

Applicant: United Firefighters' Union of Australia

Respondent: Fire Rescue Victoria

Applicant's Submissions on Minister's Application to Intervene

1. These submissions are filed in opposition to the Minister for Emergency Services' application for leave to make written and oral submissions, and adduce evidence in respect of the preliminary issue and the substantive workplace determination.¹
2. The UFU submits that the Minister's application should presently be dealt with only in relation to the preliminary issue because different considerations apply to subsequent stages of the matter. The Minister would of course be able to apply in relation to those later stages.
3. The Minister's application is to be considered under s.590 of the *Fair Work Act 2009* (Cth). Under s.590, the Commission has power to inform itself "in such manner as it considers appropriate". There is no provision for intervention under the Act. There was such a provision in previous federal legislation but it no longer there.
4. This means that the focus for the FWC in determining whether or not to receive material offered by a non-party has to be whether or not the material will assist it in the discharge of its statutory function. The focus of this provision is not on the interests of any person, but rather on the requirements of the Commission for the performance of its statutory function.
5. The current application is being heard in two stages. The first stage involves determining what are the agreed terms for the purposes of s.274(3) of the Act. After that the Commission will need to make an Intractable Bargaining Workplace Determination.
6. In relation to the first stage, the determination of agreed terms under s 274(3) focuses attention upon what has been agreed by the bargaining representatives for the proposed enterprise agreement. The Minister is not a bargaining representative. The Full Bench will thus be required to consider whether the bargaining representatives had, at the appropriate time, reached such an agreement. There is therefore nothing additional to the material from the bargaining representatives which the Minister can contribute to the Commission's inquiry in the first stage of the proceeding. The matter may need to be

¹ Minister's Submissions in Support of Intervention, 17 November 2023 at [2].

revisited if the Minister renews her application after the determination of what are agreed matters.

7. It is expected that the two bargaining representatives will provide the Commission with their respective evidence and submissions about what they say they agreed or did not agree upon.
8. It is not apparent what the Minister, who was not there could add to those respective versions.
9. In fact, in the Minister's proposed submissions filed on 17 November 2023, the first 15 pages recite facts which are matters derived from the materials filed by the bargaining parties. To that extent the Minister adds nothing to what is already before to the Commission and of which the Commission is already informed.
10. The next two pages set out the terms of the legislation, which also adds nothing which the Commission does not already know.
11. It is not until page 17 of the proposed submissions that the substantive matter is addressed. That is done again by reference to facts known, at first hand, by the bargaining representatives, not the Minister. And further, those submissions deal with the same arguments that have been raised by FRV and about which the Commission is already informed by FRV.
12. The Minister's submissions to be heard, set out what is suggested are the relevant applicable principles at paragraphs [8]-[12]. In substance they rely on two Full Bench decisions. The first is *CFMEU v Collinsville Coal Operations Pty Ltd* (2014) FWCFB 7940. The passage quoted, from [75] of the decision says no more than the Commission has a broad power to inform itself in relation to any matter. So much may be accepted.
13. It should also be noted that in that case the Commission allowed only limited participation of the non-party, even where it was the only contravenor.
14. *Collinsville* does not assist in determining when the Commission might exercise such power.
15. The Minister next relies on *Liviende Inc v Health Services Union* (2014) FWCFB 8089 at [21]. The full extent of the Full Bench's consideration in that case is as follows:

In hearing of 12 November 2014, we found it unnecessary to determine whether, having regard to s.579A(1)(b) of the Act and the written submissions of the Minister in relation to it, the Minister was entitled to do so under s.597A of the Act.

However, we accepted and considered the submissions of the Minister on the basis that we were satisfied that the Minister had a sufficient interest beyond that of an ordinary person that permission for the Minister to put submissions should be provided under s.590 of the Act, whether or not there was an entitlement to make submissions under s.597A.

16. That passage does no more than confirm that the Commission has a power to accept submissions from persons other than the parties. It seems to be posited on the existence of a “sufficient interest” to make those submissions. With respect, the reasoning in that case is dubious because it focuses on the “old test” for intervention being the interest of the putative intervenor, rather the need for the Commission to inform itself.
17. Section 590 calls for the Commission to determine whether a person who wishes to make submissions might provide information to assist it in the exercise of its statutory function. It is not dependent upon the existence of a sufficient interest of that person. That is a test which is outside the terms of s.590.
18. Accordingly, it is necessary to address the propositions which the Minister puts forward as supporting her submission that the Commission ought to receive her submissions and to see whether they inform the Commission of matters which assist, in the sense of being relevant to, the resolution of the proceeding before the Commission.
19. The first consideration put forward by the Minister is that the matter raises questions regarding the impact of bargaining parameters set by the government’s wages policy beyond what FRV had authority to agree.
20. This is a matter between FRV and the government. It has nothing to do with the UFU. The government, so far as one can ascertain from the submissions provided, simply relies on information relayed to it by FRV. FRV, which is represented by senior and junior counsel, can and have put the relevant positions in its submissions. The Minister’s submissions will only be a repetition of submissions about which the Commission will have already been informed.
21. The second argument commencing at paragraph 19 is that the Minister, as the Minister responsible for FRV has an interest in the terms included in the determination.
22. This submission is flawed because it relies on considerations beyond those prescribed by s 590.
23. It is important to emphasize that the power under s.590 is to be exercised for the purposes which it expressly states, namely, for the Commission to be informed. Implicit is that the information is necessary to the Commission to perform its task in the matter before it. In this case, the Commission is dealing with whether terms have been agreed between the bargaining representatives. Thus, the submissions of the Minister, who is not a bargaining representative, do no more than replicate those of FRV based on the evidence already provided by the bargaining representatives.
24. There may be many persons who have an interest in the outcome of this matter. The other unions in the public sector may be affected by the decision in this matter but the Commission would not be informed beyond what has been provided by the bargaining representatives, if those union sought to make submissions which effectively replicated the submissions of the UFU. That is the criterion which should be applied to the Minister.
25. The third point made by the Minister is that her submissions will provide another perspective, independent and often different to FRV and UFU. This is explained in

paragraph 27. Paragraph 27 does not make clear why it is that submissions of someone who asserts an interest in respect of the effect of the decision on other parties should be able to insert their views into the proceedings in the Commission. In any event, it is not apparent why such considerations are relevant to the determination of the preliminary questions.

26. Finally, the Minister asserts that some *re AEU* matters may arise for determination in the proceeding. They do not arise in relation to the preliminary questions. If they arise in subsequent stages of the matter, the Minister may renew her application. It should however be noted that these matters have over many years routinely been handled by parties to proceedings without ministerial intervention. There is no reason to believe that FRV, as an agency of the State, will not be alive to and quick to defend itself against impermissible terms.
27. For the foregoing reasons, the Minister's application to be heard in the proceeding should be refused.

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