DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Association of Professional Engineers, Scientists and Managers, Australia
v
Ulan West Operations Pty Ltd
(C2025/6451)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT BUTLER

SYDNEY, 20 NOVEMBER 2025

Appeal against decision [2025] FWC 1806 of Deputy President Easton at Sydney on 25 June 2025 in matter number B2024/841 – Application for an intractable bargaining declaration – Bargaining representatives accepted that bargaining was intractable – Commission determined that it was not reasonable in all the circumstances to make an intractable bargaining declaration – Whether an error to consider application on the basis that the Commission's arbitration powers should not be "lightly engaged" – Whether an intractable bargaining declaration is in tension with facilitating collective bargaining – Whether relevant that employees concerned are relatively high earning – Permission to appeal granted – Appeal allowed and application remitted to be determined.

Decision of Vice President Gibian and Deputy President Butler

[1] This appeal arises from an application made by the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) under s 234 of the *Fair Work Act 2009* (Cth) (the **Act**) for an intractable bargaining declaration.

[2] The application concerned enterprise bargaining involving Deputies employed at the Ulan West underground coal mine near the town of Mudgee in New South Wales. In broad terms, Deputies supervise the production of coal and carry out inspections of work areas. The Deputies working at the mine are employed by Ulan West Operations Pty Ltd. In late 2021, APESMA requested that Ulan West commence bargaining for an enterprise agreement to cover Deputies employed at the mine. No enterprise agreement currently covers, or has previously covered, the employment of the Deputies. Ulan West agreed to commence bargaining and bargaining commenced in around December 2021.

[3] Bargaining has been occurring since that time. Numerous meetings and conferences took place during 2022 and 2023, including conferences facilitated by a member of the Commission in relation to disputes under s 240 of the Act and under s 448A of the Act in connection with applications for protected action ballot orders. Some protected industrial action occurred in late 2023 and in 2024. The evidence at first instance suggested that there remained

a range of matters which were not able to be resolved in bargaining. During 2024, APESMA formed the view that there was no real prospect of agreement being reached.

[4] On 2 July 2024, APESMA applied for an intractable bargaining declaration under s 234 of the Act. The application was subject of a hearing which took place in September 2024 before a Deputy President of the Commission. Ulan West accepted that the Commission had dealt with the dispute about the agreement under s 240 of the Act for the purposes of s 235(2)(a) and that bargaining was intractable in the sense that there was no reasonable prospect of agreement being reached if the Commission did not make a declaration for the purposes of s 235(2)(b). It submitted, however, that it was not reasonable in all the circumstances for the Commission to make the declaration for the purposes of s 235(2)(c).

[5] The Deputy President handed down his decision on 25 June 2025.[1] In the decision, the Deputy President concluded that he was not satisfied it was reasonable to make the intractable bargaining declaration sought by APESMA.[2] As a result, the Deputy President dismissed APESMA's application.[3] APESMA seeks permission to appeal, and to appeal, from the decision of the Deputy President under s 604(1) of the Act.

Statutory provisions

[6] The capacity of the Commission to make an intractable bargaining declaration is a relatively new feature of the Act. The relevant provisions commenced operation on 6 June 2023 and were enacted as part of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022* (Cth) (the **SJBP Act**). The current provisions repealed the former serious breach declaration provisions and replaced them with the new scheme for the making of an intractable bargaining declaration. The previous provisions permitted the Commission to make a serious breach declaration if one or more bargaining representatives had contravened bargaining orders made by the Commission and the contraventions were serious and sustained and had significantly undermined bargaining.

[7] Section 234 now provides for a bargaining representative for a proposed enterprise agreement to apply for an intractable bargaining declaration as follows:

> **234 Applications for intractable bargaining declarations**
>
> (1) A bargaining representative for a proposed enterprise agreement, other than a greenfields agreement, may apply to the FWC for a declaration (an intractable bargaining declaration) under section 235 in relation to the agreement.
>
> *Note: The consequence of an intractable bargaining declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make an intractable bargaining workplace determination under section 269 in relation to the agreement.*
>
> (2) An application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement.

[8] Section 235 of the Act identifies the circumstances in which the Commission's power to make an intractable bargaining declaration is enlivened, the content of any such determination and the temporal limits of its operation. The section provides:

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:

(a) the date it is made; and

(b) the proposed enterprise agreement to which it relates; and

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

Operation of declaration

(4) The declaration:

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

(b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

End of the minimum bargaining period

(5) The end of the minimum bargaining period in relation to a proposed enterprise agreement is:

(a) if one or more enterprise agreements (the existing agreements) apply to any of the employees that will be covered by the proposed agreement—the later of the following:

(i) the day that is 9 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;

(ii) the day that is 9 months after the day bargaining starts, as worked out under subsection (6); or

(b) the day that is 9 months after the day bargaining starts, as worked out under subsection (6).

(6) For the purposes of subparagraph (5)(a)(ii) and paragraph (5)(b), the day bargaining starts for a proposed agreement is:

(a) if a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the proposed agreement—the day that the authorisation first comes into operation; or

(b) otherwise – the notification time for the proposed agreement.

[9] Section 235A then provides that the Commission may, if it considers it appropriate to do so, specify in the declaration a period known as the "post-declaration negotiating period".

[10] In summary, s 235(1) permits the Commission to make an intractable bargaining declaration if an application has been made, it is satisfied as to the matters in subsection (2) and it is after the end of the minimum bargaining period. The matters about which the Commission must be satisfied in s 235(2) are that the Commission has dealt with the dispute about the agreement under s 240 of the Act, there is no reasonable prospect of agreement being reached if a declaration is not made and that "it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement".

[11] The words "may make" in s 235(1) mean that, even if the Commission is satisfied as to each of the matters in s 235(1)(a), (b) and (c), it retains a residual discretion as to whether an intractable bargaining declaration should actually be made. However, as explained in *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180; (2023) 326 IR 230, it is difficult to envisage what discretionary matters might remain for consideration if the Commission has already satisfied itself as to the criteria in s 235(2), particularly that it is "reasonable in all the circumstances" to make the declaration.[4]

[12] The consequence of an intractable bargaining declaration being made is that the Commission may be required to make a workplace determination. When an intractable bargaining declaration is made, s 269 requires that the Commission must make a workplace determination as quickly as possible, if there is a post-declaration period, after the end of that period or, otherwise, after the making of the declaration. An intractable bargaining workplace determination is required to include "agreed terms" and the terms that the Commission considers deal with the matters still in issue.[5]

[13] A workplace determination has, in substance, the same effect as an enterprise agreement albeit that separate provision is made with respect to the operation and coverage of workplace determinations and the interaction between a workplace determination and an enterprise agreement.[6] When a workplace determination comes into operation, any existing enterprise agreement that applies to an employee in relation to particular employment ceases to apply to the employee in relation to that employment and can never so apply again.[7] The workplace determination will cease to apply to an employee if a later enterprise agreement comes into operation that covers the employee in relation to the particular employment after the workplace determination is made.[8]

[14] The provisions governing the operation of a workplace determination have some significance in the present matter given the reasoning of the Deputy President. In particular, s 279 of the Act provides that the Act applies to a workplace determination as if it were an enterprise agreement, but with certain adjustments. Section 279 provides:

> **279 Act applies to a workplace determination as if it were an enterprise agreement**
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> (1) This Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.
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> (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).
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> (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.

[15] As the Deputy President observed, the effect of s 279(2)(f) is to limit the capacity of an employer and its employees, and the Commission, to vary or terminate a workplace determination.[9] A workplace determination can only be varied by the Commission under s 218A to correct an error, defect or irregularity or under s 218 on referral from the Australian Human Rights Commission. The effect of s 279(3) is that a workplace determination may be terminated by agreement under s 219 or by the Commission on application under s 225 only after the nominal expiry date of the workplace determination. As is the case with an enterprise agreement, a workplace determination continues to operate until it is either terminated, or it ceases to have effect as a result of an enterprise agreement or another workplace determination coming into operation.

Decision of the Deputy President

[16] The Deputy President recorded that APESMA is a registered organisation of employees and is entitled to represent the industrial interests of Deputies employed in the black coal industry, including at the Ulan West mine. 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. The Deputy President noted that, in recent years, the Deputies have received annual pay increases of 4.5 per cent, 5 per cent and 4.56 per cent, a $16,000 regional allowance, and increases in total fixed remuneration through short-term incentive payments.[10]

[17] In 2021, APESMA asked Ulan West to commence bargaining for an enterprise agreement to cover Deputies employed at the Ulan West mine. The Deputy President noted that employment of the Deputies has never been covered by an enterprise agreement, but that Ulan West agreed to commence bargaining and issued a Notice of Representational Rights (NERR) on 9 December 2021. The parties then participated in bargaining, including several conferences in the Commission convened utilising the Commission's powers to deal with disputes about bargaining under s 240 of the Act. The Deputy President recorded that Ulan West accepts that bargaining is intractable but submitted that s 235(2)(c) contains a clear statutory directive that it may not be reasonable to make an intractable bargaining declaration even if there are no reasonable prospects of agreement.[11]

[18] After recounting the evidence and submissions relied upon by the parties, the Deputy President made certain observations in relation to the statutory context in which the intractable bargaining provisions appear. The Deputy President noted that the Commission is able to

directly arbitrate the terms of a new workplace instrument only in two specific circumstances: when protected industrial action in relation to a proposed enterprise agreement is terminated or when an intractable bargaining declaration is made.[12] In relation to the introduction of the intractable bargaining provisions into the Act, the Deputy President stated:

> **[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.
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> **[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.
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> **[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.

[19] In describing the provisions which, prior to the SJBP Act, permitted the Commission to arbitrate the terms of a workplace determination, paragraph [58] of the decision omits reference to a "bargaining related workplace determination" which was previously able to be made under s 269 of the Act as it existed prior to those amendments. A bargaining-related workplace determination could be made if a serious breach declaration had been made in relation to a proposed enterprise agreement because one or more bargaining representatives had contravened bargaining orders made by the Commission in a manner that was serious and sustained and had significantly undermined bargaining for the agreement.[13]

[20] In relation to the assessment of reasonableness now required by s 235(2)(c), the Deputy President made the following observations which are central to one of the complaints made by APESMA on appeal:

> **[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.
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> **[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.

[21] As will need to be examined below, APESMA contends that the Deputy President erred in approaching the question of whether it was reasonable in all the circumstances to make an intractable bargaining declaration for the purposes of s 235(2)(c) on the basis that the Commission's power of arbitration "should not be lightly engaged".

[22] The Deputy President proceeded to consider the views of the bargaining representatives as required by s 235(2)(c). The Deputy President said that, given Ulan West and APESMA have diametrically opposed views in relation to the making of a declaration, the views of the bargaining representatives "do not take the consideration very far".[14] In considering the relationship between the parties, the Deputy President noted that the Deputies pushed for an enterprise agreement and now a workplace determination because they want greater security in their terms and conditions and that Ulan West opposed the making of a declaration "because it is concerned that it will lose flexibilities that it currently pays for by providing high wages, guarantees of annual earnings and enhanced employment benefits".[15]

[23] The Deputy President accepted that both Ulan West and APESMA had a logical and rational basis for rejecting the other party's proposal and asserted that "choosing not to make an agreement at all has been a viable alternative for all parties throughout the bargaining".[16] The Deputy President continued:

> **[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.

[24] The Deputy President considered that there was a material risk that both parties will be disadvantaged by the terms that are arbitrated by the Commission. The Deputy President continued by stating that it was not clear that the intractable bargaining provisions are intended to apply to employees such as the Deputies. The Deputy President said:

> **[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.

[25] The Deputy President acknowledged that 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", but concluded that the high salaries of the Deputies, considered in conjunction with other factors, meant that it was "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".[17] The Deputy President further concluded that "[g]iven 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".[18]

[26] The Deputy President then considered the history of bargaining and the conduct of the parties and accorded significance to the fact that the Deputies have not historically been covered by enterprise agreements. The Deputy President observed that the parties had made genuine and earnest attempts to bridge the gap but that "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".[19] In relation to the views of employees, the Deputy President accepted that a significant number of Deputies support the application for an intractable bargaining declaration and that this is a significant factor.[20] Finally, the Deputy President was not satisfied that there is a substantial risk of ongoing protected industrial action.[21]

[27] The Deputy President summarised his reasons for finding that it was not reasonable in all the circumstances to make an intractable bargaining declaration as follows:[22]

> (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;
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> (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 [sic] 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.

[28] The consequence of the Deputy President not being satisfied that it was reasonable in all the circumstances to make an intractable bargaining declaration for the purposes of s 235(2)(c) of the Act is that an intractable bargaining declaration could not be made. APESMA's application was, accordingly, dismissed.

Permission to appeal

[29] APESMA requires permission to appeal under s 604(1) of the Act. The Full Bench is required, by s 604(2), to grant permission to appeal if it considers it is in the public interest to do so. Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted. Grounds upon which permission to appeal might be granted have commonly included whether the decision is attended with sufficient doubt to warrant its reconsideration, whether substantial injustice may result if permission is refused and whether an arguable case of appealable error is demonstrated.[23]

[30] Ulan West submits that permission to appeal should be refused in circumstances in which the application for an intractable bargaining declaration was sought in the proceedings only with respect to a small cohort of employees at one workplace and that the circumstances of the employees are "quite unique" in that the Deputies are high earning employees to whom no industrial instrument presently applies. APESMA, on the other hand, contends that permission to appeal should be granted because it has raised arguable grounds of appeal, grounds one to five raise important issues of principle about the correct approach to s 235 of the Act and that the outcome of the decision of the Deputy President is to permit an intractable impasse in bargaining to continue.

[31] We consider that it is in the public interest to grant permission to appeal given the nature of the submissions advanced by APESMA on appeal and, in any event, would grant permission

to appeal in exercise of the broader discretion contemplated by s 604(2). The submissions advanced by APESMA in relation to s 235 of the Act raise important questions of principle in relation to recent amendments to the Act and, in particular, the approach to be adopted when assessing if it is reasonable in all the circumstances to make an intractable bargaining declaration for the purposes of s 235(2)(c). Permission to appeal should be granted to permit the Full Bench to consider those questions. We also believe that the consequences of the Deputy President's decision have a substantial impact on the parties, including the Deputies. This consideration also favours permission to appeal being granted.

[32] At the hearing of the appeal, Ulan West tendered an email communication from one of the Deputies at the Ulan West mine, David Knespal, dated 5 August 2025. The email attached a document titled "Subject: Request to Cease Enterprise Agreement Bargaining Process and Intractable Bargaining Appeal" and appears to be signed by 19 of the Deputies. The document states that the signatories no longer wish to continue participating in the current enterprise bargaining process and request that the application or appeal be withdrawn or discontinued. The email and the attached document were relied upon solely in relation to permission to appeal and were admitted as further evidence on appeal for the purposes of s 607(2) of the Act on that basis. Ulan West also referred the Full Bench to evidence which suggested that one of the issues which animated the desire of Deputies to seek an enterprise agreement arose from concerns about the implementation of the Additional Hours Policy. Ulan West submitted that the Additional Hours Policy had been amended to address these concerns and, as we understood it, suggested that this may have prompted a change of view by employees.

[33] The further evidence relied upon by Ulan West does not persuade us that permission to appeal should be refused. The email and the attached document were tendered in isolation and in the absence of any evidence indicating the context in which it was prepared or the reasons of any of the individuals for signing the document. The submission that permission to appeal should be refused based on the document, in substance, asked the Full Bench to determine that, given its contents, an intractable bargaining declaration would not be granted. If there is evidence that some or all of the Deputies no longer wish to bargain for an enterprise agreement, that may be relevant to the assessment of whether it is reasonable in all the circumstances to make a declaration for the purposes of s 235(2)(c). However, as Ulan West accepted, that would be one consideration to be considered in the context of the whole of the circumstances that now exist in relation to the workplace and the bargaining.

[34] The hearing before the Deputy President took place more than 12 months ago. The Full Bench has no information before it in relation to the current circumstances applying at the workplace or in relation to the bargaining which would permit us to assess whether a declaration is likely to be made if the appeal is successful. APESMA has had no opportunity to interrogate or respond to the document tendered by Ulan West. We are not in a position to determine that an intractable bargaining declaration should not be made even if the document reflects the current views of a majority of the Deputies. As to the changes made to the Additional Hours Policy, the document in evidence before the Deputy President was implemented in January 2024. The Deputy President was nonetheless satisfied arising from evidence given at a hearing in September 2024 that a significant number of Deputies supported the application for an intractable bargaining declaration. That reference to the evidence is unpersuasive.

[35] For these reasons, permission to appeal should be granted.

Nature of the appeal

[36] Appeals to the Full Bench under s 604(1) of the Act are appeals by way of rehearing.[24] The consequence is that the Full Bench can only exercise its powers on appeal if there was an error in the decision at first instance. The function of the Full Bench on appeal, if permission to appeal is granted, is to determine whether there was an error on the part of the primary decision-maker.[25] We are conscious that the role of the Full Bench is to determine whether there is error in the decision of the Deputy President.

[37] A distinct question then arises as to the standard of appellate review applicable to the particular decision under consideration.[26] Under the correctness standard, the appellate bench determines for itself the correct outcome whilst making due allowance for such advantages as may have been enjoyed by the decision-maker who conducted the trial or hearing. In case of a discretionary decision, the approach in *House v The King* (1936) 55 CLR 499 dictates that appellate intervention is limited to circumstances where the decision-maker at first instance acted upon a wrong principle, or allowed extraneous or irrelevant matters to affect the decision, mistook the facts, failed to take into account some material consideration or made a decision that was unreasonable or plainly unjust.[27]

[38] APESMA accepts that it is necessary for it to demonstrate error of the nature referred to in *House v The King*. It is correct to do so. The assessment required by s 235(2)(c) is whether the member of the Commission is satisfied that it is reasonable in all the circumstances to make an intractable bargaining declaration, taking into account the views of the bargaining representatives. The process by which the Commission does, or does not, reach a state of satisfaction about that matter is properly described as involving the making of an evaluative judgment of a discretionary nature.[28] The subsection contemplates that a broad value judgment is to be made and the legal criterion to be applied tolerates a range of outcomes.[29]

[39] The grounds of appeal relied upon by APESMA seek to establish two forms of error. Grounds one to five contend that the Deputy President acted on a wrong principle in various ways and grounds six to eight allege that the Deputy President made mistakes of fact or factual findings that were not open on the evidence. A member of the Commission will have acted on a wrong principle, for the purposes of establishing error in the exercise of a discretion, in circumstances in which they apply an incorrect legal rule or principle, misunderstand or misapply the law, or otherwise base their decision on an erroneous legal foundation. If the Commission misconstrues the statutory provisions under which a decision must be made, it will commonly have misunderstood the nature of the opinion required to be formed.

Grounds one and two: Opinion required to be formed by s 235(2)(c)

[40] It is convenient to first address grounds one and two. Grounds one and two each allege that the Deputy President acted on a wrong principle. In those grounds, APESMA contends that the reasons of the Deputy President demonstrate that he misconstrued the nature of the opinion required to be formed by s 235(2)(c) of the Act by:

(a) Proceeding on the basis that the Commission's arbitration powers should not be "lightly engaged" (**Ground one**);

(b) Regarding the intractable bargaining provisions as contrary to, or in tension with, providing a "fair framework that enables collective bargaining in good faith, particularly at the enterprise level" (**Ground two**).

[41] The reasons of the Deputy President are detailed and carefully considered and address recently enacted provisions of the Act which have been, as yet, subject of relatively little authoritative consideration. With respect, however, we have concluded that APESMA has demonstrated that the Deputy President misunderstood, or misapplied, the statutory context in which the Commission is required to form the state of satisfaction in s 235(2)(c) in the manner contended in grounds one and two of the notice of appeal. In summary, the Deputy President erred by approaching the question of whether it was reasonable in all the circumstances to make a declaration on the basis that the Commission's powers to make a workplace determination should not be "lightly engaged" and that making an intractable bargaining declaration undermined or is in tension with the regime for collective bargaining, particularly at an enterprise level, otherwise created by Part 2-4.

[42] To address grounds one and two, it is necessary to examine the intractable bargaining provisions introduced by the SJBP Act, and the context in which they appear, in a little more detail. Since its commencement, the Act has made provision in Part 2-4 for collective bargaining and the making and approval of enterprise agreements. The broad structure of the Act is that it prescribes a safety net of minimum terms and conditions of employment through the National Employment Standards, modern awards and national minimum wage orders. The provisions in the National Employment Standards cannot be excluded by an enterprise agreement.[30] Terms and conditions of employment that are more beneficial than, or different to, the conditions contained in a relevant modern award can be attained through enterprise bargaining so long as an enterprise agreement meets the requirements for approval. Those requirements include that each award covered employee, and each reasonably foreseeable employee, would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.[31]

[43] Enterprise agreements are a significant, if not the predominant, means adopted by the Act for the establishment of terms and conditions of employment, and collective bargaining, required to be in good faith, is the means by which such agreements come to be made.[32] The establishment of terms and conditions of employment by enterprise agreements is a central pillar of the regulatory regime established by the Act.[33] The object of the Act includes, in s 3(f), the following:

> (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; …

[44] The objects of Part 2-4 of the Act are:

> **171 Objects of this Part**
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> 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.

[45] It is plain from ss 3(f) and 171(a), in particular, that the Act regards collective bargaining, particularly at the enterprise level, as having the potential to produce positive outcomes for both employers and employees and for the Australian economy as a whole. The Act treats collective bargaining as having the potential to produce beneficial outcomes for employees in the form of wage increases and improvement of conditions of employment and for employers in the form of flexibility and improvements in productivity.

[46] The Act establishes procedures relating to the conduct of bargaining, including a requirement for an employer to give employees a notice of employee representational rights (s 173(1)), the appointment of bargaining representatives (s 176) and for certain steps to be taken to disclose relevant information to employees and to explain the agreement (ss 179-180). Good faith bargaining requirements are prescribed in s 228. The Commission can make bargaining orders if, among other things, bargaining representatives are not meeting the good faith bargaining requirements (s 230(1)). The outcome of a collective bargaining process is, subject to satisfaction of the approval requirements, primarily left to the parties. An enterprise agreement is made either by being approved by a vote of employees that will be covered by the proposed agreement (s 182(1) and (2)) or, in the case of a greenfields agreement, by being signed by each employer and each relevant employee organisation that the agreement is expressed to cover (s 182(3)) or had a reasonable opportunity to do so (s 182(4)).

[47] From the time of its enactment, the Act recognised that there may be circumstances in which a process of collective bargaining is not likely to successfully result in an enterprise agreement being made, or the cost and inconvenience being caused by bargaining is too great. In those circumstances, the Act authorised the Commission to arbitrate matters that remained unresolved by making a workplace determination. Initially, three forms of workplace determination were possible being a low-paid workplace determination, an industrial action related workplace determination and a bargaining-related workplace determination.

[48] Most relevantly for present purposes, prior to the amendments made by the SJBP Act, s 234 of the Act permitted a bargaining representative for a proposed enterprise agreement to apply for a "serious breach declaration". The Commission could make a serious breach declaration under s 235(1) if it was satisfied of the matters set out in subsection (2) as follows:

(2) The FWC must be satisfied that:
(a) one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement; and
(b) the contravention or contraventions:
  (i) are serious and sustained; and
  (ii) have significantly undermined bargaining for the agreement; and
(c) the other bargaining representatives for the agreement (the ***designated bargaining representatives***) have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and

(d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and
(e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

[49] If a serious breach declaration was made, the Commission was required to make a bargaining-related workplace determination by what was then s 269(1) of the Act if the "post-declaration negotiating period" ends and the bargaining representatives had not settled all matters that were in issue during the bargaining. The Commission was required, by s 270(3), to include in a workplace determination terms that it considered dealt with the matters that were still in issue at the end of the post-declaration negotiating period.

[50] The provisions dealing with serious breach declarations and bargaining-related workplace determinations were repealed by the SJPB Act. It is apparent that Parliament did not regard those provisions as having operated effectively. The Revised Explanatory Memorandum to the SJBP Bill stated:[34]

> 821. The amendments in Part 18 of Schedule 1 would support the FWC to assist parties involved in bargaining for a new enterprise agreement to resolve disputes arising in bargaining.
>
> 822. The amendments would provide for the FWC to issue an intractable bargaining declaration if satisfied, among other things, that there is no reasonable prospect of the bargaining parties reaching agreement.
>
> …
>
> 825. Following any post-declaration negotiation period, the amendments would provide for the FWC to make a workplace determination to resolve any matters on which agreement had not been reached by the parties.
>
> 826. The amendments would repeal the existing provisions for serious breach declarations and bargaining-related workplace determinations as these provisions have not been effective in assisting parties to resolve bargaining disputes and would no longer be required following the commencement of the new intractable bargaining provisions.
>
> 827. These amendments support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them.

[51] The Revised Explanatory Memorandum annexed the Regulation Impact Statement with respect to the Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit. The Regulatory Impact Statement expressed the view that the existing options to progress bargaining which had become protracted were limited and continued:[35]

> Alternative dispute resolution methods such as arbitration can provide a pathway out of protracted bargaining and can provide bargaining parties with an alternative to industrial action. The Fair Work Act contains an existing framework to arbitrate disputes, however, arbitration can only be accessed by mutual consent in normal circumstances. Mutual consent may be difficult to achieve in industries especially with historic and entrenched disputation. However, arbitration can resolve disputes sooner and reduce the bargaining period (especially where bargaining would otherwise have become protracted).

> The lack of access to arbitration means that employers or unions with significant bargaining power can refuse to make concessions during bargaining (surface bargaining). One-sidedness in collective bargaining can dissuade the weaker party from participating meaningfully, which is likely contributing to the low level of bargaining that is currently occurring under the Fair Work Act. This can be the intended effect of bargaining tactics, such as threats to terminate existing enterprise agreements, which can cause employees to accept offers they otherwise would not agree to, and bring bargaining to an end.

[52] The lack of access to arbitration was perceived to be impeding effective bargaining and permitting employers and unions to refuse to make concessions during bargaining. The Regulatory Impact Statement considered that the outcome of improving real wage growth in a manner that is sustained by productivity could be achieved by increasing the rate of bargaining, among other things, by ensuring the Commission is able to assist parties in bargaining to reach outcomes.[36] It is instructive, in this respect, that an intractable bargaining declaration can be sought by any bargaining representative. In this instance, the application was made by a union. In other cases, an application is made by the employer.[37] In some of those cases, the application has been opposed by the union or unions representing relevant employees.

[53] In the second reading speech to the SJPB Bill, the Minister said:[38]

> **A stronger role for the Fair Work Commission**
>
> The bill will allow the Fair Work Commission to resolve intractable disputes through arbitration, where there is no reasonable prospect of agreement being reached.
>
> These changes are intended to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes.

[54] It is apparent from the extrinsic materials, and from the provisions inserted into the Act themselves, that Parliament regarded the previous provisions providing for the Commission to make a serious breach declaration and bargaining-related workplace determination as inadequate to address protracted bargaining disputes. The amendments were intended to enhance the circumstances in which the Commission can determine issues which cannot be resolved in bargaining. The intent of the provisions is that the availability of arbitration to make a workplace determination is not merely that the Commission can step in to resolve intractable disputes. The prospect of arbitration by the Commission is intended to provide an incentive to encourage industrial parties to bargain in good faith and to make reasonable concessions and, in that manner, improve bargaining outcomes and reduce the time taken for enterprise agreements to be finalised.

[55] The threshold for making an intractable bargaining declaration has been, accordingly, reduced in the new provisions compared to those applying to a serious breach declaration. After the end of the minimum bargaining period, the Commission may make an intractable bargaining declaration if satisfied of the three matters set out in s 235(2) being that the Commission 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, there is no reasonable prospect of agreement being reached if the FWC does not make the declaration and it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

[56] If the Commission is satisfied that there is no reasonable prospect of agreement being reached, there remains a further requirement that the Commission be satisfied that it is reasonable in all the circumstances to make the declaration. In relation to that requirement, the Revised Explanatory Memorandum states:[39]

> 847. 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.

[57] There is some lack of clarity in the matters identified as being matters the Commission might consider in assessing whether it is reasonable in all the circumstances to make the declaration. The reference to the history of the bargaining and the conduct of the parties might be intended to indicate that the Commission may conclude it is not reasonable to make a declaration if bargaining representatives have behaved unreasonably in bargaining, perhaps particularly the applicant for the declaration. We agree with the Deputy President that the examples connect the assessment of reasonableness to the consequences of making a declaration, namely, that a workplace determination will likely be made.[40] For example, the prevailing economic conditions, and the bargaining environment might be relevant if the reasons bargaining had become intractable related to the uncertainty of the economic circumstances affecting the employer or the relationship with other bargaining processes.

[58] The assessment of whether it is reasonable in all the circumstances to make a declaration involves a broad value judgment in relation to which a range of matters might conceivably be relevant. However, in our opinion, the manner in which the Deputy President approached the assessment discloses a misunderstanding of the statutory scheme in which the assessment is to be made which we have endeavoured to describe. In that respect, it is necessary to consider the errors identified in grounds one to two together.

[59] In relation to ground one, nothing in the statutory scheme, or the legislative history, supports approaching the assessment of whether it is reasonable in all the circumstances on the basis that the Commission's arbitration powers should not be "lightly engaged" as the Deputy President did in paragraph [63]. It is a possible outcome of an intractable bargaining declaration application that the Commission may find it is not reasonable to make a declaration notwithstanding that there is no reasonable prospect of agreement being reached. However, the language of s 235 does not suggest that the Commission should approach the question of reasonableness with an attitude of reticence or disinclination to make a declaration having the effect of opening the capacity of the Commission to make a workplace determination.

[60] Section 235(2)(c) asks only whether the Commission is satisfied that it is reasonable in all the circumstances to make the declaration. APESMA submits, and we accept, that the requirement that the Commission be satisfied of the reasonableness of making a declaration is value neutral. The standard of reasonableness does not suggest that the Commission should approach that assessment with any inclination or disinclination to make a declaration. If the Act had intended that a higher threshold be met before an intractable bargaining declaration should be made, it could have used language such as requiring that "good reason", "special

circumstances" or "exceptional circumstances" be demonstrated before that course is taken. A formulation "exceptional circumstances", in particular, is used throughout the Act.[41] No similar language is used in s 235(2). In our view, the language of s 235 is inconsistent with the approach adopted by the Deputy President that the powers of the Commission to make a workplace determination should not be "lightly engaged" by making a declaration.

[61] Ulan West submits that, understood in the context of the decision as a whole, the phrase "lightly engaged" in paragraph [63] does not indicate the Deputy President imposed a "high hurdle", "heavy onus" or "presumption against" a declaration being made. With respect, in our opinion, the statement that the Commission's arbitration powers are not to be "lightly engaged" cannot be read other than as imposing an additional threshold to be satisfied before the Commission should conclude that it is reasonable to make a declaration which is not warranted by the text of s 235 or, as we will come to, the statutory context. The assertion that the Commission's arbitration powers are not to be "lightly engaged" was clearly a considered aspect of the Deputy President's decision and, in our view, indicates that he adopted a predisposition against making a declaration.

[62] Other aspects of the decision support the conclusion that the Deputy President approached the application on the basis that a declaration should not be made unless a higher threshold is met. The Deputy President referred on a number of occasions to the Commission's "very limited" arbitration powers outside the modern award safety net when summarising his reasons for declining to make a declaration.[42] In one sense, it is correct to say that the Commission's power to make a workplace determination is limited. A workplace determination can only be made if the circumstances exist in which industrial action has been terminated or bargaining has become intractable. However, if those circumstances do exist, as they do in this case, the repeated observation that the Commission's arbitration powers are "very limited" is only relevant if it is being employed to justify a view that the Commission should be reticent to make a declaration which could result in a workplace determination being made.

[63] Courts and tribunals generally refer to a power not being "lightly exercised" in circumstances in which there is a threshold or standard to be met. For example, the exercise of a power to dismiss proceedings for want of prosecution without determination on the merits is a serious step which has the effect of curtailing an applicant's substantive rights and "must not be lightly exercised".[43] The High Court has said that its power to reconsider an earlier decision is not to be "lightly exercised" because of the importance of the principle of *stare decisis*.[44] When granting leave for documents to be used for a purpose other than the litigation in which they were produced outside the uses contemplated by the *Hearne v Street* obligation, it has been said that the power is not to be "lightly exercised" because "special circumstances" are required.[45] The discretion to refuse relief where a party has been denied procedural fairness should not be "exercised lightly" because of the importance of executive and administrative powers being exercised according to law.[46] The decision of the Deputy President should be understood to have adopted that type of approach.

[64] In its oral submissions, Ulan West submitted that it was appropriate for the Deputy President to require a "high degree of satisfaction" before concluding it is reasonable in all the circumstances to make a declaration and that taking the outcome of bargaining away from the parties "is not something to be taken lightly". In making those submissions, Ulan West relied on the emphasis on enterprise-level bargaining in the object of the Act and the objects of Part

2-4. On this submission, making an intractable bargaining declaration involves a departure from enterprise-level bargaining that should only take place if good reason is shown and the Commission has reached a "high degree of satisfaction" that it is reasonable for a declaration to be made. For reasons to which we will now turn in dealing with ground two, we do not accept that the statutory context supports a posture of reticence to making an intractable bargaining declaration.

[65] In relation to ground two, the context provided by Part 2-4 does not support the proposition that the Commission should adopt an attitude of reluctance when considering whether it is reasonable to make a declaration. The reason given by the Deputy President in paragraphs [62] and [63] for saying that the Commission's arbitration powers should not be "lightly engaged" is that the power of arbitration by way of making a workplace determination is available within the framework designed to enable and support agreements, particularly at the enterprise level. The reasons of the Deputy President suggest that he understood making an intractable bargaining declaration, and the prospect of a workplace determination being made, as being in tension with or antithetical to the emphasis placed on encouraging and enabling bargaining, particularly at an enterprise level, in Part 2-4 of the Act.

[66] Such an approach misunderstands the statutory context in which the assessment required by s 235(2)(c) is to be undertaken. For the reasons we have explained, the capacity of the Commission to make an intractable bargaining declaration (and, if necessary, a workplace determination) is intended to foster and support collective bargaining. Making a declaration is not inconsistent with enterprise-level collective bargaining. The statutory history and extrinsic materials demonstrate that the intractable bargaining provisions are intended to ensure that the possibility of the Commission being required to make a workplace determination if bargaining becomes intractable provides an incentive for industrial parties to bargain genuinely and constructively. The intractable bargaining provisions were enacted because Parliament believed that the serious breach declaration provisions had been ineffective in achieving that purpose and had permitted protracted and intractable bargaining to persist without resolution. The intractable bargaining provisions are an integral part of, and intended to support, the collective bargaining processes otherwise created by Part 2-4. Achievement of the statutory object is liable to be defeated, or at least impeded, if the Commission adopts a posture of reticence when assessing if it is reasonable to make a declaration for the purposes of s 235(2)(c). The Deputy President erred in approaching the assessment required by s 235(2)(c) in the manner he did.

[67] Furthermore, if an intractable bargaining declaration is made and the bargaining not otherwise resolved, the Commission must make a workplace determination. The workplace determination remains an outcome of the collective bargaining process. The workplace determination will cover the same employees as would have been covered by the proposed enterprise agreement. Typically, that will be at an enterprise level. The Commission is required to include in a workplace determination any "agreed terms" being terms the bargaining representatives had agreed, at a relevant time, should be included in the agreement.[47] The Commission only determines what terms should be included to deal with the matters still at issue between the bargaining representatives.[48] The approach the Commission has adopted when making a workplace determination has been to assess what it considered to be the appropriate outcome to the particular bargaining process. In *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242, for example, the Full Bench summarised the task of the Commission as follows:[49]

> But the task we are presently engaged in is quite different to the making or variation of an award. As explained by the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Curragh Queensland Mining Ltd* the task of the Commission in a matter such as this is to assess the respective positions of the parties in relation to the matters at issue and, by reference to the relevant statutory factors, arrive at a conclusion that would be regarded as appropriate in the context of bargaining, had the bargaining concluded successfully. Such an approach does not involve a form of subjective prognostication as to the outcome of the negotiations, but rather involves an objective assessment of the statutory factors and an overall judgement as to an appropriate determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement.

[68] In determining the matters that remain at issue between the bargaining representatives, the Commission sets conditions it considers are appropriate to apply to the particular workforce in the particular circumstances of the operations in question. The content of the workplace determination will, in part, be determined by the Commission. A workplace determination remains an instrument which is a product of an enterprise bargaining process as envisaged by the Act.

[69] The Deputy President acknowledged in his reasons that the introduction of the intractable bargaining regime had changed the dynamics of enterprise bargaining and was a measure "that assists those with weaker bargaining power to secure an agreement". The Deputy President saw this as being the case because 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".[50] We do not think, as Deputy President Saunders does, that this indicates that the Deputy President correctly understood the legislative intent behind the intractable bargaining provisions or that those provisions are consistent with, and support, enterprise-level bargaining.

[70] The bargaining strategy suggested by the Deputy President represents the inverse of the dynamic Parliament hoped to promote. Parliament anticipated that the intractable bargaining provisions will provide an incentive for parties to bargain constructively and discourage parties being obstinate or refusing to make concessions. The passage at paragraph [63] makes clear that the Deputy President regarded the fact that the power to make a workplace determination "is available within the framework designed to enable and support agreements, particularly at the enterprise level" as a reason for reticence in making a declaration and why the power should not be "lightly engaged". The opposite is the case. Parliament intended that the intractable bargaining regime would provide more ready access to arbitration to encourage and support genuine bargaining at the enterprise level. If one bargaining representative has an incentive to hold out for the status quo, that has the potential to undermine bargaining. The intractable bargaining provisions increase the risk that comes with holding out for no agreement, relative to the risk of making an agreement. To avoid the opposite incentive arbitration must also carry risk, relative to reaching agreement. If both of these alternatives – holding out for status quo, or holding out for an arbitrated outcome – carry sufficient risk relative to reaching agreement, that can encourage bargaining as a rational course of action for all involved.

[71] Every negotiation will have its own dynamics informed by the circumstances in which it is occurring. Measures aimed at ameliorating incentives to hold out would not work if they operated in a mechanistic manner. This is implicitly recognised in the statutory scheme which

provides for a discretionary rather than automatic exercise of the power to make a determination pursuant to s 235. It is possible that, in a particular bargaining process, one bargaining representative might adopt an approach of attempting to hold out in the hope of a better outcome in the arbitration resulting in the making of a workplace determination. If a bargaining representative adopted the type of strategy envisaged by the Deputy President, that factor is likely to be relevant to the assessment of reasonableness for the purposes of s 235(2)(c). If an applicant for an intractable bargaining declaration had not participated genuinely or constructively in bargaining, that might support a finding that it was not reasonable to make a declaration in all the circumstance. There is, however, no suggestion in this matter that APESMA, or the Deputies, did not participate appropriately in bargaining in this matter.

[72] For these reasons, in our opinion, the Deputy President erred in the formation of the opinion that it was not reasonable in all the circumstances to make a declaration because he proceeded on the basis of a misapprehension of the statutory context in which the opinion was to be formed. In our opinion, the Deputy President wrongly approached the question on the basis that access to the Commission's power to make a workplace determination should not be "lightly engaged" and is inconsistent or in tension with the regime of enterprise bargaining provided for in Part 2-4 of the Act.

Grounds three to eight: Remaining grounds

[73] In circumstances in which we are satisfied that APESMA has demonstrated error in the decision of the Deputy President with respect to grounds one and two, it is not strictly necessary to address grounds three to eight. However, it is appropriate to make some observations in relation to these grounds at least in brief terms.

[74] In relation to ground three, APESMA contends that the Deputy President acted on a wrong principle in considering that the "high salaries paid to Deputies" was a matter that (together with other matters) meant that it was not reasonable to make an intractable bargaining declaration. We do not accept that the existing wages and conditions of the employees to be covered by a proposed enterprise agreement is necessarily irrelevant to whether it is reasonable in all the circumstances to make an intractable bargaining declaration. Furthermore, the Deputy President referred not only to the level of the salaries of the Deputies, but also that they had received increases in pay in recent years in the absence of bargaining through a salary review system and to some other conditions of employment including hours of work. The nature and method of determination of existing rates of pay and conditions for employees might be part of the circumstances which could be considered in assessing if it is reasonable to make a declaration for the purposes of s 235(2)(c).

[75] It would be an error to consider whether it is reasonable in all the circumstances to make an intractable bargaining declaration purely by considering whether it is necessary to do so to protect lower paid employees. Nothing in the Act suggests that enterprise bargaining is only available for lower paid employees, or that a workplace determination should only be made with respect to lower paid employees. The capacity to make a workplace determination following an intractable bargaining declaration is not for the purpose of providing minimum entitlements to employees, but for the purpose of providing a fair and appropriate resolution to the bargaining for all parties. The task is distinct from the function of setting minimum terms and conditions of employment in a modern award.[51] The assertion in paragraph [84] that "it is

not clear that the intractable bargaining provisions in the Act are intended to apply to the Deputies' circumstances" because they "do not need the safety net protection of the modern award system" provides some support for the conclusion that the Deputy President held this view. However, the Deputy President elsewhere acknowledged that a workplace determination involves arbitration "beyond" the minimum safety net.[52] In any event, ground three, as framed, cannot be accepted. It was not an error simply to consider the level of salaries of the Deputies, at least together with other matters relating to their terms and conditions of employment, in making the assessment required by s 235(3)(c).

[76] In relation to ground four, APESMA contends the Deputy President acted on a wrong principle by considering in paragraph [83] and [108](m) that the fact that "both parties risk an adverse outcome in an arbitration" was a matter that meant it was not reasonable to make an intractable bargaining declaration. There is some difficulty in identifying what risk of disadvantage is being referred to by the Deputy President in those paragraphs. If the risk is that each party might not achieve their claims, such a risk is an inherent (and, indeed, intended) consequence of the jurisdiction of the Commission to make a workplace determination. To the extent that the Deputy President envisaged that the Deputies were at risk of a "reduction in employment conditions", it is unclear why the existing contractual rights of currently employed Deputies could be reduced by a workplace determination.[53] However, APESMA's submission is that the Deputy President was wrong to treat the generation of unknown and unspecified risks for each party as a matter weighing against the making of a declaration and, as a result, acted on a wrong principle. We are unable to discern how the Deputy President's consideration of the risks he envisaged might follow if a declaration was made gives rise to an error of principle or a misunderstanding of the opinion required to be formed by s 235(2)(c). We do not accept that ground four demonstrates error in the decision of the Deputy President.

[77] In relation to ground five, APESMA contends that the Deputy President erred in paragraph [92] by treating as a "significant factor" against the making of a declaration that there was no history of bargaining involving the Deputies, and no previous enterprise agreement, prior to the current round of bargaining. APESMA submits that the approach adopted by the Deputy President implicitly introduced a presumption or bias against first-time workplace instruments without any statutory foundation to justify such an approach. In our view, the existing arrangements for the determination of the terms and conditions of employment of the relevant employees, including the history of enterprise bargaining involving the employees, are capable of being relevant to whether it is reasonable in all the circumstances to make an intractable bargaining declaration. If that is the case, APESMA's complaint is no more than that the Deputy President attached too much weight to the fact that the Deputies have not previously been covered by an enterprise agreement. Such a complaint could not demonstrate appealable error. Furthermore, the Deputy President did not consider the absence of previous bargaining processes in isolation. The Deputy President also referred to the existing arrangements implemented by Ulan West to set salaries and conditions for the Deputies.

[78] In relation to ground six, APESMA contends that the Deputy President erred in paragraph [77] by finding that "APESMA has not led any evidence of any apparent uncertainty or specific risks to the employment conditions of Deputies". APESMA refers to a number of aspects of the evidence given by Tom Edwards, a Senior Organiser employed by APESMA, which it says is inconsistent with the assertion that there was *no* evidence of any uncertainty or risks to the existing conditions of the Deputies. In this respect, we accept the submissions of

Ulan West that the evidence of Mr Edwards primarily concerned the positions advanced by Ulan West in bargaining and did not suggest uncertainty in, or risk to, the existing employment conditions of the Deputies if no enterprise agreement was made. To the extent that APESMA refers to evidence of uncertainty around a potential sale and demerger process relating to the mine, the evidence was that there were no developed plans to pursue a demerger or that a demerger would threaten the employment contracts of the Deputies. It follows that no error is demonstrated in the manner alleged in ground six.

[79] In relation to ground seven, APESMA contends that the Deputy President erred in paragraph [80] by finding that "the Deputies have significant market power to secure attractive conditions of employment and ongoing wage increases". APESMA submits that the passage reveals a fundamental misunderstanding of what is meant by the economic concept of "market power" and that the Deputy President was not in a position to make such a finding in the absence of any factual foundation delineating the relevant "market" or what arrangements otherwise existed in the same market. The submission reads too much into paragraph [80]. We do not consider that the Deputy President was saying anything more in that paragraph than that the fact the Deputies have relatively high salaries, and had received regular salary increases, indicated they are valuable in the employment market. No error is demonstrated in the reasons of the Deputy President in that regard.

[80] In relation to ground eight, APESMA contends that the Deputy President erred in paragraph [82] by finding that "neither party would suffer prejudice or disadvantage if the status quo remains". We do not accept that there is any error as alleged in ground eight. We consider that the reference made by the Deputy President in the first sentence of paragraph [82] to no party being "disadvantaged" if a declaration was not made is explained by the second sentence. That is, the Deputy President was satisfied that the Deputies were not at risk of losing their existing employment benefits in the foreseeable future. Understood in that way, there is no error in the finding of the Deputy President that the Deputies would not be disadvantaged if a declaration was not made. The Deputy President was plainly conscious that the Deputies were unlikely to achieve their objectives in the bargaining if no declaration was made.

Conclusion and disposition

[81] For these reasons, permission to appeal should be granted, the appeal allowed, and the decision of the Deputy President quashed. APESMA submits that its application for an intractable bargaining declaration should be remitted to a member of the Commission to be redetermined. Given the passage of time since the hearing before the Deputy President, it will be necessary for further evidence to be before the Commission to determine the application. That is most efficiently done by the matter being remitted to a member of the Commission. We accept, in light of the decision of the Deputy President, that the matter should be remitted to another member of the Commission.

[82] The Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is allowed;
(c) The decision of Deputy President Easton made on 25 June 2025 in matter number B2024/841 is quashed; and

(d) The application in matter number B2024/841 is remitted to be determined by another member of the Commission.

Decision of Deputy President Saunders

[83] I have had the benefit of reading the reasons of Vice President Gibian and Deputy President Butler, which helpfully sets out the relevant parts of the Deputy President's decision, together with the statutory framework.

[84] For the reasons set out below, I do not, with respect, agree with the decision of Vice President Gibian and Deputy President Butler.

[85] Determining whether it is reasonable, in all the circumstances, to take a particular step, such as making an intractable bargaining declaration, necessarily involves consideration of the consequences of that action. This is acknowledged in the Revised Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)*.[54] One significant consequence of making such a declaration is that the Commission is then required to make a workplace determination "as quickly as possible" (s 269 of the Act).

[86] While there remains a window for the parties to reach agreement after the declaration is made and before the Commission issues a workplace determination, in practice, the likelihood of agreement being reached during this period is generally low. This is so because the Commission has already satisfied itself that, after at least nine months of bargaining, "there is no reasonable prospect of agreement being reached if the FWC does not make the determination" (s 235(2)(b) of the Act).

[87] In making a workplace determination, the Commission assumes responsibility for setting at least some of the terms and conditions of employment, thereby removing that power from the parties, except to the extent that they have already agreed on certain matters. Accordingly, an assessment of whether it is reasonable to make an intractable bargaining declaration must take into account, among other things, the likely consequence that the Commission will determine key aspects of employment conditions at the workplace.

[88] Whether it is reasonable for the Commission to intervene in this way depends on a careful evaluation of all relevant facts and circumstances. These include the existing terms and conditions of employment, the bargaining power of the employees, and the economic context of the employer's enterprise. Consider the following examples at either end of the employment spectrum:

(a) *Employer A* operates a highly profitable business and employs workers whose terms and conditions are set by a modern award—the statutory minimum. These employees are highly productive but have little to no bargaining power, and their only wage increases have been those awarded annually by the Commission.

(b) *Employer B* also operates a highly profitable business but employs senior finance executives who earn millions annually. These employees have successfully negotiated annual pay increases of around 10% and receive substantial annual

> bonuses. They possess significant bargaining power and are among the highest paid in their sector.

[89] Assuming the other requirements of s 235 of the Act are met in each case, it would be reasonable to make an intractable bargaining declaration in respect of Employer A, but not Employer B. The employees of Employer A lack bargaining power and have been unable to secure fair and appropriate employment conditions through collective bargaining. By contrast, the employees of Employer B, as a result of their substantial bargaining strength, have already negotiated employment terms that any reasonable observer would regard as more than fair.

[90] In my view, it would not be reasonable to make even a limited workplace determination, covering only some terms and conditions, for the employees of Employer B. Doing so would interfere with the outcomes of a bargaining process in which those employees have successfully leveraged their considerable bargaining power to secure highly favourable arrangements. Such intervention would disrupt the balance struck between the parties.

[91] Although, as counsel for APESMA submitted, high income employees are entitled to use the enterprise bargaining framework to "do even better", the Act does not confer a right on employees to have the Commission impose a workplace determination on the parties merely because agreement has not been reached after nine months of bargaining. The Act permits the Commission to make such a determination only where it is "reasonable in all the circumstances to do so" (s 235(2)(c) of the Act).

[92] In the present case, the small group of about 24 Deputies are paid between $272,000 and $352,000 per year, are entitled to at least five weeks' annual leave and three months' personal leave per year.[55] They work three or four days per week.[56] 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.[57]

[93] As the Deputy President found, the Deputies have considerable bargaining power and have "not needed to bargain collectively in the past to ensure that wages and conditions remain up-to-date and competitive".[58] The following evidence and submissions before the Deputy President supports these findings:

(a) Mr Matthew Stone, Operations Manager of the Ulan West Underground Mine, gave evidence that the mine could not operate without a Deputy being readily available to exercise their statutory functions;[59]

(b) Mr Tom Edwards, Senior Organiser of APESMA, gave evidence that there were significant labour shortages in the industry;[60] and

(c) At first instance, counsel for APESMA submitted to the Deputy President that because it is a really difficult labour market, in which the employer is competing for a limited workforce, the employer pays a regional allowance to attract people to keep working at the mine.[61]

[94] The Deputy President carefully considered these relevant matters, together with a range of other factors referred to in his decision, before reaching his broad evaluative judgment that

it would not be reasonable in all the circumstances to make an intractable bargaining declaration. In reaching this assessment, I am not persuaded that the Deputy President misunderstood, or misapplied, the statutory context or otherwise erred (in the *House v The King* sense) in any of the ways contended for by APESMA.

[95] In grounds one to three of the appeal, APESMA contends that the Deputy President misconstrued the nature of the opinion required under s 235(2)(c) of the Act. These three grounds may be dealt with together. Ground one focuses on the Deputy President's observation at [63] of the decision that "the Commission's arbitration powers should not be lightly engaged". This statement must be read in context. It is well established that appellate courts and tribunals should not subject reasons for decision to analysis through a "fine tooth comb".[62]

[96] In paragraphs [43] to [63], the Deputy President carefully considered the relevant statutory framework, including the objects of the Act and of Part 2-4, both of which underscore the importance of enterprise-level collective bargaining. At paragraph [51], the Deputy President correctly observed that "the Commission's power to directly arbitrate the terms of a new workplace instrument are only available in two specific circumstances".

[97] Having acknowledged the Act's emphasis on collective bargaining and the limited circumstances in which arbitration may be invoked, the Deputy President then stated at paragraph [63] that "the Commission's arbitration powers should not be lightly engaged". When read in context, this observation simply underscores that the Commission's intervention to impose terms, effectively removing the outcome of bargaining from the parties, is a significant step. Significant steps should not be undertaken "lightly"; they should only be taken after carefully considering all relevant matters. This is recognised in s 235 of the Act, which requires the Commission to be satisfied that not only has at least nine months of bargaining resulted in no agreement, the applicant must have participated in the Commission's processes to deal with a s 240 bargaining dispute, there must be no reasonable prospect of agreement being reached if the Commission does not make a declaration, and it must be "reasonable in all the circumstances to make the declaration" (s 235(2)(c)).

[98] It would be an error to approach the question of whether it was reasonable, in all the circumstances, to make an intractable bargaining declaration with reticence, a presumption against making such a declaration, or a general disinclination to do so. However, the Deputy President did not adopt any such approach. The principles articulated at [64] and [65] of the Deputy President's decision, together with their application throughout the reasons, make clear that the Deputy President approached the question in a manner consistent with the statutory framework.

[99] The Deputy President plainly understood that the phrase "in all the circumstances" is unmistakably broad and points against the imposition of binding rules or presumptions in the application of s 235(2)(c) of the Act.[63] Moreover, the reasoning set out at [42], [64(b)], [66]–[68], [75]–[76], [80]–[83], [94]–[104], and [108] demonstrates that the Deputy President correctly recognised that the assessment of reasonableness is an objective one, requiring consideration of the perspectives of employees, bargaining representatives, and the employer, as well as the broader context of the employer's enterprise, including its nature and operational characteristics.[64]

[100] The Deputy President's reasons do not suggest that the making of an intractable bargaining declaration constitutes an extension of the Commission's role in "providing a safety net of minimum conditions enforceable in workplace instruments". At paragraph [62], the Deputy President referred to one of the objects of the Act: namely, to ensure "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" (s 3(b)). He also noted that one of the objects of Part 2-4 is "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" (s 171(a)).

[101] Having considered this statutory context, the Deputy President then observed at paragraph [63] that an "intractable bargaining declaration gives the Commission jurisdiction to arbitrate conditions of employment **beyond** the safety net of enforceable minimum terms" [emphasis added]. This observation makes clear that the Deputy President understood the nature of the Commission's role in making a workplace determination: namely, that it involves setting employment conditions that go beyond the statutory safety net created by modern awards, just as parties do when negotiating and entering into an enterprise agreement.

[102] The reasoning reflects a proper understanding of the distinction between the Commission's role in maintaining minimum standards and its more limited power to arbitrate terms where bargaining has become intractable.

[103] Ground two asserts that the Deputy President acted on a wrong principle by treating the intractable bargaining provisions as being contrary to, or in tension with, the broader collective bargaining framework. This contention is not supported by the Deputy President's reasons. At paragraph [57], the Deputy President expressly acknowledged the intended role of the intractable bargaining regime within the enterprise bargaining framework:

> "… 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."

[104] The reference to assisting "those with weaker bargaining power to secure an agreement" demonstrates that the Deputy President understood the legislative intent underpinning the intractable bargaining provisions. Far from treating them as inconsistent with the collective bargaining framework, he recognised their potential to operate as a mechanism that encourages agreement—by introducing the prospect of arbitration where bargaining becomes intractable. This reflects Parliament's intention to incentivise resolution through negotiation, rather than determination by the Commission.

[105] The Deputy President also correctly observed at paragraph [57] that the amendments to the Act introduced a strategy whereby a bargaining representative might withhold agreement in the belief, or hope, that a better outcome could be achieved through a workplace determination. Whether such conduct would render it unreasonable to make an intractable bargaining declaration depends on the circumstances. For example, if a bargaining representative refuses to agree because the offers made are unreasonably low and they reasonably believe a better

outcome could be achieved via determination, that would not raise concerns from a reasonableness perspective.

[106] This demonstrates that while the legislative changes were intended to encourage bargaining, the possibility of Commission intervention may, in some cases, reduce the incentive to reach agreement. By acknowledging this dynamic, the Deputy President showed a nuanced understanding of the strategic considerations that may arise in enterprise bargaining. He did not act on a wrong principle by treating the intractable bargaining provisions as contrary to, or in tension with, the broader collective bargaining framework.

[107] By ground three APESMA contends that the Deputy President acted on a wrong principle by considering the high remuneration paid to the Deputies. The first point to make is that the Deputy President considered a whole range of matters in assessing the reasonableness of making an intractable bargaining declaration, including the high remuneration paid to the Deputies as a consequence of their strong bargaining power. For the reasons explained in paragraphs [86] to [95] above, these matters were plainly part of "all the circumstances" which the Deputy President was obliged to consider in his assessment of the reasonableness of making a declaration. There is no merit in the suggestion that employees being able to use their bargaining power to negotiate favourable terms and conditions of employment, including high remuneration and substantial annual increases to that remuneration, is not a relevant consideration to the assessment required by s 235(2)(c) of the Act.[65] The complaint is really one of the weight attributed by the Deputy President to the high remuneration paid to the Deputies. A failure to give sufficient weight, or giving too much weight, to a relevant consideration is not, in itself, sufficient to establish error in a discretionary decision-making process justifying appellate intervention.[66]

[108] For the reasons explained by Vice President Gibian and Deputy President Butler, I agree that no error is demonstrated in relation to grounds four to eight.

[109] I agree that permission to appeal should be granted because the appeal raises important questions of principle in relation to significant recent amendments to the Act. But I would dismiss the appeal on the basis that no error is disclosed in the decision of the Deputy President.

VICE PRESIDENT

Appearances:

C Tran, of counsel, instructed by AEN Legal for the Association of Professional Engineers, Scientists and Managers Australia.
J Murdoch KC, of counsel, instructed by Corrs Chambers Westgarth for Ulan West Operations Pty Ltd.

Hearing details:

15 August 2025.
Sydney (in person).

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[1] *Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWC 1806.

[2] [2025] FWC 1806 at [42].

[3] [2025] FWC 1806 at [109].

[4] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180; (2023) 326 IR 230 at [32].

[5] *Fair Work Act 2009* (Cth), s 270(2) and (3).

[6] *Fair Work Act 2009* (Cth), ss 276-278.

[7] *Fair Work Act 2009* (Cth), s 278(1A).

[8] *Fair Work Act 2009* (Cth), s 278(1).

[9] [2025] FWC 1806 at [70]-[73].

[10] [2025] FWC 1806 at [2]-[3].

[11] [2025] FWC 1806 at [4]-[7].

[12] [2025] FWC 1806 at [51].

[13] See *Fair Work Act 2009* (Cth), ss 234-235 (as they existed prior to 6 June 2023).

[14] [2025] FWC 1806 at [67].

[15] [2025] FWC 1806 at [75]-[76].

[16] [2025] FWC 1806 at [78]-[79].

[17] [2025] FWC 1806 at [82]-[84].

[18] [2025] FWC 1806 at [90].

[19] [2025] FWC 1806 at [93]-[94].

[20] [2025] FWC 1806 at [101] and [104].

[21] [2025] FWC 1806 at [107].

[22] [2025] FWC 1806 at [108].

[23] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025; (2013) 238 IR 258 at [9]-[12].

[24] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2003] HCA 47; (2000) 203 CLR 194 at [17] (Gleeson CJ, Gaudron and Hayne JJ).

[25] *Helensburgh Coal Pty Ltd v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [53], [55] (Gageler CJ, Gordon and Beech-Jones J) and [83] (Edelman J).

[26] *Helensburgh Coal v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [54] (Gageler CJ, Gordon and Beech-Jones JJ) and [141] (Steward J).

[27] *Moore (a pseudonym) v The King* [2024] HCA 30; (2024) 98 ALJR 1119 at [14] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ); *DP World Sydney Pty Ltd v Witherden* [2025] FWCFB 133 at [16].

[28] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180; (2023) 326 IR 230 at [27] and [30].

[29] See discussion in *DP World Sydney Pty Ltd v Witherden* [2025] FWCFB 133 at [19]-[30].

[30] *Fair Work Act 2009* (Cth), s 55(1).

[31] *Fair Work Act 2009* (Cth), ss 186(2)(d) and 193(1).

[32] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 at [5] (Jessup J).

[33] *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at [14] (Jessup, Tracey and Perram JJ).

[34] Revised Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) at [821]-[827].

[35] *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit*, Regulation Impact Statement, p20.

[36] *Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit*, Regulation Impact Statement, p21.

[37] See, for example, *Network Aviation Pty Ltd a Trustee for The Network Trust Trading AS Network Aviation Australia v AFAP, AIPA and TWU* [2024] FWC 685; *Terminals Pty Ltd T/A Quantem Bulk Liquid Storage & Handlng v UWU* [2024] FWC 2707; *NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid v CEPO, MEU, ASU, CPSU and Professionals Australia* [2024] FWC 2841; *Transdev Sydney Pty Ltd, Great River City Light Rail Pty Ltd v RTBU* [2024] FWC 3594; *Chief Commissioner of Victoria Police T/A Victoria Police v Police Federation of Australia & Ors* [2025] FWC 1; *Qube Offshore Services Pty Ltd v AWU* [2025] FWC 977.

[38] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, p2181.

[39] Revised Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) at [847].

[40] [2025] FWC 1806 at [61].

[41] *Fair Work Act 2009* (Cth), ss 65B(4)(a), 66M(6)(a), 76B(4)(a), 165(2)(b), 166(3)(b), 189(2), 286(2), 287(2)-(4), 297(2), 306L(4), 366(2), 394(3), 427(3), 443(5), 444(1B)(b), 536LU(4) and 774(2).

[42] [2025] FWC 1806 at [108](a) and (d).

[43] *Van Reesema v Giameos* (1979) 27 ALR 525 at 530; *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 at [77] (Logan and Flick JJ); *Moss v Aquisite Pty Ltd* [2024] FCA 455 at [29] (O'Callaghan J); *Priestley v Blackfisch Films Pty Ltd* [2025] FWCFB 40 at [32].

[44] *Commissioner of Taxation (Cth) v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 354 (Gibbs J).

[45] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 37 (Brennan J); *Price v ClearView Life Nominees Pty Ltd* [2024] NSWSC 706 at [19] (Kunc J).

[46] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, (2000) 204 CLR 82 at [55] (Gaudron and Gummow JJ).

[47] *Fair Work Act 2009* (Cth), s 270(2).

[48] *Fair Work Act 2009* (Cth), s 270(3).

[49] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [167]. See also *Transport Workers' Union of Australia v Qantas Airways Limited* [2012] FWAFB 6612; (2012) 225 IR 13 at [28]-[29] and *NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 73 at [61]-[62].

[50] [2025] FWC 1806 at [57].

[51] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [167]; *NSW Electricity Networks Operations Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 73 at [60](a).

[52] [2025] FWC 1806 at [63], [86] and [108](a) and (e).

[53] [2025] FWC 1806 at [103].

[54] Revised Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) at [847] provides examples which connect the assessment of reasonableness to the consequences of making a declaration, i.e. a workplace determination is likely to be made.

[55] [2025] FWC 1806 at [3].

[56] [2025] FWC 1806 at [3].

[57] [2025] FWC 1806 at [3].

[58] [2025] FWC 1806 at [80].

[59] Appeal Book at p136, [19].

[60] Appeal Book at p133, [17(a)].

[61] Appeal Book at p97, PN573-577.

[62] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

[63] *Helensburgh Coal Pty Ltd v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [39] (Gageler CJ, Gordon and Beech-Jones J).

[64] *Helensburgh Coal Pty Ltd v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 at [38] (Gageler CJ, Gordon and Beech-Jones J).

[65] Revised Explanatory Memorandum to the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) at [847].

[66] *Sydney International Container Terminals v Hancock* [2025] FWCFB 106 at [16]-[18] and the authorities referred to therein.