DECISION

Fair Work Act 2009
s.185—Application for approval of a single-enterprise agreement

Application by Metropolitan Fire and Emergency Services Board
(AG2018/1278)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 15 JANUARY 2019

Application for approval of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016; meaning of "discriminates"; whether agreement includes discriminatory terms; whether agreement includes objectionable terms; whether terms contravene s.55; consideration of permitted matters; whether the agreement passes the better off overall test; not satisfied terms of agreement do not contravene s.55; opportunity to provide undertakings given.

Abbreviations

ACFO	Assistant Chief Fire Officer
ACFO Agreement	*Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010*
Act	*Fair Work Act 2009* (Cth)

Agreement	*Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016*
AHRC	Australian Human Rights Commission
AI Act	*Acts Interpretation Act 1901*
AIG v FWA	*Australian Industry Group v Fair Work Australia* [2012] FCAFC 108
Award	*Fire Fighting Industry Award 2010*
BOOT	Better off overall test
CFA	Country Fire Authority
Commission	Fair Work Commission
Constitution	*Commonwealth of Australia Constitution Act*
EO Act	*Equal Opportunity Act 1984* (Vic)
FSCC	Fire Services Communications Controller
FWA	Fair Work Australia
GRI Award	*General Retail Industry Award 2010*
Howe	*Howe v Qantas Airways Limited* (2004) 188 FLR 1
Klein	*Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402
La Trobe	*National Tertiary Education Union v La Trobe University* [2015] FCAFC 142
Marmara	*Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84
MFB	Metropolitan Fire and Emergency Services Board
Minister	Minister for Jobs and Industrial Relations
National Retail Association (No 2)	*Shop, Distributive and Allied Employees' Association v National Retail Association (No 2)* [2012] FCA 480
NES	National Employment Standards
Pearce Declaration	Statutory Declaration of Ms Janette Pearce
SADR	Special Administrative Duties Roster
SDA	Shop, Distributive and Allied Employees Association
Skene	*WorkPac Pty Ltd v Skene* [2018] FCAFC 131
Street	*Street v Queensland Bar Association* (1989) 168 CLR

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UFU	United Firefighters' Union of Australia
UFU v CFA	*United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1
VEOHRC	Victorian Equal Opportunity and Human Rights Commissioner
Waters	*Waters v Public Transport Corporation* (1991) 173 CLR 349
WR Act	*Workplace Relations Act 1996*
2010 CFA Agreement	*Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*
2010 MFB Agreement	*Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010*

1. Introduction and background

[1] On 30 September 2010, an enterprise agreement commenced operation covering the Metropolitan Fire and Emergency Services Board (MFB), the United Firefighters' Union of Australia (UFU) and various firefighter employees employed by the MFB. It is titled the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010* (2010 MFB Agreement). It remains in operation but has long since passed its nominal expiry date of 30 September 2013. Also on that day, another enterprise agreement commenced operation. It is titled the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010* (ACFO Agreement). The ACFO Agreement covers employees of the MFB who are Assistant Chief Fire Officers (ACFO), the MFB and the UFU. Like the 2010 MFB Agreement, the ACFO Agreement remains in operation though it has passed its 30 September 2013 nominal expiry date.

[2] On 16 March 2018, an enterprise agreement titled the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* (Agreement) was made when a majority of employees employed by the MFB at the time who would be covered by the Agreement voted to approve it.

[3] By application lodged on 3 April 2018, the MFB has applied to the Fair Work Commission (Commission) pursuant to s.185 of the *Fair Work Act 2009* (Act) for the Agreement to be approved. If approved by the Commission, the Agreement will replace the 2010 MFB and ACFO Agreements. The Agreement is a single enterprise agreement. The UFU is a bargaining representative for the Agreement. It supports the approval of the Agreement and has given notice pursuant to s.183 of the Act that it wants to be covered by the Agreement.

[4] The Minister for Small and Family Business, the Workplace and Deregulation (now the Minister for Jobs and Industrial Relations) (Minister) made application seeking leave to be heard in relation to the application for approval of the Agreement. I decided, in order to inform myself in relation to the application, to permit the Minister to make submissions[1] in relation to the following issues as well as to lead evidence[2] relevant to some of these issues:

(a) Whether the Agreement is about permitted matters within the meaning of s.172(1) of the Act;

(b) Whether the Agreement contains one or more discriminatory terms within the meaning of s.195 of the Act;

(c) Whether the Agreement contains one or more objectionable terms within the meaning of s.12 of the Act; and

(d) If the Agreement contains one or more discriminatory terms, whether the Agreement passes the Better off Overall Test (BOOT).

[5] The Victorian Equal Opportunity and Human Rights Commissioner (VEOHRC) also sought leave to be heard in relation to the application for approval of the Agreement. I also decided to permit the VEOHRC to make submissions confined to the matters identified in its written submissions dated 29 May 2018 filed in support of its application for leave to be heard.[3] The VEOHRC was also permitted to file evidentiary material but did not do so.

[6] I have concluded that I am unable to approve the Agreement because I am not satisfied that particular terms of the Agreement do not contravene s.55 of the Act. This concern might be resolved by the provision of appropriate undertakings. I have also concluded that I should apply the construction of "discriminates" adopted by Tracey J in *Shop, Distributive and Allied Employees' Association v National Retail Association (No 2)*[4] (*National Retail Association (No 2)*) to the word as it appears in s.195, with the consequence that s.195 is only concerned with terms that directly discriminate against an employee covered by the agreement because of, or for reasons that include, the particular characteristics or attributes identified therein. I have concluded that the Agreement does not include terms that are directly discriminatory. I have also indicated that if I were unencumbered by the authority in *National Retail Association (No 2)* I would arrive at a different conclusion both as to the meaning of "discriminates" in s.195 and as to whether some of the terms of the Agreement are discriminatory terms. I have concluded that the Agreement does not include any objectionable terms. I have therefore concluded that the requirement in s.186(4) has been met. I have rejected the Minister's contention as to particular terms of the Agreement not pertaining to a requisite relationship. I am satisfied the Agreement passes the BOOT. The requirement in s.186(2)(d) is met. Save for the s.55 matter identified above, I have concluded the other approval requirements contained in ss.186 and 187 have been met. My reasons for these conclusions follow.

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[1] See [2018] FWC 3220

[2] Ibid; see also [2018] FWC 3942

[3] See note 1

[4] [2012] FCA 480

2. Issues in contest– summary

2.1 Unlawful terms objection

[7] The Minister and the VEOHRC contend the Agreement contains a number of unlawful terms.

[8] An unlawful term is, relevantly, a term in an enterprise agreement that is a discriminatory term or an objectionable term.[5] 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, a number of specified characteristics or attributes, relevantly sex and family or carer's responsibilities.[6]

[9] Two broad issues require determination in relation to the discriminatory terms point that is raised. The first concerns the meaning of "discriminates" in s.195 of the Act and specifically whether "discriminatory term" extends to a term of an enterprise agreement which though facially neutral or appearing to treat one employee just as another, it nevertheless has a disproportionate adverse effect on an employee covered by the agreement with a specified characteristic or attribute: that is, an employee with a characteristic or attribute is treated less favourably than an employee without the characteristic or attribute. The issue to be determined therefore is whether "discriminates" in s.195 extends to an enterprise agreement indirectly discriminating against an employee covered by it. If that is so, the second issue concerns whether particular provisions of the Agreement which touch upon or effect the capacity of an employee covered by the Agreement to work part-time are discriminatory terms.

[10] It is contended by the objections raised that various terms of the Agreement:

- prohibit part-time employees from performing operational firefighter duties, save in exceptional circumstances;
- prevent the MFB from promoting part-time employees due to insufficient operational firefighting experience and, consequently, require the MFB to hold back other benefits only available to employees of certain classifications;
- prohibit part-time employees from holding certain roles; and
- impose additional obligations on employees seeking part-time work, such as requiring evidence in the form of a statutory declaration evidencing any entitlement (that is to make a request) to flexible work, and agreement from the UFU.

[11] These terms, which are said to be directed to restricting part-time employment and opportunities for part-time employees, are consequently said to be both discriminatory and objectionable terms.

[12] An objectionable term is a term of an enterprise agreement that requires, has the effect of requiring, or purports to require or have the effect of requiring or a term that permits, has

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[5] *Fair Work Act 2009* (Cth) s.194

[6] Ibid at s.195

the effect of permitting, or purports to permit or has the effect of permitting, a contravention of Part 3–1 of the Act.[7] That part deals with general protections that prohibit the taking of adverse action against, *inter alia,* employees, prospective employees and independent contractors for particular identified reasons.

[13] Here there is no contest as to the reach of "adverse action", described in Part 3-1 of the Act as action that "discriminates between employees". It is accepted that "discriminate" extends to indirect discrimination. The contest insofar as the part-time employment provisions of the Agreement is concerned, is about whether the terms broadly identified earlier have the requisite effect so as to bring them within the definition of an "objectionable term".

[14] There is a further issue which concerns the effect of certain provisions of the Agreement upon employees who are not members of the UFU and whether these terms singularly or in combination are also objectionable terms. The Minister contends that various terms of the Agreement are objectionable because they require or permit the MFB to discriminate against non-union members. The Minister says that these terms exclude non-union members (or their representatives) from committees and other fora under the Agreement and confer veto rights on the UFU with respect to the individual terms of employment of non-union members.

[15] Together, these matters engage with one of the matters about which the Commission must be satisfied as set out in s.186 of the Act. The Commission must be satisfied, *inter alia*, that the Agreement does not include any unlawful terms.[8] If the Commission has concerns that the Agreement might contain one or more unlawful terms then it is possible for the Agreement to nonetheless be approved with an appropriate undertaking.[9]

[16] The VEOHRC's objection is confined to whether the Agreement contains unlawful terms, and then only on discriminatory grounds or reasons based on sex and family and parental responsibilities.

2.2 Terms that contravene s.55 objection

[17] Section 186(2)(c) of the Act provides that the Commission must be satisfied, before it approves an enterprise agreement, that the terms of the agreement do not contravene s.55. Section 55(1) provides that an enterprise agreement must not exclude any provision of the National Employment Standards (NES). The section also deals with the interaction between terms of an enterprise agreement and the NES. The NES is contained in Part 2-2 of the Act (ss.59-131).

[18] Section 65 of the Act deals with requests made by employees for flexible working arrangements. The Minister contends that the Commission cannot be satisfied that the Agreement does not contravene s.55 because various terms of the Agreement seek to exclude the operation of s.65. The contravention of s.55 is said to occur because by terms of the Agreement:

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[7] Ibid at s.12

[8] Ibid at s.186(4)

[9] Ibid at s.190

- requests for part-time work as an operational firefighter will only be allowed in "exceptional circumstances";
- requests for part-time work as a Fire Services Communications Controller (FSCC) will be refused in all circumstances; and
- the MFB will be required to refuse a request solely because the UFU does not agree to it.

2.3 Matters pertaining objection

[19] Section 172 of the Act provides that an enterprise agreement may be made in accordance with Part 2-4 if it is about one or more matters, relevantly, pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement and/or pertaining to the relationship between the employer or employers, and the employee organisation(s) that will be covered by the agreement.

[20] The Minister contends that the Agreement contains numerous terms about matters that are not permitted, because they neither pertain to the relationship between the MFB and its employees, nor to the relationship between the MFB and the UFU. In particular, the Minister says that various provisions of the Agreement confer broad veto powers on the UFU across managerial and operational matters. These provisions, reinforced by terms which require the MFB to provide information to the UFU to enable the UFU to monitor more closely the MFB's operations and management, are said to effectively confer management power on the UFU and deprive the MFB, in a meaningful sense, of its capacity to operate effectively as an employer.

2.4 Better off overall test objection

[21] Section 186(2)(d) requires the Commission to be satisfied as a condition of approving an enterprise agreement, that the agreement passes the BOOT. The BOOT is assessed at test time, which for this Agreement is 3 April 2018. The relevant reference instrument for the purposes of assessing the BOOT is the *Fire Fighting Industry Award 2010* (Award). These matters are not controversial.

[22] The proper application of the BOOT requires a finding that each award covered employee and prospective employee would be better off under the agreement than under the relevant modern award.[10] The requirement that "each" such employee and prospective employee be better off overall is a rigorous one. The ordinary meaning of "each" is "every, of two or more considered individually or one by one."[11] It follows that every award covered employee and prospective employee must be better off overall, with the corollary that if any such employee is not better off overall, the relevant enterprise agreement does not pass the BOOT.[12] The Commission is entitled to assume, in the absence of evidence to the contrary,

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[10] *Solar Systems Pty Ltd* [2012] FWAFB 6397 at [11]; *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited; Australasian Meat Industry Employees Union, The v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887 at [6], [15]; *SDAEA v Beechworth Bakery Employee Co Pty Ltd* [2017] FWCFB 1664 at [11]

[11] *Macquarie Online Dictionary*

[12] *Application by Aldi Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) & Welsh and Others (Loaded Rates Agreements Case)* [2018] FWCFB 3610 at [100]

that if a class of employees to which a particular employee belongs would be better off overall if the agreement applied to that class than if the relevant modern award applied, the employee would be better off overall if the agreement applied to the employee.[13]

[23] A proper application of the BOOT also requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial, and an overall assessment of whether an employee would be better off under the agreement.[14]

[24] The Minister contends that the Agreement is unprecedented in its content. It breaks new ground in its interference in the ability of, in particular, women and people with family and carer responsibilities, to obtain part-time work. These restrictions on part-time employment cause the enterprise agreement to fail the BOOT. The Minister says that existing and prospective Award covered MFB employees seeking to work part-time are worse off under the Agreement than the Award because such employees are not permitted under the Agreement to perform operational firefighter duties, except in exceptional circumstances. Such employees are also precluded under the Agreement from performing certain roles and they are required to seek the approval of the UFU in order to make part-time arrangements.

2.5 Whether undertakings can cure the matters identified?

[25] The capacity of the Commission to accept an undertaking in relation to the approval of an enterprise agreement is dealt with in s.190 of the Act. Section 190 is engaged, relevantly, if an application for approval of an agreement has been made under s.185 and the Commission has a concern that the agreement does not meet the requirements set out in ss.186 and 187.[15] It is uncontroversial in relation to the Agreement that there is an application for its approval under s.185. Whether I have concerns that the Agreement does not meet, *inter alia*, the requirements in ss.186(2)(c), (d) and (4) of the Act is dealt with later in this decision.

[26] Section 190(2) confers discretion on the Commission to approve an agreement under s.186 if satisfied that acceptance of the undertaking, subject to the fetters in ss.190(3) and (4), meets the concern. Any undertaking proffered must be responsive to and meet the concern that the agreement does not meet one or more of the identified requirements set out in ss.186 and 187 of the Act. By s.190(3), the Commission may only accept a written undertaking 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. Section 190(4) prevents the Commission from accepting an undertaking unless it has sought the views of each person who the Commission knows is a bargaining representative for the agreement. Finally, an undertaking that is proffered must meet the signing requirements prescribed by the regulations. A residual discretion remains to be exercised even if the undertaking that has been accepted meets the identified concern.

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[13] *Fair Work Act 2009* (Cth) s.193(7)

[14] *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* [2017] HCA 53 at [92]; *Armacell Australia Pty Ltd* [2010] FWAFB 9985 at [41]; *Application by Aldi Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) & Welsh and Others (Loaded Rates Agreements Case)* [2018] FWCFB 3610 at [112]

[15] *Fair Work Act 2009* (Cth) s.190(1)

[27] The Minister contends that the issues identified cannot be remedied by way of written undertakings. The effect of the issues identified is that the Agreement should not be approved. The Minister contends that some of the Agreement terms identified as unlawful terms are central to the Agreement's operation, thus any undertakings purporting to cure these flaws in the Agreement would involve substantial changes to the Agreement and would, in effect, cause a rewriting of the Agreement itself. The Minister says that such undertakings would not be permitted under s.190 of the Act.

3. Uncontroversial ss.186 and 187 requirements and mandatory terms

[28] The MFB has filed, in support of its application for the approval of the Agreement, a statutory declaration made by Ms Janette Pearce (the Pearce Declaration) which addresses the various requirements in ss.186 and 187 of the Act.

[29] Section 186(1) of the Act provides that if an application for the approval of an enterprise agreement is made, relevantly in this case, under s.185, the Commission must approve the agreement if the requirements set out in ss.186 and 187 are met.

[30] The first of these requirements is that the Commission must be satisfied that the Agreement has been genuinely agreed to by the employees covered by the Agreement. Section 188(1) provides that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the Commission is satisfied that:

> **188 When employees have genuinely agreed to an enterprise agreement**
>
> (1) An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre approval steps);
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> (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
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> (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
>
> (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

[31] I am satisfied based on the material contained in the Pearce Declaration and the documents which are annexed thereto that the MFB complied with ss.180(2), (3) and (5) and 181(2).

[32] According to the Pearce Declaration, at the time the MFB asked relevant employees to vote to approve the Agreement, there were 1,999 employees who were employed who would be covered by the Agreement. Of that voting cohort, 1,768 employees cast a valid vote, and 1,759 voted to approve the Agreement. Plainly, a majority of employees employed at the time who cast a valid vote, voted to approve the Agreement. There is no suggestion that the employees who were asked to vote to approve the Agreement did not meet the description in s.182(1), nor is it suggested that there are employees who met that description but were not asked to vote to approve the Agreement. I am therefore satisfied, based on the material contained in the Pearce Declaration, that the Agreement was made in accordance with s.182(1).

[33] Save for the matter raised by the Minister concerning the nature and extent of the matters which are said not to pertain to the requisite relationships, which I address later in this decision, there is no material before me nor am I aware of any other basis upon which I should conclude that there are other reasonable grounds for believing that the Agreement has not been genuinely agreed to by the relevant employees.

[34] As this is not a multi-enterprise agreement, the requirement in s.186(2)(b) does not apply. The requirements in s.186(2)(c) and (d) are the subject of the objections earlier summarised and are dealt with further below. That said, save for the matters identified in the BOOT objection, there is no suggestion that the Agreement does not pass the BOOT. After a review and comparison of the Agreement terms and the Award terms taking into account the less beneficial terms under the Agreement identified in Attachment F of the Pearce Declaration, I am satisfied (putting to one side the part-time employment issues) the Agreement otherwise passes the BOOT in respect of every other award covered and prospective award covered employee.

[35] The Agreement does not cover all of the MFB's employees. The Agreement covers employees of the MFB who may broadly be described as operational firefighters together with employees holding the ranks of Commander and ACFO. It is evident from the classification structure in the Agreement and the organisation of the MFB in respect of its firefighting services, that firefighters are engaged in particular classifications in which they are part of a "rank" or command structure commencing at Recruit Firefighter through to ACFO, and ultimately to the Chief Fire Officer, who understandably is not covered by the Agreement.

[36] The Agreement does not cover MFB employees engaged in administrative, clerical, engineering, technical and associated functions or employees engaged in the MFB's mechanical workshop. Separate enterprise agreements covering these employees are in operation. It appears to me clear that the group of employees covered by the Agreement is operationally distinct. The group may be broadly described as operational firefighters and higher ranking firefighters exercising some level of managerial or operational control over operational firefighters. This group is operationally distinct from other groups of MFB employees who are not covered by the Agreement identified above. There is nothing in the material before me, nor is it suggested that the group of employees covered by the Agreement was anything other than fairly chosen, and I am so satisfied. The requirements in ss.186(3) and (3A) are therefore met.

[37] The requirement in s.186(4) is the subject of the unlawful terms objection earlier summarised and is dealt with further below. That said, on a review of the terms of the

Agreement, I am satisfied that the Agreement does not contain any term of the kind described in s.194(baa)–(h). No one has suggested otherwise.

[38] The requirement in s.186(4A) concerns outworker terms and does not arise in respect of the Agreement.

[39] The Agreement specifies a nominal expiry date of 1 July 2019. The requirement in s.186(5) is therefore met.

[40] Clause 21 of the Agreement contains a dispute resolution term. It allows the Commission to settle disputes about matters arising under the Agreement and in relation to the NES. It also allows for the representation of employees covered by the Agreement for the purposes of the procedure. The requirement in s.186(6) is therefore met.

[41] There is no material before me, nor has it been suggested by any person who made a submission in relation to the Agreement, that the approval of the Agreement would be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives for the proposed Agreement. There is also no scope order in operation. I am therefore satisfied that the requirement in s.187(2) is met.

[42] The requirement in s.187(3) has no application to this Agreement since it concerns a multi-enterprise agreement.

[43] Section 187(4) requires the Commission to be satisfied as referred to in any of the provisions of Subdivision E of Division 4 (ss.196-200). Sections 197-200 have no application in relation to the Agreement.

[44] Section 196 of the Act is concerned with ensuring that a shiftwork employee covered by an enterprise agreement, who is entitled to an additional week's leave under the NES because an award that is in operation and covers the employee describes that employee as a shiftworker for the purposes of the NES, continues to be so entitled when the agreement is in operation. When s.196 applies, the Commission must be satisfied that the enterprise agreement also defines or describes the employee as a shiftworker for the purposes of the NES.

[45] Clause 28.2 of the Award defines or describes the kind of employee that is a shiftworker for the purposes of the NES. Such an employee is covered by the Agreement. Section 196 is therefore engaged. Clause 90.2 of the Agreement defines or describes such an employee as a shiftworker for the purposes of the NES in the same terms as the Award. I am satisfied therefore that the Agreement defines or describes the employee as a shiftworker for the purposes of the NES. The requirement in s.187(4) is therefore met.

[46] The requirements in ss.187(5) and (6) have no application as the Agreement is not a greenfields agreement.

[47] Section 202 of the Act requires an enterprise agreement to include a flexibility term that enables an employee and his or her employer to agree to an arrangement varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and the employer. Such a term must comply with the content requirements set out in s.203.

[48] Clause 15 of the Agreement contains a flexibility term. It has a narrow permissible subject matter which can be the subject of a flexibility arrangement. It is confined to "when leave is to be taken in accordance with clause 107" of the Agreement. Nonetheless, it is a term described in s.202(1) and its terms comply with s.203.

[49] Section 205 requires that an enterprise agreement include a term that requires an employer to which the agreement applies to consult with employees about a major workplace change that is likely to have a significant effect on the employees. The term must also require consultation about a change to an employee's regular roster or ordinary hours of work, and must allow for the representation of employees for the purposes of the consultation.

[50] Clause 16 of the Agreement sets out a comprehensive consultation scheme. It is a term of the kind required by s.205(1) and it makes provision for the matters set out in s.205(1A).

[51] Accordingly, s.201(1) has no work to do in respect of this application.

4. Unlawful terms

4.1 The discriminatory term point – s.195

[52] There is no suggestion that any term of the Agreement directly discriminates against an employee covered by the Agreement because of, or for reasons including, one or more of the other identified characteristics or attributes in s.195 of the Act. The contention advanced by the Minister and the VEOHRC is that a number of the terms of the Agreement indirectly discriminate against an employee covered by the Agreement because of, or for reasons that include, the employee's sex and/or family or carer's responsibilities.

4.1.1 The impugned terms of the Agreement

[53] A number of the terms of the Agreement are said to be caught by s.195 of the Act. The terms of the Agreement impugned as discriminatory terms by the Minister and the VEOHRC are clauses 9, 43 and 44 of the Agreement. The Minister also contends that clauses 12, 41, 85, 136, 138 and 152 are discriminatory terms.[16] The impugned terms may be grouped into six broad categories. The sixth category is in my view a contention that the term contravenes s.55 of the Act.

[54] The first category includes terms that are said to have the effect of not permitting a part-time employee to perform operational firefighter duties except in exceptional circumstances. These terms are:

> *Special administrative duties terms*
>
> 9.1.6. Where in accordance with this clause the MFB agrees to a request to work other than full time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.

[16] See Annexure 1 of the Minister's Outline of Submissions dated 22 June 2018

44.1.1. Where in accordance with this clause the MFB agrees to a request to work other than full-time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.

Save in exceptional circumstances terms

9.1.7. Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangement will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.

44.1.2. Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangements will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.

43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational "10/14" roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCCs.

On-shift employees should be employed on a full-time basis terms

9.1.4. In addition to any other obligations, the MFB acknowledges the obligations to make reasonable accommodation for employees with parental or carer responsibilities and to make reasonable adjustments for employees with disabilities. However the MFB have determined and the parties have reached agreement that the MFB's operational requirements mean generally that on-shift employees should be employed on a full-time basis. The MFB will meet the obligation to give reasonable accommodation/adjustments as required on a case by case basis, but the parties acknowledge that this may, in some cases require an employee to transfer off-station or from their current work location to another position.

9.1.5. To avoid doubt, in addition to other obligations, this Agreement does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has determined and the parties have reached agreement that the MFB's operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case by case basis, but the parties acknowledge that this may, in some cases require an entitled employee to transfer off-station or from their current work location to another position. Without limiting the foregoing, this subclause applies to the following clauses and schedules: 12.3, 43.1, 69, 121.1, 136.1.1, 138.1, 139, 152.1, 153, Schedule 3, and Schedule 14 despite any inconsistent terms therein.

44.1. In addition to other obligations on the MFB, and to avoid doubt, this clause does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s.65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has

determined and the parties have reached agreement that MFBs operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case-by-case basis, but the parties acknowledge that this may in some cases require an entitled employee to transfer off station or from their current work location to another position.

[55] The second category includes terms identified above that are said to relegate part-time employees to administrative duties which has the consequential effect of limiting career progression and denying other benefits. These latter terms are:

Classification progression contingent on firefighting duties terms

12.3.1. **Recruit Firefighter (C)** means a probationary Firefighter, who is undertaking the MFESB recruit firefighter training course.

12.3.2. **Firefighter Level 1 (C)** means a Firefighter who has completed the MFESB recruit firefighter training course in accordance with the training framework at schedule 3. Firefighter Level 1 (C) employees who have successfully completed the MFESB recruit firefighter training course shall be engaged in the duties of a Firefighter Level 1 (C) in accordance with the classification description for Firefighter Level 1 (C) (schedule 12).

12.3.3. **Firefighter Level 2 (C)** means a Firefighter who has completed the MFESB recruit firefighter course and has completed twelve months service with the MFESB and all MFESB Firefighter Level 1 (C) modules.

12.3.4. **Firefighter Level 2 (C)** employees are engaged in the duties of a Firefighter Level 2 (C) in accordance with the classification description for Firefighter Level 2 (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.

12.3.5. **Firefighter Level 3 (C)** means a firefighter who has completed 24 months service with the MFESB and all MFESB Firefighter Level 2 (C) modules.

12.3.6. **Firefighter Level 3 (C)** employees are engaged in the duties of a Firefighter Level 3 (C) in accordance with the classification description for Firefighter (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.

12.3.7. **Qualified Firefighter (C)** means a firefighter who has completed a minimum of 36 months service with the MFESB, all MFESB Firefighter Level 3 modules and possesses the Certificate of Proficiency.

12.3.8. **Qualified Firefighter (C)** employees are engaged in the duties of a Qualified Firefighter (C) in accordance with the classification description for Qualified Firefighter (C) (schedule 12). The modules and training applicable for progression to this paypoint are contained in the training framework at schedule 3.

12.3.9. **Senior Firefighter (C)** means a firefighter who translates to this paypoint as a result of being a Senior Firefighter in the previous agreement.

12.3.10. **Leading Firefighter (C)** means a firefighter who has completed a minimum of 48 months career firefighting service with the MFESB, has successfully completed all MFESB Firefighter Levels 1, 2 and 3 modules, all MFESB Qualified Firefighter modules, all LFF modules, all Command and control modules and has been a Qualified Firefighter with the MFESB (the LFF requirements). Leading Firefighter (C) employees are engaged in the duties of a Leading Firefighter in accordance with the position description for that classification in SCHEDULE 12.

12.3.11. **Senior Leading Firefighter (C)** means a career firefighter who has completed 5 years' service within the MFB at the classification of Leading Firefighter.

12.3.12. **Station Officer (C)** means an appointed Officer who has completed a minimum of 6 years career firefighting service with the MFESB, with at least 1 year at a minimum classification of Leading Firefighter with the MFESB, and has successfully completed the Station Officer modules and MFESB Station Officer assessment (the SO requirements). Station Officer employees are engaged in the duties of a SO in accordance with the position description for that classification in SCHEDULE 12.

12.3.13. **Senior Station Officer (C)** means an appointed Officer who has completed a minimum of 2 years' service with the MFESB at the Station Officer Level and has successfully completed the Senior Station Officer modules and assessment (the SSO requirements). Senior Station Officer (C) employees are engaged in the duties of a SSO in accordance with the position description for that classification in SCHEDULE 12.

12.3.14 **Commander (C)** means an appointed officer who has completed a minimum of 1 year's service with the MFESB at the SSO Level on shift and a minimum of 1 year's service with the MFESB at the SO or SSO Level in a day duty department and who has successfully completed the Commander modules and assessment (the Commander requirements).Commander employees are engaged in the duties of a Commander in accordance with the position description for that classification in SCHEDULE 5.

12.3.15 **Assistant Chief Fire Officer (C)** means an employee appointed officer who has a minimum of two years' service with the MFESB at the Commander Level and who has successfully completed the ACFO modules and assessment (the ACFO requirements). ACFO employees are engaged in the duties of a ACFO in accordance with the position description for that classification at SCHEDULE 10 – and the functions at SCHEDULE 11.

12.3.16 **Fire Service Communication Controller (C**) means an appointed officer who has completed a minimum of 10 years' service with the MFESB at the Station Officer Level (half of which has been on shift) and has successfully completed the FSCC modules and assessment (the FSCC requirements). FSCC employees are engaged in the duties of a FSCC in accordance with the position description for that classification at SCHEDULE 8.

12.3.17. **Senior Fire Service Communication Controller** means a Fire Service Communication Controller who has completed 12 months service within the MFB at the classification of FSCC. Where this agreement refers to a FSCC, it shall be taken to include Senior FSCC, unless the context requires otherwise.

Terms that make benefits only available to employees of certain classifications

41.1. Employees to whom this agreement applies shall not be permitted, or required, to undertake a secondment to another organisation except in accordance with the secondment programme in SCHEDULE 13.

41.3.2. The agreed secondment program will only be for employees that hold the rank of Leading Firefighter or above.

136.1.1. The MFB will not appoint a person to a position of instructor, and no person may hold a position of instructor, unless that person is an operational employee who holds a MFB firefighting stream rank referred to in clause 12.3.10.

[56] The third category includes terms that are said to make no provision for a part-time employee to be an FSCC or Senior FSCC. These terms are:

152.1. FSCCs will work in accordance with clause 43 and where applicable clause 153.

152.2. The ordinary working hours for employees shall be 38 per week, over a cycle of eight weeks for which the roster of hours and leave operates. Employee's shall be rostered and worked an average of 42 hours per week, two of which hours shall be overtime work and paid for as such and the remaining two hours shall be taken as accrued leave, in accordance with the roster laid down for this purpose.

43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational "10/14" roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCCs.

43.6.2. Full-time operational dayworkers (professional firefighters who are not working on a roster referred to in 43.6.1) shall work and be rostered in accordance with the special administrative duties roster set out in clause 135.

[57] The fourth category includes terms that are said to require the agreement of the UFU for part-time employment. These terms are:

43.3. The MFB 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).

43.4. This clause is subject to the rights of employees to work in a non- station based position pursuant to clause 44 below.

138.4 The MFB 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).

43.6.3. Where part-time employment is agreed, part-time operational dayworkers will:

a) work and be rostered on hours negotiated and agreed in writing between the MFB the employee and the UFU that, on average are less than 42 hours per week. These hours may be worked over a 5 day cycle and may include evening or weekend work;

138.4.1. Where part-time employment is agreed, part-time operational dayworkers will:

a) work and be rostered on hours negotiated and agreed in writing between the MFB the employee and the UFU that, on average are less than 38 hours per week. These hours may be worked over a 5 day cycle and may include evening or weekend work;

…

[58] The fifth category includes terms that are said to impose imposts on the MFB in relation to part-time employees. That is, they act as a disincentive to part-time employment by adding additional costs to be borne by the MFB if an employee is engaged on a part-time basis. These terms are:

Insecure work allowance

43.5. Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage.

138.2 Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage.

Special administrative duties allowance

43.6. Employees shall have their normal hours of work arranged in the following manner:

. . .

b) Be paid special administrative duties allowance not at a pro rata rate; and

85.16.1. Employees rostered for Special Administrative Duties shall receive an allowance in accordance with Schedule 4 Allowances whilst so rostered. Special Administrative Duties shall include all rostered duty in all MFB departments including but not limited to Training and Education, Fire Safety and Administrative areas of Operations as well as the rosters of all day work personnel on OSG.

> 138.4.1. Where part-time employment is agreed, part-time operational dayworkers will:
>
> . . .
>
> b) Receive special administrative duties allowance not at a pro rata rate; and
>
> …

[59] The final category contains a term that is said to constrain access to certain NES entitlements. This term is:

> 44.3.1. An employee must provide appropriate evidence of their entitlement under the Act in the form of a statutory declaration, copies of which will be provided to the UFU and MFB.

[60] I take the reference to "their entitlement under the Act" in clause 44.3.1 to mean establishing an employee's entitlement to make a request under s.65(1) by reference to, *inter alia*, the application of the circumstances in s.65(1A) to the employee.

[61] As I have already noted, the criticism of this provision is in essence one concerned with whether it contravenes s.55 of the Act. If it does, the term is to that extent of no effect in the same way that a term that is caught be s.195 is of no effect.[17] I will deal with this issue later in this decision.

[62] The VEOHRC argues that any clause of the Agreement that:

- requires a person to work full-time or prevents the person from working part-time;
- restricts, or attaches conditions to, the ability of an employee to work, or seek to work part-time; or
- affords less favourable treatment to an employee because the employee works, or seeks to work part-time;

indirectly discriminates against those who have the status or attribute of being female, a parent, a carer or being older or of having family responsibilities or a disability.[18]

[63] The Minister contends that the terms are discriminatory against women and employees with family and carer's responsibilities because the terms have the effect that:

1. Part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances;
2. Part-time employees are relegated to administrative duties and are impeded in career progression and precluded from other benefits;
3. There is no provision for part-time FSCCs and Senior FSCCs;

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[17] *Fair Work Act 2009* (Cth) ss.56 and 253(1)(b)

[18] Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [22]-[24]

4. Employees are required to provide a statutory declaration evidencing their entitlement under s.65 of the Act;
5. Part-time employees require UFU agreement to work part-time; and
6. There is an impost imposed on the MFB for part-time employees.

4.1.2 Meaning of "discriminates" in s.195

[64] Section 195 of the Act provides:

> **195 Meaning of discriminatory term**
>
> *Discriminatory term*
>
> (1) 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 opinion, national extraction or social origin.
>
> *Certain terms are not discriminatory terms*
>
> (2) A term of an enterprise agreement does not discriminate against an employee:
>
> (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
>
> (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
>
> (3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:
>
> (a) all junior employees, or a class of junior employees; or
>
> (b) all employees with a disability, or a class of employees with a disability; or
>
> (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

[65] The words "discriminatory term", "discriminates", "discriminates against" or "discriminates between" used variously in the Act are not defined. Ascertaining their meaning thus becomes a matter of statutory construction. Before dealing with the competing

contentions of the parties as to the meaning of those words, it is convenient to summarise the principles of statutory construction to be applied.

[66] The task of ascribing meaning to the words of the statute is concerned with interpreting the relevant statutory provision(s) consistently with the intended purpose or objects of the legislature as disclosed by the text of the statute and begins with an examination of the ordinary grammatical meaning of the words used in the context of the statute as a whole in which they appear. This point was made clear in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [19] wherein their Honours said:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."[20] [Footnotes omitted]

[67] The point was also made long ago, as is clear from the following passage of the judgment of Dixon J (as he was then) in *R v Wilson; Ex parte Kisch*:[21]

> "The rules of interpretation require us to take expressions in their context, and to construe them with proper regard the subject matter with which instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them."[22]

[68] A summary of the relevant principles is contained in the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[23] as follows:

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[24] [Footnotes omitted]

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[19] (1998) 194 CLR 355

[20] Ibid at [69]

[21] (1934) 52 CLR 234

[22] Ibid at 244

[23] [2009] HCA 41; (2009) 239 CLR 27

[24] Ibid at [47]

[69] In the same case, French CJ observed:

> "The starting point in consideration… is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose… In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy."[25] [Footnotes omitted]

[70] More recently, the High Court has set out the approach to be applied to issues of statutory construction in *SZTAL v Minister for Immigration and Border Protection*.[26] In their joint judgment, Kiefel CJ, Nettle and Gordon JJ said:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[27] [Footnotes omitted]

[71] In the same case Gageler J observed:

> "Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* ((1985) 157 CLR 309 at 315):
>
> > "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."
>
> Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd* (CLR 384 at 408):
>
> > "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."

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[25] Ibid at [4]

[26] [2017] HCA 34; (2017) ALR 405

[27] Ibid at [14]

> Both of those passages have been "cited too often to be doubted". Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".
>
> The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".
>
> Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation" "is in that respect a particular statutory reflection of a general systemic principle".”[28] [Footnotes omitted]

[72] These principles were also recently considered by a Full Court of the Federal Court of Australia in *WorkPac Pty Ltd v Skene*[29] (*Skene*) wherein the Court said:

> “…Ordinarily, the meaning of an undefined expression is discerned by reference to the language of the Act viewed as a whole. As French CJ, Hayne, Kiefel, Gageler and Keane JJ said in *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22], the task of statutory construction involves the attribution of meaning to statutory text. It is a task which must begin with the consideration of the text itself, but the meaning of the text must be construed by reference to context and legislative purpose of the provision. Similar guidance emphasising the need to discern the statutory purpose of a provision was given by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [39] where their Honours said that “integral” to the making of constructional choices “is discernment of statutory purpose”. Similar guidance also is derived from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).”[30]

[73] Also relevant to a consideration of the statutory context is that the words “discriminates” or “discriminates against” appear in ss.153 and 342 as well as in s.195 of the Act, undefined. A principle of construction, albeit one that may readily be rebutted, is that

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[28] Ibid at [35]-[39]

[29] [2018] FCAFC 131

[30] Ibid at [105]

words are assumed to be used consistently in legislation. For example in *Craig Williamson Pty Ltd v Barrowcliff,*[31] Hodges J said the following:

> "I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act."[32]

[74] The same point was recently made in *Skene* with the appropriate caution:

> "It is ordinarily considered a sound rule of construction that the same word appearing in different parts of a statute should be given the same meaning. Such an assumption is a logical starting point or a sensible working hypothesis, particularly where an expression is used in the same division or in closely proximate provisions of a statute. However, it is not an assumption that is to be rigidly adopted and it may be rebutted where the context, purpose or surrounding text provide reason to do so. Whether the context, purpose or surrounding text so require must be considered on a case by case basis: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88 at [3] (Allsop CJ); *Craig Williamson Pty Ltd v Barrowcliff* [1915] VicLawRp 66; [1915] VLR 450 at 452; *Registrar of Titles (WA) v Franzon* [1975] HCA 41; (1975) 132 CLR 611 at [11] (Mason J); *Secretary, Department of Social Security v Copping* [1987] FCA 280; [1987] 73 ALR 343 at 347-348 (Jenkinson J); *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005)145 FCR 523 at [14] (Moore J); and *The State of Queensland (Queensland Health) v Chi Forest* [2008] FCAFC 96; (2008) 168 FCR 532 at [41] (Black CJ)."[33]

[75] Section 15AA of the *Acts Interpretation Act 1901*[34] (AI Act) also makes it clear that in interpreting a statute, regard must be had to the purpose or object underlying the statute (whether that purpose or object is expressly stated in the statute or not) and that a construction that would promote its underlying purpose or object is to be preferred to a construction that would not promote that purpose or object.

[76] The AI Act also deals, in s.15AB, with the extent and purpose to which extrinsic material may be called upon to aid the interpretation of a statute. In their joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[35] Brennan CJ and Dawson, Toohey and Gummow JJ observed:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to

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[31] [1915] VLR 450

[32] Ibid at 452

[33] [2018] FCAFC 131 at [106]

[34] As in force on 25 January 2009: See s.40A of the Act

[35] (1997) 187 CLR 384

arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."[36] [Footnotes omitted]

[77] In *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union,*[37] the Full Court of the Federal Court (Allsop CJ, Griffiths and O'Callaghan JJ) noted that some caution is required in selecting and applying the non-statutory or common law principles to construction. The Full Court said:

"The task of statutory construction can be assisted by a wide range of more specific principles of statutory construction, many of which have been developed by the courts, while others are now expressed in legislation such as the *Acts Interpretation Act 1901* (Cth) (the *AIA*), including ss 15AA and 15AB. Some caution is required in selecting and applying the non-statutory or common law principles. They are not inflexible rules and their application in particular circumstances can be nuanced. Moreover, there can be tension between some of the principles. They are not masters, but should be viewed as servants and tools of analysis in the task of statutory construction.

One of the matters which the plurality and Gageler J highlighted in *SZTAL* is the importance of a purposive approach. Such an approach is also required by s 15AA of the *AIA*. It requires the Court, in interpreting a provision of an Act, to prefer an interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) over any other interpretation. That requirement is uncontroversial. In some instances, difficulties can arise in identifying the relevant purpose or object. This is frequently the case, for example, with legislation which reflects the Parliament's balancing of competing and conflicting interests or where the legislation has more than one purpose.

Where there is more than a single legislative purpose, it may be difficult to identify which, if any, of the overarching legislative purposes is apposite to an individual provision. These and other related difficulties were highlighted by Gleeson CJ in *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 (*Carr*) at [5] (footnotes omitted):

> 5. Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen*. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen*. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a

[36] Ibid at 408

[37] [2018] FCAFC 223

> construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) ("the Acts Interpretation Act"). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act 1984* (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."[38]

[78] Authorities on the meaning of "discriminates" in the context of ss.153 and 342, as well as in other contexts, are considered later below.

[79] Additionally, statutory construction principles would allow a broad interpretation of s.195 if, as the Minister and the VEOHRC submit, it is a provision which is beneficial or remedial in purpose.[39] A Full Bench of the Commission considered the approach to construction of remedial or beneficial provisions in *Bowker and Others v DP World Melbourne Limited T/A DP World, Maritime Union of Australia and Others*.[40] The Full Bench observed:

> "The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in *Waugh v Kippen*:
>
> > "… the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended he should have."
>
> Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow, provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used'. As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:

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[38] Ibid at [78]-[80]

[39] See Minister's Outline of Submissions dated 22 June 2018 at [25] and the Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [9]

[40] [2014] FWCFB 9227

> "… beneficial and remedial legislation, like the [Equal Opportunity] Act is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."
>
> If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted."[41] [Footnotes omitted]

[80] These principles of statutory construction are not seriously in contest. Their application to the provisions at issue in this case is quite another matter and the task is not without difficulty.

[81] The MFB contends that s.195 does not encompass indirectly discriminatory terms.[42] In the absence of an express definition of the word "discriminates" within the Act, it contends that the construction of s.195 must be approached in the context of its place within a scheme of provisions in the Act which complement State and Territory equal opportunity legislation in limiting the extent to which an agreement might operate with discriminatory effect.[43]

[82] Based on Commonwealth, State and Territory anti-discrimination legislation, the MFB contends that legislatures in the various jurisdictions have separately defined direct and indirect discrimination, or have expressly defined "discriminates against" as encompassing both direct and indirect discrimination.[44] It contends that these legislatures have incorporated an express "reasonableness" exception into definitions of indirect discrimination.[45] It contends therefore that, had Parliament intended s.195 to encompass indirect discrimination, it would have made express provision for this, as it did for s.351 of the Act.[46]

[83] The MFB also argues, contrary to the submissions of the Minister noted below, that s.195(3)(c) does not create a carve-out capable of applying to indirect discrimination.[47] That subsection provides that a term of an enterprise agreement does not discriminate against an employee merely because it provides wages for all employees to whom training arrangements apply, or to a class of such employees.

[84] The MFB argues in the alternative, that if s.195 extends to indirectly discriminatory terms, it could only extend to terms which necessarily produce, and only produce, a discriminatory outcome.[48] Further, if s.195 so extends, it should be read as not applying to

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[41] Ibid at [25]-[27]

[42] Applicant's outline of submissions dated 13 August 2018 at [6(a)]

[43] Ibid at section B.2

[44] Ibid at [41]-[43]

[45] Ibid at [44]

[46] Ibid at [45]

[47] Ibid at [53]

[48] Ibid at [131]-[132]

terms of the Agreement which impose requirements, conditions or practices that are reasonable or reflect the inherent requirements of the position concerned.[49] It contends that the requirements imposed by the impugned terms are reasonable and reflect the inherent requirements of the position concerned.[50]

[85] As a further alternative, the MFB contends that if s.195 encompasses indirect discrimination and does not import a reasonableness test, then the 'inherent requirements' exception in s.195(2) will have to be read broadly, in a manner which effectively equates with the 'reasonableness' exception.[51]

[86] Like the MFB, the UFU advances a construction of s.195 that does not encompass indirect discrimination. Its submissions include that:

- the terms of s.195, when contrasted with how federal anti-discrimination legislation deals with direct and indirect discrimination, including by providing separate definitions and defences in each case, favour a narrow construction of the section limited to direct discrimination;[52]
- s.195 does not require the parties or Commission to scrutinise the Agreement for terms which might disparately impact on hypothetical employees with the full range of relevant characteristics unknown to the parties at the time of making the Agreement;[53]
- s.195 should be considered in the context of federal anti-discrimination legislation and its place in a statutory regime designed to allow scrutiny of the terms of industrial instruments;[54]
- the objects of Part 2-4 of the Act include ensuring that applications to the Commission for approval of enterprise agreements are dealt with without delay, and a construction of s.195 that extended to indirect discrimination would mean the parties and the Commission would need to be alive to and address all indirect consequences of facially neutral terms;[55] and
- the decision in *National Retail Association (No 2)*, is the only directly relevant decision and supports a construction of s.195 that does not include indirect discrimination.[56]

[87] The UFU also contends that the text of s.195 requires the Commission to be satisfied that the Agreement does not contain a term that discriminates against an employee covered by the Agreement because of, or for reasons including, any of the employee's characteristics or attributes as identified, which is suggestive of a requirement that an employee covered by the Agreement be identified.[57] The UFU submits that the Minister did not identify any employee

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[49] Ibid at [6(e)]

[50] Ibid at section B.8

[51] Ibid at [164]

[52] Outline of Opening Submissions of the United Firefighters Union of Australia dated 14 August 2018 at [13]-[16]

[53] Ibid at [26]

[54] Ibid at [34]

[55] Ibid at [46]

[56] Ibid at [55]

[57] Ibid at [10]

who is discriminated against by any term of the Agreement.[58] This submission is rejected. Contextually, the focus of the enquiry under s.195 is on effect of the term upon an employee who falls within the coverage of the Agreement.

[88] The Minister contends that "discriminates" in s.195 incorporates concepts of both direct and indirect discrimination.[59] The Minister's contention as to that which constitutes "indirect discrimination" differs from the construction for which the VEOHRC advocates. In the Minister's view, "indirect discrimination arises where a condition or requirement disadvantages people with a particular attribute (or is likely to do so), which is not reasonable in the circumstances."[60] [Emphasis added]

[89] In support of this construction, the Minister submits, *inter alia,* that:

- the concept of indirect discrimination incorporates a requirement of reasonableness;
- the ordinary and natural meaning of "discriminates" includes both direct and indirect discrimination,[61] and judicial consideration of the word in *Street v Queensland Bar Association*[62] *(Street), Waters v Public Transport Corporation*[63] *(Waters)* and *Klein v Metropolitan Fire and Emergency Services Board*[64] *(Klein)* supports this view;[65]
- to give effect to the object of the Act (s.3), and in the context of its predecessor provisions and other provisions in the Act that include the term "discriminates" should be construed to include both direct and indirect discrimination;[66]
- a narrow construction of "discriminates" in s.195(1) is inappropriate given the provisions of the Act aimed at eliminating discrimination are beneficial and remedial in purpose. Rather, s.195 should be construed to give the fullest remedy of the situation with which it is intended to deal, available from the wording;[67]
- a construction which includes both direct and indirect discrimination provides the fullest remedy;[68] and
- the exceptions provided by ss.195(2) and (3) to the s.195(1) preclusion of discriminatory terms can apply to clauses that could be indirectly discriminatory.[69]

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[58] Ibid at [12]

[59] Minister's outline of submissions dated 22 June 2018 at [10] where second appearing

[60] Ibid at [12]

[61] Ibid at [18]

[62] (1989) 168 CLR 461

[63] (1991) 173 CLR 349

[64] [2012] FCA 1402

[65] Minister's outline of submissions dated 22 June 2018 at [19]-[23]

[66] Ibid at [39] and [40]-[51]

[67] Ibid at [25]

[68] Ibid at [26]

[69] Ibid at [34]

[90] The Minister argues the construction for which she contends is consistent with other provisions in the Act which concern the concepts of discrimination,[70] and that it should be presumed that the term has the same meaning in s.195 as elsewhere throughout the Act.[71]

[91] The VEOHRC contends that "discriminates" in s.195 should be given its ordinary meaning, which in its submission encompasses both direct and indirect discrimination. In doing so, it adopts the meaning of indirect discrimination articulated by Dawson and Toohey JJ in *Waters*:[72]

> "…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."[73]

[92] The VEOHRC argues that the statutory history of s.195 does not identify any Parliamentary intent to constrain "discriminates" to only direct discrimination.[74] It submits that an interpretation which includes indirect discrimination best achieves the objects set out at s.3 of the Act,[75] and that the weight of authority of single members of the Commission and its predecessors supports that interpretation.[76] The VEOHRC relies upon the interpretation of "discriminates" adopted by Gordon J in *Klein*[77] in arguing that there is no reason to give "discriminates" a meaning which in any way departs from the meaning attaching to the same phrase in s.195.[78] *Klein* concerned the meaning of the word "discriminates" in the context of s.342 of the Act.

[93] Unlike the Minister, the VEOHRC does not contend that reasonableness is a relevant consideration in assessing whether a term is a discriminatory term. However, it submits that if its construction of s.195 is not accepted, the Commission should adopt the position of the Minister.[79]

[94] The meaning of "discriminates" in s.195 has not been the subject of judicial consideration, but as already noted, it has been considered in other contexts, including ss.153 and 342 of the Act. Those authorities provide useful guidance on the meaning of the term in s.195, particularly noting the statutory construction principle referred to at [73] and [74] above.

[95] In *Street,*[80] the High Court of Australia considered whether "discrimination" in s.117 of the *Commonwealth of Australia Constitution Act* (Constitution) encompassed indirect

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[70] Ibid at [53]

[71] Ibid at [82]

[72] (1991) 173 CLR 349

[73] Ibid at 392

[74] Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [9]

[75] Ibid at [5]-[7]

[76] Ibid at [13]

[77] [2012] FCA 1402

[78] Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [16]

[79] Outline of Oral Submissions of the VEOHRC dated 31 August 2018 at [16]

[80] (1989) 168 CLR 461

discrimination.[81] The judgment in *Street* departed from previous High Court authority which had confined "discrimination" in s.117 of the Constitution to direct discrimination. Mason CJ observed:

> "…The section is not concerned with the form in which that law subjects the individual to the disability or discrimination. It is enough that the individual is subject to either of the two detriments, whatever the means by which this is brought about by State law. This approach to the interpretation of the section accords with the approach generally adopted in connection with statutes proscribing particular kinds of discrimination. They are either expressed or construed as proscribing an act or a law the effect of which is relevantly discriminatory… It would be surprising if it were otherwise, especially since such statues are generally intended to provide relief from discrimination rather than to punish the discriminator. … It would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect."[82] [Citations omitted, emphasis added]

[96] Brennan J similarly observed:

> "…For the purposes of s.117, it is not the indifferent application of a law to in-State and out-of-State residents which is material, but the actual impact on a protected person of a law or governmental act in comparison with the impact it would have if that person were an in-State resident.
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> …
>
> A law which does not have a discriminatory character may produce an impermissible discrimination in a particular case, and a law which does have that character may not do so in a particular case."[83]

[97] As to the breadth of the protection against indirect discrimination, Gaudron J said:

> "... The limits to the protection afforded by s. 117 are, in my view, to be ascertained by reference to the expression "disability or discrimination" rather than by identification of interests pertaining to national unity or by reference to the federal object attending s. 117.
>
> Although in its primary sense "discrimination" refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is "discrimination between"; the legal sense is "discrimination against".

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[81] Section 117 of the Constitution provides: "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State"

[82] (1989) 168 CLR 461 at [25]

[83] Ibid at [21] and [24]

Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed. Even so, the legislation frequently allows for an exception in cases where the characteristic has a relevant bearing on the matter in issue. Thus, for example, the *Anti-Discrimination Act* 1977 (N.S.W.), whilst proscribing discrimination in employment on the grounds of race and sex, allows in ss. 14 and 31 that discrimination is not unlawful if sex or race is a genuine occupational qualification.

The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination. Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference also constitutes discrimination.

The importance of a relevant difference was noted by Judge Tanaka in the *South West Africa Cases (Second Phase)*, in these terms:

> "... the principle of equality before the law ... means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ... To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists."

Similarly, the European Court of Justice said in *Re Electric Refrigerators:*

> "Material discrimination would consist in treating either similar situations differently or different situations identically."

In *State of West Bengal v. Anwar Ali* S.R. Das J. said in relation to Art. 14 of the Indian Constitution which guarantees equality before the law and the equal protection of the law:

> "All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation."

His Honour then went on to note that two requirements are necessary to avoid the prohibition against discrimination, namely,

> "(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them."

> The reference to "disability" in s. 117 must be construed in the context of the expression "disability or discrimination". Just as the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference, so too, the absence of a right or entitlement does not constitute a disability if the right or entitlement is appropriate to a relevant difference."[84] [Citations omitted, emphasis added]

[98] Brennan J made a similar observation:

> "Although it is misleading to derive principles from discrimination cases decided under statutes which are not analogous to s. 117, I refer to these two turban cases as illustrations of two propositions which are inherent in the concept of discrimination. First, discrimination on a prohibited ground may be effected, albeit indirectly, when the expressed ground is a natural or ordinary concomitant of the prohibited ground. Secondly, where the concomitant ground has a rational connexion with an objective unrelated to the prohibited ground, it may not be discriminatory. That is because a class which is singled out for adverse treatment on a ground which has a rational connexion with an unrelated objective - Sikhs who refuse to wear hard hats when the wearing of hard hats is a bona fide occupational requirement, for example are relevantly unequal to others to whom the ground applies and the difference in treatment reflects the inequality. The absence of discrimination consists as much in the unequal treatment of unequals as in the equal treatment of equals. I need not repeat what I said on that topic in *Gerhardy v. Brown*, but I would add the observation of Vierdag, *The Concept of Discrimination in international Law* (1973), at p. 61:
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> > "discrimination occurs when in a legal system no inequality is introduced in the enjoyment of a certain right, or in a duty, and as a result thereof no sufficient connexion exists between the unequalness of the subjects treated and the right or the duty."
>
> However, a difference in treatment on a ground which is rationally connected with an unrelated objective will nevertheless be discriminatory if the difference is not proportionate to the relevant inequality: see the reference to proportionality in the *Belgian Linguistic Case* [No.2]."[85] [Citations omitted, emphasis added]

[99] The references to "different treatment appropriate to a relevant difference" and "a rational connection with an object unrelated to the discriminatory ground" appear to me to bear the hallmarks of excluding from the area of proscribed discrimination differential treatment which is reasonable in the circumstances.

[100] In *Waters,*[86] the High Court considered the meaning of "discriminates" in s.17 of the *Equal Opportunity Act 1984* (Vic)(EO Act). Section 17(1) of the EO Act provided in effect that a person discriminates if, on the ground of another person's status or private life, the first

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[84] Ibid at [19]-[25]

[85] Ibid at [27]

[86] (1991) 173 CLR 349

person treats the second person less favourably than they would another person of a different status or with a different private life. Section 17(5) provided:

> "For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if –
>
> (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;
>
> (b) the other person does not or cannot comply with the requirement or condition; and
>
> (c) the requirement or condition is not reasonable."[87]

[101] In their joint judgment, Mason CJ and Gaudron J observed that the subject matter of s.17(5) is usually referred to as indirect or adverse effect discrimination, "signifying that some criterion has been used or some matter taken into account which, although it does not, in terms, differentiate for an irrelevant or impermissible reason, has the same or substantially the same effect as if different treatment had been accorded precisely for a reason of that kind."[88] Their Honours observed:

> "Within the Australian legal system, it is usual for anti-discrimination legislation to ban discriminatory practices in terms which deal separately with treatment which differentiates by reason of some irrelevant or impermissible consideration and with practices which, although not overtly discriminating on that basis, have the same or substantially the same effect. That is the case with s.17(1) and s.17(5) of the Act…"[89]

[102] Later their Honours observed that "…[i]nstead of making separate and independent provision for indirect discrimination, the legislature has chosen by sub-s.5 to make it clear that sub-s.1 applies to indirect discrimination of the kind described in sub-s.5… Accordingly, sub-s.5 is epexegetical to, or explanatory of, sub-s.1, spelling out the reach, though not necessarily the whole of the reach of that provision in its application to indirect discrimination…"[90] Their Honours did not, however, find s.17(5) to be an exhaustive statement of that which constitutes indirect discrimination for the purposes of s.17.[91]

[103] As to whether an intention to discriminate was required, their Honours considered that it would significantly impede or hinder the attainment of the objects of the EO Act if s.17(1) were to be construed as requiring an intention or motive on the part of the alleged discriminator that related to the status or private life of the person less favourably treated.[92]

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[87] Extracted in the judgment in *Waters* at [11]

[88] (1991) 173 CLR 349 at [15]

[89] Ibid at [17]

[90] Ibid at [19]

[91] Ibid at [20]

[92] Ibid at [21]

[104] In *National Retail Association (No 2),*[93] Tracey J considered the meaning of "discriminate against" in s.153 of the Act, in the context of a controversy whether an amendment to clause 13.4 of the *General Retail Industry Award 2010* contravened s.153 because it discriminated against school aged persons. Section 153 of the Act is in terms very similar to, but not the same as, s.195. Section 153(1) begins by providing that a "modern award must not include terms that discriminate against an employee because of, or for reasons including," and then proceeds to identify a number of attributes or characteristics commonly found in anti-discrimination legislation. Reading s.195(1) together with ss.186(4) and 194(a), in considering whether to approve an enterprise agreement, the Commission "must be satisfied that the agreement does not include any term(s) to the extent the term(s) discriminate(s) against an employee covered by the agreement because of, or for reasons including, the employee's" identified attribute or characteristic. The prohibition against approving an enterprise agreement that includes a term that is "a discriminatory term" is found in s.186(4) informed by s.194(a). Section 195(1) proceeds to describe that which is a "discriminatory term" by providing that a "term of an enterprise agreement is a discriminatory term to the extent it discriminates against an employee covered by the agreement because of, or for reasons including" and then proceeds to identify the same attributes or characteristics found in s.153(1), and indeed in s.351(1).

[105] The exceptions in ss.153(2) and (3) and 195(2) and (3) are in all material senses, the same.[94]

[106] Tracey J observed that the ordinary and natural meaning of the word "discriminate" connotes the making of distinctions. In the case of s.153, which prohibited discriminating against an employee, what was proscribed was the making of adverse distinctions between employees.[95] His Honour did not consider that the proscription extended to indirect discrimination. His Honour said of Federal and State anti-discrimination legislation, "[t]ypically, such legislation defines discrimination so that it covers both direct and indirect discrimination."[96] Relying on passages of the joint judgment of Dawson and Toohey JJ's decision in *Waters,*[97] his Honour said that the reason this was considered necessary was "because the proscription of discrimination, without more, is not apt to pick up "facially neutral" discrimination which is otherwise known as indirect discrimination."[98]

[107] His Honour found that no attempt had been made in the Act to provide an extended definition of the term "discrimination" so that it encompassed indirect discrimination, and that it was highly unlikely Parliament intended that s.153(1) could be contravened by indirect discrimination.[99] Further, the exceptions in ss.153(2) and (3) to the general rule contained in s.153(1) all covered terms that would meet the description of direct discrimination.[100] I will

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[93] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480

[94] Section 153(3) contains the word "minimum" before "wages" which is consistent with the safety net nature of Modern Awards

[95] [2012] FCA 480 at [52]-[53]

[96] Ibid at [54]

[97] (1991) 173 CLR 349 at 392-93

[98] [2012] FCA 480 at [54]

[99] Ibid at [56]

[100] Ibid at [57]

return shortly to the question of whether I should apply *National Retail Association (No 2)* to the construction of "discriminates" in s.195.

[108] The approach in *National Retail Association (No 2)* was not followed by Gordon J in *Klein.*[101] In *Klein,* Gordon J considered the meaning of "discriminates" in Item 1(d) of s.342(1) of the Act. That section relevantly provides that adverse action is taken by an employer against an employee if the employer "discriminates between the employee and other employees of the employer." In finding that "discriminates" extends to indirect discrimination, Gordon J observed that the text of Item 1(d) is to be construed in the context of the Act and in a manner consistent with the policy and purpose of the legislation, noting that the ordinary and natural meaning of the word "discriminates" connotes the making of distinctions.[102] Her Honour noted:

> "As is readily apparent, "indirect discrimination" is not… necessarily a separate "statutory concept". Indeed, as Mason CJ and Gaudron J made apparent at 358 [of *Waters*], where a statutory provision uses the ordinary and natural meaning of the word "discriminate" and expresses the obligation or restriction in general terms:
>
> > …[it] is apt to apply to both direct and indirect ("adverse effect") discrimination. Conduct which is "facially neutral" may nevertheless amount to, or result in, "less favourable" treatment."[103]

[109] As to the judgment in *National Retail Association (No 2),* Gordon J observed that the judgment dealt with a different section of the Act so did not bind her, but said even if it did, she would decline to follow it. Her Honour said of Tracey J's reliance on passages from the joint judgment of Dawson and Toohey JJ in *Waters:*

> "…A number of points need to be made. First, the analysis of Mason CJ and Gaudron J (with which Deane J agreed) … is to the opposite effect. The trial judge did not refer to this analysis. Second, such a view is contrary to the historical source of the concept of "indirect discrimination" and, third, as the trial judge himself recognised, the question is ultimately one of statutory construction. Dawson and Toohey JJ's analysis of whether conduct which was "facially neutral" would fall within one section or another was ultimately resolved by construction of the statute. With respect, I do not consider that the extracted passage is authority for the proposition advanced by the trial judge that 'the proscription of discrimination, without more, is not apt to pick up "facially neutral" discrimination which is otherwise known as indirect discrimination'."[104]

[110] Gordon J construed "discriminates" in s.342 to include both direct and indirect discrimination, taking the view that too narrow a construction of the provisions would be contrary to the objects of the Act and particularly Part 3-1.[105]

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[101] [2012] FCA 1402

[102] Ibid at [89]

[103] Ibid at [92]

[104] Ibid at [95]

[105] Ibid at [97]

[111] Both the MFB and the UFU have urged that I should apply *National Retail Association (No 2)* to the construction of s.195. They argued that ss.195 and 153 are in all material respects the same and that the criticisms found in *Klein* does not displace the force of *National Retail Association (No 2)* as *Klein* concerned the meaning of "discriminates between" in s.342 of the Act in the context of an application under Part 3–1 of the Act. Moreover, it is said that though there were differences as to the characterisation of some of the reasoning in *Waters*, Gordon J in *Klein* merely declined to adopt the observation of Tracey J, in reliance upon particular passages in *Waters* that the proscription of discrimination without more, is not apt to pick up indirect discrimination.

[112] It is also the case that Tracey J did not rely solely on the identified passages in *Waters* in coming to his view on the proper construction of s.153. As is evident from the passages extracted further below and as already noted earlier, his Honour took into account other considerations related to the purpose of the provision which informed his construction.[106]

[113] It is also said that I should follow *National Retail Association (No 2)* because it is on point and it is not plainly wrong.

[114] The facts in *National Retail Association (No 2)* were relevantly that Fair Work Australia (FWA) varied Clause 13.4 of the *General Retail Industry Award 2010* (GRI Award) which had previously fixed three hours as the minimum period for which casual employees could be engaged. The variation permitted employers to employ secondary school students on a casual basis for periods of less than three hours per day subject to certain conditions. The Shop, Distributive and Allied Employees Association (SDA) brought judicial review proceedings challenging FWA's decision to vary the Award.

[115] The SDA contended, *inter alia*, that Clause 13.4 as amended was a form of indirect discrimination on the basis of age, and therefore proscribed by s.153(1) of the Act. That section provides:

> **153 Terms that are discriminatory**
>
> *Discriminatory terms must not be included*
>
> (1) A modern award must not include terms that discriminate against an employee 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 opinion, national extraction or social origin.
>
> *Certain terms are not discriminatory*
>
> (2) A term of a modern award does not discriminate against an employee:
>
> (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

[106] [2012] FCA 480 particularly at [56]

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

(a) all junior employees, or a class of junior employees; or

(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

[116] The SDA accepted that Clause 13.4 did not in terms adopt age as a criterion for discrimination between persons whose employment was governed by the GRI Award, but contended that it did discriminate, as a practical matter, on that basis because secondary school students were overwhelmingly teenagers and they were the only group afforded the opportunity of working for less than three hours on weekdays.

[117] Tracey J rejected the SDA's contention and in doing so said:

"The Act does not define the word "discriminate" or the words "discriminate against". The ordinary and natural meaning of the word 'discriminate' connotes the making of distinctions: cf *HBF Health Funds Inc v Minister for Health and Ageing* (2006) 149 FCR 291 at 295. In the context of s 153(1) this involves the making of distinctions between employees whose employment is regulated by the Award.

It is next to be noted that not all discrimination is proscribed. What is proscribed is discrimination *against* an employee. That means the making of an *adverse* distinction between employees: cf *Helal v McConnell Dowell Constructors (Aust) Pty Ltd* (2010) 193 FCR 213 at [24] (per Ryan J). The adverse distinction must be drawn for one of the reasons, including age, which appear in the sub-section.

As can be seen, the proscribed reasons for adverse discrimination are those which are commonly dealt with in Federal and State anti-discrimination legislation. Typically, such legislation defines discrimination so that it covers both direct and indirect discrimination: see for example the *Disability Discrimination Act 1992* (Cth) ss 4, 5 and 6; *Sex Discrimination Act 1984* (Cth) ss 5, 6, 7 and 7B; *Equal Opportunity Act 2010* (Vic) ss 8 and 9. The reason that this was considered necessary is, as Dawson and Toohey JJ pointed out in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392-3, because the proscription of discrimination, without more, is not apt to pick up "facially neutral" discrimination which is otherwise known as indirect

> discrimination. Indirect discrimination, as defined in anti-discrimination legislation requires the imposition of a requirement or condition which does not, in terms, distinguish between people on prohibited grounds but which, in practice, adversely impacts on such people. It must be established that the requirement or condition is one with which a substantially higher proportion of persons who are not aggrieved by its operation are able to comply, that the requirement or condition is not reasonable and that the aggrieved person is not able to comply with it.
>
> No attempt has been made in the Act to provide an extended definition of the term "discrimination".
>
> It would be highly unlikely that the Parliament intended that s 153(1) could be contravened by indirect discrimination. Awards typically contain many provisions that discriminate between employees. Wage rates, for example, are usually fixed by reference to criteria such as length of service and qualifications held. It is unlikely that Parliament intended that such provisions could be impugned on the ground that they indirectly discriminated on the grounds of age because younger employees as a group would not have had the length of service, or the time to obtain the requisite qualifications, in order to qualify for placement in the higher classifications which attract higher wages.
>
> It is also to be observed that the exceptions to the general rule contained in s 153(1), which are to be found in sub-sections (2) and (3), all cover terms which would meet the description of direct discrimination. A modern award may, for example, discriminate on the ground of age by expressly providing for minimum wages for young employees of a certain age or on the ground of disability when fixing wage rates for such employees: see s 153(3).
>
> In this context it may be observed that Clause 13.4, in its unamended form, would also be susceptible to challenge under s 153(1) if the sub-section covered indirect discrimination. This is because it could be said to discriminate against any secondary school student who wanted to work after school but was not available for three hours or more or where the prospective employer closed for business less than three hours after the student was able to commence work on school days."[107]

[118] In considering whether to apply *National Retail Association (No 2)*, it is to be observed that the Commission is an administrative tribunal and does not exercise the judicial power of the Commonwealth under s.71 of the Constitution.[108] It lacks the power to make determinative findings of law, and its decisions are subject to scrutiny through judicial review by relevantly, the Federal Court of Australia. The decision-making powers of the Commission are drawn from, and cannot exceed, those contained in the Act. In performing its functions and powers, the Commission may interpret law, and in particular, provisions of the Act incidentally and as necessary in the course of a proceeding, but these interpretations are not a binding exposition as to the meaning of a particular provision nor are its interpretations binding on the parties as a declaration of rights and obligations.[109] An interpretive decision of

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[107] Ibid at [52]-[58]

[108] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254

[109] *Re Cram; Ex parte The Newcastle Wallsend Coal Company Pty Ltd* (1987) 163 CLR 140 at 149

the Federal Court on the meaning of a particular provision of the Act which has a bearing on a proceeding or on the exercise of a particular function or power cannot simply be ignored.

[119] Ultimately, I agree with the contentions of the MFB and the UFU that I should follow and apply *National Retail Association (No 2)* with the consequence that "discriminates" in ss.195 and 153 of the Act has the same meaning, which does not include indirect discrimination. I do so for the reasons already identified above and for the reasons which follow.

[120] Absent the judgment in *National Retail Association (No 2)*, for the reasons I shortly will discuss, I would come to a different view as to the meaning of "discriminates" in s.195 than Tracey J did in respect of that word in s.153. I am also mindful of the comments about judicial comity of the Full Court in *Saeed v Minister for Immigration and Citizenship*[110] which were as follows:

> "Contestable questions of statutory construction raise issues of particular difficulty. The course of events in relation to the provisions here under consideration is a sufficient illustration of the fact that firmly held views for both sides of an argument about a point of statutory construction may exist. French J, in *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1263; (2003) 133 FCR 190 (*Nezovic*) said (at [52]):
>
> > [52] ... Judicial comity does not merely advance mutual politeness between judges of the same or co-ordinate jurisdictions. It supports the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges. Where questions of law and in particular statutory construction are concerned, the view that a judge who has taken one view of the law or a statute is "clearly wrong" is not likely to be adopted having regard to the choices that so often confront the courts particularly in the area of statutory construction ... (Emphasis added.)
>
> In similar vein Weinberg J (with whom Allsop J agreed on this point) said in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2; (2006) 150 FCR 214 (*SZEEU*) at [148]-[149]:
>
> > [148] The word "plainly" does more than simply add emphasis. It suggests that the error must be manifest or, if it does not rise to that level, at least capable of being easily demonstrated. In a sense, *the error must be so clear as to enable a later court to say that the point is not reasonably arguable*.
> >
> > [149] An example of plain error would be that discussed in *Bristol Aeroplane*, namely that the earlier judgment was given "per incuriam". However, an earlier decision may be "plainly wrong", within the meaning of that expression, for other reasons as well. It goes without saying that such a finding will not be lightly made. As Allsop J correctly observes, *there is a need to be "convinced*

[110] [2009] FCAFC 41; (2009) 176 FCR 53

> *or persuaded" of the earlier Full Court's error, and that can not be achieved in a case in which minds might reasonably differ as to the proper construction of a particular statutory provision*. (Emphasis added.)

In the same case Moore J (with whom Allsop J agreed also) said at [8]:

> [8] However formulated, the duty of any later Full Court to follow an earlier Full Court is founded on public policy considerations and, in particular, the need for consistency in the application of federal laws in this Court, subject always to correction of any error by the High Court or the amendment of the law by Parliament.

There is generally little scope, at the same level in a court's hierarchy (at least this Court's hierarchy), for the adoption of personal views about an issue of statutory construction at the expense of considerations of comity..."[111]

[121] There is even greater need to conform with this approach so far as an administrative tribunal is concerned. As an administrative tribunal the consideration is not one of judicial comity but rather whether I am bound to apply a judgment of the Federal Court. I consider that I am bound to apply *National Retail Association (No 2)* as it is on point, not plainly wrong, and has not been overruled. Although the judgment in *National Retail Association (No 2)* was concerned with a different provision of the Act, both provisions are concerned with the non-permissible discriminatory content in industrial instruments. In *Klein*, Gordon J did not conclude that *National Retail Association (No 2)* in its construction of s.153 of the Act was plainly wrong. Indeed, her Honour distinguished it as not binding her Honour in the construction of s.342. No one suggested that the provisions of ss.153 and 195 are materially different either in terms or in context so as to allow me to distinguish *National Retail Association (No 2)*. Moreover, *National Retail Association (No 2)* has not been overruled.

[122] There can be little doubt that so far as the Commission is concerned, *National Retail Association (No 2)* in its interpretation of s.153 is currently a binding statement of the law as to the meaning of "discriminates" in that section. It follows that terms may be included in Modern Awards which indirectly discriminate. Whether such terms should be included will be determined by other considerations including the Modern Award's objective.[112] It is to be noted that ss.195 and 153 are related, not only because they concern the content of industrial instruments made or approved by the Commission, or because they are expressed in substantially the same language. The provisions are also related because they are capable of interacting in a very practical way. If different interpretations were to be adopted of the word "discriminates", this may lead to an absurd result. A simple example will suffice.

[123] Consider that an enterprise agreement covering a retail employer is made. Consider also that that agreement incorporates the terms of the GRI Award including clause 13.4. Assuming for the purpose of the example that clause 13.4 indirectly discriminates and is a discriminatory term (broadly construed) within the meaning of s.195. The agreement could not be approved, at least not without an undertaking. This would be so despite the term on the authority of *National Retail Association (No 2)* having been properly included in the GRI

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[111] Ibid at [38]-[41]

[112] See *Fair Work Act 2009* (Cth) s.134

Award because it is not a discriminatory term within the meaning of s.153 of the Act. The term would also be relevant in the assessment whether the agreement passed the BOOT, but it could not be a term of the agreement.

[124] As I have already noted, no one has suggested, and on my review, I cannot identify any term of the Agreement that directly discriminates against an employee covered by the Agreement because of, or for reasons that include, one or more of the characteristics or attributes identified in s.195 of the Act. I am therefore satisfied that the Agreement does not include a discriminatory term.

[125] As I have foreshadowed, were I free to conclude otherwise, I would do so. Since the issues were fully ventilated before me, I will express my view as to the meaning of "discriminates" in s.195 of the Act and the consequences of that construction upon the impugned terms.

[126] Applying the statutory construction principles earlier discussed, the construction of s.195 as including indirect discrimination is to be preferred. My reasons for that view follow below.

[127] The starting point is to consider the word "discriminates" in the context of the actual provision.

[128] A person or thing "discriminates" if the person or thing makes a distinction or differentiates. In the context of s.195, the thing is a term of an enterprise agreement, and the making of a distinction between employees covered by the Agreement. Section 195 is not concerned with all distinctions, just those because of, or for reasons including, the protected employees attribute. "Discriminates" is followed by "against", which as Tracey J observes in *National Retail Association (No 2),* involves making an adverse distinction between employees.[113] An adverse distinction may occur directly or indirectly where employees are treated equally but the equal treatment results in less favourable treatment of one or more employees with a particular characteristic or attribute.

[129] The authorities discussed above provide guidance on the ordinary meaning of "discriminates" or "discriminates against". On balance, I consider these to favour a reading of "discriminates" that includes both direct and indirect discrimination. It is noted that treatment of s.195 by single Members of the Commission, while varied, has also been weighted towards such an interpretation of s.195.[114]

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[113] [2012] FCA 480 at [53]

[114] In *Qantas Airways Limited* [2013] FWCA 8454, Commissioner Johns said at [7]: "The Commission accepts that indirect discrimination falls within the scope of sections 194 and 195 of the FW Act". In *Application by Commissioner for Public Employment* [2010] FWAA 9372, Vice President Lawler assumed without deciding, that a reference in s.195 to "discriminates" extends to indirect discrimination. In *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693, the Vice President said at [14]: "I am inclined to the view that the notion of discrimination in s.195 extends to indirect discrimination because that construction would seem to be a construction that better furthers the objects of the FW Act"; Decision of Bissett C in *University of Melbourne Enterprise Agreement 2013* [2014] FWCA 1133 at [51]-[54]

[130] As Gaudron J noted in *Street,* the framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination.[115] With the exception of the Northern Territory, not only has the concept of discrimination encompassing both direct and indirect discrimination been adopted by Federal, State and Territory anti-discrimination statutes, but so has the protected attribute which is identified in s.195.[116] As Gaudron J also explained in *Street*, this has led to an understanding that discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact as well as by acts or decisions based on discriminatory considerations. The full context in which Gaudron J expressed these views has earlier been reproduced in this decision.

[131] As with s.17(1) of the EO Act considered in *Waters*,[117] s.195(1) is also, in my opinion, expressed in general terms, and so the use of the word discriminates seems also apt to apply to both direct and indirect or adverse effects discrimination.

[132] In *Klein*, Gordon J adopted similar reasoning in rejecting the notion that the proscription of discrimination, without more, is not apt to pick up facially neutral discrimination which is otherwise known as indirect discrimination.[118] Her Honour had also earlier noted that indirect discrimination is not necessarily a separate statutory concept and that where a statutory provision uses the ordinary and natural meaning of the word "discriminates" and expresses an obligation or restriction in general terms that it is apt to apply to both direct and indirect discrimination.[119] Gordon J noted, however, that the meaning of "discriminates" is ultimately a question of proper statutory construction.[120]

[133] The ordinary of meaning of "discriminates" used in s.195(1) expressed in general terms would appear to include a term of an enterprise agreement that indirectly discriminates against an employee covered by the agreement because of, or for reasons including, a particular characteristic or attribute of the employee.

[134] Turning to the remainder of s.195, subsection 195(2) sets out that a term of an enterprise agreement does not discriminate against an employee:

> "(a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or

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[115] [1989] 168 CLR 461 at 571

[116] *Australian Human Rights Commission Act 1986* s.3; *Age Discrimination Act 2004* ss.14, 15; *Disability Discrimination Act 1992* ss.5, 6; *Racial Discrimination Act 1975* s.9; *Sex Discrimination Act 1984* ss.5, 5A, 5B, 5C, 6, 7, 7AA, 7A, 7B; *Equal Opportunity Act 2010* (Vic) ss.8, 9; *Anti-Discrimination Act 1977* (NSW) s.24(1)(a) and (b); *Anti-Discrimination Act 1991* (Qld) ss.10 and 11; *Discrimination Act 1991* (ACT) ss.8(1) to (5); *Equal Opportunity Act 1984* (SA) s.29(2)(a) and (b), 29(2a)(a) and (b), 29(3)(a) and (b), 29(4)(a) and (b); *Equal Opportunity Act 1984* (WA) ss.8(1) and (2), 9(1) and (2), 10(1) and (2), 10A(1) and (2); *Anti-Discrimination Act 1998* (Tas) ss.14 and 15; cf. *Anti-Discrimination Act 1996* (NT) s.20.

[117] (1991) 173 CLR 349 at 358

[118] (2012) 208 FCR 178 at 204; [95]

[119] Ibid at 203; [92]

[120] Ibid at 204; [96]

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed."

[135] Both the "exceptions" are in my view capable of application to a term that indirectly discriminates against an employee covered by an agreement. For example, the first exception is concerned with the reason for the discrimination. A term of an enterprise agreement which imposes a facially neutral condition for classification at a particular level within a classification structure but which has an adverse effect, for example on employees with a disability, may be justified on the basis that the reason for the condition is the inherent requirement of the particular position concerned.

[136] Subsection 195(3) provides:

"A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

(a) all junior employees, or a class of junior employees; or

(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply."

[137] Although paragraphs (a) and (b) appear to be concerned only with direct discrimination for the reason, or for reasons that include, an employee's age or disability, paragraph (c) is capable of application to both direct and indirect discrimination. That an employee is undergoing training pursuant to a training arrangement is itself not a protected attribute under s.195(1). Differential wage rates applicable to an employee covered by an agreement to whom a training arrangement applies may suffer adverse effects discrimination by reason of, for example, age. But such a term would not be a discriminatory term by reason of s.195(3)(c).

[138] There is therefore nothing in s.195 when read as a whole, and in particular the exceptions to which I have just referred, which would suggest that a construction which includes indirect discrimination in the meaning of "discriminates" should not be adopted.

[139] Next it is necessary to consider the broader statutory context in which s.195 operates including the objects of the Act.

[140] As already noted, s.186(4) contains, in effect, a prohibition of the inclusion of unlawful terms. Section 194(a) provides that a discriminatory term is an unlawful term and s.195 sets out, in effect, the meaning of discriminatory term.

[141] Section 194(b) provides that a term of an enterprise agreement is an unlawful term if it is an objectionable term and s.12 defines "objectionable term".

[142] The object of the Act is contained in s.3 and "...is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians..."

[143] The means by which this object is to be achieved is set out in the various paragraphs enumerated in s.3 of the Act, and relevantly those found in ss.3(d) and (e) which provide:

> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; …

[144] A reading of s.195(1) as encompassing terms that indirectly discriminate against an employee covered by an enterprise agreement is consistent with ss.3(d) and (e), although it is readily apparent that provisions elsewhere in the Act are also intended to give effect to these paragraphs. The objects of Part 2-4 in which s.195 is found are set out in s.171 as follows:

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[145] The process for bargaining and making an enterprise agreement, and the approval and content requirements are set out variously in Divisions 2 to 6 of Part 2-4 of the Act.

[146] The object of enabling the Commission to "facilitate...the making of enterprise agreements...through ensuring that applications to the [Commission] for approval of enterprise agreements are dealt with without delay" might be said to favour the more limited reading advanced by the UFU and the MFB. This is because the approval scheme might be

said to be pragmatic in the sense that the approval process is not (and is not intended to be) a panacea for all non-compliant agreement content. Rather, the approval process is a 'point in time' assessment aimed at curing many (but not all) defects. Other provisions of the Act operate to address non-compliant content where the approval process is ill-suited to do so. Having regard to those other provisions,[121] s.195 need not do all of the 'heavy lifting' in addressing indirectly discriminatory terms.

[147] But the need for the approval of agreements without delay does not mean approval without scrutiny. There are many approval requirements in ss.186 and 187, which may in any given case, be complex and require some heavy lifting. For example, questions about whether the group of employees covered by the agreement has been fairly chosen; or whether the agreement has been genuinely agreed to by the employees covered by the agreement; or whether the agreement passes the BOOT, are each not without complexity. Indeed, satisfaction that the agreement does not contain unlawful terms is not merely confined to a consideration of whether the agreement contains one or more discriminatory terms. As s.194 discloses, there is an array of terms which are described as unlawful terms and the absence of such terms is a matter about which the Commission must be satisfied. Moreover, a consideration whether a term of an agreement is an objectionable term, and therefore an unlawful term, may itself involve consideration, for example, of whether a term requires or has the effect of requiring an employer to take adverse action by directly or indirectly discriminating between employees in circumstances that would contravene s.351.

[148] The nature of the assessment that is to be made by the Commission in exercising agreement approval powers is also relevant. Section 195 of the Act falls for consideration in amongst Part 2-4 as a whole, and as already noted, the Commission's task is principally set out in ss.186 and 187. The nature of that task is a factor which may distinguish s.195 from that confronting a Court in an application under Part 3-1 of the Act or under anti-discrimination legislation. This may suggest a different approach to the construction of the word "discriminates". The Commission is required to approve an enterprise agreement where the agreement meets the requirements in ss.186-187. Where the Commission has a concern that the agreement does not meet those requirements, it may approve the agreement subject to undertakings which meet the concern.

[149] A state of satisfaction as to the non-existence of a discriminatory term in an enterprise agreement must be arrived at on a proper basis. In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd and Others,*[122] Latham CJ observed:

> "…where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist."[123]

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[121] For example s.218, s. 253 and Part 3-1 of the Act

[122] (1944) 69 CLR 407

[123] Ibid at 430-432

[150] An assessment whether the requirement in s.186(4) is met is conducted before the agreement is in operation. Such an assessment can readily be made with respect of a term that directly discriminates against an employee covered by the agreement because the differential treatment that such a term imposes will emerge on the face of the terms itself. The assessment of whether a term indirectly discriminates is not as straightforward in every case. The question of whether a term is indirectly discriminatory involves an inquiry into the effect or impact of the term on a particular identified employee or group of employees. That inquiry necessarily gives consideration to the manner in which the term will operate in context and practice. It may be that such an inquiry sits awkwardly with ss.186(4), 194(a) and 195, given the time at which those provisions are considered by the Commission. Though this has some force, it is to be remembered that, the impact of conduct that may be indirectly discriminatory in contravention of Part 3-1 of the Act that is required or permitted by a term of an agreement, must also be assessed at that time. Indeed, although the considerations as to that which is an objectionable term and that which is a discriminatory term differ, it is possible that a term of an agreement may at the same time be a discriminatory term and an objectionable term.

[151] It is also to be observed that in some cases, that a term indirectly discriminates will be obvious from the term itself.

[152] Ultimately, the time at which the assessment is undertaken by the Commission impacts upon the state of satisfaction. But that in my view is not reason enough for a narrow construction of the word discriminates in s.195 to be adopted.

[153] Section 218 of the Act also provides context. It permits the variation of an enterprise agreement on referral by the Australian Human Rights Commission (AHRC). Section 218(1) requires the Commission to review any enterprise agreement referred to it under s.46PW of the *Australian Human Rights Commission Act 1986.* That provision deals with discriminatory industrial instruments and operates upon AHRC receiving a written complaint alleging that a person has done a discriminatory action under an industrial instrument.

[154] By s.218(3) of the Act, if the Commission considers that the agreement reviewed requires a person to do an act that would be unlawful under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992* or the *Sex Discrimination Act 1984*, the Commission must vary the agreement so that it no longer requires the person to do an act that would be so unlawful. Both direct and indirect discrimination is unlawful under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984.*[124] It follows that on referral, if a term of an enterprise agreement requires a person to do an act which would (but for the doing of the act in direct compliance with the agreement exception)[125] be indirectly discriminatory and unlawful under one of the aforementioned statutes, the agreement must be varied on review so that the agreement no longer requires the person to do that act.

[155] As the MFB has correctly pointed out, a review under s.218 of the Act is concerned with the actual (rather than conjectural) effect of the impugned term of the relevant agreement that is already operational. Those inquiries may sensibly encompass indirectly discriminatory

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[124] *Age Discrimination Act 2004* ss.14, 15; *Disability Discrimination Act* 1992 ss.5, 6; *Sex Discrimination Act 1984* ss.5, 5A, 5B, 5C, 6, 7, 7AA, 7A, 7B

[125] See for example *Sex Discrimination Act 1984* s.40(1)(g)

terms. The MFB also contended that ss.186(4) and 218 can thus be seen as complementary. Section 186(4) operates to filter out directly discriminatory terms. Insofar as those terms are also capable of lawful operation, s.190 allows employers to provide undertakings to clarify (and limit) the nature of their operation. Section 218 operates once an agreement commences applying to employees. It deals with concrete factual scenarios in which indirectly discriminatory effect can be examined. Upon relevant application, where a term has such an effect, the agreement will be varied to remove that effect.

[156] So much is uncontroversial but it is only half the picture. As I have already noted, s.218 is concerned with an agreement that "requires a person to do an act that would be unlawful" under the identified Commonwealth anti-discrimination statutes. Section 195 is concerned with the terms of an agreement which are themselves discriminatory. The question whether terms of an agreement "require" a person to do an act that would be unlawful, is in essence the same enquiry as one would make in relation to an objectionable term *vis-à-vis* for example ss.342 and 351. Moreover, many terms of enterprise agreements that require the doing of an act that is unlawful under an identified anti-discrimination statute would likely be of no effect because they would be objectionable terms,[126] for example, if the term required an employer to discriminate between employees for a proscribed reason. The mere presence of s.218 does not obviate the need for the Commission to be satisfied that an agreement, the subject of an approval application, does not contain any objectionable term. Similarly, it does not provide contextual support for reading down s.195(1) as operating upon terms that only directly discriminate.

[157] It is also to be remembered that a provision in an agreement which required, for example, an employer to do an act that would be unlawful under one of the identified anti-discrimination statutes, would not at the approval stage be binding on the employer since the agreement did not apply to the employer but only covered the employer.[127] There could not at that stage be any requirement to do the act. It therefore makes sense in the scheme of the Act, which has an object "enabling fairness…at work" and "the prevention of discrimination"[128] for the Commission to raise concerns about whether such a term is a discriminatory or objectionable term before the agreement is approved, commences operation and the term is thus binding. Section 218, like s.253(1)(b), does not operate to read down the meaning of discriminates in s.195(1), rather it operates upon terms of an agreement that were not identified by the Commission in the process of approving it.

[158] The general protections provisions in Part 3-1 of the Act and the objects found in s.336(1) also provide relevant context. The objects include "to provide protection from workplace discrimination", and "to provide effective relief for persons who have been discriminated against".

[159] Section 342(1) of the Act sets out the circumstances in which a person takes adverse action against another person. The taking of adverse action for various reasons (or for reasons which include those reasons) is proscribed by, *inter alia*, ss.340, 346 and 351. Adverse action by an employer against an employee will be taken if, for example, the employer discriminates

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[126] *Fair Work Act 2009* (Cth) s.253(1)

[127] See ss.51 and 52

[128] Ibid at s.3(e)

between the employees and other employees of the employer.[129] Adverse action in the form of "discriminates against" is also identified as against prospective employees and independent contractors.[130] The meaning of "discriminates" in s.342(1) (Item 1(d)) was, as already noted, held in *Klein* to include both direct and indirect discrimination.

[160] Section 351(1) of the Act proscribes the taking of adverse action by an employer against an employee or prospective employee "because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin." The proscription does not apply to action that is:

> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed taken:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.[131]

[161] Paragraphs (b) and (c) above are in essence the same exceptions as are to be found in ss.195(2)(a) and (b) of the Act, save for differences that are necessary because s.195 is concerned with the terms of an enterprise agreement and s.351 is concerned with action taken by an employer.

[162] The absence of an exception in s.195 of the Act which corresponds with s.351(2)(a) is also explained for the same reason. Section 195 is not concerned with conduct or action by an employer that discriminates but with a term of an enterprise agreement that discriminates. The range of anti-discrimination laws in respect of which s.351(2)(a) is directed are concerned with proscribing conduct. Moreover, conduct taken in direct compliance with a term of an enterprise agreement that is an unlawful term is not exempt under a number of anti-discrimination laws identified in s.351(2)(a).[132] A corresponding provision in s.195 would add little.

[163] Contextually then, the Commission is required by s.186(4) to be satisfied an enterprise agreement does not contain an objectionable term. Assessing whether a term relevantly requires or permits a contravention of, for example, s.351, will involve considering whether

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[129] Ibid at s.342(1) - Item 1(d)

[130] Ibid at s.342(1) – Items 2(b) and 4(b)

[131] Ibid at s.351(2)

[132] See for example note to s.40(1) of the *Sex Discrimination Act 1984*; note to s.47(1) of the *Disability Discrimination Act 1992*; note to s.39(8) of the *Age Discrimination Act 2004*

the term requires or permits adverse action to be taken against an employee in the form of direct or indirect discrimination between an employee and other employees covered by the agreement. Consistent with the objects of the Act, there seems to me to be no good reason why, so far as discriminatory terms are concerned, the assessment required by s.186(4) as concerns a discriminatory term would be limited to those terms which directly discriminate but the assessment of an objectionable term would examine both. Considered in this way, ascribing the same broad meaning to "discriminates" in s.195 and s.342(1) – Item 1(b) and thus requiring under s.186(4) satisfaction that an enterprise agreement does not include terms that directly or indirectly discriminates or require or permit such discrimination for proscribed reasons, is consistent with the objects of the Act.

[164] Sections 26, 27 and 29 of the Act also provide some context. They deal with the interaction of the Act with particular State and Territory laws and with the interaction of, relevantly, enterprise agreements with particular State and Territory laws. Section 26 provides that it "is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer." This intention however is expressly excluded in respect of laws enumerated in s.27.

[165] Section 27(1A) of the Act provides that s.26 does not apply to any of the identified State and Territory anti-discrimination statutes. Section 29(1) provides that "a modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency." Section 29(2) provides that:

> (2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:
>
> (a) any law covered by subsection 27(1A);
>
> (b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).

[166] The terms of an enterprise agreement therefore apply subject to any applicable State or Territory anti-discrimination law.

[167] The operation of s.29(2) is discussed in the Explanatory Memorandum to the *Fair Work Bill 2008* and provides:

> "However, subclause 29(2) provides that a modern award or enterprise agreement is subject to any of the State or Territory laws that are saved by clause 27, as well as any State or Territory laws prescribed by the regulations. This means that a modern award or enterprise agreement cannot diminish, but may supplement, rights and obligations under these laws."[133]

[133] Explanatory Memorandum to the *Fair Work Bill 2008* at [149]

[168] In *Re Master Builders Australia,*[134] a Full Bench of the Commission considered the operation of s.29(2) and said as follows:

> "While s 29(1) of the Act provides that, as a general rule, modern awards prevail over State and Territory laws to the extent of any inconsistency, s 29(2) provides an exception in relation to a term of an enterprise agreement which is inconsistent with, relevantly, a law of a State or Territory covered by s 27(1)(c). Section 27(1)(c), as we have already noted, refers to non-excluded matters, one of which is OHS.
>
> The effect of these provisions is that in the event of inconsistency between a term of a modern award dealing with OHS and State and Territory OHS legislation the latter prevails. To the extent that a provision in a modern award purports to reduce an entitlement under the relevant State and Territory legislation, the provision is of no legal effect. As the Government noted, this is consistent with para 149 of the Explanatory Memorandum..."[135]

[169] The MFB contends the practical effect of these provisions is that the operation of State and Territory anti-discrimination legislation is left undisturbed. As a term of an enterprise agreement that has an indirectly discriminatory effect would contravene State and Territory laws, such a term is of no effect to the extent of that operation. The MFB contends that there is nothing remarkable about the Act leaving the regulation of indirectly discriminatory matters to State and Territory equal opportunity legislation. This is true, but the same may be said about terms of an agreement that directly discriminate, yet on the MFB's analysis, the Parliament elected to leave the regulation of indirectly discriminatory matters to State and Territory anti-discrimination legislation but not terms that directly discriminate and those are to be weeded out, initially at least pursuant to ss.186(4), 194(a) and 195. It did this apparently but without expressly saying so. I would not accept this construction.

[170] Section 29(2) operates on terms of an agreement that, relevantly, discriminate. If a term of an agreement diminishes, by direct or indirect discrimination against an employee covered by the agreement, a protection afforded by an applicable State or Territory anti-discrimination law, the term operates subject to that law. These provisions therefore say little about whether s.195 should be confined to direct discrimination. If anything they, together with the various other provisions in the Act to which reference has already been made, suggest the Parliament intended a comprehensive approach to the prevention and elimination of discrimination in the workplace. A narrow reading of s.195 would seem to me to be inconsistent with that approach.

[171] I turn then to s.153 of the Act. As already noted, that section has been construed as being confined to terms that directly discriminate. It is in substantially the same terms as s.195, though s.195(1) is prefaced with the words "to the extent", whereas s.153(1) is not. I do not consider this to be a significant difference. If free to do so, I would come to a different conclusion to that of Tracey J in *National Retail Association (No 2)* for the following reasons. First, I agree with the difficulties in the reasoning of Tracey J identified by Gordon J in *Klein,* which are, in my respectful opinion, compelling. Secondly, for the reasons earlier given, I do not share the view expressed by Tracey J that the exceptions in ss.153(2) and (3) "all cover

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[134] [2012] FWAFB 10080

[135] Ibid at [53]–[54]

terms which would meet the description of direct discrimination."[136] Plainly, ss.153(2)(a) and (b) and 153(3)(c) are capable of being invoked in respect of an indirectly discriminatory term. Thirdly, I would depart from his Honour's view that it would be highly unlikely that Parliament intended s.153(1) could be contravened by indirect discrimination as awards typically contain many provisions that discriminate between employees, and in particular, that wages are often fixed by reference to criteria such as length of service and qualifications. His Honour reasoned that it is unlikely that Parliament intended such provisions could be impugned because they indirectly discriminate on the ground of age as an example.[137] Respectfully, this analysis pays insufficient attention to the fact that the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference.[138] To paraphrase Brennan J in *Street*, where a reason for different treatment has a rational connection with an objective unrelated to a prohibited ground, the different treatment will not be discriminatory.[139] Fourthly, the weight of authority, and particularly High Court authority, lies with the interpretation of "discriminates" favoured by Gordon J. I would also regard this as apposite to the meaning of "discriminates" in s.153.

[172] In my respectful opinion, reading the word "discriminates" in the context of s.195 and the Act as a whole leads to a conclusion that "discriminates" in s.195 includes indirect discrimination. Preferring such an interpretation is consistent with a purposive approach to the construction of statutory provisions having regard to the objects of the Act earlier noted.

[173] Reference was also made during the course of proceedings to relevant legislative history. I do not consider it necessary to refer to that history in this decision. Were it necessary for me to do so, I would be inclined to adopt the submissions and analysis of the VEOHRC of that legislative history.[140]

[174] It should also be evident from the analysis above, that I consider both persuasive and applicable the notion discussed by both Gaudron and Brennan JJ in *Street* which is to the effect that the legal concept of discrimination does not extend to different treatment that is appropriate to a relevant difference. It follows that I would reject so much of the VEOHRC's submission as invited me to adopt a construction of the word "discriminates" unencumbered by any filter of reasonableness.

4.1.3 Are the impugned terms discriminatory terms?

[175] It is strictly unnecessary, given my earlier conclusion, to consider whether any of the impugned terms is a discriminatory term in the sense that a term indirectly discriminates for impermissible reasons against an employee covered by the Agreement. Nevertheless, as the matters were fully ventilated, I will express my view.

[176] As the description of that which is a discriminatory term in s.195(1) suggests, it is the term that must discriminate against an employee because of, or for reasons including, one or

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[136] [2012] FCA 480; (2012) 205 FCR 227 at [57]

[137] Ibid at [56]

[138] See *Street* at 529, Gaudron J

[139] Ibid at 510

[140] Outline of submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at section B and Schedule thereto

more of the enumerated characteristics or attributes. It is not enough, in my view, that the term be capable of indirectly discriminating for one or more reasons proscribed. A term must actually do so. Put another way, the term must produce the proscribed discriminatory outcome *vis-à-vis* an employee covered by the Agreement. A term may have both a proscribed and a lawful operation. It is only to the extent a term has a proscribed operation that it will be a discriminatory term.

[177] This seems clear from the text of s.195 and from other related provisions of the Act. Section 195 provides that a term is a discriminatory term "to the extent that" it discriminates against an employee. Section 56 renders a term of no effect "to the extent that" it contravenes s.55. Section 253 renders a term of no effect "to the extent that" it is not a term about a permitted matter, it is an unlawful term, or is a designated outworker term. Section 356 renders a term of no effect "to the extent that" it is an objectionable term. These provisions each contemplate that a term may operate in both a permissible and impermissible way. Provisions of an agreement which can operate in a permissible way without impermissibly discriminating continue to operate. Determining whether a term of an enterprise agreement is one caught by s.195 is a matter of construction of the term.

[178] Much like the approach to construing a statute, the construction of an enterprise agreement or a term of an agreement begins with a consideration of the ordinary grammatical meaning of the words used, having regard to the context and evident purpose of the provision or expression being construed. Context may be found in the provisions of the instrument taken as a whole, or in their arrangement and place in the instrument being considered. The statutory framework under which the instrument is made may also provide context, as might an antecedent instrument or instruments from which particular provisions might have been derived.[141]

[179] The Agreement also contains a number of terms which may be described as aspirational. It is relevant therefore to consider how such provisions ought be construed. In *National Tertiary Education Union v La Trobe University* (*La Trobe*),[142] both Bromberg and White JJ considered the effect of particular aspirational terms contained in the *La Trobe University Collective Agreement 2014*. An issue in *La Trobe* was whether the following term imposed any binding obligation on La Trobe University in the context of a proposed restructure that would result in 280 redundancies:

> "The University is committed to job security. Where possible redundancies are to be avoided and compulsory retrenchment used as a last resort. The University reserves the right to use the agreed redundancy procedures and provisions set out in this Agreement when all reasonable attempts to mitigate against such action and to avoid job loss have been unsuccessful."[143]

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[141] See for example *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at 438 and *Amcor Limited v CFMEU* (2005) 222 CLR 241 at 253 per Gummow, Hayne and Heydon JJ

[142] [2015] FCAFC 142

[143] Ibid at [5]

[180] Bromberg J concluded that the first sentence of the clause did not impose any binding obligation upon the University, but served to introduce and frame the remainder of the clause by identifying the underlying goal or objective.[144] His Honour said that the second sentence identified the method by which this goal would be achieved,[145] while the third sentence reflects that there are limitations on the rights referred to in the third sentence.[146]

[181] White J observed that parties may include terms in an agreement which may not be intended to be enforceable but which nonetheless provide context to terms which are enforceable. His Honour said:

> "…It is the very nature of these [enterprise] agreements that they are intended to establish binding obligations. The manner of making such agreements is subject to detailed prescription and their operation is contingent upon approval of the Fair Work Commission, the obtaining of which is itself a matter of detailed prescription. In my opinion, it is natural to suppose that parties engaging in this detailed process intend that the result should be a binding and enforceable agreement…
>
> That does not mean that parties to an enterprise agreement may not include in their agreement some matters which are in the nature of statements of aspiration or commitment and not themselves intended to be enforceable obligations or entitlements. Clearly they may: *Reeves v MaxiTRANS Australia Pty Ltd* [2009] FCA 970; (2009) 199 IR 297 at [19]-[22]. The 2014 Agreement itself provides an example as the parties were agreed that the first sentence in cl 74 is aspirational in nature. But it remains the fact that the 2014 Agreement was plainly intended, at least generally, to create binding obligations and cl 74 is to be construed in that context."[147]

4.1.3.1 Characteristics of part-time employees

[182] Before considering whether the impugned terms of the Agreement indirectly discriminate against employees covered by the Agreement who are women or who have family or carer's responsibilities because of, or for reasons that include those characteristics or attributes, it is necessary to make some general observations about the impact of limiting access to flexible working arrangements upon employees with these attributes.

[183] Some relevant observations were made in the *Family Leave Provisions Case 2003-2005*,[148] the *4 Yearly Review of the Firefighting Industry Award*[149] and in *Howe v Qantas Airways Limited,*[150] which I adopt. I consider that it can now confidently be stated that a complete absence of, or limited access to flexible working arrangements in a workplace will have a disproportionately negative impact upon at least employees who are women, parents of young and early school age children and those with family or carer's responsibilities.

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[144] Ibid at [66]

[145] Ibid at [67]

[146] Ibid at [68]

[147] Ibid at [108]-[109]

[148] PR082005 dated 8 August 2005

[149] [2016] FWCFB 8025

[150] (2004) 188 FLR 1

[184] In the *Family Leave Provisions Case 2003-2005*, a Full Bench, having considered a range of evidence with respect to how workers balance work and caring responsibilities, observed that many women take up part-time employment in order to do so.[151] In the *4 Yearly Review of the Firefighting Industry Award*, a Full Bench said:

> "We accept that the variation of the Fire Fighting Award to permit part-time employment and more flexible rostering arrangements is likely to facilitate increased female workforce participation and hence promote gender diversity.
>
> . . .
>
> The variation of the Fire Fighting Award to permit part-time employment in the public sector fire services (with some consequential changes to rostering provisions to facilitate such employment) would assist employees to balance their work and family responsibilities. Such a variation would be consistent with the objects of the Act."[152]

[185] In the *Family Friendly Working Arrangements* decision,[153] the Full Bench made a number of findings, including that:

> "1. The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers.
>
> 2. Access to flexible working arrangements enhances employee well-being and work-life balance, as well as positively assisting in reducing labour turnover and absenteeism.
>
> 3. Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care.
>
> 4. Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.
>
> 5. The most common reason for requesting flexible working arrangements is to care for a child or children; another significant group seek flexible working arrangements to care for disabled family members or elders.
>
> 6. The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities. The next most common type of flexibility sought is a change in start/finish times and a change in days worked.
>
> 7. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible working

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[151] *Family Leave Provisions Case 2003-2005* at [70]

[152] [2016] FWCFB 8025 at [136] and [144]

[153] [2018] FWCFB 1692

arrangements. Women do most of the unpaid care work and seek to adapt their paid work primarily by working part-time."[154]

4.1.3.2 Does the Agreement prevent part-time employees performing operational firefighting duties?

[186] It is relevant to provide some evidentiary context against which the impugned terms are to be considered. The MFB and the UFU led evidence by which they sought to establish the following:

- numbers of firefighters in the MFB are essentially fixed by government;
- the ability to replace the loss in full-time equivalent employee numbers is affected by the lengthy and rigorous selection and training processes that are necessary for requisite skills acquisition and retention;
- there are existing minimum crewing requirements that govern deployment; for these reasons and for reasons of safety, service delivery and employee welfare, full-time employment must be the norm; and
- the MFB could not across any meaningful period of time accommodate a significant number of requests for part-time employment as they would necessarily affect the numbers of full-time equivalent firefighters available for deployment as part of the minimum crewing requirements.

[187] The UFU submitted that it follows that part-time employment is the exception, hence the language used in clauses 9, 43 and 44 of the Agreement.

[188] Evidence was also adduced about the possible impact on career progression because of the limited forms of part-time employment said to be available under the Agreement. In particular, the evidence adduced sought to blunt the attack on the impact of the absence of the opportunity to work, except in exceptional circumstances, as an operational firefighter and the deployment of part-time employees into special administrative duties.[155] There was some evidence about the impact on a part-time firefighter of not forming part of the minimum crewing numbers[156] although it is clear that there have been no part-time firefighters assigned to a station above the minimum crewing level and that this was because there had been no such requests.[157]

[189] Indeed, the evidence was that there had been no requests made by any firefighter employed by the MFB to work alternative work arrangements while carrying out operational firefighter duties.[158]

[190] There was evidence that the MFB currently employed three operational firefighters who were working on a part-time basis.[159] But this is not the same work as these "operational

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[154] Ibid at [392]

[155] See for example Transcript at PN797 – PN807; PN1925 – PN1927

[156] See Transcript at PN1721 – PN1722

[157] Transcript at PN1724; PN1871

[158] Exhibit 5 at [11]; Transcript at PN754

[159] Exhibit 5 at [8]

firefighters" performing operational duties as firefighters.[160] This was apparent as, of the three "operational firefighters" working part-time none were assigned to a fire station. Two of these "operational firefighters" were engaged in a job sharing arrangement in relation to a single position deployed in the MFB's emergency management department and the other employee was working reduced hours at the "district office of Oakleigh".[161]

[191] It must also be said that there was no evidence from which it could be concluded that any employee covered by the Agreement was actually disadvantaged by terms in the 2010 MFB Agreement which restricts part-time employment in similar ways to those in the Agreement.

[192] Returning then to the impugned terms. The text of clauses 9.1.4, 9.1.5 and their mirrors in 44.1.1 and 44.1.2 is set out in chapter 2 of this decision.

[193] The Minister contends that these clauses have the effect of preventing part-time employees from performing operational firefighter duties, save in exceptional circumstances.

[194] In summary, the Minister submits that:

(a) clauses 9.1.5 and 44.1 include aspirational words that do not provide any real safeguard;

(b) clauses 9.1.6 and 44.1.1 provide that part-time employees will be rostered pursuant to clause 124, which provides for rostering to Special Administrative Duties. The Minister submits that employees on the Special Administrative Duties Roster (SADR) do not perform operational firefighter duties;

(c) clauses 9.1.7 and 44.1.2 provide that part-time employees are not permitted to work on the 10/14 roster, save in exceptional circumstances. The Minister submits that employees working the 10/14 roster are referred to as "on-shift" and perform operational firefighting duties; and

(d) clauses 9.1.4, 9.1.5 and 44.1 provide that generally on-shift employees should be employed on a full-time basis and part-time employees may be required to be transferred off station.[162]

[195] The MFB's submissions include that:

(a) clauses 9.1.6. 9.1.7, 44.1.1 and 44.1.2 do not prevent part-time employees from performing operational firefighting duties. Clauses 9.1.6 and 44.1.1 provide for part-time employees to be rostered on the SADR in accordance with clause 124. It is not inconsistent for someone on the SADR to perform operational firefighter duties;

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[160] See Transcript at PN738

[161] Exhibit 5 at [14]

[162] Minister's Outline of Submissions dated 22 June 2018 at [84]-[88]

(b) clause 85.16.1 of the Agreement supports the above proposition, providing that special administrative duties shall include all rostered duty in all MFB departments. The MFB submits operational firefighter duties fall within that scope; and

(c) clauses 9.1.4, 9.1.5 and 44.1 do not prohibit on-shift employees from working on a part-time basis, or constrain employee rights under s.65 of the Act.

[196] The UFU contends:

(a) clause 9.1.4 means that "generally", on-shift employees are employed full time;

(b) clause 9.1.5 is at pains to not exclude any possibilities and that each case will be assessed on a case-by-case basis;

(c) the effect of clause 9.1.6 (and 44.1.1) is that the default position is that part-time firefighters will be rostered on the SADR provided by clause 124, which reflect the general situation that operational firefighters are engaged on the 10/14 roster provided for in clauses 120-123. The UFU says that the text of clause 124 does not prevent a part-time firefighter from performing operational duties, notwithstanding that this is not the core role of a firefighter on the SADR; and

(d) clause 9.1.7 and (44.1.2) contemplates that a part-time employee could be employed on the 10/14 Roster, albeit in limited circumstances.

[197] The VEOHRC submits that conditioning the rostering of part-time employees so that they can only perform station duties or work on a 10/14 roster in exceptional circumstances is, of itself, discriminatory, as these conditions do not apply to other employees. It describes clauses 9.1.4, 9.1.5, and 44.1 as merely aspirational.

[198] In construing the impugned sub-clauses within clause 9 (and, where applicable, clause 44), regard must be had not only to the text of the individual sub-clauses but to their relationship with the rest of clause 9. Clause 9 deals with the obligations of the MFB. In clause 9.1.4, the first sentence and the first part of the third sentence provide that the MFB acknowledges that it will meet its obligations to make reasonable accommodation for employees with parental or carer responsibilities and to make reasonable adjustments for employees with disabilities. The second sentence and second part of the third sentence qualify this acknowledgment, providing that generally, on-shift workers should be employed on a full-time basis and making reasonable accommodation may require an employee to transfer off-station or from their current work location to another position.

[199] Clause 9.1.5 operates to similar effect as clause 9.1.4, but with respect to requests for flexible work arrangements under s.65 of the Act.

[200] Both clauses 9.1.4 and 9.1.5 provide that generally "on-shift" employees will be required to work full-time. The Agreement distinguishes between employees working on the 10/14 roster provided by clause 122, and those working on the SADR provided by clause 124. Employees on the 10/14 roster are described as "on-shift", while employees not working on-shift are described as being on "day shift" or "day work duties". Clause 124, which deals with the SADR, provides that employees working this roster will work an average of 42 hours per week and will receive the same total weekly wages as employees on a 10/14 roster as well as

the SADR allowance.[163] This clearly suggests that an employee working on a SADR will not work in accordance with the 10/14 roster. As clause 124.3 makes clear, if the MFB agrees to a request for work other than full time, such employees will not be required to work the average number of hours specified in clause 124.1.1. This suggests that a part-time employee will work an average number of hours which is less than 42 hours per week, but plainly will not work those hours in accordance with a 10/14 roster.

[201] This position is reinforced by clause 9.1.6, which expressly states that where, in accordance with clause 9, the MFB agrees to a request to work other than full time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124. When read with the forgoing provision, this means that where the MFB agrees to an employees' request under s.65 of the Act for flexible working arrangements, the employee will be rostered on "day shift", not "on-shift". The same view may be taken of clause 44.1.1.

[202] Clause 9.1.7 operates to qualify clause 9.1.6 to a limited extent, as clause 44.1.2 does for clause 44.1.1.

[203] The combined effect of clauses 9.1.4-9.1.7 is in my view clear. Notwithstanding the MFB's obligations under s.65 of the Act, or more generally to make reasonable accommodations for employees with parental or caring responsibilities or disabilities, employees accessing a part-time arrangement will not be permitted to work on the 10/14 "on-shift" roster or form a part of minimum safety crewing in Schedule 2 of the Agreement, save in exceptional circumstances. Rather, they will be rostered on the SADR.

[204] What is not clear is whether being rostered on the SADR means that a part-time employee is prevented from performing operational firefighting duties. There is disagreement about whether this is the case.

[205] The words "special administrative duties" of themselves lend support to the view that the work to be performed is other than operational. The Macquarie Online Dictionary provides a number of definitions for "special", the most applicable of which appears to be, "having a particular function, purpose, application, etc", or "distinguished or different from what is ordinary or usual: *a special occasion"*. It defines "administrative" as "relating to administration".

[206] Clause 85.17, which provides for a Special Administrative Duties Allowance, says: "Special Administrative Duties shall include all rostered duty in all MFB departments including but not limited to Training and Education, Fire Safety and Administrative areas of Operations as well as the orders of all day work personnel on [the Operational Support Group]." Clause 85.17 does not expressly exclude operational firefighting, but the omission of operational firefighting from any express mention in the non-exhaustive definition is, I think, telling. If SADR involved operational firefighting duties then the need for the detailed references to all but those duties would seem unnecessary. Although characterised as a non-exhaustive list of work, it operates in my view as restricting the SADR to that work or work of that kind. Moreover, it is clear that working on the SADR, will not, save for exceptional

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[163] *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* at clauses 124.1.1 and 124.1.2

circumstances, involve work on a 10/14 roster nor as part of minimum crewing.[164] SADR might involve work as an "operational dayworker" but it is clear that that work will never involve working on a 10/14 roster.[165]

[207] The language used in other parts of the Agreement indicates the drawing of a distinction between MFB Operations and MFB Departments,[166] and operational and administrative duties.[167] For example, clause 74 provides that employees (except ACFOs) rostered on other than a 10/14 roster are required to work at least one on-shift roster per annum at a fire station performing operational duties for which they are equipped for the purpose of skills maintenance. Similarly, clause 158.3 provides that all on shift FCSSs shall undertake at least one roster of skills maintenance in a day work position on the SADR within each year. These clauses suggest that employees on the SADR do not ordinarily perform operational firefighter duties.

[208] It is notable that the description of Special Administrative Duties in clause 85.17 is similar to that in the *Fire Fighting Industry Services Award*, which provides that special administrative duties will include "all rostered duty in the training and education, fire safety and administrative areas of operations."[168] The Award makes separate provision for operational firefighting.

[209] I consider that reading the Agreement as a whole, the better construction of special administrative duties is that the duties do not extend to operational firefighting and specifically not as minimum crew members working on a 10/14 roster. As a consequence, the effect of the impugned sub-clauses within clause 9 is that part-time employees will only be permitted to perform operational firefighting duties in exceptional circumstances, where there is no risk to service delivery, safety and welfare of employees. As the VEOHRC submits, this is a requirement that only applies to part-time employees and relevantly under clause 44, employees who want to work part-time because of, relevantly, family or carer's responsibilities. This in itself is discriminatory. The restriction imposed on part-time employees covered by the Agreement, given that which earlier appears, will adversely impact disproportionately on women and employees with family or carer's responsibility. That a part-time employee cannot work as an operational firefighter save in exceptional circumstances, adversely impacts because it deprives such an employee the opportunity to perform duties for which they were trained and to attain the skill and experience that would necessarily come from working as a fully functioning operational firefighter.

[210] It can be accepted that not every form of part-time hours could be accommodated operationally, for example, working as an operational firefighter as a member of the minimum crewing for two hours of a 12 hour shift may not be practical or even operationally possible. But the reason why it is that a part-time employee could not be accommodated by working some but not all of the full days that a full-time employee would work on a 10/14 roster frankly escapes me. The evidence given as to the need to work full-time on a 10/14 roster as

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[164] Ibid at clauses 44.1.1 and 44.1.2

[165] See clauses 43.6.2 and 43.6.3 read with 43.6.1

[166] For example, the FSCC Job Description at Schedule 8 provides that FSCC's communicate internally with MFB Operations and MFB Departments

[167] For example, clause 12A.3(f)

[168] *Fire Fighting Industry Services Award 2010,* clause 17.11

the only means by which to ensure safety or through which necessary training can be given or received, was unpersuasive.[169] The blanket restrictions imposed on part-time employees by the impugned terms identified are not justifiable on the basis that the different treatment has a rational connection with an objective which is unrelated to the prohibited ground of discrimination. A much more nuanced approach would be required to achieve this result. I would conclude, for the reasons stated, that the terms identified are discriminatory terms because they indirectly discriminate. Part-time employees and those wishing to work part-time because of at least family or carer's responsibilities are unfavourably treated. It follows that I would not be satisfied by reason of the identified provisions that the Agreement does not include any unlawful terms.

4.1.3.3 Are part-time employees impeded in their career progression and precluded from other benefits?

[211] The Minister contends that part-time employees are disadvantaged as a consequence of not being permitted to perform operational firefighter duties, save in exceptional circumstances, because they lose the opportunity to participate in firefighting operations and associated job satisfaction. Additionally, their career progression is stalled because to progress through the classifications of "Firefighter" set out at clauses 12.3.1 to 12.3.11 of the Agreement, part-time employees must have had minimum service periods of "career firefighting service" or served in roles that required such minimum service. Stalled career progression means a loss of salary increase and other benefits, such as access to secondment opportunities, only available to employees of certain classifications.

[212] The text of clauses 12.3.1 to 12.3.17 and clauses 41.1 and 41.3.2 is set out in chapter 2 of this decision.

[213] Becoming a Leading Firefighter or Station Officer requires the employee to be a firefighter who has completed a prescribed period of "career firefighting service with the MFESB."[170] This might be contrasted with the definitions in clauses 12.3.3 and 12.3.5, which provide that to become a Firefighter Level 2(C) or Firefighter Level 3(C) requires the employee to be a firefighter who has completed a prescribed period of service with the MFB. Clauses 12.3.3 and 12.3.5 do not stipulate that the required service be "career firefighting service." This difference might be explained as simply imprecise drafting or the use of infelicitous language.

[214] Career progression through the positions identified in clauses 12.3.11 to 12.3.17 is contingent on a relevant employee having held a position which required a prescribed period of career firefighting service. Similarly, clauses 41.1 and 41.3.2 provide that eligibility to undertake a secondment is contingent upon an employee having reached the rank of Leading Firefighter or above, which again requires the completion of the prescribed period of career firefighting service.

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[169] Exhibit 10 at [62]-[71]; Transcript at PN1726-PN1739

[170] *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016* at clauses 12.3.10 and 12.3.12

[215] What then does "career firefighting service" mean? If it requires only operational firefighting service then, as may be seen from the foregoing discussion, part-time employees will be disadvantaged in that the Agreement only provides for such employees to perform operational firefighting service in exceptional circumstances.

[216] "Career Firefighter" is defined in clause 11.6 as "a paid employee of the MFB in one of the classifications of this Agreement and who has been appointed in accordance with this agreement including clause 12.3. A career firefighter is also referred to in this agreement as a Professional Firefighter."

[217] The MFB contends "career firefighter" in clause 11.6 should not be read down to encompass only periods of service that involve operational duties. It submits that a Qualified Firefighter working on the SADR will suffer no disadvantage in progressing to the Leading Firefighter classification as their service on the Special Administrative Duties Roster will count as "career firefighting service."[171]

[218] Clause 43.6 deals with rostering and refers to professional firefighters. Clause 43.6.1 provides for full-time employees to be rostered in accordance with the 10/14 roster, with the exception of operational dayworkers. Full-time operational dayworkers are defined as "professional firefighters who are not working on a roster referred to in 43.6.1". This indicates that operational dayworkers are considered professional firefighters. Clause 43.6.3 refers to part-time operational dayworkers but does not include a definition.

[219] Other parts of the Agreement appear to use Career or Professional Firefighter as a way of distinguishing between Recruit Firefighters and those who are not recruits,[172] or between professional firefighters and volunteers.[173]

[220] While the wording of the Agreement is somewhat ambiguous and imprecise, on balance, I consider the better view is that the Agreement does not require an employee to be engaged in operational firefighting duties in order to accrue career firefighting service. If this is accepted, then the impugned sub-clauses within clause 12 are not discriminatory against part-time employees and, it follows, against persons with the characteristics identified by the Minister and the VEOHRC.

4.1.3.4 No provision for part-time FSCCs and Senior FSCCs

[221] The Minister submits that pursuant to clause 12.3.17 of the Agreement, there is no provision for FSCCs and Senior FSCCs to work on a part-time basis.[174] Clauses 43 and 153 require FSCCs to work an average of 42 hours per week.[175] Further, FSCCs roster is referred to in clause 43.6.1. The part-time provisions in clause 43.6.3 only apply to operational dayworkers, not firefighters working on a roster referred to in clause 43.6.1.

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[171] Applicant's outline of submissions dated 13 August 2018 at [152]

[172] See Schedule 6 of the Agreement

[173] See for example clause 12A.3.(f) of the Agreement

[174] Minister's outline of submissions dated 22 June 2018 at [98]

[175] Ibid at [99]

[222] The MFB submits that, subject to meeting the requirements of clauses 9.1.6 and 43.6.3, there is nothing that prevents a part-time FSCC or Senior FSCC role being performed on the SADR.

[223] In the UFU's submission, the general position is that part-time employees are rostered on the SADR, but no possibility is excluded as each application is dealt with on a case-by-case basis.[176]

[224] The text of clauses 43.6 and 152 is set out in chapter 2 of this decision.

[225] Clause 152 deals with the ordinary hours of work for an FSCC. As noted by the UFU, clause 152.1 provides that an FSCC will work in accordance with clause 43. Clause 43.6.3 does make provision for part-time employees, but only part-time employees that are operational dayworkers. As noted above, dayworkers are not operational firefighters (although they can be professional or career firefighters). FSCCs are operational firefighters.

[226] It appears to me that the effect of clauses 43.6 and 152 is that FSCCs are not able to access the part-time rostering arrangements. In the result, the clauses indirectly discriminate against employees with the characteristics identified by the Minister and the VEOHRC. There does not appear to me to be a rational connection with an object that is unrelated to a prohibited ground of discrimination that could justify the differential treatment.

[227] It follows that I would not be satisfied, by reason of the identified terms, that the Agreement does not include any unlawful terms.

4.1.3.5 Statutory declaration of entitlement under s.65 of the Act

[228] Clause 44 of the Agreement deals with requests under s.65 for flexible work arrangements. The Minister submits that clause 44.3.1 imposes a burden on employees who want to make such a request which goes beyond that which the Act allows.[177]

[229] Whether clause 44.3.1 falls foul of the requirement in s.55 of the Act is discussed further below. For that reason, it is unnecessary to consider the issue here.

4.1.3.6 Part-time employees require UFU agreement

[230] The Minister contends that clauses 43.3, 43.4, 43.6.3, 138.4 and 138.4.1 of the Agreement are discriminatory terms as they impose further restrictions on part-time employment in that they require the UFU's approval for an employee to work part-time or the UFU's approval of the hours worked by part-time employees.[178]

[231] The VEOHRC says clause 43.3 prevents employment of anyone on a part-time or casual basis unless there is agreement between "all the parties", which includes the agreement of the UFU.[179]

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[176] Outline of Opening Submissions of the United Firefighters Union of Australia dated 14 August 2018 at [75]

[177] Minister's outline of submissions dated 22 June 2018 at [105]

[178] Ibid at [108]

[179] Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [27]

[232] The MFB says that nothing on the face of the clauses necessarily and only results in a discriminatory operation such as to render them discriminatory terms. Rather, the clauses impose a facially neutral requirement for the MFB and UFU to agree to a proposal.[180]

[233] The UFU submits that clause 43.3 does not condition the right of an employee to make an application under s.65 of the Act.[181]

[234] The text of clauses 43.3, 43.4 and 138.4 are set out in chapter 2 of this decision.

[235] Clause 138.4 mirrors clause 43.3 but applies to Assistant Chief Fire Officers.

[236] The plain meaning of clauses 43.3 and 138.4 is that no employee can hold a part-time or casual position unless all parties to the Agreement, which includes the UFU, agree on a case by case basis.

[237] Clause 43.4 provides that the clause is subject to the rights of employees to work in a non-station based position pursuant to clause 44. Clause 44.1.1 is discussed above, but relevantly provides that generally on-shift employees should be employed on a full-time basis. The effect of this is that clause 43.4 provides that the clause is subject to the rights of employees to work in a role other than an operational firefighting role. For reasons discussed earlier above, this is discriminatory.

[238] The question is whether the requirement that the UFU approve all part-time employment arrangements is discriminatory. The terms require employees who wish to access part-time arrangements to overcome greater hurdles than are provided for in s.65 of the Act. While all employees who wish to access part-time arrangements are affected equally in respect of those hurdles, employees who wish to access part-time arrangements and work as operational firefighters are disadvantaged. Discerning the intentions of the parties from the text of the Agreement, clauses 9 and 44, clauses 43.3 and 43.4 indicates that the common intention of the parties, which includes the UFU, is that permission to work as an operational firefighter on a part-time basis will not usually be granted by either party.

[239] The effect of this, embedded in the impugned terms, is that part-time employees are discriminated against as they are restricted from performing part-time operational firefighting duties, and this indirectly discriminates against employees with the characteristics identified by the Minister and the VEOHRC. There is no evident objective unrelated to the prohibited grounds which would justify the differential treatment.

[240] It follows that I would not be satisfied by reason of the identified provisions that the Agreement does not include any unlawful terms.

4.1.3.7 Impost imposed on MFB for part-time employees

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[180] Applicant's outline of submissions dated 13 August 2018 at [160]

[181] Outline of Opening Submissions of the United Firefighters Union of Australia dated 14 August 2018 at [75(f)]

[241] Clauses 43.5 and 138.2 provide for payment of an insecure work allowance of 25% of their annual wage for employees other than full time employees. Clauses 43.6, 85.16.1 and 138.4.1 provide for payment of a special administrative duties allowance.
[242] The Minister submits that while at first blush these clauses appear to be beneficial to part-time employees, in practice they disadvantage employees seeking part-time arrangements as they impose a cost burden on the MFB and confer no benefit on the MFB in exchange for the impost. The Minister submits that the 25% impost is the equivalent of a penalty.[182]

[243] The MFB argues that the clauses in question do not provide anything other than a direct benefit to relevant employees.[183]

[244] The text of clause 43.5 is set out in chapter 2 of this decision.

[245] There is little doubt that clause 43.5 provides a benefit to an employee who is a part-time employee. But read in the context of the Agreement as a whole, it is also plain to me that the impost serves as a disincentive to engage employees on a part-time basis because of the additional cost impost. That said, the term is not discriminatory in the sense that it does not adversely impact on a part-time employee. Its effect however, is likely to be that part-time employment under this Agreement will be an exception.

4.2 The objectionable term point

[246] The Minister and the VEOHRC contend that the Agreement does not meet the approval requirement in s.186(4) of the Act because it includes unlawful terms that are objectionable terms.

4.2.1 The impugned terms of the Agreement

[247] The Minister contends that the terms impugned as discriminatory are also objectionable terms because they, *inter alia*, require or permit the MFB to take adverse action described in Item 1(d) of s.342(1) of the Act in contravention of s.351. The VEOHRC makes a similar argument. The Minister also contends that a number of clauses of the Agreement are objectionable terms because they, *inter alia*, require or permit the MFB and the UFU to take adverse action as described in Items 1 (in the case of MFB) and 7 (in the case of the UFU) of s.342 of the Act against employees because of non-union membership in contravention of s.346.

[248] As to the non-union membership terms, the Minister contends the impugned clauses fall into three broad categories. The Minister contends these clauses require or permit or have the effect of requiring or permitting the MFB to discriminate against employees based on their non-union membership by:[184]

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[182] Minister's outline of submissions dated 22 June 2018 at [111]

[183] Applicant's outline of submissions dated 13 August 2018 at [162]

[184] Minister's outline of submissions dated 22 June 2018 at [170]

- excluding MFB employees who are non-union members from direct engagement with the MFB in certain forums (for example, committees and working groups) where the constituents include MFB employees who are UFU members;[185]
- giving preference to union members in such forums, by engaging only with their representatives (UFU representatives) and not with any representative of the non-union workforce, regardless of whether any of the UFU representatives are MFB employees;[186] and
- conferring a veto power on the UFU in respect of decisions which impact employees, including non-union members.[187]

4.2.2 Meaning of objectionable term

[249] An "unlawful term" by s.194 of the Act includes an "objectionable term". Section 12 of the Act defines an objectionable term as follows:

> **12 The Dictionary**
>
> …
>
> ***objectionable term*** means a term that:
>
> (a) requires, has the effect of requiring, or purports to require or have the effect or requiring; or
> (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;
>
> either of the following:
>
> (c) a contravention of Part 3-1 (which deals with general protections);
> (d) the payment of a bargaining services fee.

[250] Each part of the definition is to be considered. It is only if a term of an enterprise agreement requires or permits (in the relevant sense) a contravention of Part 3–1 of the Act that the term will be objectionable. This necessarily means that the term must require or permit (in the relevant sense) adverse action, but that will not be enough. Merely because an employer takes adverse action against an employee, will not without more give rise to a contravention of Part 3–1. Similarly, a term which requires or permits (in the relevant sense) such action will not, without more, be an objectionable term. Only if the term requires or permits (in the relevant sense) adverse action for the reason of, or reasons including a proscribed reason, will it be an objectionable term.

[251] A contravention of Part 3-1 includes taking adverse action against another person. Section 342 sets out when a person takes adverse action against another person. It relevantly provides:

> **342 Meaning of adverse action**

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[185] For example, in respect of rates of pay, leave entitlements and allowances: see (eg) clauses 43.5 (loading); clause 85.8.1 (travel allowance); and clause 101.1.1 (annual leave)

[186] For example (i) Dispute Resolution Officer – clause 16A; and (ii) Disputes Panel – clause 50

[187] For example Clause 16 – Consultation

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person:

Meaning of *adverse action*		
Item	**Column 1** ***Adverse action* is taken by…**	**Column 2** **if…**
1	an employer against an employee	the employer: … (d) discriminates between the employee and other employees of the employer.
7	an industrial association, or an officer or member of an industrial association, against a person	The industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, or prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor – takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association – imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

[252] The taking of adverse action by a person against another person is prohibited if taken for particular reasons variously described in Part 3-1 of the Act and relevantly in ss.346 and 351 as follows:

346 Protection

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b) ; or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings or a particular religion or creed – taken:

(i) in good faith; and

(ii) to avoid injure to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an ***anti-discrimination law***:

(aa) the Age Discrimination Act 2004;
(ab) the Disability Discrimination Act 1992;
(ac) the Racial Discrimination Act 1975;
(ad) the Sex Discrimination Act 1977 of New South Wales;
(a) the Anti- Discrimination Act 1977 of New South Wales;
(b) the Equal Opportunity Act 2010 of Victoria;
(c) the Anti- Discrimination Act 1991 of Queensland;
(d) the Equal Opportunity Act 1984 of Western Australia;
(e) the Equal Opportunity Act 1984 of South Australia;
(f) the Anti-Discrimination Act 1998 of Tasmania;
(g) the Discrimination Act 1991 of the Australian Capital Territory;
(h) the Anti-Discrimination Act of the Northern Territory.

[253] In *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003,*[188] a Full Bench of the Australian Industrial Relations Commission considered s.298Z(5) of the *Workplace Relations Act 1996* (WR Act), which defined objectionable provisions in similar terms to the definition of objectionable terms in s.12 of the Act. The consideration arose in the context of an appeal against a decision to dismiss applications made by the Employment Advocate under s.298Z of the WR Act to remove particular terms from a large number of certified agreements. The Full Bench said:

> ". . . In considering whether the terms of a certified agreement require or permit, etc conduct in breach of Part ZA one is dealing with conduct which may occur and not with conduct which has actually occurred. It follows that there can be no evidence about the actual reason or reasons for the decision to engage in adverse activity. Because s.298Z is directed at conduct of a kind which may occur, it is difficult to see how any reason could be ascribed for the adverse activity, unless the reason or reasons for the activity are obvious from the terms of the agreement. Furthermore, even where the reason or reasons for the adverse activity are apparent from the terms of the agreement, s.298Z will not be attracted unless those reasons include a prohibited reason. The agreement may permit different adverse activities by an employer – termination of employment is the most obvious example. It is apparent that if an employer terminates the employment of an employee he or she may do so for a prohibited reason. Yet it is inconceivable that a termination of employment provision of itself would be an objectionable provision. On the other hand a provision requiring an employer to give preference in employment to union members might result in the employer dismissing an employee who is not a member of a union. One of the reasons for the employer's decision to dismiss such a person could be a prohibited reason, namely: that the person is not a member of a union…"[189]

[254] The word "permit(s)" in the definition of "objectionable term" means to "authorise", rather than "afford the possibility" and connotes actual authorisation which calls for the positive operation of the clause in question rather than a passive one.[190] Relevantly, in assessing whether a term of an enterprise agreement is an objectionable term, consideration of an employer's potential conduct is entirely speculative and of no assistance if a clause is capable of being given a lawful operation.[191]

[255] In *Klein*, Gordon J considered whether consultative provisions under the *MFESB and UFU Operational Staff Agreement 2005* were objectionable terms. Her Honour adopted the position in *Australian Industry Group v Fair Work Australia*[192] *(AIG v FWA)* that "permit" in the definition of "objectionable term" means "authorise", rather than "afford the possibility", and that a clause may require or permit conduct in contravention of Part 3-1 of the Act either directly or by necessary implication.[193]

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[188] PR910205 dated 12 October 2001

[189] Ibid at [30]

[190] *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; (2012) 205 FCR 339 at [18] and [66]; see also *Klein* at [221] and *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1; (2015) 228 FCR 497 at [219]

[191] *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; (2012) 205 FCR 339 at [89]

[192] [2012] FCAFC 108; (2012) 205 FCR 339

[193] *Klein* at [221]

[256] In *United Firefighters' Union of Australia v Country Fire Authority (UFU v CFA)*,[194] the Full Court considered an appeal from a judgment of Murphy J[195] in which his Honour held that clauses 13, 14 and 16 of the *Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010*, referred to as the "consultation clauses", were not objectionable terms. The Country Fire Authority (CFA) had argued that the clauses authorised it to discriminate against its non-union staff by providing for a consultation regime which excluded their participation, as the clauses did not provide any machinery by which non-union employees would be required to be involved in the consultation regime.

[257] In particular, the clauses provided for two committees: one which consisted of people involved in the decision making processes of both organisations (the UFU and CFA), which would necessarily not include non-union members. The other consisted of equal numbers of management and employee representatives 'as determined by the respective parties' (the UFU and CFA). The clause did not prevent the UFU from appointing non-members.

[258] One of the bases that the primary judge had concluded that the clauses were not discriminatory was that they did not authorise discriminatory selection of union members over non-union members. The Full Court noted that the relevant person whose discriminatory conduct was under consideration was the employer, not the union, and the question was whether the clause permitted (in the sense of authorise) or required the employer to discriminate between its employees on the basis of their union membership.

[259] As to whether a term is indirectly discriminatory, the Full Court observed:

> "…If it be correct that indirect discrimination is forbidden by s 342(1), then it may be open in a case such as the present to argue that there is indirect discrimination when the clause imposes on non-union members as a condition of their entitlement to be consulted by the CFA that they should first be nominated to the EBIC by the UFU. This would, presumably, be because UFU members were more likely to satisfy this condition than non-union members. In any event, this is not how the case before this Court was run and it would be inappropriate to decide it on such a basis now."[196]

[260] In *Marmara v Toyota Motor Corporation Australia Limited*,[197] Bromberg J observed that the purpose of the Act in precluding a term from requiring or authorising a contravention of Part 3-1 is to protect the intended operation of Part 3-1 from being undermined by the making of enterprise or other agreements.[198] His Honour observed:

> "A provision in an enterprise agreement that required or permitted action to be taken that could fall within the FW Act's definition of "adverse action", but which was silent as to the reason or reasons for which the conduct could be taken, could authorise or have the effect of authorising a contravention of Pt 3-1 if the conduct was taken or threatened to be taken for a prohibited reason…

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[194] [2015] FCAFC 1

[195] *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17

[196] [2015] FCAFC 1 at [229]

[197] [2013] FCA 1351

[198] Ibid at [82]

> It cannot be the case that conduct permitted by a term in an enterprise agreement which could constitute adverse action … must be ineffective because it is theoretically capable of being taken or threatened to be taken for a prohibited reason. However, when such conduct is taken or threatened to be taken for a prohibited reason, s 253(1) and s 256 will render the clause ineffective to authorise the taking of that conduct in that circumstance."[199]

[261] His Honour's decision on this point was appealed. In rejecting that aspect of the appeal, the Full Court in *Toyota Motor Corporation Australia Limited v Marmara (Marmara)*[200] said:

> "…it is, in our view, not sufficient if a term of an enterprise agreement has an omnibus operation which, while being silent with respect to acts which would constitute adverse action, could theoretically comprehend conduct which, in particular circumstances, might be so characterised..."[201]

[262] The authorities discussed above make clear that for a term to be objectionable, the term must relevantly require or permit (in the sense of authorise) etc taking adverse action for a proscribed reason in contravention of Part 3-1 of the Act. It seems to me to follow that the reason for which action is required or permitted must be clear from the impugned term.

4.2.3 Contentions – whether impugned terms are objectionable terms

[263] As noted above, the Minister contends that the clauses of the Agreement earlier identified as discriminatory terms, are also objectionable terms as they require or permit the MFB to take adverse action against an employee because of the employee's sex or family or carer's responsibilities. In particular, the Minister submits that the clauses require or permit the MFB to:

> (a) prohibit part-time employees from performing operation firefighter duties, save in exceptional circumstances;
>
> (b) refrain from promoting part-time employees due to insufficient operational firefighting experience and, consequently, hold back other benefits only available to employees of certain classifications;
>
> (c) prohibit part-time employees from holding the role of FSCC or Senior FSCC;
>
> (d) further restrict part-time opportunities for employees seeking part-time work by insisting upon a statutory declaration evidencing any entitlement under s.65 of the Act and enterprise agreement, and UFU approval.[202]

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[199] Ibid at [88]-[89]

[200] [2014] FCAFC 84

[201] Ibid at [128]

[202] Minister's Outline of Submissions dated 22 June 2018 at [118]

[264] The Minister contends that the question whether adverse action will be taken because of an employee's family or carer's responsibilities cannot be answered by reference to the MFB's subjective intent, as the adverse action has not occurred at the time the enterprise agreement is made. For this reason, whether adverse action will be taken against employees because of their gender or family or carer's responsibilities must be answered prospectively, by reference to the terms of the Agreement.[203] The Minister contends that the causal connection between the adverse action and the protected attributes is established through the operation of the clauses, because the effect of the conduct required or permitted of the MFB disproportionately disadvantages people with these attributes.[204]

[265] The Minister also contends that clauses of the Agreement permit the MFB to discriminate against employees based on their non-union membership by excluding those employees from direct engagement with the MFB in certain fora where the constituents include MFB employees who are UFU members, giving preference to union members in such fora. This is said to occur by engaging only with UFU representatives, and conferring a veto power on the UFU in respect of decisions which impact employees, including non-union members.[205]

[266] The VEOHRC contends that:

> (a) the relevant clauses permit conduct that is contrary to Part 3-1 in the sense identified in *Marmara;*
>
> (b) to be objectionable, it is necessary to identify the conduct that could be said to contravene Part 3-1 in order to determine whether or not the impugned clause might authorise that conduct or not; and
>
> (c) a number of clauses in the Agreement identify the conduct that could be said to contravene Part 3-1.[206]

[267] The MFB contentions include that:

> (a) a term will only be objectionable if it requires or permits an injury constituting adverse action for the reason of or reasons including a proscribed reason; and
>
> (b) relying on the reasoning in *Klein*, for there to be a contravention of Part 3-1 of the Act by indirect discrimination in breach of s.351, not only must there be adverse action (which may be occasioned by the imposition of a facially neutral criterion that has an adverse impact on a protected group) but the adverse action (including through the imposition of that facially neutral criterion) must be taken for the reason or for reasons including a proscribed reason.

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[203] Ibid at [121]

[204] Ibid at [122]

[205] Ibid at [170]

[206] Outline of Submissions of the Victorian Equal Opportunity and Human Rights Commission dated 22 June 2018 at [37]-[38]

[268] As to the terms of the Agreement which the Minister says are objectionable terms, the UFU contends that they are all capable of operation in accordance with their terms without sex, family or carer's responsibilities playing a role, and thus that adverse action is not permitted "because of" sex, family or carer's responsibilities.[207] Relying on *Klein* and *AIG v FWA* in support of its contentions, the UFU says that a term which "permits" a contravention of Part 3-1 is to be construed as "authorising", rather than "affording the possibility" of a contravention, and the impugned clauses are capable of lawful operation, therefore not objectionable.

4.2.4 Are the impugned terms objectionable terms?

4.2.4.1 The part-time employment provisions

[269] It should be evident from the discussion of the authorities earlier that a consideration whether a term is an objectionable term involves different considerations to those involved in assessing whether a term is a discriminatory term in the s.195 sense.

[270] The part-time employment provisions to which earlier reference has been made, may have the effect of enabling adverse action being taken for a prohibited reason. For example, the requirement in clause 43.3 of the Agreement for there to be the agreement of all parties in order for an employee to be employed on a part-time basis could theoretically operate to deny an employee with a disability access to a flexible working arrangement because the employee has a disability. But it does not follow that the clause permits or requires taking adverse action because the employee has a disability.

[271] The relevant inquiry in determining whether a term of an enterprise agreement is an objectionable term is not whether a clause "may" require or permit an employer to act in a manner that has an indirectly discriminatory effect on a particular group of employees, but whether the clause requires or permits a contravention of Part 3–1 of the Act. In essence, all that is alleged in relation to the impugned terms is that there are facially neutral terms that "afford a possibility" or would enable the MFB to indirectly discriminate.

[272] None of the part-time employment provisions identified by the Minister or the VEOHRC as indirectly discriminatory above, provide on their terms that the reason for which adverse action is permitted or required is because of a proscribed reason. I agree with the MFB and the UFU that these terms are not objectionable terms.

4.2.4.2 Provisions said to discriminate between employees who are union members and employees who are not

[273] The Minister contends that several clauses of the Agreement provide for various committees and working parties to be established to address issues that affect all employees, and for these committees and working parties to consist of only MFB and UFU representatives. The Minister concedes that none of the clauses expressly require the UFU to appoint representatives that are union members or MFB employees, while submitting that it could not reasonably be expected to do so. The Minister submits that these terms have the effect of requiring or permitting the MFB to discriminate against non-union members by

[207] Outline of Opening Submissions of the United Firefighters Union of Australia dated 14 August 2018 at [81]-[82]

engaging in a process which has a less favourable impact on those members, and by permitting the MFB to discriminate against its employees on the ground of union membership.

[274] Item 1(d) of s.342 provides that an employer takes adverse action against an employee if the employer discriminates between the employee and other employees of the employer. Section 346(a) relevantly prohibits taking adverse action against a person on the grounds that the person is not an officer or member of an industrial association.

[275] Item 7 of s.342 deals with adverse action taken by an industrial association or its officer or member. It is not, as the Full Court observed in *UFU v CFA*,[208] adverse action for a union to discriminate in favour of its own members and against non-members.[209] There the Full Court found that a clause establishing a committee was not objectionable where the members of the committee did not have to be members of the UFU, but were appointed by it. It said of the clause: "[it] does not require or authorise the CFA not to consult with it non-union employees. That result only comes about if the UFU itself decides to exclude non-union members from the consultation processes."[210] The same observation may be made about the impugned clauses.

[276] The Minister seeks to distinguish the position in *UFU v CFA* on the basis that there the Full Court considered whether a consultation clause was objectionable because it authorised the CFA to discriminate against its non-union staff, rather than considering the broader question of whether the term had the effect of permitting or requiring, or purporting to permit or require such discrimination. As noted earlier, the Full Court in *UFU v CFA* left open the possibility that a term of an agreement could be objectionable on the basis of indirect discrimination.

[277] In *Klein*, Gordon J held that consultation terms of the 2010 MFB Agreement, which are in essence the same as clauses 16 and 17 of the Agreement, were not objectionable terms.[211] There does not appear to me to be any reason why I should adopt a different view for clauses 16 and 17 of the Agreement. These clauses provide that a consultation committee be established comprising equal numbers of employee representatives appointed by the MFB and the UFU respectively. In *Klein,* Gordon J rejected the proposition that the impugned consultation terms were objectionable terms because they discriminated against non-union members.[212] This was because the provisions allowing for representation of employees by the UFU were consistent with the scheme of representation under the Act and there was nothing in the clauses that require or permit discrimination between UFU members and non-UFU members.[213]

[278] In *UFU v CFA,* the Full Court held that clauses 13, 14 and 16 of the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement*

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[208] [2015] FCAFC 1

[209] Ibid at [228]

[210] Ibid

[211] [2012] FCA 1402 at [225]

[212] Ibid at [222]

[213] Ibid

2010 (2010 CFA Agreement) were not objectionable terms.[214] Clauses 13, 14, and 16 of the 2010 CFA Agreement are in essence the same as clauses 16, 16A and 17 of the Agreement. The Full Court said that provisions allowing for representation of employees by the UFU were consistent with the scheme of representation under the Act. The Full Court also observed:

> "…Just as clause 13.2 does not require the CFA to discriminate in a direct sense against its non-unionised employees because the clause does not prevent the UFU from exercising its power of appointment in an even-handed way, there is likewise nothing in clause 16 which requires the CFA to discriminate. No doubt there will be discrimination if the UFU adopts a discriminatory practice in relation to how it approaches clause 16 but that does not mean that clause 16 requires or authorises the CFA to do so."[215]

[279] On my reading, nothing in the wording of the impugned clauses requires or permits the MFB to discriminate between union and non-union employees.

[280] The Minister also argues that clauses which provide the UFU with a right of veto are objectionable because they permit discrimination against non-union members.[216] This is also rejected. On my reading, there is nothing on the terms of these clauses which requires or permits adverse action by the MFB against employees on the grounds of their non-union membership. Nor do they require or permit the UFU to do so. They are therefore not objectionable terms.

5. Whether terms of the enterprise agreement contravene s.55

[281] Section 55 of the Act contains the interaction rules between the NES and a modern award or enterprise agreement, and relevantly provides that an enterprise agreement must not exclude the NES or any provision of the NES. That section also provides that an enterprise agreement may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES, provided that the effect of any such term is not detrimental to an employee in any respect when compared to the NES. A provision of an enterprise agreement need not expressly exclude the NES in order to fall foul of s.55(1). A provision of an enterprise agreement, which would result in an employee not receiving the full benefit of the NES also contravenes the prohibition.[217]

[282] Section 186(2)(c) of the Act provides, as one of the requirements which must be met in order that an enterprise agreement may be approved, that the Commission be satisfied that the terms of the agreement do not contravene s.55. For the purposes of s.186(2)(c), a term or terms of an enterprise agreement will contravene s.55(1) if that term or those terms exclude the NES or a provision of the NES. If one or more terms of an enterprise agreement are ancillary or incidental to the operation of an entitlement under the NES or supplement the

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[214] [2015] FCAFC 1 at [3]

[215] Ibid at [234]

[216] The impugned clauses are set out at Annexure 3 of the Minister's Outline of Submissions dated 22 June 2018

[217] *Canavan Building Pty Ltd* [2014] FWCFB 3202; 244 IR 1 at [36]; *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124 at [29]; *Construction, Forestry, Mining and Energy Union v CSRP Pty Ltd* [2017] FWCFB 2101 at [33]

NES, such term or terms will contravene s.55(4) of the Act if the effect of that term or those terms is detrimental to an employee in any respect when compared to the NES.

[283] Clause 44.3.1 of the Agreement provides that an employee must provide appropriate evidence of their entitlement under the Act in the form of a statutory declaration, copies of which will be provided to the UFU and MFB. Clause 44.3.1 is not in terms confined to an NES entitlement under s.65 of the Act. Read in isolation, it is capable of operating upon a number of NES entitlements to which evidentiary requirements attach, such as parental leave, personal/carer's leave and compassionate leave, and community service leave. The heading to clause 44 of the Agreement is "Rights Under NES". Clause 44.1 makes reference to entitlements under s.65 of the Act. Clauses 44.1.1, 44.1.2 and 44.2 appear also to be concerned with entitlements under s.65 of the Act. The introductory words of clause 44.3 which appears to condition that which follows engage with "operational requirements". "Operational requirements" also appear to condition, at least at a level of generality, the right to make a request under s.65, to which reference is made in clause 44.1. Clause 44.4 also deals with an "employee who works flexible working arrangements in accordance with this clause". The words "in accordance with this clause" seem to me to clearly be a reference to clause 44 as a whole.

[284] Clause 44.3.1 is to be read in the context of clause 44 as a whole and that context strongly suggests that its operation is only upon the entitlement under s.65 of the Act and no other NES entitlements. I proceed on that basis and no person appearing to make submissions in relation to the application suggested a contrary view.

[285] Section 55(4) of the Act permits an enterprise agreement to include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to any employee in any respect when compared to the NES.

[286] Section 65 of the Act provides the following:

> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> (1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and
(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee--the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee--the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

[287] Section 65 of the Act confers an entitlement on an employee who is a parent, or has responsibility for the care of a child who is of school age or younger, or is a carer, has a disability, is 55 years of age or older or is experiencing family violence, to request the employer for a change in working arrangements relating to those circumstances. The request must be in writing and set out details of the change sought and the reasons for the change. The reasons for the change would plainly include information sufficient to establish that one of the circumstances in s.65(1A) is engaged. It is to be doubted whether an employer can, through an enterprise agreement or otherwise, dictate that such a written request must be in the form of a statutory declaration, or that there be some further step in addition to the written request which involves the provision of a statutory declaration as evidence of an entitlement to make a request under s.65. An email or a letter to the employer from an employee making a request setting out the details of the change sought and the reasons for the change would seem to me to be sufficient to satisfy the requirements in s.65(3). No other or additional step appears to be required.

[288] The MFB submitted that as an employee has no right to request a flexible work arrangement *per se* and that as that right is predicated on the factual existence of one or more of the matters set out in s.65(1A) of the Act, a requirement that the employee substantiate the statutory basis for the request in the form of a statutory declaration is merely ancillary or

incidental to the operation of that entitlement as contemplated by s.55(4).[218] This submission is rejected because it ignores the caveat in s.55(4). Moreover, the submission says nothing about the requirement to provide a copy to the UFU or the disadvantage an employee encounters in having to seek out an eligible person before whom a statutory declaration is made.

[289] There is no rational basis which would justify a copy of a written request for flexible working arrangements being given to the UFU as is plainly required by clause 44.3.1. The impugned term does not supplement the NES. To the extent that it might be said that clause 44.3.1 of the Agreement is ancillary or incidental to the operation of an entitlement under s.65 of the Act, it is plainly detrimental to an employee since it requires the additional step of preparing and obtaining the kind of written notice required by the clause and involves the provision of that notice to an organisation that is not required under the NES to be notified. Moreover, the requirement that, *inter alia*, an employee of the MFB who is experiencing family violence should have to advise the UFU in writing of that fact is frankly abhorrent.

[290] Where the Parliament has contemplated that an employer might require a particular form of evidentiary justification as a precondition to an NES entitlement it has expressly made provision.[219] The Parliament has made similar provision in respect of certain NES entitlements, for an enterprise agreement to include terms relating to the kind of evidence that an employee must provide in order to be entitled to a particular entitlement.[220] There are no such provisions in respect of the entitlement to request flexible working arrangements under s.65.

[291] Clause 9.1.5 of the Agreement provides that "[T]o avoid doubt, in addition to other obligations, this agreement does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s.65 of the act, to make such a request and to have it considered by the MFB in accordance with that section . . ." This provision does not save clause 44.3.1 from contravening s.55 of the Act. This is so because first, it is concerned with not limiting the rights of employees who are entitled to make a request, whereas clause 44.3.1 is concerned with requiring evidentiary material of a particular kind to establish the entitlement. Secondly, even if it purports to have some broader effect, it is not possible to reconcile the avoidance of doubt expressions in clause 9.1.5 with the text of clause 44.3.1. Thirdly, clause 9.1.5 is very broad whereas clause 44.3.1 is very specific. Clause 9.1.5 does not for example suggest that the terms of clause 44.3.1 which has the effect of adding additional burdens on an employee who is eligible and wishes to apply for flexible work arrangements, will have no effect. Fourthly, the second sentence of clause 9.1.5, which provides "[H]owever, the MFB has determined and the parties have reached agreement that the MFB's operational requirements mean generally that on-shift employees should be employed on a full-time basis", seems to me to disclose that the first sentence pays mere lip service to the right of an eligible employee who has made a request under s.65 of the Act to have his or her request properly considered. Fifthly, the statement in clause 9.1.5 that the Agreement does not limit rights to make a request under s.65, is plainly inaccurate. Clause 9.1.5 is nothing but a bold statement of a state of affairs under the Agreement which is not borne out by the terms of the Agreement.

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[218] Applicant's outline of submissions dated 13 August 2018 at [179]

[219] See for example s.107(3); s.110(3) and s.111(3)

[220] See for example s.107(5)

[292] In my view, clause 44.3.1 of the Agreement contravenes s.55 of the Act in the manner stated. I am therefore not satisfied that the requirement in s.186(2)(c) of the Act is met. This is a matter that may be capable of an undertaking directed to this concern, a subject to which I will later return.

[293] The Minister also contends that a number of other terms of the Agreement contravene s.55 because they interfere with the manner in which the MFB gives consideration to a request, and in particular the grounds on which a refusal is to be founded. Specifically, although the MFB is permitted by s.65 to consider that a request for part-time employment cannot be refused on reasonable business grounds, however, contrary to s.65(5), the MFB will nevertheless be compelled to refuse it by terms of the Agreement that require:

- requests for part-time work as a firefighter to be allowed only in "*exceptional circumstances*";
- requests for part-time work as a FSCC to be refused in all circumstances; and
- the MFB to refuse a request solely because the UFU does not agree to it.

[294] Clause 43 of the Agreement deals, *inter alia*, with rostering and provides:

> **43. ROSTERING**
>
> 43.1. Employees shall be rostered in accordance with this clause.
>
> 43.2. The parties agree that for reasons including the welfare and safety of employees covered by this Agreement, the MFB will not employ any employee on any basis other than a roster of hours provided for in this Agreement.
>
> 43.3. The MFB 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).
>
> 43.4. This clause is subject to the rights of employees to work in a non- station based position pursuant to clause 44 below.
>
> 43.5. Employees other than full time employees shall have access to all terms and conditions under this agreement on a pro rata basis and shall receive an insecure work allowance of 25% of their annual wage.
>
> 43.6. Employees shall have their normal hours of work arranged in the following manner:
>
> 43.6.1. With the exception of operational dayworkers, full-time employees shall work and be rostered in accordance with the operational "10/14" roster set out in clause 133 and the conditions in clause 123 or the conditions set out in clause 153 for FSCC's.

43.6.2. Full-time operational dayworkers (professional firefighters who are not working on a roster referred to in 43.6.1) shall work and be rostered in accordance with the special administrative duties roster set out in clause [124].[221]

43.6.3. Where part-time employment is agreed, part-time operational dayworkers will:

a) work and be rostered on hours negotiated and agreed in writing between the MFB the employee and the UFU that, on average are less than 42 hours per week. These hours may be worked over a 5 day cycle and may include evening or weekend work;

b) Be paid special administrative duties allowance not at a pro rata rate; and

c) be paid for any additional hours worked at overtime rates

[295] As I have already observed, clause 44 of the Agreement deals with flexible working arrangements and requests to work such arrangements made under s.65 of the Act. It provides:

44. RIGHTS UNDER NES

44.1. In addition to other obligations on the MFB, and to avoid doubt, this clause does not limit the rights of employees, who are entitled to make a request for a change in working arrangements under s65 of the Act, to make such a request and to have it considered by the MFB in accordance with that section. However, the MFB has determined and the parties have reached agreement that MFBs operational requirements mean generally that on-shift employees should be employed on a full-time basis. As required by the Act, the MFB will consider every request from an entitled employee for flexible working arrangements and will assess each request on a case-by-case basis, but the parties acknowledge that this may in some cases require an entitled employee to transfer off station or from their current work location to another position.

44.1.1. Where in accordance with this clause the MFB agrees to a request to work other than full- time, for the reasons of service delivery, safety and welfare of employees, the employee will be rostered pursuant to clause 124.

44.1.2. Save in exceptional circumstances where there is no risk to service delivery, safety and welfare of employees, the MFB agrees that anyone accessing part-time arrangements will not work on the 10/14 Roster or form a part of minimum safety crewing in Schedule 2.

…

[221] The agreement lodged for approval makes reference to clause 135, however, it is uncontroversial that this is a typographical error and the reference should be to clause 124

> 44.2. If a transfer is required, the employee shall suffer no detriment by virtue of working in a different position and shall be entitled to resume their station/location based on shift duties as soon as operational requirements permit.
>
> 44.3. To ensure that operational requirements are maintained, the following will apply:
>
> > 44.3.1. An employee must provide appropriate evidence of their entitlement under the Act in the form of a statutory declaration, copies of which will be provided to the UFU and MFB.
> >
> > 44.3.2. An employee will be granted reasonable time off as they require if they are working in a non-station based position. An employee who is granted time off without pay in accordance with this clause will have their leave and other entitlements accrue on a pro-rata basis (that is, in accordance with the number of hours actually worked). Deductions from their ordinary total remuneration for any given cycle will be made proportional to the number of hours not worked out of a 42 hour week. However, continuity of service, the special administrative allowance and the streaming allowance will not be affected.
> >
> > 44.3.3. An employee who is absent from work without pay as set out in this clause will not be counted for the purposes of minimum staffing while absent. The MFB will be required to make arrangements in accordance with this agreement to ensure the requisite additional staff are rostered to ensure safe minimum staffing levels are met at all times.
>
> 44.4. An employee who works flexible working arrangements in accordance with this clause may be required to undertake such additional skills maintenance as the parties agree are necessary to ensure skills are maintained. Such skills maintenance shall be at times the employee is willing to work and shall be conducted during paid working hours. If an employee is performing skills maintenance pursuant to this clause, then that employee shall not count for the purposes of minimum staffing for the period that they are performing such skills maintenance.

[296] Clause 43.3 of the Agreement appears to me to present a major hurdle to an employee who is making a request under s.65 of the Act. Section 65(4) requires that an employer must give an employee a written response to the request within 21 days stating whether the employer grants or refuses the request. An employer is only permitted to refuse a request for flexible working arrangements "on reasonable business grounds".[222] Without limiting that which may constitute reasonable business grounds, some matters which are reasonable business grounds are set out in s.65(5A).

[297] The effect of clause 43.3 appears to me to be that, even if the MFB considered that there was no reasonable business grounds upon which to refuse a request, it could not agree to such a request until there was an agreement of "all parties". Although strictly speaking, an enterprise agreement made under the scheme of the Act is not made as between parties, in the context of the Agreement read as a whole, the use of "parties" throughout the Agreement is a

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[222] *Fair Work Act 2009* (Cth) s.65(5)

reference to the parties identified in clause 6, which includes the UFU. The structure of clause 43.3 does not leave open a construction that the reference to "all parties" is a reference only to the MFB and the person being employed on a part-time or casual basis or wishing to hold a position on such basis. If I am wrong in this reading then the issue can be clarified by way of an undertaking, given that on my reading, the combined effect of clauses 43 and 44 is that these terms place additional hurdles in the way of an employee making a request and the MFB agreeing to or refusing a request made under s.65 of the Act.

[298] Clause 43.4 provides that the whole of clause 43 operates subject to the rights of employees working in "a non-station based position pursuant to clause 44". That clause, as has already been observed, places further restrictions on the manner in which a request is made. Moreover, it ensures a particular request to work part-time on a 10/14 operational roster will not be assessed on its merits. Rather, the result is that such a request will be refused, save in "exceptional circumstances". This is so even if there are no reasonable business grounds for refusing a request of a firefighter to work part-time within the 10/14 roster arrangement. Clause 44 also makes clear that where the MFB agrees to a request for part-time work such a request will be agreed only on the basis that the employee will work in accordance with clause 124 which deals with the SADR.

[299] Furthermore, clause 43.6.3 of the Agreement requires that where part-time employment is agreed for part-time "operational day workers", such a worker will "work and be rostered on hours negotiated and agreed in writing between the MFB, the employee and the UFU that, on average are less than 42 hours per week". Section 65 allows the employee to nominate the particular "change to his or her working arrangements" because of one of the circumstances set out in s.65(1A) in the written request made to the employer. Section 65(4) requires the employer to respond to that request. Clause 43.6.3 of the Agreement, apart from limiting the nature of the request that might be considered by the MFB, places the additional obstacle of requiring the working arrangements to be negotiated and agreed *inter alia* with the UFU.

[300] The introductory sentences in clause 44.1 do not save offending provisions. They are in terms and effect the same as those in clause 9.1.5 and my criticism of that provision is also apposite here.

[301] I consider these provisions to contravene s.55 of the Act with the consequence that I am not satisfied that the requirement set out in s.186(2)(c) is met. As I have already observed, concerns about this requirement having been met may be addressed through an undertaking with which I will later deal.

6. Permitted matters

[302] As earlier noted, the Minister contends that the Agreement contains numerous terms about matters that are not permitted because they do not pertain to the relationship between the MFB and its employees or to the relationship between the MFB and UFU. This contention is advanced on the basis that various provisions in the Agreement confer "veto powers" on the UFU across managerial and operational matters. Particular terms are said to impermissibly interfere with matters that are solely to be regarded within the purview of managerial prerogative. It is said that these terms trespass on actual managerial control, that is, the ability of the MFB itself to manage and govern its own affairs in relation to decisions that may be required to be made from time to time.

[303] The Minister contends that the Agreement is drafted in such a way as to substantially deprive the MFB of its capacity as an employer to make decisions in the future. The level of interference in the ability of an employer to manage its business or organisation in the future is, according to the Minister, unprecedented. The Minister says that the consequence is achieved in two ways. First, because various terms of the Agreement provide the UFU with extensive veto powers, the MFB is prevented from meaningfully operating and managing its own fire service without the agreement of the UFU.[223]

[304] The veto powers identified include subject matter concerning:

- any matters pertaining to the employment relationship of employees covered by the Agreement (clause 16);
- any proposed change affecting the application or operation of the Agreement, employees' terms and conditions of employment or the employment relationship (clause 16);
- employment entitlements (clauses 11.7, 12.9.15, 43.3, 43.6.3(a) and 130.4);
- work functions and roles (clauses 12A, 13.3.1, 39.18.8 and 60.3) ;
- training requirements (clauses 69.3, 69.5, 69.6, 69.9, 69.11, 69.13 and 70.1);
- terminating the employment of employees (clauses 33.1.3 and 39.17);
- managing employees and associated organisational issues (clauses 64.2, 64.3.6, 66.2, 66.3 67, 74.1, 75, 116.1 and 116.7);
- determining and managing operational activities (clauses 27, 38.2.7, 38.3, 39.3, 39.18.7, 41, 129.3, 130.10, 131.5 and 132.8);
- implementing or enforcing policies, including operational policies (clauses 36.2-36.4);
- implementing change (clauses 16.3.2, 16.4, 16.5.1, 16.5.5, 16.5.11, 17, 20, 24, 25 and 26); and
- embarking on processes (including by making recommendations to government) which may result in organisational change (clauses 14 and 18).[224]

[305] The second is by terms of the Agreement (clauses 15.6, 39.8, 39.10, 44.3.1) requiring the MFB to provide information to the UFU to enable the UFU to more closely monitor the MFB's operations and management. It is said that these terms do not simply perform an information pathway for the UFU but permit the UFU thereafter, together with its veto powers under the Agreement, to substantially control how the MFB will function going forward.[225]

[306] The Minister contends that the combined effect of these provisions is sufficiently powerful that the MFB, through the Agreement, has in effect ceded its managerial power to the UFU. These provisions incapacitate the MFB, removing its ability to operate effectively as an employer. The terms are said to operate to deny the MFB the status, role and function of an employer as the entity legally responsible for the management and conduct of the

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[223] Minister's outline of submissions dated 22 June 2018 at [196]–[204]

[224] Ibid at [205]

[225] Ibid at [206]

enterprise to which the Agreement relates. In the case of veto power terms, they give the UFU a power to simply cancel the progressing of decisions and actions of management.[226]

[307] According to the Minister, two consequences flow from the identified terms of the Agreement.

[308] First, the veto interference at this level of decision-making cannot constitute a matter pertaining to the employment relationship. It lacks the necessary connection with the relationship between an employer in its capacity as an employer and an employee in his or her capacity as an employee in a way which is direct and not merely consequential.

[309] The veto terms pertain to a matter of a fundamentally different character. They do not operate to fix a particular term and condition of employment on the subject to which the term is directed. The terms are instead directed to the power to make a decision on the subject. As such, these terms are of a very different character and are not permitted matters.[227]

[310] The Minister contends that the veto terms go to the heart of the ability of the MFB to in truth be an employer and manage its business now and into the future. The veto terms also take the UFU well beyond its representative capacity and into a managerial capacity – at the managerial table. The presence of the UFU at the managerial table is not limited by way of discussion or consultation, but with a right of veto in respect of nearly all meaningful operational and managerial decisions that may otherwise have been made by the MFB. As such, these provisions do not pertain to the relationship between an employer and a union as described in s.172(1)(b). This is because the term must relate to the UFU's legitimate role in representing the employees to be covered by the Agreement.[228] The Minister contends that the veto right terms give a role to the UFU in a managerial capacity, rather than a representative.[229]

[311] Therefore, the Minister contends, the Agreement is not an enterprise agreement as contemplated by the Act and that s.253(2) of the Act, to which I will return shortly, does not alter that conclusion.

[312] The Minister also points to several other provisions, which although not containing veto terms, are said nonetheless not to pertain to the requisite relationship.[230] The first of these is the requirement under the individual flexibility arrangement in clause 15 of the Agreement for copy of the agreement to be provided to the UFU. The second is clause 44.3.1 to which I have earlier made reference. Apart from pointing to these clauses, the Minister makes no particular submission that these clauses in and of themselves mean that the Agreement is not an enterprise agreement. By themselves these clauses, even if not permitted (on which I need not express a view) matters, are contemplated by s.253(2). By themselves they are not of a

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[226] Ibid at [207]–[208]

[227] Ibid at [209]–[232]

[228] For this proposition the Minister relies on the Explanatory Memorandum to the Fair Work Bill at [675] which states: *"For an agreement to fall within paragraph 172(1)(b), the term needs to relate to the employee organisation's legitimate role in representing the employees to be covered by the agreement."* The Minister also cites *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 4457 at [22]; *AMWU v Visy Board Pty Ltd T/A Visy Board* [2018] FWCFB 8 at [18]; *CFMEU v Baulderstone Pty Ltd* [2013] FWC 2671 at [50]

[229] Minister's outline of submissions dated 22 June 2018 at [233]–[241]

[230] Ibid at [242]–[245]

character which would prevent the Agreement from being an enterprise agreement. Given that conclusion, there is nothing in the approval provisions of the Agreement which would prevent the Agreement from being approved by reason of the existence of these clauses even if, as the Minister contends, they are not permitted. Section 253(1)(a) spells out the consequence.

[313] The second consequence according to the Minister is that the impugned terms provide a basis to conclude that the Agreement was not genuinely agreed to by the employees covered by it.[231] The Minister contends that employees voted to approve the Agreement on the basis that it provided for profound control by the UFU over the operational and managerial decision-making of the MFB from the date of approval and into the future. This UFU control included, by way of an elaborate and extensive regime, UFU veto powers over MFB decision-making. As the terms to establish this control over the MFB by the UFU do not involve permitted matters, the fundamental regime of UFU control that is founded on these terms is of no effect. According to the Minister, employees voted on the Agreement on the basis that the UFU had this level of control over the organisation that employs the employees. Consequently, because the terms are of no effect, the entire character of the Agreement has changed. That which the employees voted to approve was an agreement with deep UFU control of the MFB, enforceable as terms of the Agreement. An agreement that did not have this UFU level of control was not approved by the employees. Hence, there are reasonable grounds for believing that the Agreement has not been genuinely agreed to by the employees.[232]

[314] The Minister's contentions are not accepted for the reasons which follow.

[315] Section 172 of the Act deals with making an enterprise agreement and relevantly provides:

> **172 Making an enterprise agreement**
>
> *Enterprise agreements may be made about permitted matters*
>
> (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:
>
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
>
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
>
> (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
>
> (d) how the agreement will operate.

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[231] Ibid at [247]-[251]

[232] *Fair Work Act 2009* (Cth) s.188(c)

[316] Clearly for an agreement to be an enterprise agreement it must be one that is about one or more of the matters described in (a)–(d). However, as already noted, an agreement will not lose its character as an enterprise agreement merely because it may include terms in addition to those described s.172(1).[233]

[317] The use of the "matters pertaining to the relationship" formulation in s.172(1)(a) bears the hallmarks of statutory formulations used to describe the scope of matters falling within the jurisdiction of industrial arbitration tribunals since the enactment of the *Conciliation and Arbitration Act 1904* (which defined "industrial matters" which could be the subject of an interstate industrial dispute as including "all matters pertaining to the relations of employers and employees"). The Explanatory Memorandum to the *Fair Work Bill 2008* explains the use of this formulation in s.172(1) in the following way:

> "668. Paragraph 172(1)(a) refers to 'matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement', referred to after this as 'matters pertaining to the employment relationship'.
>
> 669. The matters pertaining to the employment relationship formulation is of long standing. Under both the Industrial Relations Act 1988 and the WR Act prior to 27 March 2006, collective agreements had to be about matters pertaining to the employment relationship. Since 27 March 2006, a term of a workplace agreement that was not about such matters was 'prohibited content'. Between 1904 and 2006, the formula was also used in the definition of 'industrial dispute' under successive Commonwealth industrial relations statutes.
>
> 670. Although the precise words used have changed from time to time, the courts have construed each manifestation of the formula in a similar way. There is substantial jurisprudence about what the phrase means. It is intended that paragraph 172(1)(a) should be read in line with that jurisprudence. The courts' interpretation of the formulation has evolved over time in line with changing community understandings and expectations about the kinds of matters that pertain to the employment relationship, and it is expected that this approach will continue.
>
> 671. Whether a particular term is about matters pertaining to the employment relationship will depend on its precise construction, as well as the circumstances surrounding the particular employment relationship. Frequently, it will be obvious that a term pertains to the employment relationship - e.g., a term about the payment of wages or a term about hours of work and shift patterns. However, there are some terms where it is not so immediately clear whether the terms are about matters pertaining to the employment relationship (see, e.g., the discussion in *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004* [2004] AIRC 1064.
>
> 672. It is intended that the following terms would be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

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[233] See s.253(2)

- terms relating to particular staffing levels (subject to any other applicable legislative requirements or limitations) particularly if those terms are aimed at ensuring the health, safety and well-being of employees;
- terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security - e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement;
- terms that would provide that casual employees are converted to permanent employees after a set period of time;
- terms that would prevent an employer from seeking a contribution or indemnity from an employee in respect of personal injuries or losses suffered by that person where such injuries or losses were cause by the employee in the course of their employment.

673. The following terms would not be intended to be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

- terms that would contain a general prohibition on the employer engaging labour hire employees or contractors;
- terms that would contain a general prohibition on the employer employing casual employees;
- terms that would require an employer or employee covered by to the enterprise agreement to make a donation to a political party or charity;
- terms that would require an employer to source only products from a particular supplier or Australian made products (unless, e.g., such a term was directly related to employees' job security);
- terms that would require an employer to engage or not engage particular clients, customers or suppliers who had agreed to commit to certain employment, environmental or ethical standards (unless, e.g., such a terms was directly related to employees' health and safety);
- terms that relate to corporate social responsibility, e.g., terms requiring an employer to participate in charity events or commit to climate change initiatives."

[318] The Explanatory Memorandum also contains the following about the formulation in s.172(1)(b):

676. The following terms are examples of those intended to fall within the scope of permitted matters for the purpose of paragraph 172(1)(b):

- terms relating to union training leave and leave for training conducted by a union;
- terms that provide for employees to have paid time off to attend union meetings or participate in union activities;
- terms that provide for union involvement in dispute settlement procedures;
- terms that allow unions to promote membership or have noticeboards in the workplace or otherwise provide information to employees;
- terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee;

- terms that provide for the union to attend the workplace for certain purposes such a dispute resolution or consultation meetings (subject to the rules governing unlawful content – clause 194).

677. The fact that a term falls with paragraph 172(1)(b) does not prevent it from also falling within the description in paragraph 172(1)(a).

678. Because of the way in which the relationship arises, there are limitations on the types of terms that would pertain to the relationship between an employer and an employee organisation.

For example, a term granting a lease over property owned by the employer to the employee organisation would not be a term about a permitted matter because it would not concern the relationship between the employer as an employer and the employee organisation as a representative of the employees covered by the agreement.

[319] The Minister's contention appears to be constructed around the following passage of the regulatory analysis section of the Explanatory Memorandum:

> r.145. This content rule retains the 'matters pertaining' formulation established in case law and ensures that matters that clearly fall within 'managerial prerogative', that are outside the employer's control or are unrelated to employment arrangements are not subject to bargaining and industrial action. The continuation of the familiar 'matters pertaining' formulation provides certainty to employers as to what matters can be included in enterprise agreements.

[320] I agree with the MFB that the Minister's approach pays insufficient attention to the caveats in the passage on which reliance is placed and gives weight to that passage without regard to the other relevant parts of the Explanatory Memorandum to which reference is made above and to the jurisprudence to which the passage refers.

[321] Quite apart from the paragraphs from the Explanatory Memorandum to which I have already referred, [r.145] of the Explanatory Memorandum needs to be read in the context of the other paragraphs surrounding it which deal with the content of enterprise agreements. Apart from [r.144] which in essence reproduces s.172(1), there are the following paragraphs:

> r.146. The content rule will cut regulation so that matters that historically have been included in agreements which encompass the relationship between an employer and a union but were prohibited under Work Choices can be included where agreed to, for example, union consultation clauses or leave to attend union training. The formulation also makes it clear that provisions for payroll deductions such as salary sacrifice and union fees can be included in agreements.
>
> r.147. The capacity to include more issues in agreements where the parties agree will make side agreements between employers and unions unnecessary.
>
> r.148. Provisions that would be inconsistent with, or seek to override provisions in, the new legislation on matters such as freedom of association, unfair dismissal and industrial action would be classed as unlawful content. For example, the payment of union bargaining fees, provisions that purport to 'contract out' of unfair dismissal

> protections and provisions that purport to allow industrial action during the life of an agreement would be unlawful. FWA will not approve agreements that contain unlawful content.
>
> r.149. Provisions that breach occupational health and safety laws will also be unlawful subject to interaction rules between state and territory laws. Provisions which are discriminatory will also be classed as unlawful content.
>
> r.150. Other matters currently classed as prohibited content may be included in agreements where they meet the content rule. There will be no concept of 'prohibited content' in the Bill.
>
> r.151. In order to facilitate more flexible employment relationships, enterprise agreements will also be required to include an individual flexibility arrangement and a consultation clause where major change is considered. Where no such provisions are included, the respective model term prescribed by the regulations is taken to be a term of the agreement. It is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion in modern awards. These provisions will allow employers to enter into individual flexibility arrangements with employees where this is to the benefit of the employer and the employee.
>
> r.152. In addition, before approving an agreement, FWA must be satisfied that the agreement includes a term that provides a procedure that requires or allows FWA or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes about any matters arising under the agreement; and in relation to the NES. Such term must allow for the representation of employees covered by the agreement for the purposes of the dispute settlement procedure.
>
> r.153. Agreements will have a NED of no later than four years after the date of operation.
>
> r.154. The removal of complex regulation surrounding the content of agreements will simplify the agreement making process, offer employers and employees genuine flexibility and remove harsh financial penalties for including content in agreements that is outside the content rule.

[322] The foregoing suggests that only terms that clearly fall within 'managerial prerogative' are to be excluded. It also seems clear that the general thrust of the provision is intended to broaden the subject matters about which an enterprise agreement could be made. This is apparent from the reference to the making of "side deals" unnecessary. Those familiar with the industrial relations landscape prior to the Act, would recognise the reference to "side deals" as a reference to a common vehicle used by parties to workplace agreements to deal with subject matter that was prohibited content under s.356 of the *Workplace Relations Act 1996* and regulations 8.4 to 8.7 of the *Workplace Relations Regulations 2006*. Further, the Explanatory Memorandum draws a distinction between an enterprise agreement that includes provisions that do not pertain to the requisite relationship and which will not impact upon whether or not it can be approved and an agreement which includes terms that are unlawful terms and which will impact upon approval. This is also evident from the scheme of the Act.

[323] As earlier noted, that which appears to be intended to be caught by subsections 172(1)(a) and 172(1)(b) is explained in the Explanatory Memorandum at [668]–[681]. Paragraphs [672] and [673] each list the types of matters which will or will not pertain to the employment relationship while [676]-[678] illustrate the types of matters which will or will not pertain to the relationship between an employer and the employee organisation covered by an enterprise agreement.

[324] It seems to me to be clear both from the terms of s.172(2)(b), and such exposition as the Explanatory Memorandum provides, that terms of an enterprise agreement which facilitate the capacity of an employee organisation covered by an agreement to represent its members who are covered by the agreement will pertain to the relationship between the employer and the employee organisation. It will only be in a case where there is clearly no nexus between a term of an agreement and the representative function of the employee organisation that the term will not pertain.

[325] I also agree with the MFB that the Minister's characterisation that terms of an enterprise agreement which deny, or which operate to overturn, or which are otherwise antithetical to the employer holding and exercising a fundamental management function, necessarily do not pertain to the requisite relationship, should be rejected. This is because the characterisation invokes a binary approach that is inconsistent with modern authority about whether a term pertains to the requisite relationship.

[326] As the decisions in *Federated Clerks' Union of Australia v Victorian Employers' Federation*[234] and *Re Cram; Ex parte NSW Colliery Proprietors' Association Limited*[235] make clear, an assessment whether a matter pertains is not to be conducted on the basis that there are mutually exclusive segments into which matters pertaining on the one hand and management or managerial decisions on the other can separately be assigned.[236] The issue is whether a matter pertains to the employment relationship. A matter will pertain to the relationship of employers and employees if it directly affects the conditions of employees, which includes all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment.[237] If a matter pertains, then the fact that it also intrudes upon managerial prerogative does not change its character.

[327] I do not accept that the impugned terms of the Agreement do not directly affect the conditions of employees, which includes all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment. Once it is understood that managerial prerogative and the requisite relationship are not consigned to mutually exclusive segments, it is difficult to conclude that the impugned terms, which are said to be "veto powers" and which on their face appear also to directly affect conditions of employment of the employees covered by the Agreement as just

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[234] [1984] HCA 53; (1984) 154 CLR 472

[235] [1987] HCA 28; (1987) 163 CLR 117

[236] [1984] HCA 53; (1984) 154 CLR 472 per Mason J at 490-491 and per Murphy J at 493; [1987] HCA 28; (1987) 163 CLR 117 at 136

[237] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2016] FWCFB 2894 at [26] citing *Re Cram; Ex parte NSW Colliery Proprietors' Association Limited* (1987) 163 CLR 117 at 133-136

described, do not then directly affect the relationship between the MFB and the UFU in its capacity of representing its members.

[328] The Minister makes various criticisms of the impugned terms including that the terms:

- constitute an unprecedented interference in the ability of the MFB to manage its business organisation in the future;
- prevent the MFB from meaningfully operating and managing its own fire service without the agreement of the UFU;
- concede managerial power to the UFU;
- deny the MFB the status, role and function of an employer and as the entity legally responsible for the management and conduct of the enterprise to which the Agreement relates;
- create a relationship between MFB and the UFU whereby the latter has a determinative and supervisory role with respect to the management and conduct of the enterprise; and
- strip the MFB of its ability as an employer to manage its business in the future.

[329] In truth these criticisms are about the extent to which the MFB by this Agreement (and historically as evident in the 2010 MFB Agreement and its predecessors) wishes to engage with the UFU in decisions affecting the conduct of the service that the MFB provides in so far as they affect firefighters covered by the Agreement. These may be legitimate criticisms of the MFB in making enterprise agreements that so constrained aspects of its decision-making, but they do not in my opinion diminish the character of the impugned terms as terms that pertain to the requisite relationships.

[330] The question remains whether the provision can be characterised as pertaining to the relationships between the MFB and its employees or between the MFB and the UFU as an organisation representing its members covered by the Agreement. A term of an enterprise agreement will be so characterised if it directly affects the conditions of employees, which includes all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting their employment, or the capacity of the UFU to represent its members in respect of such matters.

[331] It is ultimately unnecessary at the stage of the Commission's approval of an enterprise agreement stage to undertake an assessment as to whether or not particular provisions of the Agreement pertain to one or other of the requisite relationships. It is sufficient for me to express a view that most of the terms identified do so pertain and that the Minister's contention that in effect the sheer magnitude of non-pertaining matters takes the Agreement outside of the description of an enterprise agreement is rejected. It follows that it is unnecessary for me to deal with the Minister's contention that impugned terms provide a basis to conclude that the Agreement was not genuinely agreed to by the employees covered by it. That said, as the vast majority of the impugned terms appear to me to be matters pertaining to the requisite relationships, it is difficult to see how the existence of a few terms which might not pertain could be said to provide a foundation for concluding that there are reasonable grounds for believing that the Agreement was not genuinely agreed to by the employees covered by it.

[332] Taking into account that which appears earlier in this decision, I am satisfied that the Agreement has been genuinely agreed to by the employees covered by the Agreement, with the consequence that the requirement in s.186(2)(a) is met.

7. Better off overall test

[333] As noted earlier, s.186(2)(d) requires the Commission to be satisfied that the Agreement passes the BOOT. The Minister contends that the Agreement's restrictions on part-time employment cause it not to pass the BOOT. This is because existing and prospective award covered MFB employees seeking to work part-time are not permitted under the Agreement to perform operational firefighter duties, except in exceptional circumstances. Such employees are also precluded under the Agreement from certain roles and are required to seek the approval of the UFU in order to make part-time arrangements.

[334] An enterprise agreement will pass the BOOT if the Commission is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the Agreement would be better off overall if the Agreement applied to the employee than if the relevant modern award applied to the employee.[238] An "award covered employee" is an employee who is to be covered by the Agreement and, at the test time, is covered by a modern award that is in operation, covers the employee in relation to the work that he or she is to perform under the Agreement and covers his or her employer.[239] A "prospective award covered employee" is a person who, if he or she were an employee at the test time of an employer covered by the Agreement, would be covered by the Agreement and would be covered by a modern award that is in operation and would cover the person in relation to the work that he or she would perform under the Agreement and covers the employer.[240]

[335] The assessment of whether an enterprise agreement passes the BOOT in relation to a prospective award covered employee is concerned with the hypothetical. It is established for the purposes of comparing the position of the hypothetical person who is treated as though he or she were an employee at the test time of an employer under the Agreement on the one hand and the award on the other. The hypothetical scenario is a construct. It does not require that one work backwards to construct a realistic narrative about the employer's hypothetical decision to engage an employee either under the award or agreement.[241] The prospective award covered employee description tells the Commission all that is required for the purposes of assessing whether the hypothetical person as at test time would be better off overall if the agreement applied to the hypothetical person than if the relevant modern award applied to that person.

[336] The Award covers employers throughout Australia in the firefighting industry and their employees in the classifications listed in Schedule B – Classifications to the exclusion of any other modern award.[242] There is no dispute that it is the relevant reference instrument against which the question whether the Agreement passes the BOOT is to be assessed.

[337] Schedule B to the Award contains classifications for, *inter alia*, Recruit, Firefighter Level 1, 2 and 3, Qualified Firefighter, Leading Firefighter, Station Officer, Senior Station Officer and FSCC. In contending that the Agreement does not pass the BOOT, the Minister

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[238] *Fair Work Act 2009* (Cth) s.193(1)

[239] Ibid at s.193(4)

[240] Ibid at s.193(5)

[241] *Construction, Forestry, Mining and Energy Union v SESLS Industrial Pty Ltd* [2017] FWCFB 3659 at [23]

[242] *Fire Fighting Industry Award 2010* at clause 4 and Schedule B

provides an analysis that is said to be limited to the award covered and prospective award covered employees falling within these classifications.[243] This is inconsistent with that which is contended later which is to the effect that for the purposes of the Minister's submissions relating to the BOOT, the relevant class of employees is defined as part-time employees in the equivalent Agreement classifications to the Award classifications from Qualified Firefighter and above.[244] I take the reference to Recruit and Firefighter Levels 1, 2 and 3 in the Minister's submission to be an error, given that which later follows and as part-time employment in these classifications is not permitted under the Award.

[338] Clause 10 of the Award deals with types of employment in the public sector. Clause 10.3(a) describes an employee as a "part-time employee" in circumstances where an employee works less than the full-time hours of 38 ordinary hours per week; has reasonably predictable hours of work; and receives, on a pro rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work.

[339] As already noted, clause 10.1(b) of the Award permits part-time employment by providing that, "an employer in the public sector may employ employees at the classification Qualified Firefighter or above on a part-time basis."

[340] A "Qualified Firefighter" means an employee who has completed a minimum of 36 months service and possesses a Certificate of Proficiency.[245] It seems clear from the definitions of Recruit and of Firefighter Levels 1, 2 and 3 in Schedule B of the Award, that a Qualified Firefighter is a higher classification than the aforementioned classifications. Employment of a person at the lower levels may only be on a full time basis under the Award.

[341] The Minister contends that Award covered and prospective Award covered part-time employees are not better off overall if the Agreement applied to these employees than if the Award applied. This is because the part-time provisions under the Agreement are less beneficial than the part-time provisions under the Award. The Minister contends[246] that under the Agreement:

- part-time employees are not permitted to perform operational firefighter duties, save in exceptional circumstances. This is to be contrasted with the Award which contemplates part-time work both on and off a 10/14 roster where such employees will be "rostered and work hours as agreed under clause 10.3(b) or varied under clause 10.3(c)"; [247]
- part-time employment of FSCCs and Senior FSCCs is not permitted. This is to be contrasted with clause 10.1(b) read with clauses 22.2(a) and (c), 22.5(b), 22.3 (a) and (b) of the Award which does not prohibit part-time employment;
- additional UFU agreement and approval requirements are imposed, further restricting the availability of part-time employment. This is to be contrasted with the position under clause 10.3(b) and (c) of the Award which require only an

[243] Minister's outline of submissions dated 22 June 2018 at [140]

[244] Ibid at [143]

[245] *Fire Fighting Industry Award 2010* at Schedule B, clause B.1.5

[246] Minister's outline of submissions dated 22 June 2018 at [144]-[163]

[247] *Fire Fighting Industry Award 2010* at clauses 22.2 and 22.3

agreement between an employee and an employer for the purposes of part-time employment; and

- the enterprise agreement dispenses with the protections afforded by the Award in respect of part-time employment. The Award protections are the requirement that the employer and employee agree in writing the regular pattern of work, specifying at the number of hours worked each day; the days on the employee will work; the starting and finishing times; and that any variation will be in writing.[248] In addition, the Award requires a part-time employee to be rostered for a minimum of three consecutive hours on any shift,[249] whereas the Agreement does not.

[342] The Minister contends that although the Agreement makes provision for some monetary benefits for part-time employees, such as the insecure work allowance and the special administrative duties allowance, these benefits do not offset the substantially less beneficial provisions under the Agreement.[250]

[343] It seems to me that there are two comparisons relevant for the purposes of the BOOT so far as it concerns part-time employment. The first is the position of an employee or prospective employee who is or is hypothetically a part-time employee under the Agreement compared to the position of that employee or prospective employee under the Award. The second concerns the position of an employee or prospective employee who is not part-time but wants (or perhaps through circumstances, needs) to work part-time.

[344] The Minister's contention insofar as it concerns the first comparison appears to me to ignore a number of the other provisions of the Agreement. In the first place, the existing or prospective part-time employee, for the purposes of the comparison, is or is to be assumed to be has already been engaged in a part-time capacity at test time and so the barriers to which the Minister points have been or are to be assumed to have been overcome. It is necessary to examine the position of these employees under the Agreement *vis-à-vis* the Award on an overall basis.

[345] Apart from the substantially higher rates of pay in the Agreement compared to the Award for each classification, as the MFB has rightly pointed out, the Agreement makes provision for other benefits which apply on a pro rata basis to part-time employees by operation of clause 43.5 of the Agreement and included include a pro rata of the following leave entitlements:

- 65.06 days of annual leave;[251]
- 33 shifts of paid personal leave on commencement, a further 3 shifts after one years' service and a further 18 shifts on completion of two years' service and each year thereafter;[252]
- this leave may be taken as carer's leave;[253]

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[248] Ibid at clauses 10.3(b) and (c)

[249] Ibid at clause 10.3(d)

[250] Minister's outline of submissions dated 22 June 2018 at [145]

[251] *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2016 at* clause 101.1.1

[252] Ibid at clause 92.1.2

- 30 shifts of sick leave on commencement, 15 shifts of sick leave upon completion of two years' service and 15 shifts of sick leave for each year's service thereafter.[254] This is a separate and additional entitlement to the paid personal leave entitlement and which may also be taken as carer's leave;[255]
- 4 days of compassionate leave;[256]
- 10 days of paid community service leave;[257]
- 14 weeks of paid maternity leave, 1 week of paid paternity leave, and 6 weeks of paid adoption leave;[258]
- paid special maternity leave;[259]
- 4 shifts of paid 'pressing necessity' leave;[260]
- cultural and ceremonial leave;[261]
- unlimited paid family violence leave, subject to various criteria;[262]
- accident make up pay over 104 weeks;[263]
- 15 shifts of paid 'special sick leave', covering illness or injury directly attributable or aggravated by defence force service;[264]
- 5 days of paid industrial training and union leave;[265]
- unlimited paid study leave for approved courses of study;[266]
- additional unpaid study leave;[267]
- reimbursement of associated costs including course fees and books;[268]
- 20 days of paid defence force leave;[269]
- additional unlimited paid leave for the purposes of "service or travelling";[270]
- paid ANZAC Day leave of between 1 to 3 days;[271] and
- paid blood donation leave.[272]

[346] The Agreement also makes provision for a range of allowances which are variously higher than, or additional to, the allowances for which provision is made under the Award. All

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[253] Ibid at clause 94.1

[254] Ibid at clause 93.2.1

[255] Ibid at clause 94.1

[256] Ibid at clause 95

[257] Ibid at clause 113

[258] Ibid at clause 115.4.2

[259] Ibid at clause 115.10.4

[260] Ibid at clause 96.1

[261] Ibid at clause 97

[262] Ibid at clause 98.4

[263] Ibid at clause 99

[264] Ibid at clause 100

[265] Ibid at clause 106

[266] Ibid at clause 107.1

[267] Ibid at clause 107.2

[268] Ibid at clauses 107.3 and 107.4

[269] Ibid at clause 108.1

[270] Ibid at clause 108.3

[271] Ibid at clause 109

[272] Ibid at clause 111

employees in the qualifying circumstances described are entitled to the particular allowances. The Agreement provides, *inter alia*, for:

- a higher meal allowance;[273]
- a spoilt meal allowance where the Award provides none;[274]
- a higher travel allowance and a longer period of notice of any change in location;[275]
- a substantially higher personal expenses and accommodation allowance;[276]
- a substantially higher vehicle allowance;[277]
- a tollway reimbursement allowance, where the Award provides none;[278]
- substantial temporary[279]and permanent[280]relocation allowances, where the Award provides none;
- a first aid allowance, where the Award provides none;[281]
- substantially higher qualification allowances;[282]
- long hours assistance allowance, where the Award provides none;[283]
- for station officers not working the 10/14 roster – a higher availability allowance;[284]
- an 'after hours disturbance allowance', where the Award provides none;[285]
- broader access to driving licence fee reimbursement;[286]
- a substantial 'language' allowance, where the Award provides none;[287] and
- a higher Special Administrative Duties allowance.[288]

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[273] $17.83 under the Agreement, a figure which will further increase by 19% upon commencement (see clauses 85.2, 85.6 and Schedule 4). This compares with $15.45 under the Award (see clause 17.2)

[274] $17.83 under the Agreement, which will further increase by 19% upon commencement (see clauses 85.2, 85.7.1 and Schedule 4)

[275] Clause 85.8.1 of the Agreement, and clause 17.3(a) of the Award

[276] $378.18 per day for capital cities and $325.52 for other places in Australia under the Agreement, figures which will further increase by 19% upon commencement (see clauses 85.2, 85.5 and Schedule 4). This compares with $262 per day for capital cities and $168.73 for other places in Australia under the Award (see clause 17.3(d))

[277] $1.31 per kilometre travelled under the Agreement, a figure which will further increase by 19% upon commencement (see clauses 85.2, 85.9 and Schedule 4). This compares with $0.78 per kilometre for motor vehicles and $0.26 for motorcycles under the Award (see clause 17.4)

[278] Clause 85.10.1 of the Agreement

[279] $4.16 per day shift or $5.40 per night shift, figures which will further increase by 19% upon commencement (see clauses 85.2, 85.13.3 and Schedule 4)

[280] $1,461.32 for each 30 minutes of additional total daily travel time, a figure which will further increase by 19% upon commencement (see clauses 81.11 and 85.2)

[281] $19.72 per week, a figure which will further increase by 19% upon commencement (see clauses 85.2, 85.14 and Schedule 4)

[282] Compare clause 85.18 of the Agreement (as uplifted by 19% upon commencement by clause 85.2) with clause 17.7 of the Award

[283] Clause 85.19 of the Agreement requires reimbursement of taxi fares, accommodation and/or airfares where applicable in circumstances where the employee considers it is not safe for them to drive after they have finished working

[284] Compare clause 85.13.1 of the Agreement (as uplifted by 19% upon commencement by clause 85.2) with clause 17.8 of the Award

[285] A minimum of one hours' pay at ordinary rates for each discrete contact (see clause 85.13.2)

[286] Compare clause 85.12.1 of the Agreement with clause 17.9 of the Award

[287] $1215.58 per year, a figure which will further increase by 19% upon commencement (see clauses 85.2, 85.17.1 and Schedule 4)

[288] $73.14 per week under the Agreement, a figure which will further increase by 19% upon commencement (see clauses 85.16.1, 85.2 and Schedule 4). This compares with $61.13 under the Award (being 7.3% of the standard rate per week: see clause 17.11)

[347] It is plainly the case that each employee or prospective employee will not obtain the benefit of every one of the array of leave entitlements and allowances for which provision is made under the Agreement. Nevertheless, existing and prospective part-time employees at test time would plainly be better off overall if the Agreement applied than if the Award applied. Although important, I do not consider the absence of a capacity to work as an operational firefighter, save in exceptional circumstances, outweighs the other benefits for which the Agreement provides. It is also relevant to note that although there is an absence of any restriction in the Award on part-time employees working as operational firefighters as part of a 10/14 roster, the Award does not mandate that this occurs. Such benefit as the Award confers in this regard is a contingent benefit and its value is difficult to assess. Section 193(7) of the Act provides that for the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the Agreement applied to that class than if the relevant modern award applied to that class, the Commission is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the Agreement applied to the employee. It seems to me plain that part-time employees as a class would be better off overall if the Agreement applied to part-time employees than if the Award applied. There is no evidence before me which would lead to a conclusion to the contrary in relation to a particular part-time employee.

[348] What then is the position of an employee or prospective employee who is not part-time but wants to work part-time? There can be little doubt that the strictures placed in the way of part-time employment under the Agreement are much greater than under the Award. As the Minister has identified, there are not insignificant barriers under the Agreement to an employee who wants or needs to work part-time being able to so do. The MFB's response that experience has shown that only a small percentage of its employees request part-time or other flexible working arrangements[289] is not really to the point. It is relevant to take into account the unusually generous leave entitlements applicable under the Agreement (and its predecessors), but I do not accept that these conditions explain the lack of take up of part-time arrangements.[290] It might just as readily be supposed that the lack of resort to part-time employment is a product of the barriers that the Agreement establishes to part-time employment.

[349] That said, as I have already observed, the Award does not create a right to part-time employment but merely facilitates the working of part-time employment in respect of persons who are engaged in particular classifications for which the Award provides. Such rights as are available for flexible working arrangements are exercisable under s.65 of the Act. Thus, although it is much more difficult to navigate through the barriers which the Agreement establishes in order that an employee or prospective employee might attain part-time employment, the position under the Agreement and under the Award is the same in the sense that under neither can it be said that a particular employee or prospective employee has a right to part-time employment. The barriers that exist under the Agreement offend s.65 of the Act for the reasons earlier stated. But ultimately, such detriments as exist by reason of the strictures apparent under the Agreement can only be contingent detriments since there is an absence of a right to insist to be engaged on a part-time basis under the Award.

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[289] Applicant's outline of submissions dated 13 August 2018 at [279]

[290] Ibid

[350] But even if I am wrong about this, given my conclusion earlier about the effect of particular provisions in the Agreement on s.65 of the Act, undertakings that might be given in relation to those concerns will plainly also impact on the BOOT since the undertakings will need to be directed to the very same restrictions.

[351] That said, it is difficult to see given the content of the Agreement compared to the Award, how award covered employees and prospective employees who want to work part-time would not be better off overall if the Agreement applied than if the Award applied.

[352] The superior leave entitlements and allowances together with the substantially higher minimum rates of pay under the Agreement compared with the shift loaded rates payable under the Award weigh heavily in the assessment.[291] Even assuming the restrictions on part-time operational duties, it cannot be said on that basis alone, having regard to the Agreement's more generous rates of pay, leave entitlements and allowances that any employee and prospective employee, at test time, is not better off overall if the Agreement applied to the employee than if the Award applied to that employee. There is no evidence that any particular employee covered by the Agreement will, by reason of a need to work part-time, not be better off overall under the Agreement.

[353] Apart from the part-time issue, there is no suggestion that any other existing or prospective employee covered by the Agreement would not be better off overall if the Agreement applied than if the Award applied.

[354] I therefore am satisfied that the Agreement passes the BOOT with the consequence that the requirement in s.186(2)(d) is met.

8. Conclusion

[355] For the reasons stated, I have concluded that:

a. I should apply the judgment of Tracey J in *National Retail Association (No 2)* to the construction of the word "discriminates" in s.195(1) of the Act. It follows that a term of an enterprise agreement will only be a discriminatory term to the extent that it directly discriminates against an employee covered by the agreement because of, or for reasons including, the employee's particular identified characteristic or attribute. I am satisfied that the Agreement does not therefore include any discriminatory terms. I would conclude differently if I felt free to disregard *National Retail Association (No 2);*

b. the Agreement does not include any objectionable terms. The requirement in s.186(4) is met;

c. the Agreement is predominantly about matters that pertain to the requisite relationships and the objection raised on this ground is rejected;

d. the Agreement passes the BOOT. The requirement in s.186(2)(d) is met;

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[291] Clause 133.1 of the Agreement compared to clause 15.1 of the Award

e. save for the matter below, I am otherwise satisfied for the reasons stated that the approval requirements in ss.186 and 187 have been met; and

f. I am not satisfied that particular terms of the Agreement earlier identified in this decision do not contravene s.55 of the Act. I do not consider the requirement in s.186(2)(c) has been met.

[356] Appropriate undertakings might be formulated by the MFB to meet the concern in (f) above. Consequently, I direct as follows:

1. The MFB is to file in my Chambers and serve on the UFU any written undertaking that it wishes to give to meet the concern that the Agreement contains terms that contravene s.55 of the Act within 21 days of the date of this decision;

2. Before filing any undertaking, the MFB is to consult with the UFU in its capacity as bargaining representative for the Agreement about the undertaking;

3. The UFU may file in my Chambers and serve on the MFB any written submission it might wish to make in relation to any undertaking that is given by the MFB within seven days after the undertaking is filed;

4. The MFB may file in my Chambers and serve on the UFU any submissions in reply within seven days thereafter.

DEPUTY PRESIDENT

Appearances:

C O'Grady QC, R Nelson and A Pollock of Counsel for the Metropolitan Fire and Emergency Services Board.
RC Kenzie QC and *TJ Dixon* of Counsel for the United Firefighters' Union of Australia.
J Bourke QC and *J Firkin SC* for the Minister for Jobs and Industrial Relations.
P O'Grady QC and *N Campbell* of Counsel for the Victorian Equal Opportunity and Human Rights Commissioner.

Hearing details:

2018.

Melbourne:
August 27, 28, 30 and 31.

Written submissions:

Minister for Jobs and Industrial Relations, 22 June 2018.
Victorian Equal Opportunity and Human Rights Commissioner, 22 June 2018.
Metropolitan Fire and Emergency Services Board, 13 August 2018.
United Firefighters' Union of Australia, 14 August 2018.
United Firefighters' Union of Australia (Closing submissions), 30 August 2018.
Metropolitan Fire and Emergency Services Board (Additional issues raised during argument), 30 August 2018.
Metropolitan Fire and Emergency Services Board (Sections 185, 186 and 187), 30 August 2018.
Victorian Equal Opportunity and Human Rights Commissioner (Oral submissions), 31 August 2018.
Metropolitan Fire and Emergency Services Board (Supplementary submissions), 7 September 2018.
United Firefighters' Union of Australia (Supplementary submissions), 7 September 2018.

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<PR703692>