



DECISION

Fair Work Act 2009

s.269 - Intractable bargaining workplace determination

Transport Workers' Union of Australia

v

Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd

(B2023/1110)

DEPUTY PRESIDENT WRIGHT

COMMISSIONER MATHESON

COMMISSIONER CRAWFORD

SYDNEY, 12 JUNE 2024

Intractable bargaining workplace determination

Introduction and Outcome

[1] On 16 October 2023, the Transport Workers' Union of Australia (TWU) made an application for an intractable bargaining declaration pursuant to s.234 of the *Fair Work Act 2009* (the FW Act) in relation to the proposed *Cleanaway Erskine Park Drivers Enterprise Agreement 2022* (2022 Erskine Park Agreement).

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

[3] On 12 January 2024, the Fair Work Commission (Commission) issued an intractable bargaining declaration.¹

[4] The declaration specified a post-declaration negotiating period from 12 to 25 January 2024. During that period, the Commission conducted three private conferences. At the conclusion of those conferences, the Commission issued a Statement on 25 January 2024 setting out the following matters that were still at issue:

- (a) Ordinary hours of work.
- (b) Weekend penalty rates.
- (c) Wage increases.
- (d) Consultation.
- (e) Expiry date.

[5] Having made an intractable bargaining declaration, the Commission is required by s.269 of the FW Act to make an Intractable Bargaining Workplace Determination.

[6] For the reasons that follow we propose to make an Intractable Bargaining Workplace Determination in relation to drivers at Cleanaway's Erskine Park site and have issued a draft determination to the parties with this decision.

Directions and Hearing

[7] The matter was listed for directions on 2 February 2024.

[8] On 27 and 29 February and 2 April 2024 the TWU filed a draft workplace determination, submissions and evidence. On 26 and 27 March 2024, Cleanaway filed a draft workplace determination, submissions and evidence. The matter was listed for hearing on 10, 11 and 12 April 2024.

[9] We granted permission for both parties to be legally represented at the hearing. Mr Gibian SC and Mr Boncardo, counsel appeared for the TWU. Mr Bourke KC and Mr Avallone, counsel appeared for Cleanaway.

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

- a. Ms Isabella Wisniewska, Legal Officer, TWU;
- b. Mr Steven Stassen, TWU member and rear-lift driver for Cleanaway;
- c. Mr Wayne Richards, TWU delegate and hook-lift driver for Cleanaway; and
- d. Mr Stephen Russell, TWU delegate and hook-lift driver for Cleanaway.

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

- a. Ms Michaela White, ER/IR Manager, Cleanaway;
- b. Mr Paul Vella, Operations Manager for the Cleanaway Erskine Park site; and
- c. Ms Leigh Newman, Regional Manager for Cleanaway's operations in relation to commercial and industrial (C&I) solid waste and for the NSW Metropolitan area.

Factual Background

[12] Cleanaway conducts waste management, industrial and environmental services and waste transportation in Australia. Cleanaway is divided between separate business units including solid waste, health care, liquid, industrial waste and hydrocarbons.²

[13] Across Australia, Cleanaway has approximately 7,200 employees and there are over 100 enterprise agreements which apply to various parts of the workforce.³

[14] Erskine Park is one of Cleanaway's solid waste services sites with a focus on commercial and industrial waste (C&I). Cleanaway's Erskine Park and Katoomba depots are referred to by Cleanaway as 'Metro C & I'.⁴ The Katoomba site has only 2-3 drivers and its service levels are insignificant compared to Erskine Park. Metro C&I collects and manages C&I waste from areas extending to Katoomba in the west, to Newport in the northeast of Sydney and to Wollongong in the south.⁵

[15] The Erskine Park site also operates a mechanical workshop and services centre for Cleanaway vehicles.⁶

[16] Metro C&I services approximately 200,000 bins per month from various commercial and industrial organisations including major retailers such as Coles, Woolworths, Aldi and 7-Eleven and Sydney Water, Australian Turf Club and many internal business units such as TOMRA/Cleanaway and the Post Collections Business. The C&I business also services small to medium businesses particularly in the retail sector such as Chemist Warehouse and Hardware & General Stores.⁷

[17] Metro C&I services many waste streams including general waste, organic waste, wet and dry, cardboard, comingle services, secure destruction waste and civil waste materials. Metro C&I outsources many waste services such as office secure destruction and large hygiene jobs.⁸

[18] Employees of Cleanaway at Erskine Park are covered by the *Cleanaway Erskine Park Drivers Enterprise Agreement 2020* (2020 Erskine Park EA) which has a nominal expiry date of 23 September 2022. The 2020 Erskine Park EA was approved on 2 February 2021 and commenced operation on 9 February 2021. The base hourly wage rates in the 2020 Erskine Park EA are set out in the Site Specific Schedule to the Agreement and span the period of the COVID-19 pandemic. This schedule includes base hourly wage rates as at 23 September 2018, 23 September 2020 (calculated to include a 2.5% increase) and 23 September 2021 (calculated to include a further 2.5% increase). No increase is prescribed in respect of 2019, however, a lump sum amount of 2% was backdated to 23 September 2019. Clause 23 of the 2020 Erskine Park EA makes provision for ordinary hours to be worked between 3.00am and 4.00pm, Monday to Sunday.

[19] Clause 3 of the 2020 Erskine Park EA requires the parties to commence negotiations for a new enterprise agreement no later than 3 months prior to the nominal expiry date. On 30 August 2022, the TWU filed a dispute with the Commission against Cleanaway regarding non-compliance with this clause.⁹ On 5 September 2022, Cleanaway advised the TWU that Cleanaway would commence bargaining for a new agreement to replace the 2020 Erskine Park EA.¹⁰

[20] Cleanaway and the TWU commenced bargaining for a new agreement to replace the 2020 Erskine Park EA on 20 October 2022.¹¹ The TWU bargaining committee consisted of Mr Ho Lau, TWU Official, and Mr Wayne Richards, Mr Stephen Russell and Mr Steven Stassen, who are all Cleanaway employees and members of the TWU.¹² Mr Richards and Mr Russell are also TWU workplace delegates. Cleanaway's bargaining representatives were Ms Kylie Bowe, Cleanaway ER/IR Manager, who was succeeded by Ms Michaela White¹³ and Mr Paul Vella, Cleanaway Operations Manager.¹⁴

[21] Cleanaway and the TWU attended 17 bargaining meetings for the replacement enterprise agreement during the period from 20 October 2022 to 24 August 2023.

[22] The main areas of disagreement between the parties were the quantum of pay rises and arrangements in relation to ordinary hours. The TWU is seeking that the determination reflect an operational practice whereby ordinary hours are worked from Monday to Friday and work on Saturdays and Sundays is performed on a voluntary basis at overtime rates. Cleanaway is seeking to maintain the clause in the 2020 Erskine Park EA that allows ordinary hours to be rostered Monday to Sunday, particularly as weekend work is increasing at Erskine Park.

Cleanaway's preference is for weekend work to be performed by permanent Cleanaway employees including by rostering this work as ordinary hours which it says will reduce the costs of temporary labour, provide increased work opportunities for permanent employees, and provide certainty for Cleanaway that the weekend services will be completed.

[23] On 22 June 2023, Cleanaway opened the voting ballot for a replacement agreement which included Cleanaway's preferred ordinary hours of work clause, weekend penalties clause and wage offer. 64 out of 69 eligible employees participated in the vote. 64 employees voted against the proposed agreement and there were no votes in favour.¹⁵

[24] On 1 August 2023, the TWU filed an application for a bargaining dispute which was allocated matter number B2023/780.¹⁶ This matter was listed for conferences before Commissioner Riordan on 10 August 2023, 28 September 2023 and 18 October 2023.¹⁷ On 16 October 2023, the TWU filed the current application.¹⁸ At the conclusion of the 18 October 2023 conference before Commissioner Riordan, the parties agreed that Cleanaway would review its position, provide a written position paper to the TWU by 30 October 2023 and that the intractable bargaining declaration application would not be progressed until that date.¹⁹

[25] On 30 October 2023, Cleanaway provided the TWU with a final proposed draft of the 2022 Erskine Park Agreement by email.²⁰ On 10 November 2023, Cleanaway advised the TWU that Cleanaway would ask employees to vote in relation to the final proposed draft. The vote commenced on 20 November 2023 and concluded on 21 November 2023. 67 out of 74 eligible employees participated in the vote. 63 employees voted against the proposed agreement and there were 4 votes in favour.²¹ On 19 December 2023 Ms White sent an email to Ms Wisniewska which relevantly provided:

The result of the vote means that we confirm the proposed agreement, containing further concessions made by Cleanaway in an attempt to secure majority employee agreement in the November 2023 proposal (which Cleanaway indicated may be withdrawn if that agreement was not achieved) is withdrawn in its entirety. This means that there is no agreement, including on the issues on which Cleanaway recently made further concessions.²²

[26] Later that day, Ms Wisniewska responded to Ms White and claimed that Cleanaway's conduct was a breach of the good faith bargaining obligations, in particular the obligation not to engage in capricious and/or unfair conduct that undermines collective bargaining.²³ Ms White then responded to Ms Wisniewska's email advising that the withdrawal is consistent with the communications to the TWU and the Erskine Park workforce.²⁴

[27] The parties had further discussions about the terms of the proposed 2022 Erskine Park Agreement during the post-declaration negotiating period from 12 to 25 January 2024. During that period, Deputy President Slevin conducted three conferences.

[28] On 15 January 2024, Ms White sent correspondence to Ms Wisniewska alleging that the TWU had failed to provide justification as to why the ordinary hours of work clause proposed by Cleanaway was not agreed. Cleanaway also put the TWU on notice that if a response was not provided, it would apply for bargaining orders.²⁵ Ms Wisniewska sent a reply the following day, disputing that the TWU had not provided reasons for its position in relation to ordinary

hours.²⁶ Ms White's evidence was that while the TWU had expressed its position throughout bargaining, it had not provided the basis for its position in terms that would allow Cleanaway to engage with the TWU by developing alternatives that would take account both parties' positions.²⁷ At the hearing, Ms White said that the feedback that Cleanaway was receiving from employees about ordinary hours differed from what was being communicated by the TWU.²⁸

[29] According to Ms Wisniewska, Cleanaway confirmed during the first conference before Deputy President Slevin on 16 January 2024 that all matters between the parties were settled apart from ordinary hours of work, weekend penalty rates, wage increases, the nominal expiry date and consultation.²⁹ Following the conference, on 18 January 2024, Cleanaway claimed in writing that these matters were not agreed, which was refuted by the TWU.³⁰ Ms White did not attend the first conference as she was on leave.³¹ Ms White gave evidence that during the conference, she had a telephone call with Ms Jennifer Kennedy, Industrial Relations Manager who attended on her behalf. During the call, they discussed the five outstanding issues and Ms White reiterated previous instructions that she had provided to Ms Kennedy that there were no agreed terms.³²

[30] The parties attended a second conference on 19 January 2024. At the third conference on 25 January 2024, the parties agreed that the outstanding matters were ordinary hours of work, weekend penalty rates, wage increases, the nominal expiry date and consultation and Deputy President Slevin issued a Statement to this effect.³³

Statutory framework

[31] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (*Secure Jobs, Better Pay Act*) repealed the former serious breach declaration provisions of the FW Act and replaced them with a new scheme of provisions relating to intractable bargaining declarations, with effect from 6 June 2023.

[32] Section 269 provides that an intractable bargaining workplace determination cannot be made prior to an intractable bargaining workplace declaration having been made and the post-declaration negotiating period (if any) having passed.

[33] Many of the aspects of Part 2-5, Division 4 of the FW Act which deal with the terms of a workplace determination have not been significantly modified by the *Secure Jobs, Better Pay Act*. Section 270(1) requires an intractable bargaining workplace determination to include the terms set out in s. 270, the core terms in s. 272 and the mandatory terms in s. 273. The determination must also comply with s. 270(4) which requires that the determination is expressed to cover each employer and the employees that would have been covered by the agreement and any employee organisation that was a bargaining representative of those employees. The terms set out in s. 270 are the agreed terms (ss.270(2) and 274(3)) and the terms dealing with the matters at issue (ss.270(2) and 270A). Section 271 prohibits the inclusion of any terms other than those required by s. 270(1).

[34] Sections 272 and 273 were not amended by the *Secure Jobs, Better Pay Act*. A delegates' rights term at s.273(6) which applies to a workplace determination made on or after 1 July 2024 was later inserted by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (*Closing Loopholes Act*).

- [35] Section 272 sets out the core terms that a determination must include. These are:
- the nominal expiry date which must be no more than 4 years after the date on which the determination comes into operation (s.272(2)); and
 - terms such that the determination would, if it were an enterprise agreement, pass the better off overall test under section 193 (s.272(4)).

- [36] In addition, s. 272 provides that the determination must not include:
- any terms that would not be about permitted matters if the determination were an enterprise agreement (s.272(3)(a)); or
 - a term that would be an unlawful term if the determination were an enterprise agreement (s.272(3)(b)); or
 - any designated outworker terms (s.272(3)(c)).
 - a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:
 - (a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
 - (b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees). (s.272(5)).

- [37] Section 273 sets out the core terms that a determination must include. These are:
- a procedure for settling disputes about any matters arising under the determination and in relation to the National Employment Standards (s.273(2));
 - the model flexibility term or an agreed term which satisfies paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements) (s.273(4));
 - the model consultation term or an agreed term which satisfies s. 205(1) (which deals with terms about consultation in enterprise agreements) (s.273(5));
 - a delegates' rights term (s.273(6)) which was inserted by the *Closing Loopholes Act 2023* and applies to a workplace determination made on or after 1 July 2024).

[38] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (*Closing Loopholes No. 2 Act*) amended the intractable bargaining determination provisions in relation to agreed terms and matters still at issue with effect from 27 February 2024. These amendments apply to intractable bargaining determinations made on or after 27 February 2024 regardless of when the application for an intractable bargaining declaration or the intractable bargaining declaration was made.

- [39] Section 274 deals with agreed terms. In relation to an intractable bargaining workplace determination, it now provides at paragraph (3) that an agreed term 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.

[40] Section 270(3) requires that the determination must include terms that the Commission considers deal with the matters that were still at issue at the end of a post-declaration negotiating period (if there was one) or otherwise after making the declaration under s.235A.

[41] The *Closing Loopholes No. 2 Act* inserted a new s. 270A which applies if an enterprise agreement applies to one or more employees who will be covered by the determination immediately before the determination is made. It provides that a term included in the determination that deals with a matter at issue (apart from a term which provides for a wage increase) must not be 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.

[42] Section 275 provides that the factors that the Commission is required to 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.

[43] This provision is in the same terms as it was prior to the commencement of *Secure Jobs, Better Pay Act* apart from paragraph (b) which was deleted and paragraph (ca) which was added by *Secure Jobs, Better Pay Act*.

Issues to be determined

[44] The parties have jointly filed a draft determination. The draft determination complies with s.270(4) and includes the terms set out in ss. 270(2), (3), 272 and 273. It does not include any terms other than those required by s.270(1). There is no dispute between the parties about what the agreed terms are for the purpose of s. 274 and these are included in the draft determination as required by s. 270(3). What remains to be decided is the matters at issue under 270(3), having regard to the factors in s. 275. As noted above, the parties reached agreement about the matters that were still at issue at the conclusion of the post-declaration negotiating period.

Ordinary Hours of Work

[45] The TWU's hours of work claim was narrowed during the course of the hearing and now seeks that:

- i. ordinary hours of work for full-time employees will be 38 hours per week to be worked within a work cycle not exceeding 28 days;
- ii. ordinary hours are to be worked between 3am to 4pm, Monday to Friday; and
- iii. ordinary hours must not exceed 8 hours per day.

[46] Cleanaway proposes the following clause:

21.1 The ordinary hours of work for full-time employees shall be an average of 38 hours per week to be worked within a work cycle not exceeding 28 consecutive days.

21.2 The maximum daily ordinary hours will be 8 hours.

Spread of ordinary hours

21.3 Subject to the exemptions hereinafter contained the ordinary hours of work shall be worked on any day Monday to Sunday between the hours of 3.00 a.m. and 4.00 p.m.

21.4 (**Monday-Friday Ordinary Hours by election**) A permanent employee, having regard to their personal or family circumstances, may elect in writing for their ordinary hours to be worked on any day Monday to Friday between the hours of 3.00 a.m. and 4.00 p.m. The election may be withdrawn in writing. The election or withdrawal as the case may be is effective from the first full pay period commencing 28 days after the election or withdrawal is given in writing. An election and/or the withdrawal of an election under this sub-clause may be made unilaterally by an employee at least once in each full year of operation of this Determination (to avoid doubt, additional elections or withdrawals may be made by agreement with the Company).

21.5 An election or a withdrawal of an election pursuant to sub-clause 21.4 shall be freely made by the permanent employee and as such, neither the Company, the Union nor any Employee or Employees shall seek to influence, encourage or pressure any permanent employee(s) to make any particular election or any particular withdrawal of an election pursuant to sub-clause 21.4.

21.6 (**Monday-Sunday Ordinary Hours for converting regular indirect weekend workers**) A permanent employee employed after the date this Workplace Determination commences operation where the employee has worked as a contractor, owner-driver or other indirect worker for the Company regularly performing work on Saturday and/or Sunday will not be eligible to make an election under sub-clause 21.4 for a period of 3 years' continuous service as a direct employee of the Company (other than by agreement with Cleanaway).

21.7 For public holidays only, the spread of hours (i.e. 3.00 a.m. to 4.00 p.m.) may be altered by up to one hour at either end of the spread, by agreement between the Employer

and the majority of employees concerned or in appropriate circumstances, between the Employer and an individual employee.

21.8 Where the Company desires to vary or change the regular starting time of an employee they shall give one week's notice of such variation or change to the employee concerned and post a notice of the intended change at the depot or yard.

21.9 To avoid doubt, nothing in this clause affects steps the Company may take to manage operational requirements to have work performed on a Saturday or Sunday.

Evidence

[47] Ms Leigh Newman is the Regional Manager for Cleanaway's operations in relation to commercial and industrial (C&I) solid waste and for the NSW Metropolitan area.³⁴ Ms Newman gave evidence that major NSW clients which require C&I waste collections are predominantly serviced by the Erskine Park site.³⁵

[48] According to Ms Newman, weekend NSW metro C&I waste collections are required by approximately 18 of Cleanaway's national clients, 17 mid-market clients, and numerous small-medium Enterprise (SME) clients. There are 659 weekend C&I waste collections for all NSW metro customer/clients, including 414 for Cleanaway's national clients.³⁶

[49] These 659 weekend collections represent 17% of the total scheduled services for all active customers serviced by metro C&I, with additional ad hoc requests.³⁷ The clients who require weekend services spend a total of \$46 million (across all days of the week) representing approximately 40% of annual revenue from metro C&I clients. Ms Newman says that if Cleanaway cannot service one of those clients on the weekend then it may lose the client for all days of the week.³⁸

[50] The clients serviced by Cleanaway's Erskine Park site are split between supermarkets, shopping centres, convenience stores, food and beverage, casino and event services.³⁹ Cleanaway's major NSW clients operate on all days of the week and in particular, in industries where a significant amount of organic waste is produced. Frequent collection of organic waste which extends to weekends is imperative to reduce odour, vermin and maggots created by decomposing organic waste at client sites.⁴⁰

[51] It is standard practice in the waste management industry for service providers like Cleanaway to submit or resubmit tenders for work with large national customers. Contracts with those large customers usually operate for 2-5 years before Cleanaway needs to retender to maintain the work. For example, the contract with Woolworths which the Erskine Park site services has an operative term of two years and will expire in July 2025 with an extension option. Other major customers such as Aldi, Coles, Hungry Jacks, Kmart and Tomra which the Erskine Park site also services have contracts with an operative term of at least three years.⁴¹

[52] Cleanaway's contracts (and ability to successfully re-tender) with its large national clients are critical to its business model. The volume of work produced by these large contracts improves Cleanaway's profit margins by increasing the number of customer collection sites over which travel costs can be shared, which directly impacts the amount of work available to

employees. The work Cleanaway offers to employees is built around the need to service large national clients, and then rosters are 'in-filled' with work provided by midmarket and SME clients. The loss of a major client will increase the cost to small-medium businesses due to additional travel being required to attend those sites without some of the travel costs being shared by other customers.⁴²

[53] Cleanaway must work around clients' opening times and schedules which dictates when the collections take place including weekend services. Cleanaway's ability to service its contract with Woolworths is particularly important to its NSW operations, and the loss of this contract (or unsuccessful re-tender) will result in a significant loss of work available for employees who perform C&I waste collections in the NSW metro area.⁴³

[54] In the 2023/2024 financial year, Cleanaway is expected to collect approximately 100,000 bins on weekends in its metro C&I business based on current run rates to February 2024 extrapolated to the full financial year.⁴⁴ From FY2022, the trend of weekend collections has been increasing, including organics collections more than doubling. This increase in weekend services provided to NSW clients is partially attributable to Cleanaway winning a major contract with the Woolworths group in 2022.⁴⁵

[55] Ms Newman says that there has been a general increase in environmental, social and governance (ESG) initiatives by clients. Such initiatives by clients can involve a focus on responsible waste management, and one of the ways in which clients seek to reduce their environmental and sustainability impact is by separating organic waste from other waste. This then necessitates the frequent collection of organic waste.⁴⁶

[56] The ability to perform weekend collections is also important for collecting the general waste, particularly from some major clients. Cleanaway collects general waste on Saturday and Sunday and currently collects organics on a Saturday due to the Erskine Park Transfer station being closed on Sunday. The organic Sunday service is currently contracted to a third party. However, the long-term strategy is to bring all subcontracted services back in house and for there to be additional transfer station and disposal facilities open on weekends. Cleanaway is currently working with some of its major clients in the fast-food industry to further separate organics from their general waste which will increase the collections required. Weekend collections are necessary for these clients to reduce the impact of leaving their general waste in bins overnight or over consecutive dates.⁴⁷

[57] Nationally, Cleanaway has major clients whose contracts for services expressly provide for weekend collections. These major contracts account for approximately \$139 million in annual revenue nationally. Failure to complete weekend collections in accordance with these contracts may put that revenue at risk. Loss of any of these contracts would therefore be detrimental to Cleanaway's profitability and would pose a serious risk to its continued ability to maintain its current workforce headcount. Retaining these contracts is therefore essential to employees' job security.⁴⁸

[58] The NSW Government Waste and Sustainable Materials Strategy 2041 provides that by 2025, organic waste collection will be mandated for organisations that generate a significant volume of food waste, such as supermarkets and large hospitality businesses. This will increase

existing demand for organic waste collection services by Cleanaway as these types of businesses already represent a significant proportion of Cleanaway's major NSW clients.⁴⁹

[59] It is common for Cleanaway's clients to require both weekday and weekend services, and it is unusual for a contract for services to be 'split' such that it solely provides for weekday or weekend services. Cleanaway's clients generally want to have one waste management company providing waste management services. It is not efficient for these clients to engage two or more waste management service providers to ensure that both weekday and weekend collections take place. Cleanaway has recently lost client contracts in Fairfield Heights in Greater Western Sydney, due to recurring missed Saturday collections. The value of these contracts was approximately \$150,000 and another under \$100,000. If this type of issue were more widespread (including with a major client) then there will be a significant risk of lost revenue and market share.⁵⁰

[60] Cleanaway needs to be able to offer weekend organic waste collections to existing and prospective clients to be competitive to win tenders. Price competitiveness is usually the determinative factor in whether Cleanaway wins or loses a tender. Cleanaway does not tender separate weekday and weekend rates to clients and prospective clients. Cleanaway instead tenders a single rate irrespective of weekday or weekend collection, and so must ensure that labour costs in relation to both weekday and weekend collections are considered.⁵¹ Cleanaway considers current labour costs in determining what prices to tender.⁵² The existing cost of weekend labour to Cleanaway comprises of wages paid to employees and fees paid to indirect labour in the form of contractors and owner drivers.⁵³

[61] The cost of engaging owner-drivers is a significant component of Cleanaway's total labour costs. It is more expensive to engage owner drivers, compared to employees.⁵⁴ Cleanaway's long-term strategy is to reduce engagements of contractors, owner-drivers and casual employees and increase employment of direct permanent labour for the following reasons:

- it holds the view that engaging significant numbers of individual owner-drivers increases the potential for safety incidents to occur as Cleanaway is not able to exert its desired level of control over owner-drivers in relation to safety and fatigue management;
- it seeks to improve reliability to consistently provide weekend collections and reduce the occurrence of missed or failed weekend collections;
- it seeks to reduce overall reliance on owner-drivers, who as contractors may elect to perform work for competitors; and.
- it seeks to reduce overall labour costs.⁵⁵

[62] Paul Vella, Branch Manager – Solid Waste Services for Cleanaway's Erskine Park site gave evidence that the waste collection and disposal trucks operated at Erskine Park are Hook Lift, Rear Lift and Front Lift vehicles. Cleanaway also has a hygiene waste services business. Rear Lift and Front Lift services operate on a set route model with on call allocations being processed across the shifts. However, Hook Lift vehicles which are involved in bulk bin collections require more on call allocations and varied bin movements because these systems are mainly used in servicing major clients and are more versatile for use for different collections each day as they are not restricted to particular runs or routes.⁵⁶

[63] Mr Vella gave evidence that an optimal shift has a running time of approximately 9.6 hours each day. This is optimal in relation to both the driver and vehicle, to manage driver productivity and fatigue-related risk factors while ensuring that enough time is left between shifts to check, service and repair vehicles. However, many Cleanaway vehicles are used on two shifts in a 24 hour period (called ‘double shifting’) due to operational requirements where a particular type of vehicle is needed for consecutive jobs, and because of business growth and increased service offering.⁵⁷

[64] As a result of double shifting, there is more pressure on the workshop with a smaller window for fleet repairs and the lifespan of the vehicles is reduced.⁵⁸

[65] There is much less pressure on the workshop staff when the Operations Team spreads the work across seven days, rather than implementing double shifting. Currently, the majority of the fleet is idle over the weekend which will change as work increases. Cleanaway currently outsources much of the weekend work to owner drivers and sub-contractors. However, the aim is to internalise core work as it is much more cost effective.⁵⁹

[66] Cleanaway and owner drivers typically have an arrangement where the owner driver supplies the chassis and cab component and Cleanaway provides the ‘body’ component of the truck. The body of the truck is the part which performs the most work when it comes to waste collection and includes the relevant lifting mechanism, an internal blade to compact waste, and a hydraulic system which bears the brunt of wear and tear. Cleanaway performs maintenance on the body components which require servicing after approximately every 300 hours of use.⁶⁰

[67] According to Mr Vella, the following factors are indicative of more weekend waste services being required of providers in the C&I waste sector, including work serviced out of a busy metropolitan site like Erskine Park:

- Hours of operation of clients leading to production of waste requiring transport from client sites. Where clients undertake waste-producing activities on or immediately prior to a weekend, they can require waste services to remove it on the weekend.
- Variable and sometimes low capacity of individual client sites to hold volumes of waste awaiting pickup including, for example, small format ‘metro’ retail or convenience stores, which tend to have high turnover and low waste storage space.
- Different types of service (hook lift, side lift, front lift) required at different sites, restricting the capacity to perform particular types of waste pickup as not every vehicle type, employee or other worker is able to interchangeably service each type of lift.
- Heavy traffic within the Sydney metropolitan area can cause delays in weekday collection. If a driver is caught in traffic and consequently is unable to complete their run, that part of the run will need to be completed the following day and as a result will overflow into the weekend.
- The nature of particular waste streams required to be serviced, with some waste streams requiring time-sensitive pickups, for example organic waste which can break down leading to environmental issues.
- While Cleanaway does not currently have a tipping option for organics disposal on Sundays, this will change in the near future. Cleanaway has multiple transfer stations placed in the metropolitan area for other waste streams including Auburn and Artarmon which are open for use 24/7.

- Recently, curfews set by Cleanaway's major customers Coles and Woolworths (including on weekdays) has impacted its ability to collect waste between the hours of 10:00pm – 7:00am at the relevant collection points. Subsequently, Cleanaway is servicing more customers during business hours which is also impacting its capacity to keep up with weekday collection. More services will need to be scheduled during daytime hours across Saturday and Sunday as a result.
- The structure of waste contracts under which clients require waste services to be provided, in that almost exclusively, ongoing waste service provision is not contracted for by clients on the basis of whether the service is required on a weekend or not. Clients will contract for work to be performed according to the client's operating hours and waste-producing work. Therefore, the waste services provider must also be able to adequately service weekend work to obtain contracts to service Monday to Friday work.⁶¹

[68] The current level of weekend work required is presently managed in the following ways:

- Services are scheduled where possible for Friday (so, immediately prior to the weekend) or for Monday (so, immediately following the weekend).
- Engagement of owner-drivers.
- Engagement of subcontractors.
- Cleanaway employees performing overtime.
- Ordinary hours performed by a small number of employees who have requested to work Saturdays due to personal reasons.⁶²

[69] Mr Vella explained that scheduling weekend services on Monday or Friday has a flow-on effect in which there is little or no remaining capacity for Monday or Friday work to be performed and as such, the practice impacts the level of work that can be serviced on those days (including unscheduled work requiring immediate servicing). This becomes an issue because the additional deferred or brought-forward from weekend load on Mondays and Fridays, will impact Cleanaway's capacity to meet regular weekday work if it becomes available and it will be more impacted by personal leave taken on those days.⁶³

[70] Mr Vella said that since 2021, he has not sought to make any major shift changes because this could result in existing skilled employees leaving Cleanaway. He is concerned that Cleanaway's current and future customers will increase their demands on weekend service options, and Cleanaway needs to be able to roster new staff or existing staff if that suits a particular employee or applicant for employment.⁶⁴

[71] Mr Vella's evidence is that while the majority of services are scheduled on various set runs and shifts, national customers such as Coles, Woolworths and Aldi have a priority booking arrangement as part of the service agreement. These customers can call a representative from Cleanaway 24/7, and the Call Centre will contact the Branch to book the service. Once the service is booked with the Branch, the Branch must attend that customer to provide the service within the timeframe specified in the customer's service agreement. The Operations Team and Mr Vella receive such calls regularly after hours and on weekends.⁶⁵

[72] Due to the nature of organic waste, it is required to be collected each day (including Sunday). Data of organics collections at Erskine Park since December 2022 shows that there

has been an overall trend upwards in demand for organics collections since then. In circumstances where a collection of organic waste is missed, and the bin overflows, Cleanaway needs to engage a contractor to assist with the collection because Cleanaway's vehicles cannot pick up the overflowing bins. At the Erskine Park site, Cleanaway has engaged CBD Waste to perform this work. It is not efficient or sustainable for Cleanaway to leave organic waste uncollected on a Sunday and doing so risks Cleanaway's capacity to continue to service its existing customers to the level expected by those customers.⁶⁶

[73] There are approximately 6,953 active sites requiring waste management services by Erskine Park. Contracts with customers can include a number of sites. Some contracts require Cleanaway to collect bins on an 'as required' basis. Where possible Cleanaway tries to schedule collections to ensure it has adequate labour coverage to service those collections. But Cleanaway must also meet on demand requests for bin collections, including on weekends. Other contracts specify that service collections are to be provided between Monday and Sunday. While Cleanaway can outsource collections to ensure weekend collections are made, most customers have a preference to deal with only one waste management company for the period from Monday to Sunday. There is also a risk in giving away a weekend day's work to a competitor because that competitor may ultimately become the sole provider (because the customer sees them as being able to provide a seven day service when Cleanaway cannot do so).⁶⁷

[74] There has been an increase in hours performed by employees on Saturdays over the past 3 years. There has been a slight drop in hours performed on a Sunday, but also an increase in leave taken on Sundays.⁶⁸

[75] At Erskine Park there are presently approximately 24 runs to cover on a Saturday, and approximately 10 runs on a Sunday. Each run has one vehicle with one driver allocated to it and each run will service multiple sites. An individual site may have multiple lifts (because there are multiple bins at the site).⁶⁹ The majority of this weekend work is not performed by direct permanent employees but by temporary labour consisting of owner drivers, contractors and sometimes casual employees.⁷⁰

[76] The work performed by direct permanent employees, direct casual employees and owner drivers is supplemented by subcontractors. Approximately nine rear lift runs are usually performed by subcontractors over a weekend. This number can increase where Cleanaway does not have sufficient employees or other temporary labour available to provide the required services. Cleanaway relies on owner drivers and contractors because there is not a sufficient uptake of overtime by employees over the weekend.⁷¹ Cleanaway has managed to service weekend work at Erskine Park, but at times is required to find alternatives to permanent employees in order to do so. There is a risk that a particular run may not be serviced because temporary labour may not accept a shift. Further, it costs Cleanaway to engage that temporary labour. For example, when Cleanaway utilises an owner driver to perform services on the weekends it makes a net loss on at least three Saturday front lift runs.⁷² A directly engaged employee performing four hours work on a Saturday or Sunday under the 2020 Erskine Park EA costs Cleanaway less than engaging owner drivers in these circumstances.⁷³

[77] Mr Vella gave evidence that an example of how restrictive ordinary hours might affect Cleanaway is the Easter period. Cleanaway found it challenging to fill the required runs over

the Easter weekend and at the time of the hearing, did not have a sufficient number of employees accepting work over the Easter weekend.⁷⁴

[78] Mr Vella says it is challenging to secure employees to work on weekends. Drivers tend to prefer certain runs. When an employee who usually performs a particular run is on holiday or absent on personal leave, it is difficult to replace that absent employee to have the run performed.⁷⁵

[79] When Cleanaway cannot service a client's requirements, Mr Vella may receive communications from senior managers for the client. If Cleanaway is unable to service the work, Cleanaway may need to outsource the collection to a third party. Many of these priority jobs are requested after hours and on weekends. The risk is heightened when Cleanaway is obliged under its commercial terms with a client to provide emergency callout services. A broader spread of hours means Cleanaway is likely to have better coverage to meet such callout requests.⁷⁶

[80] When Cleanaway outsources the collections to a third party such as APS Waste or CBD Waste, Cleanaway pays a premium price and at times makes a loss on the run. The financial loss is in addition to the commercial and reputational impact that having to outsource the work can have. When Cleanaway sends external contractors to service its customers, it risks losing those customers to the competition, and also faces possible reputation issues due to inadequate service by the sub-contractor.⁷⁷

[81] Mr Vella says that if Cleanaway can source more driver employees who wish to perform ordinary hours of work on a weekend (whether part-time or full time) it will be able to engage them and reduce reliance on owner drivers and subcontractors. Mr Vella believes it is likely that this would not affect the level of overtime regularly serviced by current direct employees in the short-to medium term (and at least not over the next two or three years) because it makes sense for Cleanaway to redirect work performed by owner-drivers and subcontractors to its own employees as a first step in improving reliability and predictability of in-house capacity to perform the work. Based on his experience, Mr Vella does not believe that Cleanaway will be able to source more new employees in the short-to-medium term wishing to perform ordinary hours on a weekend than the level of work that is presently performed by owner-drivers and subcontractors.⁷⁸

[82] Clients such as Woolworths, Coles and Aldi are expected to increase their need for waste collections and on a more frequent basis. The impact of those supermarkets changing the way they treat organic waste has created a significant change to the needs to collect waste each day throughout the week. Based on Mr Vella's experience, there is a level of commercial risk involved in relying too heavily on temporary labour to fill shifts on weekends. If the weekend services are to increase and additional hours are required to be performed on Saturdays and Sundays, Cleanaway may find it difficult to service those increased needs. If Cleanaway cannot engage employees to work ordinary hours on Saturdays and Sundays, Cleanaway will need to factor this into bidding for new contracts and reviews of existing contracts. This may result in Cleanaway losing contracts at Erskine Park, that it otherwise would have won.⁷⁹

[83] Cleanaway's concern is not that a premium needs to be paid to service additional work on the weekends but having the capacity to pick up more bins across seven days a week. This

will have a significant positive impact on service delivery during the week where Cleanaway is currently experiencing peaks on Mondays and Fridays in order to complete all services.⁸⁰

[84] For example, currently five rear lift runs are performed on a Monday to service organics collections because Cleanaway has been unable to service that work on Sundays. Mr Vella would prefer to have additional collections on a Sunday and to reduce those Monday organic runs to four, thereby freeing up a driver to collect other waste.⁸¹

[85] Cleanaway's capacity to collect organics on a Sunday is currently limited by deposit sites not being open. Cleanaway is in active discussions with participants in the waste management sector with the objective of having an organics deposit point in the very near future. This will increase the capacity of Cleanaway to meet its organics collections and disposals on a Sunday more readily, subject to having the labour available to drive the rear lift trucks required to collect such waste.⁸²

[86] Ms Wisniewska's evidence is that Erskine Park employees oppose Cleanaway having the ability to direct them to work on weekends and want to retain the current practice where their ordinary hours are worked Monday to Friday and where they can choose on a week-by-week basis to nominate to work overtime on Saturdays or Sundays.⁸³

[87] Ms Wisniewska says that based on her discussions with the TWU Erskine Park Bargaining Committee, employees want to maintain the arrangement where they contact Cleanaway throughout the week to express interest in overtime work and that this has never presented any issues for Cleanaway or the employees.⁸⁴

[88] This arrangement suits employees as it recognises that there are some occasions that an employee is available to work on weekends, whereas on other occasions, employees may have other commitments, be too fatigued, or feel it unnecessary to work on the weekend.⁸⁵ Some employees nominate to work weekends every week, every second week, once a month, or sporadically based on their needs, or otherwise do not nominate to work on weekends at all.⁸⁶

[89] Employees want to retain the discretion to nominate for overtime work on weekends to balance responsibilities and priorities they have on weekends, including:

- a. caring responsibilities;
- b. spending time with their families;
- c. attending children's weekend sports events;
- d. participating in extra-curricular activities;
- e. facilitating custody arrangements;
- f. for religious observance; and/or
- g. to relax and recuperate from working during the week.⁸⁷

[90] The current arrangement at Erskine Park allows employees to work around these responsibilities and priorities on a week-by-week basis. The opt-in system allows employees to make alternative arrangements on weekends where they wish to work overtime to make extra money.⁸⁸

[91] Ms Wisniewska says the Erskine Park employees see the current opt-in system as representing the fairest method of distributing overtime weekend work, in comparison to Cleanaway directing a group of employees to work ordinary hours on weekends, which attracts a weekend penalty rate, while other employees work their ordinary hours of work throughout the week at the hourly base rate of pay.⁸⁹

[92] The opt-in system has existed for about 15 years and Ms Wisniewska says the TWU Erskine Park Bargaining Committee do not understand why Cleanaway is claiming that current arrangements are not fit for purpose. Every week, approximately 30 employees nominate themselves as available for Saturday work and approximately 10 employees nominate themselves for Sunday work. In addition to Erskine Park depot employees nominating to work on weekends, Cleanaway engages approximately 30 owner drivers who work exclusively at the Erskine Park depot and are required to work weekends. Cleanaway therefore has access to approximately 60 workers from the Erskine Park depot for Saturday work and approximately 40 workers to service clients on Sundays. In these circumstances, Ms Wisniewska says it is unclear why Cleanaway requires the discretion to direct employees to work weekends as ordinary hours of work.⁹⁰

[93] Ms Wisniewska says Erskine Park employees are concerned that Cleanaway's ability to roster ordinary hours of work on a Monday to Sunday basis will lead to a roster system where half of the workforce completes work on a Monday to Friday basis and the other half of the workforce completes their ordinary hours on weekends. Cleanaway's preferred weekend penalty rate clause provides a different rate for weekend work, in comparison to the overtime rate that employees are currently paid for weekend work. Ms Wisniewska says this illustrates that Cleanaway wants the ability to direct employees to work on weekends and for this work not to be considered overtime.⁹¹

[94] Ms Wisniewska says many employees are financially reliant on the overtime hours they work and, where shifts were split between two groups of employees which limits access to overtime, many employees will resign from their employment with Cleanaway.⁹²

[95] Mr Richards and Mr Russell are the TWU delegates at Erskine Park and members of the TWU Bargaining Committee.⁹³ Mr Stassen is a TWU member and member of the Bargaining Committee.⁹⁴ Mr Russell has worked for Cleanaway at Erskine Park for five years as a hook-lift driver.⁹⁵ Mr Richards has worked for Cleanaway for about 17 years including for 15 years at Erskine Park and is currently a hook-lift driver.⁹⁶ Mr Stassen has been employed by Cleanaway for five years as a rear lift driver.⁹⁷ There are about 70 other Cleanaway employees based at the Erskine Park depot and over 90% of them are members of the TWU.⁹⁸ There are also approximately 30 owner drivers who are contracted to work exclusively for Cleanaway seven days a week. These owner drivers are also based at Erskine Park.⁹⁹

[96] Mr Russell's regular start time at Erskine Park is 4:30 am Monday to Friday.¹⁰⁰ He works overtime almost every day, finishing at around 3:00pm most days. Mr Russell tries to limit himself to working 10 hours per day as he has young children to get home to.¹⁰¹ Mr Russell works on bottle returns.

[97] Mr Stassen commences work at 2:00am every day so he receives shift allowance of 30% because he is commencing work before 3:00am.¹⁰² He collects organic waste so he only collects

from Woolworths, Aldi and Coles.¹⁰³ Mr Stassen said Cleanaway had increased the organics runs from one or two when he first commenced employment to approximately six.¹⁰⁴ Mr Stassen agreed during cross examination that customers want organic waste collected every day because it smells, however, it is currently unable to be disposed of on Sundays if collected on that day.¹⁰⁵ Mr Stassen usually finishes work at around 1:30pm so he works overtime nearly every day due to the 'run size'. He explained that his collection point was the city and that the run size referred to him leaving the Erskine Park depot then driving to the city, collecting the first load then returning to Erskine Park to dispose of the load. He then returns to the city.¹⁰⁶ Mr Stassen also said he works more hours than he would like to because of the travel time. He would prefer to work ten hours per day but ends up working 11 or 12 hours per day.¹⁰⁷ When he first started working for Cleanaway, he was advised that Cleanaway rosters a 10 hour day but that in practise the runs can result in more than this.¹⁰⁸ Mr Stassen says that most employees work overtime regularly as Cleanaway bases the runs off a ten-hour average length. These ten-hour runs commenced at around the time that Mr Stassen commenced employment with Cleanaway.

[98] During the first two years he worked at Erskine Park, Mr Stassen worked ordinary hours on Monday to Friday and opted to work overtime on Sundays to make extra money to supplement his income. During the past three years, he has chosen not to work on weekends.¹⁰⁹

[99] Mr Stassen says that some of the objections that Erskine Park employees have made to the ordinary hours of work and weekend penalty rate clauses that Cleanaway proposed include:

- a. Employees want to maintain the ability to choose to work on weekends and not be directed by Cleanaway to work on weekends.
- b. Employees have different obligations in their personal lives (for example children, custody arrangements, weekend sports, religious obligations and/or time with family).
- c. Employees arrange their lives around the Monday to Friday work week and do not want these arrangements disrupted.
- d. Where employees choose to work on weekends they believe that weekend penalty rates should be paid as required under the *Waste Management Award 2020*.

[100] Mr Stassen cannot work on weekends as he has children from his previous relationship who he only sees on weekends.¹¹⁰ Mr Stassen knows of other employees working at Erskine Park who are in similar situations and are unable to work on weekends because of custody and other arrangements.¹¹¹ Mr Stassen described the hours of work clause as a 'make or break' clause for many Erskine Park employees. He says has spoken to between 15 to 20 colleagues at length who have explained that if Cleanaway rosters them seven days a week they will leave the Erskine Park depot and work for another waste management company that is a Monday to Friday site.¹¹²

[101] In the five years that Mr Russell worked for Cleanaway at Erskine Park, he was unaware that the 2020 Erskine Park EA included an ordinary hours of work clause that allowed Cleanaway to roster ordinary hours from Monday to Sunday. Mr Russell had never read this section of the 2020 Erskine Park EA and Cleanaway has never required him to work ordinary hours on weekends.¹¹³ Mr Richards and Mr Stassen say that they were also not aware of this. Mr Richards says this information came to light in bargaining meetings, when the bargaining

representatives were arguing about weekend penalty rates and how many ordinary hours an employee can work per day.¹¹⁴

[102] Each week, a Cleanaway manager who allocates work sends a text message to all employees asking for expressions of interest in relation to working on the upcoming Saturday or Sunday.¹¹⁵ Mr Russell has nominated to work most Saturdays for the past three years. When Mr Russell nominates to work on Saturdays he usually works from 5:00am until about 2:00pm or 3:00pm.¹¹⁶

[103] The current arrangement of Cleanaway managers offering weekend work every week is important to Mr Richards as it provides him with the flexibility to plan work around his life and pick up extra work at penalty rates on weekends if he is available and needs to supplement his income from working his ordinary hours.¹¹⁷

[104] Mr Russell works on Saturdays so that his family can make ends meet financially.¹¹⁸ Mr Russell's family has purchased a new house and needs to service the mortgage and the many rate increases that have taken place in the last couple of years.¹¹⁹ Working Saturdays on overtime rates has helped Mr Russell's family make their mortgage repayments and keep up with the rising cost of living and pay for school fees, food, bills, utilities and other everyday expenses.¹²⁰ If Mr Russell only worked Monday to Friday without the opportunity to work on weekends, he could not sustain his family financially.¹²¹ Mr Russell is financially reliant on having the opportunity to work Saturdays particularly as employees at Erskine Park have not had a pay increase since 23 September 2021. Mr Russell says this has put financial pressure on his family as every expense seems to have increased but his income has not kept up.¹²²

[105] Mr Richards has nominated to work Saturdays every fortnight for the past ten years to make extra money to support his family and to keep up with the cost of living. He says if he was only offered 38 hours of work per week at Erskine Park, it would not be a financially sustainable job.¹²³

[106] Mr Richards estimates that he works a minimum of 55 hours per week when he does not work on a Saturday, but when he works on a Saturday, he can work over 60 hours in a week. His usual weekly earnings are between \$1700 and \$2000 depending on whether he works on a Saturday. His earnings from work on a Saturday make up around \$350 of the \$2000.¹²⁴ If Cleanaway's claim is upheld, Mr Richards estimates that he would lose around \$200 every week.¹²⁵

[107] Mr Richards says that most other employees at Erskine Park work significant hours each week to make a decent living. While the maximum daily ordinary hours under the 2020 Erskine Park EA are eight,¹²⁶ he estimates that most of the employees work between 10 to 12 hours per day to make ends meet financially.¹²⁷

[108] It is unclear to the TWU why Cleanaway has difficulty rostering work on weekends. Mr Richards estimates that each Saturday there are at least 25 employees who elect to work and 30 owner drivers who attend work. There is less work to be performed on Sunday in comparison to Saturdays, as many sites and landfill stations are closed on Sundays. For this reason, Cleanaway requires less employees on Sunday than on Saturdays to service its clients. Mr

Richards understands that Sundays are usually worked by approximately ten employees. Cleanaway also has the ability to ask owner drivers to work on Sundays as well.¹²⁸

[109] Before bargaining, Mr Richards was never told by anyone from Cleanaway that there were issues with enough staff nominating to work on weekends.¹²⁹

TWU Submissions

[110] The TWU seeks that the ordinary hours of work clause provide that ordinary hours are to be worked Monday to Friday ‘to enshrine the current practice at Erskine Park into the determination’. It submits that Cleanaway has almost never found the need to roster ordinary hours on weekends. This capacity is clearly not significant to Cleanaway and its business at Erskine Park has functioned effectively and productively with an ordinary hours of work arrangement of the kind sought by the TWU.

[111] The amendment to the ordinary hours of work clause ensures that employees are not required to work ordinary hours on weekends. The TWU submits this would be disruptive to their family responsibilities, including custody arrangements, caring responsibilities, religious sensibilities and work-life balance more generally. It will also cause a reduction in earnings for employees who work on weekends to supplement their weekly income.

[112] Cleanaway has work available to be performed on weekends and employees are able to opt in to perform this work. This arrangement has existed for at least 15 years. It is beneficial to employees as it permits them to have weekends off if they choose. It also allows those who wish to earn extra money on weekends to do so. Given the current cost of living, this is imperative for a number of employees to make ends meet.

[113] Cleanaway’s position is unnecessary to ensure that it has sufficient labour to perform work on weekends. It has always managed to obtain sufficient labour and there is no reason to think it will experience any future difficulties in doing so. If employees wish to work ordinary hours on weekends, there will be an individual flexibility agreement (IFA) provision in the workplace determination as an agreed term and which permits an IFA to be made about when work is performed as well as overtime and penalty rates.

[114] The TWU submits that Cleanaway’s position is also counterintuitive as it could result in experienced employees who rely on weekend overtime leaving its business and otherwise cause further disharmony which has the potential to decrease productivity of employees.

[115] The TWU submits that in the circumstances, it is fair, just and consistent with the maintenance of proper industrial standards for an ordinary hours of work clause to be made that requires ordinary hours to be worked Monday to Friday and work on weekends to be overtime paid at time and a half for the first 2 hours and double time thereafter, on Saturdays, with time worked on Sundays to be paid at double time.

Cleanaway Submissions

[116] Cleanaway submitted that the demand for weekend work is client driven. Cleanaway's clients produce waste and require Cleanaway to take that waste away. Many of those businesses operate seven days a week, and many of them require a seven day a week service.

[117] There is increasing demand from Cleanaway's clients for weekend services to be provided and an expected future increase in such demand. The demand is driven by a shift by clients towards increasing environmental sustainability, for example, separating out organic waste from general waste. Organic waste, by its nature, cannot be left lying around over the weekend waiting for Monday until it is collected. This is why seven-day services are increasing and expected to increase further.

[118] Cleanaway submitted that not all employees have the same personal and family circumstances. Some will have family and circumstances that make working on the weekend difficult and/or problematic, and some will not. Other persons, whether they are currently employed by Cleanaway at Erskine Park or whether they are potential future employees, may have personal or family circumstances that make it more preferable, or practicable, to work on a Saturday and/or Sunday than some other day of the week. Offering employees a choice as to whether they work ordinary hours on weekends will open up opportunities for employment for those who may need or prefer such flexibility as to their days of work because of their personal and family circumstances.

[119] Cleanaway submitted that as women employees are much more likely to usually work set days other than Monday to Friday only, an industrial instrument which restricts ordinary hours so that they can only be worked Monday to Friday is likely to present a barrier to entry for a significantly greater proportion of women than men. It says Cleanaway's efforts to improve female-participation in the waste-management industry, particularly at Erskine Park, will be undermined by an arbitrated outcome which denies employees the flexibility of working ordinary hours on Monday to Sunday. It says such an outcome would be inconsistent with the statutory objectives in s.3(a) (promoting gender equality) and s.3(d) (assisting employees to balance their work and family responsibilities by providing for flexible working arrangements).

[120] The interest that some current employees have in being paid overtime rates for working on their weekend is to be balanced against a number of other considerations. Those considerations include the interest that other current and future employees have in being able to work ordinary hours on a weekend.

[121] Cleanaway says the TWU's argument prioritises the working of overtime over the working of ordinary hours and that there are many reasons why the working of overtime can be problematic, including greater risk of fatigue and possible health and safety issues.

[122] Cleanaway submits that the starting point position is that the existing ordinary hours of work clause should be replicated in the workplace determination. However, in an effort to provide the Full Bench with a sustainable middle ground solution, which has regard to the TWU's case relying on some employees' personal and family circumstances, Cleanaway proposes a modification to the status quo to allow employees, having regard to their personal and family circumstances, to elect in writing for their ordinary hours of work to be Monday to Friday. Employees who do not make such an election, or who having made an election withdraw it in writing, will have ordinary hours capable of being worked Monday to Sunday.

The choice will be with employees, having regard to their own personal and family circumstances.

Weekend Penalty Rates

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

Evidence

[124] The TWU seeks the weekend penalty rates provided for in the *Waste Management Award 2020* (the Award) whereas Cleanaway seeks to maintain the weekend penalty rates provided for in the 2020 Erskine Park EA. Ms Wisniewska says that Erskine Park employees in practice are paid weekend penalty rates in accordance with the Award, as the custom and practice at the site is that all ordinary hours are worked on Monday to Friday and all weekend work constitutes overtime work.¹³⁰ Mr Richards says he could not afford to remain working at Cleanaway if Saturday work at penalty rates is not offered to him. He would see Cleanaway achieving the ordinary hours of work and weekend penalty rates clause as a ‘red flag’ that it is his time to move onto a new employer.¹³¹

TWU submissions

[125] The Award would, but for the 2020 Erskine Park EA, apply to Cleanaway and its employees. Clause 13.2 of the Award provides that ordinary hours are to be worked Monday to Friday and otherwise not exceed 8 hours a day. Employees who perform work on weekends receive overtime under clause 19 of the Award, being time and a half for the first two hours and double time thereafter.

[126] The TWU submits that this prescription of ordinary hours and the requirement for work performed on weekends to be remunerated at overtime rates is consistent with the modern award objective specified in s. 134(da) of the FW Act that a modern award provide a fair and relevant minimum safety net of terms and conditions taking into account employees working, relevantly, on weekends.

Cleanaway Submissions

[127] Cleanaway submits that the 2020 Erskine Park EA’s provisions dealing with weekend penalty rates should be replicated in the determination. Considerations which apply to overtime rates such as compensating employees for working in excess of an average of 38 hours a week or in excess of their maximum daily hours, do not apply to what weekend penalty rates should be paid for ordinary hours on a weekend.

[128] Cleanaway submits that the higher base rate of pay under the 2020 Erskine Park EA compared to the Award more than makes up for any difference in the percentage rates applicable to hours worked beyond two hours on a Saturday. If the rate of pay on Saturdays becomes the equivalent of the overtime rate of pay, this would make the cost of employing direct employees to work ordinary hours on a Saturday more expensive than requiring employees to work overtime, because overtime does not attract an obligation to pay superannuation.

[129] Cleanaway submits that preserving the status quo provision will provide an incentive for bargaining in the future, consistent with s275(h) of the FW Act. It also submits that increasing the penalty rates for ordinary hours of work on a Saturday will act as brake on opportunities for permanent employment at Cleanaway, and instead may lead to greater use of temporary workforce solutions such as owner drivers and subcontractors.

Term of Agreement

Expiry Date

[130] The TWU seeks an expiry date of 30 June 2026. Cleanaway proposes an expiry date 36 months after the date that the workplace determination comes into operation.

TWU Submissions

[131] The TWU seeks an expiry date of 30 June 2026, submitting this will enable the parties to rebuild their relationship and for Cleanaway to replenish the trust and confidence of employees and will also encourage and facilitate bargaining for a new agreement.

[132] The 2020 Erskine Park EA reached its nominal expiry date on 23 September 2022. A nominal expiry date of 30 June 2026 will mean the workplace determination will expire almost 4 years after the 2020 Erskine Park EA.

Cleanaway Submissions

[133] Cleanaway submits that in setting an appropriate nominal expiry date, the Commission should seek to balance the need for sufficient time to rebuild the fractured relationship between the bargaining parties, and ensure stability of terms and conditions. Further, the bargaining representatives should be provided with an opportunity and incentive to bargain again at a later time noting that a new enterprise agreement can be made at any time after the workplace determination is made.

[134] It submits a three year nominal term will also enable future anticipated changes to client demand and the application of the ordinary hours clause to those changes to be bedded down before the nominal expiry date is reached.

[135] Finally, the evidence is that the usual period of tenders for clients of Cleanaway's Erskine Park site is two to five years and its major contract with Woolworths is expected to expire in July 2025. If Cleanaway is successful in tendering to renew it, the next contract is expected to end in December 2027. Cleanaway submits a three year nominal expiry date is necessary to provide Cleanaway with sufficient certainty as to the availability of labour on the weekend, and its labour costs, so as to make decisions in relation to resourcing, and pricing, for future tenders. Such certainty is important to the tendering for future work, which ensures Cleanaway's ability to provide ongoing opportunities for employment to current and future employees at the Erskine Park site.

Pay increase

[136] The TWU seeks pay increases of:

- i. 6% backpay from 23 September 2022 to commencement of determination;
- ii. 6% backpay from 23 September 2023 to commencement of determination;
- iii. 6% from first pay period after 23 September 2024;
- iv. 6% from first pay period after 23 September 2025.

[137] Cleanaway proposes pay increases of:

- i. 5% on commencement.
- ii. 3% on first anniversary of commencement;
- iii. 3% on second anniversary of commencement

(or 2.5% per year if the TWU's ordinary hours claim is accepted).

Evidence

[138] The TWU is seeking increases of 6% per year for each of the four years from 23 September 2022 to 23 September 2025 for reasons which include:

- compensation for the increases not passed on from the last round of bargaining for the 2020 Erskine Park EA and the sacrifices the employees made for Cleanaway during the COVID-19 pandemic.
- record inflation and cost of living pressures in 2022 and 2023.
- achieving a competitive increase that is comparable to other waste industry yards, whilst also recognising cost of living pressures.

[139] In relation to the first reason, in 2020, employees initially voted in favour of an agreement that included a 3% increase as at 23 September 2020 and a 3% increase as at 23 September 2021. Cleanaway managers told the Erskine Park depot that as a result of COVID-19 there was uncertainty in the waste industry and Cleanaway was struggling to retain clients. For this reason, Cleanaway advised that they would not ask the Commission to approve the EA and employees would be asked to vote in relation to another version of the EA, with smaller pay increases.¹³² The 2020 Erskine Park EA which was approved by the Commission ultimately included more modest pay increases of 2.5% from 23 September 2020 and 2.5% from 23 September 2023, applied to base wage rates current as at 23 September 2018. The 2020 Erskine Park EA did not apply an increase in 2019, however, a lump sum amount of 2% was backdated to 23 September 2019.

[140] In relation to the second reason, Mr Russell says he is struggling to afford fuel, groceries, power bills and school fees as well as his monthly mortgage repayments which have increased by between \$700 and \$800 in the last year.¹³³

[141] Mr Stassen says that many employees have expressed to him dissatisfaction with the rate of pay at Erskine Park, which was competitive in 2020, but no longer is because there has

been no pay rise since 23 September 2021 and record inflation since that time.¹³⁴ Mr Stassen says he knows of approximately six former colleagues who resigned and commenced work at other waste companies over the last 18 months as the hourly rate at the Erskine Park depot is no longer competitive in comparison to other Cleanaway sites such as Glendenning or other waste companies like Veolia and Remondis.¹³⁵ Mr Stassen's rent has increased by at least \$100 per week and he says the increase in the price of basic necessities like groceries and fuel mean that he is unable to save a lot for the future financial stability of his family because they are just keeping their heads above water.¹³⁶

[142] Mr Richards said that his standard of living has gone backwards since the last pay increase. His mortgage has increased by a few hundred dollars per month, the price of groceries has increased significantly, and his electricity bill is now around \$2000 a quarter. Mr Richards' current financial situation means he cannot save any of his earnings. He says he is currently only paying interest on his mortgage because his current earnings and the interest rate increases have made it nearly impossible to make any principal loan repayments in addition to interest.¹³⁷

TWU Submissions

[143] Employees last received a wage increase on 23 September 2021. Since that time, the consumer price index (CPI) has increased by 13.7%.¹³⁸ The period since 23 September 2021 has been one of high inflation and as such there has been a substantial reduction in the real value of employees' income since 23 September 2021. In this period, the Reserve Bank of Australia has increased the cash rate from 0.1% to 4.35% which has negatively impacted employees with mortgages.

[144] The Australian Bureau of Statistics publishes a Living Cost Index (LCI). The LCI, unlike the CPI, takes into account mortgage interest rates and may better reflect costs incurred by employees. Five LCI indexes are published, including one for employees. Since September 2021 LCI has increased by 16.3%.¹³⁹

[145] The TWU submits that employees to whom the workplace determination will apply are, and have for some time, been experiencing financial pressure and household stress as a result of increases in the cost of living and interest rates. It submits that increases of 6% for both September 2022 and September 2023 are imperative just to ensure the maintenance of the real value of employee wages.

[146] The Reserve Bank anticipates that inflation will decline to be within 2-3% in 2025, however, notes that the economic outlook remains uncertain. It forecasts CPI inflation in the June 2024 quarter to be 3.3% and December to be 3.2%.¹⁴⁰ CPI inflation in the June 2025 is forecast to be 3.1%¹⁴¹ and in December 2025 2.8%. By June 2026, it is anticipated to be 2.6%.

[147] A further factor supporting the increases sought by the TWU is that when the 2020 Erskine Park EA was voted on, employees agreed, at the eleventh hour and in circumstances where Cleanaway asserted that its business was and would continue to be adversely affected by the COVID-19 pandemic, that it was necessary to reduce the formerly agreed annual wage increases from 3% to 2.5%. Employees had a reasonable expectation that when the difficulties presented by the COVID-19 pandemic passed and there was bargaining for a new agreement,

that Cleanaway would make good the reduced pay offer they had belatedly agreed to before the 2020 Erskine Park EA was voted up.

[148] The TWU submits that in all the circumstances, it is fair and just for 6% annual pay increases as sought by the TWU to be made and backdated to September 2022 and 2023 to ensure the real value of wages is maintained.

[149] Cleanaway is a substantial and profitable business and there can be no contention that such increases would present any financial difficulties to it.

Cleanaway Submissions

[150] The wages under the 2020 Erskine Park EA are higher than those for comparable sites. The most common classification at Erskine Park is a level 5 employee. Material produced by Cleanaway shows that the base rate for a level 5 employee under the 2020 Erskine Park EA, even without any increases under the workplace determination, is significantly higher than comparable award rates, and higher than comparable enterprise agreement rates. The Cleanaway Erskine Park rate of pay is still 23% higher than the current Award rate of pay (taking into account the all purpose industry allowance). Some operators and sites have higher rates, and some have lower rates of pay, as part of differing packages of terms and conditions including in some cases a broader spread of ordinary hours meaning lower overtime pay. A number of Cleanaway's competitors do not have enterprise agreements publicly available on the Commission's website.

[151] In considering the merits of the case, the interests of Cleanaway and the employees who will be covered by the determination, the Commission should take into account the impact that wage increases will have on Cleanaway's ability to continue to win tenders at the Erskine Park site. Whatever wage increase is awarded will necessarily increase labour costs and therefore flow through to the price at which Cleanaway tenders for work from existing and new clients. Higher tender prices make it less likely that Cleanaway will win new work and retain existing work, and therefore have an adverse impact on opportunities for permanent direct employment with Cleanaway and the public interest.

[152] Unintended consequences, such as pay rises at such a level as to lead to a reduction in employment of employees covered by the workplace determination, are to be avoided. Incentives should not be created for Cleanaway to contract out work, by imposing too high a pay increase in relation to direct employees.

[153] Any backdating of pay increases will have a cost impact on Cleanaway, without any corresponding improvements in productivity having any backdated effect. Cleanaway will not be able to recover those costs in relation to work that has past, because the price has already been set and it has been paid by Cleanaway's customers. Cleanaway submits any cost recovery would have to be achieved by increasing Cleanaway's tender price for future work for Erskine Park, which will tend towards making Cleanaway's Erskine Park site less competitive, and less able to win new work (and/or keep existing clients) so as to provide ongoing employment opportunities for current and future employees. Inevitably, this may have an adverse impact on employment levels and on the level of services provided to Cleanaway's customers. The cost

and impact of backdating will be even greater the higher the initial wage increase awarded by the Full Bench.

[154] While maintaining some of the flexibility of the status quo ordinary hours of work position, Cleanaway's proposed compromise solution will limit flexibility in relation to when ordinary hours may be worked. It therefore will limit the opportunities for improvements in productivity which are inherent in the 2020 Erskine Park EA. The loss of productivity is an inevitable consequence of modifying the status quo provision to accommodate the TWU's concerns. Cleanaway submits for those reasons, the wage increases which are awarded as part of the workplace determination should be less than might otherwise have been the case.

[155] Cleanaway submits there is a cogent argument that the initial pay increase under the workplace determination should be at or near the rate of zero percent. It submits this would minimise the damage to the interests of Cleanaway and its current and future employees (because making Erskine Park rates much higher than other sites and competitors' rates inevitably reduces opportunities to win work and offer permanent direct employment), and also provide significant incentives to continue enterprise bargaining at a later time.

[156] Cleanaway submits if a wage increase is to be awarded, the appropriate measure to take into account is the Wage Price Index (WPI) rather than CPI. Increases in the prices of consumer goods (that is, CPI movements) are caused by many factors other than wage inflation. Examples are the war in the Ukraine and government policy to promote renewable energy. If wages increase in response to these shocks, the result would be a wage/price spiral (CPI increases would lead to wage increases, and wage increases would lead to CPI increases). Cleanaway submits this is an outcome to be avoided by the Full Bench. Since the last pay increase under the 2020 Erskine Park EA, the WPI increased by 8.4% to 31 December 2023, by 31 March 2024 the WPI increased by 9.3%¹⁴² and, by 30 June 2024, the WPI can be expected to have increased by 10.6%.

[157] If pay rates are increased in line with the rate of inflation since the last pay increase under the 2020 Erskine Park EA, the initial increase as at 31 March 2024 would be set at 9.3%, and if it were a an effective date of 30 June 2024, the initial increase would be at 10.6%.

[158] Cleanaway submits that the initial pay increase should be significantly below these figures as even without any pay increase, the rates of pay contained in the 2020 Erskine Park EA are significantly above Award rates, and above comparable rates in competitors' enterprise agreements and at other Cleanaway sites. Cleanaway submits that awarding a pay increase at Erskine Park for the entirety of WPI risks making Erskine Park uncompetitive and also makes direct permanent employment more expensive than using owner-drivers or contractors. For that reason, Cleanaway submits some discounting from the full rate of WPI increase is warranted to encourage (and not actively discourage) permanent direct employment of employees at the Erskine Park site.

[159] The compromise solution proposed by Cleanaway in relation to ordinary hours of work will, inevitably, reduce Cleanaway's flexibility to roster ordinary hours of work to be performed on the weekend. Cleanaway submits some further discounting from the rate of growth of WPI is warranted by this loss in productivity caused by this reduction in flexibility.

[160] Taking all of the above into account, and on the basis that it can be expected that the operative date of the first pay increase is likely to be on the Commencement Date of the workplace determination which could be in or about May 2024, Cleanaway submits that an initial pay increase of 5%, with effect from the Commencement Date, is appropriate. WPI will increase 3.6% from July 2024 to June 2025; and a further 3.2% from July 2025 to June 2026. In the circumstances, Cleanaway submits that on each anniversary of the Commencement Date an increase of 3% is appropriate.

[161] Cleanaway submits if the TWU ordinary hours claim to restrict ordinary hours to Monday to Friday is accepted, the initial pay increase should be 2.5%, and future pay increases should be 2.5% per year.

Consideration

[162] We have considered the submissions made by the parties and all the evidence in our determination of this matter and the conclusions we have reached. This is the first intractable bargaining workplace determination made under the FW Act. However, numerous cases which dealt with similar provisions provide guidance as to the correct interpretation and application of the s. 275 criteria. In *Transport Workers' Union of Australia v Qantas Airways Limited; Q Catering Limited*¹⁴³ (*TWU v Qantas*) the Full Bench referred to *CFMEU v Curragh Queensland Mining Ltd (the Curragh Case)*¹⁴⁴ as a leading case dealing with the approach to similar legislation dealing with many of the same factors the Full Bench was required to take into account.¹⁴⁵ The Full Bench in that case noted that when amending legislation adopts wording or tests from predecessor legislation it is inferred that the legislature intended that authorities dealing with the predecessor legislation will continue to apply.¹⁴⁶ The Full Bench in *TWU v Qantas* noted the Full Bench in *the Curragh Case* endorsed the approach that the task of the tribunal is to assess the respective positions of the parties in relation to the matters at issue and, by reference to the statutory factors, arrive at a conclusion that would be regarded as appropriate in the context of the bargaining had the bargaining concluded successfully. This involves an objective assessment of the statutory factors and an overall judgment as to an appropriate workplace determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement.¹⁴⁷

[163] In *Parks Victoria v The Australian Workers' Union and others (Parks Victoria)*¹⁴⁸ the Full Bench observed that the use of the word 'include' in s.275 suggests that the Commission is not confined to those considerations alone, and can have regard to any other relevant considerations in the circumstances of the particular case.¹⁴⁹

[164] In relation to the matters in s.275, we make the following general observations having regards to the issues we are required to determine:

(a) the merits of the case;

[165] This involves setting out the respective cases advanced by the parties and our analysis and conclusions concerning the merits of their cases.¹⁵⁰ We have undertaken this exercise below in relation to our consideration of the five matters at issue.

(c) the interests of the employers and employees who will be covered by the determination;

- [166] The evidence establishes that the interests of employees at the Erskine Park site are to:
- obtain pay increases which enable them to meet their costs of living;
 - have regular and predictable hours of work;
 - be able to supplement their income through working overtime on the weekend; and
 - be able to pick and choose when they work on the weekends to balance work and personal priorities.

- [167] The interests of Cleanaway are:
- the ability to meet the needs of its customers, especially major customers that provide a significant source of revenue;
 - the ability to adapt to changing government policy that will increase demand for weekend collections, grow its business and increase its profit;
 - to have a more reliable workforce through increasing the number of directly engaged employees;
 - work, health and safety considerations; and
 - a flexible and productive workforce.

We have taken these interests into account in relation to our consideration of the five matters at issue.

(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;

[168] This is a new subclause which has not previously been considered by the Commission. This matter is not relevant to our consideration of the term of the determination or the quantum of pay rises but may be relevant in relation to the parties' respective claims about hours of work and weekend penalty rates. Cleanaway wishes to maintain the capacity to roster ordinary hours of work on weekend and current weekend penalty rates whereas employees wish to change these clauses to reflect the current practice whereby ordinary hours are worked Monday – Friday and overtime is worked (on a voluntary basis) on the weekend.

[169] As far as the employees are concerned, the arrangements in the 2020 Erskine Park EA in relation to ordinary hours of work and weekend penalty rates are not significant, because they have not been applied by Cleanaway for at least 15 years. However, these arrangements are significant to Cleanaway as they provide Cleanaway with the ability to roster ordinary hours on weekends, which it says will increase the reliability of services, and the ability for employees to be directly engaged to work ordinary hours on weekends.

[170] We have taken these matters into account in our consideration of the ordinary hours of work and weekend penalty rates claims. We accept Cleanaway's submission that current practices in relation to ordinary hours of work and weekend penalty rates are not directly relevant to our consideration of s. 275(ca). However, as noted in *Parks Victoria* the Commission is not confined to the s. 275 considerations alone, and can have regard to any other relevant considerations in the circumstances of the particular case.¹⁵¹ In our view, in the circumstances of this matter, the current practices in relation to ordinary hours of work and weekend penalty

rates are relevant, particularly as the application of the 2020 Erskine Park EA to these practices means that employees receive a higher income associated with working ordinary hours Monday to Friday and receiving overtime pay in respect of weekend work than they would if they were required to work ordinary hours on weekends and/or less overtime. The evidence suggests such practices and the financial benefits attaching to this arrangement under the 2020 Erskine Park EA are of great significance to the employees who work pursuant to these practices and we have also had regard to this in our determination of the matter.

(d) the public interest;

[171] The Full Bench in *Parks Victoria* said that consideration of the public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the FW Act¹⁵² and that it refers to matters that may affect the public as a whole such as the achievement or otherwise of the objects of the FW Act, employment levels, inflation and the maintenance of appropriate industrial standards.¹⁵³ The public interest is distinct from the interests of the parties, though the considerations may overlap. Therefore matters which may be in the public interest may also be in the interests of one or more of the parties.¹⁵⁴

[172] Matters relied upon by the parties which are relevant to the circumstances of this matter and our consideration of the public interest include job security, increasing opportunities for permanent employment, and environmental sustainability measures such as those which reduce landfill by having organic waste separately collected and disposed of.

(e) how productivity might be improved in the enterprise or enterprises concerned;

[173] In *Schweppes Australia Pty Ltd (Schweppes)*,¹⁵⁵ the Full Bench said the following in relation to productivity [footnotes omitted]:

[42] We accept that the conventional economic meaning of the word productivity is the number of units of output per units of inputs. Productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Schweppes incorrectly equates productivity with the average cost of labour per unit, which, properly understood, is a measure of nominal unit labour costs.

[43] In our view productivity, as used in the Act, refers to the conventional economic meaning of the quantity of output relative to the quantity of inputs. It is quite different in concept to the price of output and price of inputs, including the price of labour.

[44] The legislative context is also important. Context may require a word to be read more narrowly than if was considered in isolation. In this regard we note that the ‘modern awards objective’ (s.134) requires consideration of the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden. The distinction between productivity and employment costs recognises that whilst employment costs will be affected by productivity in relation to the quantity of labour input required, the price of labour constitutes a separate and distinct consideration. A similar distinction is made between productivity and business competitiveness and viability in the ‘minimum wages objective’. It may be

presumed that Parliament intended the word productivity to have the same meaning throughout the Act.

[45] Accordingly, we find that ‘productivity’ as used in s.275 of the Act, and more generally within the Act, is directed to the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.¹⁵⁶

[174] We agree with the approach of the Full Bench in *Schweppes* in relation to the definition of productivity. In the case of Cleanaway’s business at Erskine Park, the inputs are likely to be number of working and driving hours and the number of vehicles used and the outputs the number of bins collected. Cleanaway submits that its proposal to roster ordinary hours on weekends aims to decrease Cleanaway’s reliance on owner drivers and other contractors on the weeks, therefore increasing the reliability of services. This has the potential to improve productivity through increasing the number of bins collected.

(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;

[175] We propose to deal with ss. 275(f) and (g) together. In relation to these considerations, the TWU submits there were a number of instances of unreasonable conduct by Cleanaway (which Cleanaway disputes) during bargaining and, in particular submits:

1. Almost a month after employees voted down Cleanaway’s proposed agreement on 20 November 2023, Cleanaway unilaterally and without prior notice to the TWU purported to withdraw from all previously agreed claims. The TWU submits this was also capricious conduct that undermined collective bargaining contrary to s. 228(1)(e).
2. Cleanaway disingenuously asserted that the TWU has not provided reasons for why proposals had not been agreed by a majority of employees and the TWU after the intractable bargaining declaration.
3. Cleanaway agreed at the post declaration negotiating period conference that the outstanding issues were those articulated by the TWU and everything else was settled. The TWU claims Cleanaway then falsely asserted that it had not agreed that all claims bar those identified by the TWU had been noted to be agreed.
4. Cleanaway’s conduct was unreasonable in the above respects because it resulted in an unnecessary post declaration bargaining period that delayed arbitration of the outstanding claims.
5. Cleanaway also engaged in unreasonable conduct in May 2023 by distributing a different version of an agreement without notice and without bargaining with the TWU.

[176] We note that the matter at 5. was referred to by Deputy President Wright in the intractable bargaining declaration decision as follows:

On 1 May 2023 Cleanaway commenced the access period for a proposed agreement to replace the Erskine Park EA. On 12 May 2023 the TWU filed a bargaining dispute pursuant to s.240 of the FW Act in matter B2023/443 in relation to a ballot for the

proposed enterprise agreement which ultimately did not proceed. On 30 May 2023, the TWU discontinued matter B2023/443 as a result of parties reaching a consent position.¹⁵⁷

[177] In circumstances where any concerns that the TWU may have had about this matter appear to have been resolved by consent, there does not appear to be any basis for us to find that Cleanaway behaved unreasonably with respect to this issue.

[178] In relation to matters 1-4, the TWU's concern is that Cleanaway's alleged conduct delayed arbitration of the outstanding claims. In relation to the matter at 2, we accept Ms White's evidence that Cleanaway continued to ask the TWU to explain its reasons for rejecting Cleanaway's ordinary hours claim because it wanted to develop alternatives that would take into account both parties' positions. We note that the matter at 1. was referred to by Deputy President Wright in the intractable bargaining declaration decision as follows:

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

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

[179] We agree with these observations. In relation to the matter at 3, there appears to have been a miscommunication between Ms White and Ms Kennedy which resulted in Ms Kennedy advising that only five matters were outstanding at the first conference before Deputy President Slevin on 16 January 2024, and then Cleanaway contradicting this advice in its letter to the TWU on 18 January 2024. However, this was ultimately resolved by the third conference nine days later.

[180] While Cleanaway's initial approach in withdrawing the agreed claims on 19 December 2023 may have heightened tensions, it took steps to address this and we do not accept that Cleanaway's conduct, when considered in totality and against a background of protracted bargaining was unreasonable or inconsistent with the good faith bargaining requirements. We have considered all of these matters and note that the time between Cleanaway withdrawing from agreed matters and the parties reaching agreement is approximately one month and that

employees do not appear to have been disadvantaged by this short delay. We therefore regard these matters as neutral considerations in our determination of the matters at issue.

[181] We note that commencement of bargaining was delayed by over 4 months and did not commence until the TWU filed a dispute with the Commission against Cleanaway regarding non-compliance with Clause 3 of the 2020 Erskine Park EA which requires the parties to commence negotiations for a new enterprise agreement no later than 3 months prior to the nominal expiry date. This meant bargaining should have commenced by 23 June 2022 yet the first bargaining meeting did not occur until 20 October 2022. In our view, Cleanaway did not proffer a reasonable explanation for its conduct in delaying commencement of bargaining and we have taken this into account in determining the date that the first pay increase should commence from.

(h) incentives to continue to bargain at a later time.

[182] Cleanaway submitted that the approach the Full Bench might take in relation to particular matters might be not to include a term dealing with a matter, or to replicate the relevant term of the current agreement or to leave the matter to be negotiated between the employer and its employees in a future round of bargaining and that such an approach would be consistent with *Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology (Dorevitch)*¹⁵⁸ and the recent inclusion of s.275(ca). Cleanaway also submitted that as an incentive to bargain in the future, the last pay increase should be scheduled for 12 months prior to the nominal expiry date of the workplace determination.

[183] As noted in *Dorevitch* in order for there to be an incentive to bargain in the future, there must remain subject matters to bargain about.¹⁵⁹ The most significant issue between the parties in this matter is hours of work and whether Cleanaway should have the ability to roster ordinary hours of work on weekends. Given the conflict of positions concerning this issue was a significant impediment to agreement being reached, it will be necessary for the issue to be resolved in the determination that we make. However, a balanced determination that does not reflect the position of either party in full may, in our view, still provide scope for both parties continue to pursue their interests in future bargaining. Additionally, a determination that supports productivity gains would provide capacity for employees to bargain for a share of these gains in future bargaining.

[184] We now turn to consider each of the matters at issue taking into account the matters in s. 275 and other relevant factors.

Hours of work

[185] There is no dispute between the parties that Cleanaway performs waste collection services on weekends and that employees are regularly requested to work on weekends. The TWU contends that the current system where weekend work is carried out by a combination of owner-drivers, subcontractors and Cleanaway employees performing overtime is working well

and that Cleanaway's evidence does not establish otherwise. The TWU also claims that Cleanaway's evidence does not establish that weekend work is likely to increase.

[186] Cleanaway contends that the weekend work is driven by the needs of its customers which we accept. We also accept Cleanaway's evidence that work is performed pursuant to contracts with multiple businesses of usually 2-5 years duration. The effect of this is that work for a specific customer is not guaranteed over an extended period of time and could be lost if that customer chooses to engage a competitor. Cleanaway's contention that weekend work is likely to increase therefore necessarily involves a degree of speculation as new customers may require more or less weekend services compared to current customers. This could result in weekend work remaining the same or increasing or decreasing. Given that Cleanaway's business relies on the renewal of existing contracts or entering into new contracts, it appears to us that Cleanaway cannot simply sit on its hands and ignore the possibility that an increase in weekend work might arise from future contracts and changing client demands.

[187] Further, an initiative by the NSW Government which will lead to the increase of organic waste collection is the *NSW Government Waste and Sustainable Materials Strategy 2041* which provides that by 2025, organic waste collection will be mandated for organisations that generate a significant volume of food waste, such as supermarkets and large hospitality businesses. Cleanaway contends that this will increase existing demand for organic waste collection services by Cleanaway as these types of businesses already represent a significant proportion of Cleanaway's major NSW clients. In cross examination, TWU witnesses agreed that collection of organics has increased and was likely to increase further. We accept Cleanaway's evidence that because of the nature of organic waste, in that it creates odour and attracts vermin and maggots, it needs to be collected daily including on weekends. We therefore accept that the implementation of the *NSW Government Waste and Sustainable Materials Strategy 2041* will lead to an increase in weekend work at the Erskine Park depot.

[188] Cleanaway submits that it prefers to meet any increase in weekend work by engaging permanent employees which will reduce overall labour costs and ensure greater levels of safety and reliability. This is because contractors may not be subject to Cleanaway's desired level of control in relation to safety and fatigue management. Cleanaway also raised the concern that contractors may elect to perform work for competitors.

[189] The previous and current enterprise agreements which apply to Erskine Park establish that Cleanaway has had the ability to roster ordinary hours on the weekends since at least 2010. The uncontested evidence of the TWU's witnesses is that Cleanaway has not sought to roster ordinary hours on weekends for at least 15 years except for a small number of employees who have requested this due to personal circumstances. Despite asserting that weekend work has been increasing, Cleanaway's only explanation for not rostering ordinary hours weekend work is from Mr Vella who says that since 2021 when he was appointed to his current role, he has not sought to make any major shift changes because this could result in existing skilled employees leaving Cleanaway.

[190] The current arrangements in relation to weekend work have enabled Cleanaway to win contracts and be a profitable business, although there was evidence of Cleanaway losing client contracts in Fairfield Heights in Greater Western Sydney, due to recurring missed Saturday collections. To carry out this weekend work, Cleanaway relies upon 24 employees on Saturday

and approximately 10 employees on Sunday to fulfill existing client requirements which is approximately half the workforce at Erskine Park. It appears that most employees are also likely to be performing overtime during the week, given Mr Vella's evidence that the optimal shift has a running time of approximately 9.6 hours each day and the evidence of the TWU witnesses who usually work between 10 and 12 hours per day. This is in circumstances where the maximum daily ordinary hours under the current enterprise agreement is 8. It is therefore not surprising that Cleanaway employees have come to rely upon overtime as part of their regular income. Mr Russell's evidence is that if he only worked Monday Friday without the opportunity to work on weekends, he could not sustain his family financially particularly as employees at the Erskine Park depot have not had a pay increase since 23 September 2021. Mr Richards has worked work Saturdays every fortnight for the past ten years to make extra money to support his family and to keep up with the cost of living and said if he was only offered 38 hours of work per week, it would not be a financially sustainable job. Cleanaway has derived certain benefits from operating its business in a way that employees have come to depend on overtime in that it has been able to staff weekend collection services and retain those staff who are attracted to earning extra income.

[191] In addition to helping employees financially, the current way in which weekend work is performed serves the interests of current employees because it is carried out on a voluntary basis. For employees such as Mr Stassen who cares for his children on the weekend, there is no requirement to work on weekends and he does not do so. However, Mr Russell nominates to work most Saturdays and Mr Richards nominates to work every second Saturday. We accept that this voluntary arrangement accommodates the needs of individual employees including caring responsibilities while enabling them to meet their financial obligations.

[192] In support of its claim for employees to be able to work ordinary hours on weekends, Cleanaway expressed concerns about the quantum of overtime performed by employees and the potential impact on health and safety, including fatigue. However, there was no evidence provided by Cleanaway to establish that the current levels of overtime are in fact unsafe.

[193] Cleanaway contends that the determination covers current and future employees and therefore must take into account the interests of both current and future employees which may be different. It claims that some persons will have family circumstances that make working on the weekend difficult and/or problematic, and some will not. In particular, it points to the interests of women workers, who according to ABS statistics, work only Monday to Friday less often than men do. Therefore, according to Cleanaway, an industrial instrument which restricts ordinary hours so that they can only be worked Monday to Friday is likely to present a barrier to entry for a significantly greater proportion of women than men. We accept Cleanaway's submission that as s. 275(c) requires us to take into account the interests of employees who will be covered by the determination, this includes the interests of both current and future employees. However, our consideration of these matters must be informed by evidence, not by broad hypothetical examples of who the future employees might be.

[194] The evidence provided by Cleanaway in relation to the interests of future employees is limited to ABS statistics and its Drivers Academy. The Cleanaway Drivers Academy aims to attract and train women who want to become part of the waste management industry and who have never driven a truck before. However, Cleanaway has not provided any evidence about the women who have participated in the Drivers Academy, whether they are now working for

Cleanaway, the patterns of hours they are working and whether they have a preference for working on weekends. Further Cleanaway has not provided any evidence about whether more women are employed at sites where ordinary hours of work are performed on weekends and whether those women have a preference for working on weekends.

[195] The ABS statistics presented by Cleanaway apply to workers in all industries and not specifically to waste services. The statistics show that overall, both men (59.6%) and women (47.9%) work more frequently Monday to Friday only compared to ‘other set days’. While these statistics show that a greater proportion of women compared to men work ‘other set days’, they do not assist Cleanaway to establish that a restriction on ordinary hours being worked Monday to Friday is likely to detrimentally affect more women than men in circumstances where Cleanaway has not provided evidence in relation to its current women workforce as referred to above.

[196] Cleanaway has indicated that it is hoping to recruit new drivers from the existing cohort of owner drivers at the Cleanaway site, however, Cleanaway has not provided any evidence about the interests of current owner drivers and whether they diverge from the interests of current employees. Cleanaway has also not provided any evidence of how many new drivers it is proposing to recruit in the future (in addition to current owner drivers). Cleanaway has not provided any evidence of the interests of future employees.

[197] Based upon the material before us, we have reached the following conclusions:

- The interests of Cleanaway in growing its business and meeting the needs of its customers in respect of weekend services have been served by engaging many employees to perform weekend work on a voluntary overtime basis for at least 15 years.
- Weekend work is likely to increase by 2025 because by then, the NSW Government will mandate organic waste collection for organisations that generate a significant volume of food waste, such as supermarkets and large hospitality businesses who are major customers of Cleanaway.
- Weekend work may also increase because of the changing requirements of new or existing customers and it is reasonable for Cleanaway to plan for this possibility.
- It is reasonable for Cleanaway to meet any requirements for weekend work through directly engaged permanent employees.
- Requiring employees to work ordinary hours on weekends is likely to adversely affect current employees in the following ways:
 - For employees like Mr Stassen, who only sees his children on the weekends, he will have less time with his children and to attend to his caring responsibilities.
 - For employees like Mr Richards and Mr Russell who regularly perform overtime on Saturdays, their income will likely reduce as:
 - ordinary hours weekend penalty rates will apply to working on Saturdays rather than overtime rates;
 - their regular working hours will likely reduce if Saturday is to become a fifth ‘ordinary hours’ day rather than a sixth ‘overtime’ day as it is currently.

[198] In the circumstances, and taking all of the matters into s. 275 into account, we have decided to incorporate Cleanaway's proposed hours of work compromise clause with some modifications.

[199] Cleanaway's proposed clause provides:

21.1 The ordinary hours of work for full-time employees shall be an average of 38 hours per week to be worked within a work cycle not exceeding 28 consecutive days.

21.2 The maximum daily ordinary hours will be 8 hours.

21.3 Subject to the exemptions hereinafter contained the ordinary hours of work shall be worked on any day Monday to Sunday between the hours of 3.00 a.m. and 4.00 p.m.

21.4 (**Monday-Friday Ordinary Hours by election**) A permanent employee, having regard to their personal or family circumstances, may elect in writing for their ordinary hours to be worked on any day Monday to Friday between the hours of 3.00 a.m. and 4.00 p.m. The election may be withdrawn in writing. The election or withdrawal as the case may be is effective from the first full pay period commencing 28 days after the election or withdrawal is given in writing. An election and/or the withdrawal of an election under this sub-clause may be made unilaterally by an employee at least once in each full year of operation of this Determination (to avoid doubt, additional elections or withdrawals may be made by agreement with the Company).

21.5 An election or a withdrawal of an election pursuant to sub-clause 21.4 shall be freely made by the permanent employee and as such, neither the Company, the Union nor any Employee or Employees shall seek to influence, encourage, or pressure any permanent employee(s) to make any particular election or any particular withdrawal of an election pursuant to sub-clause 21.4.

21.6 (**Monday-Sunday Ordinary Hours for converting regular indirect weekend workers**) A permanent employee employed after the date this Workplace Determination commences operation where the employee has worked as a contractor, owner-driver or other indirect worker for the Company regularly performing work on Saturday and/or Sunday will not be eligible to make an election under sub-clause 21.4 for a period of 3 years' continuous service as a direct employee of the Company (other than by agreement with Cleanaway).

21.7 For public holidays only, the spread of hours (i.e. 3.00 a.m. to 4.00 p.m.) may be altered by up to one hour at either end of the spread, by agreement between the Employer and the majority of employees concerned or in appropriate circumstances, between the Employer and an individual employee.

21.8 Where the Company desires to vary or change the regular starting time of an employee he/she shall give one week's notice of such variation or change to the employee concerned and post a notice of the intended change at the depot or yard.

21.9 To avoid doubt, nothing in this clause affects steps the Company may take to manage operational requirements to have work performed on a Saturday or Sunday.

[200] In our view, clause 21.4 meets the caring and other responsibilities of employees which may arise on the weekends by allowing employees to elect to work only Monday to Friday. It is reasonable for Cleanaway and its employees to have some certainty in relation to rosters so we accept that it is necessary to limit the number of occasions that an employee moves between ordinary hours Monday to Friday and ordinary hours Monday to Sunday to once per year. However, such a limitation should not affect an employee's ability to make a request under s. 65 of the FW Act if their circumstances change and they have already made an election during the relevant twelve month period under clause 21.4. In the circumstances, we propose to amend clause 21.4 to take account of s. 65 of the FW Act.

[201] We believe that the matters that clause 21.5 is concerned with are already dealt with by ss.343 and 344(b) of the FW Act. Amongst other things, s. 343 prohibits a person from acting with the intention to coerce another person to exercise or not exercise a workplace right. Section 344(b) prohibits an employer from exerting undue influence or pressure on an employee in relation to a decision by the employee to make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement. An employee affected by the conduct referred to in clause 21.5 would be free to make an appropriate application alleging contravention of s. 343 and/or s. 344(b). In the circumstances, we believe that clause 21.5 is unnecessary and have decided not to include this provision in the workplace determination.

[202] We note that clause 21.6 specifically deals with persons who are not current employees but who will be new employees covered by the determination. These potential employees are known to Cleanaway as they are a 'contractor, owner-driver or other indirect worker for the Company regularly performing work on Saturday and/or Sunday'. However, Cleanaway has not called evidence from this cohort of workers about what their interests might be and the effect of the clause on their interests. The effect of the clause is that these employees are required to work for at least three years Monday to Sunday before being eligible to make an election, other than by agreement with Cleanaway. While we understand that Cleanaway may be trying to achieve certainty for its business by imposing this requirement, the consequences are unknown, particularly if the employee's personal circumstances change. In our view, a degree of certainty is achieved which accommodates the possibility of the employee's circumstances changing, by imposing a one year, rather than three year period of service before an employee is eligible to make an election.

[203] Clauses 21.7 and 21.8 are identical to clauses in the 2020 Erskine Park EA. Clause 21.9 is a new clause proposed by Cleanaway and is not in the 2020 Erskine Park EA. Although these clauses are not in the draft determination filed by the TWU, the TWU has not expressed any specific concerns about these provisions. In the circumstances, as clauses 21.7 and 21.8 contain terms which currently apply to Cleanaway and employees at Erskine Park and we have no material before us which suggests that they are causing any issues, we have decided to include these clauses in the determination. However, we have decided to exclude clause 21.9 as it contains terms which do not currently apply to Cleanaway and employees at Erskine Park and we have no material before us which weighs in favour of its inclusion in the determination.

[204] The clause we propose is therefore in the following terms:

21.1 The ordinary hours of work for full-time employees shall be an average of 38 hours per week to be worked within a work cycle not exceeding 28 consecutive days.

21.2 The maximum daily ordinary hours will be 8 hours.

21.3 Subject to the exemption in clause 21.4, the ordinary hours of work shall be worked on any day Monday to Sunday between the hours of 3.00 a.m. and 4.00 p.m.

21.4 (**Monday-Friday Ordinary Hours by election**) A permanent employee, having regard to their personal or family circumstances, may elect in writing for their ordinary hours to be worked on any day Monday to Friday between the hours of 3.00 a.m. and 4.00 p.m. The election may be withdrawn in writing. The election or withdrawal is effective from the first full pay period commencing 28 days after the election or withdrawal is given in writing.

21.5 A change to the spread of ordinary hours under this subclause 21.4 (other than by agreement with the Company) may be made:

- (a) once in each full year of operation of this Determination and
- (b) at other times pursuant to a request under s. 65 of the Fair Work Act 2009.

21.6 (**Monday-Sunday Ordinary Hours for converting regular indirect weekend workers**) A permanent employee employed after the date this Workplace Determination commences operation where the employee has worked as a contractor, owner-driver or other indirect worker for the Company regularly performing work on Saturday and/or Sunday will not be eligible to make an election under sub-clause 21.4 for a period of 1 years' continuous service as a direct employee of the Company (other than by agreement with Cleanaway).

21.7 For public holidays only, the spread of hours (i.e. 3.00 a.m. to 4.00 p.m.) may be altered by up to one hour at either end of the spread, by agreement between the Employer and the majority of employees concerned or in appropriate circumstances, between the Employer and an individual employee.

21.8 Where the Company desires to vary or change the regular starting time of an employee he/she shall give one week's notice of such variation or change to the employee concerned and post a notice of the intended change at the depot or yard.

[205] In our view, this term complies with s.270A as it is not less favourable to each of the employees covered by the determination and the TWU, than a term of 2020 Erskine Park EA that deals with the matter.

[206] Our determination of this matter provides Cleanaway with the ability to roster ordinary hours of work on weekends and employees with the ability to opt out of weekend work. As our determination does not meet the claims of either party both parties continue to have the capacity to ventilate their interests in future bargaining. In addition, employees have the capacity to bargain for a share in any productivity gains achieved through the new working hours arrangements.

Weekend penalty rates

[207] The hours of work clause which we will include in the determination meets the interests of employees like Mr Stassen who cannot or do not wish to work on weekends. For employees like Mr Russell and Mr Richards, the clause is likely to cause financial disadvantage if the work that they currently perform on Saturdays is ordinary hours rather than overtime. Mr Russell currently works every Saturday and as such his personal circumstances are likely make him suitable for ongoing Saturday work. Mr Richards' evidence was that he could not afford to remain working at Cleanaway if Saturday work at penalty rates is not offered and that if Cleanaway achieved their ordinary hours of work and weekend penalty rates claims, this would be a 'red flag' that it is his time to move onto a new employer.

[208] The TWU seeks the weekend penalty rates provided for in the Award as this is what the Erskine Park employees in practice are paid given the long term practice at the site as to when ordinary hours are performed. Cleanaway opposes this as it will cost more than engaging employees to perform overtime, that different considerations apply in determining weekend penalty rates compared to overtime and that the higher base rate paid to employees compared to the Award compensates them for the different weekend penalty rate entitlement under the current Agreement. Cleanaway also says that increasing the penalty rates for ordinary hours of work on a Saturday may hinder opportunities for permanent employment at Cleanaway, and instead lead to greater use of temporary workforce solutions such as owner drivers and subcontractors.

[209] One of the reasons that Cleanaway would prefer to engage employees to perform work on the weekend rather than owner drivers is because of the lower costs involved. Cleanaway has not provided any modelling or other evidence that demonstrates that paying ordinary hours at overtime rates will be more expensive than engaging owner drivers. There is no evidence that establishes that the TWU weekend penalty rates claim will increase temporary workers at Erskine Park.

[210] On the other hand, the TWU have provided evidence that employees will consider leaving if required to work on weekends at lower rates of pay. Similarly, Mr Vella has provided evidence that he has not sought to make any major shift changes (including rostering ordinary hours on weekends) since 2021 because this could result in existing skilled employees leaving Cleanaway.

[211] Cleanaway's interests are to have permanent employees carrying out the majority of weekend work and reducing its reliance on owner drivers and contractors. We believe that this is best achieved by encouraging the current workforce to agree to undertake ordinary hours on weekends. In our view reducing the rate of pay for workers on Saturday is likely to discourage employees from working on weekends and could encourage them to look for work elsewhere. Further, there is no cogent reason to incorporate the current weekend penalty rates clause into the determination because it has rarely been applied. In the circumstances we have determined to incorporate the TWU weekend penalty rates clause into the determination with the following words of clarification:

26.1 All work on weekends is to be paid pursuant to overtime rates at clause 25.3 of this Determination. To avoid doubt, ordinary hours worked on the weekend will be treated as ordinary hours of work but will be paid at the overtime rates in clause 25.3.

We consider these words may assist given the employee witnesses expressed a degree of confusion about the distinction between ordinary hours and overtime.

[212] In our view, this term complies with s.270A as it is not less favourable to each of the employees covered by the determination and the TWU, than a term of 2020 Erskine Park EA that deals with the matter.

[213] A related matter is the claim by Cleanaway to include the following clause which has the same effect as clause 28.7 of the 2020 Erskine Park EA:

28.3.3 An Employee who is rostered to perform the major portion of their shift work on a Saturday or Sunday or a public holiday shall be paid the Weekend or Public Holiday rates instead of the Shift loading rate expressed in this clause.

[214] The shift loading rate referred to in this clause is 20% of base pay for an employee working a shift where the ordinary hours of work finish after 6.30 pm but not later than 12.30 am (afternoon shift) and 30% of base pay for an employee working a shift where the ordinary hours of work finish after 12.30 am and at or before 8.30 am (night shift). Employees are better off under the proposed clause 28.3.3 as weekend and public holiday rates in the workplace determination exceed the afternoon and night shift loading rates. Although this is not an agreed term, the TWU has not made any submissions or otherwise expressed any specific concerns about this provision. In the circumstances and taking into account the matters in s. 275, we have decided to include clause 28.3.3 in the Determination.

[215] In our view, this term complies with s.270A as it is not less favourable to each of the employees covered by the Determination and the TWU, than a term of 2020 Erskine Park EA that deals with the matter.

Term of Determination

[216] The TWU seeks an expiry date of 30 June 2026. Cleanaway seeks an expiry date approximately one year after that date. Both parties say that the term they each propose will enable the parties to rebuild their relationship.

[217] Cleanaway also points to a three year term providing stability of terms and conditions, enabling future anticipated changes to client demand and working hours arrangements to be bedded down, and being consistent with meeting its obligations throughout the duration of the term of its contracts with major clients.

[218] Given the difficulties that the parties have faced in reaching agreement over an extended period, and given the period of uncertainty navigated in bargaining during the COVID-19 pandemic that gave rise to wage restraint in the making of the 2020 Erskine Park EA, we are attracted to a longer term than the two year period advanced by the TWU. In our view, it is in the interests of both the employees and Cleanaway for there to be certainty in relation to terms and conditions for some time into the future. We believe the three year period proposed by

Cleanaway strikes the right balance between providing incentives to bargain and the securing of benefits under the determination. Having regard to all of the circumstances, we have decided that the nominal expiry date of the determination will be 30 June 2027.

Pay increases

[219] It is common ground that employees at the Cleanaway Erskine Park depot have not received a pay increase since 23 September 2021. There is evidence that employees at Erskine Park are struggling to meet the costs of living in the face of significant inflation. Since the last pay rise, the living cost index (LCI) has increased by 16.3% to December 2023, the consumer price index (CPI) has increased by 14.7% to March 2024, and the wage price index (WPI) has increased by 9.3% to March 2024. The Reserve Bank forecasts CPI inflation in June 2024 to be 3.8% and December 2024 to be 3.8%. CPI inflation in the June 2025 quarter is forecast to be 3.2% and in December 2025 to be 2.8%. By June 2026, it is anticipated to be 2.6%. WPI is forecast to increase 3.6% from July 2024 to June 2025; and a further 3.2% from July 2025 to June 2026. The TWU rely upon CPI and LCI increases since 23 September 2021 to support its claim for 6% pay rises each year from September 2022-September 2025. The TWU also relies upon its assertion that the rates of pay in the current agreement are 1.5% lower than originally agreed and that this shortfall should be addressed in determining appropriate rates of pay.

[220] If the TWU’s proposal was accepted wage rates for a level 5 employee across an agreement with the TWU’s proposed two year term would be as follows (rounded to two decimal places):

2020 Erskine Park EA rate 23 September 2021	23 September 2022	23 September 2023	23 September 2024	23 September 2025
\$34.96	\$37.06	\$39.28	\$41.64	\$44.14

[221] Cleanaway claims that there is a cogent argument the initial pay increase under the workplace determination should be at or near the rate of 0% because making Erskine Park rates much higher than other sites and competitors’ rates inevitably reduces opportunities to win work and offer permanent direct employment. Cleanaway submits that the WPI rather than CPI should be the appropriate measure to take into account in the event that a wage increase is awarded. However, Cleanaway submits the full value of the WPI should not be awarded as the first wage increase because the current rates of pay are significantly above Award rates and above comparable rates in competitors’ enterprise agreements and other Cleanaway sites. Awarding a pay increase at Erskine Park at the full rate of the WPI risks making Erskine Park uncompetitive and also makes direct permanent employment more expensive than using owner drivers or contractors. This amount should be further reduced because of the loss of productivity caused by the reduction in flexibility arising from the compromise solution proposed by Cleanaway in relation to ordinary hours of work. On this basis Cleanaway proposes an initial pay increase of 5% with effect from the commencement date and annual pay rises of 3% thereafter.

[222] If Cleanaway’s proposal was accepted wage rates for a level 5 employee across an agreement with a proposed three year term would be as follows (rounded to two decimal places):

2020 Erskine Park EA rate 23 September 2021	1 July 2024	1 July 2025	1 July 2026
\$34.96	\$36.71	\$37.81	\$38.94

[223] In *Parks Victoria*, the Full Bench referred to a number of decisions where the Commission either awarded a retrospective wage increase¹⁶⁰ or front loaded the first increase¹⁶¹ to compensate employees for the delay since they last received a wage increase. In that case, the Full Bench:

- noted that compensating employees for such delay has been a common feature of workplace determinations, both under the FW Act and the legislative predecessors to the current provisions;
- noted that in a number of these cases the Commission has not applied a test of special, compelling or exceptional circumstances before awarding either retrospectivity or a front loaded increase;¹⁶²
- expressed the view that the time between the nominal expiry date of a previous agreement and the operative date of a workplace determination is a factor to be taken into account in deciding the wage increases to be included in the workplace determination;¹⁶³ and
- observed that the bargaining process can be protracted, and the time taken in bargaining is not necessarily a function of unreasonable behaviour by a particular party. Absent unreasonable behaviour there is no reason in principle why a party should be disadvantaged by the time taken in the bargaining process.¹⁶⁴

[224] The Full Bench noted that the following matters are relevant to the assessment of wage claims in the context of workplace determinations but that these are not the only relevant matters and they are not determinative:

- the maintenance of real wages and in this respect CPI figures are the appropriate measure of inflation;
- wage outcomes for the same class of workers in the same industry;
- wage rates and increases in comparable instruments.¹⁶⁵

[178] Ultimately, the wage increase determined depends upon a consideration of all the relevant circumstances including the other aspects of the determination.¹⁶⁶

[225] In *Schweppes* the Full Bench observed that:

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.577 and 578 of the Act are also relevant and must be taken into account.

[226] In our consideration of this matter we have taken into account the factors in s.275 and ss.577 and 578 of the FW Act. The pay rises proposed by the TWU aim to ensure that the real value of employees' pay is maintained although the pay rises sought in September 2024 and September 2025 exceed projected inflation. The TWU explains this on the basis that the pay rises for September 2022 and September 2023 are below inflation and that future pay rises compensate for this. In addition the pay rises take account of the claimed 1.5% shortfall in the 2020 Erskine Park EA. We accept that addressing a shortfall in current rates is the type of matter that parties may wish to negotiate about during bargaining for future pay rises. However, given the unique circumstances in which the initial pay increases were reduced and that there appears to be a factual dispute about whether 2020 Erskine Park EA was initially voted up with higher pay increases, this is not a matter we propose to have regard to when determining appropriate rates of pay for the workplace determination. We do however acknowledge the period of uncertainty navigated in bargaining during the COVID-19 pandemic appears to have led to wage restraint in the making of the 2020 Erskine Park EA. Employees have not had the benefit of a pay rise since the last prescribed increase in the 2020 Erskine Park EA during a period of high inflation and that this should be taken into account.

[227] We have also taken into account the time between the nominal expiry date of the 2020 Erskine Park EA and the operative date of the workplace determination in deciding the wage increases to be included in the workplace determination. We agree with the Full Bench in *Parks Victoria* that there is no reason in principle why employees should be disadvantaged by the time taken in the bargaining process in the absence of unreasonable behaviour. In this regard we repeat the observations of Deputy President Wright in the intractable bargaining declaration decision that there is nothing unusual or unreasonable about employees resisting a change to the current practice which they perceive would leave them worse off and seeking that their current working arrangements are confirmed in an industrial instrument.¹⁶⁷ Consistent with other decisions of this Commission, we do not believe that it is necessary for us to be satisfied that there are special, compelling or exceptional circumstances before awarding either retrospectivity or a front loaded increase. Whether or not this should occur will depend on the circumstances of each matter.

[228] Had the bargaining commenced in accordance with the current enterprise agreement in June 2022 and not become intractable, we believe that a new Agreement would have been negotiated and been in place within twelve months, by 1 July 2023. We note that there was a delay in commencement of bargaining of over four months and believe that employees should not be disadvantaged by this. We also note that the enterprise agreement that Cleanaway asked employees to vote for on 22 June 2023 provided for a pay rise of 4% at commencement of the Agreement and pay rises of 4% per year for each of the three years from the first pay period after 23 September 2024 to 23 September 2026. Further, the enterprise agreement that Cleanaway asked employees to vote for on 20 November 2023 provided for 4% with backpay from 23 September 2022, a pay rise of 4% at commencement of the Agreement, pay rises of 4% per year for each of the three years from the first pay period after 23 September 2024 to 23 September 2026. To demonstrate the impact this latter offer would have had relative to the positions taken by the parties, wage rates for a level 5 employee across an agreement with a proposed three year term would be as follows (rounded to two decimal places):

2020 Erskine Park EA rate 23 September 2021	23 September 2022	Commencement	23 September 2024	23 September 2025	23 September 2026
\$34.96	\$36.36	\$37.81	\$39.32	\$40.90	\$42.53

[229] In our view, these proposals, although not accepted by employees at Erskine Park show that Cleanaway had financial capacity in 2023 to offer pay rises in excess of pay rates at competitor sites.

[230] Taking these matters into account, we have determined that an initial pay rise will be payable from 1 July 2023 then a further pay rise will be payable six months after that date from 1 January 2024. For employees to maintain the value of wages negotiated in the 2020 Erskine Park EA, it is necessary for these pay rises to take into account the high levels of inflation which have occurred since employees' last pay increase in September 2021. We agree with the submissions of the TWU that both the CPI and WPI are relevant to our consideration of this matter but that changes to cost of living are more relevant to the interests of the employees than movements of other wages. The increase of CPI from September 2021 to December 2023 was 13.7% and the increase of the WPI was 8.5% for the same period.

[231] In our view the pay rises proposed by Cleanaway will result in employees continuing to struggle to meet the costs of living. This is particularly in circumstances where employees may be financially disadvantaged by no longer having the benefit of working a sixth day as overtime. The proposal does not address the record levels of inflation that employees experienced in 2021 and 2022 which led to a decline in the real value of their wages and it does not take into account that employees have not had an increase since September 2021.

[232] In relation to concerns about its competitiveness with other waste management services, we note that Cleanaway's rate of pay continues to be higher than many of its competitors, although those rates have not increased for almost three years, a period when rates of pay at competitors' sites have increased. This suggests that Cleanaway's rates were considerably higher than competitors when they were last negotiated. There may be a range of reasons for this, including Cleanaway's profitability and a desire to attract and retain a highly skilled workforce. Although there is some evidence of Cleanaway not winning contracts that it is tendering for, the evidence overall points to Cleanaway being a very successful and profitable business. We agree that a relevant matter for us to consider is the rates of pay at other Cleanaway sites and Waste Management sites. However, we agree with the submissions of the TWU that the rates vary considerably, and we are unable to ascertain the extent to which the employees and employer covered by each instrument is comparable to or not comparable to the circumstances of Cleanaway and the employees at the Erskine Park site. We therefore do not propose to reduce the pay increases in the determination on the basis that the rates of pay at Erskine Park are currently higher than competitors.

[233] Similarly, we do not propose to reduce the pay increases on the basis of Cleanaway's claim that there will be a loss of productivity caused by the reduction in flexibility arising from the compromise solution proposed by Cleanaway in relation to ordinary hours of work. As indicated above, 'productivity' as used in s.275 of the FW Act, and more generally within the

FW Act is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. In the case of Cleanaway’s business at Erskine Park, the inputs are likely to be number of working and driving hours and vehicles and the outputs the number of bins collected. Cleanaway has produced no evidence which establishes that there will be a decline in the number of bins collected arising from its compromise solution. To the contrary, the proposal is likely to decrease Cleanaway’s reliance on owner drivers and other contractors on the weekend, therefore increasing the use of Cleanaway vehicles and reliability of services which will in turn increase the number of bins collected.

[234] Having regard to all of these matters and that there is a 21 month period between the last pay rise received by employees and the first date that a pay increase is due under our proposal, we believe that a 6% pay increase should apply from 1 July 2023, followed by a 5% pay increase from 1 January 2024.

[235] In relation to future pay increases, we note that CPI is forecast to be 3.3% in June 2024, 3.2% in December 2024, 3.1% in June 2025, 2.8% in December 2025 and 2.6% by June 2026. WPI is forecast to increase 3.6% from July 2024 to June 2025; and a further 3.2% from July 2025 to June 2026. In considering the quantum of future pay rises, we have taken these matters into account as well as the real possibility that many employees who currently perform overtime on weekends will suffer a significant financial disadvantage as a result of their working days reducing from six to five. On this basis, we believe that it is appropriate for future pay rises to be marginally higher than projected CPI and WPI. We have therefore determined that the workplace determination should provide for three annual pay rises of 4% for each of the three years from 1 September 2024 to 1 September 2026.

[236] In summary the pay increases in the workplace determination will be as follows:

- First pay period after 1 July 2023: 6%
- First pay period after 1 January 2024: 5%
- First pay period after 1 September 2024: 4%
- First pay period after 1 September 2025: 4%
- First pay period after 1 September 2026: 4%

[237] To demonstrate the impact relative to the positions taken by the parties, wage rates for a level 5 employee across an agreement with a proposed three year term would be as follows (rounded to two decimal places):

2020 Erskine Park EA rate 23 September 2021	1 July 2023	1 January 2024	1 September 2024	1 September 2025	1 September 2026
\$34.96	\$37.06	\$38.91	\$40.47	\$42.09	\$43.77

Consultation

[238] The only matter at issue between the parties in relation to consultation is whether the Employee Consultative Committee should be required to discuss changes to ordinary hours of

work. The parties' joint position is that the following clause, which is not provided for in the 2020 Erskine Park EA, should be included in the determination:

43. EMPLOYEE CONSULTATIVE COMMITTEE

43.1 A Consultative Committee shall be established of an equal number of management and elected workforce representatives. Unless otherwise agreed, this committee shall comprise of no less than two (2) management and two (2) workforce representatives. The Consultative Committee make up or representation may be reviewed on an annual basis.

43.2 The Committee shall meet on a quarterly basis or as required by the operational requirements of the business to:

- a) Oversee the successful implementation of the terms of this Workplace Determination: or
- b) Develop further the prospects for improved business performance; or
- c) Discuss workplace cultural and safety improvements.

[239] In addition, Cleanaway submits that proposed clause 43 should include the following additional clause, which is opposed by the TWU:

43.3 Without limiting clause 43.2, the Consultative Committee will meet if the Company proposes to introduce a change to when the ordinary hours of work of Employees are to be rostered. A meeting under this sub-clause 43.3 is not required if the change to be introduced:

- a) is at the request of the Employee(s);
- b) is a request for a flexibility arrangement under Clause 12 of this Workplace Determination; or
- c) does not impact all Employees covered by this Workplace Determination.

[240] Cleanaway submits that the inclusion of such a clause is appropriate given that ordinary hours of work has been such a major source of dispute. The TWU is concerned about the proposed exceptions to the requirement that the Consultative Committee meet especially at clause 43.3(c). The parties have jointly proposed a consultation clause for inclusion in the determination which requires Cleanaway to consult employees about a change to their regular roster or ordinary hours of work. We note the parties have reached agreement on the terms that require Cleanaway to consult employees in relation to a change to their regular roster or ordinary hours of work but have not reached agreement about how the Consultative Committee would deal with this matter. Further, we believe that the consultation clause renders clause 43.3 unnecessary, and that the Consultative Committee would potentially duplicate the discussions which the parties are required to have under the consultation clause. For these reasons and

having regard to the factors in s. 275, we have decided not to include clause 43.3 in the Determination.

Conclusion

[241] A draft workplace determination to give effect to our decision, based upon the document prepared jointly by the parties, will be provided to the parties.

[242] The TWU and Cleanaway are directed to confer in relation to the draft workplace determination, and to file any submissions (jointly or separately) identifying any errors, omissions or other difficulties in the draft determination on or before 19 June 2024.

[243] We will make the final determination shortly thereafter.



DEPUTY PRESIDENT

Appearances:

M *Gibian* SC and P *Boncardo*, on behalf of the Applicant.

J *Bourke* KC and B *Avallone*, on behalf of the Respondent.

Hearing details:

2024

April 10, 11 and 12

Sydney

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<PR775920>

¹[\[2024\] FWC 91](#).

² Statement of Michaela White dated 26 March 2024, [4] (Court Book (CB) 1382).

³ Ibid, [5], (CB 1382).

⁴ Amended Statement of Paul Vella dated 9 April 2024, [4], (CB 2449).

⁵ Ibid [12], (CB 2450).

⁶ Ibid, [4], (CB 2449).

⁷ Ibid, [13], (CB 2450).

⁸ Ibid, [14], (CB 2450).

⁹ Statement of Isabella Wisniewska dated 27 February 2024, [6] (CB 219).

¹⁰ Ibid, [8], (CB 219).

¹¹ Ibid, [9], (CB 219).

¹² Ibid, [9], (CB 219).

¹³ Statement of Michaela White dated 26 March 2024, [34] (CB 1389).

¹⁴ Statement of Isabella Wisniewska dated 27 February 2024, Attachment IW-13, (CB 370).

¹⁵ Ibid, [53]-[54], (CB 222).

¹⁶ Ibid, [59], (CB 223).

¹⁷ Ibid, [63]-[85], (CB 223-225).

¹⁸ Ibid, [79], CB 224.

¹⁹ Ibid, [84]-[85], (CB 225).

²⁰ Ibid, [86]-[87], Annexure IW-21 (CB 225).

²¹ Ibid, [91]-[92], Annexures IW-23 and IW-24 (CB 226).

²² Ibid [97], Annexure IW-26 (CB 226-227).

²³ Ibid, [102], Annexure IW-27 (CB 227).

²⁴ Ibid, [103], Annexure IW-28 (CB 227).

²⁵ Ibid, [111]-[113], Annexure IW-29 (CB 228).

²⁶ Ibid, [118], Annexure IW-30 (CB 228).

²⁷ Statement of Michaela White dated 26 March 2024, [81] (CB 1395).

²⁸ Transcript, PN934-PN936.

²⁹ Statement of Isabella Wisniewska dated 27 February 2024, [130] (CB 229).

³⁰ Ibid, [139]-[141], Annexure IW-32 (CB 230).

³¹ Statement of Michaela White dated 26 March 2024, [76] (CB 1395).

³² Ibid, [84], (CB 1399).

³³ Statement of Isabella Wisniewska dated 27 February 2024, [159]-[163] (CB 232).

³⁴ Statement of Leigh Newman dated 26 March 2024, [1], (CB 2274).

³⁵ Ibid, [8], (CB 2275).

³⁶ Ibid, [10], (CB 2275).

³⁷ Ibid.

³⁸ Ibid, [21], (CB 2276-2277).

³⁹ Ibid, [11], (CB 2275).

⁴⁰ Ibid, [22], (CB 2277).

⁴¹ Ibid, [12]-[13], (CB 2275).

⁴² Ibid, [20], (CB 2276).

⁴³ Ibid.

⁴⁴ Ibid, [16], (CB 2276).

⁴⁵ Ibid, [18]-[19], (CB 2276).

⁴⁶ Ibid, [24], (CB 2277).

⁴⁷ Ibid, [26], (CB 2277).

⁴⁸ Ibid, [30], (CB 2278).

⁴⁹ Ibid, [33], (CB 2278).

⁵⁰ Ibid, [36]-[38], (CB 2279).

⁵¹ Ibid, [40], (CB 2279).

⁵² Ibid, [42], (CB 2279).

⁵³ Ibid, [44], (CB 2280).

⁵⁴ Ibid, [47], (CB 2280).

⁵⁵ Ibid, [50], (CB 2280).

⁵⁶ Amended Statement of Paul Vella dated 9 April 2024, [15] (CB 2451).

⁵⁷ Ibid, [16], (CB 2451).

⁵⁸ Ibid, [17], (CB 2451).

⁵⁹ Ibid, [19]-[20], (CB 2452).

⁶⁰ Ibid, [21], (CB 2452).

⁶¹ Ibid, [22], (CB 2452-2453).

⁶² Ibid, [25], (CB 2453-2454).

⁶³ Ibid, [25.1], (CB 2453).

⁶⁴ Ibid, [25.5], (CB 2454).

⁶⁵ Ibid, [26], (CB 2454).

⁶⁶ Ibid, [30]-[32], (CB 2455).

⁶⁷ Ibid, [33]-[37], (CB 2455).

⁶⁸ Ibid, [38], (CB 2455).

⁶⁹ Ibid, [40], (CB 2456).

⁷⁰ Ibid, [44], (CB 2456).

⁷¹ Ibid, [42]-[43], (CB 2456).

⁷² Ibid, [46]-[47], (CB 2456-2457).

⁷³ Ibid, [48], (CB 2457).

⁷⁴ Ibid, [50], (CB 2457).

⁷⁵ Ibid, [52], (CB 2458).

⁷⁶ Ibid, [53], (CB 2458).

⁷⁷ Ibid, [54], (CB 2459).

⁷⁸ Ibid, [55], (CB 2458).

⁷⁹ Ibid, [57]-[58], (CB 2458-CB 2459).

⁸⁰ Ibid, [59], (CB 2459).

⁸¹ Ibid, [60], (CB 2459).

⁸² Ibid, [61], (CB 2459).

⁸³ Statement of Isabella Wisniewska dated 27 February 2024, [171]-[172], (CB 233).

⁸⁴ Ibid, [177], (CB 233).

⁸⁵ Ibid, [178], (CB 233).

⁸⁶ Ibid, [182], (CB 234).

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- ⁸⁷ Ibid, [179], (CB 233- 234).
- ⁸⁸ Ibid, [180]-[181], (CB 234).
- ⁸⁹ Ibid, [183], (CB 234).
- ⁹⁰ Ibid, [184]-[187], (CB 234).
- ⁹¹ Ibid, [188]-[189], (CB 234).
- ⁹² Ibid, [195], (CB 235).
- ⁹³ Statement of Stephen Russell dated 27 February 2024, [3]-[4], (CB 1345).
- ⁹⁴ Statement of Steven Stassen dated 27 February 2024, [2], [7], (CB 1358).
- ⁹⁵ Statement of Stephen Russell dated 27 February 2024, [1], (CB 1345).
- ⁹⁶ Statement of Wayne Richards dated 27 February 2024, [5], [7], (CB 1369).
- ⁹⁷ Statement of Steven Stassen dated 27 February 2024, [3], (CB 1358).
- ⁹⁸ Statement of Stephen Russell dated 27 February 2024, [5]-[6], (CB 1345).
- ⁹⁹ Statement of Wayne Richards dated 27 February 2024, [8], (CB 1369).
- ¹⁰⁰ Statement of Stephen Russell dated 27 February 2024, [13], (CB 1346).
- ¹⁰¹ Ibid, [14]-[15], (CB 1346).
- ¹⁰² Statement of Steven Stassen dated 27 February 2024, [16], (CB 1359).
- ¹⁰³ Transcript PN 387.
- ¹⁰⁴ Transcript PN 390.
- ¹⁰⁵ Transcript PN 393.
- ¹⁰⁶ Transcript PN 423.
- ¹⁰⁷ Transcript PN 423.
- ¹⁰⁸ Transcript PN 426-427.
- ¹⁰⁹ Statement of Steven Stassen dated 27 February 2024, [18], (CB 1359).
- ¹¹⁰ Ibid, [67], (CB 1363).
- ¹¹¹ Ibid.
- ¹¹² Ibid, [69], (CB 1363).
- ¹¹³ Statement of Stephen Russell dated 27 February 2024, [16]-[17], (CB 1346).
- ¹¹⁴ Statement of Wayne Richards dated 27 February 2024 [14], (CB 1370).
- ¹¹⁵ Statement of Stephen Russell dated 27 February 2024 [20], (CB 1346); Statement of Wayne Richards dated 27 February 2024 [16], (CB 1370).
- ¹¹⁶ Statement of Stephen Russell dated 27 February 2024, [21]-[22], (CB 1346).
- ¹¹⁷ Statement of Wayne Richards dated 27 February 2024, [20], (CB 1370).
- ¹¹⁸ Statement of Stephen Russell dated 27 February 2024, [23], (CB 1346).
- ¹¹⁹ Ibid, [26], (CB 1346).
- ¹²⁰ Ibid, [25]-[27], (CB 1346).
- ¹²¹ Ibid, [28], (CB 1347).
- ¹²² Ibid [29]-[31], (CB 1347).
- ¹²³ Statement of Wayne Richards dated 27 February 2024, [22]-[24], (CB 1370).
- ¹²⁴ Ibid, [25]-[26], (CB 1371).
- ¹²⁵ Ibid, [27], (CB 1371).
- ¹²⁶ Statement of Steven Stassen dated 27 February 2024, [20], (CB 1359).
- ¹²⁷ Statement of Wayne Richards dated 27 February 2024, [28], (CB 1371).
- ¹²⁸ Ibid, [53]-[54], (CB 1373).
- ¹²⁹ Ibid, [55], (CB 1373).

- ¹³⁰ Statement of Isabella Wisniewska dated 27 February 2024, [203], (CB 236).
- ¹³¹ Statement of Wayne Richards dated 27 February 2024, [48], (CB 1372).
- ¹³² Statement of Wayne Richards dated 27 February 2024, [40]-[44], (CB 1372).
- ¹³³ Statement of Stephen Russell dated 27 February 2024, [38], (CB 1347).
- ¹³⁴ Statement of Steven Stassen dated 27 February 2024 [70], (CB 1363).
- ¹³⁵ *Ibid*, [72], (CB 1364).
- ¹³⁶ *Ibid*, [73], (CB 1364).
- ¹³⁷ Statement of Wayne Richards dated 27 February 2024, [35]-[36], (CB 1371).
- ¹³⁸ This is the increase as at December 2023. As at March 2024, the increase was 14.7%.
- ¹³⁹ This is the increase as at December 2023. As at March 2024, there was a further increase of 1.7%.
- ¹⁴⁰ These forecasts were made in the RBA's February 2024 Statement. These forecasts have been updated in the RBA's, *Statement of Monetary Policy* issued in May 2024 to 3.8% and 3.8% respectively.
- ¹⁴¹ This forecast has been updated in the RBA's May 2024 Statement to 3.2%.
- ¹⁴² At the time of the hearing, this increase was estimated to be 9.5%.
- ¹⁴³ [\[2012\] FWAFB 6612](#).
- ¹⁴⁴ Print Q4464.
- ¹⁴⁵ [\[2012\] FWAFB 6612](#), [28].
- ¹⁴⁶ *Lennon v Gibson and Howes Ltd* (1919) 26 CLR 285, 287.
- ¹⁴⁷ [\[2012\] FWAFB 6612](#), [29].
- ¹⁴⁸ [\[2013\] FWCFB 950](#)
- ¹⁴⁹ *Ibid*, [46].
- ¹⁵⁰ *Essential Energy Workplace Determination* [\[2016\] FWCFB 7641](#), [100]
- ¹⁵¹ [\[2013\] FWCFB 950](#), [46].
- ¹⁵² *Ibid*, [49].
- ¹⁵³ *Ibid*, [50].
- ¹⁵⁴ *Ibid*, [51].
- ¹⁵⁵ [\[2012\] FWAFB 7858](#).
- ¹⁵⁶ *Ibid*, [42]-[45].
- ¹⁵⁷ [\[2024\] FWC 91](#) [22].
- ¹⁵⁸ [\[2018\] FWCFB 5778](#).
- ¹⁵⁹ *Ibid*, [90].
- ¹⁶⁰ *Transport Workers Union of Australia v Qantas Airways Ltd and Anor* [\[2012\] FWAFB 6612](#), 96; *Health Services Union v Austin Health and Ors* [2009] AIRCFB 353, 34; *Southlink Pty Ltd v Transport Workers Union* [PR948148](#), 96 - 97; *CPSU v Australian Protective Service (APS)* [PR910682](#), 272 - 277 and *Australian Education Union v State of South Australia (DETE) and CPSU and State of South Australia (DETE)* Print T1383, 170.
- ¹⁶¹ *Schweppes Australia Pty Ltd v United Voice - Victoria Branch* [\[2012\] FWAFB 8599](#); *TWU v Qantas* [\[2012\] FWAFB 6612](#)
- ¹⁶² *Parks Victoria* [\[2013\] FWCFB 950](#), [158].
- ¹⁶³ *Ibid*, [161].
- ¹⁶⁴ *Ibid*, [165].
- ¹⁶⁵ *Ibid*, [177].
- ¹⁶⁶ *Ibid*, [178].
- ¹⁶⁷ [\[2024\] FWC 91](#), [92]