



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON**

B2023/771

s.234 - Application for an intractable bargaining declaration

United Firefighters' Union of Australia

and

Fire Rescue Victoria t/a FRV

Melbourne

10.00 AM, TUESDAY, 26 SEPTEMBER 2023

Continued from 9/08/2023

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Borenstein and Mr Friend and Mr Dixon appear for the applicant?

PN2

MR W FRIEND: Correct.

PN3

JUSTICE HATCHER: Ms Sweet and Mr Garozzo, you appear for the Fire Rescue Victoria?

PN4

MS R SWEET: Yes, if it please the Commission.

PN5

JUSTICE HATCHER: And Mr O'Grady and Ms Leoncio, you appear for the Minister?

PN6

MR C O'GRADY: Yes.

PN7

JUSTICE HATCHER: All right. I see there is no objection to anybody being granted permission for legal representation. That permission is granted. Again, I assume there is no objection to the appearance of the Minister in the proceedings?

PN8

MR FRIEND: There is opposition to the Minister being permitted to make submissions.

PN9

JUSTICE HATCHER: There is?

PN10

MR FRIEND: Yes, yes.

PN11

JUSTICE HATCHER: All right.

PN12

MR FRIEND: Yes, he filed submissions, your Honour, last week, some response submissions. Have they made their way to the members of the Commission?

PN13

JUSTICE HATCHER: I think so. Do you want to deal with that point first?

PN14

MR FRIEND: Yes.

PN15

JUSTICE HATCHER: All right then, go ahead.

PN16

MR FRIEND: Thank you. I do need to ask if you've got a copy of those response submissions.

PN17

JUSTICE HATCHER: Let me have a look.

PN18

MR FRIEND: 21 September, they were filed.

PN19

JUSTICE HATCHER: I see, yes. Yes, all right. Go ahead, Mr Friend.

PN20

MR FRIEND: You have those. There was also a statement of Ms Campeniaro(?) filed on that day, a second statement.

PN21

JUSTICE HATCHER: Yes.

PN22

MR FRIEND: Thank you. The points we make are these. Simply, there is no intervention under the Fair Work Act that the Commission can hear from whoever it wishes to, to assist it exercising its function. It is different from intervention because it turns on the needs of the Commission rather than the interests of the party.

PN23

And it might be contrasted with section 101 of the workplace Relations Act which dealt with intervention in more traditional terms. We accept that section 590 gives the Commission the power to allow the Minister to make submissions. But the focus of the exercise should be on whether anything the Minister might add would be of use to the Full Bench in reaching its conclusions.

PN24

The Minister's submissions are virtually identical to those of the FRV, and predominantly, simply recite facts, facts which apart from what you make of them which is in dispute, are generally not in dispute. So, in those circumstances we submit that anything the Minister can add will be of doubtful relevance or use to the Full Bench.

PN25

We do note in those reply submissions, however, that often the Commission approaches these issues in the same way that a court approaches them, a request for intervention. The Minister puts her case on the basis that she is responsible for Emergency Services of Victoria and that FRV requires her authorisation to put any pay offers to the union. We submit that that doesn't take the matter very far.

PN26

We know from FRV's submissions from what it says that it regards itself as bound by the government wages policy. We don't need the Minister here to tell the Full

Bench that. If I can ask you to go to the response submissions and turn to paragraph 5 we've set out there the basis on which we oppose the Minister's application to be heard. Firstly - - -

PN27

JUSTICE HATCHER: But does the Minister making submissions in the matter in any way operate adversely to your client's interests? I'm struggling to understand what the practical import of this is.

PN28

MR FRIEND: The practical import of this is that we've got to listen to the same twice, and why should it happen.

PN29

JUSTICE HATCHER: I'm not sure we'll be listening to anything much, since you all seem to be of the same position, with respect, except for the issue of the - - -

PN30

MR FRIEND: Post declaration negotiation period.

PN31

JUSTICE HATCHER: Post declaration negotiation period.

PN32

MR FRIEND: Yes. That's so, although I understood the Minister's application to be for the matter generally, not just today.

PN33

JUSTICE HATCHER: No, I think the parties should proceed on the basis that we're only dealing with this application and there's no reason to assume that the same Full Bench will be hearing the arbitration in the event that we determine to issue a declaration.

PN34

MR FRIEND: Yes.

PN35

JUSTICE HATCHER: So, that can be dealt with separately if and when that situation arises.

PN36

MR FRIEND: Your Honour, our secondary position was that the Minister shouldn't be allowed to say anything other than things that have not been put by FRV. That would be the traditional way in which these things are dealt with in the courts. We've made reference in the submissions to *Village Roadshow v iiNet* where the High Court sets out these principles, and the references are there in the submissions.

PN37

JUSTICE HATCHER: So, in answer to my question about adversely affected your client's interests the only thing you've raised is potential boredom and irritation at hearing the same thing twice, is that it?

PN38

MR FRIEND: Your Honour, that could be put in relation to any question of intervention. If the Commission is going to let everyone in whenever they come along and say they want to say something even if they're only going to say the same thing it's not consistent with the principal. That's what we put. That presumably is the way you'd characterise what the High Court said in *Village Roadshow v iiNet*. That's all I need to say on the question of the Minister making submissions at this hearing.

PN39

JUSTICE HATCHER: All right, thank you. Yes, thank you,

PN40

Mr Friend. We hear what you say but we will allow the Minister to make the foreshadowed submissions to the Commission. I should emphasise that having regard to the significant degree of common ground between the parties appearing at the Bar table, we don't think that there'll be any necessity to repeat submissions that have been already made by the parties.

PN41

MR FRIEND: Thank you, your Honour.

PN42

JUSTICE HATCHER: All right.

PN43

MR FRIEND: Can I move onto the next issue which is the intractable bargaining declaration. I would propose to deal with that very quickly, simply on the basis that we accept that it's a decision for the members of the Full Bench even though the parties all come before you saying that one should be made. We have set out in our primary submissions why it should be made.

PN44

JUSTICE HATCHER: Can we start off by marking the evidence you rely upon?

PN45

MR FRIEND: Yes. The evidence we rely on is the statement of Laura Campeniario of 11 August, the statement of Peter Marshall - - -

PN46

JUSTICE HATCHER: Just slow down. So, the statement of Laura Campeniario dated 11 August 2023 will be exhibit 1.

**EXHIBIT #1 STATEMENT OF LAURA CAMPENIARIO DATED
11/08/2023**

PN47

MR FRIEND: There's a statement by Mr Peter Marshall, also of 11 August.

PN48

JUSTICE HATCHER: Hold on just a moment. All right, the statement of Peter James Marshall dated 11 August 2023 will be marked exhibit 2.

EXHIBIT #2 STATEMENT OF PETER JAMES MARSHALL DATED 11/08/2023

PN49

MR FRIEND: There's going to be a statement of James Kafalis(?), also of 11 August.

PN50

JUSTICE HATCHER: The statement of James Kafalis dated 11 August 2023 will be exhibit 3.

EXHIBIT #3 STATEMENT OF JAMES KAFALIS

PN51

MR FRIEND: There is a second statement of Ms Campeniario dated 21 September.

PN52

JUSTICE HATCHER: What was that date?

PN53

MR FRIEND: 21 September.

PN54

JUSTICE HATCHER: The second witness statement of Laura Campeniario dated 21 September 2023 will be exhibit 4.

EXHIBIT #4 SECOND WITNESS STATEMENT OF LAURA CAMPENIARO DATED 21/09/2023

PN55

MR FRIEND: FRV have a witness statement too, your Honour.

PN56

JUSTICE HATCHER: Yes. Ms Sweet, do you tender that statement?

PN57

MS SWEET: Yes, thank you, your Honour. That's one statement of Jo Crabtree and it's dated 5 September 2023.

PN58

I tender that.

PN59

JUSTICE HATCHER: The statement of Jo Crabtree dated 5 September 2023 will be exhibit 5.

EXHIBIT #5 STATEMENT OF JO CRABTREE DATED 05/09/2023

PN60

MS SWEET: If the Commission pleases.

PN61

JUSTICE HATCHER: Yes, Mr Friend?

PN62

MR FRIEND: That's all the evidence (indistinct). So, the first question is whether there should be a declaration. As I've said, I don't want to trouble the Members of the Full Bench too much with the facts. They are set out in the submissions that we've made and filed in August. We've had 76 in-person meetings, 16 conciliation conferences before the Commission, a position where, to put it in neutral terms, everything but wages and allowances appear to be agreed between the parties.

PN63

I got a glance of the draft agreement which was used as a working document in which matters that were resolved were shaded in green that visually shows what this looks like. That's exhibit 3 to Ms Campeniaro's first statement LC3 and the Commission has that. Page 638.

PN64

JUSTICE HATCHER: Yes.

PN65

MR FRIEND: The easiest way to see this, you'll see that what's shaded in green is agreed and what's yellow is not agreed, and this is a document that was prepared and agreed by both parties, and just to look through the table of contents you will see that very little is shaded in yellow, all to do with wage rates and some of the allowances. Now during the course - - -

PN66

JUSTICE HATCHER: So, when was that prepared?

PN67

MR FRIEND: That was prepared in June, I think.

PN68

JUSTICE HATCHER: June.

PN69

MR FRIEND: June. June 14 of this year. It's paragraph 28 of Ms Campeniaro's statement – of the submissions, I'm sorry. So, the 13th and 14th is Ms Campeniaro's statement, I'm told. Now, after the formation of FRV, and the Commissioner's might understand that the FRV resulted from the amalgamation of the old Metropolitan Fire & Emergency Services Board and the Country Fire Authority, and with respect of professional firefighters.

PN70

But there's obviously a lot of duplication in relation to the way the two organisations were conducted, and the union and the employer sat down and had negotiations and reached agreement on a number of things that were called, 'efficiencies.' And this is dealt with at 33 and following of Ms Campeniaro's first statement.

PN71

Those efficiencies have been valued by the parties and the union has a higher valuation than the FRV, as one would expect. But FRV puts the valuation at 117 million dollars. The union and RFV always operated in negotiations on the assumption that that would flow through to employees. And can I take you to the Crabtree statement at attachment 11.

PN72

JUSTICE HATCHER: Can I have the PDF page number?

PN73

MR FRIEND: Yes, I'm just turning it up, your Honour. It doesn't seem to be paginated on my copy.

PN74

JUSTICE HATCHER: Yes.

PN75

MR FRIEND: 99, perhaps would do it.

PN76

JUSTICE HATCHER: This is a letter dated 3 March?

PN77

MR FRIEND: Yes, that's it. That's a letter from Commissioner Block of FRV to the Minister. And you'll see in the fourth paragraph down he says:

PN78

In bargaining to replace the EA FRV has represented to the UFU other employed bargaining representatives to the Fair Work Commission that a proposed settlement offer regarding the replacement EA made under the 2019 wages policy which was consistent with advice to the government include pillar 3 considerations.

PN79

Then if we turn to the next page under the February position, so he's saying that there are going to be payments under pillar 3, it will become apparent that that's in respect of efficiencies. He says:

PN80

The February position represents a significant change to FRV's position of bargaining. FRV has said that agreed efficiencies could be used to fund additional employee benefits in the replacement agreement consistent with the 2019 wages police.

PN81

The February position is significantly less beneficial to employees than the 2019 wages policy because it excludes additional pillar 3 measures. This exposes FRV to allegations of capricious or unfair conduct contrary to good faith bargaining requirements of the Fair Work Act.

PN82

The February position undermines, it is contrary to FRV's position in the efficiencies allowance dispute. FRV's position in that matter is that bargaining in pillar 3 or equivalent are the appropriate mechanisms for which monetary savings arising from the agreed efficiencies could be shared with operational employees.

PN83

The February position does not provide for any additional payment under pillar 3, or otherwise engage or address the matters the subject of the efficiencies allowance dispute. Consequently, removal of those matters from bargaining would legitimise the UFU's agitation for an efficiencies allowance and would undermine the basis of the FRV's objection to that outcome.

PN84

Now, can I just explain that a little bit. One of the things that the union did after there was no progress in the bargaining in respect of wages and allowances and these efficiencies was to bring a claim in the Commission under an existing enterprise agreement for an allowance to be called an efficiency allowance.

PN85

That proceeded some way and then the Minister intervened and as a result of the Minister's intervention and submissions made and some comments by Commissioner Wilson, it was determined and the UFU agreed with this to have the question of the efficiencies dealt with in the bargaining. And that was the position of all parties. But we then find that in March, and we didn't know anything about this letter at the time – the first time we saw this letter was when it was filed as part of Ms Crabtree's statement, although it did become sort of apparent later on that the efficiencies couldn't be paid under the existing wages policy – that money became unavailable. So, the distance between the parties is, we would say, unbridgeable.

PN86

JUSTICE HATCHER: I'm going to stop there because your client's belief was that it was negotiating efficiencies on the basis that it would receive some return by way of an efficiencies allowance?

PN87

MR FRIEND: Or in the enterprise agreement.

PN88

JUSTICE HATCHER: In the agreement?

PN89

MR FRIEND: Yes.

PN90

JUSTICE HATCHER: But does that mean that the base wages were to be adjusted in accordance with the government's wages policy? Or was that another agreement, not - - -

PN91

MR FRIEND: It hadn't been determined how it will be done. It probably would have been under pillar 3 which is not a wage adjustment, it's a different type of payment. But that was the understanding. And it wasn't just my client's understanding, as you can see from that letter. It was what FRV represented to the UFU all along. And then the Minister has said you can't do it.

PN92

JUSTICE HATCHER: And then the draft agreement you took us to earlier, insofar as all the parts that are marked out in green, does that include changes which take into account what you say are the agreed efficiencies?

PN93

MR FRIEND: Yes, there are some. Some of the things are not part of the agreement but some of the things are changes which include some of those efficiencies.

PN94

VICE PRESIDENT ASBURY: The efficiencies started to be negotiated under the interim agreement? That's the case, isn't it?

PN95

MR FRIEND: They were – there was negotiation while that agreement was in operation.

PN96

VICE PRESIDENT ASBURY: And the dispute in relation to the efficiencies allowance arose under the interim agreement?

PN97

MR FRIEND: That's correct.

PN98

VICE PRESIDENT ASBURY: And then it was parked to allow - or was withdrawn, so that it's not one of the ones that was adjourned sine die, it was actually withdrawn on the basis that it would be dealt with in the bargaining?

PN99

MR FRIEND: I think it's adjourned sine die.

PN100

VICE PRESIDENT ASBURY: It's adjourned sine die, is it?

PN101

MR FRIEND: Yes.

PN102

VICE PRESIDENT ASBURY: Okay.

PN103

MR FRIEND: So, this is what we say, and I think what everyone agrees that the gap on wages and allowances is unbridgeable. We submit that Mr Block was right to indicate that FRV is exposed to allegations of capricious or unfair conduct

contrary to the good faith bargaining requirements of the Act. And it's also right in its submissions on this application to concede there is no real prospect of the bargaining parties being able to close the Act.

PN104

In paragraph 86 of her statement Ms Crabtree asserts, as well, 'There is presently no reasonable prospect of an agreement being reached between the parties. Things may be different during a post declaration negotiation period.' She doesn't explain why that would be so, especially in view of the FRV reneging on its commitment and now it would say - - -

PN105

JUSTICE HATCHER: Reneging on what?

PN106

MR FRIEND: I'm sorry?

PN107

JUSTICE HATCHER: The FRV reneging on what?

PN108

MR FRIEND: On its commitment about efficiencies.

PN109

JUSTICE HATCHER: Right.

PN110

MR FRIEND: And it also seems now to be seeking to renege on the terms that have already been agreed, all the ones in green. Because the position the FRV takes, and the Minister supports this is that nothing is agreed at all. Now, what we say about that is that this is a question of characterisation. What was done, and the evidence about this is in Ms Campeniaro's second statement is these negotiations were held and the UFU was led to believe that these matters were agreed.

PN111

Not only was the UFU led to believe it but the Commission was led to believe it. And Commissioner Wilson as part of the 240 proceedings made two statements to the effect that matters were agreed. The second one in June of this year was that all matters apart from wages and allowances were agreed.

PN112

Can I take you to those two statements. Actually, just put it this way, I should put all the material together. In November of '22 FRV filed the section 240 application. It has listed nine matters with which it sought the Commission's assistance. That is referred to in Ms Campeniaro's first statement at paragraph 24. On 3 February of this year Commissioner Wilson made a statement and that is LC5 to Ms Campeniaro's first statement which is at page 1283.

PN113

I draw attention to paragraph 4 once the members of the Bench have found that document. Now if I can then just briefly take you back to Ms Campeniaro's first statement and at paragraph 28, subparagraph (c), and this is on page 6 of the statement, 6 of the PDF she notes that on 29 March FRV published a video to all FRV staff.

PN114

'Fire Rescue Commissioner Gavin Freeman says significant progress has been made with these negotiations for the operational agreement. 'For example, all matters have been agreed other than the firefighters registration board for the funding to increase the minimum staffing requirements, and annual leave for fire safety officers, et cetera.' So that's what all the employees are being told by the Commissioner.

PN115

Then if you move onto the next paragraph of Ms Campeniaro, paragraph 29, she notes that FRV and UFU met to discuss a draft statement by Commissioner Wilson that was circulated to the parties, and made some amendments and sent it back to Commissioner Wilson as an agreed document, and Commissioner Wilson then published that as LC7 which you will find at page 1288.

PN116

JUSTICE HATCHER: Twelve?

PN117

MR FRIEND: 1288. And you will see there that the Commissioner says everything is agreed except wages and allowances.

PN118

VICE PRESIDENT ASBURY: Sorry, where does the Commissioner specifically say that?

PN119

MR FRIEND: Paragraph 2. 'Bargaining has progressed very well to the point that the UFU with FRV now report that since the last conciliation conference all outstanding matters have been resolved, save for the matter of an offer for increased wages and related monetary allowances.'

PN120

VICE PRESIDENT ASBURY: Except there was a dispute about the Registration Board at that point, was there not?

PN121

MR FRIEND: No. No, it was resolved by then. It's green in the document.

PN122

VICE PRESIDENT ASBURY: It might be green in the document but are you quite sure that it's resolved?

PN123

MR FRIEND: Yes. Those are my instructions.

PN124

VICE PRESIDENT ASBURY: Okay.

PN125

MR FRIEND: What had happened to resolve it was that the union had a claim for a different clause to the ones in the existing agreement and had abandoned that claim and said just replicate the clause in the existing agreement, and that was what the dispute - - -

PN126

VICE PRESIDENT ASBURY: Resolve the dispute about what was in the agreement, but it quite possibly didn't resolve the dispute about the substantive matter of the registration board.

PN127

MR FRIEND: We're only talking about what was going to the agreement and that was agreed between the parties on the basis that they agreed that that clause would go into the agreement. Now what it all meant and how it worked was something that might have had to be dealt with elsewhere. That's often the case with agreements.

PN128

VICE PRESIDENT ASBURY: So, the clause from the interim agreement was agreed to go into - - -

PN129

MR FRIEND: The new agreement.

PN130

VICE PRESIDENT ASBURY: The new agreement?

PN131

MR FRIEND: Yes.

PN132

VICE PRESIDENT ASBURY: Okay.

PN133

MR FRIEND: Now, Ms Crabtree seeks to deal with all of this evidence by saying, well, government wages policy applied, the government had to agree to everything and it hadn't, and that the union knew government wages government policy applied. It's certainly true the union knew that they then regarded itself as being bound by government wages policy.

PN134

But it was never told, and that's her evidence in the second statement, that these matters that it was being told all along were agreed were still subject to agreement by the government. In other words, the FRV would be standing there with their fingers crossed behind their back when they said things were agreed, on the basis that they could come back and say, oh, the government hasn't agreed, sorry, it's all off the table, which is what they're doing now.

PN135

What they have said in these proceedings is that all that hard work, all those agreements, they're not agreements, at all, because they didn't get government approval and they didn't tell the union that they hadn't got government approval. And that's why we say it's a characterisation of the dispute between the parties. We say that properly looked at, these are agreed matters. And they can't turn it into unagreed matters given their conduct, by having had the secret reservation.

PN136

JUSTICE HATCHER: So, just to be clear where we're going with this, so for the purpose of whether the declaration should be granted, does all of this really matter? At the end of the day I think it's agreed that wages and allowances cannot be agreed between the parties because of restrictions imposed by the government's wages policies.

PN137

MR FRIEND: Yes.

PN138

JUSTICE HATCHER: For the purpose of whether we grant or not the declaration do we need to go into all these statements of the other terms?

PN139

MR FRIEND: At some stage the Commission will have to determine what's agreed and what's not agreed, and what's put against us as part of a function of the Commission today, you should have a post declaration and negotiation period because none of these things are agreed.

PN140

We say, to put it shortly, that you shouldn't have a post declaration negotiation period because all of these things are agreed on any view of the facts and if it's possible, FRV will unagree with them during any post declaration negotiation period.

PN141

JUSTICE HATCHER: Well, this seems to turn on section 274 subsection (3), does it not?

PN142

MR FRIEND: Yes.

PN143

JUSTICE HATCHER: And that talks about an agreed term being agreed at particular times.

PN144

MR FRIEND: Yes.

PN145

JUSTICE HATCHER: So, if there's no post declaration negotiating period, paragraph (b) applies. That is, it's at the time the declaration is made.

PN146

MR FRIEND: That's so.

PN147

JUSTICE HATCHER: So, let's assume for argument's sake that immediately following the hearing we made a declaration later today.

PN148

MR FRIEND: Yes.

PN149

JUSTICE HATCHER: On one view whatever may have been the case back in June or before that, as at today there's nothing agreed, is there?

PN150

MR FRIEND: No, we would say, your Honour, that's not so.

PN151

JUSTICE HATCHER: I mean, you might criticise FRV and the Minister for reneging on agreements or going back on their word, or you could put it even in more pejorative terms but that doesn't alter the fact that whatever they said they had agreed to as of today, is not agreed.

PN152

MR FRIEND: No, your Honour, we don't see it that way. The Commission has got to determine whether the matters are agreed as an objective fact.

PN153

JUSTICE HATCHER: We don't have to determine that. That will be a matter for the arbitral Bench in the event that a determination is made.

PN154

MR FRIEND: I accept that. I said the Commission has to determine that.

PN155

JUSTICE HATCHER: Yes.

PN156

MR FRIEND: The Commission here could determine it as part of the process of deciding whether or not to have a post declaration negotiation period. Because what the risk is in having a period is that they will do more than they have done, so far. They will say, no, we don't agree to anything, everything is off the table. Now, I haven't taken you yet to the letter of 7 August.

PN157

VICE PRESIDENT ASBURY: Haven't they done that? In their submissions don't they say that if this is rejected, everything's off the table? Because the issue that I'm having is if the reneging has occurred and it's been capricious and

whatever it's been, on your argument, this isn't an application for a bargaining order, this is just, is there agreement in a point in time.

PN158

And however there has ceased to be agreement is not the question. The issue is on one view of it there is no agreement on anything because the position was put prior to these proceedings that this was always subject to the government agreement. And whether there's been a miscommunication, a capricious withdrawal, whatever there's been, arguably there is no agreement on anything.

PN159

MR FRIEND: Well, if you say that, arguably, the argument has to be had.

PN160

VICE PRESIDENT ASBURY: Yes.

PN161

MR FRIEND: But we say that on any view of the facts there is agreement until they undo it. Now, they have undone it in respect of two matters in their letter of 7 August, or three matters in the letter of 7 August. Could I take you to the letter of 7 August. That is attachment PM2 to

PN162

Mr Marshall's affidavit. It's found at paragraph – I haven't got a page number for that, I'm sorry. It's the second page of the UFU's attachments to it, there's not much there.

PN163

VICE PRESIDENT ASBURY: All right.

PN164

MR FRIEND: Now, this is where things change. After the making of this application they make an offer in relation to wages and allowances. And you'll see on the second page of that, part of that offer, and there are two bullet points there. 'Any reference to a firefighter's registration board including the inclusion of a replacement operation group, the current reference to clause 49 has to go.'

PN165

And secondly, 'clauses allowing for extra claims to be arbitrated by the Fair Work Commission,' has to go. They also say that increases to minimum staffing are dependent on funding and although the numbers were agreed, always subject to funding and we accept that, they can't go in either. But they don't say everything else is out. They stand by the agreements that they have made in respect to everything else.

PN166

VICE PRESIDENT ASBURY: What do they mean then by saying, 'This settlement offer is being put in the context of an overall package'?

PN167

MR FRIEND: Well - - -

PN168

VICE PRESIDENT ASBURY: Arguably they are saying it's a package. And if you reject this then it's an overall package you reject as a package.

PN169

MR FRIEND: Yes, but they don't say we take those other things off the table. They don't. They haven't even said them in their submissions here. They haven't gone any further than to say, but because we needed government approval there wasn't really an agreement despite what we said, and you should have a negotiation period so we can tick that off and get those things, notice of agreements and things - - -

PN170

VICE PRESIDENT ASBURY: But isn't there always a risk when one party in negotiations puts a package and the other party rejects it, that the first party doesn't have to come back to the table with the same offer? It can say, you rejected my package, I'm coming back with ground zero.

PN171

MR FRIEND: Well, that's a possibility. That's not what's happened, Vice President. That is not what's happened here. They haven't said that. All they have done is said to their employees all these things are agreed, but there might be good reason why they haven't said that they're all not agreed now. There's a risk, they say, or that they can't be regarded as agreed for the purpose of the Act. We say they have to be.

PN172

And what the risk of doing this is eloquently expressed by a letter to FRV from the Deputy Secretary of the Emergency Management Department of 15 June, which is attachment 18 to the statement of Ms Crabtree. I'll just find the page number for that – 127.

PN173

VICE PRESIDENT ASBURY: What attachment number is it?

PN174

MR FRIEND: Eighteen, Vice President.

PN175

VICE PRESIDENT ASBURY: Thanks.

PN176

MR FRIEND: And in that letter, and this is a letter that has slightly different figures of what's in the 7 August offer, but you'll see on the first page into paragraph (e), the three matters that I referred to, the 7 August of – that they go back on the existing agreements.

PN177

On the next page the Deputy Secretary says to the Commissioner, 'In addition to above the settlement offer should also specify that if the offer is rejected by the UFU and other bargaining representatives, FRV will reserve its rights to withdraw

in principle agreement to retain some or all of the restrictive clauses contained in the current operational agreement.'

PN178

JUSTICE HATCHER: Well, these are all past events. In the event that in a little while Ms Sweet gets up and says, as of today nothing is agreed, that's the end of it, isn't it?

PN179

MR FRIEND: That might be the case. Let's wait and see, your Honour.

PN180

JUSTICE HATCHER: I mean, it seems to me that the risk you're talking about runs the other way. That is, if the FRV is forced to say what it's agreed to as of the date of the declaration, and it might take the course of saying nothing, in which case your client has to face an arbitration about everything, about every single clause in this document, as against the alternative where if you have a short post negotiating period the parties might be able to revive previous understandings and come to an agreement about an arbitration with a sensible scope.

PN181

MR FRIEND: Your Honour, I hadn't finished my point but the point – it is past matter. That threat was not included in the letter of 7 August. We now know about it. What's to stop FRV saying in a post negotiation bargaining period, all these clauses we don't like are off? Now, we say they're agreed.

PN182

If you give them a post negotiation bargaining period you give them the opportunity to unagree them, to drive the parties further apart. Now, we might be right about agreement and we'll mark that argument. We might be right about that and we don't want to lose that opportunity. But if you allow a post negotiation bargaining period you allow FRV and the Minister to drive the parties further apart and there's nothing we can do about it.

PN183

JUSTICE HATCHER: It seems to me that we'll be in a better position to assess this when we hear from the FRV as to what exactly their position is, as at today.

PN184

MR FRIEND: Yes. Yes.

PN185

JUSTICE HATCHER: Do you accept that?

PN186

MR FRIEND: Well, yes. If they say everything is not agreed, they can say that and we'll take that back to our client and I don't think there'll be many happy people around but - - -

PN187

JUSTICE HATCHER: So, take it back to your client and what?

PN188

MR FRIEND: But we have to tell them. They won't be happy.

PN189

JUSTICE HATCHER: They're not happy already by the sounds of it.

PN190

MR FRIEND: No, they're not.

PN191

VICE PRESIDENT ASBURY: And they're here listening, so if they're not going to be happy it'll be immediate.

PN192

MR FRIEND: So, we submit that what the legislation is designed to do is to allow the parties to come closer during the post declaration negotiation period. What is likely to happen in this case on the documents is that they will be driven further apart. If we're right about agreement. If we're wrong, we'll take that risk.

PN193

But that's the risk we want to take. We think we can argue that there is agreement and I can run you through some of those arguments. And that's a matter that can be dealt with by the Full Bench that hears the matter. If a whole range of that is determined to be unagreed there is nothing to stop the Full Bench dealing with the arbitration from sending the parties away for conciliation where they can make agreements and those matters can go into determination.

PN194

But there is a real risk that things will get a lot worse if there's a post declaration negotiation period and we submit you shouldn't make one for that reason. Thank you.

PN195

JUSTICE HATCHER: All right. Ms Sweet?

PN196

MS SWEET: Thank you, your Honour. To avoid keeping anyone in suspense I might just come right to the point, particularly because I think my learned friend has been arguing a case that doesn't really need to be argued today. Everyone is in heated agreement in the FRV and the UFU that the declaration should be made.

PN197

The position is that as at today the FRV can only propose an agreement if it is authorised to by the government, and in doing that it needs that agreement to be funded by the government, it needs the government's authorisation and approval to make the offer. Those are the circumstances in which the 7 August offer was made and I can take you back to it.

PN198

So, in that sense FRV's hands are tied, such that as of today there is no overall agreement therefore there isn't agreement, which is not to renege on the fact that the parties agree the vast majority of items on an in principle basis. Where it stands is the offer of 7 August has been rejected. It was rejected the same day by Mr Marshall. So, what was on the table has been rejected.

PN199

What the parties are substantively apart on are these things. The first is the wages and allowances, and that is really entirely a product of the parameters under which FRV is operating. And most specifically what is driving the parties apart are the two or three payments and how and in what manner the efficiencies allowances, the efficiency savings, the quantum of which has been the subject of agreement in other proceedings in this Commission, how and to what extent that can be brought to account.

PN200

And so, in that sense there seems to be an unbridgeable gap and that leads into the submissions that the declaration can be made. The parties are then substantively apart on the other matters that are raised in the 7 October letter, which is to say – sorry, 7 August letter which is to say the Registration Board, the extra claims clauses and the matter of minimum staffing increases being included within the agreement – it's just coming back to each of those issues.

PN201

The Firefighter Registration Board, when one looks at LC3 which is version 14 of the proposed agreement, and then that is contained in LC3. That date is actually 26 July because there was an error that was corrected. So, that's version 14 and there's no more green ink left in the state because it's all been used on printing out these agreements.

PN202

But that was the state as at 26 July with respect to the Registration Board. It's at page 702. What the clause says in its clause 55.1 says is that the FRV endorses the establishment of a Firefighters Registration Board, the FRV will demonstrate this by letter of endorsement to the UFU Secretary. Apparently that's been done. That was done years ago. That's the extent of it. As at today, it's the same as at 7 August. The reference to that board is not to be included.

PN203

So, it's not legal in fact that there was in principle agreement, but ultimately there is not approval from government to have that reference to the board in the agreement, so there's no agreement on that. Then there's the extra claims clauses and there is numerous throughout LC3 including at pages 738 to 9, clause 104.3. As at the date of LC3 that was agreed. As at the date of 7 August and at today, the extra claims clauses are not agreed.

PN204

There is then the issue of minimum staffing. And you will see, and just to step it back, attachment 16 to JC1 you will see there is a - - -

PN205

JUSTICE HATCHER: So, what page is that?

PN206

MS SWEET: I'm just getting the page reference. PDF120. It should state at the top, 'Matter 2022/1676.' Does the Commission have that?

PN207

JUSTICE HATCHER: Yes, I can see that.

PN208

VICE PRESIDENT ASBURY: Yes.

PN209

MS SWEET: Yes, thank you.

PN210

JUSTICE HATCHER: Yes.

PN211

MS SWEET: So, you see on the second page there is – so, this is at 16 March there is a row in on the second page that deals with minimum staffing. And there's specific references to FRV having no commitment from government to fund the increases, and minimum staffing requirements in the proposed agreement. For that such funding FRV does not agree to increases to the minimum staffing requirements.

PN212

FRV will continue to make submissions to government with respect to funding for increased staffing. FRV proposes to maintain the current minimum staffing charts of the proposed EA. You would then go to attachment 21 which is the letter of offer. So, we're back to 7 August, PDF138 where the position is that it is consistent with what's in attachment 16 and it's dependent on funding; there's no approval for that. What there is agreement to do is to continue to seek funding as necessary to address the gaps.

PN213

Now, my instructions on what has been agreed is there was an agreement of a certain number of firefighters who were required over the next five years. That's outside bargaining and there's an agreement that as these needs come up there will be representations made to government with respect to funding of these positions. But as at 7 August, as at today, the funding for those positions doesn't exist and it's not included within the agreement.

PN214

So, the board, the extra claims and the minimum staffing, funding are matters on which the parties are substantially apart. With respect to, and I've dealt with the issue of wages and allowances, there's then really a third category which is things that have been in principle agreed between FRV and the government where there's – and then they're not called out in the specific letter.

PN215

Now, all that FRV can say is that there is in principle agreement as between the two bargaining parties. But FRV is negotiating subject to agreement as for an overall package, and Deputy President, you picked up that reference in the letter that is part of an overall package. It's subject to overall approval and government authorisation and we don't have that. So, these are the reasons that the parties are apart.

PN216

JUSTICE HATCHER: But in relation to this, what you call the third category - -
-

PN217

MS SWEET: Yes.

PN218

JUSTICE HATCHER: In relation to this, what you call the third category - - -

PN219

MS SWEET: Yes.

PN220

JUSTICE HATCHER: In relation to section 274 subsection (3) - - -

PN221

MS SWEET: Yes.

PN222

JUSTICE HATCHER: If we did an order, a post declaration negotiating period and made the declaration today, are those third category issues agreed terms for the purpose of section 274?

PN223

MS SWEET: In my submission it is unlikely they would be. It's not - - -

PN224

JUSTICE HATCHER: Well, it's the current position. If we did it today there's a – the time is today. It's a yes or no answer. Are they agreed terms for the purpose of 274(3) or not? Because if there's no post declaration negotiating period you won't get an opportunity to consider this. It's either now agreed or not agreed.

PN225

MS SWEET: Then it's not agreed. I mean, the Commission doesn't need to determine today what those things are, or what it does need – there's no post declaration negotiating period – this just means this is a drop dead date. There can be submissions about what that means but as I stand here today, given the parameters under which we're bargaining they're not agreed terms for that subsection.

PN226

JUSTICE HATCHER: Okay.

PN227

MS SWEET: There's been in principle (indistinct) there has been in principle agreement but that's not sufficient in my submission for what is required under that subclause.

PN228

VICE PRESIDENT ASBURY: Ms Sweet, can I just understand, we were taken – and because I don't have a PDF page number but we were taken to a direction to FRV about what it should go back to the UFU with as a negotiating position and an offer that was to be put.

PN229

MS SWEET: Yes, that's attachment 11.

PN230

VICE PRESIDENT ASBURY: Yes.

PN231

MS SWEET: Yes, the letter of 3 March, isn't it.

PN232

VICE PRESIDENT ASBURY: Yes.

PN233

MS SWEET: Yes.

PN234

VICE PRESIDENT ASBURY: Okay, so that letter basically says, make it clear – as I read it, and perhaps I'm putting it in the vernacular, but make it clear, if this package is rejected then we will consider that it's open that everything is back on the table and some of the clauses that we see as being restricted in the proposed agreement, we'll be seeking to bargain about again. We're not going to necessarily accept what's been agreed in principle. So, that's the direction to FRV, go back and make that clear.

PN235

And on one view of it that second-last paragraph that starts with, 'This settlement offer is being put in the context of an overall package,' what that says on one view of it is, here's the wages offer, the in principle agreement that we had where everything's green, we're now ungreening, we're saving some green ink, on the two dot points and the minimum staffing levels – that's our offer, best and final. And if you reject it then it's a package. So, you're rejecting the whole package, including what you think is already green. That's a reading of that paragraph and it's certainly consistent with what FRV was instructed to do.

PN236

MS SWEET: Yes. May I just correct myself. The attachment is attachment 18. It's the letter of 15 June. I think all I can say to that, Deputy President, is those specific words don't appear in the 7 August letter. It's not put in those terms and it's a matter for the Commission how it wishes to construe that. And otherwise I think all I can say is that the offers have always been put and we're

only authorised to put it on the basis that it's approval was on a whole package basis.

PN237

VICE PRESIDENT ASBURY: So, the document that's all green, other than these items, are no longer green and that's the package, take it or leave it, essentially. We're putting that without prejudice, meaning that if you don't accept it we're not going to be bound by the fact we made this offer. We're putting it without prejudice and it's a package.

PN238

And so, if you don't accept the wages offer and these matters not being any longer agreed, so the Registration Board not being permitted to be referred to in the agreement; clauses allowing for the arbitration of extra claims throughout the life not in there; and other than that, that's the package. So, you say that was not the intent of the letter, of you don't – I don't understand the position.

PN239

MS SWEET: I think what you're saying is if you don't agree to it, if it's rejected then the entire package is rejected and I think that's essentially just a general bargaining principle. If it's rejected the whole package is rejected. It's rejected on a whole package basis.

PN240

VICE PRESIDENT ASBURY: Okay, so essentially there isn't agreement.

PN241

MS SWEET: That's correct.

PN242

VICE PRESIDENT ASBURY: Okay.

PN243

JUSTICE HATCHER: Let's assume the declaration is granted and an arbitration proceeds on that basis, if on the category three issues the UFU say so the Commission, you should make a determination containing all those terms in green, what's going to be the FRV's position? Are you going to put different proposals for all those terms? Are you going to say, no, they should be something else, or what - - -

PN244

MS SWEET: That's a future matter. I mean, I certainly don't – as I read the cases it would be open to the parties to say the fact that there was in principle agreement should be taken into account.

PN245

JUSTICE HATCHER: I understand that point but I'm trying to flesh out when you say nothing is agreed, what in fact would be the position put by FRV of an arbitration in respect of those category three issues? Would it, in fact, be different to what's in green?

PN246

MS SWEET: Well, it probably depends on what it's authorised to do. But it certainly doesn't renege on the fact that there was in principle agreement to all these other matters. It's just, well, there was in principle agreement, there isn't today. But it doesn't renege on the fact that these things were agreed. That might be something that is taken into account by the Commission. I can't say sitting here today, what the position would be.

PN247

JUSTICE HATCHER: Well, I mean, if we granted a declaration and we didn't have a post declaration negotiating period, you could expect that the directions for the hearing would have this first direction, 'the parties to file a document identifying the agreed terms,' as per section 274.

PN248

MS SWEET: It would be a short document.

PN249

JUSTICE HATCHER: So, from your perspective nothing will be agreed and we'll be setting up an arbitration about every term in the document?

PN250

MS SWEET: Yes, nothing is an agreed term.

PN251

JUSTICE HATCHER: I understand that but does it follow then we'll be having an arbitration about every single term or not?

PN252

MS SWEET: I can't answer that today. It might be that the parties – I mean, there's nothing to stop the parties agreeing. They wouldn't be agreed terms but you could reach agreement. But in terms of if there isn't a bargaining period then the FRV's position would be that the starting point for the determination is version 14 minus the matters from the 7 August letter.

PN253

DEPUTY PRESIDENT HAMPTON: Ms Sweet, the problem with that proposition is this, that in a sense all bargaining is conducted on the basis that there is no agreement till there's a whole agreement.

PN254

MS SWEET: Yes.

PN255

VICE PRESIDENT ASBURY: And I think that follows. But also, bargaining is conducted by bargaining representatives, and bargaining representatives oddly don't make the decision, certainly not in government bargaining, and arguably not in a – well, in a private sector bargain. And I say that for this reason is that ultimately the bargain representative has come to a position which then has to be endorsed by the board, or in this case, the minister.

PN256

But there's no agreement from the employee bargaining representatives in the sense that they might form a view but ultimately the employees actually vote on the agreement. So, if you apply a very sort of narrow approach there's never any agreed terms until someone's gone to vote. Now, it seems to me that's not what's contemplated here.

PN257

And so, I'm troubled a the notion of agreement for this purpose is so fluid that it can just really, in effect, be withdrawn at any point by one of the bargaining representatives.

PN258

MS SWEET: Yes, well, I mean all of this speaks to the utility of a post declaration bargaining period - - -

PN259

DEPUTY PRESIDENT HAMPTON: Yes.

PN260

MS SWEET: Where it's - - -

PN261

DEPUTY PRESIDENT HAMPTON: That's the purpose.

PN262

MS SWEET: The hope is that this can be ironed out in a way it isn't today, based on – because today we're basing it on the 7 August letter and the rejection the same day. But these matters may be able to be clarified in relatively short compass in a post negotiation period, so we're not potentially facing a workplace determination starting from ground zero.

PN263

VICE PRESIDENT ASBURY: Or on your submission, even if the declaration was made today there would be nothing to stop the parties between when the declaration was made and when the matter was heard, withdrawing some of the matters from the arbitration or seeking to do so by informing the Commission that they were now agreed and that it was only required to deal with certain matters with the determination.

PN264

MS SWEET: Yes, that's right.

PN265

JUSTICE HATCHER: Of course, the risk your client faces is that if everything is not agreed then it leaves it open for the UFU to advance a whole bunch of new claims you've never heard before and have them arbitrated.

PN266

MS SWEET: That's the risk of a ground zero workplace determination, certainly.

PN267

DEPUTY PRESIDENT HAMPTON: So, is that the scheme of the Act?

PN268

MS SWEET: I beg your pardon, Commissioner?

PN269

DEPUTY PRESIDENT HAMPTON: Is that the scheme of the Act?

PN270

MS SWEET: Well, the scheme of the Act says there are certain clauses that need to be included. But I don't think it would stop anybody from advancing something that wasn't pushed in bargaining.

PN271

DEPUTY PRESIDENT HAMPTON: Isn't the assessment to be made as to the point that the bargaining representatives reach? I mean, in that context, without necessarily going out, you know, how can you ever say there's no capacity for agreement? How can you say anything is agreed or not agreed, in the sense, but then do a vote? Now, the Act doesn't require that to occur before you've reached this stage. So, I'm just trying to explore what 'agreed' means for this purpose and whether it's quite as fluid as you suggest.

PN272

MS SWEET: Yes, I think that is some – what an agreed term is has not been fleshed out substantially in the submissions and it might be something the Commission would benefit from with submissions from the parties.

PN273

DEPUTY PRESIDENT HAMPTON: Yes.

PN274

MS SWEET: But I mean, section 275 sets out what the Commission needs to take into account in determining workplace determination. It seems to me like we are going down a track that is not actually proposed by any of the parties, and I don't want to frighten the horses.

PN275

DEPUTY PRESIDENT HAMPTON: Well, there are huge consequences to the parties if anyone is wrong – is right about that, and what your ultimate instructions are about what might be able to be agreed or not during a post period if one is ordered.

PN276

MS SWEET: Yes, I think all of this just speaks to the need for a post negotiating bargaining period, because the parties might be much closer than they realise. In my submission there's no basis for the submission, first of all that the parties will be driven further apart; or that the scheme allows only for the (indistinct) as a corollary that the scheme only allows moving forward together.

PN277

The post negotiation period requires or allows for bargaining to be explored with a declaration made and a workplace determination hanging over people so it concentrates the mind. But in my submission there should be a bargaining period because it may clear much of this up.

PN278

VICE PRESIDENT ASBURY: Would it be a bargaining period in your view facilitated by a member of the Commission or would it be a bargaining period where the parties would seek to narrow their issues?

PN279

MS SWEET: The FRV, in terms of process, there would be a member of the Commission assisting the parties. So, just some final points. I mean, what is agreed for the relevant purposes of the Act depends on the terms that FRV is authorised to agree to by the state. It's always been the issue and that's why it's important that the Minister is here today.

PN280

Because what we can agree to, an in principle agreement depends on what we're authorised to agree to. Now, FRV hopes to get as much approval as possible to get the necessary approval for as many of the terms that have been agreed in principle, as possible. And there's nothing in our literature that suggests otherwise.

PN281

That is what the intent of FRV is, to pull this back on track. And the FRV does not seek arbitration on everything. But again it's subject to getting the necessary approval during a post negotiating bargaining period. I think that's all I intend to address the Commission on for the purposes of the question that the Commission has to decide today. Was there any other questions for me from the Full Bench?

PN282

JUSTICE HATCHER: No, thank you. Mr O'Grady?

PN283

MR O'GRADY: Thank you, President. We have prepared a short outline of submissions in reply to the outline that was filed by the UFU and if I could provide copies of that to the Full Bench. And you'll see that it deals with both the issues of intervention but also the issue of a post declaration bargaining period.

PN284

So, if I could ask the Full Bench to go to paragraph 10 where the issue of the post declaration negotiating period is dealt with. And I don't want to take up undue time in respect of this document given where the parties are but you'll see that in paragraph 11, 'In which the Commission can be satisfied that it is appropriate to specify a post declaration negotiating period,' and we'll refer back to our submissions at first instance. In paragraph 13 - - -

PN285

JUSTICE HATCHER: Sorry, Mr O'Grady, but the fact that 274 changes the time at which agreed terms are assessed to exist depending upon whether a post

negotiating period is ordered or not suggests that the post negotiating period is intended to serve the purpose of reaching agreed terms, does it not?

PN286

MR O'GRADY: Yes, I would accept that. I would accept that. And it seems to us that there are perhaps two ways of approaching it. There is that first level of whether it is an agreed term for the purposes of 274, and then there is perhaps another light way of approaching it of a noncontentious term, in that even after the trigger point or the timing point has occurred there may well be scope for parties to agree that the terms are not contentious. And that is a matter that whilst the Commission still has to consider whether to make those terms in the determination, it could have regard to the approach of the parties as to the way we would analyse it.

PN287

And as far as the position of the Minister at this point in time is concerned, that that is what we've set out in paragraphs 76 and 77 of our original submissions which is in effect that given the way in which bargaining has occurred, and given the structure of the Act, and given the response to the offer of 7 August, for the reasons picking up on some of the observations of the Vice President then as a matter of the application of 274 there are no agreed terms at this point in time.

PN288

But there may be scope to narrow the issues in dispute between the parties if a post declaration bargaining period were ordered. And in our submission that approach is consistent with authorities that have developed in respect of industrial action determinations. And if I could hand up to the Full Bench some folders, just to refer to three authorities, very briefly.

PN289

The first authority is behind tab 1 and it's the ALAEA against Qantas, re the licensed engineers case. And you'll see that in that case the issue of agreed terms were dealt with in the context of arbitration by way of evidence, and at paragraph 10 there is reference to a Mr Brown from Qantas leading evidence as to what were the agreed terms, and the ALAEA led evidence from Mr Basta(?), and which he agreed to the evidence of Mr Brown.

PN290

And that was the way in which that matter was the subject of consideration by the Full Bench. And in paragraph 11

PN291

Mr Brown gave evidence at the end of the post industrial Qantas and ALAEA 'agreed on the following terms that should be included in the new enterprise agreement.' And we would submit that that is a mechanism that could be applied in the context of this case.

PN292

The next authority I wanted to refer the Full Bench to is behind tab 10 and it will be a decision that whilst you may have forgotten, at one stage you would have been familiar with, President. It's the decision of *TWU v Qantas Airways Limited*,

again an industrial action determination issue. But you will see that in respect of the agreed terms issue it's dealt with at paragraphs 58 and 59, and there was an acceptance, and admittedly it was an acceptance by all parties, but we would say the evidence here gives one to the same result that in the proceedings there were no agreed terms at the end of the post industrial action negotiating period because the negotiations were conducted that nothing was agreed until everything was agreed.

PN293

We agree that this is the position and there are no agreed terms as defined in 274 to be inserted into the determination. To the extent there is now some consensus to certain matters we are required to apply the test to apply to record terms in the agreement is likely to impact upon the merits of those matters. Again, consistent in my submission with what I said earlier.

PN294

And the last authority that I take the Full Bench to is behind tab 9. Again, it's a decision that you would be familiar with, President. This is the decision of *Specialist Diagnosis Services v Dorevitch Pathology*, and you'll see that at paragraph 16 there was a contest between the parties as to which issues were not agreed at the end of the post industrial action negotiating period. As set out earlier, '267(2) requires the terms agreed at that date must be included in the determination, the Commission does not have authority to arbitrate in respect of those terms and the identification of non agreed terms is therefore a matter of some significance for the exercise of power under 267.'

PN295

And then what the parties did in that case would appear to be the same approach that you were suggesting earlier, President, namely that they put forward draft determinations and that that then identified the issues that were not agreed. And you will see that there was consideration of that at paragraphs 19 and following.

PN296

I would draw the Full Bench's attention to paragraph 21 where there is a clear focus, in our submission on what was agreed as at the date, or as at the trigger date, the date of the determination, or the date at the end of the bargaining period. And the fact that there had been some agreement in respect of a clause as noted on a working draft did not mean that that was to be taken in the agreed term in circumstances where it was impossible to exclude the possibility that Dorevitch advanced a claim for clause 12.5 some time prior to the relevant cut off date, so as to make the issue not an agreed as a that date.

PN297

In light of what has transpired this morning and given that we have attempted to reduce our submissions on the relevant principles and authorities to writing, other than reiterate that the Minister's position is that as set out in paragraphs 76 and 77 of the substantive submissions, namely that we say that at this point in time there are no agreed terms as such but there may be scope for a narrowing of the issues in dispute if there was a post declaration period.

PN298

I don't think I need to address the Full Bench further, other than to note that in our submission the 7 August 2023 letter which we would submit should be construed in the way that you were suggesting, Vice President, namely it's a reference to a package that was rejected and that the consequences that you have suggested flow from that.

PN299

We would also note that in the second bullet point on the second page there's references to clauses allowing for extra claims to be arbitrated by the Fair Work Commission during the life of the agreement where this is currently provided for. Now, those clauses aren't identified but clearly that was something that the FRV was indicating needed to be removed from the agreement, and there is therefore a number of clauses flagged in the letter of

PN300

7 August. On no view can it be seen as agreed terms. Unless there are any issues that the Full Bench wishes me to address those are the submissions I'm instructed to put on behalf of the Minister.

PN301

JUSTICE HATCHER: In respect of what Ms Sweet referred to as the category 3 issues, does FRV need the Minister's authorisation to reach agreement as to those terms, in the event that we decide that there should be a post declaration negotiating period, or does it have authority to, for the purpose of 274 only, to say the terms in that category are agreed?

PN302

MR O'GRADY: Not at this point in time as I'm currently instructed.

PN303

JUSTICE HATCHER: Right. All right, thank you.

PN304

DEPUTY PRESIDENT HAMPTON: Mr O'Grady, each of those authorities you recite, do each of them have the equivalent of a post declaration period?

PN305

MR O'GRADY: I'm not sure, to be honest.

PN306

DEPUTY PRESIDENT HAMPTON: Yes, it might well have been required.

PN307

VICE PRESIDENT ASBURY: A post negotiation – post industrial action - - -

PN308

MR O'GRADY: Yes, well they're all cases, or they're all industrial action determinations.

PN309

DEPUTY PRESIDENT HAMPTON: They don't actually address the issue about - precisely the issue that a Full Bench will have to confront at some point - - -

PN310

MR O'GRADY: Yes.

PN311

DEPUTY PRESIDENT HAMPTON: About what is originally agreed.

PN312

MR O'GRADY: Yes. I accept that but in our submission they do provide insight as to how these issues might be addressed in that – and picking up the point that you made earlier that, well, has it by its very nature – bargaining is sometimes agreed and then not agreed but how does one move through that? And in our submission that provides some guidance as to how that can be sensibly attacked.

PN313

VICE PRESIDENT ASBURY: Because the statute in the 2018 matter provided that the Commission couldn't determine anything that was - - -

PN314

MR O'GRADY: Correct.

PN315

VICE PRESIDENT ASBURY: Already agreed.

PN316

MR O'GRADY: Yes. Yes.

PN317

VICE PRESIDENT ASBURY: So that the mechanism was to require both parties to file draft determinations setting out what they said was agreed.

PN318

MR O'GRADY: Yes.

PN319

VICE PRESIDENT ASBURY: And then it had to be determined whether it was agreed or not.

PN320

MR O'GRADY: Yes. Yes, I accept that, Vice President. But doing what we could to find assistance in some of the authorities as to how this issue might be addressed, in our submission they provide some guidance.

PN321

VICE PRESIDENT ASBURY: It's an analogous sort of process.

PN322

MR O'GRADY: Yes. Yes.

PN323

VICE PRESIDENT ASBURY: Yes, I understand.

PN324

MR O'GRADY: Yes. If the Full Bench pleases.

PN325

JUSTICE HATCHER: All right, Mr Friend?

PN326

MR FRIEND: Your Honour, I'm going to relieve Mr Friend for the reply if the Commission pleases.

PN327

JUSTICE HATCHER: Mr Borenstein, all right. Sorry.

PN328

MR BORENSTEIN: Can I start off by clarifying that the submissions that we make about not making a bargaining period, we don't call on the Commission to make a definitive ruling about whether the terms are agreed or not. What we seek to do is to submit to the Commission that there are arguments available to be deployed to support the proposition that what has been agreed as

PN329

Mr Sweet describes in principle constitutes or should be held to constitute agreed terms for the purpose of the intractable bargaining workplace determination.

PN330

JUSTICE HATCHER: Mr Borenstein, if your position is right, that is the – let's use this term, category three issues, if in relation to the category three issues you are right in saying agreement was reached for the purpose of 274 and that it's not open to FRV just to change its mind, what's the risk associated for your client in having a post declaration negotiating period?

PN331

MR BORENSTEIN: We are concerned – the Bench has been taken to the letter from the Minister's office, putting the threat which hasn't been conveyed in the letter of 7 August that if you don't accept then everything is off the table. The concern we have is that that is not position that has been put to FRV by the bargaining to the UFU by the bargaining representative for FRV.

PN332

So, in terms of the negotiations, up until now between the bargaining representatives who are the key entities in this process, that hasn't been put.

PN333

JUSTICE HATCHER: It has now.

PN334

MR BORENSTEIN: I'm sorry?

PN335

JUSTICE HATCHER: It has now. That is, we've heard clearly the FRV's position is that nothing is agreed.

PN336

MR BORENSTEIN: Well - - -

PN337

JUSTICE HATCHER: In terms of 274. And that's their position. They might be right or wrong, but given that is their position as of today I don't understand how things can get worse for your client over a negotiating period. Either you're right, in which case they can't walk away, or you're wrong, in which case it can't get any worse.

PN338

MR BORENSTEIN: But your Honour is putting that proposition on the basis of how things stand today. We don't know how things will stand in two weeks or three weeks after there's discussion between the parties and whether things will be said or other steps will be taken by FRV which might change the position as it stands today.

PN339

VICE PRESIDENT ASBURY: But if your argument is - - -

PN340

MR BORENSTEIN: We understand we've got to take the risk on how things – sorry - - -

PN341

VICE PRESIDENT ASBURY: Sorry, I was going to say if your argument is right it can't change the position.

PN342

MR BORENSTEIN: Well, that may or may not be so. If our friend is prepared to say that they accept that whatever happens in the bargaining period won't change the position from what it is today, then that would obviate the problem. But we can't be confident that Mr O'Grady or Ms Sweet won't come up with a strategy that does change the circumstances from where they stand today, and that's our concern.

PN343

VICE PRESIDENT ASBURY: From where you say they stand today.

PN344

MR BORENSTEIN: Sorry?

PN345

VICE PRESIDENT ASBURY: It's from where you say they stand today. They don't agree that they stand where you say they stand.

PN346

MR BORENSTEIN: I accept that, Vice President. Our position is that we believe we have arguments to put, as things stand today that a range of the terms of the agreement are agreed for the purposes of the legislation.

PN347

JUSTICE HATCHER: What I'm failing to understand is that if you're right, how can that position be vitiated over a post declaration negotiating period?

PN348

MR BORENSTEIN: Because we fear that our friends will, in the negotiating period, put up different propositions that will strengthen whatever position they have today in terms of what is and isn't agreed. Because the critical period for determining agreed terms if there is a bargaining period is at the end of the bargaining period, not as at today .

PN349

And we have to accept the burden of the argument as it stands today. But we are concerned that that burden will be increased if we have three or four weeks of further interactions where further things might be put which might change the position as it stands today. That's our concern.

PN350

Now, we don't know what they're going to say but we can't exclude the prospect that our position will be diminished because of that period. And we say by way of, in quotes, 'comfort,' that if the Commission moves to commence the determination process immediately there is nothing to prevent the Commission from starting, as it might need to do, by identifying what the parties say are or aren't agreed terms, and to the extent that there is disagreement between them the Commission might move to decide the question of what are the agreed terms at the outset, so as to set the parameters for the arbitration.

PN351

And the disagreement between the parties would then be resolved at an early point and if after resolving that issue the parties feel that there is some value, or the Commission thinks that there's some value in the parties going off and having discussions, that is a process that's available. But it would be done in circumstances where the risk that our position is further prejudiced during the bargaining period is avoided.

PN352

Other than that there is no prejudice to anybody in the process, by simply making the declaration and then moving to the determination stage and in that stage, addressing the question of whether we are right about agreed terms, or our friends are right about agreed terms, and then looking at how the land lies in terms of potential agreements on various matters. And it's for that reason that we are concerned about the bargaining period.

PN353

JUSTICE HATCHER: Does the UFU accept that on the issues of the Registration Board, extra claims and no extra claims and minimum staffing, there are no agreed terms?

PN354

MR BORENSTEIN: I think given the letter of 7 August, yes.

PN355

JUSTICE HATCHER: All right.

PN356

DEPUTY PRESIDENT HAMPTON: And wages.

PN357

JUSTICE HATCHER: And wages and allowances, of course.

PN358

MR BORENSTEIN: Yes. That's always been accepted, and indeed that was the basis upon which the UFU brought the matter to the Commission in the first instance. I don't think it's necessary for me to outline the arguments that we would want to put on the legal characterisation of the events and whether they do or don't constitute agreed terms.

PN359

I just remind the Commission, and I'm sure it's not necessary but I do so, in section 274 subsection (3) there's a definition of agreed terms for an intractable bargaining workplace determination which is separate from the definition for the industrial action workplace determination, and in subsection (3) indicates that an agreed term is a term that the bargaining representatives of the proposed workplace agreement concerned had at either of the times, agreed should be included in the agreement.

PN360

And that might put a slightly different complexion on the way in which the discussion has taken place up until now. And if I could just take up the point that was sought to be raised by the Deputy President, we would argue that it's important to recognise and remember that this intractable bargaining determination process has been imposed on an existing enterprise bargaining process in the Act, and that its clear intent was to assist parties who were in enterprise bargaining who could not reach a conclusion, who had reached an impasse, to have the assistance of the Commission in overcoming that impasse.

PN361

And so, as the Deputy President said, in all enterprise bargaining it can be said that no particular agreement clause is agreed until everything is agreed, and indeed you don't have an enterprise agreement until everything is agreed. And so the approach to construing the meaning of 'agreed term' for the purpose of this particular process of intractable bargaining determination needs to be informed by the context into which these provisions have been inserted. That is, the general enterprise bargaining provisions.

PN362

And so, when we talk in the section about agreed terms that are agreed to be included in the enterprise agreement, regard must be had to that and weight must be given to the fact that people have been bargaining for enterprise agreement as these parties have, over a period of time without thinking that we're going to end up in this process, and they've reached in principle agreement, as people do every day in ordinary workplace agreement bargaining, and they have reached an impasse and they come to the Commission to resolve that impasse.

PN363

And we will be arguing that it is not open to those parties to say that things we agreed in principle, because we didn't reach an overall agreement, weren't agreed terms. That would be antithetical to the purpose and the scheme of the intractable bargaining provisions. But we will develop that argument in due course but just to give an indication of why we say that these in principally agreed terms are able to be identified as agreed terms of the purpose of the legislation. So, unless there is anything else I can assist the Commission with on the bargaining period they're our submissions in reply.

PN364

JUSTICE HATCHER: All right. We thank counsel for their submissions - - -

PN365

MS SWEET: There is two issues, your Honour.

PN366

JUSTICE HATCHER: Yes.

PN367

MS SWEET: The first is the potential lead to – if there is to be a negotiating period, the potential lead time before intensive bargaining could occur in earnest and the need for that. The second is, just raising the issue of the effect of the bargaining declaration on the ability to bring protected industrial action, if I might address you on both of those just very briefly.

PN368

The first is with respect to the negotiating period my instructions are that the process the FRV would support would be intensive bargaining over a period of two to three days a week for the period of the bargaining period, save to say that it would need to commence that period from 9 October. And my instructions are that the interim period between now and 9 October would be used in order to obtain the necessary approvals from government so that we can be in a position to progress the negotiations on the basis that we've talked about with respect to the position of LC3.

PN369

The other thing with respect to that is that it would be the preference of the FRV is representatives of both Industrial Relations Victoria and the DJCS who had authority to agree to matters were in attendance at the meeting or could make themselves available - - -

PN370

JUSTICE HATCHER: What's the DJCS?

PN371

MS SWEET: The Department of Justice & Community Safety – if they could participate in the negotiating process just to avoid double handling. That's what I say in respect to the process for negotiation.

PN372

In respect of the ability to take industrial action the Full Bench will be aware of section 413. Just, I draw the attention of the Full Bench to subsection (7) in particular, that 'none of the following must be in operation at a time when industrial action is taken. This includes an intractable bargaining declaration in relation to the proposed agreement.'

PN373

The reason I raise this is just to say that if there was to be a declaration made, that as I understand it there are employees planning to take industrial action today from 6 pm, and as such if there was to be a declaration if it could take effect from tomorrow's date, and this might all be moved just in case it isn't, so that there is time for FVR to communicate with employees. Because we wouldn't want a situation where a declaration came into effect and people were taking industrial action only because we couldn't communicate with them to tell them that they weren't able to do that. I just raise those two matters.

PN374

JUSTICE HATCHER: So, you don't want a declaration made today?

PN375

MS SWEET: No, that's correct, not in circumstances where we understand there's action preparing to be taken from 6 pm. It might not give us time in order to communicate with people. So, if it could take effect from tomorrow, that would deal with that issue.

PN376

JUSTICE HATCHER: What's the action in question?

PN377

MS SWEET: The form of action is stoppages.

PN378

JUSTICE HATCHER: Does any of you want to say anything about that?

PN379

MR BORENSTEIN: I have no instructions about this, we're taken completely by surprise by Ms Sweet's submissions. We think that these are all matters that really don't go to what the Commission needs to do today, and if there are issues that FRV has about various matters they should raise them with the union. If the Commission makes a declaration and the industrial action is prohibited, it's prohibited.

PN380

JUSTICE HATCHER: We will reserve our decision and we'll now adjourn.

ADJOURNED INDEFINITELY

[11.36 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #1 STATEMENT OF LAURA CAMPENIARO DATED
11/08/2023 PN46**

**EXHIBIT #2 STATEMENT OF PETER JAMES MARSHALL DATED
11/08/2023 PN48**

EXHIBIT #3 STATEMENT OF JAMES KAFALIS PN50

**EXHIBIT #4 SECOND WITNESS STATEMENT OF LAURA
CAMPENIARO DATED 21/09/2023 PN54**

EXHIBIT #5 STATEMENT OF JO CRABTREE DATED 05/09/2023 PN59