

**IN THE FAIR WORK COMMISSION
AT MELBOURNE**

Matter: Intractable bargaining application (B2023/771)

Applicant: United Firefighters Union of Australia (**UFU**)

Respondent: Fire Rescue Victoria (**FRV**)

FRV'S OUTLINE OF SUBMISSIONS ON AGREED TERMS AND MATTERS AT ISSUE

A. OVERVIEW

1. On 4 October 2023, the Commission made an intractable bargaining declaration pursuant to s 235(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) (**IBD**) in relation to the proposed enterprise agreement to replace the *Fire Rescue Victoria Interim Operational Employees Enterprise Agreement 2020* (**FRV Operational EA**) and ordered a two-week post-declaration negotiating period (**PDNP**).
2. At the conclusion of the PDNP on 18 October 2023, the parties had not agreed on any terms to be included in the proposed enterprise agreement.
3. The Commission is now required to make an intractable bargaining workplace determination under Division 4 of Part 2-5 of the FW Act, and has sought submissions from the parties on the following preliminary questions:
 - a. What are the agreed terms for the workplace determination for the purposes of s 270(2) of the FW Act?
 - b. What are the matters at issue for the workplace determination for the purposes of s 270(3) of the FW Act?
4. For the reasons that follow, the Commission should find that:

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- a. there are, regrettably, no “agreed terms” within the meaning of s 270(2) of the FW Act because:
 - i. terms previously agreed in-principle in the course of bargaining were subject to the following conditions:
 1. overall agreement of a package of terms, including wages and allowances; and
 2. Victorian Government approval,neither of which occurred;
 - ii. FRV made an overall offer to the bargaining parties on 7 August 2023, with specific matters carved out on the basis that FRV was not authorised to include them – this offer was not accepted;
 - iii. in any event, pursuant to the FW Act, the relevant test time for agreed terms is – in this case - the end of the PDNP (18 October 2023), and it is clear that there were no terms agreed between the bargaining parties at that date;
 - b. each of the claims that the bargaining parties press for inclusion in the proposed enterprise agreement is a matter at issue within the meaning of s 270(3) of the FW Act.
5. However, whilst there are no agreed terms and all of the claims pressed by the bargaining parties are technically matters at issue in this proceeding, there are a large number of matters which are now confirmed not to be ‘in contest’. The matters substantively in contest for the purposes of a workplace determination are those identified as Substantive Workplace Determination Matters in a position document prepared by the Government which will be filed with the Minister's submissions in this matter.
 6. To the extent that any matters were included in version 14 of the draft proposed enterprise agreement (which appears as exhibit LC-3 to the witness statement of Laura Campanaro dated 11 August 2023), and do not fall within the categories identified as Substantive Workplace Determination Matters in the Government's position document,

FRV is now authorised, and agrees, not to contest their inclusion in the workplace determination.¹

B. BACKGROUND

FRV's evidentiary case

7. In this matter, FRV relies upon the statements of Jo Crabtree, Executive Director of People & Culture at FRV dated 5 September 2023 (**First Crabtree Statement**) and 16 November 2023 (**Second Crabtree Statement**).

Background to the making of the IBD

8. FRV and the UFU have been bargaining for an enterprise agreement to replace the current FRV Operational EA (initially through informal discussions and then through formal bargaining) since about July 2020.²
9. In addition to the requirements for making an enterprise agreement under the FW Act, FRV is required to comply with the enterprise bargaining framework that the Victorian Government sets for bodies within the Victorian public sector (including the Victorian Government's 2023 Wages Policy (**Wages Policy**)).³
10. Amongst other things, the Wages Policy:
 - a. caps increases to wages and allowances to a certain annual percentage;
 - b. requires agencies such as FRV to seek government approval at two stages:
 - i. in relation to the agency's management log at the commencement of bargaining; and then
 - ii. in relation to the proposed replacement agreement in its entirety;

¹ Second Witness Statement of Jo Crabtree dated 17 November 2023 (**Second FRV Statement**), [19] – [24].

² Witness Statement of Jo Crabtree dated 5 September 2023 (**First FRV Statement**), [29].

³ First FRV Statement, Exhibit JC-1, Attachment 3.

- c. requires all offers to be made on an in-principle basis with agencies such as FRV to communicate that such offers are subject to government approval.
11. The current bargaining process for an enterprise agreement to replace the FRV Operational EA has been conducted within the above framework.
12. The bargaining process has included approximately 76 bargaining meetings attended by representatives of FRV, the UFU and, from time to time, independent bargaining representatives. In addition, the parties took part in a series of ten conciliation conferences pursuant to s 240 of the FW Act before Commissioner Wilson (in matter B2022/1676).⁴ The statements issued by Commissioner Wilson in that matter record that, despite progress in bargaining, the parties remained opposed on at least the quantum of an increase to wages and allowances.⁵
13. Although FRV and the UFU had reached in-principle agreement on the vast majority of non-wage related matters, such in-principle agreement was at all times subject to overall agreement and government approval. FRV communicated these matters to the UFU in the course of bargaining.⁶
14. On 7 August 2023, FRV wrote to the UFU to advise it that the Victorian Government had approved the making of a without prejudice offer to finalise negotiations for an enterprise agreement to replace the FRV Operational EA and to put that offer to the UFU (**7 August Offer**).⁷ The letter said, amongst other things, that:

“In accordance with the Victorian Government’s 2023 Wages Policy and the Enterprise Bargaining Framework (the 2023 Wages Policy), FRV is pleased that they have been authorised by the Government to make a settlement offer.

On this basis, FRV provides the following settlement offer to the United Firefighters Union (UFU) and other bargaining representatives in relation to a replacement Operational Agreement:

⁴ Statement of Laura Campanaro dated 11 August 2023 (**Campanaro Statement**), [4], [5] and [7].

⁵ Campanaro Statement, LC-5 and LC-7.

⁶ See, for example, First FRV Statement at [59] and Exhibit JC-1, Attachment 14.

⁷ First FRV Statement, Exhibit JC-1, Attachment 21.

- a) *A four-year agreement with a first increase of 1 July 2023, consistent with the Wages Policy, no back payments beyond 1 July 2023 will be made;*
- b) *Four annual wage increases to wages and allowances of 3 per cent as of 1 July of each year;*
- c) *A separate lump sum cash payment under Pillar 1 of the Wages Policy, which is a one-off single payment to each person amounting to approximately \$7,359 per Full-Time Equivalent (FTE);*
- d) *Four lump sum cash payments to each person over the life of the Agreement as a “Pillar 3” payment of approximately \$2,021 per year, with the first payment payable on 1 July 2023.*

The above accords with the 2023 Wages Policy, which, amongst other things, requires that all agreements be fiscally sustainable and fully funded. This is particularly important in the economic environment in which the state of Victoria finds itself.”

15. The 7 August Offer also emphasised the requirement in the Wages Policy for all agreements to be fiscally sustainable and fully funded and that, as a result, there were certain matters which had been the subject of negotiations between the parties, and in some cases had been agreed in-principle, which the Victorian Government did not approve being included in the replacement enterprise agreement. In particular, the letter indicated that the Victorian Government did not approve the inclusion of:

- a. any reference to a Firefighters Registration Board;
- b. provisions within any clause allowing for the Commission to arbitrate extra claims;
and
- c. changes to minimum staffing charts

(the **Non-Approved Matters**).

16. By reason of the absence of approval from the Victorian Government, the 7 August Offer excluded each of the Non-Approved Matters, which had the effect of rendering nugatory any in-principle agreement previously reached in relation to these matters.

17. The 7 August Offer was not accepted by the Applicant.⁸ In circumstances where the 7 August Offer was expressed as a package, the fact that it was not accepted by the Applicant meant that there was no agreement between the parties in relation to any matters for inclusion in an enterprise agreement to replace the FRV Operational EA.

Negotiations during the PDNP

18. On 4 October 2023, a Full Bench of the Commission, on application by the Applicant, made an IBD under s 235 of the FW Act in relation to the proposed enterprise agreement.⁹ The IBD included, pursuant to s 235A(1) of the FW Act, a two-week PDNP to end on 18 October 2023.
19. On 10 October 2023, the UFU wrote to FRV and stated its position that all matters other than wages and allowances were agreed terms, and that it intended to press that position in the present proceeding before the Full Bench.¹⁰
20. A bargaining meeting was scheduled for 11 October 2023. FRV sought to have an observer from the Department of Justice and Community Services (**DJCS**) present at this bargaining meeting, given the need to seek approval from the Government for any matters to be agreed.¹¹ However, the UFU did not agree to a DJCS representative being present at the bargaining meeting, on the basis that the Government is not a party to bargaining.¹²
21. At the bargaining meeting on 11 October 2023, FRV stated its position that the 7 August Offer continued to represent FRV's position in bargaining, and that it was put forward as a package that needed to be accepted and endorsed by the Government. FRV also explained its opposition to including terms in the enterprise agreement relating to staffing numbers, a firefighters registration board, and extra claims arbitration clauses.

⁸ First FRV Statement, Exhibit JC-1, Attachment 22.

⁹ *United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180.

¹⁰ Second FRV Statement, Exhibit JC-2, Attachment 28.

¹¹ Second FRV Statement, [11], Exhibit JC-2, Attachment 29.

¹² Second FRV Statement, [12], Exhibit JC-2, Attachment 30.

22. On 13 October 2023, FRV sent the UFU a letter confirming the matters raised at the 11 October meeting in writing.¹³ The letter sought a response from the UFU as to its position on wages, and whether it intended to put any counter-proposal to the 7 August Offer.
23. On 16 October 2023, the UFU responded to FRV, largely setting out its account of the meeting on 11 October 2023, and seeking a further meeting with FRV on 17 October 2023.¹⁴ Ultimately, the further meeting sought on 17 October 2023 did not go ahead.
24. On 17 October 2023, the UFU emailed FRV with details of the terms it would be prepared to agree to in relation to the firefighters' registration board and wages and allowances.¹⁵ The wages and allowances increases included:
 - a. a 3% per annum increase per employee under Pillar 1 of the Wages Policy;
 - b. a 20.36% per annum increase per employee under Pillar 3 of the Wages Policy; and
 - c. additional cost of living adjustment payments to proceed to arbitration as part of the workplace determination.
25. The UFU's letter sought a response by 2pm on 18 October 2023, the last day of the PDNP.
26. On 18 October 2023, FRV wrote to the UFU and put it on notice that FRV's position was that it could not agree to the proposed firefighters registration board clause, nor the increases to wages or allowances, as it did not have Government approval to do so.¹⁶
27. The letter to the UFU on 18 October 2023 concluded with the following:

“As you are aware, the 7 August Offer reflects the terms (including, amongst other things, proposed salary increases, lump sum payments and certain conditions) that the Victorian Government advised FRV it is prepared to approve on an overall package basis. FRV has not been authorised to agree to

¹³ Second FRV Statement, [14], Exhibit JC-2, Attachment 31.

¹⁴ Second FRV Statement, [16], Exhibit JC-2, Attachment 33.

¹⁵ Second FRV Statement, [17], Exhibit JC-2, Attachment 34.

¹⁶ Second FRV Statement, [18], Exhibit JC-2, Attachment 35.

any other proposal and it is clear that UFU have rejected the 7 August Offer, including wages and conditions.

Unfortunately, in circumstances where FRV has made it clear that the 7 August Offer was put as a package, the UFU's rejection of this package means that there are currently no matters that meet the definition of 'agreed terms' for the purpose of inclusion in a workplace determination.

Therefore, whilst it is not FRV's preference, given the UFU's intractable bargaining application and the status of bargaining outlined above, the matter will need to proceed to the Commission for the making of a workplace determination.”

C. AGREED TERMS AND MATTERS AT ISSUE

28. The IBD having been made, and the PDNP having passed, the provisions of Division 4 of Part 2-5 of the FW Act, concerning the making by the Commission of intractable bargaining related workplace determinations, are invoked.
29. Section 269 relevantly requires that, where an IBD has been made, the Commission must make a workplace determination as quickly as possible after the end of the PDNP.
30. Sections 270(1)(a), 270(2) and 270(3) require that, amongst other things, the workplace determination must include *“the agreed terms”* and, also, *“terms that the [Commission] considers deals with the matters that were still at issue at the end of the [PDNP]”*.

Agreed terms

31. An *“agreed term”* for an intractable bargaining workplace determination is defined in s 274(3), which provides:

“(3) An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:

- (a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;*

(b) *otherwise—at the time the intractable bargaining declaration was made.”*

(Underline emphasis added)

32. The meaning of an “*agreed term*” or “*a term that the bargaining representatives ... had ... agreed should be included in the agreement*” at the end of the PDNP is to be determined by the ordinary principles of statutory construction. That requires an analysis of the text, having regard to the context and the evident purpose of the provision.¹⁷ A construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object.¹⁸
33. As to what will constitute a term being “*agreed*” for inclusion in the proposed enterprise agreement, the ordinary meaning of that term should be applied. In the context of two or more parties, to agree on a matter means for them “*to determine; settle*” the matter.¹⁹ The finality connoted by the term is important, because the “agreement” by FRV to all terms prior to the 7 August Offer was, consistent with the requirements of the Wages Policy, only ever in-principle and subject to specified conditions.
34. There is nothing in the text or context of s 274(3) of the FW Act to suggest that a term that has been “agreed” would include a term that was at a stage of negotiation falling short of a determined or settled agreement, such as a term which was agreed only in-principle and subject to final approval. On the contrary, the purpose of the requirement in s 270 that the Commission include agreed terms in its determination is to give effect to the consensus of the parties, but to break any deadlocks by arbitrating the remaining matters at issue. That purpose would be frustrated if parties could be held to agreements or assurances they had made in the course of bargaining which are ultimately subject to contingencies or conditions that never eventuate.
35. In *ALAEA v Qantas Airways Ltd*,²⁰ a Full Bench of the Commission held that an employer’s agreement to a term, which was expressed as being contingent upon

¹⁷ *SZTAL v Minister for Immigration and Border Protection & Anor* (2017) 262 CLR 362, 368 [14] (Keifel CJ, Nettle and Gordon JJ).

¹⁸ *Acts Interpretation Act 1901* (Cth), s 15AA (section 40A of the FW Act provides that the *Acts Interpretation Act 1901* (Cth), as in force as at 25 June 2009, applies to the FW Act).

¹⁹ Macquarie Dictionary (online), “agree” (10), (accessed on 13 November 2023).

²⁰ [2012] FWA FB 236; (2012) 218 IR 165.

acceptance of a suitable overall package, was not an agreed term, because “*the condition attaching to the ... agreement in respect of [the] matters was not satisfied...*”.²¹

36. That an agreement is made in-principle is a specific qualification on a final determined or settled agreement, such as to facilitate continuing negotiations, but subject to final confirmation or approval. FRV’s agreement was only ever in-principle, or conditional, because, as stated above, FRV was (and is) required to obtain approval from the Victorian Government before offering, or agreeing to, any final terms of the proposed enterprise agreement.
37. To date, the condition on which any prior agreement of FRV to terms of the proposed enterprise agreement was based — Victorian Government approval — has not been satisfied. Government approval has only been given to FRV to offer or agree on the basis set out in the 7 August Offer. Therefore, none of the terms which were the subject of FRV’s in-principle agreement during bargaining, but which did not have the necessary Government approval, are “agreed terms” for the purposes of s 274(3) of the FW Act.
38. Further and in any event, the relevant time to assess agreed terms is expressed in s 274(3)(a) to be at the end of the PDNP, namely 18 October 2023. On that day, there was a clear statement from FRV²² that it did not have approval to agree to anything other than the 7 August Offer, that the 7 August Offer was put as a package and that the UFU was continuing to reject that package. Therefore, whatever argument may have been had about the status of the terms agreed in-principle by FRV at any other point during bargaining, it is clear that, at the relevant time, those terms were not agreed. Such is the case for any terms which were negotiated in bargaining prior to the FRV’s Government-approved 7 August Offer.
39. Ultimately, the UFU has categorically rejected the 7 August Offer. Given this offer reflected the only terms that FRV was authorised to agree to as at the end of the PDNP and the offer was put on an overall package basis, this means that there are no agreed terms within the meaning of s 274(3) of the FW Act

²¹ At [18]. See also: *Application by Specialist Diagnostic Service Pty Ltd T/A Dorevitch* [2018] FWCFB 5778 at [31].

²² Which was only the last in a line of such statements made in, and after, the 7 August Offer.

Matters at issue

40. As there are no agreed terms, each of the claims made by the parties in bargaining which are still pressed will be matters at issue for the purposes of s 270(3) of the FW Act.
41. However, while all of the matters referred to above are technically at issue, the Government has now authorised FRV to, and FRV has determined to, adopt a position that, other than matters which FRV is not authorised to agree to or support (including the matters identified in the 7 August Offer) as summarised in a position document prepared by the Government to be filed with the Minister's submissions described as Substantive Workplace Determination Matters, matters included in version 14 of the draft proposed enterprise agreement (which appears as exhibit LC-3 to the witness statement of Laura Campanaro dated 11 August 2023) are not contested.²³

D. ORDERS SOUGHT

42. For these reasons, the Commission should find that:
- a. there are no agreed terms for the purposes of s 270(2) of the FW Act; and
 - b. the matters at issue for the purposes of s 270(3) of the FW Act include all claims that the parties seek to be included in the proposed enterprise agreement.

17 November 2023

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²³ Second FRV Statement, [19] – [24].