

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 Yearly Review of Modern Awards

AM2014/202

UFUA'S ANSWERS TO QUESTIONS ON NOTICE OF 16 JUNE 2016

These submissions respond to the Questions of Notice directed to the UFU and all Parties on 16 June 2016, and the additional questions asked by the Commission at the conclusion of the hearing on 17/6/2016.

QUESTIONS FOR THE UFU

QUESTION 1 – Whether any of the propositions set out in paragraphs [13]-[22] of the Fire Services' submission of 16 May 2016 are contested

1. The UFU contests paragraph [14] of the submission. It accepts that the statute's objectives are to be gleaned from a reading of the Act as a whole (see Q11 below) and says that the question of whether those objectives have been met is to be determined by reference to those provisions and on the basis determined by the Fair Work Commission in the Award modernisation decisions. The UFU's submissions are expressly based on the principles emanating from those decisions.
2. The UFU also disputes the proposition in paragraph [16], asserting that the Commission, or its predecessors, has not considered the merits of including part-time employment in a predecessor award. The UFU submissions in this regard, to the effect that the appropriateness of part-time employment was determined (as it had to be determined) by Hingley C are found at paragraphs [15]-[21] of the UFUA Outline of Submissions in Reply of 6 April 2016. The UFU submits that this conclusion is not undermined by the fact that the consent position reached between the UFU and the CFA was not itself expressly referred to in the Reasons of the Commissioner.

3. The UFU further submits that the issue has been addressed by the Full Bench (see paragraph 31 below).

QUESTION 2 – Acceptance of the proposition set out in paragraph [24] of the Fire Services’ Final Submission

4. The UFU accepts this proposition, but asserts that the proposition does not provide a basis for an Award variation which would e.g. compromise the safety and welfare of employees.

QUESTION 3 – The statements of the Fire Services concerning part-time work provisions in industrial instruments in other States and Territories and in relation to emergency services agencies in Victoria

5. The UFU accepts that part-time work in some form is permitted in each applicable industrial instrument in every other State and Territory in Australia (save for Western Australia) but denies that part-time work is generally available for operational employees undertaking shift work in other States for the reasons enunciated at paragraph [29] of its submission in reply of 6 April 2016.
6. In nearly all of the interstate cases the applicable instrument (whether it be an award or an agreement) has qualifications such that it operates in a far narrower scope than the draft determination.
7. The UFU does not dispute that part-time work has been a feature of industrial instruments covering Victoria Police. As far as Ambulance Victoria (and its predecessors) are concerned, the evidence of Deputy Chief Officer Leach (at PN1104 and following) identifies provisions expressly permitting part-time employment only from 2009.

QUESTION 4 – Assertion of inconsistency between the UFU support for part-time employment in industrial instruments in other States and Territories and its opposition to the present claim

8. The UFU has addressed this issue in its oral submission. The UFU opposition in the present case is based upon the evidence of the way in which the MFB and CFA operate in Victoria – and the evidence of its witnesses as to the compromise to safety and welfare that would inevitably be involved in the introduction of a blanket provision permitting part-time employment as sought in these proceedings. With the exception of New South Wales, there is no evidence as to the types of operations existing in other States and Territories. The evidence in relation to New South Wales (see Q5 below) establishes that the position in New South Wales is demonstrably different to that in Victoria in respects that are clearly highly relevant. The UFU disputes any suggestion of inconsistency in its stance in this regard.

QUESTION 5 – The evidence of Chief Superintendent Connellan and the Productivity Commission Report on Government Services

9. The UFU strongly contests the submission advanced in the Fire Services Submissions as to the similarity of operations as between New South Wales and Victoria. The UFU does not dispute the introduction of the arrangements referred to in paragraph [54] of the Fire Services’ submission, or its uptake as referred to in paragraph [55]. However, the matters identified by the Fire Services in the submissions at paragraphs [51]-[61] (in addition to identifying the existence of a limitation on part-time arrangements (at paragraph [57]) relating to recruits which is inconsistent with the Fire Services’ application in the present case) completely ignore the considerations identified by the UFU in its Final Submissions at paragraphs [113]-[115]. These include fundamental differences in operation including a clear departure from the team work position central to the evidence of the parties in Victoria (see paragraph [113(x)] of the UFU’s final submission). The Fire Services’ submissions also ignore the fundamental differences in terms of the makeup of the workforce – involving retained firefighters with their own Award, as well as (consequential) differences in relation to the approach to skills maintenance (see paragraph [115(vi)] of the UFU’s final submissions).

10. In its oral submission the UFU invited the Commission to consider the evidence of Mr Connellan in Exhibit MFB/CFA25 (particularly his evidence as to the teams constantly changing) and asked whether it can seriously be contended that this has any relationship to the way in which the services work in Victoria – where the position is manifestly radically different.
11. This is reflected in the Fire Services' own witnesses' acceptance that the introduction of the proposed clause, if accepted, would require foundational change to the way in which the Fire Services operate (see the UFU Final Submissions at para [50]) and the acceptance of the Fire Services, in their original submission, that there were operational impediments to the introduction of part time work that were described by them as "not insurmountable".
12. As to the Productivity Commission Report, the UFU notes that in paragraph [60] the Fire Services acknowledged that Victoria has a "very good rate of confining fires to the room of origin" (see also Q19 below).

QUESTION 6 – Comment on paras [73]-[74] of the Fire Services' Final Submissions – relating to the level of flexibility currently available under the rostering arrangements

13. The UFU does not dispute the fact that the special duties roster is a 42 hour week roster with hours set between 7.45am to 6.15pm over 4 days or that the special administrative duties roster contained in the MFB agreement is limited to non-operational duties only (to which see the Joint Submission of the Parties on this issue). The UFUA, however, disputes the assertion that there is no element of flexibility in the special duties roster.

QUESTION 7 – The assertion that 6 of the 13 UFU witnesses' objections proceeded on a false assumption (paras [81] and [84] of the Fire Services' Final Submission)

14. The UFU accepts that some (but not all) of the witnesses referred to in paras [81] and [84] of the Fire Services' submission proceeded on the basis that part-time employment was (or at least included) casual and intermittent employment.

15. Contrary to the submission of the Fire Services, the evidence of (eg) Mr Geary did not fall into this category; he said at PN3318, 3319 and 3338 that his definition of “part-time employee” would be anyone working less hours than normal on a different roster than what is allowed in the Enterprise Bargaining Agreement.
16. The UFU would not concede that “reasonably predictable hours of work” as incorporated in the definition proffered by the Fire Services’ draft determination does not include regular attendance in any event.
17. Further, the agreement in writing required by proposed clause 10.3(b) of the draft determination is sufficiently broad to allow irregular employment at least in respect of an existing employee.
18. Further, and regardless of the above, the UFU witnesses referred to by the Fire Services gave evidence on a range of matters relevant to the proceeding, including:
 - (i) the amount of training done (Geary at PN3348);
 - (ii) the importance of team work, and its relationship to the 10/14 roster (Geary at PN3424);
 - (iii) the importance of proficiency *vis a vis* competency (Geary at PN3391-3395).
19. Whether or not the Commission feels that the evidence of the relevant UFU witnesses in relation to the ultimate question is diminished, this is irrelevant because 7 UFUA witnesses whose evidence is uncriticised in a relevant regard, as well as Geary, are the witnesses whose evidence is fundamentally relied on by the UFU in its Final Submission – including Brown, Martin and Thomas.

QUESTION 8 – Position of the UFU in relation to the insertion of any provision providing for part-time work - Extent of UFU opposition to the introduction of part time employment.

20. The UFU is opposed to the blanket position as advanced by the MFB/CFA submissions.

21. The UFU is also aware that:
- (i) Apart from the provisions relied on by the Applicants in this proceeding, there is a specific provision of the *Fair Work Act*, namely section 65, which is designed to apply to existing employees in relation to obtaining flexible work arrangements; and
 - (ii) The existing award contains, in clauses 6 and 7, provisions acknowledging the NES and the capacity of the employer and an individual employee to agree to a variation of applicants of terms of the Award including terms concerning arrangements for when work is performed.
22. In paragraph 5 of its primary submissions of 6 April 2016, the UFU indicated its intention to identify and explore the impediments to the introduction of the (global) variations sought so that, if appropriate, the Full Bench could consider whether the Award should be qualified in one or more of the respects indicated: see also paragraphs 44-5 of the UFU's primary submission, and paragraph 138 of the UFU Final Submission of 7 June 2016 referring to the concerns expressed in the UFU evidence and submissions.
23. Consistent with these submissions (and the concerns of the Applicants that some qualifications (e.g. concerning recruits, and a prohibition on secondary employment) are acceptable) if the Commission is satisfied by the need for some form of part time provisions in the Award beyond that which would be facilitated by existing Clause 7, the UFU provides (**annexed** hereto) a Draft Determination designed to reflect the evidence of both the Applicants (as to the need for part time provisions) the concerns of the UFU witnesses and the requirements of the Act.
24. The Draft Determination is intended to apply as follows:
- a. Clause 10.1 maintains as a starting proposition that work in the Fire Services is to be undertaken on a full-time basis;

- b. Clause 10.2 makes it clear that the employees identified in s. 65(1A) of the *Fair Work Act 2009* are not subject to the clause 10.2 once they make an application for flexibility arrangements; and
 - c. Clause 10.3 provides that, due to the reasons of service delivery, safety and welfare which was the subject of evidence in the proceedings, any employee accessing flexibility arrangements in the form of part-time work would be engaged under an existing Award roster – namely the ‘not the 10/14 roster’ referred to in clause 22.3.
 - d. There is a consequential amendment to clause 22.3 to remove the minimum hours requirement to allow the appropriate flexibility under the ‘not the 10/14 roster’.
25. As is made clear in the Joint Submission of the Parties from [15]-[26] – employees working a roster which is ‘not the 10/14 Roster’ are at present understood to be ‘day workers’, who may from time to time be called on to perform operational duties when required: see Joint Submission from [15]-[26]. Such employees, who are working ‘not the 10/14 Roster’, never form part of minimum crewing requirements: see Joint Submission from [25]. Accordingly, the Draft Determination addresses the fundamental concern identified by the UFU in its Final Submissions at paragraph [138].
26. The UFU submits that, at the very least, such a provision also addresses the evidence of the Applicants as to the need for the ability to provide more flexibility to the identified groups of employees, and thus addresses the objectives in s. 134(1)(c) of the *Fair Work Act*.
27. As the Draft Determination provides that operational considerations (including considerations of employee safety and welfare) are addressed, the variation presents an (appropriate) prohibition on part-time employment being initially offered to its prospective employees, and appropriately qualified in respect of existing employees. This variation also obviates the need for a new operational day worker roster as contented for by the Fire Services – for which there was no evidence.
28. The UFU submits that a provision framed in terms wider than this would not be "necessary" to achieve the statutory purposes: ss. 134, 138.

QUESTION 9 – Identification of issues identified in the 6 April submission said to be “not adequately addressed in the Final Outline of Submissions of 7 June 2016”

29. In its Final Outline of Submissions on 7 June 2016 the UFU has not repeated its earlier detailed submissions on:
- (a) the acceptance by the Fire Services that there are operational impediments to the introduction of part-time work qualified by the proposition that these are not insurmountable (see para [4] of the earlier submission);
 - (b) the extensive industrial history (including the early industrial history) identified at paras [7]-[11], including the introduction of the 10/14 roster system in Victoria in 1972;
 - (c) the greater detail of the proceeding before Hingley C identified in paras [14]-[22] of the submission;
 - (d) the detail of the submissions as to the situation in other jurisdictions found in paras [28] and [29] of the submission;
 - (e) the detail of the rostering system currently in place and the accommodation of employees’ requests in relation to special arrangements in paras [31]-[35] of the submission; and
 - (f) its submissions on the principle in *Re AEU* in paras [36]-[43] of the submission (noting that in para [133] of its Final Submission the UFU specifically relies on these earlier submissions).
30. Each of these matters has not been replicated in the Final Submissions and the UFU maintains its reliance on all of the submissions found in its “Outline of Submissions in Reply of 6 April” because they have not again been “adequately addressed” in its Final Outline.

QUESTION 10 - Whether the Full Bench is confined by the terms of the variations sought; and whether the Full Bench may conclude that it is necessary to insert a part time provision in the awards and then hold further proceedings, as to the context/content of such a provision.

31. The UFU does not contend that the Full Bench is confined by the terms of the variation sought by the Applicants.
32. The UFU acknowledges that it would be open to the Full Bench to conclude that it was; (1) not prepared to introduced a blanket provision in relation to part time employment but (in circumstances which the Applicants had only sought by such a provision), that it was; (2) appropriate to hold further proceedings to consider which, if any provisions were necessary to achieve the modern award objective.

QUESTION 11 – The approach to be taken to Modern Award variation and the UFU’s submission that a “parsimonious approach” should be taken

33. The UFU accepts that the statute’s objectives are to be gleaned from a reading of the Act as a whole, including the provisions identified in Q11 of the questions on notice.
34. The UFU does not accept that its submission is a “gloss” on the words in s.138. The UFU submits that its submission is simply a restatement of the accepted principle that an amendment inserted in the Modern Award as a result of the process will not go beyond that which is necessary to achieve the statutory purpose. All that the UFU is saying in its submissions is that, when faced with a blanket amendment (as in this case), the Commission will not approach the matter on the basis that it considers the general statutory purpose alone and without consideration of whether the proffered amendment goes beyond what is necessary to achieve it. This is not a “gloss” in any sense of the word. Neither is it a new test.
35. What the UFU is submitting is that, if, despite its submissions relating to safety, welfare and service delivery, the Full Bench considers that part-time employment should be available, then the variation should be narrowly tailored so that it achieves the objectives, and does not go any further.

QUESTION 12 – “Changed circumstances”

36. This matter was addressed in oral submissions. The UFU does not submit that the jurisdiction of the Fair Work Commission in award modernisation is confined to circumstances in which the applicant can prove a change in circumstances. The UFU submission is simply that where (as here) there is an existing award determined by the Commission (in this case, a determination that part-time employment should not be a feature of public sector fire services), the Commission has acknowledged that *prima facie* it will be accepted that the Award addresses the Modern Award principle. The jurisdiction of the Commission in such a case is necessarily focused on the question of whether there has been any change since the time that the Award was made. In the present case, for example, the Fire Services submit that, if the Commission is satisfied that the Award met the principles at the time it was made, the Commission would be further satisfied that circumstances have changed since then. What the UFU is submitting is that:

- (a) the Award met the Modern Award principles at the time it was made; and
- (b) the only changes of relevance that have occurred since that time (namely the changes to the environment in which the firefighters work and the consequences for training and skills maintenance) have operated to fortify the conclusion that part-time work is not a condition precedent of the Award satisfying the Modern Award standards.

QUESTION 13 – The occasions on which the parties have turned their mind to the presence of part-time work and determined against a prescription in the public sector

37. As the UFU has submitted, this occurred in the 2009 proceedings when the CFA and the UFU filed a joint submission advocating the proposition that part-time work was not appropriate in the industry. It further occurred in 2010 at the time of the making of the two Enterprise Agreements when both the CFA and the MFB agreed with the UFU that, for reasons including welfare and safety, the Agreement would not contain

provisions permitting part-time employment: see references in the Findings of Fact Sought dated 7 June 2016 at [3].

QUESTION 14 – Whether the evidence referred to at para [27(e)] of the UFU Final Outline of Submissions was the subject of cross-examination and whether the previous proceedings were contested

38. The evidence in question is the evidence of Thomas appearing at attachment BT-1 to Exhibit UFU-15 and Annexure LIA-1 to the affidavit of Lia in Exhibit UFU-4. These were witness statements filed in 1998 proceedings before Hingley C. The matter was originally contested by the CFA but, after the filing of the UFU evidence, a joint submission was advanced before Hingley C identified in para [19] of the UFU Outline of Submissions in Reply of 6 April, clause 8 of which provided as to part-time employment that:

“The parties submit that, having regard to the nature of the industry and of the firefighting occupation, it is not appropriate to employ part-time firefighters and officers in the CFA.”

39. The evidence before the Commission in this matter does not reveal whether the deponents were cross-examined but the UFU believes that they were not.

40. The other occasions relied on related to the making of the Certified Agreement in 2010: see paragraph [27(d)] of the UFUA’s Final Outline of Submissions of 7 June identifying clause 29 of the CFA Agreement and clause 37 of the MFB Agreement where the parties used the words “*for reasons including the welfare and safety of employees*” the Fire Services will not employ an employee “*on a part-time or casual basis*”: see the Findings of Fact sought at paragraph [3].

QUESTION 15 – The existence of any detailed consideration by the Commission as to part-time work in the firefighting industry

41. The UFU does not accept the proposition that part-time work was never the subject of any detailed consideration by the Commission. As submitted in the UFU’s Outline of Submissions in Reply of 6 April at para [16], Hingley C was required to satisfy himself

on the issue of part-time employment (and did so). This was so notwithstanding that the parties arrived at a joint submission on that very issue. Moreover, in the 2009 Modern Award review proceedings, the Full Bench, after considering the evidence and submissions, including the submission that part time work should be included, considered that part-time employment was not then appropriate for the public sector – yet took a different approach to the private sector. It is submitted that the Commission could only have arrived at such a bifurcated outcome following detailed considerations, including consideration of the industrial histories.

42. The UFU does not dispute that the relevant level of consideration by the Commission is a matter that can be taken into account in the present proceeding for the purpose of considering the *prima facie* position that the Award meets the Modern Award's objective. The UFU contends that the consideration by Hingley C (required by the Act at the time) and the consideration by the Full Bench leading to the continued exclusion of part-time employment in the public sector are both relevant to the conclusion that the Award meets the Modern Award's objective.
43. By virtue of the foregoing, it is submitted that the Commission's consideration should commence from the position that part-time employment in the public sector is not appropriate.

QUESTION 16 – The relevance of s.134(1)(b) to the assertion that seeking the assistance of the Commission to establish a favourable bargaining framework to allow the Fire Services to negotiate with the UFUA is not a Modern Award objective

44. This question relates to Q3 of the “Questions for the MFB/CFA” – that is, why is it necessary to vary the Award to enable bargaining without the introduction of part-time work? The UFU submits that it is not necessary. If that submission is accepted, then the evidence and submissions of the Fire Services referred to at paragraph [40] of the UFU's Final Submissions to the effect that the Modern Award stands in the way of bargaining over part-time employment must be rejected. Seeking to establish a “favourable bargaining framework” in those circumstances does not accord with the objective in s.134(1)(b). That subsection is rather directed towards the insertion of clauses in modern awards that would promote collective bargaining. The insertion of

a part-time provision in the Modern Award would not achieve this as the parties are free to bargain collectively irrespective of the variation now sought.

QUESTION 17 – The identification of which Public Sector Fire Services are covered by the Modern Award and how many of these have agreements which permit part-time work

45. See the Joint Submission of the Parties.

QUESTION 18 – The CFA submission before Commissioner Hingley in 2000

46. The reference to the submission in the year 2000 is a further reference to the joint submissions before Hingley C identified above. In this case extracts have been provided to the Commission but not the whole joint submission. A copy of the whole joint submission and the relevant transcript is **attached**.

QUESTION 19 – Whether the UFU accepts that the Victorian Fire Services are the most expensive in Australia in terms of total expenditure on per capita basis (say for NT)

47. The UFU completely accepts the contents of the Report, including the material at 9A.29 of the Report. There is no evidence before the Commission that it is this factor, rather than the considerations referred to by Thomas, that are responsible for the outcomes underpinning the Victorian Fire Services' claim for being industry leaders in Australia.

48. It is not known whether the expenditure referred to in para [9A.29] of the Report is or is likely to be expenditure in relation to operational matters only – as opposed to expenditure on administrative matters like the Bushfire Inquiry or litigation.

49. Acceptance that the Victorian Fire Services are the most expensive in Australia in terms of total expenditure and on a *per capita* basis (save for the NT) is a reflection of the sovereign right of any State Fire Service to prioritise firefighting budgets as they see fit. It is a further reason why comparisons between States and Territories in terms of their industrial instruments do not always bear close scrutiny.

QUESTION 20 – The question of whether there is any evidentiary basis for the proposition that an unqualified part-time award prescription may give rise to the advent of secondary employment

50. There is no evidentiary basis which directly relates to this proposition. The only evidence relating to the subject is that referred to in para [29(iv)] of the UFU’s original Outline of Submissions in Reply of 6 April, referring to the position in the Northern Territory. In that jurisdiction, s. 61 of the *Public Sector Employment and Management Act* (NT) relevantly provides that “*an employee must not engage in paid employment outside his or her duties as an employee except with the approval of his or her Chief Executive Officer*”, and that “*a Chief Executive Officer must not give approval unless satisfied the paid employment will not interfere with the performance by the employee of his or her duties*”.
51. It is not suggested that the UFU cross-examined Superintendent Connellan as to whether the introduction of part-time employment in the New South Wales service gave rise to the advent of secondary employment.

QUESTION 21 – The basis of the UFU’s submission that part-time employment might ultimately include irregular and intermittent work

52. This submission is based on the proposition that the agreement in writing required by the Fire Services proposed clause 10.3(b) is sufficiently broad to allow irregular employment (at least in respect of an existing employee).

QUESTION 22 – The question of whether the UFU is suggesting that the Fire Services have sought the proposed variation for an ulterior purpose and the question of whether this proposition was put to any of the Fire Services witnesses

53. This matter was also dealt with in oral submissions. The UFU has never suggested an “ulterior purpose”. What the UFU has submitted is consistent with the evidence that was advanced by the Fire Services witnesses *themselves* as to the purpose for which the application was made (see para [1(a)] of the Findings of Fact sought by the UFU, being Annexure A to the UFUA’s Final Outline of Submissions). All that the UFU has

submitted is that this purpose is not a purpose relevant to the question of whether the Award should be varied to reflect the Modern Award principles.

54. As submitted in oral submissions, there was no need to put any proposition about ulterior motive to the Fire Services witnesses (for the purposes of addressing *Brown v Bunn*) because no suggestion of ulterior purpose was made in the first place.
55. As to the relevance of an interested party's motivation in the context of a proceeding which is not an *inter partes* proceeding, the only relevance that exists is in relation to testing the submissions of that interested party in relation to the question of whether the amendments sought are "necessary" to achieve the Modern Award purpose. In this case, it is submitted that the amendments sought are not "necessary" for a host of reasons, including the fact that the facilitation of the Fire Services negotiating position (the purpose advanced by them) is not "necessary", and additionally because the amendment sought goes beyond that which the Fire Services' own witnesses have said is appropriate – because it extends too far (see again the evidence of Kirsty Schroder).

QUESTIONS FOR ALL PARTIES

Q1: The view of the UFUA to an Award provision which restricted access to part-time work for Level 1 firefighters

56. The evidence of Schroder was in fact that Trainees, and Levels 1 to 3 inclusive should not be the subject of any part-time prescription: PN795. The issue is dealt with in the UFU's Draft Determination (**attached**), and addressed under Question 8 above.

Q2: The extent of disagreement between the parties about the correct interpretation of previous decisions

57. The UFU has submitted that the Fire Services have failed to explain their previous consent or agreement to the proposition that part-time employment in the public sector in Victoria was inappropriate. Accordingly, the parties are in fundamental disagreement over this aspect of the historical context.

58. As to the relevance of the evidence before the Commission, the principal disagreement between the parties is in relation to the relevance of the parties' conduct in executing enterprise agreements – i.e., conduct outside the ambit of proceedings before the Commission itself. The UFU's contention that the Agreements cannot be excluded from the relevant historical context is entirely consistent with the recognition by the Fair Work Commission (in cases like the Maritime case) to the effect that the history of historical practice in relation to part-time employment is relevant. If the Commission was correct in the Maritime case in treating the absence of a practice of part-time employment in the industry as critical to its decision, then a conclusion that the practice of the parties in accepting in their Enterprise Agreements that part-time employment was inappropriate could not logically be excluded.
59. As to the submission that the Agreements, solemnly entered into by the MFB and CFA, cannot be ignored, see:
- (i) *Equiscorp Pty Ltd and Anor v Glengollan Investments Pty Ltd* (2004) 218 CLR 471 (at [33]);
 - (ii) *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 (at [52]-[55]); and
 - (iii) *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (at [42]-[48])

Q3: The interaction between the proposed variation and the operation of s.65 of the NES – the question of whether an inability to request to work part-time is consistent with the legislative intent in s.65

60. The UFU has dealt with question by way of the attached Draft Determination, and explained the interaction between the variation now advanced and s. 65 above under Question 8.

R.C. Kenzie QC

T. J. Dixon

State Chambers

Date: 24 June 2016

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 Yearly Review of Modern Awards

AM2014/202

UFUA'S DRAFT DETERMINATION

It is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009* (Cth), that the Firefighting Industry Award 2010 be varied as follows:

[1] By amending clause 10 as follows:

10. Types of employment—public sector

10.1 Subject to clauses 7 and 10.2 of this Award, an employer in the public sector may only engage or employ a person in a classification in this award on a full-time basis. A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

10.2 Nothing in this clause is intended to limit the rights of employees to seek flexible working arrangements under s. 65 of the *Fair Work Act 2009* (Cth).

10.3 An employer who agrees to a request under s. 65 of the *Fair Work Act 2009* (Cth) by an employee to work part-time must, based on reasons of service delivery, safety and welfare of employees, roster an employee pursuant to clause 22.3 of this Award.

[2] By amending clause 22 as follows:

22. Ordinary hours of work and rostering—public sector

22.1 This clause only applies to public sector employers and their employees.

[all other subclauses remain unvaried]

22.3 Employees not working a 10/14 roster

- (a) Subject to clause 22.3(e), employees (other than recruits) who are not working a 10/14 roster will be required to work an average of 42 hours per week, two hours of which will be overtime work and paid for as such and the remaining two hours will be taken as accrued leave.

[all other subclauses remain unvaried]

- (e) Employees who enter into flexibility arrangements pursuant to section 65 of the Fair Work Act 2009 (Cth) involving part-time work are not required to work the average number of hours per week referred to in clause 22.3(a) of this Award.

[3] The determination shall operate on and from XX YY 2016.

BY THE COMMISSION

ANNEXURE to Question 18

(being the relevant transcript and Joint Submission in the Hingley C proceedings)

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TRANSCRIPT OF PROCEEDINGS

O/N 0019

A 4.1.2000

AUSTRALIAN INDUSTRIAL

RELATIONS COMMISSION

COMMISSIONER HINGLEY

C No 37547 of 1997

C No 00164 of 1998

C No 00819 of 1998

**ACTION ON THE COMMISSION'S
OWN MOTION**

**Application under section 33 of the Act
re allowable award matters**

**VICTORIAN FIREFIGHTING INDUSTRY EMPLOYEES
INTERIM AWARD 1993**

**FIREFIGHTING SERVICES - WAGES - FIREFIGHTERS
AND FIREFIGHTING OFFICERS - VICTORIA - AWARD 1996**

**Review under Section 51, Item 51, Schedule 5,
Transitional WROLA Act 1996 re conditions of
employment**

MELBOURNE

2.23 PM, WEDNESDAY, 1 DECEMBER 1999

Continued from 29.11.99

THE COMMISSIONER: Yes, Mr Hinkley.

5 MR HINKLEY: As the Commission knows, Mr Commissioner, I appear for the United Firefighters Union and my learned friend MS RUSSELL appears for the County Fire Authority. I am instructed that there are two representatives of the Metropolitan Fire Brigade, I don't know that I have got that title right, present in the Commission, who have no objection to their names being mentioned for the benefit of the record, and they are Mr J. Carlise and Mr A. Garcia.

10 The Commission will recall that last Thursday there was tendered to the Commission, a joint submission by the CFA and the UFU which the Commission marked as UFU42.

THE COMMISSIONER: Yes.

15 MR HINKLEY: That was signed by Mr P.J. Watson, who is the Industrial Relations Manager for the CFA, and by Mr Adam Bandt, B-a-n-d-t, who is my instruction solicitor from Slater and Gordon. Commissioner, I did omit on that occasion to seek the leave of the Commission to have the content of that exhibit incorporated into transcript. If we could seek that leave we could hand a copy to the transcript service and that might be a convenient way for that to happen.

20 THE COMMISSIONER: Yes, thank you.

JOINT SUBMISSIONS OF CFA AND THE UFU

25 Since this matter was last before the Commission on 24 September 1999, the parties (CFA and the UFU) have in consultation with each other and for the purposes of Item 51 of the *Workplace Relations and Other Legislation Amendments Act 1996 (Cth)* (the WROLA) reviewed and re-examined the issues involved in the proceedings. In that process they have reconsidered their views as previously expressed to the Commission regarding the nature of the industry and the appropriateness of a number of the parties' proposed variations to the Award. They are now agreed that a number of variations to the Award that were previously proposed are not appropriate and should not be made.

30 The parties are almost in the position to provide the Commission with a draft Award which they agree should be made as the outcome of award simplification.

35

5 In that same process of review and re-examination of the issues the
parties have determined to actively resume their enterprise
bargaining negotiations with a view to reaching an agreement for
certification by the Commission in the very near future. As an
earnest of their intention to reach such an agreement they have
agreed to arrangements for the appointment of an independent
facilitator to assist in those negotiations. They agree that if
necessary that person will be selected by the Minister for Police and
Emergency Services. In furtherance of the objective of reaching
10 such an agreement the UFU is terminating its Notice of Intention to
take industrial action.

In accordance with the outcome of their review and re-examination
of the issues in the proceedings the parties now state their agreed
submissions on a number of the issues in the proceedings.

- 15 1. CFA does not seek any variation to the award to provide for
the employment of 'day' firefighters or officers on a lower
rate of pay or lesser conditions than those applicable to
firefighters and officers on the 10/14 roster.
- 20 2. The parties consider that it is not appropriate to employ part-
time firefighters or officers in the CFA.
3. The parties agree that the rates provided in the award are
properly fixed minimum rates.
- 25 4. CFA does not seek any variation to the award to alter its
current provisions in respect to higher duties as those
provisions meet the relevant criteria in the WROLA.
5. The parties submit that the award provisions in relation to
transmission of business are within the Commission's
jurisdiction and power.
- 30 6. The parties agree that the jurisdictional issue regarding the
award's provisions in respect of redundancy and related
payments should be determined by the Commission after
written submissions from the parties.

35 The parties are still engaged in discussions on other outstanding
issues. The parties intend to agree on variations to the award which
they submit accord with the provisions of section 89A of the
Workplace Relations Act 1996 (Cth) and item 51 of the WROLA
and then provide the Commission with a draft award. The parties

ring bells in the Commission's mind. They certainly do in mine, Commissioner.

5 So far as regular part-time employment is concerned, the Commission can see at the bottom of page 2, it is succinctly stated, that the parties have the view that it is not appropriate to employ part-time firefighters and officers in the CFA. On the rates of pay issue, Commissioner, which is really a minimum paid rates awards issue, the parties have reviewed the history of the present interim award, and jointly submit that that history shows that the wage rates are indeed properly fixed minimum wage rates. It may be, 10 Commissioner, that the Commission would like access to more detailed material, some of which is referred to in that part of the joint submissions, and if the Commissioner felt a need for that, it is readily available and it can be provided to the Commission, and if it were of any assistance, submissions could be made in relation to it.

15 Now that leaves us in the handy position today, Commissioner, of being able to tender to the Commission, a copy of what we have entitled the UFU proposed simplified award, which was prepared as it says on its face, on 27 November 1999 and amended on 1 December 1999 which is today's date. I don't know whether the Commission would like two of these, not 20 that we are trying to get rid of them, but it may be easier for note taking purposes.

THE COMMISSIONER: Thank you, Mr Hinkley, I will take two.

EXHIBIT #UFU45 UFU PROPOSED SIMPLIFIED AWARD

25 MR HINKLEY: Now, Commissioner, apart from three matters to which I will draw attention, the content of this proposed simplified award, subject to what my learned friend Ms Russell calls word-smithing, and I gratefully adopt that expression, subject to word-smithing represents the agreed position of the parties in relation to all issues other than the three issues to which I will draw attention very quickly.

30 Now, Commissioner, the parties are still presently working with each other on that word-smithing aspect, and would anticipate by the end of tomorrow to have word-smithed themselves out of existence, and be able to on Friday, at least in relation to what is the subject of that work, leaving aside the three matters to which I will come, be able to give the Commission a 35 consolidated document which quite accurately records the very language that they both agree upon as being appropriate to meet the requirements of the Act and of the arrangements that they have come to.

5 It might be of some assistance to record, Commissioner, that this, what is now exhibit UFU45, takes the form of an earlier exhibit whose number we have forgotten, which recorded the UFUs proposed interim award, and where there are changes in it they are identified by the use of capital letters, by bold letters.

THE COMMISSIONER: Can you take me to an example of that?

MR HINKLEY: Well, it is funny you say that, Commissioner, because I was trying to illustrate that to my learned friend and I couldn't find one. Page 57 is an example of it, Commissioner.

10 THE COMMISSIONER: Yes, I see what you are talking about.

MR HINKLEY: I recollect, and I have been reminded also that I might have inadvertently mislead the Commission. I am conscious that this document represents changes to an earlier document, but I don't think you ever saw the earlier document, Commissioner.

15 THE COMMISSIONER: I have seen a lot of documents - - -

MR HINKLEY: I know.

THE COMMISSIONER: - - - so I don't know the one you are referring to, but - - -

20 MR HINKLEY: No. So I don't think I can, with any confidence say that the changes here are changes to a document which you have been provided with previously, sir.

THE COMMISSIONER: But they represent an up-to-date position?

25 MR HINKLEY: Yes. But between the parties those embolded expressions assist the parties in seeing what the difference is between a very recent time, and as I say they represent, subject to what has to be done, the agreed position of the parties. Now there is also being prepared and finalised by the UFU, as an outcome of what the parties are bringing to completion at the moment in relation to the content of the proposed award, two other documents.

30 One of those will be an exhibit which details the changes to, or rather details the content of the current award, and identifies in the column next to it, what has happened to that content. The Commission, does have something like that already, but this new document which will provide to

the Commission, will supersede it. So that will be a working document that would assist the Commission and the parties.

THE COMMISSIONER: Yes.

5 MR HINKLEY: We are also in the same process generating a new copy
of the document which we previously called the august working document.
You might recall it was a reference to a month of the year that we got
carried away and turned it into something much more significant, and
happily now, everyone thinks it is much more significant anyway,
10 Commissioner. We will be calling it the august working document mark
2, and it will detail chapter and verse, the content of the proposed draft
award and whence it came, and why things have been deleted or added in,
and grammatical changes.

15 I think those sorts of documents the Commission is well familiar with as
a mechanism that enables not so readily, but with a bit of work, an
effective identification of what the changes are being proposed.

THE COMMISSIONER: Are you suggesting to me I give them an exhibit
number now?

20 MR HINKLEY: No, Commissioner, because we are in this funny
position. What you have marked UFU45 happily does represent what these
other two exhibits will represent when we finish them. We just have not
been able to in the machinery system to get everything organised. What
you have got in UFU45 does represent the agreed position apart from three
issues to which I will come, and apart from the word-smithing that both
parties will be engaged in.

25 The other two, which we know will be - well we do know will be very
useful in part examining what's happened will be ready by the end of
tomorrow as I am instructed, Commissioner, and we want to be able to
provide them to you directly, of course with the co-operation of my learned
friend's clients, and then we would say to the Commission that we would
30 both be very eager for the Commission to have some time, such time as is
necessary early if possible next week, or later if necessary next week, for
us to come back before the Commission. Now what we have in mind
there, sir, is whatever it is you have in mind, once you accepted the
suggestion of what we had in mind.

35 THE COMMISSIONER: So far I am still with you.

MR HINKLEY: It is this, Commissioner, we do think that the
Commission might not want us to stand up here and go through each clause

explaining what happens. We are very prepared to do that, Commissioner, and it may be that that's what suits the Commission, very happy to do - - -

THE COMMISSIONER: I think that document is going to do that though, isn't it?

5 MR HINKLEY: I think that is right, Commissioner, yes. So what we had in mind is that the Commission wasn't going to ask that of us, but which we were very pleased to do, the Commission would hopefully have an opportunity to examine the document and then early next week or later if necessary call us back to ask us questions or make comments as to what
10 else should be done, or whatever.

THE COMMISSIONER: Yes.

MR HINKLEY: We will get those two new documents to you, sir. We are certainly capable of giving you copies of them now, but they are not even as up-to-date as this consolidated document, UFU45.

15 THE COMMISSIONER: No, I will wait for them, but I would be grateful of them because I will rely on them rather than take the parties through the award clause by clause.

MR HINKLEY: Yes. I must say, Commissioner, we did expect that, but we didn't want the Commission to think that we were not happy to do
20 otherwise, if it suited the Commission. Now that leaves, and I should say this, sir, that those two documents when they come to you like this UFU45 which is presently before you, will represent the consent position of the parties, leaving aside three issues to which I have already made reference so far.

25 Can I identify those three issues, and I don't do this in any sense of priority or significance. One of them is an issue as to provisions in the award concerning redundancy. On that issue the parties are agreed as to what appropriate wording would be used in respect of redundancy, if there were a redundancy clause. Presently the parties are further examining their
30 position in relation to that issue, and would expect by Friday to be able to advise the Commission of their position in relation to it.

The Commission might recall that the first joint submission made reference to the prospect of written submissions from the parties on that issue, if indeed there were a difference of view about it. As we presently see it, if
35 there were a difference of view about it, there would be such written submissions, but no one can say with any confidence at all at the moment

whether or not the parties will reach an agreed position or have a common view.

5 Now the other two matters, Commissioner, are matters on which we have a joint view that we could well very much be assisted by discussions with the Commission, and for the Commission to give consideration to those issues and indicate what attitude the Commission took about them. And they are these, Commissioner. The first is a provision that is in the interim award which enables three days of bereavement leave to be taken on any occasion for which it is relevant, and for such leave to be re-credited to the
10 leave bank, as it were.

15 The other issue on which the parties would appreciate discussions with the Commission, and some guidance, is the issue of the provisions in the interim award in relation to the MFB and CFAs Acts concerning disciplinary matters, disciplinary and related matters. And I don't think I need to express that more than that, the Commissioner would be aware of the issue that is involved. So on those two issues, Commissioner; the three days re-crediting bereavement leave issue, and the disciplinary provisions of the MFB and CFA Acts, the parties considered they would benefit from guidance from the Commission in a discussion.

20 We had in mind, Commissioner, if it was convenient for the Commission, that the Commission might move out of formal hearing very soon, and with the CFA, ourselves, and the MFB participating, engage in those discussions on the bereavement and disciplinary issues, and have the benefit of guidance from the Commission about those matters, and then be able to
25 determine what their views are, and to what extent they agree or disagree about them. Subject to anything the Commission wants to discuss that is as much as we wanted to say about these matters.

THE COMMISSIONER: Thank you, Ms Russell.

30 MS RUSSELL: Yes, Commissioner, really I don't have anything to add, Mr Hinkley has set out the position between the parties as such.

35 MR HINKLEY: I am grateful for my friend's indication of that Commissioner, I should ask you sir, and I failed to do it, for leave to have incorporated into transcript the further joint submissions which you marked UFU44 and because this is going to appear on another page of the transcript, to record once again that they were signed by my learned friend Ms Russell from CORRS on behalf of the CFA and by Mr Peter Marshall on behalf of the United Firefighters Union, both signatures bearing today's date, if the Commission pleases.

THE COMMISSIONER: Yes, well those submissions will be included in transcript. I think we will just go off the record if we might, for a moment.

FURTHER JOINT SUBMISSIONS

- 5
1. As foreshadowed in the CFA and UFU joint submissions to the AIRC on 25 November 1999, the parties have had further discussions and are now in a position to provide the Commission with a draft simplified Award that they submit accords with the requirements of the *Workplace Relations and Other Legislation Amendments Act 1996 (Cth)* (WROLA) and the *Workplace Relations Act 1996 (Cth)* (WRA). A copy of this Award is attached to this submission and the parties will seek to tender this.
- 10
2. In these submissions, the parties make further submissions to the Commission on a number matters, namely: day firefighters; part-time firefighters; and rates of pay.
- 15
- A. DAY FIREFIGHTERS**
3. The draft Award makes it clear that firefigheres and fire officers may be employed on the 10/14 roster, the 'not subject to the 10/14 roster' basis or on the special duties roster. Such employees are paid the same total weekly wage under the Award as firefighters or fire officers on a 10/14 shift roster.
- 20
4. Since 1986 the CFA has not employed any firefighter or fire officer pursuant to the Award on other than the 10/14 roster, the special duties roster or the 'not subject to 10/14 roster' basis.
- 25
5. The parties accordingly submit that the Award provisions relating to day firefighters are obsolete.
- 30
6. Consistent with the provisions of the WROLA, the parties submit that the Award ought be varied by removing the obsolete provisions of the Award.
- 35
7. Consistent with the provisions of the WROLA, the parties submit that the Award ought be varied to avoid any confusion and to clarify that the wages to be paid under the

Award to various firefighters within any given rank are the same.

B. PART-TIME EMPLOYMENT

- 5 8. The parties submit that, having regard to the nature of the industry and of the firefighting occupation, it is not appropriate to employ part-time firefighters and officers in the CFA. Accordingly the Commission need make no variation to the Award in this regard.

C. RATES OF PAY

- 10 9. The parties submit that the Award rates of pay provided for firefighters and fire officers are properly fixed minimum rates of pay. In paragraphs 10-14 the parties briefly summarise the relevant award history to that effect.
- 15 10. Following the *August 1989 National Wage Case Decision* (NWC) (Print H9100), the rates of pay and the classification structures were comprehensively reviewed by the parties and by the Industrial Relations Commission of Victoria (IRCV) to ensure that the Award complied with the NWC principles. As submitted below, three increases to the Award rates were granted because the principles of the NWC had been complied with. Since that time the only increases to the rates of pay have been 'safety net' increases.
- 20
- 25 11. First Structural Efficiency Principles (SEP) increase The Parties agreed on a Joint Statement on 19 September 1989 which committed them to major reforms of the fire service in the context of structural efficiency negotiations. On November 1989, the parties entered into the *CFA Structural Efficiency Enabling Agreement* that outlined specific principles to govern the structural efficiency process. The MFB and UFU entered into another Structural Efficiency Enabling Agreement in November 1989 in similar terms. This was signed on 22/11/89 by the UFU and MFB. The first SEP increase became accessible following a commitment to restructuring in accordance with the SEP. Decision D89/1395 on 22 November 1989 granted the first SEP increase to the MFB and CFA.
- 30
- 35
12. The UFU applied to the CFA Operational and Operational Support Conciliation and Arbitration Board on 21 September

5

1990, for the establishment of a new award - the *CFA Operational and Operational Support Award 1990*. This amalgamated two previous CFA awards. The Commissioner considered whether the proposed award would infringe the SWC or NWC principles and held:

10

*'The parties have addressed their minds to ensuring that the provisions contained in this first consolidated award are provisions that are consistent with the SWC Principles. There are no increases in salaries or allowances that have not been the subject of approval of either the Full Bench or approval by this Board.'*¹

In addition, the Commissioner noted that the SEP had not been infringed.²

15

13. The second SEP increase On 31 May 1991 a Full Bench of the IRCV, hearing the matter as a special case, held that the second SEP increase was justified.

20

14. The third SEP increase As a result of the *State Wage Case* on 15 July 1991 (Decision D91/0300 of the IRCV), a further 2.5% (maximum) SEP increase became available upon application. On 15 August 1991 the IRCV granted the third SEP increase (Decision D91/0345).

Safety Net Increases

25

15. Following the variations to the classification structures and the wage rates in accordance with the *National Wage Case Decision 1989* and the structural efficiency principles, the only variations to the Award rates of pay have been safety net increases. These increases are as set out in the following table.

Classification	Nominal Relativities	Safety Net Adjustment 1 C.No 34859 Nov. 1994 \$8.00	Safety Net Adjustment 2 C.No 32549 May 1995 \$8.00	Safety Net Adjustment 3 C.No 34194 Oct. 1996 \$8.00	Safety Net Adjustment 4 C.No 32933 June 1997 \$10.00	Safety Net Adjustment 5 C.No 36508 Sept 1998 \$12-14.00
Recruit (10 week)	88	405.70	413.70	421.70	431.70	445.70
F/F Level 1	88	582.93	594.42	605.91	615.91	640.40
F/F Level 2	90	594.71	606.20	617.69	627.69	652.20
F/F Level 3	92	607.93	619.42	630.91	640.91	665.40
Qualified F/F	100	659.51	671.00	682.49	692.49	717.00
Qualified F/F (with L/F Qualls)	105	691.98	703.47	714.97	724.97	749.50
Senior F/F	110	724.31	735.80	747.30	757.30	781.80
Leading F/F	115	756.78	768.27	779.77	789.77	811.40
Station Officer	125	821.59	833.08	844.57	854.57	876.20
Snr Station Officer	135	886.39	897.88	909.37	919.37	941.00

(Signed)
Louise Russell
On behalf of the
Country Fire Authority
1 December 1999

(Signed)
P.J. Marshall
On behalf of the
United Firefighters' Union
1 December 1999

NO FURTHER PROCEEDINGS RECORDED

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NONE REQUESTED

IN THE MATTER
of the *Victorian Firefighting Industry Employees*
Interim Award 1993 Division B

AND IN THE MATTER
of a Review pursuant to the
Workplace Relations and Other Legislation Amendments Act 1996

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house Russell
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COAG

On behalf of the Country Fire Authority
29 November 1999

9/12/99

P. Marshall
.....

On behalf of the United Firefighters' Union
30 November 1999

9/12/99

³ Print L5300.

⁴ Print M5600.

⁵ Print P1997.

⁶ Print Q1998.

⁷ The classification levels of Station Officer and Senior Station Officer were replaced by the terms Fire Officer Grade 1 and Grade 2, respectively to distinguish the CFA from the MFB.