IN THE FAIR WORK COMMISSION
AT MELBOURNE

FWC Matter No: B2023/771

The United Firefighters' Union of Australia
(Applicant)

Fire Rescue Victoria
(Respondent)

MINISTER'S REPLY SUBMISSIONS ON AGREED TERMS AND MATTERS AT ISSUE

A. INTRODUCTION

1. These submissions are made on behalf of the Minister for Emergency Services, the Hon Jaclyn Symes MLC (**Minister**) pursuant to Order 5 of the directions of the President dated 25 October 2023 (**Directions**).

2. They address, on a provisional basis, the Minister's response to the materials filed by the United Firefighters' Union of Australia (**UFU**) and Fire Rescue Victoria (**FRV**) in accordance with order 3 of the Directions relating to:

   (a) the agreed terms for the intractable bargaining workplace determination pursuant to section 274(3) of the *Fair Work Act 2009* (Cth) (***FW Act***); and

   (b) the matters at issue pursuant to section 270(3) of the *FW Act*.

3. The UFU's submissions filed on 17 November 2023 (**UFU Submissions**) raise two key issues:

   (a) the proper construction of section 274(3) of the *FW Act*; and

   (b) whether, as a matter of fact, the bargaining representatives have "*agreed*" terms within the meaning of section 274(3) of the *FW Act*.

4. It is important to note at the outset that the contention underlying the UFU Submissions is that the Commission is bound to insert terms "agreed" during the course of bargaining even though at the relevant time (i.e. the time of the intractable bargaining declaration or the conclusion of any post-declaration negotiating period as the case may be) one or all of the bargaining representatives don't agree that those terms should be included in the determination.

5. Such a contention is antithetical to bargaining and fails to reflect the fact that bargaining commonly involves trade-offs in an effort to reach agreement on a package. It also ignores the fact that any agreement in bargaining is contingent upon all matters being agreed and that an employer cannot be forced to put an agreement to a vote and thus has the capacity to withdraw agreement as to any specific clause that occurred during bargaining. In this regard section 181 of the *FW Act* relevantly states: "*An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it*."

6. As to the first issue noted in paragraph 3(a) (the proper construction of section 274(3) of the *FW Act)*, the UFU contends that "agreed terms" under section 274(3) of the *FW Act* extends to conditional agreement[1] and to agreement at any earlier time during bargaining, which cannot later be withdrawn.[2]

7. As outlined below at paragraphs 12 to 42, this contention is contrary to the principles of statutory construction, the text of the sections in context and the statutory purpose and intent. Applying those principles, "agreed" under section 274(3) of the *FW Act* has its ordinary meaning. This ordinary meaning connotes settled agreement. It does not extend to conditional agreement. Further, the question of whether there are "agreed terms" must be assessed at the time of the post-declaration negotiating period or the date of the declaration (**the Prescribed Time**). This is inconsistent with the proposition that earlier agreement which is subsequently withdrawn or departed from falls within the definition of "agreed terms" under section 274(3) of the *FW Act*.

8. The Minister's construction should be preferred because, in short:

   (a) the Minister's construction is based on the text, context and purpose of the legislative framework regulating enterprise agreements and workplace determinations (see below at paragraphs 16 to 42 and Appendix A);

   (b) the UFU's construction ignores the ordinary meaning of "agreed" and the express terms of section 274(3) of the *FW Act*, which plainly limits the assessment of an "agreed term" to the Prescribed Time (see below at paragraphs 16 to 25);

   (c) the UFU's construction is antithetical to the nature of bargaining, which is flexible, not linear and involves a series of trade-offs (see below at paragraph 40); and

   (d) the Minister's construction recognises the task of the Commission in the making of workplace determinations and is consistent with the objects of the *FW Act* relating to productivity and fairness (see below at paragraphs 26 to 39 and Appendix A).

9. In relation to the second issue noted in paragraph 3(b) (whether as a matter of fact the bargaining parties have "agreed" within the meaning of section 274(3) of the *FW Act*), for the reasons

[1] UFU Submissions at [13]-[15], [21]-[23], [62] and [63].

[2] UFU Submissions at [2], [20], [25], [26] and [58].

outlined below at paragraphs 43 to 56 and in the Minister's submissions filed on 17 November 2023 (**Minister's Submissions**), the answer is no. In respect of the additional point raised by the UFU concerning ostensible authority, no occasion for estoppel arises because FRV has acted within its actual authority and the UFU has, at all times, been aware of the limitations on FRV's authority. Those limitations included the need to finalise agreement on all matters including salaries and wages and for Government Approval.[3] The UFU is prevented from relying on any alleged representations made by FRV to the contrary (see below at paragraphs 48 to 54).

10. Two things flow from this. First, the Commission is required to include the mandatory terms mandated by section 273 of the *FW Act*. Second, each of the remaining terms of the Proposed Operational EA are technically matters at issue within the meaning of section 270(3). Nevertheless, in respect of the matters other than those identified in the Minister's position as "Substantive Workplace Determination Matters", whilst those matters are not *"*agreed terms", it will be open for the Commission to have regard to the fact that those matters are not contested in applying the factors set out in section 275.

11. These submissions therefore:

    (a) address the proper construction of "agreed terms" (taking into account the text, statutory context and purpose and role of the Commission); and

    (b) identify that there are no "agreed terms".

B. PROPER CONSTRUCTION OF "AGREED TERMS"

The task of statutory construction

12. The task of statutory construction must begin and end with the text.[4] The starting point for ascertaining the meaning of a statutory provision is its text, having regard to its context and purpose.[5] Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[6]

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[3] See in this regard in addition to the various wages policies the Public Sector Industrial Relations Policies 2015 at Part 5.3.

[4] *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[5] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ).

[6] Ibid.

13. Statutory purpose can be described as the "*public interest sought to be protected and enhanced" by the law*,[7] which may be identified by reference to the "*mischief*" that the law seeks to redress.[8] Statutory purpose is not something which exists outside the statute, *"[i]t resides in its text and structure*".[9] A construction that would promote the purpose or object of the *FW Act* is to be preferred to one that would not promote that purpose or object.[10]

14. A court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning.[11]

15. The application of these principles underpins the analysis set out below.

The text

Ordinary meaning of "agree" and "agreed"

16. The starting point is the text of section 274(3), which provides that an agreed term for an intractable 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.

17. The term "agree" is defined to include "*to determine; settle: to agree a price; to agree that a meeting should be held.*"[12] "[A]greed" is defined as "*arranged by common consent*".[13]

18. The ordinary meanings ascribed to "agree" and "agreed" indicate that a level of certainty and finality is required in the consensus reached. Whilst no particular legal formality is required to establish agreement, that does not detract from the need to ensure agreement, as a matter of fact, exists. Indeed, the UFU appears to accept that, in some circumstances, a conditional

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[7] *Jones v Commonwealth of Australia* [2023] HCA 34 at [65] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

[8] Ibid at [65] citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy v New South Wales* (2015) 257 CLR 178 at [132], [232]; *Brown v Tasmania* (2017) 261 CLR 328 at [208]-[210]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at [171]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at [183].

[9] Ibid at [65] citing *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], [78].

[10] *Acts Interpretation Act 1901* (Cth), s 15AA (as in force as at 25 June 2009: s 40A of the *FW Act*).

[11] *Masson v Parsons* (2019) 266 CLR 554 at [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[12] Macquarie Dictionary (Online), "agree" (10), (accessed on 30 November 2023).

[13] Macquarie Dictionary (Online), "agreed", (accessed on 30 November 2023).

agreement may not amount to an "agreed term" for the purposes of section 274(3) of the *FW Act*.[14]

19. The UFU fails to grapple with the ordinary meaning of the term "agreed". The UFU seeks to extrapolate from its own asserted interpretation of the conditional word "should" that only conditional agreement is required to be reached.[15] This is a misreading of the provision. In the context of section 274(3) of the *FW Act*, "should" refers to a judgement made by the bargaining representatives at the Prescribed Time that particular terms, "should" be included in the agreement. In that context, the term "should" is used in its ordinary sense of "*indicating obligation"* or "*indicating advisability*".[16]

20. Further, under Part 2-4, bargaining proceeds on the basis that only an employer has the right to put a proposed enterprise agreement to a vote. In that context, an employer's conditional agreement as a means of obtaining an agreement on the package is a means of progressing bargaining. The proposed enterprise agreement will not be put to a vote unless the employer deems that appropriate trade-offs or concessions have been made. This reinforces, rather than renders otiose,[17] the effect of conditional agreement in bargaining. The fact that an employer has engaged in this form of negotiation promotes rather than impedes bargaining. It should not be taken as agreement to include terms that were conditionally agreed, when sufficient trade-offs or concessions are not made by the other bargaining representatives and agreement as to a package has not been obtained.

The Prescribed Time

21. The UFU's summary of section 274(3) of the *FW Act*, at paragraph 10 of the UFU submissions, ignores key parts of the provision, which make clear that the Commission's assessment of "agreed terms" is directed at a specific point in time – namely, either at the end of the post-declaration negotiating period or at the time the intractable bargaining declaration was made.

22. The UFU's apparent disregard of the point in time assessment persists throughout the UFU Submissions.[18]

23. Similarly, the UFU does not grapple with the timing prescribed by section 270(3) of the *FW Act* in respect of "matters at issue". Section 270(3) provides that the determination must include the terms that the Commission considers deal with the matters that were still at issue:

    (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned – after the end of that period; or

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[14] UFU Submissions at [62].

[15] UFU Submissions at [13], [14].

[16] Macquarie Dictionary (Online), "*should*" (1) and (2) (accessed on 30 November 2023).

[17] UFU Submissions at [21].

[18] UFU Submissions at [12], [13], [20], [26], [63] and [68].

(b) otherwise – after making the declaration.

24. The timing of the assessment of agreed terms and matters at issue cannot be ignored.

25. The timing of the assessments in both sections 274(3) and 270(3) is significant because it draws the Commission's attention to what the bargaining parties had, at that time, agreed should be included in the proposed enterprise agreement. In the face of the clear terms of the *FW Act*, there is no basis for a construction of "agreed terms", which would require the Commission to ignore any clarifications of positions, further offers or changes in position or withdrawal of agreement during the course of bargaining.

Context and purpose

26. Underlying the UFU submissions is a suggestion that the Commission should strive to give effect to any form of agreement between bargaining representatives, conditional or otherwise, and regardless of the point in time when such agreement was reached in order to meet the definition of "agreed terms" under section 274(3). Such an approach ignores the relevant statutory regime and the consequence of status as an "agreed term" being that the Commission is required to include it in the determination. It is also inconsistent with the statutory objects of productivity and fairness.

27. There is nothing in the relevant context or purpose, which requires a departure from the ordinary meaning of "agree". An important part of the statutory context is the way the *FW Act* regulates agreement making. That regime is summarised in **Appendix A** of this outline.

The role of the Commission

28. Contrary to paragraphs 18 to 25 of the UFU Submissions, the context provided by the Commission's role in agreement-making does not support a broad interpretation of the word "agreed" to extend to conditional agreement.[19]

29. Whilst it may be accepted that, pursuant to section 595(3) of the *FW Act*, the Commission may only deal with a dispute by arbitration only if the Commission is expressly authorised to do so under or in accordance with another provision of the *FW Act*, such authorisation is conferred by section 270(3) of the *FW Act*. By that provision, the Commission is authorised to exercise its arbitral powers to include in the intractable bargaining workplace determination the terms that it considers deal with the matters at issue at the Prescribed Time.

30. In considering the relevant statutory context, the UFU fails to have regard to the operation of section 235 of the *FW Act*, which grounds the Commission's jurisdiction in section 269 to make an intractable bargaining workplace determination.

31. The criteria in section 235 ensures that an intractable bargaining declaration will be made only in certain circumstances. Once a declaration is made, it is Part 2-5, which regulates workplace

[19] UFU Submissions at [18].

determinations. The UFU's reference to section 269 at paragraph 22 of the UFU Submissions is wrong. Section 269, which empowers the Commission to make an intractable bargaining workplace determination, is located in Division 5 of Part 2-5, not Division 8 of Part 2-4. Division 5 is entitled "Intractable Bargaining Workplace Determinations" and not "FWC's general role in facilitating bargaining."

32. The limitation of the Commission's role is found in the limitations expressly built into the statutory framework for agreement-making and workplace determinations. There is no need to read down (or to impermissibly rewrite) the terms of section 274(3) to encompass terms where agreement has fallen short of a final or settled agreement. To the contrary, given that the terms will apply without the usual protections built into the agreement-making process in Part 2-4, the legislative framework requires that the ordinary meaning of "agreed" should be adopted.

33. Indeed, were it to be the case that an employer is bound by conditional agreement should an intractable bargaining declaration be made, it is difficult to see why an employer would conditionally agree to anything, if to do so could result in any term so agreed being given statutory force and effect even where there has been no agreement on a package. As noted in the UFU Submissions, in the ordinary course of bargaining, if the bargaining representatives are unable to agree upon a package, an employer can resile from anything conditionally agreed through the expedient of not putting the agreement to a vote. On the UFU construction, employee bargaining representatives can refuse to agree upon a package (by for example refusing to make concessions in respect of wages and allowances claims), yet "lock in" positions put by the employer. The disincentive that such an outcome creates for engaging in enterprise bargaining, is antithetical to the objects set out above.

34. Put differently and contrary to what appears at paragraphs 25 and 26 of the UFU Submissions, any in-principle agreement in respect of particular terms occurred in a fundamentally different context, namely that agreement would be reached on a package and FRV could decide, subject to Government approval, whether or not to put the agreement to a vote.

35. Further, whilst it may be accepted that the intractable bargaining provisions allow the Commission to bring deadlocks in bargaining to an end by ultimately determining only those matters that remain in issue at the conclusion of negotiations,[20] this does not have the consequences contended for by the UFU. First, in the context of an intractable bargaining declaration, negotiations only conclude when the declaration is made or the post-declaration bargaining period ends. Here, at both points in time, there was no agreement, formal or otherwise, that terms should be included in the agreement. Second, the assertion that a requirement for a "formal agreement on terms" would undermine the statutory purpose and neither reflects the reality of bargaining or the context in which it takes place or correctly describes the statutory purpose. That purpose is not to foist upon a party a term that might have been conditionally agreed by their representative in the course of bargaining. Rather, it is to

[20] UFU Submissions at [23].

identify what are the matters that as at the relevant date the parties, through their bargaining representatives, have determined are to be either subject to the mandatory provisions in section 273 and/or determination pursuant to section 275.

36. To the extent the UFU relies on its concerns about the conduct of FRV in bargaining, such matters are not relevant to the proper construction of an "agreed term". The legislative framework acknowledges that such matters are relevant to the question of terms to be included in a workplace determination but are expressly dealt with as factors (amongst others) to be taken into account in determining the matters at issue: section 275(f) and (g) of the *FW Act*.

The evident purpose of section 270(2) and 274(3)

37. The UFU refers to the apparent legislative intent to permit the "*parties*" to determine what goes into their agreements so far as is possible.[21] Putting to one side the tension between this submission and the ultimate position advanced by the UFU, that terms should be included in the determination that FRV says should not be, the UFU focus on the "*parties*" to the agreement[22] is misplaced. Section 274(3) of the *FW Act* is concerned with agreement between bargaining representatives. The *FW Act* does not identify the employer, or any employee or any employee organisation as a "party" to an enterprise agreement. The effect of the scheme in Part 2-4 is to empower the employer and the relevant majority of its employees to specify the terms which will apply to the employment of all employees in the area of work concerned.[23] An agreement between bargaining representatives is separate and distinct from agreements made and approved under Part 2-4. The objects of the *FW Act* need to be viewed in that context.

38. The evident purpose of section 270(2), read in conjunction with section 274(3) of the *FW Act*, is to remove from the scope of the Commission's arbitration powers, the terms that the bargaining representatives had, at the Prescribed Time, agreed should be included in the agreement. Those terms are, therefore, automatically included into the workplace determination without regard to the factors in section 275. The factors the Commission must take into account under section 275 of the *FW Act* give effect to the overall object of the *FW Act* to provide a "*balanced framework for cooperative and productive workplace relations*" and the ultimate objects of agreement making of productivity and fairness.[24] There is, implicit in that structure, an apparent acknowledgment that the "agreed terms" meet the ultimate object of agreement-making of productivity and fairness.

39. To the extent a "*constructional choice*" exists between (1) a "*final*" or "*settled*" agreement at the Prescribed Time or (2) conditional agreement given at any earlier point in time, the first

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[21] UFU Submissions at [18].

[22] UFU Submissions at [18], [20], [21], [25] and [26].

[23] *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [89].

[24] *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69 at [138] (Ross J, with whom Flick and Rangiah JJ agreed at [4] and [192]).

construction should be preferred because it promotes the purpose of the *FW Act,* for the reasons that follow.

(a) The ultimate goals of agreement-making are productivity and fairness. A settled agreement on a term being included in an enterprise agreement is more likely to have struck the appropriate balance between productivity and fairness than an agreement that is conditional or otherwise falls short of final agreement. The fact that it is conditional suggests there had not been complete acceptance of that term by that bargaining representative.

(b) Similarly, by ensuring only terms where there was a true meeting of the minds between the bargaining representatives are included in the determination promotes a "*balanced framework"* by recognising the positions of all bargaining representatives. Ignoring a bargaining representative's conditional position on a term does not promote a balanced framework as the interests of that bargaining representative would be compromised.

(c) There is intended to be a level of flexibility in the enterprise agreement framework. Requiring that a bargaining representative be held to a particular position on a term for an indefinite period is inherently inflexible. If the initial position is subject to agreement on other terms, which do not ultimately eventuate, this may hinder the objects of delivering productivity benefits.

(d) Given that an agreed term must be included in an intractable bargaining workplace determination, without approval by the employees or the Commission under Part 2-4 and will not be subject to the factors outlined in section 275 of the *FW Act*, the Commission should be cautious to include a term where agreement is not certain or has been overtaken by a later position.

Bargaining context

40. The UFU seeks to characterise bargaining as a linear process, whereby bargaining representatives consider each term in isolation and move through the negotiations one term at a time.[25] Such characterisation is not consistent with the reality of collective bargaining, which is fluid and involves trade-offs at various stages of the process.[26] The UFU's characterisation is particularly inapt to describe bargaining involving a Government agency employer where FRV requires Government approval under the relevant Wages Policy at various stages of the bargaining process.

Conclusion on proper construction

[25] UFU Submissions at [15], [26] and [63].

[26] *Target Australia Pty Ltd v SDA* [2023] FCAFC 66 at [54] (Bromberg J).

41. Applying the ordinary principles of statutory construction, “agreed” under section 274(3) of the *FW Act* has its ordinary meaning requiring final or settled agreement and therefore does not extend to conditional agreement. Further, such agreement must be assessed at the Prescribed Time, being at the end of the post-declaration negotiating period or the date of the declaration (as appropriate).

42. It is noteworthy that the UFU appears to accept that agreement to a term conditioned on agreement to another term, which is not ultimately agreed, might not fall within the concept of “agreed terms”.[27] This indicates that the real issue between the parties on this point is not the proper construction of the *FW Act*, but whether, as a matter of fact, FRV’s bargaining representatives’ conditional agreement fell short of a “settled” or “final” agreement.

D. NO AGREED TERMS

43. For the reasons set out at paragraphs 85 to 108 of the Minister’s Submissions, augmented by the analysis of the statutory regime set out above, there are no agreed terms within the meaning of section 274(3) of the *FW Act*.

44. In respect of paragraphs 61 to 71 of the UFU Submissions, in considering whether there is a truly conditional agreement such that there is no final certain agreement on any terms that should be included in the enterprise agreement, the Commission should have regard to all of the relevant circumstances.

No settled or final agreement

45. Each of the relevant circumstances are set out at paragraphs 13 to 72 of the Minister’s Submissions. In addition, the Minister relies on the following matters set out in the witness statements filed by FRV:

(a) FRV’s response to version 12 of the UFU’s log of claims dated 29 November 2022 which states, amongst other things, that "*a range of substantive matters are subject to State Government instruction and approval*" and refers to a number of clauses that are "*agreed in principle by FRV*" but are "*subject to final agreement on an overall package of provisions for the proposed EA…*". (see Attachment 7 to the First Witness Statement of Jo Crabtree dated 5 September 2023 (**First Crabtree Statement**);

(b) on 24 February 2023, an email was sent from FRV to the UFU attaching a 'report back document' noting that staffing, amongst other matters, remained subject to Government approval/funding (see Attachment 10 of the First Crabtree Statement);

(c) on 16 March 2023, FRV sent an email to the UFU and Commissioner Wilson’s chambers, which attached a status document, stated to be read in conjunction with

[27] UFU Submissions at [62].

FRV's response document dated 29 November 2022. The covering email stated, "*FRV has no commitment from Government to fund increases to the minimum staffing requirements in the proposed EA. Without such funding FRV does not agree to increases to the minimum staffing requirements in the proposed EA. While Government has advised that any increases to the minimum staffing charts should not be included in the proposed EA, FRV will continue to make submissions to Government with respect to funding for increased staffing".* Further, the status document, in reference to the allowance schedule noted that "*FRV agree this is essentially a drafting issue that can be dealt with once in-principle agreement reached on EA*" (see Attachment 16 of the First Crabtree Statement); and

(d) the matters set out in paragraphs 5(a) and (b) and 6 of the Third Witness Statement of Jo Crabtree.

46. When regard is had to these circumstances it is apparent that, contrary to the assertion at paragraph 62 of the UFU Submissions, bargaining **was** conducted on the basis that the terms that were "agreed" were agreed on the basis that there would also be agreement on wages and allowances consistent with government Wages Policy and acceptable to government.[28] No such agreement was reached.

47. Again, contrary to paragraph 62 of the UFU Submissions, this does not mean there is no point in having the IBD provisions in the *FW Act*. It simply means that if the UFU wanted to obtain the benefit of any term previously agreed it was incumbent upon each to make the necessary concessions in respect of wages and allowances so as to secure government approval. Absent such concessions the terms would need to be arbitrated by reference to the criteria in section 275 of the *FW Act*.

48. In relation to paragraphs 65 to 68 of the UFU Submissions, the UFU's assertion that FRV should be bound by its representations that it had authority to make the agreements should be rejected. FRV acted within the scope of its authority and, thus, no issue of apparent or ostensible authority arises.

49. Further, or alternatively, to the extent any principles of estoppel apply (which is denied), the UFU was well aware of the limitations upon FRV's authority and therefore no such estoppel arises.[29] At all relevant times, the UFU were aware of the Wages Policy, and its contents, and that FRV considered itself bound by the Wages Policy.[30] The Wages Policy expressly provides that all offers in bargaining should be made on an in-principle basis and may be subject to change.[31] The Wages Policy requires approval at various stages in bargaining, including prior to the

[28] See too the Public Sector Industrial Relations Policies 2015 at Part 5.3.

[29] *Flexirent Capital Pty Ltd v EBS Consulting Pty Ltd* [2007] VSC 158 at [203].

[30] Minister's Submissions at [85].

[31] Exhibit 5, Attachment 1, pp. 10 and Attachment 3, pp. 9.

commencement of any of the formal approval requirements under the *FW Act.*[32] To be approved by Government, a proposed enterprise agreement settled between the parties must meet all the conditions specified in the Wages Policy, including that it must be fiscally sustainable and funded from indexation, revenue, appropriate cost offsets or a Government approved funding strategy, and other requirements of the Industrial Relations Policies.[33] With the knowledge of those requirements for approval under the Wages Policy and, in the absence of a settled outcome on wages and allowances, the UFU cannot reasonably rely on any alleged representations of FRV that it had authority to agree, on a final basis, to discrete terms of the proposed operational EA.

50. This issue also informs the approach to be taken to the statements made by Commissioner Wilson. In the statement made 3 February 2023, the Commissioner noted that the parties had been negotiating under the 2019 Wages Policy.[34] This was confirmed (as was the fact that any agreement to clauses set out in the UFU revised log V12 was in principle and subject to final agreement on an overall package of provisions for the proposed enterprise agreement) in the letter from the Fire Rescue Commissioner to Mr Marshall dated 14 March 2023.[35] The second statement made 19 June 2023 needs to be read in this context. There is no suggestion that FRV received dispensation from government Wages Policy or from the requirements that terms were not capable of being finally agreed absent agreement on the terms of an entire agreement/package. Nor is there any suggestion that FRV represented that it had received such dispensations.

51. *ANMF v Kaizen* is distinguishable on the basis that the relevant employees in that case were not on notice of any circumstance which would have suggested that the bargaining representative's authority was at an end.[36]

52. At paragraph 29 of the UFU Submissions, the UFU refers to the Heads of Agreement between the then Minister and the UFU, which is dated 20 February 2020.

53. The commitment contained in clause 11 of the Heads of Agreement concerned the preservation of terms and conditions of employment in respect of a proposed transferring instrument under the *FW Act*, which ultimately became the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (**FRV Operational EA**). This is clear from the context. As recorded by Recital C, the parties were in discussions about the work underway on the development of a transferring instrument to protect terms and conditions of employment during the transfer of business process for FRV. At clause 7, reference is made to a transfer of business instrument suitable to transfer to FRV the applicable enterprise agreements "in order to preserve working

[32] Exhibit 5, Attachment 1, pp. 9-10 and Attachment 3, pp. 7-10.

[33] Exhibit 5, Attachment 1, pp.4, 10 and Attachment 3, pp. 3, 10.

[34] Exhibit 5, Attachment 8 at [6].

[35] Exhibit 5, Attachment 14.

[36] *ANMF v Kaizen* (2015) 228 FCR 225 at [66] (Greenwood J).

conditions of transferring employees". Clause 11 is contained in a section headed "Preservation of Terms and Conditions of employment". By the other clauses in this section, it is clear that the subject of clause 11 is the transferring instrument.

54. In a separate section, under the heading "Negotiation of a proposed Fire Rescue Victoria Enterprise Agreement", clause 9 of the Heads of Agreement provides that the parties agree that the terms of the proposed FRV Enterprise Agreement will set the terms and conditions of employment of professional operational staff of FRV from the relevant date of its approval by the FWC, consistent with the commitments made by the Victorian Government." There is no cross-reference to the commitments in clause 9. Read in context, the commitment was to the prior commitment to implement clause 9.

The effect of the 7 August Offer

55. Finally, in respect of the 7 August Offer referred to at paragraphs 69 to 71 of the UFU Submissions:

(a) The genesis of the 7 August Offer is the offer authorised by DJCS in correspondence sent to FRV on 15 June 2023. That correspondence was sent to FRV over a month before the application for an intractable bargaining workplace determination was made, on 28 July 2023. Given that timing, the offer was clearly not designed to undermine the intractable bargaining provisions of the *FW Act*, or the *FW Act* more generally.

(b) The significantly increased wage offer in exchange for concessions on a small number of non-financial clauses on an overall package basis represented a trade-off of the kind often encountered in the usual course of bargaining.[37]

(c) The exclusion of the clauses referred to in the 7 August Offer was based on genuine concerns about the funding for staffing numbers having not been approved and about additional unbudgeted costs associated with the arbitration of extra claims and the firefighter's registration board.[38]

(d) The UFU submissions, at paragraph 71, appear to accept (though not expressly) that a change in bargaining position demonstrably for a genuine concern might be effective.

56. Whilst the 7 August Offer outlined three matters which were to be excluded in the proposed operational EA, the settlement offer was expressed as "*being put in the context of an overall package*". It is clear from that statement that, upon rejection, there were no terms that would be agreed, either in-principle or at all.

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[37] *Target Australia Pty Ltd v Shop, Distributive and Allied Employees' Association* [2023] FCAFC 66 at [54] (Bromberg J).

[38] Second statement filed by FRV dated 17 November 2023, Exhibit JC-2, Attachment 31, p. 25.

E. CONCLUSION

57. For the reasons outlined above and set out in the Minister's Submissions, the Commission should accept the position that:

(a) there are no "agreed terms" to be included in the intractable bargaining workplace determination pursuant to sections 270(2) and 274(3);

(b) the Commission must include the mandatory terms required by section 273; and

(c) the terms identified in the position document as "Substantive Workplace Determination Matters" other than the mandatory terms required by section 273 need to be substantively considered by the Commission and included in the intractable bargaining workplace determination.

58. In respect of the matters other than those identified in the Minister's Submissions as "Substantive Workplace Determination Matters", whilst those matters are not "agreed terms" and are, strictly speaking, "matters at issue", as explained above, it is open for the Commission to have regard to the fact that those matters are not contested in applying the factors set out in section 275.

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11 December 2023

APPENDIX A

The statutory context – agreement-making

1. In order to discern the "*purpose and policy*" reasonably attributed to the intractable bargaining workplace determination provisions, it is necessary to consider the statutory context of agreement-making and workplace determinations under the *FW Act*.[39]

2. Section 3 of the *FW Act* sets out the object of the *FW Act* which is "*to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*". This is achieved, in part, by:

> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;
>
> …
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;

3. Section 5(2) of the *FW Act* sets out the sources of the main terms and conditions provided under the *FW Act* – the National Employment Standards, modern awards and enterprise agreements. Although not expressly included in section 5(2), the note to that sub-section provides that, "*workplace determinations are another source of main terms and conditions. In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279)*."

4. Part 2-4 regulates the making of enterprise agreements.

5. Section 171 provides that the objects of Part 2-4 are:

> (a) to **provide a simple, flexible and fair framework** that enables collective bargaining in good faith, particularly at the enterprise level, for **enterprise agreements that deliver productivity benefits**; and
>
> (b) to **enable the FWC to facilitate** good faith bargaining and **the making of enterprise agreements,** including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

6. Emphasis is again placed on the ultimate objects of fairness and productivity. The framework is designed to be simple, flexible and fair. The Commission's role in facilitating good faith

[39] *Esso Australia Pty Ltd v Australian Workers Union* (2017) 263 CLR 551 at [71] (Gageler J).

bargaining and the making of enterprise agreements is recognised as a separate object of Part 2-4.

7. There are a number of divisions contained in Part 2-4, including (amongst others) Division 2, which sets out the requirements for making enterprise agreements, Division 3, which deals with the right of employees to be represented by a bargaining representative, Division 4, which deals with the approval of proposed enterprise agreements and Division 8, which provides for the Commission to facilitate bargaining.

8. Collective bargaining is commenced by formal notification under section 173 and conducted between bargaining representatives as defined by section 176 of the *FW Act*, who are ordinarily an employer and an employee organisation. Division 8 of Part 2-4 enumerates the "*good faith bargaining*" which a bargaining representative for a proposed enterprise agreement must meet.

9. A proposed enterprise agreement reached between the bargaining representatives does not come into operation until the following steps are completed:

   (a) an employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it: section 181;

   (b) an agreement is made when a majority of employees who cast a valid vote approve the agreement: section 182;

   (c) if an agreement is made, a bargaining representative must apply to the Commission for approval of the agreement: section 185;

   (d) if an application for approval is made under section 185, the Commission must approve the agreement if certain requirements are met: section 186;

   (e) an enterprise agreement approved by the Commission operates from 7 days after the agreement is approved or, if a later day is specified in the agreement – the later date: section 54; and

   (f) an enterprise agreement does not impose obligations on a person or confer any entitlements on a person and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person: section 51.[40]

10. As is clear from the statutory regime identified above, a proposed enterprise agreement which is finalised between the bargaining representatives imposes no obligations and confers no entitlements unless and until each of the procedural steps set out above have been completed. So much is implicitly recognised in the UFU Submissions[41] which speak in terms of the proposed

[40] As to coverage and application of an enterprise agreement, see sections 52 and 53.

[41] UFU Submissions [13], [26] and [63].

agreement being “finalised” or “made” or one where “all [of the terms] are agreed”. Here that never occurred.

11. Part 2-5 regulates the making of workplace determinations and the relevant provisions are set out at paragraphs 73 to 83 of the Minister Submissions.

12. The Commission’s jurisdiction in this determination is enlivened by reason of the intractable bargaining declaration made under section 235 of the *FW Act*, which is contained in Division 8 of Part 2-4. Division 8 of Part 2-4 is titled “*FWC’s general role in facilitating bargaining*”. It is clear from Division 8 that there are only limited circumstances where the Commission is empowered to assist in the process of bargaining.

13. Section 235 of the *FW Act* provides that the Commission may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:

    (a) an application for the declaration has been made;

    (b) the Commission is satisfied of the matters set out in section 235(2), namely:

        (i) the Commission has dealt with the dispute about the agreement under section 240 and the applicant participated in the Commission’s process to deal with the dispute;

        (ii) there is no reasonable prospect of agreement being reached if the Commission does not make the declaration; and

        (iii) it is reasonable, in all the circumstances to make the declaration, taking into account the views of the bargaining representatives for the agreement; and

    (c) it is after the end of the minimum bargaining period.

14. A further relevant provision is section 275 of the *FW Act*, which sets out the factors that the Commission must take into account in deciding the terms of a workplace determination and include the following:

    (a) the merits of the case*;*

    (b) [Repealed]

    (c) the interests of the employers and employees who will be covered by the determination;

    (ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;

    (d) the public interest;

    (e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements; and

(h) incentives to continue to bargain at a later time.