IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2014/202

SUBMISSIONS ON BEHALF OF
THE METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD AND
THE COUNTRY FIRE AUTHORITY

Introduction

1. The Fair Work Commission is conducting a four yearly review of modern awards, and has convened a Full Bench to hear the application of the Metropolitan Fire and Emergency Services Board (MFB) and the Country Fire Authority (CFA) for the variation of the Fire Fighting Industry Award 2010 (Award) to remove the prohibition in the Award against part-time employment, and to make consequential changes to rostering provisions in the Award.

2. Clause 10 of the Award presently confines employment by public sector employers to full time employment. The practical effect of clause 10 is to prevent employment on other bases, including part-time employment. By contrast, clause 11 of the Award expressly provides for part-time employment in the private sector.

3. The MFB and CFA contend that this distinction should be removed. They seek a determination that the Award be amended to permit part-time work, in the terms set out in the draft determination attached to these submissions. The capacity to offer part-time employment is essential to ensure that the safety net of minimum terms and conditions of employment is fair and relevant. The inclusion of part-time work in the Award is necessary to meet the modern awards objective.

4. Victoria stands alone in prohibiting part-time work among firefighters in Australia. Part-time work in some form is permitted in each applicable industrial instrument in

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1 The Explanatory Memorandum to the Fair Work Act 2009 (Cth) provides that the 4 yearly reviews are the “principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions.”: Explanatory Memorandum, Fair Work Bill 2008 at [15].
every other state and territory in Australia. The United Firefighters Union Australia (UFU) is a party to, or bound by, all but one of the interstate arrangements. Moreover, since at least the early 2000s, part-time work has been a feature of industrial instruments of emergency services agencies in Victoria including Ambulance Victoria, and Victoria Police.

5. The capacity of an employer to offer employment on a part-time basis and the capacity of an employee to seek employment on a part-time basis reflect contemporary workplace and employment standards. Part-time employment is accordingly a necessary feature of a fair and relevant minimum safety net of terms and conditions of employment. As part of the award safety net, a public sector fire service should be able to cater for persons who might not seek 42 hours of work per week. The ability to offer part-time work would afford the agencies greater opportunity to offer employment to, and retain, a greater spectrum of the community, including workers with carers’ responsibilities, women with young children, and workers who are seeking flexible work practices at particular stages of their careers. This will in turn promote social inclusion, result in a more diverse workforce, and allow the MFB and CFA to meet the needs of its workforce throughout the course of their working lives.

6. The inclusion of part-time work in the Award will not displace bargaining in relation to that matter or arrangements governing the operation of part-time work.

7. In accordance with the direction of Justice Ross dated 24 December 2015, these submissions are divided into four parts as follows:

   Part A – Relevant procedural/arbitral history

   Part B – Legislative context, including the modern awards objective

   Part C – Findings sought by the MFB and CFA on the basis of the evidence filed

   Part D – Merit arguments advanced in support of the proposed variations

**PART A – RELEVANT PROCEDURAL/ARBITRAL HISTORY**

**The MFB and the CFA**

8. The MFB is a statutory authority constituted under the *Metropolitan Fire Brigades Act 1958* (Vic) (*MFB Act*). Its functions, as set out at s 7 of the MFB Act, include
providing for fire suppression and fire prevention services in the metropolitan district; providing for emergency prevention and response services in the metropolitan district; and carrying out any other functions conferred on the Board.

9. The MFB currently employs approximately 1,909 firefighters who provide a 24 hour response to emergencies across the Melbourne metropolitan fire district. The MFB also provides community protection, education services and emergency response from strategically located fire stations and specialist departments.

10. The modern fire service is required to deliver a variety of services to the communities it serves. Recently, the *Emergency Management Act 2013* (Vic) established Emergency Management Victoria which is tasked with, among other things, maximising the ability of the emergency management sector to work together. The MFB and CFA increasingly work together, and with other emergency services agencies, to ensure maximum and effective use of systems and resources.

11. The terms and conditions of MFB operational employees who are covered by the Award are governed by the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010* (MFB Operational Agreement).

12. Throughout Victoria, the CFA, a statutory body set up under the *Country Fire Authority Act 1958* (CFA Act), carries out similar services in regional and country areas and Melbourne’s outer urban areas to those provided by the MFB in metropolitan areas. Its general duty, as set out at s 20 of the CFA Act, is taking all necessary steps for the prevention and suppression of fires, the protection of life and property in case of fire and the general control of all stations and brigades in the country area of Victoria.

13. Currently, the CFA has approximately 1025 operational employees, 879 of which are full-time career firefighters based at one of the CFA’s 34 integrated stations. The CFA also has approximately 55,341 volunteers, 35,793 of which are operational volunteers.

14. The terms and conditions of CFA operational employees who are covered by the Award are governed by the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010* (CFA Operational Agreement).
15. Smaller private sector employers also provide discrete services throughout the state with employees who are also covered by the Award.

16. Other states and territories have their own publicly funded fire fighting services as well as a number of private operators. The nature of the fire fighting services in each state is similar to those provided in Victoria. However, the manner in which employees of the various fire fighting services are employed, and their terms and conditions of employment, differ with respect to part-time work. This is addressed in more detail from paragraph 38 below.

**Historical context of the Fire Fighting Industry Award 2010**

17. The *Fire Fighting Industry Award 2010* was created by the Australian Industrial Relations Commission (AIRC) during the award modernisation process. Before the commencement of the modern Award, there was no fire fighting services industry award operating across Australia. In Victoria, the *Victorian Firefighting Industry Employees Interim Award 2000* (VFIE Award) covered most employees and employers in the fire fighting industry throughout Victoria, including the MFB and CFA and, from 1 January 2005, private sector employers.

18. Relevantly, the VFIE Award only provided for employees to be engaged on a 38 hour week, over a roster cycle of eight weeks, being two 10 hour day shifts followed by two 14 hour night shifts (*10/14 Roster*). The 10/14 Roster was, and remains, the standard method for arranging the work of most firefighters in the various public sector fire services in Australia, although most other state fire fighting services provide some flexibility in hours of work.

19. During the award modernisation process, the AIRC considered both the hours of work provisions for public sector employment and the inclusion of part-time provisions in the *Fire Fighting Industry Award*.

20. The hours of work provisions in the VFIE Award were ultimately included in the Award. However, the Full Bench of the AIRC noted the flexibility afforded to the private sector and the restrictions placed on the public sector with regard to hours
of work and rostering, and stated that these matters “should be revisited at a time when it is practicable to canvass more extensive argument on these issues”.

21. The AIRC’s exposure draft of the Fire Fighting Industry Award initially provided for part-time work, and submissions were made on behalf of a number of major fire fighting services throughout Australia (including the MFB and CFA) in support of the inclusion of such provisions.

22. Although the proposed part-time provisions were not ultimately included in the Award, this was not because the matter was considered on the merits and determined by the AIRC. Rather, the CFA (the moving party) elected not to pursue its application for the inclusion of part-time work in the Award. In its decision regarding the making of the Fire Fighting Industry Award, the AIRC stated:

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.

23. It is clear from this statement that the Fair Work Commission, including in any of its predecessor forms, has not considered the merits of including part-time employment in the Award. In the award modernisation process, the Full Bench was not convinced that provisions relating to part-time employment should be excluded

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2 [2009] AIRCFB 945, [49].
from the Award. Rather, it reserved its view on this issue for future consideration. The time for such consideration is now.

PART B – LEGISLATIVE CONTEXT, INCLUDING THE MODERN AWARDS OBJECTIVE

24. The task of the Full Bench in conducting the four yearly review of modern awards is governed by statute. Section 156 of the *Fair Work Act* sets out the requirement to conduct the review. The Commission has broad discretion as to the conduct of the review, but must ensure that the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern award objective set out in section 134(1) of the *Fair Work Act* (*the safety net requirements*).\(^4\) The National Employment Standard of particular relevance to this application is the right to request a change in working arrangements contained in s 65 of the *Fair Work Act*.

25. In addition to taking into account the safety net requirements, the following statutory requirements are relevant to the task of the Full Bench:

   (a) A term should be included in a modern award “only to the extent necessary to achieve the modern awards objective”.\(^5\)

   (b) A modern award must not include terms that discriminate against an employee for reasons including, relevantly, sex, age, or family or carer’s responsibilities.\(^6\)

   (c) In performing functions or exercising powers, the Commission must take into account the objects of the *Fair Work Act* including, relevantly, assisting employees to balance their work and family responsibilities by, amongst other things, providing for flexible working arrangements.\(^7\)

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\(^5\) *Fair Work Act* s 138.

\(^6\) *Fair Work Act* s 153(1).

\(^7\) *Fair Work Act* s 578(a), and s 3(d).
(d) In performing functions or exercising powers, the Commission must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of sex, age, and family or carer’s responsibilities.8

26. The requirement that a modern award term be “necessary” to achieve the modern awards objective requires the Full Bench to form “a value judgment” based on the considerations delineated in s 134(1) of the \textit{Fair Work Act}.9 It is convenient to set out the section in full:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and
(b) the need to encourage collective bargaining; and
(c) the need to promote social inclusion through increased workforce participation; and
(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
(da) the need to provide additional remuneration for:
   (i) employees working overtime; or
   (ii) employees working unsocial, irregular or unpredictable hours; or
   (iii) employees working on weekends or public holidays; or
   (iv) employees working shifts; and
(e) the principle of equal remuneration for work of equal or comparable value; and
(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

27. Part-time work is associated with increased female participation and retention in the paid workforce; in light of the fact that nearly 70 per cent of part-time employees are

8 Fair Work Act s 578(c).
9 Jurisdictional Issues Decision, [36].
women, this is a reasonable correlation to draw.\textsuperscript{10} The existence of part-time work arrangements can reasonably be expected to assist with employing and retaining women who have (or are planning to have) young children, and falls within s 134(1)(c) of the modern awards objective. Further, part-time work is a form of flexible work, and therefore attracts s 134(1)(d) of the modern awards objective. The introduction of part-time work will not have a negative effect on the other terms of the modern awards objective; in particular, the existence of part-time work as a standard clause in the Award will not have a negative impact on business or employment growth, which is relevant to ss 134(1)(f) and (g) of the \textit{Fair Work Act}.

28. There is no doubt that part-time work is a permitted term in any modern award. Section 136 of Division 3 of the \textit{Fair Work Act} sets out what can and cannot be included in a modern award and provides, amongst other things, that a modern award can include terms permitted or required by Subdivision B (which relates to terms that may be included in modern awards). Section 139 in Subdivision B in turn permits the inclusion of ‘types of employment’ including full-time, part-time and casual employment. Where a term is a permitted modern award term, s 138 of the \textit{Fair Work Act} provides that the term can only be included in a modern award to the extent necessary to achieve the modern awards objective.

29. In the \textit{Jurisdictional Issues Decision}, the Full Bench of the Fair Work Commission stated that in conducting the four yearly review, the Commission will proceed on the assumption that modern award being reviewed achieved the modern awards objective at the time that it was made.\textsuperscript{11} The Full Bench went on to note that it was “appropriate for the Commission to take into account previous decisions relevant to any contested issue”, considering the context of that previous decision, and following previous Full Bench decisions unless there were cogent reasons for not doing so.\textsuperscript{12} However, in the present case, the industrial history is clear. Part-time work in the firefighting industry has \textit{never} been considered by the Commission or its predecessors. The exposure draft of the Award contained part-time work provisions, but these were removed by consent between the parties. The assumption that the

\textsuperscript{10} \textit{ABS, Labour Force}, January 2016 (released 25 February 2016), Cat. 6291.0.55.001. See also paragraph 40 below.

\textsuperscript{11} \textit{Jurisdictional Issues Decision} [24].

\textsuperscript{12} \textit{Jurisdictional Issues Decision} [24], [27].
Award met the modern awards objective at the time it was made is undermined by the observations of the AIRC cited at paragraph 22 above. This application does not require the Full Bench to depart from any previous decision, because none exists. Instead, the AIRC expressly reserved part-time work in the Award for consideration at a later date.

PART C –
FINDINGS SOUGHT BY THE MFB AND CFA ON THE EVIDENCE FILED

30. The evidence filed by the MFB and CFA demonstrates the following propositions.

31. First, clause 10 of the Award does not promote flexible modern work practices or the efficient and productive performance of work, contrary to s 134(1)(d) of the Fair Work Act, for reasons including that the existing Award provision as reflected in the Operational Agreements only allows for part-time work to be negotiated on an individual basis. This is inefficient and can lead to inequitable results. Michael Werle, MFB Director of Human Resources provides evidence of the need to negotiate any individual part-time arrangement on a case-by-case basis with the UFU at an enterprise level, and Lucinda Nolan, CFA CEO, also addresses this issue.

32. Second, the proposed variation is likely to promote social inclusion through increased workforce participation, particularly of women. The number of women employed by the MFB and CFA is very small: 3.46 per cent and 3.30 per cent respectively (see the statements of Michael Werle, MFB Director of Human Resources and Margareth Thomas, CFA Acting Executive Director of People & Culture). By contrast, Ambulance Victoria, which has had formal part-time work provisions since 2009, has 40.26 per cent of its workforce as female (per the statement of Greg Leach, MFB Deputy Chief Officer), and Victoria Police, which has had operative part-time employment arrangements since the late 1990s and has close to 34 per cent women (per the statement of Alex Tasominos, Victoria Police Acting Director Workplace Relations).

33. There is evidence that the MFB and CFA face challenges when accommodating operational employees’ need to work part-time during periods in their lives, particularly around returning to work after the birth of a child, as set out in the statements of Lucinda Nolan, CFA CEO, and Michael Werle, MFB Director of
Human Resources. It is hoped that the introduction of part-time work as a minimum standard under the Award will assist with resolving these difficulties.

34. Employees who in practice might benefit from part-time operational work include employees returning to work after a period of parental leave, employees returning to work after an injury, and firefighters who wish to transition to retirement. This is addressed by Joe Buffone, CFA Chief Officer, Greg Leach, MFB Deputy Chief Officer, Michael Werle, MFB Director of Human Resources, and Kirstie Schroder, MFB Director, Operational Learning and Development.

35. Third, there is support at very high levels of the emergency services sector for the introduction of part-time work to the Award safety net: see for example the statements of Peter Rau, MFB Chief Officer; Lucinda Nolan, CFA CEO; Joe Buffone, CFA Chief Officer; and Craig Lapsley, Victorian Emergency Management Commissioner.

36. Finally, the material set out below under paragraph 38 below makes it clear that the capacity to offer part-time work is an essential element of contemporary (ie relevant) minimum employment standards in the community at large, and in the emergency services sector. Several of the MFB and CFA witnesses provide evidence about the nature and operation of part-time work provisions in parallel services in other states and territories in Australia, and in the emergency services in Victoria, and support the notion that there is no insurmountable operational impediment to part-time work in the emergency services. Those witnesses are:

(a) Lucinda Nolan, CFA CEO, sets out her experience working at Victoria Police over 32 years, including during the introduction of part-time work to the Police Force in 1992 and up until September 2015.

(b) Joe Buffone, CFA Chief Officer, describes the ability of other emergency services in Victoria including the SES and the Department of Transport, Planning and Local Infrastructure, to employ part-time workers.

(c) Bruce Byatt, CFA Deputy Chief Officer – Readiness and Response – describes his experience working in the Queensland and Northern Territory firefighting services, where part-time work provisions exist in the relevant industrial instruments.
Greg Leach, MFB Deputy Chief Officer sets out his experience with the formal introduction of part-time work to Ambulance Victoria, where he worked between 2007 and 2014.

PART D –
MERIT ARGUMENTS IN SUPPORT OF THE PROPOSED VARIATIONS

37. The MFB and CFA rely on four main propositions in support of the proposed variation:

   (a) Part-time work arrangements are a community standard across the Australian workplace, and form part of the industrial standard in firefighting and emergency services.

   (b) The Award in its current form does not achieve the modern awards objective because the availability of part-time work is a necessary element of the safety net of fair and relevant terms and conditions.

   (c) The prohibition against part-time work could have a discriminatory effect.

   (d) The prohibition against part-time work offends the principles in Re AEU.

Part-time work arrangements are the norm in Australia and in emergency services

38. Firefighters across Australia are permitted to access a range of part-time work options, from the absolute to the conditional, but all enshrined in the relevant award or agreement. By contrast, Victorian firefighters are left out in the cold on this issue.

39. There is no sound operational reason to prevent part-time employment by public sector employees. The existence of part-time work provisions in industrial instruments for other emergency services in Victoria, as well as other firefighting forces across Australia, suggests both that part-time work is an ordinary and uncontroversial employment option in the sector, and that there is no rational operational impediment to including part-time work in the Award.

Part-time work in Australia

40. Part-time work is commonplace in Australia. The latest labour statistics published by the Australian Bureau of Statistics on 25 February 2016 demonstrate that of the 11,909,000 employed persons in Australia, 31 per cent, or 3,699,000, are employed
on a part-time basis.\textsuperscript{13} Of the part-time population of Australia, 2,552,900, or nearly 70 per cent, are women.

**Part-time work in firefighting industrial instruments in other states and territories**

41. Each other state and territory in Australia permits engagement of firefighters on a part-time basis. The existence of part-time work as an employment option, even in limited or prescribed circumstances, is evidence that the industrial standard within the industry, across Australia, accommodates part-time work. Moreover, the existence of a full range of flexible employment options including part-time, casual, temporary, and job-sharing arrangements in certain firefighting services in Australia suggests that there is no conflict between flexible working arrangements and the operational requirements of modern and effective firefighting agencies.

42. The relevant industrial instruments, and their part-time work (and associated) provisions, are identified in Table A annexed to these submissions. In summary:

(a) Part-time work within the 10/14 roster is permitted in the Australian Capital Territory pursuant to the provisions of Section J of the *ACT Public Service Act Fire and Rescue Enterprise Agreement 2011–2013* (the *ACT Agreement*); in Queensland per clause 24 of the *Queensland Fire and Emergency Services Determination 2013* (the *Qld Determination*) and clause 4.2 of the *Queensland Fire and Rescue Service Award – State 2012* (the *Qld Award*); and in Tasmania by clause 34 of the *Tasmanian Fire Fighting Industry Employees' Industrial Agreement 2014* (the *Tasmanian Agreement*). The UFU was a bargaining representative for the ACT Agreement, is bound by the Qld Determination and the Qld Award, and is a party to the Tasmanian Agreement.

(b) Part-time work is available in the New South Wales Fire & Rescue Service pursuant to clause 8.2.3 in conjunction with clause 8.2.2 of the *Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2016* (the *NSW Award*), and is expressly acknowledged by clauses 21.3.3.2 and 21.9.1.2. The Fire Brigade Employees’ Union of NSW is a party to the NSW Award.

(c) Part-time work is available on request by all firefighters in the Northern Territory, subject to operational requirements and other criteria, and to women firefighters returning to work after the birth of a child until the child reaches school age, per clauses 57 and 42.15(a) of the *Northern Territory Public Sector Fire and Rescue Service 2011–2013 Enterprise Agreement* (the NT Agreement). United Voice is the union party to the NT Agreement.

(d) In South Australia, firefighters are entitled to return to work after maternity or adoption leave on a part-time basis until their child’s second birthday, and such return to work must be on a non-discriminatory basis, per clause 24.3 of the *South Australian Metropolitan Fire Service Enterprise Agreement 2014* (the SA Agreement). The UFU is a party to the SA Agreement. The entitlement to part-time work is included in clause 11 of the *Firefighting Industry Employees (South Australian Metropolitan Fire Service) Award 2007* (the SA Award), with express provision made, by clause 22.12, for part-time work for pregnant women, or employees on parental leave.

(e) Western Australian firefighters are entitled to work part-time if they are non-rostered shift workers, or are Communications Systems Officers, per clause 19 of the *Western Australian Fire Service Enterprise Bargaining Agreement 2014* (the WA Agreement). There is no provision for part-time work in the *Fire Brigade Employees’ Award 1990*. However, there is provision at clause 19(6)(b) of the WA Agreement for the parties to “agree to develop a part-time/job share arrangement for all employees covered by this Agreement over the life of this Agreement”. UFU are a party to the WA Agreement.

**Part-time work in emergency services in Victoria**

43. Within Victoria, the industrial instruments governing the other agencies in the emergency services triumvirate – Victoria Police and Ambulance Victoria – permit part-time work for operational employees, and have done so for many years.

44. Ambulance Victoria organises its shiftwork on a 10/14 roster. Clause 14 of the *Ambulance Victoria Enterprise Agreement 2015* provides that employees may be engaged as full time, part-time, casual, fixed term, or job share employees. Ambulance Victoria cannot unreasonably refuse a request for part-time employment (per clause 16.1). The right to work part-time is part of the award safety net,
contained in clause 10.1 of the *Ambulance and Patient Transport Modern Award 2010*. Part-time work and the 10/14 roster have been features of the applicable Award since at least 2002, and part-time work, as well as some use of the 10/14 roster, have been contained in the applicable enterprise agreements since at least 1997.

45. Victoria Police employees may work part-time on the application of an employee, or where they have been selected for an advertised part-time position. The part-time work provisions are contained in clause 31 of the *Victoria Police Force Enterprise Agreement 2011*. Part-time work has been a feature of Victoria Police industrial instruments since at least 1992.

46. The shift rostering employed by Victoria Police is far less predictable and arguably less employee-friendly than the 10/14 roster. Each 24 hour period contains three eight hour shifts, over a two week roster. Nevertheless, part-time employees are accommodated within that system.

**Part-time work in the modern awards**

47. Taking a broader view outside the emergency services landscape reveals that part-time work is part of the minimum safety net terms and conditions contained in all but six of the 122 modern awards. The six are:

(a) The *Road Transport (Long Distance Operations) Award 2010* (but does provide for casual employment);

(b) The *Maritime Offshore Oil and Gas Award 2010* (but provides for relief or project-based employment);

(c) The *Seagoing Industry Award 2010* (but does provide for casual employment);

(d) The *Stevedoring Industry Award 2010* (but does provide for casual employment, and for less than full engagement);

(e) The *Mobile Crane Hiring Award 2010* (but does provide for casual employment, and part-time work for casual employees); and

(f) The *Professional Diving Industry (Industrial) Award 2010* (but does provide for casual employment).
Although the applicants are not in a position to say definitively why the six awards do not include part-time work, for at least the first four awards in the above list, it is possible that the nature of the work means that employees are away from home for long periods of time, and therefore there is no practical basis on which part-time employment could operate. In support of this hypothesis, we note that the Road Transport (Long Distance Operations) Award provides, at clause 4.2, that where the employee is not performing long distance work, the Road Transport and Distribution Award applies, which does provide for part-time employment. Further, both the Mobile Crane Hiring Award and the Professional Diving Industry (Industrial) Award contemplate employment on a weekly, albeit permanent, basis, suggesting that the appropriate work model for those industries is seasonal or demand-based rather than predicable and therefore not suited to part-time work.

Finally, it is relevant to note that the Award permits part-time employment by the private sector (at clause 11). There is no rational basis for a distinction between the public and private sectors in relation to part-time employment.

This examination of three categories of industrial instruments – interstate firefighting services, other Victorian emergency services, and all modern awards – produces an unimpeachable conclusion that part-time work is a central and uncontroversial feature of the industrial standard of employment for firefighters. The fact that the UFU is either a party or bound by almost all of the interstate instruments providing for part-time work for firefighters would suggest that the union also holds this view.

The Award does not meet the modern awards objective

The Commission should find that the Award in its current form does not achieve the modern awards objective defined in s 134(1) of the Fair Work Act because the inclusion of clause 10 has the consequences and effects outlined below.

First, the safety net established by the Award is not “fair” as mandated by s 134(1). It is not fair because clause 10 thereof:

(a) prevents employees of public sector employers being employed on terms that may be suitable to them;

(b) prevents public sector employers from employing employees on certain well established bases;
(c) prevents employees and employers from reaching agreement about certain types of mutually acceptable and well established types of employment;

(d) has a discriminatory effect on employees and prospective employees as outlined in these submissions;

(e) has the effect that, unlike their colleagues in all other states and territories, Victorian firefighters cannot be employed on a part-time basis.

53. Secondly, the safety net established by the Award cannot be described as “relevant” pursuant to s 134(1). Clause 10 of the Award is an anachronism. It is inconsistent with the contemporary acceptance and availability of part-time employment in the community generally, in all other firefighting forces across Australia and in other emergency services in Victoria.

54. Thirdly, clause 10 of the Award hinders and cannot be said to promote “social inclusion through increased workforce participation” (s 134(1)(c)). The inability to provide employment on a part time basis adversely affects the capacity of public sector employers to employ persons from a wider spectrum of the community than currently are employed including women, workers with carers’ responsibilities, women with young children and workers who are seeking flexible work practices at particular stages of their careers.

55. Fourthly, by prohibiting part-time employment in the public sector, clause 10 of the Award manifestly does not promote “flexible modern work practices” (s 134(1)(d)).

56. Fifthly, as demonstrated by the fact that this application is brought by the MFB and the CFA, the Commission may be satisfied that the exercise of modern award powers by the making of the variations proposed will not have any undue or deleterious effects on business including productivity, employment costs and the regulatory burden (s 134(1)(f)).

**Failure to permit consideration of part-time work could have a discriminatory effect**

57. The prohibition against part-time in the Award is potentially discriminatory and could be inconsistent with the *Equal Opportunity Act 2010* (Vic) and the *Fair Work Act* including section 153.
58. For example, employers must not unreasonably refuse to accommodate the responsibilities that an employee may have as a carer or parent and must consider any request for flexible work arrangements. The Award does not take into account these obligations.

59. The right to flexible work is not absolute. The employer must not unreasonably refuse to accommodate that employee’s responsibilities. However, insofar as the employers in this application are concerned, the statutory test of whether an employer has unreasonably refused a request to work part-time does not clearly suggest any operational or substantive basis on which the MFB or the CFA could refuse to consider part-time work for operational firefighters.

60. Further, both the MFB and CFA are subject to the public sector values and employment principles in the Public Administration Act 2004 (Vic). The Public Administration Act reflects the overarching approach of government to public sector employment, articulated in the public sector values and employment principles in ss 7 and 8 of the Act. Providing equal employment opportunity, for example, is one of the public sector values associated with the employment of public servants in Victoria.

The provision offends the implied constitutional limitation

61. In Re Australian Education Union; Ex parte Victoria (Re AEU), the High Court expressed the implied limitation which exists on Commonwealth legislative power derived from Melbourne Corporation v The Commonwealth (Melbourne Corporation) as follows:

The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ("the limitation against discrimination") and (2) the prohibition against laws of general application.

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15 Equal Opportunity Act s 19(2)
16 The MFB and CFA are both ‘public entities’ within the meaning of s 5 of the Public Administration Act and therefore both part of the ‘public sector’ within the meaning of s 4 of the Act.
17 (1995) 184 CLR 188
18 (1947) 74 CLR 319
application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.19 (emphasis added)

The Court explained the second limb of the implied limitation as follows:

It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.20 (emphasis added)

62. Applying this principle to the various awards and findings of disputes that were at issue, the High Court in Re AEU held that:

[T]he operation of the implied limitation would preclude the Commission from making an award binding the States in relation to qualifications and eligibility for employment, term of appointment and termination of employment, at least on the ground of redundancy.21

63. Clause 10 of the Fire Fighting Industry Award provides:

An employer in the public sector may only employ a person in a classification in this award on a full-time basis. A full-time employee is an employee who is engaged to work an average of 38 hours per week. (emphasis added)

64. The plain effect of clause 10 is to limit the availability of part-time employment to private sector employers; further it does not contemplate that employees will be employed on a casual basis.

65. By restricting the circumstances in which a public sector employer may engage its employees to full-time employment, clause 10 operates to deny a public sector employer the right to engage an employee if that appointment is other than on a full-time basis. Such a restriction limits the number of employees whom a public sector employer can employ. For example, it is not open to the MFB to employ a larger number of employees, each of whom works fewer hours.

66. This restriction also interferes with the capacity of a public sector employer to determine the identity and term of its employees, as some individuals only have the capacity or availability to work fewer hours and are therefore precluded from being employed by reason of clause 10.

19 At 231.
20 At 232–233.
67. By this operation and effect, clause 10 of the *Fire Fighting Industry Award* infringes the implied limitation on Commonwealth legislative power and is accordingly beyond the Commission’s power and invalid.

S MOORE

K BURKE

26 February 2016

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21 At [234].
Annexure 1

Links to witness statements:

Bruce Byatt
David Youssef
Kirstie Schroder
Margareth Thomas
Peter Rau
Gregory Leach
Lucinda Nolan
Joseph Buffone
Craig Lapsley
Alex Tasominos
Michael Werle
Further to the Decision and Reasons for Decision <<DecisionRef>> in AM2014/202, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Firefighting Industry Award 2010 be varied as follows:

[1] By amending clause 10 as follows:

10.1 An employer in the public sector may only employ a person in a classification in this award on a full-time or part-time basis. A full-time employee is an employee who is employed to work an average of 38 ordinary hours per week.

10.2 Full–time employment
A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

10.3 Part–time employment
(a) A part-time employee is an employee who:

(i) works less than the full-time hours of 38 ordinary hours per week;
(ii) has reasonably predictable hours of work; and
(iii) receives, on a pro rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work.

(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.

(d) An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

(e) All time worked in excess of the hours as agreed under clause 10.3(b) or varied under clause 10.3(c) will be overtime and paid for at the rates prescribed in clause 26.1—Overtime – public sector.

(f) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the appropriate weekly rate prescribed in clause 15 – Minimum wages – public sector.

[2] By amending clause 22.2(a) as follows:

(a) 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.

[3] By amending clause 22.3 as follows:

(a) 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) Subject to clause 22.3(a), a full-time Fire Service Communications Controller will, subject to the requirements in clauses 22.2(b) 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.

(c) Where an employee is required to undertake duties that are outside of the standard hours for the work location the following will apply:

(i) where such activity involves normal activities a minimum break between periods of duty of 10 hours will apply; and

(ii) where such activity involves a major fire or major incident a minimum break between periods of duty of 12 hours will apply.
(d) Full-time employees (other than recruits) not working a 10/14 roster, will receive the same total weekly wage as employees on a 10/14 roster.

[4] By inserting a new clause 22.4 as follows:

22.4 Day work
Employees may be employed on day work in which they may be required to work up to 10 ordinary hours per day, between the hours of 7.00am and 6.00pm, Monday to Sunday. If the employer and a majority of affected employees agree, up to 12 ordinary hours per day may be worked.

[5] By amending clause 22.5(b) as follows:

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

[6] By amending clause 22.8(b) and clause 22.8(e) as follows:

(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.

(e) Full-time employees operating under this roster will receive the same total weekly wage and annual leave provisions as Firefighters on a 10/14 shift roster.

[7] By amending clause 26.1 as follows:

(a) Shiftworkers

(i) A shiftworker working a 10/14 roster or a Fire Service Communications Controller required to work in excess of a rostered shift or for more than four shifts in any one week will be paid for such additional time as overtime.

(ii) Subject to clause 26.1(a)(i), all time worked in excess of the daily or weekly ordinary hours of work is overtime and will be paid for at the rate of double time.

(iii) The rate used for the purpose of calculating overtime payments is 130% of the minimum weekly wage: 38 hours for employees in clause 26.1-Overtime-public sector.

(iv) Overtime will be calculated to the nearest quarter of an hour.

(v) To remove doubt, no additional payment is made to an employee in respect of the average of two hours a week of overtime incorporated in minimum weekly rate payable to the employee.
(b) **Day workers**

All time worked in excess of the daily or weekly ordinary hours of work is overtime and will be paid for at the rate of double time save that any overtime worked on a public holiday will be paid at the rate of double time and half.

[8] By amending clause 27 as follows:

27.1 Employees who are employed as shiftworkers will receive a shift loading of 30% in addition to their classification rate of pay. For full-time public sector employees, including those who work a 10/14 roster, this loading is built into their minimum weekly wage specified in clause 15-Minimum wages-public sector.

27.2 Clause 27.2 applies to private-sector day workers only.

[9] By amending clause 28.3(a) as follows:

Notwithstanding clause 28.2, a full-time employee working the 10/14 roster and other full-time employees of public sector employers will be entitled to 65.06 days annual leave per annum inclusive of the NES. Part-time employees working the 10/14 roster will be entitled to annual leave on a pro-rata basis of 65.06 days annual leave per annum inclusive of the NES. Such leave is to be taken on the following basis:

(i) for full-time employees subject to the 10/14 roster, such leave will be taken in periods of 28 calendar days within alternating periods of 20 weeks and 24 weeks; and

(ii) for other employees not subject to the 10/14 roster and for part-time employees, such leave will be taken within periods as reasonably prescribed by the employer. These employees will be required to take any public holiday on the date reasonably prescribed.


BY THE COMMISSION
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<td><strong>Relationship of Agreement to the Award</strong></td>
<td>Read in conjunction with the State Service Act and the PSEM By-laws and Determinations. Agreement prevails to the extent of any inconsistency.</td>
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<td>Clause 16: 10/14 roster and ordinary 38 hour work</td>
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