IN THE FAIR WORK COMMISSION

AT MELBOURNE

Matter: Intractable bargaining application (B2023/771)

Applicant: United Firefighters Union of Australia (**UFU**)

Respondent: Fire Rescue Victoria (**FRV**)

RESPONDENT'S OUTLINE OF REPLY SUBMISSIONS ON AGREED TERMS[1]

A. INTRODUCTION

1. On 17 November 2023, the UFU filed an outline of submissions in this proceeding on the question of what are the *"*agreed terms*"* under s 270(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) for the purposes of the intractable bargaining workplace determination, and what are the *"*matters at issue*"* under s 270(3) (**UFU's Submissions**).

2. In summary, the UFU's Submissions contend that the agreed terms are those shaded in green in the version of the proposed enterprise agreement contained at annexure LC-3 to the statement of Laura Campanaro dated 11 August 2023 (**14R**), and the matters at issue are the terms shaded in yellow in that document.

3. The UFU submits that the green-shaded terms are said to have been "agreed" as at 19 June 2023, when Commissioner Wilson issued a statement to that effect after a s 240 conference. The UFU submits that, <u>despite</u> FRV's agreement to those terms being subject to agreement to an overall package and Victorian Government approval, and <u>despite</u> FRV expressly stating that it did not agree to any of those terms prior to the end

[1] On 29 November 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) passed the House of Representatives. That Bill, as currently drafted, contains provisions which would amend the definition of *"*agreed terms*"* in s 274(3) of the FW Act. If that amendment was to become law, it could impact the analysis as to what is an agreed term in the present workplace determination proceeding. However, FRV can only proceed on the basis of the law currently in force.

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of the Post-Declaration Negotiating Period (**PDNP**), the green-shaded terms are "agreed terms" for the purposes of a workplace determination.

4. FRV disputes those contentions, and it makes the following submissions in reply. FRV otherwise relies on its outline of submissions dated 17 November 2023.

B. SUBMISSIONS IN REPLY

5. At paragraph 10, the UFU extracts the terms of s 274(3) of FW Act, which it then purports to construe. However, the extract was incomplete. The emphasised relevant portions was left out:

> *"An agreed term 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; or*
>
> *(b) otherwise—at the time the intractable bargaining declaration was made."*

6. These missing words are critical to the proper construction of the provision, as they indicate that there is a point in time at which the question of agreement is to be assessed. Further, they indicate a contemplation by the legislature that "agreed terms" at the end of any PDNP might be different – and, indeed, more narrow – that what was agreed when the intractable bargaining declaration was made. Those matters undermine the UFU's construction, which would deem terms to fall within s 274(3) if they had been "agreed" at any point in bargaining, even if they were not agreed at the critical times referred to in s 274(3)(a) and (b).

7. Ultimately, it is FRV's primary position that no matters were agreed with the necessary degree of finality to amount to "agreed terms" for the purpose of inclusion in a determination at any point in the bargaining process. However, even if there were terms that had been agreed for relevant purposes at some point (which is denied), this was not the case at the time the UFU made the application for an intractable bargaining declaration, the time the declaration was made or at the conclusion of the PDNP – the

latter being the relevant time for determining whether there are any agreed terms in the current matter.

8. At paragraphs 12 to 14, the UFU submits that the inclusion of the word *"should"* in s 274(3) indicates that only *"a conditional agreement be reached"* on the term being included in the proposed agreement. That submission does not follow. "Should" is an auxiliary verb; it is the past tense of "shall". It is a word of very broad usage, but one that is primarily indicative of an obligation,[2] and a synonym of "obligate".[3] There is no warrant in the text or context of s 274(3) to utilise the word "should" to water down the term "agreed", which is the focus of the provision, and require something other than an ordinary — that is, unconditional — agreement.

9. At paragraph 15, the UFU submits that its construction reflects *"the normal progress of bargaining where parties discuss a matter, settle it or reach agreement on it, and move onto the next one"*. To the extent this submission suggests that it is a normal feature of bargaining that parties, having agreed to a matter, in-principle or otherwise, are therefore locked into that agreement and not able to reconsider it in light of future circumstances or developments, it is unrealistic and should not be accepted. Moreover, generalised statements about what occurs during the *"normal progress of bargaining"* are unlikely to assist the Commission to determine this matter.

10. At paragraph 18, the UFU submits that, having regard to the object of the FW Act that seeks to achieve productivity and fairness through enterprise bargaining, *"the legislation is designed to permit the parties to determine what goes into their agreements so far as is possible"*. So much may be accepted. But that does not get around the difficulty in the submission that, whatever was the status of agreement at some prior point in bargaining (and FRV maintains that the status of agreement never reached the point of "agreed terms"), as at the relevant time (i.e. the end of the PDNP), it is evident that FRV did not agree with what the UFU wanted to include in the proposed enterprise agreement.

11. At paragraph 21, the UFU submits that a bargaining position that *"nothing is agreed until everything is agreed"* is *"otiose"*, because *"there can be no enterprise agreement until the employer puts a proposed agreement (as a whole) to the ballot of its relevant employees"*. That submission conflates the process involved in making an enterprise

[2] Macquarie Dictionary (online), *"should"* (1).

[3] Macquarie Thesaurus (online), *"obligate"*.

agreement with the question of what is an agreed term for the purposes of a workplace determination. FRV's position is, clearly, not that there can be no agreed terms until an enterprise agreement is voted up by employees, it is that, for the purposes of what is an agreed term under s 270(2), there needs to be agreement by the parties in bargaining that the term be included in the proposed agreement at the relevant time.

12. At paragraphs 22 to 26, the UFU submits that it is inconsistent with the purpose and object of the intractable bargaining provisions for *"parties who have previously agreed on terms to withdraw from such agreement"*. That is said to be the case because the purpose and object of the provisions is to break deadlocks by arbitration, not to arbitrate determinations from scratch. That submission is not correct, and places too great an emphasis on the element of arbitration, at the expense of agreement.

13. The purpose of the intractable bargaining provisions, in particular ss 270(2) and (3) is for the Commission to break deadlocks by including in a determination, relevantly, those matters that are agreed between the parties, and to arbitrate the matters at issue. It is not to the point that, because of the features of a particular bargaining process, or the positions of one side or another, it may be the case that in the end no agreed terms can be reached, and, in effect, all matters are at issue.

14. The effect of the UFU's submission would be contrary to the FW Act's object of achieving fairness in bargaining, by automatically including in a determination (and thereby saddling a party for up to four years with) a term that had been the subject of some agreement, in-principle or otherwise, during bargaining, but which as bargaining progressed, was not agreed at the relevant time. The construction would bring with it the risk of parties being treated unfairly by agreed terms being — irretrievably — "banked" during the bargaining process, such as to enable one party or another to increase the ambit of the matters at issue with impunity. That outcome would be perverse, and the legislature should not be taken to have intended it.

15. At paragraphs 38 and 65, the UFU acknowledges that it was aware that the Victorian Government **Wages Policy** 2023 required that the Government approve the proposed enterprise agreement. However, it says that the UFU was never told that FRV had not already obtained authority in relation to the green-shaded terms in 14R. The UFU's state of awareness as to whether FRV had pre-approval to agree to certain terms is not relevant.

16. In any event, if the UFU was aware of the Wages Policy, it must have been aware of the requirement to obtain approval at multiple stages, including prior to taking pre-approval steps on a proposed final enterprise agreement. That requirement, including that any term agreed in-principle was still subject to final Government approval of an *"overall package"* was adverted to numerous times in FRV's correspondence to the UFU during bargaining.[4]

17. At paragraph 71, the UFU submits that *"FRV's purported offer and withdrawal of agreement should be seen as what is it, a sham, a tactical ploy to try and achieve an advantage …"*. That submission should be rejected. There is no evidence, and no reasonable basis to suggest, that FRV's position in this matter is a result of tactics or a sham. The simple fact is that, in circumstances where the parties have not reached agreement on an overall package, FRV does not, and did not at the relevant time, have the requisite Government approval to agree to any terms.

18. Moreover, the good faith bargaining requirements in s 228 of the FW Act set out the obligations on bargaining representatives. It is not inconsistent with any of those obligations for a party to agree to terms, in principle or otherwise, and then to subsequently withhold or withdraw full, unqualified agreement, at least where that occurs on a principled basis. The Commission has previously held as much.[5]

19. Similarly, a Full Bench of the Commission has previously held that, a party's change to an in-principle position in bargaining does not, of itself, support a finding that the party is not "genuinely trying to reach agreement" for the purposes of obtaining a protected action ballot order.[6]

20. If an alteration of position in bargaining is not inconsistent with the good faith bargaining requirements, nor with the statutory expectation that parties to bargaining be genuinely trying to reach agreement, it is quite difficult to see any merit in the UFU's submission that such a course is anathema to the scheme of the FW Act for the making of enterprise agreements or workplace determinations.

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[4] See statement of Jo Crabtree dated 5 September 2023, [39]-[73].

[5] See *Construction, Forestry, Mining and Energy Union v Shinagawa Refractories Australasia Pty Ltd* [2011] FWA 8304, [25]; *Queensland Nurses' Union of Employees v TriCare Limited* [2010] FWA 7416, [51].

[6] *Application by the Maritime Union of Australia, The* [2014] FWCFB 2587, [69].

C. CONCLUSION

21. For these reasons, and those given in FRV's submission dated 17 November 2023, the Commission should find that:

    a. there are no agreed terms for the purposes of s 270(2) of the FW Act; and

    b. the matters at issue for the purposes of s 270(3) of the FW Act include all claims that the parties seek to be included in the proposed enterprise agreement.

11 December 2023

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