

**IN THE FAIR WORK COMMISSION**

*Fair Work Act 2009*

s.156 – Four Yearly Review of Modern Awards

AM2014/202

**SUBMISSIONS IN REPLY  
ON BEHALF OF  
THE METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD AND  
THE COUNTRY FIRE AUTHORITY**

**Introduction**

1. These submissions are filed in reply to the submissions of the United Firefighters' Union dated 7 June 2016, and are made further to submissions of the Metropolitan Fire and Emergency Service Board (**MFB**) and the Country Fire Authority (**CFA**) (together the **fire services**) dated 16 May 2016.
2. The fire services reply to the following matters raised in the UFU submissions:
  - (a) The statutory framework, including the concept of necessity, the relevance of history and precedent, and whether the fire services are required to show changed circumstances.
  - (b) The merits of the application, and the proper weight to be afforded to the evidence of the fire services' witnesses.
  - (c) Other matters including limitations on part time work proposed by the UFU in the event that the ban on part time employment is removed from the modern award, and the implied constitutional limitation.
3. In responding to the matters raised by the UFU, these submissions also address, where relevant, the Background Paper prepared by the Fair Work Commission dated 20 May 2016.

## A STATUTORY INTERPRETATION

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### *Necessity and the modern awards objective*

4. Section 138 of the FW Act provides:
 

A modern award may include terms it is permitted to include, and must include terms it is required to include, only to the extent necessary to achieve the modern awards objective...
5. The UFU submit that the term ‘necessity’ in s 138 of the FW Act compels “*a parsimonious approach to be taken to modern award variation*”.<sup>1</sup>
6. While it may be accepted that what is necessary is not the same as what is desirable, the submission put by the UFU is a gloss on the words in s 138 does not assist the Commission in undertaking its statutory function. In *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (*Preliminary Jurisdictional Issues Decision*), the Full Bench expressly stated that the question of ‘necessity’ in s 138 of the FW Act was to be answered by forming a ‘value judgment’ based on the considerations in the modern awards objective, the objects of the FW Act (s 3), and the statutory provisions providing for the performance of functions and exercise of powers by the Commission (ss 577, 578).<sup>2</sup>
7. The UFU have not ever addressed the criteria in s 134 of the FW Act, nor ss 3, 577 and 578 of the FW Act, and associated statutory provisions relevant to the Commission’s exercise of its modern award powers, including that:
  - (a) A modern award **must not** contain terms that discriminate against an employee for reasons including family or carer’s responsibilities, per s 153(1) of the FW Act.
  - (b) When exercising powers or performing functions, the Commission **must** take into account the need to help to prevent and eliminate discrimination on

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<sup>1</sup> See submissions of the UFU dated 7 June 2016 (**UFU Submissions**), [8].

<sup>2</sup> See submissions of the MFB and the CFA dated 16 May 2016 (**Fire Services Submissions**), [13] esp [13(d)] and [13(e)].

the basis of sex, age, and family or carer's responsibilities: s 578(c) of the FW Act.<sup>3</sup>

- (c) When exercising powers or performing functions, the Commission **must** take into account the objects of the Act including providing for flexible working arrangements to assist employees to balance their work and family responsibilities: per ss 3(d), 578(a) of the FW Act.
  - (d) The Full Bench of the Commission **must** ensure that modern awards provide a fair and relevant safety net of minimum terms and conditions of employment, taking into account the need to promote social inclusion through increased workforce participation: s 134(1)(c) of the FW Act.
  - (e) The Full Bench of the Commission **must** ensure that modern awards provide a fair and relevant safety net of minimum terms and conditions of employment taking into account the need to promote flexible modern work practices: s 134(1)(d) of the FW Act.
8. At this late stage of proceedings, after filing pre-hearing submissions, nearly four days of evidentiary hearings, and comprehensive final submissions, the UFU have still not ever attempted to explain how a ban on part-time work can be reconciled with the modern awards objective, the objects of the FW Act, and the statutory requirements of the Commission's exercise of powers.<sup>4</sup> The only explanation is that the ban on part-time work is indefensible when measured against the statutory standards.

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<sup>3</sup> As stated in the Fire Services Submissions, it is no answer to say that the existing provisions of the modern award provide flexibility. They do not. See Fire Services Submissions at [73]–[76].

<sup>4</sup> The UFU claim the variation is not necessary because, among other matters, the MFB Agreement and the CFA Agreement, as defined in paragraph 8 of the Fire Services Submissions, permit part-time employment by agreement between the UFU and the MFB or CFA: at [48]. As the fire services have stated on numerous occasions, and as the UFU acknowledge (see footnote 42), these arrangements do not apply to operational firefighters.

***The relevance of history and precedent to the Commission’s task***

9. The parties agree that the historical context of the modern award is relevant to the task of the Full Bench in conducting the four-yearly review of modern awards.<sup>5</sup> There is some disagreement between the parties about the correct interpretation of previous decisions relating to the *Fire Fighting Industry Award*.

Previous determinations concerning the *Fire Fighting Industry Award*

10. The fire services have addressed the history of the modern award in the primary submissions between paragraphs 15 to 24. We do not repeat those submissions here, other than to reiterate that there is no previous decision of the Commission or its predecessors about part-time work to follow in this case. When the award was last considered by the Commission, during award modernisation, the issue of part-time work was expressly reserved for future consideration.<sup>6</sup>
11. The UFU claim that this reservation by the AIRC at award modernisation “*does nothing to undermine the prima facie position that the modern award... achieved the modern awards objective at the time [the modern award] was made*”,<sup>7</sup> as expressed by the Full Bench in the *Preliminary Jurisdictional Issues Decision*.
12. Two points can be made in response.
13. First, the assumption that the modern award met the modern awards objective at the time it was made is a *prima facie* assumption; that is, it is a first impression capable of being displaced. The express reservation by the AIRC during award modernisation of part-time work in the modern award clearly displaces the assumption with regard to that matter.<sup>8</sup>
14. Second, even if the modern awards objective was met at the time when the modern award was made, the evidence presented by the fire services in this review establishes that the modern awards objective is no longer met by the ban on part-time work. In particular, the fire services rely on the evidence of:

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<sup>5</sup> See Fire Services Submissions, [15]; UFU Submissions, [12]; *Re 4 Yearly Reivew of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdictional Issues Decision***), [27].

<sup>6</sup> See Fire Services Submissions, [21]–[22].

<sup>7</sup> UFU Submissions, [29].

<sup>8</sup> See Fire Services Submissions, [22].

- (a) The industrial standard in fire services across Australia, where part-time and flexible work options are available and accommodated, including on the 10/14 roster.<sup>9</sup>
- (b) The industrial standard in emergency services, where part-time work is available and accommodated, including on the 10/14 roster.<sup>10</sup>
- (c) The industrial standard across other modern awards, where part-time work provisions are contained in 94 per cent of modern awards, and alternatives to full-time work arrangements are contained in over 99 per cent of modern awards, with the *Fire Fighting Industry Award* as the outlier.<sup>11</sup>
- (d) The high rates of part-time employment across Australia.<sup>12</sup>
- (e) The failure of the UFU to explain why the firefighting industry in Victoria is manifestly different to firefighting in all other states and territories in Australia where part-time and even more flexible work options are available to operational firefighters.

#### The industrial standard – fire services across Australia

15. As set out in the fire services' submissions at paragraphs 48–50, each other state and territory permits the employment of operational firefighters on a part-time basis. The fire services have always acknowledged that the implementation of part-time work in state and territory fire services is often limited to prescribed circumstances. The UFU appear to view this as injurious to the fire services' application to vary the modern award because, they contend, the majority of instruments in other states that deal with part-time employment apply at any enterprise level, putting the fire services'

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<sup>9</sup> See from paragraph 15 below, and Fire Services Submissions, [48]–[60].

<sup>10</sup> See from paragraph 26 below, and Fire Services Submissions, [61]–[64].

<sup>11</sup> See from paragraph 28 below, and Fire Services Submissions, [25]–[33] and Annexure A. Of the 122 modern awards, 115 or 94 per cent contain part-time work provisions for all employees. Of the seven awards that do not permit part-time work (including the *Fire Fighting Industry Award*), four permit casual employment, and the other two permit relief employment, bringing the total number of modern awards that offer a form of employment other than full-time permanent employment to 121 out of 122, or 99.18 per cent.

<sup>12</sup> See Fire Services Submissions, [43], and Background Paper, Part 4.

application “at odds with this aspect of the industrial history in other jurisdictions”.<sup>13</sup> However, this is not the case, as the following examples illustrate:

- (a) In Queensland, the *Queensland Fire and Rescue Service Award – State 2012* underpins the *Queensland Fire and Emergency Services Determination 2013*. The Qld Award provides, at clause 4.1, that employees can be engaged on a full-time, part-time, or temporary basis. Clause 4.2 describes generic part-time employment (minimum and maximum hours, application of entitlements, etc). The 2013 Determination, at clause 24, provides enterprise-specific detail about the operation of part-time work in the QFES. That is, the Qld Award provides for *carte blanche* part-time employment, and the UFU is bound by that Award – a position in direct contrast to that claimed by the UFU in its submissions in this matter.
- (b) In South Australia, the *Firefighting Industry Employees (South Australian Metropolitan Service) Award 2007* provides, at clause 11, that “*Employees under this Award will be employed as full-time employees or part-time employees*” as informed by the employer at the time of engagement, and that the salary payable to part-time employees is to be adjusted to the proportion of hours worked. That is the extent of the provision in the SA Award; it contains no enterprise-specific provisions. The applicable enterprise instrument, the *South Australian Metropolitan Fire Service Enterprise Agreement 2014*, provides at clause 24 that part-time work is only available to women returning from maternity leave. The UFU is a party to the SA Enterprise Agreement.
- (c) The *Tasmanian Firefighting Industry Employees Award* provides at clause 1(a) that all employees are employed under the *State Service Act 2000* (Tas). Section 37(3)(a) of the *State Service Act* provides that persons may be employed on a part-time basis working specific hours on a regular basis each week. This provision is incorporated in to the *Tasmanian Fire Fighting Industry Employees’ Industrial Agreement 2014*, at clause 34. The UFU is an interested party under the Tasmanian Award and a party to the Tasmanian Agreement.

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<sup>13</sup> See UFU Submissions, [39].

- (d) In New South Wales, the applicable instrument is the *Crown Employees (Fire and Rescue Permanent Firefighting Staff) Award 2016*. Clause 8.2.2 provides that operational firefighters may propose work on an alternative roster, the precise detail of which is to be determined by the firefighter and the Department, and subject to certain limitations relating to occupational health and safety, minimum crewing (which cannot be reduced by the alternative roster), and permissible minimum working hours. That is, the state award provides blanket flexibility, and implementation is a matter determined at the individual level.
16. Based on these matters, it is not correct to state, as the UFU does, that other fire services around Australia do not support a *carte blanche* part-time work clause, or that interstate industrial instruments universally contain significant qualifications around part-time work, in contrast to the variation proposed by the fire services.<sup>14</sup> Instead, it appears, based on at least the Queensland, South Australian, and Tasmanian state awards, that even the UFU has supported *carte blanche* part-time work provisions. Further, across Australia, it is common practice for the applicable state awards to make provision for part-time employment and for the applicable enterprise instrument to set out the implementation of part-time employment – just as occurs with respect to full-time employment.

*Evidence from other fire services*

17. The UFU claims, curiously, that “*it is noteworthy that no other Fire Services from around Australia have sought to intervene or be heard in these proceedings*”.<sup>15</sup> It is not clear what the Commission is to make from this statement. The UFU contend that the non-participation of other fire services is somehow proof that other fire services do not support a *carte blanche* part-time clause. However, as outlined above, several state awards contain *carte blanche* part-time clauses. In any event, the participation or not of other fire services in this review is not evidence of anything, particularly given the modern award does not cover the other states.

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<sup>14</sup> UFU Submissions, [38], [39].

<sup>15</sup> UFU Submissions, [38]. Presumably, NSW is excluded from this observation.

18. The fire services submit that the availability of part-time work for firefighters in Australia (except Victoria) is highly relevant to this application, because the UFU have raised the spectre of employee safety and service delivery in opposition to the application. If the UFU's contention – and it is nothing more than a contention, as there is no evidence other than the *impressions* of UFU witnesses who are vehemently and irrationally opposed to part-time employment – is correct, and part-time work will have a negative impact on employee safety and service delivery in Victoria, then it is incumbent on the UFU to explain why it has supported part-time work for firefighters elsewhere in Australia. Either part-time work is unsafe, in which case the UFU has wrongly exposed its members to unsafe work practices in Queensland, South Australia, Tasmania, and the Australian Capital Territory, or there is something special and different about Victoria. No explanation has been forthcoming; at this stage it may be assumed that no rational explanation exists.

*The experience in New South Wales*

19. The UFU seek to distinguish the evidence of Superintendent Malcolm Connellan on behalf of the New South Wales Fire & Rescue Services (**NSWFRS**), on the basis of “*stark differences*” in the operational structures between NSW and Victoria.<sup>16</sup>
20. While the fire services agree there are differences between the NSWFRS and the MFB and CFA,<sup>17</sup> the fire services and the UFU are at odds as to the relevance of the evidence of Mr Connellan. The fire services maintain that the evidence from the NSWFRS demonstrates that it is possible for operational firefighters to work part-time without the adverse consequences contended for by the UFU in Victoria. The structural differences between the states do not override the fact that firefighters in both states do the same job.<sup>18</sup>
21. We do not intend to repeat our submissions at paragraphs 51–60 concerning the evidence of Mr Connellan. However, the UFU point to “*a host of reasons*”<sup>19</sup> in support of their argument that Mr Connellan's evidence should be disregarded.

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<sup>16</sup> UFU Submissions, [113].

<sup>17</sup> See Fire Services Submissions, [51].

<sup>18</sup> See UFU Submissions, [113(v)].

<sup>19</sup> UFU Submissions, [113].



Several of these are based on a misunderstanding of the nature of that evidence, and must be corrected.

22. At paragraph 113(iii) of the UFU submissions, it is stated that the separate K and L platoons for part-time employment in the 2014 NSW award were “*removed within two years*”. Part-time employment, including working on the K and L roster model, is still available to NSWFRS operational firefighters; the arrangement has been subsumed into the broad flexibility provisions of clause 8 of the *Crown Employees (Fire and Rescue Permanent Firefighting Staff) Award 2016*.<sup>20</sup> This also explains the statement at paragraph 113(iv) of the UFU submissions that the only reference to part-time work in the 2016 Award is at clause 29 facilitating the return to work for female employees who are returning from maternity leave.
23. The UFU contend, at paragraph 113(vi), that in NSW the onus is placed on employees to ensure maintenance of skills. In fact, Mr Connellan’s evidence was that there was shared responsibility between station commanders and employees with respect to skills maintenance and training.<sup>21</sup> Further, in both fire services, there is no requirement that employees complete skills maintenance training. Rather, the requirement is that station officers conduct the requisite number of drills each week.<sup>22</sup> In that way, the onus is placed on employees in the MFB and CFA to ensure maintenance of skills, just as in New South Wales.
24. It is asserted, at paragraph 113(ix), that there are dissimilar lines of communication with respect to monitoring employee welfare in New South Wales as compared with Victoria. The UFU point to the role of Station Officer in Victoria and claim that there is no similar, consistent, role in New South Wales, based on Mr Connellan’s evidence that Station Officers may not always work at the same station as a firefighter in their crew. But Mr Connellan’s evidence was that there is a Station Officer at every station, and there are multiple layers of welfare support for firefighters in NSW.<sup>23</sup> Similarly, Station Officers in Victoria do not carry the sole

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<sup>20</sup> See Statement of Malcolm Connellan, MFB/CFA 25, [19]–[20], [22], [24]; and PN 3991–92; PN 4028–4030.

<sup>21</sup> PN 4108–09.

<sup>22</sup> See Fire Services Submissions, [111].

<sup>23</sup> See PN 4079.

burden for employee welfare – there are a range of established arrangements for providing welfare to firefighters.<sup>24</sup>

25. The flexibility provisions in the NSWFRS are not completely foreign to the Victorian experience as asserted at paragraph 113(x) of the UFU submissions. While the MFB does not deploy retained firefighters, teams in the MFB and the CFA frequently “*change around all the time*,”<sup>25</sup> particularly given the very high rates of recalled and retained firefighters.<sup>26</sup> For example, in the calendar month 20 March 2016 – 20 April 2016, a total of 921 CFA firefighters were recalled to work with a team other than their usual team.<sup>27</sup> This is 42 more than the 879 career firefighters employed by the CFA.<sup>28</sup>

The industrial standard – other emergency services

26. The UFU seek to distinguish the evidence concerning part-time employment in Ambulance Victoria and Victoria Police on the basis that those services are “*manifestly and relevantly different from that of the MFB/CFA*,”<sup>29</sup> primarily based on the assertion that Victorian firefighters work in exceptionally close teams that have no parallel in Victoria and Victoria Police.<sup>30</sup> But the UFU has not been able to explain why a part-time firefighter cannot be part of a closely knit team. As important as teamwork and familiarity are, it is a rare week that a firefighter works with exactly the same people on each shift, given the leave requirements, high rates of absenteeism, provision for transfer and secondment, frequency of work alongside volunteers, and likelihood of working in strike teams or other emergency services, that characterise work in the fire services.<sup>31</sup>

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<sup>24</sup> See, eg, evidence of Daniel Gatt at PN 2356; evidence of Glenn Veal at PN 3722–3727.

<sup>25</sup> UFU Submissions, [113(x)].

<sup>26</sup> See Fire Services Submissions, [105(b)], [105(c)], [121]; Statement of David Youssef, MFB/CFA 20, [19]–[20].

<sup>27</sup> See Statement of Bruce Byatt, MFB/CFA 24, [10]. Mr Byatt was not cross-examined on this statement.

<sup>28</sup> Statement of Margareth Thomas, MFB/CFA 2, [16]. Ms Thomas was not cross-examined.

<sup>29</sup> UFU Submissions, [122].

<sup>30</sup> UFU Submissions, [118]–[122].

<sup>31</sup> See Fire Services Submissions, [105].

Relevance of the industrial standard

27. The point that the fire services seek to make by drawing attention to the evidence about the NSWFRS, Ambulance Victoria, and Victoria Police, is not that the implementation of part-time work in other emergency services can be picked up and applied without alteration to the MFB and the CFA. The point is that part-time work is a standard term and condition of employment for all emergency services in Victoria, and for fire services across Australia. The existing industrial standard is relevant to the Commission’s exercise of its powers in determining the content of the modern award, because the Commission is required to consider whether the modern award provides a fair and relevant minimum safety net of terms and conditions of employment. In assessing the minimum safety net, the practice across parallel and similar industries is relevant.

The industrial standard – other modern awards

28. The UFU rely on the exclusion of part-time work in the six other modern awards that do not have part-time provisions, as a reason why part-time work should continue to be excluded from the *Fire Fighting Industry Award* for public sector employees. The UFU claim that the exclusion of part-time work from the six awards arose because “*the nature of the industry has been reflected in the historical consideration that part-time work is not a feature of employment*” in those industries.<sup>32</sup> It is contended that the firefighting industry in Victoria is a parallel example of an industry in which part-time work has never been accepted, and taking into account “*the evidence supporting the conclusion that the introduction of a general part-time prescription would be unsafe and contrary to public interest*”, the case for rejection is far stronger than those six awards addressed in the Background Paper.<sup>33</sup>
29. In response, the fire services note that firstly, while part-time work is excluded from the six identified awards, each of the six awards provide for casual or temporary employment. It is therefore not correct to assume that those industries are unable to accommodate employment in any form other than full-time. As set out in Annexure A of the fire services submissions, the following awards permit casual or temporary employment:

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<sup>32</sup> UFU Submissions, [23].

- (a) The *Mobile Crane Hiring Award 2010*, the *Professional Diving Industry (Industrial) Award 2010*, the *Road Transport (Long Distance Operations) Award 2010*, and the *Stevedoring Industry Award 2010* permit casual employment
  - (b) The *Seagoing Industry Award 2010* and the *Maritime Offshore Oil and Gas Award 2010* permit relief employment.
30. Second, the UFU submissions conflate the relevance of the history of the applicable award, and the applicable industry. In the case of the *Maritime Offshore Oil and Gas Award*, the Full Bench noted that part-time employment was not a feature of the award, or of the industry more generally.<sup>34</sup> However, while part-time work has not been a feature of the *Fire Fighting Industry Award* as it applies to the public sector, it cannot be said that part-time work has not been a feature of the firefighting industry across Australia.
31. Third, the fire services refer to and repeat their submissions concerning the opinion ‘evidence’ – in the form of opinion and speculation by UFU witnesses – relied on by the UFU in support of its contention that part-time work would be unsafe and contrary to public interest. For the reasons already expressed, that evidence is not reliable and should be rejected.
32. Finally, to the extent the UFU argue that because part-time work has never been a feature of the modern award, it should not now become a feature of the modern award,<sup>35</sup> this argument is irrational and must be rejected. To accept past standards as determinative of future standards is to prevent all changes to the status quo.

***‘Changed circumstances’ and the terms of the enterprise agreements***

Relevance of the enterprise agreements

33. The UFU contend that the content of the enterprise agreements between the fire services and the UFU is also relevant to the Commission’s conduct of the four-yearly review.<sup>36</sup> In particular, the UFU rely on clause 37 of the MFB Agreement, and clause

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<sup>33</sup> UFU Submissions, [24]–[26].

<sup>34</sup> See Background Paper, [29], [30]; relied on in the UFU Submissions at [20]–[22].

<sup>35</sup> See UFU Submissions, [18].

<sup>36</sup> See UFU Submissions, [13(ii)], [27(d)], [27(f)].

29 of the CFA Agreement, which reiterate the ban on part-time work for operational firefighters, “*for reasons including the welfare and safety of employees*”. However, clause 10 of the modern award does not record any such reason or justification for banning part-time work. The terms of the agreements are not part of the modern award and were not considered by the Commission during award modernisation.

34. The UFU’s contention that the terms of the enterprise agreements are relevant to the four-yearly review is untenable. It has never been part of the Commission’s statutory function in reviewing modern awards to consider terms and conditions in enterprise agreements. The statute does not require it. The exercise would be unworkable in industries where the modern award applies to thousands of employers and employees, and underpins potentially hundreds of enterprise agreements. Most critically, the contention misunderstands the function of the modern award as the safety net of minimum terms and conditions of employment. To consider the terms and conditions in enterprise agreements as relevant to the content of modern awards would be appellable error; they are not relevant to the Commission’s assessment of whether the terms of the modern award meet the modern awards objective.
35. If the UFU seriously contends that the terms of its enterprise agreements with *Victorian* fire services are relevant to the *national* modern award – a contention that the fire services maintain is untenable – then the UFU must accept that terms of the ACT and Northern Territory fire services’ enterprise agreements are also relevant to the exercise of the Commission’s function in conducting the four-yearly review. Taking the *ACT Public Service Act Fire and Rescue Enterprise Agreement 2013–2017* as an example, clause 12 and Section J of that agreement provides for full-time employees to convert to part-time employment on the 10/14 roster, and Section J further provides for additional flexible work arrangements including job sharing, and permanent part-time employment. The UFU was a bargaining representative for the Agreement.<sup>37</sup>
36. The UFU claim that it was incumbent on the fire services to explain, in this application, the difference in position between the joint submission of the CFA (not the MFB) and the union before Commissioner Hingley at award simplification in

2000, and the terms of the enterprise agreements in 2010, relating to the ‘inappropriateness’ of part-time work for Victorian firefighters. The need for this explanation apparently arises by the operation of s 156 of the FW Act because, in the UFU’s submission, “*the Commission’s jurisdiction under s 156 is necessarily focussed on changed circumstances*”.<sup>38</sup> However:

- (a) There is no reference in s 156 to ‘changed circumstances’. No such test is required by the statute. The UFU are contending for an impermissible gloss on the Commission’s function that is outside the statutory prescription.
- (b) To the extent the UFU rely on the statement by the Full Bench in the *Preliminary Jurisdictional Issues Decision* that the four-yearly review proceeds on the basis that *prima facie* the modern awards objective was met at the time the modern award was made, for the reasons set out above at paragraph 13, this assumption does not apply to the prohibition on part-time work in the modern award.

### ***The practical effect of the proposed variation***

#### Intention and implementation

- 37. The UFU claim it is “*completely artificial*” to assess the draft determination against the modern awards objective, because it is “*undisputed*” that there is no intention to make the variations operational.<sup>39</sup> This is a mischaracterisation of the fire services’ evidence.
- 38. The evidence of the fire services was *not* that there was no intention to ever introduce part-time work to the fire services, but that there is no intention to implement part-time work in the fire services *immediately* and without consultation with employees and the UFU. The fire services clearly intend and wish to offer part-time work to its employees. The precise form of that work will be the subject of consultation in accordance with the terms of the relevant agreements.

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<sup>37</sup> See [2014] FWCA 4633. A copy of the 2011-2013 ACT Agreement was provided to members of the Full Bench at the hearing in April. Copies of the 2013-2017 ACT Agreement will be provided at the hearing on Friday 17 June 2016.

<sup>38</sup> UFU Submissions, [14].

<sup>39</sup> UFU Submissions, [30]–[31], [51].

39. The UFU refer to the application by the MFB in 2014 to terminate the MFB Agreement as evidence that the proposed draft determination could potentially be implemented unilaterally and without consultation. This proposition ignores clause 8 of the modern award, which requires employers to consult and discuss major workplace changes, and changes to rosters and hours of work, with employees and their representatives. Implementation without consultation is impossible regardless of the applicable industrial instrument. It cannot be seriously contended that the Commission should refuse to amend the modern award on the basis that it might apply at some point in the future.
40. The UFU also argue that the jurisdiction of the Commission in this review requires the Full Bench to assess the draft clause, and determine the effect the clause will have “*once in operation*”.<sup>40</sup> This is plainly wrong.
41. The statutory framework in which the Commission is operating requires that the draft determination be assessed against s 134 of the FW Act. To do otherwise would be a radical departure from the Commission’s express function in the context of the four-yearly review.
42. In support of their argument that the Full Bench is required to assess matters of implementation at the enterprise level, the UFU point first to s 134 of the FW Act. But the modern awards objective says nothing about a ‘requirement’ to determine how clauses of modern awards will operate at an enterprise level, nor to assess the minutiae of implementation for each of the thousands of businesses or enterprises covered by modern awards.
43. The UFU also rely on the approach set out in *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170. That decision concerned the two-year transitional review of modern awards, specifically with respect to the individual flexibility clause in each modern award. The clause was varied to remedy issues identified with the technical, administrative, and practical operation of individual flexibility arrangements across all industries. At the conclusion of its judgment, the Full Bench stated, at paragraph 212, which is the pinpoint citation relied on by the UFU:

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<sup>40</sup> UFU Submissions, [52].

The determinations giving effect to our decision will be settled by Senior Deputy President Watson, with recourse to the Full Bench if necessary. After the Full Bench dealing with the annual leave aspects of the model award flexibility term has decided the applications before it, a statement will be issued setting out the process of implementing our decision (and the decision of the Annual Leave Full Bench insofar as it deals with the model award flexibility term) in all modern awards.

44. This paragraph does not appear to assist the UFU. The reference to implementation is a reference to implementation in all modern awards, not at the enterprise level.
45. The concerns raised by the UFU and even by some of the fire services' witnesses including Ms Schroeder about how best to accommodate part-time employment along with the skills acquisition and maintenance requirements of the job, the 18.8 week recruit training course and the subsequent three years of introductory employment, are properly understood as concerns about the implementation of part-time employment within the structures of the MFB and the CFA. The UFU relies heavily on the evidence of Ms Schroeder in support of its assertion that part-time work will have an impact on training of firefighters at Levels 1 to 3, but ignores her evidence that the MFB could accommodate part-time work arrangements for firefighters at Qualified Firefighter level and above.<sup>41</sup>
46. There are legitimate differences of opinion about where part-time work arrangements might be best utilised to ensure the highest quality of service delivery to the community, safety to employees, and fairness to employees that are unable to work 42 hours a week on the rotating 10/14 roster but wish to remain operational firefighters. These differences of opinion are properly matters for consultation.
47. There is a difference between assessing the merits of a proposed clause against the modern awards objective, and assessing the implementation of part-time work at an enterprise level – a difference that does not appear to have been appreciated by the UFU. It is the modern awards objective that guides the Commission's task in conducting this review and in making amendments to modern awards more broadly. The function of the modern award is to provide a fair and relevant minimum safety net of employment terms and conditions, consistent with the objective, and within other relevant provisions of the FW Act, none of which require the Commission to

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<sup>41</sup> See PN 814 – PN 831; see UFU Submissions, [59]–[61].



consider the implementation of modern award terms at the enterprise level. To require the Commission to consider enterprise-level implementation of modern award terms and conditions is to conflate the function of modern awards and of enterprise agreements, and would be wholly inappropriate.

### Bargaining

48. The UFU accuse the fire services of bringing this application for the sole purpose of creating a favourable bargaining framework.<sup>42</sup>
49. As stated in the fire services submissions at paragraph 11, this accusation was not put to any of the fire services' witnesses. The implication that this application has been brought for an ulterior purpose must be rejected for *Browne v Dunn* (1893) 6 R 67 reasons alone.
50. There is no doubt that the terms and conditions in all modern awards shape the bargaining framework. This is uncontroversial. The function of modern awards are to provide a safety net of minimum terms and conditions of employment – they set the floor, not the ceiling, of employment conditions. The UFU complain that the fire services' intention to comply with the consultation clauses in the Agreements has the effect of 'sidelining' any debate about the necessity for inclusion of a 'global entitlement' to part-time work.<sup>43</sup> This does not follow. Why would the parties not be able to debate the necessity of a global, or more qualified form of part-time work, at the enterprise level regardless of the award terms? The proposed draft determination does not compel part-time employment; it merely permits the arrangement.
51. The UFU refer to the decision of the Full Bench in the *Award Modernisation Decision* (2009) 187 IR 192 (*Award Modernisation Decision*) in support of its claim that the draft determination is vague and uncertain. The UFU contend that the draft determination has "even less content" with regard to certainty and predictability than a part-time work provision that was rejected in the *Award Modernisation Decision*.<sup>44</sup>

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<sup>42</sup> UFU Submissions, [34], [35], [58].

<sup>43</sup> UFU Submissions, [36].

<sup>44</sup> UFU Submissions, [37].

52. However, a proper understanding of the *Award Modernisation Decision* assists the fire services, and does not assist the UFU. In that decision, the Full Bench considered numerous state-based awards applying to the industry subsequently covered by the *Registered and Licensed Clubs Award 2010*. Most state-based awards including in Victoria, Queensland, and the ACT, contained a part-time employment provision in terms provided for in the exposure draft for the modern award. It is worth setting out how the Full Bench described that clause:

The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime.<sup>45</sup>

53. By contrast, the New South Wales state award did not provide for the matters in the exposure draft part-time work clause, but instead prescribed, relevantly, that part-time employees work a minimum of 32 hours and a maximum of 148 hours in a four week period, to be worked over no more than 20 days in a four week period, as well as other matters including a limitation of three part-time employees for each full-time employee.<sup>46</sup> It was *this* clause that was rejected by the Full Bench for inclusion in the modern award on the basis that it removed “*the essential characteristics of part-time employment of some degree of regularity and certainty of employment*”.<sup>47</sup> Instead, the Full Bench included a part-time work clause in *Registered and Licensed Clubs* modern award in terms practically identical to that proposed by the fire services in the draft determination.
54. Finally, the UFU argue that there is nothing to stop the parties from negotiating part-time work arrangements as has been done in other states and territories, and there is no evidence that such an attempt has been made and failed in bargaining.<sup>48</sup> The argument misses the point that the function of modern awards is to provide a

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<sup>45</sup> *Award Modernisation Decision*, [136].

<sup>46</sup> See *Award Modernisation Decision*, [137]–[138].

<sup>47</sup> *Award Modernisation Decision*, [144].

<sup>48</sup> UFU Submissions, [41].

minimum *safety net* of terms and conditions of employment. The fact that it is open to the parties to seek to negotiate or bargain for the introduction of part time work is irrelevant to the Commission's function in the four-yearly review. The fact that a variation to the terms and conditions in the modern award will affect the bargaining framework does not negate the fact that the proposed variation is necessary in order for the *Fire Fighting Industry Award* to meet the modern awards objective.

## **B THE MERITS OF THE APPLICATION**

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### ***Part-time work is not casual work***

55. The draft determination filed by the fire services defines part-time work, relevantly, as follows:

#### **10.3 Part-time employment**

- (a) A part-time employee is an employee who:
- (i) works less than the full-time hours of 38 hours per week;
  - (ii) has reasonably predictable hours of work;
- ...
- (b) At the time of engagement as a part-time employee, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work, and the actual starting and finishing times each day.

56. This definition is consistent with the definition employed in 116 out of 122 modern awards,<sup>49</sup> including the definition of part-time work for the private sector in the *Fire Fighting Industry Award*.
57. The UFU claim that “part-time employment *might ultimately include irregular and intermittent work*”.<sup>50</sup> But that is not the definition of part-time work in the draft determination. Part-time work is defined to exclude irregular and intermittent work, consistent with the “*conventional concept of part-time work*” as featuring “*some degree of regularity and certainty of employment*”.<sup>51</sup> The UFU cannot rationally object to the application on the basis that it might be something it is expressly stated not to be.

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<sup>49</sup> See Fire Services Submissions, [33]–[35], and Annexure A.

<sup>50</sup> UFU Submissions, [125].

***‘Administrators’ v operational firefighters***

58. The UFU contend that the witnesses on its behalf were “experienced, operational firefighters” whose evidence should be preferred to the witnesses called by the fire services, who were described as “*largely administrators*”.<sup>52</sup>
59. This is an incorrect characterisation of both the UFU and fire services witnesses.
60. Of the UFU witnesses, it is acknowledged that the following witnesses have considerable operational experience. However, they hold the following administrative, or non-operational positions:
- (a) Ken Brown is currently seconded to Emergency Management Victoria as Director of Fire Enhancement Programs.
  - (b) Alan Quinton is Assistant Chief Fire Officer, Fire Safety.
  - (c) Tony Martin is a structural firefighting instructor.
  - (d) Bradley Quinn is Commander, Operational Communications.
61. Of the fire services witnesses who currently occupy non-operational positions, the following have extensive experience as operational firefighters:
- (a) Peter Rau, Chief Fire Officer of the MFB, has over 30 years experience as an operational firefighter.
  - (b) David Youssef, Deputy Chief Officer and Regional Director of the North West Metro Region of the MFB, has over 30 years’ experience as an operational firefighter.
  - (c) Greg Leach, Deputy Chief Officer and Executive Director Organisational Learning and Development at the MFB, has over 20 years’ experience as an operational firefighter.
  - (d) Bruce Byatt, Deputy Chief Officer – Readiness and Response at the CFA has nearly 40 years experience as an operational firefighter.
  - (e) Steve Warrington, Deputy Chief Officer – Emergency Managment at the CFA has nearly 30 years experience as an operational firefighter.

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<sup>51</sup> See *Award Modernisation Decision*, [144].

<sup>52</sup> UFU Submissions, [57].

***There is no evidence that skills and safety will be undermined by part-time work***

62. The UFU assert that part-time work will have an impact on the ability of firefighters to acquire and maintain skills.<sup>53</sup> In support of this assertion, the union relies on the evidence of its witnesses, the CFA/UFU submission to Commissioner Hingley in award simplification, the terms of the CFA Agreement, and certain material contained in the Background Paper.
63. As to the concerns of the UFU witnesses, the fire services accept that these concerns are genuinely held beliefs of those witnesses. However, sincerity does not elevate a concern from speculative to rational. For the reasons set out in the fire services' primary submissions at paragraphs 79 to 132, the evidence of the UFU witnesses on this issue was not reasonable, sound, or reliable evidence.
64. The UFU criticise the fire services for relying on the evidence of non-operational 'administrators' CFA CEO Lucinda Nolan and MFB Human Resources Director Michael Werle "*for the proposition that standards would not be lowered by the introduction of part-time work*".<sup>54</sup> The UFU also contend that the evidence of their witnesses about their concerns about part-time work were "*legitimised*" by the evidence of Kirstie Schroeder, MFB Director of Operational Learning and Development.<sup>55</sup>
65. Ms Schroeder is not and has never been an operational firefighter. She is an administrator. The fact that her evidence is so readily accepted and relied upon by the UFU makes it clear that the basis of the UFU's objection to the evidence of Ms Nolan and Mr Werle is to the substance of their evidence, rather than their background and experience. The submission that evidence of non-operational 'administrators' should be given no weight cannot stand in light of the UFU's reliance on Ms Schroeder's evidence, as well as the fact that several of the UFU's own witnesses occupy administrative, non-operational, positions, as set out above.
66. Next, the UFU rely on the joint submission of the CFA and the UFU in award simplification, and clause 37 of the CFA Agreement, as 'evidence' that part-time

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<sup>53</sup> UFU Submissions, [65]–[66].

<sup>54</sup> UFU Submissions, [64]; and see [62]–[63].

<sup>55</sup> UFU Submissions, [61].

work was inappropriate for Victorian firefighters.<sup>56</sup> The position reached by each party at award simplification and in enterprise bargaining is not proof of the fact of any matter other than that agreement was reached. Neither is it relevant to the Commission's task of determining whether the modern award is a fair and relevant safety net of minimum terms and conditions of employment.

67. The UFU also rely on a reference in the Background Paper to research exploring whether there is any link between part-time work and poor performance.<sup>57</sup> The reference in the UFU submissions is to a paper by MacDonald et al (**MacDonald paper**).<sup>58</sup>
68. The MacDonald paper was a literature review of six papers that compared physical characteristics and performance of part-and full-time tactical personnel. Of the six papers assessed, three reviewed physiological and performance measures of military personnel, and three concerned firefighters – two studies of male and female personnel in the Swedish Fire & Rescue Service, and one of male trainee firefighters as well as male and female civilians in the United Kingdom.<sup>59</sup> One of the Swedish studies involved a questionnaire and required subjects to self-assess their fitness levels; the other measured physiological responses using laboratory tests. The Swedish study that conducted laboratory tests found “*no overall statistically significant differences between part-time and full-time firefighters*”.<sup>60</sup>
69. The United Kingdom study assessed the fitness of recruit firefighters before and after the removal of a cardiorespiratory fitness standard as an entry standard to the UK Fire and Rescue Service, and found that lowering the standard led to worse health outcomes, regardless of the nature of employment.<sup>61</sup>

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<sup>56</sup> UFU Submissions, [65]

<sup>57</sup> UFU Submissions, [69].

<sup>58</sup> MacDonald D, Orr R and Pope R (2016), ‘Differences in physical characteristics and performance measures of part-time and full-time tactical personnel: A critical narrative review’, 24(1) *Journal of Military and Veterans' Health* 45 (**MacDonald paper**), cited in the Background Paper at [62].

<sup>59</sup> See MacDonald paper, Table 2, 49.

<sup>60</sup> See MacDonald paper, Table 2, summary of findings from Lindberg, Oksa and Malm (2014).

<sup>61</sup> See MacDonald paper, Table 2, summary of findings from Wynn and Hawdon (2011).

70. Although the authors of the MacDonald paper stated that, “*caution should be applied in the interpretation and application of these findings to practice*”,<sup>62</sup> if anything, the literature reviewed in the paper supports the fire services’ contention that what determines firefighter safety and performance is fitness and skills, not employment arrangements. In any event, the publication of a single paper, studying a mix of professions, none of which include Victorian or Australian firefighters, that are described by the authors as containing “non-conclusive” results, is hardly a devastating indictment of the fire services’ application.
71. The UFU’s reliance on the MacDonald paper is at best weak, and at worst, inconsistent with its position elsewhere in this proceeding. It is inconsistent with other aspects of its case, namely, its dismissal of the evidence about part-time work in fire services across Australia, including in New South Wales, and of the employment arrangements and experiences of emergency services in Victoria, on the basis that the experience of parallel services is too different to be relevant to Victorian firefighters. Notwithstanding its rejection of this evidence, the UFU is willing to rely on a paper that refers to three other papers concerning Swedish and British firefighters, as evidence in support of their position that part-time work will expose firefighters to risk. This is untenable.
72. Further, the UFU ignore the conclusions expressed in another paper referred to in the Background Paper, published by the Melbourne Institute, which found that “*when working hours are less than around 25 hours a week for employees over 40 years of age there is a positive correlation with improved cognitive functioning*”.<sup>63</sup>
73. Similar considerations apply to the UFU’s reliance on the June 2008 Productivity Commission Staff Working Paper.<sup>64</sup> The findings cited by the UFU are not causative but correlative, and offered without explanation. The UFU acknowledge that the conclusions in the Productivity Commission paper, and the MacDonald paper, are non-conclusive and not directed at Victorian firefighters, or emergency services in Australia at all. Nevertheless, it asserts that it is “*highly likely*” that evidence of this

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<sup>62</sup> MacDonald paper, 53.

<sup>63</sup> Kaijitani S, McKenzie C and Sakata K (2016) ‘Use it Too Much and Lose It? The Effect of Working Hours on Cognitive Ability’, *Melbourne Institute Working Paper No 7/16*, cited in FWC Background Paper, [71].

<sup>64</sup> UFU Submissions, [70].

correlation *would* become more pronounced in the firefighting industry.<sup>65</sup> This assertion is made without basis, unsupported by evidence, and should not be accepted.

Proficiency v competency: a false dichotomy

74. The UFU contend that the Victorian fire services are assessed at the elite end of the spectrum of fire services because of their proficiency, as distinct from their competency. It is argued that “*proficiency is the key to safety and service delivery outcomes*”.<sup>66</sup> The evidence relied on in support of this proposition is the opinion evidence of UFU witnesses.<sup>67</sup>
75. To illustrate their point, the UFU compare “*a part-time worker*” with “*a specialist firefighter who is at an elite level of proficiency*”.<sup>68</sup> But this is comparing apples and oranges. The example works equally the other way around – a recruit working full-time will have far less proficiency than a firefighter with 10 years experience and several specialist skills, who happens to work 20 hours a week instead of 42.
76. The distinction between competency and proficiency, if it is a meaningful dichotomy, can only be relevant to this application if it follows that part-time employees can never reach proficiency; or that a ‘specialist firefighter with an elite level of proficiency’ will immediately lose that proficiency if they elect to work part-time. The evidence provides no support for either proposition.

The status quo accommodates part-time work

77. The UFU argues that “*intense, team-based training is constant and ongoing*”, and any absence from this ‘routine’ is a cause for “*major concern*”.<sup>69</sup>
78. The fire services addressed, in considerable detail, the circumstances in which the fire services already accommodate employee absences when arranging skills maintenance and drills.<sup>70</sup>

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<sup>65</sup> UFU Submissions, [71].

<sup>66</sup> UFU Submissions, [80].

<sup>67</sup> See UFU Submissions, fn 70.

<sup>68</sup> UFU Submissions, [80].

<sup>69</sup> UFU Submissions, [102].

<sup>70</sup> See Fire Services Submissions, [118]–[123]; [127]–[132].



79. For the avoidance of doubt, it must be made clear that, unless firefighters are called out, when working on the 10/14 roster they are entitled to be asleep for 16 hours out of a 42 hour roster, and during that time, training is expressly prohibited by the terms of the MFB Agreement and discouraged by the terms of the CFA Agreement.<sup>71</sup> The UFU have completely failed to reconcile their position that full-time *hours* are necessary to maintain skills, trust and confidence in their fellow firefighters, and the fact that full-time hours are *not available* for training (or even consciousness). It is for this reason that the evidence of Mr Thomas that 42 hours a week is insufficient to meet the training needs of operational firefighters was described as ‘nonsense’ in the fire services primary submissions. Presumably neither Mr Thomas nor the UFU are seeking to remove the prohibition on night training to accommodate their concerns.<sup>72</sup>
80. Further, the argument made by the UFU, properly understood, is that absences of up to 20 per cent of the workforce at any given time is an acceptable feature of the ‘status quo’, and can be accommodated where those absences are the result of industrial outcomes negotiated with, and approved by, the UFU. Absences of any other kind, however, are an ‘inroad’ to the status quo, and to be resisted. It is not clear why part-time workers would constitute a ‘further inroad’ into the status quo. Currently, operational firefighters who wish or need to work part-time are removed from the operational workforce altogether. Retaining firefighters in operational roles on a part-time basis will constitute an *increase* in the operational workforce.
81. Finally, the UFU characterises the evidence of MFB witnesses about the magnitude of skills maintenance training as stating that the intensity of training undertaken by firefighters as “*enormous*” and “*in the thousands*”.<sup>73</sup> To describe the MFB’s training requirements for individual firefighters as in the ‘thousands’ is apt to mislead. The MFB offers thousands of training drills each year; individual firefighters participate in a minimum of four drills each 28 days, or approximately 52 drills each year. Taking annual leave only into account, the figure is closer to 42 drills per year.<sup>74</sup>

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<sup>71</sup> See MFB Agreement, 83.2.1, and CFA Agreement, 84.

<sup>72</sup> See also UFU Submissions, [126]–[127].

<sup>73</sup> UFU Submissions, [105].

<sup>74</sup> See Fire Services Submissions, [111].

***Full-time work on the 10/14 roster is not the only way***

Trust, confidence, and employee welfare

82. The fire services acknowledge the importance of the 10/14 roster to forming and maintaining teams. However, as stated in the fire services submissions from paragraph 97, the 10/14 roster is not the sole or exclusive source of team-building and maintenance in the fire services. In particular, the fire services identified numerous occasions in which firefighters do not work with a crew they know intimately, or in some cases, at all.<sup>75</sup>
83. The UFU assert this argument is a *non sequitur*, because “*firefighters’ teams remain intact*” even when working alongside other firefighters and personnel.<sup>76</sup> But the evidence was quite the opposite – firefighters regularly work in teams comprised of operational firefighters that they do not know very well, or at all, including recruits, recalled and retained firefighters, transferees, secondees, and in the case of the CFA, 35,793 operational volunteers, or 40.7 volunteers to each career firefighter.<sup>77</sup>
84. The UFU wrongly assert that part-time work will constitute a ‘further inroad’ into time spent at work. The ‘inroads’ referred to are presumably the leave entitlements outlined in the fire services primary submissions at paragraph 118, and the high levels of recalled and retained firefighters.<sup>78</sup> The UFU argue that “*the existing turnover among team members represents part of the status quo*”, and so any “*further inroads*” into the present system must have an impact on service delivery and safety.<sup>79</sup>
85. As to the first point, the existing turnover among team members is exceptionally high, with the MFB’s rates of unauthorised absenteeism the highest among emergency services in Victoria.<sup>80</sup> It is at least possible that the introduction of part-time work for Victorian firefighters may reduce these high levels of absenteeism, as

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<sup>75</sup> See Fire Services Submissions, [105].

<sup>76</sup> UFU Submissions, [86], [89].

<sup>77</sup> See Fire Services Submissions, [105]; Statement of Margareth Thomas, MFB/CFA 2, [16]: the CFA employs 879 operational firefighters and has 35,793 operational volunteers out of a total of 55,341 volunteers.

<sup>78</sup> See Fire Services Submissions, [121].

<sup>79</sup> UFU Submissions, [87], [88].

<sup>80</sup> See Fire Services Submissions, [119].

has occurred in New South Wales with the introduction of flexible working arrangements.<sup>81</sup> As to the second point, there is simply no reliable evidence that part-time work would constitute a further ‘inroad’ to service delivery and safety.

#### Secondary employment

86. The UFU suggest that permitting part-time work may give rise to the advent of secondary employment. This is the first time secondary employment has been raised as a basis of objection to the fire services’ application. The current Agreements do not prohibit secondary employment; it is possible that a degree of secondary employment exists already. In any event, as the UFU submissions note, “*the effect of secondary employment is not something that is known*”, and the argument does not assist the UFU or the Commission.<sup>82</sup>

#### Day work roster

87. The basis of the UFU’s opposition to the day work roster relies on the same arguments that underpin the union’s opposition to part-time work: that safety and service delivery will be affected by any change to the existing roster system, and that the parties’ past agreement on this issue should dictate the future progress of the matter.<sup>83</sup> The fire services refer to and repeat their submissions on those issues.
88. As stated in the fire services submissions at paragraph 39, the proposed day work clause of the draft determination mirrors the award provisions applying to the private sector. The new roster is intended to act as a consequential change to enable regular and predictable part-time work. Although the 10/14 roster is predictable, it is not regular. Mr Connellan gave evidence about the issues this can cause for employees with caring responsibilities for young children – it is simply not possible to book childcare places on a roster that moves forward one day each week.<sup>84</sup>
89. Part of the purpose of permitting part-time employment for operational firefighters is to allow firefighters with caring responsibilities to return to work in a way that utilises their training as operational firefighters, as well as ensuring that skills,

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<sup>81</sup> See Fire Services Submissions, [56].

<sup>82</sup> UFU Submissions, [91].

<sup>83</sup> See UFU Submissions, [92]–[99].

<sup>84</sup> See Fire Services Submissions, [69].

experience and exposure to opportunities for promotion are maintained. Some employees with caring responsibilities may have arrangements that make it possible to work part-time on the 10/14 roster. However, it is possible that others will not. There is little practical purpose in offering part-time work expressly for the purpose of retaining skilled operational firefighters with caring responsibilities, if they are unable to accommodate those responsibilities within an incompatible roster.

90. Where an operational firefighter is willing and able to perform operational duties but only on a part-time basis during the day, the modern award should be able to facilitate this on an arrangement that is suitable to the employee. This arrangement will not always be the 10/14 roster.

#### **OTHER RELEVANT MATTERS**

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##### *Matters raised by the UFU*

##### Part-time work should only be allowed with qualifications

91. The UFU argue that if the ban on part-time work is removed from the modern award, then it should be accompanied by qualifications such including that part-time employment should only be permitted above minimum crewing, as part of the 10/14 roster, and for specific purposes.<sup>85</sup>
92. This argument should be rejected. The qualifications identified by the UFU are said to be those of “*the vast majority of UFU witnesses*”, rather than any proper consideration of the needs of the whole of the MFB and CFA workforce, and the respective fire services.<sup>86</sup> It is appropriate for the modern award to state the general principle that part-time work is permitted, and to allow enterprises to implement the employment arrangement in a way that is appropriate to that organisation, as has occurred in other states. Moreover, the qualifications sought by the UFU could impact on part-time arrangements in the Australian Capital Territory and the Northern Territory, where the *Fire Fighting Industry Award* is the applicable modern award.

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<sup>85</sup> See UFU Submissions, [55(ii)].

<sup>86</sup> UFU Submissions, [55(ii)].

### Experience of UFU witnesses

93. The UFU acknowledge that their witnesses have no experience of working part-time. However, the UFU claim that their witnesses' did give evidence of working alongside part-time employees in other services, and with volunteers, and this experience "*confirm[ed] their views*" that anything less than full-time employment on the 10/14 roster affected their skill proficiencies, teamwork, service delivery, and safety,<sup>87</sup> or, in other words, that part-time and volunteer employees were less competent and represented a threat to teamwork and proficiency.
94. These assertions are not borne out by the evidence.
95. No UFU witnesses gave any evidence of working alongside any part-time firefighter. No UFU witness was aware of whether or not they had worked alongside any part-time employee of Victoria Police or Ambulance Victoria. All UFU witnesses who acknowledged working with Victoria Police or Ambulance Victoria spoke highly of the skills and professionalism of those employees, and stated that their employment arrangements made no difference to their proficiency.<sup>88</sup> All UFU witnesses employed by the CFA gave evidence that they had worked alongside volunteers and did not state that they found the experience put them at risk or impacted service delivery.<sup>89</sup>

### ***The constitutional limitation***

96. The UFU criticises the fire services' reliance on the statements by the High Court in the *Native Title Act* on the basis that the High Court "*was clearly there paraphrasing the ratio from Re AEU*" and did not "*overrule or qualify in any way the rest in Re AEU*".<sup>90</sup>
97. These submissions are fundamentally in error. The High Court delivered its reasons for judgment in the *Native Title Act* case<sup>91</sup> before judgment was delivered in *Re AEU*.<sup>92</sup>

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<sup>87</sup> See UFU Submissions, [128], [131].

<sup>88</sup> See Fire Services Submissions, [106].

<sup>89</sup> Fire Services Submissions, [105(f)].

<sup>90</sup> See UFU Submissions, [134].

<sup>91</sup> 16 March 1995.

98. The statements of principle by the High Court about the implied limitation in the *Native Title Act* upon which reliance is now placed by the fire services were referred to with approval in both *Austin*<sup>93</sup> and, more recently, in *Fortescue*.<sup>94</sup>
99. The UFU otherwise adopts its primary submissions in relation to *Re AEU*. Insofar as those submissions are not already addressed by the fire services in their primary submissions, the fire services rely on their submissions in reply dated 18 April 2016 (see at [48]-[54]).

**Date:** 14 June 2016

**S Moore**

**K Burke**

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<sup>92</sup> 7 April 1995.

<sup>93</sup> *Austin v Commonwealth* (2003) 215 CLR 185 at [146] per Gaudron, Gummow and Hayne JJ.

<sup>94</sup> *Fortescue Metals Group Limited v Commonwealth* (2013) 250 CLR 548 at [132] per Hayne, Bell and Keane JJ. See the fire services' primary submission at [145].