Memorandum of Advice

Application by the MFESB to terminate an enterprise agreement

1. I am instructed by the United Firefighters Union that it sent an email to Commander and ACFO members that contained what is extracted below:

> "It appears that the MFB in public statements on this matter, and as we understand in their approaches to individuals, have been focusing on the consultation clause, dispute resolution and matters that relate to implementing change within the organisation. UFU is concerned that there is some confusion among senior officers about the nature of the MFB's case.
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> So you are fully aware and have been advised of the true scope of the MFB's application, we advise that if the Commission finds the MFB application is in the public interest, it must set aside the agreement in its entirety. It is not open to the Commission to set aside an individual clause or a handful of clauses as that is not permitted in the context of the MFB's application."

2. I am asked to advise whether in my opinion the statement in the above extract that the Commission "must set aside the agreement in its entirety" is correct.[1] I think it is. The grounds for doing so however are twofold: the Commission must be persuaded that termination is not contrary to the public interest and that it is appropriate to do so in all the circumstances, taking into account employer and employer views and the likely effects of termination on both groups.

3. The MFESB has applied under s. 225 of the *Fair Work Act* 2009 to terminate 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.

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[1] In this advice, I address only the position of the agreements under the Commonwealth *Fair Work Act 2009*. I do not examine what may be done to enforce the agreements if terminated, nor have I been asked to.

4. The power to terminate is conferred by s. 226. It is expressed in mandatory terms. It must be exercised in favour of termination if the Commission reaches the opinions stated in s. 226(a) and (b). So much is clear from the text of s. 226 itself, which is set out below:

> **226 When the FWC must terminate an enterprise agreement**
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> If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
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> (a) the FWC is satisfied that it is not contrary to the public interest to do so; and
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> (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
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> (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
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> (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

5. Further, s. 227 provides that:

> **227 When termination comes into operation**
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> If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.

6. The legislation does not permit the Commission to terminate in part. An enterprise agreement is a collection of terms and conditions that is regarded by the *Fair Work Act* as one legal instrument. All the terms and conditions in it become legally enforceable once the instrument is approved by the Commission; all of them cease to be legally enforceable under the *Fair Work Act* once the agreement is terminated. The last proposition is confirmed by s. 54(2) and (3); and s. 53(5).

7. S. 55(2)(a) relevantly provides that an enterprise agreement ceases to operate on the day the termination comes into effect pursuant to s. 227.

Significantly, s. 54(3) declares that once an enterprise agreement has ceased to operate "[it] can never operate again". An enterprise agreement "applies" to an employee if the employee is "covered". By means of these concepts, the *Fair Work Act* selects which persons are legally entitled under that law to the conditions contained in a particular enterprise agreement, subject to any exclusion or limitation in the agreement itself. To apply to an employee, the employee must be covered. However, by reason of s. 53(5) an employee is not covered (or more accurately is no longer covered) if an enterprise agreement has ceased to operate.

8. If, as the Union email suggests, the primary focus of the MFB is on collecting evidence of the effect of particular clauses of 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, such evidence can only deployed in an effort to persuade the Commission that the criteria for termination are satisfied. If successful, termination of the agreements is required by the statute, in which case:

    (a) they cease to operate on the date they are terminated;

    (b) they can never operate again;

    (c) any employee presently covered by the agreements ceases to be covered on the termination date; and

    (d) the instrument as a whole becomes inoperative, and cannot be enforced as an enterprise agreement under the compliance provisions of the *Fair Work Act*.

9. Subject to relevance, a person called to give evidence may be cross examined about more than their experience of the effect of the clauses about which they give direct evidence.

10. In an application under s. 225, the scope of what evidence is relevant is of potentially wide compass because the termination criteria specified by s.

226(a) and (b) of the *Fair Work Act* is very broadly expressed. Both criteria must be present. As to the first, the Commission must be satisfied that it is not contrary to the public interest to terminate. The Commission has in past cases held that the concept of the public interest cannot be precisely defined (save that it is distinct from the interests of the parties), may involve questions of degree and may involve a broad range of circumstances. The concept is broad. The same is true of the second criterion in (b) of s. 226, which is more directly concerned with the effect of prospective termination on employees and the employer. The Commission is required to form an opinion that it is "appropriate to terminate the agreement taking into account all the circumstances". The circumstances are not identified by the Act. This is left to the Commission.

11. By reason of the above, if it assists, it is possible that a witness may be asked questions about matters within his or her knowledge or expertise in addition to the topics he or she has been called to give evidence, subject to any rulings of the Commissioner.

12. I trust the above meets your requirements. I would be happy to further advise or clarify any aspect if that is required.

5 May 2014

Malcolm Harding
Isaacs Chambers