



DECISION

Fair Work Act 2009

s.234 - Application for an intractable bargaining declaration

**The Association of Professional Engineers, Scientists and Managers,
Australia**

v

Ulan West Operations Pty Ltd
(B2024/841)

DEPUTY PRESIDENT EASTON

SYDNEY, 25 JUNE 2025

Application for an intractable bargaining declaration – s.235 Fair Work Act 2009 – bargaining is intractable – reasonable in all the circumstances per s.235(2)(c) – high-income employees – frontline management – no workplace instruments apply to the employment – disparate interests of bargaining parties – FWC arbitration powers beyond a safety net of minimum enforceable conditions – FWC arbitration powers to facilitate good faith bargaining and the making of enterprise agreements – workplace determinations – no prejudice or disadvantage if declaration is not made – not reasonable in all the circumstances to engage the FWC’s arbitration powers – application dismissed.

[1] The Association of Professional, Engineers, Scientists and Managers, Australia has applied for an intractable bargaining declaration under s.234 of the *Fair Work Act 2009* in respect of the proposed agreement to cover Deputies employed by Ulan West Operations Pty Ltd at the Ulan West coal mine in regional NSW. One of only a few things that are agreed between the parties is that bargaining is intractable. However Ulan West argues that an intractable bargaining declaration cannot be made because the Commission cannot be satisfied that it is reasonable in all the circumstances to make the declaration.

Background

[2] The Association of Professional, Engineers, Scientists and Managers, Australia (**APESMA**) is a registered organisation of employees and is entitled to represent the industrial interests of Deputies employed in the black coal industry.

[3] Ulan West Operations Pty Ltd (**Ulan West**) operates the Ulan West underground coal mine, which is a part of the Ulan Complex of Glencore mines located at Ulan, near Mudgee in New South Wales. The Deputies work three or four days per week, are paid between \$272,000 and \$352,000 per year, and are entitled to at least five weeks’ annual leave and three months’ personal leave per year. In recent years the Deputies have received annual pay increases of 4.5%, 5% and 4.56%, a \$16,000 regional allowance, and increases in total fixed remuneration through short-term incentive payments.

[4] In late 2021 APESMA asked Ulan West to commence bargaining for an enterprise agreement to cover Deputies employed at the Ulan West site. The employment of the Deputies has never been covered by an enterprise agreement. Ulan West agreed to commence bargaining and issued a Notice of Representational Rights (**NERR**) on 9 December 2021.

[5] Since then the parties have participated in bargaining, including several conferences in the Fair Work Commission convened utilising the Commission's powers to deal with disputes about bargaining under s.240 of the *Fair Work Act 2009* (Cth) (**the FW Act**).

[6] APESMA said it has taken all reasonable steps to secure an agreement: engaging actively in the negotiations and with the claims advanced by Ulan West; soliciting the assistance of the Commission; participating constructively in conferences held by the Commission and taking protected industrial action in support of its claims.

[7] Ulan West accepts that bargaining is intractable but relies on s.235(2)(c) of the FW Act. Ulan West said s.235(2)(c) gives a clear statutory directive that it may not be reasonable to make a declaration even where there are no reasonable prospects of agreement. Ulan West argued that APESMA's evidence does not provide a proper basis upon which the Commission could be satisfied that it is reasonable to make the declaration, particularly given that the declaration will fundamentally alter the legal relationship between the parties.

The Evidence

[8] APESMA relied on evidence from Mr Tom Edwards, who was employed as a Senior Organiser for APESMA's Collieries' Staff Division. Mr Edwards had day to day responsibility for recruiting, organising and representing the industrial interests of eligible members.

[9] Mr Edwards explained that the Deputies' goal in negotiating an enterprise agreement has been to secure existing entitlements including personal leave, bonus and accident pay, salaries, overtime, superannuation, public holidays, redundancy and consultation and dispute resolution.

[10] APESMA's members have taken protected industrial action in support of their claims by way of 80-minute stoppages and bans on un-rostered overtime.

[11] Mr Edwards said:

“At the time of making this statement, the parties are divided on a range of issues in bargaining, including:

- (a) Personal leave, with APESMA pressing to secure existing contractual entitlements (which provide for 3 months or 6 months entitlement) and the respondent pressing to revert to the Award entitlement of 105 hours per year;
- (b) Redundancy processes and severance entitlements;
- (c) Payment of accrued personal leave on termination;
- (d) Bonus;
- (e) Public Holidays;
- (f) Overtime;
- (g) Salaries; and
- (h) The preservation of existing more favourable contractual terms.”

[12] In his statement in reply Mr Edwards' observations regarding sick leave included the following:

“[Ulan West's] position has not changed through the negotiation. The claim of Ulan West is to reduce the current entitlement of employees to the Award minimum accrual – it is a significant reduction of entitlement. As I understand it, the position of the Ulan West, is that the leave, despite being reduced to the Award minimum accrual, would not be paid out on termination consistent with the Award...

...

I do not accept that the rationale used [by Ulan West] is anything other than an attempt to frustrate bargaining. I say this because Ulan West has had the opportunity to reduce personal leave entitlements when offering employment contracts to new staff on the commencement of their employment or as a condition of an offer. It has not done so. It has maintained current conditions relating to personal leave and not reduced them. However, for the purposes of the proposed agreement, Ulan West says it must reduce an entitlement that it is offering in common law contracts. This highlights to me that it is not the fact of the condition that is the issue but rather the instrument it is contained in.”

[13] Mr Edwards also described APESMA's consultation process with the Deputies regarding the application for an intractable bargaining declaration, including:

“I said there were three options available to members as we saw it:

1. take protected industrial action;
2. abandon the bargaining altogether;
3. pursue an intractable bargaining declaration

As to intractable bargaining, I said it was a new process designed to conclude bargaining. I outlined the process which I understood to apply. I said first there will be a hearing to determine if the bargaining is intractable. Then if the Commission agrees it is intractable we would enter a post declaration negotiation period to try to conclude an agreement and hopefully the company might be more reasonable at that stage knowing an agreement is going to be made. If we do not get an agreement, then a decision will be made by the Full Bench of the Fair Work Commission. I said we will need to demonstrate the merits of our claim, and the Commission will make a decision. That will then be the contents of the new agreement. The Commission decides the issue.

I offered Deputies an opportunity to ask questions. Some did. Some did not. I then asked Deputies to identify which of the three options presented above they favoured and noted that it would be used to determine the attitude of the majority and the course we would take. The vast majority supported pursuing this application immediately – there were some who were uncertain and asked to think about it initially before calling back and confirming their support. We spoke with 20 persons overall. There was one person who

said they did not support the intractable process. We tried to contact another Deputy but could not do so.”

[14] Mr Edwards was cross-examined about his dealings with APESMA’s members regarding the decision to seek an intractable bargaining declaration. Mr Edwards said that members “voted” for making the application through meetings and phone calls during which options were explained and discussed. The options canvassed by Mr Edwards were (1) take protected industrial action or (2) abandon the bargaining altogether or (3) pursue an intractable bargaining declaration.

[15] He said “we made it very clear that we were collecting this feedback [about the options].” Each person was asked to register their vote “verbally.” Mr Edwards disagreed with the proposition that it was an “opinion gauging process rather than a vote.” Mr Edwards conceded that APESMA was locked into its preferred course to apply for a declaration before speaking to individual members and conducting its so-called vote. Mr Edwards also conceded that members were not given any documentation to review about the options presented by APESMA and were not given any documentation outlining the ‘pros and cons’ of the application. Mr Edwards also conceded that if a declaration is made the arbitrated outcome could be significantly less than the Deputies’ current entitlements.

[16] Ulan West relied on evidence from Mr Matthew Stone who is the Operations Manager at Ulan West, and Mr Michael Kelly who is an industrial relations consultant.

[17] Mr Stone provided a brief history of the Ulan West mine site and the engagement of Deputies on the site. There are 27 Deputies, 24 of whom are directly employed by Ulan West. Mr Stone explained the statutory functions of a Deputy and how the Deputies are integral to health and safety at the mine.

[18] Mr Stone said that the Deputies are “frontline management with responsibility for their production crew ... [and who] report to the Undermanager.” He said:

“While no two shifts are identical, a Deputy's shift will roughly look like this:

- (a) prior to the commencement of their shift, the Deputies are required to complete a number of pre-shift tasks, including:
 - (i) reviewing and consulting the shift plan for the shift;
 - (ii) reviewing the statutory reports prepared for the previous shift;
 - (iii) carrying out a handover with the outgoing Deputy regarding that shift;
 - (iv) attending the Undermanager's start of shift meeting with other Deputies who are rostered on as well as shift engineers. The purpose of this meeting is to discuss safety considerations, determine personnel and equipment resourcing for the shift;
- (b) during the shift, the Deputy will:
 - (i) lead, supervise and direct the respective underground, production and outbye and maintenance crew, which includes providing direction to the crew to work in accordance with the shift plan;
 - (ii) lead underground production crews which might include performance management or disciplining members of the production crew;

- (iii) advance the Company's initiatives, such as with respect to safety and industrial relations;
- (iv) carry out statutory functions, which includes conducting the required inspections and completing shift reports; and
- (c) A handover with the incoming Deputy occurs underground prior to the end of the shift;
- (d) at the completion of the shift, spend approximately 15 minutes to complete any shift reports and debrief the undermanager. The debrief may take longer if there has been an incident within their assigned area of the mine. “

[19] More importantly for present purposes, Mr Stone described the employment arrangements of the Deputies, including the following:

“At Ulan West, the production and engineering workforce are considered wages employees and are covered by the Ulan West Enterprise Agreement 2020.

All other employees, including the Deputies - i.e. the staff or management employees - are employed under individual contracts. The Deputies have never been covered by an enterprise agreement.

There is one template contract for staff employed by the Company. The contracts issued to some staff employees may differ depending on when they were issued and the level of the remuneration may vary...

My understanding is that all staff employees, who earn above the high-income threshold, have agreed guarantees of annual earnings (GAE). I understand this means that the *Black Coal Mining Industry Award 2020* (Award) does not apply to their employment.

At Ulan West, if prospective employees are offered a job by the Company, and the remuneration is above the high-income threshold, it is a condition of employment that the prospective employee agree a GAE. If an existing employee is earning above the high-income threshold and is offered a new contract, the employee is asked to agree a GAE.

All Deputies employed at Ulan West are subject to a GAE.

The Company has a sophisticated remuneration structure in place for staff employees, including the Deputies. There is no single hourly rate that applies to the Deputies' employment. This is reflective of their management roles.

For the 2023 calendar year, the Deputies gross earnings for those employed for the full year, taking into account the total fixed remuneration (TFR) (discussed below) as well as all of the other payments outlined below, ranged from \$272,137.33 to \$352,249.37. These total amounts are the consequence of a range of entitlements that are not available to production and engineering employees.

Under the individual employment contracts, the Deputies receive a TFR that compensates them for all entitlements they would have otherwise received under the Award or any applicable legislation. The TFR expressly compensates for:

- (a) the Deputy's normal rate of pay;
- (b) superannuation contributions;
- (c) meal breaks;
- (d) all disabilities, allowances and leave loadings;
- (e) production bonuses; and
- (f) any claim to rostered and unrostered overtime.

... The TFR is reviewed each December, and applied in the next pay cycle, which is in January of the following year. The TFR increases for the past three years, which covers the period during which the bargaining has taken place, are as follows:

- (a) January 2022 - 4.5%;
- (b) January 2023 5%; and
- (c) January 2024 - 4.56%.

With every TFR increase, there are roll on effects for the short-term incentive payment (STIP) and the roster allowance ... since both are calculated with reference to the TFR...

Deputies are eligible to participate in a short-term incentive plan (STIP) which provides a gross additional payment of up to 20% of their TFR. The STIP comprises business and personal performance measures...

In the 2023 calendar year, all Deputies received a STIP, with the payments ranging from \$37,479 to \$44,616.

Depending on the rosters worked by a Deputy, they may receive a roster allowance (also known as a Work Pattern allowance). The roster allowance is designed to compensate the Deputy for working afternoon, night shift and weekend shifts...

Notwithstanding the TFR is expressed to compensate Deputies for any claim to unrostered overtime, the Company has an Additional Hours Policy which provides employees with additional remuneration for time worked to cover emergencies, training and/or leave coverage...

Given the location of the Ulan Complex, a Regional Allowance Policy has been implemented. Deputies receive an additional \$16,000 per annum under the Regional Allowance Policy..."

[20] Mr Stone also described the roster pattern under which the Deputies work. Since 2022 Deputies have worked a four-day week or a three-day weekend on fixed shifts. Weekday shifts are either 8.75, 10.5 or 12 hours, and weekend shifts are all 12 hours. Roster patterns change during longwall moves, which are scheduled to occur every 9-12 months and take between 6 and 8 weeks.

[21] Mr Stone described the bargaining for a new agreement. He said that the Deputies want to retain their contractual remuneration and benefits package and Ulan West's position has been that if there was to be an enterprise agreement it would wholly replace the terms of the contract.

[22] Ulan West has sought concessions because of concerns about sick leave:

“The Company also sought to find a solution to the relatively high rate of absenteeism. For the 2023 calendar year, on average, the deputies were absent on personal leave for 9.08 shifts each (excluding long term leave). However in the 2022 calendar year, the Deputies' personal leave rates were 16.52 shifts per person (excluding long term leave). By way of comparison, the Undermanagers average absenteeism during this period were 4.44 shifts in 2022 and 3.34 shifts in 2023 (excluding long term leave) during this period.

When Deputies are absent there are significant flow on effects ...”

[23] Mr Stone summarised the bargaining as follows:

“The negotiations have been conducted by the Company on the basis that is negotiating a package of changes and so positions taken on matters may change if the total package is not acceptable. In my view, the most significant issues of difference relate to APESMA seeking to preserve in an enterprise agreement their members' favourable contractual entitlements including with respect to personal leave and their remuneration structure and claim for fixed pay increases in an enterprise agreement while preserving the current contractual remuneration. They are also seeking to reduce the present flexibilities available to the Company with respect to the working of public holidays; the process for implementing redundancies and Company shutdowns.”

[24] Mr Stone expressed concern about whether the Deputies fully understand the effect of an intractable bargaining declaration because he thinks “a majority of Deputies are happy with their remuneration and terms of employment.” He said:

“The terms of the current contract are on the basis that the Company is not constrained in how it manages the business by removing the application of the Award. The current terms and conditions of employment afforded to the Deputies allow the Company sufficient flexibility to enable it to effectively manage Ulan West. In my opinion, if an intractable bargaining declaration, and then an intractable bargaining determination, was made, the Company is at risk of having imposed an instrument that could limit the flexibility it has paid for in its present contractual arrangements with this key group of managerial employees.”

[25] Mr Stone was cross-examined about employment conditions for Deputies at another site, the Ulan No 3 mine. Mr Stone has no direct knowledge of those matters.

[26] Mr Michael Kelly carries out a business as an industrial relations consultant and has provided advice and assistance to employers since 1999 in a range of industries including coal mining. Before starting his consultancy business, Mr Kelly was an official of the Construction, Forestry, Mining and Energy Union, Mining and Energy Division and before that worked as a

coal mine worker at Ravensworth Open Cut Coal Mine. Mr Kelly estimated that he has been involved in approximately 140 enterprise bargaining negotiations.

[27] Mr Kelly indicated that Ulan West issued a NERR after being satisfied that a majority of Deputies wanted to commence bargaining and that “APESMA would have applied for a majority support determination [and so] rather than waste the parties’ time and resources contesting a majority support determination, the Company agreed to commence bargaining.” Mr Kelly also noted that when Ulan West agreed to commence bargaining there was almost no possibility that the Commission could arbitrate an outcome if the parties could not reach agreement:

“Relevantly, at the time the Company agreed to bargain, the intractable bargaining regime had not been introduced and the position under the [the FW Act] was that the parties would either reach an agreement or they would not. Accordingly, my view at the time was that the Company could commence bargaining and seek an agreement that provided some benefit to the business. If agreement was unable to be reached, the parties could agree to “walk away”. This reflected my experience in enterprise bargaining up to that time.”

[28] Mr Kelly also observed that during the bargaining process the Deputies had “nothing to lose” if no agreement was reached because of their underpinning contractual entitlements and the strong views of APESMA’s representatives:

“... Additionally, unlike general enterprise agreement negotiations, the Deputies were in the unusual position where an unsuccessful vote had little or no consequence for them as the very generous terms of their contracts continued to apply. They had nothing to lose.”

[29] Mr Kelly described in detail the bargaining to date between the parties and provided copies of his notes from several bargaining meetings. Mr Kelly reiterated that Ulan West “at the outset and consistently throughout the negotiations, sought to reset the personal leave standard for Deputies through the terms of a negotiated enterprise agreement.” Mr Kelly said that in the bargaining process it was agreed that subject areas would be arranged into packages that the parties could work through systematically. He said that negotiations were conducted on a total package basis, meaning that matters agreed in principle are not final until all packages were agreed and earlier packages that might have been agreed could be reopened and reviewed until such time as a complete package was agreed.

[30] Mr Kelly described bargaining for the “first package”:

“The first package was tabled at that 27 May 2022 meeting. That package dealt with the important issue of the relationship of any enterprise agreement with the contracts of employment under which Deputies have always been employed by the Company. On behalf of the Company, Mr Ribaux and myself explained that the Company’s preferred bargaining position was that an enterprise agreement would replace the Deputies’ contractual entitlements in their entirety. The approach of having what I describe as a “stand alone” enterprise agreement is an approach that I support and recommend to my

clients. This avoids the complexity and confusion of having two sources of entitlements and the potential for “cherry picking” of entitlements between the two...”

[31] Mr Kelly similarly queried the motivation of the Deputies and the information provided to them:

“I do not know what information has been received by the Deputies that has motivated them to support APESMA seeking an intractable bargaining declaration or a determination. I am unaware whether the Deputies understand that the terms of any determination will certainly from the Company’s perspective need to replace the substantive terms of the current contracts.

I have been party to all the negotiations and, based on what was said at the early meetings, the matters of significance which it was said motivated the Deputies to seek to bargain for an enterprise agreement ... have effectively been resolved with the Company.”

Ulan West’s Submissions

[32] Ulan West opposes the making of an intractable bargaining declaration. Ulan West accepts that two of the three preconditions in s.235(2) are satisfied. Ulan West submitted that the Commission cannot be satisfied that it is reasonable in all the circumstances to make the declaration (see s.234(2)(c)) and also that the Commission should otherwise exercise its discretion not make the declaration.

[33] Ulan West’s submissions about the terms of s.235 included the following:

- (a) the reasonableness of making a declaration was an independent requirement within s.235;
- (b) the intractability of the bargaining is necessarily not a relevant factor when considering the reasonableness of the declaration;
- (c) the clear statutory directive from the terms of s.235(2) is that it may not be reasonable to make a declaration even where there is no reasonable prospects of agreement; and
- (d) assessing the reasonableness of making a declaration requires an evaluative judgment.

[34] Ulan West argued that:

- (a) the evidentiary burden falls to APESMA to satisfy the Commission that it is positively reasonable in all the circumstances to make the declaration taking into account the views of the bargaining representatives;
- (b) APESMA has not provided sufficient basis upon which the Commission could be satisfied that it is reasonable to make the declaration sought;

- (c) the Deputies are managerial employees who have rights and entitlements commonly afforded to salaried managers. As such “contractual terms enjoyed by the Deputies are based on the absence of a collective instrument applying to them;”
- (d) the imposition of a determination would fundamentally alter the legal relationship between the parties;
- (e) it is not reasonable to impose a collective industrial instrument on the employment of the Deputies in light of the managerial contracts that apply;
- (f) the outcome now posed by APESMA is a hybrid of an imposed collective outcome and managerial contracts of employment. Such an outcome would be manifestly inappropriate and far removed from the remedial outcomes contemplated by the intractable bargaining legislation;
- (g) the legislative intent behind the introduction of the intractable bargaining regime was not to cover or assist employees in the position of the Deputies. The introduction of the intractable bargaining regime was driven by a desire to seek to improve real wage growth and rebalance bargaining;
- (h) in all the circumstances of the matter the Commission cannot be satisfied that it is reasonable to make the declaration; and
- (i) even if the Commission was satisfied that it was reasonable to make a declaration, there is a residual discretion, evidenced by the word ‘may’ in the chapeau in s.235(1), although the breadth of the reasonableness criterion in s.235(2)(c) means that 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)” (citing *UFU v Fire Resources Victoria* [2023] FWCFB 180 at [32], (2023) 326 IR 230 at 240 and *Transport Workers’ Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWCFB 127 at [10], (2024) 329 IR 238 at 242-244).

[35] In response to APESMA’s submissions (see below) Ulan West argued:

- (a) the risk of further protected industrial action is low and the consequences of such action are low and therefore this factor does not support the making of a declaration;
- (b) the fact that APESMA supports the making of an intractable bargaining declaration should be afforded no more weight than the fact that Ulan West does not support the making of the declaration – this factor is rendered moot by the parties’ opposing positions;
- (c) the length of the bargaining process is not a factor to be considered, nor is the fact that the employer issued a NERR, Ulan West said it only the NERR under the threat of an application for a majority support determination; and
- (d) The Deputies work four days per week, are paid in the range of \$272,137 and \$352,249 per year, and are entitled to at least five weeks’ annual leave and three months’ personal

leave per year. The new provisions of the FW Act are not directed at these employees; and

- (e) There is no imperative that requires the Commission's intervention.

[36] Ulan West submitted that an intractable bargaining declaration is not the refuge of parties who are unable to achieve their bargaining objectives. Nor, Ulan West said, should the intractable bargaining provisions be used as a bargaining chip to force an agreement. In this regard Ulan West said:

“... the apparent strategic purpose for seeking an intractable bargaining declaration weighs against the reasonableness of the Commission intervening to assist the Applicant achieve an outcome it has been unable to achieve through bargaining.”

[37] In its closing submissions Ulan West said:

- (a) the Commission does not need to take into account the views of the bargaining representatives about all the circumstances of the matter;
- (b) this is not a case in which the bargaining parties have harmed themselves or others with protected industrial action (s.424) such that it is reasonable for the Commission to make a workplace determination by arbitration because the parties cannot reach agreement by themselves;
- (c) this is also not an industrial slugfest where the parties have attempted to overwhelm each other, have not succeeded and the circumstances dictate that something needs to be done because the tools made available under the FW Act have not brought about a result;
- (d) nor does this case involve a group of workers who are demonstratively disadvantaged because of poor pay or conditions, or because of weak bargaining power and it is reasonable for the Commission to arbitrate to finalise the bargaining and prevent an injustice;
- (e) in this matter the employer is well-resourced, the employees are part of management, highly paid and represented by a well-resourced, professional union. These circumstances steer away from the Commission taking the radical course of making a declaration that will lead to a workplace determination;
- (f) the Commission must look critically at the way in which APESMA sought authorisation from the Deputies to make the application for a declaration, particularly the way in which views were canvassed and a so-called vote took place. The Commission can note that APESMA did not call any evidence from any employees;
- (g) there are genuine doubts about whether the approval was obtained from fully informed members. As such the application has unsatisfactory origins and is subject to, at the very least, caution;

- (h) it is inappropriate to apply for a declaration if the true intention of the application were to improve their bargaining position in the post-declaration bargaining period;
- (i) making a declaration is a grave step that takes away the primary rights that the parties have under the bargaining regime of the FW Act, including the right not to make an agreement; and
- (j) APESMA has not met its onus to provide sufficient evidence from which the Commission could be satisfied that it is reasonable in the circumstances to make the declaration.

APESMA's Submissions

[38] APESMA submitted that the reasoning in three FWC decisions are relevant to the assessment of the reasonableness of making a declaration:

- (a) in *UFU v Fire Resources Victoria* [\[2023\] FWCFB 180](#) at [42], (2023) 326 IR 230 at 243 the Full Bench considered (a) the importance of firefighting services to public safety and the risks of greater protected industrial action; (b) the history of bargaining; (c) the preparedness of the parties to arbitrate remaining disputes; (d) the views of the bargaining representatives that a declaration should be made;
- (b) in *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [\[2024\] FWCFB 127](#) at [110]-[118], (2024) 329 IR 238 at 263-5 the Full Bench considered: (a) the TWU supported the making of the declaration and it represented a significant number of bargaining employees; (b) TWU had not been intransigent, unreasonable, uncooperative or recalcitrant; (c) both parties engaged meaningfully in the Commission's processes; (d) the broader history of the relationship did not weigh against a declaration; (e) more protected industrial action would otherwise ensue; (f) there had been no pay rise since July 2021; and
- (c) in *Network Aviation Pty Ltd v AFAP & TWU* [\[2024\] FWC 685](#) at [180]-[181] Deputy President Beaumont took into account (a) the employer and each union supported or did not oppose the declaration (b) the disjoint between the view of the union bargaining representatives and the voting employees and (c) the significant financial impact of the protected industrial action taken in support of the agreement.

[39] APESMA relied on the following circumstances:

- (a) the Deputies serve an important supervisory role in coal mines and further protected industrial action would be detrimental to an important Australian industry;
- (b) further protected industrial action may occur unless the enterprise agreement can be agreed;
- (c) the Union is the only bargaining representative for the employees and supports the making of the declaration;

- (d) the history of bargaining supports a conclusion that it would be reasonable to make an intractable bargaining declaration - the Deputies have been seeking to agree on an enterprise agreement for over 2.5 years; and
- (e) Ulan West's views opposing the declaration are relevant but not determinative.

[40] APESMA further submitted:

- (a) as a matter of construction, it does not necessarily follow from the fact that there is no reasonable prospect of agreement that it is thus reasonable to make the declaration;
- (b) however the phrase "in all the circumstances" in s.235(2)(c) includes factors relevant to s.235(2)(a) and s.235(2)(b);
- (c) the fact that Ulan West would rather rely on contracts of employment does not mean that the Deputies should not be given the benefit of an intractable bargaining declaration to assist them to attempt to agree on an enterprise agreement; and
- (d) Ulan West's preference to leave regulation of the employment relationship to individual contracts has little weight in the face of the objects of the FW Act including "achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action" (s.171(a)).

[41] In its closing submissions APESMA said:

- (a) Ulan West's contention that the Deputies were not properly informed of the risks of applying for a declaration is "unsupported by the evidence [and] is actually just pure speculation";
- (b) more significantly, the reasonableness test does not require any assessment of the merits of possible alternative provisions that might be arbitrated in a later determination. When contemplating making a declaration the Commission cannot and should not speculate about what a Full Bench could do in making a workplace determination under s.275. Section 275 prescribes certain factors that the Full Bench must take into account in deciding which terms to include in a workplace determination, including the very broad notions of the interests of the employers and employees who will be covered by the determination, and the public interest. It is not a foregone conclusion that the matter will go to an arbitration if a declaration is made because of the post declaration bargaining period;
- (c) the intractable bargaining provisions are intended to deal with situations where there will be no change in conditions of employment without intervention by the Commission because bargaining has become intractable;

- (d) the fact that the Deputies are well-paid does not disentitle them to a declaration nor does it exclude them from the regime of intractable bargaining. Deputies employed by other employers are covered by enterprise agreements and/or are parties to enterprise bargaining; and
- (e) there is no preference in the FW Act for governing employment relationships by contract.

Consideration

[42] In this matter I am not satisfied that it is reasonable to make the intractable bargaining declaration sought by APESMA. In reaching this conclusion I have considered the following matters:

- (a) the legislative context, provisions and established principles;
- (b) the views of the bargaining representatives;
- (c) the dispute in the context of the whole of the relationship of the parties;
- (d) the history of bargaining and the conduct of the parties;
- (e) the views of the employees; and
- (f) the possibility of further protected industrial action.

Consideration – the legislative context

[43] The FW Act provides a safety net of minimum employment conditions through the National Employment Standards and Modern Awards. The FW Act also sets a high-income threshold above which many of the safety net benefits are not available to high-income employees.

[44] The objects of the FW Act include the following:

“3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

...

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

[45] The FW Act allows the Commission to facilitate enterprise bargaining and the making of enterprise agreements, to have limited oversight of the terms of agreements via the approval process and the Better Off Overall Test and, once agreements are made and approved, to vary or terminate them.

[46] The objects of Part 2-4 Enterprise Agreements of the FW Act are:

“171 Objects of this Part

The objects of this Part are:

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

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

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.”

[47] The requirements of good faith bargaining are identified in s.228. These requirements apply to bargaining representatives and are directed to the bargaining process rather than to particular bargaining outcomes:

“228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

- (2) The good faith bargaining requirements do not require:
- (a) a bargaining representative to make concessions during bargaining for the agreement; or
 - (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.”

[48] Apart from orders relating to industrial action, the Commission has limited powers to make orders against the wishes of bargaining representatives in the ordinary course of enterprise bargaining. If certain conditions are satisfied the Commission may make:

- (a) a majority support determination (s.237) that requires an employer to issue a notice of employee representational rights (s.173) and commence bargaining;
- (b) a bargaining order (s.230) requiring a bargaining representative to meet the good faith bargaining requirements;
- (c) a scope order (s.238) that alters the coverage of a proposed agreement and therefore the composition of the bargaining cohort.

[49] These express powers are directed to the bargaining process rather than bargaining outcomes, and each has an important qualification: the Commission must be satisfied that it is “reasonable in all the circumstances” to make the order/determination - see s.230(1)(c), s.237(2)(d) and s.238(4)(d) respectively.

[50] Section 240 allows the Commission to arbitrate bargaining disputes with the consent of all bargaining representatives. The outcome of an arbitration under s.240 does not directly determine the content of any agreement that is ultimately made.

[51] The Commission’s power to directly arbitrate the terms of a new workplace instrument are only available in two specific circumstances:

- (a) when a termination of industrial action instrument has been made following threatened or actual protected industrial action, and the Commission decides that it is appropriate that protected industrial action be terminated rather than suspended (see s.266(1) and *Re Svitzer Australia Pty Limited* [\[2022\] FWC 213](#) at [38]-[46], (2022) 320 IR 91 at 104-108); or
- (b) when an intractable bargaining declaration is made under s.235.

[52] In both scenarios the scope of the matters the Commission can arbitrate are limited to the matters that are in issue between the bargaining representatives at a particular point in time.

Consideration - the intractable bargaining provisions

[53] The intractable bargaining provisions of the FW Act are in Division 8 of Part 2-4. Section 234 give bargaining representatives the right to make an application for an intractable bargaining declaration.

[54] Section 235 confers upon the Commission a discretion to make an intractable bargaining declaration and includes the following:

“235 When the FWC may make an intractable bargaining declaration

Intractable bargaining declaration

(1) The FWC may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:

- (a) an application for the declaration has been made; and
- (b) the FWC is satisfied of the matters set out in subsection (2); and
- (c) it is after the end of the minimum bargaining period (see subsection (5)).

Matters of which the FWC must be satisfied before making an intractable bargaining declaration

(2) The FWC must be satisfied that:

- (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.

What declaration must specify

(3) The declaration must specify”

[55] An application for an intractable bargaining declaration is the first step in a process likely to result in the making of a workplace determination. Only one bargaining representative need apply for a declaration and it is therefore possible that a workplace determination could be made against the wishes of other bargaining representatives, regardless of terms of the determination.

[56] If a declaration is made then the provisions of Part 2-5 of the Act apply. A Full Bench is required to arbitrate the matters not resolved between the bargaining representatives (s.269). The resultant workplace determination must contain the terms set out in s.270, core terms (s.272), mandatory terms (s.273), any terms dealing with matters still at issue between the bargaining representatives (s.270A), and no other terms (s.271).

[57] In this regard the introduction of the intractable bargaining regime changed the dynamics of enterprise bargaining. The amendments introduced an available strategy for bargaining representatives to withhold consent or support for a proposed agreement in the hope of a better result in arbitration via the intractable bargaining route. This change is clearly intentional and a measure that assists those with weaker bargaining power to secure an agreement.

[58] The Commission did have a power to arbitrate prior to the legislative amendments but that power was limited to low-paid workplace determinations and industrial action related workplace determinations.

[59] In this context Parliament recognised that it is reasonable to make an intractable bargaining declaration in circumstances where all the preconditions in s.235 are met. By the inclusion of s.235(2)(c) Parliament recognised that in some instances it is not reasonable to make a declaration and workplace determination even if all the other requirements have been met. Parliament gave the Commission broad discretion to assess the reasonableness of making a declaration and required the Commission to take into account all the circumstances of the case and the views of all the bargaining representatives.

[60] The examples given in the Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 145 [847] of matters the Commission might consider provide further context for the assessment of reasonableness:

“Finally, the FWC would be required to be satisfied before making an intractable bargaining declaration it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement. 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.”

[61] Reasonableness is not to be considered in a vacuum. The examples in the Revised Explanatory Memorandum connect the assessment of reasonableness to the consequences of making the declaration. The Commission might consider, for example, the reasonableness of arbitration by reference to the dispute in the context of the whole of the relationship of the parties, or the reasonableness of an arbitrated outcome by reference to the history of bargaining.

[62] Similarly, the consequences of making an intractable bargaining declaration must be considered in the context of the terms and objects of the FW Act, particularly the objects of providing a safety net of enforceable minimum terms and providing a “fair framework that enables collective bargaining in good faith, particularly at the enterprise level” (s.171(a)).

[63] An intractable bargaining declaration gives the Commission jurisdiction to arbitrate conditions of employment beyond the safety net of enforceable minimum terms. This arbitration power is available within the framework designed to enable and support agreements, particularly at the enterprise level. Understood in this way, the Commission’s arbitration powers should not be lightly engaged.

[64] The following principles can be drawn from the authorities when considering whether it is reasonable to make an intractable bargaining declaration¹:

- (a) the precondition in s 235(1)(c) requires the Commission to be “satisfied” as to reasonableness. 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” rather than one of “objective fact”;
- (b) 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;
- (c) 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;
- (d) the Commission might consider matters such as 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;
- (e) the explicit 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; and
- (f) each application for an intractable bargaining declaration will turn on its own facts notwithstanding that a declaration may or may not have been made in other proceedings, even related proceedings.

[65] Factors that have been taken into account in other decisions² include:

- (a) the union supported the making of the declaration and it represented a significant number of bargaining employees;
- (b) the union had not been intransigent, unreasonable, uncooperative or recalcitrant;
- (c) both parties engaged meaningfully in the Commission’s processes;
- (d) the broader history of the relationship did not weigh against a declaration;
- (e) more protected industrial action would otherwise ensue;

- (f) there had been no pay rise in the three years prior to making the declaration;
- (g) the history of bargaining;
- (h) the fact that the relevant union was at odds with its own members' views; and
- (i) the history and impact of protected industrial action.

Consideration - the views of the bargaining representative

[66] The Commission must consider the views of the bargaining representatives. As stated above, the views of the bargaining representatives must be treated as a matter of significance, but not necessarily determinative.

[67] In this matter the views of the bargaining representatives do not take the consideration very far. There are only two bargaining representatives, Ulan West and APESMA, and their views on the making of a declaration are diametrically opposed. In a contested application for an intractable bargaining declaration involving only two bargaining representatives it is no surprise that the applicant bargaining representative supports the making of a declaration and the opposing bargaining representative does not.

[68] In other circumstances the views of the bargaining representatives can be far more significant to the assessment of reasonableness. Where there are many employee bargaining representatives and/or groups of employees with different interests, there may be differing views amongst the employee bargaining representatives about the reasonableness of making a declaration.

Consideration - the dispute in the context of the whole of the relationship of the parties;

[69] If a declaration is made then the Commission will be required to make a new workplace determination which in turn will bring about a significant change in way the employment conditions are regulated for Deputies.

[70] The FW Act Applies to a workplace determination as if it was an enterprise agreement save for certain provisions:

“279 Act applies to a workplace determination as if it were an enterprise agreement

(1) This Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

(2) However, the following provisions do not apply to the determination:

- (a) section 50 (which deals with contraventions of enterprise agreements);
- (b) section 53 (which deals with the coverage of enterprise agreements);
- (c) section 54 (which deals with the operation of enterprise agreements);

(d) section 58 (which deals with the interaction between one or more enterprise agreements);

(e) section 183 (which deals with the entitlement of employee organisations to be covered by enterprise agreements);

(f) the provisions of Subdivisions A, AA, AB, AC, AD, AE and B of Division 7 of Part 2 - 4 (which deal with the variation of enterprise agreements) other than section 218 (which deals with variation of an enterprise agreement on referral by the Australian Human Rights Commission).

(3) In addition, Subdivision C of Division 7 of Part 2 - 4 (which deals with the termination of enterprise agreements by employers and employees) only applies to a workplace determination after the determination has passed its nominal expiry date.”

[71] Section 279(2)(f) has the effect that none of the conditions of employment included in a workplace determination can be varied except by the Commission under s.218A to correct or amend an obvious error, defect or irregularity, or under s.218 on referral from the Australian Human Rights Commission.

[72] The employer and employees covered by a workplace determination cannot agree to terminate the workplace determination during its nominal term (s.279(3)) save for making a new enterprise agreement that will displace the workplace determination. After the nominal expiry date the workplace determination can be terminated by agreement (s.219) or by application to the Commission (s.225) subject to the requirements of s.236.

[73] Otherwise a workplace determination continues to have effect ad infinitum unless replaced by an enterprise agreement or another workplace determination (s.276(2)).

[74] The employment of the Deputies is not presently regulated by an industrial instrument. All of Ulan West’s Deputies are paid above the high-income threshold and have guarantees of annual earnings that mean that the modern award does not apply (s.47(2)).

[75] The Deputies have pushed for an enterprise agreement and now a workplace determination because they want greater security in their terms and conditions. The terms of a contract of employment are quite obviously less secure for employees than the terms of an enterprise agreement. That is not to say that the terms of each contract are determined individually or in isolation. The evidence is that Ulan West uses a template contract, with only minor updates over time, and that most contractual conditions are common for each of the Deputies.

[76] Ulan West has been reluctant to bargain and now opposes the making of an intractable bargaining declaration because it is concerned that it will lose the flexibilities that it currently pays for by providing high wages, guarantees of annual earnings and enhanced employment benefits.

[77] APESMA has not led any evidence of any apparent uncertainty or specific risks to the employment conditions of the Deputies. To the contrary, the conditions afforded to the Deputies seem to be regularly enhanced to keep pace with the market, as evidenced by APESMA not pursuing wage claims on behalf of the Deputies with any particular vigour other than a claim, pursued only for a period, for minimum increases to underpin Ulan West's salary review system.

[78] In the bargaining process both Ulan West and the Deputies have a logical and rational basis to reject the other party's proposal and choose not to make an agreement at all.

[79] In fact, choosing not to make an agreement at all has been a viable alternative for all parties throughout the bargaining. Ulan West could choose not to put an agreement to a vote, APESMA as a bargaining representative, could choose not to support a proposed agreement and [a majority of] the Deputies could choose to vote against the making of an agreement.

[80] The Deputies are well paid and have not needed to bargain collectively in the past to ensure that wages and conditions remain up-to-date and competitive. The Deputies have significant market power to secure attractive conditions of employment and ongoing wage increases. For the Deputies the option of not making an agreement at all is more attractive and viable than for other employees in the workforce. The bargaining history in relation to sick leave provides a powerful demonstration of this reality. The Deputies can choose to avoid being covered by an enterprise agreement (by voting against any proposed agreement that includes such terms) knowing that their contractual entitlements would continue. As Mr Kelly said, drawing upon his experience in negotiating more than 140 enterprise agreements, the Deputies had nothing to lose if no agreement was reached because of their underpinning contractual entitlements.

[81] I agree with APESMA that it is not possible or appropriate to speculate at this stage of the process about the terms that might be included in any workplace determination made by a Full Bench if a declaration is made. It is not possible to speculate with any precision because of the post declaration bargaining period that may or may not reduce the scope of the matters in issue between the bargaining representatives. It is not appropriate to speculate about the terms of any workplace determination that might be made because the reasonableness of any particular term is a matter for a Full Bench to determine.

[82] However, what can be said from the evidence in this matter is that no party is disadvantaged if an intractable bargaining declaration is not made (and no workplace determination is made). Although the Deputies do not achieve the outcome they seek, being the security of a binding industrial instrument, there is no evidence to suggest that any of the Deputies are at risk of losing any of their employment benefits in the foreseeable future.

[83] By contrast, if a declaration is made and then a workplace determination is made, there is a *material risk* that one or both parties will be disadvantaged by the terms arbitrated by a Full Bench.

[84] The objects of the FW Act are clear. However it is not clear that the intractable bargaining provisions in the FW Act are intended to apply to the Deputies' circumstances. The Deputies do not need the safety net protection of the modern award system: Deputies earn between five and seven times the national minimum wage. All Deputies are High-Income Earners and some Deputies earn approximately twice the High-Income Threshold. The hours worked by the Deputies are not excessive and are rostered over three or four days per week.

[85] The FW Act does not exclude high-income earners from the enterprise bargaining regime generally or from the intractable bargaining regime specifically. The provisions of the Act designed to facilitate good faith bargaining apply to high-income earners. It would be erroneous to find that it was not reasonable to make an intractable bargaining declaration solely because the employees involved are high income earners.

[86] However the high salaries paid to Deputies, considered in conjunction with other factors, mean that it is not reasonable to engage the Commission's powers to arbitrate conditions of employment beyond the safety net of enforceable minimum terms by making the declaration sought.

[87] Ulan West provides a package of employment conditions to its Deputies that intentionally takes the Deputies out of the coverage of the Modern Award. No one has claimed that the package provided to Deputies is unreasonable or uncompetitive. There is no basis to find that a declaration is necessary so that the Deputies can have access to reasonable wages and conditions through the enterprise bargaining regime.

[88] The remuneration packages provided to the Deputies are not stagnant insofar as they are updated at least annually under a formal salary review system. Not all Deputies are paid the same which indicates that there is scope for advancement. There is no basis to find that a declaration is reasonable so that the conditions of employment for Deputies can catch up or keep pace with movement or improvements gained by others. APESMA submitted that the intractable bargaining provisions are intended to deal with situations where there will be no change in conditions of employment without intervention by the Commission because bargaining has become intractable. On the evidence in this matter the terms and conditions of employment for the Deputies will continue to change without the Commission's intervention.

[89] There is no history of bargaining or other collective activities that have influenced, positively or negatively, how the parties have managed and determined employment conditions. In the circumstances of this matter there is no basis to find that is reasonable to make the declaration sought so that wages and conditions can continue to be regulated by collective bargaining.

[90] Ulan West submitted that there has not been an industrial slugfest where the parties have attempted to overwhelm each other, have not succeeded and the circumstances dictate that something needs to be done because the tools made available under the FW Act have not brought about a result. The Deputies have been represented and advised by a well-resourced union with experienced personnel. In this matter the bargaining tools available in the Act did facilitate an attempt by both bargaining parties to reach a middle ground that was attractive enough to rationally agree to move away from the status quo. Given that neither bargaining party would suffer prejudice or disadvantage if the status quo remains, and that both parties risk

an adverse outcome in an arbitration, it is not reasonable to make the declaration sought by only one bargaining representative against the opposition of the other bargaining representative.

Consideration - the history of the bargaining, the conduct of the parties;

[91] APESMA said the Deputies are entitled to bargain for better entitlements than what they are presently receiving. This is obviously correct. The FW Act facilitates bargaining for Deputies but the real question in this matter is whether it is reasonable that the Commission engages the coercive power to arbitrate conditions of employment beyond the safety net of enforceable minimum terms in an industrial instrument if APESMA has not succeeded in persuading Ulan West to make an agreement.

[92] The bargaining history between the parties is a significant factor to take into account because, unlike all the other contested cases in which the Commission has made a declaration, there is no evidence of any bargaining history between the parties prior to the current round of bargaining. This can be contrasted with, for example, *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWCFB 127 at [116], (2024) 329 IR 238 at 265 where there was evidence of a long history of collective bargaining and a submission put that if a declaration was not made then “the only real option available to the Bargaining Employees would be to take further protected industrial action” because of the long history of regulating wages and conditions via enterprise agreements.

[93] Over the three years in which the bargaining has taken place, both parties have made genuine and earnest attempts to bridge the gap: Ulan West made it clear to APESMA and the Deputies that it did not think an agreement was appropriate or necessary and if it was to make an agreement there would need to be some significant benefit to Ulan West. Ulan West sought concessions in relation to sick leave and absenteeism. APESMA never conceded that sick leave was a real issue but tried to work through Ulan West’s concerns. Although bargaining and inter-parte correspondence was strained at times, it cannot be said that the conduct of one party solely led to bargaining becoming intractable.

[94] In fact it is quite possible that the bargaining process for these parties was doomed from the start because the respective interests of the parties were too disparate. The Deputies are treated as management, are paid accordingly, receive regular annual pay increase and other benefits so that their employment packages are competitive against other employers across the country. As Mr Stone said “the terms of the current contract are on the basis that the Company is not constrained in how it manages the business by removing the application of the Award. The current terms and conditions of employment afforded to the Deputies allow the Company sufficient flexibility to enable it to effectively manage Ulan West.” By pursuing an enterprise agreement the Deputies sought the same surety and security for their conditions of employment that are enjoyed by the operators that they supervise.

[95] Neither bargaining party was prepared to fully accommodate the concerns of the other party or, more precisely, accommodate the other party’s concern enough to reach an agreement. Ulan West, understandably, was not prepared to sufficiently replicate the Deputies’ contractual terms in an enterprise agreement to gain the Deputies consent, and the Deputies were understandably not prepared to sufficiently reduce their employment entitlements to gain Ulan West’s consent.

Consideration - the views of the employees

[96] The Commission is not expressly required to consider the views of employees who would be covered by the agreement or the workplace determination (by contrast see s.236(3)(a) in relation to an application to terminate an enterprise agreement).

[97] In many instances the views of employees cannot be conveniently assessed, however in this matter the Deputies are a relatively small cohort and their views can be canvassed fairly pragmatically. Almost all Deputies are members of APESMA. APESMA has represented and advised its members over the whole course of bargaining.

[98] Ulan West tried to cast doubts over the level of support for the intractable bargaining declaration from the Deputies themselves. No Deputies gave evidence and there is only hearsay evidence from Mr Edwards and Mr Stone about the views of the Deputies themselves.

[99] Ulan West said it was significant that APESMA did not lead any direct evidence from any Deputies. Ulan West made a valid point that it was not for the employer to lead evidence from Deputies about their preference.

[100] Ulan West challenged the evidence of Mr Edwards under cross-examination. The two key points of challenge were that (1) the risk of an inferior outcome for Deputies in arbitration was significant and the logic of the application was questionable and (2) the consultation process undertaken by APESMA was unorthodox, too informal and did not provide adequate information to the Deputies.

[101] Despite the challenge mounted by Ulan West, I accept that a significant number of Deputies support the application for an intractable bargaining declaration. The process by which members were said to have “voted” to support the application was unorthodox. The “vote” process would fail the test under s.180 if the pre-approval provisions applied (which of course they do not). Members were spoken to individually or in small groups, no written material was supplied that Deputies could investigate or consider for themselves, and so on.

[102] However the FW Act does not require bargaining representatives to seek or have the endorsement of their constituency before making an application under s.234 for an intractable bargaining declaration. A bargaining representative that makes an application under s.234 with the informed consent of the parties that they represent will be in a stronger position to press for a declaration, however it is not essential that they do so.

[103] Ulan West’s scepticism about the level of support within the ranks of Deputies is consistent with Ulan West’s wider case. Ulan West argued that the Deputies are at risk in an arbitration that the reduction in employment conditions in a workplace determination might outweigh the benefits gained by the Deputies. This risk for the Deputies is said by Ulan West to support a conclusion that it is not reasonable to make the declaration sought.

[104] APESMA said that it advised its members of the risks associated with a workplace determination and that almost every member supported the application. That is a significant factor insofar as those employees are content to leave it to the Commission to decide their terms and conditions of employment, even if it means that some of those conditions are reduced.

Consideration – the possibility of further protected industrial action

[105] The risk of further protected industrial action could be a relevant factor in assessing the reasonableness of an intractable bargaining declaration, particularly if the bargaining is otherwise intractable.

[106] An intractable bargaining declaration prevents any further protected industrial action in support of the agreement (see s.409(1)(c) and s.413(7)(c)). If bargaining is intractable and there is a significant risk of ongoing industrial action, it might be reasonable for the Commission to intervene and facilitate an arbitrated conclusion to the bargaining.

[107] APESMA took some protected industrial action and the Deputies are in a critical safety-related role. I am not satisfied that there is a substantial risk of ongoing protected industrial action. Ulan West has adequate contingency arrangements which mean that protected industrial action by Deputies is not likely to cause significant disruption. As such, it does not make much sense for Deputies to lose pay by taking industrial action.

Conclusion

[108] In summary, I have declined to make the intractable bargaining declaration sought by APESMA because:

- (a) if a declaration is made the Commission is required to use its very limited power to arbitrate conditions of employment beyond the safety net of enforceable minimum terms and impose specific terms and conditions of employment in an enforceable workplace instrument;
- (b) the conditions of employment for each Deputy are currently regulated by contracts of employment. The contracts for the Deputies are similar in form and most terms and conditions are common across the whole cohort of employees;
- (c) the remuneration package afforded to each Deputy is significant: Each Deputy is a high-income employee as defined in the FW Act, has an agreed guarantee of annual earnings and is paid substantially more than the high-income threshold in the FW Act – in some cases double the high-income threshold and almost five times the national minimum wage;
- (d) to the extent that the FW Act gives the Commission arbitration powers with the stated object to provide a safety net of minimum employment conditions enforceable in workplace instruments, those objects are not engaged for these employees;
- (e) to the extent that the FW Act gives the Commission very limited arbitration powers to arbitrate conditions of employment beyond the safety net of enforceable minimum terms with the stated object to “to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level” and “to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements”, it is not reasonable to engage those powers in the present circumstances;

- (f) there is no basis to find that a declaration is necessary or reasonable so that the Deputies can have access to reasonable wages and conditions through the enterprise bargaining regime;
- (g) conditions of employment for the Deputies are not stagnant - in recent years Deputies have received significant annual pay increases and other benefits through a formal salary review system and incentive payments;
- (h) there is no basis to find that a declaration is reasonable so that the conditions of employment for Deputies can catch up or keep pace with movement or improvements gained by others;
- (i) the respective interests of the bargaining parties is disparate. Both bargaining parties have a logical and rational basis to choose not to make an agreement at all;
- (j) despite the genuine and earnest attempts by the bargaining representatives to bridge the gap, neither bargaining party was prepared to fully accommodate the concerns of the other party or, more precisely, accommodate the other party's concern enough to convince them to make an agreement;
- (k) there is no basis to find that is reasonable to make the declaration sought so that wages and conditions can continue to be regulated by collective bargaining;
- (l) the making of a workplace determination, regardless of its specific terms, will impose a fundamental change in the employment relationship between the parties with significant legal consequences; and
- (m) given that neither bargaining party would suffer prejudice or disadvantage if the status quo remains, and that both parties risk an adverse outcome in an arbitration, it is not reasonable to make the declaration sought by only one bargaining representative against the opposition of the other bargaining representative.

[109] APESMA's application for an intractable bargaining declaration is dismissed.



DEPUTY PRESIDENT

Appearances:

C Tran of Counsel and *A Neilson* of AEN Legal for the Applicant
J Murdoch KC and *K Brotherson* of Counsel and *J De Flamingh* of Corrs Chambers Westgarth
for the Respondent

Hearing details:

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¹ See *TWU v Cleanaway* [\[2024\] FWCFCB 127](#) at [10]-[11], (2024) 329 IR 328 at 242-244, *United Firefighters' Union of Australia v Fire Rescue Victoria* [\[2023\] FWCFCB 180](#) at [27]-[34], (2023) 326 IR 230 at 239-241.

² See *TWU v Cleanaway* [\[2024\] FWCFCB 127](#), (2024) 329 IR 328, *United Firefighters' Union of Australia v Fire Rescue Victoria* [\[2023\] FWCFCB 180](#), (2023) 326 IR 230 and *Network Aviation Pty Ltd v AFAP & TWU* [\[2024\] FWC 685](#).