DECISION

Fair Work Act 2009
s.739—Dispute resolution

Susan Lloyd
v
Department of Justice and Community Safety
(C2019/148)

COMMISSIONER WILSON MELBOURNE, 30 JULY 2019

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

INTRODUCTION

[1] This decision concerns an application by Susan Lloyd, pursuant to s.739 of the *Fair Work Act 2009* (the Act) alleging a dispute arising under an enterprise agreement. The matters in dispute relate to the relocation of Ms Lloyd from the Sheriff's Office in Wonthaggi to the Warragul as a result of the implementation by the Department of Justice and Community Safety of a 'two-up operations' model whereby there are at least two Sheriff's Officer at any one time when performing particular kinds of work in the Gippsland Region.

[2] In particular, the decision concerns whether the Department of Justice and Community Safety failed to consult with Ms Lloyd regarding her relocation as well as to provide considered reasons for the relocation in accordance with clause 10 of the *Victorian Public Service Enterprise Agreement 2016*[1] (referred to as either the Agreement of the VPS Agreement).

[3] Following two unsuccessful conciliations of the matter on 21 January and 12 March 2019, Ms Lloyd requested that the matter proceed to hearing on 15 March 2019 with the hearing itself taking place on 6 and 7 May 2019.

[4] Mr David Langmead of Counsel appeared on behalf of Ms Lloyd while Mr Matthew Minucci of Counsel instructed by Ronan O'Donnell of Victoria Government Solicitors Office appeared for the Department of Justice and Community Safety (the Department). Permission for both parties to be represented in these proceedings by a lawyer was granted by me pursuant to s.596 of the Act, with me being satisfied that legal representation would enable the matter to be dealt with more efficiently taking into account the complexity of the matter (s.596(2)(a)).

[5] Evidence in these proceedings was provided by Ms Susan Lloyd and Ms Michael Cahir the previous Regional Manager, Sheriff's Operations, Gippsland Region at the Department for the Applicant as well as Mr John Barclay General Manager, Human

Resources and Business Support Services, South Area at the Department and Adam Kent Hale, current Regional Manager, Sheriff's Operations, Gippsland Region at the Department for the Respondent.

BACKGROUND

[6] Ms Lloyd is employed by the Sheriff's Office of Victoria as an Assistant District Supervisor.[2] The Sheriff's Office of Victoria is a unit of the Victorian Department of Justice and Community Safety and Ms Lloyd has been employed in the Sheriff's Office since about July 1990. Since 2005, after moving home to Phillip Island she has worked for the office in the Bass Coast/South Gippsland region. Her present assignment is in Wonthaggi at the Department's Justice Centre.

[7] Owing to changes within the Department and how it operates, Ms Lloyd has been given notice that her work location will change from Wonthaggi to Warragul a distance of around 76 kilometres. The effect of the change will be to substantially increase Ms Lloyd's travel time to and from work, which is the matter leading to her application to the Commission to deal with an alleged dispute. The Department's motives in seeking her relocation are connected with a desire to more efficiently and safely organise its offices and staff in order to grapple with changed operational needs, including the need to undertake fieldwork on a two-up basis, instead of alone, as well as to be able to be prepared for a new work allocation model which includes assignments being pushed out to an officer by an automated workflow system.

[8] The Sheriff's Office "is responsible for enforcing warrants and orders issued by Victorian courts for both criminal and civil matters. Sheriff's Officers are officers of the Supreme Court of Victoria, and have a range of enforcement powers, including, amongst other things, wheel clamping, number plate removal, seizure and sale of assets and arrest."[3] The background for the changes includes:

> "The 'two-up' model was first devised in early 2015, and trialled in the Department's metropolitan regions from that time. The model requires two Sheriff's officers to be present when undertaking certain operational duties, and when a risk assessment has determined that working two-up is the safest option for all officers involved."[4]

[9] During 2017 an external consultant, the FBG Group, was retained by the Department to "to undertake a review of the two up preferred operating model for all Sheriff's officers. The review was to consider the Sheriff's Officers in the operational context and the day-to-day risks of Sheriff's Officers, and assess the feasibility of the implementation of the two-up preferred operating model across the regions in Victoria".[5] The work undertaken by the FBG Group led to a report being provided to the Department on the subject. The introduction to the report included this valuable background:

> "In early February 2017, the Infringement Management and Enforcement Services (IMES) of the Department of Justice and Regulation (the Department) Commissioned FBG Group to conduct a review of the two-up preferred operating model for Sheriff's officers (officers) working in Victoria. Under the current Standards of Service two officers must be present when undertaking certain operational duties. In addition, a two-up working arrangement is required when a risk assessment has determined that working two-up is the safest opt ion for all officers involved.

In January 2015, an officer working one-up was involved in an incident which resulted in the submission of a number of Provisional Improvement Notices (PINs) under the *Occupational Health and Safety Act 2004*. The PINs proposed that officers work in a two-up capacity when t hey are in contact with defend ants. Simultaneously, the threat level under the National Terrorism, Public Alert System was deemed 'High' and Victoria Police held concerns regarding the safety of uniformed officers. These concerns led Victoria Police in May, 2015 to implement interim security measures that dictated a mandatory two-up policy for police officers working in public places, and con ducting reception duties in low-security police stations. The policy was relaxed slightly after a month due to concerns that resourcing in rural locations made implementing two-up difficult. However, Victoria Police two-up policy remained in place for all highway patrol officers across Victoria.

In 2015, the Sheriff's Office of Victoria (SOV) implemented a trial to assess t he impact of new operational procedures which mandated that all officers in metropolitan regions were required to operate two-up. The trial encompassed all metropolitan locations and one rural location (Hume). The trial aimed to reduce risks to officer safety and to enable officers to feel safer in the conduct of their duties, and to evaluate the impacts and outcomes of the policy change.

The trial concluded that officers felt safer whilst conducting their duties however, in relation to reducing t he risk to officer safety results were inconclusive. The trial resulted in a recommendation that two-up be considered further to form the basis of a standard model to operate state-wide. Following the end of the trial metropolitan staff continued to work in a two-up capacity for all operational activities. Currently, rural regions continue to operate in a one-up capacity excluding the mandated activities in which two-up is required (wheel clamping, possessions, arrest and bail, convey, and seizure and removal), and when a risk assessment deems that two-up is required. With the introduction of the new Standards of Service on 1 February 2017 (which all must operate in line with), officers are able to apply discretion to identify if a two-up response is required for operational activities."[6]

[10] The executive summary to the report then set out these key findings and recommendations which add further context to the work undertaken and its outputs:

"KEY FINDINGS

- The risk Landscape is changing for officers
- It could not be concluded that operating in a two-up capacity reduced the risk of occupational violence against officers
- Research indicated that if injuries were sustained these tended to be more severe for enforcement officers working in a one-up capacity compared with those operating two-up
- Working two-up reportedly enabled officers to more effectively assess risk and implement controls prior to engaging in activities
- The two-up operating model is feasible for metropolitan regions. However, it is not currently
- feasible for some rural regions and specific locations
- Maintaining two distinct systems of work for metropolitan and rural regions may have negative cultural and legal implications

RECOMMENDATIONS

1. Introduce mandatory two-up operating procedures for all operational activities undertaken statewide – this refers to all defendant facing operations including visiting a defendant's property. This does not include non-defendant facing activities such as telephoning defendants, traveling to and from alternate regions and or locations.
2. Review and evaluate the efficacy and suitability of resourcing options to support the implementation of a two-up operating model in rural regions
3. Regional Managers to be given ownership over the implementation and sustainability of a two-up operating model within their region
4. Establish quality assurance processes to continuously monitor, assess, evaluate, and improve risk management and operational capacity"[7]

[11] The way the Sheriff's Office and the Department has been organised in the past is that individuals from several different disciplines may be located in Justice Centres as part of a multidisciplinary team. In Ms Lloyd's case she is the only Sheriff's Officer at the Wonthaggi Justice Centre.

[12] The practical effect of the change notified by the Sheriff's Office is to pull Ms Lloyd's position out of the Wonthaggi Justice Centre and to move it to Warragul. Once done there will be three Sheriff's Officers at Warragul.[8] This arrangement is to be complemented by a further three Sheriff's Officers at Sale.[9]

[13] The Bass Coast/South Gippsland region comprises a large part of the state, being essentially that part of Victoria to the south and east of the diagonal line running north east from Philip and French Islands to the Victorian/NSW border. A map of the Sherriff's Office regions is shown as Attachment 1 to this decision. Ms Lloyd's home is in the far south-western part of the region; the practical effect of this is that every part of the Department's operations in the region is some distance from her home. She estimates that she presently travels approximately 68 km per day to Wonthaggi, taking one hour and 10 minutes to do so. She further estimates that the region she serves from the Wonthaggi Justice Centre is an area of around 4200 km².[10]

[14] Ms Lloyd estimates she presently travels 612 km per fortnight to attend work at Wonthaggi, taking about 10 hours per week in total to do so for the round trip.[11] She estimates that the work relocation to Warragul will increase her travel to around 1620 kms per fortnight, taking 24 hour travel per fortnight. She estimates the total daily travel will increase from 68 kms per day to 198 kms.[12] Ms Lloyd also estimates that the change in work location will increase her fuel costs from $86 per fortnight to around $227 per fortnight. She estimates this to be a 10% reduction in her disposable income.[13]

[15] Ms Lloyd put forward several alternatives to the Sheriff's Office in order to reduce the effect of the proposed change. In April 2018, Ms Lloyd suggested that instead of the Sheriff's Office staffing complement in Bass Coast/South Gippsland being two offices of three staff, it could be configured as three offices of two staff each.[14]

[16] When she put forward the alternate proposal, Ms Lloyd referred to several matters, including the answer to one of the Departments "FAQs", which advised that "no staff will be disadvantaged and personal circumstances will be considered". The background to the FAQs

is that staff affected by the Department's change proposal were sent information about the changes in February 2018.[15] Part of the information provided to employees was a document entitled "Frequently Asked Questions (FAQs) Warragul – Accommodation Expansion" with questions 16 and 17 being answered in this way:

> "16. How many staff will be at each location?
>
> Warragul will have approximately 15-20 staff and will comprise of CCS, Sheriff's, Youth Justice and corporate services staff
>
> 17. How will staff be selected to relocate?
>
> Staff from CCS, Sheriff's Office, Youth Justice, Corporate and Community services will receive an Implementation of Change Clause 10 letter notifying staff of the proposal to relocate staff and the process to be followed. An expression of interest (EOI) process will be undertaken to allow staff an opportunity to lodge an interest in relocating to Warragul. The CPSU has been notified and will receive an Implementation of Change Clause 10 letter. An agreed process will be followed to manage over and under subscription of the EOI's. It should be noted no staff will be disadvantaged and personal circumstances will be considered."[16]

[17] In her April 2018 proposal, Ms Lloyd first explained her concerns about the proposed change and then put forward an alternative for consideration to the Department:

> "I am currently travelling approx. 68 km per day at 1 hour and 10 mins per day to and from work. The proposed Warragul office is approx. 99 km one way, making a total travel distance of 198 km per day at approx. 2 hours 40 mins per day in travel time.
>
> As per the EBA section 13.1 (having a balance between both professional and family life), Code of Conduct 7.2 (encourage work arrangements that enable their employees to achieve work/life balance) and DOJ Values+ Behaviours (value work I life balance), my move to Warragul would mean a considerable deficit of work I life balance.
>
> The cost of travelling to Wonthaggi currently is approx. $95 per fortnight in fuel. The cost of travelling to Warragul is approx. $290 a fortnight, a difference of $195 per fortnight. This is a huge reduction of my disposable income and will be a financial hardship and burden. As per the FAQ document (no staff will be disadvantaged and personal circumstances will be considered) , I should not be required to relocate.
>
> As per Code of Conduct 4.1 (implementing government policies and programs equitably) and Code of Conduct 4.3 (deal with issues consistently- being just and working within commonly accepted rules), I propose a two man station be implemented at Wonthaggi as per Sale location. <u>With Hume and Barwon both retaining one man stations and Sale a two man station, this an equitable and fair arrangement in line with other regions and areas</u>. With the precedent being set in Sale and other regions of two and one man stations, a two man station would be an effective operational option."[17] (original emphasis removed; underlining added)

[18] Ms Lloyd's proposal for three offices of two staff each was rejected by the Department.[18] Part of the Department's response was to make a monetary "hardship" proposal:

> "Consideration for hardship
>
> I note your concerns regarding fatigue and the Department recognises the importance of employee wellbeing. We will work closely with you to monitor and address any issues arising.
>
> …
>
> Given you are to travel to a new work location you are entitled to a once only allowance in compensation for all disturbance factors arising, in accordance with Clause 32.10 Victorian Public Service Enterprise Agreement 2016 (VPS Agreement). The payments are as follows:
>
> > $1,429 as an allowance in accordance with clause 32.10(b) for the first 30 minutes of additional total daily travel time required or 30 kilometres additional daily distance or part thereof (Clause 31.10 c[i]);
> >
> > $4287 as a further equivalent allowance in accordance with clause 32.10(b) for each additional 30 minutes or 30 kilometres or part thereof (Clause 31.10 c[ii]).
>
> …
>
> It is noted that the allowance paid would differ when based upon the additional travel time component versus the additional travel distance component. Additional time (86 minutes) would equate to a payment of $4287 (3 X $1429). Additional travel distance (122 kilometres) would equate to a payment of $7145 (5 X $1429).
>
> In recognition of your circumstances, the Department proposes to adopt the most favourable interpretation of clause 32.10 of the VPS Agreement which would calculate an allowance on the basis of your additional daily travel, and will support a one off payment to you of $7145 (5 X $1429) before applicable taxation in recognition of the permanent relocation of your place of work."[19]

[19] Ms Lloyd has maintained her "3 office x 2 staff" alternative since originally putting it forward in April 2018, although she elaborated further on how it could operate in further correspondence to the Department in June 2018. In particular, she proposed a mechanism by which each of the offices in her proposal – Sale, Warragul and Wonthaggi – would be allocated work according to Postcode to their catchment area. Her June 2018 proposal also drew sharply to the Department's attention that it was taking one approach in the Bass Coast/South Gippsland region (being a three-person office configuration) when it was more relaxed and willing to countenance two-person offices in other regions and notably in Hume in Barwon.[20]

[20] After further several steps, on 30 July 2018 the Department provided a final response to Ms Lloyd. Amongst other matters, that response advised of the consideration the

Department had given to Ms Lloyd's situation and her alternative proposal and confirmed it would not be adopting what had been put forward:

> "I have considered your personal circumstances, Sue and the alternative proposal you have provided. I am writing to you as requested at our meeting, to confirm the decision to establish a regional hub of Sheriff's Operations in Warragul, which includes relocating the Senior Sheriff's Officer (SSO) position currently based at Wonthaggi Justice Service Centre - your substantive position to the Warragul Justice Service Centre.
>
> Further considered reasons as to why I do not support your alternative proposal as reiterated in your letter 5 June 2018 and our meeting held 22 June 2018 are as follows.
>
> Sue, in your letter 5 June you stated that relocating a Senior Sheriffs Officer (SSO) from the Warragul Justice Service Centre to Wonthaggi Justice Service Centre would be more efficient " ... by covering a greater geographical area and concentrating resources where they are required."
>
> In support, you included a comparison of Bass Coast and South Gippsland Shire local government areas with Baw Baw Shire and Latrobe Shire (sic) minus Traralgon and surrounds, serviced by two SSOs based in Wonthaggi Justice Service Centre and serviced from the regional hub in Warragul Justice Service Centre- in terms of distances to towns; warrant holdings and warrants per defendants; 'quality' of warrants (high/low); the causes of fines (accessing tollways); and population characteristics including mortgage belt, high rental areas, transience, levels of income and ability to pay.
>
> You outlined your current workload with the majority of your time based in your current location spent in executing and " ... finalising warrants as the addresses are confirmed and contact with the defendants is highly likely", with reference to results stated in your previous correspondence which were based on a select period July 2017 to October 2017.
>
> You asserted that" ... to continue current productivity levels, South Gippsland and Bass Coast must be serviced on an almost full-time basis and certainly have the warrant holding to maintain a permanent team" and propose that , " ... if serviced from Warragul would be much more inefficiently performed than it would be if served from Wonthaggi."
>
> In response and in confirming my position, I again cite the Evaluation of the Working Two Up Trial (ACIG February 2016); the Two Up Review of Sheriff's Operations (FBG March 2017), which was specifically Commissioned to guide the implementation of Two Up in the rural regions; the model proposed for implementation by then Regional Manager Bob Gahir in a memo to me; and the assessment of productivity of various configurations of Sheriff's Operations across the state by Sheriff's Office of Victoria (SOV) -which is informed by long term data collection and more
> rigorous analysis of performance at officer, location and regional levels.

> The consideration I have given to your personal circumstances includes the following concerns
> you expressed in support of your alternative proposal:
>
> > " ... Barwon and Hume regions have taken alternate proposals In order to support their staff during the implementation of '2 up', regardless of the FBG review, and consider a precedent has been set by these regions as well as by supporting a 2 man station at Sale. The point where Hume and Barwon presented proposals outside of the preferred parameters would have been an opportunity to revisit the Gippsland proposal in order to better support staff and better apply DOJ values and Behaviours of 'commit to achieving customer and community goals', 'be honest, fair and reliable, 'apply sound judgement and common sense', 'value work/life balance' and 'be responsive and flexible'. I don't see that these concerns have been addressed in your latest correspondence."”[21]

[21] The Department also addressed Ms Lloyd's contention that the local manager of the region at the time, Michael Cahir, had been prepared to support her proposal notwithstanding head office's view:

> "I have also given consideration to a concern you attribute to a recent email to you from Mr Cahir, stating
>
> > " ... it was made quite clear by both the SOV and supported by the independent consultants report that it was not an option to have either a stand alone 1 or 2 officer location .These were the goal posts that the new structure had to fit within ." (Copy of correspondence from Bob Cahir dated 30/05/3018 emailed to you).
>
> While Mr Cahir did not copy me with this email, I do not agree with the assertions, including that " ... the requirements/goal posts were moved at the last minute ... " (op cit)."

[22] The Department then gave some detailed reasons for its rejection of Ms Lloyd's alternative proposal as well as restating its advice that she may be due for a hardship payment.

[23] Ms Lloyd was notified by the Department on 3 August 2018 that it would be implementing the two-up model in early September 2018.[22]

[24] After being provided with this final response, Ms Lloyd progressed her dispute with the Department through a "Review of Action" application, an avenue available to her under s.64 of the *Public Administration Act 2004* (Vic) and Regulation 6 of the *Public Administration (Review and Actions) Regulations 2015*. The Review of Action was the subject of several stages of consideration, including the exchange of material, a hearing and a Final Report dated 14 December 2018 which was issued dismissing the application.[23] In doing so, the Final Report determined that the decision complained of by Ms Lloyd was neither unfair nor inconsistent with the Victorian Public Sector legislation.[24]

[25] On 10 January 2019 Ms Lloyd further exercised her rights by making an application under s.739 of the FW Act for the Commission to deal with a dispute arising under an

enterprise agreement, namely the *Victorian Public Service Enterprise Agreement 2016* (the VPS Agreement).[25]

QUESTIONS FOR DETERMINATION

[26] Six interconnect questions are posed for determination by the Applicant which all except one are objected to by the Department. The questions posed by the Applicant are connected with the process and outcome of the Department's proposal to restructure its Sheriff's Office in Gippsland Region so that three Sheriff's Officers are located both at the Sale and Wonthaggi Offices, resulting in relocation of two Officers from Morwell and one from Warragul (Ms Lloyd) to Wonthaggi and one Officer from Bairnsdale to Sale.

[27] Formally, the Questions for Determination by the Commission are these:

1. Has the Applicant been afforded procedural fairness during the process leading to the decision?
2. Did the Department comply with the consultation provisions of clause 10?
3. Is the Department's proposal unfair to the Applicant?
4. Did the Department have insufficient regard to the negative personal impacts on the Applicant?
5. Should the proposal of the Department or the Applicant or another model be preferred?
6. Should the Department rescind its decision and adopt the Applicant's proposal or another model?

[28] The Department put forth that the Commission's jurisdiction to arbitrate the proposed Questions for Determination is limited to the single question of "Did the Department comply with the consultation provisions of clause 10 of the VPS Agreement?".[26] The submissions put forth are that the Commission's jurisdiction of arbitration is limited by the terms of the dispute resolution clause in an enterprise agreement.[27] Clause 12.2 of the Agreement containing the dispute resolution provision is limited to 'a dispute about a matter arising under this Agreement of the National Employment Standards set out in the FW Act', with none of the remaining questions being questions relating to the Agreement but rather fairness, negative personal impacts on the Applicant and whether an alternative model should be chosen, all of which are outside the scope of the Agreement and therefore outside the Commission's jurisdiction to arbitrate.

RELEVANT PRINCIPLES FOR DETERMINATION OF THE DISPUTE

[29] In dealing with a dispute such as this 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.[28] 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".[29]

[30] 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.[30] 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."[31]

[31] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute.[32] The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction.[33] 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.[34] The character of the dispute is distinguishable from any relief which may be sought, or granted, following an arbitration of the dispute.[35] However, the relief sought may cast light on the true nature of the dispute in some cases.[36]

[32] 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)[37] 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.[38]

[33] Interpretation of an enterprise agreement requires construction of the words of the instrument, with 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*[39] (Berri) setting out 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

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."[40]

[34] 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."[41]

RELEVANT AGREEMENT PROVISIONS

[35] Clause 10 of the Agreement provides the relevant consultation provisions of the Agreement as follows:

> "**Part 2 Communication, Consultation and Dispute Resolution**

10. Implementation of Change

10.1 Where the Employer has developed a proposal for major change likely to have a significant effect on Employees, such as a restructure of the workplace, the introduction of new technology or changes to existing work practices of Employees, the Employer will advise:

(a) the relevant Employees and the relevant Union covered by this Agreement of
the proposed change as soon as practicable after the proposal has been made.

(b) the relevant Employees and the relevant Union covered by this Agreement of the likely effects on the Employees' working conditions and responsibilities.

(c) of the rationale and intended benefits of any change, including improvements
to productivity, if applicable.

10.2 For the purpose of this clause, a major change is ***likely to have a significant effect on Employees*** if it results in:

(a) the termination of the employment of Employees;

(b) major change to the composition, operation or size of the Employer's workforce or to the skills required of Employees;

(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure);

(d) the alteration of hours of work;

(e) the need to retrain Employees;

(f) the need to relocate Employees to another workplace;

(g) the restructuring of jobs.

10.3 **Relevant employees** means the Employees who may be affected by a change referred to in **clause 10.1**.

10.4 The Employer will:

(a) regularly consult with relevant Employees and the relevant Union covered by this Agreement; and

(b) give prompt consideration to matters raised by the Employees or the Employees relevant Union covered by this Agreement; and

(c) where appropriate provide training for the Employees to assist them to

integrate successfully into the new structure.

10.5 In accordance with this clause, the relevant Employees and the relevant Union covered by this Agreement may submit alternative proposals which will meet the indicated rationale and benefits of the proposal.

(a) Such alternative proposals must be submitted in a timely manner so as not to
lead to an unreasonable delay in the introduction of any contemplated change.

(b) If such a proposal is made the Employer must give considered reasons to the
affected Employees and the relevant Union covered by this Agreement if the Employer does not accept its proposals.

(c) Indicative reasonable timeframes are as follows:

Step in process	**Number of working days in which to perform each step**
Employer advises Employees and relevant Union covered by this Agreement	
Response from Employees or the relevant Union covered by this Agreement	5 days following receipt of written advice from Employer
Meeting convened (if requested)	5 days following request for meeting
Further Employer response (if relevant)	5 days following meeting
Alternative proposal from Employees or relevant Union covered by this Agreement (if applicable)	10 days following receipt of Employer response
Employer response to any alternative proposal	10 days following receipt of alternative proposal

10.6 Any dispute concerning the Parties' obligations under this clause shall be dealt with in accordance with **clause 12** (Resolution of Disputes)."

[36] Clause 12 of the Agreement provides then provides the relevant dispute resolution procedures as follows:

"**12. Resolution of Disputes**

12.1 For the purposes of this **clause 12**, a dispute includes a grievance.

12.2 Unless otherwise provided for in this Agreement, a dispute about a matter arising under this Agreement or the National Employment Standards set out in the FW Act, other than termination of employment, must be dealt with in accordance with this clause. For the avoidance of doubt, a dispute about termination of employment cannot be dealt with under this clause.

12.3 This clause does not apply to any dispute regarding a matter or matters arising in the course of bargaining in relation to a proposed enterprise agreement.

12.4 A person covered by this Agreement may choose to be represented at any stage by a representative, including a Union representative or Employer's organisation.

12.5 **Obligations**

(a) The parties to the dispute and their representatives must genuinely attempt to
resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.

(b) Whilst a dispute is being dealt with in accordance with this clause, work must
continue in accordance with usual practice, provided that this does not apply to an Employee who has a reasonable concern about an imminent risk to his or her health or safety, has advised the Employer of this concern and has not unreasonably failed to comply with a direction by the Employer to perform other available work that is safe and appropriate for the Employee to perform.

(c) No person covered by this Agreement will be prejudiced as to the final settlement of the dispute by the continuance of work in accordance with this clause.

12.6 Agreement and Dispute Settlement Facilitation

(a) For the purposes of compliance with this Agreement (including compliance with this dispute settlement procedure) where the chosen Employee representative is another Employee of the Employer, he/she must be released by the Employer from normal duties for such periods of time as may be reasonably necessary to enable him/her to represent Employees concerning matters pertaining to the employment relationship including but not limited to:

(i) Investigating the circumstances of a dispute or an alleged breach of this
Agreement;

(ii) Endeavouring to resolve a dispute arising out of the operation of this Agreement; or

(iii) Participating in conciliation, arbitration or any other agreed alternative
dispute resolution process.

(b) The release from normal duties referred to in this clause is subject to the proviso that it does not unduly affect the operations of the Employer.

12.7 Discussion of Dispute

(a) The dispute must first be discussed by the aggrieved Employee(s) with the immediate supervisor of the Employee(s).

(b) If the dispute is not settled, the aggrieved Employee(s) can require that the dispute be discussed with another representative of the Employer appointed for the purposes of this procedure.

12.8 Internal Process

(a) If any party to the dispute who is covered by this Agreement refers the dispute
to an established internal dispute resolution process, the matter must first be dealt with according to that process, provided that the process is conducted as expeditiously as possible and:

(i) is consistent with the rules of natural justice;

(ii) provides for mediation or conciliation of the dispute;

(iii) provides that the Employer will take into consideration any views on who should conduct the review; and

(iv) is conducted with as little formality as a proper consideration of the dispute allows.

(b) If the dispute is not settled through an internal dispute resolution process, the
matter can be dealt with in accordance with the processes set out below.

(c) If the matter is not settled either party to the dispute may apply to the FWC to have the dispute dealt with by conciliation.

12.9 Disputes of a Collective Character

(a) The Parties acknowledge that disputes of a collective character concerning more than one Employee may be dealt with more expeditiously by an early reference to the FWC.

(b) No dispute of a collective character may be referred to the FWC directly unless there has been a genuine attempt to resolve the dispute at the workplace level prior to it being referred to the FWC.

12.10 Conciliation

(a) Where a dispute is referred for conciliation, a member of the FWC shall do everything that appears to the member to be right and proper to assist the parties to the dispute to agree on settlement terms.

(b) This may include arranging:

(i) conferences of the parties to the dispute presided over by the member; and

(ii) for the parties to the dispute to confer among themselves at conferences
at which the member is not present.

(c) Conciliation before the FWC shall be regarded as completed when:

(i) the parties to the dispute have reached agreement on the settlement of the dispute; or

(ii) the member of the FWC conducting the conciliation has, either of their
own motion or after an application by a party to the dispute, satisfied themselves that there is no likelihood that, within a reasonable period, further conciliation will result in a settlement; or

(iii) the parties to the dispute have informed the FWC member that there is no likelihood of agreement on the settlement of the dispute and the member does not have substantial reason to refuse to regard the conciliation proceedings as completed.

12.11 Arbitration

(a) If the dispute has not been settled when conciliation has been completed, a party to the dispute may request that the FWC proceed to determine the dispute by arbitration.

(b) Where a member of the FWC has exercised conciliation powers in relation to the dispute, the member shall not exercise, or take part in the exercise of, arbitration powers in relation to the dispute if a party to the dispute objects to the member doing so.

(c) Subject to clause 12.11(d), the determination of the FWC is binding upon the
persons covered by this Agreement.

(d) A determination of a single member of the FWC made pursuant to this clause
may, with the permission of a Full Bench of the FWC, be appealed.

12.12 General Powers and Procedures of the FWC

Subject to any agreement between the parties in relation to a particular dispute and the provisions of this clause, in dealing with a dispute through conciliation or arbitration, the FWC may conduct the matter in accordance with Subdivision B of Division 3 of Part 5-1 of the FW Act."

CONSIDERATION

[37] Common between the parties is that Question 2 is within the Commission's jurisdiction and may be answered by this decision. The Department denies there is jurisdiction for the remaining five questions. I shall deal first with Question 2, which is posed as whether the Department complied with the consultation provisions of clause 10 of the VPS Agreement.

2. Did the Department comply with the consultation provisions of clause 10?

[38] There is no material before the Commission that would mean that considerations other than the words of the Agreement require taking into account. That is, there is no evidence of the parties' objective intentions for the relevant clauses.

[39] The obligations of clause 10 are set out above. It is to be noted from the clause that clauses 10.1 and 10.2 set out the things to which the wider clause has application. Importantly the clause is to be employed "where the employer has developed a proposal for a major change likely to have a significant effect on employees" with the term "likely to have significant effect on employees" then further defined. It is evident that the clause has application to Ms Lloyd's circumstances potentially for at least one matter that might be regarded as having a significant effect, namely "the need to relocate Employees to another workplace" (clause 10.2(f)). The Department does not dispute that its proposed restructure was such a change.[42]

[40] The clause then obliges the Department to advise the relevant employees and the relevant union covered by the Agreement of the proposed changes; the likely effects on employees working conditions and responsibilities; and "the rationale and intended benefits of any change, including improvements to productivity, if applicable" (clause 10.1). There is an obligation on the part of the employer to regularly consult with employees and the union covered by the Agreement, and to "give prompt consideration to matters raised by the employees" or the union, as well as to provide appropriate training to employees to assist them to "integrate successfully into the new structure" (clause 10.4).

[41] It is common ground between the parties as well as being self-evident from the clause that affected employees are entitled to submit alternative proposals with there then being an obligation on the part of the employer to consider proposals and provide "considered reasons" to employees and the union in the event that the employer does not accept the proposals (clause 10.5).

[42] It may be drawn from this provision that submissions of alternative proposals on the part of an employee or their union are to be "alternative proposals which will meet the indicated rationale and benefits of the proposal" with the proposals to be submitted in a timely manner. On the part of the employer it has an obligation to "give considered reasons" if it does not accept the proposals, also with an obligation to do so within a timely manner.

[43] The proposal's rationale and benefits, at least as seen by the Department, are to be drawn from several sources.

[44] At some stage before 2017, consideration was given by the Department to a "two up" working model for Sheriff's Officers. There appear to have been a number of externalities which led to such a consideration. Those externalities included both the circumstance in which an officer had been involved in an incident which then lead to the issuance of

provisional improvement notices under the *Occupational Health and Safety Act 2004* (Vic) (the OHS Act), as well as movements made within Victoria Police on the same subject. Such considerations appear to have led directly to the Department's Commissioning of the FBG report, completed in March 2017. The connection of the matters recommended within that report to improve safety of Sheriff's Officers is unambiguous and is clearly to be viewed as a rationale and benefit for what then became the Department's proposal to employees such as Ms Lloyd within the Bass Coast/Gippsland Region.

[45] Even so, by the time of the Department's notification to the CPSU of the proposed changes in February 2018, the rationale and benefits of the proposal were stated in somewhat of a more muted fashion, connected strongly with service delivery needs in contrast to Occupational Health and Safety demands.[43] In a similar vein the communication sent directly to Ms Lloyd on 27 April 2018 also emphasised the operational importance of the proposal, without particularly connecting the proposal with matters of Occupational Health and Safety. The correspondence also invited for the first time any views that Ms Lloyd may have, to be provided in the form of an alternative proposal:

> "…
>
> In accordance with obligations arising from the Implementation of Change provision of the Victorian Public Service Enterprise Agreement 2016 (Agreement) and the duty of the employer to consult with employees in accordance with Section 35 of the Occupational Health and Safety Act 2004, I advise of the intention to relocate identified staff members from the Gippsland Regional Office - Morwell and Warragul Community Correctional Services Reporting Centre, State Government Office within the Department's Gippsland Region to a new location. The location of the new Warragul Justice Service Centre will be 12-14 Queen Street, Warragul, Victoria, 3820.
>
> The decision to relocate staff is aligned to the Department's strategic, long-term focus on providing an accessible regional model of service delivery. The location the Warragul office has been chosen to meet the growing needs in Gippsland's growth corridor.
>
> Background
>
> Following a recent service review, the need for a Warragul Justice Service Centre was identified. The current Warragul reporting centre offers limited services and is presently serviced by a small staffing compliment. To address the full service needs of the area, the Department is in the process of fitting out a full Justice Service Centre.
>
> It is proposed that the staff numbers required to meet the service needs of the Warragul Justice Service Centre will initially be sourced via expressions of interest (EOI) received from staff of the Gippsland Regional Office - Morwell and Warragul Community Correctional Services Reporting Centre, State Government Office. It is anticipated that the majority of positions will be filled through this process as many staff have already indicated a preference for the Warragul location due to the distance from home residences.
>
> …"[44]

[46] The FAQs document did not specifically address the rationale and benefits of the proposal, instead focusing on the locations, facilities and staffing of the ongoing offices. The communication sent on the same date to the CPSU provided slightly greater rationale, connecting the proposal with the OHS Act (at least in the headnote of the correspondence) and by stating:

> "Dear Ms Batt,
>
> Implementation of Change- Clause 10 Victorian Public Service Enterprise Agreement 2016 - Section 35 Occupational Health and Safety Act 2004 - Department of Justice and Regulation (the Department), Gippsland Region - Implementation of the Sheriffs Two Up Model.
>
> I write to you in accordance with obligations arising from the Implementation of Change provision of the Victorian Public Service Enterprise Agreement 2016 to formally advise of a proposal to move to a Two Up staffing model for the Sheriff's Office of Victoria - Gippsland Region and the subsequent proposal to relocate identified staff to facilitate a regional hub model.
>
> Background
>
> In 2017, the Infringement Management and Enforcement Services (IMES) commissioned a review of the two-up preferred operating model for Sheriff's officers. The purpose of this work was to understand officer's operational context, develop a comprehensive understanding of their day-to-day risks and asses the feasibility of the two-up preferred operating model across the regions. The final report was provided to the Regional Services Network (RSN) with the recommendation that the RSN work immediately on the implementation of two up working arrangements for the Sheriff Officer activities involving contact with defendants in all regions across Victoria.
>
> To facilitate the two-up model it is proposed that Gippsland establishes a regional hub in Warragul and locates two Senior Sheriff's Officers in Sale. The Senior Sheriff's Officer (SSO) at Bairnsdale Justice Service Centre (JSC) will transfer to the Sale JSC, with both SSOs serving Wellington and East Gippsland Shires and part of Latrobe City. The SSO at Wonthaggi JSC and the Assistant Supervisor at Morwell JSC relocate to the Warragul JSC joining two other SSOs to serve Bass Coast, South Gippsland, Baw Baw Shire, and Latrobe City.
>
> It is also proposed that the Regional Manager and Sergeant relocate to the Warragul JSC to establish the regional hub and continue to provide operational support to SSOs across the region.
>
> It is intended that the relocation will be implemented in September 2018 to align with the opening of the new Warragul JSC, 12-14 Queen Street, Warragul, Victoria, 3820 in September 2018."[45]

[47] As set out above, Ms Lloyd responded to the 27 April 2018 notification providing the alternative proposal set out above. After that correspondence, Mr Crinall, the Regional Director, Gippsland Region for the Department responded to Ms Lloyd's alternative proposal,

potentially also putting forward some further rationale and indication of benefit for the proposal:

> "Alternative proposal
>
> The alternative you propose is that a two person station be established at Wonthaggi Justice Service Centre.
>
> Your proposal would enable some level of compliance with the Two Up policy, which is specified in the Sheriff's Standards of Service, (Sheriff's Office Victoria, 1 February 20 '17) but would require the relocation of a Sheriff's Officer currently based in Warragul. This would reduce the practical benefits In terms ol health and wellbeing and operational efficiency of the proposed regional hub, locating the majority of Sheriff's Officers at the new Warragul Justice Service Centre, which is due for occupancy by October 2018.
>
> While Bass Coast/South Gippsland Shires 11ave 20% of the region's defendants and 25% of the outstanding warrants, Baw Baw Shire/Latrobe City have 50% of the defendants and 51% of the outstanding warrants. The proposal to base the majority of Sheriff's Office Victoria Gippsland staff at a regional hub in Warragul JSC will meet the Two Up policy requirements more effectivity, provide maximum rosterlng flexibility and allow for more accessible management of the regional warrant pool.
>
> Sheriff's Office Victoria (SOV), in agreement with the Regional Services Network (RSN), had previously mandated that two-up is the preferred operating model for aU Sheriff's officers across Victoria. Under this model, two Sheriff's officers must always be present in operational situations where a risk assessment determines working two-up is the safest option for all officers involved.
>
> The Two Up policy was introduced following an incident in January, 2015 where a Sheriff's Officer working alone became involved In an Incident that led to the issue of Provisional Improvement Notices (PINs) under the Occupational Health and Safety Act. The PINs related to a failure to provide a safe system of work, failure to provide supervision and training and failure to provide a safe working environment. The PINs proposed that all Sheriff's Officers be required to work two-up whenever they are in contact with defendants. As a result of meetings with the Health and Safety Representatives (HSRs), Community and Public Sector Union (CPSU) and WorkSafe the Department withdrew their dispute in relation to two of the PINs while the third PIN relating to working two-up for warrant executive activities remains outstanding."[46]

[48] While the Department's communications did not strongly make the case to either the CPSU or to employees such as Ms Lloyd that a driver of the proposal was concerns about occupational health and safety, the evidence as a whole allows the finding that such was a driver for the policy change. The whole concept of two-up working was plainly motivated by the need to control the safety risks of officers working alone.

[49] What may be discerned from these 2017 and early 2018 documents and other materials before the Commission dealing with the Department's motivations for making the proposed changes are that they were reasoned as doing several things of benefit for the

Department; overcoming through a two up working model Occupational Health & Safety issues of some significance when Sheriff's Officers attended alone certain, but not all, site related actions; and implementing this model in a way which would be most efficient for the Department. In a broad sense those matters may be regarded as the Department's rationale for the proposed change. The benefits that may be regarded as flowing from the proposed change as well as from its implementation include; controlling the Occupational Health & Safety risk to a satisfactory standard; and ensuring that the smallest possible negative impact on service delivery and finances is achieved.

[50] A review of these matters and the evidence supporting them allows the conclusion that the steps required of the Department by clauses 10.1 and 10.2 have been complied with. Those requirements however go only so far as to advise and inform employees.

[51] So far as is relevant clauses 10.4 and 10.5 require the Department to consult with employees; give prompt consideration to matters raised and to consider alternative proposals. Part of the obligation is to give "considered reasons" if an alternative proposal was rejected, however the question of what are "considered reasons" is not dealt with in the VPS Agreement.

[52] Ms Lloyd made two alternative proposals – essentially the same – for consideration first on 30 April 2018 and secondly on 5 June 2018. Each proposal was based on the Bass Coast/Gippsland region being serviced by 3 x 2 person offices, rather than 2 x 3 person offices. Ms Lloyd put forward strongly that her proposal would both service the community better, as well as be more efficient. In particular:[47]

> "So far as workload is concerned, my experience is that currently approx. 40% of my work time is spent on CCS Wonthaggi generated warrants, 20% on VIC POL generated warrants including follow up from roadblocks, 1 0% on warrants generated from other stakeholders and 30% on targeting high volume defendants, Civil and Possessions. The majority of this time is spent on finalising warrants as the addresses are confirmed and contact with the defendants is highly likely (results as stated in previous correspondence).
>
> I make the following observations re the distribution of warrants in the Gippsland area.
>
> -Baw Baw Shire is currently holding 28,912 warrants, serviced by the team located at Warragul.
>
> -Traralgon, part of Latrobe Shire {15,789 warrants) is serviced by the East Gippsland team to ensure they have a wider pool of warrants than just those provided by East Gippsland area.
>
> -South Gippsland I Bass Coast shires hold 41,888 warrants.
>
> -The remaining warrants in the Latrobe region (38,937) are largely located in Moe and Morwell.
>
> Moe and Morwell, historically, provide poor finalised returns and productivity results as they are low income, high rental areas. Discussion with other Gippsland sheriff's will confirm this assertion. In order to continue current productivity levels, South

Gippsland and Bass Coast must be serviced on an almost full-time basis and certainly have the warrant holding to maintain a permanent team.

Key performance indicators have not been changed since the release of the FBG review so with the reduction of resources the 'quality' of warrants is imperative."

"Regarding the four recommendations derived from the FBG report.

Recommendation 1. -I support working '2 up' and my alternate proposal covers mandatory '2 up'.

Recommendation 2. -My proposal uses current office locations and Wonthaggi JSC is already in compliance with all SO requirements and safety. There is no additional cost to the Department. My proposal for Steve Wynn to be part of a Wonthaggi team would ensure sufficient staff at each location. My proposal shares staff more equally amongst the region to cover the geographical area. Bass coast & SG have a rapidly increasing population growth. 10% in BC in 5 years and 8% in SG in the same time frame. This is projected to increase substantially over the next 10 years (shire web sites). The extensive range of stakeholders- CCS, VIC POL, Bass Coast Health, local financial counselling services, REMAR ·would be serviced. Responding to stakeholder requests and following up subsequent 7DN ensures a full time presence is required.

Recommendation 3 ·The FBG review clearly states a recommendation that 'regional managers to be given ownership over the implementation'.

As per attached correspondence, from Bob Gahir RM, I understand a proposal was originally floated for three '2 man' stations, one each at Sale, Warragul and Wonthaggi. It is my understanding that the RM was advised this was not an option as each station required 3 officers. As the parameters have changed, with Hume, Barwon and Gippsland all maintaining 1 or 2 man stations, the original proposal should be reconsidered. This still ensures a mandatory '2 up' implementation. I cannot understand why such an outcome is not in the best interests of the Department in the circumstances I have outlined above.

Recommendation 4- An ongoing monitoring .of the proposal by the Sergeant and RM will ensure quality assurance.

The rationale for the Clause 10 proposal regarding resources would not at all be affected by adopting my proposal. The same number of vehicles would be required regardless of where they are located (Warragul or Wonthaggi). It would in fact, be a considerable saving of running costs to locate a vehicle at Wonthaggi to reduce the constant travel between Warragul and Bass Coast/South Gippsland."

[53] When it came to respond to Ms Lloyd's proposals, the Department did so by referring both to its reasoning for the change proposal, including its duty of care to employees for Occupational Health & Safety reasons, as well as dealing with matters associated with the impact of the alternative proposals on service delivery and resourcing, including for the matters set out in the "background" section of this decision.[48]

[54] The Respondent also met with Ms Lloyd about her concerns on 22 June 2018.[49] The evidence allows a finding that Ms Lloyd had an opportunity to articulate her views, both as to the deficiencies of the Department's change proposal and her own alternative proposals. Her concerns were also the subject of a Review of Action under Victorian Government public sector management legislation which is not strictly part of the consultation process since the Review is conducted independently of the line agency and its decision makers.

[55] Considering these matters together, the finding should be made that Ms Lloyd was consulted with and had the opportunity to raise matters of concern to her (clause 10.4); had the opportunity to submit alternative proposals and did so, and when those proposals were rejected by the Department was provided with considered reasons for its rejection (clause 10.5).

[56] Accordingly Question 2 must be resolved in the affirmative.

> *1. Has the Applicant been afforded procedural fairness during the process leading to the decision?*
> *3. Is the Department's proposal unfair to the Applicant?*
> *4. Did the Department have insufficient regard to the negative personal impacts on the Applicant?*
> *5. Should the proposal of the Department or the Applicant or another model be preferred?*
> *6. Should the Department rescind its decision and adopt the Applicant's proposal or another model?*

[57] The remaining five questions are objected to by the Respondents as not being within the Commission's jurisdiction. Those questions, set out again immediately above, go to whether Ms Lloyd has been afforded procedural fairness; whether the decision against her alternative proposals is substantively unfair; whether for some other reason the Department's decision-making should be varied by the Commission.

[58] Those propositions are not favoured by me. Firstly, and most importantly the questions posed by Ms Lloyd are not within the Commission's jurisdiction. Secondly, Ms Lloyd's alternative proposals were considered and engaged with bythe Department. Thirdly, the fact that the Department had an affinity for its preferred operational model is neither unfair or implausible.

[59] In relation to jurisdiction, Mr Langmead, Counsel for Ms Lloyd, argued:

- When clause 12.1 defines a dispute to include a grievance that term, on the basis of the Macquarie Dictionary impute, something wider than a mere dispute. Ms Lloyd's complaint is to be viewed as a grievance.[50]

- Because of this construction clause 12.2 which says that "a dispute about matters arising under this agreement or the National employment standards set out in the FW act, other than termination of employment, must be dealt with in accordance with this clause" is not to be read as confining the process only to disputes arising under the agreement or the NES.[51]

- *UFU v MFB;CFA*[52] is authority for the proposition that the Commission may be authorised to deal with disputes broader than the content of an enterprise agreement and in particular for disputes over matters pertaining to the employment relationship. Section 172 enables bargaining over matters pertaining to the employment relationship and clause 12.3 of the VPS Agreement confirms the intention to resolve broader disputes;[53]

  Such clause would be unnecessary if clause 12.2 is paramount and excluded any other sort of dispute.[54]

  The reference by Mr Langmead to *UFU v MFB;CFA* is a reference to the findings of the Full Bench that inclusion in an agreement of a dispute resolution clause that allows disputes to be raised over "all matters arising under this agreement … which the parties have agreed includes … all matters pertaining to the employment relationship" was a decision by the parties that the clause "would encompass, *inter alia*, all matters pertaining to the employment relationship, whether expressly dealt with in the Agreement or not. They agreed that disputes about all of those matters could be dealt with under the dispute resolution terms".[55] Further;

  > "[31] Relevantly, s.186(6) does not confine the kinds of disputes that may be progressed through a dispute resolution term to those that are "about any matters arising under the agreement". Rather it is concerned with ensuring that terms as a minimum allow for the settlement of such disputes. A dispute resolution term in an enterprise agreement may also make provision for dealing with other disputes about matters that pertain to the relationship between the employer covered by the agreement and the employer's employees who are covered by the agreement, whether dealt with by a term of the agreement or not.
  >
  > [32] That this is so, seems to us to be acknowledged in s.738(b) of the Act.
  >
  > [33] The dispute resolution terms in the Agreements satisfy s.186(6) of the Act and also provide for a broader range of disputes to be dealt with, recognising the limits on agreement content in s.172. They are terms of the kind described in s.738(b).
  >
  > [34] Each of the Agreements contained a term as described in s.738(b) of the Act. The questions raised by the disputes fall within the remit of each dispute resolution term. There is no contention that any of the preliminary steps required to be taken before the Commission can arbitrate have not been followed. Each dispute resolution term requires or allows the Commission to deal with the disputes. The result is that each dispute engaged s.739 and was properly before the Commission. The Commission had jurisdiction to deal with the dispute, including by arbitration."[56]

- Each of the draft questions are disputes "arising under this agreement" since they are grievances of Ms Lloyd's. She has engaged with her rights in clause 10 and especially 10.4, conferring a right to matters she raises to be properly considered and 10.5, giving her the right to submit alternative proposals and be provided with considered reasons if those proposals are rejected. Since Ms Lloyd is dissatisfied

> with the Department's actions in these regards she has a grievance and that grievance may be dealt with through the dispute resolution process established by clause 12, which includes the right front resolve disputes to be determined by the Commission by arbitration (clause 12.11).[57]

[60] Against these matters the Respondent argued there is no dispute that the word "dispute" also means a grievance however, as submitted by Mr Minucci, for the Department:

> "There's no dispute from the purposes of the Department that the word "dispute" also means a grievance. There's no issue about that. But simply what 12.1 does means that the word "dispute" and "grievance" can be used interchangeably. So, if that's the case, let's assume that that's right, and let's assume that grievance means a complaint or something of that kind, if we follow that through the steps in Clause 12 through to 12.2 the relevant provision would read, "A grievance about a matter arising under the agreement must be dealt with in accordance with this clause".
>
> So the relevant phrase about a matter arising under this agreement is a qualifier. It must be read as a qualifier to the words a "dispute" or a "grievance". It is only disputes of that kind that can be dealt with by virtue of the dispute resolution contemplated in the clause."[58]
>
> "The question is really in essence what does "a dispute about a matter arising under the agreement" mean? In my submission and in the Department's submission, that must mean that the dispute has to be about the application or the proper application of the terms of the agreement. That is, the dispute must be about something that exists within the document. If it doesn't exist within the document it doesn't ground the jurisdiction of the Commission because it's not about a matter arising under the agreement.
>
> To that end the Department accepts that a dispute about consultation is a dispute about a matter arising under the agreement, because clause 10, the major change provision of the VPS agreement, expressly contemplates consultation appearing in particular defined circumstances. And the Department's proposed change to the structure in the Gippsland region to deliver to this right model falls within the definition of a major change that would have significant effect on employees, and therefore those consultation obligations apply, and the Department has to comply with the matters in clause 10. And as we've submitted in our written outline, and I'll take the Commission to shortly, we say we have met those obligations."[59]

[61] I am not satisfied that the proper construction of the VPS Agreement would attract jurisdiction in the way advocated by the Applicant.

[62] Clause 12 provides a confined opportunity for disputes including grievances to be raised, progressed and resolved under the procedure set out therein. That process plainly includes conciliation and arbitration of the dispute by the Commission. The considerations in *UFU v MFB; CFA* do not apply to this matter, which does not include a dispute resolution procedure so wide as to deal with matters pertaining to the employment relationship. There are important differences in the MFB and CFA dispute resolution clauses which means they are far from analogous with the one in the VPS Agreement. The clause in the VPS Agreement enables the raising and progression of a confined class of matters being "a dispute

about a matter arising under this Agreement or the National Employment Standards set out in the FW Act, other than termination of employment". In contrast, the terms under consideration in *UFU v MFB; CFA* allows disputes to be raised over "all matters arising under this agreement … which the parties have agreed includes … all matters pertaining to the employment relationship". The latter clauses are significantly broader than that in consideration in this matter, and their meaning is plainly different.

[63] The proposition advanced by Mr Langmead is to the effect that the clause allows disputes and grievances to be raised about the Agreement and the NES and that it separately allows grievances to be raised about any other matter at all, provided that it pertains to the employment relationship. Such proposition is not to be found within the words of the clause:

- which defines a dispute to include a grievance, imputing that a dispute is something wider than a dispute (clause 12.1);

- and after providing that "Unless otherwise provided for in this agreement" mandates progression of a dispute in accordance with the clause while limiting that progression to "a dispute about a matter arising under this agreement or the National employment standards set out in the FW act, other than termination of employment" (clause 12.2); and

- finally prevents disputes either about termination of employment or bargaining claims to be dealt with under the clause (clauses 12.2; 12.3).

[64] Were clause 12 to have the intention that grievances unconnected with matters arising under the Agreement or the NES could be separately raised and progressed it would likely read "a dispute about a matter arising under this agreement or the National Employment Standards set out in the FW act, other than termination of employment, or a dispute about a matter pertaining to the employment relationship …". It would be a strain on the language of clause 12.2 to see such intention within the clause.

[65] Ms Lloyd also raises the proposition that she has a grievance about the Department's decision-making under clause 10.4 and 10.5 and that such grievance is a dispute that may be raised and progressed under clause 12. Ms Lloyd may well be aggrieved about the outcome of the things that she has raised under clauses 10.4 and 10.5, but the grievance or dispute which she may progress under clause 12 are the things directly connected with the two former clauses. In the case of clause 10.4 she is entitled to argue, and has, that she has been inadequately consulted with or that the Department has not given prompt consideration to the matters that she raised (noting that the third element of clause 10.4 relating to the provision of appropriate training is not a subject of these proceedings). Under clause 10.5 Ms Lloyd is entitled to argue that she did not receive considered reasons for the Department's rejection of her alternative proposals. It is to be noted that other than for the broad nature of Question 2 which asks whether the Department complied with consultation provisions of clause 10 the elements of clause 10.5 are not dealt with in Ms Lloyd's questions for determination for the Commission.

[66] As a result of this consideration, I find that the Commission does not have jurisdiction to determine questions 1, 3, 4, 5 and 6.

[67] While it is not necessary to do so, the totality of the evidence before the Commission reasonably leads to the conclusion that the Department has given ample opportunity for Ms Lloyd to put her case for its consideration and to propose alternatives. In overall terms this is a situation in which Ms Lloyd is aggrieved both because of matters of simple geography as well as the Department's engagement with and determination of an appropriate solution to matters of some significance relating to its duty of care to employees generally as well as for service delivery to the community.

[68] In relation to geography, while there may well be places to reside within the Bass Coast/Gippsland region which are further away from the general body of the population serviced by the region, there would not be many. Residing almost at the most westerly part of the region, close to its most southern part, means that in the face of any decision by the Department to consolidate its offices away from Wonthaggi will mean further travel for Ms Lloyd. That matter of geography is not likely to be overcome through any consolidation decision which did not favour retention of the Sheriff's Office presence in Wonthaggi or supplementation of Ms Lloyd with additional staff. Unfortunate, though it may be for Ms Lloyd, a considered decision on the part of the Department to consolidate staff in places other than Wonthaggi would inevitably have adverse consequences for Ms Lloyd, including additional travel and travel time. The unanswered questions, beyond jurisdiction for the Commission to deal with, going to matters of the fairness of the Department's proposal and whether another model should be preferred are amply dealt with in the review of action report published by the Department in December 2018. That report comprehensively analysed the matters in contest and made the following pertinent findings.

> "The Review Officer notes that:
>
> > i. both parties accept that the Department ought to implement two-up operations within the Gippsland Region in the future, based on the findings and recommendations within the FGB Report, however,
> >
> > ii. the parties disagree on which is the most appropriate operational rnodel to most effectively deliver two-up operations within the Gippsland Region, particularly based on their understanding of how these services are delivered and where they are most required within the Region.
>
> Nonetheless, it is the Review Officer's view that the Department has reasonably selected the Two Location Model comprising the Warragul JSC and Sale JSC, in circumstances where it was fair, reasonable and open for it to do so. Notwithstanding that Ms Lloyd disagrees with the rationale offered by the Department for the Two Location Model and the impact on delivery of professional services to the Region, it is clear that the FGB Report states a similar rationale supporting a 2 Location Model, by stating that that three officers would ideally be required 'to ensure operational activities are continued during periods of planned or unplanned leave and; that officers have the ability to rotate partners' …"[60]
>
> "… the Department has acknowledged repeatedly, in its correspondence with Ms Lloyd and its submissions, that the proposed relocation of her workplace is significant and would have negative impacts on her, including financially. It is also the Review Officer's view that the Department has considered these impacts in considerable detail"[61]

"… the Department appears to have correctly applied the relevant compensatory provisions within the VPS Agreement, and in particular, clause 32.1 0, in outlining its compensatory offer to Ms Lloyd by way of providing her with a one-off allowance to compensate her for relocating her workplace. On the face of it, these provisions appear to contemplate the kind of workplace relocation situation facing Ms Lloyd, and therefore appear to be a reasonable and fair form of compensation and means of dealing with Ms Lloyd's concerns about the additional costs of travel to and from work. Notably, it is the Review Officer's view that, in the event that Ms Lloyd is deployed in the future to perform a significant amount of her duties in the Bass Coast/South Gippsland Shires, then it would appear that such deployments, over time, could also significantly mitigate both the travel a 1 other negative impacts asserted by Ms Lloyd in her submissions.

While the Review Officer acknowledges that there are a range of non-financial but still significant negative impacts on Ms Lloyd of the proposed relocation, it is not possible for the Review Officer to come to a conclusion that they outweigh the operational benefits associated with implementing a Two Location Model, as asserted by the Department."[62]

"In the Review Officer's view, the Department has properly taken into account Ms Lloyd's rationale for the Alternative Proposal, albeit it has come to a different conclusion about this rationale. Since becoming aware of Ms Lloyd's rationale as initially submitted in the 30 April Letter, the Department has repeatedly engaged with Ms Lloyd in further consideration of this rationale, as evidence by its letters on 24 May, 30 July and 11 September 2018. The Department's correspondence appears both reasonable and detailed, and while Ms Lloyd remains in disagreement with many of the arguments submitted by the Department, in the Review Officer's view, these largely constitute differences of opinion, with the Department being entitled to base some of its key rationale on similar grounds to that espoused in the FBG Report ie. the impact of leave arrangements on two-up operations (which would occur across the three two person stations proposed by Ms Lloyd) and the impact on the capacity for Ms Lloyd to rotate partners."[63]

"… while the Review Officer notes that the Department could have elected to exercise its discretion differently with respect to the Gippsland Region, it is not possible for the Review Officer to make a conclusion that such exercise of discretion by the former Gippsland Regional Manager, in conjunction with Mr Crinnal, was unfair or unreasonable in the circumstances, notwithstanding that the Barwon and Hume Regions have implemented different structures to give effect to two-up operations. This is primarily because the Department appears to have had valid and sound reasons for deciding to implement the three-person Officer structure in the Gippsland Region as recommended as being ideal by the FBG Group."[64]

and "… there have been no breaches of procedural fairness by the Department in respect of its consideration of the Alternative Proposal prior to making the Decision."[65]

[69] Having considered these findings, I express the opinion they are neither inconsistent with the evidence before me about the matters in contest, or unreasonably made. It may be

seen from this report that Ms Lloyd was given every reasonable opportunity to object to the Department's decision and to propose alternatives for its consideration. The Report shows that the Department fairly and seriously considered her views and proposal, but in the end held a different perspective about the problem it faced. I hold the opinion that it was fair and reasonable that the Department act on the problems identified in the FBG Report and that to do otherwise may have legal consequences in the case of a serious safety incident. Faced with the difficulty of maximising the effect of scarce resources over a large region, its decision making was fair and reasonable. The fact that its decisions do not accord with Ms Lloyd's wishes and that she may have to make hard decisions as a result is unfortunate, but hardly unremarkable, let alone unfair, in the context of difficult decisions taken by Government agencies. That eventuality is precisely why the VPS Agreement contains the provisions it does in clauses 31.10 (Permanent relocation of usual place of work), 32.11 (Residential Relocation principles), and 32.12 (Reasonable relocation expenses), noting that whether or not those clauses apply to Ms Lloyd or whether she chooses to exercise her rights under those clauses is not a matter for determination in this decision.

CONCLUSION

[70] For the reasons set out above, I answer the Questions for Determination as follows:

- Q2. Did the Department comply with the consultation provisions of clause 10?
    - A: Yes.

- Q1. Has the Applicant been afforded procedural fairness during the process leading to the decision?
- Q3. Is the Department's proposal unfair to the Applicant?
- Q4. Did the Department have insufficient regard to the negative personal impacts on the Applicant?
- Q5. Should the proposal of the Department or the Applicant or another model be preferred?
- Q6. Should the Department rescind its decision and adopt the Applicant's proposal or another model?
    - A: The Commission does not have jurisdiction to answer each of these questions.

[71] The dispute is determined accordingly.

COMMISSIONER

Appearances:

D. Langmead of Counsel for the Applicant.

M. Minucci of Counsel instructed by the Victorian Government Solicitors Officer for the Respondent.

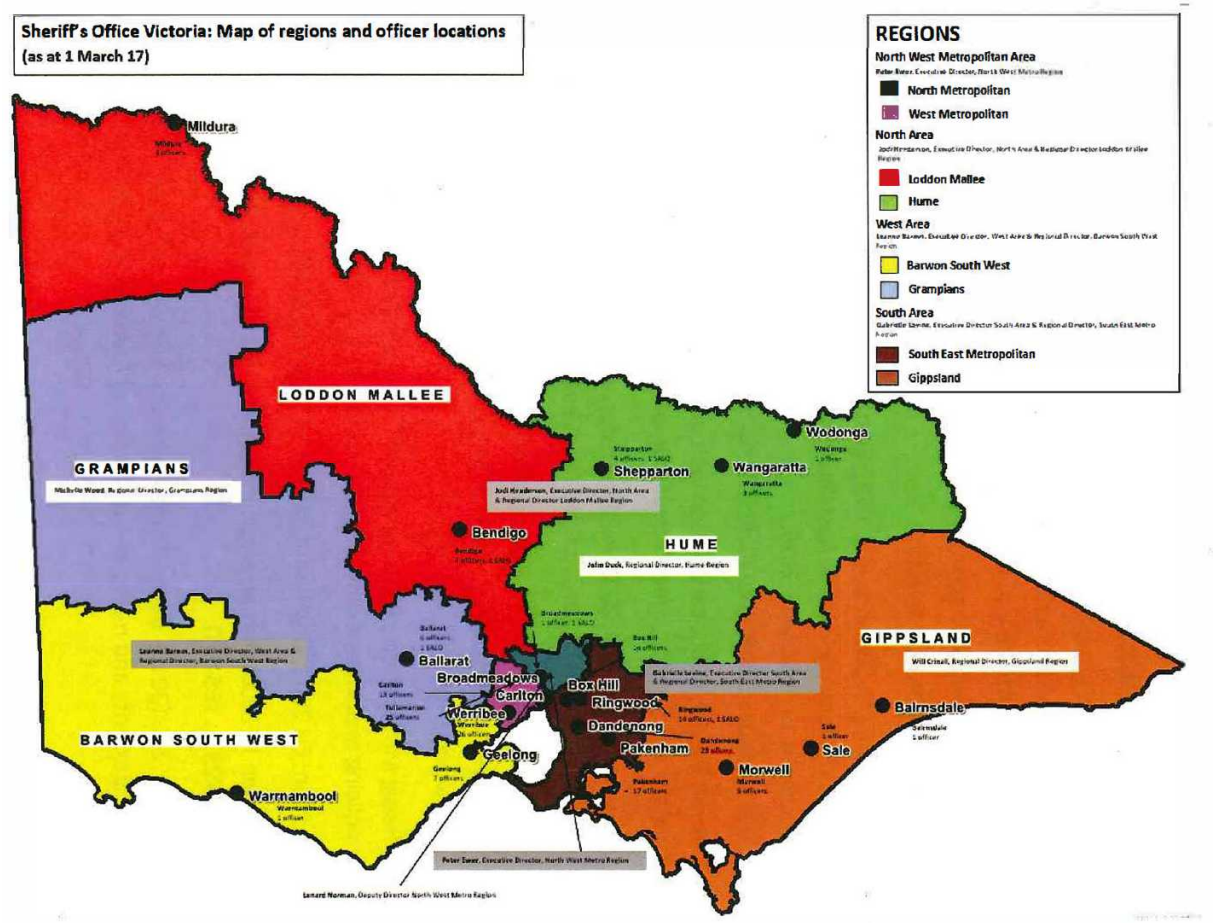
Hearing details:

2019.
Melbourne:
6 May.

Printed by authority of the Commonwealth Government Printer

<PR710475>

ATTACHMENT 1 – MAP OF SHERRIFF'S OFFICE REGIONS (Exhibit R2, Attachment JB-1, p.29)



[1] AE418873.

[2] Exhibit A3, *Witness Statement of Susan Lloyd*, [1].

[3] Exhibit R2, *Witness Statement of John Barclay*, [6].

[4] Ibid, [12].

[5] Ibid, [13].

[6] R2, Attachment JB-1, p.3.

[7] Ibid, pp.2.

[8] Transcript, PN 196, 346.

[9] Exhibit A3, [20].

[10] Exhibit A4, *Applicant's Document Bundle*, Tab 5.

[11] Exhibit A3, [24].

[12] Exhibit A4, Tab 5

[13] Exhibit A3, [24].

[14] Ibid, [19].

[15] Exhibit R2, [26].

[16] Ibid, JB-4, pp.3.

[17] Exhibit A4, Tab 5.

[18] Ibid, Tab 6.

[19] Ibid, p.3.

[20] Exhibit A4, Tab 7.

[21] Ibid, Tab 9, pp.2.

[22] Ibid, Tab 10.

[23] Ibid, Tab 16.

[24] Exhibit R2, Attachment JB-13, pp.3.

[25] AE418873.

[26] Exhibit R1, *Respondent Outline of Submissions,* 1 May 2019, [4].

[27] *Fair Work Act 2009* (Cth), s.739(4).

[28] *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].

[29] *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].

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

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

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

[33] Ibid [47].

[34] *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.

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

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

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

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

[39] [2017] FWCFB 3005.

[40] Ibid [114].

[41] [2017] FWCFB 4537.

[42] Exhibit R1, [56].

[43] Exhibit R2, Attachment JB-2.

[44] Ibid, Attachment JB-22.

[45] Ibid, Attachment JB-5.

[46] Ibid, Attachment JB-7.

[47] Ibid, Attachment JB-8.

[48] See especially Exhibit R2, Attachments JB 7, pp. 2 – 5; Attachment JB-9, pp. 1 – 2.

[49] Exhibit R2, Attachment JB-9.

[50] Transcript, PN 719 – 720.

[51] Ibid, PN 722.

[52] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board; Country Fire Authority* [2019] FWCFB 184.

[53] Transcript, PN 739 – 732.

[54] Ibid, PN 730.

[55] [2019] FWCFB 184, [25].

[56] Ibid.

[57] Transcript, PN 738 – 739.

[58] Ibid, PN 849 – 850.

[59] Ibid, PN 855 – 856.

[60] Exhibit R2, Attachment JB-13, *Final Report: Review of Action Application, Susan Lloyd*, 14 December 2018, p.25.

[61] Ibid.

[62] Ibid, pp.26.

[63] Ibid.

[64] Ibid, pp. 26 – 27.

[65] Ibid, pp.27.