Proposed enterprise agreement to replace *Country Fire Authority-United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*

MEMORANDUM OF ADVICE

1. We asked to advise the Country Fire Authority (**CFA**) on:

   1.1 whether (or to what extent) we concur with the views of the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) concerning Version 17.1 of the proposed enterprise agreement to replace the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*, as set out in the VEOHRC report dated 31 December 2015 (**VEOHRC Report**);

   1.2 whether the current UFU proposal (Version 17.3), contains unlawful terms (as defined in s 194 of the *Fair Work Act 2009* (Cth) (**FW Act)**); and

   1.3 whether Version 17.3 excludes s 65 of the FW Act, which provides individual employees with a right to request flexible working arrangements.

SUMMARY OF ADVICE

VEOHRC Report concerning Version 17.1

2. The VEOHRC Report contains a considered assessment of the likely operation and effect of Version 17.1 of the proposed agreement, assessed against best practice for achieving substantive equality and the CFA's positive duty under s 15(2) of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) to take reasonable and proportionate measures to eliminate discrimination. This is necessarily broader than advice as to whether, as a matter of law, a term of the proposed agreement involves unlawful discrimination contrary to the EO Act, or is an unlawful term for the purposes of the FW Act.

3. That said, we agree with VEOHRC that the clauses in the proposed agreement that prohibit or restrict part time work are likely to indirectly discriminate against employees who are women, pregnant, have the status of parent or carer, have a disability and possibly also older people. We also agree that these clauses are likely to place the CFA in breach of its obligation to provide reasonable accommodation of an

employee's responsibilities as a parent or carer and to make reasonable adjustments for an employee with a disability. These clauses are:

3.1 clause 51 (Rostering), read in combination with other terms of the proposed agreement including clause 52 (Carers of children with rights under NES) and clause 20 (Individual Flexibility Arrangements); and

3.2 clauses 140, 146, 162.5.2, 165, 183, 194, 207, 219 and 234, each of which restricts part time work in a manner consistent with clause 51.

4. In the time available to provide this advice we have not formed a view about the balance of VEOHRC's conclusions.

Whether Version 17.3 contains unlawful terms

5. In our opinion clause 51 of the proposed agreement may be an unlawful term, as may the other clauses that restrict part time work in the same way as clause 51.[1] This is because the effect of these clauses, in combination with other provisions of the agreement, such as clause 20 (Flexibility clause) and clause 52 (Carers of children with rights under NES), is to restrict part time work arrangements so extensively that they are likely to discriminate indirectly against employees who, because of family or carer responsibilities or another protected attribute, have difficulty working full time.

6. While the law is not settled, the weight of authority suggests that the word 'discriminates' in ss 195 and 342 of the FW Act includes both direct and indirect discrimination.

7. On that basis, these clauses may be unlawful terms because they may be both discriminatory and objectionable. To the extent that they are either, they would have no effect even if the proposed agreement were to be approved by the Fair Work Commission (**FWC**). The FWC must not approve the agreement unless it is satisfied that the agreement does not include unlawful terms.

8. The probable discriminatory effect of clause 51 and related clauses could in large part be remedied by:

8.1 permitting individual flexibility arrangements under clause 20 in relation to part time work arrangements (hours of work and rostering), directly between an

[1] That is, clauses 140, 146, 162.5.2, 165, 183, 194, 207, 219 and 234. These clauses are referred to in this advice as 'related clauses'.

employee and the CFA and without the need for agreement from the UFU, as an exception to the requirement for the UFU's agreement to part time work arrangements in clause 51 and related clauses; and

8.2 deleting the requirement to pay a 25% insecure work allowance.

9. Consideration would also need to be given to the interaction between individual flexibility arrangements under clause 20 and the consultation and dispute resolution procedures in clauses 21 and 26, given the potential for disputes over individual part time work arrangements.

10. An alternative view is that clause 51 and the related clauses are capable of operating in a way that does not discriminate against employees with relevant attributes, and that the proposed agreement could be approved by the Fair Work Commission on the basis of undertakings from the CFA. Undertakings by the CFA alone are unlikely to be sufficient if the agreement continues to provide that part time work arrangements require the agreement of the UFU in each case. This outcome would also place the CFA in the invidious position of having to deal with ongoing conflict between the terms of the agreement, the FW Act and the EO Act.

11. Our conclusion is not affected by the inclusion of an additional objective in clause 3 of the proposed agreement, in accordance with amendment 10 of Commissioner Roe's recommendation of 1 June 2016. Clause 3.3 in Version 17.3 provides 'In implementing this Agreement the parties will act consistently with equal opportunity and anti-discrimination legislation.'

12. This clause does no more than state the parties' intention to act in accordance with applicable equal opportunity and anti-discrimination legislation, which includes the EO Act, in implementing the agreement. It does not qualify the operative terms of the proposed agreement, in particular clause 51 and related terms that restrict employees' ability to negotiate part time work arrangements. It does not alter our view that these provisions may be unlawful terms. Nor would its inclusion in an approved agreement resolve the conflict that would exist between the CFA's obligations under clause 51 and related terms, the FW Act, in particular ss 65 and 351, and the EO Act, in particular ss 18, 19 and 20.

Right to request flexible working arrangements

13. Under s 65 of the FW Act an employee with, for example, parental or carer responsibilities, may request a change in working arrangements, including part time work. The CFA must respond to a request within 21 days. The CFA may only refuse a request for a flexible work arrangement on reasonable business grounds, and must give written reasons for the refusal.

14. Section 65 is a provision of the National Employment Standards (**NES**). A term of an enterprise agreement may not exclude a provision of the NES. To the extent that it does so, it is of no effect.

15. Clause 52 of the proposed agreement does not exclude s 65 of the FW Act, because it allows (albeit in highly qualified terms) the CFA to agree to an individual on-shift employee working part time without moving off station.

16. The requirement in clause 51 (and related clauses) for the UFU to agree to a part time work arrangement is inconsistent with s 65 of the FW Act. While the CFA may only refuse a request for a flexible working arrangement on reasonable business grounds, there is no such limitation on the reasons for which the UFU may withhold its agreement to a part time work arrangement. Unlike the CFA, the UFU has no obligation to provide reasons for refusing a request to work part time.

17. Clause 51 and the related clauses do not expressly exclude s 65. However, a term of an agreement that results in an employee not receiving, in full or at all, a benefit provided for by the NES has been held to exclude the relevant provision of the NES. On that basis, clause 51 and the related clauses would be of no effect to the extent that they exclude s 65 of the FW Act.

18. The conflict between clause 51 (and related clauses) and s 65 could be resolved by amending clause 20 to enable the CFA to agree to a flexible working arrangement directly with an employee, without the need for the UFU's agreement. The inclusion of the additional objective in clause 3.3 does not resolve the conflict.

MATERIAL CONSIDERED

19. In preparing this advice we have considered:

    19.1 VEOHRC Report – Country Fire Authority Compliance Review dated 31 December 2015;

19.2 UFU Log of Claims (Version 17.1);

19.3 Draft Recommendations of Commissioner Roe of the Fair Work Commission dated 14 January 2016;

19.4 UFU Log of Claims (Version 17.2) (which incorporates, among other things, Draft Recommendations of Commissioner Roe dated 14 January 2016);

19.5 Final Recommendations of Commissioner Roe dated 1 June 2016;

19.6 UFU Log of Claims (Version 17.3) (the current log of claims, prepared by our instructing solicitors, which incorporates Final Recommendations of Commissioner Roe dated 1 June 2016);

19.7 Letter to Peter Marshall (UFU) from John Peberdy (Acting Chair, CFA Board) dated 5 June 2016 noting the CFA's diversity concerns about the proposed agreement and stating that the CFA cannot support an agreement containing discriminatory terms and objectionable terms as defined in the FW Act, including one attachment (CFA Proposal on Diversity);

19.8 Submissions in relation to the 4 yearly review of the Fire Fighting Industry Award 2010 (part-time provisions):

20.8.1 CFA/MFB Outline of Submissions dated 26 February 2016;

20.8.2 UFU Outline of Submissions in Reply dated 6 April 2016;

20.8.3 CFA/MFB Submissions in Reply dated 18 April 2016; and

20.8.4 CFA/MFB Final Submissions dated 16 May 2016.

BACKGROUND

20. We received the following instructions about the context in which our advice is sought.

21. The CFA and the UFU have been engaged in protracted negotiations for a new enterprise agreement to replace the *Country Fire Authority / United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*.

22. Pursuant to section 151(1) of the EO Act, in or about November 2015 the CFA sought a compliance review of the UFU's then current log of claims (Version 17.1).

23. On 31 December 2015, VEOHRC provided its report to the CFA. The 36 page report detailed the concerns of VEOHRC that Version 17.1 contained a number of terms, compliance with which:

    23.1 would cause the CFA to be in breach of its obligations under the EO Act - for example, provisions regulating classifications and progression, rostering, limitations on flexible work practices including part time work, provisions mandating UFU agreement which were likely to disadvantage non-union members;

    23.2 had the potential to cause the CFA to be in breach of its obligations under the EO Act – for example, transfers, consultation, referral of diversity matters to both the UFU and the CFA for determination.

24. In 2015 the matter was referred to the FWC as a bargaining dispute, by agreement under s 240 of the FW Act. From around November 2015, Commissioner Roe held a number of conferences with the parties to seek to resolve the dispute.

25. On 14 January 2016 Commissioner Roe issued, in draft form, his recommendations of the changes to be made to Version 17.1 (**Draft Recommendations**). None of the changes recommended by Commissioner Roe addressed the compliance concerns identified in the VEOHRC Report.

26. The Draft Recommendations were never finalised and the matter was adjourned.

27. The UFU subsequently produced a further version of its log of claims which incorporated the Draft Recommendations as well as some other amendments to the proposed agreement (Version 17.2).

28. In May 2016 conferences were again held before Commissioner Roe in relation to Version 17.2.

29. On 1 June 2016 Commissioner Roe issued final recommendations that the dispute be settled on the basis of Version 17.2, subject to 14 listed changes (**Final Recommendations**).

30. The UFU has accepted the Final Recommendations. The CFA has not. One of the CFA's concerns with the Final Recommendations is that they do not cure the compliance concerns identified by VEOHRC.

31. On 5 June 2016 the CFA wrote to the UFU noting these concerns. The CFA has not received any response to date.

RELEVANT LEGISLATION

Fair Work Act 2009 (Cth)

32. The FW Act provides for employers and employees to make enterprise agreements about matters pertaining to the employment relationship, and other permitted matters.[2] Once approved by the FWC an enterprise agreement has statutory force. A contravention of an enterprise agreement is a contravention of s 50 of the FW Act. Employees affected by a contravention, a union that represents them and fair work inspectors can enforce the agreement under Part 4-1 of the FW Act, and can seek a range of civil remedies in respect of a contravention. These civil remedies include the imposition of civil penalties.[3]

33. The FWC may approve an enterprise agreement when the general requirements in s 186 of the FW Act are met. Section 186(4) provides that the FWC must be satisfied that the agreement does not include any unlawful terms. The FWC may not approve an agreement if it is not so satisfied. An employer that lodges an enterprise agreement with the FWC for approval must also lodge a statutory declaration made by a person on behalf of the employer that, among other things, declares that the agreement does not contain any unlawful terms.[4]

34. **Unlawful term** is defined in s 194 of the FW Act to include:

    34.1 a discriminatory term; and

    34.2 an objectionable term.

35. **Discriminatory term** is defined in s 195(1). Subject to the exceptions in sub-s (2) and (3), a term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political

[2] FW Act, s 172
[3] FW Act, s 546
[4] FW Act, s 185(2), Rule 24 of the *Fair Work Commission Rules 2013* and Form F17

opinion, national extraction or social origin. The word 'discriminates' is not defined in the FW Act. Its meaning is discussed further at paragraphs 60 to 65 below.

36. **Objectionable term** is defined in s 12 of the FW Act, to mean a term of an enterprise agreement that requires or permits (or has the effect of requiring or permitting) a contravention of Part 3-1 of the FW Act. Part 3-1 prohibits, among other things, an employer taking adverse action against an employee because of, relevantly, the employee's sex, age, physical or mental disability, family or carer's responsibilities and pregnancy.[5]

37. **Adverse action** is taken by an employer against an employee, among other things, if the employer discriminates between the employee and other employees of the employer.[6] The meaning of 'discriminates' is discussed further below.

38. The word 'permits' in the definition of objectionable term has been held to mean that the term authorises the contravention, rather than merely affords the possibility of a contravention of Part 3-1.[7]

39. It is not always a simple matter to identify in advance whether a term of an agreement will have the effect of discriminating against an employee, or requiring or permitting the employer to discriminate between employees, on the basis of a number of protected attributes. The discriminatory effect of a term may only become apparent through its implementation. In that event, s 253(1)(b) of the FW Act provides that a term of an enterprise agreement has no effect to the extent that it is an unlawful term, and s 356 provides that a term of a workplace instrument or agreement has no effect to the extent that it is an objectionable term.

40. Further, a potentially discriminatory or objectionable term may be capable of a lawful operation. A term of an enterprise agreement is only discriminatory (and hence unlawful) to the extent that it discriminates. It may be included in an enterprise agreement if it is capable of a non-discriminatory operation. In cases where the FWC is concerned that a term may have a discriminatory effect, it may require the employer to

[5] FW Act, s 351(1)
[6] FW Act, s 342(1), item 1(d)
[7] *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339, [18], [66].

give undertakings to protect against that outcome as a condition of approving the agreement.[8]

41. Section 65 of the FW Act entitles certain employees, including those with parental and carer responsibilities, to request a change in working arrangements. The employer is obliged to consider the request and provide the employee with a written response within 21 days, and may refuse it only on 'reasonable business grounds'. If the employer refuses the request it must provide details of its reasons for doing so in its written response.

42. Section 65 is a provision of the NES set out in Part 2-2 of the FW Act. An employer must not contravene a provision of the NES.[9] This obligation is enforceable as a civil remedy provision under Part 4-1 of the FW Act, in the same way as the obligation not to contravene a term of an enterprise agreement. However, no order may be made in relation to a refusal of a request that is in contravention of s 65(5).[10]

43. An enterprise agreement must not exclude a provision of the NES.[11] To the extent that a term of an enterprise agreement does so, it has no effect.[12] A provision that 'excludes' one or more terms of the NES is not limited to an express ouster clause, but refers to any provision which would in its operation 'result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES'.[13]

***Equal Opportunity Act 2010* (Vic)**

44. The EO Act applies to the CFA as an employer. The CFA has a positive duty, under s 15(2) of the EO Act, to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

45. **Discrimination** is defined in the EO Act to include direct or indirect discrimination on the basis of an attribute.[14] It also includes a contravention of s 19, which obliges an

[8] See for example *Appeal by Australian Industry Group* [2010] FWAFB 4337, [38]-[40]; *Australian Catholic University Limited t/a Australian Catholic University* [2011] FWA 3693, [35]-[36]; *Eastern Australia Airlines Pty Limited T/A QantasLink* [2011] FWA 4261, [73], [76].
[9] FW Act, s 44(1)
[10] FW Act, s 44(2)
[11] FW Act, s 55(1)
[12] FW Act, s 56
[13] *Re Canavan Building Pty Ltd* [2014] FWCFB 3202, [36]. See also Explanatory Memorandum to the Fair Work Bill 2009, [208]-[209] and *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 136, [38].
[14] EO Act, s 7(1)

employer to provide reasonable accommodation of an employee's parental or carer responsibilities.

46. The attributes that are protected by the EO Act include, relevantly, sex, pregnancy, breastfeeding, parental status or status as a carer, disability and age.[15]

47. **Direct discrimination** occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.[16]

48. **Indirect discrimination** occurs if a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute, and that is not reasonable.[17] The person who imposes the requirement, condition or practice has the burden of proving that it is reasonable in all of the relevant circumstances, including the matters that are listed in s 9(3).

49. The CFA must not discriminate against its employees in their employment, including by denying or limiting access to opportunities for promotion, transfer or training or other benefits of the employment, or by subjecting the employee to any other detriment.[18] Further, it must not, in relation to the work arrangements of an employee or a potential employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.[19] Whether a refusal is reasonable is determined having regard to all relevant facts and circumstances, including the matters listed in s 19(2).

50. The CFA is also required to make reasonable adjustments, which may involve an adjustment to hours of work, for a person offered employment or an employee with a disability.[20] Whether an adjustment is reasonable depends on a consideration of all relevant facts and circumstances, including those matters listed in s 20(3). There is no obligation to make a reasonable adjustment if the person could not perform the genuine and reasonable requirements of the employment even after the adjustment is made.[21]

[15] EO Act, s 6.
[16] EO Act, s 7(1)
[17] EO Act, s 9(1)
[18] EO Act, s 18(1).
[19] EO Act, ss 17(1) and 19(1)
[20] EO Act, s 20(1)
[21] EO Act, s 20(2)

51. The CFA's obligations under ss 18, 19 and 20 of the EO Act are enforceable under Part 8 of the EO Act. An individual employee may bring a dispute to VEOHRC, which may attempt to resolve the dispute if the parties agree. The employee may also apply to the Victorian Civil and Administrative Tribunal (VCAT) for a remedy, which may include an injunction, an order to do something to remedy the contravention, or compensation.[22]

52. The positive duty to eliminate discrimination in s 15(2) not enforceable in this way. Instead, a contravention of the duty may be the subject of an investigation by VEOHRC under Part 9 of the EO Act.[23]

53. The prohibitions against discrimination in Part 4 of the EO Act apply subject to a number of exceptions. Section 75 provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of an Act or other enactment. An 'Act' is an act passed by the Parliament of Victoria,[24] and 'enactment' is defined to include various types of subordinate legislation and legislative instruments.[25] The exception in s 75 does not extend to an act authorised by a Commonwealth statute, or to an enterprise agreement approved by the FWC.

54. Previously, a federal award or agreement prevailed over a State law to the extent of any inconsistency.[26] However, while the FW Act excludes the operation of State industrial laws,[27] it specifically preserves the operation of State anti-discrimination legislation such as the EO Act.[28] Similarly, although an enterprise agreement usually prevails over a law of a State to the extent of any inconsistency, s 29(2)(a) of the FW Act provides that an enterprise agreement applies subject to the EO Act.

55. That is, a term of an enterprise agreement applies 'subject to' the EO Act. The Explanatory Memorandum to the Fair Work Bill 2009 states that this means that 'an enterprise agreement cannot diminish, but may supplement, rights and obligations under' the EO Act.[29] To the extent that a term of an enterprise agreement requires conduct that would be in breach of the EO Act, the term would give way to the EO Act.

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[22] EO Act, s 125
[23] EO Act, s 15(3)-(4)
[24] *Interpretation of Legislation Act 1984* (Vic)
[25] EO Act, s 4
[26] Commonwealth Constitution, s 109
[27] FW Act, s 26
[28] FW Act, s 27(1A).
[29] At [149]

Federal Anti-Discrimination Legislation

56. Discrimination is regulated at the federal level by a suite of legislation, under the umbrella of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). The AHRC Act provides for the enforcement of prohibitions against discrimination contained in:

    56.1 the *Racial Discrimination Act 1975* (Cth) (**RD Act**);

    56.2 the *Sex Discrimination Act 1984* (Cth) (**SD Act**), which prohibits discrimination in employment by reason of attributes including sex, pregnancy or potential pregnancy, breastfeeding and family responsibilities;

    56.3 the *Disability Discrimination Act 1992* (Cth) (**DD Act**); and

    56.4 the *Age Discrimination Act 2004* (Cth) (**AD Act**).

57. While each of the RD Act, the DD Act and the AD Act apply to the CFA as an employer, the SD Act does not. Section 13(1) of the SD Act provides that s 14, which prohibits discrimination in employment, does not apply to an instrumentality of a State. A State instrumentality is a body or authority established for a public purpose by a law of a State, which clearly includes the CFA.

58. Discrimination that would otherwise be unlawful under one of these statutes may be lawful if done in compliance with an industrial instrument such as an enterprise agreement under the FW Act.[30] Section 46PW of the AHRC Act provides for a person to make a complaint to the Australian Human Rights Commission (**AHRC**) alleging that a person has done a discriminatory act under an industrial instrument. A discriminatory act is an act that, but for being done in compliance with an industrial instrument, would be unlawful under Part 4 of the ADA, Part 2 of the DDA, or Part II of the SDA. If the act appears to the President of the AHRC to be a discriminatory act, the industrial instrument must be referred to the FWC. Upon referral, the FWC must review the enterprise agreement and vary the agreement so that it no longer requires the person to do an act that would be unlawful.

59. Because s 14 of the SD Act does not apply to the CFA, this procedure has no application to the extent that an industrial instrument by which it is bound authorises discrimination on the ground of sex, pregnancy, breastfeeding or family

[30] See for example SD Act, s 40

responsibilities. The AD Act and the DD Act both apply to the CFA, and there is potential for a referral to the FWC in relation to provisions of an agreement that discriminate on the basis of age or disability.

Discrimination in the FW Act

60. The word 'discriminates' is not defined in the FW Act. This is in contrast to the EO Act and federal anti-discrimination statutes, each of which contain detailed definitions of discrimination that include both direct and indirect discrimination. The word 'discriminates' appears in several provisions in the FW Act, including in ss 195 and 342(1), item 1, and will be given a consistent meaning in each of those provisions.

61. It is generally accepted that 'discriminates' in the FW Act includes direct discrimination – i.e. differential treatment because of an attribute listed in s 195(1) and s 351. What is not settled is whether it also includes indirect discrimination – i.e. an apparently neutral requirement or condition that has the effect of disadvantaging persons with a protected attribute. The difference between the two forms of discrimination was explained by Dawson and Toohey JJ in *Waters v Public Transport Corporation* (***Waters***):[31]

> A distinction is often drawn between two forms of discrimination, namely "direct" or "disparate treatment" discrimination and "indirect" or "adverse impact" discrimination. Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such "equal" treatment is that the former is in fact treated less favourably than the latter. The concept of indirect discrimination was first developed in the United States in relation to practices which had a disproportionate impact upon black workers as opposed to white workers. Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

[31] (1991) 173 CLR 349, 392

62. The weight of authority suggests that 'discriminates' in the FW Act includes both direct and indirect discrimination.

63. In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (***National Retail Association***),[32] Tracey J rejected an argument that a discriminatory term included a term that had an indirectly discriminatory effect. This approach has been followed in the FWC in *Re University of Melbourne Enterprise Agreement 2013*.[33]

64. However, in *Klein v Metropolitan Fire and Emergency Services Board* (***Klein***)[34] Gordon J gave detailed consideration to the issue. Her Honour declined to follow *National Retail Association* and held that 'discriminates' in s 342 of the FW Act extended to indirect discrimination. This conclusion was apparently accepted by a Full Court in *United Firefighters Union of Australia v Country Fire Authority*.[35] It is also consistent with the approach taken earlier by Lawler VP in *Australian Catholic University Limited t/a Australian Catholic University*.[36]

65. In our view Gordon J's conclusion in *Klein* is preferable to Tracey J's in *National Retail Association*. It is consistent with the High Court's approach in *Waters*,[37] and also with authority in relation to the meaning of 'discriminate' in s 92 of the Commonwealth Constitution.[38] This view informs our assessment of the proposed agreement that follows.

PROPOSED AGREEMENT

66. The VEOHRC report identified numerous clauses of Version 17.1 of the proposed agreement to be non-compliant or potentially non-compliant with the EO Act. In the time available to provide this advice we have been able to consider only the clauses that impose restrictions on part time work, in particular clause 51 (Rostering).

67. Our consideration of these clauses is based on the UFU's current draft agreement – being Version 17.2 and the further changes recommended by Commissioner Roe on 1

[32] (2012) 205 FCR 227, [52]-[57]
[33] [2014] FWCA 1133 (Bissett C)
[34] (2012) 208 FCR 178, [88]-[102]
[35] (2015) 228 FCR 497, [229]
[36] [2011] FWA 3693, [11]-[14]
[37] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 357-8 (Mason CJ and Gaudron J), 392-3 (Dawson and Toohey JJ), 382 (Deane J).
[38] *Cole v. Whitfield* (1988) 165 C.L.R. 360, 399, 407-408*; Castlemaine-Tooheys Ltd. v. South Australia* (1990), 169 C.L.R. 436, 466-467, 478, 480, referred to be Mason CJ and Gaudron J in *Waters* at 358.

June 2016 in the Final Recommendations (together, Version 17.3). There are three differences between Version 17.1 and Version 17.3 that are relevant to our consideration:

67.1 First, a new clause 3.3 was inserted in clause 3 (Objectives) that states: 'In implementing this Agreement the parties will act consistently with equal opportunity and anti-discrimination legislation';[39]

67.2 Second, clauses 51.6.4(b) and 51.6.5(b), which required part time employees to be paid streaming and special administrative duties allowances not at a pro rata rate, have been deleted;[40]

67.3 Last, clause 84 (Diversity) has been moved to after clause 147 and renumbered clause 147A.[41]

68. The second change addresses an issue identified by VEOHRC, by removing one disincentive to agreeing to a part time work arrangement. It does not, however, resolve the broader concerns about restrictions on part time work.

69. The other two changes do not affect the conclusions that VEOHRC expressed in its report.

70. Clause 3.3 does no more than state the parties' intention to act in accordance with applicable equal opportunity and anti-discrimination legislation, which includes the EO Act, in implementing the agreement. This is no more than a statement that they will comply with the law. It does not qualify the operative terms of the proposed agreement, in particular clause 51 and related terms that restrict employees' ability to negotiate part time work arrangements. It does not alter our view that these provisions may be unlawful terms. Nor would its inclusion in an approved agreement resolve the conflict that would exist between the CFA's obligations under clause 51 and related terms, the FW Act and the EO Act.

71. The wording of clause 147A (Diversity) has not changed. The clause provides for the establishment of a working party to consider and develop strategies to increase diversity within the CFA's operational workforce. The working party will consider

[39] In accordance with Final Recommendations, [8](10)
[40] In accordance with Draft Recommendations, [82]
[41] In accordance with Final Recommendations, [8](3)

rostering, including part time and flexible work options, but may not put forward a proposal for change that would impact or alter the 10/14 roster.

72. Clause 51 provides for rostering of employees. Clause 51.2 provides:

> The parties agree that for reasons including the welfare and safety of employees covered by this Agreement, the CFA will not employ any employee on any basis other than a roster of hours provided for in this agreement.

73. Clause 140 (Roster of hours) requires the CFA to employ each employee on one of the following rosters:

73.1 the 10/14 Roster System;

73.2 Special Duties Roster;

73.3 Special Administrative Duties Roster;

73.4 any other configuration as agreed between the UFU and the CFA.

The three named rosters are all full time.[42] A station may only be staffed on an agreed roster other than the 10/14 roster by agreement between the UFU and the CFA.[43] Clause 140.5 provides that part time employees shall be rostered in accordance with clause 51.

74. Clause 51.3 provides:

> The CFA will not employ an employee on a part-time or casual basis, and no employee may hold a position on such a basis, unless in each case there is agreement between all parties on a case by case basis (agreement is required for each employee).

75. It is clear that 'agreement between all parties' in clause 51.3 means agreement between the CFA, the UFU and the employee concerned. The requirement for the UFU's agreement is consistent with clauses 51.6.4(a) and 51.6.5(b), which require the UFU's agreement in writing to the hours and rosters to be worked by part time operational day workers and part time employees other than professional firefighters or MCSs.[44]

76. Clause 51.5 requires employees other than full time to be paid an insecure work allowance of 25%. This requirement is not limited to casual employees, but extends to part time employees.

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[42] Version 17.3, cll 142, 143 and 145
[43] Version 17.3, cl 146
[44] MCS is Manager Community Safety: Version 17.3, cl 12.3.28

77. Clauses 51.6.1 to 51.6.3 provide for the rosters to be worked by full time employees. Clauses 51.6.4 and 51.6.5 provide for part time work in specified roles – operational day workers and in roles other than as professional firefighters or MCSs.

78. The combined effect of clauses 51 and 140 is that the proposed agreement does not contemplate part time work in a station, on shift. An employee wishing to work on shift, in a station, must work full time in accordance with the 10/14 roster.

79. This is reinforced by clause 52 (Carers of children with rights under NES). Clause 52.1 provides:

> The parties recognised and support the rights of employees with children who are entitled to request flexible work practices pursuant to the National Employment Standards of the Act. However, the CFA has determined and the parties have reached agreement that CFAs operational requirements mean that on-shift employees should be employed on a full time basis. As required by the Act, the CFA will consider every request from and entitled employee for flexible working arrangements and will assess each request on a case-by-case basis, but the parties acknowledge that this may require an entitled employee to transfer off station or from their current work location to another position.

80. While clause 52 does not in terms prevent the CFA from agreeing to a request for a flexible working arrangement that involves part time work, it is a clear statement by both the CFA and the UFU that they are unlikely to agree to any such request. As mentioned, clause 51.3 provides that any part time work arrangement requires the agreement of 'all parties' including the UFU.

81. Further, an employee who wishes to request a flexible working arrangement must be prepared to submit evidence of their reason for doing so to both employer and union. Clause 52.3.1 requires an employee who makes a request for a flexible working arrangement to provide evidence of their entitlement to make the request in the form of a statutory declaration, to both the UFU and the CFA.

82. There is no scope under clause 20 (Flexibility clause) for an employee and the CFA to enter into an individual flexibility arrangement that involves part time work. Clause 20 allows an individual flexibility arrangement to be entered into between the CFA and an employee only in relation to the taking of study leave in accordance with clause 121. It does not provide for flexibility in relation to any other aspect of the proposed agreement, including rosters and hours of work.

83. There are other provisions of the proposed agreement that restrict or discourage part time work arrangements:

83.1 Where a part time work arrangement would involve a change in a workplace, clause 22 (Introduction of change) obliges the CFA to consult with the UFU in accordance with clause 21 (Consultation) before it implements the arrangement. The consultation process is open ended and, arguably, requires the agreement of the UFU before any change can be implemented.[45]

83.2 Clause 26 (Dispute resolution) enables the UFU to submit a dispute about an agreement by the CFA to a part time work arrangement, and clause 26.4 requires the status quo that existed before the dispute to apply pending resolution of the dispute.

83.3 Clause 147A (Diversity) excludes any alteration to the 10/14 roster from proposals for change to increase diversity within the CFA that may be considered by the working party to be established under clause 147A.

84. VEOHRC found clause 51 to be non-compliant with the EO Act, because it restricts access to part time work arrangements in a way that could result in:

84.1 indirect discrimination in employment on the basis of pregnancy, parental status or status as a parent, disability and potentially age, contrary to s 18(a) and (d) of the EO Act;

84.2 an unreasonable refusal to accommodate parental or carer responsibilities, contrary to ss 17 and 19; and

84.3 a failure to provide reasonable adjustments to the hours of work of an employee with a disability, contrary to s 20 of the EO Act.

85. The features of clause 51 that were of particular concern to VEOHRC were:

85.1 clause 51, in combination with clause 52, effectively bans part time work at a station as an active career firefighter;

85.2 a part time work arrangement requires the agreement of the UFU as well as the CFA; and

[45] A similar provision in the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010* was described by Wilson C in *Metropolitan Fire & Emergency Services Board* [2014] FWC 7776, [208] as an 'agreement-to-change model'.

85.3 the requirement to pay a 25% insecure work allowance is likely to act as a disincentive to the CFA agreeing to a part time work arrangement.

86. We agree with VEOHRC's conclusion in relation to clause 51. It follows that we agree with VEOHRC's findings that clauses 140, 146, 162.5.2, 165, 183, 194, 207, 219 and 234, each of which restricts part time work in a manner consistent with clause 51, do not comply with the EO Act.

87. There are employees who, because of a protected attribute, have difficulty working full time. Relevant attributes are pregnancy (and hence sex), status as a parent or carer/family or carer's responsibilities (and hence sex), disability and age. A requirement to work full time may disadvantage employees with those attributes. A requirement to work full time may result from a blanket prohibition on part time work, an unreasonable refusal to agree to a request by such an employee to a flexible working arrangement involving part time work, or an unreasonable requirement to transfer to a different role in order to be able to work part time.

88. Although each case turns on its own facts, there are a number of decisions under the SD Act, in which a requirement to work full time was found to amount to indirect discrimination on the basis of sex and family responsibilities.[46] After a contrary conclusion was reached by the Court of Appeal in *State of Victoria v Schou*,[47] provisions were included in the EO Act to require employers to reasonably accommodate an employee's parental or carer responsibilities. A complaint involving the same facts as *Schou* may well have had a different outcome under the current EO Act.

89. It follows that we consider that clause 51 may be an unlawful term, and so may clauses 140, 146, 162.5.2, 165, 183, 194, 207, 219 and 234. Although these terms are not explicitly discriminatory, they impose such extensive restrictions on part time work that there is an obvious potential for them to operate in a way that discriminates against employees with an attribute that makes it difficult to work full time. There is a particularly clear potential for clause 51 to unreasonably disadvantage employees with family responsibilities. For the same reasons, there is a high degree of risk that clause 51 will be found to be an objectionable term, because it requires or permits the CFA to

[46] *Hickie v Hunt & Hunt* [1998] HREOCA 8 (extract at (1998) EOC 92-910); *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [69]-[73]; *Howe v Qantas Airways Ltd* (2004) 188 FLR 1.
[47] (2001) 3 VR 655

discriminate against employees with these attributes, in particular family responsibilities, by refusing or limiting their ability to work part time.

90. If the proposed agreement in its current form is lodged for approval with the FWC it is highly likely that third parties will intervene to make submissions about the lawfulness of clause 51, the related clauses, and the other provisions identified by VEOHRC as being of concern. The hearing and determination of these issues will necessarily involve the CFA and are likely to delay a decision on approval of the agreement.

91. If the FWC has a concern that these clauses are unlawful, it may require undertakings from the CFA under s 190(3) of the FW Act before it approves the agreement. In our view, undertakings from the CFA will not be sufficient to meet the concerns we have identified. This is because clause 51 and related clauses require the UFU's agreement to any part time work arrangement, a matter over which the CFA has no control and about which it could not make any undertaking. Section 190 of the FW Act does not provide for undertakings from a bargaining representative such as the UFU;[48] undertakings may only be accepted from an employer. Further, the FWC may only accept a written undertaking from the CFA if satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement.[49]

92. If, despite the potential for these clauses to have a discriminatory effect, the FWC is satisfied that the proposed agreement does not contain an unlawful term, it may approve the agreement. In that case, the clauses will have effect subject to ss 253 and 356 of the FW Act – that is, they will have no effect to the extent that they require or permit discrimination against employees with protected attributes. As discussed, they will also have effect subject to the CFA's obligations as an employer under the EO Act.

93. We also consider that clauses 51.3, 51.6.4(a), 51.6.5(a) and 52.3.1 exclude aspects of an employee's right to request flexible working arrangements under s 65 of the FW Act. This is because clauses 51.3, 51.6.4(a) and 51.6.5(a) require the UFU's agreement to a flexible working arrangement that involves part time work, including written agreement to the roster and hours to be worked. Unlike the CFA, the UFU need not respond within 21 days, may withhold its agreement for reasons unrelated to 'reasonable

[48] An enterprise agreement is between an employer and the employees covered by the agreement. An employee organisation that was a bargaining representative for the agreement can give notice to the FWC that it wants the agreement to cover it: FW Act, s 183.
[49] FW Act, s 190(3)

business grounds' and is not required to provide details of its reasons for refusing a request. Further, the requirement in clause 52.3.1 to provide proof of entitlement in the form of a statutory declaration to the UFU and the CFA is more onerous than s 65(3), which requires only that a request to an employer be made in writing and set out details of the change sought and of the reasons for the change.

94. If the proposed agreement were to be approved in its current form, the CFA would be placed in the invidious position of being bound by an enterprise agreement that may conflict with its obligations under other provisions the FW Act and under the EO Act. The CFA would have to make difficult judgments about when its obligations under the enterprise agreement in relation to part time work arrangements must give way to its conflicting obligations under ss 65 and 351 of the FW Act, and ss 18 to 20 of the EO Act. These judgments are likely to be contested. There would be little if any certainty about which provisions prevail in an individual case, because so much depends on what is reasonable in the particular circumstances of the case. This uncertainty would be compounded by the comprehensive consultation process in clause 21, which arguably requires the UFU's agreement to the implementation of any change, and the dispute resolution process in clause 26, under which notification of a dispute requires maintenance of the status quo until the dispute is resolved.

95. Another alternative would be to amend the proposed agreement to address the concerns identified by VEOHRC, with which we agree, in relation to clause 51 and related clauses. This could be achieved by:

    95.1 permitting individual flexibility arrangements under clause 20 in relation to part time work arrangements, directly between an employee and the CFA and without the need for agreement from the UFU, as an exception to the requirement for the UFU's agreement to part time work arrangements in clause 51 and related clauses; and

    95.2 deleting the requirement in those clauses to pay a 25% insecure work allowance to part time employees.

96. Consideration would also need to be given to the interaction between individual flexibility arrangements under clause 20 and the consultation and dispute resolution procedures in clauses 21 and 26, given the potential for disputes over individual part time work arrangements.

Dated: 10 June 2016

MELINDA RICHARDS
Crown Counsel

REBECCA PRESTON[i]
Aickin Chambers

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