

Applicant: United Firefighters' Union of Australia

Respondent: Fire Rescue Victoria

APPLICANT'S SUBMISSIONS

1. These submissions are filed pursuant to Directions made on 9 August 2023 as amended, and in support of the UFU's application for an intractable bargaining declaration under s.235 of the *Fair Work Act 2009* (FW Act).

Factual Background

2. Fire Rescue Victoria (FRV) is a public entity established under s.6 of the *Fire Rescue Victoria Act 1958* (Vic). It is the successor to the former Metropolitan Fire and Emergency Services Board (MFB), and also employs professional firefighters (**operational staff**) transferred to it from the Country Fire Authority (CFA).¹ FRV is responsible for fire safety, fire suppression and fire prevention services, and emergency response services in the Fire Rescue Victoria fire district.²
3. FRV commenced on 1 July 2020.³ Prior to the restructure of the Victorian fire services in 2020:
 - (a) The *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* covered the operational staff employed the MFB (**MFB Agreement**)⁴; and
 - (b) The *Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010* covered the operational staff employed the CFA (**CFA Agreement**).⁵
4. The MFB Agreement and the CFA Agreement each became transferrable instruments that covered the FRV at the time of its commencement.⁶ On 26 August 2020, the MFB Agreement and the CFA Agreement were varied in the terms set out in the *Fire Rescue*

¹ *Applications by Block, Ken* [2020] FWC 3428 (26 August 2020) at [31].

² Section 7 of the *Fire Rescue Victoria Act 1958* (Vic).

³ *Applications by Block, Ken* [2020] FWC 3428 at [2].

⁴ *Applications by Block, Ken* [2020] FWC 3428 at [6].

⁵ *Applications by Block, Ken* [2020] FWC 3428 at [12].

⁶ *Applications by Block, Ken* [2020] FWC 3428 at [35].

*Victoria Operational Employees Interim Enterprise Agreement 2020 (Interim Agreement).*⁷

5. Division A of the Interim Agreement applies to former MFB operational staff. Clause 4.1 of Division A of the Interim Agreement provides for a nominal expiry date of 1 July 2019. Division B of the Interim Agreement applies to former CFA operational staff. Clause 4.1 of Division B provides for a nominal expiry date of 30 September 2013.
6. The United Firefighters Union, Victoria Branch (UFU) represents nearly all operational staff employed by the FRV covered by the Interim Agreement.⁸
7. The FRV and the UFU are the relevant bargaining agents for the proposed enterprise agreement for the purposes of s.176(1) of the FW Act.⁹

Bargaining History

8. The UFU and FRV commenced discussions for a new operational staff Agreement in 2020.¹⁰ Throughout the course of bargaining, the UFU maintained control of a master copy of the proposed new Agreement that contained clauses agreed between the parties.¹¹ The master copy was updated to identify the parties' progress, and copies of the updated versions were provided to the FRV.¹²
9. Many changes to the operational staff's work practices and legal entitlements under the Interim Agreement have been put in place as a result of co-operation between the parties since 2020.¹³ These changes within the context of the fire services restructure and the harmonisation of the administrations of the former MFB and CFA within FRV have been referred to as "efficiencies".¹⁴
10. Throughout the course of bargaining, the UFU has sought payment of the savings that have been generated by efficiencies to be included in any wages outcome in the new Agreement.¹⁵ It has done so on the basis of an agreement between the parties that the UFU's co-operation in achieving the efficiencies was contingent on any concomitant savings being flowed on to operational staff.¹⁶

⁷ PR720617.

⁸ Statement of Peter Marshall at [6]; *Applications by Block, Ken* [2020] FWC 3428 at [9].

⁹ The five other bargaining agents have been served with the UFU's application.

¹⁰ Statement of Laura Campanaro at [4].

¹¹ Statement of Laura Campanaro at [8].

¹² Statement of Laura Campanaro at [10].

¹³ Statement of Peter Marshall at [6]-[11].

¹⁴ The efficiencies conceded by FRV are set out in the statement of Laura Campanaro at [42]-[43] and attachment LC-8. The figure of \$117 million was conceded by FRV in submissions to the FWC on 23 July 2023 in matter C2023/2071, at [33]-[34], and admitted in evidence filed by the FRV.

¹⁵ Statement of the Commission of 3 February 2023 at [9] (Statement of Laura Campanaro at LC5).

¹⁶ Statement of Peter Marshall at [12]-[13]; Statement of Laura Campanaro at [55] and [59] (LC-9 and LC-13).

11. On 1 November 2021, the UFU made an application in B2021/1057 seeking the Commission’s assistance over *inter alia* the alleged failure of FRV to provide costings for efficiencies claimed by the UFU.¹⁷
12. On 26 April 2022, the UFU commenced formal bargaining with the FRV.¹⁸
13. On 26 May 2022, in the absence of any agreement between parties, the UFU discontinued B2021/1057. It thereafter took steps to commence protected industrial action¹⁹, and advance its claims for payments based on efficiencies via the allowances clauses in the Interim Agreement (**UFU’s Efficiencies Allowance claim**).²⁰
14. On 4 November 2022, FRV filed an application under s.240 in B2022/1676 in which it stated that it “*contends that the alleged efficiencies relied upon by the UFU in C2022/5683 could be properly viewed as relevant to operational cost savings and/or productivity outcomes*” which “*fall to be assessed in and, subject to agreement, given effect through the bargaining for the New Agreement*”.²¹ That is, the FRV took the position that the UFU’s Efficiencies Allowance claim was properly to form part of bargaining for a new agreement and should not be advanced as a claim under the Interim Agreement. The FRV also identified the need for the Commission’s assistance in respect of nine subject-matter items in the draft Agreement including wages, allowances and efficiencies.²²
15. On 3 February 2023, Commissioner Wilson issued a Statement identifying 10 subject-matter items that remained in issue between the parties.²³ The Commission relevantly considered that:
 - (a) It was “*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*”²⁴; and

¹⁷ *United Firefighters’ Union of Australia v Fire Rescue Victoria* [2023] FWC 512 (7 March 2023); Statement of Peter Marshall at [14].

¹⁸ Statement of Laura Campanaro at [5].

¹⁹ Protected action ballot order (B2022/652): *UFU v FRV* [2022] FWC 1763 (7 July 2022).

²⁰ C2022/5683 commenced on 15 August 2022; and C2023/207 being an application increase existing allowances.

²¹ FRV’s F11 Application in B2022/1676 at [2.1(23)].

²² Statement of Laura Campanaro at [24].

²³ Statement of Laura Campanaro at [26].

²⁴ Statement of Laura Campanaro at LC-5, p.1286 at [14].

- (b) It was desirable that “*the parties endeavour to resolve to finality all of the non-wages matters that have been under discussion in the conciliation conferences to date*”.
16. The UFU and FRV representatives thereafter met 12 times between 3 February and 26 April 2023 and resolved all outstanding non-wage-related items.²⁵
17. On 7 March 2023, the Emergency Services Minister intervened in the UFU’s Efficiencies Allowance claim proceedings, and submitted *inter alia* that “*the matters the subject of this application would be better dealt with in the course of enterprise bargaining*”.²⁶ The UFU’s Efficiencies Allowance claim proceedings were thereafter adjourned, and the parties pursued their respective claims through bargaining in B2022/1676.
18. On 10 March 2023, the FRV made an offer to settle the bargaining dispute.²⁷ The FRV offer did not include any non-wage-related claims. The terms of the offer were:
- (a) A three-year Agreement;
 - (b) Three annual wage increases of 2 per cent effective from the commencement of the Agreement; and
 - (c) One-off sign on payment of \$1500.
19. The UFU responded to the FRV offer on 15 March 2023 by accepting the FRV’s terms on condition that *inter alia*:
- (a) There be a “mechanism to protect against cost-of-living changes and inflation” included in any outcome; and
 - (b) The UFU’s claims in respect of 19 identified efficiencies would be able to be pursued by way of agreement, or a consent arbitration notwithstanding the no extra claims clauses in the new Agreement.²⁸
20. The conditions attached to the UFU’s counter-offer were put forward on the basis that the parties had “otherwise agreed to all non-wages terms and conditions as contained in the most recent iteration” of the draft Agreement.
21. The parties did not reach agreement. The FRV explained its position by reference to a document that the FRV had prepared and advanced in the course of bargaining that

²⁵ Statement of Laura Campanaro at [27].

²⁶ *United Firefighters’ Union of Australia v Fire Rescue Victoria* [2023] FWC 512 at [18].

²⁷ Statement of Laura Campanaro at LC-10, p.1306 (Letter from Acting Commissioner Gavin Freeman (FRV) to Peter Marshall (UFU) dated 10 March 2023).

²⁸ Statement of Laura Campanaro at LC-12, p.1313 (Letter from Peter Marshall (UFU) to Acting Commissioner Gavin Freeman (FRV) dated 15 March 2023).

quantified savings achieved through efficiencies (**FRV efficiencies estimate document**).²⁹ FRV confirmed that³⁰:

- (a) The FRV efficiencies estimate document identified a number of efficiencies, and that there were “savings as a result of these efficiencies”;
- (b) It recognised that some of the “efficiencies have already been achieved as referenced in the document”;
- (c) Its “commitment that such savings would be available to flow to FRV employees”.
- (d) Despite FRV’s acceptance of these matters:
 - (i) “Government instruction” was that the efficiencies identified in the FRV efficiencies estimate document “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)”; and
 - (ii) “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”.

22. It follows that:

- (a) The FRV was prepared to negotiate an outcome with the UFU on the basis of its commitment to the UFU that savings would flow to FRV operational staff.
- (b) However, the Government directed the FRV not to make any wages offer that included efficiencies as the savings had already been achieved during the life of the Interim Agreement. That is, the Government would only recognise savings if they were achieved during the life of the new Agreement.³¹

23. The UFU has accused the FRV of renegeing on its agreement to flow on savings achieved by way of efficiencies to staff.³² The position of the UFU was set out in its letter to the FRV of 27 March 2023³³:

Despite the position of both the FRV and the Minister that Efficiencies should be the subject of bargaining, the FRV and Government have refused to engage in any discussions about the payment of realised Efficiencies in the course of discussions over wages, and have actively sought to prevent any of the

²⁹ Statement of Laura Campanaro at LC-8, p.1290.

³⁰ FRV letter to UFU dated 29 March 2023 (Statement of Laura Campanaro at [61]-[62], LC-14, p.1327).

³¹ Statement of Laura Campanaro at p.1275; Pillar 3 allowed for funding of agreement outcomes derived “from appropriate cash offsets and/or a government approved funding strategy”.

³² Statement of Peter Marshall at [22].

³³ Statement of Laura Campanaro at LC-13, from p.1323.

Efficiencies identified in Tables 2 and 3 of the enclosed FRV [efficiencies estimate] document from being the subject of any bargaining for an increase in the wages of operational firefighters.

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.

24. The parties were apart on wages by a figure of at least \$117 million as a result of the positions adopted by them.³⁴ The total efficiencies claim by the UFU is \$203,768,949.³⁵

All other clauses save for quantum of wages have been agreed

25. Version 13 of the draft Agreement was created on or around 20 March 2023.³⁶ Version 13 identified that 277 out of 281 clauses and all schedules in the draft Agreement had been agreed.³⁷

26. On 4 April 2023, the Victorian Government announced a new Government Wages Policy.³⁸ The Parties met a number of times in April 2023, including at a s.240 report back conference on 27 April 2023.³⁹ The Parties had agreed to all outstanding matters save for the quantum of wages and allowances, and an issue with the Firefighters

³⁴ Statement of Laura Campanaro at [42]; LC-12 at p.1314, [2]; Statement of Peter Marshall at [21].

³⁵ Statement of Laura Campanaro at LC-12, p.1316.

³⁶ Statement of Laura Campanaro at [11].

³⁷ Statement of Laura Campanaro at [27]-[28].

³⁸ Statement of Laura Campanaro at [16]; The Wages Policy was published on 2 May 2023.

³⁹ Statement of Laura Campanaro at [66]-[70].

Registration Board which had been the subject of other proceedings throughout the course of bargaining.⁴⁰

27. The Registration Board matter was subsequently agreed such that the only matter outstanding between the parties was the quantum of wages and allowances.⁴¹ There were no further s.240 conferences after 27 April 2023.⁴²
28. The final iteration of the draft Agreement, namely Version 14, was created on 14 June 2023.⁴³ Version 14 reflected the fact that the parties had reached agreement on all matters other than the quantum of wages and allowances.
29. The Commission issued its second Statement in matter B2022/1676 on 19 June 2023 confirming that⁴⁴:
 - (a) *“all outstanding matters have been resolved, save for the matter of an offer for increases to wages and related monetary allowances”*: at [2]; and
 - (b) 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”*: at [3] (being a reference to the efficiencies).

The UFU’s intractable bargaining application

30. The Commission noted in its 19 June 2023 Statement 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””, and urged the FRV to “make a proposal to the UFU and other employee bargaining representatives in the near future which properly responds to their claims”.⁴⁵
31. On 28 July 2023, and in the absence of any such wages offer, the UFU filed its application for an intractable bargaining application.
32. On 7 August 2023, the FRV made a wages offer.⁴⁶ The offer was made contingent on certain previously agreed matters not forming part of the settlement offer, namely:

⁴⁰ In matters C2022/2043 (*United Firefighters’ Union of Australia v Fire Rescue Victoria* [2022] FWC 3170); and C2023/635 (*United Firefighters’ Union of Australia v Fire Rescue Victoria* [2023] FWC 1235); Statement of Laura Campanaro at [28(d)], [70].

⁴¹ Statement of Laura Campanaro at [76].

⁴² Statement of Peter Marshall at [29].

⁴³ Statement of Laura Campanaro at [13]-[14].

⁴⁴ Statement of Laura Campanaro at LC-7, p.1288.

⁴⁵ Statement of Laura Campanaro at LC-7 at [5]-[6].

⁴⁶ Statement of Peter Marshall at PM-2.

- (a) the firefighter’s registration board;
 - (b) “clauses allowing for extra claims to be arbitrated by the Fair Work Commission” during the life of the new Agreement; and
 - (c) “increases to the minimum staffing charts contained within the agreement”.
33. The UFU rejected the “offer” as a tactical move by the FRV to support its position in the intractable bargaining proceedings; because the offer would result in “a serious diminution in the conditions of UFU members”; and because the offer failed to give effect to “the agreement between FRV and the UFU” that efficiencies in the amount of at least \$117m achieved during the creation of the FRV “were intended by all parties to be utilised to fund wage increases”.⁴⁷
34. The UFU considers that the FRV’s 7 August 2023 offer drove the parties further apart.⁴⁸
35. The UFU has indicated it will not settle with the FRV unless the outcome involves the recognition of efficiencies achieved to date, and the non-wages clauses agreed to are honoured.⁴⁹
36. The UFU sees no reasonable prospect of agreement being reached if the Commission does not make the declaration.⁵⁰

Legal Submissions

37. The Commission has a discretion to make an intractable bargaining declaration:
- (a) if the minimum bargaining period has passed: s.235(1)(c) and (5); and
 - (b) the Commission is satisfied of the matters set out in s.235(2).

Section 235(1)(c)

38. The minimum bargaining period has passed. It is over 9 months after:
- (a) the relevant nominal expiry dates identified in the Interim Agreement, namely 1 July 2019 (for former MFB operational staff), and 30 September 2013 (for former CFA operational staff) for the purposes of ss.235(5)(a)⁵¹; and
 - (b) the FRV agreed to commence formal bargaining on 26 April 2022 for the purposes of ss.173(2)(a) and ss.235(5)(b) and (6) of the FW Act.⁵² This is the later date for the purposes of s.235(5).

⁴⁷ UFU letter to FRV dated 7 August 2023 (Statement of Peter Marshall at PM-3).

⁴⁸ Statement of Peter Marshall at [38].

⁴⁹ Statement of Peter Marshall at [39].

⁵⁰ Statement of Peter Marshall at [37]; Statement of Laura Campanaro at [81].

⁵¹ *Applications by Block, Ken* [2020] FWC 3428 at [6] and [12].

⁵² Statement of Laura Campanaro at [5].

Section 235(2)(a)

39. The FWC must also be satisfied that “*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*”: s.235(2)(a).
40. There have been a number of s.240 proceedings commenced by the parties in the course of this dispute which involved a high level of participation by the Applicant:
- (a) The UFU lodged an Application under s.240 in B2021/1057 on 1 November 2021 that involved a number of conferences.⁵³
 - (b) The latest s.240 application commenced by the FRV on 4 November 2022 in B2022/1676 involved 10 conciliation conferences before Commissioner Wilson between November 2022 and April 2023.⁵⁴ The Commission issued its last statement in that matter 19 June 2023.
 - (c) Four conciliation conferences also took place during the UFU’s Efficiencies Allowance claim proceedings in C2022/5683.⁵⁵
41. Approximately 32 bargaining meetings were held between July 2020 and 26 April 2022⁵⁶; approximately 32 additional meetings took place between 26 April 2022 and December 2022⁵⁷; and a further 12 meetings were held between 3 February 2023 and 27 April 2023.⁵⁸
42. Thus there have been some 76 in-person meetings between the bargaining representatives; 16 conciliation conferences attended by the parties; as well as regular correspondence aimed at arriving at a negotiated outcome.⁵⁹

Section 235(2)(b)

43. The Commission must also be satisfied that “*there is no reasonable prospect of agreement being reached if the FWC does not make the declaration*”: s.235(2)(b).
44. Satisfaction that there is “no reasonable prospect” of agreement “does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance

⁵³ Statement of Laura Campanaro at [37].

⁵⁴ Statement of Laura Campanaro at [25].

⁵⁵ Statement of Laura Campanaro at [38]-[39].

⁵⁶ Statement of Laura Campanaro at [4].

⁵⁷ Statement of Laura Campanaro at [5].

⁵⁸ Statement of Laura Campanaro at [7].

⁵⁹ Statement of Laura Campanaro at [4]-[7]; Statement of Peter Marshall at [25].

of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance”.⁶⁰

45. The expression “no reasonable prospect was considered by the High Court, albeit in the different statutory context:

“No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is “no reasonable prospect”. The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like “no reasonable prospect” is to be avoided”.⁶¹

46. Some insight into the expression “*no reasonable prospect of agreement*” can be gained from the scheme of the FW Act, which contemplates that the Commission can be “*satisfied that there is no reasonable prospect of agreement*” at the same time as the Commission “*considers it appropriate*” to specify a post-declaration negotiating period.

47. The purpose of specifying a post-declaration negotiating period is to allow the parties “to continue to negotiate with a view to reaching an enterprise agreement before the FWC proceeds to make a workplace determination”⁶², during which time the Commission can “*provide other assistance during the period, such as conciliation*”.⁶³

48. The expression “*no reasonable prospect of agreement*” must accordingly be understood as embracing circumstances where the Commission can simultaneously hold the view that an intractable bargaining order should be made, and that there is nevertheless utility in continuing negotiations with a view to reaching agreement. The evident legislative purpose revealed by the statutory scheme will be defeated if the bar for establishing the requisite satisfaction under s.235(2)(b) is set too high.

49. In this case, for the reasons set out above, there is “no reasonable prospect” of agreement being reached as:

- (a) Following the restructure of the Victorian fire services in 2020, the UFU engaged in a process to assist in the harmonization of the operational workforces and on the basis that operational staff would be paid from the efficiencies realised

⁶⁰ Revised Explanatory Memorandum, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [846]; *Ansett Australia Limited v The Australian Workers’ Union* [2000] AIRC 1379 at [56]-[58] (Whelan C).

⁶¹ *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 at [58] (Hayne, Crennan, Kiefel & Bell JJ).

⁶² Revised Explanatory Memorandum at [853].

⁶³ Section [235A\(1\)](#) of the FW Act.

through such changes. The UFU thereafter pursued the payment of those efficiencies through bargaining⁶⁴;

- (b) The FRV admitted that it took the benefit of the UFU's involvement in those processes, and that efficiencies were achieved as a result. The FRV quantified those efficiencies in the amount of at least \$117 million, and accepted that it made a commitment that such savings would be available to flow to FRV employees⁶⁵;
- (c) When it became clear that the FRV would not pay for those efficiencies through bargaining in the absence of government approval, the UFU sought payment of the efficiencies through arbitration involving a claim under the allowances clauses of the Interim Agreement⁶⁶;
- (d) The FRV and the Government took the position that the most appropriate forum to pursue the efficiencies claims was in bargaining. The UFU thereafter adjourned the UFU's Efficiencies Allowances claim and pursued efficiencies through bargaining⁶⁷;
- (e) Despite the submissions made in the UFU's Efficiencies Allowances claim, and despite the Statements of the Commission directed at the FRV to put a firm wages proposal to the UFU "that is capable of encompassing the matters that are within the scope of the Efficiencies Allowance claim", the FRV and the Government thereafter refused to bargain in respect of the efficiencies⁶⁸;
- (f) The Government recognised that efficiencies had been achieved, but because they had already been realised, the savings generated did not fall within the strict terms of the Government Wages Policy which only recognised a trade-off for future savings⁶⁹;
- (g) Despite negotiating formally and informally over a number of years to reach agreement on all non-wage clauses in the draft agreement, the FRV put an offer after the UFU had commenced these intractable bargaining proceedings which sought to undo a number of clauses that had been agreed. This offer was rejected, and is seen by the UFU as driving the parties further apart.⁷⁰

50. No progress has been made in respect of the negotiations over the quantum of wages. The two offers made to date by the FRV have not engaged with the UFU on efficiencies.

⁶⁴ See above at [17].

⁶⁵ See above at [21].

⁶⁶ See above at [13].

⁶⁷ See above at [17].

⁶⁸ See above at [21].

⁶⁹ See above at [22].

⁷⁰ See above at [33].

51. The UFU identifies an amount of \$203,768,949 for efficiencies, and has indicated a preparedness to countenance a figure of at least \$117 million, being a figure arrived at and conceded by the FRV.⁷¹ The UFU, at the Government's direction, puts the amount on offer for efficiencies at \$0.
52. The FRV's position is, despite its concessions, constrained by the position taken by Government. The UFU maintains that the FRV has reneged on an agreement to flow the efficiency savings to operational staff after taking the benefit of the UFU's involvement in securing those efficiencies.
53. Given the present intractability of the parties' respective positions, and the amount that presently separates them, the prospect of any agreement being reached in the foreseeable future is vanishingly small.

Section 235(2)(c)

54. The Commission must also be satisfied that "*it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement*": s.235(2)(c).
55. The attitude of the FRV to the UFU's application have not as yet been revealed.
56. It is otherwise submitted as reasonable in all the circumstances to make the declaration sought as the parties have been negotiating since 2020, and the state of negotiations is such that the efforts to achieve agreement on all non-wage related matters are in danger of being undone.
57. The intractable bargaining provisions are designed to focus on the issues that are not agreed, and to have them determined if there is no reasonable prospect of the parties reaching agreement.
58. It is submitted that it not would be appropriate for the Commission to specify a post-declaration negotiating period for the following reasons.
 - (a) The parties have agreed to all non-wage-related terms, and have informed the Commission of this position⁷²;
 - (b) The distance between the parties on wage matters is unbridgeable given that FRV is prohibited from honouring its commitment to pass on the efficiency savings⁷³;

⁷¹ See above at [21], and footnote 14.

⁷² See above at [29].

⁷³ See above at [21].

- (c) The most likely outcome of a post-declaration bargaining period would be for the parties to move further apart, as demonstrated by the 7 August 2023 offer, made after this application, which attempted undo some of the agreed matters. The UFU has treated this offer as a counter-productive expression of bad faith⁷⁴; and
- (d) The evident purpose of the intractable bargaining provisions is to promote the resolution of bargaining impasses. To use the period prior to an intractable bargaining workplace determination to undo and revisit terms that have been agreed would hinder rather than promote the statutory purpose.

59. For all of the above reasons, the Commission should make the orders sought in the Application, and program the matter for determination.

W.L Friend

T.J. Dixon

Counsel for the UFU

Date: 14 August 2023

⁷⁴ See above at [33]-[35].