



DECISION

Fair Work Act 2009

s.234 - Application for an intractable bargaining declaration

Commissioner For Public Employment

v

United Workers' Union

(B2026/919)

COMMISSIONER RIORDAN

SYDNEY, 4 SEPTEMBER 2026

Application for an intractable bargaining declaration

[1] The Commissioner for Public Employment (**CPE**) is the statutory employer for every public servant in the Northern Territory. The Office of the Commissioner for Public Employment (**OCPE**) is the authority to each enterprise agreement, and conducts bargaining in partnership with agencies of the Northern Territory Government, which in this matter, is the Fire and Rescue Service (**NTFRS**).

[2] This matter deals with the enterprise agreement for firefighters. The current agreement is the *Northern Territory Public Sector Fire and Rescue Service 2021-2025 Enterprise Agreement (the Agreement)*. This Agreement expired on 7 November 2025. The United Workers' Union (**UWU**) has a very high density of members employed by the CPE covered by the Agreement.

[3] The CPE (the Applicant) has made an application under s.234 of the *Fair Work Act 2009* (the FW Act) for an Intractable Bargaining Declaration (**IBD**). This application was heard on 26 August 2026.

[4] The Applicant was granted leave pursuant to s.596 of the FW Act to be represented at the Hearing by Mr Leigh Howard of Counsel. The UWU was represented by Mr Tom Whiteside, Senior Industrial Officer.

[5] The following persons gave evidence for the Applicant at the Hearing:

- Ms Johanna Stieber, Senior Executive Director, Employee Relations, Office of the Commissioner for Public Employment; and
- Mr Wayne Green, Deputy Chief Fire Officer – Territory Operations of the NTFRS.

[6] The following persons gave evidence for the UWU at the Hearing:

- Ms Erina Early, Secretary – Northern Territory, UWU;
- Mr Peter Jelly, Leading Firefighter;

- Mr Ash Spurrell, Firefighter;
- Mr Keith Hutton, Firefighter; and
- Mr Jesse Kaldor, Firefighter.

Factual Background

[7] The parties have been bargaining for a new enterprise agreement, the *Northern Territory Public Sector Fire and Rescue Service 2025–2029 Enterprise Agreement (the Proposed Agreement)* since 11 July 2025.

[8] The Applicant issued a NERR to all employees on 10 July 2025. It is not in dispute that the parties have met for 19 formal bargaining meetings between 11 July 2025 and 3 March 2026. On 3 February 2026, the UWU lodged an application for a Protected Action Ballot Order (**PABO**) which was subsequently granted. The members of the UWU commenced Protected Industrial Action (**PIA**) from 6 March 2026.

[9] The first ballot for the Proposed Agreement occurred on 20 March 2026. Of the 266 employees who were eligible to vote, 192 employees exercised their right to cast a vote. All 192 employees voted against the Proposed Agreement. On 9 April 2026, the CPE made an application under s.240 of the FW Act.

[10] I convened an intensive s.240 conference over 2.5 days between 29 April and 1 May 2026 in Darwin. The negotiations over these days were lengthy and willing, but achieved a great deal of progress. For example, the UWU proposed a new claim to increase the General Fire Fighting Allowance (GFFA) by 3% over the life of the Agreement in order to match the 15% increase that the NT Police achieved in their agreement. The CPE acknowledged the productivity and efficiency benefits which existed in the Proposed Agreement and agreed to the GFFA increase. This outcome surprised the UWU bargaining representatives. Robust discussions continued on a number of other issues, but an overall and final agreement could not be reached. I suggested to both parties that, in my opinion, they were better off reaching a negotiated agreement themselves rather than heading down the IBD path.

[11] In an attempt to overcome the impasse, I issued a recommendation which I believed gave the employees some security for their next EBA and ensured that the retention allowance for Alice Springs kept pace with the CPI from 2028. I was confident that these extra changes, if accepted by the CPE, would result in a positive outcome at a ballot. The CPE accepted my recommendation. The UWU ran a ‘no campaign’ against the Proposed Agreement and, unsurprisingly, it was voted down by 98% of the employees that cast a vote on 22 June 2026. The UWU made it very clear during these negotiations that they knew that the next step in the negotiation process would be an IBD.

[12] I convened a further conference on 24 June in an attempt to explain to the parties the possible perils of the IBD process. At my request, the CPE sent out a further explanation to all employees about the IBD process and inviting employees to reconsider their opposition to the Proposed Agreement. I made this request on the basis that some Bargaining Representatives clearly did not understand the ramifications of the IBD process. The UWU conducted a further survey of its members and advised the CPE that 98% of its members were still opposed to the Proposed Agreement.

[13] The CPE lodged an IBD application on 30 July 2026. I convened further Conferences on 5 August and 19 August 2026 in the hope that a negotiated settlement could be achieved but without success.

[14] The UWU sent a new proposal to the CPE on 12 August 2026 in a ‘last ditch’ attempt to resolve the dispute, which relevant said:-

“The below offers are made on a without prejudice basis as a final attempt to resolve the matters before an intractable bargaining process. Please note, the concessions contained in this correspondence will lapse in the event that this offer is not accepted, and the UWU will revert to its previous position for the purposes of an intractable bargaining determination.”

(My emphasis)

[15] The CPE rejected this proposal on the basis that it would cost significantly more money over the life of the Agreement than the Government Wages Policy (**the Wages Policy**) and the last proposal which was not endorsed by the employees.

[16] Despite the wording of the UWU’s correspondence, the Union has opposed the making of an IBD on the basis that they believe that an agreement is possible, taking into account that 4 agreements have been successfully negotiated over the last 15 years and that the current negotiating period is only some 14 months compared to over 2 years of negotiations for the last agreement.

Statutory Framework

[17] Section 235 of the FW Act relevantly provides:-

“235 When the FWC may make an intractable bargaining declaration

Intractable bargaining declaration

(1) The FWC may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:

- (a) an application for the declaration has been made; and
- (b) the FWC is satisfied of the matters set out in subsection (2); and
- (c) it is after the end of the minimum bargaining period (see subsection (5)).

Matters of which the FWC must be satisfied before making an intractable bargaining declaration

(2) The FWC must be satisfied that:

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

- (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
- (c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

What declaration must specify

- (3) The declaration must specify:
 - (a) the date it is made; and
 - (b) the proposed enterprise agreement to which it relates; and
 - (c) any other matter prescribed by the procedural rules.

Operation of declaration

- (4) The declaration:
 - (a) comes into operation on the day it is made; and
 - (b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

End of the minimum bargaining period

- (5) The end of the minimum bargaining period in relation to a proposed enterprise agreement is:
 - (a) if one or more enterprise agreements (the existing agreements) apply to any of the employees that will be covered by the proposed agreement—the later of the following:
 - (i) the day that is 9 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;
 - (ii) the day that is 9 months after the day bargaining starts, as worked out under subsection (6); or
 - (b) the day that is 9 months after the day bargaining starts, as worked out under subsection (6).
- (6) For the purposes of subparagraph (5)(a)(ii) and paragraph (5)(b), the day bargaining starts for a proposed agreement is:
 - (a) if a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the proposed agreement—the day that the authorisation first comes into operation; or
 - (b) otherwise—the notification time for the proposed agreement”

[18] Section 235A of the FW Act provides:-

“235A Post - declaration negotiating period

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

(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)."

Consideration

[19] As cited in the Full Bench decision of *Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd (Ulan West)*,¹ in the second reading speech to the SJPB Bill, the Minister said:

"A stronger role for the Fair Work Commission

The bill will allow the Fair Work Commission to resolve intractable disputes through arbitration, where there is no reasonable prospect of agreement being reached.

*These changes are intended to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes."*²

[20] As to the making of an IBD, the Full Bench in *Ulan West* also relevantly stated that:-

"[54] ... The prospect of arbitration by the Commission is intended to provide an incentive to encourage industrial parties to bargain in good faith and to make reasonable concessions and, in that manner, improve bargaining outcomes and reduce the time taken for enterprise agreements to be finalised.

...

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

[60] Section 235(2)(c) asks only whether the Commission is satisfied that it is reasonable in all the circumstances to make the declaration. APESMA submits, and we accept, that the requirement that the Commission be satisfied of the reasonableness of

making a declaration is value neutral. The standard of reasonableness does not suggest that the Commission should approach that assessment with any inclination or disinclination to make a declaration. If the Act had intended that a higher threshold be met before an intractable bargaining declaration should be made, it could have used language such as requiring that “good reason”, “special circumstances” or “exceptional circumstances” be demonstrated before that course is taken. A formulation “exceptional circumstances”, in particular, is used throughout the Act.⁴¹ No similar language is used in s 235(2). In our view, the language of s 235 is inconsistent with the approach adopted by the Deputy President that the powers of the Commission to make a workplace determination should not be “lightly engaged” by making a declaration.”

[21] I now turn to the relevant matters that I must be satisfied of under s.235(2) of the FW Act.

Section 235(2)(b) – no reasonable prospect of agreement if the Commission does not make the declaration

[22] In *United Firefighters’ Union of Australia v Fire Rescue Victoria (UWU)*,³ a Full Bench determined:

“[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” 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 an agreement will be reached.”

[23] As can be seen from the Factual Background above, I have been closely and actively involved in the negotiating process since April 2026. I have held numerous formal and informal discussions with the parties in an attempt to break the impasse – to no avail.

[24] This dispute, in my view, and taking into account the comments of the Minister identified above, is a classic example as to why the Federal Government introduced the IBD legislation. There is no shame or blame to be afforded to either party simply because an agreement could not be reached. Parties are entitled to stand firm on their respective positions. I cast no dispersion on either party. I am more than satisfied that the CPE has negotiated in good faith. The CPE has accepted propositions and recommendations that I made throughout the s.240 process, which were all in excess of the Wages Policy, to try and reach an agreement. I make absolutely no criticism of the CPE during this process. The submissions from the UWU that the CPE has simply delayed and obfuscated throughout this process to get to an IBD application timeline is simply wrong and without foundation. I have taken this into account.

[25] If Bargaining Representatives are going to enter negotiations with a log of claims which contains 70-80 items, then clearly the negotiating process is going to be lengthy and cumbersome. Further, I am of the view that every party in every EBA negotiation would now be aware of the IBD legislation. It is there for a reason, to provide comfort to the parties that

the Commission will determine any disputed provisions of an agreement rather than allow frustrating negotiations to last for years until one side is forced to surrender due to attrition, like what occurs in the USA. I have taken this into account.

[26] Based on my close observation and involvement in the negotiation process, and the current positions of the respective parties, I am satisfied that there is no reasonable prospect of the parties reaching an agreement without an IBD being made. Based on the current position of the CPE, the employees would have to accept an inferior proposal than the one I recommended on 5 May 2026 to reach an agreement. Such a scenario is highly unlikely. As a result, the provisions of the FW Act allow the Commission to arbitrate an intractable dispute. Negotiations between the parties did not resolve the impasse, a recommendation from the Commission did not resolve the impasse, post-recommendation proposals did not resolve the impasse. The only way to change a negotiating dynamic is to change the structure and incentivise the parties, as discussed in *Ulan West*.⁴ As a result, I am satisfied that there is no reasonable prospect of agreement without the making of an IBD.

Section 235(2)(c) – it is reasonable in all the circumstances to make the declaration, taking into account the view of all the bargaining representatives

[27] In *UFU*, the Full Bench explained that under s.235(2)(c):-

“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.”

[28] I note that the UWW opposes the making of the IBD. As extracted above, but repeated here for convenience, the correspondence of the UWW to the CPE on 12 August 2026 stated:-

“The below offers are made on a without prejudice basis as a final attempt to resolve the matters before an intractable bargaining process. Please note, the concessions contained in this correspondence will lapse in the event that this offer is not accepted, and the UWW will revert to its previous position for the purposes of an intractable bargaining determination.”

This statement is unambiguous and uncontentious. It describes the offer as a ‘final attempt’ to resolve the dispute before an intractable bargaining process. Further, the positions proposed by the UWW will simply lapse if they were not accepted by the CPE for the purposes of the intractable bargaining declaration. This correspondence is clear evidence that the Union accepted that an IBD was forthcoming and they attempted to resolve the impasse by making another offer. To now suggest that further discussions could now resolve the dispute is in direct contradiction of this correspondence. I have taken this into account.

[29] The Union submitted that the Commission should not issue a declaration on the basis that it could exercise its right to take further PIA. From my understanding, the Union has continued to take PIA over a long period of time, which has not resulted in any recent modification of the CPE’s offers to employees. The argument that the Union believes that

further PIA would result in a negotiated agreement, belies the historical circumstances of this dispute. I have taken this into account.

[30] Further, the CPE has made it very clear that they cannot and will not entertain further negotiations which results in additional costs to the NTFRS. It is not in dispute that the propositions contained in the letter of 12 August 2026 are not cost neutral or cost savings, but provide additional costs for the employer. I have taken this into account.

[31] The fact that an IBD has been made does not extinguish the capacity for further negotiations. On the contrary, the making of an IBD has, in some cases, enabled the parties to refocus on their respective positions which has resulted in a successful negotiated outcome prior to any arbitration.

[32] As a result, for the reasons identified above, I am satisfied that it is reasonable in all the circumstances to make the IBD.

Conclusion

[33] It is not in dispute that an application for an intractable bargaining declaration has been made and that the pre-requisites of s.235(5) have been met. It is also not in dispute that the parties have been involved in a s.240 process before the Fair Work Commission.

[34] For the reasons identified above, and taking into account the Full Bench decisions cited above, I am satisfied and find that the provisions of s.235(2)(b) and (c) of the FW Act have been met and that it is appropriate to make an intractable bargaining declaration in relation to the Proposed Agreement.

[35] The declaration is published by separate order in PR814016 which, in accordance with section 235(4)(a), operates from the date of this decision.

Post-declaration negotiating period

[36] The parties have both endorsed a post-declaration bargaining period. I have suggested that the parties make themselves available for an in-person conference on 24 September 2026. On this basis, I am satisfied and find that a post-declaration negotiating period will start today, 4 September 2026, and end on 25 September 2026.

[37] A further Conference between the parties has been set for 9am on 24 September 2026 in Darwin at the Commission. A listing for this Conference will be issued in due course.



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¹ [2025] FWCFB 264

² Ibid at [53].

³ [2023] FWCFB 180.

⁴ [2025] FWCFB 264 at [66].