



QUESTIONS ON NOTICE

4 yearly review of modern awards—Fire Fighting Industry Award 2010 (AM2014/202)

MELBOURNE, 16 JUNE 2016

Note:

- 1. The questions below are put to the parties by the presiding Member. The other members of the Full Bench may have further questions, which will be put during the course of the oral hearing.*
- 2. The parties may choose to answer the questions orally or in writing. If answers are provided in writing they may be handed up during tomorrow's hearing or at a later date.*

Questions for the MFB/CFA

1. The final submissions filed on 16 May 2016 are said (at paragraph [3]) to 'consolidate the submissions filed by the fire services dated 26 February 2016 and 18 April 2016'.

Does this mean the 16 May 2016 submission replaces the earlier submissions of 26 February and 18 April 2016?

2. At paragraph [10] of the final submissions of 16 May 2016 reference is made to the evidence of the MFB Chief Officer, CFA Chief Officer and CFA CEO. It is said that the evidence of these witnesses was 'explicit in stating that the inclusion of part time work in the modern award will not displace bargaining in relation to that matter or arrangements governing the operation of part-time work'.

What is meant by this statement, given that:

- *the MFB and CFA operational employees who are covered by the modern award are covered by enterprise agreements;*
- *these enterprise agreements provide that employees cannot be employed on a part-time basis; and*
- *by reason of s.57(1) these agreements apply to the relevant employees to the exclusion of the modern award.*

3. At paragraph [11] of the final submissions of 16 May 2016 it is submitted that the proposed variation in respect of part-time work ‘is necessary to *enable* bargaining on the issue’. Further at paragraph [12] it is submitted that:

‘The absence of that established category of employment in the modern award undermines and limits the capacity of parties to negotiate arrangements for part-time employment which are suitable and adapted to the needs of employees, employers and the emergency services sector.’

Why is it necessary to vary the award to enable bargaining about the introduction of part-time work?

On what basis is it put that the current prohibition on part-time employment in the modern award prohibits bargaining in respect of this issue?

4. At paragraphs [33]–[40] of the final submissions of 16 May 2016 it is contended that part-time employment in modern awards is provided for in simple terms and accordingly the proposed variation is simple. Clause 10 is to be amended to mirror the provisions in clause 11 that apply to private sector employees, where part-time work is permitted.

Do the fire services accept that each modern award is to be reviewed in its own right (s.156(5)) and, accordingly, the context and circumstances of the industry or occupation covered by a modern award is relevant to the form of a part-time employment award term?

5. At paragraph [78] of the final submissions of 16 May 2016 the fire services contend that the unions’ objections are based around the implementation of part-time work. These objections are said to be ‘premature’ because ‘the implementation of part-time work would be a matter for consultation between the fire services, its members and their union’.

What is the legal basis for the proposition that the implementation of part-time work must be the subject of consultation? Is this a reference to clause 8 of the award (see reply submission at paragraph [39])?

6. The proposed insertion of a new clause 22.4 – Day Work – does not appear to be the subject of any detailed submissions or evidence. (See final submissions at paragraph [39] and reply submissions at paragraphs [87]–[90]).

The fire services are invited to elaborate on the submissions and evidence in support of this proposed variation.

7. At paragraph [101] of the final submissions of 16 May 2016 it is submitted that the reason Mr Brown (a UFUA witness) has not reported his concerns that CFA volunteers are working unsafely is because he does not believe they are.

Was this put to Mr Brown?

Questions for the UFUA

1. At Part B of the final submissions of 16 May 2016 the fire services deals with the statutory framework for the 4 yearly review.

Does the UFUA contest any of the propositions set out at paragraphs [13]–[22]?

2. *Does the UFUA accept the proposition, set out at paragraph [24] of the fire services final submission, that ‘the services should continue to modernize, adapt and reflect the diversity in the community served’?*

3. *Does the UFUA accept the statements set out at paragraph [45] of the fire services final submission of 16 May 2016 and at paragraphs [41]–[42] of the fire services submission of 26 February 2016 and Table A attached to those submissions?*

4. *What does the UFUA say about the fire services submission (at paragraph [50] of its final submissions of 16 May 2016) that there is an inconsistency between its support for part-time employment in industrial instruments to which it is a party and its opposition to the present claim?*

5. At paragraphs [51]–[61] of their final submissions of 16 May 2016 the fire services purport to summarise the evidence of Chief Superintendent Connellan and address the Productivity Commission Report on Government Services.

Does the UFUA contest any of this material?

6. *The UFUA is invited to comment on paragraphs [73]–[74] of the fire services final submissions of 16 May 2016.*

7. *Does the UFUA accept the proposition that six of its 13 witnesses’ objections to part-time work proceeded from a false assumption that part-time work was ‘casual, irregular work’? (see fire services final submission 16 may 2016 at paragraphs [81] and [84].*

8. Is the UFUA opposed to the insertion of *any* provision providing for part-time work in the modern award? Or is its opposition only in relation to the form of the particular variation sought by the fire services?

If the UFUA does not have a blanket position in opposition to a part-time provision being inserted into the award, what type of provision does it propose? Is it limited to a provision of the type mentioned at paragraph [138] of its final outline of submissions?

9. Paragraph [1] of the UFUA’s final outline of submissions of 7 June 2016 states that those submissions are ‘to be read in conjunction with the UFUA’s primary submissions dated 6 April 2016’.

What issues dealt with in the 6 April submissions are not adequately addressed in the final outline of submissions of 7 June 2016?

10. The UFUA's submissions are directed at whether the application 'as framed' satisfies the requirements of ss.134, 138 and 156.

Is the UFUA suggesting that the Full Bench is confined by the terms of the variation sought?

What does the UFUA say to the proposition that the Full Bench may conclude that it is necessary to insert a part-time provision in the award, and then hold further proceedings as to the content of such a provision?

[Note: The fire services are also invited to comment on this issue]

11. Paragraph [8] of the UFUA's final outline of submissions of 7 June 2016 advances the submission that 'the necessity test requires a parsimonious approach to be taken to modern award variation, such that variations should only be made where there is an imperative to achieve the statutes objectives'.

Does the UFUA accept that the 'statutes objectives' are to be gleaned from a reading of the Act as a whole, including ss.3, 134, 138, 156, 577 and 578?

What does the UFUA say in response to the fire services reply submission of 14 June 2016 at paragraph [6]?

12. At paragraph [14] of the UFUA's final outline of submissions it is submitted that 'the Commission's jurisdiction under s.156 is necessarily focused on changed circumstances'.

What is the legislative basis for this proposition, given that s.156 makes no reference to 'changed circumstances'?

13. At paragraph [27] (a) of the UFUA's final outline of submissions it is said '...it is manifest that the industrial parties have, *on a number of occasions*, turned their minds to the matter and actively determined against such a prescription in the public sector of the industry'.

What are the 'number of occasions' referred to? Who are the 'industrial parties' referred to?

14. *In relation to the previous evidence referred to at paragraph [27] [e] of the UFUA's final outline of submissions, was that evidence the subject of any cross examination? Were the previous proceedings contested, in respect of the part-time work issue?*

15. At paragraph [28] of its final outline of submissions the UFUA advances the following submission, :

'The Fire Services' attempt in this case to address the industrial history simply by contending (erroneously) that part-time work in the firefighting industry has never been considered by the Commission entirely misses the point: at [29]. Even if the Fire Services' contention was accepted, it would have no impact on the significance

of the history disclosed by the evidence, including the significance of past agreements that part-time employment was inappropriate in the industry.’ (footnotes omitted)

Does the UFUA dispute the proposition that part-time work in the firefighting industry has never been the subject of detailed consideration by the Commission?

If the above proposition is accepted, why is it not relevant to the Commission’s consideration of the prima facie position that the award meets the modern awards objective?

16. At paragraph [35] of its final outline of submissions, the UFUA submits, :

‘Properly understood, the Fire Services’ application seeks the assistance of the Commission to establish a favourable bargaining framework which would allow the Fire Services to negotiate with the UFUA from a position in which they could drive negotiations.¹ This is not a Modern Award objective.’ (footnotes omitted)

What about s.134(1)(b)?

17. At paragraph [38] of its final outline of submissions the UFUA submits that it is ‘noteworthy that no other Fire Services from around Australia have sought to intervene or be heard in these proceedings’.

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?

18. At paragraph [65] of its final outline of submissions of the UFUA reference is made to a CFA submission before Commissioner Hingley in 2000.

Is the CFA’s 2000 submission in the material before the Full Bench? If so, where? If not, can it be provided?

19. At paragraphs [73]–[75] of the final outline of submissions the UFUA makes reference to the Productivity Commission’s Report on Government Services, in support of its contention that ‘in terms of performance and safety, the Victorian Fire Services can make a strong claim for being industry leaders in Australia’.

Does the UFUA accept that the Victorian Fire Services are the most expensive in Australia, in terms of total expenditure, and on a per capita basis (save for N.T.)? (see Table 9A.29 of the P.C. Report)

20. At paragraph [91] of the UFUA’s Final Outline of Submissions it is suggested that an unqualified part-time award prescription may give rise to the advent of

¹ See MFB/CFA Submissions in Reply dated 18 April 2016 at [27]; see also references in UFUA’s Findings of Fact Sought dated 20 April 2016 at [1].

secondary employment. It is also said that secondary employment may hamper organizational flexibility.

What is the evidentiary basis for the proposition that an unqualified part-time award prescription may give rise to the advent of secondary employment?

Did the UFUA cross examine Superintendent Connellan as to whether the introduction of part-time employment in the NSWFRS gave rise to the advent of secondary employment?

Given that secondary employment may impede organizational flexibility and the need to take into account 'the need to promote flexible modern work practices' (s.134(1)(d)) should the award be varied to prohibit secondary employment for all employees?

The fire services are also invited to comment on this proposition.

21. At paragraph [125] of the final outline of submissions the UFUA submits that 'part-time employment might ultimately include irregular and intermittent work'.

What is the basis for this submission give that the terms of the proposed clause defines a part-time employee as an employee who, among other things, 'has reasonably predictable hours of work' and requires the part-time employee and the employer to agree in writing 9at the time of engagement as a part-time employee) on a 'regular pattern of work' specifying:

- *the hours worked each day;*
- *which days of the week the employee will work; and*
- *the actual starting and finishing times each day.*

22. One of the findings of fact sought by the UFUA is that the fire services are seeking the proposed variations 'for the purposes of improving their negotiation positions with the UFUA' (see final submissions of 7 June 2016, Annexure A, at paragraph [1]).

Is the finding sought intended to suggest that the fire services have sought the proposed variation for an ulterior purpose?

If so, was this proposition put to any of the fire services witnesses?

Given that the matter before the Full Bench is not an inter partes proceeding, but a review under s.156, what is the relevance of an interested parties' motivation for advancing a particular view?

Questions for all parties

1. Recruit firefighters to both the MFB and CFA undertake a training course of 18.8 weeks (full-time) and, after successful completion of the recent course, the firefighter is then classified as a Level 1 Firefighter.

What is the view of the fire services and the UFUA to an award provision which restricted access to part-time work to Level 1 Firefighters?

2. The parties agree that the historical context of the modern award is relevant to the task of the Full Bench in conducting the four-yearly review of modern awards.²

What is the extent of the disagreement between the parties about the correct interpretation of previous decisions relating to the Fire Fighting Industry Award.

² See Fire Services Submissions, [15]; UFU Submissions, [12]; *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdictional Issues Decision***), [27].