[2025] FWCFB 73

The attached document replaces the document previously issued with the above code on 11 April 2025.

At [231], to correct a typographical error to change “proposed” to “we propose”

Associate to Vice President Gibian

Dated 16 April 2025

DECISION

Fair Work Act 2009
s.269 – Intractable bargaining workplace determination

NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid
v
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Mining and Energy Union, Australian Municipal, Administrative, Clerical and Services Union, the Community and Public Sector Union, and Professionals Australia
(B2024/1006)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT BOYCE
DEPUTY PRESIDENT BUTLER

SYDNEY, 11 APRIL 2025

Intractable bargaining workplace determination – Bargaining for new enterprise agreement to apply to electrical workers employed by NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid – Intractable bargaining declaration made under s 234 of the Fair Work Act 2009 (Cth) – Commission required to make intractable bargaining workplace determination – Matters that were still at issue included wages, allowances, overtime, backpay and the nominal expiry date of the proposed agreement – Whether claims with respect to superannuation and nominal expiry date "agreed terms" – Whether s 270A of the Act relevant to determination of matters still at issue – Conduct of the parties during bargaining – Whether unreasonable conduct or breach of good faith bargaining requirements – Quantum and timing of wage increases – Relevance of maintenance of the real value of wages – Employees last received a wage increase on 1 December 2022 – Regulatory restrictions on the capacity of Transgrid to derive revenue from its business – Capacity of Transgrid to fund wage increases above its offer – Claim for increase in overtime rates for Saturday work – Increase in superannuation contributions – Nominal term of workplace determination – Workplace determination made.

Introduction

[1] NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid (**Transgrid**) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Mining and Energy Union, Australian Municipal, Administrative, Clerical and Services Union, the Community and Public Sector Union, and Professionals Australia (together, the **Joint Unions**) are covered by the *TransGrid Employees Agreement 2020* (**2020 Agreement**). The 2020 Agreement passed its nominal expiry date on 1 December 2023. The parties have been

involved in bargaining for an enterprise agreement to replace the 2020 Agreement (**Proposed Agreement**) since July 2023.

[2] The parties participated in various bargaining meetings from September 2023 through to the end of 2023 and then through to the second half of 2024. The bargaining was heavily contested. Members of the Joint Unions took part in various forms of protected industrial action from January 2024. The bargaining prompted various proceedings before the Fair Work Commission. Those included an application for bargaining orders made by the CEPU, dispute proceedings under s 240 of the *Fair Work Act 2009* (Cth) (the **Act**) brought by Transgrid, three applications made by Transgrid under s 424 of the Act to suspend or terminate forms of protected industrial action engaged in by members of the Joint Unions and an application by Transgrid under s 418 of the Act for orders to stop industrial action with respect to what it alleged was unprotected industrial action.

[3] Transgrid also applied to the Commission for an intractable bargaining declaration pursuant to s 234 of the Act on 7 August 2024. Transgrid and the Joint Unions ultimately agreed that the requirements for the making of an intractable bargaining declaration were met, including that there was no reasonable prospect of agreement being reached if the Commission did not make a declaration and that it was reasonable in all the circumstances to make the declaration.[1] On 14 October 2024, the Commission made an intractable bargaining declaration.[2] The declaration provided for a post-declaration negotiating period of seven days for the purposes of s 235A of the Act.

[4] The consequence of the making of an intractable bargaining declaration is that the Commission is required by s 269 of the Act to make an intractable bargaining workplace determination as soon as possible after the making of the declaration or the end of the post-declaration negotiating period (as relevant). The Act requires that the function of making an intractable bargaining workplace determination must be exercised by a Full Bench of the Commission.[3] Accordingly, the matter was allocated to the present Full Bench.

[5] The matter was programmed for hearing from 16 to 20 December 2024. In accordance with the directions made, the parties filed a document identifying the agreed terms, and the terms that were not agreed, and filed respective draft determinations as well as submissions and evidence. The evidence filed was voluminous. There were also various interlocutory issues that had to be managed prior to the hearing. Among other things, the Commission made an order that Australian Energy Regulator provide information in the form of a report or witness statement from an appropriate authorised person.[4]

[6] In accordance with the directions, the parties filed a draft determination identifying the matters that were agreed by the bargaining representatives for the purposes of s 270(2) of the Act and those that were still at issue at the end of the post-declaration negotiating period for the purposes of s 270(3)(a). The bulk of the terms of the workplace determination are "agreed terms" that must be included in the workplace determination by reason of s 270(2). Transgrid's position is that the following matters remain at issue between the bargaining representatives and must be determined by the Commission:

(a) Wages, superannuation and allowances, including the quantum of the increases over the life of the workplace determination, the level of weekly base salary and

allowances at commencement of the workplace determination and the effective date from which the weekly base salary will be payable;

(b) Overtime, specifically the rate at which overtime is payable on Saturdays; and

(c) The nominal term of the workplace determination.

[7] The Joint Unions contend that the nominal term of the workplace determination and the superannuation outcome were agreed between the bargaining representatives and must be included in the workplace determination in the form contained in their draft workplace determination. Transgrid disputes that those matters are "agreed terms" for the purposes of s 270(2) of the Act.

[8] In summary, the position of the parties is as follows. Transgrid contends that the Commission should make a workplace determination which provides for a 14 percent increase in wages and allowances over the life of a three-year determination with a 5 percent increase on commencement, 4.5 percent increase in year two and 4.5 percent in year three (with the increases in years two and three including a 0.5 percent increase in superannuation contributions). Transgrid further contends that the workplace determination should have a nominal term of three years commencing on the date that the workplace determination is made and that no change should be made to the overtime provision for Saturday work.

[9] The Joint Unions contend that there should be a workplace determination made providing for a 20.5 percent increase in wages and allowances comprising a 6.5 percent increase in each year of a three-year determination with, in addition, an increase in superannuation contributions of 0.5 percent in the second and third years. The Joint Unions submit that the first pay increase should apply from 1 December 2023 and that the workplace determination should have a nominal term which expires on 1 December 2026. Finally, the Joint Unions seek that all overtime performed by day workers on a Saturday be paid at double time.

Background and conduct of bargaining

[10] Transgrid is involved in the electric power transmission industry and is the manager and operator of the High Voltage Transmission Network (**HVTN)** in New South Wales and the Australian Capital Territory. The HVTN transmits electricity from generators of electrical power to distributors (who provide electricity to consumers), other states within Australia and a select range of major end users. Transgrid's primary operations involve its "prescribed network business", which concentrates on planning, operating and managing the HVTN.[5]

[11] Transgrid's operations form part of the functions previously undertaken by the Electricity Commission of New South Wales. In the early 1990s, the Electricity Commission was renamed Pacific Power under the *Electricity Legislation Amendment Act 1995* (NSW). On 1 February 1995, Transgrid was formed and the HVTN assets were transferred from Pacific Power to Transgrid. In 2015, Transgrid became a private company and was sold to a private consortium under the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW). As part of that arrangement, the NSW government granted a 99-year lease over the HVTN to NSW Electricity Networks Operations Pty Ltd as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid.[6]

[12] The HVTN includes assets such as underground cables, overhead lines, transmission towers and substations. Transgrid's HVTN transmits electricity to distributors in NSW and the ACT, to and from Queensland and Victoria and to major end users, known as "Direct Connect Customers", such as large energy-intensive industrial customers. Transgrid's biggest Direct Connect Customer is the Tomago Aluminium Smelter. The Tomago Aluminium Smelter is located near Newcastle and is the largest consumer of electricity in New South Wales using at least 10 percent of the State's total electricity supply.[7]

[13] Transgrid is a transmission network service provider (**TNSP**) in the national electricity market (the **NEM**) and, as such, its operations are subject to the National Electricity Rules and determinations made by the Australian Energy Regulator (the **AER**). The National Electricity Rules are made by the Australian Energy Market Commission under the National Electricity Law. An aspect of the determination made by the AER for any TNSP is that it controls the revenue able to be recovered from consumers from electrical transmission activities. A significant component of Transgrid's submissions as to why wage increases above its position should not be awarded is that it represents the outer limit of what it could reasonably accommodate within the "maximum allowed revenue" set by the AER. It will be necessary to return to this issue in more detail later in this decision.

[14] Transgrid also operates a contestable business known as Lumea, which is primarily involved in the connection of renewable energy generators to the HVTN. The type of work undertaken by Transgrid and Lumea also includes the delivery of maintenance work and project work which involves bidding for projects, project design, project contract management and project construction. This includes projects which are intended to contribute to Australia's net zero emissions goal by 2050 and a reduction of greenhouse gas emissions (below 2005 levels) by 2030. These additional parts of Transgrid's operations are not subject to determinations made by the AER.

[15] Between 2000 and 2010, Transgrid employees were covered by a series of New South Wales state awards. From 2010, Transgrid employees have been covered by the modern award known as the *Electrical Power Industry Award 2010*. Transgrid has made a series of enterprise agreements under the Act, most recently the 2020 Agreement. Transgrid currently employs approximately 1,803 employees of which approximately 1,431 are covered by the 2020 Agreement. Employees covered by the 2020 Agreement include administrative officers; engineering officers; professional officers; operators; power workers; tradespersons and apprentices.[8]

[16] Bargaining for a new enterprise agreement to replace the 2020 Agreement commenced in July 2023. At the start of the bargaining, Transgrid provided the Joint Unions with its log of claims which initially comprised four claims being a fair salary outcome, an individual flexibility arrangement provision to permit employees to request to be paid additional superannuation component as a separate payment, a public holiday swap provision and various compliance updates. After a few bargaining meetings, subject to some updating issues, Transgrid essentially reverted to a position of proposing a "roll over" of the existing agreement subject to an acceptable wages outcome.[9]

[17] From the commencement of the bargaining, the negotiations were being led on behalf of the Joint Unions by an official of the CEPU, Nick Bligh. On 15 August 2023, the Joint

Unions provided their initial log of claims. The Unions' log of claims included 28 claims for improvements in wages and conditions along with various claims in relation to employees working in Transgrid's Control Room. In relation to wages, the Joint Unions' initial log of claims sought an increase of 8 percent in wages upon commencement and at each anniversary thereafter, all allowances to increase by the same amount and a 2 percent increase in superannuation contributions upon commencement and 0.5 percent increases on the second and third anniversaries of commencement.[10] The bargaining with respect to Control Room employees was pursued separately and was able to be resolved in March 2024.[11]

[18] At a bargaining meeting held on 26 September 2023, Transgrid communicated its first wages offer to the Joint Unions. Its first offer was for a 5 percent increase in the first year, 3 percent increase in the second year and 3 percent increase in the third year.[12] There was initially a factual dispute between the parties as to whether the Joint Unions put a counteroffer during the bargaining meeting on 26 September 2023. The question of whether such an offer was made by, or on behalf of, the Joint Unions at the meeting on 26 September 2023 assumed some significance in the submissions made by Transgrid as to whether the Joint Unions had behaved unreasonably in the bargaining.

[19] Scott Berryman, who is employed by Transgrid in the role of Senior Manager ER & IR, gave evidence as to what occurred at the 26 September meeting. Mr Berryman said that a delegate of the CEPU, Paul O'Malley, communicated a verbal offer during the meeting of an aggregate wage increase of 17 percent over three years comprised of a 6 percent wage increase in the first year, a 5 percent wage increase in the second and third years and a 0.5 percent increase in superannuation contributions in the second and third years.[13] Mr O'Malley made a witness statement which appeared to dispute that a "counteroffer" had been made during the meeting on 26 September 2023. Mr O'Malley indicated that each union would need to put any offer from Transgrid to the membership prior to making a "formal" counteroffer.[14]

[20] It emerged during cross-examination, however, that the dispute was largely one of semantics. In his oral evidence, Mr O'Malley did not dispute that, after having a period of time to confer and consider Transgrid's offer, the Joint Unions had put a position to Transgrid during the meeting as described by Mr Berryman. Mr O'Malley's evidence included:[15]

> You accept, I think when I read your reply statement, you don't cavil with the fact, as described in Mr Berryman's evidence at paragraph 50, that you put a position on wages, namely, 17 per cent in aggregate over three years comprising 6 per cent in year one, 5 per cent plus an increase of 0.5 per cent to superannuation in year two, and 5 per cent plus an increase in superannuation of 0.5 per cent in year three; correct?---Yes.
>
> You put that in front of all the union representatives?---Yes.
>
> You didn't qualify that wages position by saying that it was not a formal offer, did you?---No, it was just like for a lot of the to and fro with negotiations, so a position's put and that is put sort of in a without prejudice situation.
>
> Of course. You didn't say that this was what the unions might, or might likely, accept, did you?---No.
>
> You put the position on wages in the presence of, and with the approval of, the union officials and delegates following your private conferral in the main room; correct?---Yes.

> Of course, any agreement would have to go to the members for approval later, but you were authorised to communicate this wages position as a counteroffer; correct?---It was a position that wouldn't have been authorised by the membership at that stage.
>
> No, but, of course, you had put it with the authority of the ETU officials and delegates who were there and also the officials and delegates of all of the other unions who were there?---Of those present, yes.

[21] The Joint Unions ultimately accepted that a counteroffer was made at the meeting on 26 September 2023 albeit they maintained that the position they put was subject to approval by the membership.[16]

[22] At the next bargaining meeting on 24 October 2023, Transgrid put a further offer in relation to wages of a 5 percent increase in the first year, 3.5 percent increase in the second year and 3.5 percent increase in the third year.[17] This offer was rejected by the Joint Unions. On 21 November 2023, Transgrid made a third wages offer being for a 5 percent increase in the first year, 3.5 percent increase in the second year and 3.5 percent increase in the third year plus a 0.5 percent increase in superannuation contributions in each of the second and third years.[18] On 27 November 2023, the Joint Unions rejected that offer as well.

[23] On 1 December 2023, following rejection of the offer, Transgrid notified the Joint Unions that it intended to proceed to a ballot to ask employees to approve an agreement reflecting its offer by a vote.[19] On 7 December 2023, Mr Bligh and Mr O'Malley engaged in a discussion with a representative of Transgrid, Ian Davidson, by messaging through Microsoft Teams, to explore a possible resolution of the bargaining. Mr Davidson was part of Transgrid's negotiating team and held the position of General Manager – Maintenance. Transgrid relied on part of the message conversation which was in the following terms:[20]

> Davidson: Another thought….does it help to swap super out for wages year 3? Then you can sell the Wages number as 4…..so it is 5%, 4%+0.5%, 4%?
>
> O'Malley: Probably not. 5+0.5, 4+0.5, 4 would be good though!

[24] Mr O'Malley emphasised that he made no offer on behalf of the Joint Unions and was not authorised to do so. Mr O'Malley said he was "[i]n all truth … trying to circumvent a non-union-agreed EBA being put out for a vote" and "[i]t was a tester to see if he would increase his offer".[21]

[25] Between 20 and 22 December 2023, a ballot was conducted in relation to Transgrid's proposed enterprise agreement. A majority of employees eligible to vote in the ballot rejected the enterprise agreement.[22] Also in December 2023, the Commission made orders for a protected action ballot of CEPU members and the ballot resolved in favour of protected industrial action. Employees commenced engaging in various forms of protected industrial action from January 2024.

[26] From January 2024 onwards, the bargaining for the Joint Unions was led by Matt Murphy, National Industry Coordinator for the CEPU and Allen Hicks, NSW Secretary of the ETU Division of the CEPU. A further bargaining meeting took place on 15 January 2024. At

this meeting, the Joint Unions advised that they had reverted to their original wages claim for an 8 percent increase each year over a three-year agreement with a 0.5 percent increase in superannuation contributions in the second and third years.[23] Transgrid referred to a "Bargaining Update" published to members of the CEPU, on 23 January 2024, which said, among other things:[24]

> On the basis that their draft getting knocked over by 83%, we would not be returning to a bargaining position that existed immediately prior to their draft going out
>
> Our position remains at 3 x 8% + super and all claims must be addressed, not just responded to …

[27] In February and March 2024, the parties participated in further bargaining meetings and a conference conducted by the Commission and somewhat narrowed the differences between them. On 11 March 2024, Transgrid made a further wages offer of 5 percent in the first year and 4 percent in the second and third years plus an increase of 0.5 percent in the second and third years. Mr Berryman asserted that Mr Davidson indicated that the offer was "a package".[25] On 14 March 2024, the Joint Unions advised Transgrid that they rejected the offer.

[28] On 4 April 2024, the Joint Unions made a revised offer with respect to wages of 6.5 percent wage increase per annum over three years plus an increase of 0.5 percent in the second and third years.[26] Mr Hicks gave evidence that Mr Davidson said that the offer "exceeds what we can afford", was "outside the bargaining parameters set by the Board and the Executive" and would place further pressure on the budget and mean increased risk to the network.[27] After further discussion, Mr Davidson conceded that the Board was not involved in setting bargaining parameters and it was the executive that set the bargaining parameters.[28]

[29] During the meeting, Mr Hicks requested certain information to assist in the Joint Unions in understanding Transgrid's position, including whether Transgrid had undertaken any costings in relation to the Joint Unions' proposal. Mr Hicks said that Mr Davidson confirmed that Transgrid had not performed any costings of the Joint Unions' key proposals. In an email sent later on 4 April 2024, Mr Hicks listed the information requested as follows:[29]

> a. The wages and wage increases (including any bonuses) paid to the Executive General Managers and General managers of the business for FY23 FY22 FY21. We understand this information will be deidentified so as to maintain the individual employees confidentiality;
> b. The revenue, operating expenses, net profit achieved. and dividends paid by the business for FY23 FY22 FY21;
> c. The CAPEX budget for 2023/2024 financial year;
> d. The OPEX budget for the 2023/2024 financial year;
> e. The expenses associated with the engagement of contractors paid by the business for FY23, FY22 FY21; and
> f. The bargaining parameters set by the Executive including all workings.

[30] On 12 April 2024, Mr Hicks caused a letter to be sent to Transgrid that dealt with a number of matters, including the CEPU's concerns that Transgrid was not bargaining in good faith.[30] In the letter, Mr Hicks repeated his request for information and requested a response by 15 April 2024. On 15 April 2024, Mr Davidson wrote a letter to the CEPU, responding to the request for information. In the letter, Mr Davidson declined the request and said that "to the

extent that the requested information is not publicly available, it is both confidential and commercially sensitive and Transgrid is not prepared to provide access to it".[31]

[31] Mr Hicks gave evidence that he made various attempts to contact the Chief Executive Officer of Transgrid, Mr Redman by email on 25 February 2024, 25 March 2024 and 4 April 2024 and received no reply. Mr Hicks stated that, in his experience, it is highly unusual for a CEO of a large employer to not engage in bargaining in any respect and the consistently and deliberately ignore correspondence from the Secretary of a major union.[32] Craig Stallan, who is now General Manager of Lumea, indicated that he had authority for bargaining, that he was the point of contact for employee representatives, and that Mr Hicks was aware of this. Mr Stallan said that Mr Hicks' correspondence was responded to by other representatives of Transgrid.[33]

[32] On 16 April 2024, the CEPU filed an application for bargaining orders under s 229 of the Act in which it alleged that Transgrid was not meeting the good faith bargaining requirements set out in s 228(1), including by reason of Transgrid refusing to provide relevant information to the Joint Unions in relation to the bargaining.[34] The application was allocated to Deputy President Slevin. The Deputy President conducted a number of conciliation conferences and, ultimately, a hearing with respect to the application occurred later in August 2024.

[33] At a bargaining meeting on 9 April 2024, Transgrid formally rejected the Joint Unions revised offer made on 4 April 2024. Mr Berryman gave evidence that Mr Davidson indicated that Transgrid could "look at the shape of the package – but we have no room to move on wages".[35] A further bargaining meeting was held on 16 April 2024. Although there is some disagreement over precisely what was said, it is clear that Mr Davidson again indicated that there may be some ability for Transgrid to move the package around, although only in a narrow band and the total remuneration outcome it was willing to offer remained at 13 percent for wages and 1 percent for superannuation.[36]

[34] During April and May 2024, further bargaining meetings were held, but those meetings did not result in progress on the wages and other outstanding claims. Transgrid maintained its position of a 14 percent increase in aggregate (including superannuation) over the life of a three year agreement.[37] On 3 June 2024, Transgrid filed an application for the Commission to deal with a bargaining dispute to pursuant to s 240 of the Act. A conference was conducted by Deputy President Easton on 11 June 2024 in order to try and reach agreement as to the terms of an enterprise agreement to be put to a vote. No agreement could be reached between Transgrid and the Joint Unions. On 12 July 2024, Transgrid communicated to the Commission that it saw no further utility in the process under s 240 of the Act.

[35] On 18 June 2024, during a further bargaining meeting, Transgrid made what it described as its "best and final offer". The offer reflected Transgrid's position communicated on 11 March 2024, that is, an aggregate wage increase of 14 percent over a three year period with two additional concessions. The two additional concessions, which were said to be conditional on a successful ballot occurring in July 2024, were that the first wage increase would be effective from 1 December 2023 and a one-off $1,500 gross sign on payment for all employees.[38] Mr Murphy indicated that the offer was rejected and that, if there was a no vote, the Joint Unions would return to a position of demanding wage increases of 8 percent per year.[39]

[36] As it had foreshadowed, Transgrid put a proposed agreement reflecting its "best and final offer" to a vote of employees. The vote was conducted between 22 and 26 July 2024. The Joint Unions did not support the approval of the proposed agreement and recommended that employees vote "no" to what they described in publications to members as a "substandard proposal". The majority of eligible employees who participated in the ballot voted not to approve the proposed agreement.[40]

[37] On 31 July 2024, Mr Hicks wrote to Transgrid requesting that, given that a majority of the employees had voted to reject Transgrid's latest offer, further bargaining meetings be held and confirming that the CEPU "is ready and available to continue negotiations and is available to meet any time that Transgrid representatives make themselves available".[41] On 1 August 2024, a reply was received from Samuel Pickering, Enterprise Agreement Lead, stating that the offer which had been put to employees represented Transgrid's "best and final offer" and stated:[42]

> In these circumstances, Transgrid is of the view that there is no realistic prospect of an agreement through further bargaining and that an intractable bargaining declaration is needed to achieve an orderly resolution of the dispute through conciliation and arbitration in the Fair Work Commission.
>
> We invite you to provide Transgrid with a specific proposal in writing for its consideration to break the apparent impasse. Absent that, Transgrid does not see any utility in convening a bargaining meeting.

[38] On 2 August 2024, the CEPU wrote to Transgrid expressing concern that Transgrid was not meeting its good faith bargaining obligations by refusing to engage in bargaining and that it had effectively determined to pursue an intractable bargaining declaration.[43] On the same day, the CEPU also wrote to Transgrid setting out the matters that, in its view, remained outstanding and indicating a willingness to work to resolve those matters.[44]

[39] On 5 August 2024, Transgrid responded to the CEPU's correspondence again in correspondence from Mr Pickering. Transgrid asserted that the claims that remained outstanding represented "very significant matters" and that the parties remained "miles apart". Transgrid indicated that it had made its best and final offer which was rejected by the Joint Unions and the employees and that, in those circumstances, "Transgrid is of the view that there is no realistic prospect of an agreement through bargaining and that an intractable bargaining declaration is need to achieve an orderly resolution of dispute".[45]

[40] The CEPU subsequently filed a further application for bargaining orders. The CEPU's applications for bargaining orders were subject to a further conciliation conference on 7 August 2024. On 9 August 2024, Deputy President Slevin made a recommendation that further bargaining meetings be held in the week commencing 12 August 2024. Bargaining meetings were then conducted on 13 August and 16 August 2024. Mr Hicks gave evidence that, at those meetings, Transgrid confirmed that they were not going to move any of the outstanding matters and had presented their final offer.[46]

[41] On 19 August 2024, Deputy President Slevin handed down a decision with respect to the CEPU's application for bargaining orders in which he found that Transgrid had not met the good faith bargaining requirements by failing to provide the CEPU with information relevant

to the bargaining.[47] The Deputy President ordered Transgrid to provide certain information to the CEPU, including in relation to the remuneration paid to General Managers and Executive General Managers, key financial indicators for the business and its total expenses associated with the use of contractors.[48]

[42] On 19 July 2024, Transgrid had filed an application under s 424 of the Act to suspend or terminate protected industrial action being taken by the Joint Unions. On 24 July 2024, the Commission made an order suspending protected industrial action for a period of three weeks.[49] The CEPU applied for permission to appeal and to appeal from this decision. On 8 August 2024, a Full Bench of the Commission refused permission to appeal.[50]

[43] On 12 August 2024, Transgrid filed a further application under s 424 of the Act to suspend or terminate protected industrial action being taken by the Joint Unions. On 16 August 2024, the Commission made an order suspending protected industrial action for a period of two months.[51] The CEPU again applied for permission to appeal from that decision. On this occasion, a Full Bench of the Commission granted permission to appeal and quashed the decision and order suspending protected industrial action.[52] Subsequently, Transgrid did not press for a redetermination of the application under s 424 of the Act.

[44] On 11 September 2024, Transgrid filed an application under s 418 of the Act to stop unprotected industrial action. The matter was to be listed on 13 September 2024. In its submissions in respect of the s 418 application, the CEPU explained that it had advised its employees to comply with any direction given by Transgrid under the safety commitment it had given with respect to the industrial action. On that basis, Transgrid withdrew its application under s 418 of the Act.

[45] As has been observed, Transgrid had earlier applied to the Commission for an intractable bargaining declaration to be made pursuant to s 234 of the Act on 7 August 2024. On 14 October 2024, after the parties reached a consent position that an intractable bargaining declaration could and should be made, Deputy President Grayson made such a declaration.[53] It was made with a post-declaration negotiating period of seven days. The post-declaration negotiating period ended on 21 October 2024.

Statutory Framework

[46] With effect from 6 June 2023, Schedule 1, Part 18 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022* (Cth) repealed the former serious breach declaration provisions of the Act and replaced them with the new scheme for the making of an intractable bargaining declaration. Section 234 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.

[47] Section 235 of the Act identifies the circumstances in which the Commission's power being enlivened to make an intractable bargaining declaration, 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.

[48] The legislative note in s 234 of the Act makes clear that it is only after the Commission exercises its discretionary power conferred on it by s 235(1) (after, of course, that discretion is enlivened by the prerequisites in s 235(2) being met) that an intractable bargaining workplace determination can be made.

[49] Section 269 of the Act imposes a duty on the Commission once an intractable bargaining declaration has been made to make an intractable bargaining workplace determination as quickly as possible following, relevantly, the end of the post-declaration negotiating period. The section provides:

269 When the FWC must make an intractable bargaining workplace determination

If an intractable bargaining declaration has been made in relation to a proposed enterprise agreement, the FWC must make a determination (an ***intractable bargaining workplace determination***) as quickly as possible:

(a) if there is a post-declaration negotiating period for the declaration under section 235A—after the end of that period; or

(b) otherwise—after making the declaration.

Note: The FWC must be constituted by a Full Bench to make an intractable bargaining workplace determination (see subsection 616(4)).

[50] Section 270(1) provides for a basic rule in relation to intractable bargaining workplace determination, requiring that they must comply with s 270(4), include the core terms as set out in s 272, the mandatory terms as set out in s 273 and the agreed terms as provided for in s 274. Section 271 makes clear that an intractable bargaining workplace determination must not include any terms other than those required by s 270(1).

[51] Section 270(2) requires that the determination must include "agreed terms". For the purposes of an intractable bargaining workplace determination, the concept of an "agreed term" is defined in s 274(3) in the following terms:

Agreed term for an intractable bargaining workplace determination

(3) An ***agreed term*** for an intractable bargaining workplace determination is:

(a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and

(b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and

(c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

Note: The determination must include an agreed term (see subsection 270(2)).

[52] Section 270(3) provides that an intractable bargaining workplace determination must include terms the Commission considers deal with matters still in issue following either, if there is a post-declaration negotiating period, after the end of that period or, otherwise, after the making of the intractable bargaining declaration.

[53] Section 270(4) requires that an intractable bargaining workplace determination be expressed to cover the employer and employees that would have been covered by "the agreement" and any employee organisation that was a bargaining representative for those employees. "The agreement" is a reference to the proposed agreement the subject of the intractable bargaining declaration. This subsection requires that the intractable bargaining workplace determination in the present case cover Transgrid, employees of Transgrid employed in classifications set out in clause 12.1 of the 2020 Agreement and the relevant employee organisations being the MEU, CEPU, ASU, CPSU and Professionals Australia.

[54] Section 270A is a new provision introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) and prevents a workplace determination containing terms that, in relation to the same matter, would be less favourable to employees than a term of an existing enterprise agreement. The section provides as follows:

270A Terms dealing with matters at issue

(1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.

(2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

(3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.

(4) Subsection (2) does not apply to a term that provides for a wage increase.

[55] Section 272 provides for the core terms of a workplace determination. In summary, a workplace determination must include a nominal expiry date which must not be more than 4 years after the determination comes into operation, must not include terms that are not about "permitted matters" (being matters detailed in s 172(1) of the Act in relation to enterprise agreements),[54] a term that would be an "unlawful term" if the determination were an enterprise agreement or any "designated outworker terms", must include terms such that the determination would pass the better off overall test under s 193 of the Act and must not include terms which, if the determination were an enterprise agreement, would preclude the agreement being approved by reason that the term would contravene s 55 or on account of ss 196-200 of the Act relating to particular kinds of employees.

[56] Section 273 sets out the mandatory terms that a workplace determination must include. Section 273(2) and (3) requires that a workplace determination include a term that provides a procedure for settling disputes about matters arising under the determination and the National Employment Standards unless an agreed term would satisfy the requirements of s 186(6). Section 273(4) and (5) require that a workplace determination must include respectively the model flexibility term and model consultation term unless an agreed term would satisfy the requirements of ss 202(1)(a) and 2023 and 205(1). Section 273(6) and (7) requires that a determination include a delegates' rights term which must not be less favourable that the delegates' rights term in any relevant modern award.

[57] Section 275 contains the considerations which the Commission must take into account in deciding which terms to include in a workplace determination. The section provides as follows:

> **275 Factors the FWC must take into account in deciding terms of a workplace determination**
>
> The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:
>
> (a) the merits of the case;
> (c) the interests of the employers and employees who will be covered by the determination;
> (ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
> (d) the public interest;
> (e) how productivity might be improved in the enterprise or enterprises concerned;
> (f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;
> (g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;
> (h) incentives to continue to bargain at a later time.

[58] The matters set out in s 275 are mandatory considerations is the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24.[55] To take a mandatory consideration into account requires that it be evaluated and given due weight and treated as a matter of significance in the decision-making process.[56] A mandatory consideration is not taken into account by being noticed and erroneously discarded as

irrelevant.[57] However, a requirement to "take into account" a set of considerations leaves open what weight or influence each of the particular matters is to have in the decision to be made.[58] Further, none of the factors detailed in s 275 necessarily take on more particular significance than others. For instance, it would be erroneous to approach consideration of the s 275 factors on the premise that the merits of the case under s 275(a) or productivity under s 275(e) are or should necessarily be more consequential or significant than other factors.

[59] The matters specified in s 275 of the Act are not exhaustive of the considerations that the Commission can have regard to in deciding the terms to be included in a workplace determination. This is apparent from the word "include" in the chapeau of s 275, which allows the Commission the discretion to also have regard to any other relevant matter depending on the particular case. The determination of the Commission will be informed by ss 577 and 578 of the Act, including that the Commission must exercise its powers in a manner that achieves an outcome that is fair and just and that promotes harmonious and cooperative workplace relations. This consideration for the Commission is especially important in the context of an intractable bargaining workplace determination, where clearly bargaining relations between the parties have broken down.

[60] Some of the factors in s 275 of the Act are reasonably self-explanatory. However, we make (and endorse where previously established by authority) the following observations in relation to the s 275 factors:

(a) Reference to the "merits of the case" in s 275(a) requires consideration of whether the Commission considers it is appropriate to include the terms proposed in light of the evidence and contentions advanced by the parties.[59] We emphasise, however, that the task in conducted in the context of determining the outcome of a bargaining processes and not setting minimum terms and conditions of employment for the purposes of a modern award.

(b) The requirement under s 275(c) to take into account the interests of the relevant employees and employers requires that those interests be identified and taken into account and the Commission must exercise a broad judgment to produce an outcome which is a fair compromise, balancing the legitimate expectations and interests of the employees and employers.[60]

(c) Section 275(ca) is a new subclause and requires consideration to be given to the importance to the employer and employees to be covered by the workplace determination of the arrangements and benefits of an existing enterprise agreement the applies to the employer.[61]

(d) The "public interest" in s 275(d) refers to matters that may impact the public as a whole and are distinct from the interests of employees and employers who will be covered by the workplace determination and will include, for instance, the achievement (or otherwise) of the objects of the Act, including employment levels, inflation and the maintenance of appropriate industrial standards.[62]

(e) The concept of "productivity" in s 275(e) refers to the well-known economic concept of the quantity of outputs relative to the quantity of inputs. Productivity does not, as is often erroneously asserted in media and political discourse, concern the price of inputs such as a labour. Hence, an employer does not have a more productive workplace because its labour costs are lower. The same output at a lesser cost due to reduce wage or salary levels does not equate to productivity in the sense contemplated by s 275(e).[63]

(f) The concept of the "reasonableness" of conduct under s 275(f) requires an evaluation of the party's conduct during bargaining and whether the conduct was rational, logical or excessive. This falls to be assessed, however, against the rights conferred on bargaining parties during enterprise bargaining, including the right to engage in protected industrial action, and the fact that the parties are, to a reasonably wide degree, entitled to conduct the bargaining as they see fit.

(g) Consideration of incentives to bargain at a later time for the purposes of s 275(h), which is congruent with the encouragement of collective bargaining as an important means to achieve productivity and fairness as an object of the Act, requires an assessment of what substantive provisions are likely to encourage the parties to return to bargaining in the future. It may be relevant, for example, to consider whether the workplace determination leaves matters to be bargained about in the future.[64]

[61] The Commission is ultimately tasked with assessing the respective positions of the parties as to the terms disputed between them and, by having regard to the mandatory considerations under s 275 of the Act and other relevant considerations, make an objective assessment and overall judgement as to the appropriate terms of a workplace determination that will cover the employees and apply to the parties. In *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242, the Full Bench summarised the task of the Commission as follows:[65]

> 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.

[62] In an arbitration in relation to the making of a workplace determination, neither party bears an onus of proof in respect of any change from the position pertaining in the most recent enterprise agreement or to establish the desirability of any particular condition or term sought to be included.[66] Insofar as the Commission has a discretion in setting the terms of a workplace determination, the critical factors bearing upon the exercise of that discretion are the matters required to be taken into account by s 275 and the Commission must determine what it considers to be the appropriate outcome in light of the material which is placed before it.

Consideration

Core and mandatory terms

[63] It is common ground between the parties that the draft workplace determination they prepared contains the core terms set out in s 272 and mandatory terms in s 273 of the Act. The parties agree that the draft workplace determination contains a term specifying a date as the determination's nominal expiry date (as required by s 272(2)), albeit the date to be specified is

a matter that needs to be resolved in the arbitration and meets all of the other negatively expressed requirements in s 272.

[64] It is also common ground between the parties that the workplace determination include the following mandatory terms:

(a) a term that provides a procedure for settling disputes about any matters arising under the determination and in relation to the National Employment Standards, required by s 273(2) (clause 35);
(b) a flexibility term which would satisfy paragraph 202(1)(a) and s 203 (which deal with flexibility terms in enterprise agreements) if the determination were an enterprise agreement, required by s 273(4) (clause 10);
(c) a consultation term which would satisfy s 205(1) (which deals with terms about consultation in enterprise agreements) if the determination were an enterprise agreement, required by s 273(5) (clause 5); and
(d) a delegates' rights term for the workplace delegates to whom the determination applies, which term is not less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies, required by ss 273(6) and (7) (clause 39).

[65] The workplace determination we propose to make complies with requirement in s 271 that it contain no terms other than those required by s 270(1).

Section 270A of the Act

[66] In their initial written submissions, the Joint Unions contended that the outcome able to be determined by the Commission was constrained by s 270A of the Act. The terms of s 270A are set out above. The primary impact of the section is that s 270A(2) requires that a term of a workplace determination that deals with a particular matter must not be less favourable to employees, or any relevant employee organisation, than a term of an enterprise agreement that deals with the matter and applies to employees who will be covered by the determination. The purpose of s 270A is apparent from its terms. It is to regulate the content of terms to be included by the Commission in a workplace determination that are "still at issue" and to do so by requiring that, with respect to those terms, employees and any employee organisation that was a bargaining representative of those employees cannot be worse off than they were under a term of a current enterprise agreement.[67]

[67] The Joint Unions initially submitted in writing that s 270A(2) requires that the Commission include in the workplace determination the terms in the form they seek with respect to the commencement date of wages increases, superannuation and the nominal expiry date of the workplace determination. In closing oral submissions, the Joint Unions indicated that they did not press those submissions.

[68] The Joint Unions were correct not to press the submission. We are satisfied that s 270A of the Act does not constrain the terms the Commission is able to include in a workplace determination with respect to the commencement date of wages increases, superannuation and the nominal expiry date. In relation to the commencement date of wage increases, s 270A(4) provides that subsection (2) does not apply to a term that provides for wages increases. In

relation to superannuation, the workplace determination would not be less favourable to employees if it failed to provide for the same increases in superannuation contributions so long as the superannuation contributions required to be made are equal to or higher than those provided for in the 2020 Agreement. In relation to nominal expiry date, it cannot be said that a longer or shorter nominal period is necessarily less favourable to employees.

Conduct of the bargaining representatives

[69] Both the Joint Unions and Transgrid criticised the conduct of the other in bargaining and submit that the Commission should take that conduct into account in deciding the terms which should be included in the workplace determination. The Joint Unions submit that the conduct of Transgrid is a factor that weighs heavily in favour of the claims of the Joint Unions and is applicable in respect of all the matters that remain in issue. Transgrid submits that the conduct of the Joint Unions, particularly the CEPU, should be taken into account, but is most relevant to the issue of the effective date of the commencement of any wage increases provided for in the workplace determination. It submits that the considerations in s 275(f) and (g) of the Act do not otherwise readily translate into matters the Full Bench is required to consider in arbitrating the workplace determination.

[70] It is necessary, then, to consider the submissions advanced in relation to the conduct of Transgrid and the Joint Unions. We turn first to the submissions made with respect to the conduct of Transgrid. The Joint Unions submit that the conduct of Transgrid in bargaining was not reasonable for the purposes s 275(f) of the Act and that it failed to comply with the good faith bargaining requirements for the purposes of s 275(g). Specifically, the Joint Unions contend that Transgrid's conduct during the bargaining included that Transgrid had:

(a) conceded that it had failed to undertake costings in relation to key proposals made by the Joint Unions;
(b) refused to provide relevant information to the Joint Unions;
(c) refused to discuss costings or engage with proposals put forward by the Joint Unions, including during bargaining meetings held on 4 April 2024, 23 April 2024, 13 August 2024 and 16 August 2024;
(d) filed multiple applications under s 424 of the Act seeking orders suspending or terminating the protected industrial action engaged in by the members of the Joint Unions;
(e) failed properly engage with the Joint Unions from around 31 July 2024 on the basis that Transgrid considered there was "no real prospect of an agreement" and embarking of a strategy of pursuing an intractable bargaining declaration;
(f) had orders made against it by the Commission on the basis that it was not complying with its good faith bargaining requirements by failing to provide relevant information to the Joint Unions; and
(g) failed to respond to numerous attempts by Mr Hicks to discuss the proposed agreement with Transgrid's CEO.

[71] The Joint Unions submit that the inference to be drawn from the evidence is that, from late July 2024, Transgrid formulated a plan to pursue an intractable bargaining declaration application rather than genuinely engage in bargaining. It is submitted that this demonstrated that Transgrid failed to comply with the good faith bargaining requirements in s 228 of the Act

in addition to its failure to comply with the good faith bargaining requirements for the reasons set out by Deputy President Slevin in his decision.

[72] The Joint Unions make some additional complaints in relation to the conduct of Transgrid during bargaining. In particular, the Joint Unions complained that, in the lead up to the vote on Transgrid's proposed agreement in late July 2024, Transgrid circulated a brochure which stated, among other things, that a "no" vote would mean that any backpay and the one-off payment of $1,500 would be off the table and would not be offered again.[68] The Joint Unions contend that this represented unreasonable conduct in circumstances in which Transgrid had received the benefit of increases in the maximum allowable revenue under the AER determination based on increases in employment costs.

[73] There are essentially three components to the complaints made by the Joint Unions concerning the conduct of Transgrid in bargaining. First, the Joint Unions complain about Transgrid pursuing a number of applications before the Commission, particularly under ss 418 and 424 of the Act. We do not consider that Transgrid acted unreasonably in making applications to the Commission at various times seeking orders under ss 418 and 424 of the Act to suspend or terminate protected industrial action or to stop unprotected industrial action. Obviously enough, the Act permits applications to be made to the Commission for various types of orders in the context of bargaining, including to suspend or terminate protected industrial action or to stop industrial action which is not protected action. It is unlikely that utilising avenues available under the Act to seek orders in the context of bargaining will constitute unreasonable conduct.

[74] It is conceivable that a party may engage in unreasonable conduct during bargaining, at least for the purposes of s 275(f), if it pursues vexatious or meritless applications to the Commission, pursues applications for an ulterior purpose or behaves in an unreasonable manner in proceedings before the Commission. We do not believe that conclusion can be drawn in this matter. Transgrid's application under s 424 of the Act in December 2023 was resolved by the Joint Unions giving a "safety commitment" in relation to protected industrial action. Its applications in July and August 2024 were each successful in obtaining orders suspending protected industrial action albeit that the second order was set aside on appeal. The application under s 418 of the Act was discontinued as a result of the advice given by the CEPU to its members to comply with any direction given by Transgrid under the safety commitment. There is no basis upon which the Full Bench could conclude that those applications were made by Transgrid other than in good faith and believing there were reasonable ground to do so. We are not satisfied that Transgrid conducted itself unreasonably, or failed to comply with the good faith bargaining requirements, by pursuing applications to the Commission in relation to industrial action taken by members of the Joint Unions.

[75] Second, the Joint Unions complain about the failure or refusal of Transgrid to provide information that had been requested in the context of bargaining. We have set out the requests for information made by the Joint Unions above and the responses received from Transgrid. The requests for information and the refusal of Transgrid to provide information to the Joint Unions was subject of the proceedings before Deputy President Slevin. The conclusion of the Deputy President was as follows:[69]

> **[38]** I find that Transgrid has not met its good faith bargaining obligations by failing to provide the CEPU with information relevant to bargaining I am satisfied that each of the requirements in s.230 are met and I am satisfied it is reasonable in all the circumstances to make an order.
>
> **[39]** For the foregoing reasons, I grant the application and make the following order:
>
> 1. Transgrid must, within 14 days of this decision, provide the CEPU the following information:
>   a. The remuneration paid to General Managers and Executive General Managers for each of FY21, FY22 and FY23 expressed as a total for all managers along with the number of managers in each category each year.
>   b. The key financial indicators of the business for FY23 expressed in the same manner and including the same data as the information provided in the tables contained in the Annual Review documents for 2021 and 2022.
>   c. The total expenses associated with the use of contractors who are engaged to perform work line or substation work on transmission infrastructure being built for or maintained on behalf of Transgrid for each of the FY21, FY22 and FY23.

[76] We did not understand Transgrid to submit that the Full Bench should come to a different conclusion to Deputy President Slevin or disregard that finding. In the circumstances of the application before the Deputy President, the finding that Transgrid had not met, or was not meeting, the good faith bargaining requirements was an essential prerequisite to making bargaining orders.[70] Transgrid did not appeal the decision. There may have been interesting questions raised had Transgrid submitted the Full Bench should reach a different conclusion, including whether it is bound by the Deputy President's determination.

[77] However, no such submission was made. It is appropriate to proceed on the basis that Transgrid failed to comply with the good faith bargaining requirements in the manner found by Deputy President Slevin. That is a matter which the Full Bench is required to take into account in deciding which terms to include in the workplace determination by s 275(g). Transgrid, implicitly at least, accepted that is the case. However, it submits that the Commission should not give significant weight to that consideration because its failure to provide information to the Joint Unions would not have made any difference to the course of the bargaining.

[78] The basis of Transgrid's submission is that the provision of the information sought by the Joint Unions at an earlier stage of the bargaining would not have changed the approach of any party to the bargaining. It refers to the cross-examination of Mr Hicks in which the following evidence was given:[71]

> Perhaps I'll put it a different way. Once you got that updated information, can I suggest to you that that confirmed a view that you already had that Transgrid could afford the wages, having regard to the increases in revenue and EBITDA over the years?---Yes.
>
> The information that you got from Transgrid in compliance with the good faith bargaining orders confirmed your resolve to press your wages claim?---Yes.
>
> Had you been supplied with all of that information in April, you would still have pressed the position on wages, as you did?---Yes.

[79] In re-examination, Mr Hicks suggested that provision of the information at an earlier time might have changed its approach to a number of issues that were then being considered.[72]

The Joint Unions conceded, in closing oral submissions, that the information was not likely to change the position of the bargaining representatives in relation to the issue of wages.

[80] Section 275(g) requires that the Commission take into account the extent to which the bargaining representatives complied with the good faith bargaining requirements in deciding which terms to include in a workplace determination. We have taken into account that Transgrid failed to comply with the good faith bargaining requirements by not disclosing relevant information in a timely manner.[73] However, we do not believe much significance can be attached to that matter in the present context. We accept the submission of Transgrid that, had it provided the information at an earlier point, it is unlikely to have changed the course of the bargaining or altered the matters now at issue between the parties.

[81] To the extent that a separate complaint was made by the Joint Unions in relation to the failure of the Chief Executive Officers of Transgrid, Mr Redman, to respond to communications from Mr Hicks, we are unable to conclude that this represented unreasonable conduct during bargaining. It may be, as Mr Hicks said, unusual for the Chief Executive of a major employer to refuse to communicate with the Secretary of a major union in which it is engaged in bargaining. We venture to suggest it will often be useful for the most senior persons within the organisations of the bargaining parties to directly communicate at least once it appears that an impasse is likely. However, the communications from Mr Hicks were responded to albeit by other representatives of Transgrid. We have no reason to believe that Mr Redman's involvement would, in this case, have changed the course of the bargaining. The evidence does not support a finding that Transgrid acted unreasonably by reason of the reluctance of Mr Redman to directly communicate with Mr Hicks.

[82] Third, the Joint Unions submit that Transgrid acted unreasonably because it decided, some time in late July 2024, to cease engaging in bargaining and to pursue the making of an intractable bargaining declaration. The Joint Unions submit that the Full Bench should find that Transgrid formulated a plan in late July 2024 to pursue an intractable bargaining declaration application rather than to genuinely continue to bargain and that, in so doing, it failed to comply with the good faith bargaining requirements and otherwise acted unreasonably in the bargaining.

[83] The Joint Unions invited the Full Bench to reject the evidence of Mr Berryman that Transgrid had not resolved to pursue an intractable bargaining declaration after the employees voted not to accept its proposed agreement in July 2024. Mr Berryman's evidence in cross-examination, for example, included:[74]

> MR MAHENDRA: Mr Berryman, after the proposed agreement had been voted down, Transgrid's position was that bargaining had become intractable. Correct?---No, I don't agree in the sense that of course there was always some hope that the parties still might be able to reach an agreement. It seemed more likely that bargaining for some months prior, of course, had been difficult. And the parties, I think, I said before were miles apart. And, therefore, that was more likely but I don't necessarily agree with what was put.

[84] Mr Berryman was then asked about his recollection of internal discussions within Transgrid in late July and early August 2024 in the period preceding its application for an intractable bargaining declaration on 7 August 2024. Mr Berryman's evidence was that he did not have a clear recollection of those discussions.[75]

[85] To the extent Mr Berryman gave evidence that Transgrid did not have a firm view from late July 2024 that the likely and desirable manner in which the bargaining would be resolved, from its perspective, was through an intractable bargaining declaration being made, we do not accept his evidence. The communications from the Transgrid in that period, particular Mr Pickering's email of 1 August 2024 and its correspondence of 5 August 2024, expressly stated that it had made its "best and final offer", it believed there was no realistic prospect of an agreement through further bargaining and that an intractable bargaining declaration was needed. The evidence indicated that in the bargaining meetings held in August 2024, Transgrid communicated that it had made its best offer and would not move of any key issues. In our opinion, it is clear that Transgrid had resolved by that stage not to engage in further active bargaining and to pursue an intractable bargaining declaration application, at least unless there was an unanticipated change in the position of the Joint Unions.

[86] The question is whether, in doing so, Transgrid engaged in unreasonable conduct in bargaining for the purposes of s 275(f) or failed to comply with the good faith bargaining for the purposes of s 275(g). Transgrid was entitled to adopt the position that it had made its best and final offer and was not willing to make further concessions. That conduct did not, in our opinion, give rise to a contravention of the good faith bargaining requirements. Section 228(2) makes clear that the good faith bargaining requirements do not required a bargaining representative to make concessions or to reach agreement on the terms to be included in an agreement. Construed as part of the composite phrase, "concessions during bargaining", s 228(2)(a) is directed to ensuring that a party subject to the good faith bargaining requirements need not concede or yield something which is being asked of them during that bargaining process.[76] We also do not believe Transgrid acted unreasonably in bargaining in refusing to make further concessions after late July 2024. The submission that the Full Bench should make such a finding would require it to form a view about the wisdom or appropriateness of the substantive position adopted in bargaining. In the circumstances of this matter at least, we do not think it is possible to reach such a conclusion.

[87] The Joint Unions separately submit that Transgrid acted unreasonably in refusing to meet with unions after the vote in late July 2024 notwithstanding the CEPU indicating that it was willing and available to meet to progress the bargaining. The good faith bargaining requirements include "attending, and participating in, meetings at reasonable times".[77] Sometimes meetings can lead to progress even where it appears unlikely. However, the position was that Transgrid had determined not to make further concessions from its "best and final offer" and the position of the Joint Unions did not appear likely to change. In the particular circumstances, we do not believe it was unreasonable for Transgrid to request some indication that there was some prospect of progress in the bargaining prior to agreeing to meet. Transgrid did participate in further bargaining meetings in mid-August 2024 following a recommendation by the Commission. Whilst different views might be expressed as to the wisdom of its approach, we are not satisfied that Transgrid engaged in unreasonable conduct in bargaining in this regard.

[88] We now turn to consider Transgrid's submissions in relation to the conduct of the Joint Unions during the bargaining. The central submission advanced by Transgrid is that the bargaining was progressing positively in late 2023 in that the Joint Unions had made a counteroffer in relation to wages of a total increase of 17 percent over three years (including superannuation) at the meeting on 26 September 2023 and Transgrid had progressed to a

position of offering increases of 13 percent (including superannuation) by November 2023. Transgrid also pointed to attempts by representatives at Transgrid to bridge the gap with direct discussions and representations with Mr O'Malley and Mr Bligh.

[89] Transgrid suggests that the bargaining was upset by the decision of the Joint Unions in January 2024 to revert to a position with respect to wages of seeking three increases of 8 percent per annum. Mr Hicks is painted as the villain in this story. Transgrid submits that the evidence demonstrates that there was a clear pivot in early 2024 that was driven by Mr Hicks, which effectively scuttled what, otherwise, appeared to be productive negotiations that were heading in the right direction towards an agreement. In substance, Transgrid submits that, when Mr Hicks took a leading role in the bargaining from early 2024, the Joint Unions reverted to their original bargaining position and adopted a hardline position thereafter which stood in the way of a successful resolution to the bargaining. This course of action, it is said, constituted unreasonable conduct in bargaining.

[90] It is necessary to comment on one aspect of the evidence in this respect. Mr Hicks was cross-examined as to whether, when he became involved in the bargaining, he was informed that the Joint Unions had made an offer in September 2023 of an aggregate wage increase of 17 percent over a three year agreement. Mr Hicks' evidence was that he should have been told if a position had been put forward by the Joint Unions in relation to wages, but could not recall having been informed of the offer made in September 2023. Mr Hicks' evidence in cross-examination included in relation to his discussions with Mr Bligh in January 2024:[78]

> Yes, and that he's mentioned to you, in fact, that on 26 September 2023 the unions have put a position to Transgrid on wages, being 6 per cent, 5 per cent, 5 per cent, plus 0.5 per cent increases to superannuation in years 2 and 3?---Not that I can recall.
>
> Mr O'Malley's given evidence yesterday that the union did that. I'm putting to you that while you don't recall, you'd accept, wouldn't you, that had that offer been put, that you would have been told about that in your handover in your discussion with Mr Bligh. Correct?---Yes, I should have.
>
> And after the handover, you've made a decision to go back with the original log of claims, after the proposed agreement that Transgrid had put to the workforce in December 2023 had been voted down. Correct?---No.

[91] Transgrid submits that Mr Hicks' evidence is not credible and should not be accepted. It says Mr Hicks must have known of the position put by the Joint Unions in September 2023 and that a tactical decision was made in 2024 to revert to the original log of claims. That decision, it is submitted, derailed the bargaining and resulted in the impasse that was experienced in 2024. Contrary to the initial position it put forward, Transgrid said that these events were relevant to the merits of the wages claim as well as the issue of backpay.

[92] There is some difficulty in resolving the factual issue and we are reluctant not to accept the direct evidence of Mr Hicks. The evidence as to the formulation of the bargaining strategy of the Joint Unions is sparse at best. Mr Bligh and Mr Murphy, who led the bargaining with Mr Hicks in 2024, did not give evidence. Mr O'Malley did give evidence but was not cross-examined about his interactions with Mr Hicks concerning the counteroffer made on 26 September 2024. The evidence is in an unsatisfactory state. This is both because the Joint

Unions did not deal with these issues in their evidence in chief and because the cross-examination of Mr Hicks and Mr O'Malley did not fully explore the contentions that Transgrid ultimately made in closing submissions.

[93] Although the evidence is incomplete, it would be surprising if an offer was made in September 2023 without Mr Hicks being aware of it, or authorising it, at the time. The bargaining is important to the CEPU, and it is unlikely a position would be put forward in relation to wages without the Secretary of the ETU Branch being aware that it had occurred. However, it is unnecessary to form a concluded view on that question. We believe it is more likely that, whatever interactions occurred between Mr Hicks, Mr Murphy and Mr Bligh in January 2024 and whatever the state of Mr Hicks' knowledge, the Joint Unions at some point made a conscious choice to revert to the position put forward in the log of claims which had been authorised by members. They did so with knowledge that an offer had been put in September 2023 as described by Mr O'Malley.

[94] The question is whether, as a result, the conduct of the Joint Unions was not reasonable for the purposes of s 275(f) or failed to comply with the good faith bargaining requirements for the purposes of s 275(g). Transgrid's submissions did not identify whether it contends that the Joint Unions breached the good faith bargaining requirements or, if so, in what respect or whether the submission is simply that the conduct of the Joint Unions in changing their position in early 2024 was unreasonable conduct in bargaining.

[95] It is appropriate to deal first with the good faith bargaining requirements. In some decisions, it has been suggested that a unilateral change to the bargaining position of a party might give rise to a breach of the good faith bargaining requirements by amounting to a failure to give genuine consideration to the proposals of other bargaining representatives for the purposes of s 228(1)(d).[79] There may be some difficulty in reconciling such a conclusion with s 228(2) which indicates that the good faith bargaining requirements do not require a bargaining representative to reach agreement on the terms to be included in an enterprise agreement, or even make concessions. That provision limits the extent to which the substantive positions adopted by bargaining representatives as to the content of an agreement can give rise to a contravention of the good faith bargaining requirements. The bare fact of a revised claim, even an increased wages claim, is not sufficient in and of itself to establish a failure to bargain in good faith for the purposes of s 228. Rather, the overall circumstances in which such a revised wages claim is made is the focus.

[96] In any event, for present purposes, we are not satisfied that the conduct identified by Transgrid gave rise to a failure to comply with the good faith bargaining requirements. As we have observed, Transgrid did not identify any particular aspect of the good faith bargaining requirements that was not met. We do not believe the change in position demonstrates that the Joint Unions failed to give genuine consideration to the proposals made by Transgrid for the purposes of s 228(1)(d). We also do not believe the conduct can be described as capricious or unfair and, even if the conduct could be described in that way, that it undermined freedom of association or collective bargaining for the purposes of s 228(1)(e).[80]

[97] We are also not satisfied that the Joint Unions engaged in unreasonable conduct during bargaining for the purposes of s 275(f) as a result of the stance taken in January 2024. The concept of "unreasonable conduct during bargaining" may be broader than a failure to comply

with the good faith bargaining requirements. It is possible that a unilateral change to the substantive position of a party in bargaining might give rise to unreasonable conduct. However, the test of unreasonableness presents a high threshold. Transgrid acknowledges that the Joint Unions were entitled to adopt a robust approach to bargaining. In most negotiations parties are entitled to make limited offers, and are not obliged to make another offer in the same terms at a later time if the other party passes up the opportunity. When weighing up the considerations in favour and against accepting an offer, a negotiating party should generally take into account that what is on the table tomorrow may not be as favourable to them as what is on the table today. A party does not necessarily engage in unreasonable conduct by adopting negotiating tactics and strategies.

[98] Although the reasons for the strategy of the Joint Unions were not comprehensively explained in the evidence, we do not accept that their conduct, when considered in totality and against a background of protracted bargaining, was unreasonable. The Joint Unions endeavoured to explore whether agreement could be reached prior to the nominal expiry of the 2020 Agreement in December 2023. That was unsuccessful. Transgrid determined, as it was entitled to do, to put a proposed agreement to a vote of employees in December 2023 without securing the agreement or support of the Joint Unions. The vote was also unsuccessful. Approximately 83 percent of employees voted not to approve the proposed agreement.

[99] It is perhaps unsurprising that, in those circumstances, the Joint Unions determined to return to their log of claims. The evidence of its witnesses and the contemporaneous documents do not suggest that its representatives were shocked or outraged at the time. The position of the Joint Unions was announced at a bargaining meeting on 15 January 2024. Mr Berryman's notes of that meeting contain no indication of surprise, nor does his witness statement.[81] We also note that Transgrid also changed its position during the bargaining. After the unsuccessful vote in July 2024, Transgrid altered its position in bargaining and withdrew its offer of backpay and a one-off cost of living payment.

[100] Even if the conduct of the Joint Unions during the bargaining could be described as unreasonable, which we do not accept, we do not believe that much weight can be given to the conduct in the determination of the matters that remain at issue. The position of Transgrid throughout the bargaining with respect to wages has been, and continues to be, that it cannot responsibly provide an aggregate increase in wages and superannuation of more than 14 percent over a three year term. If the Joint Unions had maintained the position on wages which was put forward in September 2023, albeit without the approval of members, there is nothing to suggest that the bargaining would have been successfully resolved during 2024.

Wages and allowances

[101] The principal matter at issue in this arbitration, and which the Commission must deal with in the workplace determination, concerns the provision that should be made with respect to wages and superannuation. As has been observed, the issues that remain to be determined in relation to wages include the quantum of the increases over the life of the workplace determination, the level of week base salary and allowances at commencement of the workplace determination and the effective date from which the weekly base salary will be payable. Transgrid also emphasised that determination of the level of wage increases to be included in the workplace determination required consideration of the increases in superannuation

contributions also sought by the Joint Unions and Transgrid. In relation to allowances, both parties accepted that most allowances should be increased by the same amount as wages and at the same points in time.

[102] The position of Transgrid is that there should be a prospective increase in wages and superannuation of an aggregate amount of 14 percent over three years comprised of a five percent increase in wages in the first year and a four percent increase in wages (plus a 0.5 percent increase in superannuation) in the second and third years. The calculations undertaken by Transgrid indicate that the total cost of those increases in wages and superannuation contributions would be $28,341,894 over three years.

[103] The position of the Joint Unions is that there should be an aggregate increase in wages and superannuation of 20.5 percent over three years commencing on 1 December 2023 comprised of a 6.5 percent increase in wages each year plus a 0.5 percent increase in superannuation in the second and third years. Transgrid says that the additional cost of the Joint Unions' claim would be $42,990,686 over three years or $14,684,792 more than Transgrid's position. That calculation does not take into account the different timing sought for the commencement of the wages increases.

[104] The most relevant considerations in relation to the wage outcome to be included in the workplace determination, in this matter, are the merits of the case, the interests of the parties and the public interest for the purposes of s 275(a), (c) and (d). The Commission has previously indicated that the type of matters that are relevant to the assessment of wage claims in the context of workplace determinations include:[82]

(a) the maintenance of real wages;
(b) wage outcomes for the same class of workers in the same industry; and
(c) wage rates and increases in comparable instruments.

[105] These matters are relevant but not determinative. Other matters may be relevant, including the interests of the parties. Employees, obviously enough, have an interest in maintaining and, over time at least, increasing the real value of their wages, supporting themselves and their families in a comfortable manner and obtaining fair and reasonable remuneration for the work they perform. Transgrid has an interest in ensuring it has a sustainable and profitable business and is able to invest in the future of the business and maintain the infrastructure, plant and equipment necessary for its operation.

[106] The submissions advanced by the parties in relation to the wages outcome that should be included in the workplace determination were within a relatively limited compass. The most significant feature of the Joint Unions' submissions in relation to wages is that the employees have suffered a substantial reduction the real value of their earnings during the operation of the 2020 Agreement and the increases sought are justified to partially recover the reduction in the real value of the wages of the relevant employees. The Joint Unions also submit that its claim is consistent with industry benchmarks to the rate of pay at various interstate operators which they claim are equivalent and that employees have experienced an increase in work intensity, are working longer hours, undertake more high risk work and performing significant amounts of overtime.

[107] Transgrid's submissions in relation to wages relied heavily on the submission that Transgrid's capacity to fund wage increases is constrained by the regulatory framework and, in particular, the constraints on its revenue it can derive from prescribed transmission services imposed by the AER determination. Transgrid submits that to fund wage increases in excess of 14 percent over three years it would either need to achieve productivity or cost savings that would be very difficult to achieve or exceed the maximum allowable revenue and be exposed to financial penalties. Transgrid also disputes that the effects of recent changes to the cost of living to not justify a higher increase and that the industry benchmarks relied upon by the Joint Unions do not represent appropriate comparators or justify the wages increases sought.

[108] We note that neither Transgrid or the Joint Unions put forward productivity initiatives or cost saving measures in the course of bargaining or as part of the workplace determination the Commission is asked to make which would separately justify additional wage increases or be relevant for the purposes of s 275(e) of the Act. The mutual position of the parties was that s 275(e) was not relevant. We do not consider it an influential consideration in this matter.

Cost of living changes and other factors relied upon by the Joint Unions

[109] The Joint Unions contend that the merits of the case, and consideration of the interests of employees, strongly support the wage increases they seek having regard to evidence that the employees have experienced a reduction in real wages over the course of the current enterprise agreement.

[110] The employees last receive a wage increase on 1 December 2022. The wage increases for which provision was made in the 2020 Agreement were for a 2.5 percent increase from 1 December 2020 and a 3 percent increase on each of 1 December 2021 and 1 December 2022.[83] The Joint Unions submit that, as a result of the high rates of inflation experienced in Australia since 2020, the employees are suffered a reduction in the real value of wages and their wages will continue to be substantially below 2020 levels in real terms if the wage increases urged by Transgrid are adopted.

[111] In this respect, the Joint Unions relied on three expert reports prepared by Professor John Buchanan, Associate Professor Anastasios Panagiotelis, and Dr Troy Henderson from the University of Sydney Business School. The first report was entitled *Movements in the real value of Transgrid's current and proposed EBA pay rates 2020-2027* and is dated 20 November 2024. The second report, entitled *Response to Expert Report of Greg Houston* and is dated 9 December 2024. The third report is entitled *Response to HoustonKemp Supplementary Report* and is dated 17 December 2024. Professor Buchanan gave oral evidence at the hearing of the proceedings and was cross-examined.

[112] The first report purports to deal "with two central wages policy issues: movements in wage rates and inflation, including the cost of living."[84] The authors relied on the Consumer Price Index (**CPI**), the Selected Living Cost Index for Employees (**LCI**) and the Wage Price Index (**WPI**), produced by the Australian Bureau of Statistics.[85] The report was based on estimates of changes in real wages for Transgrid Salary Point 13 (entry level trade rate) and Salary Point 24 (experienced operator rate) and compared wage levels for those classifications with changes in the three relevant indices being the CPI, the LCI and the WPI.

[113] The core statistics and forecasts used in the first report are set out in Table 1 to the report as follows:

Table 1 The core statistics and forecasts informing the empirical analysis in this report,

	Price change indices (December)				Pay increase (1 December)
	Living costs (Employee basis)	CPI (Australia)	CPI (Sydney)	WPI[3]	
	Percentage change, year to December				Percentage change, 1 December
2020	-0.5	0.9	0.8	1.4	2.5
2021	2.6	3.5	3.1	2.3	3.0
2022	9.3	7.8	7.6	3.4	3.0
2023	6.9	4.1	4.2	4.3	0
2024	[2.6]	(2.6)	[2.6]	3.4	0 [[$1,500]]
2025	[3.7]	(3.7)	[3.7]	{3.2}	[[5]]
2026	[2.5]	(2.5)	[2.5]	{3.1}	[[4]]
2027	((2.5))	((2.5))	((2.5))	((3.0))	[[4]]

Sources: See details in Attachment 3.
Notes:
[ ] = estimate based on RBA forecasts of national CPI.
( ) = RBA forecast,
(( )) = naïve forecasting assumption.
{ } = based on Aust Treasury 2024:53
[[ ]] Figures have been based on pay offers reportedly made by Transgrid management in recent times.. The $1,500 refers to a lump sum sign on bonus offered but then withdrawn in 2024.

[114] The first report then calculated the extent to which the real value of the wages of employees to be covered by the workplace determination had declined when measured against the CPI and the LCI. The calculation was undertaken historically for the period of the 2020 Agreement, that is, from 2020 to 2024 and prospectively based on forecasts produced by the Reserve Bank of Australia for the period from 2020 to 2026 and 2020 to 2027 assuming that Transgrid's position with respect to wage increases was adopted. The outcome of the calculations is set out in Table 2 to the report as follows:

Table 2: Change in nominal and real wage rates (%)[1] for Transgrid Salary Points 13 (entry level trade) and 24 (experienced + qualified high voltage operators) since 2020

Classification		Current EBA period	Forecast (RBA basis)		Naïve forecast for 2027 of 2.5% inflation rate	
Salary point + annual rate in 2020	Basis for calculating change in value of wage rate	2020 - 2024	2020 - 2026		2020 - 2027	
			No sign on, no back pay	Sign on, no back pay	No sign on, no back pay	Sign on, no back pay
Level 13 (2020: $74,297.07)	Nominal EBA rate	+6.1	+15.9%	+18.1	+23.5	+22.8
	LCI	-13.7%	-11.3	-9.6	-10.0	-8.3
Sign on in 2024 <=> 1.9%	CPI (Aust)	-11.0%	-8.5	-6.8	-7.2	-5.4
	CPI (Sydney)	-10.5%	-8.1	-6.4	-6.8	-5.0
Level 24 (2020: $111,009.91)	Nominal EBA rate	+6.1%	+15.9	+17.3	+20.5	+22.0
	LCI	-13.7%	-11.3	-10.2	-10.2	-8.9
Sign on in 2024 <=> 1.3%	CPI (Aust)	-11.0%	-8.5	-7.4	-7.2	-6.0
	CPI (Sydney)	-10.5%	-8.1	-6.8	-6.8	-5.6

Sources: The material in this table reports on data reported in Attachment 4. That material has been generated using statistics and indices reported in Attachment 3.
Notes: 1. This table uses statistics produced by Ass Pro Panagiotelis. Full details in Attachment 4.

[115] We note that the Reserve Bank does not produce forecasts for the LCI and the report assumes that the LCI will move in accordance with the forecast changes to the CPI.

[116] The consequence of the analysis undertaken is that Transgrid employees are worse off in real terms in 2024 measured against either the CPI or LCI compared to 2020 and will continue to be worse off in 2027 if Transgrid's proposed increases are implemented. For example, a Salary Point 13 employee in 2024 is roughly $7,000 worse off compared to 2020 if the CPI measure is used and approximately $10,000 worse off compared to 2020 if the LCI measure is used. Under the wage increases proposed by Transgrid that employee will still be approximately

$4,000-$5,000 worse off by 2027 compared to 2020, if either the Sydney CPI or CPI is used and approximately $7,000 worse off if the report's estimate of the LCI is used.[86]

[117] Transgrid relied on an expert report authored by Greg Houston dated 21 November 2024 entitled *Expert Report of Greg Houston* and a report prepared dated 10 December 2024 entitled *Supplementary Report of Greg Houston*. Mr Houston is a partner of a firm of expert economists known as HoustonKemp. Mr Houston also gave oral evidence and was subject to cross-examination at the hearing. Ultimately, the differences between the opinions of Professor Buchanan and Mr Houston in relation to the impact of inflation and changes to the costs of living on the wages of Transgrid employees were narrow and unlikely to have any substantial impact on the task of the Full Bench. There were four areas of disagreement.

[118] First, Mr Houston criticised the analysis in Professor Buchanan's report for not including reference to the wage increase which took effect from 1 December 2020.[87] This was ultimately not a criticism of Professor Buchanan's report, but a question of what time period is chosen to make the comparison. Ultimately, Professor Buchanan's third report contained the following table which set out the outcomes of the two different approaches when using the LCI measure in a manner that we do not understand to be disputed:

Table SS1: Movements in the real value of wage rates in Transgrid's EBA 2019-2027 and 2020-2027 with Level 13 as an example, LCI (Employee Basis) deflator

Change in real value of wage rates with reference point of either 2019 or 2020 to …	Reference period point	
	2020 as reference point ($74,297.07)	2019 as reference point ($72,484.94)
…2024	-13.7%	-11.1%[1]
…2026	-11.3%	-8.7%
…2027	-10.0%	-7.4%

Sources: HoustonKemp, Supplementary report of Greg Houston, 10 December 2024: Table 2.3 page 7 and Buchanan et al report 20 November 2024 Table 2a of Attachement 5 page 16.

[119] Second, there is a disagreement over what measure is the most appropriate to be used to assess the effect of changes in the cost of living on employees. Professor Buchanan and his team expressed the conclusion that the LCI is a better measure if one is endeavouring to assess the impact of changes in prices on employees. Professor Buchanan's first report states:

> Calculating real wage rates requires taking changes in prices into account, especially those associated with the cost of living. The ABS produces a number of indices that can be used to generate estimates of real wages. Historically the most commonly used has been the Consumer Price Index (CPI). As the RBA has noted the CPI is 'not an ideal indicator' of the cost of living because it is a 'measure of price changes' rather than 'the change in spending by households required to maintain a given standard of living' (RBA 2024 in Attachment 2). It is for this reason that the ABS also collects Selected Living Cost Indexes (SLCIs). These provide a way of tracking changes in all the major costs associated with living for different groups within society. In addition the ABS maintains a Wage Price Index (WPI) to track how rates of pay for a basket of jobs changes over time. This is useful for comparing how changes in rates prevailing in Transgrid compare to developments elsewhere in the economy. In this report we describe developments using all indicators. If we are concerned with the cost of living the LCI is the most useful indicator.

[120] As to the LCI, Professor Buchanan's first report states (references omitted):

> The Selected Living Cost Indexes (SLCIs), also published by the ABS, focuses on changes in living expenses for specific household types, such as employee households, age pensioners, other government transfer recipients, and self-funded retirees. These SLCIs capture 'changes over time in the purchasing power of the after-tax incomes of households. The SLCIs are published quarterly but only on a national – not national and capital city like the CPI – basis. There are several key distinctions between the SLCIs and the CPI, specifically in how they account for insurance and financial services in relation to housing costs. For example, mortgage interest and other housing-related expenses for owner occupiers are included for SLCIs but excluded from CPI.

[121] Mr Houston does not directly provide an opinion as to the most appropriate measure of changes in prices or the cost of living for present purposes. Mr Houston provides a description of the various measures and points out that the LCI also suffers from many of the deficiencies identified in the CPI, for example, that it is limited to data collected with respect to eight capital cities.[88] Mr Houston also identifies that the include of mortgage and other interest costs in the LCI means the measure is significantly affected by changes in interest rates.[89] Transgrid submits that the LCI is a measure that should be approached with caution.

[122] The Full Bench is not engaged in a mathematical exercise in determining the fair and appropriate wage outcome to be included in the workplace determination and it is not necessary that we choose one measure to consider for that purpose. Both measures provide assistance, the CPI as a measure of consumer price inflation generally, and the LCI because it is a measure of the purchasing power of employee households. We consider it is appropriate for the Full Bench to consider both the CPI and LCI in assessing the appropriate wage outcome to include in the workplace determination and we have done so. In that respect, we observe that Commission's Annual Wage Review refers to both measures.[90] Professor Buchanan gave evidence in cross-examination concerning recent efforts internationally to develop measures of the impact of prices on different groups in the community which will give a more textured understanding of the impact of inflation. That will, no doubt, be of interest to the Commission in the future, but does not assist in the present task.

[123] Third, and relatedly, Professor Buchanan and Mr Houston have different views in relation to the method of forecasting likely change to the LCI in the future. As we have observed, the Reserve Bank does not produce forecasts of the LCI and, as a result, both Professor Buchanan and Mr Houston simply used the forecasts for the CPI. Professor Buchanan expressed the opinion that, given the recent movements in the LCI, this is a very conservative assumption and most likely under-estimates movements in this index.[91] Mr Houston's view is that movements in the LCI will fall below the CPI in the immediate future because of likely reductions in interest rates.[92] We agree with Professor Buchanan's description of this disagreement, in his oral evidence, as being "at the margins".[93] We believe, in the present circumstances at least, the best that can be done is to assume that the LCI will move in accordance with the Reserve Bank's forecasts for the CPI.

[124] Fourth, Professor Buchanan was instructed to examine the period from 2020 to 2024 and 2020 to 2027. Mr Houston expressed the view that it is appropriate to have regard to reference periods with longer time horizons so as to identify both long-term structural trends in real wages that persist across economic cycles and short-term fluctuations.[94] Mr Houston produced the following analysis of increases in wages for Transgrid employees, the CPI and the LCI from 2010-2011 to 2022-2023:

Table 5.1: Cumulative increase in wages and LCI since the 2010 financial year

Financial year	Cumulative increase in wages	Cumulative increase in CPI	Cumulative increase in WPI	Cumulative increase in LCI
2010-11	3.53%	3.55%	3.84%	4.52%
2011-12	7.18%	4.80%	7.68%	5.25%
2012-13	11.47%	7.31%	10.84%	5.99%
2013-14	14.60%	10.54%	13.72%	8.40%
2014-15	17.86%	12.21%	16.31%	9.35%
2015-16	21.28%	13.36%	18.71%	10.40%
2016-17	21.28%	15.55%	21.02%	11.87%
2017-18	26.18%	17.95%	23.51%	14.39%
2018-19	28.70%	19.83%	26.49%	16.18%
2019-20	31.28%	19.42%	28.69%	13.76%
2020-21	34.56%	24.01%	31.00%	17.54%
2021-22	38.60%	31.63%	34.45%	23.00%
2022-23	43.45%	39.56%	39.35%	34.87%

Source: HoustonKemp analysis of supplementary instructions: supplementary reply letter of instruction; ABS, All groups CPI, Australia (series: A23258446C), 30 October 2024; and ABS, ABS, Total hourly rates of pay excluding bonuses, Australia, Private and Public, All industries; (series: A2603609J), 13 November 2024 and ABS, Selected living cost indexes, Australia, Employee households (series A4083524T), 6 November 2024. Note: values in this table are reported to two decimal places for consistency with my first report.

[125] The relevant time period to be examined is not ultimately a matter of expert opinion, but a question for the Commission. We agree with Professor Buchanan's observation, in that respect, that the extent to which it is appropriate to respond to an inflationary surge, or for wages to keep pace with movements in prices and aggregate productivity over the longer term, is a matter for the Commission to determine.[95]

[126] The outcome of the expert reports the Commission has received is that Transgrid employees have experienced a significant reduction in the real value of their wages since to the commencement of the 2020 Agreement. The degree of the reduction is greater when analysed by reference to the LCI rather than the CPI, but is substantial on either measure. The employees will not recover the whole of the reduction in real wages by 2027 if either Transgrid's or the Joint Unions' claims are adopted in the workplace determination, but (obviously enough) the difference will be greater if Transgrid's proposal is accepted. Further, there is no dispute that Transgrid employees experienced increases in real wages between 2010 and 2020.

[127] Those are all matters we must consider and have considered. The maintenance of the real value of wages, and changes in cost of living or prices indexes, will frequently be significant in the determination of what increases of wages should be included in a workplace determination. The significance of that factor will depend on the circumstances of the particular case. In *Schweppes Australia Pty Ltd v United Voice (Victoria Branch)* [2012] FWAFB 7858; (2012) 226 IR 236, the Full Bench said, by reference to reliance on changes in the real value of wages, that:[96]

> Determining the level of wage increases in this context does not lend itself to the adoption of a decision rule or a mathematical formula. Fundamentally the Tribunal is seeking to arrive at an outcome which is fair in all the circumstances and that appropriately balances the interests of the parties. The factors in s 275 and ss 557 and 578 of the Act are also relevant and must be taken into account.

[128] The Commission is not bound to determine wage increases that maintain the real value of wages or, indeed, limited to determining a wage outcome that corresponds with changes in

the value of money. A workplace determination should provide for wage outcomes that the Commission considers are fair and appropriate in light of the circumstances of the particular arbitration.

[129] Transgrid did not submit that cost of living changes should not be considered. It submits, supported by the opinion of Mr Houston to which we have referred, that it is appropriate to take a longer-term view and that the Commission should take into account that its employees experienced substantial real wage increases in the period between 2010 and 2020. Transgrid refers to the following observation by the Full Bench in *Re Sydney Trains* [2023] FWCFB 52:[97]

> … while we consider that, as a matter of fairness, the real wages of the relevant employees should be maintained and, indeed, increase over time, this should be treated as a medium- to long-term objective rather than something that can necessarily be achieved in every year or within the nominal term of every enterprise agreement. An automatic "wage indexation" approach in the circumstances of the current, hopefully temporary, period of high inflation would require wage increases completely out of touch with the wage increases given to other NSW public sector employees pursuant to the 2022 Policy and thus raise broader issues of equity.

[130] We agree that it is not appropriate to attempt to adjust the wages of Transgrid employees to precisely track the spike in inflation which has taken place in recent years. However, although it is appropriate to take into account longer term movements in wages and we have done so, the period since the most recent enterprise agreement was made is the most relevant period in assessing the immediate impact of changes in prices on employees. Transgrid employees have experienced a very substantial reduction in the real value of their wages in a short period and that is a significant consideration in determining what is a fair and appropriate wage outcome.

[131] By encouraging the Commission to examine the period from 2010 to 2027, Transgrid's submissions encourage an approach of setting off recent reductions in the real value of wages against historical real wage increases in a mathematical manner. We do not consider that to be an appropriate approach. No material was put before the Full Bench concerning the basis upon which earlier wage increases were determined. The wage increases received by Transgrid employees as part of previous bargaining rounds may well have been the result of productivity improvements, trade-offs in relation to other conditions of employment or reflect changes in work value. If that were the case, it would not be appropriate to bring historical wage increases to bear, in a mathematical manner, to depress future wage outcomes.

[132] Employees will often adjust their financial commitments and spending habits in light of changes in their remuneration over time. A present reduction in the real value of their wages will have an impact on employees and their families for which little solace can be derived from increases in real wages which occurred a decade earlier. Other employees will have only commenced employment with Transgrid in recent years and will not have obtained direct benefit from earlier wage increases. The evidence indicated that the average tenure of Transgrid employees is eight years.[98] We have taken into account the fact that there were increases in the real wages of employees in the past but would not do so in the mathematical manner urged by Transgrid.

[133] The Joint Unions supported their wages claim by calling evidence from a number of individual employees who, among other things, gave evidence in relation to the impact on them

of changes to the cost of living. For example, Ben Chew gave evidence about his weekly expenditure, cost of living pressures, the fact that he does overtime on average 4 out of 5 weekdays and regularly on weekends and the importance of an increase in superannuation.[99] Bradley Wales states that his role means that he works hours in excess of his roster, and despite rostering being organised up to three months in advance, it varies due to outages, network faults, staff shortages and a change in network priorities. He provides evidence about his weekly costs and the impact of a rising cost of living, the consistency of his overtime hours and the toll this takes on his family and the importance of planning for the future and how a superannuation increase would assist this.[100] Jared Ford gives evidence about weekly costs and the impact of a rising cost of living, the consistency of his overtime hours and the toll this takes on his family and the importance of planning for the future and how a superannuation increase would assist this.[101] Michael Haddon gives evidence his weekly expenses and explains that the increases in the cost of living have impacted his family and lists a number of expenses he and his family have cut down on to reduce costs. Mr Haddon gives evidence that he works regular overtime which has limited the time he can spend with his family.[102] Ross Cardwell gives evidence that the cost of living has impacted his family, particularly in relation to the construction of their family home, and says that his wife has had to return to work full time and he now takes time off work to care for his children as it makes the most financial sense. Mr Cardwell states that he has considered taking a different job and usually works between 13 and 15 hours of overtime a week.[103]

[134] Counsel for Transgrid cross-examined some of these witnesses about their financial positions, including questioning the employees about weekly expenses, cost of living and their wage in the last financial year. It was put to three of the witnesses in cross-examination, Mr Cardwell, Mr Chew and Mr Ford, that they were not forthcoming in indicating their financial position in their witness statements, because they did not disclose some additional income they were earning from assets, including by neglecting to mention investment properties in their own or their spouses name.[104] There was an inference made that their struggle with cost of living was ameliorated by their relatively high income and additional income derived from investment properties.

[135] The employees receive what some would describe as good wages. Many Transgrid employees are well trained and perform long and intense hours of work, often with an element of danger involved. They are compensated for the work they do, and they are not low income employees, nor are they claiming to be. They are also entitled to invest or otherwise do what they wish with the fruits of their labour. The evidence the employees give is that they have been affected by a reduction in real wages due to additional cost of living pressures. We do not doubt that this is the case. The cross-examination did not undermine that proposition, nor did it particularly assist the Full Bench in undertaking the task required by s 275 of the Act.

[136] There are two further aspects of the case advanced by the Joint Unions that should be considered. The Joint Unions assert that there has been an increase in work intensity, working hours and overtime performed by Transgrid employees and that the work has become more complex and high risk. Transgrid described these submissions as representing a "work value vibe" case. We do not doubt that Transgrid employees are skilled and hardworking and undertake difficult, important and sometimes risky work. However, the evidence is not sufficiently detailed or comprehensive to permit the Full Bench to attribute much weight to alleged changes in the work of the employees in determining the appropriate wages outcome as

part of this workplace determination. There is also not sufficient evidence to establish that wage increases are likely to have a significant impact on any attraction and retention issues being experienced by Transgrid or that wage increases, in themselves, will improve productivity for the purposes of s 275(e).

[137] Finally, the Joint Unions rely on the submission that the wage increases they seek are justified by reference to industry benchmarks. The authorities suggest that wage outcomes for the same class of workers in the same industry and in comparable instruments may be relevant to the determination of the wage increases to be included in a workplace determination. We accept that may be so. However, some caution should be applied before endeavouring to compare wage rates between different operators and different agreements. Enterprise bargaining outcomes in different businesses, particularly in different parts of Australia, will often be the result of their own idiosyncratic histories and wage rates are part of a set of conditions which apply to a particular group of workers. A simple comparison of wage rates may, in some instances, be difficult or misleading.

[138] The parties disagree as to what are relevant comparators. The Joint Unions submit that the most relevant comparators are transmission operators in other states being Powerlink in Queensland, Zinfra in Victoria, Western Power in Western Australia, Power and Water in the Northern Territory and SAPN in South Australia. The Joint Unions provided a table purporting to show that those operators, generally at least, have higher rates of pay for equivalent classifications based on uncontested evidence from officials in those States. Transgrid contends that distributors in New South Wales are the most relevant comparators and that Transgrid employees have historically received higher increases that employees of Ausgrid, Essential Energy and Endeavour Energy and employees of those operators have received lower increases than are proposed by the Joint Unions.

[139] We accept the evidence of the Joint Union witnesses in relation to whether the work of Transgrid employees is relevantly different to the work undertaken by comparable employees within the operations or distributors. Transgrid relied primarily on the evidence of Mr Berryman and, with respect, he is a human resources employee with limited practical experience of the work involved.[105] However, there is substance to Transgrid's submission that there are relevant differences in the operations and histories of transmission entities in other States and Territories. In particular, Powerlink, Power and Water and Western Power are wholly government owned, Zinfra and Western Power are not regulated by the AER, Zinfra is underpinned by a different award and none operate in New South Wales or the ACT. There is also evidence before the Full Bench that the history of industrial regulation of workers engaged in the generation, transmission and distribution of electricity in the different States has been quite different. In those circumstances, although it is relevant and we have taken it into account, it is not possible to give significant weight to the evidence concerning the wage rates of transmission operators in other jurisdictions.

[140] Having considered the merits of the claims made by the Joint Unions and Transgrid, the interests of the employees in maintaining or improving real wages and the public interest in these employees being appropriately remunerated, we have concluded that the fair and appropriate outcome, in the circumstances, is that there be an increase in wages which is higher, to some extent, than the position put forward by Transgrid. The extent of reduction in real wages the employees have experienced and the time it is likely to take to recover that ground supports

such an outcome. Whether such an outcome is appropriate in light of all the matters we must take into account requires consideration of the impact on Transgrid's business and the public interest in its business being viable and profitable. We turn to that matter now.

Constraints on Transgrid's business

[141] Transgrid, as a private company operating a transmission utility, is subject to detailed regulation. It is regulated in relation to, among other things, obligations to the community, and the amount of revenue that Transgrid can raise from the community in connection with its regulated activities. Transgrid argues, in particular, that the constraints which are imposed on its capacity to generate revenue is relevant to the consideration of the merits of the case for the purposes of s 275(a), the interests of the parties for the purposes of s 275(c) and consideration of the public interest for the purposes of section 275(d) of the Act.

[142] Transgrid is subject to the National Electricity Rules and is aTNSP. Under Chapter 6A of the National Electricity Rules, the AER makes instruments called "transmission determinations" for TNSP's.[106] Transmission determinations consist of a revenue determination, and a determination specifying pricing methodology. There is a current transmission determination in force for Transgrid, which we will refer to as "the current AER Determination". The period of a transmission determination's operation is a "regulatory control period," defined in the National Electricity Rules, relevantly, as a period of not less than five regulatory years in which a total revenue cap applies to the TNSP by virtue of a revenue determination.[107] The current AER Determination with respect to Transgrid runs from 1 July 2023 to 30 June 2028 (which we will refer to as "the current regulatory control period").[108]

[143] The revenue that a TNSP may earn in any "regulatory year" of a regulatory control period is the "maximum allowed revenue" (the **MAR**), subject to any adjustments (which are not presently relevant). The maximum allowed revenue is to be determined in accordance with the revenue determination and the provision of the relevant part of the National Electricity Rules.[109] Transgrid refers to the maximum allowed revenue as "the MAR." It tends to also use this term to refer to the revenue determination under which the maximum allowed revenue is set. The "total revenue cap" is the sum of the MAR's for the TNSP for each year of the regulatory control period.[110]

[144] There are other incentive schemes in place that affect TNSP's revenue. Those instruments provide for incentive schemes, and include:

(a) the Efficiency Benefit Sharing Scheme ("the EBSS");[111]
(b) the Capital Expenditure Sharing Scheme ("the CESS");[112] and
(c) the Service Target Performance Incentive Scheme ("the STPIS").[113]

[145] The EBSS and CESS incentivise the transmission network service provider to improve efficiency and thereby reduce expenditure and consequently costs for consumers, by imposing benefits for underspending, and penalties for overspending.

[146] The operation of the EBSS, which provides for a continuous incentive based on retaining incremental efficiencies helps make sure a transmission network service provider is not tempted to increase their expenditure in the base year used to forecast operating expenditure

for the next regulatory control period.[114] This is important because higher forecasts can affect the amount of revenue the transmission network service provider is able to recover from consumers under the next period's revenue determination,[115] and information asymmetries make it difficult for the AER to accurately assess the efficiency of TNSP's proposals.[116]

[147] In addition to its prescribed transmission services that are subject to the AER determination, Transgrid provides certain non-regulated services which are not subject to the MAR. Although there was some dispute about the basis of the evidence, Mr Stallan said that work in relation to Transgrid's non-regulated services constituted approximately 20 percent of work by employees covered by the 2020 Agreement and 80 percent of work by those employees is for prescribed transmission services.[117] There was also dispute as to the extent to which Transgrid was entitled to utilise income derived from its non-regulated services, conducted through Lumea, to fund costs associated with the prescribed transmission services.

[148] The Full Bench received evidence about the operation of the regulatory framework and the instruments made under it.

(a) Arek Gulbenkoglu provided a written reports on behalf of the AER concerning the operation of the regulatory framework in response to an order made by Vice President Gibian requiring the provision of information to the Commission.
(b) Greg Houston, called by Transgrid, gave his professional opinion in relation to the regulatory framework in his capacity as a proprietor of an economic consultancy, who has an economics qualification and significant experience working with regulated sectors (including electricity).
(c) Craig Stallan, who is currently Executive General Manager of the Transgrid entity, Lumea, gave a lay opinion from the perspective of an executive working within the regulatory framework.
(d) Stephen Antoon, called by the Joint Unions, gave evidence from the perspective of a Senior Professional Engineer whose work involves interaction with one of the incentive schemes, the STPIS. Mr Antoon said that this scheme contained somewhat similar reporting and financial mechanisms as those in the CESS and the EBSS.[118]

[149] Transgrid submitted that the regulatory framework is designed to strike the balance between incentivising TNSP's to perform their functions efficiently and reveal those cost efficiencies on the one hand and ensuring that cost efficiencies are not achieved at the expense of service quality, on the other. It submits that its revenue for its prescribed network services is constrained by the MAR. This has a significant impact on Transgrid's ability, within the MAR, to meet increases in labour costs. This is particularly so because labour costs make up a significant proportion of its operating expenditure.

[150] Transgrid argued that the AER's decision as to the MAR for the current regulatory period was lower than it had sought. The amount provided for in relation to operational expenditure was 7.1 percent less than it had sought. It submits that labour costs form a very significant part of its operational expenditure and also form a significant but lesser part of its capital expenditure. It also argues that the MAR is subject to only very limited adjustment during each regulatory period that it would face difficulties in funding or absorbing unanticipated labour costs. Specifically, Transgrid submits that it cannot realistically fund

wages increases through material cuts to its maintenance program as to do so would compromise its ability to maintain the reliability of the HVTN. Transgrid says that it cannot fund wage increases by "dipping into" returns to shareholders, which are highly regulated and designed to provide a regulated return on capital. Transgrid further submits that if higher wage costs caused its expenses to exceed the amount of revenue available under the MAR or the corresponding amounts allowed for operational expenditure or capital expenditure, it would incur penalties under the EBSS or CESS, and assuming all else is equal, could experience a reduction in its actual rate of return, such that it would fall below "the regulated rate of return".

[151] In relation to the MAR and related issues, the Joint Unions submit that the assertion that Transgrid cannot responsibly accommodate an increase in wages of greater that 14 percent over three years does not withstand scrutiny. The Joint Unions contend that there is no clear assertion, on Transgrid's evidence, that a wage increase of greater than 14 percent, if granted, would cause the respondent's expenditure to exceed the amount of revenue able to be recovered under the MAR. Even if wage increases did cause Transgrid to incur costs such that its expenditure would exceed the amount of revenue able to be recovered, the Joint Unions submit that Transgrid cannot reasonably contend that it would be unable to fund those increases and that its arguments as to the ramifications if expenditure exceeds the MAR are speculative, exaggerated, or wrong.

[152] We will first consider the argument that increasing wages by more than 14 percent could cause Transgrid's expenditure to exceed the amount of revenue it can recover under the MAR, and the consequences if that occurs. Mr Gulbenkoglu says the purpose of the AER Determination "is to determine the maximum revenue that Transgrid can recover from consumers over a 5-year regulatory control period from 1 July 2023 to 30 June 2024.[119] He says the MAR is the maximum amount of revenue a TNSP is able to recover from consumers in each regulatory year of a regulatory control period.[120] The MAR forms the basis for transmission prices.[121]

[153] Mr Houston's report deals with the regulatory framework and the operation of the instruments made under it. He says that the regulatory framework is a form of incentive-based regulation. He explains that this "involves a degree of separation between the determination of a business's maximum allowed revenue (or prices) from the costs it actually incurs, such that the business stands to benefit – for a time-limited period – from improving its efficiency and thereby reducing its costs, before the benefits of those more efficient costs are then passed through to consumers in the form of lower prices and/or higher quality services."[122]

[154] He draws attention to a requirement, under the National Electricity Law, that in performing or exercising its economic regulatory functions or powers, the AER must do so in a manner that will, or is likely to, contribute to the achievement of the National Electricity Objective. Mr Houston sets out the relevant part of the National Electricity Objective, as follows:

> … to promote efficient investment in, and efficient operation of, electricity services in the long term interest of consumers of electricity with respect to –
> (a) price, quality, safety, reliability and security of supply of electricity; and
> (b) the reliability, safety and security of the national electricity system; and
> (c) the achievement of targets set by a participating jurisdiction –
> (i) for reducing Australia's greenhouse gas emissions; or

(ii) that are likely to contribute to reducing Australia's greenhouse gas emissions.

[155] Mr Gulbenkoglu stated that the AER Determination "provides for the allowed revenue in a regulatory control period based on forecast expenditure but does not restrict what a TNSP can spend."[123] Nor does the TNSP have to maintain a particular ratio between operational expenditure and capital expenditure.[124] However, spending can have implications under the incentive schemes.

[156] The AER makes the revenue determination which specifies, relevantly:[125]

(a) the amount of the estimated total revenue cap for the regulatory control period or the method of calculating that amount;
(b) the annual "building block" revenue requirement for each regulatory year of the regulatory control period;
(c) the amount of the maximum allowed revenue for each regulatory year of the regulatory control period or the method of calculating that amount;
(d) matters relating to the regulatory asset base and its indexation;
(e) matters relating to the application of the STPIS, the EBSS, and the CESS.

[157] The "annual building block revenue requirement" is how much revenue the AER says the TNSP requires for each year of the regulatory control period. A TNSP's annual revenue requirement is made up of several "building blocks" set out in the National Electricity Rules.[126] The AER summarises these building blocks into five key components:[127]

(a) return on the regulated asset base (RAB) or return on capital to compensate for the opportunity cost of funds invested in the business;
(b) depreciation of the RAB, or return of capital, to return the initial investment to investors over time;
(c) the forecast operating expenditure, being the operating, maintenance and other non-capital expenses incurred in the provision of network services;
(d) the revenue increments or decrements resulting from incentive schemes;
(e) the estimated cost of corporate income tax.

[158] This approach means that the total amount of revenue in each year, developed under this approach, is lumpy. Allowing the TNSP to recover revenue in a lumpy manner can give rise to price shocks for consumers and, to account for this, the AER smooths the revenue over the five-year period, not by simply dividing the total amount by the number of years, but by using an indexing arrangement allowing the revenue recoverable from consumers to grow along a smooth trajectory over the regulatory control period. The amount that this yields for each year of the regulatory control period is the MAR. [128] The indexation is based on a best-estimate of CPI adjusted by an "X factor" to create a smooth trajectory that is intended to end with the last year's MAR being close to that year's annual building block revenue requirement.[129] Mr Houston refers in particular to how labour costs affect the operating expenditure building block and the return on capital building block.[130]

[159] The AER forms an opinion on total forecast operating expenditure.[131] The AER publishes guidelines for forecasting expenditure, including the current Expenditure Forecast Assessment Guideline for Electricity Transmission, which deals with the approach to

forecasting operational and capital expenditure and naturally contemplates labour costs forming part of forecast expenditure.[132]

[160] The AER's explanatory statement for its EBSS, which was in place when the forecasting would have been undertaken for the now current regulatory period, and still in operation, provides a convenient summary of the AER's approach to forecasting operational expenditure:[133]

> In our Expenditure Forecast Assessment Guidelines, we have stated our preference is to continue with the revealed cost base – step – trend forecasting approach for assessing opex. If a [Network Service Provider] has operated under an effective incentive framework, and sought to maximise its profits, the actual opex incurred in a base year should be a good indicator of the efficient opex required. However, we must test this, and we determine a NSP's revealed costs are not efficient, we will adjust them to remove inefficient costs. We then add additional opex not reflected in the base year ('step changes') and trend it forward to reflect forecast changes in input costs, productivity and output growth.

[161] As can be seen, the approach starts with the revealed cost base. The actual expenditure in a base year in the immediately preceding period gives the "revealed costs," which can inform the forecast if the AER considers them to have been efficient.[134] The reference to "step" relates to anticipated step changes in expenditure. The reference to "trend" relates to applying rates of change reflecting expected changes in prices, output, and productivity for each year of the coming regulatory control period.[135] Changes in expected labour costs can therefore be taken into account when forecasting. The AER's preferred measure is the wage price index published by the Australian Bureau of Statistics.[136]

[162] Relying on the AER's report,[137] Mr Stallan also says that AER would have taken into account wage increases in the then current enterprise agreements applying in New South Wales in the utilities industry at the time, in determining expenditure forecasts.[138] The AER report says that consultants provide forecasts of WPI growth for the utilities industry, and that these forecasts draw on a wide range of data. However, as Mr Stallan acknowledges, the AER report goes on to say that consultants consider enterprise agreements in place in the utilities industry in the relevant state "but they do not rely directly on any enterprise agreements that the network has negotiated."[139] The forecast itself is undissected in that it is not broken down into explicit amounts for labour costs or other components of operating expenditure.[140] As Mr Houston points out, this ensures "flexibility in the allocation of that expenditure over the course of the regulatory period, as may be appropriate to respond to revealed circumstances."[141]

[163] Forecasting, by definition, involves prediction and uncertainty. Accordingly, it would be surprising if actual expenditure was always identical to forecast expenditure. Largely, costs actually incurred during a regulatory control period do not lead to adjustments, in that same period, of the amount of revenue Transgrid can raise from the public.[142] There are some circumstances in which the revenue constraints can be adjusted. Mr Gulbenkoglu provided an explanation of the circumstances in which the MAR is or can be adjusted.[143] Mr Houston's evidence was that a determination of the Commission in arbitration of a matter such as this one would not give rise to such an adjustment.[144] We agree with this construction of the National Electricity Rules.[145]

[164] The consequence is that if, for example, real wages growth over the five-year term of AER's determination turns out to be less than predicted, that does not mean the MAR for each year is decreased. The revenue can still be raised from the community within the existing constraint based on the forecast. That revenue can be used for other purposes or retained as increased profit. In other words, even if labour costs do not grow as predicted, that does not lead to a reduction in how much Transgrid can charge consumers.

[165] Transgrid accepted that in the immediately preceding five-year period to the current regulatory control period, real wages did not consistently grow at the rates forecast and instead suffered some negative growth.[146] This may, but does not necessarily, suggest that their labour costs would not have grown as had been contemplated when the forecasting was being undertaken prior to the 2018-2023 regulatory period. By the same token if expenditure over the five-year term is greater than forecast, the revenue constraint is generally not increased to accommodate the additional expenditure. Transgrid has to fund the cost by other means, such as by reducing spending elsewhere, or using profit derived from revenue that has been raised within the constraints, or from debt or equity.[147] However, the actual expenditure and therefore the revealed costs will inform the forecasts for, and the maximum allowable revenue, the following period.[148]

[166] The second of the two building blocks Mr Houston discusses in the context of labour costs is the return on capital building block.[149] The inclusion of this building block in the rules relating to the revenue determination means that part of the revenue that Transgrid can raise from consumers under the MAR can be put towards the return, to Transgrid and its shareholders, on capital. The return on capital is the value of the TNSP's regulated asset base multiplied by the "allowed rate of return" determined in accordance with the National Electricity Rules.[150] Obviously this means that this building block is dependent on the value of the regulated asset base. Mr Houston says the value of the regulated asset base is projected having regard to, among other things, the forecast capital expenditure as accepted or substituted by the AER.[151]

[167] As labour costs are one of the inputs into the capital expenditure forecast, they also affect the projected value of the regulated asset base, and in turn the return on capital building block.[152] The TNSP's Revenue Proposal to the AER must include forecast capital expenditure.[153] Similarly, AER forms an opinion on total forecast capital expenditure but does not dissect this into subcomponents.[154] What are the potential consequences? If increased labour costs do result in expenditure exceeding the revenue that can be recovered from consumers under the MAR, this may mean a lesser rate of return on capital to Transgrid than had been anticipated when the MAR was set. Mr Houston says this may affect Transgrid's ability to raise capital and its costs of doing so. He says it may affect Transgrid's ability to service its debts and pay dividends to its shareholders and could also affect Transgrid's credit rating.[155]

[168] We observe that these issues would apply equally to any other costs that cause an increase in expenditure beyond what is forecast, and accepted or substituted by the AER, in advance of the regulatory control period. In any such case, Transgrid may have to prioritise the way it uses its revenue, including in relation to the extent to which it allocates revenue to paying itself a rate of return. Rates of return are subject to regulation, but it has not been suggested to us that rates of return are immutable or guaranteed. The current AER determination indicates that the rate of return provided for in that determination is less than had been proposed by

Transgrid.[156] Mr Gulbenkoglu says that a TNSP that under or over-spends relative to forecasts may earn a return on assets above or below the allowed return on capital.[157]

[169] In addition to the consequence for the return that Transgrid can fund from revenue recovered from consumers, capital expenditure over-spends may attract penalties under the CESS and give rise to higher forecasts for future regulatory periods (to the extent such forecasts rely on revealed costs, discussed elsewhere in these reasons). As indicated above, in addition to the MAR, there are other relevant instruments made under the determination. Those instruments provide for incentive schemes, and include the STPIS, which relates to service improvements, the CESS which relates to capital expenditure, and the EBSS, which relates to operational expenditure. Mr Gulbenkoglu described these as the three core incentive schemes.[158]

[170] Mr Gulbenkoglu's evidence is that "in designing all three schemes the AER was mindful to provide balanced incentives across the schemes. In this way, the schemes were designed so businesses are indifferent from switching between OpEx and CapEx, while also encouraging service quality improvements that customers value."[159] Counsel for Transgrid asked Mr Gulbenkoglu about this at hearing, and he responded:[160]

> Could you just explain that a bit further? Sure. So I think maybe this goes to the point made in paragraph 43. So where - for capital expenditure, we set a forecast, that forecast is subject to the Capital Expenditure Sharing Scheme, which is the incentive scheme for CapEx. That incentive scheme, in essence, provides a 30 per cent reward for any underspend in CapEx and similarly, a 30 per cent penalty for any overspend. So that is for CapEx. Similarly, for OpEx, we set a separate forecast amount.
>
> Yes? For OpEx we similarly have an incentive mechanism in place, which is the Efficiency Benefit Sharing Scheme and again, under that scheme, there are rewards of 30 per cent for any underspend and 30 per cent penalty for any overspend. So there is a symmetry between the two incentive schemes.
>
> So in the context of the question that I asked you by reference to that scenario where money is taken from CapEx expenditure in a given year and it's used to fund labour costs in OpEx, all things being equal, are you able to explain what the consequences would be under the respective schemes, if any? It should be neutral. It should be neutral.

[171] Mr Stallan and Mr Antoon each gave their opinion on the effect of the EBSS and the CESS in practice. They both understood that under the EBSS Transgrid would bear 30% of the cost or benefit of any overspend or underspend as against the relevant forecast.[161]

[172] Mr Houston provided a useful explanation of the operation of both the EBSS[162] and the CESS.[163] Effectively, under or overspends (compared with the forecast expenditure) are carried forward and then applied as an adjustment to the revenue the TNSP can recover from consumers in the next regulatory control period. This is also clear from the inclusion of these increments or decrements in the list of building blocks in the National Electricity Rules, which we have referred to above.

[173] Mr Gulbenkoglu's report explained that the EBSS, by allowing a TNSP to retain efficiency gains or losses for a total of six years, allows it to retain approximately 30 percent of the efficiency gain in each regulatory year. The overall effect of the AER's operating

expenditure forecasting approach and the EBSS is that "where a TNSP over-spends against the AER's OpEx forecast, the TNSP bears 30% of any over-spend while consumers bear 70%".[164] This indicates that given the length of the carryover period, consumers would not commence bearing (or gaining) their share of the overspend (or underspend) until the next regulatory period.

[174] The CESS "provides TNSPs with additional financial incentives to undertake efficient CapEx over time, to ensure that only efficient CapEx is added to the regulated asset base."[165] Again, the TNSP retains 30 percent of the benefit of an underspend, or the cost of an overspend, with consumers obtaining or bearing the rest. Again this accrues over the regulatory control period and is then added or subtracted as a "building block" in the next regulatory control period.[166] Again, given the operation of the scheme consumers would not commence bearing (or gaining) their share of the overspend (or underspend) until the next regulatory period.

[175] In summary, if Transgrid's actual spending is much less than or much more than the forecasts upon which the determination is based, that can result in benefits or penalties under applicable incentive schemes. That means that if Transgrid spends more on labour costs than anticipated before the five-year period, and that causes it to spend more than anticipated overall, it will have to wear that cost within the same regulatory period, and cost-sharing will occur commencing in the next regulatory period, with the total overall allocation of the burden, over time, being 30 percent to Transgrid and 70 percent to consumers. However, unanticipated costs do not necessarily mean these penalties will be incurred, because they may not cause the TNSP to exceed the respective amounts allowed for overall operational and capital expenditure in the regulatory period.

[176] In the current regulatory period, the AER Determination included penalties under both the EBSS and the CESS, for overspends in the previous regulatory period.[167] This does not appear to have been attributable to wage prices.[168] Nor should workers be expected to accept lesser increases than they otherwise would, so that Transgrid can manage its expenditure having regard to the effect of those penalties. Mr Stallan provided evidence as to the ongoing financial impact, if the unions' wage claim was granted.[169] Transgrid stopped short of categorically stating that a wage increase higher than it had offered would necessarily be the cause of its expenditure exceeding its revenue constraints over the regulatory control period.

[177] Fundamentally, the EBSS and CESS schemes are designed to encourage TNSP's to create efficiencies. The regulatory framework anticipates and encourages efficiencies that can be passed on to consumers in the form of lower prices and better services.[170] TNSP's are expected to continuously seek to create sustainable efficiencies, including in the face of costs outside its control.[171] Costs, including wages costs and labour costs more broadly, are neither static nor perfectly predictable. This is a risk for the company to assess when deciding whether to enter into a commercial relationship to operate a transmission utility that is subject to regulation given the nature of the industry.

[178] It follows from the foregoing that if Transgrid's expenditure was to exceed the maximum revenue it can recover under the MAR, whether as a consequence of changes in labour costs or otherwise, then within the current five-year regulatory control period the excess expenditure would need to be borne by Transgrid's owners, not the New South Wales public. Over the longer term, Transgrid would bear approximately 30 percent of the burden. The

regulatory framework does not impose a spending cap. It imposes a revenue constraint that prevents TNSP's from using their market power to increase consumers' electricity prices, unchecked. This is the nature of operating a private entity to provide an essential service.

[179] In our view, this regulatory context is relevant to, but not determinative of, the appropriate wages outcome to be included in the workplace determination. It is in the public interest that Transgrid, as the provider of essential public services, be able to reasonably work within the revenue constraints imposed by the regulatory framework and we have taken that matter into account for the purposes of s 275(d). Furthermore, Transgrid has an interest in containing its operating costs, including labour costs consistent with the forecasts upon which the MAR was based, and in deriving appropriate profits from its business, retaining its capacity to raise capital and having as much flexibility as possible to perform its prescribed transmission services. We have also taken those matters into account as relevant to the interests of the parties for the purposes of s 275(c).

[180] However, a number of considerations have led us to conclude that the regulatory framework is not as constraining as Transgrid suggests and does not require that wage increases be limited as strictly as Transgrid contends. First, Transgrid has agreed to undertake the prescribed transmission services on the basis that it will be subject to the MAR as determined by the AER. As we have explained, the AER's determination is based on forecast of its likely costs, including labour costs, with a limited capacity for Transgrid to seek variation in the MAR during the currency of the determination. Actual costs will inevitably vary for the forecasts to a greater or lesser degree, including labour costs. That is the business risk that Transgrid has taken on. Transgrid entered the period of the current AER determination knowing that bargaining with its workforce was imminent. Although it is a matter to be taken into account, that the outcome of bargaining might exceed the forecasts underlying the AER determination is not, in itself, a reason to constrain wage increases if otherwise justified. The interest of Transgrid and its shareholders in deriving the greatest profit possible must be balanced with the interests of employees in maintaining the real value of their wages and receiving fair and appropriate wages.

[181] Second, the restrictions imposed on the manner in which Transgrid can utilise its revenue are not as limited as Transgrid's evidence and submissions suggested. Mr Stallan's understanding was that Transgrid could not cross-subsidise operational expenditure and capital expenditure. The AER report indicated that Mr Stallan is wrong. The report provided by the AER, and the oral evidence of Mr Gulbenkoglu, made clear that Transgrid is not constrained in the manner it utilises its revenue. Although the MAR is calculated by reference to forecast costs and Transgrid is required to fulfil its obligations in providing the prescribed transmission services, it is able to use its revenue as it determines. It is not prevented from deploying the revenue as between operational expenditure and capital expenditure as it judges is in the best interests of the business. The application of the incentive processes would also likely produce a neutral outcome if an overspend on capital expenditure is proportionate to an underspend on operational expenditure or vice versa. To the extent that Transgrid's submissions assert that the MAR sets limits on its operational expenditure or capacity expenditure directly, that proposition is not supported by the evidence.

[182] Third, the evidence did not positively establish that including wage increases of greater than 14 percent over three years in the workplace determination would cause Transgrid to

exceed its revenue constraints. At most, Transgrid suggests that this is a possibility. Furthermore, Transgrid's evidence is that its expenses are already approximately $70 million in excess of the forecast expenditure. That is, for reasons other than the potential increases in wages of its employees and as a result of other operational decisions the business has made, Transgrid's expenditure is already exceeding the forecasts underlying the MAR by a significantly greater degree. The evidence suggests that variation in costs from the forecasts which supported the MAR is something that Transgrid has to manage in its business. To the extent that wage increases might exceed the forecast increase in costs as a result of the workplace determination, that must be seen in context of considerably larger costs being experienced throughout Transgrid's business.

[183] Fourth, the MAR has been adjusted throughout the period of an AER determination, and previous determinations, by means of the formula related to forecast CPI changes in the manner we have described. The wage increases under the 2020 Agreement were significantly lower than the CPI during its nominal term. The consequence is that Transgrid has benefited, or at least potentially benefited, from increases in the revenue it has been able to derive from its prescribed transmission services by reference to projected changes to its costs which have anticipated increases in labour costs which are higher than what in fact occurred during the period of the 2020 Agreement. As a result, Transgrid has potentially received revenue on account of increases in labour costs that it has not, in fact, had to pay. In our opinion, it is appropriate to take that matter into account in considering Transgrid's submission that wage increases should not exceed the likely forecast increase in its expenditure in the coming period.

[184] Fifthly, there was debate between the parties about whether, and the extent to which, Transgrid could use earnings from its non-prescribed services conducted through Lumea to fund any additional operating expenses, including increased labour costs. On the final day of the hearing, the Full Bench was provided with common terms agreements between NSW Electricity Finance Proprietary Limited and the Commonwealth Bank and Lumea and the Commonwealth Bank. Transgrid submits that these instruments prevent Lumea providing Transgrid with loans or other forms of financial accommodation or benefits. The Joint Unions submit that the instruments do not prevent Transgrid and Lumea's parent company from injecting funds into Transgrid and, in any event, contain various exceptions about which there is no evidence. In our opinion, it is not necessary to resolve this question in order to determine the wage increases which it is appropriate to include in the workplace determination.

[185] Finally, Transgrid refers generally to its financial position. It says that it carries significant debt (approximately $6.5 billion) due to financing a series of major projects and that it is important for Transgrid to maintains its credit rating. The Joint Unions earnings point to evidence that Transgrid's revenue, asset value and earnings before interest, tax, depreciation and amortisation (**EBITDA**) have increased significantly in recent years and at a rate in excess of the rate of wage increases. We have considered the effect of the workplace determination we propose to make on Transgrid's financial position. However, we are not satisfied that the evidence as to its general financial positions justifies moderating wage increases to be included in the workplace determination to any great extent.

[186] For these reasons, we accept that the regulatory framework imposes restrictions on the revenue that Transgrid is able to derive from its prescribed transmission services. That is a relevant matter which we have taken into account in determining the terms to be included in

the workplace determination and we have done so. However, the restrictions imposed by the regulatory framework are not such as to dictate that the workplace determination must not include wage increases at a somewhat higher level that proposed by Transgrid and should be considered together with the other relevant matters set out in s 275.

Conclusion in relation to wage increases and backpay

[187] Taking into account each of the matters listed in s 275 and the submissions of the parties, we have determined that the workplace determination should include wage increases (and commensurate increases in relevant allowances) greater than the position advanced by Transgrid. The amount of the wages increases must be considered together with the timing of the increases and the question of backpay.

[188] The Joint Unions seek wages increases with the first increase having effect from 1 December 2023. Transgrid submits that there is no power for the Commission to make such an order. It points out that s 276(1) of the Act provides that a workplace determination operates from the day it is made. Transgrid contrasts the present provisions with the position under the *Workplace Relations Act 1996* (Cth) (as it existed prior to the amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)). At that time, s 170MX permitted the Commission to arbitrate the outcome of a bargaining process where the bargaining period had been terminated. Transgrid suggest that s 170MY(1), together with s 146, then permitted the Commission to make an award with retrospective operation.

[189] Transgrid acknowledges that the Commission has, on a number of occasions, made workplace determinations which included terms providing for, in effect, a retrospective wage increase. It says those decisions are wrong and should not be followed. We do not agree. In *Parks Victoria*, the AWU sought wage increases to apply from a date earlier that the commencement of the workplace determination. The Full Bench observed:[172]

> Parks Victoria submitted that there is no basis for any award of retrospectivity and in any event there is no power to grant retrospectivity in the sense that the determination can only operate prospectively. This submission was based on the terms of s 276(1) of the Act, which states:
>
> (1) A workplace determination operates from the date on which it is made.
>
> However, Parks Victoria does not contend that it is beyond the power of the Commission to include a clause which commences operation upon the actual commencement of the workplace determination and gives rise to a new obligation to calculate and provide back pay. In our view this concession is entirely appropriate. While s 276(1) expressly provides that a workplace determination operates from the date on which it is made, that does not preclude the inclusion within the workplace determination of a requirement to give effect to a wage increase from an earlier date. Such a requirement operates prospectively in the sense that it has legal effect upon the workplace determination coming into operation.

[190] The reasoning of the Full Bench is, with respect, persuasive. Making a workplace determination providing for wage increases from an earlier date does not depend on the determination itself operating earlier that the date on which it is made in a manner that would be inconsistent with s 276(1). That type of provision is to be characterised as creating a new and prospective obligation to make a payment by reference to past events. As the Full Court

observed in *Informax International Pty Ltd v Clarius Group Ltd* [2012] FCAFC 165; (2012) 207 FCR 298:[173]

> It has long been the practice of industrial tribunals to make awards and other industrial agreements which impose a prospective duty or obligation on a person (usually an employer) by reference to past transactions or events. The most common example is an award which requires back-payment of wages for work which had already been performed prior to the making of the award.

[191] The Court concluded that s 16(4) of the *Independent Contractors Act 2006* (Cth), which provided that an order "takes effect on the date of the order or a later date specified in the order", did not prevent the variation of a contract to provide for a present obligation to make a payment by reference to work performed prior to the order being made.

[192] Although it is common to refer to retrospective wage increases, the nature of the obligation such a provision actually creates is a present obligation by reference to past events. That the effect of an award provision providing for the payment of wages by reference to past work is to establish a prospective obligation has been recognised since the 1920s. In *Federated Engine-Drivers' and Firemen's Association of Australasia v Adelaide Chemical and Fertilizer Company Ltd* (1920) 28 CLR 1, Knox CJ, Gavan Duffy and Starke JJ said:[174]

> If the award prescribes a payment in respect of wages for work done prior to the award, the duty of obedience arises in the specified period and neither before nor afterwards. It is a mistaken notion that persons on whom rests the duty of obedience to the award have committed an offence or breach of the award because the conditions or wages in respect of a period anterior to the award were not observed or paid during that period. The duty of obedience arises only upon the making of the award, and continues during the specified period.

[193] The type of argument advanced by Transgrid has been made in previous cases and apparently not accepted by earlier Full Benches.[175] We consider that there is no reason as to why we would not follow these earlier decisions and, in any event, believe they are correct.

[194] Transgrid submits that, even if there is power to include such a provision in a workplace determination, there is no justification for backpay. Transgrid submits that such a provision is not justified in circumstances in which it put its best and final offer to a vote of employees with provision for backpay in July 2024 and the agreement was voted down, the cost of the backpay provision sought would have considerable cost to Transgrid and that the failure to reach agreement in bargaining was the consequence of the robust approach adopted by the Joint Unions which should not be rewarded. Transgrid refers to the decision in *Re Commonwealth of Australia represented by the Department of Home Affairs* [2018] FWCFB 3415. In the circumstances of that matter, the Full Bench concluded:[176]

> In circumstances where the parties were unable to negotiate an agreement prior to the termination of protected industrial action in early October 2016 we see no justification for the initial wage increase taking effect prior to that date, particularly as it appears to us that the key protagonists were reluctant to make significant concessions in bargaining. The failure of the parties to narrow the range of disputed issues in the post-industrial action negotiation period and subsequent unsuccessful attempts at conciliation in our view further militates against any retrospective wage increases, particularly as there remain other APS agencies that are yet to conclude an enterprise agreement as part of the current APS bargaining round.

[195] That decision does not create any rule that provision for backpay is not appropriate where the parties have been unable to reach agreement in bargaining. As the Joint Unions point out, compensating employees for the delay since the expiry of the nominal term of a previous agreement has been a common feature of workplace determinations, either by way of awarding a retrospective wage increase or a front loaded the first increase to compensate employees for the delay since they last received a wage increase.[177] Further, there is no need for the Commission to be satisfied that there are special, compelling or exceptional circumstances before awarding either retrospectivity or a front loaded increase.[178]

[196] We have decided that it is fair and appropriate to include some provision for backpay in the workplace determination albeit not to the degree sought by the Joint Unions. A number of considerations favour that conclusion. First, the employees have not received a wage increase since 1 December 2022 and have, before and after that date, experienced a considerable reduction in the real value of their wages. Second, the failure of the parties to reach agreement is not attributable solely to the behaviour of one party or the other. Both parties were entitled to take the positions they did in bargaining. Third, the AER determination permitted Transgrid to increase the revenue which it derived from its prescribed transmission services in 2023 and 2024 on the assumption that it would have to meet increases in labour costs in that period which have not occurred. It would, in effect, receive a windfall gain in revenue if no backpay provision is included in the workplace determination.

[197] In determining the wage increases to be included in the workplace determination, the Full Bench has considered each of the matters in s 275 of the Act and the submissions and evidence of the parties. The determination of the wage levels to be included in the workplace determination is not the result of any precise mathematical calculation, it constitutes our evaluative judgment concerning what is a fair and reasonable outcome of this particular bargaining. Having regard to all the above matters, we have determined that the following wage increases should be included in the workplace determination:

(a) An increase of 6.5 percent on 1 March 2024;
(b) An increase of 5.5 percent on 1 March 2025; and
(c) An increase of 4.5 percent on 1 March 2026.

Superannuation

[198] The question of what provision should be made with respect to superannuation remains in dispute between the parties. Clause 11.1 of the 2020 Agreement provides that the employer superannuation contributions for the benefit of employees will be 15 percent and then 15.5 percent from 1 July 2022. The Joint Unions pursue a claim that the superannuation contributions required to be made by Transgrid be increased by 0.5 percent in the second and third years of the workplace determination.

[199] In addition, whether the provision to be made with respect to superannuation remains at issue or is an agreed term that must be included in the workplace determination by reason of s 270(2) of the Act is itself disputed. It is appropriate to first consider that question. The meaning of the phrase "agreed term" is dictated by s 274(3). Section 274 is set out above. In accordance with s 274(3), an "agreed term" is a term that the bargaining representatives for the proposed

enterprise agreement concerned had agreed should be a term of agreement at one of three points in time. Those points in time are: (1) the time at which the application for the intractable bargaining declaration concerned was made; (2) the time at which the declaration was made; and (3) the end of any post-declaration negotiating period.[179]

[200] The Joint Unions submit that superannuation is an agreed term because, from the commencement of the bargaining, the position of the unions was that the proposed agreement should provide for a 0.5 percent increase in superannuation contributions in each of the second and third years of the agreement. The Joint Unions submit that this claim was never disputed by Transgrid and the offers made by Transgrid all included provision for a 0.5 percent increase in superannuation contributions in the second and third years. Transgrid's position is that there was never any agreement that the proposed agreement should include a particular provision with respect to superannuation because its position with respect to wages and superannuation was always presented as a "package" and, in any event, there was never a discrete agreement that the proposed agreement should include a 0.5 percent increase in superannuation in the second and third years of the agreement.

[201] The position of the Joint Unions is encapsulated in the following evidence given by Mr Hicks in cross-examination:[180]

> Wages and superannuation were always in the toing and froing with the offers and counteroffers, including the unions' revised wages offer. It was always presented as a package?---So the wages, there was obviously the disparity between the parties, but superannuation was always agreed at half a per cent and half a per cent.
>
> But it was separately identified, and both parties continued to use the 0.5 per cent increase for years 2 and 3, but they always communicated that as part of the package with the wages, didn't they?---Yes, but it was always - there was no difference between the parties. It was a half a per cent, year 2, and half a per cent, year 3. That was agreed the whole way through the process. It hadn't changed.
>
> But you'd agree, wouldn't you, that on that wages and superannuation it wasn't for cherry-picking. You couldn't pick, like, one year of that and say, 'Well, we're agreed', and similarly for the superannuation. Do you accept that that was inherent in the negotiation?---No, I don't accept that. Like, if someone offers half a per cent super and the other side agrees, that's normally an agreement.

[202] In *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FWCFB 43; (2024) 329 IR 1, the Full Bench said that the ordinary meaning of "agreed" in this context requires there to be a consensus or meeting of the minds between the parties about the subject matter of the said agreement.[181] Whether the parties are "agreed" is to be assessed objectively and depends on an assessment of whether, as a matter of fact, the bargaining representatives need to have agreed that a term of a proposed enterprise agreement should be included in the proposed agreement.[182]

[203] The Full Bench has also expressed the view that:[183]

> Where a party has, objectively assessed, genuinely reserved its position on particular terms or the entire agreement to the effect that matters are only agreed "in principle" or are "subject to"

> a satisfactory overall package being determined, then that is strongly indicative that those matters would not be "agreed" for the purpose of s 274(3).

[204] In our view, whether the bargaining representatives can be said to have agreed that a particular term should be a term of a final agreement is very much a matter of fact. There is no reason why bargaining representatives who describe their agreement to a particular term as being "in principle" or "subject to" an overall agreement being reached might not be understood to have agreed that a particular term should be a term of the final agreement. As the Full Bench acknowledged, the use of language such "in principle" agreement does not preclude a finding there were some "agreed terms" for the purpose of s 274(3).[184] In a sense, agreement to any particular term in the course of bargaining will always, as a practical matter, be subject to a final agreement being reached because a bargaining representative could always revise their position with respect to a matter until an overall agreement was finalised. That cannot, of itself, mean there is no "agreed term" for the purposes of s 274(3).

[205] In the particular circumstances of this matter, however, there was no agreed term with respect to superannuation. That is not merely, as contended by Transgrid, because the wages and superannuation outcome it offered was described as a "package" on occasion or that the wages and superannuation was referred to by reference to the "aggregate" outcome. Rather, the course of the bargaining indicated that Transgrid's primary concern was the total increase in remuneration for which provision would be made in any enterprise agreement whether it was comprised of an increase in wages or superannuation contributions. At various stages in the bargaining, Transgrid indicated a willingness to "reshape" the package, including that the amount in wages and superannuation could be moved around so that different percentages applied.[185] That suggests there was no meeting of minds or consensus that provision for a 0.5 percent increase in superannuation contributions in the second and third years would be a term of the agreement.

[206] It is also relevant that, on 5 August 2024 and prior to the application for an intractable bargaining declaration being made, Transgrid had written to the CEPU specifically stating that "superannuation is not an agreed term between the parties".[186] In our opinion, simple invocation of the statutory language of "agreed terms" might not be determinative if, in fact, the bargaining representatives had agreed that a particular term should be a term of the proposed enterprise agreement. However, in the context of this bargaining, the statement by Transgrid was consistent with its earlier indications that it was willing to adjust the components of the wages and superannuation offer such that there was not a meeting of minds in relation to the superannuation term that would be included in a final agreement.

[207] In any event, nothing ultimately turns on the question. The Joint Unions and Transgrid now both positively contend that the workplace determination should include an increase in superannuation contributions of 0.5 percent in the second and third years. Transgrid simply emphasised that this provision must be taken into account as part of determining the overall wages outcome. As indicated above, we have taken the increased superannuation contributions in determining the overall wages outcome that we believe is appropriate to be included as a term of the workplace determination.

[208] Having taken into account the matters set out in s 275, we are satisfied that it is appropriate to deal with the matter of superannuation by including the provision sought by the parties in the workplace determination. As the Joint Unions point out, from the *Transgrid*

Employees Agreement 2010 onwards employees in accumulation schemes have received superannuation contributions above those payable to satisfy the requirements under the *Superannuation Guarantee (Administration) Act 1992* (Cth). The "gap" between the contributions required under the superannuation guarantee legislation and under enterprise agreements applying to Transgrid employees have reduced over time as a result of increases in the superannuation guarantee threshold. The claim by the Joint Unions will partially restore that "gap", has merit and is consistent with the interests of the employer and employees.

[209] We are satisfied that it is appropriate to deal with the matters of superannuation by providing for increases in the superannuation contributions required by the workplace determination of 0.5 percent with effect from 1 March 2025 and 1 March 2026 in addition to the wage increases we have determined above.

Overtime

[210] The Joints Unions pursue a claim to improve the rate of overtime pay for work on Saturdays. Clauses 20 and 21 of the 2020 Agreement set the rates at which day workers and shift workers, respectively, must be paid for overtime work. The rates for day workers are set out in the following table which appears in clause 20:

DAY	PERIOD	RATE
Monday to Friday	- first two hours - after two hours	1.5 2.0
Saturday (not a public holiday)	**before midday** - first two hours - after two hours **after midday** - all hour worked	 1.5 2.0 2.0
Sunday (not a public holiday)		2.0
Public holiday	- in ordinary working hours - outside ordinary working hours	2.0+ ordinary pay 2.0

[211] The overtime rates for shift workers are set out in the following table which appears in clause 21:

Day	Period	Rate
Monday to Friday	- first two hours - after two hours	1.5 2.0
Saturday (not a public holiday)	**before midday** - first two hours - after two hours **after midday** - all hour worked	 1.5 2.0 2.0
Sunday (not a public holiday)		2.0
Public holiday	- all hours worked	2.5

[212] The Joint Unions pursue a claim that the rate for overtime performed on a Saturday should be paid at double time. Transgrid submits that the provisions in the 2020 Agreement should be retained such that overtime before midday on a Saturday is paid at time and a half for the first two hours.

[213] The Joint Unions contend that the evidence demonstrates that, throughout the period of the 2020 Agreement, employees worked longer hours, at a higher level of intensity, performed significant amounts of overtime and travel at the expense of spending time with their families or taking leisure time to rest and recover. The Joint Unions submit that their proposal is consistent with industry standards. In that respect, the Joint Unions refer to the conditions which apply to electrical workers in the construction industry and to transmission operators Powerlink in Queensland, Zinfra in Victoria and SAPN in South Australia.[187] The Joint Unions further assert that Transgrid has an issue recruiting and retaining staff and that providing overtime rates that are consistent with industry standards is likely to assist in attraction and retention and is in the interests of all parties for the purposes of s 275(c), in the public interest for the purposes of s 275(d) and likely to improve productivity for the purposes of s 275(e).

[214] Transgrid opposes any change to the rates for Saturday overtime. First, Transgrid submits that the claim by the Joint Unions does not represent industry standard and that relevant comparison should be made to distributors in New South Wales, particularly, Essential Energy, Endeavour Energy and Ausgrid. Those operators pay overtime rates of time and a half for the first two hours before midday on Saturday.[188] Second, Transgrid submits that the change would benefit only a small group of employees because Saturday overtime work is likely only to apply to approximately 100 field based employees.[189] Third, Transgrid submits that the additional costs that would occasioned by the claim are not insignificant and would be approximately $226,308.36 per annum based on work performed during the 2024 financial year.[190]

[215] There was a factual dispute as to the extent to which the relevant employees perform overtime work. A number of employees gave evidence in relation to the frequency and amount of overtime they generally undertake. That evidence was generally given in the form of general estimates, rather than by reference to any records of the amount of overtime performed in any period. For example, Mr Wales gave evidence that he works, on average, ten hours of overtime per week and one weekend a month, Mr Haddon said that the works overtime every weekday and on weekends, Mr Chew gave evidence that he works around ten hours of overtime during the week and worked seven Saturdays and two Sundays from August to November 2024, Mr Cardwell gave evidence that he usually works thirteen to fifteen hours of overtime per week and Mr Ford indicated that he works between ten and thirty hours overtime per week and usually two to three hours each weekend and ten or eleven hours of the weekend.[191] Each of the employees gave evidence as to the impact working overtime has on their personal and family life and relationships.

[216] Transgrid disputed the estimates provided by the employees. In this reply witness statement, Mr Berryman indicated he had reviewed the overtime records for the employees in the period from 1 January 2024 to 29 November 2024 and calculated the average overtime worked by the employees in the period to be substantially less than claimed by the employees. Mr Berryman calculated that Mr Cardwell worked an average of 3.5 hours overtime per week, Mr Chew an average of four hours, Mr Ford an average of 9.2 hours, Mr Haddon an average of

7.2 hours and Mr Wales an average of 3.6 hours.[192] Mr Berryman provided payroll extracts showing the overtime hours worked by the employees.[193]

[217] The employees were cross-examined specifically by reference to the calculations conducted by Mr Berryman and only in relation to their performance of overtime in the period between January and November 2024. By way of example, the cross-examination of Mr Cardwell included the following:[194]

> And you give evidence, Mr Cardwell, and this is at paragraph 9 of your witness statement, that you almost always work approximately 13 hours of overtime per week?---Correct. Yes.
>
> Would you accept the average weekly overtime that you worked, for the period 1 January to 29 November this year, was 3.5 hours per week?---Because of PIA, protected industrial action, which I took overtime ban. I haven't calculated fully but I'd say - - -
>
> If you'd be able to answer the question I've put, which is, would you accept that the average weekly overtime worked, for the period 1 January to 29 November was 3.5 hours per week?---Okay. Yes, I do.
>
> You accept that?---Probably accept that. Yes.
>
> VICE PRESIDENT GIBIAN: Sorry. Was that answer that you gave, you referred to protected industrial action, what did you intend to say about that?---Well, I guess, if you're looking at it, from January, which is what he mentioned, to November, there was a period there where we had an overtime ban, so there was on overtime being performed. So I guess it dilutes the amount of overtime that I've worked, I guess, normally, since overtime ban finished, would make it sound like it's a lot less because it's diluted through the period of the overtime ban.

[218] Each of the employees, either in response to the questions asked in cross-examination or in re-examination, explained that the amount of overtime they had performed during 2024 was less than would ordinarily have been the case as a result of the protected industrial action occurring during that period. The employees explained that the protected industrial action included overtime bans in some periods and, in addition, the protected industrial action resulted in some jobs being cancelled which would otherwise have required them to undertake overtime work.[195]

[219] Immediately prior to the commencement of closing submissions, Transgrid handed up documents purporting to constitute a summary of the overtime hours performed by the particular employees during the 2022 and 2023 calendar years. The documents had only been provided to the legal representatives for the Joint Unions that morning and there had been no opportunity for the Joint Unions to check the accuracy of the material. When the documents were provided to the Commission, the Full Bench indicated that it would receive the material but hear submissions as to whether there is a basis in fairness it should reject the evidence of the individual employees as to their general pattern of working in circumstances in circumstances in which they did not have an opportunity to explain either whether there are matters affecting their personal circumstances that might have affected the average in any other period other than in 2024 or whether there might be issues as to the reliability or otherwise of the material relied on by Transgrid.[196]

[220] The Full Bench does not believe it is appropriate to receive or consider the further documents relied on by Transgrid. Transgrid made a forensic decision to rely on evidence only in relation to the overtime worked by the employees during 2024 in circumstances in which it should have known that evidence was misleading because the amount of overtime was affected by protected industrial action. The employees were specifically cross-examined only with respect to the overtime they performed during 2024. That, again, was a forensic decision. It is not fair to the employees to ask the Commission to reject their direct evidence on the basis of material that was not put to them in cross-examination and to which they have had no opportunity to respond. Furthermore, although Transgrid described the documents as business records, no evidence was advanced as to how the information was prepared or from what system or systems it was obtained. The Joint Unions had no opportunity to investigate whether it was reliable or to seek instructions from the individual employees about the outcome of the analysis. The Full Bench rejects the further documents relied on by Transgrid.

[221] However, having considered each of the matters set out in s 275 of the Act, the Full Bench is not satisfied that it is appropriate to deal with this matter in issue by including provision in the workplace determination that all overtime performed on Saturdays should be paid at double time. In relation to the merits of the case and the interests of the parties for the purposes of s 275(a) and (c), we are not satisfied that the evidence establishes an industry standard that all overtime on Saturdays should be paid at double time. At most, the evidence suggests that some other groups of employees have been able to achieve, through bargaining, provisions in enterprise agreements that either all overtime or overtime on Saturdays is paid at double time. The Joint Unions referred only to transmission operators Queensland, Victoria and South Australia. The Full Bench does not have before it any material as to the history of the industrial arrangements that resulted in those provisions being included in the enterprise agreements applying to those operators and no overall comparison of conditions for those operators was undertaken by the Joint Unions.

[222] The relevant modern award provides for overtime performed from Monday to Saturday to be paid at a rate of time and a half for the first two hours and double time thereafter.[197] It was not suggested that the existing overtime provisions in the 2020 Agreement are otherwise less advantageous that the modern award. In terms of overtime rates, the 2020 Agreement is already superior to the modern award in that all overtime performed after midday on a Saturday is paid at double time under the 2020 Agreement. Other provisions are also superior, including that the 2020 Agreement provides for a minimum payment of four hours rather than three hours in the modern award[198] and various entitlements with respect to travel and superior meal allowance payments.[199] Although provision for all overtime on Saturdays to be paid at double time is something that the employees can legitimately pursue through bargaining, we are not satisfied that the employees will not be adequate compensated by the existing provision.

[223] We accept that it is in the interests of employees to be appropriately remunerated for overtime work and that performing overtime work is likely to interrupt family, social and leisure activities of employees. The individual employees who gave evidence that the amount of overtime they undertook affected their personal relationships, social activities and leisure time. We have no doubt that is so. However, we are not satisfied that it is appropriate to change the rate for Saturday overtime to address that situation. Although there is no evidence before the Commission as to the extent to which overtime is voluntary or directed, there is no suggestion

that employees are being required to perform unreasonable overtime. Employees a compensated for overtime by the rates already contained in the 2020 Agreement.

[224] There is not sufficient evidence before the Commission to establish to our satisfaction that changing the overtime rates for Saturday work is likely to have a meaningful impact on any attraction and retention issues that are being experienced by Transgrid or that such a change would improve productivity for the purposes of s 275(e). Those considerations do not support the claim of the Joint Unions. We also do not believe that consideration of the public interest, the conduct of the parties in bargaining or providing incentives to bargain at a future time support the change sought by the Joint Unions.

[225] For these reasons, we have determined to make a workplace determination which contains the same provisions with respect to overtime as are found in the 2020 Agreement.

Nominal expiry date

[226] The final issue to be addressed is the nominal expiry date of the workplace determination. The Joint Unions submit that the parties reached agreement on a nominal expiry date of 1 December 2026 and that, as a result, is an "agreed term" for the purposes of s 274(3) of the Act. The Joint Unions say that their position from the commencement of the bargaining was that the new enterprise agreement should have a nominal expiry date of 1 December 2026 and that this position was never disputed by Transgrid. Each of Transgrid's offers contained a nominal term of three years concluding on 1 December 2026.

[227] We do not accept that submission. It is readily apparent that Transgrid's position with respect to the nominal expiry date of a new enterprise agreement was connected to resolution of the wages issue. That is, Transgrid proposed a three year agreement with a nominal expiry date of 1 December 2026 on the basis that agreement could be reached on annual wage increases to apply from 1 December each year commencing on 1 December 2023. The parties were unable to reach such an agreement. Transgrid communicated in its correspondence dated 5 August 2024 that "it is no longer part of Transgrid's wages offer that the first increase to apply from 1 December 2023. The nominal expiry date is therefore also not agreed." There was no agreed term at the time the application for an intractable bargaining declaration was made.

[228] As to what nominal expiry date the Full Bench should include in the workplace determination, the Joint Unions submit that a nominal expiry date of 1 December 2026 maintains the three year bargaining cycle that has applied for Transgrid employees for many years. That cycle provides the best mechanism for employees to secure increased wages and conditions and for Transgrid to negotiate based on more recent and relevant data and, for those reasons, is in the interests of all parties. The Joint Unions further submit that the circumstances that will exist in 2027 and 2028 in relation to cost of living and economic conditions are difficult to predict and it is undesirable for the parties to be locked into a workplace determination that far into the future.

[229] Transgrid submits that the workplace determination should contain a nominal expiry date three years from the date it is made, that is, in the first half of 2028. It submits that Transgrid plays a key role in Australia's energy transition, is engaged in a range of critical projects and faces a number of operational challenges in the next few years. Transgrid notes that it had been

involved in bargaining for four of the last five years and that the recent bargaining had been difficult and operationally disruptive. It submits that it is in the interests of the parties, and the public interest, that Transgrid and its employees are not forced to return to bargaining too quickly and that it has a period of stability in relation to its industrial arrangements.

[230] Having taken into account the merits of the case, the public interest, the interests of the parties and the need to provide incentives to bargain at a later time for the purposes of s 275(a), (c), (d) and (h), the Full Bench has determined to set a nominal expiry date of 1 March 2027. The period of operation of the workplace determination will provide an opportunity for the parties to have some stability but also return to bargaining within a reasonable period. The insertion of that nominal expiry date also has the advantage of providing the possibility of a new enterprise agreement being in place prior to the next AER determination coming into force. In this respect, we have also taken into account the conduct of the parties in bargaining for the purposes of s 275(f) and (g) but, for reasons explained above, we do not believe these considerations assist in relation to the nominal expiry date.

Conclusion and disposition

[231] For the reasons set out above, and in accordance with s 269 of the Act, we propose to make an intractable bargaining workplace determination containing the terms we have described in this decision. We are satisfied that the workplace determination otherwise provided to the Commission by the parties meets the relevant requirements of Part 2-5 of the Act.

[232] The final terms of the workplace determination require the calculation of the precise wage rates to apply to the various classifications and of the quantum of a number of allowances contained in the determination. The convenient course is to direct the parties to confer and provide the Commission with the form of the workplace determination that reflects this decision within 14 days.

VICE PRESIDENT

Appearances:

R Dalton KC and *A Crocker*, of counsel, instructed by MinterEllison for Transgrid.
D Mahendra, of counsel, instructed by Maurice Blackburn Lawyers for the CEPU, MEU, ASU, CPSU and Professionals Australia.

Hearing details:

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[1] *Fair Work Act 2009* (Cth) (the Act), s 235(2)(b) and (c).

[2] *NSW Electricity Networks Operations Pty Ltd (t/as Transgrid) v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2841.

[3] See s 616(4) of the Act.

[4] *NSW Electricity Networks Operations Pty Ltd (t/as Transgrid) v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 3242.

[5] Witness Statement of Scott Berryman, 21 November 2024, at [27a].

[6] Witness Statement of Scott Berryman, 21 November 2024, at [7]-[14].

[7] Witness Statement of Scott Berryman, 21 November 2024, at [18]-[20].

[8] Witness Statement of Scott Berryman, 21 November 2024, at [31]-[32].

[9] Witness Statement of Scott Berryman, 21 November 2024, at [47].

[10] Witness Statement of Scott Berryman, 21 November 2024, at [45] and SB-02.

[11] Witness Statement of Scott Berryman, 21 November 2024, at [75] and SB-12.

[12] Witness Statement of Scott Berryman, 21 November 2024, at [48].

[13] Witness Statement of Scott Berryman, 21 November 2024, at [50].

[14] Witness Statement of Paul O'Malley, 10 December 2024, at [14]-[15].

[15] Transcript, 16 December 2024, PN1109-PN1115.

[16] Transcript, 19 December 2024, PN3013 and PN3156.

[17] Witness Statement of Scott Berryman, 21 November 2024, at [53].

[18] Witness Statement of Scott Berryman, 21 November 2024, at [55].

[19] Witness Statement of Scott Berryman, 21 November 2024, at [58] – [59] and SB-04.

[20] Witness Statement of Scott Berryman, 21 November 2024, at [61] and SB-05.

[21] Transcript, 16 December 2024, PN1141-PN1142.

[22] Witness Statement of Scott Berryman, 21 November 2024, at [63]-[64].

[23] Witness Statement of Scott Berryman, 21 November 2024, at [67]-[68].

[24] Witness Statement of Scott Berryman, 21 November 2024, at [71] and SB-10.

[25] Witness Statement of Scott Berryman, 21 November 2024, at [78]-[79] and SB-13.

[26] Witness Statement of Scott Berryman, 21 November 2024, at [87].

[27] Witness Statement of Allen Hicks, 21 November 2024, at [19].

[28] Witness Statement of Allen Hicks, 21 November 2024, at [20].

[29] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH1.

[30] Witness Statement of Allen Hicks, 21 November 2024, at [32] and AH5.

[31] Witness Statement of Allen Hicks, 21 November 2024, at [33].

[32] Witness Statement of Allen Hicks, 21 November 2024, at [69]-[71].

[33] Witness Statement of Craig Stallan, 10 December 2024, at [8]-[9].

[34] Witness Statement of Scott Berryman, 21 November 2024, at [140]; Witness Statement of Allen Hicks, 21 November 2024, at [52].

[35] Witness Statement of Scott Berryman, 21 November 2024, at [88].

[36] Witness Statement of Scott Berryman, 21 November 2024, at [90]; Witness Statement of Allen Hicks, 21 November 2024, at [26]-[27].

[37] Witness Statement of Scott Berryman, 21 November 2024, at [93].

[38] Witness Statement of Scott Berryman, 21 November 2024, at [103].

[39] Witness Statement of Scott Berryman, 21 November 2024, at [40] and SB-23.

[40] Witness Statement of Scott Berryman, 21 November 2024, at [112]-[113] and SB-31 and SB-32.

[41] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH8.

[42] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH9.

[43] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH10.

[44] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH11.

[45] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH12.

[46] Witness Statement of Allen Hicks, 21 November 2024, at [56]-[58].

[47] *Application by Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2200 at [38].

[48] Ibid at [39].

[49] *NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 1914.

[50] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid* [2024] FWCFB 333.

[51] *NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2182.

[52] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v NSW Electricity Networks Operations Pty Limited As Trustee For NSW Electricity Networks Operations Trust T/A Transgrid* [2024] FWCFB 365.

[53] *NSW Electricity Networks Operations Pty Ltd (t/as Transgrid) v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2841.

[54] Section 12 of the Act.

[55] *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40.

[56] *Edwards v Giudice* (1999) 94 FCR 561 at [5] (Moore J); *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56] (Collier, Bromberg and Katzmann JJ); *Re 4 yearly review of modern awards* [2019] FWCFB 6067 at [13].

[57] *Nestle Australia Ltd v Commissioner of Taxation (Cth)* (1987) 16 FCR 167 at 184 (Wilcox J); *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [19].

[58] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 at 187-188 (Hill J); *Kurtev v KCB Australia Pty Ltd* [2025] FWCFB 13; (2025) 336 IR 226 at [23].

[59] See, for example, *Schweppes Australia Pty Ltd v United Voice (Victorian Branch)* [2012] FWAFB 7858; (2012) 226 IR 236 at [273].

[60] *Transport Workers' Union of Australia v Qantas Airways Limited* [2012] FWAFB 6612; (2012) 225 IR 13 at [39]; *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [272].

[61] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 305 at [168]-[170].

[62] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [49]-[51].

[63] *Schweppes Australia Pty Ltd v United Voice (Victoria Branch)* [2012] FWAFB 7858; (2012) 226 IR 236 at [45]-[46]; *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [52].

[64] *Re Specialist Diagnostic Services Pty Ltd (t/as Dorevitch Pathology Workplace Determination)* [2018] FWCFB 4228 at [90].

[65] *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].

[66] *Re Essential Energy Workplace Determination* [2016] FWCFB 7641 at [77]; *Re Specialist Diagnostic Services Pty Ltd (t/as Dorevitch Pathology Workplace Determination)* [2018] FWCFB 4228 at [74].

[67] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 305 at [135].

[68] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH7B.

[69] *Application by Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2024] FWC 2200 at [38]-[39].

[70] *Fair Work Act 2009* (Cth), s 230(3)(a)(i).

[71] Transcript, 17 December 2024, PN387-PN389.

[72] Transcript, 17 December 2024, PN430-PN433.

[73] *Fair Work Act 2009* (Cth), s 228(1)(b).

[74] Transcript, 17 December 2024, PN1282.

[75] Transcript, 17 December 2024, PN1283-PN1313.

[76] *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764; (2012) 206 FCR 576 at [57] (Flick J).

[77] *Fair Work Act 2009* (Cth), s 228(1)(a).

[78] Transcript, 17 December 2024, PN229-PN231.

[79] See, for example, *Australian Municipal, Administrative, Clerical and Services Union v NCR Australia Pty Limited* [2010] FWA 6257 at [14].

[80] See, for example, *Queensland Nurses' Union of Employees v TriCare Limited* [2010] FWA 7416 at [51].

[81] Witness Statement of Scott Berryman, 21 November 2024, Annexure SB-08.

[82] *Schweppes Australia Pty Ltd v United Voice (Victoria Branch)* [2012] FWAFB 7858; (2012) 226 IR 236 at [241]; *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [177] and the authorities cited therein.

[83] *Transgrid Enterprise Agreement 2020*, clause 11.

[84] *Movements in the real value of Transgrid's current and proposed EBA pay rates 2020-2027*, p3.

[85] *Movements in the real value of Transgrid's current and proposed EBA pay rates 2020*-2027, p4.

[86] *Movements in the real value of Transgrid's current and proposed EBA pay rates 2020*-2027, p6.

[87] *Supplementary Report of Greg Houston*, at [29]-[34].

[88] *Supplementary Report of Greg Houston*, at [40]-[43].

[89] *Supplementary Report of Greg Houston*, at [74]-[76].

[90] See, for example, *Annual Wage Review 2023-2024* [2024] FWCFB 3500; (2024) 331 IR 248 at [41] and Table 4.

[91] *Movements in the real value of Transgrid's current and proposed EBA pay rates 2020-2027*, p3.

[92] *Supplementary Report of Greg Houston*, at [82]-[86].

[93] Transcript, 18 December 2024, PN2635.

[94] *Supplementary Report of Greg Houston*, at [88].

[95] *Response to HoustonKemp Supplementary Report*, p2.

[96] *Schweppes Australia Pty Ltd v United Voice (Victoria Branch)* [2012] FWAFB 7858; (2012) 226 IR 236 at [130].

[97] *Re Sydney Trains* [2023] FWCFB 52 at [86].

[98] Reply Witness Statement of Scott Berryman, 10 December 2024, at [22].

[99] Witness statement of Ben Chew, 21 November 2024, at [22]-[31].

[100] Witness statement of Bradley Wales, 19 November 2024, at [18]-[24].

[101] Witness statement of Jared Ford, 19 November 2024, at [21]-[36].

[102] Witness statement of Michael Haddon, 20 November 2024, at [23]-[31].

[103] Witness statement of Ross Cardwell, 20 November 2024, at [20]-[34].

[104] For example, Transcript, 16 December 2024, PN653-PN695, PN730-PN775 and PN876-PN902.

[105] Witness Statement of Scott Berryman, 21 November 2024, at [198]; Witness Statement in Reply of Scott Berryman, 10 December 2024, at [45]-[69].

[106] National Electricity Rules, Rule 6A.2.

[107] National Electricity Rules, Chapter 10.

[108] Witness Statement of Craig Stallan, 21 November 2024, at [35].

[109] National Electricity Rules, Rule 6A.3 cl 6A.3.1.

[110] National Electricity Rules, Chapter 10; AER report, at [11].

[111] National Electricity Rules cl 6A.6.5.

[112] National Electricity Rules cl 6A.6.5A.

[113] National Electricity Rules cl 6A.7.4.

[114] AER report, at [50].

[115] Expert report of Mr Houston, [59] and [68]. Exhibit 14, Reply statement of Mr Antoon, 10 December 2024, annexure SA-R3, AER Efficiency Benefit Sharing Scheme explanatory statement, 6, and annexure SA-R4, 1.

[116] AER report, [45].

[117] Witness Statement of Craig Stallan, 21 November 2024, at [36].

[118] Witness Statement in Reply of Stephen Antoon,10 December 2024, at [8].

[119] AER report, at [6].

[120] AER report, at [10].

[121] AER report, at [14].

[122] *Expert Report of Greg Houston*, at [20].

[123] AER report, at [42]; Transcript, 19 December 2024, PN3052.

[124] Transcript, 19 December 2024, PN3071.

[125] National Electricity Rules, Clause 6A.4.2.

[126] National Electricity Rules, Clause 6A.5.4; *Expert Report of Greg Houston*, at [29].

[127] AER report, at [4], and Attachment 1, Overview, Final Decision – Transgrid transmission determination 2023-28, 16.

[128] *Expert Report of Greg Houston*, at [30]-[35].

[129] *Expert Report of Greg Houston*, at [34]. National Electricity Rules, r 6A.5 and cl 6A.6.8. Exhibit 44, AER report, [12].

[130] *Expert Report of Greg Houston*, at [36].

[131] *Expert Report of Greg Houston*, at [38].

[132] Expenditure Forecast Assessment Guideline for Electricity Transmission, 10.

[133] Reply statement of Mr Antoon, 10 December 2024, Annexure SA-R3 ;AER Efficiency Benefit Sharing Scheme explanatory statement, 6.

[134] *Expert Report of Greg Houston*, at [39]; AER report, at [61]; Exhibit 34, *Supplementary Expert Report of Greg Houston*, at [118]-[119].

[135] *Expert Report of Greg Houston*, at [39].

[136] *Expert Report of Greg Houston*, at [43].

[137] AER report, at [60].

[138] Reply Statement of Craig Stallan, 10 December 2024, at [23]-[24].

[139] AER report, at [60].

[140] *Expert Report of Greg Houston*, at [38]; AER report, at [61]; *Supplementary Expert Report of Greg Houston*, at [118]-[119]

[141] *Expert Report of Greg Houston*, at [38].

[142] *Supplementary Expert Report of Greg Houston*, at [119]

[143] AER report, at [30]-[40].

[144] *Expert Report of Greg Houston*, at [82]-[95].

[145] National Electricity Rules, Rule 6A.6.9 and 6A.7.1.

[146] Transcript, 19 December 2024, PN4058-PN4059.

[147] *Expert Report of Greg Houston*, at [96]-[102].

[148] AER report, at [50], and Annexure AER-15 (Expenditure Forecast Assessment Guideline for Electricity Transmission) section 4; Exhibit 14, Reply statement of Mr Antoon, 10 December 2024, Annexure SA-R3, AER Efficiency Benefit Sharing Scheme explanatory statement, 6, and annexure SA-R4, 1.

[149] *Expert Report of Greg Houston*, at [47] and following.

[150] National Electricity Rules, Clause 6A.6.2.

[151] *Expert Report of Greg Houston*, at [48].

[152] *Expert Report of Greg Houston*, at [53].

[153] *Expert Report of Greg Houston*, at [49].

[154] *Expert Report of Greg Houston*, at [50].

[155] *Expert Report of Greg Houston*, at [111]. As to the costs of raising capital see also Third Witness Statement of Craig Stallan, 13 December 2024, at [19].

[156] Witness Statement of Craig Stallan, 21 November 2024, Annexure CS-3, Overview, Final Decision – Transgrid transmission determination 2023-28, 18-19.

[157] AER report, at [17].

[158] AER report, at [48].

[159] AER report, at [49].

[160] Transcript, 19 December 2024, PN3504-PN3506.

[161] Reply Statement of Craig Stallan, 10 December 2024, at [21]-[22]. Reply Witness Statement of Stephen Antoon, 10 December 2024, at [20]-[29].

[162] *Expert Report of Greg Houston*, at [64].

[163] *Expert Report of Greg Houston*, at [72].

[164] AER report, at [50]-[51] and see also Attachment AER-18.

[165] AER report, at [51] and Attachment AER-19.

[166] AER report, at [51].

[167] Witness Statement of Craig Stallan, 21 November 2024, Annexure CS-3, Overview, Final Decision – Transgrid transmission determination 2023-28, 25.

[168] Transcript, 19 December 2024, PN3898-PN3899.

[169] Third Witness Statement of Craig Stallan, 13 December 2024, at [23]-[27].

[170] *Expert Report of Greg Houston*, at [20].

[171] Reply Witness Statement of Stephen Antoon, 10 December 2024, Annexure SA-R3, AER Efficiency Benefit Sharing Scheme explanatory statement, 25-28.

[172] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [151]-[152].

[173] *Informax International Pty Ltd v Clarius Group Ltd* [2012] FCAFC 165; (2012) 207 FCR 298 at [148] (Besanko, Jagot and Bromberg JJ).

[174] *Federated Engine-Drivers' and Firemen's Association of Australasia v Adelaide Chemical and Fertilizer Company Ltd* (1920) 28 CLR 1 at 10 (Knox CJ, Gavan Duffy and Starke JJ).

[175] See also *Schweppes Australia Pty Ltd v United Voice (Victoria Branch)* [2012] FWAFB 7858; (2012) 226 IR 236 at [237]; *Transport Workers' Union of Australia v Qantas Airways Limited* [2012] FWAFB 6612; (2012) 225 IR 13 at [96].

[176] *Re Commonwealth of Australia represented by the Department of Home Affairs* [2018] FWCFB 3415 at [24].

[177] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [158] referring to *Transport Workers' Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612; (2012) 225 IR 13 at [96]; *Health Services Union v Austin Health* [2009] AIRCFB 353; (2009) 180 IR 41 at [34]; *Southlink Pty Ltd v Transport Workers' Union of Australia* (unreported, AIRC (FB), PR948148, 18 June 2004) at [96]-[97]; *Community and Public Sector Union v Australian Protective Service* (unreported, AIRC (FB), PR910682, 29 October 2001) at [272]-[277] and *Australian Education Union v South Australia* (unreported, AIRC (FB), T1383, 12 October 2000) at [170].

[178] *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [157]; *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 287 at [227].

[179] As explained in *United Firefighters Union of Australia v Fire Rescue Victoria* [2025] FCAFC 16 at [15] (Wheelahan, Raper and Dowling JJ).

[180] Transcript, 17 December 2024, PN396-PN398.

[181] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FWCFB 43; (2024) 329 IR 1 at [141] referring to authorities dealing with the expressions "arrangement" or "understanding" as those terms are used in the *Competition and Consumer Act 2010* (Cth) as summarised in *Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 5)* [2022] FCA 1475 (O'Bryan J) at [101]-[108].

[182] Ibid at [145]-[146].

[183] Ibid at [147].

[184] Ibid at [148].

[185] See, for example, Witness Statement of Scott Berryman, 21 November 2024, at [88].

[186] Witness Statement of Allen Hicks, 21 November 2024, Annexure AH12.

[187] Witness Statement of Allen Hicks, 21 November 2024, at [90].

[188] Witness Statement of Scott Berryman, 21 November 2024, at [198].

[189] Witness Statement of Scott Berryman, 21 November 2024, at [198]; Witness Statement of Craig Stallan, 21 November 2024, at [101].

[190] Witness Statement of Craig Stallan, 21 November 2024, at [100]-[102].

[191] Witness Statement of Bradley Wales, 19 November 2024, at [21]; Witness Statement of Michael Haddon, 19 November 2024, at [28]-[29]; Witness Statement of Ben Chew, 20 November 2024, at [25]-[26]; Witness Statement of Ross Cardwell, 20 November 2024, at [9] and [26]; Witness Statement of Jared Ford, 19 November 2024, at [28].

[192] Reply Witness Statement of Scott Berryman, 10 December 2024, at [19].

[193] Reply Witness Statement of Scott Berryman, 10 December 2024, Annexure SB-04.

[194] Transcript, 16 December 2024, PN706-PN710.

[195] See, for example, Transcript, 16 December 2024, PN710, PN791, PN849, PN946 and PN998.

[196] Transcript, 19 December 2024, PN3132.

[197] *Electrical Power Industry Award 2020*, clause 19.1.

[198] Compare *Electrical Power Industry Award 2020*, clause 19.2 and 2020 Agreement, clause 20.1 and 21.3.

[199] Compare *Electrical Power Industry Award 2020*, clauses 14.4, 14.5 and 17.1(a) and 2020 Agreement, clauses 20.3, 20.4, 20.10 and 21.12.