

**IN THE FAIR WORK COMMISSION  
AT MELBOURNE**

**FWC Matter No: B2023/771**

**The United Firefighters' Union of Australia**  
(Applicant)

**Fire Rescue Victoria**  
(Respondent)

**OUTLINE OF SUBMISSIONS ON BEHALF OF THE MINISTER  
FOR EMERGENCY SERVICES**

**Introduction**

1. The United Firefighters' Union of Australia (**UFU**) has applied pursuant to section 234(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) for an intractable bargaining declaration (**IBD**) in relation to a proposed enterprise agreement (**Proposed Operational EA**) to replace the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (**FRV Operational EA**).
2. The UFU contends, and Fire Rescue Victoria (**FRV**) agrees, that the statutory criteria for the making of an IBD under section 235 have been met. The UFU seeks that the Fair Work Commission (**Commission**) make an IBD without specifying a post-declaration negotiating period. By contrast, FRV submits that the IBD order should include, pursuant to section 235A(1), a post-declaration negotiating period.
3. As the responsible Minister, the Minister for Emergency Services in Victoria, the Hon Jaclyn Symes MLC (**Minister**) has a clear interest in the proceedings,<sup>1</sup> and seeks to intervene for the purpose of making written and oral submissions in respect of the making of an IBD and any resultant intractable bargaining workplace determination.
4. The Minister contends that an IBD should not be made lightly and that the expectations of the Minister and the Government, more broadly, is that, where reasonably possible, enterprise agreements should be bargained, made and approved through the framework established by Part 2-4 of the *FW Act*. However, given the particular circumstances of this application and the

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<sup>1</sup> Form F1 filed on behalf of the Minister for Emergency Services dated 23 August 2023.

UFU's position (further addressed below), the Minister does not oppose the Commission making an IBD pursuant to section 235 of the *FW Act* in relation to the Proposed Operational EA.

5. A comprehensive wage offer was made by FRV on 7 August 2023. As the UFU rejected outright the wage offer, it has not been the subject of negotiations. Further, the UFU's position in this application is at odds with the parameters within which bargaining has proceeded. Those parameters included that in-principle agreement between FRV and the UFU has at all times been subject to overall agreement on the package, including salary and allowance outcomes being agreed, and subject to Government approval. In this context, there is a strong incentive for the parties to return to negotiations in a final attempt to reach agreement prior to the making of an intractable bargaining workplace determination. In the circumstances, a post-declaration negotiating period is appropriate.
6. Given the above, the Minister seeks that, if the Commission makes an IBD, the declaration specify a post-declaration negotiating period of four weeks from the date of the IBD order pursuant to section 235A(1) of the *FW Act*.

## **Background**

7. FRV is established by section 6 of the *Fire Rescue Victoria Act 1958* (Vic) (***FRV Act***). It is responsible for fire safety, fire suppression and fire prevention services, and emergency response services in the FRV fire district.<sup>2</sup>
8. The Minister's portfolio includes:
  - (a) responsibility for administering the *FRV Act*;
  - (b) having general direction and control over FRV in respect of the performance of its duties and functions, including the exercise of powers by FRV and the Fire Rescue Commissioner;<sup>3</sup> and
  - (c) accountability for FRV's budget and financial management.<sup>4</sup>

## **Wages Policy**

9. As a public sector agency, FRV is required to comply with the Government's enterprise bargaining framework and wages policy.<sup>5</sup>

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<sup>2</sup> Section 7 of the *FRV Act*.

<sup>3</sup> Section 8(1) of the *FRV Act*.

<sup>4</sup> The Minister is the "relevant Minister" for FRV (and all other public bodies for which she is the responsible Minister) for the purposes of the *Financial Management Act 1994* (Vic). FRV's financial accountability and reporting obligations are set out in Part 7 of that Act.

<sup>5</sup> Statement of Jo Crabtree dated 5 September 2023 (**Crabtree Statement**), [29].

10. At the commencement of bargaining for the Proposed Operational EA, the wages policy and enterprise bargaining framework that applied to bargaining was contained in the 2019 wages policy and enterprise bargaining framework (**2019 Wages Policy**).<sup>6</sup>
11. That policy contained a framework that placed different bargaining and governance expectations (including the level of Government supervision and approval) on different types of public sector agencies relative to the size of their workforce, wages bill, and relative industrial or financial risk profile (**Framework**).<sup>7</sup> Under the Framework there were two categories of enterprise agreement – Major Agreements (which required Government oversight and approval of the strategy and negotiations) and Non-major Agreements. Major Agreements were stated to include agreements covering firefighters.<sup>8</sup>
12. Under the 2019 Wages Policy, increases in wages and conditions were capped at a rate of growth of 2.0 per cent per annum.<sup>9</sup> Public sector agencies were required to seek pre-approval from the Government to make any offer above the capped growth rate.<sup>10</sup> Additional changes to allowances and other conditions (not general wages) were only allowed if the Government agreed that the changes addressed key operational or strategic priorities for the agency and/or one or more of the Public Sector Priorities.<sup>11</sup> No retrospective payments could be made.<sup>12</sup>
13. In addition, the 2019 Wages Policy required that, “*all agreements must be fiscally sustainable and fully funded from capped indexation revenue and /or appropriate cost offsets.*”<sup>13</sup>
14. Amongst other things, the 2019 Wages Policy required FRV to seek approval:
  - (a) at the commencement of bargaining;
  - (b) to make offers outside the approved parameters; and
  - (c) prior to the commencement of any of the formal approval requirements under the *FW Act*.<sup>14</sup>
15. The 2019 Wages Policy also provided that:

All offers should be made on an in-principle basis, with the public sector agency communicating that the offer is subject to government approval and may be subject

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<sup>6</sup> Crabtree Statement, [30]; Exhibit JC-1, Attachment 1.

<sup>7</sup> Exhibit JC-1, Attachment 1, p. 7.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, p. 4.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid. The Public Sector Priorities are set out in Exhibit JC-1, Attachment 1, p. 3.

<sup>12</sup> Ibid, p. 4.

<sup>13</sup> Ibid.

<sup>14</sup> Crabtree Statement, [31]; Exhibit JC-1, Attachment 1, pp. 9-10.

to change to ensure compliance with Wages Policy, the Industrial Relations Policy, the Fair Work Act or other relevant legislation.<sup>15</sup>

16. It went on to provide:

To be approved by Government, a proposed enterprise agreement (whether a Major Agreement or Non-major Agreement) must meet all the conditions specified in Wages Policy.<sup>16</sup>

17. FRV was given permission from the Government to continue to apply the 2019 Wages Policy despite the commencement of a new Wages Policy in 2022.<sup>17</sup>

18. In April 2023, the Victorian Government published a revised wages policy and enterprise bargaining framework (**2023 Wages Policy**).<sup>18</sup>

19. Under the 2023 Wages Policy, increases in wages and conditions are funded at a rate of growth of 3.0 per cent per annum over the life of the agreement.<sup>19</sup> In addition to annual wage increases, a separate lump sum, cash payment is available equivalent to an additional 0.5 per cent of overall agreement costs (Pillar 1).<sup>20</sup> Additional changes to allowances and other conditions (not general wages) are only allowed if the Government agrees that the changes will address key operational or strategic priorities for the agency, and/or one or more of the Public Sector Priorities and provided the associated costs are funded through appropriate cash offsets or Government approved funding strategy (Pillar 3).<sup>21</sup> While there is no cap on overall agreement outcomes, Pillar 1 increases to wages and conditions cannot exceed the funded allocation and improvements and Pillar 3 improvements must be funded from appropriate cash offsets and/or a Government approved funding strategy.<sup>22</sup> As with the 2019 Wages Policy, no retrospective payments can be made.<sup>23</sup>

20. The 2023 Wages Policy provides that parties currently bargaining for a proposed enterprise agreement are required to seek Government approval before any offer is made under the new 2023 Wages Policy parameters.<sup>24</sup>

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<sup>15</sup> Ibid.

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<sup>17</sup> Crabtree Statement, [33].

<sup>18</sup> Crabtree Statement, [34]; Exhibit JC-1, Attachment 3.

<sup>19</sup> Exhibit JC-1, Attachment 3, p. 3.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, p. 4

<sup>24</sup> Ibid, p. 9 .

21. Consistent with the 2019 Wages Policy, the 2023 Wages Policy contains each of the matters referred to above at paragraphs 11, and 13 to 16.<sup>25</sup> Further, under the Framework put in place by the 2023 Wages Policy, where a final proposed enterprise agreement is settled between the parties, a public sector agency must obtain Government approval of the proposed enterprise agreement, costings and funding strategy before commencing the *FW Act* pre-approval steps.<sup>26</sup>
22. The Minister understands that bargaining for the Proposed Operational EA has, at all times, been conducted within the Government's enterprise bargaining framework, including that FRV made it clear to all bargaining representatives, including the UFU, that any proposed final agreement would be subject to approval by the Government.<sup>27</sup> The UFU acknowledges that it was aware that FRV considers itself bound by the Government's wages policy.<sup>28</sup>

### **Process of bargaining**

23. The background to bargaining for the Proposed Operational EA is outlined at paragraphs 28 to 81 of the statement of Jo Crabtree filed on 5 September 2023 (**Crabtree Statement**).
24. Relevantly, for the purposes of the present application, the Minister emphasises the following key events.
25. In or around July 2020, the UFU and FRV commenced informal discussions for the Proposed Operational EA.<sup>29</sup>
26. In August 2021, FRV sought the Government's approval to commence bargaining for the Proposed Operational EA and, in doing so, acknowledged the requirement to reach agreement with the UFU in accordance with the Government's wages policy and that any proposed final agreement would be subject to approval by the Government.<sup>30</sup>
27. On or around 6 December 2021, the Government approved FRV's bargaining strategy and provided formal approval to commence bargaining (under the 2019 Wages Policy).<sup>31</sup>
28. On 26 April 2022, formal bargaining for the Proposed Operational EA commenced.<sup>32</sup> Bargaining representatives were requested to review and sign an "*Agreed Charter*" for bargaining which contained an agenda item for the first bargaining meeting, which stated, "*FRV to provide*

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<sup>25</sup> Ibid, pp. 3, 7-10,

<sup>26</sup> Ibid, p. 7.

<sup>27</sup> FRV's Outline of Submissions dated 5 September 2023 (**FRV's Submissions**), [10]; Crabtree Statement, [43].

<sup>28</sup> Statement of Laura Campanaro dated 11 August 2023 (**Campanaro Statement**), [15], [71].

<sup>29</sup> Crabtree Statement, [28].

<sup>30</sup> Crabtree Statement, [40].

<sup>31</sup> Crabtree Statement, [45].

<sup>32</sup> Crabtree Statement, [47].

*explanation of current status of current Enterprise Agreement, Government Wages Policy, FRV objectives and broad concepts.*"<sup>33</sup>

29. On 4 November 2022, FRV filed a section 240 application with the Commission.<sup>34</sup> In that application, FRV noted as part of its description of the course of bargaining at paragraph [18]:

The most recent bargaining meeting occurred on 11 October 2022. At that meeting the following was noted:

a. the UFU would provide FRV with an updated draft enterprise agreement reflecting the amendments agreed in-principle, including unresolved matters, for FRV to consider and provide a response to (that draft was referred to as 'V12'); and

b. FRV confirmed the in-principle agreement matters were subject to what occurs with respect to the 'efficiencies' the subject of B2021/1057 and the ongoing dispute in C2022/5683 and Government instruction to FRV.<sup>35</sup>

30. On 29 November 2022, FRV sent the UFU its response to version 12 of the UFU's revised log of claims.<sup>36</sup> The introduction of the response document states that "*[t]he following provides FRV's response to the above revised UFU Log on a without prejudice basis, noting that a range of substantive matters are subject to State Government instruction and approval.*"<sup>37</sup>

31. The response document sent by FRV on 29 November 2022 also states that:

All clauses as set out in the UFU revised Log V12 unless otherwise commented upon below, are agreed in principle by FRV subject to final agreement on an overall package of provisions for the proposed EA and subject to proceedings in C2022/5683 (Efficiencies Allowance matter) (emphasis added).<sup>38</sup>

32. On 3 February 2023, Commissioner Wilson issued a statement noting that the parties had reached agreement "*on all but 10 issues*".<sup>39</sup> In that statement, the Commissioner said at paragraph [6]:

It is clear to me bargaining will be unlikely to meaningfully progress without the capacity of FRV to put forward a detailed monetary proposal for consideration of the UFU and other employee bargaining representatives. What is ultimately put forward by the FRV for consideration of the UFU and employees is likely to be a function of the Victorian Government wages policy which is presently under review following its re-election in November 2022. I note that the parties are currently bargaining under the 2019 wages policy.<sup>40</sup>

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<sup>33</sup> Campanaro Statement, [6]; Attachment LC-1.

<sup>34</sup> Crabtree Statement, [48]; Attachment 6.

<sup>35</sup> Crabtree Statement, Attachment 6, p. 6 at [18].

<sup>36</sup> Crabtree Statement, [49]; Exhibit JC-1, Attachment 7, p. 1.

<sup>37</sup> Ibid, p. 2.

<sup>38</sup> Ibid.

<sup>39</sup> Crabtree Statement, [50]; Exhibit JC-1, Attachment 8.

<sup>40</sup> Ibid.

33. Consistent with the 2019 Wages Policy, FRV indicated to Commissioner Wilson that the principal parties had reached agreement on matters other than those identified in Commissioner Wilson's statement.<sup>41</sup> This indication reflected the fact that the parties had reached in-principle agreement as contemplated by the 2019 Wages Policy.<sup>42</sup>
34. On 24 February 2023, the Department of Justice and Community Safety (**DJCS**) wrote to FRV setting out the terms of a provisional settlement offer, being:
- (a) a three-year agreement with a commencement date of 1 March 2023;
  - (b) three annual wage increases of 2 per cent;
  - (c) a one-off sign on payment of \$1500; and
  - (d) changes that FRV and the UFU had agreed in principle to the Proposed Operational EA and approved by DJCS and Industrial Relations Victoria for inclusion in the settlement offer.<sup>43</sup>
35. The reference to "*changes approved by*" DJCS and Industrial Relations Victoria in paragraph 34(d) above was to approval that would subsequently be sought by FRV. No such approval had been sought or given.
36. In addition, the provisional settlement offer was to specify that any increases to the minimum staffing charts should not be included in the Proposed Operational EA and there would be no reference to a firefighters' registration scheme in the Proposed Operational EA.<sup>44</sup>
37. On 3 March 2023, FRV responded to the Minister's 24 February letter.<sup>45</sup> In its letter, FRV sought authorisation to make a revised provisional offer to the UFU.<sup>46</sup>
38. On 7 March 2023, the UFU wrote to FRV requesting that FRV provide to the UFU the date upon which FRV would provide UFU with a wages offer. In that letter, the UFU stated:
- After six months of negotiations in the Commission, FRV failed to make an offer to the UFU. It continually referred to the fact that the Government would issue a new Wages Policy, however, that has not been forthcoming.<sup>47</sup>
39. On 10 March 2023, FRV sent the UFU an offer (**10 March Offer**), stating:

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<sup>41</sup> Crabtree Statement, [51].

<sup>42</sup> Ibid.

<sup>43</sup> Crabtree Statement, [52]; Exhibit JC-1, Attachment 9.

<sup>44</sup> Ibid.

<sup>45</sup> Crabtree Statement, [55]; Exhibit JC-1, Attachment 11

<sup>46</sup> Ibid.

<sup>47</sup> Campanaro Statement, [55]; Exhibit LC-9.

In accordance with the Victorian Government's 2019 Wages Policy, [FRV] is authorised to, makes the following monetary offer to the UFU and other bargaining representatives in relation to bargaining for a new operational agreement.

- A three-year Agreement;
- Three annual wage increases of 2 per cent effective from the commencement of the Agreement; and
- One-off sign on payment of \$1500 (emphasis added).<sup>48</sup>

40. On 10 March 2023, the UFU responded to the 10 March Offer.<sup>49</sup> In its response, the UFU set out four questions in which it sought FRV's position in respect of bargaining.<sup>50</sup>

41. On 14 March 2023, FRV responded confirming the following matters:

On 29 November 2022, FRV provided a without prejudice response to the UFUs revised log V12 in this matter. That response confirmed:

- all references to quantum for Wages and Allowances are subject to instruction and approval from Government and having regard to Government Wages Policy and the treatment of efficiencies; and
- all clauses as set out in the UFU revised log V12 (unless they were otherwise commented on) were agreed in principle by FRV, subject to final agreement on an overall package of provisions for the proposed enterprise agreement and subject to the efficiencies allowance dispute proceedings in C2022/5683.

FRV has maintained this position throughout bargaining and continues to maintain this position.<sup>51</sup>

42. FRV reiterated that the 10 March Offer was “*a genuine offer made under applicable Wages Policy*.”<sup>52</sup>

43. On 15 March 2023, the UFU wrote to FRV rejecting the 10 March Offer and making a counter offer.<sup>53</sup> Whilst purporting to accept the offer of a 2 per cent base wage increase plus a sign-on bonus of \$1500, the counter offer went on to attach additional conditions including:

- (a) a cost-of-living adjustment payment payable annually and capped at 5 per cent;
- (b) payment of an Efficiencies Allowance asserted by the UFU to be valued at \$203,768,949, the value of which to be arbitrated if not agreed at a value of no less

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<sup>48</sup> Crabtree Statement, [57]; Exhibit JC-1, Attachment 12.

<sup>49</sup> Crabtree Statement, [58]; Exhibit JC-1, Attachment 13.

<sup>50</sup> Ibid.

<sup>51</sup> Crabtree Statement, [59]; Exhibit JC-1 Attachment 14.

<sup>52</sup> Ibid.

<sup>53</sup> Crabtree Statement, [61]; Exhibit JC-1, Attachment 15.

than \$117 million, backdated to the start of the agreement and not subject to the no extra claims clause;

- (c) the application of any new (more favourable) wages policy over the life of the agreement in addition to any cost-of-living adjustment; and
- (d) an additional annual bonus payment of \$1500 per employee for the life of the agreement and until terminated or replaced.<sup>54</sup>

44. The counter offer stated that it was put on the basis *"that the parties have otherwise agreed to all non-wages terms and conditions as contained in the most recent iteration of the Draft Operational Staff Agreement"*.<sup>55</sup>

45. On 15 June 2023, DJCS wrote to FRV providing the Government's authority to put a revised settlement offer under the 2023 Wages Policy including:

- (a) a four-year agreement with a first increase of 1 July 2023, consistent with the 2023 Wages Policy with no back pay;
- (b) four annual wage increases of 3 per cent;
- (c) a separate lump sum cash payment under Pillar 1 of the 2023 Wages Policy, which is a one-off single payment to each firefighter amounting to approximately \$7,359 per Full-Time Equivalent (FTE), based on 3,800 FTE;
- (d) four lump sum cash payments over the life of the agreement in line with "Pillar 3" (details to be confirmed separately);
- (e) the offer should specify that the following will not be included in the Proposed Operational EA:
  - (i) any increases to the minimum staffing charts;
  - (ii) any reference to a firefighter's registration scheme, including removal of the current reference; and
  - (iii) clauses allowing for extra claims during the life of the agreement, such as the proposed productivity clause and harmonisation clause. This includes removing current references.<sup>56</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Crabtree Statement, [66]-[67]; Exhibit JC-1, Attachment 18.

46. The letter also stated that:

[T]he settlement offer should also specify that if the offer is rejected by the UFU and other bargaining representatives, FRV will reserve its rights to withdraw in-principle agreement to retain some or all of the restrictive clauses contained in the current Operational Agreement.

[A]ny final in-principle agreement reached with the union and independent bargaining representatives will require final approval by Government and must be compliant with the Government's 2023 Wages Policy.<sup>57</sup>

47. On 19 June 2023, Commissioner Wilson issued a statement noting that the UFU and FRV reported that "*since the last conciliation conference held on 27 April 2023 all outstanding matters ha[d] been resolved, save for the matter of an offer for increases to wages and related monetary allowances*".<sup>58</sup> FRV provided that indication on the basis that the parties had reached in-principle agreement as contemplated by the 2023 Wages Policy.<sup>59</sup> In that statement the Commissioner said at paragraph [4]:

Shortly before the last conciliation conference, held on 27 April 2023, the Victorian Government announced details of its updated Wages Policy and Enterprise Agreement Framework. Until the new policy was announced in April 2023 and then later documented bargaining on the matter of the union's monetary claims had been unable to progress as there was both a lack of clarity about the quantum of increase that could be considered by FRV as well as that FRV had no authority to put forward a wages proposal for the UFU's consideration.<sup>60</sup>

48. On 7 August 2023, FRV wrote to the UFU making a further wage offer with the following conditions (**7 August Offer**):

- (a) a four-year agreement with a first increase of 1 July 2023, consistent with the 2023 Wages Policy, no back payments beyond 1 July 2023 will be made;
- (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 2023 Wages Policy, which is a one-off single payment to each person amounting to approximately \$7,359 per Full-Time Equivalent (FTE); and
- (d) four lump sum cash payments to each person over the life of the Proposed Operational EA as a "Pillar 3" payment of approximately \$2,021 per year, with the first payment payable on 1 July 2023.<sup>61</sup>

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<sup>57</sup> Ibid.

<sup>58</sup> Crabtree Statement, [68]-[72]; Exhibit JC-1, Attachment 20.

<sup>59</sup> Crabtree Statement, [71].

<sup>60</sup> Exhibit JC-1, Attachment 20.

<sup>61</sup> Crabtree Statement, [75]; Exhibit JC-1, Attachment 21.

49. The 7 August Offer provided that FRV was not authorised by the Government to include in the Proposed Operational EA:

- (a) any reference to a firefighters registration board;
- (b) clauses allowing for extra claims to be arbitrated by the Commission during the life of the agreement; and
- (c) any increases to the minimum staffing charts.<sup>62</sup>

50. The 7 August Offer was put in the context of an overall package.<sup>63</sup> Further, FRV noted in its letter that:

While FRV and the bargaining representatives have been in direct negotiations, as a government agency, any offer made by FRV, and all matters agreed in-principle are subject to government approval and authorisation. FRV has consistently reinforced this message throughout the bargaining process.<sup>64</sup>

51. Later that day, at approximately 9:21pm, the UFU rejected the 7 August Offer.<sup>65</sup>

52. On 9 August 2023, MinterEllison, lawyers acting for FRV, sent a letter to Davies Lawyers, lawyers acting for the UFU, responding to the UFU's rejection of the 7 August Offer.<sup>66</sup> The letter reiterated that:

FRV has at all times sought to be clear that all matters the subject of bargaining could only be agreed in principle and were subject to Government approval. Bargaining for the Proposed Agreement has at all times been conducted within a framework in which it is understood that any proposed bargaining outcome is ultimately subject to Government approval and funding.<sup>67</sup>

53. Having regard to the above, and as confirmed by FRV in its submissions,<sup>68</sup> it is clear that throughout the bargaining process, bargaining has proceeded on the basis that any in-principle agreement reached between FRV and the UFU is subject to:

- (a) Government approval; and
- (b) final agreement being reached on the terms of the entire agreement/package.

#### **Intractable bargaining declarations under section 235 of the *FW Act***

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Crabtree Statement, [76]; Exhibit JC-1, Attachment 22.

<sup>66</sup> Crabtree Statement, [79]; Exhibit JC-1, Attachment 23.

<sup>67</sup> Ibid.

<sup>68</sup> FRV's Submissions, [3(b)], [14], [28], [38], [39].

54. Section 235(1) of the *FW Act* provides that the Commission may make an IBD in relation to a proposed enterprise agreement (here, the Proposed Operational EA), if:
- (a) an application has been made;
  - (b) the Commission is satisfied of the matters set out in section 235(2); and
  - (c) it is after the “*end of the minimum bargaining period*”.
55. Pursuant to section 235(1)(b) of the *FW Act*, the Commission must be satisfied of the matters set out in section 235(2) of the *FW Act*. Those matters are:
- (a) the Commission has dealt with the dispute about the agreement under section 240 and the UFU participated in the Commission's processes to deal with the dispute (section 235(2)(a));
  - (b) there is no reasonable prospect of agreement being reached if the Commission does not make the declaration (section 235(2)(b)); 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)(c)).

Section 235(2)(a): participation in section 240 processes

56. Section 235(2)(a) of the *FW Act* requires the Commission to be satisfied that it has dealt with the bargaining dispute under section 240 and that the UFU participated in the Commission's processes in that regard.
57. The parties agree in relation to this requirement.<sup>69</sup> There have been several section 240 disputes commenced by the parties in relation to the Proposed Operational EA, which involved participation by the UFU.

Section 235(2)(b): no reasonable prospect of agreement being reached

58. Section 235(2)(b) of the *FW Act* requires that the Commission be satisfied that there “*is no reasonable prospect of agreement being reached*” if the IBD is not made (i.e. in the status quo).
59. The Minister endorses paragraphs 24 to 30 of FRV's submissions in respect of there being no reasonable prospect of agreement being reached within the meaning of section 235(2)(b).
60. As noted at paragraph 25 of FRV's submissions, the revised explanatory memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Revised EM)* explains that section 235(2)(b) “*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.*”<sup>70</sup>

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<sup>69</sup> FRV's Submissions, [23]; UFU's Outline of Submissions dated 14 August 2023 (**UFU's Submissions**), [39]-[42].

<sup>70</sup> Revised explanatory memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Revised EM)*, [846].

61. The Minister expects that with the significantly increased wage offer having been made on 7 August 2023, the parties are capable of genuinely engaging in further bargaining to seek to reach agreement. Nevertheless, given the UFU's rejection, if the UFU maintains its position that it is not prepared to negotiate in relation to the wage offer and the conditions attached to that offer, then it appears that there "*is no reasonable prospect of agreement being reached*" within the meaning of section 235(2)(b). As referred to below, this does not prevent the Commission forming the view that a post-declaration negotiating period is appropriate.
62. Further, the Minister refers to the matters set out above at paragraphs 9 to 53, which make clear that any agreement between FRV and the UFU (including on salary and allowance outcomes) was subject to overall agreement and Government approval. It follows that absent agreement on salary and allowance outcomes; Government approval; and, the UFU agreeing to the removal or amendment of the clauses of concern to the Government (as detailed in the 7 August Offer), nothing has been agreed.
63. In the circumstances, the Minister agrees that there is no reasonable prospect of agreement being reached.

Section 235(2)(c): reasonable in all the circumstances

64. Section 235(2)(c) of the *FW Act* requires that the Commission be satisfied that it is reasonable in all the circumstances to make the IBD, taking into account the views of the bargaining representatives.
65. The Minister endorses paragraph 31 of FRV's submissions that it is reasonable in all the circumstances to make the IBD.

**Post-declaration negotiating period**

66. Under section 235A(1) of the *FW Act*, the Commission, at its discretion, can, if it considers it appropriate to do so, specify a post-declaration negotiating period in an IBD. A post-declaration negotiating period starts on the day the declaration is made. It ends on the date specified by the Commission in the declaration and can be extended by the Commission if it considers it appropriate to do so.
67. Section 269 and the note to section 235A(1) make clear that the Commission cannot make an intractable bargaining workplace determination during the post-declaration negotiating period but may still provide other assistance during the period, such as conciliation.
68. The statutory scheme contemplates that a post-declaration negotiating period may be specified even if the Commission is satisfied that there are "*no reasonable prospect of agreement*" pursuant to section 235(2)(b). The purpose of the post-declaration negotiating period is to

enable “*the parties to continue to negotiate with a view to reaching an enterprise agreement before the FWC proceeds to make a workplace determination.*”<sup>71</sup>

69. Under section 270(2), any intractable bargaining workplace determination must include “*agreed terms*”. Section 274(3) defines agreed terms for an intractable bargaining workplace determination as follows:

(3) An ***agreed term*** for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:

(a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;

(b) otherwise—at the time the intractable bargaining declaration was made.

70. The effect of subsections 274(3)(a) and (b) is that the timing for the determination of agreed terms differs depending on whether or not there is a post-declaration negotiating period. If there is a post-declaration negotiating period, the agreed terms are those that are agreed at the end of the post-declaration negotiating period. Otherwise, the agreed terms are those that are agreed at the time that the IBD was made.

71. The Minister supports FRV’s submissions regarding a post-declaration negotiating period set out at paragraphs 33 to 45 of FRV’s submissions.

72. A post-declaration negotiating period would provide a different, and potentially more fruitful, bargaining environment to what has occurred to date for the following reasons.

73. Having regard to the matters set out above at paragraphs 9 to 53, it is clear that bargaining for the Proposed Operational EA has proceeded on the basis that any in-principle agreement reached between FRV and the UFU is subject to Government approval and final agreement being reached on the terms of the entire agreement/package.

74. The UFU’s assertion that the parties had agreed all terms of the Proposed Operational EA other than the quantum of wages and allowances<sup>72</sup> is at odds with the basis upon which bargaining was conducted and the terms of the Government wages policy. At all times, the UFU was aware of the Government wages policy and the fact that FRV was negotiating, subject to its terms.<sup>73</sup> In addition, this fact was communicated to the UFU on numerous occasions.<sup>74</sup> Accordingly, to

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<sup>71</sup> Revised EM, [853].

<sup>72</sup> UFU’s Submissions, [8], [16], [25]-[29], [32], [35], [49(g)], [58(a)], [58(c)], [58(d)]; Statement of Peter Marshall dated 11 August 2023, [24]-[36], [39]; Campanaro Statement, [10]-[14], [20]-[32], [52], [76]; Statement of James Kefalas dated 11 August 2023 (**Kefalas Statement**), [10]-[21], [25].

<sup>73</sup> Campanaro Statement, [15]-[19], [71].

<sup>74</sup> Campanaro Statement, [6]; Attachment LC-1; Crabtree Statement, [49], [57], [59], [75], [79]; Exhibit JC-1, Attachments 7, 12, 14, 21, 23.

the extent any FRV agreement is depicted in the various versions of the Proposed Operational EA circulated by the UFU, such agreement could only have been provided on an “*in-principle*” basis.<sup>75</sup>

75. The 7 August Offer was comprehensive and included a significantly increased wage offer. FRV offered annual wage increases to wages and allowances of 3 per cent, a separate lump sum cash payment to each person amounting to approximately \$7,359 and four lump sum cash payments to each person of approximately \$2,021 per year. This was a substantial increase from the previous 10 March Offer which was made under the 2019 Wages Policy which was capped at an increase of 2 per cent per annum with a one-off sign on payment of \$1,500. The 7 August Offer also made clear that the wage offer was made on the condition that the following matters were not included in the Proposed Operational EA:

- (a) any reference to a firefighters registration board;
- (b) clauses allowing for extra claims to be arbitrated by the Commission during the life of the agreement; and
- (c) any increases to the minimum staffing charts.

76. As set out above, in circumstances where there has not been any agreement to salary and allowance outcomes, no Government approval and the UFU has not agreed to the removal or amendment of the clauses of concern to the Government (as detailed in the 7 August Offer), no matters have been the subject of unconditional agreement for inclusion in an enterprise agreement. This means that, if the UFU maintains its position to the 7 August Offer, all clauses of the Proposed Operational EA (including the clauses of concern identified in the 7 August Offer), remain in contention and cannot constitute “*agreed terms*” within the meaning of section 274(3) of the *FW Act*.

77. A post-declaration negotiating period would provide the UFU with the opportunity to engage in bargaining in a way that recognises that absent overall agreement including salary and allowance outcomes and Government approval, nothing is agreed. It will also enable meaningful negotiation on the 7 August Offer, paving the way for the making of the Proposed Operational EA and obviating the need for the making of an intractable bargaining workplace determination under Part 2-5 of the *FW Act*. Alternatively, it will provide an opportunity for the parties to narrow the matters in dispute and in so doing, reduce the range of matters that the Commission will be required to consider in any intractable bargaining workplace determination.

## CONCLUSION

78. Consistent with the position adopted by FRV, the Minister submits that the Commission should include a relatively confined post-declaration negotiating period.

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<sup>75</sup> Campanaro Statement, [10]-[14], Kefalas Statement, [12], [13], [17]-[21].

79. The Minister proposes that a period of four weeks be specified to enable the parties to reach agreement in respect of the Proposed Operational EA or in respect of “*agreed terms*” to be included in an intractable bargaining workplace determination pursuant to sections 270(2) and 274(3) and to enable FRV to obtain the necessary Government approval in respect of any such agreement.

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8 September 2023