

[2023] FWC 1235 [Note: An appeal pursuant to s.604 (C2023/3422) was lodged against this decision - refer to Full Bench decision dated 30 November 2023 [[\[2023\] FWCFB 225](#)] for result of appeal.]



## DECISION

*Fair Work Act 2009*  
s.739—Dispute resolution

### United Firefighters' Union of Australia

v

### Fire Rescue Victoria

(C2023/635)

COMMISSIONER WILSON

MELBOURNE, 29 MAY 2023

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

[1] This decision concerns an application pertaining to the establishment of a firefighter registration board for the purposes of registering firefighters employed by Fire Rescue Victoria (FRV).

[2] The application was made by the United Firefighters' Union of Australia (UFU) and is made pursuant to s.739 of the *Fair Work Act 2009* (Cth) (the FW Act) allowing the resolution of disputes arising under an enterprise agreement. In this case the applicable enterprise agreement is the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (the 2020 Agreement).

[3] The subject of the dispute was also dealt with in *United Firefighters' Union v Fire Rescue Victoria*<sup>1</sup> (the Fettering Decision) issued by me on 2 December 2022. In that decision I found that the registration board as then proposed could not be the subject of an order by the Commission in the form then proposed as it fettered the powers and functions of FRV under applicable state legislation, being the *Fire Rescue Victoria Act 1958* (Vic) (the FRV Act).

[4] The Fettering Decision noted that the 2020 Agreement obliges FRV to endorse the establishment of a registration board and to do so by demonstrating this through a letter of endorsement to the UFU. Further, the UFU seeks implementation of the registration board arrangements through FRV entering into a Service Agreement (or Service Contract) with an entity formed by the UFU for the purposes of firefighter registration, the Victorian Professional Career Firefighters Registration Board Ltd (referred to as the Corporate Board).

[5] Since publication of the Fettering Decision there have been two developments of significance; on 23 December 2022 the UFU sought that I revoke the decision or parts of it pursuant to s.603 of the FW Act<sup>2</sup> (the Revocation Application) and on 8 February 2023 the

UFU commenced the application that is the subject of this decision (the 2023 Dispute Application).

[6] The Revocation Application and 2023 Dispute Application were the subject of Directions from me for the filing of relevant materials from all parties and a hearing on 30 March 2023 at which the UFU and FRV attended in order to elaborate on their written submissions and witness statements. As with the proceedings leading to the 2022 Fettering Decision, the Victorian Minister for Emergency Services sought and was granted leave by me to intervene in the hearing.

[7] Mr Herman Borenstein KC with Mr Ben Bromberg of Counsel appeared for the UFU in the hearing, instructed by Davies Lawyers. Mr Malcolm Harding SC with Mr Matthew Minucci of Counsel appeared for FRV, instructed by Hall and Wilcox. Mr Chris O’Grady KC with Ms Rebecca Davern of Counsel appeared for the Victorian Attorney General and Minister for Emergency Services, Ms Jacqueline Symes MP, instructed by Maddocks. Each party and the Minister sought and was granted permission by me to be represented by a lawyer with me being satisfied that to do so would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[8] At the start of the hearing on 30 March 2023 Mr Borenstein advised his client did not press the Revocation Application at this time and requested it be adjourned sine die which course of action was not opposed by the UFU and the Minister. This decision therefore concerns only the 2023 dispute application.

[9] The 2023 Dispute Application is characterised by the UFU as being about the following matters:

- “1. On 29 March 2021 the Applicant (UFU) filed a Form 10 application for an arbitration under the dispute resolution procedures in clause 1.3 above (the first matter). A copy of the Form 10 is attached in Attachment D. That application was given Matter Number C2022/2043.
2. The first matter related to the establishment of a Firefighters Registration Board (Registration Board) and the service agreement governing the delivery of the registration services by the Registration Board to Fire Rescue Victoria (FRV) (the service agreement).
3. Commissioner Wilson conducted an arbitration of the first matter and on 2 December 2022, he handed down his decision in [\[2022\] FWC 3170](#) (the Decision). At [102] of the Decision the Commissioner dismissed the application in the first matter.
4. The only basis stated by the Commissioner in the Decision for the dismissal of the application is in the findings made by the Commissioner at [73]-[79] of the Decision to the effect that the service agreement did not prevent the Registration Board from applying registration qualifications beyond those specified in the FRV IO Agreement 2020 and thereby create a fetter on FRV’s functions inconsistent with section 25B of the Fire Rescue Victoria Act 1958 (FRV Act).

5. At [80] of the Decision, the Commissioner noted that the service agreement could be drafted in such a way as not to fetter FRV's functions as above.

6. On 14 December 2022, the UFU wrote to Mr Starinkas (Acting Deputy Commissioner, Operational Training) in relation to the Decision. In that letter the UFU proposed an amendment to both Schedule 2, paragraph 5 and Schedule 4, paragraph 3 of the Supply Contract that could resolve the issue (Attachment E).

7. On 10 January 2023 representatives of UFU and FRV met to discuss the amendments proposed by UFU in Attachment E. At that meeting, UFU and FRV both confirmed that it was not intended that the Registration Board would be able to impose standards or qualifications higher than those prescribed in FRV IO Agreement 2020. FRV also indicated to UFU that it would not oppose the proposed amendments.

8. After the meeting on 10 January 2023, UFU sent a minute of the discussions at the meeting and asked for confirmation of the minute.

9. On 11 January 2023, Mr Starinkas replied: "I can confirm that the attached minutes and correspondence you have provided is an accurate reflection of yesterday's meeting." However, FRV did not confirm its agreement to the amendments."<sup>3</sup>

[10] The relief sought by the UFU from these proceedings is set out in its application form as follows:

"The following order is sought by the United Firefighters Union:

*Order that FRV enter into a contract with the Victorian Professional Firefighters Registration Board Limited ACN 659 177 992 and the UFU in the form and to the effect of the proposed service contract, subject to completion of the details in Schedules 1 and 3 (which is attached as Attachment A to these orders), for the provision by the company of the services of registering qualified firefighters for FRV and such other services as are provided for in the contract. (Copy **attached**)"*<sup>4</sup> (bold in original)

[11] The context to the UFU's proposed order and the wider 2023 Dispute Application is the union's submission that the things that led to my reasoning in the Fettering Decision not to grant the relief then sought, have since been remedied. It is argued that there should now be no anticipation of impermissible fettering of the FRV if the order now sought were to be granted.

[12] Relevant background that may be drawn from the Fettering Decision includes the following:

- The proposition of impermissible fettering stems from s.25B of the FRV Act with the Minister submitting the section prevents the FRV from entering into agreements that would fetter FRV's power to determine whether a person is suitable for employment or to promote an employee; and suspend or remove an employee.<sup>5</sup>

- Whereas FRV came freely to the 2020 Agreement, with it being presumed the agency was authorised for the agreement to be made and approved, the Corporate Board and Service Agreement sit outside that framework<sup>6</sup> with the governance and functions of each being set out in the Corporate Board’s Constitution and the Service Agreement:

“[69] The governance of the Corporate Board includes the board itself, comprising a Chair and other directors. According to the Corporate Board’s Constitution, decisions about qualifications of firefighters are a combination of initial prescription (being things set out in the Constitution) and determination by the Board, including for reason of the initial prescriptions being superseded. The Corporate Board’s Constitution provides about registration,

“17.1 Qualification for Registered Victorian Professional Career Firefighters

(a) In order to be registered with the VPCFRB, professional career firefighters must be:

(i) Hold the qualifications, skills and experience listed in this clause, appropriate for their qualification or deemed equivalent by the VPCFRB; and

(ii) Employed by Fire Rescue Victoria or another fire service as approved by the VPCFRB.

(b) The training and qualifications framework for professional career firefighter requires prerequisite pathways and minimum times at ranks to ensure experience is gained and skills are developed and consolidated, so that emergencies can be mitigated safely, and both public and firefighter safety ensured.” (underlining added)

[70] The Service Contract is in similar terms as well as making the following provision about registration standards, which extend to those who may be qualified for secondment to the CFA (noting that the reference in the passage below to the Operational Agreement is a reference to the 2020 Agreement or its replacement),

“REGISTRATION STANDARDS

3. The qualifications, competencies and operational experience, as specified by the Operational Agreement and the agreed training framework, are the standards required for registration as a professional career firefighter.

4. External professional career firefighters seeking to be an officer or employee of Fire Rescue Victoria, including for the purpose of being made available on secondment to CFA or other agencies by agreement of the Board, must first seek registration with the Registration Board.

They must have as a minimum, the qualifications, competencies and operational experience as specified by the Operational Agreement and the agreed training framework.”

[71] The Corporate Board’s Constitution specifies in Clause 17 that there will be six registration categories: Firefighter (which includes Firefighter 1 to Leading Firefighter), Officer (which includes Station Officer and Senior Station Officer), Commander, Assistant Chief Fire Officer, Fire Service Communication Controller, and “Other Classifications”. Each registration category specifies the criteria for registration, with me extracting only the “Firefighter” category for the purposes of illustration,

“FIREFIGHTER: Completion of PUA20613 Certificate II in Public Safety (Firefighting and Emergency Operations) and partial completion of PUA30613 Certificate III in Public Safety (Firefighting and Emergency Operations) or its equivalent superseded qualifications.

Note: On completion of recruit training recruits are promoted to the rank of Firefighter

1. Promotion to Firefighter 2 is gained after 12 months career professional service on shift and Firefighter 3 after 24 months career professional service on shift and the completion of continuation training at the level of Firefighter 2.”

[72] The Corporate Board’s Constitution states about the “Other Classifications” category,

“OTHER CLASSIFICATIONS: This category covers professional career firefighters for operational ranked classifications not listed in Categories 1 – 5 as agreed by the VPCFRB through consultation in accordance with the Fire Rescue Victoria and United Firefighters Union Operational Staff Agreement.”

[73] The Corporate Board’s Constitution Clause 18 (Registration Provision) appears to provide transitional registration arrangements for already employed firefighters, with a reference to “Professional career firefighters (previously with MFESB and CFA) employed by Fire Rescue Victoria”. However, the intent of the clause and its interaction with Clause 17 is not clear. If it is intended as a transitional registration provision it highlights the possibility that the provisions of Clause 17 may have the intention of developing greater than existing registration requirements.

[74] Consideration of these matters leads to the conclusion that the Minister may well be correct in the assertion that, as presently designed, the Service Contract, and behind it the Corporate Board, will be a fetter on the FRV’s powers

of determination about employment of “any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act”.”

- The Corporate Board would become the entity that registers firefighters and determines the qualifications they should hold, with no requirement to register all existing professional firefighters or recognise the qualifications of firefighters trained elsewhere than FRV.<sup>7</sup>
- The Corporate Board’s arrangements are such that it could move to do things differently to FRV’s requirements:

“[77] The Corporate Board may not immediately act in such way as to set the FRV in a direction contrary to s.25B of the FRV Act, or even inevitably do so. Rather, the proposition is that the Corporate Board could move to do such things with its constitution and the Service Contract as drafted and signed by the FRV not plainly preventing such things. Although Schedule 4 to the Service Contract refers to a condition of registration as holding “as a minimum, the qualifications, competencies and operational experience as specified by the [2020 Agreement] and the agreed training framework” it still potentially takes the determination of employment away from the FRV, and even away from the 2020 Agreement.

[78] Such eventualities would plainly be determinations or decisions by the Corporate Board and not controlled by the FRV, with it not having a majority of members of the Corporate Board. If they came about, it would be difficult to see how their occurrence was consistent with the FRV’s legislated entitlement/freedom to “employ any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act”.”

- In its conclusion on the matter of impermissible fettering, the Fettering Decision found:

“The finding that the Fettering Objection should be upheld is on the basis that the Service Contract as drafted has the potential to conflict with the FRV’s legislated function (see FRV Act s.25B (1)) since the Corporate Board may potentially set the qualifications of the firefighters it registers and thereby the firefighters the FRV may engage. However, that is not to say that the Service Contract is incapable of being drafted in such a way that the conflict is removed.”<sup>8</sup>

- Commitments given by FRV to the UFU in October 2021, which included that what was envisaged is “an independent board operating independently of both FRV and UFU”<sup>9</sup> are not in conflict with s.25B<sup>10</sup> even though those commitments place the registration board outside of FRV.<sup>11</sup>

[13] After the Fettering Decision was issued the UFU proposed certain amendments to the Service Agreement to FRV designed to overcome the fettering concerns (the Amendments). The Amendments proposed changes to Schedules 2 and 4 of the Service Agreement. Schedule 2 is entitled “Specification”, which term is defined by the agreement to mean “the relevant technical, functional, performance and other specifications specified in Schedule 2 that the Services are required to meet”. Schedule 4 is entitled “The Registration System” and deals with

the aims of firefighter registration, the registration standards, and categories of registration. The amendments proposed by the UFU are as follows (and underlined):

““Schedule 2

...

5. The Registration System will:

- a. have written terms, conditions, standards and/or rules, howsoever described;
- b. set clear and appropriate rank-specific standards for inclusion on the Register by reference to qualifications, competencies and operational experience, obtained through employment with a recognised professional career firefighting service and as specified by the Operational Agreement (and the Training Framework set out in the Operational Agreement);

i. For the avoidance of doubt, the standards for inclusion on the register will at all times be the same as those specified by Schedule 3 of Division A, and Schedule 5 of Division B of the Operational Agreement.”

“Schedule 4

3. The qualifications, competencies and operational experience, as specified by the Operational Agreement and the agreed training framework, are the standards required for registration as a professional career firefighter. For the avoidance of doubt the qualifications, competencies and operational experience required for registration shall at all times only be those specified in Schedule 3 of Division A, and Schedule 5 of Division B of the Operational Agreement.”

Note: the term ‘Operational Agreement’ is a reference to the 2020 Agreement.”<sup>12</sup>

**[14]** The Minister maintains the objection that the Corporate Board and Service Agreement, as amended, will impermissibly fetter FRV, advancing three submissions of substance that would lead to the Commission rejecting the relief sought by the UFU in the 2023 Dispute Application:<sup>13</sup>

- The dispute now before the Commission “is the same dispute as the Original Registration Board Dispute and it is therefore, an abuse of process for it to be determined again” (the Same Dispute Objection);
- “the amendments to the Service Agreement do not cure the improper fettering of FRV’s duties and powers pursuant to the FRV Act” (the 2023 Fettering Objection); and
- “even if the fettering issues were cured by the amendments to the Service Agreement the New Registration Board Dispute cannot be determined by ordering the entry into the Service Agreement” (The No Capacity for an Order Objection).

[15] The Minister’s 17 March 2023 correspondence to the Acting Fire Rescue Commissioner also objects to FRV “participating in the formation of a body corporate” without her consent to do so.

[16] FRV also objects to the UFU’s application, however on a narrower basis; namely that with reference to the Ministerial Direction given to FRV on 18 September 2022:

“18. The terms of the Ministerial Direction are clear: they relevantly prohibit the FRV from entering into the Proposed Services Agreement the subject of the Dispute Application. That is so, because the Proposed Services Agreement the subject of the Dispute Application is the same Services Agreement (albeit with some modification) that was the subject of the dispute arising in matter C2022/2043.

19. If the Commission made an order in the terms sought by the UFU in the Dispute Application, FRV would still be prohibited by operation of the Ministerial Direction from complying with the terms of the order. FRV could not “enter into a contract” with the Victorian Professional Firefighters Registration Board and the UFU.

20. Moreover, the Proposed Services Agreement has a number of clauses to be completed following negotiations between the UFU and the FRV: see for example Items 2, 6, 7, 8 and 9 of Schedule 1 and Schedule 3. The Ministerial Direction would prevent FRV from even negotiating on the terms of the Proposed Services Agreement, and any such negotiations would be futile.”<sup>14</sup>

[17] I deal with these matters at the same time as the Minister’s “No Capacity for an Order Objection”.

#### *The Same Dispute Objection*

[18] With respect to the Minister’s contention that the 2023 Dispute Application is the same dispute as previously dealt with, it was argued that a matter may be considered an abuse of process in the event the claim is clearly without merit, or it has no reasonable prospect of success; if it is for an improper purpose; or if it is for an improper motive. It is argued by the Minister that this dispute “has been lodged because the UFU has not obtained the outcome it wishes to achieve” with the application being an attempt to relitigate the original dispute.<sup>15</sup> In support of the latter submission, the Minister makes reference to the grounds relied upon by the UFU for its Revocation Application, being that the union was denied the opportunity to make amendments to the Service Agreement and would have done so given the chance. The Minister argues that it follows from reliance on that ground that “the proposed amendments of the Service Agreement ought to have been raised in [the 2022 Dispute Application], they are not the subject of a new dispute”.<sup>16</sup>

[19] The Minister further argues that the issue for arbitration in the 2022 Dispute Application was framed by the UFU in conjunction with FRV and that each agreed to be bound by the result of the arbitration, subject to any appeal. It was noted that courts generally do not allow re-litigation of the same matter, relying upon a form of estoppel in order to do so.

[20] FRV did not make submissions directly on this subject.



[21] In response to the Minister’s submissions the UFU argued there was no abuse of process and that it was not relitigating the earlier dispute. It submitted the 2022 Dispute Application was about the setting up of a registration board to register operational firefighters employed by FRV, with the Commission “asked to rule on whether the respondent should enter into a particular service agreement which had been negotiated between the UFU and the respondent and was largely agreed”<sup>17</sup> and that:

“The only basis stated by the Commissioner in the Decision for the dismissal of the application is in the findings made by him at [73] to [79] of the Decision to the effect that the Service Agreement did not prevent the firefighters registration board, to which he referred as the Corporate Board, from applying registration qualifications beyond those specified in the 2020 Agreement and thereby create a fetter on FRV’s functions inconsistent with s 25B of the FRV Act.”<sup>18</sup>

[22] The UFU also submitted that the Fettering Decision did not resolve the underlying dispute about the establishment of a registration board and that the 2023 Dispute Application is “about the refusal of the FRV to agree to the amended Service Agreement”.<sup>19</sup> It further submitted:

“Third, the Decision expressly contemplates a redrafting of the Service Agreement. This dispute cannot be said to be an abuse of process in circumstances where it arises from actions specifically countenanced by the Commission itself”.<sup>20</sup>

[23] I am not satisfied of the Minister’s Same Dispute contentions for the reason that the dispute presently before the Commission started with the refusal or failure of FRV to confirm it agreed to the Amendments. As dealt with before me the dispute may also be characterised as whether reformulated clauses in the Service Agreement impermissibly fetter FRV and if not, whether FRV should enter into the Service Agreement. I accept the UFU’s submission that the 2022 Dispute Application has important differences to the 2023 Dispute Application. In particular, I accept the characterisation of the earlier dispute as being about the potential for an order to be issued requiring FRV to enter into an agreement in a particular form and that the Fettering Decision envisaged the amendment of the Service Agreement to address the matters referred to in the decision. It was at all times foreseeable that agreement over an amended Service Agreement may not be reached. What is brought forward by the UFU may be regarded as an endeavour by the union to address the fettering problem that had been found, and to that extent the application may be allowed to proceed and be determined.

[24] To the extent there is a discretion associated with my decision to hear and determine the 2023 Dispute Application or not I consider it to be appropriate to proceed for the reason that the substantive part of the UFU’s claims that led to the 2022 Dispute Application, or at least those connected with its merits, were not resolved in the Fettering Decision. The merits were not heard as the view was held that they could not be heard. In this matter the UFU argues it has considered and dealt with the reasons which led to the 2022 Dispute Application’s merits not being resolved. It would, in the context of this dispute, be unsatisfactory for the Commission to take the view that the technical reasons that led to the end of the 2022 Dispute Application meant that the subject matter of the dispute could never be dealt with, even if the reasons that led to impermissible fettering had been resolved.

*The 2023 Fettering Objection*

[25] The Minister’s submissions in support of the 2023 Fettering Objection commence by noting that the Fettering Decision had found there was an impermissible fetter on FRV through the Corporate Board being able to determine whether a person is suitable for employment by FRV; when persons can be promoted; and when a person should be deregistered.<sup>21</sup> It was argued that those fetters remain, especially as a result of the discretions that are within the Corporate Board’s operations, as well as it being the case that the board operates outside of the 2020 Agreement’s framework, allowing for termination or variation for ambiguity:

“64. That impermissible fetter is not cured by the change to the proposed Service Contract to require the standards for registration by the Corporate Board to be aligned to the classifications in the FRV Interim Agreement. The FRV Interim Agreement does not, for example, grant a third party (such as the Corporate Board) the ability to determine whether a person is suitable for employment by FRV (by being suitable for registration) or whether a person should not remain in employment (because they have been deregistered by the Corporate Board). The Service Contract does so. Further, the inclusion of the terms in a contract between FRV and a third party that is not subject to termination or variation for ambiguity in the same manner as an enterprise agreement is of itself a further fetter of FRV’s powers.

65. In addition, as was made clear in cases like *Bostik (Australia) Pty Ltd v Georgevski (No 1)* (1992) 36 FCR 20 and *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 there is a fundamental difference between a statutory right or limitation contained in a federal statutory instrument and contractual rights. These differences go to the nature of the right or entitlement, forms of relief and the availability of remedies. The relationship between the Commonwealth and a State may mean that it is open for a State Agency to fetter itself by agreeing to terms in an enterprise agreement that govern the qualifications, competencies and operational experience of persons it can employ in particular positions. It does not follow that were it to do the same thing under the terms of a contract or arrangement with a corporate body such fettering would be lawful.”<sup>22</sup>

[26] The UFU submits about the Amendments that they address the dispositive reasons in the Fettering Decision and in particular “the Commission’s concern that the drafting of the service agreement and Corporate Board’s Constitution did not plainly prevent the Board from acting in a way which is inconsistent with the 2020 Agreement”.<sup>23</sup> With respect to the Minister’s arguments as referred to above, regarding decisions over who may be employed, promoted or deregistered etc, the UFU submitted:

“... the Decision finds that the existence of the Registration Board is not of itself a ‘fetter’ on the employment powers of FRV, as long as it acts within the bounds of the commitments the FRV has already agreed to in the 2020 Agreement. Instead, the dispositive reasoning of the Commission is that the fetter arises in a confined context by reason of the fact that, in the Commission’s view, the drafting of the Proposed Service Agreement and Registration Board’s Constitution does not plainly prevent the Board from acting in a way which is inconsistent with the commitments in the 2020 Agreement ...”<sup>24</sup>

[27] The union also submitted that the Minister’s contention that the Amendments would not cure the fettering problem through requiring the standards for registration by the Corporate Board to be aligned to the classifications in the 2020 Agreement, including for the reason that the enterprise agreement does not contemplate employment decisions being made by a third party were incorrectly based. In this respect the UFU argued that the Minister’s submissions did not take account of limitations on FRV caused by the 2020 Agreement. It argued the Minister’s submissions:

“... are based on a mischaracterisation of the effect of the 2020 Agreement and the proposed Service Agreement on the employment of firefighters by FRV. The 2020 Agreement constrains or limits the FRV in this regard by prescribing qualifications for prospective employees. No issue is nor could be raised about this by the Minister. The effect of the Service Agreement is the engagement by FRV of an expert body to assist it with the assessment of whether prospective employee firefighters meet the qualifying standards prescribed by the 2020 Agreement. So (correctly) understood, the Service Agreement facilitates the application of the provisions of the 2020 Agreement and is beyond the objections in the Minister’s Submissions. The engagement of a third party in this way is not objectionable any more than if FRV engaged a third party to provide payroll services in meeting its obligations under the 2020 Agreement”.<sup>25</sup>

[28] FRV did not make submissions directly on this subject.

[29] The identified fetters may be summarised as FRV’s capacity to determine whether a person is suitable for employment by FRV; when persons can be promoted; and when a person should be deregistered. Suitability for employment connotes a time when employment might be considered but has not commenced. Promotion and deregistration plainly relate to events that may take place after employment has commenced and likely has been operating for some time.

[30] The Minister made submissions in the 2022 Dispute Application proceedings about provisions of the FRV Act dealing with a statutory Firefighters Registration Board with there being concerns about duplication and confusion.

[31] Both in the current proceedings as well as in the proceedings for the 2022 Dispute Application the Minister submitted the FRV Act empowered the giving of directions to FRV and its Commissioner, with the following taken from submissions made in the earlier proceedings:

“12. The stated purposes of the FRV Act are contained in s 2 as being (a) to provide for fire safety, fire suppression and fire prevention services and emergency response services in the Fire Rescue Victoria fire district; and (b) to establish FRV.

13. The functions of FRV are set out in s 7 of the FRV Act and include relevantly, “*to implement the fire and emergency services priorities of the Government of Victoria*”.

14. Section 8 of the FRV Act concerns the “[a]ccountability of [FRV] and the Fire Rescue Commissioner”. It identifies the circumstances in which the Minister is able to direct and control FRV and the Fire Rescue Commissioner. It relevantly provides:

(1) Fire Rescue Victoria and the Fire Rescue Commissioner are subject to the general direction and control of the Minister in the performance of the duties and functions and the exercise of powers of Fire Rescue Victoria and the Fire Rescue Commissioner, including, but not limited to, the policies and priorities to be pursued by Fire Rescue Victoria and the Fire Rescue Commissioner.

15. Section 25B of the FRV Act confers power on FRV in relation to employees. Section 25B(1) and (2) provide:

(1) Fire Rescue Victoria may from time to time—  
(a) employ any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act; and  
(b) transfer, promote, suspend or remove any employee.

(2) Every appointment or promotion of a member of the operational staff is to be on 3 months’ probation.”<sup>26</sup> (italics in original)

[32] In these proceedings the Minister noted that the Fettering Decision had not yet determined whether the Minister’s Direction prevented FRV from entering into the Service Agreement. The Directions were an impediment to the making of orders, along with the need for Ministerial Consent in order to enter into the Service Agreement and the governance matters referred to.<sup>27</sup>

[33] The UFU contested whether s.8 of the FRV Act enabled directions to be given as widely as contemplated by the Minister submitting that the construction advanced by the Minister was erroneous and inconsistent with principles of statutory construction:

“(a) First, their submissions about s 8 of the FRV Act are flawed because they ignore the basic tenet of statutory construction, namely, that provisions must be construed in context and consistently with the other provisions of the relevant legislation. As was said by McHugh, Gummow, Kirby and Hayne JJ in the leading case of *Project Blue Sky v ABA*<sup>28</sup>:

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

and

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

The Minister’s attention and emphasis on s 8 in isolation is erroneous.”<sup>29</sup>

**[34]** Further, it was submitted by the UFU that instead of generally permitting directions to be given about any of FRV’s day-to-day operations s.8 of the FRV Act had confined application:

“(b) For present purposes, s 8 must be construed having regard, in particular, to s 25A of the FRV Act. When that is done, the proper meaning of s 8 is that it is a general provision authorising the Minister to give FRV directions about matters of general policy and priorities. It does not empower the Minister to give directions as to how the FRV ought to conduct its day-to-day operations. That is plain enough on the words of s 8 of the FRV Act. However, that construction is supported by s 25A of the FRV Act, which requires ministerial consent for certain day to day operations.

(c) For the reasons referred to in paragraphs 24 and 25 above, the UFU contends that the FRV does not need ministerial consent to enter into the amended Service Agreement. And it would be an odd construction, and in our submission an erroneous one, if having not needed consent to enter into the amended Service Agreement under s 25A, the Minister could now exercise its general power under s 8 to effectively prohibit the same action. Such an outcome would render s 25A otiose and that is a result which is to avoided.”<sup>30</sup>

**[35]** The FRV submitted that s.8(2) expressly permitted the Minister to give directions, subject to a number of carve-outs, none of which apply in this instance and that once given “there is no discretion or ability for the FRV or the FRV Commissioner to depart from, or otherwise choose to disregard, such a direction”. FRV does not see s.8 as having a confined operation as submitted by the UFU since “[t]he general powers conferred on FRV by s 25A(1) of the FRV Act are conferred “Subject to this Act.” The generality of that conferral for the purposes of s 25A(2) is to be read in this way.”<sup>31</sup>

**[36]** The Amendments proposed by the UFU are set out above and consist of two contractual clarifications within the Service Agreement. The first is within Schedule 2 dealing with the contract’s specification of services to be delivered and has the effect of providing that while the Registration System therein established will “set clear and appropriate rank-specific standards for inclusion on the Register” etc, the inclusion standards will be the same as those specified in the 2020 Agreement. The second is within Schedule 4 prescribing the aims of firefighter registration, the registration standards and categories of registration and seeks to clarify that the matters set out within the schedule are aligned with the 2020 Agreement.

**[37]** Section 25B of the FRV Act provides that FRV may “employ any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act” and similarly FRV may “transfer, promote, suspend or remove any employee”. Two matters of relevance stem from the provision: the use of the word “any” leads to the construction that there is no restriction on those decisions, and the provisions of the section when construed within the context of the statute as a whole means the decision maker is FRV.

**[38]** The word “any” is capable of having several meanings, with the Macquarie Dictionary defining the word variously:

“adjective 1. one, a, an, or (with plural noun) some, whatever or whichever it may be: if you have any witnesses, produce them.

2. in whatever quantity or number, great or small: have you any butter?; have you any blank disks?

3. every: any schoolchild would know that.

4. (with a negative) none at all.

5. a great or unlimited (amount): any number of things.” (underlining added)

[39] There are other definitions provided, which are neither relevant for present purposes or inconsistent with the above.

[40] The context of s.25B is plainly to grant permission to FRV to gather any resources without limitation but perhaps balanced with potentially competing requirements elsewhere in the FRV Act, to enable the performance of its functions and in the exercise of its powers. The wider context of the FRV Act is to support the view that the phrase “Fire Rescue Victoria may from time to time ...” together with the phrasing “employ any person it considers necessary ...” is to be construed as meaning that the relevant action is one to be taken by FRV. The section plainly provides that the discretionary decision about employment rests with FRV and that FRV is the entity that forms the view a person is considered necessary for employment. A contractual external block on engaging a particular person that FRV considered necessary to assist it in carrying out its functions and exercising its powers would likely not conform with FRV’s discretion to employ any person it considered necessary.

[41] The Revocation Application identifies and objects to findings made by me in relation to aspects of the Fettering Decision. Because those objections have been made and the Revocation Application is only adjourned and not withdrawn, I do not determine at this time whether the Amendments remove the concerns identified by me of impermissible fettering. The Revocation Application provides responses to the identified concerns, however having not heard the UFU or FRV or the Minister on the subject it would not be appropriate through this decision to either confirm the concerns or accept they have been addressed by the Amendments. Critically, examination needs to be given to whether the Amendments are sufficient to overcome the concerns of impermissible fettering.

#### *The No Capacity for an Order Objection*

[42] The Minister puts forward several matters that would prevent orders being made in the form sought by the UFU:

- Consent must be given by the Minister pursuant to s.25A of the FRV Act before FRV could enter into the Service Agreement;<sup>32</sup>

- A Direction was given to FRV on 19 September 2022 directing FRV not to enter into the Service Agreement to create the Corporate Board. Further, the Minister reiterated her concerns and expectations to FRV in a letter dated 17 March 2023.<sup>33</sup>
- Various governance concerns remain in the Service Agreement which are yet to be addressed.<sup>34</sup>

[43] The Minister also argued that Full Bench authority prohibited the Commission from making orders in respect of a third party that was not a party to the 2020 Agreement.<sup>35</sup>

#### Ministerial consent

[44] The matter of the requirement of Ministerial consent under s.25A of the Act for the FRV to enter into the Service Agreement was considered but not determined by me in the Fettering Decision, as it was not necessary to do so given my findings about an impermissible fetter.<sup>36</sup>

[45] The UFU argues that Ministerial consent is not required in order to enter into the Service Agreement. It argues that in relying upon s.25A of the FRV Act the Minister misconstrues the Service Agreement, which is not to be sensibly characterised as an agreement for the provision of services.<sup>37</sup>

[46] The basis of the Minister’s contention regarding consent stems from s.25A of the FRV Act, which requires in the performance of certain of its duties and functions that consent be first given by the Minister. The relevant extract of the section is this:

“(3) Fire Rescue Victoria must obtain the written consent of the Minister before—

(a) entering into any agreement or arrangement with any person or body for the provision of goods or services by Fire Rescue Victoria; or

(b) forming, participating in the formation of, or becoming a member of a body corporate, association, partnership, trust or other body; or

(c) entering into any joint venture agreement, shareholders agreement or unitholders agreement.

(4) Subsection (3)(a) does not apply to an agreement or arrangement for the provision of goods or services by Fire Rescue Victoria—

(a) to a unit or group of units or to a person acting on behalf of a unit or group of units; or

(b) where the provision of those goods or services falls within the general duties and functions of Fire Rescue Victoria.” (underlining added)

[47] The section plainly requires Ministerial consent in order for FRV to provide services *to* another party.

[48] The contention in this matter is that the requirement placed by the Service Agreement on FRV to provide lists of several types to the Corporate Board are covered by the phrase “provision of goods or services by Fire Rescue Victoria”. The UFU resists that contention submitting that the provision of lists to the Board for the purposes of the performance of its work is not a provision by FRV of goods or services to another.

[49] Neither the words “goods”, “services” or the phrase “goods or services” are defined by the FRV Act.

[50] The word “goods” is defined by the Macquarie Dictionary to include “possessions, especially movable effects or personal belongings” and “articles of trade; wares; merchandise, especially that which is transported by land”. These definitions infer something real and tangible, potentially both those with a commercial value or with the intention of trade, as well as being a reference to personal, non-tradeable things.

[51] Likewise, the dictionary definition of “services” includes “an act of helpful activity”, “the supplying or supplier of any articles, commodities, activities, etc., required or demanded” or “the providing of, or a provider of, a public need, such as communications, transport, etc”. Again, the definitions allow the view that services may be commercial or non-commercial.

[52] Against these definitions though are the ways in which the FRV Act uses the phrase “goods or services”, or a related one, “goods or valuables”. There is no occasion in which the word “goods” is used without the adjunct of “services” or “valuables”. The word “services” is used many times in the Act, mainly associated with FRV’s title, or with reference to “emergency services”.

[53] Section 25A(1) gives FRV a power to do all things necessary to perform its duties and functions. Section 25A(2) makes plain that in order to do those things FRV can enter into commercial arrangements with others: it may enter into agreements or arrangements for the provision of services by the other party and it may provide goods or services to a party; and FRV may commercialise its intellectual property. It may participate in the formation of other legal entities, and it may appoint others as its agent.

[54] Section 25A(3) is the section dealing with Ministerial consent and contains three subsections; (a) which provides that written consent must be obtained before “entering into any agreement or arrangement” for the provision of goods or services by FRV, but not when the goods or services are provided to a fire or emergency services “unit” established under the Act; (s.25A(3)); (b) which requires consent before involvement in the formation, etc of another entity; and (c) requiring consent before “entering into any joint venture agreement, shareholders agreement or unitholders agreement”.

[55] Section 21 uses the term “goods or services” in connection with potential conflicts of interest about “the supply of goods or services” to a person. Section 58 uses the term “goods or valuables”, however in an entirely different context, being an exclusion from the power of FRV to order the removal of a person from burning premises.

[56] Consideration of these matters leads to the conclusion that use of the phrase “goods or services” in the FRV Act is with respect to things with a commercial value: those supplied to



FRV; those provided to others by FRV; FRV's exploitation of intellectual property; and the FRV's participation in the establishment of commercial entities. None of those uses would appear to be references to the provision of information to FRV's suppliers for the purposes of undertaking work for FRV.

[57] The provision of information by FRV to a contracted provider solely for the purposes of undertaking the contracted works is not reasonably to be construed as "entering into any agreement or arrangement with any person or body for the provision of goods or services by Fire Rescue Victoria". The Minister's consent under s.25A(3) of the FRV Act is therefore not required in order to enter into the Service Agreement.

### Ministerial Direction

[58] The Minister refers in her submissions to the direction given to FRV on 19 September 2022 and correspondence on the subject of the Corporate Board on 17 March 2023 being:

"...a direction to FRV and the Acting Fire Rescue Commissioner that it not enter into the proposed agreement with the Victorian Professional Career Firefighters Registration Board Limited for the provision of firefighter registration and related services to FRV. That direction remains in force. The concerns held by the Minister remain unaddressed. FRV is of the view that it precludes it from entering into the Service Contract which is the subject of the New Registration Board Dispute. The Minister has written to FRV seeking to be informed if FRV's position in relation to the effectiveness of the direction and its ability to enter into the Service Contract changes".<sup>38</sup>

[59] FRV submitted that it must follow the Ministerial Direction leaving it with no capacity to advance toward execution of the Service Agreement with it being prohibited from entering into the agreement even were the Commission to order such to be done. It submitted that an order of the Commission would not settle the dispute presently before the Commission. The FRV's submissions on these matters included the following:<sup>39</sup>

"14. Once a direction is given by the Minister pursuant to s 8, there is no discretion or ability for the FRV or the FRV Commissioner to depart from, or otherwise choose to disregard, such a direction. The general powers conferred on FRV by s 25A(1) of the FRV Act are conferred "Subject to this Act." The generality of that conferral for the purposes of s 25A(2) is to be read in this way."

...

"18. The terms of the Ministerial Direction are clear: they relevantly prohibit the FRV from entering into the Proposed Services Agreement the subject of the Dispute Application. That is so, because the Proposed Services Agreement the subject of the Dispute Application is the same Services Agreement (albeit with some modification) that was the subject of the dispute arising in matter C2022/2043.

19. If the Commission made an order in the terms sought by the UFU in the Dispute Application, FRV would still be prohibited by operation of the Ministerial Direction

from complying with the terms of the order. FRV could not “enter into a contract” with the Victorian Professional Firefighters Registration Board and the UFU.

20. Moreover, the Proposed Services Agreement has a number of clauses to be completed following negotiations between the UFU and the FRV: see for example Items 2, 6, 7, 8 and 9 of Schedule 1 and Schedule 3. The Ministerial Direction would prevent FRV from even negotiating on the terms of the Proposed Services Agreement, and any such negotiations would be futile.

21. For these reasons, an order in the terms sought by the UFU would not settle the dispute raised by the Dispute Application.”

**[60]** The UFU rejects the arguments of the Minister and FRV submitting:

- The Ministerial Direction is invalid after considering the proper construction of the statute:

“(b) For present purposes, s 8 must be construed having regard, in particular, to s 25A of the FRV Act. When that is done, the proper meaning of s 8 is that it is a general provision authorising the Minister to give FRV directions about matters of general policy and priorities. It does not empower the Minister to give directions as to how the FRV ought to conduct its day-to-day operations. That is plain enough on the words of s 8 of the FRV Act. However, that construction is supported by s 25A of the FRV Act, which requires ministerial consent for certain day to day operations.”<sup>40</sup>

- A requirement for ministerial consent to enter into the Service Agreement “would be an odd construction, and in our submission an erroneous one, if having not needed consent to enter into the amended Service Agreement under s 25A, the Minister could now exercise its general power under s 8 to effectively prohibit the same action. Such an outcome would render s 25A otiose and that is a result which is to avoided.”<sup>41</sup>
- “The other parties’ construction about s 8 also runs foul of two accepted maxims of statutory construction. First, that general provisions do not prevail over specific provisions in the case of inconsistency. Second, that it is not permissible to do indirectly what is prohibited to be done directly.”<sup>42</sup> (footnotes omitted)

**[61]** Notwithstanding its submission that the Ministerial Direction is invalid, the UFU also argues the Commission need not concern itself with that subject:

“The Ministerial Direction does not preclude the Commission from granting the relief sought by the UFU in this arbitration. The question of whether or not (a) a valid Ministerial direction has been given and (b) what effect that has in relation to an order made by the Commission, are matters beyond the scope of the arbitration and shouldn't be attempted to be introduced through the side door by asserting that it is a matter relevant to the Commission’s discretion in resolving the arbitration. The Commission should hear and determine the arbitration of the dispute that has been referred to it and

make whatever order it considers appropriate in relation to the dispute between the UFU and FRV. The Minister’s Direction is a matter that arises after the Commission’s order is made. To the extent that issues of constitutional and administrative law may arise in relation to it, they should be left to an appropriate judicial forum empowered to deal with them.”<sup>43</sup>

**[62]** I accept what the Minister has to say on this subject for the reason that the direction has been given by an arms-length third party, not being one covered by the 2020 Agreement. On its face the Ministerial Direction has been given and FRV is compelled to comply with it. I am not satisfied there is a proper basis for the Commission to find the direction is invalid. As a result, consideration of the effect of the Ministerial Direction takes me nowhere, with me accepting that the direction has been made and that FRV is compelled to follow it unless and until it is either withdrawn or declared invalid. The UFU though is correct to argue that the status of the direction is a matter arising after any order of the Commission is made. However for different reasons, set out below, I am not satisfied an order should be issued in this case.

### Governance

**[63]** The Minister also submitted that “various governance issues” raised in the 2022 Dispute Application had not yet been addressed and that Full Bench authority prohibited the Commission from making orders in respect of a third party that was not a party to the 2020 Agreement.<sup>44</sup>

**[64]** The subject of the Minister’s concerns about the Corporate Board’s governance was set out in the Fettering Decision as follows:

“(a) Deficiencies remain in the transparency and oversight of the Corporate Board’s functions under the Proposed Services Agreement that would not advance the purpose or functions of the FRV Act or the government’s fire and emergency services priorities. The Proposed Services Agreement does not make provision for regulatory oversight adopted by registration bodies subject to Victorian legislation and therefore would not meet public expectations.

(b) The Corporate Board will not be a public entity and therefore would not be subject to accepted public sector requirements such as complying with the Freedom of Information Act 1982 (Vic) and administrative law principles such as procedural fairness and judicial review. There would be limited ability for government to oversee the administration of the Corporate Board’s performance of its obligations under the Services Agreement, notwithstanding that it will regulate public sector employees. The lack of regulatory oversight and transparency in the governance and scope of the activities to be undertaken by the Corporate Board pursuant to the Proposed Services Agreement raise significant public interest risks.

(c) Any obligation on the Corporate Board to comply with public law principles, such as information privacy principles, would only arise due to contractual provisions in the Proposed Services Agreement which could be amended.

(d) The Proposed Services Agreement could impermissibly fetter FRV's employment powers contained in section 25B of the Act. Even if the fettering were lawful, it would be inappropriate for a body that sits outside the public sector to maintain a Register of FRV employees in circumstances where the Register might be used to limit the manner in which FRV exercises its power of employment.

(e) The potential for duplication between the functions to be performed under the Proposed Services Agreement and those to be performed by the Board established by section 149 of the FRV Act (Statutory Board) may create confusion and undermine the legislative objectives of the Statutory Board.

(f) The costs associated with the operation of the Corporate Board under the Proposed Services Agreement will be borne by the Victorian Government. The Proposed Services Agreement fails to meet public expectations in ensuring transparency in meeting financial reporting obligations designed to prevent fraud and corruption and ensure accountability and transparency in the administration of public funds.<sup>45</sup>

**[65]** I am not aware of whether the Minister maintains her objection on each of the above matters or whether one or more are withdrawn.

**[66]** The Fettering Decision made the following conclusions about governance matters:

“[91] The governance grounds relied upon by the Minister, and set out above, are no doubt real. However, there is insufficient material before me to lead to a finding that for those reasons alone the relief sought by the UFU could not be granted. If they are matters about which she is concerned, and the FRV is in turn concerned, they should be capable of resolution. The fact that the design of the Corporate Board to date has not sufficiently addressed the matters about which the Minister expresses concern does not mean that the board's design cannot be moved to address the concerns. It must be said though that the public sector regularly enters into service contracts and the governance matters she raises are not novel, likely even within FRV let alone the wider Victorian public sector, and it would be straining credulity for it to be suggested that the Minister's identified concerns have not already been addressed in other template contractual arrangements, or cannot be so.

[92] The ground dealing with duplication of function between the Corporate Board and the Statutory Board would have some merit were it not for the fact that the Statutory Board has the extremely limited functions of registering “officers and employees of Fire Rescue Victoria proposed to be made available to the Country Fire Authority under a secondment agreement” and “other persons who wish to be employed by Fire Rescue Victoria in order to be made available to the Country Fire Authority under a secondment agreement”. There is no evidence before me as to the actual duplication about which the Minister is concerned, and so I do not find the asserted duplication to be credible.”

**[67]** I adopt these as my findings in relation to the governance issues now pressed by the Minister. To the extent the matters are real, they are likely capable of resolution with further alterations to the Service Agreement. The complaint raised in the 2022 Dispute Application

proceedings regarding the duplication of the Corporate Board with the Statutory Board has insufficient basis within the evidence and submissions to be adopted.

#### Whether order binds a third party

[68] The Minister’s submission that the Commission is prohibited from making orders in respect of a third party that is not a party to the 2020 Agreement is consistent with a submission made in the 2022 Dispute Application that the Commission is barred from making an order that “in any way shape or form, binds the corporate entity”.<sup>46</sup> That submission stems from the reasoning of the Full Bench in *Metropolitan Fire and Emergency Services Board v United Firefighters’ Union of Australia (Victorian Branch)*<sup>47</sup> (MFESB v UFU). The matter before the Full Bench was an appeal against a decision in which orders had been made with respect to the provision of income protection insurance. Having found that the proposed scheme required a premium at a particular rate the UFU Counsel conceded to the Full Bench on appeal that if the insurer moved the premium above that rate “the order ceases to have effect and there will no longer be an income protection scheme” available to the affected firefighters who would lose their insurance cover.<sup>48</sup> The Full Bench then found it was the case that “the insurer being a third party, not a party to the Agreement, and therefore not amenable to the jurisdiction of Fair Work Australia. No order can bind the insurer”.<sup>49</sup>

[69] In response the UFU notes that the order now sought “is to be understood and evaluated by reference to the context and history out of which it arose” being “that there was not, before the Minister’s intervention, any resistance by FRV to sign a Services Agreement with the Corporate Board and the only matters in dispute were as to the terms of that Agreement”.<sup>50</sup> Further:

“The orders sought then, and now, involved identifying the document which comprised the Services Agreement and directing FRV to sign it. Such an order is consistent with FRV’s obligation under Division A Clause 42 and Division B Clause 49 of the 2020 Agreement. No order was ever sought against the Body Corporate. The Minister’s reliance on *MFESB v UFU* is unhelpful because the circumstances of that case are distinguishable”.<sup>51</sup>

[70] Application of the *MFESB v UFU* reasoning to this matter and its context would lead to the conclusion that an order is not able to be made by the Commission requiring the Corporate Board to register or refuse to register a particular person. Similarly it would appear beyond power for an order to be made on the Corporate Board that it should prescribe particular competencies for promotion but not prescribe others. However, for the reasons articulated by the UFU, I am unpersuaded that the Full Bench reasoning would prevent an order being issued of the type sought by the UFU. The proposed order, set out above, seeks only that FRV enter into a contract and does not purport to bind any entity other than FRV. That order, conceptually at least, is capable of being granted by the Commission without infringing the reasoning in *MFESB v UFU*. It is uncontroversial that arbitral determinations may potentially impose new obligations on the parties which are not inconsistent with the terms of the enterprise agreement.<sup>52</sup> The text of the proposed order does no more.

#### Participation in formation of the Corporate Board

[71] The Minister did not in these proceedings specifically address an assertion made in her 17 March 2023 correspondence to the Acting Fire Rescue Commissioner, Mr Gavin Freeman, regarding FRV’s participation in formation of a corporate entity in which she said:

**“Ministerial consent required**

As you are aware, I am supportive of the establishment of an appropriate scheme for firefighter registration in Victoria. However, as already outlined in my previous correspondence to then Acting Fire Rescue Commissioner Braid on 17 August 2022, and my letter to you dated 19 September 2022, I consider that Ministerial consent is required under section 25A(3) of the FRV Act for FRV to participate in the formation of the proposed board, and for FRV to enter into the Services Agreement. Consistent with this position, I would like to make clear my view that Ministerial consent is also required for FRV to enter into the Amended Services Agreement. This is on the basis that:

- FRV’s proposed entry into the Amended Services Agreement is inextricably connected with the series of steps taken by FRV and the UFU since February 2021 to facilitate the establishment of the Corporate Board. By taking these steps, FRV is participating in the formation of a body corporate for the purposes of s 25A(3)(b) of the Act. Ministerial consent was therefore required before FRV took these steps, but I have not previously consented to the taking of those steps; and
- further and separately, the requirement for FRV to routinely provide information to the Corporate Board, including details of FRV recruits and other FRV firefighters, such as those who have completed a promotional course, constitutes the provision of a service by FRV for the purposes of s 25A(3)(a).<sup>53</sup> (underlining added)

[72] As the subject has not been developed before me in these proceedings, I do not address the matter further in these reasons for decision.

[73] In conclusion on the matter of the No Capacity for an Order Objection, I am satisfied the Minister’s consent is not required under s.25A(3) of the FRV Act for FRV to enter into the Service Agreement; that the effect of the Ministerial Direction is to prevent FRV from finalising the Service Agreement while the direction remains; that the Minister’s governance concerns may require addressing by the parties before a Service Agreement may be finalised; and that the UFU’s proposed order does not contemplate the Commission making an order in relation to a third party.

**CONCLUSION**

[74] I am not satisfied from the material before me that it would be appropriate to grant the relief sought by the UFU for two reasons.

[75] First, I accept the FRV’s submission that further work is required to be done by the UFU and FRV in order to bring the Service Agreement from its current place of an unfinalised draft

to one capable of being signed.<sup>54</sup> Even if it were said that this work is minor or inconsequential, the fact is that it would require someone in FRV to turn their mind to several topics and disclose a final position and likely negotiate that with the UFU. Given the matters referred to in the Minister's 17 March 2023 correspondence such steps would require FRV to notify her as a matter of urgency, possibly inviting refusal, further legal direction or other action, as well as no doubt a reminder of her direction given on 19 September 2022.

[76] Second and relatedly, if an order were to be issued by the Commission to sign the Service Agreement such would most likely place FRV officer(s) involved in an impossible situation. Do they risk the consequences of not complying with an order of the Fair Work Commission? Or do they risk the consequence of not complying with a Ministerial Direction? I cannot see a pathway in which both requirements might be simultaneously complied with.

[77] While there is an element of discretion vested in the Commission in relation to the disposition of this matter, it is not a discretion at large and regard must be had to the object of the dispute resolution power. The Full Bench in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board; Country Fire Authority*<sup>55</sup> accepted that the capacity of the Commission to arbitrate under s.739 of the Act depends upon the express conferral of that power by the terms of the applicable enterprise agreement, and holding the following about the Commission's exercise of its powers:

“[59] The dispute resolution terms in the MFB and ACFO Agreements provide that if “the matter is not settled the following progression through the disputes procedure it may be referred by the union or the employer to the FWA. FWA may utilise all its powers in conciliation and arbitration to settle the dispute”. It appears to us that this procedure is both permissive and discretionary. It is permissive because it is a conferral of power. It is discretionary because it leaves it to the Commission to determine which of its powers it will exercise to settle the dispute, and how. But in the end it is not a discretion which is exercisable at large because the discretionary choice that is to be made is to be directed at the object of the power, namely “to settle the dispute”. It may be, for example, that a Commission Member dealing with a dispute forms the view that the continued exercise of conciliation power is a better vehicle through which to settle the dispute than arbitrating the dispute. But we do not think it open under the dispute resolution terms for the Commission to refuse to arbitrate a dispute with the consequence that the dispute has no means of resolution. As long as it is within the scope of the matters which can be progressed under the term, what is required is that the Commission do what is necessary, using the powers conferred by the term, “to settle the dispute”.”<sup>56</sup> (underlining added)

[78] As noted in the Fettering Decision:

“The 2020 Agreement's dispute resolution procedures are within the Agreement's Division A (applicable to former MFB employees) at clause 21, page 39, and Division B (applicable to former CFA employees) at clause 26, page 413. The provisions are wide and allow disputes to be raised and progressed about a broad range of matters. The Division A term provides the following (with the Division B term in substantively identical terms):

“21. DISPUTE RESOLUTION

21.1. This dispute resolution process applies to:

21.1.1. all matters arising under this Division; and

21.1.2. all matters relating to the application of, or for which express provision is made in this Division; and

21.1.3. all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this Division; and

21.1.4. all matters pertaining to the relationship between FRV and UFU, whether or not express provision for any such matter is made in this Division; and

21.1.5. all matters arising under the National Employment Standards.

The parties agree that disputes about any such matters may be dealt with by using the provisions in this clause.”

A stepped escalation process is set out within each clause for unresolved matters, with the final step stated in the following way (from Division A);

“21.2.6. Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWC. The FWC may utilise all its powers in conciliation and arbitration to settle the dispute.”<sup>57</sup>

[79] Relevantly, the Commission is charged to utilise all its powers in conciliation and arbitration to settle the dispute.

[80] It is also necessary to note the limits on the arbitral role of the Commission, well summarised by the Full Bench in *Kentz (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*<sup>58</sup> (*Kentz*). With reference to the judgement of the Full Federal Court in *Construction, Forestry, Mining & Energy Union v Wagstaff Piling Pty Ltd and Others*,<sup>59</sup> the Full Bench stated:

“[52] Buchanan and Katzmann JJ found that the participation of the Commission in dispute settlement procedures was an arrangement which was, generally speaking, constitutionally effective, citing passages from *CFMEU v AIRC*.<sup>60</sup> In the context of the distinction between private arbitration and the exercise of judicial powers drawn in *CFMEU v AIRC*, Buchanan and Katzmann JJ observed that:

- “even an arbitrated dispute resolution procedure could not validly purport to confer judicial power” ;<sup>61</sup>
- although the Commission “cannot exercise the judicial power of the Commonwealth, it is well established that a federal



industrial tribunal, exercising powers of conciliation and arbitration, may legitimately form and act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers” .<sup>62</sup> Simply expressing an opinion about the legal operation and effect of an agreement does not necessarily involve the exercise of the conferred power;<sup>63</sup> and

- a Member of the Commission can, by not observing the fundamental distinction between private arbitration and the exercise of judicial power, stray into the exercise of judicial power by expressing an opinion about a legal matter, but not for the purpose of taking some further step within the Commission’ s own power. Indeed Buchanan and Katzmann JJ found, in the circumstances of the matter before them, that a Commissioner in reviewing a Victorian Disputes Board decision did so.” <sup>64</sup>

**[81]** The dispute before the Commission is described in lengthy terms in the UFU’s application form, set out above. The UFU asserts FRV has failed to confirm minutes from a meeting regarding proposed amendments to arrangements for the registration board and seeks the relief, also set out in the application form, being an order that would require FRV to enter into the Service Agreement.

**[82]** The dispute arises from clauses 42 and 49 of the 2020 Agreement which provide merely that “FRV endorses the establishment of a firefighters registration board. FRV will demonstrate this by letter of endorsement to the UFU Secretary”. The Minister observed in the proceedings leading to the Fettering Decision that the obligation created by the two clauses had been discharged when FRV wrote to the UFU on 23 April 2021.<sup>65</sup> The union though submitted that to interpret the clause as pertaining only to the sending of the letter would be an interpretation “divorced from any industrial reality.”<sup>66</sup>

**[83]** The extent of the Commission’s power as set out in *Kentz* includes the capacity to establish legal rights and obligations as a step in the exercise of its arbitral functions and powers. A determination that the Ministerial Direction is invalid would likely not be consistent with this limitation. The direction though is both a product and determinant of the circumstances presently before me. Another set of circumstances may well lead to a different conclusion.

**[84]** On the basis of the material presently before me it is likely that the status of an order of the Commission would inevitably be the subject of attack for its own validity vis-à-vis that of the Minister. While that prospect is not a definitive reason not to grant the relief sought by the UFU, as the Victorian Government in all its forms is a regular participant in proceedings before this Commission at all levels and is frequently bound to orders made by the Commission, whether or not the responsible Minister is content for that to be done, it is a matter to be taken into account. Rather than resolving the dispute, the issue of orders as sought has the potential to appreciably widen the dispute. Court proceedings of some type would likely arise regarding the validity of any order of the Commission, as well as in relation to any person or body who contravened the Ministerial Direction. There is then the prospect of court proceedings in relation to the Ministerial Direction.

**[85]** Further, the Fettering Decision identified concerns on my part as to whether the operations of the Corporate Board fettered the powers of FRV and especially with respect to s.25B of the FRV Act. The matters within the UFU’s Revocation Application show that at the least the UFU regards those concerns as not having been fully argued before me. After considering the operation of the Corporate Board the Fettering Decision made several observations about how the registration scheme may operate and whether those things fettered the FRV’s decision making:

“[73] The Corporate Board’s Constitution Clause 18 (Registration Provision) appears to provide transitional registration arrangements for already employed firefighters, with a reference to “Professional career firefighters (previously with MFESB and CFA) employed by Fire Rescue Victoria”. However, the intent of the clause and its interaction with Clause 17 are not clear. If it is intended as a transitional registration provision it highlights the possibility that the provisions of Clause 17 may have the intention of developing greater than existing registration requirements.

[74] Consideration of these matters leads to the conclusion that the Minister may well be correct in the assertion that, as presently designed, the Service Contract, and behind it the Corporate Board, will be a fetter on the FRV’s powers of determination about employment of “any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act”.

[75] Once implemented, the Corporate Board would be the entity that not only registers firefighters, compiling a list of those registered and the qualifications, but actually determines the qualifications that firefighters should hold. There appears to be no requirement that the board should or must register all existing professional firefighters, or that it will provide recognition of those registered or employed as professional firefighters in other Australian fire services. There are no apparent contractual constitutional constraints on the Corporate Board about who must be registered or not, or even that determinations must be made in such a way as to avoid inappropriate or unlawful matters of discrimination. That is not to say that the Corporate Board may do such things, merely that there appears to be no constraint against doing so.”<sup>67</sup>

**[86]** The UFU is critical of these propositions, submitting in its written submissions for the Revocation Application that it was denied procedural fairness with respect to these and other observations.<sup>68</sup> It submits that had it been provided with an opportunity to make submissions about these matters, it could have done so and then rebuts several of the propositions advanced by me through reference to provisions within the Corporate Board’s Constitution.<sup>69</sup> The Minister resists this characterisation.<sup>70</sup>

**[87]** I accept there may be a need to hear from the parties on these matters before finalising my reasoning with respect to the 2023 Fettering Objection.

**[88]** I also accept FRV’s submission that further amendments would be required to the Service Agreement before it could be finalised (of a relatively minor and consequential nature and not seemingly going to matters of fettering). It may well be that these matters could be

resolved directly between the parties, or if in dispute through assistance from the Commission in the form of conciliation.

[89] FRV sees the Ministerial Direction in stark terms: it has no discretion or ability to depart from or disregard the direction; the direction prohibits FRV from entering into the Service Agreement, even if the Commission made an order. FRV could not even negotiate with the UFU over the clauses requiring completion and any negotiations would be futile. An order in the terms sought by the UFU would not settle the dispute now before me.<sup>71</sup>

[90] I am unable through this decision to determine the status of the Ministerial Direction. While the Minister's consent under s.25A(3) of the FRV Act is not required in order to enter into the Service Agreement, that alone does not resolve the broader matter.

[91] I am also unable to see a pathway to resolution of the dispute now before the Commission: any such pathway would require the Ministerial Direction to be set aside, either by consent or by a court. The fact of the Ministerial Direction and the consequential impasse it creates for FRV in taking any steps to finalise the Service Agreement together with me not yet being persuaded that the Service Agreement does not impermissibly fetter FRV leads me to conclude that I should not at this time determine the dispute.

[92] I therefore decline to make the order sought by the UFU for two essential reasons; I am not yet satisfied that the Service Agreement does not impermissibly fetter FRV, and I am not satisfied that the Commission should make the order as sought given the Ministerial Direction as I am concerned there would either be no utility in doing so or that issuing the order would not settle the dispute.

[93] The dispute is determined accordingly.



## COMMISSIONER

### *Appearances:*

*Mr H. Borenstein* KC of Counsel and *Mr B. Bromberg* of Counsel for the UFU

*Mr M. Harding* SC and *Mr M. Minucci* of Counsel for FRV

*Mr C. O'Grady* KC and *Ms R. Davern* of Counsel for Victorian Attorney General and Minister for Emergency Services, *Ms Jacqueline Symes* MP

### *Hearing details:*

Melbourne;

30 March;  
2023

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<sup>1</sup> [\[2022\] FWC 3170](#).

<sup>2</sup> Application assigned matter number C2022/8485.

<sup>3</sup> Form F10, Application Form, 8 February 2023, item 2.1.

<sup>4</sup> *Ibid*, item 3.1.

<sup>5</sup> [\[2022\] FWC 3170](#), [67].

<sup>6</sup> *Ibid*, [68].

<sup>7</sup> *Ibid*, [75].

<sup>8</sup> *Ibid*, [94].

<sup>9</sup> *Ibid*, [27].

<sup>10</sup> *Ibid*, [96].

<sup>11</sup> *Ibid*, [99].

<sup>12</sup> Exhibit UFU 2, Applicant's Outline of Submissions, 7 March 2023, [26].

<sup>13</sup> Exhibit Minister 1, Minister's Outline of Submissions, 17 March 2023, [52].

<sup>14</sup> Exhibit FRV 1, FRV's Outline of Submissions, 17 March 2023.

<sup>15</sup> Exhibit Minister 1, [54].

<sup>16</sup> *Ibid*, [56].

<sup>17</sup> Exhibit UFU 3, Applicant's Reply Submissions, 24 March 2023, [12].

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*, [13].

<sup>20</sup> *Ibid*.

<sup>21</sup> Exhibit Minister 1, [63].

<sup>22</sup> *Ibid*.

<sup>23</sup> Exhibit UFU 2, [28].

<sup>24</sup> Exhibit UFU 3, [20].

<sup>25</sup> *Ibid*, [21].

<sup>26</sup> Exhibit UFU 5, *Witness Statement of Antonia Sakkas*, 24 March 2023, Attachment AS – 2; Exhibit Minister 1.

<sup>27</sup> Exhibit Minister 1, [66].

<sup>28</sup> (1998) 194 CLR 355.

<sup>29</sup> Exhibit UFU 3, [26].

<sup>30</sup> *Ibid*.

<sup>31</sup> Exhibit FRV 1, [12] – [14].

<sup>32</sup> Exhibit Minister 1, [66](a).

<sup>33</sup> *Ibid*, [66](b), [67].

<sup>34</sup> *Ibid*, [66](c).

<sup>35</sup> *Ibid*, [66](c) and (d).

<sup>36</sup> [\[2022\] FWC 3170](#), [83].

<sup>37</sup> Exhibit UFU 3, [24]; with reference to the UFU Reply Submissions in matter number C2022/2043, [69] – [79].

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- <sup>38</sup> Exhibit Minister 1, [67].
- <sup>39</sup> Exhibit FRV 1.
- <sup>40</sup> Exhibit UFU 3, [26](b).
- <sup>41</sup> Ibid, [26](c).
- <sup>42</sup> Ibid, [26](d).
- <sup>43</sup> Ibid, [26](f).
- <sup>44</sup> Exhibit Minister 1, [66](c) and (d).
- <sup>45</sup> [\[2022\] FWC 3170](#), [84].
- <sup>46</sup> Transcript, matter number C2022/2043, PN 571.
- <sup>47</sup> [\[2012\] FWAFB 9555](#).
- <sup>48</sup> Ibid, [35], [42].
- <sup>49</sup> Ibid, [33].
- <sup>50</sup> Exhibit UFU 3, [28].
- <sup>51</sup> Ibid.
- <sup>52</sup> *MFESB v UFU*, [23], see also *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [\[2013\] FWCFCB 2301](#), [34].
- <sup>53</sup> Exhibit Minister 2, *Witness Statement of Eloise Daff*, 17 March 2023, Attachment END – 3.
- <sup>54</sup> Exhibit FRV 1, [18].
- <sup>55</sup> [\[2019\] FWCFCB 184](#).
- <sup>56</sup> Ibid.
- <sup>57</sup> [\[2022\] FWC 3170](#), [21].
- <sup>58</sup> [\[2016\] FWCFCB 2019](#).
- <sup>59</sup> 203 FCR 371.
- <sup>60</sup> (2012) 203 FCR 371, [29] – [30].
- <sup>61</sup> Ibid, [31].
- <sup>62</sup> Ibid, [21].
- <sup>63</sup> Ibid, [17].
- <sup>64</sup> Ibid, [22].
- <sup>65</sup> Exhibit Minister 1, [32].
- <sup>66</sup> Exhibit UFU 3, [19].
- <sup>67</sup> [\[2022\] FWC 3170](#).
- <sup>68</sup> Applicant's Outline of Submissions, 13 February 2023, [13] – [19].
- <sup>69</sup> Ibid, [34].
- <sup>70</sup> Exhibit Minister 1, [42] – [48].
- <sup>71</sup> Exhibit FRV 1, [14] – [21].