Introduction

1. These submissions respond to the applications for intervention made by the Minister for Small and Family Business, the Workplace and Deregulation (Minister) and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (the Intervention Applications).

2. The Metropolitan Fire and Emergency Services Board (MFESB) opposes the applications for intervention. It does so for the following reasons:

   a. The Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016 (the 2016 Agreement) is an agreement between the MFESB and its employees represented by the United Firefighters Union (UFU). It does not apply to or affect the terms and conditions of employment of persons employed by the Commonwealth or VEOHRC. Neither the Minister nor VEOHRC have an interest in the approval of the agreement that would warrant them being given leave to intervene. The issues which the Minister and VEOHRC have indicated they wish to ventilate are not issues peculiar to the 2016 Agreement.
b. The approval of the 2016 Agreement should be determined by the Fair Work Commission (the Commission) on the submissions of the MFESB and the UFU. To the extent that the approval of the 2016 Agreement potentially involves the issues foreshadowed by the Minister and VEOHRC, the Commission has been made aware of that potential as a result of the statutory declaration filed by MFESB in support of the approval of the 2016 Agreement, the Minister’s application for referral to a Full Bench, and the Intervention Applications. Further involvement by the Minister and/or VEOHRC is neither necessary or in keeping with the statutory scheme.

c. Further and alternatively, if the Commission were of the view that it would be assisted by submissions from the Minister and/or VEOHRC in respect of the matters identified in the Intervention Applications, such assistance could be received in the way currently as suggested by VEOHRC, namely without granting a general right of intervention or the ability to call or test evidence. Confining the involvement of the Minister in this way would be consistent with the statutory scheme and the fact that the 2016 Agreement is between the MFESB and its employees. The Minister and VEOHRC should have leave to file any further submissions in respect of the issues that they seek to ventilate pursuant to a timetable that would enable the MFESB and the UFU to consider and respond to those submissions. If it subsequently appeared that the Commission would be assisted by some other further involvement of the Minister, including by allowing him to put on evidence, this could be assessed at that juncture.

The Statutory Scheme

3. In support of this position MFESB relies upon the following features of the scheme put in place by the Fair Work Act 2009 (the FW Act).

4. Division 4 of Part 2 – 4 of the FW Act sets out the process for the approval of enterprise agreements. This process reflects the fact that agreements are made between employers and employees as represented by their bargaining representatives. Save for the requirement that the Commission assess whether the statutory
preconditions for approval have been met, it is not a process which contemplates the involvement of third parties.

5. This was explained by the Full Bench in *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWCFB 7940 [(2014) 246 IR 21](http://www.fairwork.gov.au/). At [65] – [63] the Full Bench said:

[65] In our view the right, interest or legitimate expectation that is said to be affected by application of the kind before the Senior Deputy President must be identified and understood against the framework of enterprise bargaining and agreement making established by the FW Act. It is not enough, without more, to point to the status of the CFMEU as an employee organisation with a history of representation at the workplace or in the industry. Moreover, this is not a case where some of the members of the CFMEU voted against the approval of the Agreement or did not vote at all. All of the employees covered by the Agreement voted, and all of those employees (including Employee 2) voted in favour of approving the Agreement.

[66] The statutory framework includes that enterprise agreements are made principally between an employer and employees; that bargaining representatives have a role in relation to enterprise bargaining either by default or by appointment; that default bargaining representatives can be displaced by appointment or by revocation; that enterprise agreements operate primarily at the single enterprise level and do not create rights of general application across an industry or have common rule application; that rights of an employee organisation to be involved in the bargaining process under the FW Act is not separate from its standing as a bargaining representative; and that its capacity to be involved in protected industrial action by seeking a protected action ballot authorisation cannot be separated from its standing as a bargaining representative.

6. The right, interest or legitimate expectation of the Minister to be heard as to the approval of an agreement at first instance is, with respect, more tenuous than that of an employee organisation with a history of representation at the workplace in the industry.

7. Section 590 of the FW Act provides:

Powers of the FWC to inform itself

(1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.

(2) Without limiting subsection (1), the FWC may inform itself in the following ways:
(a) by requiring a person to attend before the FWC;
(b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;
(c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;
(d) by taking evidence under oath or affirmation in accordance with the regulations (if any);
(e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;
(f) by conducting inquiries;
(g) by undertaking or commissioning research;
(h) by conducting a conference (see section 592);
(i) by holding a hearing (see section 593).

8. It is apparent from s 590 that if the Minister and/or VEOHRC are allowed to participate in the proceedings the Commission can limit their involvement in the way suggested above.

9. Contrary to the suggestion in the submissions of the Minister and VEOHRC, the focus of s 590 is not the provision of a contradictor: instead, it facilitates the Commission informing itself. Had Parliament intended that agreement approval applications ordinarily proceed with a contradictor, it would have enacted provisions granting a right of intervention to unions with constitutional coverage of employees to be covered by the agreement, or at the very least an obligation for employers to notify such unions of approval applications.

10. That Parliament did neither is instructive. Parliament instead enacted a regime dealing with the making and approval of enterprise agreements intended (amongst other objects) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, and to facilitate the making of enterprise agreements through ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay. As Williams C recently observed when dealing with an intervention application by a union who was not a bargaining representative in Macmahon Contractors Pty Ltd [2018] FWC 869 (at [40]):
“The absence of a contradictor would be the most common situation the Commission deal with in agreement approval applications and is in no way abnormal or in any way inconsistent with the scheme of the Act. This absence of a contradictor of itself is not sufficient reason for the Commission to exercise its discretion and allow a union, that was a stranger to the bargaining process, to be heard over the objections of one or more of that parties to the Agreement.”

11. Indeed for s 590 to be used as a means of importing a contradictor into the approval process is arguably inconsistent with the scheme that the FW Act puts in place for the approval of agreements.

12. Section 597 of the FW Act provides:

Minister's entitlement to make submissions

(1) The Minister is entitled to make a submission for consideration in relation to a matter before the FWC if:

   (a) the matter is before a Full Bench and it is in the public interest for the Minister to make a submission; or

   (b) the matter involves public sector employment.

(2) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

13. Section 597 is complemented by section 605 of the FW Act and provides:

Minister's entitlement to apply for review of a decision

(1) The Minister may apply to the FWC for a review to be conducted by the FWC of a decision made by the FWC (other than a decision of a Full Bench or an Expert Panel) if the Minister believes that the decision is contrary to the public interest.

(2) Without limiting when the FWC may conduct a review, the FWC must conduct a review of the decision if the FWC is satisfied that it is in the public interest to conduct the review.

Note: The FWC must be constituted by a Full Bench to decide whether to conduct a review, and to conduct the review (see section 614).

(3) In conducting a review:

   (a) the FWC must take such steps as it considers appropriate to ensure that each person with an interest in the review is made aware of the review; and

   (b) the Minister is entitled to make submissions for consideration in the review.

(4) Nothing in this section affects any right of appeal or any power of the FWC under section 604 or 607. A review of a decision and an appeal of the decision may be dealt with together if the FWC considers it appropriate.
14. This is the mechanism which the FW Act puts in place for the Minister to be heard in relation to his responsibilities in respect of the FW Act. As section 597 makes clear, the entitlement of the Minister to make submissions in relation to a matter before the FWC is confined to matters before a Full Bench where it is in the public interest for the Minister to make a submission; or matters involving public-sector employment. Public-sector employment is defined in sections 12 and 795 of the FW Act and does not extend to the employment by MFESB of its employees. Section 605 is again confined to hearings before a Full Bench, but allows the Minister to institute such a hearing if he can satisfy the Commission that it is appropriate to do so. It would be anomalous for the statutory preconditions for the involvement of the Minister to be circumvented through the expedient of an application for intervention under section 590.

The issues sought to be raised by the Minister and VEOHRC

15. The Minister and VEOHRC have now advised the Commission of the areas they consider need to be assessed and scrutinised.

a. The Minister wants to raise discriminatory terms, objectionable terms, the BOOT in respect of part-time employment, genuine agreement and the impact of the 2 notices of employee representational rights issued 6 or 7 months apart.

b. VEOHRC wants to be heard in respect of discriminatory terms, objectionable terms and also wants to put submissions in respect of alleged non-compliance with the NES.

These issues are not unique to the 2016 Agreement. Neither the Minister nor VEOHRC would appear to have sought to intervene in respect of the approval of other agreements where they arise.

16. To the extent that the Commission is of the view that these are substantive issues it can ask the MFESB and the UFU to address them. No further involvement of the Minister or VEOHRC is necessary or warranted.
17. Alternatively, any further involvement of the Minister or VEOHRC should be confined to the elaboration of the submissions made to date.

18. To the extent that the Minister might wish to address these issues more generally, the appropriate mechanism is for him to intervene in any appeal under section 597 or seek a review of any decision of the Commission under section 605 in due course. Any such review would be contingent upon the Minister persuading the Commission that a review was in the public interest or otherwise appropriate.

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