IN THE FAIR WORK COMMISSION
AT MELBOURNE

APPLICATION BY THE METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD

MINISTER’S OUTLINE OF SUBMISSIONS IN RESPONSE TO OBJECTIONS TO EVIDENCE¹
(Filed pursuant to the directions of Deputy President Gostencnik made 4 June 2018 and amended on 27 June 2018)

Allocated Member: Deputy President Gostencnik
Date of document: 3 July 2018
Filed on behalf of: The Minister for Small and Family Business, the Workplace and Deregulation
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Background

1. On 22 June 2018, pursuant to the orders made on 4 June 2018, the Minister filed the following categories of evidentiary material:

   (a) statements of witnesses intended to be called;

   (b) submissions, witness statements, transcript and other tendered documents relevant to the 4 yearly review of the Award (AM2014/202) (4 yearly review);

   (c) an article titled “Women Top Fire Chief’s List” and related documents; and

   (d) emergency services industrial instruments, statistical information and a journal article that were not part of the 4 yearly review,

¹ These submissions adopt the same terms as defined in the Minister’s Outline of Submissions filed on 22 June 2018.
(together, the **Minister’s evidence**).

2. On 29 June 2018, the MFB and the UFU each filed submissions in respect of the Minister’s evidence.

3. The UFU take evidentiary objection to the Minister’s evidence on the following two grounds:
   
   (a) s.195 of the FW Act is not directed at terms in enterprise agreements that are indirectly discriminatory; and

   (b) the material has only “**minimal relevance**”.²

4. Most tellingly, the MFB, which is the actual party with the carriage of the application for approval of the enterprise agreement, does not object to the Commission receiving the Minister’s evidence. The MFB, with respect, correctly says that questions of relevance and weight should be ultimately assessed after full argument at the hearing of the application.³ Nevertheless, the MFB submits that the evidentiary case relevant to the 4 yearly review is of “**limited weight**”.⁴

**Relevance of the Minister’s evidence**

5. The Commission is not bound by the rules of evidence and is obliged by statute to perform its functions in a manner that is fair and just.⁵

6. The Minister’s evidence is directly relevant to the question of whether there are terms in the enterprise agreement that are discriminatory or otherwise objectionable.

7. Contrary to the submissions of the MFB and UFU, the Minister’s evidence is of significant probative value. The relevance of each document is articulated in the list of documents titled, “**Documentary evidence to be relied upon by the Minister**” and made plain in the Minister’s outline of submissions dated 22 June 2018.

8. In broad terms, the Minister’s evidence establishes:

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² Submissions of the UFU – leave to adduce evidence, [31].
³ Submissions of the MFB – leave to adduce evidence, [6].
⁴ Submissions of the MFB – leave to adduce evidence, [5].
⁵ FW Act, ss.577 and 591.
(a) the discriminatory impact of restrictions on part-time employment on
women and carers, including the loss of promotional opportunities;

(b) that there are no insurmountable operational impediments to part-time
work in the firefighting industry;

(c) the UFU’s refusal of previous requests for part-time employment; and

(d) the practical application of terms used in the enterprise agreement,
such as “special administrative duties”.

9. These matters are directly relevant to the question of the discriminatory
nature of the part-time restrictions in the enterprise agreement and whether
the restrictions are reasonable. The UFU and MFB do not address, in any
meaningful way, the substance of the Minister’s evidence. Instead, the UFU
and MFB focus on the nature of the inquiry undertaken by the 4 yearly
review.

10. The 4 yearly review was conducted under s.156 of the FW Act. The task of
the Full Bench in the 4 yearly review involved, amongst other things,
consideration of the requirement under s.153(1) of the FW Act that a modern
award must not include terms that discriminate against an employee for
reasons, including sex, or family or carer’s responsibilities.6

11. The 4 yearly review of modern awards – Fire Fighting Industry Award
2010 [2016] FWCFB 8025 concerned the MFB and the CFA’s application to
vary the Award to remove the prohibition against part-time employment in
the firefighting industry in the public sector, and to make consequential
changes to rostering provisions in the Award.

12. Although the proceeding was directed at the prohibition on part-time
employment in the Award, the issue of discrimination was a live issue in the
proceeding.7 The evidence adduced by the MFB and CFA in support of its
application for the variation directly concerned the disadvantages on women

and [44]; Submissions on behalf of the Metropolitan Fire and Emergency Services Board and the
Country Fire Authority dated 26 February 2016 at [25(b)].

7 In the final submissions on behalf of the Metropolitan Fire and Emergency Services Board and the
Country Fire Authority dated 16 May 2016, the MFB stated that “the prohibition against part-time
work in the modern award is potentially discriminatory”, at [71] to [76].
and carers as a result of the prohibition on operational part-time firefighting in the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010.

13. It is self-evident that the evidence of those disadvantages is directly relevant to the question of whether restrictions on part-time operational firefighting in the enterprise agreement is discriminatory against women and carers. The fact that the witnesses were subjected to cross-examination or were not required for cross-examination by the UFU further strengthens the probative value of the evidence.

14. The MFB refers to the Full Bench’s comments regarding consultation prior to the introduction of part-time employment. Those comments were directed at consultation as to “the precise form” of part-time working arrangements and do not otherwise detract from the MFB witnesses’ evidence regarding the discriminatory effects of restrictions on part-time employment.

15. The MFB’s evidence remains relevant because the enterprise agreement continues the restriction on part-time operational firefighting that was in the award.

16. The MFB notes in its written submissions, that the Minister has not sought to adduce the evidence upon which the UFU relied in the 4 yearly review. The Full Bench in the 4 yearly review decision noted the narrow professional experience of the UFU witnesses and expressed a preference for the evidence of the MFB and CFA. Having regard to the limitations of the UFU evidence, the Minister does not seek to adduce that evidence.

17. Whilst of course the Minister’s evidence should be considered in light of the context of the 4 yearly review, the differing nature of the statutory inquiry in that review should not give rise to a blanket exclusion, nor should the probative value of such evidence be automatically discounted. The evidence is still highly probative of the issues in play in this application.

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9 Submissions of the MFB – leave to adduce evidence, [3].
10 4 yearly review of modern awards – Fire Fighting Industry Award 2010 [2016] FWCFB 8025, [189] and [192].
Issues of statutory construction

18. The Minister accepts that the Minister’s evidence goes to establishing that the part-time provisions of the enterprise agreement are indirectly discriminatory and that the question of whether s.195 of the FW Act covers indirect discrimination is a live issue in this proceeding.

19. In his written submissions filed on 22 June 2018, the Minister sets out detailed argument regarding the proper construction of s.195 and the reasons for contending that indirect discrimination is covered by that provision. Those submissions address, amongst other things, the matters raised by the UFU in its written submissions.

20. The Minister contends that the proper construction of s.195 is not a matter which ought be determined at this preliminary stage concerning objections to evidence. Notwithstanding the emphasis in the UFU submission on *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) [2012] FCA 480*, the weight of the authorities, as demonstrated by the Minister’s submissions, favours a construction of s.195 of the FW Act that includes indirect discrimination.

21. The law in respect of this question is, nevertheless, not settled. The fact that this question of law is not settled was itself recognised by Hatcher VP, after his Honour reviewed the state of the authorities, in *The Metropolitan Fire and Emergency Services Board [2018] FWC 2441* at [14]-[21].

22. Finally, although the Minister does not propose to respond in detail in these submissions, which are directed to evidentiary matters, as to whether s.195 includes indirect discrimination, two brief observations of the UFU’s submissions are called for.

23. First, the UFU asserts (at [13] and [14]) that if s.195 included indirect discrimination, it would provide for statutory defences, such as reasonableness and special measures.

24. The concept of indirect discrimination, however, incorporates a requirement of reasonableness. Reasonableness is required either as one of the elements

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11 Minister’s outline of submissions dated 22 June 2018, [10]-[82].
12 Minister’s outline of submissions dated 22 June 2018 at [10]-[82].
of indirect discrimination (Minister’s submissions [12]), or as an additional statutory defence (as submitted by the UFU).

25. The Minister’s submission on indirect discrimination is supported by:

(a) the legal meaning of the term “discriminates”, which is informed by the framework of anti-discrimination legislation (Minister’s submissions at [19]);

(b) the resulting consistency in the concept of discrimination for the purposes of s.195 and other provisions of the FW Act, noting the UFU concedes (at [25]) ss.218 and 351 encapsulate indirect discrimination (including a requirement of reasonableness);

(c) the statutory history of the term (for example, see Minister’s submissions at [68]).

26. At [28] and [29], the UFU provides various examples, which it contends demonstrate the unlikelihood that Parliament intended s.195 to cover indirect discrimination. Such an example includes a failure to provide special accommodation during holy months where food and drink cannot be ingested in daylight hours. These submissions ignore that reasonableness is an established element of indirect discrimination.

27. Secondly, in relation to exceptions to discrimination found in anti-discrimination, the UFU’s submission overlooks their application to both direct and indirect discrimination. The special measures exception identified by the UFU at [14], found in s.7D of the Sex Discrimination Act 1984 (Cth), provides an example. For this reason, the UFU’s contention does not assist in resolving the constructional issue before the Commission.

28. Having regard to the complexity of this issue, a fact that the UFU refuses to acknowledge, these evidentiary objections of the UFU should not be determined at a preliminary stage but only in light of all the evidence and after full argument at the hearing scheduled for 27 to 31 August 2018.

29. In these circumstances, the UFU’s objection to the Minister’s evidence based on its construction of s.195 of the FW Act should be rejected.
30. Furthermore, the Minister’s evidence is also relied upon in support of the Minister’s position that the enterprise agreement contains “objectionable terms”. The UFU makes no serious case that this argument of the Minister is also untenable. It is not. Again, this is another basis why this evidence should be admitted, and its weight assessed in light of all the evidence and after full argument.

Conclusion

31. In light of the above, the Minister’s evidence should be admitted. Ultimately, matters of weight should be determined in light of all the evidence and with the benefit of final submissions and not by way of a preliminary ruling.

32. The position of the Minister as to the treatment of the Minister’s evidence accords with the position of the applicant to this application for approval, the MFB. In this respect, the MFB makes the following submission as to admissibility of the Minister’s evidence (at [6]):

“That said, in light of ss 577, 590 and 591 of the Fair Work Act 2009 (FW Act) the MFB does not object to the Commission receiving this material. The relevance, weight (if any) to be given to that material and whether it assists the Commission to inform itself in respect of the current application, are matters that the MFB will address at the hearing of the application.”

33. The Minister’s only qualification to this submission is that matters of relevance and weight should be assessed not only after the MFB addresses these issues at the hearing of the application, but also after these issues are fully addressed by the Minister, the Victorian Equal Opportunity and Human Rights Commission and the UFU.

34. The UFU’s pre-emptive strike to rule out the Minister’s evidence at this preliminary stage of the application should accordingly be rejected.

JUSTIN L. BOURKE QC
JENNY FIRKIN
REBECCA PRESTON
FRANCESKA LEONCIO
DATED: 3 July 2018

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