IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2014/202

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

1. These submissions are made in reply to the UFU’s submissions dated 6 April 2016, and are made further to submissions filed on behalf of the MFB and CFA (the fire services) dated 26 February 2016.

2. Part A of these submissions address the relevance of the industrial history to the exercise of the Commission’s modern award powers in this matter (responding to the matters raised in paragraphs 2(i) and 6–22 of the UFU submissions).

3. Part B of these submissions address the UFU’s identification of “impediments to the introduction of the variations sought”¹ (responding to the matters raised in paragraphs 2(ii)–(iii), 3–5, and 24–27 of the UFU submissions), and outlines the findings sought on the reply evidence filed on behalf of the MFB and the CFA with these submissions.

4. Part C of these submissions addresses other matters raised in the UFU submissions including the relevance of any existing flexible work arrangements in the Enterprise Agreements (discussed in the UFU submissions at paragraphs 31–35), and the application of the principles in Re AEU (at paragraphs 36–43 of the UFU submissions).

¹ UFU submissions, [5].
PART A: THE INDUSTRIAL HISTORY AND THE LEGISLATIVE PROVISIONS

5. The UFU argues that the exclusion of part-time work from the Award at the time of modernisation is evidence that the Commission did not consider part-time work to be ‘necessary’ for inclusion in the modern award in 2009. As a consequence, it is argued that the fire services are required to identify a “significant factual change such as to now render ‘necessary’ the inclusion of the proposed terms for the purposes of section 157 of the FW Act”.\(^2\)

6. There are two insurmountable difficulties with this proposition.

7. First, section 157 of the FW Act is not the statutory test applicable to this review. Section 157 is contained in Division 5 of Part 2-3 of the FW Act. Division 5 applies to the exercise of modern award powers outside the 4 yearly review. This application is made as part of the 4 yearly review of modern awards contained in Division 4 of Part 2-3 of the FW Act. To the extent the UFU rely on section 157 to argue that the fire services are required to establish that the proposed variation is ‘necessary’, this reliance is misplaced and those aspects of their submissions should be disregarded.\(^3\)

8. Instead, the task of the Full Bench in the 4 yearly review is governed by section 156 of the FW Act. In *Re Four Yearly Review of Modern Awards –Preliminary Jurisdictional Issues* [2014] FWCFB 1788, the Full Bench identified that, in addition to section 156, a range of other provisions in the Act are relevant to the review. Those provisions included terms of modern awards (Div 3 of Part 2-3), the objects of the Act (s 3), the interaction with the NES (s 55) and those provisions providing for the performance of functions and exercise of powers by the Commission (ss 577 and 578).

9. Second, it is wrong to say that the Commission has found that part-time work was not a necessary inclusion in the Award for the purposes of meeting the modern awards objective. In award modernisation, the Commission expressly “reserve[ed]...\(^2\)

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\(^2\) UFU submissions, [2(i)].

\(^3\) The UFU identify s 157 as relevant in its submissions at footnote 1; at paragraph 2(i); and at paragraph 45.
for further consideration the issue of whether part time employment should also be available in the public sector.”  

10. There is no ambiguity in these words of the Full Bench. The issue of part-time work in the Award has not been considered by the Commission, and it is open for it to do so in this review. While the UFU have quoted the extract above in their own submissions, they do not identify if or how they say the decision of the Full Bench was wrong, or is not relevant. It appears that the reliance on the decision of Hingley C in 2000 in award simplification is a matter of preference rather than principle.

11. Further, as noted by the Full Bench in award modernisation, “Commissioner Hingley’s decision makes no mention of part-time employment.” The Full Bench therefore did not regard 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.”

12. In light of the application that has now been made by the MFB and CFA, it is appropriate that the Commission considers the issues raised on the basis of the evidence and factual circumstances put forward by the parties. Included in those facts and circumstances is evidence of ‘the changing fire service’ and the belief from within the fire services (and from outside) that the services should continue to modernise, adapt and reflect the diversity in the community served. The introduction of part-time employment to the underlying safety net terms and conditions will facilitate these goals.

13. Further, consistent with the Explanatory Memorandum to the Fair Work Bill 2008, it is expected that when considering whether and how to vary the content of a modern

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4 [2009] AIRCFB 945, [51].
5 UFU submissions, [14].
6 [2009] AIRCFB 945, [51]. The fire services otherwise refer to and repeat paragraphs 17 to 23 of the primary submissions.
7 See, eg, the witness statements of David Youssef, [13]–[28]; Joe Buffone, [20]–[22]; and Bruce Byatt, [9].
8 See, eg, the witness statements of David Youssef, [18]; Michael Werle, [11]–[12]; Lucinda Nolan, [19]; Joe Buffone, [19]; Margareth Thomas, [10]; and Craig Lapsley, [15]–[21].
award in the 4 yearly review process, the Commission will be “guided by criteria which take into account public, social interest and economic aspects”.\(^9\)


15. The Review was commissioned in July 2015 by the Minister for Emergency Services, Jane Garrett MP. The Report makes 20 recommendations, 18 of which have been accepted by government.\(^10\) Relevantly, recommendations include that:

\[2(d)\] ...the fire services introduce a broader scope of working arrangements, including job sharing and part-time options, for persons returning from parental leave.\(^11\)

\[7\] ...the fire services take the lead in advancing the sector’s collective effort to increase diversity in the sector...\(^12\)

16. The MFB and CFA submit that the variation of the Award to permit part-time employment is a necessary first step toward improving diversity in the fire services, providing flexible work options, reflecting the community they service, and meeting public and social expectations.

17. The evidence clearly suggests that the availability of part-time employment increases gender diversity in a workforce. This is derived not only from the Australia-wide statistics, where on average 70 per cent of the part-time workforce are women,\(^13\) but directly from the experience of Victoria Police. The evidence of Acting Workplace Relations Director at Victoria Police, Alex Tasominos, is that almost 6.2 per cent of the operational workforce in Victoria Police are currently on part-time arrangements, rising from 2.53 per cent in 2000 shortly after part-time arrangements were introduced. This is matched by an increase in the number of female operational employees from 14.69 per cent in 2000 to almost 25 per cent in 2015.\(^14\)

\(^9\) Explanatory Memorandum, Fair Work Bill 2008, r 105 (emphasis added).
\(^10\) Government Response, 3.
\(^12\) Fire Services Review Report, Recommendation 7.
\(^13\) MFB/CFA primary submissions, [40].
\(^14\) See witness statement of Alex Tasominos, [30].
PART B: THE ‘IMPEDEMENTS’ IDENTIFIED BY THE UFU

18. The bulk of the UFU’s submissions and evidence are directed to operational matters, apparently to demonstrate that the mere prospect of part-time work is fundamentally incompatible with the Modern Award and the fire services. This material reflects a misunderstanding about the nature of the Commission’s task in the 4 yearly review, the operation and purpose of modern awards as a safety net of minimum terms and conditions of employment and on the role of bargaining in that context.

19. As is presently relevant, the following essential features characterise the legislative regime established by the FW Act:

(a) modern awards, together with the NES and national minimum wage orders, comprise the “guaranteed safety net of fair, relevant and enforceable minimum terms and conditions”;\(^{15}\)

(b) the Commission must review each modern award in its own right every 4 years;\(^{16}\)

(c) in the 4 yearly review of modern awards, the Commission “must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions”;\(^{17}\)

(d) the terms of modern awards form the framework for the making of enterprise agreements under Part 2-4 of the FW Act. In order to approve an enterprise agreement, the Commission must be satisfied that the agreement passes the better off overall test\(^{18}\) which mandates a comparison between the terms of a proposed agreement and applicable modern award;\(^{19}\) and the base rate of pay under an enterprise agreement must not be less than the applicable rate under a modern award;\(^{20}\) and

\(^{15}\) FW Act, s 3(b).
\(^{16}\) FW Act, s 156.
\(^{17}\) FW Act, s 134(1).
\(^{18}\) FW Act, s 186(2)(d).
\(^{19}\) FW Act, s 193.
\(^{20}\) FW Act, s 206.
(e) an enterprise agreement applicable to an employee operates to the exclusion of a modern award; the modern award also does not then apply to an employer in relation to the employee.21

20. The UFU has not addressed how the Award in its current form meets the modern awards objective and the National Employment Standards, nor the statutory requirements that govern the inclusion or exclusion of particular terms in modern awards, and the matters that the Commission must take into account when performing functions and exercising powers.22

21. At paragraph 3 of their submissions, the UFU states it is “mindful of the Full Bench’s jurisdiction to promote both social inclusion and flexible modern work practices” in section 134 of the FW Act. This is the extent of the consideration of the modern awards objective by the UFU in their submissions.

22. The UFU then seeks to reserve its right to advance a position on the issue prior to the date set aside for final submissions.23 This is an unacceptable position. The modern awards objective is central to the Commission’s task in determining the issues in dispute between the parties and will guide the Commission’s task when hearing the evidence called by both parties. The UFU was required by directions dated 24 December 2015 to file submissions addressing matters including “the legislative context, including the modern awards objective.”24 It has not done so.

23. Insofar as the UFU’s submissions and evidence are relied on in relation to whether the Award achieves the modern awards objective, an underlying error in those submissions is the reliance upon evidence about the operation of the enterprise agreements which bind the UFU and the fires services. A feature of the present matter is that, by reason of the operation of the enterprise agreements to which the fire services are parties and section 57(1) of the FW Act, the Award does not apply to the relevant employees of the fire services. As a consequence, no evidence is able to be adduced by the parties about the actual practical operation and effect of the Modern Award.

21 FW Act s 57(1).
22 See MFB/CFA primary submissions, [24]–[25].
23 UFU submissions, [3].
24. The UFU’s apparent reliance on evidence about the operation of the enterprise agreements is fundamentally misplaced because the conditions provided for by those agreements do not constitute the safety net of fair and relevant minimum conditions. The UFU’s case plainly invites error if it is contended that, in undertaking its statutory function to ensure that the Modern Award provides a fair and relevant minimum safety net of terms and conditions, the Commission should do so by reference to existing bargained conditions which are over and above the minimum safety net.

25. The UFU objects to the proposed variation on the basis that it is not clear if there is any intention to introduce part-time employment in any form to the fire services. It would be thought that the fact of this application for variation is sufficient evidence of the intention to introduce part-time work, but in case there is any remaining doubt, the evidence of MFB Chief Officer Peter Rau and CFA CEO Lucinda Nolan in reply make it clear that both the MFB and CFA intend to introduce more flexible working options for their employees. Further, it is clear that there is support, at the highest level of government in Victoria, for the introduction of more flexible working options in the industry.

26. The ability to work part-time is part of the minimum safety net of terms and conditions of employment in Australia, in emergency services, and in fire fighting services. The fire services have identified, in paragraphs 27, and 31–36 of the primary submissions, the findings sought from the evidence that goes to the safety net. Part-time work is consistent with the fire services’ shared objectives to create, promote and support a diverse workforce, and provide a safe healthy and respectful workplace which is free of unlawful discrimination.

27. In the context of a bargaining framework established by reference to modern awards, it is essential that the instrument regulating the minimum safety net of conditions provide for and contemplate the possibility of part-time work in line with established

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24 Directions dated 24 December 2015, [1](ii). The UFU is required to address those matters per [2] (Note).

25 UFU submissions, [2(v)].

26 *Government Response to Fire Services Review*, 5-6; Witness Statement of Craig Lapsley, [13]–[21].

27 See, eg, Reply statement of Peter Rau, [5]; Reply statement of Lucinda Nolan, [5] – [7].
community and industry standards. The absence of that established category of employment in the Award undermines and limits the capacity of parties to negotiate arrangements for part time employment which are suitable and adapted to the needs of employees, employers and the emergency services industry. Given the operation of the enterprise agreements, the actual implementation of part-time employment as a standard working arrangement would be a matter for the CFA and MFB to each determine following a period of planning and consultation with employees.

The relevance of the industrial standard across Australia

28. As the UFU points out in its submissions, other public sector fire services across Australia have varying degrees of part-time employment available in the applicable industrial instruments. The UFU identify a number of qualifications contained in the relevant industrial instruments applying to fire services across Australia that they claim militate against the inclusion of “unfettered entitlements” to part-time work in the modern award.

29. The fire services recognise that certain interstate industrial instruments contain qualifications. At paragraphs 41–42 of the primary submissions, the fire services identify “the existence of part-time work as an employment option, even in limited or prescribed circumstances” in the relevant industrial instruments. There is no controversy between the parties about the terms of the instruments.

30. What the differences between the states and territories show is that there is no ‘one size fits all’ approach. What is clear is that part-time employment is an established feature of employment in the industry, and it is appropriate that this should be reflected in the underlying safety net terms and conditions.

31. Although the Award at present covers only public sector fire services in Victoria, the ACT and the Northern Territory, it is a federal instrument and it is possible that, in the future, other States may refer powers to the Commonwealth. In this context it is inappropriate to codify in the Award detailed parameters around part-time employment which may not be suited or relevant to all potential employers in the industry.

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28 UFU submissions, [28]–[30].
29 UFU submissions, [29]–[30].
32. The UFU has not addressed or explained the inconsistency between its support for part-time work in industrial instruments to which it is a party, or was involved in negotiating, in the ACT, Queensland, Tasmania, and South Australia, and support in Western Australia for the development of a part-time/job share arrangement for covered employees, and its refusal to support part-time work for firefighters in Victoria.

The operational objections

33. The UFU witnesses identify a number of objections to the introduction of part-time work for operational firefighters in the Award. These objections can only be relevant if the UFU is claiming that the inclusion of part-time work in the Award is so unworkable that it could never meet the modern awards objective. This is an extraordinarily high threshold, and would require the UFU to address not just the modern awards objective itself, but each of the relevant statutory parameters around the exercise of the Commission’s modern award powers, its powers under the FW Act. It has not done so.

34. By identifying so-called “substantial impediments” to the introduction of part-time work, it appears that the UFU are attempting to engage in a form of shadow bargaining rather than grappling with the variation to the Award and the statutory obligations of the Commission to ensure the modern award provides a fair and relevant minimum safety net. For the avoidance of any doubt, the fire services do not call on the Commission in this modern award review to arbitrate the implementation of part-time work in the Agreements.

35. It is unclear what findings the UFU is asking the Commission to make from its evidence. The UFU’s submissions do not identify any such findings, despite the directions of Ross J dated 24 December 2015, and the additional time provided by agreement to the UFU to file and serve its material.

36. Nevertheless, on the assumption that the UFU wishes the Commission to make findings by reference to its evidence, the fire services have filed reply evidence addressing, at an appropriately broad level, the nature of the objections formulated

31 See MFB/CFA primary submissions, [24]–[29].
by the union. The key findings sought by the fire services in respect of that evidence are set out below:

(a) Both the MFB and CFA intend to provide more flexible working options for their employees. This evidence is provided by MFB Chief Officer Peter Rau, and CFA CEO Lucinda Nolan.

(b) It is not unusual, and even common, for firefighters in the MFB and the CFA to work alongside firefighters they do not know, including recalled firefighters within each fire service, volunteers, firefighters on secondment, new recruits, inter-agency exchanges, interstate crews, and international crews. In such circumstances, firefighters work well and successfully together, and the health and safety of the firefighters and the community is not compromised. This evidence is provided by CFA Chief Officer Joe Buffone; MFB Deputy Chief Officer David Youssef; CFA Deputy Chief Officer Steven Warrington; and CFA Deputy Chief Officer Bruce Byatt.

(c) Firefighters at the MFB and CFA work alongside other emergency services personnel and do not know those persons’ level of training and experience, and the nature of their employment (full-time, part-time, etc). In such circumstances, firefighters work well and successfully with other emergency services agencies, and the health and safety of the firefighters and the community is not compromised. This evidence is provided by CFA Chief Officer Joe Buffone; MFB Deputy Chief Officer David Youssef; CFA Deputy Chief Officer Steven Warrington; MFB Deputy Chief Officer Gregory Leach; and CFA Deputy Chief Officer Bruce Byatt.

(d) It is not essential for the proper maintenance of skills and training that a firefighter only be employed full-time on the 10/14 roster. This evidence is provided by CFA Deputy Chief Officer Steven Warrington; MFB Deputy Chief Officer Gregory Leach; CFA Deputy Chief Officer Bruce Byatt; and CFA Executive Director Learning and Volunteerism Kate Harrap.
PART C: THE UFU’S FURTHER SUBMISSIONS

37. The UFU also replies to the submissions of the MFB and CFA that the prohibition against part-time work could have a discriminatory effect;\(^{33}\) and that the prohibition offends the implied limitation principle in *Re AEU*.\(^{34}\)

*Discriminatory effects*

38. The UFU contends that concerns regarding the potential discriminatory effects of the Award are mitigated by:

(a) the fact that “*the system always accommodates requests for flexible work arrangements*”;\(^{35}\) and

(b) the existing flexibility provisions within the Award including the special duties roster.\(^{36}\)

39. At the outset, it must be made clear that the submissions of the UFU on this point fail to grapple with the fact that there are no flexible work arrangements available for operational firefighters. If an operational firefighter needs or wishes to work part-time, she or he must effectively change jobs.

40. The Award provides that operational firefighters in the public sector can *only* be employed on a full-time basis, including under the special duties roster referred to by the UFU.\(^{37}\) The simple fact is that the Award does not contemplate that an operational firefighter may become employed in the public sector on any basis other than working a 42 hour week.

41. Section 153(1) of the FW Act provides that a modern award must not include terms that discriminate against an employee for reasons including the employee’s race, sex, age and family or carer’s responsibilities. A term does not discriminate if the reason for the discrimination is the inherent requirements of the particular position.\(^{38}\)

\(^{33}\) UFU submissions, [31]–[35].

\(^{34}\) UFU submissions, [36]–[43].

\(^{35}\) UFU submissions, [31]–[32].

\(^{36}\) UFU submissions, [33]–[35].

\(^{37}\) *Fire Fighting Industry Award*, cl 22.2(a), 22.7(b).

\(^{38}\) FW Act s 153(2)(a).
42. The UFU has not put forward any argument or evidence that employment of operational firefighters in the public sector on a full-time basis is an inherent requirement of the role. The availability of part-time work for operational firefighters in other fire services across Australia prima facie stands against any such argument, if one were made.

43. The UFU has, at best, contended that the terms of the Award are not discriminatory because the parties, in practice, comply with their legal obligation under the NES to consider request for part-time working on a case-by-case basis. This is not evidence that the terms of the Award, as they presently stand, are not discriminatory within the meaning of section 153 of the Act.

Special duties roster

44. The UFU also makes a submission to the effect that variation to the Award is not required because clause 22.7 of the Award provides for a special duties roster. But clause 22.7, and its equivalent in the CFA Operational Agreement at cl 77, is no answer to the question of part-time work. This is evident from its terms:

Clause 22.7 Special duties roster
(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 will be 42 hours per week over a seven day cycle.
(c) The roster of hours will be between 7.45 am to 6.15 pm comprising four day shifts worked either Monday to Thursday or Tuesday to Friday or such other configuration agreed between the employer and a majority of affected employees.
(d) Arrangements may be made for employees to vary from one day shift to another, or from day work to shiftwork.
(e) Employees operating under this roster will receive the same total weekly wage and annual leave provisions as Firefighters on a 10/14 shift roster.
45. While the UFU have filed evidence referring to the existence of this clause, it has not filed any evidence of any person who has utilised the special duties roster to meet a need to work part time. Reliance on this clause is, therefore, of no assistance to the Commission or to any firefighter seeking part-time work.

46. The UFU also refers to, and apparently conflates, the special administrative duties provisions in cl 84 of the MFB Agreement. That clause, unlike the special duties roster in the Award and CFA Agreement, does not proscribe the hours and times of work for firefighters (other than through clause 37.2). But its application is limited to off-shift duties only, and therefore is not a meaningful answer to the question of part-time work for operational employees.

47. As for the enterprise agreements, these are instruments containing terms which have been negotiated and agreed between the parties. Each agreement provides that employees cannot generally be employed on a part-time basis. As set out at paragraphs [13] – [17] above, the fire services consider that variation of the Award to contemplate part-time employment in the public sector is an appropriate and necessary first step in ongoing efforts to improve diversity and flexible work options, reflect the communities served, and meet public and social expectations as they stand in 2016.

Re AEU

48. The UFU contends that clause 10 of the Award does not prevent the fire services from employing any number of people they so choose and that its subject matter is characterised as a term or condition of employment.

49. This is an inadequate and inaccurate characterisation of the terms and effect of clause 10. The clause expressly confines public sector fire services to employing employees on a full-time basis. Persons who are not willing or able to work on a full-time basis are not eligible to be employed by the MFB or CFA.

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39 UFU submissions, [5(i)]; see, eg, the UFU witness statements of Ken Brown, [21]–[23] and Malcolm Hayes, [13], and [25]–[26].

40 See UFU submissions, [34] (including citations).

41 MFB Agreement, cl 37.2; CFA Agreement, cll 29.2, 30.1.
50. This directly engages both the “first” and the “second” limbs of the Re AEU which stipulates that an award cannot constrain the capacity of a State “to determine the number and identity of the persons whom it wishes to employ.”

(a) As concerns the first limb, it limits the State’s capacity to increase the number of people it employs by engaging them on a part-time basis, even though the amount of work to be performed remains the same. To take a simple example, it would prevent the State from deciding that the work presently performed by 10 full-time employees should in future be performed by 15 part-time employees.

(b) The second limb has the effect that the Commission cannot make an award binding the States in relation to, inter alia, “qualifications and eligibility for employment.”

51. The public sector is, by direct operation of the Award, unable to offer employment to any person who is unable or unwilling to work 42 hours every week. In Re AEU the High Court referred with approval to the statement of Deane J in Queensland Electricity Commission that the central operation of the limitation is to preclude the exercise of Commonwealth powers to “control the States” in a manner which would be inconsistent with the continued existence of the States as independent entities and their capacity to function as such. The effect of clause 10 in limiting and confining the class of persons who are eligible to be employed to those willing or able to be employed by the fire services on a full-time basis does exactly that.

52. This, contrary to that submitted by the UFU, goes directly to the ‘identity’ of that person or a class of persons. For example, the public sector through the fire agencies is prohibited from employing a person who is only able to, or only seeks, 30 hours of work per week because of their responsibilities to care for a child.

53. It is contended by the UFU that there is no submission or supporting evidence to support the proposition that the State of Victoria has ever been impermissibly burdened by clause 10 of the Award. The substance and actual operation of clause 10

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42 (1985) 184 CLR 188 at 233.
43 Queensland Electricity Commission (1985) 159 CLR at 217 per Mason J.
44 UFU submissions at [41].
of the Award is not a matter requiring formal proof. As a provision which defines the class of persons eligible to be employed, neither is its effect and operation amenable to proof in the ordinary way.

54. The UFU also argues that, because clause 10 of the Award was introduced by consent of a Victorian government agency, a “consent award of this nature” has a very different quality to the imposition by the Commonwealth of an arbitrated outcome on a State or its agencies which have opposed that outcome.” The Award is not a consent award; neither is its legal character analogous to that of an enterprise agreement made under the FW Act. It is an instrument made as a result of the exercise of power vested in the Commission’s predecessor pursuant to Part 10A of the Workplace Relations Act 1996. The burden and limitation imposed on the State by clause 10 of the Award is not altered by the statutory and procedural context in which the Award was made.

S Moore

K Burke

18 April 2016

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45 *Parks Victoria v The Australian Workers’ Union* [2013] FWCFB950, [310]

46 UFU submission at [42].

47 Referring to the statement by the Full Court of the Federal Court in *United Firefighters’ Union of Australia v Country Fire Authority* [2015] FCAFC 1 at [208].