# REASONS FOR DECISION

*Fair Work Act 2009*
s.604 - Appeal of decisions

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Australian Manufacturing Workers' Union (AMWU) and the Australian Workers' Union (AWU)**
**v**
**Wilmar Sugar Pty Ltd**
(C2024/4421)
(C2024/4418)
(C2024/4397)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT WRIGHT
COMMISSIONER CRAWFORD

SYDNEY, 26 JULY 2024

*Appeal against decision [2024] FWC 1720 and Order PR776565 of Deputy President Dobson at Brisbane on 30 June 2024 in matter number B2034/821 – application for order suspending protected industrial action under s 424(1)(d) of the Fair Work Act 2009 (Cth) – admission of expert evidence – whether unions denied procedural fairness – whether significant damage threatened to an important part of the Australian economy – important part of the Australian economy – permission to appeal granted – appeal allowed and decision and order quashed – application redetermined.*

**Introduction**

**[1]** Wilmar Sugar Pty Ltd (**Wilmar** or the **respondent**) operates eight sugar mills located at various places in Queensland. Wilmar has been engaged in bargaining for the making of a new enterprise agreement to replace the *Wilmar Enterprise Agreement 2020* since March 2023. Three unions are bargaining representatives for employees proposed to be covered by the replacement agreement, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**), the Australian Manufacturing Workers' Union (**AMWU**) and the Australian Workers' Union (**AWU**) (collectively, the **appellant unions**). The bargaining continues.

**[2]** On 24 June 2024, the CEPU and AMWU notified Wilmar of an intention to take protected action in the form of one-hour stoppages of work at each of the sugar mills on four different days, being:

- 12:00pm, 2 July 2024;
- 12:00pm, 4 July 2024;
- 12:00pm, 8 July 2024; and
- 12:00pm, 11 July 2024

**[3]** The AWU notified an intention to take protected industrial action in the form of a one-hour stoppage of work only on 2 July 2024. The AWU indicated during the hearing of the appeal that it had intended to give notice of an intention to also take protected industrial action on 4, 8 and 11 July. However, this intention was overtaken by the events which are set out below and no further notice of protected industrial action was given by the AWU prior to the hearing of the appeal.

**[4]** On 25 June 2024, Wilmar applied to the Fair Work Commission (the **Commission**) for an order under s 424(1) of the *Fair Work Act* 2009 (Cth) (the **Act**) suspending protected industrial action for a period of three months. Wilmar contended that an order suspending protected industrial action was required to be made because protected action was threatening to cause significant damage to an important part of the Australian economy for the purposes of s 424(1)(d) of the Act.

**[5]** Section 424(3) requires that, if an application for an order under that section is made, the Commission must, as far as practicable, determine the application within 5 days after it is made. The application was allocated to Deputy President Dobson. Consistent with the statutory obligation, the Deputy President moved to hear the application expeditiously. The hearing of the application commenced late in the afternoon of Thursday 27 June and continued on Friday 28 June and Sunday 30 June 2024 concluding around 5pm in the afternoon on that day.

**[6]** Later in the evening of Sunday 30 June 2024, the Deputy President made an order under s 424(1) of the Act that protected industrial action in relation to the proposed agreement be suspended for a period of six weeks. At that time, the Deputy President published brief reasons for her decision.[1] The Deputy President's brief reasons indicated that she had determined that protected industrial action was threatening, impending or probable and that it has, is or would threaten to cause significant damage to an important part of the Australian economy.[2]

**[7]** Later the same evening, each of the appellant unions filed a notice of appeal with respect to the decision and order of the Deputy President in substantially the same form. Each of the notices of appeal sought an urgent hearing of the appeals and a stay of the decision and order of the Deputy President. The application for a stay was listed for hearing on Tuesday, 2 July 2024 before Vice President Gibian. During the hearing of the stay applications, the Commission indicated that the appeals could be listed for an urgent hearing on Friday, 5 July 2024. As a result of that indication, the appellant unions did not press for a stay pending hearing of the appeal but reserved their positions should the Full Bench reserve its decision after hearing the appeals. The protected action notified for 2 July and 4 July did not proceed.

**[8]** The hearing of the appeals took place in Sydney on Friday, 5 July 2024. Late the previous evening, Deputy President Dobson published detailed reasons for her decision.[3] The Full Bench expresses its gratitude to the Deputy President for dealing with complex and robustly contested proceedings so expeditiously, including conducting hearings outside of usual

Commission hours, and for producing clear and detailed reasons within such a short timeframe. The Deputy President's detailed reasons facilitated the Full Bench being able to deal with the appeal on an expedited basis consistent with the obvious public interest in the matter being resolved as quickly as possible.

**[9]** At the conclusion of the hearing of the appeal on 5 July 2024, the Full Bench made orders granting permission to appeal, allowing each of the appeals and quashing the decision and order of the Deputy President. Having further heard from the parties, the Full Bench redetermined Wilmar's application for an order under s 424(1) of the Act and dismissed the application. The Full Bench provided short oral reasons on that day. These are the more detailed reasons for the orders made on 5 July 2024.

**Background to the application**

**[10]** The background to the appeals is as follows. Wilmar operates eight sugar mills located in the Herbert region, Burdekin region and Mackay region in North Queensland. It is a significant operator in the Australia sugar industry. The evidence indicated that it is responsible for the production of approximately 50% of sugar processed in Australia. In addition to generating revenue from processing sugar cane, Wilmar operates a cogeneration facility at the Pioneer mill which generates electricity using steam from the mill and a distillery that produces bioethanol from molasses which is a by-product of the raw sugar milling process.

**[11]** Operations at these sugar mills are divided into two seasons referred to as the maintenance season, in which work is done to prepare machinery for the crushing season, and the crushing season (or just 'the crush'), in which sugarcane is harvested and processed at the mills. The crushing season generally runs from around June to November or December each year. Wilmar employs approximately 1,300 employees during this period who would be covered by the proposed agreement.

**[12]** During the crushing season, sugar cane is harvested and transported by rail to the mills to be processed. The evidence indicated that, from the moment it is harvested, the sucrose content of the sugar cane starts to deteriorate. The objective of the operation is to ensure that all cut cane is processed as soon as possible and within 24 hours of harvest to avoid sugar deterioration. Once delivered to the mill, the sugar cane is processed using machinery including conveyor belts, rollers and high-pressure boilers to extract the sucrose.

**[13]** The mills are intended to operate on a 24 hour/7 days a week basis throughout the crushing season. Processing operations may, however, be interrupted by a variety of events, including inclement weather which prevents harvesting taking place, machinery breakdowns or disruptions, staff shortages or other logistical difficulties. The consequence is that the precise duration of the crushing season will vary from year to year. At present, the evidence indicated that the target 'crush end date' at the various mills varies between 18 November 2024 to 5 December 2024.

**[14]** The sugar content of the cane generally reduces later in the year and the onset of the wet season means that the crushing season will conclude at least by the end of the calendar year or, on some occasions, early in the new year. If disruptions in processing are unable to be made up by the end of the season, a proportion of the sugar cane crop might go unharvested which, if it

were to occur, would result in a loss of revenue to Wilmar and canegrowers who rely on Wilmar's operations for processing. Protected industrial action, if it disrupts processing, has the potential to increase that risk. Whether it does so will depend on the nature and duration of the protected action and the extent of other interruptions in processing which are experienced during the crush.

**[15]** The appellant unions and the respondent are presently negotiating to replace the existing enterprise agreement. These negotiations appear to be protracted and are ongoing. It is unnecessary for the purposes of the appeal to set out the full history of the bargaining. It is appropriate, however, to note the manner in which protected industrial action commenced in relation to the proposed new agreement.

**[16]** The appellant unions each applied to the Commission for a protected action ballot order on 5 April 2024 and orders were made by the Commission on 9 April 2024. The results of ballots were declared on 26 April 2024. Since 1 May 2024, the appellant unions served notices of protected industrial action, including full day stoppages on 9 May, 13 May, 21 May and 23 May 2024, intermittent or consecutive one-hour stoppages, an overtime ban and partial work bans. These instances of protected industrial action occurred prior to the commencement of the crushing season.

**[17]** On 4 June 2024, Wilmar gave notice of employer response action pursuant to s 411 of the Act to the effect that any employee who engages in protected industrial action on any day on or after 5 June 2024 would be locked out from their employment until further notice. Following the lockout notice, each of the appellant unions withdrew notices of protected industrial action relating to bans on overtime for the period between 5 June and 11 June 2024. Wilmar withdrew its lockout notice on 11 June 2024 and no employees were locked out.

**[18]** Further protected industrial action took place on 12 June 2024 in the form of a one-hour stoppage at each of Wilmar's mills. On the afternoon of 12 June 2024, Wilmar filed an application pursuant to s 424 of the Act seeking a suspension of protected industrial action. Following the filing of that s 424 application, each of the appellant unions withdrew all outstanding notices of protected industrial action. In those circumstances, Wilmar withdrew its s 424 application.

**[19]** No further notices of protected industrial action were served until the notices issued on 24 June 2024. As has been mentioned, the form of protected industrial action notified by the appellant unions on 24 June 2024 involved four one-hour stoppages of work. The impact of the proposed protected action would be somewhat greater than may appear on its face in the circumstances of the crushing season. To the extent that protected industrial action involves a complete stoppage of work at the mills for any period of time, it is necessary for Wilmar to take mitigation steps to ensure the mills can be shut down safely to avoid risk of damage to equipment or loss of product.

**[20]** The period of time needed to shut down and start up processing operations varies from mill to mill. There was some dispute between the parties as to the likely interruption of production that would be occasioned by a one-hour stoppage of work. The Deputy President found that it was appropriate to assess the consequences of a one-hour stoppage on the basis that it would cause 12 hours of lost production.[4] No party challenged the finding of the Deputy

President in that respect. It is appropriate, for the purposes of this decision, to operate on the basis that a one-hour stoppage of work by all employees at a mill is likely to result in an interruption of processing for approximately 12 hours.

**Legislative Framework**

**[21]** Industrial action has not generally been looked upon favourably by the law. Although the Act does not contain a general prohibition on industrial action, industrial action organised or engaged in before the nominal expiry of an enterprise agreement or workplace determination will be a contravention of the Act potentially attracting penalty.[5] The Commission is required to make orders that industrial action stop, not occur or not be organised if satisfied that industrial action which is not protected action is happening, threatening, impending or probable or is being organised.[6] Industrial action, unless protected by legislation, also has the potential to attract a range of remedies under the general law by reason of involving breaches of contract, one or other of the 'industrial' or 'economic' torts or contraventions of other statutes such as competition and consumer legislation.

**[22]** Part 3-3 of the Act deals with industrial action. Within Part 3-3 provision is made for a limited form of protected industrial action which is shielded from the legal consequences which it might otherwise attract by being conferred with immunity from any action under any law with some limited exceptions.[7] The primary form of protected action is employee claim action provided for in s 409 of the Act which is organised or engaged in for the purposes of supporting or advancing claims in relation to a proposed enterprise agreement. The provisions acknowledge that the primary mechanism through which workers and their representatives can exercise power in collective negotiations is through the credible threat of strike or other industrial action. Provision is also made for employee response action and employer response action.

**[23]** It is in that context that the Act enables or requires the Commission to suspend or terminate protected industrial action in various circumstances set out in ss 423 to 426 of the Act. The provision relied upon in this matter is s 424(1)(d) of the Act which, broadly speaking requires that the Commission suspend or terminate protected industrial action that has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it. Section 424 provides as follows:

> "**424 FWC must suspend or terminate protected industrial action—endangering life etc.**
>
> *Suspension or termination of protected industrial action*
>
> (1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
>
> (a) is being engaged in; or
> (b) is threatened, impending or probable.
>
> if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

(c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
(d) to cause significant damage to the Australian economy or an important part of it.

(2) The FWC may make the order:

(a) on its own initiative; or
(b) on application by any of the following:
(i) a bargaining representative for the agreement.
(ii) the Minister.
(iia) if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State.
(iib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;
(iii) a person prescribed by the regulations.

*Application must be determined within 5 days*

(3) If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.

*Interim orders*

(4) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.

(5) An interim order continues in operation until the application is determined."

**[24]** An important contextual feature of s 424 is that, although the Commission is required to suspend or terminate particular protected industrial action if satisfied that one of the circumstances in s 414(1)(c) or (d) exists, the effect of such an order is that all protected action in relation to the proposed agreement ceases to have protection. That is because the common requirements that apply for industrial action to be protected industrial action include that an order suspending or terminating protected industrial action is not in operation.[8] No protected industrial action can be engaged in during the period of any suspension or after termination of protected industrial action.

**[25]** The Commission is required to make an order suspending or terminating protected industrial action under s 424(1)(d) if two requirements are met: protected industrial action is being engaged in or is threatened, impending or probable and the protected industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it. The parties advanced detailed submissions addressing each aspect of those requirements, including what is necessary for protected industrial action to be 'threatened, impending or probable', what constitutes 'significant damage' and what could constitute an 'important part' of the Australian economy. As will appear below, it is not necessary to address all of those submissions to resolve the present appeal or redetermine Wilmar's application.

## Consideration

### Permission to appeal

**[26]** The Full Bench decided to grant permission to appeal in relation to each appeal as we are satisfied it is in the public interest to do so and we would, in any event, exercise our discretion to grant permission to appeal. The appeals raise a number of matters of importance and general application in relation to the application of s 424 of the Act, particularly the matters in relation to which the Commission must be satisfied for an order suspending or terminating protected industrial action to be made under s 424(1)(d). Those contentions should be considered by the Full Bench.

**[27]** In addition, the bargaining involving Wilmar and employees at its sugar mills is itself a matter of public importance. The order suspending protected industrial action in relation to the proposed new enterprise agreement has the potential to influence the course and outcome of the bargaining. If the decision and orders of Deputy President Dobson are attended by error, the appellant unions and their members have potentially suffered an injustice by being wrongly deprived, for a period, of the opportunity to take protected industrial action for the purposes of supporting and advancing their claims in relation to the proposed new agreement. That consideration also favours permission to appeal being granted.

### Merits of the appeals

**[28]** The appellant unions relied on common grounds of appeal in the following terms:

> **Ground 1**
>
> The Commission erred by admitting the expert report of Reuben Lawrence in circumstances where the underlying modelling setting out the assumptions underpinning the economic conclusions was not set out in the report, was sought by production order and otherwise and was not provided, and in so doing:
>
> a. Denied the respondents procedural fairness; and
> b. Thus fell into jurisdictional error.
>
> **Ground 2**
>
> The Commission erred in reaching each of the conclusions that:

> a. Protected industrial action beyond four notified one-hour stoppages was threatened, impending or probable;
> b. The action would cause harm to an important part of the Australian economy; and
> c. Any such harm would constitute significant harm,
>
> as these findings were not reasonably open to the Commission on the material before it.
>
> **Ground 3**
>
> The decision was unreasonable and plainly unjust in the sense described in *House v the King* (1936) 55 CLR 499.

**[29]** The determination of the Deputy President involved an exercise of discretion in the broad sense in that the threat as to which the Commission must be satisfied for the purposes of s 424(1)(d) involves a degree of subjectivity or value judgment.[9] As such, error of the type described in *House v The King* (1936) 55 CLR 499 is required to be demonstrated.

**[30]** The grounds of appeal were, obviously enough, prepared prior to receipt of the Deputy President's detailed reasons for decision. At the commencement of the hearing of the appeal, the Full Bench asked whether the Deputy President's detailed reasons altered the grounds of appeal or necessitated any amendment to the notices of appeal. The appellant unions indicated that they maintained the same grounds of appeal although the detailed reasons permitted more specific particularisation of Ground 3 beyond reliance on the 'unreasonable and plainly unjust' limb in *House v The King*.

**Ground 1 – Denial of Procedural Fairness**

**[31]** The first ground of appeal arises from the admission into evidence of a report of Reuben Lawrence that was tendered by Wilmar.

**[32]** Mr Lawrence's report is entitled 'Economic Impact of Wilmar Sugar and Qld Sugar Manufacturing Industry'. Speaking broadly, the report contained opinions expressed by Mr Lawrence in relation to the economic benefit to the Queensland economy of Wilmar's operations and the direct, indirect and consumer-induced impacts of the sugar manufacturing industry on the Queensland economy and various regional economies within Queensland. The report also expressed conclusions in relation to the impact to local, state and regional economies of a loss of production in Wilmar's sugar operations.

**[33]** Mr Lawrence's report purports to be expert evidence. That is, the evidence was put forward on the basis (implicitly at least) that Mr Lawrence has specialised knowledge based on his training, study or experience and the opinions expressed in his report are wholly and substantially based on that knowledge.[10] Mr Lawrence describes himself as the founder and principal of Lawrence Consulting and indicated that he had over 25 years' experience in consulting to and advising government and corporate clients across a wide scope of projects

and industries. The nature of Mr Lawrence's experience, and the qualifications he holds, were not further elaborated upon beyond an indication that he holds a Bachelor of Economics (Honours) from the University of Queensland.

**[34]** That, however, is not the complaint made by the appellant unions. It does not appear to have been disputed that Mr Lawrence was able to give expert evidence. The complaint made by the unions is that the admission of Mr Lawrence's report involved error because the report contains conclusions which were dependent upon modelling which he had undertaken in the form of input/output tables and specific input/output multipliers without disclosing the tables or multipliers in the report or otherwise. That was said to have deprived the appellant unions of the capacity to interrogate and challenge the opinions contained in the report.

**[35]** Although the grounds of appeal advanced by the appellant unions were identical, the precise nature of the error alleged differed somewhat in the submissions of the different unions. The CEPU and the AWU submitted that the admission of Mr Lawrence's report involved error because the report was inadmissible in circumstances in which the report did not disclose the underlying assumptions and reasoning upon which its conclusions were based. The CEPU and AWU, in addition, submitted that the admission of Mr Lawrence's report resulted in the appellant unions being denied procedural fairness. The submissions of the AMWU concentrated on the contention that the admission of the report, without disclosure of the assumptions and reasoning supporting the opinions expressed, denied the unions procedural fairness.

**[36]** In our view, it is appropriate to concentrate on the allegation that the appellant unions were denied procedural fairness. An assertion that Mr Lawrence's report was 'inadmissible' by reference to the requirements of s 79 of the *Evidence Act* 1995 (Cth) (the ***Evidence Act***) or by reference to common law principles in relation to the admissibility of expert evidence would not, without more, establish error on the part of the Deputy President. Under s 590(1) of the Act, the Commission has a very broad discretionary power to inform itself in relation to any matter before it in such manner as it considers appropriate. Section 591 expressly provides that the Commission is not bound by the rules of evidence. The absence of an obligation to strictly apply the rules of evidence is an important aspect of the operation of the Commission which permits it to get to the heart of matters as directly and effectively as possible.[11]

**[37]** That, of course, does not mean that the rules relating to the admission of expert evidence are irrelevant to whether the Commission should receive evidence. The Commission tends to follow the rules of evidence as a general guide to good procedure.[12] The rules of evidence reflect a system which is calculated to produce a body of proof which has rational probative force and cannot be set aside, without grave danger of injustice, in favour of methods of inquiry which advantage one party and disadvantage the opposing party.[13] The Commission is bound to afford procedural fairness and must generally perform its functions in a manner that is fair and just.[14] However, s 591 of the Act involves an implicit recognition that facts can be fairly found without strict adherence to the technical rules of evidence.

**[38]** Particular considerations arise in relation to the admission of expert evidence. There are many areas of the Commission's jurisdiction in which the receipt of expert evidence will be of great assistance and, indeed, essential to the Commission's work. However, the uncritical receipt of expert evidence has the potential to lead to error and to cause unfairness to the parties

if an expert opinion is unable to be properly examined or tested. If expert evidence is not properly presented, there is a danger that an expert opinion will appear and be treated as authoritative without consideration of the steps by which it was reached and in circumstances in which interrogation might reveal it to be unreliable or at least contestable.[15]

**[39]** In *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd* [2021] FWCFB 6059, 310 IR 299, the Full Bench summarised the basis upon which expert evidence can be admitted at common law as follows:[16]

> While there is some divergence in the authorities, we think a fair summary of the basis on which expert evidence is admitted at common law is that:
> • the expert has specialist knowledge or expertise
> • the evidence given is within the expert's field of specialist knowledge or expertise
> • the evidence given is something about which the tribunal of fact needs assistance from a third party, as opposed to relying upon its general knowledge and common sense
> • the expert's contribution should not have the effect of supplanting the function of the tribunal deciding the issue before it, and
> • the admissibility of the evidence depends upon proof of the factual basis of the opinion.

**[40]** To that may be added that it is a basic rule of the common law (and now s 79 of the *Evidence Act*) that an expert opinion is inadmissible unless the expert states the reasoning by which the expert conclusion arrived at flows from the facts proved or assumed by the expert, so as to reveal that the opinion is based on the expert's expertise. The expert must explain how his or her conclusions were arrived at. That is, the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached such that the expert's evidence explains how the field of specialised knowledge on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded.[17]

**[41]** In *Mt Arthur Coal*, the Full Bench noted that the *Evidence Act* provides other grounds for excluding evidence, including a general discretion under s 135 to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time.[18] Any of those consequences, if they would arise from the receipt of evidence in proceedings before the Commission, will be relevant to the exercise of the Commission's discretion to inform itself for the purposes of s 590 of the Act.

**[42]** In the proceedings before the Deputy President, the appellant unions objected to at least parts of Mr Lawrence's report being admitted into evidence. The initial objection was to pages 31 to 33 of Mr Lawrence's report with a particular focus on Table 12. Table 12 dealt with the estimated impact of loss of production for Wilmar and is as follows:

| Table 12: Estimated Regional Impact of Loss of Production for Wilmar Sugar | | | | | | | |
|---|---|---|---|---|---|---|---|
| Region | | | | Direct impact | | | Total impact |
| | Direct employees (FTEs) | Associated salaries ($M) | Mill supplier spending ($M) | Cane payments ($M) | Total direct spending ($M) | Total value added ($M) | Total employment (FTEs) |
| Lost production (2 days) | | | | | | | |
| Capital Region | 5 | 0.5 | 0.1 | 2.7 | 3.3 | 4.0 | 16 |
| Central Coast | 9 | 0.8 | 0.3 | 4.4 | 5.6 | 6.8 | 24 |
| Central West | 4 | 0.4 | 0.4 | 1.7 | 2.5 | 3.7 | 21 |
| **Queensland** | **22** | **2.2** | **2.6** | **9.3** | **14.3** | **21.9** | **106** |
| Lost production (5 days) | | | | | | | |
| Capital Region | 13 | 1.3 | 0.3 | 6.6 | 8.3 | 9.9 | 40 |
| Central Coast | 23 | 2.1 | 0.8 | 11.1 | 14.0 | 17.0 | 60 |
| Central West | 11 | 1.0 | 1.0 | 4.3 | 6.3 | 9.3 | 53 |
| **Queensland** | **56** | **5.4** | **6.6** | **23.3** | **35.7** | **54.7** | **265** |
| Lost production (10 days) | | | | | | | |
| Capital Region | 27 | 2.6 | 0.7 | 13.3 | 16.6 | 19.8 | 80 |
| Central Coast | 46 | 4.2 | 1.5 | 22.2 | 28.1 | 34.0 | 121 |
| Central West | 22 | 2.0 | 2.0 | 8.6 | 12.7 | 18.6 | 106 |
| **Queensland** | **112** | **10.8** | **13.1** | **46.7** | **71.5** | **109.4** | **530** |
| Lost production (15 days) | | | | | | | |
| Capital Region | 40 | 3.9 | 1.0 | 19.9 | 24.9 | 29.6 | 121 |
| Central Coast | 68 | 6.3 | 2.3 | 33.3 | 42.1 | 51.0 | 181 |
| Central West | 33 | 3.0 | 2.9 | 12.9 | 19.0 | 27.8 | 160 |
| **Queensland** | **168** | **16.2** | **19.7** | **70.0** | **107.2** | **164.1** | **795** |

**[43]** It is necessary to briefly explain the way in which the objection arose. The report was served on the appellant unions at about 5pm on the afternoon of 25 June 2024. At approximately 11am on Thursday 27 June 2024, the AMWU applied for an order for production seeking, among other things, production of the modelling used to create Table 12 in Mr Lawrence's report and the underlying data sources relied on. The Deputy President issued this order shortly thereafter requiring production at 3pm on the same day.

**[44]** At approximately 3pm, Wilmar's solicitors wrote to the Commission. While they produced some documents, in respect of the modelling their response was that Wilmar had conducted searches and did not have any documents which fall within this category. The AMWU wrote to Wilmar asking it to confirm whether it had asked Mr Lawrence for the documents. No response was received before the hearing commenced at 4pm. At the commencement of the hearing on 25 June 2024, senior counsel for Wilmar said in respect of the production order:[19]

> My client has done its best to supply those documents that were in its possession or readily obtainable. There are some documents that have not been obtainable…But I want to assure you, Deputy President, that we've done our best in the short time available.

**[45]** Wilmar was pressed on whether it had endeavoured to obtain the documents from Mr Lawrence. Senior counsel for Wilmar indicated that he was sure his instructors would endeavour to contact the expert overnight. The issue stood over until the listed hearing the next morning.

**[46]** Prior to the commencement of the hearing on Friday 28 June 2024, Wilmar produced two further documents: a spreadsheet of data about its operations that it had provided Mr Lawrence and a spreadsheet setting out the full results of the modelling Mr Lawrence had undertaken, but not the modelling itself. The hearing commenced at 9.30am on 28 June 2024. An objection was made to the admission of pages 31 to 33 of Mr Lawrence's report on the basis that the modelling underlying the opinion's expressed had not been provided. Wilmar reiterated its position that the material was in the possession of Mr Lawrence and not Wilmar. Senior counsel expressed the view that the appropriate course was for the appellant unions to take up any issues with the modelling or assumptions with Mr Lawrence in cross-examination.

**[47]** Having heard from the parties, the Deputy President ruled on the objection and decided to admit Mr Lawrence's report. The relevant portion of the transcript records as follows:[20]

> THE DEPUTY PRESIDENT: Thank you, Mr Murdoch. Mr Saunders and everyone, the Commission is not strictly by the rules of evidence. Notwithstanding that, I understand the concerns that you've raised. I think it is appropriate that you cross-examine the witness as you see fit, and I will place the appropriate weight on that evidence. And I'm happy to hear submissions in your closing submissions further also in respect of your views after you have cross-examined the witness as to the weight that you believe I should place on that evidence at that time.
>
> It is also open to you if you think it helps for the further production of evidence that might arise from that cross-examination. I'm happy to consider that, such that we might have to make arrangements to hold over the witness to Sunday or to later today if that's something that is necessary, Mr Saunders, but I'll leave that to you.

**[48]** Mr Lawrence was cross-examined, including in relation to the failure of the report to disclose the basis of the modelling used to derive the conclusions reached in his report. Mr Lawrence agreed that the multipliers he had used were not disclosed in his report. The cross-examination by Mr Massey proceeded as follows:[21]

> Well, I think the point I'm asking you is, it's very difficult for someone reading your report to know how you've done that, isn't it?---Yes.
>
> Yes. And it's very difficult for anyone else to comment on whether or not you had done that correctly?---Yes.

**[49]** Notwithstanding this cross-examination, no application was made by the appellant unions for an order for production requiring Mr Lawrence to produce documents which might reveal the basis of the report. In final submissions, the CEPU invited the Deputy President to reconsider the admission of Mr Lawrence's report.[22] This submission appears to have related to the entirety of Mr Lawrence's report. The submission, it appears, was not accepted.

**[50]** We accept that the way Mr Lawrence's report was prepared and admitted into evidence had the potential to cause procedural unfairness to the appellant unions. The relevant parts of Mr Lawrence's report contain assertions as to the total economic impact of a loss of production in Wilmar's mills for periods of 2, 5, 10 and 15 days. Although there was other evidence as to the direct financial impact on Wilmar of interruptions in production, the opinion given by Mr Lawrence as to the total impacts of a loss production at Wilmar's sugar mills was based on modelling the details of which were not disclosed. That is a matter that was accepted by Mr Lawrence in cross-examination.

**[51]** The difficulty in interrogating this aspect of Mr Lawrence's report was demonstrated by the attempt made by the appellant unions to do so. Evidence was called by the CEPU from another expert, Dr Margaret McKenzie. Dr McKenzie engaged in an exercise of endeavouring to estimate the multipliers used by Mr Lawrence to produce his opinions as to the total impact of loss of production at Wilmar's mills. The outcome of that exercise was criticised by Mr Lawrence who said it was inaccurate. If Mr Lawrence was correct in that assertion, that fact only goes to underline the difficulty in assessing the reliability of his opinions without access to the modelling he utilised.

**[52]** We further accept that it is not necessarily a sufficient answer to the failure of an expert to adequately set out his or her reasoning to suggest that the matter can be taken up in cross-examination. Generally speaking, a party is entitled to prepare cross-examination, and obtain instructions, with the benefit of knowing the basis upon which an expert has formed his or her opinion. For example, in *Dasreef Pty Ltd v Hawchar*, Heydon J said (bolding added):[23]

> At common law there is no doubt that an expert opinion is inadmissible unless the expert states in chief the reasoning by which the expert conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert's expertise. The court does not have to be satisfied that the reasoning is correct: "the giving of correct expert evidence cannot be treated as a qualification necessary for giving expert evidence." But the reasoning must be stated. **The opposing party is not to be left to find out about the expert's thinking for the first time in cross-examination.**

**[53]** Having said that, the question remains whether the appellant unions were denied procedural fairness by reason of the admission of Mr Lawrence's report.

**[54]** The question of whether there was a denial of procedural fairness also requires examination of the use made by the Deputy President of Mr Lawrence's report. In her detailed reasons, the Deputy President ultimately indicated that she had placed no weight on the specific figures estimated by Mr Lawrence. In particular, the Deputy President noted the contest in the evidence between Mr Lawrence and Dr McKenzie and continued:

> **[65]** When Dr McKenzie gave her evidence, she claimed that Mr Lawrence had double counted figures in both the direct and again indirect calculations. After some discussions among counsel, Mr Lawrence was brought back to give further evidence, an opportunity to respond this Dr McKenzie's opinion. There was some disagreement about what was direct and what was indirect. Based on the evidence before me, I preferred Mr Lawrence's evidence and formed the view that on the evidence the question asked by Mr Massy of Dr McKenzie in this exchange did not align with the evidence given by Mr Lawrence and did not satisfy me that there was any double counting in Mr Lawrence's report. In any event, ultimately Mr Lawrence gave evidence

> that he had not in any way double counted any figures in his analysis and I accepted this proposition. **If I am wrong on that, nothing turns on it in any event as my calculations are ultimately not based on these figures in Mr Lawrence's report.**

**[55]** The Deputy President then referred to the objections made by the appellant unions to the admission of Mr Lawrence's report and said (bolding added):

> **[69] Whilst I note the concerns of the Respondents, I have placed no weight on the data in the Lawrence report that is calculated with the multipliers in question.** Instead, as recommended by the full bench in Mt Arthur Coal, I have satisfied myself on the basis of my own calculations which derive from the evidence provided throughout the first two days of the hearing and I have set those out accordingly in my decision. I note that the limbs of s.424 are satisfied on this basis, but that doesn't mean I agree that little weight should be placed on Mr Lawrence's report. I simply find that the tests are met without the multiplier.

**[56]** As foreshadowed, the Deputy President ultimately based her conclusions on calculations the Deputy President herself undertook using other evidence provided by Wilmar as to the direct financial consequences for Wilmar of lost production during the crushing season.[24]

**[57]** The appellant unions maintained they were nonetheless denied procedural fairness by reason of the admission of Mr Lawrence's report into evidence because the Deputy President accepted his evidence that it was appropriate to apply a multiplier to assess the effect of lost production in economic terms. The Deputy President indicated that she preferred Mr Lawrence's evidence that there should be a multiplier to assess the 'ripple effects' of expenditure and the Deputy President ultimately applied a multiplier of 0.3 in assessing the total impact of four one-hour stoppages of work at Wilmar's mills.[25] This was said to involve an implicit acceptance of Mr Lawrence's approach even if not reliance on the specific outcomes of his analysis.

**[58]** We accept that the Deputy President's decision involves an acceptance that it is appropriate to apply a multiplier in endeavouring to assess the impact on the economy of particular economic activity (or an interruption of that economic activity). To the extent that there was dispute about the appropriateness of that as a matter of approach, we do not believe that the absence of documents disclosing the details of the modelling used by Mr Lawrence deprived the unions of a fair hearing in relation to the question of general approach or of an adequate opportunity to contest the approach of Mr Lawrence.

**[59]** Dr McKenzie provided a detailed critique of the methodology used by Mr Lawrence. Mr Lawrence was cross-examined at length on the subject. Leaving aside the precise conclusions of Mr Lawrence's modelling, the appellant unions were not deprived of an adequate opportunity to contest the general approach he adopted. That is particularly so when the context of the hearing is considered. As we have observed, the Commission is required to determine an application for an order under s 424, as far as practicable, within 5 days after it is made. The opportunity to interrogate evidence in that context will frequently be more abbreviated than will be the case in other court or tribunal proceedings.

**[60]** We also note that the appellant unions could have sought an order for production be issued addressed to Mr Lawrence directly but did not do so. It is correct to say that, ordinarily, the basis of the opinion of an expert witness should be revealed prior to any cross-examination

taking place. However, given the abbreviated timeframe within which the Deputy President was required to determine the application, the approach she adopted of permitting cross-examination and leaving it open for the appellant unions to seek the production of further documents was not unreasonable.

**[61]** However, it is unnecessary to express a final view in relation to that matter. For the other reasons set out above, the appellant unions were not denied procedural fairness by reason of the admission of the report of Mr Lawrence having regard to the use made of that report in the Deputy President's decision. Ground 1 must be rejected.

**Grounds 2 and 3 – Findings not Reasonably Open/*House v The King* errors**

**[62]** Grounds 2 and 3 in the notice of appeal were dealt with together in the submissions of the parties. That is understandable. Ground 2 alleges that the conclusions of the Deputy President were not reasonably open on the evidence and Ground 3 alleges that the decision was unreasonable and plainly unjust in the sense described in *House v The King*. The contentions advanced in the written submissions in relation to both grounds essentially overlapped.

**[63]** Ground 3 refers to approach of detecting error in the final limb identified in *House v The King* as follows:[26]

> It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

**[64]** At the time the notices of appeal were filed, the parties only had the benefit of the short initial reasons provided by the Deputy President. By the time of the hearing of the appeal, the Deputy President had produced detailed reasons for her decision. It is no longer possible to say that it was unclear how the Deputy President reached the result embodied in her order. The reasons provided by the Deputy President were detailed and unambiguously set out how she reached her conclusion.

**[65]** During the hearing of the appeal, the appellant unions identified specific errors alleged to be revealed by the Deputy President's reasons beyond an assertion that the outcome was unreasonably or plainly unjust or the factual findings were not reasonably open. At least one aspect of the errors alleged in the notices of appeal also fell away upon consideration of the detailed reasons. The grounds of appeal assumed that the Deputy President had found that there was protected industrial action that was threatened, impending or probable beyond the four one-hour stoppages which had been notified. The detailed reasons indicate that the Deputy President was satisfied that the requirements of s 424(1)(d) of the Act were met having regard only to the four notified one-hour stoppages.[27]

**[66]** In the circumstances, it is appropriate to first consider the specific *House v The King* errors identified during oral submissions in relation to the appeals. In this regard, the appellant unions accepted that protected industrial action was threatened, impending or probable in the form of the four notified one-hour stoppages. The unions contended, however, that the reasons

of the Deputy President revealed that she had adopted an erroneous approach and erred in the application of s 424(1)(d) of the Act in reaching the conclusion that she was satisfied that the protected industrial action has threatened, is threatening or would threaten to cause significant damage to an important part of the Australian economy.

**[67]** The AMWU, supported by the other unions, identified three errors in that conclusion involving an alleged failure to have regard to relevant considerations and an erroneous application of the requirements in s 424(1)(d) of the Act. Each of the errors arose from the conclusion of the Deputy President that the four notified instances of protected industrial action are threatening or would threaten to cause significant damage to an important part of the Australian economy. The first and second errors were alleged to relate to the conclusion that the damage threatened by the four instances of protected action was 'significant' and the third relates to the Deputy President's identification of the relevant 'part of the Australian economy'.

**[68]** To understand the submissions, it is necessary to reflect briefly on the reasoning of the Deputy President. The Deputy President's reasoning relevantly proceeded in the following steps. Having considered the evidence, the Deputy President concluded that it was appropriate to apply an assumption that a one-hour stoppage of work would produce 12 hours of lost production at each mill for the purposes of calculating the impact of the stoppage.[28] The Deputy President used the estimates provided by Wilmar's General Manager – Finance and Information, John Seedhouse. Mr Seedhouse gave evidence as to the loss of revenue that would be caused to Wilmar and to canegrowers by 18 hours of lost production. The Deputy President used those figures to determine the hourly cost impact of lost production and then calculated the loss that would be occasioned by four 12-hour periods of lost production. The Deputy President, again relying on Mr Seedhouse's evidence, added amounts for lost revenue from Wilmar's bioethanol and cogeneration operations. That exercise produced a total estimated direct revenue lost from the notified stoppages of $26.48 million. Finally, the Deputy President applied what she described as a 'conservative multiplier of 0.3' to produce a total loss figure of $34.434 million.[29]

**[69]** The appellate unions did not dispute the Deputy President's calculations for the purposes of the appeal aside from submitting that there was no satisfactory evidentiary basis for the application of a multiplier of 0.3 to the direct economic cost to Wilmar for the purpose of determining the total economic impact of the stoppages. The error was rather alleged to be found in the conclusion the Deputy President drew from the outcome of her calculations. At paragraph [161] of the decision, the Deputy President said:

> **[161]** I am therefore satisfied that the lost revenue for the 4 notified 1-hour stoppages is at least $34.424 million. Having regard to the definition of significant discussed at [129] of this decision and referencing Sucrogen, "significant" meaning "important, notable and consequential," I am satisfied these figures are significant.

**[70]** Following that paragraph, the Deputy President proceeded directly to consider whether that damage was to an important part of the Australian economy.

**[71]** The complaint made in relation to that reasoning is twofold. The first error alleged to be found in the conclusion at paragraph [161] of the decision was that the Deputy President concluded that a potential loss of revenue of $34.424 million was significant in isolation and

without reference to or in the context of the Australian economy as a whole or any identified important part of the Australian economy. We agree that this represented an error in the decision-making process which demonstrated a misunderstanding of the opinion required to be formed by s 424(1)(d).

**[72]** The question of whether protected industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it cannot be answered by simply producing an estimate of the likely economic impact of the industrial action as a monetary figure and asserting that the figure is large. To assess the significance of damage threatened to be caused by industrial action, it is necessary to understand that the damage must be significant by reference to the Australian economy as a whole or an important part of it. To say that the loss of revenue or profit to a particular employer or third parties might, in the abstract, be considered to be a large sum does not address the question posed by s 424(1)(d). The significance of the threatened damage must, in our opinion, be assessed in the context of, and by reference to, the Australian economy as a whole or the important part of the Australian economy alleged to be subject of the threat.

**[73]** So much is apparent from the text of the section and from authority. There was much focus in the submissions on the decision of Guidice J in *Coal & Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14. That decision concerned a predecessor provision, namely, s 170MW of the *Workplace Relations Act* 1996 (Cth). The three members of the Full Bench in that matter prepared separate decisions. As the members of the High Court later recognised, the reasons of Giudice J represented the decision of the Full Bench.[30] Reflecting on the phrase "significant damage to the Australian economy or an important part of it', Giudice J said (bolding added):[31]

> 6.6 " … Significant damage to the Australian economy or an important part of it"
> Damage to the economy is separated out as a criterion by which to identify a circumstance for purposes of s 170MW(1). **As with the social interests endangered by industrial action, the circumstance is dependent on both the degree of damage and the field on which it impacts.** There is perhaps a greater emphasis on matters of degree imported by the words "significant damage". Similarly, the impact must be on the whole, or an "important part" of the Australian economy. Neither of those expressions is a term of art. Each requires application through an assessment of the facts and circumstances as a matter of fact and degree. However, as already noted, similar expressions have long been the subject of judicial construction in application to matters arising under Commonwealth anti-dumping legislation. The view that there should be a relatively rigorous causative relationship between the industrial action and significant damage is consistent with that line of authority.

**[74]** His Honour makes clear that an assessment as to whether industrial action is threatening to cause significant damage to the Australian economy or an important part of it (then for the purposes of s 170MW(3)(b)) depends on both the degree of the damage and the field on which it operates. The degree of damage cannot be examined in the abstract divorced from consideration of the nature, size and elements of the part of the Australian economy alleged to be threatened or, as his Honour put it, 'the field on which it impacts'. That is also apparent from his Honour's conclusion that it was not reasonably open to find that the requirement in s 170MW(3)(b) was met where there was "(n)o data concerning the size of the economy of the region – assuming that it extend beyond the black coal export industry – the size of the economy

of New South Wales or any other data which would have enabled the relevant quantifications to be made were produced”.[32]

**[75]** Other decisions have adopted an approach of assessing the significance of any damage threatened to be caused by industrial action by reference to the size and overall operations of the relevant identified part of the Australian economy. For example, in *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] AIRC 367, Commissioner Bacon assessed the significance of the damage threatened to be caused by reference to the percentage reduction in economic activity in the regional economy and the length of time over which the loss was likely to be sustained.[33]

**[76]** In *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* [2010] FWAFB 6021, 198 IR 360, the Full Bench considered the phrase “significant harm” for the purposes of s 426(3) of the Act. In relation to that phrase, the Full Bench observed (bolding added):[34]

> When regard is had to context of the FW Act as a whole and to the explanatory memorandum, the expression “significant harm” in s 426(3) should be construed as having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. In this context, the word “significant” indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under s 426 in very rare cases, as contemplated by the Explanatory Memorandum. It follows that it will not, of itself, be sufficient that the harm, viewed in isolation, can be characterised as “substantial”. Substantial harm to third parties is a common consequence of effective industrial action. Unless the harm is out of the ordinary then suspension would contrary to the legislative intention that suspension should not be able to used generally to prevent legitimate protected industrial action in the course of bargaining. **In assessing whether there is “significant harm” context is also important. A particular quantum of financial loss may constitute “significant harm” in one context but not in another.**

**[77]** It may be that not all the discussion by the Full Bench in relation to s 426(3) is able to be directly applied to the phrase “significant damage” in s 424(1)(d).[35] However, in our opinion, the observation that assessing whether there is ‘significant harm’ must be considered in context is applicable to the assessment required by s 424(1)(d). Whether significant damage is threatened to an important part of the Australian economy cannot be answered merely by reference to estimates that an objectively large sum of loss might result from industrial action. The same quantum of financial loss may be significant in one context but not in another.

**[78]** That accords with the approach of Deputy President Easton in *Svitzer Australia Pty Ltd v Australian Maritime Officers’ Union* [2022] FWC 493. In that matter, the Deputy President found that the projected damage that would be caused by the threatened protected industrial action was significant in both relative and absolute terms, including by reference to evidence as to the estimates of loss relative to gross state revenue.[36] As to the proper approach, the Deputy President observed:[37]

> The observations in *Woodside Burrup* are apposite to circumstances where the damage caused by protected industrial action is likely to be large. Viewed in isolation, amounts measured in

> tens or hundreds of millions are substantial. Viewed in the context of the wider Australian economy and the context of the FW Act, such amounts may or may not be "significant".
>
> Predictions and estimations of likely damage might have to be considered in both absolute and relative terms, depending on the circumstances and the available evidence. In most of the cases referred to above the estimated damage, in monetary terms, was very large – in fact multiples of $10M and even $100M. Damage might not be 'significant' even if it is large in absolute terms, because it might be only a minute fraction of a much larger economy, state or industry. Conversely, a large quantum of damage might nonetheless be seen as 'significant damage' even if the damage is small in relative terms. Ultimately such assessments can only be made on the material available.

**[79]** A further example is found in the decision of Deputy President Cross in *New South Wales v Australian Rail, Tram and Bus Industry Union* [2022] FWC 1746 where it was found that industrial action in relation to the Sydney Metro would not cause significant damage to the New South Wales economy by means of engaging in a comparison between the projected costs of the industrial action against the size of the New South Wales economy as a whole.[38]

**[80]** There are decisions in which the Commission appears to have assumed that significant damage was threatened based on estimates as to the total financial impact of the protected industrial action with limited express reference to context or any comparison between the projected damage and the total size of the economy or relevant part of the economy. Many of those cases were instances in which the existence of a threat of significant damage to the Australian economy or an important part of it was not disputed and was, frankly, undeniable.[39] Those authorities do not detract from the conclusion that assessment of whether significant damage is threatened to the Australian economy or an important part of it must be evaluated in context. It is a misunderstanding of s 424(1)(d) of the Act to reason that the threatened damage is significant simply because it is a large sum. The opinion required to be formed requires consideration of whether the impact of the industrial action can be described as significant in the context of the economy as a whole or the relevant identified part of it.

**[81]** With respect, the Deputy President failed to apply s 424(1)(d) in this manner. The conclusion drawn from paragraphs [155]-[161] of the decision was that the Deputy President regarded a loss of revenue of $34.424 million to be a significant figure having regard to dictionary definitions of that word. The decision does not reflect any consideration of whether a loss of revenue of $34.424 million is significant in the context of the Queensland economy, regional economies of North Queensland or the sugar industry or sugar manufacturing industry or even Wilmar's total operations. That reflects a misunderstanding of the opinion the Deputy President was required to form for the purposes of s 424(1)(d) of the Act.

**[82]** Having found that the conclusions of the Deputy President involved error in the construction and application of the section, it is unnecessary for the Full Bench to express a concluded view as to whether the finding of that significant damage was threatened was reasonably open on the material before the Deputy President. It is sufficient to observe that, if the proper approach were adopted, it is far from obvious that the same conclusion would be reached. For example, the AMWU pointed to the evidence of Dr McKenzie that suggested the total sugar manufacturing revenue in Australia was $3.6 billion in the 2022/2023 financial year. Wilmar's own revenue from its sugar cane products division amount to $1.4484 billion out of its total revenue of $2.2943 billion in 2022. Wilmar's General Manager – Commercial, Mark

Greenwood, gave evidence that industry revenue historically has been between $1.5 billion and $2.5 billion per year but that, having regard to prices for the 2024/2024 season, industry revenue was likely to exceed $3.5 billion. A loss of revenue of approximately $34 million appears to us to fall short of constituting significant damage in the context of the industry as a whole or even Wilmar's operations.

**[83]** The second specific error identified in the conclusion of the Deputy President at paragraph [161] of the decision was that the Deputy President concluded that the four instances of protected industrial action threatened to cause significant damage without taking into account that the harm feared was contingent. As has been explained, the value of the loss of production likely to be occasioned by stoppages of work at Wilmar's mills is capable of calculation. As we have observed, on appeal, the calculation of the value of the lost production undertaken by the Deputy President based on Mr Seedhouse's evidence was not disputed (leaving aside the multiplier used).

**[84]** However, whether any interruption of processing ultimately resulted in a loss of revenue to Wilmar or to canegrowers depends on future and unknown events. The concern expressed by Wilmar was that, if interruptions in processing were caused by industrial action, those delays, in combination with other inevitable delays caused by inclement weather, machinery breakdowns or logistical difficulties, might mean that some cane could not be harvested and processed before the end of the crushing season. If that were to occur, Wilmar and canegrowers would suffer a loss of revenue.

**[85]** The appellant unions contended that the Deputy President failed to have regard to a relevant consideration in evaluating whether the damage threatened to be caused by the protected industrial action was significant, namely, that any loss was contingent and uncertain and might not come to pass. The Deputy President did not ignore the fact that the potential losses pointed to by Wilmar were uncertain. The Deputy President made findings earlier in the decision as follows:[40]

> **[148]** I am satisfied that based on all of the evidence including the weather forecast, and the loss of cane not crushed in the three prior years316 that like *Sucrogen* in 2010, there is a particular pressure on the 2024 crushing season. This is exacerbated by the shortage of tradespeople for which there was a great deal of evidence that recognised this as a National issue. These issues agitate against the capacity of Wilmar to mitigate the impacts of the threatened industrial action. It is worth noting that these terms do not require me to form a view that the protected industrial action WILL cause serious damage etc, instead I must be satisfied that they "have, are or would threaten", this is a different proposition. I conclude that I am satisfied that the protected industrial action "has threatened, is threatening or would threaten."

**[86]** This passage makes clear that the Deputy President considered the contingent and uncertain nature of the loss of revenue when considering if the protected action was threatening to cause any damage at all. However, it is not apparent from the decision that the Deputy President considered the contingent nature of the losses that it was contended would be caused by the protected action when evaluating if the threatened damage could be described as significant.

**[87]** To form the opinion required by s 424(1)(d), the Commission must have some basis upon which to be satisfied that significant damage is threatened above generalised predictions as to the likely consequences of the industrial action in question.[41] The precise nature and extent of damage likely to be caused by industrial action, particularly indirect impacts, is inevitably uncertain and probably unknowable. The fact that the precise extent of the likely damage is uncertain does not, of itself, mean the threatened damage is not significant. Whether that is so will depend upon an assessment of the full circumstances of the matter.

**[88]** In the particular circumstances of this case, we believe it was necessary for the Deputy President to consider the contingent nature of loss of revenue Wilmar claimed would be caused by the protected action that was threatened. In this matter, it was not merely a matter of the extent of the likely consequences being uncertain. On one view, whilst the loss of revenue was a potential and maybe the more likely outcome, it is possible that, ultimately, no loss of production would be suffered at all. In our opinion, to properly apply s 424(1)(d) of the Act, it was necessary to consider that matter in evaluating whether the industrial action was threatening to cause significant damage. The Deputy President did not do so.

**[89]** The third specific error identified in the decision concerns the manner in which the Deputy President identified the relevant important part of the Australian economy she found was threatened by the protected industrial action. The reasoning of the Deputy President in relation to that matter was as follows:[42]

> **[162]** The parties contested whether Wilmar's contributions to the sugar industry formed the basis of an 'important part of the Australian economy'.
>
> **[163]** I have referenced the definitions of important and part at paragraphs [130] and [131] of this decision. I am not persuaded by the submissions of the Respondents on this issue. The evidence of Mr Greenwood which I accept is:
> • that Wilmar is responsible for producing 50% of all sugar in Australia;
> • that Wilmar is responsible for producing 50% of the total industry revenue; and
> • based on the Queensland Sugar Industry report for the financial year 2020/2021, the Queensland Sugar industry contributed 19,673 direct and indirect full time equivalent jobs. Even if it is argued that this is based on the Lawrence Report and I consequently provide no weight to it, I note that in Sucrogen, it was found that the Sugar industry employee approximately 22,000 people directly and approximately 110,000 people in upstream and downstream economic sectors dependent on the sugar sector. As I noted earlier, there was no evidence put before me of any significant change to the industry since Sucrogen despite the parties relying on Sucrogen in their submissions.
> • The contribution of Wilmar's revenue to the Queensland economy at 7.3% of the total GRP in North Queensland region, 3.8% of GRP in the Mackay region and 1.9% of the GRP in the Far North Queensland region.
>
> **[164]** On the basis of the evidence before me, I am satisfied that the damage is indeed to an important part of the economy. Therefore, in consideration of all of the elements in the second limb I am satisfied on the evidence that the protected industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy **or an important part of it.**

**[90]** Despite the reference to the whole of the Australian economy in the concluding sentence of paragraph [164], we understand the Deputy President to have concluded that there was a

threat of significant damage to an important part of the economy. The part of the Australian economy the Deputy President considered to be important is identified in paragraph [162] to be 'Wilmar's contributions to the sugar industry'. Each aspect of the evidence of Mr Greenwood set out in paragraph [163] similarly refers to Wilmar's own sugar operations other than the third dot point which refers to the Queensland sugar industry more generally. The third dot point, in our opinion, appears to be included primarily, if not exclusively, to emphasise the importance of Wilmar's operations.

**[91]** We do not believe it is open, on a proper interpretation of s 424(1)(d) of the Act, to regard the operations of one employer as constituting an important part of the Australian economy. In the authorities referred to above, the Commission has identified relevant 'parts' of the Australian economy as including the nation as a whole,[43] whole states,[44] whole major cities[45] and whole industries.[46] There is no authority which suggests that the operations of a single employer could constitute a part of the Australian economy and the text and context of the section are against acceptance of such a proposition.

**[92]** The language of s 424(1)(d) refers to the Australian economy or an important part of it. An economy is simply the sum of all activities related to the production, sale, distribution, exchange, and consumption of resources by a group of people living and operating within it. The language of the section suggests that the relevant 'part' of the Australian economy must also involve the collective activity of a group of people albeit within an identifiable and discrete component of the whole economy. The section appears to us to be directed at circumstances in which industrial action is threatening to cause significant damage to an identifiable collection of businesses, workers and consumers. It is not necessary to be exhaustive as to the way in which a part of the economy may be delineated. Parts of the economy could at least be identified on a geographical, sector or industry basis.

**[93]** The language is not compatible with regarding a single employer as being part of the Australian economy. The context supports that view. Section 423 of the Act separately confers a discretion on the Commission to suspend or terminate protected industrial action where the action is causing or threatening to cause significant harm to the employer or employers that will be covered by a proposed enterprise agreement. That provision imposes additional requirements in relation to which the Commission must be satisfied before an order can be made. Those include that the harm is imminent, that the industrial action has been engaged in for a protracted period and that the dispute will not be resolved in the reasonably foreseeable future.[47] Section 426 also addresses a circumstance in which significant harm is threatened to a third party.

**[94]** If a single employer or business could constitute an important part of the Australian economy for the purposes of s 424(1)(d) of the Act, that section has the potential subsume ss 423 and 426 but sidestep the additional requirements that must be satisfied for an order to be made under those provisions. Read in context, the reference to a part of the Australian economy in s 424(1)(d) is to be understood as referring to a discrete and identifiable collection of businesses, workers and consumers within the broader Australian economy. It does not, in our view, extend to the operations of a single employer, even if its operations are substantial. With respect, the Deputy President erred in treating Wilmar's operations as being an important part of the Australian economy.

**[95]** For each of those three reasons, the Deputy President's reasons involved errors in the construction and application of s 424(1)(d) and the decision must be set aside. In circumstances in which we have identified specific errors in the reasoning of the Deputy President, it is unnecessary to determine the appellant unions' contentions that the conclusions were not reasonably open on the evidence or otherwise unreasonable or plainly unjust.

**Redetermination**

**[96]** During the hearing on 5 July 2024, the Full Bench announced that it had decided there was error in the decision of the Deputy President and made orders quashing the decision and orders made on 30 June 2024. After an adjournment, senior counsel for Wilmar pressed for the Full Bench to redetermine its application for an order under s 424(1). In those circumstances, it was necessary for Wilmar's application for a suspension order to be determined afresh.

**[97]** The Full Bench decided to undertake that task itself, rather than remit the matter for redetermination, having regard to the urgency of the application and the impending protected industrial action. No party objected to that course. In those circumstances, we redetermined the application based on the evidence that was before Deputy President Dobson as supplemented by information provided by the parties at the appeal hearing to update the Commission as to further developments. Determination of the application under s 424 of the Act required the Full Bench to consider whether protected industrial action was threatened, impending or probable and, if so, whether the protected industrial action was threatening or would threaten to cause significant damage to the Australian economy or an important part of it.

**[98]** Answering those questions is straightforward in light of two developments. First, by the time of the appeal hearing the time at which two of the four instances of notified protected industrial action were to occur had passed. Only two notified instances of protected industrial action were then threatened, impending or probable, namely, the one-hour stoppages notified by the AMWU and CEPU to occur on 8 July and 11 July 2024. After seeking instructions, senior counsel for Wilmar informed the Full Bench that it did not press a contention that any further protected industrial action was threatened, impending or probable beyond the two actions notified by the AMWU and CEPU for 8 July and 11 July.

**[99]** The parties agreed with the following summary of the question to be considered on redetermination:

> VICE PRESIDENT GIBIAN: Yes, all right. And I'm correct in stating the position - anyone can tell me if this is not true - the parties are content for us to redetermine the matter having regard to the view we've formed about the appeal on the basis of the material that's currently been presented, the question being whether the two further instances of protected industrial action which have been notified by the AMWU and the CEPU are such as to be protected industrial action which has threatened, is threatening or would threaten to cause significant damage to the Australian economy or an important part of it.

**[100]** Second, the AWU informed the Commission that it had not notified protected industrial action to be taken on 8 July and 11 July and that the time for giving such notice had passed. The consequence is that there was no protected industrial action that was threatened, impeding or probable by members of the AWU. That has important implications for the likely consequences of the two further notified instances of protected industrial action. The Full Bench

was informed by senior counsel for Wilmar that, if members of the AWU did not participate in the one-hour stoppages, it would not be necessary for the mills to engage in the shut down and start up processes which otherwise would have resulted in extended periods of lost production. Senior counsel informed the Commission:

> My learned friend, Mr Spence, raised the matter of the consequences of the AWU in compliance or out of respect to the members, the Deputy President orders, had not gone ahead with their intent to notify action on Monday next and Thursday next.
>
> The position would appear to be this, that if the members of the AWU are on duty, and one would assume they would be, on those two days, even if the ETU and the Metal Workers take the one hour stoppage, the mills would not have to be run down because there would be licenced personnel on duty during the periods of the stoppage. So that the factor that was the basis of the evidence about running the mills down and starting them up again, namely, the lack of licenced supervision, wouldn't exist.
>
> There are a couple of minor qualifications to all that. One would be that if something went wrong, and in the sugar mills things do go wrong, requiring the shift electrician during that one hour, it would create problems. But that's a different set of problems to those that arise when you know there's going to be a scheduled stoppage that deprives the mill of the licenced personnel.

**[101]** Senior counsel later clarified that, so long as the licenced personnel who are members of the AWU were present, it was likely that a one-hour stoppage by members of the AMWU and CEPU would not result in any interruption in production at all or, at worst, a short period of interruption if an incident occurred requiring attendance of, for example, the shift electrician who was taking industrial action.

**[102]** On redetermination, the Full Bench made a finding that protected industrial action was threatened, impending or probable in the form of one-hour stoppages of work notified by the AMWU and CEPU to occur on 8 July 2024 and 11 July 2024. However, the Full Bench was not satisfied that this protected industrial action had threatened, was threatening or would threaten to cause significant damage to the Australian economy or a significant part of it. For reasons that have been explained, on the material before the Commission, the two stoppages of work notified by the AMWU and CEPU were unlikely to result in any loss of production at Wilmar's mills at all or, at most, some minor delay if a mechanical or other issue happened to arise during the period of the one-hour stoppages. In those circumstances, there was plainly no basis upon which the Full Bench could be satisfied that significant damage was threatened to be caused to any important part of the Australian economy.

**[103]** For the purposes of redetermination of its suspension application, the Full Bench understood Wilmar to press its contentions that each of the following constitute important parts of the Australian economy: Queensland, the regional economies of the North Queensland, Far North Queensland and Mackay regions and the sugar industry and the sugar manufacturing industry. The parties advanced detailed submissions on the appeal as to whether the evidence could sustain a finding that those parts of the Australian economy are 'important' for the purposes of s 424(1)(d) of the Act.

**[104]** In relation to the sugar industry or the sugar manufacturing industry, the appellant unions pointed to the evidence of Dr McKenzie that the sugar manufacturing industry contributes approximately one seventh of one per cent of Australian GDP (0.14 per cent) and three one hundredths of one per cent of national employment. The unions submitted that, having regard to that data, it was impossible to say that the sugar manufacturing industry was an important part of the Australian economy. The appellant unions noted that, in *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] AIRC 367, Commissioner Bacon doubted that the export coal industry constituted an important part of the Australian economy where it was a relatively small employer and contributed only 1.3% of GDP.[48]

**[105]** The relative contribution of the sugar industry or the sugar manufacturing industry to the national economy raises a real question as to whether it can be described as an important part of the Australian economy. Reliance by Wilmar on the decision in *Sucrogen Australia Pty Ltd v The Australian Workers' Union* [2010] FWA 6192 as authority for the proposition that the sugar industry is an important part of the Australian economy is, in our opinion, misconceived. Whether an identified part of the Australian economy can be described as important is a matter of fact and degree to be decided having regard to the evidence before the Commission in a particular matter.[49] However, we would not wish to countenance the suggestion that a part of the Australian economy can never be an 'important' one unless its contribution to that economy is above some arbitrary threshold. We would also not foreclose an argument being advanced that an industry might constitute an important part of the Australian economy because of its contribution to and significance for employment and economic activity in a particular region of Australia even though it represents a small part of the Australian economy as a whole.

**[106]** It is not necessary or appropriate for the Full Bench to resolve these submissions. The submissions raise potentially important questions which should be resolved in a case where it is necessary to do so. Assuming, without deciding, that the parts of the Australian economy identified by Wilmar constitute 'important parts' of that economy, the Full Bench is not satisfied that the two instances of protected industrial action which had been notified were threatening or would threaten to cause significant damage to any of those parts of the economy. The two stoppages are likely to cause little, if any, damage to anyone. The consequence is that a suspension order could not be made under s 424(1) of the Act. Wilmar's application must be dismissed.

**Conclusion**

**[107]** For these reasons, the Full Bench made orders on 5 July 2024 granting permission to appeal in each appeal, allowing the appeals, quashing the decision and orders of Deputy President Dobson made on 30 June 2024 and dismissing Wilmar's application for an order under s 424 of the Act.

VICE PRESIDENT

*Appearances*:

*L Saunders,* counsel, appearing for the AMWU instructed by Maurice Blackburn Lawyers
*CA Massey*, counsel, appearing for the CEPU instructed by Hall Payne Lawyers
*T Spence*, counsel, appearing for the AWU instructed by the *G Taylor*, AWU
*JE Murdoch KC and C Martin*, counsel, appearing for Wilmar Sugar Pty Ltd instructed by MinterEllison

*Hearing details:*

2024.
Sydney (in person):
5 July.

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[1] *Wilmar Sugar Pty Ltd v Australian Workers' Union & Ors* [2024] FWC 1720.

[2] Ibid at [7]-[8].

[3] *Wilmar Sugar Pty Ltd v Australian Workers' Union & Ors* [2024] FWC 1767.

[4] Ibid at [155].

[5] *Fair Work Act* 2009 (Cth), s 417.

[6] *Fair Work Act* 2009 (Cth), s 418.

[7] *Fair Work Act* 2009 (Cth), s 415.

[8] *Fair Work Act* 2009 (Cth), s 413(7)(a). See explanation provided in *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65, 202 FCR 200 at [72] (Lander J), [130] (Buchanan J) and [182] (Perram J).

[9] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 at [20] and [28] (Gleeson CJ, Gaudron and Hayne JJ) (*Coal & Allied (HC)*).

[10] *Evidence Act* 1995 (Cth), s 79(1).

[11] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 5, 192 FCR 78 at [25] (Buchanan J).

[12] *King v Freshmore (Vic) Pty Ltd* (Print S4213, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [61]-[62]; *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354 at [48]-[50]; *Australian Meat Industry Employees' Union v Dardanup*

*Butchering Company Pty Ltd* (2009) IR 1 at 2; *Gibbens v The Commonwealth of Australia (Department of Home Affairs)* [2018] FWCFB 6449 at [33].

[13] *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491-492 (Brennan J).

[14] *Fair Work Act* 2009 (Cth), s 577(a).

[15] See discussion in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, 243 CLR 588 at [129] (Heydon J).

[16] *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd* [2021] FWCFB 6059, (2021) 310 IR 299 at [37].

[17] See, for example, *Dasreef* at [36]-[37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) and [91]-[93] (Heydon J) referring (among other things) to *Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305, (2001) 52 NSWLR 705 at [85] (Heydon J). See also *4-yearly review of modern awards – Penalty Rates* [2015] FWCFB 6509 at [13]-[14].

[18] *Mt Arthur Coal* at [39].

[19] Transcript 27/6/24 PN82.

[20] Transcript 28/6/24 PN480-481.

[21] Transcript 28/6/24 PN1266-1267.

[22] Relying on *Minerology Pty Ltd v Sino Iron Ore (No 6)* [2015] FCA 825, (2015) 329 ALR 1 at [232].

[23] [2011] HCA 21, 243 CLR 588 at [91] (Heydon J). See also *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Ltd* [2014] FCA 1412 at [32].

[24] [2024] FWC 1767 at [155]-[161].

[25] Ibid at [99] and [160].

[26] *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTeirnan JJ).

[27] [2024] FWC 1767 at [147].

[28] Ibid at [155].

[29] Ibid at [156]-[160].

[30] *Coal & Allied (HC)* at [22] (Gleeson CJ, Gaudron and Hayne JJ).

[31] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (1998) 80 IR 14 at 33 (*Coal & Allied (AIRC)*).

[32] Ibid at 50-51.

[33] *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] AIRC 367 at [46].

[34] *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* [2010] FWAFB 6021, 198 IR 360 at [44].

[35] See discussion by Easton DP in *Svitzer Australia Pty Ltd v Australian Maritime Officers' Union* [2022] FWC 493 at [63].

[36] Ibid at [87]-[90].

[37] Ibid at [63]-[64].

[38] *New South Wales v Australian Rail, Tram and Bus Industry Union* [2022] FWC 1746 at [124].

[39] See, for example, *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, 214 IR 367 at [9]-[10]; *Minister for Industrial Relations for the State of Victoria v Australian Workers' Union* [2016] FWC 8826 at [15]-[16]; *BP Refinery (Kwinana) Pty Ltd v Australian Workers Union* [2019] FWC 68 at [49]-[57]; *Re Svitzer Australia Pty Ltd* [2022] FWCFB 213, 320 IR 19 at [35]-[37].

[40] [2024] FWC 1767 at [148].

[41] *Coal & Allied (HC)* at [28] (Gleeson CJ, Gaudron and Hayne JJ).

[42] [2024] FWC 1767 at [162]-[164].

[43] *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, 214 IR 367.

[44] *Minister for Industrial Relations for the State of Victoria v Australian Workers' Union & Ors* [2016] FWC 8826; *Minister for Industrial Relations for the State of Victoria v AGL Loy Yang Pty Ltd & Ors* [2017] FWC 2533; *BP Refinery (Kwinana) Pty Ltd v Australian Workers Union* [2019] FWC 68.

[45] *Sucrogen Australia Pty Ltd v The Australian Workers' Union* [2010] FWA 6192; *Re Sydney Trains* [2018] FWC 632, 277 IR 389.

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[46] *Sucrogen Australia Pty Ltd v The Australian Workers' Union* [2010] FWA 6192; *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, 214 IR 367.

[47] *Fair Work Act* 2009 (Cth), s 423(5) and (6).

[48] *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] AIRC 367 at [54].

[49] *Coal & Allied (AIRC)* at 33.