IN THE FAIR WORK COMMISSION

Fair Work Act 2009
s.156—4 yearly review of modern awards
4 Yearly Review of Modern Awards
AM2014/202

SUBMISSIONS ON BEHALF OF
THE COUNTRY FIRE AUTHORITY

Introduction

1. These Submissions are made on behalf of the Country Fire Authority (CFA) in the context of the Fair Work Commission’s (Commission) 4 Yearly Review of Modern Awards, and are filed in accordance with Directions issued by the President on 21 October 2015.

2. These Submissions are made in respect of the Fire Fighting Industry Award 2010 (Fire Fighting Industry Award), which is being considered as part of the Commission’s Group 2 proceedings.

3. These Submissions deal with relevant technical and drafting issues relating to the exposure draft for the Fire Fighting Industry Award 2010 as published by the Commission on 16 October 2015 (Exposure Draft). They also address clause 10 of the Fire Fighting Industry Award which relates to ‘types of employment’.

4. The CFA does not wish to make detailed submissions in response to the issues raised by the Australian Workers Union (AWU) in its submissions dated 5 February 2015 (and which were novated on 15 July 2015).

5. These submissions are divided into three parts as follows:

   Part A – Background
   Part B – Types of Employment
   Part C – Issues Raised by the Commission
   Part D - Evidentiary material and referral to a separately constituted Full Bench
PART A - BACKGROUND

6. The CFA is a statutory authority constituted under the *Country Fire Authority Act 1958 (Vic)* (CFA Act). According to section 6(1) of the CFA Act its principal purpose is to ensure ‘the more effective control of the prevention and suppression in the country area of Victoria’.

7. The CFA currently has approximately 1,400 employees, of whom 500+ are engaged in fire fighting duties. It also has some 55,000+ volunteers, who are organised into more than 1,200 brigades throughout country Victoria and in outer metropolitan areas.

8. The CFA is party to a number of enterprise agreements made under the *Fair Work Act 2009 (FW Act)*, including the *Country Fire Authority/United Firefighters’ Union of Australia Operational Staff Enterprise Agreement 2010* and the *CFA Professional, Technical and Administrative Agreement 2011*. Negotiations for replacements for these agreements are on-going.

PART B – TYPES OF EMPLOYMENT

9. As it presently stands, clause 10 of the Fire Fighting Industry Award provides that a public sector employer in the industry ‘may only employ a person in a classification in this award on a full-time basis’. A full-time employee for this purpose is ‘an employee who is engaged to work an average of 38 ordinary hours per week’.

10. This contrasts with the situation in the private sector where (clause 11.1) ‘an employer...may employ a person in a classification in this award on a full-time or part-time basis’.

11. The CFA submits that there is no proper basis for a distinction between the public and private sectors in relation to this issue: all employers in the Firefighting Industry should be able to engage employees on a full-time or part-time basis as best suits the requirements of their undertaking.

12. In 2009 in the course of the award modernisation process which led to the making of the Fire Fighting Industry Award, the Australian Industrial Relations Commission (AIRC) issued an exposure draft which initially provided for the engagement of firefighters on a full-time or part-time basis in both the public and private sectors. Submissions in support of this provision were made on behalf of
a number of major fire fighting services throughout Australia (including the CFA and the Metropolitan Fire and Emergency Services Board (MFB)).

13. In the event, provision for the engagement of part-time firefighters in the public sector was not included in the Fire Fighting Industry Award. This did not, however, reflect any determination by the Commission that such provision was inappropriate or unnecessary:

The exposure draft (of the Fire Fighting Industry Award) made provision for part-time employment. The UFUA made strong submissions against that position and contended that the Commission has already made a “determination” that part-time employment is not appropriate in this industry. That contention appears to be based on the award simplification decision by Commissioner Hingley in relation to the Victorian Firefighting Award. As appears from the UFUA’s own submissions, part-time employment had not been part of that award and the CFA made application for the inclusion of part-time employment as part of the award simplification proceedings for that award. The UFUA filed evidence arguing against the CFA’s application. However, ultimately, the CFA abandoned its claim so there was a consent submission against the inclusion of part-time employment. Commissioner Hingley’s decision makes no mention of part-time employment. In those circumstances, we do not see that decision as constraining us from considering for ourselves whether part-time employment is appropriate in this industry and we are far from persuaded that part-time employment should not be available. We note that while it is not provided for in Victoria it is provided for in several other States. Nevertheless, in the award we have made we have limited the availability of part-time employment to the private sector reserving for further consideration the issue of whether part time employment should also be available in the public sector.2 (emphasis added)

14. It is clear, therefore, that when making the Fire Fighting Industry Award the Full Bench was not convinced that provisions relating to part-time employment

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1 See Submissions on behalf of the MFB, CFA, NSW Fire Brigades, Queensland Fire and Rescue Service, South Australian Metropolitan Fire Service, Fire and Emergency Services Authority of Western Australia, and Tasmania Fire Service, dated 3 August 2009, at paras [72]-[80]. These submissions also argued that it should be possible to engage firefighters on a casual basis.

2 [2009] AIRCFB 945 at [51].
should be excluded from it. Rather, it reserved its view on this issue for future consideration.

15. The CFA strongly submits that the Commission ought now to revisit this issue as part of its current review.

16. There are a number of reasons why the new Fire Fighting Industry Award should permit the engagement of firefighters on a part-time as well as full-time basis:

- First, it is anomalous that public firefighters cannot be engaged on a part-time basis in those States where public firefighters are engaged by constitutional corporations (Victoria, Tasmania, South Australia) and/or where the relevant government has referred its legislative power in relation to firefighters to the Commonwealth (Victoria), but that they can be engaged on such a basis in the remaining States. The CFA submits that there is nothing about the engagement of public firefighters in Victoria which warrants differential treatment in relation to forms of engagement.

- Secondly, there is no rational basis for treating firefighters in the public sector differently from firefighters in the private sector.

- Thirdly, being able to engage firefighters on a part-time basis would enable firefighting authorities more flexibly to deploy resources – especially in rural and semi-rural areas where the demand for firefighters is more seasonal and less regular in character than in metropolitan areas.

- Fourthly, the flexibilities associated with part-time engagement can help open up job opportunities for groups of workers whose circumstances make it difficult for them to work on a full-time basis. This would include, for example, persons (especially women) with family responsibilities who would find it difficult to combine full-time work with those responsibilities. Availability of part-time work might also facilitate the engagement of retired firefighters who would be interested in working on a part-time, but not full-time, basis. Enabling such groups to work as firefighters would help promote equality of opportunity in a manner consistent with the policies of successive State governments in Victoria and elsewhere – as reflected, for example in section 8(c) of the Public Administration Act.
2004 (Vic). In particular, the Commission is also referred to section 153 of the FW Act.

PART C – ISSUES RAISED BY THE COMMISSION

17. Can public sector employees work other than a shift roster (clause 9, Exposure Draft)?

17.1 In its submissions to the AIRC in the award modernisation process, the United Firefighters’ Union of Australia (UFUA) clearly considered that the 10/14 roster was to be the basis upon which work was to be performed. However, it did recognise that different arrangements could be put in place at fire stations which do not operate on a 24 hour per day basis. In such circumstances:

[F]irefighters work what is known as a day-work roster, a flexible full-time arrangement which has them at work during day-time hours, usually Monday to Friday.

Day workers work on average the same number of hours and receive at least the same overall pay as 10/14 workers...

This last proposition was then illustrated by reference to clause 11.2 of the Victorian Firefighting Industry Employees Interim Award 2000, which applied to employees of the CFA who are not subject to a 10/14 roster.

17.2 This reasoning appears to have commended itself to the AIRC which, when making the 2010 Award, observed:

We acknowledge that the 10/14 roster is the standard method for arranging the work of most firefighters in the various public sector fire services in Australia. It is workable in a large fire service which operates fire stations on a 24 hours a day, seven days a week basis. However, we are not persuaded that a public sector employer covered by a modern award for the fire fighting industry should be prevented from employing firefighters except on a 10/14 roster...In the public sector it [the Fire

3 Submission of the United Firefighters Union of Australia concerning the exposure draft Fire Fighting Industry Award 2010, dated 16 October 2009, paras [11]-[14].

4 Ibid, paras [15]-[16].
Fighting Industry Award 2010] permits employment on bases other than the 10/14 roster. We have also included “special roster’ provisions adopted from the part of the Victorian Firefighting Award that applies to the Country Fire Authority (CFA) on the basis that this is one way in which this can be achieved. It may be that the hours of work and rostering provisions in the modern award should be revisited at a time when it is practicable to canvass more extensive argument on these issues. (emphasis added)

17.3 It is clear, therefore, that it is possible for CFA employees to work on other than a shift roster, subject to the effect of clauses 9.2(d) and 9.5(e).

18. The definition of a 10/14 roster (clause 9, Exposure Draft)

The CFA agrees that the definition of a 10/14 roster in the Exposure Draft reflects the submissions of the UFUA in the award modernisation proceedings, and has no objection to the definition being incorporated in the award.

19. Authorised or Unauthorised Absence (clause 9.4, Exposure Draft)

19.1 The CFA confirms its view that the words ‘to sanction an authorised absence’ should be replaced with ‘to sanction an unauthorised absence’ in the second sentence in clause 9.4(h).

19.2 It also suggests that the comma which appears after the words ‘absent member’ in that sentence should be deleted. This would make clear the apparent intention of the clause that, where persons who are supposed to be on shift are absent, the mere detention of other persons already on duty should not be deemed to:

(i) “sanction an unauthorised absence”; or
(ii) “relieve the absent member from a liability to be charged with being absent without leave and dealt with accordingly”.

19.3 For further clarity, the CFA suggests that the words ‘being absent without leave’ in the last line of clause 9.4(h) (set out above at [19.2(ii)]) should be replaced with ‘an offence’. This allows for the possibility that in some situations the relevant offence for being absent without leave may be described in different terms from those used in clause 9.4(h) as presently drafted.
20. Reference to ‘minimum weekly rate’ or to ‘total weekly wage’ (clause 20.1, Exposure Draft)
The CFA considers that ‘the average of two hours a week of overtime’ referred to in clause 20.1(c) is reflected in the minimum weekly wage, plus shift loading, plus average 40 hours loading set out in the table in clause 13. It follows that clause 20.1(c) should refer to the ‘total weekly wage’ rather than to ‘the minimum weekly rate’.

21. Overtime for shift workers who are not on a 10/14 roster (clause 20.2, Exposure Draft)
The CFA does not make any submissions on this matter (its shift workers do not work overtime).

22. Public holiday payments for day workers (clause 21.3, Exposure Draft)
The CFA does not make any submissions on this matter.

23. Payment of annual leave (clause 22, Exposure Draft)
The CFA does not consider that any useful purpose would be served by inserting a provision concerning the rate of pay for an employee on annual leave.

24. Definition of ‘public sector employer’ and ‘private sector employee’ (Schedule D, Exposure Draft)
The CFA does not consider that any useful purpose would be served by including in the new award a definition of either the term ‘public sector employer’ or ‘private sector employer’.

PART D – EVIDENTIARY MATERIAL AND REFERRAL TO A SEPARATELY CONSTITUTED FULL BENCH

25. The CFA has not specified the evidentiary material that it may wish to file in relation to the above matters – the material required will depend on the submissions of other interested parties, as will whether it is necessary to refer the matter to a separately constituted Full Bench.

26. It is most likely that the CFA’s substantive submissions concerning a variation to permit flexible employment in the public sector, as opposed to the matters
specifically referred to by the Commission, will require evidentiary material as well as a hearing before a Full Bench. The CFA strongly submits that the Commission ought to revisit this issue as part of its current review. The CFA is aptly able to call evidence to support its submissions on this issue if required.

20 November 2015
Corrs Chambers Westgarth