DECISION

Fair Work Act 2009
s.234 - Application for an intractable bargaining declaration

Transport Workers' Union of Australia
v
Cleanaway Operations Pty Ltd
(B2023/1110)

DEPUTY PRESIDENT WRIGHT SYDNEY, 12 JANUARY 2024

Introduction and Outcome

[1] On 16 October 2023, the Transport Workers' Union of Australia (TWU) made an application for an intractable bargaining declaration pursuant to s.234 of the Fair Work Act (the FW Act) in relation to the proposed *Cleanaway Erskine Park Drivers Enterprise Agreement 2022* (Erskine Park Agreement).

[2] The Respondent to the application is Cleanaway Operations Pty Ltd (Cleanaway).

[3] The matter was listed for directions on 14 November 2023.

[4] On 24 November 2023, the TWU filed submissions and evidence. On 8 December 2023, Cleanaway filed submissions and evidence.

[5] The matter was listed for report back on 11 December 2023. At the report back, Cleanaway advised the Commission that, consistent with the submissions filed, it did not oppose the Commission making an intractable bargaining declaration and that it sought a post-declaration negotiating period of thirty days. Although the TWU initially sought a post-declaration negotiating period of fourteen days in its application, the TWU submitted that a post-declaration negotiating period should not be ordered.

[6] For the reasons that follow I have made an intractable bargaining declaration in relation to the proposed Erskine Park Agreement which specifies a post-declaration negotiating period from 12 January 2024 to 25 January 2024.

Hearing

[7] The matter was listed for hearing on 21 December 2023.

[8] I granted permission for both parties to be legally represented at the hearing. Mr Boncardo of Counsel appeared for the TWU. Mr Avallone of Counsel appeared for Cleanaway.

[9] The following witnesses gave evidence on behalf of the TWU:

a. Isabella Wisniewska, Legal Officer, TWU
b. Steven Stassen, TWU member and rear-life driver for Cleanaway

[10] The following witnesses gave evidence on behalf of Cleanaway:

a. Michaela White, ER/IR Manager, Cleanaway
b. Paul Vella, Operations Manager for the Cleanaway Erskine Park site

Factual Background

[11] Cleanaway conducts waste management, industrial and environmental services and waste transportation in Australia. Cleanaway is divided between separate business units including solid waste, health care, liquid, industrial waste and hydrocarbons.[1]

[12] Across Australia, Cleanaway has approximately 7,200 employees and there are over 100 enterprise agreements which apply to various parts of the workforce.[2]

[13] Erskine Park is one of Cleanaway's solid waste services sites with a focus on commercial and industrial waste (C&I). The Erskine Park C&I site also operates a mechanical workshop and services centre for Cleanaway vehicles.[3]

[14] Employees of Cleanaway Operations Pty Ltd (Cleanaway) at Erskine Park are covered by the *Cleanaway Erskine Park Drivers Enterprise Agreement 2020* (Erskine Park EA) which has a nominal expiry date of 23 September 2022.

[15] Clause 3 of the Erskine Park EA requires the parties to commence negotiations for a new enterprise agreement no later than 3 months prior to the nominal expiry date. On 30 August 2022, the TWU filed a dispute with the Commission against Cleanaway regarding non-compliance with this clause.[4] On 5 September 2022, Cleanaway advised the TWU that Cleanaway would commence bargaining for a new agreement to replace the Erskine Park EA.[5]

[16] Cleanaway and the TWU commenced bargaining for a replacement enterprise agreement for Cleanaway Erskine Park on 20 October 2022.[6]

[1] Exhibit 6, [4] (Court Book (CB) 1121).

[2] Ibid, [5] (CB 1121).

[3] Exhibit 7, [4] (CB 1964).

[4] Exhibit 1, [7] (CB 179).

[5] Ibid, [9] (CB 179).

[6] Ibid, [10] (CB 179).

[17] Cleanaway and the TWU attended 17 bargaining meetings for the replacement enterprise agreement on the following dates:

a. 20 October 2022
b. 4 November 2022
c. 17 November 2022
d. 1 December 2022
e. 2 February 2023
f. 15 February 2023
g. 27 February 2023
h. 2 March 2023
i. 9 March 2023
j. 3 April 2023
k. 6 April 2023
l. 17 April 2023
m. 20 April 2023
n. 23 May 2023
o. 8 June 2023
p. 16 August 2023
q. 24 August 2023

[18] The TWU bargaining committee consists of Mr Ho Lau, TWU Official, and Mr Wayne Richards, Mr Stephen Russell and Mr Steven Stassen, who are all Cleanaway employees and members of the TWU.[7]

[19] Cleanaway's bargaining representatives for the Erskine Park replacement enterprise agreement are Ms Kylie Bowe, Cleanaway ER/IR Manager, who was succeeded by Ms Michaela White and Mr Paul Vella, Cleanaway Operations Manager.

[20] On 13 December 2022, the Commission made orders for a protected action ballot order.[8] The ballot was approved on 9 January 2023 by TWU members employed by Cleanaway who were to be covered by the replacement enterprise agreement.[9]

[21] Erskine Park employees have engaged in protected industrial action on 27 January, 10 February, 11-12 April and 20 April 2023.[10]

[22] On 1 May 2023 Cleanaway commenced the access period for a proposed agreement to replace the Erskine Park EA. On 12 May 2023 the TWU filed a bargaining dispute pursuant to s.240 of the FW Act in matter B2023/443 in relation to a ballot for the proposed enterprise agreement which ultimately did not proceed. On 30 May 2023, the TWU discontinued matter B2023/443 as a result of parties reaching a consent position.[11]

---

[7] Ibid, [11] (CB 179).

[8] Ibid, [24] (CB 180).

[9] Ibid, [39]-[41] (CB 182).

[10] Ibid, [43]-[54] (CB 182-4).

[11] Ibid, [58]-[75] (CB 183-4).

[23] On 22 June 2023, Cleanaway opened the voting ballot for the replacement agreement. The voting closed on 23 June 2023. The replacement agreement that was voted upon included Cleanaway's preferred ordinary hours of work clause, weekend penalties clause and wage offer.[12]

[24] 64 out of 69 eligible employees participated in the vote. 64 employees voted against the proposed agreement and there were no votes in favour.[13]

[25] On 1 August 2023, the TWU filed an application for a bargaining dispute which was allocated matter B2023/780 and listed before Commissioner Riordan on 10 August 2023. Further conferences took place before Commissioner Riordan on 28 September 2023 and 18 October 2023.[14]

[26] During the period that Commissioner Riordan had carriage of the bargaining dispute, the parties exchanged correspondence. On 20 September 2023 Ms Wisniewska sent a position paper to Ms White to highlight outstanding claims that the TWU sought to continue bargaining about during the course of the s.240 dispute.[15] On 27 September 2023, Ms White responded to Ms Wisniewska's correspondence.[16] This correspondence dealt with the TWU's claims in relation to:

a. ordinary hours of work;
b. weekend penalty rates;
c. wage increases; and
d. the expiry date of the proposed enterprise agreement.[17]

[27] On 9 October 2023, Ms Wisniewska emailed Ms White noting that in addition to the outstanding claims listed in the 20 September 2023 letter, the TWU also had claims to amend the wording in the consultation clause and the dispute resolution clause.[18] On 11 October 2023, Ms White emailed the TWU with an updated version of the proposed enterprise agreement for the Erskine Park depot noting other changes that Cleanaway sought to make, which would affect:

a. the coverage clause;
b. allowances;
c. superannuation;
d. compassionate leave; and
e. the employee consultative committee.[19]

---

[12] Ibid, [77] (CB 185).

[13] Ibid, [80] (CB 185).

[14] Ibid, [85]-[106] (CB 185-7).

[15] Ibid, [92] (CB 186).

[16] Ibid, [95] (CB 186).

[17] Ibid, [94] (CB 186).

[18] Ibid, [99] (CB 186).

[19] Ibid, [100]-[101] (CB 186).

[28] On 16 October 2023, the TWU filed the current application for an intractable bargaining declaration. At the conference before Commissioner Riordan on 18 October 2023, the TWU advised Cleanaway that there was no dispute relating to the changes made to the proposed agreement regarding the coverage clause, allowances, superannuation, compassionate leave or the employee consultative committee.[20] According to Ms White, all of those changes were either beneficial to employees, or machinery/language changes.[21]

[29] There was agreement at the conclusion of the meeting that Cleanaway would review its position and provide a written position paper to the TWU by 30 October 2023. The parties agreed that they would not proceed with the intractable bargaining declaration application until that date.[22]

[30] On 30 October 2023, Cleanaway provided the TWU with a final proposed draft of the Erskine Park Agreement by email.[23] The email relevantly provided:

> Our proposal is made on the basis that it is a package and provides a basis to settle all bargaining issues. In the event of a change to any particular item within the proposal, Cleanaway reserves our right to reconsider our position and potentially make changes including to other items in future.[24]

[31] On 10 November 2023, Cleanaway advised the TWU that Cleanaway would ask employees to vote in relation to this proposed enterprise agreement. Cleanaway provided employees with written communication in relation to the vote which relevantly provided:

> Should employees vote in favour of the proposed agreement we will process the back payment on a 'yes' vote, rather than waiting for the Fair Work Commission to approve the agreement. If the result is a 'no', all previous negotiated financial and non financial items may be withdrawn or will be up for renegotiation, including the back payment.[25]

[32] The vote commenced on 20 November 2023 and concluded on 21 November 2023. 67 out of 74 eligible employees participated in the vote. 63 employees voted against the proposed agreement and there were 4 votes in favour.[26]

[33] On 19 December 2023 Ms White sent an email to Ms Wisniewska which relevantly provided:

> The result of the vote means that we confirm the proposed agreement, containing further concessions made by Cleanaway in an attempt to secure majority employee agreement in the November 2023 proposal (which Cleanaway indicated may be withdrawn if that agreement was not achieved) is withdrawn in its entirety. This means that there is no

---

[20] Ibid, [108] (CB 187).

[21] Exhibit 6, [74] (CB 1132).

[22] Exhibit 1, [110]-[111] (CB 187).

[23] Ibid, [112] (CB 187).

[24] Ibid, IW-30 (CB 697)

[25] Exhibit 6, MW-70 (CB 1920).

[26] Exhibit 1, [117]-[118] (CB 188-189).

agreement, including on the issues on which Cleanaway recently made further concessions.[27]

[34] Later that day, Ms Wisniewska responded to Ms White requesting that Cleanaway confirm the position that was previously uncontroversial between the parties, namely that the only outstanding claims are those outlined paragraph 115 of Ms Wisniewska's statement filed in the proceedings. Ms White then responded to Ms Wisniewska's email advising that the withdrawal is consistent with the communications to the TWU and the Erskine Park workforce.[28]

Outstanding Claims

[35] It is necessary to outline the outstanding claims as these form the basis for the TWU's contention that the bargaining is intractable.

[36] Cleanaway's position is that no matters are agreed.

[37] According to Ms Wisniewska,[29] the outstanding claims are as follows:

Ordinary Hours of Work Claim:

[38] The TWU seeks that:

i. ordinary hours of work for full-time employees will be 38 hours per week to be worked within a work cycle not exceeding 28 days;
ii. ordinary hours are to be worked between 4am and 5pm, Monday to Friday; and
iii. ordinary hours must not exceed 7.6 hours per day to be worked continuously.

[39] Cleanaway proposes that:

i. ordinary hours for full-time employees will be 38 hours per week to be averaged over a period not exceeding 28 days, which will be arranged to meet the ongoing operational requirements of Cleanaway;
ii. the spread of hours from 3am to 4pm, Monday to Sunday; and
iii. the maximum ordinary hours if work will not exceed 8 hours in a day.

Weekend Penalty Rates Claim

[40] The TWU seeks that Saturday work is paid at 150% for the first 2 hours and 200% thereafter. Cleanaway proposes that Saturday work is paid at 150% for all time worked.

[27] Exhibit 2.

[28] Ibid.

[29] Exhibit 1, [115] (CB 187-188).

Wage Increase

[41] The TWU seeks pay increases of:

i. 6% on 23 September 2023;
ii. 6% on 23 September 2024; and
iii. 6% increase on 23 September 2025.

[42] Cleanaway proposes pay increases of:

i. 4% on the commencement of the agreement;
ii. 4% on 23 September 2024;
iii. 4% on 23 September 2025; and
iv. 4% increase on 23 September 2026.

Expiry Date

[43] The TWU seeks an expiry date of 30 June 2026. Cleanaway proposes an expiry date 3 years from the date on which the Agreement is approved by the Commission.

Consultation Clause

[44] The TWU seeks the inclusion of the line 'This clause is to be read consistent with the model consultation term as defined and prescribed under the FW Act as varied from time to time' within the consultation clause. Cleanaway does not agree to this inclusion.

[45] Much of the evidence in the proceedings was in relation to the parties' hours of work and weekend penalty rates claims. The hours of work and weekend penalty rates clauses sought by Cleanaway are in identical terms to the current enterprise agreement and have appeared in predecessor agreements since 2010.[30]

[46] According to Mr Stassen, during his five years of employment with Cleanaway, the ordinary hours of work at the Erskine Park depot have always been between Monday to Friday between 3am and 4pm.[31] Mr Stassen says that while the maximum daily ordinary hours under the 2020 EA are 8, most employees at the Erskine Park depot work for at least 10 hours per day and most employees work overtime regularly as Cleanaway bases the runs on a 10 hour average run length.[32] It is very common that Cleanaway requires employees at the Erskine Park depot to work on Saturdays and Sundays. Where Cleanaway requires employees to work on a Saturday or Sunday, Cleanaway asks employees whether they want to nominate to work on the weekend. This process allows employees to use their discretion and make a choice about whether they wish to work overtime on a weekend.[33] It is common that employees nominate to work on Saturdays and/or Sundays, due to the attractive overtime rates. Whether employees

[30] Exhibit 6, [11]-[15] (CB 1124-5).

[31] Exhibit 3, [13]-[14] (CB 1105).

[32] Ibid, [19]-[20] (CB 1105).

[33] Ibid, [21]-[23] (CB 1105).

nominate to work will also depend on their family and caring responsibilities.[34] Mr Stassen's understanding is that during the period covered by the current enterprise agreement, there were so many people nominating to work on weekends, that Cleanaway was knocking people back from requests to work.[35]

[47] Before commencing bargaining for the most recent enterprise agreement, Mr Stassen was not aware that Cleanaway had the ability to roster employees from Monday to Sunday as ordinary hours.[36] Mr Stassen became aware of this at or around the third bargaining meeting on 17 November 2022. Mr Stassen and the other members of the TWU bargaining committee resolved that they wanted the current practice in relation to working ordinary hours Monday to Friday confirmed in the new agreement. They were concerned that any change in operation would have a huge effect on how the yard operated and the work life balance of employees.[37]

[48] Ms White's evidence is that the position of Cleanaway is not that every enterprise agreement must provide for ordinary hours of work throughout seven days of the week. Each agreement is to be considered in the context of the requirements of an individual site.[38]

[49] Over the past 24 months, 50 enterprise agreements covering Cleanaway have been approved by the Commission. There are currently 39 enterprise agreements being negotiated with employees across Australia.[39] Of approximately 50 enterprise agreements approved over the last 24 months, 36 enterprise agreements have the capacity for ordinary hours to be worked from Monday to Sunday.[40]

[50] The starting position for Cleanaway is that ordinary hours of work should be able to be rostered Monday to Sunday due to the nature of the work being performed. However, there are arrangements that can be made to ensure Cleanaway's objectives and the particular site requirements are met with different mechanisms as to hours of work. Not all of Cleanaway's sites are the same. Some sites, including Erskine Park, require a greater amount of flexibility than other sites.[41]

[51] Mr Vella gave evidence that weekend work is required, and increasing, at Erskine Park.[42] In response to Mr Stassen's statement about large numbers of people nominating to work on weekends, Mr Vella says that Cleanaway has experienced difficulties in ensuring it has sufficient personnel to complete work on Saturdays and Sundays.[43] Currently, approximately 50% of the Saturday runs are performed by Cleanaway employees as overtime because they usually have already completed their 38 hours by the end of the week. The other 50% is covered by temporary labour consisting of owner drivers, contractors and sometimes

[34] Ibid, [25] (CB 1105).

[35] Ibid, [26] (CB 1105).

[36] Ibid, [27] (CB 1106).

[37] Ibid,[34]-[38] (CB 1106).

[38] Exhibit 6, [20 (CB 1125).

[39] Ibid, [7] (CB 1122).

[40] Ibid, [8] (CB 1122).

[41] Ibid, [21-[22] (CB 1126).

[42] Exhibit 7, [15] (CB 1965).

[43] Ibid, [35] (CB 1967).

casuals.[44] There is a risk that a particular run may not be serviced because temporary labour may not accept a shift, and it also costs Cleanaway approximately 30% more to engage temporary labour than if they were to have a permanent employee perform that work on the weekends.[45] Mr Vella's preference is for weekend work to be performed by permanent Cleanaway employees. This would reduce the costs of temporary labour, provide increased work for permanent employees, and provide certainty for Cleanaway that the weekend services will be completed.[46]

[52] Mr Vella is concerned that the TWU's claim to get rid of an existing spread of hours clause which permits ordinary hours to be worked by permanent employees at Erskine Park on weekends has the risk of reducing future opportunities for full-time work at Erskine Park. This would increase the need for casuals, contractors and owner/drivers.[47] Mr Vella says that if the weekend services are to increase and additional hours required to be performed on Saturdays and Sundays, Cleanaway may find it difficult to service those increased needs. If Cleanaway cannot engage employees to work ordinary hours on Saturdays and Sundays, Cleanaway would need to factor that risk into bidding for new contracts and review existing contracts. This may mean that Cleanaway loses contracts at Erskine Park, that it otherwise would have won, impacting on its ability to provide opportunities for employment.[48]

Legislation

[53] The main features of ss. 234 and 235 of the FW Act are described in detail in the Full Bench decision in *United Firefighters' Union of Australia v Fire Rescue Victoria* (*UFU v FRV*)[49] and I rely upon what is said in that decision.

[54] Section 234 of the FW Act makes provision for a bargaining representative to make an application for an intractable bargaining declaration. Section 235(1) sets out the circumstances in which the Commission may make an intractable bargaining declaration which are that the application has been made, the Commission is satisfied of the matters set out in subsection (2) and it is after the end of the minimum bargaining period as defined in s. 235(5).

[55] The minimum bargaining period as defined in s.235(5) is the later of:

- the day that is 9 months after the nominal expiry date(s) of the existing agreement(s); or

- the day that is 9 months after the day that bargaining starts, being the 'notification time' for the proposed agreement.

[44] Ibid, [16] (CB 1965).

[45] Ibid, [19] (CB 1966).

[46] Ibid, [20] (CB 1966).

[47] Ibid, [21] (CB 1966).

[48] Ibid, [26] (CB 1966-7).

[49] [2023] FWCFB 180.

[56] This is essentially an issue of fact.[50] The notification time for a proposed agreement is as set out in s.173(2). The issue of the NERR in respect of a single-enterprise agreement (other than a greenfields agreement) must occur not later than 14 days after the notification time for such an agreement, so the fact that the NERR has been issued will usually be a reliable indicator that the notification time has already occurred.[51]

[57] The matters that the Commission must be satisfied about in s.235(2) before making a declaration are:

> (a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and
>
> (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
>
> (c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

[58] Satisfying the criteria in s.235(2)(a) simply requires a finding of fact that the Commission has dealt with the dispute about the agreement under s. 240 and the applicant for the intractable bargaining declaration has participated in the Commission's processes to deal with the dispute.[52]

[59] Section 235(2)(b) requires the Commission to make an evaluative judgment as to whether there is 'no reasonable prospect of agreement being reached' if an intractable bargaining declaration is not made.[53] Section 235(2)(c) requires the Commission to make a further evaluative judgment, in relation to whether it is reasonable in all the circumstances to make the declaration sought, taking into account the views of the bargaining representatives for the agreement.[54]

[60] The 'reasonable in all the circumstances' criterion requires an assessment of what is 'agreeable to reason or sound judgment' in the context of the relevant matters and conditions accompanying the case.[55] The requirement to take into account the views of the bargaining representatives means that their views must be treated as a matter of significance, but not necessarily a determinative consideration, in the assessment of whether it is reasonable in all the circumstances to make the determination sought.[56] Where the Commission is satisfied as to each of the matters in paragraphs (a)-(c) of s 235(1), it retains a residual discretion as to whether an intractable bargaining declaration is actually made. However, it is difficult to identify what discretionary matters might remain for consideration if the Commission has already satisfied itself as to the criteria in s 235(2).[57]

---

[50] Ibid, [25]

[51] Ibid, [26].

[52] Ibid, [28].

[53] Ibid, [29].

[54] Ibid, [30]

[55] Suncoast Scaffold Pty Ltd [2023] FWCFB 105 at [17] cited in *UFU v FRV* [2023] FWCFB 180, [30]

[56] *UFU v FRV* [2023] FWCFB 180, [31].

[57] Ibid, [32].

[61] Section 235(3) provides the matters which must be specified in the declaration. Section 235A provides that the Commission may, if it considers it appropriate to do so, specify a period in the declaration called a 'post-declaration negotiating period'. Item 847 of the Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* explains that s.235A 'would allow the FWC to, when making an intractable bargaining declaration, specify a period after the making of the declaration for the parties to continue to negotiate with a view to reaching an enterprise agreement before the FWC proceeds to make a workplace determination.' During this period, the Commission cannot make an intractable bargaining workplace determination but may provide other assistance during the period such as conciliation.

Consideration

[62] I have considered the submissions made by the parties and all the evidence in my determination of this matter and the conclusions I have reached.

Has an application for the declaration been made? — s 235(1)(a)

[63] The TWU submitted that it is a 'bargaining representative' for a proposed agreement to replace the Erskine Park EA. The proposed agreement is not a greenfields agreement and this application does not pertain to a multi-enterprise agreement. The TWU has standing to make the application which is an application for the purposes of s.235(1)(a). Cleanaway does not dispute this. I therefore find that a valid application has been made under s. 235(1)(a).

Is it after the end of the minimum bargaining period? — s 235(1)(c)

[64] The TWU submitted the nominal expiry date of the Erskine Park EA was 23 September 2022. The notification time for the proposed agreement was 5 September 2022. More than 9 months have elapsed since the nominal expiry date of the Erskine Park EA. Cleanaway does not dispute this. I therefore find that the precondition under s 235(1)(c) is established.

Has the FWC has dealt with the dispute about the agreement under section 240, and has the applicant participated in the FWC's processes to deal with the dispute? — s 235(2)(a)

[65] The TWU filed a dispute on 1 August 2023, under s. 240 of the FW Act. The dispute concerned the matters on which the parties had not been able to reach agreement, including the competing ordinary hours of work and weekend penalty rates claims, wage increases, terms of the consultation clause and the nominal expiry date of the proposed agreement.

[66] The issues the subject of the dispute application concerned the matters which the TWU contends have made the bargaining intractable. Both the TWU and Cleanaway participated in conferences before Commission Riordan in relation to the dispute.

[67] Cleanaway submitted that on 30 October 2023 Cleanaway provided to the TWU a 'final' proposed enterprise agreement. That final proposed agreement was rejected by the TWU. The TWU unilaterally brought the s.240 Erskine Park Dispute to an end on 13 November 2023. While maintaining significant concerns about the manner in which the TWU brought the s240

proceeding to an end without giving the Commission an opportunity to exercise all powers under s595(2), on balance it is open to the Commission to be satisfied of s235(2)(a).

[68] It is not in dispute that there was a s.240 dispute. The dispute was on foot for a period of more than three months. During that period, the parties participated in three conferences before Commissioner Riordan, exchanged position papers and other correspondence and reached agreement on the coverage clause, allowances, superannuation, compassionate leave and the employee consultative committee. Cleanaway provided to the TWU a 'final' proposed enterprise agreement on 30 October 2023 and commenced the access period for the proposed agreement on 10 November 2023, in relation to a vote scheduled on 20 and 21 November 2023.

[69] The evidence clearly establishes that the Commission dealt with the dispute by convening three conferences. The Commission has discretion whether to exercise the powers specified in s.595(2), so in my view satisfaction of s.235(2)(a) does not require the Commission to exercise all of these powers. The evidence also establishes that the TWU participated in the Commission's processes to deal with the dispute. The TWU attended the conferences convened by Commissioner Riordan and provided written communication about its position. Although the TWU may have discontinued the s.240 proceedings unilaterally, this occurred after Cleanaway was preparing to ask employees to vote in relation to its 'final' proposed enterprise agreement. This was a clear indication to the TWU that Cleanaway did not agree with the TWU in relation to the outstanding claims. In these circumstances, I do not find that the TWU terminated the s.240 proceedings prematurely or that this establishes that the TWU did not participate in the Commission's processes to deal with the dispute.

[70] I find that the Commission has dealt with the dispute about the agreement under s.240, and that the TWU has participated in the Commission's processes to deal with the dispute.

Is there no reasonable prospect of agreement being reached if the Commission does not make the declaration? — s 235(2)(b)

TWU Submissions

[71] The TWU submitted that bargaining has been extensive and protracted and has been ongoing for over a year. The parties had reached an impasse on outstanding issues, particularly in relation to ordinary hours and weekend penalty rates, by early 2023.

[72] The parties have explored reasonable options and processes to resolve the bargaining, including engaging in a substantial number of bargaining meetings and utilising the processes of the Commission to assist the parties to reach agreement. Cleanaway has asked employees to approve a proposed agreement on two occasions and it has been resoundingly rejected by employees.

[73] The issues that remain in dispute are significant. Amongst other things, employees have regularly and overwhelmingly instructed the TWU that they will not accede to Cleanaway's ordinary hours claim, as reflected in the petition obtained by the TWU. The insolubility of bargaining is emphasised by the resounding 'no' votes including the most recent vote of 64 in favour and 3 against. There is no real chance that an agreement will be reached. In all the

circumstances, the Commission can be comfortably satisfied that there is no reasonable prospect of agreement being reached.

Cleanaway Submissions

[74] Cleanaway submitted that given the similarities between Cleanaway's proposed ordinary hours of work clause and that contained in Erskine Park's enterprise agreements since 2010, it is not Cleanaway's intention to agree to any 'grandfathering' or other modifications. There is nothing to 'grandfather'.

[75] It is the TWU which is seeking to depart from the long-time agreed spread of ordinary hours at Erskine Park. The TWU seems to be intransigent in that approach, and intent upon chancing its arm in arbitration that it might be able convince a Full Bench to overturn 13 years of agreed provisions.

[76] It may be that if the Commission had the opportunity to continue with the previous Erskine Park s.240 Dispute – or if after making a s.235 declaration and during the post-declaration negotiating period the Commission exercises powers of conciliation – the employees may have an opportunity to hear directly from the Commission whether a workplace determination might be obtained which departs from an enterprise agreement clause which has been agreed (without issue) for 13 years. But the Commission does not currently have a vehicle to conciliate and to express an opinion in conference about those matters.

[77] It may also be that once the Erskine Park employees come to understand that the making of a declaration under s.235 means that all matters are to be arbitrated through a workplace determination – including wage rises and whether any back pay should be provided for and that the Commission when arbitrating a workplace determination does not have Constitutional power to impose on either party a dispute resolution procedure which provides for a power of arbitration – that there will be some movement on the part of the TWU. But these are all matters for the post-declaration negotiating period.

[78] In the circumstances, as things stand, Cleanaway accepts that it is open to the Commission to be satisfied on balance of the matters set out in s235(2)(b).

Findings

[79] I am satisfied that there is no reasonable prospect of agreement being reached if the Commission does not make the declaration. The parties are entrenched in their respective positions, particularly in relation to ordinary hours and weekend penalty rates.

[80] The TWU is seeking to maintain the current practice that ordinary hours are worked from Monday to Friday and that work on Saturdays and Sundays is performed on a voluntary basis at overtime rates. Cleanaway is seeking to maintain the clause in the current Agreement that ordinary hours of work can be rostered Monday to Sunday particularly as weekend work is increasing at Erskine Park. Cleanaway's preference is for weekend work to be performed by permanent Cleanaway employees including by rostering this work as ordinary hours which it says would reduce the costs of temporary labour, provide increased work for permanent employees, and provide certainty for Cleanaway that the weekend services will be completed.

[81] There is no indication that either Cleanaway or the TWU is willing to compromise in relation to their respective positions. The employees covered by the proposed agreement have overwhelmingly voted against Cleanaway's proposal and most of them have signed a petition in support of the TWU's position. Cleanaway speculates that there may be some movement on the part of the TWU once employees come to understand that the making of a declaration under s.235 means that all matters are to be arbitrated through a workplace determination however this is not supported by any evidence. Given that there is no evidence that Cleanaway intends to resile from its position that the current clause be maintained, it is clear that bargaining has reached an impasse.

Is it reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement? — s 235(2)(c)

TWU Submissions

[82] The TWU submitted that it would be manifestly reasonable to make a declaration in the circumstances of the bargaining for a new agreement to replace the Erskine Park EA. Bargaining has been protracted and has been ongoing for over a year. The bargaining is and has been at an impasse for some time. Cleanaway's position on ordinary hours and the other outstanding claims has consistently been unwavering and unchangeable.

[83] Further, employees have been without a pay rise since 23 September 2021. This has resulted in them going backwards on wages in an environment of persistently high inflation. They will continue to do so unless a declaration is made, and the Commission arbitrates outstanding claims. The only tool left for employees to move Cleanaway will be extensive and significant protected industrial action. The bargaining has produced contending claims in the Federal Court of Australia in relation to the conduct of the parties, indicative of the strained relationship and the intractable nature of the positions of the parties.

[84] Finally, the TWU supports the making of a declaration. It represents all or almost all employees who will be covered by the proposed agreement. Significant weight should be placed on its view.

Cleanaway Submissions

[85] Cleanaway submitted that in all the circumstances, the Commission would be entitled to have real reservations as to whether it is reasonable to make the proposed declaration. The TWU intransigence, in refusing to contemplate a clause similar to that which has applied at Erskine Park for 13 years, is to be deprecated. So too is the conduct of the TWU in unilaterally discontinuing the Erskine Park s.240 Dispute.

[86] In considering the phrase 'all the circumstances' and the broad evaluative judgement required by s235(2)(c), it may be that the Commission considers it necessary to take into account the subject matter of the current Court proceedings between the parties concerning Erskine Park:

(a) A possible explanation for why the Erskine Park employees will not agree to a clause with a spread of ordinary hours the same as agreed clauses which have applied to

Erskine Park since 2010 is an atmosphere of mistrust in Cleanaway which has been fostered by the TWU. For example, see the misrepresentations by the TWU which are the subject of the Federal Court cross-claim by Cleanaway.

(b) The TWU's submissions and evidence rely upon its allegations of a failure by Cleanaway to comply with the ballot agent's initial timeline for the conduct of the Erskine Park protected action ballot.

[87] If those matters are relevant to the evaluative judgement under s235(2)(c), then it is appropriate that the Commission be fully informed of all matters relating to the Federal Court claim and cross-claim. Putting aside the content of the Federal Court proceedings, Cleanaway accepts that it is open to the Commission to be satisfied of the matter contained in s235(2)(c) of the FW Act.

Findings

[88] I am satisfied that it is reasonable in the circumstances to make the declaration given that the parties are at an impasse, bargaining has been protracted and has been ongoing for over a year, employees have not received a pay rise since 23 September 2021 and the TWU who represents all or almost all employees who will be covered by the proposed agreement supports the making of a declaration.

[89] Although Cleanaway accepts that it is open for the Commission to be satisfied that it is reasonable to make the declaration, Cleanaway submitted that Commission would be entitled to have real reservations as to as to this matter. In this regard, Cleanaway relies upon the TWU refusing to contemplate a clause similar to that which has applied at Erskine Park for 13 years and the conduct of the TWU in unilaterally discontinuing the s. 240 Dispute.

[90] Notwithstanding that Cleanaway has had the ability to roster the ordinary hours of employees on weekends for thirteen years, there is no evidence that it has ever done so in respect of most or all of the employees at Erskine Park. There are a range of reasons why an employer may choose not to apply provisions in an industrial instrument. These reasons may include that it is not necessary to do so because of the operational requirements of the business, or that the provisions are unpopular amongst employees and may create attraction and retention issues for the employer if implemented. Cleanaway has not explained to the Commission why it does not as a matter of practice roster the ordinary hours of employees on weekends.

[91] Mr Stassen's evidence is that the current practice of rostering ordinary hours from Monday to Friday allows employees to use their discretion and make a choice about working overtime on a weekend. It is common that employees nominate to work on Saturdays and/or Sundays, as the overtime rates that Cleanaway pays are enticing to them. Whether employees nominate to work depends on their family and caring responsibilities.

[92] If Cleanaway implements the current ordinary hours clause in the Agreement, this could result in employees working on weekends regardless of whether they wish to or not and receiving weekend penalties rates which in some cases are lower than overtime. In these circumstances, there is nothing unusual or unreasonable about employees resisting a change to the current practice which they perceive would leave them worse off and seeking that their current working arrangements are confirmed in an industrial instrument. Indeed, the nature of

the current bargaining framework in providing employees and employers with the ability to negotiate successive enterprise agreements contemplates that changes may be made to employment conditions with the effect that clauses will not necessarily be replicated from one agreement to the next.

[93] In relation to the TWU terminating the s.240 dispute, it is difficult to see why this would lead the Commission to have concerns about the reasonableness of making the declaration. The TWU continued to participate in the s.240 dispute after filing the intractable bargaining application. As noted above, the TWU discontinued the s.240 proceedings three months after they commenced and shortly after Cleanaway was preparing to ask employees to vote in relation to its 'final' proposed enterprise agreement. If Cleanaway believed that there was further scope for the Commission to deal with the dispute to bring the parties closer to resolution, there was nothing to prevent Cleanaway from filing its own s.240 application, but it did not do so.

[94] Both parties referred to competing claims in the Federal Court in their submissions. These matters relate to the conduct of a protected action ballot approximately one year ago. Although the fact that these proceedings are on foot may be relevant to my consideration as to whether it is reasonable in the circumstances to make the declaration, I have decided not to have regard to these matters as they are currently before the Court and are yet to be determined. It is also not necessary for me to have regard to these matters to reach the requisite degree of satisfaction that it is reasonable in the circumstances to make the declaration taking into account all of the other factors which weigh in favour of this conclusion.

Conclusion re intractable bargaining declaration

[43] All the preconditions for the making of an intractable bargaining declaration pursuant to s.235(1) are satisfied. In the exercise of my residual discretion, there is no matter which I can identify which would weigh against making an intractable bargaining declaration. Accordingly, I make the declaration applied for by the TWU.

Post-declaration negotiating period — s.235A

TWU submissions

[95] The TWU submitted that the discretion in relation to whether to order a post-declaration negotiating period is two-fold, involving consideration of firstly, whether there should be such a period and secondly what its duration ought to be. The issue of whether the Commission can be satisfied that a post declaration period might assist agreement to be reached is a most material factor in the exercise of the discretion under section 235A.

[96] The notion that there will be some change in position by the TWU and the employees that it represents or by Cleanaway in the event that the Commission imposed the post declaration negotiating period would be an exercise in optimism that is not warranted when regard is had to what has actually happened historically and what the current position of the parties is.

[97] All that the imposition of such of such a period would do is delay further the employees accessing their rights to have the Commission to arbitrate an intractable bargaining dispute

between the parties in circumstances where employees have not had a pay rise for some time, and they are presently struggling and with the ever-increasing cost of living.

[98] It was never communicated by Cleanaway that its position was nothing is agreed until all is agreed. This shows that Cleanaway is motivated to utilise a post-declaration negotiating period to either continue to agitate its view that nothing, in fact, at all is agreed or to bolster that view. It makes clear Cleanaway's actual view that there is no realistic possibility of agreement being reached with the assistance of the Commission, or otherwise. It supports the TWU's view and position that this bargaining has reached an irresolvable impasse and has been at that point for many months. If Cleanaway had a different view, it would have taken some action after 18 October or 30 October 2023 to engage with the TWU and its members in respect to bargaining.

[99] The TWU submitted that given the lengthy bargaining which has occurred to date and the utilisation of the processes of the Commission to assist the parties, there is no sensible reason for any post-declaration negotiating period to be specified in the intractable bargaining declaration. A post-declaration negotiating period will be an exercise in futility and will simply delay arbitration of outstanding matters via a workplace determination.

[100] This case is very different in to *UFU v FRV*. Firstly, the Commission would not accept that it has always been Cleanaway's position that negotiations have proceeded on the basis that everything is agreed or nothing is agreed. Secondly, it is clear what the issues in dispute actually are between the parties and what is in effect not agreed, and thirdly, this is a case where a post declaration negotiating period would be able to be utilised by Cleanaway to continue to depart from agreements it has already reached to facilitate or promote whatever it considers its best interests to be in the workplace determination.

[101] It would be, in the circumstances of this case, counterintuitive for the Commission to impose such a period when regard is had to the length of the negotiations when robust assistance has already been provided by the Commission.

Cleanaway submissions

[102] Cleanaway submitted that a 30-day post-declaration negotiating period, with active supervision and assistance from the Commission, may help the TWU and its members to understand that there remains risk that what they are seeking may not be able to be achieved from a workplace determination, because it is such a great departure from the pre-existing and long-standing enterprise agreement clause.

[103] Although it has been left to the discretion of the Commission as to whether a post-declaration negotiating period should be specified, the fact that Parliament has made provision for such a period suggests that satisfaction of s.235(2)(b) is not intended to foreclose that a post declaration negotiating period is appropriate. The making of a declaration (and the prospect of an intractable bargaining workplace determination) has the potential at least to change the position of the parties and the dynamics of the negotiations so as to warrant consideration of whether a negotiating period should be specified.

[104] It was acknowledged by the Full Bench in *UFU v FRV* that:

> On one view, it would be counter-intuitive to specify a post-declaration negotiating period where the Commission must have already…satisfied itself pursuant to s 235(2)(b) that there is no reasonable prospect of agreement being reached if a declaration is not made. Notwithstanding this, there may be circumstances which justify the specification of a post-declaration negotiating period…[58]

[105] In the circumstances of the current case, if the Commission is satisfied that it should make a declaration under s.235, the circumstances justify the specification of a 30-day post-declaration bargaining period.

[106] The starting point when considering whether to order a post declaration bargaining period is that the Parliament has deliberately created this power for the Commission to order such a negotiating period, notwithstanding that at the point of making the declaration it might seem that the bargaining is intractable. The Parliament has created that power for reasons including the primary statutory objective in s.3(f) of the FW Act of emphasising enterprise bargaining or enterprise level collective bargaining. Another reason is that conciliation before arbitration is what the Commission and its predecessors have been doing for 120 years. It always involved finding that there is a dispute, engaging with the parties in conciliation and exploring whether some agreed position can be reached.

[107] The Commission can be a force for good in bringing people and parties together. The system is not one about finding that there is a dispute between the parties, leaving them completely to their own devices, and then if they can't resolve it, immediately following on past that point of no return to arbitration of potentially each and every condition.

[108] The TWU's submissions that a post declaration negotiating period would be an exercise in futility is inconsistent with the statutory scheme. It is possible for there to be satisfaction right now that if the Commission does not make the declaration there is no reasonable prospect of agreement being reached. This still leaves open the possibility that after the declaration is made, with some assistance from the Commission post declaration, the dynamics might change, and agreement might be reached.

[109] There are a range of factors that should satisfy the Commission that there is a chance that during the post declaration bargaining period agreement might be reached, or at least the matters in dispute might be reduced. They include that the TWU discontinued the s.240 process after just one phone conference and two conciliation conferences and that the Commission did not have a chance to formally exercise powers available to it including making recommendations for expressing opinions.

[110] What the Commission needs to look at in deciding whether to make a post declaration negotiating period, is the prospect of agreement being reached for reduction of the matters in dispute with the assistance of the Commission. It's a forward-looking proposition, not what the position is now or what the position was previously.

[111] Another factor lending support to the possibility that there may be an agreement reached after the declaration being made is the history of enterprise bargaining at Cleanaway between

---

[58] Ibid [34].

Cleanaway and its employees. Over the decades the Commission has had a tradition of bringing the parties together in disputes that are a lot worse than this and the parties are a lot further apart.

[112] The TWU has potentially created mistrust amongst the employees at Cleanaway which the Commission may be able to cut through and encourage the parties to focus on the future, and what is in the best interests of the employer and the employees at the worksite with the view to trying to resolve the matter.

[113] Given the significant resources that the Full Bench and the parties would need to put into an arbitration, the Commission should try over a period of 30 days to invest some time to get the parties over the line, or at least closer together.

[114] All terms will need to be arbitrated which may involve a Full Bench hearing for several weeks. The best way to shorten the case for the Full Bench even if agreement cannot be reached in the 30-day period, is to order a 30-day period which might lead to the matters in dispute being narrowed, if not completely resolved.

Findings

[115] I accept Cleanaway's submission that the making of a declaration (and the prospect of an intractable bargaining workplace determination) has the potential at least to change the position of parties and the dynamics of the negotiations so as to warrant consideration of whether a negotiating period should be specified. However, I believe that this is more likely to occur where the declaration is opposed by at least one of the bargaining representatives. It is likely that a bargaining representative who opposes the making of a declaration would be doing so for the purpose of avoiding an intractable bargaining workplace determination being made. That party may be concerned that there is a risk that they will be disadvantaged by a workplace determination. Once such a declaration has been made, a workplace determination can only be avoided by the parties reaching agreement on the terms of the enterprise agreement. The making of the declaration is likely to incentivise a party who wishes to avoid a workplace determination to change their position and to try to reach agreement.

[116] In the current matter, the application for a declaration is not opposed and the parties appear to accept that a workplace determination is inevitable, although Cleanaway continues to remain hopeful that the TWU will change its position. In these circumstances, because neither party appears to be actively avoiding the possibility of a workplace determination, I believe that it is unlikely that the declaration will change the position of the parties and the dynamics of the negotiations. This is particularly the case as there have been numerous events during the course of bargaining which had the potential to change the dynamics of the negotiations but did not do so. These include the TWU lodging the s.240 application, Cleanaway's proposed agreement being overwhelmingly rejected by employees on two occasions, and the TWU lodging the current application. None of these incidents resulted in the parties significantly comprising their positions.

[117] I also accept Cleanaway's submission that the consideration of this matter must have regard to the objects of the FW Act, including s.3(f), which deals with emphasising enterprise bargaining or enterprise level collective bargaining. I note s.3(e) is also relevant, which deals

with providing accessible and effective procedures to resolve grievances and disputes. These are matters are relevant to my consideration of whether there may be circumstances in this case which justify the specification of a post-declaration negotiating period.

[118] As noted by the Full Bench in *UFU v FRV*, whether or not a post-declaration negotiating period is specified by the Commission is relevant to the consideration of what might be an 'agreed term' for an intractable bargaining workplace determination under s.274(3). Cleanaway's position is that there are currently no agreed terms. The TWU's position is that the only terms that are not agreed are those in relation to ordinary hours of work, weekend penalty rates, wage increases, the expiry date of the proposed enterprise agreement and the consultation clause.

[119] If there is no post-declaration negotiating period, the Full Bench will be required to determine what if any terms the bargaining representatives for the proposed enterprise agreement had agreed should be included in the agreement at the time that the intractable bargaining declaration was made. This will involve determining whether there are currently no agreed terms or whether most of the terms are agreed apart from the five outstanding issues specified by the TWU.

[120] If there is a post-declaration negotiating period, the Full Bench will be required to determine what if any terms the bargaining representatives for the proposed enterprise agreement had agreed should be included in the agreement at the end of the post-declaration negotiating period. It is possible that the parties' positions in relation to what terms are agreed will change between the time that the declaration is made and the end of the post-declaration negotiating period. Any change in the parties' positions should be with the aim of reducing any areas of disagreement. This would be consistent with the purpose of the period which is to negotiate with a view to reaching an enterprise agreement before a workplace determination is made. If there is no change to the parties' respective positions at the conclusion of the post-declaration negotiating period, the Full Bench will be required to perform the same exercise as if there is no post-declaration negotiating period. If this occurs, there will be no benefit to the parties and in fact there could be a disadvantage to employees caused by the deferral of the determination of their pay and conditions.

[121] In *UFU v FRV*, the Full Bench considered that the specification of a post-declaration negotiating period would be useful for the purpose of giving the parties an opportunity to resolve, or at least narrow, their differences as to what matters will need to be arbitrated. Cleanaway has urged the Commission to follow the same approach in this case given its position that there are no agreed terms. In *UFU v FRV*, the UFU's position was that all matters in the proposed agreement, apart from wages, allowances and the related efficiencies issue, had already been agreed. However, the FRV's position was that there were no agreed terms because its previous agreements-in-principle on individual items were always subject to Government approval and agreement on an entire package including wages and allowances. In my view, the FRV's position as stated in *UFU v FRV* is very different to the position that Cleanaway articulated in their written communication to employees and the TWU.

[122] Cleanaway produced items of correspondence which variously stated that in relation to the 'final' version Cleanaway's proposed Erskine Park Agreement:

- In the event of a change to any particular item within the proposal, Cleanaway reserves its right to reconsider its position and potentially make changes including to other items in future.

- If the result of the vote for the agreement is 'no' all previous negotiated financial and non-financial items may be withdrawn or will be up for renegotiation, including the back payment.

[123] On 19 December 2023, Cleanaway sent an email to the TWU in which it stated that its proposed Erskine Park Agreement 'is withdrawn in its entirety'.

[124] Cleanaway has not produced evidence that it articulated a position to the TWU and employees in writing that any agreements-in-principle on individual items were always subject to agreement on an entire package. Instead, the evidence shows that Cleanaway reserved for itself the right to change or withdraw agreed items and ultimately purported to do so on 19 December 2023. Whereas the FRV's position appears to be that there has never been an agreement about any terms with the UFU, the correspondence from Cleanaway shows that there were terms that were agreed with the TWU, but that Cleanaway purported to withdraw from agreement in relation to those terms on 19 December 2023.

[125] It is verging on disingenuous for Cleanaway to now be urging the Commission to specify a post-declaration negotiating period for the purpose of narrowing the issues when it appears to be the actions of Cleanaway, two days before the hearing of this matter, that have significantly increased the issues in dispute. Given Ms Wisniewska's response to Ms White's email of 19 December 2023, it is probable that Cleanaway's actions in purporting to withdraw the proposed Erskine Park Agreement will have heightened the tensions between the parties and reduced the likelihood that any further discussions will be productive.

[126] I note that a further reason that Cleanaway contends that the Commission should specify a post-declaration negotiating period is because it would help the TWU and its members to understand that the risks of seeking a workplace determination and overcome the mistrust created by the TWU between Cleanaway and its members. Implicit in Cleanaway's submissions is that employees will accept the current ordinary hours clause if the Commission provides further conciliation and exercises all powers available to it. There is no suggestion by Cleanaway that further conciliation by the Commission will assist Cleanaway to compromise or change its position.

[127] The contention that employees will resile from their claim that ordinary hours be performed Monday to Friday is not supported by the evidence. In fact, the evidence overwhelmingly demonstrates that almost all employees wish to maintain the current practice of ordinary hours being performed Monday to Friday. Mr Stassen and Ms Wisniewska gave evidence about this matter. Mr Stassen gave evidence that employees are aware of the implications of a declaration being made as the TWU has gone to great lengths to explain this.

[128] The TWU have produced a petition supporting the ordinary hours claim signed by almost all employees at Erskine Park. Cleanaway's proposed agreement has been convincingly voted down on two occasions. The parties engaged in a three-month process before the Commission arising from the s.240 application which culminated in Cleanaway's proposed agreement being voted down a second time on 21 November 2023. The parties have not held bargaining meetings or sought further assistance from the Commission since that time. Having regard to all of these maters I do not accept that a post-declaration negotiating period is likely to result on either Cleanaway or the TWU compromising their claims in relation to ordinary hours and weekend penalty rates.

[129] I am not persuaded by Cleanaway's submissions as to the circumstances which many justify a post-declaration negotiating period. However, I am conscious of the fact that the Full Bench will need to determine agreed terms as part of the workplace determination and that Cleanaway has already foreshadowed that it will be arguing that no terms are agreed and that the 'non-agreed matters to be determined by the Full Bench under s.269 will be numerous, and significant'.[59] This will inevitably lead to lengthy arguments about whether there are agreed terms for the purpose of s.274 and potentially lead to a protracted hearing if Cleanaway's position is accepted by the Full Bench. If this occurs, the employees are unlikely to receive a pay rise for some time, noting the TWU's submissions that employees are presently struggling with the ever-increasing cost of living.

[130] I believe that there is scope for the Commission to assist the parties, particularly Cleanaway, to reassess their position in relation to agreed terms. If at the end of the post-declaration negotiating period there is agreement between the parties about the agreed terms this will accelerate the issuing of the workplace determination. More importantly, this will also result in employees receiving a pay rise and having certainty about their conditions of employment much sooner than what is currently likely. I have considered the TWU's submissions about the imposition of such of a period further delaying the matter. Taking into account these submissions I have determined that the circumstances I have outlined justify a short post-declaration negotiating period commencing from today's date and concluding on 25 January 2024.

Conclusion

[131] I make an intractable bargaining declaration in relation to the proposed *Cleanaway Erskine Park Drivers Enterprise Agreement 2022*. A post-declaration negotiating period will start today, 12 January 2024, and end on 25 January 2024. The declaration is made by a separate order that is published in conjunction with this decision and which, in accordance with s.235(4)(a) of the FW Act, will operate from the date of this decision. The matter will be

[59] Ibid.

referred to another member of the Commission who will be available to assist the parties during the post-declaration negotiating period.

DEPUTY PRESIDENT

Appearances:

P Boncardo of Counsel, on behalf of the Applicant.
B Avallone of Counsel, on behalf of the Respondent.

Hearing details:

2023
21 December
Sydney.

Printed by authority of the Commonwealth Government Printer

<PR770185>