

IN THE FAIR WORK COMMISSION

MATTER: B2023/771

Applicant: United Firefighters' Union of Australia

Respondent: Fire Rescue Victoria

Submissions of the UFU in Reply

1. These submissions are filed by the UFU pursuant to Order 5 of the Directions made on 25 October 2023 in relation to the preliminary questions¹, in reply to the submissions of the FRV dated 17 November 2023 (**FRV Submissions**) and the provisional submissions of the Minister dated 17 November 2023 (**Minister's Submissions**). They are to be read as supplementary to the UFU's submissions dated 17 November 2023 (**UFU Submissions**).
2. The UFU joins issue on the preliminary questions, namely:
 - (a) the proper meaning of the expression "agreed term" for the purposes of s.274 of the Act (**the construction question**); and
 - (b) the matters that fall within the expression "agreed term", and the matters "that were still at issue" for the purposes of s.270(3) of the Act (**the factual question**).
3. For the reasons that follow, the FRV and the Minister have misconstrued the Act and, as a result, take the erroneous position that there are no agreed terms.
4. The Commission should find that all terms identified as agreed in Version 14 of the draft Enterprise Agreement dated 26 July 2023 were agreed terms for the purposes of s.274.²
5. The only matters that were still in issue at the conclusion of the post-declaration negotiating period were the quantum of wages and allowances, and the funding for the minimum staffing provisions (the terms of which were otherwise agreed).³

The Construction Question

6. The FRV submits that "there are, regrettably, no "agreed terms" within the meaning of s 270(2) of the FW Act".⁴ This result is said to follow because, it submits, "terms previously agreed in-principle in the course of bargaining" were subject to the two

¹ The "preliminary issues" are those identified in the Directions of 25 October 2023 at [3(a)(i)-(ii)].

² The Third Statement of Laura Campanaro at [69], LC-11 (referred to as the "revised Version 14").

³ The Third Statement of Laura Campanaro at [143], [151]; UFU's Position Paper.

⁴ FRV Submissions at [4(a)], [36]. at [9], [85]-[93]; The Minister takes the same position: Minister's Submissions at [9], [85]-[93]; Minister's Position Paper at [2]-[3].

unfulfilled conditions, namely that there be (i) overall agreement on a package of terms; and (ii) Victorian Government approval.⁵

7. Both the FRV and the Minister submit that, because these conditions remain unfulfilled, there can be no “agreed term” for the purposes of s.274 of the Act.
8. For the reasons that follow, this submission must be rejected. Each condition qualified the making of an enterprise agreement. The conditions did not qualify the agreement of the bargaining representatives to include individual terms in the draft agreement. It is the latter situation that the provisions of Part 2-5 of the Act operate upon.

The principles of statutory interpretation

9. The UFU firstly relies on the principles in paragraph 11 of the UFU Submissions. Secondly, the UFU agrees with the second and third sentences of paragraph 32 of the FRV Submissions and adds that the aim of statutory interpretation is to give effect to a construction that promotes the statutory purpose.⁶ The task is to give the words of a statutory provision the meaning that the legislature “is taken to have intended them to have”.⁷
10. In order to achieve this purpose, the inquiry is directed to the textual and contextual meaning of the words used.⁸ The relevant context includes the mischief which the statute was designed to overcome, the objects of the legislation, the legislative history, extrinsic materials, and the state of the law at the time that the statutory provision was enacted.⁹

The Statutory Purpose of the Intractable Bargaining Provisions

11. Section 274(3) relevantly provides that “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”.
12. The UFU has submitted that s.274 and the expression “agreed term” should be construed in a purposive manner in order to address the mischief to which the intractable bargaining provisions are directed.¹⁰ That is, to resolve impasses in bargaining for an enterprise agreement by the mechanism of a determination, whilst giving full effect to terms that are agreed by the bargaining representatives.

The Statutory Context

⁵ FRV Submissions at [4(a)].

⁶ *Lacey v Attorney-General of Queensland* [2011] HCA 10; 242 CLR 573 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

⁷ *Project Blue Sky v ABA* [1998] HCA 28; 194 CLR 355 at [78] (McHugh, Gummow, Kirby & Hayne JJ).

⁸ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] (Kiefel CJ, Nettle & Gordon JJ).

⁹ *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell & Gageler JJ); *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; 218 CLR 273 at [11]-[12] (McHugh ACJ, Gummow & Hayne JJ).

¹⁰ UFU Submissions at [11]-[26].

13. The UFU has submitted that the statutory context militates in favour of a less legalistic interpretation of the expression “agreed term” than that advanced by the FRV and the Minister.¹¹ The FRV submits, on the basis of a dictionary definition, that the expression requires a “determined or settled agreement”.¹² However that approach is entirely unhelpful because it overlooks the context in which the concept of “agreed terms” is to operate, as explained in paragraphs 21 and 22 of the UFU Submissions. There is no engagement by the FRV Submissions with that context and the outcome therefore falls into error.
14. There is a complete overlooking by FRV and the Minister of the purpose of the intractable bargaining provisions as an aid and adjunct to the statutory scheme for enterprise bargaining. As such it should be construed and applied consistently with the way in which enterprise bargaining works. At the time the UFU and the FRV were bargaining for their enterprise agreement there could not be a finally agreed term because the terms can only be finally agreed by a ballot of the employees to be covered by it. When the intractable bargaining provisions are applied to the bargaining history, they should be seen as operating on the bargaining history within that paradigm. The first sentence of paragraph 34 of the FRV Submissions exposes this constructional error of FRV.
15. The second and third sentences of paragraph 34 of the FRV Submissions compound the foregoing error by introducing the term “consensus” without explaining what is meant by it in this context. There is then a complaint about frustration of its flawed purpose, if bargaining representatives were held to agreements that they made during bargaining about particular terms which are subject to “contingencies or conditions that never eventuate”. The FRV’s analysis is mistaken for the reasons explained in the UFU Submissions and above.
16. The FRV’s reliance on *ALAEA v Qantas* is also mistaken. It misstates the finding of the Full Bench in paragraph 18 of the decision. The Full Bench was dealing with a specific situation where there was a specific trade-off of certain terms for others. That is not the situation in this case. The reference to “a suitable overall package” (cited in the FRV Submissions) appears in the sentence which reads: “There may be circumstances where agreement to a matter subject to an overall satisfactory package might mean that matter is an agreed matter with the meaning in s 267(2) of the Act”.
17. Another flaw in the submissions of the FRV and the Minister is the failure to recognise that the focus of section 274 is on “a term” and not on an overall agreement. Section 274(3) provides that an “agreed term” is “a term” that the bargaining representatives had “agreed should be included in the agreement”. That provision directs attention to the identification of “a term” which the parties agreed “should” at some future time be included in the agreement.¹³

¹¹ UFU Submissions at [12]-[23], [62]-[63]; cf FRV Submissions at [32]-[34]; Minister’s Submissions at [90].

¹² FRV Submissions at [33].

¹³ UFU Submissions at [12].

18. The FRV and the Minister posit an erroneous construction of s.274 that elides the difference between the concept of agreement upon the desirability of the inclusion of a single term in an agreement (as s.274 requires), and the concept of a binding, overall agreement.¹⁴
19. The elision of these concepts is apparent when the Minister submits that “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”.¹⁵
20. The Minister’s Submission fails to grapple with the focus of s.274 upon a single term where there is no “binding” overall Agreement, and irrespective of whether other terms (including essential terms) remain in issue. The acceptance of such a construction would effectively undermine the purpose and object of the intractable bargaining provisions because an application under those provisions is only made when the bargaining representatives have been unable to reach an overall binding agreement; it would mean that in all cases, all terms of a proposed agreement would need to be arbitrated, and that cannot have been the intention of the legislature.

Agreement “in principle”

21. The FRV and the Minister submit that the provisions should not be construed such as to give recognition to agreement on terms in principle or subject to any qualifications.¹⁶ The Minister also submits that “bargaining will be impeded” if parties negotiating on a conditional 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*”.¹⁷
22. These submissions, if accepted, would allow parties to undermine the statutory purpose for the reasons previously submitted.¹⁸
23. Their complaint is based on a misunderstanding of the UFU’s position. There will always need to be an assessment of whether a term is agreed or only agreed subject to other matters being resolved. That will involve an objective assessment of what passed between the bargaining representatives. Such an approach strikes a balance between promoting the evident purpose of the legislation without imposing terms on parties which have not truly been agreed.

¹⁴ FRV Submissions at (eg) [33]-[34], [36]-[37]; Minister’s Submissions at [90].

¹⁵ Minister’s Submissions at [101].

¹⁶ FRV Submissions at [34]-[36]; Minister’s Submissions at [85]-[86], [88]-[90].

¹⁷ Minister’s Submissions at [104]-[105]; see also FRV Submissions at [34].

¹⁸ UFU Submissions at [23].

The word “should” in s.274

24. The UFU has advanced submissions on the importance of the word “should” in the context of s.274.¹⁹ Neither the FRV nor the Minister address the temporal aspect of the statutory language.
25. The choice of the conditional “should”, as opposed to the imperatives “must” or “shall”, indicates that the verb is intended to identify the normative position taken by the parties. That is, an agreement on the desirability of the inclusion of a term in the proposed agreement.
26. Such a construction is apt to embrace circumstances where qualifications or conditions may be attached to the making of an overall agreement. That is because s.274 directs attention to what the parties have agreed to in respect of a single term, and not to any broader agreement. This follows axiomatically because the intractable bargaining provisions necessarily assume that no overall agreement has been reached.²⁰

Conclusion on the construction question

27. The provisions of Part 2-5 are remedial and designed to address the mischief of intractable bargaining. As such, they should be construed such as to give the “fullest relief which the fair meaning of its language will allow”.²¹
28. The UFU’s construction in that regard serves to identify the point at which the bargaining representatives arrived when bargaining became intractable.
29. The construction sought by the Minister and the FRV would lead to an outcome where there are no agreed terms notwithstanding three years of intensive bargaining. Such an anomalous consequence should not be attributed to parliament’s intent.²²

The Factual Question

30. The evidence will show that the parties engaged in extensive negotiations over the period of three years, including with the assistance of the Commission. In the course of those negotiations, the parties developed a draft agreement which progressed through numerous iterations culminating in version 14. After each iteration, the matters in issue were progressively settled and included in a “Master Copy” of the draft agreement such that, at the time of lodging the UFU’s application for a workplace determination, the only terms in issue were the quantum of wages and allowances.²³
31. The Minister’s chronology of bargaining omits critical matters.²⁴ The relevant events are as follows:

¹⁹ UFU Submissions at [13]-[15].

²⁰ Section 258 of the Act.

²¹ P. Herzfeld, T. Prince and S. Tully, “Interpretation and Use of Legal Sources - The Laws of Australia” (Thomson Reuters, 2013) at [25.1.3210].

²² P. Herzfeld, T. Prince and S. Tully, “Interpretation and Use of Legal Sources - The Laws of Australia” (Thomson Reuters, 2013) at [25.1.880].

²³ Third Statement of Laura Campanaro at [29].

²⁴ Minister’s Submissions from [28]-[52] (to the point of the FRV’s offer of 7 August 2023).

- (a) **July 2020 – April 2022:** Bargaining commenced in or about July 2020 in what was treated as the informal bargaining period.²⁵ Some 32 meetings took place between the bargaining representatives in the informal bargaining period.²⁶ The Commission should note the following matters from this period:
- (i) The parties developed numerous iterations of the Master Copy of the draft agreement during this period, such that there were only 20 non-quantum matters remaining at issue at the conclusion of it, with all other non-quantum matters treated as agreed in Version 9 of the draft agreement.²⁷
 - (ii) There was never any condition or qualification attached to the agreement of the terms included in the Master Copy in this period.²⁸
 - (iii) The FRV makes no assertion to the contrary. It relies upon no material in chief in the form of contemporaneous, first-hand accounts from any person present during the informal negotiation period.²⁹
- (b) **26 April 2026 – July 2023:** Bargaining continued in what was treated as the formal bargaining period.³⁰ At least 44 further meetings took place between the bargaining representatives in this period.³¹ An “Agreed” Bargaining Charter was tabled by FRV at the commencement of formal bargaining.³² The Commission should note the following matters from this period:
- (i) The parties commenced formal negotiations using Version 9, and developed a further 5 iterations of the Master Copy of the draft agreement during this period (to Version 14), such that there were no non-quantum matters remaining at issue at the conclusion of it.
 - (ii) The Bargaining Charter dated 26 April 2022 does not make any reference to the fundamental notion that the negotiations would proceed on an all-or-nothing basis. The apparent need for government approval on each term negotiated, or prior to any offer made by the FRV, is not referred to.³³

²⁵ First Witness Statement of Jo Crabtree at [28].

²⁶ Third Statement of Laura Campanaro at [7], [30]-[33].

²⁷ Third Statement of Laura Campanaro at [99]; LC-16; see also at [32].

²⁸ Second Statement of James Kefalas at [9]; Third Statement of Laura Campanaro at [7], [50].

²⁹ *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 at pp.309-310; The persons present at bargaining meetings in this period are identified in the Third Statement of Laura Campanaro at [7], [22]-[24].

³⁰ Third Statement of Laura Campanaro at [8].

³¹ Third Statement of Laura Campanaro at [34]; see also [8], [64].

³² Third Statement of Laura Campanaro at [18].

³³ Third Statement of Laura Campanaro at [10]-[19], LC-2; The FRV makes no mention of the Bargaining Charter in its submissions or its materials in chief.

- (iii) To the contrary, the Bargaining Charter includes an item that: “*Parties to present any proposals for proposed Enterprise Agreement*”³⁴; and that a record be kept of “*Matters and actions agreed*”.³⁵
 - (iv) That is, what was proposed by the FRV was a protocol for negotiating an Enterprise Agreement, which included a means of recording what was “agreed” between the parties. That is what occurred thereafter.
- (c) **10 May 2022:** A formal bargaining meeting took place.³⁶ The FRV responded to Version 9 of the draft agreement at that meeting and over the ensuing weeks.³⁷ The Commission should note the following:
- (i) The FRV’s response makes reference to Version 9 and notes the FRV’s position in respect of some 274 clauses and 40 Schedules.
 - (ii) In respect of each matter, the FRV noted whether the term was “Agreed”, “Not Agreed”, or made a comment as to any amendment sought. No condition or qualification was attached to the FRV’s agreement on the terms in the draft agreement.
 - (iii) Version 9 confirmed agreement between the UFU and the FRV in respect of “over 90% of all matters”.³⁸
- (d) **11 August 2022:** After further bargaining, the UFU recorded the position of the parties in Version 10 of the proposed Agreement.³⁹ The Commission should note the following:
- (i) Version 10 recorded agreement between the UFU and the FRV in respect of “over 90% of all matters”.⁴⁰
 - (ii) No qualification or reservation had, to date, ever been expressed by the FRV in respect of its agreement to include terms in the proposed agreement.⁴¹
- (e) **16 August 2022:** From this date, the FRV commenced referring to “agreement in-principle” and introduced qualifications to its agreement based on the need for government approval under the Wages Policy.⁴² The Commission should note the following:

³⁴ Third Statement of Laura Campanaro at LC-2 (page 2, item 4 of the meeting of 26 April 2022).

³⁵ Third Statement of Laura Campanaro at LC-2 (page 4, paragraph 4 (“Bargaining Meeting Process”)).

³⁶ Third Statement of Laura Campanaro at [32], LC-4.

³⁷ Third Statement of Laura Campanaro at [34]-[38], LC-5, LC-6, LC-7.

³⁸ Third Statement of Laura Campanaro at [32].

³⁹ Third Statement of Laura Campanaro at [54].

⁴⁰ Third Statement of Laura Campanaro at [56].

⁴¹ Third Statement of Laura Campanaro at [57].

⁴² Third Statement of Laura Campanaro at [60], LC-10.

- (i) The FRV indicated that, in respect of Version 10, “*a range of substantive matters now await instruction to FRV by the State Government*”.⁴³
 - (ii) The “substantive matters” referred to in the FRV’s response were all related to quantum aside from the Firefighters’ Registration Board clause.⁴⁴ No qualifications were identified in respect of the matters that had been agreed to that date.
- (f) **November 2022:** The parties had further narrowed the matters in issue and had highlighted the agreed terms in Version 12.⁴⁵ The Commission should note the following:
- (i) The FRV’s response to Version 12 identified only 10 matters, including quantum of wages and allowances, that “remain unresolved”.⁴⁶ The terms relating to minimum staffing numbers had been agreed at this stage, subject to government funding.⁴⁷
 - (ii) The FRV indicated in its response that the balance of “*clauses as set out in the UFU revised Log V12 unless otherwise commented upon below, are agreed in principle by FRV*”. The in-principle agreement was identified as being “*subject to final agreement on an overall package of provisions*” and “*proceedings in C2022/5683 (Efficiencies Allowance matter)*”.⁴⁸
 - (iii) No reference was made in the FRV’s response to the need for Government approval or the Wages Policy other than in respect of terms that relate to “Wages and Allowances”.⁴⁹
- (g) **3 February 2023:** Commissioner Wilson issued a Statement in the s.240 proceedings commenced by the FRV.⁵⁰ The Commission should note that:
- (i) The Commissioner recorded that, when the matter was referred to him on 4 November 2022, “*the principal parties, the FRV and UFU, had reached agreement on all but 10 issues*”.⁵¹
 - (ii) The Commissioner indicated that another conference was scheduled and that, in his view, it was “*desirable that before that date and time the parties*

⁴³ Third Statement of Laura Campanaro at [60], LC-10. This was narrowed

⁴⁴ Third Statement of Laura Campanaro at [61]-[62], LC-10.

⁴⁵ Third Statement of Laura Campanaro at [66]-[67]; First Witness Statement of Jo Crabtree at [49].

⁴⁶ First Witness Statement of Jo Crabtree at JC-1, Attachment 7 (page 1 of 6).

⁴⁷ Third Statement of Laura Campanaro at [48]-[49], LC-9; Second Statement of James Kefalas at [18]-[28].

⁴⁸ First Witness Statement of Jo Crabtree at JC-1, Attachment 7 (page 2 of 6).

⁴⁹ First Witness Statement of Jo Crabtree at JC-1, Attachment 7 (page 1 of 6 at [1]).

⁵⁰ Third Statement of Laura Campanaro at [79]-[81].

⁵¹ Third Statement of Laura Campanaro at [83], LC-13 at [4].

*endeavour to resolve to finality all of the non-wages matters that have been under discussion in the conciliation conferences to date”.*⁵²

- (iii) That is, the Commissioner understood that there was capacity to “*resolve to finality*” all of the non-wage matters notwithstanding that “*final agreement on an overall package of provisions*” would not at that point have been achieved.
 - (h) **10 March 2023:** The FRV made an Offer to the UFU.⁵³ The Commission should note that, consistent with the Commissioner’s Statement of 3 February 2023 that all remaining non-wage clauses should be finalised, the FRV’s offer was in respect of the quantum of wages only.
 - (i) **19 June 2023:** Commissioner Wilson issued a further Statement in the s.240 proceedings commenced by the FRV.⁵⁴ The Commission should note that:
 - (i) The Commissioner noted 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*”.⁵⁵ No qualification or condition was noted.
 - (ii) Neither the FRV or the Minister take issue with the correctness of the Commission’s Statements of 3 February 2023 and 19 June 2023.⁵⁶
 - (j) **27 June 2023 – 26 July 2023:** Version 14 of the proposed Agreement was produced and revised.⁵⁷ The Commission should note that:
 - (i) Version 14 was the final version of the proposed Agreement and recorded that the parties had agreed upon every clause, save for quantum.⁵⁸
 - (ii) The UFU commenced these proceedings on 28 July 2023.
32. The preceding matters establish that, at least by 26 July 2023, agreement was reached between the bargaining representatives for the purpose of s.274 on all matters except the quantum of wages and allowances.⁵⁹

The relevance of the Government Wages Policy to s.274

⁵² Third Statement of Laura Campanaro at [83], LC-13 at [4].

⁵³ Third Statement of Laura Campanaro at [121], LC-20.

⁵⁴ Third Statement of Laura Campanaro at [79]-[81], LC-15.

⁵⁵ Third Statement of Laura Campanaro at [2].

⁵⁶ FRV Submissions at [12]; Minister’s Submissions at [38], [52].

⁵⁷ Third Statement of Laura Campanaro at [69], [91].

⁵⁸ Third Statement of Laura Campanaro at [70], [146].

⁵⁹ FRV Submissions at [12].

33. The FRV submits that the ““agreement” by FRV to all terms prior to the 7 August Offer was, consistent with the requirements of the Wages Policy, only ever in-principle and subject to specified conditions”.⁶⁰ These qualifications are relied upon to support submissions that there were no agreed terms.
34. The bargaining agents commenced formal bargaining under the 2019 Wages Policy.⁶¹ The 2019 Wages Policy relevantly provided that “[a]ll 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”.⁶²
35. That language was reproduced in a provision of the 2023 Wages Policy.⁶³ This provision is relied upon by both the FRV and the Minister to support their submissions that there was not a single “agreed term”.⁶⁴
36. There is a live issue in the proceedings as to whether the FRV communicated any such condition in respect of non-quantum terms.⁶⁵ The UFU’s evidence will be that all the terms in Version 14 were agreed by the FRV’s representatives on the basis that they had the authority to make the decisions within the terms of their formal bargaining parameters.⁶⁶
37. The FRV and the Minister also rely upon a provision of the 2023 Wages Policy that provides “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 Fair Work Act pre-approval steps”.⁶⁷
38. The Wages Policy thus assumes a situation where *a final proposed enterprise agreement is settled between* the bargaining agents. It is at that stage, once the individual terms have been agreed, that the FRV must seek approval by the Government before it executes the agreement.
39. However, for the reasons submitted above, the Act requires the Commission to focus on the agreement of the bargaining agents on individual terms at points in time prior to any final settlement of the overall agreement.
40. That is, the Act operates at a point in time prior to the engagement of the provision of the Wages Policy relied upon by the FRV and the Minister.

⁶⁰ FRV Submissions at [33].

⁶¹ Third Statement of Laura Campanaro [10], [71].

⁶² 2019 Government Wages Policy: First Witness Statement of Jo Crabtree dated 5 September 2023 at [30]-[31], Attachment 1, page 10; FRV Submissions at [10(c)]; Minister’s Submissions at [21], [27], [90].

⁶³ 2023 Government Wages Policy: First Witness Statement of Jo Crabtree dated 5 September 2023 at [30]-[31], Attachment 3, page 9.

⁶⁴ FRV Submissions at [10(c)]; Minister’s Submissions at [21], [85(a)].

⁶⁵ UFU Submissions at [38]; [65]-[67].

⁶⁶ Third Statement of Laura Campanaro [8].

⁶⁷ 2023 Government Wages Policy at First Witness Statement of Jo Crabtree dated 5 September 2023 at [30]-[31], Attachment 3, page 7 (dot point 3); Minister’s Submissions at [27].

Events post-7 August 2023

41. The FRV's offer of 7 August 2023 was made after the UFU commenced these proceedings.
42. Three matters were sought to be put in issue. Those matters – the firefighters' registration board, the new allowances clause, and the increases to minimum staffing - were previously agreed.⁶⁸
43. The UFU submitted that the offer was a tactical ploy.⁶⁹ The UFU will lead evidence that, despite seeking a post-declaration negotiating period, the FRV had no instructions to engage in any meaningful negotiations in respect of these clauses.⁷⁰
44. Additionally, the three matters were put in issue by FRV upon instructions of the Government.⁷¹ There is no evidence relied upon by FRV that it no longer desired the terms to be included in the draft agreement. The FRV's offer of 7 August 2023 reflected the views of Government, not the relevant bargaining agent. Only the latter are relevant.
45. The views of the Minister, who is not a bargaining agent, should be irrelevant for the purposes of s.274. Despite this, the Minister has belatedly sought to expand the matters in issue in the Minister's Position Document. The Minister lists 10 "substantive workplace determination matters" which are now said to be in issue. The Minister's Position Document includes many matters that were not identified in the FRV's 7 August 2023 Offer (where only three matters were identified as at issue), and which were not raised in the post-negotiation negotiating period.⁷² As such, they should not be accorded any significance in the proceedings.

Conclusion

46. The FRV and the Minister ask the Commission to accept that the legislation should be read such that three years of intensive bargaining that progressively brought the parties closer to agreement can amount to nothing.
47. For the reasons set out above, an outcome after that process that there were no agreed terms would give rise to an anomalous and patently unintended result; it would visit very significant prejudice on the party that has, over many decades, progressively negotiated terms that are otherwise not in issue.⁷³
48. This is not a case, such as *TWU v Qantas*, where it is "accepted by the parties in the proceedings that there were no agreed terms at the end of the post-industrial action

⁶⁸ Third Statement of Laura Campanaro [149]-[151].

⁶⁹ UFU Submissions at [70]-[71]; Third Statement of Laura Campanaro [167]-[168].

⁷⁰ UFU Submissions at [70]-[71]; Third Statement of Laura Campanaro [161]-[169], LC-33.

⁷¹ First Witness Statement of Jo Crabtree at [75].

⁷² Section 274(3)(a).

⁷³ *Application by Metropolitan Fire & Emergency Services Board* [2014] FWC 7776.

negotiation period”.⁷⁴ There were no matters in issue at the time the UFU filed the application for an intractable bargaining determination, save for terms dealing with the quantum of wages and allowances.

49. The more cogent construction of the provisions, consistent with the statutory purpose, is that the bargaining agents’ assent to the inclusion of the terms in Version 14 meant that they were agreed terms for the purposes of Part 2-5 of the Act and therefore no longer “at issue”.

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Date: 11 December 2023

⁷⁴ *Transport Workers’ Union of Australia v Qantas Airways Limited and another re Qantas Airways Limited and QCatering Limited - Transport Workers Workplace Determination 2012* [\[2012\] FWAFB 6612](#) at [59]; *cf State of Victoria v CPSU, the Community and Public Sector Union* [\[2012\] FWAFB 6139](#) at [34].