TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1053625

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT O'CALLAGHAN
COMMISSIONER WILSON

AM2014/201

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/202)
Fire Fighting Industry Award 2010

Melbourne

9.32 AM, FRIDAY, 17 JUNE 2016

Continued from 28/04/2016

PN4675

JUSTICE ROSS: Good morning. Could I have the appearances.

PN4676

MR S MOORE: If the Commission pleases, my name is Moore. I appear with Ms K Burke for the MFB and the CFA.

PN4677

MR R KENZIE: If it please the Commission, Kenzie. I appear with my learned friend, Mr T Dixon, for the UFUA.

PN4678

JUSTICE ROSS: Thank you. The only reason I asked for the appearances was I thought you might be in Sydney, but it turns out not. I circulated some questions to the parties late yesterday. Can I indicate in relation to those, two points. One, I accept that because you were given them the day before the hearing, there are some you may want to give consideration to and provide a written response. I'm content with that. I'd leave it to counsel to work out what direction or what process might be adopted in that regard. I'll be content with whatever you mutually agree.

PN4679

The second thing is that - this only occurred me after - there are a lot more questions for you, Mr Kenzie. It occurred to me when I finished it that that was the case, but that is the case because you haven't had a reply. Some of the matters I've raised would no doubt be subsumed within your submissions in any event. You might just indicate, if that is the case, when you get to a point in your submissions and say, "The submission I've just made addresses the answer to question", whatever, and deal with it that way, if you like.

PN4680

MR KENZIE: I was proposing do that, your Honour.

PN4681

JUSTICE ROSS: Okay.

PN4682

MR KENZIE: But in relation to some of the matters - - -

PN4683

JUSTICE ROSS: Yes.

PN4684

MR KENZIE: Our position in relation to the questions as a whole, some of them are subsumed, some of them are well within what we were proposing to address on. Some of them are not.

PN4685

JUSTICE ROSS: Yes.

PN4686

MR KENZIE: Some of them are matters which, in addition to raising matters of detail - and necessary detail - are matters which raise serious questions on which we're going to need to get some further instructions.

PN4687

JUSTICE ROSS: No, I understand that.

PN4688

MR KENZIE: So in relation to that - and I think my friend's position might be a bit different - we are proposing to, as we indicated, put the submissions finally today on the basis that was discussed in the mention and then seek to address the balance of the questions in writing, because we think that will be much more efficient. We don't need the chance to talk to them.

PN4689

JUSTICE ROSS: Yes.

PN4690

MR KENZIE: We think it will be much more efficient if we do it that way.

PN4691

JUSTICE ROSS: Can I indicate that some of them I'm going to want you to confer about. For example, question 17 relates to this point about no other fire services. The first question, "What public sector fire services are covered by the modern award?" that's not a straightforward question inasmuch as the sort of answer that I'd look for is really a joint answer, because it ought not be something that - it's a legal question and it turns on the construction of the coverage clause applied to whatever state public sector instruments are in place, et cetera.

PN4692

I think the answer is Victoria, the NT and the ACT might be the end point. I'm assuming that from the nature of the submissions that have been put on other issues, but I'm not sure necessarily how you get from A to B.

PN4693

MR KENZIE: No.

PN4694

JUSTICE ROSS: I'm not sure whether B is right. That's why I've asked the question.

PN4695

MR KENZIE: We're more than happy to liaise about that.

PN4696

JUSTICE ROSS: Yes.

PN4697

MR KENZIE: Any difference between the parties on that is not, at least in our submission, going to be critical in any way to this case.

PN4698

JUSTICE ROSS: No.

PN4699

MR KENZIE: That was raised really as an aside on the basis that - as to the question as to what was the true extent of this proceeding.

PN4700

JUSTICE ROSS: Yes.

PN4701

MR KENZIE: The reference to intervention is simply saying, well, look, no one else is here, but I don't think anyone is going to make any fundamental submission about - - -

PN4702

JUSTICE ROSS: No. I suppose the answer to why no one is here is it doesn't affect anyone.

PN4703

MR KENZIE: No, right.

PN4704

JUSTICE ROSS: But the counterpoint to that is that the MFB refer in a number of their submissions that this a national award. True it is, but it might not have a legal effect nationally.

PN4705

MR KENZIE: Right.

PN4706

JUSTICE ROSS: So it's trying to work out that issue really.

PN4707

MR KENZIE: It's only in that context that we mentioned this. We said, well, if it is, no one else is here and really that's where the debate dies.

PN4708

JUSTICE ROSS: Yes.

PN4709

MR KENZIE: Unless someone wants to make something further of it.

PN4710

JUSTICE ROSS: Yes. The other issues, they relate to the day work roster issue. You will know - Mr Moore, I put a question to you about that - on the evidence, it seems that there are operational members who work day rosters and presumably they do that pursuant to the enterprise agreements that are in place. I really want to find out, well, what is the practical position now in relation to at least the MFB and CFA. If there is any material about day rosters worked elsewhere - and it may just be that in reading through it, I haven't picked up the particular aspects that go to day work. It was certainly dealt with in your reply.

PN4711

One of the issues that I've raised with each of you is that - you know, I've got a stack of submissions from each of you going back to November last year. I just want to know how much of that I really need to focus on, I suppose. The reason for putting it in the questions is that I anticipated that your reaction on your feet might be, "Well, everything we have said is relied on", but I'm trying to discourage you from doing that and really identifying, if there are earlier submissions, which parts of them, because I don't want to get caught with - as is often the case - later iterations of submissions that express the point in slight different language. I don't want to be caught with trying to distil what your intention is.

PN4712

The final matter I wanted to raise is also a matter that in the context of this case may not have an impact. I may have overlooked it. It might have been referred to in a footnote. The MFB referred to the Parks Victoria decision, which of course was the subject of some gentle hip and shouldering in the UFU v CFA Full Court decision at least in relation to the characterisation of Re AEU being a particular subset of a general doctrine. More importantly, the Full Court says:

PN4713

That principle applies where the curtailment or interference with the exercise of a state's constitutional power is significant, which is to be judged qualitatively and, in general, by reference, among other things, to its practical effects.

PN4714

That is at 176. That does seem to me to be an elaboration of the Re AEU point. They deal with Re AEU and how it's consistent with that. Each of you can have leave to have a look at that. If there's something you want to say about it, then by all means, but I anticipate the position of the fire services will be, well, there is a practical effect and you refer to your main submissions, but, nevertheless, it seems to me that it does raise a different - or it's an elaboration of the legal test that you do need to look at its significance in a practical way, not simply a theoretical construct. All right. Mr Moore?

PN4715

MR MOORE: Thank you, your Honour. Can I just deal with a couple of housekeeping matters. I've raised these with my learned friends. We have provided to the associate a couple of folders of cases referred to in our submissions to assist the bench. Beyond that, we seek to tender a copy of the Victorian Auditor-General's Report - Management of Unplanned Leave in Emergency Services. We have referred to this in our submissions.

PN4716

JUSTICE ROSS: You did.

PN4717

MR MOORE: But we have omitted to tender it. It's a public document. I don't understand it to be subject to any objection, but just to make sure it's before the bench we tender that, if it please the Commission.

PN4718

JUSTICE ROSS: No objection?

PN4719

MR KENZIE: No objection.

PN4720

JUSTICE ROSS: MFB/CFA26.

EXHIBIT #MFB/CFA26 VICTORIAN AUDITOR-GENERAL'S REPORT - MANAGEMENT OF UNPLANNED LEAVE IN EMERGENCY SERVICES

PN4721

While we're on that point - and I don't think you need to tender it, Mr Kenzie - but I think in your written submissions you do refer to some other publicly available documents - I think there's a reference to a Productivity Commission point about part-time work, et cetera - but what we'll do is, following today, is prepare a document which sets out everything that's before us and we'll cover off on those things, just so there's no misunderstanding about any of that, and that way if we've missed something a party can bring it to our attention. And we'll add that to the list, Mr Moore. Is there anything you wanted to take us to in relation to it?

PN4722

MR MOORE: No, we've referred to it in our submissions, and I don't need to - - -

PN4723

JUSTICE ROSS: Yes, it's only for that purpose?

PN4724

MR MOORE: Yes, that's right.

PN4725

JUSTICE ROSS: Thank you.

PN4726

MR MOORE: Your Honour, the second housekeeping matter is you might recall we provided the Bench with a folder of industrial instruments. One of those industrial instruments was the ACT Fire & Rescue Enterprise Agreement 2011 - 2013. We've later discovered that that agreement has been replaced by a subsequent agreement.

PN4727

JUSTICE ROSS: Okay.

PN4728

MR MOORE: An agreement by the same title except it's for the dates 2013 - 2017, so I just thought we would provide that to the Bench for completeness.

PN4729

JUSTICE ROSS: Sure, thank you.

PN4730

MR MOORE: Thank you.

PN4731

JUSTICE ROSS: Does that affect attachment A to your earlier submissions?

PN4732

MR MOORE: No, I don't believe it does, your Honour.

PN4733

JUSTICE ROSS: So it's essentially the same provision?

PN4734

MR MOORE: Yes.

PN4735

JUSTICE ROSS: It's been picked up, it's just a different instrument, is that the idea?

PN4736

MR MOORE: That's right, your Honour.

PN4737

JUSTICE ROSS: All right.

PN4738

MR MOORE: They're the preliminary matters. If I can also, before I address the Bench, deal with question 1, because that, as your Honour has foreshadowed, needs some clarification. To answer the question whether or not our submissions of 16 May replace the earlier submissions of 26 February and 18 April, the answer is not quite, but we rely on those earlier submissions in the following specific respects. Firstly, at a number of places of our 16 May submissions and our later more recent reply submissions, we pick up and cross-refer to - - -

PN4739

JUSTICE ROSS: Yes, you do.

PN4740

MR MOORE: - - - statements in the earlier submissions.

PN4741

JUSTICE ROSS: Particularly, yes, to award history and those sorts of issues, yes.

PN4742

MR MOORE: That's right, so it's important that we continue to rely on those earlier submissions for that purpose.

PN4743

JUSTICE ROSS: Yes.

PN4744

MR MOORE: The parts of the outline of submissions dated 26 February which are relied upon but which are not set out in the later submissions are paragraphs 8 to 16 dealing with the statutory arrangements in respect of the fire services, paragraph 42 dealing with the industrial instruments in other States and Territories, and paragraphs 44 to 46 dealing with other emergency services instruments. We rely upon those paragraphs. And in relation to the 18 April reply submissions, we can't disregard those because they reply to the union's submissions, if the union's continuing to rely upon its submissions, its earlier submissions to which our submissions reply, we need to continue to rely on those.

PN4745

JUSTICE ROSS: We'll find out from Mr Kenzie in due course and that'll solve that.

PN4746

MR MOORE: Yes. The only other part in those submissions upon which we specifically do need to rely but to which we don't refer specifically I don't believe in our later submissions are paragraphs 14 to 16 which deal with the fire service's review. So hopefully that - I'm sorry it's a bit inconvenient - - -

PN4747

JUSTICE ROSS: No, no, no.

PN4748

MR MOORE: - - - but that hopefully spells out the extent of the reliance on the earlier submissions.

PN4749

JUSTICE ROSS: Yes. No, that does assist, thank you.

PN4750

MR MOORE: I'm in the Commission's hands as to how to deal with the questions identified. I should say at the outset that perhaps putting to one side for a moment your Honour's remarks a few moments ago of raising some matters, it's our intention to endeavour to respond to the questions today. For our part we would like to deal with all matters today if we can. Your Honour's raised a couple of additional matters this morning which I'll need to consider whether or not we can do that today, but in relation to the questions provided yesterday, we do seek to answer those today.

PN4751

JUSTICE ROSS: Yes.

PN4752

MR MOORE: So if it's convenient to the Bench, what I propose to do is just to develop the address and along the way refer to the questions. Insofar as I don't, I'll come back to the questions at the end to make sure I've addressed them.

PN4753

JUSTICE ROSS: Yes, I'm content for you to deal with it in whatever way you think's appropriate.

PN4754

MR MOORE: Thank you. So the fire services rely on our written submissions of 16 May and the reply of 14 June, and our earlier submissions in the way in which I've outlined a few moments ago. Those submissions are comprehensive. I don't want to repeat them. I'm not going to belabour the points that members of the Bench will no doubt read them and give them due consideration. What I want to do is to simply emphasise our submissions in relation to three topics. One is the statutory framework, the second is the question of the implementation of part-time work and the union's objection to a unfettered part-time work provision in the award, and the third is to deal with a couple of what we understand and perceive to be the key factual controversies.

PN4755

Dealing first with the statutory framework, in this case there is a risk that the statutory setting falls out of focus, and it's important that the Bench obviously bring that centrally into focus, and in our respectful submission, the union's submissions really don't pay sufficient regard to the statutory framework in which this proceeding begins and ends, and the guiding principle, without dealing with matters which members of the Bench are no doubt well-familiar, is the modern awards objective in section 134(1) and the obligation and duty on the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the factors in subparagraphs (a) to (h). And we emphasise the words: "safety net of terms and conditions." This is about the safety net. We're not dealing with, and the Commission is not permitted in this jurisdictional setting to deal with the fairness and relevance of bargained terms and conditions.

PN4756

Can I deal next as part of the statutory framework submissions the question of history and the relevance of history, and this picks up one of the questions your Honour identified. We don't need to say much about that. In the *Preliminary Jurisdictional Decision* at paragraph 27, citation [2014] FWCFB 1788, the Full Bench stated that it is appropriate in conducting the 4-yearly review that the Commission take into account previous decisions about any contested issue, and we refer to that in our submissions of 16 May at paragraph 15. The key point is this: critically there is no decision - there is no decision of the Commission or its predecessors about the appropriateness of part-time work in the modern award or its predecessors. The question of part-time work in the award or its predecessors has never been a contested issue resolved by a decision of this Commission or its predecessors.

PN4757

JUSTICE ROSS: And that is the essence of the difference between you, isn't it? It's said by the union that the award modernisation Full Bench did not insert a part-time provision, relying in part on the submissions that were put, and the issue wasn't in contest, and they then rely on the prima facie presumption.

PN4758

MR MOORE: Yes.

PN4759

JUSTICE ROSS: Your proposition really is, as you've put, that well that's true insofar as it goes, but there was no arbitral determination in any real sense because the issue wasn't contested, and in that way it wasn't given detailed consideration.

PN4760

MR MOORE: That's the beginning and end of it, your Honour, as we see it.

PN4761

JUSTICE ROSS: Yes.

PN4762

MR MOORE: And there's a lot of smoke and a lot of, in our respectful submission, a digression, inappropriate digression, unhelpful digression in our respectful submission by the union on this issue, coming back to the guidance which the Full Bench providing the *Preliminary Jurisdictional Decision*. The question is, the obligation on the Bench is currently constituted in this review, to take into account decisions in relation to contested issues. I'm sorry, your Honour.

PN4763

JUSTICE ROSS: Yes, I'm sorry, Mr Moore.

PN4764

MR MOORE: There was not, there has been no decision on a contested issue relating to part time work. Further, the point that your Honour alluded or referred to, the question of part time work in award modernisation was expressly reserved for later consideration. It was put to one side to be dealt with later, and that is where we are today.

PN4765

This is later. It is now being dealt with. It was not dealt with when the award was made. That feeds into the prima facie argument which your Honour refers to. So the Full Bench identifies that the prima facie, when made, award is taken to have met the modern award's objectives. Well the short answer to that is first, plainly that's a presumption, able to be rebutted or displaced having regard to the circumstances at hand, and here, it is blindingly self-evident in my respectful submission, that the presumption can be displaced in relation to part time work because of the express reservation by the Full Bench to deal with the question of part time at a later time.

PN4766

That issue is dealt with at paragraphs 22 to 23 of our submissions of 16 May and the express reservation where we deal with the express reservation.

PN4767

Yes, your Honour.

PN4768

JUSTICE ROSS: It didn't seem to me to be the difference between you about - although there is a different characterisation of it put by the union, but to the proposition that this is a review, we're obliged to review all modern awards. We're obliged to review each modern award in its right and the review process involves

the Commission satisfying itself that the award under review provides a fair and relevant minimum safety net of terms and conditions. In other words, that it meets the modern award objective.

PN4769

There are other elements of the review, for example, it doesn't contain terms that are obsolete or inconsistent with the NES etcetera or otherwise beyond power. But that's the fundamental jurisdictional basis for what we're doing. The other discussion around the prima facie position of the awards etcetera, are observations that have been made about how that task might be approached. It really comes down to the proposition that if you like, it seems to me, it's a form of elaboration of the general principle the Commission has always applied and that is that, it won't depart from previous authority without cogent reasons.

PN4770

Now cogent reasons include the fact that the award was made against a particular context and that's a relevant consideration. It's also relevant to the extent to which there was a debate about the issue and whatever observations the Bench made. I'm not sure, and speaking for myself, I've been trying to resist the temptation of further elaboration on the issue, because it seems to me it detracts from the statutory task.

PN4771

I understand what each of you have said about the previous position and the UFU's point it seems to me, is raised in two ways. One, well there's a prima facie position, but two, the position of at least one of the parties here was, well, it wasn't an issue and really they're suggesting that really begs the question of what's changed between now and then at least for that party.

PN4772

But isn't that really where we're up to? We can get I think, caught up a bit too much in the characterisation of the - we're certainly not bound in any statutory sense to follow the decisions taken previously.

PN4773

MR MOORE: No.

PN4774

JUSTICE ROSS: It's an issue of jurisprudence and practice of the Tribunal has been - and I'm not suggesting for a moment you know a departure from that broad position, but it seems to me that we've sort of - you run a risk of adding things into the statute if it's elevated to some sort of statutory test.

PN4775

MR MOORE: I understand that your Honour, and I would suggest that in one way, the heart of the matter is that having regard to the usual approach which the Full Bench pays deference to previous decisions of the earlier Full Bench decisions and doesn't depart, save for the existence of cogent reasons, unless there's cogent reasons to do so. The heart of the matter here is that there's nothing to depart from.

PN4776

JUSTICE ROSS: I suppose in terms of previous decisions, I understand what you both say about that, but a point made by the UFU is there is a departure in relation to at least one of your clients. The CFA's position.

PN4777

MR MOORE: But that's a different point, your Honour.

PN4778

JUSTICE ROSS: No.

PN4779

MR MOORE: There's certainly a change in position by one of my clients, but the relevant question, that's in my respectful submission, neither here nor there.

PN4780

JUSTICE ROSS: I put a question around that issue to the UFU and it really relates to their point about the bargaining position and you take exception to that in the written submissions I want to agitate that issue. But my question is more well, what relevance does the motive of your client have in any event? It not a case where you have to come with clean hands; it's not a civil inter-party proceeding. It's frankly, I obviously hear what you Mr Kenzie, but on the face of it, I don't care what the motivation is of a party. Ultimately it's a matter of against the evidence and the statutory framework, are you going to do something or not?

PN4781

MR MOORE: Well, your Honour, that's right. There's a review to be conducted. The question of parties' positions today in this review and what they were in 2009, is irrelevant. There's no adverse judgment or any adverse conclusion to the interests of my clients that could be formed on the basis that there is any change in position between 2009 in award modernisation and now.

PN4782

My client is entitled to come to the Commission and to say here in 2016, the award is not meeting the modern award's objective. I don't see any basis why the Commission should not otherwise deal with that position at face value and without any adverse criticism being levelled at my clients as the union attempts to do.

PN4783

But ultimately we say, your Honour, I hear what your Honour says about, in my words, the risks that might be attendant upon further commentary or further explanation as to the approach to the Commission in the statutory review. The words of the Act is where one begins and where one ends. The Full Bench has articulated an approach in the *Preliminary Jurisdictional Decision*. That is the guidance that is provided. That guidance is, in my respectful view, properly reflective of what the Act says.

PN4784

JUSTICE ROSS: And I don't take either party to be seeking to depart from the *Preliminary Jurisdictional Decision*. It's just how does it apply in the context of this issue, but that's the only thing.

PN4785

MR MOORE: We think it's all a furphy, this issue, and it's been, in my respectful view, unnecessarily complicated because of the point, which I won't repeat again, that there was no decision - there has been no decision by this Commission or its predecessors on the issue presently at hand. Thus there is no question - no question arises for this Full Bench as to whether or not to depart from anything.

PN4786

JUSTICE ROSS: But again, that's really a question of degree. There was a decision, and there was a decision that did not include part time work in the award. What there wasn't, was a contested arbitral process that led, with reasons, to that conclusion. Now, you each draw from that what you will. I don't think it's accurate to say there was no decision. There was, because the award was made without that provision, but the real point is what was the nature of the process that led to that and was there a detailed consideration of that issue? Whether there was or there wasn't, what does one draw from all of that?

PN4787

MR MOORE: Yes, I understand that, your Honour. We say that in characterising that decision, one must not overlook the express reservation by the Full Bench to deal with this matter in the future.

PN4788

JUSTICE ROSS: I follow.

PN4789

MR MOORE: That, we say, is very important. Can I deal with the question of changed circumstances in section 156. The union contends erroneously, in my respectful submission, that the Commission's jurisdiction under the section is necessarily focused on changed circumstances. That is in their submissions at paragraph 14. That submission finds no support in the terms of the section itself. It finds no support in the *Preliminary Jurisdictional Decision*.

PN4790

To the contrary, in that decision in charting the metes and bounds of the four-yearly review, what the Full Bench said was that the review is broader in scope than the transitional review and that:

PN4791

> *Where a significant change is proposed, it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*

PN4792

That is the approach and that is what the fire services have done. We say the Commission should not fall into error by adopting the submission that the union

contends for and fetter its approach in terms which find no support in the Act at all. I've dealt with the question of "prima facie", which I won't repeat. As to necessity in section 138, section 138 provides that:

PN4793

A modern award may include terms it is permitted to include, and must include terms it is required to include, only to the extent necessary to achieve the modern awards objective.

PN4794

The UFU in its submissions to the Commission adopts the wrong approach to that provision and they contend that the variation proposed for by my clients is inconsistent with the requirements of section 138, because it said the fire services seek the variation for the purpose of improving their bargaining position. It said that they had no intention to implement the terms of the determination. It said that the fire services have failed to inform the Commission about how the clause would operate in practice and the Commission is required to determine the effect the clause will have once in operation.

PN4795

Now, we say those submissions are wrong in fact and in law. In terms of the factual claim, the evidence is that the fire services wish to offer part-time employment to employees. The evidence there can be found in the evidence by Chief Officer Peter Rau at paragraph 11, in his second statement at paragraph 6; Chief Officer Buffone of the CFA at paragraph 14 in his statement; the CEO of the CFA, Ms Nolan, at paragraph 19 of her witness statement. We refer to that evidence in our submission.

PN4796

They say that they want to be able to offer part-time work for three reasons. First, it would allow the fire services to attract and retain operational firefighters at times in their lives when they may be unable or unwilling to work 42 hours a week on the 10/14 roster and in this way it will assist the fire services to become employers of choice. Chief Officer Buffone says that at para 17; Ms Nolan at para 21 of her statement; Chief Officer Rau in his second statement at paragraphs 5 to 6.

PN4797

The second reason they want to be able to employ firefighters on a part-time basis is that it is consistent with fire services' responsibilities as part of the Victorian public sector and with community standards. One will find that evidence given by Chief Officer Buffone at paragraph 14; Ms Nolan at paragraph 19; Chief Officer Rau in his second statement at paragraph 5.

PN4798

The third reason they advance for why they want to be able to offer part-time work to firefighters is that it would be consistent with the reform agenda of the emergency services sector more broadly, which includes embracing diversity and as a key element of building and retaining an inclusive, capable and sustainable workforce, and will facilitate gender equality. Mr Lapsley has given evidence about which he wasn't cross-examined, of course, at paragraphs 15 to 16 about

that; Ms Nolan at paragraph 23; Chief Officer Rau in his second statement at paragraph 5.

PN4799

The factual basis of the UFU's submission that there is no intention to seek part-time employment is contrary to the evidence. Plainly there is a strong appetite by my clients to introduce part-time, but the reality is that that must occur in the framework at hand. The framework at hand is that there are enterprise agreements in place. While they are in place, by operation of section 57 of the Act, the award doesn't apply and the agreements prohibit part-time employment. That is accepted.

PN4800

Now, the relevant issue - and this comes to the question of consultation which the witnesses referred to - while the agreements are in operation and the award is not in operation, there is a consultation requirement which would deal with the question of any proposed introduction of part-time work. I should be clear that the agreements prohibit part-time employment save by agreement.

PN4801

JUSTICE ROSS: So how is any of that relevant to what the award might do, because the agreements will operate at their own force while they're in operation.

PN4802

MR MOORE: Yes.

PN4803

JUSTICE ROSS: The award won't. It's really if we're looking at the award, what are the obligations.

PN4804

MR MOORE: Yes. Well, it's relevant to the question - some challenge is made by the union.

PN4805

JUSTICE ROSS: Yes.

PN4806

MR MOORE: And I think your Honour has asked questions about how we put our case in this regard about the question of consultation. We're seeking to address that - - -

PN4807

JUSTICE ROSS: But, you see, my point is that it doesn't really address it to say there is a consultation provision in the agreement, because the agreement excludes part-time work other than by agreement.

PN4808

MR MOORE: Yes, indeed.

PN4809

JUSTICE ROSS: So if we were to vary the award to provide for part-time employment in the way you propose, the agreement consultation provision won't arise in relation to that because you still won't be able to introduce it absent agreement whilst the agreements are in operation.

PN4810

MR MOORE: Whilst the agreements are in operation, if my clients seek to introduce part-time work, presumably they would look at that provision, see that part-time is not allowed save by agreement and then approach presumably the union for their agreement. That would presumably engage the consultation processes under the agreement.

PN4811

JUSTICE ROSS: Sure, but that's all something you can do now.

PN4812

MR MOORE: That's true, your Honour. I accept that, but the - - -

PN4813

JUSTICE ROSS: Yes. I'm really looking at - well, if we leave aside whether there are enterprise agreements in place, because that is an unknown in the future about what their content might be or whether they exist.

PN4814

MR MOORE: Yes.

PN4815

JUSTICE ROSS: If you just look at the modern award - because your submission is, well, there will be consultation with the employees affected and the union about the introduction of part-time work, and the question to you is, well, we're looking at the award - a point you make elsewhere that the agreements aren't relevant to that. Looking at the award, your obligations to consult are limited to clause 8.

PN4816

MR MOORE: Yes, they are.

PN4817

JUSTICE ROSS: Yes.

PN4818

MR MOORE: I accept that, your Honour.

PN4819

JUSTICE ROSS: That is the affected employees that you would have to consult with if it's seen to be a significant change, if it's characterised that way, or if it's a roster change it's the individual employee affected.

PN4820

MR MOORE: Well, your Honour, if we're dealing with the rubric of the award setting, so in the circumstance where there are no agreements in operation for whatever reason and we're in the context of the award, the consultation

obligations would be those set out in clause 8. Those consultation provisions require the fire services to consult with employees and their representatives, that's in clause 8.1(a)(i) about any major workplace change. And major workplace change is one that's likely to have a significant effect on employees and significant effects is defined in clause 8.1(a)(ii) as including alteration of hours of work and restructuring or jobs.

PN4821

JUSTICE ROSS: Yes.

PN4822

MR MOORE: So we would have thought - and the award goes on to prescribe the timing for and the content of the consultation in 8.1(b). So in the setting of the award, in the circumstance the agreements aren't in operation, there would continue to be an obligation on my clients to consult with employees and their representatives in the event of a proposed introduction of part time work.

PN4823

Can I now deal with - just to finish the submissions on the question of necessity in 138. I've dealt with the factual matters, we say that the contention of the variations sought by the Fire Services is not necessary, is wrong for legal reasons on these bases. First, and this picks up a point your Honour has asked in one of the questions. We say that the modern award in the context of the Act, frames and has the capacity to impact upon bargaining.

PN4824

Where terms and conditions of employment are covered by an enterprise agreement, it's the express purpose of a modern award to act as the minimum safety net of employment terms and conditions against which the agreement is assessed, section 193(1). And of course, the Commission in undertaking its present task in considering whether the award meets the objective, it's not part of the statutory requirement that the Commission be satisfied that the varied modern award operate at an enterprise level. That's the tenor and substance of the union's submissions that reading into section 134(1) some need to consider how a proposed variation would operate at an enterprise level. We say that's an impermissible gloss on the provisions and would plainly be unworkable.

PN4825

More generally, the import of the Fire Service's evidence is that a variation is sought - and this picks up on the point your Honour raised to enable bargaining on part time. We say that that is, in the context of the Act, an unremarkable position to adopt and does not bear upon the requirements of section 138 and whether the award achieves the modern award's objective. Plainly, one of the factors in the modern award's objective, in 134(1)(b) is the need to encourage collective bargaining. Now in the context of the Act, collective bargaining, if one looks at the overall scheme of the Act, must be understood to include plainly the making of enterprise agreements. Enterprise agreements are assessed by the BOOT test, by reference to awards.

PN4826

So as a matter of industrial reality, as a matter of the framework of the Act, it is unsurprising that the Fire Services' witnesses come to this Commission and say, in effect, well, we want this change in the underpinning instrument to enable, in other words, to facilitate bargaining on a matter. Of course it's accepted, like it's accepted that there's nothing which strictly prevents the Fire Services from bargaining about part time employment now, even without such a provision in the award.

PN4827

JUSTICE ROSS: Indeed, they have.

PN4828

MR MOORE: And they have.

PN4829

JUSTICE ROSS: So contrary to the award, if you like, you can introduce, pursuant to the agreement, part time work by agreement.

PN4830

MR MOORE: Well, I should say that the only basis upon which it could be said, as I understand that they have bargained in relation to that matter, is the fact that the agreements to refer to part time employment, which would suggest that it was a matter in the bargaining context. That's as I understand it, the only evidence about that.

PN4831

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Mr Moore, can I just clarify what you're saying? Am I correct in understanding that there's no proposition that the agreement or agreements ought not be approved, or shouldn't have been approved on the basis that they could have failed the BOOT test?

PN4832

MR MOORE: No, no, that's not good enough.

PN4833

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: All right, thank you.

PN4834

MR MOORE: The point we sought to make, is that it's accepted that the bargaining framework provided by the Act is not confined to bargaining about matters - subject matters or topics in the award. That's accepted, but we are saying beyond that, in the reality of industrial relations, given the statute or framework, it is unremarkable that my clients adopt the position that to facilitate, to enable bargaining about that matter, the award needs to be brought up to date and in line with contemporary standards by allowing part time work.

PN4835

JUSTICE ROSS: I think that addresses question three. It was really whether you were advancing it as some sort of legal impediment - but you've addressed that by, I suppose, it's to facilitate bargaining of the issue.

PN4836

MR MOORE: Yes, your Honour.

PN4837

JUSTICE ROSS: Or the variation would have that effect.

PN4838

MR MOORE: The last point I wanted to make - well the next point I want to make about this around section 138 we say it's irrelevant that the Fire Services have not specified the precise form and arrangements which part time would take the shape of, if it was implemented. It's irrelevant because the complaint grafts on to section 138 a condition which is foreign to the terms of the section. The relevant enquiry under the section is whether the terms of an award are confined to permitted and required terms to the extent necessary to achieve the objective. The focus is therefore directed back to that safety net. Whether or not a term is proposed to be implemented, is irrelevant to that assessment, in our respectful view.

PN4839

So we have outlined in our submissions what we say is the right approach the Commission should adopt to section 138 and we set out the reference to the observations by the Full Bench in the *Preliminary Jurisdictional Decision* that the question of necessity in 138 is to be answered by forming a value judgement based on the considerations in the modern award's objective and the Full Bench says that at paragraph 36 of that decision.

PN4840

That value judgment, as we outline in paragraph 13 of our 16 May submissions, is not made in a vacuum. We refer to a number of matters, which I'll quickly refer to. The explanatory memorandum to the Fair Work Bill provides that it is expected that when considering whether and how to vary the content of a modern award in the four yearly review, the Commission will be "guided by criteria which take into account public, social interest and economic aspects". We rely upon that. Another part of the context which informs that value judgement, is the provisions in section 153(1) of the Act, which prohibits a modern award from including terms that discriminate against employees for reasons including relevantly sex, age or family or carer's responsibility.

PN4841

Of course section 578A and section 3(d) of the Act have the effect of when performing its functions or exercising its powers, the Commission must take into account the objects of the Act which include relevantly, assisting employees to balance their work and family responsibilities by, amongst other things, providing for flexible working arrangements.

PN4842

Likewise, section 578C and the objects of the Act indicate that in performing functions or exercising its powers the Commission must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of sex, age and family or carer's responsibilities.

PN4843

So we say they are the contextual matters which inform the value judgment - contextual matters from the Act and the extrinsic materials to the Act which inform the context in which the value judgment around necessity is to be assessed. We say that the variation is necessary for five key reasons, and I won't repeat - this is set out in our submissions, but I wish to emphasise them:

PN4844

(1) The capacity of an employer to offer employment on a part-time basis and the capacity of an employee to seek employment on that basis, reflects contemporary workplace employment standards, and we point to a number of matters in that regard. We say part-time work is consistent with the industrial standard existing in the fire services and in the emergency services more broadly, except for Western Australia, all fire services offer some form of part-time work to operational firefighters. That's the reality, there's no contention on that issue as I understand it from the union.

PN4845

Secondly, the union has been involved in the making of all of those industrial instruments with the exception of the Northern Territory and New South Wales, and we refer to our submissions at paragraph 48 to 50, our 16 May submissions, and our 26 February submissions at paragraph 42. We have emphasised that part-time work is available to Victorian paramedics and police officers. It is only, we say, Victorian public sector firefighters, they're the only ones who are required to work 42 hours a week. We refer to paragraphs 61 to 64, the firefighters submissions at paragraph 16.

PN4846

In terms of the other matters we point to around establishing the contemporary workplace and employment standards, they are ones relating to the emergency services industry and fire services in particular. We point out in our submissions that part-time work is provided for in 94 per cent, 94 per cent of modern awards. Of all of the 122 modern awards, it is only this award that restricts employment to full-time employment only. Refer to paragraph 14(c) of our submissions of 14 June.

PN4847

The other six per cent of awards make provision for other categories of employment, such as casual and relief work. We make the point in our submissions at paragraph 43 of the 16 May submissions, that part-time work is ordinary feature of employment across the community, with approximately one third of Australians work part-time. We make the point that part-time is not - part-time work is not some novel creature that's recently emerged. It's been around and increasingly common since the late 1980s and we've recounted the history of the emergence of part-time provisions in awards, we deal with that at paragraphs 25 to 31.

PN4848

So that's the first reason we say that it's necessary to make the variation, that is the changes consistent with contemporary standards. The second is that we say that the variation is necessary because consistent with the values of the fire services -

because it's consistent with the values of the fire services and in particular the public sector values and employment principles provided for in the Public Administration Act 2004, Victorian statute which include providing for equality - equal opportunity of employment. We refer to that in our submissions.

PN4849

We make the point thirdly that the capacity to offer part-time work is consistent with the fire services' obligations under the Equal Opportunity Act 2008 (Victoria) and the Fair Work Act. We have explained at paragraph 71 of our submissions that the prohibition on part-time work in the modern award is potentially discriminatory and inconsistent with section 17 and 19 of the Equal Opportunity Act, and section 65 and 153 of the Fair Work Act. In essence, those provisions provide that:

PN4850

Employers must not unreasonable refuse to accommodate the caring and parenting responsibilities of its employees and must consider requests for flexible working arrangements.

PN4851

PN4852

Which are also relevant to section 134(1)(d) of the Act of course. Now the current prohibition on part-time employment is, at least arguably, inconsistent with those obligations.

PN4853

The next point we make in relation to necessity is that the capacity of the part-time work would afford the fire services greater opportunity to offer employment and to retain in employment a broader spectrum of the community, including workers with caring responsibilities, women with infants or young children and workers who are seeking more flexible work practices at particular stages of their careers. We deal with that in our 16 May submissions at paragraphs 65 to 66.

PN4854

Can I just emphasise a couple of things there. Ms Nolan and Mr Werle gave evidence about the challenges faced by women firefighters returning to work after the birth of a child, and that evidence wasn't challenged in cross-examination. That's at paragraph 65 of our submissions of 16 May. Superintendent Connellan from the New South Wales Fire and Rescue Service hit the nail on the head when he observed in his evidence, that if you are the primary carer of a child or a single parent, you simply can't book child care places if you're working on a revolving 42 hour a week 10/14 roster. That's at transcript paragraph 4208, 4209.

PN4855

We think that that is a very stark and succinct illustration of the incompatibility between the existing employment arrangements provided for under the award, and being a primary parent with the care and responsibilities of a child.

PN4856

The ability to offer part-time work will also mean that women returning to work after the birth of a child do not suffer further degradation or depletion in their skills, and loss of promotional opportunities, by reason of being compelled to work in non-operational roles. That is the effect as things currently stand. That will assist in improving the gender diversity in the services.

PN4857

It's not to be overlooked that the fire services are manifestly not diverse in terms of gender and age. The MFB employs 3.46 per cent women, and the CFA's statistics are comparable at 3.3 per cent. It's also worth noting that over 57 per cent of the MFB workforce are aged over 45 and over 60 per cent of the CFA workforce are aged over 35. That's set out in the statements of evidence of Mr Werle and Margareth Thomas.

PN4858

So there is an urgent need to redress the lack of gender diversity and diversity on other grounds within the fire services. The composition of the fire services workforce are out of whack with the gender composition of the community as a whole, and in the workforce. It's also worth noting, and we deal with this at paragraph 40 of our submissions of 26 February, that nearly 70 per cent of the 3.6 million part-time employees in Australia are women. That is a powerful indicator of what the introduction of part-time work, what its implications could well be, would likely be, in redressing gender inequality or lack of gender diversity.

PN4859

The fifth reason the variation is necessary is that it will allow the fire services to meet the needs of its workforce throughout the courses of their working lives, including when the parents of young children, or have other caring responsibilities. That's consistent with the objects of the Act, in particular section 3(d), and the matters the Commission must take into account when performing its functions and exercising its powers.

PN4860

So for those reasons that I have sought to outline, which are set out in greater detail in our written submissions, the capacity to offer part-time employment is essential to ensure that the safety net of minimum terms and conditions of employment contained in the award at hand, is fair and relevant. As such, the inclusion of that provision in the award as sought by the fire services is necessary to meet the modern award's objective.

PN4861

Can I now deal with the question of implementation. I think I might have dealt with some of this already. The fire services have maintained that the implementation of part-work is a matter for the fire services to work through with their employees, and the union about the absence of detail in the draft determination and contend that the unfettered draft determination is problematic. The union hasn't actually specified in any clear way the form they say any determination should take; they haven't put forward, as it were, an alternative draft determination.

PN4862

JUSTICE ROSS: But they deal with it I think towards the end of their submission when they talk about in addition to minimum staffing requirements, et cetera.

PN4863

MR MOORE: That's right, your Honour - I accept that; I was about to come to that.

PN4864

JUSTICE ROSS: Yes.

PN4865

MR MOORE: But they haven't - the only point I was making, they haven't spelt out - - -

PN4866

JUSTICE ROSS: No, they haven't put forward a proposed variation, no.

PN4867

MR MOORE: No, but there are suggestions in their submissions that part-time work should only be introduced above minimum crewing, within the 10/14 roster, and for specific purposes such as return to work after maternity leave. They refer to that paragraph 55(ii) of their submissions. The fire services oppose the proposition that any variation to the award providing for part-time employment should be fettered or constrained in any of the ways suggested, and we make these points: first, the terms - my clients are not seeking to change - they're not engaging in any radical act in terms of the existing state of industrial standards in this country in 2016 - the terms of the proposed variation advanced by my clients are consistent with part-time work provisions in almost all other modern awards, and we deal with that in our 16 May submissions at para 34 and Annexure A to those submissions. So this is no radical departure from existing standards set by this Commission in relation to part-time work.

PN4868

Secondly, we point to the fact that unfettered part-time provisions exist in at least three interstate territory fire services' industrial instruments, and a list of those is set out in paragraph 15 of our reply submissions dated 14 June. We say it's a pretty important point. Thirdly, the inclusion of a simple and unfettered part-time work provision in awards has a long history, and we refer to the requirements under the Workplace Relations and Other Legislation Act 1996 that matters of detail or process are more appropriately dealt with by agreement at the workplace or enterprise level. And we're not dealing with the WROLA Act here obviously, but that principle continues to be apposite today and has informed the Commission's approach to the evolution of awards since that enactment in the late-1990s.

PN4869

For the reasons I've really already gone to, the assessment and determination of enterprise matters around how to fashion or constrain, how to implement part-time work is not part of the Commission's function in conducting the 4-yearly review and we say would be unworkable. That's a matter for my clients to consult and consider with their employees and their representatives as appropriate. And we

make the point in our submissions that the union's witnesses obviously have strongly held views in opposition to part-time work and no doubt other people - at risk of understating that - but there's no doubt strong views held by very many people about part-time work and whether it's appropriate, and if it is what constraints, limitations, if any, should apply. They are all properly the matters for consultation and discussion at the workplace level, and are not properly matters for inclusion in the modern award for the reasons I've outlined.

PN4870

Can I deal with next the key factual controversies in the case? The union objects to the inclusion of part-time work on the basis - and I seek to capture their case here - that it will have a negative impact on skills, trust and confidence, team work, service delivery, and employee welfare. And they advance that case even though the extant agreements do not permit part-time work, as we've considered already, and that prohibition on part-time employment is not going away while that agreement is in place.

PN4871

JUSTICE ROSS: But as you say elsewhere in your submission, we're looking here at the minimum safety net.

PN4872

MR MOORE: Yes, absolutely.

PN4873

JUSTICE ROSS: And the point they make is, well, one of your clients has made application to terminate agreements, and the point I'd make is that I don't think we can deal with the matter on the basis that the provisions of the agreement, as they currently stand, are somehow going to remain in place in perpetuity.

PN4874

MR MOORE: I accept that, your Honour, and without going back to the matter we canvassed earlier, the obligation of consultation will arise either way.

PN4875

JUSTICE ROSS: Yes - no, I follow that.

PN4876

MR MOORE: The only point I was seeking to make in going to this is just to highlight the union's position as being a foundation or a fundamental objection to part-time work. But despite that, this in-principle foundational objection to part-time work, the UFU have agreed to part-time work provisions in industrial instruments on behalf of its members in the ACT, in Queensland, in South Australia and Tasmania. We acknowledge that some but not all of those provisions limit the circumstances in which part-time can apply - but they don't all do that, such as returning to work after the birth of a child. But there is a manifest contradiction in the union's in-principle objection that the world is going to fall down if the award is amended to permit part-time, and the fact that it has agreed to part-time work in four other jurisdictions and that inconsistency in the union's position has never been explained, and it highlights, we say, the illogical nature of the union's objections to the proposal at hand.

PN4877

This is really the situation: either the union's submission in this matter is correct and part-time work is unsafe, in which case the union has wrongly exposed its members to unsafe work practices in the other States and Territories where it's agreed to part-time work, or there is something special and different about Victoria that has never been identified, and our submission doesn't exist. We put those propositions because that's really, as we see it, absent hearing from my learned friends, the only way to really reconcile the union's submissions here, and its actions in four other jurisdictions.

PN4878

I want to deal, beyond that general matter, which we say is an underlying contradiction and flaw in the union's case, there are four other factual controversies I want to quickly advert to. The first is that part-time work is not casual work. The UFU's objection to this application has proceeded at least in part on a profound misunderstanding of what part-time work is, and that misunderstanding is fatal, we say, to at least part of the evidence called by the union. As we've set out in our submissions at paragraph 81 in our 16 May submissions, the evidence of Patrick Geary, Malcolm Hayes, Alan Quinton, Michael Lia, Cory Woodyatt and John Radford about the supposed impact of part-time on the fire services proceeded from an assumption or understanding by them that part-time work is casual, irregular work. For obvious reasons, that evidence should be rejected. Part-time work is the opposite of casual work, and is defined in the draft determination as predictable, pre-determined hours of work. Now the UFU claim in their reply submissions at paragraph 125, the part time employment might ultimately include irregular and intermittent work. We say that that objection is irrational and we say that in paragraph 57 of our submissions. The UFU can't logically object to this application on the basis that it might be something it is expressly stated not to be.

PN4879

So there's this - we have a situation where some seven of the witnesses called by the union have ventilated their concerns about "part time work" when they're really concerned about casual work. For that reason, that evidence should not be given any weight, the evidence by those witnesses.

PN4880

The next point we want to emphasise is the evidence around part time work, safety and skills maintenance and the Fire Services have always acknowledged that the unions witnesses' concerns are genuinely held, but the Fire Services maintain these concerns can be addressed and discussed through a consultation process. Now the Fire Services also gave clear evidence that there is no intention to lower standards to part time employees and the references to the evidence can be found in paragraph 114 of the 16 May submissions by the Fire Services.

PN4881

It's important to note that the interaction between part time work - the interaction between part time work and skills maintenance is not some highly advanced scientific exercise which takes us into unchartered territory. It has been worked out. It is capable of resolution and one example demonstrates the point. The ACT agreement which is in the folder of agreements provided, and which I note the

UFU is a party to this agreement, provides at clause 58.2 "to ensure maintenance of their core and specialist skills, part time employees will be required to attend mandatory and specialist training, regardless of their normal patterns of work. These hours of attendance will be paid as per clause 58.5.

PN4882

So there we have the union, coming to this Commission in this proceeding saying, can't be done - jeopardising safety, skills maintenance. Fundamental incompatibility between part time work and skills maintenance and safe work and protecting the community. When outside this place, they strike an agreement in the ACT which addresses that very problem. That is one way, how parties can reach agreement to deal with the matters of concern identified by the UFU witnesses in this case.

PN4883

It's also important to understand of course, that the Fire Services already have to deal with restrictions for various types on how skills are maintained and acquired and how generally speaking training is undertaken. We have set out in detail in our submissions, how that occurs, in paragraph 127 to 132 of our submissions of 16 May of how skills maintenance and training such as drills, informal skills maintenance sessions are able to be accommodated with a workforce that already has high levels of planned and unplanned levels of absenteeism and given the unpredictable nature of work that the firefighters need to undertake when called upon.

PN4884

We wish to draw attention in particular to the evidence of Assistant Chief Fire Officer Ken Brown, who was called by the union and this evidence can be found at transcript 2534 and is extracted in our submissions at paragraph 127. He said:

PN4885

For undetermined leave like the unplanned leave as you say, but what will happen is that the station officer will plan that. So there might be an exercise or a drill that's planned for that week. So the officer might turn around and say well firefighter X is off for these four days because of this, so we'll delay that drill till next week, so we can do it altogether. That's the important thing about doing it altogether, that the team work is there and have an understanding. So that's why the flexibility is put into the skills maintenance database, so you can capture those drills in that process.

PN4886

That evidence is important because it shows a firm and clear understanding from one of the union's key witnesses in this proceeding, about how flexibility is already built into the skills maintenance program and it can't credibly be asserted, in our respectful view that there is any inherent or fundamental difficulty in accommodating another type of planned absence, which is what part time employment really is.

PN4887

Now the next factual controversy I want to avert to is about part time work, trust and confidence. It's said by the union in substance that firefighters will lose the

trust and confidence they have in their full time colleagues if there are part time firefighters. It's said that firefighters will not have the requisite degree of competency of proficiency - and I've already addressed matters of skills maintenance and I won't repeat that. And we say that that is a complete answer to that concern.

PN4888

It's said that firefighters working part time and on the 10/14 roster will be unfamiliar to the crew. We've addressed that, so this is a stranger danger type submission that's advanced by the union that we don't know this person who is coming here to work with us and in some way that undercuts the required level of familiarity and team based work.

PN4889

We want to reiterate two points which we address in greater detail at paragraph 96 to 107 of our submissions. First, many of the UFU witnesses do not work on a 10/14 roster, but nevertheless turn out when required and they agreed in cross-examination that they were able to perform their role safety and effectively and had never received any complaints from their 10/14 colleagues about working alongside dayworkers.

PN4890

Four out of the six UFU witnesses that worked for the MFB are day workers and four out of the seven who work for the CFA are day workers. They are Ken Brown, Bradley Quinn, Alan Quinton and Tony Martin for the MFB. Gerald Conroy, Barry Thomas, Patrick Geary and John Radford for the CFA. They're evidence is summarised at paragraphs 98 to 102. So, that we say, fundamentally undercuts the nature of the union's objections around teamwork and trust.

PN4891

The second point we make on that issue is that - and we develop this at greater length in our submissions and I won't unduly repeat it, but we seek to emphasise it, is that it has always been the case and continues to be the case that firefighters work successfully and safely alongside other firefighters and emergency services personnel they don't know. And this is an ordinary part of the job and it's dealt with appropriately, and that happens in all sorts of ways with recruits coming in, recalled and retained firefighters, CFA volunteers, transferees and secondees, working in strike teams, working with interstate agencies and working with Ambulance Victoria and Victoria Police personnel.

PN4892

Before coming to deal with any questions that I might not have addressed, can we just emphasise a number of matters that the UFU have never addressed in their submissions to the Commission so far. We say this reveals some weaknesses in their case beyond those that I've already identified. Each of these matters that I'm about to raise have been raised in my client's submissions of 26 February and 18 April and 16 May, one or all of those. But they've never been addressed.

PN4893

What we have not heard from the union, there is no evidence - they haven't called any witness evidence from firefighters who have sought to or been compelled to

give up their operational roles and work part time by way of agreement between the union and the Fire Services using the so-called existing flexibility mechanisms in the agreement that the union wants to make much of. The union says there's these existing flexibility provisions, that answers all of the fire services' concerns. Well where's the evidence of a firefighter who's used those provisions and has been able to have their circumstances adequately addressed? We say the reason there isn't such evidence is that those existing mechanisms are neither flexible nor fair.

PN4894

We point out that the individual flexibility clause in the agreements upon which some reliance is placed, that's clause 12, is limited to study leave. So that's irrelevant or doesn't appear to be particularly relevant. Secondly, the special duties roster at clause 77 of the CFA agreement is for 42 hours per week, and is for non-operational work. We have addressed that in our submissions at paragraph 44 of our 18 April submissions. The special administrative duties roster at the MFB in clause 84 is also for non-operational work. So the reality is there is no existing flexibility for firefighters to work operationally on a part-time basis.

PN4895

The next thing that we note is that the UFU did not produce a single witness who was a primary caregiver or who had ever returned from maternity leave, to give evidence that there was no need for part-time work provisions. Or that part-time was not sought on the basis that it would undermine team work and skills maintenance. One would have thought we would have heard such evidence given the union's case. By contrast, the fire services have given evidence about conversations with female firefighters about the obstacles they face returning to work after having a baby, and that's Ms Nolan, paragraphs 24 to 26, and Mr Werle at 18. We note that Ms Nolan's evidence at paragraph 25 was read but not for the truth of the content. We just refer to the fact of the conversations.

PN4896

There is no explanation from the union about its inconsistent position, as I've identified before, between why it opposes fundamentally as an item of faith the availability of part-time work in the modern award in Victoria, compared with its position to facilitate and allow part-time work in Tasmania, Queensland, South Australia and ACT. Nor is there any explanation about how the union's witnesses' objections to part-time work sit comfortably or conformably with the union's support for part-time work in those other jurisdictions.

PN4897

Now I don't wish to say anything more at this time other than if I might just quickly deal with the questions, insofar as I haven't dealt with them. I think in terms of the questions for my client, I've dealt with question 1. I think I've dealt with question 2, your Honour.

PN4898

JUSTICE ROSS: You've dealt with 3.

PN4899

MR MOORE: Dealt with 3. I don't think I have answered question 4 but I can do so shortly. It is of course accepted that each modern award is to be reviewed in its own right, and as a result the context and circumstances of the industry or occupation covered by it is relevant to the form of a part-time employment award term. I accept that that must be so.

PN4900

What is not accepted, however, for the reasons I have outlined is that the context and circumstances of the industry or occupation of Victorian public sector firefighters are relevantly different to the context and circumstances or industry or occupation of firefighters in other states, so as to justify the continuing prohibition of part-time work in Victoria while it's permitted elsewhere.

PN4901

I think I've dealt with the question of consultation in question 5, your Honour. Question 6, we don't want to add anything further to our submissions in relation to day workers beyond what's in our written submissions, your Honour.

PN4902

JUSTICE ROSS: Right. Well I put the further question orally this morning.

PN4903

MR MOORE: Yes.

PN4904

JUSTICE ROSS: About how does it work at the moment, because a number of the witnesses did seem to be on day work and did seem to be doing operational work. So how does all that come about at the moment?

PN4905

MR MOORE: Yes, if I take some instructions about that.

PN4906

JUSTICE ROSS: Sure.

PN4907

MR MOORE: To clarify, your Honour wants to understand how the day work provisions currently operate.

PN4908

JUSTICE ROSS: Yes.

PN4909

MR MOORE: Question 7, I think the answer to that question is no.

PN4910

JUSTICE ROSS: Doesn't that then raise the Browne v Dunn point that you raised against the UFU in relation to another witness?

PN4911

MR MOORE: I agree that it does. I think there was a - we were invited to deal with some of the questions otherwise directed to the UFU.

PN4912

JUSTICE ROSS: They were numbers 10 and 20.

PN4913

MR MOORE: Yes. Number 10, I think the second question is really what's relevant to my clients. We would oppose that suggestion, your Honour. The proceeding has occurred on a clear and comprehensive basis. The fire services have spelt out the contents of the part-time term that's sought. The case has never proceeded in a bifurcated way between whether there should be a term and then separately if so, what its contents are. It's all been rolled together, that's the basis upon which we've conducted the case.

PN4914

JUSTICE ROSS: Yes. I suppose it was really asked at a point in time when you hadn't addressed the UFU proposition about what constraints might be put on the clause, towards the end of their submission and you've now done that orally. Is that the - - -

PN4915

MR MOORE: Yes.

PN4916

JUSTICE ROSS: Right.

PN4917

MR MOORE: Question 20, dealing with the matter of secondary employment. We say that there's no evidence before the Commission to suggest that secondary employment may impeded organisational flexibility, and we don't accept that that proposition is so. However, in principle, the fire services do not oppose a variation prohibiting secondary employment for all employees, if the Commission is otherwise satisfied that there is a basis for so determining.

PN4918

JUSTICE ROSS: Right.

PN4919

MR MOORE: Then there were questions for all parties. I think they were the last in the UFU questions that were drawn to our attention, your Honour.

PN4920

JUSTICE ROSS: Yes. I think we've probably sufficiently canvassed number 2.

PN4921

MR MOORE: Yes. So question 1, which deals with ascertaining a view about an award provision restricted - we take it that the question is inviting a response to confinement of part-time to level 1 firefighters and above.

PN4922

JUSTICE ROSS: Yes.

PN4923

MR MOORE: Yes.

PN4924

JUSTICE ROSS: Yes, I'm sorry, yes.

PN4925

MR MOORE: Yes.

PN4926

JUSTICE ROSS: So in other words, you have to have successfully completed the recruit course.

PN4927

MR MOORE: Yes.

PN4928

JUSTICE ROSS: Having regard to Ms Schroder's evidence.

PN4929

MR MOORE: Yes. Well for the reasons that I've gone through, and consistent with the terms of nearly all other modern awards and the minimum right in relation to firefighters in a number of other states, the fire services do seek a variation in the terms proposed, which would provide for a general right for them to employ operational staff on a part-time basis. That remains out strong and firm position. However, in the event that the Bench determines to restrict access to part-time employment to level 1 firefighters and above, that course would not be opposed by the fire services.

PN4930

JUSTICE ROSS: Thank you.

PN4931

MR MOORE: Excuse me a moment. Unless there's anything further, they are the submissions for the fire services, your Honour. I'll take some instructions about the matter of day workers.

PN4932

JUSTICE ROSS: And the coverage question.

PN4933

MR MOORE: Yes.

PN4934

JUSTICE ROSS: Can I add one more for each of you. I suppose the question arises, in part, of an observation that you made in your oral submissions that the variation would allow the fire services to meet the needs of their workforce. I'm interested in hearing from each of you about the interaction between the proposed variation and, for that matter, the awards that currently stand and the operation of section 65 of the NES.

PN4935

Section 65 provides that a relevant employee who has certain caring responsibilities or is returning to work after taking leave in relation to the birth of a child, may request to work part-time to assist. Well, if part-time employment is

prohibited in the award, is that consistent with the legislative intent in section 65? If it isn't, then what flows from any of that?

PN4936

MR MOORE: The matters which remain outstanding from my side of the bar table: how does day work operate now, what are the existing arrangements in relation to day work; the coverage question, which I understand is a reference to the issue about the coverage of the award now in Victoria, Northern Territory and ACT - - -

PN4937

JUSTICE ROSS: Well - - -

PN4938

MR MOORE: Is that what your Honour meant?

PN4939

JUSTICE ROSS: No. It's really paragraph 17.

PN4940

MR MOORE: Of your questions, your Honour?

PN4941

JUSTICE ROSS: Yes, to the UFU, question 17. I've heard Mr Kenzie already about the - I'm not inviting any further comment about the fact that no other service has sought to intervene. I understand what each of you say about that. It's really the two questions: which public sector fire services are covered by the modern award and that involves an examination of the coverage clause, and then tracking through how many state services or public sector fire services fall within the exclusions and for what reason.

PN4942

Then the second question also is raised and that is of those who are covered by the award, how many have agreements which permit part-time work.

PN4943

MR MOORE: Yes.

PN4944

JUSTICE ROSS: That will be a subset of your attachment A, I imagine. I would encourage you to have a discussion jointly about that. For that matter, there should be some discussion about whether you can agree on a joint position about how day work currently operates. I'm not asking you to come to a joint view about the interaction with section 65. You'll say what you want to say about that, but I will ask you to have a discussion about how do you want to deal with these outstanding matters.

PN4945

MR MOORE: Yes.

PN4946

JUSTICE ROSS: Whether you want rights to reply. How all that might work in the time frame, I'm content to leave that in your hands. If you can just let my chambers know in due course.

PN4947

MR MOORE: I think the last remaining matter was the query your Honour raised about the Parks Victoria decision.

PN4948

JUSTICE ROSS: That's right.

PN4949

MR MOORE: And Re AEU.

PN4950

JUSTICE ROSS: Yes.

PN4951

MR MOORE: I'm not in a position to respond to - - -

PN4952

JUSTICE ROSS: No. Look, it may not - - -

PN4953

MR MOORE: I'm not sure if I'll reach agreement with Mr Kenzie on that.

PN4954

JUSTICE ROSS: No, I doubt if you will. I'm not seeking it, in that. I think it's really the factual or the purely incontrovertible legal matters that I'm seeking some joint position on. That's all.

PN4955

MR MOORE: Yes, I understand. Thank you, your Honour.

PN4956

JUSTICE ROSS: Thank you. Mr Kenzie?

PN4957

MR KENZIE: Thank you, your Honour. I will adopt a similar approach to that of my friend. That means we don't see this as the occasion to traverse the matters that we've had adequate opportunity to put submissions on. There are many submissions in this case. In doing what we're going to do today, we will attempt to identify as we go where our submissions intersect with some of the questions that your Honour asked the parties yesterday.

PN4958

As I indicated to your Honour, we do not propose to take the same approach as Mr Moore in relation to that for reasons that I've already advanced, but we will need to come to an agreement. We don't want to turn this into another separate exercise - - -

PN4959

JUSTICE ROSS: I don't want you to either.

PN4960

MR KENZIE: We're very conscious of that, your Honour.

PN4961

JUSTICE ROSS: Yes.

PN4962

MR KENZIE: We see it as more efficient if we can come to an agreement to expeditiously respond to the questions and we'll talk to our friend about that. We would expect that many if not most of the questions that have been identified would be dealt with that way for a number of reasons. We think it's most convenient that it be dealt with that way. We can deal with them succinctly in writing. It's far preferable to me seeking to deal with those in - than rifling through the evidence about those questions on my feet.

PN4963

Some of the questions are general and ask for responses in relation to categories of evidence and the like, and it will be better and more efficient if we do it that way as I've explained.

PN4964

JUSTICE ROSS: Yes.

PN4965

MR KENZIE: If it please the Commission, we want to put in addition to and in respect of the written submissions that we filed on 6 April 2016 and our final outline of submissions on 7 June - make the submissions by way of summary that I'm now about to make. We will, in writing, duplicate the exercise that our friend capably did, if I may say so, on his feet, and that is to give your Honour an indication of how those submissions interact.

PN4966

We will, likewise, point out where in relation to the earlier submissions those matters were not picked up in the later submissions. We will need to rely on them, as Mr Moore did. For example, there are aspects of our first submission which dealt with the details of the interstate awards which weren't again picked up in the later submissions and we'll identify that as our friend did.

PN4967

Your Honours, could I address the statutory criteria and in particular the historical context, including the relevance of the enterprise agreements that are referred to in our submissions. Secondly, in relation to the statutory requirements, the aspects of our submissions that go to the relationship between the statutory requirements and the fact that the application made by the fire services is and continues to be pressed on the global basis that it is.

PN4968

It is quite clear from the submissions that have been made today that nothing, with the possible exception of the last point made by Mr Moore as to level 1

firefighters - nothing that has happened in this proceeding has dissuaded our friend from seeking to move the award globally into a position in which there will be an entitlement as far as the award is concerned to employ on a part-time basis, and that means we will move from the present position under the award to a position where the award embraces globally the employment of part-time personnel for all operational purposes included, and by that I mean the award will go to the initial employment as well as the employment decisions to be made and to be made about the employment or the work of existing employees. And the Commission has seen that some of the interstate awards, for example, have provisions in them dealing with the position of people returning after pregnancy and the likes - specific provisions dealing with existing employees.

PN4969

But the global position that is being sought is one that relates to part-time employment from scratch, and the scope of the application is one that would and is designed to permit the services, regardless of anything that's happened in the past, to employ at the outset a part-time employee from, as it were, cradle to grave, that is, from recruit stage through to the most senior stage, without exception; it is global, and it is pressed and continued to be pressed on that basis. And a fundamental aspect of our case has been that in those circumstances it cannot be said or shown to be necessary to have a provision that looks like that. Whatever might be said about a more limited provision, it cannot be said at the end of the day - it cannot be shown to be necessary within the meaning of the authorities.

PN4970

Could I say something about the statutory criteria? In paragraph 7 of the applicant's reply it is asserted that we have not addressed the statutory criteria, and again today, I think, Mr Moore put it slightly differently; he said our submissions haven't paid sufficient attention to the statutory criteria. And it is true that our submissions in a sense take as a given the statutory criteria that have been relied on by the fire services, and take them as a given and rely on what has been said about the modern award principles in decisions like the Preliminary Jurisdictional Issues decision. But the fact that we have not referred to or relied on those provisions says no more than that they are a given in terms of our submission. Our submissions are not to be taken to be a rejection or ignoring of those matters; far from it.

PN4971

One of the questions that your Honour the President asked was whether we accept that the statute's objectives are to be gleaned from a reading of the Act more generally as a whole, and your Honour mentioned section 3 - I see section 3(d) is there - 134, 138, 156 and 577 and 578, and our response to that is that of course the Court can look at those objectives for the purpose of what it is doing, and will. 578, just to take one them, your Honour, is 578(c): in performing functions or exercising powers, the Fair Work Commission must take into account the need to respect and value the diversity of the work force, for example. We don't flee from that, neither could we. What we have done, however, in our submissions is to address the statutory criteria in paragraphs 6 to 29 of our final submission, specifically by reference to the requirements as identified by the Full Bench in the

Preliminary Jurisdictional Issues decision: "This", if it please the Commission, "included recognition that a variation is to be included only to the extent necessary to achieve the modern award objective", and those words they're quotes. Our point is that that necessarily requires attention being given to that which is claimed, as well as that part of the decision which specifically identifies the relevance of the historical context.

PN4972

The Full Bench decisions on award modernisation confirm that in addition to requiring a focus on that which is claimed by way of addition, or change, to a modern award, there's nothing in the statutory provisions that justifies the inclusion of a provision which goes beyond that which is necessary. Neither is there anything in those provisions which would require, or even suggest, the inclusion of provisions that represent a compromise to the safety and the welfare of employees. In other words, accepting all of those of the statutory provisions, heavily relied on by the applicants, when the Commission is performing its statutory task - and bearing in mind the need to consider gender diversity, the need to consider all of those objects that we see and are relied on - the Commission will approach the matter consistent with sections 577 and 578 in accordance with equity and good conscience, and would not vary a modern award if it - in a way in which it was satisfied that it was, firstly, not necessary in that form, and certainly would not vary a modern award, however legitimate the underpinning concerns were in relation to diversity and the like, in a manner that raised serious issues about the welfare and safety of the employees that it was going to cover.

PN4973

That is our submission in relation to the matter. It involves a complete acceptance of the provisions that our friend relies on, but what is more it relies on a fuller acceptance of the decisions of the Fair Work Commission in relation to the matters to be taken into account in dealing with and applying those sections, and that involves, in particular, the historical context. The only other thing I'd want to say before - I want to say a couple of things about the historical context, and one of our submissions in relation to the jurisdiction before coming more particularly to that historical context.

PN4974

The first is that the applicants in paragraph 8 of their last written submission assert that we have never explained how the existing award can be reconciled with the modern award's objective. We would rather put it, your Honours, that the task consistent with the Act and the principles applied in the Award Modernisation decisions is to identify whether the change that is now sought to be made to the award is one that satisfies the requirements and is necessary to be included for the first time.

PN4975

As your Honour the Presiding Member said, whatever might be said about the quality or content of the deliberations of the Commission leading to the modern award being in the position it is now, the award is in that position. There have been a number of processes. There was the process before Commissioner Hingley earlier, and you have our earlier submissions in relation to that. We put that Commissioner Hingley, he had a joint submission before him, he applied the

statutory criteria. He didn't refer expressly to the matter which was originally contested but became agreed, but he applied the statutory criteria and made the award in the form that it was.

PN4976

That was then brought before the Full Bench in the Award Modernisation case and it was the subject of deliberation, and whether or not the Full Bench said then well, a full debate will take place on a later day, we'll put that aside for full consideration. The fact remains that in a context in which there was a contest about the inclusion of part-time work, in the public and the private sector, the Full Bench determined to incorporate part-time in the private sector but declined to insert it in the public sector.

PN4977

The fact that it said there will need to be a - well may be a full debate, does not militate against the fact that there has been a decision which put us where we are today. Now the second thing I wanted to say before going to historical contest is that one of our submissions as to the task of the Commission has been, to an extent, legitimately criticised. The language of jurisdiction is used to suggest that there is a jurisdictional connection between the task at hand and the need to show changed circumstances. That we have to concede must represent an overstatement on our part, and let us know something about that at the outset.

PN4978

The words "changed circumstances" don't appear in the legislation as is correctly identified. It would be completely possible to identify, to have a case, a modern award case, in which a provision was inserted, even inserted over objection, where there was no evidence of changed circumstance. For example, if it were definitely shown that the provision wasn't put in by mistake and what happened on day one shouldn't have happened, and it needs to be rectified. No evidence of changed circumstances, and our friend's criticised our language there and he's entirely right. We have to say that.

PN4979

The point we're trying to make in relation to the aspect before the Full Court is this, that the award modernisation decisions reflect two things clearly and consistently. One is that prima facie the - consistent within general industrial practice, the Commission will proceed on the basis that the existing award - the existing provision complies with the principle. That's the starting point.

PN4980

The second proposition that has been consistently applied in two modern award decisions expressly picked this up, is a recognition of the relevance of the historical context. Now what we say is that in a case like this where you have the provision put in by the Commission, where there is a history such as this history, where it has been put in originally before Hingley C in a sense as a matter of consent, subsequently by the Full Bench in the manner that is described in the first earlier award modernisation decision, you have an award provision which prima facie complies with the legislative requirements. In those circumstances, evidence of something and in particular in cases where there has been an acceptance by the parties and we'll come to the historical context, of the reason for the exclusion, in

this case of part-time employment, you would require as a matter of logic some satisfaction that there had been some change to a position - - -

PN4981

JUSTICE ROSS: But you don't have that here. You've got a position of one of the parties, one of the interested parties in the context of the regulatory instrument that's not respondency based.

PN4982

MR KENZIE: Yes.

PN4983

JUSTICE ROSS: So one of the parties has expressed a view previously - - -

PN4984

MR KENZIE: Yes, yes. Well, no, your Honour, it's taking me - I'm being slow to get where I need to go. It's my fault.

PN4985

JUSTICE ROSS: No, no, that's fine.

PN4986

MR KENZIE: But that gets us to the question of what is the historical context, and this is a point on which the parties are bitterly divided, and it's an important point. I want to come to it in just a moment.

PN4987

What I did want to do, just before I did come to that, is to say well what is the - what is the situation in relation to the parties' position as to changed circumstances, if it is truly relevant. I know I have to deal with your Honour - the presiding judge's observation before I come to that. Could I just say this; the undisputed evidence is that since the time that the matter has been before the - was before the Award Modernisation Bench, certainly since the award was made, the complexity of both the training and the work of firefighters has continued to dramatically increase. We've dealt with this in paragraph 17 of our final submissions, which also refers to the acknowledgement by the fire services witnesses. You will remember this sort of evidence.

PN4988

That against a flat line or a background of the rigorous training requirements described by Mr Leach who knew all about this subject, he was taken to it in depth, he agreed with every proposition put to him about the extent of the training in cross-examination from an earlier affidavit filed in the other proceeding. Against that background, he and others, fire services' witnesses, agreed that the training regime already as rigorous as it could be, the training regime, the skills maintenance regime, was - and this is an advocate's flourish, but dramatically changing by the changed environment in which firefighters operated.

PN4989

The nuclear biological threat added to the mix means that skills maintenance, and we don't just mean drills. Skills maintenance has gone through the roof and is

going upwards as we speak. That's the world. So on day one when parties were doing - - -

PN4990

JUSTICE ROSS: This is the world affecting firefighters generally in the public sector?

PN4991

MR KENZIE: Well, it's certainly affecting firefighters in the public sector in very particular ways. It may well - certainly the sorts of considerations feed into other emergency services as well, but confining ourselves to the case at hand we have a situation in which the evidence in this case is one in which it can't be denied that management is all about making sure that skills training and maintenance, proficiency training and maintenance occurs on a station basis, at station, on duty, and it's accelerating and has accelerated since this was last looked at.

PN4992

Now that is a dramatic event - development that affects the people concerned, and feeds into a number of things including your evaluation of the concerns of the firefighters about matters on which we're at loggerheads. Your Honours, on the other hand in paragraph 14 of their reply, the applicants submit that even if the modern award's objectives were met at the time when the modern award was made, it no longer - it's no longer met and they refer to what they describe there as the industrial standards in fire services across Australia and in emergency services. You'll see that from the submissions in reply.

PN4993

All we wanted to say in relation to that is if you look at paragraph 14 you will see that the things that are advanced by way so-called development of industrial standard were largely in place before the last award was made. These aren't more recent developments. They're not - largely not changed circumstances at all. The relevance of the so-called industrial standard in emergency services is entirely irrelevant where the circumstances of those other emergency services is radically different from the situation being considered here, and as far as industrial standard across other modern awards, true it is that other modern awards have been affected but it's not suggested that there wasn't a real developing standard as to part time in 2010.

PN4994

What we do submit is that if you're talking about the way in which things have moved since the last time the parties and the Commission addressed this matter, the most significant change, is the one relied on by the UFUA. It's not just an incident, it's something that affects every day of their life, every time they go to work, this is a change that has happened. And again, when we come to what you do with this evidence, we'll come back to this.

PN4995

Could I then come to the historical context? Everyone agrees, as they must, with the proposition that the historical context is relevant. The parties are doing different things with the historical context however. Whatever might be said about the question of whether Commissioner Hingley actively considered the

same question as currently before the Full Bench, and we refer to that in our final submission, paragraph 13.

PN4996

It cannot be denied that in that case, and I'm coming to your Honour the presiding member's question - in that case, one of the parties, the CFA together with the UFUA advanced a joint submission that it was not appropriate to employ part time firefighters in the industry, and we've identified that. That is but one of the occasions in which the parties have had cause to address this matter. They have also addressed it and had to address it in the context of making certified agreements, and it is here that the parties - the fork in the road arises in relation to the historical context, and I'll come to it.

PN4997

As far as the CFA's position, our submission is that consideration together with the other matters which you'll find identified in our final submission, paragraphs 12 to 29, in which we look at the historical context more generally, demonstrate that the historical context is of great significance in this case. Our submissions, as you will note, and I'm not going back to them, record that in other industries where part time employment has not been accepted by the Commission, notwithstanding a contest, the fact that part time prescription has not been a feature of the award, has been regarded by the Full Bench as important, understandably so.

PN4998

JUSTICE ROSS: That was hearing the award modernisation process.

PN4999

MR KENZIE: Yes, and it's treated as relevant, because common sense would suggest you treat it as relevant because it's unlikely that it had something to do with the nature of the activities that are going on there. The Maritime Award, you don't look at the Maritime Award and immediately think about the suitability of part time employment. Casual employment perhaps, but part time employment, it wasn't a feature of the award. That was regarded as salient, as relevant and correctly so, in our respectful submission.

PN5000

The Commission didn't go on to identifying the cases that we've referred to in our submission for all of the reasons why that might have happened. The fact of it not being in the award was considered significant in itself, but in this case, you have so much more. You have so much more - you have the fact that there has been past conduct of the parties, and I'm still coming to that - I will get there. And you have evidence given before you which mirrors evidence given in previous proceedings which led to the award being made, explaining why this is so.

PN5001

So this case is a far different beast from cases like the Maritime Award where the simple fact of the history of the award was given a tick. This is a case where it has been explained to the Commission why all this was so and the circumstances in which it occurred. Our case is not simply based on the absence of part time prescription, but it's based on the fact that that absence has to be seen in the

context where the parties have on more than one occasion, accepted as inappropriate the use of part time prescription in the public sector of the firefighting industry in Victoria.

PN5002

Our friend says well if you can't find a recent decision of the Commission which explains all this - that awaits. But our point is, no, the historical context includes, it's not part of a historical context, it's this historical context and that includes the occasions on which the parties have had to direct their attention to this, and that does embrace the enterprise agreements, and I'll come to what we have to say about the enterprise agreements in a moment.

PN5003

The fact is that both the MFB and CFA, each agreed in 2010 that, and I'm quoting "for reasons including safety and welfare of employees covered by the agreement" the Fire Services will not employ part time or casual firefighters. You will see that in paragraph 13(ii) of the submission. Now in our submission, that is, it is simply part of the historical context, but it is a very very important part of the historical context and not to be sidelined.

PN5004

The significance of it, as you will immediately see, is if you've got all the parties solemnly entering into an agreement, whereby they say that for reasons including safety and welfare, part time employees won't be employed, that is a very powerful and comparatively recent consideration. And your Honours, when we come to it, it is completely destructive of the proposition that the UFU firefighters' evidence as to the issue of safety and welfare thrown up by part time work, are to be simply rejected so that they conveniently fall from view.

PN5005

This is not simply a case of one party changing its mind about what should be in the prescription; this is a case where there is consistency of absence of coverage, explained in the case of the CFA in two enterprises, the award and the agreement enterprise, and in the case of the MFB, in the case of the agreement.

PN5006

How do the Fire Services deal with this when they're submissions of course, contain not one word of explanation as to how the dramatic change of position has come about. What is the dramatic change of position? The change of position is one in which 2010 they're saying for reasons including safety and welfare of employees covered by the agreement, we won't employ part time employees, to two, inviting you to reject as valueless and of no weight the sworn evidence of experienced and senior firefighters who have come before you and subjected themselves to cross-examination about their concerns.

PN5007

The response of the applicants, staggeringly so, in my submission, is to say that you should treat that evidence as of no weight. In our submission, you would reject that contention. It isn't just a matter of this simple changing of mind, it goes to the veracity and the supportability of the contention that our witnesses are coming here and expressing concerns that are without foundation. Now your

Honour, the parties are far apart here in relation to the relevance of this material, because in paragraphs 33 to 35 of the reply the applicants submit that the terms of the agreements relied on by the UFUA are entirely irrelevant so that they should not be considered by the Commission in this application.

PN5008

Indeed, the applicant's go so far as to assert that a consideration of the terms and conditions of the enterprise agreements by you, would be appealable error. We invite you to reject that submission. It is completely untenable. The Full Bench decisions relied on by the UFUA in relation to award modernisation which understandably accept the significance of the historical context, do not refer to part of the historical context. They don't refer to that part of the context which consists of deliberations. Indeed the decisions in award modernisation proceed on the basis of what has actually happened in the industry.

PN5009

As you'll see in the Maritime case, and I'm not going back to it now, the Commission looked at whether something was a feature of the award and whether something was a feature of practice in the industry. In other words, they were looking at the conduct of the parties, not just what the Full Bench had to say about it. On no account can you take these 2010 agreements, which were solemnly reached and are still being applied and say just forget about those, just put them to one side and by the way disbelieve all the evidence of people who've - or the voracity or the reliability of it, notwithstanding the fact that it's completely consistent with the concessions made and the understandings reached in 2010 because it's irrelevant.

PN5010

JUSTICE ROSS: Does it follow from that that we should also have regard in looking at the context at the range or arrangements that operate in other public sector fire services?

PN5011

MR KENZIE: Yes, your Honour. The range of what the Commission could legitimately look at in this context, in that regard would be limited only by common sense and what the evidence would entitled you to do. I will have to come and address this too. Because it's clear that the UFU use names on agreements in other places and it's clear that other places have agreements that are described in the evidence. That is - you're entitled to look at that. You're entitled to give it the weight that the evidence before you allows it to be given, and I will need to address this.

PN5012

In this case what has happened is that the Commission has called for some evidence about New South Wales, and it's received that evidence which is quite detailed through Mr Connellan's helpful evidence about the way things work in New South Wales. But otherwise, and the parties are again apart in terms of what Mr Connellan's evidence disclosed as to the relationship between New South Wales and Victoria. There is no similar evidence in relation to the other states. The Commission hasn't received evidence as to that.

PN5013

JUSTICE ROSS: Well, we can seek it.

PN5014

MR KENZIE: The Commission could and being the nature of the proceeding it is and indeed the Commission could respond to submissions like this and say well, now that the UFU's raised that it may be that it would be helpful to do so, and again the Commission is at large in this regard and that must be so. My point is that at least at the stage of the evidence that we've got, what we have is we have evidence as to how the Victorian systems work and we have masses of evidence about that, including the evidence of the significance of team work, training and reliance, and also including evidence from management as to the way - the method of operation, the way in which they conduct these services which consciously involves massive amounts of proficiency and skills training on an ongoing basis.

PN5015

That's the way the system is designed to work in Victoria. Management has devised it that way. Management in this case have come into the witness box and when they've been asked about the effect on the practices in Victoria that would necessarily follow from the introduction of part-time work, I'll take you to the specific evidence, they have agreed - at least two witnesses agreed that that would involve a big change to the way in which things operate in Victoria. You can understand why that is so.

PN5016

It is because of the nature of the evidence as you heard about the way and the intensity of the training. It is also interesting, and again this relates to another of the questions that your Honour asked about the productivity report, where the UFU has said, well, look, Victoria can lay claim to having a particularly good safety record. Your Honour asked the quite understandable question well, do you also accept that it costs a lot more money to get you there.

PN5017

JUSTICE ROSS: It's asked because it would seem to follow that your response time's going to be lower if you've got more fire stations and more firefighters.

PN5018

MR KENZIE: Yes. Yes, indeed your Honour. I'm not seeking to - I accept completely the legitimacy. Indeed, it was a completely understandable question. The point in this regard was to show that you can't simple mention the word fire services across different states and get necessarily the same answer about the strength of the evidence that we rely on in this case. As I say, at this stage there is no evidence as to what is mirrored in other states, other than New South Wales where you have Mr Connellan and I'll remind the Commission, I'm not going to go trawling through the evidence, but I'll remind the Commission of where the parties are apart in relation to Mr Connellan's evidence. It's sufficient at the moment to do perhaps two things.

PN5019

Mr Connellan's statement voluntarily identified that the way in which they operate in New South Wales was that crews changed all the time. That's the way they operate. That alone throws it into stark relief for the way that things operate here. In Victoria there is a - well the Commission has the evidence as to the way in which things operate in Victoria. Of course that is punctuated by leave, jury service, defence service and the like but the aim and the expectation, because of the way they operate, is to do it that way.

PN5020

Now does that mean that the arguments that we are running in this case could have been mounted in relation to New South Wales or Queensland? The Commission doesn't know that. We would submit that the arguments which we are mounting in this case would have had a different dimension if we were examining the New South Wales service. Because you would have Mr Connellan in the witness box saying look, don't get too excited about the consistency of teams because we operate on a much more flexible basis. So your Honour - - -

PN5021

JUSTICE ROSS: Well, you asked him directly whether he - they were departing from teams and he responded no, they weren't. They were expanding the team.

PN5022

MR KENZIE: It's a bigger team. That's exactly right.

PN5023

JUSTICE ROSS: Yes.

PN5024

MR KENZIE: Again, I'm not inviting you to reject that as some sort of clever answer. Mr Connellan was a forthright witness doing the best he could to explain in the time that he had, the way things work. Call it a bigger team, call it something else. It's still a different operation. It's still a relevantly different operation. Relevantly different in terms of what we've come to this Commission to argue about.

PN5025

So is there an inconsistency in the UFUA here? Well we would say, first of all the UFUA didn't negotiation the new agreements in New South Wales, and was there inconsistency in relation to the other states? What you do know is that they have agreements which appear to have been generally negotiated. They're a variety of different agreements. In Western Australia there isn't anything. So the position is disparate. One thing you can't get from that is that there is inconsistency in relation to what the UFUA is saying about the evidence in this case and the way the Victorian services operate. That is our response to the question of inconsistency. We don't - there may be an element of inconsistency but the evidence doesn't establish the sorts of considerations which we are placing so much emphasis on here are mirrored. They're certainly not mirrored in New South Wales, have a mirror in Queensland.

PN5026

The other differences in New South Wales of course include the fact that they have totally different means of operation because they have retained firefighters. Part of their operational personnel, they've got a separate award, on-call duties and the like. They don't translate into the Victorian system. So your Honours I won't reprise it now because it's all in the submissions. Your Honour has Mr Moore's submissions about the things that he's drawn from New South Wales, which he says, well, look, it's pretty similar. The station officer - you've still got a station officer for welfare and the like, and even in Victoria there are - crews have changed and the like.

PN5027

Our submissions simply say to you, look, you have a look at that evidence and we invite you to pick up Mr Connellan's evidence and say does that mirror the situation that you've heard all this evidence about in Victoria. Someone's right and someone's wrong, your Honour. We would suggest that the differences far outweigh and are far more relevantly present in accordance with our submissions in that regard.

PN5028

Now your Honour, the enterprise agreements which we say are relevant are obviously a highly significant part of the historical context, and we would ask the question just rhetorically, how it could be seriously contended that the fact that the same parties have reached agreement on the very matter that is before the full bench be excluded from consideration as part of the historical context. That would require some defending.

PN5029

JUSTICE ROSS: Well, accepting for the purposes of the argument that it's part of the relevant historical context, isn't it also relevant that the agreements were made against the background of an award provision that prohibited part-time employment?

PN5030

MR KENZIE: Yes, it's true that that happened, but the fact that the award - - -

PN5031

JUSTICE ROSS: I raise it because in that sense it's unsurprising that the agreement doesn't provide for part-time employment. It would be surprising if it did given the position in the award.

PN5032

MR KENZIE: Well, your Honour, all I would say to that is that the existence of the award and the relevance or irrelevance of part-time employment, no doubt provided a relevant part of the historical background to the making of the agreement, but the making of the award which was otherwise silent did not require the parties to agree that, "For reasons including safety and welfare, we won't have part-time employment."

PN5033

JUSTICE ROSS: I follow that part of the proposition.

PN5034

MR KENZIE: That's a big part, your Honour. It goes directly to the issue that we're spending so much time fighting about in this proceeding. The fact of the agreement by the principal parties reflected in the express terms of the agreements go directly to that issue. Our friend's only response is to say, "Forget about it." There is no other response given. No attempt to say, "Well, look, we didn't really mean what we say, but reject their evidence." There is no attempt to deal with it at all other than to make the benign submission that this somehow disappears from view. We've said what we need to say about it.

PN5035

JUSTICE ROSS: Part of your proposition is that such a change would have an impact on service delivery through the skill acquisition and safety issues. I'm not suggesting that those are not relevant factors, but in this case we have to consider them against the background that the employers are under a statutory obligation about service delivery and it's their statutory obligation about health and safety; that they carry that issue. We're not, as it were, assuming those responsibilities.

PN5036

MR KENZIE: I accept that.

PN5037

JUSTICE ROSS: It may be that you're on a continuum. There are some changes that may potentially have some health and safety impact and the Commission might take a more benign view having regard to the risk, et cetera, on the basis that, well, the employers are covered by their statutory obligations and they'll have to meet those.

PN5038

MR KENZIE: Yes.

PN5039

JUSTICE ROSS: Others, you might have, for example, a provision that provides for - well, I'll give you a precise example. I can't remember how many years ago now, but I remember dealing with an Ambulance Victoria Northern Region agreement that sought the introduction of 24-hour shifts - or provided for 24-hour shifts. The question was, was it in the public interest to deal with those. In the end, I concluded it wasn't because of fatigue and other factors.

PN5040

MR KENZIE: Yes.

PN5041

JUSTICE ROSS: So you have that sort of at the extreme end where the Commission has intervened, but it's really where does this case sit or that continuum - - -

PN5042

MR KENZIE: Yes. Your Honour, as a matter of logic it would be open to the Commission to say, "Well, look, there has been this dispute between the parties about a fundamental issue, but we're compelled to accept the version of the UFU

because, after all, it was signed up to a few years ago and these people have given forceful evidence about it", but it is against a background of the function that the Commission is presently forming.

PN5043

It's not a compelling enough reason because it goes to matters that are within the responsibility of management. Although we reject - I think this is what your Honour is putting to me - the fire services' case or argument on this point, nonetheless it has to be considered against that background. Our submission is this: it would be a possible, but, in our respectful submission surprising, result for the Commission to effectively put this evidence on one side in circumstances where it's in proceedings where you have been invited to make a profound change and the services are denying the validity of our position.

PN5044

This is a significant thing, your Honour. They are seeking to introduce a blanket provision and they are denying the validity of the firefighters' complaints at the same time. They're saying, "Forget the detail. Don't worry about the detail. That's for later implementation. Open the door now and, by the way, don't be dissuaded by any of this evidence because you shouldn't accept it, notwithstanding the fact that we signed up to it in 2010."

PN5045

Your Honour, do I accept that it would be possible for the Commission to be comforted by the fact that there is statutory and other obligations? The answer is yes.

PN5046

JUSTICE ROSS: So it's a relevant consideration, but in the context of this case and the evidence that you've put, you say it's outweighed by that evidence.

PN5047

MR KENZIE: Correct. In our submission - and it's an advocate's point, your Honour - it's a very strong case.

PN5048

JUSTICE ROSS: Yes.

PN5049

MR KENZIE: We have the other side signing up, saying, "Forget we've done it", and then inviting you to reject a string of statements. What is so surprising about firefighters who are walking into a fire ground coming into the court and saying, "Look, we have concerns about people who aren't - they might be the best quality people in the world, but we have concerns about the fact that they can't share the totality of our most rigorous and developing training regime." Our general point is there is nothing surprising about that evidence.

PN5050

JUSTICE ROSS: Well, except that they do work side by side with people who don't share it. They work on strike teams and they work interstate.

PN5051

MR KENZIE: They do.

PN5052

JUSTICE ROSS: They work overseas.

PN5053

MR KENZIE: They do.

PN5054

JUSTICE ROSS: With people that don't know anything about their training regime.

PN5055

MR KENZIE: Your Honour is putting that to me and it's the second line of defence that is put by the fire services, and in our submission totally unhelpful for present purposes, because what we have come to court to do is to explain how in Victoria, contra New South Wales, we work so far as we can in teams that are trained constantly as teams. That is foundational. You'll recall the evidence that it's not just teams, but people have roles in teams. There is the first responder, there are the incident controllers, there are the people who have got specific functions.

PN5056

You have evidence from our firefighters, which we've gathered in our submission, to say, "Look, everyone's role is important in this team." It's put against us, "Well, you work alongside police and you work as part of an integrated team for the emergency services, and ambulance services", to which our response and our witnesses' response was all of that is, "True, but it doesn't meet or go anywhere near the concern that I've come to court to explain. My concern is not with the police, who are doing the best they can, whatever their training is over there, subject to their own procedures and commands. My concern is the people in my team, who I train with all the time."

PN5057

JUSTICE ROSS: Mr Kenzie, that concern - it's put against you in that regard that we should have regard to the Auditor-General's report. That report identified that:

PN5058

Firefighters' personal unplanned leaves remained high compared to Victoria's other emergency services and has increased steadily - - -

PN5059

MR KENZIE: Yes.

PN5060

JUSTICE ROSS: It continued to assert that 2011-2012 unplanned leave averaged 139 and a half hours per full-time equivalent.

PN5061

MR KENZIE: Yes.

PN5062

JUSTICE ROSS: How do you respond to that proposition?

PN5063

MR KENZIE: Thank you, your Honour. Indeed that was and had to be my next point. The points that are raised are, firstly, don't accept them. Secondly, in any event, you work alongside the police and ambulance services. The third point is, well, you cope with absences. This position that is put that you've got these rock-solid teams, has to respond to reality which includes large amounts of leave, jury service, defence leave. My friend added them up and indeed the fire services are quite triumphantly pointing out these matters for the purpose of saying in their submission, well, look, the notion that the fire services cannot cope with part-timers has to accommodate this very point. You've got these other absences and as far as unplanned leave is concerned, Victoria is high on the list as you correctly point out to me.

PN5064

But our point is this; that is the status quo. This application to include something in the award is being sought in circumstances where all of these truths exist. Firefighters' leave has to be accommodated if in fact there's something being not administered as well as it might be in the services so that there's too much unplanned leave. That's a fact of life. Firefighters have to go on leave, you have to find relievers and the like and it's a given and our friend cross-examined about how that works. You will get firefighters that will come from a nearby fire station and they are treated as part of the team, as they should be, and to which our witnesses said yes, that's clearly so.

PN5065

JUSTICE ROSS: Is the short point that you accept that there are these factors that impact on the team's functionality but what this will do is add a further factor which will degrade that.

PN5066

MR KENZIE: Correct, and far from it being a series of propositions that help the fire services, it's something that we have to deal with and it's part of the background in which they seek to change the award. So they are seeking to add a new category of employee with all of the problems that are identified by our witness to that picture. So this evidence does not help them, it hurts them in our respectful submission. It provides another reason why you wouldn't do this.

PN5067

Where Mr Thomas - you remember Mr Thomas, his evidence was likewise described as nonsense. He explained his position in clear enough terms. It was suggested to him that he was somehow being unreasonable because he was saying that anyone working less than 42 hours constituted a threat, and my friend was - - -

PN5068

JUSTICE ROSS: Asked him whether 41 would constitute a threat.

PN5069

MR KENZIE: He was saying 41 and the like, and I can understand and I don't criticise my friend at all. It was a perfectly legitimate thing to do but what Mr Thomas was saying, and you'll recall his evidence, he's saying look, I am concerned about the change to the status quo because as we speak, with the changes to training and the like and the demands on our people, we don't have enough time to ensure with the multi-tasking and the development of skills maintenance that's required to keep up to the level of safety and welfare that I considerable desirable. We're struggling.

PN5070

So when you say 41 with a smile on your face to say how can that make a difference, my answer is to say it make a difference and it is - it represents a move the wrong way and 41, 40, 39, this isn't about 41, 39, this is about opening the door to part-time employment. The fact that it comes equipped with a consultation provision in the form of clause 8, true, but consultation is something that has to happen. Once it's happened, it's happened and what is being sought here is a right to do something after consultation. But a right to do something, a right to employ part-time people at large.

PN5071

The fact that there's got to be consultation before that happens, even if you assume that the enterprise agreements, and you can't assume they'll be there forever, and you have to say well the consultation provision is there. If consultation is had, the firefighters say what they do in the witness box and Ms Nolan says, as she did in the witness box, it's all a conspiracy theory, none of that's accepted, we're now employing part-time firefighters because the award's been changed. That's the case.

PN5072

JUSTICE ROSS: But to some extent you're each asking us to do or to make some assumptions. You're asking us to assume that they'll introduce it carte blanche without addressing any of the concerns that have been raised, and the fire services are saying well those issues will all be addressed in the consultation process.

PN5073

MR KENZIE: They are, they are.

PN5074

JUSTICE ROSS: But if you've got those two, if your apprehension is realised and the fire service consults but makes no change to a proposal to globally introduce part-time work, leave aside the agreement issue for the moment, and you believe that change will offend the modern award objectives because of the way they're proposing to implement it, why can't you apply to vary the award at that point?

PN5075

MR KENZIE: Well, there's no doubt you could, you can do this in stages. Our position in - - -

PN5076

JUSTICE ROSS: No, I wasn't talking about doing it in stages. That's a separate point. It's that if the award was varied consistent with the proposition put by the

fire services, and if contrary to what the fire services have indicated, the operational and other concerns are not addressed to - in a way that the UFU believes is appropriate, then why at that point can't the UFU make an application to vary the general prescription for part-time work and seek to limit it in a particular way?

PN5077

MR KENZIE: Well, your Honour, I suppose the vehicle for doing that - well we're in a relatively unusual proceeding.

PN5078

JUSTICE ROSS: Sure.

PN5079

MR KENZIE: What we are dealing with here is the award modernisation principles against a background of the statutory requirements and the UFU putting submissions that the Commission has accepted that you would look at certain things.

PN5080

JUSTICE ROSS: Sure.

PN5081

MR KENZIE: If we had the award in place and you've got to turn around a say please re-change it because it hasn't worked, the notion that you could change the modern award because you could show that someone had used it for the purposes of achieving change that was not justified is a question in itself, and I would suggest the proof of that fact would not be tantamount to proof of a ground for removing the provision of the modern award, or may not be.

PN5082

But your Honour when I said stages, I meant put it in then

PN5083

possibly take it out. That's what I meant by stages.

PN5084

JUSTICE ROSS: Yes.

PN5085

MR KENZIE: Your Honour - - -

PN5086

JUSTICE ROSS: But the Commission may make a determination varying a modern award - - -

PN5087

MR KENZIE: Yes.

PN5088

JUSTICE ROSS: - - - under 157, outside the context of a review if it's satisfied that making the determination is necessary to achieve the modern award

objective. So in other words if the way a provision operates is not fair, in that sense doesn't meet the modern award objective, then a party that can mount such a case would have a basis for - would provide the Commission with a basis for varying the award.

PN5089

MR KENZIE: Yes. Do I deny that that process could take place? No, it plainly could take place. The question is whether this case is a suitable vehicle for that potential progression and what we come to put is that we are opposed by applicants that deny the very foundation of our case, and who are seeking and continue to seek - - -

PN5090

JUSTICE ROSS: Well, they're not denying the - they're not denying that the concerns are genuinely held and they're not saying the concerns wouldn't be addressed in the course of consultation. They're putting that the concerns are not relevant to the variation of a modern award because it provides a minimum safety net and it has a consultation provision.

PN5091

MR KENZIE: Well, your Honour, can I just say this. Firstly, if you look at the final submissions you'll read those final submissions and you'll see that the reliance that the fire services placed on their witnesses' submissions was not the evidence of people who said I accept the legitimacy of the fire service - the witnesses of the UFU. They placed reliance on the evidence of Ms Nolan, and Ms Nolan denied fundamentally the basis of this. She thought this was just - she'd heard it all before, it was a big conspiracy theory, and that was expressly relied on by our friend.

PN5092

If you look at the final submissions that's where they've gone.

PN5093

JUSTICE ROSS: Yes.

PN5094

MR KENZIE: Now your Honour then says, well, look, some of the other people adopted a different line and it's fair to say there were some - there were some people who were called by the fire services, who would show every sign of having concern and are all over the sorts of subjects, and they included people - I instance by Mr Leach who was a very knowledgeable person, he was all over the training regime. He shared the view that the firefighters' concerns were legitimate but he was one of those people who thought that they could be accommodated, even though it wasn't against a background in which he was dealing with any particular definition of part-time work. He was confident that whatever came up it could be accommodated.

PN5095

Your Honour, at the same time in addition to pressing the application as they continue to do - we've referred to the evidence - their own witness, Ms Schroder, who was central to the training regime, her experience in the training regime, her

knowledge would have been close to unique - hers and Mr Leach - she said I don't think that it's appropriate to extend this sort of thing to recruit firefighters, and neither do I think it's appropriate - it's problematic to include level 1 firefighters. But none of this has impacted - notwithstanding that evidence, it's necessary to have a global application that will allow them to hire or recruit a firefighter and a recruit level 1 firefighter, despite their own witnesses' evidence. So do we submit to your Honour that it would be a good idea to see how this goes and then see if we can make an application later? No, we don't, your Honour; we resist that.

PN5096

JUSTICE ROSS: No, I didn't think you'd - - -

PN5097

MR KENZIE: It's not attractive to our clients for those reasons, amongst others.

PN5098

JUSTICE ROSS: No.

PN5099

MR KENZIE: Your Honour, so that's what we say fundamentally about the proper application of the principles that are adumbrated in the Award Modernisation cases. Could I say something briefly about the statutory requirements in relation to the actual application? I've already submitted that if you're going to apply a test of necessity, by definition you need to have something to apply it against and that must be what is sought, otherwise the capacity to test what is necessary as opposed to what is desirable is not able to be addressed. In this regard, the fire services don't intend to go out and implement the clauses holus-bolus, as sought, and we've referred in our submissions to the evidence of Mr Leach in paragraph 31(b) - I don't invite your Honours to open it - but he says, look, we just never looked at this; we want the award first and then we'll look at the detail later. And your Honour, no one tried to cover this up. The position of the fire service was transparent. It wasn't as though people came along and said that they had one purpose and in truth they had another. They've been quite transparent in saying we want this general provision, we don't have any intention of implementing this as is, because there'd need to be consultation and the like. And we have attacked that approach, because fundamentally it goes back to the question of necessity.

PN5100

The fire services at the moment have no idea how any of this is going to work, but they say our blanket provision is necessary. They say there's no vice in putting the provision in place to facilitate bargaining, and they accuse us of ascribing to them an ulterior - that is, a wrongful - motive. It's not that, but the motive of someone in a proceeding like this is not relevant in itself. The fact that someone wanted something for a wrong reason wouldn't help you much in a proceeding like this. The purpose of our objection was to say not that it was an ulterior, namely wrongful, motive, but it was a misguided motive because the aim of getting this in place so that there can then be bargaining didn't give effect to a modern award principle. It wasn't proscribed by the modern award principles, but it was simply a matter of desirability and not necessity.

PN5101

The reason that they want a provision this broad is not based on necessity. However much they talk about diversity, their own witness, Schroder, says, please, not the recruits or the level 1. They say we want a provision this wide, and it's necessary. They want it for bargaining. It's not a sin, but it's not a modern award objective, and a provision this wide on the evidence is not necessary. How can it be necessary to have a provision that allows them to recruit a recruit part-time, when their own witness said that's going to be inimical to their operation - uncontradicted evidence? How can it be necessary to have a provision like that? It can't be. But they are pressing forward with their application, and that's really the point that we make in relation to this, the difference between desirability and necessity.

PN5102

In truth, if they want to bargain they don't need any of these changes. They don't need a change to the enterprise agreement; they don't need a change of the award. If they want to bargain over these matters there's been nothing to stop them at any point of time and that remains the case. Your Honour, even if we were attributing an ulterior motive or a wrongful motive, Browne and Dunn wouldn't apply. We are not suggesting here that people had a motive that was not disclosed. All that we are doing in this part of our submission is to say on their own evidence this is what is behind it. So we're relying on their evidence. It's not a Browne and Dunn point. We're not asserting that they've not come clean about their motive; we're saying look, they've come very clean about their motive, this is what they want to achieve. That's no doubt a desirable end from their point of view, but it's not necessary within the meaning of the authorities.

PN5103

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Mr Kenzie, just one issue - it goes back to the question I asked of Mr Moore. Can I take it then that what you're saying to us is that the absence of any part-time provision in this award doesn't preclude, if you'll excuse my double negatives, parties reaching an agreement that could then be approved in accordance with the BOOT test so as to include part-time provisions?

PN5104

MR KENZIE: Yes, certainly that's our position, that there's nothing in existence that would preclude a negotiation for an agreement of this type, and, indeed, I think the agreement itself contemplates - - -

PN5105

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: That may be the case but that's not my question. My question goes to the extent to which the BOOT test could only be applied then with respect to part-time employment if that doesn't exist in the award. See, the award provides for a weekly rate of pay or set rates of pay; it doesn't seem to provide for part-time rates.

PN5106

MR KENZIE: The fact that there might be issues to confront if there was such an agreement is not going to rise or fall with the changes in this proceeding. If there's a capacity to negotiate there's a capacity to negotiate, and if the outcome of

negotiations is going to give rise to a problem with the BOOT test it's going to give rise to a problem with the BOOT test. But whilst it might be so, it's not going to swing on the success or failure of this proceeding. If there's a capacity to negotiate about it, there will be a capacity to negotiate about it if these changes are made. Nothing will relevantly change. Our point is that there's nothing to stop people negotiating now, as was put by the presiding member to my friend and I think accepted by him.

PN5107

I've taken longer than I'd intended already. Could I as quickly as I can say something briefly about the merits, and I've already traversed this ground in dealing with the first part of the submission in any event, so I propose to be brief. But the fundamental objection on the merits, as expressed through our witnesses, is that as expressed in paragraph 55(1) of our final submission, and that is based on the way in which firefighting activities in the public sector have been performed in Victoria, and the characteristics of that I have identified and I don't repeat them. You know what the firefighters have said about them. It is in these circumstances that, understandably in our submission, the firefighters have objected to the introduction of a blanket entitlement, as pressed, to employ firefighters on a part-time basis.

PN5108

We've collected a summary of their concerns, and again I don't go back to it but you'll find them in paragraph 56 of the final submission, and all that we have to say about it is that these are the submissions, all of them, that the fire services have said should be given no weight. You'll see that is being pressed in paragraph 80 of the final submission and in the submissions in reply. Notwithstanding everything that has been put, the fire services repeat this submission and maintain their contention that the evidence of the firefighters called by the UFUA should be given no weight at all. You'll see they're maintaining this to the end. Paragraph 31 of their reply, "That evidence is not reliable and should be rejected."

PN5109

Why is this so? We're told by the fire services, your Honour, this evidence is entitled to no weight because they, or most of them, had never actually worked with part-time firefighters. You'll remember the cross-examination, "Have you ever been a part-time worker? Have you ever been a part-time firefighter?" "No, no." Your Honours, we submit that it would be entirely wrong - quite apart from the documentary evidence which we've referred to - for the Commission to obliterate the views of these experienced witnesses because they hadn't worked as part-timers. We submit that's a total diversion.

PN5110

The idea that these personnel who were in absolutely the best position to assess, who couldn't express an informed view as to the impact of the introduction of part-time work in relation to the environment in which they worked, is nothing short of ludicrous, in our submission. Why couldn't they express a view? They can see the intensity of training every day. They can see it going through the roof.

PN5111

They can see the pressure everyone is under. They can look around and see the environment every day into which part-times would come. Apparently they're not entitled to have a view because they've never been a part-timer. That just doesn't follow, but in truth that was the reason that was advanced by the fire services as to why the Commission should ignore their evidence. The fact that firefighters who gave evidence hadn't worked as part-timers was simply one of a number matters that was thrown up, you'll recall; working with people they didn't know and other matters that we've dealt with. Lots of leave and the like.

PN5112

None of those considerations can possibly climb the mountain that is necessary to deal with people in the position of these firefighters who have come along and said, "Look, this is our world. This is what we're operating in. There's nothing fanciful about it and we're concerned if people haven't got the level of training that we've got", but you're invited to treat it as of no weight. Why are you invited to treat it as of no weight? You could be invited to treat it as being there, but able to be accommodated in one way or the other even though it has got weight; but you're invited to reject it because that's the position of the applicants who are seeking this relief.

PN5113

Your Honour, we rely on our written submissions in relation to aspects which support our witnesses' evidence - in addition to their experience, the evidence of proficiency under the current arrangements. Pointing out that competency training may appear on the database is part of the solution, so people say, "Well, I can look up what Bloggs is doing", but it won't help anyone in terms of the constant proficiency training that people are achieving.

PN5114

The applicants acknowledge that a distinction between competency and proficiency would be relevant if the evidence established that part-time employees could not reach proficiency or that levels of proficiency achieved would be lost upon election to work part-time, but that's exactly what the evidence does throw up. We had the fire services' own evidence complaining that one of the reasons needed for a change was that people who were returning from pregnancy and the like were losing their skills. We had Mr Thomas's evidence, which was further to the effect that if you've got highly developed skills like this, they get upgraded. There's nothing surprising in that.

PN5115

Your Honours, I leave with the Commission all our submissions in relation to teamwork, skills acquisition and maintenance. I don't need to say anything further about that. Neither do I need to, I think in the circumstances, say anything further about our position in relation to New South Wales. If I can just take a moment to say that Mr Connellan's evidence - which you'll find orally and in exhibit CFB/CFA25 - is summarised by us at paragraphs 112 through 116. As I already put and I won't dwell on it, if you read his evidence - just his statement evidence will do - you'll see enough to know that what he is talking about is radically different to what we're talking about. I need to say something briefly about one of the matters - - -

PN5116

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Perhaps before you leave that - I'm not sure if I've got this in the right order and I don't want to cut you off if you're going to cover it, but are you going to say anything further about the question of competence and proficiency?

PN5117

MR KENZIE: Well, I was only going to refer to what we have had to say about it in paragraphs 73 to 80 of our submission, your Honour.

PN5118

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Yes.

PN5119

MR KENZIE: I wasn't going to seek to develop it further.

PN5120

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: I just wonder whether you might clarify that for me. You see, the words are very often conflated. In fact in looking at various training descriptors and position descriptors, they are often used together, including, might I say, in some of the various fire service definitions of units of competency.

PN5121

MR KENZIE: Yes.

PN5122

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: You say at paragraph 100 that the two terms cannot be conflated. I'm not sure that I understand what you're putting to us in that regard.

PN5123

MR KENZIE: No, well, your Honour, they obviously can be conflated and what we're really attempting to say is they shouldn't be conflated. All that we're seeking to do is to counter the submission that is made by the fire services that, look, when you reduce what appears to be this apparent enormous amount of skills maintenance down to unit levels, the figures aren't so frightening and it can be accommodated in some way.

PN5124

In response to that, we have said, well, look, formal skills training and maintenance is fine, but whatever is going on in the fire services involves the development of proficiency and whether or not they're conflated for that purpose or not, it doesn't matter. At the end of the day, there is an incredibly large amount of training. Is it competency training, is it a conflated description of proficiency training? Perhaps, but it's common ground that there is an enormous amount of training going on and it involves proficiency training. Is it correctly designated in all cases? The evidence in this case wouldn't allow you to know, but there is a lot of it and it is accelerating.

PN5125

The evidence that is probably most salient to the question that I've been asked is that which is dealt with in paragraph 79 of our final submission. I won't read it, but this is Mr Geary's explanation about competency based training and how it actually works. In paragraph 80 we say, well, look, proficiency as is said by our witnesses is the key to safety and service delivery, and you just can't track that on the database. Are all our definitions correct in that regard? Well, the evidence is only as good as it is.

PN5126

Your Honours, I need to say something as briefly as I can about the criticism of our friend in relation to some - I think he suggested it was seven - of our witnesses who he said had a view of part-time which coloured their evidence and so therefore whatever else you did with the other witnesses, you should discount the evidence of those persons. And our friend relied on the definition that had been inserted in the application. Your Honours, what we say about that is a number of things. Even if everything that our friend said is correct, the witnesses who principally relied on the submissions by the UFU are people who aren't in that category but who are in the category who had a very clear idea about what they meant by part-time, which was consistent with the application. Even in relation to that seven, could we suggest to you that Mr Geary is included in our friend's list? Mr Geary - I don't want to go into too much detail - but he said at page 3318:

PN5127

My definition of part-time employees would be anyone working less hours than normal on a different roster than what's allowed in the EB.

PN5128

So he doesn't seem to fit into that category. In any event, in relation to the balance of the remaining six, they gave evidence on a variety of matters that were not affected by any misunderstanding of the nature of their employment, including the amount of training done, the importance of team work, the importance of proficiency, and the like, so even if the Commission was troubled by the fact that they might have had a broader view of part-time, firstly, it wouldn't matter because there are plenty of other witnesses that we relied on, but secondly, their evidence in relation to what was actually going on and the basis of concerns would continue to be relevant.

PN5129

Finally, we'd point out in this regard that the fire service witnesses themselves gave evidence about part-time, but they were supporting a general notion of part-time employment without any details. If any of the UFU witnesses is to be discounted because they were not aware of the definition, well the same is true of the fire services' evidence. There's no evidence that what they were talking about was connected with the definition either. But at the end of the day, probably the simplest answer to this is that none of it matters because there's plenty of evidence from experienced officers who have got a very clear idea of what part-time is, and their evidence is central to that which is relied on by the UFU.

PN5130

Your Honours, I wasn't going to go into our submissions in relation to the AEU. It appears to be accepted that the approach to the Melbourne Corporation case is

to be understood by reference to considerations subsequently identified in cases like Austin and Clarke, which reflect the need to actually scrutinise the extent of the burden. In fact, that appears to be accepted by the parties and correctly so. In this case, as we say, the award provision doesn't affect either the number or identify of persons sought to be employed by the fire services, for reasons which we've given in paragraphs 38 and 41. The clause is obviously closely linked to the rostering arrangements and is seen relevantly as a term or condition of employment. As to the reference to Parks Victoria, your Honour, in relation to the particular clause in question at paragraph 160 of the fire services' final submissions, that clause was found to operate to restrict the number of seasonal employees that an employer could appoint because of the words: "not to be used to diminish full-time employment opportunities", and it has no counterpart in this case. So there's nothing in Parks Victoria, regardless of where it stands in the light of UFU and CFA, that possibly provides any assistance in this case.

PN5131

So we've referred to the AEU principles to Clarke and Austin, we've referred to the consent nature of the provision in the existing award, and to the language flowing from the Full Court decision in the UFU case as to the proper approach. The degree of interference, in this case, would in practice have to be assessed by reference, at least at the moment, to the existence of the certified agreements. That is the fact, as we stand. We can't assume they're always going to be there. You can't make any assumptions about much at all. But it's not readily apparent how any of this would - the matters that we're talking about would operate as a substantial interference with the operations of the State of Victoria, for reasons that we've given associated with identify and number.

PN5132

I don't think it's necessary to go further in that regard, and just to remind the Commission that Mr Connellan's evidence was that after some decades of ability to deal with part-time employees in a very large operation, they had a grand total of 23 people who were affected by the part-time provisions in that award. And at least if New South Wales is any guidance, this isn't some earth shaking exercise that we're dealing with here. I'm sorry to have taken so long, your Honours.

PN5133

JUSTICE ROSS: I suppose those numbers might be unsurprising given that they have retained firefighters who are effectively part-timers and they're dealt with by a separate instrument.

PN5134

MR KENZIE: That may well be right, your Honour. I wouldn't want to stake too much of the farm on that submission, but it is the fact that there appear - in terms of the existence of part-time employees as such, it appears to be minimal. Your Honours, we would otherwise - I've traversed some of the matters that are in questions and I've tried to identify where they did intersect - we would otherwise seek as quickly as we can to deal in writing with the balance of the questions, including giving your Honours an understanding of where our submissions sit.

PN5135

JUSTICE ROSS: Okay. Thank you, Mr Kenzie. Mr Moore, what do you want to do? Respond orally - or Mr Kenzie's going to provide I suppose his complete reply, if I can put it that way, by addressing some of the matters in writing. Do you want to then respond to those and whatever has fallen from him today that you want to deal with, or do you want to deal with it orally now?

PN5136

MR MOORE: I'll just take some - I mean, I'm in a position to deal with matters that my friend has addressed orally today, to reply to those matters, but there is an outstanding question of how we proceed from here in terms of the matters that Mr Kenzie's going to address in writing.

PN5137

JUSTICE ROSS: No, that's fine, I'll leave that - - -

PN5138

MR MOORE: And matters your Honour raised.

PN5139

JUSTICE ROSS: I'll leave it to you, and on that issue, that is, the outstanding matters, if for some reason you're not able to reach an agreed landing, just contact my Chambers and we'll have a mention and deal with it that way. But by all means deal with the matters that Mr Kenzie's dealt with orally today.

PN5140

MR MOORE: I think I just wanted to deal with three or four matters quite briefly in a directed way. I don't want to re-hash our engagement with the issues which is set out in our submissions - I'm just going to repeat what we've said before. This threshold debate that loomed large - and does loom large in the proceeding around historical context as relates to the task as part of the 4-yearly review, the point we make in reply, if it hasn't already been clearly made, is we place emphasis upon the observation by the Full Bench in the Preliminary Jurisdictional Issues decision at paragraph 24, and without asking the Bench to open it I can read the relevant sentence. After referring to the approach in paragraph 23, the Bench continued and said as follows:

PN5141

In conducting the review, the Commission will also have regard to the historical context applicable to each modern award.

PN5142

I end the quote there. The remainder of the paragraph is a reference then, if I might paraphrase, to the matters leading to the making of modern awards and some observations about that. We ask the Bench, with respect, to not lose sight of that observation, that the historical context which is relevant here is the historical context applicable to the modern award. It is not the historical context at large.

PN5143

JUSTICE ROSS: I understand what you're putting, but to some extent, does it make any difference, because you're inviting us to look at enterprise agreements by way of saying, well, look, this can be done. UFU is inviting us to look at

enterprise agreements by way of saying well, perhaps put it more crudely, that well the CFA's saying one thing and doing another. But they've accepted that it has an impact on safety here, but not there.

PN5144

Well, isn't that just part of - it's not, as you say, the historical context relating to the making of the modern award, but aren't they just contextual considerations as are, for example, the legislative framework within which the fire services operate. It's been accepted that that's a contextual consideration here as well.

PN5145

MR MOORE: The parties are doing it for different purposes, and I would say that we're doing it for permissible purposes.

PN5146

JUSTICE ROSS: I'm sure Mr Kenzie would say that too, but yes.

PN5147

MR MOORE: But the distinction is this, Mr Kenzie says look at, amongst other things, he says look at the provision in the clause of the extant agreements which prohibits part time and contains some further commentary about that and says that that provision itself is relevant and should be taken into account in appraising as part of the historical context. Now we say that that is impermissible. We say when we advert to and direct the Commission's attention to provisions of agreements elsewhere, what we are doing is examining the factual matter of the extent to which there is part time provision available generally.

PN5148

JUSTICE ROSS: No, I follow the distinction and accepting for the purposes of the argument, your point that Mr Kenzie's characterisation of the agreement doesn't fall within the meaning of the historical context as it's referred to in the decision, it's there, talking about the historical context in which the award came into operation etcetera. But, I'm not following how you can say that factual context, as to what's in these other agreements is relevant, but somehow, factual context about what's in the agreements that binds your client is not relevant.

PN5149

MR MOORE: Because we are saying that the factual enquiry about the extent to which there is provision made generally for part time work elsewhere, is a factual matter which forms part of the context in which the Commission exercises power here and is to be distinguished from the line of enquiry my friend invites, which is to say, to consider this application by looking at a particular term, that is he says, by reason of the provisions in the 2010 agreements prohibiting part time employment, that forms part of the historical context which should lead the Commission to decide that the current proposed term is not necessary to meet the modern award's objective. We seek to draw a distinction in that way.

PN5150

The next point I just want to deal with, my friend referred to Ms Nolan in her evidence referring to a conspiracy theory. It's important that I just correct the record if I might on that matter. I think it's fair to say, looking at the transcript

again at the Bar table, that when Ms Nolan referred to a conspiracy, what's in fact clear, what she was referring to specifically was the circumstances when it is proposed that steps be taken to increase the number of women and the question of standards is then raised as a concern. She was in that context, that is the link between women, increased recruitment or employment of women and the claimed lowering of standards. It was that to which she referred as the - - -

PN5151

JUSTICE ROSS: Do you have the transcript?

PN5152

MR MOORE: I think I do, and in fact, she acknowledged, your Honour - I'll come to that in just a moment, that the concerns raised by the firefighters in their evidence would be addressed. So my friend has taken a reference to conspiracy theory which was very specific and wrongly, with respect, applied that to Ms Nolan's broader evidence.

PN5153

The reference I have is paragraph 396 and 406.

PN5154

JUSTICE ROSS: Thank you.

PN5155

MR MOORE: Now, my friend complained about the submissions, the fire services put that the evidence of the UFU witnesses should be given no weight. He said in concluding that submission, that well, that was because that's the position my client wish to assert. Can I just reiterate for the Bench that we understand that that is a strong submission to put? It's not one that's been made lightly, it's one which has been made and is made on a reasoned and clear basis. The reason the evidence of the witnesses overall called by the union should not be given weight, are because, and we address this in paragraphs 81 through 132 of our submissions, and we address there the key reasons why, and they fall under a number of - I think four headings.

PN5156

One, the fact that about half of them, we say six or seven - yes I'm sorry, six, their evidence is revealed as being based on a false foundation because it was directed at casual employment and I won't go through that again. But that deals with half of the witnesses. We make the point from paragraph 85 onwards, that the witness evidence was dealing with very broad and inchoate notions of part time work and we make the point that the UFU witnesses have no experience of part time work.

PN5157

It's not simply the case of saying they've never worked part time, we do make that point, but that they've had no experience whatsoever of working cheek-by-jowl with part time workers and we develop that submission and then we go on to set out at length, why the objections of the witnesses were based on various false assumptions. Now we set that out at some length. I just want to address my friend's dismissal of that submission. We have sought to provide a cogent and

extensive basis for the submission which is put that their evidence should not be given any weight.

PN5158

I think lastly Mr Kenzie seemed to say in relation to something to this effect, as I understand it, that if the six UFU witnesses whose evidence was revealed to be based on a false basis, as we submit, that is that because their notion of part time employment was in fact casual employment, well the Commission should likewise give no weight to the evidence from the fire services witnesses. And we reject that. The difference is, I asked the UFU witnesses what they actually meant and it was revealed to be, as we've outlined, based upon a false understanding. The fire services witnesses were not asked that, and thus their evidence is not shown to be based on a misapprehension.

PN5159

JUSTICE ROSS: I think the high point of the question that was put to them in cross-examination was whether they had seen the draft determination.

PN5160

MR MOORE: Yes, that's right. Your Honour, can I just have a moment to seek instructions, if that's all right?

PN5161

JUSTICE ROSS: Yes, certainly.

PN5162

MR MOORE: Thank you, your Honour. I appreciate that indulgence. I think where things are left, as I understand it, is that we'll have a conversation with my friends to work out an arrangement to deal with the outstanding matters. For our part, we're very keen to see the matter concluded in terms of what the parties need to do as soon as possible, so we would seek to come to grips with an arrangement which provides for a very quick timetable.

PN5163

JUSTICE ROSS: Sure.

PN5164

MR KENZIE: Your Honour, I don't want to multiply things, but very briefly could I just give the Commission a final reference to paragraphs 113 to 116 of the final submissions of the MFB/CFA in relation to Ms Nolan's evidence. It explains why we said what we did about it and how they described it there. It's not how our friend has just described it, but I leave that with the Commission.

PN5165

JUSTICE ROSS: Okay. Ultimately the issue will be resolved on an examination of her evidence.

PN5166

MR KENZIE: Yes.

PN5167

JUSTICE ROSS: Nothing further? I will wait to hear from you as to the process you have agreed on. As I have indicated, we will send you a document setting out the list of things we have got in front of us, in terms of the material, just in case - really out of an abundance of caution. All right. Thanks very much. We will adjourn.

ADJOURNED INDEFINITELY **[12.53 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #MFB/CFA26 VICTORIAN AUDITOR-GENERAL'S REPORT - MANAGEMENT OF UNPLANNED LEAVE IN EMERGENCY SERVICESPN4720