DECISION

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

Transport Workers' Union of Australia
v
Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd
(B2023/1106)

DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT
COMMISSIONER CRAWFORD

SYDNEY, 7 MARCH 2024

Application for intractable bargaining declaration – whether the Commission has dealt with the dispute – whether there is no reasonable prospect of agreement being reached if the Commission does not make the declaration – whether it is reasonable in all the circumstances to make the declaration – whether a post declaration negotiating period should be granted – intractable bargaining declaration made with 21 day post-declaration negotiating period.

Introduction and background

[1] The Transport Workers' Union of Australia (***TWU***) has made an application to the Fair Work Commission (***Commission***) pursuant to s 234 of the *Fair Work Act* 2009 (Cth) (***Act***) for an intractable bargaining declaration in relation to employees of Cleanaway Operations Pty Limited (***Cleanaway***) who work at its Unanderra depot and who are covered by the *Cleanaway Solid Waste Services (C&I) Wollongong Enterprise Agreement 2020* (***Unanderra EA***). Cleanaway opposes the making of the intractable bargaining declaration.

[2] A similar application was made by the TWU in relation to Cleanaway's employees who work at its Erskine Park depot. Those employees are covered by the *Cleanaway Erskine Park Drivers Enterprise Agreement 2020*. Cleanaway did not oppose that application. Deputy President Wright made an intractable bargaining declaration on 12 January 2024 in relation to Cleanaway's employees who work at its Erskine Park depot.[1]

[3] There are about 36 Cleanaway employees based at its Unanderra depot. About 20 of those employees are covered by the Unanderra EA (***Bargaining Employees***) and it is proposed that they will be covered by a replacement enterprise agreement. The Bargaining Employees work across Cleanaway's commercial and industrial (***C&I***) waste business and its container deposit scheme (***CDS***) business, servicing Cleanaway's clients in Wollongong and surrounding areas. Other Cleanaway employees based at the Unanderra depot undertake maintenance works and are covered by a different enterprise agreement.

[4] The TWU is a bargaining representative in relation to the bargaining for an enterprise agreement to replace the Unanderra EA. There are also two individual bargaining representatives, neither of whom took any part in the current proceedings before the Commission.

[5] We heard the TWU's application on 26 and 27 February 2024. The TWU adduced evidence from Ms Isabella Wisniewska, Legal Officer of the TWU, Mr Ryan Smith, an official of the TWU who is responsible for representing TWU members working for Cleanaway at the Unanderra depot, and Mr William Stephen, an employee of Cleanaway who works at the Unanderra depot. Cleanaway adduced evidence from Ms Michaela White, ER/IR Manager of Cleanaway, and Mr David Moon, Regional Manager of Cleanaway for Southern NSW/ACT, including the Unanderra depot. Both parties filed written submissions and made supplementary oral submissions at the hearing.

Statutory framework

[6] Subdivision B of Division 8 (FWC's general role in facilitating bargaining) sits within Part 2-4 of the Act. It governs applications for intractable bargaining declarations.

[7] Because the TWU is a bargaining representative for the proposed agreement, it has the right to make an application for an intractable bargaining declaration (s 234(1) of the Act).

[8] Section 235 of the Act relevantly provides:

> "(1) The FWC may make an intractable bargaining declaration relation to a proposed enterprise agreement if:
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> (a) an application for the declaration has been made; and
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> (b) the FWC is satisfied of the matters set out in subsection (2); and
>
> (c) it is after the end of the minimum bargaining (see subsection (5)).
>
> (2) The FWC must be satisfied that:
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> (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
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> (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
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> (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."

[9] Section 235A of the Act provides:

"(1) The FWC may, if it considers it appropriate to do so, specify in the declaration a period (the ***post-declaration negotiating period***) that:

(a) starts on the day the declaration is made; and

(b) ends on:

(i) the date specified by the FWC in the declaration; or

(ii) any late day determined under subsection (2).

(2) The FWC may, if it considers it appropriate to do so and taking into account any views of the bargaining representatives, extend the period referred to in subsection (1) by determining a later day for the purposes of subparagraph (1)(b)(ii)."

[10] Another Full Bench of the Commission made the following observations, with which we agree, about these provisions in *United Firefighters' Union of Australia v Fire Rescue Victoria*:[2]

"[27] The precondition in s 235(1)(b) requires the Commission to be 'satisfied' as to each of the matters in paragraphs (a)-(c) of s 235(2). The process by which a tribunal does, or does not, reach a state of satisfaction about a prescribed matter involves the making of an evaluative judgment of a discretionary nature. The exercise of discretion involved will be wider where the prescribed matter is one of 'opinion or policy or taste' (as is the case with paragraphs (b) and (c) of s 235(2)) than one of 'objective fact' (paragraph (a)).

[28] As indicated, satisfaction as to 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. Section 240 is a provision by which a bargaining representative for a proposed enterprise agreement may apply to the Commission for it to deal with a dispute about the agreement which the bargaining representatives are unable to resolve. Under ss 240(4) and 595, the Commission may deal with such a dispute by mediation, conciliation, making a recommendation or expressing an opinion, and by consent arbitration, and these may be understood as the Commission's 'processes to deal with the dispute' referred to in s 235(2)(a). We note that s 235(2)(a) refers to the Commission having dealt with 'the' dispute about the proposed agreement, not simply 'a' dispute about the agreement. On one view, the use of the definite article suggests that the dispute which the Commission has previously dealt with under s 240 must be the same as the dispute which is said to have caused bargaining to become intractable for the purpose of an application under s 234. However, as will later become apparent, this constructional issue need not be determined in this matter.

[29] 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. 'No reasonable prospect' is obviously not the same

as ‘no prospect’ in that it does not require a ‘certain and concluded determination’ that an agreement cannot be reached if a declaration is not made but rather, on the ordinary meaning of the words used, requires an evaluative judgment that it is rationally improbable that an agreement will be reached. Paragraph [846] of the Revised Explanatory Memorandum (REM) for the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (SJBP Bill), which explains this provision, is consistent with this approach:

> … This does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance. It is unlikely that the FWC would reach such a state of satisfaction unless the parties had been bargaining for an extended period and had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration. …

[30] Satisfaction in respect of s 235(2)(c) requires the Commission to make a further evaluative judgment, namely that it is reasonable in all the circumstances to make the declaration sought, taking into account the views of the bargaining representatives for the agreement. 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. The REM for the SJBP Bill gives examples of potentially relevant circumstances as follows:

> This would provide scope for the FWC to, for example, consider the dispute in the context of the whole of the relationship of the parties, the history of the bargaining, the conduct of the parties, the prevailing economic conditions, and the bargaining environment.

[31] 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.

[32] Where the Commission is satisfied as to each of the matters in paragraphs (a)-(c) of s 235(1), it retains a residual discretion (‘may make’) 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).

[33] Where an intractable bargaining declaration is made pursuant to s 235, s 235A confers upon the Commission the power to specify a ‘post-declaration negotiating period’…

[34] The discretionary nature of the above provision is in contrast to s 266(3), which requires a ‘post-industrial action negotiating period’ when a termination of industrial

action instrument has been made pursuant to ss 423, 424 or 431. The REM 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'. On one view, it would be counter-intuitive to specify a post-declaration negotiating period where the Commission must have already reached 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, as is illustrated by this case and discussed further below."

[11] We add to these observations the following matters:

(a) Each application for an intractable bargaining declaration will turn on its own facts,[3] notwithstanding that a declaration may or may not have been made in other (even related) proceedings, such as *TWU v Cleanaway Operations Pty Ltd*.[4]

(b) In assessing whether there is no reasonable prospect of agreement being reached if the Commission does not make a declaration, it is necessary to have regard to the history of negotiations and any developments or negotiations which take place up until the time of the assessment.[5]

(c) Consideration as to whether there is no reasonable prospect of agreement being reached does not require any assessment of the merits of possible alternative provisions that might be arbitrated in a later determination.[6]

(d) The subjective views of parties, employees, union officials or any other individuals involved in bargaining as to the criteria in paragraphs 235(2)(a), (b) and (c) of the Act are not determinative. The test is objective. The task involves the Commission having regard to all the relevant circumstances and then deciding whether or not it is satisfied of the statutory criteria in s 235(2) of the Act.

[12] We do not accept the contention advanced on behalf of Cleanaway that the Commission will not have "dealt with the dispute" within the meaning of paragraph 235(2)(a) until the Commission has had the opportunity to use *all* of its efforts to assist the parties to resolve the dispute, using its powers under s 595, and the Commission has dealt with the s 240 proceedings to conclusion. Cleanaway relies on submissions to this effect made by the ACTU in different proceedings involving Virgin Australia Regional Airlines. Those proceedings were resolved and therefore not determined by the Commission.

[13] If dealing with s 240 proceedings "to conclusion" requires the proceedings to be either discontinued by the applicant or dismissed by the Commission, such an interpretation is not supported by the text, context or purpose of s 235(2)(a) of the Act. The provision uses the expression "dealt with" rather than a word or expression connoting finalisation, conclusion, discontinuance or dismissal. The ordinary meaning of the word "dealt" is the "past tense and past participle of deal".[7] The most applicable ordinary meanings of the expression "deal with" include "to occupy oneself or itself with" and "to take action with respect to".[8] It follows that a person or body may have dealt with a dispute, within the ordinary meaning of that expression,

even though the dispute is ongoing and may involve the person or body having future dealings with it. As to context, s 240 bargaining disputes involve members of the Commission using their dispute resolution tools and skills to assist parties to reach agreement on disputed issues in the course of bargaining for a new enterprise agreement. This may involve the member of the Commission conciliating or mediating the dispute, asking parties to identify their positions, interests and reasons for holding those positions and interests, requesting further information from one or more parties, expressing opinions, making recommendations, suggesting that further bargaining meetings take place between the parties, or conducting a consent arbitration of one or more matters in dispute. It is common in s 240 applications for the Commission to keep its file open for a period of time after having dealt with the matter but not resolving all (or any) issues in dispute, so that either party can request further assistance from the Commission. In these circumstances, the Commission may, at a particular point in time, have dealt with the s 240 application extensively, notwithstanding that it may have future dealings with the dispute. As to purpose, the objective of s 235(2)(a) is plainly to ensure that the Commission has been given the opportunity to assist the parties to resolve their bargaining dispute by agreement before the Commission makes an intractable bargaining declaration and moves to the next step of determining the disputed matters. Consistent with this objective, the Commission must have had a real opportunity to take action with respect to the bargaining dispute in order to have dealt with it within the meaning of s 235(2)(a). But the purpose does not suggest a need for the s 240 proceedings to be at an end (i.e. discontinued or dismissed) to meet the criterion of the dispute having been "dealt with".

[14] Nor is there anything in the text, context or purpose of s 235(a) to support a conclusion that the Commission must have used *all* of its available powers under s 595 of the Act in order to have "dealt with" the dispute. Many s 240 disputes involve the Commission exercising one or more powers under s 595 but not, for example, making a recommendation or expressing an opinion. The Commission has a discretion under s 595(2) to deal with a dispute as it sees fit. It is a matter of judgment for the Commission member dealing with the dispute to determine which, if any, of the methods to which reference is made in s 595(2) should be applied to the circumstances of a particular dispute. The question of whether the Commission has dealt with a s 240 application is one of fact, which must be assessed by reference to all the relevant circumstances.

[15] There may be cases in which there is a real question as to whether the Commission has dealt with the dispute under s 240 of the Act because, for example, the Commission has only received the application and conducted a preliminary conference for the purpose of finding out about the matter and deciding how best to deal with the dispute. Each case will turn on its own facts.

[16] Cleanaway made much in its submissions of the fact that one of the objects of the Act is to achieve "productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"[9] and two of the objects of Part 2-4 of the Act are to "provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity and benefits" and "to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements".[10] Cleanaway submits that in light of these objects and the role of the Commission to facilitate bargaining, it is not for the Commission to supplant bargaining by being rushed to arbitration, or by enabling

one party or the other by its intransigence to self-servingly declare that bargaining is intractable, and in so doing to make it inevitable that a declaration under s 235 will be made.

[17] As was explained in the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*,[11] "while the primary focus of the FW Act would remain on supporting parties to reach their own agreements through collective bargaining in good faith, the FWC would, following the proposed amendments, have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties reaching agreement." The intractable bargaining declaration provisions of the Act set out a new mechanism to resolve an impasse in bargaining if the statutory criteria in s 235(2)(a), (b) and (c) are satisfied.

[18] There are other provisions of the Act which recognise that enterprise level bargaining does not always work well or give rise to appropriate outcomes. For example, the Commission has the power under s 424 of the Act to suspend or terminate protected industrial action if it is satisfied that the action has threatened, is threatening, or would threaten to endanger the life, personal safety, or welfare of the population or part of it, or cause significant damage to the Australian economy or an important part of it.

Contentious matters and issues in dispute

[19] There is no dispute between the parties, and we are satisfied on the evidence, that:

(a) an application for an intractable bargaining declaration has been made (s 235(1)(a) of the Act); and

(b) the nominal expiry date of the Unanderra EA was 1 July 2022. Bargaining commenced in November 2022. It follows that the (9 month) minimum bargaining period ended in August 2023 (s 235(1)(c) & (5) of the Act).

[20] The issues in dispute between the parties concern each of the elements of s 235(2)(a), (b) and (c) of the Act.

Relevant facts

[21] Detailed evidence was adduced from both parties in relation to the history of bargaining for an enterprise agreement to replace the Unanderra EA, as well as what was said during various conferences before the Commission in connection with the bargaining. We have considered that evidence, but for the purpose of explaining our reasons for reaching the necessary state of satisfaction as to the matters set out in s 235(2)(a), (b) and (c) of the Act we do not need to record in this decision every aspect of the history of bargaining and all the comments made throughout the conferences before the Commission. It is sufficient to provide the following summary of the relevant facts and circumstances, so that we may explain the reasons for our decision.

[22] In July 2021, the Bargaining Employees received their last pay rise.

[23] On 1 July 2022, the Unanderra EA reached its nominal expiry date.

[24] In November 2022, Cleanaway issued a notice of employee representational rights to the Bargaining Employees.

[25] On 16 November 2022, the first bargaining meeting took place between Cleanaway and the TWU bargaining committee, which consisted of Mr Smith, Mr Stephen and a TWU delegate who works at the Unanderra depot, Mr Stephen Ten-Hoonte.

[26] On 30 November 2022, a bargaining meeting took place.

[27] On 14 December 2022, a bargaining meeting took place.

[28] On 21 December 2022, a bargaining meeting took place.

[29] On 18 January 2023, a bargaining meeting took place.

[30] On 31 January 2023, a bargaining meeting took place.

[31] On 23 February 2023, a bargaining meeting took place.

[32] On 27 February 2023, Cleanaway communicated a proposal to the TWU which included a claim by Cleanaway to change the ordinary hours of work provisions of the Unanderra EA. It is contextually relevant that Cleanaway is covered by more than about 37 enterprise agreements approved over the last 24 months which have the capacity for ordinary hours to be worked from Monday to Sunday. Cleanaway has also made other enterprise agreements that provide for different hours of work depending on when an employee was employed, or which include obligations on Cleanaway relation to rostering of ordinary hours that can only be changed in certain circumstances.[12]

[33] Cleanaway has explained that "the need to move towards a clause allowing for ordinary hours to be worked Monday to Sunday is about future proofing" the Unanderra depot.[13] In particular, being able to roster employees at the Unanderra depot to work ordinary hours from Monday to Sunday:

(a) would enable Cleanaway's CDS business, which operates seven days a week as a result of the need to collect containers from drop-off/collection points every day and sometimes multiple times a day, to continue to operate efficiently;

(b) would ensure that Cleanaway's C&I business unit could continue to service its existing clients, including those that require weekend collections, noting that there has been a gradual shift towards seven day collection services being required by clients. Also of relevance is that there have been some instances where there have been operational challenges to find enough employees at the Unanderra depot to work on a weekend, particularly where employees pull out of the voluntary overtime at the last minute;

(c) would increase Cleanaway's prospect of attracting new clients that require flexible service including on weekends. Continuing to run a model whereby weekend work is undertaken by employees on a voluntary basis on overtime is higher risk and potentially not sustainable; and

(d) would enable alternative rosters for employees, or potential future employees, who request different or flexible working arrangements to suit their individual circumstances.[14]

[34] Cleanaway's starting position is that ordinary hours of work should be able to be rostered Monday to Sunday due to the nature of the work being performed. But Cleanaway says that there are arrangements that can be made to ensure Cleanaway's objectives of the particular site requirements are met with different mechanisms as to hours of work. This is evidenced, so Cleanaway contends, by the different enterprise agreements it has made with different groups of employees in different geographical locations around Australia.[15] Notwithstanding these matters:

(a) Ms White accepted in her evidence that changing the ordinary hours provisions in the Unanderra EA is a "key matter" and "one of the most important matters" in bargaining for Cleanaway; and

(b) Mr Moon accepted in his evidence that Cleanaway is determined to move to a seven day a week span of ordinary hours for the Unanderra depot, Cleanaway is not going to budge on this issue, and Mr Moon does not believe that the employees at the Unanderra depot will support an enterprise agreement which includes the grandfathering of ordinary hours for existing employees.

[35] The TWU has consistently stated that the Bargaining Employees want to essentially retain the ordinary hours of work provisions in the Unanderra EA.

[36] On 1 March 2023, a bargaining meeting took place.

[37] On 23 March 2023, a bargaining meeting took place.

[38] On 5 April 2023, the TWU made an application to the Commission for a protected action ballot order in relation to the Bargaining Employees. The order was made by the Commission on 11 April 2023.

[39] On 19 April 2023, a bargaining meeting was scheduled to take place. It was cancelled by Cleanaway.

[40] On 21 April 2023, the results of the protected action ballot were revealed. They showed that a strong majority of the Bargaining Employees voted to approve the taking of protected industrial action.

[41] On 11 May 2023, a bargaining meeting was scheduled to take place. It was cancelled by Cleanaway.

[42] Also on 11 May 2023, the TWU issued Cleanaway with a notice of intention to take protected industrial action on 17 and 18 May 2023. The TWU issued this notice because they believed that Cleanaway was not moving during bargaining and they were cancelling bargaining meetings.

[43] On 16 May 2023, a bargaining meeting took place.

[44] On 17 to 18 May 2023, protected industrial action was taken by the Bargaining Employees.

[45] On 19 June 2023, a bargaining meeting took place.

[46] On 23 June 2023, a bargaining meeting took place.

[47] On 6 July 2023, a bargaining meeting took place.

[48] In the period between 20 and 21 July 2023, Cleanaway requested the Bargaining Employees to vote on a proposed enterprise agreement which included a provision whereby ordinary hours could be worked from Monday to Sunday.[16] The result was that 17 employees voted no to the proposed enterprise agreement and three voted yes.

[49] On 3 August 2023, the TWU filed a s 240 application in the Commission in relation to bargaining for an enterprise agreement to replace the Unanderra EA. The application included the following explanation of the main matters in dispute:

> "1. Cleanaway and the TWU have not yet reached agreement on two outstanding clauses to be included in the Replacement Agreement, being:
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> a. the ordinary hours of work clause (including removal of clause 21(c) of the Expired Agreement); and
> b. the spread of hours.
>
> 2. The clauses that Cleanaway presses are strongly opposed by the TWU and its members, as the clauses represent a material loss to employees of important conditions of employment and will cause employees to go back financially particularly given present rates of inflation.
> 3. The ordinary hours of work clause that Cleanaway pursues leaves the arrangement of employees' average weekly hours, over a three month period for the sole purpose of meeting Cleanaway's operational requirements.
> 4. Further, Cleanaway's removal of clause 21(c) of the Expired Agreement, which provided that ordinary hours would be "worked on any day Monday to Friday between the hours of 4.00am and 5.00pm", means that Cleanaway is able to introduce what is, in effect, a 7 day roster.
> 5. This would allow Cleanaway to bypass the operation of clause 24.3, Overtime Rates, by rostering people on Saturdays and Sundays as part of their ordinary hours of work.
> 6. The spread of hours clause, specifically clause 20.2.2 of the Replacement Agreement, also seeks to increase the daily maximum ordinary hours of work from 8 hours to 9.5 hours, effectively stripping employees of 1.5 hours of potential overtime every day.
> 7. To date Cleanaway and the TWU have been unsuccessful in reaching a mutually agreeable position on the two outstanding clauses.
> 8. Accordingly, the TWU seeks the assistance of the Commission in reaching an outcome."

[50] On 10 August 2023, Commissioner Riordan conducted a conference, by telephone, in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. During the conference the parties outlined the extent to which bargaining had taken place and what they perceived to be the outstanding claims. Commissioner Riordan requested that the parties engage in two further bargaining meetings, which they did on 17 and 24 August 2023. No substantive progress was made at these bargaining meetings.

[51] On 20 September 2023, the TWU provided Cleanaway with a position paper that outlined the outstanding claims, as perceived by the TWU.

[52] On 28 September 2023, Commissioner Riordan conducted an in-person conference in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. The parties discussed their positions.

[53] On 13 October 2023, Cleanaway provided the TWU with a response to its position paper. Cleanaway's response included its proposed changes to the Unanderra EA and the reasons for those changes.

[54] On 16 October 2023, the TWU filed its application for an intractable bargaining declaration in relation to the Unanderra depot.

[55] On 18 October 2023, Commissioner Riordan conducted an in-person conference in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. The parties discussed their positions and requested information about various matters. Cleanaway advised that it would review its position on outstanding matters and provide a formal response to the TWU by 30 October 2023.

[56] In her witness statement, Ms White stated that during the conference on 18 October 2023 Mr O'Leary of Cleanaway suggested to the TWU that a further bargaining meeting be undertaken outside the Commission. Ms White further stated that "the TWU refused to agree to a further bargaining meeting. Mr Webb said that although the TWU would consider Cleanaway's position that it would provide on 30 October 2023, the TWU would in any event be proceeding with the IBD applications".[17] Ms Wisniewska gave evidence that Mr Webb responded to the suggestion of further bargaining meetings by saying that was fine but the TWU would not discontinue its applications for intractable bargaining declarations. During cross examination, Ms White accepted that (a) Mr Webb did not say that the TWU would not meet, (b) the TWU never outright refused to attend any bargaining meetings, and (c) in the period between 13 November 2023 and 24 January 2024, Cleanaway did not make any efforts to meet with the TWU to bargain for a new agreement to replace the Unanderra EA; instead, Cleanaway exchanged emails with the TWU. On the basis of these concessions, together with the supporting evidence of Ms Wisniewska, we find, on the balance of probabilities, that the TWU did not refuse to attend any bargaining meetings with Cleanaway. As a matter of fact, no bargaining meetings have taken place since prior to 18 October 2023.

[57] Ms Wisniewska gave evidence that during the conferences before Commissioner Riordan the parties discussed the idea of grandfathering ordinary hours for existing employees and the TWU rejected the idea, explaining that the employees wanted one set of terms and

conditions for all employees, not a two-tier workforce. Ms White gave evidence that she does not recall grandfathering being discussed during the conferences before Commissioner Riordan but it may have been discussed. In light of Ms White's acceptance that grandfathering of ordinary hours may have been discussed and Ms Wisniewska's evidence that it was discussed, we find on the balance of probabilities that the idea of grandfathering ordinary hours for existing employees was discussed in the conferences before Commissioner Riordan, together with at least some of the TWU's reasons for rejecting the proposal.

[58] Ms White also accepted in her evidence that Cleanaway had previously raised the idea of a maximum of 7.6 ordinary hours for employees on a 5:2 roster, and the TWU had rejected the proposal.

[59] On 30 October 2023, Cleanaway provided the TWU with an updated position in relation to outstanding issues in bargaining. Cleanaway's updated position did not resolve the outstanding claims between the parties.

[60] Also on 30 October 2023, Cleanaway informed the Commission that it objected to the intractable bargaining declaration application filed by the TWU. Amongst other things, Cleanaway indicated that its position was that there was still more bargaining that could occur and the s 240 proceedings were still being dealt with.

[61] On 31 October 2023, Cleanaway provided an update to the Bargaining Employees on the bargaining in the form of a memo. The memo outlined Cleanaway's revised offer that would set the maximum number of daily ordinary hours for employees working a 5:2 roster as 7.6 hours per day. The memo further stated:

> "Next Steps
>
> There are a number of items that are still subject to discussion between the TWU, your employee representatives, and Cleanaway including consultation, classification structure, hours of work, weekend penalties, the wage offer, redundancy clauses and the requirement for an on-call/standby allowance.
>
> Cleanaway is now awaiting a response on their current position from your representatives and further information on the two applications that are currently within the Fair Work Commission. We will continue to keep you updated during this process.
>
> Cleanaway wants to take this opportunity to confirm our commitment to continue productive and meaningful discussions and seek to understand what's important to you, including addressing any questions you may have in relation to the Proposed Agreement."

[62] On 1 November 2023, the TWU conveyed its response to Cleanaway in relation to four proposed terms. The response relevantly stated:

> "With regards to the Unanderra responses provided, please be advised that:
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> 1. Removal of the on-call/standby clauses is consented to;

2. Backpay on ordinary hours and overtime is consented to;
3. The ordinary hours of work clause is not consented to; and
4. The amended classification structure that Cleanaway proposed is not consented to. The yard seeks to retain the classification structure as stated at clause 15 of the [Unanderra EA]…"

[63] On 8 November 2023, Cleanaway sought clarification from the TWU as to the outstanding claims in bargaining.

[64] At 2:47pm on 13 November 2023, the TWU filed a notice of discontinuance in the Commission in relation to its s 240 application because it believed that bargaining had become intractable. At the time the notice of discontinuance was filed, the s 240 proceedings were not listed for a further conference and Commissioner Riordan had not informed the parties that he expected or required any further step to be taken in the s 240 proceedings, nor had the parties requested that any further step be taken in those proceedings.

[65] At 5:04pm on 13 November 2023, the TWU responded to Cleanaway in relation to the outstanding claims in bargaining.

[66] In about November 2023, 20 Bargaining Employees signed a petition in the following terms:

> "We the undersigned employees at 5 Charcoal Close, Unanderra NSW 2526 will only vote in support of an enterprise agreement where ordinary hours are:
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> a. will be an average of 38 hours per week to be worked within a work cycle not exceeding 28 days for full-time employees;
> b. worked between 4am and 5pm, Monday to Friday; and
> c. do not exceed 7.6 hours per day to be worked continuously."

[67] In late November and the first half of December 2023, Ms White obtained feedback from some of the Bargaining Employees in relation to the unresolved matters in bargaining. Ms White says that some of the feedback she received included being told by various Bargaining Employees that Cleanaway could "buy them out" of the hours of work clause, the employees would accept the grandfathering of the current hours of work clause for existing employees, Cleanaway's hours of work clause would be accepted if Cleanaway provided a 6% wage increase to the employees, and the maximum daily ordinary hours was a concern.

[68] On 8 December 2023, Cleanaway proposed to the TWU, in writing, that it grandfather the ordinary hours of work clause in the proposed enterprise agreement for current employees.

[69] On 13 December 2023, the TWU informed Cleanaway that "the yard seeks that all employees (both current and future) engaged under the proposed agreement work their ordinary hours Monday to Friday and have the discretion to work Saturdays and Sundays where Cleanaway requires, paid overtime rates". On 14 December 2023, the TWU further explained to Cleanaway that "the response is that the Unanderra yard does not agree to a clause where there is grandfathering for ordinary hours of work. The yard seeks that ordinary hours are worked Monday to Friday for all employees, which would constitute weekend work as overtime".

[70] On 19 December 2023, Cleanaway explained to the Bargaining Employees that the proposal being put to employees was a package of terms, which meant that if the proposal to be voted on by the Bargaining Employees was voted down, all previous negotiated financial and non-financial items may be withdrawn and will be up for renegotiation.[18]

[71] On 22 December 2023, Cleanaway requested the Bargaining Employees to vote on a proposed enterprise agreement. The proposed enterprise agreement included grandfathering of the hours of work provisions, in that existing employees would be able to work ordinary hours between 4am and 5pm Monday to Friday and new employees would be able to work ordinary hours between 4am and 5pm Monday to Sunday. Ms White factored the feedback she had received from employees in November and the first half of December 2023 into the proposal put by Cleanaway to the Bargaining Employees for a vote on 22 December 2023. The result of the vote was that 20 Bargaining Employees voted against the proposed agreement and no Bargaining Employees voted in favour of the proposed agreement. Two Bargaining Employees did not vote.

[72] On 28 December 2023, Cleanaway informed the TWU that as a result of the proposed enterprise agreement being rejected, Cleanaway withdrew from their positions in their entirety and that all matters remained "on the table".

[73] On 16 January 2024, the TWU informed Cleanaway that it had not been notified that Cleanaway would withdraw the agreed terms of the proposed agreement if the vote was unsuccessful. Cleanaway disputed this claim.

[74] On 24 January 2024, Cleanaway filed a s 240 application in the Commission in relation to bargaining for an enterprise agreement to replace the Unanderra EA. The application filed by Cleanaway referred to the ordinary hours of work provisions as being one of the main matters in dispute in bargaining. Cleanaway also contended in its application that the TWU had refused to provide reasons as to why a grandfathering arrangement did not satisfy the concerns of its members in relation to ordinary hours of work.

[75] On 30 January 2024, the TWU sent correspondence to Cleanaway responding to its s 240 application. In that correspondence the TWU, among other things:

- refuted the allegation that it had not provided reasons for its position on various issues throughout the course of bargaining;

- explained that the TWU's s 240 application was discontinued because "bargaining had clearly become intractable"; and

- provided the following further explanation in relation to the grandfathering of ordinary hours:

> "TWU members at the Unanderra depot have instructed the TWU that a grandfathered position on the ordinary hours of work clause is not a position that will be accepted.

> The Unanderra depot does not wish to have two separate rostering systems for current and future employees, as there [sic] are concerned that the workforce will be two-tiered. If the Unanderra depot becomes a two-tiered workforce, new employees will be cheaper to work on weekends (Saturdays in particular), meaning those employees who currently opt into working weekends will be less likely to receive weekend work.
>
> TWU members at the Unanderra depot have also instructed the TWU to communicate that changing the ordinary hours of work clause is a claim pursued by Cleanaway, not the TWU. TWU members at the Unanderra depot are of the view that the current ordinary hours of work clause has worked well for both employees and Cleanaway and the only reason for changing to a seven day operation is to make labour cheaper for Cleanaway."

[76] On 15 February 2024, Commissioner Ryan conducted a conference, in person, in relation to the s 240 application filed by Cleanaway. Representatives of Cleanaway and the TWU attended the conference. The parties spent a few hours in the conference discussing the main outstanding claims and respective positions, including in relation to ordinary hours of work. Towards the end of the conference, Cleanaway provided Commissioner Ryan with the details of a proposed package that it would be willing to offer. Commission Ryan communicated the proposal to the TWU. The proposal was rejected by the TWU.

[77] On 21 February 2024, Cleanaway provided the TWU with a further proposed enterprise agreement as a "package … to facilitate discussions". The essential elements of this package had been rejected by the TWU at the conference before Commissioner Ryan on 15 February 2024. Cleanaway's covering letter to its 21 February 2024 offer provides the following explanation in relation to hours of work:

> "a. The ordinary hours of work of a full time Employee are an average of 38 hours per week over a period of not more than three months.
>
> b. The spread ordinary hours of work will be 4.00am to 5.00pm, Monday to Sunday.
>
> c. The maximum ordinary hours of work will not exceed 9.5 hours in a single day.
>
> d. Ordinary hours of work on a weekend will be paid at the following penalty rates:
>
> i. Saturday 150% for the first 2 hours and 200% thereafter
>
> ii. Sunday 200% for all hours"

[78] This proposal did not include any grandfathering of ordinary hours for current employees. It did increase the rate at which ordinary hours of work on a weekend would be paid to match overtime rates under the Unanderra EA. The proposal also (a) maintained averaging of ordinary hours over three months, rather than over 28 days under the Unanderra EA and (b) proposed maximum ordinary hours of 9.5 per day, rather than 8 per day under the Unanderra EA.

[79] Cleanaway's offer of 21 February 2024 also noted that the nominal expiry date of the proposed agreement was no longer an agreed term.

[80] On 22 and 23 February 2024, 17 Bargaining Employees signed a petition in the following terms:

> "We the undersigned employees at 5 Charcoal Close, Unanderra, NSW, 2516 will **only vote in support of an enterprise agreement where ordinary hours and weekend rates are**:
>
> a. will be an average of 38 hours per week to be worked within a work cycle not exceeding 28 days for full-time employees;
> b. worked between 4am and 5pm, Monday to Friday;
> c. do not exceed 7.6 hours per day to be worked continuously;
> d. Saturday work is paid at 150% for the first 2 hours and 200% thereafter; and
> e. Sunday work is paid at 200% for all time worked."

[81] Four Bargaining Employees were on leave on 22 and 23 February 2024, with the result that they did not have the opportunity to sign the petition.

[82] The TWU sought instructions from its members who work at the Unanderra depot. Their instructions were to reject Cleanaway's offer of 21 February 2024. The TWU provided its written response to the offer to Cleanaway on 23 February 2024. The response rejected the "package" proposed by Cleanaway and provided the following explanation in relation to the offer:

> "a. the ordinary hours clause is not acceptable and is rejected. Cleanaway is well aware that TWU members reject any ordinary hours clause that permits ordinary hours to be worked outside of Monday to Friday. Cleanaway is also well aware of the reasons employees have consistently rejected this and insist on the maintenance of the current ordinary hours arrangement, namely (a) they do not want Cleanaway to have the ability to roster them to work ordinary hours on weekends; and (B) they do not want to be compelled to work on weekends. Cleanaway's revised offer on ordinary hours is worse than the offer put to employees December last year when Cleanaway put its proposed agreement to a vote in so far as that offer involved grandfathering of current ordinary hours arrangements for current employees. That grandfathering has now been removed. How or why Cleanaway thinks employees would be moved to accept the worse offer on ordinary hours to that which they resoundingly rejected last year is not apparent. It is clear that Cleanaway just will not move on its desire to change the ordinary hours clause so that ordinary hours can be rostered 7 days a week and up to 9.5 hours a day. The TWU and its members have made clear their position on the ordinary hours clause. The parties have been at an impasse on this important clause for a significant time and remain at an impasse;
>
> b. the wage increases proposed are acceptable;

c. the consultation clause needs to be read in accordance with the model consultation clause as it exists from time to time. It is anticipated that the model consultation clause may be varied in light of recent amendments to the *Fair Work Act 2009* (Cth). This is not reflected in the proposal and is not acceptable;

d. the classification structure proposed is acceptable;

e. the removal of ordinary and customary turnover of labour is acceptable;

f. the proposed annual leave loading clause is acceptable;

g. the proposal for a 3-year nominal expiry date has been rejected over and over again by the TWU and its members. This is not acceptable.

3. The 'package' contained in the proposed agreement is, therefore, not accepted. The TWU and its members are not willing to resolve all matters relating to the proposed agreement on the basis of the enclosed draft given the ordinary hours clause, the consultation issue and the nominal expiry date issue.

[83] Similarly, Mr Stephen gave evidence in his witness statement that TWU members had provided the following feedback in relation to the ordinary hours of work issue:

"a. They did not want to work weekends unless it was over time and unless it was their choice to do so (i.e., they wanted to nominate whether they wanted to work on a weekend, rather than being directed by Cleanaway that they had to);

b. They were unwilling to work over 7.6 ordinary hours per day;

c. They were concerned that where they were required to work 9.5 ordinary hours per day, employees would lose a significant amount of overtime payment on a daily basis;

d. There were concerns about there being a four day on and three day off roster;

e. There were concerns over the change to averaging ordinary hours over a six (6) month period;

f. Members were concerned about their work/life balance and having to change their current arrangements and lifestyle; and

g. Members who regularly opted to work Saturdays and Sundays were also concerned that this meant that they wouldn't necessarily be working on these days and even when they did, on Saturdays they would receive less income."

[84] Mr Stephen and Mr Smith emphasised in their oral evidence the concern on the part of Bargaining Employees that they would lose the opportunity to work overtime on weekends if new employees could be rostered to work ordinary hours on weekends.

[85] On 23 February 2024, Commissioner Ryan conducted a further conference, by telephone, in relation to Cleanaway's s 240 application. Representatives of both Cleanaway and the TWU participated in the conference. Cleanaway's offer of 21 February 2024 was discussed. The TWU indicated that the Unanderra yard would not accept a Monday to Sunday ordinary hours of work clause. Cleanaway indicated that it wanted to continue with the s 240 process. The TWU indicated that it had a hearing next week and the Full Bench would decide if the bargaining was in fact intractable. Commissioner Ryan indicated that Cleanaway may make a further offer. Commissioner Ryan did not list the matter for a further conference, but he informed the parties that he would keep the s 240 file open and he asked Cleanaway to provide a report back, in writing, by 4pm on Monday, 4 March 2024. Commissioner Ryan also stated that he would list the matter for a further conference if requested to do so by Cleanaway.

[86] When Ms White gave evidence in chief at the hearing on 27 February 2024, she stated that she had received internal approval from Cleanaway to put another offer to the Bargaining Employees, the essential elements of which are as follows:

(a) ordinary hours will be grandfathered for existing employees, as was the case in the December 2023 offer. New employees could be rostered to work ordinary hours from Monday to Sunday;

(b) ordinary hours worked on a Saturday will be paid at 150% for the first two hours and 200% thereafter. Ordinary hours worked on a Sunday will be paid at 200%. As a result, employees, whether current or new, will be paid the same rates to work on a weekend;

(c) ordinary hours will be a maximum of 7.6 per day if the employee works 5 days on and two days off. Ordinary hours will be a maximum of 9.5 per day if the employee works other than a 5:2 roster. Cleanaway would have the right to change an existing or new employee's roster and ordinary hours of work after consulting with the employee;

(d) ordinary hours may be averaged over 3 months; and

(e) the exception to the obligation to pay redundancy pay in circumstances of ordinary and customary turnover of labour will be maintained in the new proposal.

[87] Mr Stephen gave evidence on the day before this revised proposal was communicated to the Commission and the TWU. Mr Stephen was asked whether he would support any offer from Cleanaway whereby ordinary hours of work were grandfathered for current employees and all employees would be paid the same rates of pay on weekends. Mr Stephen effectively said that he would not support such a proposal because it would give rise to two different sets of terms and conditions for employees working in the same yard.

[88] At the time of the hearing of this matter on 26 and 27 February 2024, Cleanaway's position is that not a single term has been agreed with the TWU or the Bargaining Employees and everything is "on the table" for negotiation.

Has the Commission dealt with the dispute under s 240 (s 235(2)(a))?

[89] The TWU contends that the Commission has dealt with the dispute under s 240 of the Act on two occasions. First, it was dealt with in relation to the TWU's s 240 application when Commissioner Riordan conducted three conferences, two in-person and one by telephone. Secondly, it was dealt with in relation to Cleanaway's s 240 application when Commissioner Ryan conducted two conferences, one in-person and one by telephone.

[90] Cleanaway contends that the Commission has not dealt with the dispute under s 240 of the Act. As to the TWU's s 240 application, Cleanaway points to the fact that the TWU's application for an intractable bargaining declaration was made while the s 240 proceedings before Commissioner Riordan were still ongoing and Cleanaway's opposition to the application for an intractable bargaining declaration (citing, among other things, that the s 240 proceedings were still ongoing) was met with the TWU discontinuing its s 240 application. Cleanaway contends that is does not lie in the mouth of the TWU now to say that its s 240 application has been "dealt with" or that the TWU "participated in" the Commission's processes when it was the TWU that brought the s 240 proceedings to an end before the Commission had a chance to make a recommendation, express an opinion, or conduct a conciliation or mediation in relation to the proposal communicated by Cleanaway on 28 and 30 October 2023. Those powers were not able to be exercised by the Commission, so Cleanaway contends, because at the end of the second in-person conciliation conference before Commissioner Riordan Cleanaway committed to go away and provide further details in relation to two matters, and to provide a further revised enterprise agreement for consideration by the TWU, yet before the TWU responded to those matters (at 5:04pm on 13 November 2023) the TWU had discontinued its s 240 application (at 2:47pm on 13 November 2023). Cleanaway submits that the Commission cannot be satisfied of the jurisdictional precondition in s 235(2)(a) because the pre-emptory and unilateral discontinuance of the TWU's s 240 application on 13 November 2023 denied the Commission of the ability to facilitate collective bargaining at the enterprise level, consistent with the primary object in s 3(f) of the Act and the object of Part 2-4 in s 171(1) of the Act. Further, Cleanaway contends that the Commission cannot be satisfied that the TWU participated in the Commission's processes to deal with the TWU's s 240 application because those processes were not finished when the notice of discontinuance was filed.

[91] As to Cleanaway's s 240 application, Cleanaway submits that it is still being dealt with by Commissioner Ryan, as is evident from the fact that the Commissioner has left the file open, requested a written report back from Cleanaway, and indicated that the matter will be listed for a further conference if Cleanaway so requests.

[92] We are satisfied that the Commission has dealt with the dispute about the proposed enterprise agreement under s 240 of the Act and the TWU has participated in the Commission's processes to deal with the dispute. This jurisdictional prerequisite has been met twice. It was first met when the TWU filed its s 240 application in the Commission in 2023 and Commissioner Riordan conducted three conferences, one by telephone and two in-person. During those conferences the parties to the dispute stated their positions, explained reasons for their positions, exchanged information and followed the suggestions provided by Commissioner Riordan, such as participating in two bargaining meetings in between the first conference (by telephone) and the second conference (in person) and exchanging position papers. There is no suggestion that Commissioner Riordan made a recommendation or expressed an opinion when he was dealing with the dispute, but he was not prevented from doing so during his dealings with the parties. At the end of the second in person conference, at

which the outstanding claims were discussed, Cleanaway indicated that it would put another bargaining proposal to the TWU and the TWU indicated that it would respond to the proposal. Importantly, however, it was not suggested that either Cleanaway's proposal or the TWU's response would be given in a conference before the Commission. At the time the TWU filed its notice of discontinuance on 13 November 2023, the TWU's s 240 application had been before the Commission for more than three months, the Commission had held three conferences, it was not contemplated by Commissioner Riordan that any further step would be taken in the s 240 proceedings and the parties had not requested that any such step be taken, and the parties were a long way apart from reaching an agreement to resolve the dispute. Having regard to all the circumstances, we are satisfied that by 13 November 2023 the Commission had dealt with the dispute about the proposed agreement under s 240 and the TWU had participated in the Commission's processes to deal with the dispute.

[93] The jurisdictional requirement in s 235(2)(a) of the Act has also been met in relation to the s 240 application filed by Cleanaway on 24 January 2024. Commissioner Ryan has conducted two conferences, one in person and one by telephone, in relation to this application. Both the TWU and Cleanaway have participated in the Commission's processes by attending those conferences, at which they exchanged positions, views and information. At the first conference, on 15 February 2024, Cleanaway communicated a proposal (through Commissioner Ryan) and the TWU rejected the proposal. Cleanaway then put essentially the same proposal to the TWU in writing on 21 February 2024. After consulting with members, the TWU rejected that proposal on 23 February 2024. At the second conference, on 23 February 2024, the parties' positions were discussed and Commissioner Ryan indicated to the TWU that Cleanaway may make a further offer. Commissioner Ryan has not closed the Commission's file in relation to Cleanaway's s 240 application, nor has he listed the matter for a further conference or scheduled any further step to be taken in the proceedings, apart from the provision of a written report back by Cleanaway. The Commissioner's invitation for Cleanaway to request a further conference in the future suggests that the Commission may have future dealings with the dispute under s 240 of the Act, but this does not alter the position that the Commission has, as a matter of fact, dealt with the dispute about the proposed enterprise agreement under s 240 of the Act.

[94] There is no doubt that both s 240 dispute proceedings have dealt with the same dispute, namely the main outstanding issues in bargaining for a new enterprise agreement to replace the Unanderra EA. It is also beyond question that the TWU's application for an intractable bargaining declaration is concerned with the same dispute. It follows that, like the Full Bench in *United Firefighters' Union of Australia v Fire Rescue Victoria*,[19] we do not need to deal with any constructional issue under s 235(2)(a) of the Act as to whether the s 240 dispute must be the same dispute which is said to have caused bargaining to become intractable for the purpose of an application under s 234 of the Act.

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

[95] The TWU contends that there is no reasonable prospect of agreement being reached as to the terms of a new enterprise agreement if the Commission does not make an intractable bargaining declaration.

[96] Cleanaway submits that, consistent with the statutory objects of emphasising,[20] enabling[21] and facilitating[22] enterprise-level collective bargaining, the state of satisfaction required by s 235(2)(b) should not be too lightly reached.

[97] Cleanaway submits that the petitions signed by employees were not managed in the same way as a secret ballot would be conducted when a proposed enterprise agreement is put to employees for their approval. Nor, so Cleanaway submits, do the petitions say anything about the signatories' stated preparedness to approve an agreement which grandfathers their current hours of work provisions for existing employees.

[98] Cleanaway points to the large number of enterprise agreements made with groups of employees at its other depots, some of which include different arrangements for the working of ordinary hours. Cleanaway also emphasises the concessions it has made in bargaining in relation to wage increases, back pay, maximum ordinary hours per day (9.5 hours, but 7.6 hours if an employee is working a 5:2 roster).

[99] Cleanaway submits that in circumstances where it has very recently indicated a preparedness to put to a vote a further revised enterprise agreement, containing a grandfathering provision for ordinary hours of work, enhanced penalty rates for work on weekends (whether the work is undertaken as part of an employee's ordinary hours of work or on overtime), wage increases and the like, the Commission cannot be satisfied that there is no reasonable chance of an agreement being made.

[100] We are satisfied that there is no reasonable prospect of agreement being reached if the Commission does not make the declaration. In reaching this state of satisfaction, we have had regard to all the circumstances, including the revised offer foreshadowed by Cleanaway at the hearing on 27 February 2024, and wish to emphasise the following matters in making our evaluative assessment that it is rationally improbable that an agreement will be reached:

(a) The parties have been bargaining since November 2022, during which time they have participated in about 15 bargaining meetings and five conferences before two different members of the Commission. Notwithstanding this history and the efforts of those involved in the bargaining process, nothing is agreed between the parties.

(b) Two different proposed enterprise agreements have been put to the Bargaining Employees for their vote. Both proposed agreements have been voted down in a resounding manner.

(c) While the ability of Cleanaway and different groups of employees to make enterprise agreements at different depots gives some comfort that Cleanaway and the Bargaining Employees *may* be able to reach an agreement to replace the Unanderra EA, it is important to focus on the facts and circumstances of the present case, including the desires of the Bargaining Employees and the likelihood of a majority of them reaching agreement with Cleanaway. Eskine Park is an example of a situation where Cleanaway and its employees at that depot are at an impasse in bargaining, notwithstanding the success Cleanaway has had at other depots to make enterprise agreements with different groups of employees.

(d) Although Ms White obtained feedback from some of the Bargaining Employees in November and the first half of December 2023 which suggested that they may be willing to agree to some changes to the ordinary hours of work provisions in the Unanderra EA, Ms White factored that feedback into the proposal she put to the Bargaining Employees for a vote in December 2023. The outcome of that vote was 20 against and zero for the proposed enterprise agreement.

(e) A significant number of the Bargaining Employees have signed two petitions. The first petition was signed in November 2023 and the second petition was signed as recently as 22 and 23 February 2024. Both petitions make clear that the signatories want to retain most of the essential elements of the ordinary hours provisions of the Unanderra EA, including working ordinary hours from Monday to Friday, ordinary hours not exceeding 7.6 per day,[23] the averaging of 38 ordinary hours per week to be calculated over a 28 day period, and work on a weekend to be paid at penalty rates. Although such petitions are not prepared in the same manner as a secret ballot for a vote on a proposed enterprise agreement and there is always some prospect that particular employees may vote differently in a secret ballot than is suggested by their signature on a petition prepared by a union, we consider that it is appropriate to give some weight to the petitions, particularly in circumstances where they are supported by the evidence given by Mr Stephen, Mr Smith and Mr Moon (insofar as he does not believe that the employees at the Unanderra depot will support an enterprise agreement which includes the grandfathering of ordinary hours for existing employees).

(f) The main issue in dispute in bargaining is the claim by Cleanaway to change the existing hours of work provisions in the Unanderra EA so that at least some employees can be directed to work ordinary hours on the weekend. This is a "key matter" and "one of the most important matters" in bargaining for Cleanaway. Mr Moon, the Cleanaway manager with responsibility for the Unanderra depot, gave evidence, which we accept, that Cleanaway is determined to move to a seven day a week span of ordinary hours for the Unanderra depot and it is not going to budge on this issue. Mr Moon gave sound business reasons for adopting this position. Equally, the Bargaining Employees have provided sound reasons for rejecting the changes proposed by Cleanaway to their ordinary hours of work. The Bargaining Employees do not want a two-tier workforce, where existing employees are on one set of terms and conditions and new employees are on different terms and conditions, with the risk that the provisions for current employees will be phased out over time. Further, even if ordinary hours worked by new employees on a weekend are paid at the same rate as overtime worked by existing employees on a weekend (as indicated in the proposal foreshadowed by Cleanaway on 27 February 2024), existing employees are concerned that their opportunity to work overtime on a weekend will be diminished if new employees can be directed to work their ordinary hours on a weekend. The consistent position of the Bargaining Employees throughout bargaining has been to reject any proposal which permits ordinary hours to be worked on a weekend. We consider it to be rationally improbable that either Cleanaway or the Bargaining Employees will change their position on the working of ordinary hours across seven days of the week.

(g) In our view, it is rationally improbable that the most recent proposal foreshadowed by Cleanaway at the hearing on 27 February 2024 will break the current impasse. First, the

proposal includes the grandfathering of ordinary hours for existing employees, with new employees able to be rostered to work ordinary hours on weekends at the same rates of pay as overtime for existing employees on a weekend. For the reasons already explained, including the resounding rejection by the Bargaining Employees, in December 2023, of a proposed enterprise agreement that included the grandfathering of ordinary hours for existing employees, we consider it to be rationally improbable that the Bargaining Employees will accept this aspect of the proposal. Although this proposal overcomes the concern of Cleanaway being able to roster new employees to work on a weekend at a lower rate of pay compared to existing employees, it does not overcome the concerns of a two-tier workforce and the loss of opportunity for existing employees to work and earn overtime on a weekend. Secondly, the proposal increases the maximum daily ordinary hours that may be worked from 8 per day to 9.5 per day, unless the employee is working a 5:2 roster (in which case the daily maximum is 7.6 hours). An employee's roster may be altered by Cleanaway after it consults with the employee, so even existing employees may, under this proposal, be rostered up to 9.5 ordinary hours in a day. This is a material disadvantage compared to the Unanderra EA, under which employees are entitled to overtime after they work 8 ordinary hours in a day. Thirdly, the proposal permits Cleanaway to average an employee's ordinary hours over a three month period, as opposed to a 28 day period under the Unanderra EA. This is a material disadvantage to employees. Fourthly, the proposal includes contentious and unresolved claims in relation to Cleanaway's ability to avoid redundancy payments where there is an ordinary and customary turnover of labour, the nominal expiry of the proposed agreement, and annual leave loading.

Is it reasonable in all the circumstances to make the declaration (s 235(2)(c))?

[101] The TWU contends that it is reasonable in all the circumstances for the Commission to make the declaration sought by it.

[102] Cleanaway contends that the Commission should not be satisfied under s 235(2)(c) of the Act that it is in all the circumstances reasonable to make the proposed declaration. Cleanaway submits that the TWU's intransigence during bargaining, coupled with the following unreasonable conduct on the TWU's part, weighs against a conclusion that making the proposed declaration is reasonable:

(a) The TWU steadfastly refused to consider Cleanaway's ordinary hours of work clause, as part of a proposed enterprise agreement, notwithstanding that other enterprise agreements made by Cleanaway and its employee drivers (represented by the TWU) at other sites have agreed to clauses in similar terms.

(b) The TWU never proposed, or explored, a grandfathering provision or other arrangement, which would address the current employees' stated concerns about their hours of work while also addressing Cleanaway's stated desire to "future proof" the Unanderra depot.

(c) The TWU participated in only one telephone conference and two conciliation conferences in the s 240 proceedings commenced by the TWU, and in that process never

provided the Commission with the opportunity to deal with the dispute by exercising its powers under s 595(2)(b) of the Act.

(d) The TWU refused to meet with Cleanaway in further bargaining meetings after the conference before the Commission on 18 October 2023.

(e) When Cleanaway provided further details on 28 October 2023 and a further revised proposed agreement on 30 October 2023, as it had committed to do as part of the s 240 process, the TWU initially wrote back only a very short email rejecting certain elements without explaining why. And then, when asked to explain its specific concerns, only then for the first time did the TWU explain to Cleanaway's negotiators the reasons for the positions it took in relation to annual leave loading and classifications.

(f) Instead of going back before the Commission in relation to the s 240 application filed by the TWU, particularly in light of the concessions that had been made by Cleanaway since the 18 October 2023 conference, the TWU peremptorily and without explanation discontinued the s 240 proceedings. This was not only a missed opportunity, it denied the Commission the ability to deal with the dispute using its processes under s 595(2) of the Act.

[103] In contrast to the TWU's unwillingness to budge on the ordinary hours of work issue, Cleanaway says that it has made a range of different concessions and demonstrated a willingness to be flexible so that an agreement can be reached. This is consistent with the manner in which Cleanaway says that it has been able to reach agreement with employees at different depots, such as the Hillside depot.

[104] Cleanaway submits that bargaining has been going on only a number of months longer than the bare minimum required under s 235(5) of the Act, which is not enough to tip the balance over to make it reasonable to make a declaration.

[105] Cleanaway submits that although the Bargaining Employees have not had a pay rise since 1 July 2021, this is not a strong factor in support of the making of declaration. In a context where the emphasis is on enterprise-level collective bargaining, Cleanaway submits that it is important to note that its current position is that, in an attempt to reach agreement as part of an overall package, it is prepared to make back payments of wage increases for 2022 and 2023. But if an agreement to an overall package cannot be reached, then there is no agreement as to back pay and this will be a matter that will have to be determined by the Commission. Cleanaway submits that there can be no guarantee for the employees that, after a workplace determination process lasting potentially months, they will receive any back pay at all. The best way for the Commission to facilitate the making of back payments is, so Cleanaway contends, to dismiss the application and encourage the parties back to the bargaining table to discuss the proposed agreement most recently foreshadowed by Cleanaway.

[106] Cleanaway contends that its reasons for opposing the making of a declaration – fundamentally so that the parties could focus on enterprise-level collective bargaining, consistent with the objects of the Act – are well-founded. By contrast, Cleanaway submits that the TWU's support for the making of a declaration seems to be born of a desire not to bargain

collectively at the workplace level. Weighed together, Cleanaway submits that the views of the main bargaining representatives tip the balance against the making of a declaration.

[107] Cleanaway submits that in order to reach a state of satisfaction in relation to s 235(2)(c) of the Act, it is necessary to take into account the views of the two individual bargaining representatives. Given that the Commission does not know the views of those two individuals, Cleanaway submits that the Commission cannot reach the necessary state of satisfaction under s 235(2)(c) of the Act.

[108] Cleanaway submits that the broader history of the relationship of collective bargaining between the parties, in particular the history of enterprise bargaining for agreements covering similar employees and other Cleanaway depots, weighs against a finding that it is reasonable in all circumstances to make the declaration. On this score, the following matters were relied on:

(a) Cleanaway currently has over 100 enterprise agreements which have been successfully collectively bargained at the enterprise level, including approximately 51% with the TWU.

(b) About 37 current enterprise agreements, negotiated in the last 24 months, have been agreed to by Cleanaway employee drivers with ordinary hours of work clauses similar to the clause sought at the Unanderra depot by Cleanaway.

(c) A number of those agreements have included modifications, such as grandfathering arrangements (e.g. the Hillside agreement), where the employer and employees at the site have agreed to those arrangements in the circumstances of the particular site.

[109] That industrial history suggests, so Cleanaway contends, that, despite the professed intransigence of the TWU in relation to the proposed agreement at the Unanderra depot, if left to engage in enterprise-level collective-bargaining the parties will reach agreement between themselves.

[110] We are satisfied that it is reasonable in all circumstances the to make the declaration sought by the TWU, taking into account the views of the bargaining representatives for the agreement.

[111] We do not have any direct evidence or information from the two individual bargaining representatives as to their views in relation to the declaration sought by the TWU. Both individuals signed the two employee petitions in November 2023 and February 2024 respectively, but despite being made aware of these proceedings they have elected not to take any part in them or to inform the Commission of their views in relation to the application by the TWU for an intractable bargaining declaration. In our view, it would be impracticable to require every individual bargaining representative for a proposed agreement (which in some cases includes scores of individuals) to inform the Commission of their views in relation to an application by one bargaining representative for an intractable bargaining declaration. We consider that it is important as a matter of natural justice for all individual bargaining representatives to be made aware of an application to the Commission for an intractable bargaining declaration, but if one or more individual bargaining representatives decide not to inform the Commission of their views in relation to the application, that does not preclude the

Commission from being able to reach the necessary state of satisfaction under s 235(2)(c) of the Act.

[112] The TWU is a bargaining representative for the proposed agreement. It represents a significant number of the Bargaining Employees. The TWU supports the making of the declaration sought by it. We consider that the TWU has sound reasons for its position in that regard. We have taken the TWU's views into account.

[113] Cleanaway is also a bargaining representative for the proposed agreement. It opposes the making of the declaration sought by the TWU. We consider that Cleanaway has sound reasons for its position in that regard. We have taken Cleanaway's views into account.

[114] We do not accept Cleanaway's contention that the TWU has been intransigent, unreasonable, uncooperative or recalcitrant in the bargaining process for an enterprise agreement to replace the Unanderra EA. It is Cleanaway that wishes to alter the ordinary hours of work provisions in the Unanderra EA. The TWU and the Bargaining Employees essentially want the current provisions to be retained in a replacement enterprise agreement. Further, as we have explained, there are sound reasons why the Bargaining Employees do not want Cleanaway to be able to roster all, or any, employees to work ordinary hours on a weekend. In the circumstances of this case, the position of the TWU and the Bargaining Employees in wanting to retain the benefits of the ordinary hours of work provisions of the Unanderra EA does not weigh against a conclusion that it is reasonable in all the circumstances to make the declaration sought by the TWU.

[115] We consider that both parties have engaged in a meaningful way in the Commission's processes in relation to both s 240 applications. Both parties have exchanged views, provided information, discussed different proposals, explored reasonable options, and communicated reasons for their positions. We reject Cleanaway's contention that the TWU has failed or refused to provide reasons for rejecting the grandfathering of ordinary hours for existing employees, or that it has acted inappropriately in relation to either s 240 application before the Commission. It is clear from the evidence adduced by the TWU that it has a number of reasons for opposing such grandfathering and it communicated those reasons in the conferences before Commissioner Riordan and in its written communications with Cleanaway. Mr Stephen and Mr Smith also explained those reasons further in their evidence to the Commission. The TWU's decision to discontinue its s 240 application on 13 November 2023 was made in light of the view it had reached at that time that bargaining had reached an impasse. We consider that was a reasonable view for the TWU to have taken at that time. The TWU engaged in a meaningful way in the Commission's processes, the object of which were to assist the parties to reach an agreement.

[116] We do not consider that the broader history of the relationship of collective bargaining between the parties weighs against a conclusion that it is reasonable in all the circumstances to make the declaration sought by the TWU. That history shows that on many occasions Cleanaway has been able to negotiate an enterprise agreement with employees at a particular depot (sometimes with the involvement of the TWU), but there are occasions (such as Erskine Park) where bargaining has reached an impasse, much for the same reason as it has at the Unanderra depot. If an intractable bargaining declaration is not made in this case, we accept the

submission advanced on behalf of the TWU that the only real option available to the Bargaining Employees would be to take further protected industrial action.

[117] For the reasons explained above, we reject the contention that the TWU refused to meet with Cleanaway in further bargaining meetings after 18 October 2023. Cleanaway has not invited the TWU or the Bargaining Employees to attend a bargaining meeting since well before 18 October 2023. Instead, Cleanaway has chosen to engage in communications directly with the TWU, partly in proceedings before the Commission, in an attempt to negotiate a new enterprise agreement for the Bargaining Employees.

[118] We consider that the fact the Bargaining Employees have not had a pay rise since July 2021, during a period of relatively high inflation, weighs in support of a conclusion that it is reasonable in all the circumstances, including the current impasse in bargaining after unsuccessful negotiations for more than 15 months, to make the declaration.

Residual discretion under s 235

[119] Having regard to all the circumstances, we have not identified any matter which would weigh against us exercising our residual discretion to make an intractable bargaining declaration.

Should there be a post-declaration negotiating period (s 235A)?

[120] The TWU submits that there would be little utility in ordering a post-declaration negotiating period.

[121] Cleanaway submits that if the Commission is satisfied that the jurisdictional prerequisites are made out to make a declaration under s 235, the Commission should order that there be a post-declaration negotiating period of at least 30 days so that further bargaining can take place between the parties.

[122] We are satisfied that a 21 day post-declaration negotiating period should be ordered. Cleanaway has put its recent bargaining proposals to the TWU and the Bargaining Employees on the basis that they are a "package" deal, with the result that the rejection of any part of the "package" means that the entire proposal is rejected and all matters are open for negotiation. It follows that there are currently no agreed matters in bargaining between the parties, although we accept that there may be some arguments as to whether any matters were agreed at the time the application for the intractable bargaining declaration was made by the TWU in the Commission.[24] Giving the parties a relatively short period of time (21 days) to attempt to reach agreement on at least some terms will not unduly delay the hearing of the determination and will also, in our view, likely reduce the length of the hearing.

[123] A member of the Commission will be made available, if requested by the parties, to assist the parties during the 21 day post-declaration negotiating period.

Conclusion

[124] For the reasons given we make an intractable bargaining declaration in relation to the proposed enterprise agreement which will replace the Unanderra EA. The declaration is made by separate order, which will be published in conjunction with this decision and which, in accordance with s 235(4)(a) of the Act, will operate from the date of this decision. The declaration will specify a post-declaration negotiating period of 21 days.

DEPUTY PRESIDENT

Appearances:

M. Gibian SC and P. Boncardo, of counsel, for the Transport Workers' Union of Australia.

B. Avallone, of counsel, for Cleanaway Operations Pty Ltd.

Hearing details:

2024.

Sydney:
26 & 27 February

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[1] [2024] FWC 91

[2] [2023] FWCFB 180

[3] *Ventia Australia Pty Ltd v United Firefighters' Union of Australia* [2023] FWC 3041 at [84]

[4] [2024] FWC 91

[5] *Australian Workers' Union v Caltex Refineries (NSW) Pty Ltd*, 10 July 2000, Print S7892, at [24]

[6] *Australian Collieries' Staff Association v Gordonstone Coal Management Pty Ltd* (1999) 86 IR 229 at 234

[7] Macquarie Dictionary, Revised Third Edition

[8] Ibid

[9] Section 3(f) of the Act

[10] Section 171(a) of the Act

[11] At paragraphs [108], [821] & [827]

[12] Ex R2 at [8]-[9]; Ex R3 at [4]-[6]

[13] Ex R5 at [12]

[14] Ex R2 at [19]; Ex R4 at [18]; Ex R5 at [12] & [15]-[32]

[15] Ex R2 at [21]

[16] Court Book at p 1101

[17] Ex R2 at [45]

[18] Ex R3 at [16]-[17]

[19] [2023] FWCFB 180 at [28]

[20] Section 3(f) of the Act

[21] Section 171(1)(a) of the Act

[22] Section 171(1)(b) of the Act

[23] Clause 21(b) of the Unanderra EA provides for the maximum daily ordinary hours to be 8 hours

[24] Section 274(3)(a) of the Act