IN THE FAIR WORK COMMISSION

Matter No: AG2018/1278

Applicant: Metropolitan Fire and Emergency Services Board

APPLICANT’S OUTLINE OF SUBMISSIONS REGARDING SECTIONS 185, 186 and 187

A. OVERVIEW

1. The Metropolitan Fire and Emergency Services Board (MFB) has applied for approval of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016 (Agreement) under sections 185 of the Fair Work Act 2009 (FW Act). The Commission must approve the Agreement if the requirements of sections 186 and 187 are met.1

2. For the reasons that follow, the MFB has met those requirements. The Commission ought approve the Agreement.

B. APPLICATION UNDER s 185

3. The MFB, being its own bargaining representative,2 applied on 3 April 20163 pursuant to s 185(1) for the Commission to approve the Agreement (Application). The Application was accompanied by:

   (a) a signed copy of the Agreement,4 signed in accordance with the requirements of regulation 2.06A of the Fair Work Regulations 2009 (FW Regulations); and

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1 FW Act s 186(1).
2 FW Act s 176(1)(a).
3 Statement of Janette Lori Pearce dated 13 August 2018 (Pearce Statement) at [77].
4 FW Act s 185(2)(a).
(b) a statutory declaration dated 3 April 2018, in accordance with the approved form and rule 24 of the *Fair Work Commission Rules 2013* (*FWC Rules*) of Janette Pearce on behalf of the MFB (*MFB Statutory Declaration*). The MFB Statutory Declaration attached the relevant notices of employee representational rights in accordance with subsection 173(1), which are referred to further at paragraphs 17(e) to 19 below.

4. The Agreement having been made on 16 March 2018, the 14 day period after that date ended on Friday 30 March 2018. Given that 30 March was Good Friday, 31 March was Holy Saturday, 1 April was Easter Sunday and 2 April was Easter Monday (all of them public holidays), the date by which the Application was required to be filed with the Commission was Tuesday 3 April 2018. Accordingly, the Application was filed within the period prescribed by s 185(3)(a) of the *FW Act* and rule 24(1) of the *FWC Rules*.

C. REQUIREMENTS UNDER s 186

C.1 The Agreement has been genuinely agreed

5. The Commission can, and should, be satisfied that the Agreement has been “genuinely agreed” to by the employees covered by the Agreement. This is so because:

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5  *FW Act* s 185(2)(b).
6  Annexure JP-33 to the Pearce Statement.
7  Rule 24(2) of the *FWC Rules*.
8  See paragraph 20 below.
9  *FW Act* s 185(3)(a), read together with s 36(2) of the *Acts Interpretation Act 1901* (Cth).
10  Further and alternatively, if it be necessary, the MFB seeks an extension of time in accordance with s 185(3)(b) of the *FW Act* and rule 6(1) of the *FWC Rules* to allow the filing of the application on 3 April 2018. The MFB submits that it is fair to extend the period to 3 April 2018, given the Easter holiday period and the public holidays of Good Friday and Easter Monday.
11  *FW Act* s 188.
12  *FW Act* s 186(2)(a).
(a) the MFB complied with the pre-approval steps (set out in subsections 180(2), (3) and (5));\textsuperscript{13}

(b) the MFB complied with subsection 181(2);\textsuperscript{14}

(c) the Agreement was made in accordance with subsection 182(1);\textsuperscript{15} and

(d) there are no other reasonable grounds for believing that the Agreement has not been genuinely agreed to by the employees.\textsuperscript{16}

C.1.1 Section 180(2)

6. From 26 February 2018 (a period of more than 7 days before the ballot opened on 9 March 2018\textsuperscript{17}) and at all times during the access period, the MFB took all reasonable steps to ensure that the relevant employees variously were given a copy of the Agreement and the material incorporated by reference into the Agreement,\textsuperscript{18} or otherwise had access to those materials throughout the access period.\textsuperscript{19}

7. It did so by:

(a) posting those materials, the explanatory materials, and relevant correspondence between the MFB and the UFU on the MFB Workplace Relations intranet page (Intranet Page);

(b) emailing employees on 26 February 2018 to advise them that the materials were available on the Intranet Page;

(c) writing to employees on leave to the same effect; and

\textsuperscript{13} FW Act s 188(a)(i).
\textsuperscript{14} FW Act s 188(a)(ii).
\textsuperscript{15} FW Act s 188(b).
\textsuperscript{16} FW Act s 188(c).
\textsuperscript{17} Pearce Statement at [65]-[66].
\textsuperscript{18} Pearce Statement at [62].
(d) posting hard copies, and sending PDF copies, of the Agreement to employees on request.

C.1.2 Section 180(3)

8. The MFB took all reasonable steps to notify the relevant employees of the time and place at which the vote would occur and the voting method that would be used (namely, an electronic ballot conducted by Computershare, open from 0600 hours (6:00am) on 9 March 2018 until 1300 hours (1:00pm) on 16 March 2018.\(^{20}\) It did so by emailing employees on 26 February 2018 notifying them of those details, and writing to employees on leave to the same effect.

C.1.3 Section 180(5)

9. The MFB took all reasonable steps to ensure that the terms of the Agreement, and the effect of those terms, were explained to the relevant employees (in an appropriate manner taking into account the particular circumstances and needs of the relevant employees).\(^{21}\)

10. It did so by providing a comprehensive explanatory statement to relevant employees which reflected a proposed statement attached to a Recommendation dated 20 February 2018 issued by the Commission.\(^{22}\)

11. Amongst other things, the explanatory statement set out a detailed clause-by-clause explanation of the Agreement and compared the Agreement’s terms with its predecessor agreements. Such a course was plainly reasonable. The relevant employees to be covered by the Agreement were, at the relevant time, subject to the application of the existing enterprise agreements. Insofar as the terms of the Agreement would have had any relevant effect on existing terms and conditions, it was

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\(^{22}\) Pearce Statement at [52]-[53] and Annexure JP-17.
to displace the application of the terms of the existing agreements. That effect was explained to those employees in considerable detail.23

12. The explanatory statement also explained to employees how the Agreement interacted with:

(a) rights and obligations under State and Territory occupational health and safety legislation;

(b) rights and obligations under State and Territory equal opportunity legislation, and under the NES; and

(c) the Chief Officer’s powers under the MFB’s enabling legislation.

13. Whether a step is “reasonable” is not to be assessed in a theoretical vacuum. It is to be assessed in full context.24 That context logically must include consideration of the other steps being taken by the employer, and by the bargaining representatives of the relevant employees. Here, that context includes the fact that the United Firefighters’ Union of Australia (UFU) – a bargaining representative for nearly all of the employees to be covered by the Agreement – conducted a series of Special General Meetings of relevant employees, and delivered presentations addressing the terms and effect of the Agreement.

14. Critically, the assessment of whether an available step was reasonable must be judged against the objective that is sought to be achieved by the imposition of the obligation to take “all reasonable steps”.25 Here, the object of the reasonable steps that are to be taken is to ensure that the terms of the agreement and their effect, are

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23 Compare BGC Contracting Pty Ltd [2018] FWC 1466 (BGC Contracting) at [88] (Gostencnik DP).
24 BGC Contracting at [43].
25 BGC Contracting at [43].
explained to relevant employees in a manner that takes into account the particular circumstances and needs of the relevant employees.26

15. Convening ‘town hall’-style meetings, for example, may be a reasonable step in meeting that objective considered in isolation. But it may be superfluous (and hence not reasonable to require an employer to undertake it) where, as here, a bargaining representative who represents nearly all of the relevant employees conducts such a process. Were it otherwise, s 180(5) would place too burdensome an onus on employers: it would set the bar for compliance at the limits of the imagination of objectors and the Commission, and risk equating "all reasonable steps" with "all conceivable steps".

C.1.4 Notice of Employee Representational Rights - subsection 181(2)

16. The MFB’s request to the relevant employees that they approve the Agreement was made more than 21 days after the day on which the last notice of employee representational rights under subsection 173(1) in relation to the Agreement was given.27 The date of the notices of employee representational rights given under subsection 173(1) was 15 August 2013.

17. The sequence of events in respect of the notices of employee representational rights was as follows:

   (a) On 19 April 2013, the MFB distributed emails to staff which purported to be notices of employee representational rights in relation to a proposed Metropolitan Fire Brigade Operational Employees Agreement 2013 and a proposed MFB Senior Operational Leadership Agreement 2013 (Initial NERRs).28 Those Initial NERRs, however, were not conformable with regulation 2.05 of the FW

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26 BGC Contracting at [77].
27 FW Act s 181(2).
Regulations. The MFB does not rely upon those notices for the purposes of meeting the requirements of subsections 173(3) and 181(2) of the FW Act.

(b) Bargaining meetings occurred in relation to the MFB Senior Operational Leadership Agreement 2013 (Proposed Senior Leadership Agreement) on 15 and 23 May 2013. Those meetings did not include the UFU, nor were they productive.\(^2^9\) There was then a period of almost three months – until after the 15 August 2013 NERRs (referred to below) were distributed, before a further bargaining meeting occurred in relation to the Proposed Senior Leadership Agreement on 15 August 2013.\(^3^0\)

(c) There were no bargaining meetings between the MFB and employee bargaining representatives (individuals and the UFU), about the proposed Metropolitan Fire Brigade Operational Employees Agreement 2013 (Proposed Operational Agreement) until 6 August 2013.\(^3^1\) At that meeting, the UFU raised a number of issues, including the non-conformity of the Initial NERRs. The other topics discussed were the taking of minutes of meetings of the parties, whether bargaining protocols should be put in place between the parties, and the location of meetings. The meeting closed without any actual enterprise bargaining (ie, bargaining in relation to terms and conditions to be contained in an enterprise agreement) having occurred.\(^3^2\)

(d) Following the 6 August 2013 meeting, there then followed correspondence between the MFB and UFU about whether the Initial NERRs were conformable with the FW Act, and other machinery items such as taking of minutes of meetings of the parties, whether bargaining protocols should be put in place

\(^3^0\) Pearce Statement at [26] and Annexure JP-5.
\(^3^1\) Pearce Statement at [27].
\(^3^2\) Pearce Statement at [28]-[30] and Annexure JP-6.
between the parties, and the location of meetings. Effectively, bargaining was put on hold pending the resolution of various preliminary concerns raised by the UFU, including its concerns about the Initial NERRs.

(e) Having considered the UFU’s criticisms of the Initial NERRs, on or about 15 August 2013 the MFB agreed to re-initiate enterprise bargaining for both the Proposed Operational Agreement and the Proposed Senior Leadership Agreement (Notification Time). The MFB indicated this agreement by issuing new notices of employee representational rights, in relation to both agreements, which were attachments to emails to staff dated 15 August 2013 at 12.21pm (Operational Agreement) and 12.22pm (Senior Operational Leadership Agreement) (15 August 2013 NERRs).

18. The 15 August 2013 NERRs are consistent with the requirements in regulation 2.05 of the Fair Work Regulations 2009, and s 174 of the FW Act. They were issued within 14 days after the Notification Time, and more than 21 days before the MFB requested the employees who will be covered by the Agreement to approve of the Agreement by voting for it.

19. The approach taken by the MFB, in re-initiating bargaining in August 2013 (thus creating a new notification time) and then issuing the 15 August 2013 NERRs, is consistent with the approach of the majority in Uniline Australia Limited (2016) 263 IR 255 at [115]. It having become apparent (once the UFU raised its concerns about the Initial NERRs) that an enterprise agreement capable of being approved under the FW Act could not be made on the basis of those initial notices, the MFB “initiate[d]
bargaining for a proposed agreement, the effect of which will be to trigger a new
notification time following which a valid Notice must be given."

C.1.5 The Agreement was made in accordance with subsection 182(1)

20. The Agreement was made in accordance with subsection 182(1) on 16 March 2018,
when Computershare declared the outcome of the electronic ballot in which all
employees were asked to approve the Agreement, and a valid majority of employees
voted to do so.41

C.1.6 No reasonable grounds for believing that the Agreement has not been
genuinely agreed (s 188(c))

21. There are no other reasonable grounds for believing that the Agreement has not been
genuinely agreed by the employees.42

22. Section 188(c) requires an assessment of whether there were no other reasonable
grounds for a state of belief. The relevant state of belief is that the proposed
agreement was not actually genuinely agreed to by the employees. Unless there are
reasonable grounds for such belief, then it follows that there are "no other reasonable
grounds".43

23. The MFB accepts the breadth of s 188(c) as understood by the Full Court of the
Federal Court in *One Key Workforce (No 2).* 44 It also accepts the Full Court’s
observations concerning the need for consent of a higher quality than mere agreement.
However, insofar as sections 186(2)(a) and 188(c) require employees to give their
informed consent to the agreement, that requirement does not extend to requiring

40 *Uniline Australia Limited* (2016) 263 IR 255 at [115].
41 Pearce Statement at [65]-[76] and Annexures JP-26 to JP-32 inclusive.
42 FW Act s 188(c).
43 *CFMEU v CSRP Pty Ltd* (2017) 270 IR 1 at [27].
44 *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 356 ALR 535
(Bromberg, Katzmann and O’Callaghan JJ)
each employee to have a detailed understanding of every term in the agreement. Nor do those sections – nor section 180(5) – require an employer to explain every single term of an agreement. Genuine agreement (or, put another way, ‘informed consent’) to the agreement as a whole is required. This requires that an employer advise relevant employees of the consequences of giving their approval to the agreement.  

24. Critically, the type of explanation of particular terms required to ensure that employees’ consent is ‘informed’ will vary upon the extent to which that explanation might reasonably be expected to have affected the voting group.  

The authorities speak not simply of a requirement of ‘informed consent’, but rather of both ‘informed consent’ and an ‘absence of coercion’: that is, the requirement is concerned with matters which could (or in fact did) sway an employee’s vote.  

25. Nothing on the face of the evidence provides a reasonable basis for believing that the Agreement has not been genuinely agreed. The Agreement was the subject of extensive and protracted bargaining. Employees were provided with detailed explanations of the Agreements terms and effect from both the MFB and the UFU. That those terms provided significant benefits to employees is underscored by the fact that the Agreement was ultimately made with greater than 99 per cent employee support.

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45 Re Coles Supermarkets Australia Pty Ltd (unreported, 19 October 2000, AIRCFB, Print T2319) (Re Coles) at [20] (Ross VP, Williams SDP, Smith C).

46 See Re Grocon Enterprise Agreement (2003) 127 IR 13 (Grocon) at [52]-[53] (Ross VP).

47 See Re Toys "R" Us (Aust) Pty Ltd Enterprise Flexibility Agreement 1994 (unreported, 3 February 1995, AIRC, Ross VP, Print L9066) (Toys R Us), cited with approval in Grocon at [46].

48 In Grocon, the employer failed to explain the effect of the scope of the relevant agreement was to split the existing agreement into 5 separate agreements (which in turn meant that groups of employees formerly covered by one agreement could be employed under disparate terms and conditions). In Toys R Us, the employer gave a selective and misleading explanation of the way in which the relevant agreement compared to those of its competitors (thus giving the employees the misleading impression that the relevant agreement was a ‘good deal’ in comparative terms). See also Re Coles, where the relevant employees were wrongly told that they would receive significant wage increases (as against underpinning awards) as a result of the implementation of the agreement, in circumstances where they were entitled to higher rates under a different agreement.
26. The Minister and the VEOHRC do not have leave to make submissions in respect of this matter. Insofar as the Minister’s attempt (at [247]-[251] of his Outline of Submissions dated 22 June 2018) to cloak a genuine agreement submission with a submission on permitted matters is entertained by the Commission, it ought be rejected for the reasons advanced in the MFB’s substantive Outline of Submissions dated 13 August 2018 (MFB Submissions).

C.2 National Employment Standards

27. The terms of the Agreement do not contravene section 55 of the FW Act.\(^{49}\) The MFB refers to and repeats paragraphs 137, 138, 180 of the MFB Submissions, and relies further upon the responses to questions 2.11 and 2.12 of the MFB Statutory Declaration.

C.3 Better off overall test

28. The Agreement passes the better off overall test.\(^{50}\) The MFB refers to and repeats paragraphs 263 to 281 of the MFB Submissions, and relies further upon the responses to questions 3.1 to 3.5 of the MFB Statutory Declaration, and upon Attachments E and F to the MFB Statutory Declaration.

C.4 Fairly chosen

29. The MFB submits that the group of employees covered by the Agreement was fairly chosen.\(^{51}\) The Agreement covers all operational employees, excluding Deputy Chief Fire Officers and the Chief Fire Officer. Taking into account the different types of work performed by other MFB employees,\(^{52}\) the group of employees to be covered is

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\(^{49}\) Subsection 186(2)(c) of the FW Act.

\(^{50}\) s 186(2)(d) and 193 of the FW Act

\(^{51}\) FW Act s 186(3).

\(^{52}\) Pearce Statement at [10]-[16]
operationally and organisationally distinct. It covers the entire geographic area covered by the MFB. It is fairly chosen.\textsuperscript{53}

C.5 No unlawful terms

30. The FWC can, and should, be satisfied that the Agreement does not include any unlawful terms.\textsuperscript{54} The MFB refers to and repeats paragraphs 23 to 227 of the MFB Submissions, and relies further upon the responses to questions 2.13 and 2.14 of the MFB Statutory Declaration.

C.6 No designated outworker terms

31. The FWC can, and should, be satisfied that the Agreement does not include any designated outworker terms.\textsuperscript{55}

C.7 Nominal expiry date

32. The nominal expiry date of the Agreement is 1 July 2019.\textsuperscript{56} This will be less than 4 years after the date on which the Commission approves the Agreement.\textsuperscript{57}

C.8 Term about settling disputes

33. The Agreement contains a term about settling disputes, consistent with subsection 186(6) of the FW Act.\textsuperscript{58} The term allows the Fair Work Commission to settle disputes about any matters arising under the Agreement and in relation to the National

\textsuperscript{53} FW Act s 186(3A).
\textsuperscript{54} FW Act s 186(4).
\textsuperscript{55} FW Act s 186(4A).
\textsuperscript{56} Clause 4 of the Agreement.
\textsuperscript{57} FW Act s 186(5).
\textsuperscript{58} Clause 21 of the Agreement.
Employment Standards,\textsuperscript{59} and it allows for the representation of employees covered by the Agreement for the purposes of the dispute resolution procedure.\textsuperscript{60}

D. REQUIREMENTS UNDER s 187

34. Only one requirement under s 187 of the FW Act applies to the Agreement: the requirement under subsection 187(4) and subsection 196 in relation to shiftworkers. That requirement is satisfied for the reasons set out in paragraph 36 below.

35. None of the other requirements in subsection 187 apply to the Agreement:

(a) subsection 187(2) does not apply because no scope order was made in relation to the Agreement;

(b) subsection 187(3) does not apply because, amongst other reasons, the Agreement is not a multi-enterprise agreement;

(c) whilst subsection 187(4) applies in relation to shiftworkers,\textsuperscript{61} it does not apply in relation to pieceworkers,\textsuperscript{62} school-based apprentices\textsuperscript{63} or outworkers;\textsuperscript{64} and

(d) subsections 187(5) and (6) do not apply, because the Agreement is not a greenfields agreement.

36. The Agreement applies to employees who are defined or described by the relevant modern award as “shiftworkers” for the purposes of the purposes of the National Employment Standards.\textsuperscript{65} Clause 90.2 of the Agreement defines or describes those

\textsuperscript{59} FW Act s 186(6)(a); clause 21.1 of the Agreement.
\textsuperscript{60} FW Act s 186(6)(b); clause 21.8 of the Agreement.
\textsuperscript{61} FW Act s 196.
\textsuperscript{62} FW Act s 197-198.
\textsuperscript{63} FW Act s 199.
\textsuperscript{64} FW Act s 200.
\textsuperscript{65} Question 2.16 of the MFB Statutory Declaration; clause 28.2 of the Fire Fighting Industry Award 2010.
employees as “shiftworkers” for the purposes of the purposes of the National Employment Standards. 66

37. It follows from paragraphs 34 to 36 above that such requirements in section 187 as apply to the Agreement are satisfied.

E. CONCLUSION

38. An application for approval of the Agreement having been made under section 185, and the requirements of sections 186 and 187 being satisfied, the Commission must approve the Agreement. The MFB respectfully seeks that the Commission do so.

CHRIS O’GRADY QC
REBECCA NELSON
ANDREW POLLOCK
BRENDAN AVALLONE
Counsel for the Applicant

LANDER & ROGERS LAWYERS
30 August 2018

66 FW Act s 196.