DECISION

Fair Work Act 2009
s.234 - Application for an intractable bargaining declaration

United Firefighters' Union of Australia
v
Fire Rescue Victoria T/A FRV
(B2023/771)

DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT BELL — MELBOURNE, 5 FEBRUARY 2024
COMMISSIONER ALLISON

Intractable bargaining determination – preliminary hearing about 'agreed' matters for s 274 of the Fair Work Act 2009 (Cth).

[1] The applicant, the United Firefighters' Union of Australia (UFU), and the respondent, Fire Rescue Victoria (FRV) are covered by the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (2020 Agreement). They have been bargaining informally and formally since about July 2020 for the purpose of making a proposed enterprise agreement to replace the 2020 Agreement.

[2] On 4 October 2023, a Full Bench of the Fair Work Commission (Commission) made an intractable bargaining declaration,[1] pursuant to s 234 of the *Fair Work Act 2009* (Cth) (FW Act). The declaration was made upon an application by the UFU, which was supported by FRV. The Victorian Minister for Emergency Services, the Hon Jaclyn Symes MLC (Minister), being the Minister with statutory responsibility for FRV, also supported the making of the declaration.

[3] The order[2] giving effect to the declaration further specified a post-declaration negotiating period that started on 4 October 2023 and ended on 18 October 2023. The matter remained unresolved at the end of that period and, as no order for a further post-declaration negotiating period was made,[3] it now falls to the Commission to make an intractable bargaining workplace determination "as quickly as possible" under s 269 of the FW Act.

[4] An intractable bargaining workplace determination must include "agreed terms": s 270(2) of the FW Act. This decision addresses a preliminary issue in dispute, which is what terms – if any – of the proposed enterprise agreement are "agreed terms" for the purposes of ss 270(2) and 274(3) of the FW Act.

[5] In summary, the UFU's position was that all matters between the UFU and FRV are agreed terms, other than terms involving increases to wages and increases to allowances. By contrast, FRV (and the Minister) stated that there are no agreed terms within the meaning of s 274 of the FW Act. While maintaining the position that there are no agreed terms, FRV and the

Minister identified a confined list of ten specific matters (including wages and allowances) that they stated would require substantive determination, with the balance of matters not being contested nor likely to be the subject of substantive submission as to their inclusion in an intractable bargaining workplace determination. With the exception of the ten specific matters, the uncontested matters that have been identified are included in a version of a proposed enterprise agreement prepared on around 26 July 2023[4] – that version is variously described by the parties as 'Version 14,' a term we adopt for convenience. It is not necessary for this decision to describe the terms in Version 14 in any detail.

[6] The UFU and FRV each filed written submissions and witness statements.

[7] For its witness evidence, the UFU relied upon two statements of Laura Campanaro, Industrial Officer Coordinator for the UFU, and a statement by James Kefalas, the officers' representative on the Branch Committee of Management of the Victorian Branch of the UFU. Reflecting the titles to those statements, we refer to them as the 'Third Campanaro statement' (dated 17 November 2023), the 'Fourth Campanaro statement' (dated 11 December 2023)[5] and the 'Second Kefalas Statement' (dated 17 November 2023).[6] Ms Campanaro was cross-examined; Mr Kefalas was not required for cross-examination.

[8] For its witness evidence, FRV called Jo Crabtree, Executive Director, People and Culture, FRV. Reflecting the titles to her statements, we refer to them as the 'First Crabtree Statement' (dated 5 September 2023), the 'Second Crabtree Statement' (dated 17 November 2023), and the 'Third Crabtree Statement' (dated 11 December 2023). The First Crabtree Statement was made in respect of the application for an intractable bargaining workplace declaration, although it was relied upon by FRV in the preliminary hearing before us. Ms Crabtree was cross-examined.

[9] The Commission exercised its discretion to grant leave to the Minster to intervene to make written and oral submissions. The grant of leave did not extend to the Minister adducing evidence in respect of the determination of the preliminary issue in dispute and the discretion was exercised subject to an overriding procedural consideration that the time allocation between FRV and the Minister did not unduly disadvantage the UFU. No disadvantage was contended, nor apparent, during the preliminary hearing.

[10] The Minister relied upon an amended position document, an amended outline of submissions, and amended reply submissions, each dated 19 December 2023. The amendments to each of these documents were limited to the incorporation of cross-references to referred material in the Commission's Court Book.

[11] The Court Book is comprised of four volumes. Volume A contains the material relied upon by the UFU in respect of the preliminary issue in dispute. Volume B comprises FRV's material and the Minister's submissions are contained in Volume C. Volume D is comprised of court documents and other materials filed before the earlier Full Bench in this matter, that the parties indicated a desire to rely on in the preliminary hearing. Court Book references in this decision are therefore preceded by reference to the relevant volume.

Statutory framework

[12] Part 2-4 of the FW Act is titled "Enterprise agreements" and addresses a wide range of matters dealing with that subject. There are eleven Divisions in Part 2-4 and many subdivisions. While it is not necessary to summarise them, Division 8 of Part 2-4 is titled "FWC's general role in facilitating bargaining." Up until 6 June 2023, Subdivision B of Division 8 was titled "Serious breach declarations."

[13] As noted in the earlier Full Bench decision in this matter,[7] the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) repealed the former "serious breach declaration" provisions of the FW Act, replaced them with their current form, and retitled the subdivision to "Intractable bargaining declarations."

[14] Section 234 of the FW Act (including the legislative note) is now as follows:

> "**Subdivision B—Intractable bargaining declarations**
>
> **234 Applications for intractable bargaining declarations**
>
> (1) A bargaining representative for a proposed enterprise agreement, other than a greenfields agreement, may apply to the FWC for a declaration (an intractable bargaining declaration) under section 235 in relation to the agreement.
>
> Note: The consequence of an intractable bargaining declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make an intractable bargaining workplace determination under section 269 in relation to the agreement.
>
> (2) An application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement."

[15] Section 235 sets out when an intractable bargaining declaration can be made and s 235A provides for any post-declaration negotiating period. It is not necessary to set those sections out, save to note that the Commission must be satisfied (which has been the case) of the following matters specified in s 235(2):

> "(a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and
>
> (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
>
> (c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement."

[16] As the legislative note to s 234 indicates, a necessary step making an intractable bargaining workplace determination is that an intractable bargaining workplace declaration is first made.

[17] The provisions for making intractable bargaining workplace determinations are contained in Part 2-5 of the FW Act. Part 2-5 is comprised of six Divisions numbered 1 – 7.[8] Division 3 provides for *industrial action related workplace determinations*.

[18] Prior to 6 June 2023, Division 4 provided for *bargaining related workplace determinations*. The division was amended by the SJBP Act to its current form, and now provides for *intractable bargaining workplace determinations*. By s 269, an intractable bargaining workplace determination cannot be made prior to an intractable bargaining workplace declaration having been made and the post-declaration negotiating period (if any) having passed.

[19] Section 270 provides for the terms that must be included in an intractable bargaining workplace determination, which include the "core terms" set out in s 272, the "mandatory terms" set out in s 273 and the "agreed terms" provided for by s 274. Division 3 of Part 2-5 provides a similar structure for the terms of industrial action related workplace determinations.

[20] Section 274 is as follows:

> "**274 Agreed terms for workplace determinations**
>
> *Agreed term for an industrial action related workplace determination*
>
> (2) An agreed term for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.
>
> Note: The determination must include an agreed term (see subsection 267(2)).
>
> *Agreed term for an intractable bargaining workplace determination*
>
> (3) An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:
>
> (a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;
>
> (b) otherwise—at the time the intractable bargaining declaration was made.
>
> Note: The determination must include an agreed term (see subsection 270(2))."

[21] Section 274(1) was repealed by the SJBP Act. Prior to its repeal, the subsection, which is set out below, defined "agreed term" in materially the same way as s 274(3):

> "*Agreed term for a low-paid workplace determination*

> (1) An agreed term for a low-paid workplace determination is a term that the application for the determination specifies as a term that the bargaining representatives concerned had, at the time of the application, agreed should be included in the proposed multi-enterprise agreement concerned.
>
> Note: The determination must include an agreed term (see subsection 264(2)).”

Factual background and findings

[22] The firefighting services in Victoria have a long and established history. Until 2020, the two primary firefighting and rescue services were the Metropolitan Fire and Emergency Services Board (MFB) and the Country Fire Authority (CFA).

[23] Prior to 2020, the enterprise agreements for operational staff were the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* (MFB Agreement) and the *Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010* (CFA Agreement). The nominal expiry date of the MFB Agreement was 1 July 2019 and for the CFA Agreement it was 30 September 2013.

[24] Prior to 2020, the Victorian Government undertook a number of reforms of fire services in Victoria, which ultimately led to the establishment of FRV among other changes.

[25] On 20 February 2020, in anticipation of the establishment of FRV, the UFU and the then Minister for Police and Emergency Services for Victoria signed a document titled “Heads of Agreement.”[9]

[26] The purpose of the Heads of Agreement was, broadly, to provide for a range of industrial measures and processes for the implementation of the Victorian Government's fire services reforms and the establishment of FRV. By way of example, the matters it provided for included:

- Commitment by the parties to the Heads of Agreement for making the “proposed FRV Enterprise Agreement,” as well as assurances that existing terms and conditions would not be diminished.

- A proposed 2.5% pay increase for staff covered by the MFB Agreement and the CFA Agreement.

- An acknowledgement that the Heads of Agreement was consistent with the Victorian Government's “Wages Policy”.

- A commitment by the Minister “as a show of good faith that she will instruct the MFB and CFA to apply an interim adjustment to the wages and allowances” applicable under the then-relevant enterprise agreements.

- Commitment to enter into a “Common Law Deed of Agreement to be settled by the UFU, and a Transfer of Business instrument pursuant to the [FW Act], to provide an appropriate agreed legal basis and certainty for UFU members in relation to these commitments.”

[27] While we understand that the UFU and the relevant Minister entered into the "Common Law Deed of Agreement" contemplated by the Heads of Agreement, it was not in evidence and there was no suggestion it had any ongoing operational relevance.[10]

[28] FRV was established under Victorian law by the *Fire Rescue Victoria Act 1958* (Vic) (FRV Act). FRV commenced on 1 July 2020, following the assumption of all the functions of the MFB and some of the functions of the CFA.[11] FRV's core functions are firefighting and rescue throughout the state of Victoria.

[29] From 26 August 2020, following an order by Deputy President Gostencnik,[12] the 2020 Agreement has applied to employees of FRV covered by that agreement.

[30] The UFU is a registered organisation of employees, whose members comprise of about 98% of FRV's operational workforce.[13] The UFU is, and remains, a bargaining representative of nearly all relevant FRV employees in relation to bargaining between FRV and the UFU.

[31] The reference in the Heads of Agreement to the "Wages Policy" is evidently a reference to the Victorian Government's policy at the time titled "Wages policy and the Enterprise Bargaining Framework"[14] (2019 Wages Policy), as issued by the Treasurer of Victoria and Minister for Industrial Relations, the Hon Tim Pallas MP. By a covering letter from the Treasurer for that document, the 2019 Wages Policy applied from 17 April 2019 and it revoked and replaced the previous wages policy and guidance material. The 2019 Wages Policy applied to Victorian Government agencies and bodies.

[32] The 2019 Wages Policy stated that the primary pathway for enterprise agreement-making under the policy had three "pillars":

- "Pillar 1" was titled "Wages" and, in summary, it stated that increases in wages and conditions will be capped at 2.0 percent per annum over the life of the agreement.

- "Pillar 2" was titled "Best Practice Employment Commitment" and was aimed at implementing various government priorities operationally or without significant cost.

- "Pillar 3" was titled "Additional strategic changes." The requirements of Pillar 3 stated that additional changes to allowances and other conditions (not general wages) will "only" be allowed if the Government agrees that the changes will address "key operational or strategic priorities for the agency, and/or one or more of the Public Sector Priorities." Examples given of possible Pillar 3 priorities included: increasing penalty rates for weekends or night to address high instances of unscheduled absences at those work times; removing or reducing restrictions which impede the efficient allocation of resources; and targeted wage increases to a specific and identifiable cohort of the workforce who have historically been underpaid because of gender.

[33] Under the heading "Enterprise Bargaining Framework"[15] in the 2019 Wages Policy was a description of the "Government's approval arrangements which public sector agencies must meet before commencing bargaining, during bargaining and before seeking approval of final enterprise agreements" (our emphasis).

[34] That same section of the 2019 Wages Policy distinguished between "Major and Non-major Agreements." Major Agreements included any enterprise agreement with a large public sector workforce, with a salary base in excess of $1billion, or with significant industrial or financial risk, and/or or strategic or operational importance to the Government. The 2019 Wages Policy specifically stated that enterprise agreements for "firefighters" were Major Agreements.[16]

[35] The 2019 Wages Policy then listed some specific obligations on government agencies under the headings "Authority to commence bargaining," "During bargaining" and "Approval requirements."

[36] Obtaining authority to commence bargaining was, as would be expected, required to be sought before bargaining commenced.

[37] For the stage "During bargaining," the 2019 Wages Policy requirements included:[17]

> "All offers should be made on an in-principle basis, with the public sector agency communicating that the offer is subject to government approval and may be subject to change to ensure compliance with Wages Policy, the Industrial Relations Policy, the Fair Work Act or other relevant legislation."

[38] Under the heading "Approval requirements," the 2019 Wages Policy requirements included:

> "All proposed enterprise agreements require the approval of Government prior to the commencement of any of the formal approval requirements outlined in the Fair Work Act."

[39] And, for Major Agreements:

> "The process for seeking Government approval of final agreements under the Framework differs for Major Agreements and Non-major Agreements. Approval of Major Agreements at a high level of Government is required."

[40] We note that a replacement wages policy took effect from 1 January 2022 (2022 Wages Policy).[18] The 2022 Wages Policy substantively replicated the requirements stated above, although one significant change was that wages under Pillar 1 were now to be capped at 1.5 percent.

[41] It is uncontroversial that "informal" bargaining commenced between FRV and the UFU in about July 2020. Ms Campanaro's evidence was that between July 2020 and 26 April 2022, there were approximately 32 meetings involving discussions for a new enterprise agreement.[19]

[42] The (slow) pace of progress during discussions throughout this informal phase was evidently a matter of frustration to the UFU. On 1 November 2021, the UFU made a 'Form F11' application under s 240 of the FW Act seeking the assistance of the Commission to deal with a bargaining dispute.[20] The form was signed by the UFU's external solicitor.

[43] Among other matters, the UFU stated the following in its Form F11 application:

> "9. On 30 November 2020, the UFU presented to the FRV its log of claims in relation to a proposed Operational Staff Agreement.
> …
>
> 11. On 8 December 2020, FRV responded to the UFU's claims.
>
> 12. On 14 January 2021, the UFU met with some members of the FRV Executive Leadership Team to discuss the proposed Operational Staff Agreement.
>
> 13. On 29 July 2021, FRV informed the UFU that to bargain under the applicable wages policy, FRV needed to make a request to the Victorian Government to commence bargaining by 1 August 2021. FRV informed the UFU that it would make its submission with respect to a new enterprise agreement within this timeframe to ensure that when the parties were ready to commence negotiations for the operations staff agreement, they would be in a position to do so having already obtained Government approval.
>
> 14. To date, FRV have failed to:
>
> a. provide costings of the monetary value for efficiencies arising from the UFU Efficiency Clauses; and/or
> b. formalise the bargaining process by taking the necessary action to obtain Victorian Government approval."

[44] The main matters in dispute were said to be FRV's failure to provide costings or to formalise the bargaining process by obtaining Victorian Government approval (i.e. as extracted above).[21]

[45] On 26 April 2022, FRV issued a 'Notice of Representational Rights'[22] to relevant employees for the purposes of s 173 of the FW Act, thus commencing what the parties have respectively described as "formal" bargaining.[23] FRV was given permission from the Government to continue to apply the 2019 Wages Policy despite the commencement of the 2022 Wages Policy, as noted at [40] above.[24] Ms Campanaro's evidence is that there were 44 bargaining meetings held in the 12 months from April 2022.[25]

[46] Ms Campanaro refers to a "Bargaining Charter" drafted by FRV, that bargaining representatives were requested to review and sign.[26] The copy of the document in evidence[27] is titled "Agreed Charter" (Charter) and, while unsigned, that version was dated 3 May 2022.

[47] The Charter contains a suggested agenda for "Meeting One" on 26 April 2022.[28] One item on the agenda was "FRV to provide explanation of current status of current Enterprise Agreement, Government Wages Policy, FRV objectives and broad concepts."

[48] Ms Campanaro's evidence about the meeting on 26 April 2022 was that "FRV mentioned government wages policy at that meeting in the context of monies."[29]

[49] Ms Campanaro's qualification to the effect that wages policy discussions only concerned monies or quantum is illustrative of a key difference between the parties regarding negotiations.

[50] For example, at least for what appears to be the period up until August 2022 (the exact timeframe is not clear from Ms Campanaro's evidence), she states:

> "45. From the time of the FRV's first response document, the UFU and FRV were negotiating and agreeing clauses.
>
> 46. There was no qualification or reservation expressed by the FRV during these negotiations which suggested the agreements reached between the parties on non quantum clauses were subject to government approval.
>
> 47. The only matter during the bargaining process that was acknowledged to be agreed in principle between the UFU and FRV and subject only to Government funding (other than quantum) was the matter of increased safe staffing levels."

[51] On 15 August 2022, the UFU filed an application with the Commission seeking payment of an "efficiencies allowance" (with case number C2022/5683), which Ms Campanaro described as the "UFU's Efficiencies Application."[30] Ms Campanaro says of the Efficiencies Application:

> "59. FRV's response in bargaining changed following the UFU's Efficiencies Application. For the first time, FRV used the language of agreement in-principle and the need for overall agreement on a package."

[52] By way of example, Ms Campanaro referred to the FRV's bargaining document[31] provided by FRV to the UFU following the UFU's Efficiencies Application. In the opening paragraphs of that document, FRV stated (original bold, underlining added):

> "**Without Prejudice – 16 August 2022**
>
> **FRV Response to UFU Log V10) received by FRV 11 August 2022.**
>
> The following provides FRV's response to the above Log on a without prejudice basis, noting that a range of substantive matters now await instruction to FRV by the State Government. FRV has appraised the Government of the UFU's Log.
>
> The clause numbers referenced below are the clause or subclause numbers as set out in the UFU Log.
>
> All clauses as set out in the UFU Log, unless otherwise commented upon below, are agreed in principle by FRV, subject to final agreement on an overall package of provisions for the proposed EA."

[53] FRV's response to the UFU's log then set out some specific comment on particular issues or clauses. For example, in relation to clause 55 of the (then) proposed enterprise agreement, FRV wrote: "55 Firefighters Registration Board - FRV's response is pending the outcome of proceedings in the FWC and instruction from Government." The document listed a number of other specific items concerning wages or allowances, variously stated to be awaiting "instruction from Government."[32]

[54] We note that the parties are in disagreement as to the significance of the above exchanges, which is a matter we will return to. In summary, however, Ms Campanaro states that other than the "uniquely" separate issue of the Firefighters Registration Board, "all government references to instruction related to wages and allowance increases. That is, the government attached no qualifications to non-wages and allowances clauses."[33]

[55] Ms Campanaro made a more general observation of bargaining, that the UFU said was unchallenged, which was:[34]

> "63. On occasion Mr Parkinson said of some matters that they were subject to Government approval or a package. Whenever he did one of the UFU representatives would ask in effect if the matter was agreed or not. Every time he replied that it was agreed."

[56] Ms Campanaro's evidence describes the course of bargaining with FRV since late 2022, where she states that "FRV and UFU have substantially narrowed the outstanding matters in bargaining."[35] Ms Campanaro then described (and there was no dispute) numerous bargaining meetings, including with the assistance of Commissioner Wilson of the Fair Work Commission.[36]

[57] On 4 November 2022, FRV filed with the Commission a Form F11 application for the Commission to deal with a bargaining dispute in which it stated, *inter alia,* that it had attended bargaining meetings with UFU and nominated employee representatives in good faith, at which a "range of concessions agreed in-principle (subject to reaching an overall agreement)."[37] Further, it was noted that at the most recent bargaining meeting on 11 October 2022, it was agreed that the UFU would provide FRV with an updated draft enterprise agreement reflecting the amendments agreed in principle.

[58] We note that by late November 2022, 'Version 12' of the proposed enterprise agreement had been circulated between the UFU and FRV.[38]

[59] On 3 February 2023, Commissioner Wilson issued a "Statement" to the UFU, FRV and Industrial Relations Victoria.[39] The statement was expressed to be "issued for the purposes of conciliation and is without prejudice to the rights of all concerned." After a brief introductory overview, Commissioner Wilson stated:

> "[4] Bargaining between the FRV and the UFU and other bargaining representatives has progressed between the parties with substantial goodwill, to the point where at the time the matter was referred to me to be dealt with the principal parties, the FRV and UFU, had reached agreement on all but 10 issues, as follows: …"

[60] The 10 outstanding issues were a mix of (predominantly) wages/allowances and other non-wage issues. Additionally, Commissioner Wilson further summarised aspects of one particular issue – the "Efficiency Allowances matter" – and made various observations as to the state of bargaining, including the impact of the Victorian Government's wages policy and the changes to that policy that were pending at the time. The Commissioner's conclusionary paragraphs in the Statement were as follows:

> "[13] The nature of these proceedings, though, is such that an early resolution to bargaining will require a firm monetary offer to be put by the FRV to the UFU in the near future. Of course, such can only be done in the event the FRV is authorised by the Victorian Government to do so.
>
> [14] As a result, I consider to be incumbent on the FRV, and through it the Victorian Government, to put forward a firm wages proposal to the UFU and other employee bargaining representatives for their consideration of the earliest opportunity and, preferably, one that is capable of encompassing the matters that are within the scope of the Efficiencies Allowance claim. That is not to suggest there should be an uncritical adoption of the union's position in respect of either its bargaining claim or the Efficiencies Allowance claim. However, I do suggest that such proposal as is put forward engages with and endeavours to address both matters.
>
> [15] I note the next conference in relation to the FRV's bargaining dispute application is scheduled before me on Friday 24 February 2023 at 2 PM.
>
> [16] I consider it desirable that before that date and time the parties endeavour to resolve to finality all of the non-wages matters that have been under discussion in the conciliation conferences to date. In particular I request that they meet on that subject before the next conference, discussing all remaining non-wages matters.
>
> [17] I also encourage the FRV and those that it is required to consult with in order to form its instructions to have a firm wages proposal to provide to the UFU and the Commission on or before the date of the next conciliation conference."

[61] Ms Campanaro's evidence is that UFU and FRV representatives met a further 12 times between 3 February and 26 April 2023.[40]

[62] On 7 March 2023, the UFU wrote to FRV primarily in connection with the UFU Efficiencies Application. The UFU identified a "development that has undermined the prospect of ongoing co-operative industrial relations between the UFU and FRV."[41] While that correspondence was primarily directed to the UFU's Efficiencies Application, it sought clarification on matters relating to bargaining. Specifically (among other matters) the UFU:

- Referred to a proposal it made in about 28 February 2023 to vary the 2020 Agreement to insert a "Productivity Clause" that the UFU said would "reflect that which was agreed in bargaining over a year ago – if the matter was not able to be progressed in bargaining." In summary, the proposed Productivity Clause would establish a mechanism under which payments for various "efficiency" matters

could be resolved by arbitration before the Commission if agreement could not be reached in relation to such matters.

- Observed that the Productivity Clause "is one of many clauses that the parties have treated as settled," being a reference to settled in bargaining between the parties.

- Noted the Minister's intervention in the UFU's Efficiencies Application. While the UFU further noted that the Minister did not consent to the UFU's proposed variation, the Minister had not "purport[ed] to formally direct the FRV in respect of its approach to the proposed variation" (and gave an example from a different dispute proceeding where the Minister had formally directed FRV pursuant to the FRV Act.)

[63] The UFU stated that no reasons were given for the Minister's position, and it expressed its concerns as follows:

> "In those circumstances, the Minister's response potentially calls into question the entirety of the negotiations that have taken place in respect of the replacement agreement (which is now up to version 12, with few or no matters left in dispute other than the quantum of the wage increases)."

[64] The UFU then sought reply correspondence from FRV as to its position on the UFU's proposed variation application, as well as the date upon which FRV would make an offer on wages.

[65] On 10 March 2023, FRV wrote to the UFU with a monetary offer it said it was "authorised" to make in accordance with the 2019 Wages Policy.[42] The offer was a three-year agreement, with increases of 2 percent effective from the commencement of the agreement and a one-off sign on payment of $1,500. The letter stated that there was no component for "Pillar 3" wages or allowances "due to the uncertainty regarding the efficiency allowance matter currently before the Fair Work Commission." The letter concluded that "Government" was, at the time, reviewing the wages policy and stated, "we hope" to be in a position to provide a revised offer under the new wages policy "in the near future."

[66] The UFU responded[43] on the same day and challenged the proposition that any "Pillar 3" component could not be included in bargaining and further queried whether FRV's offer was genuine or if it was "designed only to avoid further criticism of FRV's previous "inertia" in bargaining."

[67] On 14 March 2023,[44] FRV's response to the UFU's letter of 10 March 2023 included the following:

> "On 29 November 2022, FRV provided a without prejudice response to the UFU's revised log V12 in this matter. That response confirmed:
>
> • all references to quantum for Wages and Allowances are subject to instruction and approval from Government having regard to Government Wages Policy and the treatment of efficiencies; and

- all clauses as set out in the UFU revised log V12 (unless they were otherwise commented on) were agreed in principle by FRV, subject to final agreement on an overall package of provisions for the proposed enterprise agreement and subject to the efficiencies allowance dispute proceedings in C2022/5683.

FRV has maintained this position throughout bargaining and continues to maintain this position."[45]

And:

"On 3 March 2023, FRV sought Government authorisation to make an alternate wages proposal which included a Pillar 3 element, contrary to the instruction from Government set out above. On 8 March 2023, Government reaffirmed its instruction as set out above, confirming that FRV had no authorisation to put forward FRV's alternate wages proposal.

In these circumstances, FRV will not make an offer which includes the Pillar 3 efficiencies because it does not have Government authority to do so or Government funding for those items.

FRV's position regarding the inclusion of the Pillar 3 efficiency items has changed as a result of Government's instruction set out above. However, it should be noted that throughout bargaining, FRV has consistently maintained the position that wages and allowances are subject to Government Wages Policy and approval."

[68] On 15 March 2023, the UFU replied[46] to FRV's monetary offer made on 10 March 2023. The UFU's letter stated that the "UFU accepts your offer of a 2% base wage increase plus a sign-on bonus of $1500, subject to the conditions set out in this letter." The "conditions" attached to the purported acceptance of the FRV's offer included a "cost-of-living adjustment" that, in substance, pegged wage increases to any consumer price index increases above 2 percent, capped at 5 percent per annum. Ms Campanaro's evidence is that FRV responded to this letter from the UFU at a conference before the Commission on 24 March 2023 and rejected the UFU's position.[47]

[69] Under correspondence dated 20 March 2023, the UFU provided 'version 13' of the proposed enterprise agreement to FRV. In the covering letter,[48] the UFU stated that (among other matters):

"277 out of 281 clauses and all schedules have been agreed between UFU and FRV, with many clauses already implemented. The agreed clauses are highlighted in green in the enclosed Version 13."

[70] On 27 March 2023, the UFU wrote to FRV setting out the UFU's evident frustration with what it perceived to be FRV's and the Government's position regarding compensation for the "efficiencies" realised as a result of the integration of the MFB and CFA.[49]

> "For three years, the UFU has facilitated FRV's harmonisation and progression of changes to key entitlements including Relocation Assistance and Special Rosters, as well as other items such as introducing the IFP program, harmonising appliances and harmonising consultation. The UFU's participation in these processes was on the basis that operational members would be paid from the Efficiencies realised by such changes.
>
> The FRV has previously confirmed that the processes of harmonisation and achievement of efficiencies could not have been achieved without the participation and co-operation of the UFU. It does not appear in issue that these efficiencies have led to very significant savings for the FRV to date, as the Table 3 total confirms.
>
> However, the position of the Government and the FRV is to take the full benefit of the UFU's participation, but to refuse to recognise it in bargaining because those Efficiencies have already been realised (and so will not lead to any spending changes in the new Agreement).
>
> The position of the FRV in this matter is untenable. To highlight how industrially unsound its position is, it is apparent that, if the UFU had sought to prevent the processes of harmonisation and merger and instead insisted on the maintenance of its strict legal rights under the Interim Agreement, it would be in a far better position in bargaining today. That is because the Government and FRV would recognise any efficiencies to be achieved under the new Agreement (but not prior) under Pillar 3.
>
> The FRV's untenable stance on Efficiencies has now placed the UFU in an invidious position where, in order to achieve what it was promised [the UFU referred here to its correspondence of 7 March 2023] it is in it best interests to immediately unwind the work from the last three years to put its members in the place where they should be in bargaining."

[71] On 29 March 2023, FRV wrote to the UFU setting out FRV's position, including the following:[50]

> "FRV's position post the recent Fair Work Commission (FWC) conciliation conference and subsequent conversations between UFU and FRV is:
>
> …
>
> - Government instruction is that the efficiencies referred to in Table 3, cannot be relied on by FRV under Pillar 3 of the 2019 Wages Policy as it is Government's view that they do not represent 'offsets' (i.e. current expenditure).
>
> - As of 24 February 2023, FRV has been under Government direction not to make a wages offer that includes any additional payment under Pillar 3 of the 2019 Wages Policy. Therefore, FRV's ability to finalise bargaining and make a wages offer with the inclusion of these efficiencies is not possible.
>
> - As such, FRV understands that where the implementation of these efficiencies is no longer agreed, any such savings would no longer be available to flow to employees.

> FRV confirms it will continue to bargain in respect of the efficiencies identified in the Efficiencies Estimates document. Noting, any wages offer is subject to government approval. Additionally, FRV is advised by Government that it is currently reviewing its wages policy. FRV hopes to be in a position to provide an updated wage proposal under a new wages policy in the near future."

[72] Ms Campanaro's evidence then describes various other events, prior to a further round of conferences involving the assistance of Commissioner Wilson. For example, the UFU relies upon a video message issued to FRV staff by the Fire Rescue Commissioner on 29 March 2023, where he states (among other matters) "significant progress has been made with these negotiations, for the Operational Agreement for example all matters have been agreed other than the Firefighters Registration Board clause, the funding to increase minimum staffing requirements, and Annual Leave for Fire Safety Officers and the Incident Management Support clause for those Fire Safety Officers. The quantum of wages and allowances increases of course is yet to be agreed as well."[51]

[73] On 4 April 2023, the Treasurer of Victoria and Minister for Industrial Relations issued a press release[52] announcing the Victorian Government's new wages policy. Despite the press release being issued that day, the actual wages policy referred to was not.[53] The press release stated there would be an increase in the "wages component" of the wages policy from 1.5 percent per annum to 3.0 percent, as well as there being an ability to obtain a "lump-sum sign on bonus equal to up to 0.5 percent of overall agreement costs."

[74] The detail contained in the press release was sufficient to cause the UFU to write to Commissioner Wilson to request an adjournment of the "Efficiencies" matter before him.[54] Ms Campanaro describes various efforts by the parties to continue with bargaining.

[75] On 2 May 2023, the new wages policy[55] was issued and was titled "Wages Policy and the Enterprise Bargaining Framework" (2023 Wages Policy).

[76] The 2023 Wages Policy was broadly similar in content and structure to the 2019 Wages Policy and the 2022 Wages Policy. It retained as the "primary pathway" for enterprise agreement-making substantially the same three "Pillars" in previous versions of the policy. One notable change to Pillar 1 was that the approved increase in wages would be funded at 3.0 percent per annum (not 2.0 percent as per the 2019 Wages Policy or the 1.5 percent amount under the 2022 Wages Policy, for example) plus an additional lump sum, cash payment of up to 0.5 percent of the overall agreement costs.

[77] Under the 2023 Wages Policy:

- There were transitional arrangements that permitted parties to enterprise agreements who had not finalised new agreements under previous wages policies to "seek Government approval" to bargain under the new policy parameters.

- There remained a section titled "Enterprise Bargaining Framework" that applied "before" bargaining, "during" bargaining, and "before seeking employee approval" of final enterprise agreements.

- The distinction between "Major Agreements" and "Non-major Agreements" was retained, with agreements covering "firefighters" again being specifically listed as an example of a Major Agreement.

[78] The "Approval requirements" section of the 2023 Wages Policy, which were as follows, were substantially unchanged from the requirements under the 2019 Wages Policy:

> "All proposed enterprise agreements require the approval of Government prior to the commencement of any of the formal approval requirements outlined in the Fair Work Act.
>
> To be approved by Government, a proposed enterprise agreement (whether a Major Agreement or Non-major Agreement) must meet all the conditions specified in Wages Policy. In addition:
>
> - the public sector agency must verify that it has conducted a comparison of the terms of the Agreement with the relevant Award, and that the Agreement provides that each employee will be Better Off Overall than the relevant Award, within the meaning of the Fair Work Act
>
> - other requirements from the Industrial Relations Policies must be met
>
> The process for seeking Government approval of final agreements under the Framework differs for Major Agreements and Non-major Agreements. Approval of Major Agreements at a high level of Government is required.
>
> Eligible public sector agencies must submit proposed enterprise agreements negotiated under the secondary pathway to Government for approval as soon as possible once bargaining has commenced. A fast track approval process will apply for these agreements. Where Government approval is obtained, agencies must comply with Fair Work Act requirements and seek approval of their agreement from the Fair Work Commission."

[79] Negotiations between the UFU and FRV ensued, with the assistance of Commissioner Wilson. On 19 June 2023, Commissioner Wilson issued a statement (19 June Statement), which, prior to being issued, he circulated to the UFU and FRV in draft.[56] As the 19 June Statement was afforded significance by the UFU, we set it out in full together with the sole amendments made to the draft of that statement by the parties (which was in paragraph [2]).

> "*Statement*
>
> [1] Bargaining for a replacement to the Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020 (the 2020 Agreement) has been underway for some time now. Bargaining has mainly taken place outside of the Fair Work Commission with claims and responses being discussed and resolved between the parties in an orderly and constructive manner. There have also been 11 conferences chaired by the Commission since an application for assistance with a bargaining dispute was lodged by Fire Rescue Victoria on 4 November 2022.

> [2] Bargaining has progressed very well to the point that the ~~United Firefighters' Union (UFU)~~UFU and FRV now report~~s~~ that since the last conciliation conference held on 27 April 2023 all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances.
>
> [3] The constructive flow of bargaining has been assisted by mutual commitments between the main actors in the negotiations, Fire Rescue Victoria (FRV) and the UFU to constructively facilitate the formation of the FRV in July 2020 after the merger of the Metropolitan Fire and Emergency Services with the professional firefighting operations of the Country Fire Authority. The constructive industrial relations climate since 2020 has allowed, so I have been informed in the conciliation conferences held, for significant organisational and operational changes to be made faster than otherwise may be the case and with potentially greater effect, including financial effect. The UFU points to these matters as not only a justification for its wages and allowance claims but also as a reminder that continued constructive cooperation cannot be taken for granted. The UFU also points to the fact that cooperation in negotiations has taken place against the fact that the relevant parts of the 2020 Agreement all passed their nominal expiry date no later than 1 July 2019.
>
> [4] Shortly before the last conciliation conference, held on 27 April 2023, the Victorian Government announced details of its updated Wages Policy and Enterprise Agreement Framework. Until the new policy was announced in April 2023 and then later documented bargaining on the matter of the union's monetary claims had been unable to progress as there was both a lack of clarity about the quantum of increase that could be considered by FRV as well as that FRV had no authority to put forward a wages proposal for the UFU's consideration.
>
> [5] It is no understatement to record that the whole 8-month life of this file has been featured by statements throughout that a comprehensive wages and allowance offer from FRV to the UFU is "imminent". The file started that way, and it remains so now.
>
> [6] There is a need for FRV and those who instruct them to take the imminence of a wages proposal beyond rhetoric and make a proposal to the UFU and other employee bargaining representatives in the near future which properly responds to their claims. The publication of the Victorian Government's Wages Policy and Enterprise Agreement Framework clears the way for such an offer to be made and it behoves FRV to ensure an offer is communicated in the very near future."

[80] On 27 June 2023, the UFU circulated an updated version of the proposed enterprise agreement to FRV, being 'Version 14' referred to in paragraph [5] above. Version 14 includes the beginning statement: "All highlighting in green denotes agreement between bargaining representatives of UFU & FRV." Nearly all terms are highlighted in green, save for a number which are identified as concerning wages or allowances.

[81] On 3 July 2023, the UFU sought an update on FRV's wages offer. On 7 July 2023, FRV stated "We aim to provide you with the offer in writing on Monday 10 July 2023." Despite that indication, no such offer was put.[57]

[82] On 26 July 2023, the UFU provided a revised Version 14[58] and Analysis of Changes table, which corrected an inadvertent omission from the previous version.[59]

[83] On 28 July 2023, the UFU filed its application for an intractable bargaining declaration. The events following this date can be summarised more succinctly.

[84] On 7 August 2023, FRV wrote to the UFU under cover of a letter titled "Re: Bargaining – Operational Agreement" (7 August letter).[60] The initial parts of the letter were as follows (emphasis added):

> "As you are aware, formal bargaining for the replacement Operational Agreement has been underway for a number of years, with informal bargaining in place since July 2020 and formal bargaining commencing in April 2022. Much progress has been made between the bargaining parties in establishing a framework for the replacement Operational Agreement that will support future harmonisation of Fire Rescue Victoria's (FRV's) workforce.
>
> While FRV and the bargaining representatives have been in direct negotiations, as a government agency, any offer made by FRV, and all matters agreed in-principle are subject to government approval and authorisation. FRV has consistently reinforced this message throughout the bargaining process.
>
> In accordance with the Victorian Government's 2023 Wages Policy and the Enterprise Bargaining Framework (the 2023 Wages Policy), FRV is pleased that they have been authorised by the Government to make a settlement offer.
>
> On this basis, FRV provides the following settlement offer to the United Firefighters Union (UFU) and other bargaining representatives in relation to a replacement Operational Agreement: …"

[85] The letter then set out the financial terms of the offer before proceeding to explain that "there are some elements that FRV has not been authorised by the government to include in the replacement Operational Agreement as they could result in additional unbudgeted costs." Those elements were identified as any reference to a firefighters registration board and any clause that would allow the Commission to arbitrate for any extra claims.

[86] The letter stated a further qualification to the effect that the offer would be "revised" if the Commission made a determination on the UFU's Efficiencies Application or in relation to a different application (C2023/2071) before the Commission for an increase in allowances that would affect allowances for operational staff. A further item concerned funding for "staff increases" (which were noted as having not been approved at that time), although the letter expressed the view that this issue "would not result in a change to the replacement Operational Agreement."

[87] The letter then concluded:

"This settlement offer is being put in the context of an overall package, provided on a "without prejudice" basis.

FRV will be seeking a s240 conference with the FWC to enable discussion of the settlement offer."

[88] The UFU's response, by a letter to FRV on the same day, was swift and direct. It is unnecessary to summarise its four pages although the statements in the opening paragraph encapsulate its view, namely that FRV's offer was "rejected outright" and was "clearly incompatible with the good faith bargaining obligations" under the FW Act.[61] The UFU's letter then set out a chronology of bargaining events before a heading "The UFU's Position." The UFU's position was stated to be as follows:

"Your letter of 7 August 2023 is suggestive of an intention to resile from a number of agreements already made by FRV in the proposed draft agreement. These agreed clauses are:

(a) The withdrawal from agreement to the longstanding clause on allowances. This represents a serious diminution in the conditions of UFU members. This clause has been used, often by practical agreement between the parties, to obtain minimal increases for firefighters in circumstances where bargaining for wage increases has taken an inordinate length of time, just like the current situation. In fact, as you are no doubt aware there is a claim currently reserved by Wilson C in which FRV agreed that there should be an increase under this clause pending resolution of the current drawn-out bargaining process.

(b) The withdrawal of agreement to the Firefighters' Registration Board clause. It is hard to see that this relates to funding issues as opposed to political issues arising from other litigation.

(c) While your letter does not expressly state it, it makes clear that you now wish to resile from agreement over staffing increases. These were agreed through a process in which FRV and the UFU sought to identify what was necessary for the safe operation of FRV. This is a significant betrayal of the process of co-operation which has been undertaken by the parties in these negotiations, and a betrayal of UFU members.

Additionally, your offer fails to recognise or to give effect to the agreement between FRV and the UFU that efficiencies achieved during the creation of the FRV, which were only achieved through UFU co- operation, and were intended by all parties to be utilised to fund wage increases. Those efficiencies on FRV's figures amount to $117m. The increases in your offer come nowhere near that figure. The bad faith involved in this about face, which was detailed in my letters to you of 7 March 2023 and 27 March 2023, has prevented any prospect of genuine agreement being reached in bargaining.

Your offer is made on the eve of the first hearing of the UFU's intractable bargaining application (listed on 9 August 2023). Aside from matters related to the increase in quantum of wages and allowances everything else was agreed, and you have gone on

> record to that effect. This offer is rejected because it is not a genuine offer, it is nothing more than a cynical, disingenuous and transparent attempt to reframe the issues that will be liable to be arbitrated in an intractable bargaining workplace determination. It is seen by the UFU as such and is rejected out of hand."

[89] Further correspondence followed, which is unnecessary to summarise. It suffices to observe that the UFU's position was that the "only" thing the parties were bargaining about was the quantum of wages and, in its view, FRV's contrary statements were "part of a tactical ploy."[62]

[90] As noted above, on 4 October 2023, the Full Bench of the Commission made an intractable bargaining declaration in respect of the matter and ordered that there be a post-declaration negotiating period starting on 4 October 2023 and ending on 18 October 2023.

[91] While correspondence and communications between the parties ensued after 4 October 2023, by 18 October 2023, the parties had not reached agreement on the "overall package." On that final day of the post-declaration negotiating period, FRV wrote to the UFU in the terms that relevantly concluded:[63]

> "**UFU Rejection of the Package and Government Approved FRV position**
>
> As you are aware, the 7 August Offer reflects the terms (including, amongst other things, proposed salary increases, lump sum payments and certain conditions) that the Victorian Government advised FRV it is prepared to approve on an overall package basis. FRV has not been authorised to agree to any other proposal and it is clear that UFU have rejected the 7 August Offer, including wages and conditions.
>
> Unfortunately, in circumstances where FRV has made it clear that the 7 August Offer was put as a package, the UFU's rejection of this package means that there are currently no matters that meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination.
>
> Therefore, whilst it is not FRV's preference, given the UFU's intractable bargaining application and the status of bargaining outlined above, the matter will need to proceed to the Commission for the making of a workplace determination."

[92] We record briefly that the evidentiary material filed by the UFU and FRV was extensive in volume. The evidence described in this decision, based as it was on documentary material, was not of itself controversial. The dispute about that evidence concerns its significance.

[93] However, the parties led evidence about a number of other matters. While we have touched upon some particularly salient aspects of the evidence in the following paragraphs, we have not sought to summarise its totality. Notwithstanding, we have considered the evidence as a whole and, in particular, by reference to the question of whether there were "agreed terms" for the purposes of s 274(3) between the UFU and FRV.

[94] As is commonly the case, some of the evidentiary material was not controversial, albeit not directly probative, such as general background material or contextual material to explain why certain actions were taken or not.

[95] Other material was of greater controversy. The UFU contends that the Commission should approach the evidence of Ms Crabtree with caution. It notes that unlike the direct evidence given by Ms Campanaro for the UFU, Ms Crabtree was not involved in negotiations until mid to late 2022 and aspects of her evidence were based on information derived from other unidentified sources, or omitted from inclusion.[64] In circumstances where Ms Crabtree did not commence her role with FRV until July 2022, we accept that any evidence given by Ms Crabtree in relation to specific aspects of the bargaining meetings prior to this time is of limited probative value. However, we do not understand Ms Crabtree's evidence to be solely directed to bargaining meetings, and it addresses matters including the industrial framework within which FRV engaged in bargaining[65] and the steps taken during the post-declaration negotiating period between 4 October and 18 October 2023.[66]

[96] Ms Crabtree was cross-examined at some length about evidence in the First Crabtree Statement describing private communications between FRV and the Minister's office or the Government in about July 2023.[67] Various calls for documentary productions were made (and responded to). We note Ms Crabtree's evidence about those matters was contained in the First Crabtree Statement, which was filed in support of the making of an intractable bargaining declaration. In that context, the private communications between FRV and the Government were potentially relevant to the decision to make the intractable bargaining declaration, although we do not consider them relevant to the question of whether, objectively assessed, there were "agreed terms" for the purposes of s 274(3) of the FW Act.

[97] Ms Crabtree was also challenged under cross-examination[68] about the authorisation FRV was given on 15 June 2023 by the Government to put a revised settlement position to the UFU. The offer, which was ultimately contained in the 7 August letter, did not specify the specific condition nominated by Government, set out in the First Crabtree Statement,[69] that should the UFU reject the offer in the 7 August letter, FRV "will reserve its rights to withdraw in-principle agreement to retain some or all of the restrictive clauses contained" in the current agreement. Ms Crabtree accepted this was so during cross-examination. The UFU submits that FRV's contention that the offer contained in the 7 August letter was framed and approved by Government is not borne out having regard to the nature of the Government's authorisation and the express terms of the 7 August letter which omits the Government's condition.[70] Nor should the Commission infer, it is submitted, that the UFU understood the dramatic consequence that would follow as a consequence of rejecting the offer.[71] We will return to this issue in our consideration later in this decision, although we indicate at this point that Ms Crabtree's subjective understanding of the effect of the 7 August letter is not a matter we consider is objectively relevant.

[98] Another area of controversy concerned the testimonial statements by witnesses as to what was said or not said at particular meetings between the UFU and FRV and, in particular, evidence by those witnesses stating, to the effect, that various matters were "agreed" or not between the parties. For example:

- In the Third Crabtree Statement, Ms Crabtree states that, at the time the UFU's intractable bargaining declaration was made on 28 July 2023, "no matters had been agreed between FRV and the UFU." Ms Crabtree states this was "because" (among other matters) "FRV has, throughout the bargaining process, made it clear to the UFU (and other bargaining representatives) that any in principle agreement on the inclusion of particular clause" was subject to Victorian Government approval.[72]

- In the Third Campanaro Statement, under the heading "The process of reaching agreement during bargaining" Ms Campanaro makes numerous references to "agreed clauses" and "agreed items" or the "matters agreed."[73] Other examples include rolled-up evidence regarding occasions (not specified) where a representative for FRV – Mr Parkinson – said some of the matters were subject to Government approval or a package. Mr Parkinson was said to have been challenged by the UFU "[w]henever" he made such statements by being asked "in effect" if the "matter was agreed or not," and he replied it was agreed.[74]

- In the Second Kefalas Statement, Mr Kefalas said that, during bargaining, "the parties agreed on clauses as they progressed discussions." He said further that there "was no qualification" in relation to the matters "agreed" between the parties concerning non-wage related clauses "until at least August 2022."[75]

[99] In a similar respect, in the Second Kefalas Statement, Mr Kefalas referred to events "post-August 2022" in which he said FRV "indicated" for the first time that FRV required Government approval on certain non-wage related matters.[76] How the matter was "indicated," what words were said, by who or when were not provided except in a summary way.

[100] Mr Kefalas held a specific responsibility for negotiating staffing numbers.[77] Mr Kefalas describes three meetings "prior to formal bargaining" (being prior to about April 2022). He gives a summary of "these meetings" and then states that, after "the UFU had responded to all of [FRV] Commissioner Block's questions, he expressed his agreement to the Plan to increase the capability (that is the staffing numbers, infrastructure and appliances)…"

[101] We do not consider that the matters we have described at [98]-[100] above to be sufficiently probative.

[102] Of greater reliability, having regard to its specificity, is evidence such as Ms Campanaro's statement regarding the first "formal" bargaining meeting on 26 April 2022. Ms Campanaro states there was "no discussion" at that meeting of "any qualification" that might attach to agreements reached by the parties during bargaining and "any" discussion of the wages policy was confined to early topics she had listed (which were FRV having "approval" to bargain, that there was an "extension" 2019 Wages Policy until 1 August 2022, and that the 2019 Wages Policy was more beneficial than the 2022 Wages Policy). Further, Ms Campanaro states that there was an "agreement" at the first formal bargaining meeting that conditions could not be diminished from those in the 2020 Agreement.[78]

[103] A particular area of evidentiary controversy concerned the UFU's awareness of various elements of the Government's wages policies. Ms Campanaro was cross-examined about this

matter. Ms Campanaro was apparently unaware of, or could not recall, a number of matters regarding significant elements of the Government's then 2019 Wages Policy, including:

- The "enterprise bargaining framework" section within that policy was not a matter Ms Campanaro had paid attention to.[79]

- Ms Campanaro could not recall "firefighters" being referred to under the "Major agreements" part of that policy.[80]

- Ms Campanaro was unaware of the concept, within the "Approval requirements" part of the policy, that all enterprise agreements required approval of the government prior to the commencement of any formal approval requirements outlined in the FW Act. Ms Campanaro was aware, however, that FRV was required to obtain government approval to commence bargaining.[81]

[104] It was put to Ms Campanaro that she had read the 2019 Wages Policy quite closely. Ms Campanaro denied that proposition and, having regard to her lack of understanding or recall about other significant elements of the wages policy that applied to firefighters, we accept her denial. Nonetheless, Ms Campanaro was plainly aware of the existence of the 2019 Wages Policy and that FRV considered itself bound by that policy.[82]

[105] We are readily satisfied that the UFU, as a factual matter, was aware of each relevant iteration of the Government's wages policy and was also aware that FRV considered itself to be bound by such policies.

Applicable principles

[106] There did not appear to be any general disagreement between the parties[83] that the task of statutory construction begins and ends with consideration of the statutory text, read in context, having regard to the purpose and policy of the provision under consideration, in particular the "mischief" the provision is seeking to remedy.[84]

[107] While the parties were generally aligned regarding the principles of interpretation, they differed as to how those principles were to be applied to the construction of the statute and the application of the facts to them.

[108] Section 274(3) defines an "agreed term" for an intractable bargaining determination. There are a number of elements to the section:

- *First*, s 274(3) has, at its centre, a requirement that certain matters be "agreed";

- *Second*, the FW Act does not state that a term must be "agreed" *simpliciter*. The subject matter of what must be "agreed" is that there be a "term" of the proposed enterprise agreement concerned which "should be included in the agreement";

- *Third*, that agreement must be between the "bargaining representatives"; and

- *Fourth*, that agreement must exist at a defined point of time. Where there is a post-declaration negotiating period in place, the point in time is at the end of that period. If there is no post-declaration negotiating period, the point in time is at the time the intractable bargaining declaration was made.

[109] It is uncontroversial that in respect of the third and fourth elements, summarised above:

- the UFU and FRV are the bargaining representatives; and

- as there was a post-declaration negotiating period, the relevant time for an agreement to subsist is therefore at the end of 18 October 2023 (being 11.59pm on that date).

[110] The other elements are in controversy.

[111] The FW Act does not provide a definition of "agreed," as it applies to the first element of s 274(3) described above. Nor does the statute give definitional guidance as to what is meant by the words "should be included in the agreement."

[112] We proceed on the basis that any agreement is a matter to be determined *objectively*, having regard to factual matters known between the parties. We did not understand any party or the Minister to take a different position.

UFU submissions

[113] The UFU notes (and we agree) that, strictly speaking, there can be no enterprise agreement at all until the employer puts a proposed enterprise agreement - as a whole - to the ballot of its relevant employees. In bargaining parlance, the UFU states that often parties take the position that "nothing is agreed until everything is agreed," which it says is otiose because, at law, that is the only position until employees have approved by ballot a proposed enterprise agreement.[85]

[114] What flows from this, on the UFU's position, is that the use of the word "should" indicates that the focus is on some future time when the proposed agreement is finalised.[86] The UFU further contends that the word "should" means the requirement for s 274(3) is "only that a *conditional* agreement be reached on a provision" (our emphasis).[87]

[115] The UFU notes the word "should" reflects a position of desirability, as opposed to the imperatives "must" or "shall." Further, the question is whether the parties have agreed a *term* should be included in the proposed agreement, not a broader agreement.[88]

[116] As we understand the UFU's submissions, a reference to a conditional agreement is met through the "normal progress of bargaining" where the "parties discuss a matter, settle or reach agreement on it, and move onto the next one."[89]

[117] The UFU submits that support for the above propositions is derived from the purpose of the intractable bargaining provisions, which is to allow the Commission to "break deadlocks"

in bargaining by determining "only" those matters that remain in issue at the conclusion of negotiations.[90]

[118] Here, the context of the FW Act is said to support the UFU's preferred construction. The UFU relies upon one of the objects of the FW Act in s 3(f) which emphasises enterprise-level collective bargaining and submits that the legislation permits parties to determine the content of enterprise agreements with the involvement of the Commission only where expressly authorised by a provision of the FW Act. The UFU submits that the limitation on the Commission's arbitral powers is reinforced by s 270(2) which is designed to facilitate the making of a workplace determination that includes all of the terms agreed between the parties and thus s 269 (which deals with when the Commission must make an intractable bargaining workplace determination) is located in Part 2-4 of the FW Act, titled "FWC's general role in facilitating bargaining."[91]

[119] In light of its position that s 274(3) requires only a conditional agreement be reached on a provision, the UFU submits that a construction of s 274 that required "formal agreement" on terms would undermine the statutory purpose and could be circumvented by facile and transparent stratagems.

[120] As to the temporal question of when an agreed term must subsist, the UFU contends that the purpose of the post-declaration negotiating period is to narrow the issues in dispute between the parties and it is "inconsistent" with the purpose of the intractable bargaining provisions for parties who have previously agreed on terms to "withdraw from such agreement."[92]

[121] The UFU further emphasised, that for the purpose of s 274(3), the focus is expressly about agreement between the bargaining representatives "and not outsiders."[93] It submits the fact that the Minister may not have agreed to certain term or even that FRV may have failed to comply with a Government policy on enterprise bargaining, cannot affect matters agreed between FRV and the UFU as bargaining representatives.[94]

[122] Having regard to the above matters, the UFU urges the Commission to find that all terms identified as "agreed" in Version 14 were agreed terms for the purposes of s 274 of the FW Act with the only matters remaining in issue at the conclusion of the post-declaration negotiating period being the quantum of wages and allowances and the funding for the minimum staffing provisions (the terms of which were otherwise agreed).

FRV and Minister submissions

[123] FRV submits that there are "regrettably" no agreed terms within the meaning of s 270(2) of the FW Act. This is said to arise because terms previously agreed "in principle" during bargaining were subject to (a) overall agreement of a package of terms, including wages and allowances, and (b) Victorian Government approval, neither of which it is said have occurred.[95]

[124] FRV and the Minister submit that because these conditions remain unfulfilled, there can be no "agreed term" for the purpose of s 274 of the FW Act.

[125] FRV submits, having regard to the Macquarie Dictionary meaning of the word "agree," that the term requires a determined or settled agreement. It contends that there is no textual

support for reading s 274(3) as extending to a term agreed only in principle and subject to final approval. The requirement to include "agreed terms" in an intractable bargaining workplace determination, is said is to give effect to the "consensus" of the parties.[96]

[126] FRV says that its agreement was "only ever" in principle, or conditional in light of its requirement to obtain approval from the Victorian Government before offering, or agreeing to, any terms. FRV contends that its position is consistent with the conclusion of the Full Bench in *Australian and International Pilots Association v Qantas Airways Limited (ALAEA v Qantas)*[97] that an employer's agreement to a term, expressed as being contingent upon acceptance of a suitable overall package was not an agreed term because "the condition attaching to the …agreement in respect of [the] matters was not satisfied…".[98]

[127] With respect to *ALAEA v Qantas*, the Minister submits that the Full Bench did not define the circumstances in which agreement subject to an overall satisfactory package might be sufficient to amount to an agreed matter. The Minister's position is that the present circumstances could not amount to a binding agreement because agreement was subject to both an overall package *and* the Government's authority and further, the bargaining parties had not reached agreement on the essential monetary terms.[99]

[128] FRV says the fact that an agreement is made in principle is a specific qualification on a final determined or settled agreement, such as to facilitate continuing negotiations, but subject to final confirmation or approval. It submits that to date, that condition – being Victorian Government approval – has not been satisfied. Victorian Government approval has been given to FRV to offer or agree on the basis set out in the 7 August letter.[100] Accordingly, it is contended that none of the terms which were the subject of FRV's in principle agreement during bargaining, but which did not have the requisite Government approval, are agreed terms.[101]

[129] In any event, FRV submits, the relevant time to assess agreed terms is expressed s 274(3)(a) to be at the end of the post-declaration negotiating period, namely 18 October 2023. FRV's position is that on that day, there was a clear statement from FRV that it did not have approval to agree to anything other than the 7 August letter, that the 7 August letter was put as a package and that the UFU had rejected, and continued to reject, that package. FRV submits that "whatever argument may have been had" by the parties about the status of the terms agreed in principle by FRV at any other point during bargaining, at the relevant time, those terms were not agreed.[102]

[130] FRV therefore contends that all of the matters between the parties are "technically at issue." Despite this, FRV submits that with the Victorian Government's authorisation, other than the matters FRV is not authorised to agree to or support,[103] the matters included in Version 14 are not contested.[104]

UFU reply submissions

[131] The UFU contends that FRV and the Minister have misconstrued the FW Act and their contention that there are no agreed terms is erroneous. The UFU says that FRV and the Minister overlook the purpose of the intractable bargaining provisions as an "aid and adjunct" to the statutory scheme for enterprise bargaining. In this way, a term under s 274(3) could never be a

"finally agreed term" because terms can only be finally agreed by a ballot of the employees to be covered by the enterprise agreement.[105]

[132] The UFU contends that there will always need to be an assessment of whether a term is agreed, or only agreed subject to other matters being resolved. Such an exercise will involve an objective assessment of what passed between the bargaining representatives and thereby strikes a balance between promoting the evident purpose of the legislation without imposing terms on parties which have not been "truly agreed."[106]

[133] The UFU submits that FRV's reliance upon the reaching of a "consensus" by the parties before an enterprise agreement is "made" is flawed,[107] and exposes the constructional error with FRV's approach.[108] Further, the UFU says that FRV misstates the finding in *ALAEA v Qantas*, with the Full Bench stating that there may be circumstances where agreement to a matter subject to an overall satisfactory package "might mean that matter is an agreed matter…".[109]

[134] Further to its position as set out at [115] above, the UFU submits that FRV and the Minister fail to recognise that the focus of s 274 is on "a term" and not on an overall agreement, with such approach eliding the difference between the concept of agreement upon the desirability of including a single term in an agreement (as s 274 requires), and the concept of a binding overall agreement.[110] Specifically, it is said, having regard to the Minister's submission as set out at [127] of this decision, that the Minister fails to grapple with the focus on a single term where there is no binding overall agreement and irrespective of whether other terms (including essential terms) remain in issue.[111]

[135] The UFU rejects the contention put against it[112] that bargaining will be impeded if parties negotiating on a conditional basis, or a package basis, are held piecemeal to in principal agreement on discrete clauses and then subjected to an arbitration outcome on the core issues of wages and allowances. The UFU's position is that previously held views about "what is and isn't possible under enterprise bargaining have to be reviewed" to take account of the reforms introduced by the SJBP Act. It says that to do otherwise deprives the reforms of any effect. Holding bargaining parties to terms agreed "along the way" is a function and effect of the amendments to the FW Act and ought to be given an appropriate generous construction that gives effect to their purpose as remedial legislation.[113]

[136] The UFU notes that neither FRV nor the Minister address its contentions, summarised at [115] of this decision, as to the temporal aspect of the statutory language and the importance of the word "should" in the context of s 274. The UFU urges against adopting the construction sought by the Minister and FRV, which it contends would lead to an outcome where there are no agreed terms notwithstanding three years of intensive bargaining.[114]

[137] The UFU asserts that the evidence establishes that at least by 26 July 2023 (being the exchange of the revised Version 14), agreement was reached between the bargaining representatives for the purposes of s 274 of the FW Act on all matters except the quantum of wages and allowances.[115] It contends that this is consistent with the 19 June 2023 Statement issued by Commissioner Wilson with the agreement of FRV.[116] The UFU says that FRV's offer in the 7 August letter was made after the UFU commenced these proceedings and reflected the views of the Government, not FRV as the relevant bargaining agent – where only the latter are relevant.[117]

Applicable principles

[138] Section 274(3) requires the bargaining representatives to have "agreed" that there is a "term" that "should be included in the agreement." That agreement must co-exist at the point in time defined by the statute, which in this matter is at the end of 18 October 2023.

[139] The amendments made to s 274 by the SJBP Act adopted the same formulation for the subject matter of terms that are "agreed" as was, and still is, used for the "industrial action related workplace determinations" in s 274(2), as was previously used for low-paid workplace determinations in s 274(1) (now repealed), and as was used for "bargaining related workplace determinations" in s 273(3) (prior to its current form). We do not consider that Parliament intended a different meaning for the current expression of s 274(3) with the amendments by the SJBP Act, although it is evidently the case that the SJBP Act contemplated readier access to the intractable bargaining provisions compared to serious breach provisions they replaced, the latter having "not been effective" in assisting parties to resolve bargaining disputes.[118]

[140] The FW Act does not define the meaning of "agreed" in s 274(3). We consider its ordinary meaning applies. "Agreed" in this context is the past participle form of "agree." Relevant definitions of "agree" from the Macquarie Dictionary[119] include "consent," "be of one mind," and "come to an arrangement or understanding."

[141] To have "agreed" for the purpose of s 274 does not require formal agreement necessary for contract law. However, the ordinary meaning of "agreed" in this context requires there to be a consensus or meeting of the minds between the parties about the subject matter of the said agreement. The ordinary meaning accords with judicial consideration of the concepts "arrangement" or "understanding" as those terms are used in the *Competition and Consumer Act 2010* (Cth) (CCA) and its predecessors. In the CCA, those terms appear in statutory provisions that variously prohibit parties making or giving effect to a provision of a "contract," "arrangement" or "understanding" having statutorily-proscribed anti-competitive purposes or effect.

[142] While the statutory subject matter under the CCA is quite different to the matters engaged by s 274 of the FW Act, the established cases[120] dealing with looser forms of agreement – namely, arrangements or understandings – recognise a "spectrum of consensual dealings," with contracts having a well-understood degree of legal formality at one end and "understandings" at the other.[121] But at all parts of that spectrum, there remains a requirement for a meeting of minds or consensus[122] about the proscribed statutory subject matter, and a mere hope or expectation is insufficient, even when that hope or expectation in one party was aroused by the other.[123]

[143] It is evident from the nature of such consensual dealings that parties are free to resile from them.

[144] As to the subject matter of the agreement – being a "term" that "should" be included – we agree with the UFU's submission that the term "should" is necessarily future looking. But this does not alter the requirement that the relevant parties must "agree" on that subject matter and be in agreement at the time required by the statute.

[145] Whether the parties are "agreed" is a matter to be assessed objectively. Neither party suggested to the contrary.

[146] While we accept the UFU's submission that the nature of the agreement is not to be approached in a formal, or legalistic manner, there remains the requirement that, as a *factual* matter, the bargaining representatives need to have *agreed* that a term of a proposed enterprise agreement *should be included* in the proposed agreement.

[147] Where a party has, objectively assessed, genuinely reserved its position on particular terms or the entire agreement to the effect that matters are only agreed "in principle" or are "subject to" a satisfactory overall package being determined, then that is strongly indicative that those matters would not be "agreed" for the purpose of s 274(3).

[148] The circumstances of each case will need to be determined on the evidence in that matter. Simply making statements during negotiations that particular terms or the entire agreement is agreed "in principle" does not automatically preclude a finding of "agreed terms" for the purpose of s 274(3) although it may do so in the particular circumstances.

[149] The ritual incantation of words of qualification such as "in principle" or the recourse to an exclusion clause effectively long buried in antecedent negotiations may not, of itself, act as a barrier to a finding that there are "agreed terms" in a particular bargaining agreement. The search for an agreed term is for agreement in substance not form.

[150] In industrial bargaining, parties will commonly "give and take" during the bargaining process. One party will often make a concession over a particular issue on the basis that it will extract more favourable concessions on a different issue.

[151] The bargaining process is not necessarily linear nor evenly balanced, although it sometimes might be. For example, a particular issue might be very valuable or sought after by one party but the other party is indifferent to it. The indifferent party might be willing to concede that issue for little (or perhaps for goodwill or for the avoidance of protected industrial action) or it might refuse to yield to that claim without maximising (in that party's view) what other benefits it can extract from any concession.

[152] In *Target Australia Pty Ltd v Shop, Distributive and Allied Employees' Association,*[124] Bromberg J made observations in the context of attempting to find a "common intention" between parties in relation to clauses of an enterprise agreement. His Honour stated:

> "55 It is not to be expected that an industrial bargaining process will always produce an agreement where each entitlement provided will be either objectively reasonable or rational and in harmony with other entitlements, or based on some objectively discernible purpose that may have explained the reason for its adoption in a predecessor agreement made under a different bargaining process: see *Shop Distributive and Allied Employees' Association v Woolworths Limited (*2006) 151 FCR 513 at [26] (Gray ACJ) (*SDA v Woolworths*). That is not to say that industrial sensibility may not provide a guide to intent, particularly where one construction of a provision would not further the industrial interests of either the employer or its employees. But it is to say that the

> reality of industrial bargaining must be taken into account in the search for intent. It must be recognised that industrial bargaining is driven far more by competing self-interests and economic power than by an attempt to rationally balance the legitimate interest of both the employer and employees in the way that arbitral awards are made or in the way in which it is assumed legislation like the FW Act is made."

[153] While his Honour's observations were in a different context, his observations about the "reality" of industrial bargaining are informative to discerning whether terms are those that the parties agree "should be included in the agreement."

[154] In the bargaining process, progress is often made on the basis that there will be a complete and final agreement for all matters, in which case concessions made by each party about matters during the bargaining journey need to be viewed in that context. Commonly, although not always, the most significant issue will be wages. In such a case, concessions made by a party will often be conditional upon the final issue of wages being (in that party's view), satisfactory.

[155] Section 274(3) defines agreed terms for an intractable bargaining workplace determination as a term that the bargaining representatives have (at the relevant time), agreed "should be included in the agreement." This directs attention to the potential final form of any agreement. While parties may sometimes agree that, regardless of any other issues, some terms should go in an agreement, s 274(3) does not extend to terms where there is a conditional reservation attached to all terms (or all key terms) being satisfactorily arrived at.

[156] When industrial parties are bargaining, they are doing so to secure a final package that is, overall, better than no new agreement at all. The final package will inevitably include a number of terms that each party is sufficiently happy with and, quite likely, other terms that the parties wished was excluded. Concessions through the "give and take" of bargaining before a final package is approved do not, of themselves, indicate that the bargaining representatives consider all the terms up to the point should be included in a final package. They may do so for some terms, but for others they are either expressly or implicitly only doing so on the basis that the final package will be suitable. We consider so much is self-evident in industrial bargaining. What the position will be in a particular bargaining process will be determined on the circumstances of that process.

[157] Similarly, a party that conditionally states (however that condition is expressed) that certain terms should be included in an agreement has not necessarily agreed, as factual reality, that those terms should be included in the agreement. All that party might be conveying is that those terms are agreed on the basis that a satisfactory package will be achieved. A genuine conditional reservation is inconsistent with an agreement that the particular terms being discussed "should" (without reservation) be included in the proposed enterprise agreement. If s 274(3) provided for terms that were conditionally agreed, the position would be different. However, the statute does not provide for conditional agreements about terms and we consider it would constitute a significant alteration to the bargaining dynamic for enterprise agreements under the FW Act if it did so. We do not consider this was Parliament's intention.

Consideration

[158] We earlier found, at [105] of this decision, that the UFU was aware of each relevant iteration of the Government's wages policy and that FRV considered itself to be bound by such policies. It follows from this finding that we consider that at all times the UFU has been aware that all offers are to be made on an in-principle basis, in that such offers are subject to Victorian Government approval, and that to be approved by Government, the proposed agreement must meet all the conditions specified in the applicable wages policy.

[159] Further, we are satisfied and we find that the UFU was specifically aware of the requirement for the proposed enterprise agreement to be approved by the Minister. The 20 February 2020 Heads of Agreement entered into between the UFU and the then Minister was acknowledged to be consistent with the Victorian Government's wages policy and expressly dealt with bargaining matters, including a commitment by the parties for making the "proposed FRV Enterprise Agreement."

[160] The objective requirement that FRV was bound by the wages policies in force is a determinative matter that is entirely inconsistent with FRV having agreed that any term should be included in an enterprise agreement, except on a conditional basis that it remained subject to final approval (which had not been provided).

[161] The existence of the Victorian Government's wages policies in force from time to time is a "notorious fact" that industrial bargaining parties in Victoria affected by those policies can be taken to know about. While it is true that employee bargaining representatives are not directly subject to those wages policies, the policies permeate industrial bargaining with Victorian Government agencies because the Government agencies are bound by them. Contrary to the UFU's position,[125] it was unnecessary for FRV to state at every meeting or in every communication that an item "agreed" during the course of bargaining was, strictly, agreed subject to compliance by FRV with the applicable wages policy in place at the time.

[162] In any case, the evidence demonstrates that from at least August 2022, FRV did make clear statements indicating that compliance with the wages policy was required. In August 2022, following the lodgement of the UFU's Efficiencies Application, FRV explained in bargaining that Government approval was required in relation to all matters, including non-wages related matters.

[163] FRV's Form F11 dated 4 November 2022, which it lodged with the Commission in the context of an application for the Commission to deal with a bargaining dispute, noted that bargaining had occurred on the basis of agreement in principle, subject to reaching an overall agreement. The Form F11 application further stated that it was intended that the UFU would provide FRV with an updated draft enterprise agreement (which occurred, as Version 12) reflecting the amendments agreed in principle. We accept that the matters contained in the Form F11 to which we have referred accurately reflects FRV's approach to bargaining, having regard to the industrial significance of a wages policy for bargaining in Victoria and FRV's understanding of the binding nature of such policies upon it.

[164] On 29 November 2022, FRV provided a response to the draft enterprise agreement provided to it in the form of Version 12. In that response, FRV stated that that the clauses in

Version 12, unless otherwise commented on were agreed in principle by FRV, subject to final agreement on an overall package of provisions (and subject to the UFU's Efficiencies Application).

[165] On 10 March 2023, FRV made a monetary offer to the UFU, said to be authorised in accordance with the 2019 Wages Policy. This offer did not address non-wage related matters and preceded a further statement by FRV on 14 March 2023 in which FRV reiterated its position expressed to the UFU on 29 November 2022 as set out at [164] above. FRV further stated that it had maintained, and continued to maintain, that position throughout bargaining.

[166] In this context, the 19 June Statement issued by Commissioner Wilson, which is extracted in its entirety at [79] above is instructive. The Statement addresses the restrictions on progressing the "union's monetary claims" in the context of the proposal to update the then applicable wages policy and the "lack of clarity about the quantum of increase that could be considered by FRV as well that FRV had no authority to put forward a wages proposal for the UFU's consideration." The Statement proceeds to consider the need for FRV "and those who instruct them" to take steps to respond to the UFU's claims. We are satisfied that the 19 June Statement was made in circumstances where the bargaining parties and the Commissioner understood that any matters resolved between the UFU and FRV had been within the parameters of the relevant wages policy.

[167] The UFU draws a distinction between the concept of reaching a final agreement, as against the bargaining parties' desire to include a single term in an agreement, if a final agreement is reached. We accept that the focus of s 274(3) of the FW Act is upon agreed *terms*. On an objective assessment of the above matters, we are satisfied that the bargaining representatives did not reach a consensus or meeting of the minds on the terms that should be included in the agreement – the qualifications attached to FRV's "agreements" prevent them being agreed terms for the purpose of s 274(3).

[168] The UFU states that FRV had ostensible authority to "agree" to non-wage items in bargaining and that FRV did so by various statements and conduct to the effect that many matters were "agreed." In the context of the bargaining realities in place where bargaining is taking place under the auspices of the Victorian Government's wages policy for a "Major Agreement," at no point did FRV conduct itself so as to indicate, objectively assessed, that the requirements of the wages policies for final approval did not apply or had been given. An "agreement" that remains subject to a formal process of final review and approval under the wages policy is not an agreement that particular terms should be included in the proposed enterprise agreement that the parties were seeking to negotiate. The position regarding ostensible authority might be different if FRV, without authorisation, asserted that final approval had been given under the relevant wages policy to make an offer, but this was not the case before us.

[169] It follows that the bargaining parties did not make any "agreed terms" for the proposed enterprise agreement.

[170] We have been presently focussed on whether there were any terms that the parties agreed should be included in the proposed agreement up to and including the issuing of the Statement on 19 June 2023 by Commissioner Wilson and for the exchange of Version 14 on 6 July and

26 July 2023. We have done so because the UFU's position is that, *firstly*, there were "agreed terms" constituted by the conduct of the parties up until that point in time and, *secondly*, that FRV did not depart from that position subsequently. As the foregoing conclusions indicate, we disagree with the UFU's first premise concerning the establishment of "agreed terms" as at 19 June 2023 or 26 July 2023, because we do not consider there were any terms objectively agreed by the parties that should be included in the proposed enterprise agreement.

[171] In any event, should our conclusion at [170] be wrong, we are satisfied that the 7 August letter, which was made on an overall package basis and clearly identified a number of matters that were not to be included in the proposed agreement, is inconsistent with any term being agreed in principle. Further, the 7 August letter addressed FRV's position that any offer made by it and all matters agreed in principle, are subject to "government approval and authorisation" and that FRV had consistently reinforced this message throughout the bargaining process.

[172] In this context, any term agreed in principle was surpassed by the 7 August letter, which contained an "overall package"[126] offer which the UFU rejected "out of hand."[127] Further, the UFU did not agree to the removal or amendment of the specific clauses of concern to the Government which were set out in the 7 August letter. In these circumstances, the position at this time was that there were no agreed terms for inclusion in an agreement. This is so irrespective of whether the 7 August letter contained the ultimatum which the Minister had sought be included when that offer was authorised by Government on 15 June 2023 (and which the UFU was unaware of). Notwithstanding the significance the UFU attaches to this purported omission, the content of the 7 August letter is to be construed on its terms, having regard to the objective background facts known to the parties. It is readily apparent from the UFU's same-day response to the 7 August letter that it construed the offer as "suggestive" of FRV's intention to "resile from a number of agreements made by FRV" notwithstanding the absence of a clear directive to that effect being included in the correspondence. Accordingly, we reject the contention that the 7 August letter is to no effect.

[173] To the extent that there is any ambiguity in respect of this matter, the 18 October letter[128] from FRV to the UFU puts beyond doubt that at the relevant time, being at the conclusion of the post-declaration negotiating period on 18 October 2023, nothing had been agreed.

[174] As noted above, the UFU contends that at least by 26 July 2023, agreement was reached between the bargaining representatives on all matters except the quantum of wages and allowances. The UFU contends that the "agreement" reached at that point in time survived the correspondence of 7 August and 18 October 2023. The UFU says that neither the 7 August letter nor the 18 October letter withdrew the terms agreed prior to those events.

[175] We are satisfied and we find that FRV had made it unambiguously clear that following the UFU's rejection of the offer in the 7 August letter, no terms were agreed either in principle, or at all. The 18 October letter was in starker terms. In the clearest of terms, that letter stated, "there are currently no matters that meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination." That statement is not merely an opinion expressed about the operation of s 274, it is an objectively manifest disclaimer by one party that it does not presently agree that any terms should be included in a proposed enterprise agreement.

[176] As stated above, while we do not accept that there was an agreement before the 7 August letter and the 18 October letter were sent, each of those letters is incompatible with the survival of some residual agreement for the purposes of s 274 coinciding until the end of the post-declaration negotiating period. Any "agreement" that did persist was premised on a conditional package requiring approval under the wages policies (which approval did not exist).

[177] Both the UFU and the Minister made submissions in effect recognising the desirability of narrowing matters in dispute during the post-declaration negotiating period, and contending that this did not occur because of the approach of the other party.[129] Having noted this, we do not consider either party acted "impermissibly" during the post-declaration negotiating period.

[178] As indicated above, the UFU has raised in its correspondence complaints about the bargaining conduct of FRV and/or the Minister. While we have considered them for the purpose of assessing whether there are "agreed terms" within the meaning of s 274(3), we are mindful that the conduct of the bargaining representatives is a matter that the Commission must consider in deciding the terms of a workplace determination: s 275(f). For that reason, we make no further observations here.

Disposition

[179] We have determined that there are no "agreed terms" within the meaning of s 274 in the matter before us. The application will be listed for a case management conference on a date to be advised.

DEPUTY PRESIDENT

Appearances:
H Borenstein, W Friend and *T Dixon* of Counsel for the United Firefighter's Union of Australia.
R Sweet and *M Garozzo* of Counsel for Fire Rescue Victoria.
C O'Grady and *F Leoncio* of Counsel for the Minister of Emergency Services (intervening).

Hearing details:
2023.
Melbourne:
December 18, 19.

Printed by authority of the Commonwealth Government Printer

<PR770962>

[1] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180 (Hatcher J, Asbury VP, Hampton DP).

[2] PR766779, 4 October 2023.

[3] *Fair Work Act 2009* (Cth), s 235A(2).

[4] Annexure LC-11 to the Third Campanaro Statement Court Book (CB) A109-A744.

[5] Ms Campanaro made two earlier statements, respectively dated 11 August 2023 and 21 September 2023, in respect of the application for an intractable bargaining workplace declaration.

[6] Mr Kefalas made an earlier statement, dated 11 August 2023, in respect of the application for an intractable bargaining workplace declaration.

[7] [2023] FWCFB 180 at [23].

[8] Following amendments made by the SJBP Act effective from 6 June 2023, there is no Division 2. Division 2 previously dealt with low-paid workplace determinations.

[9] CB A55.

[10] Transcript PN1146-PN1147.

[11] First Crabtree Statement, [12]-[13] CB D2154.

[12] PR720617.

[13] Annexure LC-19 CB A781. See also CB D2078, [6].

[14] CB D2171.

[15] CB D2177; CB A751.

[16] Ibid.

[17] CB D2180; CB A754.

[18] CB D2184.

[19] Third Campanaro Statement, [7] CB A27.

[20] CB D2203.

[21] Third Campanaro Statement, [97] CB A41.

[22] CB D2209.

[23] Third Campanaro Statement, [8] CB A27-A28.

[24] First Crabtree Statement, [33] CB D2158.

[25] Third Campanaro Statement, [34] CB A31.

[26] Third Campanaro Statement, [19] CB A29.

[27] Annexure LC-2, CB A61.

[28] Annexure LC-2, CB A62.

[29] Transcript of proceedings (Transcript) PN227.

[30] Third Campanaro Statement, [58], [103] CB A34, A42; cf Second Campanaro Statement, [6], [7] CB D2095-D2096.

[31] Annexure LC-10, CB A103.

[32] CB A103-A108.

[33] Third Campanaro Statement, [62] CB A35; cf Second Campanaro Statement, [5] CB D2095.

[34] Third Campanaro Statement, [63] CB A35.

[35] Third Campanaro Statement, [76] CB A36.

[36] Third Campanaro Statement, [76]-[92] CB A36-CB A41.

[37] CB D2212-D2222, [17].

[38] Third Campanaro Statement, [67] CB A35.

[39] Annexure LC-13, CB A757; CB D2020.

[40] Third Campanaro Statement, [85] CB A39.

[41] Annexure LC-19, CB A780.

[42] CB D2256; Annexure LC-20, CB A790.

[43] CB D2259.

[44] Annexure LC-21, CB A793.

[45] Cf Annexure JC-1 Attachment 7 CB D2224.

[46] Annexure LC-22, CB A798; CB D2267.

[47] Third Campanaro Statement, [124] CB A46.

[48] CB D2024; Annexure LC-13, CB A761.

[49] Annexure LC-23, CB A803.

[50] Annexure LC-24, CB A807.

[51] Third Campanaro Statement, [86](d) CB A39.

[52] Annexure LC-25, CB A809.

[53] Third Campanaro Statement, [129] and [137] CB A47-A48, CB A49.

[54] Third Campanaro Statement, [130] CB A48.

[55] Annexure LC-26, CB A811; CB D2192; CB D2066.

[56] Fourth Campanaro Statement, [5] CB A851 and Annexure LC-36, CB A853; Annexure LC-15, CB A763.

[57] Third Campanaro Statement, [140]-[142] CB A49.

[58] Being the version in Annexure LC-11 CB A109.

[59] Third Campanaro Statement, [69] CB A35.

[60] Annexure LC-27, CB A821.

[61] Annexure LC-28 CB A823.

[62] CB D2303.

[63] Annexure LC-35, CB A845.

[64] Transcript PN1137-PN-1138.

[65] First Crabtree Statement, [7] CB D2154.

[66] Second Crabtree Statement, [5] CB B15.

[67] Eg, First Crabtree Statement, [73] CB D2166.

[68] Transcript PN613-PN623.

[69] First Crabtree Statement, [67(a)] CB D2165.

[70] Transcript PN1044-PN1047, PN1177-PN1178.

[71] Transcript PN1180-PN1186.

[72] Third Crabtree Statement, [5] CB B77

[73] Third Campanaro Statement, [29], [32], [33] CB A30-A31.

[74] Third Campanaro Statement, [63] CB A35.

[75] Second Kefalas Statement, [29]-[30] CB A18.

[76] Second Kefalas Statement, [13] CB A16.

[77] Second Kefalas Statement, [20] CB A17.

[78] Third Campanaro Statement, [10]-[12], [14] CB A28.

[79] Transcript PN190.

[80] Transcript PN194.

[81] Transcript PN197.

[82] Transcript PN204.

[83] UFU Reply Submissions, [9]-[10] CB A866.

[84] Eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at [47].

[85] UFU Submissions, [21] CB A5-A6.

[86] UFU Submissions, [13] CB A5.

[87] UFU Submissions, [13] and [22] CB A5, A6.

[88] UFU Reply Submissions, [24]-[26] CB A869; Transcript PN1117-PN1120.

[89] UFU Submissions, [15] CB A5.

[90] UFU Submissions, [23] CB A6.

[91] UFU Submissions, [16]-[20], [22] CB A5-A6.

[92] UFU Submissions, [25] CB A6.

[93] Transcript PN918; see also UFU Submissions, [66]-[68] CB A12.

[94] UFU Submissions, [68] CB A12.

[95] FRV Submissions, [4a] CB B4.

[96] FRV Submissions, [33]-[34] CB B11.

[97] [2013] FWCFB 317; 230 IR 238 at [18].

[98] FRV Submissions, [35] CB B11-B12; see also Minister's Amended Submissions at [85]-[86], [88]-[90] CB C31-C33, C33-C34.

[99] Minister's Amended Submissions, [101] CB C36.

[100] Minister's Amended Submissions, [90] CB C34.

[101] FRV Submissions, [37], CB B12; Minister's Amended Submissions, [90] CB C34.

[102] FRV Submissions, [38] CB B12.

[103] See Minister's Amended Position Document CB C3-C6.

[104] Annexure LC-11 CB A109-A744.

[105] UFU Reply Submissions, [13]-[14] CB A867.

[106] UFU Reply Submissions, [23] CB A868.

[107] Transcript PN1012-PN1015.

[108] UFU Reply Submissions, [14]-[15] CB A867.

[109] [2013] FWCFB 317; 230 IR 238 at [18].

[110] UFU Reply Submissions, [18]-[19] CB A868.

[111] UFU Reply Submissions, [20] CB A868; Transcript PN1120-PN1123.

[112] FRV Submissions, [34] CB B11; Minister's Amended Submissions, [104]-[105] CB C37-C38.

[113] Transcript PN1126-PN1130.

[114] UFU Reply Submissions, [29] CB A869.

[115] UFU Reply Submissions, [32] CB A871.

[116] Transcript PN914.

[117] UFU Reply Submissions, [44] CB A875.

[118] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Explanatory Memorandum at [789].

[119] Seventh edition, 2017.

[120] A comprehensive summary of which was provided in *Australian Competition & Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 (O'Bryan J) at [101]-[108].

[121] Ibid, [102](a).

[122] Ibid, [102](b).

[123] Ibid, [102](c).

[124] [2023] FCAFC 66.

[125] Transcript PN1158.

[126] See paragraph [87] above and Annexure LC-27 CB A821; see also paragraph [52] above and Annexure LC-10 CB A103.

[127] See paragraph [88] above and Annexure LC-28 CB A823.

[128] See paragraph [91] above and Annexure LC-35, CB A845.

[129] Transcript PN1211, PN1318.