



## DECISION

*Fair Work Act 2009*  
s.185—Enterprise agreement

### **Metropolitan Fire and Emergency Services Board** (AG2018/1278)

### **METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD, UNITED FIREFIGHTERS UNION OF AUSTRALIA, OPERATIONAL STAFF AGREEMENT 2016**

Fire fighting services

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 18 FEBRUARY 2019

*Application for approval of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016; undertakings provided; whether undertakings meet concerns about terms of the agreement contravening s.55; undertakings meet concerns; agreement with undertakings approved.*

[1] The Metropolitan Fire and Emergency Services Board (MFB) applied under s.185 of the *Fair Work Act 2009* (Act) for approval of an enterprise agreement titled the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* (Agreement). The Agreement was made on 16 March 2018 and the application was lodged with the Commission on 3 April 2018. The United Firefighters Union of Australia (UFU) was a bargaining representative for the Agreement. It supports the approval of the Agreement and has given notice pursuant to s.183 of the Act that it wants to be covered by the Agreement.

[2] The relevant background and proceedings history are set out in my earlier decision dealing with the application for approval of the Agreement<sup>1</sup> and need not be repeated here. In that decision I concluded that:

- the Agreement does not include any discriminatory terms;<sup>2</sup>
- the Agreement does not include any objectionable terms and the requirement in s.186(4) is met;<sup>3</sup>
- the Agreement is predominantly about matters that pertain to the requisite relationships;<sup>4</sup>
- the Agreement passes the BOOT and the requirement in s.186(2)(d) is met;<sup>5</sup>

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<sup>1</sup> [2019] FWC 106

<sup>2</sup> Ibid at [355(a)]

<sup>3</sup> Ibid at [355(b)]

<sup>4</sup> Ibid at [355(c)]

- I was not satisfied that particular terms of the Agreement do not contravene s.55 of the Act and that the requirement in s.186(2)(c) has been met.<sup>6</sup> The terms of the Agreement that were of concern were:
  - Clause 43.3;
  - Clause 43.4;
  - Clause 43.6.3; and
  - Clause 44.3.1.
- save for the concerns in relation to s.55, I was satisfied that the approval requirements in ss.186 and 187 have been met.<sup>7</sup>

[3] I also noted that the concerns identified in the decision were amenable to undertakings. I therefore allowed MFB a period of 21 days (which was subsequently extended) within which to provide any undertakings it wishes and to seek the views of the UFU before filing any undertaking.

[4] Following correspondence between the MFB and my Chambers in relation to my concerns, on 14 February 2019, MFB proposed undertakings, a copy of which is attached in Annexure A.

[5] It is necessary to examine the relevant provisions concerning the proffering and acceptance of undertakings and then to consider the nature of the concerns sought to be addressed by the undertakings in their statutory context in order to determine whether the undertaking meets that concern.

[6] The capacity of the Commission to accept an undertaking in relation to the approval of an enterprise agreement is dealt with in s.190 of the Act. Section 190 is engaged relevantly if an application for approval of an agreement has been made under s.185 and the Commission has a concern that the agreement does not meet the requirements set out in ss.186 and 187.<sup>8</sup> It is uncontroversial in relation to the Agreement that there is an application for its approval under s.185 and that I have concerns that the Agreement does not meet, *inter alia*, the requirement in s.186(2)(c) of the Act.

[7] Section 190(2) confers discretion on the Commission to approve an agreement under s.186 if satisfied that acceptance of the undertaking, subject to the fetters in s.190(3), meets the concern. It is clear, therefore, that the undertaking proffered must meet the concern that the agreement does not meet one or more of the identified requirements set out in ss.186 and 187 of the Act. The relevant requirement here, about which there is a concern, is the requirement that the terms of the Agreement do not contravene s.55 of the Act.

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<sup>5</sup> Ibid at [355(d)]

<sup>6</sup> Ibid at [355(f)]

<sup>7</sup> Ibid at [355(e)]

<sup>8</sup> *Fair Work Act 2009* (Cth) s.190(1)

**[8]** By s.190(3), the Commission may only accept a written undertaking if satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in a substantial change of the agreement. Section 190(4) prevents the Commission from accepting an undertaking unless it has sought the views of each person who the Commission knows is a bargaining representative for the agreement. Finally, an undertaking that is proffered must meet the signing requirements prescribed by regulations.<sup>9</sup>

**[9]** The process for proffering, accepting undertakings, assessing whether an accepted undertaking meets the requisite concern, and considering whether to approve an enterprise agreement may be summarised, chronologically as follows.

**[10]** First, there must be made an application for approval of an enterprise agreement.

**[11]** Secondly, the Commission must have a concern that the agreement does not meet one or more of the requirements set out in ss.186 and 187 of the Act. It should go without saying that the relevant concern needs to be identified by the Commission and communicated to the applicant for the approval of the agreement, and where the applicant is a bargaining representative for the agreement which is not the employer, also communicated to the employer or employers covered by the agreement. Only an employer or employers covered by an agreement can give an undertaking.

**[12]** Thirdly, there must be a written undertaking from one or more of the employers covered by the agreement and that undertaking must meet the signing requirements.

**[13]** Fourthly, the Commission must assess and be satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement.

**[14]** Fifthly, before accepting an undertaking the Commission must seek the views of known bargaining representatives for the agreement.

**[15]** Sixthly, if the undertaking is accepted the Commission must be satisfied that the accepted undertaking meets its concern before it may approve the agreement.

**[16]** Seventhly, there is a residual discretion to be exercised whether to approve the agreement with the undertaking that has been accepted and that meets the identified concern.

**[17]** The undertakings proposed in Annexure A meet my concerns. These undertakings do not cause any financial detriment to any employee covered by the Agreement nor do they result in any substantial change to the Agreement. The UFU has advised that it supports the undertakings.<sup>10</sup> I accept the undertakings.

**[18]** With the undertakings attached to this decision as Annexure A, and for the reasons stated, I am satisfied that each of the requirements of ss.186, 187,188 and 190, as are relevant to this application for approval, have been met. I am also satisfied that with the undertakings, the Agreement no longer contravenes s.55 of the Act. The Agreement is approved.

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<sup>9</sup> Ibid at s.190(5)

<sup>10</sup> Email from Davies Lawyers on behalf of UFU dated 15 February 2019 at 07.18am

[19] In accordance with s.201(2) and based on the statutory declaration provided by the organisation, I note that the Agreement covers the UFU.

[20] The date of the approval is 18 February 2019 and, in accordance with s.54, the Agreement will operate from 25 February 2019. The nominal expiry date of the Agreement is 1 July 2019.



DEPUTY PRESIDENT

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## Annexure A

### IN THE FAIR WORK COMMISSION

**FWC Matter No:** AG2018/1278

Application by Metropolitan Fire and Emergency Services Board for approval of the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016*

### UNDERTAKING

Pursuant to section 190 of the *Fair Work Act 2009* (Cth) and regulation 2.07 of the *Fair Work Regulations 2009* (Cth), the Metropolitan Fire and Emergency Services Board (MFB) hereby gives the following written undertaking in respect of the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* (**Agreement**).

1. The effect of this undertaking will not cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement.

### Amended Clauses

2. The MFB undertakes that clauses 43, 44, 85.16 and 124 of the Agreement are to read as follows.

#### 43. ROSTERING

- 43.1. Employees shall be rostered in accordance with this clause.
- 43.2. The parties agree that for reasons including the welfare and safety of employees covered by this Agreement, the MFB will not employ any employee on any basis other than a roster of hours provided for in this Agreement.
- 43.3. ~~The Save as in relation to an application made under s.65 of the Act and in respect of clause 44, the~~ MFB will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis, unless in each case there is agreement between all parties ~~on a case by case basis~~ (agreement is required for each employee).
- 43.4. This clause is subject to the rights of employees to work in a non-station based position pursuant to clause 44 below.
- 43.5. Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage.

- 43.6. Employees shall have their normal hours of work arranged in the following manner:
- 43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational "10/14" roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCC's.
- 43.6.2. Full-time operational dayworkers (professional firefighters who are not working on a roster referred to in 43.6.1) shall work and be rostered in accordance with the special administrative-duties roster set out in clause ~~135~~124.
- 43.6.3. Where part-time employment is agreed, part-time ~~operational dayworkers~~ employees will:
- a) work and be rostered on hours negotiated and agreed in writing between the MFB, the employee and (save as in relation to an application made under s.65 of the Act and in respect of clause 44) the UFU that, on average are less than 42 hours per week. These hours may be worked over a 5 day cycle and may include evening or weekend work;
  - b) Be paid special administrative duties allowance not at a pro rata rate; and
  - c) be paid for any additional hours worked at overtime rates.
- 43.7. For the avoidance of doubt, FSCCs are able to access the part-time rostering arrangements in accordance with this clause and clause 44.

#### 44. RIGHTS UNDER NES

- 44.1. In addition to other obligations on the MFB, and to avoid doubt, this clause does not limit the rights of employees, who are entitled to

make a request for a change in working arrangements under s65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has determined and the parties have reached agreement that MFBs operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case-by-case basis, but the parties acknowledge that this may in some cases require an entitled employee to transfer off station or from their current work location to another position.

44.1.1 If the MFB grants an employee's request for a change to his or her working arrangements under s.65 of the Act, the employee will be rostered taking into account the employee's preference, the existence of any relevant reasonable business grounds, service delivery requirements, safety and welfare of employees. If, for reasons of the employee's preference, the existence of any relevant reasonable business grounds, service delivery requirements, safety or welfare of employees, the employee cannot be rostered in accordance with the operational "10/14" roster, the employee may be rostered pursuant to clause 124. Where in accordance with this clause the MFB agrees to a request to work other than full-time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.

44.1.2 Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangements will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.

44.1.3

44.2. If a transfer is required, the employee shall suffer no detriment by virtue of working in a different position and shall be entitled to resume their station/location based on shift duties as soon as

operational requirements permit.

- 44.3. To ensure that operational requirements are maintained, the following will apply:
- 44.3.1. An employee ~~must provide appropriate evidence of their entitlement under the Act in the form of making a statutory declaration, copies of which request will be provided~~ provide to the UFU-MFB in writing the details of the change sought and MFB the reasons for the change.
- 44.3.2. An employee will be granted reasonable time off as they require if they are working in a non-station based position. An employee who is granted time off without pay in accordance with this clause will have their leave and other entitlements accrue on a pro-rata basis (that is, in accordance with the number of hours actually worked). Deductions from their ordinary total remuneration for any given cycle will be made proportional to the number of hours not worked out of a 42 hour week. However, continuity of service, the special administrative allowance and the streaming allowance will not be affected.
- 44.3.3. An employee who is absent from work without pay as set out in this clause will not be counted for the purposes of minimum staffing while absent. The MFB will be required to make arrangements in accordance with this agreement to ensure the requisite additional staff are rostered to ensure safe minimum staffing levels are met at all times.
- 44.4. An employee who works flexible working arrangements in accordance with this clause may be required to undertake such additional skills maintenance as the parties agree are necessary to ensure skills are maintained. Such skills maintenance shall be at times the employee is willing to work and shall be conducted during paid working hours. If an employee is performing skills maintenance pursuant to this clause, then that employee shall not count for the purposes of minimum staffing for the period that they

are performing such skills maintenance.

**85.16 Special Administrative Duties Allowance**

85.16.1 Employees rostered for Special Administrative Duties shall receive an allowance in accordance with schedule 4 Allowances whilst so rostered. Special Administrative Duties shall include all rostered duty in all MFB departments including but not limited to Training and Education, Fire safety and Administrative areas of Operations as well as the rosters for all day work personnel on OSG.

**124. SPECIAL ADMINISTRATIVE DUTIES ROSTER**

124.1. An employee rostered to Special Administrative Duties shall:

124.1.1. Be required to work an average of 42 hours per week, two of which shall be overtime work and paid for as such and the remaining two hours shall be taken as accrued leave;

124.1.2. Receive the same total weekly wage as employees on the 10/14 roster as well as the Special Administrative Duties allowance set out in clause 85.16; and

124.1.3. Shall otherwise be entitled to all the terms and conditions of this agreement.

124.2. Where an employee is required to undertake duties that are outside of the standard hours for the work location the following shall apply:

124.2.1. Where such activity involves normal activities a minimum break between periods of duty of ten hours shall apply.

124.2.2. Where such activity involves a major fire or major incident a minimum break between periods of duty of twelve hours shall apply.

124.3. Where the MFB agrees to a request in accordance with clause 9 or clause 44 of this Agreement which involves work other than full

time, that employee will not be required to work the average number of hours per week referred to in clause 124.1.1

On behalf of **Metropolitan Fire and Emergency Services Board**



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Signed by Dan Stephens  
Chief Officer/Chief Executive Officer  
14 February 2019