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
(B2023/1106)

DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT
COMMISSIONER CRAWFORD

SYDNEY, 10 JULY 2024

Intractable bargaining workplace determination – agreed terms – terms no less favourable – wage increases – dispute resolution procedure – classifications – redundancy exemption – nominal expiry date – delegates' rights clause.

Introduction

[1] On 7 March 2024, we made an intractable bargaining declaration in relation to employees of Cleanaway who work at its Unanderra depot and who are covered by the Unanderra EA.[1]

[2] Following a post-declaration negotiating period of 21 days in which the dispute was not resolved, the Commission became required to make an intractable bargaining workplace determination "as quickly as possible".[2] We gave each party an opportunity to file and serve evidentiary material and submissions in relation to the making of an intractable bargaining workplace determination and then heard the matter on 30 May and 6 June 2024.

[3] The TWU adduced evidence from Ms Isabella Wisniewska, Legal Officer of the TWU, Mr Ryan Smith, an official of the TWU who is responsible for representing TWU members working for Cleanaway at the Unanderra depot, and four employees of Cleanaway who work at the Unanderra depot (Mr William Stephen, Mr Stephen Ten-Hoonte, Mr Ethan Packer and Mr Paul Green). Both Mr Packer and Mr Green are bargaining representatives for the enterprise agreement which Cleanaway has been seeking to make with the Bargaining Employees. Cleanaway adduced evidence from Ms Michaela White, ER/IR Manager of Cleanaway.

[4] We use the same defined terms in this decision as we did in our earlier decision concerning the making of the intractable bargaining declaration. The relevant background is also set out in our earlier decision.

Statutory framework

[5] Part 2-5 of the Act governs workplace determinations. Division 4 of Part 2-5 is concerned with intractable bargaining workplace determinations. Sections 270, 270A and 271 provide:

> **"270 Terms etc. of an intractable bargaining workplace determination**
>
> *Basic rule*
>
> (1) An intractable bargaining workplace determination must comply with subsection (4) and include:
>
> (a) the terms set out in this section; and
>
> (b) the core terms set out in section 272; and
>
> (c) the mandatory terms set out in section 273.
>
> Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.
>
> *Agreed terms*
>
> (2) The determination must include the agreed terms (see subsection 274(3)) for the determination.
>
> *Terms dealing with the matters at issue*
>
> (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:
>
> (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned—after the end of that period; or
>
> (b) otherwise—after making the declaration.
>
> Note: Any such terms must comply with section 270A.
>
> *Coverage*
>
> (4) The determination must be expressed to cover:
>
> (a) each employer that would have been covered by the agreement; and
>
> (b) the employees who would have been covered by that agreement; and
>
> (c) each employee organisation (if any) that was a bargaining representative of those employees.
>
> **270A Terms dealing with matters at issue**
>
> (1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.
>
> (2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.
>
> (3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.
>
> (4) Subsection (2) does not apply to a term that provides for a wage increase.

271 No other terms

An intractable bargaining workplace determination must not include any terms other than those required by subsection 270(1)."

[6] Division 5 of Part 2-5 governs core terms, mandatory terms and agreed terms of workplace determinations. It provides:

"272 Core terms of workplace determinations

Core terms

(1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

(2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc.

(3) The determination must not include:
  (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
  (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
  (c) any designated outworker terms.

Better off overall test

(4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

(5) The determination must not include 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).

273 Mandatory terms of workplace determinations

Mandatory terms

(1) This section sets out the mandatory terms that a workplace determination must include.

Term about settling disputes

(2) The determination must include a term that provides a procedure for settling disputes:
  (a) about any matters arising under the determination; and

(b) in relation to the National Employment Standards.

(3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term

(4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term

(5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

Delegates' rights term

(6) The determination must include a delegates' rights term for the workplace delegates to whom the determination applies.

Note: ***Delegates' rights term*** is defined in section 12.

(7) The delegates' rights term must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

274 Agreed terms for workplace determinations

Agreed term for an industrial action related workplace determination

(2) An ***agreed term*** for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 267(2)).

Agreed term for an intractable bargaining workplace determination

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

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

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

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

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

275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

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

(ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;

(d) the public interest;

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

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

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

Agreed terms

[7] It is convenient to first deal with whether there are any "agreed terms" within the meaning of s 274(3) of the Act

Applicable principles re "agreed terms"

[8] A Full Bench of the Commission made the following observations about the meaning of "agreed terms" in s 274(3) of the Act in *United Firefighters' Union of Australia v Fire Rescue Victoria*:[3]

> "[108] Section 274(3) defines an "agreed term" for an intractable bargaining determination. There are a number of elements to the section:
>
> • First, s 274(3) has, at its centre, a requirement that certain matters be "agreed";
>
> • Second, the FW Act does not state that a term must be "agreed" simpliciter. The subject matter of what must be "agreed" is that there be a "term" of the proposed enterprise agreement concerned which "should be included in the agreement";
>
> • Third, that agreement must be between the "bargaining representatives"; and
>
> • Fourth, that agreement must exist at a defined point of time. Where there is a post-declaration negotiating period in place, the point in time is at the end of that period. If there is no post-declaration negotiating period, the point in time is at the time the intractable bargaining declaration was made.
>
> …

[111] The FW Act does not provide a definition of "agreed," as it applies to the first element of s 274(3) described above. Nor does the statute give definitional guidance as to what is meant by the words "should be included in the agreement."

[112] We proceed on the basis that any agreement is a matter to be determined objectively, having regard to factual matters known between the parties. We did not understand any party or the Minister to take a different position.

…

[138] Section 274(3) requires the bargaining representatives to have "agreed" that there is a "term" that "should be included in the agreement." That agreement must co-exist at the point in time defined by the statute, which in this matter is at the end of 18 October 2023.

[139] The amendments made to s 274 by the SJBP Act adopted the same formulation for the subject matter of terms that are "agreed" as was, and still is, used for the "industrial action related workplace determinations" in s 274(2), as was previously used for low-paid workplace determinations in s 274(1) (now repealed), and as was used for "bargaining related workplace determinations" in s 273(3) (prior to its current form). We do not consider that Parliament intended a different meaning for the current expression of s 274(3) with the amendments by the SJBP Act, although it is evidently the case that the SJBP Act contemplated readier access to the intractable bargaining provisions compared to serious breach provisions they replaced, the latter having "not been effective" in assisting parties to resolve bargaining disputes.

[140] The FW Act does not define the meaning of "agreed" in s 274(3). We consider its ordinary meaning applies. "Agreed" in this context is the past participle form of "agree." Relevant definitions of "agree" from the Macquarie Dictionary include "consent," "be of one mind," and "come to an arrangement or understanding."

[141] To have "agreed" for the purpose of s 274 does not require formal agreement necessary for contract law. However, the ordinary meaning of "agreed" in this context requires there to be a consensus or meeting of the minds between the parties about the subject matter of the said agreement. The ordinary meaning accords with judicial consideration of the concepts "arrangement" or "understanding" as those terms are used in the Competition and Consumer Act 2010 (Cth) (CCA) and its predecessors. In the CCA, those terms appear in statutory provisions that variously prohibit parties making or giving effect to a provision of a "contract," "arrangement" or "understanding" having statutorily-proscribed anti-competitive purposes or effect.

[142] While the statutory subject matter under the CCA is quite different to the matters engaged by s 274 of the FW Act, the established cases dealing with looser forms of agreement – namely, arrangements or understandings – recognise a "spectrum of consensual dealings," with contracts having a well-understood degree of legal formality at one end and "understandings" at the other. But at all parts of that spectrum, there remains a requirement for a meeting of minds or consensus about the proscribed statutory subject matter, and a mere hope or expectation is insufficient, even when that hope or expectation in one party was aroused by the other.

[143] It is evident from the nature of such consensual dealings that parties are free to resile from them.

[144] As to the subject matter of the agreement – being a "term" that "should" be included – we agree with the UFU's submission that the term "should" is necessarily future looking. But

this does not alter the requirement that the relevant parties must "agree" on that subject matter and be in agreement at the time required by the statute.

[145] Whether the parties are "agreed" is a matter to be assessed objectively. Neither party suggested to the contrary.

[146] While we accept the UFU's submission that the nature of the agreement is not to be approached in a formal, or legalistic manner, there remains the requirement that, as a factual matter, the bargaining representatives need to have agreed that a term of a proposed enterprise agreement should be included in the proposed agreement.

[147] Where a party has, objectively assessed, genuinely reserved its position on particular terms or the entire agreement to the effect that matters are only agreed "in principle" or are "subject to" a satisfactory overall package being determined, then that is strongly indicative that those matters would not be "agreed" for the purpose of s 274(3).

[148] The circumstances of each case will need to be determined on the evidence in that matter. Simply making statements during negotiations that particular terms or the entire agreement is agreed "in principle" does not automatically preclude a finding of "agreed terms" for the purpose of s 274(3) although it may do so in the particular circumstances.

[149] The ritual incantation of words of qualification such as "in principle" or the recourse to an exclusion clause effectively long buried in antecedent negotiations may not, of itself, act as a barrier to a finding that there are "agreed terms" in a particular bargaining agreement. The search for an agreed term is for agreement in substance not form.

[150] In industrial bargaining, parties will commonly "give and take" during the bargaining process. One party will often make a concession over a particular issue on the basis that it will extract more favourable concessions on a different issue.

[151] The bargaining process is not necessarily linear nor evenly balanced, although it sometimes might be. For example, a particular issue might be very valuable or sought after by one party but the other party is indifferent to it. The indifferent party might be willing to concede that issue for little (or perhaps for goodwill or for the avoidance of protected industrial action) or it might refuse to yield to that claim without maximising (in that party's view) what other benefits it can extract from any concession.
…

[154] In the bargaining process, progress is often made on the basis that there will be a complete and final agreement for all matters, in which case concessions made by each party about matters during the bargaining journey need to be viewed in that context. Commonly, although not always, the most significant issue will be wages. In such a case, concessions made by a party will often be conditional upon the final issue of wages being (in that party's view), satisfactory.

[155] Section 274(3) defines agreed terms for an intractable bargaining workplace determination as a term that the bargaining representatives have (at the relevant time), agreed "should be included in the agreement." This directs attention to the potential final form of any agreement. While parties may sometimes agree that, regardless of any other issues, some terms should go in an agreement, s 274(3) does not extend to terms where there is a conditional reservation attached to all terms (or all key terms) being satisfactorily arrived at.

> [156] When industrial parties are bargaining, they are doing so to secure a final package that is, overall, better than no new agreement at all. The final package will inevitably include a number of terms that each party is sufficiently happy with and, quite likely, other terms that the parties wished was excluded. Concessions through the "give and take" of bargaining before a final package is approved do not, of themselves, indicate that the bargaining representatives consider all the terms up to the point should be included in a final package. They may do so for some terms, but for others they are either expressly or implicitly only doing so on the basis that the final package will be suitable. We consider so much is self-evident in industrial bargaining. What the position will be in a particular bargaining process will be determined on the circumstances of that process.
>
> [157] Similarly, a party that conditionally states (however that condition is expressed) that certain terms should be included in an agreement has not necessarily agreed, as factual reality, that those terms should be included in the agreement. All that party might be conveying is that those terms are agreed on the basis that a satisfactory package will be achieved. A genuine conditional reservation is inconsistent with an agreement that the particular terms being discussed "should" (without reservation) be included in the proposed enterprise agreement. If s 274(3) provided for terms that were conditionally agreed, the position would be different. However, the statute does not provide for conditional agreements about terms and we consider it would constitute a significant alteration to the bargaining dynamic for enterprise agreements under the FW Act if it did so. We do not consider this was Parliament's intention."

[9] To these observations we would add that it is clear from the phrase "the bargaining representatives for the proposed enterprise agreement concerned had agreed" in s 273(3)(a) and the phrase "the bargaining representatives had agreed" in s 274(3)(b) and (c) that *all* bargaining representatives for the proposed agreement must agree for there to be an "agreed term" within the meaning of s 274(3)(a), (b) or (c) of the Act.

Relevant facts re "agreed terms"

Bargaining representatives

[10] There are four bargaining representatives for the proposed enterprise agreement to replace the Unanderra EA:

(a) as an employer that will be covered by the proposed enterprise agreement, Cleanaway is a bargaining representative (s 176(1)(a) of the Act);

(b) the TWU is a bargaining representative for almost all of the Bargaining Employees because they are members of the TWU who have not appointed another person as their bargaining representative or revoked the status of the TWU as their bargaining representative (s 176(1)(b) of the Act);

(c) Mr Packer is a bargaining representative for himself because, on 17 November 2022, he appointed himself, in writing, as his bargaining representative and has not revoked that appointment at any time (s 176(1)(c) of the Act); and

(d) Mr Green is a bargaining representative for himself because, on 18 November 2022, he appointed himself, in writing, as his bargaining representative and has not revoked that appointment at any time (s 176(1)(c) of the Act).

[11] Neither Mr Packer nor Mr Green were members of the TWU at the time they appointed themselves as bargaining representatives.

[12] On about 15 January 2023, Mr Green became a member of the TWU.

[13] On about 30 March 2023, Mr Packer became a member of the TWU.

[14] There is no evidence that Cleanaway was aware that Mr Packer and Mr Green were members of the TWU.

[15] Neither Mr Packer nor Mr Green provided Cleanaway with a log of claims or attended any bargaining meetings. Nor were they part of the TWU bargaining committee for the negotiation of an enterprise agreement to replace the Unanderra EA. The TWU bargaining committee has at all material times been composed of Mr Ryan Smith, Mr Ten-Hoonte and Mr Stephen.

[16] Neither Mr Packer nor Mr Green attended any conference or directions hearing held in the Commission in relation to bargaining for an enterprise agreement to replace the Unanderra EA.

[17] The subjective understanding of each of Mr Packer and Mr Green is that, once they became members of the TWU, the TWU was their representative in bargaining for a new enterprise agreement. However, there is no evidence to suggest that either Mr Packer or Mr Green communicated this understanding to the TWU or Cleanaway. Nor is there any evidence to suggest that the TWU informed Cleanaway that it was representing Mr Packer or Mr Green in bargaining for a new enterprise agreement. The first time that the TWU asserted it was representing Mr Packer and Mr Green in bargaining for a new enterprise agreement was when the TWU filed its reply evidence on 27 May 2024 and its reply submissions on 28 May 2024.

[18] Mr Packer and Mr Green gave evidence in their witness statements made on 27 May 2024 that they support and agree with the TWU's bargaining claims, including the TWU's proposal for wage increases of 4%, 4%, 3.75% and 3.75%. However, apart from the petitions signed in relation to hours of work, there is no evidence to suggest that either Mr Packer or Mr Green communicated to the TWU or Cleanaway their agreement or support for any claims made by the TWU during bargaining.

[19] Mr Stephen asserted in his reply witness statement that the interests of Mr Packer and Mr White have been represented by the TWU bargaining committee since they became members of the TWU. However, no evidence was adduced to provide any foundation for this assertion. For example, Mr Stephen did not give evidence of any discussion he, or anyone else from the TWU, had with Mr Packer or Mr Green in which they authorised or requested the TWU to represent them in bargaining with Cleanaway.

[20] Ms Wisniewska has been heavily involved in negotiations on behalf of the TWU with Cleanaway in relation to the negotiation of an enterprise agreement to replace the Unanderra EA since the TWU filed a s 240 bargaining dispute in the Commission on 3 August 2023. As at 27 February 2024, Ms Wisniewska had not engaged with Mr Packer or Mr Green, she had

never met them, she had never spoken to them individually and did not know them, and she did not believe they were members of the TWU. Ms Wisniewska only found out that Mr Packer and Mr Green were members of the TWU a few days before she gave evidence in the Commission on 30 May 2024.

[21] Ms White has conducted negotiations on behalf of Cleanaway for an enterprise agreement to replace the Unanderra EA since September 2023. However, it was not until about the end of December 2023 when Ms White was reviewing Cleanaway's file in relation to the Unanderra negotiations that she became aware that Mr Packer and Mr Green were bargaining representatives.

Relevant events during bargaining re "agreed terms"

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

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

[24] On 16 November 2022, the first bargaining meeting took place between Cleanaway and the TWU bargaining committee.

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

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

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

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

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

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

[31] On 27 February 2023, Cleanaway communicated a proposal to the TWU which included a claim by Cleanaway to change the ordinary hours of work provisions of the Unanderra EA.

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

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

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

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

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

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

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

[39] Also on 11 May 2023, the TWU issued Cleanaway with a notice of intention to take protected industrial action on 17 and 18 May 2023.

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

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

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

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

[44] On 11 July 2023, Cleanaway sent the Bargaining Employees, including Mr Packer and Mr Green, a letter enclosing a proposed enterprise agreement to be submitted for an employee ballot. The letter stated, among other things, that "if the majority of employees vote against the Proposed Agreement, the parties will be forced to return back to the negotiation table. This means, all previous negotiated financial and non-financial items may be withdrawn or will be up for renegotiation".

[45] On 13 July 2023, a toolbox meeting was held with employees at the Unanderra depot, including Mr Packer and Mr Green. Cleanaway discussed its proposed enterprise agreement and stated that "if the majority of employees vote against the proposed agreement, the parties will be forced to return back to the negotiation table. This means, all previous negotiated financial and non-financial items may be withdrawn and will be up for renegotiation".

[46] In the period between 20 and 21 July 2023, Cleanaway permitted the Bargaining Employees to vote on a proposed enterprise agreement which included a provision whereby ordinary hours could be worked from Monday to Sunday.[4] The result was that 17 employees voted no to the proposed enterprise agreement and three voted yes.

[47] On 21 July 2023, Cleanaway issued a memorandum to the Bargaining Employees informing them of the vote result and stating, among other things, that:

> "As a consequence of this voting result, management and the Bargaining Representatives may now be forced to return back to the negotiation table to renegotiate the Proposed Agreement's terms and conditions. This means that the Company will now seek to review its bargaining position and options. As was communicated to employee representatives, if the Agreement wasn't supported at the first vote, Cleanaway would not be offering back pay.

> To avoid any doubt, the commencement of a new renegotiation period means that all previous negotiated financial and non-financial items are withdrawn or renegotiated…"

[48] On 3 August 2023, the TWU filed a s 240 application in the Commission in relation to bargaining for an enterprise agreement to replace the Unanderra EA.

[49] On 10 August 2023, Commissioner Riordan conducted a conference, by telephone, in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. Mr Packer and Mr Green did not participate. During the conference the parties outlined the extent to which bargaining had taken place and what they perceived to be the outstanding claims. Commissioner Riordan requested that the parties engage in two further bargaining meetings, which they did on 17 and 24 August 2023. No substantive progress was made at these bargaining meetings.

[50] On 20 September 2023, the TWU sent correspondence to Cleanaway outlining its position in relation to outstanding claims in bargaining, as perceived by the TWU. There is no evidence that the correspondence was sent or provided to Mr Packer or Mr Green. The purported outstanding claims related to:

(a) ordinary hours of work;

(b) weekend penalty rates: Saturday 150% for the first two hours and 200% thereafter and Sunday 200% for all work;

(c) nominal expiry date of the proposed agreement: 30 June 2026; and

(d) wage increases: 4% increase as at 1 June 2022, 4% increase as at 1 June 2023, 3.75% increase as at 1 June 2024, and 3.75% increase as at 1 June 2025.

[51] On 27 September 2023, Cleanaway responded to the TWU's correspondence received on 20 September 2023. There is no evidence that Cleanaway's response was sent or provided to Mr Packer or Mr Green. Cleanaway's response was that:

(a) it did not agree with the TWU's position on ordinary hours of work. Cleanaway proposed a different position in relation to this issue;

(b) it did not agree with the TWU's position on weekend penalties. Cleanaway proposed Saturday 150% for all hours and Sunday 200% for all hours;

(c) it "was happy to agree to … [the TWU's] nominal expiry, though would like to note if we are unable to reach an agreement by the end of 2023 we may need to revisit this expiry date in order to provide the employees and Cleanaway with a period of stability"; and

(d) in relation to wage increases, Cleanway would confirm its "current position in relation to the wage offer at the conference tomorrow. Reviewing the documents that I have on file however it does appear the parties are in agreement on the wage offering".

[52] On 28 September 2023, Commissioner Riordan conducted an in-person conference in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. Neither Mr Packer nor Mr Green participated. The TWU and Cleanaway discussed their positions at the conference. Ms Wisniewska contends that at the conference Cleanway agreed to the TWU's proposal that the agreement have a nominal expiry date of 30 June 2026 and accepted the TWU's proposal in relation to wage increases. Ms White contends that at the conference she stated that wage increases had been agreed subject to overall agreement being reached, but there was still an issue as to whether Cleanaway would provide backpay only on ordinary hours or also on overtime hours worked by employees. Ms White also says that the nominal expiry date of 30 June 2026 was conditionally agreed, with the caveat that an agreement would be finalised by the end of 2023.

[53] On 9 October 2023, the TWU corresponded with Cleanaway in relation to two further claims relating to consultation and dispute resolution for the proposed agreement. There is no evidence that the correspondence was sent or provided to Mr Packer or Mr Green.

[54] On 13 October 2023, Cleanaway provided the TWU with a response to the position put by the TWU September. There is no evidence that Cleanaway's response was sent or provided to Mr Packer or Mr Green. Cleanaway's response included a draft proposed enterprise agreement and an explanation which relevantly stated:

(a) nominal expiry date: "Cleanaway has amended the expiry date to 30 June 2026 in the attached proposed draft";

(b) consultation: Cleanaway proposed a "redrafted version of the current model clause";

(c) dispute resolution: "Cleanaway is happy to agree to include the Dispute Resolution Clause from the current proposed Hillside agreement";

(d) ordinary hours of work: Cleanaway proposed a different clause from the proposal put by the TWU;

(e) weekend penalty rates: Cleanaway proposed that weekend penalties for ordinary hours of work should be 150% for all hours worked on a Saturday and 200% for all hours worked on a Sunday; and

(f) wages: Cleanaway agreed to the TWU's proposed percentage wage increases but stated, "I note there is no position in relation to the back payment component of the above. Cleanaway's position is that this is payable on ordinary hours only".

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

[56] On 18 October 2023, Commissioner Riordan conducted an in-person conference in relation to the TWU's s 240 application. The TWU and Cleanaway participated in the conference. Mr Packer and Mr Green did not participate. The TWU and Cleanaway discussed their positions and requested information about various matters. Cleanaway advised that it

would review its position on outstanding matters and provide a formal response to the TWU by 30 October 2023.

[57] No bargaining meetings have taken place since prior to 18 October 2023.

[58] On 19 October 2023, Cleanaway provided the Bargaining Employees with a memo in relation to the status of bargaining at that time.

[59] On 30 October 2023, Cleanaway provided the TWU with an updated position in relation to outstanding issues in bargaining. There is no evidence that Cleanaway's updated position was sent or provided to Mr Packer or Mr Green. Cleanaway's updated position did not resolve the outstanding claims between the parties, but it did confirm that Cleanaway would agree to pay backpay on all hours worked rather than ordinary hours only. Cleanaway also stated in its correspondence of 30 October 2023 that "our proposal is made on the basis that it is a package and provides a basis to settle all bargaining issues".

[60] Also on 30 October 2023, Cleanaway informed the Commission that it objected to the intractable bargaining declaration application filed by the TWU. Amongst other things, Cleanaway indicated that its position was that there was still more bargaining that could occur and the s 240 proceedings were still being dealt with. There is no evidence that Cleanaway's email sent to the Commission on 30 October 2023 was sent or provided to Mr Packer or Mr Green.

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

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

[62] On 1 November 2023, the TWU conveyed its response to Cleanaway in relation to four proposed terms. There is no evidence that the TWU's response was sent or provided to Mr Packer or Mr Green. The response relevantly stated:

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

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

[63] On 8 November 2023, Cleanaway sought clarification from the TWU as to the outstanding claims in bargaining. There is no evidence that this correspondence was sent or provided to Mr Packer or Mr Green.

[64] At 2:47pm on 13 November 2023, the TWU filed a notice of discontinuance in the Commission in relation to its s 240 application because it believed that bargaining had become intractable. At the time the notice of discontinuance was filed, the s 240 proceedings were not listed for a further conference and Commissioner Riordan had not informed the parties that he expected or required any further step to be taken in the s 240 proceedings, nor had the parties requested that any further step be taken in those proceedings. There is no evidence that the notice of discontinuance was sent or provided to Mr Packer or Mr Green.

[65] At 5:04pm on 13 November 2023, the TWU responded to Cleanaway in relation to what it perceived to be the outstanding claims in bargaining. There is no evidence that this correspondence was sent or provided to Mr Packer or Mr Green.

[66] In about November 2023, 20 Bargaining Employees (including Mr Green) signed a petition in the following terms:

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

[67] On 16 November 2023, Cleanaway sent a memo to the Bargaining Employees to provide them with an update of what was happening in bargaining.

[68] Between 27 and 29 November 2023, Ms White spoke with some of the Bargaining Employees to obtain feedback from them in relation to bargaining for an enterprise agreement to replace the Unanderra EA.

[69] On 1 December 2023, Cleanaway sent an email to the TWU requesting the TWU to agree to an amendment to the coverage clause of the proposed agreement. There is no evidence that this email was sent or provided to Mr Packer or Mr Green.

[70] On 4 December 2023, the TWU informed Cleanaway, by email, that it agreed to the proposed amendment to the coverage clause. There is no evidence that this email was sent or provided to Mr Packer or Mr Green.

[71] On 8 December 2023, Cleanaway proposed to the TWU, in writing, that it grandfather the ordinary hours of work clause in the proposed enterprise agreement for current employees. Cleanaway also proposed an increased wage offer and stated that its "proposal is made on the

basis that it is a package … Cleanaway reserves our right to reconsider our position, including the revised wage offer and backpay arrangements, and potentially make changes including to other items in future". There is no evidence that this correspondence was sent or provided to Mr Packer or Mr Green.

[72] On 13 December 2023, the TWU informed Cleanaway, by email, that "the yard seeks that all employees (both current and future) engaged under the proposed agreement work their ordinary hours Monday to Friday and have the discretion to work Saturdays and Sundays where Cleanaway requires, paid overtime rates". On 14 December 2023, the TWU further explained to Cleanaway, by email, that "the response is that the Unanderra yard does not agree to a clause where there is grandfathering for ordinary hours of work. The yard seeks that ordinary hours are worked Monday to Friday for all employees, which would constitute weekend work as overtime". Later on 14 December 2023, Cleanaway informed the TWU, by email, that it intended to put a proposed agreement to a vote. There is no evidence that the correspondence sent between Cleanaway and the TWU on 13 and 14 December 2023 was sent or provided to Mr Packer or Mr Green.

[73] Also on 14 December 2023, Cleanaway informed the Bargaining Employees, by letter, of the details for the upcoming vote and advised them that:

> "If the majority of employees vote against the Proposed Agreement, the parties will be forced to return back to the negotiation table. This means, all previous negotiated financial and non-financial items may be withdrawn or will be up for renegotiation."

[74] On about 15 December 2023, Cleanaway provided the Bargaining Employees with a further memo to update them in relation to bargaining for a new enterprise agreement.

[75] On 19 December 2023, Cleanaway explained to some employees at the Unanderra depot during a toolbox talk that if the proposal to be voted on by the Bargaining Employees was voted down, all previous negotiated financial and non-financial items may be withdrawn and will be up for renegotiation.

[76] On about 21 December 2023, Cleanaway provided the Bargaining Employees with a further memo in which they were reminded that the offer being made by Cleanaway was a "package of conditions" which may be withdrawn or up for renegotiation if the result of the upcoming vote is "no".

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

[78] On about 21 December 2023, Cleanaway provided the Bargaining Employees with a memo in relation to the outcome of the vote and Cleanaway's position that the proposed agreement was "withdrawn in its entirety".

[79] On 28 December 2023, Cleanaway informed the TWU, by email, that as a result of the proposed enterprise agreement being rejected, Cleanaway withdrew from their positions in their entirety and that all matters remained "on the table". There is no evidence that this correspondence was sent or provided to Mr Packer or Mr Green.

[80] On 16 January 2024, the TWU informed Cleanaway, by email, that it had not been notified that Cleanaway would withdraw the agreed terms of the proposed agreement if the vote was unsuccessful. Cleanaway disputed this claim. There is no evidence that the TWU's correspondence was sent or provided to Mr Packer or Mr Green.

[81] On 24 January 2024, Cleanaway filed a s 240 application in the Commission in relation to bargaining for an enterprise agreement to replace the Unanderra EA. Mr Packer and Mr Green were copied in to the email by which Cleanaway filed the application in the Commission. The application also named Mr Packer and Mr Green, as well as the TWU, as respondents to the application.

[82] Also on 24 January 2024, Cleanaway emailed Mr Packer and Mr Green to inform them that they had been included in Cleanaway's email filing the s 240 application in the Commission because they had both completed bargaining representative nomination forms. Neither Mr Packer nor Mr Green responded to this email from Cleanaway.

[83] On 29 January 2024, Cleanaway provided the Bargaining Employees with a memo explaining what had happened since the unsuccessful vote in December 2023, including their filing of a s 240 application to seek the assistance of the Commission in relation to bargaining for a new agreement.

[84] On 30 January 2024, the TWU sent correspondence to Cleanaway responding to its s 240 application. Notwithstanding that Mr Packer and Mr Green had been named, in their capacity as bargaining representatives, as individual respondents to the s 240 application lodged by Cleanaway in the Commission, there is no evidence that the TWU sent or provided to Mr Packer or Mr Green its 30 January 2024 correspondence to Cleanaway. In this correspondence the TWU, among other things:

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

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

- provided a further explanation in relation to the grandfathering of ordinary hours.

[85] On 8 February 2024, Cleanaway's s 240 application was listed for conference, by telephone, before Deputy President Saunders. Mr Packer and Mr Green were notified of the conference but did not participate in it.

[86] On 15 February 2024, Commissioner Ryan conducted a conference, in person, in relation to the s 240 application filed by Cleanaway. Representatives of Cleanaway and the TWU attended the conference. Mr Packer and Mr Green were notified of the conference but did not attend it. Cleanaway and the TWU spent a few hours in the conference discussing the main outstanding claims and their respective positions, including in relation to ordinary hours of work. Towards the end of the conference, Cleanaway provided Commissioner Ryan with the details of a proposed package that it would be willing to offer. Commission Ryan communicated the proposal to the TWU. The proposal was rejected by the TWU.

[87] On 16 February 2024, Cleanaway provided a memo to the Bargaining Employees which summarised the discussions between Cleanaway and the TWU at the conference on 15 February 2024.

[88] On 21 February 2024, Cleanaway provided the TWU with a further proposed enterprise agreement as a "package … to facilitate discussions". The essential elements of this package had been rejected by the TWU at the conference before Commissioner Ryan on 15 February 2024. Mr Packer and Mr Green were copied in to the email by which Cleanaway communicated its further proposed enterprise agreement to the TWU.

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

[90] On 22 and 23 February 2024, 17 Bargaining Employees (including Mr Packer and Mr Green) signed a petition in the following terms:

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

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

[92] Ms Wisniewska says that the TWU "sought instructions from its members at the Unanderra depot" in relation to Cleanaway's proposal and "their instructions were to reject the further offer". Ms Wisniewska did not give any evidence of any particular communications with Mr Packer or Mr Green in relation to Cleanaway's proposal of 21 February 2024. The TWU provided its written response to the offer to Cleanaway at 2:13pm on 23 February 2024. The response rejected the "package" proposed by Cleanaway. There is no evidence that the TWU's response was sent or provided to Mr Packer or Mr Green.

[93] At 3pm on 23 February 2024, Commissioner Ryan conducted a further conference, by telephone, in relation to Cleanaway's s 240 application. Mr Packer and Mr Green were notified of the conference but did not participate in it. Representatives of both Cleanaway and the TWU

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

[94] We heard the TWU's application for an intractable bargaining declaration on 26 and 27 February 2024.

[95] On 1 March 2024, Cleanaway provided the TWU with a further proposed enterprise agreement as a "package … to facilitate discussions … If there is no agreement on all matters set out in the enclosed draft, then none of the enclosed draft agreement will be regarded as agreed by Cleanaway. To avoid any doubt, we specifically confirm that this package is put on the basis nothing is agreed unless everything is agreed". Mr Packer and Mr Green were copied in to the email by which Cleanaway communicated its further proposed enterprise agreement to the TWU.

[96] On 1 March 2024, Cleanaway also provided the Bargaining Employees, including Mr Packer and Mr Green, with its further proposed agreement as a "package".

[97] Ms Wisniewska forwarded Cleanaway's 1 March 2024 proposal to the TWU bargaining committee for the Unanderra depot. They instructed Ms Wisniewska to reject the proposal.

[98] On 5 March 2024, at Cleanaway's request, Commissioner Ryan listed the matter for conference on 15 March 2024. Mr Packer and Mr Green were notified of that listing.

[99] On 7 March 2024, we made an intractable bargaining declaration in relation to the Unanderra depot. We also determined that there would be a 21 day post-declaration negotiating period.

[100] On 8 March 2024, Cleanaway provided the Bargaining Employees with a memo updating them in relation to bargaining, including the "package of terms and conditions" put forward by Cleanaway on 1 March 2024.

[101] The parties agreed that the conference before Commissioner Ryan on 15 March 2024 would be the first post-declaration negotiation period meeting. Representatives of the TWU and Cleanaway attended the conference on 15 March 2024. Mr Packer and Mr Green did not attend. A number of outstanding claims were discussed during the conference on 15 March 2024.

[102] On 15 March 2024, Cleanaway provided the Bargaining Employees with a memo providing a brief overview of what had been discussed at the conference before the Commission earlier that day.

[103] On 18 and 19 March 2024, emails were exchanged between Cleanaway and the TWU in relation to some allowances. There is no evidence that these emails were sent or provided to Mr Packer or Mr Green.

[104] On 26 March 2024, a further conference was held before Commissioner Ryan. Representatives of the TWU and Cleanaway attended the conference. Mr Packer and Mr Green did not attend. Prior to the conference on 26 March 2024, Ms Wisniewska sought "instructions from TWU members" but does not state that she had any communications with Mr Packer or Mr Green in relation to these "instructions".

[105] During the conference on 26 March 2024, a number of outstanding claims were discussed by the TWU and Cleanaway. Both the TWU and Cleanaway requested that Commissioner Ryan issue a statement setting out the matters that were not agreed in relation to bargaining for an enterprise agreement to replace the Unanderra EA. Commissioner Ryan agreed. The TWU and Cleanaway then informed Commissioner Ryan of the matters that they believed had not been agreed. Later on 26 March 2024, Commissioner Ryan issued a draft statement to the TWU and Cleanaway. The draft statement was not sent to Mr Packer or Mr Green. The TWU and Cleanaway conferred, by email, about the draft statement and made suggested edits in an email to the chambers of Commissioner Ryan on 28 March 2024. There is no evidence that the conferral emails between Cleanaway and the TWU or the subsequent email that was sent to the chambers of Commissioner Ryan were sent or provided to Mr Packer or Mr Green.

[106] The post-declaration negotiating period ended on 28 March 2024.

[107] At 10:34am on 2 April 2024, Commissioner Ryan's associate sent an email to the TWU, Cleanaway, Mr Packer and Mr Green attaching a statement made by Commissioner Ryan, noting that the matters still at issue at the end of the post-declaration negotiating period were:

(a) nominal expiry date;

(b) consultation in relation to major workplace change;

(c) dispute resolution;

(d) classifications;

(e) wage rate increases, including any retrospective wage rate increases and wage rate increases during the life of the agreement;

(f) ordinary hours of work, including maximum daily and weekly hours, the spread of hours and weekend penalty rates;

(g) redundancy;

(h) annual leave loading; and

(i) consultative committee.

Consideration re "agreed terms"

[108] In accordance with s 274(3) of the Act, the three critical dates for analysis of "agreed terms" in this matter are:

(a) 16 October 2023, when the TWU filed its application for an intractable bargaining declaration in the Commission;

(b) 7 March 2024, when the intractable bargaining declaration was made; and

(c) 28 March 2024, when the post declaration negotiating period ended.

[109] As to 16 October 2023:

(a) the TWU contends that at the time it sent its correspondence to Cleanaway on 20 September 2023 all matters other than the "outstanding claims" addressed in that correspondence (ordinary hours of work, weekend penalty rates, nominal expiry date and wage increases) were agreed. The TWU then relies on correspondence between Cleanaway and the TWU dated 20 September 2023, 27 September 2023, 9 October 2023 and 13 October 2023 (and the attachments thereto), together with communications between Cleanaway and the TWU at a conference before Commissioner Riordan on 28 September 2023, to support its contention that it and Cleanaway had agreed, as at 16 October 2023, to all terms (including wage increases, dispute resolution and the nominal expiry date) of the proposed agreement save for the terms set out in Cleanaway's correspondence to the TWU of 13 October 2023, including ordinary hours, weekend penalties, consultation, classifications, redundancy and grandfathered annual leave loading. The TWU submits that, assessed practically and realistically, if there was a meeting of the minds between the TWU and Cleanaway then there was a meeting of the minds of all four bargaining representatives because Mr Packer and Mr Green did not participate in bargaining and their interests were represented by the TWU;

(b) Cleanaway submits that there are no "agreed terms" within the meaning of s 274(3) of the Act. One of Cleanaway's arguments in support of this contention is that no agreement was ever reached between all four bargaining representatives. Cleanaway submits that the TWU cannot rely on its correspondence – written on behalf of those employees for whom it was then the bargaining representative – as demonstrating the agreement, or otherwise, or Mr Packer and Mr Green, to anything contained in the TWU's or Cleanaway's correspondence. This is because, by reason of s 176(1)(a) and (c) of the Act, the TWU did not represent Mr Packer or Mr Green. Further, Cleanaway submits that the most recent correspondence (prior to the critical date of 16 October 2023), to which Cleanaway was a party and which was provided to Mr Packer and Mr Green is a Cleanaway letter dated 11 July 2023 to all Bargaining Employees, enclosing a proposed agreement to be submitted for an employee ballot. That letter, so Cleanaway submits:

- was clearly conditional in its terms: "Please note, if the majority of employees vote against the Proposed Agreement, the parties will be forced to return back to the negotiation table. This means, all previous negotiated financial and non-financial items may be withdrawn or will be up for renegotiation";

- attached a proposed agreement which included terms quite different from the terms which the TWU contends are "agreed terms";

- was followed up by a toolbox talk meeting on 13 July 2023, attended by both Mr Packer and Mr Green, at which Cleanaway stated that "if the majority of employees vote against the proposed agreement, the parties will be forced to return back to the negotiation table. This means, all previous negotiated financial and non-financial items may be withdrawn and will be up for renegotiation";

- was followed up by employees voting not to accept Cleanaway's proposed agreement; and

- finally, was followed by a memo to employees on 21 July 2023 which stated among other things, that:

> "As a consequence of this voting result, management and the Bargaining Representatives may now be forced to return back to the negotiation table to renegotiate the Proposed Agreement's terms and conditions. This means that the Company will now seek to review its bargaining position and options. As was communicated to employee representatives, if the Agreement wasn't supported at the first vote, Cleanaway would not be offering back pay.
>
> To avoid any doubt, the commencement of a new renegotiation period means that all previous negotiated financial and non-financial items are withdrawn or renegotiated…"

[110] In our view, prior to the TWU's correspondence to Cleanaway on 20 September 2023, the evidence does not reveal any agreement between all four bargaining representatives on any terms. Cleanaway put a proposed agreement to a vote on 21 July 2023. The Bargaining Employees voted not to make an agreement in those terms. Cleanaway made it very clear to the Bargaining Employees, including Mr Packer and Mr Green, both before and after the vote, that if its proposed agreement was not approved by a majority of Bargaining Employees then "all previous negotiated financial and non-financial items are withdrawn or renegotiated".

[111] The evidence does not establish that Mr Packer or Mr Green were sent or provided with a copy of the correspondence which passed between Cleanaway and the TWU on 20 September 2023, 27 September 2023, 9 October 2023 and 13 October 2023. Nor were Mr Packer or Mr Green present during discussions between Cleanaway and the TWU at the conference on 28 September 2023. Subject to the contention that the TWU was representing Mr Packer and Mr Green (which we deal with below), absent knowledge of the communications between Cleanaway and the TWU in the period from 20 September 2023 to 13 October 2023 and the proposals put forward in those communications, it could not be found, as a matter of fact, that

Mr Packer or Mr Green agreed with any of the proposals put by Cleanaway or the TWU at any time in the period from 20 September 2023 to 13 October 2023. There is no evidence on which a reasonable person could form the view that Mr Packer or Mr Green were "of one mind" with the TWU and Cleanaway, as at 16 October 2023, in relation to any "term" that "should be included in the agreement".

[112] The TWU was not the bargaining representative of Mr Packer or Mr Green at any time during negotiations for an enterprise agreement to replace the Unanderra EA. That is because they each appointed themselves as their own bargaining representative and did not revoke those appointments (s 176(1)(b) & (c) of the Act). While it may be possible for a union to act as the agent for one or more of its members who have appointed themselves as their bargaining representatives for the purpose of putting a particular proposal, or responding to a particular proposal, in bargaining, the relationship of principal and agent would have to be established on the evidence. As Justice Brooking observed in *Ryan v Textile Clothing & Footwear Union*:[5]

> "There is no reason in theory why a trade union could not, in making an agreement with an employer dealing with terms and conditions of employment, do so as agent for some or all of its members. It will usually be found, however, that there are great if not insuperable difficulties, in a given case, in treating a trade union as acting as agent in entering into a collective agreement."

[113] In the present case, on no view of the evidence could it be found that Mr Packer or Mr Green authorised the TWU to act on their behalf generally, or in putting or accepting particular proposals, when bargaining with Cleanaway for a new enterprise agreement.[6] The evidence does not reveal that Mr Packer, Mr Green or anybody else said or did anything which could confer actual or apparent authority on the TWU to act on their behalf in bargaining with Cleanaway. At no time did Mr Packer or Mr Green inform Cleanaway that the TWU was representing them in bargaining, nor did the TWU inform Cleanaway that it was representing Mr Packer and Mr Green in bargaining. It is not enough that Mr Packer and Mr Green held an uncommunicated subjective belief or understanding that the TWU would represent them in bargaining once they became members of the TWU. The holding of such an uncommunicated belief or understanding did not authorise the TWU to act as their agent in negotiations with Cleanaway.

[114] We do not accept the assertion contained in Mr Stephen's reply witness statement that the "interests" of Mr Packer and Mr Green "have been represented by the TWU bargaining committee" since they became members of the TWU. Mr Stephen did not give any evidence as to which "interests" he was referring or the basis on which it could be found that the TWU bargaining committee had any authority to represent those "interests" in circumstances where Mr Packer and Mr Green had each appointed themselves as their own bargaining representatives.

[115] Evidence given by Mr Packer and Mr Green in their witness statements made on 27 May 2024 that they have always agreed with the TWU's claim for wage increases, as well as other claims made by the TWU during bargaining with Cleanaway, is irrelevant because it amounts to evidence of an uncommunicated subjective intention. As explained above, the assessment of whether a term is "agreed" requires an objective assessment of what was said and done by each person who allegedly "agreed" to a term.[7] It is not a question of what each

party subjectively believed (or believes) was agreed. A party's uncommunicated subjective intention is not relevant to determining whether a term was objectively agreed.[8]

[116] It follows that there were no terms that all four bargaining representatives for the proposed agreement had agreed, at the time the TWU made its application for an intractable bargaining declaration on 16 October 2023, should be included in the agreement.

[117] As to 7 March 2024, the TWU submits that although on 28 December 2024 Cleanaway purported to withdraw its "agreement" to all previously held bargaining positions in communications with both the Bargaining Employees and the TWU, this did not have any impact on the terms to which the TWU contends Cleanaway had agreed by 16 October 2023. We take this submission to be an acceptance that there were no "agreed terms" when the intractable bargaining declaration was made on 7 March 2024. In any event, the evidence does not support a finding that all four bargaining representatives agreed, at the time the intractable bargaining declaration was made, that any terms should be included in the agreement.

[118] As to 28 March 2024, the TWU contends that the parties agreed that all issues other than those outlined in the statement issued by Commissioner Ryan on 2 April 2024 were agreed. We disagree. On no view of the evidence could it be found that, as at 28 March 2024, Mr Packer or Mr Green agreed to any terms. They were not involved in any of the conferences before Commissioner Ryan at which Cleanaway and the TWU discussed their positions and what remained in dispute between them. Nor were they sent or provided with copies of the correspondence which passed between Cleanaway and the TWU in relation to those matters. There is no evidence as to whether Mr Packer or Mr Green agreed that the matters described in Commissioner Ryan's statement were in issue or the only matters in issue. We also reject, for the reasons set out above, that the TWU was representing Mr Packer or Mr Green at the time the TWU agreed with Cleanaway on the list of outstanding matters to be included in Commissioner Ryan's statement. The evidence does not support a finding that all four bargaining representatives agreed, at the time post-declaration negotiating period came to an end on 28 March 2024, that any terms should be included in the agreement.

[119] Accordingly, there are no "agreed terms" within the meaning of s 274(3) of the Act. Notwithstanding this, Cleanaway and the TWU have agreed during the course of these proceedings that all terms other than those listed in paragraph [125] below are not in dispute and should be included in the workplace determination in the terms agreed between Cleanaway and the TWU. We are satisfied that each of those terms meet the requirements of ss 270, 270A, 271, 272, 273 and 275 of the Act and should be included in the workplace determination. For completeness, we note that there is no evidence from Mr Packer or Mr Green in relation to their views concerning these non-disputed terms.

[120] Cleanaway accepted during closing submissions that it was "not ideal" for there to have been a bargaining process in which two individual bargaining representatives did not actively participate in bargaining and this may have unravelled matters potentially agreed between the TWU and Cleanaway. We agree with that description.

[121] The NERR was issued to employees on 14 November 2022. The first bargaining meeting took place between Cleanaway and the TWU on 16 November 2022. The following two days, on 17 and 18 November 2022, Mr Packer and Mr Green appointed themselves, in

writing, as their own bargaining representatives. There is no evidence that establishes that Mr Packer or Mr Green had ever been involved in bargaining for an enterprise agreement prior to appointing themselves as bargaining representatives or that they were aware of their rights and obligations as bargaining representatives. In contrast, Cleanaway has extensive experience in enterprise bargaining as evidenced by the more than 100 enterprise agreements which currently apply to various parts of its workforce.

[122] Cleanaway was required by s 228 of the Act to recognise and bargain with Mr Packer and Mr Green for an enterprise agreement. There is no evidence that Cleanaway ever bargained with Mr Packer or Mr Green. The first occasion that Cleanaway recognised Mr Packer and Mr Green as bargaining representatives was when it made an application to the Commission under s 240 of the Act on 24 January 2024, 14 months after bargaining commenced.

[123] Clearly, Cleanaway should have notified the TWU about the two individual employee bargaining representatives shortly after they appointed themselves as bargaining representatives to enable the TWU to meet its good faith bargaining obligations to the two individuals. There are various courses of action the TWU may have taken if it was aware of the two individual bargaining representatives during the bargaining process. The good faith bargaining obligations cannot sensibly operate unless the bargaining representatives are aware of who the other bargaining representatives are. Further, once the TWU was aware (at the latest, by January 2024) that Mr Packer and Mr Green were individual bargaining representatives, there are steps the TWU could and should have taken to involve them in bargaining or seek their response or concurrence to various claims advanced during bargaining.

[124] This decision also does not stand for a general proposition that silence and inactivity from bargaining representatives will always be taken to mean they have not agreed to any claims. Each case will turn on its facts. In this case, there was no evidence that Mr Packer and Mr Green notified anybody about their apparent desire to be represented by the TWU after they became members. Even the witness statements provided by Mr Packer and Mr Green only provided evidence at a very high level about the TWU's claims. There was no evidence, for example, that Mr Packer and Mr Green had any specific knowledge or understanding of the TWU's claim concerning the dispute resolution procedure, even at the time of the hearing. Although Cleanaway accepted it reached agreement with the TWU in relation to the dispute resolution procedure, we cannot conclude that Mr Packer and Mr Green also agreed in relation to the dispute resolution procedure given the lack of evidence.

Disputed terms

[125] The following terms remain in dispute between the TWU and Cleanaway:

(a) ordinary hours of work, including maximum daily and weekly hours, the spread of hours and weekend penalty rates;

(b) dispute resolution procedure;

(c) wage increases;

(d) redundancy;

(e) classifications; and

(f) nominal expiry date.

Section 275 factors

[126] In determining the terms which remain in dispute, we must take into account the non-exhaustive list of factors set out in s 275 of the Act.

[127] In relation to the s 275 factors, we make the following general observations, which we have taken into account, where relevant, in determining the remaining terms in dispute:

(a) the merits of the case involves setting out the respective cases advanced by the parties and our analysis and conclusions concerning the merits.[9] We have undertaken this exercise below in relation to our consideration of the six matters at issue;

(b) it is clear from the phrase "employees who will be covered by the declaration" in s 275(c) of the Act that consideration must be given to the interests of future employees, not just current employees. The interests of employees who will be covered by the workplace declaration we will make include obtaining wage increases which enable them to meet their costs of living, having regular and predictable hours of work, (for current employees and some potential future employees) working their ordinary hours from Monday to Friday and being able to supplement their income through working overtime on the weekend if they wish to do so, and (for some potential future employees) working ordinary hours from Monday to Sunday in order to meet their own family and personal needs or desires;

(c) the interests of Cleanaway include the ability to meet the needs of its customers, 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 diverse workforce which includes employees who wish to work ordinary hours on a weekend, to have a reliable and available pool of direct employees to work shifts on a weekend, to attract new and potentially more diverse entrants to the workforce at the Unanderra depot, to have a flexible and productive workforce, and to reduce the reliance on overtime in order to mitigate driver fatigue and ensure a safe working environment;

(d) the Unanderra EA contains a number of terms and conditions that benefit or impact Cleanaway and the Bargaining Employees in different but significant respects. We address these existing provisions below when considering the matters that remain at issue between the TWU and Cleanaway;

(e) consideration of the public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the Act. It refers to matters that may affect the public as a whole such as the achievement or otherwise of the objects of the Act, employment levels, inflation and the maintenance of appropriate industrial

standards.[10] The public interest is distinct from the interests of the parties, though the considerations may overlap. In the present case, matters relevant to the public interest include job security, increasing opportunities for permanent employment for all members of the community (including persons who may wish to work ordinary hours on weekends to meet their own personal and family circumstances), appropriate and timely management of waste, and the competitiveness of employers that operate in the waste management industry;

(f) the terms of a workplace determination may enhance productivity, worsen productivity or have no material bearing on productivity in the workplace. The term 'productivity' as used in s 275 of the Act is directed to the conventional economic concept of the quantity of output relative to the quantity of inputs.[11] Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.[12] For the reasons set out below, the workplace determination we will make in this matter will largely be a rollover of the Unanderra EA. We have taken this into account in making our evaluative assessment as to the terms that should be included in the workplace determination;

(g) neither party contended that the conduct of any bargaining representatives for the proposed enterprise agreement was unreasonable or contravened the good faith bargaining requirements during bargaining; and

(h) matters such as when the final wage increase takes effect may have an impact on the incentives to bargain at a later time. We have taken this factor into account where relevant in relation to the six remaining matters at issue.

Ordinary hours of work

[128] The TWU effectively seeks that the ordinary hours of work provisions in the Unanderra EA (including maximum daily and weekly hours, the spread of hours and weekend penalty rates) be replicated in the workplace determination. Those terms provide:

"**21. HOURS OF WORK**

(a) 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.

(b) The maximum daily ordinary hours will be 8 hours.

(c) Subject to the exemption hereinafter contained the ordinary hours of work shall be worked on any day Monday to Friday between the hours of 4.00 am and 5.00 pm.

(d) For public holidays only, the spread of hours (i.e. 4.00 a.m. to 5.00 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.

(e) 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.

…

25. OVERTIME

…

(d) Employees will be given the following overtime rates for overtime:

(i) Time and a half for the first 2 hours and then double time.

(ii) All work on Saturday, time and a half for the first 2 hours and then double time with a minimum of 4 hours payment except where such overtime is continuous with overtime commenced on the previous day.

(iii) All work on Sunday, double time with a minimum of 4 hours payment."

[129] Cleanaway seeks that the ordinary hours of work (including maximum daily and weekly hours, the spread of hours and weekend penalty rates) terms of the workplace determination provide for:

(a) ordinary hours from 4am to 5pm Monday to Sunday, with an option for employees to elect to work ordinary hours Monday to Friday 4am to 5pm in accordance with the terms of Cleanaway's draft clause 20;

(b) maximum daily ordinary hours of work 9.5 hours; 8 ordinary hours for employees on a 5:2 roster; and

(c) penalty rates for ordinary hours worked on weekends to be 150% on Saturday and 200% on Sunday.

[130] The relevant clauses in Cleanaway's proposed workplace determination are in the following terms:

"HOURS OF WORK AND RELATED MATTERS

20.1 Ordinary Hours of Work

20.1.1 The ordinary hours of work of a full time Employee are an average of 38 hours per week.

20.1.2 The average of 38 ordinary hours per week, over a period of not more than 28 consecutive days.

20.1.3 The maximum ordinary hours of work will not exceed 9.5 hours in a single day, unless an employee is rostered on a 5:2 roster. In a 5:2 roster arrangement, the maximum ordinary hours will not exceed 8 hours in a single day

20.2 Spread of Hours

20.2.1 Subject to the exemptions hereinafter contained the ordinary hours of work shall be worked on any day Monday to Sunday between the hours of 4.00 a.m. and 5.00 p.m.

20.2.2 (**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 4.00 a.m. and 5.00 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. Unless an election is made to the contrary, any current employee as at the date of the commencement of this workplace determination will be treated as having elected to work their ordinary hours as they are currently working, and in those circumstances the 28 days' notice requirement is to have no application. The requirement to give 28 days' notice also does not apply to an election made by an new employee on or before commencement of their employment. 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 Workplace Determination (to avoid doubt, additional elections or withdrawals may be made by agreement with the Company).

20.2.3 An election or a withdrawal on an election pursuant to sub-clause 20.2.2 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 20.2.2.

20.2.4 **(Monday-Sunday Ordinary Hours for converting regular casual weekend workers)** A permanent Employee employed as such after the date this Workplace Determination commences operation where the Employee has worked as casual employee regularly performing work on Saturday and/or Sunday will not be eligible to make an election under sub-clause 20.2.2 for a period of 3 years' continuous service as a permanent employee of the Company (other than by agreement with Cleanaway)

20.2.5 For public holidays only, the spread of hours (i.e. 4.00 a.m. and 5.00 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.

20.2.6 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.

20.2.7 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.

20.3 Rostering of Start and Finish Times

20.3.1 A roster will be prepared by the Company and will be posted in a conspicuous place and will be readily accessible to the Employees concerned. The roster will clearly show the Employee's shift commencement and finishing times against each Employee's name.

20.3.2 The roster or shift arrangements may be altered by the parties' consent at any time or by amendment of the roster or shift arrangement by giving the affected Employees seven (7) days' notice.

20.3.3 Where an Employee's rostered day off or scheduled day(s) off are required to be changed to meet the operational requirements of the business, the parties may consent to the change at any time or by the Company giving the affected Employees reasonable notice of the change.

21 WEEKEND PENALTIES (ORDINARY HOURS)

21.1 The Company may roster an Employee to perform their ordinary hours of work on Saturday or Sunday to meet the operational requirements of the business and its clients.

21.2 Weekend work will be paid the following weekend penalty rates:

Work Pattern	**150% - Base Rate of Pay**	**200% - Base Rate of Pay**
Between midnight Friday and midnight Saturday	All hours	-
Between midnight Saturday and midnight Sunday	-	All Hours

21.3 An Employee required by the Company to work weekend work shall be paid for a minimum of four (4) hours of work."

Section 270A

[131] The TWU submits that the hours of work provisions for which Cleanaway contends offend s 270A of the Act. Before considering that argument we wish to make some observations about the proper construction of s 270A.

[132] The starting point in construing legislation is to construe the words of the statute according to their ordinary meaning having regard to their context and legislative purpose.

Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy and the legislative history.[13]

[133] The plurality in *SZTAL v Minister for Immigration and Border Protection*[14] succinctly described the contemporary approach to statutory construction:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[15] (footnotes omitted)

[134] Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires the Commission to prefer a construction of a provision which best gives effect to the legislative purpose over any other interpretation.[16] Hence, if it is open to construe a provision in more than one way, the construction which will best promote the purpose of the provision must be adopted.[17]

[135] The purpose of s 270A is apparent from its terms. It is to regulate the content of terms to be included by the Commission in a workplace determination that are "still at issue" and to do so by requiring that, in relation to those particular terms, employees and any employee organisation that was a bargaining representative of those employees cannot be worse off than they were under a term of a current enterprise agreement.

[136] In order for the protection afforded by s 270A to apply, there must be an enterprise agreement that applies, immediately before the workplace determination is made, to one or more employees who will be covered by the determination (s 270A(1)).

[137] Subsection 270A(2) establishes a rule that applies to a term of a workplace determination if the term was included in the determination because it was "still at issue" after the end of the post-declaration period or, if there was no such period, after making the intractable bargaining declaration. The rule requires that such a term "must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter". The expression "those employees" in s 270A(2) is clearly a reference to the employees to whom an enterprise agreement applied immediately before the determination was made (s 270A(1)). It follows that the focus of s 270A is on current employees, not potential future employees. The concept of "less favourable" means "less advantageous" or "less beneficial".

[138] Although the requirement of a term under a workplace determination being not less favourable must apply to *each* of the employees to whom an enterprise agreement applied immediately before the determination was made, subsection 270A(3) is a facilitative provision that enables the Commission to assume, absent evidence to the contrary, that if a term to be included in the determination is not less favourable to a class of employees then it is not less favourable to an employee who belongs to that class of employees.

[139] The protection afforded to employees and their union bargaining representatives by s 270A(2) does not apply to a term of the workplace determination that provides for a wage increase (s 270A(4)).

Application of s 270A to ordinary hours terms

[140] We are satisfied that the ordinary hours of work (including maximum daily and weekly hours, the spread of hours and weekend penalty rates) terms proposed by Cleanaway are less favourable to Bargaining Employees than the relevant terms of the Unanderra EA. First, Cleanaway's proposal increases the maximum number of ordinary hours which an employee may work in a single day from 8 to 9.5 hours. Although the cap of 9.5 hours per day does not apply to an employee who is rostered on a 5:2 roster, Cleanaway's proposed workplace determination permits employee rosters to be unilaterally amended by Cleanaway, after consultation with affected employees, on seven days' notice to those employees (clauses 9 and 20.3.2 of Cleanaway's proposed workplace determination). Accordingly, under Cleanaway's proposal a Bargaining Employee who is currently rostered on a 5:2 roster may in the future have their roster changed unilaterally by Cleanaway to, say, a 4:3 roster, in which case they will not become entitled to overtime unless they work more than 9.5 hours in a day. Some Bargaining Employees may be willing to trade off longer ordinary hours of work each day for the opportunity to work a compressed working week (e.g. a 4:3 roster), but other Bargaining Employees would be likely to find Cleanaway's proposal less favourable than the current regime under the Unanderra EA, which entitles them to be paid overtime once they work 8 hours in a day.

[141] Secondly, the evidence demonstrates that the Bargaining Employees want to work their ordinary hours on Monday to Friday. We accept Cleanaway's submission that the desires of at least some of those Bargaining Employees may change in the future such that they wish to work some of their ordinary hours on a weekend. Cleanaway's proposed workplace determination facilitates this choice by permitting employees to work ordinary hours on any day Monday to Sunday. We do not accept the TWU's submission that employees can only make the election to work Monday to Friday if they have particular personal or family circumstances. Proposed clause 20.2.2 confers a right on a permanent employee to "elect in writing for their ordinary hours to be worked on any day Monday to Friday". The election must be made "having regard to their personal or family circumstances", but those "personal or family circumstances" do not need to be at a particular level or threshold to justify the election. The need to have regard to personal or family circumstances does not apply to persons employed by Cleanaway at the time the workplace determination is made, because they will be treated as having elected to work their ordinary hours as they are currently working unless an election is made to the contrary. Although the flexibility associated with a choice to work ordinary hours on any day of the week may be viewed as favourable to Bargaining Employees who may wish to make such a choice in the future, we consider that the constraints and limitations imposed by proposed clause 20.2 outweigh the advantage or benefit associated with such a choice. In particular:

(a) proposed clause 20.2.2 permits an employee to make an election or the withdrawal of an election once in each full year of operation of the workplace determination, but if the employee wishes to make another election or withdrawal of an election within that year then the agreement of Cleanaway is required;

(b) proposed clause 20.2.4 provides that casual employees who have performed regular work for Cleanaway on a Saturday or Sunday and who are employed by Cleanaway on a permanent basis after the commencement of operation of the workplace determination will not be eligible to make an election under clause 20.2.2 for a period of three years (other than by agreement with Cleanaway);

(c) proposed clause 20.2.2 imposes a waiting period before any election or withdrawal of an election takes effect. The waiting period is until the first pay period commencing 28 days after the election or withdrawal is given in writing; and

(d) Cleanaway's proposal limits the payment of all hours worked by an employee on a Saturday to 150% of their base pay, whereas the Unanderra EA provides for the first two hours worked on a Saturday to be paid at 150%, with the balance of hours worked on a Saturday to be paid at double time.

[142] Thirdly, the current position is that Bargaining Employees are regularly offered to work overtime on weekends. The evidence demonstrates that some of the Bargaining Employees regularly take up those offers, while others do not. The evidence also establishes that Cleanaway will continue to need work undertaken in the Wollongong area on a weekend. If Cleanaway's proposed clauses are included in the workplace determination, then it will be permitted to engage employees who agree to work ordinary hours on a weekend. According to Cleanaway's proposed workplace determination, those employees will be paid 150% of their base pay (plus superannuation) for all hours worked on a Saturday, which is less than Cleanaway's proposed workplace determination overtime rates on a Saturday (150% of the base rate for the first two hours and 200% thereafter). We consider that this pay differential would be likely to result in fewer Saturday overtime shifts being offered to the Bargaining Employees than is currently the case. This would be less favourable to those Bargaining Employees who like to work overtime on a Saturday.

[143] Because Cleanaway's proposed terms concerning ordinary hours and related provisions offend s 270A of the Act, they cannot be included in the workplace determination (s 270A(2) of the Act).

What provisions should be included in the workplace determination re ordinary hours?

[144] We will now consider the arguments advanced in relation to the provisions that should be included in the workplace determination in relation to ordinary hours (including maximum daily and weekly hours, the spread of hours and weekend penalty rates).

[145] The TWU submits that there is no proper evidentiary case advanced by Cleanaway as to why changes need to be made to the current ordinary hours terms of the Unanderra EA. There is, for instance, no evidence of any actual practical or operational issues with the current ordinary hours provision. Nor is there, so the TWU submits, any evidence that such issues may occur in the future or are likely to arise.

[146] The TWU submits that Cleanaway's case is premised, in part, on assertions about what employees might want in terms of flexibility and conjecture about what might happen in the future. The TWU submits that there is no evidence that employees want to work ordinary hours

on Saturdays for less pay than they currently receive. Nor is there any evidence that any new employees are proposed to be employed at the Unanderra depot in the short to medium term (or at all) or that such future prospective hypothetical employees might wish to work ordinary hours on weekends.

[147] It is submitted by the TWU that the relevant class of employees for the purposes of s 275(c) are those who will be covered by the workplace determination. That class is focused, primarily, on those who are covered by the Unanderra EA and who will be covered by the workplace determination. Whilst it is possible that the interests of unknown and unidentified future new employees may be relevant, the TWU submits that it is not clear how their interests will differ from those of current employees and there is no evidence to substantiate any divergences in interests.

[148] The TWU submits that the data relied on by Cleanaway concerning the percentages of males and females who work on different days of the week is so general as to be meaningless in the circumstances of the present case. This data, so the TWU submits, says nothing about the circumstances or wishes of women in the waste management industry including those who may, at some future point, wish to work for Cleanaway. Apart from generalisations and speculation, the TWU submits that there is no evidence that revision of the ordinary hours clause will increase female participation in the workforce at the Unanderra depot. Nor is there evidence that denying employees a 'choice' to work ordinary hours from Monday to Sunday will disproportionately affect women adversely.

[149] The TWU contends that there is nothing preventing Cleanaway from rostering employees to work overtime on weekends if this is reasonable under the Unanderra EA. Nor is there any evidence that Cleanaway could not service current or future anticipated work if it had to roster employees to work overtime on weekends.

[150] The TWU submits that Cleanaway's attempt to assert that individual flexibility agreements are not a solution to the imagined issue of not being able to roster employees to work ordinary hours on weekends is bereft of merit.

[151] The TWU submits that Cleanaway's true reason for its proposed ordinary hours clause is to obtain the power to roster employees to work ordinary hours on weekends and reduce its labour costs. It is submitted that this will not increase productivity because productivity does not concern the price of inputs such as labour.

[152] Cleanaway submits that it desires provisions to be included in the workplace determination which enable employees to choose whether to work ordinary hours on a weekend, for the following reasons:

(a) to enable employees to choose when to work the ordinary hours, so that they may fit their personal and family responsibilities around their working week;

(b) if there is an increase in hours required to be performed from the Unanderra depot on weekends, to enable Cleanaway to service that future demand with directly engaged employees and not to be at risk of not being able to meet that demand because of the current voluntary overtime model in place which the TWU seeks to continue.

Cleanaway says this is important to the securing of existing clients and new clients, and therefore to Cleanaway's ability to provide ongoing direct employment at the Unanderra depot;

(c) to be able to attract new entrants and potentially more diverse entrants to the current workforce at the Unanderra depot (which save for one driver is presently all male) who wish to have the flexibility to work on weekends instead of weekdays, and for whom the requirement to work ordinary hours on a weekday may be a barrier to participation; and

(d) to reduce the reliance on overtime in order to mitigate driver fatigue and the heightened risk of heavy vehicle accidents.

[153] Cleanaway submits that its sustainable middle ground solution provides for ordinary hours to be worked Monday to Sunday, but allows employees, having regard to their personal and family circumstances, to elect in writing for the ordinary hours of work to be Monday to Friday. It is submitted that this approach strikes a balance between the interests of current employees represented by the TWU, the interests of future employees who may seek greater flexibility as to when they perform their work, those employees whose personal and family circumstances allow them to work ordinary hours on Monday to Sunday, and those whose personal and family circumstances restrict them to working ordinary hours on Monday to Sunday, and also the interests of Cleanaway.

[154] Cleanaway points to Australian Bureau of Statistics (***ABS***) data concerning days of the week usually worked by males and females in all jobs, which shows that:

(a) the proportion of males ordinarily working Monday to Friday only (59.6%) is much higher than the proportion of females ordinarily working Monday to Friday only (47.9%); and

(b) the proportion of females ordinarily working other set days (35.4%) is much higher than the proportion of males ordinarily working other set days (24.6%).

[155] Cleanaway submits that this is consistent with the ABS data set dealing with "Barriers and Incentives to Labour Force Participation" aligning with the still notorious common experience that because historically family and carer's responsibilities fall disproportionately upon women, women have a greater need for flexibility in order to facilitate employment.

[156] Cleanaway submits that the ABS data indicates that females in particular highly value working a set number of hours on set days and the ability to work part-time, as do a significant, but lower, percentage of males with young children. The data also indicates that approximately 40% of females and approximately 60% of males find it somewhat important, not important at all or not relevant to be able to work school hours. This indicates that there is a significant proportion of female and male parents of children aged 0 to 14 years old who would be willing to, or would want to, work outside of school hours.

[157] Cleanaway submits that if it were able to engage an employee to work ordinary hours on weekends paid at ordinary rates on the weekend (subject to weekend penalties), this would

enable potential employees and current employees the opportunity to be engaged on a part-time or full-time basis with set working hours on the weekend. It is submitted that this would give employees or potential employees who only want to work weekends, or want the majority of their working hours to be on a weekend, the opportunity to be engaged for set working hours each weekend, which they otherwise would not be offered. It is contended that for some potential employees this could be the deciding factor for them to apply for or accept employment, particularly if access to childcare during the week is problematic.

[158] Cleanaway submits that because female employees are more likely to seek to usually work set days, and those days other than Monday to Friday only, an industrial instrument which restricts the unilateral exercise by employees of a choice in favour of 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. Put another way, it is submitted that an industrial instrument which offers employees the unilateral choice of flexibility to work ordinary hours on Monday to Sunday is much more likely to facilitate much greater female participation in the workforce than one which is limited to the Monday to Friday arrangements of days gone by.

[159] Cleanaway submits that measures which facilitate a possible increase in female participation in the waste management industry are consistent with the statutory objectives in s 3(a) of the Act (promoting gender equality) and s 3(d) (assisting employees to balance their work and family responsibilities by providing for flexible working arrangements) of the Act. It is submitted that it would be in the public interest to pursue an outcome which furthers these objectives.

[160] Cleanaway submits that to deny employees the choice to work ordinary hours on Monday to Sunday will disproportionately affect women adversely and prioritise the interests of the current male-dominated workforce over the interests of females more generally.

[161] Cleanaway submits that if it uses individual flexibility agreements to permit employees to work ordinary hours on a weekend, this is likely to cause tension at the Unanderra depot because there are some employees who like to work overtime on weekends to earn more money. It is also submitted that any reliance on individual flexibility agreements ignores the time, inconvenience and procedural complexity that can arise in respect of such instruments.

[162] Cleanaway submits that productivity would be improved by arrangements which permit it to set and adjust ordinary hours to ensure that the appropriate number of appropriately skilled employees are available to provide all the relevant services required by clients at the times (and days) those services are required. If clients operate and produce waste on weekends, and the collection of that waste is time sensitive for hygienic or logistical reasons, then that is when the waste must be collected for Cleanaway to be able to employ employees to undertake the work. Measures which restrict such flexibility, such as restrictions on the working of ordinary hours on weekends, reduce such productivity and may also have an impact on client outcomes. They may also impact on future employment opportunities for new and existing employees because client needs cannot be met. Cleanaway submits that a workplace determination which would prohibit ordinary hours from being worked on the weekend will be destructive of future productivity improvements.

[163] Cleanaway submits that it should not be more expensive for it to accommodate (or recruit) an employee who wants to work ordinary hours on a weekend because of their personal or family circumstances in contrast to simply having employees work more overtime.

[164] Cleanaway seeks that the relevant term provide for maximum ordinary hours of 9.5 per day, unless the employee works a traditional 5:2 working week. This is to accommodate an arrangement under which an employee might choose to work a compressed working week – say on the basis of a four-day working week. It is submitted that this would increase the flexibility offered by Cleanaway to its employees, to facilitate them working their ordinary hours in a manner consistent with their personal and family circumstances.

[165] Cleanaway also submits that we could vary its proposed ordinary hours provisions to remove any parts that offend s 270A of the Act.

Consideration of ordinary hours and related terms

[166] Cleanaway accepts that its proposed terms concerning ordinary hours and related provisions are *not* necessary for its business. The evidence supports this concession. Cleanaway's contention is that its proposed terms concerning ordinary hours are flexible, provide current and future employees with choice and are otherwise good terms. But those terms are less favourable to the Bargaining Employees than the corresponding terms of the Unanderra EA and there is no evidence that the Bargaining Employees want to work ordinary hours on Saturday for less pay than they currently receive. The evidence of the wishes of the Bargaining Employees is to the contrary. If any of the Bargaining Employees change their mind in the future or Cleanaway employs a person who wishes to work ordinary hours on a weekend, Cleanaway has the option of entering into an individual flexibility agreement to achieve such an outcome. In circumstances where the number of employees in a relatively small workforce such as the Unanderra depot who would wish to work ordinary hours on a weekend is likely to be small, we do not consider that the use of individual flexibility agreements to achieve such an outcome would be unreasonable or impose an unreasonable administrative burden on Cleanaway. Nor do we consider that such use of individual flexibility agreements would be likely to give rise to significant tension at the Unanderra depot.

[167] As to Cleanaway's contention that a workplace determination 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 repeat and rely on the observations made by the Full Bench in *TWU v Cleanaway*[18] (Eskine Park) at [193] to [196].

[168] Taking into account the factors set out in s 275 of the Act, we are satisfied that the ordinary hours provisions of the Unanderra EA (including maximum daily and weekly hours, the spread of hours and weekend penalty rates) should be replicated in the workplace determination. Those terms permit Cleanaway to either continue its current practice of seeking volunteers to work overtime on a weekend or roster employees to work overtime on a weekend provided it is reasonable to do so. We accept Cleanaway's submission that the implementation of the *NSW Government Waste and Sustainable Materials Strategy 2041* is likely to lead to an increase in weekend work at the Unanderra depot,[19] as may demand from current and future clients for weekend services. However, the evidence does not establish that Cleanaway would not be able to service its current or anticipated future work from the Unanderra depot if it had

to either seek volunteers to work overtime on a weekend or roster employees to work such overtime on a weekend. Nor does the evidence establish that any current or projected overtime levels are likely to have a significant impact on employee health, safety or fatigue.

Dispute resolution provision

[169] The issue in dispute between the TWU and Cleanaway is whether a dispute resolution clause providing for arbitration in the absence of the parties in dispute consenting to arbitration can and should be included in the determination. A related issue concerns whether the dispute resolution clause for which Cleanaway contends is, in any event, congruent with s 270A of the Act.

[170] Cleanaway's proposed clause provides for "arbitration by the FWC by agreement between the parties to the dispute".

[171] The TWU's proposed clause provides that "the dispute may be arbitrated by the FWC" without requiring the subsequent consent of both parties.

[172] In *Commonwealth of Australia represented by the Department of Home Affairs (**Home Affairs**)*,[20] a Full Bench of the Commission made the following observations about the inclusion of a non-consensual arbitration provision in a workplace determination made by the Commission:

> "[541] With regard to the issue of arbitration, the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (CFMEU v AIRC) said as follows:
>
> > "There is, however, a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by particular person or body and to accept the decision of that person as binding on them." (Underlining added)
>
> [542] Against that background, and having particular regard to the underlined text in the above extract from the decision in *CFMEU v AIRC*, the Commission is unable to require in a dispute settlement procedure that it determine disputes other than where the parties consent to the Commission doing so. Accordingly, the dispute settlement term to be included in the determination we will make will not provide for arbitration other than where the parties consent to that course of action."

[173] Mr Boncardo submitted, quite properly, on behalf of the TWU, that this Full Bench will follow the decision of the Full Bench in *Home Affairs* at [542] unless there are good reasons to depart from it. In our opinion, there are not.

[174] The Commission is required to have regard to the Constitutional power of the Commonwealth Parliament in interpreting how far provisions such as ss 274(3)(a) and 270A of the Act reach. It is clear from the decision of the Full Bench in *Home Affairs* and the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission*[21] that the legislative power of the Commonwealth does not extend to empowering the Commission to include within a workplace determination a dispute resolution procedure that empowers the Commission to arbitrate a dispute absent the consent of the parties. In the present case, Cleanaway has made very clear that it does not consent to a workplace determination being made which includes a power of arbitration, unless the parties to the particular dispute consent to such arbitration.

[175] Regardless of whether it might be thought that Cleanaway's proposed dispute resolution clause (without compulsory arbitration) is less favourable than the dispute resolution clause in the Unanderra EA, section 270A of the Act cannot, in our opinion, override the limitation on the power of the Commission, as well as the legislative power of the Commonwealth Parliament, as to prevent the imposition on a party to a compulsory arbitration clause to which it does not consent.

[176] For the reasons given and taking into account the s 275 factors, we consider that Cleanaway's proposed clause concerning dispute resolution should be included in the workplace determination.

Wage increases

[177] The TWU and Cleanaway are at issue as to the quantum of any past and future wage increases under the workplace determination and whether any past wage increases should apply to ordinary hours only or all pay afforded to employees.

[178] The Bargaining Employees last received a wage increase in July 2021.

[179] The positions put by the TWU and Cleanaway on wage increases are summarised in the table below:

Year	**TWU position**	**Cleanaway position**
2022	4% on 1 June 2022	Nil
2023	4% on 1 June 2023	Nil
2024	3.75% on 1 June 2024	6% on the date the workplace determination is made
2025	3.75% on 1 June 2025	4% or 3% (if Cleanaway's position on ordinary hours is not accepted). Increase to take effect the first pay period commencing on or after the first anniversary of the commencement of the workplace determination.
2026	4 % on 1 June 2026[22]	4% or 3% (if Cleanaway's position on ordinary hours is not accepted). Increase to take effect the first pay period commencing on or after the first anniversary of the

		commencement of the workplace determination.

[180] The TWU submits that since the Bargaining Employees last received a wage increase in July 2021 the consumer price index (***CPI***) has increased by 13.7%. Further, the TWU submits that interest rates have increased significantly since 1 July 2021, which has impacted those employees who have mortgages. The ABS publishes a Living Cost Index (***LCI***) which takes into account mortgage interest rates and, so the TWU submits, better reflects costs incurred by employees. In the period from September 2021 until 31 December 2023, the LCI has increased by 16.3%. The TWU submits that the CPI is a more appropriate measure than the wage price index (***WPI***) given the WPI is not an indicator of cost of living pressures or the relative value of wages.

[181] The TWU submits that in light of the diminution in the real value of employee wages by inflation, moderate increases of 4% from 1 July 2022 and 1 July 2023 are imperative just to ensure the maintenance of the real value of employee wages and further increases from 1 July 2024 and 1 July 2025 of at least 3.5% are necessary to ensure that employee wages at least keep pace with inflation and that their real value is maintained. The TWU submits that its proposed wage increases are fair and just. It also contends that Cleanaway is a substantial and profitable business and there can be no contention that such increases would present any financial difficulties to it.

[182] The TWU submits that backdating some wage increases is appropriate in circumstances where Cleanaway has received the benefit of employees' labour without having to pay wage increases for a protracted period and Cleanaway itself has (during bargaining) proposed backdating wages.

[183] The TWU submits that there is no proper evidentiary foundation that its proposed wage increases will place Cleanaway at some competitive disadvantage or otherwise have any appreciable impact on Cleanaway. It is submitted that Cleanaway's contention is undermined by the fact that it has proposed wage increases as sought by the TWU.

[184] In summary, Cleanaway submits:

- no backpay should be awarded. Any delay in reaching an agreement is not attributable to Cleanaway but is essentially a result of the lack of agreement on ordinary hours. Cleanaway submits that it genuinely tried to reach an agreement and put a range of different proposals to attempt to break the impasse;

- any backdating of pay increases will have a cost impact on Cleanaway, without any corresponding improvements in productivity. Cleanaway also submits that it will not be able to recover the additional costs of backpay in relation to work that has past, because the price for that work has been set and paid by Cleanaway's customers;

- making an initial higher increase to deal with the delay in bargaining on wage rates is both appropriate and administratively easier than awarding backpay;

- in considering the merits of the case, the interests of Cleanaway and the employees who will be covered by the determination and the public interest, Cleanaway submits that the Full Bench should take into account the impact that wage increases will have on Cleanaway's ability to continue to win tenders at the Unanderra depot. It is submitted that 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. Cleanaway submits that 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, which operates in a highly competitive environment where some of its competitors do not have an enterprise agreement and whose minimum conditions are those set out in the applicable award;

- its wages for a level 6 employee are currently 17% higher than the award, not taking into account the 1 July 2024 award increase of 3.75% and any wage increases to be awarded by the Full Bench in this matter;

- the two main competitors with enterprise agreements that compete with Cleanaway in the Unanderra area are Remondis Illawarra and Veolia Port Kembla. Cleanaway submits that their rates should be treated with caution because they have a different spread of hours to the spread of hours in the Unanderra EA. Cleanaway also points to the fact that two of the main competitors of Cleanaway (JJ Richards and Bingo) do not have enterprise agreements. Cleanaway does not know the rates of pay paid by JJ Richards and Bingo, but has some information to suggest that JJ Richards pays award rates. Cleanaway says that the wage increases proposed by the TWU would put the wages paid to the Bargaining Employees significantly above the average of its competitors' rates;

- there is no reason to simply apply the CPI to the TWU's wage claims. This is especially true when no productivity or flexibility gains can be identified in the TWU's claim. Such benefits will only arise (at least in terms of flexibility) if Cleanaway secures its ordinary hours term. It is submitted that the approach for which the TWU contends would simply promote a wage/price spiral if it was replicated across other determinations; and

- having regard to the RBA February 2024 forecast that WPI and CPI will increase 3.6% and 3.1% respectively from July 2024 to June 2025 and a further 3.2% and 2.6% respectively from July 2025 to June 2026, it is submitted that future increases of 3% is more than appropriate if Cleanaway's position on ordinary hours is not accepted, or 4% if Cleanaway's position on ordinary hours is accepted.

[185] Taking into account the factors set out in s 275 of the Act, we consider that it would be fair and just for the following wage increases to be included in the workplace determination:

(a) an increase of 4% on 1 July 2022;

(b) an increase of 4% on 1 July 2023;

(c) an increase of 3.5% on 1 July 2024;

(d) an increase of 3% on 1 July 2025; and

(e) an increase of 3% on 1 July 2026.

[186] We consider that these wage increases appropriately balance the interests of employees to be covered by the workplace determination and Cleanaway, as well as the public interest. Factored into our determination of past wage increases are the significant increases in living costs which the Bargaining Employees have faced since the nominal expiry of the Unanderra EA, noting that they last received a wage increase in July 2021. In addition, in deciding that it is appropriate to provide for past wage increases we have had regard to the fact that although both the TWU and Cleanaway genuinely tried to reach an agreement, the main reason for the delay in negotiating a new enterprise agreement has been the desire on the part of Cleanaway to change the ordinary hours provisions of the Unanderra EA.

[187] The past wage increases we have determined will only apply to persons who are employed by Cleanaway and covered by the workplace determination at the time it commences operation. We consider it appropriate that those past wage increases apply to all hours worked by those employees, not just their ordinary hours. This is consistent with the position put by Cleanaway on 30 October 2023 and 21 February 2024, albeit as part of its 'package' offer at those times.

[188] In determining the quantum of wage increases we have taken into account that our workplace determination will not improve productivity or flexibility in relation to work undertaken from the Unanderra depot. This fact, together with an expectation of declining inflation in 2025 and 2026,[23] supports our conclusion that wage increases of 3% are appropriate for 2025 and 2026.

[189] We do not consider that the wage increases we have determined will have any significant impact on Cleanaway's competitiveness. The rates to be paid by Cleanaway under the workplace determination will be similar to the rates paid by Remondis Illawarra and a little above those paid by Veolia Port Kembla under their enterprise agreements. The evidence concerning the level of wages paid by JJ Richards and Bingo is limited and does not persuade us that Cleanaway will become uncompetitive by reason of the wage rates to be included in our workplace determination. Furthermore, the question of competitiveness turns largely on the prices to be charged by Cleanaway for its services, not just the wage rates paid by Cleanaway to its employees. Whether Cleanaway will decide to pass on some or all of the wage increases to its customers by way of higher prices for its services will depend on a whole range of factors, including the profit margin it currently earns from providing services to clients. Cleanaway did not adduce evidence of its profit margin, nor did it provide any analysis to demonstrate that an increase in wages of a particular quantum would result in it increasing its prices by a particular amount, which would result in its prices being higher, or significantly higher, than its competitors. Ms White accepted in her evidence that the proposals which Cleanaway had put to the Bargaining Employees during bargaining would ensure that Cleanaway remained competitive. It is important to recognise that those proposals were put on a 'package' basis, part of which included Cleanaway's ordinary hours of work provisions. This must be taken into

account when considering the fact that some of Cleanaway's proposals included the same percentage wage increases as are being sought by the TWU in these proceedings.[24]

[190] The last wage increase under the workplace determination should take effect 12 months prior to the end of the nominal expiration of the workplace determination, so that there is an incentive for the parties to bargain for a new enterprise agreement in the third year of operation of the workplace determination.

Redundancy

[191] There is an issue between the TWU and Cleanaway as to whether an exception from the obligation to pay redundancy where a redundancy arises due to the ordinary and customary turnover of labour in relation to employees covered by 'grandfathered' redundancy entitlements should be included in the workplace determination.

[192] Cleanaway's proposed clause maintains an express exclusion, for "ordinary and customary turnover of labour", in relation to the redundancy definition for employees on a 'grandfathered' and increased redundancy pay scale, being those employed before 7 June 2010. This reflects the current position in the Unanderra EA.

[193] The TWU proposed clause does not contain an express exclusion for "ordinary and customary turnover of labour" for any employees, whether employed before or after 7 June 2010.

[194] Taking into account the factors required by s 275 of the Act, we are of the view that clause 29 of Cleanaway's draft workplace determination should be replicated in the workplace determination made by the Commission. This clause continues the existing exclusion, and explains what it means, in relation to employees engaged prior to 7 June 2010. We do not consider that there is any good reason to vary the effect of the current term.

[195] Cleanaway's proposed term maintains the status quo and hence satisfies s 270A of the Act.

Classifications

[196] The Unanderra EA covers employees from levels 5 to 7. The TWU seeks the same coverage in the workplace determination. Cleanaway seeks an expansion of the coverage to include what are effectively levels 1 to 4 from the Waste Management Award 2020. Cleanaway also proposes the inclusion of an express term that "an Employee's classification will not be reduced unless the Employee is offered and accepts employment at a lower classification".

[197] Taking into account the factors required by s 275 of the Act, we are of the view that the workplace determination should cover levels 1 to 7, as proposed by Cleanaway, and include a term that "an Employee's classification will not be reduced unless the Employee is offered and accepts employment at a lower classification". This would protect all the Bargaining Employees from being downgraded, against their will, to a lower classification. Further, coverage from levels 1 to 7 will ensure that all employees who are covered by the Waste Management Award and work at the Unanderra depot are covered by the one industrial instrument, including a depot

hand in training and a depot hand. There is no sound reason why levels 1 to 4 of the Waste Management Award should be excluded from coverage of the workplace determination.

[198] We are satisfied that the coverage provisions of the workplace determination for which Cleanaway contends are not less favourable to the Bargaining Employees than the coverage provisions of the Unanderra EA. The express protection against unilateral demotion to a lower level will ensure that this is the case.

Nominal expiry date

[199] The TWU seeks a nominal expiry date of 30 June 2026. Cleanaway contends for a nominal expiry date of mid-2027.

[200] Taking into account the s 275 factors, we are of the view that the workplace determination should have a nominal expiry date of 30 June 2027, which will be almost three years after the date on which the determination comes into operation. We consider that a nominal term of almost three years would balance the need to rebuild a fractured relationship between the bargaining parties, together with the benefits associated with a stable set of terms and conditions, against the opportunity and incentive for the parties to bargain again at an appropriate time in the future.

[201] A nominal expiry date of almost three years from commencement is no less favourable than the nominal expiry date of the Unanderra EA, which date has passed.

Delegates' rights term

[202] Both Cleanaway and the TWU have requested an opportunity to be heard in relation to the content of the delegates' rights term which must be included in the workplace determination. They should be given an opportunity to make submissions on that matter.

Conclusion

[203] The TWU and Cleanaway are directed to confer and prepare a workplace determination which accords with our decision in this matter. The draft workplace determination should be filed by 4pm on 24 July 2024.

[204] The following directions are made in relation to the delegates' rights term which must be included in the workplace determination:

(a) by 4pm on 17 July 2024, the TWU must file and serve its proposed delegates' rights term and any submissions in support thereof;

(b) by 4pm on 17 July 2024, if Mr Packer and/or Mr Green wish to be heard in relation to a delegates' rights term, they must file and serve their proposed delegates' rights term and any submissions in support thereof;

(c) by 4pm on 24 July 2024, Cleanaway must file and serve its proposed delegates' rights term and any submissions in support thereof; and

(d) by 4pm on 29 July 2024, the TWU must file and serve any reply submissions in relation to the content of a delegates' rights term to be included in the workplace determination.

DEPUTY PRESIDENT

Appearances:
Mr P. Boncardo, of counsel, appeared for the TWU
Mr J. Bourke KC and Mr B. Avallone, of counsel, appeared for Cleanaway Operations Pty Ltd

Hearing details:
30 May and 6 June 2024 in Sydney

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[1] [2024] FWCFB 127; PR772155

[2] *Fair Work Act 2009* (Cth) s 69 (***Act***)

[3] [2024] FWCFB 43

[4] Court Book at p 1101

[5] [1996] 2 VR 235 at 238

[6] Ibid at 239

[7] *United Firefighters' Union of Australia v Fire Rescue Victoria* at [112], [145]

[8] *Ryeldar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA at [257]-[316]

[9] *Essential Energy Workplace Determination* [2016] FWCFB 7641 at [100]

[10] *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 at [46]

[11] *Schweppes Australia Pty Ltd* [2012] FWAFB 7858 at [45]

[12] Ibid

[13] *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [59]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 at [26]-[37]

[14] [2017] HCA 34 (Kiefel CJ, Nettle and Gordon JJ)

[15] Ibid at [14]; also see *Australian Mines and Metals Association Inc v CFMMEU* [2018] FCAFC 223 at [76] – [86]

[16] *Mills v Meeking* (1990) 169 CLR 214 at 235

[17] *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20]

[18] [2024] FWCFB 287

[19] Cleanaway's supplementary submissions dated 21 June 2024 at [5(a)]

[20] [2019] FWCFB 143

[21] [2000] HCA 16

[22] TWU's supplementary submissions dated 21 June 2024 at [16] and [22]

[23] As stated above, the Reserve Bank expects that WPI and CPI will increase 3.6% and 3.1% respectively from July 2024 to June 2025 and a further 3.2% and 2.6% respectively from July 2025 to June 2026

[24] See, for example Court Book at p 2396