

**IN THE FAIR WORK COMMISSION
AT MELBOURNE**

FWC Matter No: B2023/771

The United Firefighters' Union of Australia
(Applicant)

Fire Rescue Victoria
(Respondent)

MINISTER'S OUTLINE OF SUBMISSIONS ON AGREED TERMS AND MATTERS AT ISSUE

INTRODUCTION

1. These submissions are made on behalf of the Minister for Emergency Services, the Hon Jaclyn Symes MLC (**Minister**) pursuant to Order 4 of the directions of the President dated 25 October 2023.
2. These submissions address, on a provisional basis, the matters relating to:
 - (a) the agreed terms for the intractable bargaining workplace determination pursuant to section 274(3) of the *Fair Work Act 2009* (Cth) (**FW Act**); and
 - (b) the matters at issue pursuant to section 270(3) of the *FW Act*.
3. On 28 July 2023, the United Firefighters' Union of Australia (**UFU**) applied pursuant to section 234(1) of the *FW Act* for an intractable bargaining declaration (**IBD**) in relation to a proposed enterprise agreement (**Proposed Operational EA**) to replace the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (**FRV Operational EA**). That application was heard by a Full Bench of the Fair Work Commission (**Commission**) on 26 September 2023.
4. On 26 September 2023, the Full Bench had a hearing in order to determine whether it should make an IBD and whether it should order there be a post-declaration negotiating period. At that hearing the UFU, FRV and the Minister agreed that the Full Bench should make an IBD. FRV and the Minister also sought a post-declaration negotiating period. FRV's position in response to questions from the Bench was that there were no terms that met the definition of an agreed term under the *FW Act*.¹

¹ Transcript 26 September 2023 (**Transcript**) PN 250. See also PN 224 – 227 and 234 – 241.

5. On 4 October 2023, the Full Bench made the IBD and ordered that there be a post-declaration negotiating period. The post-declaration negotiating period concluded on 18 October 2023.
6. On 20 October 2023, the matter was listed for mention and directions before the President. At the time of that hearing, FRV had informed the UFU that its position was that at the conclusion of the post-declaration negotiating period there were no agreed terms for the purposes of section 274(3) of the *FW Act*.²
7. On 25 October 2023, the Full Bench made directions (**Directions**) listing the matter for a preliminary hearing to determine:
 - (a) whether the Minister is permitted to intervene in this matter in relation to the intractable bargaining workplace determination; and
 - (b) which are the agreed terms and which are the matters at issue that the Full Bench will need to proceed to determine in the course of making the intractable bargaining workplace determination.
8. Pursuant to the Directions these submissions are filed concurrently with those of the UFU and FRV.
9. The Minister has filed a "*position document*" setting out the agreed terms, the matters at issue and the matters which will be the subject of substantive consideration by the Commission, on a provisional basis. In support of the Minister's position, it is contended that in circumstances where:
 - (a) at all relevant times, bargaining for the Proposed Operational EA proceeded on the basis that:
 - (i) in-principle agreement was subject to an acceptable package; and
 - (ii) FRV was required to obtain Government approval after in-principle agreement and may be subject to change;
 - (b) on 7 August 2023, the FRV made an offer authorised by Government, which included, amongst other things, proposed salary increases, lump sum payments and certain conditions, on an overall package basis (**7 August Offer**);
 - (c) the UFU rejected the 7 August Offer, including in respect of the wages and conditions;
 - (d) following the UFU's rejection of the 7 August Offer, the bargaining representatives have not agreed to include any terms in the Proposed Operational EA;
 - (e) as at the date of the IBD FRV informed the Commission its position was that there were no agreed terms;

² Letter from FRV to UFU dated 18 October 2023. See also Transcript 20 October 2023 PN 10 and 46.

- (f) at the end of the post-declaration negotiating period FRV confirmed in writing that there were no agreed terms in circumstances where the bargaining parties had been unable to agree on the terms of a proposed enterprise agreement during the post-declaration negotiating period;

there are no agreed terms for the purposes of section 274(3) of the *FW Act*.

- 10. Accordingly, each of the terms of the Proposed Operational EA, are technically matters at issue within the meaning of section 270(3) of the *FW Act*.
- 11. Notwithstanding the fact that each of the terms of the Proposed Operational EA are technically matters at issue within the meaning of section 270(3) of the *FW Act*, consistent with the approach adopted by previous Full Benches in the context of industrial action related workplace determinations (further addressed below), the Full Bench may have regard to any subsequent consensus reached after the relevant assessment time in determining the factors under section 275 of the *FW Act*.
- 12. In recognition of these authorities and in order to assist the Commission, the Minister has indicated in the position document those terms of the Proposed Operational EA that, in her submission, should be the subject of substantive consideration by the Commission. The Minister will seek to address these issues in the hearing of the intractable bargaining workplace determination (**Substantive Workplace Determination Matters**). The remaining matters, although falling within the definition of a “matter at issue” for the purposes of the *FW Act* and, as such, subject to the assessment required by section 275, will not be contested by the Minister during the hearing of the intractable bargaining workplace determination – in that neither FRV nor the Minister intend to make submissions opposing their inclusion in the intractable bargaining workplace determination.

Relevant background

- 13. FRV is established by section 6 of the *Fire Rescue Victoria Act 1958* (Vic) (**FRV Act**). It is responsible for fire safety, fire suppression and fire prevention services, and emergency response services in the FRV fire district.³ FRV employees, inter alia, persons whose employment will be subject to the intractable bargaining workplace determination (**Operational Firefighters**). Some of the Operational Firefighters employed by FRV are seconded to the Country Fire Authority (**CFA**).
- 14. The Minister’s portfolio includes:
 - (a) responsibility for administering the FRV Act;

³ Section 7 of the *FRV Act*.

- (b) having general direction and control over FRV in respect of the performance of its duties and functions, including the exercise of powers by FRV and the Fire Rescue Commissioner;⁴
- (c) accountability for FRV's budget and financial management;⁵
- (d) responsibility for administering the *Country Fire Authority Act (CFA Act)*;
- (e) having general direction and control over the CFA in respect of the performance of its duties and functions, including the exercise of powers by the CFA;⁶
- (f) accountability for the CFA's budget and financial management.

Wages Policy

15. As a public sector agency, FRV is required to comply with the Government's enterprise bargaining framework and wages policy.⁷ This reflects the fact that the vast majority for funding for FRV is provided by the Victorian Government.
16. At the commencement of bargaining for the Proposed Operational EA, the wages policy and enterprise bargaining framework that applied to bargaining was contained in the 2019 wages policy and enterprise bargaining framework (**2019 Wages Policy**).⁸
17. That policy contained a framework that placed different bargaining and governance expectations (including the level of Government supervision and approval) on different types of public sector agencies relative to the size of their workforce, wages bill, and relative industrial or financial risk profile (**Framework**).⁹ Under the Framework there were two categories of enterprise agreement – Major Agreements (which required Government oversight and approval of the strategy and negotiations) and Non-major Agreements. Major Agreements were stated to include agreements covering firefighters.¹⁰
18. Under the 2019 Wages Policy, increases in wages and conditions were capped at a rate of growth of 2.0 per cent per annum.¹¹ Public sector agencies were required to seek pre-approval from the Government to make any offer above the capped growth rate.¹² Additional changes to

⁴ Section 8(1) of the *FRV Act*.

⁵ The Minister is the "relevant Minister" for FRV (and all other public bodies for which she is the responsible Minister) for the purposes of the *Financial Management Act 1994* (Vic). FRV's financial accountability and reporting obligations are set out in Part 7 of that Act.

⁶ Section 6A of the *CFA Act*.

⁷ Statement filed on behalf of FRV dated 5 September 2023 read into evidence and marked Exhibit 5 (**Exhibit 5**), [29].

⁸ Exhibit 5, [30]; Exhibit JC-1, Attachment 1.

⁹ Exhibit 5, Exhibit JC-1, Attachment 1, p. 7.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 4.

¹² *Ibid.*

allowances and other conditions (not general wages) were only allowed if the Government agreed that the changes addressed key operational or strategic priorities for the agency and/or one or more of the Public Sector Priorities.¹³ No retrospective payments could be made.¹⁴

19. In addition, the 2019 Wages Policy required that, “*all agreements must be fiscally sustainable and fully funded from capped indexation revenue and /or appropriate cost offsets.*”¹⁵

20. Amongst other things, the 2019 Wages Policy required FRV to seek approval:

- (a) at the commencement of bargaining;
- (b) to make offers outside the approved parameters; and
- (c) prior to the commencement of any of the formal approval requirements under the *FW Act*.¹⁶

21. The 2019 Wages Policy also provided that:

All offers should be made on an in-principle basis, with the public sector agency communicating that the offer is subject to government approval and may be subject to change to ensure compliance with Wages Policy, the Industrial Relations Policy, the Fair Work Act or other relevant legislation.¹⁷

22. It went on to provide:

To be approved by Government, a proposed enterprise agreement (whether a Major Agreement or Non-major Agreement) must meet all the conditions specified in Wages Policy.¹⁸

23. FRV was given permission from the Government to continue to apply the 2019 Wages Policy despite the commencement of a new Wages Policy in 2022.¹⁹

24. In April 2023, the Victorian Government published a revised wages policy and enterprise bargaining framework (**2023 Wages Policy**).²⁰

25. Under the 2023 Wages Policy, increases in wages and conditions are funded at a rate of growth of 3.0 per cent per annum over the life of the agreement.²¹ In addition to annual wage increases, a separate lump sum, cash payment is available equivalent to an additional 0.5 per cent of overall agreement costs (Pillar 1).²² Additional changes to allowances and other conditions (not

¹³ Ibid. The Public Sector Priorities are set out in Exhibit JC-1, Attachment 1, p. 3.

¹⁴ Ibid, p. 4.

¹⁵ Ibid.

¹⁶ Ibid, pp. 9-10.

¹⁷ Ibid, p. 10.

¹⁸ Ibid.

¹⁹ Exhibit 5, [33].

²⁰ Exhibit 5, [34]; Exhibit JC-1, Attachment 3.

²¹ Exhibit 5, Exhibit JC-1, Attachment 3, p. 3.

²² Ibid.

general wages) are only allowed if the Government agrees that the changes will address key operational or strategic priorities for the agency, and/or one or more of the Public Sector Priorities and provided the associated costs are funded through appropriate cash offsets or Government approved funding strategy (Pillar 3).²³ While there is no cap on overall agreement outcomes, Pillar 1 increases to wages and conditions cannot exceed the funded allocation and improvements and Pillar 3 improvements must be funded from appropriate cash offsets and/or a Government approved funding strategy.²⁴ As with the 2019 Wages Policy, no retrospective payments can be made.²⁵

26. The 2023 Wages Policy provides that parties currently bargaining for a proposed enterprise agreement are required to seek Government approval before any offer is made under the new 2023 Wages Policy parameters.²⁶
27. Consistent with the 2019 Wages Policy, the 2023 Wages Policy contains each of the matters referred to above at paragraphs 17, and 19 to 22.²⁷ Further, under the Framework put in place by the 2023 Wages Policy, where a final proposed enterprise agreement is settled between the parties, a public sector agency must obtain Government approval of the proposed enterprise agreement, costings and funding strategy before commencing the *FW Act* pre-approval steps.²⁸

Process of bargaining

28. The Minister emphasises the following key events in bargaining for the Proposed Operational EA, which were outlined in the materials filed by the parties in the application for the IBD.
29. In or around July 2020, the UFU and FRV commenced informal discussions for the Proposed Operational EA.²⁹
30. In August 2021, FRV sought the Government's approval to commence bargaining for the Proposed Operational EA and, in doing so, acknowledged the requirement to reach agreement with the UFU in accordance with the Government's wages policy and that any proposed final agreement would be subject to approval by the Government.³⁰
31. On 30 November 2021, the UFU filed an application under section 240 of the *FW Act* seeking the Commission's assistance to deal with the bargaining dispute on the basis that the FRV had

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid, p. 4

²⁶ Ibid, p. 7.

²⁷ Ibid, pp. 3, 7-10,

²⁸ Ibid, p. 7.

²⁹ Exhibit 5, [28].

³⁰ Ibid, [40].

failed to, amongst other things, “*formalise the bargaining process by taking necessary action to obtain Victorian government approval.*”³¹ The application stated:

On 29 July 2021, FRV informed the UFU that to bargain under the applicable wages policy FRV needed to make a request to the Victorian Government to commence bargaining by 1 August 2021. FRV informed the UFU that it would make its submission with respect to a new enterprise agreement within this timeframe to ensure that when the parties were ready to commence negotiations for the operations of staff agreement, they would be in a position to do so having already obtained Government approval.³²

32. On or around 6 December 2021, the Government approved FRV’s bargaining strategy and provided formal approval to commence bargaining (under the 2019 Wages Policy).³³
33. On 26 April 2022, formal bargaining for the Proposed Operational EA commenced.³⁴ Bargaining representatives were requested to review and sign an “*Agreed Charter*” for bargaining which contained an agenda item for the first bargaining meeting, which stated, “*FRV to provide explanation of current status of current Enterprise Agreement, Government Wages Policy, FRV objectives and broad concepts.*”³⁵
34. On 4 November 2022, FRV filed a section 240 application with the Commission.³⁶ In that application, FRV noted as part of its description of the course of bargaining at paragraph [18]:

The most recent bargaining meeting occurred on 11 October 2022. At that meeting the following was noted:

- a. the UFU would provide FRV with an updated draft enterprise agreement reflecting the amendments agreed in-principle, including unresolved matters, for FRV to consider and provide a response to (that draft was referred to as ‘V12’); and
- b. FRV confirmed the in-principle agreement matters were subject to what occurs with respect to the ‘efficiencies’ the subject of B2021/1057 and the ongoing dispute in C2022/5683 and Government instruction to FRV.³⁷

35. On 29 November 2022, FRV sent the UFU its response to version 12 of the UFU’s revised log of claims.³⁸ The introduction of the response document states that “[*t*]he following provides FRV’s response to the above revised UFU Log on a without prejudice basis, noting that a range of substantive matters are subject to State Government instruction and approval.”³⁹

³¹ Exhibit 5, [44], Exhibit JC-1, Attachment 4, p. 5, [14(b)].

³² Ibid, p. 4, [13].

³³ Exhibit 5, [45].

³⁴ Ibid, [47].

³⁵ Statement of Laura Campanaro dated 11 August 2023, read into evidence and marked Exhibit 1 (**Exhibit 1**), [6]; Attachment LC-1.

³⁶ Exhibit 5, [48]; Exhibit JC-1, Attachment 6.

³⁷ Ibid, p. 6 at [18]. See also [17] and [23].

³⁸ Exhibit 5, [49]; Exhibit JC-1, Attachment 7, p. 1.

³⁹ Ibid, p. 2.

36. The response document sent by FRV on 29 November 2022 also states that:

All clauses as set out in the UFU revised Log V12 unless otherwise commented upon below, are agreed in principle by FRV subject to final agreement on an overall package of provisions for the proposed EA and subject to proceedings in C2022/5683 (Efficiencies Allowance matter) (emphasis added).⁴⁰

37. On 3 February 2023, Commissioner Wilson issued a statement for the purposes of conciliation and on a without prejudice basis noting that the parties had reached agreement “*on all but 10 issues*”.⁴¹ In that statement, the Commissioner said at paragraph [6]:

It is clear to me bargaining will be unlikely to meaningfully progress without the capacity of FRV to put forward a detailed monetary proposal for consideration of the UFU and other employee bargaining representatives. What is ultimately put forward by the FRV for consideration of the UFU and employees is likely to be a function of the Victorian Government wages policy which is presently under review following its re-election in November 2022. I note that the parties are currently bargaining under the 2019 wages policy. (emphasis added)⁴²

38. Consistent with the 2019 Wages Policy, FRV indicated to Commissioner Wilson that the principal parties had reached agreement on matters other than those identified in Commissioner Wilson’s statement.⁴³ This indication reflected the fact that the parties had reached in-principle agreement as contemplated by the 2019 Wages Policy.⁴⁴

39. On 24 February 2023, the Department of Justice and Community Safety (**DJCS**) wrote to FRV setting out the terms of a provisional settlement offer, being:

- (a) a three-year agreement with a commencement date of 1 March 2023;
- (b) three annual wage increases of 2 per cent;
- (c) a one-off sign on payment of \$1500; and
- (d) changes that FRV and the UFU had agreed in principle to the Proposed Operational EA and approved by DJCS and Industrial Relations Victoria for inclusion in the settlement offer.⁴⁵

40. The reference to “*changes approved by*” DJCS and Industrial Relations Victoria in paragraph 39(d) above was to approval that would subsequently be sought by FRV. No such approval had been sought or given.

⁴⁰ Ibid.

⁴¹ Exhibit 5, [50]; Exhibit JC-1, Attachment 8, [4].

⁴² Ibid, [6].

⁴³ Exhibit 5, [51].

⁴⁴ Ibid.

⁴⁵ Exhibit 5, [52]; Exhibit JC-1, Attachment 9, p. 1.

41. In addition, the provisional settlement offer was to specify that any increases to the minimum staffing charts should not be included in the Proposed Operational EA and there would be no reference to a firefighters' registration scheme in the Proposed Operational EA.⁴⁶
42. On 3 March 2023, FRV responded to the Minister's 24 February letter.⁴⁷ In its letter, FRV sought authorisation to make a revised provisional offer to the UFU.⁴⁸
43. On 7 March 2023, the UFU wrote to FRV requesting that FRV provide to the UFU the date upon which FRV would provide UFU with a wages offer.⁴⁹ In that letter, the UFU stated:

After six months of negotiations in the Commission, FRV failed to make an offer to the UFU. It continually referred to the fact that the Government would issue a new Wages Policy, however, that has not been forthcoming.⁵⁰

44. On 10 March 2023, FRV sent the UFU an offer (**10 March Offer**), stating:

In accordance with the Victorian Government's 2019 Wages Policy, [FRV] is authorised to, makes the following monetary offer to the UFU and other bargaining representatives in relation to bargaining for a new operational agreement.

- A three-year Agreement;
- Three annual wage increases of 2 per cent effective from the commencement of the Agreement; and
- One-off sign on payment of \$1500 (emphasis added).⁵¹

45. On 10 March 2023, the UFU responded to the 10 March Offer.⁵² In its response, the UFU set out four questions in which it sought FRV's position in respect of bargaining.⁵³

46. On 14 March 2023, FRV responded confirming the following matters:

On 29 November 2022, FRV provided a without prejudice response to the UFUs revised log V12 in this matter. That response confirmed:

- all references to quantum for Wages and Allowances are subject to instruction and approval from Government and having regard to Government Wages Policy and the treatment of efficiencies; and
- all clauses as set out in the UFU revised log V12 (unless they were otherwise commented on) were agreed in principle by FRV, subject to final agreement on an

⁴⁶ Ibid, p.2.

⁴⁷ Exhibit 5, [55]; Exhibit JC-1, Attachment 11.

⁴⁸ Ibid.

⁴⁹ Exhibit 1, [55]; Exhibit LC-9, p. 1297.

⁵⁰ Ibid.

⁵¹ Exhibit 5, [57]; Exhibit JC-1, Attachment 12., p.1

⁵² Exhibit 5, [58]; Exhibit JC-1, Attachment 13.

⁵³ Ibid.

overall package of provisions for the proposed enterprise agreement and subject to the efficiencies allowance dispute proceedings in C2022/5683.

FRV has maintained this position throughout bargaining and continues to maintain this position. (emphasis added)⁵⁴

47. FRV reiterated that the 10 March Offer was “*a genuine offer made under applicable Wages Policy.*”⁵⁵
48. On 15 March 2023, the UFU wrote to FRV rejecting the 10 March Offer and making a counter offer.⁵⁶ Whilst purporting to accept the offer of a 2 per cent base wage increase plus a sign-on bonus of \$1500, the counter offer went on to attach additional conditions including:
- (a) a cost-of-living adjustment payment payable annually and capped at 5 per cent;
 - (b) payment of an Efficiencies Allowance asserted by the UFU to be valued at \$203,768,949, the value of which to be arbitrated if not agreed at a value of no less than \$117 million, backdated to the start of the agreement and not subject to the no extra claims clause;
 - (c) the application of any new (more favourable) wages policy over the life of the agreement in addition to any cost-of-living adjustment; and
 - (d) an additional annual bonus payment of \$1500 per employee for the life of the agreement and until terminated or replaced.⁵⁷
49. The counter offer stated that it was put on the basis “*that the parties have otherwise agreed to all non-wages terms and conditions as contained in the most recent iteration of the Draft Operational Staff Agreement.*”⁵⁸
50. On 15 June 2023, DJCS wrote to FRV providing the Government’s authority to put a revised settlement offer under the 2023 Wages Policy including:
- (a) a four-year agreement with a first increase of 1 July 2023, consistent with the 2023 Wages Policy with no back pay;
 - (b) four annual wage increases of 3 per cent;
 - (c) a separate lump sum cash payment under Pillar 1 of the 2023 Wages Policy, which is a one-off single payment to each firefighter amounting to approximately \$7,359 per Full-Time Equivalent (FTE), based on 3,800 FTE;

⁵⁴ Exhibit 5, [59]; Exhibit JC-1, Attachment 14, p. 1.

⁵⁵ Ibid, p. 3.

⁵⁶ Exhibit 5, [61]; Exhibit JC-1, Attachment 15.

⁵⁷ Ibid, p. 2.

⁵⁸ Ibid.

- (d) four lump sum cash payments over the life of the agreement in line with “Pillar 3” (details to be confirmed separately);
- (e) the offer should specify that the following will not be included in the Proposed Operational EA:
 - (i) any increases to the minimum staffing charts;
 - (ii) any reference to a firefighter’s registration scheme, including removal of the current reference; and
 - (iii) clauses allowing for extra claims during the life of the agreement, such as the proposed productivity clause and harmonisation clause. This includes removing current references.⁵⁹

51. The letter also stated that:

[T]he settlement offer should also specify that if the offer is rejected by the UFU and other bargaining representatives, FRV will reserve its rights to withdraw in-principle agreement to retain some or all of the restrictive clauses contained in the current Operational Agreement.

[A]ny final in-principle agreement reached with the union and independent bargaining representatives will require final approval by Government and must be compliant with the Government’s 2023 Wages Policy.⁶⁰

52. On 19 June 2023, Commissioner Wilson issued a statement noting that the UFU and FRV reported that “*since the last conciliation conference held on 27 April 2023 all outstanding matters ha[d] been resolved, save for the matter of an offer for increases to wages and related monetary allowances*”.⁶¹ FRV provided that indication on the basis that the parties had reached in-principle agreement as contemplated by the 2023 Wages Policy.⁶² In that statement the Commissioner said at paragraph [4]:

Shortly before the last conciliation conference, held on 27 April 2023, the Victorian Government announced details of its updated Wages Policy and Enterprise Agreement Framework. Until the new policy was announced in April 2023 and then later documented bargaining on the matter of the union’s monetary claims had been unable to progress as there was both a lack of clarity about the quantum of increase that could be considered by FRV as well as that FRV had no authority to put forward a wages proposal for the UFU’s consideration. (emphasis added)⁶³

53. On 7 August 2023, FRV wrote to the UFU making a further wage offer in the context of an overall package with the following conditions (the 7 August Offer):

⁵⁹ Exhibit 5, [66]-[67]; Exhibit JC-1, Attachment 18, p. 1.

⁶⁰ Ibid, p. 2.

⁶¹ Exhibit 5, [68]-[72]; Exhibit JC-1, Attachment 20, [2].

⁶² Exhibit 5, [71].

⁶³ Exhibit 5, Exhibit JC-1, Attachment 20, [4].

- (a) a four-year agreement with a first increase of 1 July 2023, consistent with the 2023 Wages Policy, no back payments beyond 1 July 2023 will be made;
- (b) four annual wage increases to wages and allowances of 3 per cent as of 1 July of each year;
- (c) a separate lump sum cash payment under Pillar 1 of the 2023 Wages Policy, which is a one-off single payment to each person amounting to approximately \$7,359 per Full-Time Equivalent (FTE); and
- (d) four lump sum cash payments to each person over the life of the Proposed Operational EA as a “Pillar 3” payment of approximately \$2,021 per year, with the first payment payable on 1 July 2023.⁶⁴

54. The 7 August Offer provided that FRV was not authorised by the Government to include in the Proposed Operational EA:

- (a) any reference to a firefighters registration board;
- (b) clauses allowing for extra claims to be arbitrated by the Commission during the life of the agreement; and
- (c) any increases to the minimum staffing charts.⁶⁵

55. The 7 August Offer was put in the context of an overall package.⁶⁶ Further, FRV noted in its letter that:

While FRV and the bargaining representatives have been in direct negotiations, as a government agency, any offer made by FRV, and all matters agreed in-principle are subject to government approval and authorisation. FRV has consistently reinforced this message throughout the bargaining process. (emphasis added)⁶⁷

56. Later that day, at approximately 9:21pm, the UFU rejected the 7 August Offer.⁶⁸

57. On 9 August 2023, MinterEllison, lawyers acting for FRV, sent a letter to Davies Lawyers, lawyers acting for the UFU, responding to the UFU’s rejection of the 7 August Offer.⁶⁹ The letter reiterated that:

FRV has at all times sought to be clear that all matters the subject of bargaining could only be agreed in principle and were subject to Government approval. Bargaining for the Proposed Agreement has at all times been conducted within a framework in which it is

⁶⁴ Exhibit 5, [75]; Exhibit JC-1, Attachment 21, p. 1.

⁶⁵ Ibid, p. 2.

⁶⁶ Ibid.

⁶⁷ Ibid., p. 1.

⁶⁸ Exhibit 5, [76]; Exhibit JC-1, Attachment 22, p.1.

⁶⁹ Exhibit 5, [79]; Exhibit JC-1, Attachment 23.

understood that any proposed bargaining outcome is ultimately subject to Government approval and funding.⁷⁰

58. In addition to the above, FRV and UFU outlined the positions of the bargaining representatives through materials filed with the Commission in respect of the application for an IBD. The pertinent matters are set out in the following paragraphs.
59. On 11 August 2023, the UFU filed a witness statement of Laura Campanaro, which referred to the 2019 Wages Policy and the 2023 Wages Policy and provided that FRV had “*stated that it does consider itself bound by the Policy.*”⁷¹
60. On 14 August 2023, the UFU filed written submissions in support of its application for an IBD. The UFU stated, in its submissions:
- The FRV’s position is, despite its concessions, constrained by the position taken by the Government.⁷²
61. On 5 September 2023, FRV filed written submissions in respect of the UFU’s application for an IBD. FRV made clear, in its submissions, that it cannot and will not wilfully ignore the Wages Policy.⁷³ FRV’s submissions relevantly provided that:
- ...[H]aving regard to at least the progress of bargaining and the terms of the 7 August Offer, it is clear that the Victorian Government has not approved all of the matters that were agreed in-principle between FRV and the UFU and on this basis at least the parties cannot be said to be agreed on all non-wage related terms. Without the required government approval and agreement on the entire package, it is unlikely that the vast majority of non-wage related matters which were subject to in-principle agreement between FRV and the UFU will satisfy the legal definition of “agreed terms” in s 274(3) of the FW Act for the purpose of inclusion in a workplace determination pursuant to s 270(2) of the FW Act.⁷⁴
62. The UFU’s application for an IBD was heard before a Full Bench of the Commission on 26 September 2023. In the course of that hearing, senior counsel for FRV submitted that, as at that date, FRV’s position was that there were no terms that met the definition of an agreed term under the *FW Act*.⁷⁵
63. On 4 October 2023 the Full Bench made the IBD and ordered that there be a post-declaration negotiating period. The post-declaration negotiating period concluded on 18 October 2023.
64. The bargaining representatives reiterated their respective positions in correspondence exchanged during the course of the post-declaration negotiating period. The Minister emphasises the following matters.

⁷⁰ Ibid, p. 1.

⁷¹ Exhibit 1, [71]; Attachment LC-4, Attachment LC-16.

⁷² Applicants Submissions dated 14 August 2023 (**UFU Submissions**) at [52].

⁷³ Respondent’s Outline of Submissions dated 5 September 2023 (**FRV Submissions**) at [30].

⁷⁴ Ibid, [39]. See also FRV Submissions at [3(b)], [8]-[10], [14], [19], [28] and [38].

⁷⁵ Transcript, 26 September 2023, PN222-225; PN243-245.

65. On 10 October 2023, the UFU wrote to the FRV stating that:

The UFU's position in relation to the bargaining which is to take place, is that which accords with the consent position put by the UFU and FRV to Fair Work Commissioner Wilson in Matter B2022/1676 on 19 June 2023 and which is reflected in paragraph 2 of the Statement of Commissioner Wilson of the same date:

[2] Bargaining has progressed very well to the point that the UFU and FRV now report that since the last conciliation conference held on 27 April 2023 all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances.

That is the position which UFU will advance to the Full Bench in the forthcoming arbitration. The UFU seeks to preserve that position and will not, in bargaining, derogate from that position.

We look forward to bargaining with FRV tomorrow on the two unresolved matters referred to by Commissioner Wilson. (emphasis in original)⁷⁶

66. On 11 October 2023, FRV and the UFU attended a meeting and discussed the key elements of the 7 August Offer.⁷⁷

67. On 13 October 2023, FRV wrote to the UFU referring to the meeting on 11 October 2023 and provided a further explanation of the elements of the 7 August Offer. FRV relevantly stated:

As you are aware, the 7 August Offer was expressed as a package and, in the absence of that package being accepted, there are currently no matters that meet the definition of 'agreed terms' for the purpose of being automatically included in a workplace determination. Even if certain matters are said by the UFU to be agreed for relevant purposes at some point in the past (which cannot be accepted on the basis that any 'in-principle' agreement was always subject to government approval and overall agreement on the terms of the replacement enterprise agreement), the 7 August Offer and subsequent correspondence make it clear that this is no longer case.⁷⁸

68. On 16 October 2023, the UFU wrote to FRV providing its version of the matters that took place during the meeting on 11 October 2023, including that:

At the outset of the session, the UFU's representatives identified that the UFU was commencing bargaining in this session on the basis that the parties had agreed to all of the clauses set out in Version 14 of the draft Agreement, and as confirmed in Commissioner Wilson's Statement of 19 June 2023. The UFU's representatives stated that they understood that the Government now took a different view in this respect, and that the purpose of the negotiations was to try to reach agreement on matters in issue.⁷⁹

69. On 17 October 2023, the UFU wrote to FRV setting out an alternative proposed Firefighters Registration Board clause and the UFU's position on wages and allowances, including a proposal that:

- (a) Pillar 1 provides for 3% per annum per operational employee;

⁷⁶ Statement filed on behalf of FRV dated 17 November 2023 (**FRV Supplementary Statement**).

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

- (b) Pillar 3 provides for increases for efficiencies of 20.36% per annum; and
- (c) Additional cost of living adjustment payments proceed to arbitration.⁸⁰

70. On 18 October 2023, FRV wrote to the UFU in response to the UFU's correspondence dated 16 and 17 October 2023.⁸¹ FRV confirmed that it did not agree with most of the matters set out in the UFU's letter dated 16 October 2023 and the characterisation of what was discussed at the 11 October 2023 meeting.⁸² FRV confirmed that it did not have authority to accept the proposed Firefighters Registration Board clause, nor could it agree to the wage and allowance proposal set out in the UFU's correspondence dated 17 October 2023.⁸³

71. FRV relevantly stated:

For clarity, FRV reiterates its position that whilst the parties had reached in-principle agreement on a majority of conditions matters during bargaining, this was always on the basis that the position on those matters was subject to agreeing an acceptable package, including the wages and allowances matters (which has occurred), and was subject to the need to obtain Government approval after in-principle agreement and that this may result in changes to conditions matters. FRV made a substantive offer which reflected the package that had been authorised by Government, as set out in the 7 August Offer, overtaking the previous position.⁸⁴

72. FRV also relevantly stated:

As you are aware, the 7 August Offer reflects the terms (including, amongst other things, proposed salary increases, lump sum payments and certain conditions) that the Victorian Government advised FRV it is prepared to approve on an overall package basis. FRV has not been authorised to agree to any other proposal and it is clear that UFU have rejected the 7 August Offer, including wages and conditions.

Unfortunately, in circumstances where FRV has made it clear that the 7 August Offer was put as a package, the UFU's rejection of this package means that there are currently no matters that meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination.⁸⁵

Relevant provisions

73. Pursuant to section 269 of the *FW Act*, following the making of the IBD, the Commission must make an intractable bargaining workplace determination as quickly as possible after the end of the post-declaration negotiating period, being, in the present application, after 18 October 2023.

74. Section 270 sets out the terms of an intractable bargaining workplace determination. The basic rule is contained in section 270(1) of the *FW Act* and provides that:

- (1) An intractable bargaining workplace determination must comply with subsection (4) and include:

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

- (a) the terms set out in this section; and
- (b) the core terms set out in section 272; and
- (c) the mandatory terms set out in section 273.

75. The terms set out in section 270 are agreed terms, terms dealing with the matters at issue and terms dealing with coverage.
76. Under section 270(2), any intractable bargaining workplace determination must include “*agreed terms*”.
77. Section 274(3) defines agreed terms for an intractable bargaining workplace determination as follows:
- (3) An ***agreed term*** for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:
 - (a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;
 - (b) otherwise—at the time the intractable bargaining declaration was made.
78. As a post-declaration negotiating period was specified in the IBD, the agreed terms are those that were agreed on 18 October 2023, being the end of the post-declaration negotiating period.
79. In respect of the terms dealing with the matters at issue, section 270(3) of the *FW Act* provides that:
- (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:
 - (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned – after the end of that period; or
 - (b) otherwise – after making the declaration.
80. As with agreed terms, the matters that were still at issue are the matters that were still at issue as at 18 October 2023, being the end of the post-declaration negotiating period.
81. Section 272 sets out the core terms of workplace determinations and includes a term specifying the determination’s nominal expiry date and terms that would pass the better off overall test under section 193.⁸⁶ Section 272 also provides that a workplace determination must not include terms about non-permitted matters, unlawful terms, any designated outworker terms and terms contravening safety net requirements.⁸⁷

⁸⁶ *FW Act*, section 272(4).

⁸⁷ *FW Act*, section 272(3).

82. Section 273 sets out the mandatory terms of workplace determinations and includes dispute settlement terms, flexibility terms and consultation terms.
83. Section 271 provides that an intractable bargaining workplace determination must not include any terms other those required by subsection 270(1).
84. The Commission has previously recognised the importance of identifying the mandatory terms and agreed terms, which must be incorporated in workplace determinations, the core terms that must satisfy section 272 of the *FW Act* and the matters at issue that the determination must deal with.⁸⁸ This is because the legislation imposes different obligations on the Commission depending on the subject matter of bargaining, the status of negotiations and the proposed terms of the workplace determination.⁸⁹

No agreed terms

85. Having regard to the matters set out above at paragraphs 15 to 72, it is clear that the bargaining representatives did not reach a binding agreement on the terms that should be included in the Proposed Operational EA. In particular:
- (a) at all times, the UFU has been aware of the fact that FRV considers itself bound by Government Wages Policy⁹⁰ and the terms of that policy, including that all offers should be made on an in-principle basis; that the offer is subject to Government approval;⁹¹ and that to be approved by Government a proposed agreement must meet all the conditions specified in Wages Policy⁹².
 - (b) from at least August 2022, FRV explained in bargaining that it needed Government approval on non-wage related matters.⁹³
 - (c) in its Form F11 dated 4 November 2022 FRV stated that bargaining had occurred on the basis of agreement in-principle (subject to reaching an overall agreement) and that the UFU would provide FRV with an updated draft enterprise agreement reflecting the amendments agreed in-principle;⁹⁴

⁸⁸ *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2012] FWAFB 236 at [7] (per Watson VP, Boulton J and Roe C).

⁸⁹ *Ibid* at [6].

⁹⁰ Exhibit 5, Exhibit JC-1, Attachment 4, p. 4, [13].

⁹¹ Exhibit 1, Attachment LC-4, p. 1281; Attachment LC-16, p. 1337.

⁹² Exhibit 1, Attachment LC-4 at p. 1282; Attachment LC-16 p. 1338.

⁹³ Second Statement of Laura Campanaro dated 21 September 2023, read into evidence and marked Exhibit 4 (**Exhibit 4**), [6], [7].

⁹⁴ Exhibit 5, Exhibit JC-1, Attachment 6, pp. 6-7, [17], [18] and [23].

- (d) on 29 November 2022, FRV expressly stated that the clauses in revised Log V12 that were not commented on were agreed “in principle by FRV subject to final agreement on an overall package of provisions for the proposed EA”;⁹⁵
- (e) the 10 March Offer, which expressly referred to the 2019 Wages Policy, was a monetary offer and did not refer to non-wage related items;⁹⁶
- (f) on 14 March 2023, FRV reiterated that the clauses in revised Log V12 that were not commented on were agreed “in principle by FRV, subject to final agreement on an overall package of provisions for the proposed enterprise agreement” and that FRV had maintained, and continued to maintain, that position throughout bargaining;⁹⁷
- (g) the statement made by Commissioner Wilson on 19 June 2023 was made in the context where the bargaining representatives and Commissioner Wilson understood that the parties were operating within the parameters of the Wages Policy and, accordingly, any indication that matters had been resolved could only have been on an “*in-principle*” basis;⁹⁸
- (h) the 7 August Offer was made on an overall package basis, it clearly identified a number of conditions matters that were not to be included in the agreement.⁹⁹ The 7 August Offer reiterated that it had consistently reinforced throughout the bargaining process that all matters agreed in-principle are subject to government approval and authorisation;¹⁰⁰
- (i) on 9 August 2023, MinterEllison, on behalf of FRV, reiterated that at all times the FRV sought to make clear that all matters the subject of bargaining could only be agreed in principle and were subject to Government approval;¹⁰¹
- (j) FRV’s submissions filed in the IBD application and its clear statement at the hearing of the IBD on 26 September 2023 that, as at 26 September 2023, nothing was agreed;¹⁰²
- (k) FRV’s correspondence during the post-declaration negotiating period that reiterated that in-principle agreement on conditions matters during bargaining was always on the basis that the position on those matters was subject to agreeing an

⁹⁵ Exhibit 5, [49]; Exhibit JC-1, Attachment 7, p. 1.

⁹⁶ Exhibit 5, [57]; Exhibit JC-1, Attachment 12, p. 1.

⁹⁷ Exhibit 5, [59]; Exhibit JC-1, Attachment 14, p. 1.

⁹⁸ Exhibit 5, [68]-[72]; Exhibit JC-1, Attachment 20, [4].

⁹⁹ Exhibit 5; Exhibit JC-1, Attachment 21, p. 2.

¹⁰⁰ Ibid, p. 1.

¹⁰¹ Exhibit 5; Exhibit JC-1, Attachment 23, p. 1.

¹⁰² FRV Submissions at [3(b)], [8]-[10], [14], [19], [28] and [38]-[39]; Transcript PN 250. See also PN 224 – 227 and 234 – 241.

acceptable package, including the wages and allowances matters (which had not occurred), and was subject to the need to obtain Government approval after in-principle agreement;¹⁰³

- (l) FRV's confirmation on 18 October 2023, at the end of the post-declaration negotiating period, that the UFU's rejection of the package in the 7 August Offer meant that there are currently no matters that meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination.¹⁰⁴

86. Further, the 7 August Offer, which was reoffered and further explained during the post-declaration negotiating period, made clear that the wage offer was made on the condition that the following matters were not included in the Proposed Operational EA (and therefore not agreed):

- (a) any reference to a firefighters registration board;
- (b) clauses allowing for extra claims to be arbitrated by the Commission during the life of the agreement; and
- (c) any increases to the minimum staffing charts.¹⁰⁵

87. The 7 August Offer was made on an overall package basis and did not indicate agreement to specific provisions in isolation.¹⁰⁶ It was rejected by the UFU out of hand, the same day.¹⁰⁷

88. In the context of the above:

- (a) to the extent any agreement is depicted in the various versions of the Proposed Operational EA circulated by the UFU or was described in communications with Commissioner Wilson in FRV's section 240 proceeding, such agreement could only have been made on an "*in-principle*" basis having regard to the conditions on bargaining imposed by the Wages Policy, of which the UFU was well aware;
- (b) the use of the term "*in-principle*" considered in light of all of the relevant circumstances falls short of binding agreement to include those terms in the Proposed Operational EA for the purposes of section 274(3) of the *FW Act* given the in-principle agreement was subject to an acceptable overall package *and* Government approval and any in-principle agreement excluded the essential terms of the agreement, being the wages related terms;

¹⁰³ FRV Supplementary Statement.

¹⁰⁴ Ibid.

¹⁰⁵ Exhibit 5; Exhibit JC-1, Attachment 21, p. 2.

¹⁰⁶ Ibid.

¹⁰⁷ Exhibit 5, [76]; Exhibit JC-1, Attachment 22, p. 1.

- (c) in any event, any such “*in-principle*” agreement was clearly overtaken by the 7 August Offer, which was made on an overall package basis and was ultimately rejected by the UFU.
89. Further, the Commission should have regard to the relevant context in which the above communications were made, being bargaining for the purposes of making an enterprise agreement under Part 2-4 of the FW Act. In that context, negotiations are fluid and can involve changes to the make-up of a package offered. A bargaining party may offer additional or increased benefits in certain conditions or wages that it had not previously been prepared to offer or concede, but on the basis of a reduction or concession by the other bargaining party in its claims or other negotiated conditions. That such compromises are intrinsic to the nature of bargaining was made clear by Bromberg J in *Target Australia Pty Ltd v SDA* [2023] FCAFC 66 at [54].
90. In circumstances where the UFU has rejected the 7 August Offer and the UFU has not agreed to the removal or amendment of the clauses of concern to the Government (as detailed in the 7 August Offer), no matters have been the subject of unconditional agreement for inclusion in an enterprise agreement. Consequently, all clauses of the Proposed Operational EA (including the clauses of concern identified in the 7 August Offer) cannot constitute “*agreed terms*” within the meaning of section 274(3) of the FW Act and are, strictly speaking, “*matters at issue*”.
91. The fact that sections 274(3) and 270(3) require a point in time assessment informs what is meant by respectively agreed terms and matters that were still at issue. The focus is not on the positions that the parties may have taken during the course of bargaining but rather what is the position as at the conclusion of, relevantly, the end of the post-declaration negotiating period. As noted above, as at that point in time, FRV’s position is that in the absence of overall agreement and Government approval there were no terms which met the definition of agreed terms.
92. In addition, the basis on which bargaining has occurred also weighs heavily against a finding that there are any agreed terms. Where, as here, bargaining has been conducted on a: in principle; total package; and subject to final approval basis, and: has not moved beyond in principle agreement; no total package has been agreed and no approval granted, there is no proper basis for finding that there are any agreed terms.
93. These factors both severally and in combination mean that there are no agreed terms as that phrase is defined in section 274(3).
94. The Minister’s contention is consistent with the approach adopted in *Transport Workers’ Union of Australia v Qantas Airways Limited; Q Catering Limited* [2012] FWAFB 6612 (**Qantas**) in respect of the Commission’s determination of agreed terms for an industrial action related workplace determination. In *Qantas*, the Full Bench agreed with the joint position put by the parties that there were no agreed terms, as defined in section 274 of the FW Act, at the end of the post-industrial action negotiation period because the negotiations were conducted on the

premise that “*nothing was agreed until everything was agreed.*”¹⁰⁸ However, the Commission can take into account any subsequent consensus on certain matters applying the test that applies to core terms under section 275 of the *FW Act* as any agreement is likely to impact on the merits of those matters.¹⁰⁹

95. Similarly, in *Application by Specialist Diagnostic Services Pty Ltd T/A Dorevitch* [2018] FWCFB 5778, the Full Bench was required to determine disputes about the “agreed terms” for an industrial action related workplace determination for the purposes of section 274 of the *FW Act*. The Full Bench considered that a term which had been noted as “subject to agreement by Dorevitch” where no evidence of subsequent agreement had been adduced, was not an agreed term.¹¹⁰

UFU’s contention should be rejected

96. The UFU asserts, in its materials filed in support of the IBD and its further correspondence to FRV during the post-declaration negotiating period, that all terms of the Proposed Operational EA other than the quantum of wages and allowances are “agreed terms”.¹¹¹ This assertion ignores any and all matters following 19 June 2023, and in particular, the position as at the relevant date, being 18 October 2023.
97. In the application for the IBD, the UFU relied on the conduct of the parties during bargaining in support of its contention that the parties had agreed to all non-wage related terms.¹¹² In particular, the UFU relied on the parties’ conduct during bargaining-related meetings, versions of the Proposed Operational EA that was exchanged between UFU and FRV and conduct which resulted in a Statement made by the Commission on 19 June 2023.¹¹³ The UFU’s assertion is at odds with the basis upon which bargaining was conducted and the terms of the Government wages policy as outlined above. Further, this position fails to have any or sufficient regard to the following features of the legislation:
- (a) the terms of section 274(3) of the *FW Act* and the times it requires the assessment of what are agreed terms to occur;¹¹⁴

¹⁰⁸ *Qantas* at [59].

¹⁰⁹ *Ibid.* See also *The Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2012] FWAFFB 236 at [10]-[12] and *Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology* [2018] FWCFB 5778 at [16]-[19], [21].

¹¹⁰ *Application by Specialist Diagnostic Services Pty Ltd T/A Dorevitch* [2018] FWCFB 5778 at [31].

¹¹¹ UFU Submissions, [8], [16], [25]-[29], [32], [35], [49(g)], [58(a)], [58(c)], [58(d)]; Statement of Peter Marshall dated 11 August 2023, which was read into evidence and marked Exhibit 2 [24]-[36], [39]; Exhibit 1, [10]-[14], [20]-[32], [52], [76]; Statement of James Kefalas dated 11 August 2023, which was read into evidence and marked Exhibit 3, [10]-[21], [25]; Exhibit 4, [9]-[32], [38]-[47].

¹¹² UFU Reply Submissions dated 21 September 2023 (**UFU Reply Submissions**) at [26].

¹¹³ *Ibid.*

¹¹⁴ In this regard compare *ALAEA v Qantas Airways Limited – re Licenced Aircraft Engineers* [2012] FWAFFB 236 at [10], [11] and [18]; *Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology* [2018] FWCFB 5778 at [16] and [21]; and *Commonwealth of Australia as represented by the Department of Home Affairs* [2019] FWCFB 143 at [15].

- (b) the terms of section 270(3) of the *FW Act* and the times it requires the assessment of “the matters...still at issue” to be made;¹¹⁵ and
- (c) the factors that the Commission must take into account under section 275 of the *FW Act* in deciding which terms to include in a workplace determination including the factors identified in subsections 275(f) and (g).

98. As set out above, the question is not whether the bargaining representatives have, at any time, agreed that a term should be included in a proposed enterprise agreement. The assessment is made at the end of the post-declaration negotiating period, being 18 October 2023. At that time, FRV had made it unambiguously clear that following the rejection of the 7 August Offer no terms were agreed, either “in-principle” or at all.

99. The UFU further contended, at paragraph 35 of its reply submissions, that, “*the construction of the expression “agreed terms” for the purposes of s.234 should be broad enough to embrace conditional agreement on terms in any event.*”

100. The UFU relied on *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited* (2012) 218 IR 165 where the Full Bench stated, at paragraph 18, in respect of negotiations for an industrial action related workplace determination:

Mr Brown gave evidence that there were three further matters which were either agreed or withdrawn subject to the condition that all other outstanding matters were agreed before the end of the post-industrial action negotiation period. **There may be circumstances where agreement to a matter subject to an overall satisfactory package might mean that matter is an agreed matter within the meaning of s.267(2) of the Act. However, in the circumstances of this case, as no agreement was reached on the other outstanding matters before the end of the post-industrial action period, the condition attaching to the withdrawal or agreement in respect to these three matters was not satisfied and we therefore regard these matters as also at issue at the end of the post-industrial action negotiation period.** (emphasis added).

101. The Full Bench did not define the circumstances in which agreement subject to an overall satisfactory package might be sufficient to amount to an agreed matter. Having regard to the matters referred to above, any in-principle agreement in the circumstances of the present application could not amount to a binding agreement in the relevant sense because agreement was subject to an overall package *and* the Government’s authority. Further, the bargaining representatives had not reached agreement on the essential terms of the contract. Specifically, the bargaining representatives had not reached agreement on the monetary terms to be included in the proposed enterprise agreement.

102. The UFU, in its reply submissions, also relied on *Caltex Refineries v Australian Workers’ Union* (2001) 110 IR 322 (**Caltex**), in which the Commission exercised its arbitration powers pursuant to section 170MX of the *Workplace Relations 1996* (Cth). The UFU contended, at paragraph 35, “in this case many of the key terms have been agreed between the parties over a year ago and have been included in earlier iterations of the agreement between the parties.” The UFU relied on the following paragraphs in *Caltex*:

¹¹⁵ Ibid.

15. Some observations on our approach to the arbitration are appropriate. We deal first with the significance to be attached to agreements reached during negotiations. The AWU said we should adopt provisions agreed during the negotiations and arbitrate only on matters which are outstanding. Caltex submitted that we should disregard agreements on particular matters and deal with all claims on their merits. We do not think it is necessary to rule on which of these approaches is correct. All of the circumstances must be taken into account in deciding on the content of the award. The fact that a particular provision has been agreed to during negotiations may be a relevant circumstance. **It is at least an indication that the provision of itself is one that both parties find acceptable in certain circumstances. Equally it would be wrong to give too much weight to such agreements because doing so might inhibit the bargaining process in the future.** Certainly the merits of the cases presented will be the primary consideration. But **where there is no case of substance put by either side it may be appropriate to adopt a provision which was earlier agreed to – even though agreement was conditional on an acceptable total package.**

...

17. ...The approach we intend to adopt is that it is not appropriate to deprive the refinery technicians of conditions in the 1997 agreement which they wish to retain unless the case put on the merits justifies that course. We think it would be artificial to hold otherwise. **It is clear enough that the AWU used the existing conditions, including those in the 1997 agreement, as the base for its negotiating position.** Naturally the weight to be given to those conditions must depend upon the circumstances including the strength of the cases put. But in proceedings of this kind **we attach considerable weight to provisions which were introduced by agreement and which have been operating for some years, particularly if no case has been mounted against them. We are reluctant to ignore agreed provisions of long standing in the absence of cogent reasons for so doing.** It is also relevant that neither party made an application to set the 1997 agreement aside. (emphasis added.)

103. The passages on which the UFU rely concern the Full Bench's approach to section 170MX of the *Workplace Relations Act 1996* (Cth), which previously included, "the matters that were at issue during the bargaining period". The Full Bench was not, therefore, considering the "agreed terms" for the purposes of determining the terms that must be included in the determination. Rather, the comments were made in the context of its consideration of whether its arbitration powers should be exercised to include certain terms. In that context, it is understandable that the Commission had regard to any agreement during the course of negotiations and whether the term had been included in earlier iterations of the agreements. It does not follow that the same approach should be adopted for the purposes of determining the agreed terms under section 274(3) of the *FW Act*. Further, the assessment period in the predecessor provision refers to "during the bargaining period", and not to a single point in time assessment as is required by sections 270(3) and 273(4).

104. The Minister's position is consistent with the statutory purpose of the intractable bargaining provisions and does not, as contended for by the UFU in its reply submissions, undermine the statutory framework.¹¹⁶ In particular, the UFU expresses concerns about the use of "condition bargaining" as a device to render all progress in bargaining nugatory in the face of an intractable bargaining application.¹¹⁷

¹¹⁶ UFU Reply Submissions at [42].

¹¹⁷ Ibid.

105. Indeed, contrary to the UFU position, bargaining will be impeded if parties negotiating on a conditional basis, or a package basis, are held piecemeal to in principle agreement on discrete clauses and then subject itself to an arbitration outcome on the core issues of wages and allowances. It is difficult to see why any party would engage in bargaining on such a basis.
106. The identification of agreed terms as defined by section 274(3) is critical to determining the nature of the Commission’s task. It is not, as the UFU impliedly suggests, a vehicle for incentivising or regulating bargaining conduct.
107. Whilst it may be accepted that the object of the intractable bargaining provisions includes “*provid[ing] a strong incentive for good-faith negotiations*”¹¹⁸, the relevant mechanism for the consideration of the nature of a bargaining representative’s conduct during the course of bargaining is through the factors to be taken into account under section 275 of the *FW Act*.
108. In circumstances where an agreed term will be automatically included in a workplace determination, and the usual requirements for the making of an agreement under section 182, including a majority vote by employees, are bypassed, the Commission should be cautious to conclude that a “conditional agreement” is sufficient for the purposes of section 274(3) of the *FW Act*. For the reasons outlined above, in the particular circumstances of the bargaining for the Proposed Operational EA the bargaining was appropriately conditional (having regard to the operation of the Wages Policy) and should not amount to agreement for the purposes of section 274(3) of the *FW Act*.

CONSEQUENCES OF THERE BEING NO AGREED TERMS FOR THE PURPOSES OF SECTION 274(3) OF THE *FW ACT*

109. Whilst these issues will need to be explored more fully at the hearing of the intractable bargaining workplace determination, the Minister notes that there are a number of consequences of there being no agreed terms for the purposes of section 274(3) of the *FW Act*:
- (a) *First*, there are no agreed terms that the Commission is required to include in the intractable bargaining workplace determination.
 - (b) *Second*, to the extent that the *FW Act* requires the insertion of mandatory terms in the absence of agreed terms, those mandatory terms must be included into the determination. Those terms are the model flexibility term mandated by section 273(4) of the *FW Act* and the model consultation term mandated by section 273(5) of the *FW Act*. This is not an outcome that flows from the preference of the Minister. Rather it flows from the decision of the UFU to bring the application for an intractable bargaining declaration in circumstances where there were no agreed terms for the purposes of section 274(3) of the *FW Act* and the operation of the *FW Act*.
 - (c) *Third*, all matters other than mandatory terms are technically “matters at issue” for which terms dealing with such matters need to be included in the intractable

¹¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2176 (Tony Burke MP).

bargaining workplace determination. In determining the form of such terms the Commission is required to have regard to the factors set out in section 275 of the *FW Act*. Those factors do not preclude (and indeed contemplate) the Commission having regard and giving significant weight to the extent that “matters at issue” are not being actively contested by the parties and other interested parties. It is intended that only the matters identified as “Substantive Workplace Determination Matters” in the position document will be the subject of substantive consideration by the FWC. Outside of the “Substantive Workplace Determination Matters”, the remaining matters in the Proposed Operational EA are not contested – in that neither FRV nor the Minister would be intending to make submissions opposing their inclusion in the intractable bargaining workplace determination.

- (d) *Fourth*, the terms dealing with “matters at issue” are subject to the requirements of the *FW Act*.
- (e) *Fifth*, consistent with the terms dealing with “matters at issue” being made pursuant to an intractable bargaining workplace determination, limitations of the Commission’s jurisdiction more generally, including limitations imposed by the Constitution as explained in *Melbourne Corporation* and *Re AEU*, need to be complied with.

110. The matters identified by the Minister as “Substantive Workplace Determination Matters” take into account and are informed by these considerations.

CONCLUSION

111. For the reasons outlined above, the Commission should accept the position that:

- (a) there are no “*agreed terms*” to be included in the intractable bargaining workplace determination pursuant to sections 270(2) and 274(3);
- (b) the terms identified in the position document as “Substantive Workplace Determination Matters” for which terms dealing with such matters need to be substantively considered by the Commission and included in the intractable bargaining workplace determination.

112. In respect of the matters other than those identified in the Minister’s position as “Substantive Workplace Determination Matters”, whilst those matters are not “agreed terms” and are, strictly speaking, “matters at issue”, as explained above, it is open for the Commission to have regard to the fact that those matters are not contested in applying the factors set out in section 275.

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17 November 2023