Victorian Equal Opportunity & Human Rights Commission

Country Fire Authority

> Compliance Review

31 December 2015

Prepared by the Victorian Equal Opportunity and Human Rights Commission

Contents

Introduction

1. Thank you for the opportunity to conduct this compliance review under s 151(1) of the *Equal Opportunity Act 2010* (Vic) (**Equal Opportunity Act**).
2. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) has been instructed that the Country Fire Authority (**CFA**) has been negotiating with the United Firefighters Union (**UFU**) for a replacement agreement for the *Country Fire Authority / United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010* which had a nominal expiry date of 30 September 2013.
3. The Commission has reviewed, at your request, the current Log of Claims, version 17.1 (**the Log**), which was created as part of the enterprise bargaining for this new agreement. The purpose of the review is to determine compliance of organisational policy and practice (or proposed organisational policy or practice) with the Equal Opportunity Act, as it is reflected or proposed in the Log. We also note that we have been instructed that many of the current terms have been included in the Log.
4. The Commission has taken proposed clause 7.11 into account in its assessment of compliance, namely, that in interpreting the proposed Agreement, a construction that advances the objectives of the Agreement shall be preferred. Proposed clause 3.1.9 provides that one of the objectives of the proposed Agreement is respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination. The Commission considers that where we have made a finding of non-compliance of a proposed clause (as outlined in the schedule), we consider on the information available, that clause is not capable of a construction which advances the non-discrimination objective.
5. The Commission notes the importance of compliance with the Equal Opportunity Act in light of the low participation by women in the CFA workforce. We have been instructed that only 2.9% of operational staff (i.e. career firefighters) are women – 31 out of 1,082 total firefighters. Women also comprise only 24.6% of the total workforce (including support and technical staff). CFA needs to ensure that its workplace is one where all employees are able to fully participate, including for historically disadvantaged groups such as women, parents/carers, people with a disability, transgender people, and people with specific cultural or religious beliefs that might affect their ability to work full time.
6. As requested, this letter sets out the compliance issues with the Log but does not provide recommendations as to how to remedy these issues. The Commission notes for completeness that formal organisational policies, procedures or guidelines may have an effect on the way that the practices contained in the Log will operate. However, the Commission has not been asked to formally review any underlying policies or procedures of CFA to determine their compliance with the Equal Opportunity Act.

Executive Summary

7. The review findings contained in this letter are made on the basis of compliance with equal opportunity law as it applies in Victoria (set out below). Under anti-discrimination law, employers must ensure that their terms of employment are reasonable and lawful, and reasonably adapted to the purpose for which the person is employed based on the genuine and reasonable requirements of the position.[1]
8. We have considered whether on its terms, or on the application or possible interpretation of its terms, the conditions of employment or organisational practice proposed in the Log amounts to direct or indirect discrimination on the basis of one a protected attribute, within the meaning in the Equal Opportunity Act.
9. We have also considered whether the terms of employment or organisational practice proposed in the Log could result in:
    a. an unreasonable refusal to accommodate parental or carer responsibilities under s17 or s19 of the Equal Opportunity Act,
    b. failure to make reasonable adjustments for an employee with a disability under s 20, or
    c. CFA being prevented from complying with the "positive duty" in s 15 of the Equal Opportunity Act to take all reasonable steps to eliminate discrimination, sexual harassment and victimisation as far as possible.
10. The Commission has found that a number of proposed practices in the Log if they were to be agreed and become organisational practice are not compliant with the Equal Opportunity Act, or have the potential to be non-compliant. In particular, we have found the following proposed clauses are non-compliant:
    - Proposed clauses 12.3 (Classification and Rank Appointment and Progression), 83 (Training and Professional Development) and Schedule 5 (Training Framework), impose a requirement on employees that they must attend full time training in order to attain career progression, which is likely to amount to indirect discrimination of women who are pregnant, people with the status of parent or carer, people with a disability, and potentially older people;
    - Proposed clauses 20 (Individual Flexibility Arrangements) and 38 (Adverse Reports) are likely to prevent CFA from taking all reasonable and proportionate steps to eliminate discrimination, sexual harassment and victimisation in the workplace, as required under s 15 of the Equal Opportunity Act;
    - Proposed clause 51 (Rostering), and all clauses which refer to clause 51 or contain the same provisions, each impose a requirement or condition that operational firefighters must work "on shift" full time for their entire career, which is likely to amount to indirect discrimination of people with the status of parent or carer, people with a disability, and potentially older people; Application of these clauses could also result in unreasonable refusals of parental or carer responsibilities in breach of s 17 or s 19 of the Equal Opportunity Act, or failure to make reasonable adjustments under s 20 of the Equal Opportunity Act;
    - Proposed clauses 51 (Rostering) and related clauses also impose a condition that employees who obtain part time work be paid an "insecure work" allowance of 25% and certain entitlements in full, is likely to amount to indirect discrimination of women who are pregnant, people with the status of parent or carer, people with a disability, and potentially older people;
    - Proposed clause 51 (Rostering) also contains a condition that to obtain part time work, an employee must get the approval of both the CFA and the UFU, amounting to

[1] *State of Victoria v Schou* (2001) 3 VR 655 at 621 [22].

indirect discrimination. This condition is likely to have the effect of disadvantaging employees with the attribute of industrial activity, where they are not a member of the union;

- Proposed clause 52 (Carers of Children with Rights under NES) is likely to amount to direct discrimination in the form of unfavourable treatment of parents and carers, people with a disability and potentially older people by requiring that if they need flexible working arrangements they must work off-station or at a different location; alternatively it could amount to indirect discrimination of people with those attributes by imposing a condition or requirement that to access part time or flexible work, they must transfer off-station, to a different location, and otherwise stop working as an operational firefighter; Application of proposed clause 52 could also result in unreasonable refusals of parental or carer responsibilities in breach of s 17 or s 19 of the Equal Opportunity Act, or failure to make reasonable adjustments under s 20 of the Equal Opportunity Act;
- Proposed clause 52 may also result in direct discrimination against employees on the basis of industrial activity, in respect of non-UFU members who wish to request flexible working arrangements but do not wish to involve the union in the application or provide personal information to them;
- Proposed Schedule 17 (Secondment) imposes a condition or requirement on a secondee to undertake secondment training on a fulltime basis. This is likely to amount to indirect discrimination of women who are pregnant, people with the status of parent or carer, people with a disability, and potentially older people.

11. We have found the following proposed clauses are potentially non-compliant:
    - Proposed Clause 12.9 (Transfer) and 87 (Specialist Courses), in relation to potential direct discrimination on the basis of age, where selection criteria includes seniority and not merit;
    - Proposed clause 21 (Consultation) and proposed clause 42 (Policies), in relation to potentially hindering the CFA's ability to implement changes including introducing or amending equal opportunity policies required to comply with the positive duty in s 15 of the Equal Opportunity Act, and in relation to potential discrimination on the basis of industrial activity;
    - Proposed clause 70 (Equal Employment Opportunity), in respect of whether the clause intends to take a substantive equality approach, and could result in direct discrimination on the basis of industrial activity in relation to referring disagreement over an employee's family responsibilities to both the union and the employer for resolution; in addition, consideration of family responsibilities only in respect of allocation to a station may not fully cover the obligation to not unreasonably refuse parental and carer responsibilities in the Equal Opportunity Act;
    - Proposed clause 77 (Return to Work) and Schedule 19 (Return to Work) in relation to whether the process covers potential reasonable adjustments to both the duties of the employee and to their workstation/work location, and could potentially result in direct discrimination on the basis of industrial activity; and
    - Proposed clause 162.14 (Transfer – Instructors), in relation to requiring that non-union members provide personal information to the union without their express consent.
12. While the Commission was not instructed to complete a compliance review under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), the Commission notes for completeness that the CFA as a statutory body with public functions conferred under the *Country Fire Authority Act 1958* (Vic) is a public authority for the purpose of the Charter. Section 38 of the Charter requires public authorities to give proper consideration to human rights set out under the Charter and to act compatibly with human rights. The Commission has concerns about whether clauses which require employees to provide

personal information to the UFU or seek the UFU's agreement for changes to their work arrangements, properly take those employees' privacy and freedom of association rights into consideration. The Commission would be happy to discuss this with CFA in future.

Limitations of this review

13. While the Commission, in the schedules to this report, identifies compliance issues and makes findings as to whether it considers the proposed practices contained in the Log are compliant with the Equal Opportunity Act, this report and any advice contained within it does not constitute legal advice.
14. Similarly, this report does not purport to provide compliance advice in relation to the *Fair Work Act 2009* (Cth) (**Fair Work Act**), and in particular the provisions relating to Part 2-4 of the Fair Work Act relating to approval of enterprise agreements by the Fair Work Commission such as whether an agreement passes the better off overall test, whether there is a contravention of the National Employment Standards, or whether there is any unlawful (discriminatory or objectionable) term.
15. We strongly recommend that the CFA seeks independent legal advice about the matters contained in this report and any outstanding or related issues that might arise under the Fair Work Act.
16. Please note that under s 151(2) of the Equal Opportunity Act, giving compliance advice or information by the Commission as part of a compliance review cannot give rise to
    a. any liability of, or other claim against, the Commission;
    b. any right, expectation, duty or obligation that would not otherwise be conferred or imposed on CFA; or
    c. any defence that would not otherwise be available to CFA.
17. This means, for example, that the review by the Commission will not prevent a person from making a complaint about CFA on an equal opportunity issue to a relevant body (e.g. the Commission or the Victorian Civil and Administrative Tribunal) or prevent CFA from being found responsible for any discrimination or other breaches of the Equal Opportunity Act.
18. Please note that the Commission's dispute resolution staff have not been involved in any way in this compliance review and they will not be provided with the contents of this review.

Legal framework

19. The Equal Opportunity Act provides a broad legislative scheme to protect people from discrimination, victimisation and sexual harassment in Victoria. Key objectives of the Act contained in s 3 are to promote recognition and acceptance of everyone's right to equality of opportunity, and to eliminate discrimination as far as possible. As a general principle, the Equal Opportunity Act is remedial legislation and should be construed beneficially.[2] When adopting a beneficial and purposive approach to anti-discrimination statutes, a court or tribunal may give such legislation "the widest interpretation that its language will permit".[3]
20. The objectives of the Equal Opportunity Act are reinforced by s 15, which places on duty holders (such as employers) an obligation to take all reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. While s 15 is not able to be the subject of an individual complaint to the Commission in its dispute resolution capacity or to the Tribunal,[4] it is part of the legislative framework which emphasises that employers must act proactively comply with the Equal Opportunity Act.[5] This is often described as the "positive duty".
21. The positive duty is about addressing the systemic causes of discrimination, sexual harassment and victimisation. Just like occupational health and safety laws require employers to take appropriate steps to improve their systems, policies and practices so injuries don't occur, the Equal Opportunity Act requires duty holders to take appropriate steps to prevent discrimination, sexual harassment and victimisation from occurring. What is reasonable and proportionate for an employer will depend on the size, nature, and resources of the business or operations, as well as business and operational priorities, and the practicability and cost of the measures. Low cost, high impact measures are likely to be considered reasonable and proportionate, and larger employers are expected to do more than smaller employers.
22. The Equal Opportunity Act prohibits discrimination on the basis of 18 attributes which include sex, race, religious belief or activity, age, sexual orientation, marital status, pregnancy and gender identity. It also prohibits discrimination on the basis of "industrial activity", which includes a broad range of activity that may relate to union and non-union member employees of CFA:
    a. being or not being a member of an industrial organisation[6] or industrial association[7];
    b. joining, not joining, or refusing to join an industrial organisation or industrial association;
    c. establishing or being involved in establishing an industrial organisation;
    d. forming or being involved in forming an industrial association;

[2] *IW v City of Perth (1997)* 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 (Kirby J).
[3] *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, 260-261 (McHugh J).
[4] *Equal Opportunity Act 2010* (Vic), ss 15(3).
[5] Victoria, *Second Reading Speech to the Equal Opportunity Bill 2010*, Legislative Assembly, 25 March 2010, 1111.
[6] "Industrial organisation" is defined as an employee or employer organisation, or other organisation established for people in a particular industry, trade, profession, business or employment, where that organisation is registered or recognised under a State or Commonwealth Act or enactment (*Equal Opportunity Act 2010* (Vic), s4).
[7] "Industrial association" is defined as a group of employees or employers, formed formally or informally to represent or advance the views, claims or interests of the employees or employers in a particular industry, trade, profession, business or employment, not including an industrial organisation (*Equal Opportunity Act 2010* (Vic), s4).

e. organising, promoting or proposing to organise or promote a lawful activity on behalf of an industrial organisation or industrial association; or

f. not participating in, or refusing to participate in a lawful activity organised or promoted by an industrial organisation or industrial association.

23. Discrimination on the basis of an attribute also includes discrimination on the basis of a characteristic that a person with an attribute generally has, a characteristic that is generally imputed to a person with an attribute, or where a person presumes that a person has an attribute.

Direct and indirect discrimination in employment

24. Under s 18 of the Equal Opportunity Act, an employer must not discriminate against an employee:

    a. by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment;

    b. by dismissing the employee or otherwise terminating his or her employment;

    c. by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or

    d. by subjecting the employee to any other detriment (defined as including humiliation and denigration).

25. Similarly, an employer must not discriminate against a person under s 16:

    a. in determining who should be offered employment; or

    b. in the terms on which employment is offered to the person (which would include the terms of any enterprise agreement which would cover an employee); or

    c. by refusing or deliberately omitting to offer employment to the person; or

    d. by denying the person access to a guidance program, an apprenticeship training program or other occupational training or retraining program.

26. Discrimination under ss 16 and 18 may be direct or indirect. Direct discrimination is where a person treats or proposes to treat a person unfavourably because of their attribute. Direct discrimination will be 'on the basis" of an attribute when that attribute is a substantial reason for the treatment (s 8(2)(b)).

27. Indirect discrimination is where a person imposes, or proposes to impose, a condition, requirement or practice:

    - that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
    - that is not reasonable.

28. The protection against indirect discrimination recognises that a condition which purports to treat everyone the same, may operate in practice to unfairly disadvantage some people or groups of people based on an attribute. Disadvantage occurs simply where the treatment is 'adverse to the interests' of the person'.[8]

29. When responding to claims, it is the employer who bears the onus of showing that the requirement was reasonable.[9] Factors relevant to whether a requirement, condition or practice is reasonable depend on all the relevant circumstances of the case, including:[10]

    a. the nature and extent of the disadvantage

[8] *Firestone and Australian National University* [2009] ACTDT 1 [45]; Also see *Prezzi v Discrimination Commissioner* [1996] ACTAAT 132 [24].
[9] *Equal Opportunity Act 2010* (Vic), s 9(2)
[10] *Equal Opportunity Act 2010* (Vic), s9(3)

b. whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice

c. the cost of any alternative requirement, condition or practice

d. the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice, or

e. whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

30. This list is not exhaustive. Also relevant is whether there is a logical and understandable basis for imposing the requirement, condition or practice (such as the cost of imposing the condition or not imposing it), any relevant policy objectives for government or statutory bodies, and whether there are alternative requirements, practices or conditions which could be equally effective. Ultimately, the position of both the employer and the employee is considered and weighed.[11]

31. In addition to direct and indirect discrimination, the Equal Opportunity Act prohibits two further types of discrimination which are not referable to the tests for direct or indirect discrimination mentioned above.

Accommodation of parental and carer responsibilities

32. Under the Equal Opportunity Act, an employer must not, in relation to the work arrangements of an employee or a person offered employment, unreasonably refuse to accommodate the responsibilities that person has as a parent or carer.[12] An unreasonable refusal will amount to discrimination under the Act.[13]

33. "Work arrangements" is defined broadly as those arrangements applying either to the workplace or the employee specifically.[14] Examples of work arrangements which may be varied to accommodate an employee's responsibilities as a parent or carer are provided in the Act: [15]

> An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

34. As with indirect discrimination, there are a number of factors in the Act to consider in determining whether an employer has made an unreasonable refusal. These include the person's circumstances and the nature of their responsibilities as a parent or carer, the nature of their role (or the role being offered), the nature of the arrangements required to accommodate the responsibilities, the effect on the workplace including the cost to implement the arrangements, the size and nature of the employer's business, and the consequences for the employer of making such accommodation.[16]

35. As above, this involves a weighing of the factors to determine whether in all the circumstances it is reasonable. These factors are "common-sense considerations that aim to encompass the needs of both parties".[17] Importantly, none of these factors are determinative on their own and there may be other factors that are relevant to a particular

[11] *State of Victoria v Turner* (2009) 23 VR 110, 135-136, [100]
[12] *Equal Opportunity Act 2010* (Vic), s17, s19
[13] *Equal Opportunity Act 2010* (Vic), s7(1)(b)
[14] *Equal Opportunity Act 2010* (Vic), s4
[15] See examples in *Equal Opportunity Act 2010* (Vic), s19(1)
[16] *Equal Opportunity Act 2010* (Vic), s16(2), s19(2)
[17] Victoria, *Second Reading for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007,* Legislative Assembly, Thursday, 11 October 2007, 3468.

case.[18] For example, the timing of the new arrangements, how long they might continue for, the accrued entitlements of the employee, and whether there are any legal or other constraints which will affect the practicability of the requested accommodation.[19]

36. Accommodating parental and carer responsibilities should be considered on a case by case basis, depending on the needs of the individual employee making the request in the context of their employment and working arrangements. Any refusal to accommodate parental responsibilities must have a valid basis, determined after proper consideration of all the circumstances. Generally speaking, larger employers who are well resourced will be expected to do more to accommodate parental and carer responsibilities than smaller employers.[20] However, it is not likely to be unreasonable for an employer to organise its work in the most cost effective or efficient way, including in relation to setting of roster patterns, particularly where there is a "logical and understandable basis" for the work arrangements based on reasonable operational grounds.[21] Employers must still give proper consideration to any request to accommodate parental and carer responsibilities, and any refusal must be reasonable taking in to account the circumstances.

37. For completeness the Commission notes that there may be some overlap between the obligations in s 19 of the Equal Opportunity Act and the right to request flexible working arrangements in s 65 of the Fair Work Act. However s 19 creates a separate and distinct obligation on an employer consider the employee's situation and not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer, in all the circumstances.

38. Moreover, s 19 is a more beneficial provision than s 65 of the Fair Work Act, and so can co-exist to create parallel and complementary rights for an employee. A refusal of a request for flexible working arrangements on reasonable business grounds, in accordance with ss 65(5) and (5A), will not necessarily mean a refusal to accommodate parental and carer responsibilities will also be reasonable under s 19 of the Equal Opportunity Act.

Reasonable adjustments for employees with a disability

39. Finally, s 20 of the Equal Opportunity Act provides that an employer must make reasonable adjustments for an employee or person offered employment with a disability. Specifically, the employer *must* make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment. Reasonable adjustments do not need to result in the employee performing the job perfectly – just adequately.[22]

40. As with indirect discrimination and accommodation of parental/carer responsibilities, s 20(3) provides a non-exhaustive list of factors for assessing whether an adjustment is reasonable. These include:

    - The person's circumstances, including the nature of his or her disability
    - The nature of the role
    - The nature of the adjustments required to accommodate the person's disability;
    - The financial circumstances of the employer;
    - The size and nature of the workplace and the business; and

[18] Explanatory Memorandum, *Equal Opportunity Bill 2010* (Vic) 20.
[19] Victoria, *Second Reading for the Equal Opportunity Amendment (Family Responsibilities) Bill 2007,* Legislative Assembly, Thursday, 11 October 2007, 3468.
[20] *Richold v State of Victoria, Department of Justice (Anti-Discrimination)* [2010] VCAT 433 [41]
[21] *McIntyre v Hastings Deering (Australia) Ltd & Anor* [2013] QCAT 695 [82], [89]. Also see *Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144; *Lamb v Bunnings Group Limited* [2013] FWCFB 2698; *ASU v Brimbank City Council* [2013] FWC 5; *AMWU v Mildura Rural City Council* [2012] FWA 4308; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122; *Reddy v International Cargo Express* [2004] NSWADT 218.
[22] *Dziurbas v Mondelez Australia Pty Ltd (Human Rights)* [2015] VCAT 1432 [141]

- The effect on the workplace and the employer's business of making the adjustment, including the impact on others and on productivity and efficiency of the business.

41. Adjustments could relate to any part of the employee or person offered employment's position – for example providing a ramp to access the workplace, modifying work manuals or instructions, allowing them to be absent during work hours for rehabilitation or treatment, or allowing more frequent breaks.[23] Adjustments relate to both the work environment and location, as well as the specific duties that the employee has (such as not lifting beyond a certain weight) or the work arrangements of the employee (such as not working at specific times of day which might aggravate the employee's condition). There should be no "rigid stereotyping" of what a reasonable adjustment might be for a particular person – instead it should be approached on the basis of the medical evidence available as to the nature of the disability and adjustments required.[24]

42. In effect, s 20 requires an employer and an employee to have a discussion about the nature of the employee's disability and what is required by way of adjustments to their role or work environment. Reasonable adjustments are therefore a "*product of proper consultation by parties armed with appropriate … medical information and advice and appropriate knowledge of the genuine and reasonable requirements of the particular job*".[25] Moreover, employers should be flexible, practical and consultative in their approach to reasonable adjustments, tailored to the individual over time, and the identified genuine and reasonable requirements of their role.[26]

43. A breach of s 20 is a stand-alone form of discrimination, without need to refer to the tests for direct or indirect discrimination.[27]

Motive is not relevant

44. Under the Equal Opportunity Act, it does not matter whether the person intended to discriminate or whether she or he intended to breach the law. Unlawful discrimination may be unintentional.

Exceptions and exemptions

45. There are some circumstances when the Equal Opportunity Act says that discrimination, or treating people differently because of a protected attribute is not unlawful.[28] This includes where:

    - it is a special measure to promote the realisation of equality for a group that has been traditionally disadvantaged (s 12)
    - an exception in the Act applies, such as the exception for employment of people of one sex, where it is a genuine occupational requirement for employees to be of that sex (such as to preserve decency or privacy of people in fitting rooms) (s 26), or
    - a service provider has been granted an temporary exemption from the Act (for up to 5 years) by the Victorian Civil and Administrative Tribunal (s 89).

46. An employer seeking to rely on these provisions bears the onus of proving that it applies.[29] The Commission notes that exceptions under the Equal Opportunity Act are not referred to in proposed clause 3.2.1 of the Log, only exemptions under Commonwealth anti-discrimination legislation.

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[23] See examples under *Equal Opportunity Act 2010* (Vic), s20(2)
[24] *Watts v Australian Postal Corp* (2014) 222 FCR 220; [2014] FCA 370 [24]
[25] *Muller v Toll Transport (2) (Human Rights)* [2014] VCAT 472 [74]
[26] *Muller v Toll Transport (2) (Human Rights)* [2014] VCAT 472 [69]; *Watts v Australian Postal Corp* (2014) 222 FCR 220; [2014] FCA 370 [24], [220]
[27] *Equal Opportunity Act 2010* (Vic), s7(1)(b)
[28] *Equal Opportunity Act 2010* (Vic), s13(1)
[29] *Equal Opportunity Act 2010* (Vic), s13(2)

Liability

47. Section 109 of the Equal Opportunity Act provides that, where a person contravenes the Act in the course of their employment or whilst acting as an agent, then *both the employer or principal and the person* is taken to have also discriminated against that person. In this circumstance, the employer/principal is considered *vicariously liable* for the conduct and the complainant has the right to bring an action against either the person, the employer/principal or both.
48. The vicarious liability of an employer or principal is a legal presumption that can only be displaced under s 110 of the Equal Opportunity Act with sufficient evidence to prove on the balance of probabilities that the employer/principal took all reasonable precautions to prevent the conduct occurring.

Findings on Compliance

49. The Commission's findings on compliance in relation to these matters are set out in the attached Schedules. Schedule 1 contains headline compliance issues, and schedule 2 contains additional issues that the CFA may wish to consider.
50. Where the Commission has found there to be a problem with a proposed clause in the Log, we have listed the clause and explained how we consider the clause could potentially breach the Equal Opportunity Act or result in the CFA failing to meet its obligations to take reasonable and proportionate steps to prevent discrimination, sexual harassment and victimisation in the workplace.
51. We appreciate the opportunity to provide assistance to the CFA in relation to their proposed practices in the Log. If you have any questions about this report please contact us.

Yours sincerely

Kate Jenkins

Commissioner

Schedule One – Headline Issues

Clause	Comment
Part A	
12.3 - Classification and Rank Appointment and Progression 12.7 and 12.8 – Length of Service 83 – Training and professional development Schedule 5 – Training Framework	**Finding: non-compliant in respect of training** **Finding: potentially non-compliant in respect of service** Proposed clause 12.3 provides for classification and rank appointment and progression for employees covered by the proposed agreement. In relation to firefighters, each of the ranks (except Senior Firefighter and Senior Leading Firefighter), as well as the Fire Service Communication Controller and Manager Community Safety, there is a requirement that the employee must successfully complete specific firefighter training courses or modules, and complete a specific amount of service, before progression can occur. Proposed clause 12.7 provides that no person is allowed to sit for any assessment for a given rank unless that person has served the length of service that would otherwise make them eligible for promotion to that rank. Proposed clause 12.8 similarly provides that appointment to Commander and ACFO will be determined by reference to competencies and time served. Proposed clause 83 provides that the parties agree to implement the recommendations and the provision contained in the Training Framework at proposed schedule 5. All parties agree to comply with the requirements and matters can only be changed by agreement via consultation. Proposed clause 83.4 provides that training will only take place at agreed recognised training locations and not stations. A sufficient number of courses will be provided for employees to undertake their work, having regard to work life balance (83.7). The training framework “methodology” at proposed schedule 5 effectively provides that all coursework is full time, even “continuation training”, which is block release and self paced study. The Commission understand that the block courses are full time. If this is the case, then it may amount to indirect discrimination, in the form of a proposed requirement that an employee must complete a full time course in order to progress in their career that is likely to have the effect of disadvantaging women who are pregnant, people with the status of parent or carer, people who have a disability and potentially older people. Persons with those attributes are likely to require adjustment to the hours , and without that adjustment, will be potentially unable to attend the training thereby limiting their access to opportunities for promotion, training or other benefits associated with the employment in breach of section 18(a) of the Equal Opportunity Act. It may also or potentially subject them to a detriment under section 18(d) of the Act. The question then is whether it is reasonable to require all employees to attend training on a full time basis in order to progress in their career. Unless the CFA can point to compelling objective operational

	reasons why this is the case, we consider that it is likely to be unreasonable.[30] In relation to the service requirement, it is unclear from the text of the Log whether service would include periods of paid or unpaid leave. We have been instructed that periods of paid leave (such as paid maternity or paternity leave) would in fact be counted towards service. The implication is that periods of unpaid leave, such as unpaid parental leave taken under the Fair Work Act, are likely to be excluded. This amounts to a further proposed requirement, condition or practice which is likely to have the effect of disadvantaging women and people with parental responsibilities. However, given the operational imperatives to ensure that all staff are competent and appropriately skilled in order to progress, excluding long periods of unpaid leave from the definition of service is likely to be reasonable and therefore not a breach of the Act. Finally, it is unclear how other forms of workplace training (such as in relation to anti-discrimination law or other workplace policies) would fit within the training framework at proposed schedule 5. Training employees in their workplace obligations under the Equal Opportunity Act is an essential part of complying with the "positive duty" in s 15 of the Act, as well as a component of displacing the presumption of vicarious liability whereby an employer is deemed responsible for an employee's conduct in breach of the Act (ss 109-110).[31] Any proposed clause or schedule which would act to limit or prevent the CFA conducting such training in an appropriate manner could result in a breach of s 15.
12.9 – Transfer	**Finding: potentially non-compliant** Proposed clause 12.9 provides that employees are entitled to register on a workplace transfer request list, which shall be ordered by 1) local relievers first, and 2) seniority. After establishment of the lists, future list order will be based on time on list. The Commission considers that this clause has the potential to be non-compliant with the Equal Opportunity Act on the basis that restricting transfers on the basis of seniority for a period of time is likely to unfavourably affect younger members. This could amount to direct discrimination on the basis of age, in breach of section 18(a) of the Act, by denying or limiting access to promotion or benefits connected with employment.
20 – Individual Flexibility Arrangements	**Finding: non-compliant** This proposed clause provides that the only matter about which an individual flexibility arrangement can be made between CFA and an employee is in relation to when leave is to be taken, in accordance with proposed clause 121 (which appears to relate to study leave). Clause 20.6 requires the employer to provide the UFU with a copy of any individual flexibility arrangement

[30] *Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 [51]; *Lamb v Bunnings Group Limited* [2013] FWCFB 2698 [22]. In *Lamb,* the enterprise agreement provided that in setting rosters, Bunnings would take into account family responsibilities of team members as well as operational requirement. The Full Bench of the Fair Work Commission interpreted "operational requirements" as involving "more than mere preferences devoid of a perceived advantage" and stated that "an operational requirement is something that is considered to be a benefit to the business" (at [22]).

[31] See e.g. *McKenna v State of Victoria* [1998] VADT 83; *Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102* [158]-[164] (not disturbed on appeal)

	relating to any employee, including non-members of the UFU. The Commission understands that under section 202 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**), employers are required to include a flexibility term in enterprise agreements which "enables an employee and his or her employer to agree to an arrangement (an *individual flexibility arrangement*) varying the effect of the agreement in relation to the employee and employer, in order to meet the genuine needs of the employee and employer" (s 202(1)(a) Fair Work Act). Section 203 of the Fair Work Act provides that a flexibility clause must set out the terms of the enterprise agreement which may be varied by an individual flexibility arrangement and parties can negotiate the content of the flexibility clause provided it relates to a lawful, permitted matter. By way of example, the model flexibility term contained in Schedule 2.2 of the *Fair Work Regulations 2009* (Cth) includes matters such as overtime rates, penalty rates, and arrangements about when work is performed. The Fair Work Ombudsman states that flexibility terms are intended to provide employers with a method of introducing flexibility into the workplace for individuals, which does not undermine minimum entitlements and protections contained in the enterprise agreement (which often do not or cannot take individual circumstances into account).[32] For example, by allowing a person to change their hours of work to start or finish earlier. The Commission acknowledges the Fair Work Act allows parties to negotiate which matters about which an individual flexibility arrangement can be made, if they do not wish to include the model clause. This means it is open to the CFA and UFU to determine what matters they wish to include in proposed clause 15. However, the Commission notes in the context of this compliance review that if CFA were able to utilise individual flexibility agreements for when work is to be performed for individual employees with a genuine need (such as to vary their hours of work or shift patterns) this is likely to amount to a reasonable and proportionate step under s 15 of the Equal Opportunity Act towards eliminating discrimination against employees who require the accommodation of parental and caring responsibilities or employees with disabilities who require reasonable adjustments to perform their position. This comment is made in the context of the Commission's other findings about compliance with the Equal Opportunity Act and potentially unreasonable disadvantage caused to employees who are unable to work part time or request flexible working arrangements under the National Employment Standards unless they have the agreement of both the CFA and the UFU, provide personal information to both those parties, and effectively agree to work at a different location, in a different position, and/or work "off station". The proposed clause may also amount to direct discrimination on the basis of industrial activity. Requiring the employer to provide the UFU with a copy of non-members individual flexibility arrangements, will result in providing the union with information about that employee's personal life and working arrangements, and is likely to be unfavourable and detrimental treatment in breach of section 18(d) of the Equal Opportunity

[32] Fair Work Ombudsman, *Use of Individual Flexibility Arrangements*, https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/use-of-individual-flexibility-arrangements

	Act.
21 – Consultation	**Finding: potentially non-compliant** The proposed clause provides that there will be a consultation committee for the purpose of consultation between the parties. The committee shall comprise equal numbers of employer and employee representatives appointed by the employer and the UFU respectively. (21.3.1 and 21.3.2). The proposed clause also provides that the UFU will appoint employee representatives to the Committee "without discrimination" and will call for expressions of interest or nominations, or will undertake its own consultation with employees (21.3.4). The role of the Committee is to provide the forum for consultation on terms which require it, under the proposed agreement. It is also to provide a mechanism for employee input (21.4). Consultation is required for any proposals involving change affecting the application or operation of this agreement, employee's terms and conditions of employment, or the employment relationship (21.4.7). Proposed clause 21.5.1 provides that the committee will operate on the basis of consensus, which shall be required prior to implementing any matter of change about which consultation is required under the proposed agreement. Similarly, any working group or sub-committee must work on the basis of consensus in relation to any recommendations that it makes to the Committee (21.5.9). Consensus is defined as "unanimous agreement on an outcome supported by all members" (clause 21.5.11). The proposed consultation clause is clearly an important aspect of the Log, as it appears that it can be invoked in any situation which relates to the terms and conditions of employment or anything to do with the employment relationship. There are two aspects to the proposed consultation clause that the Commission is concerned about relating to the limitation on consultation to employees appointed by the UFU, with no mechanism for independent nomination or appointment, and in relation to consensus decision-making. *Discrimination on the basis of industrial activity* First, the proposed clause makes no provision for consultation by the employer with non-union members without the involvement of the union. While there is a safeguard built in to proposed clause 21.3.4 that the UFU will not discriminate in the employee representatives that it selects, there is no mechanism in the consultation clause for an individual to nominate themselves and be selected as an employee representative without the union being notified or involved in some way. By way of comparison, under s 173 of the Fair Work Act, employers must notify employees of the right to be represented by a bargaining representative of their choosing, in relation to commencing enterprise bargaining. Section 175 of the Fair Work Act provides that bargaining representatives can include a union who has members who will be covered by the agreement, or any other person nominated by an employee as their bargaining representative. In this way, employees who are not union members or who seek to be represented by someone other than the union have a mechanism for doing so

	independently of dealing with the union during enterprise bargaining.[33]. The Commission is concerned that the process set out in proposed clause 21 may amount to direct discrimination on the basis of industrial activity, by limiting an employee's access to a benefit associated with their employment (namely the potential opportunity to be a member of the consultative committee, or to be consulted on workplace issues), under section 18(a) of the Equal Opportunity Act. In the alternative, it could amount to indirect discrimination as a condition or requirement that employees who wish to participate in the consultation process be selected by the UFU as an employee representative, which is likely to have the effect of disadvantaging non-union members (falling under the attribute of industrial activity). The CFA would need to prove that it is reasonable in the circumstances for the UFU to be the organisation which selects employee representatives on this committee. The Commission notes that it is aware of the decision of *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 and the findings made in relation to whether the consultation clause was an "objectionable clause" and, by reason of s 356 of the FW Act, have no effect. The consultation clause in issue was similar to that proposed by CFA in the Log. The Commission observes that this decision may be distinguished on the basis that it did not consider the test under the Equal Opportunity Act for indirect discrimination. Rather, it turned on an interpretation of the meaning of the adverse action provisions, in that the MFESB's agreement to the consultation clause in the agreement could not in itself amount to adverse action as injury to his employment or alteration of his position to his detriment because that consultation clause had existed for a number of years.[34] The Federal Court also stated: [35] "it cannot be said that the MFESB agreed to or selected the Consultative Provisions because of their adverse impact on Mr Klein or non-UFU members." By comparison, the Equal Opportunity Act clearly provides that indirect discrimination can arise out of the terms and conditions of employment offered (see s16()(b)) and does not limit "benefits" in s18(a) to those conferred under an enterprise agreement but rather "benefits connected with employment". Indirect discrimination under the Equal Opportunity Act in breach of these terms must necessarily be based on a neutral condition that applies across the board. There is no requirement in Victorian anti-discrimination law for indirect discrimination to be implemented "because of" an attribute or "because of its adverse impact" conditions, nor must the relevant employees have been considered on imposition of the condition. In fact, motive is irrelevant under the Equal Opportunity Act (s 10). The Commission is also aware of the decision *UFU v CFA* [2015] FCAFC 1, which considered the CFA's current consultation clause which is similar to that in the Log. In that decision, the Full Federal Court considered arguments about

[33] The Commission notes this does not require the employer to follow the same process during the life of the agreement and instead the consultation clause in the enterprise agreement is what guides that process.
[34] *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 [119], [123]
[35] *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 [136]

	whether the consultation clause was an objectionable term (for the purposes of s 356 of the FW Act). The court accepted that there was no mechanism in the clause which requires non-union members to be involved in the consultation committee process,[36] but ultimately the clause was found not to be objectionable under the FW Act. This was because it was "impossible" to say whether the clause permitted or authorised direct discrimination.[37] However, the court noted that it was still open to argument about whether the clause resulted in indirect discrimination.[38] In any event, as with *Klein*, the test for what amounts to an "objectionable term" is a different legal test to that under the Equal Opportunity Act, and specifically focuses attention on whether the clause *requires or permits* a contravention of the general protection provisions (which includes discrimination at s 351). Motive and intention is irrelevant under the Equal Opportunity Act and the focus for whether discrimination has occurred is on the actual effect of the conduct or proposed conduct, and whether it is unfavourable treatment substantially because of a protected attribute (for direct discrimination), or an unreasonable condition, requirement or practice which disadvantages a person or group of people with a protected attribute (for indirect discrimination). There is no need for the clause to specifically authorise or permit the conduct for discrimination under the Equal Opportunity Act to be made out. While *UFU v CFA* decision holds the door open for claims about indirect discrimination in the FW Act context, it can be distinguished for the purposes of assessing the compliance of the consultation clause with the Equal Opportunity Act. *Consensus and the positive duty* The second concern of the Commission is in relation to the requirement for the consultation committee and its sub-committees and working groups to operate on the basis of consensus. The Commission has no objection to a consensus based model, if the parties both agree to this in negotiation. However, there are no safeguards in place for this consultation clause to allow for reasonable and proportionate steps to be taken by management to eliminate discrimination, sexual harassment and victimisation in accordance with the positive duty in s 15 of the Equal Opportunity Act, where those steps are required to be taken urgently or as a matter of priority to rectify an unsafe situation or to ensure policies, practices and programs are compliant. For example, the Commission is concerned that if the CFA wished to introduce a new equal opportunity policy, with proactive measures providing compulsory training to staff on anti-discrimination obligations, the introduction and content of that policy and training would be required to be agreed upon by consensus at the Consultation Committee (or at the very least a recommendation to implement that training would need to be agreed unanimously). If safeguards are not introduced, a consensus based model has the potential to hinder the CFA's ability to meet its legal obligation in s 15 of the Equal Opportunity Act as an employer duty holder, to take reasonable and proportionate measures to prevent discrimination, sexual harassment and victimisation in

[36] *UFU v CFA* [2015] FCAFC 1 [221]
[37] *UFU v CFA* [2015] FCAFC 1 [227]
[38] *UFU v CFA* [2015] FCAFC 1 [229]-[230]

	the workplace.
38 – Adverse Reports	**Finding: non-compliant** This proposed clause provides that any adverse report about an employee's conduct will be placed on the employee's file for no longer than 12 months. After that date the proposed clause deems that the report is no longer relevant (regardless of the content) and the report and all copies shall be removed from the file and returned to the employee. No other copy is to be kept by the employer. An adverse report is defined as a report alleging serious misconduct, a serious breach of discipline, or a series of less serious acts of misconduct or breaches of discipline which are likely to affect an employee in his/her career. It can also relate to an allegation of inefficiency or lack of diligence. The Commission is concerned about this proposed clause on the basis that it might hinder the CFA from meeting its obligation in s 15 of the Equal Opportunity Act to take reasonable and proportionate steps to prevent discrimination, sexual harassment and victimisation. If an employee is found guilty of serious misconduct that involves sexual harassment of a colleague or member of the public, or the employee has been harassing or bullying another employee on the basis of a protected attribute in the Equal Opportunity Act, then a record of that misconduct ought properly to be kept on their file, even if the matter does not proceed through to charges and discipline under the If that record is removed after 12 months this is likely to limit the CFA's ability to ascertain whether that employee has a history or acting in a similar manner across their employment, and whether they are in fact displaying predatory behaviour. Whether an employee has been found to have sexually harassed, discriminated against or victimised a fellow employee is also highly relevant to whether it is appropriate to promote that person into a position of leadership or power over other employees. Allowing promotion could result in the entrenchment of systemic behaviours and the potential for harmful behaviour to continue unchallenged. The Commission acknowledges that adverse reports may cease to be relevant after a length of time, but does not consider 12 months to be a long enough period, in light the obligation on the CFA under the Equal Opportunity to take reasonable steps to prevent sexual harassment and discrimination within the workplace.
42 – CFA Policies	**Finding: potentially non-compliant** Proposed clause 42 provides that any policy that affects the application and operation of this agreement, or the work of employees covered by this agreement may only be made or varied by agreement. Where CFA seeks to vary, amend or introduce new policies, it must utilise the consultation clause of the proposed agreement (42.1). Any policy that has not been approved through the consultative process is deemed unenforceable (42.2). The Commission considers that proposed clause 42 has the potential to be non-compliant with s 15 of the Equal Opportunity Act, as it requires use of the proposed consultation clause 21, which we have also found to potentially be non-compliant. As noted above, if safeguards are not introduced, a consensus

	based model of consultation has the potential to hinder the CFA's ability to meet its legal obligation in s 15 of the Equal Opportunity Act as an employer duty holder, to take reasonable and proportionate measures to prevent discrimination, sexual harassment and victimisation in the workplace including by ensuring its equal opportunity and anti-discrimination policies are current, implemented and enforced.
51 - Rostering	**Finding: non-compliant** The propose clause 51 provides: • For reasons including the welfare and safety of employees covered by the propose agreement, the CFA will not employ any employee on any other basis other than a roster of hours provided for in this agreement (51.2) – a 10/14 roster under propose clause 141, a 12/12 roster under proposed clause 220 for FSCCs, the Special Duties roster under proposed clause 143 or the Chief Officer Emergency Roster under propose clause 144 • CFA will not employee any employee on a part time basis, and no employee may hold a position on such basis, unless there is agreement between "all parties" (which we understand includes agreement by the UFU) for each employee (51.3) • Employees may be entitled to work in a non-station based position if they meet the criteria in propose clause 52 (51.4) • Where agreement is reached, a non-full time employee will receive a 25% "insecure work" loading (51.5) • Full time operational dayworkers - who are professional firefighters not working one of the above rosters - shall work a special administrative duties roster set out in proposed clause 145 (51.6.2) • Part time operational dayworkers' hours of work will be agreed between the CFA, the employee and the UFU (51.6.4) for an average of less than 42 hours per week over a 5 day cycle and may include weekends and evening work. The effect of this proposed clause (particularly combined with the next proposed clause 52), is that the agreement effectively bans employees working part time at a station as an active career firefighter. Any employee who wishes to work part time under the proposed clause 51 must first get the employer and union's agreement to do so, and can only work on a special administrative duties roster which (according to proposed clause 52) is likely to be at a different location or a different station, if such a position exists or can be created within budget. Then, the employee must have their specific hours agreed to again by both the employer and the union. It seems foreseeable that a person may wish to transfer to a part time daywork position in order to not work nights or weekends – but this clause implies they could still be required or that either the union or employer may veto their hours of work. The Commission considers that this proposed clause is not compliant with the Equal Opportunity Act for a number of reasons, outlined below. The proposed condition that all operational firefighters must work "on shift" or "on station" full time for their entire career is highly likely to result in indirect discrimination, as it is likely to

	have the effect of disadvantaging people who are parents or carers, people who have a disability and potentially employees over 55 years of age. Those people may, because of their attributes (or characteristics of their attributes), require accommodation or adjustment to the hours or location of their work. They are also entitled under the Fair Work Act to request flexible working arrangements (which could potentially include part time work). Requiring them to work full time despite having legal entitlements reasonable accommodation or reasonable adjustments, and an entitlement to request flexible working arrangements, could result in the employee being subjected to a detriment in breach of section 18(d) of the Equal Opportunity Act or limiting access to benefits connected with their employment in breach of section 18(a) of the Act. The proposed condition that to obtain part time work, the employee must get the approval of both the employer and the union for their change to part time and the actual hours they will be working, has the potential to amount to indirect discrimination as well. This is because it is likely to have the effect of disadvantaging employees with the attribute of "industrial activity", where the employee is not a member of the union. As above, this could result in the employee being subjected to a detriment in breach of section 18(d) of the Equal Opportunity Act or limiting access to an opportunity for transfer or benefits connected with their employment in breach of section 18(a) of the Act. The proposed condition that employees who obtain part time work be paid a 25% "insecure work" loading and that they receive certain entitlements in full (not pro rata) is likely to have the effect of disadvantaging pregnant employees, people with parental and caring responsibilities, older employees, and employees with a disability. These are the groups of employees who are more likely to seek part time work, in order to enable them to fully participate in the workplace. However, the additional payments required, which would ordinarily only be paid to casual staff to recognise the fact that casual staff generally do not receive personal/carer's leave and annual leave, and are engaged from shift to shift rather than on a permanent basis, may act as a disincentive to the CFA agreeing to take on a part time employee where an operational daywork position can be found for them. In addition to causing or being likely to cause disadvantage to persons with an attribute, the condition, requirement or practice must be not reasonable, to be unlawful. However, the onus is on the CFA to prove that each of these conditions or requirements outlined above are reasonable in all the circumstances, by reference to objective operational requirements for setting the organisational framework in this way. Relevant to this would be what specific safety or welfare concerns exist to restrict part time work (as indicated in the proposed clause) and how they are proportionate to the restrictions on employees' ability to work part time. Considerations about the potential nature and extent of disadvantage to employees arising from the conditions or requirements are relevant. The proposed clauses effectively placing a ban on operational firefighters working part time may also result in the application of the ban being an unreasonable refusal to accommodate parental and carer responsibilities, under s 17 or s 19 of the Act, or result in a failure to provide reasonable adjustments to the

	hours of work of an employee with a disability, under s 20 of the Act. Of course, these provisions also turn on whether the refusal or failure was reasonable in all the circumstances and as outlined above, there are a number of relevant factors. It is difficult to assess reasonableness for these matters without knowing an individual employee's circumstances that lead to a request for reasonable adjustments or accommodation of parental/carer responsibilities. A blanket ban has significant potential to be unreasonable, as do the significant hurdles placed on an employee obtaining that part time work (in the form of agreement by the CFA and the union, and the 25% loading and non-pro rata payments).
52 – Carers of Children With Rights under NES	**Finding: non-compliant** This proposed clause relates to the right to request flexible working arrangements under the Fair Work Act. Relevantly for the Commission's compliance review, it proposes: • CFA operational requirements mean that on-shift employees should be employed on a full time basis (52.1) • CFA will consider every request under the National Employment Standards (NES) for flexible working arrangements and will assess them on a case-by-case basis (52.1) • Employees acknowledge that making such requests "may require an entitled employee to transfer off station or from their current work location to another position" (52.1) • An employee making a request for flexible working arrangements must provide evidence of their entitlement in the form of a statutory declaration to both the CFA and the UFU (52.3.1) • An employee who works flexible working arrangements may be required to undertake additional skill maintenance as the parties (i.e. CFA and the UFU) agree to ensure skills are maintained (52.4) The Commission notes that flexible working arrangements do not necessarily always involve an employee moving from full time to part time employment. Instead, in practice, they could relate to changing an employee's start and finish times to accommodate dropping off and picking up children from school. It might relate to allowing an employee longer breaks, for rehabilitation purposes or to attend medical appointments. It might even relate to a person working from home one day a week, or job-sharing with another employee. Not all of these arrangements are going to require an employee to reduce their hours to part time. The Commission notes for completeness that section 65 of the Fair Work Act provides the right to request flexible working arrangements for employees with parental and caring responsibilities, but also other broader groups of employees than when it was first introduced, such as employees experiencing family violence, employees with a disability, or employees over the age of 55 years of age. The proposed clause amounts to direct discrimination, in the form of proposed unfavourable treatment of people with a disability, parents and carers, and older people, who are each entitled to request flexible working arrangements (being a benefit of their employment). The unfavourable treatment of those employees is that, if their request is approved, they could

	be forced to transfer off-station (i.e. to an office-based position), relocate, or otherwise change positions. The only reason for this treatment is substantially because of their protected attributes, being the reason they are requesting the flexible work in the first place. In the alternative, proposed clause 52 could amount to indirect discrimination by proposing a condition or requirement that to access part time work, employees must transfer off-station, to a different location, and otherwise stop working as an operational firefighter. This is likely to disadvantage people with those same attributes listed above, as they will no longer be working as an operational "on station" firefighter. In either case, this proposed treatment is likely to amount to subjecting an employee to detriment in breach of section 18(d) of the Equal Opportunity Act (including because it is assumed a person requiring flexible working arrangements will necessarily be losing their skills and require skill maintenance programs). In addition, the propose clauses potentially deny or limit access by the employee to benefits connected with the employment (accessing flexible work and retaining their position as a on-station/on-shift operational firefighter) in breach of section 18(a) of the Act. Alternatively, removing an employee from operational firefighting duties entirely because of their parental/carer responsibilities (or other protected attribute), when they are capable of performing part-time operational duties could also amount to direct discrimination in breach of section 18(a) or (d) of the Act. There is no defence of reasonableness available for direct discrimination. The proposed clause may also amount to direct discrimination on the basis of industrial activity. Requiring an employee who is not a member of the UFU to provide the union with a statutory declaration as proof of their entitlements, will result in providing they union with information about that employee's personal life and working arrangements, and is likely to be unfavourable and detrimental treatment in breach of section 18(d) of the Equal Opportunity Act. Depending on how this proposed clause is applied in practice, it may also result in a breach of sections 17, 19 and 20, in relation to unreasonable refusal to accommodate parental or carer responsibilities, or failure to provide reasonable adjustments to a person with disabilities in order to assist them perform the genuine and reasonable requirements of their employment.
70 – Equal Employment Opportunity	**Finding: potentially non-compliant** This proposed clause provides that CFA will ensure that employees are not subjected to any from bullying and harassment, and that its employment practices are non-discriminatory and workers have equal access to multi-skilling, career path opportunities and all terms and conditions of employment (70.1). The proposed clause also provides that CFA will take a recruit's family responsibilities into account when allocating them to a station. However, if there is disagreement about the "bone fides" of an employee's family responsibilities, the matter will be referred to the CFA and the UFU for resolution (70.2). Proposed clause 70.2 is potentially too narrow to cover the full spectrum of family responsibilities covered by the Equal Opportunity Act (e.g. carer responsibilities; accommodation of

	parental/carer responsibilities beyond station allocation). Proposed 70.2 could potentially result in direct discrimination against an employee on the basis of industrial activity, as they could potentially be subjected to detrimental treatment for not being a member of the union, or in having personal details about their home life shared with the union without their express consent, in breach of s18(d) of the Equal Opportunity Act. For completeness the Commission notes that neither bullying nor harassment are defined terms in the Equal Opportunity Act. Sexual harassment is covered, but not harassment without reference to unwelcome sexual conduct. Similarly, bullying is only covered within the Equal Opportunity Act regime where it relates to unfavourable or detrimental treatment on the basis of a protected attribute. We presume that the CFA has an underlying policy which clarifies the meaning of bullying and harassment in the context of this proposed clause.
77 – Return to work Schedule 19 – Return to Work	**Finding: potentially non-compliant** / **needs clarification** This proposed clause provides that the parties recognise "the importance of a fair and equitable rehabilitation program which recognises the requirement to reasonable accommodation for employees returning from illness or injury." A proposed Return to Work program is contained in schedule 19 for this purpose for ill and injured employees.(77.1) The proposed clause also provides that an on request of the employee, the CFA will, by agreement with the employee and UFU, vary the employee's duties or transfer them to a different position which will not require the employee to move from their appointed station or place of residence without their agreement (77.2) Schedule 19 sets out a comprehensive guide for returning employees to work after a period of leave off work due to injury or illness. The goal outlined in proposed schedule 19 of providing meaningful and decent work to ill and injured employees who have either a psychological or physical injury is to be commended, and is consistent with the positive duty in s 15 and the objectives in s 3 of the Equal Opportunity Act. In addition, the proposed process discussed on page 398 of proposed schedule 19 relating to the employer making effort to find selected duties in line with the doctor's proposal is consistent with the case law relating to reasonable adjustments for those with a disability, discussed in the letter above. However, the Commission makes a number of comments about this clause that need clarifying to ensure no discrimination occurs: • Despite providing an obligation to provide reasonable adjustments to employees with a disability, anti-discrimination law is not mentioned in the objectives to the schedule as legislation which relates to the provision of safe systems of work; • It is not clear if Schedule 19 also applies to the situation where an employee is diagnosed with an injury or illness which does not require time off work but who requires reasonable adjustments to continue to working; • It is unclear to what extent a return to work plan will involve reasonable adjustments of *any* aspect of the employee's

	employment as required by their injury/illness. Proposed clause 77.2 refers to varying duties or transferring an employee to a different position, and on page 398 of proposed schedule 19, the CFA agrees that where practicable it will undertake any workplace or workstation modification requested – in consultation with the union. There is an implication on page 397 where the proposed schedule refers to an employee being absent or on "modified duties/hours", but there is nothing specifically in these provisions allowing for reduced hours of work where that it medically required or varied methods of working in either the propose clause or schedule. If the processes for accommodation of an injured or ill employee does not apply to employees not requiring time off but rather reasonable adjustments to assist them continue working, this has the potential to result in failure to provide reasonable adjustments in breach of s 20 of the Equal Opportunity Act. Finally, the Commission has concerns about potential detrimental treatment of non-union members with the attribute of industrial activity, in relation to proposed clause 77.2.1, in that an employee's varied duties or transfer must be agreed to by the union even when the employee is not a union member. As noted above, proposed schedule 19 provides that a requirement for an employee's reasonable adjustments relating to the workplace and workstation to be agreed with the union. This has the potential to result in unfavourable and detrimental treatment in breach of section 18(d) of the Equal Opportunity Act as it requires sharing the employee's personal information including potentially medical information with the union. This is no way prohibits an employee from seeking union representation if they wish to do so.
87 – Specialist courses	**Finding: potentially non-compliant** Proposed clause 87 provides that the selection process for selecting personnel to undertake specialist courses will be made via equal weighting to the following three factors: need, time served, and merit. The Commission considers that this clause has the potential to be non-compliant with the Equal Opportunity Act on the basis that including time served as a criterion for selection is likely to affect younger members. This could amount to direct discrimination on the basis of age, in breach of section 18(a) of the Act, by denying or limiting access to training or benefits connected with employment.
Part B – Conditions applying to recruit firefighter to CFO and instructors and MCS	
140- Roster of Hours	**Finding: non-compliant** Proposed clause 140 provides that employees to whom this part applies will be rostered on either a 10/14 roster, the special duties roster, the special administrative duties roster, "any other configuration as agreed between the UFU and CFA" and that "part time employees shall be rostered in accordance with proposed clause 51. To the extent that this proposed clause acts to reinforce the limitations in the proposed clause 51 it is also non-compliant with the Equal Opportunity Act, for the same reasons.
146 – Day staffing	**Finding: non-compliant**

	This proposed clause provides that a station may only be staffed on an agreed roster other than the 10/14 roster where there is agreement with the CFA and UFU. To the extent that this propose clause acts to reinforce the limitations in the proposed clause 51 it is also non-compliant with the Equal Opportunity Act, for the same reasons.
162.5.2 – Classification/Recruitment and Selection [instructors]	**Finding: non-compliant** This clause provides that all instructors are to be employed on a full time basis. To the extent that this clause replicates the limitations on part time and flexible working arrangements as propose clause 51, the same concerns apply and the Commission considers the clause non-compliant for the same reasons.
162.14 – Transfer [instructors]	**Finding: potentially non-compliant** This proposed clause provides that instructors will not be transferred between work locations or rosters except by agreement between the instructor, the CFA and the UFU. To the extent that this clause may require non-union members to provide personal information to the union without their express consent, it may amount to unfavourable treatment on the basis of industrial activity, in subjecting the employee to detriment in breach of section 18(d) of the Act.
Part C – Additional Conditions applying to Commander to ACFO Classifications and the MCS Classification	
165 – ACFO Hours of Work	**Finding: not compliant** This proposed clause provides rostering-related rules for ACFO classifications. To the extent that this proposed clause replicates the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU (proposed clauses 165.3.1), and that employees other than full time employees shall receive an “insecure work allowance” of 25% of their annual wage (165.2), it is not compliant with the Equal Opportunity Act for the same reasoning outlined above in proposed clause 51.
Part D – Communications Department	
183 – Hours of Work	**Finding: not compliant** This proposed clause sets the hours of work for the communications department. To the extent that this proposed clause replicates the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU (proposed clause 183.3), and that employees other than full time employees shall receive an “insecure work allowance” of 25% of their annual wage (183.2), it is not compliant with the Equal Opportunity Act for the same reasoning outlined above in proposed clause 51. Considerations of reasonableness for communications staff are likely to be different to operational on-shift firefighters.

Part E – Protective Equipment Department	
194 – Hours of Work	**Finding: not compliant** This proposed clause sets the hours of work for the protective equipment department. To the extent that this proposed clause replicates the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU (proposed clause 194.3), and that employees other than full time employees shall receive an "insecure work allowance" of 25% of their annual wage (194.2), it is not compliant with the Equal Opportunity Act for the same reasoning outlined above in proposed clause 51.
Part F – Conditions Applying to Practical Area Drill Department	
207 – Hours of work	**Finding: not compliant** This proposed clause sets the hours of work for the practical area drill department. To the extent that this proposed clause replicates the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU (proposed clause 207.3), and that employees other than full time employees shall receive an "insecure work allowance" of 25% of their annual wage (207.2), it is not compliant with the Equal Opportunity Act for the same reasoning outlined above in proposed clause 51.
Part G – Conditions Applying to Fire Service Communication Controllers (including Senior FSCCs)	
219 – Hours of work	**Finding: not compliant** This proposed clause sets the ordinary hours of work for FSCCs, specifically in accordance with clause 51. As this proposed clause relies on the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU, and that employees other than full time employees shall receive an "insecure work allowance" of 25% of their annual wage, it is not compliant with the Equal Opportunity Act for the same reasoning outlined above.
Part H – ITFTO's	
234 - Hours of work	**Finding: not compliant** This proposed clause sets the hours of work for Information Technology Field Technical Officers. To the extent that this proposed clause relies on the provisions in proposed clause 51 which provides that no employee shall work part time and no employee shall hold a position on such a basis, unless there is agreement between CFA and the UFU (234.4), and that employees other than full time employees shall receive an "insecure work allowance" of 25% of their annual wage (234.2), it is not compliant with the Equal Opportunity Act for the same reasoning outlined above in

	proposed clause 51.
Schedules (not already dealt with)	
Schedule 17 – Secondment training program	**Finding: non-compliant** This proposed schedule sets out the secondment agreement and training schedule for seconding firefighters in conjunction with proposed clause 49 and proposed schedule 16. Part C of proposed schedule 17 provides that a person seconded to CFA cannot form part of minimum crewing unless they have successfully completed an endorsed induction course. Attachments 2 and 3 to proposed schedule 17 sets out the Secondment Conversion Course timetable. This is a full time course. To the extent that this schedule proposes full time training without exception for potential secondees who are pregnant, have a disability, are older, or who are a parent/carer, the same potential for discrimination occurs as in relation to proposed clause 83 (Training and Professional Development) and Schedule 5 (Training Framework). For the same reasons, the Commission considers the proposed secondment conversion course is non-compliant.

Schedule Two – Other Issues

Clause	Comment
3.2.2 – Objectives	**Finding: needs clarification** The proposed clause provides that nothing in the proposed agreement is taken to affect an employee, employer or registered organisation pursuing matters of discrimination in any State or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission. CFA may wish to clarify whether the Log should refer to the Victorian Equal Opportunity and Human Rights Commission, or the federal Australian Human Rights Commission (formerly known as the Human Rights and Equal Opportunity Commission).
36 – Work Organisation	**Finding: potentially non-compliant** Proposed clause 36.1 provides that, subject to other terms of the proposed enterprise agreement, the CFA may direct an employee to carry out duties and use tools and equipment that are within the limits of the employee's skills, competence, and training, provided that those duties do not promote deskilling. This clause is not on its face discriminatory. However, the Commission notes that there is potential for this clause to be applied in a discriminatory manner. In particular, it might result in unfavourable treatment of women (including pregnant women), employees who are parents or carers, older employees or employees with a disability. The Commission acknowledges an employer's right to set inherent requirements of employment, which may include criteria for physical fitness based on the duties the employee will be required to perform. Employers also have health and safety obligations to ensure their employees are fit for their role and can perform their duties safely without risk of injury to themselves or others. However, on the face of this clause there is potential for managers or supervisors to apply the proposed clause in a way which would let them direct an employee to carry out particular duties based on an unconscious bias, stereotypical views about capacity, competence, or perceptions about physical strength or stamina – as opposed to an employee's *actual* capacity, competence, strength and stamina. For example, directing older firefighters to perform roles that do not involve heavy lifting or that are considered less demanding, because of their perception that older people are not as fit as younger people, rather than the specific employee's actual fitness capability. This could result in an employee being subjected to direct discrimination by being subjected to detriment in their employment (s18(d) of the Equal Opportunity Act), or potentially denying the employee access to benefits connected with their employment (s18(a) of the Equal Opportunity Act).
37 – Conduct Resolution Schedule 18 – Conduct Resolution Process	**Finding: need clarification / potentially non-compliant** Proposed clause 37 sets out that any resolution of conduct of an employee must be dealt with in accordance with proposed schedule 18, which sets out the procedures for addressing and resolving alleged misconduct of employees (see proposed item 3, schedule 18).

	The Commission considers clarification is needed as to whether a breach of the Equal Opportunity Act (such as sexual harassment) would fall within the meaning of misconduct under proposed item 3.3 of schedule 18, or serious misconduct under proposed item 3.3A. The closest relevant item appears to be a serious and/or repeated breach of published standard procedures", or negligent discharge of an employee's duties. If discrimination, sexual harassment and victimisation are not included as misconduct or serious misconduct, it is unclear what process the CFA will be able to take to investigate allegations and take action to resolve those allegations (including taking disciplinary action). Proposed schedule 18 appears to be intended to cover the field for all conduct-related allegations and investigations. The Commission is concerned about this proposed clause on the basis that it might hinder the CFA from meeting its obligation in s 15 of the Equal Opportunity Act to take reasonable and proportionate steps to prevent discrimination, sexual harassment and victimisation. In addition, in order to rebut the presumption of vicarious liability for discrimination, sexual harassment and victimisation by its employees, employers must show they have taken reasonable precautions to prevent the behaviour. Communicating to employees the types of behaviour that re prohibited under anti-discrimination law and which are not acceptable in the workplace is a key part of both the positive duty and taking reasonable precautions, as both are intended to prevent unlawful conduct from occurring.[39] The Commission considers clarification is also needed as to the process under schedule 18 for an employee who raises disability or parental/carer status as a reason or causative factor in alleged poor performance or misconduct, in light of the obligations in the Equal Opportunity Act to make reasonable adjustments for employees with a disability (including a mental disability such as depression or anxiety), and to not unreasonably refuse to accommodate parental and carer responsibilities.
57 – Accident and illness policy	**Finding: need clarification** This proposed clause sets out that the CFA will provide income insurance cover for employees for all injuries or illnesses rendering them incapable from work. The Commission is concerned with any proposed clause that might result in employees being required to provide to the employer medical information that does not relate to their ability to perform the genuine and reasonable requirements of employment. For example, if an employee is transgender, they should not be required to provide to their employer any medical information that might disclose their pre-transition gender and any gender reassignment treatment or surgery where it has no bearing on their ability to perform their role. Under proposed clause 57, it is unclear to what extent an employee covered by the accident and illness policy will be required to provide such medical information. More information is required about this proposed clause to determine whether it might breach the Equal Opportunity Act in relation to its proposed treatment of transgender or employees with a disability, or by requesting information that could be used to discriminate, in breach of s 107 of the Act.

[39] *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102; *Aleksovski v AAA Pty Ltd* (2002 EOC 93-219;

63 – Medical care/attention	**Finding: need clarification** The same concerns apply to the medical care/attention clause as to the accident and illness policy above, in relation to the provision of medical information to the employer about non-work related conditions or treatments.
70 – Equal Employment Opportunity	**Finding: need clarification** This proposed clause provides that CFA will ensure that employees are not subjected to any from bullying and harassment, and that its employment practices are non-discriminatory and workers have equal access to multi-skilling, career path opportunities and all terms and conditions of employment (70.1). The proposed clause also provides that CFA will take a recruit's family responsibilities into account when allocating them to a station. However, if there is disagreement about the "bone fides" of an employee's family responsibilities, the matter will be referred to the CFA and the UFU for resolution (70.2). The Commission notes the proposed clause 70.1 is a "formal equality" approach to equal employment opportunity where all employees are treated the same regardless of their protected attributes. The Equal Opportunity Act has moved to a "substantive equality" approach whereby the systemic causes of discrimination, sexual harassment and victimisation are to be identified and eliminated, in order to prevent the conduct from occurring. This means recognising that equal application of a rule to different groups can have unequal results or outcomes, and that access to opportunities is not equitably distributed throughout society (see s 3, Equal Opportunity Act). Proposed clause 70.1 therefore needs clarifying to confirm whether it is taking a formal or substantive equality approach, in order to determine whether it is likely to assist compliance with the "positive duty" obligations in s 15 of the Act.
90 – Uniforms, Appliances and Equipment	**Finding: need clarification** This proposed clause deals with supplying each employee with clothing and equipment to be worn and use by the employee (90.1). The CFA and UFU must agree on all aspect of articles of clothing, equipment, station wear, appliances and technology (90.4). The Commission is concerned about whether the CFA firefighter uniforms are gendered or not (i.e. separate uniforms for men and women, particularly where there may be skirt or dress options available for women). The Log does not make this clear (even in proposed schedule 20). This could potentially be an issue if there is a transgender employee who wishes to transition from one sex to the other, and who wishes to wear a gender-appropriate uniform. Alternatively, there could potentially be an issue for a pregnant employee who needs adjustments to her uniform where she is still safe to continue working in a role requiring uniform. More information is needed to determine whether the proposed clause could result in direct or indirect discrimination on the basis of gender identity, pregnancy or sex for an employee, in breach of section 18(a) or (d) of the Equal Opportunity Act.
92 – Email access	**Finding: need clarification** Proposed cl 92.5 provides that 'in recognition of health and safety, the employer will not monitor or access employees emails in any way. No person shall be given access rights to monitor or access employees emails in any way except in the event of a personal

	emergency affecting the employee'. We note that in an employment context, employers may need to monitor or access employee emails in certain specified circumstances for example to ensure the organisation's compliance with the positive duty under s15 of the Equal Opportunity Act and to protect the rights, health and safety of staff. Clarification is needed as to how CFA will comply with s 15 in light of this provision.
94 – Amenities	**Finding: need clarification** This proposed clause relates to the provision of amenities for rest and recline, recreation and refreshments at stations. As above, the Commission is concerned about whether the CFA amenities are divided into separate facilities for men and women. The Commission is also concerned about whether amenities include appropriate facilities for female employees to breastfeed or express milk, or a room which could be made available for prayer. More information is needed to determine whether the proposed clause could result in direct or indirect discrimination on the basis of gender identity, breastfeeding, religious belief or sex for an employee, in breach of section 18(a) or (d) of the Equal Opportunity Act. Similarly, more information is required about steps taken to ensure the safety of all employees at overnight shifts to determine whether there is compliance with s 15 relating to preventing sexual harassment of employees in the workplace.
95 – Infrastructure	**Finding: needs clarification** Proposed clause 95.6 and 95.7 provide that modifications to infrastructure, workstation and location will be in accordance with the Infrastructure Agreement and by agreement between the employer and UFU. In requiring employer and UFU agreement before the employer can make modifications to infrastructure, this clause in practice may limit the employer's ability to respond appropriately to reasonable needs to modify infrastructure, for example to make reasonable adjustments for a person with a disability or adjustments necessary to enable a person to enjoy other rights under section 20 of the Equal Opportunity Act.
105 – Definition of Immediate Family or Household	**Finding: need clarification** This proposed clause provides a definition for the proposed leave entitlements in the Log. Spouse is defined to include domestic partners of the same sex (105.1). Immediate Family is defined in proposed clause 105.3 as including an employee's: • spouse, including former spouse, de facto spouse, and former de facto spouse; and • Child or adult child (including adopted child, step child, or ex-nuptual child), parent, grandparent, grandchild, niece, nephew or sibling of the employee or their spouse. While the Commission acknowledges that this aligns with the definition provided in s 12 of the Fair Work Act, there are other considerations necessary under the Equal Opportunity Act, primarily relating to employees with the attribute of race. Some races, ethnicities or nationalities (such as Aboriginal and Torres Strait Islanders and Maori) have an extended definition of what amounts to a family member which would include aunts and uncles, or even non-family members who are considered aunts or

	uncles. Similarly, some races, ethnicities or nationalities have different cultural requirements around caring for extended family members or assisting at funerals. Incorporating the standard definition in the NES is likely to be reasonable in all the circumstances. However, not providing carer or compassionate leave for people in those particular cultural groups to the extent required to allow them to comply with their cultural beliefs has the potential to result in direct discrimination on the basis of race, in breach of s18(d) of the Equal Opportunity Act. Clarification needs to occur as to what the CFA will do in those circumstances.
111 – Cultural and ceremonial leave	**Finding: need clarification** Generally speaking, providing additional leave for employees for cultural and ceremonial purposes would assist in an employer meeting its "positive duty" under s 15 of the Equal Opportunity Act. The Commission notes that this proposed clause does not appear to actually provide any additional leave for cultural or ceremonial purposes. It is unclear what "accrued leave" an employee would be able to utilise for these purposes, bearing in mind that different races, ethnicities, nationalities and religions will have different requirements. In addition, Aboriginal and Torres Strait Islander employees may wish to celebrate NAIDOC Week, which is arguably a cultural celebration. It is unclear from this clause whether NAIDOC week would be included in the types of purposes for which cultural and ceremonial leave could be utilised. Requiring employees to take existing leave entitlements such as sick leave or annual leave for cultural and ceremonial leave purposes could result in direct discrimination, by way of unfavourable treatment of those employees on the basis of race or religious belief. Employees would be deprived of the use of their other leave entitlements for the purpose they were provided, if required to use them for cultural and ceremonial leave. This could result in a breach of section 18(a) or 18(d) of the Equal Opportunity Act. The Commission notes that clarification may be required as to whether an employee fasting for religious reasons may also need to take cultural leave for those purposes, or whether other accommodations would be made for their fasting and how it might affect the performance of their duties.
112 – Family Violence Leave	**Finding: need clarification** The Commission commends the CFA and the UFU for proposing to include a family violence leave clause. Workplaces have been identified by the Victorian Government as a key setting in the primary prevention of violence against women. Workplace environments that are safe, inclusive of women and encourage the participation and leadership of women at all levels, reinforce social norms of respect, non-violence and equity.[40] Evidence suggests that it is overwhelmingly women who are the victims/survivors of family violence.[41] In the Commission's submission to the Family Violence Royal

[40] State of Victoria, *Victoria's Action Plan to Address Violence Against Women and Children: Everyone has a Responsibility to Act: 2012-2015,* (October 2014)
[41] Our Watch, *End Violence Against Women and Children "Key terms, definitions and statistics' Policy Brief 1,* (September 2014).

	Commission, we strongly recommended that Victorian Public Service Enterprise Agreement included family violence leave as "miscellaneous leave" which should include a number of requirements aimed at protecting the safety and privacy of employees through training, flexible work practices and referral to appropriate family violence support services. In our submission to the Family Violence Royal Commission we recommended: • Family violence leave should be an additional form of paid leave on top of any other existing entitlements. • The leave should be described as "miscellaneous leave" including on the internal payroll system, in order to protect privacy in not having to flag a domestic/family violence category (provided it was not the only form of leave in this category). • Family violence leave can be subject to appropriate evidential requirements (such as is the case for personal/carer's leave under the Fair Work Act). However, the evidential burden should not be set too high, given the circumstances in which the employee is needing to take the leave. Examples of evidence that would satisfy a reasonable person, such as a medical certificate or statutory declaration, ought to be included in the agreement. • Mechanisms need to be put in place to ensure the confidentiality of an employee's application and taking of leave. • Clauses should not be gendered to recognise that men also experience family violence from heterosexual partners, and both men and women may experience violence from same sex partners or members of their family. In our submission to the Family Violence Royal Commisison, the Commission also recognised that there needed to be a Family Violence policy underpinning any family violence leave entitlement in an enterprise agreement, in order to ensure that other operational aspects of taking leave were considered. The policy could include development and understanding of safety planning strategies in the workplace, to ensure the employees' safety (such as if the partner attends the workplace or telephones); provision of referral pathways for appropriate family violence support services for those who wish to be referred; and requirements that human resources staff and management attend training and support to create a safe environment for those employees in order to disclose their situation and request leave. Employees taking family violence leave or seeking information about such leave should also be protected from any adverse action or discrimination based on their disclosure of family violence. Actions taken by an employer to protect and support women in the workplace and create a safe environment for those experiencing gender-based violence is likely to fall within reasonable steps to eliminate discrimination, sexual harassment and victimisation under the "positive duty" in s15 of the Act. The proposed clause 112 includes all the key aspects recommended by the Commission to the Royal Commission on Family Violence, except describing the leave as "miscellaneous leave" (or otherwise providing anonymity on payroll systems), and giving examples about what kind of "agreed documents" will be required as reasonable evidence to support a leave application (only the types of people who can provide that document is listed).

	The Commission acknowledges in the importance of ensuring that family violence leave clauses are tailored to the situation of each organisation or agency provided there are safeguards to protect an employee's privacy and safety. The Commission also notes the problems discussed above in relation to the definition of "family member" should not be a problem if the definition of family member contained in the Family Violence Protection Act 2008 (Vic) is adopted for this proposed clause. Section 8 of that Act includes a much broader definition of family member than the Fair Work Act. For example, it includes all relatives of the person, as well as other people who are "regarded as being like a family member" if it is or was reasonable to do so, having regard to matters such as the nature of the social and emotional ties between the people, and "the cultural recognition of the relationship as being like family in the relevant person's or other person's community" (Family Violence Protection Act, s8(3)). For completeness we note that the Victorian Government has announced that the family violence leave clause it is negotiating with the CPSU fro the Victorian Public Sector Agreement, will be available as a model clause for government agencies to use.
131.7 – Transfer to a Safe Job	**Finding: potentially non-compliant** This proposed clause reflects the statutory entitlement for an employee who is pregnant to transfer to a safe job where one is available, where in the opinion of a medical practitioner, it is inadvisable for the employee to continue to work in her present role for safety reasons (Fair Work Act, s 81). The Commission is concerned that, when proposed clause 131.7 is compared with the detailed return to work program available for employees recovering from an illness or injury (including the explanation of what "meaningful work" will be provided), it seems that pregnant employees may miss out on the tailored and appropriate adjustments to their workplace or duties available to ill or injured employees. The proposed enterprise agreement contains no comparable process or guidance for employees who are pregnant and need accommodation of their pregnancy in their work duties. For example, there are additional safeguards for what amounts to an "appropriate safe job" contained in s 81(3), (4) and (5) of the Fair Work Act but which are not reflected in the proposed clause. There is "no safe job leave" specifically available in the proposed clause 131.7 for a pregnant employee where no appropriate safe job is available under s81(3)(b) of the Fair Work Act. Proposed clause 131.7.2 simply provides if the transfer to a safe job is not practicable, the employee may elect to commence parental leave (which is distinct from the entitlement to "no safe job leave"). The Commission presumes that these would apply given they form part of the required National Employment Standards but at present, the proposed clause 131.7 has the potential to result in direct discrimination against pregnant women, either in potentially denying the employee access to benefits connected with their employment (s18(a) of the Equal Opportunity Act), or subjecting them to detriment in their employment (s18(d) of the Equal Opportunity Act).
147.3.5 - Transfer	**Finding: need clarification** This proposed clause provides that employees cannot be transferred between work locations or rosters except by

	agreement. It needs to be clarified as to whose agreement is to be sought. If it refers to agreement between the parties (the CFA and the UFU), then the Commission has the same concerns regarding the rights of people who are non-union members with the attribute of industrial activity as have already been raised above.
162.1.4 – Classification and location of instructors	**Finding: need clarification** The proposed clause provides that all operational training and assessment within CFA including but not limited to training listed in schedule 7 (training module delivery by career instructors) must be undertaken by professional internally appointed CFA instructors only, unless by agreement with the UFU. It is unclear whether workplace training, such as in relation to anti-discrimination law or other workplace policies, would fall within this clause. If so, this would result in the CFA being limited in seeking external trainers who have expertise in anti-discrimination law. As noted above, training employees in their workplace obligations under the Equal Opportunity Act is an essential part of complying with the "positive duty" in s 15 of the Act, as well as a component of displacing the presumption of vicarious liability whereby an employer is deemed responsible for an employee's conduct in breach of the Act (ss 109-110).[42] Any proposed clause or schedule which would act to limit or prevent the CFA conducting such training in an appropriate manner could result in a breach of s 15 of the Act.
162.19 – Uniform [instructors]	**Finding: need clarification** This proposed clause deals with supplying each instructor with clothing. To the extent that instructors are required to have gendered uniforms (i.e. separate uniforms for men and women, particularly where there may be skirt or dress options available for women) the Commission has the same concerns as the general uniform clause noted above. More information is needed to determine whether the proposed clause could result in direct or indirect discrimination on the basis of gender identity, pregnancy or sex for an employee, in breach of section 18(a) or (d) of the Equal Opportunity Act.

[42] See e.g. *McKenna v State of Victoria* [1998] VADT 83; *Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102* [158]-[164] (not disturbed on appeal)