

# United Firefighters Union, Victorian Branch

## Legal Update Newsletter

*Keeping members informed about litigation issues*



Issue: 1 Vol: 1 April 2014

**To ALL UFU MEMBERS**

## Litigation Update

**The CFA and MFB are continuing their regressive and litigious approach towards your terms and conditions of employment which both employers agreed to in 2010.**

To keep members informed on this constant stream of employer actions, please find in this newsletter an over-view of the current legal and industrial matters facing the Union.

The summary below of significant matters clearly shows the persistent renegeing of agreements and the denial of rights under the enterprise agreements.

Due to space constraints, this is just an outline of some of the key issues that are currently being litigated, however further updates will be provided on a regular basis.

### Cases

#### MFB APPLY TO TERMINATE OPERATIONAL STAFF AGREEMENTS

The MFB have made an application to the Fair Work Commission to have the MFB UFU Operational Staff Agreement 2010 and the MFB UFU ACFO Agreement 2010 terminated. These agreements were negotiated, agreed, signed by the MFB and UFU and then certified by the Fair Work Commission in 2010.

The MFB now wants to wipe out the operational staff terms and conditions of employment claiming they are unworkable and contain "not permitted matters" despite declaring the agreements were lawful at the time.



*Napthine's future plans for Victorias fire services.*

The MFB's intention is to have the working conditions reduced to the Modern Award which is the Firefighting Industrial Award 2010.

MFB have announced it will give an undertaking "to maintain the core entitlements" of operational staff if the Agreements are terminated. The terms, scope or effect of any such undertaking, if eventually given, are unknown.

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The MFB also applied to the Fair Work Commission to have the matter heard by a Full Bench. Fair Work Commission President Ross refused to have the matter heard by a Full Bench. As a result it will be heard by one Commissioner which is usual practice.

The case has been set down for a 20 day-hearing due to the expected significant evidence and number of witnesses. It is proposed to be heard in July 2014.

### UFU APPEAL AND CFA CROSS-APPEAL OF THE "RECRUITS" CASE IN THE FEDERAL COURT OF AUSTRALIA

This is the Appeal of the Federal Court case that was brought because the CFA reneged on the implementation of the independent board of reference findings on severe fire-fighter resourcing problems across the State and cancelling the recruitment of 342 additional staff as agreed ("the Recruits case"). The failure to honour this agreement is significant for the protection of the Victorian community. Of note, the Auditor General found this year that the CFA doesn't even have an understanding of how many volunteers are needed to service the community.

There were a number of issues in the Federal Court case before Justice Murphy. Many of these involved the CFA asserting that the Agreement it had made, and freely entered, and had certified by the Fair Work Commission, was invalid for a variety of technical reasons. The UFU won all but one of these arguments.

In the decision that is being appealed [***United Firefighters Union v Country Fire***

***Authority 2014 FCA 17 (31/1/14)***] the Federal Court ruled enterprise agreement clauses regarding staffing, contracting out/maintenance of classifications, secondment and lateral entry (clauses 26, 27, 28 and 122) were invalid as they impaired the capacity of a state government to determine the number and identity of its employees or the number and identity of employees to be made redundant.

However, Justice Murphy went on to say:

*"I have some difficulty in treating the implied constitutional limitation as applicable to **industrial agreements** that are bona fide voluntarily entered into by a state party and which may therefore have no practical impact on a State's capacity to govern."*

The CFA had negotiated and agreed to the 342 additional firefighters and the process for employing the additional firefighters and signed the operational enterprise agreement in 2010. They also had government approval to do so and the agreement was subsequently certified.

The CFA have notified of cross-appeals of Justice Murphy's decision again attempting to challenge the validity of consultation and dispute resolution clauses.

The CFA argued that clauses 13, 14 and 16 of the Agreement were "objectionable" and /or "unlawful terms".

The UFU was **successful** in its argument that these clauses did not contain either objectionable or unlawful terms. Justice Murphy said that he did not see the role of the UFU in the consultation process (as

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approved by all CFA employees covered by the Agreement) as discriminatory and accordingly he held that these clauses were in fact **valid**.

The CFA argued that:

- Clause 15 should only apply to those matters arising under the Agreement that pertain to:
  - the relationship between the CFA and the employees covered by the Agreement or
  - the CFA and the UFU.
- Alternatively, the CFA argued that clauses 15.1.2 and 15.1.3 of the Agreement to the extent that they relate to the dispute resolution procedure beyond matters under the Agreement, are invalid.

Again, the **UFU won** this argument as the Court found that this clause was valid and that the clause did not prevent a dispute resolution clause from extending to matters beyond the Agreement.

Importantly, the UFU also successfully argued that the CFA is a constitutional corporation. If the CFA had been found not to be a trading corporation then the Referral Act 2009 would prevent prescribed minimum staffing.

The CFA has filed a notice of contention claiming Justice Murphy erred in finding the CFA was a constitutional corporation.

### **COMMON LAW DEEDS TO BE CONSIDERED BY THE FEDERAL COURT OF AUSTRALIA IN THE UFU v CFA VOLUNTEER SUPPORT OFFICES CASE**

CFA have sought to introduce a Volunteer Support program and officers in early 2013 with no consultation and significant concerns raised by the Union about work currently performed by current Operational Staff. The UFU have filed in the Federal Court regarding breach of the agreement.

The UFU has also put the Common Law Deed between the UFU and the CFA before the Federal Court in this matter.

The Deed was agreed and signed by the CFA and UFU in 2010 to protect terms of conditions of employment should any term of the CFA UFU Operational Staff Agreement be deemed to be unlawful and/or unenforceable.

The Deeds have been put before the Federal Court in this matter as a result of the Recruits case (referred to above) where Justice Murphy found four clauses including the no contracting out/maintenance of classifications clause were unlawful on the basis it interfered with the State's right to determine the number and identity of state employees.

### **MFB OPERATIONAL BARGAINING - GOOD FAITH BARGAINING ORDERS**

MFB filed for a breach of good faith bargaining and then withdrew their application.

They have since threatened another application and parties are continuing discussions, including through conciliation at the Fair Work Commission.

Presently the UFU are recasting a number of claims.

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### **CFA OPERATIONAL BARGAINING - GOOD FAITH BARGAINING ORDERS**

CFA filed for a breach of good faith bargaining.

The matter was heard in late February and the Fair Work Commission issued interim orders against the CFA and the UFU. CFA attempted to seek new orders at a hearing on 26/3/14 however this attempt was not accepted by the Commission.

Parties are currently complying with the interim order and the matter is due back in the Fair Work Commission on 26/5/14.

### **CFA FISKVILLE BARGAINING - FAIR WORK COMMISSION BARGAINING DISPUTE**

This matter has been in front of the Fair Work Commission since 2012, where CFA stated that it was their final offer despite not having any wage figures in the agreement at the time. The parties have been in numerous conferences before the Commission since and most recently on Tuesday 25/3 several matters were progressed however significant outstanding matters remain with no adequate movement from CFA. Fiskville hospitality staff are also seeking to become incorporated into the larger PTA agreement. The CFA have put a settlement offer to employees that is currently being considered.

### **CFA DMO FAIR WORK COMMISSION BARGAINING DISPUTE**

Members have voted to take protected industrial action, due to the CFA's conduct in bargaining and lack of an acceptable agreement proposal. CFA have attempted to use legal arguments to stop the effect of the protected action.

Several conferences have been held in front of the Fair Work Commission in order to progress the bargaining dispute.

### **CFA PAD FLEXIBLE HOURS OF WORK**

This dispute concerned whether the CFA could implement certain flexible hours for PAD Operators pursuant to clause 150 of the 2010 Agreement. The CFA has sought to implement a flexible hours arrangement. The CFA has filed in Fair Work Australia in a bid to put PAD supervisors and operators on a roster.

The PAD section of the enterprise agreement clearly sets out the hours of work. The CFA is claiming that a clause headed "flexible working hours" is sufficient to change those hours of work. The UFU has claimed FWA has no jurisdiction to hear the matter as the hours of work clause details the hours to be worked and it would be an extra claim.

FWC decided that parties should attempt to reach agreement on the implementation of flexible hours. The UFU appealed this matter however because the FWC didn't finally decide the dispute, meaning the appeal could not be heard at that time. The matter has been discussed between the parties and has been heard at the Fair Work Commission. On 28/3/14 the UFU met with the CFA to attempt to resolve matters via conference at the Commission and is continuing examining the issue. There is a FWC conference report back to Commissioner Wilson later this month.

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### **CFA and MFB FISKVILLE**

Disputes have been heard in the Fair Work Commission regarding use of Fiskville for MFB.

EPA have issued clean up notices regarding the site soil and water

The UFU is currently pursuing an investigation and prosecution through WorkSafe regarding this matter.

### **CFA RESERVED MATTERS**

Nearing the end of the negotiations for the 2010 Operational Agreement, Mick Bourke wrote a letter setting out a list of reserved matters that could go to arbitration in the Commission should they not be able to be agreed upon. These matters were attempted to be resolved between the parties for a significant period of time and when they could not be agreed, the UFU referred them to the Commission for arbitration. The CFA are now attempting to use legal arguments to stop the arbitration, despite having agreed to it in 2010. The matter is currently in front of the Commission for hearing.

### **HAZELWOOD OHS MATTERS**

After numerous and serious health and safety concerns arising in relation to the Hazelwood Mine Fire, including serious water quality issues and a leaked letter regarding Carbon Monoxide levels and work systems at the site, this matter has continued to escalate. At this stage the UFU has made applications to both the Coroner and also WorkSafe for investigation and possible prosecution. The Coroner will not investigate as it views it as a duplication of the government's inquiry into the Hazelwood fire. The UFU is preparing a submission with witness statements to the government inquiry focussing on serious OH&S issues Fire Fighters faced. Worksafe

has referred our claim to the Enforcement Group for a comprehensive investigation regarding breaches of OH&S legislation. Worksafe stated as six months has not elapsed since alleged event has occurred the matter is not treated as a request for prosecution.

### **FIREGROUND ACCOUNTABILITY & GPS**

The UFU and MFB have been consulting for many months regarding enhanced fireground accountability systems. Last year, the UFU filed a dispute regarding the MFB's lack of consultation surrounding their unilateral attempt to implement an excel spreadsheet as a fireground accountability tool. Out of this a consultative process was put in place that resulted in a UFU/MFB working group developing the FAST Card system. Since the development of that system the UFU and MFB have been in dispute regard the use of GPS as part of the system. The UFU has provided the MFB with protocols which allow GPS to be used in any emergency response however; as the MFB were refusing to implement GPS in these circumstances the UFU filed a dispute before the FWC. The parties have met once in conference before FWC however the MFB have now decided to ignore the agreed outcome of that conference before the Commission. The matter is ongoing and the UFU is considering the next steps.

### **LATE NOTIFICATION PAYMENTS**

For some time members have been raising with the UFU multiple disputes relating to the MFB refusing to pay members payments regarding late notification of a move. The UFU has always maintained that the clause requires a member to be notified of a move within the specified timeframes and, at a time

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when they are *on shift*. The MFB have sought to deny this interpretation and deny members payment.

The UFU is now running a test case arbitration before the Fair Work Commission seeking a decision on the interpretation of the clause. The matter will be head in early May.

### **NON-PAYMENT AND PAYROLL DEDUCTIONS**

In regards to the recent deployments by MFB firefighters including to Stawell and Hazelwood the MFB has continued to seem incapable of simply paying members in time for their work.

The UFU has notified the MFB and are preparing applications seeking payment of monies owing through Federal Circuit Court within the small claims jurisdiction.

### **TERMS OF REFERENCE DISPUTE**

Recently the MFB did not succeed in an application to re-open the term of reference dispute.

In 2011 the UFU filed a dispute surrounding the terms of reference for the Consultative Committee and Sub-Committees. As members would be aware the consultative process is crucial to ensuring your voice, through your representatives, is heard, and is part of decisions within the MFB.

The process since the operation of the agreed terms of reference has come into force has generally been smooth between the parties with consultative committee meetings and subcommittee meetings being held regularly.

The MFB however, who we know are continually trying to collapse the consultative process and avoid firefighter input, have sought to recently re-open the terms of reference dispute before FWC which was concluded in 2011.

The Fair Work Commission denied the MFB request to reopen the dispute.

### **MFB LEAVE BALANCES**

This matter has been ongoing at the Fair Work Commission reagrding the accuracy of Firefighter's leave balances within the MFB. This has been a persistent and ongoing issue. To date the MFB has been unable to explain why numerous employees have identified significant discrepancies within their leave balances.

Last year before the Commission the MFB made commitments to provide the Deloitte audit report to the UFU. However after numerous requests, a report has not been forthcoming and the UFU has recently sought the matter be relisted.

### **TRANSFIELD NON-PAYMENT OF ALLOWANCE**

The UFU have lodged a dispute in the Commission regarding a non-payment of an allowance at Transfield, the 'Range' allowance. A conference regarding this matter is scheduled for 1/4/14 at the Fair Work Commission.

### **AWARD MODERNISATION**

As part of the award modernisation process, enterprise awards and other awards are being modernised or terminated. The UFU has made applications to modernise the Victorian Firefighting Industry Employees

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Award and the CFA Administrative and Support Services Award.

The Award that the MFB have referred to in correspondence regarding their application to terminate the operational staff agreements is an Award that has already been modernised – the Firefighting Industry Award.

In most cases these Awards are the safety net of conditions which have been significantly superseded by enterprise agreements. However it is important to protect these instruments of which are utilised by the Commission when considering the approval of enterprise agreements.

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The United Firefighters Union holds one of the highest membership densities of any contemporary unions, whereby almost all CFA and MFB firefighters are members. This means we have a collective voice which is both unique and loud. It means as a collective, we can cause change where wrongs need to be righted.



**Make no mistake - this constant stream of litigation is not by chance or coincidence.**

It is clear there is no intention by CFA and MFB Boards or senior management to honour the agreements and that they are undertaking an unending stream of litigation intended to attack you conditions of employment. Whilst the UFU Legal and Industrial teams continue to resist these attacks, there is much that members can do to assist in bringing awareness regarding the actions of the current employers and the Government.

**If we don't organise and stand up now, the CFA, MFB and Government will not stop until our industry and your job is reduced to rubble.**

**Now is the time to act!**

Victorian Firefighters will be active and loud over the coming months, leading up to the November State Government Election where Napthine and Minister Wells will be seeking to regain their control over your workplace. **Please contact your shop steward or electorate coordinators to find out what we need.**

If you are unsure of your local representatives, please contact the UFU Office on 9419 8811.

**Do you have a question?**

Please email any questions to [reception@ufuvic.asn.au](mailto:reception@ufuvic.asn.au).