



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT COLMAN
DEPUTY PRESIDENT O'NEILL**

C2023/3422

s.604 - Appeal of decisions

**Appeal by United Firefighters' Union of Australia (259V)
(C2023/3422)**

Melbourne

10.02 AM, TUESDAY, 19 SEPTEMBER 2023

PN1

VICE PRESIDENT ASBURY: Thank you. Could we start by taking the appearances?

PN2

MR H BORENSTEIN: If the Commission pleases, I seek leave to appear for the appellants, with Mr Bromberg. We filed a submission on 1 August this year for permission to appear.

PN3

VICE PRESIDENT ASBURY: Thank you.

PN4

MR C O'GRADY: If the Commission pleases, I seek leave to appear with my learned friend Ms Davern for the Minister for Emergency Services who is seeking to be heard in this matter pursuant to section 590 and again, we filed submissions going to the issue of permission in accordance with the Commission's directions.

PN5

VICE PRESIDENT ASBURY: I think on the basis of our satisfaction that this matter raises issues of some complexity, no issues of fairness arise with respect to the parties being legally represented and permission is granted. Thank you. Are there any preliminary matters that we need to deal with?

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MR O'GRADY: The only preliminary matter might be whether the Commission wishes me to address the second 590 point. You'll have seen in our written submissions we have directed the Full Bench to the relevant authorities in respect to 590. Of course there is a very broad discretion. I'm happy to do that in the running, if you like, or I'm happy to do it as a preliminary issue. I'm in the Full Bench's hands.

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VICE PRESIDENT ASBURY: I think it might be better in the running.

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DEPUTY PRESIDENT COLMAN: Yes, or it may be no issue.

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VICE PRESIDENT ASBURY: Yes, we might deal with it in the running, thank you.

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MR O'GRADY: Yes.

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MR BORENSTEIN: I might indicate to the Commission that given that the Minister was allowed in the door in the first instance, we really don't feel we can stand in her way at this level.

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VICE PRESIDENT ASBURY: So it really isn't an issue that we need to deal with? Thank you.

PN13

MR BORENSTEIN: Thank you, no. If the Commission pleases, you'll have seen from the documents that this is an appeal from a decision of the Commissioner in matter 2023 FWC 1235, where the Commissioner was exercising private arbitral powers under clause 21 of Division A in clause 26 of Division B of the Fire Rescue Victoria Operational Employees Interim Enterprise Agreement, 2020. We've attached a copy of that enterprise agreement to our list of authorities and the clauses – the Commission will find the clauses at page 535 of the PDF of the list and clause 21.7 and 26.7.

PN14

I should perhaps explain that the enterprise agreement is divided up into two parts: division A and division B. They deal with different categories of firefighters. But for present purposes there is no need to be concerned about them. The relevant clauses are the same in both parts. So clause 21.7 of division A and clause 26.7 of division B provide that the parties have agreed that each may appeal a decision of the Commissioner as a right. On that basis it's submitted that the union doesn't require permission to appeal, as is the normal case under section 604. We've given the Commission in our outline of submissions a reference to the Full Bench decision of DP World Brisbane, where that point is explained.

PN15

We don't understand that the other parties take any opposition to that position. Can I just take a few moments to explain the factual background to the appeal? There is an extant dispute between the union and FRV about the establishment of a Victorian Firefighters Registration Board. The concept, as is explained in the Commissioner's decision, which he calls the fettering decision, is essentially that an entity was intended to be established to assess whether firefighters employed by FRV meet the qualifications which are prescribed in the schedules to the enterprise agreement. The schedules describe standards that need to be met for employment at different levels within Fire Rescue Victoria.

PN16

The purpose of the registration board, as it was originally intended, was for someone to assess the firefighters against those standards and if they meet the standards, to issue them with a registration certificate. The dispute, as you will have seen from the papers, has been the subject of two arbitrations by the Commission. The first arbitration was heard by the Commissioner in August of 2022. He handed down a decision on 2 December 2022 which he calls and which we will call the fettering decision. Parenthetically, can I just say the reason it's called the fettering decision is because the Commissioner dismissed the application at that time on the basis that he formed the view that the establishment of the registration board under the document that was being proposed would fetter the statutory powers of FRV under its legislation.

PN17

The second arbitration was heard in March of this year and the decision was handed down on 29 May of 2023. That's the decision against which we appeal. If

the Commission has the decision handy, you will see at paragraph 10 that the Commission has set out the order in which we asked him to make in settlement of the dispute. You'll see that the order is that the FRV enter into a contract with a corporate entity and the UFU in the form and to the effect of the proposed service contract, subject to completion of details in schedule 1 and 3 - and I'll explain that in a moment – for the provision by the company of the services of registering qualified firefighters for FRV and such other services that are provided for in the contract.

PN18

Now, when the dispute first started, the union's claim was simply for the establishment of a registration board. In the course of negotiations around that dispute, FRV indicated that it required that the registration services to be provided by a board had to be provided under a service contract of the kind which they entered into with other service providers. So that is how we've got ourselves into the situation where we're arguing about a service contract. The service contract is the template which FRV uses. The negotiations over the course of the dispute were about the terms that were or weren't appropriate to go into the contract for this particular purpose and a number of the clauses couldn't be resolved.

PN19

They were initially put to the Commission in the first arbitration and then following that, the outstanding issues were sought to be resolved in the second arbitration.

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VICE PRESIDENT ASBURY: Mr Borenstein, can I just ask, was the proposal or the claim for a registration board in the form that is – that it ended up being? Was that what the UFU was seeking at the outset? Forgetting the service contract aspect of it, but other than that was the structure that was being proposed or being sought the same as what is currently being agitated?

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MR BORENSTEIN: Effectively, yes.

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VICE PRESIDENT ASBURY: Yes, okay – thank you.

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MR BORENSTEIN: Now, just as an historical matter, in the fettering decision, which is the decision on 2 December 2022, which – you'll find it in tab 13 of our listed authorities but can I just give you the reference? At paragraph 7 of that decision the Commissioner set out the questions which were put to him by the parties – by both parties, FRV and the UFU, because it was a consent arbitration. You'll see that in paragraph 7 and it deals with questions about the content of the service contract and the execution of the service contract. They were the questions which the parties to the enterprise agreement and the parties to the arbitration as a consent arbitration under the enterprise agreement asked the Commission to decide. The Minister came along. The Minister is not a party to the enterprise agreement. The Minister is not a party to the arbitration. The

Minister is probably not bound by the arbitration – and asked to make submissions about issues which neither of the other parties raised.

PN24

The Commissioner allowed the Minister to make her submissions and then the Minister went on to decide the arbitration, having regard to those submissions and our response to them. We would ask the Full Bench to note – and you'll see this at page 428 of the list of authorities; this is in paragraph 17 of the fettering decision – that in that hearing, noting the questions which were posed for arbitration, the Commission recorded what had happened in the proceeding. He recorded in its oral submissions the FRV submitted that it did not oppose either affirmative answers to the questions or for the order as attached to be granted. It goes on to refer to an argument that was raised by the Minister about whether the claim was a matter pertaining and FRV stated on transcript:

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FRV has proceeded on the basis that those clauses are matters that pertain to the employment relationship and as the agreement indicates, the FRV agreed to include those clauses therein on that basis.

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MR BORENSTEIN: So one of the many arguments which the Minister advanced about the claim, being that it didn't pertain in the relevant sense was rejected by FRV, the other party to the arbitration and the Commission ultimately rejected that it was an argument in any event. But we draw attention to that, to that response by FRV to demonstrate the point that this was a private arbitration. It wasn't a general proceeding of the kind the Commission sometimes deals with and private arbitrations have a particular character and within the private arbitration the parties to it were in agreement about the orders that the Commission might make and the only reason that the matter had to be resolved by the Commissioner in a decision, was the participation of the Minister, who raised a range of various issues.

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DEPUTY PRESIDENT COLMAN: Does that mean the parties weren't in dispute, then?

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MR BORENSTEIN: I'm sorry?

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DEPUTY PRESIDENT COLMAN: If the FRV didn't oppose what was sought by the union - - -

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MR BORENSTEIN: Oppose the making of the orders?

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DEPUTY PRESIDENT COLMAN: Yes – what was the dispute between the parties then, that required a resolution?

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MR BORENSTEIN: Well, in the result, the orders weren't made and they weren't implemented so the underlying issue is still unresolved.

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DEPUTY PRESIDENT COLMAN: But if the FRV didn't oppose what was being sought, was there actually a dispute, I'm just wondering – between the parties. The Minister had raised these other issues - - -

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MR BORENSTEIN: Well, but it needed an order to be made.

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VICE PRESIDENT ASBURY: But why? If the parties agreed to the order, then why couldn't they have agreed – why were they in the Commission at all if they were in agreement?

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MR BORENSTEIN: Well, Mr Catanese might be able to explain that but the FRV weren't prepared to sign the document. They didn't come to us and say, 'Well, we're now in agreement about all that. Give us the document and we'll put our signature on it'. That was never proposed to us. All that we get – and with respect, the question, a legitimate question but all that we got was a statement to say, 'Well, we're not going to oppose this'.

PN37

VICE PRESIDENT ASBURY: But what was the dispute that was notified that we've got agreement and they won't sign it, or what? What was the underlying dispute?

PN38

MR BORENSTEIN: No – the agreement was that in the course of negotiations the service contract was developed.

PN39

VICE PRESIDENT ASBURY: Yes.

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MR BORENSTEIN: But there were outstanding issues that hadn't been agreed when we notified the dispute. They are the questions that are in paragraph 7 of the first decision.

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VICE PRESIDENT ASBURY: But if you agreed on them by the time you got to the Commission, why did you have to go to the Commission? Why couldn't you have just amended the service contract to reflect the agreed content of the orders and gone happily on your way and - - -

PN42

MR BORENSTEIN: Well, if that were achievable that would have been a very handy outcome but it didn't happen because FRV didn't offer to sign the

contract. There was only that statement. I understand the import of what you're putting to me, Vice President, but I'm just saying that in their submissions, in their oral submissions to the Commissioner, this is what they said – that there was no indication that they were prepared absent an order to sign the document.

PN43

DEPUTY PRESIDENT COLMAN: So there was a dispute at least to that extent, that the union wanted the FRV to sign the agreement and the FRV wouldn't do so.

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MR BORENSTEIN: That's how I perceived it, yes.

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VICE PRESIDENT ASBURY: And to bring the agreement into effect because it had been agreed it was a service contract, it had to have been signed by the other party to have been the FRV?

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MR BORENSTEIN: Yes.

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VICE PRESIDENT ASBURY: I understand, thanks.

PN48

MR BORENSTEIN: Of course, it's to be remembered that at this point in the process before the Commission in the first instance, the Minister had already been participating in the arbitration and had put on submissions opposing the making of the orders. But as between us and FRV, it seemed to us that the FRV were asking for orders to be made to then lead to the execution of the agreement.

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DEPUTY PRESIDENT COLMAN: To facilitate its agreement – to facilitate its ability to sign the document, is that right?

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MR BORENSTEIN: Effectively, I think.

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DEPUTY PRESIDENT COLMAN: All right.

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MR BORENSTEIN: I'm not privy to the internal thinking that went on - - -

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DEPUTY PRESIDENT COLMAN: Yes.

PN54

MR BORENSTEIN: - - - in those instructing Mr Catanese from FRV and I don't claim to have any expertise on the bureaucratic mind and whether there is some imperative in having a Commission make an order before you can do something.

PN55

DEPUTY PRESIDENT COLMAN: But I'm just wondering, coming back to the dispute question – I mean, it would be one thing if one party wants the other party to sign a document and the other party says, 'No, we don't agree to do that, we don't want to do that', so there's a dispute about that matter. But then if the other party says, 'Well, actually we'd be perfectly happy to sign it but we need a legal mechanism to enable us to do that', is that a dispute between the parties? I'm not sure, I'm just wondering.

PN56

MR BORENSTEIN: Well, the way we see it, Deputy President, is that there is an underlying dispute about the establishment of a registration board. As between the parties, FRV have said, 'That can be done but it has to be done through a contract'. So taking a pragmatic view of things, the union has said, 'Okay, let's work through the contract', the intention being that when they get agreement on the terms of the contract it would be signed off by both parties and then the board would be established and that would resolve the dispute. What has happened is that there hasn't been agreement on the terms of the contract in the first instance and a dispute has had to be taken to the Commission. When we get to the actual hearing in the Commission FRV indicate, 'Well, we don't oppose the making of the orders'.

PN57

But it appeared to us that it required the orders to allow FRV to then take the next step and sign the agreement or the contract.

PN58

VICE PRESIDENT ASBURY: It's like disputes back in the '80s: 'We know we should agree but we're not going to so we'll go to the Commission and get them to tell us to agree and then we will'.

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MR BORENSTEIN: That's before my time.

PN60

VICE PRESIDENT ASBURY: Touche.

PN61

MR BORENSTEIN: But so that's where we got and I wasn't seeking to embarrass FRV by drawing attention to those passages in the decision but simply to indicate that this has blown up by reason of the intervention of the Minister. We opposed the intervention at that time. We were overruled and the rest is history, but - - -

PN62

VICE PRESIDENT ASBURY: Or has it blown up because the FRV refused to sign something?

PN63

MR BORENSTEIN: No. What I mean is the scope of the arguments in the dispute have blown out because of the gamut of issues that the Minister has raised, including that the claim doesn't relate to the relationship and those sort of arguments and fettering arguments and a range of other arguments which I'll

regale you with shortly. But I suppose making a comment that has no bearing any longer, it perhaps shines a light on the need to be very conscious about the special character of an arbitration as opposed to the ordinary sort of proceedings that a Commission has and I'm sure members of the Bench are familiar with all the court authorities about the character and nature of a private arbitration in the Commission and how it's intended to find the particular parties and the powers of the arbitrator to do that on the various issues that are before him work.

PN64

But at any length I shall move on. In any event, leaving all of that history behind, the Commissioner decided to dismiss the application. He upheld the Minister's objection, which he described as the fettering objection and he dismissed the application and that can be seen from paragraph 98 of the fettering decision and paragraph 102, which simply record that he has upheld the fettering decision. The fettering decision is dealt with in the reasons for decision at paragraphs 59 through to 80 and I don't propose to take up the time of the Commission here but I might simply give you a reference to it. It's perhaps encapsulated at paragraph 94 of the fettering decision in the penultimate dot point where the Commissioner is summarising the various findings on the various objections and he says:

PN65

The finding that the fettering objection should be upheld is on the basis that the service contract as drafted has the potential to conflict with the FRV's legislative function under 25B since the corporate body may potentially seek the qualifications of firefighters of registers and thereby the firefighters FRV may engage.

PN66

MR BORENSTEIN: Then he goes on to say – and I wish to emphasise this because it explains the next round – he says:

PN67

However, that is not to say that the service contract is incapable of being drafted in such a way that the conflict is removed.

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MR BORENSTEIN: So he upheld the fettering objection. He told us, 'Well, if you change the contract you may overcome the problem', and dismissed the application on that basis. Following that decision on 2 December, the union filed a revocation application on 12 December and that's in the appeal book at page 134 and you'll find the grounds for that at page 138. Just to summarise without taking up too much time, the grounds were that the fettering, the grounds of the fettering objection which the Commission upheld were not matters that had been advanced in those terms at the hearing and that the UFU have not had an opportunity of responding to it and it was essentially a denial of natural justice and what was being sought was that the dismissal of the application should be revoked and that the union should be given an opportunity of addressing that fettering issue.

PN69

Having done that, the union also at the same time, being very proactive, sought to engage with the Commissioner's suggestion that the contract might be amended in

order to overcome the fettering decision and it was thought that if you could do that, there's no need to have the legal argument about revocation and so on, if you can just meet the objection by amendments, then that solves the problem. So the union took steps to try and address that and at appeal book 227 you have a statement from Ms Campanaro, who is the industrial officer for the union, where she sets out correspondence that she's had with FRV over the periods between December and February, proposing changes to the service contract, to meet the fettering objection.

PN70

Now, the fettering objection as we understood it from the Commissioner was that the contract allowed the registration board to impose qualifications beyond those that were prescribed in the enterprise agreement. In that way, although it might be said that FRV is not fettered because it's agreed to the qualifications in the agreement if the board goes beyond that, that might be a fettering. So it was proposed that there would be some amendments which would make it clear that the board was confined only to applying the qualifications that were in the enterprise agreement. Now, that was proposed to FRV and FRV wouldn't agree to that. So because there was no agreement from FRV, the UFU notified a dispute – second dispute – asking for the Commission to order the signing of an amended service contract which included those limitations that had been proposed to FRV but hadn't been agreed.

PN71

The arbitration, which we're appealing – the decision which we're appealing – addressed that amended application and the further objections which the Minister made to the orders. So that's the historical background to why we're here and how we come here. In the minister's outline of submissions, which she filed on 12 September, which is in the appeal book somewhere – I assume that the Bench has access to it. Apparently the appeal book was filed before (indistinct). At paragraph 3 to 9 of that document, the Minister outlines what she asserts is the background, the relevant background, and we just wish to take some issues with some of the points that she makes. In paragraph no.4 she describes what she says is the registration process that's proposed and we wish to take issue with the way she's described it. First and foremost we wish to say that it fails to mention at all the point which we make, which is that the qualifications for firefighters to achieve registration are qualifications that are set out in the enterprise agreement.

PN72

The relevant qualifications can be found at appeal book 661 and 665, which are pages in the list of authorities, which are the pages – I'm sorry. They're the pages at which we've made the amendments to limit the registration to – I have to correct myself. It's page 661 and 665 of the appeal book, which is the contract.

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VICE PRESIDENT ASBURY: Of the appeal book, yes.

PN74

MR BORENSTEIN: Yes, I just want to draw attention to the clauses which we inserted as a result of the first decision. You'll see in clause 5 – that's schedule 2, clause 5 – in paragraph B, we've inserted subparagraph (i), which reads:

PN75

For the avoidance of doubt, the standards for inclusion on the register will at all times be the same as those specified in schedule 3 of division A and schedule 5 of division B of the operational agreement.

PN76

MR BORENSTEIN: There's a similar amendment made in schedule 4 on page 665 in clause 3, where we've added the sentence – you'll see in clause 3 it starts off by saying:

PN77

The qualifications, competencies and operational experiences as specified by the operational agreement and the agreed training framework of the standards required for registration as a professional career firefighter - - -

PN78

MR BORENSTEIN: And we've added in response to the Commission's fettering decision:

PN79

For the avoidance of doubt, the qualifications, competencies and operational experiences required for registration shall at all times only be those specified in schedule 3 of division A and schedule 5 of division B of the operational agreement.

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MR BORENSTEIN: Those were the clauses which we proposed to FRV and which they couldn't agree to. So we've put them in the contract and we've sent them off to the Commission. In the background document, the Minister does not refer to them, which is a significant omission. Our submission is that contrary to the sinister undertone of the Minister's characterisation of the role of the registration board, we submit that the registration board, the role of the registration board, is analogous to that of an expert assisting the FRV with the assessment of where the prospective firefighters meet the qualifying standards prescribed by the enterprise agreement and agreed to by the FRV.

PN81

We put it to the Commissioner that it's akin to employing a third party to provide pay roll services in order to meet FRV's obligations under the enterprise agreement. It's analogous to that process. It's not sinister and it doesn't add anything to what's agreed to already in the enterprise agreement.

PN82

VICE PRESIDENT ASBURY: Except if the firefighter doesn't get registered, doesn't achieve registration, they can't be employed whereas at the moment if they meet the definitions in the enterprise agreement, they can.

PN83

MR BORENSTEIN: Yes, but they can't – but if they don't get registered it's only because they don't meet the definitions. The registration is simply an acknowledgment that they have the competencies, et cetera, that are prescribed in

the agreement. If they don't have those competencies, they would have to get those competencies before they could do whatever they're being asked to do in their employment.

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VICE PRESIDENT ASBURY: Why would they be employed at all if they didn't meet the competencies that are already in the agreement?

PN85

MR BORENSTEIN: It's – the timing of the actual employment, the actual offer of employment, is not something that was canvassed in the arbitration and there is no evidence about the mechanical process by which these people are employed. It's not clear, for example, whether they have an offer of employment which is conditional on them satisfying the conditions in the enterprise agreement which is something you might expect. There was no evidence about that before the Commissioner. It was – I think everybody simply assumed that if you were to be employed you had to have the various competencies, et cetera, that are prescribed and not only employed but promoted and so on, that you had to have the competencies that were required under the enterprise agreement. If you didn't have the competencies then it was incumbent on you to get them – to do some training or however you needed to, to achieve the standards that were required.

PN86

VICE PRESIDENT ASBURY: Thank you.

PN87

MR BORENSTEIN: Can I also then briefly avert to paragraph 8 of the Minister's outline where it's said that under the contract it's the registration board, not FRV, that's responsible for the application of those standards and make the responsive submission that that's not really a very fair or accurate representation of the contractual position between the parties. We would say that if a service provider fails to provide the contracted services on the terms that are contracted, that would be a breach of the contract so if the pay roll service fails to pay the correct wages to a worker, that would be a breach of the contract. To say that the FRV is responsible for the application of those standards misrepresents the position. The registration board has the mechanical task on behalf of FRV of ensuring that firefighters meet the standards that are required at the particular time.

PN88

If it doesn't do it then it's in breach of contract and FRV would be able to intervene under the contract. So it goes nowhere to say that it's the registration board rather than FRV that makes the assessment. Then paragraph 5 of the background draws attention to various provisions of the constitution of the corporate registration board. We say that is a complete distraction from the issues that are to be decided. The constitution of a company forms not part of any contract that it enters into for the provision of services. What is significant and what is important legally is what is the content of the contract, which prescribes what the obligations are of the board and FRV, as between themselves. So to refer to the terms of a constitution is a complete distraction and to be ignored. Then in paragraph 4A the Minister says:

PN89

A contract remains on foot until terminated, such termination only being permitted with the agreement of the UFU.

PN90

MR BORENSTEIN: Now, that – respectfully to our friends – is a misrepresentation of the position as it was before the Commissioner. The Minister in the first instance raised this as an objection. It was said, how can you have a contract which can't be terminated and goes on forever unless the UFU agrees to extermination? In response to that, the UFU submitted a variation to the contract and provided that the contract would only continue during the lifetime of the enterprise agreement. So at the end of the enterprise agreement, the UFU would have no – just trying to find the clause for you – would have no ability to prevent the termination of the contract by FRV.

PN91

VICE PRESIDENT ASBURY: But did that mean while the agreement was in its nominal term or while it operated?

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MR BORENSTEIN: While it operated – while it continued to operate.

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VICE PRESIDENT ASBURY: Which could be indefinitely – until terminated or replaced.

PN94

MR BORENSTEIN: Yes. But this was an arbitration under this enterprise agreement to resolve a dispute that had arisen under this enterprise agreement and the purpose of the amendment was to confine its ongoing effect to the lifetime of the agreement that it was made under. The clause in question is at page 654 of the appeal book at clause 16.2A. It basically says the requirement in the previous clause is for the prior written agreement (indistinct) shall only apply while the 2020 agreement remains in operation.

PN95

VICE PRESIDENT ASBURY: 664 of the appeal book?

PN96

MR BORENSTEIN: 654, sorry.

PN97

VICE PRESIDENT ASBURY: Thanks.

PN98

MR BORENSTEIN: It's clause .2A.

PN99

VICE PRESIDENT ASBURY: Thanks.

PN100

MR BORENSTEIN: This point of this being that this is a dispute between the union and FRV. FRV have proposed that the dispute be resolved by using the mechanism of a contract. The FRV – I'm sorry, the union – has an interest in preserving the settlement of the dispute at least during the lifetime of the enterprise agreement. The Minister drew attention to the fact that it potentially could have – the contract could have continued on beyond that and in response to that, the clarifying amendment was made. Now, we only draw attention to it because it's at odds with what is advanced by the Minister in clause 4A of her background document.

PN101

Then finally, in relation to paragraph 9 of the Minister's document, it's said – reference is made to a direction by the Minister made under section 8 of the Fire Rescue Victoria Act, that FRV not enter into the service contract, and then the final sentence: 'At all times FRV has taken the view that the direction was binding on it and prevented it from entering into the amended service contract'. We simply make the point in response to that, that whatever view FRV took about the validity of the Minister's direction is not a matter that should have affected any consideration of the claim, whether the direction was valid or not as a matter of law is not determined by the subject belief of one or other of the parties.

PN102

DEPUTY PRESIDENT COLMAN: If there was some doubt about that, that would be a relevant discretionary consideration, wouldn't it?

PN103

MR BORENSTEIN: If there's some doubt about which, sir?

PN104

DEPUTY PRESIDENT COLMAN: Some doubt about what the legal effect of the direction would be.

PN105

MR BORENSTEIN: But it doesn't turn on the subjective belief of one party or the other.

PN106

DEPUTY PRESIDENT COLMAN: No, but if the Commissioner thought that there was some doubt about what the illegal effect of his order would be in light of the directions, he could take that into account, couldn't he?

PN107

MR BORENSTEIN: Well, we propose to address the Commission about that. I can say by way of preview that what we would say based on authority is that where there was a live question in the arbitration, as there was, about the validity of that direction, insofar as the Commissioner took the view that its validity or otherwise impacted on what he can or should do under the arbitration to resolve the dispute. We will submit to you that it was incumbent on him to form an opinion about the validity in order to inform how he resolved the dispute.

PN108

DEPUTY PRESIDENT COLMAN: Thank you.

PN109

MR BORENSTEIN: I should say, there was another – and again, I'll come to this too – there was another, similar type of legal issue that was before him, which was – I'm not sure of the right noun but a direction from the Minister that her consent was required for entering into this contract under section 25A and she did not give her consent and the Commissioner analysed that argument and found that no consent was required and so put that aside. I simply mention that to draw attention to the fact that the Commissioner did follow that course, of forming an opinion about that legal issue.

PN110

DEPUTY PRESIDENT COLMAN: And you say he should have done the same thing with the other orders?

PN111

MR BORENSTEIN: Absolutely. Now, the Commissioner in this arbitration declined to make the order sought by the union and at paragraph 92 of his decision, he says: 'I therefore decline to make the order sought by the UFU for two essential reasons' – paragraph 92:

PN112

I therefore decline to make the order sought by the UFU for two essential reasons: I am not yet satisfied that the service agreement does not impermissibly fetter FRV and I am not satisfied that the Commission should make the order as sought, given the Ministerial direction, as I am concerned there would be no utility in doing so or that issuing the order would not settle the dispute.

PN113

Now, we have in our notice of appeal advanced 13 grounds of appeal but we have sought to group them to make life a bit easier and so if I might I'll address them in the groupings that we've proposed and which the Minister has responded to in any event. So if you have the notice of appeal I can direct your attention to the first group of grounds that I wish to address. They are grounds 6 and 13. Six is a substantive grounds and it reads that:

PN114

The Commissioner erred by misdirecting himself as to the effect of the authorities referred to in paragraph 77 and 78 of his decision because those authorities require that to exercise the arbitral powers to settle the dispute submitted to him without regard to interventions by parties external to the arbitration and the dispute.

PN115

MR BORENSTEIN: The error which we say the Commissioner made is that he refused to resolve the dispute. The error was caused because the Commissioner misdirected himself as to the effect of certain authorities bearing on the Commission's jurisdiction. You'll see that at paragraphs 77 through to 83 of the decision, where at paragraph 77 the Commissioner refers to the Full Bench

decision in the *United Firefighters' Union v MFB* case and that he sets out a passage from that Full Bench decision, which is paragraph 59 of the Full Bench decision which says:

PN116

The dispute resolution terms in the MFB and ACFO agreements provide that if the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWA. FWA may utilise all its powers in conciliation and arbitration to settle the dispute. It appears to us that this procedure is both permissive and discretionary. It is permissive because it is conferral of power. It is discretionary because it leaves it to the Commission to determine which of its powers it will exercise to settle the dispute and how.

PN117

MR BORENSTEIN: Then the underlined passage – and this is not our underlining, this is the Commissioner's underlining:

PN118

But in the end it is not a discretion which is exercised and let large because the discretionary choice that is to be made is to be directed at the object of the power, namely to settle the dispute. It may be, for example, that a Commission member dealing with a dispute forms the view that the Continued existence of conciliation power is a better vehicle through which to settle the dispute than arbitrating the dispute. But we do not think it is open under the dispute resolution terms for the Commission to refuse to arbitrate a dispute with the consequence that the dispute has no means of resolution. As long as it is within the scope of the matters which can be progressed under the term which is required, what is required is that the Commission do what is necessary, using the powers conferred by the term to settle the dispute.

PN119

VICE PRESIDENT ASBURY: But why doesn't that include, 'Go away and keep talking. I'm not yet satisfied but if you come back with something else, I might be'. Why doesn't the discretion include that?

PN120

MR BORENSTEIN: Well, firstly, that's not what the Commissioner said. We'll take you to come of the passages that support that conclusion that he made and you'll see that, for example, with the fettering he didn't address the fettering and we'll show you that in a moment. But the fettering being one of the critical matters on which he refused to make the order – he having not addressed the fettering - - -

PN121

VICE PRESIDENT ASBURY: But hadn't he addressed it in the fettering decision?

PN122

MR BORENSTEIN: Yes, I know, but that was the earlier decision which we sought to address by amending the contract. We've now given him an amended contract.

PN123

DEPUTY PRESIDENT COLMAN: And he says he's still not yet satisfied.

PN124

MR BORENSTEIN: Because he hasn't – I'll show you the passages in a moment. But the fact is that what he said was the fettering issue has been raised in the revocation case and I'm not dealing with the revocation case because I've been asked not to deal with that matter and I think he says in one of the passages: 'I've not heard submissions about fettering and therefore I can't decide the fettering'. Now, we say that his analysis is wrong and we'll make submissions about that in a moment. But that was one of the two essential reasons. It wasn't, 'Go away and do it again'. It was, 'I can't decide the fettering decision and therefore I'm not going to make the order here'. We'll make a submission to you short to explain why he was wrong about that and why he misunderstood the interaction between this arbitration and the revocation application. It was explained to him at the outset but he appears to have failed to appreciate the distinction between the two. I can say it parenthetically. When the case started we made an application – both the revocation application and the dispute application were listed and in the lead up to the case we approached the other parties and we say to them, 'There's no need to have the revocation argument if he's going to consider the service contract, which has the amendments in it, because in considering that he'll have to decide whether that resolves the earlier fettering problem. So we'll park the revocation case and we'll simply address this because we have it addressed in this case. There is no need to have the arguments around revocation and what have you'.

PN125

We explained that to the Commissioner and we'll show you the references to that and so that's the basis on which it proceeded. Arguments were put about the fettering in this case and yet he found that he couldn't resolve it because the fettering arguments were in the revocation case (indistinct).

PN126

VICE PRESIDENT ASBURY: Didn't he just find that he couldn't resolve it because he wasn't satisfied that - or he was not yet satisfied that the service agreement does not impermissibly fetter FRV?

PN127

MR BORENSTEIN: Well, but the reason why he was not yet satisfied is because he says earlier that he hadn't heard the arguments about it.

PN128

DEPUTY PRESIDENT COLMAN: So you say that he's not saying at 92: 'I'm not yet satisfied, notwithstanding these changes that you've made'?

PN129

MR BORENSTEIN: Yes.

PN130

DEPUTY PRESIDENT COLMAN: He's not saying that.

PN131

MR BORENSTEIN: I'm sorry, I will show you the passage shortly. But the line of reasoning was that, 'We haven't heard argument about the fettering because that's in the revocation case and therefore, I can't decide it in this case', and that's what he was referring to in 92. So you'll see at paragraph 85 of the decision, for example – yes, the starting point really is paragraph 41, I'm sorry, where he says:

PN132

The revocation application identifies and objects to findings made by me in relation to aspects of a fettering decision. Because those objections have been made, and the revocation application is only adjourned and not withdrawn, I do not determine at this time whether the amendments remove the concerns identified by me of impermissible fettering. The revocation application provides responses to the identified concerns. However, having not heard the UFU or FRV or the Minister on the subject, it would not be appropriate through this decision to either confirm the concerns or accept that they've been addressed by the amendments. Critically, examination needs to be given to whether the amendments are sufficient to overcome concerns of impermissible fettering.

PN133

DEPUTY PRESIDENT COLMAN: And you say that he didn't give consideration to that?

PN134

MR BORENSTEIN: No. No, he didn't.

PN135

VICE PRESIDENT ASBURY: So you say that the argument you put is that the amendments overcame the fettering issue and those arguments were not dealt with?

PN136

MR BORENSTEIN: No, because they were parked to be dealt with in the revocation, as the paragraph - - -

PN137

VICE PRESIDENT ASBURY: And you parked them because you wanted them to be dealt with in the proceedings that this decision was determining?

PN138

MR BORENSTEIN: Our position was that the question about whether or not the amendments resolve the fettering dispute overlapped. So in the revocation argument, in the revocation application there was an argument about it, about whether the fettering concerns were overcome and in this application, there was the same argument. They were different vehicles but the arguments overlapped and we explained this to the Commissioner and we say, 'Because they overlap and we're hearing this, let's hear this and we get a final decision instead of having a

revocation where we then have to go back and have another hearing', which would be about the same topic.

PN139

DEPUTY PRESIDENT COLMAN: Yes. But it would seem, then, that the Commissioner is proposing at least at this stage then to hear further from the parties or to further consider that issue. Is that your understanding?

PN140

MR BORENSTEIN: If and when the revocation application came on and our complaint is that that was wrong – that the issue was before him, because we have an amended contract and we were saying this contract meets the fettering concerns.

PN141

DEPUTY PRESIDENT COLMAN: All right – but that's why you said, 'Not yet'. He says, 'Not yet satisfied', because he's proposing to come back to the matter at some point.

PN142

MR BORENSTEIN: If and when the revocation application comes in. But the purport of paragraph 41 is, 'I'm not dealing with the fettering objections now because they are part of the revocation application and that's not before me'. We say that's wrong because the current application required him to deal with the fettering objections because we were asking him to rule on a contract that included the response to the fettering objections.

PN143

VICE PRESIDENT ASBURY: So essentially you're asking that the Full Bench send the matter back to Commissioner Wilson to deal with the fettering objections
- - -

PN144

MR BORENSTEIN: We say that's one of the - - -

PN145

VICE PRESIDENT ASBURY: - - - and whether your proposed amendments to the service contract address them?

PN146

MR BORENSTEIN: That's one of the errors we say he made and if you uphold that error, then ultimately we say you should send the matter back to him to decide in accordance with the decision of the Full Bench. So if you decide, for example, that the fettering decision should have been resolved within this matter, and you send it back to him to resolve, then that would be the relief that we would ask about the fettering.

PN147

VICE PRESIDENT ASBURY: That's the relief you're seeking, as I understand it.

PN148

MR BORENSTEIN: Yes.

PN149

VICE PRESIDENT ASBURY: Well, why couldn't you have achieved the same outcome by simply going back to the Commissioner and saying, 'We requested that you park the issue of the revocation application by adjourning sine die. Now we want it brought on again'?

PN150

MR BORENSTEIN: Because we don't want to deal with it in the revocation application – we had the issue before the Commissioner in this matter. We argued it before the Commissioner in this matter. For reasons that aren't entirely clear, the Commissioner took the view that it wasn't an issue to be decided in this matter. It's hard to understand how you come to that view when he's being asked to order a contract to be signed which includes the amendments addressing the fettering decision.

PN151

We want and we are entitled under the agreement to have this dispute resolved. This dispute includes dealing with the fettering problem. And we would submit respectfully that it's not appropriate for us to have this decision and to say, well, we have argued it here and we haven't decided here so let's go and have a different argument which raises other issues as well as fettering. I mean, the revocation application in order to succeed in that, we have to have a whole argument about denial of natural justice and what flows from that and so on. And so you might do the revocation application and on an issue completely separate from the fettering, the Commission might say, well, I am not revoking it because you haven't made out the grounds for revocation. But we just go around in a circle, because all we want is a decision on the fettering.

PN152

VICE PRESIDENT ASBURY: Then could the issue have been that because you did not seek to withdraw the revocation application that you adjourned it sine die, that the Commissioner thought, well, you are having a bet each way and you are leaving it – that you are leaving the same issues there for determination?

PN153

MR BORENSTEIN: We explained to the Commissioner why we were doing it. There was no question raised with him – by him or any of the other parties that you are suggesting to me of course. We thought we were doing what would be efficient which is to say well, if we have the revocation application, go around in a circle, but we come back to the same point.

PN154

Because the revocation application simply gives us a new hearing to argue the fettering, so we are already here for the fettering.

PN155

DEPUTY PRESIDENT O'NEILL: Are you able to point to where that issue was explained to the Commissioner?

PN156

MR BORENSTEIN: Yes. Yes, I will do that. I will do that. It's in – further down - - -

PN157

VICE PRESIDENT ASBURY: Sorry, we are taking you out of what you - - -

PN158

MR BORENSTEIN: No, no, I have no difficulty with that at all. So I was directing your attention to the passage out of the *UFU v MFB*, Full Bench at paragraph 77. And then at paragraph 79, the Commissioner notes following that and following setting out the Dispute Resolution Clause from the Agreement:

PN159

Relevantly – he says – The Commission is charged to utilise all its powers in consideration arbitration to settle the dispute.

PN160

He's underlined it.

PN161

VICE PRESIDENT ASBURY: And so your submission is he in fact did not do that?

PN162

MR BORENSTEIN: That's right.

PN163

VICE PRESIDENT ASBURY: He's emphasized those matters but did not in fact do it.

PN164

MR BORENSTEIN: That's precisely our assertion.

PN165

VICE PRESIDENT ASBURY: Yes, I understand.

PN166

MR BORENSTEIN: At paragraph 80 of the decision, the Commissioner sets out a passage from the Full Bench's decision in *K-e-n-t-z*, on the limits of the – of the Commission's jurisdiction in an arbitration. He extracts paragraph 52 from the decision, but we would seek to address the two following paragraphs as well. This is in the list of authorities at 169. I will just bring up the paragraphs at 164.

PN167

At paragraph 46, the Full Bench starts discussing the nature of the Commission's role in under a dispute settlement procedure of an Enterprise Agreement and we will see in paragraph 46, it refers to the High Court in the AIRC case. And then at paragraph 49, there's an extract from the Full Court in the ALS case – TCL case, rather. And then at paragraph 51, the Full Bench refers to the Wagstaff Piling

case in the Full Court. Paragraph 52, it sets out the passage which the Commissioner extracts at paragraph 8 of his judgment.

PN168

And the second dot point in that passage which is from the judgment of Buchanan and Katzmann JJ is:

PN169

Although the Commission cannot exercise the judicial power of the Commonwealth, it is well established that a Federal Industrial Tribunal exercising powers of conciliation and arbitration may legitimately form an Act on opinions about legal rights. And obligations as a step in the exercise of its own functions and powers. Simply expressing an opinion about the legal operation, in effect, an agreement does not necessarily involve the exercise of the conferred power.

PN170

And then at paragraph 53, the Full Bench refers to the separate judgment of Flick J in that case and they extract some paragraphs from his judgment. If I can direct attention to paragraph 62 of His Honour's judgment, he said:

PN171

The manner in which the question for resolution was put to the Full Bench may have suggested otherwise but construed as but a question forming a part of a broader industrial dispute and as a question to be answered as but a step in the process of resolving that dispute, no difficulty arises. Properly characterised, it is considered that the Full Bench was doing no more than answering the question put to it as but a step in resolving the more broadly expressed dispute between the parties. The mere fact that the Full Bench was asked to resolve the question put to it and in isolation from much other matters as may have formed part of the industrial dispute, did not propel the Full Bench into an exercise of anything other than its conciliation arbitration powers.

PN172

And the question that was being put was a question about the construction of the agreement and then going on, at paragraph 54 of the Full Bench, Flick J found that:

PN173

There was no impediment of the Full Bench expressing its own view as to the proper interpretation of the relevant clause, which is a legal question.

PN174

Citing a passage from RE Cram in the High Court, and that passage reads:

PN175

The result is that the authority had no – this is from the High Court – the result is that the authority had no jurisdiction to determine or enforce a legal right to payment of wages on the part of employees in respect of the past period during which they'd been stood down or refused work or to enforce the provisions of

an award regulating the right to payment of wages for employers for such a period.

PN176

And then they explain:

PN177

*What this principle relevantly denies to the authority is the power of judicial determination which includes to use the word that Kitto J in *Aberdare Collieries*, beginning of decisions in the nature of adjudications upon rights as to disputes as to rights or obligations arising from the operation of law on past events and conduct.*

PN178

The making of a binding declaration of right is an instance of the exercise of judicial power. It stands outside the arbitral function.

PN179

And then we emphasize the next part:

PN180

But there is no substance in the suggestion that an industrial tribunal cannot interpret laws, awards and other legal instruments. A tribunal could not discharge its arbitral functions if it were unable to form an opinion on a matter of interpretation. The formation of views and opinions on matters of interpretation in arbitral proceedings does not in itself amount to a use of (indistinct) judicial power.

PN181

Indeed, a tribunal may find it necessary to form an opinion as to existing legal rights of the parties as a step in arriving at the ultimate conclusion on which the Tribunal bases the making of an award intending to regulate the future rights of the parties. Of course, the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights. But it forms part of the arbitral decision.

PN182

And - - -

PN183

VICE PRESIDENT ASBURY: So you say the failure to determine those legal points was a failure to take into account a relevant matter and had an effect on the exercise of the discretion?

PN184

MR BORENSTEIN: Absolutely, and we say it probably amounts to a failure to exercise the jurisdiction.

PN185

VICE PRESIDENT ASBURY: I understand.

PN186

MR BORENSTEIN: And we make that point not only in relation to the fettering issues, but also in relation to another issue which we will come to shortly, which is the validity of the Ministerial direction.

PN187

VICE PRESIDENT ASBURY: Direction.

PN188

MR BORENSTEIN: Because as Deputy President Colman raised earlier in the piece, the question about its validity or otherwise bore on the approach to the resolution of the dispute and in circumstances where it had that effect on the arbitration. And where the parties made submissions about its validity and the Commissioner took the view that somehow or other, the question affected what it could or couldn't do, we say it was incumbent on him in line with these principles to form an opinion which would then support the ultimate conclusion which he made.

PN189

And just to emphasize that point, in paragraph 91, the Commissioner says, talking about the Ministerial direction in the second sentence:

PN190

The fact of the Ministerial direction and the consequential impasse it creates for FRV in taking any steps to finalise a service agreement together with me not yet being persuaded the service agreement doesn't impermissibly fetter FRV leads me to conclude that I should not at this time terminate dispute.

PN191

So the second part of paragraph 91 was that the Commissioner saw the Ministerial direction as an impasse. Creating an impasse to the resolution of the dispute. And that underscores the point that's made in the course. That he should have formed an opinion about its validity so that he could overcome that impasse one way or the other. Now, he formed an opinion that it was invalid to go down this path. And he formed an opinion it was valid. Then it would go a different path.

PN192

VICE PRESIDENT ASBURY: So the two essential points – you say theirs were the two essential points that were argued and were required to be determined.

PN193

MR BORENSTEIN: Absolutely.

PN194

VICE PRESIDENT ASBURY: And were not. And the failure to do so resulted in the discretion miscarrying?

PN195

MR BORENSTEIN: Yes, we do.

PN196

VICE PRESIDENT ASBURY: Or in a failure to exercise jurisdiction.

PN197

MR BORENSTEIN: Yes, we do.

PN198

VICE PRESIDENT ASBURY: I understand. Thank you.

PN199

MR BORENSTEIN: And it's – and in a sense, and in a not ironic sense, it's compounded by the fact that the Minister had no concerns. As I said earlier, in resolving an objection that was taken – I am sorry. The Commission had no concerns in resolving the dispute that had arisen, which also involved an interpretation of the validity of an Act of the Minister under the legislation where she asserted that she had the right to consent or withhold consent to the entry into the agreement. And that she withheld consent and the Commissioner examined that and came to an opinion about that and dismissed that objection.

PN200

VICE PRESIDENT ASBURY: Of course, that's premised on the proposition that the Commissioner did not determine the dispute rather than did not determine the dispute by making the order sought.

PN201

MR BORENSTEIN: He did not – he did not determine the dispute.

PN202

VICE PRESIDENT ASBURY: Well, that's the question.

PN203

MR BORENSTEIN: Yes.

PN204

VICE PRESIDENT ASBURY: Then in paragraph 93, he says the dispute is determined accordingly. So that's the question I am posing.

PN205

MR BORENSTEIN: Yes.

PN206

VICE PRESIDENT ASBURY: Is whether when he refers to, in paragraph 91 that I shouldn't at this time determine the dispute whether what he's actually saying, is it shouldn't determine the dispute by making the order sought.

PN207

MR BORENSTEIN: Well, by the time he's come to paragraph 93, he's decided he's not going to do anything. He's not going to make the order. He's not deciding the fettering decision. The fettering objection. And so, when he says a dispute is determined accordingly, it's hard to see how that determines the dispute.

PN208

VICE PRESIDENT ASBURY: So the Commissioner could have, by exercising his discretion determined the dispute by refusing to make the order that you - - -

PN209

MR BORENSTEIN: Determined the proceeding - the arbitration.

PN210

VICE PRESIDENT ASBURY: Determined the arbitration by refusing to make the order but you say by doing that, in circumstances where you allege that he failed to have regard to these – or failed to decide these two points, that coming to that conclusion was not – was based on a failure to have regard to a relevant consideration or two relevant – a number of relevant considerations.

PN211

MR BORENSTEIN: Yes, to that effect. The passage from the Full Bench, the *UFU v MFB* case underscores that the primary obligation is to settle a dispute. To use the power to settle the dispute. Now, we draw a distinction between the dispute and the arbitration and because the arbitration is a process, a legal process.

PN212

VICE PRESIDENT ASBURY: But if the union comes to the Commission with a dispute and it's a binary argument, this is what we want, nothing short of this to settle the dispute and the Commission says, 'Well, I am not making that order'.

PN213

MR BORENSTEIN: Yes, but the way in which we would characterise that with respect, is that the Commission is confronted with a – the arbitral process, a hearing and the Commission might or might not be persuaded to run the orders which are sought which are said to be in settlement of the dispute. If the Commissioner decides not to do that, then he can dismiss the application before him, dismiss the arbitration.

PN214

VICE PRESIDENT ASBURY: Yes.

PN215

MR BORENSTEIN: If he dismisses the arbitration on flawed grounds, then there's an error and what we are really saying is that, (1) he hasn't actually dismissed the application and he hasn't dismissed the – he hasn't resolved the dispute. But however you characterise paragraph 93, he's got there on the basis of the errors that we have identified.

PN216

VICE PRESIDENT ASBURY: Yes. I understand the submission, so it would have been entirely open to him to come to that conclusion, but you say he's come to it based on a failure to determine the relevant issues.

PN217

MR BORENSTEIN: That's what we say. Obviously, a Commissioner must have power to dismiss an application or proceeding. It's the reasons for the dismissal that can be reviewed and examined.

PN218

VICE PRESIDENT ASBURY: Yes. Or the reasons for the matter being dismissed can be considered by the parties and they can go away and decide to come back with a different proposal or to keep discussing things.

PN219

MR BORENSTEIN: Which is what we did.

PN220

VICE PRESIDENT ASBURY: Yes. Yes.

PN221

MR BORENSTEIN: It's how we got here.

PN222

VICE PRESIDENT ASBURY: But you couldn't do it on the basis of this decision completely because there was no reason given as to why you are proposed amendment still fettered the discretion and there was no reason given as to why the ministerial direction was or was not relevant.

PN223

MR BORENSTEIN: Well, the Commissioner did not form an opinion about it which we say he was bound to do in order – in moving to making this decision, what he was going to do about the – about the arbitration.

PN224

DEPUTY PRESIDENT COLMAN: What about his second fundamental reason? That – or you will come to that? The second - - -

PN225

MR BORENSTEIN: Which one? Which one are you referring to?

PN226

DEPUTY PRESIDENT COLMAN: Well, sorry, essential reason, I think that you referred to.

PN227

MR BORENSTEIN: Essential, yes.

PN228

DEPUTY PRESIDENT COLMAN: The essential reasons at paragraph 92, and your second one is that the Commission says I am not satisfied the Commission should make the order as sought given the direction and I am concerned there would be no utility in doing so and that seems to pick up what he's saying, the Commissioner, at 89 where he notes that FRV sees the direction as not allowing it to enter into the contract.

PN229

MR BORENSTEIN: Yes.

PN230

DEPUTY PRESIDENT COLMAN: So that's the second independent reason – you might be right about the first reason and then that would leave the second reason then, wouldn't it.

PN231

MR BORENSTEIN: We did address the Commissioner. We have got some submissions about that. And we say that that's an inappropriate consideration to take into account in an arbitration. An arbitration by its very nature is a consent process where two parties to an agreement submit to the Commissioner a question for decision. A question for decision here was identified and we have shown you that, which was to enter into the service contract.

PN232

DEPUTY PRESIDENT COLMAN: Was it – the question was whether he should make an order directing the FRV to enter into the contract. Yes.

PN233

MR BORENSTEIN: Yes. Yes. That's what I intend to say. Yes.

PN234

DEPUTY PRESIDENT COLMAN: Yes.

PN235

MR BORENSTEIN: And we say that the fact that a third party takes some action outside the arbitration, which may or may not impact on one of the parties in the arbitration. We say is not something that was appropriate for the Commissioner to take into account. We addressed him on this. We say, sorry, I will just finish the point.

PN236

We say that the Commissioner's concern was to deal with the arbitration as it was before him. And if he thought it was appropriate on the merits of the arbitration to order the contract to be signed, he should have done that and if he thought it wasn't appropriate for the reasons dealing with the contract, he could have dismissed that. But what happens – what might happen afterwards is not something that the Commissioner should have speculated about, and it's purely speculative, because nobody knows what the Minister would have done if the Commission gave a decision and said, 'I think it is appropriate that a contract should be entered into', we can't speculate about whether the Minister would have said, 'Well, I don't care about the Commission, I am going to do this'. The Minister might have taken note of the fact that the matter was before the Commission. There was a considered decision and a resolution that they dispute. And the Minister might have said, 'Okay, well, I will take note of what the Minister says, and I will withdraw the direction'. We don't know. There's also an added complication which is that this is a process under a Federal Law. And the Commissioner's decision is a decision of a Federal authority. And there are all sorts of nice constitutional questions about whether the Minister can come in and say, 'Well, I am telling you to do this to override what the Federal Commission has done'.

PN237

I am only raising these things to demonstrate that there's an array of considerations that might or might not happen after an order, but it's not appropriate for the Commissioner in a private arbitration where a confined question is put, to say, 'Oh, if I answer the question this way, somebody out there might do something somewhere else and that might cause all sorts of problems.'

PN238

Now, if the FRV is subject to an order of the Commission, and it's concerned about its obligations under the Minister's direction, it could approach the Minister. It could say, 'Look, we have got the decision of the Commission. You really have to let us sign this.' Or, it could go off to court and you could say to the court, 'Look, we are in a cleft stick here. Give us an answer. A definitive answer as a judicial answer, a ruling on this point'.

PN239

But these are all matters outside the arbitration. And we say because they're so uncertain and so speculative, it's quite inappropriate for the Commission to say, 'Oh well, I am worried about what might or might not happen and there might be other proceedings that might happen after this and so I really think I won't settle the dispute.'

PN240

VICE PRESIDENT ASBURY: But if you wanted the Commissioner to have regard to the validity of the direction and make a finding in that regard, had the Commissioner done that and made the finding, and I accept you say the Commissioner should, then why wouldn't it be a legitimate discretionary matter to say well, regard – there's no utility in making the order, because the Minister's validly made a direction that the FRV can't sign this agreement.

PN241

MR BORENSTEIN: Well, it depends on which way the Commissioner forms the opinion. If the Commissioner forms an opinion that the Ministerial direction is valid. Then what you are putting to me has force. But if he forms the opinion that it's not valid, then it goes the other way. But the discretionary consideration must at the very least be contingent on the opinion that the Commissioner forms about validity.

PN242

VICE PRESIDENT ASBURY: So again, it's the failure to form the opinion on that – on that point. That's the issue. And to come to the conclusion that that's a relevant matter without the pre-requisite step of deciding whether it is or is not a valid direction.

PN243

MR BORENSTEIN: Well, that provides the platform for the following reasoning it seems to me.

PN244

DEPUTY PRESIDENT COLMAN: But the dispute, we were talking earlier about what was the dispute between the parties and I was just quickly flicking through the evidence. There's the statement of Ms Campanaro and there she

addresses this correspondence. The path between the parties and – sorry, and I can see that they agree that it wasn't intended that these – I am paraphrasing – it wasn't intended that there be a fetter and so forth. So, I am looking at page – where are we, Appeal Book 228. And then – but despite some correspondence and discussions, the parties were unable to resolve the dispute and that's the word we'd seek. And I have mentioned a number of times the VFR – sorry, Fire Rescue Victoria and the UFU, they were unable to resolve the dispute.

PN245

MR BORENSTEIN: Yes.

PN246

DEPUTY PRESIDENT COLMAN: And - - -

PN247

MR BORENSTEIN: I was being kind.

PN248

DEPUTY PRESIDENT COLMAN: Pardon me?

PN249

MR BORENSTEIN: I was being kind.

PN250

DEPUTY PRESIDENT COLMAN: You were being kind.

PN251

MR BORENSTEIN: The history which Ms Campanaro sets out.

PN252

DEPUTY PRESIDENT COLMAN: Yes.

PN253

MR BORENSTEIN: The history of the correspondence, you will see that she – they have a meeting with FRV. They discuss the proposed amendments. They discuss whether the amendments are apt to meet the fettering objection. There seems to be agreement.

PN254

DEPUTY PRESIDENT COLMAN: Yes.

PN255

MR BORENSTEIN: At those meetings.

PN256

DEPUTY PRESIDENT COLMAN: Yes.

PN257

MR BORENSTEIN: And so she says, 'Well, okay, well, are you prepared to sign the contract?'

PN258

DEPUTY PRESIDENT COLMAN: Yes.

PN259

MR BORENSTEIN: And they say, 'No, we can't'.

PN260

DEPUTY PRESIDENT COLMAN: And indeed, one of the – one of the minutes, I think, at LC3 says or FRV says that it doesn't oppose the edits. That's so - - -

PN261

MR BORENSTEIN: But they can't agree to them.

PN262

DEPUTY PRESIDENT COLMAN: Yes. Evidently, because of their concern about their legal position, they think they can't and indeed, the FRV – they can't agree – and the submission of the respondent in the proceeding, well, they have asked not to be - - -

PN263

MR BORENSTEIN: Yes.

PN264

DEPUTY PRESIDENT COLMAN: It says, at paragraph 3 of the submission, that they:

PN265

Contended before the Commission that the orders shouldn't be made on the basis that it was unable to enter into the agreement because of the direction.

PN266

MR BORENSTEIN: Yes.

PN267

DEPUTY PRESIDENT COLMAN: And this remains the case.

PN268

MR BORENSTEIN: Yes. That's why they were in dispute.

PN269

DEPUTY PRESIDENT COLMAN: Yes.

PN270

MR BORENSTEIN: There was a disagreement obviously between them about the effect of the Minister.

PN271

DEPUTY PRESIDENT COLMAN: Yes.

PN272

MR BORENSTEIN: But the bottom line of it is, they were in dispute because they couldn't agree to sign the contract with these clauses and for whatever reason.

PN273

DEPUTY PRESIDENT COLMAN: Yes.

PN274

MR BORENSTEIN: And that's why we get to the dispute. Now, I said to you earlier, the subjective view of a party about the validity of the Ministerial direction is not to the point. There's got to be an objective assessment made of it and we say the Commissioner should have formed an opinion about it for the purpose of resolving this dispute. And if the Commissioner had formed the view that on analysis, the Minister's direction was beyond power, then that may have given comfort to FRV and they might have said, 'Well, okay, we had doubts about it. The Commission's given us a decision. That's resolved our doubts but the fact that the FRV at the outset was nervous about the Minister looking over their shoulder, doesn't resolve the problem here. The problem here is that the Commissioner had an arbitration before him. A party at – a participant in the arbitration that said, 'You can't do this because there's a Minister's direction'. The UFU said, the Minister's direction is completely invalid, it's beyond power. And made detailed submissions about it and said – and then he says, 'Well, that's part of the impasse for me resolving the dispute.'

PN275

Well, that's precisely the sort of situation which the Full Bench in the MFB case was talking about. You have got to use your powers including the power in the jurisdiction to form an opinion about the validity of the issue which you say is the impasse. And overcome the impasse. Now, you can do it – we can't predict which way the Commissioner would decide it. I mean, we think he should decide it as – on the basis it's invalid, obviously but he might come up with an analysis that makes it valid, but whichever way he goes, he was bound to form the opinion and that would then inform how he resolved the dispute.

PN276

I was going to make some submissions about the Minister's written outline, but in view of the time, I will leave that to reply and just go on with the submissions that we want to make. The next grouping of the grounds of appeal that we want to go to are Grounds 1 to 3 and 10 and 11.

PN277

So Grounds 1 to 3 are that the Commissioner erred in his findings about the operation of section 25B of the Fire Rescue Victoria Act in that he failed to find that the powers of FRV under that section to employ persons were the subject to relevant provisions of Fire Rescue of the Enterprise Agreement. So this is the fettering argument.

PN278

The Commissioner erred in failing to consider and determine whether the amendments to the service agreement which was the subject of the decision in December last year cured the fettering of the FRV's power identified in that decision. The Commissioner erred in failing to consider and determine whether the service agreement as amended by the applicant following the fettering decision contained any impermissible fetters on the statutory power of FRV.

PN279

At paragraph 10, the Commissioner erred in finding at paragraphs 85 to 87 of his decision that perhaps it was seeking to mitigate in the matter, in this matter, the grounds of its revocation application that was not before the Commissioner. The grounds of the revocation application are irrelevant to the present matter in which the applicant was asking the Commissioner to arbitrate and determine whether its amendments to the previous service agreement resolved the Commissioner's decision in the fettering decision. And 11, further to Ground 10, the Commissioner erred in deciding that he should not make the order sought by the applicant because he was not yet satisfied that the service agreement did not impermissibly fetter FRV.

PN280

So we have gone over a number of those grounds in the discussion which we have had and at – in paragraphs 37 to 40 of his decision, the Commissioner sets out his reasoning and the first flaw that we identify in the reasoning there is that he failed to take into account in his reasons that the 2020 agreement was in place and prescribed and prescribed the qualifications which form the basis for the Registration Board to grant or refuse registration. We made written and oral submissions to the Commissioner and the written submissions we will find in our outline which is Appeal Book 263 and 264 and I won't delay to read them and they are oral submissions that are in the transcript which you will find at Appeal Book pages 69 to 71 and the submissions were to the effect that the service agreement did not fetter the powers of FRV because the 2020 agreement already constrained or limited the FRV by prescribing the qualifications for prospective employees.

PN281

So where the Commissioner emphasizes that the section in the Act effectively allows them to employ anyone, it overlooks a very significant factor which is that it can't employ anyone. It's bound to comply with the Enterprise Agreement. And so the foundation stone of his reasoning on that is wrong. And we have made a submission earlier and we rely on the fact that the Registration Board did not take away the ability of FRV to employ or not employ the function of the Registration Board as is explained in the contract service is to monitor and assess whether fire fighters employed by FRV satisfy the criteria which is prescribed in the Enterprise Agreement and instead of getting an elephant stamp they get a certificate of registration if they comply.

PN282

VICE PRESIDENT ASBURY: Except, doesn't the agreement at 7.8 speak to the FRV entering into this division to do a number of things including facilitate the exercising performance of its powers and obligations under the following legislation and associated regulations and it includes the Fire Rescue Victoria Act and also the Public Sector Management and Employment Act?

PN283

MR BORENSTEIN: Yes.

PN284

VICE PRESIDENT ASBURY: So to say that the employment provisions of the agreement are standalone or operate independently. They don't. They're still – the agreement calls in those, you know, those other pieces of legislation and says that surely that – surely the Public Sector Management and Employment Act applies to employment. It's based – it's got – it's got provisions I don't doubt about merits selection and all sorts of things that the FRV is also subject to, isn't it? It's on page

PN285

MR BORENSTEIN: I am just pulling up the clause, sorry.

PN286

VICE PRESIDENT ASBURY: Page 10 of the agreement.

PN287

MR BORENSTEIN: I am not sure, you are looking at Clause 7.8.

PN288

VICE PRESIDENT ASBURY: Yes.

PN289

MR BORENSTEIN: Yes. We would say, Clause 7.8 doesn't attract from – doesn't attract from the circumstance that FRV has voluntarily entered into a federal instrument which contains qualifications for firefighters at different levels within the organisation and we don't see – and we would submit that there's nothing in Clause 7.8 which detracts from that. And indeed, you would – we would say, you would read Clause 7.8 as indicating that it has entered into this Enterprise Agreement for the purpose of better affecting its operations under the Fire Rescue Act, the Occupational Health and Safety Act, and so on. We wouldn't – we wouldn't read any other implications into that clause.

PN290

VICE PRESIDENT ASBURY: Well, because it says to facilitate and the exercising performance of its powers and obligations.

PN291

MR BORENSTEIN: Yes.

PN292

VICE PRESIDENT ASBURY: So the agreement is to facilitate the performance of those. It's not the sole – there's a possibility that something could be inconsistent.

PN293

MR BORENSTEIN: But what I was about to say Vice President, it's a matter of reconciling the obligations which are taken up under this federal instrument with the obligations that arise under the various laws which are referred to there and we would say that obviously it would be – it would have been intended that the obligations under the agreement would be reconciled with the various statutes but if you say that the contract of employment is offensive because it allows for a fettering of FRV by not allowing it to employ anybody as the Commissioner

seems to say under section 25B, then you have to say as a natural (indistinct) of that, that the terms of the Enterprise Agreement which makes similar provision, must also fall away and we would say that's not a correct – not a correct analysis. The federal instrument is to be given full effect. It's been entered into voluntarily by the UFU - by the FRV and the contract, the service contract with the Registration Board completely hangs off the provisions of the Enterprise Agreement. It has no existence except to implement what's in the Enterprise Agreement.

PN294

So if you are saying what the Registration Board is doing is impermissible, then the natural corollary of that is that the schedules in the Enterprise Agreement are impermissible. And clearly, we would say they are not. And if you accept that they are not, and that they are consistent with FRV's other obligations, then the fact that FRV's engaged an entity to in effect, apply those standards to its employees by issue of registration certificates comes down to the same thing.

PN295

VICE PRESIDENT ASBURY: I understand your submission. Thank you.

PN296

MR BORENSTEIN: So we say that – excuse me. We say that the Commissioner's failure to avert to the FRV's obligations under the 2020 agreement, when considering section 25B of the State Law is an error which undermines the correctness of – undermines the correctness of our – of the Commissioner's decision. The - - -

PN297

VICE PRESIDENT ASBURY: So is that another aspect of your argument that before finding that the – before the Commissioner found that he was not able to make a conclusion or – not yet satisfied that the service agreement does not impermissibly fetter FRV, he was required to say what the fettering he was concerned about was? In light of the amendments to the agreement?

PN298

MR BORENSTEIN: Yes, he was but focussing on this part of his reasoning.

PN299

VICE PRESIDENT ASBURY: Yes.

PN300

MR BORENSTEIN: We say that this part of his reasoning is flawed because he's approaching the question inadequately. He's looking at one factor which is not the only factor that needs to be taken into account and we addressed him on this. We addressed him on the existence of the Enterprise Agreement and its effect on the way in which the FRV has to operate under it statute and we say that he hasn't taken that into account and that's a significant omission which affects his whole line of reasoning about fettering.

PN301

VICE PRESIDENT ASBURY: But under the agreement – taking the agreement for example, the Clause 12 that defines the classifications is already fairly prescriptive. You can't be employed to a classification unless you are employed in one immediately under it. So arguably, what does the – if somebody meets these definitions, what does the Registration Board add?

PN302

MR BORENSTEIN: The Registration Board, there are schedules appended to the Enterprise Agreement which set out tables of competencies et cetera, that apply to each level of employment.

PN303

VICE PRESIDENT ASBURY: Which seems to have modules that go with them.

PN304

MR BORENSTEIN: Yes.

PN305

VICE PRESIDENT ASBURY: So again, people, I assume there's somebody that delivers training or assesses people on a competency basis against a module. So again, what does the – if that's – if there are modules, there's a body that assesses, isn't there?

PN306

MR BORENSTEIN: But these things might happen over a period of time and the Registration Board would go through the records of each employee who has done the modules and so on and make sure that they have done all the modules that are required. Done and past all the modules that are required at each level in the schedule.

PN307

VICE PRESIDENT ASBURY: Okay. I understand.

PN308

MR BORENSTEIN: It's probably not – it's probably not rocket science, but it's just a mechanical process to ensure – to ensure that people at a particular level have in fact done what they were required to do. That's as I understand it.

PN309

VICE PRESIDENT ASBURY: Well, it's more than a mechanical process because what's the result of not achieving registration?

PN310

MR BORENSTEIN: Well, that's reported back to FRV. And then FRV have to engage with the employee about how to rectify the employee's position.

PN311

VICE PRESIDENT ASBURY: And if they're not already employed they can't employ them?

PN312

MR BORENSTEIN: Well, again we would say FRV would in the normal course speak to the applicant for employment and say well, you haven't done Module X or Y or Z and that doesn't meet our standards and therefore we can't employ you. But they may be given an opportunity of correcting that situation. The ultimate employer is FRV. It's the entity which ultimately engages with the employees. Now, it's engagement may be informed by what the Registration Board does, whether it issues registration or not and if not, why not?

PN313

VICE PRESIDENT ASBURY: I understand.

PN314

MR BORENSTEIN: And the point you raise with me, Vice President, again, underscores what we were saying a few minutes ago. Section 25B of the Act which the Commissioner paid attention to, says:

PN315

Fire Rescue Victoria may from time to time employ any persons that it considers necessary to assist. That it considers necessary to assist it in carrying out its functions.

PN316

Well, if it's complying with the Enterprise Agreement, that's an immediate detraction from that statutory provision, because as you said, the employees have to have certain qualifications. And that's why we say that it's incorrect to simply look at 25B and say well, they have got power to employ anybody, so if you have a registration system, that's a fettering.

PN317

It comes back to understanding the true character of the registration system which is simply to monitor compliance with what's already in the Enterprise Agreement. The Registration Board makes no other standards and applies no other standards. The Commissioner raised that as a possible concern in fettering decision and we clarified that by the amendments which we put in and which we have shown.

PN318

Now, you asked me earlier about where we ought to refer you to where we informed the Commissioner of parking of the revocation application and why. And you will find that in the transcript. Yes, so first of all, at paragraph 5 of our reply submissions, which is at page 259 of the Appeal Book, we flag that issue and then in the transcript on the 30 March which is at Appeal Book 58 to 60 at paragraphs PN22 to 43.

PN319

So these grounds that we have grouped together are to the effect that the Commissioner did not resolve the fettering issue in this arbitration either by assessing whether the amended service agreement resolved the issues raised in the fettering decision or by assessing anew, whether the amended service agreement resulted in an impermissible fetter of the powers of the FRV. And as we have explained, we say that that failure is an appealable error.

PN320

VICE PRESIDENT ASBURY: Sorry, can you give me the transcript references again?

PN321

MR BORENSTEIN: Yes. Sorry. It's PN22 to PN43 at Appeal Book page 58 through to 60.

PN322

VICE PRESIDENT ASBURY: Thank you.

PN323

MR BORENSTEIN: And in our reply submissions before the Commissioner, at paragraph 4 and 5 at pages 258 and 259. And so we say in Ground 10 that the Commissioner erred because he incorrectly treated the fettering issue as being only arising in the revocation application when plainly it was an issue which overlapped both applications and needed to be resolved to settle the dispute.

PN324

We also make the submission that contrary to the Commissioner's comment that he needed to hear submissions about the fettering, both the UFU and the Minister made submissions about the fettering and I will give you the references to those. In writing, in the UFU's written submission at paragraphs 27 to 29, at Appeal Book 253, and in the reply submissions at paragraphs 19 to 23 at Appeal Book 263 to 264. Do you want me to repeat those references?

PN325

VICE PRESIDENT ASBURY: Is it 263 to 264?

PN326

MR BORENSTEIN: Yes, that's right.

PN327

VICE PRESIDENT ASBURY: 253 and then 263 to 264.

PN328

MR BORENSTEIN: Correct.

PN329

D

PN330

VICE PRESIDENT ASBURY: Yes.

PN331

MR BORENSTEIN: And then the Minister in her submissions at paragraphs 39 to 51 which is in Appeal Book 428 to 432. And then the parties also made oral submissions. The union's oral submissions are at PN47 to 49 which is at Appeal Book 61 to 62. Then at PN64 to 76, which is at Appeal Book 64, to 65. And then at PN89 which is at Appeal Book 67 and PN96 to 104 which is at Appeal Book 69 to 71 and the Minister made oral submissions at all and her submissions were at

PN267 to 273 which is at Appeal Book 92 to 93. And PN291 to 321 which is at Appeal Book 96 to 99.

PN332

There is a summary of those submissions in the Commissioner's decision at paragraphs 25 to 40 as well. And so although the Commission had that – had those submissions, we say that his conclusion at paragraph 41 which we have already read and at paragraph 87 where he says, 'I accept that maybe I need to hear from the parties on these matters before finalising my reasoning with respect to the 2023 fettering objection', is also unsound.

PN333

And that leads into the statement in 92 about his lack of satisfaction about the fettering.

PN334

DEPUTY PRESIDENT COLMAN: I am sorry to interrupt. Just in relation to direction. Doesn't he actually decide that at 62? Doesn't he actually say, just in the middle of 62, the Commissioner says:

PN335

As a result, consideration of the affect of the ministerial direction takes me nowhere.

PN336

Not sure. But anyway, he goes on to say:

PN337

With me accepting that the direction has been made and that FRV is compelled to follow it unless and until it is either withdrawn or declared invalid.

PN338

So he then does go on to say:

PN339

In any event, though it is for a different reason that I am not satisfied I should issue the order.

PN340

Apparently on a discretionary basis, but doesn't that passage there indicate that he's accepted that the direction has to be followed by FRV?

PN341

MR BORENSTEIN: Are you looking at 62?

PN342

DEPUTY PRESIDENT COLMAN: Sixty-two, sorry, yes.

PN343

MR BORENSTEIN: Well, if you are looking at the second sentence of 62.

PN344

DEPUTY PRESIDENT COLMAN: Yes.

PN345

MR BORENSTEIN: All that he says there is that on its face, the direction's been given and FRV is compelled to comply with it.

PN346

DEPUTY PRESIDENT COLMAN: Oh yes. No, sorry, a third - is that a second, then third – the fourth sentence.

PN347

As a result, consideration of the effect of the ministerial direction takes me nowhere.

PN348

MR BORENSTEIN: But that's ducking it.

PN349

DEPUTY PRESIDENT COLMAN: Well, but then anyway, I am not sure what he means by that, but he does go on to say then:

PN350

With me accepting that the direction has been made and that FRV is compelled to follow it.

PN351

Unless - - -

PN352

MR BORENSTEIN: But that doesn't – but that's a non-sequitur. I mean - - -

PN353

DEPUTY PRESIDENT COLMAN: I am just asking you what it means, that's all.

PN354

MR BORENSTEIN: No, no - - -

PN355

DEPUTY PRESIDENT COLMAN: What do you say it means?

PN356

MR BORENSTEIN: Well, with respect that's a very good question. I mean, he was addressed in some detail about the validity. And this is all you get really, in response to that. And we say the first part of it is he accepts that there's an existence, a direction. Well, nobody's arguing that the Minister issued a direction and nobody's arguing that on its face, FRV's bound to comply with it.

PN357

DEPUTY PRESIDENT COLMAN: Although, he doesn't say - - -

PN358

MR BORENSTEIN: The \$64 million question is, is it valid?

PN359

DEPUTY PRESIDENT COLMAN: Well, he says FRV is compelled to follow it unless and until it's either withdrawn or declared invalid.

PN360

MR BORENSTEIN: Yes, but that's the whole point. That's the point of all these authorities that this is the impasse that he refers to, the impediment to resolving the dispute. Whether it's discretionary or any other way. Because he says, well, there's this Ministerial direction out there. If I resolve the dispute there will be litigation and there will be a continuing dispute. But it all comes back to the fact that for the purpose of this arbitration.

PN361

DEPUTY PRESIDENT COLMAN: It's arguably slightly different isn't it, from those other cases, because you know, if we have an unfair dismissal application, is the person an employee? Question of law. We make a determination as a step in the process of determining unfair dismissals. So but here it seems on one view that what's – that the dispute really is – on one view the FRV is not opposed to signing the agreement. It just doesn't think it can as a matter of law. And that's the – and so that seems to be or at least a big part of what comprises the substance of the dispute. So it's a bit different from a step in the process, isn't it?

PN362

MR BORENSTEIN: Well, I mean, it's a different factual scenario, no question. But as you say, there was an initial dispute. There was a contract. FRV said, 'Well, you know, if you made the order, we would sign it', effectively, and then the Minister comes along and says 'Hang on a minute, I am not going to let you do that. I am going to issue a direction'. And she doesn't only do that, she turns up in the Commission and argues, 'I have got a direction and it's valid'. And she puts that to the Commissioner as a reason not to make the order. Well, doesn't that insert it centrally into the arbitration as a necessary thing that the Commissioner has to consider? And you can't just say, 'Well, it looks like a direction, so it must be valid'. You have to actually engage with the argument. And the Commissioner heard argument. He heard argument from us. We did an analysis of how section 8 operates together with section 25A and we gave him references to legal principles and what have you and you don't see any references to any of that in the decision.

PN363

And Mr O'Grady made submissions and you don't see any reference to that. And we say it's not right to say that he did not need to decide it. He needed to because it was inserted by the Minister as a central issue in the case. It was put up as the central impediment to getting – ordering FRV to sign the contract. Because it was, 'You shall not sign the contract', now the validity of that is critical to how you resolve this dispute. Now, it's not an unfair dismissal, obviously. But in the context of this dispute, it's a central legal question which the Commission – which the Minister has – the Commission has allowed an external party to come in and raise and to try to block the arbitration.

PN364

So we say that paragraph 62, really is very unhelpful. Even if you said, well, somehow or other, you should assume that there's a decision made there about the question, it's really not a satisfactory decision. I mean, there is no engagement with the argument. There's no explanation of what the Commissioner means and it's for that reason that we say that it shouldn't be read in that way. We think that the reading of it is that on the face of it, you have got something that looks like a valid direction which would bind FRV and because of then fact that that's something that might otherwise be dealt with in another Tribunal, it's not appropriate for the Commission to deal with it here. And we think the Commissioner with respect has just misunderstood his obligation to form an opinion on this legal issue. Especially when he saw it as being so central to how he resolves the matter.

PN365

DEPUTY PRESIDENT COLMAN: Okay. Thank you.

PN366

VICE PRESIDENT ASBURY: Can you just give us a reference to where those arguments were put in relation to the validity of the direction?

PN367

MR BORENSTEIN: Sure. I will give them to you shortly.

PN368

VICE PRESIDENT ASBURY: Thank you.

PN369

MR BORENSTEIN: Mr Bromberg will just find them for me. We will give you a note when we come back from lunch if that's all right.

PN370

VICE PRESIDENT ASBURY: Sure. Thank you.

PN371

MR BORENSTEIN: So I now want to go to the next bundle of – grouping of appeal grounds which are 4, 5, 7, 8, 9, 12.

PN372

At paragraph 4, we say that the Commissioner erred in finding at paragraphs 74, 75 and 88 of the decision that it would be inappropriate to grant the relief sought by the applicant for the reasons that further work is required to be done by the UFU and FRV in order to bring the service agreement from its current place of an unfinancial, unfinalized draft to one capable of being signed and it would require someone at FRV to turn their mind to several topics et cetera.

PN373

Now, the Commissioner made these findings at paragraph 74 and 75. And they relate to items in the schedule to the proposed contract which are uncontroversial and deal with things like commencement date, contact person, things of that kind and you will see them in Schedule 1 at – I think Schedule 1 of the agreement. They were in that form in the fettering argument as well. And nobody

raised any objection about them being there in an incomplete way, because by their nature, they're only appropriate to be completed at the time when you actually sign the contract.

PN374

And we say that the Commissioner has elevated them to a much higher level than is appropriate by saying people would have to do work in the nature of – would have to do significant work which would be prohibited by the Ministerial direction. As I say, the FRV did not take any issue about this in the earlier arbitration and no one ever explained to the Commission what sort of work might be required to fill in the name of the contact person or the commencement date or things of that kind. The other thing too, that the Commissioner overlooked is that in the order that he was asked to make, which is set out at paragraph 10 of his decision, the order is expressly made subject to the details in Schedule 1 and 3 being completed.

PN375

So there's no obligation to sign anything unless and until they were completed and the order we were asking was to accommodate the fact that the Commission could make the order and that there – the parties would then go away and complete those – those formal matters really before signing the contract. The Commissioner in his reasoning paid no regard to that proviso in the order that was sought. And so – and we say that when you look at the – when you look at the information that's being sought, we submit that – we submit that it's quite wrong to suggest that the need to complete those matters before signing is an objection to making the order and we also say that when you look at the nature of those matters, they ought to be regarded as being included in the ambit of the ministerial direction even if it is valid.

PN376

We addressed the Commissioner on this topic at – in the transcript at PN161 at Appeal Book 78 and the Commissioner hasn't really explained why he's come to that view given the submissions that were made to him. Then moving on to Grounds 5, 7, and 8. Ground 5, the Commissioner erred in finding in paragraph 76 of his decision, it would be inappropriate to grant relief sought by the applicant because of the existence of the Ministerial direction. The Commissioner erred by misdirecting himself as to the effect of the authorities to which he referred in paragraph 77 and 80, because those authorities require that he exercise his arbitral powers to settle the dispute submitted to him without regard to interventions by parties external to the arbitration and dispute.

PN377

And the Commissioner erred in finding that the determination as to the validity of the Ministerial direction given on 19 September 2022 was not an appropriate step in the exercise of his arbitral powers in this matter. And that goes to paragraph 62 which Deputy President Colman referred to earlier.

PN378

Now, at the hearing, we made a two-pronged submission to the Commissioner. Our first submission was that the direction was beyond power and therefore of no effect and we made that submission in our reply submissions at

paragraph 26, sub-paragraphs 8(f) and especially (f), which is at Appeal Book 265 to 266. We also made oral submissions in transcript at PN107 to 141, which is at Appeal Book pages 71 to 75.

PN379

And so that was our first – the first limb of our submission. It's invalid, it's beyond power. Here are the reasons. And in the briefest of summaries, I can say this, that the power was purportedly exercised under section 8 of the FRV Act. And sub-section (1) of section 8 says that:

PN380

Fire Rescue Victoria and the Fire Rescue Commissioner are subject to the general direction and control of the Minister and the performance of the duties and functions and exercise of powers of FRV and the Fire Rescue Commissioner, including but not limited to the policies and priorities to be pursued by Fire Rescue Victoria and the Fire Rescue Commissioner.

PN381

And then in sub-section (3), there are various topics that those directions cannot be applied to and so that's the section under which the Minister regarded it as appropriate to give a very specific direction about signing of a particular contract.

PN382

Now, our submission was that that section has to be read together with section 25A. 25A sets out the general powers of Fire Rescue Victoria and sub-section (2) empowers Fire Rescue Victoria to enter into various contractual arrangements. And if I direct your attention specifically for the present purposes to sub-section (2)(a):

PN383

FRV has the power to enter into agreements or arrangements with any personal body for the provision of goods or services to Fire Rescue Victoria.

PN384

Specific power. To enter into a contract like this for the provision of services. Now, that power expressed in those absolute terms is to be contrasted with paragraph (b). Paragraph (b) says that:

PN385

Subject to sub-section (3) FRV is empowered to enter into agreements or arrangements with any person, et cetera for the provision of goods or services by FRV.

PN386

And then sub-section (3) says that in order to do that, you need to have the consent of the Minister. So without obviating the need to look at the detail of our submissions, basically what we said was, you have got a specific power which says you can do this and you don't need consent and you have got a general power over here and by reason of the various principles of statutory construction, the specific is not overridden by the general. And you can't do through the side do

what you can't do through the front door. And it's a nice saying but it's actually got judicial endorsement.

PN387

And we gave the Commissioner the cases for that. But so that in a nutshell, that was the argument that we put to him.

PN388

VICE PRESIDENT ASBURY: And the contract, the service contract is in no way Fire Rescue Victoria providing goods and services? Even though it's anticipating - - -

PN389

MR BORENSTEIN: Well, Mr O'Grady tried to do that.

PN390

VICE PRESIDENT ASBURY: That's your submission though, it's not?

PN391

MR BORENSTEIN: No, no, no. And Mr O'Grady – but it was dealt with by the Commissioner. Mr O'Grady tried it on. He said, 'Well, FRV is providing services to the Registration Board because they're giving him the names and addresses or the details of the employees. And the Commissioner had no difficulty disposing of that argument.

PN392

And he found it was a contract of service provided to FRV not by FRV and so it came under paragraph (a) and it did not need the consent. And that's how you resolve the other of Mr O'Grady's arguments, that it needed consent.

PN393

So this is really the nub of the argument and about him failing to form an opinion about the validity of the direction. As we have already said to you a number of times, he was obliged to form the opinion on the authorities we have cited to you. And he failed to do that. We say that his reference to the Kentz case which I took you to, and the passages from Wagstaff made that clear and it appears that he has failed to grasp the purport of those passages. And we say that it wasn't open to him in the exercise of his power to refuse or fail to exercise the jurisdiction to form an opinion. Particularly because he saw that as an issue which was so central to resolving the matter.

PN394

So that was our first – so our first, as I said, our first argument was it's invalid and it doesn't effect it. But we said but in the alternative, you don't need – you should simply confine yourself to the issues in the arbitration and put the question of the Minister's direction to one side and you make your order if you think it's appropriate and whatever happens in other places will or won't happen and that's a matter for a different Tribunal and a different – and a different consideration.

PN395

Now, that was our second argument, so as I say, we put two arguments. The Minister, the Commissioner did not decide the first argument and in relation to the second argument took a different view and said, 'Well, this direction is floating around. I don't know what's going to happen in other places if I make an order and so I am not going to make an order'. And as I said earlier today, we submit that that sort of speculation in the circumstances was inappropriate.

PN396

And then the final grounds of appeal are Grounds 9 and 12. Ground 9. The Commissioner erred in deciding at paragraph 84 of his decision that he would not grant the relief sought because his determination as to the validity of the Ministerial direction would inevitably make the validity of the decision – of his decision the subject of attack. And Ground 12, the Commissioner erred in deciding that he should not make the order sought by the applicant because the existence of the Ministerial direction rendered the relief sought by the UFU of no utility and/or that the relief sought by the UFU would not settle the dispute before the Commission because of the prospect of subsequent and related litigation. And I have addressed most of this already this morning and I won't repeat it. We say that the consideration of what might happen elsewhere afterwards is speculative and shouldn't be engaged in. So it's an improper consideration to take into account. And on that basis, the Commissioner erred in forming his view.

PN397

Now, they're our submissions on the grounds of appeal. If we are fortunate enough to be successful in the appeal then as we have said in our notice of appeal we would ask that the matter be remitted back to the Commissioner to decide in accordance with the reasons of the Full Bench on this appeal. If there's anything else I can – unless there's anything else I can assist the Bench with.

PN398

VICE PRESIDENT ASBURY: Thank you.

PN399

MR BORENSTEIN: Thank you.

PN400

VICE PRESIDENT ASBURY: Thanks, Mr Borenstein. Do you want to continue? How long do you estimate?

PN401

MR O'GRADY: Well, I don't think I will be as long as my learned friend. But I certainly, I think I will be finished before lunch time. But I am very much in the Full Bench's hands as to whether you have had to listen to my learned friend all morning, whether you feel you need a break or whether you'd like to listen to me for a little while?

PN402

VICE PRESIDENT ASBURY: We will press on. Yes.

PN403

MR O'GRADY: Yes. Thank you.

PN404

So as the Full Bench will appreciate, we have filed an outline of submissions and my learned friend this morning took issue with some parts of the background that appears in paragraphs 3 to 9. As to his complaint regarding what we have said in paragraph 4(a) can I simply note that the version of the contract that was amended or that was upended to the dispute notification did not have the clause in it that my learned friend relies upon reducing the length or the operation of the contract. But we accept. Subsequently, my learned friend or his instructors did provide to the Commission a further amended version of the services contract that did not have Clause 16.2(a) in it.

PN405

But the point of course remains that, as you pointed out, Vice President, that is still a very significant provision, because my learned friend has disavowed that on the nominal expiry date of the 2020 agreement, the service contract will come to an end. It is only if it is replaced or terminated and as the Full Bench will appreciate. That could be a significant period of time. And indeed, it may be that the existence of the services contract is a matter that is – regard is had to by the parties in determining what approach they take to the replacement and/or termination of the 2020 agreement. So in our submission, it's an important feature of the scheme.

PN406

The second point my learned friend took issue with was what we said in paragraph 8 of the background. And we say with respect to my learned friend, he's wrong about that. As my learned friend has taken you to Clause 25 – section 25(b) and I will need to go to that in more detail in a moment, but as Commissioner found, the effect of that section is to repose in FRV the capacity to make the decision about who it employs and in what position it employs them. The effect of the services contract or the amended services contract is that those decisions will no longer be made by FRV. They will be made by the Firefighter's Registration Board because absent registration, FRV will not have the capacity to employ people at all or employ them in particular positions because registration is being put in place as a pre-requisite to employment with FRV in an operational capacity.

PN407

So in our submission, it is important that the – under the amended services contract, it is the Corporate Registration Board, not FRV that is responsible for the application of the standards. And in this regard, and I will need to develop this in due course, the amended services contract is different even from the extensive prescription in the Enterprise Agreement. There are a number of provisions in the Enterprise Agreement that require for example agreement by UFU in respect of lateral entry, for example.

PN408

But there, the entity agreeing is the United Firefighter's Union, not his Corporate Board which is a simple legal entity. There, the provisions of the dispute resolution process will apply. And one would have thought that if the UFU were to unreasonably refuse to agree, that could be the subject of a dispute under the Enterprise Agreement. It is not in our respectful submission, the same where you

are dealing with a corporate entity, albeit one that has significant connections with the UFU.

PN409

In paragraphs 12 and following, we sought to summarise the grounds of appeal and we deal with combined ground 1 commencing at paragraph 20 which is in effect that the Commissioner refused to resolve the dispute and that this constitutes appellable error. And as the Full Bench will have heard this morning, my learned friend relies upon the decision in *UFU v MFB* in support of these grounds and if I could ask the Full Bench to go to that decision, it's contained in our authorities behind Tab 9.

PN410

And you will see from that decision, it was dealing with really quite an extraordinary circumstance in that in that case, there were a number of disputes that were sought to be agitated under the existing Enterprise Agreement where there was a soon to come into effect – a new Enterprise Agreement. And in effect, what the Commissioner did was to (a) find that it did not have jurisdiction to determine the disputes, but (b) assuming that he did have jurisdiction, to decline to determine those disputes and that the nub of it is set out in paragraph 55, which we have referred to in our submissions. And you will see there that in paragraph 55 the Full Bench proceeds on the basis that the Commission was exercising a discretion not to determine the disputes.

PN411

And the discretionary basis - and this appears at about a third of the way into the paragraph or a quarter of the way into the paragraph - upon which the Commissioner expressed its views largely and of exclusively related to the application currently before the Commission for the approval of 2016 agreement. In short compass, the considerations the Commissioner weighed as apparent from his decision are concerned with potential duplication and wasted resources in respect to proceeding with an arbitration which might be overtaken by referrals of the same question or at least aspects of these questions for arbitration on the 2016 agreement.

PN412

So what the Full Bench is dealing with there is a clear election by the Commissioner not to exercise his jurisdiction to determine the dispute because he did not want to waste resources in effect, given the pending approval of the 2016 agreement.

PN413

It is, in our respectful submission, a fundamentally different scenario to the approach adopted by the Commissioner in these proceedings. The Commissioner in these proceedings did not sit back and say well, I am – I think it will base resources if I determine this.

PN414

What we say, and I will have to come to his reasons in due course, is that he did engage with the proposition simply being put to him. Albeit perhaps not as clearly with the benefit of hindsight, he might have done so. And indeed, with

respect, he can be forgiven, given the multiplicity of proceedings that the UFU had been agitating in respect of these issues. We have the first dispute notification and that's dealt with. We then have a 603 application, seeking, not an appeal, but a 603 application seeking the Commissioner in effect annul various parts of his decision. And whilst that's still on foot, we have a second dispute application. And then on the day of the hearing albeit shortly before the day of the hearing when we get the reply submissions, the UFU say, 'Well, we want to keep the 603 application on foot but we want you to defer it, so we will deal with the second dispute application in the meantime.'

PN415

With due respect to him, the Commissioner did very well in the circumstances to deal with the multiplicity of issues that were being thrown up at him by the UFU as clearly and concisely as he did. But the point remains, in our respectful submission, it is just a misreading of *UFU v MFB* to assert that it is dealing with scenarios or issues of the type the Commissioner dealt with here. He's really dealing with a fundamentally different type of scenario where the Commission just declines in general to exercise its – to determine the dispute as opposed to determining the dispute in a particular way.

PN416

And on that point, we would adopt, with respect, the observations that I think you may have, Deputy President O'Neill. That the better way of reading paragraph 91 when one has regards to what the Commissioner said in paragraph 92 is that he is not determining the dispute in the way sought by the UFU in making the binary order or the order that is set out in paragraph 10.

PN417

Indeed, in our submission, that is the only way that one can reconcile what appears in paragraphs 92 and 93 with what appears in paragraph 91, that perhaps the Commissioner expressed himself inelegantly, but it's not a case, we would submit that comes within cooe of what the Full Bench was concerned with in *MFB and UFU*.

PN418

VICE PRESIDENT ASBURY: So because the – because the outcome that was sought by the UFU was binary, the Commissioner was entitled in the exercise of his discretion to say, 'I am not going to grant that outcome'?

PN419

MR O'GRADY: Yes, yes. In our respectful submission. In circumstances where the Commissioner had already in effect determined the fettering issue, albeit on a service - form of services contract that hadn't been amended and in circumstances where the Commissioner had before him in this proceeding a direction from the Minister that in effect prohibited FRV from entering into this contract, it was perfectly open for him to determine the dispute by saying I am not going to make the orders that you want that are going to require FRV to enter into a contract which they have been told by their Minister under a direction, under the FRV Act, you cannot enter into.

PN420

It is with respect hardly a surprising outcome. And indeed, one would have been surprised if in those circumstances, the Commissioner nonetheless ordered FRV to enter into that contract. And we have dealt with those matters in through to paragraph 27. We do note the outcome in *UFU v MFB* in that the Full Bench there appeared to have been attracted by similar discretionary considerations to that which motivated the Commissioner at first instance because as you – if one goes to paragraph 65 of the decision, what they have decided to do is to in effect adjourn the applications, because to not do so may well have involved the waste and duplication that was the subject of the appeal in the first place. And we make the submission here that if the UFU want to test the validity of the direction that was made, and/or the issue of fettering, there are mechanisms open to it. And one way of viewing the decision in our submission - under appeal, in our submission is that what the Commissioner has said is that in the current state of affairs, it is not appropriate for me to make the orders that have been sought by the UFU.

PN421

If the direction was set aside or if there was a determination by, say, the Supreme Court that there was no fettering, then that one would have thought could give rise to a further application by the UFU. And then matters could be perused in that way. It is clear in our submission that the Full Bench in *UFU v MFU* are not seeking to constrain the Commission as to which of its powers should be exercised or which should be deployed at which juncture.

PN422

Rather, what they're saying is, on our reading of it, is that it's not open for the Commission to simply say, 'Well, I am not going to engage with it at all, but on any view', that's not what the Commissioner did here in our submission. And similarly, we would submit that to the extent that the Commissioner, and I will have to come to this in a moment, but to the extent that the Commissioner in respect of the fettering issue might be said to have deferred conclusive determination of that issue until after the revocation application was dealt with, in our submission that was a course that was open to it. And does not give rise to appellable error.

PN423

Could I then go to the decision in some detail, because with respect to my learned friend there were some elements that we would submit need to be fleshed out. In respect of the Commissioner's discussion of the fettering objection commences at paragraph 25, commences by referring to his earlier decision, the 2 December decision.

PN424

And he notes some of the submissions that were put including those by the Minister and the UFU. And in effect the submission that was put by the UFU below, has – which has been repeated this morning, which was in effect FRV is already fettered by the terms of the Enterprise Agreement. So there can't be further fettering. Now, we say that's wrong for a number of reasons. Firstly, we would submit that a second fetter – a fetter doesn't cease to be a fetter because there's already a fetter in place.

PN425

Secondly, we would submit the appropriate analysis in respect of fettering is as between the FRV Act on the one hand and the contract on the other. Thirdly - - -

PN426

VICE PRESIDENT ASBURY: Rather – sorry to interrupt you but rather than the agreement?

PN427

MR O'GRADY: Rather than the agreement, yes.

PN428

VICE PRESIDENT ASBURY: Yes. I understand.

PN429

MR O'GRADY: Yes. Because it's the FRV Act that confers the powers of employment and promotion onto FRV. Parliament of Victoria has said the person or entity that is to exercise these powers is FRV. And the contract in our submission purports to say that the entity that is to, at least in part, exercise those powers is the Corporate Registration Board because absent registration, as we read it, it's not open for FRV to employ persons as firefighters. That's not to say it has to employ people who are registered, but it would set the scheme that knowingly, if FRV could simply ignore it and in circumstances where there is capacity for a dispute over the application of the contract to be brought back into the Commission, there is in our submission a clear imposition on FRV.

PN430

And then at paragraph 27, you will see that again the Commissioner has set out in some detail the argument of being agitated by the UFU before him, knowingly, the – well, you are already fettered, so there's nothing to worry about. And including the argument about payroll services, and he comes back in paragraph 29 to the submissions being put by the Minister about the nature of the fettering. And then he goes on to set out section 25B, and this is at the foot of paragraph 31, and then he discusses this in more detail, commencing at paragraph 36 where again he deals with what's in the Enterprise Agreement and then he goes back to section 25B and focusses on the words 'any as that appears'.

PN431

And his analysis, we would submit, is in paragraph 40.

PN432

The context of 25B is plainly to grant permission to FRV to gather any resources without limitation but perhaps balanced with potentially competing requirements elsewhere in the FRV Act to enable the performance of its functions in the exercise of its powers.

PN433

And then he says:

PN434

The section plainly provides that discretionary decision of that employment rests with FRV in that FRV's the entity that forms a view – forms the view a

person is considered necessary for employment. A contractual external block on engaging a particular person that FRV considered necessary to assist it in carrying out its functions and exercising its powers would not – would likely not confirm with FRV's discretion for employing the persons it considers necessary.

PN435

Now, in our submission, that is on its face a determination or an expression of a view by the Commissioner that the block that the amended service agreement sought to put in place would likely not conform with the discretion that section 25B reposes into FRV.

PN436

We accept that in paragraph 41, the Commissioner then refers back to the revocation decision but to the extent to which my learned friend is suggesting that the fettering issue was not the subject of consideration by the Commissioner, in our respectful submission, that's not right. He has considered the submissions and he has expressed a view about the issue of fettering and it's not with respect correct as my learned friend seemed to be suggesting that he did not have regard to the terms of the 2020 agreement and the amendments made to the service agreement, amended service agreement in enriching that view.

PN437

That submission in our submission just cannot be reconciled with what appears in paragraph 36 of the decision. So to the extent that it is said in respect of the first group of combined grounds that this is analogous to the situation that the Full Bench dealt with in *UFU v MFB*, we say with respect that's just not right, in respect of fettering. It's clearly not right in respect of the direction but it's not right even in respect of fettering.

PN438

Turning to the issue of the direction and once again dealing with this first group of combined grounds, the position in our submission was made clear in paragraph 62, the consideration of the direction and it is scattered with respect in the decision and so you will see that it is first dealt with at paragraph 31 and then again at paragraphs 32 and 33 and you will note the observations by the Commissioner that the direction was not in place at the time of the fettering decision. That's something – what is the chronology if it assists, is that there was a hearing in respect of the – that gave rise to the fettering decision. There was then an opportunity for FRV and UFU to put in submissions responding to the submissions that were put on behalf of the Minister.

PN439

In the interim, the direction was issued by the Minister. There was then a hearing as to whether or not that direction should be admitted into evidence because FRV sought to tender the direction into evidence in the – in the fettering proceedings. That application was refused by the Commissioner. He'd primed to allow the direction to be received into evidence and there was a separate determination to that effect. And then he handed down his decision, refusing to make the order sought by the UFU on the basis of the fettering issue.

PN440

But when the second dispute application was made, the one that is the subject of these proceedings, the direction was sought to be tendered into evidence by FRV and was received into evidence by FRV. There is further discussion of the submissions being put in respect of the direction at paragraphs 34 through to 35. And then there's analysis of those matters mentioned at paragraph 58. And you will note that there are a number of matters noted by the Commissioner.

PN441

Firstly, the fact of the direction was dealt with in paragraph 58. Secondly, the fact that FRV had submitted that it must follow the direction, leaving it with no capacity to advance towards the execution of the service agreement with it being prohibited from entering into an agreement even where the Commissioner ordered it to be done. And importantly, the FRV submitted that an order of the Commission would not settle the dispute presently before the Commission.

PN442

And this is clearly something that the Commissioner took into account, in effect that if he were to make the order, it wouldn't resolve matters, because FRV would remain bound by the direction. And indeed, FRV remained of the view that it was so bound by the direction and as the Commissioner goes on to explain, were he to make the order sought by the UFU, it ran the risk of expanding the dispute.

PN443

And you will see there in paragraph 59, he sets out the relevant parts of the submissions made by FRV, which highlighted the invidious position that an order would put FRV into. And then at paragraph 60, he summarises the UFU submissions, again with respect, it's not accurate to suggest that the Commissioner did not engage with or simply ignore the submissions. There's a difference in our submission between a rejection of a submission on the one hand and a failure to engage with it. And in our submission, the Minister – the Commissioner clearly set out the nub of what was being put to him including both limbs. So you will see the first limb, i.e. that the direction is invalid is dealt with in paragraph 60 of the decision. And the second limb, that – well, even – you shouldn't even engage with it, is dealt with in paragraph 61.

PN444

And then we have the conclusion. And again, with respect to the Commissioner, it may well be that it could have been more clearly expressed. But what he is doing in our submission is he is accepting the submissions that the Minister put to him in respect of the direction. That's the effect, in our submission of the first sentence.

PN445

He also, in our submission, accepts that (a) the direction had been given and that FRV is compelled to comply with it. Unless and until it is either withdrawn or declared invalid. So as to this limb also, we would submit that we are dealing with a very different scenario to that which was dealt with by the Full Bench in *UFU v MFB*. And added to that, I should also note what appears under the heading with a conclusion or – sorry, what appears just before conclusion. You will see there in paragraph 73 in summarising the position, he says:

PN446

In conclusion on the matter of no capacity nor objection I am satisfied the (indistinct) consent is not required for FRV (indistinct) service agreement, that the effect of the Ministerial direction is to prevent FRV from finalising the service agreement while that direction remains.

PN447

So again, he is expressing a conclusion in our respectful submission as to the efficacy of the direction. The last point I sought to make in respect of this group of combined grounds, is that as my learned friend has taken the Full Bench too, at paragraphs 77, the Commissioner has set out passages from *UFU v MFB*. It is hardly to be supposed that he set out those passages with a view to ignoring them. You know, when one reads what he has done, he clearly sees himself as having followed a relevant Full Bench authority. In my submission to the extent which there is some infelicity of expression in other parts of the decision, a guide can be taken from the fact that the Commissioner has directed himself to the relevant authority and then has proceeded to, as he said, in paragraph 93, determine the dispute. I was now intending to move on to the second of the combined grounds which would mean fleshing out, if you like of the fettering issues. And then moving on to the direction issue. I do note the time but I am very much in the Full Bench's hands.

PN448

VICE PRESIDENT ASBURY: Thank you, Mr O'Grady. Yes. We are happy to keep going if the parties are. Thanks.

PN449

MR O'GRADY: Okay. Okay. Thank you. All right. Could I then ask the Full Bench to go to the Appeal Book. And to the services contract and I am happy to work off the version that my learned friend referred to which commences at paragraph 634.

PN450

VICE PRESIDENT ASBURY: Sorry, Mr O'Grady, I missed the page of the Appeal Book?

PN451

MR O'GRADY: Sorry. It's 634. And as I say, there is – there are at least two version of this document in the Appeal Book, the one that was attended to the dispute notification. And this one. I should perhaps before going to this document touch back slightly on the history in that the – to the extent that it's relevant, there is a slightly longer background to this matter than the dispute notification that was filed in respect of the dispute – it gave rise to the fettering matter.

PN452

The FRV Act makes provision for a firefighter's registration forward. And that is apparent from section 147 of the FRV Act. The FRV Act is included in the last of the materials in our bundle of authorities. But it's a Firefighter's Registration Board directed to determining whether or not employees of FRV are suitable to be seconded to the CFA as the Full Bench will appreciate, following the fire services

reforms that were put into effect by the FRV Act, CFA cease to employ operational firefighters. It had volunteers and it had administrative staff and management staff, but it ceased to employ operational firefighters.

PN453

All operational firefighters working for a government agency were to be employed by FRV but there was clearly a need for CFA to have persons who were not just volunteers, assisting it in a provision of its firefighting services. And there is therefore a provision for secondment from FRV to CFA of such persons and the FRV Act, among other things sought to put in place a firefighter's registration scheme at sections 147 and following. That scheme was not in effect at the time of these disputes being determined. And in order to address the immediate issue of determining whether or not firefighters could be seconded from FRV to CFA, there was an Interim Registration Board set up as part or through the auspices of the consultative committees in the, then existent EBA, and that was progressed for some months. There was then a proposal by the UFU to set up an entity of which FRV was to have some directors. And that was to be a proposal and included a National Board and then there was to be a sub-board for Victoria.

PN454

And then that proposal was abandoned and there was then a further proposal for a - a Corporate Board created by FRV. Sorry, created by - well, a Corporate Board with a company that was created by the UFU and that then gave rise to the proposal in respect of the services contract.

PN455

And I only go into that detail because I don't think it's - I wouldn't want the Full Bench to be proceeding on the basis that the position has been from the get-go, that there's to be services contract of the type that is such to these proceedings. It's more convoluted than that. If I could then go to the - - -

PN456

VICE PRESIDENT ASBURY: So could I just ask how the timing of those matters, you have just recounted relates to the clause in the Enterprise Agreement, dealing with the board?

PN457

MR O'GRADY: Yes, and can I - I can get the dates for the Full Bench in due course, but in the essence as you would have known, Vice President, Clause 42 of Division A and there's an equivalent provision in Division B, says that:

PN458

FRV endorses the establishment of a firefighter's Registration Board. FRV will demonstrate this by a letter of endorsement to the UFU secretary.

PN459

That was done. There was a letter sent to that effect and my recollection but I will confirm it after lunch if I may, was that that was done at the time of the - or as a precursor to the interim board. It was either done before the interim board under the EBA was set up or at a time when that was in operation. As I recall. But I

will get the correct dates. And that of course raises the question as to well, the capacity to have a dispute over a clause like Clause 42 in circumstances where the letter that it refers to has already been sent. And one would have thought there is an argument there, at least that it's spent. That was an argument that I proffered at the first – at the fettering proceedings. It wasn't accepted by the Commissioner and has been now appealed with respect. Could I then ask the Full Bench to go to the agreement. As the Bench will appreciate, the UFU is to be a party to this agreement and that's set out in the background of it. Disputes over the application of this agreement are to be subject to the disputes resolution procedure in the Enterprise Agreement. And that is dealt with at Clause 15.6.

PN460

We have dealt with termination and then we have the schedules that deal with specifications. And the registration system is dealt with in Schedule 2 and you will see that it is:

PN461

To have written the terms and conditions and standards and all rules both so described, set clear and appropriate range specific standards for inclusion on the registrar by reference at qualification, decision and operational experience obtained from employment with a recognised professional career firefighting service and as specified by the operational agreement.

PN462

So it does not in the first part of Clause 5(b) confine itself to the Enterprise Agreement but then we have the insertion to the avoidance of doubt:

PN463

The standard is for inclusion of a Registrar who of all times be the same as those specified by Schedule 3 of Division A, and Schedule 5 of Division B, of the operational agreement.

PN464

There is capacity to allow FRV to nominate up to two persons to participate in the decision making by the contractor and there are some matters that are excluded. And you will note that in Clause 11 of Schedule 2:

PN465

The registration system must also be consistent with matters in schedule - - -

PN466

Which is then not defined. I am assuming that should be a reference to Schedule 4. Schedule 4, which appears at Appeal Book page 665, sets out a number of requirements in Clause 2 and then refers to registration standards. And it says:

PN467

The qualifications, competence and operational experience as specified in the operational agreement and the agreed training framework are the standards required for a registration of a professional career firefighter for (indistinct words) operational experience required for registration.

PN468

So at all times, only be those specified in Schedule 2 of Division A and Schedule 5 of Division B. And then there's a requirement for external professional career firefighters seeking to be an officer employee of Fire Rescue Victoria to first seek registration, if they are registrational.

PN469

And they must have as a minimum the qualifications, competencies and operational experience as specified by the operational agreement and the agreed training framework.

PN470

There is then a requirement, or – sorry. And then Clause 5:

PN471

In order to be registered with the board, professional career firefighters must hold the qualifications or skills experience listed in this clause appropriate for their qualification or deemed equivalent by the board.

PN472

And that in our submission is not without significance. The board isn't just, as my learned friend seems to be suggesting, ticking boxes. It is making determinations as to equivalence of qualifications. And that of course is, it's making those determinations, not as section 25(b) of the FRV Act would have it. FRV. And they must be employed by Fire Rescue Victoria or another fire service as approved by the board.

PN473

So again, the board is determining what fire services are – can be approved for somebody to be registered.

PN474

VICE PRESIDENT ASBURY: Well, at the outset, it seems that because Clause 4 says that external professional career firefighters et cetera, and it says, including for the purpose of being made available on secondment to CFA. So it's – it includes that purpose whereas the Act has award for that purpose.

PN475

MR O'GRADY: Yes. Indeed. And so there's another issue of course here, which is that potential conflict between the Registration Board that the Act seeks to put in place and the Registration Board that the UFU seeks FRV to be ordered into. Could I then ask the Full Bench to go to the agreement. The Enterprise Agreement. Sorry, my learned friend notes the time. I am happy to keep going as long as you are happy to hear me. But I am happy to stop at any time that suits you.

PN476

VICE PRESIDENT ASBURY: How much longer have you got?

PN477

MR O'GRADY: I would be finished within an hour.

PN478

VICE PRESIDENT ASBURY: Even if we have a - perhaps if we just have a short break, say half an hour. Is that all right, with the parties?

PN479

MR O'GRADY: Yes, yes.

PN480

VICE PRESIDENT ASBURY: Okay. thanks.

LUNCHEON ADJOURNMENT

[1.05 PM]

RESUMED

[1.40 PM]

PN481

VICE PRESIDENT ASBURY: Thank you.

PN482

MR O'GRADY: Before we went for lunch, I was asked a question about chronology.

PN483

VICE PRESIDENT ASBURY: Yes.

PN484

MR O'GRADY: In respect of things. My instructions are that on 23 April 2021, FRV sent the letter to the UFU endorsing in the establishment of the Registration Board. And then on 29 April 2021, FRV endorsed the interim board. So this was the board under the auspices of the consultative committee in the Enterprise Agreement. And then on the 2 July 2021, the interim board first met. And then there was a – as I tried to explain before lunch, a departure in the approach being taken by the UFU and the move towards this Corporate Registration Board.

PN485

Before lunch, I was going to take the Full Bench to some provisions in the Enterprise Agreement and if I can do that as quickly as I can. Can I start with Clause 11.15 of Division A. That's at Appeal Book page 509. And you will see there that under the various definitions, there are reference to various classifications. And importantly, there's then reference to there being at the end of those definitions, FRV specific requirements from Tables 3 and Tables 4. And this is a reference to those tables in Schedule 3 that I will go to in a moment. But you will see that that is replicated in respect of the last bulk of the position descriptions. And then as you noted before lunch, Vice President you have got Clause 2.3 which talks about

PN486

Employees will only be appointed to a classification if they have already been employed in a classification below the classification.

PN487

But there is also a reference there to lateral entry provisions at the foot of the clause. And then one – if one goes to the lateral entry provisions, they commence

at Clause 41 where there's provision for internal division transfer and lateral entry. And then lateral entry is dealt with first at 41.8 which is a requirement to comply with 41.9 and then there is a process set out in the bulk of 41.8 of:

PN488

Advertising and waiting and advertising and offering positions to internal applicants before moving to offering a person lateral entry.

PN489

You will note that in Clause 41.8.4:

PN490

There are limitations on who applications can be received from and naming a career firefighter of FRV Division B unless otherwise agreed, on a case by case basis between FRV and UFU.

PN491

And I repeat the point I made before lunch, that that in our submission is a significant difference from the system that is sought to be put in place by the amended services contract because here it is that position as between FRV and UFU subject to a dispute that might be brought under this agreement which isn't the party to the application of the Registration Board.

PN492

You will see in 41.8.4(b):

PN493

They must have completed a recruit course.

PN494

A recruit course agreed between FRV and UFU. Again, that's a difference we would submit. There's a requirement in (c):

PN495

To hold the same or equivalent rank as the position being advertised.

PN496

Well, again, that would on its face be a determination made by FRV and not something that has been determined by this Corporate Board.

PN497

And then again in 41.9.3 there's issues regarding career firefighting services. Again, those are services as determined between UFU and FRV on a case by case basis. As opposed to this other board that is sought to be put in place.

PN498

If I could then go to Schedule 3 and that appears at Appeal Book page 738. And you will see that – so this is the schedule that is referred to in the definitions of the positions. And you will see that there are a number of limbs to it. Firstly, there is the reference to Emergency Response Training Framework. Then there is a

deeming and recognition process which is described in page 745. And then there are the tables that are referred to in the position descriptions.

PN499

Now, it would appear, although it's hard to read, that Table 1, which commences at a page 750, is a reference to various courses that must be obtained. And in regards to that table, it may be that somebody has either done the course or they haven't done the course. But that of course doesn't address the issue of equivalence and the like, particularly when one is dealing with somebody from another fire service. The position is less clear in respect of Table 3 which again is a requirement under the Enterprise Agreement because you will see there that in respect to the various ranks there described, the MFB's specific requirements in the training framework make reference to what might be described as law amorphous types of training and/or school acquisition. And again, under the Enterprise Agreement, one would have thought that is something that is being applied by FRV as opposed to this Corporate Board that's sought to be put in place through the amended services contract.

PN500

And there are similar provisions in the second division of the agreement that is commences at page 841 with the definitions of the position descriptions in Clause 11.17 which is at page 857. There are provisions for lateral entry in – at Clause 48 which is at page 700 and – or commences at page 711. And there are similar CFA specific requirements in Schedule 5 which commences at page 1124 and we have taken three – a viewing at page 1132.

PN501

In our submission, an indicator that this is not just a box ticking exercise can be gleaned from the constitution of the Victorian Professional Career Firefighters' Registration Board. That appears at Appeal Book page 501. And you will see that in that constitution there is, in describing the powers in Clause 6(e):

PN502

The powers are to determine persons suitable for employment as operational firefighters through the registration process to ensure prospective employees have a minimum of qualification competencies and operational experience as specified by the FRV operational agreement and the agreed training framework.

PN503

So there is no necessary alignment between that purpose and what is in operational agreement. And then there is registration that was dealt with in Clause 17. And it's clear from 17.1 that:

PN504

In order to be registered, professional career firefighters must be – hold qualifications, skills and experience listed in this clause appropriate for the qualifications or deemed equivalent by the Corporate Board, employed by Fire Rescue Victoria or other Fire Services as approved by the Corporate Board.

PN505

And then in Clause 18:

PN506

The provision of registration deals with the situation of professional career firefighters employed by Fire Rescue Victoria and they're required to provide evidence of appropriate or any specific qualifications.

PN507

And then in 18.2:

PN508

There are transitional registration provisions for career firefighters employed by Fire Rescue Victoria.

PN509

And in (b):

PN510

A firefighter currently employed by Fire Rescue Victoria who holds incomplete qualifications that the Corporate Board and Fire Rescue Victoria considers contain similar competencies and operational professional career firefighting experience will qualify for registration only in the category that aligns to their current rank.

PN511

So there is in effect a freezing position in respect of that individual. And then:

PN512

Indeed if the training registration provision cannot be applied because of significant gaps in skill and knowledge are identified during the registration process, the Corporate Board may require firefighters to undertake bridging clauses to meet the skills and knowledge, requirements and the relevant qualifications.

PN513

And then in 18.4, the issue of lateral entry from other firefighting services is dealt with. Again, with a requirement that the services be agreed to by the Corporate Board. A position that we say is fundamentally at odds with section 25B which as the Commissioner pointed out in his decision is clearly concerned with or opposes in FRV the determination as to who it might seek to employ and in what capacity.

PN514

So in summary, the response to the fettering issue is that (a), the fact that there are some obligations imposed upon FRV by the operational agreement is in our respectful submission no answer to the issue of fettering. Second fetter is no less a fetter. (b) There is fundamental distinction between the entity in which these determinations are opposed by the FRV Act and the amended services contract. (c) There are of course various statutory mechanisms that come into play as far as the operation of an Enterprise Agreement is concerned that are not necessarily present in respect of the contract. There may be some provisions of an Enterprise Agreement that are of no force and effect because they are

objectionable terms. There may be mechanisms for varying an Enterprise Agreement whether by way of vote or by – in order to remove ambiguity or uncertainty. None of that is present in the Corporate Board structure, that the UFU seeks my client to enter into.

PN515

And for those reasons we submit that the Commissioner was correct to observe that a contractual barrier of the type that is here contemplated would appear to transgress the – and impose a fetter upon FRV.

PN516

Could I then turn – and before leaving this topic, could I make the final point that as we have said in paragraphs 28 and 29 of our outline of submissions, even if one accepts my learned friend's reading of the Commissioner's decision, as was pointed out by Deputy President Colman this morning, the fettering issue was not the sole basis upon which the Commissioner declined to make the order sought. In our submission, it is only if my learned friends succeed in respect of Ground 1 and Ground 3 that the issue of the fettering needs to be determined.

PN517

Absent success in respect of those additional combined grounds and sorry, I am using the language of combined grounds - as we have sought to define it in our outline of submissions - the fettering issue did not need to be determined because there was a proper basis for the client to make the orders sought in any event.

PN518

My learned friend was asked about the – where the submissions in respect of fettering are and he sought to summarise where his clients or his submissions were and also where our submissions were. And I am not critical of him. He may have missed some of the passages. You will find that footnote 29 of our outline of submissions seeks to refer the Full Bench to where our – we dealt with the fettering issue. Twenty-nine. Fettering issue, both in the written submissions and in – within oral submissions.

PN519

In respect of the issue of the Commissioner deferring, the fettering issue to the revocation application, can I simply refer the Full Bench to paragraph 37 and 41 of the transcript which commences at Appeal Book page 60 where in response to my learned friend seeking to defer the revocation application, I did put a submission, but in the Minister's view. That was – there were issues with that and it was not appropriate having affected two proceedings on foot running in parallel. A position which may have – be said to in some way be vindicated by the very good place my learned friend seeks to agitate in this part of his appeal.

PN520

Could I then turn to combine – sorry. Sorry, combine Ground 3. And can I commence that by inviting the Full Bench to have a look at the FRV Act which is, I say, is the last of the authorities in our bundle. And as my learned friend said, the starting point in respect of this issue is section 8. And you will note that it is written in I think four terms.

PN521

Fire Rescue Victoria and the Fire Rescue Commissioner are subject to the general direction and control of the Minister in the performance of the duties and function and the exercise of the powers of Fire Rescue Victoria and the Fire Rescue Commissioner including but not limited to the policies and priorities issued by Fire Rescue Victoria and the Fire Rescue Commissioner.

PN522

Here we are talking about the pursuit of a firefighter's Registration Board through this corporate service contract arrangement in circumstances where there is statutory provision, albeit for a narrower firefighter's Registration Board in the FRV Act itself. One can hardly have thought of a – think of a topic more right for the Minister to be concerned about or a policy and priority that the Minister might be entitled to issue a direction about. There is of course, a limitation on that power of direction and that that limitation is spelled out.

PN523

Sub-section (2) says:

PN524

The Minister may from time to time give written directions to the Fire Rescue Victoria and the Fire Rescue Commissioner.

PN525

And for completeness, I should just direct the Full Bench to that direction. It appears in the Appeal Book relevantly on a number of occasions, but at AB590 you have the statutory declaration of Mr Cantonese where he attaches the direction and the direction itself appears at 595.

PN526

The FRV Act (indistinct words) the direction to be published in the Government Gazette.

PN527

That's section 8(7). And if one goes to Appeal Book page 611, one will see that that was done in respect of the direction.

PN528

And you will see that in section 8(3), there are some express carve outs.

PN529

The Minister must not give a direction in relation to the exercise of operational functions and powers of Fire Rescue Victoria or the Fire Rescue Commissioner including but not limited to a function or power under any of the following provisions.

PN530

And if one goes to those provisions, one sees that these are very much matters going to the way in which Fire Rescue Victoria goes about fighting fires. So for example, the first of those provisions is section 26. Section 26 is at page 332 of our bundle of authorities. It's about formation of units. Section 32 deals with

parallels of access. Section 32AA deals with a duty to warn the community. So what is carved out and this is a consistent theme when one goes through all of those provisions. What is carved out is the Minister not in effect taking it upon herself to run the day to day operations of the fire service to say, 'Well, my beach house is threatened by this fire front. I'd like you to dispatch a number of units there to make sure that it's appropriately protected.'

PN531

DEPUTY PRESIDENT O'NEILL: So she couldn't hold a hose.

PN532

MR O'GRADY: She – she could – well, she couldn't issue a direction in respect of who held the hose or how the hose was to be held, but you are right, Deputy President. But it is very much in that bailiwick. As opposed to what we are talking about here is a significant issue of policy. Namely, who gets to decide who can be registered to work as a firefighter in Victoria. And a matter that involves significant Government expenditure as you would have seen from the contract. There is to be an annual fee per firefighter at \$180 per person. Somewhere between 600 and 700 or \$800,000. On an annual basis. That is to be maintained until either the UFU agrees that the contract can be terminated or the operational agreement comes to an end.

PN533

Now, my learned friend as I understood it, stood in this morning and at first instance says, 'Well, these aren't matters of concern because somehow you read down section 8 and impose an additional limitation'. Not the limitations that are there in the section itself, but an additional limitation and one might have thought that it is, with respect unlikely that Parliament having spelled out some 20-odd sections that cannot be the subject of direction intended that. Section 25A(2)(a) would also be something that could not be the subject of a direction.

PN534

And the deciding point with my learned friend's submission in respect of section 25A are the opening words of section 25A(1). Section 25A in its entirety is subject to the Act, including section A. And indeed, it is in our respectful submission impossible to reconcile the clear terms of section 8 if one then imposes some further limitation in respect of section 25A(2).

PN535

Now, my learned friend says, 'Well, yes, there is a power to enter into agreements or arrangements with any person for the provision of goods and services to Fire Rescue Victoria.' And – but there's nothing to suggest that that power cannot be the subject of direction. One would have thought that all of the – the – well, I will take a step back. Necessarily, a direction is going to be directed towards the exercise of a power by Fire Rescue Victoria. If Fire Rescue Victoria doesn't have the power to do it, there doesn't need to be, in effect, a direction. Other than perhaps in order to take a belt and braces approach. But one would have thought in the ordinary course the Minister is issuing directions in respect of matters that FRV would otherwise have the power to do. And my learned friend says, 'Well, you contrast 25A(2)(a) and 25A(2)(b) and then in 25A(2)(b) is subject to 25A(3)

where there are some contracts, namely contracts for the provisional services that Ministerial consent is required for.

PN536

But there is a fundamental difference in our respectful submission between consent being a prerequisite for the doing of a thing. And a direction that the thing cannot be done. In respect of the contracts that are the subject of 25A(3), Fire Rescue Victoria doesn't pass Go, absent there being Ministerial consent.

PN537

That is not to a basis, in our respectful submission, for reading down section 8 in the way contended for by my learned friend. Now, he's referred to the Anthony Hordern principle. In our submission, and we developed this before the commission of the Anthony Hordern principle supports the construction that we would put on these provisions. Here we have a specific provision dealing with what the Commissioner can issue – what the Minister can issue directions about and it should not be read down or diminished by a recourse to the general powers that Fire Rescue Victoria might otherwise have.

PN538

Before lunch, I took the Full Bench to those parts of the Commissioner's decision dealing with the issue of direction and as I said before lunch, in my submission, the better view is what the Commissioner determined is that there was a direction finding upon FRV and that in those circumstances and that direction had not been set aside or found or declared invalid. In our submission, that was the right conclusion and a proper basis for the Commissioner not to make the order sought. And as the Commissioner will explain in his decision, were he not to take that into account, he would be placing FRV in the invidious position – or impossible position I think he used of being on the one hand subject to an order from the Commission and on the other hand being subject to a direction from the Minister.

PN539

Now, my learned friend says, 'Well, this wasn't something that the Commissioner needed in this second limb, as we understand it. This wasn't something that the Commissioner needed to determine because it was in effect outside the scope of the dispute.'

PN540

In our respectful submission, the Commissioner was entitled to take into account whether or not FRV had the power to enter into the contract he was being asked to order to enter into. And it was not something that he could just simply ignore in that regard. And if I could pick up some of the observations made by the Full Bench earlier this morning. This is in our submission, a fundamentally different scenario to that, that might be confronting the Commissioner in say an unfair dismissal case, as you mentioned Deputy President Colman where you need to work out whether there's employment. Or even on a dispute over the application of agreement case where the Commission might be required to construe the Enterprise Agreement as part of determining what is the appropriate order to make in respect of the application of that clause.

PN541

Here what we are dealing with, is we are dealing with in effect a statutory instrument by the responsible Victorian Government Minister, which on its face is binding upon a Government Agency that has not been set aside or withdrawn.

PN542

In our submission it would be remarkable if in those circumstances the Commissioner simply ignored that. And in effect let the chips fall where they may. Particularly, as the Commissioner and this is what the Commissioner made clear, to do that, would be unlikely to resolve the dispute. Indeed, it would be likely to exacerbate the dispute because FRV had indicated to him that he could not in his view lawfully do what he was directing it to do.

PN543

VICE PRESIDENT ASBURY: It might be more akin to where there's a circumstance where a statute prohibits a certain person from being employed or from complying with the direction and the Commission's required to decide whether the direction is lawful.

PN544

MR O'GRADY: Yes.

PN545

VICE PRESIDENT ASBURY: Or compliance with the directions would put the person in breach of a statute.

PN546

MR O'GRADY: Yes. Yes. I think that's right, Vice President. So we say it's something that the Commissioner was required to form a view about. He did form a view about it. And he then allowed that view to inform the decision he made as to the appropriateness of the orders being sought. And that in our submission was not only open to him but clearly the right thing to do.

PN547

And if I am reminded, this was an issue that was dealt with by FRV in its submissions on the direction. So put in written submissions on the direction – sorry just bear with me. At paragraphs 19 to 21, which is at Appeal Book page 616. An oral submissions were put by counsel for FRV at paragraph 200 and 201 which is at Appeal Book page 82. The effect of which was FRV's position was that he proceeds on the basis that he's been given a valid direction by the Minister not to enter into the service agreement with UFU.

PN548

I am instructed FRV will comply with that and will not contravene the direction. However, its position is that it does not view itself as (indistinct) from continuing to be amenable to enter into a service agreement in the future subject to the details Mr Borenstein referred to by reference to paragraph 20 of our earlier submissions, if the FRV and the FRV Commissioner cease to be the subject of the direction. So it was in an impossible position. And that was something that in our submission the Commissioner rightly took into account.

PN549

My learned friend also referred to Kentz and the need for a - and the approach to the Commissioner in any effect making a determination along the way. In our submission, even if I am wrong about the Commissioner having found – made a finding in respect of the direction, the observations he made were sufficient for him to enable being able to discharge the function that he had to perform in that the fact that he was confronted with a position where there was prima facie a valid direction binding upon FRV that FRV considered itself to be bound by the direction and would not comply with that direction, was a sufficient basis for him to decline to make the order sought by the UFU.

PN550

Unless there are any questions by the Full Bench, those are the submissions we would seek to put orally.

PN551

VICE PRESIDENT ASBURY: Thank you.

PN552

MR O'GRADY: Thank you.

PN553

VICE PRESIDENT ASBURY: Thanks very much. Reply?

PN554

MR BORENSTEIN: Thank you. Can I start by responding to some submissions that Mr O'Grady made before lunch by reference to the specific terms of the service contract. It's an accepted principle of construction of contracts between parties that the Tribunal that is dealing with them and is called on to construe the contracts or interpret the contracts that they should have regard to a purpose and the object of the contract in interpreting the various terms of the contract.

PN555

I won't take you to this, but I will give you a reference to some High Court authority for that proposition. The decision is called *Ecosse* and it's reported in [2017] 261 Commonwealth Law Reports starting at page 544 and it's at paragraph 16. And it echoes the decision and the reasoning in the well-known case of *Codelfa v State Rail Authority* which is in [1982] 149 CLR 387 at page 350. Justice Mason. And so when you are invited to interpret what the various words and particular clauses and phrases mean in the service agreement, we make the following submissions. First of all, there is nothing in the service agreement that takes away the right of FRV to employ any firefighter.

PN556

What the service agreement does, is it is a consensual document between FRV which has that power under the Act and which hasn't given up that power under the Act and a service provider which is engaged at the behest of FRV to look at whether employees or applicants for employment satisfy the various qualifications that are set in the terms of the Enterprise Agreement. That is the Commercial arrangement and it's in the context of that commercial arrangement, that purpose, that object that all of these clauses are to be interpreted and so where the

agreement says that it – you need to get a registration from the Registration Board, that's to be interpreted as part of an arrangement entered into between FRV and the Registration Board by which the Registration Board reports to FRV whether a particular employee or applicant for employment satisfies the requirements which FRV is committed to under the Enterprise Agreement.

PN557

Now, there is nothing that fetters the FRV's position beyond what is already done by the Enterprise Agreement and we say that this word by word, comma by comma analysis really goes nowhere unless you recognise what the true character of the transaction is. The true character of the transaction is not take away the right to employ under 25B. The true character is simply to report to FRV as the employer, whether the person in question does or does not satisfy the requirements which the FRV is required under the Enterprise Agreement to apply.

PN558

The simple fact of entering into a contract with another entity by a public sector agency does not of itself constitute a fettering. We had this argument before the Commission in the first arbitration and we gave the Commissioner some written submissions which took him to the various authorities on the question of the effect of a contract by a Government or Public Service Agency and whether it attracts from the statutory functions of that agency. And if I can give you a reference at Appeal Book page 294, they are the written submissions which we gave to the Commissioner and at paragraphs 90 to 95, you will see a survey of the relevant authorities which come to the conclusion that you cannot simply assume that because their contract was entered into by a public entity with an outside entity, that that is some derogation of the public entities statutory function. You must examine what the contract actually does and whether or not it actually does derogate in its terms and operations from the statutory function.

PN559

And we say of course, as I have just said, that there is nothing in the contract that deprives the MFB of its functions under the section in question. The FRV, I am sorry.

PN560

Now, our friend made some submissions about the decision of the Full Bench in the *UFU v MFB* case. And he sought to interpret paragraph 55 of that decision and he did so by reference to the particular facts of the case which were that an arbitration was about to take place and the Enterprise Agreement under which it was being done was about to expire and be replaced by another agreement and there was a question about whether it would be a wasted effort of having that arbitration rather than coming back when the new agreement is put in place.

PN561

Of course there's some more recent authority in the Commission which suggests that an arbitration started under one agreement can continue on under an ensuing agreement but that's to the side. We would ask you to look when you are considering this matter, to look at paragraph 59 and 61 where the Full Bench makes it clear that as a general proposition, the function of the arbitrator is to direct or to exercise and deploy the powers of the Commission to settle a

dispute. Not to put it off. If it's possible to settle the dispute, you should settle the dispute. And the discretion that is relied on here by the Minister, is not something, anything like the discretion which was confronted in the MFB case. Here what's being said is I am not going to decide this because this issue (a) in relation to the Ministerial direction, is too fraught and I am not sure what's going to happen in the next week, month, year, if I make a decision. And secondly, that the fettering decision, the fettering concerns don't arise in this matter, they arise in the revocation case.

PN562

Now, neither of those two considerations, we say are legitimate. We say they are not a proper basis for the exercise of a discretion not to decide. Indeed, quite the opposite. And as we have said, and I won't take up your time, in relation to the fettering, the Commissioner was addressed on it – on those issues. We have given you the references. And it was a live issue. Clearly a live issue, otherwise why are the parties addressing you? It was a live issue. It was incumbent on the Commissioner to engage with the issue, to give it proper consideration and to make a decision on that issue. And he did not. He failed to do that. He failed to exercise his powers and jurisdiction as the Commissioner doing the arbitration. It was a central issue in the arbitration that was submitted to him.

PN563

The second thing as I have said, is that he found that the presence of the direction, the Minister's direction was an impediment. He called it an impasse. Now, in our submission in those circumstances as I have said, it was incumbent on him to form an opinion to get over the impasse. Because the ultimate purpose of the arbitration was to settle the dispute. And if it was open to him to do that, and we say clearly it was, on the authorities, he should have done it. And he should have made his decision.

PN564

Now, our friend made some submissions about section 25B and referred to paragraph 40 of the decision. As we have said, the Registration Board does not prevent FRV from employing anybody. You won't find in term of the service agreement that does that, Mr O'Grady has combed through the agreement in some detail. He hasn't pointed you to any clause which says FRV cannot employ who they wish. And the reason why it's not there is because, as I said, the purpose of it is to deal with something quite different. In paragraph 40 in the last sentence, the Commissioner says:

PN565

A contractual external block on engaging a particular person that FRV considers necessary to assist in carrying out its function and exercising its power, would likely not confirm with FRV's discretion to employ any person.

PN566

Strangely equivocal statement by saying likely instead of being positive about it. But leaving that to one side, we say that is subject to the same vice as underlies and premises Mr O'Grady's submissions that the role of the Registration Board is to block anything. And we say that to the extent that the Commissioner takes that

view he's mistaken in that and that has contributed to the miscarriage of his decision.

PN567

Now, our friend then made some submissions about the Commissioner's dealing with the ministerial direction. He referred you to paragraphs 31 and 34 and 35 of the decision which set out the respective submission of the parties and he drew your attention to the FRV submission that they couldn't sign the contract because of the ministerial direction. Our submission is that the subjective view of a party about the validity of an ministerial direction, is completely irrelevant. The validity is an objective matter. It either is valid or it is not valid and you need to form an opinion and then proceed on – and proceed on that opinion. And if the Commissioner has proceeded as Mr O'Grady seems to suggest on the subjective view of FRV as the basis for not resolving the dispute, then that exposes an error. That exposes an error in the Commissioner's reasoning. Our friend then took you on a survey of the provisions of the Enterprise Agreement and the schedules and the provisions that are made for those matters of qualification and competency. He did not offer you any explanation of what each of the tables or functions – sorry, what each of the tables were that he took your attention – he drew your attention to. He made something of or sought to make something of Schedule 3 which is at Appeal Book 738 and said the terms of Schedule 3 are very imprecise and leaves a lot of room for – for subjective assessments or judgments to be made, implying that the Registration Board would make those judgments and then somehow or other impeded the ability of FRV.

PN568

We would suggest that Schedule 3 is open to a different reading which is simply to indicate the various competencies and so on which the training programs were intended or designed or should be designed to deal with and that they were not setting standards of achievement of qualification but rather dealing with the setting up by FRV of the various training courses that would be necessary for applicants and employees to undertake.

PN569

Now, our friend then made a submission that it was because the Commissioner had made the decision which he did based on two considerations being the fettering and also the Ministerial direction that in order for us to succeed, we really have to persuade you that he was wrong in relation to both. Now, as we have already submitted, we do say he was wrong on both. And we do rely on that.

PN570

Then can I go to our submission that our friend made about the FRV - the FRV Act in section 8. And the problem that our friend creates by his submission is this. He says, section 8 overrides section 25A(2). 25A(2) is the provision where we show you this morning that it was permitted to enter into a contract to secure services from another entity and it did not require consent.

PN571

The submission which we made to the Commissioner, was that if our friend is right – oh, I should say, we made some submissions this morning about this and we rely on those and I won't repeat them. But the thing that our friend can't

grapple with is this. If he is right about section 8, if he is right that under section 8 the Minister can give a direction about a specific contract for the acquisition of services by FRV, exactly the thing that sub-section (2)(a) of section 25A covers and doesn't require a consent form, then that renders section 25(2)(a) completely otiose. Cross it out. Delete it from the Act.

PN572

Except that the High Court in Project Blue Sky says that's not a proper interpretation to (indistinct) statute and that you need to interpret the different provisions of statutes so that they work harmoniously.

PN573

The submissions which we made this morning and which we made to the Commissioner are based on the general propositions in section 8 and the specific s in section 25A(2) and we say that based on accepted principle of statutory interpretation, you don't have – you don't treat a specific provision as being overridden by a general provision and you say that specific provision takes precedence.

PN574

Now, our friend then comes up with another argument. He says, 'Oh, well, look, section 25A says it's subject to this Act', but sub-section (2) doesn't say that. Sub-section (1) says that. But sub-section (2) doesn't. Sub-section (2) is not subject to this Act. It says, 'Without limiting or derogating from the generality of the powers, these things apply to these specific circumstances.' And so we say it's clear on any accepted standards or principles of statutory interpretation that using section 8(1) to overcome the position under section 25A(2)(a) where the Minister doesn't get a say, expressly doesn't get a say, is doing what I said this morning. Is trying to do through the back door what you can't do through the front door.

PN575

And again, as a matter of legal construction, that's not permissible. And so we say that there is a powerful argument. A powerful argument that what the Minister did is beyond power. And it was open to the Minister to form an opinion on that and to the extent that he did not form an opinion, or to the extent that he formed a sort of equivocal statement that he made in section – in paragraph 62, I think it is, he was wrong and the Full Bench should correct that.

PN576

And then finally, our friend made some submissions about the Kentz decision and the case is referred to there. We clearly disagree with what our friend put and we rely on the submissions we made this morning. And other than that, unless there are any other matters that the Commission wishes to raise with me, they are our submissions in reply.

PN577

VICE PRESIDENT ASBURY: Thank you. Thank you, Mr Borenstein. Thank you to both counsel for your submissions. We will indicate that we will reserve our decision and issue it in due course. On that basis we will adjourn.

ADJOURNED INDEFINITELY

[2.34 PM]