Peabody such that it needs to provide enhanced pay and conditions to overcome these challenges. It operates in a stable financial environment which is likely to result in different bargaining priorities compared to Ulan, Whitehaven and Peabody. We accept that Delta Coal does have some common circumstances that relate to interests with the other Respondent Employers. However the significance of the different commercial purpose of Delta Coal compared to the other Respondent Employers, its different interests with respect to employees and the probable effects of these matters in bargaining, combined with all of the other points of distinction here, leads us to conclude that Delta Coal has demonstrated that it does not have clearly identifiable common interests, compared to the other Respondent Employers, as contemplated by s.249(3)(a) of the FW Act.

[493] We are satisfied that Ulan, Whitehaven and Peabody, have clearly identifiable common interests for present purposes.[483] More directly, Ulan, Whitehaven and Peabody have failed to prove to the contrary the presumption that is set out in s.249(3AB) of the FW Act.

6.4.2 Public Interest

[494] We are satisfied that it is not contrary to the public interest to make the authorisation.[484]

[495] For reasons previously outlined, it is presumed that it is not contrary to the public interest to make the authorisation unless the contrary can be proved. This is the first occasion that

[483] *FW Act* s.249(3)(a).

[484] *FW Act* s.249(3)(b).

'public interest' has been considered in the context of a contested application under s. 248 of the FW Act.

[496] The Respondent Employers claim that it is contrary to the public interest to make the authorisation because enterprise bargaining is unlikely to be facilitated in an efficient manner, the authorisation would be contrary to the objects of the FW Act which give priority to single enterprise agreements, and they should not be constrained in the flexibility they currently have in relation to the employment arrangements for SIEA Employees.

[497] In relation to the meaning of 'public interest,' a number of the parties referred the Commission to *O'Sullivan v Farrer* (1989) 168 CLR 210 [13], in which the High Court observed that:

> …the expression 'in the public interest', when used in a statute, classically imports discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory entitlements may enable.

[498] In the industrial context, a Full Bench of the Australian Industrial Relations Commission in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*[485] said:

> The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. …. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.[486]

[499] These authorities have been cited with approval on many occasions by Full Benches of this Commission when dealing with the meaning of 'public interest' in various provisions of the FW Act.[487]

[500] The Explanatory Memorandum[488] relevantly stated:

> "The requirement in new paragraph 249(3)(f) would provide the FWC with scope to consider all the relevant circumstances and the broader public interest of making the authorisation. For example, the FWC could consider the broader economic ramifications of making the authorisation. The public interest would be likely to favour the making of authorisations that inhibit a 'race to the bottom' on wages and conditions while discouraging the making of authorisations that could adversely affect competition on the

[485] (2005) 139 IR 34 (*Kellogg Brown*).

[486] *Kellogg Brown* at [40].

[487] See for example *Randall v Australian Taxation Office* (2010) 198 IR 114 at [11] which deals with s.400(1); *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 at [49]-[51] which deals with s.275 and *Aurizon Operations Limited* [2015] FWCFB 540 at [129] which deals with the former s. 226(a).

[488] *SJBP EM*.

> basis of factors such as quality (including service levels) and innovation. The views of the employers and employee bargaining representatives obtained under new paragraph 249(3)(e) could be relevant to the FWC's consideration of the public interest, including whether they support the authorisation being made. For example, if an employee organisation did not support an authorisation being made, its reasons for not supporting the authorisation would be a relevant factor to consider."[489]

[501] There are many features of the Industry which are relevant to our consideration of matters which affect the public as a whole in the context of the scope and purpose of the FW Act. As noted above, Australia is the world's second largest exporter of thermal coal. The Industry has a significant impact on the New South Wales and Australian economies including its contribution to national and state gross product, its role as a significant employer, its contributions to every relevant region across New South Wales, and the royalties, rates and tax payments it makes to local governments and the New South Wales Government.

[502] There is no evidence that establishes that the making of the authorisation would have a detrimental effect on the role of the Respondent Employers in the contributions made by the Industry. There is no evidence that employment would decline or that contribution to regions or local and state governments would be affected.

[503] We have already considered the objects of the FW Act and concluded that the authorisation of multi-enterprise bargaining is consistent with the promotion of collective bargaining which achieves productivity and fairness at the level of the enterprise, subject to the express provisions giving some priority to single enterprise agreement. We therefore do not accept that the authorisation would be contrary to the objects of the FW Act. Further, we note that there is no evidence of any history of bargaining between the Respondent Employers and the SIEA Employees or intention on the part of the Respondent Employers to engage in bargaining in the future with the SIEA Employees. If made, the authorisation would meet an important object of the FW Act which is designed to achieve productivity and fairness.

[504] In relation to the Respondent Employers' concerns that enterprise bargaining is unlikely to be facilitated in an efficient manner, and that the flexibility of the employment arrangements for SIEA Employees may be undermined by an authorisation, these are matters which pertain to the Respondent Employers' interests rather than matters which affect the public as a whole.

[505] Given the nature and scope of bargaining that is anticipated here, the making of the Authorisation would not negatively impact any broader economic or competitive considerations.

[506] Whitehaven and the MCA contended, albeit faintly, that it may be contrary to the public interest to make an Authorisation where not all of the originally named Respondent Employers were included. We do not consider that this test creates a wide discretion that would embrace such a consideration. In any event, we do not find that this circumstance as it exists in this matter creates any tension with the objects of the FW Act or the notion of the public interest.

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[489] *SJBP EM* at [1023].

[507] Taking all of these matters into account, we are satisfied that it is not contrary to the public interest to make the Authorisation.

[508] Accordingly, we are satisfied that the requirements under s.249(3) of the FW Act have also been met in relation to the Respondent Employers.

6.5 Operations and Business Activities of Respondent Employers

[509] If the requirements of s.249(3) are met, i.e. the employers have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation, consideration of s.249(1)(b)(vi) is enlivened. Although in the case of Delta Coal we have not found that s.249(3) has been met, we deal with the remaining statutory requirements in its case as this informs the consideration and provides an additional basis for its non-inclusion in the Authorisation.

[510] Section 249(1)(b)(vi) requires that the Commission be satisfied that the operations and the business activities of each of the employers are reasonably comparable with other employers that will be covered by the agreement. For reasons previously stated, s.249(1AA) creates a rebuttable presumption in this matter that the requirements in s.249(1)(b)(vi) are met unless the contrary is proved.

[511] The application was made by a bargaining representative under s.248(1)(b) and each of the Respondent Employers has conceded that as at the date of the application, being 6 December 2023, they employed 50 or more employees. In these circumstances the burden of displacing the presumption that the operations and business activities of each of the employers are reasonably comparable with other employers that will be covered by the agreement lies with the party seeking to displace this presumption, in this case each of the Respondent Employers.

Submissions of APESMA – construction of s.249(1)(b)(vi)

[512] By way of summary, APESMA submitted, in relation to the proper construction and application of s.249(1)(vi):

- the stated purpose of the legislative amendments, as set out in the Explanatory Memorandum, is to simplify the process for obtaining single interest authorisations and the assessment imported by the requirement is more akin to answering the question 'is one of these things not like the other', than it is to the conduct of a forensic audit of each employer;[490]
- while the Full Bench in *IEU v CEWA*[491] expressed a tentative view that the comparability of operations and business activities under s.249(1)(b)(vi) is likely to be more stringent than the 'common interest' requirement under s249(3), the better view is that, while there will be facts that are relevant to each, they are two different tests, and whether one or the other is more likely to be met in a given fact situation will depend on the facts;[492]

[490] *APESMA Outline of Submissions* at [21].

[491] *IEU v CEWA*.

[492] *APESMA Outline of Submissions* at [22].

- the criteria in s.249(3) and s.249(1)(b)(vi) are directed to different things with the former focused on identification of common interests between the employers the subject of the application and the latter arising where the operations and business activities of the employers are of the same broad type such that they are capable of being compared (e.g. they are all underground coal mines in NSW);[493]
- the requirement for the operations and business activities to be 'reasonably comparable' is not an overly stringent test to satisfy, no two businesses are going to be the same and the criterion would not be interpreted to mean that only employers who are identical, or indeed substantially the same, can be said to be 'reasonably comparable';[494]
- comparable businesses will differ in the manner by which they are funded, the extent to which they are profitable, the extent to which they can absorb increased employment costs, how they arrange their management structure, and the particular methodologies they adopt in their operations.[495]

[513] APESMA clarified in its reply submissions that its position is not that the expression 'reasonably comparable' should be taken to mean 'capable of being compared' but rather the expression conveys that two or more things are of a similar type or genus while not needing to be the same.[496] That is, having considered their 'operations' and 'business activities' the employers are 'sufficiently similar'.[497]

[514] APESMA submitted that it may be accepted that the requirement as to reasonable comparability of operations and business activities invites a focus upon matters that are broadly relevant to enterprise bargaining.[498] APESMA said that for example, two agricultural employers in the same region with the same number of employees, or same turnover would not have 'reasonably comparable' operations and business activities if one is a winery and the other a dairy farm. However, conversely, two wineries in the same region of a broadly similar size may be 'reasonably comparable', even though one employs more employees than the other, makes more profit, or uses different technology, if they employ the same types of employees, doing the same types of work, subject to the same regulatory requirements, including safety requirements.[499] APESMA submitted that it follows that questions as to who buys the products produced are highly unlikely to have any relevance.[500]

[515] APESMA did not agree with Peabody's contention that the purpose of the 'reasonable comparable' threshold is not only that the multi-employer bargaining be rational and practical, but that it would facilitate bargaining at least as equally as the alternative of single employer bargaining'. In this regard it submitted that this purpose is not explicit in the language of the subsection and nor is that purpose articulated elsewhere in the language of the Division, which

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[493] *APESMA Outline of Submissions* at [23].

[494] *APESMA Outline of Submissions* at [24].

[495] *APESMA Outline of Submissions* at [24].

[496] *APESMA Submissions in Reply* at [39].

[497] *APESMA Submissions in Reply* at [39].

[498] *APESMA Submissions in Reply* at [40].

[499] *APESMA Submissions in Reply* at [40].

[500] *APESMA Submissions in Reply* at [41].

is otherwise detailed and specific and had Parliament intended such a purpose it would have said so.[501]

Submissions of the ACTU – construction of s.249(1)(b)(vi)

[516] The ACTU submitted that the term 'operations and business activities' refers to two discrete but intrinsically linked concepts with:

- 'operations' referring to the manner in which work is organised and performed (i.e. how the company operates); and
- 'business activities' referring to the trading activities (commercial or otherwise) of the business,

put simply, what the employers do and why.[502]

[517] The ACTU submitted that in the context of sheet metal manufacturing:

- operations would be rationally described as the manufacturing of sheet metal via workers with particular skills performing particular tasks in particular work environments;
- the business activities would include the sale of such sheet metal to various consumers;
- it would not usually particularly matter what the consumers then did with the sheet metal (which has a wide range of interesting uses) as the focus is on the central activities of the relevant employers;
- more would be required before different ultimate use of any produced good would be of any real significance, particularly where this did not lead to differences in the underlying work being performed.[503]

[518] By way of summary, the ACTU submitted that:

- in the context of a Part directed at establishing terms and conditions of work for employees, the nature of the work performed is important;
- the purpose of the relevant provisions is directed at ensuring sufficient commonality such that joint negotiation is both rational and practicable;[504]
- an important contextual factor is that the relevant provisions are concerned with the commencement of bargaining and not necessarily the imposition of common conditions (or any conditions at all);[505]
- the process is flexible in respect of the outcomes it is capable of producing, including separate conditions for separate sites where needed;[506]

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[501] *APESMA Submissions in Reply* at [42].

[502] *ACTU Outline of Submissions in Reply* at [31].

[503] *ACTU Outline of Submissions in Reply* at [32] – [34].

[504] *ACTU Outline of Submissions in Reply* at [35].

[505] *ACTU Outline of Submissions in Reply* at [37].

[506] *ACTU Outline of Submissions in Reply* at [38].

- it is not required that the businesses be identical or that there be 'perfect overlap' as shown by the inclusion of the word 'reasonably' which imports a degree of flexibility;[507]
- although it is conceptually possible that two employers could have common interests but not be reasonably comparable, this would not be sensibly established by the mere existence of some differences.[508]

[519] The ACTU also addressed the "obiter" of the Full Bench in *IEU v CEWA* who expressed a tentative view that the comparability of operations and business activities under s249(1)(b)(vi) is likely to be more stringent than the 'common interest' requirement under s249(3). In this regard the ACTU submitted:

- this is best understood as referring to the fact that this line of enquiry will necessarily be more specific;
- while common interest employers may not be reasonably comparable it is difficult to conceive of the converse;
- correctly interpreted s.249(1)(vi) requires closer examination of the particular circumstances of the employers than s.249(3), but does not impose a necessarily higher threshold: it is simply a different question.[509]

Submissions of Peabody – construction of s.249(1)(b)(vi)

[520] Peabody submitted that s.249(1)(b)(vi) should not be interpreted to mean that all that is required is some threshold or *prima facie* analysis of whether the employers' operations and business activities are such that they *could* be reasonably compared, absent an actual need to undertake a comparison exercise.[510] Rather, Peabody submitted that the term 'comparable' conveys not just the concept of things being amenable to a comparison exercise but conveys an observation or conclusion that things are comparable following a comparison exercise and that the proper construction of 'comparable' is that actual comparison is to be undertaken.[511]

[521] Peabody submitted that saying that something is 'able to be compared' also conveys 'seen to be similar or alike' or, more directly, 'similar' or 'alike'.[512]

[522] It also submitted that the operations and business activities of the employers is to be identified and compared and the adjective 'reasonably' moderates and focuses the analysis to the relevant threshold.[513] Peabody accepted the ACTU's contention that the purpose of the threshold is to ensure sufficient commonality such that joint negotiation is both rational and

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[507] *ACTU Outline of Submissions in Reply* at [36].

[508] *ACTU Outline of Submissions in Reply* at [39].

[509] *ACTU Outline of Submissions in Reply* at [41].

[510] *Peabody Outline of Submissions* at [14].

[511] *Peabody Outline of Submissions* at [16] – [17].

[512] *Peabody Outline of Submissions* at [16], with reference to to *Industry Research & Development Board v Bridgestone Australia Ltd* (2001) 109 FCR 564, 581 per Lindgren J with whom Branson J (567, [9]) and Mansfield J (584, [86]) agreed.

[513] *Peabody Outline of Submissions* at [17].

practicable and went further to say the purpose is also to facilitate bargaining at least as equally as the alternative of single employer bargaining.[514]

[523] Peabody noted that the meaning of 'operations and business activities' does not appear to have been the subject of previous consideration and in this regard submitted:

- the 'operations' of the employer would entail the industrial processes and methods – how the employer's enterprise produces; and
- the 'business activities' of the employer would entail the trading and commercial activities, i.e. what kind of business activities the employer's enterprise is engaged in.[515]

[524] Peabody noted that there are different levels at which one could describe the operations of an enterprise and its business activities.[516]

Submissions of Ulan - construction of s.249(1)(b)(vi)

[525] Ulan also addressed the obiter of the Full Bench in *IEU v CEWA* in which the Full Bench said the "requirement for comparability of operations and business activities is likely more stringent than the requirement for common interests".[517] It submitted that the Full Bench observation underscores the need for a close analysis of the operations and business activities of the Respondent Employers.[518]

[526] Ulan submitted:

- the task is to assess the extent to which the business and operations are comparable (as in the extent to which they exhibit like for like characteristics) as qualified by the adjective 'reasonably', which is an acknowledgement that they do not need to be identical but is a point of emphasis that they do need to have sufficiently similar business and operational activities;
- in the context of requiring employers to bargain together, to use the colloquial, the task is to compare 'apples with apples';[519]
- the *SJBP Supplementary EM* highlights the task at hand when it explains that even an employer of a similar size, scope and scale in the same industry may not be reasonably comparable[520] and in this regard, the test of reasonably comparable operations and business activities is not that they are 'amenable to comparison or of the same broad type such that they are capable of being compared' as was suggested in APESMA's Outline of Submissions.[521]

Submissions of Whitehaven – construction of s.249(1)(b)(vi)

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[514] *Peabody Outline of Submissions* at [17].

[515] *Peabody Outline of Submissions* at [18] – [19].

[516] *Peabody Outline of Submissions* at [20].

[517] *IEU v CEWA* at [34].

[518] *Ulan Submissions in Reply* at [15].

[519] *Ulan Submissions in Reply* at [16].

[520] *SJBP Supplementary EM* at [71].

[521] *Ulan Submissions in Reply* at [17].

[527] By way of summary Whitehaven submitted that:

- it agreed with the observation of the Full Bench in *IEU v CEWA* that the "requirement for comparability of operations and business activities is likely more stringent than the requirement for common interests";[522]
- the 'reasonably comparable' test is different to the 'common interests' test in that while the 'common interests' test calls for a broader enquiry and allows for consideration of the interests at enterprise (i.e. mine) level as well as the broader operations of a corporate group (if the interests of the separate corporate entities overlap), the 'reasonably comparable' test is only concerned with the relevant employer entities, and the enquiry is targeted at the 'operations' and 'business activities' of that specific entity;[523]
- the legislature did not set the requirement at mere comparability and the term 'reasonably comparable' requires a higher degree of comparability.[524]

[528] Whitehaven pointed to the Macquarie definition of 'operations' and submitted that 'business activities' extends to transactions and other revenue generating activities.[525]

Submissions of Delta Coal – construction of s.249(1)(b)(vi)

[529] Delta Coal noted that the FW Act does not define 'reasonably comparable' and submitted that in the absence of a definition the phrase should be afforded its ordinary meaning in the context of the FW Act.[526]

[530] In this regard, Delta Coal submitted the word 'comparable' ordinarily has two meanings:

- firstly, it means of equivalent size, amount or quality;[527]and
- secondly, it means capable of, fit for, worthy of or suitable for comparison[528]

with the subject of the phrase being the operations and business activities of the employers the subject of the application.[529]

[531] Delta Coal submitted that in context, 'reasonably' qualifies the nature of the 'comparability' of the operations and business activities of the employers the subject of the application and that the phrase 'reasonable comparable' in s.249(1)(b)(iv) should be construed to mean two or more employers who are the subject of the application and who are of equivalent size, amount (of sales or business) or quality so as to be suitable for comparison.[530]

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[522] *Whitehaven Outline of Submissions* at [24]; *IEU v CEWA* at [34].

[523] *Whitehaven Outline of Submissions* at [25].

[524] *Whitehaven Outline of Submissions* at [28].

[525] *Whitehaven Outline of Submissions* at [27].

[526] *Delta Outline of Submissions* at [19] – [20].

[527] *Delta Outline of Submissions* at [21] with reference to Cambridge Dictionary Online (accessed February 2024).

[528] *Delta Outline of Submissions* at [21] with reference to The Australian Oxford Dictionary, Second Edition, (1999), page 258; Macquarie Concise Dictionary, (2020), page 241.

[529] *Delta Outline of Submissions* at [24].

[530] *Delta Outline of Submissions* at [23] – [25].

[532] Delta Coal also submitted that:

- the phrase requires that the Commission considers in a detailed way the factual circumstances of the operations and business activities of the employers the subject of the application; and
- it is insufficient to satisfy the requirements of the phrase by considering that the employers the subject of the application are in the same industry and the subject of the same regulatory regime.[531]

[533] In this regard Delta Coal noted that the *SJBP Supplementary EM* stated:

> "The amendments would ensure that the FWC must also be satisfied that the operations and business activities of an employer are reasonably comparable with the other employers. It may be open to the Fair Work Commission to conclude that despite two employers of similar size, scope and scale operating in the same industry, they are not 'reasonably comparable' once the full extent of the business activities and operations are considered."

Submissions of Minerals Council of Australia – construction of s.249(1)(b)(vi)

[534] The MCA submitted that s.249(1)(b)(vi) requires the Commission to be satisfied that the operations and business activities of each of the Respondent Employers are 'reasonably comparable' with those of the other Respondent Employers and that this is an evaluative exercise requiring the Commission to determine:

1. firstly, what the 'operations' and 'business activities' of each of the Respondent Employers are; and
2. on what basis they are to be compared.[532]

[535] The MCA referred to the observation of the Full Bench in *IEU v CEWA* that the "requirement for comparability of operations and business activities is likely more stringent than the requirement for common interests"[533] and submitted this suggests that the test is more confined and should be distinguished from the 'common interests test'.[534] In particular, it submitted that for the provision to be given real meaning it must consider something more than mere commonality of interests and this is consistent with the Supplementary Explanatory Statement which suggests it may be open to conclude that 'despite two employers of similar size, scope and scale operating in the same industry, they are not 'reasonably comparable' once the full extent of the business activities and operations are considered' (MCA emphasis).[535]

[536] The MCA submitted that the public policy reason for this statutory requirement is clear on the face of the provision: multi-employer bargaining is less likely to be able to be conducted

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[531] *Delta Outline of Submissions* at [27] – [28].

[532] *MCA Outline of Submissions in Reply* at [28].

[533] *MCA Outline of Submissions in Reply* at [29], *IEU v CEWA* at [34].

[534] *MCA Outline of Submissions in Reply* at [29].

[535] *MCA Outline of Submissions in Reply* at [30].

efficiently or effectively in circumstances where the operations or business activities of the relevant employers are distinct or divergent.[536] It submitted such an outcome would be contrary to the objects of the Act, which include to promote 'flexibility for businesses', to 'achieve productivity and fairness through an emphasis on enterprise-level collective bargaining', and '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'.[537]

[537] The MCA submitted that the mere fact that each of the Respondent Employers engage in the general business activity of extracting coal for sale by way of underground mining operations does not mean that their operations and business activities are reasonably comparable for the purposes of s.249(1)(b)(v).[538]

[538] In relation to the term 'reasonably comparable' it submitted:

- the word 'comparable' implies two things that are 'able to be compared' in the sense of bearing some rational relationship to each other;
- however the qualifying requirement that the operations and business activities are 'reasonably' comparable is a higher standard than mere 'comparability';
- by way of example, a family-owned small business operating a fish and chip shop could be compared to a large multi-national fast food chain by reference to a variety of characteristics (some which might even be in common) but it would plainly be inapposite to suggest that these businesses are 'reasonably comparable' and it is the comparison exercise that shines light on the critical differences between them.[539]

[539] The MCA referred to the matter of *Airservices Australia v Canadian International Airlines Ltd*[540] in which the High Court considered the meaning of the phrase 'reasonably related' in the *Civil Aviation Act 1988* (Cth) and said:

> "The requirement that the charges be reasonably related to the expenses as described above at least requires that there be some rational relationship between the charges and the expenses. But once this rather low threshold is met, the degree of closeness of the relationship which is required in order for the statutory requirement to be satisfied cannot be described in the abstract. It depends on the application, to the circumstances of a particular case, of the fact-value complex that the word "reasonably" invokes. Important in that assessment are the purposes or objects of the Act…"[541] (emphasis added)"

Consideration – construction of s.249(1)(b)(vi)

[540] As noted above, section 249(1)(b)(vi) requires that that the Commission be satisfied that the 'operations' and the 'business activities' of each of the Respondent Employers are

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[536] *MCA Outline of Submissions in Reply* at [31].

[537] *MCA Outline of Submissions in Reply* at [31].

[538] *MCA Outline of Submissions in Reply* at [33].

[539] *MCA Outline of Submissions in Reply* at [34].

[540] (1999) 202 CLR 133 (*Airservices Australia*).

[541] *Airservices Australia* at [220].

'reasonably comparable' with other Respondent Employers that will be covered by the agreement.

[541] The terms 'operations', 'business activities' and 'reasonably comparable' are not defined in the FW Act and this requires, as a starting point, consideration of the ordinary meaning of those terms.

[542] The Macquarie dictionary defines the term 'operation' as:

> "5. a process of a practical or mechanical nature in some form of work or production: *a delicate operation in watchmaking.*
> 6. a course of productive or industrial activity: *building operations.*
> 7. a particular course or process: *metal operations.*
> 8. a business transaction, especially one of a speculative nature or on a large scale: *operations in oil.*"

[543] The Macquarie dictionary defines the term 'business' as:

> "1. one's occupation, profession, or trade.
> 2. Economics the sale of goods and services for the purpose of making a profit.
> 3. Commerce a person, partnership, or corporation engaged in business; an established or going enterprise or concern: a clothing business.
> 4. volume of trade; patronage.
> 5. one's place of work.
> 6. that with which one is principally and seriously concerned.
> 7. that with which one is rightfully concerned.
> 8. affair; matter."

[544] The Macquarie dictionary relevantly defines the term 'activity' as 'the state of action; doing' and a 'specific deed or action; sphere of action: *social activities*'.

[545] We agree with the ACTU that the terms 'operations' and 'business activities' are discrete yet intrinsically linked concepts. Both of these concepts need to be considered with reference to an employer that will be covered by the agreement, being a national system employer as defined by s.14 of the FW Act. Having regard to the ordinary meaning of those terms in the context of the FW Act:

- the term 'operations' should be taken to mean '*how*' that employer operates, in terms of its industrial activity, work and production processes; and
- the term 'business activities' should be taken to mean '*what*' that employer does in terms of the goods and services it provides or sells, or as submitted by the ACTU, its trading activities.

[546] The Macquarie Dictionary defines the term 'comparable' as 'capable of being compared' and 'worthy of comparison'.[542] No party suggested that there is a requirement for two things to be 'identical' in order to be 'comparable.' However we agree with APESMA's

[542] Macquarie Dictionary, accessed 9 June 2024, macquariedictionary.com.au.

qualified submission that in order for two or more things to be 'capable of being compared', they need to be of a similar 'type' while not needing to be the same and it follows that the 'operations' and 'business activities' of the employers need to be *sufficiently similar*.

[547] The word 'reasonably' is a qualifier and imports a level of judgment into the Commission's consideration of whether employers' operations and business activities are, as a question of fact, sufficiently similar. An objective assessment as to whether the employers' operations and business activities are 'reasonably' comparable needs to be undertaken in the context of the intended purpose of the provision and the broader objects of the FW Act.

[548] In this regard, the *SJBP Supplementary EM* states:

> "70. New subparagraph 249(1)(b)(vi) would require the FWC to be satisfied that, in respect of each employer that is a common interest employer, the operations and business activities of that employer are reasonably comparable with those of other employers that would be covered by the proposed agreement that relates to the single interest employer authorisation.
>
> 71. Employers of very different size, scope and scale might, depending on all the circumstances, be found to have clearly identifiable common interests for the purpose of bargaining together. This amendment would ensure that the FWC must also be satisfied that the operations and business activities of an employer are reasonably comparable with the other employers. It may be open to the Fair Work Commission to conclude that despite two employers of a similar size, scope and scale operating in the same industry, they are not 'reasonably comparable' once the full extent of their business activities and operations are considered.
>
> 72. This amendment would also insert new subsection 249(1AA) that would provide that, if an application for a single interest employer authorisation is made by a bargaining representative under paragraph 248(1)(b) in respect of an employer that has 50 or more employees, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved.
>
> 73. The matters specified in subparagraph 249(1)(b)(vi) concern whether relevant employers are reasonably comparable in terms of their operations and business activities. Such evidence is likely to concern the nature and size of the employers, and their operations and business activities. While some of this information may be available - at least in part - to employees, particularly in smaller enterprises, much of it will only be known to the employer or to employees only as it pertains to their role, i.e. in a partial or fragmentary way. This is particularly acute in terms of the nature of the employer's enterprise, the employer's business activities and operations. In most cases, such information will be most readily available to employers or their bargaining representatives.
>
> 74. These are considerations which must be balanced in determining who should bear the burden of establishing that the relevant test is met or not met. Having

> regard to the burden that could be imposed on enterprises with 20 to 49 employees, it is appropriate in such cases to require employees and their bargaining representative/s to establish that the relevant test is met when making the application for the authorisation.
>
> 75. In respect of employers with 50 or more employees, due to their increased size and complexity of their operations, they are more likely to be in a position to provide the relevant evidence going to these matters. In such circumstances, it would also be much more difficult for employees and their representatives to provide sufficient evidence to establish that the test is met. It is appropriate therefore that the amendments provide for a rebuttable presumption and an opportunity for employers (with 50 or more employees) to establish that the relevant test is not met in relation to their business."[543]

[549] It can be taken from the above extract of the *SJBP Supplementary EM* that the Parliament relevantly intended that:

- while there may be some overlap in the factors that are relevant to each question, the questions of whether employers have identifiable common interests and whether their operations and business activities are reasonably comparable invoke different considerations based on a different level of analysis;
- it is possible to conclude that employers of a very different size, scope and scale might, depending on all the circumstances, be found to have clearly identifiable common interests for the purpose of bargaining together;
- however the question of whether the operations and business activities of employers are 'reasonably comparable' contemplates consideration of the full extent of their business activities and operations and in that sense requires more detailed analysis;
- in circumstances where the employers employ 50 or more employees, due to their increased size and complexity of their operations, these employers would be in the best position to provide the relevant evidence turning to their business activities and operations (hence the rebuttable presumption); and
- while evidence turning to the nature and size of the employers, and their operations and business activities will be relevant, two employers may be of a similar size, scope and scale and may operate in the same industry but it nevertheless may follow that they are not 'reasonably comparable' depending on what an examination of the full extent of their business activities and operations identifies.

[550] In *IEU v CEWA* the Full Bench made the observation that it was apparent that the requirement for comparability of operations and business activities is likely more stringent than the requirement for common interests in s.249(3) of the FW Act.[544] In that matter no party attempted to prove that the requirement in s.249(1)(b)(vi) had not been met but the Full Bench went on to say that as each of the respondent employers in that matter shared the following in common, that was sufficient to demonstrate necessary comparability:

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[543] *SJBP Supplementary EM*.

[544] *IEU v CEWA* at [34].

- they were principally engaged in the provision of primary and/or secondary education in a school setting;
- they operated in the state of Western Australia;
- they operated schools that are registered under the *School Education Act 1999* (WA) (**SE Act**);
- they were the employers of one or more employees to whom the Educational Services (Schools) General Staff Award 2020 applies;
- they engaged in Roman Catholic religious instruction;
- they received funding from the Government of the Commonwealth of Australia for the purpose of delivering education;
- they received funding from the Government of the State of Western Australia for the purpose of delivering education; and
- they employed one or more persons who are principally employed to provide, or to assist in providing, educational instruction or who are employed in any other capacity, and who are not employed as teachers.

[551] The factors in the above list turn to a range of matters, including

- the general nature of the services provided;
- the setting in which those services are provided (in that case a school);
- the particular nature of the services (in that this involved a particular type of religious instruction);
- where the business operates (i.e. Western Australia);
- the regulatory regime within which they operate (i.e. the SE Act);
- the modern award that applies to them and their employees;
- how they were funded; and
- that they employed persons to deliver the services or assist in their delivery.

[552] We understand that the Full Bench listed these matters as providing the context for the reasonably comparable factors. We observe that it is the 'operations and business activities' of each of the employers that are the subject of a particular application that the Commission is required to consider in determining whether they are 'reasonably comparable' and such an assessment will depend upon the evidence before the Commission in each case.

[553] In *IEU v CEWA* the observations of the Full Bench drew out the 'similarities' between the employers the subject of that application. In circumstances where an employer seeks to rebut the presumption that the operations and business activities of each of the employers that are the subject of a particular application are reasonably comparable, the employer evidence will likely turn to differences between those employers. However, in order to determine whether those differences are *enough* to displace the presumption that the operations and business activities of each of the employers that are the subject of a particular application are reasonably comparable, both differences and similarities will be relevant to the assessment. This necessitates a comparative exercise.

Factors relied on by the parties for the purposes of s.249(1)(b)(vi)

[554] The MCA has submitted that the appropriate exercise is for the Commission to evaluate the full extent of the Respondent Employers' operations and business activities, including a detailed consideration of the factors that define and characterise large employers in the New South Wales coal mining industry and that such factors should include, without limitation:

- the mining and processing techniques of each of the Respondents;
- the nature and quality of coal produced;
- the economic market for the Respondents' products;
- the nature of investment decisions in respect of the various operations and mines, including the source of investment funding;
- the impact of external regulatory, economic or industrial factors on each of the Respondents;
- their respective cost structures; and
- their skills and workforce requirements.[545]

[555] The MCA submitted that a detailed consideration of these factors is consistent with the object of the FW Act to provide a balanced framework that is flexible for businesses and promotes productivity and growth.[546]

[556] As earlier noted, if a party is to displace the rebuttable presumption, they bear the onus of doing so. In this regard, each of the Respondent Employers have submitted that their operations and business activities are not reasonably comparable with the other Respondent Employers who will be covered by the agreement and have, unsurprisingly, sought to draw the Commission's attention to points of distinction.

[557] Some of these features relate to the Respondent Employers' 'operations', which we have found should be taken to mean '*how*' that employer operates, in terms of its industrial activity, work and production processes. By way of summary, these include:

- their principal business activities, considered in the context of their ownership, corporate and management structure;
- where they operate (i.e. remotely or close to regional centres) and how they integrate with neighbouring townships and engage with the community;[547]
- the method of mining they adopt (i.e. board and pillar vs longwall);[548]
- mine environment (including stressors and geography of operations);[549]
- equipment used;[550]
- distribution channels;[551]
- the size and structure of their workforces;[552]

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[545] *MCA Outline of Submissions in Reply* at [37] – [38].

[546] *MCA Outline of Submissions in Reply* at [39].

[547] *Peabody Outline of Submissions* at [23]; *Ulan Outline of Submissions* at [19].

[548] *Peabody Outline of Submissions* at [23]; *Ulan Outline of Submissions* at [19].

[549] *Ulan Outline of Submissions* at [19].

[550] *Peabody Outline of Submissions* at [28], [31].

[551] *Ulan Outline of Submissions* at [19].

[552] *Ulan Outline of Submissions* at [19].

- how the Respondent Employers source and accommodate their workforce, rostering arrangements and the terms upon which the workforces are engaged;[553]
- regulatory arrangements;
- cost of production, including capital and maintenance costs associated with operation.[554]

[558] Other distinguishing features that the Respondent Employers seek to rely on relate to the Respondent Employers' 'business activities' which we have found should be taken to mean '*what*' that employer does in terms of the goods and services it provides or sells, or as submitted by the ACTU, its trading activities. These include:

- anticipated life of mine;[555]
- who they supply coal to and sources of revenue;[556]
- contracting arrangements with customers and how they market their coal;[557]
- characteristics of the coal produced;[558]
- size of mine, yield (the quantum of coal extracted relative to how much is sold), scale of production and capacity to scale up and down;[559]
- operating margins and realised coal price.[560]

[559] Unsurprisingly, APESMA has pointed to factors relevant to the Respondent Employers' operations that suggest similarity including:

- where they operate (i.e. the state);
- what regulatory regimes apply to them and what licences they are required to have;
- who they are required to employ pursuant to those regulatory regimes;
- similarity between methods of working.

[560] APESMA has also submitted that there is similarity in the Respondent Employers' business activities in that each of the Respondent Employers are engaged in the 'business activity' of extracting coal for sale by way of underground mining operations.[561]

[561] That both APESMA and the Respondent Employers sought to rely on the location of work in support of their cases demonstrates Peabody's point that there are different levels at which one could describe the operations of an enterprise and its business activities.[562] This is where the Commission's task of assessing whether those factors make them 'reasonably

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[553] *Peabody Outline of Submissions* at [28], [31]; *Ulan Outline of Submissions* at [19].

[554] *Peabody Outline of Submissions* at [23], [28].

[555] *Peabody Outline of Submissions* at [25], [31], [32]; *Ulan Outline of Submissions* at [19].

[556] *Peabody Outline of Submissions* at [23], [29], [32]; *Ulan Outline of Submissions* at [19].

[557] *Peabody Outline of Submissions* at [29].

[558] *Ulan Outline of Submissions* at [19].

[559] *Peabody Outline of Submissions* at [23], [25], [28], [31]; *Ulan Outline of Submissions* at [19].

[560] *Peabody Outline of Submissions* at [25], [28], [31].

[561] *APESMA Outline of Submissions* at [19].

[562] *Peabody Outline of Submissions* at [20].

comparable' is important. What is 'reasonable' will require an objective assessment based on the facts of each case as established by the evidence before the Commission.

[562] In pointing to factors where it is said there are differences and similarities, the parties provide a helpful starting point for the Commission's analysis. Whether the differences and similarities exist as a matter of fact will be borne out of the evidence before the Commission. Where differences and similarities are established, what weight should be given to each factor and at what 'level' or how a factor is applied will depend on what is 'reasonable' in the circumstances of the matter. The context of the proposed bargaining, in this case for an agreement to cover the SIEA Employees, is particularly relevant.

What differences and similarities between the Respondent Employers' 'operations' and 'business activities' are borne out of the evidence?

[563] Each of the Respondent Employers are part of a complex and unique group structure and their role in these structures provides context relevant to understanding their principal business activities.

Principal business activities

Peabody and the Wambo Mine

[564] Peabody operates eight thermal and metallurgical coal-producing assets across Queensland and New South Wales. It has both open cut and underground mines and produces a range of metallurgical and thermal coals for domestic and international markets.[563]

[565] Related bodies corporate of Peabody own and operate various assets in a the Wambo Complex. The Wambo Complex comprises:

(a) an underground mine, being the Wambo Mine;
(b) an open cut mine operated by Glencore in which a related body corporate of Peabody is a 50% joint venture partner with United Collieries (owned by Glencore Coal and the Construction, Forestry, Mining, and Energy Union);
(c) a coal handling and preparation plant (CHPP) owned and operated by a related body corporate of Peabody; and
(d) train loading and other facilities that are owned and operated by a related body corporate of Peabody.[564]

[566] Peabody is the employing entity of the SIEA employees who work at the Wambo Mine[565] which is an underground coal mine.[566]

[567] Peabody has a mining lease over the Wambo Mine under the Mining Act, which gives Peabody the exclusive right to mine over a specific area of land as dictated by the terms of the

[563] *Roberts Statement* at [42].

[564] *Carter Statement* at [19].

[565] *Carter Statement* at [20].

[566] *Carter Statement* at [7].

mining lease.[567] At times operations have ceased, for short and long-term periods as mining activities have moved into different areas. Most recently, the operations ceased in 2001, and then recommenced in 2006 following capital investment into mining a new area at the Wambo Complex. This operation has run continuously since 2006, apart from temporary closures in 2020 and 2021.[568]

Ulan and the Ulan No.3 Mine

[568] Ulan is a wholly owned subsidiary of Glencore Coal Pty Ltd which has 15 operating coal mines in Australia located in the Hunter Valley and Western coalfields in New South Wales, and the Galilee Basin and Bowen Basin in Queensland and it is a part of the broader Glencore group.[569] The Glencore group is a global diversified natural resource company and major producer and marketer of commodities worldwide.[570] It is the largest coal producer in Australia.[571]

[569] Part of Ulan's function and purpose is identifying any additional opportunities for mining operations.[572] Ulan holds all legal and beneficial titles to land and other assets and is the employing entity for staff employees who perform shared services for the Ulan Complex generally.

[570] Ulan operates the Ulan No.3 mine, an underground coal mine, in the Western coalfields and is the employer of the SIEA Employees work at the Ulan No. 3 Mine. The Ulan No. 3 Mine operates as part of an integrated unit with two mining operations within a broader complex and the coal produced by the mine is typically blended with coal produced by other assets within the Glencore group.[573] The Ulan No.3 mine is integral to ensuring that the Glencore group can meet its contractual commitments and market demands.[574]

Whitehaven and the Narrabri Mine

[571] Whitehaven is a wholly owned subsidiary of Whitehaven Coal Limited.[575] Whitehaven Coal Limited operates through a network of controlled entities and its principal activity is the development and operation of coalmines in New South Wales and Queensland.[576] Its mine sites include one underground mine and four open cut mines.[577]

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[567] *Carter Statement* at [24].

[568] *Carter Statement* at [23].

[569] *Ostermann Statement* at [12].

[570] *Ostermann Statement* at [13].

[571] *Ostermann Statement* at [14].

[572] *Ostermann Supplementary Statement* at [7] – [9].

[573] *Ostermann Statement* at [36].

[574] *Ostermann Statement* at [27].

[575] *Humphris Statement* at [1].

[576] *Humphris Statement* at [14].

[577] *Humphris Statement* at [14].

[572] Whitehaven is also a part of a broader group structure and owns twelve other companies.[578] By reason of the beneficial ownership of these companies, it an indirect beneficial interest in certain coalmine operations and activities.[579] This includes a 77.5% indirect beneficial interest in the Narrabri Mine[580] via a joint venture.[581] The Narrabri Mine is the only underground coal mine in the Whitehaven Coal Limited Group.[582] Narrabri Mine is operated by Narrabri Coal Operations Pty Ltd, a wholly owned subsidiary of Whitehaven Coal Mining Ltd.[583]

[573] The operational function of Whitehaven is largely limited to its role as an employer and in contracting suppliers and other service providers but it does not otherwise take an active role in operating coal mines or other projects[584] with the exception of selling some coal product on the export market.[585] All employees at the Narrabri Mine are employed by Whitehaven, including the SIEA Employees.[586]

Delta Coal and the Chain Valley Colliery

[574] Delta Coal is wholly owned by the Delta Parent Company.[587] Delta Coal operates the Chain Valley Colliery,[588] an underground coal mine, and employs people in production and maintenance crews in roles such as operators, electricians or mechanical fitters as well as the SIEA Employees.[589]

[575] Delta Coal is operationally distinguishable in that its Chain Valley Colliery supplies coal to a single customer within the same corporate group; a co-located at a domestic power station being the Vales Point Power Station.[590] Delta Coal does not export coal and does not have the infrastructure or means to export coal or any intention to do so.[591] Delta Coal's coal operations do not involve exploratory drilling,[592] transportation of coal over long distances and to ports for exportation or any sales, business development or marketing activities to attract buyers.[593]

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[578] *Humphris Statement* at [9].

[579] *Humphris Statement* at [10].

[580] *Humphris Statement* at [9] – [10]; *Humphris Supplementary Statement* at [6].

[581] *Humphris Statement* at [40].

[582] *Humphris Statement* at [34].

[583] *Humphris Statement* at [41].

[584] *Humphris Statement* at [12].

[585] *Humphris Supplementary Statement* at [7].

[586] *Case Statement* at [23].

[587] *Cornford Statement* at [11].

[588] *Cornford Statement* at [2].

[589] *Cornford Statement* at [14] – [15].

[590] *Carter Statement* at [109(a)]; *Roberts Statement* at [78]; *Cornford Statement* at [24] – [25].

[591] *Cornford Statement* at [38] – [39].

[592] *Cornford Statement* at [30].

[593] *Cornford Statement* at [39] – [40].

[576] Delta Coal's sole commercial purpose is to supply thermal coal to Delta Electricity Pty Ltd[594] at a set price so that the Delta Parent Company may generate domestic electricity. Delta Coal does not operate to generate profit or commercial gain. In essence, Delta Coal exists for a different purpose.

Where the Respondent Employers operate

[577] The SIEA Employees the subject of the application will carry out the operational activities of the Respondent Employers at one of four different sites, depending on who employs them.

Peabody's Wambo Mine

[578] Peabody's Wambo Mine forms part of the Wambo Complex in Warkworth, New South Wales.[595] The Wambo Complex is located approximately 220 kilometres from Sydney, 100 kilometres from Newcastle and 25 kilometres from Singleton.[596]

Ulan's Ulan No. 3 Mine

[579] The Ulan No. 3 Mine forms part of the Ulan Complex in Ulan, New South Wales.[597] The Ulan Complex is located approximately 45 kilometres from Mudgee and 25 kilometres from Gulgong.[598] Mudgee is the largest town in the Mid-Western Regional Council Local Government Area with a population of approximately 13,000 people. Due to Ulan Complex's close proximity to Mudgee, Ulan Coal Mines has an established community investment program.[599] The program involves investment and support in local initiatives such as sporting teams and education programs.[600] The Ulan Complex also provides payments that contribute to the maintenance and upgrade of the roads between the mine and each of Mudgee and Gulgong.[601]

Whitehaven's Narrabri Mine

[580] Whitehaven's Narrabri Mine is located 17 kilometres from Narrabri, New South Wales.[602] The town of Narrabri had a population of 12,703 according to the 2021 Census.[603] The Narrabri Mine is located 70 kilometres from Gunnedah, approximately 380 kilometres

[594] *Cornford Statement* at [31].

[595] *Carter Statement* at [19].

[596] *Carter Statement* at [21].

[597] *Ostermann Statement* at [4].

[598] *Ostermann Statement* at [21].

[599] *Ostermann Statement* at [71].

[600] *Ostermann Statement* at [71].

[601] *Ostermann Statement* at [29].

[602] *Carter Statement* at [13(b)].

[603] *Case Statement* at [13(c)].

from Newcastle and approximately 530 kilometres from Sydney.[604] It is the most inland coal mine in New South Wales.[605]

Delta Coal's Chain Valley Colliery

[581] Delta Coal's Chain Valley Colliery is located close to Mannering Park on the central coast of New South Wales, approximately 60 kilometres from Newcastle.[606] Compared with the other Respondent Employers, Delta Coal's Chain Valley Colliery is located significantly closer to a major regional centre and the coast.[607] The Chain Valley Colliery is located within a couple of hundred metres of the Vales Point Station.

Method of mining

[582] There are two main methods of underground coal mining being the longwall method and bord and pillar method.[608] A description of these methods has been provided earlier in this decision.

[583] The longwall method is generally more capital intensive than the bord and pillar method at the initial stage of the mining operation because of investment required in specialised plant and equipment.[609] However operational costs associated with the longwall method are generally lower than those associated with the bord and pillar method after initial set up.[610] Bord and pillar mining involves extracting coal by leaving pillars holding up the land above the extraction point.[611] It is a more labour intensive method of mining[612] involving manual installation of bolts, mesh, concrete and ventilation and less reliance on large, capital intensive automatic coal miners compared to longwall mining.[613] While a longwall method extracts almost all available coal at the extraction point the bord and pillar method may only extract roughly 30 percent of the coal that is there.[614] Mr Cornford's opinion was that bord and pillar mining is a less efficient method of extraction and we accept this is generally the case.[615]

[584] Mr Cornford did however say that one of the advantages of the bord and pillar method over the longwall method is that it allows more continuity of coal extraction.[616] In this regard he explained that when the end of a longwall block of coal is reached the longwall machine needs to be disassembled into each of its components, physically relocated to a new location

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[604] *Humphris Statement* at [36] – [37]; *Case Statement* at [13(c)].

[605] *Humphris Statement* at [36]; *Case Statement* at [13(b)].

[606] *Cornford Statement* at [22].

[607] *Carter Statement* at [109(h)].

[608] *Case Statement* at [18(a)].

[609] *Case Statement* at [18(a)].

[610] *Case Statement* at [18(a)].

[611] *Cornford Statement* at [42].

[612] *Cornford Statement* at [61].

[613] *Cornford Statement* at [62] – [63].

[614] *Cornford Statement* at [51].

[615] *Cornford Statement* at [51].

[616] *Cornford Statement* at [64].

and then reassembled which can take six to eight weeks.[617] In comparison a continuous miner used in the bord and pillar method can be moved within days.[618]

Peabody, Ulan and Whitehaven

[585] Peabody, Ulan and Whitehaven use longwall mining methods at the Wambo, Ulan No. 3 and Narrabri Mines.[619] Whitehaven's Narrabri Mine also has a small bord and pillar operation accounting for less than 10 percent of production at the Narrabri Mine which is operated by a third party.[620] Undermanagers, Control Room Operators and Shift Engineers at the Narrabri Mine have occasional involvement in the bord and pilar operation.[621]

Delta Coal

[586] Delta Coal does not use the longwall mining method[622] and uses the bord and pillar method of mining.[623]

Mine environment (including stressors and geography of operations) and access conditions

[587] We accept Mr Ostermann's evidence that:

- different local conditions such as depth of cover, strata conditions including stress magnitude and direction characteristics, geology, gas and water will all have an effect on production rates and also influence how the mine is managed; and
- the production and capacity of mines depends upon the infrastructure installed via capital investment that is commensurate with the local mining environment conditions and age of the operation.[624]

Peabody's Operations at its Wambo Mine

[588] Mr Carter's evidence was, in effect, that Peabody is now in the latter part of the production phase for the presently approved mining lease and the geological features of this section include geological faults and dykes (being a rock intrusion in the coal seam).[625] Mr Carter said the dyke and faulting produces a higher rock content in material extracted from the coal seam resulting in:

- more complex mining operations that are time consuming as mining activities have to navigate around the dyke;

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[617] *Cornford Statement* at [64].

[618] *Cornford Statement* at [64].

[619] *Carter Statement* at [25].

[620] *Case Statement* at [18(b)].

[621] *Case Statement* at [18(b)].

[622] *Cornford Statement* at [44].

[623] *Carter Statement* at [109(e)]; Cornford at [42].

[624] *Ostermann Statement* at [38].

[625] *Carter Statement* at [44(a)].

- a more onerous washing process at the CHPP to remove impurities from the 'run of mine' (**ROM**) coal;
- a lower yield of saleable coal;[626] and
- circumstances where it may not be possible to cut through, resulting in the need to move the longwall mining equipment and infrastructure to a new location and a loss in production time.[627]

[589] Mr Carter's evidence was that accessing the Wambo Mine requires travel across an open cut mine and that the travel time to access the underground mining operation is unusually long compared to other underground mines.[628] Mr Carter said that the requirement to travel across the open cut mine before entering the underground mine results in an increased risk of lightning strike and a need to coordinate safe operations when blasting at the open cut mine is occurring.[629] Mr Carter's evidence suggests these factors give rise to operational delays.[630]

Whitehaven's Operations at its Narrabri Mine

[590] Mr Case said that the arrangements for travel to and from Whitehaven's Narrabri Mine are relatively simpler and workers do not have to change vehicles or travel through or across any other mining operations.[631] Mr Case said that the operations at the Narrabri Mine do not require the mine operator to coordinate activities with other entities and the operations are relatively resilient to weather events.[632] Mr Case did however indicate that the longwall operation at Whitehaven's Narrabri Mine is around 6 kilometres from the surface and that to undertake this travel workers alight an underground transport vehicle that takes around 30 minutes to travel to the underground work area of the mine and that the duration of travel impacts rostering arrangements as those arrangements involve a two-hour overlap in rostered shifts to account in part for this travel.[633]

[591] There are also geological challenges affecting operations at Whitehaven's Narrabri Mine.[634] There are a number of stone intrusions that have presented in the coal seam where the longwall operation is occurring and this results in significantly lower productivity because the siltstone and sandstone is hard, and therefore, takes longer to be sheared. The increase shearer cycle times also results in an increase in equipment maintenance costs as equipment becomes worn more quickly than if there were no stone intrusions.[635] Mr Case said it is anticipated that the geological issue will continue to impact operations until mid-2025 when the operation on

[626] *Carter Statement* at [49].

[627] *Carter Statement* at [50].

[628] *Carter Statement* at [71].

[629] *Carter Statement* at [73] – [74].

[630] *Carter Statement* at [73] – [75].

[631] *Case Statement* at [50(a)].

[632] *Case Statement* at [52(a)].

[633] *Case Statement* at [50(a)] – [50(b)].

[634] *Case Statement* at [53(b)].

[635] *Case Statement* at [53(b)], [53(d)].

the current panel has been completed.[636] Mr Case was of the opinion that the other Respondent Employers are not currently experiencing the same geological issue.[637]

[592] Mr Case said another unique feature of the Narrabri Mine is the existence of a large conglomerate unit overlaying the coal deposit at the mine that causes occasional weighting events and roof collapses within the longwall operations.[638] Mr Case said this is a significant safety hazard and causes significant production delays when this occurs.[639] Whitehaven have introduced a unique pre-conditioning program to address this risk which adds an extra step to the mining process and results in an additional operating cost.[640]

[593] Mr Case also said that the coal deposit at Narrabri Mine is characterised by its naturally high in-situ carbon dioxide content, setting it apart from mines like Ulan No. 3 Mine, which to his knowledge have very low, if any, gas emission issues.[641] Mr Case said this elevated carbon dioxide content at Narrabri Mine presents several challenges, including risks of outbursts of coal and exposure of personnel to noxious gases within ventilated roadways and in order to mitigate these risks, Narrabri Mine has implemented an extensive drilling program.[642] Mr Case said the naturally high in-situ carbon content at Narrabri Mine also has consequences in connection with the Federal Government's Safeguard Mechanism for facilities that emit more than 100,000 tonnes carbon dioxide equivalent emissions in a financial year.[643] This Safeguard Mechanism is given effect under the *National Greenhouse and Energy Reporting Act 2007* (Cth) and requires entities that it covers to ensure that emissions for the relevant facility remain below certain prescribed levels. In cases where emissions exceed prescribed levels, offset credits are required. Mr Case said this has a significant financial impact on business operations at Narrabri Mine, and that other mine sites that do not have emissions that exceed prescribed levels do not bear the same financial burden.[644]

Whitehaven's Operations at its Ulan No. 3 Mine

[594] There are also challenges that affect mining at the Ulan No. 3 Mine.[645] Strata conditions, such as stress magnitude and geology, interfere with the efficiency of mining operations. These factors affect the geotechnical stability of the Ulan No. 3 Mine, impacting production levels. Production at Ulan No. 3 last year was less than in previous years because of deteriorating strata conditions.[646]

[595] The Ulan Complex also has an environmental protection licence issued under the PEO Act and there are strict environmental conditions that relate to water management (discharge

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[636] *Case Statement* at [53].

[637] *Case Statement* at [53].

[638] *Case Statement* at [53].

[639] *Case Statement* at [53].

[640] *Case Statement* at [53].

[641] *Case Statement* at [53(i)].

[642] *Case Statement* at [53(i)] – [53(j)].

[643] *Case Statement* at [53(k)].

[644] *Case Statement* at [53(k)].

[645] *Ostermann Statement* at [38] – [45].

[646] *Ostermann Statement* at [40].

and usage) and the location of the mine alongside a freshwater river. The type of environmental conditions that apply to the Ulan Complex include subsidence management of public infrastructure and designated conservation areas; rehabilitation; dust management; noise management; and biodiversity.[647]

Delta Coal's Operations at the Chain Valley Colliery

[596] Delta Coal is mining under sensitive areas, such as the foreshore of Lake Macquarie and residential housing and it uses the bord and pillar method of extraction to minimise surface subsidence.[648]

Equipment used

Peabody's Operations at its Wambo Mine

[597] Mr Carter's evidence was that at Peabody's Wambo Mine, the following equipment is used:

- two shearers that have been in service since 2006 and 2010;
- approximately 145 hydraulic shields which are 17 years old (all were purchased in 2006 and have been in service since 2007);
- three continuous miners, two of which have been in service since 2006 and the third which has been in service since 2019; and
- diesel support machinery and other support equipment that is approximately 17 years old.[649]

[598] Given the anticipated mine life of Peabody's Wambo mine, it uses much older equipment resulting in less efficient extraction, higher maintenance costs and greater loss of productive time when the equipment is serviced compared to the Ulan No. 3 Mine and Whitehaven's Narrabri Mine which utilise more modern equipment.[650] This is exacerbated by the high rock content in the sections of the area now being mined which puts additional strain on, and causes additional wear to, the equipment. These issues constrain production volumes and add significantly to marginal costs of production.[651]

Whitehaven's Operations at its Narrabri Mine

[599] The Narrabri Mine commenced operations in 2012 and on the basis that the equipment aligns with the mine's age, it uses newer longwall equipment to the equipment used at the Wambo mine.[652] Mr Carter said that he understands there is also capital planned for replacement

[647] *Ostermann Statement* at [28].

[648] *Cornford Statement* at [47].

[649] *Carter Statement* at [61].

[650] *Carter Statement* at [44(b)], [62] – [70], [121] – [123].

[651] *Carter Statement* at [44] – [45].

[652] *Carter Statement* at [142].

and upgrades of the equipment to sustain efficient operations for the duration of the mine's life.[653]

Ulan's Operations at its Ulan No.3 Mine

[600] Due to an operational change in 2006, Ulan purchased and installed new mining equipment. Subsequently, Ulan has made significant capital investments in the maintenance and modernisation of its equipment.[654]

Delta Coal's Operations at the Chain Valley Colliery

[601] Five continuous miners are used at Delta's Chain Valley Colliery.[655] A continuous miner is remote controlled and a worker will need to be within a few metres of the machine to push buttons for almost every function whereas a longwall miner is highly automated and can largely be run from the surface if required.[656] Compared to the other Respondent Employers, Delta uses continuous miners rather than longwall miners at a lower purchase cost of around $10 million compared to $100 million to mine the coal.[657] Delta purchased the continuous miners in 2019 and they were the subject of a major maintenance overhaul in 2020 and 2021.[658] The annual repair and maintenance costs of:

- the first continuous miner has increased from approximately $300,000 in 2020 to approximately $600,000 in 2023; and
- the second continuous miner has increased from no expenditure in 2020 to approximately $600,000 in 2023.[659]

Distribution channels

Peabody, Ulan and Whitehaven

[602] Peabody, Ulan and Whitehaven all transport coal by rail to a port in Newcastle for export.

Coal from Peabody's Wambo Mine

[603] Extracted coal from Peabody's Wambo Mine is transported approximately 2.5 kilometres, by truck, to the Wambo CHPP where it is washed, crushed and sorted.[660] Afterwards, the coal is transported, by train, to Port Waratah.[661] Once washed, it is crushed into grade-sized chunks and sorted into stockpiles ready to be loaded on to trains for transport to

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[653] *Carter Statement* at [142].

[654] *Ostermann Supplementary Statement* at [46] – [48].

[655] *Cornford Statement* at [57].

[656] *Cornford Statement* at [59].

[657] *Cornford Statement* at [60].

[658] *Cornford Supplementary Statement* at [4(b)].

[659] *Cornford Supplementary Statement* at [4(b)].

[660] *Carter Statement* at [26].

[661] *Ostermann Statement* at [23].

Newcastle.[662] Rejected materials are transported via trucks to pits within the Wambo Complex for storage and rehabilitation.[663] The journey by rail from the Wambo CHPP to the closest port in Newcastle takes between two and three hours.[664] The round-trip journey between the Wambo Complex and Port Waratah is approximately 11.5 hours.[665]

Coal from Ulan's Ulan No.3 Mine

[604] Extracted coal from the Ulan No. 3 Mine is transported, by train, to Port Waratah, Newcastle which is a journey of approximately 250km.[666] The total cycle time, being the time it takes to do a round-trip journey from between the Ulan Complex and Port Waratah and loading and unloading the coal, takes approximately 22.7 hours.[667]

Coal from Whitehaven's Narrabri Mine

[605] Narrabri Mine has a wash plant on site.[668] It also has a crushing and bypass facility which can be used to prepare coal for transport for washing at another site.[669] Extracted coal from Whitehaven's Narrabri mine that is processed at the onsite wash plant[670] is then transported, by train, to Port Waratah, Newcastle[671] where it is then exported. It takes approximately 20 hours to load the coal onto the train.[672]

[606] The round-trip journey between the Narrabri Mine and Port Waratah is approximately 27 hours.[673] There a number of difficulties that occur when transporting the extracted coal to Port Waratah, which is inclusive of the time taken to load, and unload, the coal.[674] There is a 240-kilometre single rail line where loaded trains require bank engine assistance to haul over the Liverpool Range.[675] The total distance from the Narrabri Mine to Port Waratah is 382 kilometres.[676] As a result of this distance, rail and haulage costs are significantly higher than they would be for other coalmine operators that are closer to the Port.

Coal from Delta Coal's Operations at the Chain Valley Colliery

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[662] *Carter Statement* at [26].

[663] *Carter Statement* at [26].

[664] *Carter Statement* at [27].

[665] *Ostermann Statement* at [23].

[666] *Ostermann Statement* at [21].

[667] *Ostermann Statement* at [23].

[668] *Case Statement* at [18(c)].

[669] *Case Statement* at [18(c)].

[670] *Case Statement* at [18(c)].

[671] *Ostermann Statement* at [23].

[672] *Case Statement* at [19(a)].

[673] *Ostermann Statement* at [23].

[674] *Ostermann Statement* at [23], *Case Statement* at [19(a)].

[675] *Humphris Statement* at [38].

[676] *Case Statement* at [19(a)].

[607] Extracted coal from Delta Coal's operations at the Chain Valley Colliery is transported directly to the Vales Point Station, via the Mannering Colliery.[677] The extracted coal is often used immediately at the Vales Point Station.[678]

Size, structure and nature of the workforce

[608] As noted earlier in this Decision, although the detailed functions of the respective SIEA Employees may vary from mine to mine, the general descriptions of the roles undertaken by the SIEA Employees are common across the Respondent Employers' workforces[679] and each of the SIEA roles are important positions that are either required by the relevant mining safety legislation or undertake functions that are required.

[609] Detailed findings about the composition of the workforce, induing the SIEA Employees have been made earlier in this Decision. This includes the shift rosters and general employment arrangements. This has also the context for out consideration more generally, and we have had regard to this, where relevant, in our assessment of the comparability of operations and business activities.

Regulatory regimes applicable to the Respondent Employers

[610] All of the Respondent Employers are national system employers subject to the FW Act and they are covered by the Black Coal Award. They also have a common regulator being the Secretary of the Department of Regional NSW and are subject to common regulatory regimes that apply to the Industry including the:

- CMI (Long Service Leave) Administration Act;
- WHS (Mines and Petroleum Sites) Act;
- WHS (Mines and Petroleum Sites) Regulation;
- Mining Act, including licensing requirements under that Act;
- CI Act, including maintenance of workers compensation insurance for employees and compliance with Order 34, which gives directions to the Respondent Employers about what is required in training schemes and management for health and safety.

[611] Delta points to a factor distinguishing it from the other Respondent Employers in that it can be subject to regulations made under the ES Act in respect of its supply of thermal coal to the Delta Parent Company.[680]

Cost of production, including capital and maintenance costs associated with *operation*

[612] Mr Roberts' evidence is that cost of production is affected by a range of factors including geology, the location and characteristics of the coal seam, the mining method adopted,

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[677] *Cornford Statement* at [26] – [27].

[678] *Cornford Statement* at [27].

[679] *Ulan Coal Bundle of Position Descriptions, Delta Coal Bundle of Position Descriptions, Peabody Bundle of Position Descriptions, Case Statement* Annexures A – D.

[680] *Delta Outline of Submissions* at [29.9].

the scale of the operation, and stage in the mine life cycle.[681] Some of these factors are considered further below.

[613] As noted above, Peabody, Ulan and Whitehaven all use longwall mining methods. The cost to establish a longwall mine and to buy equipment for a longwall mine is greater than for a bord and pillar mine[682] Mr Carter's evidence indicates that there are significant upfront costs associated with establishing and supporting a longwall mining operation and that it takes a minimum of eight years to amortise the initial capital outlay.[683] Mr Carter said that in comparison, the economics for a bord and pillar mining operation are different in that the mine life can be shorter and the scale of production lover in order to recover capital outlay.[684]

[614] In terms of the size of a longwall mining operation Mr Case said:

- a wider longwall panel directly improves production capacity because shearing equipment used in the mining operation requires around 15 minutes to transition to the next segment of the coalface after completing its cut across the width of a panel, during this time there is no coal production and a wider longwall panel therefore minimises downtime;[685]
- increasing the length of a longwall panel directly improves production capacity by facilitating continuous mining operations for greater periods of time because production needs to cease for a period when mining is completed along the length of a panel to enable relocation of equipment, which can take around two months;[686]
- by having a wider and longer longwall panel, the mining operation is more productive and efficient.[687]

[615] Despite adopting the longwall method, Peabody is different from Ulan and Whitehaven in that Peabody's Wambo Mine activities are concerned with a smaller longwall operation relative to its peers and at a different stage of the mine's life. In this regard Peabody contends that the Ulan No. 3 Mine and Whitehaven's Narrabri Mine currently have a lower cost of production as they operate at a larger scale than what is possible at the Wambo Mine. Further, as noted above, Peabody's Wambo Mine uses much older equipment compared to the Ulan No. 3 Mine and Narrabri Mine and Mr Carter's evidence is that this results in less efficient extraction, higher maintenance costs and loss of productive time when the equipment is serviced.[688]

[616] As noted above, Delta Coal uses the bord and pillar method of mining at its Chain Valley Colliery. Given the difference in mining method this would suggest it has lower capital and maintenance costs built into its cost base relative to the other Respondent Employers. Mr Carter also said that due the scale and complexity of a longwall, a longwall mining operation has a

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[681] *Roberts Statement* at [29].

[682] *Carter Statement* at [33]-[35].

[683] *Carter Statement* at [42].

[684] *Carter Statement* at [42].

[685] *Case Statement* at [47(b)].

[686] *Case Statement* at [47(c)].

[687] *Case Statement* at [47(d)].

[688] *Carter Statement* at [62] – [70], [121] – [123], [142].

higher minimum labour component than bord and pillar mining.[689] Notwithstanding its lower capital costs, as noted above the evidence suggests that bord and pillar method adopted by Delta Coal is a more labour intensive bord and pillar approach to mining coal.

Anticipated life of mine

[617] Mr Roberts's evidence was that the most economically viable coal from a mine is traditionally mined first, leading to lower costs and better productivity in the earlier years of a mine's life with production yield decreasing as the coal seam is progressively depleted.[690] Mr Roberts said the costs associated with maintenance of aging equipment increase as the mine ages and comparative efficiency of extraction is diminished as new mines are established with newer technologies.[691] The witness evidence suggests a greater anticipated mine life results in greater capacity to absorb increases to the cost base in the short term on the assumption that subsequent increases in the coal price will enable margins to be restored and losses recovered.[692]

Peabody's Operations at the Wambo Mine

[618] Peabody's operations at the Wambo Mine commenced in 1969[693] and we have taken into account the anticipated mine life and related circumstances.[694]

Ulan's Operations at the Ulan No. 3 Mine

[619] The mine life of the Ulan Mine is anticipated to continue to 2033.[695]

[620] Ulan No. 3 uses the retreat longwall method of mining to produce coal[696] and as the longwall panels move further north, the extracted part of the coal seam is thinning. That means that there is less coal per metre of retreat along the longwall, thereby reducing the productivity of the mine.[697] These operational pressures will increase as Ulan No. 3 continues to produce until the expected cessation of production in 2033 (assuming an extension will be approved). Without the extension receiving approval, production at Ulan No. 3 will cease in 2031.[698]

[621] Once production ceases, the mine will enter its rehabilitation phase at which time Ulan will demobilise the site, extract any equipment of value, and undertake other necessary tasks to rehabilitate the mine as planned in the development consent. The workforce at Ulan No. 3 will reduce significantly at this point.[699]

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[689] Carter *Statement* at [38].

[690] *Roberts Statement* at [34].

[691] *Roberts Statement* at [34].

[692] *Carter Statement* at [135], *Roberts Statement* at [41].

[693] *Carter Statement* at [22].

[694] *Carter Statement* at [28].

[695] *Ostermann Statement* at [45].

[696] *Ostermann Statement* at [43].

[697] *Ostermann Statement* at [44].

[698] *Ostermann Statement* at [45].

[699] *Ostermann Statement* at [45].

Whitehaven's Operations at the Narrabri Mine

[622] The mine life of Whitehaven's Narrabri mine is anticipated to continue for many years[700] and possibly beyond as the operator of the mine has an exploration lease within the area of the mine and it is possible that additional coal deposits will be identified.[701]

[623] Narrabri Mine is Whitehaven's only underground coal mine and has been in operation since 2012. It is approved to produce 11 million tonnes of ROM coal per annum until the end of December 2031, although approval has been sought to extend the life of Narrabri Mine until 2044.[702] If approval to operate to 2044 is secured the Narrabri Mine will continue to operate using the existing infrastructure and workforce and will be updated with a second longwall operation that will increase production capacity.[703]

Delta Coal's Operations at the Chain Valley Colliery

[624] Production at Delta Coal's Chain Valley Colliery commenced in 1962[704] and it has been mined for over 60 years.[705] Currently, the Delta Coal Colliery has planning approvals to continue operating for several more years.[706] The details of this are in the evidence before the Commission and have been taken into account, but we have not found it necessary to include in this published Decision.

[625] Delta Coal is seeking to extend its planning approval until 2029.[707] Given the unique circumstances of the Chain Valley Colliery, its operations are expected to cease once the life of the Vales Point Station comes to an end.[708] It is anticipated that the Vales Point Station will cease operations in 2033.[709] Assuming applications to extend the approvals are granted, it is anticipated Delta Coal will end the operations of the Colliery in 2033.[710]

Who the Respondent Employers supply coal to and sources of revenue

[626] Peabody, Ulan and Whitehaven have a common characteristic in that they all export thermal coal to international markets in Asia. Mr Ostermann's evidence is that the international market for thermal coal is highly variable and influenced by a range of factors including:

(a) international demand, and relatedly demand for electricity;

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[700] *Humphris Statement* at [35]: Mining at the Narrabri Mine is currently approved until December 2031. An approval has been sought to extend the life of the Narrabri Mine until 2044.

[701] *Case Statement* at [46].

[702] *Humphris Statement* at [35], *Case Statement* at [14].

[703] *Case Statement* at [14(d)].

[704] *Cornford Statement* at [23].

[705] *Cornford Supplementary Statement* at [4(a)].

[706] *Cornford Supplementary Statement* at [11].

[707] *Cornford Statement* at [29].

[708] *Cornford Statement* at [28] – [29].

[709] *Cornford Statement* at [29].

[710] *Cornford Statement* at [28]-[29].

(b) international supply as customers can, and do, source coal, particularly thermal coal, from Indonesia, Columbia, South Africa, Canada, the USA and other suppliers in Australia;
(c) government regulations and policy;
(d) the reshaping of the global energy market with a focus on alternative sources of energy supply and particularly the speed of transition to renewable energy sources;
(e) geopolitical risks and related interventions by governments.[711]

Coal produced at Peabody's Wambo Mine

[627] The majority of the coal produced from the Wambo Mine is sold in the branded market comprising of customers from Taiwan, Japan and Korea. Any coal not sold on the branded market is then sold through the generic specification market or global coal specification market.

Coal produced at Ulan's Ulan No.3 Mine

[628] The coal produced from the Ulan No. 3 Mine is predominately sold to customers in Asia.[712] The coal produced from the Ulan No. 3 Mine is also sold to international markets[713] with the majority of it sold to customers in South East Asia, and specifically, China and Japan.

Coal produced at Whitehaven's Narrabri Mine

[629] The coal produced from Whitehaven's Narrabri Mine is predominately sold to customers in Asia. The export market for coal extracted at the Narrabri Mine includes Japan, Korea, Taiwan and other countries in the Asian region.[714] Coal with a calorific value (**CV**) above 5600 kilocalories per kilogram can be sold to Japan and Japan is the primary export market for coal produced at the Narrabri Mine.[715]

Coal produced at the Chain Valley Colliery

[630] The coal produced from Delta's Chain Valley Colliery is sold directly to the Vales Point Station.[716] Delta Coal does not supply extracted coal to any other consumer.

How the Respondent Employers market their product and contracting arrangements with customers

Peabody, Ulan and Whitehaven

[711] *Ostermann Statement* at [47].

[712] *Roberts Statement* at [51] – [54].

[713] *Ostermann Statement* at [18].

[714] *Case Statement* at [20(a) – (b)].

[715] *Case Statement* at [20].

[716] *Cornford Statement* at [25].

[631] Compared with Peabody's Wambo Mine, the Ulan No. 3 Mine and Whitehaven's Narrabri Mine have a larger base of potential customers,[717] higher margins and a longer remaining mine life which gives them the flexibility market their coal using short-term and spot price contracts in a more prospective way.[718] In comparison, the Wambo Mine's lower operating margins and anticipated mine life has implications for the percentage of its coal produced that is committed to sale under long term-term fixed price contracts.[719] While Peabody acknowledges that these long term contracts provide security of revenue it says this leaves the Wambo Mine with limited capacity to optimise production volume in response to changes in its cost base, including labour costs.[720]

Characteristics of the coal produced by the Respondent Employers

[632] Coal mines produce coal of different qualities and properties and the properties of coal across a coal seam also vary with the best quality coal typically being mined in the early life of a mine.[721] Coal that is of a lower CV is considered a lower quality coal[722]. A greater quantity of lower CV coal is required to achieve the same electricity generation as higher quality coal and higher CV coal demands a higher price in the market.[723] A lower ash content in coal increases a power station's combustion efficiency, with higher heat output and lower particulate emissions.[724] A low sulphur content minimises sulphur dioxide emissions from power generation.[725] Coal washing is a process undertaking to refine coal and clean it of impurities and this increases the efficiency, quality and price of the coal.[726]

Coal produced at Peabody's Wambo Mine

[633] Peabody's Wambo mine in the Hunter Valley predominantly produces thermal coal for export.[727] The Hunter Valley has a reputation for producing some of the highest quality thermal coal and customers in Japan have designed their generators and other systems specifically to operate on the high-quality coal produced from the Hunter Valley region.[728] At Peabody's Wambo Mine, the ROM coal, being raw coal from the mine, is extracted from the mine, sent to the surface using a conveyor and transported by truck for approximately 2.5 kilometres where it is washed at a CHPP to remove impurities.[729] Peabody's main competitors in the market for coal of the type produced by Wambo are other thermal coal producers in the Hunter Valley region who produce thermal coal with similar characteristics. There are only approximately five or six other mines who would be able to produce comparable coal to the coal extracted from

[717] *Carter Statement* at [91]; *Roberts Statement* at [104].

[718] *Roberts Statement* at [41], [93], [100].

[719] *Carter Statement* at [59].

[720] *Peabody Outline of Submissions* at [29(a)], [32(b)].

[721] *Ostermann Statement* at [32].

[722] *Case Statement* at [15(c)].

[723] *Case Statement* at [15(c)], *Humphris Statement* at [21].

[724] *Humphris Statement* at [21].

[725] *Humphris Statement* at [21].

[726] *Cornford Statement* at [68].

[727] *Cornford Statement* at [74].

[728] *Roberts Statement* at [56].

[729] *Carter Statement* at [26].

Wambo Mine including two open cut mine complexes located in the Hunter Valley owned by Glencore.[730]

Coal produced at Ulan's Ulan No.3 Mine

[634] Only thermal coal is extracted at Ulan No.3[731] and each of Ulan Coal Mines' customers require coal with certain specifications, pertaining to values such as calorific value and moisture content.[732] Glencore responds to customer needs by blending coal from different mines.[733] The coal produced from the Ulan No. 3 Mine has a low ash content and is high quality thermal coal that is almost always blended with coal from other sources to meet customer expectations.[734] The Ulan Complex includes a coal washery.[735]

Coal produced at Whitehaven's Narrabri Mine

[635] Whitehaven's Narrabri mine predominately extracts thermal coal[736] although a small amount of pulverised coal injection coal is also extracted.[737] Extracted coal from the Narrabri mine is processed at an onsite wash plant.[738] Mr Case's evidence is that the quality of the thermal coal produced at Narrabri Mine ranges from mid CV to high CV and the coal currently produced at Narrabri Mine is mid CV, between 5500 and 5800 kilocalories per kilogram. [739] Mr Humphris' evidence was that the average net CV of Whitehaven Coal Limited's group exports was about 6,100 kilocalories per kilogram with 100 percent of its coal exports being greater than 5,600 kilocalories per kilogram and 85 percent of the coal exports being greater than 5,850 kilocalories per kilogram.[740]

Coal produced at the Chain Valley Colliery

[636] Delta Coal only extracts thermal coal from the Chain Valley Colliery, currently from one seam.[741] Delta Coal does not have a coal preparation plant and unlike in the longwall mining method, coal extracted at the Chain Valley Colliery is not washed.[742] Mr Conford said that export coal is generally a 6,000 kilocalorie specification whereas the coal that Delta Coal produces is roughly 5,500 kilocalories per kilogram which the Vales Point Station can accept.[743]

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[730] *Roberts Statement* at [62].

[731] *Ostermann Statement* at [30].

[732] *Ostermann Statement* at [34].

[733] *Ostermann Statement* at [34], *Cornford Statement* at [72].

[734] *Ostermann Statement* at [36].

[735] *Cornford Statement* at [71].

[736] *Humphris Statement* at [39], *Cornford Statement* at [75].

[737] *Case Statement* at [15(a)].

[738] *Case Statement* at [15(c)], [18(c)].

[739] *Case Statement* at [15(b)].

[740] *Humphris Statement* at [22].

[741] *Cornford Statement* at [34].

[742] *Cornford Statement* at [66], [68].

[743] *Cornford Statement* at [70].

In contrast to coal from the Ulan No.3 Mine, Delta Coal does not blend its extracted coal with coal from another mine before supplying it to the Vales Point Power Station.[744]

Size of mines, scale of production and yield ratio

[637] The Wood McKenzie data indicates that 2.7 million tonnes of coal are produced per year at Wambo compared to 5.3 million at the Ulan No. 3 Mine and 7.1 million tonnes at the Narrabri Mine.[745]

[638] The Wood McKenzie data also indicates that the yield ratio, being the percentage of extracted coal that is saleable, is only 55% at the Wambo Mine compared to 95% at the Ulan No. 3 Mine and 98% at the Narrabri Mine.[746] According to the Wood McKenzie data this means that the total number of saleable tonnes per year of coal is 1.5 million tonnes at the Wambo Mine compared to 5.0 million tonnes at Ulan No. 3 Mine and 7.0 million tonnes at the Narrabri Mine.[747]

[639] However questions arise regarding the reliability of the Wood McKenzie figures given our earlier observations and when the evidence relating to actual production and yield ratio is considered.

[640] By way of comparison:

- the longwall at the Wambo Mine is approximately 250m wide and 700m to 800m long;[748]
- the current longwall operation at the Ulan No. 3 Mine is 300 to 400 metres in width and 2.5 to 3.6 kilometres in length; [749]
- the longwall at Whitehaven's Narrabri Mine is approximately 400 metres in width and 3.6 to 6 kilometres in length.[750]

[641] Mr Case gave evidence that a wider longwall panel directly improves production capacity because:

- the shearing equipment used in the mining operation requires around 15 minutes to transition to the next segment of the coalface after completing its cut across the width of a panel;
- during this period of time there is no coal production and so a wider longwall panel streamlines operations and minimises downtime, optimising overall productivity;
- narrower longwall panels result in more frequent interruptions in the shearing process to facilitate the equipment's transition to the next coalface segment, thereby decreasing overall productivity; and

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[744] *Cornford Supplementary Statement* at [13].

[745] *Carter Statement* Annexure MR-9.

[746] *Carter Statement* Annexure MR-9.

[747] *Carter Statement* Annexure MR-9.

[748] *Carter Statement* at [39].

[749] *Ostermann Supplementary Statement* at [54] – [59].

[750] *Carter Statement* at [51] – [52];*Case Statement* at [47].

- it facilitates continuous mining operations for greater periods of time because production needs to cease for a period of time when mining activities have been completed along the length of a panel so that equipment can be relocated to the next panel and at Narrabri Mine, this equipment relocation process usually takes around two months.[751]

[642] The evidence[752] is that the anticipated mine life of Peabody's Wambo Mine, and associated circumstances, impacts upon production volumes. The details of this are in the evidence before the Commission and have been taken into account, but we have not found it necessary to include in this published Decision.

[643] Mr Carter and Mr Roberts' gave evidence that geological factors and life of mine mean that the Wambo Mine must extract almost twice as much raw material to produce the same quantity of saleable coal as the Ulan No. 3 Mine and Whitehaven's Narrabri Mine.[753]

[644] We accept that the anticipated mine life and associated circumstances together with geological considerations, means that it is operating a much smaller longwall operation with the consequence that production scale and yields are significant lower [754] compared to the Ulan No.3 Mine and Whitehaven's Narrabri Mine.

[645] Mr Cornford said that the scale of the other Respondent Employers is different to Delta Coal as their sites extract substantially more tonnes per annum because they use a different method of mining and are not subject to the same constraints as Delta Coal such as subsidence restrictions.[755] The data provided by the Respondent Employers appears to support this.

[646] Both Mr Carter and Mr Roberts said that compared to Peabody's Wambo Mine, Delta Coal's Chain Valley Colliery has a greater capacity to scale its operations up and down.[756] However it is not clear that this is the case as Mr Cornford disputed this, giving evidence that:

- in his experience it takes at least 12 months to order and receive a new continuous miner and it is not possible for Delta Coal to scale up its operations in less than 12 months;
- infrastructure constraints limit the availability of Delta Coal to scale up and if the Chain Valley Colliery was to do so it would likely need to upgrade its main surface fans or install an additional ventilation shaft and fan upgrade or replace its main winder system which would take at least 12 months;
- Delta Coal has fixed overhead costs associated with its operations and scaling down operations is likely to mean that the fixed price for the lower amount of extracted thermal coal will not cover the variable extraction costs and the fixed overhead costs.[757]

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[751] *Case Statement* at [47].

[752] *Carter Statement* at [44].

[753] *Carter Statement* at [136]; *Roberts Statement* at [47], [94].

[754] *Carter Statement* at [140], *Roberts Statement* at [47], [94].

[755] *Cornford Statement* at [76].

[756] *Carter Statement* at [109(e)]; *Roberts Statement* at [39].

[757] *Cornford Supplementary Statement* at [22].

[647] All Respondent Employers appear to incur restraints in their capacity to scale up and down.

Operating margins and realised coal price

[648] We accept that as Peabody's Wambo Mine activities are concerned with mining remnant coal in an atypically small longwall operation, this results in lower yield, a lower yield ration (that is the percentage of extracted coal that is saleable), higher costs of production and therefore a significantly lower cash operating margin compared with the Ulan No. 3 Mine and Whitehaven's Narrabri Mine.

[649] Delta Coal is also different from the Respondent Employers in that it operates the Chain Valley Colliery at a loss as its operating costs outweigh its revenue from supplying coal to the Delta Parent Company.[758] It relies on a subsidy from the Delta Parent Company to meet operating costs.[759] The price at which it supplies its coal is the subject of a confidential contract.

Consideration - Are the Respondent Employers' 'operations' and 'business activities' reasonably comparable?

[650] The Respondent Employers share both similarities and differences. In respect of the differences identified, the ACTU submitted that this could be accommodated by negotiation of distinct terms and conditions set out in schedules to an agreement.[760] Peabody has submitted that if the differences between the Respondent Employers are significant enough that separate negotiations around wages and conditions is likely, then doubt would arise as to whether bargaining would proceed efficiently and in a manner consistent with the objects of the FW Act.[761]

[651] As stated above, the import of the objects of the FW Act for applications of this nature is that the legislation promotes collective bargaining which achieves productivity and fairness through collective bargaining at the level of the enterprise, including where authorised and subject to the express provisions giving some priority to single enterprise agreements, at a multi-enterprise level. Part 2-4 of the Act also includes among its objects the provision of 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.[762] These objects should also guide the Commission's exercise of judgement in determining whether operations and business activities are reasonably comparable.

[652] Each of the Respondent Employers operate pursuant to a unique corporate and ownership structure. We note that among the evidence and submissions of the Respondent Employers are details concerning the broad operations of those employers beyond the contemplated coverage of the Authorisation. The 'reasonably comparable' test is concerned with the Respondent Employer entities, and the enquiry is targeted at the 'operations' and

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[758] *Cornford Statement* [35] – [40].

[759] *Ambridge Statement* at [12].

[760] *ACTU Outline of Submissions in Reply* at [52].

[761] *Peabody Outline of Submissions* at [36].

[762] *FW Act* s.171(a).

'business activities' of those specific entities. We do however accept that the operations and business activities of the Respondent Employers may be influenced by their relationship within the broader corporate group structure and this context may have some relevance in understanding what the Respondent Employers do and why they do it.

[653] Further, in our view, greater weight should be given to differences in operations and business activities of the Respondent Employers to the extent that these relate to the proposed coverage of the Authorisation. In other words, greater weight should be attached to the operations and business activities of the Respondent Employers to the extent that they relate to the work performed by the SIEA Employees proposed to be covered by the agreement and are connected to bargaining.

[654] The Respondent Employers share key similarities, in particular:

- they are all in the Industry, operating underground coal mines and extracting coal for sale to industrial users in Asia;
- although the mines are located in distinct regions of the state, and on different coal seams, they are all operating in New South Wales;
- although the detailed functions of the respective SIEA employees may vary from mine to mine, the general descriptions of the positions of the relevant employees are similar; [763]
- each of the SIEA roles are important positions that are either required by the relevant mining safety legislation or undertake functions that are required;
- they are subject to common regulatory regimes that apply to Industry;
- while their challenges are unique to the environments in which they are mining, they all confront different stressors associated with the geology of their mines and environment in which they are mining.

[655] Further, in respect of Peabody, Ulan and Whitehaven:

- the work being performed by the SIEA employees is similar;
- they are all in the competitive international export thermal coal markets and their product is predominately sold to customers in Asia;
- they are all based in regional inland areas within New South Wales and confront challenges in attracting and retaining staff; and
- they all use longwall mining methods.

[656] Having considered the similarities and differences between the Respondent Employers, we are not persuaded that the differences between Ulan and Whitehaven are such that these employers have rebutted the presumption that they are reasonably comparable.

[657] Peabody warrants further consideration.

Key differences between Peabody and the other Respondent Employers

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[763] *Ulan Bundle of Position Descriptions, Peabody Bundle of Position Descriptions, Delta Coal Bundle of Position Descriptions, Case Statement Annexures A - D.*

[658] Peabody's Wambo Mine has a number of unique characteristics that distinguish it from the Ulan No. 3 Mine and Narrabri Mine. These are largely driven by its anticipated life of mine and include:

- a small longwall operation relative to its peers resulting in higher costs of production relative to the other Respondent Employers;
- a significantly lower yield ratio, being the percentage of extracted coal that is saleable;
- the use of much older equipment resulting in less efficient extraction, higher maintenance costs and greater loss of productive time when the equipment is serviced compared to the Ulan No. 3 Mine and Whitehaven's Narrabri Mine which utilise more modern equipment;[764]
- differing contractual arrangements with customers regarding the percentage of its coal produced is committed to sale under long term-term fixed price contracts.[765]

[659] We accept that differences in matters such as size and scale may result in a finding that two employers are not reasonably comparable. It could not reasonably be said, for example, a small business is reasonably comparable with a large multi-national corporation. However Peabody, Ulan and Whitehaven are all large, sophisticated businesses that export to international markets. Further, while the above differences may mean that activities at the Wambo mine are less productive, there are substantial similarities in the work activities being performed by the SIEA employees for each of Peabody, Ulan and Whitehaven and this should be given significant weight.

[660] We do however acknowledge that Peabody's differences may result in unique commercial challenges. In particular, production and profitability are influenced by a range of factors including mine life and given the Wambo Mine's anticipated life and associated matters it can be contemplated that it may be more sensitive to fluctuations in its cost base. To the extent that these differences have the capacity to influence Peabody's approach to bargaining, they are, in our view, more relevant to a consideration of common interests and have been considered in that context earlier in this decision. However, it does not follow that Peabody's:

- 'operations' at the Wambo Mine, being '*how*' it operates; or
- its 'business activities' being 'its trading activities or '*what*' it does in terms of the goods and services it provides;

are so different that they are not reasonably comparable with those of Ulan and Whitehaven. In our view, Peabody has not displaced the presumption that its operations and business activities are reasonably comparable with those of Ulan and Whitehaven.

[661] Despite this finding we acknowledge that the anticipated life of a mine may mean that a mine ceases operation or moves into its closure phase in the foreseeable future. As stated earlier, there is some uncertainty and considerable conjecture about the timing of this aspect. In this regard, we note that s.251 of the FW Act enables an employer or bargaining representative of an employee who will be covered by the proposed enterprise agreement to which the authorisation relates may apply for a variation to remove the employer's name from the

[764] *Carter Statement* at [44(b)], [62] – [70], [121] – [123].

[765] *Carter Statement* at [59].

authorisation. The Commission is required to vary the authorisation if the requirements of s.251(2A) or s.251(2B) are met. Of note the requirements in s.251(2A) will be met if:

(a) the employers specified in the authorisation and the bargaining representatives of those employers have had an opportunity to express their views on the application to the Commission ; and
(b) because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

[662] If the circumstances subsequently changed significantly such that, for example, the SIEA Employees employed by Peabody actually ceased carrying out the work proposed to be covered by the multi-employer agreement, it would likely follow that requiring Peabody to continue to bargain with the other Respondent Employers would no longer be appropriate.

Key differences between Delta Coal and the other Respondent Employers

[663] We have earlier found that 'business activities' should be taken to mean '*what*' that employer does in terms of the goods and services it provides or sells, or as submitted by the ACTU, its trading activities and it is very clear that Delta's trading activities are very different to that of the other Respondent Employers. In particular, Delta Coal's Chain Valley mining operation is materially different to the Wambo, Ulan and Narrabri mining operations in that it supplies coal to a domestic power station owned by the same parent company. It is distinguishable in that:

- it supplies coal to a single customer within the same corporate group a co-located at a domestic power station;[766]
- its operations do not involve exploratory drilling for other coal and mining opportunities;[767]
- it does not compete in either the domestic or global marketplace and its operations do not involve any exportation of coal.[768] Rather, there is a fixed contract of supply between Delta Coal and its single customer, the Delta Parent Company, on a fixed term basis[769] and it is unable to vary the fixed price;[770]
- it does not operate to generate profit or commercial gain.[771] Rather, Delta Coal operates the Chain Valley Colliery at a loss[772] and it relies on a subsidy from the Delta Parent Company to meet operating costs.[773]

[664] Unlike Peabody, Delta Coal's Chain Valley mining operation essentially exists for a different purpose compared to the operations of the other Respondent Employers and this is a

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[766] *Carter Statement* at [109(a)]; *Roberts Statement* at [78];*Cornford Statement* at [11], [24] –[25].

[767] *Cornford Statement* at [30].

[768] *Cornford Statement* at [38].

[769] *Cornford Statement* at [35].

[770] *Cornford Supplementary Statement* at [7].

[771] *Delta Coal Outline of Submissions* at [42.5].

[772] *Cornford Statement* at [35] – [40].

[773] *Ambridge Statement* at [12].

factor that, in our view, carries significant weight. That is, this relevantly impacts upon how it conducts its business activities.

[665] There are other factors that distinguish Delta Coal's Chain Valley mining operation from the mining operations of the other Respondent Employers. In particular:

- it is located location close to a major regional centre and its workforce is locally based;
- it uses a different method of mining in that it does not use the longwall mining method and uses the bord and pillar method of mining,[774] a more labour intensive method of mining involving manual installation of bolts, mesh, concrete and ventilation and which and its use of continuous miners rather than large, capital intensive automatic coal miners used in longwall mining;
- it does not have a coal preparation plant and unlike in the longwall mining method, coal extracted at the Chain Valley Colliery is not washed;[775]its operations do not involve transportation of coal over long distances and to ports for exportation. Rather, extracted coal from Delta Coal's Chain Valley Colliery is transported directly to the Vales Point Station, via the Mannering Colliery[776] where it is often used immediately at the Vales Point Station;[777]
- it can more readily be subject to regulations made under the ES Act in respect of its supply of thermal coal to the Delta Parent Company.[778]

[666] In assessing these differences, we have given greater weight to the factors relevant to bargaining for an enterprise agreement for the SIEA employees.

[667] In our view, the fact that Delta Coal's business activities are materially different from that of the other Respondent Employers together, with other differences in its operations as referred to above, mean that it's operations and business activities are not reasonably comparable to the other SIEA Employees in the manner contemplated by s.249(1)(b)(vi) of the FW Act.

[668] As a result, we are satisfied that only Delta Coal has proven to the contrary the presumption that its operations and business activities are reasonably comparable with those of the other Respondent Employers.

6.6 General building and construction work

[669] The proposed agreement will not cover employees in relation to general building and construction work.[779]

6.7 Other matters

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[774] *Carter Statement* at [109(e)], *Cornford Statement* at [42].

[775] *Cornford Statement* at [66], [68].

[776] *Cornford Statement* at [26] – [27].

[777] *Cornford Statement* at [27].

[778] *Delta Coal Outline of Submissions* at [29.10].

[779] *FW Act* s.249A.

[670] Except for Delta Coal, the findings of satisfaction with all of the relevant statutory requirements apply to each of the Respondent Employers. For the purposes of s.250(2) of the FW Act, we are satisfied that the remaining 3 employers should be specified in the Authorisation.

7. Conclusions

[671] We are satisfied that all of the requirements for making the Authorisation have been met in relation to each of the Respondent Employers, with the exception of Delta Coal. Accordingly, we are obliged to issue the Authorisation under s.249(1) of the FW Act in relation to the remaining employers and their SIEA employees.

[672] The Authorisation has been issued separately in PR777608.

[673] The Authorisation specifies each of the relevant matters required by s.250(1) of the FW Act.

[674] Pursuant to s.249(4) of the FW Act, this Authorisation comes into operation on the day it is made (23 August 2024) and will cease to have effect on the earlier of the day on which the proposed enterprise agreement is made or 12 months after the date of this Authorisation, subject to any extension pursuant to s.252 of the FW Act.

[675] The Commission stands ready to assist the parties with the bargaining for the proposed multi-employer agreement should that be sought, such as under a s.240 application or a joint request to conduct a collaborative approaches process to utilise interest-based bargaining.

DEPUTY PRESIDENT

Appearances (all with permission):

L Doust of Counsel for The Association of Professional Engineers, Scientists and Managers, Australia, instructed by AEN Legal.

R Dalton KC of Counsel with *J Mclean* for Peabody Energy Australia Coal Pty Ltd, instructed by Herbert Smith Freehills.

A Gotting of Counsel for Great Southern Energy Pty Ltd T/A Delta Coal, instructed by Bartier Perry.

J Murdoch KC of Counsel for Ulan Coal Mines Pty Ltd, instructed by Corrs Chambers Westgarth.

V Bulut of Counsel for Whitehaven Coal Mining Limited, instructed by Sparke Helmore.

S Kemppi, and later *L Saunders* of Counsel, for the Australian Council of Trade Unions.

G Giorgi with *A Agostino* of Corrs Chambers Westgarth for the Minerals Council of Australia.

Hearing details:

Sydney
2024
29, 30 April
2, 3, 8 and 9 May.

Printed by authority of the Commonwealth Government Printer

<PR774539>