



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

United Firefighters' Union of Australia

v

Fire Rescue Victoria T/A FRV

(C2024/5387)

COMMISSIONER WILSON

MELBOURNE, 24 SEPTEMBER 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)].

[1] The following is my decision in relation to an application by Fire Rescue Victoria (FRV) for the production of documents.

[2] The primary application before the Commission is made by the United Firefighters Union of Australia (UFU), alleging a dispute arising under the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020*¹ (the Agreement). The dispute is with FRV and relates to concerns held by the UFU that there is or may be a proposal on the part of FRV to reduce the amount reimbursed to employees in relation to expenses incurred for income protection insurance.

[3] FRV's application for the production of documents was the subject of a hearing before me on Monday, 16 August 2024. Mr Herman Borenstein KC instructed by Davies Lawyers appeared for the UFU. Mr Brendan Avallone of Counsel instructed by Lander and Rogers appeared for FRV. Both lawyers appeared with permission given by me pursuant to s.596 (2) (a) of the *Fair Work Act 2009*.

[4] The substantive dispute arises under both parts of the Agreement being Division A, which applies to former MFB operational employees, and Division B, which applies to former CFA operational employees. The relief sought by the UFU is an order from the Commission that FRV continue to pay the full amount of the income protection allowance as fixed by an order of the Commission.

[5] The substantive application was the subject of conciliation before the Commission on Thursday, 15 August 2024. A focus of the conciliation was whether a fringe benefit tax liability has accrued to FRV as a result of changes by the UFU to the structure of income protection insurance arrangements. The matter has been the subject of what appears to be extensive dialogue between the UFU and FRV, as well as between FRV and advisers retained by it about its tax exposure.

[6] On 27 August 2024, FRV made an application to the Commission pursuant to s.590(2)(c) of the FW Act for an order for production of documents etc. Section 590 empowers the Commission to inform itself in relation to a matter in such manner as it considers appropriate, including by requiring a person to provide copies of documents or records, or to provide any other information to the FWC.

[7] The document sought to be produced is the “trust deed (Trust Deed) for the discretionary trust established by or on behalf of the United Firefighters Union of Australia - Victorian Branch, of which Alternative Risk Management Services Pty Ltd (ABN 70 649 963 191) is trustee (Discretionary Trust)”.

[8] Income protection insurance coverage has been provided to firefighters working under the Agreement and its predecessors for many years. For reasons which do not need to be referred to in this decision, the practicality of the arrangement is that employees are reimbursed to a maximum amount set either by the Agreement or more recently, by an order of the Commission made in accordance with the Agreement. From 16 June 2023, the income protection reimbursement has been set at \$55.22 per week.

[9] It is unnecessary to repeat the principles relating to orders for the production of documents, however I note they have recently been set out in some detail by Vice President Gibian in the matters of *Matthew Lawrence v United Workers' Union* [2024] FWC 2040 and *AMWU v Sublime Infrastructure Pty Ltd and Another*, [2024] FWC 2135. No argument was put by the UFU that responsiveness to the proposed order would be “fishing” or oppressive. In *Sublime Infrastructure*, and with reference to the principle of apparent relevance, the Vice President said;

“[14] Apparent relevance is tested by asking whether it is “on the cards” that the documents sought will assist the party’s case or the documents have the potential to “throw light on the issues”. Relevance “may lie in giving rise to a line of enquiry which is relevant to the issue before the trier of facts” and documents “will frequently be relevant for the purpose of meeting the opposing case, as for example, by way of cross examination”.

[15] In the context of Commission proceedings, whether an order for production should be issued will be subject to an overall assessment as to whether requiring the production of the documents represents an appropriate way for the Commission to inform itself. ...”

[10] FRV argues the provision of the Trust Deed is required for the purposes both of conciliation, and if that is unsuccessful, arbitration. It says that in either stage, provision of the Trust Deed will assist the Commission in considering whether the UFU’s proposed order is appropriate in the circumstances, with its provision being a step to understanding the current arrangements and their implications.

[11] In response, the UFU argues that it provided Deloitte Tax Services, acting for FRV, with a copy of the Trust Deed on a confidential basis on 20 November 2023. This was for the purpose of analysing the benefits provided to firefighters. The UFU believes that Deloitte has in turn provided FRV with advice about the benefits available to firefighters and a break-up of the

payable allowance under the enterprise agreement and that correspondence from FRV, dated 1 May 2024, demonstrates that advice was given by Deloitte to FRV on these matters.

[12] The most recent order of the Commission includes the following terms (noting that the dollar amount referred to has since been increased by another order of the commission to \$55.22)²;

“3. Employees who have income protection insurance under the arrangements agreed between UFU and FRV from time to time will be entitled to reimbursement of their premiums up to an amount of \$50.43 per week or such other amount as is agreed between the UFU and FRV for the period of operation of the Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020 and any agreement which directly replaces that agreement, to indemnify them for the cost of such insurance, subject to the employee providing proof of payment.” (underlining added)

[13] As part of its case, FRV relies upon the phrase “under the arrangements agreed”, arguing that the arrangements that may have been in place at earlier times are no longer in place and are not agreed.

[14] The dispute has some complexity to it, and I am not presently satisfied that conciliation is at an end.

[15] The UFU’s proposed order is “that FRV continue to pay the full amount of the income protection allowance” as presently fixed by the Commission. However, the dispute as it manifests itself before me appears to not be focused around whether FRV continue to pay the full amount of the income protection allowance, which it is obliged to do anyway, and is instead now an apprehension on the part of the UFU that FRV will seek to reduce income protection payment. In comparison FRV’s view of the dispute likely concerns whether the current changed design of the Trust Deed and ancillary arrangements leaves FRV open to an unanticipated and substantial fringe benefits tax liability.

[16] The UFU argues that the core of the dispute is a construction issue. FRV takes a different tack, arguing that the “arrangements agreed” have changed, without it having an understanding the scope of the change. It seeks the trust deed in order to understand the extent and meaning of the changes.

[17] Failing agreement between the parties, the Commission may be asked to arbitrate the dispute, however characterised.

[18] While not clear, it appears reasonably likely that FRV will press for a reduction in the amount of its reimbursement, including through determination of the subject by the Commission. It appears driven in this possibility through advice given to it by its tax advisers that the actual cost of income protection insurance is but just a fraction of the weekly payment of \$55.22, with a substantial part of the balance being used for matters other than the provision of income protection insurance. The possibility has two implications; first, that FRV is being overcharged for a benefit provided to employees for a specified purpose and/or second, that the situation attracts a significant and unanticipated high fringe benefits tax liability, which it has no desire to assume and which it may need to seek to avoid through private tax ruling.

[19] I note the UFU's desire to keep the content of the Trust Deed confidential, although why is not clear, other than it is a private document deserving to remain private. I accept generally that there is an entitlement on the part of any party for their private affairs to be guarded against unnecessary scrutiny by others.

[20] Even so, FRV argues it will be impeded from furthering its legitimate enquiries and taking advice for the purposes of these proceedings if it does not have direct access to the Trust Deed. It argues provision of the documents on a confidential basis to its tax advisers, is insufficient for the purposes of obtaining advice for these proceedings. Since the Trust Deed was provided to FRV's tax advisers confidentially they are restrained from providing a copy of it to FRV.

[21] After considering the submissions of each party and the limited material before me at this time, I am satisfied that a case has been made for the provision of the Trust Deed directly to FRV. The document plainly has relevance to the course of proceedings before me. I am concerned that without production of the document, further conciliation will be ineffective, with a key party perhaps not being as aware of its situation as it should be, and being unable to respond with appropriate concessions or responses to the UFU. I am then concerned that, without production of the document, arbitration, if necessary, may be similarly ineffective, or that the Commission as arbitrator is inadvertently misdirected.

[22] While I am prepared to grant the application for an order, I am also of the view that this needs to be done in two stages.

[23] First, taking into account my observation that FRV needs access to the Trust Deed document so as to obtain advice, including legal advice, for the purposes of these proceedings – presently at the stage of conciliation – it is my view that the document should be provided to FRV in a controlled and confidential manner. In this respect, I will order that only a nominated senior executive within FRV and its solicitors and barristers retained for these proceedings, may have access to the Trust Deed once produced and then only for the purposes of these proceedings. To the extent that it is necessary to do so I invoke the provisions of s.593 of the Act to give effect to this intention.

[24] Second, should the application proceed to arbitration then, subject to further determination, I consider it would be appropriate for the document to be generally available to the parties, their instructors and witnesses in the hearing, albeit that the document may still be subject to a wider confidentiality order. Consideration of any such further order pertaining to the Trust Deed may be made at the appropriate time and I do not issue an order dealing with this second stage at this time.

[25] An Order will be made by the Commission through separate instrument in the following terms (and dealing only with the first stage referred to above);

[1] Having regard to the provisions of s.590 and s.593 of the *Fair Work Act 2009*, the following Orders are made by the Commission;

(a) Subject to paragraphs (b), (c) and (d) herein, the United Firefighters' Union of Australia of 410 Brunswick Street Fitzroy VIC 3065 is ORDERED to provide to the Fair Work Commission the documents, records and other information specified in the Schedule to this order (“the Documents”) before the Fair Work Commission at the following time, date and place:

Time: 10:00 AM

Date: Tuesday 1 October 2024

Place: Via email to Chambers.Wilson.C@fwc.gov.au
kgulle@landers.com.au and ataraborrelli@landers.com.au

(b) Until further order of the Commission, the Documents so produced are confidential and may not be distributed to or accessed by a person other than;

- (i) the United Firefighters' Union of Australia, its lawyers and persons it authorises;
- (ii) a nominated senior executive of Fire Rescue Victoria and lawyers acting for Fire Rescue Victoria in relation to the proceedings before the Fair Work Commission in matter number C2024/5387;
- (iii) a Member or employee of the Fair Work Commission dealing with matter number C2024/5387.

(c) Fire Rescue Victoria is to advise the Commission and the United Firefighters' Union of Australia of the name and position of the “nominated senior executive” referred to in paragraph (b)(ii), by no later than **10 AM Monday 30 September 2024**.

(d) A person authorised by paragraph (b)(ii) above to access the Documents may only do so for the purposes of responding to the Fair Work Commission proceedings in matter number C2024/5387.



COMMISSIONER

Appearances:

Mr H Borenstein KC, for the Applicant.

Mr B Avallone, for the Respondent.

Hearing details:

16 September.
2024.

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¹ [PR720617](#).

² See [2023 FWC 2020 and Print [PR765587](#), as amended by a Correction Order, Print [PR7678712](#)