In the Fair Work Commission
At Melbourne

FWC Matter No: AG 2018/1278

In the Matter of an Application for Approval of an Enterprise Agreement
by the Metropolitan Fire and Emergency Services Board

Outline of Opening Submissions of the United Firefighters Union of Australia

Introduction

1. These submissions are filed by the UFU in accordance with Directions made by Gostencnik DP on 4 June 2018 (as varied on 27 June 2018) in reply to the submissions of the Minister for Small and Family Business, the Workplace and Deregulation (Minister) filed on 22 June 2018 and of the VEOHRC filed on 22 June 2018, and in support of the application for approval of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016 (Agreement).

2. On 4 June 2018, the Commission permitted the Minister to make submissions in respect of the following issues:\[1\]:

(a) Whether the Agreement is about permitted matters within the meaning of s.172(1) of the Act;
(b) Whether the Agreement contains one or more discriminatory terms within the meaning of s.195 of the Act;
(c) Whether the Agreement contains one or more objectionable terms within the meaning of s.12 of the Act; and
(d) If the Agreement contains one or more discriminatory terms, whether the Agreement passes the Better off Overall Test (BOOT).

\[1\] [2018] FWC 3220 at [2].
3. The Minister was also permitted to file evidentiary material in support of his contention that the Agreement contains discriminatory terms, and (if the issues overlap) about objectionable terms.²

4. The Commission also permitted VEOHRC to make submissions confined to the matters identified in its written submissions dated 29 May 2018.³ Those submissions are directed to the treatment of part-time employees under the Agreement, namely whether:

(a) clauses 9 and 43 of the Agreement contain discriminatory terms⁴;
(b) the agreement is compliant with the NES (s.65)⁵;
(c) the agreement permits conduct in breach of Part 3-1 (s.351).⁶

5. The issues concerning whether:

(a) the Agreement met the pre-approval steps, including those required pursuant to s.180 of the Fair Work Act 2009 (Cth) (FW Act); and
(b) there has been genuine agreement (ss.186(2)(a) and 188(c)),

are therefore not the subject of the grants of leave, and will be separately addressed.

6. These submissions address each of the topics raised by the interveners in the order they appear in the Ministers’ submissions.

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² [2018] FWC 3220 at [3].
³ [2018] FWC 3220 at [41].
⁴ From [28]; “32. The combined effect of the above parts of clauses 9 and 43 is that no part-time employee can work:
(a) on station duties; or
(b) on any part of a 10/14 roster.
33. That is discriminatory.”
⁵ From [37]; “The requirement in clause 43.3 (and its related clauses) that a part-time work arrangement can only be made with the agreement of the Union is inconsistent with s.65 of the Fair Work Act”.
⁶ From [39] (in respect of provisions within clauses 9, 43 and 44).
A. Discriminatory Terms

7. The Minister in his written outline of 22 June 2018 submitted that the Agreement should not be approved on the basis it contained discriminatory terms because:

(a) Part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances;7
(b) There is no provision for part-time FSCCs and Senior FSCCs;8
(c) The statutory declaration requirement for an application under s.65 of the FW Act is discriminatory;9
(d) Employees require UFU agreement to engage in part-time work;10
(e) There is an impost imposed on MFB for part-time employees.11

8. VEOHRC also submits that the Agreement contains discriminatory terms as it attaches conditions to the ability of part-time employees (at [31]).

A(i) Section 195 of the FW Act does not extend to indirect discrimination as alleged

9. The submissions of both the Minister and VEOHRC in respect of discriminatory terms proceed on the basis that the terms of the Agreement indirectly discriminate, and that they offend s.195 of the FW Act as that section is directed to both direct and indirect discrimination. No allegation of direct discrimination is made.

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7 From [84]; and [88]: (“The presumption against part-time on-shift employees enshrined in these provisions demonstrates a predisposition against part-time employees on the 10/14 roster or in minimum safety crews”); and [89]-[90] (“The fundamental disadvantage part-time employees suffer as a consequence of this treatment [ie, that part-time employees must perform administrative office-based duties] is the loss of opportunity to participate in firefighting operations, and any associated deprivation of job satisfaction”).

8 From [97]; and [100] (“The part-time provisions in clause 43.6.3 do not apply to FSCCs because they only apply to “operational dayworkers”. Clause 43.6.2 defines “operational dayworkers” to mean “professional firefighters who are not working on a roster referred to in 43.6.1” (and therefore necessarily excludes FSCCs, whose roster is referred to in clause 43.6.1)).

9 From [103].

10 At [108] (“A similar concern arises from clauses of the enterprise agreement which require UFU approval for part-time station-based employees;78 and the hours worked by part-time employees.79 The additional agreement and approval requirements of the UFU impose further restrictions on the availability of part-time employment”).

11 At [109] (“In addition to their pro-rata annual wage, the MFB must pay part-time employees:
(a) an insecure work allowance of 25% of the employee’s annual wage; and
(b) a special administrative duties allowance of $73.14”).
The relevant text of s.195

10. For the reasons that follow, s.195 requires the Commission to be satisfied that the Agreement does not contain a term that discriminates “against an employee covered by the agreement because of, or for reasons including” any of the employee’s characteristics as identified. That is suggestive of a requirement that an employee “covered by the agreement” be identified, and that relevant discrimination be identified by reference to the employee’s characteristics.

11. This construction is fortified by s.195(2)(a) which provides that a term of an enterprise agreement does not discriminate against an employee if the reason for the discrimination is “the inherent requirements of the particular position concerned”. The expression “the particular position concerned” is suggestive of a specific factual situation in which the conditions attaching to a known classification under an agreement disadvantage certain employees with ascertainable characteristics.

12. The evidence relied upon by the Commonwealth does not identify any employee who is discriminated against by any term in the agreement.

The text of s.195 is directed to direct discrimination only

13. Federal anti-discrimination legislation\(^\text{12}\) deals separately with direct and indirect discrimination, including by way of providing separate definitions and defences in each case.\(^\text{13}\)

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\(^{12}\) Namely, the Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); and the Age Discrimination Act 2004 (Cth). Note that s.13(1) of the Sex Discrimination Act 1984 (Cth) provides that s.14, which prohibits discrimination in employment, does not apply to a State instrumentality.

\(^{13}\) For example, see definitions in ss.5 [direct] and 6 [indirect] of the Sex Discrimination Act 1984 (Cth); ss.5(1) [direct] and 5(2) [indirect] of the Disability Discrimination Act 1992 (Cth); ss.14 [direct] and 15 [indirect] of the Age Discrimination Act 2004 (Cth), and separate defences for indirect discrimination based on reasonableness provided for in (eg) s.6(3) of the Disability Discrimination Act 1992 (Cth); s.7B of the Sex Discrimination Act 1984 (Cth); s.15(1)(b) of the Age Discrimination Act 2004 (Cth).
14. The definitions of direct discrimination in federal anti-discrimination legislation focus on how the discriminator “treats” the aggrieved person, or are based on the “reasons” or “purpose” of the discriminatory conduct.

15. By contrast, the definitions of indirect discrimination in Federal anti-discrimination legislation focus on the “effect” of a “condition or requirement” in disadvantaging an aggrieved person. The requirement or condition alleged must in each case be identified with precision.

16. However, there is nothing in the terms of s.195 which suggests that the section is directed to the “effects” of terms, or that it is concerned with “requirements or conditions”. To the contrary, the language of s.195 is in terms of purpose. This is to be contrasted with the language of s.195A which extends to terms which have the “effect” of requiring or restricting certain outcomes.

17. The scope of ‘discrimination’ referred to in s.195(1) is further illuminated by section 195(2) of the FW Act. The ‘defences’ provided for in s.195(2)(a) and (b) are based on the motivation of the discriminator. That is, they are directed to direct discrimination.

18. By contrast, the standard defence of ‘reasonableness’, which applies in respect of indirect discrimination under relevant Federal anti-discrimination legislation, is not available under the terms of s.195. This feature militates in favour of a narrow construction of s.195 limited to direct discrimination.

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14 Eg, s.5(1) of the Disability Discrimination Act 1992 (Cth); s.5(1) of the Sex Discrimination Act 1984 (Cth).

15 Sections 9, 18 and 18B of the Racial Discrimination Act 1975 (Cth).

16 Eg, s.6(1)(c) of the Disability Discrimination Act 1992 (Cth); s.5(2) of the Sex Discrimination Act 1984 (Cth); s.15(1)(c) of the Age Discrimination Act 2004 (Cth); and s.9(1) of the Racial Discrimination Act 1975 (Cth).


18 “because of, or for reasons including”.

19 “if the reason for the discrimination is”: s.195(2)(a) being an “inherent requirements” defence applicable to disability discrimination (s.21A of the Disability Discrimination Act 1992 (Cth)); and “in good faith”: s.195(2)(b)(i) which applies to religious institutions.

20 New South Wales v Amery [2006] HCA 14; (2006) 230 CLR 174 at [18] (Gleeson CJ); s.6(3) of the Disability Discrimination Act 1992 (Cth); s.7B of the Sex Discrimination Act 1984 (Cth); s.15(1)(b) of the Age Discrimination Act 2004 (Cth).
19. For example, s.7B of the *Sex Discrimination Act 1984* (Cth) provides that a person does not discriminate against another person by imposing a condition or requirement that has the disadvantaging effects if the condition, requirement or practice is “reasonable” in the circumstances.

20. A term which overtly (facially) advantages (eg) one ethnic group over another may or may not be discriminatory under the *Racial Discrimination Act 1975* (Cth). This is because the prohibition on racial discrimination in Part II of that Act does not apply to “special measures” taken for the “sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals”.

21. Similarly, s.7D of the *Sex Discrimination Act 1984* (Cth) recognises that “special measures” may be taken “for the purpose of achieving substantive equality” between people with different characteristics. Once again, this recognises that positive discrimination may not necessarily be unlawful discrimination.

22. The Commission could not, therefore, determine whether the term of an agreement was relevantly discriminatory under Federal anti-discrimination legislation without knowing what the purpose of the term was. However, even if a facially discriminatory term is identified and a purpose can be gleaned, section 195 does not recognise an “affirmative action” exception as is available under s.8 of the *Racial Discrimination Act 1975* (Cth) and s.7D of the *Sex Discrimination Act 1984* (Cth).

23. The Commission would presumably have to find affirmative action terms to be discriminatory under s.195 notwithstanding they are directed to securing adequate advancement of certain racial or ethnic groups, or the for the purpose of achieving substantive equality between groups with different characteristics referable to matters of sex. This is because, on an *expressio unius est exclusio alterius* construction, s.195 sets out the available defences, and it leaves no room for implication of other defences including “affirmative action” exceptions.

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21 Section 8 of the *Racial Discrimination Act 1975* (Cth), referencing paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.
24. It is submitted that s.195 could not have been directed to requiring a general inquiry with the result that an agreement would be rejected for terms whose purpose was to effect (eg) affirmative action, or terms which might be discriminatory but otherwise “reasonable” such as to attract the defences to indirect discrimination under relevant federal anti-discrimination legislation.\(^{22}\)

25. The language of s.195 is therefore not apt to support a construction which requires a wide-ranging assessment of the conditions attaching to all positions under an agreement against the litany of possible characteristics a hypothetical employee may possess.

26. *A fortiori*, section 195 does not give rise to a requirement for the parties or the Commission to scrutinise agreements for terms which might disparately impact on hypothetical employees with the full range of relevant characteristics unknown to the parties at the time of making the agreement.

27. As section 195 does not on its face provide for such defences, clauses such as 45A in the Agreement which are directed to achieving diversity and substantive equality will come under scrutiny on the interveners’ construction.

28. Such an outcome, it is submitted, could not have been intended. It demands a reading down of the scope of s.195 for these reasons.

*Section 195 to be understood within the context of the federal anti-discrimination regime*

29. Discrimination that would otherwise be unlawful under Federal anti-discrimination legislation may be lawful if done in compliance with an industrial instrument such as an enterprise agreement under the FW Act.\(^{23}\)

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\(^{22}\) Section 6(3) of the *Disability Discrimination Act 1992* (Cth); s.7B of the *Sex Discrimination Act 1984* (Cth); s.15(1)(b) of the *Age Discrimination Act 2004* (Cth); see also *New South Wales v Amery* [2006] HCA 14; (2006) 230 CLR 174 at [18] (Gleeson CJ).

\(^{23}\) Section 40(1)(g) of the *Sex Discrimination Act 1984* (Cth); s.47(1)(c) of the *Disability Discrimination Act 1992* (Cth); s.39(8) of the *Age Discrimination Act 2004* (Cth).
30. Section 46PW of the *Australian Human Rights Commission Act 1986* (Cth) allows a person to make a complaint to the Australian Human Rights Commission (AHRC) alleging that a person has done a discriminatory act under an industrial instrument.

31. A discriminatory act is an act that, but for being done in compliance with an industrial instrument, would be unlawful under relevant Federal anti-discrimination legislation. If it appears to the President of the AHRC that an act done under an industrial instrument is discriminatory in this way, the industrial instrument must be referred to the Fair Work Commission (FWC).²⁴

32. Upon referral and review, if the FWC considers that the agreement requires a person to do an act that would be unlawful under any relevant Federal anti-discrimination legislation²⁵, the FWC must vary the agreement so that it no longer requires the person to do an act that would be so unlawful.²⁶

33. Additionally, Division 2 of Part 1-2 of the FW Act provides that an enterprise agreement applies subject to the State anti-discrimination laws identified in s.27(1A).²⁷ An additional layer of protection exists as the rights and obligations under State anti-discrimination laws supplement the protections in the FW Act. This would typically include protection against indirect discrimination.

34. Thus there is an extensive statutory regime in place which is designed to allow scrutiny of the terms of industrial instruments, and which subjects the terms of such agreements to the definitions and defences in relevant Federal and State anti-discrimination legislation.

35. This regime militates against a construction of s.195 that would involve subjecting terms of agreements to unstructured scrutiny by the Commission, as s.195 recognises no relevant defences to facially neutral terms alleged to have discriminatory effects.

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²⁴ Section 46PW(3).
²⁵ The Acts referred to include the *Age Discrimination Act 2004* (Cth), *the Disability Discrimination Act 1992* (Cth), and the *Sex Discrimination Act 1984* (Cth).
²⁶ Section 218 of the FW Act.
²⁷ Section 29(2)(a) of the FW Act.
The structure of the FW Act militates against a broad construction of s.195

36. It cannot be assumed that the Parliament intended one particular purpose in a complex legislative scheme to be pursued at all costs and to the greatest degree possible.  

37. The Part of the FW Act in which s.195 is found is directed to facilitating agreement-making at enterprise level, whereas the Part of the FW Act in which s.351 is found is directed to providing protection from discrimination.

38. Section 351 of the FW Act appears in Part 3-1 – General Protections. The objects of Part 3-1 include the aim “to provide protection from workplace discrimination”. Section 351(1) relevantly provides that an employer “must not take adverse action against a person who is an employee, or prospective employee, of the employer because of” the various features identified in that subsection.

39. Critically, however, s.351(1) does not apply to action that is not unlawful under any anti-discrimination law which is in force in the place where the action is taken: s.351(2). “Anti-discrimination laws” include Commonwealth and State antidiscrimination legislation collocated in s.351(3) including, relevantly, the Sex Discrimination Act 1984 (Cth).

40. “Adverse action” for the purposes of s.351(1) takes its meaning from s.342 of the FW Act. Relevantly, adverse action is taken by an employer against an employee if the employer “discriminates between the employee and other employees of the employer”.

41. As Gordon J stated in *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 (10 December 2012), any allegation of adverse action requires consideration of “conduct”.

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29 Section 336(1)(c).

30 “Klein”.

31 At [104].
42. The scheme which is apparent from these provisions is one that proscribes all the forms of discrimination rendered unlawful by anti-discrimination legislation. The consequence is that conduct that falls within the defences or exceptions in anti-discrimination legislation is not ‘discrimination’ for the purposes of Part 3-1 of the FW Act.

43. In light of the scheme and objects underpinning Part 3-1 of the FW Act, it is therefore wholly unsurprising that the provisions of Part 3-1 encompass indirect discrimination.

44. However, the provisions of Part 3-1 exist in a very different statutory context to those in Part 2-4, which are concerned with agreement making. The objects of Part 2-4 include, relevantly, objects directed to facilitating good faith bargaining, and “ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay”.32

45. The approval process is intended to be a “simple, point in time assessment” of the enterprise agreement and the circumstances under which it was made.33

46. The practical consequences of the Minister’s construction of s.195 is not addressed in the submissions filed by him. However, the consequence is that the parties and the Commission itself will need to be alive to and address all indirect consequences of facially neutral terms when making and approving enterprise agreements. That would, as Hatcher VP identified, typically necessitate the calling of evidence on an agreement approval application.34 Such consequences could not have been intended by Parliament, and are inconsistent with the Objects in Part 2-4.

47. Section 195, within Part 2-4, is not concerned with “conduct”. It is concerned with any “term” of an enterprise agreement that is discriminatory. The absence of any provisions which recognise available defences to indirect discrimination (as is the case in s.351 of

32 Section 171(b)(iii).
33 Explanatory Memorandum at [155]-[160].
34 Metropolitan Fire and Emergency Services Board [2018] FWC 2441 (23 May 2018) at [22] (“it is difficult to imagine that a seriously arguable case that a provision of the Agreement is indirectly discriminatory could be advanced without adducing evidence at least going to the potential effect of the term upon the identified disadvantaged groups of employees”).
the FW Act) militates strongly against the notion that s.195 is concerned with indirect discrimination.

48. As submitted above, section 218 of the FW Act provides that the Commission must review enterprise agreements referred to it under s.46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments). Those Acts contain detailed defences in respect of indirect discrimination. Moreover, s.218 does not involve a mere review of the “terms” of the enterprise agreement. To the contrary, it is directed at agreements that “require” certain acts to be done. That is a very different question to that involved in assessing facially neutral terms for discrimination.

49. Viewed in this way, a construction of s.195 which limits its scope to addressing direct discrimination in respect of an employee covered the agreement achieves harmony with the other provisions of the FW Act which address effects in the form of ‘conduct’ and ‘acts’.  

*The legislative history of s.195 does not require a broad interpretation*

50. The Minister and the VEOHRC each make an appeal to legislative history in support of their contentions.

51. Following the amendments to the *Industrial Relations Act 1988* (Cth) in 1993, a number of Conventions and Recommendations were annexed as schedules to the legislation. The legislation provided that a principal object of the Act was “ensuring” that labour standards met Australia’s international obligations.

52. The FW Act removed the remaining Conventions from the legislation and provided for the need to “take into account” Australia’s international labour obligations in its objects.  

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36 *Industrial Relations Reform Act 1993* (Cth).

37 See ss.3(a) and 578(c) of the FW Act.
53. The meaning of any legislative phrase must be discerned by reference to the statute in which it is employed.\(^{38}\) The FW Act has very different constitutional underpinnings to the earlier iterations of the legislation. The best guide to construing legislation is to start with a consideration of the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose.\(^{39}\) Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text.\(^{40}\)

54. For the reasons submitted above, a textual and contextual analysis of s.195 leads to a construction which excludes reference to indirect discrimination.

\textit{Tracey J has decided the issue in any event}

55. The single decision which is on point in respect of the terms of s.195 is the decision of Tracey J in \textit{Shop Distributive and Allied Employees’ Association v National Retailers Association (No 2)} [2012] FCA 480 (11 May 2012) (SDA).

56. In dealing with the “discrimination point” raised in those proceedings, Tracey J noted that:

(a) The FW Act does not define the word “discriminate” or the words “discriminate against”\(^{41}\). No attempt has been made in the Act to provide an extended definition of the term “discrimination”.\(^{42}\)

(b) It would be highly unlikely that the Parliament intended that s.153 [and s.195] could be contravened by indirect discrimination. Awards typically contain many provisions that discriminate between employees. Wage rates, for example, are

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\(^{38}\) ABCC v McConnell Dowell Constructors (Aust) Pty Ltd [2012] FCAFC 93 (29 June 2012) at [50] (Flick J).


\(^{41}\) At [52].

\(^{42}\) At [55].
usually fixed by reference to criteria such as length of service and qualifications held. It is unlikely that Parliament intended that such provisions could be impugned on the ground that they indirectly discriminated on the grounds of age.43

(c) The exceptions to the general rule contained in s. 153 [and s.195] which are to be found in sub-sections (2) and (3), all cover terms which would meet the description of direct discrimination.44

57. As Tracey J identifies, the intervener’s construction of s.195 would result in wage rates fixed by reference to criteria such as length of service and qualifications being rendered discriminatory on the grounds of age because younger employees as a group would not have had the length of service, or time to obtain the requisite qualifications, in order to qualify for placement in the higher classifications which attract higher wages.45

58. Many other examples could be identified, such as redundancy provisions: see Australian Iron & Steel Pty Ltd v Banovic [1989] HCA 56; (1989) 168 CLR 165. A last in-first out clause was held to be indirectly discriminatory in Banovic based on evidence that there had been a history of gender discrimination, such that the redundancy clauses had a disparate impact. That is, the Commission could never be satisfied that any redundancy provisions were not indirectly discriminatory (without significant evidence of the employer’s employment history) notwithstanding that the terms themselves were facially neutral.

59. Tracey J’s decision is one that accords with a common-sense approach to the legislation.46 As agreements are made between employees and employers at enterprise levels, it is hardly to be anticipated that each indirect effect flowing from otherwise facially neutral terms in an enterprise agreement should be in the contemplation of the parties (typically unsophisticated in the nuances of indirect discrimination).

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43 At [56].
44 At [57].
45 At [56].
60. In circumstances where Tracey J has squarely dealt with the proper construction of the terms of the cognate provision now in question, there is no sound basis for the Commission to depart from that decision, particularly where this would lead to bizarre and unworkable outcomes.

61. *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 (“*Klein*”) was concerned with alleged objectionable terms (s.194(b)) based on adverse action (ss.194(b) and 342(1)) and the expression “discriminates between”). *SDA* was concerned with discriminatory terms (s.195) and the expression “discriminates against”. Gordon J in *Klein* declined to apply *SDA* as “[t]he decision dealt with a different provision in the FW Act” and a different expression to the one in issue before her Honour.\(^{47}\)

62. That is an entirely unsurprising result.\(^{48}\) The meaning of any particular phrase must be discerned by reference to the statute in which the phrase is employed. The duty is to construe and apply statutory language in the context in which it appears.\(^{49}\)

63. *SDA* governs the proper construction of s.195 of the FW Act.

*Conclusion on proper construction of s.195*

64. The overall scheme of the FW Act is to identify facially discriminatory terms as part of the agreement approval process to the extent that they discriminate against employees covered by the agreement.

65. However, if those terms in their operation (that is, post-approval) give rise to direct or indirectly discriminatory outcomes in the way contemplated by ss.218 and 351, then the Act provides for defences, including the defence of ‘reasonableness’.

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\(^{47}\) *Klein* at [94].

\(^{48}\) *In Waters v Public Transport Corporation* [1991] HCA 49; 173 CLR 349, Mason CJ and Gaudron J noted the differences in the expressions “discrimination between” and “discrimination against” (at 362-363).

Conversely, if the legislation is interpreted in the manner contended for by the Minister and the VEOHRC, it would mean that any term of an agreement, benign on its face, shown to have an indirectly discriminatory consequence for a statutorily protected group would be unlawful regardless of whether it fell within the statutorily prescribed defences in the relevant Federal anti-discrimination legislation. This, it is submitted, would be an incoherent, bizarre and unworkable result that could not have been contemplated.

**A(ii) The Agreement does not give rise to indirect discrimination in any event**

67. Further or alternatively, the terms of the Agreement do not give rise to any relevant indirect discrimination, as alleged.

68. The VEOHRC submits that the Agreement contains discriminatory terms as:

“The attachment of those two conditions [“exceptional circumstances”\(^{50}\) and agreement of “all the parties”\(^{51}\)] to the ability of part-time employees who wish to perform station duties or on part of a 10/14 roster is, of itself, discriminatory. The conditions do not apply to any other employees.”\(^{52}\)

69. The first observation is that the presence of any “conditions” (which is denied) apply to all employees. The extant 2010 operational staff agreement and the Modern Award prior to its variation in [2016] FWCFB 8025 provided for no part-time employment. The terms of the Agreement apply to all employees.

70. The Special Administrative Duties Roster (SADR) provided for in clause 124 of the Agreement should not be construed to permit day-work firefighters to work full-time on station such as to replace or undermine the 10/14 Roster. It has never been used in this way.

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\(^{50}\) Clauses 9.1.7 and 44.1.2.

\(^{51}\) Clause 43.3.

\(^{52}\) At [31].
71. However, subject to that qualification, there is no impediment to part-time employees from being employed on the SADR in any capacity in accordance with the terms of cl.124. Each case is to be dealt with on a “case by case basis” with nothing ruled out in limine.

72. That is, contrary to the submissions of the Minister and VEOHRC, part-time employees can perform deployable, operational roles on the SADR.

73. Moreover, the terms of the agreement do not require a test of ‘exceptional circumstances’ to be overcome by the applicant firefighter in order to access part-time employment, including operational firefighting roles.

*The proper construction of the impugned terms*

74. The Commission will hear evidence that:

(a) numbers in the MFB are essentially fixed by government;
(b) the ability to replace the loss in full-time equivalent employee numbers is affected by the lengthy and rigorous selection and training processes that are necessary for requisite skills acquisition and retention;
(c) there are extant minimum crewing requirements that govern deployment;
(d) for these reasons and for reasons of safety, service delivery and employee welfare, full-time employment must be the norm;
(e) accordingly, the MFB could not across any meaningful period of time accommodate a significant number of requests for part-time employment as they would necessarily affect the numbers of full-time equivalent firefighters available for deployment as part of the minimum crewing requirements; and
(f) it follows therefore that part-time employment is the exception, hence the language used in clauses 9, 43 and 44 of the Agreement.

75. The proper construction of the ‘part-time provisions’ in the agreement is as follows:

(a) The agreement states certain facts which reflect the nature of the service and the manner in which firefighters are deployed under existing rosters. It does not create a test for accessing part-time employment.
(b) Clause 9.1.4 means that “generally”, on-shift employees are employed full time. For the reasons set out in the witness statement of Brendan Angwin from [30]-[77], full time employment is necessarily the default position because the MFB is constrained by numbers and the inability to readily replace operational firefighters. Understood in this way, part-time work on the 10/14 Roster must be the exception, hence the use of the term ‘exceptional’. It is not a test. It reflects the reality identified in paragraph 74 above.\textsuperscript{53}

(c) Clause 9.1.5 deals with applications made under s.65 and is dealt with in clause 44. The MFB has an (unreviewable\textsuperscript{54}) right to refuse a request based on reasonable business grounds. Once again, the “general” position identified reflects the reality set out above, however the clause is at pains to not exclude any possibilities. Each case is to be dealt with on a “case by case basis”. The evidence will disclose that, due to issues such as minimum crewing numbers, it must be this way.

(d) Clause 9.1.6 provides that the default position for part-time firefighters is clause 124, namely the SADR (otherwise known as the “Day Worker” roster). Once again, this reflects the general situation that operational firefighters are engaged on the 10/14 Roster provided for in clauses 120-123.

(e) Clause 9.1.7 confirms that no possibility to work operationally and part-time is excluded as the subclause contemplates a part-time employee being engaged on the 10/14 Roster, albeit limited to the circumstances identified.

(f) Clause 43.3 provides that the UFU must agree where an employee is to be engaged on a part-time basis. This does not condition the right of the employee to apply under s.65 of the FW Act.

\textsuperscript{53} See witness statement of David Bruce at [61],[66]; witness statement of Janette Pearce at [107]; witness statement of Brendan Angwin at [76]. A requirement that employees who sought to access flexible work arrangements must remain fully operational on the 10/14 roster would fail to recognize the typical circumstances in which employees seek such flexibility (eg, pregnancy, recent childbirth, and transitioning out of the workforce due to age or injury). That is, the SADR is available to provide some respite from the rigours of the 10/14 Roster.\textsuperscript{54} Section 44(2) of the FW Act.
(g) Clause 43.6.1 reflects the general position identified in 9.1.4 as described above, which reflects the reality of the situation given the limited flexibility in respect of overall firefighter numbers.

(h) Clause 43.6.2 reflects the position identified in 9.1.6 as described above. That is, the default position for part-time employees is clause 124, but no possibility is excluded as each application is dealt with on a case by case basis.

(i) Clause 43.6.3 reflects the position that people who seek to work part time might do so because they have issues with working full-time in a deployable role, for example, a pregnant firefighter, or a person managing an injury. If the part-time worker wants to remain on the 10/14 Roster, that possibility is not precluded: clause 9.1.7.

(j) Clause 44.1 deals with employees’ s.65 rights and reflects the position in clause 9.1.5. as described above. That is, the MFB has an unreviewable55 right to refuse a request based on reasonable business grounds, and that while a “general” position is identified, each case is to be dealt with on a “case by case basis” by the MFB.

(k) The SADR was first introduced to provide an alternative roster for operational employees to undertake necessary roles that were not on station (for example, training, fire safety and other specialist and technical roles). An allowance was attached to the roster so as to compensate for people coming off the 10/14 Roster to fill such roles. However, over time the roster has been used to accommodate people transitioning in and out of the workforce (eg) in circumstances of injury and the like where there is an inability to perform full-time deployment roles.

(l) Clause 124 of the Agreement deals with the SADR. Firefighters on this roster are operational firefighters notwithstanding that they perform specialist and technical roles. That is, they wear the uniform and need to maintain their skills to be

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55 Section 44(2) of the FW Act.
available for deployment. Other than these types of roles, there may be reasons based on inherent ability to perform the role of an operational firefighter why a person would be assigned on the SADR (eg, where a person is working on light duties because of injury).

(m) The text of clause 124 does not therefore prevent a part-time firefighter from performing operational duties, including “on a firetruck”, notwithstanding that this is not the core role of a firefighter on the SADR.

76. The premise of the interveners’ submissions (ie, that “part-time employees must perform administrative office-based duties”, and that they suffer “the loss of opportunity to participate in firefighting operations”) is therefore fundamentally incorrect.56

77. The principles governing the interpretation of enterprise agreements were addressed in *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241.57 Madgwick J in *Kucks v CSR Ltd* [1996] IRCA 166; (1996) 66 IR 182 stated (at 184):

> “It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon.”

78. Thus meanings which avoid inconvenience or injustice may reasonably be strained for. Another relevant factor is the intention of the parties: *Shop Distributive and Allied Employees’ Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [14]; *Kucks* at 184.

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56 See witness statement of Brendan Angwin from [30]-[52].

57 At [96] (Kirby J), [129] (Callinan J); see also *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426 at [57] (French J). *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245 at [74] (Bromberg J).
79. In circumstances where the Agreement can be reasonably construed such that there are no relevant barriers to performing any type of work as a part-time employee, no relevant discrimination can be said to be occasioned by the regime of part-time work created under the terms of the Agreement.

**A(iii) The clauses impugned as discriminatory are not objectionable terms**

80. The Minister also submits that the clauses analysed as discriminatory terms are also objectionable terms (from [118]) as they require the MFB, or permit the MFB in the requisite sense, to contravene of s.351 of the FW Act as they:

(a) prohibit part-time employees from performing operational firefighter duties, save in exceptional circumstances;

(b) refrain from promoting part-time employees due to insufficient operational firefighting experience and, consequently, hold back other benefits only available to employees of certain classifications;

(c) prohibit part-time employees from holding the role of FSCC or Senior FSCC;

(d) further restrict part-time opportunities for employees seeking part-time work by insisting upon a statutory declaration evidencing any entitlement under s.65 of the FW Act and enterprise agreement, and UFU approval.

81. It is asserted in paragraph 122 of the Minister’s Submission that the terms are objectionable because it is evident from the terms themselves that the adverse action required or permitted is taken “because of” sex or family or carer’s responsibilities.

82. This is manifestly not so. The clauses in question are clearly capable of operation in accordance with their terms without considerations of sex or family or carer’s responsibilities playing any role.

83. The clauses in question do not “require or permit” a contravention of s.351 anymore than does a general termination clause.

84. The question of whether a clause requires or permits a contravention of s.351 cannot be addressed without the requirement that a contravention be undertaken for a
proscribed reason. This requirement cannot simply be swept aside as the Minister seeks
to do in paragraph 121 or by reference to the circular reasoning in paragraphs 121-122
of the Minister’s submission.  

85. Gordon J in Klein determined that “permit” in the definition of “objectionable term”
has been construed to mean “authorise”, rather than “afford the possibility”: Australian
(AIG) at [18] and [66].

86. The Full Court in AIG stated (at [89]):

“There is nothing in cl 16.6 which dictates conduct of ADJ which would be in
contravention to s 350. The employer’s potential conduct is entirely speculative. ADJ
should be assumed for present purposes to take conduct that does not contravene s 350.
This conduct may occur in any number of ways. The clause is capable of being given a
lawful operation. As it is capable of being given lawful operation, the argument of AIG
must fail.”

87. The impugned clauses are capable of lawful operation. Accordingly, they cannot be
objectionable.

A(iv) The issue of FSCCs

88. The Minister submits that the Agreement makes no provision for FSCCs and Senior
FSCC to access the part-time provisions (at [98]-[100]).

89. This submission should be rejected. The Agreement discloses an intention that the part
time provisions apply to FSCCs.

90. Clause 152.1 provides that FSCC will work in accordance with inter alia clause 43. IN
turn, clause 43.3 makes provisions for employment of all employees, including FSCCs.
B. *The Agreement does not pass the BOOT*

91. The Minister submits that the Agreement does not pass the BOOT (from [144]) on the basis that the part-time employees are overall worse off under the enterprise agreement because the part-time provisions under the enterprise agreement are less beneficial than the part-time provisions under the Award. This is said to result because under the enterprise agreement:

(a) part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances;
(b) part-time employment of FSCCs and Senior FSCCs is not permitted;
(c) additional UFU agreement and approval requirements of the UFU are imposed, further restricting the availability of part-time employment;
(d) the enterprise agreement dispenses with the protections afforded by the Award in respect of part-time employment.

92. The BOOT requires the identification of terms which are more beneficial for an employee, terms which are less beneficial, and then an overall assessment of whether an employee would be better off under the agreement.\(^{60}\) Where there is a comparison of non-monetary terms, there will be difficulty in assigning any monetary value to the entitlement. In those circumstances, the Commission “must simply do its best and make what amounts to an impressionistic assessment”.\(^{61}\)

93. Despite the impressionistic nature of the BOOT assessment, it is not clear how these matters translate to monetary benefits given an application for part-time employment necessarily countenances a reduction in pay.

94. The Full Bench in the Modern Award decision\(^{62}\), stated that “the variation of the Fire Fighting Award in the manner proposed by the Victorian Fire Services will not give

\(^{60}\) *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53; (2017) 350 ALR 381; 92 ALJR 33; 270 IR 459 at [92], [99]; *Armacell Australia Pty Ltd* [2010] FWAFB 9985 at [41].

\(^{61}\) *BGC Contracting Pty Ltd* [2018] FWC 1466 (12 June 2018) at [231]-[233] (Gostencnik DP).

\(^{62}\) 4 yearly review of modern awards- Fire Fighting Industry Award 2010 [2016] FWCFB 8025 at [198]-[201].
rise to an unfettered right to introduce part-time work in the public sector fire services” (at [201]).

95. The Full Bench further noted that “there are legitimate differences of opinion about where part-time work arrangements might be best utilised to ensure the highest quality of service delivery to the community; safety to employees; and fairness to employees that are unable to work 42 hours a week on the rotating 10/14 roster but wish to remain operational firefighters. These differences of opinion are properly matters for consultation” (at [200]).

96. This was consistent with the position of the Victorian Fire Services' witnesses that “there are likely to be differing opinions about how part-time work might be implemented, but that any operational challenges could be addressed during a consultation process with the relevant employees and the UFUA”. That is, “the precise form” of part-time work would be the subject of consultation (at [199]). That consultation has now occurred, and subject to the any further consultation under clause 45A, the position of the parties is reflected in the Agreement.

97. The notion that there would be an unfettered right to part-time employment was never in contemplation by either the Full Bench or the MFB. Yet the Minister’s submissions turn on the putative difference between the access to part-time employment under the Modern Award as compared to access under the Agreement.

98. What has been agreed necessarily required the parties to balance the matters identified as relevant by the Full Bench, namely to "ensure the highest quality of service delivery to the community; safety to employees; and fairness to employees that are unable to work 42 hours a week on the rotating 10/14 roster but wish to remain operational firefighters". The terms of the Agreement must be construed in that context.

99. For the reasons set out above, there is no reason to assess the part-time provisions in the Agreement as more disadvantageous than those in the Agreement. For example, the Modern Award terms relating to part-time employees insofar as they apply to trainee
firefighters are arguably non-applicable and therefore inferior to their rights under the Agreement. 63

100. Further, there appears to be no attempt made to determine whether each award covered employee (and each prospective award covered employee) for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee: s.193. Many terms and conditions in the Agreement are superior to those in the Modern Award. 64

101. For all of the above reasons, the Minister’s submissions with respect to the BOOT should be rejected.

C. Objectionable Terms

102. The Minister submits the Agreement contains objectionable terms (from [170]) on the grounds of union membership. The Minster submits the impugned clauses fall into three broad categories – namely, clauses that require or permit or have the effect of requiring or permitting the MFB to discriminate against employees based on their union non-membership by:

(a) excluding MFB employees who are non-union members from direct engagement with the MFB in certain forums (for example, committees and working groups) where the constituents include MFB employees who are UFU members65;

(b) giving preference to union members in such forums, by engaging only with their representatives (UFU representatives) and not with any representative of the non-

63 Four yearly review of modern awards [2016] FWCFB 8025 (15 November 2016) at [215] (“In view of the evidence the terms of the variation to the Fire Fighting Award will be such that in the public sector fire services part-time employment will only be available to employees employed at or above the qualified firefighter classification”).

64 See, for example, in respect of rates of pay, leave entitlements and allowances: see (eg) clauses 43.5 (loading); clause 85.8.1 (travel allowance); and clause 101.1.1 (annual leave).

65 Reference is made to the (i) Transfer Grievance Committee – clause 126.12; (ii) Diversity Working Party – clause 45A; (iii) Special Operations Working Party – clause 58.3; (iv) Absenteeism Working Party - clause 116.1; (v) Rostering Committee – clause 126.2.3.
union workforce, regardless of whether any of the UFU representatives are MFB employees\(^\text{66}\); and
(c) conferring a veto power on the UFU in respect of decisions which impact employees, including non-union members.\(^\text{67}\)

103. The crux of the Minister’s argument appears at [173] – “It could not reasonably be expected that the UFU would appoint a non-UFU member as its employee representative on any of the above bodies.”

104. The term “permit” in the definition of “objectionable term” has been construed to mean “authorise”, rather than “afford the possibility”: *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; (2012) 205 FCR 339 at [18] and [66].\(^\text{68}\)

105. Gordon J in *Klein* held that clauses that stipulate that the UFU can select members of the Consultative Committee do not require or permit discrimination between UFU members and non-UFU members because nothing in those clauses required union members to be selected on the committees.\(^\text{69}\)

106. Gordon J in *Klein* considered the consultation regime in the 2010 MFB Agreement, being the predecessor to the present enterprise agreement which is the subject of the application for approval.

107. The applicant in *Klein*, an MFB employee, submitted that the consultation clauses in the agreement precluded the inclusion of non-UFU members in the consultation process and hence infringed s.346 of the FW Act (the adverse action claim).\(^\text{70}\) Klein submitted the employer engaged in adverse action because:

(a) the Employer made the agreement containing terms that discriminated against him as a non-union member\(^\text{71}\); and

\(^{66}\) Reference is made to (i) Dispute Resolution Officer – clause 16A; and (ii) Disputes Panel – clause 50.

\(^{67}\) Reference is made to Clause 16 – Consultation.

\(^{68}\) *Klein* at [221].

\(^{69}\) *Klein* at [222]-[223].

\(^{70}\) *Klein* at [156],[195],[203].

\(^{71}\) *Klein* at [104].
(b) because of “specific events” including the exclusion from negotiation of the 2010 Agreement.\textsuperscript{72}

108. Section 346 of the FW Act relevantly provides that a person “must not take adverse action against another person” on the grounds set out therein. Item 1(d) of s.342(1) provides that adverse action is taken by an employer against an employee if the employer relevantly “discriminates between” the employee and other employees of the employer. Gordon J construed the expression “discriminates between” in item 1(d) of section 342 of the FW Act to include indirect discrimination.\textsuperscript{73}

109. Notwithstanding this construction of s.342 of the FW Act, Gordon J did not then proceed to deal with indirect discrimination in order to resolve this ground of the application.\textsuperscript{74} Her Honour set out the steps required under the FW Act for agreement approval (from [107]-[118]) and then queried:

“Could the MFESB’s agreement to the Consultative Provisions constitute adverse action? The answer is no. First, the scheme of the FW Act dealing with enterprise agreements provides a procedure for enterprise agreements to be negotiated and then approved”.\textsuperscript{75}

110. That is, the action involved in taking the steps as prescribed by the FW Act to make an agreement involved a vote by employees and was not action by the employer. Her Honour reasoned that, “[a]bsent the approval by the employees covered by the agreement, and the subsequent FWA approval, the act of the MFESB agreeing to the Consultative Provisions had no impact on Mr Klein”.\textsuperscript{76}

\textsuperscript{72} Klein at [105]; In this case there is no allegation of conduct (“specific events”) which amounts to adverse action.

\textsuperscript{73} Klein at [102]: (“There is nothing in the language of Pt 3-1 of the FW Act that would support limiting “discrimination” for the purposes of Item 1(d) of the definition of “adverse action” in s 342 so as to exclude “facially neutral” or indirect discrimination of that kind”).

\textsuperscript{74} As recognised by the Full Court in United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1; 228 FCR 497 at [229] (Perram, Robertson & Griffiths JJ).

\textsuperscript{75} Klein at [119].

\textsuperscript{76} at [122].
111. In this case, the Form F17 identifies that, of 1999 employees, 1768 cast a valid vote and 1759 voted in favour. Such “conduct” could not be discriminatory on the authority of Klein.77

112. Klein also submitted that the consultation provisions in the agreement were objectionable terms for the purposes of section 356 of the FW Act, as that term is defined in s.12, because they required or permitted the employer to contravene Pt 3-1 of the FW Act by excluding non-union members from the consultative processes in the agreement.78

113. Gordon J did not apply her reasoning in respect of indirect discrimination to this aspect of her decision. Gordon J determined this ground on the basis that “permit” in the definition of “objectionable term” has been construed to mean “authorise”, rather than “afford the possibility”: Australian Industry Group v Fair Work Australia [2012] FCAFC 108; (2012) 205 FCR 339 at [18] and [66].79

114. Gordon J held that clauses that stipulated that the UFU could select members of the Consultative Committee did not require or permit discrimination between UFU members and non-UFU members because nothing in those clauses required union members to be selected on the committees.80

115. The clauses identified in the Minister’s submissions are in relevantly similar terms to those under consideration in Klein. Klein has been applied in subsequent Federal Court proceedings in respect of clauses in similar terms to those now impugned and held not to be objectionable.81

77 Form F17 at [2.10]; Alternatively, Gordon J reasoned that the impugned provisions existed in the same or similar form in earlier iterations of the enterprise agreement. The impugned committees therefore already existed as authorised by the provisions of the earlier agreements. That same reasoning applies to this case: section 342(3) of the FW Act; cf Construction, Forestry, Mining & Energy Union v Rio Tinto Coal Australia Pty Ltd [2014] FCA 462; 232 FCR 560 (Flick J) at [84]; Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 2) [2017] FCA 1046 (Wigney J) at [291].

78 Klein at [216], [218].

79 Klein at [221].

80 Klein at [222]-[223].

81 Murphy J in United Firefighters Union of Australia v Country Fire Authority [2014] FCA 17 (31 January 2014) followed (at [163]-[165]) very similar reasoning applied in Klein at [222]. An Appeal to the Full Court from Murphy J’s decision was rejected in respect of this aspect of the case: [2015] FCAFC 1; 228 FCR 497 at [230] (Perram, Robertson & Griffiths JJ).
116. *Klein* has been applied by a Full Bench of the Commission in *Appeal by United Firefighters' Union of Australia* [2014] FWCFB 410 (13 February 2014). The Full Bench there held that provisions in relevantly indistinguishable terms to the consultative provisions in the Agreement were not objectionable.\(^{82}\)

117. The Minister impugns the Agreement clauses by raising hypothetical possibilities This is not the proper approach to determining whether the clauses require or permit contraventions of Part 3-1. As the clauses are capable of being given a lawful operation, the Minister’s arguments must fail.\(^{83}\)

**D. Non-Permitted Matters**

118. The Minister submits that the Agreement contains non-permitted matters (from [192]) as the ‘veto-power’ clauses (namely clauses identified in paragraph 205 that require the agreement of the UFU) trespass into matters of managerial prerogative: *Re Cram* (1987) 163 CLR 117 at [24]-[25].

119. The error in the Minister’s submissions is to ask the wrong question. The task of the Commission is not to characterise a clause as falling within managerial prerogative. It is to characterise the clause as a relevant matter pertaining for the purposes of s.172(1).

120. In *Schefenacker Vision Systems Australia Limited, AWU, AMWU Certified Agreement 2004*\(^{84}\) it was held that the task of the Commission:

> “is to characterise each of the provisions in question in these proceedings by reference to the cases concerning the definition of an industrial dispute. The cases show that the question to be asked is whether the provision is one which pertains to the relationship of employers and employees.”

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\(^{82}\) At [32], [35].


\(^{84}\) [2004] AIRC 1064 at [25].
121. An examination of the individual provisions identified by the Minister in paragraph 205 will show that, considered individually as required, it could not be seriously contended that their subject matter was other than a matter pertaining to the relationship of employer and employee. Indeed, the heavily qualified submission in paragraphs 212 and 215 of the Minister’s submission do not actively contend to the contrary.

122. It could not be sensibly contended, for example, that clauses dealing with proposed changes affecting employees’ terms and conditions of employment, or terms relating to the determination of employment entitlements, work functions and roles and training requirements, do not pertain to the relationship of employer and employee.

123. No doubt cognisant of the problem he faced with this submission, the Minister then asserts at paragraph 207-208 that it is “the combined effect of these provisions” which should be taken into account in order to conclude that they deny an effective role of the MFB as an employer, and are therefore contrary to s.172.

124. Unsurprisingly, the Minister can point to no authority to support the far-reaching conclusion that any one of the clauses identified by him when considered individually (as required) fails the s.172 test merely because of the inclusion of a requirement for agreement of the industrial parties in relation to the subject matter.

125. The same is true in respect of the second criticism of the form of the agreement identified by the Minister in paragraph 206 – namely, the requirement for the MFB to provide information to the UFU in relation to the matters in the identified clauses.

126. The notion that the requirement for the provision of information in relation to matters which otherwise pertain has the effect of turning a term into a non-permitted matter is not sustainable.

85 Paragraph 205(b) of the Minister’s submissions.

86 Paragraph 205(c) of the Minister’s submissions.
127. The Explanatory Memorandum to the *Fair Work Bill 2009 (Cth)* specifically identifies as an example of terms intended to fall within the scope of permitted matters for the purpose of paragraph 172(1)(b):

“Terms that require an employer to provide information to a Union about employees who are covered by an Enterprise Agreement or information about a Union to an employee.”

128. It is not possible to conclude, by reference to any of the individual terms considered separately that their subject matter is control of the employer’s business. Neither is it possible to avoid the necessity of considering the individual clauses by appealing to “the true subject matter of the combined effect of” the clauses as attempted in paragraph 216 of the submission.

129. The subject matters of the impugned clauses are matters pertaining. There is no warrant to treat clauses that pertain to the employment relationship as non-pertaining because of some arbitrary combination of provisions that is said to make inroads into what was traditionally an area reserved to management.

130. In any event, this is not a matter that would affect approval of the Agreement.

**E. No Genuine Agreement**

131. The Minister contends that there was no genuine agreement by the parties (from [127]).

132. This ground is advanced on the basis that “The significance and sheer number of provisions that are not about permitted matters, have the effect that the relevant employees have not genuinely agreed to the enterprise agreement”.

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87 Explanatory Memorandum at paragraph 676.

88 Paragraph 209 of the Minister’s submission.

89 Section 253 of the FW Act.
133. No leave was granted to the Minister in respect of this ground. The submissions should be rejected.

**Conclusion**

134. The main attack by the Minister and the VEOHRC in respect of discrimination is leveled against clauses 9, 43, 44 and 123 of the Agreement.

135. For the reasons submitted above, the impugned clauses do not create any relevant obstacles that discriminate against a specific group of employees. Properly construed, the agreement contemplates any form of operational work for part-time employees as agreed on a case by case basis.

136. Such provisions should be construed on the basis that they are capable of lawful operation, and not on hypothetical grounds.90

137. In any event, s.195 of the FW Act does not address indirect discrimination.91

138. For all of these reasons, the Commission should conclude that the matters raised by the Minister and VEOHRC do not preclude the Commission from reaching the requisite state of satisfaction necessary to approve the Agreement, as augmented by any further submissions and evidence addressing the pre-approval steps (not dealt with in this submission).

R.C. KENZIE QC

T.J. DIXON

Counsel for the Plaintiff

State Chambers

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91 Shop, Distributive and Allied Employees Association v National Retail Association (No 2) [2012] FCA 480 (Tracey J).