DECISION

Fair Work Act 2009
s.234—Intractable bargaining declaration

United Firefighters' Union of Australia
v
Fire Rescue Victoria
(B2023/771)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON

SYDNEY, 4 OCTOBER 2023

Application for an intractable bargaining declaration in relation to the proposed Fire Rescue Victoria, United Firefighters' Union Operational Staff Agreement 2022.

Introduction and factual background

[1] The United Firefighters' Union of Australia (UFU) has applied for an intractable bargaining declaration pursuant to s 234 of the *Fair Work Act 2009* (Cth) in respect of bargaining with Fire Rescue Victoria (FRV) for the proposed *Fire Rescue Victoria, United Firefighters' Union Operational Staff Agreement 2022* (proposed agreement). FRV is a State Government entity which is responsible for fire safety, fire suppression and fire prevention services and emergency response services in the FRV fire district.[1] FRV agrees that the declaration sought by the UFU should be made. The Victorian Minister for Emergency Services (Minister), being the Minister with statutory responsibility for FRV, also supports the making of the declaration.[2]

[2] The factual background, as relevant to the determination of this matter, is uncontested and straightforward. The UFU relied upon witness statements made by the following persons:

- Peter Marshall, Secretary of the Victorian Branch of the UFU;
- James Kefalas, Senior Station Officer employed by FRV, and UFU representative in bargaining; and
- Laura Campanaro, Industrial Officer Coordinator for the Victorian Branch of the UFU.

[3] FRV relied upon a witness statement made by Jo Crabtree, its Executive Director – People & Culture.

[4] None of these witnesses was required for cross-examination. From these witness statements, the following non-controversial factual narrative may be derived.

[5] FRV commenced on 1 July 2020, absorbing all the functions of the former Metropolitan Fire and Emergency Services Board (MFB) and some of the functions of the Country Fire Authority (CFA). Professional firefighting staff and some non-operational employees previously employed by the MFB and the CFA were transferred to FRV. The *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* (MFB Agreement) and the *Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010* (CFA Agreement) applied to MFB and CFA firefighting staff respectively. The MFB Agreement and the CFA Agreement became transferrable instruments that covered FRV at the time of its commencement. On 26 August 2020, the agreements were varied in the terms set out in the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (2020 Interim Agreement). Informal discussions for a new agreement to replace the 2020 Interim Agreement began in 2020, with the UFU presenting its log of claims in November of that year. On 29 July 2021, FRV informed the UFU that it was required to seek the approval of the Victorian Government to commence formal negotiations in accordance with the Government's 2019 Wages Policy. This approval was eventually given on or around 6 December 2021. FRV issued a notice of representational rights (NERR) pursuant to s 173(1) of the FW Act on 26 April 2022, and 'formal' bargaining commenced from that point.

[6] Partly in conjunction and partly in parallel with the enterprise bargaining process, FRV and the UFU have engaged in discussions concerning the identification and implementation of 'efficiencies' arising from the amalgamation of former MFB and CFA functions into FRV. It appears to have been the expectation of the UFU and FRV that firefighters would be able to share in the cost savings generated by the agreed efficiencies by way of an 'efficiencies allowance' pursuant to 'Pillar 3' of the 2019 Wages Policy. On 1 November 2021, the UFU filed a s 240 application[3] for the Commission to deal with a bargaining dispute concerning the efficiencies issue, and this led to Commissioner Wilson conducting a series of conferences in which the parties engaged in the exercise of costing agreed efficiencies. The UFU discontinued this matter on 26 May 2022.

[7] On 15 August 2022, the UFU filed an application pursuant to s 739 of the FW Act[4] seeking that the Commission determine a dispute under the dispute resolution procedure in the 2020 Interim Agreement concerning its claim for an efficiencies allowance. This matter was also allocated to Commissioner Wilson and, on 20 December 2022, he listed the matter for hearing on 27-28 February and 1-3 March 2023 and made directions for the filing of evidence and submissions.

[8] By about October 2022, the outstanding issues between the parties were small in number but included the major issues of wages, allowances and efficiencies. On 4 November 2022, FRV filed a s 240 application[5] seeking the assistance of the Commission to resolve a bargaining dispute, with nine items (including wages and allowances) said to remain in dispute.[6] The matter was also allocated to Commissioner Wilson, who conducted 11 conciliation conferences in the period from November 2022 to April 2023.

[9] At the commencement of the hearing of the UFU's s 739 application on 27 February 2023, the Minister appeared in the matter and sought leave to intervene in order to submit that the UFU's application was an abuse of process and beyond the Commission's jurisdiction. In a decision issued the same day, for which reasons were published on 7 March 2023,[7]

Commissioner Wilson determined to allow the Minister to intervene on a limited basis. Ultimately, the hearing was adjourned on the basis of an understanding that the parties would focus on bargaining for the proposed agreement and consider the issue of an efficiencies allowance (as well as wages) in that context. However, in his reasons of 7 March 2023, the Commissioner said:

> [40] If the position that bargaining is to be preferred over determination of the Efficiencies Allowance Application through arbitration is to be seriously maintained it is incumbent on the Minister to ensure the wages proposal encompassing the matters within the Efficiencies Allowance application is put to the UFU in bargaining at the earliest opportunity.

[10] At a conference before Commissioner Wilson on 10 March 2023, FRV made an offer of wage increases of 2 per cent per year over three years and a one-off sign-on payment of $1,500. The offer did not include any monetary component in respect of the efficiencies allowance claim pursuant to 'Pillar 3' of the 2019 Wages Policy. FRV indicated, in correspondence dated 14 March 2023, that it had been instructed by the Government not to make any offer in this respect. FRV's correspondence stated:

> On 3 March 2023, FRV sought Government authorisation to make an alternate wages proposal which included a Pillar 3 element, contrary to the instruction from Government set out above. On 8 March 2023, Government reaffirmed its instruction as set out above, confirming that FRV had no authorisation to put forward FRV's alternate wages proposal.
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> In these circumstances, FRV will not make an offer which includes the Pillar 3 efficiencies because it does not have Government authority to do so or Government funding for those items.
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> FRV's position regarding the inclusion of the Pillar 3 efficiency items has changed as a result of Government's instruction set out above. However, it should be noted that throughout bargaining, FRV has consistently maintained the position that wages and allowances are subject to Government Wages Policy and approval.

[11] On 15 March 2023, the UFU sent correspondence to FRV in which it purported to accept the offer of 10 March 2023 'subject to the conditions set out in this letter'. These conditions included provisions of additional annual wage increases, to a cap of 5 per cent, to compensate for any increase in the Consumer Price Index that exceeded 2 per cent. They also included the following:

> … The 19 efficiencies identified in Appendix A (Efficiencies) will be the subject of separate agreement between the Parties and, if unable to be agreed, an arbitration in the Commission to be listed by consent within 6 months after the Agreement comes into operation in order to determine the quantum of each Efficiency item only. The total quantum of Efficiencies agreed or determined by the Commission will be, by agreement, no less than $117 million. The quantum of Efficiencies agreed or determined will thereafter be payable as an allowance backdated to the start of the Agreement. The agreement concerning, or arbitration of, Efficiencies will be an exception to the no extra claims clauses of the Agreement.
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> (footnotes omitted)

[12] In further correspondence to the UFU dated 29 March 2023, FRV stated its position as follows:

FRV's position post the recent Fair Work Commission (FWC) conciliation conference and subsequent conversations between UFU and FRV is:

- FRV confirms that Table 3 contained within the Efficiencies Estimate document, represents efficiencies and there are savings as a result of these efficiencies. FRV recognises that some of these efficiencies have already been achieved as referenced in the document.
- FRV confirms its commitment that such savings would be available to flow to FRV employees.
- Government instruction is that the efficiencies referred to in Table 3, cannot be relied on by FRV under Pillar 3 of the 2019 Wages Policy as it is Government's view that they do not represent 'offsets' (i.e. current expenditure).
- As of 24 February 2023, FRV has been under Government direction not to make a wages offer that includes any additional payment under Pillar 3 of the 2019 Wages Policy. Therefore, FRV's ability to finalise bargaining and make a wages offer with the inclusion of these efficiencies is not possible.
- As such, FRV understands that where the implementation of these efficiencies is no longer agreed, any such savings would no longer be available to flow to employees.

FRV confirms it will continue to bargain in respect of the efficiencies identified in the Efficiencies Estimates document. Noting, any wages offer is subject to government approval. Additionally, FRV is advised by Government that it is currently reviewing its wages policy. FRV hopes to be in a position to provide an updated wage proposal under a new wages policy in the near future.

[13] In April 2023, the Victorian Government issued its new wage policy and enterprise bargaining framework (2023 Wages Policy). Relevantly, under 'Pillar 1' of the 2023 Wages Policy, agencies would only be funded for increases in wages and conditions of 3 per cent per annum plus a lump sum cash payment for new agreements of 0.5 per cent of overall agreement costs. Under 'Pillar 3', additional changes to allowances and other conditions would only be allowed if, among other things, the associated costs were 'funded through appropriate cash offsets or a government approved funding strategy'. Enterprise agreements were prohibited from containing retrospective payments.

[14] On 19 June 2023, Commissioner Wilson issued a statement in which he said, among other things, that the parties had reported that since the last conciliation conference conducted on 27 April 2023, 'all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances'. The Commissioner's statement went on to say:

[3] The constructive flow of bargaining has been assisted by mutual commitments between the main actors in the negotiations, Fire Rescue Victoria (FRV) and the UFU to constructively facilitate the formation of the FRV in July 2020 after the merger of the Metropolitan Fire and Emergency Services with the professional firefighting operations of the Country Fire Authority. The constructive industrial relations climate since 2020 has allowed, so I have been informed in the conciliation conferences held, for significant organisational and operational changes to be made faster than otherwise may be the case and with potentially greater effect, including

> financial effect. The UFU points to these matters as not only a justification for its wages and allowance claims but also as a reminder that continued constructive cooperation cannot be taken for granted. The UFU also points to the fact that cooperation in negotiations has taken place against the fact that the relevant parts of the 2020 Agreement all passed their nominal expiry date no later than 1 July 2019.
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> [4] Shortly before the last conciliation conference, held on 27 April 2023, the Victorian Government announced details of its updated Wages Policy and Enterprise Agreement Framework. Until the new policy was announced in April 2023 and then later documented bargaining on the matter of the union's monetary claims had been unable to progress as there was both a lack of clarity about the quantum of increase that could be considered by FRV as well as that FRV had no authority to put forward a wages proposal for the UFU's consideration.
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> [5] It is no understatement to record that the whole 8-month life of this file has been featured by statements throughout that a comprehensive wages and allowance offer from FRV to the UFU is "imminent". The file started that way, and it remains so now.
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> [6] There is a need for FRV and those who instruct them to take the imminence of a wages proposal beyond rhetoric and make a proposal to the UFU and other employee bargaining representatives in the near future which properly responds to their claims. The publication of the Victorian Government's Wages Policy and Enterprise Agreement Framework clears the way for such an offer to be made and it behoves FRV to ensure an offer is communicated in the very near future.

[15] On 7 July 2023, FRV sent an email to the UFU which relevantly stated:

> … As discussed, FRV has received authority from Government to put a settlement offer to you and other bargaining representatives for the replacement Operational Agreement. We aim to provide you with the offer in writing on Monday 10 July 2023. We will make ourselves available to meet with you on this matter at any time.

[16] However, no offer was communicated to the UFU in accordance with the above indication. On 28 July 2023, the UFU filed its application for an intractable bargaining declaration.

[17] On 7 August 2023, FRV sent the UFU a 'settlement offer' which had been authorised by the Government. The key features of this offer were:

- A four-year agreement with a first pay increase from 1 July 2023.
- Increases to wage and allowances of 3 per cent from 1 July in each of the four years of the agreement.
- A one-off cash payment worth approximately $7,359 for a full-time employee under 'Pillar 1' of the 2023 Wages Policy.
- Four lump sum cash payments to each person over the life of the agreement of approximately $2,021 per year pursuant to 'Pillar 3' of the 2023 Wages Policy, with the first payment payable on 1 July 2023.

[18] Under this offer, there would be no capacity for the Commission to arbitrate extra claims during the life of the agreement. The correspondence communicating the settlement offer concluded by stating:

> The settlement offer will be revised if the FWC makes a determination on the efficiency allowance matter (C2022/5683) or the application for an increase to existing allowances (C2023/2071) that affects allowances for FRV operational staff.
>
> This settlement offer is being put in the context of an overall package, provided on a "without prejudice" basis.
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> FRV will be seeking a s 240 conference with the FWC to enable discussion of the settlement offer.

[19] The UFU rejected the offer the same day in a letter sent to FRV. The letter stated that the settlement offer was 'suggestive of an intention to resile from a number of agreements already made by FRV in the proposed draft agreement', and stated:

> Additionally, your offer fails to recognise or to give effect to the agreement between FRV and the UFU that efficiencies achieved during the creation of the FRV, which were only achieved through UFU co-operation, and were intended by all parties to be utilised to fund wage increases. Those efficiencies on FRV's figures amount to $117m. The increases in your offer come nowhere near that figure. The bad faith involved in this about face, which was detailed in my letters to you of 7 March 2023 and 27 March 2023, has prevented any prospect of genuine agreement being reached in bargaining.
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> Your offer is made on the eve of the first hearing of the UFU's intractable bargaining application (listed on 9 August 2023). Aside from matters related to the increase in quantum of wages and allowances everything else was agreed, and you have gone on record to that effect. This offer is rejected because it is not a genuine offer, it is nothing more than a cynical, disingenuous and transparent attempt to reframe the issues that will be liable to be arbitrated in an intractable bargaining workplace determination. It is seen by the UFU as such and is rejected out of hand.

[20] In letters dated 9 August and 17 August 2023, FRV stated that its preference was to continue negotiations with the assistance of the Commission. In the former letter, FRV

> In the UFU's response to the settlement offer, the UFU also raised concerns that the offer was incompatible with FRV's good faith bargaining obligations on the basis that it resiled from previously agreed matters. FRV has at all times sought to be clear that all matters the subject of bargaining could only be agreed in principle and were subject to Government approval. Bargaining for the Proposed Agreement has at all times been conducted within a framework in which it is understood that any proposed bargaining outcome is ultimately subject to Government approval and funding.
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> While the fact that the settlement offer that has now been approved by Government is conditional on some changes to the approach that the parties had proposed in relation to certain matters is unfortunate, it is consistent with the framework within which bargaining is taking place and is in no way incompatible with good faith bargaining.

[21] This was rejected by the UFU in correspondence dated 18 August 2023. The UFU stated that it considered FRV's proposal to be a 'tactical ploy' and that, '[i]n the absence of any

meaningful engagement from the FRV, the UFU is focussed on the intractable bargaining proceedings and will seek a declaration and a determination on wages and allowances'.

[22] The UFU's members have taken protected industrial action on various occasions during the formal bargaining process in the form of bans and stoppages. None of this has involved any disruption to the provision of emergency services, and Ms Crabtree described the industrial action as not impacting on public safety and 'largely… respectful'.

Statutory framework

[23] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) repealed the former serious breach declaration provisions of the FW Act and replaced them with a new scheme of provisions relating to intractable bargaining declarations,[8] with effect from 6 June 2023. This scheme is contained in Subdivision B of Division 8 of Part 2-4 of the FW Act. Section 234 deals with the circumstances in which an application for an intractable bargaining declaration may be made:

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

[24] Section 235 provides for the Commission's power to make an intractable bargaining declaration, the content of such a determination if made and its temporal operation:

> **235 When the FWC may make an intractable bargaining declaration**
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> *Intractable bargaining declaration*
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> (1) The FWC may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:
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> (a) an application for the declaration has been made; and
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> (b) the FWC is satisfied of the matters set out in subsection (2); and
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> (c) it is after the end of the minimum bargaining period (see subsection (5)).
>
> *Matters of which the FWC must be satisfied before making an intractable bargaining declaration*
>
> (2) The FWC must be satisfied that:

(a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and

(b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and

(c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

What declaration must specify

(3) The declaration must specify:

(a) the date it is made; and

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

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

Operation of declaration

(4) The declaration:

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

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

End of the minimum bargaining period

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

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

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

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

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

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

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

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

[25] Section 235(1) confers upon the Commission a discretionary power to make an intractable bargaining if each of the preconditions described in paragraphs (a), (b) and (c) is met. The precondition in s 235(1)(a) for an application for the declaration to have been made connotes a valid application that conforms with the requirements of s 234.[9] The requirement in s 235(1)(c) is that the 'minimum bargaining period', as defined in ss 235(5) and (6), has ended. This is essentially an issue of fact. In the context of single enterprise bargaining where an existing enterprise agreement(s) applies to any of the employees to be covered by the proposed agreement the subject of bargaining, the minimum bargaining period is the later of:

- the day that is 9 months after the nominal expiry date(s) of the existing agreement(s); or
- the day that is 9 months after the day that bargaining starts, being the 'notification time' for the proposed agreement.

[26] The notification time for a proposed agreement is as set out in s 173(2). Because, under s 173(3), the issue of the NERR in respect of a single-enterprise agreement (other than a greenfields agreement) must occur not later than 14 days after the notification time for such an agreement, the fact that the NERR has been issued will in most conceivable circumstances be a reliable indicator that the notification time has already occurred.

[27] The precondition in s 235(1)(b) requires the Commission to be 'satisfied' as to each of the matters in paragraphs (a)-(c) of s 235(2). The process by which a tribunal does, or does not, reach a state of satisfaction about a prescribed matter involves the making of an evaluative judgment of a discretionary nature. The exercise of discretion involved will be wider where the prescribed matter is one of 'opinion or policy or taste' (as is the case with paragraphs (b) and (c) of s 235(2)) than one of 'objective fact' (paragraph (a)).[10]

[28] As indicated, satisfaction as to s 235(2)(a) simply requires a finding of fact that the Commission has dealt with the dispute about the agreement under s 240 and the applicant for the intractable bargaining declaration has participated in the Commission's processes to deal with the dispute. Section 240 is a provision by which a bargaining representative for a proposed enterprise agreement may apply to the Commission for it to deal with a dispute about the agreement which the bargaining representatives are unable to resolve. Under ss 240(4) and 595, the Commission may deal with such a dispute by mediation, conciliation, making a recommendation or expressing an opinion, and by consent arbitration, and these may be understood as the Commission's 'processes to deal with the dispute' referred to in s 235(2)(a). We note that s 235(2)(a) refers to the Commission having dealt with 'the' dispute about the proposed agreement, not simply 'a' dispute about the agreement. On one view, the use of the definite article suggests that the dispute which the Commission has previously dealt with under s 240 must be the same as the dispute which is said to have caused bargaining to become intractable for the purpose of an application under s 234. However, as will later become apparent, this constructional issue need not be determined in this matter.

[29] Section 235(2)(b) requires the Commission to make an evaluative judgment as to whether there is 'no reasonable prospect of agreement being reached' if an intractable

bargaining declaration is not made. 'No reasonable prospect' is obviously not the same as 'no prospect' in that it does not require a 'certain and concluded determination'[11] that an agreement cannot be reached if a declaration is not made but rather, on the ordinary meaning of the words used, requires an evaluative judgment that it is rationally improbable that an agreement will be reached. Paragraph [846] of the Revised Explanatory Memorandum (REM) for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (SJBP Bill), which explains this provision, is consistent with this approach:

> … This does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance. It is unlikely that the FWC would reach such a state of satisfaction unless the parties had been bargaining for an extended period and had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration. …

[30] Satisfaction in respect of s 235(2)(c) requires the Commission to make a further evaluative judgment, namely that it is reasonable in all the circumstances to make the declaration sought, taking into account the views of the bargaining representatives for the agreement. The 'reasonable in all the circumstances' criterion requires an assessment of what is 'agreeable to reason or sound judgment' in the context of the relevant matters and conditions accompanying the case.[12] The REM for the SJBP Bill gives examples of potentially relevant circumstances as follows:[13]

> This would provide scope for the FWC to, for example, consider the dispute in the context of the whole of the relationship of the parties, the history of the bargaining, the conduct of the parties, the prevailing economic conditions, and the bargaining environment.

[31] The requirement to take into account the views of the bargaining representatives means that their views must be treated as a matter of significance, but not necessarily a determinative consideration, in the assessment of whether it is reasonable in all the circumstances to make the determination sought.

[32] Where the Commission is satisfied as to each of the matters in paragraphs (a)-(c) of s 235(1), it retains a residual discretion ('may make') as to whether an intractable bargaining declaration is actually made. However, it is difficult to identify what discretionary matters might remain for consideration if the Commission has already satisfied itself as to the criteria in s 235(2).

[33] Where an intractable bargaining declaration is made pursuant to s 235, s 235A confers upon the Commission the power to specify a 'post-declaration negotiating period':

> **235A Post-declaration negotiating period**
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> (1) The FWC may, if it considers it appropriate to do so, specify in the declaration a period (the post-declaration negotiating period) that:
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> (a) starts on the day the declaration is made; and
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> (b) ends on:

(i) the day specified by the FWC in the declaration; or

(ii) any later day determined under subsection (2).

Note: The FWC cannot make an intractable bargaining workplace determination during any post-declaration negotiating period (see section 269) but may still provide other assistance during the period, such as conciliation.

(2) The FWC may, if it considers it appropriate to do so and taking into account any views of the bargaining representatives, extend the period referred to in subsection (1) by determining a later day for the purposes of subparagraph (1)(b)(ii).

[34] The discretionary nature of the above provision is in contrast to s 266(3), which requires a 'post-industrial action negotiating period' when a termination of industrial action instrument has been made pursuant to ss 423, 424 or 431. The REM explains that s 235A 'would allow the FWC to, when making an intractable bargaining declaration, specify a period after the making of the declaration for the parties to continue to negotiate with a view to reaching an enterprise agreement before the FWC proceeds to make a workplace determination'.[14] On one view, it would be counter-intuitive to specify a post-declaration negotiating period where the Commission must have already reached satisfied itself pursuant to s 235(2)(b) that there is no reasonable prospect of agreement being reached if a declaration is not made. Notwithstanding this, there may be circumstances which justify the specification of a post-declaration negotiating period, as is illustrated by this case and discussed further below.

[35] If the Commission makes an intractable bargaining declaration, s 269 of the FW Act requires a Full Bench of the Commission to make an 'intractable bargaining workplace determination' as quickly as possible after the end of the post-declaration negotiating period, if one is specified, or otherwise after making the declaration. Section 270 requires such a declaration to include, in addition to the 'core terms' set out in s 272 and the 'mandatory terms' set out in s 273, the 'agreed terms' (s 274(3)) and the terms described in s 270(3). Section 274(3) defines the agreed terms as follows:

274 Agreed terms for workplace determinations
…
Agreed term for an intractable bargaining workplace determination

(3) An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:

(a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates--at the end of the post-declaration negotiating period;

(b) otherwise-- at the time the intractable bargaining declaration was made.

[36] Section 270(3) provides:

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.

[37] It is apparent that the above provisions operate in conjunction with each other — that is, the Commission must make a determination which includes terms which the parties agree should be included in the determination, and terms which deal with the matters remaining in issue. Whether a post-declaration negotiating period is specified in the determination pursuant to s 235A affects this since, if such a period is specified, the agreed terms and the matters in issue are identified as at the end of/after the period, whereas if no such period is specified, they are identified as at/after the time the declaration is made. This distinction is of some significance in this case, as we discuss later in this decision.

Consideration

Has an application for the declaration been made? — s 235(1)(a)

[38] There is no dispute that the UFU has made a valid application under s 234 of the FW Act. It is a bargaining representative for the proposed agreement, and the application is made in relation to a single-enterprise agreement, not a multi-enterprise agreement.

Is it after the end of the minimum bargaining period? — s 235(1)(c)

[39] It is clear that, as at the date of this decision, it is well after the end of the minimum bargaining period. The nominal expiry date of the MFB Agreement was 1 July 2019 and for the CFA Agreement it was 30 September 2013. The notification time for the proposed agreement was not later than 26 April 2022, when FRV issued the NERR. The notification time is therefore the later date for the purpose of s 235(5), and more than nine months have passed since that date.

Has the FWC has dealt with the dispute about the agreement under section 240, and has the applicant participated in the FWC's processes to deal with the dispute? — s 235(2)(a)

[40] As identified in the earlier factual narrative, the Commission has dealt with the dispute about the agreement in two s 240 proceedings, in which the UFU participated. The matters dealt with in those proceedings included the core issues now remaining in dispute, namely wages, allowances and the related issue of efficiencies. Given the scope of the s 240 applications, we accept that 'the dispute' that currently exists about these matters has previously been dealt with under that section.

Is there no reasonable prospect of agreement being reached if the Commission does not make the declaration? — s 235(2)(b)

[41] We are satisfied that there is no reasonable prospect of an agreement being reached if the Commission does not make the declaration sought by the UFU. The key issue in dispute is

that the UFU believes it is entitled to a remuneration outcome which would pass on to employees the value of efficiencies said to have been identified in the amount of at least $117 million. The UFU's belief in that regard appears, on the evidence placed before us, to have been to a considerable degree engendered by FRV in its negotiations with the UFU, as FRV's letter of 29 March 2023 makes clear. However, FRV cannot make any wages/allowances offer which is not authorised by the Victorian Government. It is clear that the Minister will not authorise any offer which could conceivably meet the UFU's expectations for the reason that this is considered to be significantly inconsistent with the 2023 Wages Policy. As the UFU's response to FRV's offer of 7 August 2023 demonstrates, it is not prepared to discuss any proposal which is not consistent with the approach it considers had previously been agreed with FRV. As a consequence, and as all parties agree, bargaining has reached an impasse.

Is it reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement? — s 235(2)(c)

[42] We are satisfied that it is reasonable in all the circumstances to make the declaration for the following reasons:

(1) The firefighting services provided by FRV are critical to public safety. Although the protected industrial action which has occurred to date has not affected the provision of firefighting services, we are concerned that the refusal of an intractable bargaining declaration might mean that the only resort for the UFU to advance its position is to escalate protected industrial action.

(2) Bargaining has been occurring in one form or another for about three years. It is clear that FRV's acknowledged change of position on the efficiencies issue on the instruction of the Victorian Government has embittered industrial relations within FRV, and this would best be resolved by a speedy arbitration rather than the continuation of bargaining.

(3) The parties have previously prepared for an arbitration on the efficiencies issue earlier this year (which, as recounted above, did not proceed), and thus at least on this issue would be substantially prepared for the arbitration which would follow the issue of an intractable bargaining declaration.

(4) The bargaining representatives for the proposed agreement which appeared in this proceeding, being the UFU and FRV, agree that an intractable bargaining declaration should be made. The UFU plainly represents nearly all employees who would be covered by the proposed agreement. There are five other individual bargaining representatives, but they did not appear in the proceeding or otherwise seek to express a view concerning the UFU's application.

Conclusion re intractable bargaining declaration

[43] All the preconditions for the making of an intractable bargaining declaration in s 235(1) are satisfied. In the exercise of our residual discretion, there is no matter which we can identify which would weigh against us making an intractable bargaining declaration. In this regard, we

note that the Victorian Government accepts that bargaining is intractable and that a declaration should be made. Accordingly, we will make the declaration applied for by the UFU.

Post-declaration negotiating period — s 235A

[44] The parties are at odds as to whether the declaration should specify a post-declaration negotiating period. The UFU's position is that all matters in the proposed agreement, apart from wages, allowances and the related efficiencies issue, have already been agreed, as demonstrated by (among other things) Commissioner Wilson's statement of 19 June 2023, and that these would be the agreed terms for the purpose of s 274(3) at the time a declaration was made. It submits that if a post-declaration negotiating period were to be specified, this might be counter-productive in that it would provide FRV with the opportunity to depart from the agreements it had already reached with the UFU about all matters except wages, allowances and efficiencies, and might therefore widen the gap between the parties.

[45] FRV submits that there should be a post-declaration negotiating period. Its position, as stated at the hearing before us on 26 September 2023, was that there were no agreed terms because its previous agreements-in-principle on individual items were always subject to Government approval and agreement on an entire package including wages and allowances. It submits that a post-declaration negotiating period would be useful for the purpose of clarifying what would be the agreed terms for the purpose of the intractable bargaining workplace determination to be made by the Commission. The Minister supports FRV's position.

[46] It is not our function in this proceeding to determine what are or will be the agreed terms under s 274(3) and the matters still at issue under s 270(3). That will be a matter for the Full Bench which undertakes the arbitration to come. Accordingly, it is not necessary for us to resolve the dispute between the parties about this issue. However, we hold a significant concern that, because of the radical difference in the positions of the parties at the present time as to what constitute the agreed terms and the matters in issue, the arbitration required to be conducted will be considerably extended by the need to determine, as a preliminary step, which matters need to be arbitrated. This may compromise the Commission's capacity under s 269(1) to make an intractable bargaining workplace determination 'as quickly as possible'. We consider therefore that the specification of a post-declaration negotiating period would be useful for the purpose of giving the parties an opportunity to resolve, or at least narrow, their differences as to what matters will need to be arbitrated. Given that FRV's current stated position is that there are no agreed terms at all, we do not accept the UFU's submission that a post-declaration negotiating period would be counter-productive because it would give FRV the opportunity to renege on agreements about items which, it contends, have already been reached. We also note that the Full Bench which ultimately arbitrates this matter will not only have to decide which terms are agreed and which matters remain at issue but will also have to take into account, under s 275(f) and (g), the extent to which the conduct of the bargaining representatives during bargaining was reasonable and the extent to which the bargaining representatives have complied with the good faith bargaining requirements.

[47] For the above reasons, the declaration which we make will specify a post-declaration negotiating period of two weeks. Commissioner Wilson will be available, on request, to assist the parties during this period.

Conclusion

[48] We make an intractable bargaining declaration in relation to the proposed *Fire Rescue Victoria, United Firefighters' Union Operational Staff Agreement 2022* which will specify a post-declaration negotiating period of two weeks. The declaration is made by a separate order that is published in conjunction with this decision and which, in accordance with s 235(4)(a) of the FW Act, will operate from the date of this decision.

PRESIDENT

Appearances:

H Borenstein KC and *W Friend KC* with *T Dixon*, counsel, for the United Firefighters' Union of Australia.

R Sweet KC with *M Garozzo*, counsel, for Fire Rescue Victoria.

C O'Grady KC with *F Leoncio*, counsel for The Honourable Jaclyn Symes, Minister for Emergency Services (Victoria), intervening.

Hearing details:

2023.

Melbourne:
26 September.

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[1] *Fire Rescue Victoria Act 1958* (Vic) s 7.

[2] We granted permission for the Minister to intervene in the proceedings, over the objection of the UFU, on the basis that we accept that the Minister has a significant interest and that this was not outweighed by any additional time that may be taken in the Full Bench hearing by the Minister.

[3] Matter B2021/1057.

[4] Matter C2022/5683.

[5] Matter B2022/1676.

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[6] The UFU had itself filed a s 240 application on 12 October 2022 but discontinued on 14 October 2022.

[7] [2023] FWC 512.

[8] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Sch 1, Part 18.

[9] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 at [29].

[10] *Buck v Bavone* [1976] HCA 24, 135 CLR 110 at 118-119 (Gibbs J).

[11] *Spencer v Commonwealth* [2010] HCA 28, 241 CLR 118 at [52] (Hayne, Crennan, Kiefel and Bell JJ).

[12] *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 at [17].

[13] Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [847].

[14] Ibid at [853].