

Applicant: United Firefighters' Union of Australia

Respondent: Fire Rescue Victoria

SUBMISSIONS OF THE UNITED FIREFIGHTERS' UNION

A. Introduction

1. These submissions are filed by the United Firefighters' Union (UFU) in respect of the matters to be determined in the preliminary hearing, namely, which are the agreed terms and which are the matters at issue for the purposes of the Intractable Bargaining Workplace Determination (**IBWD**) to be made by the Fair Work Commission.
2. In summary, the position of the UFU is that other than terms involving increases to wages and increases to allowances all matters between the UFU and FRV were agreed terms consistently with the statement issued by Commissioner Wilson and approved by each of the parties on 19 June 2023.

B. The statutory framework

3. The Intractable Bargaining Provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) commenced on 1 July 2023. They replaced provisions, never used, which granted the Commission power to make serious breach declarations. To date no Intractable Bargaining Workplace Determination (**IBWD**) has been made by the Commission.
4. Section 234(1) of the FW Act provides that a bargaining representative may apply for an Intractable Bargaining Declaration (**IBD**).
5. Under s.235 the Commission is given power to make an IBD if it is satisfied of certain matters. Those matters include that the Commission has dealt with a dispute about the proposed agreement under s.240 of the Act and that the Applicant participated in those processes. The Commission must also be satisfied that there is

no reasonable prospect of agreement and that it is reasonable in all the circumstances to make the declaration.

6. Section 235A allows the Commission to specify a post-declaration negotiating period if it considers it appropriate.
7. In the present case the IBD was made on 4 October 2023. A post-declaration bargaining period of two weeks followed that declaration.¹
8. Once an IBD is made the Commission is required to make an IBWD as quickly as possible (s.269).
9. Relevantly, an IBWD must include the agreed terms, which are defined in s.274(3), and the Commission must arbitrate the matters at issue between the bargaining parties (s.270(3)).
10. An agreed term is “a term that the bargaining representatives for the proposed enterprise agreement concerned had ... agreed should be included in the agreement...”

C. Construction of the relevant provisions

11. The resolution of this issue depends on construction of the Act according to principles which have been repeated by the High Court on several occasions. The task begins and ends with the statutory text, read in context.² That context includes the general purpose and policy of the provision under consideration,³ which purpose is to be derived from the statutory text and not from any assumption about the desired or desirable operation of the provision.⁴

¹ PR776779.

² See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539 [47]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57].

³ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at 516 [41].

⁴ *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]-[26]; *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at 295-6 [37].

12. Looking first at the text of s.274(3), it is apparent that what must be determined is whether or not a particular term was agreed by the *bargaining representatives* as being one that *should* go into the agreement.
13. The use of the conditional “should” indicates that the focus is on some future time when the proposed agreement is finalised. The requirement is only that a conditional agreement be reached on a provision.
14. This is not a reference to some sort of formal agreement or contractual understanding. It is a criterion directed at the Commission ascertaining at the relevant time, whether or not bargaining representatives had agreed that a particular provision should go into the agreement.
15. This reflects the normal progress of bargaining where parties discuss a matter, settle it or reach agreement on it, and move onto the next one.
16. The context of the legislation assists in this construction.
17. Section 3 of the FW Act sets out the object of the legislation, which includes:
 - (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;*
18. The legislation is designed to permit the parties to determine what goes into their agreements so far as is possible. The role of the Commission in arbitrating is limited. Section 595(3) of the FW Act provides that the Commission can only exercise arbitral functions in respect of a dispute if expressly authorised by a provision of the Act.
19. The limitation of arbitral powers is reinforced by s.270(2) which provides that the Commission must include the agreed terms in a determination.
20. The text and context and purpose of the provision make clear that they are designed to facilitate the making of workplace determination which includes all of the terms agreed between the parties.
21. That agreement is not something to be assessed in a legalistic way but in the context of bargaining for an enterprise agreement. Often in bargaining parties take the position that nothing is agreed until everything is agreed. Such a position is in fact

otiose. There can be no enterprise agreement until the employer puts a proposed agreement (as a whole) to the ballot of its relevant employees.

22. Therefore, any agreement in respect of a term going into a proposed enterprise agreement must be conditional at all times upon agreement being reached on all terms. That is part of the statutory context that informs the construction of the provision dealing with IBWD's. It is to be understood that those provisions were introduced as a supplement and aid to the enterprise bargaining processes provided for by the FW Act. Thus, s.269 is in Part 2-4, Division 8 of the FW Act which titled "FWC's General Role in Facilitating Bargaining".
23. The purpose of the Intractable Bargaining Provisions is to allow the Commission to break deadlocks in bargaining by ultimately determining only those matters that remain in issue at the conclusion of negotiations. A construction that required formal agreement on terms would undermine the statutory purpose. Such a requirement could be satisfied by the most facile and transparent stratagems of circumvention. Such an unlikely constructional choice would not be consistent with the purposive approach to statutory interpretation.⁵
24. The change wrought by the IBWD provisions is that those terms become incorporated into an eventual workplace determination if the criteria for making an IBWD are satisfied. The Commission simply takes the agreed terms and arbitrates the balance.
25. Given that the purpose of the provisions is to allow the Commission to arbitrate in limited circumstances it can readily be seen that the purpose of a post declaration negotiation period is to narrow the matters in dispute between the parties. That is also consistent with the intended role of these provisions to assist in the enterprise bargaining process. 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.
26. In summary, s.274(3) is directed at identifying those terms which the parties have negotiated as being terms that should go into an agreement if one is made and moved on with their negotiations. The context in which it must be construed is one where the

⁵ *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [38]-[39] (Gageler J).

provision is directed at capturing the common ground achieved by the parties during their negotiations and permitting the Commission to impose an arbitrated solution only in respect of other matters that were at issue during the relevant periods. The context provided by the legislation is a focus on the industrial parties determining the content of enterprise agreements so far as possible and the Commission's arbitral power being limited.

D. Facts

27. The background facts are set out in great detail in Laura Campanaro's third statement.
28. Bargaining commenced in 2020 around the time of or shortly after the creation of FRV.
29. Bargaining was initially supported by a Heads of Agreement between the then Minister and the UFU which provided amongst other things that terms and conditions of employment would "not be diminished."⁶
30. The parties adopted a process in respect of bargaining.
31. There were approximately 32 meetings between July 2020 and 26 April 2022.⁷
32. The UFU and the FRV made progress towards agreeing clauses and claims in the log of claims.
33. There was never any discussion at that time that there were any qualifications or reservations to agreements reached by the parties during bargaining.⁸
34. Formal bargaining commenced on 26 April 2022, following the issues of a Notice of Employee Representational Rights by FRV. There were a further 32 meetings held between then and the end of 2022.⁹

⁶ Third statement of Laura Campanaro para 17, annexure LC-1.

⁷ Third statement of Laura Campanaro para 8.

⁸ Third statement of Laura Campanaro, para 12.

⁹ Third statement of Laura Campanaro, para 8.

35. The parties always operated on the basis that the existing agreement was the starting point. This was mentioned by Mr Peter Parkinson representing FRV at the very first bargaining meeting on 26 April 2022.¹⁰
36. Additionally, the parties entered into a bargaining charter which at no stage made mention of the need for government approval of any item.¹¹
37. During the course of the process of bargaining FRV represented to the UFU representatives that its Executive Leadership Team was making relevant decisions.¹²
38. While the UFU representatives were aware that government wages policy required approval of new agreements they were never told that when FRV reached agreement on a particular provision it had not already obtained authority in relation to that.
39. On 8 August 2022 Mr Peter Parkinson, who was a lead negotiator for FRV, circulated a long document about implementation of the terms agreed thus far. There was no indication that this was provisional or subject to approval. The document shows the parties regarded the relevant terms as agreed.¹³
40. The only exception concerned wages and allowances which were always understood by all parties to be subject to government approval. This was obviously apparent since no offer could be made without it.
41. One important aspect of the bargaining was that as a result of the creation of FRV, the parties agreed in bargaining on a number of “efficiencies” which allowed FRV to make significant savings in excess of \$100m through the cooperation of the UFU. As will become apparent during the second stage of this hearing, it was always understood between the parties that those savings would flow through to firefighters through this round of negotiations.¹⁴
42. During bargaining the parties used a draft copy of the proposed Operational Staff Agreement. The UFU’s copy became the key copy.¹⁵ By July 2023 every item in the

¹⁰ Third statement of Laura Campanaro, para 14.

¹¹ Third statement of Laura Campanaro, para 19.

¹² Third statement of Laura Campanaro, paras 22-28.

¹³ Third statement of Laura Campanaro, para 44, annexure LC-8.

¹⁴ Third statement of Laura Campanaro, paras 93-116.

¹⁵ Third statement of Laura Campanaro, paras 20 and 29-31.

draft agreement, other than those items dealing with wages and allowances, was noted as agreed by being shaded in green.¹⁶

43. Ms Campanaro’s statement describes in detail the processes undertaken to reach agreement. Each party filed a s.240 application and each s.240 application was dealt with by Commissioner Wilson.
44. The Commissioner issued two statements, the first on 3 February 2023 indicating that there were ten items outstanding at that stage. The Commissioner said the parties “had reached agreement on all but ten issues”.¹⁷
45. The Commissioner also said that it was clear that bargaining would be unlikely to progress without FRV being able to put a monetary proposal and that that was likely to be a function of Victorian government wages policy. He said at [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.*¹⁸

46. While the parties awaited the government’s new wages policy they undertook such discussions.¹⁹
47. As a consequence, all matters were resolved other than wages and allowances. This is reflected in Commissioner Wilson’s statement of 19 June 2023.²⁰
48. This is consistent with the conduct of the parties leading up to that period. In March 2023 Fire Rescue Commissioner Gavin Freeman published a video to all FRV staff in which he stated:

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

¹⁶ Third statement of Laura Campanaro, para 69, annexure LC-11.

¹⁷ Third statement of Laura Campanaro, para 83, annexure LC-13.

¹⁸ Third statement of Laura Campanaro, para 83.

¹⁹ Third statement of Laura Campanaro, paras 84-89 and 132-133.

²⁰ Third statement of Laura Campanaro, para 90, annexure LC-15.

*quantum of wages and allowances increases of course is yet to be agreed as well.*²¹

49. UFU members had also been kept updated by the union as to progress culminating in a communication in July 2023 that all matters had been agreed other than wages and allowances.²²
50. The Victorian government's new wages policy for 2023 was published in May 2023.²³ Despite that, no offer was forthcoming at that time. No offer on wages and allowances was forthcoming after Commissioner Wilson's statement of 19 June 2023.
51. In the knowledge that almost everything had been agreed, the UFU initiated its application for an IBD on 28 July 2023.
52. Following that application, the FRV purported to make an offer to the UFU on 7 August 2023.²⁴
53. It is noted that the letter does not purport to resile from any but three of the items previously agreed.
54. On 2 October 2023 FC Freeman published a video in which he stated that FRV wanted to use the agreed matters (other than the three exceptions raised in the letter of 7 August) as the starting point for negotiations in any future negotiations.²⁵
55. The FRV's attempts to repudiate its agreement on all items only crystallised in the hearing on the application for the IBD.²⁶
56. After having requested the post-declaration bargaining period which the FRV submitted would enable the parties to finalise agreement on all of the matters that it had now stated were not agreed, FRV offered to meet one week after the start of the period, that is at its mid-point.²⁷

²¹ Third statement of Laura Campanaro, para 86(d).

²² Third statement of Laura Campanaro, para 92

²³ Third statement of Laura Campanaro, para 137, annexure LC-26.

²⁴ Third statement of Laura Campanaro, paras 147-150, annexure LC-27.

²⁵ Third statement of Laura Campanaro, para 154, annexure LC-29.

²⁶ Transcript 26 September 2023 PN214-225.

²⁷ Third statement of Laura Campanaro, para 155, annexure LC-30.

57. At that meeting it made no offers.²⁸ Another meeting was arranged and FRV did not make itself available.²⁹ However, while not resiling from its position that the issue of Firefighters' Registration Board was agreed, the UFU wrote to FRV with a new proposal in respect of the Board on that day.³⁰ No response has been received.

E. The Agreed Terms

58. It is submitted that when the provisions of the Act are understood, everything which was noted as agreed in version 14R of the draft agreement as agreed between the parties, was agreed at the end of the post-declaration negotiation period.

59. FRV has never at said that it does not want all those agreed terms, many of which must be totally uncontroversial, in the agreement.

60. Instead, it has said that on a construction of what happened between the parties they do not satisfy the definition of "agreed term". as we apprehend it, this is said to be on two bases.

61. First it is said that there is no agreement until everything is agreed.

62. It cannot be that the legislature intended that there would not be an agreed term until everything was agreed. There would be no point in having the IBD provisions in the Act. A different situation might arise if a party said we will agree to Term X provided we can reach agreement on Term Y where no agreement was reached on Term Y. That is a conditional agreement of a different kind to the ordinary type of agreement which occurs in industrial negotiations.

63. In any negotiation the parties sit down and work through the issues. When they have resolved an issue they put it to one side and move on to the next. None of those resolved issues actually becomes part of an enterprise agreement until all are agreed and the procedures under the act are gone through. But the test is not whether the agreed terms are terms which have been agreed to finality. The test is whether they are terms which had been agreed as being terms that should go into the enterprise agreement.

²⁸ Third statement of Laura Campanaro, para 157-159.

²⁹ Third statement of Laura Campanaro, para 164.

³⁰ Third statement of Laura Campanaro, para 165, annexure LC-34.

64. Secondly, it is said that any “in principle” agreements were subject to government approval.
65. This contention should be rejected on the facts. The UFU was never advised that everything was still subject to government approval. The parties conducted themselves and represented to Commissioner Wilson that all matters other than wages and allowances were agreed.
66. In *ANMF v Kaizen*, the Full Federal Court dealing with the issues of representation and ostensible authority in respect of the making of an enterprise agreement found an employer was bound by the actions of its representative even though he or she did not have actual authority to agree on the terms agreed.³¹
67. The situation is not on all fours here, but FRV has represented that it had authority to make the agreements it made. Why should not it, as a bargaining representative, be bound by those representations?
68. It is not to the point that it now says it did not have authority; that is a matter between it and the State Government. Government wages policy is not legislation. It is simply a policy. If FRV fails to comply with one of the Victorian Government’s policies that will be a matter between it and the Victorian Government. But it cannot affect matters agreed between the FRV and a third party, that is, another bargaining representative in an enterprise agreement negotiation.
69. FRV will no doubt contend that the three issues in respect of which it purported to withdraw agreement in the letter of 7 August 2023 are not agreed. Those matters were the firefighters’ registration board, the new allowances clause and the increases to minimum staffing.³² Any such contention should be rejected.
70. The letter of 7 August does not resile from most of the agreed terms, but rather endorses them or reaffirms them. It is transparently an attempt to put something new in issue in circumstances where the conduct of FRV in the negotiations over wages

³¹ (2015) 228 FCR 225.

³² Third Statement of Laura Campanaro para 151.

and conditions has been unacceptable to say the least. It is an attempt to FRV to position itself to create a contest in relation to the three items listed in it.

71. The FW Act is concerned with closing the gap between the parties not facilitating its expansion. Any change in bargaining position should be demonstrably for a genuine reason rather than a tactical ploy. The FRV's purported offer and withdrawal of agreement should be seen as what it is, a sham, a tactical ploy to try and achieve an advantage in a way which directly undercuts the evident purpose of the Act. As such it should be regarded as ineffective.

F. Conclusion

72. For the foregoing reasons the Commission should determine that the agreed matters are those annotated as agreed in version 14R and the unagreed matters are those stated to be unagreed in that document.

Herman Borenstein KC
Warren Friend KC
Tom J Dixon
Counsel for the Applicant
Date: 17 November 2023