IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2014/202

UFU'S ADDITIONAL SUBMISSIONS 7 July 2016

1 The UFUA has been invited to comment further on the issue raised by the President on transcript at PN4712-4714 concerning the decision in *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242.

2 The UFUA understood the President to ask (at PN4712) whether the Full Bench decision in *Parks* is relevant in the sense that it suggests the Court in *Re AEU* created a sub-rule to the *Melbourne Corporation* Principle. That putative sub-rule (*Parks* at [366]) was expressed in terms that "*certain features of State governments (such as the capacity to determine the number and identify of public sector employees) must be kept free of Commonwealth regulation, without requiring the States to demonstrate that regulation of those matters would in fact undermine the capacity of the State to govern*."

3 The Full Court in *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (8 January 2015) rejected the submission based on the proposition that such a sub-rule existed (at [190]):

> "*We do not consider that AEU should be viewed as establishing any such sub-rule. Rather, AEU is to be understood as applying the Melbourne Corporation principle in a particular statutory context which, on its facts, involved a significant impairment to the State's capacity to function as a government in the relevant sense. Generally, however, for the implied limitation to apply it will be necessary to demonstrate the existence of such an impairment, consistently with subsequent authorities such as Austin, Clarke, the Work Choices Case and Fortescue.*"

4 In *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34; (2013) 250 CLR 548, Hayne, Bell and Keane JJ stated (at [130]):

> "*Hence, as the decisions in Austin and Clarke each demonstrate, the Melbourne Corporation principle requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments*." (citations omitted).

5 Accordingly, there is a need in this case for the Fire Services to demonstrate a relevant impairment as understood in terms of the *Melbourne Corporation* Principle. Nothing in *Re AEU* or *Austin* is inconsistent with this test.

6 The Full Bench in *Parks* (at [367]) made clear that:

> "*In the context of the present case it is important to appreciate that Parks Victoria does not seek any finding to the effect that the impact of the impugned clauses is such as to impair the State of Victoria's capacity to function as a government. The case put by Parks Victoria is based upon s. 5(1)(a) and any residual application of Re AEU, it is not propounding a general case based on the implied limitation."* (original emphasis)

7 That is not the case now run by the Fire Services: see Fire Services' primary submissions of 26 February 2016 at [61]-[67]. The Fire Services submission in this case relies on *Re AEU*, and not the *Referral Act* as was the case in *Parks.*

8 To come within *Re AEU*, the Fire Services needed to first show that the Award dealt with numbers and identity: *Re AEU* at p. 232.8. The award clause deals with the "types of work" that employees may be engaged in and does not relevantly deal with matters of "numbers" or "identity" for the purposes of *Re AEU*. The Fire Services in their primary submissions at [65] do not characterize 'identity' by reference to eligibility or qualifications, but rather on the speculative notion of 'availability to work'.

9 As to impairment; there is no submission or supporting evidence to the effect that the State of Victoria has ever been impermissibly burdened by the current clause. Similar clauses were introduced by consent into the Enterprise Agreements, and the clause dealing with full-time employment was introduced by consent of one of the Victorian government agencies in the Hingley C proceedings. Consent instruments of this nature have *"a very different quality to the imposition by the Commonwealth of an arbitrated outcome on a State or its agencies which have opposed that outcome*": *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (8 January 2015) at [208] per Perram, Robertson and Griffiths JJ.

10 The history of the consent position adopted in 2009 and the lack of any complaint about Clause 10 imposing any burden are important considerations when assessing whether there are in reality any 'practical effects' which can be qualitatively characterized as significant curtailments on governmental functions, or whether the claim involves mere 'speculation and uncertainty': *Clarke v Commissioner of Taxation* [2009] HCA 33 (2 September 2009) at [32]-[33] per French CJ; *Austin v The Commonwealth of Australia* [2003] HCA 3 (5 February 2003) at [150], [158], [172] per Gaudron, Gummow and Hayne JJ; *Melbourne Corporation v The Commonwealth* [1947] HCA 26; (1947) 74 CLR 31 at 74-75 per Starke J.

11 For these additional reasons, the submission made at [160] of the Fire Services' Final Submissions, which cites *Parks* in support, must accordingly be rejected.

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