APPLICATION BY THE METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD

MINISTER’S OUTLINE OF SUBMISSIONS
(Filed pursuant to the directions of Deputy President Gostencnik made 4 June 2018)

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PART A: OVERVIEW

1. The Metropolitan Fire and Emergency Services Board (MFB) has applied for approval of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016 (the enterprise agreement).

2. The enterprise agreement is unprecedented in its content. It breaks new ground in its interference in the ability of, in particular, women and persons with family and carer responsibilities, to obtain part-time work. These restrictions on part-time employment also cause the enterprise agreement to fail the “better off overall test” (BOOT).

3. The enterprise agreement also gives rights to members of the United Firefighters’ Union of Australia (UFU) that are not also provided to non-union members.

4. The enterprise agreement, by a combination of powerful terms, in effect, also usurps the ability of the MFB to manage its own fire service. These terms provide a level of union control over management decision-making that has never been seen in this country before.

5. Terms of this kind are unlawful under the Fair Work Act 2009 (Cth) (FW Act).

6. For these reasons, the enterprise agreement does not meet the requirements for approval under Division 4 of Part 2-4 of the FW Act.

7. These obstacles to approval are further briefly examined by way of overview in this part, and more deeply later in this submission in Parts B to F below.

Discriminatory and objectionable terms relating to part-time employees (Part B)

8. Various provisions of the enterprise agreement relating to part-time employment indirectly discriminate against women and people with family or carer’s responsibilities.

9. The clauses:
(a) prohibit part-time employees from performing operational firefighter duties, save in exceptional circumstances;

(b) prevent the MFB from promoting part-time employees due to insufficient operational firefighting experience and, consequently, require the MFB to hold back other benefits only available to employees of certain classifications;

(c) prohibit part-time employees from holding certain roles;

(d) impose additional obligations on employees seeking part-time work, such as requiring evidence in the form of a statutory declaration evidencing any entitlement to flexible work, and agreement from the UFU.

10. These clauses, which are directed to restricting part-time employment and opportunities for part-time employees, are both discriminatory and objectionable. The Commission is expressly precluded from approving an enterprise agreement that contains such terms by s.186(4) of the FW Act.

11. Further, these provisions undermine the statutory safeguards for flexible working arrangements found in s.65 of the FW Act. The Commission is precluded from approving the enterprise agreement by s.186(2)(c) of the FW Act.

**Failure to pass the BOOT (Part C)**

12. The enterprise agreement does not pass the BOOT, which requires all employees and prospective employees to be better off overall under the enterprise agreement than any applicable modern award.

13. Existing and future MFB employees seeking to work part-time are worse off under the enterprise agreement than the *Fire Fighting Industry Award 2010* (Award) because they:

(a) are not permitted to perform operational firefighter duties, save in exceptional circumstances;

(b) are precluded from certain roles; and

(c) are required to seek the approval of the UFU for part-time arrangements.
14. The Commission must not approve the enterprise agreement unless it is satisfied that the enterprise agreement passes the BOOT, save in exceptional circumstances, by reason of ss.186(2)(d) and 189(2) of the FW Act. No such exceptional circumstances exist.

**Objectionable terms relating to non-union members (Part D)**

15. Various terms in the enterprise agreement are objectionable because they require or permit the MFB to discriminate against non-union members.

16. These terms:

   (a) exclude non-union members (or their representatives) from committees and other forums under the enterprise agreement; and

   (b) confer veto rights on the UFU with respect to the individual terms of employment of non-union members, despite their choice not to be members of the UFU.

17. The Commission must not approve the enterprise agreement if it finds the agreement contains objectionable terms: s.186(4) of the FW Act.

**The enterprise agreement contains non-permitted matters (Part E)**

18. The enterprise agreement contains numerous terms about matters that are not permitted, because they do not pertain to the relationship between the MFB and its employees, nor the relationship between the MFB and the UFU.

19. In particular, various provisions confer broad veto powers on the UFU across managerial and operational matters. These provisions, reinforced by terms which require the MFB to provide information to the UFU to enable the union to monitor more closely the MFB’s operations and management, effectively confer management power on the UFU and deprive the MFB, in a meaningful sense, of its capacity to operate effectively as an employer.

20. Provisions of this kind are not permitted under the FW Act.
The application should be refused (Part F)

21. For each of the above reasons, the application for approval of the enterprise agreement should be refused.

22. As these flaws are so substantial, any undertaking proffered in an attempt to cure them is not permitted under s.190(3)(b) of the FW Act.

PART B: DISCRIMINATION AND OBJECTIONABLE TERMS – PART-TIME EMPLOYEES

The prohibition on discriminatory and objectionable terms

5. Before approving an enterprise agreement, the Commission must be satisfied that the agreement does not include any unlawful terms (s.186(4) of the FW Act). A term of an enterprise agreement is an unlawful term if it is a discriminatory term or an objectionable term (s.194(a) and (b) of the FW Act).

6. A term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of the employee’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin (s.195(1) of the FW Act).

7. An objectionable term of an enterprise agreement:

(a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or

(b) permits, has the effect of permitting, or purports to permit or have the effect of permitting – a contravention of Part 3-1 of the FW Act, which deals with general protections (s.12 of the FW Act).

8. Relevantly for the purposes of this proceeding, s.351, which is found in Part 3-1 of the FW Act, prohibits adverse action by an employer where it is taken against an employee, or prospective employee, because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy,
religion, political opinion, national extraction or social origin. Adverse action is taken by an employer against the employee if the employer discriminates between the employee and other employees (item 1(d) of s.342(1)).

9. The submissions in Part B address:
   (a) first, the meaning of discrimination regulated by s.195 of the FW Act which, in the Minister’s submission, incorporates concepts of both direct and indirect discrimination;
   (b) secondly, the ways in which various provisions of the enterprise agreement relating to part-time employment constitute discriminatory terms because they indirectly discriminate against women and people with family or carer’s responsibilities;
   (c) thirdly, the extent to which the provisions constitute objectionable terms for the same reasons; and
   (d) fourthly, the extent to which the provisions exclude the operation of s.65 of the FW Act with respect to requests for flexible working arrangements, such that the Commission cannot be satisfied that the terms of the enterprise agreement do not contravene s.55 (as required by s.186(2)(c) of the FW Act).

The meaning of “discriminates” in s.195 of the FW Act

10. In the Minister’s submission, the term “discriminates” in s.195 of the FW Act incorporates concepts of both direct and indirect discrimination.

11. Direct discrimination occurs where a person with a particular attribute is treated less favourably than others without that attribute in the same or similar circumstances.

12. Indirect discrimination arises where a condition or requirement disadvantages people with a particular attribute (or is likely to do so), which is not reasonable in the circumstances.

13. Both concepts involve less favourable treatment of people with a particular attribute, but direct discrimination concerns differential treatment and indirect discrimination concerns the differential impact of

“Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.”¹ (emphasis added)

The statutory construction task

14. The meaning of the term “discriminates” in s.195(1) of the FW Act has not been judicially determined.² Federal Court authorities on the meaning of discrimination relate to different provisions in the FW Act, and are addressed in the context of these provisions below.

15. In the absence of judicial authority on the meaning of the term “discriminates” in s.195(1) of the FW Act, these submissions consider its meaning by applying the ordinary principles of statutory construction.

The text of s.195(1)

16. The task of construction must begin with the text of the provision itself.³

17. The meaning of the term “discriminates” in s.195(1) of the FW Act, or elsewhere in the FW Act, is not defined. It is necessary, therefore, to consider the ordinary and natural meaning of the word. The ordinary and natural meaning of the word is consistent with the Minister’s construction for the following reasons.

The accepted legal meaning of “discriminates”

18. Where a statutory provision uses the ordinary and natural meaning of the word, “discriminates” applies to both direct and indirect discrimination.

¹ At 392.
² Although the Commission has on a number of occasions held that the term “discriminates” in s.195(1) extends to indirect discrimination. See, for example, Australian Services Union (Qantas Airways Ltd) Agreement [2011] FWA 3632 at [38]–[48] (10 June 2011, Raffaelli C); Australian Services Union (Qantas Airways Limited) Agreement 10 [2013] FWCA 8454 (1 November 2013) per Johns C at [7], [24]–[32]; Re Australian Catholic University Ltd [2011] FWA 3693 per Lawler VP at [14].
In *Street v Queensland Bar Association and Others* (1989) 168 CLR 461 (*Street*), in the context of s.117 of the Constitution, Gaudron J considered:

“The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination.”

20. A concept of discrimination, which encapsulates both direct and indirect discrimination, has been adopted and elucidated by all Federal and State anti-discrimination statutes. Justice Gaudron considered that the field of anti-discrimination law has led to an understanding that:

“discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination).”

21. Based on this concept, Gaudron J concluded that the protection of s.117 of the Constitution “extends to indirect discrimination or different treatment which is revealed by the disparate impact of the matter in complaint”.

22. In *Waters v PTC*, with respect to s.17(1) of the *Equal Opportunity Act 1984* (Vic), Mason CJ and Gaudron J considered that the provision, which used the word “discriminates” in general terms, was “apt to apply to both direct and indirect (“adverse effect”) discrimination.” Their Honours cited a decision of the Supreme Court of the United States in *Griggs v*

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4 Which provides: “A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.”

5 At 571.

6 *Australian Human Rights Commission Act* 1986 s.3; *Age Discrimination Act* 2004 ss.14, 15; *Disability Discrimination Act* 1992 ss.5, 6; *Racial Discrimination Act* 1975 s.9; *Sex Discrimination Act* 1984 ss.5, 5A, 5B, 5C, 6, 7, 7AA, 7A, 7B. *Equal Opportunity Act 2010* (Vic) ss.8, 9; *Anti-Discrimination Act 1977* (NSW) s.24(1)(a) and (b); *Anti-Discrimination Act 1991* (Qld) ss.10 and 11; *Discrimination Act 1991* (ACT) ss.8(1) to (5); *Equal Opportunity Act 1984* (SA) s.29(2)(a) and (b), 29(2a)(a) and (b), 29(3)(a) and (b), 29(4)(a) and (b); *Equal Opportunity Act 1984* (WA) ss.8(1) and (2), 9(1) and (2), 10(1) and (2), 10A(1) and (2); *Anti-Discrimination Act 1998* (Tas) ss.14 and 15; cf. *Anti-Discrimination Act 1996* (NT) s.20.

7 At 566. See also Brennan J at 507-508 and 511-512; Deane J at 528.

8 At 569. See also Deane J at 507-508 and 511-512; Deane J at 528.

9 At 358 (Deane J agreeing at 382). The relevant sub-section was in these terms:

“A person discriminates against another person ... if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.”
Duke Power Co (1971) 401 US 424, from which the notion of indirect discrimination is derived. In that case a general anti-discrimination provision directed to the elimination of racial discrimination was interpreted as prohibiting the use of a selection test which, although not overtly differentiating on the basis of race, had a disparate impact on persons from different racial backgrounds.

23. The same approach was adopted by Gordon J in Klein v Metropolitan Fire and Emergency Services Board (2012) 208 FCR 178 (Klein v MFESB), with respect to the reference to the word “discriminates” in item 1 of s.342(1) of the FW Act (addressed in more detail below). Her Honour considered that:

“... ‘indirect discrimination” is not ... necessarily a separate "statutory concept.””

The beneficial construction of the term “discriminates”

24. The term “discriminates” in s.195(1) of the FW Act is not confined or limited in any way. Yet the MFB and UFU seek to read into the term a restriction that it encompasses direct discrimination only.

25. This narrow construction is inappropriate, given the provisions of the FW Act, aimed at eliminating discrimination, are beneficial and remedial in purpose. It should be construed to give the fullest remedy of the situation with which it is intended to deal, that is available from the wording.

26. A construction of the term “discriminates” which includes both direct and indirect discrimination provides the fullest remedy.

The remainder of the provision: s.195(2) and (3)

27. The remainder of s.195 provides exceptions for certain terms that would otherwise be discriminatory terms.

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10 See Waters v PTC at 357 (Mason CJ and Gaudron J, Deane J agreeing at 382) and at 392 (Dawson and Toohey JJ).
11 At [92].
12 Submissions of the MFB and UFU in response to the Ministers s.615A submissions, at [8] and [24] respectively.
13 Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 652 at 659-660 (Brennan CJ) and 675 (Dawson, Toohey, Gaudron and Gummow JJ).
28. Sub-section (2) provides:

“A term of an enterprise agreement does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

29. Sub-section (3) provides:

“A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

(a) all junior employees, or a class of junior employees; or

(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.”

30. The exceptions found in s.195(2) and (3) apply in some cases to clauses that are directly discriminatory, in some cases to clauses that are indirectly discriminatory and in some cases to both.

31. For example, the exceptions in s.195(3)(a) and (b), which relate to wages of junior employees or employees with a disability, will apply to clauses that are directly discriminatory based on age and disability.

32. Conversely, the exception for wages of employees to whom training arrangements apply in s.195(3)(c) can only relate to clauses that are indirectly discriminatory. Employees undergoing training are not provided any special protection by s.195(1). A term will only be discriminatory if it discriminates against an employee because of one of the protected attributes listed in s.195(1). It follows that a clause for wages of employees to whom training arrangements apply will only ever contravene s.195(1) if it indirectly impacts upon employees with one of these attributes (most likely, those of a certain age).
33. The exception made for clauses directed to the inherent requirements of a position in s.195(2)(a) may apply equally where a clause is directly or indirectly discriminatory.

34. The application of the exceptions in ss.195(2) and (3) of the FW Act to terms that would otherwise be discriminatory both directly and/or indirectly supports the Minister's construction of the meaning of “discriminates” in sub-section (1). Otherwise, to the extent that the exception in s.195(3)(c) applies to clauses of an enterprise agreement that are indirectly discriminatory, it has no work to do.  

**The historical meaning in predecessor provisions**

35. The meaning of the term “discriminates” is informed by its predecessor provisions in previous industrial legislation.

36. The first equivalent provisions of s.195 of the FW Act were ss.170MD(5) and 170ND(10) of the *Industrial Relations Act 1988* (Cth), after the 1993 reforms (*Post Reform IR Act*).

37. In applying its functions at that time, the Commission was required to take account of the principles embodied in the Family Responsibilities Convention, in particular, relating to preventing discrimination against workers who have family responsibilities. The Convention, which was set out in schedule 12 of the *Post Reform IR Act*, expressly sought to create “*effective equality of opportunity and treatment*” for workers with family responsibilities. This objective can only be achieved by preventing both direct and indirect discrimination. It is well established

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14 A court must strive to give every word of a provision meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).


16 Section 93A of the *Post Reform IR Act*.

Note that under the current Act the Commission, in performing functions or exercising powers, must take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin: s.578(c) of the FW Act.

17 Preamble, *Workers with Family Responsibilities Convention, 1981* (Schedule 12 of the *Post Reform IR Act*). See also article 3(1).
that inflexible work arrangements indirectly discriminate against women and people with family responsibilities.18

38. It follows that the Commission was required, before certifying or approving an agreement under ss.170MD(5) and 170ND(10) of the Post Reform IR Act, to take into account the principles of direct and indirect discrimination embodied in the Family Responsibilities Convention when considering whether the proposed agreement contained discriminatory terms.

39. Thus, from the inception of the prohibition against discriminatory terms in agreements, the term “discriminates” has been informed by both concepts of direct and indirect discrimination.

The object of the FW Act

40. The reference to discrimination in s.195(1) of the FW Act should be construed in order to give effect to the object of the FW Act. The prohibition of discriminatory terms, found in s.194, gives legislative effect to the circumstances in which an enterprise agreement should be of no effect because it undermines the policy and scheme of the FW Act.19

41. Further, an interpretation of any statutory provision that would promote the purpose or object underlying the FW Act is to be preferred to an interpretation that does not.20 This principle is of particular significance in the case of legislation that protects or enforces human rights.21

42. Section 3 of the FW Act provides that the object of the FW Act is to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

20 Section 15AA of the Acts Interpretation Act 1901 (Cth) (Reprint No. 11). Note s.40A and 578(a) of the FW Act.
21 Waters v PTC at 359 (Mason CJ and Gaudron J).
One of the ways in which the FW Act seeks to achieve this object, set out in paragraph (d), is by:

“assisting employees to balance their work and family responsibilities by providing for flexible working arrangements”.

This objective can only be achieved by a prohibition on discrimination where such prohibition includes both direct and indirect discrimination, for the reasons addressed above.

Another of the ways in which the FW Act seeks to achieve this object, set out in paragraph (e), is by:

“enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination...”

The statutory history of this paragraph demonstrates that the “discrimination” which the legislation seeks to prevent is both direct and indirect discrimination.

The first provision which introduced the protection against discrimination as one of the ways in which to achieve the object of the statute was s.3(g) of the Post Reform IR Act. Section 3 provided that:

“The principal object of this Act is to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by:

... (g) helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”

The Supplementary Explanation Memorandum provided:

“A new object is added to the IR Act’s new principal object (clause 4 of the bill, p.2, proposed section 3) to provide that it is an object of the IR Act to help prevent and eliminate discrimination on various grounds (proposed paragraph 3(g)).

The new object reflects certain obligations imposed by treaties to which Australia is a party...”

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22 Industrial Relations Reform Bill 1993, Supplementary Explanatory Memorandum, 12.
49. The treaties, which were set out in schedules of the *Post Reform IR Act*:

(a) adopted a broad meaning of “discrimination” to include any
distinction, exclusion or preference made on the basis of certain
attributes which has the effect of nullifying or impairing equality of
opportunity or treatment;\(^{23}\)

(b) sought to assist workers with family responsibilities;\(^{24}\)

(c) sought to prevent “direct or indirect discrimination” on the basis of
family responsibilities.\(^{25}\)

50. Understood in this context the objective in s.3(e) of the FW Act, like that
in s.3(d) of the FW Act, is consistent with an understanding of
discrimination which includes indirect discrimination.

51. It follows that a narrower construction of the term in s.195 of the FW Act
would be contrary to the object of the FW Act. Although addressing a
different section, Gordon J made the equivalent observation in *Klein v
MFESB* at [97].

**The other provisions of the FW Act**

52. To determine Parliament’s intent, the Commission should consider the
words used by the legislature in context.\(^{26}\) For purposes of statutory
construction, context includes the remainder of the FW Act,\(^{27}\) and its legal
and historical context.\(^{28}\)

53. There are multiple provisions of the FW Act which concern concepts of
discrimination, which, for the reasons set out below, are consistent the
Minister’s construction.

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\(^{23}\) Article 1 of *Discrimination (Employment and Occupation) Recommendation, 1958* (Schedule 9
of the *Post Reform IR Act*).

\(^{24}\) Preamble and article 3(1), *Workers with Family Responsibilities Convention, 1981* (Schedule 12
of the *Post Reform IR Act*).

\(^{25}\) Article 7, *Workers with Family Responsibilities Recommendation, 1981* (Schedule 13 of the *Post
Reform IR Act*).

\(^{26}\) *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ,
Dawson, Toohey, Gummow JJ).

\(^{27}\) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]
(McHugh, Gummow, Kirby and Hayne JJ).

\(^{28}\) *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [124]
(McHugh J).
Review of enterprise agreements referred by the AHRC: s.218 of the FW Act

54. Section 195 of the FW Act is found in Part 2-4, which is directed to enterprise agreements.

55. Section 218, which is found in the same Part, provides for the variation of an enterprise agreement on referral by the Australian Human Rights Commission (AHRC). Section 218(1) requires the Commission to review any enterprise agreement referred to it under s.46PW of the Australian Human Rights Commission Act 1986, which deals with discriminatory industrial instruments.

56. If the Commission considers that the agreement reviewed requires a person to do an act that would be unlawful under the Age Discrimination Act 2004, the Disability Discrimination Act 1992 or the Sex Discrimination Act 1984, the Commission must vary the agreement so that it no longer requires the person to do an act that would be so unlawful (s.218(3)).

57. Both direct and indirect discrimination are unlawful in these statutes and, therefore, terms of an enterprise agreement that are indirectly discriminatory must be varied on review.29

58. It should be inferred that the ambit of s.195 is intended to preclude all discriminatory terms which may be reviewed under s.218, to prevent their inclusion at the outset. This would include terms that are indirectly discriminatory. A more limited construction of discriminatory terms under s.195 would lead to an anomalous result, namely, the inclusion of terms at the approval stage that must be later removed once referred by the AHRC.30

59. This inference is supported by the mischief which the power of referral is concerned to address, as demonstrated through the statutory history of the provision. Parliament was concerned to ensure that the advent of

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29 Age Discrimination Act 2004 ss.14, 15; Disability Discrimination Act 1992 ss.5, 6; Racial Discrimination Act 1975 s.9; Sex Discrimination Act 1984 ss.5, 5A, 5B, 5C, 6, 7, 7AA, 7A, 7B.

30 The same argument applies to ss.153 and 161 in relation to discriminatory terms of modern awards.
certified agreements (as they were then known) did not have an adverse impact on women.

60. A referral power was first conferred by s.113(2A) of the Post Reform IR Act, and a corresponding power to confer provided to the Sex Discrimination Commissioner under s.50A of the Sex Discrimination Act 1984 (Cth). The referral power related to discriminatory awards, which at that time included certified agreements. A discriminatory award was an award that required a person to do any act that would be unlawful under Part II of the Sex Discrimination Act 1984 (Cth), which included both direct or indirect discrimination in work.

61. Parliament’s intent in conferring this power is elucidated in the Second Reading Speech to the Sex Discrimination and Other Legislation Amendment Bill 1992:

“We have decided to extend the Sex Discrimination Act to industrial awards.

Concern has been expressed by women’s organisations that the advent of enterprise bargaining and the new certified agreement provisions contained in the Industrial Relations Act may have an adverse impact on women.

While the ‘no disadvantage’ test contained in the certified agreement provisions is intended to protect well-established standards such as maternity leave and parental leave, the Government accepts that it will not necessarily operate against provisions which discriminate against women.

The proposed changes will underline the social justice safeguards in the Government’s industrial relations framework.

They will signal to all workers, especially women, that the shift to a more decentralised system is a part of a managed and responsible process.

Discriminatory acts done in direct compliance with an award are currently exempted from the operation of the SDA.

The Lavarch Committee received a number of submissions which were critical of this exemption.

In response, we have developed a mechanism so that complaints concerning a discriminatory award will be able to be made to the

31 Section 4 of the Post-Reform IR Act.
32 Section 4 of the Post-Reform IR Act.
33 Section 14 of the Sex Discrimination Act 1984 (Cth) (noting the definition of “discrimination” in s.5).
Human Rights and Equal Opportunity Commission under proposed section 50A of the SDA alleging that a person has been discriminated against under an award.” 34

62. The potential for the “adverse impact” of discriminatory award provisions, underlying Parliament’s concern, must encapsulate the fundamental concept of indirect discrimination, not merely direct discrimination.

**Discriminatory terms in awards: s.153**

63. Section 153(1) of the FW Act contains a prohibition on discriminatory terms of an award in the same terms to s.195(1):

“A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”

64. Sections 153(2) and (3) provide the same exceptions as in ss.195(2) and (3).

65. The statutory history demonstrates that the purpose underlying this prohibition of discriminatory award terms was intended to extend to terms that were both directly and indirectly discriminatory.

66. The first provision prohibiting discriminatory terms in awards was s.150A(2)(b) of the Post Reform IR Act. Section 150A(2) provided:

“If, after reviewing an award for the purposes of this section, the Commission considers that the award is deficient in any of these respects:

... 
(b) the award contains a provision which discriminates against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; 

... 
the Commission must, in order to remedy the deficiency, take the steps (if any) prescribed by the regulations.”

34 Senate, 24 November 1992, pages 3338-3339.
As for s.153(1) of the FW Act, the meaning of “discriminates” in this earlier provision was not amplified.

The meaning of the term was considered by a seven member bench of the Australian Industrial Relations Commission in the Third Safety Net Adjustment and Section 150A Review (1995) 61 IR 236. In item 2.4.1 of the decision, the Commission accepted that the requirement under s.150A(2)(b) of the Post Reform IR Act to remove discriminatory award terms included **both** direct and indirect discrimination. The Commission proceeded to consider the meaning of each type of discrimination for the purposes of the provision as follows:

“The requirement under s.150A(2)(b) of the Act to remove specified forms of discrimination (both direct and indirect) from awards was one of the issues addressed by central working party (i) established by the Commission in the November 1994 Statement...

Central working party (i) concluded that discrimination includes both direct and indirect discrimination and agreed on the following definitions:

**Direct discrimination** occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.

**Indirect discrimination** occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute can comply, and the requirement or condition is unreasonable under the circumstances. For example a job advertisement may contain a requirement that the job applicants must be over 180 centimetres tall, which may exclude many applicants, including most women and most members of particular racial groups. If there is no reasonable explanation for why applicants had to be so tall, the height requirement may be unlawful.

We are willing to accept these agreed definitions as practical and appropriate.”

The Commission then considered the terms for a model anti-discrimination clause below. It is implicit in the clause adopted that the Commission considered that the meaning of discrimination in the objects (s.3(g) of the Post Reform IR Act) as well as the prohibition against discriminatory terms in s. s.150A(2)(b) included indirect discrimination:
1. It is the intention of the respondents to this award to achieve the principal object in section 3(g) of the Industrial Relations Act 1988 by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

2. Accordingly, in fulfilling their obligations under the disputes avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.” (emphasis added)

70. This model anti-discrimination clause was expressly permitted by s.89A(8) of the Workplace Relations Act 1996 (Cth).

71. Despite the accepted meaning of “discriminates” in the original prohibition against discriminatory award terms, Tracey J considered the same term was confined to direct discrimination in the current prohibition found in s.153 of the FW Act in Shop, Distributive and Allied Employees Association v National Retail Association (No 2) [2012] FCA 480 (SDA v NRA). His Honour held that:

“the proscription of discrimination, without more, is not apt to pick up ‘facially neutral’ discrimination which is otherwise known as indirect discrimination.”

72. The decision of SDA v NRA was considered by Gordon J in Klein v MFESB in addressing the meaning of the term “discriminates” in item 1 of s.342 of the FW Act. Her Honour did not consider herself bound by SDA v NRA because it dealt with a different provision of the FW Act, but declined to follow it in any event.

73. Justice Gordon considered that the term “discriminates” countenances both direct and indirect discrimination. Her Honour disagreed with Tracey J’s analysis for three reasons:

(a) the conclusion of Tracey J set out above is at odds with the analysis of Mason CJ and Gaudron J (with which Deane J agreed) in Waters

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35 At [54].
36 At [94] and [95].
37 At [97].
38 At [95].
Their Honours considered that, where a statutory provision uses the word *discriminate* in general terms it is “apt” to apply to both direct and indirect discrimination;

(b) Justice Tracey’s narrow construction of the term “discriminate” was contrary to the historical source of the concept of indirect discrimination;

(c) the passages of *Waters v PTC* relied upon by Tracey J do not provide a basis for his more limited construction. In these passages, Dawson and Toohey JJ consider whether provisions regulating direct and indirect discrimination in the *Anti-Discrimination Act 1977* (NSW) and the *Equal Opportunity Act 1984* (Vic) intersect or are mutually exclusive. Their Honours did not find that a statutory prohibition of “discrimination” will cover direct discrimination only.

74. The approach of Gordon J in *Klein v MFESB* should be preferred. In addition to the concerns raised by Gordon J, with respect, there is no explanation in the conclusions of Tracey J in *SDA v NRA* as to why the term “discriminates” in s.153 should be construed differently to its established meaning in predecessor provisions.

75. In relation to Tracey J’s further reasons:

(a) the cases cited by Tracey J do not concern the FW Act (or its predecessors) and do not directly address the issue;

(b) whilst it is true that no attempt has been made in the FW Act to provide an extended definition of the term “discrimination”, equally no attempt has been made to confine it;

(c) his Honour’s concern that wage rates are linked to years of service would be rendered unlawful overlooks the requirement that such

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39 See Mason CJ and Gaudron J at 358; Deane J agreeing at 382.
40 See *SDA v NRA* at [54] referring to *Waters v PTC* at 392-3.
41 *HBF Health Funds Inc v Minister for Health and Ageing* (2006) 149 FCR 291 at 295, cited at [52], and *Helal v McConnell Dowell Constructors (Aust) Pty Ltd* (2010) 193 FCR 213 at [24], cited at [53] (in which the phrase “indirect discrimination” was used in a different sense).
42 Cf. *SDA v NRA* at [55].
provisions will not be indirectly discriminatory unless unreasonable;\textsuperscript{43}

(d) his Honour incorrectly assumed that the exceptions to discriminatory terms in s.153 all covered terms that were directly discriminatory. At least one could only apply to indirect discrimination, for the same reasons identified above in relation to the equivalent exceptions in s.195 (2) and (3).\textsuperscript{44}

\textbf{Adverse action: s.342}

76. Section 342(1) of the FW Act contains a table that sets out circumstances in which a person takes adverse action against another person. Adverse action is prohibited in various circumstances by ss.340, 346 and 351. Adverse action includes discrimination between or against employees and independent contractors in the following scenarios:

(a) action taken by an employer against an employee if the employer discriminates between the employee and other employees of the employer (item 1(d));

(b) action taken by a prospective employer against a prospective employee if the prospective employer discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee (item 2(b));

(c) action taken by a person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor, if the principal discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor (item 4(b)).

77. The leading decision relating to the meaning of “\textit{discriminates}” in s.342(1), \textit{Klein v MFESB}, is consistent with the Minister’s construction of the term. As noted above, Gordon J considered the word “\textit{discriminates}”

\textsuperscript{43} Cf. \textit{SDA v NRA} at [56].
\textsuperscript{44} Cf. \textit{SDA v NRA} at [57].
in s.342(1) (item 1(d)). Her Honour held that the term “discriminates”
countenances both direct and indirect discrimination, relying on the
objects of the FW Act, and, in particular, Part 3-1.45

78. The conclusion of Gordon J in Klein v MFESB, that the word
“discriminates” in s.342(1) (item 1(d)) includes both direct and indirect
discrimination, has been followed in Hudston v Active Foundation Inc
[2017] FCCA 699 at [92] (Driver J) and Australian Rail, Tram and Bus
Industry Union v Australia Western Railroad Pty Ltd [2017] FCCA 1954
[101] (Lucev J).

79. The Full Federal Court in United Firefighters’ Union of Australia v
Country Fire Authority [2015] FCAFC 1 (UFU v CFA), citing Klein v
MFESB, contemplated that indirect discrimination may be forbidden by
s.342(1), although the Court did not ultimately decide this question for
itself because the case before it was not argued in that way.46

Discriminatory adverse action: s.351

80. Section 351 of the FW Act is one of the provisions that proscribes adverse
action. Section 351 provides:

“(1) An employer must not take adverse action against a person who
is an employee, or prospective employee, of the employer
because of the person’s race, colour, sex, sexual orientation, age,
physical or mental disability, marital status, family or carer’s
responsibilities, pregnancy, religion, political opinion, national
extraction or social origin.

(2) However, subsection (1) does not apply to action that is:
(a) not unlawful under any anti-discrimination law in force in
the place where the action is taken; or
(b) taken because of the inherent requirements of the
particular position concerned; or
(c) if the action is taken against a staff member of an
institution conducted in accordance with the doctrines,
tenets, beliefs or teachings of a particular religion or creed-
taken:
   (i) in good faith; and

45 At [97]. The objects to Part 3-1 in s.336 include, in paragraph (c), to provide protection from
workplace discrimination.
46 At [229] and [230].
(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an **anti-discrimination law**:

(aa) the Age Discrimination Act 2004;
(ab) the Disability Discrimination Act 1992;
(ac) the Racial Discrimination Act 1975;
(ad) the Sex Discrimination Act 1984;
(a) the Anti-Discrimination Act 1977 of New South Wales;
(b) the Equal Opportunity Act 2010 of Victoria;
(c) the Anti-Discrimination Act 1991 of Queensland;
(d) the Equal Opportunity Act 1984 of Western Australia;
(e) the Equal Opportunity Act 1984 of South Australia;
(f) the Anti-Discrimination Act 1998 of Tasmania;
(g) the Discrimination Act 1991 of the Australian Capital Territory;
(h) the Anti-Discrimination Act of the Northern Territory."

81. Section 351 was considered by Mortimer J in *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460. Justice Mortimer considered that when item 1(d) of s.342(1) is read together with s.351, the provisions operate to render conduct proscribed under other anti-discrimination regimes as conduct contravening s.351.47 In this way, her Honour found that indirect discrimination was incorporated into Division 5 of Part 3-1 of the FW Act.48

**Conclusion on the meaning of “discriminates” in s.195 of the FW Act**

82. The Minister’s construction of the term “discriminates” in s.195(1) of the FW Act, to include both direct and indirect discrimination:

(a) is consistent with the accepted legal meaning of the word “discriminates”;

(b) provides a beneficial construction to the term “discriminates”;

(c) gives effect to the object of the FW Act;

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47 Justice Mortimer held that the term “discriminates” in item 1(d) of s.342 should be construed as treating people differently at [160]. It does not appear from the judgment that her Honour was referred to *Klein v MFESB*.

48 At [161].
(d) avoids incongruity with the other sub-sections of s.195, to the extent that they provide exceptions for clauses of an enterprise agreement that are indirectly discriminatory;

(e) avoids incongruity with s.218, which allows for the removal of terms that are indirectly discriminatory;

(f) is consistent with the meaning of the term in equivalent predecessor provisions;

(g) is consistent with the meaning of the term in other provisions of the FW Act, as considered by the authorities above. It should be presumed that the term has the same meaning in s.195, as elsewhere throughout the FW Act.  

Analysis of discriminatory terms in the enterprise agreement

83. The relevant extracts of the discriminatory terms are contained in Annexure 1.

Part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances

The full-time work requirement

84. The enterprise agreement places a number of restrictions on the type of work that may be performed in a part-time capacity. The effect of these provisions is to impose a requirement or condition on employees in all but exceptional circumstances that they work full-time in order to perform operational firefighter duties.

85. The enterprise agreement expressly provides that part-time employees will be rostered pursuant to clause 124. Clause 124 is a “special administrative duties” roster. The concept of “special administrative duties” encapsulates duties that do not involve operational firefighter duties. “Special administrative duties” are expressed to include “all rostered duty in all MFB departments including but not limited to Training and Education, Fire Safety and Administrative areas of

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49 See Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 at 618 (Mason J, with Barwick CJ and Jacobs J agreeing).

50 Clauses 9.1.6 and 44.1.1 of the enterprise agreement.
Operations as well as the rosters of all day work personnel on OSG [Operational Support Group].”

In practice, MFB staff working on special administrative duties are referred to within the MFB as “day shift” workers. They perform day work, and do not perform on shift operational duties.

Part-time employees are not permitted to work on the 10/14 roster, save in exceptional circumstances. MFB staff who are rostered according to the 10/14 roster are referred to as “on-shift”. On-shift employees perform operational firefighting duties. Excluding part-time employees from the 10/14 roster is another way in which the enterprise agreement precludes part-time employees from performing operational firefighting duties.

Similarly, part-time employees cannot form part of a minimum safety crew save in exceptional circumstances. A minimum safety crew prescribes the minimum crewing and appliance requirements in specified locations in readiness for response to an incident. Exclusion of part-time employees from minimum safety crews is a further way in which they are precluded from operational firefighting duties.

The exception made to both the prohibition of part-time employees working on the 10/14 roster or in minimum safety crews in “exceptional circumstances” is theoretical and confined. The content of the “exceptional circumstances” requirement is informed by clauses 9.1.4, 9.1.5 and 44.1, each of which provide that:

51 Clause 85.16.1 of the enterprise agreement. Similarly, clause 17.11(b) of the Award states that “Special administrative duties” include “all rostered duty in training and education, fire safety and administrative areas of operations”.
52 Joint response of the MFB, the CFA, and the UFU regarding award coverage and day work in the MFB and CFA Enterprise Agreements at [16].
53 Youssef Reply at [43].
54 Youssef Reply at [41]-[44]; Leach Reply, [28]-[33]; Joint response of the MFB, the CFA, and the UFUA regarding award coverage and day work in the MFB and CFA Enterprise Agreements at [18]-[19].
55 Clauses 9.1.7 and 44.1.2 of the enterprise agreement. The 10/14 roster is found in clause 122.
56 See clauses 9.1.4 and 9.1.5 of the enterprise agreement. See also Youssef Reply at [41]-[44].
57 Youssef Reply [43].
58 Clauses 9.1.7 and 44.1.2 of the enterprise agreement.
59 Schedule 2 to the enterprise agreement.
(a) generally on-shift employees should be employed on a full-time basis;

(b) part-time employees may be required to transfer off station.\textsuperscript{60}

The presumption against part-time on-shift employees enshrined in these provisions demonstrates a predisposition against part-time employees on the 10/14 roster or in minimum safety crews.

\textit{Disadvantages to part-time employees flowing from full-time work requirement}

89. Part-time employees must perform administrative office based duties or “\textit{day work}”, assuming there are no exceptional circumstances.

90. The fundamental disadvantage part-time employees suffer as a consequence of this treatment is the loss of opportunity to participate in firefighting operations, and any associated deprivation of job satisfaction.

91. There are further flow on effects of the full-time work requirement.

92. Once placed in office based duties, the career progression of part-time employees is stalled. The first eleven classifications are all “\textit{Firefighter}” classifications, requiring increasing levels of experience in firefighter roles.\textsuperscript{61} Higher classifications are contingent on minimum service periods assessed either by reference to “\textit{career fighting service}” with the MFB,\textsuperscript{62} or in role classifications that can only be achieved after reaching classifications contingent on these minimum service periods.\textsuperscript{63} Part-time employees are not able to progress through the enterprise agreement classifications without the relevant “\textit{firefighting}” experience within the MFB.

93. A loss of promotional opportunities for part-time employees means a commensurate loss of salary increase.\textsuperscript{64}

94. Further, a loss of promotional opportunities for part-time employees

\textsuperscript{60} Note also clause 45A.6 of the enterprise agreement which prevents any proposals for change arising from a diversity working party from impacting minimum crewing or the 10/14 roster.

\textsuperscript{61} Clauses 12.3.1 to 12.3.11 of the enterprise agreement.

\textsuperscript{62} Clauses 12.3.12 to 12.3.13, 12.3.16 and 12.3.17 of the enterprise agreement.

\textsuperscript{63} Clauses 12.3.14 and 12.3.15 of the enterprise agreement.

\textsuperscript{64} Clauses 133 of the enterprise agreement.
means that part-time employees may not be entitled to certain benefits only available to employees of certain classifications. For instance, opportunities for secondment or to hold the position of instructor are restricted to employees of a certain rank.\(^65\)

**The full-time work requirement is not reasonable, nor based on inherent requirements**

95. There is no rational operational impediment for the restrictions to part-time employment in the enterprise agreement. The evidence will establish that there are no operational challenges to the MFB implementing part-time working arrangements for operational firefighters in the classification qualified firefighter and above.\(^66\)

96. Other industrial regulation demonstrates that part-time work for operational firefighters is both feasible and available outside of the MFB. The Award permits the part-time employment of firefighters.\(^67\) There are enterprise agreements for firefighting services in every other state and territory in Australia that permit the employment of firefighters on a part-time basis.\(^68\) Similarly, industrial instruments for other emergency services, such as the Victoria Police and Ambulance Victoria, permit employment on a part-time basis.\(^69\)

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\(^65\) Clauses 41.3.2 and 136.1.1 of the enterprise agreement.

\(^66\) Submissions on behalf of the MFB and CFA dated 26 February 2016, [36], [39], [41], [42], [47]-[50]; Submissions in Reply on behalf of MFB and the CFA dated 18 April 2016, [28]-[32] and [36]; Final submissions of the CFA and MFB dated 16 May 2016, [51]-[132]; Submissions in reply on behalf of the MFB and the CFA dated 14 June 2016, [15]-[16], [19]-[25], [82]-[90]; Rau Reply, [25]; Rau, PN 638, 654 and 655, Schroder, [10]-[29], Buffone Reply, [6]-[19]; Leach Reply, [6]-[26]; Youssef Reply, [6]-[48], Youssef, PN 1458-1471; Byatt Reply, [6]-[33]; Warrington, [9]-[59], Warrington, PN 1319-1331, Harrap, [10]-[22]. This was accepted by the Commission in the four yearly review *Fire Fighting Industry Award 2010* [2016] FWCFB 8025 at [189].

Note also “Women Top Fire Chief’s List”, Herald Sun dated 2 June 2018.

The exclusion of part-time employees from the firefighting rosters in all but exceptional circumstances cannot sensibly be reconciled with the flexibility afforded to other employees on those rosters in other circumstances: for example, Agreement, clauses 64.2.1, 123.1 and 123.2.

\(^67\) The absence of any inherent requirement for full-time employment was considered extensively in *Fire Fighting Industry Award 2010* [2016] FWCFB 8025 at [148]-[208].

\(^68\) Annexure 2.

\(^69\) Annexure 2: clause 14 of the *Ambulance Victoria Enterprise Agreement 2015*; clause 31 of the *Victoria Police Enterprise Agreement 2011*.

See further, Tasominos, [13]-[24]; Leach, [17]-[29]; Byatt, [10]-[12]; Connellan, [30]-[39].
No provision for part-time FSCCs and Senior FSCCs

The FSCC full-time work requirement

97. A Fire Services Communications Controller (FSCC) is responsible for monitoring and reporting on communications activities to ensure operational requirements, performance standards and protocols are achieved.\textsuperscript{70}

98. The enterprise agreement makes no provision for FSCCs (which includes Senior FSCCs)\textsuperscript{71} to work on a part-time basis.

99. The enterprise agreement requires FSCCs to work an average of 42 hours per week\textsuperscript{72} in accordance with clauses 43 and 153.\textsuperscript{73} Clause 43, in so far as it concerns the roster of FSCCs, refers back to clause 153.\textsuperscript{74} Clause 153 contains a 12/12 roster. The 12/12 roster comprises two 12-hour day shifts and two 12-hour night shifts followed by four days off.\textsuperscript{75} There is no provision for FSCCs to perform the 12/12 roster on a part-time basis.

100. The part-time provisions in clause 43.6 do not apply to FSCCs because they only apply to “operational dayworkers” (addressed above). Clause 43.6.2 defines “operational dayworkers” to mean “professional firefighters who are not working on a roster referred to in 43.6.1” (and therefore necessarily excludes FSCCs, whose roster is referred to in clause 43.6.1).

Disadvantage to part-time employees flowing from the FSCC full-time work requirement

101. Part-time employees are precluded from holding the role of FSCC or Senior FSCC by reason of the FSCC full-time work requirement.

The FSCC full-time work requirement is not reasonable, nor based on inherent requirements

102. There is no operational reason for the FSCC role to be performed only on

\textsuperscript{70} Schedule 8 to the enterprise agreement.
\textsuperscript{71} Clause 12.3.17 of the enterprise agreement.
\textsuperscript{72} Clause 152.2 of the enterprise agreement.
\textsuperscript{73} Clause 152.1 of the enterprise agreement.
\textsuperscript{74} Clause 43.6.1 of the enterprise agreement.
\textsuperscript{75} Clause 153.3 of the enterprise agreement.
Statutory declaration of entitlement under s.65 of the FW Act

The statutory declaration requirement

103. Under clause 44.3.1 of the enterprise agreement, an employee must provide appropriate evidence of his or her entitlement to make a request under s.65 of the FW Act in the form of a statutory declaration. The evidence must be provided to the UFU and the MFB.

104. Section 65 of the FW Act provides a mechanism for employees of certain types (including those with parental responsibilities) to make a request for a change in working arrangements relating to those circumstances, and imposes a corresponding obligation on the employer to accede to the request unless there are reasonable business grounds not to do so. The only formal requirement imposed by s.65 is that the request must be in writing, and set out details of the change sought and of the reasons for the change.

Disadvantage flowing from the statutory declaration requirement

105. The statutory declaration requirement:

(a) imposes an additional logistical burden on employees seeking part-time or flexible working arrangements, over and above that required by s.65 of the FW Act;

(b) has the potential to discourage employees from making part-time work requests, having regard to the UFU’s public opposition to part-time working arrangements in Victoria.

106. This undermines the protection provided to employees by s.65 of the FW Act.

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76 No operational reason specifically relating to the role of the FSCC was raised as an impediment to the introduction of part-time employment during the 4 yearly review of the Award and formed no part of the subsequent amendments to the Award.

77 Submissions on behalf of the MFB and CFA dated 26 February 2016, [57]-[59]; Final submissions of the CFA and MFB dated 16 May 2016 at [79] (recording UFU opposition to part-time employment); Werle, [17]-[20] and Annexure MW-1 (UFU refusal of requests for part-time employment); Nolan, [26], Leach, [31].
The statutory declaration requirement is not reasonable, nor based on inherent requirements

107. The basis for the statutory declaration requirement is not apparent. No obligation to provide a statutory declaration is imposed on employees seeking to make any change to their hours in any other circumstances outside an application under s.65 of the FW Act.

Part-time employees require UFU agreement

108. A similar concern arises from clauses of the enterprise agreement which require UFU approval for part-time station based employees;\(^78\) and the hours worked by part-time employees.\(^79\) The additional agreement and approval requirements of the UFU impose further restrictions on the availability of part-time employment. The requirement of UFU approval is not reasonable, nor based on inherent requirements.

Impost imposed on MFB for part-time employees

The part-time impost

109. In addition to their pro-rata annual wage, the MFB must pay part-time employees:

(a) an insecure work allowance of 25% of the employee’s annual wage;\(^80\) and

(b) a special administrative duties allowance of $73.14.\(^81\)

Disadvantage flowing from the part-time impost

110. At first blush, the insecure work allowance and special administrative duties allowance appear to be of benefit to part-time employees. In practice, however, they work to the disadvantage of employees seeking part-time arrangements.

111. As set out above, s.65 of the FW Act imposes an obligation on the employer to accede to a flexible work request unless there are reasonable

\(^{78}\) Clauses 43.3 and 43.4 and 138.4 of the enterprise agreement; Note: although the term “parties” is not defined, the enterprise agreement is expressed to apply to, cover and be binding on the UFU: clause 6.1.2.

\(^{79}\) Clauses 43.6.3 and 138.4.1 of the enterprise agreement.

\(^{80}\) Clauses 43.5 and 138.2 of the enterprise agreement.

\(^{81}\) Clauses 43.6(b), 85.16.1, 138.4.1 and Schedule 4 of the enterprise agreement.
business grounds to refuse it. The part-time impost provides such a ground where:

(a) it imposes a cost burden on the MFB;

(b) there is no benefit conferred on the MFB in exchange for the impost. The wages for a full-time firefighter are the same as the wages of an employee of a corresponding level working the equivalent of four days a week confined to office duties, for no apparent reason;

(c) the 25% impost is, therefore, equivalent to a penalty.

The part-time impost is not reasonable, nor based on inherent requirements

112. The basis for the part-time impost is not apparent.

Objectionable terms

113. Unlawful terms of an enterprise agreement include, in addition to discriminatory terms, terms that are objectionable (s.194(b)). As identified above, the Commission must be satisfied that the enterprise agreement does not include any unlawful terms before approving an enterprise agreement (s.186(4)).

114. An “objectionable term” of an enterprise agreement:

(a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or

(b) permits, has the effect of permitting, or purports to permit or have the effect of permitting – a contravention of Part 3-1 of the FW Act, which deals with general protections (s.12).

115. To “permit” in this context, means to “authorise” rather than to “afford the possibility”, either directly or by necessary implication.82 It is not sufficient for the term to have an “omnibus operation which, while being silent with respect to acts which would constitute adverse action, could

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theoretically comprehend conduct which, in particular circumstances, might be so characterised”.83

116. The relevant contravention of Part 3-1 of the FW Act, for the purposes of this part of the analysis, is adverse action prohibited by s.351 of the FW Act. Adverse action is prohibited by s.351 where it is taken against an employee because of, amongst other things, the person’s sex or family or carer’s responsibilities. Adverse action is taken by an employer against the employee if the employer discriminates between the employee and other employees (item 1(d) of s.342(1)). The meaning of discrimination in the context of ss.342 and 351 of the FW Act incorporates concepts of direct and indirect discrimination, for the reasons set out above.

117. It follows that a clause of an enterprise agreement will require or permit a contravention of s.351, or have the effect of doing so, if it requires or permits an employer to take adverse action against an employee because of the person’s sex or family or carer’s responsibilities, or has the effect of doing so.

118. The clauses analysed in the previous section prescribe particular acts that constitute prohibited adverse action by the MFB. They require the MFB, or permit the MFB in the requisite sense, to:

(a) prohibit part-time employees from performing operational firefighter duties, save in exceptional circumstances;

(b) refrain from promoting part-time employees due to insufficient operational firefighting experience and, consequently, hold back other benefits only available to employees of certain classifications;

(c) prohibit part-time employees from holding the role of FSCC or Senior FSCC;

(d) further restrict part-time opportunities for employees seeking part-time work by insisting upon a statutory declaration evidencing any entitlement under s.65 of the FW Act and enterprise agreement, and UFU approval.

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119. Each of the above acts indirectly discriminate between employees who are women or who have family or carer’s responsibilities and other employees, for the reasons advanced above. Therefore, these acts constitute adverse action within the meaning of items 1(d) and 2(d) of s.342(1).

120. The question as to whether this adverse action will be taken against employees “because of” their or family or carer’s responsibilities cannot be answered by reference to the MFB’s subjective intent. At the time an enterprise agreement is made, the adverse action has not yet occurred. The reasons of the MFB for engaging in the conduct at some point in the future are impossible to identify in advance.84

121. For that reason, the question as to whether the adverse action will be taken against employees “because of” their gender or family or carer’s responsibilities must be answered prospectively, by reference to the terms of the agreement.85 A clause will require or permit, or have the effect of requiring or permitting, conduct in contravention of Part 3-1 if it requires or permits, or has the effect of requiring or permitting, such conduct by its terms, either directly or by necessary implication.86 In the case of s.351, this implication will arise where the causal connection between the adverse action and the protected attribute, is apparent from the operation of the term.

122. It is evident from the enterprise agreement itself that the adverse action (discrimination) required or permitted by its terms is taken against employees “because of” their sex or family or carer’s responsibilities. The causal connection between the adverse action and the protected attributes


86 See, for example, Office of Employment Advocate v Construction, Forestry, Mining and Energy Union [2003] AIRC 468 at [16] (Lawler VP, Kaufman SDP, Whelan C), with respect to s.298Z of the Workplace Relations Act 1996.
is established through the operation of the clauses, because the effect of
the conduct required or permitted of the MFB disproportionately
disadvantages people with these attributes.

123. The above clauses can be distinguished from terms of an enterprise
agreement that may or may not adversely affect an employee depending
upon the circumstances. Clauses regulating termination of employment
provide an example. A clause of an enterprise agreement permitting
termination may be used in a way that contravenes Part 3-1, or used
permissibly, depending entirely on the reason for termination.

124. For these reasons, the above clauses of the enterprise agreement require
or permit adverse action in contravention of s.351 of the FW Act by the
MFB, or have effect of doing so, and, therefore, constitute objectionable
terms.

Section 65 of the FW Act

125. Section 186(2)(c) of the FW Act provides that the Commission must be
satisfied, before approving an enterprise agreement, that the terms of the
agreement do not contravene s.55. Section 55(1) of the FW Act provides
that an enterprise agreement must not exclude any provision of the
National Employment Standards (NES).

126. Section 65 of the FW Act is one of the provisions of the NES. Section 65
Act relevantly provides:

*Requests for flexible working arrangements*

*Employee may request change in working arrangements*

**(1) If:**

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

**(1A) The following are the circumstances:**

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
(b) the employee is a carer (within the meaning of the Carer Recognition Act 2010); …

Agreeing to the request …

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service. …”

127. The Commission cannot be satisfied, as required by s.186(2)(c), that the enterprise agreement does not contravene s.55 because various clauses of the enterprise agreement seek to exclude the operation of s.65 of the FW Act.

128. The MFB may consider that a request for part-time employment cannot be refused on reasonable business grounds but, contrary to s.65(5), nevertheless be compelled to refuse it by terms of the enterprise agreement that require:

(a) requests for part-time work as a fire fighter to be allowed only in “exceptional circumstances”;

(b) requests for part-time work as a FSCC to be refused in all circumstances;

(c) the MFB to refuse a request solely because the UFU does not agree to it;
Clauses 9.1.5 and 44.1 of the enterprise agreement do not overcome the illegitimate effect of the above clauses. The repeated assertion in each of clauses 9.1.5 and 44.1 that the enterprise agreement does not limit the rights of employees under s.65 of the FW Act is blatantly incorrect. The provisions of each clause proceed to set out the framework in which the MFB must consider each request for part-time work, namely, by the relegation of part-time employees to administrative duties save in exceptional circumstances. The MFB must follow this procedure, and the various other restrictions on part-time requests found in the enterprise agreement, to avoid a contravention. The aspirational words contained in clauses 9.1.5 and 44.1 do not provide any real safeguard against a contravention of s.55 of the FW Act.

**PART C: THE BOOT**

The BOOT

130. Before approving an enterprise agreement, the Commission must be satisfied that the enterprise agreement passes the BOOT.88

131. Pursuant to s.193(1) of the FW Act, the enterprise agreement will pass the BOOT, “if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.”

132. The test time is defined as the time that the application to approve the agreement was made under s.185 of the FW Act.89

133. An “award covered employee” is defined in s.193(4) of the FW Act as an employee who is covered by the agreement and, at the test time, is covered by a modern award that is in operation, covers the employee in relation to the work that he or she is to perform under the agreement and covers his or her employment.

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87 Clauses 9.1.6, 9.1.7, 44.1.1 and 44.1.2 of the enterprise agreement.
88 FW Act, ss.186(1) and 186(2)(d).
89 FW Act, s.193(6).
A “prospective award covered employee” is defined in s.193(5) of the FW Act as a person who, if he or she were an employee at the test time of an employer covered by the agreement, would be covered by the agreement and would be covered by a modern award that is in operation, covers the employee in relation to the work that he or she would perform under the agreement and covers the employer.

The relevant principles relating to the BOOT were recently enunciated by the Full Bench in Construction, Forestry, Mining and Energy Union v SESLS Industrial Pty Ltd [2017] FWCFB 3659 (SESLS). The Full Bench stated, at [23]:

“It is well established that the test requires the identification of terms which are more beneficial for an employee, terms which are less beneficial for an employee, and an overall assessment of whether an employee would be better off under the agreement.90 The overall assessment involves a global comparison.91 However, it is clear from s 193(1) that this global comparison must be undertaken in relation to “each” award covered and prospective award covered employee.92 The test is not directed at whether most employees or most classes of employees are better off.” (emphasis added)

In SESLS, the Full Bench noted that s.193(5) of the FW Act relates to a hypothetical situation and observed at [36], that:

“The BOOT, in relation to prospective employees, addresses a hypothetical scenario. It is established for the purposes of comparing the position of the notional employee under the agreement on the one hand and the award on the other. The hypothetical scenario is a construct. It does not require that one work backwards to construct a realistic narrative about the employer’s hypothetical decision to engage an employee either under the award or agreement.”

Section 193(7) of the FW Act permits the Commission to assume that, if a particular class of employees is better off under an agreement, an employee who belongs to that class would also be better off. However, the Commission may only make this assumption in the absence of evidence to the contrary.

90 AKN Pty Ltd t/a Aitken Crane Services [2015] FWCFB 1833; Armacell Australia Pty Ltd [2010] FWAFB 9985.
91 CFMEU v TR Construction Services Pty Ltd [2017] FWCFB 1928 at [20].
92 Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited; Australasian Meat Industry Employees Union, The v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited [2016] FWCFB 2887 at [33].
138. The phrase “class of employees” is not defined in the FW Act. Part-time employees who would otherwise be regulated by the modern award have previously been considered a “class of employees” for the purposes of the BOOT.93

The relevant Award

139. The Award is expressed to cover “employers throughout Australia in the fire fighting industry and their employees in the classifications listed in Schedule B – Classifications to the exclusion of any other modern award”.94 The Award is therefore the relevant modern award for the purposes of the BOOT.

140. Schedule B to the Award covers Recruit, Firefighter Level 1, 2 and 3, Qualified Firefighter, Leading Firefighter, Station Officer, Senior Station Officer and FSCC.95 For the purposes of the BOOT, the analysis is limited to the employees falling within these classifications.

141. A “part-time employee” is defined in the Award as an employee who:
(a) works less than the full-time hours of 38 ordinary hours per week;
(b) has reasonably predictable hours of work; and
(c) receives, on a pro-rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work.96

142. Clause 10.1(b) of the Award permits part-time employment and states, “an employer in the public sector may employ employees at the classification Qualified Firefighter or above on a part-time basis.”

143. For the purposes of these submissions relating to the BOOT, the relevant class of employees is therefore defined as part-time employees in the equivalent classifications to the Award classifications from Qualified Firefighter and above, namely, Qualified Firefighter,97 Senior

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93 AJ Convenience Services Pty Ltd v Shop, Distributive and Allied Employees’ Association [2016] FWCFCB 2116 at [96] (McKenna C); Roseneath Aged Care Centre v NSW Nurses & Midwives’ Association; Australian Nursing Federation – New South Wales Branch; Health Services Union [2013] FWC 4969 at [6].
94 FW Act, ss.193(4)(b) and 194(5)(b); see clause 4 and Schedule B of the Award for coverage.
95 Award, Schedule B.
96 Award, clause 10.3(a).
97 Clauses 12.3.7 and 12.3.8 and Schedule 12 of the enterprise agreement.
Firefighter;98 Leading Firefighter,99 Senior Leading Firefighter,100 Station Officer;101 Senior Station Officer;102 FSCC,103 and Senior FSCC104 (together, the Part-time Employees).

144. The Part-time Employees are overall worse off under the enterprise agreement because the part-time provisions under the enterprise agreement are less beneficial than the part-time provisions under the Award because under the enterprise agreement:
(a) part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances;
(b) part-time employment of FSCCs and Senior FSCCs is not permitted;
(c) additional UFU agreement and approval requirements of the UFU are imposed, further restricting the availability of part-time employment;
(d) the enterprise agreement dispenses with the protections afforded by the Award in respect of part-time employment.

145. Although Part-time Employees are provided with some monetary benefits, such as the insecure work allowance and the special administrative duties allowance, these benefits do not offset the substantially less beneficial provisions under the enterprise agreement.

Part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances

146. Clause 22.2(a) of the Award refers to employees working a 10/14 roster and provides for part-time employment as follows:

98 Although the Award does not expressly refer to a Senior Firefighter, the duties of a Senior Firefighter are the same as the Qualified Firefighter but with a longer period of service: clause 12.3.9 and Schedule 12 of the enterprise agreement.
99 Clause 12.3.10 and Schedule 12 of the enterprise agreement.
100 Although the Award does not expressly refer to a Senior Leading Firefighter, the duties of a Senior Leading Firefighter are the same as the Leading Firefighter but with a longer period of service: clause 12.3.11 and Schedule 12 of the enterprise agreement.
101 Clause 12.3.12 and Schedule 12 of the enterprise agreement.
102 Clause 12.3.13 and Schedule 12 of the enterprise agreement.
103 Clause 12.3.16 and Schedule 8 of the enterprise agreement.
104 Although the Award does not expressly refer to a Senior FSCC, the duties of an FSCC are the same as the FSCC but with a longer period of service: clause 12.3.17 and Schedule 8 of the enterprise agreement.
“Full-time employees working a 10/14 roster will be rostered and work an average of 42 hours per week, two hours of which will be overtime work and paid for as such and the remaining two hours will be taken as annual/accrued leave in accordance with the roster laid down for this purpose. Part-time employees working a 10/14 roster will be rostered and work hours as agreed under clause 10.3(b) or varied under clause 10.3(c).”

147. Clause 22.3(a) of the Award refers to employees not working a 10/14 roster and provides for part-time employment as follows:

“Full-time employees (other than recruits) who are not working a 10/14 roster will be required to work an average of 42 hours per week, two hours of which will be overtime work and paid for as such and the remaining two hours will be taken as accrued leave. Part-time employees who are not working a 10/14 roster will be rostered and work hours as agreed under clause 10.3(b) or varied under clause 10.3(c).”

148. Clause 22.5(a) sets out the 10/14 roster, which is extracted in Annexure 4. Clause 22.5(b) refers to part-time employment as follows:

“The roster may be varied for part-time employees, employees employed on special duties and to provide that during the first year of service employees may be rostered for up to five consecutive day duties.”

149. Clause 22.8 of the Award refers to a “special duties roster” and provides:

“(a) A special duties roster may be introduced into any permanently manned fire station to increase the day manning capability.

(b) The hours of duty for full-time employees will be 42 hours per week over a seven day cycle. The hours of duty for part-time employees will be as agreed under clause 10.3(b) or varied under clause 10.3(c).”

150. The progression of part-time employees is set out in Schedule B to the Award. The minimum service period for each classification under the Award refers only to “service” of the employees.105 Therefore, the Part-time Employees are able to progress through the classifications based on his or her years of service (without regard to the type of service performed). In contrast, under the enterprise agreement, Part-time Employees are not able to progress through the enterprise agreement’s classification structures without relevant “firefighting experience”.

105 Award, Schedule B.
In comparison to the broad range of part-time rostering options permitted by the Award, the enterprise agreement places a number of restrictions on the availability of part-time work and the type of work that may be performed in a part-time capacity by imposing the full-time requirement, and the statutory declaration requirement. These restrictions are less beneficial for the Part-time Employees for the same reasons set out at paragraphs 89 to 93 above.

Having regard to the restrictions to part-time employment and the restrictive classification structure, the enterprise agreement is less beneficial for Part-time Employees.

No provision for part-time FSCCs and Senior FSCCs

The Award classifications extend to an FSCC. By reason of clause 10.1(b), the Award permits employment of FSCCs on a part-time basis. The availability of part-time employment for FSCCs under the Award is further clarified by the ordinary hours of work and rostering provisions in clause 22 of the Award, which is further described below.

Clause 22.3(b) refers to a “full-time Fire Services Communications Controller” and provides:

“(b) Subject to clause 22.3(a), a full-time Fire Service Communications Controller will, subject to the requirements in clauses 22.2(a) and (c) and clause 22.5(b), work a 12 hour continuous roster over a cycle of eight weeks with a day shift of 7.00 am to 7.00 pm and a night shift of 7.00 pm to 7.00 am.”

Clause 22.3(b) is subject to clauses 22.3(a), 22.2(a) and 22.5(b), which are set out above at paragraphs 146 to 148 and provide that part-time employees may be rostered and work hours as agreed. The Award therefore permits FSCCs to be employed on a part-time basis.

As set out above at paragraphs 98 to 100, the enterprise agreement makes no provision for FSCCs (which include Senior FSCCs) to work on a part-time basis.

106 See above at paragraphs 84 to 88.
107 See above at paragraph 103.
In light of the above, the enterprise agreement is less beneficial for part-time employees because it precludes part-time employees from holding the role of FSCC or Senior FSCC.

Part-time employees require UFU agreement

Clause 10.3 of the Award sets out the requirement for agreement between an employee and an employer for the purposes of part-time employment and relevantly states:

“10.3 Part–time employment

(b) At the time of engagement as a part-time employee, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

(c) Any agreed variation to the hours of work will be recorded in writing.”

As set out above at paragraph 103 and 108, the enterprise agreement requires additional UFU approval for part-time arrangements and the provision of a statutory declaration to the UFU for entitlements under s.65 of the FW Act.

Part-time Employees are, therefore, worse off under the enterprise agreement because it imposes further restrictions on the availability of part-time employment which would not otherwise apply under the Award.

Protection for part-time employees under the Award

The enterprise agreement does not require the employer and employee to agree in writing, as does the Award, on a regular pattern of work, specifying at least:

(a) the number of hours worked each day;

(b) which days of the week the employee will work;

(c) the actual starting and finishing times of each day; and

(d) that any variation will be in writing.

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108 Award, clause 10.3(b).
109 Award, clause 10.3(b).
110 Award, clause 10.3(b).
111
162. Further, the enterprise agreement does not require a part-time employee to be rostered for a minimum of three consecutive hours on any shift.\textsuperscript{112}

163. These additional provisions provide further protection for part-time employees in respect to their hours of work and the enterprise agreement dispenses with these requirements.\textsuperscript{113} In this respect, the Part-time Employees are worse off under the enterprise agreement.

**Payment for part-time work**

164. The enterprise agreement provides for the following additional payments to part-time employees:

(a) an insecure work allowance of 25% of the employee’s annual wage;\textsuperscript{114} and

(b) a special administrative duties allowance of $73.14.\textsuperscript{115}

165. There is no equivalent insecure work allowance under the Award. Clause 17.11(b) of the Award provides for a duty allowance for Station Officers and Firefighters rostered for special administrative dues, who are required to maintain operational, competencies. The allowance is currently $59.06.\textsuperscript{116}

166. Although the enterprise agreement provides more beneficial monetary entitlements for part-time employees, the enterprise agreement is overall less beneficial having regard to the restrictions on part-time work and the type of work available on a part-time basis. The additional allowances do not off-set the less beneficial part-time employment provisions and the greatly reduced promotional opportunities.

\begin{itemize}
  \item \textsuperscript{111} Award, clause 10.3(c).
  \item \textsuperscript{112} Award, clause 10.3(d).
  \item \textsuperscript{113} See analogous analysis in respect of similar part-time provisions under the *General Retail Industry Award 2010* in *Kikki K Pty Ltd* [2017] FWCA 1848.
  \item \textsuperscript{114} Clause 43.5 of the enterprise agreement.
  \item \textsuperscript{115} Clause 43.6(b), 85.16.1 and Schedule 4 of the enterprise agreement.
  \item \textsuperscript{116} Clause 17.11(b) of the enterprise agreement states the allowance is 7.3% of the standard rate; see definition of "standard rate" in clause 3 which refers to the minimum weekly wage: 38 hours for a Qualified Firefighter set out in clause 15-Minimum wages-public sector; see minimum wage in clause 15, which is $809.10.
\end{itemize}
Conclusion on the BOOT

167. In light of the above, the Part-time Employees are overall worse off under the enterprise agreement and, as a result, the enterprise agreement does not pass the BOOT.

168. The Commission may approve an agreement that does not pass the BOOT if the Commission is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.\textsuperscript{117} No such exceptional circumstances exist.

169. For the reasons set out above, the part-time provisions in the enterprise agreement are discriminatory. In those circumstances, approval would be contrary to the public interest.\textsuperscript{118}

PART D: OBJECTIONABLE TERMS – NON-UNION MEMBERS

170. Clauses in the enterprise agreement which are objectionable terms on the grounds of union membership fall into three broad categories – namely, clauses which require, permit, have the effect of requiring or permitting, or purport to require or permit or have the effect of requiring or permitting the MFB to discriminate against employees based on their union non-membership by:

(a) excluding MFB employees who are non-union members from direct engagement with the MFB in certain forums (for example, committees and working groups) where the constituents include MFB employees who are UFU members;

(b) giving preference to union members in such forums, by engaging only with their representatives (UFU representatives) and not with any representative of the non-union workforce, regardless of whether any of the UFU representatives are MFB employees;

(c) conferring a veto power on the UFU in respect of decisions which impact employees, including non-union members. The force of this

\textsuperscript{117} FW Act, s.189(2).
\textsuperscript{118} See meaning of “public interest” in Re Kellogg Brown and Root Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000 (2005) 139 IR 34 at [23].
point is further underlined given that the UFU is required to act in
the interests of its members, consistent with the Objects of its Rules,
and not necessarily in the interests of non-union members and
certainly not in the interests of non-union members where such
interests conflict with the interests of UFU members.  

**Exclusion from direct engagement**

171. As noted above, certain processes under the enterprise agreement have
the effect of excluding non-union members from direct participation,
thereby requiring or permitting the MFB to discriminate against
employees who are not union members and/or having the effect of
permitting or requiring the MFB to discriminate against its employees on
grounds of union membership, or purporting to do so.

172. The relevant provisions include:

(a) **Transfer Grievance Committee** – clause 126.12 provides for the
operation of a “transfer grievance committee”, comprised of “two
employer and two employee (UFU) representatives with a MFB
delegate in a bipartisan consultative capacity”, to hear and
determine transfer grievances brought before it by any employee
who believes that they have been unfairly treated because of a
transfer;

(b) **Diversity Working Party** – clause 45A provides for the
establishment of a diversity working party which will report to the
Consultation Committee on diversity issues. The working party is to
comprise “equal numbers of MFB and UFU representatives”;  

(c) **Special Operations Working Party** – clause 58.3 provides for
the establishment of a working party to review the feasibility of a
Special Operations unit, the terms and conditions of employment
and deployment arrangements that might apply. The working party

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119 See UFU Rules section 5 – Objects, for example, (1), (2), (5), (6), (28), (33), section 48 –
Implied and Incidental Powers. See also the requirement on union officers in s.286(1)(b) of the
*Fair Work (Registered Organisations) Act 2009* (Cth) to exercise powers and discharge duties for
a proper purpose.

120 Clause 45A.4.
is to comprise a representative from each Specialist Operation function and equal representation from the MFB and UFU;\textsuperscript{121}

(d) \textit{Absenteeism Working Party} – clause 116.1 provides for an absenteeism working party to discuss specific procedures for programs that could reduce levels of absenteeism, to continue to be comprised of equal numbers of representatives of the MFB and the UFU;

(e) \textit{Rostering Committee} – clause 126.2.3 provides that a Rostering Committee that has “equal employer and UFU representation”, will monitor and review all rostering issues.

173. It may be observed that none of these provisions expressly stipulate that the UFU representatives must be UFU members, or indeed MFB employees. However, given the number and nature of each of such bodies – and, specifically, the organisational knowledge required for each – it must be assumed that at least one UFU representative on each committee/working party would be an MFB employee. It could not reasonably be expected that the UFU would appoint a non-UFU member as its employee representative on any of the above bodies. All the more so in the context of an agreement the clear intent of which is to ensure that the UFU retains tight control over all employment and other operational decisions. There is also no mechanism for non-union members to ensure alternative non-union representation.

174. Accordingly, the above provisions have the effect of requiring the MFB to engage with employees who are UFU members, but not those who are non-members. In doing so, the provisions:

(a) require or permit the MFB to discriminate against non-union members, by engaging in a process which has a less favourable impact on those employees;

(b) have the effect of, or purport to have the effect of, requiring or permitting the MFB to discriminate against its employees on the

\textsuperscript{121} Clause 58.6.
ground of union membership, by treating non-union members less favourably in not engaging with them.

175. As already noted above, the MFB’s subjective intent is not a matter to be considered at the agreement approval stage. The causal connection between the adverse action required or permitted by the term (non-engagement with non-union members in the particular forum) and the protected attribute (non-union membership), is readily apparent.

176. A similar circumstance to the above was considered by the Full Federal Court in UFU v CFA, in the context of broader consultation obligations under the CFA’s enterprise agreement at the time.

177. The Full Court held that the relevant provision was not an objectionable term, because it did not “require or authorise the CFA not to consult with its non-union employees. That result only comes about if the UFU itself decides to exclude non-union members from the consultation processes”. The Full Court left open the question of whether the word “discriminates” in s.342(1) (adverse action) countenanced both direct and indirect discrimination, and whether the term was an objectionable term on the basis of indirect discrimination.

178. The question that the Full Court considered that it had been called upon to determine, and the question that it did determine, was whether the consultation clause was an objectionable term because it authorised the CFA to discriminate against its non-union staff. The Full Court’s decision was limited to this aspect of the definition of objectionable term in s.12 of the FW Act, and not its broader scope as a term which has the effect of permitting or requiring, or purports to permit or require or have the effect of permitting or requiring.

179. Regardless of whether discrimination for the purposes of s.342(1) encompasses indirect discrimination (which the Minister says it does), the breadth of the s.12 definition of objectionable term means that the impact, or purported impact, of the provision necessarily falls to be considered.

122 Op cit at [228].
123 Op cit at [220].
124 Op cit at [228].
Preference to union members by engagement only with union representatives

180. No facility is made in any of the above provisions for the MFB to engage with one or more representatives of employees who are not UFU representatives. Other relevant provisions are:

(a) **Dispute Resolution Officer** – clause 16A provides for the resolution of disputes about the agreement’s far-reaching consultation obligations by consensus between the MFB CEO, the Secretary of the UFU Victorian Branch (or their respective delegates) and the Dispute Resolution Officer (a person agreed between the UFU and the MFB);

(b) **Disputes Panel** – clause 50 provides for the establishment of a panel comprised of a UFU nominee, a MFB nominee and a chairperson agreed between the UFU and the MFB, for resolving disputes which may, by agreement between the MFB and the UFU, concern any matter pertaining to the employment relationship.¹²⁵

181. To the extent that the enterprise agreement provides for the MFB to engage **only** with UFU representatives or nominees in various contexts – the provisions are objectionable terms. This is the case whether or not any of the UFU representatives are MFB employees.

182. Such terms have the effect, or purport to have the effect, of requiring or permitting the MFB to discriminate against non-union members, by not consulting, if not directly with those persons (as discussed above), then with their chosen representatives. Again, the causal connection between the adverse action (being the MFB’s liaison only with UFU representatives and not non-union representatives) and the protected attribute (non-union membership) is readily apparent.

UFU veto

183. There are numerous provisions dispersed across the enterprise agreement which provide the UFU with rights of veto over matters relevant both to union and non-union members. We have set these out in **Annexure 3.**

¹²⁵ Clause 50.2.
By requiring the MFB to implement changes or other measures only with the consent of the UFU, these provisions have the effect, or purport to have the effect, of requiring or permitting the MFB to discriminate against its non-union employees by denying non-members or their representative an equivalent veto power (if such veto powers are otherwise permitted matters, which for the reasons identified below, they are not).

As noted above, in circumstances where the UFU has no obligations to non-UFU members, and will prefer the interests of its members over other employees, the discriminatory effect beyond the deprivation of a choice of representative is apparent.

A crucial source of UFU veto power is found in the clause 16 consultation process. This is the gateway for facilitating change in any matters pertaining to the employment relationship. Although clause 16 makes changes to the predecessor provisions (in what is clearly an attempt to avoid the challenge adverted to by the Full Court in UFU v CFA), these changes are directed to the issue of the MFB consulting only with employees who are UFU members, not the broader ramifications on the veto power contemplated by this clause.

Also, in respect of the composition of the consultation committee required by clause 16, the clause discriminates against non-union membership by providing that the UFU (and not non-union members) appoints 50% of the persons who are to comprise the committee. This discriminatory preference of the UFU over non-union members is not disturbed even if the UFU thereafter proceeds to appoint non-union members to this committee. The fact is that the UFU controls this selection process.

Thus, although theoretically, via clause 16.3.4, non-union employees can be on the Consultation Committee, such placement will only be because of a decision of the UFU itself. Also, clause 16.3.2 reserves at least one place on the Committee to the UFU. It does not reserve an equivalent place for non-union employees or their representative.

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126 See, for example, clauses 16.4, 16.5.5 and 17 of the enterprise agreement.
127 At clause 16.3.4.
128 See clause 13 of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia Operational Staff Agreement 2010.
Furthermore, regardless of the precise constituency of the consultative committee, the UFU retains a veto right over any proposal for change in respect of matters pertaining to the employment relationship and this veto power exists irrespective of the views of the other employee representatives who may sit on the consultation committee.\footnote{See clause 16.3.2. Employee representatives shall include a person or persons with authority to speak and make decisions on behalf of the UFU, and clause 16.5.1 and 16.5.11, which provides that decision making must be by consensus, meaning \textit{“unanimous agreement on an outcome supported by all members”}. The effect of the consultation provisions in providing a UFU power of veto is also demonstrated by the terms in which other provisions of the agreement are cast – see, for example, clause 27.1 (“the employer will consult and reach agreement with the UFU via the consultation committee in clause 16 regarding multi agency drills or training involving employees”).} 

**PART E: PERMITTED MATTERS**

The FW Act enables the making of agreements about \textit{“permitted matters”}, as defined in s.172. Relevant for present purposes are paragraphs 172(1)(a) and (b), which respectively define permitted matters in the following terms:

(a) \textit{“matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement;”}\n
(b) \textit{matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement.”}\n
A term of an enterprise agreement has no effect to the extent that it is not a term about a permitted matter.\footnote{Section 253(1)(a).} The fact that an enterprise agreement includes terms which are not about permitted matters, may not be a bar \textit{per se} to the Commission approving the enterprise agreement.\footnote{Section 253(2).}

However, it does not follow that the presence, in an enterprise agreement presented for Commission approval, of terms about non-permitted matters cannot in any circumstance have consequences for the capacity of the Commission to approve it. Rather, on examination, the nature and effect of such terms can have the consequence that the agreement:
(a) has “a fundamentally different character” to that which employees perceived they were voting on – such that the employees are misled as to its legal effect. In that circumstance, it cannot be said that the agreement was “genuinely agreed” to by the employees it covered – a matter about which the Commission must be satisfied as a condition precedent to approval; 

(b) in any event, is not an enterprise agreement as contemplated by s.172(1) of the FW Act and therefore not capable of approval.

In the present case, the enterprise agreement presented for approval contains multiple and/or critical terms (as identified below) which are about non-permitted matters. These terms usurp MFB management of the enterprise.

Matters pertaining to the employment relationship

The matters pertaining to the employment relationship formulation is of long standing. The Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) makes clear that s.172(1)(a) of the FW Act is intended to be read in light of the substantial jurisprudence that has developed over time. Paragraph 670 of the Explanatory Memorandum notes that:

“The courts’ interpretation of the formulation has evolved over time in line with changing community understandings and expectations about the kinds of matters that pertain to the employment relationship, and it is expected that this approach will continue.”

Thus, although historically it was the prerogative of management to decide how a business enterprise should operate and whom it should employ, without employees having any stake in the making of decisions, it is now recognised that many management decisions directly impact on

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132 To use the words of Sheppard AJA in the context of contracts void using the defence of *non est factum*, representing the unanimous views of the New South Wales Court of Appeal in *Paul George Pty Ltd v George* [1998] NSWCA 288 at pp.22-23.

133 See ss.186(2)(a) and 188(c).

134 Section 186(1) and (2)(a). See *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (*One Key*) at [103].

135 Tracing back to 1904 and the definition of “industrial dispute” in the context of award making powers.
work conditions, and properly fall within the matters pertaining to the employment relationship formulation.\footnote{Re Cram (1987) 163 CLR 117 (Re Cram) at [24], [25].}

198. Nevertheless, as reflected in the Explanatory Memorandum at [R.145], it is recognised that post-Re Cram, an area that constitutes “managerial prerogative” and is thus not a matter pertaining, still exists. The Explanatory Memorandum states:

“This content rule retains the ‘matters pertaining’ formulation established in case law and ensures that matters that clearly fall within ‘managerial prerogative’, that are outside the employer's control or are unrelated to employment arrangements are not subject to bargaining and industrial action. The continuation of the familiar ‘matters pertaining’ formulation provides certainty to employers as to what matters can be included in enterprise agreements.” (emphasis added)

199. The above statement reflects a correct recognition that the relevant case law accepts that there are matters “that clearly fall within ‘managerial prerogative’”.

200. It also correctly reflects the notion that the jurisprudence proceeds on the basis that a defining characteristic of an employer is that of being the person that holds and exercises the function of management of the business or enterprise in which employees are employed.

201. As such, it provides emphatic support to the position that the matters pertaining formulation in the current legislation is to be interpreted as providing that terms which deny, or which operate to overturn, or which are otherwise antithetical to the employer holding and exercising that fundamental management function, are not matter pertaining terms.

202. The impugned terms of the enterprise agreement trespass on actual managerial control: the ability of the MFB itself to manage and govern its own affairs in relation to decisions that may be required to be made from time to time.

203. The enterprise agreement is drafted in such a way as to substantially deprive the MFB of its capacity as an employer to make decisions in the
future. The level of interference in the ability of an employer to manage its business or organisation in the future is unprecedented.

204. First, this outcome is achieved by providing the UFU with extensive veto powers, to prevent the MFB from meaningfully operating and managing its own fire service without the agreement of the UFU.

205. These UFU veto powers are set out in Annexure 3. Such veto powers include the following subject matters:

(a) any matters pertaining to the employment relationship of employees covered by the enterprise agreement;\textsuperscript{137}

(b) any proposed change affecting the application or operation of the agreement, employees’ terms and conditions of employment or the employment relationship;\textsuperscript{138}

(c) determining employment entitlements, work functions and roles\textsuperscript{140} and training requirements;\textsuperscript{141}

(d) terminating the employment of employees;\textsuperscript{142}

(e) managing employees and associated organisational issues;\textsuperscript{143}

(f) determining and managing operational activities;\textsuperscript{144}

(g) implementing or enforcing policies, including operational policies;\textsuperscript{145}

(h) implementing change;\textsuperscript{146} and

(i) embarking on processes (including by making recommendations to government) which may result in organisational change.\textsuperscript{147}

\textsuperscript{137} Clause 16.
\textsuperscript{138} Clause 16.
\textsuperscript{139} See, for example, clauses 11.7, 12.9.15, 43.3, 43.6.3(a), 130.4.
\textsuperscript{140} See, for example, clauses 12A, 13.3.1, 39.18.8, 60.3.
\textsuperscript{141} See, for example, clauses 69.3, 69.5, 69.6, 69.9, 69.11, 69.13, 70.1.
\textsuperscript{142} See, for example, clauses 33.1.3 and 39.17.
\textsuperscript{143} See, for example, clauses 64.2, 64.3.6, 66.2, 66.3 67, 74.1, 75, 116.1, together with 116.7.
\textsuperscript{144} See, for example, clauses 27, 38.2.7, 38-3, 39.3, 39.18.7, 41, 129.3, 130.10, 131.5, 132.8.
\textsuperscript{145} Clause 36.2 to 36.4.
\textsuperscript{146} See, for example, clauses 16.3.2, 16.4, 16.5.1, 16.5.5, 16.5.11, 17, 20, 24, 25 and 26.
\textsuperscript{147} See, for example, clauses 14.18.
206. Secondly, this outcome is achieved by requiring the MFB to provide information to the UFU to enable the UFU to more closely monitor the MFB’s operations and management.\textsuperscript{148} These terms do not simply perform an information pathway for the UFU but permit the UFU thereafter, together with its veto powers under the enterprise agreement, to substantially control how the MFB will function going forward.

207. The combined effect of these provisions is sufficiently powerful that the MFB, through the enterprise agreement, has in effect ceded its managerial power to the UFU. These provisions incapacitate the MFB, removing its ability to operate effectively as an employer.

208. These terms operate to deny the MFB the status, role and function of an employer as the entity legally responsible for the management and conduct of the enterprise to which the agreement relates. In the case of veto power terms, they give the UFU a power to simply cancel the progressing of decisions and actions of management.

209. At this fundamental level, these terms cannot be about a matter pertaining to the employment relationship between the MFB and its employees, nor about the MFB and the UFU in the context of the enterprise agreement. Rather, the subject matter of those terms is control over management and conduct of the business. As such, they speak of and create a different relationship, namely, a relationship between the MFB and the UFU whereby the latter has a determinative and supervisory role with respect to the management and conduct of the enterprise. That relationship is foreign to the relationship between an employer and its employees, and a union and an employer.

210. These terms are antithetical to an employment relationship by stripping the employer (MFB) of its ability, as an employer, to manage its business in the future.

211. Thus, the provisions referred to above do not pertain to the employment relationship, as defined in s.172(1)(a) of the FW Act, nor under s.172(1)(b).

\textsuperscript{148} See, for example, clauses 15.6, 39.8, 39.10, 44.3.1.
212. The terms we have identified above, including in Annexure 3, do not involve terms covering a permitted subject matter, in the sense of terms that spell out relevant terms and conditions of employment that are the subject of agreement.

213. The regime of terms here, and especially the UFU veto powers, simply interfere with and potentially prevent the MFB as an employer making necessary operational and managerial decisions in the future across a vast array of potential subject matters. This squarely involves an interference in the area of management decision-making itself. As such, each of these terms, whether viewed separately or aggregated, do not involve a permitted matter but matters of management.

214. The vast array of UFU veto powers that could traverse in truth across all or nearly all material managerial and operational decisions do not become a matter pertaining to the employment relationship simply because the particular subject matter of any decision going forward itself may be capable of being a matter pertaining to the employment relationship.

215. These veto provisions do not deal with fixing a particular term and condition of employment by dealing with a particular subject matter. The veto provisions in fact cast a net, permitting the UFU to exercise veto rights across a broad spectrum of potential topics of decision-making going into the future.

216. The true subject matter of the combined effect of these veto clauses is in fact in respect of managerial control of the MFB itself – that is, the ability of the MFB itself to manage and govern its own affairs in relation to decisions that may be required to be made from time to time. Interference at this level of decision-making into the future does not constitute a matter pertaining to the employment relationship. This is so even if such future decisions for which a veto may be exercised may involve a subject matter that is a permitted matter.

217. As such and, in particular, the veto clauses, have the combined effect in trespassing into the subject matter of managerial decision-making per se.
218. A line needs to be drawn between terms of an enterprise agreement that may deal with a permitted subject matter, to adopt the approach in *Re Cram*, that concerns the employment relationship and terms which, on a proper characterisation, simply trespass on the ability of an employer to manage its business in the future.

219. To take an extreme example, if an enterprise agreement has as a term or terms that all future managerial and operational decisions must be made by the union and not the employer, such term or terms would clearly interfere with the decision-making process of management itself and would not be permitted matters.

220. Does this conclusion change where the union does not have the sole power to make managerial or operational decisions going forward but nevertheless holds a right of veto before such decisions can be made? The answer would be the same. Such clauses are not permitted.

221. Interference at this level of decision-making cannot constitute a matter pertaining to the employment relationship. It lacks the necessary connection “with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential”. ¹⁴⁹

222. That such terms do not pertain to the employment relationship is the current law in Australia. In this respect, although clauses concerning consultation in respect of future management decisions have been recognised in the case law as involving permitted matters, the Minister knows of no case where clauses that provide for union veto rights over future management decisions have been recognised as valid. Interference at this level of future decision-making by management is to trespass into forbidden areas of management.

223. In the 1984 *Termination Change and Redundancy Case (TCR Case)*,¹⁵⁰ the validity of consultation obligations fell to be considered by the High Court. ¹⁴⁹ *Re Manufacturing Grocers' Employees Federation (1986) 160 CLR 341* at 353. ¹⁵⁰ *Federated Clerks Union of Australia and Anor v Victorian Employers Federation and Others [1984] 154 CLR 472.*
Court. The relevant provision obliged employers to consult, within the proper meaning of that word, in the event of technological change.

224. In the TCR Case, Gibbs CJ noted that:

“it is clear, as Anderson J said in the Full Court, that the award could not validly give an effect to the outcome of consultation, or give employees the right to control or direct the decision of management, for if it did it would be dealing with a matter of management and not with an industrial matter.”

225. These obiter dicta observations were consistent with the law as in force up until that time. Although Gibbs CJ was in dissent about whether the consultation clause in question (which did not have the above-stated effect) pertained to the employment relationship, he was not in dissent in relation to the notion that the right of employees to control or direct the decisions of management was not a matter pertaining to the employment relationship.151

226. Subsequent decisions have continued to support the view that matters managerial in nature do not pertain to the employment relationship. For example, McHugh J in Electrolux Home Products v AWU (2004) 221 CLR 309 at [60]152 stated that:

“This court has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee.” (emphasis added)

227. This view of s.172(1)(a) is consistent with the Full Bench of this Commission in Schefenacker Vision Systems Australia.153

228. In this respect, in Schefenacker, Justice Guidice, President, Lawler VP and Simmonds C, after examining the High Court authorities, observed at [25]:

“In our view, our task is to characterise each of the provisions in question in these proceedings by reference to the cases concerning the definition of an industrial dispute. The cases show that the question to be asked is whether the provision is one which pertains to the

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151 Both Mason J at p.491 and Wilson J at p.499 raised the issue as one which would likely require further consideration at some later stage.
152 See also Callinan J at [245].
relationship of employers and employees. If the provision cannot be so characterised, but rather is of an academic, political, social, managerial or any other nature, the agreement cannot be the subject of a valid application for certification.” (emphasis added)

229. The decision Re Cram does not detract from the continued operation of the principle that there is a level of intrusion in management that is forbidden. The reasoning of the Court in Re Cram was essentially that it had become necessary to recognise that where decisions made by management on certain subjects (in that case, the mode of recruitment of labour) had direct impacts on the working conditions of employees, a demand directed to the content of the decision on that subject (in that case that recruitment be in accordance with an existing agreement which gave preference to union members) was a demand in respect of a matter pertaining the relationship of employees and employers.

230. The Court reasoned that a decision by an employer on the mode of recruitment ought not be regarded as the “sole prerogative” of the employer (and as within an imprecise category of matters labelled as “managerial prerogative” which were, by virtue of that characterisation, immune from industrial demand or prescription as previous decision had suggested). The Court spoke of the employees having a “stake” and “legitimate interest” in decisions on such a matter.

231. It was a short step for the Court to conclude that a demand as to the manner in which recruitment was carried out by the employer was a demand about a matter pertaining to the relationship between an employer and employees. A claim for a term or terms conferring upon a union veto power over the decision making by an employer on a particular subject, however, is not to be equated with the matter which was the subject of a demand in Re Cram.

232. The veto terms here pertain to a matter of a fundamentally different character. They do not operate to fix a particular term and condition of employment on the subject to which the term is directed. The terms are instead directed to the power to make a decision on the subject. As such,
these terms are of a very different character and are not permitted matters.

The UFU acting in a managerial – not representative – capacity

233. As noted above, these clauses go to the heart of the ability of the MFB to in truth be an employer and manage its business now and into the future.

234. The UFU veto powers also take the UFU well beyond its representative capacity and into a managerial capacity – at the managerial table. The presence of the UFU at the managerial table is not limited by way of discussion or consultation, but with a right of veto in respect of nearly all meaningful operational and managerial decisions that may otherwise have been made by the MFB. As such, these provisions do not pertain to the relationship between an employer and a union (s.172(1)(b)).

235. For a term to fall within s.172(1)(b), the term needs to relate to the union’s legitimate role in representing the employees to be covered by the enterprise agreement.154

236. But the veto right clauses give a role to the UFU in a managerial capacity, rather than a representative capacity – and beyond the legitimate role of a union.

237. This conclusion is also underlined by a number of terms which enable the UFU to override the will of employees, by requiring the agreement of the UFU as well as, and separately, the agreement of relevant individual employees.155

238. The statutory intent of s.172(1)(b) could not have extended to permitting an incursion by industrial organisations into having veto powers over future operational and managerial decisions of employers. If such an outcome were intended, it would have been made plain in the

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154 Explanatory Memorandum at [675] which states: “For an agreement to fall within paragraph 172(1)(b), the term needs to relate to the employee organisation’s legitimate role in representing the employees to be covered by the agreement.”

See also Airport Fuel Services Pty Ltd v Transport Workers’ Union of Australia [2010] FWAFB 4457 at [22]; AMWU v Visy Board Pty Ltd T/A Visy Board [2018] FWCFCB 8 at [18]; CFMEU v Baulderstone Pty Ltd [2013] FWC 2671 at [50].

155 See, for example, clauses 43.6.3(a), 64.2.1, 68.3, 105.1, 138.4.
Explanatory Memorandum. This is especially so as there is no case law that recognises that union veto rights can be a matter pertaining.

239. Such a construction of s.172 would also be inconsistent with meeting the objects of Part 2-4, namely, “to provide a simple, flexible and fair framework ... that delivers productivity benefits” (s.171(a)), nor, the objects of the FW Act more broadly, including:

“achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simply good faith bargaining obligations and clear rules governing industrial action156.” (s.3(f)).

240. These conclusions are also consistent with the types of provisions intended to be captured by s.172(1)(b), as set out in the Explanatory Memorandum.157

241. Finally, s.172(1)(b) is directed to the role of unions in representing the employees “that will be covered by the agreement”. To the extent the terms in question do not relate to the relationship between the MFB as employer and its employees, it follows that such terms also cannot be about the relationship between the MFB with the UFU in its representative capacity for the employees covered by the agreement.

**Specific non-veto terms that are not permitted**

242. Finally, a number of clauses, although providing no veto rights to the UFU, still illustrate a regime via the enterprise agreement of UFU control over the MFB.

243. For example, the enterprise agreement contains a requirement that the MFB provide the UFU with a copy of any individual flexibility arrangement (IFA) made in accordance with clause 15.158 In contrast

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156 Industrial action may also only be taken in respect of permitted matters (s.409).
157 At [676], namely, terms relating to union training leave and leave for training conducted by a union; terms that provide for employees to have paid time off to attend union meetings or participate in union activities; terms that provide for union involvement in dispute settlement procedures; terms that allow unions to promote membership or have noticeboards in the workplace or otherwise provide information to employees; terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee; terms that provide for the union to attend the workplace for certain purposes such as dispute resolution or consultation meetings.
158 Clause 15.6.
with the multiple veto rights conferred by the enterprise agreement, the UFU is prevented from being a party to an IFA by s.202(1) of the FW Act.

244. Despite this statutory prohibition, the UFU seeks via clause 15 to maintain an element of control over this process, in a way that pertains neither to the UFU/MFB relationship, nor to the employment relationship.

245. In a similar vein, clause 44.3.1 requires an employee who makes a flexible work request to provide to both the MFB and the UFU a statutory declaration evidencing their entitlement under the FW Act to make that request. The making of flexible work arrangements under the FW Act\(^\text{159}\) is a matter between the employee in question and the employer. There is no basis for the UFU to receive a copy of the employee's declaration.

246. These clauses are further examples of the extensive non-permitted terms in the enterprise agreement.

**Genuine agreement**

247. The significance and sheer number of provisions that are not about permitted matters, have the effect that the relevant employees have not genuinely agreed to the enterprise agreement.

248. Section 188 of the FW Act describes when employees have genuinely agreed to an enterprise agreement. As a Full Federal Court recently held:

(a) paragraph 188(c) is a “catch-all” provision, intended to pick up anything not caught by paragraphs (a) and (b);

(b) any circumstance which could logically bear on the question of whether the agreement of the relevant employees was genuine would fall to be considered under s.188;\(^\text{160}\)

(c) mere agreement will not suffice to amount to genuine agreement, consent of a higher quality is required.\(^\text{161}\) What is mandated is an informed and genuine understanding of what is being approved.\(^\text{162}\)

\(^{159}\) Section 65.

\(^{160}\) One Key at [142].

\(^{161}\) One Key at [141].

\(^{162}\) One Key at [156].
Employees voted on an enterprise agreement on the basis that it provided for profound control by the UFU over the operational and managerial decision-making of the MFB from the date of approval and into the future. This UFU control included, by way of an elaborate and extensive regime, of UFU veto powers over MFB decision-making.

As the terms to establish this control over the MFB by the UFU do not involve permitted matters, the fundamental regime of UFU control that is founded on these terms is invalid. But employees clearly voted on the enterprise agreement on the basis that the UFU had this level of, what must be said, unprecedented control over the organisation that employs the employees in question.

As such, the entire character of the enterprise agreement has changed. What was voted upon was an enterprise agreement with deep UFU control of the MFB. An agreement that did not have this UFU level of control was never approved by the employees. Hence, the enterprise agreement cannot meet the requirements of s.188. It was never genuinely agreed.

Not an enterprise agreement as contemplated by the FW Act

Section 253(2) of the FW Act makes it plain that that the inclusion in an enterprise agreement of a term that is not about a permitted matters does not prevent the agreement from being an enterprise agreement. However, it is nevertheless plain that to be an enterprise agreement the agreement must answer the description of being an agreement that is about one or more of the matters referred to in s.172(1).

The phrase “does not prevent” in s.253(2) does not imply that the presence of terms in an agreement that are not about permitted matters can never result in an agreement failing to answer the description of an agreement about matters referred to in s.172(1). Rather, the phrase indicates that an agreement is not incapable of being an enterprise agreement by reason only of the circumstance that it includes one or more terms that are not about permitted matters (that is, it provides that an
agreement which contains terms that are not about permitted matters is not *ipso facto* not an enterprise agreement because of that feature).

254. Otherwise, s.253(2) does not provide the answer to whether an agreement which carries such terms answers the description of being an enterprise agreement that is about one or more of the matters referred to in s.172(1) – it only recognises that it *may* be an enterprise agreement.

255. Neither does s.253 suggest that in determining whether an agreement answers the description of an enterprise agreement, terms that by operation of s.253(1) are of no effect, are to be put aside.

256. In this case, the non-permitted terms are numerous and in powerful terms. The agreement in this sense is fundamentally in non-compliance with s.172. As such, on proper characterisation, the content of the agreement has too many critical terms that are forbidden by the FW Act to be treated under the FW Act as an enterprise agreement that is capable of approval. Again, for this further reason, the enterprise agreement should not be approved.

**PART F: CONCLUSION AND UNDERTAKINGS**

257. The issues identified in these submissions cannot be remedied by way of written undertakings. The effect of the matters identified above is that the enterprise agreement should not be approved.

258. Furthermore, the Commission may only accept written undertakings from the MFB if the Commission is satisfied that the effect of accepting the undertaking is not likely to:

(a) cause financial detriment to any employee covered by the agreement; or

(b) result in substantial changes to the agreement.\(^{163}\)

259. The terms identified above as invalid are central to the agreement’s operation. Any undertakings to purportedly cure these flaws in the enterprise agreement would involve substantial changes to the agreement

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\(^{163}\) FW Act, s.190(1) to (3).
and, in fact, would cause a rewriting of the agreement itself. Such undertakings would not be permitted under s.190 of the FW Act.164

JUSTIN L. BOURKE QC
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DATED: 22 June 2018

K&L GATES
Solicitors for the Minister for Small and Family Business, the Workplace and Deregulation

164 See Re AKN Pty Ltd t/a Aitkin Crane Services [2015] FWCFB 1833 at [34] and, by way of example, Re Kore Construction Pty Ltd [2014] FWC 1955 at [32] (Gostencnik DP) and Re SRSW Pty Ltd [2015] FWC 994 at [68] (Ashbury DP). If undertakings are proffered by the MFB/UFU, the Minister may seek permission to be heard in respect of such undertakings.
## ANNEXURE 1
### DISCRIMINATORY CLAUSES

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> Part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances</td>
<td></td>
</tr>
<tr>
<td>1.1 Part-time employees rostered pursuant to “special administrative duties” roster</td>
<td></td>
</tr>
<tr>
<td>Clause 9.1.6, Obligations Part A – Conditions applying to all employees, A1 Application, operation and structure</td>
<td>9.1.6. Where in accordance with this clause the MFB agrees to a request to work other than full time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.</td>
</tr>
<tr>
<td>Clause 44.1.1, Rights under the NES Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters</td>
<td>44.1.1. Where in accordance with this clause the MFB agrees to a request to work other than full-time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.</td>
</tr>
<tr>
<td><strong>1.2</strong> Part-time employees not permitted to work on the 10/14 roster or as part of minimum safety crew, save in exceptional circumstances</td>
<td></td>
</tr>
<tr>
<td>Clause 9.1.7, Obligations Part A – Conditions applying to all employees, A1 Application, operation and structure</td>
<td>9.1.7. Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangement will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.</td>
</tr>
<tr>
<td>Clause</td>
<td>Description</td>
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</tr>
<tr>
<td>Clause 44.1.2, Rights under the NES Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters</td>
<td>44.1.2. Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangements will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.</td>
</tr>
<tr>
<td>Clause 43.6.1 Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters</td>
<td>43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational “10/14” roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCCs.</td>
</tr>
</tbody>
</table>

1.3 Generally on-shift employees should be employed on a full-time basis

| Clauses 9.1.4, 9.1.5, Obligations Part A – Conditions applying to all employees, A1 Application, operation and structure | 9.1.4. In addition to any other obligations, the MFB acknowledges the obligations to make reasonable accommodation for employees with parental or carer responsibilities and to make reasonable adjustments for employees with disabilities. However the MFB have determined and the parties have reached agreement that the MFB’s operational requirements mean generally that on-shift employees should be employed on a full-time basis. The MFB will meet the obligation to give reasonable accommodation/adjustments as required on a case by case basis, but the parties acknowledge that this may, in some cases require an employee to transfer off-station or from their current work location to another position.  

9.1.5. To avoid doubt, in addition to other obligations, this Agreement does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has determined and the parties have reached agreement that the MFB’s operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case by case basis, but the parties acknowledge that this may, in some cases require an entitled employee to |
<table>
<thead>
<tr>
<th>Clause</th>
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<tbody>
<tr>
<td></td>
<td>transfer off-station or from their current work location to another position. Without limiting the foregoing, this subclause applies to the following clauses and schedules: 12.3, 43.1, 69, 121.1, 136.1.1, 138.1, 139, 152.1, 153, Schedule 3, and Schedule 14 despite any inconsistent terms therein.</td>
</tr>
</tbody>
</table>

Clause 44.1, Rights under the NES
Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters

44.1. In addition to other obligations on the MFB, and to avoid doubt, this clause does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s.65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has determined and the parties have reached agreement that MFBs operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case-by-case basis, but the parties acknowledge that this may in some cases require an entitled employee to transfer off station or from their current work location to another position.

2. Part-time employees relegated to administrative duties are impeded in their career progression and precluded from other benefits

2.1 Classification progression contingent on firefighting

Clauses 12.3.1-17, Classifications, career paths and opportunities
Part A – Conditions applying to all employees, A1 Application, operation and structure

12.3.1. **Recruit Firefighter (C)** means a probationary Firefighter, who is undertaking the MFESB recruit firefighter training course.

12.3.2. **Firefighter Level 1 (C)** means a Firefighter who has completed the MFESB recruit firefighter training course in accordance with the training framework at schedule 3. Firefighter Level 1 (C) employees who have successfully completed the MFESB recruit firefighter training course shall be engaged in the duties of a Firefighter Level 1 (C) in accordance with the classification description for Firefighter Level 1 (C) (schedule 12).

12.3.3. **Firefighter Level 2 (C)** means a Firefighter who has completed the MFESB recruit firefighter course and has completed twelve months service with the MFESB and all MFESB Firefighter Level 1 (C) modules.

12.3.4. **Firefighter Level 2 (C)** employees are engaged in the duties of a Firefighter Level 2 (C) in accordance with the classification description for Firefighter Level 2 (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>12.3.5.</td>
<td><strong>Firefighter Level 3 (C)</strong> means a firefighter who has completed 24 months service with the MFESB and all MFESB Firefighter Level 2 (C) modules.</td>
</tr>
<tr>
<td>12.3.6.</td>
<td><strong>Firefighter Level 3 (C)</strong> employees are engaged in the duties of a Firefighter Level 3 (C) in accordance with the classification description for Firefighter (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.</td>
</tr>
<tr>
<td>12.3.7.</td>
<td><strong>Qualified Firefighter (C)</strong> means a firefighter who has completed a minimum of 36 months service with the MFESB, all MFESB Firefighter Level 3 modules and possesses the Certificate of Proficiency.</td>
</tr>
<tr>
<td>12.3.8.</td>
<td><strong>Qualified Firefighter (C)</strong> employees are engaged in the duties of a Qualified Firefighter (C) in accordance with the classification description for Qualified Firefighter (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.</td>
</tr>
<tr>
<td>12.3.9.</td>
<td><strong>Senior Firefighter (C)</strong> means a firefighter who translates to this paypoint as a result of being a Senior Firefighter in the previous agreement.</td>
</tr>
<tr>
<td>12.3.10.</td>
<td><strong>Leading Firefighter (C)</strong> means a firefighter who has completed a minimum of 48 months career firefighting service with the MFESB, has successfully completed all MFESB Firefighter Levels 1, 2 and 3 modules, all MFESB Qualified Firefighter modules, all LFF modules, all Command and control modules and has been a Qualified Firefighter with the MFESB (the LFF requirements). Leading Firefighter (C) employees are engaged in the duties of a Leading Firefighter in accordance with the position description for that classification in SCHEDULE 12.</td>
</tr>
<tr>
<td>12.3.11.</td>
<td><strong>Senior Leading Firefighter (C)</strong> means a career firefighter who has completed 5 years’ service within the MFB at the classification of Leading Firefighter.</td>
</tr>
<tr>
<td>12.3.12.</td>
<td><strong>Station Officer (C)</strong> means an appointed Officer who has completed a minimum of 6 years career firefighting service with the MFESB, with at least 1 year at a minimum classification of Leading Firefighter with the MFESB, and has successfully completed the Station Officer modules and MFESB Station Officer assessment (the SO requirements). Station Officer employees are engaged in the duties of a SO in accordance with the position description for that classification in SCHEDULE 12.</td>
</tr>
<tr>
<td>12.3.13.</td>
<td><strong>Senior Station Officer (C)</strong> means an appointed Officer who has completed a minimum of 2 years’ service with the MFESB at the Station Officer Level and has successfully completed the Senior Station Officer...</td>
</tr>
</tbody>
</table>
Clause | Description
--- | ---
modules and assessment (the SSO requirements). Senior Station Officer (C) employees are engaged in the duties of a SSO in accordance with the position description for that classification in SCHEDULE 12 –.

12.3.14 **Commander (C)** means an appointed officer who has completed a minimum of 1 year’s service with the MFESB at the SSO Level on shift and a minimum of 1 year’s service with the MFESB at the SO or SSO Level in a day duty department and who has successfully completed the Commander modules and assessment (the Commander requirements). Commander employees are engaged in the duties of a Commander in accordance with the position description for that classification in SCHEDULE 5.

12.3.15 **Assistant Chief Fire Officer (C)** means an employee appointed officer who has a minimum of two years’ service with the MFESB at the Commander Level and who has successfully completed the ACFO modules and assessment (the ACFO requirements). ACFO employees are engaged in the duties of a ACFO in accordance with the position description for that classification at SCHEDULE 10 – and the functions at SCHEDULE 11.

12.3.16 **Fire Service Communication Controller (C)** means an appointed officer who has completed a minimum of 10 years’ service with the MFESB at the Station Officer Level (half of which has been on shift) and has successfully completed the FSCC modules and assessment (the FSCC requirements). FSCC employees are engaged in the duties of a FSCC in accordance with the position description for that classification at SCHEDULE 8.

12.3.17. **Senior Fire Service Communication Controller** means a Fire Service Communication Controller who has completed 12 months service within the MFB at the classification of FSCC. Where this agreement refers to a FSCC, it shall be taken to include Senior FSCC, unless the context requires otherwise.

**2.2 Certain benefits only available to employees of certain classifications**

| Clause 41.1, 41.3.2, Secondment & Lateral Entry Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters | 41.1. Employees to whom this agreement applies shall not be permitted, or required, to undertake a secondment to another organisation except in accordance with the secondment programme in SCHEDULE 13 –.
41.3.2. The agreed secondment program will only be for employees that hold the rank of Leading Firefighter or above. |
<table>
<thead>
<tr>
<th>Clause</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Clause 136.1, Further terms and conditions of employment for instructors</td>
<td>136.1.1. The MFB will not appoint a person to a position of instructor, and no person may hold a position of instructor, unless that person is an operational employee who holds a MFB firefighting stream rank referred to in clause 12.3.10.</td>
</tr>
<tr>
<td>Part B – Conditions applying to recruit firefighters through to ACFO’s, B1 – Wages, allowances and other remuneration</td>
<td></td>
</tr>
<tr>
<td>3. No provision for part-time FSCCs and Senior FSCCs</td>
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</tr>
<tr>
<td>Clause 152, Ordinary hours of work</td>
<td>152.1. FSCCs will work in accordance with clause 43 and where applicable clause 153.</td>
</tr>
<tr>
<td>Part D – Conditions applying to FSCCs (including Senior FSCC’s)</td>
<td>152.2. The ordinary working hours for employees shall be 38 per week, over a cycle of eight weeks for which the roster of hours and leave operates. Employee’s shall be rostered and worked an average of 42 hours per week, two of which hours shall be overtime work and paid for as such and the remaining two hours shall be taken as accrued leave, in accordance with the roster laid down for this purpose.</td>
</tr>
<tr>
<td>Clause 43.6.1, 43.6.2</td>
<td>43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational “10/14” roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCCs.</td>
</tr>
<tr>
<td>Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters</td>
<td>43.6.2. Full-time operational dayworkers (professional firefighters who are not working on a roster referred to in 43.6.1) shall work and be rostered in accordance with the special administrative duties roster set out in clause 135.</td>
</tr>
<tr>
<td>4. Statutory declaration of entitlement under s. 65 of the FW Act</td>
<td>44.3.1. An employee must provide appropriate evidence of their entitlement under the Act in the form of a statutory declaration, copies of which will be provided to the UFU and MFB.</td>
</tr>
<tr>
<td>Clause 44.3.1, Rights under the NES</td>
<td></td>
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<tr>
<td>Clause</td>
<td>Description</td>
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</tr>
<tr>
<td>Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters</td>
<td></td>
</tr>
<tr>
<td>5. <strong>Part-time employees require UFU agreement</strong></td>
<td></td>
</tr>
</tbody>
</table>
| Clause 43.3, 43.4, Rostering Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters | 43.3. The MFB will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis, unless in each case there is agreement between all parties on a case by case basis (agreement is required for each employee).
43.4. This clause is subject to the rights of employees to work in a non-station based position pursuant to clause 44 below. |
| Clause 138.4, ACFO hours of work Part C – Additional conditions applying to Commander to ACFO Classifications | 138.4 The MFB will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis, unless in each case there is agreement between all parties on a case by case basis (agreement is required for each employee). |
| Clause 43.6.3, Rostering Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters | 43.6.3. Where part-time employment is agreed, part-time operational dayworkers will:
a) work and be rostered on hours negotiated and agreed in writing between the MFB the employee and the UFU that, on average are less than 42 hours per week. These hours may be worked over a 5 day cycle and may include evening or weekend work; |
| Clause 138.4.1, ACFO Part C – Additional conditions applying to | 138.4.1. Where part-time employment is agreed, part-time operational dayworkers will:
a) work and be rostered on hours negotiated and agreed in writing between the MFB the employee and the UFU that, on average are less than 38 hours per week. These hours may be worked over a 5 day cycle and may |
<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commander to ACFO Classifications</td>
<td>include evening or weekend work;</td>
</tr>
</tbody>
</table>

### 6. Impost imposed on MFB for part-time employees

#### 6.1 Insecure work allowance

| Clause 43.5, Rostering Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters | 43.5. Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage. |
| Clause 138.2, ACFO Hours of Work Part C – Additional conditions applying to Commander to ACFO Classifications | 138.2 Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage. |

#### 6.1 Special administrative duties allowance

| Clause 43.6(b), Rostering Part A – Conditions applying to all employees, A4 MFB Systems conditions, activities and rosters | 43.6. Employees shall have their normal hours of work arranged in the following manner:  
...  
b) Be paid special administrative duties allowance not at a pro rata rate; and |
<p>| Clause 85.16.1, Special Administrative duties | 85.16.1. Employees rostered for Special Administrative Duties shall receive an allowance in accordance with Schedule 4 Allowances whilst so rostered. Special Administrative Duties shall include all rostered duty in all |</p>
<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>allowance, Part A – Conditions applying to all employees, A6 Wages, allowances and remuneration</td>
<td>MFB departments including but not limited to Training and Education, Fire Safety and Administrative areas of Operations as well as the rosters of all day work personnel on OSG.</td>
</tr>
<tr>
<td>Clause 138.4(b), ACFO Hours of Work Part C – Additional conditions applying to Commander to ACFO Classifications</td>
<td>138.4.1. Where part-time employment is agreed, part-time operational dayworkers will: ... b) Receive special administrative duties allowance not at a pro rata rate; and</td>
</tr>
</tbody>
</table>
# ANNEXURE 2

## PART-TIME EMPLOYMENT PROVISIONS FOR EMERGENCY SERVICES INDUSTRIAL INSTRUMENTS

<table>
<thead>
<tr>
<th>Agreement/Award</th>
<th>Part-time provisions (or commentary in respect of absence of part-time provisions)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Agreements under the FW Act</strong></td>
<td></td>
</tr>
<tr>
<td>Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Enterprise Agreement 2010 (the current MFB Agreement)</td>
<td>Clause 37.2. For the avoidance of doubt, the MFESB will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis unless by agreement between the parties.</td>
</tr>
</tbody>
</table>
| Metropolitan Fire and Emergency Services Board Corporate & Technical Employees Agreement 2017 | Clause 24.1(a) Employees under this agreement will be employed in one of the following categories:  
(i) full-time employees; or  
(ii) regular part-time employees; or  
(iii) casual employees; or  
(iv) employees engaged on a fixed term basis (both part-time and full-time hours). |
| Country Fire Authority, United Firefighters Union of Australia, Operational Staff Enterprise Agreement 2010 (the current CFA Agreement) | Clause 29.2. For the avoidance of doubt, the CFA will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis. |
| Country Fire Authority Professional, Technical and Administrative Agreement 2016 | 14.3 Part-Time Employment  
14.3.1 CFA may employ Part-Time Employees in any classification in this Agreement. |
<p>| CFA District Mechanical Officers and | Clause 13.4 CFA may employ Part-Time Employees in any classification contained within this Agreement.” |</p>
<table>
<thead>
<tr>
<th>Agreement/Award</th>
<th>Part-time provisions (or commentary in respect of absence of part-time provisions)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Tower Overseers Agreement 2014</em></td>
<td></td>
</tr>
<tr>
<td><em>Victoria State Emergency Service Agreement 2016</em></td>
<td>Clause 15.6  Part-time employment may be worked only by agreement between the employer and the employee.</td>
</tr>
<tr>
<td><em>Victoria Police Force Enterprise Agreement 2011</em></td>
<td>Clause 31.1: An employee may work on a part time basis where the employee has been selected for a part time position which was advertised by the employer, or, the employee has applied to work 76 hours or less per <em>fortnight</em> and the employer has agreed.</td>
</tr>
<tr>
<td><em>Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015</em></td>
<td>Clause 33.1  An employee may work on a part time basis where the employee has been selected for a part time position which was advertised by the employer, or, the employee has applied to work 76 hours or less per <em>fortnight</em> and the employer has agreed.</td>
</tr>
<tr>
<td><em>Ambulance Victoria Enterprise Agreement 2015</em></td>
<td>Clause 14  Employees may be engaged as full- time, part-time, casual, fixed term or job share employees.</td>
</tr>
<tr>
<td><em>St John Ambulance Western Australia Ltd Ambulance Officers’ / Paramedics Enterprise Agreement 2014</em></td>
<td>Clause 11(b)  Subject to legislative requirements, St John may offer part-time positions to any classification as operationally required.</td>
</tr>
</tbody>
</table>
| *St John Ambulance Australia Tasmania Trainers Enterprise Agreement 2015*       | Clause 24.2  Part Time employment  
(a)  Part time employee’ means an employee who is engaged to work for less than 38 hours per week on a reasonably predictable basis.                                                                 |
| *St John Ambulance Australia (NT) Inc. Ambulance Enterprise Agreement 2016 – 2019* | 23.3  Part-time Employees will be required to work an average of ordinary hours less than seventy-six (76) hours per fortnight (“Ordinary Hours”) and not less than four (4) consecutive hours per day.  
(iv)  All hours worked by Part-time Employees in excess of seventy-six (76) hours per fortnight shall be paid as overtime. |
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<tr>
<th>Agreement/Award</th>
<th>Part-time provisions (or commentary in respect of absence of part-time provisions)</th>
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<tbody>
<tr>
<td><strong>v)</strong> Part-time Employees will have a written agreement upon commencement specifying the hours to be worked.</td>
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</tr>
<tr>
<td><strong>ACT Public Sector ACT Fire &amp; Rescue Enterprise Agreement 2013 – 2017</strong> 58. Regular Part Time Employment 58.1 Employees may apply to work on a part time roster. The following arrangements will apply: (a) Attendance will occur within the 10/14 roster with a regular attendance pattern throughout the year; (b) Approval for access to part time working arrangements will be contingent on sufficient operational staffing in full time equivalents as per clause 148. Part time employees will be allocated to the relief roster; (c) To be considered for part time work arrangements employees must have a minimum of 3 years operational experience in the Fire Service and be at a classification of FB 4 or higher. (d) Appropriate skill mix must be maintained on all platoons; (e) Movement to part time work arrangements is voluntary; (f) Employees on part time work arrangements accrue time at classification on a pro-rata basis; (g) If an employee on part time work arrangements is promoted to or within officer classifications (FB6-FB8) the employee must revert to full time employment for a period of not less than two years; (h) For safety reasons no part trained or part year persons will be employed under this agreement; (i) All part time work arrangements will be reviewed annually.</td>
<td></td>
</tr>
<tr>
<td><strong>ACT Public Service ACT Fire &amp; Rescue Enterprise Agreement 2011-2013</strong> 58. Regular Part Time Employment 58.1 Employees may apply to work on a part time roster. The following arrangements will apply: (a) Attendance will occur within the 10/14 roster with a regular attendance pattern throughout the year; (b) Approval for access to part time working arrangements will be contingent on sufficient operational staffing in</td>
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<td>Agreement/Award</td>
<td>Part-time provisions (or commentary in respect of absence of part-time provisions)</td>
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<tr>
<td>full time equivalents as per clause 145. Part time employees will be allocated to the relief roster;</td>
<td>(c) To be considered for part time work arrangements employees must have a minimum of 3 years operational experience in the Fire Service and be at a classification of FB 4 or higher.</td>
</tr>
<tr>
<td>(d) Appropriate skill mix must be maintained on all platoons;</td>
<td>(e) Movement to part time work arrangements is voluntary;</td>
</tr>
<tr>
<td>(f) Employees on part time work arrangements accrue time at classification on a pro-rata basis;</td>
<td>(g) If an employee on part time work arrangements is promoted to or within officer classifications (FB6-FB8) the employee must revert to full time employment for a period of not less than two years;</td>
</tr>
<tr>
<td>(h) For safety reasons no part trained or part year persons will be employed under this agreement;</td>
<td>(i) All part time work arrangements will be reviewed annually.</td>
</tr>
</tbody>
</table>

**Northern Territory Public Sector Fire and Rescue Service 2013 - 2017 Enterprise Agreement**

57.1 Work Life Balance Initiatives

The NTFRS is committed to providing an employee with flexibility to assist in balancing their work and life commitments. The following initiatives may be accessed by all employees, except casual employees:

(a) flexible working hours;
(b) home-based work (for day duty employees);
(c) job sharing;
(d) part-time work;
(e) career breaks;
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<tbody>
<tr>
<td></td>
<td>(f) part-year employment; and</td>
</tr>
<tr>
<td></td>
<td>(g) short term absences for family and community responsibilities.</td>
</tr>
</tbody>
</table>

57.2 General Principles in Relation to Work Life Balance Initiatives

When considering applications from an employee wishing to access the initiatives specified in sub-clause 57.1, the Director or their delegate must ensure that:

(a) NTFRS operational requirements are met and services to the public are not disrupted; and

(b) the employee fulfils the criteria outlined in this clause; and

(c) fair and reasonable consideration is given to employee applications; and

(d) arrangements can be put in place to ensure that approval of the application will not result in unreasonable increases in the workload and overtime required to be performed by other employees.

**Northern Territory Public Sector Fire and Rescue Service 2011-2013 Enterprise Agreement**

57.1 Work Life Balance Initiatives

The NTFRS is committed to providing an employee with flexibility to assist in balancing their work and life commitments. The following initiatives may be accessed by all employees, except casual employees:

(a) flexible working hours;

(b) home-based work (for day duty employees);

(c) job sharing;

(d) part-time work;

(e) career breaks;

(f) part-year employment; and

(g) short term absences for family and community responsibilities.

57.2 General Principles in Relation to Work Life Balance Initiatives

When considering applications from an employee wishing to access the initiatives specified in sub-clause 57.1, the
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<tbody>
<tr>
<td>Director or their delegate must ensure that:</td>
<td></td>
</tr>
<tr>
<td>(a) NTFRS operational requirements are met and services to the public are not disrupted; and</td>
<td></td>
</tr>
<tr>
<td>(b) the employee fulfils the criteria outlined in this clause; and</td>
<td></td>
</tr>
<tr>
<td>(c) fair and reasonable consideration is given to employee applications; and</td>
<td></td>
</tr>
<tr>
<td>(d) arrangements can be put in place to ensure that approval of the application will not result in unreasonable increases in the workload and overtime required to be performed by other employees.</td>
<td></td>
</tr>
</tbody>
</table>

**Australian Federal Police Enterprise Agreement 2017 – 2020**

60 Part-Time Work

(1) The Commissioner may approve a request from an Employee to become a Part-Time Employee. Where an Employee is a Part-Time Employee, remuneration and other employment conditions outlined in this Agreement will be calculated on a pro-rata basis unless otherwise specified.

(2) A Part-Time Employee must have an approved IFA in place.

(3) Where a Part-Time Employee’s hours of duty are varied through an IFA the approved arrangement may impact on the Employee’s ability to be eligible for payment of the Core Composite.

**Australian Federal Police Executive Level Enterprise Agreement 2016-2019**

38. Part-Time

The Commissioner may approve a request from an Employee to become a Part-Time Employee. Where an Employee is a Part-Time Employee, remuneration and other employment conditions outlined in this Agreement will be calculated on a pro-rata basis unless otherwise specified.

**Transfield Services Defence Base Services (Vic) and the United Firefighters' Union of Australia (Victorian Branch) Fire and Rescue Enterprise Agreement 2015**

The hours of work (clause 5.1) and roster of hours (clause 5.2) terms do not provide for rosters for part-time employees. The 10/14 roster (clause 5.2.2) appears to presume that employees are working full-time. The agreement expressly incorporates the NES flexible work arrangements (clause 7.3).

**Broadspectrum and the United**

The agreement provides that employees will be engaged on a permanent basis but does not expressly provide for
<table>
<thead>
<tr>
<th>Agreement/Award</th>
<th>Part-time provisions (or commentary in respect of absence of part-time provisions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Firefighters’ Union of Australia SA Fire and Rescue Enterprise Agreement 2015</td>
<td>part-time arrangements (clause 16.2). The rostering arrangements do not appear to contemplate part-time arrangements (clause 19). The agreement expressly incorporates the NES flexible work arrangements (clause 28).</td>
</tr>
<tr>
<td>Broadspectrum (Australia) Pty Ltd and United Firefighters’ Union of Australia (WA Branch) Fire and Rescue Enterprise Agreement 2015</td>
<td>The agreement does not expressly provide for part-time arrangements (clause 24). The rostering arrangements do not appear to contemplate part-time arrangements (clause 25). An employee (full time or part time) is entitled to make a request for parental leave once the employee has completed 12 months of continuous service (clause 43.1.1)</td>
</tr>
<tr>
<td>Compass Group (ESS RMV Fire Rescue) Enterprise Agreement 2013</td>
<td>The agreement does not expressly provide for part-time arrangements (clause 5.1). The rostering arrangements do not appear to contemplate part-time arrangements (clause 5.2). The agreement does not appear to contemplate flexible work arrangements.</td>
</tr>
<tr>
<td>Logistics Coordination Unit (NT) Enterprise Agreement 2015 - 2018</td>
<td>Clause 16</td>
</tr>
<tr>
<td></td>
<td>Logistics Co-ordinators will be employed in one of the following employment categories:</td>
</tr>
<tr>
<td></td>
<td>(i) Full time;</td>
</tr>
<tr>
<td></td>
<td>(ii) Part time; or</td>
</tr>
<tr>
<td></td>
<td>(iii) Casual.</td>
</tr>
<tr>
<td>State based instruments</td>
<td></td>
</tr>
<tr>
<td>Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2016</td>
<td>8.2.2 Operational Firefighters may, with the Department’s agreement, elect to work alternative rosters to their default roster, provided that any such alternative roster: 8.2.2.1 must operate over an eight-week cycle and be drawn up and provided to both the Operational Firefighter and the Union not less than fourteen days prior to commencement; 8.2.2.2 must allow at least eight consecutive hours between the cessation of one rostered shift and the commencement of the next rostered shift; 8.2.2.3 must operate within the hours of the Operational Firefighter’s default roster, provided that employees whose default roster is the Special Roster may apply to work alternative rosters that</td>
</tr>
<tr>
<td>Agreement/Award</td>
<td>Part-time provisions (or commentary in respect of absence of part-time provisions)</td>
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<tr>
<td></td>
<td>commence and cease up to two hours earlier or later than provided by the Special Roster.</td>
</tr>
<tr>
<td></td>
<td>8.2.2.4 must not allow split or broken shifts;</td>
</tr>
<tr>
<td></td>
<td>8.2.2.5 must not allow a reduction in the minimum Operational Firefighter staffing required at the station/location in question;</td>
</tr>
<tr>
<td></td>
<td>8.2.2.6 must not allow more than five days’ work, or more than five rostered shifts, in any seven day period; and</td>
</tr>
<tr>
<td></td>
<td>8.2.2.7 must not average more than forty two ordinary working hours per week over the eight-week cycle.</td>
</tr>
<tr>
<td></td>
<td>8.2.3 An Operational Firefighter who elects to work an alternative roster that allows fewer average ordinary working hours than allowed for by subclause 8.1 shall be paid and accrue leave on a pro-rata basis.</td>
</tr>
<tr>
<td>Crown Employees (Rural Fire Service) Award</td>
<td>7. Hours of Work</td>
</tr>
<tr>
<td></td>
<td>7.1 Notionally staff will work a 35-hour week worked any time from Monday to Sunday.</td>
</tr>
<tr>
<td></td>
<td>7.2 The normal working week shall be Monday to Friday with standard office hours from 9.00 am to 5.00 pm.</td>
</tr>
<tr>
<td></td>
<td>7.3 The bandwidth for working the 35 hours will normally be between 7.00 am and 7.00 pm unless otherwise agreed.</td>
</tr>
<tr>
<td>Queensland Fire and Emergency Service Certified Agreement 2016</td>
<td>Clause 32: Part-time employment</td>
</tr>
<tr>
<td></td>
<td>(a) Firefighters at the rank of First Class Firefighter or above may be engaged on a part-time basis.</td>
</tr>
<tr>
<td>Queensland Fire and Emergency Service Employees Award – State 2016</td>
<td>8.2 Part-time employment</td>
</tr>
<tr>
<td></td>
<td>(a) Subject to consultation occurring between the parties prior to part-time employment being introduced into any new area after the date of commencement of this Award, an employee may be engaged on a part-time basis under the conditions prescribed in clause 8.2. Existing part-time employees as at the date of commencement of this Award may continue to be employed on that basis under the conditions prescribed in this clause.</td>
</tr>
<tr>
<td>Agreement/Award</td>
<td>Part-time provisions (or commentary in respect of absence of part-time provisions)</td>
</tr>
<tr>
<td>----------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Queensland Fire and Emergency Services Determination 2013 | Clause 24. Part-time employment  
(a) Firefighters at the rank of first class firefighter or above may be engaged on a part-time basis. |
| Queensland Fire and Rescue Service Award – State 2012 | Clause 4.2 Part-time employment  
4.2.1 Prior to the introduction of part-time employment, consultation shall occur between the parties. The following provisions will apply:  
(a) The spread of ordinary hours shall be the same as those prescribed for a full-time employee under this Award.  
(b) A Part-time Employee shall be employed for no less than an average of 8 hours and no more than 32 hours per week.  
(c) A Part-time Employee shall be paid at the same hourly rate as a full-time employee would have been paid for performing duty at the same Classification Level. A Part-time Employee shall also be entitled to allowances as and where prescribed by this Award and on a pro rata basis where appropriate.  
(d) The public holiday provisions of this Award shall apply on a pro rata basis to part time employees.  
(e) All leave provisions of this Award applying to full-time employees shall apply pro rata to Part-time Employees |
| South Australian Metropolitan Fire Service Enterprise Agreement 2017 | The agreement expressly only provides for full-time employees (Part B) and does not provide for part-time employees. |
| Firefighting Industry Employees (South Australian Metropolitan Fire Service) Award 2007 | Clause 11: Contract of employment  
Employees under this Award will be employed as full-time employees or part-time employees. At the time of engagement an employer will inform each employee of the terms of their engagement, in particular, whether they are to be full-time or part time.  
11.1 Part-time employment  
The salary payable to a part-time employee is the full-time rate adjusted to the proportion of the actual hours worked. |
<table>
<thead>
<tr>
<th>Agreement/Award</th>
<th>Part-time provisions (or commentary in respect of absence of part-time provisions)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>South Australian Metropolitan Fire Service Enterprise Agreement 2014</em></td>
<td>24.3 Return to work on a part time basis</td>
</tr>
<tr>
<td></td>
<td>Subject to this clause, an employee is entitled to return to work after maternity or adoption leave on a part-time basis, at the employee’s substantive level, until the child’s second birthday.</td>
</tr>
<tr>
<td><em>Tasmanian Firefighting Industry Employees’ Industrial Agreement 2014</em></td>
<td><strong>34. PART TIME EMPLOYMENT (INCLUDING JOB SHARING)</strong></td>
</tr>
<tr>
<td></td>
<td>The parties agree that an employee may be employed as a part time employee in accordance with the following provisions:</td>
</tr>
<tr>
<td></td>
<td>a) Definition</td>
</tr>
<tr>
<td></td>
<td>’Part Time Employee’ means a person who is employed on an ongoing basis in accordance with Section 37(3)(a) of the State Service Act 2000 to work a specific number of hours each week, on a regular basis, that are less in number than that of a full time employee undertaking similar duties.</td>
</tr>
<tr>
<td></td>
<td>b) Entitlements</td>
</tr>
<tr>
<td></td>
<td>i) A part-time employee is entitled to wages, allowances other than expense-related allowances, and leave in the same ratio that their ordinary weekly hours bear to the ordinary weekly hours of equivalent full-time employees.</td>
</tr>
<tr>
<td></td>
<td>ii) A part-time employee is entitled to payment of expense-related allowances at the same rate as that applying to an equivalent full-time employees. (2007)</td>
</tr>
<tr>
<td></td>
<td><strong>61. FAMILY-FRIENDLY WORKING ARRANGEMENTS</strong></td>
</tr>
<tr>
<td></td>
<td>Flexible working arrangements assist employees to balance work and family commitments. The adoption or extension of family-friendly arrangements may require innovation in respect of supervision, scheduling of meetings, training opportunities, hours of work, and how, where and when work is performed.</td>
</tr>
<tr>
<td></td>
<td>Without limiting the kind of arrangements that may be suitable in any individual instance, family-friendly arrangements could include non-standard and variable starting and/or finishing times, parental leave, lactation breaks, State Service Accumulated Leave, part-time work, and job sharing.</td>
</tr>
<tr>
<td></td>
<td>In considering an employee’s request for flexible work arrangements, the employer is to take into account the employee’s family and other, relevant, commitments.</td>
</tr>
<tr>
<td>Agreement/Award</td>
<td>Part-time provisions (or commentary in respect of absence of part-time provisions)</td>
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</tr>
<tr>
<td></td>
<td>Such requests also have to be considered in light of the operational needs of the employer but are not to be unreasonably refused. Employees are to be given the reasons if requests for flexible working arrangements are not approved.</td>
</tr>
<tr>
<td></td>
<td>A brochure is to be prepared detailing employment entitlements and options available to women in the State Service preparing to take maternity leave. (2001, 2004)</td>
</tr>
<tr>
<td>Western Australian Fire Service Enterprise bargaining Agreement 2017</td>
<td>Clause 19(1) Communication System Officers and non-rostered shift workers may be engaged on a part time basis.</td>
</tr>
<tr>
<td>Western Australian Fire Service Enterprise Bargaining Agreement 2014</td>
<td>Clause 19(1) Communication System Officers and non-rostered shift workers may be engaged on a part time basis.</td>
</tr>
</tbody>
</table>
## ANNEXURE 3

### UFU POWERS OF VETO

<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 11.7</td>
<td>UFU veto over the circumstances in which service will be continuous, beyond the circumstances stipulated in the agreement.</td>
</tr>
<tr>
<td>2. 12.9.15</td>
<td>UFU veto over employees undertaking acting up duties (in a higher classification or rank) being recalled into the classification which they are acting up into.</td>
</tr>
<tr>
<td>3. 12A</td>
<td>UFU veto on common rank structure for senior operational personnel in the CFA and MEB to assist in improving interoperability between the two agencies and improve the career opportunities of employees.165</td>
</tr>
<tr>
<td>4. 13.3.1</td>
<td>UFU veto (read together with clause 16) in respect of the introduction of new work functions, activities or processes within the scope of the agreement’s classifications, or which otherwise are proposed to be performed by employees to whom the agreement applies who are capable of such performance.</td>
</tr>
<tr>
<td>5. 14</td>
<td>UFU veto over any memoranda of understanding the MFB wishes to enter with any other fire service or entity that affects the MFB and the response requirements of one or more employees covered by the agreement.</td>
</tr>
<tr>
<td>6. 16, see, in particular, 16.3.2, 16.4, 16.5.1, 16.5.5, 16.5.11</td>
<td>UFU veto conferred by general consultation provision about: (a) any matters pertaining to the employment relationship of employees covered by the agreement; (b) any matters about which the agreement requires consultation; (c) any proposals involving change affecting the application or operation of the agreement, employees’ terms and conditions of employment or the employment relationship.</td>
</tr>
<tr>
<td>7. 16A.2, 16A.3</td>
<td>UFU veto over the resolution of disputes regarding consultation under the agreement166 and appointment of dispute resolution officer.</td>
</tr>
</tbody>
</table>

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165 Subject to right to refer any dispute to the Fair Work Commission in the event consensus cannot be achieved.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.</td>
<td>17 UFU veto over the implementation of change in matters affecting the application or operation of the agreement or pertaining to the employment relationship.</td>
</tr>
</tbody>
</table>
| 9.        | 18 UFU veto over:  
(a) proposed changes arising from proposed legislative or regulatory or statutory rule changes or reform likely to constitute a major change or have a significant effect on employees, including public sector reform;  
(b) positions that the MFB may put to government in relation to the same. |
| 10.       | 20 UFU veto over technological change affecting the application or operation of the agreement and/or employees. |
| 11.       | 24 UFU veto over the introduction of any changes to align the MFB with emergency management arrangements, which will impact on employees or any terms and conditions of employees. |
| 12.       | 25 UFU veto over the introduction of any change arising out of the 2009 Victorian Bushfires Royal Commission report to the future of Victoria's fire service and emergency management arrangements, which seeks to change:  
(a) the entitlements and way work is carried out by employees covered by the agreement;  
(b) the employment relationship of employees covered by the agreement;  
(c) the relationship between the MFB and UFU regarding agreements and entitlements covering their relationship pertaining to representation of the employees covered by the agreement. |
| 13.       | 26 UFU veto in relation to researching, considering, planning and preparing for changes in emergency management which impact on the work of or conditions under which work is performed by employees as a result of changes to climate. |
| 14.       | 27 UFU veto over multi-agency drills or training involving employees. |
| 15.       | 30.3 UFU veto over employees acting down (in a lower classification or rank). |

---166 Subject to right to refer any dispute to the Fair Work Commission in the event consensus cannot be achieved.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.</td>
<td>33.1.3  UFU veto over termination of employment.167</td>
</tr>
<tr>
<td>17.</td>
<td>36 UFU veto over making, varying or deleting workplace policies, and the implementation of existing policies for certain purposes.</td>
</tr>
<tr>
<td>18.</td>
<td>38.2.7 UFU veto over minimum firefighter numbers on the fire ground before the commencement of operations (minimum of seven unless otherwise agreed).</td>
</tr>
<tr>
<td>19.</td>
<td>38.1, 38.3 read together with 38.2 and the associated schedules, see also 39.13 Agreement prescribes the fundamentals of operations, including locations and numbers of appliances and employees and the mechanisms for operational response, including: (a) the Greater Alarm Response Matrix at Schedule 15 – which mandates the resources required to respond to particular alarms; (b) minimum Crewing Chart at Schedule 2 – which mandates crewing levels down to the number of each rank and type of appliance required at specified locations. These provisions also provide a UFU veto in relation to any changes to the MFB Systems Conditions or agreed safe systems work.</td>
</tr>
<tr>
<td>20.</td>
<td>39.3 UFU veto over temporary alterations to employee allocations.</td>
</tr>
<tr>
<td>21.</td>
<td>39.15 UFU veto over cross crewing of appliances.</td>
</tr>
<tr>
<td>22.</td>
<td>39.17 UFU veto over redundancies.</td>
</tr>
<tr>
<td>23.</td>
<td>39.18.7 UFU veto over deployment of qualified recruit firefighters.</td>
</tr>
<tr>
<td>24.</td>
<td>39.18.8 UFU veto over the creation of new positions and deployment into these positions.</td>
</tr>
</tbody>
</table>

167 Subject to right to refer any dispute to the Fair Work Commission in the event consensus cannot be achieved. This depends on the UFU having notified a dispute in relation to the termination.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>25. 40.3</td>
<td>UFU veto over relief planning.</td>
</tr>
<tr>
<td>26. 41, see, in particular, 41.1, 41.3.1, 41.3.9, 41.3.10, 41.4.3, 41.7</td>
<td>UFU veto over secondments and the associated programmes.</td>
</tr>
<tr>
<td>27. 41.8, 41.8.4(a), (b) and (d), 41.9.3</td>
<td>UFU veto over certain requirements around lateral entry from other firefighting services.</td>
</tr>
<tr>
<td>28. 43.3, 43.6.3(a) and 138.4</td>
<td>UFU veto over part-time and casual employment, and hours worked.</td>
</tr>
<tr>
<td>29. 45A read together with 16</td>
<td>UFU veto over diversity strategies.</td>
</tr>
<tr>
<td>30. 48</td>
<td>UFU veto over income protection policy/scheme.</td>
</tr>
<tr>
<td>31. 50.2</td>
<td>Disputes panel – UFU veto over the matters that may be considered and thereafter determined by the Disputes Panel.</td>
</tr>
<tr>
<td>32. 51.1</td>
<td>UFU veto (read together with cl. 16) over preferred providers of medical services.</td>
</tr>
<tr>
<td>33. 53</td>
<td>UFU veto over implementation or changes to the provision of employee access to psychologists for work related matters.</td>
</tr>
<tr>
<td>34. 54.1</td>
<td>UFU veto over exposure control issues (in relation to hazards).</td>
</tr>
<tr>
<td>35. 55 see, in particular, 55.4, 55.5, 55.7</td>
<td>Health screening programme – UFU veto over the provider, the details of the programme and the extent of any post-employment screening.</td>
</tr>
<tr>
<td>36. 56 see, in particular,</td>
<td>UFU veto over the maintenance and enhancement of voluntary health and fitness programmes for employees,</td>
</tr>
<tr>
<td>Clause No.</td>
<td>Content</td>
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</tr>
<tr>
<td>56.1 and 56.4</td>
<td>and the work practices of fitness leaders.</td>
</tr>
<tr>
<td>37. 57.2</td>
<td>UFU veto over disputes about the bona fides of a recruit’s family responsibilities in the station allocation process which calls for consideration of the same.(^{168})</td>
</tr>
<tr>
<td>38. 59.2</td>
<td>UFU veto over the implementation of rapid impact assessment teams, and any changes thereto affecting the application or operation of this agreement or the work of employees.</td>
</tr>
<tr>
<td>39. 60.3</td>
<td>UFU veto over any implementation of any changes to Marine duties.</td>
</tr>
<tr>
<td>40. 61</td>
<td>UFU veto over asbestos programmes, policies and training and carbon fibre policies.</td>
</tr>
<tr>
<td>41. 63.2</td>
<td>UFU veto over any amendments to the OHS agreement at schedule 3.</td>
</tr>
<tr>
<td>42. 64.2, 64.3.6</td>
<td>UFU veto over the management of sick or injured employees.</td>
</tr>
<tr>
<td>43. 64.3.1, Schedule 20</td>
<td>UFU veto (read together with cl. 16) over workplace modifications in return to work situations (top p.321), and in overseeing individual rehabilitation programmes.</td>
</tr>
<tr>
<td>44. 66.2, 66.3</td>
<td>UFU veto over gambling drug and alcohol protocol and selected medical practitioner for this purpose.</td>
</tr>
<tr>
<td>45. 67</td>
<td>UFU veto on transition to retirement arrangements.</td>
</tr>
<tr>
<td>46. 68.3</td>
<td>UFU veto on whether employees may work more than 18 consecutive hours.</td>
</tr>
<tr>
<td>47. 69, in particular, 69.3, 69.5, 69.6, 69.9, 69.11, 69.13</td>
<td>UFU veto on a range of matters related to training and professional development, including the content of training, training locations, number of courses, staffing levels for each technical operations specific area and use of technology.</td>
</tr>
</tbody>
</table>

\(^{168}\) Subject to right to refer any dispute to the Fair Work Commission in the event consensus cannot be achieved.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
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</thead>
<tbody>
<tr>
<td>48. 70.1</td>
<td>UFU veto over the development and implementation of a joint CFA/MFB recruitment course and the associated curriculum.</td>
</tr>
<tr>
<td>49. 72</td>
<td>UFU veto over developing and considering new community safety initiatives or variation to existing initiatives.</td>
</tr>
<tr>
<td>50. 74.1</td>
<td>UFU veto over the requirement for employees rostered on other than the 10/4 roster (12/12 in the case of FSCCs) to work at least one on-shift roster per annum.</td>
</tr>
<tr>
<td>51. 75</td>
<td>UFU veto over the development and implementation of a range of employee support programmes – health and wellbeing; communication and relationship management skills; career counselling; financial planning and education.</td>
</tr>
<tr>
<td>52. 76, in particular, 76.4, 76.5, 76.6, 76.11, 76.12.4, 76.13, 76.14, 76.17, 76.18, 76.19.1, 76.19.3, 76.20</td>
<td>UFU veto over uniforms, appliances and equipment – including all clothing, personal protective equipment, technology, station wear, all vessels and vehicles used by employees (including any attachments). For example, UFU agreement in relation to appliances is required in relation to design and specifications of the appliance, infrastructure to house the appliance and staffing levels within a fire station, appliance crewing and training, applicable allowances. Clause 76.5 (schedule 6), 76.6 (schedule 9) sets out the details of station wear, uniform, personal protective clothing and equipment that may be used and the processes for replacing these items.</td>
</tr>
<tr>
<td>53. 79.2</td>
<td>UFU veto on the installation of CCTV or like devices.</td>
</tr>
<tr>
<td>54. 79.4</td>
<td>UFU veto on the use and installation of surveillance or monitoring devices.</td>
</tr>
<tr>
<td>55. 80, in particular, 80.1 and 80.6, 161</td>
<td>UFU veto on amenities to be provided by the MFB to its employees.</td>
</tr>
<tr>
<td>56. 81, in particular, 81.1, 81.3, 81.5.1, 81.5.2, 81.6.1, 81.6.3, 81.6.4,</td>
<td>Obligation on the MFB to abide by an agreed Infrastructure Agreement in relation to all matters associated with work location, infrastructure, including design, modification and construction and the design and specifications of appliances and equipment to be used in any work location/station. UFU veto in relation to any deviations</td>
</tr>
<tr>
<td>Clause No.</td>
<td>Content</td>
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</tr>
<tr>
<td>81.9</td>
<td>from the Infrastructure Agreement.</td>
</tr>
<tr>
<td>57.</td>
<td>81.9 UFU veto in relation to facilities and amenities in temporary premises (no relocation of employees until such agreement is reached).</td>
</tr>
<tr>
<td>58.</td>
<td>81.10 UFU veto in relation to all aspects and properties of new permanent premises (such as new locations, stations or training colleges), including design, facilities, amenities and allowances (no relocation of employees until such agreement is reached).</td>
</tr>
<tr>
<td>59.</td>
<td>85.11.1 and 85.11.2 UFU veto over any requirement to attend or use training facilities (which will only be used following UFU agreement).</td>
</tr>
<tr>
<td>60.</td>
<td>85.13.1 UFU veto over all on-call arrangements including rosters.</td>
</tr>
<tr>
<td>61.</td>
<td>105.1 UFU veto over whether employees are allowed to work during any period of recreation/annual leave, including by participating in consultation processes, FWC proceedings or major emergencies.</td>
</tr>
<tr>
<td>62.</td>
<td>114.3 UFU veto over contact point for employees applying for leave without pay due to a social and community issue such as mental illness, a drug alcohol or gambling addiction, or a serious/ chronic illness or injury.</td>
</tr>
<tr>
<td>63.</td>
<td>116.1 read together with 116.7 UFU veto over attendance management initiatives.</td>
</tr>
<tr>
<td>64.</td>
<td>121.1.3, 123.1 UFU veto over deviations from the agreement’s rostering arrangements.</td>
</tr>
<tr>
<td>65.</td>
<td>126.2.3 UFU veto over review of rostering, roster rotation principles.</td>
</tr>
</tbody>
</table>
| 66.       | 126.12 UFU veto over the determination of transfer grievances in the context of the transfer grievance committee.  

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169 This is subject to alternative modes of challenge by an employee.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>67.</td>
<td>129.3 UFU veto on pre-planned activities which may be conducted during 11:00 pm and 7:00 am.</td>
</tr>
<tr>
<td>68.</td>
<td>130 in particular 130.2 UFU veto on specialist operations crewing levels for emergency response outside the metropolitan fire district.</td>
</tr>
<tr>
<td>69.</td>
<td>130.4 UFU veto over alternative entitlements for employees whose emergency response duties outside of the metropolitan fire district coincide with rostered shifts.</td>
</tr>
<tr>
<td>70.</td>
<td>130.10 UFU veto over interstate and overseas deployments (subject to prior agreement on applicable terms and conditions).</td>
</tr>
<tr>
<td>71.</td>
<td>131.1 UFU veto over the minimum number of specialist HAZMAT staff.</td>
</tr>
<tr>
<td>72.</td>
<td>131.5 UFU veto over the upgrading of HAZMAT equipment.</td>
</tr>
<tr>
<td>73.</td>
<td>131.6 UFU veto over the development of operational staff into specialised Operational Scientific Officer positions.</td>
</tr>
<tr>
<td>74.</td>
<td>132.8 UFU veto over implementation of outcomes of review into MFB EMR capabilities and range of services provided (which are regulated by clause 132 generally).</td>
</tr>
<tr>
<td>75.</td>
<td>135.1 UFU veto over the review of conditions of Commander Relievers.¹⁷⁰</td>
</tr>
<tr>
<td>76.</td>
<td>135.6 read with 16 UFU veto on the development of a rostering system to ensure that the opportunity to obtain HAZMAT Technician qualifications and perform this function is applied equitably to all MFB employees.</td>
</tr>
<tr>
<td>77.</td>
<td>136.2 UFU veto over when training may be undertaken by persons other than professional MFB instructors.</td>
</tr>
<tr>
<td>78.</td>
<td>136.7.3 UFU veto over the number of instructors at particular ranks for courses other than as identified in clause 136.7.1</td>
</tr>
</tbody>
</table>

¹⁷⁰ Subject to right to refer any dispute to the Fair Work Commission in the event consensus cannot be achieved.
<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>79.</td>
<td>139.2 to 139.4, 139.12.1 UFU veto over special roster arrangements and hours for ACFOs, with limitations on the special rosters that may exist, except by agreement with the UFU.</td>
</tr>
<tr>
<td>80.</td>
<td>140.2 read with 16 UFU veto over ACFO transfers.¹⁷¹</td>
</tr>
<tr>
<td>81.</td>
<td>143.2, 143.4 UFU veto over roles to be performed by Commanders and ACFOs, roster periods and arrangements for those roles and resources.</td>
</tr>
<tr>
<td>82.</td>
<td>143.5 UFU veto over pre-formed teams for significant incidents – the definition of significant incidents and the composition of team qualifications, skills and competencies.</td>
</tr>
<tr>
<td>83.</td>
<td>146.1.3 UFU veto over Commander Reliever positions, including the locations of appointment, the geographic areas where they may perform relieving duties, ratio of Commander Relievers to Commanders/ACFOs, workload and intensity, administrative arrangements.</td>
</tr>
<tr>
<td>84.</td>
<td>146.1.4 UFU veto over managing lack of relief and relief arrangements.</td>
</tr>
<tr>
<td>85.</td>
<td>159.6 UFU veto over the scope of work performed by FSCCs for other agencies.</td>
</tr>
</tbody>
</table>

¹⁷¹ Subject to right to refer any dispute to the Fair Work Commission (clause 140.3).
Annexure 4
10/14 ROSTER\textsuperscript{172}

<table>
<thead>
<tr>
<th></th>
<th>First week</th>
<th>Second week</th>
<th>Third week</th>
<th>Fourth week</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A Platoon</strong></td>
<td>DDN</td>
<td>N</td>
<td>DD</td>
<td>D</td>
</tr>
<tr>
<td><strong>B Platoon</strong></td>
<td>DDNN</td>
<td>DDNN</td>
<td>DDN</td>
<td>ND</td>
</tr>
<tr>
<td><strong>C Platoon</strong></td>
<td>DDNN</td>
<td>DDNN</td>
<td>DDNN</td>
<td>DDNN</td>
</tr>
<tr>
<td><strong>D Platoon</strong></td>
<td>NN</td>
<td>D</td>
<td>DDN</td>
<td>DDN</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Hours</th>
<th>34</th>
<th>34</th>
<th>38</th>
<th>38</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fifth week</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sixth week</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Seventh week</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>Eighth week</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| **A Platoon**  | DDNN       | DDNN        | DDN        | DDNN        |
| **B Platoon**  | NN         | D           | DDN        | DDN         |
| **C Platoon**  | DDN        | N           | D          | ND          |
| **D Platoon**  | DDNN       | DDNN        | DDN        | ND          |

| Hours          | 48         | 48          | 48         | 48          |

\textsuperscript{172} Award, clause 22; clause 122 of the enterprise agreement.