To ALL UFU MEMBERS

MFB OPERATIONAL STAFF ENTERPRISE BARGAINING UPDATE

The UFU and the MFB met today to further discuss/negotiate a new operational staff enterprise agreement in accordance with the agreed procedures.

The MFB, prior to this meeting, had forwarded to the UFU correspondence which outlined the MFB’s position regarding the recent decision of Justice Murphy in the Federal Court – the CFA staffing matter.

Members would be aware, that the UFU has appealed Justice Murphy’s decision.

However, irrespective of such the MFB are relying upon its content and have indicated to the UFU that it is illegal for the UFU to pursue sub sections of clauses or in some cases the total content of clauses which are as follows:

(A copy of the MFB’s correspondence dated 21 February 2014 is attached. Members should read the MFB’s correspondence so you fully understand what your employer is seeking.)

- Minimum staffing
- Clause 12 classification of career paths and opportunities
- Clause 13 contracting out and maintenance of classification
- Clause 39 safe staffing levels
Clause 41 secondment and lateral entry
Clause 43 rostering
Clause 75 training and professional development
Clause 127 classifications
Clause 130 maintenance of classifications
Clause 137 rostering arrangement and procedures
Clause 149 maintenance of classifications
Clause 162 classifications
Clause 168 rostering arrangement procedures
Clause 171 career paths and opportunities
Clause 172 work locations and duties for Fire Service Communication Controllers
Clause 176 maintenance of classifications
Schedule 2 minimum staffing

UFU Response

In response to the MFB’s letter dated 21 February 2014 the UFU provided correspondence dated 27 February 2014 which advanced a way forward for negotiations and also address the issues raised by the MFB.

The parties met today to discuss the UFU’s correspondence of which the MFB representatives rejected and quite frankly were fairly aggressive in their approach to removing the above conditions of employment.

The UFU has in turn advised the MFB that it will respond accordingly in the near future.

In the interim Members should fully appraise themselves of the MFB’s position contained in the attached correspondence.

If you have any queries please contact the UFU office on 9419 8811.

Strength in Unity

READ OUT AT MUSTER AND PIN ON NOTICE BOARD

Authorised by Peter Marshall, Branch Secretary
21 February 2014

Mr Peter Marshall
United Firefighters Union
Victoria Branch
410 Brunswick Street
FITZROY VIC 3065

Sent via email: p.marshall@ufuvic.asn.au

Dear Mr Marshall,

Bargaining – Operational Employees Agreement 2013 and Senior Leadership Agreement 2013

The MFB refers to the bargaining for the proposed Metropolitan Fire Brigade Operational Employees Agreement 2013 and the proposed Metropolitan Fire Brigade Senior Operational Leadership Agreement 2013 (Proposed Agreements).

This letter is intended to put the UFU on notice pursuant to section 229(4)(b) of the Fair Work Act 2009 (FW Act) that the MFB has concerns that the UFU (as a bargaining representative for the Proposed Agreements) has not met, and is not meeting, the good faith bargaining requirements in its continued efforts to seek to include in the Proposed Agreements matters which are impermissible.

The MFB sets out below in detail the nature of its concerns. To progress bargaining, the MFB requests that the UFU responds to these concerns by Thursday 10.00am on 27 February 2014, prior to the next bargaining meeting.

Effect of the CFA decision

As you know, the recent decision of Murphy J in the Federal Court in United Firefighters Union of Australia v Country Fire Authority [2014] FCA 17 (CFA decision), makes a number of findings, including that:

1) The principle of implied constitutional limitation described in Re Australian Education Union; Ex parte Victoria (1995) 184 CLR 188 (Re AEU) applies to enterprise agreements approved by the FWC entered into voluntarily by the State or its agencies.
2) Where a clause in an enterprise agreement contravenes the implied constitutional limitation, it is invalid and unenforceable.

3) Clauses in the enterprise agreement between the UFU and the CFA that constrained the CFA's ability to deal with issues such as recruitment, redundancy and work classification were found to be unconstitutional and, accordingly, invalid and unenforceable.

The CFA decision affirms the MFB's long-standing position that:

a) there is content in a number of clauses\(^1\) which contravene the implied constitutional limitation, and which is accordingly invalid and unenforceable, in the Current Agreements\(^2\); and

b) content which offends Re AEU is not capable of being included in any new enterprise agreement, and will not be included in the Proposed Agreements.

**MFB's communication of its position in relation to the Proposed Agreements**

The MFB has informed the UFU that content which offends the principle set out in Re AEU (and the limitations on referral of power contained in the *Fair Work (Commonwealth Powers) Act 2009*) should not be included in the Proposed Agreements on a number of occasions, including at the commencement of bargaining for the Proposed Agreements in its letter dated 16 April 2013.

In that letter, the MFB informed the UFU that the Proposed Agreements should not contain "content that purports to interfere with, or curtail, the functions of the Victorian Government or its capacity to function as a government" in accordance with Re AEU. That letter also set out a list of key clauses in the Current Agreements which the MFB considers are of no effect due to Re AEU.

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\(^1\) In the *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010*, the MFB considers that the following clauses contain content which is impermissible: **Clause 32**: Maintenance of classifications; **Clause 33**: Safe staffing levels; **Clause 36**: Crewing appliances and stations; **Clause 37**: Rostering; **Clause 69**: Classifications; **Clause 70**: Career paths and opportunities; **Clauses 74 and 116**: Maintenance of classifications; **Clause 82**: Rostering arrangements and procedures; **Clause 91**: Operational Support Group; **Clause 92**: Training; **Clause 112**: Career Paths and Opportunities; **Clause 113**: Work location and duties for fire service communication controllers; **Schedule 2**: Minimum crewing.

In the *Metropolitan Fire and Emergency Services Board & United Firefighters Union Assistant Chief Fire Officers Agreement 2010*, the MFB that the following clauses contain content which is impermissible: **Clause 21**: Establishment numbers for ACFOs; **Clause 26**: Career Paths and Opportunities; **Schedule 2**: ACFO Position Description; **Schedule 3**: Staffing.

\(^2\) The Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010 and the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010 (Current Agreements)
Since the MFB sought to commence bargaining for the Proposed Agreements (now ten months ago), the MFB has continued to inform the UFU that such clauses should not be included in the Proposed Agreements, including on the following occasions:

- In the MFB's explanatory memoranda for the Proposed Agreements, sent to the UFU on 25 October 2013.
- In the 'Outline of Key Bargaining Outcomes' document, prepared and provided for the UFU at the MFB's presentation on the Proposed Agreements on 31 October 2013.
- By way of letter to the UFU dated 21 November 2013, regarding the UFU's bulletin of 19 November 2013.
- Through responses to the UFU's questions arising from the MFB's presentation, sent to the UFU on 31 October 2013.
- In the MFB's response to the UFU's request for further information on the Proposed Agreements to understand proposed changes to the existing employment arrangements, sent to the UFU on 2 December 2013.
- In the MFB's letter to the UFU dated 6 December 2013, putting the UFU on notice that the MFB has concerns that the UFU is not meeting the good faith bargaining requirements.
- In the MFB's letter and response to the UFU's draft agreement, provided to the UFU on 23 January 2014.
- In bargaining meetings on 4 February 2014, 13 February 2014 and 18 February 2014.

**UFU's conduct in bargaining**

Despite the MFB's repeated communication to the UFU that the MFB will not include content in the Proposed Agreements that is impermissible, the UFU have continued to seek to include impermissible matters in the Proposed Agreements.

In the UFU draft agreement, provided to the MFB on 2 December 2013, the UFU has sought inclusion of the following clauses which contain content which offends the principle in Re AEU:

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<tr>
<th>Clause</th>
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<tr>
<td>12</td>
<td>Classifications, career paths and opportunities</td>
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<td>13</td>
<td>Contracting out/maintenance of classifications</td>
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<td>39</td>
<td>Safe staffing levels</td>
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<td>41</td>
<td>Secondment and lateral entry</td>
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<td>Rostering</td>
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<td>Work location and duties for fire service communication controllers</td>
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<td>176</td>
<td>Maintenance of classifications</td>
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<td>Schedule 2</td>
<td>Minimum crewing</td>
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The UFU has also sought to include impermissible content in the UFU’s ‘Document of further response to the MFB Operational Staff Claims’, dated 19 December 2013.

The UFU has also continued to pursue the inclusion of impermissible content at bargaining meetings held, subsequent to the handing down of the CFA decision, on 4 February 2014, 13 February 2014 and 18 February 2014.

**MFB’s concerns that the UFU’s conduct breaches the requirements of good faith bargaining**

The MFB is concerned that the conduct of the UFU in seeking to include impermissible matters in the Proposed Agreements is contrary to the good faith bargaining requirements as set out in section 228 of the FW Act.

In particular, the MFB considers that the UFU’s conduct in seeking to negotiate during bargaining for the inclusion of impermissible content in the Proposed Agreements constitutes a failure or a refusal by the UFU to:

  a) give genuine consideration to the MFB’s Proposed Agreements or the documents provided by the MFB to the UFU as background or supporting information; and
b) conduct itself in negotiations in a manner that is not capricious or unfair so as to undermine collective bargaining,
as required by section 228(1) of the FW Act.

Seeking to include impermissible matters which it is outside the jurisdiction of the Fair Work Commission to approve, and which cannot lawfully be included in an enterprise agreement, indicates that the UFU is not genuinely trying to reach agreement.

The MFB refers to the law on protected industrial action, where a protected action ballot order can only be made where the Fair Work Commission is satisfied that the applicant is genuinely trying to reach an agreement with the employer\(^3\). Case law in this area states that if a party is pursuing demands for provision that cannot lawfully be included in an agreement under the FW Act, it is unlikely that the party can be said to be genuinely trying to seek agreement\(^4\).

By analogy, the MFB submits that in pursuing demands for inclusion of content in the Proposed Agreements which, in accordance with Re AEU and the CFA decision, cannot lawfully be included in an agreement, the UFU cannot be said to be genuinely trying to reach agreement.

In these circumstances, it cannot be the case that, as a party who is not genuinely trying to reach agreement, the UFU can be found to be bargaining in good faith.

The MFB look forward to the UFU's response to the MFB's concerns by Thursday 27 February 2014.

Yours sincerely,

[Signature]

Russell Eddington
Acting Chief Executive Officer

\(^3\) FW Act section 443.