



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

COMMISSIONER WILSON

C2023/635

s.603 - Application to vary or revoke a FWC decision

United Firefighters' Union of Australia

and

Fire Rescue Victoria

(C2022/8485)

Melbourne

10.00 AM, THURSDAY, 30 MARCH 2023

PN1

THE COMMISSIONER: Good morning, parties. If I can commence by taking the appearances, please?

PN2

MR H BORENSTEIN: Commissioner, I seek permission to appear with Mr Bromberg. I think we filed a written note in support - - -

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THE COMMISSIONER: You have and I grant you that permission, along with the other counsel, Mr Borenstein, thank you.

PN4

MR M HARDING: Commissioner, in light of the permission you've granted I appear with Mr Minucci.

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THE COMMISSIONER: Thank you, Mr Harding.

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MR C O'GRADY: And similarly, Commissioner, I appear with Ms Davern.

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THE COMMISSIONER: Thank you, Mr O'Grady. Thank you. All right, well, thank you one and all and thank you for filing the material in support of the applications. Now, obviously I've been through that material. Whether I can be said to understand it yet is another matter but obviously I'll be looking forward to the submissions from all concerned about the matters. One question my associate did ask me, Mr Borenstein, is whether any of the people who have filed statutory declarations, whether they need to give oral evidence today? I assumed that was the case. All right, okay, so I'll turn to you for submissions.

PN8

MR BORENSTEIN: Can I start with a housekeeping matter, Commissioner? You'll recall – and this is noted in your previous decision – that during the hearing on the last occasion we sought to amend clause 16 of the service agreement or service contract by the insertion of a clause limiting the operation of the agreement to the operation of the 2020 enterprise agreement. You'll find a copy of that in the court book at page 447.

PN9

THE COMMISSIONER: I'm sorry, what page was that?

PN10

MR BORENSTEIN: Four-four-seven.

PN11

THE COMMISSIONER: All right, thank you. I see, thank you.

PN12

MR BORENSTEIN: Unfortunately when we filed the contract for services, which is the subject of the order that we are seeking, and which you'll find at page 40 of the court book, we omitted to make the correction to clause 16 and so that you have a document that is completely up to date, we've prepared a new version of that document to substitute for the document that's at court book page 40.

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THE COMMISSIONER: All right, thank you.

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MR BORENSTEIN: I might hand that up, please?

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THE COMMISSIONER: Thank you. Now, do I need to mark that as a separate document or – probably I should.

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MR BORENSTEIN: I'm in your hands. It's not a matter that – it's on transcript and that might be sufficient.

PN17

THE COMMISSIONER: All right, must one moment. I think what I'll do is mark the entire document you've handed up this morning as an exhibit and I'll mark that as exhibit UFU1, which will be the amended contract for the supply of services.

EXHIBIT #UFU1 AMENDED CONTRACT FOR THE SUPPLY OF SERVICES

PN18

MR BORENSTEIN: Thank you.

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THE COMMISSIONER: Then we'll deal with the other documents as we come to them.

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MR BORENSTEIN: Yes.

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THE COMMISSIONER: All right, thank you.

PN22

MR BORENSTEIN: Now, the next thing that I wanted to raise with you, Commissioner, is a proposal which we had made in our reply submissions of 24 March about the way in which the matters before you should proceed. These are our submissions in reply, 24 March.

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THE COMMISSIONER: All right, let me just turn that up, please.

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MR BORENSTEIN: I'm just going to try and find the court book page for you.

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THE COMMISSIONER: I think it's about page 130.

PN26

MR BORENSTEIN: Do you have them, Commissioner?

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THE COMMISSIONER: Yes, I do.

PN28

MR BORENSTEIN: Can I direct your attention to paragraph 4 and 5? So in paragraph 4, we note that in the revocation application there are objections raised which involve a number of complex legal arguments together with the suggestion of the utility of that application – that is the revocation application in view of the second dispute application. That is because the ultimate end point of the revocation is to have an arbitration of the proposed amendments to the enterprise agreement in the event and that's the same end point for the dispute application. And so what we've proposed in paragraph no.5 is that the revocation application should be adjourned to a date after the determination of the dispute matter and that the dispute matter should be – should proceed and be heard.

PN29

We've received responses to that proposal from the other parties and they've indicated that they don't oppose that course being taken and so on that basis I would submit that the Commission should decide to take that course to hear and determine the dispute matter and to leave the revocation matter to be dealt with after the outcome of the dispute and it may be that depending on the outcome of the dispute, there will be no need to go to that at all.

PN30

THE COMMISSIONER: So just to clarify and hopefully to make sure my left hand knows what my right hand's doing, the revocation application is the entirety of the form F1 C2022/8485? Am I correct in that?

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MR BORENSTEIN: That's the revocation application.

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THE COMMISSIONER: Yes, okay – so the entirety of that application is put to one side.

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MR BORENSTEIN: Yes, yes.

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THE COMMISSIONER: Okay, thank you.

PN35

MR O'GRADY: Before determining that, could I briefly be heard on that issue?

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THE COMMISSIONER: Certainly.

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MR O'GRADY: Yes – it's just that whilst it is the case that the Minister does not oppose that course, she has also indicated that she doesn't oppose it on the basis that it's a matter for the Commission and that there is an issue as to the appropriateness of both matters staying on foot. The Minister's position is that as you would have seen in the submissions, there is an element of an abuse of process in having both of these matters running in parallel. In the Minister's submission the appropriate course would be for the UFU to withdraw the revocation application and then proceed to deal with the new dispute if that is what the UFU wishes to do. But whilst my learned friend is correct, we have indicated that we don't oppose it because we think it is a matter for the Commission, it is not simply a case of us consenting to that position. We think there is an issue as to whether or not it is appropriate for both matters to stay on foot and for one to be deferred until the other is determined.

PN38

THE COMMISSIONER: All right, I understand the submission, Mr O'Grady. Thank you. Mr Harding, is there anything you wanted to say on the subject?

PN39

MR HARDING: Only to say – while not necessarily embracing everything that Mr O'Grady said, FRB does not oppose the proposal from the UFU.

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THE COMMISSIONER: Thank you. Mr Borenstein, is there anything you wanted to say further?

PN41

MR BORENSTEIN: Well, Mr O'Grady keeps falling down these flippers all the time. We had come along this morning on an indication that the matter wasn't going to be – the proposal wasn't going to be opposed. We completely reject the idea that there is any abuse of process. There is a utility in preserving the revocation application to await the outcome of the dispute because one of the arguments that the Minister raises in relation to the dispute matter is that it is an abuse of process, not for the reasons that Mr O'Grady mentions this morning, but for other reasons which we will address. And if you were to find that the dispute process is an abuse of process and should be struck down for that reason, then that would give utility to dealing with the revocation application.

PN42

THE COMMISSIONER: All right, thank you, Mr Borenstein and others. Look, I am content to adopt the position that Mr Borenstein puts forward this morning. I think that will assist me, at least, in understanding or simplifying the issues that need to be determined initially in respect of the revocation decision. I will accept the submission that it should be adjourned until a date or time to be fixed.

PN43

MR BORENSTEIN: Thank you.

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THE COMMISSIONER: So please proceed.

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MR BORENSTEIN: So I'll deal then with the dispute matter. I'll call it the registration dispute, if I may, and it's a dispute – excuse me – which has been referred to the Commission for arbitration pursuant to clause 21 of Division A of the 2020 agreement and clause 26 of Division B and you're familiar with the two divisions of the agreement. The dispute relates to the establishment of a firefighters' registration board which is contemplated by clause 42 of the Division A and clause 49 of Division B, which you've also seen before in relation to the previous arbitration. This dispute, the present dispute, arises from events that follow the delivery of your decision on 2 December last year in the previous arbitration.

PN46

For the purposes of this application, we seek to rely on the evidence that's contained in Ms Campanaro's statement of 13 February 2023 and the attachments, and you'll find that at court book 99. Now, the relevant background facts to the arbitration this morning, involve a review of the circumstances that led to the previous arbitration as well and the previous arbitration was initiated by a form F10, which was filed on 29 March 2021 and you'll find at that at court book 313. That was filed under the same dispute procedures as the present dispute. That dispute was also dealing with the establishment of a firefighters' registration board and the service agreement that was going to govern the delivery of the registration services by that board and that agreement was known or was called – referred to – as a service agreement or service contract.

PN47

Now, the arbitration of that matter occurred in August of last year and as I said, you handed down your decision on 2 December and at paragraph 102 of that decision, you dismissed the application. Now, the only basis that you stated in the decision for the dismissal of the application was the findings that you made at paragraph 73 to 79 to the effect that the service agreement didn't prevent the registration board, which you called the corporate body, from applying registration qualifications beyond those in the 2020 agreement. And as a result of that you formed the view that it created a fetter on the FRV's functions, which was inconsistent with section 25B of the FRV Act, which was the section, you'll remember, that gave the FRV power to employ employees at its discretion. I think you set that out in the previous decision.

PN48

At paragraph 80 of that decision, you noted that the service agreement could be drafted in such a way as not to fetter the functions in the way in which you had found. You can see that at paragraph 80. In consequence of that decision – and this material comes from Ms Campanaro's statement – on 7 December Ms Campanaro emailed Deputy Commissioner Braid and Mr Starinkas who is the Acting Deputy Commissioner operational training, requesting a meeting to discuss the decision and that's at paragraph 5 of Ms Campanaro's statement. On

14 December Ms Campanaro sent a letter by email to Mr Starinskas in relation to the decision and in that letter, the union proposed amendments to both schedule 2, paragraph 5, and schedule 4, paragraph 3 of the service agreement that could resolve the outstanding issue which you have identified in the decision. And I'll refer to those changes as the amendments. They were designed and they were intended to address the concerns which you had expressed about the fettering of section 25B and you'll find that letter at attachment LC1 to Ms Campanaro's statement at court book 103.

PN49

And if I can just take you to that for a moment you'll see that there's a letter from Mr Marshall who analyses the various points that you decided in the decision and then on the second page of the letter reference is made to your conclusions and then there is a reference to an attachment of proposed amendments and then if you turn the page to the attachment, you'll see that the amendments are set out together with the clauses as they presently stood, and so you'll see in relation to schedule 2, paragraph 5, paragraphs (a) and (b) are unchanged, and then there's an addition at the end of paragraph (b) that, for the avoidance of doubt, the standards for inclusion on the register will at all times be the same as those specified by schedule 3 of Division A and schedule 5 of Division B of the operational agreement.

PN50

And then there is a similar amendment made on the next page to schedule 4, paragraph 3 in the same terms. Now, those amendments have been marked up in UFU1, which we handed up this morning, and they were also in the agreement which is at court book 40. Then after Christmas on 9 January, Ms Campanaro sent an email to Mr Starinskas and that is at court book 108. You'll see that in the second or third paragraph of that email she wrote:

PN51

The UFU seeks a meeting with FRV tomorrow to confirm that FRV is of the same understanding as the UFU, being that firefighter officer qualifications considered by the registration board in the registration process are not able to be higher than the qualifications specified by the enterprise agreement.

PN52

So she's essentially seeking to have a discussion about the amendments which Mr Marshall had sent before Christmas and again, as I say, that's in paragraph 7 of Ms Campanaro's statement. Then on 10 January, representatives of the UFU and FRV met to discuss the amendments and at that meeting they both confirmed that it was intended the corporate board would be able to impose standards or qualifications higher than those prescribed in the 2020 agreement and FRV indicated to the UFU that it would not oppose the amendments. That's at paragraph 8 of Ms Campanaro's statement and there is no material from FRV to dispute that.

PN53

After that meeting Ms Campanaro sent a minute of the discussions to Ms Schroeder and Mr Starinskas and asked for their confirmation of the minute, and

you'll find that at court book 109. Again, it's an attachment to Ms Campanaro's statement. If you go to that page you will see the minute, which starts off:

PN54

FRV and UFU discuss the decision of Commissioner Wilson, 2 December and the fettering objection issue. PM reaffirmed that as previously agreed between UFU and FRV it is not the UFU's intention by core position that the board can impose standard qualifications higher than those prescribed by the current enterprise agreement. KS (which is Ms Schroeder) confirmed FRV is of the same position as the UFU is on this issue.

PN55

FRV and UFU discussed the suggested amendments to the supply contract as outlined in the correspondence of 14 December. Mr Marshall queried whether FRV would be amenable to editing the supply contract to include additional clauses as outlined in UFU correspondence. Ms Schroeder confirmed FRV would not oppose such edits. Ms Schroeder undertook to talk through the edits with Fire Rescue Commissioner Ken Block and confirmed with the UFU the outcome of that discussion.

PN56

And the rest I don't think I need to read to you. And then on 11 January Mr Starinkas replied by email which is at court book 15:

PN57

I can confirm that the attached minutes and correspondence you have provided is an accurate reflection of yesterday's meeting.

PN58

And so at that point there is agreement documented between UFU and FRV to accept – I'm sorry – that neither of them intended that the board would be able to impose conditions that were higher than those in the enterprise agreement and it was left with FRV to respond definitively on the issue of the amendment but there was the indication that they did not oppose the amendments. And then on 12 January, Ms Campanaro sent an email to Ms Schroeder, and you'll find this at court book 117 and in that email she indicated that FRV had been unable to provide actual agreement to the proposed amendments as opposed to non-opposition and she accordingly in the final paragraph notified a dispute under the two clauses relating to the implementation of the registration board and the terms of the supply contract to give effect to it. So that's the instigation of the dispute proceeding under the enterprise agreement. On 12 January, Ms Schroeder sent Ms Campanaro an email stating that she would have further discussions with the Commissioner – Fire Rescue Commissioner – and come back regarding FRV's position on the amendments, and that's at paragraph 12 of Ms Campanaro's statement.

PN59

Then on 21 January Ms Campanaro emailed Mr Starinkas, informing him that the UFU wish to escalate the grievance to step 2 in the process and that's at paragraph 13 of Ms Campanaro's statement. On 23 January the parties met to discuss the dispute but they were unable to resolve that. That's attested to at

paragraph 14 of Ms Campanaro's statement. Then on 24 January Ms Campanaro sent an email to FRV informing that the UFU was escalating its grievance to step 3. On 25 January the parties met to discuss the dispute again, again unable to resolve it. And on 1 February '23 Ms Campanaro escalated the grievance to step 4. Those matters are in paragraphs 16 and 17 of her statement.

PN60

The parties met again at step 4 on 1 February, unable to resolve the dispute, and on 8 February Ms Campanaro filed a form F10 in the Fair Work Commission to refer the matter that's before you this morning. You'll find that at court book 13. Now, in our submission - - -

PN61

THE COMMISSIONER: Just please pause for a minute? I just wish to have a look at something. All right, please go on. So please continue.

PN62

MR BORENSTEIN: Yes, I'm just looking for a document - - -

PN63

THE COMMISSIONER: Okay, thank you.

PN64

MR BORENSTEIN: Now, in terms of the amendments and the effect of the amendments, we want to make the submissions that they address the reasoning that you set out at paragraphs 68 through to 80 of the decision and essentially what you expressed at paragraph 75 where you wrote:

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Once implemented, the corporate board would be the entity that not only registers firefighters, compiling a list of those registered and the qualifications that actually determines that qualifications that firefighters should hold. There appears to be no requirement that the board should or must register all existing professional firefighters or that it will provide recognition of those registered or employed as professional firefighters in other Australian fire services. There are no apparent contractual, constitutional constraints on the corporate board about who must be registered or not or even that determinations must be made in such a way as to avoid inappropriate or unlawful matters of discrimination.

PN66

That is not to say that the corporate board may do such things: merely that there appears to be no constraint against it doing so.

PN67

Then at 77 you say:

PN68

The corporate board may not immediately act in such a way as to set the FRV in a direction contrary to section 25(b) of the Act, or even inevitably do so. Rather the proposition is that the corporate board could move to do such

things with its constitution and service contract as drafted and signed by the FRV, not plainly preventing such things. Although schedule 4 of the service contract refers to a condition of registration as holding as a minimum the qualifications, competencies and operational experience as specified by the 2020 agreement and the agreed training framework, it still potentially takes the determination of employment away from the FRV and even away from the 2020 agreement.

PN69

And then at 78:

PN70

Such eventualities would plainly be determinations or decisions by the corporate board not controlled by FRV, with it having a majority of members of the corporate board. If they came about it would be difficult to see how the outcomes was consistent with the FRV's legislative entitlement of freedom to employ persons that it considers necessary to assist it in carrying out the functions under the Act or any other act.

PN71

And so at 79 you conclude:

PN72

As drafted, the corporate board, constitution and service contract do not appear to be consistent with section 25(b) and as such amount to a fettering of the FRV's functions. It would be inappropriate for the Commission to determine such a situation through this arbitration. It follows from the above that the fettering objection must be upheld with the consequence that the Commission must also decline to provide the leave sought by FRV.

PN73

And then importantly at 80:

PN74

This is not to say that either the corporate board or the service contract cannot be drafted in such a way as to not fetter the FRV's legislative right in relation to whom it employs.

PN75

So the amendments are directed to addressing that reasoning and the invitation – well, not the invitation but the indication in paragraph 80 that the situation was not irretrievable. They do that, as you have seen, by addressing directly your concern that the board might impose requirements or limitations on registration by reference to qualifications that are greater or in excess of those qualifications that are prescribed by the enterprise agreement and you will have seen from the amendments that they directly address that by explicitly limiting the qualifications that can be imposed by the registration board in carrying out the registration function and limiting them to those that are prescribed in the enterprise agreement.

PN76

Those amendments are consistent with the position and the understanding both of the employer and the union as to the intent of the registration board operations as it was originally conceived and sought to be implemented and the evidence of Ms Campanaro which I read to you demonstrates that; that the outcome that you have identified was never intended by either of the prime parties and so the amendments seek to rectify that situation and give expression to their original intention and also, as I say, to address the concerns which you have expressed and we say – and we submit – that having done that the concern which founded your upholding of the fettering objection and ultimately led to the dismissal of the application, has now been overcome and should lead you, based on the other findings that you've made which are undisturbed, to now make the orders which are sought in this application, which are to the same effect as those which were sought in the previous arbitration, save that the object of the orders – that is the agreement – is different and is different critically because it contains those amendments which address the fettering problem.

PN77

Now, if I might take a few minutes I'd seek to provide our submissions in response to the submissions which primarily the Minister has made in opposition to this dispute because the Minister has effectively taken on the role of the primary objector and the FRV are essentially saying – throwing their hands up and saying, 'We can't do anything because the Minister has given the direction'.

PN78

THE COMMISSIONER: Before you take me to that, Mr Borenstein, you say that UFU1 has the clauses which give effect to the protections you've just been through.

PN79

MR BORENSTEIN: Yes.

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THE COMMISSIONER: And they're marked up within UFU1. Am I correct in thinking that they – in effect, two amendments, one in schedule 2 and one in schedule 4?

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MR BORENSTEIN: Yes, and they are in the court book at page 40 in that document as well.

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THE COMMISSIONER: Sure, all right.

PN83

MR BORENSTEIN: But they are the two amendments and they're the only two amendments.

PN84

THE COMMISSIONER: Sure, okay. All right, thank you. Please go on.

PN85

MR BORENSTEIN: Now, the Minister's objections to the relief sought in the dispute matter are set out in her written outline dated 17 March, which is at court book 293 and they commence at paragraph 52. Sorry, it's 304 of the court book.

PN86

THE COMMISSIONER: Thank you.

PN87

MR BORENSTEIN: Do you have that page?

PN88

THE COMMISSIONER: I do, thank you.

PN89

MR BORENSTEIN: So you'll see in paragraph 52 that there are three grounds set out for opposition. The first one is that this dispute is the same as the original registration board dispute and therefore it's an abuse of process for it to be determined again. Then the second ground is that the proposed amendments don't cure the improper fettering of the FRV and then the third one is that even if the fettering issues were cured, a new registration dispute can't be determined by ordering the entry into the service agreement. That's a repeat of the argument that was run last time as well, based on the Minister's direction. So if I can deal with the three issues in sequence: firstly, the question of the abuse of process. At paragraphs 54 and 55 of the Minister's submissions they contend that the registration board dispute is brought because the UFU did not obtain the outcome it wishes in the previous arbitration because it wishes to relitigate the original dispute. Our response to that is that that's patently not correct. I've outlined to you the circumstances out of which the second dispute arose and I've outlined to you how that state of affairs has given rise to a new dispute which was notified on 12 January and that the new dispute concerns an amended service agreement, not the original service agreement.

PN90

Inssofar as it concerns a different subject matter – that is the amended service agreement – it is a different dispute and it is completely incorrect to describe it as relitigating the former dispute. We say also that the Minister's position completely overlooks the industrial context in which all of this arose. You're aware and you noted in your decision that there is an underlying dispute about the establishment of a registration board and you'll recall on the last occasion Mr O'Grady, regardless of whether his submissions about matters pertaining and so on, and you made a finding that it's clearly a matter pertaining and you identified that dispute as being the dispute about the establishment of a registration board.

PN91

That dispute was not resolved by your previous decision. So after your previous decision there remained a dispute between the parties about the establishment of a registration board. The parties took steps to adopt an alternative or a different or a new approach to resolving that dispute and that approach involved the preparation of a new service agreement and although the new service agreement is in large part – I'm sorry. The new service agreement in large part contains the same terms as the previous one, it is critically different because it directly ensures that it will

not fetter the powers of the employer under section 25(b) as was identified in your decision.

PN92

And then thirdly we say that it's highly inappropriate to suggest that this is an abuse of process where what the parties have done was to take up the comment which you made in paragraph 80 about the ability to reframe the agreement so as to avoid any fettering. In circumstances where the parties have acted on the indications in your own decision it's totally inappropriate to say that in doing so, that they're engaging in an abuse of process. So we say that that answers the first part of what the Minister says on this question of abuse of process. At paragraphs 56 to 58 the Minister seeks to criticise the union on the basis that these matters could have and should have been raised in the earlier proceeding and to do so now is inviting or is engaging in what the Minister describes as having a second bite of the cherry or a re-litigation. They say that what we are trying to do is to reformulate the previous question. Our response to that is that that whole analysis is entirely inappropriate. It's drawn from a context that is alien to industrial relations dispute. It draws on the language of litigation in courts of record where you have pleadings and where you have various technical forensic rules that apply to the conduct of proceedings but it is completely blind to the industrial context, where industrial disputes have an existence in their own and the parties may seek in various ways to resolve them and if one way doesn't do the job then they try to resolve it in another way.

PN93

One of the core tasks of the Commission is to assist parties in resolving industrial disputes. What we are engaged in in the present proceeding is to try and resolve an industrial dispute about the establishment of a registration board at FRV. An attempt was made to resolve that dispute previously. That failed for particular reasons and now the disputing parties have sought to resolve that dispute in line with their original intentions. That can hardly be said to be a second bite or a re-litigation of the dispute which previous – of the arbitration which previously you decided, because the subject matter of this arbitration is different. The subject matter of this arbitration is a new services agreement and it is not just a reformulation of the dispute. It is a substantive change of the subject matter.

PN94

At paragraphs 59 and 60, the Minister continues with this legalistic, forensic approach and seeks to invoke and apply issues of – or the rules or principles – of issue estoppel. But again, we don't concede that they necessarily apply in a Commission proceeding like this. But leaving that to one side, the foundation for the argument is missing. The foundation for the argument on issue estoppel doesn't exist because the decision which you made on the previous occasion was a decision about a particular service agreement or service contract. The decision you were being asked to make in this proceeding is on a different document and a significantly different document. So it can't be said that there is an estoppel, an issue estoppel, about what you said about the earlier agreement to prevent you from saying something about the new agreement. We don't seek to re-litigate what you said about the earlier agreement. We haven't appealed it. We don't re-litigate it in this proceeding. We say we have taken on board what you said in

relation to that agreement and we now provide you with a new subject matter, a new agreement, which we asked you to decide upon. So in no way can it be said that there is an issue estoppel. And again, we repeat, that the proceedings have been brought following the indication that you set out in paragraph 80 to indicate that the service contract could be redrafted in order to meet the fetter problems that you've identified. And so allowing that this is the Commission and not the High Court of Australia, and allowing for the fact that the Commission and certainly the principal parties are seeking to resolve an industrial dispute, it would be quite inappropriate to deal with this and treat it as an issue estoppel matter.

PN95

The case which the Minister refers to in paragraph 60 of *Vakras v Cripps* doesn't help because it is a case about what courts do. It is not a case about what is appropriate for the Commission to do in the present context. At paragraphs 61 and 62 of the written submissions, the Minister seems to suggest that the further dispute is inconsistent with clause 21 but it does that on the basis that it characterises this dispute as a re-litigation. Now, we've already made submissions about the inappropriateness of that description and beyond that, we submit that there is nothing inconsistent in clause 21 with the Commission dealing with this new dispute based on a new agreement.

PN96

The Minister then goes on at paragraph 63 to deal with its second ground of dispute, which is the fettering and the suggestion that the changes to the service agreement – the amendments – don't cure the improper fettering problems identified by the Minister in the original dispute - registration board dispute. Firstly, we say that that submission proceeds on an erroneous interpretation or reading of your decision. As I have already submitted to you, the only aspect of the fettering which you identified in the decision was the prospect that under the service agreement or the service contract the corporate board could impose qualifications for registration that were inconsistent with the 2020 agreement.

PN97

The service agreement which is the subject of this dispute, as I've already explained to you, is intended and does directly address that finding. In relation to the other matters of fettering which the Minister raised in the previous proceeding you dealt with those and as we read the decision they were not upheld. The Minister's submissions seem to be founded on the notion that the mere existence of the registration board itself is a fetter on the FRV and in your decision you indicated that you did not see that that is the case and that your concern was with the ability of the board in exercising its powers to register people to go beyond what the enterprise agreement had prescribed as qualifications. You made the point that in relation to the qualifications in the enterprise agreement, the FRV had accepted those, had submitted to those, and you I think made the point that it can be assumed that they had been approved by the government in terms of the making of the agreement in line with policy.

PN98

So the only question that remained was would this registration board with the agreement that I've had previously do more or be able to do more, be able to

impose a higher standard of qualification than those to which FRV had agreed in the enterprise agreement and as I've said a number of times, we've sought to address that by those amendments and they do that explicitly. The submissions which are set out in paragraph 64 make this point about the contended vice and the existence of the corporate board at all. They make the point that by granting the corporate board the ability to determine the qualifications that in some way is antithetical to the powers of the FRV under the legislation.

PN99

The submission we make in relation to that is that it's based on a mischaracterisation of the effect of the enterprise agreement. I'm sorry, I'm just looking for it. The section in the FRV Act empowers the FRV to employ people as it considers necessary. I have to try and find the text of it so I don't misquote. Mr O'Grady will be very upset if I do. So 25B of the FRV Act says in subsection (1) that:

PN100

FRV may from time to time employ any persons that it considers necessary to assist in carrying out its functions under this Act or any other Act and transfer, promote, suspend or remove any employee.

PN101

Now, what has happened and what is the substance of this transaction is that through a service contract FRV proposed to engage an expert body to assist it with the assessment of whether prospective employees meet the qualifying standards in the agreement. That's in aid of the exercise of the powers in the section, to employ those people that it considers appropriate. So correctly understood the service agreement facilitates the application of the provisions of the 2020 agreement which the FRV has accepted as being a standard for suitability for employment under section 25B and the engagement of a third party in this way is no more objectionable than if FRV engaged a third party to, for example, provide pay roll services in meeting the obligations of the agreement to pay wages. There is nothing inconsistent with the concept of FRV employing a third party to provide services that are in aid of the FRV's decision-making processes under section 25B. There is nothing in any of the documents, there's nothing in the service agreement that prevents FRV if it thinks it's appropriate to not employ someone, a particular individual, for whatever reason it may lawfully choose.

PN102

The purpose of the service agreement is to assess and provide a certificate as to the qualifications which the employees that are that coming into FRV hold and whether they meet the standards that FRV has committed in the enterprise agreement to apply to its workforce. It's nothing more and nothing less than that. And so the sort of objection which we find in the Minister's submissions at paragraph 64 are entirely inapposite. Then it goes on in the final paragraph of 64 to make a submission that the inclusion of the terms in a contract between FRV and a third party that is not subject to termination or variation for ambiguity in the same matter as an enterprise agreement is of itself a further step fettering FRV's powers.

PN103

This is not an argument that was raised at the earlier hearing and so perhaps Mr O'Grady won't say that we're re-litigating that argument. The contractual parties – the parties to a contract rather – do have rights in relation to the proper performance of their contracts. And there are rights about whether the contract properly reflects the intent of the parties in entering into it. They're not the same as might arise in relation to enterprise agreements but that hardly seems to be the point. The FRV enters into many agreements with outsiders, many contracts with outsiders, without the Minister turning up and objecting and all of those contracts similarly have different rules that apply to termination or variation than what one might find in an enterprise agreement.

PN104

That can't be a basis for saying that entering into a contract is a fetter on the FRV. The issue of fetter is one that must be specific to the content of the agreement that FRV enters into and as we indicated on the last occasion it will be a question of degree, and the authorities that we referred you to last time make it plain that not every contract that a statutory body enters into ipso facto constitutes a fetter.

PN105

Then thirdly the Minister's objection about the Minister's intervention and the issue of whether there is a need for the Minister to give consent and what should happen if the Minister doesn't give consent. Now, we made some extensive submissions on this in the previous hearing in our reply submissions which you can find at court book 148 and the submissions are at paragraphs 69 to 79, which is at court book 162 to 164. They deal with this question of consent and what's to be made of it and we rely on those submissions here.

PN106

We note also that in your decision you indicated the view that those were matters that it was not necessary for you to decide in the arbitration and they were matters that would be resolved between the Minister and FRV, depending on the outcome of the arbitration, and we made submissions on the last occasion to the same effect and we repeat that submission now in answer to what's at 66 paragraph (a).

PN107

In relation to the direction the Minister claims that she has made a formal direction pursuant to section 8 of the FRV Act directing FRV not to enter into the service agreement. Section 8 states that the Fire Rescue Victoria and the Fire Rescue Commissioner are subject to the general direction and control of the Minister in the performance of the duties and functions and the exercise of powers of Fire Rescue Victoria and the Fire Rescue Commissioner, including but not limited to the policies and priorities to be pursued by FRV and the Commissioner. So it's dealing with a situation of general direction and control.

PN108

You will have heard on the last occasion, and we indicate now, that there's another section, and this is the section which the Minister in her letter refers to in giving the directions. Now, that section is section 25A which is headed 'The general powers of Fire Rescue Victoria.' Subsection (1) says:

PN109

Subject to this Act Fire Rescue Victoria has the power to do all things necessary or convenient to be done for or in connection with the performance of its duties and functions.

PN110

And then at subsection (2):

PN111

Without limiting or derogating from the generality of the powers of Fire Rescue Victoria under this Act the powers of Fire Rescue Victoria include to enter into agreements or arrangements with any person or body for the provision of goods or services to Fire Rescue Victoria.

PN112

Our submission is that the service contract falls fairly and squarely within paragraph (a). That is a power of Fire Rescue Victoria under this section which is explicit and unlimited in its terms. It's to be contrasted with the next subparagraph (b). Subparagraph (b) is constrained. It says:

PN113

Subject to subsection (3) Fire Rescue Victoria can enter into arrangements or agreements with any person, et cetera, for the provision of goods or services by Fire Rescue Victoria.

PN114

And then it goes on and there's some paragraphs that have the subject of subsection (3) in it and others that don't, and we direct attention for example to paragraph (e).

PN115

Subject to subsection (3) form, participate, information of, et cetera, a body corporate, association, partnership, trust or other body.

PN116

Now, our first answer to the Minister's reliance on section 8 is that you can't interpret section 8 in isolation from section 25A. The High Court in Project Blue Sky, and I think we have sent you some electronic authorities and it's in there.

PN117

THE COMMISSIONER: You have, thank you.

PN118

MR BORENSTEIN: At paragraph - I will tell you the tab number - Project Blue Sky at paragraph 69, the plurality in the High Court - we will provide you with a copy of that.

PN119

THE COMMISSIONER: There's no need.

PN120

MR BORENSTEIN: You know it?

PN121

THE COMMISSIONER: I wouldn't say know it.

PN122

MR BORENSTEIN: You know of it.

PN123

THE COMMISSIONER: I know of it.

PN124

MR BORENSTEIN: Yes. The reference to it is 194 CLR page 355. I'm sorry, it was meant to be in - - -

PN125

THE COMMISSIONER: No, no, that's okay. Which paragraph are you referring to?

PN126

MR BORENSTEIN: And in paragraph 69 Justices McHugh, Gummow, Kirby and Hayne stated:

PN127

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.

PN128

Then at paragraph 70 they say:

PN129

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.

PN130

So paraphrasing you've got to read the legislation as a whole and you've got to try and give the meaning of the different provisions a harmonious operation. We say that when you construe section 8 having regard to section 25A the proper meaning of section 8 is that it's a general provision which authorises the Minister to give FRV directions about matters of general policy and priorities, and it doesn't empower the Minister to give directions as to how the FRV ought to conduct its day to day operations.

PN131

That is plain from the words of section 8, but is supported by section 25A, which identifies specific day to day functions and identifies which ones of them require ministerial consent, and which ones don't, and entering into contracts for the provision of goods or services to FRV doesn't require ministerial consent. It doesn't give the Minister the power to issue directions about it.

PN132

If our friend's interpretation were right, and if all that the Minister needed to do to control FRV entering into a contract for the provision of services to it was to rely on section 8, then section 25 would be useless, it would be otiose. And if that's the outcome of the analysis that's not an outcome which should be adopted, and in Project Blue Sky their Honours made that statement at paragraph 71.

PN133

So when you're construing legislation you need to avoid a situation where your construction renders one other provision effectively inoperable. What would be the operation or the need for subsection (2)(a) in section 25A if the Minister can say, 'I don't need that. I will just go along under section 8 and issue a directive tantamount to stopping that activity.'

PN134

And two other things. The construction about section 8 and reliance on section 8 for the Authority to issue the directives, the instructions by the Minister also falls foul of two other principles or maxims of statutory construction. The first one is that general provisions don't prevail over specific provisions where there's an inconsistency, and there is a decision of the Commission in the Full Bench which makes this point. I am hoping this is in the electronic version, and it's at tab 11. The case is called *re Australian Electoral Commission*. The relevant passage in that case is at paragraph 37, and you will see there that the Full Bench says:

PN135

Although no party referred to the Acts Interpretation Act with all the various aids and approaches to statutory interpretation often described by Latin maxims, they appear to inform the submissions of the parties and the interpretation of various sections adopted by them. One of those principles is described by the maxim generalia specialibus non derogant. The English translation recently described in the High Court decision of Mistrum as being the express mention of one thing implies the exclusion of another. The maxim is described in the statutory interpretation in Australia in the context of the application to the resolution of internal conflict between sections in an Act as where there's a conflict between general and specific provisions the specific provision prevails.

PN136

And then at paragraph 47 you have the findings that the Full Bench made in relation to the legislation that they were dealing with and applying that maxim. So that's the first thing, and we say that the special provision is in section 25A. The general provision is section 8, and the maxim tells you that the specific takes precedence over the general.

PN137

The second principle or maxim that we seek to draw attention to is that you can't do indirectly what's prohibited to be done directly, and that's explained in a decision of the Full Bench in *Queensland Bulk Handling* which is at tab 10 of the electronic folder, and at paragraph 51 - this is a five member Full Bench - at paragraph 51 the Full Bench says - it starts at 50:

PN138

There are two aspects of the contextual approach to construction which are particularly relevant in this case. The first is the well-established principle that what cannot be done directly cannot be done indirectly. As their Mason CJ, Gaudron and McHugh JJ observed in Caltex Oil: 'An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts of collision between the contractual provisions and the statutory provisions. Inconsistency in this context arises where there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So if the operation of a contractual provision defeats or circumvents the statutory purpose or policy the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.'

PN139

And then the next paragraph:

PN140

The principle that it is not permissible to do indirectly what is prohibited directly, which is expressed in the Latin maxim, is a more traditional general statement of the same purpose.

PN141

And then they go on to elaborate on that principle. Now, what we say is that under section 25A(2)(a) the Minister could not do directly what she seeks to do indirectly by trying to rely on section 8, if she's right. And if that is right then this principle would preclude her from doing that. And so for all of those reasons we say that the direction that the Minister made was beyond power, because the triggering facts were absent, and so it's unlawful and it's of no effect.

PN142

And then secondly we say that in any event, and we said this last time as well, the validity of the ministerial direction and its effect shouldn't be a matter which the Commission concerns itself with. It doesn't preclude the Commission from exercising the powers with which it's charged under the legislation and under the dispute procedures in the enterprise agreement, and it doesn't preclude the Commission from discharging those powers to grant the relief which is sought in the proceeding on the basis of the industrial merits of the application.

PN143

The question of whether or not the ministerial direction is valid or what effect it has in relation to any order which you make, in our submission are beyond the scope of this arbitration and they shouldn't be attempted to be produced through the side door by asserting it as a matter of relevance to your discretion. You should hear and determine the arbitration of the dispute and make whatever order you consider is appropriate in relation to the resolution of that dispute.

PN144

The direction from the Minister is a matter that arises after your determination, and to the extent that issues of constitution or administrative law may arise they should be left to the appropriate judicial forum to deal with, and that's consistent

with what you said at paragraph 94 of the decision in the final dot point where you see you said:

PN145

The significance of the withholding the ministerial consent for the FRV to enter into the service contract is not a matter properly to be determined through this decision, and nor is it necessary to do so.

PN146

And we say that that's absolutely correct and we urge you to apply the same reasoning in this instance.

PN147

While you have that open looking at the second last dot point, this harks back to something that I said a little while ago about the Minister's concern about the other objections that it had raised on the question of fettering, and the second dot point really just reaffirms the submission which we made to you that the various fettering objections that were made by the Minister were only upheld in the way in which we have identified, and which is set out in that dot point and the other ones were not upheld.

PN148

So then moving on to the next part of the Minister's submissions - - -

PN149

THE COMMISSIONER: Mr Borenstein, I think I have just made an error, I have realised there's an error. I think that reference in that second dot point should not be 25B(1), it should be by the looks of it 25A(1). Anyway we can worry about that later.

PN150

MR BORENSTEIN: Yes. The comment I just made arises then in relation to paragraph 66 of the Minister's submissions where it said that if the amendments do cure the flaw that you identified on the last occasion the new dispute has to deal with as yet undetermined impediments to the Commission ordering the FRV to enter into an agreement, and that those remain from last time, and the first of them is the Minister's consent under section 25A, and I think maybe that's also an error, to enter into the proposed service agreement with the corporate board and the UFU. As I said you made some findings about that and we would urge you to make similar findings on this occasion in response to that.

PN151

Then secondly the formal direction under section 8, we addressed you on that, and that again was dealt with on the last occasion, and heaven forbid that we should say that the Minister seeks to relitigate that matter. The finding that you made on the last occasion about what to do with the Minister's directions, in our submission, should apply again this time, and in any event we rely on the submissions I have already outlined to you about the validity, we say invalidity of the Minister's direction.

PN152

In relation to the various governance issues, which are referred to in paragraph 66(c), as we understand your decision they were not matters that you found of any consequence or substance in terms of objection. But can we refer you, please, to the submissions which we made in the last matter on 26 September and which are in the court book starting at court book 148, and the particular paragraphs are 110 and 111 at pages 170 to 172, and they identify each of these governance issues that the Minister raised, and they provide an answer to them.

PN153

As we said on the last occasion these are clauses which the FRV proposed, and you will recall that we indicated to you on the last occasion, and we reiterate that here, that the whole idea of seeking to resolve the underlying dispute by utilising a service contract, which is a contract which the FRV uses with all its suppliers, and which has the same sorts of terms in it as it does with all the suppliers, should weigh in favour of you rejecting this sort of objection to having those matters included in this agreement. The concerns which the Minister has raised are all addressed by specific provisions in the agreement, and we say that's a complete answer.

PN154

Then finally in 66 paragraph (d) the Minister says that you shouldn't make an order, and it uses the terminology 'in respect of a third party, not a party to the interim agreement.' It's not clear what it means by that, but there is, we say, an underlying misconception about the nature of the order which is sought.

PN155

The parties to the agreement, that is the actual parties to the industrial situation, the actual parties to the industrial dispute, have agreed between themselves and have spent months negotiating on a mechanism to resolve the dispute. The mechanism is a service contract, and the mechanism is for a service contract by a third party to provide services to FRV.

PN156

We don't ask you to make any orders directed to the third party. We ask you to make an order that will conclude the dispute resolution processes which the parties have undertaken themselves. The parties proceeded on the basis that upon concluding a mutually agreeable service agreement FRV would sign it. We are asking you to make an order that it do what was agreed to be done in the process of negotiating through the Commission and beforehand a resolution of this industrial dispute, and we say that there is nothing in the Act that precludes you from making an order.

PN157

You will recall that on the last occasion FRV indicated that it had no opposition to an order of that kind, and we say that that speaks much louder than the intervention of a third party to the dispute in the way in which the Minister has done on this occasion.

PN158

Just turning to the submissions that were made by FRV, their submissions are pretty much confined to pleading that they can't do anything because the Minister

has given them a direction. We don't seek to restate the submissions we made about the effects of the Minister's direction and what you should do about it. We do want to make a submission though about paragraph 20 of those submissions. Paragraph 20 makes reference to some formal matters that were to be completed in schedule 1 of the agreement, and if I could ask you to just have a look at schedule 1 of the agreement, UFU1.

PN159

THE COMMISSIONER: Yes. Go ahead.

PN160

MR BORENSTEIN: And you will see that the items which they mention have been marked, and they were marked on the last occasion as well, and they are clearly administrative matters that would go in at the last minute. So item 2, the commencement date, obviously that would need to be completed when the document was filled in. Item 6, the name of the contact or receiving advices, obviously that would need to go in contemporaneously with the execution of the agreement. Insurance - that's a matter that's again to be put in and from the discussions that the parties had that's not contentious, it's just a matter of putting in the contemporary details at the time of execution. Item 8, again is just filling in addresses, and item 9 deals with just inserting the contemporary details of the contact people.

PN161

Now, what is said by the submission is, and this is without any evidence, that the ministerial direction would prevent FRV from even negotiating the terms of the proposed service agreement, and any such negotiations would be futile. Now, if you look at the terms of the Minister's direction, which is at 467 of the court book, there is nothing said there about negotiating the terms of these outstanding items. What the direction is, is not to enter into the proposed agreement, and there's an interesting point that at the time this was made there was a different proposed agreement than there is today, but leaving that aside there's nothing there about discussing with the UFU the details that would go into these clauses, and these are matters that were the subject of the negotiations between the parties and were not contentious. And you will recall from the last occasion that nobody sought to raise any problems about the fact that these things had been left incomplete.

PN162

So, Commissioner, they are the submissions that we seek to advance in support of the orders that we seek in the dispute matter. The orders are set out in the Form F10 at paragraph 3.1 from memory. Sorry, that's not the orders.

PN163

THE COMMISSIONER: At page 20 of the hearing book I think.

PN164

MR BORENSTEIN: Yes. And the contract that's referred to as being attached is UFU1. So unless there's anything else I can assist you with they are the submissions we wish to advance.

PN165

THE COMMISSIONER: Just bear with me one minute, please. You gave me some submissions this morning as to the development of the dispute now before the Commission, and you took me through the exchanges principally between Ms Campanaro and Ms Schroeder, or on occasions Mr Starinkas. Now, I understand the sequencing of those exchanges. The question I have got is whether there's any material before me as to why the dispute has arisen.

PN166

MR BORENSTEIN: As to?

PN167

THE COMMISSIONER: Why the dispute has arisen. Now, the reason I raise that is that you refer to Mr Starinkas' acceptance of some minutes of a meeting which was at I think page 115 of the hearing book - actually page 117. I'm sorry, that's a letter from the union. I don't have the reference immediately from Mr Starinkas, but his reply if I remember it correctly was that he accepted that the minutes which had been put forward were accurate. The question I have got I guess is just to understand if there is any material before me about the reasoning between that point and the point where the union said we are now in dispute.

PN168

MR BORENSTEIN: I can explain that. The amendments that were proposed in that original letter from Mr Marshall on 14 December were never agreed to. There appears to have been a sensitivity in the FRV about actually agreeing to the amendments. The minute records the mutual intention in relation to the original agreement, and the mutual intention that the agreement would not, or the service contract would not allow the corporate body to impose higher qualification standards than the agreement, and the minute records that both FRV and UFU agreed that was their intention.

PN169

And in relation to the amendments to the agreement, to address the finding which you made about that topic, the minute records from Ms Schroeder that FRV would not oppose such amendments, but they were going to go away and find out whether they could agree, and of course if they agreed then it may be that this dispute wouldn't have to come here. But because ultimately FRV was never able to say throughout all of the steps in the process that they could agree to the amendments that we have had to come to you with this issue.

PN170

THE COMMISSIONER: All right. Thank you. The only other thing I need to is I guess mark the documents which you are now relying upon.

PN171

MR BORENSTEIN: That's Ms Campanaro's statement.

PN172

THE COMMISSIONER: Also your outline of submissions and outline of submissions in reply.

PN173

MR BORENSTEIN: Yes. I can identify those for you.

PN174

THE COMMISSIONER: The outline of submissions is at page 120. I believe that's the one relating to C2023/635.

PN175

MR BORENSTEIN: There is also one on 13 February. I'm sorry, 13 February is the revocation one, so we don't need that.

**EXHIBIT #UFU2 APPLICANT'S OUTLINE OF SUBMISSIONS
FILED ON 07/03/2023 APPEARING AT 120 OF THE HEARING
BOOK**

**EXHIBIT #UFU3 APPLICANT'S OUTLINE OF SUBMISSIONS IN
REPLY APPEARING AT PAGE 130**

**EXHIBIT #UFU4 WITNESS STATEMENT OF LAURA
CAMPANARO WITH FIVE ATTACHMENTS FROM PAGE 103 OF
THE HEARING BOOK**

PN176

THE COMMISSIONER: Do I need to mark the statement of Ms Sakkas? I mean no disrespect, but I am not quite sure what topic that's on.

PN177

MR BORENSTEIN: Page 147.

PN178

THE COMMISSIONER: Yes, it goes to the previous matters. I will mark that.

**EXHIBIT #UFU5 WITNESS STATEMENT OF ANTONIA SAKKAS
WITH THREE ATTACHMENTS**

PN179

MR BORENSTEIN: Can I just ask you, with UFU4 I didn't hear the court book page number that you - - -

PN180

THE COMMISSIONER: Commencing at page 99 - - -

PN181

MR BORENSTEIN: Yes, that's correct.

PN182

THE COMMISSIONER: - - - with five attachments.

PN183

MR BORENSTEIN: No, that's correct.

PN184

THE COMMISSIONER: All right. Well, thank you very much. Now, parties, I think we will just take a short adjournment before we continue with the submissions. If we adjourn briefly.

SHORT ADJOURNMENT

[11.45 AM]

RESUMED

[11.58 AM]

PN185

THE COMMISSIONER: Thank you, parties. Now, do I turn to you, Mr Harding?

PN186

MR HARDING: Yes, Commissioner.

PN187

THE COMMISSIONER: All right, thank you.

PN188

MR HARDING: Commissioner, we filed some submissions dated 17 March and they appear at page 484 of the court book, and thereafter. In light of the disposition or adjournment of the revocation application from the UFU we only need for today's purposes to have regard to part C of our submissions which commence on page 486. And, Commissioner the nub of what's contained in that part is that the Minister has given the FRV and the FRV Commissioner a direction pursuant to section 8(1) of the FRV Act and in paragraph 11 we set out the content of that provision and refer in the next paragraph to the power to give the direction in writing.

PN189

The content of the direction is annexed to a statutory declaration from David Cameron Catanese, and that statutory declaration appears from page 462 of the court book, and you will see on that page that Mr Catanese deposes to FRV receiving a letter from the Victorian Attorney-General and Minister for Emergency Services. He then annexes that letter, but for the purposes really of brevity it's necessary only to refer to the extract from it which is on page 463, and there you will see the text of the direction that was given by the Minister to FRV, the operative part of which is in paragraph 1 which is a direction not to enter into a services agreement with the corporate body, as you have described it in your earlier decision in December.

PN190

Just by way of completeness section 8(7)(a) requires that such a direction be gazetted, and Mr Catanese deposes to that in paragraphs 10 and 11 of his statutory declaration, and I tender that declaration and the attachments to it, Commissioner.

PN191

THE COMMISSIONER: In doing that can I just point out I don't think I have got a complete copy of DCC6, which is at page 483, and I noticed this yesterday afternoon when I was preparing and went back to the filing, and you will see right

at the bottom of page 483 that it says, 'In the proceedings 23 August outline of' - -

PN192

MR HARDING: I see.

PN193

THE COMMISSIONER: And then even in the document that was filed yesterday whatever comes after that had not been filed. So if I could maybe request that that be filed once we adjourn, please.

PN194

MR HARDING: We can do that, Commissioner, but perhaps the explanation is that we really only rely on the ministerial direction for the purposes of this proceeding which is at the top of the page.

PN195

THE COMMISSIONER: All right. I won't press it any further, but I just make that point. So you want to tender your submissions and the statutory declaration of Mr Catanese?

PN196

MR HARDING: Yes, I do.

PN197

THE COMMISSIONER: All right.

**EXHIBIT #FRV1 RESPONDENT'S OUTLINE OF SUBMISSIONS
FILED ON 17/03/2023**

**EXHIBIT #FRV2 STATUTORY DECLARATION OF DAVID
CAMERON CATANESE WITH SIX ANNEXURES**

PN198

MR HARDING: Thank you, Commissioner.

PN199

THE COMMISSIONER: All right, thank you.

PN200

MR HARDING: This morning Mr Borenstein made some submissions about how one construes, how one ought to construe the provisions in section 8 of the FRV Act with those in 25A, and, Commissioner, we have addressed the constructional questions in our submissions in paragraphs 13 and 14, and insofar as my learned friend relies on section 25A(2) we draw attention to the last sentence of that submission, and otherwise rely on those paragraphs.

PN201

Further to those submissions, Commissioner, I am instructed that FRV's position is that it proceeds on the basis that it's been given a valid direction by the Minister not to enter into the services agreement with the UFU. I am instructed that FRV will comply with that and will not contravene the direction. However, its position

is that it does not view itself as precluded from continuing to be amenable to entering into the service agreement in the future, subject to the details that Mr Borenstein referred to by reference to paragraph 20 of our earlier submissions, if the FRV and the FRV Commissioner cease to be subject to the Minister's direction.

PN202

Mr Borenstein also drew attention to paragraph 20 that I have just identified. Commissioner, I can't take our position any further than what's set out in paragraph 20, and in light of what I have just said about FRV's view of the direction and the effect thereof. Subject to anything that you may ask, Commissioner, they're the submissions for FRV.

PN203

THE COMMISSIONER: No, I have no further questions, Mr Harding, thank you very much. Mr O'Grady?

PN204

MR O'GRADY: Commissioner, we have also filed written submissions which set out in some detail the matters that we would rely upon. They commence at CB page 293. You will appreciate, Commissioner, that because at that juncture the two matters were in effect listed for concurrent determination they address both the 603 application and also the new dispute.

PN205

In an effort to reduce the amount of paper that we gave you, Commissioner, we in effect adopted some of the matters that we put in respect of the 603 application in respect of the new dispute. So can I just perhaps indicate what paragraphs you don't need to have regard to in light of the fact that the 603 application is being deferred. So this commences at 293, Commissioner.

PN206

THE COMMISSIONER: All right, thank you.

PN207

MR O'GRADY: It would appear that the submissions that are made at paragraphs 14 through to 28 are primarily focused upon the 603 application and don't have application here. What we say however in respect of paragraphs 29 to 31 we would say does have application, and you will recall this was touched upon by Mr Borenstein in his submissions this morning; namely, the Minister has put the submission that when one has regard to your decision there were some issues that were raised by the Minister last year that you rejected and we don't seek to reargue those matters.

PN208

There were however other matters which you didn't feel you needed to determine in circumstances where you had found that there was fettering, and in our submission those matters remain to be determined. But rather than go through them in great detail this morning what we would seek to do is simply refer the Commission to what we said last time.

PN209

And to that end can I refer you to the outline of submissions which was filed last year, which is in the court book, and that appears at court book page 174, and as you might recall, Commissioner, we addressed those matters in more detail on the second day of hearing, and the transcript which is also in the court book and commences at 252, and relevantly it's paragraphs numbers 523 to 749. So to the extent that those submissions go to matters that weren't determined, and I will come to your decision in due course, we would seek to rely upon those submissions.

PN210

THE COMMISSIONER: Would you just please bear with me for one moment. All right, thank you. So am I to understand that you are repeating the submissions that you have made on those earlier occasions?

PN211

MR O'GRADY: Yes.

PN212

THE COMMISSIONER: All right, thank you.

PN213

MR O'GRADY: And to the extent that they go to the matters that we have identified in paragraphs 29 to 30, which we say weren't determined by you in your decision. As I say we don't suggest that it would be appropriate for us to reventilate the matters that you rejected in the context of these proceedings, but as I have indicated we say that on a fair reading of your decision you didn't have to determine a number of matters and you left them in obedience.

PN214

We say that they are still significant issues and they would need to be determined were you to make the orders sought by the UFU, in circumstances where I think even my learned friend would acknowledge that those arguments to the extent that they have proper foundation are equally applicable to the service agreement that's the subject of the new registration board dispute as to the previous version of the service agreement, which is readily understandable in circumstances where the amendments are confined in the way that my learned friend has described this morning. But we don't believe there's a need for you to have regard to what appears at paragraphs 32 to 33.

PN215

At paragraphs 34 and following under the heading of 'No basis for the section 603 application' we do put a number of submissions that go to the proper construction of your decision, and I put this with a degree of caution because it's always dangerous to tell a member what they decided based on one's reading of their decision, but in our respectful submission the appropriate way of construing what you determined last year is as set out in particular paragraphs 38 through to 41 of the submissions, but for context I would ask you to have regard to what appears at 34 really all the way through to 43. We would accept there's no need for you to have regard to what's at 44 and 45 or at 49, but we would rely on the parts of the

603 submissions, and then of course those that are directed to the new registration board dispute.

PN216

Could I then go to the decision and go to how we respectfully submit the decision should be interpreted, and that appears at paragraphs 38 and following, and in particular paragraph 39. The nub of the submission, Commissioner, is that whilst we accept that you made reference to a number of examples of fettering, whether by way of acting in a discriminatory way or imposing standards or qualifications that had no alignment with the standards or qualifications contained in the enterprise agreement, in our reading of your decision is you did not confine yourself to those issues, and indeed should not be seen to have confined yourself to those issues when one has regard to the broader principles associated with fettering.

PN217

In our submission the starting point in that analysis is paragraph 78 of your decision where you set out what we say is the gravamen of the fettering problem, that these would be determinations or decisions by the corporate board and not controlled by FRV, with it not having a majority of members of the corporate board. If that came about it would be difficult to see how their occurrence was consistent with FRV's legislative entitlement/freedom to employ any persons that it considers necessary to assist it to carry out its functions under this Act or any other Act and we of course agree with that.

PN218

But if the touchstone is as identified in that last two lines of paragraph 78 then clearly there would be other aspects of the registration board system that would transgress that very principle. And the key issue, in our respectful submission, in respect of that, is who is making the determination? It is clear from paragraph 25B of the FRV Act – and I don't know whether you have a copy of the FRV Act there?

PN219

THE COMMISSIONER: Yes, I do.

PN220

MR O'GRADY: That as you acknowledged in paragraph 78 that the issue of – or that the entity who is to employ any persons that it considers necessary to assist it in carrying out its functions and/or to transfer, promote, suspend or remove any employee is FRV. And clearly, under the proposed registration board system, even with the amendments suggested by my learned – or put before as part of the new dispute notification, it would no longer be FRV who would be making that determination. It would be the corporate board that is making that determination. Now, there is provision within the FRV Act for delegation.

PN221

That is contained in section 24B of the FRV Act. But importantly, FRV can only delegate to any employee or class of employees of FRV.

PN222

THE COMMISSIONER: Sorry, which section was that?

PN223

MR O'GRADY: Section 24B:

PN224

Fire Rescue Victoria may by instrument under its official seal delegate to any employee or class of employee of Fire Rescue Victoria any responsibility, power, authority, duty or function of Fire Rescue Victoria under this Act or the regulations or under any other Act or regulations other than this power of delegation.

PN225

So we accept that. The statutory scheme that reposes on to FRV the power to employ, transfer, promote, et cetera can be accommodated by a delegation but there are clear limits on to who that delegation can occur and importantly, it can't be delegated to somebody who is not an employee or class of employees of FRV. This becomes important, Commissioner, because - - -

PN226

THE COMMISSIONER: Can I just pause you there? I just need to reflect on the statutory construct and it's escaping me at the moment. You have a situation in which it's envisaged the firefighters are registered for the purposes of their duties. Can you remind me, please, whether or not that requirement – or is there a requirement for registration under the Fire Rescue Victoria Act?

PN227

MR O'GRADY: Sorry, at this point in time, no, there isn't. There is under the Act a proposed statutory scheme for registration. And you might recall the evidence last year was that there had been some steps taken in respect of the development of that scheme. But that the registration board that's being proposed as part of this dispute is not part of that scheme.

PN228

THE COMMISSIONER: Right – and the reason I raise that is the language of section 24B. You were putting the view that you can delegate to an employee or class of employees of Fire Rescue Victoria: any responsibility, power, authority due to your function at Fire Rescue Victoria under this Act or some other act. I was wanting to explore that aspect, which is is there a responsibility, power, authority, duty or function to register a firefighter as such?

PN229

MR O'GRADY: Well, as I understand the position, the statutory scheme for registration whilst it is referred to in this Act as something that is to be developed has not yet been put in place and so at this point in time there is no statutory function in respect of registration. That's dealt with at sections 147 and following.

PN230

THE COMMISSIONER: All right, thank you.

PN231

MR O'GRADY: And you'll see that there is to be a scheme and what this part of the Act does is set up the framework for that scheme. But as I understand it the board is yet to be appointed. Now, it may be of course that once that happens there could be an impact on the exercise of the powers set out in section 25B. Now, that may be something that is perfectly permissible because the registration board is – involves employees of FRV and/or a class of employees of FRV. It might also be perfectly permissible because we accept as a matter of principle that the generalis specialis doctrine applies – that if you have a specific provision dealing with a specific function, then that would have precedence over more generalised provision and here, as my learned friend said – and we don't disagree with that – there is a need to read the various parts of the Act consistently with each other, and consistent with what the High Court said in Project Blue Sky.

PN232

But at this point in time that hasn't happened and perhaps more fundamentally, Commissioner, that is not what is being proposed by the new registration board service agreement. What is being proposed is that individuals who aren't employed by FRV, although there may be some who are but there is no requirement that they all be employed by FRV, make the determination as to who can work as a firefighter in Victoria. We say that is fundamentally at odds with section 25B when read in combination with 24B. This becomes important, Commissioner, because what we are concerned with here is a decision as to who can be employed or who can be promoted and what position they can hold.

PN233

It is not just a question of applying criteria. As the Commission would be aware, you can have two people of goodwill looking at the same criteria and come to different determinations. What the Act contemplates – and indeed what is the current position under the enterprise agreement – is that it is FRV that applies the criteria. It is FRV that determines whether or not a particular person should or should not be classified at a particular level. Now in respect of some of the lower levels as contemplated by the agreement, that may be a largely automatic process because of the prescriptive nature of the enterprise agreement. But that is not necessarily the case when one moves into the more senior Acts. There has to be an assessment performed as to whether or not somebody should be engaged at one of those more senior Acts.

PN234

And what the Act puts in place – and indeed what the enterprise agreement contemplates – is that FRV will be the entity that undertakes that assessment. And that is not what the new registration board dispute contemplates. What is contemplated is that a third party will undertake that assessment.

PN235

THE COMMISSIONER: Mr O'Grady, that appears to be a new submission on the part of the Minister. I'm not criticising her for that but I just want to understand if that is the case that my understanding of the previous case was obviously about the matters which we've discussed this morning about whether there was fettering, whether it fitted within matters pertaining. But I don't seem to recall on the previous occasion that there had been an argument to the effect that

there is decision-making – I'm paraphrasing you here obviously, maybe erroneously – there is decision making that only can be done by FRV.

PN236

MR O'GRADY: Well, with respect, Commissioner, I think it was put last time and indeed in my submission it is reflected in what you said in paragraph – the last part of 78 – that the Act contemplates it is FRV that is to make these types of decisions. But I do accept, Commissioner, that - - -

PN237

THE COMMISSIONER: That's a fair point.

PN238

MR O'GRADY: - - - part of what I'm saying to you is in response to my learned friend's submission regarding, 'Well, this is nothing other than just like outsourcing payroll'. You might recall my learned friend took you to that submission this morning. It appears at paragraph 21 of his submissions. And he says, well, there is no problem because FRV can outsource payroll and this is just like payroll and so there is no fettering issue. In my respectful submission that is just fundamentally wrong for reasons that I've sought to explain. One can understand that FRV might enter into a contract with a payroll provider. That wouldn't transgress what section 25B talks about, namely that it is a person or entity that decides whom it wants to employ for its purposes.

PN239

But that's what the registration board contemplates and that's the case even if you accept that the criteria that the registration board would be applying mirror the criteria that the enterprise agreement puts in place because as I've indicated those criteria still have to be applied and as I've also already submitted, once you apply criteria there is capable of different outcomes. What Parliament has said in 25B is that the entity that is to apply the criteria is FRV. It can delegate that to its employees but not to anybody else. There is also - - -

PN240

THE COMMISSIONER: That's where I'm still unsure of what you're putting or the basis of what you're putting. You're saying in respect of section 24B that it can't delegate the matter of who it employs. Now, 24B though appears to confine the power of delegation or prevent the power of delegation of duties, et cetera, under this Act and the question which I have is whether the determination of who can be employed is something dealt with in this Act.

PN241

MR O'GRADY: Well, the determination of who is employed is a power conferred upon FRV by section 25B.

PN242

THE COMMISSIONER: All right. I'm then having a difficulty reconciling the differences between employing a person and registering a person and the extent to which that may be dealt with within section 25B or somewhere else.

PN243

MR O'GRADY: Well, under this Act, under these provisions, there is no registration board in place. And so what section 25B does is it says it's up to FRV to decide who it wants to employ and in which positions. Now, we would accept that FRV as being bound by the enterprise agreement is confined in some respects as to how it goes about discharging that function and the Commission would be familiar with the provisions in the FRV operational agreement that deal with that. So it's clause 12 and then the various schedules that that clause refers to. But the decision as to who it employs is still being made by FRV and as - - -

PN244

THE COMMISSIONER: So the function which is non-delegable is the decision of employment?

PN245

MR O'GRADY: Yes, and in the role that they're employed in the second part of the section.

PN246

THE COMMISSIONER: Sure.

PN247

MR O'GRADY: Transfer, promote, suspend or remove any employee.

PN248

THE COMMISSIONER: But is it then possible that there is a separate function of registration which is not required by the Act and which therefore can be delegated to whoever they wish?

PN249

MR O'GRADY: Not if that separate function or registration confines FRV as to whom it can employ and in what position it wants to employ them. If it was the case that FRV could ignore the registration, and just simply employ who it wanted to be, whether they're registered or not, then that might be a different thing but as we understand what's being put, that's not the case at all; that if somebody does not – is not registered at all or is not registered in a particular position, or being able to perform a particular position, then FRV can't simply ignore that, and that's the vice because it might have applied the criteria in the enterprise agreement in a way that gave rise to it preferring to employ Fred in a particular role rather than Harry.

PN250

But if the registration board – even if it is applying the criteria set out in the enterprise agreement – decides that it doesn't want to register Fred at a particular level, and it's acting in good faith, it's just come to a different view on the application of the criteria, then Fred can't be employed by FRV at that level because he's not endorsed by the registration board to be engaged at that level.

PN251

THE COMMISSIONER: So in essence that's a submission that there can never be a third-party registration board of any type.

PN252

MR O'GRADY: Well, a third-party registration board that – other than the one contemplated by the Act - - -

PN253

THE COMMISSIONER: I accept that's limited and that's in respect of people deployed to the CFA, if I remember correctly.

PN254

MR O'GRADY: Yes, yes, yes. But a registration board that's not contemplated by the Act and that in effect makes the determination as to who can be employed by FRV, we would submit is inconsistent with the statutory scheme because 25B confers that power on FRV. FRV can delegate it but it can only delegate it to employees or classes of employees of FRV.

PN255

THE COMMISSIONER: All right, and would you accept that the argument in that sense is a much stronger argument that the minister put on that subject previously?

PN256

MR O'GRADY: Well, I would accept that it's is being developed more than the argument that I put on that subject previously but as I've sought to explain, it in my submission is consistent with the core argument that was put previously – namely, that it's FRV that has to make these determinations but it's developed in response to the submissions that my learned friend put on in reply to say, 'Well, this is the same as payroll'. And it's patently not the same as payroll because payroll doesn't have to be exercised by FRV.

PN257

THE COMMISSIONER: I might have a different view with you on that but - - -

PN258

MR O'GRADY: Well, I don't need to – all I'm saying is on any view of it it is FRV that is to make the decision and the answer that's being suggested in these proceedings, which wasn't of course the subject of its submission in the last proceedings, is, well, you don't have to worry about it because the criteria that FRV will apply are precisely the same criteria that are in the enterprise agreement and therefore there is no additional fettering. And our response to that is, well, even if you accept that's right – and we don't necessarily accept that's right and I want to come to that in a moment – but even if you accept that's right, it's the person who is applying the criteria that is inconsistent with the statutory scheme.

PN259

THE COMMISSIONER: All right, thank you.

PN260

MR O'GRADY: And that can give rise to different outcomes. Can I then turn to the agreement which is UFU1 and make the point in respect of schedule – is it schedule 5? Schedule 4 – that it is difficult, in our respectful submission, to reconcile the blanket way in which the amendment is expressed which in effect

says for the avoidance of doubt, the qualifications, competency and operational experience required for registration shall be at all times only those specified in schedule 3 of Division A and schedule 5 of Division B of the operational agreement and the fact that the service agreement itself appears to put in place requirements that don't mirror what is contained in the enterprise agreement. So, for example, if one goes to clause 7, there are six registration categories and I accept that the first category includes a number of subcategories because it goes from firefighter 1 to leading firefighter and officer includes station officer and senior officer, but there are some 14 categories referred to in clause 12 of the enterprise agreement.

PN261

If one then goes to clause 8 of schedule 4 of the service agreement, there are specific criteria and/or qualifications set out in respect of particular categories of firefighter. They are not simply mirrors of what is provided for in the enterprise agreement. If one goes to clause 9, which talks about current firefighters being registered, to be aligned with their current rank and to be considered for registration to a higher category they'll need to demonstrate all the qualifications for registration by the board. Again, there may well be an overlap with these provisions and those contained in the enterprise agreement but to say that it is simply the application of what the enterprise agreement puts in place is inconsistent with the fact that the service agreement itself sought to put in place particular criteria that the board has to apply.

PN262

Now, Commissioner, I've taken you to paragraph 78 of your decision. We also rely on paragraph 79, where you say:

PN263

As drafted, the corporate board constitution and service contract do not appear to be consistent with (indistinct) in 25B and amount to a fettering of the FRV's function.

PN264

So again, the point you're making on our reading of the decision is the tension between the service agreement and section 25B. What the amendments to the service agreement that are the subject of this dispute do is seek to resolve any tension between the service agreement and the terms of the enterprise agreement. But that's a different question, in our respectful submission, and not the appropriate test for determining whether or not there is fettering. The issue, in our respectful submission, is is there a tension between section 25B read in combination with section 24B, and the terms of the service agreement and for the reasons I've sought to explain we say there is and adopting the same criteria as the enterprise agreement, even if that is what is occurring, doesn't address that issue. And in paragraph 80 you say it's not to say that either the corporate board or the service contract cannot be drafted in such a way as to not fetter FRV's (indistinct) right in relation to employees. And we would accept that. It may be, for example, that if all the registration board did was make a recommendation or if FRV was entitled to ignore the determination of the registration board, then there would be no fettering but that is not the position as we apprehend it.

PN265

We elaborate on that in paragraph 40 and 41 of the written submissions. You'll see in paragraph 43 we take or refer to the Commission to some other parts of the transcript where you'll see in the emphasised subparagraph (c) we note that we made the point that was being proposed was a contractual arrangement that in contrast with 25B effectively repose the decision as to whom FRV could employ, who it could promote and who it could not employ, including by way of suspension or dismissal on somebody other than FRV, which is – so we made that point last time but we can perhaps make it with more force on this occasion.

PN266

THE COMMISSIONER: Just in respect of that submission, what – I'm looking at section 25B again. It certainly states that Fire Rescue Victoria can do from time to time the things which are specified. But what effect does the enterprise agreement have in tempering that function already – and what I meant to say there is in terms of the consultative or the dispute processes which from time to time arise.

PN267

MR O'GRADY: Well, in effect two submissions we would make in respect of that: the first is as I've already put, the agreement, to the extent that it imposes criteria, that then need to be applied still puts the FRV in a position where it is making a decision. There then is an issue of – as you've pointed out – if a dispute is raised about a determination FRV makes FRV has made itself subject to the terms of the enterprise agreement and to that extent one would have thought FRV is in a position where under the current state of the law it would be bound by a determination of the Commission in an arbitration of that type but that is by virtue of the fact that an issue of that type – i.e. a dispute over the application of the agreement – is a matter that FRV has agreed could be subject of a private arbitration.

PN268

In my submission that principle doesn't extend to in effect the UFU seeking an order from the Commission that the Commission make an order that FRV enter into a contract to then repose that power into a third party. What the Commission is doing in respect of this type of issue that you were identifying a moment ago is it is resolving a dispute as between FRV and the UFU over a determination that FRV has made in respect of employing or not employing a particular individual. It's fundamentally different to, if you like, outsource that process to a third party by way of determining a dispute, in our submission.

PN269

The second point I would seek to make is that there is in the submissions that we've made a difference between what might be thought to be said that FRV can do or is required to do by virtue of the fact that it's a party to the enterprise agreement, and what can arise by way of contract. And you may have seen that we've made these submissions at some length in the written submissions. But in our submission there is a fundamental difference between the capacity of FRV to fetter itself pursuant to a federal instrument that has been made under the statutory scheme and the capacity of FRV to fetter itself by way of a contract that it entered into with a third party.

PN270

There is a federal statutory scheme that determines and has in place its own safeguards and protections as to what can and cannot be included in an enterprise agreement. What is being talked about here is something completely different, in our submission, and there are consequences.

PN271

There are limitations on the mechanisms or remedies available for a contravention of an enterprise agreement that are different from those that apply to contract. There is the involvement of the Commission in various respects that are different from what might be the situation in respect of contract. There are orders that can or can't be made in respect of the enforcement of an enterprise agreement or for the resolution disputes over an enterprise agreement that are different from those that might arise in contract.

PN272

In our submission the fact that FRV might arguably have fettered itself through entering into the enterprise agreement does not warrant the conclusion that FRV can similarly fetter itself by entering into a contract, even into a contract that it's ordered to enter into pursuant to the resolution of this dispute.

PN273

At paragraph 48 of the submissions we have raised a number of other matters that we would say have application to the new registration dispute. We make the point in paragraph (a) that I think I have already dealt with. In paragraph (b) we note the concession that the service contract needs to be read in conjunction with the registration board's constitution, but we would submit that doesn't resolve the fettering issue, it just means that a firefighter can be frozen in their existing position in perpetuity unless the board decides to register them. That being the case even if FRV wishes to promote them.

PN274

In subparagraph (c) we again make the point that it's the board not FRV who decides what a firefighter from another recognised fire service, or whether a firefighter from another recognised fire service can be employed by FRV. Again the fact there are similar restrictions in the interim agreement doesn't resolve this issue.

PN275

In respect to the point made in respect of discrimination in our submission this highlights the vice of what is being proposed. As we understand the submission being put by the UFU we don't have to worry about discrimination because there's an Equal Opportunity Act there and that can resolve issues of discrimination, and of course discrimination was one of the matters you expressly addressed in your decision. It hasn't been something that has sought to be addressed by way of amendment to the service agreement. So whatever concerns you had about discrimination in respect of the previous iteration of the service agreement are still there and unresolved, we would submit. But the answer that has been proffered by the UFU is, well that doesn't matter because there's an Equal Opportunity Act. But as we submit in paragraph 48(d) that highlights the problem.

PN276

If the Fire Registration Board acted in a discriminatory way FRV would still be precluded from employing or promoting persons who would wish to employ or promote. So if the board discriminated against women for example under the current regime FRV wouldn't be entitled to ignore what the board had done because it had acted in a discriminatory way. Again that's a matter that one would have thought could have been addressed in the amendments to the service contract by making express provision that FRV is not bound by any determination of the board that it believes is discriminatory. It hasn't been.

PN277

But the solution that's proffered by the UFU is that FRV in effect has to go to the Victorian Civil and Administrative Tribunal and seek orders as against the board, or the employee who is being discriminated against needs to go to VCAT and seeks orders against the Board. And then if the tribunal in due course makes those orders and the board decides to change its determination FRV would then be allowed to employ the individual concerned. Again it highlights the complexities that flow from the allocation of this function to an entity other than FRV, and in our submission can't be reconciled with section 25B. As I have indicated, Commissioner, for the current dispute you don't need to have regard to 49 to 51 because they deal with the implications of any denial to accord procedural fairness.

PN278

And then we turn to the submissions specifically in respect of the new registration board dispute, and the first of the points raised of course is the issue of abuse of process, and as I understand it my learned friend doesn't cavil with the general propositions that are stated in paragraph 53 as to what may constitute an abuse of process. His answer is, well it's not an abuse of process because we've amended the agreement.

PN279

In our submission what that overlooks is that the dispute that was notified back in March I think it was of 2021, and it's in the court book at (indistinct) the statutory declaration of Ms Daff at 313, which as my learned friend submits sought in general terms for FRV to establish a registration board in accordance with the FRV IO agreement. The assistance of the Commission to consider that dispute and the assistance of the Commission to resolve issues between the parties associated with the establishment of the board had crystallised by the time the matter came on for determination last year, and that's apparent from the submissions that were filed by the UFU in those proceedings which appear at court book page 336.

PN280

So the UFU and it would appear FRV had determined that all that needed to be resolved by the Commission or arbitrated by the Commission in order to resolve the dispute was whether or not the amendments that were sought to be made to the contract, or proposed service agreement there under consideration should be made, and what the Commission determined is that, no, those amendments should not be made because the contract as currently structured would involve an impermissible fetter on the powers of FRV. That resolved the dispute.

PN281

In our respectful submission for the union to in effect come back and say, well we're going to modify the agreement and have another crack does constitute an abuse of process. The union chose to formulate its issues. The union chose to characterise what was outstanding as far as the dispute was concerned, and what it was putting forward to be determined was the making of the agreement with the modifications referred to in paragraph 2 of the outline of submissions that the UFU filed last year, and the Commission determined that it should not make the orders that were being sought by the UFU.

PN282

It is inconsistent with the notion of dispute resolution that an unsatisfied party can simply go and reformulate the orders they are seeking after they have lost and have another go. In our respectful submission the new proceedings should be properly characterised as an abuse of process. The UFU of course had options in respect of your determination last year, including an appeal, and/or including a 603 application. It has decided rather than deal with those issues it has simply sought to in effect reargue matters by making amendments which on its own submission, and indeed in their own terms, do not change the substance of the service agreement because they are put in there by way of for avoidance of doubt. And we generally rely upon the submissions that we have made in respect of abuse of process.

PN283

While my learned friend says, well we've relied on some court authorities and the Commission isn't a court and there are no pleadings and the like, we would accept that, but the substantive point remains the same. Just as in a court in the Commission the parties are expected to abide by the outcome of the other, and they're not entitled to simply have another try when they don't get the outcome they like, and that is, in our respectful submission, what has occurred in respect of this subsequent application. And we make the point that is implicit, in our respectful submission, and this is at paragraph 61 of the dispute resolution processes, that if the matter is not settled following progression through the dispute procedure it may be referred to the union (indistinct) to the FWC, and the FWC may utilise all its powers and conciliation and arbitration to settle the dispute. In our submission the dispute has been settled. It is inconsistent with the settlement of that dispute for the new application to be made.

PN284

We make in paragraph 63 the points that I have already taken the Commission to and I won't repeat them, and in 64 I have already made those submissions. In paragraph 65 we note the effect of changing the nature of the instrument and we rely upon what we have said there. At paragraph 66 we make the point that there are a number of other matters that we respectfully submit on a fair reading of your decision you simply left in obedience, and we're not critical of course for that, they weren't matters that needed to be determined, but they are, in our respectful submission, matters that would need to be determined if you were to consider determining the new registration board dispute in favour of the UFU, and we have identified those matters.

PN285

Again conscious of the dangers of in effect telling you what you meant when you wrote your decision we simply say that for the reasons that I have already foreshadowed these matters are all undetermined and in obedience and they are all powerful considerations against the making of the orders sought by the UFU.

PN286

Can I turn then to develop in some more detail the submissions in respect of fettering and also in respect of - - -

PN287

THE COMMISSIONER: Mr O'Grady, would that be a convenient time to break for lunch?

PN288

MR O'GRADY: Yes, Commissioner.

PN289

THE COMMISSIONER: All right. Maybe if we adjourn until 2 o'clock.

LUNCHEON ADJOURNMENT [12.56 PM]

RESUMED [1.59 PM]

PN290

THE COMMISSIONER: Thank you, Mr O'Grady.

PN291

MR O'GRADY: Yes. Thank you, Commissioner. Can I just finish off with the fettering submissions? You will recall, Commissioner, that in the respect of the original Fire Registration Board dispute, there was capacity to amend the proposed service agreement, and indeed that occurred I think on at least three occasions.

PN292

There was an amendment made, which appears at court book page 447, in respect of inserting a new clause 16.2(a). There was an amendment made that was I think contained ultimately in UFU3, and that's at court book page 448, and then there is a further variation of that amendment, which appeared at court book page 449.

PN293

The reason for directing the Commission's attention to those parts of the court book is that it was clear that the UFU had the capacity to address issues in respect of the service contract in the running last time, and it didn't do so, and in addition, there are some matters, particularly in respect of the discrimination issue that I raised before lunchtime, that it still hasn't done so.

PN294

Can I then go to UFU1 and part of the constitution? At UFU1, schedule 4 you will find clause 10(b)(iii), and this deals with the formation of the panel who is to do the assessing, and you will see there at receipt of such application, the registration board will nominate for firefighters employed by, but in my respectful

submission, importantly, or formerly employed by Fire Rescue Victoria or its predecessors to conduct equivalent assessment on its behalf.

PN295

THE COMMISSIONER: I'm sorry, which paragraph are you referring to?

PN296

MR O'GRADY: Sorry. It's clause 10(b)(iii).

PN297

THE COMMISSIONER: Thank you.

PN298

MR O'GRADY: And that obviously goes to the point that I was making earlier about delegations. But also, if one goes down to (iv), there are qualifications that the panel must hold and experience that they must have.

PN299

In my submission, what flows from that is that it is contemplated that there is going to be an assessment undertaken by the panel. This isn't just, if you like, a tick a box exercise. Indeed, if it was simply a tick a box exercise, one wonders why you would need the board at all.

PN300

There is to be an evaluative assessment undertaken by the board in respect of persons who have made an application to be registered as firefighters, and that assessment is to be undertaken by somebody other than FRV or its employees.

PN301

There's a similar point that can be made in respect of the constitution of the board, and the constitution commences at page 373, but the relevant clause I wanted to direct the Commission's attention to is at 18.4(c) and following, which is at court book page 400, and you will see there, there is again a process of assessment that is contemplated by persons who may include employees of FRV, but is not confined to employees of FRV.

PN302

If I could then take the Commission to - - -

PN303

THE COMMISSIONER: I'm sorry, where does it refer to they did not have to have - - -

PN304

MR O'GRADY: Sorry?

PN305

THE COMMISSIONER: I think you were saying that there may be people on the panel who are not qualified.

PN306

MR O'GRADY: Yes, because it is enlivened in 18.4(c):

PN307

On receipt of such application, VPCFRB will nominate a panel of career firefighters employed by, or formerly employed by, Fire Rescue Victoria or its predecessors to conduct equivalent assessments on VPCFRB's behalf.

PN308

And you will recall that section 24(b) didn't extend to delegation to former employees of FRV. It was current employees.

PN309

Again, in my submission, the two points are that persons making the decisions are not the same persons as the Act contemplates will be making the decision, and secondly, that what we are talking about is an evaluative assessment, which necessarily, in my submission, gives rise to the proposition that different people acting in good faith come to different conclusions applying the same criteria.

PN310

MR BORENSTEIN: Your Honour, can I just rise to say this by way of objection? This is the second time our friend has made a submission like this. He's asserting from the Bar table what the process is and whether it involves a subjective process or an objective process, and he's put on no evidence, and he's asking you draw inferences simply from what he says at the Bar table, and I can tell you now my instructions are to the contrary.

PN311

THE COMMISSIONER: Thank you, Mr Borenstein. Look, I accept that it is merely a submission, and I'll need to make some decisions as to the weight to be accorded to it.

PN312

MR O'GRADY: Thank you, Commissioner. And of course I am referring to both UFU1 and the constitution of the board, and again, if it was simply an automatic process, query why you need to have panel members who hold, or have held, at a minimum a rank of station officer, and have experience in conducting equivalent assessments. Why do you need to have a board at all if it's simply a question of applying the enterprise agreement?

PN313

Could I then go to some authorities in respect of fettering, or one authority in respect of fettering, and that is the *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54? It wasn't in our list of authorities, but we've got copies for the parties.

PN314

THE COMMISSIONER: Thank you.

PN315

MR O'GRADY: This is an unusual case in a way, Commissioner, in that Mason J, as he then was, dissented in the outcome, but everybody seems to acknowledge that what he said is right and is the appropriate descriptor of how fettering operates in respect of entities.

PN316

The first page I'd ask you to go to is page 74 and you will see at the foot of that page, or the paragraph at the foot of that page, his Honour makes the observation – well, identifies the tension in this space, namely that:

PN317

Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities. And it would be detrimental to the public interest to deny to the government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future.

PN318

Which is the attention. Then his Honour continues at page 77 in the first full paragraph on that page, and the last full paragraph on that page:

PN319

Where statutory approval for the making of the contract exists and the contract contains an undertaking that the statutory power will be exercised in a particular way, there is no room for the notion that the undertaking is invalid on the ground that it is an anticipatory fetter on the exercise of a statutory discretion. The contract, assuming it to be within constitutional power, is valid and the undertaking is free from attack. There is in such a case the initial question: Does the statute which approves the making of the contract expressly or impliedly amend, for the purposes of the contract, the pre-existing law providing for the exercise of the discretion? The statute may impose on the repository of the discretion a duty to exercise it in conformity with the undertaking or it may leave him with a discretion to arrive at some other result. If it be the former, then the contracting party may be able to compel the government and the person in whom the discretion is vested, though it has been relevantly converted into a duty, to comply with the undertaking. If it be the latter, then the undertaking if it is enforceable will be enforceable by an action for damages only.

PN320

It will be perceived from what I have written that in my opinion the doctrine that an agreement of the kind in question may constitute an anticipatory fetter on the exercise of a statutory discretion is closely connected with the question whether the agreement is authorized by statute, or is prohibited by, or incompatible with it. If the agreement is authorized, then it is valid, and any breach of the undertaking it contains will be enforceable by damages but only when the effect of statutory approval is to convert the discretion into a duty will it be enforceable specifically.

PN321

The nub of the submission that I put in respect of this is that, in our submission, the agreement is incompatible with the statutory scheme, for the reasons I have sought to put to you this morning.

PN322

Could I then turn to the issue of direction and ask the Commission to go back to the FRV Act? The starting point, in my submission, in respect of this issue is section 8. My learned friend made some reference to some parts of section 8(1), but I don't recall him addressing the rest of the section, and in my respectful submission, there needs to be consideration of the rest of the section.

PN323

But in respect of section 8(1), you'll see it provides that:

PN324

Fire Rescue Victoria and the Fire Rescue Commissioner are subject to the general direction and control of the Minister -

PN325

So it's not just a capacity to issue general directions or guidelines; it is general direction and control of the Minister –

PN326

in the performance of the duties and functions and the exercise of powers of Fire Rescue Victoria and the Fire Rescue Commissioner, including, but not limited to, the policies and priorities to be pursued by Fire Rescue Victoria and the Fire Rescue Commissioner.

PN327

And then it says in subsection (2):

PN328

Subject to this section, the Minister may from time to time give written directions to Fire Rescue Victoria and the Fire Rescue Commissioner.

PN329

And then subsection (3) through to (6) set out those areas where the Minister can't issue a direction. Subsection (3) provides:

PN330

The Minister must not give a direction under subsection (2) in relation to the exercise of the operational functions and powers of Fire Rescue Victoria or the Fire Rescue Commissioner including, but not limited to, a function or power under any of the following provisions of this Act -

PN331

And thereafter there are enumerated some 20-odd sections, which when one goes to them are sections which are concerned with the task of fighting fires, how brigades are to be constructed, where they are to be located, when a notice should be issued, how people are to be rescued.

PN332

They are the operational aspects, consistent with of course the chapeaux in section 8(3), but importantly, for the purposes of this argument, there is no mention of either 25(b) or 25(a). My learned friend's submission this morning was that you should read down the power contained in section 8, because it is in effect subject to the specific provisions in section 25A:

PN333

In circumstances where Parliament has gone to the effort of identifying with precision what sections the Minister cannot issue a direction in respect of - - -

PN334

THE COMMISSIONER: It's not an exhaustive list, is it?

PN335

MR O'GRADY: No, I accept it's not an exhaustive list. But it's – and indeed I would accept - - -

PN336

THE COMMISSIONER: I mean, it's a long list.

PN337

MR O'GRADY: It's a long list.

PN338

THE COMMISSIONER: But it's not exhaustive.

PN339

MR O'GRADY: No, I accept that and – but when one goes to the provisions that are listed, what one finds is that they are provisions that in effect deal with the operational functions and powers of Fire Rescue Victoria. But they're not provisions that deal with, in effect, the general powers. So what in effect is signified by that list, in my respectful submission, is that it's not the Minister's job to direct Fire Rescue Victoria how it deploys its resources in respect of dealing with the various statutory responsibilities it has concerning the fighting of fires and the like.

PN340

THE COMMISSIONER: So coming back to the first subsection, are the terms, 'General direction or control', defined anywhere in this Act? I think not but are they then defined elsewhere, for example, in the Acts Interpretation Act?

PN341

MR O'GRADY: I don't know the answer to the latter question. I'm confident that the answer to the first question is no. And in those circumstances, one would apply the ordinary English usage of the term and control signifies that subject to the limitations contained in subsections (3) through to (6), the Minister can issue directions to affect control.

PN342

THE COMMISSIONER: So there seems to be a division between the things that the Minister can do in subsection (1) and the things that cannot be done in

subsection (3). The things in subsection (3) would appear – just trying to give an example – that the Minister would not be able to give a direction that you must have a fire station in Warrnambool or you have to use green trucks, not red trucks.

PN343

MR O'GRADY: Yes.

PN344

THE COMMISSIONER: But the question, I guess, is what fits within subclause (1)? Presumably that goes to things – I don't know but things such as key performance indicators or response times.

PN345

MR O'GRADY: Well, it may be guidelines along those lines but in my submission, Parliament having turned its mind to – well, there's two points I would make: firstly there is the fact of the list and you accept and I accept it's not exhaustive. But the other matters that can be added to the list have to be forward in the chapeau of section 8(3); namely, they must be in relation to the exercise of the operational functions and powers of Fire Rescue Victoria and the Fire Rescue Commission. And it might help, Commissioner, if I just skip through some of them. So we start with section 26. That deals with the formation of units. If we then go to section 32, that deals with the power of access.

PN346

If we go to 32AA that deals with duty to warn the community; 32B, action on alarm of fire; 32C, destruction of a building by Fire Rescue Victoria; 32D, false alarm of fire. So they're matters of that nature but there's nothing to suggest that in respect of 8(3) the powers of the type – sorry, the powers and functions – as set out in section 24, can't be the subject of a direction. So that's the first point I would make in respect of that. So for example, there's a power in 24 to purchase and sell property. That's not picked up; 24B is not picked up, the power of delegation; 25A is not picked up, the general powers of Fire Rescue Victoria.

PN347

Then in subsection (4) there's an additional limitation, namely the limitation – sorry, I apologise; 24B is picked up in subsection (4). So the Minister must not give a direction in relation to the exercise of the power of delegation and so 24B deals with the power of delegation from Fire Rescue Victoria; 31A deals with the power of delegation from the Fire Rescue Commissioner, as I recall it. Five: must not give a direction in relation to the organisational structure of Fire Rescue Victoria; 6, in relation to the allocation or employment of employees at particular locations and the establishment of fire or emergency services units.

PN348

But there is nothing, it seems to me, in my submission, in any of those provisions that suggests that the general powers in section 25A are to be immune from a direction and indeed, if it was intended that the general powers in 25A were to be immune from direction, one would have to first bring those general powers within the chapeau in section 8(3) but secondly, one would have to say that they are powers that are in effect of the same type as those that have been identified. In my submission they're clearly of a different type.

PN349

Then going to section 25A, my learned friend in effect draws a contrast between the powers that are set out in subsection (1) and (2) and the requirement for omission set out in subsection (3) and (4) and says, well – as I understood him – there'd be no need for those provisions if the Minister could simply, by way of issuing a direction, direct FRV. In my submission that proposition wrongly conflates the issue of seeking permission and being able to be subject to a prohibition. But the position in respect of subsections (3) and (4) is that unless and until FRV obtains the written consent of the Minister, to do the things it has identified in those provisions, it can't do it. It is not allowed to do it.

PN350

And you'll recall, Commissioner, the submissions I put to you last year in respect of formation of a company and the like. The Minister's position in respect of that issue is that until such permission is granted they don't get to pass go. Section 8 is dealing with a different issue. It is dealing with the issue of being told, 'You are not allowed to proceed to do it'. So it's not a precondition for the doing of the things. It's a power to stop FRV from doing things that it might otherwise want to do, even though it doesn't need the Minister's permission to do it. So there's no – in my respectful submission – tension between the application of a direction to the matters that are dealt with in paragraph 25A and the restrictions in respect of permission contained within that provision because we're dealing with very different subject matters.

PN351

Could I then take you to some of the authorities that my learned friend referred to in respect of statutory construction to apply those provisions to them? The first authority that he referred to is Project Blue Sky and I'm sorry, Commissioner – we also don't have a spare copy of it.

PN352

THE COMMISSIONER: We've located a copy, so thank you.

PN353

MR O'GRADY: But the relevant paragraphs as my learned friend said commence at paragraph 69 and we don't quibble with what is said there. Indeed, we rely upon it. In my submission, giving full effect to section 8 including the matters where the Minister is prevented from issuing a direction is consistent with the construction that we would put forward. Indeed, on my learned friend's approach section 8 would be denuded of effect and the limitation that appears in subsection (3) and (4), (5) and (6), would be overwritten, if you like, by a general limitation. And there is nothing in the terms of the section that in my respectful submission would warrant such a reading.

PN354

In paragraph 70, there is the observation – again which we don't quibble with – which is a legislative instrument must be construed on a prima facie basis that its provisions are intended to give effect to harmonious goals. Again, in my respectful submission, that assists the position of the Minister. The construction that we would contend for – namely the Minister can issue a direction in respect of non-operational matters, including the matters dealt with in section 25A, does

give effect to harmonious goals and there is for the reasons I sought to put a moment ago no tension, in our submission, between that power and the fact that in respect of some issues FRV needs the Minister's permission before it can do particular things. Then the next paragraph, 71, is also of significance. It says:

PN355

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision.

PN356

That, in my respectful submission, includes giving effect to the meaning of the word, 'control'. It includes giving effect to the meaning of the descriptor of what limitations are contained in subsection (3) by reference to the chapeau and includes giving effect to the fact that there have been other express limitations. Again, my learned friend's submissions in our submission don't achieve that. My learned friend then referred to what is sometimes referred to as the Anthony Hordern principle. Again, we don't take issue with the proposition that that is an appropriate approach to statutory construction. But in our submission he has the position, with respect to him, inverted. He would seek to limit the specific provision, which is section 8, which tells you what it is the Minister can and cannot issue directions in respect of by reference to the general provision in section 25A which confers the general powers on FRV to conduct its business.

PN357

In my submission, applying the Anthony Hordern principle, the starting point is that unless there is on its proper construction a limitation contained in section 8 that would preclude its application to the matters identified in section 25A, it's the specific provision and it should be given priority to the extent that there's a tension. Now, in my submission there is no such tension because when one has regard to section 25A it's dealing not with operational matters, it's dealing with the general powers of FRV. When one has regard to the carve-outs that are expressly set out and/or are encompassed by the chapeau in section 8(3), they are dealing with operational matters.

PN358

But if there is application of the principle then it helps us rather than hurts us. There was a discussion of the Anthony Hordern principle in a case that was tendered in part because we wanted to rely on it in the 603 application but there is a useful passage, if I could take you to it. It's the Minister for Industrial Relations of Victoria v Esso, which is behind tab 9 of the bundle of authorities. You'll see at paragraph 67 the Minister on that occasion was in effect relying on section 604 as a basis for reading down 603.

PN359

THE COMMISSIONER: Sorry, which paragraph?

PN360

MR O'GRADY: Sorry – paragraph 67.

PN361

THE COMMISSIONER: Thank you.

PN362

MR O'GRADY: You'll see this meant the Minister admitted that 603 should not be construed so as to achieve precisely the same effect as an appeal under 604 but free from the principles of law that have been established about conditions and for limits of an appeal. In this respect the Minister sought to invoke the Anthony Hordern principle – that is the principle at 7 that where the legislative explicitly gives the power by particular provision which prescribes the mode which it is to be exercised and the conditions and restrictions which it must be observed. It excludes the operation of the general expression in the same instrument which might otherwise have been relied upon for the same power.

PN363

Now, we would say that – as I've already submitted, Commissioner – when one has regard to the prescription associated with the exercise of the power to give a direction contained in section 8 itself, that is the guide, and it's only if you form the view that the direction transgressed those limits that the direction might otherwise not be valid.

PN364

At paragraph 71, the Full Court went on to observe the scope of the Anthony Hordern principle, where they said:

PN365

Secondly, the Anthony Hordern principle does not preclude altogether the same subject matter being dealt with in different ways in the one statute.

PN366

As was observed by Gummow and Hayne JJ in Nystrom:

PN367

The cases applying the Anthony Hordern principle indicate that it must be possible to say that the (indistinct) confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to restrictions in the former power.

PN368

Their Honours observe that – in all the cases they had considered the ambit of the restricted power was essentially holding the ambit of the power, which itself was not expressly subject to restrictions.

PN369

And you will see at paragraph 72 they went on to reject the application of the Anthony Hordern principle to the issue that they were there conferring.

PN370

My learned friend also referred to the *CFMEU v Queensland Bulk Handling Pty Ltd* [2012] FWA 7551 decision. That appears behind tab 10 of the bundle of authorities, and as I recall it, he took you to paragraphs 50 and 51. At 50 they say:

PN371

There are two aspects of the contextual approach to statutory construction 38 which are particularly relevant in this case.

PN372

The first is the well established principle that what cannot be done directly cannot be done indirectly. As their Honours Mason CJ, Gaudron and McHugh JJ observed in Caltex Oil (Aust) Pty Ltd v Best:

PN373

'An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions. Inconsistency in this context arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So, if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.'

PN374

Here of course we would apply the same approach to the issue of who it is that it is to make the decisions as to who FRV should or should not employ, and for the reasons I sought to put before lunch, we would say applying that approach one would say that there is an inconsistency in that there is a conflict between the contractual provisions and the purpose or policy of the statute as reflected in its terms.

PN375

My learned friend then put the submission that, well, you shouldn't worry about the validity of the direction; you should simply make the orders and they can be sorted out somewhere else.

PN376

In my respectful submission, implicit in that submission is that you should proceed on the basis that the direction is invalid, and in my respectful submission, that is not the correct approach.

PN377

Prima facie the direction is valid. It's a direction of course that FRV considers itself to be bound by, and in my submission, for you to make an order that would require FRV to do something that it believes it cannot do lawfully under its statute is – it would not be the appropriate response.

PN378

And I do note that this direction has been in place since September 2022. The UFU has had many months to seek to clarify the status of the direction should it wish to do so, and it has elected not to do so.

PN379

In my submission, in those circumstances the appropriate course is to proceed on the basis that the direction is valid, and if the UFU wants to challenge it, it can seek to do so. It has its rights in that regard.

PN380

Could I then turn to the direction itself, and that appears at a number of places in the court book, but I think the first occasion is at page 465?

PN381

I don't understand my learned friend to be submitting that, but if there is a submission to the effect that somehow the direction doesn't apply because it was issued when there was a different service contract in place, we would submit that that again is a submission that should be rejected, because when one has regard to the rationale for the issuing of the direction, there is no reason why, in our submission, those matters would not carry equal weight in respect of the new form of the service contract and the pre-existing form, particularly when one recalls that, on its face, the amendments made to the service contract are there for the avoidance of doubt, as opposed to any substantive change.

PN382

You will see that the Minister did make reference to section 25A, as my learned friend mentioned this morning, and this appears in paragraph 2 at page 465, where she made reference to the fact that she considered consent was required and she wasn't giving that consent, but she went on in paragraph 3 to explain why it was she didn't give that consent, and that it's those reasons that form the basis for the subsequent issuing of the direction, namely, she had concerns about the transparency and oversight of the Firefighting Registration Board on the proposed service agreement, the risks arising from the fact the proposed service agreement would affect the statutory employment of FRV and the duplication of functions by the proposed board and Firefighting Registration Board established by the FRV Act.

PN383

In my submission, both because of the de minimis nature of the amendments that had been made between the two agreements, but also because the rationale of the Minister would appear to have equal application, you should proceed on the basis that this direction – it does have the effect that FRV says it has, namely, it binds it and it is not able lawfully to enter into an agreement of the type that is being contemplated by the UFU, and in those circumstances, in my submission, it would not be appropriate for you to order FRV to do something which it says we can't lawfully do that.

PN384

THE COMMISSIONER: So do you submit that – well, what is the direction? Is the direction the Minister's letter and the attachment, or is it only the attachment?

PN385

MR O'GRADY: It's only the attachment.

PN386

THE COMMISSIONER: And then in respect of the attachment, do you then say that that extends to these proceedings?

PN387

MR O'GRADY: Yes.

PN388

THE COMMISSIONER: And I heard your submission in respect of I should not inquire behind the direction. I understand why that might be put, but doesn't that potentially create all sorts of possibilities when you look at section 8(1)? A minister could potentially give all sorts of directions which invite – I'm trying to choose my words carefully – directing the FRV not to operate in conformity with things that might be required under the Fair Work Act.

PN389

MR O'GRADY: Under the Fair Work Act?

PN390

THE COMMISSIONER: Yes. She could give a direction, couldn't she, that I direct you not to bargain, and on your submission, when a dispute comes to me, or one of my colleagues, we would have to say, well, that's the end of that one, isn't it.

PN391

MR O'GRADY: Well, not necessarily, because one then gets into the world of the relationship between federal legislation and state legislation.

PN392

THE COMMISSIONER: And that's why I'm raising it.

PN393

MR O'GRADY: Yes. But that's not the position here, with respect. Here we have a contract that the UFU is asking FRV to be compelled to enter into.

PN394

THE COMMISSIONER: But I'm not even at that point. Your submission is that the direction - I must accept is valid.

PN395

MR O'GRADY: Unless and until it is set aside.

PN396

THE COMMISSIONER: Yes, and that's why I'm putting the question to you.

PN397

MR O'GRADY: Yes.

PN398

THE COMMISSIONER: Could that not have all sorts of remarkable consequences?

PN399

MR O'GRADY: And in my submission, there are mechanisms through which those consequences could be resolved, namely - - -

PN400

THE COMMISSIONER: Not in this place.

PN401

MR O'GRADY: Not in this place, but they could be resolved, and that's why I emphasise I suppose the fact that the UFU has had since September of last year to address any concerns it has in respect of the validity of this direction, and it's chosen not to, and then comes to you and says: well, don't worry about that, that's somebody else's problem, you should order FRV to do something, which FRV says it is not lawfully able to do and it can be sorted out down the track.

PN402

In my submission, that gets to the position that inverts the correct position. Absent there being a proper basis for something that the direction isn't lawful because it has been the subject of some other proceedings, in my submission, you should proceed on the basis it's a lawful direction.

PN403

THE COMMISSIONER: All right.

PN404

MR O'GRADY: Could I then turn to other matters, and as I've already mentioned, we rely upon our submissions, and I think I've referred you to the relevant part of that transcript and the pages in the court book this morning?

PN405

One matter that I did want to expand upon slightly is this issue of making an order that binds a third party. You'll see in the authorities at tab 22, we've referred to the *MFB v UFU* [2012] FWAFB 9555 case, and you might recall, Commissioner, you were taken to this during submissions in the earlier proceeding.

PN406

THE COMMISSIONER: I'm sorry, which tab is it?

PN407

MR O'GRADY: Sorry. Tab 22.

PN408

THE COMMISSIONER: Thank you. Yes, I recall being taken to this.

PN409

MR O'GRADY: Yes, and I'd simply make the point that, as appears at paragraph 43, there is no capacity for an order to bind the insurer, and in those circumstances they decided that it wasn't appropriate to impose the MFB leave bank proposal on the parties.

PN410

Now, my learned friend says, well, we're not seeking an order that's going to bind the third party; we're seeking an order that's going to bind FRV. That, in my

respectful submission, overlooks a number of important factors. Firstly, the order that will bind FRV is to enter into a contract with a third party. If there is such an order, then the consequence is that the third party is subject to the contract that is now UFU1.

PN411

Secondly, as you might recall, the third party isn't just involved or engaged in a contract with FRV. It's a contract that has the UFU as a party, and it confers upon the UFU various rights and entitlements, including rights and entitlements concerning the termination of the contract, and including rights and entitlements concerning the resolution of disputes in respect of the application of the contract.

PN412

And dealing with it conceptually, in my respectful submission, it's unavoidable that were you to make the orders as proposed by the UFU, you would be in effect binding a third party and applying the principle that the Full Bench set out in this MFB decision. In our respectful submission, that's not something that the Commission can or should do.

PN413

Those are the submissions, Commissioner. Can I just identify, just for your ease, the parts of the court book that we rely upon? I think I've mentioned most of them, but can I just briefly run through a list or put all this on transcript so that you know what we'd like you to look at?

PN414

THE COMMISSIONER: All right.

PN415

MR O'GRADY: There's the Minister's outline of 29 August, and that's at court book page 174. There's the Minister's outline in these proceedings, which is at 293. There's parts of the statutory declaration of Ms Eloise Daff at 309/310. There's the transcript at 252 to 279. There's the Minister's direction, which, as I recall, it was tendered by FRV, and that's at 465 to 467. There's the constitution of the board, which I took you to this afternoon, and that's at 373. There's the UFU submissions in the proceeding last year, at 336. And there is the original variation of the agreements that occurred last year and that's at 447 to 449.

PN416

Unless there are any questions, Commissioner, those are the submissions I seek to put.

PN417

THE COMMISSIONER: All right, thank you. Mr O'Grady, I should mark your outline of submissions, the document commencing at page 293, which will be marked as Minister 1. Then the statutory declaration of Elouise Daff, with three annexures, commencing at page 309 will be Minister 2.

EXHIBIT #Minister 1 OUTLINE OF SUBMISSIONS

**EXHIBIT #Minister 2 STATUTORY DECLARATION OF ELOUISE
DAFF AND ANNEXURES**

PN418

THE COMMISSIONER: All right, thank you.

PN419

MR O'GRADY: Thank you.

PN420

THE COMMISSIONER: Mr Harding, do you wish to respond, in any way, to the submissions?

PN421

MR HARDING: No.

PN422

THE COMMISSIONER: Okay. So I turn to you, Mr Borenstein.

PN423

MR BORENSTEIN: Can I start, Commissioner, by dealing with a matter that Mr O'Grady dealt with latterly in his submissions, which was to make the submission that we're complaining about the, or we've made submissions about the validity of the Minister's direction and we've had since November of last year and we've done nothing.

PN424

Mr O'Grady's got selective amnesia. We are appearing tomorrow in a directions hearing, in the Federal Court, in a matter in which the UFU is the applicant and the Minister is the respondent. A part of the claim, in that proceeding, is that the Minister's direction is unlawful. That proceeding was issued in November of last year.

PN425

Tomorrow, instead of the Minister encouraging that issue to be litigated, the Minister has issued an application challenging the UFU's standing to raise the matter. So for Mr O'Grady to stand up here and criticise the UFU for not taking court proceedings to challenge the validity is totally inappropriate and he should apologise.

PN426

Now, going to his actual submissions, he started off by giving you a reference to some material that was submitted and made by the Minister, in the first proceeding, in relation to matters that it said the Commission hadn't dealt with, and these are matters that are referenced in, I think, paragraphs 29 to 31. He gave you a reference to the court book, at page 252 and the transcript references at paragraphs 523 to 749.

PN427

We responded to those matters, in detail, in our reply submissions in that matter and we would like to give you a reference to where we did that. The reply

submissions are in the court book and the passages that are relevantly responsive are at paragraph 80 to 101, which are at court book 164, and paragraph 102 to 109, which are at court book 169.

PN428

THE COMMISSIONER: When you refer to the court book are you referring to this one or the earlier one?

PN429

MR BORENSTEIN: This one.

PN430

THE COMMISSIONER: This one, thank you.

PN431

MR BORENSTEIN: All of those matters have been absorbed into this court book.

PN432

THE COMMISSIONER: Okay.

PN433

MR BORENSTEIN: Now, our friend then made some submissions about what the Commission had or had not decided, on this question of fettering. They made reference to paragraph 78 of your decision, indicating that that was the nub of the finding and that was the point of reference in deciding what you had decided.

PN434

Now, that's a submission that was made in the written submissions that our friend made and we responded to that, in our written submissions, I'll just find the paragraph, I'm sorry, too many pieces of paper, Commissioner. Sorry to take so long. In the submissions which we filed, which are UFU3, court book 130, at paragraph 39, we have put in writing our analysis of the various parts of your reasoning around the fettering. I went to some of them this morning but, in direct response to what our friend said this afternoon, can I give you a reference to that at paragraph 39 of the submissions of UFU3, please.

PN435

THE COMMISSIONER: All right, thank you.

PN436

MR BORENSTEIN: Our friend then made a submission, which wasn't elaborated in the previous hearing, about the question of who makes the determination of the registration, having regard to the wording of section 25B.

PN437

Now, all of these submissions, by our friend, conflate the concept of certifying registration and employment. There is nothing in the service contract or service agreement, or whatever you want to call it, that deprives the FRV of the power, under section 25B, to:

PN438

Employ any person that it considers necessary to assist it in carrying out its functions, under the Act, and to transfer, promote, suspend or remove any employee.

PN439

There is nothing.

PN440

The enterprise agreement has a requirement that people employed by FRV should hold certain qualifications. The registration process, which FRV has agreed to, both in the agreement and in the course of discussions through the dispute last year and this year, is a mechanism for identifying whether people who are employed by FRV have the relevant qualifications. If they do then they are treated as 'registered'. An entity has been created to undertake that task.

PN441

Now, that is not a delegation of any powers, under section 25B. As I said to you, earlier this morning, it is a mechanism whereby the board operates in a way to facilitate FRV exercising its powers, under section 25B(1), to employ the persons that it considers necessary, et cetera.

PN442

It's clear that FRV considers it necessary, in the persons it employs, that they be registered because registration equals holding the qualifications that are proscribed in the enterprise agreement that binds FRV. It is nothing more sinister than that and it's nothing more far-reaching than that.

PN443

To the extent that Mr O'Grady stands at the Bar table and offers you his view, based on no evidence, that it has this effect or that effect, is totally without any weight and should be set aside.

PN444

Our instructions are that the exercise that is carried out is an objective exercise of identifying the various courses and qualifications which applicants for registration have completed at the various stages or at the various ranks, and to certify that they have completed those qualifications which give them the ranks that they hold. On that basis, the registration is given.

PN445

Now, Mr O'Grady again says, 'Well, you know, this is all evaluative, Jack in one room and Jill in the other room might come to different conclusions'. Our instructions are, that is not correct. Our instructions are that it is an objective process of identifying the various courses and qualifications that are achieved by particular applications for registration and determining whether that means that they have reached a particular level and can be certified.

PN446

Now, our friends made all these submissions without taking you to the documents that are involved. We note that you have previously referred to the EBA, or the EA, when Mr O'Grady referred you to it, and we assume that you have it. Can we

had up to you a schedule from that document, in a size which might be barely legible.

PN447

THE COMMISSIONER: Thank you, that would help.

PN448

MR BORENSTEIN: It's even colour coded and Mr O'Grady might like a copy too.

PN449

THE COMMISSIONER: I think I've leafed. previously, through this part of this agreement, very quickly.

PN450

MR BORENSTEIN: I'm sorry, I didn't catch that.

PN451

THE COMMISSIONER: I think, when I've seen this previously, I've flicked through it fairly quickly.

PN452

MR BORENSTEIN: Yes. Well, we might need to take a little bit of time.

PN453

THE COMMISSIONER: All right.

PN454

MR BORENSTEIN: Can I take you to the agreement first, the enterprise agreement, if you still have it?

PN455

THE COMMISSIONER: Yes, please go on.

PN456

MR BORENSTEIN: We've got a hard copy here, if you would prefer it.

PN457

THE COMMISSIONER: No, no, that's okay. Please go. I've got the agreement in front of me.

PN458

MR BORENSTEIN: Could I ask you, at the same time, if you could open UFU1 next to it, so that we can take you through?

PN459

THE COMMISSIONER: All right, thank you.

PN460

MR BORENSTEIN: Now, if you go to Schedule 4 of UFU1, you will recall that Mr O'Grady drew attention to paragraph 7, where he said, 'See, this doesn't correspond with the enterprise agreement because it's only got six categories for

registration'. So if we go to the enterprise agreement and you go to clause 12, on page 15, you see that there are a number of classifications, but when you compare them to the classifications in 7 of the service agreement, you see that the six categories, in fact, are intended to include a range of the items that appear in 12.2. So if you look at 7(a), 'Firefighter' includes firefighter 1 to leading firefighter. If you go to 12.2, 12.2.2 is firefighter level 1 and then it goes all the way down to leading firefighter at 12.2.7. So what's happened is that, for convenience, paragraph 7 has conflated groups that appear in 12.2, not to leave them out but just to categorise them into groups.

PN461

Then, if you look at 12.3, you see that it then identifies the various firefighters at the different levels. It indicates that they have completed - at the various levels they have completed the training courses, in accordance with the training framework at Schedule 3. Then that flows through to the various ranks and positions, right through to 12.3.12.

PN462

Then, to get further clarification, at clause 11 of the enterprise agreement, at 11.16, for example, you have definitions of the different firefighters at the different levels.

PN463

11.16 FRV firefighter level 1. Modules are the level 1 units, in tables 1 and 2 of Schedule 3, with the inclusion of firefighter level 1 level et cetera.

PN464

And it goes through and identifies the various modules, training modules, that need to be completed in order to reach those levels.

PN465

The large document, which I handed up to you, has those modules. In the table which is numbered 243, for example, you have, at the top of the page, in hard to read yellow, the modules and units that have to be completed by the various levels. So the first column is, I think, 'Level 1', and then the second column is, 'Firefighting and emergency operations', I can't read the rest, and then the third column is 'Certificate IV, public safety, et cetera'.

PN466

So these are all the various component models and then, at the bottom of the page, there is a colour coding where you see the light green are the components or the units that need to be completed by firefighter level 1, that is a recruit, the yellow is firefighter level 2 and the green is firefighter level 3. In these various columns you'll see corresponding units that need to be completed, in order to achieve those standards. Now, these are the units that are referred to in the enterprise agreement as needing to be completed, in order to satisfy the requirements for registration - classifications, I'm sorry.

PN467

Then, in the other pages of this schedule, you'll see that there are further standards and competencies that are set out, in respect of the different certificates and the

different firefighters. So in table 3, for example, there are specific requirements for people who are leading firefighter, for station officer, et cetera, and they then correspond with the various units that need to be completed.

PN468

Now, they're our instructions. Had we known that Mr O'Grady was going to raise matters of this kind today, having not raised them in his outline of submission, we might have put on some evidence to explain it to you. If you are concerned about how it operates, we would be grateful for an opportunity of providing a statement that explains it, say, within the next seven days. If you want to hear more quickly than that, we notice that Mr Strazinski(?) is in the court. He apparently is the acting deputy commissioner operational training. He may be able to explain it to you here and now, if you wish to do that. But absent that, if that's a matter of concern to you, we would seek an opportunity of addressing it with an appropriate statement from someone, who is actually involved in the process, as opposed to someone from the Minister's office, who is standing on the side and has no real involvement in how it works on the ground.

PN469

THE COMMISSIONER: Mr Borenstein, do I take from that submission, you're saying, essentially, putting words in your mouth, which is dangerous I realise, but you're saying, essentially, that the things which are stated in Schedule 4 are a summary of the things which are stated within the tables you've just taken me through?

PN470

MR BORENSTEIN: Yes.

PN471

THE COMMISSIONER: For eligibility for registration, one has to, depending on which level one wishes to be registered at, demonstrate that you've got whichever units are stipulated or optional or what have you?

PN472

MR BORENSTEIN: Yes.

PN473

THE COMMISSIONER: All right, that much I understand.

PN474

MR BORENSTEIN: And depending on whether you get your registration or not, FRV then makes the decision whether it will or won't employ you. It may not employ you, even if you get the registration, it may not employ you because it has a concern that's unrelated to that. So the submission I made earlier is, the registration doesn't, ipso facto, indicate you will or won't be employed, that's a power that's retained by FRV. And there's nothing in any of the documents, and Mr O'Grady, in his thorough analysis, didn't point you to one thing which says, 'FRV can't employ who they want to employ'. That really puts paid to most of what he says.

PN475

THE COMMISSIONER: I might be registered as a truck driver, but I might not be employed as one?

PN476

MR BORENSTEIN: I'm sorry, I didn't hear.

PN477

THE COMMISSIONER: I might be registered as a truck driver, in Victoria, but I might not be employed.

PN478

MR BORENSTEIN: There might be all sorts of things. I'm not privy to what goes on, but my instructions are that it does happen, that the Registration Board puts up a group of people that have passed the registration and not all of them get employed.

PN479

THE COMMISSIONER: All right.

PN480

MR BORENSTEIN: Now, can I - - -

PN481

THE COMMISSIONER: So just to round out the proposition you were making, I don't need further evidence on that subject.

PN482

MR BORENSTEIN: Thank you.

PN483

Can I then go on to the question which our friend ventilated about who it is that makes the determination to register, and indicating, under section 25B, it has to be FRV. As I've indicated already, this all turns on how you characterise the position of registration, or the function of registration. If FRV, in its infinite wisdom, has decided that in deciding who it wishes to employ, it wishes to know whether people have completed certain competencies that are proscribed in the enterprise agreement and those competencies are spelled out and it engages someone to undertake that task of identifying them, then we say that the question of who makes the decision to register has no bearing on section 25B.

PN484

I think you raised this with Mr O'Grady, that there's a distinction between the decision to employ and the function of registration. Unless Mr O'Grady can produce evidence to you to say that there is an inexorable link that one inexorable link leads to the other, then his argument doesn't go anywhere and reliance of section 25B and who makes the decision also doesn't go anywhere. The bottom line is, that there is no evidence that any entity, other than FRV, makes decisions on who it employs and how it doesn't employ.

PN485

In its wisdom in deciding who it wishes to employ, it has a discretion to say, 'We wish to employ people who have got registration and we will set up a process that will tell us that'. We say that there's absolutely nothing untoward about that process and there is nothing that is unlawful about it or objectionable about it.

PN486

In terms of section 25D and this proposition about delegation, that's a complete red herring, we say. There's no delegation of any statutory power involved in the registration process, unless you accept the flawed argument that registration takes away FRV's capacity to employ or not to employ, and we say that you shouldn't accept that.

PN487

Our friend then made some submissions about duplication of the two registration boards, and he referenced paragraph 92 of his submissions. We say that there is no duplication. The two boards are directed to different tasks. There is no greater duplication than would occur if there wasn't a registration board of the kind we're looking at and the government set up its own. Because even without a registration board, the FRV is obligated, under the enterprise agreement, to have its employees meet certain qualifications.

PN488

We don't know, the Minister can't tell us, what the qualifications are that the statutory board will apply. We don't know. Unless and until we know, there's no point thinking about it. If and when it arises, it will be a matter that will have to be resolved. There is nothing wrong with a situation where the employees of FRV have to meet certain qualifications by reason of their enterprise agreement and if the statutory board says, 'We want to either apply a lower standard or a higher standard', it doesn't matter. It's an additional thing, it's not a substitute. All the people who will be employed by FRV will have to meet the same standard. If the Minister, through her board, decides that those that are going to be transferred to CFA should have a higher standard, on top of the one that they get at FRV, or a lower standard, that's completely irrelevant to the standard that's set by the EBA. That's all that our registration board is designed to do, to apply that standard.

PN489

Now, I've dealt with our friend's argument about paragraphs 7 and 8, et cetera. Our friend then made some submissions, by reference to paragraph 79 of your decision and made the submission that the amendments that we were seeking to make were intended to resolve the tensions between the enterprise agreement classifications and the service agreement, on the basis that you found, last time, that it was open to the corporate board to impose greater qualification standards than were in the enterprise agreement.

PN490

Our friend said, 'Well, that's all very well, but they don't resolve the tension between the service agreement and section 25B'. Now, again, this harks back to the notion which we've said is wrong, that 25B doesn't allow or requires that only FRV can determine who it employs and that carries with it the requirement, unstated in the legislation, that it, too, must carry out the registration process. In

that regard, our friend made the submission about the subjective nature of the assessment of the qualifications and suggested that there might be different decisions arrived at by different people looking at the same application.

PN491

Now, there's no evidence of that, that our friend produced. Our instructions are to the contrary and we would ask you to reject that submission, in the absence of evidence. That, again, puts paid to his argument about the effectiveness of the amendments in dealing with the actual fettering problem that you identified in your decision.

PN492

Our friend made some submissions then about fettering that might occur as a result of the effect of a federal instrument and, as a result of a contract and made reference to the decision of the High Court in *Ansett v Commonwealth of Australia*. He took you to the judgment of Mason J and relied on that. In the outline of submissions which we made in the previous hearing, we addressed this question of the ability of FRV to enter into contracts which might, 'fetter', and we did that at paragraphs 90 to 95, which is in court book 166. In those submissions we gave you a reference to some other authorities which were decided after the *Ansett* case and which construed the finding in the *Ansett* case somewhat differently than our friend did and recognised that there is a range of contracts which the Crown enters into on a daily basis without any foundation for saying that those contracts fettered the Crown's rights under whatever legislation it's operating in and indicated that the question of fettering is a question of degree.

PN493

We made this submission in those paragraphs and we reiterate them now and that in the circumstances of 25B, it cannot be found properly that by asking an entity – sorry, by contracting with another entity to assist in determining the qualifications of the applicants for employment that the function of FRV in deciding who it does and doesn't employ is in any relevant way fettered. This comes back again to the proposition I've made that our friend's submission conflates the idea of employment with registration and that's incorrect. Our friend then made some submissions referencing paragraph 48 of his outline and complained about the lack of any protection against discriminatory conduct in the service contract. In fact, the contract is concerned with ensuring the protection of peoples' human rights and if you turn to clause 3.6 of the – if you turn to clause 3.6 of exhibit UFU1 you will see that under the heading, 'Human Rights':

PN494

The contractor must comply with the requirements of the charter in the same way as if it was a public authority in particular when performing the service must not act in a way that is incompatible with the human rights protected by the charter or where making a decision in relation to the performance of the services failed to give proper consideration to such a human right.

PN495

Now, we haven't got a copy of the charter but can I make the submission that it protects a range of what we would describe as human rights and indicates that this complaint is completely ill-founded but even if that weren't there, our friend

misunderstands the submission we make. There is a law in Victoria which would govern the performance of the contract by the contracting company and by FRV. They would be bound to comply with the law like everyone else. If they didn't comply with the law, there are remedies – not in VCAT – there are remedies for FRV under the contract. When you look at the contract you can see that FRV can complain about breach of the contract, can create a dispute about breach of the contract and if FRV says that the board is discriminating against particular applicants, because of their race or gender or whatever else, it can complain. It doesn't have to go to VCAT. It can complain and there is a mechanism in the contract to resolve those disputes.

PN496

If an applicant for employment is discriminated against, that applicant can complain to FRV as well because they were a prospective employee. They can complain. They have rights to complain and if the complaint is legitimate FRV has the right to raise it with the board to seek to resolve it. Now, it may be that as a last resort FRV might end up going to VCAT. But it's not as though every time there is a discriminatory act everybody is going to pack up their bags, get Mr O'Grady and go down to VCAT. The risk of anybody doing things which might be perceived as being discriminatory in one or the other happens every day in industry and there isn't a queue at VCAT because these things are resolved on a common sense basis, mostly. There's certainly not a queue when I drive past.

PN497

THE COMMISSIONER: It's probably early in the morning.

PN498

MR BORENSTEIN: But in any event the point is it's over-egging the pudding to say that there isn't an express obligation in the contract even though there is a law that governs everybody's conduct anyhow and so that's a fatal flaw in the contract. Even if there was a clause in the contract or if there wasn't a clause in the contract, rather, it would still be a matter that could be resolved under the contract itself without lawyers at 10 paces. Then our friend referred to his submission at paragraph 52(a) about abuse of process and the proposition that the first decision resolved the dispute. We've made submissions this morning about that.

PN499

Our friend seems unable to grasp the proposition that the Commission was asked to make a decision based on a particular subject matter – that is the contract that was presented in the first case. The Commission declined to do that. The parties were still involved in an underlying dispute about the establishment of the registration board. They sought to produce a new document which might be more effective and more acceptable. They couldn't agree on that and they are asking the Commission now to resolve an arbitration based on a different topic – sorry, a different subject matter – which is a different document. After lunch our friend came back to the submissions on the schedule in UFU1, made some submissions about the constitution of the board and the panel that would decide the various applications before it. But again, as we say, all of this was premised on the conflated idea of connecting registration with employment. As we've already said there is nothing in the documentation that supports that connection.

PN500

Then our friend went to and made some lengthy submissions based on section 8 and in response to the submissions we made about interpreting section 8 in isolation from the rest. Unfortunately our friend's analysis of section 8 is legally incorrect. As has been pointed out and as you've noticed, Commissioner, subsection (1) is in broad, general terms and it's the subject – and it allows for the Commissioner and FRV to be subject to the general direction and control of the Minister in performance of the duties and functions. The duties and functions are to – generally – fight fires. And then our friend seeks to say, well, have a look at subsection (3). Subsection (3) deals with giving directions and limits the directions that can be given under subsection (2).

PN501

Subsection (2) is expressed to be subject to this section and then subsection (3) goes on to say that the Minister mustn't give directions in relation to the exercise of operational functions and powers of FRV. And then it goes on to state after that general proposition some examples where the power can't be exercised but as you rightly pointed out, Commissioner, it is not intended to be an exhaustive list. There is nothing here that would exclude the ability for section 25B to operate in the way in which we contend – 25A, sorry. If we go back to 25A, 25A says:

PN502

Subject to this Act (this is subsection 1) Fire Rescue Victoria has the power to do all things necessary or convenient to be done for and in connection with the performance of its duties and functions.

PN503

Now, Mr Harding had a very incisive submission. He says subject to this Act in subsection (1) means the whole of section 25A is subject to section 8. Unfortunately, subsection (2) doesn't start with the words, 'Subject to this Act'. And there's nothing in subsection (1) that suggests that it applies or seeks to limit the operation of subsection (2) and indeed, subsection (2), instead of saying, 'Subject to this Act', says, 'Without limiting or derogating from the generality of the Fire Rescue Victoria powers, they include' – they include. And then it lists a number of things. The star entry is at paragraph (a): 'Enter into agreements or arrangements with any person or body for the provision of goods or services to Fire Rescue Victoria'. That's our contract of service. Despite the submissions that the Minister made last time, that by giving information to the board, FRV was providing a service to the board, which is a nonsensical argument, paragraph (a) applies to this contract.

PN504

Paragraph (a) is not subjected to the need for consent by the Minister under subsection (3) and I didn't hear Mr O'Grady or Mr Harding explain that it is so subject in terms of subsection (3)'s interaction with subsection (2). And if you compare subsection (2) with section 8(3) there is no inconsistency. There is no inconsistency and subsection (2) says it's not to be read as limiting or derogating from the generality of the powers of FRV. So we say that whichever way you approach this, whichever way you approach this, the Minister has got no power to direct that this contract should not be entered into. Our friend says, well, the

argument that if you give section 8 the operation for which they argue, and that would render section 25A(2) otiose, is wrong. But the explanation for that submission is, we say, unsound.

PN505

It's quite clear that if the Minister can prevent the FRV from exercising a power of the kind in 2(a), by relying on section 8, then what work has 2(a) got to do? There's no need for 2(a). It's in that sense that we say that 2(a) becomes otiose. Now, it doesn't work the other way around in the way that Mr O'Grady suggested because there is nothing in 2(a) that cuts down the operation of section 8 of subsection 8(3). There is no inconsistency between 2(a) and 8(3) because 2(a) is dealing with a particular subject matter, entering into contracts for services, not mentioned in section 8. So we say it's quite unsound to suggest that it works the other way. Now, our friend referred to the decision in the court of *Victoria v Esso*, and a passage at paragraph 67 and 71 and 72. The court there was dealing with something somewhat different in the passage which our friend read to you, which was that if there's a power to appeal, if there's a power to revoke, does one override the other in the sense that there's a particular course that you have to follow or another course.

PN506

But at the end of the passage they make the general proposition for which we contend, and we say that because it was dealing with a different factual situation you need to be cautious about what you take from the discussion of the particular facts in the case as opposed to the general propositions or principles which apply. And similarly the Queensland Bulk mining case also supports the proposition and the arguments that we've advanced.

PN507

Now, in terms of how you should deal with the direction our submission is that you should do as you did on the last occasion and treat the direction as being irrelevant to what you need to decide, and it's not to the point that FRV has a particular opinion about the legal issue of the validity of that agreement. The opinion of FRV on that legal point is not determinative of anything.

PN508

We ask you to make a decision on the arbitration of the industrial dispute, and as we said last time and as I said this morning the question about whether or not FRV will or won't comply with any orders that you make if you make orders is not a matter that you need to be concerned about in making the order. You should make an order that is just and appropriate on the dispute that's presented to you, and the other matters will be resolved in other forums, and perhaps if the Minister would allow us to run our argument in the Federal Court it might be sooner rather than later, but in our respectful submission you don't need to be concerned with those legal and quasi constitutional questions which arise for the purpose of this arbitration.

PN509

Then our friend made some submissions towards the end of his oral submissions about orders binding third parties. We have made some written submissions about that, but can I just summarise them briefly, and they are that we don't ask

you to make any order that binds a third party. We ask you to make an order that FRV sign the agreed contract.

PN510

That is consistent with the whole tenor of the way in which this dispute has been progressed between the parties, and you will recall from early on in the piece when you convened conciliation meetings that there's never been a question from FRV about them signing the contract. It has always been a question about what goes into the contract, and overwhelmingly those matters have been resolved.

PN511

So we don't ask you to make an order that's binding on any third party, we ask you to make an order that's binding on a party to the dispute and a party to the enterprise agreement, and you don't need to be concerned about the enforcement of the contract when FRV signs up to it. That's a matter outside the scope of this arbitration. The terms of the contract have been negotiated between FRV and UFU and provision has been made for the resolution of any difficulties that arise in the administration of the contract, and so that's a matter that's for the future.

PN512

As far as the arbitration is concerned we would respectfully submit you should confine the considerations to what will be necessary to resolve the dispute between FRV and the UFU and then the Minister can have her day afterwards in another place. Commissioner, if there's anything else that I can assist you with.

PN513

THE COMMISSIONER: No, there's not.

PN514

MR BORENSTEIN: They're the submissions in reply then, Commissioner.

PN515

THE COMMISSIONER: All right. Thank you very much, Mr Borenstein.

PN516

MR HARDING: Commissioner, can we be heard in relation to one minor matter? Well, it might be minor.

PN517

THE COMMISSIONER: By the looks of it Mr O'Grady wants to be heard on something as well.

PN518

MR O'GRADY: Two issues, Commissioner, and I'm happy to follow Mr Harding, I'm happy to go now. It really is in response to - - -

PN519

THE COMMISSIONER: Maybe if I hear Mr Harding first, please.

PN520

MR O'GRADY: Yes, of course.

PN521

MR HARDING: Both the submissions of the Minister and Mr Borenstein's submissions appear to proceed on the basis that registration might be regarded as a precondition to employment in one way or another, and it's arisen for the first time in this arbitration, and it's a matter for which I need further instructions. Mr Borenstein took you to clause 12 of the enterprise agreement, and clause 12.3 seems to be saying that:

PN522

Employees will only be appointed to a classification if they are already employed in the classification immediately below. For the avoidance of doubt save persons previously employed by the CFA no person can be employed without first entering FRV at the classification of recruit, the exception being lateral entrance.

PN523

And recruit is defined by 12.3.1 as a person who is undertaking a CFA or FRV recruit firefighter training course. They are employed.

PN524

THE COMMISSIONER: Mr Harding, I'm sorry, which clause was that?

PN525

MR HARDING: Clause 12 of the enterprise agreement, and my copy is on page 19. I must say that those page numbers don't always align with reality.

PN526

THE COMMISSIONER: They don't. Which subclause was it?

PN527

MR HARDING: 12.3. So clause 12 deals with classifications, career paths and opportunities, and Mr Borenstein took you to various provisions in clause 12.2.

PN528

THE COMMISSIONER: Yes, it's the paragraph immediately after 12.3. I have found it now. Thank you.

PN529

MR HARDING: Sorry, it's the third paragraph in 12.3.

PN530

THE COMMISSIONER: All right.

PN531

MR HARDING: First entering FRV in the classification of recruit. And then you get to recruit, and it's someone who is performing the training course, and they are employed. Then if you look at UFU1 in the schedule 4 clause 8, 'The training and qualifications requirements apply from the firefighter class (indistinct).'

PN532

So we have a situation where if you're a recruit you're employed. If you satisfy the requirements of the recruit course you are promoted to firefighter 1 and there

are training qualifications that come with that in order to be so classified, and so on. On that analysis (indistinct) apart from lateral entrance employment occurs prior, because you only enter FRV at the recruit point.

PN533

THE COMMISSIONER: All right, thank you. And that's all the clarification you want to put?

PN534

MR HARDING: Yes.

PN535

THE COMMISSIONER: Thank you. Mr O'Grady?

PN536

MR O'GRADY: Just very briefly, Commissioner. In my submissions it's just not correct to suggest that the Federal Court proceeding confined in any way, shape or form to the issue of whether or not the direction was a valid direction. Those proceedings concern an allegation by the UFU that the Minister coerced FRV when it both issued the letter that was the subject of the earlier proceedings which went to whether or not the ministerial permission was required to be involved in the formation of a company, and/or coerced FRV when it issued the direction. And if it would assist the Commission we can provide the Commission with copies of the application, the amended statement of claim and the amended defence and the reply, so the Commission could be apprised of the issues in respect of that.

PN537

If it was the intent of the UFU to clarify whether or not the direction was a valid direction one wouldn't have done it that way. They are proceedings that necessarily are going to involve an extensive period of time and raise a number of complicated issues. My submission to you earlier was that if the UFU wanted to clarify the issue in respect of the declaration it could have gone to the Supreme Court and sought an order from the Supreme Court that the direction was ultra vires, and it didn't do that. But if it would assist we can provide you with the pleadings and the documents so you can make your own assessment as to what those proceedings are about and whether or not the institution of those proceedings is somehow an excuse for the UFU not acting to clarify what is the status of the direction.

PN538

THE COMMISSIONER: Mr O'Grady, I might be interested in the subject, but I don't think I need the pleadings or any of those other documents.

PN539

MR O'GRADY: Yes. As the Commission pleases. But my learned friend having started off with a degree of high dudgeon, in my respectful submission, and calling for an apology it was incumbent upon me to clarify the nature of those proceedings, and to reject in the strongest of terms any suggestion that those proceedings were confined to the issue of whether or not the direction was a valid direction. They are fundamentally different in nature. They concern the vexed

question, an interesting question perhaps, of whether or not the Minister in issuing the direction in any way, shape or form coerced FRV in contravention of section 343 of the Act.

PN540

The second point I'd seek to make, Commissioner, is that section 25B is of course not confined to employment, but extends to promotion, and to the extent that my learned friend says that there is no requirement or impediment on FRV employing people who haven't been registered I would ask the Commission to have regard to the terms of schedule 4 of UFU1, and in particular clause 4 which provides that:

PN541

External professional career firefighters seeking to be an officer (indistinct) of Fire Rescue Victoria, including for the purpose of being made available on secondment must first seek registration with the registration board.

PN542

If you want to work for Fire Rescue Victoria and you're an external professional career firefighter you must first seek registration. Similarly clause 9(a)(i):

PN543

It's a requirement that professional career firefighters employed by Fire Rescue Victoria will be required to provide evidence of appropriate ranks, specifications, competencies and operational experience when they register with the board.

PN544

Clause 10 - - -

PN545

MR BORENSTEIN: Commissioner, we're getting the whole submissions all over again. We're getting new submissions all the time.

PN546

THE COMMISSIONER: Mr O'Grady, I understand the objection, the point has been made.

PN547

MR O'GRADY: I simply refer you to clause 10(a)(ii), 10(b)(ii), the same points apply. The suggestion for the first time today that is open for FRV to employ persons who have not been registered in the capacity of operational professional firefighters, in my submission doesn't bear scrutiny when one has regards to the terms of UFU1. If the Commission pleases.

PN548

THE COMMISSIONER: All right. Thank you, Mr Borenstein.

PN549

MR BORENSTEIN: Commissioner, can I just respond to two things. First of all our friend takes objection to reference to the Federal Court proceedings, but he studiously avoided accepting that one of the issues, a central issue in that

proceeding is the validity of the Minister's direction. And, yes, they are proceedings about the Minister's conduct and its effect on FRV in this proceeding. They do relate to coercion, but the core of it is that the conduct in which the Minister engaged was coercive because it was unlawful. So it's a central issue in that case. Our friend can quibble about whether we should have gone in that action or another action, but he doesn't expressly accept that the question of validity of the Minister's direction is a live issue, a central issue in that case. In relation to the second - - -

PN550

THE COMMISSIONER: I will look forward to the judgment when it comes.

PN551

MR BORENSTEIN: Yes. Well, if our friends would allow us to ventilate it, it might be sooner than later. In relation to these latter clauses that our friend has now discovered dealing with the question of employment none of those, none of those indicate in any terms that FRV doesn't have the final say on who is employed and who is not employed, and again I say to you, Commissioner, that if this was going to be canvassed it should have been identified earlier so that evidence from the people who administered these things and who know how they work would have been able to explain to you how the requirements interact with FRV's residual discretion about who gets employed and who doesn't. That's all I need to say, thank you.

PN552

THE COMMISSIONER: All right. Thank you, Mr Borenstein, and others. I do appreciate the submissions and material that's been filed. The decision of the Commission will now be reserved. Thank you.

ADJOURNED INDEFINITELY

[3.44 PM]

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