DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

United Firefighters' Union of Australia
v
Metropolitan Fire and Emergency Services Board T/A MFB; and Country Fire Authority
(C2017/5456; C2017/5457; C2017/5458)

COMMISSIONER WILSON MELBOURNE, 22 AUGUST 2018

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)].

[1] This decision deals with argument from the Respondents in the matters before me that the Fair Work Commission lacks jurisdiction to hear and determine the matters.

[2] The matters before the Commission are applications by the United Firefighters' Union of Australia (UFU) for the Commission to deal with alleged disputes arising under three enterprise agreements applicable to Victoria's fire services, the Metropolitan Fire and Emergency Services Board T/A MFB (MFB) and the Country Fire Authority (CFA). Each application is made pursuant to s.739 of the *Fair Work Act 2009* (Cth) (the Act) allowing the Commission to deal with a dispute to the extent that it is required or allowed to do so, in these cases pursuant under an enterprise agreement.

[3] The matters are:

- C2017/5456 – *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010*[1] (*MFB ACFO Agreement 2010*). The nominal expiry date of the agreement was 30 September 2013.

- C2017/5457 – *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010*[2] (*MFB Operational Staff Agreement 2010*). The nominal expiry date of the agreement was also 30 September 2013.

[1] AE881004.

[2] AE881005.

- C2017/5458 – *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*[3] (referred to in this decision as *CFA Operational Staff Agreement 2010*). The nominal expiry date of the agreement was also 30 September 2013;

[4] In this decision the United Firefighters' Union of Australia is referred to as the UFU; the Country Fire Authority is referred to as CFA; and the Metropolitan Fire and Emergency Services is referred to either as MFB or MFESB.

[5] Each party was granted permission by me to be represented by a lawyer, with me being satisfied it was appropriate to do so pursuant to s.596(2)(a), after taking into account the efficiency which legal representation may bring to the matter and taking into account the complexity of the matter. As a result, Mr Eugene White and Mr Joel Fetter of Counsel, instructed by Davies Lawyers appeared for the UFU and Mr Richard Dalton and Mr Leigh Howard of Counsel, instructed by Corrs Chambers Westgarth appeared for the CFA and MFB.

BACKGROUND

[6] The three applications before the Commission were each lodged on 3 October 2017 and have each been the subject of extensive dealings by the Commission for over nine months, with more than 13 conciliation conferences before me since 20 October 2017, as well as being subject of discussion between all concerned about the suitability of the Fair Work Commission New Approaches framework[4] as a mechanism to resolve the looming impasse between the parties in their negotiations.

[7] After this prolonged history, on 29 May 2018, the UFU sought the alleged disputes be determined through private arbitration pursuant to the rights it claims exist under each of the three enterprise agreements.

[8] Two quite different disputes are sought to be resolved in these proceedings:

- What is referred to by the UFU as the Rank Alignment Question in which the Commission is asked to determine that two of the most senior classifications in the MFB should align, at least in respect of their pay, to what are perceived to be two corresponding positions within the CFA. The precise framing of the dispute and the motivators for it are set out in further detail below.

- What is referred to by the UFU as the Relativities Question in which the Commission is asked to determine that a wages anomaly exists in managerial employee levels at or above Station Officer which should then be resolved through a pay increase to those managerial classifications. Again, the precise framing the dispute and the motivation for it are set out in further detail in this decision.

[9] It is relevant also to note that not only have each of the three enterprise agreements passed their nominal expiry date but that each has also been the subject of bargaining leading

[3] AE881690.

[4] See https://www.fwc.gov.au/disputes-at-work/new-approaches

to two new agreements, namely the *CFA/UFU Operational Staff Agreement 2016* (Proposed 2016 CFA Agreement) and the *MFB/UFU Operational Staff Agreement 2016* (Proposed 2016 MFB Agreement). The Proposed 2016 MFB Agreement, the scope of which encompasses the employees presently covered by the *MFB Operational Staff Agreement 2010* and the *MFB ACFO Agreement 2010*, has been "made" within the meaning of the Act[5] but has yet to be approved by the Commission with proceedings for approval presently before another Member. The Proposed 2016 CFA Agreement has been bargained for but has neither been "made" or approved.[6]

[10] As a result of the UFU's request that the matters be referred for arbitration, Directions were issued by the Commission for hearing, with the substance of those Directions being the following (as amended) that:

- the Applicant, the UFU file draft questions for determination, its submissions and evidentiary material upon which it relied by 29 June 2018;

- the Respondent parties, the CFA and MFB file their submissions and evidentiary material by 27 July 2018; and

- the Applicant, file any reply submissions by 7 August 2018.

In relation to the potential for jurisdictional challenge to these proceedings, the parties were also directed:

> "[6] Any and all jurisdictional objections to these matters proceeding must be identified to the Commission and each other party by not later than **5:00 PM Tuesday, 26 June 2018**. Unless determined otherwise my predisposition is to deal with any jurisdictional objection at the same time as the merits. Should any party seek otherwise they must seek a Mention hearing on the subject not later than **5:00 PM 3, July 2018**."

[11] I note that the reason for providing this Direction for the identification of any matters of jurisdictional question was to ensure that the Applicant, as well as the Commission, was on notice as early as possible of any and all jurisdictional issues; that the UFU would be in a position to respond to those jurisdictional matters by the time reply submissions were due on 7 August 2018, and that none of these matters would cause a disruption to the very tightly programmed schedule for hearing which was due to start on Monday, 13 August 2018 and listed for a total of three weeks.

[12] In response to the directions the UFU filed its materials on 29 June 2018 and set out what it referred to as to common questions for determination by the Commission:

> "(a) **The Rank Alignment Question**: whether the wages of MFB Commanders should be increased so they match the wages paid to the CFA Commanders (formerly known as Operations Officers: **OOs**), and whether the wages of the CFA Operations Managers (**OMs**) should be increased so they correspond with the wages paid to MFB Assistant Chief Fire Officers (**ACFOs**); and

[5] *Fair Work Act 2009*, s.182.

[6] Exhibit R2, Outline of Submissions of the Respondents, [5].

(b) **The Relativities Question**: whether the wages of managerial employees should be increased, relative to the most experienced line firefighting rank, the Senior Leading Firefighter (**SLF**) position. For the MFB, the relevant "managerial employees" are the ranks of Station Officer (**SO**), Station Officer (**SSO**), Commander and ACFO. For the CFA, the relevant ranks are SO, SSO, Commander and OM."[7] (footnotes omitted)

Rank Alignment Question

[13] The motivation for the matters that are the subject of the Rank Alignment Question appears to stem from the view that since Victoria's emergency services increasingly operate together, there is a heightened need for pay and other alignment of their respective classifications. I understand one motivator for the dispute now before the Commission to be a desire to ensure present and future comparability between the respective senior ranks, both as to matters of function and span of control as well as for status and pay.

[14] While so, it is to be noted that the origins of the dispute are not entirely restricted to resolution of the question now before the Commission of whether there should be a common pay structure for MFB Commanders and CFA Operations Officers or CFA Operations Managers and MFB ACFOs. The UFUs originating application and Outline of Opening Submissions have the following to say on the subject:

- From the originating application to the *MFB Operational Staff Agreement 2010* dispute (C2017/5457), making reference to the Proposed 2016 MFB Agreement;

  "By cl 12A of the proposed new enterprise agreement for MFB Operational Staff the UFU and MFB acknowledge their common intention to create a common rank structure for senior operational personnel (being those employees with a rank above SSO and below Deputy Chief Officer) in the Country Fire Authority (CFA) and MFB to assist in improving interoperability between the two agencies and to improve the career opportunities of employees. Pursuant to that clause, the parties also agree to meet and negotiate on the alignment of rank structures between the two agencies within three months of the agreement coming into operation."

- From the UFU Outline of Submissions;

  "The UFU's position on each issue is as follows. On the Rank Alignment issue, the UFU contends that the pay for the most senior ranks should indeed be aligned, given the current similarity of the positions, given the convergence in recent years in the roles of the MFB and the CFA, and given the potential for the creation of a unified career firefighting service in the future."[8]

[15] The CFA and MFB characterise the UFU claims on these matters as not being about rank alignment, but about pay alignment.[9]

[7] Exhibit A2, Applicant's Outline of Opening Submissions, [1].

[8] Exhibit A2, [2].

[9] Transcript, PN415.

[16] Irrespective of how it may be best to refer to the UFU claim, and as may be seen from the Rank Alignment Question proposed by the UFU, the critical questions for consideration are whether the wages of MFB Commander should be increased to match those of the CFA Operations Officers (as they are known under the *CFA Operational Staff Agreement 2010*, and to be renamed as Commanders under the Proposed 2016 CFA Agreement); and/or whether the wages of CFA Operations Manager should be increased so they correspond with the salary levels of an MFB Assistant Chief Fire Officer (ACFO).

[17] The salary levels of these four positions under the three 2010 agreements are as follows:

- From the *MFB Operational Staff Agreement 2010*, Clause 96.1 – Wages (with table adjusted to show Commander rates only)

WAGES PER WEEK

	Relativity	Current Weekly Wage	01-Aug-10 3%	01-Aug-11 3%	01-Aug-12 3%	01-Aug-13 1.5%
Commander on commencement	151.60%	1,842.32	1,897.59	1991.65	2051.40	2082.17
Commander after 12 months	160.40%	1,949.32	2,007.80	2107.33	2170.55	2203.10
Commander after 24 months	169.19%	2,056.09	2,117.77	2222.75	2289.43	2323.77

- From the *MFB ACFO Agreement 2010*, Schedule 1 – Remuneration;

	Current Annual	01-Aug-10 3%	01-Aug-11 3% +1.9%	01-Aug-12 3%	01-Aug-13 1.5%
Commencement rate (paid on appointment)	$145,800.00	$150,174.00	$157,618.13	$162,346.67	$164,781.87
First Increment (no later than months after appointment)	$153,900.00	$158,517.00	$166,374.69	$171,365.93	$173,936.42
Full substantive rate (no later 24 months after appointment)	$162,000.00	$166,860.00	$175,131.25	$180,385.19	$183,090.97

- From the *CFA Operational Staff Agreement 2010*, Schedule 13 – Classifications and Wages;

Table B. Post-EMR Training

Table B applies in the situations specified in clause 88.4 and clause 88.9.

Classification	**Relativity**	**Current Annual Wage**	**1-Aug-10**	**1-Aug-11**	**1-Aug-12**	**1-Aug-13**
			+3%	**+3% +1.9%**	**+3%**	**+1.5%**
Operations Officer 1	166%	108,070.38	111,312.49	116,830.25	120,335.16	122,140.18
Operations Officer 2	169%	110,243.68	113,550.99	119,179.71	122,755.10	124,596.42
Operations Officer 3	173%	112,416.98	115,789.49	121,529.17	125,175.04	127,052.67
Operations Officer 4	176%	114,588.22	118,025.86	123,876.41	127,592.70	129,506.58
Operations Manager 1	186%	121,106.06	124,739.24	130,922.56	134,850.24	136,872.99
Operations Manager 2	190%	123,278.33	126,976.68	133,270.91	137,269.04	139,328.07
Operations Manager 3	193%	125,448.54	129,211.99	135,617.03	139,685.54	141,780.83
Operations Manager 4	196%	127,621.84	131,450.49	137,966.49	142,105.49	144,237.07

[18] The salary levels of these four positions under the proposed 2016 Agreements and the industrial drivers, both in respect of the Rank Alignment Question as well as the Relativities Question are referred to in the UFU submissions as follows;

> "77. Under the final (yet-to-be-approved) proposed 2016 Agreements, the relativities and premiums (now expressed relative to the SLF rank and not the LF rank) of the relevant ranks are those set out in Table 1, summarised here for convenience as follows:

MFB & CFA					
	Relativity to QF		Premium over SLF		
Qualified Firefighter	100%				
Senior Leading Firefighter	122%				
Station Officer	130%		6.6%		
Senior Station Officer	140%		14.8%		
MFB			CFA		
Commanders	152-169%	24.3-38.7%	Comm-anders	166-176%	40.2-48.6%
ACFOs	231-256%	89.1-110.1%	OMs	186-196%	57.1-65.5%

> 78. It can be seen that the effect of inserting the SLF rank was to significantly erode the premiums which management roles attract, compared to the most experienced line firefighting roles. The premiums fell by about seven percentage points, at each management rank, compared to the position immediately prior to the 2016 Agreements.
>
> 79. Indeed, over the long run between 1982 and the present, it is clear that management premiums have fallen dramatically. For example, the premium for SOs has declined from a peak of 22% in 1992, and a more recent peak of 13.1% (under the 2010 Agreements), to just 6.6% now. The premium for SSOs has fallen from a peak of 40% in 1982, and a more recent peak of 21.7% under the 2010 Agreements, to just 14.8% now."[10]

The Relativities Question

[19] The matter of the Relativities Question has entirely different origins.

[20] By way of background on the subject of the relativities between classification, it is noted that the 2010 agreements provide for the following relativities between the various classifications and that Station Officer is considered to be the first of the managerial levels.;

- From the *MFB Operational Staff Agreement 2010*;[11]

	Relativity
Recruit	88%
Firefighter Level 1	88%
Firefighter Level 2	90%
Firefighter Level 3	92%
Qualified Firefighter	100%
Qualified Firefighter with LFF Qualifications	105%
Senior Firefighter	110%
Leading Firefighter	115%
Station Officer	130%
Senior Station Officer	140%
Fire Services Communication Controller	140%

[10] Exhibit A2.

[11] Table extracted from *MFB Operational Staff Agreement 2010*, clause 96.1. It is to be noted that the Applicant says the following about the indicated relativity for a Recruit Firefighter in the Proposed 2016 Agreements, which appears equally applicable to the 2010 Agreements – "The stated relativity in the 2016 Agreements is 88% but the actual relativity is 64%." (Exhibit A2, p.10)

Commander on commencement	151.60%
Commander after 12 months	160.40%
Commander after 24 months	169.19%

- The situation relating to MFB ACFOs is less clear, with the MFB ACFO Agreement 2010, referring to the relativities of those classifications only in Schedule 4 (Scheduled Award). That Schedule indicates that the historical relativities for ACFOs are;

    - ACFO on commencement - 229.93
    - ACFO after 12 months – 242.70
    - ACFO after 24 months – 255.47

- In the CFA;[12]

Classification	**Relativity**
Recruit	88%
Firefighter Level 1	88%
Firefighter Level 2	90%
Firefighter Level 3	92%
Qualified Firefighter	100%
Qualified Firefighter with LFF qualifications	105%
Senior Firefighter	110%
Leading Firefighter	115%
Station Officer	130%
Senior Station Officer	140%
FSCC	140%

[12] Table extracted from *CFA Operational Staff Agreement 2010*, clause 94.1, Table B and Schedule 13, Table B. It is to be noted that the Applicant says the following about the indicated relativity for a Recruit Firefighter in the Proposed 2016 Agreements, which appears equally applicable to the 2010 Agreements – "The stated relativity in the 2016 Agreements is 88% but the actual relativity is 64%." (Exhibit A2, p.10)

Classification	Relativity
Operations Officer 1	166%
Operations Officer 2	169%
Operations Officer 3	173%
Operations Officer 4	176%
Operations Manager 1	186%
Operations Manager 2	190%
Operations Manager 3	193%
Operations Manager 4	196%

[21] The argument about relativities lacks some clarity in the material so far before the Commission. On the one hand, the relatives question is motivated by some historical factors, both regarding the nature of an industrial anomaly, as well as of work value. On the other, it is unavoidable to draw the conclusion that the relatives question stems, perhaps mainly so, from the "disruptive" effect of agreement, reached during bargaining, to introduce a new classification called "Senior Leading Firefighter".

[22] In relation to the first matters, of historical anomaly and work value, the UFU put forward the following substantive argument in its written submissions:

> "55. The UFU seeks to lift the pay of the senior ranks (from SO upwards), relative to the most experienced line firefighting rank, the SLF rank. As set out above, there are three related grounds for the claim. First, an adjustment is sought to rectify the historic erosion in the "premium" for management. Second, an analysis of the management roles in question reveals they are, in fact, significantly more difficult that the line firefighting roles. Thirdly, if anything, the management roles have become harder in recent decades, and there has been no recognition of this development."[13]

[23] The new Senior Leading Firefighter classification was recommended first to the CFA and then to the MFB by Commissioner Roe in January 2016,[14] with him recommending the adoption of a new level on these terms:

> "[76] Clause 99.2 which adjusts allowances by the relevant % should apply but Clause 99.3 which provides ongoing adjustments after the end of the agreement should not be included.
>
> Relativities appear in a number of clauses including Clause 157.1 and Clause 162.10.3. The following principles should be adopted:
>
> 1. MCS alignment with OM.
> 2. Inclusion of Senior Leading Firefighter as per UFU version 17.
> 3. Inclusion of Senior FSCC as per UFU version 17.

[13] Exhibit A2.

[14] Ibid, [76].

4. Changes to the current relativities for the OO (Commander) and OM ranks should await the outcome of the Clause 12A rank review process. The Agreement should be based on current relativities.
5. No change to the current relativities that apply to instructors. (Table in 162.10.3 and the pay rates in Schedule 8 should be changed to reflect status quo).

Wages adjustments
• Sign on bonus $3000
• 5% from November 2015
• 3% from 1 July 2016
• 3% from 1 July 2017
• 3% from 1 July 2018
• 3% from 1 July 2019"[15] (underlining added)

[24] The Proposed 2016 CFA Agreement and the Proposed 2016 MFB Agreement record the Senior Leading Firefighter as having a wages relativity of 122%, interposed between the long existing levels of Leading Firefighter (115%) and Station Officer (130%) with the percentage relativities for other classifications not changing. In relation to the agreed introduction of the new Senior Leading Firefighter classification, the UFU argued about the anomaly/work value matter:

"77. Under the final (yet-to-be-approved) 2016 agreements, the relativities and premiums (now expressed relative to the SLF rank and not the LF rank) of the relevant ranks are those set out in Table 1, summarised here for convenience as follows:

MFB & CFA					
	Relativity to QF		Premium over SLF		
Qualified Firefighter	100%				
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78. It can be seen that the effect of inserting the SLF rank was to significantly erode the premiums which management roles attract, compared to the most experienced line firefighting roles. The premiums fell by about seven percentage points, at each management rank, compared to the position immediately prior to the 2016 Agreements.

79. Indeed, over the long run between 1982 and the present, it is clear that management premiums have fallen dramatically. For example, the premium for SOs has declined from a peak of 22% in 1992, and a more recent peak of 13.1% (under the

[15] Applicant Witness Statement of Dimitra Eirini Sophia Krouskos (filed, but not yet sworn or admitted), Attachment RK-1

> 2010 Agreements), to just 6.6% now. The premium for SSOs has fallen from a peak of 40% in 1982, and a more recent peak of 21.7% under the 2010 Agreements, to just 14.8% now."[16]

THE JURISDICTIONAL OBJECTIONS

[25] Despite the direction to do so, neither the MFB or the CFA notified the Commission or the UFU of any jurisdictional matters by 26 June 2016, they did not seek a mention hearing on the subject and did not disclose their objections until the filing of their substantive material. The explanation put forward by the CFA and MFB is that given the enormous amount of material filed including numerous witnesses, copious public documents, reviews, reports, industrial awards and enterprise agreements couple with dealing with two organisations with executive level command and boards as well as government, it took longer than anticipated to receive instructions.[17] Notwithstanding this situation the matters referred to by the CFA and the MFB require initial determination.

[26] The jurisdictional objections raised by the CFA and MFB are to the effect that neither of the three agreements before the Commission permit the raising of the Rank Alignment Question and that only one of the three agreements, the *MFB Operational Staff Agreement 2010* allows arbitration of one specific part of the Relativities Question, and then only as it applies to the positions of Station Officers, Senior Station Officers and Commanders.[18]

[27] The jurisdictional objection raised in relation to the Rank Alignment Question involves an analysis of several parts of the three agreements, with the ultimate contention being that a combination of factors leads to the conclusion that there is no authority for continuation of the dispute. In succession, the CFA and MFB raise the argument that continuation of the dispute would not be consistent with the three agreements' "no extra claims" provisions, as well as the claim being inconsistent with the provisions of several of the agreements as they relate to the role of bargaining or variation of the agreements.

[28] It is said by the CFA and MFB that the jurisdictional impediment comes about for a number of reasons.

MFB Operational Staff Agreement 2010

[29] While the *MFB Operational Staff Agreement 2010* provides a dispute resolution procedure which enables private arbitration of claims (Clause 19), it is argued that right is limited in certain respects by the Clause 23 (No Extra Claims), in tandem with other parts of the Agreement.

[30] The no extra claims clause is brief, stating only:

> "23. NO EXTRA CLAIMS
>
> 23.1. There shall be no extra claims by either party."

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[16] Exhibit A2.

[17] Transcript, PN453.

[18] Exhibit R2, [28].

[31] The CFA and MFB argue that the clause is not limited to the nominal expiry date of the Agreement, which was stated in the approval decision to be 30 September 2013,[19] and that in any event it needs to be read not only in conjunction with Clause 19 (Dispute Resolution) but also Clause 4.3, (part of Clause 4, Date and Period of Operation), dealing with collective bargaining; Clause 5 (Renegotiation); Clause 11 (Variation of Agreement) and Clauses 70.5, 70.6 and 70.7 which are sub-clauses within Clause 70 (Career Paths and Opportunities) for those working under Part B of the Agreement.[20]

[32] Clause 19, the Dispute Resolution term provides the following, to the extent relevant to these matters:

> "19. DISPUTE RESOLUTION
>
> 19.1. This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:
>
> 19.1.1. all matters for which express provision is made in this agreement; and
>
> 19.1.2. all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and
>
> 19.1.3. all matters pertaining to the relationship between the MFESB and UFU, whether or not express provision for any such matter is made in this agreement.
>
> The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause.
>
> 19.2. To ensure effective consultation between the employer, its employee(s) and the union on all matters, the following procedure shall be followed in an effort to achieve a satisfactory resolution of any dispute or grievance:
>
> 19.2.1. Step 1 The dispute shall be submitted by the union and/or employee(s) to the employee's immediate supervisor.
>
> 19.2.2. Step 2 If not settled at Step 1, the matter shall be submitted to the appropriate senior officer.
>
> 19.2.3. Step 3 If not settled at Step 2, the matter shall be recorded. The matter shall be submitted to the appropriate delegated Industrial Representative of the employer for consultation.
>
> 19.2.4. Steps 1 - 3 Must be concluded within a period of ten (10) consecutive days. Disputes are to be resolved at a local level wherever possible.
>
> 19.2.5. Step 4 If the matter is not settled at Step 3, the dispute shall be formally submitted in writing to the Manager Employee Relations, setting out details of the dispute and, where appropriate, with supporting documentation.

[19] Ibid, [18]; see also [2010] FWAA 7414, [5].

[20] Part B is entitled "Conditions applying to Firefighters, Station Officers, Senior Station Officers and Commanders".

> The Manager Employee Relations shall convene a meeting of the employer, employee(s) and the union within a period of one week (7 days) of receipt of such submissions and endeavour to reach a satisfactory settlement.
>
> 19.2.6. Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWA. FWA may utilise all its powers in conciliation and arbitration to settle the dispute."
>
> [19.3 – 19.7 – omitted]

[33] While Clause 19 ostensibly enables a dispute to be agitated in relation "to all matters arising under this agreement", with a matter that is not settled through the stipulated procedure to be able to be referred to the Commission which "may utilise all its powers in conciliation and arbitration to settle the dispute", it is argued generally that the Commission's capacity to arbitrate in the case of a particular enterprise agreement depends on the express terms of the dispute settlement procedure and of any relevant limitations on powers to arbitrate or to otherwise bring claims forward to be dealt with. In this case the relevant limitations include the ongoing duration of the No Extra Claims provision (Clause 23) as well as the parties' mutual commitments made about collective bargaining, the renegotiation of the Agreement and variations to the Agreement (Clauses 4, 5 and 11). The CFA and MFB further argue that their position in relation to the Rank Alignment Question is bolstered through commitments given within the Agreement about relativities and other matters of rank and promotional structures for those working under Part B (Clauses 70.5 and 70.7).

[34] It is argued by the CFA and MFB that where matters are expressly reserved within the Agreement the provisions of the no extra claims clause may be read down from its plain and ordinary meaning.[21] With the exception of a work value/anomaly type matter in Clause 70.6 which was unresolved between the parties when the Agreement was made, the CFA and MFB submit that rather than being a reservation in respect of the other matters there is explicit intention within the Agreement for those matters to not be available for private arbitration.

[35] In relation to the clauses that may operate to limit the right of private arbitration, the CFA and MFB refer to the following:

- With reference to collective bargaining:

> "4. DATE AND PERIOD OF OPERATION
>
> 4.1. This Agreement shall come into force from the date it is approved by Fair Work Australia and remain in force until the 30th of September 2013. The parties agree that this agreement shall remain in force until replaced by a new agreement.
>
> 4.2. The parties agree that all wages and conditions payable under this agreement shall be payable as if this agreement was in force from the 1st of December 2009. This includes backpay to the 1st of December 2009.

[21] Transcript, PN464.

4.3. Subject to this agreement, the parties agree that they shall bargain collectively in relation to any matter, whether arising from this agreement or not and in relation to the renewal, extension or variation of this agreement." (Underlining added)

- With reference to renegotiation of the agreement:

"5. RENEGOTIATION

The parties to this agreement agree to commence negotiations on a new agreement six months prior to the expiry date of this agreement."

- With reference to making variations to the agreement:

"11. VARIATION OF AGREEMENT

11.1. Where it is agreed the parties bound by this agreement may apply to FWA to vary the agreement or replace it with another agreement.

11.2. The parties agree to review the current UFU MFB sub-committees in place and their terms of reference. Any changes to such sub-committees/committees will be by agreement."

[36] It is argued that the combined effect of Clauses 5, 4.3 and 11 is that they enable new claims to be raised after the nominal expiry date, but then only in the context of bargaining collectively for the renewal, extension or variation of the Agreement.

[37] In relation to the Rank Alignment Question the CFA and MFB put forward that there is explicit agreement between them that the relativities within the Agreement are the product of bargaining and thereby are a resolved and final subject, save as to anything which may be dealt with through collective bargaining for a variation or replacement agreement. They draw this proposition from the combined effect of Clauses 70.5, 70.6 and 70.7:

"70. CAREER PATHS AND OPPORTUNITIES"

70.1 – 70.4 – omitted

"70.5. Relativities

The parties have agreed on new relativities for the ranks referred to in this Agreement. These relativities are set out in the wages clause of this Agreement. These relativities will take effect from the date of this Agreement.

70.6. The parties acknowledge the UFUs right to pursue a work value / anomaly type exercise within the 2005 MFB UFU Operational Staff Agreement. However in light of the parties agreeing on the new relativities referred to in clause 70.5 the UFU agrees to defer any work value claim until the nominal expiry date of this agreement."

70.7. Appropriateness of ranks

> Subject to the provisions of this clause regarding relativities, SFF's, QFF's and LFF's, the parties agree that the rank and promotional structures referred to in this Agreement are appropriate and will be maintained for the life of this Agreement. No new classification or rank will be created other than by agreement of the parties."
>
> 70.8 – omitted

[38] Notwithstanding these arguments, or perhaps because of them, the Respondent's note that in the case of the *MFB Operational Staff Agreement 2010* a specific right may endure for the UFU to seek determination of "a work value/anomaly type exercise" in relation to the classifications within Part B of the Agreement, the highest of which is a Commander. This argument comes about because of the provisions of Clause 70.6, within Part B, in the terms set out above acknowledging "a work value/anomaly type exercise within the 2005 MFB UFU Operational Staff Agreement". Ostensibly this reference implies that there is a capacity for the UFU to pursue through private arbitration an anomaly or work value matter which may have come about, or was recognised by the parties in the 2005 Agreement. However the UFU argues that this is not the case at all, and that the reference in the clause to the "2005 MFB UFU Operational Staff Agreement" is plainly a typographical error with the reference actually being to the *MFB Operational Staff Agreement 2010*.[22]

[39] Other than this matter the CFA and the MFB argue there is no capacity for the UFU claims to be heard and determined by the Commission.

MFB ACFO Agreement 2010

[40] The *MFB ACFO Agreement 2010* is somewhat shorter than the corresponding operational firefighter agreement, the *MFB Operational Staff Agreement 2010*, and in parts is in different terms.

[41] Relevant to its jurisdictional objections, the CFA and MFB rely upon two clauses, the conjunction of which lead to the proposition that the *MFB ACFO Agreement 2010* does not contain any express reservation or right to make any claims that are presently before the Commission. In this regard the CFA and MFB refer to Clause 7 (Variation of Agreement) which is in identical terms to clause 11.1 of the *MFB Operational Staff Agreement 2010*. The fire services also rely upon the *MFB ACFO Agreement 2010* no extra claims clause which is in different terms to that applicable to MFB operational firefighters:

> "52 NO EXTRA CLAIMS
>
> 52.1 The union will make no extra claims prior to the nominal expiry date of the Agreement
>
> 52.2 The MFESB will make no extra claim prior to the nominal expiry date of the Agreement.
>
> 52.3 The power of Fair Work Australia to arbitrate, granted by this agreement, does not extend to matters that are extra claims, or, to change defined at Clause 8 about a matter outside the scope of this agreement."

[22] Transcript, PN526-529.

[42] The *MFB ACFO Agreement 2010* contains a dispute resolution procedure providing the same scope for the raising and pursuit of disputes for ACFO employees as within the *MFB Operational Staff Agreement 2010* (Clause 12).

[43] The CFA and MFB submissions on the *MFB ACFO Agreement 2010* are to the effect that there is an explicit prohibition in Clause 52 on the arbitration of the extra claims and that, there being no comparable provision anywhere in the Agreement dealing with the work value/anomaly matter referred to within Clause 70.6 in the *MFB Operational Staff Agreement 2010*, there is no warrant from the Agreement for either the Rank Alignment Question or the Relativities Question to be determined.

CFA Operational Staff Agreement 2010

[44] The objection raised by the CFA and MFB in relation to the *CFA Operational Staff Agreement 2010* is in essentially the same form as the matters raised in relation to the *MFB Operational Staff Agreement 2010*. The exception is that it is argued there is no ability for the UFU to pursue any part of the Relativities Question. This is for the reason that there is, within the *CFA Operational Staff Agreement 2010*[23], no provision comparable to clause 70.6 in the *MFB Operational Staff Agreement 2010* permitting the work value/anomaly matter to be raised.

[45] So far as is relevant to the *CFA Operational Staff Agreement 2010*, the CFA and MFB note that Clause 65 (No Extra Claims) is in identical terms to that in the *MFB Operational Staff Agreement 2010*. The Respondents also base their objection on comparable clauses dealing with variation of the Agreement (clause 10) and the parties' commitment to "bargain collectively in relation to any matter whether arising from this agreement or not and in relation to the renewal, extension or variation of this agreement" (Clause 4.3).

[46] Further to these matters, the CFA and MFB refer particularly to Clause 68.4, within a wider Clause 68 dealing with career paths and opportunities, which, it is argued allows the finding "that the parties bargained for, and agreed to, the relativities between those employees covered by Part B".[24]

[47] Part B of the Agreement is titled "Conditions applying to Firefighters, Station Officers and Instructors" with the first two clauses of the part being in the following terms:

> "66. APPLICATION OF PART B
>
> 66.1. This part applies to all employees of the CFA engaged in or performing work that is or may be performed by an employee engaged in a classification or occupation referred to in this part of the agreement.
>
> 67. CLASSIFICATIONS
>
> 67.1. An employee to whom this part applies shall be employed in one of the following ranks:

[23] AE881690.

[24] Exhibit R2, [40].

67.1.1. Recruit

67.1.2. Firefighter Level 1

67.1.3. Firefighter Level 2

67.1.4. Firefighter Level 3

67.1.5. Qualified Firefighter

67.1.6. Qualified Firefighter with LFF qualifications

67.1.7. Senior Firefighter

67.1.8. Leading Firefighter

67.1.9. Station Officer

67.1.10. Senior Station Officer"

[67.2 – 67.4 – omitted]

[48] Further within Part B is Clause 68.5 dealing with the role of the Enterprise Bargaining Implementation Committee (EBIC) in relation to certain matters:

> "68.5. Subject to the provisions of this agreement, including regarding harmonisation, the parties agree that unless otherwise agreed by the EBIC the rank and promotional structures in this agreement will be maintained."

[49] The import of the CFA and MFB submissions in relation to Part B is that the matter of relativities is something that was specifically bargained for in the steps taken to achieve the *CFA Operational Staff Agreement 2010* with it then being the case that there is no warrant to proceed in the absence of evidence of agreement at EBIC.

[50] Finally, the CFA and MFB argue that, in relation to Operations Officers and Operations Managers, there is a prohibition within Schedule 13 to the Agreements, which both identifies the positions within those classifications as well as providing for pay and certain other conditions for them, to unilaterally making any changes to the matters covered by the Schedule. For the purposes of context, the Schedule preamble is in the following terms:

> "SCHEDULE 13 – CLASSIFICATIONS AND WAGES
>
> Listed below are the additional positions, covered by this agreement, to which the terms and conditions of Operations Manager and Operations Officer contained in this agreement will apply. Any variations, additions or deletions will not be unilaterally implemented but will be dealt with under the provisions of Clause 10 – Variation of Agreement and Clause 13 – Consultation."

PRINCIPLES

[51] In dealing with disputes such as those that are the subject of these applications the Commission is not undertaking an exercise of judicial power but is instead exercising a power of private arbitration, with that power deriving from the parties' agreement to submit their differences for decision by a third party. The resultant arbitrator's award is not binding of its own force but instead its effect depends on the law which operates with respect to it.[25] It is accepted that while not exercising judicial power, the Commission "may legitimately form and act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers".[26]

[52] The Commission is required to examine whether an enterprise agreement's dispute settlement procedure "requires or allows" the Commission to deal with the dispute. In order to do so, it is necessary to look at the text of the dispute settlement procedure, understood in light of its industrial context and purpose, to determine whether the dispute, properly characterised, falls within it.[27] The scope of a dispute settlement procedure in an enterprise agreement should not be narrowly construed; "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."[28] While the parties to an enterprise agreement are free to impose limitations on the Commission's role to settle disputes about matters arising under the agreement and while there may be cases where, properly construed the clause allows the Commission to proceed to deal with matters of, despite certain steps not being satisfied, the general presumption is that where limitations are not observed, the Commission (or other independent person) has no discretion to deal the dispute referred to it under the agreement, unless one is conferred on it under the terms of the agreement.[29]

[53] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute.[30] The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction.[31] Further, a dispute may evolve during proceedings in the Commission. It may therefore be necessary in some cases when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in an originating application and the factual circumstances as they evolve.[32] The character of the dispute is distinguishable from any relief which may be

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[25] *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 [30]–[32]; cited in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82 at [25].

[26] *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87 [21], cited in *Kentz (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWCFB 2019 [52].

[27] *CEPU v Thiess Pty Ltd* (2011) 212 IR 327 at [42], [47]; *CFMEU v AIRC* [2001] HCA 16.

[28] *SDA v Big W Discount Department Stores* PR924554 at [23].

[29] *The Australian Workers' Union v MC Labour Services Pty Ltd* [2017] FWCFB 5032, [38] – [39].

[30] *AMWU v Holden Limited* PR940366 at [47]; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [23].

[31] Ibid [47].

[32] *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [19], [23]; *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 163 at 168; *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884.

sought, or granted, following an arbitration of the dispute.[33] However, the relief sought may cast light on the true nature of the dispute in some cases.[34]

[54] If the Commission has jurisdiction to deal with the dispute, the nature of the relief that the Commission may grant will depend on the limitation in s.739(5)[35] and the agreement of the parties as recorded in their enterprise agreement, provided that such relief is reasonably incidental to the application of the enterprise agreement to which the dispute relates.[36]

[55] Interpretation of an enterprise agreement requires construction of the words of the instrument. The Full Federal Court has held that the principles governing the interpretation of enterprise agreement are the same as those governing the interpretation of awards.[37] Further, the Full Bench in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*[38] (Berri) has set out in detail the principles for such a task. In that matter, and after an extensive analysis of the subject, the Full Bench summarised the principles to be applied in the following way:

> "[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:
>
> 1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
>
> (i) the text of the agreement viewed as a whole;
>
> (ii) the disputed provision's place and arrangement in the agreement;
>
> (iii) the legislative context under which the agreement was made and in which it operates.
>
> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
>
> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the

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[33] *MUA v Australian Plant Services Pty Ltd* PR908236; *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [21]-[22].

[34] *United Firefighters' Union v Metropolitan Fire and Emergency Services Board* PR973884 at [20].

[35] The Commission must not make a decision that is inconsistent with the FW Act, or a fair work instrument that applies to the parties.

[36] *MUA v Australian Plant Services Pty Ltd* PR908236 at [63]; *Seven Network (Operations) Ltd v CPSU* (2003) 122 IR 97 at [31]-[32].

[37] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77, [189].

[38] [2017] FWCFB 3005.

language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901* (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

> (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
>
> (ii) notorious facts of which knowledge is to be presumed; and
>
> (iii) evidence of matters in common contemplation and constituting a common assumption.
>
> 13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.
>
> 14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.
>
> 15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[39]

[56] The application of these principles, and especially to those in which ambiguity may be considered was further considered by the Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority*:

> "[35] As stipulated in Berri, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. Further, the text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in Berri emphasise that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity."[40]

CONSIDERATION

[39] Ibid [114].

[40] [2017] FWCFB 4537.

[57] Resolution of the questions before the Commission require consideration of several terms of the three agreements in accordance with the Commission's principle for interpretation of enterprise agreements, also set out previously. Given there are three agreements with somewhat different provisions, and two markedly different claims, that are the subject of the Commission's consideration, there are potentially different outcomes to the jurisdictional objections posed by the CFA and MFB.

[58] Central to the analysis are the "no extra claims" clauses in each of the three agreements and what is meant by them, noting that the term in the *MFB ACFO Agreement 2010* is in an identifiably different form to that within either of the *MFB Operational Staff Agreement 2010* or the *CFA Operational Staff Agreement 2010*.

[59] The role, purpose and limits of no extra claims clauses were considered at length by the Full Court in the matter of *Toyota Motor Corporation Australia Limited v Marmara and Others*.[41] In *Marmara*, the no extra claims clause was in a form different from any of the three agreements before the Commission:

> "Clause 4 of the Agreement provides as follows:
>
> This comprehensive Agreement resolves the enterprise bargaining claims by The Parties and shall operate seven days from the date of approval by FWA and will nominally expire on 6 March 2015.
>
> TMCA and the Union agree to start negotiations for renewal of this Agreement, three months prior to its expiry.
>
> The parties agree they will not prior to the end of this agreement:
>
> • make any further claims in relation to wages or any other terms and conditions of employment; and
> • take any steps to terminate or replace this Agreement without the consent of the other parties.
>
> Written commitments as outlined in the letter to FVIU chairperson dated 16 September 2011 will be honoured by all parties."[42]

[60] Beyond encompassing the operation of the agreement, its nominal expiry date and when renegotiation is to start, the clause differs from those in the three agreements before the Commission by qualifying that "prior to the end of this agreement … [no party will] … make any further claims in relation to wages or any other terms and conditions of employment".

[61] *Marmara* was decided on the current legislation, substantially different from predecessor legislation with the differences explained thus:

> "[51] In 1996, the 1988 Act (then re-named the *Workplace Relations Act 1996* (Cth), "the WR Act") was amended in a number of ways, one of which was the introduction, for the first time since 1930, of a direct statutory prohibition upon the taking of

[41] [2014] FCAFC 84, (2014) 244 IR 335.

[42] Ibid, [2].

industrial action. That became s 170MN of the WR Act, which provided that, from the time when a certified agreement came into operation until its nominal expiry date had passed, an employee whose employment was subject to the agreement, an organisation of employees that was bound by the agreement and an officer or employee of such an organisation acting in that capacity, "must not, for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action". A like prohibition was applicable to an employer bound by a certified agreement. Relevantly, contravention of s 170MN attracted a civil penalty.

[52] In February 2002, Kenny J decided *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588. It was held that s 170MN did not apply where the claim being supported by the action related to a matter not dealt with in the agreement. In the course of her reasons, her Honour observed (117 FCR at 602 [55]):

> If the parties so desired, they could agree that a certified agreement made by them was intended to cover the whole field of relevant employment, thereby excluding the possibility of industrial action during the currency of the agreement.

Kenny J's conclusion was upheld on appeal: *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 130 FCR 524. In dismissing the appeal, French and von Doussa JJ said (130 FCR at 535 [38]):

> It is of course possible that parties to an agreement may seek to abuse s 170MN by confecting some issue not explicitly covered by a certified agreement and using that as a basis for constructing an entitlement to protected action. It may be that in such a case the court would construe the agreement as intended to cover the field of terms and conditions defining the employment relationship in question. Indeed the parties may, as Kenny J pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship.

[53] In *United Firefighters' Union of Australia v Transfield Services Australia Pty Ltd* (2007) 167 IR 252, Vice-President Lawler of the IR Commission explained something of the consequences of *Emwest*. His Honour said (167 IR at 257 [15]):

> Transfield seeks to rely upon the factual matrix existing at the time the 2005 Agreement was made including, in particular, the history of clause 1.6 and its alleged inclusion in the immediate predecessor to the 2005 Agreement in response to the decision of the Federal Court in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588 …. In that case a collective agreement was concluded between a union and employer and certified under s 170 of the pre-reform Act. That agreement dealt with a broad range of employment conditions but did not address redundancy (in fact, the parties had agreed to postpone consideration of the union's claims in relation to redundancy). Kenny J held that the union was not prevented from taking protected industrial action

> in support of claims in relation to redundancy during the life of the agreement. The decision in *Emwest* took a number of industrial parties by surprise and was the subject of considerable interest in industrial circles because it had been generally assumed that s 170MN of the pre-reform Act prevented any lawful industrial action being taken during the nominal period of a certified agreement. After the decision in *Emwest*, so-called "no extra claims" clauses became ubiquitous in certified agreements.
>
> [54] With the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), s 170MN was repealed, but substantially re-enacted as s 110, and re-numbered as s 494. As re-enacted, the section was amended so as to apply the prohibition on taking industrial action before the nominal expiry date of a, now "collective", agreement "whether or not that action relates to a matter dealt with in the agreement". The outcome in *Emwest* was, therefore, legislatively reversed. Although grammatically re-arranged, the section was substantially re-enacted in 2009 as s 417 of the FW Act, and remained in that form at the time of the making, and approval, of the Agreement (and still remains in that form).
>
> [55] It is clear, therefore, that a prohibition on "further claims" (or "extra claims") was not novel when the present parties made the Agreement in 2011: it had a long history in Australian industrial regulation. Originally, those words were the formula by which a union that was a party to an award which came up for a national wage adjustment was required to give an undertaking the object of which was to avoid a situation in which employees covered by the award would have the benefit of such an adjustment at the same time as being at liberty to pursue other claims for improvements in wages or conditions. The formula was then, for a time, used for a similar purpose at the point where agreements came to be certified under the 1988 Act. Within that context, to regard the assertion of a right or entitlement as a limiting criterion of what constituted a "claim" would not reflect the purpose for which the formula was employed. The purpose was to require the parties – usually the relevant union and its members – to foreswear any attempt to improve upon the wages, conditions and other benefits for which the relevant industrial instrument provided. At the time (ie until 1996), there was nothing in the legislation which prohibited the taking of industrial action by a party who sought to improve upon benefits obtained under a recently-made agreement or award, so the prohibition on further claims provided, quite probably, the only practical means of keeping such a party to his or her bargain (or, as appropriate, to the terms of the award which he or she had sought)."

[62] *Marmara* then held there was no longer an embargo on further claims referable to those that could be supported by industrial action[43] and that in relation to whether proposals, or claims could have been supported by industrial action:

> "[62] For the above reasons, we take the view that the fact that Toyota's proposals could not have been supported by industrial action or any analogous direct action to secure their acceptance is neither here nor there apropos the argument that the proposals did not constitute further claims within the meaning of cl 4 of the Agreement."

[43] Ibid, [59].

[63] The Full Court also considered whether the agreement itself may have provided for contravention of the agreement and the making of further claims before the nominal expiry date:

> "[64] There are, in our view, two answers to this submission. The first is that, as a matter of internal construction, cl 4 clearly contemplates the making of claims within the three months before the nominal expiry date of the Agreement, and it would make sense to understand the reference to further claims as not extending to claims made in that environment. Particularly given the arrangement of these provisions within cl 4, a claim made in that negotiating environment should not be regarded as a "further" claim.
>
> [65] The other answer is that the conclusion, for which the submission made by Toyota implicitly presses, that a claim made by itself or the Union within the three-month negotiating period cannot have been intended to be prohibited by the no further claims aspect of cl 4, would provide no sustenance for the case which Toyota made before the primary Judge and which it makes on appeal. That case is that, whatever else it means, the relevant aspect of cl 4 cannot be read as an embargo on proposals to vary the Agreement itself. By definition, negotiations of the kind referred to in the second subparagraph of cl 4, and the claims made in those negotiations, would not involve proposals to vary the agreement before its nominal expiry date: they would involve proposals for the terms of a new agreement to commence operation at some point subsequent to the nominal expiry date of the Agreement. "

[64] The Full Court also affirmed the importance of the no extra clause in bargaining (noting that the reference to clause 10 in the final sentence of the extract below is a reference to an "objectives" clause of the agreement setting out success measures for long-term sustainability):

> "[71] It was submitted on behalf of the respondents that a provision such as the no further claims aspect of cl 4 is to be regarded as an important element of the supporting mechanisms implicit in the scheme of collective bargaining for which the FW Act provides. Such a provision delivers stability and predictability in the matter of terms and conditions of employment, generally regarded as essential characteristics of a successful business in a market economy. It was submitted, in effect, that Toyota, as the employer and the paymaster, would have regarded this provision, in itself, as fundamental to the bargain which it reached with its employees and their representatives. We accept those submissions. The objective sought to be achieved by the no further claims provision speaks so loudly through the terms of the provision itself, and the words of the provision are so free of ambiguity, as to make it quite inappropriate to attempt to modify the meaning otherwise conveyed by those words whenever it should be convenient to do so for the more effective achievement of the objects referred to in cl 10 of the Agreement."

[65] In the three agreements now before the Commission it is the case that each agreement sought to confine the claims able to be made before a period close to the end of the nominal expiry date of the particular agreement and the consequential ability for the claims to be raised as disputes, within the meaning of the relevant agreement's dispute resolution term. In addition, the three agreements each circumscribe the matters that may be raised after the nominal expiry date.

MFB Operational Staff Agreement 2010

[66] In the case of the *MFB Operational Staff Agreement 2010*[44], the making of "extra claims" within the nominal expiry date is limited either to bargaining for a new agreement or, where it is agreed, for variation, and for limited other purposes, including that articulated in Clause 70.6, being the pursuit of "a work value/anomaly type exercise within the 2005 MFB UFU Operational Staff agreement".

[67] The plain language of the Agreement, read as a whole, allows a finding that while disputes may be agitated under Clause 19 about "all matters arising under this agreement" and that unresolved disputes may be referred to the Commission which "may utilise all its powers in conciliation and arbitration to settle the dispute" the scope of those disputes is necessarily limited, because of the language of the agreement itself, construed as a whole.

[68] The first part of Clause 19 (dispute resolution) appears, at first glance to widen the matters which may be the subject of disputes with it providing:

> "19. DISPUTE RESOLUTION
>
> 19.1. This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:
>
> 19.1.1. all matters for which express provision is made in this agreement; and
>
> 19.1.2. all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and
>
> 19.1.3. all matters pertaining to the relationship between the MFESB and UFU, whether or not express provision for any such matter is made in this agreement.
>
> The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause.
>
> 19.2. To ensure effective consultation between the employer, its employee(s) and the union on all matters, the following procedure shall be followed in an effort to achieve a satisfactory resolution of any dispute or grievance:
>
> 19.2.1. Step 1 The dispute shall be submitted by the union and/or employee(s) to the employee's immediate supervisor.
>
> 19.2.2. Step 2 If not settled at Step 1, the matter shall be submitted to the appropriate senior officer.
>
> 19.2.3. Step 3 If not settled at Step 2, the matter shall be recorded. The matter shall be submitted to the appropriate delegated Industrial Representative of the employer for consultation.

[44] AE881005.

> 19.2.4. Steps 1 - 3 Must be concluded within a period of ten (10) consecutive days. Disputes are to be resolved at a local level wherever possible.
>
> 19.2.5. Step 4 If the matter is not settled at Step 3, the dispute shall be formally submitted in writing to the Manager Employee Relations, setting out details of the dispute and, where appropriate, with supporting documentation. The Manager Employee Relations shall convene a meeting of the employer, employee(s) and the union within a period of one week (7 days) of receipt of such submissions and endeavour to reach a satisfactory settlement.
>
> 19.2.6. Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWA.
> FWA may utilise all its powers in conciliation and arbitration to settle the dispute.
>
> 19.3. Notwithstanding the words contained in the above sub-clause, the steps of the procedure apply equally to a dispute raised by an employee, the union or Officer in Charge
>
> 19.4. While the above procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.
>
> 19.5. This clause shall not apply to a dispute on a Health and Safety issue.
>
> 19.6. A dispute may be submitted, notified or referred under this clause by the UFU.
>
> 19.7. A decision of FWA under this clause may be appealed. A dispute is not resolved until any such appeal is determined."

[69] While the clause is drafted as being referable to all matters arising under the Agreement it plainly only applies to the matters which do arise under the Agreement. The clause is silent as to whether it relates to disputes which may arise in relation to the National Employment Standards (s.186(6)((a)(i)).[45]

[70] Because of the drafting, it is necessary in each case to give consideration to whether a particular alleged dispute in fact is one that arises under the Agreement. The fact that a particular dispute is about a matter pertaining to the employment relationship or a matter pertaining to the relationship between the MFB and UFU will on its own be insufficient for the dispute to be one arising under Clause 19. Instead, a matter pertaining to the employment relationship or the relationship between the MFB and UFU must first be a matter "arising under this agreement". The expansive drafting of Clauses 19.1.2 and 19.1.3 explicitly provides that matters not set out within the Agreement can themselves be matters arising under the Agreement. Notwithstanding that such proposition strains against the ordinary and grammatical meaning of something "arising under this agreement", since after all how can something not stated within an agreement be part of the agreement, the greater issue is that

[45] Even though the section has since been amended, s.186(6)((a)(i) has not changed since the original enactment.

there is, within the clause itself, a practical limit on this otherwise infinite bound of possibilities. That practical limit will always be those occasions where the documented words of the Agreement themselves do not permit a matter to arise.

[71] In the case of the *MFB Operational Staff Agreement 2010*, Clause 23 No Extra Claims must be seen as being in the category of a limitation on the scope of the dispute resolution term, otherwise the words that "there shall be no extra claims by either party" would have no effect at all. The sentence only has purposeful meaning if it regulates conduct in some way, and that must be through putting a brake on what could otherwise be a never-ending stream of disputes about any aspect of the employment relationship from the day the Agreement was approved.

[72] The construction which should be accorded to those words is that the parties to the Agreement bargained for and achieved an arrangement which meant they would not make "extra claims" of each other for at least the duration of the Agreement to the nominal expiry date less six months, as well as for such matters as they may, in their own discretion, choose to be the subject of bargaining for a variation to the Agreement. Such construction is consistent with and keeps open the proposition in *Marmara* that the clause not act as a provision for either party to contravene the Agreement by making further claims before the nominal expiry date or seeking renewal or variation of the Agreement.[46] The no extra claims requirement does not extend to the pre-nominal expiry date negotiation period, and there is no embargo on raising proposals to vary the agreement itself within the relevant period.

[73] Clause 5 explicitly commits the parties to commence negotiations on a new agreement six months prior to the nominal expiry date. Clause 11 permissively allows variation or replacement of the Agreement "where it is agreed", as well as to make changes to the then current UFU and MFB subcommittees and their terms of reference. Clause 70.6 enables the work value/anomaly matter referred to be raised, but with it then being explicitly agreed that this matter would be deferred until the nominal expiry date of the Agreement.

[74] Read as a whole, and other than for the potential for a variation that may arise under Clause 11, the Agreement plainly intends to not permit the making of extra claims until the six month renegotiation window referred to within Clause 5. Even then, the Agreement does not provide an open and unlimited opportunity to pursue claims under the dispute resolution clause.

[75] Whereas it is apparent that the work value/anomaly matter referred to within Clause 70.6 is a claim that is limited only by the passage of the nominal expiry date, it is unlikely that any or all things can be pursued through the dispute resolution clause to the point of determination by the Commission. The parties have agreed to commence negotiations on a new agreement six months prior to the nominal expiry date (Clause 5). They also agreed as follows in relation to the matters of rank and promotional structures:

> "70.7. Appropriateness of ranks
>
> Subject to the provisions of this clause regarding relativities, SFF's, QFF's and LFF's, the parties agree that the rank and promotional structures referred to in this Agreement

[46] [2014] FCAFC 84, (2014) 244 IR 335, [63] – [64].

> are appropriate and will be maintained for the life of this Agreement. No new classification or rank will be created other than by agreement of the parties."

[76] The parties also explicitly agreed that matters arising out of the Victorian Bushfires Royal Commission would be the subject of collective bargaining:

> "22. BUSHFIRES ROYAL COMMISSION REPORT
>
> 22.1. The MFESB and UFU recognise the importance of the 2009 Victorian Bushfires Royal Commission report to the future of Victoria's fire service and emergency management arrangements and are committed to reviewing the recommendations in a timely manner.
>
> 22.2. The MFESB and UFU agree to bargain collectively in relation to any matter that arises out of the Royal Commission's report which seeks to change:
>
> 22.2.1. The entitlements and way work is carried out by employees covered by this agreement; or
>
> 22.2.2. The employment relationship of employees covered by this agreement; or
>
> 22.2.3. The relationship between the MFESB and UFU regarding agreements and entitlements covering the relationship between the MFESB and UFU pertaining to representation of the employees covered by this agreement."

[77] After consideration of these clauses in combination, it is apparent that on the one hand the parties agreed not to make extra claims of each other until six months prior to the nominal expiry date, save for those matters which could be the subject of an agreed variation to the Agreement. On the other hand they agreed that the matter of the work value/anomaly could be agitated after the nominal expiry date. The construction emerges that the parties then agreed that even at the point of the date six months prior to the nominal expiry date, and specifically in relation to the Rank Alignment Question now before the Commission the rank and promotional structures will be maintained for the life of the Agreement. There is nothing of substance presently before the Commission which would lead to the view that the term "life of this Agreement" should be given a meaning other than the period during which it has operation.

[78] The construction of the *MFB Operational Staff Agreement 2010* must therefore be that the subject matters of the Rank Alignment Question are not "matters arising under this agreement" and are therefore not matters which enliven the Dispute Resolution clause.

[79] The Relativities Question before the Commission is in this form referred to above, with the UFU arguing that it comes about on the basis of three related grounds; the desire to rectify a historic erosion in the "premium" for management roles; that the management roles are, significantly more difficult than the line firefighting roles; and that the management roles have become harder in recent decades, with there having been no recognition of this development.[47]

[47] Exhibit A2, [55].

[80] The CFA and MFB accept that there is a limited right to pursue the Relativities Question[48] because Clause 70.6 acknowledges the UFU's right "to pursue a work value/anomaly type exercise within the 2005 MFB UFU Operational Staff Agreement"[49] with that right being referable to the provisions of Clause 70.5 (Relativities) which sets out that the parties agreed new relativities for the ranks referred to in the Agreement, with those relativities taking effect from the date of the Agreement. The UFU says about the provisions of Clause 70.6 that it contains an obvious error,[50] whereas the CFA and MFB argue that the right preserved within the *MFB Operational Staff Agreement 2010* does not extend to anything after the making of the 2005 Agreement:

> "28. First, the FWC's ability to arbitrate that subject matter extends only insofar as it concerns employees covered by Part B of the 2010 MFB Agreement. This includes SOs, SSOs and Commanders. This power would not extend to the relativities for the ACFO rank, which is covered by the 2010 MFB ACFO Agreement (considered in Part C.2 below).
>
> 29. Secondly, the ambit of the "work value / anomaly type exercise" referred to in clause 70.6 refers back to the 2005 MFB Agreement. Clause 21.4 of the 2005 MFB Agreement provided:
>
> > 21.4 During the life of the agreement the right of the UFU is reserved to pursue a work value/anomaly type exercise to develop and introduce new relativities. If not agreed between the parties, the determination of the AIRC of any UFU application as to relativities shall, notwithstanding other provisions of this Agreement, be binding on the parties.
>
> 30. Hence, clause 70.6 has preserved particular subject matter: the work value/anomaly issue that was unresolved when the 2005 Agreement was made. In 2009, the UFU sought to have that matter arbitrated. The application was the subject a hearing on objections raised by the MFB. Vice President Lawler handed down a decision in which he found the Commission could hear the claim, but he expressed clear views that the matter should be dealt with in bargaining for the next agreement. The UFU did not press that application further at that time. With clause 70.6 of the 2010 MFB Agreement, the parties agreed to reserve that subject matter only.
>
> 31. Accordingly, clause 70.6 of the 2010 MFB Agreement did not preserve more than what was preserved in clause 21.4 of the 2005 MFB Agreement. Thus, the ambit would not extend to any relativity anomaly or work value claims arising from developments after the 2005 MFB Agreement was made."[51] (formatting and references omitted)

[81] The alternative to the construction set out above, to the effect that Clause 19 is constrained in the way set out and that the claim should be pursued through bargaining is to allow for a wholly counterintuitive arrangement in which, having got to the end of an agreement and reaching an impasse in bargaining, both about the number of classifications,

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[48] Exhibit R2, [24] – [30].

[49] From cl. 70.6.

[50] Transcript, PN522-529.

[51] Exhibit R2.

their relativities and wages, one or other of the parties merely asked for determination by the Commission of their impasse. Such would be inconsistent with the object of the Act to give an emphasis to enterprise-level collective bargaining.

[82] It is difficult to see how, within the scheme of the Act, the UFU's claims in respect of work value or anomaly have any jurisdictional basis that would empower a definitive determination by the Commission of its claims in relation to the Relativities Question. It is of course the case both that once approved by the Commission an enterprise agreement continues until it is replaced or terminated and that an enterprise agreement that has ceased to operate can never operate again (s.54). Further, it is the case that only one enterprise agreement can apply to an employee at a particular time (s.58). While conceivably as part of their bargaining, the parties to an enterprise agreement could state that their agreement does not close off claims from the past, perhaps in the way of a reserved matters list, all that really does is say that the matter can then be taken up at some future time, either for the purpose of negotiation towards a variation or a replacement agreement. The reference within Clause 70.6 to a work value/anomaly matter is unlikely to do more than enable future bargaining.

[83] Whether or not that reference, being stated as one to the 2005 MFB Agreement, is a typographical error probably does not matter to any great extent, at this stage of the proceedings at least.

[84] If the reference in the text is actually to the 2005 MFB Agreement, then such reservation of the capacity "to pursue a work value/anomaly type exercise within the 2005 MFB UFU Operational Staff Agreement" needs to be seen against the other provisions within Clauses 70.5 and 70.7 stating that new relativities have been agreed and that the rank and promotional structures are appropriate and will be maintained for life of the Agreement. The reading of the reserved entitlement in this case would be to view it as merely an opportunity to agitate that which had not been agreed at the time of settlement of the 2005 Agreement as well as the 2010 Agreement; perhaps doing no more than giving comfort to the UFU that while it could certainly raise those subjects for the purposes of agreed variations, there would still be a need to reach agreement on the subject. The same proposition emerges if the relevant reservation is read as being typographically incorrect, with the correct agreement reference being to the *MFB Operational Staff Agreement 2010*.

[85] In sharp distinction to the provisions of the prevailing agreement, the Proposed 2016 MFB Agreement potentially provides an explicit right of arbitration, with the CFA and MFB submitting on the matter:

> "49. The proposed 2016 Agreements reserve for arbitration the subject matter of the present dispute (clause 12A of each "agreement", clause 83 of the Proposed 2016 MFB Agreement and clause 90 of the Proposed 2016 CFA Agreement). In particular:
>
> > (a) Both proposed agreements contemplate referral of rank alignment for "senior operational personnel" to FWC for conciliation and arbitration. The scope of the proposed conciliation and arbitration would meet the description of the claim as described in the UFU's proposed Rank Alignment Question (see definition of "senior operational officer", clause 12A.2). Conciliation and arbitration under the clause is to be preceded by a negotiation process. After an arbitral outcome, each employer is to submit an application to vary the 2016 Agreements to give effect to the arbitral outcome.

> (b) Both proposed agreements contemplate arbitration of the Relativities Question, but only insofar that question relates to SOs and SSOs. They do not reserve arbitration of relativities of the Commander and ACFO ranks in the MFB, nor Commander and OM ranks in the CFA. However, relativities for senior operational personnel are to be "considered" under clause 12A in respect of a common rank structure (clause 12A.3(e)). The requirement to consider these relativities has to reflect that relativities specified in the proposed agreements have been agreed to between the parties (clause 83.1 of the Proposed 2016 MFB Agreement; clause 97.1 of the Proposed 2016 CFA Agreement)."[52]

[86] In relation to this right the Respondents argued that, since the *P*roposed 2016 MFB Agreement is presently being considered for approval by the Commission, constituted by Deputy President Gostencnik, there was the potential for there to be two proceedings on foot about the same matter; one before myself, and, should the proposed agreement be approved, another arising under the newly approved agreement, whether that be before myself or another member of the Commission. It was argued that this would at the least, be an unfortunate duplication of resources and that the Commission should decline to exercise such jurisdiction as it may have in the face of this potential duplication.

[87] While certainly I recognise the duplication of resources that such circumstance may lead to and that it would be unfortunate, to the point of unacceptable, for the Commission as well as the CFA and MFB to be called upon to answer the same or similar case in two places, there is potentially a further question that needs to be asked. At what stage can it be regarded that the parties have concluded their bargaining to the point that it can be said that the claims from each side have been answered as best they can and that the tools of hard bargaining have been returned to whence they came?

[88] Neither of the parties before the Commission at this stage, in relation to the Proposed 2016 MFB Agreement can be considered to be industrial naifs. Each has had the assistance of very considerable industrial and legal expertise. Each had the benefit of very considerable assistance in the development of their bargain from Commissioner Roe. Each has had the ability to weigh and consider the merits of what the other has proposed for their workplace bargain into the forward years. No one forced them to their agreement, or in the case of employees voting to make the Agreement, subjected them to employer response action, forcing them to take what was on offer or face further pain. Surely at the point the agreement was made and then submitted to the Commission for approval each party must be viewed as having said by their deed, if not their words, that this was a bargain they wanted to work under into the future and to replace that which preceded it.

[89] At a practical level the contrary approach of perpetuating industrial claims back and forth across different versions of the instruments covering the same workgroups is close to undermining the statutory encouragement of and emphasis on enterprise-level collective bargaining. This possibility comes about for two reasons. Firstly, the situation potentially undermines the need for bargaining at some point to be brought to an end, with the parties then bound by the product of their bargaining into the future, once the agreement is approved. Secondly, it sends the very sharp message to the industrial protagonists that, with an

[52] Exhibit R2.

unrestricted dispute resolution clause, even at the time bargaining has been concluded, with an agreement then made, that that which has not been achieved through the process of bargaining may be achieved through arbitration under an operative agreement which has yet to cease in operation. Neither prospect satisfactorily assists the desirability of there being an emphasis on enterprise-level collective bargaining.

[90] For those reasons alone, and in the face of an agreement which potentially and explicitly provides an avenue for determination of the questions before the Commission as presently constituted, it is desirable that these proceedings go no further.

[91] It is important that the Commission not speculate about forthcoming legislative change or tailor its processes to what may be speculated, with there being a requirement that the Commission determine matters before it on the basis of the existing legislative framework and not otherwise.[53] However, that is not to say that it is not proper for Members dealing with overlapping or a multiplicity to take account of those things in determining how to proceed, whether that be to avoid either the undesirability of more than one action over basically the same matter,[54] or the risk of inconsistent evidentiary findings or inconsistent decisions.[55] In all the circumstances, the Commission has an obligation to both balance the interests of parties in the proceedings before it as well as to consider the resourcing impact of what is proposed by those before it.

[92] While of course it is the case that the course of approval of any agreement, and no doubt the Proposed 2016 MFB Agreement in particular, is by no means quick or assured, that is not say that it is desirable or efficient for the parties to a proposed agreement to want to continue to work under their old agreement as if there were no new concluded bargain. If that is what they want to do, perhaps the new one should not be pursued by the Applicant. Although it is recognised, of course, that the existing agreement continues until such time as it is replaced and that the parties to the existing agreement have both the obligation as well as the right to conform to whatever the existing agreement contains, the argument submitted by the Respondents in relation to engagement of the Commission's resources has merit and, in the absence of the findings made by me about jurisdiction, would be something that should be taken into account in forming a decision about whether it is appropriate to proceed and determine the matters before the Commission. My disposition therefore, to the extent necessary given my findings on the greater matter of jurisidiction, would be to decline to proceed further with this matter at least.

[93] Notwithstanding these observations, and for the reasons set out above in relation to the construction of the Agreement, and the effects that construction has on the power of the Commission to proceed, I find there is no jurisdiction for the Commission to proceed and determine the application in respect of the *MFB Operational Staff Agreement 2010*.

MFB ACFO Agreement 2010

[94] While both questions before the Commission make reference to the *MFB ACFO Agreement 2010* the Rank Alignment Question is not one that needs to be determined under that Agreement because there is no proposition that the ACFO wages should be increased to a

[53] Annual Wage Review 2013–14 [2014] FWCFB 3500, [299].

[54] *AMWU v Simplot Australia Pty Ltd* [2016] FWC 991, [31].

[55] *ResMed Limited v AMWU* [2015] FWC 848, [16].

corresponding point within the *CFA Operational Staff Agreement 2010*. The Relativities Question though makes plain that a consideration is "whether the wages of managerial employees should be increased" relative to the new classification of Senior Leading Firefighter, including for the rates payable to an ACFO in the MFB.

[95] A consideration of this Agreement leads to the conclusion that the construction which must be afforded to the *MFB ACFO Agreement 2010* in relation to the Relativities Question is that there is not a power for the matter to be determined by the Commission under the dispute resolution term.

[96] Clause 52 provides that there be no extra claims prior to the nominal expiry date of the agreement and that:

> "52.3 The power of Fair Work Australia to arbitrate, granted by this agreement, does not extend to matters that are extra claims, or, to change defined at Clause 8 about a matter outside the scope of this agreement."

[97] Noting that the matters within the Relativities Question do not fit within the last part of the sentence referred to above, referable to Clause 8, which deals with the consultative process agreed between the parties, the relevant question is whether or not there is any limitation on the matter being pursued under the dispute resolution term. That term is provided for within Clause 12 (Dispute Resolution), the central part of which is in identical terms to that within the *MFB Operational Staff Agreement 2010*:

> "12.1 This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:
>
> 12.1.1 all matters for which express provision is made in this agreement; and
>
> 12.1.2 all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and
>
> 12.1.3 all matters pertaining to the relationship between the MFESB and UFU, whether or not express provision for any such matter is made in this agreement.
>
> The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause."

[98] In a departure from the *MFB Operational Staff Agreement 2010*, the *MFB ACFO 2010 Agreement* makes no provision that extra claims may be agitated prior to the nominal expiry date of the Agreement. Instead the plain reading of clause 52 is that such claims are not to be made before the passage of the nominal expiry date. No other part of the *MFB ACFO Agreement 2010* would lead to a contrary proposition. Clause 12, to the extent that it provides an open-ended opportunity to bring any matter forward as a dispute, must plainly be read in the context of Clause 52 that there will be no extra claims made prior to the nominal expiry date of the agreement.

[99] While it is in the case that the nominal expiry date has long since passed, being on 30 September 2013, that does not dispose of the issue because of the term of Clause 52.3, referring to the power of the Commission to arbitrate matters that are extra claims. The

construction which must be afforded to the clause is that it does not give authority for extra claims to be arbitrated after the nominal expiry date because the language departs from the first two subclauses of Clause 52. Those subclauses each say that a party "will make no extra claim prior to the nominal expiry date of the Agreement", which stands in distinction to the phrasing of Clause 52.3.

[100] While continuing the power of the Commission to determine disputes through private arbitration, that power "does not extend to matters that are extra claims" without putting any time limit on the exclusion. In the light of the two earlier subclauses it may be presumed that had there been an intention in Clause 52.3 that there would be capacity of the Commission to arbitrate after the nominal expiry date had passed, that the clause would instead read "does not extend to matters that are extra claims prior to the nominal expiry date of the agreement". Because the clause does not provide a time-limit to the exclusion for private arbitration, no such exclusion should be read within the clause. Accordingly Clause 52.3 is an open-ended exclusion, whereas Clauses 52.1 and 52.2 are both time-limited constraints.

[101] The reasoning set out above in relation to the *MFB Operational Staff Agreement 2010* dealing with matters of the content of the Proposed 2016 MFB Agreement and its connection both with the need for the Commission to place an emphasis on enterprise level collective bargaining, as well as the need to avoid unnecessary duplication of resources both within the Commission and within the parties is taken to apply to my consideration of the *MFB ACFO Agreement 2010*. For the same reasons, if there were not matters of jurisdictional impediment to proceeding, I would consider it appropriate to decline to proceed in this matter as well.

[102] In conclusion, for the reasons set out above, the construction of the *MFB ACFO Agreement 2010* must therefore be that the question before the Commission does not relate to "matters arising under this agreement" and therefore does not enliven the Dispute Resolution clause. I therefore find that there is no jurisdiction for the Commission to proceed and determine the application in respect of the *MFB ACFO Agreement 2010*.

CFA Operational Staff Agreement 2010

[103] Both of the questions before the Commission have application to the *CFA Operational Staff Agreement 2010*[56].

[104] Partly, but not exclusively, for the reasons set out in relation to the foregoing analysis conducted of the *MFB Operational Staff Agreement 2010* the construction to be afforded to the CFA Agreement leads to the conclusion that there is insufficient jurisdiction for the determination of the UFUs questions.

[105] The no extra claims clause within the *CFA Operational Staff Agreement 2010* is identical to that applicable to MFB firefighters, with the clause stating that "there shall be no extra claims by either party". (65.1) However, the effect of Clause 5, which deals with renegotiation of the Agreement with an undertaking given "to commence negotiations on a new agreement six months prior to the expiry date" and Clause 10, dealing with agreed variations leads to the construction that extra claims may be pursued through mechanisms similar to those available to MFB firefighters and in particular from a date six months prior to the nominal expiry date.

[56] AE881690.

[106] The construction is therefore available that when Clause 65.1 prohibits the making of extra claims by either party, that means the claims may not be made until the renegotiation window opens in the six months before the nominal expiry date or where the parties are agreed between each other that it is appropriate for a variation to be made to the Agreement.

[107] As with the *MFB Operational Staff Agreement 2010*, the greater issue is whether or not either or both of the Rank Alignment Question and the Relativities Question may be pursued in the present form and ultimately determined by the Commission.

[108] In the case of the *CFA Operational Staff Agreement 2010* the Agreement covers all operational positions to the level of Operations Manager and also includes commitments given in relation to ranks and promotional structures. Two relevant provisions were referred to by the CFA and MFB:

- Firstly from clause 68, dealing with career paths and opportunities:

  "68.4. Relativities

  The parties have agreed on new relativities for the ranks referred to in this agreement. These relativities are set out in the wages clause of this agreement. These relativities will take effect from the date of this agreement.

  68.5. Subject to the provisions of this agreement, including regarding harmonisation, the parties agree that unless otherwise agreed by the EBIC the rank and promotional structures in this agreement will be maintained."

- Secondly from Schedule 13 (Classifications and Wages), listing the actual positions identified or classified as Operations Manager and Operations Officer, and the salaries payable to such persons. The preamble to the Schedule provides:

  "SCHEDULE 13 – CLASSIFICATIONS AND WAGES

  Listed below are the additional positions, covered by this agreement, to which the terms and conditions of Operations Manager and Operations Officer contained in this agreement will apply. Any variations, additions or deletions will not be unilaterally implemented but will be dealt with under the provisions of Clause 10 – Variation of Agreement and Clause 13 – Consultation."

[109] The CFA and MFB argue that these two clauses severely limit the capacity of the UFU to agitate disputes either in relation to relativities because of Clause 68, or in relation to rank alignment, for the reason of both Clause 68 and Schedule 13.

[110] In relation to the matters put forward about Clause 68, the CFA and MFB note that there is no evidence that the CFA's Enterprise Bargaining Implementation Committee, or EBIC, has agreed to different rank and promotional structures,[57] and in relation to Schedule 13 it is argued that the prefatory paragraph prohibits any variations additions or deletions,[58]

[57] Exhibit R2, [41].

[58] Ibid, [43].

presumably until such time as the Agreement ends either because it is terminated or replaced. For their part the UFU do not accept the construction put forward by the CFA and MFB and in particular that the second sentence of the preamble to Schedule 13 has the effect argued by the Respondents of not permitting variations, additions or deletions during the life of the agreement.

[111] In considering the construction of the *CFA Operational Staff Agreement 2010* on these matters, the starting point is that referred to within the analysis pertaining to the *MFB Operational Staff Agreement 2010* to the effect that a dispute may be raised and determined under the dispute resolution procedure except to the extent that such may not be permitted because of some other provision.

[112] In this case, Clause 68.5 plainly limits the capacity of the dispute resolution clause to be used as a means to change "the rank and promotional structures in this agreement". The ordinary meaning of the reference to "rank and promotional structures" must surely be to mean not only the number of such classifications or duties that the respective positions may be required to perform, but also the pay and other benefits which attract to each. Part and parcel of that same proposition must also be the relativity that each may have to the other. There is no warrant within the Agreement itself to read the reference as somehow more narrow than its ordinary meaning. When the debate before the Commission is that the premium due to any particular managerial rank has been subject to a "historic erosion" or that the position is now "more difficult that [sic] line firefighting roles" or that the work of such positions has "become harder in recent decades, and there has been no recognition of this development"[59] it is inescapable that the debate is actually about the rank and promotional structures of the employees in question. Similarly, an argument about the similarities of functional Operations Managers in the CFA performing the same type of work as a functional ACFO in the MFB with it being said that pay alignment will assist with interoperability and transfers between the two organisations"[60] also aligns closely with the proposition that the matter is also about the rank and promotional structures of the employees in question.

[113] That being said, the UFU application under the *CFA Operational Staff Agreement 2010* falls for those reasons alone.

[114] The merit of the argument put forward by the CFA and MFB pertaining to the second sentence in the preamble to Schedule 13 is similarly clear. The language employed within the Schedule is that there will not be unilateral variations additions or deletions to the matters within the Schedule (which include wages as well as identifying the positions covered) and that those matters instead will be dealt with either through the variation of agreement clause, Clause 10, or the consultation clause, Clause 13. The reference to such matters being dealt with pursuant to the variation clause reinforces the construction that there is to be no change to the Schedule without formal agreement, as distinct to determination by the Commission.

[115] The construction I have come to in respect of Schedule 13 is that it must be read in conjunction with the provisions of Clauses 68 and especially 68.4 and 68.5. The combination of those matters leads to the conclusion that the classifications and wage set out within the Agreement, being the product of bargaining, are to be changed only through agreement, whether that be bargaining itself, or some form of less formal agreement making.

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[59] Exhibit A2, [55].

[60] Ibid, [53].

[116] The construction of the *CFA Operational Staff Agreement 2010* must therefore be that the subject matters of the Rank Alignment question and Relativities Question are not "matters arising under this Agreement" and are therefore not matters which enliven the Dispute Resolution clause. It follows that I find there is no jurisdiction for the Commission to proceed and determine the application in respect of the *CFA Operational Staff Agreement 2010*.

[117] For the reasons articulated above I find that each of the three applications before the Commission is unable to proceed for reason of jurisdictional impediment. Orders dismissing each of the applications are issued at the same time as this decision.

COMMISSIONER WILSON

Appearances:

Mr Eugene White and *Mr Joel Fetter* of Counsel instructed by Davies Lawyers for the Applicant.
Mr Richard Dalton and *Mr Leigh Howard* of Counsel, instructed by Corrs Chambers Westgarth for the Respondents.

Hearing details:

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