IN THE FAIR WORK COMMISSION

Title of Matter:	Application by Metropolitan Fire & Emergency Services Board
Section:	s.225 - Application for termination of an enterprise agreement after its nominal expiry date
Subject:	Application for termination of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010 & Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010
Matter Number:	AG2014/5121

OUTLINE OF THE APPLICANT'S SUBMISSIONS

A. Overview

1 The Metropolitan Fire and Emergency Services Board (**MFB**) applies under s 225 of the *Fair Work Act 2009* (**FW Act**) to terminate two enterprise agreements that have passed their nominal life:

a. the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010 (**ACFO Agreement**);

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b. the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010 (**Operational Staff Agreement**) [collectively, the **Agreements**].

2 For reasons developed below, terminating the Agreements is appropriate in all the circumstances. It would not offend the public interest and there are good reasons to do it, notwithstanding the likely resistance of the UFU and its members.

The Agreements

3 Both Agreements were approved by the Commission on 23 September 2010. They reached their nominal expiry dates on 30 September 2013.

4 There are significant problems with the content of the Operational Staff Agreement (and the ACFO Agreement which contains many identical provisions). First, there are provisions which seriously interfere with the process of change and improvement within the MFB and unreasonably impede the capacity of the MFB to carry out its statutory functions effectively (see Part D below). Secondly, there are provisions which offend the implied constitutional limitation as enunciated by the High Court of Australia in *Re Australian Education Union; Ex parte State of Victoria* (1995) 184 CLR 188 (***Re AEU***) (see Part E and Appendix A).

5 The MFB has sought to bargain with the UFU to address these and other issues. But the UFU has shown no real interest in engaging in bargaining about these matters. The UFU has no incentive to bargain about these matters. It knows that the MFB cannot make any significant changes given the enormous control the UFU already has over change processes. Basically, no progress has been made in bargaining for replacement agreements and there is no realistic prospect of reaching an agreement any time soon (see Part F).

B. The relevant statutory framework

6 Section 226 of the FW Act provides:

> "If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
>
> (a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them."

7 While the section is cast in mandatory language ('must terminate"), that requirement depends upon the Commission reaching a state of satisfaction as to two matters – (1) not contrary to public interest; and (2) appropriate in all the circumstances. Accordingly, the Commission is called upon to exercise discretionary judgments, particularly on the question of appropriateness. In that regard, the Commission must be "fair and just" (s 577(a)); "promote[s] harmonious and cooperative workplace relations" (s 577(d)); take into account relevant objects of the Act and its parts (s 578(a)); and have regard to "equity, good conscience and the merits of the matter" (s 578(b)).

8 As to the overall objects of the FW Act, section 3 provides that the object of the Act is:

"to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

...

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards, ...;

...

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining ..."

9 The objects to Part 2-4 Enterprise Agreements include providing for a "simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits" (s 171(a)).

10 Enterprise agreements are workplace bargains which operate over the statutory safety net as established by the National Employment Standards and the system of Modern Awards. They are approved by the Commission and are enforceable under the FW Act. Approval by the Commission is subject to the Commission being satisfied that the enterprise agreement meets the better off overall test, ensuring that the wages and conditions in the enterprise agreement will leave employees better off overall as compared with the underpinning modern award (s 186(2)(d) and s 193). Once an enterprise agreement is approved and for so long as that enterprise agreement is in operation, it will apply to the employees to the exclusion of the modern award (s 57).

11 Parties are required to agree upon the period of duration of their enterprise agreement, which cannot be longer than four years (s 186(5)). The enterprise agreement continues to have force and effect beyond its nominal life until it is replaced by a new agreement or it is terminated (ss 54 and 58).

12 If the Commission is satisfied of the matters in section 226(a) and (b), the Commission must terminate the agreement. In light of the statutory objectives and framework, there is no warrant for approaching section 226 from some predisposition that enterprise agreements should continue indefinitely

C. "Public Interest"

13 The concept of "public interest" does not lend itself to definition and it will always involve a matter of overall judgment of the prevailing circumstances. However, there are some defining characteristics about this concept. It embraces considerations beyond the interests of the immediate parties and the statutory objectives will be relevant.

14 In *Mount Thorley Operations Pty Ltd*, 1999, PR 7850 Boulton J identified six matters of particular relevance to the matter before him:

(a) the statutory scheme for the making and observance of agreements and the objects of the Act;

(b) the need to ensure the efficient and viable operation of the enterprise;

(c) the progress in the negotiations towards making a replacement agreement;

(d) the problems relating to the continued operation of the Agreement;

(e) the provisions of the Agreement dealing with its renewal and/or termination; and

(f) the implications of terminating the Agreement in regard to the terms and conditions of employment of the workers concerned and possible industrial disputation.

15 Further guidance as to the meaning of the public interest in this context can be derived from the decision of a Full Bench of the Australian Industrial Relations Commission in *Kellogg Brown & Root Pty Ltd v Esso Australia Pty Ltd* [2005] AIRC 72 [***Kellogg***] (at paras [23] and [27]):

> "The notion of the public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the [Workplace Relations] Act, employment levels, inflation, and the maintenance of proper industrial standards...While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interest of the parties may be simultaneously affected, that fact does not lessen the distinction between them.
>
> ...
>
> It should be emphasised that the Commission's consideration of the public interest for the purposes of...[the forerunner of section 226]...is directed to the consequences of terminating the agreement. In a given case, some consequences will be clearly predictable, others will be less so. For the most part the Commission should be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences."

16 These comments were cited with approval by *Lawler VP in Tahmoor Coal Pty Ltd* [2010] FWA 6468 [***Tahmoor***] (at paras [27]-[31]).

17 The termination of the Agreements would not be contrary to the public interest. It would remove problematic content of numerous provisions of the Agreements, both from a *Re AEU* perspective and from a basic productivity perspective. It would not undermine bargaining – indeed, it would leave incentives to bargain, more so than under the current circumstances.

18 Further, in the event of the Agreements being terminated, the MFB will provide terms and conditions to ACFOs and operational staff which are such as to ensure that those employees are not disadvantaged overall in their terms and conditions of employment pending negotiation of replacements for the Agreements. These employees will also have continuing access to appropriate consultation and dispute resolution procedures. It would not, therefore, be contrary to the public interest to terminate the Agreements on the ground that employees would be disadvantaged.

D. Agreements contain provisions that pose unreasonable restrictions on MFB

19 The provisions relating to consultation and dispute resolution are overly onerous and have proved for the most part to be unworkable. The continued operation of the Agreements is problematic because the consultation and "status quo" requirements combine to seriously curtail the ability of MFB command to initiate any change.

20 Clause 13 of the Operational staff Agreement provides for the establishment of 'a MFB/UFU Consultative Committee' (clause 13.2). This Committee is comprised of equal numbers of management and employee representatives (clause 13.3.2), and 'decision-making will be by consensus' (clause 13.3.2). This latter requirement is also reflected in clause 14.2 which provides that all Committees established under the Agreement 'are recommendatory in nature and will operate on the basis of consensus when developing recommendations'. Committee members are said to be obliged 'to cooperate positively to consider matters that will increase efficiency, productivity, competitiveness, training, career opportunities and job security' (clause 13.3.3). The Committee is to meet on a regular basis, and must 'communicate the outcomes of meetings to employees covered by this agreement' (clause 13.3.4). (Clause 8 of the ACFO Agreement is in identical terms.)

21 This Consultative Committee process is very cumbersome. Most things are taken to or have to go to it[1]. It is driven by a notion of "consensus". Meetings

[1] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board [2013] FWC 4758*

are monthly. Proposals get lost in sub-committees. This 'one size fits all' consultative model for all issues is oppressive.

22 The consultation obligations become even more problematic when combined with the "status quo" requirement in the disputes resolution procedure. Clause 19 of the Operational Staff Agreement deals with 'Dispute Resolution'. Clause 19.1 provides that the process 'applies to all matters arising under this agreement', including 'all matters for which express provision is made in this agreement', 'all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement', and 'all matters pertaining to the relationship between the MFB and UFU, whether or not express provision for any such matter is made in this agreement'.

23 Clause 19.2 sets out a four-step procedure for dealing with disputes or grievances which fall within the scope of clause 19, and if a matter is not resolved by that means then either party can refer it to the Fair Work Commission which may 'utilise all its powers in conciliation and arbitration to settle the dispute' (clause 19.2.6). Whilst the clause 19.2 procedures are being followed 'work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring'. (Clause 12 of the ACFO Agreement is in identical terms.)

24 The UFU has used the requirement that the consultative process operate by consensus, together with the dispute resolution provisions in clause 19, in such a way as effectively to give it the capacity to veto any changes proposed by the MFB.

25 In addition to the consultation provisions set out in clause 13 of the Operational Staff Agreement, that Agreement contains a number of other provisions which require consultation with, and the agreement of, the UFU. They include:

(a) Clause 21.2 provides that the MFB will not introduce any change that will impact on the terms and conditions of employment without the agreement of the UFU.

(b) Clause 30 provides that any policy matter that is dealt with in the Agreement can be varied only by agreement. It also provides that any

proposal to modify, delete or add to an existing policy is to be subject to consultation in accordance with clause 13, and (by implication) to the operation of the dispute resolution provisions in clause 19.

(c) Clause 32.4 requires 'consultation to reach agreement' in relation to any proposal for 'any of the activities of the MFESB or any activities usually or capable of being carried out by the MFESB' to be delegated or assigned to, or to be provided by, another party.

(d) Clause 44 requires that any change to the Occupational Health & Safety Policy and Processes Agreement which appears at Schedule 1 to the Agreement can be by agreement only, and has to be approved by the FWC.

(e) Clause 84 requires the work hours of an employee rostered to Special Administrative Duties to be agreed with the UFU.

(f) Clause 85 provides that any changes to the provisions relating to deployment outside the Metropolitan Fire District can be made only by agreement.

(g) Clause 88.1 provides that the MFB and the UFU must agree on all aspects (including 'without limitation, design and specifications') of articles of clothing; equipment, including personal protective equipment; station wear; and appliances to be used or worn by employees. This includes both new and replacement items.

(h) Clause 90.7 provides that no employee can be relocated or directed to relocate into temporary premises prior to there being agreement reached with the UFU as to (i) any necessary temporary facilities and amenities; (ii) payment of an allowance of $3.50 per attended shift. In addition, in circumstances that do not involve relocation to a fire station, 'the parties will review the quantum of any allowance that may be applicable by agreement'.

(i) Clause 90.8 requires agreement to 'the design of and facilities and amenities' at any location to which employees are to be relocated on a permanent basis. Clause 90.9 requires agreement as to station design, appliances and equipment to be used in any new station, whilst clause

90.10 requires agreement in relation to modification of amenities at existing stations.

(j) Clause 93.2 requires consultation in relation to 'new initiatives with a view to continuing to [sic] maximising and enhancing community safety outcomes'.

(k) Clause 115.1 requires agreement as to the amenities to be provided for FSCCs at each location including for 'the preparation and consumption of meals, refreshments, recreation, rest and recline (recliner chair)'.

(l) Clauses 14.2 and 33 of the ACFO Agreement are in the same terms, respectively, as clauses 21.2 and 30 of the Operational Staff Agreement.

26 MFB will adduce evidence of the serious problems encountered in having to navigate these processes. Projects and initiatives are delayed or compromised and, in some cases, abandoned. At best, this stifles creativity and innovation within the MFB. At worst, it delays or prevents better service delivery and improved safety outcomes for employees and the public.

27 The evidence to be led by the MFB will show that the consultation and/or dispute resolution provisions have seen very poor outcomes in a range of situations. Particular examples include:

(a) The planned refurbishment and modernisation of one of the MFB's older, and largest, fire-stations has not taken place because agreement cannot be reached on details of the refurbishment as required under the 2010 Agreement. Consensus could not be reached on issues such as whether new lockers for fire-fighters should be placed inside or outside fire-fighter bedroom, and without agreement on all issues the MFB is unable to secure the endorsement of the UFU as required under the consultation process. The delays meant the $3.5 million funding was lost and the project terminated.

(b) The UFU have used the dispute resolution and 'status quo' provisions of the 2010 Agreement to block a direct order of the Chief Officer regarding the allocation of MFB appliances, despite the Chief Officer having prerogative to allocate resources in order to meet MFB legislative responsibilities. To effect the movement of the appliances the MFB had to seek the assistance of the FWC, which ordered the UFU to withdraw

the grievance.

(c) The MFB spent more than 12 months in the consultation process in order to implement a standard update to its operating system from Windows XP to Windows 7. The UFU claimed that consultation was required due to the obligation under the 2010 Agreement to consult on all matters pertaining to the employment relationship, and raised a grievance under the dispute resolution process to halt a proposed roll-out of the software update.

(d) The MFB has spent six years attempting to put in place a new protocol for responses to bin-fires in the Melbourne CBD, but has been unable to proceed because agreement has not been obtained under the consultation process. The MFB remains the only public fire service in Australia which sends two fire-trucks to a reported bin-fire. All other fire services in Australia send one fire-truck.

(e) The MFB has spent $1.5 million on a new fire-truck as the first stage in a capital investment program to replace five of its trucks which are nearing the end of their recommended life-span. The fire-truck has now been sitting idle for approximately two years because the UFU has raised a grievance in relation to the truck, and has refused to give agreement under the consultative process to commission it. The MFB deployed the truck in the recent Hazlewood coal-mine fire, but fire-fighters from another State had to be flown in to operate the appliance. The truck is now once more sitting idle, with the MFB unable to use it without UFU agreement.

E. Agreements contain provisions that offend *Re AEU* implied limitation

28 The MFB considers that there are a substantial number of provisions of the Agreements which offend the implied constitutional limitation as espoused by the High Court in *Re AEU*. The MFB has raised these concerns on a number of occasions with the UFU including in April 2013 when bargaining commenced. The details of these concerns are set out in Appendix A to this outline.

29 Broadly, the *Re AEU* issues fall into the following categories:

(a) There are several provisions which require the MFB directly to engage employees to perform work covered by the Agreement. The provisions would prevent the MFB from obtaining services through third-party providers. The MFB emphasises that it has no present intention of contracting out, or 'delegating or assigning', any part of its firefighting services – however, its capacity to do so cannot validly be constrained by an instrument made and approved under the FW Act, or by any law of the Commonwealth. In *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17 (**CFA Case**) the UFU acknowledged that very similar provisions in the CFA Agreement were inconsistent with the implied constitutional limitation, whilst arguing (unsuccessfully) that the clauses were valid for other reasons

(b) There are several provisions which require the MFB to employ a predetermined minimum number of persons and which require no changes in relation to overall crewing numbers and rank/classification numbers without the agreement of the UFU. This not only limits the number of employees whom the MFB can employ, it also interferes with the capacity of the MFB to determine the identity and term of appointment of persons employed by it. This is clearly inconsistent with the implied Constitutional limitation. In no circumstances would the MFB knowingly make any staffing decision which could credibly be said to imperil the 'health, safety and welfare' of either the general public or MFB employees. However, it does not necessarily follow that protecting public or employee health, safety and welfare requires maintenance of minimum staffing levels set out in the Agreements, for the life of those Agreements. In any event, the MFB's capacity to make decisions about staffing levels cannot lawfully be constrained by an enterprise agreement made and approved under the FW Act. Again, in the CFA Case, the UFU acknowledged that very similar provisions in the CFA Agreement were inconsistent with the implied constitutional limitation, whilst arguing (unsuccessfully) that the clauses were valid for other reasons.

(c) There are provisions in the Agreements that restrict the MFB's capacity to transfer employees in a manner that is inconsistent with the 'promotion and transfer' limb of the implied Constitutional limitation.

(d) There are a number of provisions in the Agreements that have the effect of restricting the capacity of the MFB to employ lateral recruits. In the CFA Case, the UFU accepted that provisions in the CFA agreement which purported to regulate lateral hiring were not consistent with the implied Constitutional limitation, whilst arguing (unsuccessfully) that those provisions were valid for other reasons

30 The fact that the MFB agreed to the inclusion of the impugned terms in the Operational Staff Agreement does not alter the fact that the provisions in question are invalid on the ground that they are inconsistent with the implied Constitutional limitation. In the CFA Case, the Federal Court determined that the fact that the CFA had agreed to the inclusion of non-compliant terms in the CFA Agreement did not serve to validate the provisions concerned – see especially [2014] FCA [17], [132]-[133]. The decision of the Full Bench of the Fair Work Commission in *Parks Victoria v The Australian Workers' Union* [2013] FWCFB 950 adopted the same approach (see paragraph [369]):

> "We conclude...by observing that the impugned clauses have been a feature of the industrial instruments which have applied to Parks Victoria, for many years. No previous challenge has been made to those provisions. The impugned clauses are also substantially similar to clauses recently agreed by the Victorian government in the context of the VPS determination. Whilst the inconsistent approach taken by the Victorian government to these matters is regrettable it is not relevant to the task of determining whether the Commission has jurisdiction to include the impugned clauses in the workplace determination."

31 On any view, there is considerable uncertainty as to the validity of these provisions in the Agreements.

32 These provisions also have a number of unfortunate side-effects. For example, they make it more difficult for the MFB to respond in a flexible manner to seasonal fluctuations in levels of fire risk or to serious emergency situations. They also make it more difficult for the MFB to redress the gender imbalance in its workforce (presently only 3.42% of operational staff are female) because female workers are at times more likely to be attracted by part-time than full-time work. It also serves to prevent the engagement of older workers (such as retirees) who might be interested in part-time work but

who would not be able and/or interested in working on a full-time basis. Ironically, these restrictions have the further effect of limiting the total number of positions available in the firefighting service, because it can reasonably be anticipated that the MFB would be able to offer more jobs if it could engage employees on a more flexible basis.

F. The negotiations for replacement agreement/s

33 Since April 2013, the MFB has tried to engage in good faith bargaining with the UFU. The MFB has tried unsuccessfully to progress the negotiations and there is no realistic prospect of reaching a replacement agreement.

34 After more than a year of supposed negotiations, including 17 scheduled meetings (two of which were under the auspices of the Commission and two which the UFU did not attend), the parties have not reached agreement on even one substantive issue.

35 In no small measure, this has been due to the bargaining conduct of the UFU. The UFU has shown little inclination to negotiate on the substance of the issues. Instead, it has engaged in surface bargaining by raising procedural issues and other insubstantial side issues in order to give the appearance of being prepared to negotiate, without in fact doing so. The specific concerns about the UFU's bargaining conduct were canvassed in the application brought by the MFB for good faith bargaining orders in December 2013 (B2013/1564). The MFB discontinued that application in February 2014 after some marginal improvement in the UFU's bargaining behaviour. This appearance proved illusory. Additional issues arose that required further notice to be given under s.229 of the FW Act.

36 The MFB submits that the UFU's dilatory approach to bargaining reflects the fact that it has little or no incentive to bargain. The UFU is not prepared to put at risk any of its veto powers in a genuine negotiation process. It can continue to derive the benefit of these provisions, whilst the MFB's capacity to conduct its undertaking in an effective and efficient manner is severely circumscribed by their continued operation.

37 Further, on any view, there has been a reasonable opportunity for the negotiation of replacement agreements.

38 Unlike the situation in cases such as *Tahmoor*, denying the UFU continued access to the benefits of these clauses would not mean that the MFB would 'effectively achieve *all* that it sought out of the bargaining" (*Tahmoor* para [59]). On the contrary, as a perusal of the Proposed Agreements clearly demonstrates, there are very many other matters at issue between the parties.

39 The continuation of the Agreements will unreasonably hinder or impair the process of change and improvement at the MFB. Consistently with the observations of Boulton J in *Mt Thorley* at paras [47] and [48] the negative impacts of the continuing operation of the Agreements on change and improvement mean that it would not be contrary to the public interest that the agreements be terminated.

G. Impact on Employees

40 As mentioned earlier, if the Agreements are terminated, the MFB will provide terms and conditions to ACFOs and other operational staff generally consistent with the terms of the Agreements, except for the consultation and dispute resolution clauses and the other clauses that require the UFU's agreement to operational decisions, and those clauses which are inconsistent with the implied constitutional limitation.

41 As concerns consultation and dispute resolution, the MFB will observe the consultation term at clause 8 of the Fire Fighting Industry Award 2010.. It will also observe the dispute resolution procedure at clause 9 of the Fire Fighting Industry Award 2010.

42 It should also be emphasised that termination of the Agreements would not in any way deprive employees of their capacity to have their industrial interests represented by the UFU. On the contrary, the UFU could continue to act as bargaining representative for those of its members who want it to do so, and could also represent non-members who choose to appoint it as their bargaining representative in accordance with section 176 of the FW Act. The UFU would also be able to represent its members for purposes of the consultation and dispute resolution provisions which would operate.

43 The terms and conditions to be provided post-termination of the Agreements are an efficacious means of protecting the interests of employees. They would

operate until a new enterprise agreement can be made between the MFB and the relevant employees.

44 In light of the above, the Commission can be comfortably satisfied that there is no disadvantage to employees of such a nature as to make termination of the Agreements contrary to the public interest or otherwise inappropriate in all the circumstances.

H. MFB's statutory charter

45 There is an obvious public interest in the MFB being able to deliver its statutory fire-fighting and fire-safety responsibilities effectively. With the state-wide reforms of the fire service and emergency service agencies, the challenge for the MFB is to be more sophisticated and innovative in its operational activities. As dealt with above, much of the content of the Agreements is ill-suited to a modern fire service.

I. Health and Safety

46 The MFB is under a series of statutory duties to protect the health, safety and welfare of its employees, of persons whose health or safety may be impacted by the conduct of its undertaking, and the general public – see especially the *Occupational Health and Safety Act 2004* (Vic) and the *Metropolitan Fire Brigades Act 1958* (Vic). The MFB also owes a common law duty of care to its employees and to other persons who may be affected by its activities.

47 Termination of the Agreements would not in any way relieve the MFB of these responsibilities or impair its capacity to discharge them. Indeed, removal of some of the existing impediments in the Agreements would positively enhance the capacity of the MFB in the area of health and safety.

15 May 2014

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