DECISION

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

Australian Rail, Tram and Bus Industry Union
(B2024/441)

QUBE LOGISTICS (RAIL) TRAIN CREW NSW WORKPLACE DETERMINATION 2025

Rail industry

DEPUTY PRESIDENT WRIGHT
COMMISSIONER P RYAN
COMMISSIONER WALKADEN

SYDNEY, 10 JULY 2025

Intractable bargaining workplace determination

Introduction and outcome

[1] On 12 April 2024, the Australian Rail, Tram and Bus Industry Union (RTBU) made an application for an intractable bargaining declaration pursuant to s.234 of the *Fair Work Act 2009* (the FW Act) in relation to the proposed enterprise agreement to replace the *Qube Logistics (Rail) Train Crew NSW Enterprise Agreement 2019* (the 2019 Agreement).

[2] The Respondent to the application is Qube Logistics (Rail) Pty Ltd Trading as Qube Logistics.

[3] On 8 May 2025, the Fair Work Commission (Commission) issued an intractable bargaining declaration (the declaration).[1] The declaration specified a post-declaration negotiating period from 8 to 22 May 2025.

[4] On 22 May 2025, the parties advised the Commission that they had resolved the matter and reached an agreement. The parties sought and were granted a short extension of the post-declaration negotiating period for the purposes of drafting until 28 May 2025 pursuant to s.235A(2) of the FW Act.

[5] On 28 May 2025, the parties provided the Commission with a proposed Workplace Determination containing the agreed terms (proposed determination).

[1] [2025] FWC 1283.

[6] Having made the declaration, the Commission is required by s.269 of the FW Act to make an Intractable Bargaining Workplace Determination as quickly as possible after the end of the post-declaration negotiating period.

[7] We have decided to make an Intractable Bargaining Workplace Determination in the terms agreed by the parties for the following reasons.

Statutory framework

[8] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) repealed the former serious breach declaration provisions of the FW Act and replaced them with a new scheme of provisions relating to intractable bargaining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

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

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

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

[12] Section 272 sets out the core terms that a determination must include. These are:

- the nominal expiry date which must be no more than 4 years after the date on which the determination comes into operation (s.272(2)); and
- terms such that the determination would, if it were an enterprise agreement, pass the better off overall test under section 193 (s.272(4)).

[13] In addition, s.272 provides that the determination must not include:

- any terms that would not be about permitted matters if the determination were an enterprise agreement (s.272(3)(a)); or
- a term that would be an unlawful term if the determination were an enterprise agreement (s.272(3)(b)); or
- any designated outworker terms (s.272(3)(c)).
- a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

> (a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
>
> (b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees). (s.272(5)).

[14] Section 273 sets out the mandatory terms that a determination must include. These are:

- a procedure for settling disputes about any matters arising under the determination and in relation to the National Employment Standards (s.273(2));
- the model flexibility term or an agreed term which satisfies ss.202(1)(a) and 203 (which deal with flexibility terms in enterprise agreements) (s.273(4));
- the model consultation term or an agreed term which satisfies s.205(1) (which deals with terms about consultation in enterprise agreements) (s.273(5));
- a delegates' rights term (s.273(6)) which was inserted by the Closing Loopholes Act and applies to a workplace determination made on or after 1 July 2024).

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

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

> (a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and
>
> (b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
>
> (c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

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

[18] The Closing Loopholes No. 2 Act inserted a new s.270A which applies if an enterprise agreement applies to one or more employees who will be covered by the determination immediately before the determination is made. It provides that a term included in the determination that deals with a matter at issue (apart from a term which provides for a wage increase) must not be less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

[19] Section 275 provides that the factors that the Commission is required to take into account in deciding which terms to include in a workplace determination include the following:

> (a) the merits of the case;
>
> (c) the interests of the employers and employees who will be covered by the determination;
>
> (ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
>
> (d) the public interest;
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> (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.

[20] This provision is in the same terms as it was prior to the commencement of the SJBP Act apart from paragraph (b) which was deleted and paragraph (ca) which was added by the SJBP Act.

Submissions

[21] The parties made joint submissions in relation to ss.272(3) and (4) of the FW Act in response to directions made by the Commission:

Section 272(3) Permitted matters etc

[22] In relation to s.272(3), the parties submitted that the proposed determination is, in substantial part, drawn from the 2019 Agreement, which was compliant at the time of approval. The parties submitted that they have reviewed the terms of the proposed determination and are satisfied that it contains no terms that contravene any provision of the FW Act or its subordinate instruments. The parties submitted that the proposed determination is compliant with s.272(3) of the FW Act, in that it does not contain:

a. any terms that would not be about permitted matters if the determination were an enterprise agreement, in satisfaction of s.272(3)(a) of the FW Act.
b. a term that would be an unlawful term if the determination were an enterprise agreement, in satisfaction of s.272(3)(b) of the FW Act.
c. any designated outworker terms, in satisfaction of s.272(3)(c) of the FW Act.

Section 272(4) Better off overall test

[23] In relation to s.272(4), the parties submitted that:

a. the proposed determination covers only employees classified as Rail Operations employees. All financial comparisons are therefore made against the Rail Operations classifications in the *Rail Industry Award 2020* (Award).

b. The proposed determination provides for the Hourly or Normal Rate (as defined in the proposed determination). Relevantly, the Hourly Rate provides for a flat, loaded rate which is inclusive of Award-derived penalty rates, loadings and allowances (including weekend and shift penalties), unless expressly stated otherwise in the proposed determination.
c. The proposed determination sets out specific higher hourly rates for work on public holidays (clause 20.6), overtime (clause 28.3, 32, and others), and specific duty-based uplifts (for example push-pull operations at clause. 27.4).
d. The Hourly Rate, effective public holiday rate, and overtime rate provided under the proposed determination is, for all classifications, higher than the applicable penalty rate in the Award for all hours worked, with the exception of the penalty for Sunday work provided by clause 21.3 of the Award. As such, when considered on an overall basis, these rates comfortably exceed the minimum monetary entitlements under the Award when applied to the likely rosters for full-time and part-time employees.
e. For all classifications, the proposed determination flat rate exceeds the Award base rate and penalty rates for early morning, afternoon, night, Saturday, and public holiday work. The only exception is Sunday work, where the Award rate remains higher as noted above. However, given typical roster patterns, the Hourly Rate provided by the proposed determination results in overall higher weekly earnings in aggregate.
f. While the proposed determination uses a lower overtime multiplier (1.6x) than the Award (1.5x for the first 3 hours, then 2.0x), it applies that multiplier to a significantly higher flat rate and triggers more readily (for example for late shift changes). Assuming a standard 11-hour overtime shift, the proposed determination overtime rate exceeds the Award for all levels by at least $18 per hour.
g. The most beneficial public holiday rate under the proposed determination is comprised of a penalty rate of 1.6x and a stand-alone payment of 7.6 hours of the flat ordinary hour rate normally payable (at clause 20.6 of the proposed determination). This compares with a penalty rate of 2.5x under the Award. Given the 7.6 hour stand alone payment and the higher base rate, the effective public holiday rate under the proposed determination is higher than that provided under the Award;
h. Casual employees are paid in the same way except that they receive a 25% loading on the Hourly Rate in the proposed determination. A casual employee who only worked Sundays would be paid lower than what they would be paid under the Award. However, the parties are not aware of any casual employees who have only been rostered to work shifts on Sundays.
i. In addition, employees receive further financial benefits not provided under the Award, including:

    i. Additional payments for Driver Only Operations and Push/Pull Operations;
    ii. 7.6 hour payment for public holidays not worked;
    iii. Greater redundancy entitlements;
    iv. Additional 5 days of personal carer's leave;
    v. Critical incident leave;
    vi. Additional paid parental leave;
    vii. Paid health assessments and paid leave to attend health assessments;
    viii. Paid training costs;

ix. Higher minimum shift payments;
x. Shift alteration payments; and
xi. Barracks detention payments.

j. Accordingly, the parties submitted that the Hourly Rates provided by the proposed determination result in all employees being better off overall.

Consideration

[24] We have considered the joint submissions of the parties and the terms of the proposed determination. There is no dispute between the parties about what the agreed terms are for the purpose of s.274(3). The proposed determination filed by the parties complies with s.270(4) and includes the agreed terms as required by 270(2), core terms as required by s.272(2) and (4) and mandatory terms as required by s.273.

[25] The proposed determination does not include any terms other than those required by s.270(1). It does not include terms prohibited by s.272(3) and (5). There were no matters at issue under s.270(3) at the end of the post declaration negotiating period, so it is not necessary for any such matters to be included in the determination or for us to consider the matters in s.275 or to apply s.270A.

[26] As we are satisfied that the proposed determination filed by the parties meets all of the requirements of s.270, we will give effect to the agreement made by the parties by making the proposed determination known as the *QUBE Logistics (Rail) Train Crew NSW Workplace Determination 2025*.

[27] The *QUBE Logistics (Rail) Train Crew NSW Workplace Determination 2025* is made and will take effect on and from 10 July 2025.

DEPUTY PRESIDENT

Hearing details:

Determined on the papers

Final written submissions:

8 July 2025

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