

**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 IN SUPPORT OF INTERVENTION

INTRODUCTION

1. These submissions are made on behalf of the Minister for Emergency Services, the Hon Jaclyn Symes MLC (**Minister**) pursuant to Order 1 of the directions of the President dated 25 October 2023.
2. They address the issue of whether the Minister should be given leave to make written and oral submissions and adduce evidence (**intervene**) in respect of:
 - (a) the preliminary issue determining the agreed terms and the matters at issue that the Full Bench of the Fair Work Commission (**Commission**) will need to proceed to determine in the course of making the intractable bargaining workplace determination (**preliminary issue**); and
 - (b) the hearing of the intractable bargaining workplace determination itself;pursuant to section 590 of the *Fair Work Act 2009* (Cth) (**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 Commission on 26 September 2023.
4. The Full Bench recognised that, for the purposes of the application for an IBD, the Minister had a sufficiently "significant" interest to warrant intervention under section 590 of the *FW Act*.¹

¹ *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180, [1], footnote 2.

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 25 October 2023, the Full Bench made directions listing the matter for a preliminary hearing to determine:
 - (a) whether the Minister is permitted to intervene 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.
7. For the reasons outlined below, the Minister, who has statutory responsibility for Fire Rescue Victoria (**FRV**), has a sufficient interest in respect of the determination of the preliminary issue and the intractable bargaining workplace determination itself, to warrant her being given leave to make written and oral submissions and adduce evidence pursuant to section 590 of the *FW Act* and the Commission should exercise its discretion to allow her to do so.

Relevant principles

8. Section 590 of the *FW Act* confers on the Commission a broad power to inform itself in relation to any matter before it in such manner as it considers appropriate.² The Commission may make decisions as to how a matter is dealt with, is not bound by the rules of evidence or procedure and performs its functions and exercises its powers in a manner which is informal, open and transparent.³
9. Having regard to the breadth of the Commission's powers, the power under section 590 to hear from a non-party does not require a person to establish that their legal interests would be "*directly affected by a decision in the proceeding, that is one who would be bound by the decision*", as was contended by the UFU in its opposition to the Minister's intervention in the application for the IBD.⁴
10. Indeed, in *Construction, Forestry Maritime, Mining and Energy Union v Collinsville Coal Operations Pty Ltd* [2014] FWCFB 7940 (**Collinsville**), in considering an appeal on the question of the union's right to be heard in an application for the approval of an enterprise agreement, the Full Bench recognised that the Commission may, in the exercise of its powers under section 590 of the *FW Act*, choose to hear from a person even though the person may not otherwise have a right to be heard.⁵ The Full Bench in *Collinsville* relevantly stated:

² *FW Act*, s 590.

³ *FW Act*, ss. 577(b) and (c), 589(1) and 591.

⁴ UFU's Submissions in Response filed on 21 September 2023 at [6].

⁵ *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWCFB 7940 at [75].

[75] **We would make the observation however, that the Commission may choose, in a particular case, to hear from an employee organisation or any other person about the approval of an agreement even though the organisation or person may not otherwise have a right to be heard. The Commission has a broad power to inform itself in relation to any matter in such manner as it considers appropriate**, including by inviting oral or written submissions from a person of [sic] organisation. In this case the Senior Deputy President chose to exercise that power by permitting the CFMEU to be heard on the question of whether the Agreement passed the BOOT.

(Emphasis added. Citations omitted.)

11. As is apparent from this passage, the Commission has exercised the discretion under section 590 to hear from non-parties in the context of applications for approval of enterprise agreements. In so doing it has noted that “*the FWC is required to ensure that the Proposed Agreement complies with the [FW Act] and the resolution of the concerns which have been identified should be conducted with transparency and appropriate rigour.*”⁶ The Minister submits that the need for rigour applies equally, if not more so, in the current application, which will be resolved by the exercise of the Commission’s arbitral power under Part 2-5 of the *FW Act*.
12. Further, where the Commission is satisfied that the Minister has a sufficient interest beyond that of an ordinary person to make written and oral submissions and adduce evidence in respect of a proceeding, permission to do so should be granted pursuant to section 590 of the *FW Act*. This is the case whether or not there was an entitlement to make submissions under s.597A, of the *FW Act*.⁷

The Minister’s interest in the proceeding

13. The Minister has a sufficient interest in the determination of the preliminary issue and the intractable bargaining workplace determination itself to warrant being given leave to make written and oral submissions and adduce evidence for the following reasons.
14. *First*, the preliminary hearing raises questions regarding the impact of bargaining parameters set by the Wages Policy on what FRV had authority to agree to, for the purposes of ascertaining the agreed terms for the intractable bargaining workplace determination and the matters at issue.
15. The Government’s enterprise bargaining framework and wages policy applies to all departments and public sector bodies of the State of Victoria, including public sector agencies, such as FRV.⁸ Of particular significance for the purposes of the preliminary hearing, the Wages Policy requires that:

⁶ *Broome Marine Tug Pty Ltd* [2021] FWC 2318 at [14] citing *Inco Ships Pty Ltd* [2016] FWC 1637 at [25].

⁷ *Livende Inc v Health Services Union* [2014] FWCFB 8089 at [21].

⁸ Statement of Jo Crabtree dated 5 September 2023 read into evidence and marked Exhibit 5 (**Exhibit 5**), [29].

- (a) all offers should be made on an in-principle basis;⁹
 - (b) the offer is subject to government approval;¹⁰ and
 - (c) to be approved by Government a proposed agreement must meet all the conditions specified in Wages Policy.¹¹
16. The Minister understands that bargaining for the Proposed Operational EA has been conducted within the Government's enterprise bargaining framework, including that FRV made it clear to all bargaining representatives, including the UFU, that any proposed final agreement would be subject to approval by the Government.¹² The UFU has acknowledged that it was aware that FRV considers itself bound by the Government's wages policy and that it was constrained by Government.¹³
17. The Government has a strong interest in preserving Government approval and authorisation processes under the Wages Policy. It also has a strong interest in ensuring that agreements entered into by Government agencies comply with the Wages Policy, including that they are fiscally sustainable and fully funded from capped indexation revenue and/or appropriate cost offsets. In the circumstances, the Minister has a special interest in seeking to be heard on the proper application of section 274(3) of the *FW Act* as the determination of the preliminary hearing will have broader implications and impact on the Government's Wages Policy.
18. By analogy, in *Liviende Inc v Health Services Union* [2014] FWCFB 8089, the Full Bench was satisfied that the Minister for Planning and Local Government on behalf of the State of Tasmania had a sufficient interest beyond that of an ordinary person to grant permission for the Minister to make submissions under section 590 of the *FW Act*.¹⁴ In making its decision, the Full Bench had regard to the Minister's submissions that the Minister funded the relevant Appellant and a range of other providers to deliver supported accommodation and the appeal raised questions of the ongoing viability of the Appellant and had broader implications and impact on the delivery of disability support services in the State of Tasmania.¹⁵
19. *Second*, and further to the above, as the Minister responsible for FRV, the Minister has an interest in the terms to be included in the intractable bargaining workplace determination and

⁹ Exhibit JC-1, Attachment 1, p. 10; Attachment LC-16, p.1337.

¹⁰ Ibid.

¹¹ Exhibit JC-1, Attachment 1, p. 10; Attachment LC-16, p.1335.

¹² FRV's Outline of Submissions dated 5 September 2023 (**FRV's Submissions**), [10]; Exhibit 5, [43].

¹³ Statement of Laura Campanaro dated 11 August 2023, which was read into evidence and marked Exhibit 1 (**Exhibit 1**), [15], [71]; UFU's Submissions dated 14 August 2023 (**UFU's Submissions**), [52].

¹⁴ *Liviende*, [21].

¹⁵ *Liviende*, [20].

may assist the Commission in its consideration of the matters set out in Part 2-5 of the *FW Act*, including the factors under section 275 of the *FW Act*.

20. 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.¹⁶
21. The Minister also has responsibility for the Country Fire Authority (**CFA**), which is established under section 6 of the *Country Fire Authority Act 1958* (**CFA Act**) and is responsible for the more effective control of the prevention and suppression of fires in the country area of Victoria.¹⁷ FRV employs the operational firefighters, who are seconded to CFA.¹⁸ The intractable bargaining workplace determination will cover and apply to FRV and its employees, including those operational firefighters seconded to the CFA.
22. The Minister's portfolio includes:
 - (a) responsibility for administering the FRV Act and the CFA Act;
 - (b) having general direction and control over FRV and CFA in respect of the performance of its duties and functions, including the exercise of powers by FRV, CFA and the Fire Rescue Commissioner;¹⁹ and
 - (c) accountability for FRV's and CFA's budget and financial management.²⁰
23. Having regard to the above, the Minister can assist the Commission in its consideration of the factors to be taken into account in deciding which terms to include in the intractable bargaining workplace determination, which will cover and apply to FRV employees, including those working in FRV and operational employees seconded to the CFA. Given the scope of the Minister's responsibilities in respect of both FRV and the CFA, she is well placed to put submissions and potentially adduce evidence in respect of those factors, including the merits, productivity and public interest associated with various terms that might be included in the intractable bargaining workplace determination. In respect of the last of these factors, it is noteworthy that the public interest under section 275(d) of the *FW Act* "imports a discretionary value judgment confined only by the subject matter, scope and purpose of the [FW Act] and refers to matters that may

¹⁶ Section 7 of the *FRV Act*.

¹⁷ Section 6(a) of the *CFA Act*.

¹⁸ Section 25C of the *FRV Act*; section 6F of the *CFA Act*.

¹⁹ Section 8(1) of the *FRV Act*; section 6A of the *CFA Act*.

²⁰ The Minister is the "relevant Minister" for FRV and CFA (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 the *FRV Act*. CFA's financial accountability and reporting obligations are set out in Part 7 of the *CFA Act*.

*affect the public as a whole such as the achievement or otherwise, of the objects of the [FW Act], employment levels, inflation and the maintenance of appropriate industrial standards.*²¹

24. One matter at issue is the level of wage increases to be included in the intractable bargaining workplace determination. The Wages Policy, and the wage increases permitted under the policy, is a highly relevant consideration, which should be accorded appropriate weight having regard to the size of the Victorian public sector and the role of the Government in allocating scarce resources to various public services.²² The Minister, on behalf of the State of Victoria, is very well placed to make submissions and adduce evidence on the rationale and public interest implications of the Wages Policy.
25. In respect of this reason also, the approach adopted in *Livende Inc v Health Services Union* [2014] FWCFB 8089, supports the Minister being given leave to make written and oral submissions and adduce evidence.
26. *Third*, the Minister provides a perspective independent of and different to FRV and the UFU.²³
27. Whilst it is anticipated that there may be some overlap between the submissions put by FRV and those put by the Minister, the Minister and FRV differ in the perspectives from which they approach the issue of the operation of the Wages Policy and the intractable bargaining workplace determination, more generally. The Minister's perspective encompasses the potential impact of terms of the intractable bargaining workplace determination on other Government agencies including other emergency services agencies, such as the CFA.²⁴ In addition, the Minister's perspective is informed by the impact of compliance with Wages Policy on Government more generally.
28. *Fourth*, pursuant to section 270(3) of the *FW Act*, the Commission will be required to include in the intractable bargaining workplace determination terms that the Commission considers deal with the "matters at issue" after the end of the post-declaration negotiating period. In doing so, 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 considered. The Minister, on behalf of the State of Victoria, should be given an opportunity to address the Commission on any potential constitutional issues that may arise.
29. Finally, the UFU, in its application for an IBD, appeared to recognise the separate role of Government in bargaining and the significance of the Wages Policy by its repeated references

²¹ *Commonwealth of Australia as represented by the Department of Home Affairs* [2019] FWCFB 143 at [33] citing *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 (***Parks Victoria***) at [49]-[50]; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Randall v Australian Taxation Office* (2010) 198 IR 114 at [11].

²² *Parks Victoria* at [207].

²³ See, by analogy, *Ausdrill Limited* [2018] FWC 444 at [11].

²⁴ See, for example, the following clauses of the Proposed Operational EA: Infrastructure agreement (Clauses 15.5.13, 73.6, 95 and Schedule 19), Operational and Management Support to the CFA (Clauses 15.1-15.3, 15.9 and Schedule 10 and 11) and Third Party Volunteer Support Programs/Officers (Clause 31).

to those matters in the UFU's Submissions. The UFU refers to the position of the Government in relation to aspects of bargaining,²⁵ the Victorian Government's new Victorian Wages Policy and its impacts upon the UFU's Efficiencies Allowances Claim²⁶ and directions from the Government impacting upon bargaining.²⁷ The Minister should be given the opportunity to address these issues.

CONCLUSION

30. For the reasons outlined above, the Commission should exercise its discretion under section 590 of the *FW Act* to grant leave to the Minister to make written and oral submissions and adduce evidence in respect of the determination of the preliminary issue and in respect of the intractable bargaining workplace determination itself.

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²⁵ UFU's Submissions, [21(d)], [49(c)-(f)].

²⁶ UFU's Submissions, [26], [51].

²⁷ UFU's Submissions, [22(b)], [51].