

**IN THE FAIR WORK COMMISSION  
AT MELBOURNE**

**Matter:** Intractable bargaining application (B2023/771)  
**Applicant:** United Firefighters Union of Australia (UFU)  
**Respondent:** Fire Rescue Victoria (FRV)

**RESPONDENT’S OUTLINE OF SUBMISSIONS**

**A. OVERVIEW**

- 1. The UFU has applied for an intractable bargaining declaration pursuant to s 235(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) (**IBD**) in relation to the proposed enterprise agreement to replace the *Fire Rescue Victoria Interim Operational Employees Enterprise Agreement 2020* (**FRV Operational EA**).
- 2. For over three years, FRV and the UFU have been bargaining (informally and formally) for a replacement agreement. Despite a multitude of bargaining meetings, many bargaining-related disputes and much correspondence, the finalisation of a replacement agreement has eluded the parties.
- 3. Despite the protracted history of bargaining, there is currently no reasonable prospect of the parties reaching agreement on the terms of an enterprise agreement to replace the FRV Operational EA. In circumstances where FRV is bound to comply with the Victorian Government's 2023 **Wages Policy**<sup>1</sup> and bargaining framework, that conclusion is apparent from the following predicament:
  - a. the distance between the parties on the issue of proposed wage increases is currently unbridgeable given FRV is constrained by the Wages Policy and the UFU is adamant that the increases / payments offered in accordance with the Wages

<sup>1</sup> Statement of Jo Crabtree dated 4 September 2023 (**Crabtree Statement**), Attachment 3.

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Policy would not adequately compensate employees for increases in the cost of living and what they assert is their part in the achievement of what has been termed 'cost efficiencies' which have delivered significant cost savings to FRV;

- b. while FRV and the UFU had reached in-principle agreement on the vast majority of non-wage related matters, such in-principle agreement is subject to overall agreement (including on salary and allowance outcomes) and government approval, and the Victorian Government has made it clear that such approval is conditional on certain matters and/or the amendment of certain clauses, which the UFU has indicated are non-negotiable.
  - c. the UFU immediately rejected the most recent offer FRV was authorised to provide 'out of hand' and has refused FRV's subsequent attempts to continue and / or resume bargaining.
4. This is an impasse of the kind that s 235(1) of the FW Act was introduced to address — one in which there is no reasonable prospect of agreement being reached if the Commission does not make an IBD.
  5. All of the statutory criteria are satisfied. FRV and the UFU are in agreement regarding the satisfaction of these criteria, and each submit that the Commission should make the IBD.
  6. Further, FRV submits that the Commission should include in the IBD, pursuant to s 235A(1), a post-declaration negotiating period in order to enable the parties a final opportunity, with the assistance of the Commission, to settle the outstanding matters or, at the very least, narrow the matters that need to be determined by the Commission in making a workplace determination.

## **B. BACKGROUND**

7. FRV and the UFU have been bargaining for an enterprise agreement to replace the current FRV Operational EA (initially through informal discussions and then through formal bargaining) since about July 2020.<sup>2</sup>
8. In addition to the requirements for making an enterprise agreement under the FW Act, FRV is required to comply with the enterprise bargaining framework that the Victorian

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<sup>2</sup> Statement of Laura Campanaro dated 11 August 2023 (**Campanaro Statement**), [4].

Government sets for bodies within the Victorian public sector (including the Wages Policy).

9. Amongst other things, the Wages Policy:
  - a. caps increases to wages and allowances to a certain annual percentage;
  - b. requires agencies such as FRV to seek government approval at two stages:
    - i. in relation to the agency's management logs and the commencement of bargaining; and then
    - ii. in relation to the proposed replacement agreement in its entirety;
  - c. requires all offers to be made on an in-principle basis with agencies such as FRV to communicate that such offers are subject to government approval.
10. The current bargaining process for an enterprise agreement to replace the FRV Operational EA has at all times been conducted within the above framework.
11. The current bargaining process has included approximately 76 bargaining meetings attended by representatives of FRV the UFU and, from time to time, independent bargaining representatives.<sup>3</sup>
12. In addition, the parties took part in a series of ten conciliation conferences pursuant to s 240 of the FW Act before Commissioner Wilson (in matter B2022/1676).<sup>4</sup> The statements issued by Commissioner Wilson in that matter record that, despite progress in bargaining, the parties remained opposed on at least the quantum of an increase to wages and allowances.<sup>5</sup>
13. The difference between the parties on the matter of wages and allowances was, and continues to be, primarily concerned with the application of the Wages Policy. "Pillar 1" of the Wages Policy provides that the Victorian Government will fund a 3% increase in wages and wage-related conditions per annum over the life of a new enterprise agreement. In practice, that requirement imposes a cap on wage and allowance increases of 12% over the life of a four-year enterprise agreement. In addition to such

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<sup>3</sup> Campanaro Statement, [4], [5] and [7].

<sup>4</sup> Campanaro Statement, [23]-[25].

<sup>5</sup> Campanaro Statement, LC-5 and LC-7.

increases, the Wages Policy provides for the potential approval of certain additional payments if the Victorian Government considers specified requirements to have been satisfied – most notably under "Pillar 3" of the Wages Policy. However, relevant to any such potential additional payments, the Wages Policy requires that all enterprise agreements be fiscally sustainable and fully funded.

14. Although FRV and the UFU had reached in-principle agreement on the vast majority of non-wage related matters, such in-principle agreement was subject to government approval. In this respect, FRV has communicated to the UFU that its in-principle agreement to various matters was subject to:
  - a. government approval; and
  - b. final agreement being reached on the terms of the entire agreement / package.<sup>6</sup>
15. The UFU and employees have also, at various times, organised and engaged in a range of protected industrial action in support of their bargaining claims – including a number of forms of protected industrial action which are currently ongoing.<sup>7</sup>
16. On 7 August 2023, FRV wrote to the UFU to advise it that the Victorian Government had approved the making of a without prejudice offer to finalise negotiations for an enterprise agreement to replace the FRV Operational EA and put that offer to the UFU (**7 August Offer**).<sup>8</sup> The letter said, amongst other things, that:

*“In accordance with the Victorian Government’s 2023 Wages Policy and the Enterprise Bargaining Framework (the 2023 Wages Policy), FRV is pleased that they have been authorised by the Government to make a settlement offer.*

*On this basis, FRV provides the following settlement offer to the United Firefighters Union (UFU) and other bargaining representatives in relation to a replacement Operational Agreement:*

- a) *A four-year agreement with a first increase of 1 July 2023, consistent with the Wages Policy, no back payments beyond 1 July 2023 will be made;*

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<sup>6</sup> Crabtree Statement, [49] and Attachment 7, [59] and Attachment 14.

<sup>7</sup> Crabtree Statement, [82].

<sup>8</sup> Marshall Statement, PM-2.

- b) *Four annual wage increases to wages and allowances of 3 per cent as of 1 July of each year;*
- c) *A separate lump sum cash payment under Pillar 1 of the Wages Policy, which is a one-off single payment to each person amounting to approximately \$7,359 per Full-Time Equivalent (FTE);*
- d) *Four lump sum cash payments to each person over the life of the Agreement as a “Pillar 3” payment of approximately \$2,021 per year, with the first payment payable on 1 July 2023.*

*The above accords with the 2023 Wages Policy, which, amongst other things, requires that all agreements be fiscally sustainable and fully funded. This is particularly important in the economic environment in which the state of Victoria finds itself.”*

17. The 7 August Offer also emphasised the requirement in the Wages Policy for all agreements to be fiscally sustainable and fully funded and that, as a result, there were certain matters which had been the subject of negotiations between the parties, and in some cases had been agreed in-principle, which the Victorian Government did not approve being included in the replacement enterprise agreement. In particular, the letter indicated that the Victorian Government did not approve:
- a. the inclusion of any reference to a Firefighters Registration Board;
  - b. the inclusion of provisions within any clause allowing for the Commission to arbitrate extra claims; and
  - c. the inclusion of the UFU’s proposed changes to minimum staffing charts.
18. In the absence of approval from the Victorian Government, the 7 August Offer excluded each of these matters
19. The stated position of the UFU is that wages and allowances are currently the only outstanding matter between the parties in bargaining.<sup>9</sup> In light of the 7 August Offer, that stated position – whilst no doubt genuinely held by the UFU – does not reflect the

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<sup>9</sup> Campanaro Statement, [76] and LC-3.

industrial reality in which the parties are bargaining and the constraints under which the UFU acknowledges that FRV is operating.<sup>10</sup>

### **C. THE COMMISSION SHOULD MAKE THE DECLARATION**

20. The UFU's application for an IBD is made pursuant to s 234 of the FW Act.
21. The circumstances in which the Commission may make an IBD are set out in s 235(1) of the FW Act, namely where certain conditions are satisfied. The relevant conditions are:
  - a. an application for the IBD has been made;
  - b. the FWC is satisfied of the matters set out in s 235(2) of the FW Act; and
  - c. it is after the end of the minimum bargaining period (as defined in s 235(5) of the FW Act).
22. The only potentially disputable condition for present purposes is that the Commission must be satisfied (pursuant to s 235(1)(b)) of the matters set out in s 235(2), namely that:
  - “(a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and*
  - (b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and*
  - (c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.”*

#### **Section 235(2)(a) – Prior s 240 conferences**

23. As noted above, the Commission has conducted a series of s 240 conferences in relation to the dispute about the proposed replacement enterprise agreement, in which the UFU participated. Accordingly, this condition is satisfied.

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<sup>10</sup> Applicant's Submissions dated 14 August 2023, [52].

**Section 235(2)(b) – No reasonable prospect of agreement being reached**

24. The facility for an intractable bargaining application was introduced into the FW Act only recently by the *Fair Work (Secure Jobs, Better Pay) Act 2022* (Cth). Unsurprisingly, there has not yet been any consideration by the Commission of what is required to satisfy this condition.
25. However, the explanatory memorandum to the relevant Bill provided as follows in relation to what is required for the Commission to reach the requisite state of satisfaction under s 325(2)(b):<sup>11</sup>

*“This does not require the FWC to be satisfied that an agreement could never be reached but rather that the chance of the parties reaching agreement themselves is so unlikely that it could not be considered a reasonable chance. It is unlikely that the FWC would reach such a state of satisfaction unless the parties had been bargaining for an extended period and had exhausted all reasonable efforts to reach agreement, but the provision leaves it up to the FWC to determine, in all the circumstances, whether it is satisfied that there is no reasonable prospect of the parties reaching agreement if the FWC does not make the declaration.”*

(Emphasis added)

26. In these circumstances, the question for the Commission is not whether it is possible that the parties may be able to reach agreement, but whether there is a reasonable chance of the parties reaching agreement if the IBD is not made. In this respect, FRV agrees with the UFU's submission that there is presently no reasonable chance of the parties' reaching agreement in the absence of the IBD being made. While FRV had initially hoped that there was scope for further bargaining to take place following the 7 August Offer, given the response and respective positions of the parties this is not the case and there is currently no prospect of the parties reaching agreement between themselves.<sup>12</sup>
27. The position between the parties on the matter of wages and allowances alone is intractable. That is so because, as stated in the 7 August Offer, FRV is unable to move beyond the proposed increase of 3% per annum to wages and allowances and the

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<sup>11</sup> Explanatory memorandum, *Fair Work (Secure Jobs, Better Pay) Bill 2022*, [808].

<sup>12</sup> Crabtree Statement, [85]

proposed lump sum payments, due to the Wages Policy and a lack of Government approval to put forward a proposal which moves beyond the terms set out in this offer. On the other side, the UFU's position is that the proposed 3% increase per annum and the proposed lump sum payments are inadequate to compensate FRV employees for the increased cost of living and what they assert is their part in the achievement of what has been termed 'cost efficiencies' which have delivered significant cost savings to FRV in connection with the harmonisation of firefighting bodies at the time FRV came into existence in July 2020.<sup>13</sup> The UFU has stated its expectation, and the expectation of its members, that an outcome on wages and allowances beyond the proposed 3% increase per annum and the proposed lump sum payments contemplated by the 7 August Offer, is required in any agreement as compensation for their contribution to the achievement of the cost efficiencies, and that in the absence of this expectation being met there will be no agreement from the UFU.<sup>14</sup>

28. In addition to what is an unbridgeable gap between the parties on wages and allowances, the 7 August Offer and subsequent response from the UFU demonstrates that there is also an impasse in relation to non-wage and allowance related matters. While FRV and the UFU had reached in-principle agreement on the vast majority of non-wage related matters, bargaining has taken place within a framework in which it has been made clear that final agreement is subject to government approval and agreement being reached in relation to the entire agreement / package. This was again confirmed in the 7 August Offer. In this respect, the 7 August Offer makes it clear that the Victorian Government has not approved all of the matters that were agreed in principle between FRV and the UFU and that the terms of the offer made by FRV and necessary government approval is conditional on the non-inclusion of certain provisions which the UFU has indicated are non-negotiable.
29. Given the UFU rejected FRV's most recent offer 'out of hand' and has also refused FRV's subsequent attempts to continue and / or resume bargaining, the prospect of the parties being able to resolve this impasse is, at best, remote.
30. In those circumstances, the only prospect of agreement being reached between the parties would be if FRV wilfully ignores the Wages Policy, which it cannot and will not

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<sup>13</sup> Marshall Statement, [4] and [22].

<sup>14</sup> Marshall Statement, [37]-[39].



do,<sup>15</sup> or if the UFU accedes to the 7 August Offer, the prospect of which it has disavowed. Each of these prospects are so unlikely as to enable the Commission to be satisfied to the requisite standard that there is no reasonable prospect of an agreement being reached between the parties if the Commission does not make the IBD.

**Section 235(2)(c) – Reasonable in all the circumstances to make the IBD**

31. The Commission should be satisfied that it is reasonable in all the circumstances to make the IBD, particularly given the relationship between the bargaining parties, the history of bargaining, the lack of a reasonable prospect of an agreement being reached in the absence of a declaration, and the fact that it is the view of both of the parties to bargaining that the declaration ought be made.

**Conclusion on the declaration**

32. For the above reasons, the Commission should be satisfied that the requirements in ss 235(1) and (2) of the FW Act have been met and should make the intractable bargaining declaration sought by the UFU, subject to a post-declaration negotiating period, which is discussed further below.

**D. THERE SHOULD BE A POST-DECLARATION NEGOTIATING PERIOD**

33. Section 235A(1) of the FW Act provides that the Commission “*may, if it considers it appropriate to do so, specify in the declaration*” under s 235(1) a “*post-declaration negotiating period*”. The import of such a period is that, pursuant to s 269(a), the obligation for the Commission to make an intractable bargaining workplace determination “*as quickly as possible*” is not triggered until the conclusion of the period.
34. FRV respectfully submits that the Commission should include a relatively confined post-declaration negotiating period specified in any IBD.
35. The fact that the statutory scheme for making an IBD includes the possibility of a post declaration negotiating period suggests that satisfaction of section 235(2)(b) (i.e. a finding that there is no reasonable prospect of the parties reaching agreement in the absence of an IBD) does not preclude the Commission from forming the view that a post-declaration negotiating period is appropriate.

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<sup>15</sup> Crabtree Statement, [29], [35] and Attachment 3, [85].

36. There were substantive bargaining developments communicated to the UFU less than a month ago, namely, the fulsome monetary offer and confirmation from the Victorian Government that certain non-wages matters did not have approval to be included in the agreement to replace the FRV Operational EA. In those circumstances, there is purpose in ordering a post-declaration negotiating period to explore bargaining in light of these new parameters.
37. Ordering a post-declaration negotiating period would also promote (and not hinder as submitted by the UFU) the statutory purpose of resolving bargaining impasses by giving the parties, in the shadow of a workplace determination, a further opportunity to resolve any matters in issue between themselves so far as possible. The UFU acknowledges that purpose<sup>16</sup>, particularly if the parties had the assistance of the Commission. The parties have shown to date that they are able to bargain productively together. In the context of the amount of time and effort that the parties have put into bargaining, it would be sensible to allow a confined period of time in which the parties can assess the matters that can be agreed and those that remain in issue, and have that final opportunity to attempt to resolve them ahead of the workplace determination.
38. In its submission<sup>17</sup>, the UFU argues that *“it would not be appropriate for the Commission to specify a post-declaration negotiating period”*. The reasons given for that proposition are that: the parties have *“agreed on all non-wage-related terms”*; the distance between the parties on the wage-related terms is *“unbridgeable”*; and the parties are likely to only move further apart. It is respectfully submitted that this position fails to have regard to the fact that bargaining has at all times proceeded on the basis that any in-principle agreement was subject to overall agreement including salary and allowance outcomes and Victorian Government approval.
39. FRV concedes that the wage-related terms of the proposed enterprise agreement may be unbridgeable. Indeed, that is one of the key factors identified by FRV in support of its submission that a declaration should be made under s 235(1). However, having regard to at least the progress of bargaining and the terms of the 7 August Offer, it is clear that the Victorian Government has not approved all of the matters that were agreed in-principle between FRV and the UFU and on this basis at least the parties cannot be said to be agreed on all non-wage-related terms. Without the required government approval

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<sup>16</sup> Applicant’s Submissions, [46]-[47].

<sup>17</sup> Applicant’s Submissions, [58].

and agreement on the entire package, it is unlikely that the vast majority of non-wage related matters which were subject to in-principle agreement between FRV and the UFU will satisfy the legal definition of 'agreed terms' in s 274(3) of the FW Act for the purpose of inclusion in a workplace determination pursuant to s 270(2) of the FW Act.

40. There is also no sound basis for the Commission to conclude that the parties are likely to move further apart from their current positions in a post-declaration negotiating period.
41. A post declaration negotiating period would provide the opportunity for the parties to clarify and hopefully narrow the matters which remain in dispute and which the Commission will be required to arbitrate when making any workplace determination. The Commission having made declaration, and the context of an impending arbitration, creates a different context for further discussion.
42. In particular, a post-declaration negotiating period will give the parties the opportunity to reach agreement on matters with the necessary degree of finality (including obtaining the required governmental approval) to satisfy the definition of 'agreed terms' in s 274(3) of the FW Act for the purpose of inclusion in a workplace determination pursuant to s 270(2) of the FW Act.
43. It is FRV's strong desire that the parties have this further opportunity to progress to the point at which as many of the matters, as possible, in relation to which the FRV and the UFU have previously agreed in-principle, meet the definition of 'agreed terms' (including obtaining the required government approval).
44. Given each of the factors outlined above, it is possible, if not likely, that, in the context of an IBD being made, a looming workplace determination and presumed Government involvement and interest in the process, some of the matters which are currently in issue may be able to be resolved. Where that possibility exists, the parties should take the opportunity to explore it.
45. For these reasons, FRV submits that the Commission should include in any IBD a relatively short post-declaration negotiating period.

**E. ORDERS SOUGHT**

46. The Commission should make an IBD pursuant to s 235(1) of the FW Act, and should include in that order, pursuant to s 235A(1), a relatively short post-declaration negotiating period.

5 September 2023

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