



**Metropolitan Fire and
Emergency Services Board**

***Inquiries Act 2014 – Review of the
Fire Services***

**Submission from the Metropolitan
Fire & Emergency Services Board**

31 August 2015

1. Executive Summary

The Metropolitan Fire & Emergency Services Board (MFB) makes this submission to assist the Review of the Fire Services to understand the MFB and its potential to be a world class fire and emergency service. The MFB works to the shared sector goal of a *"sustainable and efficient emergency management system that reduces the likelihood, effect and consequence of emergencies."*¹ This submission addresses issues that would contribute to improvements in the emergency management sector and to a reformed and more successful MFB with a unified team operating to embedded values of respect, safety, innovation and diversity.

This submission focuses on the best ways for the MFB to deliver services to the community and to prevent, prepare for, respond to and recover from fires and emergencies. The MFB and its staff have much to be proud of, and there are opportunities to retain the elements of the current operating model that work while considering options for reform and improvement.

The MFB knows that it can best serve the people of Melbourne and Victoria by working with and alongside the Country Fire Authority (CFA), its staff and volunteers, and all other stakeholders (including other services). The MFB also recognises that there is an important role for unions, as employee representatives, in representing the interests of career firefighters in Victoria.

In preparing this submission and in considering the Terms of Reference, the MFB has considered realistic and pragmatic ways to improve the Victoria fire services, and in particular the MFB, having regard to three key principles being contemporary and first-rate governance, appropriate accountability, and excellent performance,

The MFB has a vision for a reformed MFB that sees:

- improved health and safety for employees;
- improved workplace culture for employees;
- the MFB being more responsive to the needs of the community; and
- the MFB being more agile and flexible in responding to major incidents, working interoperably with the emergency services sector.

Given this, the MFB considers there are opportunities to achieve better outcomes for the community, its staff, the sector and the Government in three areas:

- **Governance**
the current arrangements are overly complex and confusing;
- **Accountability**
accountability for decision making is diffuse and complex and should be clarified so that accountability follows decision making; and
- **Performance**
the MFB's performance can be improved if governance arrangements are changed and industrial arrangements modernised so that the MFB is better able to exercise the powers and functions provided in legislation.

¹ Victorian Emergency Management Capability Blueprint 2015-2018.

The MFB submits that with these changes the MFB can be more efficient and more sustainable in achieving its statutory functions, its purpose and its role in the Victorian Emergency Management Capability Blueprint 2015-2018. These changes would also lead to changes to culture and workplace diversity, and would lead to improvements in respect, cooperation and innovation within the MFB workforce.

Section 2 of this submission introduces the MFB, its history, its statutory framework and its planning for the future. Section 3 addresses the industrial environment within which the MFB operates and the need for workplace reform. Section 4 provides the MFB's view on the problems with complexity in governance. Section 5 outlines issues with accountability. Sections 6 to 9 address the specific Terms of Reference. Section 6 addresses the terms that deal with operational responsibilities and community safety being (a), (c) and (d). Section 7 considers terms (b), (e), (f) and (g) dealing with the MFB, its people and the Careers Firefighter Registration Board. Lastly, section 8 addresses term (h) and volunteerism.

Summary of Recommendations

The MFB has a vision for a more contemporary organisation that plays a greater role in supporting interoperability and provides better community safety outcomes. To that end, the MFB makes the following recommendations:

Recommendation 6 The MFB submits that it should be formally recognised as having specialist incident management capability for Victoria in the State Emergency Response Plan (See paragraph 6.1).

Recommendation 7 The MFB submits that the industrial arrangements should be changed to allow for greater flexibility and interoperability (See paragraph 6.2).

Recommendation 9 The MFB supports greater inter-agency planning and is prepared to play a larger role in this (See paragraph 6.4).

The MFB contends there are advantages in having a strong and independent board. The MFB is concerned about complexity in governance, and diffuse accountability and recommends:

Recommendation 3 The governance arrangements should be revisited to ensure that decisions made by all parties and the power exercised by those parties is done so in accordance with Victorian emergency management legislation (See paragraph 4.1).

Recommendation 4 There is an urgent need to clarify decision making accountability, and to ensure that accountability for decisions can be tracked and flows from the relevant exercise of statutory power (See paragraph 5.1).

Recommendation 5 Consistent with their statutory duties and functions, the MFB and the MFB Chief Officer must be able to make decisions in relation to operational deployment, staffing, operational appliances and equipment, location of fire stations, skills-based training and compliance (e.g. workplace behaviour training), amongst other things (See paragraph 5.2).

Recommendation 8 Consultation between the MFB and the United Firefighters' Union of Australia (UFU) on firefighter and public safety and related operational matters should occur under the *Occupational Health and Safety Act 2004 (OHS Act)* provisions, rather than as a result of industrial bargaining (See paragraph 6.3).

As detailed in Section 3, the MFB will work towards contemporary industrial arrangements that are consistent with normal public sector values. The MFB will pursue opportunities for more flexible deployment, flexibility in training, greater opportunities for lateral entry, managing ill and injured workers and ensuring fitness for duty, and increased workplace diversity. Accordingly this submission contains the following recommendations:

- Recommendation 1** The MFB seeks to restore its relationship with its employees and the UFU to one of a more contemporary nature. The current industrial arrangements should be amended so that the UFU will not unreasonably withhold or delay agreement in relation to any proposed changes by the MFB (see paragraph 3.1).
- Recommendation 2** To ensure the ongoing health and wellbeing of career firefighters, the MFB must be able to test fitness for duty (See paragraph 3.2).
- Recommendation 10** To maintain contemporary capability and workforce practices, the MFB must be able to recruit operational personnel laterally (See paragraph 7.1).
- Recommendation 11** To ensure that its workforce better reflects the community it serves, the MFB must be able to provide for greater flexibility and diversity for current and future staff (See paragraph 7.2).
- Recommendation 12** Any introduction of a Career Firefighters Registration Board must be aligned to the usual practices involved in professional registrations, and not increase costs for the MFB and must provide that the MFB is able to manage the conduct and performance of employees (See paragraph 7.3)

The MFB considers that change needs to be considered in the context of what already works well and in light of evidence and analysis, rather than on the basis of assertion or because of historical practices. The MFB welcomes the opportunity to provide input into this Review of the Fire Services and recognises the importance of the Terms of Reference.

2. The MFB

The MFB is a statutory authority under the *Metropolitan Fire Brigades Act 1958 (MFB Act)* and has a long and proud history dating back to 1891. The MFB has defined statutory purposes including in relation to *'fire safety, fire suppression and fire prevention services and emergency response services in the metropolitan district.'*² The current MFB Board is a skills-based Board with functions including providing for fire suppression and fire safety,³ *'emergency prevention and response services in the metropolitan district'*,⁴ and assistance in major emergencies in Victoria.⁵ The MFB Board is responsible for fulfilling the statutory responsibilities of the organisation to provide the best outcomes for the community. The MFB Board is subject to the general direction and control of the Minister who can give written directions to the Board.⁶ The MFB Board is also subject to other important statutory responsibilities, not least of which are its duties as an employer under the OHS Act.

² Section 2(a).

³ Section 7(1)(a).

⁴ Section 7(1)(b).

⁵ Section 7AA(1).

⁶ Section 8 (1) and (2). The MFB also has obligations under the *Public Administration Act 2004 (PA Act)* which imposes duties on 'public entities'. Under section 81 of the PA Act, the Board must, relevantly amongst other things: act consistently with the functions and objectives of the public entity and with any document related to the public entity's work program, for example, their business or strategic plan; inform the responsible Minister and the relevant Department head of known major risks to the effective operation of the public entity and of the risk management systems in place to address the risks; and unless prohibited from doing so by or under any law, provide the Minister responsible for the public entity with any information relating to the entity or its operations

The MFB has defined its purpose to be a world class fire and emergency service for Melbourne and Victorians.⁷ The MFB manages and supports its employees, promotes interoperability with other emergency services and contributes to the Government's vision for the emergency management sector through the important work of Emergency Management Victoria (EMV) and the Emergency Management Commissioner (EMC).

The MFB is required to contribute to the emergency management sector and provide a culture of community focus, interoperability and public value.⁸ The MFB must comply with standards from the EMC⁹ as well implement the Strategic Action Plan developed by the State Crisis and Resilience Council.¹⁰ The MFB has a Chief Executive Officer responsible for the overall running of the organisation. The MFB Act also provides for a Chief Officer who has defined statutory responsibilities including for command and control of operational personnel and attendance at fire and emergencies.¹¹

The MFB's Corporate Plan 2015-2018¹² has been developed over the past six months and represents the MFB's clear and demonstrable commitment and strategic response to changes in the operating environment, including an ageing population, climate change, changing community expectations, tighter economic conditions and increased threat levels which require the emergency services to work together and assist each other.¹³ The MFB recognises that this requires a new approach.

In many ways, the MFB is well placed to adapt to changes and to deliver exceptional service, contribute to interoperability and to work seamlessly with others in the sector to achieve the best for the community. The MFB has a high degree of public trust and has been seen by others in the sector as a leader in fire safety for decades.

The MFB Chief Officer and technical operational experts have and continue to advocate on fire safety issues. This work has been acknowledged by Coroners¹⁴ and includes:

- the MFB's important advocacy work leading to the development of legislation requiring domestic smoke alarms in homes from 1997,¹⁵
- the MFB's forceful lobbying for the current level of fire protection systems in the Burnley and Domain Tunnels;¹⁶ and
- advocacy before the Coroner and within State and Local Government about improved fire safety in rooming houses.¹⁷

that he or she requests. The PA Act also provides that the Board is accountable to the responsible Minister for the exercise of its functions (s 85).

⁷ MFB, Corporate Plan 2015-2018: A world class fire and emergency service.

⁸ Section 7A.

⁹ Section 7AC.

¹⁰ Section 7AE.

¹¹ Sections 32, 32AA, 32B, 32C, 56, 71, 72A, 87 and 93.

¹² MFB, Corporate Plan 2015-2018: A world class fire and emergency service.

¹³ MFB, Corporate Plan 2015-2018: A world class fire and emergency service, p16-17.

¹⁴ See for example the Inquest Findings, Comments and Recommendations into Fire and Nine Death at Kew Residential services on 8 April 1996 (**Attachment 1**) at p 339 where the State Coroner noted that the work of the MFB was 'invaluable' and that the 'professional level of work [was] highly commendable [and] provided objective and valuable assistance' and the Finding into Death with Inquest of Cheryl May Currie on 28 August 2015 (**Attachment 2**) at 132 where the Coroner commended the MFB's commitment to working with other agencies to assist the vulnerable.

¹⁵ See the Community Care Common Standards under the *Aged Care Act 1997* and Regulation 5.14 introduced into the *Building Regulations 1994*. This requirement is currently referred to in Regulation 707 of the *Building Regulations 2006* and applies to residential buildings constructed after 1 August 1997.

¹⁶ As noted by the Coroner in the Inquest into the Burnley Tunnel Deaths on 23 March 2007, delivered on 30 January 2013.

¹⁷ See the Coroner's findings in the Inquest into the Death of Christopher Alan Giorgi and the Inquest into the Death of Leigh Sarah Sinclair.

The MFB has also led the way among the Australian fire services in urban community engagement projects,¹⁸ and with emergency medical response (EMR) which was introduced in Victoria in 1997. The MFB continues to lead in EMR amongst other Australian and New Zealand fire services, and MFB personnel can be proud that they have saved at least 170 lives through this service. The MFB's efforts continue with the current work on the life and property risk issues arising from the use of non-compliant cladding in the Lacrosse Building in Docklands in 2014,¹⁹ leading to a recently announced investigation by the State Coroner and submissions to a Federal Senate inquiry into non-compliant building products.

MFB staff have a high level of organisational competence in emergency management and are well trained in the Australasian Inter-Service Incident Management System (AIIMS). Operational staff fill positions in Incident Management Teams (IMTs) across Victoria and interstate addressing all emergency hazards using the common AIIMS. MFB personnel held positions in IMTs during the 2014 Hazelwood Mine Fire, working alongside CFA personnel in these IMTs. Further, MFB staff assist in the State Control Centre and serve in IMTs during bushfires, floods and other emergency events outside Melbourne.

MFB personnel are specialised in marine, rescue and other technical response skills in the urban environment. The MFB's EMR capacity means that MFB personnel will be a state resource in the event of a mass casualty incident while the MFB's specialist rescue skills have been used in Victoria and interstate, including in the 1997 Thredbo landside in New South Wales.

The MFB provides a broad and expanding range of services in Melbourne and in Victoria, assisting other emergency services including the CFA during high profile campaign incidents, and in shorter duration incidents. The MFB is an active participant and contributor to both State and National specialist committees including Urban Search and Rescue, Chemical, Biological, Radiological and Nuclear, State Road Rescue and Australasian Fire Authorities Council (AFAC) Fire Investigation and Analysis working group, to name just a few. MFB has supported secondments of its staff to other agencies including Department of Justice and Regulation, Department of Premier and Cabinet, EMV, Victoria State Emergency Service (VICSES) and CFA. The MFB maintains a number of international connections via research projects, conference networking and training programs, having representation with the Federal Emergency Management Authority, Asian Disaster Preparedness Centre, New Zealand Fire Service and International Association of Fire Chiefs.

The MFB is a leading proponent of interoperability. The MFB developed, commissioned and fully funded the Craigieburn training facility which is now the Victorian Emergency Management Training Centre (VEMTC) and is used as a resource for all emergency service agencies.

3. The MFB's Industrial Climate and Employment Arrangements

The MFB is committed to being a leading employer with a focus on:

- effective consultation;
- a highly engaged workforce with opportunities for challenging and interesting work for all; and
- workplace safety being fundamental so all MFB people are "Always Safe".²⁰

¹⁸ These include the Juvenile Fire Awareness and Intervention Program since 1998, work with CALD communities since 2001, a Community Engagement Strategy since 2004, Home fire safety campaigns with the CFA since 2007 and a Hoarding strategy since 2008.

¹⁹ See MFB Post Incident Analysis Summary.

²⁰ MFB, Corporate Plan 2015-2018: A world class fire and emergency service, p 5.

The MFB operates in a highly industrialised environment and is bound by a number of enterprise agreements, including the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010 (Operational Staff Agreement)* and the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010*.

The MFB recognises and supports the UFU's legitimate role in representing and advocating the interests of its members.

However, the current industrial arrangements contain three features which impede the MFB in achieving excellent performance in a sustainable and efficient way. These are:

- the broad scope of the consultation clause;²¹
- the effective right of 'veto' by the UFU of management decisions in relation to any proposed change under the consultation clause;²² and
- the 'status quo' provision in the dispute resolution procedure.²³

There is a great deal of evidence to demonstrate the problems caused by the provisions in the industrial agreements. For example, the independent 2007 report by Judge Gordon Lewis (**the Lewis Report**)²⁴ inquired into the circumstances surrounding the delays by the CFA and the MFB to replace out-dated personal protective clothing. Judge Lewis found that the UFU consistently took advantage of the wording of the enterprise agreement to effectively veto any attempt to improve clothing and equipment. The Lewis Report recommended that any future enterprise agreements entered into by the MFB and CFA with the UFU not contain a power of veto for the UFU.²⁵

Despite this recommendation, the effective power of veto over change has remained a problematic feature of the MFB's industrial arrangements. The MFB considers that these arrangements have contributed to an adversarial work environment.

What needs to change?

The MFB intends to work towards a contemporary industrial agreement that will best serve MFB staff and the community by ensuring the provision of world class fire and emergency services in an efficient and sustainable way.²⁶

The MFB will progressively pursue opportunities for more flexible deployment, flexibility in training, greater opportunities for lateral entry, managing ill and injured workers and

²¹ In most other industrial contexts (including under industrial awards, enterprise agreements and under the model consultation clause under the FW Act), an employer's obligation to consult with employees relates to where it proposes 'significant changes', or where a change will have significant effects on employees. In contrast, the scope of the MFB's obligation to consult under clause 13 of the operational staff agreement is far broader, as it provides that consultation is required whenever the MFB "*wishes to implement changes in matters pertaining to (sic) employment relationship*".

²² The UFU has a vital role in representing its members. However it is the MFB that has statutory functions and responsibilities under the MFB Act. Central to these functions and responsibilities are the ability to control fundamental aspects of management, such as the allocation, training and deployment of its workforce, acquisition of equipment and appliances, and the building/commissioning of new stations. The industrial arrangements currently allow, and have been used, to enable the UFU to effectively block change and make decisions in these areas. There is no statutory obligation on the UFU to justify the use of its veto power on the basis that the particular change is not consistent with the MFB's functions under the MFB Act.

²³ The dispute resolution process under the current operational staff agreement provides that the dispute resolution process set out '*applies to all matters arising under this agreement*' (clause 19.1) including '*all matters pertaining to the employment relationship*' (clause 19.1.2). If a dispute is initiated, the status quo must apply until the dispute is resolved (clause 19.4).

²⁴ *Report on the processes to select new personal protective clothing for Victorian firefighters*, published 28 February 2008 (**Attachment 3**).

²⁵ The Lewis Report, p 6-7.

²⁶ MFB, Corporate Plan 2015-2018: A world class fire and emergency service, p 30.

ensuring fitness for duty, and greater workplace diversity to provide all current and future staff of the MFB with fulfilling work and a respectful and innovative workplace.

The MFB recognises the potential of all MFB staff to contribute to the MFB becoming recognised as a world class fire and emergency service of which they, and all Victorians, can be proud. The MFB recognises that there are challenges in achieving this, notably:

- an ageing workforce;²⁷
- a lack of diversity, where only 3.3% of the MFB's operational workforce is female;
- may be unable to accommodate flexible working arrangements consistent with the National Employment Standards (NES);
- the difficulty for the MFB to adequately address workplace behaviour²⁸ and workplace culture issues;²⁹
- a growing cohort of long term sick and injured operational employees who are not fit for operational duty, in circumstances where the MFB has been unable to obtain UFU 'consent' to adoption of a policy to address this;³⁰
- an inability to effectively obtain lateral entry operational employees;³¹ and
- no fitness for duty testing after initial recruitment.³²

²⁷ MFB, *Corporate Plan 2015-2018: A world class fire and emergency service*, p16-17. In 2009 -10, nationally 26% of all work-related injuries were incurred by workers in the 45-54 years age group, compared to 53% of MFB employees (double the national average). See *Worksafe Australia report Australian Work-Related Injury Experience by Sex and Age, 2009-2010*, published July 2012 at p 19.

²⁸ The UFU has also sought to apply the terms of the Operational Staff Agreement to avoid legitimate disciplinary processes in cases involving serious allegations of employee misconduct. In May 2015, the UFU sought to restrain the MFB in the FWC from continuing with a disciplinary process under the MFB Act for an operational employee, who was accused of forwarding pornographic, racist and otherwise inappropriate material. Despite the existence of an established disciplinary process under the MFB Act, the UFU argued that termination of employment could not occur until after the matter was re-litigated under the dispute resolution procedure in the Operational Staff Agreement. The FWC granted the UFU's application and restrained the MFB from continuing with its disciplinary process. This decision, and the attendant media attention, directly undermined the MFB's disciplinary processes under the MFB Act, and only encourages a culture of avoiding discipline and accountability.

²⁹ Clause 26 of the Operational Staff Agreement provides that the parties will agree to an Employee Code of Conduct with counselling and discipline outcomes. Despite recent attempts, the MFB and the UFU have not been able to agree on a Code of Conduct.

³⁰ The MFB's Operational Support Group (OSG), which allows operational employees who are not fully fit to perform operational duties to temporarily perform alternative duties, is at full capacity. This has meant that a number of operational employees who are not fit to perform operational duties are occupying non-budgeted positions within the MFB. However, the absence of a formal procedure has meant that while a number of these employees may never return to operational duties, these employees do not vacate their operational positions.

³¹ The current recruitment model prevents a flexible or creative approach to lateral recruitment of operational employees. The requirement that new operational employees complete all MFB training modules classifications for each lower classification, and have minimum periods of service for certain classifications, provides a strong disincentive to lateral recruitment. The current model provides no means of taking a flexible or creative approach to the recognition of prior skill, training and experience. There is no operational reason to insist on such a restrictive approach to recruitment. Removing these barriers would allow 'cross fertilisation' between, for example, the CFA and the MFB, and would allow the implantation of knowledge and experience from one organisation to the other. The limits on lateral recruitment will be increasingly problematic for the MFB as a large proportion of operational firefighters approach the age of retirement. At as 30 June 2015:

- 20.85% of the MFB's operational employees (a total of 393), have over 30 years of service, making them eligible to retire. If retirement was to occur, it would be difficult for the MFB to adequately address this demand;
- the average age of operational employees is 46.6 years; and
- 891 operational employees are aged 50 or over.

³² The *MFB UFU Operational Staff Agreement 2010* provides no basis for the MFB to require operational employees to be assessed for their ability to perform safe firefighting tasks or physical aptitude.

In addition, the MFB has a significant problem with unplanned leave,³³ with the Victorian Auditor-General's Office report into the management of unplanned leave among the Victorian emergency services organisations finding that the MFB has "*the poorest unplanned leave performance, which has been caused by ineffective management of the issue over the past decade*".³⁴ That report noted that the operational staff agreement contains provisions that constrain the MFB's ability to effectively and efficiently implement initiatives to manage unplanned leave and that the provisions in the agreement effectively required that any change affecting MFB's relationship with its staff be agreed upon by the UFU. This has the potential to contribute to difficulty and delay in introducing reasonable mechanisms to hold firefighters, and their managers, accountable for personal unplanned leave that is not justified by illness or injury.³⁵ The MFB's attempts to work collaboratively with the UFU in this space have been frustrated significantly.

The current industrial arrangements do not refer to 'culture'. In contrast, clause 11.2 of the *South Australian Metropolitan Fire Service Enterprise Agreement 2014* contains a clause referring to a "culture of continuous improvement", that aims to "contribute to a Workplace culture that encourages employees to maintain a clear resolve of being held in the highest regard as a modern, motivated, progressive and professional Fire Service which is responsive to the evolving needs of the South Australian community." Unfortunately the MFB's industrial arrangements seem antiquated in comparison.

The MFB considers that accountability and the management of employee performance and conduct are essential elements of a strong workplace culture in any public sector organisation that reflects the Code of Conduct for Victorian Public Sector Employees. This is particularly important for a command and control organisation such as the MFB.

The MFB has not been able to achieve the culture of employee discipline and accountability that it considers desirable because of industrial-related constraints. Even simple measures such as a policy on appropriate internet use, found in many modern workplaces, have had to be abandoned because consent was not provided.

The MFB's view is that the potential for the MFB to have a modern, progressive workplace culture has been severely diminished by current arrangements. The Fair Work Commission (FWC) has noted that:

Ultimately, what works for a given workplace is a matter for the workplace guided by the minimum requirements set out in legislation or instruments such as a Modern Award. There is a recognition in those things, as well as in the authorities of this Commission and the Courts that not only are employees entitled to know about and discuss possible change, but employers are entitled to implement change. While it is possible there are workplaces where an "agreement-to-change" model could be successfully implemented for the mutual benefit of the corporation as much as its employees, and for its external customers or stakeholders as much as its internal ones, the MFB is not one of them. **The evidence is that agreement often cannot be reached and that impasses are frequent for opaque reasons. There is no evidence that the constructive and supportive culture that would be required to allow success**

³³ The MFB's average time lost for all operational and non-operational staff (125.6 hours per FTE) also compares unfavourably with other state fire services' being significantly higher than those fire services with comparable public performance information—Tasmania (41.8, sick leave only) and South Australia (101.8, sick and carer's leave) – see *Victorian Auditor-General's March 2013 Report, Management of Unplanned Leave in Emergency Services*, p 24.

³⁴ *Victorian Auditor-General's March 2013 Report, Management of Unplanned Leave in Emergency Services*, p viii.

³⁵ *Victorian Auditor-General's March 2013 Report, Management of Unplanned Leave in Emergency Services* noted at p 22 that "Management decisions concerning staff can only be implemented with agreement of the UFU due to provisions in the enterprise agreement between MFESB and UFU. Consequently, managers experience difficulty and delays in progressing operational and administrative improvements." Further, the report noted at p 26 that "The agreement contains provisions that cause difficulty and delays for MFESB in implementing initiatives to manage personnel unplanned leave in a way that is effective and efficient."

with an "agreement-to-change" model is in place, or has any prospect of being in place.³⁶ (emphasis added)

- 3.1 **Recommendation 1: The MFB seeks to restore its relationship with its employees and the UFU to one of a more contemporary nature. The current industrial arrangements should be amended so that the UFU will not unreasonably withhold or delay agreement in relation to any proposed changes by the MFB.**

MFB operational personnel must be fit and able to carry out their role, both to fulfil the MFB's function and to ensure that injuries are reduced. The MFB must be fully able to meet its statutory duty to eliminate and/or reduce risks to health and safety³⁷ by understanding who is, and who is not, able to perform various operational tasks. Currently, the MFB is prevented from doing this because it is limited from testing for fitness for duty.

- 3.2 **Recommendation 2: To ensure the ongoing health and wellbeing of career firefighters, the MFB must be able to test for fitness for duty.**

4. Governance and Complexity

The MFB has a clear understanding of its statutory roles and the MFB's part in the broader emergency management sector. When the MFB is able to properly exercise its decision-making powers, it does so cognisant of its important responsibilities, its duties to its staff and to the sector and its obligations to the community that it serves.

The MFB has a vision for a reformed and more successful organisation, one where operational and non-operational staff are supported to achieve change and to provide a world class fire and emergency service to the Victorian community. The MFB Board members understand their fiduciary duties to serve the objects of the governing legislation.³⁸ It is the MFB's position however that there is confusion within the sector because of the complex governance arrangements that sit over and around the decisions of the MFB.

The complexity in existing governance arrangements arises from:

- the effective power of veto in the industrial arrangements that has been used without legitimate reason to interfere with and impede the MFB's prerogative on commercial and operational matters, at significant cost to the MFB. This has been upheld by the FWC and its predecessors; and serves, in the MFB's view, as an impermissible interference by a Commonwealth body with a Victorian statutory authority seeking to meet Victorian statutory functions and duties; and
- the complexity in the arrangements in the sector. The MFB is subject to an extraordinarily large number of plans, initiatives and documents.³⁹ The MFB's position is that many of these documents and plans are necessary, but some overlap, while others are too prescriptive or are too general and omit important details.

In 2010 the Victorian Bushfire Royal Commission referred to the problems of ambiguity in responsibility and accountability.⁴⁰ The MFB contends that, unfortunately, many of the

³⁶ See *Metropolitan Fire & Emergency Services Board* [2014] FWC 7776 at [208].

³⁷ Section 21 of the OHS Act.

³⁸ *Bennett v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Part 1) (NSW) 307 (Attachment 4).

³⁹ These include the Emergency Management Strategic Action Plan 2015-2018, the Fire Services Reform Action Plan, the Emergency Management Manual Victoria, the Victorian Emergency Management Capability Blueprint 2015-2018, the Monitoring and Assurance Framework for Emergency Management established by the Inspector-General for Emergency Management, Victoria's Emergency Management Long Term Communications Plan, the State Emergency Response Plans and the various sub-plans, protocols from EMV, Incident Management Procedures from the EMC, Standards from the EMC, inter-agency Memoranda of Understanding, Critical Infrastructure Plans, the Information Interoperability Blueprint and others.

⁴⁰ See the Final Report of 2009 Victorian Bushfires Royal Commission at 10.2.1.

reforms introduced after the Royal Commission which were designed to improve interoperability and improve response to major incidents have had the effect of confusing arrangements for decision making because of complexity, overlap and a lack of understanding of the respective statutory responsibilities and roles of the parties.

Historically, the responses to consultation have been to add further committees and groups. This has created a multiplicity of committees. As an illustration of this complexity, the diagram contained in **Appendix A** shows how decisions that sit with the MFB Board and/or the Chief Officer are circumscribed by other government bodies, committees and consultation arrangements, including the foreshadowed Board of Reference, the ambit of which is currently unclear.

The MFB submits there are advantages for the Government in having a strong and independent Board which, conscious of its important statutory functions and duties as outlined above, can apply its collective skills and expertise to ensure that the MFB fulfils its functions in a transparent and safe way. As noted earlier, history shows that the MFB has been an important advocate for fire safety, but not all of the matters mentioned above were politically palatable when first advocated for by the MFB.⁴¹ However, the MFB contends that in each case the MFB's thought leadership and reforms, supported by the Board, have saved lives and improved the emergency management sector. The MFB will continue to support and develop fire and emergency prevention and preparedness initiatives.

In 1994, a Report of the Public Bodies Review Committee⁴² recommended that the MFB remain a statutory authority,⁴³ and that no change was needed unless the organisation was unable to respond to community needs.⁴⁴ That report recommended that the MFB Board "must be allowed to function independently under its own legislation, imposing on Board members the duties of responsibility and care in the exercise of their duties that are required in this multi-million dollar service to the Community".⁴⁵

The MFB endorses these comments from 21 years ago as still relevant today. The MFB also refers to the commentary in the Commonwealth Government's 2003 Review of Corporate Governance of Statutory Authorities and Office Holders, known as the Uhrig Report, which noted that:

- governance boards should be utilised in statutory authorities only where they can be given the full power to act;⁴⁶
- similar to a board in a public company, a governing board in a statutory authority can only perform a governance role effectively when it has the full power to act, including the freedom to determine strategy and direction. To get the best from boards in the public sector, the governance arrangements must create an environment for boards to perform their roles with critical thought, objectivity, wisdom, authority and the ability to exercise judgement;⁴⁷ and

⁴¹ See footnotes 15-17 above.

⁴² Report into the Metropolitan Fire Brigades Board: 33rd report to the Parliament, Parliamentary Paper 1992-94, no. 76.

⁴³ Report into the Metropolitan Fire Brigades Board: 33rd report to the Parliament, Parliamentary Paper 1992-94, no. 76 at vii.

⁴⁴ Similar reasoning was adopted in the Government of South Australia 2014 report entitled Governance in the Public Sector: Review of South Australian Boards and Committees, where it was noted on page 19 that one criterion that could be considered if abolishing a board was the impact on community confidence.

⁴⁵ Report into the Metropolitan Fire Brigades Board: 33rd report to the Parliament, Parliamentary Paper 1992-94, no. 76 at p 110.

⁴⁶ 2003 Review of Corporate Governance of Statutory Authorities and Office Holders (Uhrig Report), Recommendation 3 at p 12.

⁴⁷ 2003 Review of Corporate Governance of Statutory Authorities and Office Holders (Uhrig Report) at p 34.

- when a board is not able to properly exercise its governance role, not only will it be unable to provide effective governance, but it also introduces an additional layer of participation in the governance framework, potentially clouding accountabilities.⁴⁸

These findings and observations about the role of statutory authority boards are referred to because, in the view of the MFB, there is unnecessary complexity in the governance arrangements in the sector and the potential for confusion. The MFB has not always been able to govern the organisation as it sees fit to achieve its statutory objectives, to be nimble and respond to changes in the operating environment or to be as efficient as it could be.

The MFB considers that the complexity of governance arrangements affecting the MFB results in:

- inefficiencies;
- an inability of the Board, the Chief Officer and the Executive to make decisions in accordance with the MFB's statutory responsibilities; and
- a lack of accountability for decision makers and influencers outside the MFB.

4.1 Recommendation 3: The governance arrangements should be revisited to ensure that decisions made by all parties and the power exercised by those parties is done so in accordance with Victorian emergency management legislation.

5. Accountability, Performance and Community Safety

The complex and diffuse nature of decision making in the emergency management sector referred to above means that the current arrangements are a complicated hybrid where accountability does not always sit with the decision maker or makers. The MFB contends that the accountability for any failures of the MFB has the potential to be very 'cloudy' to adopt the term from the Uhrig Report.

It is the MFB Board, the MFB Chief Executive Officer and/or the MFB Chief Officer who have to answer to external regulators including WorkSafe, the Parliament, the Coroner, the Inspector General of Emergency Management or in inquiries such as the Hazelwood Mine Fire Inquiry. The MFB must, as it should, account for how MFB personnel respond to any incident, whether they did so safely and the outcomes for the community. MFB Board members and the Executive of the MFB can be personally criminally prosecuted under the OHS Act. Rarely however are the roles of central agencies such as EMV (or its predecessor the Office of the Emergency Services Commissioner) examined, and the role of the UFU and its power of veto arrangements have almost never been scrutinised in external reviews.⁴⁹ Further, in some cases, the MFB has not been in the position to give evidence about its own practices and decision makers have relied on statements from others about what the MFB does or does not do in relation to matters such as firefighter safety.⁵⁰

Along with the noted increase in the layers of governance affecting decisions of the MFB over the last decade, there have been increased community expectations and scrutiny regarding the delivery of services by emergency service organisations.⁵¹ Almost all major emergency events in Australia today are seen as a failure of an emergency service and it is common for the chief operational head to be singled out for criticism, by the media, during the inquiry or in any findings of the inquiry.⁵²

⁴⁸ 2003 Review of Corporate Governance of Statutory Authorities and Office Holders (Uhrig Report) at p 40.

⁴⁹ A rare exception was the Lewis Report.

⁵⁰ See the findings criticising the 'fire services' in relation to occupational health and safety in the Hazelwood Mine Inquiry Report 2014 where the Board of Inquiry members had not heard relevant evidence from the MFB and cited evidence from CFA, the UFU and the EMC.

⁵¹ MFB, Corporate Plan 2015-2018: A world class fire and emergency service, p 17.

⁵² Wilkins, R (2010) Federalism and the emergency services: paper developed from a speech presented at the AFAC/ Bushfire CRC 2009 conference. Australian Journal of Emergency Management 25, p 3-6

The disconnection between the accountability of a Chief Officer and their ability to make decisions was noted in the 2009 Victorian Bushfire Royal Commission, in relation to both CFA and the then Department of Sustainability and Environment:

It became apparent to the Commission that the CFA Chief Officer and the DSE Chief Fire Officer were not at a suitable level within their organisations, potentially affecting the level of influence they were able to assert in comparison with the level of responsibility they bore for their agency's performance on 7 February.⁵³

5.1 Recommendation 4: The MFB submits that there is an urgent need to clarify decision making accountability, and to ensure that accountability for decisions can be tracked and flows from the relevant exercise of statutory power.

The MFB submits that, if able to act in accordance with its statutory functions and responsibilities, the MFB Board and its executive can progress towards changes in the MFB that will make it more efficient and sustainable and that this will lead to improved performance. The MFB should be properly accountable for the decisions it makes and controls, but should not be held responsible for the outcome of decisions where the decision making was diffused.

What is the effect on community safety and performance?

The MFB contends that the organisation is not operating as a contemporary and efficient fire and emergency service because of the industrial arrangements, which prohibit the appropriate decision makers from making decisions in the community's interest. Of greatest concern to the MFB is where the industrial arrangements have the potential to affect or actually does detrimentally affect, public safety and operational performance.

An example of a poor community safety outcome occurred in January 2014, when the MFB was delayed in deploying MFB pumper trucks to assist Ambulance Victoria during the summer heat wave. The MFB had to apply to the FWC before concessions were made. However, this action still created a delay in the MFB being able to provide increased emergency response assistance.⁵⁴

The MFB Chief Officer, consistent with his or her statutory function, should be able to determine the level of staffing required to meet community needs. For example, on extreme or code red fire danger days the MFB should be able to maintain greater resource levels in a state of readiness. This flexibility in resource levels must be agile enough to meet State requirements including for "out of scale" events.⁵⁵ The current prescriptive arrangements mean that the Chief Officer cannot exercise judgement or skill in determining the resourcing required at any time.⁵⁶ The current fixed crewing levels in the Operational Staff Agreement have not been determined based on the MFB's assessment of organisational need or community risk, but rather were fixed as a result of industrial bargaining. The lack of flexibility in crewing and appliance availability represents both an actual cost and an opportunity cost, due to the missed opportunity for operational employees not required to be on crew at a particular time to undertake other productive work.

The MFB and the MFB Chief Officer should be able to choose operational appliances, provided that they perform consultation under safety legislation as other employers are required to do. The MFB purchased a Bronto Telesquirt Appliance for \$1.5 million in 2012.

⁵³ See the *Final Report of 2009 Victorian Bushfires Royal Commission* at 10.2.2. Notwithstanding these comments the Royal Commission was very critical of both officers for a range of operational failures.

⁵⁴ See *Metropolitan Fire & Emergency Services Board* [2014] FWC 7776 at [94].

⁵⁵ Bearman et al. "The Problems of Maintaining Effective Teamwork during Out-of-Scale Events" (2013) Bushfire CRC.

⁵⁶ Schedule 2 of the *MFB UFU Operational Staff Agreement 2010*. Minimum crewing levels require a complement of 270 personnel to staff all brigade appliances including 5 on shift Commanders and 3 ancillary personnel.

The Bronto has been used by firefighters in New Zealand since 2005,⁵⁷ in South Australia since 2011 and in the Northern Territory since 2013.⁵⁸ The UFU has used its veto power to prevent the MFB commissioning the Bronto or training MFB firefighters on it.⁵⁹ As such, the MFB's Bronto has been sitting idle in Victoria apart, from one use in 2014. It was used during the 2014 Hazelwood Mine Fire when South Australian firefighters had to travel to Victoria to operate the Bronto.⁶⁰

The MFB should also be able to relocate fire stations to improve response efficiency. As an example, the MFB was blocked from doing so in Northcote when the UFU withheld consent and agreement could not be reached to 'allow' the MFB to purchase the site.⁶¹

The MFB should be able to use external trainers and different training methods to provide the very best training available for operational and non-operational staff to enable them to fulfil their, and the MFB's, potential. Training for breathing apparatus⁶² and operational exercises have either been delayed or vetoed entirely.⁶³

The MFB should also be able to introduce workplace behaviour training and, as with other employers, determine the content and form of that training. The MFB sought to introduce specific training in October 2014, after consulting with a diverse range of stakeholders since April 2013. The UFU raised a dispute under the industrial arrangements, insisting that face to face learning be used rather than online learning. The dispute is still unresolved 2 years after consultation started, as the MFB must consult on the selection of the external provider.⁶⁴

5.2 Recommendation 5: Consistent with their statutory duties and functions, the MFB and the MFB Chief Officer must be able to make decisions in relation to operational deployment, staffing, operational appliances and equipment, location of fire stations, skills-based training and compliance (e.g. workplace behaviour training), amongst other things.

6. Operational Responsibilities and Community Safety

Term of Reference (a) An assessment of the resourcing requirements necessary to ensure Victoria is appropriately equipped and fire ready, (c) The interoperability between the CFA and MFB and (d) The interoperability across fire agencies responsible for preventing and suppressing all types of fire in Victoria, whether on public or private land

The MFB's purpose is to be a world class fire and emergency service for not just those in Melbourne, but for all Victorians. The MFB has highly trained and committed operational personnel and can serve as an expert incident control agency, with specialist technical response roles and capacity to respond to all threats and events state-wide, supporting other emergency management agencies.

⁵⁷ Where they have 18 in operation: see *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 27 and 28 at [82]-[83].

⁵⁸ *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 27 and 28 at [82]-[83].

⁵⁹ If the Bronto was unsafe or otherwise unsuitable, the UFU and operational staff could utilise the provisions of the OHS Act to seek WorkSafe intervention in order to ensure it was safe. However, the UFU is not required to exhaust options under Victorian legislation before relying on its power of veto.

⁶⁰ Evidence was given to the Fair Work Commission last year by a senior operational staff member that: "Consultation certainly has a role, but the ultimate decision on important operational issues such as the replacement of appliances which are ending their life-span should be made by the organisation, not the union. If issues are identified with the commission of an appliance, the MFB has the statutory responsibility to eliminate or minimise risks to health and safety. Every step of this process should not be dictated by the union through the consultation process." See *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 27 and 28 at [133].

⁶¹ *Metropolitan Fire & Emergency Services Board [2014] FWC 7776* at [93], Exhibit MFB 55, Appendix D – Issue regarding relocation of Northcote fire station.

⁶² *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 25 and 26 at [201]-[237].

⁶³ *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 25 and 26 at [15]-[16].

⁶⁴ *Metropolitan Fire & Emergency Services Board [2014] FWC 7776*, MFB Exhibit 55, Appendix S.

The MFB considers that the MFB can serve the State of Victoria as a 365 days per year, 24/7 State resource that can:

- provide expert trained personnel to serve in IMTs;
- provide technical experts;
- provide technical equipment;
- assist with community engagement; and
- provide operational support;

for all hazards and all emergencies.

6.1 Recommendation 6: The MFB submits that it should be formally recognised as having specialist incident management capability for Victoria in the State Emergency Response Plan.

The MFB, in providing this service would:

- provide greater community safety outcomes;
- assist an interoperable emergency management sector;
- enable greater skilling of MFB personnel and provide more fulfilling careers; and
- achieve the aims of the Victorian Emergency Management Capability Blueprint 2015-2018.

The MFB will be best placed to achieve this vision if the industrial arrangements can be modernised to allow more efficient and flexible deployment of MFB personnel outside the metropolitan district. These changes would reduce costs to the State. Modernisation of the current arrangements would also ensure the MFB was more efficient, better equipped and readily available to serve the Victorian community.

6.2 Recommendation 7: The MFB submits that the industrial arrangements should be changed to allow for greater flexibility and interoperability.

The MFB contends that the consultation arrangements in the OHS Act are the appropriate mechanism for consideration of the safety implications of any proposed operational or other change. The MFB will progressively work towards replacing the current power of veto provisions in industrial agreements with a view to using these legislative consultation provisions when implementing change.

These provisions are appropriate. They apply to all Victorian employers and were described in the Maxwell Report into Victoria's safety legislation in 2004 as follows:

Consultation is not the same as, and does not require, consensus or agreement. What it must involve, however, is dialogue between the parties to the consultation. Dialogue means (at least):

- a two-way exchange of information and views;
- a consideration by the party required to consult of the views expressed by the other party; and

those views being taken into account before action is taken, or a decision made.⁶⁵

The MFB submits that consultation should not be predicated on safety issues and that safety is too important to be left to the industrial arena. This view was reflected in the significant report by Lord Robens, which is widely seen as the origin of modern health and safety thinking:

There is no legitimate scope for 'bargaining' on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions...⁶⁶

Industrial arrangements which delay decisions and require the intervention of the FWC do not provide for the efficient deployment of emergency service resources to serve community needs.

The MFB welcomes reform that leads to the organisation moving progressively towards contemporary workplace arrangements that are consistent with normal public sector values and best practice consultation on safety issues under the relevant safety legislation.

6.3 Recommendation 8: Consultation between the MFB and the UFU on firefighter and public safety and related operational matters should occur under the OHS Act provisions, rather than as a result of industrial bargaining.

The MFB considers that there is a need for enhanced inter-agency planning. This could be auspiced by the EMC or EMV, and the MFB is keen to play a leading role, particularly in relation to critical infrastructure or fire events where the MFB's expert incident management capability can assist the State. The MFB therefore welcomes opportunities for the MFB to play a leading role in inter-agency planning.

The MFB is also addressing issues arising from new risks in the built environment, for example through the use of non-conforming building products,⁶⁷ including in particular non-compliant aluminium cladding such as that used in the Lacrosse Docklands building.⁶⁸ The MFB has and will continue to share its learnings about new risks and what that means for operational response and firefighter safety with the CFA, and with other agencies in the sector to enable Victoria to be ready to address those risks.

The MFB has always been an early adopter of interoperability and is committed to interoperability with the CFA and with other fire and emergency service agencies. The MFB always prefers, where it is consistent with the MFB's duties under the MFB Act and the OHS Act, to standardise arrangements with the CFA and other agencies provided that:

- the relevant arrangements are scaleable depending on resourcing and organisational requirements;
- the MFB is able to participate in discussion about interoperability at the earliest possible stage; and
- the costs of interoperability are appropriately shared.

The MFB is committed to supporting inter-agency planning and interoperability, within a framework that delivers on the objectives of the important statutory responsibilities the MFB has on service delivery, safety and accountability.

⁶⁵ Maxwell, *Occupational Health and Safety Act Review*, (Maxwell Report), March 2004 at [923].

⁶⁶ Robens, A. (Lord), *Report of the Committee on Safety and Health at Work, 1970 – 72*, London, HMSO, Cmnd 5034, 1972, p 21 [66].

⁶⁷ See the [Senate Economics References Committee Inquiry into Non-conforming Building Products - MFB Submission](#).

⁶⁸ See the [MFB Post Incident Analysis Summary](#).

The MFB contends that the MFB and CFA should move to make their operational training more uniform, using more efficient training methods and making the best use of VEMTC. This will lead to more efficient use of training resources and improved interoperability between personnel working together on firegrounds and at emergencies.

The MFB therefore welcomes opportunities for greater interoperability.

6.4 **Recommendation 9:** The MFB supports greater inter-agency planning and is prepared to play a larger role in this.

7. **The MFB, its people, management and the best way for the MFB to serve its purpose**

Terms of Reference (b) How CFA and MFB staff can be best supported in protecting communities, taking into consideration operational needs, as well as Occupational Health and Safety best practice and best training methods, (e) CFA and MFB management structures and management work practices, (f) Enhancing workplace culture, including fostering greater respect and cooperation between management and its workforce, as well as enhancing workplace innovation and diversity and (g) Options for the establishment of a Career Firefighters Registration Board

The MFB considers that the best way to support staff to safely undertake their roles to protect the community is for the MFB to be a well-managed and well-run fire and emergency service focused on its statutory duties, with modernised workplace arrangements that reinforce respect and accountability.

The MFB, through the Corporate Plan,⁶⁹ will work to implement change to:

- reduce injury and illness through the introduction of fitness for duty testing;
- improve diversity and flexibility arrangements;
- introduce change to lead to a more diverse, open, innovative and respectful culture;
- enable efficient use of current resources; and
- provide better training, better equipment and better resources to current staff because of increased efficiency.

The MFB recognises that the current industrial arrangements will need to change to allow these changes to occur.

The MFB is proud of its staff and contends that they should be supported with better training, excellent welfare support, opportunities for flexible work and the ability to work at all times in an innovative and respectful culture. The MFB needs to maintain the capability and capacity to deliver its services. The MFB has an ageing workforce with a diverse range of skills. Careful workforce planning is required to ensure that the MFB maintains the right skills and capabilities and is more representative of the communities it serves.⁷⁰

The MFB supports its staff through welfare and support systems, and recognises the inherent stresses the operational staff face in their roles. The MFB also recognises the benefits of diversity in the workplace and flexible working arrangements. The MFB endorses the comments of the Fair Work Ombudsman, who has noted that:

Flexible work practices can deliver benefits to both employers and employees. They can lead to greater job satisfaction and help attract and retain skilled and valuable staff. Flexibility in the workplace may also improve productivity and

⁶⁹ MFB, Corporate Plan 2015-2018: A world class fire and emergency service.

⁷⁰ MFB, Corporate Plan 2015-2018: A world class fire and emergency service, p 19.

efficiency by helping maintain a motivated workforce with reduced staff turnover and absenteeism.⁷¹

The MFB contends that for MFB personnel to be able to perform at their best and to address future challenges, including delivering on change required to enable sector reform and achieving a sustainable position, it is critical that the MFB unlocks the capacity and capability of its operational workforce through influential leadership. For the MFB to reposition its leadership of the organisation it must develop stronger engagement, accountability and authority with its workforce.

The MFB could access additional first-rate operational personnel were it better able to recruit laterally. The Chief Officer gave evidence to the FWC that:

There are a whole range of great benefits associated with the ability to employ firefighters from other organisations. At the forefront is sector reform. Allowing cross fertilisation between, for example, the CFA and the MFB would allow the implantation of knowledge and experience from one organisation to the other. Certainly, consideration would need to be given to familiarisation/ orientation training, as there are differences between the organisations, but much of what we do is the same. Competencies should be recognised and credits given for learning and experience acquired outside of the MFB... the current model provides no means of taking a flexible or creative approach to the recognition of prior skill, training and experience. There is no operational reason to insist on such a restrictive approach to recruitment. The limits on lateral recruitment will be increasingly problematic for the MFB as a large proportion of operational firefighters approach the age of retirement)... There are 374 employees who have between 26 and 30 years of service, and we need to factor this into our future workforce planning as well.⁷²

7.1 Recommendation 10: To maintain contemporary capability and workforce practices, the MFB must be able to recruit operational personnel laterally.

The MFB has a responsibility to ensure workforce planning is agile and considers changes in supply and demand for labour. In addition, the MFB wants to attract a more diverse range of racial, ethnic, cultural backgrounds and more women to work for the MFB. The Operational Staff Agreement perpetuates the 'model' home-grown, full-time operational employee, and makes it nearly impossible for the MFB to accommodate employee diversity or flexible working arrangements. The MFB has considerable difficulty in accommodating requests for flexible working arrangements in accordance with its statutory obligations under the *Fair Work Act 2009 (FW Act)* and the UFU has not been amenable to 'consenting' to change these arrangements.

The MFB notes that it may be unable to accommodate flexible working arrangements consistent with the National Employment Standards and the *Equal Opportunity Act 2010*.

The MFB is progressing a Women's Employment Action Plan but ultimately without a change in the rostering arrangement and changes in the industrial arrangements to allow for greater flexibility and part-time work, the MFB recognises that it will be very difficult for the MFB to attract and retain increased numbers of female operational staff.

7.2 Recommendation 11: To ensure that its workforce better reflects the community it serves, the MFB must be able to provide for greater flexibility and diversity for current and future staff.

The MFB wants to move progressively towards contemporary industrial arrangements. There are obvious benefits to the community, the Government, the sector and very importantly to MFB staff in taking these steps. They include:

⁷¹ Fair Work Ombudsman, *Best Practice Guide: Use of individual flexibility arrangements* (July 2015), p 1.

⁷² *Metropolitan Fire & Emergency Services Board* [2014] FWC 7776, MFB Exhibit 7 and 8 at [91].

- reduction of injury and illness, and subsequent reduction in WorkCover premiums and costs;
- improved access to operational roles for women;
- a more diverse and open culture with greater respect and cooperation, and innovation;
- continued first rate operational performance by fit, trained, motivated and able staff despite the ageing of the workforce; and
- better staff engagement and opportunities for all staff.

It is the strong view of the MFB that the changes recommended will benefit MFB employees, both current and future and therefore benefit the organisation, the sector and the community.

The MFB notes that while the Terms of Reference refer to a Career Firefighters Registration Board, the detail of the proposal is not known. No such Board exists in other states or territories in Australia. Therefore the MFB's comments on this Term of Reference are necessarily general.

While there is increasingly a move to national registration arrangements in professions,⁷³ the MFB notes that, generally, professional boards exist where:

- there is a defined profession with rules of professional conduct, accreditation to industry standards and reaccreditation and compulsory continuous education required;
- the relevant Registration Board is mostly independent from the employer and the employees and contains experts in law, the relevant discipline as well as community representatives;
- the Registration Board allows for accreditation of lateral entrants;
- there may be disciplinary outcomes for complaints from members of the public or other stakeholders about conduct; and
- there is a procedure for deregistration.

These arrangements are uncommon in the emergency services sector. As an example, paramedics are not subject to registration by a professional board.

The MFB can foreshadow that there may be difficulties with implementing elements of the 'usual model' for MFB operational staff.

The MFB would consider further discussion and debate on the issue on the understanding that the MFB's position is that:

- it would be inefficient if the MFB were to be responsible for the cost of the Registration Board or the registration fees for employees; and
- the MFB must, as the employer in a command and control based organisation, retain responsibility for managing the performance and conduct of employees.

⁷³ See [Fire Protection Association Australia Fire Protection Accreditation Scheme \(FPAS\) \(July 2013\)](#); [Australian Health Practitioner Regulation Agency, National Engineering Register, and Professions Australia Blueprint for National Registration of the Professions \(April 2006\)](#).

7.3 **Recommendation 12:** Any introduction of a Career Firefighters Registration Board must be aligned to the usual practices involved in professional registrations, and must not increase costs for the MFB and must provide that the MFB is able to manage the performance and conduct of employees.

8. **Volunteerism**

Term of Reference (h) The best mechanism to provide support for volunteer fire brigades and to ensure their viability in providing emergency services

The MFB supports the principle of volunteerism and recognises the important work that volunteers do. Some MFB staff volunteer with other emergency services, and the MFB supports their efforts. The MFB is committed to working with agencies such as CFA to ensure that the service provided by operational staff and operational volunteers to the community is the best it can be.

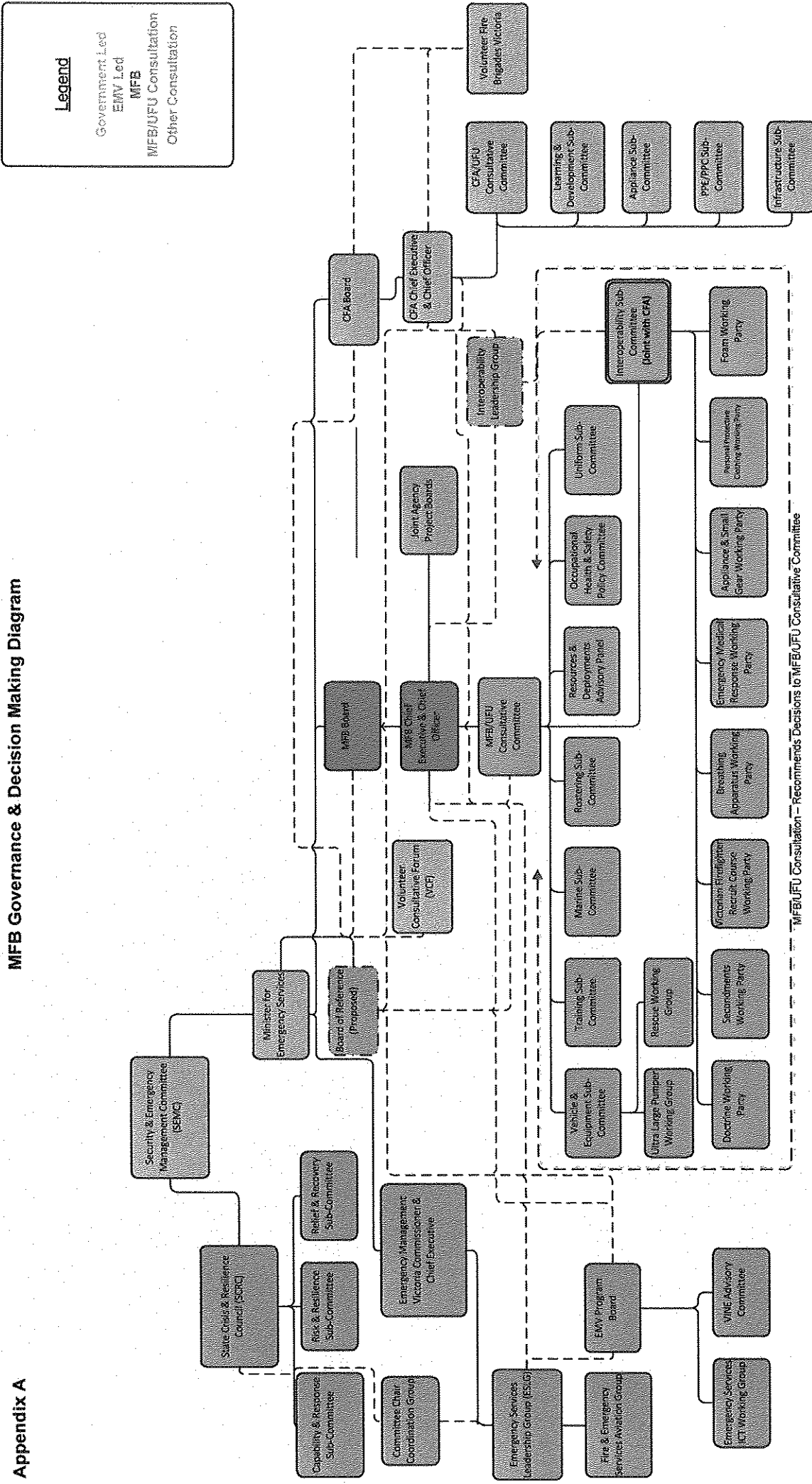
The MFB is prepared to explore volunteer roles in the MFB in the area of community safety.

The MFB welcomes any recommendations from CFA, the Volunteer Fire Brigades Victoria, the VICSES or from this Review as how the MFB can better facilitate volunteerism in the emergency services sector.

9. **Conclusion**

The MFB welcomes discussion on this document and on the MFB's experiences and recommendations, and thanks the Review for the opportunity to make this submission.

MFB Governance & Decision Making Diagram



MFB/UFU Consultation - Recommends Decisions to MFB/UFU Consultative Committee

**INQUEST FINDINGS,
COMMENTS AND
RECOMMENDATIONS
into Fire and
Nine Deaths
at Kew Residential
Services
on 8 April 1996**

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- general or specific application to community fire safety;
- application to KRS; or
- application to other areas involving the disabled.

Where the review process identifies recommendations which may have general application (or application to other areas involving the disabled), they may need to be directed to the appropriate agency, such as the Australian Fire Authorities Council, Standards Australia, Australian Fire Protection Association, Institution of Fire Engineers, etc.

Where the review process identifies further potential for improvement in the management of fire safety at KRS no doubt that will be fed into DHS's model system.

The review would need to consider consulting with Wornald, ULA, the Health and Community Services Union, the Office of the Public Advocate, Villamanta Legal Service and the New Cottages & St. Nicholas Parents Association.

9.14 GENERAL ISSUES

Several general issues involving Paul, the fire investigation and commendations to various individuals are considered in this subsection.

9.14.1 FUTURE MANAGEMENT OF PAUL

Counsel for Paul, Mr John Smallwood, indicated some concern about Paul's future management in the event that it was found that he lit the fire. Counsel submitted that:

If he be formally found to have lit the fire the very real fear is that he will effectively be kept in circumstances where those responsible for his care will be under extreme pressure to avoid repetition. Because of his extremely limited comprehension of the world around him it would be seen by some that the only effective means of such an avoidance would be the almost total deprivation of his freedom and privacy."

It is recognised that DHS will no doubt ensure that Paul is appropriately managed, balancing his needs under the *Intellectually Disabled Persons' Services Act 1986* for a degree of freedom and privacy with the issue of safety. It is acknowledged that Paul's management plan would need to accommodate compelling issues.

9.14.2 THE INVESTIGATION AND 'FIRE TEST'

Following the fire, an investigation for the Coroner was undertaken jointly by the Victoria Police (Arson Squad), the Fire Investigation Unit of the Metropolitan Fire Brigade and the Victorian Forensic Science Centre. The investigation was run under the protocols developed by the 1995 *Victorian Joint Fire Investigation Procedures*.

The MFB, in cooperation with the other investigatory agencies, developed a full 'fire test' that was conducted at leased premises at Scientific Services Laboratory, Port Melbourne. Considerable resources were committed by the MFB to the Port Melbourne 'fire test' with reconstructed, furnished units and monitoring equipment. In addition, a 'test room' was built to demonstrate the effectiveness of fire retardant bedding, plaster board, smoke alarms and a fast-response sprinkler system. A number of the parties were present during the major fire test demonstration at Port Melbourne. Testing was also conducted at the MFB's 'Fire House', Abbotsford. Prior to the testing, the Brigade undertook computer modelling with the assistance of the Centre for Environmental Safety and Risk Engineering at Victoria University of Technology.

The fire test has been an invaluable tool in assisting the understanding of many aspects of 'fire' in the residential situation. The professional level of the work undertaken by the MFB, Inspector Martin and the officers at the Fire Investigation Unit to assist the inquest is highly commendable. Throughout the inquest, the MFB provided an objective and valuable level of assistance to the Coroner.

9.14.3 COMMENDATIONS

PUBLIC SAFETY

The MFB commends *the KRS staff who were engaged in the evacuation effort for the contribution they made in uniquely challenging circumstances. The efforts of Mr. Egan in particular deserve special commendation. The result was that all disabled clients from Flats A, B, C and D and one survivor from Flat E (a total of 36 persons) self-evacuated or were evacuated safely from Unit 303!*

The court joins with the MFB Submission on this issue. All the fire officers involved in the incident and evacuation effort are deserving of commendation for their work. On any view, Mr Calder's action is deserving of special commendation. Mr Morris's actions are also commendable. It is considered that KRS staff member, Mr Chea Eapeng, should be added to the list.

9.15 CONCLUSION

Fire safety systems must be considered as a total package of risk management, equipment, maintenance, training and fire and evacuation drills. Once systems are established, audit must be regular and rigorous. Where disabled or immobile persons are concerned, the importance of the total package cannot be underestimated. Early warning to residents, staff and firefighting agencies in the event of the first signs of fire is vital to maximise the potential to reduce the risk of injury and death. Well-developed evacuation procedures are vital. Modern, fast-response residential sprinkler systems designed to reduce fire spread are essential. Building design layout, taking into account fire risk and potential spread, is an important consideration. Where locked doors restrict residents, it is vital for efficient and safe evacuation that automatic door latch release mechanisms be included in overall layout.

In conclusion, it is essential that the lessons of this fire are addressed by our community and also by those charged with the responsibility of caring for the disabled.

Gaetano Johnstone
State Coroner
17 October 1997

Assisted by Messrs Graeme
Hicks and Michael Hennessy
(instructed by Ms. Vanessa Ash
of the Office of the Director
of Public Prosecutions)

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2009 2905

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1) Section 67 of the Coroners Act 2008

Inquest into the Death of: CHERYL MAY CURRIE

Hearing Dates: 12, 13, 14, 15 and 18 March 2013 and 20 June 2013 (six days)

Appearances:

- Metropolitan Fire Brigade represented by Christopher Wiseman, General Counsel, Metropolitan Fire Brigade.
- Department of Human Services represented by Ms Erin Gardner of Counsel, instructed by in-house lawyers.
- The Transport Accident Commission represented by Ms Áine Magee of Counsel, instructed by in-house lawyers.
- Independence Australia represented by Olivia Trumble of Counsel, instructed by Moores Legal.
- Royal District Nursing Services, represented by Megan O'Brien, consultant lawyer for the Royal District Nursing Services.

Counsel Assisting the Coroner: Karen Argiropoulos of Counsel, instructed by Jodie Burns, Senior Legal Counsel, Coroners Court of Victoria.

Findings of: AUDREY JAMIESON, CORONER

Delivered On: 28 August 2015

Delivered At: 65 Kavanagh Street, Southbank 3006

I, AUDREY JAMIESON, Coroner having investigated the death of CHERYL MAY CURRIE
AND having held an Inquest in relation to this death on 12, 13, 14, 15 and 18 March 2013 and 20 June
2013 at Melbourne

find that the identity of the deceased was CHERYL MAY CURRIE

born on 8 September 1969

and the death occurred on 12 June 2009

at 3 Lonsdale Avenue, Hampton East 3188

from:

1a) SMOKE INHALATION

2 PARAPLEGIA

Pursuant to section 67(1) of the Coroners Act 2008, I make findings with respect to the following
circumstances:

1. In the early hours on 12 June 2009, Cheryl May Currie (Ms Currie), a complete paraplegic, died, aged 39 years old, of smoke inhalation from a fire in her home at 3 Lonsdale Avenue, Hampton East (Home). At the time of her death, she was alone in her home and confined to bed.

BACKGROUND CIRCUMSTANCES

2. Ms Currie's complete paraplegia resulted from an incident that occurred on 1 September 1998, when she attempted suicide by jumping in front of a train. Following this incident, the Transport Accident Commission (the TAC) accepted her claim for compensation.
3. In June 2002, Ms Currie commenced residing at her Home, owned by the Department of Human Services (the DHS),¹ Office of Housing.
4. The DHS purpose built the Home in consultation with Ms Currie, her occupational therapist, the TAC case manager and an architect, in order to meet her specific mobility and familial needs.
5. Initially, Ms Currie lived at the Home with her then partner, Greg Hagan, and her two children, Sharlene and Joshua. Also living at the Home were Sharlene's children.

¹ In 2009 it was known as the Department of Human Services. At the time of finalising the Finding the Department had changed its name to the Department of Health and Human Services.

6. In 2006, Mr Hagen moved out of the Home and in December 2008, Sharlene and her children moved out. Up until Ms Currie's death, Joshua spent some nights at the Home and some nights away from it.
7. Ms Currie had a history of schizophrenia for which she was prescribed medication and had been admitted into hospital on a number of occasions.
8. At the time of her death, Ms Currie had multiple medical concerns relating to her paraplegia, including:
 - a. colostomy in situ;
 - b. recurrent pressure ulcers;
 - c. infections relating to an indwelling urinary catheter; and
 - d. osteomyelitis (bone infection).
9. Ms Currie was being provided with support and care in her home by the following providers, funded by the TAC:
 - a. Independence Australia (formerly known as Para-Quad)² provided personal care attendants at Ms Currie's home for two shifts each day (generally from 9.00am-12.00pm and 6.00pm-9.00pm). The personal care attendants provided personal care, meal preparation and domestic assistance.³ The TAC funded Ms Currie to receive attendant care services from April 2001 until the time of her death on 12 June 2009. Over the course of that time, the amount of hours funded by the TAC varied. At the time of her death, Ms Currie was funded to receive 196 hours of care per 28 days (seven hours per day) for personal care and domestic assistance;
 - b. Nurses from the Royal District Nursing Services (RDNS) visited Ms Currie in her home three days per week (usually Monday, Wednesday and Friday) to attend to wound care for pressure ulcers related to Ms Currie's paraplegia;
 - c. Dr Guiseppe Joseph Toscano (Dr Toscano), Ms Currie's general practitioner since 7 June 2002, visited her at home as needed;

² Independence Australia (formally ParaQuad) is a not for profit organisation providing attendant care services to people with a disability. In April 2013 Independence Australia had 473 carers under employment, and; 723 clients serviced by the organisation.

³ Independence Australia entered into Service Agreements with the TAC for the provision of services to individuals who received funding for in-home care services. On the 27 March 2001, ParaQuad was engaged by the TAC to provide in-home attendant care services to Ms Currie.

- d. Jenny Sparks, occupational therapist, provided care when requested by the TAC. Ms Sparks had not provided any occupational therapy services to Ms Currie since August 2008; and
 - e. A VitaCall Personal Emergency Response Unit (PRU) was installed in Ms Currie's home in November 2008. The PRU and pendant worn around Ms Currie's neck enabled her to call for medical emergency assistance 24 hours a day.
10. Ms Currie's prescribed medications were prepared in blister packs from which she self-administered her medications. However, she regularly needed reminding to take her medications by her carers and family members.
 11. Ms Currie also received psychiatric assistance and care from Southern Mental Health who allocated Ms Anne Ball as her case manager. The TAC did not fund this assistance as Ms Currie's psychiatric conditions predated her claim.
 12. Between 10 January 2009 and 20 March 2009, Ms Currie was hospitalised at the Monash Medical Centre Psychiatric Unit following an attempt of self-harm.
 13. On 19 May 2009, Ms Currie underwent surgery at the Dandenong Hospital to repair pressure sores on her left ischial area (upper thigh). Following this procedure, she was discharged on 22 May 2009 to her home, where she was confined to bed until the wound healed, which was expected to heal by July 2009.

THE CIRCUMSTANCES IN WHICH THE DEATH AND FIRE OCCURRED

9-11 June 2009

14. On 9 June 2009, Judith Axford (Ms Axford), Independence Australia, senior personal attendant carer, attended to Ms Currie in her Home for a total of 8 hours and 15 minutes, from 9.15am to 5.30pm.
15. On 10 June 2009, Ms Axford again attended for a total of 6 hours and 15 minutes, from 8.30am to 2.45pm. An agency worker from Care and Compassion also attended for a total of three hours from 5.00pm to 8.00pm. At 7.00pm, Dr Toscano attended Ms Currie's Home, at the request of Ms Axford because she was concerned about Ms Currie's increasingly agitated state. Dr Toscano reviewed the blister pack of medication with Ms Currie and made sure she had taken her evening

medications. Dr Toscano states, "*She was paranoid but not suicidal or homicidal. I organised with her to review her the following evening*".⁴

16. On 11 June 2009, the same agency worker from Care and Compassion attended for a total of three hours from 5.00pm to 8.00pm. While Independence Australia were able to identify a roster that indicated an agency staff member attended for the 9.00am to 1.00pm shift on this day, corroborating documentation such as a timesheet could not be produced, and it is accordingly possible that the agency worker did not attend for that shift. Again, on this day, at approximately 7.00pm, Dr Toscano visited Ms Currie, and found "*she was more stable, she had no visual or auditory hallucinations, but was still paranoid and once again I reviewed her medication with her and made sure she had her evening medications. I reviewed her skin problems and we had a discussion about her future when Cheryl said she was keen to get out of bed so she could start a flower arrangement-course*".⁵

12 June 2009

17. On 12 June 2009, Ms Currie accessed her VitaCall PRU alarm at 2.29am⁶ alleging that neighbours were trying to kill her. In response, the VitaCall operator made unsuccessful attempts, at 2.40 am, to contact Joshua and Sharlene Currie.⁷
18. Later that morning, at 5.30am, a neighbour of Ms Currie was woken by the sounds of glass smashing and screaming. The neighbour looked outside, observed flames coming out of Ms Currie's bedroom window, and called 000.
19. The Metropolitan Fire Brigade's fire fighters attended Ms Currie's Home at 5.38am, at which time flames were emanating from the roof.
20. Mr Neil Jenkins, Metropolitan Fire Brigade (MFB) fire fighter, located Ms Currie directly behind the timber front door after he attempted to push it open about 8 inches, but found her body was blocking the doorway.⁸ Fire fighters assisted Mr Jenkins to pick Ms Currie up and take her outside where cardiopulmonary resuscitation (CPR) was commenced.

⁴ Inquest brief, page 14.

⁵ Inquest brief, page 15.

⁶ Records produced by VitaCall show that in the days prior to her death, Ms Currie used the PRU to contact VitaCall in relation to various matters, and on some occasions, the police attended at her home in response to her concerns. The PRU is primarily to be used for medical emergencies.

⁷ Transcript, page 264.

⁸ Inquest brief, page 42.

21. Ambulance Victoria paramedics arrived at the scene at approximately 5.50am, whereby they assessed Ms Currie and found that she was not breathing, did not have a pulse, had fixed and dilated pupils and recorded an asystolic rhythm on the cardiac monitor. CPR ceased at 5.59am.
22. Ms Currie's wheelchair was located by fire fighters in the ensuite bathroom, approximately four metres from the side of her bed. Despite not having access to her wheelchair, Ms Currie managed to get herself out of her bed and to the front door of her Home, a distance of some eight metres.⁹
23. Fire safety documentation discovered at Ms Curries' premises after the fire included literature produced by the disability service division of the DHS (and prepared with the assistance of the MFB) to assist carers who support people on individual disability support packages.

JURISDICTION

24. At the time of Ms Currie's death the *Coroners Act 1985* (Vic) applied. From 1 November 2009, the *Coroners Act 2008* (the Act) has applied to the finalisation of investigations into deaths that occurred prior to the commencement of the Act.¹⁰
25. Ms Currie's death was unexpected and therefore a reportable death under the *Coroners Act 1985* (Vic).

PURPOSE OF A CORONIAL INVESTIGATION

26. The Coroners Court of Victoria is an inquisitorial jurisdiction.¹¹ The purpose of a coronial investigation is to independently investigate a reportable death to ascertain, if possible, the identity of the deceased person, the cause of death and the circumstances in which death occurred.¹² The cause of death refers to the medical cause of death, incorporating where possible the mode or mechanism of death. For coronial purposes, the circumstances in which death occurred refers to the context or background and surrounding circumstances, but is confined to those circumstances sufficiently proximate and causally relevant to the death and not merely all circumstances which might form part of a narrative culminating in death.¹³
27. The broader purpose of coronial investigations is to contribute to the reduction of the number of preventable deaths through the findings of the investigation and the making of recommendations

⁹ Transcript, page 169.

¹⁰ Coroners Act, section 119 and Schedule 1.

¹¹ Section 89(4) *Coroners Act 2008*.

¹² Section 67(1) of the *Coroners Act 2008*. All references which follow are to the provisions of this Act, unless otherwise stipulated.

¹³ This is the effect of the authorities- see for example *Harmsworth v The State Coroner* [1989] VR 989; *Clancy v West* (Unreported 17/08/1994, Supreme Court of Victoria, Harper J).

by coroners, generally referred to as the 'prevention' role.¹⁴ Coroners are also empowered to report to the Attorney-General on a death; to comment on any matter connected with the death they have investigated, including matters of public health or safety and the administration of justice; and to make recommendations to any Minister or public statutory authority on any matter connected with the death, including public health or safety or the administration of justice.¹⁵ These are effectively the vehicles by which the prevention role may be advanced.¹⁶

28. It is not the Coroner's role to determine criminal or civil liability arising from the death under investigation. Nor is it the Coroner's role to determine disciplinary matters.
29. Detective Senior Constable Luke Walsh was the nominated coroner's investigator¹⁷ and prepared the Inquest brief.
30. Section 52(2) of the Act provides that it is mandatory for a coroner to hold an Inquest into a death if the death or cause of death occurred in Victoria and a coroner suspects the death was as a result of homicide, or the deceased was, immediately before death, a person placed in custody or care, or the identity of the deceased is unknown.
31. Ms Currie was not a person placed in 'custody or care' as defined by section 3 of the Act. Ms Currie was a public housing tenant only, her Home being owned by the DHS, Office of Housing. It was therefore not mandatory to conduct an Inquest into the circumstances of her death, however, I exercised my discretion pursuant to section 52(1) of the Act to hold an Inquest because I had identified matters of public health and safety that required further investigation.
32. This finding draws on the totality of the material, the product of the coronial investigation of Ms Currie's death. That is, the court records maintained during the coronial investigation, the Inquest brief and the evidence obtained at the Inquest.
33. In writing this finding, I do not purport to summarise all of the evidence, but refer to it only in such detail as appears warranted by its forensic significance and the interests of narrative clarity.

¹⁴ The "prevention" role is now explicitly articulated in the Preamble and purposes of the Act of the Coroners Act 1985 where this role was generally accepted as "implicit"

¹⁵ See sections 72(1), 67(3) and 72(2) of the Act regarding reports, comments and recommendations respectively.

¹⁶ See also sections 73(1) and 72(5) of the Act which requires publication of coronial findings, comments and recommendations and responses respectively; section 72(3) and (4) which oblige the recipient of a coronial recommendation to respond within three months, specifying a statement of action which has or will be taken in relation to the recommendation.

¹⁷ A coroner's investigator is a member of the police force nominated by the Chief Commissioner of Police or any other person nominated by the coroner to assist the coroner with his/her investigation into a reportable death. The coroner's investigator takes instructions directly from a coroner and carries out the role subject to the direction of a coroner.

STANDARD OF PROOF

34. All coronial findings must be made based on proof of relevant facts on the balance of probabilities. In determining whether a matter is proven to that standard, I should give effect to the principles enunciated in *Briginshaw v Briginshaw*.¹⁸ These principles state that in deciding whether a matter is proven on the balance of probabilities, in considering the weight of the evidence, I should bear in mind:

- the nature and consequence of the facts to be proved;
- the seriousness of an allegations made;
- the inherent unlikelihood of the occurrence alleged;
- the gravity of the consequences flowing from an adverse finding; and
- if the allegation involves conduct of a criminal nature, weight must be given to the presumption of innocence, and the court should not be satisfied by inexact proofs, indefinite testimony or indirect inferences.

35. The effect of the authorities is that coroners should not make adverse findings against or comments about individuals, unless the evidence provides a comfortable level of satisfaction that they caused or contributed to the death.

INVESTIGATIONS

Identity of the deceased

36. The deceased's identity was not in dispute and required no further investigation.¹⁹ Therefore, I formally find that the deceased was Cheryl May Currie, born 8 September 1969.

Medical Cause of Death

37. On 18 June 2009, Dr Melissa Baker (**Dr Baker**), Forensic Pathologist at the Victorian Institute of Forensic Medicine, performed an autopsy on the body of Ms Currie, which identified extensive soot deposition within the airways. Dr Baker concluded that the cause of death was smoke inhalation with paraplegia contributing to her death, but not directly causing it.

¹⁸ (1938) 60 CLR 336.

¹⁹ See 'Coroners Release Authority and Confirmation of Name' signed by Sharlene Currie dated 18 June 2009.

38. Dr Baker noted charring and blistering of the skin of Ms Currie's lower legs, soot deposition over her face and hands and commented that Ms Currie's impaired mobility might have affected her ability to escape from the fire.
39. Dr Baker also noted that Ms Currie was wearing a chain around her neck with an alarm device attached to it.
40. Toxicological analysis of the blood sample taken from Ms Currie after death revealed elevated carboxyhaemoglobin (63% saturation) and hydrogen cyanide (2.6mg/L), both of which are toxic fumes produced during fires. Carboxyhaemoglobin levels greater than 50% are generally considered to be fatal, and levels of hydrogen cyanide in excess of 1mg/L are considered to be life threatening.
41. Toxicological analysis also revealed the presence of olanzapine and quetiapine (medications used in the treatment of schizophrenia) at concentrations consistent with therapeutic use. Diazepam, a sedative/hypnotic drug of the benzodiazepines class, and its active metabolite nordiazepam were also detected at low levels.

The fire investigation

42. The fire scene was jointly investigated by John Kelleher (Mr Kelleher), scientist at the Victoria Police Forensic Science Centre and Station Officer Rodney East (SO East) of the MFB Fire Investigation and Analysis Unit. I consider both Mr Kelleher and SO East to be experts with respect to fire investigations.
43. SO East tested one of the smoke detectors and found it to be working correctly, while the other smoke detector was damaged to an extent that testing was not possible.
44. SO East's expert evidence as to the most probable cause of the fire was "*the imprudent use of smoking materials whilst the occupant was incapacitated in bed.*"²⁰ Both Mr Kelleher and SO East concluded that the point of the fire's origin started on or was adjacent to the bedside table on the south (right) side of the bed. The burn patterns indicated a higher-level fire,²¹ initially starting as a smouldering fire before breaking into flames and combustion.²²

²⁰ Report of SO East included in Exhibit (X)9.

²¹ Report of SO East included in X9 -refer to Note 4.

²² Transcript, pages 107- 108, 126 and 193.

45. Mr Kelleher noted that Ms Currie had severe burning to her feet and legs, probably from direct exposure to the fire, which indicated that she had been lying or sitting close to the fire at some stage.
46. SO East raised concerns regarding the inadequacy of systems in place for the testing of the smoke detectors to ensure that they were operating correctly.
47. Mr Kelleher and SO East also noted several cigarette burn marks on furniture in the lounge room at Ms Currie's Home, which suggested that a person(s), on occasion(s), had been careless with cigarettes.

Directions hearings and the Inquest

48. Prior to the commencement of the Inquest, Directions Hearings were held on 24 November 2011 and 8 August 2012.
49. I granted leave for the following interested parties to be represented at the Inquest:
 - a. The DHS;
 - b. The TAC;
 - c. Independence Australia;
 - d. The RDNS; and
 - e. The Metropolitan Fire Brigade.²³

Issues investigated at Inquest

50. The main issues for examination at the Inquest concerned the circumstances in which Ms Currie's death occurred, and whether there were safety improvements that could be made to prevent similar deaths for persons with disabilities living in public housing. The areas of inquiry included:
 - a. Whether any or adequate steps were taken to ensure the prevention and management of a fire emergency at Ms Currie's home, such as:
 - the conduct of a fire safety assessment or audit; and

²³ The MFB is a statutory authority set up by the *Metropolitan Fire Brigades Act 1958*. The MFB has a role in investigating fires (section 71 of that Act) and pursuant to the Victorian Fire Investigation Inter-Agency Agreement the MFB are expert cause and origin investigators for the Coroner.

- implementation of a plan to ensure the safe evacuation of Ms Currie from her home in the case of an emergency;
- b. The operation and location of smoke alarms installed at Ms Currie's home and the systems in place for checking that the smoke alarms were in working order;
- c. Whether a sprinkler system should have been installed at Ms Currie's home;
- d. The effectiveness of the VitaCall PRU system in a fire emergency;
- e. Whether Ms Currie's inability to access her wheelchair and/or open the front door impeded her ability to evacuate the home; and
- f. Any other opportunities for safety improvements.

***Viva voce* evidence at the Inquest**

51. A six-day Inquest was held on 12, 13, 14, 15 and 18 March 2013 and 20 June 2013. Ms Karen Argiropoulos, barrister, was counsel assisting me.

52. *Viva voce* evidence was obtained from the following witnesses at the Inquest:

- a. Judith Anne Axford;
- b. Michael Anthony Ruyg;
- c. Sharlene Ruth Currie;
- d. John Desmond Kelleher;
- e. Rodney Graham East;
- f. Julie Faye Harris;
- g. Neil James Jenkins;
- h. Monique Destiny Rasch;
- i. Dr Guiseppe Joseph Toscano;
- j. Sharon McLachlan;
- k. Jennifer Elizabeth Sparks;
- l. Roberta Jean Buchanan;
- m. Vicki Nakos; and
- n. Barbara Hill.

53. At the conclusion of the evidence, I received a written outline of submissions from counsel on behalf of all interested parties. On 20 June 2013, the interested parties, through their respective legal representatives, made oral submissions in accordance with their outline of submissions. I

thank counsel assisting and the interested parties in this matter for their valuable contribution and submissions.

Lack of fire safety risk assessment(s) and evacuation planning for Ms Currie

54. A central issue in the Inquest focused on identifying the relevant party who should be responsible for conducting fire safety risk assessment(s) for Ms Currie whilst she was in her Home.
55. The evidence revealed that at no time, did any organisation involved in Ms Currie's care conduct a fire safety risk assessment in relation to her living arrangements, nor was there any planning as to how she could be evacuated in the event of a fire.
56. Evidence from persons responsible for various aspects of Ms Currie's care, around the time of her death, revealed serious gaps in the service providers' state of knowledge of her living arrangements and care needs, which resulted in less than optimal continuity of her care.
57. The fact that Ms Currie's surgery in May 2009 did not prompt the TAC and its contracted personal care service providers involved in her care to conduct an assessment of her needs to determine whether she required additional care or supports demonstrates the gaps identified in her care.
58. In so far as identifying fire risks to Ms Currie, several witnesses, funded by the TAC, gave evidence that they had identified that smoking in bed was a risk for Ms Currie. Dr Toscano gave evidence that he discussed these risks with Ms Currie constantly.²⁴ Ms Axford's evidence was that she had discussed the issue with Ms Currie.²⁵ Mr Ruyg, registered nurse with the RDNS, and other members of the nursing service also discussed the issue with Ms Currie.²⁶
59. Vicki Nakos, Housing Services Manager at the DHS stated that, as far as she was aware, fire safety was not part of the design process when Ms Currie's Home was being planned; rather the focus was on her mobility requirements.²⁷
60. TAC Support Co-ordinator Sharon McLachlan's (Ms McLachlan) evidence suggested that, from the TAC's perspective, there was no particular person or agency responsible for assessing Ms

²⁴ Transcript, page 281.

²⁵ Transcript, page 30.

²⁶ Transcript, page 63.

²⁷ Transcript, page 459.

Currie's fire safety in her home. However, Ms McLachlan expected whoever was working directly with Ms Currie would have discussed fire safety related issues with her.²⁸

61. Occupational therapist Jenny Sparks' (Ms Sparks) evidence was that since Ms Currie's death, she now considers fire risk assessment as part of her role in assessing clients.²⁹ However, in her experience, fire safety is an issue that is rarely dealt with by occupational therapists undertaking home assessments.³⁰
62. Independence Australia, as a service provider contracted by the TAC, did not have any processes or procedures in place for fire safety risk assessments for their clients. However, it did conduct hazard checks and safety audits focused on the health and safety of its staff attending a client's home.³¹
63. The RDNS also conducted risk assessments in client's homes; however, again these were primarily concerned with the health and safety of its staff. The RDNS submitted that it did not conduct fire risk audits *per se* and considered this to be a matter for the relevant professionals and not practicable for the RDNS in any event.

Overnight care for Ms Currie

64. A critical issue for the Inquest was how on 12 June 2009, Ms Currie found herself to be alone in her Home while confined to bed.
65. The evidence revealed that while some of the organisations involved with Ms Currie's care were aware that she was alone in her Home on a regular basis, this did not trigger a process by the TAC to reassess her care needs.³²
66. It is concerning that there was no co-ordinated system for the TAC to be aware that Ms Currie was alone in her Home overnight.
67. Ms Axford's evidence was that she was aware Sharlene and Joshua Currie no longer resided with Ms Currie at the time of her death and she believed most organisations were under the impression that they were still living there.³³ Ms Roberta Buchanan (Ms Buchanan), Manager In-Home and Accommodation Services, Independence Australia stated that, as of May 2009, Independence

²⁸ Transcript, page 328-330.

²⁹ Transcript, page 406.

³⁰ Transcript, page 420.

³¹ Transcript, pages 452-455 and Exhibits 30-32.

³² Transcript, pages 23-24, 26, 55-56 and 276-277.

³³ Transcript, page 23.

Australia had a service co-ordinator attached to Ms Currie whereby care workers could report issues. However, there was no record that Sharlene moved out of the Home or that Ms Currie was home alone overnight while confined to bed.³⁴ Had it been a requirement that the service provider report such matters back to the TAC, the TAC would have been better placed to assess the client's care needs.

68. The DHS understood that Ms Currie was living by herself in her Home, having been informed that Sharlene had moved out, as required by its rent assessment processes.³⁵
69. While Dr Toscano consulted with Ms Currie on the night before she died, it was his view that "*I felt her son was there most of the time, so I didn't think it was an issue.*"³⁶
70. While the TAC stated that it was not aware that Sharlene had permanently moved out of Ms Currie's Home, there was some awareness that Sharlene had previously moved out and subsequently returned to the home.³⁷
71. The TAC had funded the installation and monitoring of Ms Currie's VitaCall PRU on the basis of a report received from the RDNS stating that she had fallen and been left on the floor overnight because nobody else was at home to assist her.³⁸
72. Ms Sparks' evidence was that she was not aware that Sharlene was no longer living at the home. Ms Sparks had previously, and consistently, recommended to the TAC that overnight care not be provided to Ms Currie because family members were at the Home overnight.
73. Ms Sparks' evidence was that had she been informed that Ms Currie was regularly alone overnight, she would have made significant changes to the care hours recommended, including recommending overnight care, which would have ensured Ms Currie was not alone overnight.³⁹
74. Ms Sparks stated that, had Ms Currie refused an increased level of support,⁴⁰ she would have had to consider whether or not Ms Currie was safe to continue to live where she was absent of overnight care.⁴¹
75. Ms Sparks was also not aware of Ms Currie's confinement to bed following surgery in May 2009,⁴² although she acknowledged that there were other times during Ms Currie's life when she

³⁴ Transcript, page 432.

³⁵ Transcript, pages 460 and 465.

³⁶ Transcript, page 281.

³⁷ Transcript, pages 321 and 325.

³⁸ Transcript, pages 321 and 1381.

³⁹ Transcript, pages 381-382.

⁴⁰ Ms Sparks' evidence was that had she had been aware that Ms Currie had been living alone that she would have recommended 16 hour care and inactive overnight care.

⁴¹ Transcript, page 403.

was confined to bed for six weeks at a time.⁴³ Ms Sparks' evidence was that she would only have expected to be informed of Ms Currie's hospitalisation and surgery if there were any changes in Ms Currie's support needs as a result.⁴⁴

76. The TAC wrote to Ms Sparks on 15 May 2009⁴⁵ requesting that she conduct an independent functional assessment of Ms Currie.⁴⁶ It appears from the contents of this letter and from Ms McLachlan's evidence, that there was no specific reason motivating this request, and it may have just have been initiated because it had been approximately one year since Ms Currie's last review.⁴⁷ The TAC's letter to Ms Sparks did not indicate that Ms Currie was to be hospitalised to repair pressure sores, that she had recently been hospitalised for mental health issues or that the review was urgent.⁴⁸ Unfortunately, Ms Sparks was not able to arrange an appointment with Ms Currie for the purposes of conducting this assessment prior to her death. Consequently, no new assessments of Ms Currie's needs were conducted in light of Sharlene moving out of the Home in December 2008 or in light of Ms Currie's recent hospitalisations.
77. Importantly, Ms Sparks' evidence was that had she known Ms Currie was alone at night she would have recommended the TAC fund overnight care.
78. Historically, all of Ms Sparks' recommendations to the TAC in relation to Ms Currie's care were approved and funded.

Case Managers

79. The TAC had a system in place for periodically reviewing its clients. This system was demonstrated by the fact that Ms Sparks had been directed to conduct an assessment of Ms Currie. However, this was not in response to any contemporaneous intelligence that Ms Currie was mostly living on her own and confined to bed.
80. Had the TAC had a 'case manager' system in place, these matters would have been known to them as they occurred and appropriate assistance and risk assessments for Ms Currie could have been implemented.

⁴² Transcript, page 423.

⁴³ Transcript, page 381.

⁴⁴ Transcript, page 380.

⁴⁵ Inquest brief, page 1399

⁴⁶ Transcript, page 376.

⁴⁷ Transcript, page 360.

⁴⁸ Transcript, page 360.

81. The TAC acknowledged that case management is appropriate in particular, in circumstances where complex care co-ordination is required. However, submissions on behalf of the TAC were that case managers were used, from time to time, to attend to a specific need or for a discrete goal, rather than for managing risk.⁴⁹
82. Since 2009, the TAC has instituted changes including a reduction of the number of clients that a support co-ordinator has in their portfolio, allowing them to have contact that is more individual with a client, including face-to-face visits.⁵⁰

Shifts not being filled by Independence Australia and adequacy of care services provided to Ms Currie

83. The evidence revealed that during 2009, a number of Ms Currie's carer shifts were not being filled, and she would often be left without a carer during evening shifts.
84. Ms Axford's evidence⁵¹ was that if there was not a carer available, Independence Australia would not be able to fill the shift. Consequently, Ms Currie would be left without a carer for the evening shift approximately once per week. Ms Axford said that she frequently received a telephone call from Ms Currie at night time, advising her that no-one had turned up and asking for help.⁵²
85. Ms Axford had been employed by Independence Australia as a Personal Care Attendant from 2001 and she cared for Ms Currie for approximately six years prior to her death. She was Ms Currie's most regular worker.
86. Sharlene said that she complained to Independence Australia about the failure to fill personal care shifts for her mother, without success.⁵³
87. Ms Axford and Sharlene⁵⁴ both expressed concern that Ms Currie may not have taken her medication when carers did not attend.
88. Ms Buchanan explained that staff shortages at this time were due to a lack of available staff across the sector. Ms Buchanan's evidence was that the majority of Ms Currie's shifts were

⁴⁹ Transcript, page 509.

⁵⁰ Transcript, pages 508-509.

⁵¹ Transcript, pages 20

⁵² Transcript, page 20.

⁵³ Transcript, page 94.

⁵⁴ Transcript, pages 85, 87 and 94.

rostered out to agency staff from Care and Compassion and a small number were rostered to Ms Axford. Rosters produced by Ms Buchanan confirmed this synopsis.⁵⁵

89. Ms Buchanan also stated that it was difficult to fill shifts for Ms Currie's care because a number of workers stated they did not wish to work with her due to difficulties experienced when caring for her.⁵⁶

Ms Axford stated:

She wasn't the easiest person to get along with and she herself would sack carers. This would be due to her mental condition. She would abuse people which was really due to her mental condition. She would abuse me at times but I knew she didn't mean it and I knew how to deal with her. Some carers weren't able to deal with it and would leave.⁵⁷

90. Ms McLachlan's evidence was that she was advised by a nurse from the RDNS that shifts were not being filled by Independence Australia. As a result, she contacted Mr Neville Dane, Coordinator for Independence Australia (when it was ParaQuad) and was advised by him that carers had been attending and was provided with copies of timesheets.⁵⁸

Whether there was a Skylight

91. Most of the fire damage was in Ms Currie's bedroom, which had major structural damage to the ceiling, roof and walls. The roof and ceiling had collapsed and the wall frames were deeply charred and completely consumed in places.
92. Initially, Mr Kelleher and SO East formed the opinion that there had been a skylight in Ms Currie's bedroom due to the apparent rapid spread of the fire to the roof. However, in response to Sharlene's evidence at the Inquest that there was no skylight in Ms Currie's bedroom or in the ensuite bathroom, SO East and Mr Kelleher accepted there was no skylight. SO East's evidence was *"The fact that the fire got up into the roof was our main reason for thinking that we had the skylight and on the morning some of the verbal conversation was the fire had got through the roof fairly quickly, which sort of supported that that was the reason why we had a skylight situation."⁵⁹*
93. SO East and Mr Kelleher noted several other possibilities as to why the fire might have entered the roof as quickly as it did, including:

⁵⁵ Transcript, page 430.

⁵⁶ Transcript, page 443.

⁵⁷ Inquest Brief, page 24.

⁵⁸ Transcript, page 327.

⁵⁹ Transcript, page 129.

- a. the bed in the bedroom was elevated higher towards the ceiling;⁶⁰
- b. the existence of a tradesman type personal hatch into the roof space;⁶¹ and/or
- c. the construction of the ceiling itself.⁶²

Smoke alarms in Ms Currie's Home

94. While there is no direct evidence that the smoke alarms activated on this night, this fortifies the need for alternatives to standard smoke detectors for people with complex needs such as Ms Currie.
95. Mr Kelleher's evidence was that while the venting of the fire into the roof space would improve a person's prospects for escaping the fire, it would also reduce the effectiveness of the smoke alarms.
96. Ms Currie's home was equipped with two Brooks PFS-ITL smoke alarms.⁶³ They were ionisation alarms, mains powered with a non-removable rechargeable lithium battery back up to ensure operation in the event of mains power failure.⁶⁴ They were located at the eastern and western ends of the hallway in accordance with the electrical plan for the Home.⁶⁵
97. The installation of those alarms complied with the legal requirements applicable to the Home pursuant to the *Building Code of Australia 1996* and the *Building Regulations 2006 (Vic)*.⁶⁶
98. Mr Kelleher's evidence was that the location of the smoke alarms were "conventional" and "quite appropriate".⁶⁷ However, in light of Ms Currie's tendency to smoke in bed, he considered it advantageous to install a different type of smoke alarm, such as a temperature rise alarm, rather than smoke, in Ms Currie's bedroom.⁶⁸
99. SO East also considered the location of the alarms to be conventional, but because Ms Currie was confined to bed and was a chronic smoker, he thought it would have been prudent to have had a photoelectric smoke alarm in her bedroom.⁶⁹

⁶⁰ Transcript, pages 119- 120 and 130.

⁶¹ Transcript, page 129.

⁶² Transcript, page 130.

⁶³ Mr Van Ravenstein's statement Inquest Brief page 945 paragraph 15, SO East's evidence at Transcript, page 132.

⁶⁴ Mr Van Ravenstein's statement Inquest Brief, page 945 paragraph 15.

⁶⁵ Mr Kelleher's evidence Transcript pages 111, 113-114, , SO East's evidence Transcript pages 132, Exhibit 8 Plans of House Inquest Brief, page 207.

⁶⁶ Van Ravenstein statement Inquest Brief, page 945 paragraphs 11-16.

⁶⁷ Transcript, page 115.

⁶⁸ Transcript, pages 115-116.

⁶⁹ Transcript, pages 133-134.

100. I note the submissions of the DHS that had it been aware of Ms Currie's change in circumstances as a result of her surgery in May 2009, safety requirements could have been considered such as a temperature activated smoke alarm in Ms Currie's bedroom and any other safety systems that warranted implementing.⁷⁰
101. The MFB recommends that smoke alarms are tested and dusted monthly.⁷¹ Ms Currie, by reason of her paraplegia, would not have been able to test her smoke alarms.
102. I agree with Ms Julie Harris', (Ms Harris), Community Ageing Strategist and Community Resilience with the MFB evidence that clients who are unable to maintain a working smoke alarm should be identified and assisted with testing.⁷²
103. Ms Axford's evidence was that it was not part of her duties to test smoke alarms. However, she personally may have changed the battery if this was required.
104. The smoke alarms in Ms Currie's home were maintained periodically by the DHS and also when electrical contractors attended the Home to perform other works.⁷³ However, the tenancy agreements between the DHS and residents rely on the tenant to regularly test that smoke alarms are working and report any faults to the DHS. This is consistent with the *Residential Tenancies Act 1997*. However, application of the *Residential Tenancies Act 1997* in this regard does not seem appropriate. The standard agreement between landlord and tenant when considered in the context of Ms Currie's (and presumably other DHS clients') circumstances and functional limitations is, at best, unfair and realistically unworkable.
105. Independence Australia was not contracted by the TAC to undertake maintenance works at the Home. Despite this, Ms Buchanan's evidence was that Independence Australia conducted hazard checks or home/site audits annually. Ms Buchanan stated a review of Ms Currie's file revealed documentation evidencing that site audits, for staff safety and not the client's, were conducted in 2001, 2002, 2004 and 2005.⁷⁴
106. Independence Australia's processes also included provision for carers to report matters through their Incident and Hazard Reporting procedure. A report could be either filled in by a carer or telephoned through to the office and a staff member filled out the Incident/Hazard/Near Miss Form. The form would be processed by the office team, who assessed the incident and

⁷⁰ Transcript, page 515.

⁷¹ Transcript, page 189.

⁷² Transcript, page 189.

⁷³ Statement of Andrew Denticoli and evidence of Nakos at Transcript, pages 461-464.

⁷⁴ Transcript, page 433 and Exhibits 30 and 32.

implemented corrective action. It was also logged on the Occupational Health and Safety register and also monitored by the Health and Safety team to ensure Independence Australia closed the loop on all corrective actions. Ms Currie's file did not contain any Incident/Hazard/Near Miss forms.

107. Ms Harris suggested that high-risk clients such as Ms Currie should have personal monitored alarm systems installed in their homes linked to the smoke alarms. If activated, a message is communicated to the monitoring company, who then contacts the client who owned the personal pendant alarm. There is merit to this suggestion.
108. The evidence was that Ms Currie's VitaCall PRU did not have the capability to be linked to the smoke alarms. However, other systems were available from various companies including Tunstall, Safety Link and INS Group.⁷⁵

Domestic sprinkler systems

109. SO East gave evidence that Ms Currie's Home would have benefited from the installation of a domestic sprinkler system, which would have given her a better chance of evacuating from the fire.⁷⁶
110. I agree with the MFB submissions that the decision whether to install a domestic sprinkler system should only be required after an individualised fire safety risk assessment is conducted. Where such an assessment indicates the need for additional fire safety measures, active consideration should be given to employing strategies to mitigate the risk of death or injury by fire.
111. Had such a risk assessment been undertaken in this case, I am confident a person such as Ms Currie who presented with risk factors of paraplegia, mental health impairment, history of smoking in bed and living alone outweighed the estimated installation and maintenance costs submitted by the DHS and the MFB of installing a domestic sprinkler system.
112. I also agree with Dr Toscano who emphasised the importance of protecting people with quadriplegia and paraplegia who live alone, often by choice. Dr Toscano stated that he had over 250 quadriplegic and paraplegic patients, only three of whom had sprinklers installed in their homes.⁷⁷

⁷⁵ Transcript, pages 200-204 and Exhibit 15.

⁷⁶ Transcript, page 140.

⁷⁷ Transcript, pages 291-292.

113. As of 20 June 2013, the TAC had approximately 244 paraplegic claimants and 200 quadriplegic claimants and it was their submission that domestic sprinkler systems could potentially be cost prohibitive. The TAC submitted:

...at the very highest, if one took the highest figure from the DHS estimate and multiplied it out just as a straight mathematical calculation for over 400 people that's over \$30 million. Similarly, those sorts of maintenance issues are over two million per annum and it's not suggested that anyone wants to penny-pinch or anything like that but one has to look at financial ramifications of these sorts of matters but the commission will engage independent contractors to assess the costs of installation of fire safety equipment where the question arises in individual circumstances rather than saying overall it will be appropriate in every case and also, Your Honour, there may well be many houses that have appropriate fire safety provision already but that is another ongoing matter.⁷⁸

114. I did not find the estimate of costs submitted by the TAC helpful. The estimated costs provided did not identify how many of those clients live in their home alone. The estimated costs were meaningless in the context of Ms Currie's death. The TAC need to undertake individualised risks assessments for each client. They will only then know the true cost of minimising fire risks and preventing like deaths, such as Ms Currie's death.

115. Service providers, such as the TAC, should incorporate into their individualised client risks assessments whether the installation of a domestic sprinkler system is necessary for minimising fire risks.

116. I, however, commend the TAC's submissions that it "*will consider the installation of appropriate fire safety equipment on an individual basis obviously for the same reasons that has to be assessed on an individual basis, the commission currently funds home modification for appropriate people and fire safety equipment may necessarily form part of those modifications based on the individual circumstances.*"⁷⁹

117. The DHS submissions detailed that it already has in place a number of processes for tenants to request modifications to the DHS owned properties. The Application for Special Accommodation Requirements⁸⁰ is one particular way in which a DHS tenant could request special accommodation

⁷⁸ Transcript, pages 510-511.

⁷⁹ Transcript, page 509.

⁸⁰ Inquest brief, page 990.

modifications. The DHS, in its submissions, advised that the Director of Housing is updating this form to prompt those filling out the form to specifically consider the risk of fire.⁸¹

Automatic doors

118. SO East further opined that Ms Currie's home would have benefitted from the installation of an electronic interlocking system, which would allow the resident to flick a switch to release the front and back doors of the property. Such a system could both unlock the doors and cause the doors to open.⁸²
119. Again, service providers, such as the TAC, should incorporate into their individualised client risk assessments whether the installation of an electronic interlocking system for safe egress is necessary for minimising fire risk.

Fire safety information and training for carers and other service providers engaged by the TAC

120. Alarming, none of the people involved in Ms Currie's care had received formal education and/or training in relation to fire safety.
121. Independence Australia, as a registered training organisation and accredited provider of training, required, and funded, its in-home carer employees to be qualified at Certificate III and/or Certificate IV level In Home and Community Care; Disability and First Aid.⁸³ While Independence Australia has its own internal policy that its carers have, at a minimum, Certificate III level for In Home and Community Care and Disability, the evidence of Ms Buchanan was that separate and additional ongoing or refresher training concerning fire safety was not provided by Independence Australia.⁸⁴
122. As at the time of Ms Currie's death, the Certificate III and IV training modules did not include specific fire evacuation training, but covered hazard training in the Occupational Health and Safety accredited unit of those certificates. However, it was general and not specific to environments such as a client's home.
123. The MFB informed me that basic home fire safety training materials had been developed and embedded into the national training for a range of community care workers. Consequently, since

⁸¹ Transcript, page 518.

⁸² Transcript, pages 140-141.

⁸³ First Aid Training is conducted annually.

⁸⁴ Transcript, page 434.

2010, newly trained workers in the community care sector were provided basic home fire safety training.⁸⁵ Ms Harris' evidence was that since December 2009, the MFB produced Basic Fire Safety Training packages for imbedding as a unit of study into 49 national qualifications pertaining to community care. In addition, the MFB have made the training materials available to registered training organisations and community service organisations for the training of their staff.⁸⁶ Further, the MFB was developing more comprehensive fire safety training for professionals or senior community workers, including occupational therapists.⁸⁷

124. I agree with the MFB concerns that despite the success of this project, not all workers employed in the community care sector undertake formal basic home fire safety training to attain the qualifications contained in these training packages and many workers will have completed formal training prior to 2010.
125. This gap in training in the community care sector is evidenced by the fact that Ms Axford completed her Certificates III and IV in 'Disability' prior to 2010 and did not receive any induction or skills maintenance training on fire safety while working for Independence Australia.
126. Nor was it a mandatory requirement by the TAC that its contracted care providers ensure their employees who undertake in-home care have recognised training such as Certificate III and/or IV for In Home and Community Care and/or Disability.⁸⁸
127. Ms Harris' evidence was that an allied health worker such as an occupational therapist, in circumstances such as those Ms Currie faced, was well placed to conduct fire risk assessments and emergency planning for individual clients.⁸⁹ Similarly, Ms Harris' evidence was that in-home care workers could also play a role in identifying clients who may be at increased risk due to behaviours such as smoking, and promote or assist with strategies to reduce their risk and reiterate a client's emergency plan.⁹⁰
128. I agree with the MFB's submission that in order to overcome the gap in training in basic home fire safety, the training materials must be mandatory as part of the induction processes for all new workers and as part of skills maintenance/refresher training for existing workers who provide in-home care.

⁸⁵ Report of Ms Harris.

⁸⁶ Transcript, pages 180-183.

⁸⁷ Transcript, pages 184-185.

⁸⁸ Transcript, page 527.

⁸⁹ Transcript page 191.

⁹⁰ Transcript, page 191.

129. I also agree with the MFB's submission that service agreements with providers should stipulate that their workers be required to go through the basic home fire safety training. This would ensure all services indirectly provided by organisations through brokerage could be delivered by workers who have an increased awareness and understanding of basic home fire safety.⁹¹
130. I also agree with Ms Harris' evidence that funding agencies which manage service agreements, such as the TAC, that broker the actual rendering of services to preferred providers, should play a role in ensuring that basic fire safety assessment policies, processes and training are implemented by the service providers they engage.⁹²
131. The evidence of Ms Barbara Hill, Senior Manager at the TAC and WorkSafe, also supported the MFB's position in that the TAC sets the expectations around the commercial arrangements with service providers and fire safety related measures are capable of being included. It is a common sense approach and one that should be adopted by the TAC, if it has not already done so.
132. I commend the MFB's commitment to working with the TAC and other entities involved in the funding or provision of in-home care to effect systemic improvements relating to fire risk in the home and the development of fire risk assessment policies and procedures.
133. Ms Harris stated that, following the death of Ms Currie, she made contact with Independence Australia to offer free fire safety training to its workers, however this offer was declined.⁹³ Ms Harris also contacted the TAC with the view to working on how it could ensure that its service providers had a consistent level of knowledge regarding fire safety, however, at that time, these discussions did not progress.⁹⁴
134. I note that since 18 March 2013, the MFB Community Resilience and the TAC Health Services Group met to progress the issue of fire safety for the TAC's clients. The first meeting occurred on 26 March 2013 with the primary focus being to develop increased inter-agency knowledge and scope a range of issues related to the fire safety of the TAC's clients. A second meeting was held on 22 April 2013 for the MFB Community Resilience Workplace Emergency Management to examine fire safety in Supported Residential Services and other care settings being explored/developed/utilised by the TAC. I commend the MFB's commitment to working with the TAC to progress discussions relating to fire safety for the TAC's clients

⁹¹ Transcript, page 246.

⁹² Transcript, pages 186-187.

⁹³ Transcript, page 253.

⁹⁴ Transcript, page 254.

135. I also commend the TAC for its submission that it is considering how it can distribute basic fire safety information to high-risk TAC clients through its service providers and the internet.⁹⁵ The TAC, through its legal representatives, advised that it was reviewing its service agreements and as part of that review, would consider how to make basic fire safety training mandatory for all of its service providers.⁹⁶

The placement of Ms Currie's wheelchair away from her bed

136. Ms Currie's wheelchair was located in the ensuite, some four metres from her bed.⁹⁷ Ms Axford explained that she had been instructed by the hospital or the RDNS to keep Ms Currie's wheelchair away from her bed so that Ms Currie would not get out of bed and aggravate the healing of her wounds. Ms Axford was not able to say with any certainty who provided the direction about the placement of the wheelchair. Her evidence was "...originally I think [it] came from Dandenong Plastics ... and passed on to Royal District...It might've been one of the nurses from Royal District that conveyed it to us",⁹⁸ and "I really can't remember exactly where it, where the message came from. I think it would've originally come from Dandenong Plastics, who would've conveyed it to probably the nursing staff that were to come in and do the wound repairs. And I can't remember whether Independence Australia actually told us as well ..."⁹⁹

137. Ms Buchanan's evidence¹⁰⁰ was that there is no evidence in the Independence Australia file that there was a direction to remove Ms Currie's wheelchair from her range. Moreover, her evidence was that she would be quite uncomfortable with such a direction, and that if a hospital had requested her to do that, she would advise them that she could not comply.

138. Mr Ruyg gave evidence that he had no knowledge of the direction to remove the wheelchair, and expressed surprise that a decision like this, which deprived Ms Currie of important rights, would have been made without consultation with her occupational therapist.¹⁰¹

139. Ms Sparks was also unaware of the direction and while she could understand something like this being said if there was someone else in the home with Ms Currie, it was "quite negligent" when

⁹⁵ Transcript, page 503.

⁹⁶ Transcript, pages 469 and 505.

⁹⁷ Transcript, page 143.

⁹⁸ Transcript, page 22.

⁹⁹ Transcript, pages 22-23.

¹⁰⁰ Transcript, page 446.

¹⁰¹ Transcript, pages 63-64.

nobody else was at home "because obviously if somebody's wheelchair dependent and they're by themselves they've got to be able to get out of bed and get out of the house."¹⁰²

140. Dr Toscano expressed a similar view in part¹⁰³ that while he was not aware of the direction to leave the wheelchair away from the bed, he could understand such advice being given in circumstances where she was recovering from major pressure area surgery. Further, he gave evidence that had she tried to get out of bed by herself with the use of her wheelchair she could potentially impact her healing process leading to a longer healing time.¹⁰⁴
141. Further enquiries by the RDNS revealed no evidence to support any suggestion that the RDNS instructed care staff of another organisation (or its own staff) to remove the wheelchair from the range of the bed.
142. The fact that Ms Currie was not able to access her wheelchair clearly contributed to her not being able to escape the fire in a timely manner.
143. However, despite a thorough investigation into the reason(s) for the wheelchair being placed away from Ms Currie's reach, I am unable to make any definitive finding as to who provided this instruction or why it was done. This further supports the need for persons such as Ms Currie to have continuity of care and a fire safety risk assessment undertaken.

Preventative measures since Ms Currie's death

144. Ms Currie's tragic death is an example of the increased risk of death by fire in the community care sector.
145. The MFB advised that nationally, there are nearly 900,000 older people living with a disability who receive in-home community care, with this figure expected to rapidly increase.
146. In 2011, the MFB commissioned a review of fatal fires in the Metropolitan Fire District between the financial years of 2000 and 2010 (**The Review**)¹⁰⁵ and examined the involvement of older people and people with disabilities. The Review identified 62 preventable¹⁰⁶ residential fire fatalities, and had the following findings:

¹⁰² Transcript, pages 383-384.

¹⁰³ Transcript, page 282.

¹⁰⁴ Transcript, page 294.

¹⁰⁵ Auferio, M., Carfone, T., Hawkins, W. and Murdy S. 2011. *An Analysis of Preventable Fire Fatalities of Older People and People with Disabilities: Risk Reduction Advice for the Community Care Sector*. The determination of age and disability was established using Fire Investigation Reports.

¹⁰⁶ *Preventable* was defined as a fire that was started *accidentally* (unintentionally).

- a. older people (65+) and people with disabilities had an increased risk of fire fatality, making up 66% (n=41) of all fatalities;
- b. people aged 65 and older were 3.7 times as likely to be a fire fatality than the general population;
- c. people with a disability were 4.2 times as likely to be a fire fatality than the general population;
- d. smoking materials were the leading cause of preventable residential fires, accounting for 34% (n=21) of fatalities;
- e. the most common room of origin in fatal fires was the bedroom, accounting for 46% (n=28) of fatalities;
- f. most homes did not have working smoke alarms, with 58% (n=36) of fatalities occurring in homes with a non-existent or non-functioning smoke alarm;
- g. most fire fatalities occurred at night, with 69% (n=38) of fatalities occurring between 8.00pm and 8.00am;
- h. 63% (n=36) of all fire fatality victims lived alone, which made people who lived alone 7.1 times as likely to be a fire fatality than the general population;
- i. 19% (n=12) of fatalities were known to be hoarders; and
- j. at least 35% (n=22) of fatalities were smokers.

147. The Review also undertook a detailed qualitative analysis into six fatal fires involving community care clients to determine the key high-risk features of each incident. This analysis identified:

- a. smoke alarms were not always present and could have helped alert the occupant or neighbours to the fire emergency, which could have helped notify emergency services more quickly;
- b. failure to be alerted to the fire reduced the time that the occupant had to respond;
- c. each individual has unique needs and identifying the specific fire risks for each person can help in preventing fires; and
- d. failure to quickly notify emergency services was a large factor that contributed to the fatality.

148. The relevant recommendations of the Review were:

- a. all rooms in which a client smokes be fitted with a stand-alone photoelectric smoke alarm with a ten year long-life battery, as opposed to ionisation smoke alarms;¹⁰⁷
- b. smoke alarms be interconnected¹⁰⁸ and linked to personal alarm pendants;¹⁰⁹
- c. all rooms in which a person smokes have a heavy-high sided ashtray placed on a stable non-combustible surface;
- d. if the person smokes in bed, use of flame retardant bedding and/or flame retardant mattresses;
- e. personal alarms for older clients that allows them to call for help to a control base with a neighbour or family member listed as the emergency contact;
- f. for clients with limited mobility, walking aids or wheelchairs should be left near their bed each night;
- g. educate clients who have experienced fire incidents previously on the dangers related to the high risk behaviour of smoking in bed, and educate clients on proper safety methods to avoid the same happening again; and
- h. where burns from previous fires are detected in combination with other risk factors, sprinkler systems or a portable sprinkler system should be installed in rooms where the fire risk is high for the client.

149. I agree with the MFB's submissions that the risks for this group are significant where:

- a. community care workers are not required to have any specific training;
- b. basic home fire safety training is not mandated for carers by the service providers and funders through qualifications, induction or skills maintenance training;
- c. there is no risk assessment process inclusive of fire risk, to assist a carer to identify high risk behaviours or environments;
- d. a community care client's lack of mobility and/or cognition prevent maintenance of a working smoke alarm without assistance;
- e. there is no discussion and planning with community care clients in relation to what to do in a fire or other emergency;

¹⁰⁷ Recommendation 1 and transcript pages 134-138.

¹⁰⁸ Recommendation 3 and transcript page 232.

¹⁰⁹ Recommendation 4 and transcript pages 200-204. I note that the MFB provided brochures for this technology during the Inquest.

- f. the community care client is considered high risk (as was the case with Ms Currie) and there is no case manager to coordinate the client's range of services and to mitigate this high risk; and
- g. specific actions to mitigate against fire safety concerns have not been implemented.

Recommendations in the Finding of Audrey Svikers

150. Since Ms Currie's death, Coroner Spooner made recommendations in her findings dated 15 November 2012 following the Inquest into the death of Audrey Svikers. The relevant recommendations are:¹¹⁰

- a. Svikers recommendation 3: That community care providers promote regular testing and maintaining of smoke alarms to the client, their family and/or friends or provide assistance for their clients to test and maintain smoke alarms if required; and
- b. Svikers recommendation 4: In homes where the client smokes, community care providers promote the use of high-sided ashtrays or sealed containers to allow for properly discarded smoking materials.

151. I support these recommendations and note that the DHS's response to recommendation 3 was that it was still considering its position because it was not known if the changing of batteries and installation of battery smoke alarms was routine practice across all service providers.

152. The DHS response to recommendation 4 was that it had implemented this recommendation and the emergency planning and home fire safety section of 'Strengthening assessment and care planning: a guide for HACC assessment services' (Department of Health, 2010) provides guidance for assessors in regard to promoting a safe home environment for chronic smokers. This includes checking that there are working smoke alarms and promoting the use of heavy, high sided ashtrays. The implementation of the recommendation was also evidenced in a number of its publications.

153. The TAC's response to recommendations 3 and 4 acknowledged that fire safety is an important safety concern in the disability sector and that it was working with the MFB and the DHS Fire Risk Management Unit to exchange information and expertise about fire safety issues.

¹¹⁰ COR 2008 2158.

154. The TAC distributed Coroner Spooner's recommendations to all contracted and non-contracted disability services providers it funded to provide supported accommodation and/or attendant care services to clients and injured workers in the last two years.

Recommendations in the Finding of Pearl Recht

155. Also since Ms Currie's death, Deputy State Coroner West made recommendations in his findings dated 6 December 2012 following the Inquest into the death of Pearl Recht.¹¹¹

156. I agree with, and support, Deputy State Coroner West's recommendations to agencies that fund programs for 'in-home' service providers to older people in Victoria. The relevant recommendations were:

- a. Recht recommendation 1(a): That the 'Basic Home Fire Safety Training Materials', as endorsed by the Australasian Fire and Emergency Service Authority Council, are mandated for use by community aged care providers in Victoria, through inclusion of the information into the induction processes for new community aged care workers. These materials should also be used for skills maintenance sessions/programs conducted by community aged care providers for existing workers.
- b. Recht recommendation 1(b): That basic home fire safety is incorporated into policy and practice guidelines for assessment processes used to assess older people for 'in home' services. In residences where the client is considered at greater risk due to health or lifestyle factors (as defined in Essential Knowledge: Basic Home Fire Safety, Section 2), additional smoke alarms should be installed to provide the earliest possible warning of a fire for the occupant.

157. The Department of Health and Ageing (Commonwealth) in responding to these recommendations accepted that service providers, through appropriate risk management strategies, may help to reduce the number of preventable fire fatalities involving older people who receive 'in-home' support to assist them to live in the community.

158. On 1 February 2013, the Department of Health and Ageing released an Alert (Annexure A) to all Australian Government subsidised providers of home care services to make them aware of Deputy

¹¹¹ COR 2011 3161.

State Coroner West's recommendations. The Alert also contains reference to the complementary recommendations made by Coroner Spooner on 15 November 2012 in relation to the death of Audrey Svikers.

159. The DHS, being an entity responsible for funding in-home care services pursuant to the Home and Community Care (HACC)¹¹² Program, in responding to these recommendations acknowledged that there is a need to identify common risk features and to deliver an improved safety outcome for older people and people with disabilities.
160. The DHS implemented an alternative to Deputy State Coroner West's recommendation 1(a) that an appropriate Certificate III level qualification would be the minimum standard of qualification required in Victoria for HACC Program funded community care workers (Department of Health HACC Community Care Worker Training Qualifications, July 2010).
161. The 'Basic Home Fire Safety Training Materials' developed by the MFB and the Australasian Fire and Emergency Service Authority Council (AFAC) is the material included in compulsory units of competency for a Certificate III level qualification. This includes an understanding of the need for smoke alarms and is focussed on both the occupational health and safety aspects of community service work, but also the duty of care to clients. As an alternative to mandating particular materials, the HACC program now recommends that service providers consider using the 'Basic Home Fire Safety Training Materials' (as appropriate) for new and existing staff. In relation to the skills maintenance sessions conducted by community aged care providers for existing workers, the HACC program is exploring with the new state-wide Education and Training Service, whether Basic Home Fire Safety using the training materials recommended by the coroner can be promoted through the HACC training calendar.
162. In relation to Deputy State Coroner West's recommendation 1(b), the DHS was still considering its response.

¹¹² The HACC Program is jointly funded by the Commonwealth and Victorian governments. The Commonwealth has responsibility for national policy development and the state has responsibility for day-to-day administration. The Department of Health, Ageing and Aged Care Branch is responsible for managing HACC in Victoria in accordance with the national guidelines. HACC funded organisations are responsible for managing and operating their services so as to ensure compliance with HACC policies, quality standards, guidelines and other requirements.

COMMENTS pursuant to section 67(3) of the *Coroners Act 2008*

163. I make no adverse comments about any individuals involved in Ms Currie's care. However, there were shortcomings identified in the management of Ms Currie's care by some of the organisations that provided her with in-home care.
164. These shortcomings, while not directly related to the cause of the fire, contributed to the circumstances in which Ms Currie found herself when she caused a fire to occur in her home.
165. In particular, the shortcomings were relevant to circumstances Ms Currie found herself in when she was unable to obtain immediate assistance and/or leave her home safely.
166. There is clear and cogent evidence of a lack of knowledge of Ms Currie's true and contemporaneous circumstances immediately before her death, reflecting a lack of a holistic approach to her care.
167. Nothing said in this Finding about Sharlene and Joshua not living at or being in the Home should be construed as a criticism of them.

FINDINGS

168. I find that the identity of the deceased was Cheryl May Currie, born on 8 September 1969 and her death occurred on 12 June 2009 at 3 Lonsdale Avenue, Hampton East.
169. I accept and adopt the conclusions of Dr Baker and I find that Cheryl May Currie's death was due to smoke inhalation. I also accept that her paraplegia contributed to her death to the extent that it contributed to her inability to escape the fire.
170. I accept and adopt SO East's expert evidence and find that the most probable cause of the fire to be "*the imprudent use of smoking materials whilst the occupant was incapacitated in bed.*"¹¹³ Both Mr Kelleher and SO East concluded that the point of origin of the fire started on or adjacent to the bedside table on the south (right) side of the bed and the burn patterns indicated a higher level fire,¹¹⁴ initially starting as a smouldering fire before breaking into flame and combustion.¹¹⁵
171. There is no evidence to suggest that the fire was deliberately or intentionally lit and the inference is available to me that the fire was an accident. Supporting this inference is an absence of evidence that Ms Currie intended to take her own life on 11-12 June 2009.

¹¹³ Report of SO East included in X9.

¹¹⁴ Report of SO East included in X9 -refer to Note 4.

¹¹⁵ Transcript, pages 107- 108, 126 and 193.

172. Without diminishing the importance smoke alarms have to minimise the risks related to fires, there is no evidence to suggest that Ms Currie's death was caused by or in any way related to the failure of the smoke alarms installed in her home.
173. The smoke alarms were located at both ends of the main hallway, one was found to be working correctly, while the other was damaged beyond testing. It is not possible for me to make a finding as to whether either smoke alarm activated in response to the fire. However, I find the systems in place for the testing of the smoke alarms to ensure that they were operating correctly was inadequate.
174. I agree with counsel assisting that the TAC, as the funding organisation of the majority of the services provided to Ms Currie, ought to be responsible for ensuring that fire safety risk assessments were conducted on an ongoing basis by the care providers it engaged.¹¹⁶
175. I find that had the TAC conducted, or caused a risk assessment to be conducted for Ms Currie as a result of her May 2009 hospitalisation, it would have identified that at the time of her death, that she required overnight care.
176. I also find that had any service provider conducted a fire safety risk assessment it would have identified that Ms Currie was a high fire risk and had an inadequate evacuation plan.
177. I agree with Ms Sparks' suggestion that the TAC pro-forma "Occupational Therapist – Functional Independence Review" be amended to clearly identify the need for the therapist to consider whether the client's fire risks have been assessed, and whether there are fire safety related issues that need to be further assessed or followed up.¹¹⁷
178. I find that there is no evidence to suggest that Ms Currie's death was caused by or in any way related to difficulties with shifts being consistently filled by agency carers.
179. I agree with the MFB submission that the TAC should review its service delivery model to give consideration to use of case managers for the TAC's community care clients with complex high care needs.
180. I also agree with Ms Harris' evidence that care workers are a service provider's "eyes and ears" and have direct knowledge of the client's day-to-day activities and risk factors. They are best placed to report relevant matters to a client's case manager for further assessment or action.¹¹⁸

¹¹⁶ Transcript, page 538.

¹¹⁷ Transcript, pages 423-424.

¹¹⁸ Transcript, pages 192-193.

181. I find that the TAC service delivery model did not use case managers for the TAC's community care clients with complex high care needs. Dr Toscano, who I found to be a compelling and impressive witness, appropriately highlighted the importance of continuity of care:¹¹⁹

*when somebody's like Cheryl, where she's an exceptionally difficult person who's got multiple issues ... you need that continuity of care, you need those carers who can be placed somewhere else so they don't lose income. And then come back into the home, because they know the person – they get to know the person and they do things with the person.*¹²⁰

182. I find the circumstances that Ms Currie found herself in after being discharged from hospital in May 2009 up until her death were due to a lack of communication, assessment and co-ordination of services having regard to her changing needs. There is no doubt that, at the time of Ms Currie's death, her risk profile, in relation to death by fire, was high because of her chronic smoking, confinement to bed after surgery and spending most nights at Home alone.

183. I find that Ms Currie's inability to access her wheelchair contributed to her inability to be able to escape the fire in a timely manner and thus her succumbing to the effects of smoke. However, I am unable to make any definitive finding on how her wheelchair came to be placed away from her direct access.

184. I find that at the time of Ms Currie's death, there was a significant gap in training in basic home fire safety for community care workers and providers.

185. I find that funding agencies, such as the TAC, play a significant role in ensuring that fire safety assessment policies and processes are implemented by the service providers they engage.¹²¹ For organisations such as the TAC that service case managers and broker the actual rendering of services to other providers, I agree with the MFB that service agreements with providers should stipulate that their workers be required to go through the basic home fire safety training. This would ensure all services indirectly provided by organisations through brokerage could be delivered by workers who have an increased awareness and understanding of basic home fire safety.¹²² The evidence of Ms Barbara Hill, Senior Manager at the TAC and WorkSafe, also supported the MFB's position in that the TAC sets the expectations around the commercial

¹¹⁹ Transcript, page 306.

¹²⁰ Transcript, page 292.

¹²¹ Transcript, pages 186-187.

¹²² Transcript, page 246.

arrangements with service providers and that fire safety related measures are capable of being included. It is a common sense approach and one that should be adopted by the TAC, if it has not already done so.

186. I make no adverse finding against any of the individual clinicians who provided care for Ms Currie, as the weight of the available evidence does not support a finding that they departed from the prevailing standards of their respective professions. Rather, the circumstances surrounding Ms Currie's death necessitated examination of systemic issues regarding the provision of in-home care in Victoria.

RECOMMENDATIONS

Pursuant to section 72(2) of the Coroners Act 2008, I make the following recommendations connected with the death:

Recommendation 1

In supporting and recognising the importance of the recommendations made by Deputy State Coroner West and Coroner Spooner, I recommend to the agencies identified in this matter,¹²³ being the DHS, the TAC, the National Disability Insurance Agency and Independence Australia, that the 'Basic Home Fire Safety Training Materials', as endorsed by the Australasian Fire and Emergency Service Authority Council, are mandated for use by all of their in-home disability care providers through inclusion of the information into the induction processes for new care workers. These materials should also be used for skills maintenance sessions/programs conducted by care providers for existing workers.

¹²³ While I note the existence of many other care providers in Victoria relating to the disability sector and other relevant sectors, such as aged care and youth disability, I note that a broad ranging recommendation to other such agencies would be beyond the scope of this Inquest. I would however encourage the dissemination of this information and recommendation to all relevant stakeholders and in-home care providers.

Recommendation 2

I recommend, the TAC, if it has not already done so, ensure that its community care clients with complex high care needs, both new and existing, are the subject of individualised risk assessments to identify fire safety risks and where necessary develop a fire safety emergency plan with specific actions to take in response to fire safety concerns associated with high risk behaviours. Such risk assessments must include, but not be limited to, ensuring the following matters are addressed:

- all rooms in which a client smokes be fitted with a stand-alone photoelectric smoke alarms with a ten year long-life battery, as opposed to ionisation smoke alarms;¹²⁴
- all smoke alarms are subjected to a clear testing regime and the person responsible for the testing to be clearly identified;
- smoke alarms be interconnected¹²⁵ and linked to personal alarm pendants;¹²⁶
- a review of the operational capacity of personal alarms in place for (or to be provided to) complex high care needs clients to ensure the personal alarms allow the client to call for help to a control base with a neighbour or family member(s) listed as the emergency contact(s);
- all rooms in which a person smokes have a heavy-high sided ashtray placed on a stable non-combustible surface;
- if the person smokes in bed, use of flame retardant bedding and/or flame retardant mattresses;
- for clients with limited mobility, mobility aids or wheelchairs should be left near their bed each night;
- educate clients who have experienced fire incidents previously on the dangers related to the high risk behaviour of smoking in bed and educate clients on proper safety methods to avoid the same happening again; and
- where burns from previous fires are detected in combination with other risk factors, sprinkler systems or a portable sprinkler system should be installed in rooms where the fire risk is high for the client.

¹²⁴ Recommendation 1 and transcript pages 134-138.

¹²⁵ Recommendation 3 and transcript page 232.

¹²⁶ Recommendation 4 and transcript pages 200-204. I note that the MFB provided brochures for this technology during the Inquest.

Recommendation 3

I recommend the TAC develop fire risk assessment policies and procedures to be used to assess and address the fire risks to the TAC's clients, and in particular, for clients who may be at increased risk of fire fatality due to impaired mobility, such as paraplegia or quadriplegia, resulting from a transport accident. Such policies and procedures should include the following:

- The provision of basic information regarding fire safety in the home and evacuation planning to the TAC's clients;
- Development of an assessment process that is inclusive of assessment of fire risk.
- Amend its pro-forma "Occupational Therapist – Functional Independence Review" form to clearly identify the need for the therapist to consider whether the client's fire risks have been assessed, and whether there are fire safety related issues that need to be further assessed or followed up
- Identify clients who may be at increased risk due to impaired mobility and behavioural factors such as smoking, and promote or assist with strategies to reduce their risk;
- Identify clients who are unable to maintain a working smoke alarm without assistance and ensure that service providers assist with testing;
- Ensure that service providers develop and discuss evacuation and emergency plans with clients who experience impaired mobility.

Recommendation 4

I recommend the TAC review its service delivery model for its clients to give consideration to use of case managers.

Recommendation 5

I recommend the TAC include in their service agreements with all brokered in-home service providers, that their workers will have undertaken education in relation to the Basic Home Fire Safety Training Materials. Also, that the service agreements with all brokered services providers include the

requirement to use the training materials in the induction of new workers and skills maintenance of existing workers.

Recommendation 6

I recommend that the TAC require all of its service providers to provide Basic Fire Safety Training to their workers. This could be done by amending the relevant service provider contracts to include a requirement that workers have undergone such training.

Recommendation 7

I recommend that the DHS include fire risk assessment as part of its processes in planning and building new homes, particularly when homes are custom built for persons with impaired mobility.

Recommendation 8

In addition to the DHS procedure that allows a tenant to request modifications to properties it owns (i.e. Application for Special Accommodation Requirements),¹²⁷ I recommend that the DHS and the TAC collaboratively review its processes to ensure all TAC clients in the DHS accommodation with paraplegia and quadriplegia are identified. Once identified, the TAC ensure individualised risk assessments are conducted in relation to fire safety equipment needs and consider installing additional smoke alarms, sprinkler systems, automated doors and/or monitored alarm systems linked to smoke alarms in appropriate cases. The TAC notifies the DHS of its assessment.

Recommendation 9

I recommend that the TAC and the MFB develop a protocol between the agencies to ensure there is ongoing collaboration with respect to fire safety for the TAC's clients.

Pursuant to section 73(1) of the Coroners Act 2008, I order that this Finding be published on the internet.

¹²⁷ Inquest brief, page 990.

**REPORT ON THE
PROCESSES TO SELECT
NEW PERSONAL PROTECTIVE
CLOTHING FOR VICTORIAN
FIREFIGHTERS**

JUDGE GORDON LEWIS A.M.

28 FEBRUARY 2008

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1. SUMMARY OF OBSERVATIONS AND RECOMMENDATIONS

The period 2000 – 2007 represents a sorry history of lack of clearly defined purpose in the first place, lack of a sense of haste, lack of communication, lack of cooperation between all parties, a policy of obstruction by the United Firefighters Union (UFU) until it achieved what it wanted, lack of intervention on the part of the firefighting bodies at Board level, ongoing industrial action, and endemic intransigency between the parties when, as was ultimately demonstrated, mutual concessions might well have saved years of haggling.

The development of the new Australian Standard AS4967 highlighted that advances in technology had overtaken the PPC in use. Both the Country Fire Authority (CFA) and the Metropolitan Fire Brigade (MFB) had the opportunity to develop and secure replacement PPC and proceeded to do so through a joint tender project.

Initial estimates in May 2002 were that the contract with the successful tenderer would be in place by May 2003. While that estimate was ambitious considering interstate experience, at that time it would have been reasonable to expect the contract to be in place early in 2004 with the cooperation of all parties.

From the outset, the UFU took a product based approach to the specification of the requirements while the agencies took a performance based approach. The issue of a performance based specification compared to a product based specification was never fully resolved. The failure to reach agreement on the specification was an underlying cause of delay.

From the evidence I have seen, it appears that lack of proper project planning and clearly defined milestones, combined with inadequate management of the multiplicity of committees and the ongoing debate over specifications, meant that any original deadlines for the project could not be met.

For each agency, the negotiation of a new Enterprise Bargaining Agreement (EBA) was accompanied by industrial action that impacted on the PPC tendering process. The Department of Justice (DoJ) intervened in the EBA negotiations between the UFU and the CFA and sought solution of the impasse to the tendering process through the "Way Forward" document in mid 2006.

Firefighters and ultimately the public have been poorly served by the inability of the UFU, the MFB and the CFA to work cooperatively to deliver new PPC for firefighters in a timely fashion. Project difficulties were symptomatic of issues in the relationships between the CFA, the MFB, the UFU and Volunteer organisations.

In an endeavour to avoid the chaos and misdirection of the past seven years in respect of the implementation of new Personal Protective Clothing (PPC) I recommend the following:

1.1 *Specifications*

I recommend the creation of a Standing Technology Committee to represent all firefighters in Victoria, which will convene on a regular basis and monitor all developments in the fabric and design affecting PPC. I contemplate that it will assume the on-going role of considering any developments which may result in

improvement in the design and material components of PPC. On determining that there is either material or an improved design which is superior to existing firefighting uniforms, I contemplate that the Standing Committee, through the bodies represented upon it, will seek the approval of all firefighting bodies in Victoria to implement those improvements, where appropriate. In making those assessments, it should be recognised that technological change, which is manifestly beneficial for one type of firefighting, may be inappropriate for another.

The Standing Technology Committee should, at the outset, make a decision whether an attempt is being made to implement the one PPC for all firefighters or whether it should acknowledge that the needs of the CFA, the Volunteer organisations and the MFB, are at variance.

Action by the Standing Committee should not be dependent upon any change in relevant standards or emerge from a particular crisis. Rather its task should be that of an ongoing assessment, with a view to the phased introduction of improved clothing and equipment, should that be the recommendation of the Standing Committee.

For the purpose of its proper function, the Standing Technology Committee should liaise closely with firefighting bodies in all other states and, if need be, other countries.

To avoid the past morass of indecision and obstruction, the Standing Committee should be structured to ensure that a recommendation supported by a majority of its members, can be made to the appropriate firefighting agency or the Minister himself. Past history suggests that there should be an independent Chairman with a casting vote. The Standing Committee should be free to utilise the services of acknowledged experts on PPC, if it is deemed appropriate.

1.2 Project Management

A large joint procurement project of this type must be properly planned and managed. It must be supported by a business case specifying the costs and benefits expected to be realised by the joint project and a risk analysis addressing the major risks, including stakeholder management.

Project planning must include clear definition of the purpose and objectives of the joint project, its outcomes and the timelines for delivery. The procurement policies and guidelines of the Victorian Government Purchasing Board and Victorian Government Gateway Review process are useful references.

The project should be managed by a dedicated team. Team members who are involved in the evaluation process, should be freed from operational duties for the duration of the evaluation period.

Project governance arrangements must be in place at the commencement of the project, including the establishment of an overarching steering committee, a clear definition of the roles and responsibilities of all participants including senior management, and probity and conflict of interest policy and procedures.

Consideration should be given to testing the market and the interest of suppliers through an Expression of Interest process, preparatory to a request for tender.

The specification of requirements should be based on research and knowledge of relevant technological developments and available products, including interstate and overseas developments and experience.

A probity adviser should be appointed for the joint tendering process.

Independent reviews should be commissioned by senior management at the key decision points in the project, to ensure that the project is proceeding according to plan and should continue. Such reviews should identify any matters that need to be addressed before approval is given to proceed to the next stage.

1.3 EBA

The first paragraph of Clause 47 "Uniforms and Equipment" in the CFA Enterprise Bargaining Agreement (CFA EBA) requires the CFA and the UFU to reach agreement on the clothing and equipment to be worn and used by employees. The third paragraph of Clause 47 requires the agreement of the CFA and the UFU on the specifications of replacement Personal Protective Equipment and Station Wear and plan of distribution of clothing.¹

I recommend that in any future EBA entered into between the CFA and the UFU, in the corresponding clause the first paragraph should be amended to read

"The employer shall supply each employee and be responsible for the cost of replacing, repairing and/or cleaning the articles of clothing and/or equipment which the employer decides must be worn and/or used by the employee, after consultation with the Union."

There is no need to amend the second paragraph or to retain the third paragraph.

I recommend that similar changes be made in any further EBA entered into between the MFESB and the UFU after the present Workplace Relations Agreement expires on 19 April 2009.

In making those recommendations, I am of the view that in relation to negotiations between the CFA and the UFU, the UFU has consistently taken advantage of the wording of the clause as it presently stands, to achieve, in effect, a veto of any attempt by the CFA to improve clothing and equipment issued to employees, with which the UFU does not agree.

The Government and the CFA have recognised the value and importance of the role that volunteers play through the Volunteer Charter, signed in 2001.² Under the terms of the Volunteer Charter, the CFA must ensure that the views, concerns and opinions of volunteers are fully considered before adopting any new or changed policies, procedures or approaches which will impact on them, as CFA volunteers.

In respect of any future EBA reached between the CFA and the UFU, it should be made clear that the CFA is committed to consult with volunteer firefighters in Victoria, who shall be entitled to participate in any discussions directed at all matters that affect them, including the improvement of clothing and equipment issued to firefighters.

¹ Appendix 12 – CFA and MFB EBA Extracts

² Appendix 15 – Volunteer Charter

In recommending a change in the wording of the relevant paragraphs in the two EBAs that I have referred to, I express my confidence in the relevant provisions in legislation, including the *Workplace Relations Act 1996* (Cmwth) and the *Victorian Occupational Health and Safety Act 2004*, which would take over in the event of the UFU considering that either the CFA or the MFB is behaving unreasonably, pursuant to those paragraphs.

The CFA EBA has a number of other clauses, which require Union agreement before the implementation of change, for example Clause 52 Training Instructors/Training and Clause 12.3 Code of Conduct. My comments above are equally applicable to those clauses.

1.4 Stakeholder Relations

Firefighters and ultimately the public have been poorly served by the inability of the UFU, the MFB and the CFA to work cooperatively to deliver new PPC for firefighters in a timely fashion. Project difficulties were symptomatic of issues in the relationships between the CFA, MFB, UFU and Volunteer organisations.

I found only limited evidence of senior management actively sponsoring and guiding the ensemble project on an ongoing basis. Specific project problems did not seem to be addressed in a timely fashion nor solutions found to enable the project to proceed.

The relationship between the UFU and the agencies was adversarial and characterised by personal conflict; intransigence; and a lack of trust, shared commitment or respect. The issues raised contributed to the delay in the tendering process.

While it was understandable that the Department of Justice (DoJ) would have strong regard for the statutory independence of the agencies concerned, its intervention was demanded long before its involvement in the preparation of the document known as the "Way Forward".

The MFB, CFA, UFU and the Volunteer organisations must immediately address the identified issues in order to rebuild an effective relationship in the interests of the firefighters and the general public.

1.5 The Future

Whatever is important in this Report, it is not the attribution of blame or responsibility for the past seven years. Rather it is what can be learnt from the mistakes that have been made in the past, so that as new material and improved specifications become available, they can be quickly introduced for the mutual benefit of firefighters themselves and the general public as a whole.

2. GLOSSARY OF TERMS

Abbreviation	Term
ACTU	Australian Council of Trade Unions
AFAC	Australasian Fire Authorities Council
AIRC	Australian Industrial Relations Commission
ARUP	ARUP Risk Consultants
AS	Australian Standard
CFA	Country Fire Authority
CPSU	Community and Public Sector Union
CTE	Can't Tear 'Em Pty Ltd
Deloitte	Deloitte Touche Tohmatsu
DoJ	Department of Justice
EBA	Enterprise Bargaining Agreement
MFB EBA	2005 Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement
CFA EBA	2002 Country Fire Authority/United Firefighters Union of Australia Operational Staff Agreement
EN	EN Standard
ERC	Expenditure Review Committee
MFESB	Metropolitan Fire & Emergency Services Board
MFB	Metropolitan Fire Brigade
Minister	Minister for Police & Emergency Services
NSCA	National Safety Council of Australia
PIN	Provisional Improvement Notice
PPC	Personal Protective Clothing
PPE	Personal Protective Equipment
OHS	Occupational Health & Safety
QIS	Quality Industrial Services
RFT	Request for Tender
SAMFS	South Australian Metropolitan Fire Service
S&H	Stewart & Heaton Clothing Co Pty Ltd
TGMS	Total Garment Manufacturing Solution
UFUA	United Firefighters Union of Australia
UFU	United Firefighters Union – Victoria Branch
UOW	University of Wollongong
UK	United Kingdom
USA	United States of America
VUFBA	Victorian Urban Fire Brigades Association
VFBV	Volunteer Fire Brigades Victoria
VRFBFA	Victorian Rural Fire Brigades Association

Note:

1. Throughout this report the term "PPC" has been used to indicate the structural ensemble being procured by the CFA and the MFB, unless quoting directly where the term PPE may be used.
2. The acronym "MFB" has been used to indicate events involving the Metropolitan Fire Brigade. Where there was an event involving the Metropolitan Fire & Emergency Services Board the acronym "MFESB" has been used.

3. REPORT OBJECTIVES AND SCOPE

3.1 *The Terms of Reference*

On 25 October 2007 The Honourable Bob Cameron MP, Minister for Police & Emergency Services, requested that I investigate the process undertaken by the Country Fire Authority and the Metropolitan Fire & Emergency Services Board to identify Personal Protective Clothing (PPC) and determine reasons for delay in the process.

The Terms of Reference are:

1. Investigate and report on the procedures and processes undertaken since 2002 to identify and procure Personal Protective Clothing for fighting structural fires – the structural ensemble.
2. Identify the causes for delay in timely decisions/agreements about the type of equipment to be procured.
3. Determine the key obstacles in the decision making processes that prevented a more timely decision on the structural ensemble.
4. Make recommendations that would resolve the procedural obstacles that have been identified and that would prevent such obstacles from occurring in future equipment purchases.³

3.2 *Submission and Consultation Process*

On 19 November 2007, I sent a letter to parties involved in the negotiation for structural ensemble, inviting them to provide a submission to me, and advising that I would meet with all parties making submissions. Organisations invited were:

- Country Fire Authority (CFA)
- Metropolitan Fire & Emergency Services Board (MFESB)
- United Firefighters Union of Australia - Victoria Branch (UFU)
- Volunteer Fire Brigades Victoria (VFBV)
- Victorian Rural Fire Brigades (VRFB)
- Victorian Urban Fire Brigade (VUFB).

Following receipt of these submissions, hearings were conducted on 10, 11 and 13 December 2007 at the County Court, Melbourne:

Monday 10 December 2007	10.00am	CFA
Tuesday 11 December 2007	10.00am	MFESB
Thursday 13 December 2007	10.00am	combined Volunteer Brigades. ⁴

The United Firefighters Union advised it would not be participating in the inquiry.⁵

In January 2008, the MFESB and the CFA provided further written clarification of issues raised in their submissions.⁶ WorkSafe also provided a submission in response to Section 3.4 of the MFESB Submission.⁷

³ Appendix 1 – Letter to Judge G. Lewis from the Hon. Bob Cameron

⁴ Appendix 2, 3 and 4 – Written Submissions and Appendix 6, 7 and 8 Hearing Transcripts

⁵ Appendix 9 – Letter Advising of Non Participation by UFU

⁶ Appendix 10 and Appendix 11 – Letters of Clarification

⁷ Appendix 5 – WorkSafe Submission

3.3 The Parties Involved

The Country Fire Authority

The Country Fire Authority (CFA) is a statutory body corporate established under Section 6 the *Country Fire Authority Act 1958*, with all the powers necessary to carry out its functions of preventing and suppressing fire in the country area of Victoria. It is subject to the general direction and control of the Minister for Police and Emergency Services in the performance of its functions and the exercise of its powers.

Following serious fires across Victoria in 1939, a Royal Commission recommended a single firefighting organisation for country Victoria. The devastation of the 1944 fires emphasised the urgency of better coordination of country fire services. Legislation was passed to establish a country fire authority and the CFA commenced operation on 2 April 1945.

The CFA is one of the world's largest volunteer-based emergency services with around 60,000 members of whom approximately 59,500 are Volunteers and 570 career firefighters.

Situated in Victoria, there are 2.5 million people and 150,182 square kilometres of land in the CFA area. This area includes more than 980,000 homes, and covers all of rural Victoria, and the provincial cities and towns (except State forests and National Parks). The area also includes more than a million residents in outer Melbourne suburbs such as Frankston and Dandenong, and key growth suburbs such as Cranbourne, Melton and Werribee.

Metropolitan Fire and Emergency Services Board

The Metropolitan Fire and Emergency Services Board (MFESB) is a statutory body corporate established under Section 6 of the *Metropolitan Fire Brigades Act 1958* with all the powers necessary to carry out its functions. Its functions are to provide for fire suppression and fire prevention services and emergency prevention and response services in the metropolitan fire district. It is subject to the general direction and control of the Minister for Police and Emergency Services in the performance of its functions and the exercise of its powers.

The area served by the Metropolitan Fire Brigade (MFB) covers more than 1,000 square kilometres incorporating Melbourne's central business district, its inner and middle suburbs and part of Port Phillip Bay.

The MFB is a career based fire and emergency services organisation with over 1,600 operational staff providing services from 47 fire stations. All MFB firefighters are permanent employees (no volunteers).

United Firefighters Union

The United Firefighters Union of Australia (UFUA) was originally registered in 1964 by the Deputy Industrial Registrar of the Conciliation and Arbitration Commission. On August 1 1990, the UFUA became an official national union representing more than 11,000 Australian firefighters. The inaugural meeting of the UFUA was held in the same month and officially opened by the then Premier of Tasmania, Michael Field.

In Victoria, the United Firefighters Union of Australia – Victoria Branch (UFU) provides industrial representation for approximately 1,900 members, of which 1,450 are MFB and 450 are CFA salaried firefighters. Given that around 12,500 volunteers are trained and equipped for structural firefighting, UFU members make up 15% of the firefighting force in Victoria affected by the outcomes of the structural PPC deliberations.

Volunteer Organisations

In 1928, a meeting of representatives of bush fire brigades from across the State resulted in the establishment of the Bush Fire Brigades Association. With the enactment of the *Victorian Country Fire Authority Act 1944*, the name of the Association was changed to the Victorian Rural Fire Brigades Association (VRFBA). The VRFBA represents the welfare of rural volunteers. The VRFBA is the largest and most representative organisation of its type in Australia. Two members of the association are represented on the CFA Board.

This Act also created the Victorian Urban Fire Brigades' Association (VUFBA), a sister organisation to the VRFBA. The VUFBA is charged with the responsibility of representing Victoria's urban volunteer firefighters in their dealings with the CFA in regard to welfare and efficiency. Two members from the VUFBA are represented on the CFA Board.

The Volunteer Fire Brigades Victoria (VFBV) is an umbrella body for the VRFBA and the VUFBA, and provides a united voice for CFA volunteers, advocating on their behalf to CFA and other key stakeholders. The VFBV Board drives policy development based on volunteer input and is involved in management of issues that are of central importance to all CFA volunteers. There are eight members of the VFBV Board comprising the Presidents of both the Urban and Rural Associations and six other board members: three are selected from brigades affiliated with the VRFBA and three from brigades affiliated with the VUFBA. Day to day issues are managed by a Chief Executive Officer and policy and issues are debated and formulated through specialist committees.

Volunteer Charter

The individual and collective interests and needs of members of the CFA and their Associations who operate under the *Country Fire Authority Act 1958* are covered by the Volunteer Charter, signed in December 2001. The Charter is a statement of principle that applies to the relationship between the CFA, the State of Victoria, and the CFA's Volunteers. It ensures that the State of Victoria and the Authority will commit to consultation with volunteers about all matters which might reasonably be expected to affect them.

3.4 Interstate and International Experiences

A number of fire brigades throughout Australia and New Zealand were contacted during the preparation of this report to provide background information on similar procurement processes.

NSW Fire Brigades

The process for the tendering of the large-scale replacement structural Personal Protective Equipment for the NSW Fire Brigades (the Brigade) started in 1998 and took 12 months from the decision to explore alternative products to identification of a suitable ensemble with the best overall performance. This process involved extensive testing of the effects of metabolic heat on firefighters when wearing different combinations of PPE and was conducted at Wollongong University. The test criteria were decided by the working group, which included union representation. The final garment selected was manufactured by the contractor in place at the time. The contract was re-tendered in 2002, specifying the design which was favoured on the basis of performance, as a result of the study done by Wollongong University. That tender, which included every item of uniform, not just PPE, took about 6 months to conclude. The result was that a new contractor was appointed.

Between January and July 2007, the Brigade again reviewed all of its specifications and proceeded to go to tender again, as the existing contract was about to expire. The tender was re-awarded in December 2007 and will commence in July 2008.

As the Brigade was aware of new developments in the overall performance of fabrics, and wished to see how they compared to the fabrics that it is using today, the Brigade is reviewing the performance of the PPE ensemble throughout 2008, in the same manner that it did in 1998. Dependent on the results of that regime of performance testing, a decision will be made if a change is required. If a change is required, then that change will take place with its existing contractor.

Tasmania Fire Service

For the last eight or nine years, the Tasmania Fire Service (TFS) has used the NSW contract for its structural PPE. About 18 months ago, it formed a working party to look at the next generation of clothing with an expected completion time of 12 months. TFS tested four combinations, Nomex and PBI Gold both with and without a moisture barrier, but the UFU advised that PBI Gold with a moisture barrier was the only acceptable combination and as a result, the testing process halted. Following agreement by the UFU to test both the Nomex and PBI Gold combinations, the working party resumed in early December 2007 and is now expected to complete its work in May 2008 (two years after commencement). TFS will then go to tender or use another State's contract.

South Australian Metropolitan Fire Service

The PPE replacement project commenced in 2003 following a risk assessment by the South Australian Metropolitan Fire Service (SAMFS). The project working group was managed by the South Australian Fire and Emergency Service Commission with representatives from the SAMFS, Country Fire Service, Attorney-General's Department and two members of the UFU Executive. Following expressions of interest being received from suppliers, registrants were then briefed on the broad requirements based on the EN Standard (the Australian Standard AS4967 was not

used, as it was an interim standard at that time). The registrants were asked to provide samples and three suppliers were selected to proceed to the request for tender stage. PPE garments prepared to specifications were purchased from the suppliers and tested. Lion Apparel was the successful tenderer and PBI Gold with Airlock moisture barrier was the chosen ensemble. The project took around 16 months from March 2003 to the signing of the contract in mid July 2004 and the roll out of garments commenced in May 2005.

Fire & Emergency Services Authority of Western Australia

Following a period of six to eight months spent specifying requirements, the Fire & Emergency Services Authority (FESA) commenced trialling of structural PPE garments in June/July 2007 in Nomex viscose material. The trials are due for completion in February/March 2008, allowing for the fire season. The garments will be assessed and FESA will go to the market for the supply of PPE.

New Zealand Fire Service

The New Zealand Fire Service (NZFS) spent two years on the procurement process for its current PPE. It formed a committee including union and volunteer representatives who developed the user requirements based on international standards. NZFS specified PBI Gold for the outer shell as PBI Gold had been supplied under the previous contract. Previously Nomex had been used for 20 years with no significant issues. Once the user requirements were completed, the project was handed to the procurement group for tendering. Tenderers were assessed on their commercial ability to fulfil the contract and some were eliminated at this point. The acceptable tenderers manufactured and sized trial garments, which were then evaluated. The trial scores were pooled and following the recommendation of the trialists, Lion Apparel was selected as the supplier. The current contract is for a five year term plus two one year options and both options have been exercised. The NZFS has begun to develop user requirements and will tender for PPE again next year.

4. THE TENDERING AND EVALUATION PROCESS

4.1 Background to Tendering Process

What initially appeared to be a complex, challenging, but relatively straightforward tendering process, ultimately proved to be anything but that.

The MFB had used its current PPC for the past 20 years, during which time it monitored performance to ensure compliance with standards and quality procedures. The CFA and the MFB firefighters sustained few burn injuries during firefighting operations, with MFB data showing only 51 reported burn injuries to its firefighters between mid 1993 and mid 2006.

Significant technological advances in both fabrics and design had occurred since the issue of their current PPC. A decision was made by the CFA and the MFB to investigate whether technical advances might further improve safety and effectiveness of firefighters.

In 2001 the existing MFB uniform supply contract was coming to the end of its term and this provided impetus for the MFB to issue the Request for Tender (RFT).

On 20 March 2001, a draft Australian Standard (AS4967) was issued by the Joint Standards Australia/New Zealand Committee. This interim Standard specified the minimum requirements and test methods for assessing structural firefighting protective clothing where there was a risk of heat and/or flame. The Standard covered the general clothing design, minimum performance levels of materials used and the methods of testing to determine the performance levels. AS4967 included an edge ignition test requiring that "the mean value of the afterflame time shall be $\leq 2s$ and the mean value of the afterglow time shall be $\leq 2s$ ".

The PPC then in use by the CFA and the MFB did not comply with the requirements of this new Australian Standard. Following the change to the Standard, the CFA commenced its PPC replacement project.

The MFB and the CFA have Enterprise Bargaining Agreements (EBA) with the UFU. Clause 47 of the CFA EBA and Clause 31 of the MFB EBA, which applied during the majority of the PPC procurement timeframe, contain similar wording on the clothing to be worn and used by employees. Additionally, in the CFA EBA, Clause 47 required that replacement Personal Protective Equipment and Station Wear shall be as agreed between the CFA and the UFU. Such agreement relates to the specifications and distribution of clothing.

4.2 Commencement of the Request for Tender Process 2000 – August 2002

The MFB commenced its new structural PPC procurement projects and PPC specifications were first developed in 2000. According to an MFESB Report dated March 2006, agreement on performance specifications was reached on 13 December 2000 between the MFB and the UFU after inclusion of UFU clauses.

In June 2001, the UFU provided specifications to the CFA for its consideration. The CFA PPC Working Party met in September 2001 and agreed to conduct a risk assessment to facilitate the introduction of a new structural clothing ensemble.

The CFA had to take into account specific design requirements involved in the use of PPC by volunteers. The PPC used by volunteers was likely to have increased exposure to UV due to the uniforms often not being kept in stations.

The MFB required supply of PPC, as well as dress tunics, shirts and trousers. The CFA's focus was on operational firefighting clothing including protective coats and protective trousers, shirts and trousers for station wear, and polo shirts.

The MFB was seeking to continue with a Total Garment Management System (TGMS) similar to that already in place with the current supplier. The MFB proposed a single contract with a supplier or consortium of suppliers to supply, manufacture, warehouse and distribute the required garments. The CFA required only the supply and delivery of replacement PPC and did not seek a TGMS.

From the outset, the UFU expressed concerns, both through its representatives on the MFB (TGMS) project, and formally as the UFU, about the TGMS approach. The UFU alleged that the TGMS approach would give the current supplier an unfair advantage, and that replacement PPC would be unacceptably delayed by the size of the evaluation task. The UFU also alleged that some suppliers would be unwilling to tender because of the requirements for sundry items and non PPC items. The UFU proposed that the structural PPC be tendered for separately. While the MFB Request For Tender (RFT) was modified in response to the UFU's concerns, to allow for tenders for the structural PPC alone or as part of TGMS tender, those concerns remained. The UFU reminded the MFB that the EBA and the OH&S agreement contained clauses that required UFU agreement to any new PPC.

In October 2001, Arup Risk Consultants alerted the MFB that its supply department and Uniform Committee appeared to disagree about what was specified in the RFT. ARUP recommended that the supply department review the RFT, in particular the associated recommendation on each item of PPC, and provide feedback as to those items forming part of the RFT and what might be used instead.

Both the MFB and the CFA specifications provided for a layered approach to the construction of structural PPC, which the UFU did not support. As late as 29 May 2002 the UFU advised that it refused to trial the layer approach to protection included in specifications for the PPC.

The CFA and the MFB worked separately until February 2002 when the CFA Board and the MFB agreed to issue a joint RFT. A joint tender was seen to be a means of achieving economies of scale and scope, and also in assisting to acquire Government funding. Within the joint tender, the MFB specification required that

PPC be certified to AS4967 while the CFA specification included additional criteria over and above AS4967.

In May 2002, the CFA and the MFB advised DoJ of the decision to develop the joint RFT to procure new PPC, with replacement ensembles to be phased in over five years.

4.3 The Tendering Process

June 2002 – December 2007

The RFT was issued on 8 June 2002 and closed on 7 August 2002. A number of expressions of interest were received but only four tenders.

The Joint Tender Panel, with representatives from the MFB, the CFA and the UFU, oversaw the evaluation tendering processes up to the time of shortlisting the two preferred tenderers. It formed a PPC Working Party to review submitted garments and develop draft design specifications.

The MFB had an original PPE/Uniform committee with MFB and UFU representation, which had advised on PPC design specifications and made recommendations to the Design Development Advisory Committee, which submitted recommendations for approval to the MFB Executive Management Team.

The MFB Tender Evaluation panel, which included representation from the UFU, was responsible for the evaluation of the PPC provided by the shortlisted tenderers.

The CFA had two committees with a role in the procurement of the new structural ensemble – the Personal Protective Clothing/Protective Equipment Committee (PPC/PPE Committee) and the Structural Apparel/Ensemble Consultative Committee (Ensemble Committee). The PPC/PPE Committee had been consulted in the development of the CFA structural PPC performance specifications and the proposed RFT. It provided recommendations to the Director of Operations/Chief Officer and was responsible for the development and ongoing review of PPC risk assessment. This committee has never ratified its Terms of Reference.

The CFA Ensemble Committee was established in June 2002 as the committee with overriding responsibility to progress issues relating to the development of the new PPC under the tendering process. This committee also included representatives from CFA management, UFU, and Volunteer organisations.

Appendix 13 "*Chronology of Events*" provides a graphical illustration of the key events in the procurement process covered in this section. This chronology is based on information received from the participants in the Inquiry.⁸

2002

Given the difference in specifications required by the two organisations, following the receipt of the tenders, the MFB and CFA conducted separate technical evaluations of the PPC received, as part of the four responses.

There were four types of tests planned by the CFA and the MFB for the evaluation of PPC:

- Laundering – to simulate the condition of garments in every day use
- University of Wollongong (UOW) – Metabolic stress testing -Trials conducted in a controlled climate chamber with a number of personnel performing simulated activities. This tested for physiological limitations, and determined which ensemble was the most comfortable and practical

⁸ Appendix 13 – Chronology of Events

- Fiskville – intensive trials in structural fire situations where operational staff reported on performance against specific criteria
- In field – firefighters used the garments over an extended period reporting against criteria at regular intervals.

RALPH (Research Aim Longer Protection Against Heat) testing, conducted in the UK, involved heat sensing mannequin testing where garments were subjected to testing at extreme temperatures. Although not originally planned as part of the testing, this was included at a later point at the instigation of the UFU.

In July 2002, the UFU raised its concerns about the perceived lack of consultation with the MFB Uniform/PPE Committee. Its grievances included that the tender had been developed by the MFB supply department and not the Uniform/PPE Committee, and that changes negotiated with the supply department had not been included. The UFU asserted that the Uniform Committee's function was to evaluate PPC and provide recommendations. It also asserted that specialist PPC providers were being cut out of the process by asking for a TGMS and that small providers would be disadvantaged in applying.

Suppliers submitted materials to the MFB supply department for evaluation as part of normal business practice. During the RFT process, the MFB placed an embargo on suppliers submitting material to the MFB outside the RFT process. Discussions between the MFB, the UFU and the ACTU led the MFB to lift the embargo in September 2002, allowing suppliers to resume the previous practice of submitting products to the supply department. In October 2002, the UFU wrote to all suppliers advising that the MFB had agreed to modify the conditions of its RFT to allow all suppliers of PPC to submit their products for evaluation by the Uniform Committee. The MFB refuted these comments, noting that it had not agreed to modify the conditions of its RFT. The MFB advised that the sourcing of products in this manner conflicted with the Victorian Government Purchasing Guidelines. At the end of October 2002, the MFB wrote to the UFU clarifying the effect of the lifting of the embargo and advising that products could be submitted by non-tenderer suppliers for normal evaluation by the Research and Development Department. Those products would not be included in the tendering process, which had closed on 7 August 2002.

As early as August 2002, when the initial joint tender evaluation panel meeting was held, the UFU had directed its representatives not to attend and the evaluation process commenced in their absence. The UFU did not participate in these meetings until January 2003.

In August 2002, the UFU also expressed concerns over what it perceived to be a lack of UFU representation on the CFA PPC Committee, which had been responsible for the development of the CFA structural PPC specifications.

The CFA Ensemble Committee met for the first time early in October 2002. The UFU refused to participate due to the inclusion of Volunteer representatives in the consultative process. The UFU also indicated the CFA RFT specifications were different to those provided by the UFU in 2000. Variation of the specifications the UFU had provided to the CFA would be considered only if the CFA could provide valid data and reasons to justify the changes. Given that there were no items of PPC that had been agreed with the UFU, the UFU alleged that the CFA was in breach of both the EBA and the OHS agreement.

A probity briefing was provided to Committee members at this first Ensemble Committee meeting. As UFU members had not attended the meeting and so had not

received the probity briefing, they were requested not to attend further meetings until such time as they had completed the necessary probity requirements. By June 2003, UFU representatives had completed the required probity briefing. They were then able to attend their first Ensemble Committee meeting in June 2003, almost 8 months after the Committee first commenced meeting. However, their concerns regarding Volunteer representatives on the Committee and the differing specifications were not resolved.

In October 2002, Deloitte were engaged to conduct a probity assessment of the PPC tendering process and delivered a report in December 2002, which contained a number of findings and recommendations for implementation. Following that report the MFB referred another matter to Deloitte for investigation. An article had appeared in *"The Australian Firefighter"* providing information on the tender assessments, written by a UFU member of the Tender Evaluation Panel. An examination by Deloitte resulted in a finding that there was no significant probity breach at that time.

In October 2002, the MFB ordered sample PPC in line with its specifications and sent these to the UOW for testing in December. The UOW testing was directed at determining whether there were any ensemble differences in:

- The storage of metabolically produced heat
- Physiological strain during the performance of standardised physical tasks
- Evaporative heat losses
- Indices of psychophysical strain.

Seven PPC configurations were assessed, and both the experimental subjects and the researchers were blind to the thermal protective qualities or layering of each ensemble. The PPC included Nomex Delta and PBI Gold outer shells. Results were received in May 2003, a month later than originally estimated. The delay was caused by difficulties in testing including:

- Manufacture of garments was more time consuming than expected
- The UOW had difficulty locating participants in certain age groups for the testing
- Some garments were ill fitting due to withdrawal of participants for whom the garments had originally been measured.

The UFU lodged a notification of dispute with the AIRC in November 2002 regarding what it saw as unsatisfactory consultative procedures by the CFA in relation to the selection of the PPC.

Both the MFB and the CFA began laundering tests in November 2002 through Quality Industrial Services. Difficulty in interpreting the manufacturers' cleaning requirements for the garments led to laundering testing issues.

2003

The AIRC hearings of proceedings by the UFU against the CFA commenced in January 2003 and continued until the end of February 2003, ultimately not being settled as the AIRC found the matter was not conciliable. Another dispute concerning the application of Clause 47 to the process of consultation was heard in March 2003 and also found not to be conciliable.

In January 2003, following resolution of the MFB EBA negotiations, the UFU began to participate in the Tender Evaluation Panel.

In February 2003, all members of the MFB Tender Evaluation Panel were given a probity briefing and signed conflict of interest declarations. The panel commenced the technical assessment of the tenders, which was completed by August 2003. In August 2003, following the evaluation of results from site visits and the conclusion of assessment of the tenders against the technical, commercial and financial criteria, both the CFA and the MFB finalised a short list of two successful tenderers who were advised of the success of their tenders. The unsuccessful tenderers were excluded on commercial bases including total project cost and a lack of infrastructure to support a TGMS.

In March 2003, a working group of the Joint Standards Australia/Standards New Zealand Committee was established to consider changes required to AS4967.

By May 2003, the final UOW Report on "*Heat Storage in Firefighting Personal Protective Ensembles*" had been received by both the CFA and the MFB. The report found two of the seven configurations to be of superior performance (both Nomex outer shell).

The UFU did not attend the CFA Ensemble Committee meeting, held in May, that discussed the tests and their results in the context of developing final CFA samples. The UFU representatives were requested not to attend due to their not completing the required probity briefing.

In July 2003, the CFA Structural PPC Consultative Committee was advised the MFB were looking at five potential ensembles, all with a moisture barrier and that it had assessed the trial garments and was formulating a draft design specification to provide to manufacturers. The CFA sent its design specifications to manufacturers.

The two short listed manufacturers were asked in November 2003, by both the CFA and the MFB, to test four different samples for compliance with the tender specification. These samples were:

- Option A – Nomex Delta C with no interior moisture lining
- Option B – Nomex Delta C with interior moisture lining
- Option C – PBI Gold outer shell
- Option D – alpine ensemble using Nomex Delta C.

Both responded that Option C (PBI Gold outer shell) did not comply as it failed the edge ignition test required by AS4967.

The CFA Structural Ensemble Field Trial Working Party agreed in November 2003 that it would remove the PBI Gold outer shell ensemble (Option C) from trials. The UFU was unable to attend this meeting. It had requested postponement due to AIRC proceedings regarding election of an OH&S representative. Its request had been denied due to concerns about delays in trial ensemble production and the inability of other attendees to reschedule. A further CFA Ensemble Committee Working Party was held on 3 December 2003 at Fiskville. That meeting unanimously confirmed the earlier decision to omit Option C from the trials. The UFU were also unable to attend this meeting. The UFU lodged a grievance in December 2003 in relation to the proposed trial, noting the UFU representative had not been able to attend the December meeting and that it believed PBI Gold (Option C) should be included in the trial.

The MFB Uniform Committee agreed on Option B (Nomex Delta C with interior moisture lining) with design modifications for its field trials.

Standards Australia met in December 2003 to discuss the removal of the afterglow requirements of the edge ignition test from AS4967. The removal of this test would result in PBI Gold meeting the standard.

An email from AFAC in December 2003 to the MFB advised there was an error in AS4967 due to a "cut and paste" editing issue. As a result, the afterglow component would need to be removed. The Standard was due to be revised in April 2004.

In November 2003, a year after the laundry testing began, results were received. Continuing into 2004 there was conflict between the UFU and the MFB regarding the laundering testing process.

2004

By January 2004, the CFA had tested the Option A and Option B ensembles at Fiskville. These were both Nomex Delta C outer shells using a Sontara inner thermal liner, one with a moisture barrier and one without. UFU members did not participate in the trials due to their objection to the elimination of the PBI Gold option. The CFA received a report from the CSIRO confirming that PBI Gold did not comply with two supplementary tests (colourfastness and high visibility).

In January 2004, the MFB advised the UFU that PBI Gold could only be evaluated by the MFB if it met the Australian Standard. In February 2004, the MFB advised that it understood the Australian Standard would not be modified within the next three months and the testing of PPC would be undertaken at Fiskville from 17-19 March 2004. If, in the future other materials, including PBI Gold, met the Standard, the MFB would evaluate those products and if deemed viable, would alter the contract to include the material.

Summaries of the results of the Fiskville, UOW and CSIRO tests were provided at a CFA Ensemble Committee meeting in March 2004, at which the UFU were present. All data indicated Option B, the Nomex Delta C ensemble with interior moisture lining, was the preferred specification. The UFU sought to have tabled correspondence from AFAC noting that AS4967 was to be amended.

During the first six months of 2004, there was ongoing correspondence between the UFU and the CFA, regarding UFU representation on the Ensemble Committee and lack of agreement on the type of apparel to be trialled. In March 2004, the UFU lodged a dispute with both the MFB and the CFA about the Fiskville trials alleging that the specifications to be used in the trials had been altered by the CFA and MFB without consultation with the UFU. The UFU held the position that each organisation was required, under their respective EBAs, to reach agreement with the UFU on PPC, before equipment could be issued to staff for testing purposes. The UFU demanded that the proposed field trials be aborted or postponed and "the purchasing process/tender proceed no further" until the matter was resolved. Another grievance was lodged in August 2004 with the AIRC, seeking to have PBI Gold included in the evaluation and this grievance was found to be not conciliable.

The MFB commissioned RALPH mannequin testing in February 2004, but their Fiskville tests, scheduled for March 2004, were postponed due to UFU action. It purchased PPC in Option B (Nomex Delta C with interior moisture lining) from both manufacturers.

In April 2004, Standards Australia agreed to an amendment to the Standard, which removed the afterglow requirements from the edge ignition test, to come into effect

on 24 April 2004. The CFA and the MFB were notified of this change by AFAC at the end of June.

RALPH testing was conducted in May 2004 on behalf of both the CFA and the MFB. Although not a requirement of the MFB specification, the MFB agreed to conduct these tests following requests from the UFU. Results were received in June 2004.

In May 2004, the CFA Ensemble Committee met and agreed that changes to AS4967 were irrelevant, as PBI Gold still did not meet their specifications. The MFB agreed in May 2004 that it would include PBI Gold if the Standard was modified to include it. Six months later, in November 2004, the MFB placed orders for a set of PBI Gold and Nomex PPC with both manufacturers for RALPH testing. In November 2004, the MFB Fiskville trials were delayed again so that all sample garments, including PBI Gold, could be tested together.

The CFA sought legal advice, in September 2004, regarding the inclusion of PBI Gold in the tendering process. The advice received was to the effect that the introduction of PBI Gold could expose the CFA to legal action.

The CFA released their "Structural Firefighting Protective Clothing Regional Evaluation - Specification B" document for regional evaluations in June 2004. This specification was Option B (Nomex outer shell) under the RFT.

The UFU identified a moisture barrier (Airlock) which it believed provided superior performance to the moisture barriers proposed to be tested as part of the structural PPC process. The UFU sought the inclusion of this moisture barrier into the testing regime. Again, the MFB and CFA resisted this approach as a change to the RFT.

In September 2004, the UFU and the MFB discussed the UFU concerns about the tendering process and its proposal to incorporate the Airlock moisture barrier used by the South Australian and ACT Fire Services. The UFU was seeking to establish an agreed design and performance specification being PBI Gold with Airlock moisture barrier. The UFU alleged that the MFB specifications had been changed in August 2003. The MFB advised that the tender specifications had not been and would not be altered, and that the nomination of a particular material was inappropriate.

Notes from a September 2004 discussion between the UFU and the MFB indicate that the UFU representative had formed the view that the MFB was driven by cost considerations in the PPC selection, but he was advised that this was not so. The UFU apparently believed that the trial PPC, constructed with Nomex outer shell and poly barrier, did not meet the tender specifications and should have been eliminated. It also believed the position of the moisture barrier, as recommended by the manufacturer, did not meet the specifications.

A further MFB file note in September 2004 indicates that the UFU statement that "the moisture barrier in the Nomex garment does not comply with the specification", was due to an apparent misunderstanding regarding the purpose of Volume 2 of the RFT. The UFU understood that Volume 2 contained the specifications, whereas it was provided for information only, and did not form part of the tender specifications. It records that the location of the moisture barrier did conform to the specifications. A further meeting ensued on this topic between a representative of the UFU and the MFB in October 2004.

In October 2004, the MFB completed its evaluation of shortlisted tenderers.

By November 2004, the MFB had advised the UFU that the option of including Airlock for testing was not possible at that late stage of the tendering process. The UFU believed the RFT contained a wide discretion and recommended the MFB seek legal advice.

2005

Throughout 2005, the UFU and the CFA continued to debate the specifications. In February 2005, the CFA rejected the 2001 UFU specification, as it did not meet existing CFA minimum requirements. In February 2005, the UFU denied there had been agreement with the UFU on the CFA specification. The UFU advised it was willing to meet with the CFA to reach agreement and to use an agreed mediator with expert knowledge, to assist parties to reach agreement.

The UFU alleged that the MFB and CFA had changed their specifications with regard to the moisture barrier lining. There were two issues :

- (1) The location of the moisture barrier in relation to the thermal barrier -
The MFB advised that UOW testing indicated the location of the barrier needed to be closest to the skin, to provide the most breathable performance. The UFU was of the opinion that the thermal barrier should be protected by the moisture barrier. The dispute about the location of the moisture barrier in the PPC continued throughout 2006, despite both the CFA and the MFB stating that the specification had not been changed.
- (2) The number of layers that comprise the thermal barrier -
The UFU was of the opinion that the number of layers in the thermal barrier had changed from two to three. The MFB indicated this was not correct and the number of layers had not changed. The MFB suggested the mistake had come about as a result of a typing error in the CFA draft.

The MFB EBA was being renegotiated at this time. As part of the EBA discussions, the UFU requested agreement to adopt a specification provided by the UFU in December 2004. The PPC was PBI Gold natural gold colour with Gore Airlock moisture/thermal barrier located behind the outer shell.

The UFU issued a bulletin in March 2005 alleging that the fire services were pushing for the cheapest available clothing that offered inadequate protection. The UFU concerns included:

- Poor protection offered by the outer material on the proposed new garment
- Refusal of the MFB to allow the UFU access to garments trialled in the UK
- The fact that technology similar to the type of moisture barrier used in the garment had consistently failed in the USA, SA and QLD
- The location of the moisture barrier made it ineffective against moisture and pathogens.

In March 2005, the UFU wrote to the Minister for Police and Emergency Services requesting an independent investigation into probity and behaviour of the management regarding PPE. It alleged that an internal audit by OH&S representatives in 2000 showed "70% of PPC condemned". The UFU stated in this letter that the MFB had done nothing since 2000 in the procurement of new PPE. This letter was referred to the MFB for response.

The UFU advised the MFB, in May 2005, that it had no option but to refer the tendering process to the "appropriate authorities" with the request that the tendering

process be supervised externally, withdrawn, re-opened or any other action be taken to address UFU concerns.

The MFB Fiskville trials of new PPC were postponed again, due to UFU action, and WorkSafe became involved in a number of disputes at Fiskville in relation to the current PPC. By May 2005, the UFU advised both the MFB and the CFA that it must negotiate an agreed structural clothing specification with the UFU by June 2005. If this action was not taken, the MFB firefighters would "withdraw from internal structural firefighting activities for their own safety". In July 2005, the UFU issued a bulletin to its members advising that no CFA firefighter was to undertake hot fire training, alleging that the current PPC was inadequate.

All parties sought legal advice on the moisture barrier and potential changes to specifications. The MFB and CFA sought advice on whether they could reopen the tendering process, rather than whether changes to specifications were allowable within the tendering process. In May 2005 and again in July 2005, the UFU obtained legal advice that the MFB could ask tenderers to include a particular type of moisture barrier in their bids without compromising probity. This would simply constitute a refinement of their bids. In August 2005, the MFB and the CFA met with their legal advisers who indicated any change to specifications carried considerable commercial risks. Further legal advice to the MFB in August 2005, indicated that reopening the tendering process to include PBI Gold would amount to a breach of the "process contract". This was not consistent with the advice obtained by the UFU.

Deloitte carried out a probity audit on the MFB PPC selection process. That draft report, dated 24 May 2005, showed a number of issues with the PPC selection process including:

- The lack of a detailed evaluation methodology or evaluation plan
- The need for the plan to be endorsed and understood by all members of the Tender Evaluation Panel
- The assertion that not all information about the process appeared to have been made available to all members of the Tender Evaluation Panel
- The assertion that membership of the Tender Evaluation Panel had changed substantially
- The assertion that not all recommendations in earlier Deloitte probity audits had been implemented.

Deloitte suggested that the MFB should consider appointing a probity adviser to monitor the progress in high value and/or complex procurements, to assist the evaluation team to plan and complete its tasks. It also made a number of recommendations, which the MFB could consider implementing before the next stage. These included preparation of an interim evaluation report signed by all members of the Tender Evaluation Panel and investigating whether any new manufacturers/distributors had entered the market, considering the time that had passed since the closing date for tenders.

On 28 July 2005, formal discussions began between the CFA and the UFU on a replacement for the 2002 EBA. The CFA sought to replace the Clause 47 requirement to secure the UFU's agreement to new PPC with a requirement to consult with the UFU. This was not acceptable to the UFU.

In September 2005, the CFA sent the AIRC and the UFU a "Facts Pack" outlining the various tests and analyses undertaken by the CFA. This information was provided to demonstrate to the UFU and the AIRC the soundness of the basis upon

which PBI Gold was excluded, and that although the product now complied with the Australian Standard, that alone did not overcome PBI Gold's failure to meet other CFA criteria.

For the MFB, the remainder of 2005 was taken up with the involvement of WorkSafe and the issue of a number of Provisional Improvement Notices (PIN). UFU and CFA hearings continued to be heard at AIRC. Moisture barrier location and durability continued to be the subjects of debate throughout the year. Continuing discussion also occurred between the UFU and the CFA on the format, timing and membership of the PPC/PPE Committee.

In December 2005, the CFA distributed sample garments for field testing. The UFU banned the MFB and the CFA firefighters from participating in the evaluation process.

The end of 2005 and the start of 2006 was another high activity fire season.

2006

When the CFA field trials commenced in January 2006, volunteer firefighters were involved, as were career firefighters. However, the career firefighters did not submit assessments. The CFA and the UFU continued to dispute both the specification of the PPC and the role of the Ensemble Committee.

In January 2006, a UFU media release stated the UK and USA had a safe and proven uniform that could be purchased at only a fraction more than the cost of the "substandard" uniform wanted by management, and alleged "penny pinching" by MFB management and the Victorian Government.

The UFU invited the MFB and the CFA to an open forum in February 2006 involving the South Australian Metropolitan Fire Service (SAMFS). SAMFS had just completed its evaluation and testing process for replacement PPC. It had chosen a PBI Gold outer shell with Airlock moisture barrier. Deloitte advised that this forum might be prejudicial to the integrity of the evaluation process and it did not go ahead.

In February 2006, the Volunteer organisations issued press releases criticising the protective material chosen by the UFU and claimed it deteriorated more quickly under sunlight. It also issued media releases regarding the then current EBA discussions between the CFA and the UFU, which criticised the prospect of a new EBA created without consultation with volunteer firefighters.

By May 2006, neither the MFB nor the CFA had PBI Gold as the preferred fabric. The UFU still considered that the only product that satisfied its criteria was PBI Gold. In May 2006, the UFU presented a paper, "Structural PPE Outstanding Issues" to an MFESB meeting, which set out the UFU's suggested way forward including a proposal to trial the SAMFS garment as a means of resolving the deadlock. The July MFESB meeting considered the UFU concerns and agreed that the UFU proposal was not acceptable.

By July 2006, long running discussions between the CFA and the UFU were still ongoing regarding the contentious issue of the type of fabric to be used in the construction of PPC and the siting of the moisture barrier in the finished product.

In June, the CFA held open forums with regional evaluation participants to receive their feedback on the structural apparel.

In June and July 2006, the MFB obtained further legal advice. In summary the advice was to the effect that:

- (1) To reopen the tender would constitute a breach of the 'process contract' formed with the two short listed tenderers
- (2) It would not breach process contract if it asked the two shortlisted tenderers to review the marketplace for advances in moisture barrier technology that met AS4967 or allowed the tenderers to amend their tender responses.

In July 2006, the UFU agreed to the proposal of asking tenderers to review the marketplace for any new moisture barrier materials. This was on the condition that the MFB based their choice of structural PPC on the results of testing in accordance with testing criteria agreed with the assistance of the Government. The UFU confirmed in July 2006 that the evaluation criteria were consistent with the tender documentation and the process for trial and evaluation developed by the PPC Committee was agreed.

In July 2006, Deloitte provided the MFB with advice about the implications of the introduction of AS4967 and continuation of the current tendering process. They advised it would not be possible to automatically shortlist the current tenderers if a new tendering process was to be commenced. The current tenderers might be disadvantaged if not given the chance to submit a new tender.

Both the MFB and the CFA approached the two short listed tenderers to seek their advice as to whether there were any technological advances since the date of their original responses, that could be included in the PPC. Both tenderers nominated the Airtlock moisture barrier previously identified by the UFU in 2004.

In July 2006, DoJ intervened in the CFA/EBA negotiations, which had stalled, and a new agreement was signed by the CFA and UFU in late November 2007.

A series of DoJ facilitated meetings of the parties produced the 'Way Forward' document under which combinations of Nomex and PBI Gold outer shells and two moisture barriers were to be evaluated. This document was agreed to by all parties in September 2006.⁹

The "Way Forward" was based on the view that the MFB and the CFA, including both career and volunteer firefighters, should have the same structural firefighting PPC. The document noted that all testing would be done on products known as at August 2006, and that the Boards of the two agencies expected the process to be completed by the end of April 2007. The document outlined the following process:

- Short listed tenderers to submit new technology moisture barriers
- New samples of the PPC to be provided by short listed tenderers
- Testing would be undertaken at the University of Wollongong, then Fiskville Hot Fire trials (involving both the CFA career and volunteer firefighters and the MFB firefighters); following that shift (field) testing would occur
- Results of all testing would be brought together to be evaluated against the agreed weighted matrix
- Pricing review would be conducted
- The stakeholder group would be reconvened to be given testing and evaluation outcomes
- Recommendations for acceptance of a tender would then be provided to the CFA Board and the MFESB.

⁹ Appendix 14 – The Way Forward Document

Shortly after having agreed to the 'Way Forward' document, in December 2006 the UFU suggested a process to replace the document. The text of this proposal was as follows:

"The evaluation of structural PPE commence at Fiskville utilising MFESB and CFA firefighters commence on 26 March 2007.

The MFESB issue structural PPE immediately for station evaluation prior to the Fiskville evaluations.

CFA utilise the list of career firefighters supplied by the UFU as trailers (sic) for both Fiskville and station evaluations.

All available test results be held confidentially and tabled to the Fire Services PPE committee for their recommendations to both the CFA and MFB Boards.

The CFA reach agreement through consultation with UFU over the career firefighters to trial station wear and other items of PPE.

Commencing in January 2007 one joint fire service PPE committee be established with representatives from CFA, MFESB and UFU to discuss, review, research, progress and implement all items of Personal PPE to be worn by firefighters in both fire services:

- a. The CFA may elect to include a volunteer representative as part of its contingent*
- b. The committee would have 10 members – two delegates from the MFB, two from the CFA, two from the UFU, two UFU OHS coordinators, Ken Brown, one government representative – Mr Alan Clayton from the Justice Department*
- c. The FS PPE Committee would meet monthly or as required and may nominate tasks to other groups that would report back to the committee*
- d. The CFA and MFB second Andrew Marmion and Philip Taylor (the CFA and MFB UFU OH&S coordinators) to the project outside their normal rostered duties to assist with this process*
- e. The CFA and MFB resource and support this process.*

Due to the fact that the previous agreement could not be carried out because of the current bushfire crises, this process replace the existing document "PPE The Way Forward.

In the event that CFA and MFB fail to agree to this process, the government direct the CFA and MFB to carry out this process."

This suggested new process was rejected by the CFA, and the evaluation process continued under the "Way Forward" document with the assistance of the Department of Justice.

In October 2006, following receipt of correspondence from the two shortlisted suppliers, the CFA introduced PBI Gold into the trial process. The CFA ordered new PPC for testing in November, and by December 2006, most of the Fiskville participants had been measured by the manufacturers.

The MFB sent further samples to the UOW in October 2006 for metabolic heat testing. In November 2006, internal MFB correspondence indicates the results of its Fiskville trials, due to commence in December 2006, would be kept confidential, so as not to prejudice CFA tests. By December 2006, the MFB Fiskville trials were again deferred, due to the CFA PPC not being ready. Neither the CFA nor the MFB considered it acceptable for the MFB to commence its testing on its own.

2007

There were issues with the provision of PPC from the manufacturers in time for the Fiskville trials, now scheduled for February. There were also issues with the availability of personnel due to the fire season, and the UFU disputed the list of career participants. However, the Fiskville trials commenced early in February 2007, followed by the commencement of the regional field trials later that month.

On 12 April 2007, the MFB Tender Evaluation Panel met to assess its field trial evaluations.

On 13 April 2007, the CFA proposed a timeline to the MFB for the evaluation process whereby the final evaluation of short listed tenderers' offers should be done jointly. The tender evaluation itself was to be done by each agency independently. A series of evaluation meetings, held individually by the CFA, by the MFB, and then jointly, would occur.

On 26 and 27 April 2007, the CFA Tender Evaluation Working Group met at Deloitte to consider the results of the feedback and data from its trials. This group included Volunteer and UFU representation. On 2 May 2007, the CFA Tender Evaluation Working Group reviewed the feedback from its on-site and field trials and examined the garments to assess manufacturer quality. The group ranked the PPC based on these evaluations and all members, including UFU representatives, signed off on the ranking outcomes.

On 8 May 2007, the Tender Evaluation Group considered the rankings and proposed that a recommendation be made to both the CFA Board and the MFESB.

On 15 May 2007, the MFB requested from tenderers final pricing and whole of life guarantees on PPC. This information was provided to both the CFA and the MFB on 24 May 2007.

On 31 May 2007, the joint Evaluation Panel met at Deloitte and reached agreement on the recommendation to the MFESB.

On 31 July 2007, MFESB approval was received to award the tender to Stuart & Heaton. Manufacturers were notified in August by the MFB of its choice. On 10 September 2007, Stuart & Heaton was recommended to the CFA Board who then identified two preferred products, allowing CFA firefighters to be given a choice of PPC, one being Nomex based and the other PBI Gold based. Both had the same inner lining.

The CFA Board was advised at the October 2007 Board Meeting that the MFESB had not chosen a PPC. A PPC would not be chosen until after the completion of further RALPH testing. The CFA would now not place their orders for the new PPC until these results were received.

The CFA had a requirement for its members to have PPC that was comparatively the same in colour, to ensure consistency between CFA and MFB personnel, who would then appear to possess a standard structural PPC. Accordingly, it would be necessary to dye the Nomex PPC to provide a colour match to that of PBI Gold. Testing needed to be conducted by the yarn suppliers, to determine whether such a procedure would affect Nomex's ability to comply with the relevant specification. The CFA received advice from DuPont International in September 2007 that the Nomex PPC could be dyed to match the colour of PBI Gold. This would take six months to develop! (My emphasis.)

4.4 Implementation

The MFB advised the Minister, in a briefing in October 2007, that before the PPC could be introduced, the MFB would need to receive the results of the RALPH testing, firefighters needed to be measured, and the yarn would have to be imported from the USA. This would not be received before February 2008. Upon receipt of the yarn, production would commence at a rate of 350 sets per week. The total requirement for the MFB was 5000 sets.

The UFU provided an implementation proposal to the MFB in October 2007, which made a number of requests. Included in these was the suggestion that garments certified to the Australian Standard be purchased immediately off the shelf. It also requested an Expression of Interest (EOI) be sought for the replacement of existing footwear and structural helmets. The MFB responded that PBI Gold product would be ordered for the first issue of PPC. The MFB agreed to progress helmet procurement and commence evaluation of turn out footwear. The UFU advised members of this in a bulletin late in October.

In November 2007, the CFA Board was provided with a roll out plan, which indicated design would be finalised in December 2007. Procurement and distribution of 21,200 PPC was planned to occur over a three year period, with approximately 7,000 PPC to be rolled out annually, beginning with Melbourne and Geelong. The Board was advised ERC funding had been approved.

The Present and the Immediate Future

Even at the time of conducting this Inquiry there are many matters unresolved. These include:

- Although both the MFB and the CFA have now selected a final manufacturer, there are still delays for the CFA in the procurement of the structural PPC due to the requirement to dye the Nomex material to ensure consistency between CFA and MFB personnel. This will require further testing to ensure that it will not affect compliance with the standard
- Final design of the PPC is yet to be completed
- The CFA has not developed a plan as to how firefighters will select their PPC from the two choices, and the UFU and CFA need to reach agreement on this process under Clause 47
- A further issue is the storage of the PBI Gold based PPC due to its deterioration under high UV environments. This may require storage facilities to be reviewed, which in turn, may result in extra funding requirements
- Final results of the RALPH testing are yet to be evaluated
- The CFA are now considering whether or not to proceed with a TGMS project.

And so the chaos continues.

5. KEY OBSTACLES AND CAUSES FOR DELAY

5.1 Specifications

Issues with the specifications were evident in the early stages of the MFB and CFA projects, well before the joint RFT was issued.

I have been particularly surprised how little liaison there appears to have been between Victoria and New South Wales during the past five years. Discussions with New South Wales' representatives and perusal of documentation indicates that in New South Wales (the State which boasts the most firefighters), peaceful compromise was reached between the relevant Unions (the ACTU and the CPSU) and controlling bodies, in a timeframe far more acceptable than that achieved in Victoria.

Joint Request for Tender

The RFT document contained different specifications for the CFA and the MFB. The RFT provided a joint approach to the market but, in effect, the two agencies continued with their separate specifications and separate approaches to evaluation and testing of PPC ensembles. The common element between the MFB and the CFA in the RFT, was the mandatory evaluation criteria. Although the aspiration was to have one structural uniform for both agencies, the adoption of separate specifications and evaluation processes created barriers to achieving this aim.

Both agencies had a number of committees who were involved in the PPC project. Although it was a joint tender, there was neither an overarching project plan nor steering committee that had ownership of the entire procurement project. The two agencies went in different directions, with the UFU being the common denominator between them.

Although all stakeholders professed a commitment to the best outcomes for firefighters, I have seen limited evidence of cooperation to achieve this aim.

Product/Performance Based Approach

The UFU took a product based approach, while the agencies took a performance based approach to the specification of requirements.

The UFU provided its own specifications in 2000, which were not adopted in the RFT. Once the tendering process was under way, it was evident that the UFU had a preference for a particular product (PBI Gold) which it would relentlessly pursue in preference to any other product, regardless of the outcome of the evaluation process. The UFU were putting forward a solution before the question to be answered was asked.

It was also evident that the MFB and CFA were not prepared to alter their performance based approach to the selection of new structural PPE. In this tendering process, performance specification and product specification were incompatible.

Specifying PBI Gold as the only option would have breached the tendering process. However, once it met the Standard, PBI Gold could have been included for evaluation purposes, without breaching the tendering process.

The MFB and the CFA treated the specification differences as a technical issue to be addressed by working parties/committees within the tendering process. However, it had become an industrial relations issue also, and senior management (in both agencies) were slow to actively address the risk.

While credit is due to the UFU for raising the impasse on PPC with senior management, the Secretary of the ACTU, DOJ and the Minister, its purpose did not seem to be to reach a negotiated outcome, but rather to impose its specifications based on PBI Gold. Its insistence on one particular outer shell and moisture barrier, prior to the agreed testing and evaluation processes, negated any suggestion of genuine participation in the tendering process.

In their initial response to the RFT, manufacturers supplied various options against the tender specifications, based on both Nomex and PBI Gold. The elimination of PBI Gold, due to non compliance with AS4967, left both the CFA and the MFB with only Nomex based ensembles. The subsequent reference to Nomex in specifications was seen by the UFU to be an apparent change of tender specifications.

After the amendment to AS4967, PBI Gold met the MFB specification. However, it still did not meet the CFA higher specification as to visibility and the UV resistance. It was, therefore, not possible to accommodate the UFU insistence on PBI Gold without changes to the CFA requirements.

The UFU used the South Australian and New Zealand experience as the basis for its request, both of which are smaller fire services than Victoria. The UFU seemed reluctant to take into account the NSW fire service PPC project, which has high user acceptance of its PPC and is a large fire brigade.

In 2004, further issues with the specifications came into play after the identification of the Airlock moisture barrier, as the preferred choice by the UFU. Strong contrary views were held on the positioning and type of moisture barriers in the PPC, and these remained ongoing issues until apparently resolved in 2006, with the "Way Forward" document.

There was no timely consideration of options within the tendering process that might accommodate the inclusion of PBI Gold and Airlock, once the MFB and the CFA had knowledge that the Standard was to change, to correct an error in the interim standard.

Whatever else can be said about the respective virtues of Nomex and PBI Gold, the ultimate acceptance by the CFA of both as PPC, suggests to an outside observer that there is little to choose between these alternatives.

The actions of the UFU in attempting to secure the PPC it required would also have led to confusion amongst its members and concern for their safety when wearing the current PPC.

The issue of a performance based specification, compared to a product based specification, was never fully resolved. The failure to reach agreement on the specification was an underlying cause of delay.

Recommendation

I recommend the creation of a Standing Technology Committee to represent all firefighters in Victoria, which will convene on a regular basis and monitor all developments in the fabric and design affecting PPC. I contemplate that it will assume the on-going role of considering any developments which may result in improvement in the design and material components of PPC. On determining that there is either material or an improved design which is superior to existing firefighting uniforms, I contemplate that the Standing Committee, through the bodies represented upon it, will seek the approval of all firefighting bodies in Victoria to implement those improvements, where appropriate. In making those assessments, it should be recognised that technological change, which is manifestly beneficial for one type of firefighting, may be inappropriate for another.

The Standing Technology Committee should, at the outset, make a decision whether an attempt is being made to implement the one PPC for all firefighters or whether it should acknowledge that the needs of the CFA, the Volunteer organisations and the MFB, are at variance.

Action by the Standing Committee should not be dependent upon any change in relevant standards or emerge from a particular crisis. Rather its task should be that of an ongoing assessment, with a view to the phased introduction of improved clothing and equipment, should that be the recommendation of the Standing Committee.

For the purpose of its proper function, the Standing Technology Committee should liaise closely with firefighting bodies in all other states and, if need be, other countries.

To avoid the past morass of indecision and obstruction, the Standing Committee should be structured to ensure that a recommendation supported by a majority of its members, can be made to the appropriate firefighting agency or the Minister himself. Past history suggests that there should be an independent Chairman with a casting vote. The Standing Committee should be free to utilise the services of acknowledged experts on PPC, if it is deemed appropriate.

5.2 Project Management

Project Planning

From the evidence I have seen, it appears that lack of proper project planning and clearly defined milestones, combined with inadequate management of the multiplicity of committees and the ongoing debate over specifications, meant that any original deadlines for the PPC project could not be met.

Pervading overall was the same lack of haste which seemed to contaminate the process from the outset. Although the MFB have provided an initial plan for its TGMS project, and the CFA have provided its original Project Definition document, I have not sighted any project plans for the overall implementation of the new PPC. Bumbling and uncoordinated progress continued throughout the project.

The agencies decided to test the market within a formal RFT process, rather than explore options through a more flexible separate EOI process. This created problems at a later stage of the tendering process.

On the issue of the RFT in 2002, all the conditions were present for a failure to deliver the project in a reasonable time:

- Different specifications within the one RFT
- Decision to tender jointly but evaluate separately, added another layer of complexity
- No evidence of commitment to a definite time for completion of the project
- Lack of agreement by the UFU, and in fact actual resistance to, the specification and the chosen RFT process
- The impact of Clause 47 of the CFA EBA and Clause 31 of the MFB EBA
- Apparent absence of independent expert research/advice on specifications for PPC.

Whilst the CFA Consultative Committee earnestly endeavoured to advance its considerations, its make up and the manner in which it approached the task in hand, were flawed. It should have been obvious, even at the early stages of the tendering process, that the path to progress was to be a rocky one.

Importantly, the project was allowed to proceed without resolution of the basis for the request for tender – the specification of requirements. The fact that the specifications continued to be a matter of contention throughout the process, underlines the absence of a sound basis for the commencement of the entire project.

Throughout the tendering process, no critical project review processes appear to have been in place, allowing corrective action to be undertaken when milestones were not reached. Delays in the project were caused by the ineffective resolution of issues. An independent circuit breaker was not introduced until the "Way Forward" process began.

UFU representatives did not appear to have the authority to commit or bind their organisation to decisions reached in the various committees. If the UFU had been a genuine participant in the process and willing to accept that the evaluation process could result in the choice of an appropriate product for structural PPC, other than its choice, the tender evaluations could have been completed in the second half of 2004.

Delays were caused by the UFU resorting to AIRC hearings, and bans placed by the UFU on its members attending CFA Ensemble Committee meetings. Existing decisions had to be revisited every time the UFU rejoined the process. The meetings, however, continued without UFU attendance. The November and December 2003 CFA meetings, which removed Option C (PBI Gold), for example, were vital meetings at which the UFU were not present. These meetings should have been rescheduled.

Bans by the UFU on its members participating in the MFB Evaluation Panel, meant that the Evaluation Panel was not able to complete its initial tender evaluation due to a lack of a quorum, until June 2003.

The MFB submission indicates that when members of the MFB PPC Committee were unavailable for meetings and proxies attended in their place, often the decision making process stalled due to the reluctance of proxies to make recommendations. There were also instances where participants in the process required a higher level of technical knowledge or better understanding of the process issues involved.

Neither the CFA nor the MFB created a project team of employees, who had been removed from operational duties, and dedicated solely to the procurement project. If a dedicated, well-designed team had been in place, it would have mitigated any problems, such as loss of focus, lack of technical knowledge, time delays and lack of continuity. All these problems arose when project team members had to juggle their operational duties against their participation in the evaluation.

Testing Delays

During the project time frame, there were a number of significant wildfire seasons, especially 2002-2003. The CFA indicated that senior personnel, who would otherwise have been available to contribute to the structural ensemble project, were redirected to firefighting duties. 2006-2007 was also a bad wildfire season, resulting in the deaths of two volunteer firefighters. This season was prolonged and a massive use of resources, including personnel, was required in the response.

However, while firefighting commitments have been advanced as having an impact on the tendering process, the extent of the impact is unclear, given that trials were scheduled and carried out during the fire season in 2004 and again in 2007.

A delay of one month ensued when the MFB sent samples to the University of Wollongong for testing in December 2002. The testing took longer than expected for a variety of reasons:

- Manufacturing of garments was more time consuming than had been anticipated
- The UOW had difficulty locating participants in certain age groups for the testing
- Some garments were ill fitting due to withdrawal of participants for whom they had originally been measured

There were also laundering testing issues, such as poor washing instructions, the need for air drying, and problems with washing temperatures. Further delays were due to the number of fabrics that required testing.

RALPH testing was not part of the original process, but following UFU requests, ensembles were ordered and sent to the UK for testing. The RALPH tests (including PBI Gold) had to be repeated following the introduction of the Airlock moisture barrier.

Recommendation

A large joint procurement project of this type must be properly planned and managed. It must be supported by a business case specifying the costs and benefits expected to be realised by the joint project and a risk analysis addressing the major risks, including stakeholder management.

Project planning must include clear definition of the purpose and objectives of the joint project, its outcomes and the timelines for delivery. The procurement policies and guidelines of the Victorian Government Purchasing Board and Victorian Government Gateway Review process are useful references.

The project should be managed by a dedicated team. Team members who are involved in the evaluation process, should be freed from operational duties for the duration of the evaluation period.

Project governance arrangements must be in place at the commencement of the project, including the establishment of an overarching steering committee, a clear definition of the roles and responsibilities of all participants including senior management, and probity and conflict of interest policy and procedures.

Consideration should be given to testing the market and the interest of suppliers through an Expression of Interest process, preparatory to a request for tender.

The specification of requirements should be based on research and knowledge of relevant technological developments and available products, including interstate and overseas developments and experience.

A probity adviser should be appointed for the joint tendering process.

Independent reviews should be commissioned by senior management at the key decision points in the project, to ensure that the project is proceeding according to plan and should continue. Such reviews should identify any matters that need to be addressed before approval is given to proceed to the next stage.

5.3 EBA

The tendering process for the new PPC was intrinsically entwined with the MFB and the CFA EBAs. Clause 47 of the CFA EBA and Clause 31 of the MFB EBA require that the CFA and MFB reach agreement with the UFU on the equipment to be worn and/or used by the employee. Additionally, in the case of the CFA UFU EBA, agreement must also be reached on PPC specifications and a plan of distribution for new PPC.

It was futile in the face of these clauses to presume that the tender could be concluded in the absence of agreement with the UFU.

The UFU used Clause 47 as the basis for a number of applications to the AIRC, including alleging unsatisfactory consultative procedures and objecting to volunteer involvement on the Committee. The UFU used Clause 47 to justify its overall obstruction of the tendering process, unless it resulted in the selection of PBI Gold.

As part of the negotiations for the new EBA, the UFU refused to participate in the MFB tendering process. It was not until the resolution of EBA negotiations in December 2002 that the UFU indicated it would participate in the Tender Evaluation Panel.

By July 2006 with both the CFA EBA negotiations and the joint MFB/CFA PPC tendering processes stalled, the Department of Justice became actively involved in the resolution of the impasses. As a result, the MFB, the CFA, the UFU and all the Volunteer organisations agreed in September 2006 on the "Way Forward" solution to select and purchase new structural PPC.

The Department of Justice also intervened in July 2006 in the CFA EBA negotiations, which then recommenced with a new agreement being signed by the CFA and the UFU in late November 2007. This agreement is currently going through the process of approval and the parties to the agreement (the CFA and the UFU) have requested that the Workplace Authority Director undertake a pre-lodgement assessment of the agreement. Clause 42 of that agreement contains similar wording to Clause 47.

Recommendation

The first paragraph of Clause 47 "Uniforms and Equipment" in the CFA Enterprise Bargaining Agreement (CFA EBA) requires the CFA and the UFU to reach agreement on the clothing and equipment to be worn and used by employees. The third paragraph of Clause 47 requires the agreement of the CFA and the UFU on the specifications of replacement Personal Protective Equipment and Station Wear and plan of distribution of clothing.¹⁰

I recommend that in any future EBA entered into between the CFA and the UFU, in the corresponding clause the first paragraph should be amended to read

"The employer shall supply each employee and be responsible for the cost of replacing, repairing and/or cleaning the articles of clothing and/or equipment which the employer decides must be worn and/or used by the employee, after consultation with the Union."

¹⁰ Appendix 12 – CFA and MFB EBA Extracts

There is no need to amend the second paragraph or to retain the third paragraph.

I recommend that similar changes be made in any further EBA entered into between the MFESB and the UFU after the present Workplace Relations Agreement expires on 19 April 2009.

In making those recommendations, I am of the view that in relation to negotiations between the CFA and the UFU, the UFU has consistently taken advantage of the wording of the clause as it presently stands, to achieve, in effect, a veto of any attempt by the CFA to improve clothing and equipment issued to employees, with which the UFU does not agree.

The Government and the CFA have recognised the value and importance of the role that volunteers play through the Volunteer Charter, signed in 2001.¹¹ Under the terms of the Volunteer Charter, the CFA must ensure that the views, concerns and opinions of volunteers are fully considered before adopting any new or changed policies, procedures or approaches which will impact on them, as CFA volunteers.

In respect of any future EBA reached between the CFA and the UFU, it should be made clear that the CFA is committed to consult with volunteer firefighters in Victoria, who shall be entitled to participate in any discussions directed at all matters that affect them, including the improvement of clothing and equipment issued to firefighters.

In recommending a change in the wording of the relevant paragraphs in the two EBAs that I have referred to, I express my confidence in the relevant provisions in legislation, including the *Workplace Relations Act 1996* (Cmwth) and the *Victorian Occupational Health and Safety Act 2004*, which would take over in the event of the UFU considering that either the CFA or the MFB is behaving unreasonably, pursuant to those paragraphs.

The CFA EBA has a number of other clauses, which require Union agreement before the implementation of change, for example Clause 52 Training Instructors/Training and Clause 12.3 Code of Conduct. My comments above are equally applicable to those clauses.

¹¹ Appendix 15 – Volunteer Charter

5.4 Stakeholder Relations

Firefighters and ultimately the public have been poorly served by the inability of the UFU, the MFB and the CFA to work cooperatively to deliver new PPC for firefighters in a timely fashion. Project difficulties were symptomatic of issues in the relationships between the CFA, the MFB, the UFU and Volunteer organisations.

I found limited evidence of senior management actively sponsoring and guiding the ensemble project on an ongoing basis. Specific project problems did not seem to be addressed in a timely fashion nor solutions found to enable the project to proceed.

The relationship between the UFU and the agencies was adversarial and characterised by personal conflict; intransigence; and a lack of trust, shared commitment or respect. The UFU contested every aspect of the evaluation and delayed the tendering process by adopting the following tactics:

- The use of industrial action and OH&S and EBA processes
- Lack of attendance at meetings
- Holding public rallies
- The UFU media releases and bulletins issued to members at many points throughout the process, critical of the tendering process and senior management. Some of these bulletins instructed members not to participate in the process
- The UFU approach to the Minister in 2004 requesting an investigation into the probity and behaviour of the MFB management, regarding the PPC project
- The UFU banning its members from participation in field trials of structural PPC under the tender evaluation processes.

At the time that the joint MFB/CFA evaluation panel met in August 2002, it should have been apparent to participants that there were major issues that needed to be resolved. If this did not warrant the direct intervention of the most senior administrators of each agency, then one queries what would? Further confrontation and confusion needed to be addressed at a more senior level including:

- The UFU's continuing initiation of AIRC proceedings, alleging failure to properly consult on structural PPC
- The FOI request lodged in June 2001 by the UFU
- The 2006 media campaign by the volunteer organisations, which was indicative of frustration and concern about their relationship with the CFA, the UFU and impact on the volunteers. The use of PPC by volunteers created special design requirements, which needed to be taken into account.
- The UFU disputing the role and involvement of volunteers in the consultation and testing processes. This stance continued throughout the entire project, and as late as November 2007, the UFU published another Bulletin regarding elimination of Volunteer organisations from PPC related committees
- The UFU objection to the TGMS approach
- The UFU's repeated withdrawals from the various committees due to objections to the tendering process
- Personal tension between members of the CFA Ensemble Committee leading to allegations by the UFU of bullying and inappropriate behaviour.

While the UFU continued to be obstructionist, the agencies also displayed an obstinate refusal to give ground.

The Volunteer Charter, which was created to recognise the value and importance of volunteers within the CFA, specifically commits the State of Victoria and the CFA to consult with volunteers on all matters that may impact upon them. This would include the introduction of new PPC. The Volunteer organisations had a genuine right to be involved in the procurement process and have their views considered in the renegotiation of the CFA UFU EBA.

In March 2004 and again in March 2005, through correspondence from the UFU, the then Ministers for Police and Emergency Services¹² and DoJ were made aware that the UFU was concerned about the tendering process and the exclusion of PBI Gold. Those matters were considered appropriate for resolution between the UFU, the MFB and the CFA, given the statutory responsibilities and independence of the MFESB and the CFA. It was understandable that DoJ would have strong regard for the statutory independence of the agencies concerned. However, the responsibility DoJ held, demanded its intervention by 2005, with the continuing delay in the tendering process and issues with the UFU.

It took until August 2006 and the "Way Forward" document, facilitated by DoJ, before the parties agreed on a common course of action to select PPC. In my view, intervention of this nature by DoJ was warranted long before this. This course of action, set out in the "Way Forward", contemplated a deadline of April 2007. However, relationships were still tense and the Way Forward took a left hand turn in December 2006 when the UFU proposed to make changes to what had been agreed and signed by all parties. This proposal was rejected.

Despite the agreement, it still took almost a year after the Way Forward document was signed, for the final decision on the successful tenderer to be approved by both the CFA Board and the MFESB. In September 2007 the CFA Board identified two preferred products for its PPC, one being Nomex based and the other PBI Gold based. If that course was acceptable in September 2007, it prompts the question why it was not acceptable at least three years earlier when PBI Gold first complied with AS4967?

Throughout these years, the machinations and intransigence of the CFA, MFB and UFU contrasted starkly to the Volunteers' cooperative participation.

Recommendation

The MFB, CFA, UFU and the Volunteer organisations must immediately address the identified issues in order to rebuild an effective relationship in the interests of the firefighters and the general public.

5.5 The Future

Whatever is important in this Report, it is not the attribution of blame or responsibility for the past seven years. Rather it is what can be learnt from the mistakes that have been made in the past, so that as new material and improved specifications become available, they can be quickly introduced for the mutual benefit of firefighters themselves and the general public as a whole.

¹² Note: The Honourable *Andra Heermeyer* was Minister for Police and Emergency Services in 2004, followed by The Honourable *Tim Holding* in 2005.

APPENDICES

- Appendix 1: Letter of Appointment to Judge Lewis
- Appendix 2: Metropolitan Fire Brigade Written Submission and Chronology
- Appendix 3: Country Fire Authority Written Submission and Chronology
- Appendix 4: Volunteer Organisations Written Submission and Chronology Including *Statement for Volunteer Fire Brigades* – Brett Hume
- Appendix 5: Worksafe Submission
- Appendix 6: Country Fire Authority Hearing Transcript
- Appendix 7: Metropolitan Fire Brigade Hearing Transcript
- Appendix 8: Volunteer Organisations Hearing Transcript
- Appendix 9: Letter Advising of Non Participation (UFU)
- Appendix 10: Country Fire Authority Letter of Clarification
- Appendix 11: Metropolitan Fire Brigade Letters of Clarification
- Appendix 12: Country Fire Authority and Metropolitan Fire & Emergency Services Board Enterprise Bargaining Agreement Extracts
- Appendix 13: Chronology of Events
- Appendix 14: The "Way Forward" document
- Appendix 15: The Volunteer Charter

**REPORT ON THE
PROCESSES TO SELECT
NEW PERSONAL PROTECTIVE
CLOTHING FOR VICTORIAN
FIREFIGHTERS**

APPENDIX 1
Letter of appointment to Judge Lewis

FEBRUARY 2008



Minister for Police and Emergency Services

121 Exhibition Street
Melbourne, Victoria 3000
GPO Box 4356QQ
Melbourne, Victoria 3001
Telephone: (03) 8684 0900
Facsimile: (03) 8684 0910
DX 210077

Judge Gordon Lewis
County Court
Level 1, 250 Williams Street
MELBOURNE VIC 3000

Dear Judge Lewis

Report on the processes to select a new structural ensemble for the CFA and MFESB firefighters

I am writing to request you to provide me with a report on the processes to select new personal protective clothing worn by firefighters in Victoria.

Discussions between parties developed an agreed performance specification for personal protective clothing (namely the structural ensemble) for firefighters in 2002. In October 2006 agreement was reached on how to progress the choice of the structural ensemble, leading to announcements by the Country Fire Authority and Metropolitan Fire and Emergency Services Board in October 2007 that a decision had been made. Arrangements are now in place for the manufacture and supply of the new equipment. The significant delay between 2002 and 2007 suggests that the reasons for delay need to be identified so that delays of this magnitude can be avoided in the future.

The Terms of Reference for your report are as follows.

1. Investigate and report on the procedures and processes undertaken since 2002 to identify and procure personal protective clothing for fighting structural fires – the structural ensemble.
2. Identify the causes for delay in timely decisions/agreements about the type of equipment to be procured.
3. Determine the key obstacles in the decision making processes that prevented a more timely decision on the structural ensemble.
4. Make recommendations that would resolve the procedural obstacles that have been identified and that would prevent such obstacles from occurring in future equipment purchases.

I have asked Dr Roslyn Kelleher, Executive Director, Police, Emergency Services and Corrections in the Department of Justice to make the necessary arrangements to enable you to complete your report. I would appreciate receiving your report by 29 February 2008. Please contact Dr Kelleher (on 8684 1500) to discuss your requirements and any queries you may have.

Yours faithfully

Bob Cameron

Bob Cameron MP
Minister for Police & Emergency Services

25/10/07



I accordingly overrule the application made by the defendant, and the note I make is this: defendant's application to set aside the originating summons is overruled, with costs.

Defendant's application to set aside originating summons overruled with costs.

Solicitors for the applicant (defendant): *Philip Malouf & Co.*

Solicitors for the respondent (plaintiff): *Freehill, Hollingdale & Page.*

O.M.L.D.

*BENNETTS v. BOARD OF FIRE COMMISSIONERS OF
NEW SOUTH WALES AND OTHERS

In Equity: Street J.

Sept. 8, 1967.

Statutory Board—Board member elected by members of trade union—Whether board member's duty to union or to board—Fire Brigades Act, 1909-1965, ss. 8, 9.

The Board of Fire Commissioners of New South Wales, constituted under the *Fire Brigades Act, 1909-1965*, comprises a president appointed by the Governor (s. 8) and four other members elected respectively as follows: one by the councils of the municipalities and shires to which the Act applies; one by the insurance companies; one by the volunteer firemen; and one by the permanent firemen who are members of the New South Wales Fire Brigade Employees' Union (s. 9).

During 1966 the union made an application for a new award to the Industrial Commission, and the Commission's decision was delivered in June 1967. At this time two of the board members were members of the union, B., who had been elected by the permanent firemen, and F. The finance committee of the board comprised the president and two other members, not including either B. or F.

The finance committee met on 9th August, 1967, to consider whether to appeal from the Commissioner's decision to the Full Industrial Commission and, in the light of counsel's opinion as to the prospects of such an appeal, resolved to recommend to the board that an appeal be instituted. On 23rd August, 1967, the board met to receive and consider this recommendation. B. asked whether the finance committee's recommendation was made on counsel's advice, and if so, whether such advice would be made available to him. The president said he would make counsel's advice available to B. only on an undertaking that its terms would not be disclosed to the union. This undertaking B. declined to give. In due course the board resolved by a three-two vote to adopt the finance committee's recommendation, with B. and F. dissenting.

B. commenced a suit by way of originating summons seeking (1) a declaration that the board was not entitled to refuse to produce the legal opinion to B. at the meeting on 23rd August, 1967; (2) a declaration that the resolution

to bring the appeal was void by reason of an alleged procedural defect, in that the opinion was withheld from B.; (3) an injunction to restrain the board from lodging an appeal against the Commissioner's decision.

Held: (1) That, in the case of a statutory board such as the Board of Fire Commissioners, once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board, in preference, on every occasion upon which any conflict may arise, to serving the interests of the group which elected him.

(2) That a member of such a board must respect the confidential nature of board affairs where the interests of the board so require.

(3) That a board member has no absolute right to see a document of importance, such as counsel's opinion; at most he has a right to see such a document in aid of the execution of the fiduciary duties cast upon him by his membership of the board; and he has no such right where, as here, he wishes to see the document in order to carry out a misconceived duty to further the interests of the group which elected him to the board.

Edman v. Ross (1922), 22 S.R. (N.S.W.) 351, at p. 361; 39 W.N. 86, at p. 89, referred to.

(4) That, in the exercise of its discretion, the court would not make the orders sought, nor grant the injunction.

ORIGINATING SUMMONS.

This was a suit in which the plaintiff, who was a member of a statutory board, sought declarations and an injunction against the defendants, the board and its four other members, arising out of the business transacted at a meeting of the board. The facts are set out in the judgment.

F. C. Hutley and L. P. Robberds, for the plaintiff.

D. A. Staff Q.C. and K. R. Handley, for the first, second, third and fifth defendants.

The fourth defendant in person.

Sept. 8.

STREET J. This is a suit instituted by originating summons in which the plaintiff seeks against the Board of Fire Commissioners declarations and an injunction arising out of the business transacted at a meeting of the board on 23rd August, 1967. The plaintiff is himself a member of the board, the remaining four members of that board, as well as the board itself, being the defendants in the suit.

It appears that in the middle of last year an application for a new award was made to the Industrial Commission by the New South Wales Fire Brigade Employees' Union. The decision on that application was delivered by the Commissioner towards the end of June 1967. An appeal lies from this decision of the Commissioner to the full Industrial Commission, and on 9th August, 1967, the finance committee of the board met and considered the bringing of such an appeal. There was before the finance committee counsel's opinion on the prospects of such an appeal, this opinion having been obtained by an officer of the board on behalf of the board. The finance committee resolved to recommend that an appeal be instituted.

The board meeting at which the finance committee's recommendation was brought forward is that from which the present suit stems, namely the meeting

of 23rd August. All five members of the board were present at that meeting. Of those five members three, including the president, had constituted the finance committee which had recommended in favour of bringing the appeal. The other two board members were Mr. Bennetts (the plaintiff) and Mr. Ford (one of the defendants). When this particular item of business was reached Mr. Bennetts asked whether legal advice had been obtained in connection with an appeal. He pointed out that he had not been present at the finance committee meeting and he was not aware of the considerations which had led to the recommendation from the finance committee. He was told by the president that legal advice had been obtained but that he (the president) was not prepared to make the legal advice available. In the course of discussion the president made it clear to Mr. Bennetts that the legal advice would be made available if an assurance was given that its terms would not be passed on to the Fire Brigade Employees' Union, of which both Mr. Bennetts and Mr. Ford are members. Mr. Bennetts replied to this: "I could not give this assurance; you know my position." After some further presently irrelevant discussion it was resolved, by a majority of three votes to two, that the finance committee's recommendation be adopted. The two dissentients were Mr. Bennetts and Mr. Ford.

The originating summons seeks, first, that it be declared that the board was not entitled to refuse to produce the legal opinion to Mr. Bennetts at the meeting on 23rd August; second, that it may be declared that the resolution to bring the appeal was void by reason of what is alleged to be the procedural defect in the opinion having been withheld from Mr. Bennetts; and third, that an injunction be granted restraining the board from lodging an appeal against the Commissioner's decision.

The direct concern of the present suit is merely this question of the bringing of an appeal to the Industrial Commission. But the dispute has its origin in what appears to be some misapprehensions as to the position occupied by members of this board. Accordingly I think it necessary to make some observations upon the responsibilities and duties of individual board members.

The Board of Fire Commissioners is set up under the *Fire Brigades Act*, 1909-1965. It comprises five persons. The president is appointed by the Governor pursuant to s. 8. The other four members are elected pursuant to s. 9. The first of these other four members is a member elected by the councils of the municipalities and shires to which the Act applies. The second is a person elected by the insurance companies. The third is a person elected by the volunteer firemen. And the fourth is a person elected by the permanent firemen who are members of the New South Wales Fire Brigade Employees' Union. Together these five members are constituted under s. 7 as a statutory body.

The duty of this statutory body is defined in s. 19 in general terms as being the taking of all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire in any municipality or shire to which the Act applies. The mere statement of this general duty is sufficient to mark the great public importance attaching to its pursuit; heavy responsibilities rest upon those who accept the public office of membership of this statutory board.

A great many public undertakings are controlled by boards or commissions set up in a manner consistent with the manner in which the present board is

set up. By the terms of their statutes, boards such as this comprise a number of persons nominated or chosen by various groups, each of which nominating or choosing groups has a direct interest in the public undertaking controlled by the board. Each of the persons on such a board owes his membership to a particular interested group; but a member will be derelict in his duty if he uses his membership as a means to promote the particular interests of the group which chose him.

The object of providing for interested groups to nominate the members of such a board as this might be said to be threefold: first, one can be confident that an interested group will select a man whose personal qualities and competence equip him for membership; second, it promotes the confidence of that particular group in the board, and provides a means of liaison between that group and the board; and third, it ensures that the board, as a single entity, has available in its deliberations the views of all the interested groups. The presence of the second and third elements necessitates in a board member the highest standards of integrity, both in his thinking and in his actions. The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. A member must never lose sight of this governing consideration. His position as a board member is not to be used as a mere opportunity to serve the group which elected him. In accepting election by a group to membership of the board he accepts the burdens and obligations of serving the community through the board. This demands constant vigilance on his part to ensure that he does not in the smallest degree compromise or surrender the integrity and independence that he must bring to bear in board affairs.

Undoubtedly there will be differences of opinion between board members. Indeed, it is well that this should be so: sound and wise decisions by the board can only be based upon a full and informed discussion of varying and conflicting views and considerations. Nomination of the individual members and their election to membership by interested groups ensures that the board as a whole has access to a wide range of views, and it is to be expected within this wide range of views that inevitably there will be differences in the opinions, approaches and philosophies of the board members. But the predominating element which each individual must constantly bear in mind is the promotion of the interests of the board itself. In particular, a board member must not allow himself to be compromised by looking to the interests of the group which appointed him rather than to the interests for which the board exists. He is most certainly not a mere channel of communication or listening post on behalf of the group which elected him. There is cast upon him the ordinary obligation of respecting the confidential nature of board affairs where the interests of the board itself so require.

If the members of boards such as the present board constantly keep before them their overriding duty to the board to promote the purposes for which it exists, then they should have little difficulty in discharging honourably their public duty, and there will be perhaps little likelihood of litigation such as is presently before the court eventuating. Disagreement is to be expected from time to time, having regard to the wide range of problems with which such boards must deal, but it must be disagreement relating to what should best be done in the promotion of the purpose enshrined in the statute, this being the common interest which all the board members must serve.

I have referred earlier to misapprehension existing in relation to these basic truths. For example, in the course of argument in the present suit it was said at one point that the president himself would have to be representing government interests on the board. That was perhaps an incautious suggestion, and was quickly withdrawn by counsel once the error was pointed out. But the fact that suggestions of this sort are made is indicative of a view which is apparently held that, because a board member is appointed or elected by a particular group, he owes some overriding obligation or duty to the group which has conferred upon him his status as a member. The error inherent in this view must be exposed and, for purposes of emphasis, I repeat what I have earlier said. It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being representative of a particular group or a particular body. Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise.

At the meeting on 23rd August Mr. Bennetts found himself in a position which I am sure presented real difficulties to him. He has given evidence before me. I am satisfied that he is a witness of credit, and I have no hesitation in accepting as correct the evidence which he gave. Indeed, I think it fair to say that, so far as appears from the evidence before me, Mr. Bennetts has sought to fill what he has found to be a somewhat difficult role with a commendable degree of dignity. He told the president quite clearly at the meeting of 23rd August that he could not give the assurance that he knew the president was about to seek from him, namely, an assurance that the contents of the opinion would not be conveyed by him to the union. Mr. Staff Q.C., who appeared for the board and three of its members who, together with Mr. Ford, were named as defendants, questioned Mr. Bennetts upon the purposes for which he may have used the contents of the opinion, if it had been made available to him. Rather than summarize the questions and answers I shall read them verbatim from the transcript:

“Q. If the advice was to the effect that there were grounds for appeal you would then have proposed to pass that material on to the union? A. Yes.

Q. That, I suppose, because the union would be the board's opponent in the appeal? A. That is right.

Q. And the union might get some benefit from knowing what advice the board had had? A. Yes.

Q. That is right? A. That is right.

Q. So that in substance what it comes to, Mr. Bennetts, is that if you had thought there was material in the advice the knowledge of which would benefit the union you would have passed it on, wouldn't you? A. Yes.”

And, lower down the page:

“Q. I suppose if the union had a remote prospect of success—that is, the legal advice had indicated remote prospects of success—you might have thought knowledge of that would have been of benefit to the union also? A. Yes.

Q. And you would have disclosed that also to the union, wouldn't you? A. Yes.

Q. And I suppose you would have regarded it as of benefit to the union not only in relation to an appeal if one were brought, but in relation to industrial relationships generally? A. Yes.

Q. Knowledge of that sort of advice would have provided the union with some ground for what I might call industrial agitation, wouldn't it? A. That is right.

Q. And that you would regard as knowledge which would benefit the union? A. Yes.

Q. And which you would pass on? A. That is right."

That evidence was given by Mr. Bennetts in the light of the view which he took of his particular position as a member of the board elected by the permanent firemen. Earlier in his evidence he described his view of his position in these terms: "As the representative of the permanent fireman I have an obligation to those firemen, and it would be incumbent upon me to make a report to my State Council upon any determinations of the board." It seems to me that it was this erroneous, but I am satisfied entirely bona fide, view held by Mr. Bennetts which provided the origin of the events at the meeting on 23rd August. Mr. Hutley, who appears for Mr. Bennetts, has argued that every member of the board has an absolute right to see a document such as this legal advice, being a document of importance and one which was before the finance committee whence came the recommendation being considered at the board meeting. His argument is that this being, so he contends, an absolute right, and it having been denied to Mr. Bennetts, it follows that the declaration of right should be made, and it also follows, so the argument runs, that the resolution adopting the recommendation to appeal was invalid by reason of this procedural defect in denying to Mr. Bennetts what is said to be his absolute right to see the legal opinion.

Mr. Staff Q.C., on the other hand, has taken issue with Mr. Hutley's basic proposition that a board member has an absolute right to see a document such as this. It is contended by Mr. Staff that the right of a board member, as, indeed, is said to be the right of other persons with similar fiduciary obligations such as company directors, is a right recognized by the courts as being necessary in aid of the execution of the fiduciary duties cast upon the members of the bodies within whose affairs contests such as these arise. Mr. Staff denies that a board member has an absolute right to inspect a document such as this, and contends that it is a right essentially and fundamentally linked to the execution of the duty cast upon a board member. He refers, by way of analogy, to an observation in the judgment in *Edman v. Ross*(1), a case concerning the right of a director of a company to inspect and take copies of company documents. The following passage appears: "The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true, nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the court must assume that he will exercise it for the benefit of his company"(2).

(1) (1922) 22 S.R. (N.S.W.) 351;
39 W.N. 86.

(2) (1922) 22 S.R. (N.S.W.), at
p. 361; 39 W.N., at p. 89.

I agree with Mr. Staff's contention. It is the necessity for clear proof to the contrary which so frequently renders it impossible or impracticable to contemplate litigation being brought concerning such domestic and internal disputes as that which is now before me. However, it is here established by the evidence that the particular purpose that Mr. Bennetts had in mind, and which led to his requesting to see the opinion, was his wish to discharge what he described as, and erroneously believed to be, his obligation to the firemen whom he erroneously believed he represented on the board. In these circumstances the case is not one in which I should make such a declaration as is sought in the first paragraph of the originating summons. Mr. Bennetts has not made out a case justifying the grant of what is, in the ultimate, a discretionary remedy. Ordinarily, of course, at any meeting of individuals who constitute a board such as this, all of the material reasonably relevant to the matter that the board may be considering ought to be made available, and it is only rarely that there would arise a situation such as the present. The origin of the situation is, as I have already said, a wrong but bona fide view which Mr. Bennetts held as to the manner in which he should resolve what he felt to be his conflicting position. The principle governing the manner in which that conflict should be resolved is that the overriding duty is the duty to the board, and that that duty must not be compromised in any degree whatever. But the due application of that principle in the day-to-day affairs of the board may give rise to personal difficulties such as those which have troubled Mr. Bennetts in the present case. Confronted with what appeared to him to be a conflict of loyalties, the view which Mr. Bennetts formed was wrong and for that reason I decline to grant to him the declaration which he seeks in par. (1) of the originating summons. For the same reason I decline to make the declaration sought in par. (2) of the originating summons; nor am I prepared to grant the injunction which is sought in par. (3).

The order I make is: leave to the plaintiff to amend the originating summons by substituting in par. (1) the words "first-named defendant" for the words "second-named defendant"; I refuse to make the declarations and to grant the injunction sought in the originating summons; having regard to the special circumstances of this case I order the first defendant to pay the costs of all parties; I reserve liberty to apply on two days' notice for any necessary reframing of the order for costs in such a way as may be appropriate to achieve the result stated; exhibits to be handed out.

Order accordingly.

Solicitors for the plaintiff: *Geoffrey Edwards & Co.*

Solicitors for the first, second, third and fifth defendants: *Pigott, Stinson & Co.*

O.M.L.D.
