



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER WILSON**

**C2022/5683**

**s.739 - Application to deal with a dispute**

**United Firefighters' Union of Australia  
and  
Fire Rescue Victoria  
(C2022/5683)**

**Melbourne**

**10.00 AM, MONDAY, 27 FEBRUARY 2023**

**Continued from 02/11/2022**

PN1

THE COMMISSIONER: Please be seated. Good morning parties. If I can take the appearances please?

PN2

MR DIXON: Yes, may it please the Commission if I could seek the permission to appear for the applicant in this matter.

PN3

THE COMMISSIONER: All right. Thank you, Mr Dixon. And in respect of both yourself and other counsel I grant you the permission you need to appear. So, thank you.

PN4

MR HARDING: Well, in that circumstance I appear for the FRV, Commissioner.

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THE COMMISSIONER: Thank you, Mr Harding.

PN6

MR O'GRADY: Good morning, Commissioner. My name is O'Grady, initial C, and I seek to intervene on behalf of the Minister and with me is Ms Nelson.

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THE COMMISSIONER: I'm sorry. What was that? I missed that.

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MR O'GRADY: Ms Davern.

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THE COMMISSIONER: Right. Okay. We're a long way away in this particular hearing room which is probably more a problem for you than me. Now is that application for appearance objected to at all?

PN10

MR DIXON: No. No, Commissioner. I understand that there's an application by Mr O'Grady's client to intervene in this matter. I just received some written submissions a few moments before 10 o'clock which I am in the process of digesting but I am prepared to respond to that application after I hear Mr O'Grady's submissions.

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THE COMMISSIONER: All right. Thank you. And Mr Harding, is that the appropriate course so far as you see as well that we take Mr O'Grady's submissions.

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MR HARDING: It is.

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THE COMMISSIONER: All right. Thank you. Yes, Mr O'Grady?

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MR O'GRADY: Yes, thank you, Commissioner. Commissioner, you'd be aware the Minister filed a Form F1 at around midday on Friday. And as I understand it from correspondence we have been copied into you're aware of that application.

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THE COMMISSIONER: I am, indeed, yes.

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MR O'GRADY: We have also filed this morning a copy or an outline of submissions on behalf of the Minister which outlines why, in her respectful submission, she should be given leave to intervene pursuant to section 590 and the issues that she wishes to agitate. And what I was proposing to do this morning, Commissioner, given the short time that you and my learned friends have had to consider this was really to, in effect, walk through this outline of submissions and take the Commission to some of the authorities.

PN17

You will see that paragraphs 1 to 4 of the outline are really there by way of background. And at paragraph 5 the first of the substantive submissions are summarised on behalf of the Minister. And the first one is that in the first submissions it's an abuse of process to pursue matters that are the subject of bargaining for the replacement agreement through a dispute claim and new allowance.

PN18

Alternatively, the Minister submits that the fact of the matters are said to justify the efficiency allowance are the subject of bargaining for a replacement agreement is a matter that the Commission can take into account in determining whether or not to make the orders sought by the UFU in the exercise of your discretion.

PN19

And you will see, in due course, we put a further submission that in those circumstances the appropriate course in the Minister's view would be for the substantive proceedings to be adjourned and for bargaining to recommence or continue in respect of the matters that are the subject of this proposed efficiency allowance.

PN20

In paragraph 6, the Minister flags that she also wishes to be heard on the question of the Commissioner's jurisdiction. And in that context she notes that FRV had previously filed submissions that raised jurisdictional issues that substantially overlap with the matters that the Minister seeks to agitate in these proceedings but those submissions or that part of those submissions was withdrawn. And in the Minister's respectful submission it's appropriate that the Commission be informed of those issues through, in effect, a contradictor in these proceedings.

PN21

And in paragraph seven we describe what are, in our submissions, the two limbs of the jurisdictional argument. And they both flow from the fact that the Commission must not make a decision which is inconsistent with the term of the

FRV interim agreement or are not acting on the bounds of the limitations that that term puts in place.

PN22

And the first of those arguments is that, in our submission, the Commission would only have the power to make the orders sought by the UFU if what is sought can be properly characterised and as an allowance. And you will see further on in the submission what we seek to do is draw a distinction between what might be described as an allowance, which is either a payment made to recompense employees for expenses incurred, or a payment made to compensate them for some particular specific disability related to the work that they perform.

PN23

And that could be contrasted with what we submit is a wage increase where there is a payment made, in effect, across the board and is payable to employees irrespective of whether or not they had incurred a particular expense, for example, accommodation and meals and the like. And irrespective whether their work has required them to endure some particular hardship for which they need to be compensated for. For example, heat allowance or a wet allowance or a dust allowances and the like.

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The second limb of the jurisdictional argument is related and it turns on the language in the clause itself. Because if one goes to the clause and that clause is extracted at paragraph 15 of the submissions you will see that the opening words of the clause are in accordance with existing practise,

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*The parties agree that any claim for additional allowance, meal allowance or increased or an existing allowance will be referred to the Fair Work Commission for determination.*

PN26

In our respectful submission, the import of those opening words is that it's only allowances of a type that have been referred to the Commission for determination as part of an existing practise that can be subject to such referral. And, again, we rule a distinction between an allowance of the type that I described earlier and namely an allowance to compensate an employee for an expense incurred. Or an allowance to – or to reimburse an employee for an expense incurred or to compensate an employee for some particular hardship associated with the work they're performing, and the generalised allowance that is being sought in these proceedings, which is in effect, in our respectful submission, to take a bucket of money and divide it equally across the workforce. Irrespective of what an individual employee has done or has not done in respect of the alleged efficiencies that are said to give rise to the aforementioned bucket of money.

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And so the second limb, in our submission, is available to the Commission even if you were to reject our primary position in respect of jurisdiction which is it needs to be an allowance proper. Because even if you were to find that what is here described is an allowance we would submit there is no existing practise of

allowances of this type being referred to the Commission for determination. And on both of those bases we respectfully submit that the Commission does not have jurisdiction.

PN28

Now, in paragraphs 8 and 9 we set out the principles in respect of section 590 and we've referred to some authorities there but as the Commission would be well aware it's a very broad discretion that the Commission has to inform itself as it sees fit and the principles are going to vary in import from case to case.

PN29

In paragraph 9 we have set out why it is, in our respectful submission, the Minister should be given leave to intervene. The first point we make is the obvious one that the parties have an obligation to raise with the Commission matters of jurisdiction. And yet at this point in time, absent the Minister's intervention those issues are not being ventilated before you.

PN30

And one of the decisions that we refer to in support of that proposition is the case of, In the matter of an application by the Chief Commissioner of Police which is a High Court decision reported in 79, ALJR, 881. And if I could provide the Commission with a copy of that decision?

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THE COMMISSIONER: Just as I asked my Associate to leave but if you hand that up - - -

PN32

MR O'GRADY: Are you comfortable if my instructor approaches the Bench? And it's a short point that emerges from the separate judgment of his Honour Justice Kirby and whose judgment commences at – sorry, paragraph 34 – and the relevant paragraph is at paragraph 68 and you will see that under the heading 'Three constitutional questions' – the first one is questions of jurisdictions and power in which his Honour says –

PN33

*In the course of argument in this court a number of constitutional questions were raised by the court that have either not been noticed or not sufficiently identified prior to the hearing. It is necessary to mention these questions although the court had only limited submissions upon them. This is because they concern the jurisdictional powers of this court in the present proceedings. Although neither the Chief Commissioner nor the Age argued a want of jurisdiction - indeed, each asserted that jurisdiction existed – it is the first rule of every court where a real question is raised as to which jurisdiction has powers (or as to the exercise thereof), that the court must satisfy itself that the jurisdiction exists and the powers may be exercised.*

PN34

And so, in our respectful submission, in circumstances where no other party is seeking to agitate what we would submit are the substantive issues going to jurisdiction it would be appropriate for the Minister to be granted leave to

intervene or grant the leave to be heard pursuant to section 590 so that those matters can be raised for the Commission's consideration.

PN35

The second point we make in paragraph 9(b)(ii) is that the Minister is the Minister responsible for FRV which is a party to a proceeding pursuant to section 240 of the Act. It has a substantial overlap with this dispute. The government is an observer in that proceedings with the Commission – of the Commission – and also provides parameters and constraints on FRV's ability to reach agreement in enterprise bargaining proceedings.

PN36

The Minister is, in my respectful submission, in a quite special position, vis-à-vis these matters and that is a matter that weighs also in favour of being given leave to be heard.

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We make the point in subparagraph (c) that section 590 confers a broad discretion on the Commission.

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THE COMMISSIONER: Can I just intervene their please? I'm not sure that it's quite accurate to say that the Minister is there as an observer or government is there as an observer. My understanding is that it was there at the invitation of the FRV as an assistance to the Commission.

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MR O'GRADY: And you would be better placed than me in that regard.

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THE COMMISSIONER: Sure.

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MR O'GRADY: Commissioner, I was acting on what I understood the position.

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THE COMMISSIONER: Indeed. And I just thought I should make that alteration.

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MR O'GRADY: Yes, thank you. Yes. Thank you. But, in my respectful submission, notwithstanding the clear relationship between the responsible Minister and an agency - - -

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THE COMMISSIONER: All right.

PN45

MR O'GRADY: - - -for which she's responsible and the fact that there is bargaining going on is a consideration that would warrant - - -

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THE COMMISSIONER: Sure.

PN47

MR O'GRADY: - - -consideration being given to what the Minister might say on matters going to jurisdiction. In subparagraph (d) we note that the Minister has been given leave to participate in and make submissions in related to disputes between FRV and the UFU. And the last point we make is the obvious one, which is the order sought by the UFU in this dispute could have significant and financial and operational impacts on FRV, a government agency for which the Minister is responsible. And for which, in fact, it is not presently funded, and we rely upon those matters cumulatively as a basis for being given leave to be heard pursuant to section 590.

PN48

In paragraphs 11 and 12 we raise the abuse of process argument. And that argument turns on the fundamental proposition that there is a significant overlap between the matters that are sought to be agitated in these proceedings in respect of an entitlement or non-entitlement to an efficiency allowance or allowances, on the one hand, and the matters are the subject of bargaining. And where bargaining predated the issuing of this dispute notification – and we have set out the chronology in our submissions – for that bargaining to be, in effect, derailed by virtue of an application made under the dispute resolution procedure, we would submit, constitutes an abuse of process.

PN49

Now, as the Commission would be aware that the boundaries of abuse of process are real defiant but they include a claim that is brought without merit and no reasonable prospects of success if it's brought for an improper purpose, and if it's brought for an improper motive, such to gain an unfair advantage in unrelated proceedings.

PN50

It's primarily the last two limbs of what we say in paragraph 11 that we rely upon. In our submission, to bring this application with this subject matter in circumstances where bargaining for a new agreement and whatever allowances might be said to be appropriate or wage increases that might be said to be appropriate flowing from the changes that are identified in the material filed by the UFU, is to bring a proceeding for an improper purpose.

PN51

In respect to the last limb, to the extent that what is sought through this proceeding is to set some sort of flaw that will impact upon that bargaining and what may be agreed into the future, we would submit that is also brought for an improper motive and in those circumstances we would submit that the criteria for an abuse of process has been met. That of course is a submission put in circumstances where the Act places considerable significance on enterprise bargaining.

PN52

That is the mechanism that the Act - at least at this point in time - puts a significant focus on in respect of how wage increases are to be obtained and how

allowances might be awarded. Now, we say that of course subject to the terms of the relevant clause which I'm going to come to in a moment, but if the Commission were to form the view that what is being sought is, in effect, an attempt to obtain what amounts to a wage increase and in so doing bypass the bargaining mechanism that the Act enshrines, in our submission, the proceedings capable of it being characterised as an abuse of process.

PN53

At paragraphs 13 and following we deal with the jurisdiction arguments and we make the point of course that the Commission's arbitral powers are not at large. They must be exercised in accordance with the terms of the FRB interim agreement and section 739(3) prohibits the Commission from exercising powers limited by a term of the interim agreement, and of course 739(5) constrains the Commission from making an order resulting in a dispute in a manner that is not consistent with the FRV interim agreement. I've already made the point that's in paragraph 14 that before the dispute can be arbitrated the Commission must satisfy itself that it has jurisdiction to do so.

PN54

In paragraph 15 we set out the terms of the clause and, as we say in paragraph 17, there are two things that emerge clearly from the clause. Firstly, it is clearly concerned with allowances, with wage rises or other payments made to employees. Secondly, the ability to refer an increase to or introduction of an allowance to the Commission for determination must be in accordance with existing practice and we would submit that, among other things, that directs attention to the type of orders sought.

PN55

THE COMMISSIONER: So what is the existing practice?

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MR O'GRADY: Well, in our submission the existing practice is for applications to be made in respect of allowances that fall within the classic definition of allowances that I've tried to describe earlier; namely, allowances that are either compensation for expenses incurred or are allowances for some associated hardship or new skill or new effort required of an employee in respect of the work performed.

PN57

THE COMMISSIONER: So your construction of clause 85.3 then, if I understand it correctly, is that the existing practice is the construct of the additional allowance, not the reference to the FWC for determination.

PN58

MR O'GRADY: It may encompass both, but we would submit that what the clause directs attention to is what is the existing practice. If what is being sought here is an allowance – if it be an allowance – that we would submit is fundamentally different from the types of allowances that have been subject to the practice that is referred to in the clause, then it is not something that the clause empowers.



PN59

THE COMMISSIONER: All right.

PN60

MR O'GRADY: If I perhaps can expand upon it, Commissioner. One can readily imagine a circumstance where over the course of the life of an enterprise agreement some new equipment is purchased or some new task is required to be performed that the parties believe there needs to be compensation for or some additional allowance paid for to the employees engaged in that work. That is the type of matter that we would respectfully submit can be the subject of an application pursuant to the clause.

PN61

That, in our submission, is fundamentally different to an application that, in effect, says there is a bucket of money because of efficiencies, allegedly, and what we want to do is we want to add up how big that bucket is and then we want to divide it equally amongst the employees who are employed by FRV irrespective of what tasks they are performing or what things they have been asked to do. It is, in our submission, quite fundamentally different to the cases that have gone before, at least as far as we can ascertain. We note that the words 'existing practice' were new to this agreement when one compares it to the previous MFB agreement and we will elaborate on that in due course.

PN62

In support of that submission, of course, we rely upon authorities like Project Blue Sky where the High Court, among other things, explained the need to give effect to every word in – they were there of course considering a statutory instrument, but we would submit that the same principle should apply in construing the clause. You'll see, Commissioner, at paragraphs 69 and following in the plurality their Honours say:

PN63

*The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'.*

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*In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.*

PN65

Then in 70:

PN66

*A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.*

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Then if I can go down to paragraph 71:

PN68

*Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In The Commonwealth v Baume Griffith CJ cited R v Berchet to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.*

PN69

In our submission, the words 'in accordance with existing practice' need to be given work to do and the work directs attention to what has happened previously. If what is being done now is not consistent with or in accordance with what had happened previously, then in our submission the clause does not empower the Commission to determine the claim for the allowance made.

PN70

In paragraph 18 we expand upon, if you like, the primary position in respect of the need for it to be an allowance in either the ordinary or industrial meaning of the word, or in the sense in which it's used elsewhere in the FRV interim agreement. We say that for the Commission to have jurisdiction the Commission must be satisfied on a proper construction of the FRV agreement that the claim is in accordance with existing practice and not – and is one for an allowance, and that is an objective question.

PN71

We have referred at the foot of that paragraph to the decision in Electrolux before Callinan J. If I could hand up the relevant part of that. The relevant paragraph is at paragraph 240. You will see at paragraph 240 what his Honour says is:

PN72

*A party's desire for the inclusion of a particular term of agreement, no matter how genuinely and dearly wished, cannot, absent express words so saying, be determinative of the true nature of the term. Nor can the fact that it may use words such as 'employee' or 'employer' or refer to the use and application of remuneration or any part of it receivable by the employee, be determinative of its true character.*

PN73

In our submission, what his Honour is there saying is that ultimately it's incumbent upon the Commission to satisfy itself that what is being sought here is in truth an allowance and also an allowance of the type that accords with existing practice. We put those two propositions in the alternative. If the Commission is not satisfied that what is being sought here is in truth an allowance, then the fact that the UFU has sought to describe it as an allowance and has put on material to the effect that it believes that it is an allowance, in our submission does not alter the task that the Commission needs to undertake.

PN74

In paragraph 20 we have summarised the relevant principles of interpreting agreements with the oft known passage from *WorkPac v Skene*. I don't need to take you through the entirety of the quote, but we do emphasise the very beginning of the paragraph which is:

PN75

*The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context.*

PN76

In our submission, the ordinary meaning of the word 'allowance' does not encompass what is being sought through these proceedings. That is the point we make, in effect, in paragraph 21. The Commission will recall that the distinction between wages and allowances has a long history. Back in the day when we had wage fixing principles there were a number of attempts to, in effect, circumvent the limitation that the Commission - as it was then - had put in place in respect of wage increases by seeking to introduce a new allowance or obtain additional allowances.

PN77

To address that and prevent that, a separate principle was developed – principle 8 – to deal with allowance to ensure that that form of circumvention did not occur. Again, in describing principle 8 what the special Full Bench of the Commission did was confine an allowance to the two propositions that I've already taken the Commission to; namely, on the one hand allowances that are there to recompense somebody for an expense incurred and on the other hand an allowance that is there to compensate an employee for some hazard or disadvantage or additional skill required by the particular work that that employee is performing. Clearly what is sought here falls under neither limb of those propositions.

PN78

If I can provide you with a copy of the wage fixing principles case. It's in the CARs at [1978] 211 CAR 268. As you would imagine, Commissioner, this was a case that involved a cast of thousands, memoirs of a bygone era, but they deal with a number of issues because they were revisiting the principles more completely, but at page 300 a discussion of principle 8 commences.

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THE COMMISSIONER: Did you say 300?

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MR O'GRADY: Yes, 300.

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THE COMMISSIONER: Thank you.

PN82

MR O'GRADY: Right. Thank you. And you will see that in dealing with the present principle they set it out and the second limb of that was, 'Allowances may

be judged from time to time where appropriate but that does not mean that existing allowances can be increased extravagantly, that new allowances could be introduced. The effect of this would be to frustrate our general intentions. Beyond this matter was equally relevant to all other award conditions.'

PN83

So you can see the problem that they were attempting to grapple with, with the previous iteration of the principle was the fact that people were using claims for allowances to, in effect, obtain de facto wage increases which were, in effect, prescribed or limited by principle 7.

PN84

And then you will see in the paragraph that commences, 'In the proceedings before us.' They go on to say, 'Three-quarters (indistinct) a degree of consensus regarding the separation of allowances into two full categories, namely, those which intend to reimburse actual expenditure incurred, e.g. tools, travelling and meals and those which relate in some way to the nature or location of the work itself, e.g. disability, special skills, locality, such as division, existing allowance, facilitates the adjustment of the former group when appropriate and conforming with the increases in actual costs as to the second – the Commonwealth employees in South Australia proposed the increasing allowance should be kept proportionate with the wage increases awarded.

PN85

Again, there is a real consciousness in my respectful submission to this need to not allow allowances to, in effect, become a form of de facto wage increase and then after further discussion of the matters before them they set out a new principle 8 at the foot of page 301, 'Allowances may be adjusted from time to time where appropriate but this does not mean that existing allowances can be increased extravagantly or that allowances can be introduced, the effect of which would frustrate the central intention of the principles. Existing allowances – existing allowances which constitute reimbursement of expenses incurred may be adjusted from time to time when appropriate to reflect the relevant change in the level of such expenses. Existing allowances which relate to work conditions which have not changed may be adjusted from time to time to reflect the movements in wage rates as a result of National wage case decisions.

PN86

And then on the next page existing allowances for which an increase is claimed because of changes in the work or conditions will determine in accordance with the relevant provisions of principle 7(a).

PN87

Again, the focus in that third limb is on an individual employees work or conditions changing, and as opposed to a generalised change in work or conditions. And then there are similar provisions in respect of new allowances and service increments.

PN88

And this distinction was also acknowledged by Commissioner Smith as he then was, in the case of (a), (b), (c), the ESU and the NEA industrial agreement on

news reading which is print K3424. And it was written, dare I say it, with the brevity for which the Commissioner was known.

PN89

THE COMMISSIONER: It's quite the Smith decision. Yes.

PN90

MR O'GRADY: And there's only the one paragraph I need to take you to, which is an observation in the third paragraph. 'There is only one other matter which I wish to make some observations and that relates to the visual display terminal allowance. I have reservations about this allowance. In the ordinary course, skill and knowledge which is endemic to a classification should be contained in a wage increase.'

PN91

Now, I accept it's only a paragraph but in my respectful submission it is a paragraph that is consistent with the distinction that we seek to draw in the submissions that we've made.

PN92

We go on in paragraph 25 to make the point that clauses 85.3 and 92.3 and what they empower needs to be read in context of the agreement more generally. And, in our submission, when one goes through the FRV interim agreement and looks at the types of matters that are the subject of allowances they can be broadly categorised in one or other of the two categories that I have been seeking to put before the Commission.

PN93

They either relate to the reimbursement of expenses or - - -

PN94

THE COMMISSIONER: Just one moment, Mr O'Grady.

**SHORT ADJOURNMENT**

**[10.43 AM]**

**RESUMED**

**[11.45 AM]**

PN95

THE COMMISSIONER: Good morning again, and please accept my apologies for the failure of our recording system. Hopefully it will keep going. Mr O'Grady?

PN96

MR O'GRADY: Yes, thank you, Commissioner. Do I need to recap over the things I've already said?

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THE COMMISSIONER: No, I don't think so.

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MR O'GRADY: All right, thank you.

PN99

THE COMMISSIONER: I'm sure they have been recorded.

PN100

MR O'GRADY: I am sure that that's a relief for all of those in the room.

PN101

Can I go back to paragraph 25, which is where I think I was when we were told that the recording had ceased. You will see there the submission is made the meaning of the term 'allowance' must be considered in the context of and consistent with how the term is used in the FRV interim agreement and that, in the last sentence:

PN102

*Any new allowance determined by the Commission must be one that's in keeping with the design of other allowance terms of the interim agreement and be in the nature of an allowance.*

PN103

That's put at two levels, Commissioner. First, that applies, in our submission, generally when one has regard to the totality of the agreement and the nature of the things that are described in that agreement as allowances, but it has particular application in respect of, relevantly, clause 85 of division A and the equivalent 92.3 of division B.

PN104

THE COMMISSIONER: Just one moment, Mr O'Grady. I hope there's no further gremlins. Thank you.

PN105

MR O'GRADY: I take it the Commission has available to it a copy of clause 85 in its entirety?

PN106

THE COMMISSIONER: I do, yes, thank you.

PN107

MR O'GRADY: You will see the structure of that clause is, in my respectful submission, consistent with the position being taken by the Minister. You've got 85.1, which speaks in terms of the allowances being paid in accordance with the Australian Tax Office legislation, but then there's a protection there.

PN108

85.2 is significant, in my submission, perhaps because what it does is indicate that there is going to be an increase by 19 per cent from the date of the commencement of this agreement. So, to an extent, what is talked about, in effect, efficiencies said to flow from the terms of this agreement, that would appear to be a matter that's already been expressly addressed by the parties in 85.2.

PN109

Then we have 85.3, which, of course, has been the subject of submission, and then we have the various allowances that are provided for. So, there's personal expenses and accommodation. Now that's clearly an allowance of the type that is there to reimburse employees for expenditure incurred.

PN110

Similarly, in 85.6, we have got meal allowances. In 85.7, we've got a spoilt meal allowance. Now that might be said to fall into both camps, but it's clearly an allowance directed to a particular occurrence or situation where a payment is to be made. Then, in 85.8, we have got expenses and roster penalties, again allowances that are directed to or associated with the particular work that a particular employee might be performing at a particular point in time.

PN111

Then we've got 85.9, motor vehicle mileage allowance. Again that's a recompense allowance; 85.10, tollway reimbursement, again a recompense allowance; 85.11, attendance at training facilities, an allowance associated with the nature of the tasks that are being undertaken by an employee; 85.12, driving licence fee reimbursement, a reimbursement allowance; 85.13, after hours allowances, an allowance directed to the fact that a particular employee is required to work in a particular way at a particular time.

PN112

85.13.3, temporary work location allowance, again a specific employee is directed to work at a particular location and there's an allowance available; 85.14, a first aid allowance, an allowance to qualify employees because they have to have, or have, a particular certificate; 85.15, representation reimbursement, again a reimbursement type allowance; 85.16, special duties allowance; 85.17, language allowance.

PN113

One can go through all of them and, in my submission, they can all be sensibly categorised as either a reimbursement allowance or an allowance attributable to the specific work or tasks that a particular employee is being asked to undertake. None of them, in my respectful submission, come within cooee of the clause that is sought by the UFU in these proceedings where there is, in effect, a bucket of money that is divided up equally amongst employees, irrespective of what work they do, what expenses they have incurred, what particular duties or skills they bring to their tasks.

PN114

In paragraph 27, we note that in addition to those clauses, there are often triggers in respect of allowances, not just those in 85, but also in respect of some of the other clauses in the agreement, that an employee has to do something or has to have attained something or has to have incurred some expenditure in order to be entitled to the allowance.

PN115

That can be, of course, contrasted with the clause that's the subject of these proceedings where the employee just simply has to be employed and that gives them an entitlement to the allowance irrespective of what they are doing or the

circumstances in which they are working, and we make that point in paragraphs 28 and 29 where we relevantly set out the clause that is before the Commission here, and that's continued on in paragraph 30.

PN116

In paragraph 31, we point out that this characterisation of the allowances the subject of these proceedings is, in our respectful submission, consistent with the evidence that the UFU has filed in reply in respect of these proceedings, and you will see that, in paragraph 31, we set out what Mr Marshall has said in respect of the reasons for the Commission making an allowance of this type. Again, in my submission, those are all reasons that might be said to warrant or justify a wage increase, but they are not, in my submission, reasons that go to whether or not a particular allowance should be made.

PN117

There is a focus really there on the overall remuneration that firefighters and other employees covered by this agreement receive, not the issue of whether or not they are undertaking specific duties or specific tasks that should attract an additional allowance of the type of the other allowances in clause 85, nor that there are employees who have incurred expenditure that they need to be reimbursed for, and we make the point in paragraph 32 that Mr Starinskas also is focused on, in effect, the general remuneration level of firefighters, which we would submit is a matter that should be dealt through by way of wage claims and agreed through the process of enterprise bargaining as opposed to the need for a particular allowance to be paid, and that point is confirmed in paragraph 33.

PN118

In paragraph 34, we make the point that it may be a legitimate outcome of enterprise bargaining for employees to be rewarded for their cooperation in the implementation of measures that lead to productivity gains and general monetary savings. However, clause 85.3 of division A and 92.3 of division B do not permit the Commission to do this by means of an allowance paid on the global basis proposed in this application and which has the effect of circumventing the current bargaining together with the statutory framework that applies to and regulates it. In our submission, that would in effect be a wage rise by stealth and it would undermine the Act's focus on enterprise bargaining and the statutory approval mechanisms for the making and variation of enterprise agreements.

PN119

We also note in paragraphs 35 through to 37 that, in our submission, the FRV interim agreement does not provide for the creation of such an allowance. That agreement deals expressly with efficiency and productivity improvements in clause 19.1 of division A and 24.1 of division B and, through those clauses, the parties express their commitment to cooperation towards the making of agreed improvements in efficiency and productivity throughout the life of the agreement. No provision is made for these improvements to sound in additional compensation during the currency of the agreement and, as I've noted, 85.2, of course, provides for at least an increase in allowances at the outset of the agreement, and so we say that, in our submission, 85.3 and 92.3 do not provide a vehicle for those payments to be made.



PN120

Again, in paragraph 38, none of this is to be said that these can't be things that cannot be the subject of further bargaining. In our submission, that's where they should be agitated. If these amounts are to be paid, they should be paid as a result of that bargaining and, of course, that bargaining would enable other issues to be raised and other productivity enhancements to be explored, which, in our submission, is consistent with the scheme of the Act.

PN121

In paragraph 39 through to 43, I deal in writing with the submission that I've already made about in accordance with existing practice and we note that that phrase wasn't there in the predecessor agreement and we say, for the reasons I have already sought to explain, consistent with what the High Court said in Project Blue Sky, that those initial words need to be given work to do.

PN122

In paragraph 41, from what we have been able to find, there is only one instance where the arbitration power in respect of allowances has been exercised in a dispute between the parties. On that occasion, the arbitration dealt with a changed manner of providing reimbursements of expenses of income protection insurance at the conclusion of the previous arrangements for income protection insurance and that was clearly in the nature of an expense-related allowance.

PN123

At paragraphs 44 to 47, we deal with an alternative approach.

PN124

THE COMMISSIONER: Before you move on to that one, Mr O'Grady, I'm just digesting what you have to say about paragraph 41. You say that there's been the one instance where the arbitration power in respect of allowances has been exercised in a dispute, which is the income protection decision.

PN125

MR O'GRADY: Yes, for a new allowance.

PN126

THE COMMISSIONER: I'm sorry?

PN127

MR O'GRADY: For a new allowance.

PN128

THE COMMISSIONER: For a new allowance. Do you say that that allowance was one of the two categories about which you have referred to previously?

PN129

MR O'GRADY: Yes, I do.

PN130

THE COMMISSIONER: Which one?

PN131

MR O'GRADY: Because it was a reimbursement allowance, in effect, in respect of income protection insurance.

PN132

THE COMMISSIONER: All right. Okay.

PN133

MR O'GRADY: For the reasons I have already sought to explain, if an employee is to incur an expense and there is a mechanism there for them to be reimbursed that expense, then that is, we would submit, consistent with the general nature of part of what's covered by an allowance.

PN134

The Commission might recall there were some issues about that decision, in any event, given that it went on to bind third parties, and you might recall we dealt with that in the other proceedings, but the point we really seek to make in paragraph 41 is that in our researches, we have been unable to find an example of an arbitrated allowance as general or even approaching the generality of what is the subject of this application.

PN135

THE COMMISSIONER: When you say that, is that with reference to this particular agreement and industry or industry generally?

PN136

MR O'GRADY: No, no, I'm speaking as between FRV and UFU and, indeed, MFB and UFU. This, of course, ties into the opening words of the clause: 'In accordance with existing practice.' So, the submission in respect of that really boils down to if you give those words work to do, then you need to have a look at what's happened previously as between FRV and UFU and/or MFB and UFU and are there previous examples of a generalised efficiency allowance being paid across the board based upon identified alleged savings, and we can't find one.

PN137

In our submission, it's incumbent upon the UFU to establish a pattern of allowances being awarded of that type for it to bring this application under the clause. It has to establish that there is such a practice and that the application it's seeking is in accordance with that practice.

PN138

In paragraph 44 and following, we deal with an alternate position. For your sins, Commissioner, you will be familiar with this because you have had to deal with these issues in different contexts. These are cases that concern the CFA and you will recall, Commissioner, back in 2014, there were issues in respect of bargaining and the Federal Court proceedings and the appeal of those Federal Court proceedings and the like, and there were a number of applications for allowances being made in respect of CFA as a result of that delay.

PN139

The first decision that we refer to is [2014] FWC 3176 and you will see, Commissioner, that in that case, the UFU sought determination of a dispute about

the introduction of four new allowances: a rope rescue allowance, a specialist allowance; a Coast Guard Brigade allowance; a member of level 2 incident team and level 3 incident management team allowance, and a difficult to fill location allowance.

PN140

The first point we would make, Commissioner, is that they would all appear on their face to be allowances in the traditional ordinary sense of the word 'allowance'. There is a particular aspect of a particular individual's employment that is said to trigger the entitlement to the allowance that was being sought.

PN141

The second point we would make is summarised at paragraph 46 where, in considering whether you should go on to make that determination - sorry, I should have also said the other thing to note was that bargaining was occurring in respect of CFA and the UFU.

PN142

At paragraph 70, you identify three factors that cause you to not list the allowance claims for arbitration. The first of those has no application here, namely, there was this pending issue about what was going to happen with the Federal Court proceedings, and you thought that engendered a degree of uncertainty such as it was not appropriate, but the other two factors you identify in the second and third bullet points at paragraph 70, in our submission, do have application. In our submission:

PN143

*There is prejudice to [FRV] in having to address the claims both in arbitration and in enterprise bargaining. There is a well advanced bargaining process here that should be permitted to take its course unimpeded by the externality that arbitration by the Fair Work Commission would represent.*

PN144

We would say that is the case here.

PN145

Then, in the last bullet point, you say:

PN146

*Because the agreement is beyond the date on which negotiations on a new agreement were to commence (and because the detail of the claims were only particularised after that date), as well as now being beyond its nominal expiry date, it is more desirable for the Allowance Claims to be resolved through enterprise bargaining.*

PN147

So, even if you were to reject the submissions that we put in respect of the nature of an allowance and in accordance with usual practice, in my submission, the approach that you have identified in this decision would cause you not to arbitrate the matter but to adjourn it so as to enable bargaining to continue.

PN148

There was a similar issue in a decision also decided by you, also at around this time, in *UFU v CFA* [2014] FWC 3261. This is referred to in the footnote, footnote [22]. You will see, Commissioner, at paragraph 6, that case concerned the introduction of heavy hazmat appliances and the contention of the UFU in that proceeding was that:

PN149

*This is a new appliance, work practice and skill and therefore, in line with custom and practice, a new allowance for this appliance, work practice and skill should be payable.*

PN150

That's at paragraph 6 at the foot of the page.

PN151

Again, Commissioner, it would appear that what is being sought there is an allowance as is commonly understood, that you have a new appliance, it requires new skills and, in those circumstances, there should be a new allowance payable to those employees, not everybody, but those employees who are involved in using that new appliance.

PN152

There were a number of arguments raised about that by UFU, including the overlap, and these are set out at paragraph 17 and following, and these include the fact that there was a Federal Court proceeding, but also that the claim should not be arbitrated because it's also being pursued by the UFU in bargaining for a new agreement, and that appears at the head of 24.

PN153

Then you deal with the matter at paragraph 64 in terms that are not dissimilar to the way in which you dealt with the other proceeding. Again, the first point that you identify we accept has no application, namely, the Federal Court proceedings, but the second and third points seem to have application here.

PN154

If the Commission pleases and unless there are any questions, those are the submissions that I have been asked to put on behalf of the Minister.

PN155

THE COMMISSIONER: All right, thank you. Mr Dixon, if I turn to you.

PN156

MR DIXON: Yes, thank you, Commissioner. Before I commence, I have just got some submissions to hand up. While that is being done, if I could just explain for the record, we didn't receive the written submissions of the Minister until a few minutes before you came onto the Bench, so the written submissions that I've just provided are necessarily anticipatory and they were informed by the points identified in the Minister's application, which was received on Friday afternoon.

PN157

At paragraph 2.2(b), the nature of the issues raised by the Minister, there are two there identified. Abuse of process isn't one of them, so I haven't dealt with abuse of process squarely in the written document, Commissioner. I will attempt to do that at the end when I address Mr O'Grady's written document, but, in the meantime, subject to that caveat, I would just - I apologise if I have to labour through this, but I want to identify some points that haven't been or don't feature at all in the Minister's submissions, and they are important points, in my submission, because they inform the Commission how we arrive at this point in time where the parties were prepared to engage in a five-day hearing on the merits of the case and absent any jurisdictional point being taken.

PN158

If you now have the written document, Commissioner, there are some attachments to that and I will come to those. The procedural background is important because in the written submissions it is suggested that it was incumbent upon the UFU to satisfy the Commission that the proper construction of the allowances clauses were sufficient to ground the jurisdiction and power to make an allowance as sought, and it was also put that the Commission had to satisfy itself of those jurisdictional matters. The procedural background identifies that the Commission did engage in that process assiduously.

PN159

The history really commences well over a year ago in November of 2021 when the UFU made an application in matter B2021/1057 and it sought the Commission's assistance in respect of two matters. One of them was providing costings for the efficiencies, and when I say 'efficiencies', I take it it's understood that we are talking about the cost savings to the FRV that have arisen through various processes, including, for example, the harmonisation work that resulted out of the merger of what were formerly two agencies, the MFB and the CFA, into one.

PN160

Those proceedings were on foot. The Commission noted in those proceedings, and I have made a reference to the court book AS3 in that. I'm not sure if you can go to that, Commissioner.

PN161

THE COMMISSIONER: That's at page 380, is it?

PN162

MR DIXON: Yes.

PN163

THE COMMISSIONER: Right, okay.

PN164

MR DIXON: If you have that document, Commissioner, that was an email from chambers dated 11 November 2021 which dealt with the principal issue of providing costings in relation to the matters that the UFU identified in its log of claims as giving rise to efficiencies. That was in points 1 and 2. You will see in point 6 - - -

PN165

THE COMMISSIONER: There might be a problem, Mr Dixon.

PN166

MR DIXON: You will see in point 6, Commissioner, that the UFU had reserved its rights under the Act to seek alternative relief of any kind should it consider that to be necessary. Now that becomes important, of course, because this matter remained on foot for some six months and, for the entirety of that time, the parties were waiting for the government to issue a new wages policy under which it could bargain, and that didn't eventuate and still hasn't eventuated.

PN167

Then in May of 2022, so over six months after the commencement of that application and the commencement of formal bargaining in April of that year, and in the absence of any agreement based on the UFU's log of claims, the matter was discontinued.

PN168

Commissioner, you will recall UFU then took steps to commence protected industrial action and it commenced a new claim, which is this matter, on 15 August 2022. Again timing is important because the UFU commenced its application first, and that's an important consideration when it comes to questions of abuse of process. It was actually the FRV's application for bargaining which was commenced some time after that which is a relevant consideration as to who is using the Commission's process for ulterior motives. I don't suggest in any case that the FRV or the UFU are seeking anything ulterior. The real dispute between the two is the most appropriate context in which to achieve and pay out in efficiencies. That's the way the parties have been approaching this question.

PN169

You will see in paragraph 5, there were a number of conferences. Again they were undertaken without any principle objection taken to the Commission's jurisdiction, so we are way down the road where the parties have expended considerable time and effort addressing the question of allowances without this point ever being taken.

PN170

On 5 October - this is at court book 74, Commissioner, if you could just turn that up, please - the Commission directed a series of questions to the FRV. The document at 74 is not the Commission's document, but it contains the Commission's questions, so I will deal with that.

PN171

The FRV responded to the Commission's questions on the 7th. You will see in question 1, the question was put whether the FRV agrees in concept to the introduction of an efficiencies allowance. The answer was 'Yes'.

PN172

MR HARDING: Commissioner, can I interrupt my learned friend at this stage. That is a without prejudice document we have taken objection to and now my friend seems to be referring to it in submissions publicly.

PN173

THE COMMISSIONER: Mr Dixon, I think Mr Harding has a correct point. The reason I was slow in responding is I'm trying to recall precisely what occurred in October last year with some difficulty, but the context of those things, I recall the questions and, indeed, I recall the response document, but the context of those things, of course, was conciliation. I think Mr Harding may well have a correct point in raising an objection on the without prejudice nature of that communication.

PN174

MR DIXON: Yes. Commissioner, can I say this about that. As you will be aware, parties sometimes put 'without prejudice' on their correspondence. The idea of keeping negotiations out of the evidence, it's obvious why the parties would do that. There would be an air of unreality introduced into this application if I were not allowed to refer to express concessions made in respect of jurisdiction by the FRV, which this document contains.

PN175

It had nothing to do with negotiating over the quantum of allowances; all it had to do with was whether the FRV accepted that the Commission had power and jurisdiction to make awards or allowances. It was a fundamental question that was put and answered, and I am relying on that, as I should be, because we have been proceeding at least from that date on the basis that there would be no issue taken in respect of the matters that the Minister introduced into the equation on Friday afternoon.

PN176

THE COMMISSIONER: I hear you as to the process. I am not comfortable in accepting that that is a concession as to jurisdiction from the FRV. The question wasn't about jurisdiction, the question was about agrees in concept. Now, admittedly, the language may be somewhat ambiguous, but I don't see that as an open concession that there is jurisdiction.

PN177

MR DIXON: Well, it was an appropriate time to raise any objection if it had a conceptual difficulty with the payment of an allowance for efficiencies.

PN178

THE COMMISSIONER: I think that's a valid point.

PN179

MR DIXON: Yes. I've called it 'jurisdiction' - I'm sorry if I cut across you then.

PN180

THE COMMISSIONER: No, no.

PN181

MR DIXON: I've called it 'jurisdiction', but it is probably a question of power as well. Mr O'Grady has raised the point that the allowances clauses don't permit the Commission to make an award in the form of an allowance for the subject matter

of this dispute, the efficiencies, and that was the very question put to the FRV and, in my submission, that issue was conceded.

PN182

MR HARDING: Commissioner, if I can be heard on this issue? The FRV has filed a set of submissions in the terms that it has and it's headed 'Replacement Outline of Submissions'. No submission is made there pertaining to jurisdiction. The Minister has made a submission in relation to that. It takes things nowhere to refer to a without prejudice document given in the course of conciliation as the basis for some contention that might arise now in relation to arbitration and my objection is utilising without prejudice communications for the purposes of the arbitration.

PN183

THE COMMISSIONER: Can you just pause there, please, for one moment. I just need to check something and then say something about what I've checked. Late on Friday, we provided the hearing book to the parties, which was about 3 o'clock, and there have obviously been some difficulties in compiling the document and providing it to all the parties. The solicitors for the FRV wrote to my chambers late on Friday, at 5.14, with Ms Small identifying that her and Mr Harding's client had some difficulties with documents within pages 15 to 80 of the court book. Now that was then first seen by me over the weekend.

PN184

The view I had about those documents, and I continue to still have the view, is that a party who wishes to object to the inclusion of those materials within the court book can say that to me in the course of submissions. The status of the court book, of course, is not much more than a compound of the relevant documents or the documents we thought were relevant. To the extent that they may be without prejudice, that of course is regrettable, but it's up to you to say to me which documents can or can't be included. I thought I should just make that point to you and your client, Mr Harding.

PN185

MR HARDING: Yes.

PN186

THE COMMISSIONER: Can I bring you back, Mr Dixon, to the issue that was being debated, which is - I'm sorry, you had concluded speaking, Mr Harding, I think?

PN187

MR HARDING: Only to formally record objection is taken on the footing that you have identified, Commissioner.

PN188

THE COMMISSIONER: Okay. Coming back to you, Mr Dixon, I wanted to, I guess, be clear that at this stage I am only considering the intervention of the Minister in these proceedings. I understand certainly what you are putting this morning, which is that you thought you were proceeding on the basis that it could



be made. Now, to me, that's not so much an issue of whether there is jurisdiction - sorry, I will start that again.

PN189

To me, it is not so much whether or not there can be an intervention of the Minister, but it's a question of jurisdiction, which obviously is to be determined after the question of the intervention has been determined. Is that an appropriate way to proceed?

PN190

MR DIXON: Indeed. I am only addressing the question of intervention, and this goes to the lateness of the Minister's application in circumstances where the parties had already crossed the Rubicon in that sense back in early October. I am not here to argue the substantive application of whether or not there is jurisdiction. I am making a different point in that respect, which I haven't quite come to yet. I am simply, at the moment, introducing the concept that the parties, at least by October, had dealt with this issue and proceeded thereafter on the basis that there would be power if the Commission accepted that there was merit in the notion of making an efficiencies allowance, granting the application, in other words.

PN191

I would ask Mr Harding - I take the point - there are, even in the FRV's materials - I have already taken you to one - AS3 in Mr Sands' application was a document that the Commission issued in the course of a conference and the like and there are others. There is AS8 as well. It makes it very difficult when the parties seek to rely on some and try to exclude others. I can understand negotiations with quantum and the like being excluded and kept away from the Commission, but this, as I say, was dealing with a more fundamental question. I'm not sure if Mr Harding has had the opportunity to take instructions on this, but I would appreciate it if there was at least a partial waiver in respect of questions 1, 2(a) and 2(c) because I do rely upon the fact that this occurred. If you look at 2(c), the FRV accepted that, subject to questions of quantum, at least some of the items identified can be the subject of an efficiencies allowance. That squarely concedes that there is power and jurisdiction to make those awards in respect of those items at least.

PN192

Moving along, on the 7th, the Commission issued a Next Steps document in which the Commission then foreshadowed listing the matter in December. Again, if the Minister was concerned about an absence of jurisdiction, then there was an express notification that the Commission was minded to have the matter heard and possibly determined in 2022.

PN193

Then, on 20 October, the FRV filed a submission in which it sought to adjourn these proceedings. It wrote:

PN194

*Given the significant funding implications of the proposed efficiency allowance, it would be necessary for FRV to obtain government approval prior*

*to any agreement to the new efficiency allowance. FRV currently does not have government approval to agree to the proposed allowance.*

PN195

So again there was at least a suggestion then. It would be inconceivable, in my submission, that the government was not aware at that point in time of the path that we were travelling down at a fairly hefty rate, but again there was no jurisdictional objection taken, it was simply a matter - and I'll come to this - of what the most appropriate forum was as to whether or not the efficiencies were realised in the UFU's application by way of an allowance or many of those same efficiencies would be realised and paid by way of bargaining through pillar 3 of the 2019 iteration of the Government Wages Policy. So, again, it wasn't a jurisdictional objection, it was a question of appropriateness.

PN196

If you look at paragraph 9 of the submission, there was an amended submission filed, again no jurisdiction or power objection - and I'm using the word 'jurisdiction' in a broad sense to encompass questions of power - but the FRV's stated position was that the most appropriate forum in which to discuss the potential efficiencies identified by the UFU is in bargaining of the replacement agreement, so a question of appropriateness only.

PN197

It then notified a bargaining dispute. So, we were some months into the UFU's application when a new application was being foreshadowed. This is important, as I say, for questions of abuse of process as to who went first.

PN198

Now, there was a mention on the 2nd and on 3 November is when the Commission listed the matter for hearing. Again, the Minister should have been on notice. We should have heard from the Minister immediately at that point in time if there were concerns over abuse or jurisdiction.

PN199

It was only on 4 November, some three months after the UFU's application, that the FRV filed its application in which it contended that the alleged efficiencies relied upon by the UFU could be properly viewed as relevant to operational cost saving and/or productivity outcomes. So, again, a suggestion that these efficiency matters were relevant but that they fell to be assessed through the bargaining for a new agreement, and that was the proceeding in which the government was an observer. So, again the government is on notice of these matters and that there was a contest between this proceeding and that proceeding as to how those efficiencies would be paid. Again we heard nothing in respect of the matters that are now submitted this morning.

PN200

Again the FRV made no submission in that application that it should be the application that the Commission deals with, in other words, there was no power or jurisdiction in respect of the other one, but it only maintained in that application that it was the more appropriate forum in which to consider these questions.

PN201

Then there were a number of directions that were amended throughout December. On 21 December, the UFU filed its written submissions and it was in those submissions that it contended that there was a jurisdictional basis for the Commission to arbitrate a new allowance dispute. Again a document that was filed and the Minister was, or should have been, on notice at that point in time that that was the contention being made by the UFU in respect of the allowances clauses. We heard nothing.

PN202

On 13 February, we received the FRV's written submissions, which now do not form part of the court book for reasons I will come to and reasons for which the Commission is aware, and we saw then that the UFU made a submission at paragraph 23 that the claim does not invoke the Commission's arbitral jurisdiction to establish a new allowance via a determination. However, before anything could happen by way of a response, on the morning of 15 February, the FRV solicitors communicated with the UFU and indicated that they would be filing a replacement submission.

PN203

If I could ask you to turn up attachment 1 to the submissions, Commissioner. If you could go to page 2, at about point 5 of the page, there was an email on Wednesday 15 February at 11.42 am from Ms Sarkis which referred to an earlier call regarding those submissions. The UFU indicated it was prepared to consent to the FRV's request to file amended submissions at close of business on Monday, subject to an understanding as to what aspects of the FRV submissions will change, so that the UFU is saying, 'We are comfortable with a change, but what will those changes be?' because the timetable thereafter would have to be compressed:

PN204

*If the written amended submission is going to be rationalised, we don't have an issue with it, we just need to know what parts of the submission might change so we can start preparing accordingly.*

PN205

This is now going to the question of prejudice, Commissioner.

PN206

The response just after midday was to the effect:

PN207

*I am instructed that the FRV intends to materially rationalise parts A, B and C of the outline of submissions.*

PN208

Those were the parts, Commissioner, that contained submissions that went to jurisdiction and power.

PN209

Then you will see the response at 12.19 pm from my instructing solicitor:

PN210

*In light of your response to our query, we will now proceed on the basis that no jurisdiction or lack of power point will be taken. We will prepare accordingly.*

PN211

If I could take you back to the written document, Commissioner, the FRV then wrote to the Commission at 1.10 pm and confirmed that the respondent withdraws in its entirety the outline of submissions, that the parties have had discussions, which I have now taken you to, and, by consent, there's a new timetable proposed for filing on Monday 20 February. We did not receive the written submission on Monday, we received it on Tuesday and they were filed as replacement submissions in which, as the Commission is aware, all of the submissions challenging the Commission's jurisdiction and the power to grant the allowance were withdrawn. Of course, the UFU then prepared its materials in reply on that basis, which is important, as I say, and it wasn't until 1.38 pm on Friday 24 February that the Minister filed its application to intervene.

PN212

Now I am just going to address the grounds upon which intervention is opposed. As I foreshadowed at the start of my oral submissions, I had prepared this on the basis that there were two points taken, which we take from the Minister's application itself. That was the jurisdictional point, and again that encompasses the power point, and the construction of the allowances clause point, and what I have called a discretion point, although I think, having heard Mr O'Grady this morning, he puts it somewhat higher. It now takes on the character of an abuse of process point. I have called it a merit point, but really it's not just a matter of what is the more appropriate forum in light of the bargaining, but really whether that amounts to some form of abuse of process.

PN213

The application, as you know, is made under section 590. That is a section which empowers the Commission to inform itself in any manner it considers appropriate. Importantly, it is not a power designed to allow the parties to seek to intervene to have their interests advanced or protected. Some of the grounds in the application do cross over into that area. The government identifies that it has its own concerns and it wishes to make submissions in respect of those matters. That is not a question for 590.

PN214

Those matters have been dealt with by parliament and there are limited rights for state ministers to intervene. None of those matters are relied upon in this application by the Minister. We are not proceeding under those sections which would have given a State Minister for Industrial Relations the power or the right to intervene in matters if it can establish that there's a public interest in doing so.

PN215

THE COMMISSIONER: I hear what you have to say in respect of section 590 and then the division between the right there and then the division for state ministers to intervene on a limited basis. However, it's not entirely without precedent, is it, that sometimes state governments will wish to intervene?

PN216

MR DIXON: Yes.

PN217

THE COMMISSIONER: A train strike, or something of that nature will often draw them out.

PN218

MR DIXON: Indeed.

PN219

THE COMMISSIONER: And that is usually based upon - well, sometimes based upon section 590, though, isn't it?

PN220

MR DIXON: Yes, indeed, and one can understand why it would be important to hear from ministers in those types of situations. I am going to address why that doesn't arise in this matter for two reasons.

PN221

THE COMMISSIONER: I just wanted to exclude - I wasn't sure whether you were arguing there is no capacity under section 590 for the minister.

PN222

MR DIXON: No.

PN223

THE COMMISSIONER: Thank you.

PN224

MR DIXON: I don't put it that highly. I understand - I have read the transcript, and I think I refer to it in this document, of the argument before you, Commissioner, in respect of the Corporate Registration Board matter where there was a similar application made at the eleventh hour and you dealt with it under section 590 and found that there were grounds for - I call it intervention - to allow the minister to make submissions in respect of that matter. I make it clear I am not in any way suggesting that that decision was wrong, just that it's entirely distinguishable from the circumstances in this case.

PN225

If I could first deal with the jurisdictional ground. Just by way of introduction in respect of the 590 matter, what we say generally is this. In respect of the jurisdictional ground, these points could have been met by evidence, and I will come to that. I accept that, for 590 purposes, it is not information that has been advanced by the FRV, but you wouldn't allow that type of information to come in at the moment or that point to be made because of the lateness and the prejudice that will be visited on the parties if we are going to allow this jurisdictional question to be ventilated at this late stage. That's the first point.

PN226

The second point, which goes to questions of merit as to what the most appropriate forum is, we have already got the FRV represented by senior counsel providing those submissions still in their written documents and the like, so that is not going to add anything to the sum total of what the Commission receives by way of information under section 590, so you wouldn't, in my respectful submission, allow the application under that limb either.

PN227

Dealing first with the jurisdictional point, Mr O'Grady has set out the allowances clause and obviously spent some time in dealing with what the introductory words 'In accordance with existing practice' could mean. I will come momentarily to what he said, but what Mr O'Grady did put in that respect, and I think it's an acceptance, Mr O'Grady's words were, 'Are there previous examples?', in other words, was there other evidence of custom and practice that informs or adds meaning or animates those introductory words? He also submitted that it has to be established practice, or that the UFU has to establish that practice. In other words, these would be questions of evidence. Mr O'Grady accepts that, that evidence could meet this challenge.

PN228

I am reading from paragraph 24:

PN229

*The UFU could have met this jurisdictional submission with evidence.*

PN230

I give there examples. Again, I don't suggest for a moment that they are comprehensive or deal with all of the possible examples in the time allowed, and this is the very point. It will take time and it will take evidence to explain exactly what occurred such that those matters inform the meaning of the clause.

PN231

In 2010, the Commission found that the claim for the payment of a fixed amount each week for income protection benefits could be characterised as a claim for a new allowance. Mr O'Grady seems to suggest that this is in the form of a reimbursement that somehow arises out of a work-related expense. However, that would be questionable. This is for income protection. It's usually a private matter as to whether someone wants to undertake that form of insurance.

PN232

The Commission in 2010 found that there was power or jurisdiction to grant the claim in the form of an allowance. I note in footnote [21] that that matter went on appeal and the appeal was allowed. The Full Bench didn't find it necessary to determine that question as to whether a claim for a disability insurance could properly be characterised as a new allowance and that that cast doubt on it, but it didn't have to determine it.

PN233

In 2017, the UFU made an application for a sports voucher allowance. One wonders what, if anything, that could have to do with a disability at work or a claim for a reimbursement, but, nevertheless, it was an allowance in the form of a

sports voucher of \$125 once per year, and that allowance was granted within that application. The reference is there.

PN234

In 2018 - I think this is the one example that Mr O'Grady identified, although I think he is relying upon the more recent update of that issue - but it again was a situation where the UFU made three applications under the allowances clauses in predecessor operational staff agreements for new allowances relating to income protection. Those applications sought the reimbursement of income protection premiums, as I say, arguably not identified with any disability, and the reimbursements were granted in the form of allowances.

PN235

These matters, if we had more time to agitate them, as I say, would have been the subject of considerable evidence and could have informed the proper construction, which is the point. There must be consequences for the Minister delaying this application, and this is how it has manifested in this case. So, to allow intervention at this late stage at the start of a five-day hearing, in circumstances where the UFU's preparation was undertaken following what I say to be an express acceptance of the Commission's jurisdiction and power, would be to visit real prejudice on the UFU.

PN236

I say there are only two possible ways to cure that prejudice. One would be to adjourn the matter. There was no application for adjournment made in the Minister's application. We now see this morning in the written submissions that, in the alternative, it is suggested that there should be an adjournment.

PN237

Commissioner, we can't proceed to hear the jurisdictional point this morning because I would need time to meet that with evidence, as I have said. We are driven towards either adjournment or to have the merit hearing proceed for the following five days and then determine jurisdiction at some other time, and for the reasons that I will now submit, neither of those options would be attractive and, indeed, should be positively dismissed as acceptable alternatives.

PN238

The reason why an adjournment would visit prejudice on the UFU, the reasons are manifold. I haven't sought to - I withdraw that. I haven't tendered any documents yet in this application and Mr O'Grady has referred to statements by Mr Marshall which have yet to be read in these proceedings. I am in your hands in that respect, Commissioner. I am going to refer to some of the evidence now. If you wish me to tender those - I understand we're in a - - -

PN239

THE COMMISSIONER: No, there's no need to tender them, but if you just refer to them and make it clear where you are referring to.

PN240

MR DIXON: The first point is that the UFU's written submissions that were filed last year identified that, amongst other things, other reasons why the Commission

would grant the application was that there will be evidence forthcoming of an agreement with the FRV that the efficiencies, once realised, show flow to operational staff. That evidence is found in a number of statements, including the original affidavit of Ms Campanaro that was filed with the FRV's material last year, as well as the statement of Mr Marshall.

PN241

That must be relevant, Commissioner, in my respectful submission, because, once it's accepted that the parties had agreed that the quid pro quo for the UFU's engagement in the process of harmonisation and the like, and the processes of which evidence will be led in respect of former Commissioner Julius Roe's work done in that respect, the quid pro quo was that those efficiencies would flow to the UFU. The question now boils down to what is the mechanism, but the concept of the payment of efficiencies appears to be, or will be, the subject of evidence that that was agreed at the outset, again which is important because this type of application is standing in the way of realising and giving effect to that agreement.

PN242

The second point is that the members are experiencing high cost of living pressures. There is a reason why we have sought to bring on this application at this point in time. The original application for bargaining in November of 2021 bore no fruit. Mr O'Grady is correct in that respect. The UFU reserved its right to seek relief through other means and it has sought to do that in circumstances where, after six months or more, there was no agreement reached and no suggestion of any agreement on the horizon.

PN243

The second attachment to the written submissions is a statement issued in, if I can call it the other matter, which is the FRV's bargaining application. There are two things to note there. I'm not sure if the Commission has got a highlighted version, but in paragraph 8, there's a reference there to pillar 3 of the Victorian Government Wages Policy and it is stated there that there is no presumption that either that pillar 3 construct or will continue unaltered. So, we don't even know whether that will be the avenue, even though it's submitted to be the most appropriate avenue. We don't even know whether that will exist in a future iteration of the Government Wages Policy.

PN244

Down to paragraph 11, I think it's accepted by all parties, but the Commission certainly identified that in earlier conclusions bargaining probably would be unlikely, and that's based on the history of all of these proceedings, I suggest.

PN245

The other point was that the members have not received a pay rise for over two years and, since that time, as the Commission is aware, real wages have gone backwards. This will feed into the reasons why you wouldn't grant or further delay these proceedings, Commissioner.

PN246

At point (d), there is no confidence that a new enterprise agreement will be struck in the near future, and I have taken you to that in your statement, and then the



final point was that there was very considerable expenditure involved in not just attending the Commission over these many months in this very matter, in which there were many conferences and the like, but also the preparation which I'm sure the Commission is aware that is involved in a five-day hearing where solicitors, counsel and UFU engage an expert, all of that would be potentially thrown away now by a late application taking a jurisdictional point.

PN247

From paragraph 30 onwards, there's a reference to how the Commission should exercise its discretion in respect of these matters. There's a reference in footnote [32] to the decision in Aon Risk, a High Court decision of 2009. If you look at footnote [32], I have extracted what the Chief Justice said in that case, that whatever costs are ordered, in other words, notwithstanding what the costs might be, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings; moreover, the time of the court is a publicly-funded resource. They are apposite observations in this case. We don't even have the benefit of a costs order that would normally flow in a civil court in circumstances where there might be a late application made and costs thrown away. We would have to bear those costs typically in a court of no costs jurisdiction. There has been no offer to pay anything for the adjournment that is now sought.

PN248

The decision in Aon Risk, in my submission, should inform the exercise of the Commission's discretion. It is not at large in that sense; it is conditioned by the need to accord natural justice. I make a reference there to Re Ladic at footnote [33]. I think the observation's trite. I've got a copy of the decision if - - -

PN249

THE COMMISSIONER: No, there's no need.

PN250

MR DIXON: The proposition is trite. If the application is granted, we cannot meet it here and now. If adjournment is the only answer, then the observations of the Chief Justice in Aon Risk are germane. We will not overcome the irreparable element of unfair prejudice that would be visited upon the UFU in those circumstances.

PN251

The Minister also states in her application that the orders sought by the UFU could have significant financial and operational impacts on the FRV. The FRV have not filed any evidence to that effect, Commissioner, they haven't sought to respond by expert evidence, there hasn't been any Treasury evidence put on going to inability to pay or effects on the economy of Victoria. None of that should be accepted as a submission because they haven't sought to take that point.

PN252

Moving on to the other point as to the abuse of process, or I've called it a merit submission really as to what the most appropriate forum is, as I have previously stated, they are the submissions already made by the FRV. 590 is not attracted in those circumstances where the FRV is represented by senior counsel who is more than prepared to put those points stridently, no doubt.

PN253

As to the delay, in my submission, that alone should be fatal to the application. There is no affidavit explaining why we are here at the eleventh hour or why the Minister waited until the afternoon of last Friday to file her application, notwithstanding that the Minister was an observer in the other proceedings that had been going on for some time in which the Minister in the application states that the observer was there to provide or the government was there to provide parameters and constraints around what the FRV was doing. So, in other words, it would beggar belief that the Minister wasn't aware that all of this was transpiring and yet we are left with no explanation whatsoever as to why the delay was as it was.

PN254

The Commission granted the Minister leave to intervene on terms in the Corporate Registration Board matter. I'm not sure if you have access to the transcript. I've got a copy if - - -

PN255

THE COMMISSIONER: I have access to it, but not right now.

PN256

MR DIXON: No.

PN257

THE COMMISSIONER: Give me two seconds and I will.

PN258

MR DIXON: I won't need to do anything other than to refer to it more generally. I'm sure you are well aware of what took place, but it was stated in the course of that application that the delay in that case - and I think again the Minister's submissions were received in writing just before the commencement of the two-day hearing and the notification occurred earlier - however, the delay in that case was only 12 days. If you recall, Commissioner, the Minister wrote a letter to the FRV in effect indicating that the Minister considered that the FRV required her consent to enter into an agreement as was proposed and that that consent was not forthcoming, in other words, the FRV had no power to do what it was proposing to do.

PN259

The Commission took the view that that was cogent evidence that went to the very heart of what was trying to be achieved by the parties and allowed that evidence in and the intervention one can understand under 590 because that was relevant information. However, in allowing the Minister's intervention on those terms, the Commission stated at transcript paragraph number 308 that the delay was unsatisfactory and ought not to be the basis for further delay, and the proceeding, as I understand, took place over the ensuing two days.

PN260

That would not be the case here for the reasons I have already indicated and the delay is far greater. It's not just 12 days, it is many months, over six months in

fact, since the application was first filed, which is now said to have been filed either as an abuse of process or without jurisdiction.

PN261

As I say at paragraph 40, the government should have been on notice, or was on notice, from the date of the UFU's application - sorry, that should be the FRV's application in 40(a), if you could just correct the first line. It should have been on notice from the UFU's application on 15 August and it should have been on notice that the FRV had not taken any jurisdictional objections in the proceedings, but, to the contrary, had conceded those matters from at least 5 August when it answered the questions that the Commission had posited.

PN262

THE COMMISSIONER: Mr Dixon, what was the paragraph number you were referring to then?

PN263

MR DIXON: 40(a). I said from the date of the UFU's application; that should be the FRV's application.

PN264

THE COMMISSIONER: I was trying to find 48. That's where I got lost.

PN265

MR DIXON: No, 40(a) - 'a' for alpha.

PN266

THE COMMISSIONER: Yes, thank you.

PN267

MR DIXON: In conclusion - I note the time, but I need to deal with Mr O'Grady's document - but there's another point that I make in the conclusion here, Commissioner, and this goes, I think, to the heart of the abuse of process point that Mr O'Grady raises.

PN268

In this case, there will be an updated table provided, if we get to that, which identifies that the efficiencies that the UFU seeks to have accepted amount to \$153 million. The FRV identifies some \$114 million of efficiencies in the document AS8, which is in Mr Sands' witness statement. That was the document that formed part of the other application or the FRV's application. So, in other words, the FRV accepts that there are efficiencies, it wants to pay those through pillar 3 once an agreement is reached, and they would conceivably amount to around, or possibly even at least, \$114 million. So, there is a difference on quantum, but there's a substantial overlap as to where the parties are at that point in time, so the argument appears to be one of the appropriate forum or mechanism of payment of at least the lower amount, the \$114 million.

PN269

Mr O'Grady's submissions this morning were to the effect that those amounts should be paid by way of an increase in wages and to the extent that one seeks

them to be paid by way of an allowance, it is really an application dressed up for an increase in wages. I think that the language used was, 'If it looks like a duck, it quacks like a duck, it's really an increase in wages.'

PN270

But there is a problem with that submission, Commissioner, and it is this. Pillar 3, as it is currently drafted, expressly provides that payment under that head, which is where the \$114 million that the FRV identifies would find expression, can only be made by way of - and I quote in inverted commas - 'changes to allowances and other conditions (not general wages).' In other words, even on the FRV's case, or the government's case, those payments cannot be made by way of an increase in general wages; they have to be made only by way of changes to allowances and other conditions.

PN271

So we are driven back to arguing over whether they should be paid by way of an allowance in the form that the UFU seeks or in the form of an allowance that the FRV ultimately wants to use, which hasn't been identified yet, but it has to be an allowance, to pay those moneys over through bargaining. Stripped to its core, the only dispute that we have, the only point at which issue is joined in this matter is over the timing of the payment. Both parties must accept, if properly understood, that the pillar 3 wages policy drives us towards a payment through an allowance or some other similar means.

PN272

So it is only a question of timing, and that is the problem in this case because if the jurisdictional objection is accepted - sorry, I withdraw that - the abuse of process objection is accepted as a basis for intervention and we have an argument about that and an adjournment is granted as a result, it would, in effect, deliver to the FRV, which is not making any submissions on this very point, it would deliver to the FRV a victory in its substantive case because it would deliver the very delay that it seeks, that being the only point of contention between the two parties in that respect. I accept there are questions of quantum - I am leaving those to one side - but given that the mechanisms are identical, the only issue is the question of timing, and this application, if adjourned, will deliver that to the FRV, notwithstanding all of the reasons for expedition that I have previously identified.

PN273

I just want to spend some time going through the Minister's - - -

PN274

THE COMMISSIONER: Mr Dixon, do you have much more in the way of submissions?

PN275

MR DIXON: I have finished with my document and I am just going to - I've got 10 points to make, and I'll do that very quickly, in respect of the Minister's written submissions, if I may.

PN276

THE COMMISSIONER: All right, indeed. Please continue.

PN277

MR DIXON: Should I press on?

PN278

THE COMMISSIONER: Indeed, thank you.

PN279

MR DIXON: I am just going to work through the Minister's written document. You have that, Commissioner. At paragraph 5, the Minister submits that it's an abuse of process to pursue matters that are the subject of bargaining for the replacement agreement. The allowance application predated that by some months. That could not be an abuse of process. If anything, the spotlight would turn onto the nature of the FRV's application in those circumstances where proceedings were already on foot and no objection was taken to those proceedings.

PN280

If you then go to paragraph 9 of the Minister's submissions, some of these points that are identified in paragraph 9 are not section 590 points. You will see that the intervention ought to be given, in paragraph (a), because of the role of the Minister in respect of the operations of the FRV. That might well be the case, but if one is proceeding under section 590, it's information that has to be identified. Similarly, in paragraph (b)(ii), the Minister is the minister responsible for the FRV, which is a party to the proceeding, and there's a substantial overlap in the dispute. But, again, the FRV is already represented in those matters and in that respect.

PN281

Moving over the page to paragraphs 11 and 12, it is submitted in 12 that, in the present case:

PN282

*It would appear that the allowance dispute has been lodged because the UFU has not obtained the outcome it wishes to achieve in bargaining and/or to obtain an unfair advantage in the bargaining proceedings.*

PN283

Well, it can't be seeking to obtain an unfair advantage because it filed its application without there being any application by the FRV. That's an important point and it explodes that notion, but, in circumstances where the UFU sought the assistance of the Commission in a bargaining dispute in November of 2021, which remained on foot for six months without any offer being put forward by the FRV in the absence of the Government Wages Policy, which still hasn't been handed down, in my submission, it was a legitimate thing for the UFU to do to seek to have the agreed efficiencies or the efficiencies that it will contend were agreed in concept paid over through a mechanism, and that's what it sought to do. As I say, when all the other avenues failed to materialise, it was a legitimate course to take.

PN284

In paragraph 14, the submission is made that the Commission itself must satisfy itself that it has jurisdiction to proceed. My submission is that the Commission

did that. It asked pertinent questions as to whether there would be any opposition in principle to the payment of the efficiencies by way of an allowance and there was no point taken in that respect. The Commission proceeded - from that point in time in October, it could have been satisfied that that was not an issue between the parties. In fact, there was an agreement at that point in time that those matters could be the subject of a payment, and that is extremely important, including, by the way, one of the cases that Mr O'Grady relied upon of Smith C in Print K 3424 - this was the very succinct decision, if you recall, Commissioner - but Mr O'Grady read the first sentence:

PN285

*It should not be assumed from the fact that I am prepared to approve this agreement given the nature and construction of the Act that I have formed the view that the change in the nature of work warrants the grant of an allowance of that quantum.*

PN286

The second sentence is relevant:

PN287

*However, I do not believe that the agreement of the parties is such that in the public interest I should reject it. Therefore, I approve the agreement of the parties.*

PN288

In other words, notwithstanding that there were some doubts, he proceeded on the basis that the parties at least accepted that it could be, as in this case, the subject of a payment by way of an allowance for efficiencies, and the Commission found it had jurisdiction to make the grant.

PN289

At paragraph 18, the Minister contends that the application fails to invoke the limited arbitral authority that those clauses confer on the Commission. It states in the final sentence:

PN290

*In addition, to use the clauses to make a claim of this type is not in accordance with existing practice.*

PN291

That is an assertion. The question is: how does the Minister know that? There is no evidence that has been put on to support such a submission and it should not be accepted. To the contrary, as I have indicated, there are at least three occasions where the parties have made an agreement as to allowances in respect of matters that weren't direct reimbursements for expenses incurred in the course of work or for disabilities.

PN292

Over the page at 25, a similar point is made that those clauses, the allowance clauses, do not give the Commission power to create an entirely new kind of employee benefit and label it an allowance. That does not accord with the very

limited history that we were able to uncover in the short time that we had available to deal with the jurisdictional point.

PN293

Mr O'Grady made some points about the existence of allowances clauses within the interim agreement. Commissioner, you will understand that the interim agreement was a consolidation of two other - sorry, there were more, but at least two other documents. One was the MFB agreement that was agreed in 2016 and the other was a 2016 CFA agreement that wasn't actually agreed. I think it remained in draft form and so it had to find expression within the interim agreement by way of an amendment.

PN294

Those agreements were consolidated and some of the nomenclature, for example, MFB was replaced by FRV, but there wasn't a wholesale renegotiation of any of the points in there. Those allowances clauses were the allowances clauses that applied under the old MFB agreement and they remain in that form and, indeed, that's why we are here before you today, because if the parties sought to rely upon their strict legal rights under those agreements, there would be a large amount of inefficiencies that would still continue.

PN295

The whole process of harmonisation gave rise to a situation where, notwithstanding what is in the enterprise agreement and notwithstanding the rights and obligations, the parties have created a new regime to allow the merger to work, and that's where the efficiencies were achieved, and it was done with the agreement of the UFU and the UFU have been saying it is now time to pay this. The members are suffering through high interest rates and we have sought this matter to be expedited and made that clear on a number of occasions. A delay would serve to undermine entirely those interests.

PN296

Paragraph 26, again there is a reliance upon the strict definition of what an allowance is in typical industrial nomenclature, but the submission is made in the last sentence at the bottom of page 7:

PN297

*It is conditioned by an expense or impost on employees or a particular condition in relation to the work being performed.*

PN298

I think Mr O'Grady then made the submission that none of those things have occurred in this case. Now that is wrong. I don't suggest that all of the efficiencies fall within the typical industrial definition of a disability, but there are at least some which haven't been acknowledged. I'm not sure if you have, Commissioner, a ready reckoner that allows you to identify what the items were and the like, but I can just - - -

PN299

THE COMMISSIONER: I don't think I do, no.

PN300

MR DIXON: Yes. Item 3, for example - - -

PN301

THE COMMISSIONER: You mean the items that justify the allowance?

PN302

MR DIXON: Yes.

PN303

THE COMMISSIONER: I'm sure I do.

PN304

MR DIXON: It's okay, I will - - -

PN305

THE COMMISSIONER: I just can't recall where I've seen it.

PN306

MR DIXON: No. Item 3 was - - -

PN307

THE COMMISSIONER: Yes, it's at page 86 in your submissions.

PN308

MR DIXON: - - - Interdivisional Firefighting Program. The claim is worth \$15 million. There doesn't appear to be any dispute over quantum in that respect, but the Interdivisional Firefighting Program - - -

PN309

THE COMMISSIONER: Mr Dixon, just to let you know, your submissions, which are at page 86, have a table for this effect.

PN310

MR DIXON: Yes, indeed. Thank you for that. At court book 504, the witness statement in response of Ms Campanaro, at paragraph 126, Ms Campanaro describes the IFP program as:

PN311

*A training course undertaken by firefighters and officers to learn a new skillset to facilitate operation in the 'other' division, that is, former MFB firefighters learning how to operate within former CFA stations and on former CFA appliances.*

PN312

Squarely a matter that goes to the nature of the work. There are other examples. The special rosters item is another one. I won't expand on that, but the point is simply that one can't simply say that none of this matter involves claims that bear no relation to what was typically understood to be a disability or work-related changes or the like. That submission is made at paragraph 28. It states in the second sentence:



PN313

*There is no impost on any new work requirement (indistinct) disability conditions or expense due to employment within the FRV.*

PN314

That submission is wrong and should not be accepted.

PN315

Then at 33 - this is just to labour the point - it states that the UFU's own evidence is to the effect that what is sought is in reality a general wage increase. That can't be accepted because the FRV and government are driven towards paying whatever they want to pay by way of something that looks like an allowance and not by way of a general wage increase, which doesn't seem to appear anywhere, respectfully, in the Minister's submissions, that acknowledgement.

PN316

Then 39, I think, repeats submissions that have already been dealt with: not in accordance with existing practice. The submission for the purpose of the intervention is that the UFU could have met this with evidence.

PN317

In respect of the adjournment, I have already made submissions as to why an adjournment would visit prejudice on the UFU.

PN318

In summary, Commissioner, this is not a strong case for intervention. It does not have the document, as was the case in Corporate Registration Board, which would have fundamentally altered the very nature of what you were hearing in those proceedings. This is not that case. It comes too late. There is no explanation as to why we are here today and not earlier, and, as I say, adjournment for a hearing on the merits and then later determining jurisdiction visits prejudice on the parties.

PN319

The other party to the agreement, the FRV, does not take any of the points that the Minister is now taking. It is the party that has been involved in the history of the agreement and presumably that corporate knowledge came through from its predecessors as well. It does not take these points.

PN320

The final point, as I say, the application for an adjournment would deliver a substantive victory to the FRV, or in substance a victory for the FRV, because it would be a delay in proceedings, which is the only thing that separates the parties in respect of how this allowance should be treated, that is, either paid now by way of allowance or later in bargaining by way of an allowance or the like.

PN321

Unless I can assist the Commission with anything, they are the submissions in reply of the UFU.

PN322

THE COMMISSIONER: Mr Dixon, what I should do is mark your written submissions with the two attachments. I will mark that as exhibit UFU 1.

**EXHIBIT #UFU 1 WRITTEN SUBMISSIONS OF THE UFU WITH TWO ATTACHMENTS**

PN323

And similarly I should mark Mr O'Grady's outline of submissions as Minister 1.

**EXHIBIT #MINISTER 1 OUTLINE OF SUBMISSIONS OF MR O'GRADY ON BEHALF OF THE MINISTER**

PN324

What I think I will do now is to adjourn until 2 o'clock and then, Mr Harding, do you have much to say?

PN325

MR HARDING: A few matters, but not much.

PN326

THE COMMISSIONER: A few matters? All right. Then we will deal with the matter of reply. Thank you, we will adjourn until 2 o'clock.

**LUNCHEON ADJOURNMENT** **[1.20 PM]**

**RESUMED** **[2.13 PM]**

PN327

THE COMMISSIONER: Thank you, parties. Now, Mr Harding, did you want to make any submissions?

PN328

MR HARDING: I did, Commissioner, just a couple, perhaps gathered under the topics of jurisdiction and adjournment.

PN329

THE COMMISSIONER: Just one moment, sorry. Please proceed.

PN330

MR HARDING: Just on the first topic, Commissioner, the replacement submissions of the FRV make no submission about jurisdiction, but, by the same token, jurisdiction is not conceded by the FRV and we say ultimately it's a matter for you, Commissioner, as to whether or not you consider that you have jurisdiction, and you will have the benefit of submissions, if you give leave, from the Minister and the UFU about that topic, but presently no submission is made by the FRV about jurisdiction.

PN331

On the question of adjournment, which is the alternative submission or case that's being put by the Minister in paragraph 4 of her written submissions, what we say about that is that the reasons advanced by the Minister for that submission align with the FRV's view, as expressed in paragraph 58 of its replacement submissions,

in which the submission is made that the effect of this application would be to sideline - this is paragraph 59 - sideline bargaining for a replacement agreement.

PN332

It is apparent from the case that FRV makes that the Commission ought not do that and, in fact, paragraph 60 of the replacement submissions identifies that FRV is of the view that the FWC should not make the new allowance sought. That includes for the reason that the FRV's view is that the appropriate course is for the subject matter of efficiencies to be dealt with in bargaining, as submitted in the paragraphs that I have taken you to, and whilst the Minister asserted that, for that reason, FRV would be prejudiced by the application proceeding, FRV does not make that specific submission, but it does say that, as a matter of statutory preference, the FW Act singles out bargaining as the method by which matters of this kind ought to be dealt with.

PN333

To that extent, my learned friend Mr O'Grady took you to the case footnoted at paragraph 22 of the Minister's submissions, which is *United Firefighters' Union of Australia v CFA* [2014] FWC 3261, and first took you to a summary of the submissions made to you in that case at paragraph 24. It follows from what I have said that dot points 1 and 2 of paragraph 24 anticipate the position that the FRV has identified in this application, and so, following from that, Mr O'Grady took you to paragraph 64 of that decision and dot points and relied from that paragraph on dot points 2 and 3, and we would embrace dot point 2 at least.

PN334

Mr Dixon took you to a submission that was made in October of 2022 by the FRV pertaining to adjournment. That is not pressed, as I am instructed, at this time, but the Minister has raised adjournment and has pressed it and we felt it necessary to identify how that application aligned with the submissions made by FRV. We would also say that that is a matter of significance in terms of its resolution because we have got the balance of the week that we need to deal with if you were to give leave to the Minister and accept that submission from the Minister, and that will have a bearing on what we do henceforth.

PN335

I did want to make two submissions in response to what Mr Dixon has said in paragraphs 42 to 44 of his written submissions. To some extent, this is really a matter that goes to the substance of the application, but he has raised it in this context, so I think it needs to be addressed.

PN336

In paragraph 42, Mr Dixon makes a submission that the UFU contends that the most appropriate mechanism to deliver the realised - realised - efficiencies is by way of an allowance over three years and then makes a submission in paragraph 43 about the FRV's submission, which is put on the basis that the FRV is to be taken to accept that there have been efficiencies identified under pillar 3. Well, as a point of distinction, the FRV does not accept that there has been realised efficiencies in the way that that submission appears to suggest, and that is the core of the factual case.

PN337

Secondly, paragraph 44 makes a submission about wages policy which is frankly wrong. What wages policy does, and that policy is annexed to the statement of Mr Sands and, for the purposes of this exercise, like Mr Dixon and Mr O'Grady, I rely on that evidence to explain that submission further, but Mr Sands has annexed at AS2 the wages policy. I am just trying to get the court book reference for your assistance as I have got it in hard copy.

PN338

THE COMMISSIONER: That's okay, I can locate it.

PN339

MR HARDING: Page 367, I'm told, and I am navigating my way to that now.

PN340

THE COMMISSIONER: Thank you very much.

PN341

MR HARDING: Yes, it's page 367. First, if you go to page 369, pillar 1, which is wages, is there identified and it says how wages and conditions are capped at a growth rate of 2 per cent. So, it is there identifying, not the merit or otherwise of what might justify wages or conditions, but rather a cap on the amount that the government is prepared to pay in escalation of those things, and then in relation to pillar 3, there is then identified what Mr Dixon took you to, namely, that additional changes to allowances and other conditions will only be allowed if the government agrees, et cetera, and then the first point under that is:

PN342

*In addition, wages policy requires that all agreements must be fiscally sustainable and fully funded from capped indexation revenue and/or appropriate cost offsets.*

PN343

Now, the way that has worked is identified by Mr Sands in his statement in paragraph 19 of that statement, which is on page - I'm getting there - 319 of the court book. What he is doing there, Commissioner, he's describing how the FRV is approaching the application of pillar 3, and the way in which they are approaching it is they are saying, 'Well, look, in relation to these new conditions that have been the subject of discussion in bargaining' - new conditions, not this allowance, new conditions, new allowances - 'it is anticipated that those new allowances would be funded by the efficiencies.'

PN344

That is not the same as this application, which says, 'There are efficiencies; create a new allowance that distributes the moneys said to arise in respect of those efficiencies in the way that the UFU has outlined.' That is quite different to the way in which the system works under wages policy.

PN345

It follows that it is not as the UFU have described it in paragraph 44 and that the mechanisms are quite different but rely on the efficiencies to justify different

things under policy as opposed to the basis upon which the UFU agitate this application, which is to create a new allowance based on - based on - those efficiencies.

PN346

Unless you have any questions, Commissioner, they are our submissions in respect of the Minister's application for intervention.

PN347

THE COMMISSIONER: Just taking - - -

PN348

MR HARDING: I ought to say that the FRV does not object to the Minister's intervention.

PN349

THE COMMISSIONER: In relation to that last point that you were putting forward about the wages policy - sorry, I've immediately lost the particular paragraph.

PN350

MR HARDING: The paragraph of Mr Sands' statement?

PN351

THE COMMISSIONER: No, the pillar paragraph.

PN352

MR HARDING: Yes, 369 is the page in the court book.

PN353

THE COMMISSIONER: All right. Pillar 3.

PN354

MR HARDING: Pillar 3, yes.

PN355

THE COMMISSIONER: Thank you, I'm indebted to you. I understand what you have to say in terms of the policy and its application in bargaining being a different set of parameters to the circumstances to be determined here. However, the proposition that this is something that should be done in bargaining but not through arbitration is the issue I just want to test, and that is that, in reading pillar 3, it appears to say an allowance of this type - sorry, I will start that again - a general payment of some type cannot be justified through pillar 3, it can only be an allowance, and the other elements which are set out within there. Is that the case? Can it only be dealt with through an allowance proposition if it is to be dealt with in bargaining?

PN356

MR HARDING: I don't have specific instructions on how the FRV is applying it in bargaining, save what Mr Sands has said in that paragraph that I took you to, and what he says is that they understand pillar 3 to allow for new allowances or conditions in the replacement agreement funded in a way that can be justified to

government, and that constitutes the offset. In other words, the efficiencies, as the FRV are putting it to government, or putting it in bargaining to the UFU and to government, is the allowances could constitute offsets, using the language at the first dot point of pillar 3, that fund allowances and other conditions.

PN357

THE COMMISSIONER: All right.

PN358

MR HARDING: And so to that extent the mechanism is perhaps more indirect than would be the case here, given that here what's being said is that the very efficiencies asserted to have been realised by FRV should sound directly in a new allowance that sums up those moneys and pays them in the method that had been proposed.

PN359

THE COMMISSIONER: All right. And the other question I have for you concerns the submission you're making in respect of jurisdiction and you said, if I am correct, the jurisdiction is not conceded by the FRV. Ultimately, it's a matter for me. And then you put a submission to the effect that, which I understood to be this, not your words – that the matter of jurisdiction, having been raised and pressed by the Minister was something that I had to be satisfied of.

PN360

MR HARDING: Well, I wouldn't put it in that context - - -

PN361

THE COMMISSIONER: That's what I am asking.

PN362

MR HARDING: No. You have to be satisfied of jurisdiction.

PN363

THE COMMISSIONER: Yes. But with you not making submissions on the subject.

PN364

MR HARDING: I'm not making submissions about jurisdiction.

PN365

THE COMMISSIONER: And with Mr Dixon not saying there's no jurisdiction, must I then consider what Mr O'Grady has said this morning?

PN366

MR HARDING: Well, if you give Mr O'Grady leave - - -

PN367

THE COMMISSIONER: Let's pretend I don't.

PN368

MR HARDING: Well, if you don't then there's no submission from the FRV about jurisdiction. But you nonetheless need to be satisfied you have it.

PN369

THE COMMISSIONER: And how do I go about doing that?

PN370

MR HARDING: Well, Commissioner, in the ordinary course of deciding the applications of this kind the Commission has to be satisfied that it has jurisdiction. I think Mr O'Grady took you to an authority referring that from Justice Kirby in that effect. That is a task that is conferred on the Commission. Now, true it is that you won't hear a submission from the FRV about that and that may inform how you resolve this application one way or the other. But there is – I can't stand here and say you're entitled to simply rely on the parties' positions without you being satisfied yourself you have it.

PN371

THE COMMISSIONER: All right. Thank you. I think they were the only questions I had for you, Mr Harding.

PN372

MR HARDING: Thank you.

PN373

THE COMMISSIONER: So thank you very much. Now, Mr O'Grady, did you want to respond?

PN374

MR O'GRADY: If I could briefly, thank you, Commissioner.

PN375

THE COMMISSIONER: Before you do, there were just a couple of questions I had and I probably should have raised them earlier but I apologise for not doing so. Just bear with me. The question was primarily around paragraph 12 of your submissions.

PN376

MR O'GRADY: Yes.

PN377

THE COMMISSIONER: And it's safest to rely upon those words as opposed to my notes about what you said. But you said at paragraph 12, 'In the present case it would appear that the allowance dispute has been lodged because the UFU has not obtained the outcome it wishes to achieve in bargaining and/or in order to obtain an unfair advantage in the bargaining proceedings.'

PN378

In relation to the first part – the first proposition that it's not obtained the outcome it wishes to achieve in bargaining. I just wanted to understand what you meant by that?

PN379

MR O'GRADY: If that had not achieved FRV's agreement to the terms and conditions it sought in respect of the moneys that are the subject of the efficiency

allowances, in that as I understand it FRV has resisted UFU's claims in that regard. It would appear, in part, because of the approach that Mr Harding explained a moment ago, namely that the approach that FRV takes is if there are efficiencies that may be something that can be used to, in effect, offset the cost of some allowances as opposed to the approach the UFU seemed to be putting forward which is they are entitled to those moneys, irrespective. So that's what we were attempting to say in respect of the first part of that proposition.

PN380

THE COMMISSIONER: Then I had a further question which was in relation to the propositions at paragraph 44 onwards in respect of adjournment of the allowance dispute being these proceedings. If I understand it correctly, the adjournment is merely to allow bargaining to conclude isn't it?

PN381

MR O'GRADY: Yes.

PN382

THE COMMISSIONER: Not for the convenience of this hearing or what have you?

PN383

MR O'GRADY: No.

PN384

THE COMMISSIONER: No.

PN385

MR O'GRADY: It is for – to allow bargaining to conclude for the reasons that are reflected in the second and third bullet points of the two CFA decisions that I took you to.

PN386

THE COMMISSIONER: Right.

PN387

MR O'GRADY: This morning.

PN388

THE COMMISSIONER: So that though requires offers to be made by the FRV doesn't it?

PN389

MR O'GRADY: Well, it requires bargaining to be conducted and there are, of course, a number of good faith bargaining obligations - - -

PN390

THE COMMISSIONER: Right.

PN391



MR O'GRADY: - - -the parties are subject to and there are other mechanisms in the Act to facilitate that bargaining. But it may mean, for example, that the UFU revisits its position. That helps a return to bargaining.

PN392

THE COMMISSIONER: And what can the Minister do in that regard to ensure that those things are being done?

PN393

MR O'GRADY: I don't have any instructions about those matters, other than as I understand it, from what Mr Harding has said FRV committed to bargaining and want to pursue bargaining and, indeed, to file a 240 application in respect of bargaining.

PN394

THE COMMISSIONER: So what would be the outer limits of the adjournment until bargaining is concluded in a temporal sense?

PN395

MR O'GRADY: Well, I thought it would be an adjournment and with liberty to apply. So if the parties wanted to come back to the Commission to say, 'All right. Well, we have gone back. We have tried to bargain. Here are the reasons why we cannot achieve a bargain.' And/or there may be a contest about that, that would be a matter that the Commission would consider at that point in time.

PN396

THE COMMISSIONER: All right. Thank you. Then, the final question I had was in respect of the intervention, let's assume that the Minister were granted intervention then what occurs on the other side of that intervention, and let's assume the proceedings continue what would the Minister propose to do? Would she be calling evidence? Making submissions?

PN397

MR O'GRADY: I don't have instructions to put anything other than jurisdictional arguments that I have put in support of the application for intervention. So I am not currently instructed, Commissioner, to seek to put on evidence or to otherwise involve the Minister in the running of the hearing were we to continue on with the hearing.

PN398

Now that might change but my current instructions are to put the submissions that I have put this morning and that are in the written outline of submissions.

PN399

THE COMMISSIONER: Thank you. They were the only questions I had for you. So - - -

PN400

MR O'GRADY: Could I address a number of matters briefly in reply?

PN401

THE COMMISSIONER: Indeed. Of course.

PN402

MR O'GRADY: Can I start with perhaps the observation of Mr Harding a moment ago in response to the question you asked him? In my respectful submission that is a powerful consideration in favour of granting the Minister leave to be heard in respect of these proceedings. That if there be initial jurisdiction and if, as Mr Harding has said, ultimately it is incumbent upon the Commission to satisfy yourself that it has jurisdiction for the reasons explained by Justice Kirby in the Chief Commissioner of Police case then, in my submission, for the Commission to engage in that task unassisted by the parties it is precisely the type of scenario that section 590 contemplates. That there is assistance that is available from an interested person in that being the Minister and, in my submission, in those circumstances that weighs heavily in favour of the application to intervene – if I can use that term – being granted.

PN403

Can I then turn to the issues raised by Mr Dixon opposing intervention. And the first point, and indeed, it would appear his primary point in respect of that is the issue of delay. And you recall, Commissioner, he started by going back to the early stages of bargaining and, in effect, saying, 'Well, the Minister could have intervened or sought to intervene at any stage in those proceedings and didn't do so, and now she's come along and she's causing difficulties.

PN404

The point, of course, Commissioner or the response to that, Commissioner, is two-fold. Well, perhaps it boils down to one point. The Commission would be aware that FRV have previously filed submissions that raised, in substance, the matters that I have sought to agitate this morning. Whilst it doesn't – all but, with the exception of abuse of process – but as Mr Harding has explained even in their current submissions there is a clear preference for bargaining, being the mechanisms through which these issues should be addressed. And as you would appreciate from what I said this morning there is a clear continuum if you like between those issues and the point that we make in respect of abuse of process.

PN405

But in respect of the jurisdictional points those original submissions dated 13 January – sorry, 13 February – and I have a copy that I can hand up to the Commission agitated in very similar terms a number of the points that are in our written submissions and are in the – and that I addressed this morning. If it assists, Commissioner, I can make that point.

PN406

THE COMMISSIONER: These are the original submissions for the - - -

PN407

MR O'GRADY: These are the original submissions.

PN408

THE COMMISSIONER: I don't need a copy of those. I think - - -

PN409

MR O'GRADY: Thank you.

PN410

THE COMMISSIONER: Well, they were on the file.

PN411

MR O'GRADY: Yes.

PN412

THE COMMISSIONER: But to what extent is it proper to rely upon those? They've been withdrawn.

PN413

MR O'GRADY: Well, it goes to the question of delay. My learned friend, Mr Dixon, says 'Well, the Minister waited until the Friday before the hearing was supposed to start before she sought to intervene.' And the point I'd seek to make, Commissioner, is that the FRV had filed submissions that agitated the issues that we seek to agitate with the possible exception of abuse of process. It then withdrew those submissions and replaced them.

PN414

But that occurred on the date of 20 February – I understand Mr Dixon to say he didn't receive them until 21 February. My instructions are that the Minister was provided with a copy of them on 23 February and it was only then that it became apparent that the points that she wishes to agitate in these proceedings weren't going to be agitated by FRV and the Minister filed its application seeking to be heard the next day by that letter or thereabouts.

PN415

So the suggestion that there has been some intolerable delay on behalf of the Minister, in my submission, it just doesn't bear strictly when one has regard to the nature and the content of the submissions that FRV originally filed and then compares them with the nature and the content of the revised submissions that were filed last week. And that crystallising the issue, in my respectful submission, from the Minister's point of view. And in circumstances where the next day the Minister has sought to be heard in respect of these matters there is no basis, in my submission, for the delay issues.

PN416

And I'd ask when and if you have regard to those original submissions to have regard to Part A of those submissions, Part B of those submissions and Part C of those submissions and also Part E of those submissions.

PN417

Now, Part E it still remains. It's now Part D. It's been culled slightly. The reason why it's now Part D is because the old Part A is gone, raising the jurisdictional issues. Sorry, the old Part B is gone.

PN418

Can I then turn to the prejudice that is said to have been suffered by the UFU? The first point I would make is that for the reasons that Mr Harding noted earlier, and as I took the Commission to this morning, the Commission either has jurisdiction or not and is required to determine that.

PN419

And so there's no prejudice, in my submission, in the Minister seeking to assist the Commission to assess whether or not it properly has jurisdiction. Ultimately, it is incumbent upon the UFU to bring its claim within the ambit of the clauses in the enterprise agreement it relies upon.

PN420

And we say it hasn't done so because (a) it's not an allowance. And (b) it's not in accordance with established practise.

PN421

The second point I would make is that to the extent to which we're dealing with the allowance issue, that is not a matter of evidence. That is as his Honour, Justice Cullinan made clear in the Electrolux case. It doesn't matter what label the UFU might put on its claim. It either is an allowance as properly construed or it isn't. And that's not an issue of evidence. That's a matter to be determined objectively.

PN422

To the extent that Mr Dixon says, 'Well, the argument about in accordance with existing practise raises matters of evidence.' In our respectful submission that's not right. The issue raised by that part of the clause goes to whether there have been determinations by the Commission of allowances of this type previously. That's a matter of public record. It's not a matter where evidence needs to be called.

PN423

And, indeed, that's reflected, in my submission, by the way in which Mr Dixon sought to address that issue in his submissions this afternoon. And when one goes to the three examples he has given – at paragraph 24 of the submissions he has filed – we have two examples that go to income protection insurance and one example that goes to a sports voucher allowance.

PN424

But in respect of each of those Mr Dixon isn't relying upon evidence. He is simply pointing to determinations of the Commission.

PN425

Now, in respect of those examples, in my submission, none of them are examples of an existing practise of the Commission determining to put in place an allowance of the type that is here, that is the subject of this application.

PN426

And, indeed, each of them are properly characterised as an allowance in the sense that I was discussing, or putting to the Commission this morning, based upon the observations of the full Bench in the wage fixing principles case. Because they

are either reimbursement of expenses incurred or relate to work or conditions associated with the work being performed.

PN427

And that is patently clear, in my submission, in respect of the income protection allowance. Because as the Commission might recall the basis upon which that allowance was sought was because of the nature of the work performed by fire fighters, that the inherent risk that fire fighters are exposed to meant that it was necessary to put in place a mechanism to ensure that if they were injured in the performance of those duties they did not suffer a dramatic loss of income.

PN428

And that can be seen in one of the decisions that referred to by my learned friend, namely the decision of Commissioner Roe in *United Fire Fighters Union of Australia v Metropolitan Fire and Emergency Services*. And we're looking for a copy and if it can't be found I will just refer the Commission to the relevant paragraphs. So it's 2012, FWA 1085. And there was, in effect, a reserve matter in respect of accidents. And, indeed, Commissioner Roe determined that he had jurisdiction to order the allowance based upon the fact that there was a reserve matter but he also gave consideration to whether or not it was a claim for an allowance as such. And that's at paragraph 27 of his decision.

PN429

But then at paragraph 87 he made these observations. 'Having carefully considered all of the evidence and submissions I accept that the work of fire fighters is particularly strenuous and dangerous and that fire fighters are at a higher risk of being unable to perform work when injured or outside of work and workers in most injuries. I consider that this is a strong reason why firefighter's income should be protected when they suffer from illness or injury, which has not been accepted as entitling the workers to a workers' compensation system.'

PN430

And then in paragraphs 90 through to 94 he notes the various limitations on the schemes that would be otherwise available for firefighters. The point I'd seek to make, Commissioner, is that this is not some generalised benefit that has been accorded to firefighters unrelated to their work. It is a benefit that has been justified and awarded to firefighters because of the very nature of their work. It is, in my submission, entirely consistent with the nature of an allowance and in those circumstances it is something that the Commissioner, as he found, had power to order under the predecessor allowance clause. He didn't do that because he said that there was a reserve matter. But, in any event, it's not a reason for rejecting the submissions that I sought to put this morning.

PN431

The other example provided by Mr Dixon, in this part of his submissions, concerns the – sorry, just bear with me – concerns an increase to that allowance that was ordered by yourself in circumstances where there was a feeling that there was no existing protections or a scheme that had previously been available to protect firefighters and their income was no longer available.

PN432

Again, in my submission, nothing in that decision takes it outside of the category of allowances – well, allowances as described in the submissions I put this morning.

PN433

And the last example, and this is 24(b), concerns a sports voucher that has been provided to employees which, as I understand it, was for the princely sum of \$125 per annum. And in circumstances where one would have thought that it's inherent in the work of a firefighter that they are required to maintain a high level of fitness.

PN434

And, indeed, the same decision dealt with a fitness leader receiving a particular allowance. And so there were fitness leaders who got an allowance and then there was also a sports voucher provided. And that was in clauses 12.1 and 12.2 of the allowances that were dealt with.

PN435

Again, there is a relevant nexus between the work being performed and the allowances being granted. There is no such nexus in respect of the allowance that is the subject of this application. And as indicated these are submissions on the nature of allowances and the need to confine the clause to the granting of allowances was something that was agitated by FRV fulsomely in its original submissions to the Commission.

PN436

My learned friend also referred to the AON decision and took you to the observations in AON in respect of costs not being a (indistinct) flowing from an adjournment. AON, of course, doesn't concern the court acting outside of its jurisdiction. And that's the nature of the submissions we seek to agitate here. It's a very different scenario, in my respectful submission. And, in any event, the delay that the Minister could be charged with is of a very different magnitude to the delay that was the subject of consideration in AON.

PN437

In respect of my learned friend's submissions regarding pillar three I would adopt the explanation provided by my learned friend, Mr Harding. I would, however, note that you made the observation in the document that Mr Dixon handed up – attachment 2 – at paragraph eight about there are difficulties in assuming that pillar three will continue or continue unaltered. It's not a reason, in my submission, for assuming that the issues between FRV and the UFU are as confined as Mr Dixon sought to put before lunch.

PN438

In respect of the 10 points that Mr Dixon went on to make and he took you to paragraph five of our submissions, in my submission, it's apparent from the submissions that Mr Dixon put that this is an alternative mechanism to pursue gains that the UFU thought it was not able to achieve through bargaining. And that raises the issues that I have already touched upon.

PN439

My learned friend also referred to the decision of Commissioner Smith and took you to the last paragraph of that decision. I would note that there is nothing in that decision, in my submission, that suggests that the Commissioner felt that he was acting beyond jurisdiction. This was an application for the certification of an agreement and he made the observation I have already taken the Commission to.

PN440

And then in the paragraph that Mr Dixon took you to he says, 'Well, I am prepared to approve this.' And he took into account the nature and construction of the Act and the change in the nature of the work warrants the grant – sorry – and so he took into account the Act and he said it shouldn't be taken that I formed the view the change in the nature of the work warrants the grant of the allowance of the quantum or in those terms. However, I do not believe that the agreement of the parties is such that in the public interests I should reject it.

PN441

So he's not acting beyond jurisdiction. And that, in my submission, is what Mr Dixon is inviting the Commission to do and for the reasons I should to put this morning, it's submitted that the Commission should not.

PN442

Mr Dixon also took you to some aspects of the efficiencies to say, 'Well, there's a component of that efficiency that is related to the work that a particular cohort of employees might perform.' Even if you were to accept that, it is clear that not all of the persons who would be entitled to receive these allowances have been subject to that impost in respect of the work, and/or the matters that they are required to do.

PN443

Even in respect of the example that Mr Dixon took you to which was the third of the elements identified by Ms Campanaro it's apparent that the allowance has been calculated on the basis that there is a percentage of firefighters who are subject to that particular, in effect, training that enables them to operate as between the two fire services.

PN444

And that, in my submission, is in many respects the key vice. The allowance that's sought by the UFU in these proceedings does not seek to distinguish between individuals and employees who either have to be reimbursed for an expenditure or who have done something in addition in their work, so as to warrant them receiving the allowance, rather as I sought to describe it this morning. There is a pot of money gathered from various sources which is then distributed across the fire service.

PN445

Lastly, I note that Mr Dixon, in his submissions, at paragraph 29 observed that determining any jurisdictional point after the merits hearing was having significant costs, time and effort being thrown away, we wouldn't disagree with that. In my submission, the Commission should determine jurisdiction prior to determining the merits.

PN446

But, in my submission, to the extent that Mr Dixon is suggesting, 'Well, that means that the Minister shouldn't be heard in respect of this matter because she's allowed this situation to develop through her delay for the reasons I have already sought to explain that that doesn't suffice for it and with respect.

PN447

Unless there are any further questions, Commissioner, those are the submissions.

PN448

THE COMMISSIONER: No, there's not, Mr O'Grady. So I take it there's nothing further from either of the counsel? No?

PN449

MR HARDING: There's none from me.

PN450

THE COMMISSIONER: All right. Thank you. What I propose to do now is to indicate to you my decision. However, what I will do is to publish a decision in relation – publish reasons for the decision in relation to the decision. I expect that my decision in respect of intervention would probably be – perhaps settling won't be today – probably not tomorrow but comfortably by Wednesday. And that decision is that I will grant appearance for the Minister for the Emergency Services but only in relation to the matter of jurisdiction of the Commission to grant the application made by the UFU.

PN451

Now that limited nature of intervention, in my view, means that there will be no right for the Minister to lead evidence or to be involved in the taking of evidence from witnesses called before the Commission.

PN452

And I indicated what I propose to do is to publish my reasons for decision in respect of this decision. But at the appropriate time whether that's this afternoon or tomorrow I propose to hear from counsel as to whether any adjournment requires being made to the hearing schedule or to the provision of further evidence or documents from any party.

PN453

Do any of you wish to say anything in respect of what I have just indicated to you at this time?

PN454

MR HARDING: Yes. I will need to take instructions on what the consequences of your decision might be in relation to the remainder of the timetable.

PN455

THE COMMISSIONER: All right. And that brings – sorry, Mr Dixon?

PN456

MR DIXON: As do I, Commissioner.



PN457

THE COMMISSIONER: And that brings me to another point I wish to say before we leave this afternoon, which is at the conclusion of these proceedings I wish to see counsel – all three counsel with their most senior instructor please. I wish to raise a matter pertaining to both this issue and bargaining. And I will do that in private session. All right? So I anticipate that that would be in about the next 10 to 15 minutes. Thank you. If we adjourn please?

**ADJOURNED INDEFINITELY**

**[3.01 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #UFU 1 WRITTEN SUBMISSIONS OF THE UFU WITH TWO ATTACHMENTS.....PN322**

**EXHIBIT #MINISTER 1 OUTLINE OF SUBMISSIONS OF MR O'GRADY ON BEHALF OF THE MINISTER .....PN323**