

## **IN THE FAIR WORK COMMISSION**

*Fair Work Act 2009*

s.156 – Four Yearly Review of Modern Awards

AM2014/202

### **JOINT RESPONSE OF THE MFB, THE CFA, AND THE UFUA REGARDING AWARD COVERAGE AND DAY WORK IN THE MFB AND CFA ENTERPRISE AGREEMENTS**

#### **Introduction**

1. This document provides a joint response of the Metropolitan Fire and Emergency Service Board (**MFB**) and the Country Fire Authority (**CFA**) (together the **fire services**), and the United Firefighters' Union of Australia (the **UFUA**) to two matters raised by Justice Ross on 16 and 17 June 2016:

(a) Question 17 of the Questions on Notice dated 16 June 2016, being:

*Which public sector fire services are covered by the modern award?*

*Of those public sector fire services covered by the modern award, how many have agreements which permit part-time work?*

(b) What is the practical position at the MFB and the CFA in relation to operational members who work day rosters? Are there provisions in the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010 (MFB Agreement)* and the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010 (CFA Agreement)* that permit day work by operational firefighters? Is there any material about day rosters worked elsewhere?

#### **Award Coverage**

2. The *Fire Fighting Industry Award 2010 (Modern Award)* covers 'national system' employers and employees throughout Australia in the 'fire fighting industry' (as defined).<sup>1</sup> It does not cover employees that are excluded from award coverage under the *Fair Work Act 2009 (Cth) (FW Act)* or employers and employees covered by a

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<sup>1</sup> Fair Work Act s 133; clauses 4.1 and 4.2, Modern Award.

modern enterprise award/instrument or a state reference public sector modern award/transitional award.<sup>2</sup>

3. Relevantly, by virtue of sections 14, 30D and 30N of the *Fair Work Act 2009* (Cth) (**FW Act**), ‘national system employers’ include constitutional corporations, the Commonwealth and Commonwealth authorities, body corporates incorporated in a Territory (and persons who carry on an activity in a Territory of Australia)<sup>3</sup> and any State that has referred its legislative powers to the Commonwealth, but only to the extent those powers have been so referred (**Referring States**).<sup>4</sup> ‘National system employees’ similarly include individuals employed by one of the abovementioned employers.<sup>5</sup>
4. Currently, Victoria is the only Referring State to have referred its powers with respect to State public sector employees to the Commonwealth (and subject to certain limitations).<sup>6</sup>
5. The MFB and CFA are public entities under the *Public Administration Act 2004* and therefore form part of the public sector of Victoria. The public sector provisions contained in the Modern Award apply to the MFB and the CFA as public sector employers.
6. Further, the Modern Award covers the MFB and the CFA by virtue of the fact that both entities are constitutional corporations.<sup>7</sup>
7. To the best of the parties’ knowledge, the only public sector fire services currently covered by the Modern Award are those operating in Victoria and the territories.
8. The parties understand that, currently, State industrial instruments govern the terms and conditions of employment for firefighters that are employed by public sector fire services operating in Queensland, New South Wales, Tasmania, South Australia and Western Australia. The parties are not aware of whether any of these public sector fire services are, like the MFB and CFA, constitutional corporations and therefore covered by the Modern Award.

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<sup>2</sup> Modern Award, clauses 4.3 – 4.5.

<sup>3</sup> These categories of ‘national system employers’ reflect the legislative powers of the Commonwealth – *Commonwealth of Australia Constitution Act*, ss 51(xx), 51(i), 122.

<sup>4</sup> *Fair Work Act* ss 30H and 30S.

<sup>5</sup> *Fair Work Act* ss 13, 30C and 30M.

<sup>6</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic), ss 4 and 5.

<sup>7</sup> See *United Firefighters’ Union of Australia v Metropolitan Fire and Emergency Services Board* [1998] FCA 551; *United Firefighters’ Union of Australia v Country Fire Authority* [2015] FCAFC 1.

9. Given the above, to the best of our knowledge, four public sector fire services are currently covered by the Modern Award. They are:
  - (a) The MFB;
  - (b) The CFA;
  - (c) The Australian Capital Territory Fire & Rescue (**ACTFR**); and
  - (d) The Northern Territory Fire & Rescue Service (**NTFRS**).
10. In respect of the ACTFR and the NTFRS the Modern Award covers these entities by virtue of section 122 of the Constitution.
11. Each public sector fire service to which the Modern Award applies is covered by an enterprise agreement.
12. Part-time work for operational firefighters is not permitted by the MFB and CFA Agreements.<sup>8</sup>
13. Part-time work in the ACTFR is permitted in the circumstances prescribed by clause 12, Section J, and clause 147 of the *ACT Public Service Act Fire & Rescue Enterprise Agreement 2013–2017*.
14. Part-time work in the NTFRS is permitted in the circumstances prescribed by clauses 42.15(a)(ii) and 57 of the *Northern Territory Public Sector Fire and Rescue Service 2011-2013 Enterprise Agreement*.

### **Day Work**

15. The MFB Agreement provides for the following work arrangements:
  - (a) The 10/14 roster – at clause 77.
  - (b) Special Administrative Duties – at clause 84.
  - (c) Any other configuration agreed to between the MFB and the UFU.
16. Operational staff working on Special Administrative Duties are referred to within the MFB as ‘day shift’ workers. There is no specific day roster in the MFB Agreement. Instead, clause 84.1 provides that “*An employee rostered to Special Administrative Duties shall work hours as agreed between the employee, the UFU and MFESB*”.
17. The general position at the MFB is that employees working on the special administrative duties roster are taken off shift and perform day work.<sup>9</sup> Deputy Chief

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<sup>8</sup> See MFB Agreement, clause 37.2; CFA Agreement, clause 29.2.

Officer David Youssef's evidence was that these employees "*are not performing operational duties on shift. The special duties roster does not allow a firefighter to work part time and remain on shift.*"<sup>10</sup>

18. To the best of our understanding, when witnesses who gave evidence during the hearing referred to being day workers, and performing operational duties, this was a reference to the fact that, from time to time, day workers can be called on to perform operational duties when required.
19. For example, Deputy Chief Officer Gregory Leach's evidence was that "*when an employee is rostered pursuant to the special administrative duties roster, he or she is taken off shift and does not perform operational duties as part of his or her ordinary duties (other than Commanders, who are still required to participate in the on-call roster for operational incidents).*"<sup>11</sup>
20. In cross examination, Assistant Chief Fire Officer Alan Quinton agreed that operational day work staff may be required to attend operational incidents from time to time,<sup>12</sup> including, for example, to respond to an alarm of fire.<sup>13</sup>
21. Commander Daniel Gatt provided the example of day workers joining a strike team.<sup>14</sup>
22. The CFA Agreement provides for the following work arrangements:<sup>15</sup>
  - (a) The 10/14 roster – at clause 76.
  - (b) Special Duties – at clause 77.
  - (c) 'Not subject to the 10/14 roster'.
  - (d) Chief Officer's emergency roster – at clause 78.
  - (e) Any other configuration agreed to between the CFA and the UFU.
23. The Special Duties roster can be introduced to permanently staffed Fire Brigades "to increase day staffing capacity": at clause 77.1.

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<sup>9</sup> Witness Statement of David Youssef (MFB/CFA 20) at [43].

<sup>10</sup> Witness Statement of David Youssef (MFB/CFA 20) at [43]-[44].

<sup>11</sup> Reply Statement of Gregory Leach (MFB/CFA 15) at [30].

<sup>12</sup> PN1939.

<sup>13</sup> PN1858-PN1863.

<sup>14</sup> PN2316.

<sup>15</sup> CFA Agreement, cl 75.1 and 75.2.

24. The roster of hours is 7.45am to 6.15pm on four day shifts either Monday to Thursday, or Tuesday to Friday or otherwise as agreed. Work on the Special Duties roster is referred to as 'day work' within clause 77 and within the CFA.
25. The general position at the CFA is that only firefighters working on the 10/14 roster are engaged in operational duties,<sup>16</sup> and firefighters on the Special Duties Roster would usually perform non-operational duties. The Special Duties Roster does not accommodate firefighters who wish to work a 10/14 shift on a part time basis.<sup>17</sup> However, some employees on the Special Duties Roster may provide operational response in certain circumstances.
26. As with the MFB day workers, to the best of our understanding, when witnesses who gave evidence during the hearing referred to being day workers, and performing operational duties, this was a reference to the fact that, from time to time, day workers can be called on to perform operational duties when required.

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<sup>16</sup> Statement of Steven Mark Warrington (MFB/CFA 16) at [46].

<sup>17</sup> Reply Statement of Bruce Raymond Byatt (MFB/CFA 18) at [23].