

## IN THE FAIR WORK COMMISSION

*Fair Work Act 2009*

s.156 – 4 Yearly Review of Modern Awards

AM2014/202

### UFUA’S FINAL OUTLINE OF SUBMISSIONS

#### *Introduction*

1. These submissions are filed in reply to the joint submission of the MFB and the CFA dated 16 May 2016<sup>1</sup>, and in opposition to the application to vary the Modern Award by introducing a *carte blanche* part-time employment provision together with a new operational day worker roster.<sup>2</sup> This document is to be read in conjunction with the UFUA’s primary submissions dated 6 April 2016.<sup>3</sup>
2. **Part A** of these submissions addresses the threshold question of whether the application as framed by the Fire Services satisfies the requirements in ss. 134, 138 and 156 of the *Fair Work Act 2009* (Cth).<sup>4</sup> The UFUA relies on the Award Modernisation decisions in placing particular reliance on the historical context. It is further submitted that, because the Fire Services seek a variation for the purposes of further bargaining and with no intent to implement the terms found in the Draft Determination, the test of “necessity” in s. 138 cannot be satisfied. No CFA or MFB witness could inform the Commission about the scope or content of any operative part-time clause. This is because no attempt has been made by the Fire Services to frame provisions that are intended to operate in practice.<sup>5</sup>
3. **Part B** of these submissions deals with the merit arguments of the Application. The Fire Services approach is to give ‘no weight’ to the evidence of the UFUA witnesses<sup>6</sup>,

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<sup>1</sup> The “MFB/CFA Final Submissions” by the Applicants (the “Fire Services”).

<sup>2</sup> The terms of which are contained in the Applicants’ Draft Determination.

<sup>3</sup> “UFUA’s Primary Submission”.

<sup>4</sup> The “FW Act”.

<sup>5</sup> See UFUA’s Findings of Fact Sought at [1]-[2].

<sup>6</sup> MFB/CFA Final Submissions at [80].

and to label their opposition to the application a ‘conspiracy theory’.<sup>7</sup> In doing so, the Applicants have rejected any attempt to grapple with the evidence of some of their own witnesses, and the recent industrial history in the Victorian Fire Services, which demonstrates that all industrial parties have accepted the existence of a direct nexus between:

- (i) on the one hand; the close teamwork that is facilitated by full time employment under the 10/14 Roster, plus the constant need for skills acquisition and maintenance to achieve *proficiency*, and
- (ii) on the other hand; service delivery, safety and welfare.

4. **Part C** of these submissions deals with the balance of the Fire Services submissions.

5. **Annexure A** to these submissions is an updated version of the UFUA’s Findings of Fact Sought dated 20 April 2016, with references to the evidence included in support of each of the findings sought.

#### **Part A – The Threshold Issues arising from the Statutory Framework**

##### *A(i) The Statutory Framework and the test of ‘Necessity’*

6. The Full Bench dealt with the construction of sections 134, 138 and 156 in the *Preliminary Jurisdictional Issues Decision*.<sup>8</sup> A term may be included by way of variation in a 4 yearly review of a modern award ‘*only to the extent necessary to achieve the modern award objective*’.<sup>9</sup> The question of what is ‘necessary’ involves a ‘value judgment’ based on s. 134 considerations.<sup>10</sup>

7. The Full Bench cited with approval the decision of Tracey J in *SDAEA v NRA (No 2)* (2012) 205 FCR 227 wherein his Honour, in dealing with a cognate provision in the

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<sup>7</sup> MFB/CFA Final Submissions at [114], citing the evidence of Lucinda Nolan, CEO of the CFA.

<sup>8</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 at [14]-[17]; [28]-[39]. The parties are largely *ad idem* in respect of the test arising under s.138 of the FW Act: MFB/CFA’s Final Submissions at [13].

<sup>9</sup> *Preliminary Jurisdictional Issues Decision* at [36].

<sup>10</sup> *Ibid.*

FW Act, stated (at [46]): “*That which is necessary must be done. That which is desirable does not carry the same imperative for action*”.<sup>11</sup>

8. It is submitted that the ‘necessity’ test therefore requires a parsimonious approach to be taken to modern award variation, such that variations should only be made where there is an imperative to achieve the statute’s objectives.
9. By definition, the test of necessity must be addressed by reference to the change to the modern award that is being sought – in this case, the changes identified in the Draft Determination filed by the Fire Services.
10. The application of the ‘necessity’ test to the Draft Determination immediately raises the following questions:
  - (i) Is the proposed variation necessary to achieve the s. 134 objectives in the circumstances?; and
  - (ii) Is a *carte blanche* provision ‘necessary’ when more limited or targeted provisions might suffice to achieve the objectives in s 134?
11. For the reasons that follow, it is submitted that each of these questions should be answered in the negative.

*A(ii) The Relevance of Historical Context*

12. In dealing with matters arising in the Review, the Commission will have regard to the relevant historical context, including previous decisions relevant to any contested issue.<sup>12</sup>
13. The historical context was dealt with in the UFUA’s Primary Submissions from [6]-[22]. Relevantly:

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<sup>11</sup> *Ibid* at [38].

<sup>12</sup> *Re 4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* (2015) 252 IR 256 at [23] citing *Preliminary Jurisdictional Issues Decision* (2014) 241 IR 189 at [27].

- (i) The proceedings before Hingley C gave rise to a joint submission, accepted by Hingley C as part of the requirement that the Commission be satisfied that the award as varied met the structural efficiency criteria under the Act.<sup>13</sup> The joint submission evidences that the Parties agreed in 2000 that it was “*not appropriate to employ part time firefighters*” in the industry, and that day firefighter rosters were obsolete as a matter of history<sup>14</sup>; and
- (ii) The MFB and the CFA each agreed in 2010 that “*for reasons including safety and welfare of employees covered by this agreement*” the Fire Services would not employ part-time or casual firefighters.<sup>15</sup>
14. Despite the fact that these submissions were put squarely in the UFUA’s Primary Submission prior to the hearing, the Fire Services called no evidence to explain the inconsistency in their recent positions. Yet it was critical for the Fire Services to explain why they have resiled from their positions, because the Commission’s jurisdiction under s. 156 is necessarily focussed on changed circumstances.
15. In the *Preliminary Jurisdictional Issues Decision*, the Full Bench also stated (at [24]) that:
- “In the Review the Commission will proceed on the basis that prima facie the Modern Award being reviewed achieved the Modern Award’s objective at the time it was made.”*<sup>16</sup>
16. The starting point must therefore be that the present iteration of the Modern Award satisfies the s. 134 objectives.

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<sup>13</sup> See UFUA Primary Submission at [18]-[22]; The issue of part-time employment was necessarily before Hingley C in the award review (irrespective of any consent position reached): Item 51(7)(b) of Schedule 5 of the *Workplace Relations and other Legislation Amendment Act 1996* (Cth) required that “*The Commission must also review the award to determine whether or not it meets the following criteria:.. (b) where appropriate, it contains provisions enabling the employment of regular part-time employees*”.

<sup>14</sup> *Re Victorian Firefighting Industry Employees Interim Award 1993* [2000] AIRC 1361 (M Print S3127 (1 March 2000) per Hingley C at [6]-[7] (“*Otherwise where the parties have reached and presented me with an agreed position which gives rise to changes in the content and/or structure of an award clause or clauses, I have reviewed it and satisfied myself that it is appropriate and meets all necessary criteria.*” – emphasis added)

<sup>15</sup> The Parties also agreed to utilise the rostering systems under the agreement for the same reasons: Clause 37 of the MFB-UFU Enterprise Agreement 2010 ([2010] FWAA 7414); Clause 29 of the CFA-UFU Enterprise Agreement 2010 ([2010] FWAA 8164); Findings of Fact Sought at [3], [8].

<sup>16</sup> See also the MFB/CFA final submissions at [15].

17. The evidence reveals that, if circumstances have changed since the last review, such a change involves the illimitable increase in complexity that defines both the training and the work of firefighters<sup>17</sup>. This change in circumstances, however, militates strongly against the variation contended for.
18. The very fact that there has never been a part-time employment provision in the public sector component of the Award is also significant in itself.
19. The Commission's Background Paper (at [21]-[38]) identifies the cases in which the Commission has refused to incorporate part-time work provisions into Modern Awards – for the reason that part-time provisions were, as a matter of history, “*not a feature*” of the relevant awards: see [29] and [30] of the Commission's Background Paper.
20. The Maritime Industry Award was dealt with in the *Award Modernisation Statement* (2009) 182 IR 413 at 433<sup>18</sup>. In circumstances where the employers proposed the insertion of part-time employment and the unions opposed it, the Full Bench said (at [114]):  
  

*“The current award does not provide for part-time ... employment. Part-time employment is not a current employment practice in this industry and we have decided not to include provision for it at this stage.”*
21. In the same case, the Full Bench dealt with the *Maritime Offshore Oil & Gas Industry Award 2010* where the principal employer group proposed the inclusion of provisions as to part-time and probationary employment. The Full Bench said (at [127]):

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<sup>17</sup> This proposition was accepted by the Fire Services' witnesses: (eg., Gregory Leach at PN1170; Joseph Buffone at PN462, PN472; MFB/CFA Exhibit 5 at [20] (“*Throughout this time I have seen important changes in the industry due to the risk environments in which we operate becoming more complicated. These changes have included dealing with a broader range of incidents and natural disasters (including floods, earthquakes, windstorms, hazardous materials, search and rescue and anti-terrorism threats) and the introduction of more rigorous training requirements and performance standards*” (Buffone)); Findings of Fact Sought at [15].

<sup>18</sup> *Award Modernisation - Statement - Full Bench* [2009] AIRCFB 450 (22 May 2009).

*“They are not a feature of the current award. We have decided not to include them at this stage.”*

22. The *Maritime Offshore Oil & Gas Industry Award* was revisited in the *Award Modernisation Decision* (2009) 187 IR 192 at 219<sup>19</sup>. The Full Bench said (at [159]):

*“Although AMMA/ASOA urged us to include part-time employment provisions in the Award we note that such an employment type is not a feature of the existing awards, nor is it a feature of the industry more generally. In the circumstances, we are not persuaded to insert such provisions at this time.”*

23. These awards, and the other awards listed in the Commission’s Background Paper at [21]-[38], are all instances where the nature of the industry has been reflected in the historical consideration that part-time work is not a feature of employment.
24. The firefighting industry in Victoria is another example of an industry in which a global introduction of part-time employment in the public sector has never been accepted. As the evidence in this case discloses, acceptance of part-time work in other States has also been heavily qualified.<sup>20</sup>
25. In the present case, the historical context is of particular significance because of the evidence supporting the conclusion that the introduction of a general part-time prescription would be unsafe and contrary to the public interest.<sup>21</sup>
26. The UFUA submits that the case for rejection of the proposed variation is therefore far stronger than those cases instanced in the Commission’s Background Paper, where a similar attempt to introduce part-time prescriptions has been rejected by the Commission on historical considerations alone.
27. Even if attention is confined to historical considerations, there are many reasons why this case is far stronger than other cases where the Commission has refused to introduce part-time provisions:

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<sup>19</sup> *Award Modernisation - Decision - Full Bench* - [2009] AIRC 826; [2009] AIRCFB 826 (4 September 2009)

<sup>20</sup> See UFUA’s Primary Submission at [28]-[30].

<sup>21</sup> See references in Findings of Fact Sought at [5]-[11].

- a. The present case is not simply one where it is correct to say that part-time provisions have not been a feature of the Award in the past. In the present case, it is manifest that the industrial parties have, on a number of occasions, turned their minds to the matter and actively determined against such proscription in the public sector of the industry.
  - b. They did this by drawing a clear distinction between the sectors in the existing Award itself (see clauses 10 and 11).
  - c. They did it in the joint submission to the Commission in 2010 as referred to in paragraph 13(ii) above.
  - d. They also did it by entering into the current Enterprise Agreements governing the industry. In these instances, the language chosen (e.g. in clause 29 of the CFA Agreement, and clause 37 of the MFB Agreement) was that of prohibition of part-time employment (something that the Applicants acknowledge is unique to this industry). Further, the explanation for the prohibition was itself enshrined in the Agreements by the words: “*For reasons including the welfare and safety of employees*” the Fire Services will not employ any employee “*on a part-time or casual basis*”.<sup>22</sup>
  - e. The existing Award provisions were included in the context of proceedings in which the UFUA relied on evidence relating to employee safety similar to that called in the present proceeding: see Exhibit UFU 15 (Thomas), at [9]-[10] and attachment BT-1; Exhibit UFU 4 (Lia), at [5] and Annexure LIA-1.
  - f. The Enterprise Agreements entered into by the parties are otherwise replete with acknowledgments of the relationship between the terms relating to staffing and considerations of employee health, safety and welfare: see e.g. clauses 33.1, 34.1 and 38.1 of the MFB Agreement.
28. The Fire Services’ attempt in this case to address the industrial history simply by contending (erroneously) that part-time work in the firefighting industry has never

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<sup>22</sup> Findings of Fact Sought at [3]

been considered by the Commission entirely misses the point: at [29]. Even if the Fire Services' contention was accepted, it would have no impact on the significance of the history disclosed by the evidence, including the significance of past agreements that part-time employment was inappropriate in the industry.<sup>23</sup>

29. Contrary to the submissions of the Applicant at [29], the observations of the Commission in the 2009 *Award Modernisation Case* do nothing to undermine the *prima facie* position that the Modern Award being reviewed achieved the Modern Award's objectives at the time it was made.<sup>24</sup>

*A(iii) The Fire Services' Application assessed against the Statutory Requirements*

30. The Fire Services seek to introduce part-time employment into the Modern Award with no intention to utilise such a position. This proposition is undisputed.<sup>25</sup>
31. The Fire Services have stated they have no intention of ever implementing the clauses in the Draft Determination.<sup>26</sup>
32. The Fire Services' principal witnesses all indicated that the details of how part-time employment would be implemented operationally were yet to be considered, see for example:
- a. Lucinda Nolan (CFA) at PN386: when it was put that the organization had not provided any evidence of any meaningful and practical examination of how part time employment would work, the witness responded, "*We haven't been in a position to actually look at those*"<sup>27</sup>;

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<sup>23</sup> Findings of Fact Sought at [3(i)].

<sup>24</sup> *Preliminary Jurisdictional Issues Decision* at [24]; As to the historical context generally, see UFUA's Primary Submission at [14]-[22].

<sup>25</sup> Paragraph 10 of the MFB/CFA Final Submissions; paragraph 27 of the MFB/CFA Submissions in Reply dated 18 April 2016; see also references in Findings of Fact Sought at [1]-[2] including (eg) the evidence of Joseph Buffone which was typical of all the Applicants' witnesses' evidence: see PN508, PN535 (witness was unable to deal with any specifics as to what would ultimately be implemented).

<sup>26</sup> See (eg) MFB/CFA Primary Submission at [27]; MFB/CFA Final Submissions at [11], [171] – that is, the Fire Services intend to bargain for an outcome.

<sup>27</sup> See also Lucinda Nolan's evidence at PN388: "*This application having been on foot for a number of months now, you don't draw attention to any step or steps that the CFA has taken to actually further any proposal as to how any of this is going to operate in practice. Correct?---Because I think it's very important that we consult widely.*" See also PN391, PN409.



- b. Joseph Buffone (CFA) at PN457-458: *“My statement is based on the premise of the Modern Award and the general premise of part-time work, for the further details to then be discussed through negotiations and applicable as appropriate”*;
- c. Peter Rau (MFB) Exhibit 7 at [12]-[13]: the witness stated that the *“actual implementation of part-time”* work would *“of course be a matter for debate and consultation, and ultimately agreement, with our employees and the union”*.<sup>28</sup>
- d. Gregory Leach (MFB) at PN1125: When it was put that *“You haven't thought your way right through this and don't claim to have?”* - the witness responded, *“No, no, it's not something that I've contemplated, no. I'm a member of the executive team at the Metropolitan Fire Brigade, we haven't had any discussions around the nature of part-time or how that might be applied within the organisation at this point.”*
33. In those circumstances, it cannot be said that the introduction of the variations in the Fire Services' Draft Determination are “necessary” to achieve the Modern Award objectives.<sup>29</sup>
34. The height of the Fire Services' case is that the proposed Award variations are desirable to create a bargaining framework in which part-time employment provisions, which remain unspecified, will become the subject of bargaining.
35. Properly understood, the Fire Services' application seeks the assistance of the Commission to establish a favourable bargaining framework which would allow the Fire Services to negotiate with the UFUA from a position in which they could drive negotiations.<sup>30</sup> This is not a Modern Award objective.

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<sup>28</sup> To similar effect, see also MFB witness David Youssef Exhibit 20 at [40], [51]; Findings of Fact Sought at [1]-[2].

<sup>29</sup> Section 138 of the FW Act.

<sup>30</sup> See MFB/CFA Submissions in Reply dated 18 April 2016 at [27]; see also references in UFUA's Findings of Fact Sought dated 20 April 2016 at [1].

36. It is significant that the Fire Services seek (in [78]) to dismiss the concerns of the firefighters as simply matters of implementation and accordingly premature – on the basis that implementation of part-time work would be a matter for subsequent consultation. In this way, any debate about the necessity for inclusion of a global entitlement is sought to be sidelined entirely – contrary to the statutory requirements.
37. This is not the approach the Full Bench has taken in *Award Modernisation Decision* (2009) 187 IR 192, where a part-time clause providing only a ‘bare guarantee’ was rejected on the basis that it gave ‘little predictability to employees’<sup>31</sup>. The Draft Determination in this case has less content than this example, as it does not even purport to offer a ‘bare guarantee’ of hours.
38. When considering the issue of necessity, it is also noteworthy that no other Fire Services from around Australia have sought to intervene or be heard in these proceedings. It cannot be said that other fire services support a *carte blanche* part-time clause. As the Fire Services submit in their Final Submissions at [49], interstate industrial instruments that deal with part-time employment contain a significant number of qualifications that stand in stark contrast to the Award Variation sought by the Applicants in this matter.<sup>32</sup>
39. The Fire Services also acknowledge (at [49]) that the majority of the instruments in other States that deal with part-time employment apply at enterprise level. That is, where part-time employment is to be found in Fire Services, it is mostly as a result of negotiations and agreement between the relevant parties<sup>33</sup>. The approach taken by the Applicants in this case is at odds with this aspect of the industrial history in other jurisdictions.
40. The Fire Services submit “*The proposed variation is necessary to enable bargaining on the issue*”: at [11], [171]. Similarly, the Fire Services witnesses proceeded on this

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<sup>31</sup> *Award Modernisation - Decision - Full Bench* - [2009] AIRC 826; [2009] AIRCFB 826; (2009) 187 IR 192 at [144]. The Commission is also unable to take into account the costs implications of any change in this matter: see (eg) *Award Modernisation - Statement - Full Bench* [2009] AIRCFB 450; 182 IR 413 at [104].

<sup>32</sup> UFUA’s Primary Submission at [29].

<sup>33</sup> And this was the case in NSW, notwithstanding that it was an Award made by the Industrial Commission: see the evidence of Malcolm Connellan at PN4204.

assumption that bargaining outcomes could only be achieved once the award was changed.<sup>34</sup>

41. However, there is nothing to stop the Applicants from negotiating a desirable outcome as has been done in NSW and other States. There is no evidence that such an attempt has been made and failed in bargaining. If such an outcome were to be achieved in bargaining, the Award would not stand in the way.<sup>35</sup> Any part-time arrangements negotiated in enterprise bargaining would render clause 10 of the Modern Award relevantly inapplicable. Indeed there is already evidence of individual part-time arrangements having been agreed with the UFUA.<sup>36</sup>
42. Thus it is not ‘necessary’ (for the purposes of s 138) to have the Modern Award varied in the manner sought in order to achieve the outcome desired in bargaining. It would merely deliver the Fire Services a strategic advantage. As Tracey J observed, that which is merely desirable does not carry the same imperative for action.<sup>37</sup>

*A(iv) Conclusion as to the Threshold Issues*

43. The *carte blanche* nature of the Draft Determination is not relevantly ‘necessary’ to achieve the Modern Award objectives. It is also inimical to a statutory scheme that permits variations only to the extent necessary.
44. As a matter of history, all the parties have, in recent times agreed that part-time employment was not appropriate for the industry based on safety and welfare concerns of the employees<sup>38</sup>. These agreements as to the inappropriateness of part-time employment in the industry in Victoria represent the *status quo*.

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<sup>34</sup> (eg) Lucinda Nolan at PN409 (“we need a foundation document that allows us to start those negotiations. At this stage we don't have any starting point. We can't even bring them into our enterprise bargaining agreements.”).

<sup>35</sup> Section 57 of the FW Act has the effect that any part-time arrangements negotiated in enterprise bargaining would render clause 10 of the Modern Award inapplicable where the Enterprise Agreement applies to particular employment.

<sup>36</sup> Statement of Michael Werle Exhibit 9 at [17]-[20].

<sup>37</sup> *SDAEA v NRA (No 2)* (2012) 205 FCR 227 at [46].

<sup>38</sup> see the UFUA’s Primary Submission dated 6 April 2016 at paragraph 13, referring to clause 37 of the MFB/UFUA Enterprise Agreement 2010, and clause 29 of the CFA/UFUA Enterprise Agreement 2010; See also the consent position reached before Commissioner Hingley in *Re Victorian Firefighting Industry Employees Interim Award (1993)* [2000] AIRC 128 (1 March 2000) Print S3127 referred to in the Full Bench Background Paper dated 20 May 2016 at paragraphs [12]-[13], and the UFUA’s Primary Submission dated 6

45. If any bargaining is to take place in circumstances where the parties have agreed that safety and welfare is an issue, then it should be done incrementally. That would involve making measured inroads into the *status quo*. This has been done in other emergency services.<sup>39</sup>
46. The Fire Services, however, seek to both resile from their historical consent positions on this issue, and commence bargaining from the other end of the spectrum – namely a situation involving a *carte blanche* right to engage employees on a part-time basis<sup>40</sup>.
47. It should also be noted that the MFB made an application to terminate the 2010 Enterprise Agreement with the UFUA.<sup>41</sup> In those circumstances, irrespective of what the MFB witnesses say about the intention to consult over the implementation of the proposed Award Variation, the *carte blanche* part-time clause would become operative upon the termination of the Agreements - and able to be implemented by administrators who dismiss the suggestion that part-time employment has a connection with safety as a conspiracy theory.
48. The Enterprise Agreements provide that, in respect to part-time employment, “no employee may hold a position on such a basis *unless by agreement between the parties*” (emphasis added). There is evidence that employees already do work part-time by such agreement.<sup>42</sup> The point is, however, that there is an existing mechanism for exceptions to clause 10 of the Award by agreement, and such agreement has been reached in the past.<sup>43</sup>
49. The Fire Services deal with the Modern Award objectives in Part F of their final submissions.<sup>44</sup> The Fire Services only submit that clause 10 of the Modern Award does not presently meet the s. 134 objectives. However, they do not grapple with what

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April 2016 at paragraphs 14-22.

<sup>39</sup> See Findings of Fact Sought at [12].

<sup>40</sup> See, for example, MFB – UFUA Enterprise Agreement 2010 at clause 37.2. The Enterprise Agreements also provide for variation, consultation in respect of change, and individual flexibility arrangements.

<sup>41</sup> *Metropolitan Fire & Emergency Services Board* [2014] FWC 7776 (3 November 2014); referred to at (eg) PN2765.

<sup>42</sup> Albeit not operationally; see Michael Werle, Exhibit 9, at [17]-[20]; PN698-701.

<sup>43</sup> Section 57 of the FW Act.

<sup>44</sup> MFB/CFA’s Final Submissions at [161]-[171].

would be required by way of variation to meet the objectives, by reference to the Draft Determination or otherwise. This is, again, because the Fire Services have not identified a clause which they intend to implement.<sup>45</sup>

50. The failure of the Applicants to consider the practicalities is more profound when it is accepted that fundamental changes to the methods of operation of the MFB and the CFA would be required, as acknowledged by (eg) Schroder at PN826, PN830, Leach at PN1209, and Warrington at PN1315.
51. It is therefore completely artificial to assess the Draft Determination against the s. 134 objectives, as there is no intent to make these variations operational. They are only intended to be a step in a process involving further bargaining.<sup>46</sup>
52. The jurisdiction of the Full Bench in Review proceedings involves assessing a draft clause and determining the effect that clause will have once in operation.<sup>47</sup> The Full Bench is unable to undertake that fundamental exercise in this case other than by reference to a clause that will never be implemented.

## **Part B – The Merits of the Application**

### *B(i) The Evidence of the UFUA witnesses should be preferred*

53. The UFUA submitted at the outset that it opposed the variation in the terms advanced by reference to the *status quo* where it was agreed by all industrial parties that part-time employment was inappropriate for the industry in Victoria.<sup>48</sup>
54. The UFUA also, in the alternative, identified a number of potential qualifications to the introduction of *carte blanche* part-time employment which arose in the evidence (including of the Fire Services' witnesses' evidence) and in other industrial instruments operative in other States.<sup>49</sup>

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<sup>45</sup> (eg) PN388 (Lucinda Nolan); Findings of Fact Sought at [2]

<sup>46</sup> MFB/CFA's Final Submissions at [171] ("*a necessary first step*").

<sup>47</sup> By reference to s 134 criteria - see the approach in (eg) *Modern Awards Review 2012 - Award Flexibility* [2013] FWCFB 2170 (15 April 2013) at [212].

<sup>48</sup> UFUA's Primary Submission at [2]; Findings of Fact Sought at [1]-[2].

<sup>49</sup> UFUA's Primary Submission at [5], [29].

55. Consistent with this position, the UFUA witnesses' evidence can be summarised as follows:

(i) They oppose the introduction of part-time employment on the basis that the manner in which firefighting has been performed in Victoria involves working in close knit teams and undertaking the vast majority of training on station and on shift in those teams.<sup>50</sup> Because of the inherent danger in the job, team members depend upon one another in a manner which is distinguishable from almost every other industry (including other emergency services). In circumstances where the employers are unable to articulate how part-time employment will operate, there is a blanket opposition to inroads being made into the *status quo* by introducing *carte blanche* part-time employment.

(ii) If, despite the UFUA's opposition to the Application, the Commission were to introduce some qualification to clause 10 of the Modern Award, then it is the view of the vast majority of UFUA witnesses that part-time employment should only be introduced:

- a. above minimum crewing requirements (to guarantee safety and welfare);
- b. as part of the 10/14 rostering arrangements (for example, by way of a job sharing scheme); and
- c. for specific purposes (such as return to work, and maternity leave).<sup>51</sup>

56. The opposition of the firefighters to the introduction of part-time employment, for reasons including its impact on firefighter safety and wellbeing, was firm and consistent.<sup>52</sup>

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<sup>50</sup> Patrick Geary at PN3424; PN481-482 (Buffone); see other references in Findings of Fact Sought at [4]-[5].

<sup>51</sup> See references in Finding of Fact Sought at [6]-[9].

<sup>52</sup> See Statements of the UFUA witnesses: Gerald (Archie) Conroy UFU Exhibit 10 at [11]-[12]; Brown (Exhibit UFU 6) paragraphs 12-19; Gatt (Exhibit UFU 5) paragraphs 17-19; Quinton (Exhibit UFU 3) paragraphs 8-9; Quinn (Exhibit UFU 7) esp. paragraphs 22-24; Woodyatt (Exhibit UFU 8), paragraphs 2-15; Radford (Exhibit UFU 12) paragraphs 10-14; Martin (Exhibit UFU 14) paragraphs 2-18; Lia (Exhibit UFU 4) paragraphs 6-14; Thomas (Exhibit UFU 15) paragraphs 9-10 and Annexure BT-1.

57. The Fire Services in their final submissions contend that these views “*should be given no weight*”: at [80]. This is an extraordinary submission, given that the UFUA’s witnesses were experienced, operational firefighters, who were all perfectly well placed to identify the interrelationship between teamwork, training, performance and safety.<sup>53</sup> The experience of the UFUA’s witnesses (including those in very senior operational roles) can be contrasted with that of the Applicants’ witnesses, who were largely administrators.
58. The dismissive attitude of the Fire Services should be a cause for concern for the Commission, given that the Applicants have sought the Modern Award variation in order to be able to bargain with the UFUA over the introduction of part-time employment.<sup>54</sup>
59. The MFB’s own witness, Kirsty Schroder, gave evidence to the following effect:
- (i) The witness accepted the legitimacy of the Firefighters’ concerns: PN823, PN830. So did Mr Leach: PN1215.
  - (ii) The implementation of changes in respect of part-time work would involve very substantial challenges: PN832; Exhibit MFB/CFA 10 at [27] and [30]-[31]<sup>55</sup>. Similarly, Mr Leach at PN1209.
  - (iii) The witness had concerns about the “*unbridled application of a part-time prescription*” because of the impact it would have on training, at least in firefighter Levels 1 to 3: PN795; Exhibit MFB/CFA 10 at [31].
60. Ms Schroder was not re-examined on her evidence.
61. Ms Schroder, who is responsible for training within the organisation, has in this evidence legitimised the concerns of the firefighters, and expressed very real concerns

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<sup>53</sup> See references in Finding of Fact Sought at [4]-[6], [11].

<sup>54</sup> See also “Report of the Victorian Fire Services Review – Drawing a Line, Building Stronger Services”, David O’Byrne, October 2015 at pages 33-34.

<sup>55</sup> Noting that none of these challenges were explored anywhere in the Fire Services’ evidence, because of the approach taken to the application.

about the *carte blanche* nature of the award variation sought (noting that the witness had not previously seen the Draft Determination, as was the case with nearly all other Fire Services' witnesses<sup>56</sup>).

62. The Applicants, in their final submissions, ignore this evidence and maintain a position that involves the *complete* dismissal of the UFUA's concerns. Rather than acknowledge or in any way attempt to grapple with this evidence (from their own witness), the Applicants principally call in aid the evidence of Lucinda Nolan of the CFA and Michael Werle of the MFB<sup>57</sup>.
63. Ms Nolan and Mr Werle are administrators. They have never been firefighters. Ms Nolan had been working in the Fire Services for five months prior to giving her evidence. Ms Nolan did not read the UFUA's witness statements (despite making a 'reply' statement).<sup>58</sup>
64. Notwithstanding this, the Applicants rely on the evidence of Ms Nolan for the proposition that standards would not be lowered by the introduction of part-time work.<sup>59</sup> Ms Nolan was of the view that the notion that there was a nexus between time spent at work and skills was a "*conspiracy theory*".<sup>60</sup> This evidence has been elevated into the Applicant's Final Submissions (at [114]).
65. Far from there being "no evidence", Ms Nolan's organisation (the CFA) made a submission before Commissioner Hingley in the year 2000 that part-time work was inappropriate in the industry in Victoria. The CFA confirmed its view again in the CFA-UFUA Enterprise Agreement in 2010, on the basis that the introduction of part-time work would impact on safety and welfare.<sup>61</sup>
66. In circumstances where the principal evidence relied upon by the Applicants:
  - (i) comes from administrators, including one recently in the job;

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<sup>56</sup> (eg) PN266-267 (Lucinda Nolan).

<sup>57</sup> Applicants' Final Submissions at [65], [114]-[115].

<sup>58</sup> PN314-315.

<sup>59</sup> See Applicants' Final Submissions at [114].

<sup>60</sup> PN406. Ms Nolan's approach was to require proof of any nexus (PN318, PN399) despite the (opposite) position her organization had adopted on this point in the past. The witness did not identify any basis to support her own opinion, other than her experience in the police force.

<sup>61</sup> See UFUA's Primary Submission at [13]-[21]; Findings of Fact Sought at [3].



- (ii) is at odds with the evidence of their own witnesses (e.g. Kirsty Schroder), and
- (iii) is at odds with the recent position taken by their organisations as a whole in the 2010 Enterprise Agreements,

the Commission should be extremely cautious in accepting the evidence of Ms Nolan and Mr Werle. The Applicants have taken no steps to attempt to reconcile their positions in this respect, including addressing these inconsistencies in their own evidence.

67. The submission that the UFUA's evidence should be accorded 'no weight', including in respect of the interrelationship between safety, skills proficiencies and full time employment, must be rejected. The UFUA witnesses are experienced fire fighters who deal in a profession where decisions are made with life and death consequences.<sup>62</sup> They gave first hand evidence of their experience in respect central to the matters in the Application. Their evidence should be preferred.
68. There is nothing at all improbable about the firefighters concerns over safety considerations arising from the introduction of unrestricted part-time employment bearing in mind
- a. The nature of the environment in which firefighters work;
  - b. The requirement that they operate in teams and in circumstances in which each team members discharges a particular role;
  - c. The enormous and accelerating investment required in skills maintenance.<sup>63</sup>
69. Moreover, the support for the views of the firefighters can be found in independent sources. The Full Bench's Background Paper dated 20 May 2016 refers to research into the link between part-time work and performance. Although it is said that these results are non conclusive, there is at least the basis for a concern that movement away from full-time employment in an industry which involves high levels of training

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<sup>62</sup> See, for example, Common Exhibit 1 (The Report on Government Services 2016, Volume D: Emergency Management) at page D.26.

<sup>63</sup> Findings of Fact Sought at [18].

and fitness might impact on skills and performance: at [71]. Mr Leach of the MFB held similar concerns.<sup>64</sup>

70. To similar effect, the Productivity Commission Staff Working Paper “Part-Time Employment: The Australian Experience”, June 2008 refers to research in both the European Union and Australia (page 154). It finds that “*part-time workers are less likely to have jobs that involve complex tasks, problem solving or planning responsibilities*”.
71. Although these conclusions might be non-conclusive *vis a vis* the general population, it is highly likely that the evidence of such interrelationships would become more pronounced in an industry such as firefighting, where training is skills-based, where fitness and mechanical aptitude are inherent requirements of the job, and where the requirements for skills maintenance are enormous.<sup>65</sup>
72. For the above reasons, the Fire Services submission that the evidence of the UFUA be accorded ‘no weight’ should be rejected. To the contrary, the UFUA evidence should be preferred and given substantial weight.

*B(ii) Evidence of the Proficiency under the Current Arrangements*

73. The evidence of UFUA witness Kenneth Brown was to the effect that Victoria was the best performance State and that “*We do it safely*”: PN2738.<sup>66</sup>
74. In terms of confinement of fire to room of origin, the Productivity Commission Report on Government Services confirms that Victoria leads all States in this respect: 71.8% on page D.26.<sup>67</sup> It is also the case that Victoria has the lowest fire injury rate amongst all States by a considerable margin: 12.0 per 100, 000 people, on page D.26.<sup>68</sup>

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<sup>64</sup> PN1209.

<sup>65</sup> Findings of Fact Sought at [6], [15].

<sup>66</sup> See also PN2751.

<sup>67</sup> Common Exhibit 1, Chapter 9 at pp 43-47.

<sup>68</sup> Common Exhibit 1, Chapter 9 at pp 40-42.

75. Accordingly, in terms of performance and safety, the Victorian Fire Services can make a strong claim for being industry leaders in Australia.

76. It is in this context that the UFUA witnesses gave evidence opposing what they consider to be major inroads into a system that had delivered such outstanding results.

77. The starting point in considering issues of service delivery and safety is that 'competency' describes a bare minimum. However, when the fire services of Victoria are assessed, their performance is at the elite end of the spectrum because of their proficiency.

78. Mr Geary, an Operations Officer at the CFA, made this point clearly (PN3391):

*I've got no doubt that a part time employee would be able to keep their competencies relevant but my concern would be the proficiency of those competencies.*

79. The witness then expanded on his answer (PN3393):

*And if you allow me to explain that, that when – the fire services, we base our training on competency based training but one of the things we do that a lot of organisations don't, we want to become, not just competent, we want to become very proficient at it and I'll give you an example and a lot of the tasks that we do are time critical, and one of the tasks that is a great example of it is putting a breathing apparatus on your back, donning it up and putting it on to go into a structure fire to save someone's lives. To become competent in that it could take you three or four minutes to put it on, you could quite competently put it on in that time. But that time is far too long for someone that's in a very dangerous situation and seconds can make a big difference. So what our guys do, is work and work at it, and they're proficient and we put a time limit on it that they need to be able to put that BA on and be at the front door in 90 seconds. Now a lot of our guys through intense training, continual training, will put a BA on a lot quicker than that and what that does is allow us to be able to get inside the house fire and save anyone's life that we can. It's very important that we're very good and competent and safe, but quick in what we do.*

80. Proficiency is the key to the safety and service delivery outcomes.<sup>69</sup> It does not follow that the a computer database tracking employee competencies is enough to guarantee that a part-time worker can stand in place of a specialist fire-fighter who is at an elite level of proficiency. This was the consistent view of the UFUA's witnesses.<sup>70</sup>

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<sup>69</sup> Bradley Quinn UFU Exhibit 7 at [18]-[21], Annexure BIQ-1 at p 19, [2.50].

<sup>70</sup> Geary at PN3323, PN3348, PN3391-3396; Conroy at PN3520, PN3557; Veal at PN3653; Radford at PN3878; Martin PN4301-4303; Thomas at 4473-4475; See also references in Findings of Fact Sought at [5]-[8].

*B(iii) Teamwork and the 10/14 Roster (cf The Applicants' submissions at [96]-[107])*

*(a) Teamwork*

81. Teamwork is identified as a key part of the success of the system employed in the Victorian firefighting industry.<sup>71</sup>

82. The introduction of part-time employment and a new rostering system to this scenario has the potential to displace the trust and confidence identified by the UFUA witnesses as a critical feature of their profession.

83. For example, Ken Brown, the Assistant Chief Fire Officer with the MFB, said when asked about his evidence in UFU Exhibit 6 at [9] (at PN2392):

*It's because on the 10/14 roster they actually live together, they drill together, the train together, they exercise together, they do everything together. They eat together, they build a very strong team. When they go out on the frontline they're the first attack principal people, so they're the people that are on the end of the hose that go into the burning building and that.*

84. Another important aspect of teamwork is the ability to monitor welfare. To that end, Mr Geary gave the following evidence (at PN3424):

*And as you have probably had explained to you, the crew is a very tight-knit group. They work together on the 10/14 system. They spend more time some of them with the guys that they work with, rather than their own families. So they get to know each other very well. If I have only got someone that is popping in every second or third day, we don't get to know that person, we don't know how they're reacting to some of the scenes that they see.*

85. The thrust of the Applicants' submissions from [96] is that the trust and confidence which is built amongst members of close-knit firefighting teams is compatible with part-time employment. The Applicants attempt to make good this contention by referring to the work that firefighters perform alongside other firefighters and emergency services personnel (at [104]).

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<sup>71</sup> See (eg) Barry Thomas UFU Exhibit 15, Annexure BT-1 at [14]-[28], [41]-[58], [98]-[119]; Geary at PN3323, PN3330, PN3391-3396; Conroy at PN3520; Veal at PN3652, 3702; Thomas at PN4489; see also the references in Findings of Fact Sought at [5] and [7].

86. The Applicants' submissions, however, fail to acknowledge the evidence, including that of their own witnesses, that even when working alongside other firefighters and personnel, the firefighters' teams remain intact.<sup>72</sup>
87. The argument that, because there is obviously some replacement of team members due to training and leave requirements, the entire firefighters' concern in this respect is defeated, is a *non sequitur*.
88. The better view of the evidence is that the existing turnover amongst team members, represents part of the *status quo*. It does not follow that any further inroads into the present system will not have an impact on service delivery and safety.
89. Thus, the evidence that the firefighters "work alongside" other part-time employees only describes the existing system. It does not deal with the fact that such interactions are peripheral - firefighters remain in their close-knit teams.<sup>73</sup> Any further inroads into the present circumstances would represent a fundamental change to the existing system.
90. The Fire Services have not sought to explore the impact of such changes – as they have not identified any operative prescription which might be the subject of assessment.
91. For example, an unqualified part-time award prescription may give rise to the advent of secondary employment (something which the Northern Territory Industrial Agreement has sought to fetter)<sup>74</sup>. The effect of secondary employment is not something that is known. Yet despite the possibility of secondary employment raising issues (including by hampering flexibility within the organisation), the approach of the Fire Services has been to reject the notion that there should be any qualifications introduced into the Award.

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<sup>72</sup> See (eg) Veal at PN3715; Barry Thomas at PN4642; Findings of Fact Sought at [4]-[5].

<sup>73</sup> Eg PN3702 (Veal).

<sup>74</sup> See UFUA's Primary Submission at [5(x)], [29(iv)]; the NT Agreement places restrictions on paid outside employment.

(b) *The 10/14 Roster*

92. The introduction of a new rostering system, in the absence of any explanation of how it will work, is seen by the UFUA witnesses as having the real potential to undermine the current system.<sup>75</sup>
93. Again, the evidence of the firefighters in this regard was clear and consistent. The introduction of a new rostering system has the potential to impact on skills acquisition and maintenance, and therefore the “welfare and safety of employees”.<sup>76</sup>
94. The Applicants own witnesses acknowledge the success of the 10/14 Roster System.<sup>77</sup>
95. The industrial parties have also agreed that for reasons ‘*including the safety and welfare of employees*’, no other Roster system would be used than that set out in the Enterprise Agreements.<sup>78</sup>
96. In 2000, before Hingley C, the industrial parties in that case jointly submitted that roster provisions relating to ‘day firefighters’ were obsolete and should be removed from the Award.<sup>79</sup>
97. Accordingly, day worker rosters have not been part of the industrial history for a very considerable time. They are now sought to be re-introduced.
98. The Applicants make no submissions and gave no evidence as to how such a roster would work. Yet the roster is submitted to now be ‘necessary’ to achieve the Modern Award objectives.

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<sup>75</sup> See references in Findings of Fact Sought at [4], [7].

<sup>76</sup> Kirsty Schroder at PN795, MFB Exhibit 10 at [31]; Leach at PN1209-1211; Each of the UFUA witnesses made this point: (eg) Ken Brown UFU Exhibit 6 at [8]-[9], [31]; Daniel Gatt UFU Exhibit 5 at [11]-[19], [34]; Alan Quinton UFU Exhibit 3 at [14]-[21], [31]-[33]; Bradley Quinn UFU Exhibit 7 at [27]-[30]; Cory Woodyatt UFU Exhibit 8 at [4], [7], [30]; Malcolm Hayes UFU Exhibit 2 at [10]-[18]; Archie Conroy UFU Exhibit 10 at [19]-[20]; John Radford UFU Exhibit 12 at [15]-[34]; Michael Martin UFU Exhibit 14 at [3], [18]; Michael Lia UFU Exhibit 4 at [14]-[17], [21]; Barry Thomas UFU Exhibit 15, Exhibit BT-1 at [20]-[39], [49]-[58]; PN481-482 (Buffone); PN1209-1211 (Leach); PN1479 (Youssef); PN1559 (Hayes); PN3391-3396 (Geary); PN4301-4311 (Martin); PN4505, PN4523 (Thomas).

<sup>77</sup> PN481-482 (Buffone); see also PN1209-1211 (Leach); PN1479 (Youssef).

<sup>78</sup> Clause 37 of the MFB-UFU Enterprise Agreement 2010; Clause 29 of the CFA-UFU Enterprise Agreement 2010.

<sup>79</sup> See UFUA’s Primary Submission at [21].

99. This submission should be rejected. This was a potential qualification that the UFUA raised in its Primary Submission as a result of it being identified in the Applicants' witness statements: at [5(viii)]. Despite this, the Applicants have rejected any consideration of introducing qualifications to the Draft Determination. In doing so, the Applicants have failed to grapple with the possibility that (eg) job sharing might permit part-time employment without undermining the 10/14 Roster System.<sup>80</sup> Such considerations were a necessary exercise by dint of s. 138 of the FW Act.

*B(iv) Skills Acquisition and Maintenance (cf The Applicants' submissions at [108]-[132])*

100. As has been submitted above, the issue of competence cannot be conflated with proficiency.

101. Mr Geary gave evidence of the constant intensity of training required to achieve the requisite level of proficiency (at PN3348):

*So what they do, they have a written plan on what they want to achieve and it's a month by month, going forward. And what they do in that month, and it comes out of the station training plan, they'll identify the bits that a firefighter at the Corio Police Station needs to do on a yearly or monthly basis. Now all the firefighters now have personal development plans, as well. A lot of them are actually going up through the ranks. They're being assessed as leaders and officers. They all must have development plans to do that, and that involves a training plan, as well. My crews, they will do a short duration drill. They will then, at least, do one two hour session of training per day and they will do that 365 days a year, other than Christmas day, or other than probably the grand final day. I wouldn't expect them to be drilling all day on a grand final day. But they will do one to two sessions a day on dayshifts on training. Because what you need to understand, a firefighter in the CFA at Corio, we've got six different appliances in that shed. We've got enormous risks. We look after oil refineries. We've got five major facilities. The guys have to be highly trained and highly skilled. And it's all about proficiency. It's not just about competencies, it's about being proficient at your job, so we need that intense ongoing training. They will train on nightshifts, they'll have all sorts of drills, et cetera, on nightshifts, they'll be training people for development. It's ongoing.*

102. This evidence describes a very different scenario to the skills maintenance requirements identified by the Applicants in their Final Submissions at [111]. The

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<sup>80</sup> UFUA Primary Submission at [5(viii)] and references therein.

Applicants submissions (form [127]) to the effect that there is enough inherent flexibility in training to accommodate part-time employees misses the point that intense, team-based training is constant and ongoing. Any absence from this routine is a cause for major concern given the consequences of a breakdown within the teamwork.

103. Mr Barry Thomas, an Operations Officer at the CFA, discussed the concern about any further derogation from the current work practices (at 4474):

*So the firefighting industry has changed to the extent that it would certainly be my argument that at 42 hours a week we're not maintaining the skills that we need. So there's an argument, for someone based on 42 hours a week, we need to adjust the way we do our business so that we can actually achieve more skills maintenance and proficiency of the role. So I guess, in the scenario you're giving me, of 41 hours a week, it is an hour less than what I consider to me a minimum anyway. So, yes, I guess what I'm saying is anything below 42 hours a week, there's a massive concern.*

104. The Fire Services' submission in this part rejects the notion of any incompatibility between skills acquisition and maintenance on the one hand and part-time employment. The evidence of Mr Thomas is described as 'nonsense'.<sup>81</sup> The Applicants rely principally on the evidence of Lucinda Nolan of the CFA, who considers the UFUA's witnesses' concerns to be part of a "conspiracy theory"<sup>82</sup>.
105. As has previously been submitted, this evidence should be treated with great caution (at best) in light of the internal inconsistencies with the Applicants' other evidence in this respect. Some of the Applicants' witnesses were prepared to acknowledge the sheer intensity of training undertaken by firefighters: Gregory Leach at Ex UFUA 1, paragraphs [71]-[74]; PN1159-1166 (thousands, or an "enormous number" of skilled maintenance activities<sup>83</sup>); and Kirsty Schroder at PN802-805 (thousands).
106. It will also be recalled that Ms Schroder identified serious reservations about the introduction of a *carte blanche* part time provision due to its impact on skills acquisition and maintenance (at least in Levels 1-3): PN795; Exhibit MFB/CFA 10 at [31]. Mr Leach also identified concerns: PN1209.

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<sup>81</sup> Applicants' Final Submissions at [86].

<sup>82</sup> Applicants' Final Submissions at [114].

<sup>83</sup> See also PN1169 as to the need to keep skill maintenance under constant review and PN1171 as to the rapidly escalating and evolving risk environment.



107. Other than the sheer magnitude of the training involved, Ms Schroder also confirmed that there was an emphasis in the development of team work as part of the training regime undertaken by the MFB: PN858.<sup>84</sup> Mr Buffone accepted that the 10/14 Roster facilitates teamwork: PN481-482.<sup>85</sup>
108. None of these challenges were explored anywhere in the Fire Services' evidence, because of the approach taken to the application. Neither are they grappled with in the final submissions, as the evidence of Ms Nolan is evidently preferred.
109. The Applicants' submissions thereafter proceed on the basis that, as there are already inroads into time spent at work (see at [118]), then further inroads should be readily accommodated. This is, once again, a *non sequitur*.
110. The Applicants have not demonstrated in their evidence how further inroads in the nature of part-time employment would nevertheless result in the same level of service delivery and safety outcomes that are currently achieved in the Victorian Firefighting Services.
111. The Commission should accordingly accept the evidence (from both parties) that recognises links between skills acquisition & maintenance, and the time spent at work under the 10/14 Roster.

*B(v) The part-time arrangements in NSW are not appropriate comparators*

112. The only evidence called as to the practical application outside Victoria was the evidence of Connellan (Exhibit MFB/CFA 25). Mr Connellan was called to give evidence of the part-time arrangements in NSW. The Fire Services rely on this evidence to submit that there is no inconsistency between flexible work arrangements and operational requirements.
113. The feature of Mr Connellan's evidence that is most noteworthy is the stark differences in the structures of the respective fire services in New South Wales and

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<sup>84</sup> The "Values" of the CFA include the following, "*We work in and promote inclusive teams*": Conroy Exhibit UFU 10 at [12]; A motto of the CFA is "*Train Together, Play Together*": Conroy Exhibit UFU 10 at [11].

<sup>85</sup> See also references in Findings of Fact Sought at [4].

Victoria. This evidence discloses that New South Wales is not a useful precedent for the Applicants for a host of reasons:

- (i) The NSW *Crown Employees (Fire and Rescue Permanent Firefighting Staff) Award 2016* was as a result of negotiation between the Industrial parties.
- (ii) There has never been a provision in NSW permitting initial employment on a part-time basis: PN4006-4007.
- (iii) Notwithstanding that a separate platoon was created to accommodate part-time employment in the 2014 Award, this was removed within two years: PN3989-3992.<sup>86</sup>
- (iv) The only remaining reference to part-time employment in the Award is in clause 29 facilitating the return of female employees: PN3993
- (v) Rather than having a system which involves full-time firefighters together with volunteers (as in Victoria), New South Wales has approximately 3,300 retained firefighters representing approximately 50% of the workforce: PN4114. The retained firefighters have their own Award, under which they are required to work a minimum number of hours each work.<sup>87</sup> This creates a very different system structurally to that in Victoria.<sup>88</sup>
- (vi) The NSW the onus is placed on the employee to ensure maintenance of skills (PN4095)
- (vii) Similarly, 20% of staff at any one time perform relieving roles: PN4178, PN4183.

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<sup>86</sup> Clause 8.6(a) of the *Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2014* (PN3974) was removed in the 2016 Award.

<sup>87</sup> In 2014, the *Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2014* [2014] NSWIRComm 33 introduced fundamental changes to the classification of retained firefighters. It introduced a requirement that all the retained firefighters be available for 80% of the calls received by their station in a 24 period per week. The changes were described by Walton P as 'exceptional'.

<sup>88</sup> The existence of retained and reserved firefighters is entirely unknown in the Victorian system (*cf* PN4116) – see the numbers in Exhibit MFB/CFA 25 at [15] (7,621 employees, comprising 24 senior executives, 341 permanent career fire officers, 3,345 retained fire officers).

- (viii) There was a 7 year trial of part-time employment before it was implemented in the Award: PN4007-4010.
- (ix) As to monitoring employee welfare, there are very dissimilar lines of communication within the NSW structure. For example, the responsible Station Officers may not work at the same Station: PN4078. There is no single point of contact: PN4083. This is to be contrasted with the position of Station Officer in Victoria and its significance in terms of welfare issues: PN1695-1697, PN1699 (Hayes).
- (x) The completely flexible operation in New South Wales is entirely inconsistent with the Victorian operation. Teams are said to change around all the time (PN4101, PN4110 and PN4111). The existence of the retained firefighters is entirely consistent with this notion.

114. It should also be noted that:

- (iv) Management in NSW determined that flexible employment was inappropriate for recruits, due to the intensity of training: PN4042.
- (v) Even with a history of flexibility, only 23 employees have taken up the option: PN4154.
- (vi) Notwithstanding the very low numbers who have taken up part-time employment, in many areas there is no capacity to engage any more part-time employees: PN4164.

115. The fundamental changes negotiated in the relevant NSW awards were as a result of consultation and agreement. They followed a long pilot program in which both parties could assess the evidence and be satisfied in respect of the outcomes. The changes were introduced into a system that was based on an existing level of structural flexibility not known to Victorian firefighters.

116. Despite the extant levels of flexibility in the NSW system, it did not introduce a *carte blanche* clause permitting the engagement of part-time fire fighters. To the contrary, the part-time provisions in NSW only serve to accommodate serving fire fighters.<sup>89</sup>

*B(vi) Part-time arrangements in other emergency services are distinguishable*

117. The Applicants submit (from [61]) that other emergency services have part-time prescriptions in their industrial instruments.

118. There is no evidence from other emergency services that there was any requirement to work in close-knit teams, as is the case in Victorian firefighting services.

119. The emergency services are fundamentally distinguishable in critical ways: see evidence of:

- a. Gregory Leach at PN1107-1130, 1147 who accepted the proposition that the fire services were distinguishable to the ambulance service in respect of the teamwork approach;
- b. Lucinda Nolan at PN336, 350-351 (no special skills maintenance in Police), PN415 (Police work not team based), and PN271-314 (5 year pilot program);
- c. Kirsty Schroder at PN856: Ambulance officers come to the job already qualified, whereas firefighters do a long apprenticeship on the job; and
- d. Alex Tasominos at PN960-961 (Police don't attend crime scenes in teams), PN1008-PN1009 (no issues surrounding team work were involved in the Police award) and PN1013 (Police involved a cautious introduction of part time work, including a lengthy pilot program).<sup>90</sup>

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<sup>89</sup> Mr Connellan described the change as expanding the return-from-maternity-leave provision which existed in the award to the entire workforce: PN4158

<sup>90</sup> See also Finding of Fact Sought at [12].

120. The mode of operation of the police service and ambulance service (including in respect of skills acquisition and skills maintenance) are relevantly different to the fire services.<sup>91</sup>
121. Moreover, there are a number of qualifications built around the part-time provisions in the industrial instruments covering other emergency services such that they ultimately stand in contrast to the Award Variation proposed by the Applicants in these proceedings: Lucinda Nolan stated that the Victorian Police model is ‘very restrictive’: PN384.
122. The whole basis of operation of those other services is manifestly and relevantly different from that of the MFB/CFA.

*B(vii) Other Concepts of Part-Time Work (Applicants’ Submissions from [85]-[87])*

123. The Applicants submit that the UFUA’s witnesses’ evidence should be discounted on the basis of their definition of part-time work: at [85].
124. The fundamental problem with this submission is that the Fire Services’ own witnesses were unable to define what was proposed in terms of part-time work as there had been no consideration of the specifics involved.
125. Accordingly, part-time employment might ultimately include irregular and intermittent work<sup>92</sup>. The questions put to the UFUA witnesses involved a proposition that the Fire Services’ own witnesses were not prepared to confirm.
126. The Applicants specifically criticised the evidence of Barry Thomas (at [86]) who gave evidence that any diminution in full-time attendance was a concern. Mr Thomas explained this because, in his view, 42 hours per week was only barely enough to keep up with the training demands<sup>93</sup>.

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<sup>91</sup> Kirsty Schroder at PN855-856; Gregory Leach at PN1116, PN1130-1136.

<sup>92</sup> See 2008 Productivity Commission Report into Part-Time Work at page 157: “Based on 2005 HILDA data, 20% of part-time workers and 10% of full-time workers did not have a fixed set of days that they worked each week”.

<sup>93</sup> See PN4474, 4477.

127. Although, as has been submitted above, his evidence in this respect is described as “nonsense” in the Applicants’ submissions (at [86]) his explanation of why it followed that every minute of training could make a difference because the service was “*at the point where we’re not meeting the capacity to have our multi-skilled workforce*” was apparently accepted (as it should have been) in the course of his cross-examination: see PN4479-4480.<sup>94</sup>

*B(viii) Criticism of UFUA’s Witnesses’ Part-Time Work Experience (Applicants’ submissions at [88]-[95])*

128. It is true that the UFUA’s witness had spent their working lives fighting fires in Victoria as full-time employees. They did however give evidence of interactions with other services (including part-time employees) and with volunteers. This experience only appeared to confirm their views: (eg) PN2966-PN2671 (Brown).

129. Tony Martin used himself as an example to show that time spent out of the operational environment affected his proficiencies: PN4309.

130. Similarly, Barry Thomas gave evidence that, when he was a volunteer placed in charge of operating a water pump, his lack of knowledge or proficiency nearly resulted in a tragic incident: PN4638.

131. Accordingly, irrespective of whether the witnesses have experience in part-time work, their evidence is to the effect that there is a nexus between time spent at work on one hand, and (on the other hand) skills proficiencies, teamwork, service delivery and safety.

132. These propositions are not seriously disputed by the Applicants’ witnesses who are experience in these matters: see, for example:

- a. Gregory Leach at PN1209-1211 (where he referred to the challenge of finding time for skills maintenance);

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<sup>94</sup> This evidence was consistent with that of the MFB’s own witness Deputy Chief Officer Leach who agreed at PN1196 that the introduction of part-time work would throw up the challenge of ensuring that sufficient opportunities for employees to upskill and maintain skill existed.

- b. Kirsty Schroder at PN821, PN830;
- c. Peter Rau at PN625; and
- d. Steven Warrington at PN1328,

who all accept the legitimacy of the firefighters' concerns in these respects.

### **Part C – Balance of the Fire Services' Submissions**

- 133. The UFUA relies upon its Primary Submission from paragraph [36] in respect of the Applicants' contention that the principle in *Re AEU* is offended.
- 134. The Fire Services' submission at [145] and [159] cannot be accepted if it involves the assertion that the High Court in the *Native Title Act* case was intending to create a different test to that set out in *Re AEU*<sup>95</sup>. The High Court in the *Native Title Act* case was clearly there paraphrasing the ratio from *Re AEU* and not attempting to create a different test involving a lower hurdle for State Governments to make out 'impermissible burden'. The *Native Title* case did not overrule or qualify in any way the test in *Re AEU*.
- 135. It would be a fundamental mistake for the Commission to proceed on the basis that there has been any qualification introduced to the test propounded in *Re AEU*.
- 136. Accordingly, an award clause which sets out the "types of work" that employees may be engaged in does not relevantly deal with matters of "numbers" or "identity" for the purposes of *Re AEU*. To the contrary, the clause places a restriction on the mode of engagement of employees, irrespective of their numbers or identity.

### **Conclusions**

- 137. The UFUA's position is that the variations sought are not necessary or appropriate in the circumstances described in these submissions. In circumstances where:

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<sup>95</sup> As to which, see Applicants' Final Submissions at [146].

- (i) both the MFB and CFA have agreed that the 10/14 Roster together with the limitation of part-time employment is not appropriate for the industry having regard to the safety and welfare of employees in Victoria;
- (ii) the firefighters have trained and performed work in close knit teams in order to achieve proficiency;
- (iii) in terms of performance, the Victorian firefighters rank at or near the top of all States in terms of both service delivery and safety;
- (iv) the nature of the work is inherently very dangerous;
- (v) The application purports to be a 'step' on the way only<sup>96</sup> - and far removed from any crystallised outcome that *might* then be assessed against the modern award objectives; and
- (vi) the Fire Services have no intention to make operational the terms of the variation which they seek,

it cannot be said that there is the requisite imperative for action in order to satisfy s. 138 of the FW Act.

138. To the extent that the Full Bench considers that the introduction of the part-time provisions or any amendments to the rostering provisions are necessary for the purposes of section 138 of the FW Act, then the decision should accommodate the concerns identified both in the Applicants' evidence and the UFUA's materials. In that event, the open-ended circumstances in which part-time employment will otherwise become available under clause 10.3(b) of the Draft Determination should accordingly be circumscribed. The views of the UFUA witnesses is that concerns of safety and welfare are, in that case, best accommodated by way of a prohibition on part time employment forming part of minimum crewing<sup>97</sup>, and the preservation of the current rostering system.<sup>98</sup>

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<sup>96</sup> MFB/CFA Final Submissions at [171].

<sup>97</sup> Findings of Fact Sought at [8].

<sup>98</sup> Findings of Fact Sought at [7].



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State Chambers  
Tel: 9223 1522  
**Date: 7 June 2016**

## ANNEXURE A

### IN THE FAIR WORK COMMISSION

*Fair Work Act 2009*

s.156 – Four Yearly Review of Modern Awards

AM2014/202

### UFUA's FINDINGS OF FACT SOUGHT

The UFUA seeks the following findings of fact from the evidence in the hearing:

1. The MFB/CFA seek the proposed Modern Award variations “in the context of a bargaining framework”<sup>1</sup> for the purposes of improving their negotiating positions with the UFUA, and have no intention of implementing the terms set out in the Draft Determination.<sup>2</sup>
2. The MFB and the CFA have undertaken no steps to assess the impact of the Draft Determination, including whether it should include operational parameters (such as qualifications as to its scope and application) which would achieve the Modern Award objectives with a minimum impact on welfare and safety of employees and service delivery.<sup>3</sup>
3. The MFB and the CFA each agreed in 2010 that “for reasons including the welfare and safety of employees” to:
  - (i) limit the types of employment to full-time engagement only<sup>4</sup>; and
  - (ii) restrict the available rosters to the 10/14 Roster for operational firefighters (together with emergency and special duties rosters for exceptional cases).<sup>5</sup>
4. Firefighters work in teams. The vast majority of skills maintenance is undertaken on-shift and on-station in a team environment. The 10/14 Roster is most conducive to allowing such a training framework to continue.<sup>6</sup>

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<sup>1</sup> MFB/CFA Reply Submissions at [27].

<sup>2</sup> Lucinda Nolan at PN386, PN388, PN409; Joseph Buffone at PN508, PN535; Gregory Leach at PN1125; Steven Warrington at PN1326; David Youssef at PN1473-1474; filed statements of Joseph Buffone MFB Exhibit 6 at [18]-[19]; Peter Rau Exhibit 7 at [12]-[13], MFB Exhibit 8 at [7]; Steven Warrington MFB Exhibit 16 at [30], [58]-[59]; Bruce Byatt MFB Exhibit 18 at [33]-[36]; David Youssef MFB Exhibit 20 at [30]-[31], [40], [51].

<sup>3</sup> Nolan at PN390-391; PN408; *ibid.*

<sup>4</sup> Clause 37 of the MFB-UFU Enterprise Agreement 2010 ([2010] FWAA 7414); Clause 29 of the CFA-UFU Enterprise Agreement 2010 ([2010] FWAA 8164).

<sup>5</sup> Clauses 76, 77 of the MFB-UFU Enterprise Agreement 2010 ([2010] FWAA 7414); Clauses 75, 76 of the CFA-UFU Enterprise Agreement 2010 ([2010] FWAA 8164).

<sup>6</sup> Ken Brown UFU Exhibit 6 at [8]-[9], [31]; Daniel Gatt UFU Exhibit 5 at [11]-[19], [34]; Alan Quinton UFU Exhibit 3 at [14]-[21], [31]-[33]; Bradley Quinn UFU Exhibit 7 at [27]-[30]; Cory Woodyatt UFU Exhibit 8 at [4], [7], [30]; Malcolm Hayes UFU Exhibit 2 at [10]-[18]; Archie Conroy UFU Exhibit 10 at [19]-[20]; John Radford UFU Exhibit 12 at [15]-[34]; Michael Martin UFU Exhibit 14 at [3], [18]; Michael Lia UFU Exhibit 4 at [14]-[17], [21]; Barry Thomas UFU Exhibit 15, Annexure BT-1 at [20]-[39], [49]-[58]; PN481-482 (Buffone); PN1209-1211 (Leach); PN1479 (Youssef); PN1559 (Hayes); PN3391-3396 (Geary); PN4301-4311 (Martin); PN4505, PN4523 (Thomas).

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5. Working consistently with the same team members on-shift gives rise to confidence within the unit of each team member's ability and capacity to perform operations to a high standard.<sup>7</sup>
6. There is a strong nexus between the quality of skills acquisition and maintenance, and the time spent at work. The less time a firefighter is at work, the more likely it is that skills acquisition, maintenance and proficiency will be compromised.<sup>8</sup>
7. The introduction of part-time work (either within the 10/14 Roster or by way of the introduction of a new operational day worker roster) has the potential to impact on skills acquisition and maintenance, and therefore the "welfare and safety of employees".<sup>9</sup>
8. Any derogation from full-time minimum crewing numbers has the potential to impact on the "welfare and safety of employees".<sup>10</sup>
9. It is essential for part-time employees to perform both day and night shifts in order to maintain skills due to the different demands and types of incidents that occur (with the greater frequency of operational incidents at night).<sup>11</sup>
10. Recruits and Level 1 to 3 firefighters undertake an intense skills acquisition regime which is not amenable to the introduction part-time employment.<sup>12</sup>
11. Any negative impact on response times due to the additional complexity introduced to operational decision-making by the introduction of part-time employment (due to such considerations as the maintenance of skill levels, and employee availability; (eg) Malcolm Hayes UFU Exhibit 2 at [20]) presents a potential danger to the community.<sup>13</sup>
12. The Victorian Police undertook a five year pilot program of limited scope to assess (including by way of "trial and error") the suitability of part-time

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<sup>7</sup> *Ibid*; Cory Woodyatt UFU Exhibit 8 at [4]-[8]; Geary at PN3323, PN3330, PN3391-3396; Conroy at PN3520; Veal at PN3652, 3702, 3715; Thomas at PN4489

<sup>8</sup> Gerald (Archie) Conroy UFU Exhibit 10 at [11]-[12]; Brown (Exhibit UFU 6) paragraphs 12-19; Gatt (Exhibit UFU 5) paragraphs 17-19; Quinton (Exhibit UFU 3) paragraphs 8-9; Quinn (Exhibit UFU 7) esp. paragraphs 19-24, annexure BIQ-1 at p 19, [2.50]; Woodyatt (Exhibit UFU 8), paragraphs 2-15; Radford (Exhibit UFU 12) paragraphs 10-14; Martin (Exhibit UFU 14) paragraphs 2-18; Lia (Exhibit UFU 4) paragraphs 6-14; Thomas (Exhibit UFU 15) paragraphs 9-10 and Annexure BT-1; Gregory Leach at PN1209-1211; Geary at PN3323, PN3348, PN3391-3396; Conroy at PN3520, PN3557; Veal at PN3653; Radford at PN3878; Martin PN4301-4303; Thomas at 4473-4475.

<sup>9</sup> Kirsty Schroder at PN795, MFB Exhibit 10 at [31]; Leach at PN1209-1211; Each of the UFUA witnesses made this point: (eg) Ken Brown UFU Exhibit 6 at [9]; Geary at PN3391-3396; Thomas at PN4505; The Parties to the Enterprise Agreements accept this point: Clause 37 of the MFB-UFU Agreement 2010; Clause 29 of the CFA-UFU Agreement 2010.

<sup>10</sup> Bradley Quinn UFU Exhibit 7 at [13]-[21]; Barry Thomas UFU Exhibit 15, Annexure BT-1 at [64]-[77]; PN2947 (Brown); PN4504-4507 (Thomas); Accepted by the parties in Clause 33.1 of the MFB-UFU Enterprise Agreement 2010 ([2010] FWAA 7414), and Clause 27.1 of the CFA-UFU Enterprise Agreement 2010 ([2010] FWAA 8164).

<sup>11</sup> (eg) Michael Lia UFU Exhibit 4 at [14]; Cory Woodyatt at UFU Exhibit 8 at [22]; Joseph Buffone at PN527, PN534; Alan Quinton at PN1731-1732; Patrick Geary at PN3348.

<sup>12</sup> (eg) Kirsty Schroder Exhibit 10 at [10]-[15], [31] and at PN795; PN2943 (Brown).

<sup>13</sup> (eg) Bradley Quinn UFU Exhibit 7 at [14]; PN3563, PN3571 (Conroy).

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employment.<sup>14</sup> The NSW fire services similarly undertook a seven year pilot program in order to assess the suitability of part-time employment.<sup>15</sup>

13. The mode of operation of the police service and ambulance service (including in respect of skills acquisition and skills maintenance) are relevantly different to the fire services.<sup>16</sup>
14. No relevant emergency service provides for the unqualified availability of part-time employment in the form of the Draft Determination.<sup>17</sup> A variation to the Modern Award in the terms sought would be unprecedented in emergency services prescriptions.
15. The work of firefighters has increased in complexity in recent years.<sup>18</sup>

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<sup>14</sup> (eg) Lucinda Nolan Exhibit 3 at [12]-[14] and PN271-314 (Nolan).

<sup>15</sup> Malcolm Connellan Exhibit 25 at [19] and PN4008 (Connellan).

<sup>16</sup> Kirsty Schroder at PN855-856; Gregory Leach at PN1116, PN1130-1136.

<sup>17</sup> UFUA's primary submissions dated 6 April 2016 at [28]-[30]; PN384 (Nolan) wherein the witness said the part-time provisions in the Police Award were 'very restrictive'.

<sup>18</sup> Gregory Leach at PN1170; Joseph Buffone at PN462, PN472; MFB/CFA Exhibit 5 at [20]; David Youssef Exhibit 19 at [19].