FEDERAL COURT OF AUSTRALIA

United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1

Citation:	United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1
Appeal from:	United Firefighters Union of Australia v Country Fire Authority [2014] FCA 17
Parties:	**UNITED FIREFIGHTERS' UNION OF AUSTRALIA v COUNTRY FIRE AUTHORITY**
File number:	VID 84 of 2014
Judges:	PERRAM, ROBERTSON AND GRIFFITHS JJ
Date of judgment:	8 January 2015
Catchwords:	**CONSTITUTIONAL LAW** – whether Country Fire Authority, established by the *Country Fire Authority Act 1958* (Vic), a trading corporation within *Commonwealth Constitution* s 51(xx) **CONSTITUTIONAL LAW** – whether *Fair Work Act 2009* (Cth) beyond the legislative power of the Commonwealth in its application to clauses 26, 27, 28 and 122 of the Country Fire Authority United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010 by reason of the principle in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 and *Re Australian Education Union, Ex parte Victoria* (1995) 184 CLR 188 **INDUSTRIAL LAW** – whether clauses 13, 14 and 16 of the Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010 (Agreement) objectionable terms for the purposes of s 12 of the *Fair Work Act 2009* and by reason of ss 253(1)(b) and 356 of that Act of no effect – whether consultation clauses not "consultation terms" as required by s 205 of the *Fair Work Act 2009* and of no effect so that the Model Consultation Term prescribed by the *Fair Work Regulations 2009* (Cth) taken to be a term of the Agreement – whether subclauses 15.1.2 and 15.1.3 of the Agreement were invalid dispute resolution clauses and invalid and of no effect – whether subclause 38.3 of the Agreement invalid and of no effect
Legislation:	*Commonwealth Constitution* s 51(xx)

Building Act 1993 (Vic) s 3
Country Fire Authority Act 1958 (Vic) ss 6, 6A, 6B, 6F, 7, 14, 17A, 20, 20A, 20AA, 20B, 21, 22, 23AA, 75, 76, 77, 77A, 77B, 80A, 84, 84B, 87, 87A, 87AA, 97B, 97C and 110
Fair Work Act 2009 (Cth) ss 12, 19, 50, 54, 163, 169, 171, 172, 176, 181, 182, 185, 186, 187, 188, 193, 194, 202-205, 209-226, 228, 230, 231, 237, 238, 239, 253, 342, 346, 356, 408, 411-415, 418, 423-424, 539 and 546
Fair Work (Commonwealth Powers) Act 2009 (Vic) ss 4, 5
Judiciary Act 1903 (Cth) s 78B

Building Regulations 2006 (Vic) reg 309
Country Fire Authority Regulations 2004 (Vic) regs 1, 96, 97, 98, 99 and 100

Cases cited:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)[2008] WASCA 254; (2008) 37 WAR 450
Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169
Austin v Commonwealth [2003] HCA 5; (2003) 215 CLR 185
Australian Industry Group v Fair Work Australia [2012] FCAFC 108; (2012) 205 FCR 339
Bankstown Handicapped Children's Centre Association v Hillman [2010] FCAFC 11; (2010) 182 FCR 483
Boral Resources (NSW) Pty Ltd Transport Workers' Union of Australia [2010] FWAFB 8437; (2010) 202 IR 135
Brown v West (1990) 169 CLR 195
Clarke v Federal Commissioner of Taxation [2009] HCA 33; (2009) 240 CLR 272
Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1
Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17; (1990) 169 CLR 594
E v Australian Red Cross Society (1991) 27 FCR 310
Fortescue Metals Group Ltd v Commonwealth [2013] HCA 34; (2013) 250 CLR 548
Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10
JJ Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53; (2012) 201 FCR 297
JS McMillan Pty Ltd v Commonwealth (1997) 77 FCR 337
Klein v Metropolitan Fire and Emergency Services Board [2012] FCA 1402; (2012) 208 FCR 178
Melbourne Corporation v The Commonwealth (1947) 74 CLR 31
Metropolitan Fire and Emergency Services Board v United Firefighters' Union of Australia (Vic Branch) [2012] FWAFB 9555; (2012) 223 IR 448

Mid Density Developments v Rockdale Municipal Council (1992) 39 FCR 579
NT Power Generation Pty Ltd v Power and Water Authority [2004[HCA 48; (2004) 219 CLR 90
New South Wales v Commonwealth [2006] HCA 52; (2006) 229 CLR 1
Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) [2002] FCA 860; (2002) 120 FCR 191
Parks Victoria v Australian Workers' Union [2013] FWCFB 950; (2013) 234 IR 242
Queensland Electricity Commission v Commonwealth [1985] HCA 56; (1985) 159 CLR 192
Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243
R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (1979) 143 CLR 190
R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533
Re Australian Education Union, Ex parte Victoria [1995] HCA 71; (1995) 184 CLR 188
Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd (1978) 36 FLR 134
State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282
United Firefighters Union of Australia v Country Fire Authority [2014] FCA 17; (2014) 218 FCR 210
United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board [1998] FCA 551; (1998) 83 FCR 346
Victoria v Commonwealth (1957) 99 CLR 575
Victoria v Commonwealth [1996] HCA 56; (1996) 187 CLR 416
Village Building Co Ltd v Canberra International Airport Pty Ltd [2004] FCA 133; (2004) 134 FCR 422
Western Australia v Commonwealth [1995] HCA 47; (1995) 183 CLR 373
Williams v Commonwealth (No 2) [2014] HCA 23; (2014) 88 ALJR 701

Dates of hearing:	13 and 14 August 2014
Place:	Melbourne
Division:	Error: Reference source not found
Category:	Catchwords
Number of paragraphs:	263

Counsel for the Appellant:	Mr R Kenzie QC with Mr W Friend QC
Solicitor for the Appellant:	Davies Lawyers
Counsel for the Respondent:	Mr JL Bourke QC with Mr JD Forbes
Solicitor for the Respondent:	Clayton Utz
Counsel for the Intervener:	Mr S McLeish QC SG with Mr N Wood
Solicitor for the Intervener:	Victorian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 84 of 2014**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**UNITED FIREFIGHTERS' UNION OF AUSTRALIA** **Appellant**
AND:	**COUNTRY FIRE AUTHORITY** **Respondent**
AND BETWEEN:	**COUNTRY FIRE AUTHORITY** **Cross-Appellant**
AND:	**UNITED FIREFIGHTERS' UNION OF AUSTRALIA** **Cross-Respondent**

JUDGES:	**PERRAM, ROBERTSON AND GRIFFITHS JJ**
DATE OF ORDER:	**8 JANUARY 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

The parties bring in orders to give effect to these reasons within 21 days.

In the event that the parties cannot agree on the orders, they are to file and serve within 28 days the orders for which they contend, together with any written submission, limited to three pages, in support of those orders.

The orders and submissions referred to in orders 1 and 2 are to include orders as to costs, both of the proceedings at first instance and of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
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ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

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AND:

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AND BETWEEN: **COUNTRY FIRE AUTHORITY**
Cross-Appellant

AND: **UNITED FIREFIGHTERS' UNION OF AUSTRALIA**
Cross-Respondent

JUDGES: **PERRAM, ROBERTSON AND GRIFFITHS JJ**
DATE: **8 JANUARY 2015**
PLACE: **Error: Reference source not found**

REASONS FOR JUDGMENT

THE COURT

Introduction

1 These proceedings in the Full Court involve an appeal, a cross-appeal and notices of contention.

2 In broad terms, the issues for determination are:

(1) Is the Country Fire Authority (**CFA**) a trading corporation?

(2) If the answer to question (1) is "Yes", is the *Fair Work Act 2009* (Cth) (*FW Act*) beyond the legislative power of the Commonwealth in respect of its application to cll 26, 27, 28

and 122 of the CFA/United Firefighters' Union of Australia (**UFU**) Operational Staff Enterprise Agreement 2010 (the **Agreement**) by reason of the principle in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 (**Melbourne Corporation**) and *Re Australian Education Union, Ex parte Victoria* [1995] HCA 71; (1995) 184 CLR 188 (**AEU**)?

(3) If the answer to question (1) is "No"; are cll 26, 27, 28 and 122 of the Agreement beyond the legislative power of the Commonwealth by reason of s 5 of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (the *Referral Act*)?

(4) Are cll 13, 14 and 16 of the Agreement, referred to as the consultation clauses, objectionable terms for the purposes of s 12 of the *FW Act* and by reason of ss 253(1)(b) and 356 of the *FW Act* of no effect?

(5) Are the consultation clauses not "consultation terms" as required by s 205 of the *FW Act* and of no effect so that the Model Consultation Term prescribed by the *Fair Work Regulations 2009* (Cth) is taken to be a term of the Agreement?

(6) Are subcll 15.1.2 and 15.1.3 of the Agreement invalid dispute resolution clauses and invalid and of no effect?

(7) Is subcl 38.3 of the Agreement invalid and of no effect?

4 Our short answers to these issues are:

(1) Yes.

(2) No.

(3) Unnecessary to answer.

(4) No.

(5) No.

(6) No.

(7) No.

5 The UFU's appeal

6 The appeal by the UFU is from certain orders made by the primary judge on 12 February 2014 relating to the Agreement: see *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17; (2014) 218 FCR 210. The grounds of appeal centred on the declarations and orders made by the primary judge that by reason of the implied limitation on the Commonwealth's legislative power to make laws which operate to destroy or curtail the capacity of

a State government to function, as expressed in *AEU*, cll 26, 27, 28 and 122 of the Agreement were invalid and unenforceable.

7 Clauses 26, 27, 28 and 122 of the Agreement concerned:

> 26. Contracting Out/Maintenance of Classifications
>
> …
>
> 27. Safe Staffing Levels
>
> …
>
> 28. Secondment & Lateral Entry
>
> …
>
> and
>
> 122. Lateral Entry
>
> …

8 The parties' notices of contention

9 The CFA contended that the primary judge erred in finding that the CFA was a constitutional corporation within the meaning of s 51(xx) of the *Commonwealth Constitution*.

10 The CFA put in issue the findings of the primary judge that three specified activities of the CFA were trading activities of that body.

11 Correspondingly, by its amended notice of contention, the UFU put in issue the findings of the primary judge that six specified activities of the CFA were not trading activities of that body.

12 The CFA contended that the primary judge should have found that it was not a constitutional corporation and its ability to make enterprise agreements was via the *Referral Act*. The CFA contended that the primary judge should have found that cll 26, 27, 28 and 122 of the Agreement fell within the referral exclusion prescribed by s 5 of the *Referral Act* and were invalid on that basis.

13 Sections 4 and 5 of the *Referral Act* relevantly provided:

> **4 Reference of matters**
>
> (1) Subject to section 5, the following matters are referred to the Parliament of the Commonwealth—
>
> (a) the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the provisions set out in the scheduled text in the Commonwealth Fair Work Act, as originally enacted, in the terms, or substantially in the terms, set out in the scheduled text;
>
> (b) the referred subject matters, but only to the extent of making laws with

respect to any such matter by making express amendments of the Commonwealth Fair Work Act;

(c) the referred transition matters.

(2) The reference of a matter under subsection (1) has effect only—

(a) if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth); and

(b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.

(3) The operation of each paragraph of subsection (1) is not affected by any other paragraph.

(4) For the avoidance of doubt, it is the intention of the Parliament of the State that the Commonwealth Fair Work Act may be expressly amended, or have its operation otherwise affected, at any time after the commencement of this Act by provisions of Commonwealth Acts whose operation is based on legislative powers that the Parliament of the Commonwealth has apart from under the references under subsection (1).

…

5 Matters excluded from a reference

(1) A matter referred by section 4(1) does not include—

(a) matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers;

(b) matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy;

…

For a referring State, ss 30D and 30N of the *FW Act* extended the definition of "national system employer" to include within the Commission's jurisdiction employers in a State that were not constitutional corporations.

14 The CFA's cross-appeal

15 There is also a cross-appeal by the CFA which may be summarised under the headings that:

Cll 13, 14 and 16 of the Agreement, referred to as the consultation clauses, were objectionable terms and had no effect;

the consultation clauses were not "consultation terms" and were of no effect;

subcll 15.1.2 and 15.1.3 were invalid dispute resolution clauses and were invalid and of no effect; and

subcl 38.3 of the Agreement was invalid and of no effect on a number of grounds.

16 By a notice of contention on the CFA's cross-appeal, the UFU contended that the primary judge erred in finding that in the event that the CFA was not a constitutional corporation then the *Referral Act* would not empower Fair Work Australia (the **FWA**, now the Fair Work Commission (the **Commission**)) to approve cll 26, 27, 28 and 122 of the Agreement.

17 Appropriate notice was given under s 78B of the *Judiciary Act 1903* (Cth).

18 The Attorney-General for Victoria intervened in the appeal pursuant to s 78A of that Act. The Attorney-General supported the position of the CFA in relation to its contention that it was not a "trading corporation" and that the *FW Act* was beyond the legislative power of the Commonwealth in respect of its application to cll 26, 27, 28 and 122 of the Agreement by reason of the operation of s 5 of the *Referral Act*. The Attorney-General also supported the position of the CFA that, if it was a "trading corporation", the UFU's appeal on the implied limit of Commonwealth legislative power should be dismissed.

19 **Issue 1 – Is the CFA a "trading corporation"?**

20 The primary judge found as follows.

21 CFA's predominant purpose was not one of trading or commerce. The CFA was under a statutory duty to prevent and suppress fires in country Victoria and the *Country Fire Authority Act 1958* (Vic) (*CFA Act*) vested control of the prevention and suppression of such fires in the CFA, together with an obligation to protect life and property in case of fire: *CFA Act* ss 6, 14 and 20. The CFA may not seek to produce profits or to expand its market share for the benefit of its private interests. It conducted its activities in the public interest.

22 The primary judge at [42] considered the following activities of the CFA which produced revenue:

(a) fire insurance company contributions made to the CFA;

(b) owner and insurance intermediary payments to the CFA;

(c) charges made by the CFA for the provision of firefighting at uninsured properties;

(d) charges made by the CFA for attendance at false alarms;

(e) charges made by the CFA for services involving hazardous materials;

(f) charges made for the provision of reports to property owners seeking consent to proposed variations from the building safety codes relating to fire safety;

(g) charges made by the CFA for fire equipment maintenance services;

(h) monies received from the sales of fire safety related goods;

(i) property rental income, including rental income from the subsidised rental of properties to CFA employees;

(j) charges made by the CFA for consultancy services provided;

(k) charges made by the CFA to the Traffic Accident Commission (**TAC**) for road accident rescue services provided; and

(l) charges made by the CFA for the provision of advice regarding dangerous goods.

The primary judge found that the activities in (a) to (f) were not trading activities and the activities in (g) to (l) were trading activities. As we have mentioned, by its amended notice of contention the UFU put in issue on the appeal the findings of the primary judge with respect to the activities in (a) to (f) and by its notice of contention the CFA put in issue on the appeal the findings that rental income of $48,320 from the subsidised rental of properties to CFA employees constituted income from trading (part of (i) above) and the findings lettered (k) and (l) above. Activities (g) and (h) and the balance of (i) were at trial conceded by CFA to be trading activities. The CFA did not seek to disturb on appeal the findings in respect of activity (j).

23 *Trading activities as found by the primary judge*

24 The approximate income received by the CFA in the 2010-2011 financial year from the three of these activities conceded by the CFA to be trading activities were, using the above lettering:

(g) fire equipment maintenance services — $5,743,798;

(h) sale of goods — $4,787,336; and

(i) property rental, excluding subsidised property rental for CFA employees — $615,854.

25 As to (j), consultancy work, the sum of $212,961 was received for those services.

26 As to subsidised rental of properties, a subset of (i), the CFA provided subsidised rental properties to some employees as a part of their remuneration. The rental income derived from this scheme in the relevant year was $48,320.

27 As to (k), road accident rescue services, the CFA provided road accident rescue services and it charged the TAC for doing so where its service involved a “compensable incident” where an

injured person was freed from a vehicle by a CFA brigade accredited to perform specialised road accident rescues. In the relevant year the CFA received $1,495,470 from the TAC for such services.

28 As to (l), advice regarding dangerous goods, the CFA charged organisations that held "fire protection quantities" of various dangerous goods a fee for the provision of advice on fire protection, placarding and emergency-management planning. The amount of revenue earned through the provision of this advice in the relevant period was $31,433.

29 *Non-trading activities as found by the primary judge*

30 As to (a), insurance company contributions, pursuant to s 76 of the *CFA Act*, 77.5% of the total funds paid to the CFA were paid by insurance companies insuring against fire property situated within the country area of Victoria and 22.5% from the Consolidated Fund. In 2010-2011, insurance companies paid a total of $309.2 million to the CFA.

31 As to (b), owner and intermediary payments, the CFA's next largest source of non-government revenue was payments made to it pursuant to s 80A of the *CFA Act*. Under s 80A compulsory contributions were required to be made to the CFA by insured property owners and insurance providers who were not caught by ss 75 and 76. The amount of the contribution was to be determined by reference to a prescribed formula. In 2010-2011 these payments totalled $14,726,912.

32 As to (c), s 87 uninsured property attendance, where the CFA provided a firefighting service to a person whose property was not insured, that person could be held liable to pay the reasonable expenses associated with the attendance. In the relevant period the CFA recovered $15,531 of its costs in providing firefighting services to uninsured property owners.

33 As to (d), attendance at false alarms, under s 20B of the *CFA Act* the CFA may charge a fee to the owner or occupier of premises for attendance at a false alarm of fire, where it considered there was no reasonable excuse for the false alarm. In 2010-2011 the CFA received $1,810,504.30 from compulsory charges associated with attendance at false alarms.

34 As to (e), Hazmat services, the CFA received $430,749 in relation to attendance at hazardous materials incidents.

35 As to (f), building fire protection services, in the relevant year, the CFA received $192,896 in such fees.

36 *Summary*

37 In total in 2010-2011, the CFA received about $12.93 million in revenue from trading activities. The CFA was a large organisation and in that year its total revenue was approximately $466.5 million. As a proportion of total revenue, that referrable to trading activities accounted for about 2.7%. The primary judge did not give much weight to the CFA's estimate that the approximately 55,000 volunteers who carried out CFA functions could be estimated to add $840 million of value, although his Honour did find that these volunteers plainly played a valuable role in the CFA and were vital in the delivery of its services to the Victorian community. The primary judge accepted that the CFA was properly categorised as a "volunteer and community based fire and emergency services organisation".

38 The CFA was plainly dependent upon the State government and the fire insurers for the vast bulk of its financial support. It was also clear that its activities were not predominantly trading activities. However, the CFA's trading activities were not peripheral, insignificant, incidental or trivial when considered either in absolute terms or relative to its overall activities. Six different CFA revenue sources arose from trading activities. The scope of these activities was broad. While they were secondary to the CFA's primary purpose, none of them was insignificant, incidental, trivial or unimportant. For example, the road accident rescue service was a specialised emergency service that the CFA had agreed to provide in country areas, which had required special training of CFA employees beyond the usual fire training, and which the CFA recognised as an important part of the range of services it provided. The CFA had no statutory obligation to provide this service and it did so at a cost to road users and the State through the TAC. The provision of this service was not incidental to the CFA's activities nor a fortuitous or casual occurrence of subordinate importance. Nor was its provision, viewed in the context of all of its services, trifling, ineffective, superficial or marginal. For essentially the same reasons, the provision of fire equipment maintenance services, consultancy on matters related to fire safety, the provision of advice related to the storage of dangerous goods and the sale of goods related to fire safety were not insignificant, incidental, trivial or unimportant activities considered against the range of services the CFA provides. These activities were seen as important by the CFA, although they were not its central or predominant focus. The revenue from these trading activities was not incidental in the sense of arising fortuitously or as a result of some other activity. The income was earned deliberately by the CFA from these six specific sources and on the basis that the CFA had special expertise or products of value which they provided in exchange. Taken together, the income from these activities was substantial. While the quantum of income from the CFA's trading activities relative to its non-trading activities was small, almost $13 million of revenue was not minimal, trivial or insignificant. It was a significant volume

of trading revenue, albeit dwarfed by the money received from non-trading sources. There was no cogent evidence that $12.93 million was insignificant to its operations, and no evidence was given that it could be easily foregone by the organisation. It was likely that the CFA would be impaired in its capacity to provide services for road accident rescue, fire equipment maintenance, fire safety consultancy or sale of fire safety related goods, which it regarded as important in the range of services offered, if it was not able to charge fees for doing so. Although the $12.93 million of trading income was plainly a substantial amount in absolute terms, it was only a small percentage relative to the CFA's total income. Even so, it was not trivial or minimal in relative terms. The CFA undertook sufficient trading for it to be seen as "not insubstantial", not trivial, insignificant, marginal, minor or incidental, and the primary judge found that it, the CFA, was a trading corporation.

39 **The parties' and the intervener's submissions**

40 The CFA submitted the Agreement was approved by the Commission on 21 October 2010. For the purposes of the legislative power of the Commonwealth empowering FWA to approve the Agreement, the issue was accordingly whether, as at 21 October 2010, the CFA was a trading corporation. That this was the issue was not disputed.

41 On the present state of the authorities, the CFA submitted, the test of whether a corporation was a trading corporation focused on the activities of the corporation, rather than the purpose of incorporation. The CFA referred to *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10; *New South Wales v Commonwealth* [2006] HCA 52; (2006) 229 CLR 1 (the **Work Choices Case**); *R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League* (1979) 143 CLR 190 (**Adamson**); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 (**State Superannuation Board**); *Bankstown Handicapped Children's Centre v Hillman* [2010] FCAFC 11; (2010) 182 FCR 483 (**Bankstown**); and *Quickenden v O'Connor* [2001] FCA 303; (2001) 109 FCR 243 (**Quickenden***)*.

42 The essential nature and key duties and functions of the CFA were not in dispute below. The CFA is a statutory authority established pursuant to the *CFA Act*. In respect of the CFA:

(a) its purpose is the "more effective control of the prevention and suppression of fires in the country area of Victoria": s 6(1); and

(b) its general statutory duty is "[T]he duty of taking superintending and enforcing all necessary steps for the prevention and suppression of fires and for the protection of life and property in case of fire": s 20.

43 Section 6F of the *CFA Act* (which we note was inserted by Act No. 10/2011 s 4 with effect from 11 May 2011) recorded the Victorian Parliament's recognition that the CFA "... is first and foremost a volunteer-based organisation, in which volunteer officers and members are supported by employees in a fully integrated manner". Consistent with s 6F, in practice the CFA carried out its duties and functions via about 55,000 volunteers, 680 career firefighters and 1500 support staff. The CFA had about 1,216 fire brigades, including 31 fire brigades manned by both volunteers and career firefighters. The CFA's volunteers performed both operational and response work and also a range of non-operational work. The primary judge correctly found that the CFA was properly characterised as a "volunteer and community based fire and emergency services organisation".

44 The CFA submitted that the primary judge erred in applying the activities test by applying an absolute test rather than a relative one and by not having regard to the CFA's total activities, and in particular the activities of its approximately 55,000 volunteers. His Honour failed to have regard to or give weight to a relevant, and indeed critical, consideration, namely, the CFA's unchallenged evidence that the annual economic value of the activities of the CFA's volunteers is about $840 million.

45 Even assuming that the Court applied a relative rather than an absolute test (which the CFA disputed), a comparison undertaken without regard to the substantive activities of volunteers, involved clear error: total revenue was only one component of the CFA's total activities.

46 Substantial, and not merely peripheral, trading activities were simply a prerequisite to a finding that a corporation was a trading corporation and not the answer in itself. The fact that trading activities may be substantial, and not peripheral, did not in itself mean that the corporation was a trading corporation.

47 The CFA only derived limited revenue from its trading activities to carry out its statutory duties. It did not in any real sense trade in its fundamental fire prevention services. Its trading activities did not form a sufficiently significant proportion of its overall activities.

48 Further and alternatively, even if a relative test was applied, the CFA's trading income (based on the factual findings of the primary judge) was only 2.7% of its overall income.

49 The primary judge also had regard to additional matters which, it was submitted, were not relevant to whether the CFA was a trading corporation. For example: the CFA's apparent opinion that activities which generate trading income are important; that the CFA's trading income could not easily be forgone, because the service could not be provided if fees could not be charged; and whether the CFA's trading income arose in a fortuitous or casual way.

50 As we have said, the CFA also submitted that the primary judge erred in finding that: rental income of $48,320 from the subsidised rental of properties to CFA employees; fees of $1,495,470 from the TAC for attending at compensable incidents; and $31,433 for advice regarding dangerous goods; constituted income from trading.

51 In respect of the meaning of "trading" in the trading corporation context, the CFA referred to *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (**St George County Council**) at 570 (Stephen J); "The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing ... it… is ... commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services": *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd* (1978) 36 FLR 134 at 139 (Bowen CJ); and "trading activities" generally connote activities of a commercial nature involving, in essence, the exchange of goods and services for reward: *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 37 WAR 450 (**Lawrence (No 2)**) at [67] (Steytler P) and [104] (Le Miere JA). Further, an activity was unlikely to constitute a trading or commercial activity "where it involves the carrying out of a regulatory or governmental function in the interests of the community or the performance of a statutory duty in respect of which fees are charged": *Village Building Co Ltd v Canberra International Airport Pty Ltd* [2004] FCA 133; (2004) 134 FCR 422 at [90(5)] (Finn J). See also *Mid Density Developments v Rockdale Municipal Council* (1992) 39 FCR 579 at 585 (Davies J) and *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 355 (Emmett J). The activities found by his Honour to be trading activities were activities directly associated with the discharge by the CFA of its statutory duties and functions.

52 The Attorney-General for Victoria submitted that the expression "trading corporation" is a "composite expression" where the word "trading" signifies a distinguishing attribute or characteristic of the corporation. Thus, in assessing whether a corporation is a "trading corporation" within the meaning of s 51(xx) of the *Constitution*, the ultimate inquiry is whether the "true character" or "true nature" of the corporation is that of a "trading" corporation, to be distinguished from corporations whose true character or nature is otherwise.

53 The process of characterisation called for a consideration of all of the circumstances touching the corporation in question before one can determine whether it satisfies the constitutional description. Whether it was apt to characterise a corporation as a trading corporation was "very much a question of fact and degree". The oft-quoted passage of Mason J's in *Adamson* at 233 that the constitutional expression "trading corporation" is "[e]ssentially ... a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation" should be understood in the context of those general principles. The Attorney-General also referred to the *Work Choices Case* at 74 [55], 75 [58] and 108-109 [158] and *Williams v Commonwealth (No 2)* [2014] HCA 23; (2014) 88 ALJR 701 (**Williams (No 2)**) at 712 [51].

54 In *Adamson*, Mason J did not purport to define the threshold at which a corporation's trading activities are "sufficiently" significant to merit the description. Considered in isolation, the passage quoted above therefore bore a protean and somewhat circular quality. It certainly did not represent a complete or definitive "test" to be adopted in characterising a corporation. A corporation was not to be characterised as a "trading corporation" simply because its trading activities might be said to be "significant" in some abstract and unarticulated sense.

55 Moreover, insofar as a corporation's activities are a guide to its true character, then the High Court authorities established that what mattered was the proportion of its total activities that were trading activities, rather than the total value of its trading activities in a quantitative sense. The applicable standard is a relative rather than an absolute one.

56 The rationale for attributing limited significance to corporate "purpose" had substantially less force when characterising a statutory corporation of limited functions and powers, such as the CFA. The capacity of a statutory corporation such as the CFA to trade was circumscribed by reference to the functions and powers statutorily conferred on the corporation. Thus, while ss 124 and 125 of the *Corporations Act 2001* (Cth) effectively abolished the ultra vires doctrine with respect to companies registered under that Act, statutory corporations such as the CFA were plainly in a different position. Even if it may be "difficult" to ascertain the purpose of an ordinary company by reference to its constitution, no such difficulty arises in ascertaining the purposes of a statutory corporation such as the CFA.

57 Where a statutory corporation engaged in limited trading activity, and an examination of its statutory functions and powers revealed that its raison d'etre had nothing to do with trade, it may be inapt to describe it as a trading corporation.

58 The Attorney-General supported the submissions of the CFA to the effect that carrying out a function of government in the interests of the community will not ordinarily involve trade, even when it entails some buying or selling of goods or services. The ultimate constitutional inquiry concerns characterisation of the true nature of the corporation itself, even though characterisation of the principal activities of the corporation may be relevant to that inquiry in a subsidiary way.

59 The characterisation of the CFA as a trading corporation by the primary judge was affected by error for the following reasons. First, the figure of 2.7% - representing the proportion of the CFA's total revenue attributable to CFA's trading revenue - was insubstantial. Secondly, the primary judge erred by failing to attribute sufficient significance to the fact that the CFA was "first and foremost a volunteer-based organisation" that deployed 55,000 volunteers to perform its statutory functions. Thus, because the figure of 2.7% failed to account for the vast volume of activities of the CFA that were performed on a voluntary basis, the figure substantially inflated the fraction of the CFA's total activity that was trading activity. In any event, the financial value of activities was only one way to measure the significance of those activities. Thirdly, the trial judge erred in characterising the CFA as a trading corporation on the basis that the income that it received in connection with the provision of certain services assisted it to provide those services. The relevant question was not would the CFA be "impaired" in its capacity to provide particular services if it were to "forego" the income that it presently received in connection with the provision of those services? Rather, the relevant question was whether trading signified a distinguishing attribute or characteristic of the CFA having regard to its relative significance in the context of all of the activities of the CFA, and in the light of its statutory functions and powers. Fourthly, the trial judge erred by attributing little to no significance to the limited statutory functions and powers of the CFA. Reference to the CFA's statutory functions and powers tended strongly to confirm that the CFA's minimal trading activity was properly to be seen as incidental or peripheral to its principal non-trading activity, which is the prevention and suppression of fires. Finally, the trial judge erred in finding that the CFA engaged in trade to the extent that it subsidised the rent of certain employees as part of their remuneration package. Just as the payment of wages or salaries to employees of a corporation does not amount to trade, the provision of remuneration to employees in another form (subsidised rent) likewise does not amount to trade.

60 The UFU submitted that the purpose test applied in *St George County Council* had been overruled in *Adamson* and the CFA's primary contention must fail.

61 The orthodox position in respect of what constitutes a trading corporation was most recently dealt with by a Full Court in *Bankstown* especially at [48]-[49]. The UFU submitted that the

following principles were particularly relevant to the present case. There was no bright line delineating what was or was not a trading corporation (*Bankstown* at [52]). There were decisions of the Federal Court holding that 5% trade as a proportion of total activities was substantial (*United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [1998] FCA 551; (1998) 83 FCR 346 at [93]) or that the commitment of 5% of total assets to financial activities was sufficient (*Quickenden* per Carr J at [110]). As long as the trading was not insubstantial, the fact that trading was incidental to other activities did not prevent it from being a trading corporation (*Adamson* per Murphy J at 239). In *Quickenden*, Black CJ and French J (at [51]) treated "substantial" and "non-trivial" as synonymous. "Substantial" activities can be measured by absolute or relative means: *Adamson* at 239 per Murphy J; *E v Australian Red Cross Society* (1991) 27 FCR 310 at 345 (**Australian Red Cross Society**). If a relative assessment was to be undertaken, then the trading activities must be assessed against activities as a whole. The mere identification of income does not demand the characterisation of such sums as non-trading 'activity'. For example, grant monies can be used to purchase and maintain assets (without there being any concomitant 'activity') or simply be banked (see the approach of Wilcox J in *Australian Red Cross Society*). Trading activities were not necessarily profit making or even profit motivated activities (*Adamson* at 219 per Stephen J and at 234 per Mason J). It followed that the classification of an organisation as non-profit or a government instrumentality did not preclude its characterisation as a constitutional corporation (see *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board*; *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860; (2002) 120 FCR 191 (**Orion**); *Australian Red Cross Society*; *Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 (the **Tasmanian Dam Case**) per Mason J at 156. Trading was a broad concept beyond the mere exchange of goods and services (see *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 613; cf *Lawrence (No 2)* at [95]-[106] per Le Miere J (in dissent)). Trading activities may involve no more than simple cost recovery (*Orion* esp at [154] and [161] per Weinberg J). That a government body was able to charge or levy rates did not preclude its characterisation as a trading corporation (see Barwick CJ in *St George County Council* at 545; approved by Mason J in the *Tasmanian Dam Case* at 155). Services provided under a statutory obligation and at a fee determined by law may constitute trading activity (the *Tasmanian Dam Case* per Mason J at 156).

62 Provisions in the *CFA Act* clearly contemplated trading activities: ss 6(2), 20AA, 21, 87, 87A and 87AA. The *Country Fire Authority Regulations 2004* (Vic) (the *CFA Regulations*) themselves expressly empowered the CFA to generate revenue from the provision of services (see regs 96, 97, 98 and 100). The six types of activity accepted by the primary judge as trading

activities and identified at [95] were central to the CFA's operations. As the primary judge observed at [98], they were not incidental or arising fortuitously out of some other activity. His Honour was correct in determining at [99] that nearly $13 million of trading revenue should not be regarded as "minimal, trivial or insignificant". Those conclusions were plainly open to his Honour and were correct.

63 As to the CFA's 55,000 volunteers, the economic value of which was said to be $840 million per year, it was submitted that the primary judge dealt with this issue correctly at [84]-[87].

64 Similarly, the complaint that the primary judge wrongly applied an absolute test was ill-founded. The UFU submitted below that the amount of trading activity (as measured in dollars) was a consideration to be weighed when determining whether the CFA was a trading corporation. The primary judge did that at [89], adopting the statement of the Full Court in *Bankstown*. He did not, as submitted by the CFA, simply adopt an absolute test. Indeed his Honour expressly stated at [102] that he was not applying such a test.

65 The question was not whether there should be an absolute or a relative approach. The task for a court was to determine which of the activities of a corporation were trading activities, and the nature of those activities in the context in which they were undertaken and assess whether they should be regarded as substantial or insubstantial. There was no error in his Honour's approach. His Honour's analysis at [92] to [94], based on *Quickenden*, was clearly correct. It was also consistent with *Bankstown*.

66 As to the CFA's contention that the purpose of the CFA was fire prevention and suppression, while it was true that this was the CFA's broad purpose, the UFU submitted that that observation said nothing about whether or not it traded. It was neutral on that question. Section 20 of the *CFA Act* set out the "General Duty" of the CFA and s 20AA set out its powers. A number of these would clearly give rise to trading activities if exercised.

67 It may be accepted that the CFA's opinion of whether the revenue from its trading activities was of importance was of only limited relevance. However, the matters dealt with in [99], that the revenues could not easily be foregone, and in [96], that they do not arise in a fortuitous or casual way, were of considerable importance to the issue in hand.

68 The UFU maintained the submissions that it advanced below that a number of the CFA's sources of revenue, which the primary judge found were not related to trading activity, were so related when properly analysed and that the primary judge correctly found the following to be

trading activities: (i) Subsidised rental of properties ($48,320); (ii) Road accident rescue services ($1,495,470); (iii) Provision of advice in respect of dangerous goods ($31,433).

69 By way of conclusion in relation to trading activities, the UFU submitted that if the False alarm, Hazmat, and Building Fire Protection Service revenue was included, the total trading revenue of the CFA in the relevant year was increased by $2,434,149 to a total of $15,159,360. If the other contested amounts were also included it increased by $326,376,592 to $341,535,952.

70 In answer to the submissions of the Attorney-General, the UFU submitted the authorities did not support the approach that, where the activities of a statutory corporation were concerned, some different approach was to be taken to determining the significance of trading activities undertaken by that body. The UFU submitted that if trading activities could not be dismissed as insignificant or insubstantial, this would not lead to the conclusion that a statutory corporation is not a trading corporation, regardless of the relationship between the raison d'être and the asserted trading activities: *Quickenden* at [51] per Black CJ and French J. Attempts to qualify the approach to the test by reference to the consideration that a company was a statutory corporation, or was carrying out the function of government in the interests of the community suggested an attempt to resurrect the notion of a divide between governmental activity and trading activity which was emphatically rejected by the High Court in in *AEU* at 188 and 230. Acceptance of the proposition that the commercial nature of an activity was an element in deciding whether the activity was trade (*Adamson* at 209 (Barwick CJ)) simply redirected attention to the elusive question of what was meant by the "commercial nature" of an activity: *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* at 139 (Bowen CJ) and 167 (Deane J); *Lawrence (No 2)* at [95]-[106] (Le Miere JA). To suggest that a company whose principal activities were trading ones would nonetheless be regarded as not being a trading corporation because those activities were carried out in the public interest, would again be contrary to authority.

71 The Attorney-General's submission that the reasoning in *Australian Red Cross Society*, asserted to be erroneous, "infected" the judge's analysis and decision should be rejected. It was clear from [102] that the primary judge did not simply apply an absolute test. His Honour considered the trading activities proffered, acknowledged their relationship to the CFA's overall activities and rejected the contention that the activities were "peripheral, insignificant, incidental or trivial", when considered either in absolute or relative terms. His Honour was quite entitled to refuse to treat almost $13 million of revenue as minimal, trivial or insignificant and to rely on the fact that the CFA put on no cogent evidence that the income from trading revenue was insignificant to its operations: *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48;

(2004) 219 CLR 90 at [55]. His Honour was entitled to proceed on the basis that, on the evidence, there was a clear relationship between the trading income that he accepted and the capacity of the CFA to undertake activities regarded by it as important relating to fire safety and accident rescue.

72 In circumstances where his Honour accepted that the CFA's trading revenue was "dwarfed" by its non-trading revenue, regardless of any consideration of the activities of volunteers, it was not readily apparent why that conclusion would have been affected had his Honour been prepared to identify the total scope of the activities of the CFA (including volunteer activities) and compare the extent of the trading portion with the non-trading portion of that total.

73 Contrary to the submissions of the Attorney-General, his Honour committed no error in finding that, on the evidence before him, it could not be found that the sum of almost $13 million was not significant to the continued operations of the CFA or able to be dismissed as trivial. It may be noted that what the Attorney-General described as "the relevant question" was not the question asked and answered in *Quickenden* where Black CJ and French J: (a) observed, at [45], that there was nothing in *Adamson* to lend support to the view that a corporation carrying on independent trading activities on a significant scale will not properly be categorised as a trading corporation if other, more extensive non-trading activities properly warrant it being also categorised as a corporation of some other type; and (b) determined, at [51], that in circumstances where the trading activities found to exist were greatly overshadowed by other activities, nonetheless they were: "a substantial, in the sense of non-trivial, element" regardless of the fact that the university in *Quickenden* was not established for the purpose of trading.

74 As to the contention that the primary judge erred in refusing to distinguish between income from subsidised rental properties and other property rental income on the ground that it was activity designed to enhance the remuneration package of employees, the primary judge appreciated that the receipt of moneys by way of subsidised rental remained a commercial arrangement and was indistinguishable from the income recognised as trading income in *Quickenden*.

75 Consideration

76 It is first convenient to consider whether there was any error in the categorisation by the primary judge of the activities of the CFA where there remains a dispute.

77 The framework for addressing each of those activities is, in our opinion, as follows.

Characterisation of a corporation's trading activities

78 First, it is necessary to consider in general terms how the question of a corporation's activities is to be approached.

79 In *Adamson*, Barwick CJ at 211 referred to certain activities, which he had listed, as being essentially commercial in nature and which emphasised the trading quality of the manner in which the Club and the League in that case promoted Australian Rules Football. Justice Mason at 235 listed certain activities of the two Leagues and said that he treated all of those activities which he had listed and which produced revenue as trading activities. His Honour did not limit the concept of trading to buying and selling at a profit; it extended to business activities carried on with a view to earning revenue.

80 Further, in *Bankstown* at [48]-[50], a Full Court of this Court accepted the following propositions as to the meaning of the word "trading" in the constitutional expression "trading corporation", adopting the summary of the principles by Steytler P in *Lawrence (No 2)* at [68]:

(i) In this context, "trading" is not given a narrower construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue, and includes trade in services.

(ii) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant. This was explained by the Full Court in *Bankstown* at [49].

(iii) The ends which a corporation seeks to serve by trading are relevant to its description. Consequently, the fact that trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the characterisation of those activities as "trade".

(iv) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.

81 We also adopt that approach.

The legislative provisions

82 Secondly, we consider the legislation, as in force at the relevant time.

83 By s 6 of the *CFA Act*, the CFA was appointed by the Governor in Council "[f]or the more effective control of the prevention and suppression of fires in the country area of Victoria". By s 6A, the CFA was subject to the general direction and control of the Minister in the performance of its functions and the exercise of its powers. By s 6B, the CFA was under a duty to use its best endeavours to carry out its functions in accordance with the standards prepared by the Emergency

Services Commissioner under Part 4A of the *Emergency Management Act 1986* (Vic). By s 7, the CFA consisted of 12 members appointed by the Governor in Council.

84 By s 14, the control of the prevention and suppression of fires in the country area of Victoria was, subject to the Act, vested in the CFA. By s 20, so far as relates to the country area of Victoria, the duty of taking, superintending and enforcing all necessary steps for the prevention and suppression of fires and for the protection of life and property in case of fire and the general control of all stations and of all brigades and of all groups of brigades was vested in the CFA.

85 The general powers of the CFA were set out in s 20AA as follows:

> **20AA General powers of Authority**
>
> (1) Subject to this Act, the Authority has the power to do all things necessary or convenient to be done for or in connection with the performance of its duties and functions.
>
> (2) Without limiting or derogating from the generality of the powers of the Authority under this Act, the powers of the Authority include the power to—
>
> (a) enter into agreements or arrangements with any person or body for the provision of goods or services to the Authority;
>
> (b) subject to subsection (3), enter into agreements or arrangements with any person or body for the provision of goods or services by the Authority;
>
> (c) apply for, obtain and hold intellectual property rights (including patents, copyrights, trade marks and registered designs);
>
> (d) enter into agreements or arrangements for the commercial exploitation of those intellectual property rights and ancillary services on any terms and conditions as to royalties, lump sum payments or otherwise as the Authority may see fit;
>
> (e) subject to subsection (3), form, participate in the formation of, or be a member of a body corporate, association, partnership, trust or other body;
>
> (f) subject to subsection (3), enter into a joint venture agreement, shareholders agreement or unitholders agreement with any other person or body;
>
> (g) do all things necessary or convenient to give effect to any agreements or arrangements entered into by the Authority including power to appoint any person or body as the Authority's agent for that purpose.
>
> (3) The Authority must obtain the written consent of the Minister before—
>
> (a) entering into any agreement or arrangement with any person or body for the provision of goods or services by the Authority; or
>
> (b) forming, participating in the formation of, or becoming a member of a body corporate, association, partnership, trust or other body; or
>
> (c) entering into any joint venture agreement, shareholders agreement or unitholders agreement.

(4) Subsection (3)(a) does not apply to an agreement or arrangement for the provision of goods or services by the Authority to a brigade or group of brigades or to a person acting on behalf of a brigade or group of brigades.

(5) The Minister's consent under subsection (3)(a) or (b) may be given in respect of a particular case or a class of cases.

86 By s 17A, a discretion was conferred on the secretary of a brigade or the group secretary of a group of brigades from time to time to appoint any person as a volunteer auxiliary worker with respect to that brigade or group.

87 Section 20A dealt with attendances unconnected with a fire. In response to a call for assistance, and with the approval of the Chief Officer, a discretion was conferred on brigades to attend and carry out any function in relation to the provision of assistance to any person or the protection of any property involved in any accident or emergency not connected with the suppression or prevention of fire. The provisions of the Act applied to such attendances, with such adaptations and variations as are necessary.

88 Section 20B dealt with false alarms of fire given by an automatic fire alarm system. The section conferred two discretions. The first was on the CFA to determine that the owner or occupier of the property did not have a reasonable excuse for the alarm being given and the second was on the CFA to require the owner or occupier to pay to it the fees and charges prescribed for the attendance of the brigade in response to the false alarm.

89 Sections 21 to 22 dealt with the CFA acquiring and otherwise dealing with land and personal property as it thought necessary for carrying into effect the purposes of the Act. The Minister might grant any unalienated Crown land to the CFA for the purposes of the Act at such price and upon such terms and conditions as the Governor in Council thinks fit. The CFA might acquire compulsorily any land which it was authorised to acquire under the Act or which was required for the purposes of the Act. A person in whom personal property was vested for or on behalf of an urban or rural brigade or group of brigades and who was authorised to do so might transfer the property gratuitously to the CFA or sell or otherwise dispose of the property and devote the proceeds to the purposes of the brigade or group of brigades.

90 By s 23AA the CFA had a discretion, in accordance with the regulations, to require any relevant owner or group of owners in a designated area to form an industry brigade for that area and, at the expense of the relevant owner or owners, to provide such officers and members for the industry brigade as are determined by the CFA and to provide the industry brigade with such

apparatus for the prevention or suppression of fires or the saving of life at fires as was determined by the CFA.

91 In terms of finances, by s 75, before the end of every financial year, the CFA was under a duty to provide the Minister with an estimate of the expenditure which it might incur and an estimate of the revenue of the CFA during the next financial year. The Minister was required to determine the total amounts of contributions payable under s 76 having regard to those estimates. The determination was required to be approved by the Governor in Council. By s 76, the total amount of contributions were to be contributed as to 22.5% from the Consolidated Fund and as to 77.5% by the insurance companies insuring against fire property situated within the country area of Victoria. By s 77 each insurance company was under a duty before 15 August each year to lodge with the CFA a return showing the portion of the total amount of the gross premiums received by or due to it during the preceding financial year as was properly attributable to insurance against fire in respect of property situated in the country area of Victoria. By s 77A, the CFA was under a duty to issue a determination of the provisional contributions of each insurance company and the amounts of provisional contributions were to be paid to the CFA. By s 77B, the CFA was under a duty to make a final calculation of the contribution of each insurance company for the financial year in respect of which the return was lodged, in accordance with the formulae there set out.

92 Section 80A applied if property in the country area of Victoria was insured against fire with a person carrying on a business of insurance against fire, not being an insurance company required to make a return under s 77. In such a case either the insurance intermediary or the owner of the property insured was required to lodge with the CFA a return showing the portion of the total amount of the premium paid to the insurance intermediary or insurance company as was properly attributable to insurance against fire. The insurance intermediary or owner of the property insured was required then within 14 days after the owner of the property insured had paid the premium, to pay to the society calculated by reference to the total amount required to be contributed to the CFA by insurance companies under s 76 in the year in which the insurance was effected or renewed.

93 By s 84 the CFA might with the consent of the Governor in Council establish certain funds to be applied to the achievement of the objectives of the *CFA Act*:

(i) a Land, Building, Vehicle, Plant and Machinery Purchase, Construction, Renewal and Replacement Fund;

(ii) a Superannuation Fund;

(iii) a Compensation Fund;

(iv) a Loan Principal Repayment Fund;

and might pay into any such fund such amounts as the Governor in Council approved either generally or in a particular case.

94 By s 84B, the CFA might design, make, assemble or alter any vehicle, equipment or product used for the prevention or suppression of fire or any other emergency and enter into any contract or agreement with any person within Australia to design, make, assemble or alter any such a vehicle, equipment or product or component thereof for or jointly with the CFA and might enter into any contract or agreement with any person within Australia for the sale or lease of any vehicle, equipment or product referred to all for the commercial exploitation of any industrial or intellectual property rights held by the CFA in any design. These powers could not be exercised by the CFA to expand the range of classes of equipment or products (other than vehicles) which the CFA was designing, making, assembling or altering as at 15 December 1988, except where the equipment or products was not or were not otherwise commercially available or was or were to be used by the CFA or a brigade or group of brigades.

95 By s 87, the owner of any property within the country area of Victoria which was damaged or destroyed by fire, if that property was not insured, was liable to pay to the CFA the reasonable costs and expenses incurred by the CFA in providing firefighting services for him in relation to that property. The amount payable was determined by the CFA. The determination of the CFA was reviewable by the Victorian Civil and Administrative Tribunal.

96 By s 97B, the CFA might provide a road accident rescue service by the use of brigades specifically approved for that purpose and the CFA might charge for the provision of those services in accordance with the regulations.

97 Similarly, by s 97C, the CFA might enter into an agreement to provide any other property protection or loss mitigation service for the prevention of, or to deal with, the effects of any emergency or hazard and the CFA might charge for the provision of those services in accordance with the regulations.

98 The regulation making power was in s 110 and provided, so far as relevant:

> **110 Regulations**
>
> (1) The Governor in Council may in respect of the country area of Victoria make regulations for or with respect to all or any of the following purposes—
>
> …
>
> (w) for prescribing, for the purposes of this Act and section twelve of the **Summary**

Offences Act 1966, the expenses and charges of any brigade in relation to attendance at any fire or answering any alarm;

(wa) for prescribing the fees and charges to be paid to the Authority for the inspection of plans, premises and equipment for the prevention or suppression of fire and other services rendered by officers of the Authority or authorizing the Authority to fix such fees and charges;

(wb) for prescribing the basis on which the cost of attending at a hazardous material incident or toxic fire incident the whole or part of which is not a fire within the meaning of section 3 is to be determined and prescribing the fees and charges to be paid to the Authority for that attendance;

(wc) for prescribing the fees and charges to be paid to the Authority for any service that the Authority is empowered to provide under this Act and for which this Act or the regulations enables the Authority to charge for providing that service;

(x) for managing and regulating the distribution of all revenue received under this Act including, without affecting the generality of the foregoing, the payment of allowances to brigades and groups of brigades for minor expenses and for expenses in connexion with fires practices demonstrations and competitions and for the stoppage reduction or forfeiture of any such payment;

…

(zd) for prescribing any matter or thing authorized or required to be prescribed by this Act or necessary or expedient to be prescribed for the purposes of this Act.

99 The *CFA Regulations* provided by reg 1(e) that one of the objectives of the Regulations was to provide for the financial arrangements of, and fees and charges levied by, the Authority.

100 The regulations relating to fees and charges were as follows:

96 Fire protection charges

(1) The Authority may, from time to time, fix fees and charges for the following services rendered by officers of the Authority—

(a) the inspection of applications made under the **Building Act 1993**;

(b) the provision of advice on fire prevention and suppression matters;

(c) the testing and inspection of fire prevention and suppression equipment.

(2) The person requesting a service referred to in subregulation (1) is liable to pay the fee or charge fixed by the Authority for that service.

97 Emergency attendances

(1) The following persons are liable to pay the relevant fee referred to in subregulation (2)—

(a) the owner or occupier of property on which an automatic fire alarm system is installed, for the attendance of a brigade in response to a false alarm given by that system in respect of which the Authority may require payment under section 20B of the Act;

(b) the owner or master of a vessel, for the attendance of a brigade in response to a fire on the vessel;

(c) in respect of an attendance of a brigade in special circumstances requiring the protection of life or property in case of fire, the person requiring the attendance or the owner or occupier, as the case may be;

(d) in respect of an attendance of a brigade in response to a hazardous material incident the whole or part of which is not a fire—

1. the owner or occupier of the premises at which the incident occurred; or

2. if the incident occurred on a street, road or highway (however described), the owner of the vehicle transporting the hazardous material involved in the incident.

(2) The fee in respect of each appliance in attendance for each 15 minutes or part of 15 minutes during which the appliance is absent from its station is—

(a) if the attendance is by a brigade classified by the Authority as a Class A Urban Fire Brigade—$361.26; or

(b) if the attendance is by a brigade classified by the Authority as a Class A1 Urban Fire Brigade—$267.35; or

(c) if the attendance is by any other brigade—$152.07.

(3) For the purposes of section 12 of the **Summary Offences Act 1966**, the amount of a brigade's expenses and charges is the relevant fee specified in subregulation (2).

98 Hazardous material incidents

(1) The cost of attending a hazardous material incident the whole or part of which is not a fire is determined by calculating the expenses incurred by the Authority in attending or dealing with the effects of the incident and shall be determined by assessing—

(a) the cost of obtaining advice as to the chemical analysis and the environmental impact of materials involved in the incident or its containment;

(b) the cost of testing, cleaning, maintaining, repairing or replacing protective equipment;

(c) the costs of removal and disposal of materials;

(d) the cost of products purchased for or consumed in neutralising the hazard involved in the incident;

(e) the cost of hiring equipment and vehicles to deal with the hazard

involved in the incident;

(f) the cost of medical and like expenses in testing and treating persons injured, or at risk of injury, in attending the incident.

(2) A person who is liable to pay a fee under regulation 97 for the attendance of a brigade in response to a hazardous material incident must, in addition to the fee required under that regulation, pay a charge to the Authority which is the amount equivalent to the cost of the incident calculated in accordance with subregulation (1).

99 Monitoring fire alarm systems

The charges payable per annum under section 97C of the Act for monitoring a fire alarm system installed at a customer's premises are as follows—

(a) if the alarm signal monitor point is monitored at a brigade classified by the Authority as a Class A Urban Fire Brigade—$252.27 in respect of each alarm signal monitor point;

(b) if the alarm signal monitor point is monitored at a brigade classified by the Authority as a Class A1 Urban Fire Brigade—$175.62 in respect of each alarm signal monitor point.

100 Road accident rescue

(1) In respect of road accident rescue services provided to people entitled to compensation under section 60(2)(a) of the **Transport Accident Act 1986**, the Authority may charge the Transport Accident Commission fees agreed with the Commission, having regard to the matters set out in subregulation (3).

(2) In respect of road accident rescue services provided to people entitled to compensation under section 99(1)(a) of the **Accident Compensation Act 1985**, the Authority may charge the Accident Compensation Commission the fees agreed with the Commission, having regard to the matters set out in subregulation (3).

(3) The fees agreed must take into account—

(a) the relevant portion of the purchase or replacement cost of vehicles, equipment and protective clothing used to provide the services and other items used for the service; and

(b) the operating costs of providing the services, including maintenance costs and the costs of employing staff to operate the services; and

(c) the organisational costs, including the cost of training people to provide the services, the co-ordination of the services, the welfare of people providing the services and the corporate support costs incurred in providing the services; and

(d) any other costs incurred in providing the services.

101 Thirdly, we turn now to consider separately the revenue producing activities of the CFA which were in issue, noting that it will be necessary as well to consider these activities cumulatively.

102 *(a) fire insurance company contributions made to the CFA*

103 The primary judge found that this was not a trading activity. We have summarised the statutory provisions above.

104 The UFU submitted that this revenue was part of a legislative scheme whereby the CFA provided the service of suppressing and fighting fires in exchange for payments by insurers who had a vested interest in seeing that was done. It was a statutory mechanism that sought to ensure that the insurers paid in advance for the service that was going to be provided. The amounts were paid by people with a commercial interest in what the CFA was doing. The CFA provided the service of suppressing and fighting fires in exchange for the payments made through insurance companies. Uninsured persons who had not made such payments and in respect of whose property the CFA attended a fire were liable to make payment for the cost of the services under s 87. Thus, the UFU submitted, the CFA received payment for the services it provided. This had the characteristic of trading activities. Reference was made to *Williams (No 2)*.

105 The primary judge found at [66] and following that this was not a trading activity. His Honour said the CFA had a statutory duty to prevent and suppress fires in country Victoria. Although the existence of its statutory duty was not fatal to the contention that the CFA was a constitutional corporation, he saw no indicia of commercial activity in the CFA's provision of these services. The primary judge did not see the CFA's fulfilment of its statutory duty in fire prevention and suppression as a business activity carried on in exchange for the revenue derived from the insurer's contributions. It was not a business activity carried on with a view to earning revenue. Amongst other things, the CFA's activities in preventing and suppressing fires involved no element of freedom of choice which was a common feature of commercial or trading activity. For example, the CFA had no discretion to decide that it would not attend a particular fire on the basis that the relevant insurer has refused or failed to make the required contribution. Its position is quite different to that of a party to a commercial arrangement.

106 We see no error in this conclusion. Although the total amount of contributions by the insurance companies was to be paid to the CFA, there was not a commercial connection between the contributions and any particular service provided by the CFA: on each side the statute required to be done what was done. It is in that way we would prefer to consider that aspect of the matter,

rather than reasoning, as did the primary judge, that the payments made by the insurers under s 76 were properly seen as being made to ensure that the CFA had sufficient resources to carry out its statutory functions. But our conclusion is the same; the payments did not demonstrate a commercial activity by the CFA.

107 *(b) owner and insurance intermediary payments to the CFA*

108 The primary judge considered this aspect of the matter at [70]-[71] in particular. The primary judge found that this was not a trading activity. We have summarised the statutory provisions above.

109 His reasoning, the primary judge said, was essentially the same as for the insurance company contributions under s 76. His Honour said he could see no element of commercial exchange or other indicia of commercial activity underpinning these payments. We repeat what we have said above in relation to the fire insurance company contributions made to the CFA. We see no error in the conclusion of the primary judge although, as we have indicated in [95], we would arrive at that conclusion for a different reason.

110 *(c) charges made by the CFA for the provision of firefighting at uninsured properties*

111 The primary judge considered this aspect of the matter at [72]-[73] in particular. We have summarised s 87 above.

112 The primary judge found that this was not a trading activity. For the reasons given in relation to the previous two activities, his Honour considered that this revenue had no bargaining element nor was there any other element of commercial exchange in the activity. He did not accept the UFU's contention that the property owner was liable to pay money in exchange for services rendered. The activity was not entered into with a view to earning revenue.

113 Although the payment here was made by the owner of the property, the service was provided to that owner and thus there was a direct relationship between the payment and the provision of the service to the owner of the uninsured property. We see no error in the conclusion of the primary judge. It is to be noted that the property was not insured within the meaning of the section because it was not insured against fire with an insurance company making a return under s 77 or under a contract of insurance in respect of which contributions had been paid to the CFA under s 80A: see s 87(10). It is also to be noted that the liability was to pay to the CFA the reasonable costs and expenses incurred by the CFA in providing firefighting services for the owner in relation to that property.

114 *(d) charges made by the CFA for attendance at false alarms*

115 The primary judge considered this aspect of the matter at [74]-[75] in particular. We have summarised s 20B and set out reg 97 above. The primary judge found that this was not a trading activity, essentially for the same reasons he had already given in relation to the activities already considered.

116 There were two discretions involved here. First, the CFA was to determine that the owner or occupier of the property did not have a reasonable excuse for the alarm being given by an automatic fire alarm system. Secondly, the CFA was entitled to give written notice requiring the owner or occupier to pay the CFA the fees and charges prescribed for the attendance of the brigade in response to the false alarm. The prescribed fees were, if the attendance was by brigade classified by the CFA as a Class A Urban Fire Brigade, $361.26 for each appliance in attendance for each 15 minutes or part of 15 minutes during which the appliance was absent from its station. The CFA's determination was reviewable by the Victorian Civil and Administrative Tribunal.

117 The primary judge could see no element of exchange or other commercial indicia in the payment. We agree with the analysis of the primary judge where his Honour said that the statutory provisions reflected a legislative policy to require persons who carelessly allowed false alarms to occur to pay the cost of the CFA's attendance. It was not business activity entered into with a view to earning revenue.

118 *(e) charges made by the CFA for services involving hazardous materials*

119 The primary judge considered this aspect of the matter at [76]-[78] in particular. We have set out regs 97 and 98 above. The primary judge found that this was not a trading activity.

120 By s 3(1), "fire" was defined to include "a hazardous material incident where the major or sole danger is the threat of fire up to the stage where there is no longer a threat of fire." To that extent a hazardous material incident would be within s 20 and, where there was no threat of fire, would be within s 20A.

121 Where the whole or part of the hazardous material incident was not a fire, reg 97(1)(d) imposed a liability for the cost of the attendance of a brigade. The liability was imposed on the owner or occupier of the premises at which the incident occurred or, in the case of an incident occurring on a road, the owner of the vehicle transporting the hazardous material.

122 Regulation 97 suggested in its opening words that the relevant fee was the fee in reg 97(2), that fee being the same as for a false alarm given by an automatic fire alarm system. However reg

98 also made the person liable under reg 97(1)(d) to pay in addition a charge to the CFA which was the amount equivalent to the cost of attending determined by calculating the expenses incurred by the CFA in attending or dealing with the effects of the incident, determined by assessing the costs there specified.

123 As the primary judge noted, the CFA had no capacity to bargain in relation to the fee. While it was a question of degree, his Honour discerned no sufficient element of commerciality in the service to treat it as trading activity. We agree.

124 *(f) charges made for the provision of reports to property owners seeking consent to proposed variations from the building safety codes relating to fire safety*

125 The primary judge considered this aspect of the matter at [79]-[81] in particular. The primary judge found that this was not a trading activity.

126 By s 3(1) of the *Building Act 1993* (Vic), in relation to any building or land outside the metropolitan fire district, chief officer means the Chief Officer of the CFA**. Regulation 309 of *Building Regulations 2006* (Vic) provided:**

> **309 Requirements for permits involving fire safety matters**
>
> (1) The report and consent of the chief officer must be obtained to an application for a building permit which involves any of the following fire safety matters if those matters do not meet the deemed-to-satisfy provisions of the BCA—
>
> (a) fire hydrants;
>
> 2. fire hose reels;
>
> 3. fire control centres or fire control rooms;
>
> 4. fire precautions during construction;
>
> (e) fire mains;
>
> 5. control valves;
>
> 6. booster assemblies;
>
> 7. emergency vehicle access;
>
> 8. fire indicator panels;
>
> 9. proscenium curtain drencher systems;
>
> 10. fire services controls in passenger lift cars.
>
> (2) In a report under subregulation (1), the chief officer may consent to a

> variation of the requirements of the BCA if the chief officer is satisfied that a satisfactory degree of fire safety is achieved.
>
> (3) When a building permit is issued which involves the installation of fire sprinklers and the installation does not meet the deemed-to-satisfy provisions of the BCA the relevant building surveyor must forward details of the installation to the chief officer.

"BCA" meant Building Code of Australia.

127 The primary judge found that the Chief Officer of the CFA had a statutory duty to consider applications for reports and consents in relation to building permits which involved fire safety matters. This duty was closely related to the CFA's central statutory duty to prevent and suppress fires.

128 The UFU submitted that those factors did not deprive the activity, inspection and reporting on fire safety for a fee, of its trading nature. That may be so, but the underlying question is whether the provision of the reports themselves were a trading activity.

129 The primary judge said that for essentially the reasons previously given in relation to the activities already considered, he saw insufficient indicia of commercial exchange or other commercial indicia to treat it as trading activity. We agree.

130 *(g) charges made by the CFA for fire equipment maintenance services*

131 The CFA conceded that this activity was a trading activity and that the revenue was $5,743,798.

132 *(h) monies received from the sales of fire safety related goods*

133 The CFA conceded that this activity was a trading activity and that the revenue was $4,787,336.

134 *(i) property rental income, including rental income from the subsidised rental of properties to CFA employees*

135 The CFA conceded that property rental, excluding subsidised property rental for CFA employees, was a trading activity and that the revenue was $615,854. The primary judge held that the entirety of these activities were trading activities.

136 The primary judge considered this aspect of the matter at [48]-[49] in particular.

137 His Honour found that the CFA provided subsidised rental properties to some employees as a part of their remuneration. The rental income derived from this scheme in the relevant year was

$48,320. The CFA conceded that its other property rental income was revenue from trading, but sought to distinguish the subsidised rent received. Mr Wootten stated that the subsidised rent was designed to assist the CFA to attract and retain employees in country towns. The CFA submits that such income was not properly characterised as a part of trade.

138 The primary judge did not agree. He noted that in *Quickenden*, rental income from properties owned by the University was designated as trading income: *Quickenden* at [23]-[24] and [49]-[51]. In *Bankstown* at [50], the question as to whether making a profit was a usual concomitant of trade was treated as barren on the basis that it was the commercial nature of an activity which indicated whether it amounted to trading. The CFA's rental of property to its employees, even though at a discount, was not altruistic and remained a commercial activity which involved the payment of money by tenants in return for enforceable property rights. The primary judge concluded that the rental of property for a financial return was a trading activity.

139 The CFA submitted that these payments were more akin to part of a package to pay people to carry out the service which was preventing fires and they should not be treated as commercial or trading in nature.

140 In our opinion, no error has been made out in respect of this reasoning or conclusion of the primary judge.

141 *(j) charges made by the CFA for consultancy services provided*

142 The primary judge considered this aspect of the matter at [45]-[46] in particular. The primary judge found that this was a trading activity.

143 The CFA has not put this conclusion into contention on the appeal.

144 *(k) charges made by the CFA to the TAC for road accident rescue services provided*

145 The primary judge considered this aspect of the matter at [50]-[58] in particular. His Honour found that this was a trading activity.

146 Having set out s 97B of the *CFA Act* and reg 100, the primary judge referred to three matters in support of his conclusion that this activity had a sufficiently commercial character to be a trading activity.

147 First, while the CFA was empowered to provide a road accident rescue service it was not under a statutory duty to provide such a service. Nor was it an activity directly related to the prevention and suppression of fires. The primary judge noted also that not all CFA firefighters

performed this work. Only CFA brigades that had been provided extra training and task-specific equipment, and which were approved to do so, were authorised to perform the road accident rescue service.

148 Secondly, the language and context of s 97B and reg 100(3) were more suggestive of a trading activity than the provisions relating to contributions by insurers and others. This could be seen in the fact that reg 100(3) envisaged that the CFA and the TAC would agree on the value of the fee to be paid. Embedded in this was an aspect of bargaining as to the fee to be paid to the CFA. The capacity to bargain gave to the CFA and the TAC a freedom which was indicative of commerciality and evidence of trading: *Adamson* at 211; *Bankstown* at [48]. In conformity with the regulations, the CFA must have had a negotiation with the TAC and there was nothing in the legislative provisions to prevent that negotiation from being an ongoing one. The bargaining in relation to the fee was another indication that the fee was in exchange for the service and indicated commercial activity.

149 Thirdly, activities performed on a full or partial cost recovery basis may nevertheless be trading activities. The primary judge referred to *Bankstown* at [51].

150 We agree and would only add that the fees agreed were not fixed or limited by reference to costs but were required only to take into account the matters set out in reg 100(3).

151 *(l) charges made by the CFA for the provision of advice regarding dangerous goods*

152 The primary judge considered this aspect of the matter at [59]-[61] in particular. His Honour found that this was a trading activity. He held that the CFA charged organisations that held "fire protection quantities" of various dangerous goods a fee for the provision of advice on fire protection, placarding and emergency-management planning. Members of the public were obliged under the *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic) to seek the CFA's advice if they desired to store dangerous goods in prescribed quantities. Regulation 96(1)(b) allowed the CFA to set its own fee for provision of this advice, without reference to any externally fixed criteria. The CFA set the fee based upon the size and complexity of each job. The fact that the CFA had chosen to provide the service on a cost recovery basis was no reason to treat it as a non-trading activity: *Bankstown* at [55]-56]. The primary judge considered it had a sufficiently commercial character to be seen as a trading activity.

153 In our opinion, no error has been demonstrated in this conclusion.

Was the CFA a trading corporation

154 Fourthly, we turn to the central issue of whether or not the CFA was a "trading corporation" within the meaning of s 51(xx) of the *Constitution*. We observe that this is a matter of characterisation: no single consideration requires a conclusion that a corporation is, or is not, a "trading corporation".

155 We see no error in the treatment by the primary judge of the very substantial number of volunteers who were engaged in firefighting in the relevant areas. As we have said, it was put that the evidence that the CFA has 55,000 volunteers, 680 career fire-fighters and 1500 support staff and that the CFA has the primary purpose, for the public good, of preventing and suppressing fires, driven by a volunteer organisation, was not given proper weight by the primary judge. The same submission was put in relation to the estimated value of the CFA's volunteers to the Victorian community, estimated at about $840 million.

156 The primary judge considered these matters at [84] and following and reasoned that although these volunteers plainly played a valuable role in the CFA and were vital in the delivery of its services to the Victorian community there were many organisations that must be seen as trading corporations even though supported by the community who see value in the maintenance and promotion of the organisation's work. After referring to *State Superannuation Board* at 304, the primary judge said at [87] that it may be accepted that the CFA was properly categorised as a "volunteer and community based fire and emergency services organisation", but whether it was also a trading corporation required consideration of how the trading activities of the CFA sat within the organisation overall and whether they were "substantial" or were "not insubstantial", to apply the test used in *Adamson*. We agree. As to the limited weight given to the figure of $840 million, we see no particular relevance in that figure given that it was a figure described as the economic value, in the abstract, of the volunteers to the Victorian community.

157 We do not accept that the primary judge applied the wrong test, as contended for by the CFA. An important question is whether the corporation's trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation: see *Adamson* at 233 per Mason J. The same approach was taken in *State Superannuation Board* at 305 per Mason, Murphy and Deane JJ where their Honours referred to the nature and the extent or volume of a corporation's activities needed to justify its description as a [trading] corporation. See also the *Tasmanian Dam Case* at 156 per Mason J; at 179 per Murphy J, at 240 per Brennan J and at 293 per Deane J. Substituting the word "trading" for "financial" follows what their Honours said in *State Superannuation Board* at 303: the Court's approach to the ascertainment of what constitutes a

"financial corporation" should be the same as its approach to what constitutes a "trading corporation", subject to making due allowance for the difference between "trading" and "financial".

158 Answering that question does not simply involve the application of a formula or equation nor the substitution of percentages or other measures of monetary value as between the activities found to be trading activities and the activities not so found. The purpose for which a corporation is formed is not the sole or principal criterion of its character as a trading corporation and the Court looks beyond the "predominant and characteristic activity of the corporation." We refer again to the nature and the extent or volume of a corporation's activities needed to justify its description as a trading corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison with the extent of the corporation's activities overall are relevant. In our opinion, this was the approach taken by the primary judge.

159 If a corporation, carrying on independent trading activities on a significant scale, is properly categorised as a trading corporation that will be so even if other more extensive non-trading activities properly warrant it being also categorised as a corporation of some other type: see *State Superannuation Board* at 304. In our view, this proposition answers in large part the submissions put as to the public purpose of the CFA. As we have said, the issue is one of characterisation and is a matter of fact and degree.

160 It is not for this Court to depart from existing authority in the High Court, particularly *Adamson*, *State Superannuation Board* and the *Tasmanian Dam Case*.

161 The CFA submitted that the error by the primary judge was crystallised at the end of [102] where his Honour said:

> In my opinion the CFA undertakes sufficient trading for it to be seen as "not insubstantial", not trivial, insignificant, marginal, minor or incidental, and I find that it is a trading corporation.

In our opinion, the primary judge was considering whether or not the activities he had found to be trading activities were, proportionately, significant and whether they should be considered as peripheral so as not to affect the overall question of characterisation. We see no error. In our opinion the primary judge correctly took into account the relationship between the trading activities and the non-trading activities in order to evaluate whether the trading activities were "independent" of the non-trading and thus might affect the characterisation of the corporation.

162 Since no error has been shown in the conclusion of the primary judge that the CFA is a trading corporation, it is not necessary to consider the CFA's further assertion that in those

circumstances the only basis upon which the Agreement could have been validly made under the *FW Act* was by virtue of the *Referral Act* and the exclusion contained in s 5 of the *Referral Act* had the effect that no agreement could have been made in respect of the number and identity of employees to be employed by the CFA.

163 **Issue Two: If the CFA is a trading corporation, is the *FW Act* beyond the legislative power of the Commonwealth in respect of its application to clauses 26, 27, 28 and 122 of the Agreement by reason of the principle *in Melbourne Corporation* and *AEU?***

164 ***Summary of primary judge's reasons***

165 The primary judge's reasons for concluding that clauses 26, 27, 28 and 122 of the Agreement were invalid and unenforceable because of the principle in *Melbourne Corporation* and *AEU* may be summarised as follows.

166 First, the principle was derived from the federal structure of the *Constitution*. Although it was described in *AEU* by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 213 as having two elements (namely a prohibition against discrimination which involved imposing special burdens or disabilities on the States and a prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments), the implied limitation had sometimes been expressed differently. For example, in *Austin v Commonwealth* [2003] HCA 5; (2003) 215 CLR 185 (**Austin**), Gaudron, Gummow and Hayne JJ at [124] explained that there was "but one limitation, though the apparent expression of it varied with the form of legislation under consideration".

167 Secondly, the High Court held in *AEU* that a federal industrial award (made under predecessor legislation to the *FW Act*) which impaired the capacity of a State government to determine the number and identity of State government employees and/or the number and identity of such employees to be made redundant, curtailed the State government's capacity to function as a government and thereby infringed the implied limitation. At 232, the *AEU* plurality observed:

> At this point it is convenient to consider South Australia's argument based on impairment of a State's "integrity" or "autonomy". Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. **It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds**. An impairment of State's rights in these respects would, in our view, constitute an infringement of the implied limitation. (Emphasis added by primary judge).

168 Thirdly, the primary judge summarised the impugned provisions of the Agreement as follows:

(a) cl 26 required that work which was carried out by a CFA employee of a particular classification under the Agreement would continue to be carried out by CFA employees who fell within the same classification, and that future work arising in these same areas would be carried out by CFA employees in the same classification. In addition, cl 26 specified that no job losses would result from the implementation of that clause;

(b) cl 27 specified the number of employees the CFA would engage in each shift and also prohibited redundancy;

(c) cl 28 required that secondment and lateral entry not be used to diminish promotional opportunities for CFA career staff, as well as imposing certain requirements and limitations on the length of secondments and filling of vacant positions by lateral entry; and

(d) cl 122 also related to lateral entry and provided that, where a position became vacant and there was no suitably qualified internal applicant, the position should be filled by an internal appointment (despite the appointee lacking the requisite training), or via lateral entry following certain required steps.

169 Fourthly, and significantly, the primary judge noted that the UFU conceded that these clauses in the Agreement were of the type referred to in *AEU* in that they pertained to the number and identity of the public sector employees whom the CFA wished to employ and/or whom it wished to make redundant. His Honour noted the UFU's further concession that these clauses would infringe the *Melbourne Corporation* principle unless they were saved by the fact that they were voluntarily entered into. This raises the critical issue in respect of this aspect of the appeal.

170 His Honour noted that the gravamen of the UFU's case was that the reasoning in *AEU* did not apply to the relevant clauses in the Agreement because *AEU* and the *Melbourne Corporation* principle only apply when the Commonwealth *imposed* requirements on State governments and their instrumentalities relating to the number and identity of persons which the State party wished to employ or wished to be made redundant, but the relevant clauses of the Agreement were valid because the CFA voluntarily entered into the Agreement. His Honour observed that this argument was to the effect that an enterprise agreement approved under the *FW Act* was freely entered into by a State government or its agency and, therefore, could not in reality impair the State government's capacity to determine the number and identity of the persons whom it wished to employ or wishes to be made redundant. His Honour noted that the UFU argued that its case was supported by *Austin*

and, in particular, at [124] per Gaudron, Gummow and Hayne JJ, where their Honours emphasised that it was necessary to focus on a "practical question", namely:

> … whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional power.

171 Reference was also made to *Clarke v Federal Commissioner of Taxation* [2009] HCA 33; (2009) 240 CLR 272 (**Clarke**) at [53] per French CJ and at [72] per Gummow, Heydon, Kiefel and Bell JJ on the need to focus on the practical effects of the legislation.

172 The primary judge considered that much of the UFU's case depended upon its reading of *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 (the **Industrial Relations Act Case**), which dealt with amendments to the *Industrial Relations Act 1988* (Cth) (the *amended IR Act*). By those amendments, new obligations were imposed on Australian employers, including State governments and agencies, in relation to minimum wages, equal pay, termination of employment, discrimination in employment and family leave. Some of the provisions outlined above were held to be invalid under the *Melbourne Corporation* principle, while the validity of others was saved by reading them down in a way which avoided that principle. In other words, even though those provisions would otherwise have bound the States, the High Court read down s 6 as though it bound the States only to the extent that the relevant provisions of the *amended IR Act* did not prevent them from determining the number of persons they wished to employ, the term of their employment, the number and identities of those whom they wished to terminate on redundancy grounds and the terms and conditions of those employed at the higher levels of government.

173 The UFU emphasised that the provisions in the *amended IR Act* relating to "certified and enterprise flexibility agreements" were found in the *Industrial Relations Act Case* to be valid in their entirety, which it submitted supported its argument. The primary judge noted that the UFU could point to no express finding in the High Court's decision which supported the UFU's argument that the *Melbourne Corporation* principle only applied when a federal industrial award was imposed by arbitration, rather than by way of an industrial agreement voluntarily entered into.

174 After analysing the structure of the majority's decision in the *Industrial Relations Act Case*, the primary judge observed that there were seven distinct legislative topics in the *amended IR Act* which were challenged in that case. As noted above, six of those topics were spared invalidity by reading s 6 down. As further noted above, the seventh topic related to the agreement-making and certification provisions of the *amended IR Act*. The UFU contended below that the fact that the

majority saw no need expressly to read down these provisions indicated that the *Melbourne Corporation* principle did not apply where the relevant limitations on a State government was the product of an agreement which was voluntarily entered into. Although his Honour described this argument as "not without force", he did not accept that the majority decision in the *Industrial Relations Act Case* supported the UFU's case. His Honour reasoned that this was because:

(a) any failure by the High Court to read down those particular provisions in the amended *IR Act* was "a tenuous basis for a conclusion that the implied limitation [did] not apply to voluntary agreements" and that, if the majority intended to create such an exception, they would have clearly articulated it;

(e) the majority did not have to deal with the reading down effect of s 6 in relation to the agreement-making and certification provisions because those provisions were incidental to the Commonwealth's award making power and, therefore, were subject to the same limitations;

(f) there was no express reasoning in the *Industrial Relations Act Case* that voluntarily-made industrial agreements certified by the Commission were outside the scope of the second limb of the *Melbourne Corporation* principle as described in *AEU* and, in particular, the High Court was not required to deal with any argument based on the second limb of that principle, as opposed to the first which related to discrimination; and

(g) in any event, the UFU's argument, which would carve out from the *Melbourne Corporation* principle voluntarily-made industrial agreements, was inconsistent with statements in *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34; (2013) 250 CLR 548 (**Fortescue**) at [130] per Hayne, Bell and Keane JJ (with whom French CJ and Kiefel J agreed); *Queensland Electricity Commission v Commonwealth* [1985] HCA 56; (1985) 159 CLR 192 (**Queensland Electricity Commission**) at 218 per Mason J and the *Work Choices Case* at [120] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. The primary judge observed (at [132]) that the "focus must be on the effect of a Commonwealth law upon the capacity of a state to function as a government, and it is of little relevance whether the state agrees to the imposition of any such limitation".

175 Although the primary judge observed that he had "some difficulty" in treating the implied constitutional limitation as applicable to industrial agreements that were bona fide voluntarily entered into by a State and which, therefore may have no practical impact on its capacity to govern, he concluded that the *Melbourne Corporation* principle, as expressed in *AEU*, applied to the approved enterprise agreement whether or not it was voluntarily entered into by the State party.

176 Finally, given the UFU's concession that clauses 26, 27, 28 and 122 of the Agreement were terms of the type described in *AEU*, his Honour found that they were invalid and could not be enforced.

177 **Relevant legislative provisions outlined**

178 It is necessary to summarise the relevant provisions of the *FW Act* (as in force on 21 October 2010) which related to the making of an enterprise agreement and collective bargaining. They were found in Ch 2 of the *FW Act*.

179 Part 2-4 of the *FW Act*, which was in Ch 2, dealt with enterprise agreements and bargaining. Section 169 provided a general guide to the provisions in Pt 2-4. Relevantly, it outlined:

(a) how an enterprise agreement was made at the enterprise level and provided terms and conditions for "national system employees" to whom it applied, which terms and conditions might be ancillary or supplementary to the National Employment Standards;

(b) that Div 2 dealt with the making of enterprise agreements about permitted matters and the fact that an enterprise agreement may be a single-enterprise agreement or a multi-enterprise agreement;

(c) that Div 3 dealt with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement and also set out the persons who were bargaining representatives;

(d) that Div 4 dealt with the approval of proposed enterprise agreements by employees and set out when an enterprise agreement was made. It also dealt with the approval of enterprise agreements by the (then) FWA;

(e) that Div 5 dealt with the mandatory terms of enterprise agreements relating to individual flexibility arrangements and consultation requirements, while Div 7 dealt with the variation and termination of enterprise agreements; and

(f) that Div 8 provided for the FWA to facilitate bargaining by making bargaining orders, serious breach declarations, majority support determinations and scope orders and permitted bargaining representatives to apply for the FWA to deal with bargaining disputes.

180 Section 171 of the *FW Act* identified the objects of Pt 2-4 as:

> (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 FWA 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 FWA for approval of enterprise agreements are dealt with without delay.

181 It is evident that, under the *FW Act*, enterprise agreements played a central role in establishing terms and conditions of employment for national system employees, which includes employees of the CFA. As Jessup J observed in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 (**JJ Richards**) at [5]:

> It is manifest that enterprise agreements are a significant, if not the predominant, means adopted by the Act for the establishment of terms and conditions of employment, and that collective bargaining, required to be made in good faith, is the means by which such agreements come to be made.

182 Sub-section 172(1) of the *FW Act* empowered the making of an enterprise agreement about specified matters which were permitted to be included in such an agreement. They included matters pertaining to the relationship between an employer and that employer's employees who would be covered by the agreement.

183 Sub-section 172(2) provided that an employer may make what (relevantly) was described as a single-enterprise agreement with its employees. Such an agreement applied to an established employer with an established enterprise and enabled that employer to make an enterprise agreement with the employees who were employed at the time the agreement was made and who would be covered by the agreement.

184 Section 172 provided:

> **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.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be covered by the agreement if the organisation notifies FWA under section 183 that it wants to be covered.

Single"enterprise agreements

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single"enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(d.i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(d.ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

For the purposes of the appeal, it is not necessary to describe other types of enterprise agreement (i.e. multi-enterprise agreements and greenfields agreements, as to which see s 182).

185 Division 3 of Pt 2-4 dealt with "Bargaining and representation during bargaining". It dealt predominantly with the representation of employees during bargaining. There is no need to describe these provisions in any detail. Nor is there a need to describe in any detail the provisions of Div 8 of Pt 2-4, other than to note that they dealt with "FWA's general role in facilitating bargaining", and included circumstances in which the FWA must make a determination that a majority of employees who will be covered by an agreement want to bargain with their employer (see s 237). Sections 238 and 239 dealt with "scope orders" and the FWA's discretion to make a scope order, which specified the employer and the employees who would be covered by an enterprise agreement.

186 Section 182 provided that such an enterprise agreement was made when a majority of employees cast a valid vote approving the agreement.

187 Section 185 dealt with the obligation to seek FWA approval for an enterprise agreement after it had been made. It is an important provision and should be set out in full:

185 Bargaining representative must apply for FWA approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWA for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a greenfields agreement, the application must be made by:

(a) an employer covered by the agreement; or

(b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) If the agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or

(b) if in all the circumstances FWA considers it fair to extend that period – within such further period as FWA allows.

(4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

(5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

188 Section 186 imposed an obligation on the FWA to approve an enterprise agreement in respect of which approval had been sought under s 185 if certain requirements which were set out in ss 186 and 187 were met. Section 186 provided:

186 When FWA must approve an enterprise agreement – general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under section 185, FWA must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: FWA may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) FWA must be satisfied that:

(a) if the agreement is not a greenfields agreement – the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: FWA may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

(3) FWA must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, FWA must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) FWA must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) FWA must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) FWA must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which FWA approves the agreement.

Requirement for a term about settling disputes

(6) FWA must be satisfied that the agreement includes a term:

(a) 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:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: FWA or a person must not settle a dispute about whether an employer had

reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

189 The additional requirements imposed by s 187 were as follows:

187 When FWA must approve an enterprise agreement – additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before FWA approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), FWA must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) FWA must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, FWA must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement.

190 Section 188 provided that an enterprise agreement was "genuinely agreed" to by the employees covered by the agreement if the FWA was satisfied of the specified matters, including that the agreement was made in accordance with relevant statutory requirements and there were no other reasonable grounds for believing that the agreement was not genuinely agreed to by the employees. There was no equivalent express provision dealing with the issue whether an employee "genuinely agreed" to an enterprise agreement, but that may not be decisive of the question whether the FWA could inquire into that matter (see further below).

191 Sections 202 to 205 prescribed certain terms which must be included in an enterprise agreement, including a flexibility term and a consultation term as defined in ss 202 and 205 respectively.

192 Division 7 of Pt 2-4 dealt with the variation and termination of enterprise agreements. Sections 207 to 211 dealt with the variation of an enterprise agreement by employers and employees. If an enterprise agreement was varied in accordance with these provisions, the variation must be approved by the FWA under s 211. The termination of enterprise agreements was dealt with in ss 209 to 226. Termination could be achieved in various ways, including by an employer and employees who were covered by the agreement jointly agreeing to its termination. If a termination of an enterprise agreement was agreed, the FWA was required to approve the termination and s 223 specified the circumstances in which such approval had to be given.

193 Division 8 of Pt 2-4 dealt with the FWA's general role in facilitating bargaining for enterprise agreements. Section 228(1) defined "good faith bargaining requirements", which a bargaining representative for a proposed enterprise agreement must meet, which included recognising and bargaining with the other bargaining representatives for the agreement. Significantly, s 228(2) specified that the good faith bargaining requirements did not require a bargaining representative to make concessions during bargaining for the agreement or to reach agreement on the terms that are to be included in the agreement.

194 Section 230 specified the circumstances in which the FWA might make a bargaining order in relation to a proposed enterprise agreement and s 231 described what a bargaining order must specify. As Jessup J observed in *JJ Richards* at [14], "s 231 effectively [left] it to FWA, in a case to which the section applied, to specify what will constitute bargaining, and what must be done by the parties who bargain, in any particular situation".

195 It was a breach of a civil remedy provision to fail to comply with an enterprise agreement (s 50). Provision was made in ss 539 and 546 for a court to impose a penalty or make other orders in respect of a contravention of s 50. By s 54(1), an enterprise agreement which had been approved by the FWA commenced to operate seven days after approval (subject to the agreement specifying a later day).

196 As is evident from this brief analysis of the relevant provisions of the *FW Act*, an enterprise agreement did not have statutory force at the time it is made by the parties. Rather, an application had to be made under s 185 for the FWA's approval of such an agreement and such an approval had

to be given under s 186 by the FWA if the requirements therein were met. Only then did an enterprise agreement have statutory force.

197 Chapter 3 of the *FW Act* dealt with the "Rights and responsibilities of employees, employers, organisations etc". It provided for what can be described as general workplace protections, including in respect of actions taken with a view to making an enterprise agreement. Part 3-3 dealt with "Industrial action". In broad terms, by s 418, the FWA was empowered to make an order that industrial action stop, but such an order was not to be made in the case of industrial action that was, or would be, "protected industrial action" (see s 408ff). Moreover, by s 415, no action lay under any law in force in a State or Territory in relation to "protected industrial action" unless that action had involved, or was likely to involve, personal injury, the wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or using of property.

198 Summary of UFU's submissions

199 The UFU submitted that the primary judge was wrong to find that the *Melbourne Corporation* principle applied to and invalidated the relevant clauses of the Agreement because:

(a) his Honour did not explain the reasons whereby he concluded that the relevant clauses operated to produce a substantial impairment to the State's capacity to function as a government;

(b) in any event, the primary judge's conclusion involved an incorrect application of the *Melbourne Corporation* principle and subsequent High Court authority (citing *AEU*, the *Industrial Relations Act Case*, *Austin*, *Clarke* and the *Work Choices Case*); and

(c) the fact that enterprise agreements contemplated by the *FW Act* were voluntary was central to the question of whether the application of that Commonwealth legislation significantly impaired the capacity of a State to govern.

200 Summary of CFA's submissions

201 In broad terms, the CFA's submissions were as follows:

(a) the UFU's appeal misunderstood the basis and operation of the *Melbourne Corporation* principle. There was no proper basis for distinguishing between the application of that principle in relation to the terms of an award and the terms of an enterprise agreement. In both cases, the terms derived their legal enforceability and regulatory effect by reason of Commonwealth law;

(b) it was irrelevant to inquire whether or not an enterprise agreement was made "voluntarily" or "consensually" by the State government employer before the enterprise agreement was imparted with the force and effect of Commonwealth law by the agreement being approved by the FWA;

(c) the *Industrial Relations Act Case* was distinguishable because of the different legislative provisions in the *amended IR Act* and the *FW Act*; and

(d) acceptance of the UFU's position would mean that the principle underlying *Melbourne Corporation* could be subverted by a State government of the day, towards the end of its term, directing its departments and agencies to make enterprise agreements under Commonwealth law which contained enforceable terms that had the very effect against which the *Melbourne Corporation* principle was intended to afford the States enduring protection.

202 Summary of the Attorney-General for Victoria's submissions

203 In broad terms, the Attorney-General's submissions were as follows:

(a) the Court was bound by *AEU* to uphold the primary judge's decision;

(b) the *Industrial Relations Act Case* did not overrule or qualify *AEU* because the High Court was not asked to quell a controversy as to the validity of provisions of Divs 2 and 3 of Pt VIB of the *amended IR Act* on the basis of the implied limitation. Rather, the plaintiffs in the *Industrial Relations Act Case* confined their *Melbourne Corporation* principle challenge to the validity of provisions in Div 2 alone and addressed their argument to the question whether the relevant provisions, by making it more difficult for the States to enter into certified agreements when compared with other employers, discriminated against the States;

(c) in any event, if the High Court had been required to decide whether the relevant provisions of Div 2 were contrary to *AEU*, it would not have been necessary for the Court to uphold the validity of those provisions by reading down s 6 of the amended *IR Act* (as it did for other provisions), because, as the primary judge found, the Commission could only certify an agreement if it could have made an award in the same terms. The award-making powers were to be read down in conformity with the *Melbourne Corporation* principle generally and the implied limitation in particular, thus there was no need to read the provisions down separately;

(d) the right of the State of Victoria to determine the number and identity of the persons whom it wished to employ or to make redundant was "plainly impaired" by legislation which provided for the validity and enforcement of the impugned clauses of the Agreement; and

(e) independently of "the dispositive effect" of *AEU*, the UFU's argument, that because the CFA voluntarily entered into the Agreement it must follow that the impugned clauses did not have the practical impact of impairing the capacity of the State to function as a government, should be rejected because:

(a.i) the constitutional powers and functions of the State, which are protected by the *Melbourne Corporation* principle, could not be displaced by the State entering into contractual arrangements;

(a.ii) the UFU invited the Court to consider the wrong question by asking whether the agreement actually prejudiced the CFA, as opposed to the right question, which was whether the Agreement impaired the capacity of the State to exercise its constitutional powers; and

(a.iii) the UFU's position was not supported by reference to s 96 of the *Constitution* and the High Court's decision in *Victoria v Commonwealth* (1957) 99 CLR 575 (the Second Uniform Tax Case) was distinguishable.

204 **Consideration**

205 We accept the UFU's submission that, while there are some difficulties in articulating and precisely identifying the limitation imposed by the *Melbourne Corporation* principle, that principle applies where the curtailment or interference with the exercise of a State's constitutional power is significant, which is to be judged qualitatively and, in general, by reference, among other things, to its practical effects. For the following reasons we also broadly agree with the UFU's submission that the primary judge erred in rejecting its central argument that the *Melbourne Corporation* principle does not apply to invalidate the relevant provisions of the Agreement because the CFA had voluntarily made the Agreement.

206 As we have said, in *Austin*, Gaudron, Gummow and Hayne JJ described the *Melbourne Corporation* principle as involving a single limitation as opposed to the description of it as having a bifurcated quality (as described in *Queensland Electricity Commission*). In particular, in *Austin* at [164], their Honours said that "though differential treatment may be indicative of infringement of the limitation upon legislative power with which the doctrine is concerned, it is not, of itself, sufficient to imperil validity".

207 In view of their significance to this aspect of the appeal, it is appropriate to look more closely at *AEU* and the *Industrial Relations Act Case*. We consider that these decisions support the UFU's central contention.

208 *AEU*

209 Following on from budgetary policies which resulted in Victoria dramatically reducing the size of its public sector and the number of its public sector employees, State legislation was enacted which established an industrial relations system which was aimed at facilitating the freedom of employers and employees to choose how they regulated their own affairs. That system replaced the previous system of compulsory arbitration under which terms and conditions of employment could either be determined by a State arbitral body by compulsory arbitration or ascertained by an employment agreement. All awards in force under the previous legislation expired on 1 March 1993 and, unless a new award was made or the employee and employer made an employment agreement, employers and employees who had previously been bound by awards became bound by individual employment agreements which incorporated the same terms and conditions as those expired awards.

210 Acting under relevant provisions of the *amended IR Act* unions whose members' terms and conditions of employment were previously governed by State industrial awards sought the coverage and protection of federal awards. The Australian Industrial Relations Commission (the **AIRC**) made various interim and final awards in respect of 15 separate logs of demand relating to the terms and conditions of employment of employees of various State governments and their agencies.

211 Proceedings were commenced in the High Court seeking to prohibit further proceedings in the AIRC and to quash the existing decisions of the AIRC. One of the grounds of challenge raised the *Melbourne Corporation* principle. That challenge was partly successful. The key relevant findings of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ may be summarised as follows.

212 First, the limitation reflected in the *Melbourne Corporation* principle had the following two elements (at [43]):

(a) the prohibition against discrimination which involved the placing on the States of special burdens or disabilities; and

(b) the prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments.

213 Secondly, the plurality noted at [55] Victoria's reliance on the formulation of the second element of the limitation and referred to Deane J's description of that limitation in *Queensland Electricity Commission* at 247 as precluding the exercise of Commonwealth powers "to control the

States" or in a manner which would be inconsistent with the continued existence of the States as independent entities and their capacity to function as such.

214 Thirdly, reference was also made in *AEU* to Victoria's reliance upon the observations of Dixon J in *Melbourne Corporation*, where, in the context of a law aimed at controlling a particular exercise of that State's exercise of its executive power, his Honour said at [79]:

> Such a law wears two aspects. In one aspect the matter with respect to which it is enacted is the restriction of State action, the prescribing of the course which the Executive Government of the State must take or the limiting of the courses available to it. As the operation of such a law is to place a particular burden or disability upon the State in that aspect it may correctly be described as a law for the restriction of State action in the field chosen. That is the direct operation of the law.

215 The plurality in *AEU* added, however, that Dixon J regarded the implied limitation as precluding the exercise of Commonwealth legislative power "for a purpose of restricting or burdening the State in the exercise of its constitutional powers" because, to do so, "brings into question the independence from federal control of the State in the discharge of its functions".

216 Fourthly, the plurality described as having some force an argument advanced by South Australia that the implied limitation protected the integrity or autonomy of a State. Although those concepts were described as being "by no mean precise", the plurality acknowledged that they directed attention to aspects of a State's functions "which are critical to its capacity to function as a government". Accordingly, their Honours expressed the following views at 232-233:

> At this point it is convenient to consider South Australia's argument based on impairment of a State's "integrity" or "autonomy". Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. **It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds**. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question. There may be a question, in some areas of employment, whether an award regulating promotion and transfer would amount to an infringement. That is a question which need not be considered. As with other provisions in a comprehensive award, the answer would turn on matters of degree, including the character and responsibilities of the employee.
>
> In our view, also critical to a State's capacity to function as a government is its ability, **not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged**. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States

> from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State.
>
> (Citations omitted and emphasis added).

217 Fifthly, the plurality in *AEU* concluded that the AIRC had the power to make awards which were binding on the States and their agencies in relation to minimum wages and working conditions which took into account the special functions and responsibilities, if any, of a broad range of public servants and employees. However, the implied limitation precluded the AIRC from making an award binding the States in relation to qualifications and eligibility for employment, term of appointment and termination of employment, at least on the ground of redundancy, as well as precluding "the Commission from making an award binding the States in relation to the terms and conditions of employment or engagement of persons such as Ministers, ministerial assistants and advisers, heads of department and senior office holders – as well as parliamentary officers and judges". It is important to note that these statements were directed to the AIRC's power to impose an award on the States as a result of the compulsory arbitration process under the then *Industrial Relations Act*.

218 Finally, the plurality noted at [60] that the impact the implied limitation would have on the AIRC's power to make an award prescribing particular minimum terms and conditions of employment for particular classes of employees, such as terms of appointment, procedures and criteria for promotion and transfer, and termination on grounds other than redundancy, was a question which had not been explored in detail before the Court.

219 In our view, it is significant that in the highlighted passage set out in [186] above, the plurality emphasised the critical importance of the capacity of a State government's right *to determine* the number and identity of the persons whom it wishes to employ, etc. Those remarks were made in the context of a federal award being made by the AIRC in the exercise of its powers under the then *Industrial Relations Act*. In our view, the position is different when a State or one of its agencies voluntarily enters into an enterprise agreement and, thereby, effectively consents to that agreement being approved by the then FWA in accordance with the relevant provisions of the *FW Act*.

220 The CFA cited the decision of the Full Bench of the Fair Work Commission in *Parks Victoria v Australian Workers' Union* [2013] FWCFB 950; (2013) 234 IR 242 at [366] in support of its contention that *AEU* should be regarded as establishing a specific "sub-rule" to the *Melbourne Corporation* principle, such that certain features of State governments (including the capacity to

determine the number and identity of public sector employees) must be kept free of Commonwealth regulation, without requiring a State to demonstrate that the regulation of those matters would in fact undermine the capacity of the State to govern. We reject that submission. We do not consider that *AEU* should be viewed as establishing any such sub-rule. Rather, *AEU* is to be understood as applying the *Melbourne Corporation* principle in a particular statutory context which, on its facts, involved a significant impairment to the State's capacity to function as a government in the relevant sense. Generally, however, for the implied limitation to apply it will be necessary to demonstrate the existence of such an impairment, consistently with subsequent authorities such as *Austin*, *Clarke*, the *Work Choices Case* and *Fortescue*.

221 *The Industrial Relations Act Case*

222 A central issue was whether various provisions in the *amended IR Act* (which replaced the earlier industrial relations legislation which had been considered in *AEU*) were invalid as infringing the implied limitation. The amendments had the effect of permitting the imposition of, or imposed, obligations on employers concerning minimum wages, equal pay, termination of employment, discrimination in employment and family leave, as well as providing for collective bargaining and the right to strike and engage in industrial action. Section 6 provided that the legislation bound inter alia the States, but the Court construed that provision as operating to bind the States to the extent that the provisions of the legislation did not prevent them from determining the number of persons they wished to employ, the term of their appointment, the number and identity of those they wished to dismiss on redundancy grounds and the terms and conditions of those employed at the higher levels of government.

223 Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said at 503:

> If s 6 is read down as indicated, the operation of the substantive provisions of the Act is correspondingly limited but their operation is otherwise unaffected. Thus, if any provision of the Act would otherwise operate **to prevent the States from determining for themselves** any of those matters which were held in *Re Australian Education Union* to be beyond the legislative power of the Commonwealth, the reading down of s 6 precludes invalidity for infringing the limitation on Commonwealth legislative power.
> (Emphasis added).

224 For similar reasons to those given above in respect of the similar language which was used by the plurality in *AEU*, we consider it to be significant that the High Court's concern was directed to legislative provisions which operated to prevent a State from *determining for itself* any of the matters which were identified in *AEU* relating to employment by the State or one of its agencies. That language suggests that the implied limitation is not applicable to provisions which operated by reference to the State or its agencies having voluntarily entered into an agreement which was then

given statutory force, but only on condition that the parties had made the agreement which was subsequently approved by the FWA.

225 Various provisions in the amended *IR Act* which were said to infringe the *Melbourne Corporation* principle were then considered in the *Industrial Relations Act Case*. They included provisions imposing restrictions on termination or requiring payment in lieu; provisions concerning payment of severance pay; provisions requiring the provision of parental leave; provisions prohibiting discrimination in employment and provisions making it an offence to dismiss an employee engaged in an industrial dispute and protected action provisions. The validity of all those provisions was upheld by applying s 6 so as to read them down in a way which preserved their validity.

226 Before us (as well as below), the UFU argued that particular significance should attach to the way in which the High Court responded to the challenge to amendments concerning certified and enterprise flexibility agreements in Divs 2 and 3 of Pt VIB of the *amended IR Act*. Under those provisions the Commission was empowered in certain circumstances and subject to certain conditions to certify industrial agreements between employers and employees who were parties to an industrial dispute or parties to an industrial situation (ss 170MA(4) and 170MC), as well as industrial agreements (described as "enterprise flexibility agreements") made with an employer who was a "constitutional corporation" as defined in s 4(1) of the *amended IR Act*. When registered or approved, such agreements took effect as awards of the Commission (see the definition of "award" in s 4(1) of the *amended IR Act*) and, by s 152, prevailed to the extent of any inconsistency over "State law, or an order, award, decision or determination of a State industrial authority". At 534-535, the plurality in the *Industrial Relations Act Case* described the relevant provisions concerning certified and enterprise flexibility agreements in the following terms:

> The provisions governing certified agreements are in Div 2 of Pt VIB of the Act which confers power on the Commission, subject to conditions, to certify agreements as specified in s 170MA(1) and (2). The agreements specified in s 170MA(1) are agreements between the parties to an industrial dispute, or any of them, the terms of which are for "the settlement of all or any of the matters in dispute; or ... [for] the prevention of further industrial disputes between them". The agreements specified in s 170MA(2) are agreements between the parties to an industrial situation, or any of them, the terms of which are "for preventing the situation from giving rise to an industrial dispute between them".
>
> The Commission's power to certify agreements is qualified by ss 170MC and 170MD. By s 170MC, "[t]he Commission must certify an agreement if, and must not certify an agreement unless, it is satisfied" of certain matters, including, under sub-s (c), that the agreement contains procedures for the resolution of disputes arising under the agreement. Section 170MC is, however, subject to s 170MD which provides that, "[d]espite section 170MC", the Commission may in certain circumstances and must in certain other circumstances refuse certification of an agreement. It is necessary to refer specifically to s 170MD(5). As already mentioned, that sub-section requires the Commission, subject to

> limited qualifications, to "refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin".
>
> The provisions governing the approval of enterprise flexibility agreements are found in Div 3 of Pt VIB of the Act. Subject to a number of conditions, the Commission is empowered to approve an agreement that applies to an enterprise of a constitutional corporation (the definition of which is set out above) and is about matters pertaining to the relationship between employers and employees (ss l70NA and 170ND). Mention should again be made of s l70ND(10), which requires the Commission to refuse approval if it thinks that a provision discriminates on any of the grounds earlier referred to in relation to certified agreements.
> (Citations omitted).

227 It is important to note that the plurality was responding to the following relevant question raised in the case stated in relation to the validity of Divs 2 and 3 of Pt VIB of the *amended IR Act* (at 535):

> Are the provisions of Divs 2 and 3 of Part IVB of the Act, or any part of such provisions, beyond the legislative power of the Commonwealth and invalid in their application to the State of Western Australia in relation to persons employed to enable the State to continue to exist and function as such?

228 This question, as formulated, did not simply focus on the issue of discrimination as an aspect of the *Melbourne Corporation* principle which was regarded at the relevant time as one of two elements of that principle. The question raised the implied limitation in its entirety, without bifurcation. It should be assumed that that was also the way in which the Court addressed and determined this aspect of the case stated.

229 The plurality in the *Industrial Relations Act Case* upheld the validity of the relevant provisions of Divs 2 and 3 of Pt VIB in their entirety. An argument that the effect of these provisions was to make it more difficult for the States to enter into certified agreements with their employees than was the case for other employers was expressly rejected by the plurality at 541-542:

> The conditions in s 170MC(1)(a) and (g) are of general application and do not distinguish between the States, as employers, and other employers. Nor do they distinguish between employees of the States and other employees. If s 170MC(1) operates to make it more difficult for the States to enter into agreements with their employees, it can only be because of either that part of the definition of "single business" that applies to government undertakings, the circumstances in which that sub-section operates with respect to the States, or a combination of both.
>
> The arguments for the plaintiff States did not rely on any particular circumstance pertaining to their activities as giving discriminatory operation to the provisions of Div 2 of Pt VIB. Rather, the argument was put by reference to the terms of the provisions in question. It was said that the definition of the activities of a State as a single business made it more difficult for a State to enter into agreements with their employees because of the need for all employees to be covered by awards and the need for an agreement to be negotiated by "a single person or group of persons representing all the other parties to the agreement".

> However, that fails to take proper account of s 170MC(l)(g) which allows that an agreement may apply to "a single business, part of a single business or a single place of work". It also fails to acknowledge that, by par (d)(ii) of the definition of single business in s 170LB, the activities of "a body, association, office or other entity" are a single enterprise. Moreover, it pays no regard to the possibility of State activities falling within other parts of the definition, including par (c) of the definition which refers to "a single project or undertaking".
>
> When regard is had to the terms of s l70MC(1)(g), it appears that, in defining single business to include activities carried on by the Commonwealth and the States and Territories, the Act simply ensures that government employers, as well as non-government employers, may take advantage of the provisions of Div 2 of Pt VIB. **There is nothing in the definition or in the terms of s 170MC(1)(g) which enables it to be concluded that the provisions of Div 2 of Pt VIB make it more difficult for the States to enter into certified agreements than for other employers or, in any other way, impose special burdens or disabilities upon the States**.
>
> (Emphasis added).

230 The Court reached the same conclusion in respect of the challenge by Western Australia to provisions in Div 3 of Pt IVB relating to the Commission's power to approve an enterprise flexibility agreement (see 542).

231 The emphasised words in the last paragraph from the extracts from the *Industrial Relations Act Case* set out at [198] above are of particular significance to this appeal. The CFA and the Attorney-General for Victoria both argued that the *Industrial Relations Act Case* provided no support for the UFU's central argument in the appeal concerning the inapplicability of the *Melbourne Corporation* principle to enterprise agreements which were voluntarily entered into. They argued that the High Court in the *Industrial Relations Act Case* was only required to deal with that aspect of the *Melbourne Corporation* principle which related to discrimination and not the second limb of that principle as described in *Queensland Electricity Commission*. For the following reasons, we consider that this argument should be rejected.

232 First, the argument is inconsistent with the terms of the case stated as set out in [196] above, which did not confine the challenge to discrimination alone.

233 Secondly, the emphasised words in the last paragraph of the extracts from the *Industrial Relations Act Case* (as set out in [198] above) indicate that the plurality not only rejected the contention that the relevant provisions were discriminatory, but also considered that they did not "impose special burdens or disabilities upon the States". It may be inferred that, in expressing that view, the plurality addressed both limbs of the implied limitation as it was then understood. We are fortified in that view by the similarity of the language used by the plurality in the *Industrial Relations Act Case* and more recent remarks in cases such as *Austin, Clarke* and *Fortescue* (see further below).

234 *More recent decisions on the implied limitation*

235 The *Melbourne Corporation* principle has been refined by the High Court after the *Industrial Relations Act Case*.

236 The relevant decisions up until 2003 were discussed in *Austin* at [146]-[152] per Gaudron, Gummow and Hayne JJ. Key relevant points established by the plurality there were:

(a) in the *Tasmanian Dam Case* at 140 and 213-215, Mason and Brennan JJ both highlighted that the concern of the implied limitation "was with the capacity of a State to function as a government rather than interference with or impairment of any function which a State government may happen to undertake" (see at [146]);

(b) in *Western Australia v Commonwealth* [1995] HCA 47; (1995) 183 CLR 373 at 480, six members of the Court stated that:

> The relevant question is whether the Commonwealth law affects which Dixon J called the "existence and nature" of the State body politic. As the *Melbourne Corporation Case* illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires. (Citations omitted);

(c) in *Austin*, the plurality described the relevant question at [148] as whether the two Commonwealth laws which imposed a superannuation contribution surcharge "restrict or control the States, in particular New South Wales and Victoria, in respect of the working of the judicial branch of the State government";

(d) after noting in *Austin* at [165] that the case stated asked whether the two Commonwealth laws were "invalid on the ground that they so discriminate against New South Wales or so impose a particular disability or burden upon the operations and activity of that State as to be beyond the legislative power of the Commonwealth", the plurality further refined the question in the following terms:

> That issue may be narrowed by asking whether that result comes about by a sufficiently significant impairment of the exercise by the State of its freedom to select the manner and method for discharge of its constitutional functions respecting the remuneration of the judges of the courts of the State. That requires consideration of the significance for the government of the State of its legislative choice for the making of provision for judicial remuneration…;

and

(e) later in *Austin*, the plurality posed the "practical question" at [168] as:

> … whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or inference with the exercise of State constitutional power.

237 Many of these principles were reaffirmed by the plurality (Gummow, Heydon, Kiefel and Bell JJ) in 2009 in *Clarke*. In particular, their Honours reiterated the doubts which had earlier been expressed in *Austin* about an excessive concentration on the notion of discrimination in applying the implied limitation. At [65], the plurality stated:

> The fifth point is that in *Austin*, a majority of the Court, Gleeson CJ and Gaudron, Gummow and Hayne JJ, concluded that the notion of "discrimination" by federal law against a State is but an illustration of a law which impairs the capacity of the State to function in accordance with the constitutional conception of the Commonwealth and States as constituent entities of the federal structure. Too intense a concern with identification of discrimination as a necessity to attract the *Melbourne Corporation* doctrine involves the search for the appropriate comparator, which can be a difficult inquiry and is apt to confuse, rather than to focus upon the answering of the essential question of interference with or impairment of State functions. **It also may be that the references to discrimination by Dixon J in *Melbourne Corporation* use the term in the somewhat different sense of a law which is "aimed at" or places a "special burden" on the States.**
>
> (Emphasis added, citations omitted).

238 Finally, it is relevant to note the following similar formulation of the implied limitation by Hayne, Bell and Keane JJ in 2013 in *Fortescue* at [130]:

> Hence, as the decisions in *Austin* and *Clarke* each demonstrate, the *Melbourne Corporation* principle requires consideration of whether impugned legislation is directed at States, **imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments.**
>
> (Emphasis added, citations omitted).

239 The relevant provisions of the *FW Act* did not single out any State or its agencies. The relevant question is whether those provisions imposed some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA which curtailed the State's capacity to function as a government. In circumstances where the CFA voluntarily agreed to make the enterprise agreement, we do not consider that the provisions offended the implied limitation. In particular, we do not consider that the statutory regime for the making and approval of an enterprise agreement had the effect on the State's governmental functions of the Commonwealth imposing on the State of Victoria or the CFA a significant "impairment", "interference", "curtailment", "control" or "restriction" so as to attract the implied limitation. In our view, the voluntary nature of the agreement is inconsistent with those concepts, which lie at the heart of the doctrine.

240 Both the CFA and Attorney-General for Victoria also argued that an exception to the *Melbourne Corporation* principle should not be carved out in respect of enterprise agreements which have been voluntarily entered into by a State or a State agency because that would be inconsistent with the constitutional underpinnings of the principle, which should not be avoided by a contractual arrangement. We consider that this argument should also be rejected, primarily because it reverses the relevant question. In our view, the correct question is not simply whether the State of Victoria has voluntarily given the Commonwealth any power. Rather, the correct question is whether the relevant provisions of the *FW Act* which provided for the making of voluntary enterprise agreements and their approval by the FWA validly applied to the States without offending the *Melbourne Corporation* principle. For the reasons we have given, we consider that the statutory scheme of the *FW Act* did not involve a significant impairment of the type which was found to exist in *AEU,* which involved the imposition of a binding award in an arbitrated context and in the context of a different statutory regime. We accept the UFU's submission that holding a State or its agency to its "determination" for the limited period of an enterprise agreement which had been voluntarily made by the parties has a very different quality to the imposition by the Commonwealth of an arbitrated outcome on a State or its agencies which have opposed that outcome.

241 Nor do we consider that any relevant significance attaches to the fact that an enterprise agreement only had statutory force if and when it had been approved by the FWA under s 186 of the *FW Act*. As the UFU points out, the fundamental point is that none of the provisions of an enterprise agreement came into statutory effect unless they had been voluntarily accepted by the parties to the agreement. In other words, no State or State agency could be bound by the terms of an enterprise agreement unless it agreed to be so bound.

242 There was no suggestion in this Court that the CFA had been compelled to enter into the Agreement because of its inability to protect itself from the consequences of protected industrial action by the UFU. It was not said, for example, that the UFU had threatened to strike during the height of the bushfire season and that s 415 of the *FW Act* (which renders the UFU immune from civil suit if it takes protected industrial action) therefore left it with no choice but to accede to the demands of the UFU. There is no question, therefore, before us as to whether the operation of the regime in Pt 3-3 (including s 415) might, in some cases, mean that an enterprise agreement, whilst voluntary on its face, was nevertheless involuntary for the purposes of *Melbourne Corporation* by reason of the operation of s 415.

243 Such a contention would raise a host of difficult issues. Section 415 creates, during the bargaining period, a field of civil immunity during which the parties may, subject to issues of

personal injury and the like, do as they please to each other without fear of civil suit. Employees may strike without any liability for breach of contract and an employer may lock out its own staff out with a similar impunity: see ss 19 and 411. The rights to take these steps are closely confined by notice requirements and the like: see, for example, ss 413-414. But the regime of immunity from what would otherwise be actionable at common law derives from a Commonwealth law, s 415, and it is that provision which in theory supports the entire scheme of bargaining upon which Pt 3-3 rests and of which an enterprise agreement is the ultimate product.

244 It may be easy to say in the case of an enterprise agreement reached between a fire authority and a firefighters' union following the calling of a strike during the height of the bushfire season that the authority's actions were involuntary and that it had no choice but to agree so as to protect the public. But difficult questions of degree - principally of a factual kind - await a case where the strike action is less extreme in its consequences; or where there exists merely the threat of strike action. Although it is unnecessary to draw any fixed conclusions about these matters, it may be that that an enterprise agreement will be involuntary for the purposes of *Melbourne Corporation* where a state entity has been forced to propose it under s 181 because of its inability at a factual level to endure protected industrial action. In practice, the ability of the Commission to order that protected industrial action be stopped under s 423 (where it is causing significant economic harm) or under s 424 (where it endangers life, the personal safety or health or the welfare of the population or causes significant damage to the Australian economy) may tend to reduce the situations in which the question of voluntariness may arise. In any event, no such issue was presented in this case.

245 For completeness, we should indicate that we do not consider s 96 of the *Constitution* to be relevant to the implied limitation.

246 For these reasons, we consider that the UFU's appeal in relation to the *Melbourne Corporation* principle succeeds.

247 Issue 3: The Referral Act

248 Since our answer to Issue 1 is "Yes", it is unnecessary to answer Issue 3.

249 Issues 4 – 7: Validity of certain clauses of the Agreement

250 We turn now to consider issues (4)-(7) identified in [2] above. The CFA's cross-claim challenged a number of unrelated clauses of the Agreement, which was, in effect, a tit-for-tat manoeuvre having no particular strategic end beyond seeking to reduce the role of the UFU under the Agreement. The remaining issues raised by the cross-claim have, therefore, no unifying theme by which they can be readily described. They can, however, be grouped into four broad categories:

(a) **The Discrimination Issue**. The CFA submitted that several clauses of the Agreement (clauses 13, 14 and 16) required it to discriminate against those of its employees who were not members of the UFU in favour of those who were. The Agreement obliged the CFA to consult on various matters, such as the Agreement's own implementation and the introduction by the CFA of major changes to the workplace. But the CFA's obligation to consult was only with, or more pertinently through, committees created by clause 13 whose employee personnel were appointed solely by the UFU. This compositional aspect of the consultation committees was said to be an instance of discrimination in favour of the UFU and against the non-union workforce. If that were the operation of the clauses it was not, in substance, disputed that they would be of no effect since the *FW Act* prohibits provisions authorising discrimination on the basis of union membership. The debate between the parties lay, instead, in whether the clauses did in fact discriminate in the manner suggested. The primary judge was of the view that they did not, concluding that they were largely, although not entirely, similar to clauses which had been upheld in the face of a similar challenge in this Court in *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402; (2012) 208 FCR 178 (**Klein**). The CFA submitted that *Klein* should be overruled. The essential issue under this heading then is whether there was discrimination.

(b) **The Consultation Clause Issue**. The *FW Act* requires by s 205 that an enterprise agreement contain a term requiring an employer to consult with its staff with respect to, inter alia, significant changes in the workplace. In default of such a term being present in an agreement, s 205(2) implies a model consultation term which is contained in the regulations. The CFA submitted that even if clauses 13, 14 and 16 did not authorise the CFA to discriminate they nevertheless failed to constitute a consultation term within the meaning of s 205 because they did not require the CFA to consult with its employees, authorising instead consultation through the committees created by clause 13. The UFU submitted that the Act permitted this to occur. The primary judge agreed with the UFU on this issue.

(c) **The Dispute Resolution Issue**. The Agreement contained a dispute resolution clause which applied, inter alia, to 'all matters pertaining to the employment relationship' (cl 15.1.2). The *FW Act* authorised the making of enterprise agreements about 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' (s 172(1)(a)). There were two arguments. First, the CFA submitted that by largely picking up the language of the *FW Act* the specification in the dispute resolution clause of the kinds of matters it governed was uncertain and failed to specify any matter at all; secondly, it was said that notwithstanding

the breadth of the language in s 172(1)(a) it was contrary to the terms of the *FW Act* for the Agreement to permit or facilitate the resolution of disputes which did not arise under the Agreement. This limitation on the ambit of s 172(1)(a) was said to arise from s 186(6) of the *FW Act*.

(d) **The Commission Issue**. In the negotiations leading to the eventual adoption of the Agreement and its ratification by what is now known as the Commission, the parties had been unable to reach a concluded agreement on a number of issues concerned with allowances. Clause 38 provided for these issues (and others potentially) to be referred to the Commission for its determination. The CFA submitted that the *FW Act* exhibited an antipathy towards the use of the Commission as an arbitral body and limited its permissible arbitral role to that of final arbiter under dispute resolution procedures. Outside that narrow confine, the *FW Act* was to be seen as being based on bargaining between the parties and not on arbitration by the Commission. The use by the parties of the Commission to resolve for them their differences about allowances was contrary to this philosophy and hence, so it was said, unauthorised. The primary judge thought that the clause was best understood as part of the dispute resolution process so that no inconsistency arose.

251 The primary judge rejected the grounds of the cross-claim relating to these issues and the CFA has challenged his Honour's findings in its cross-appeal. It is useful to consider these matters in the order set out above. Clauses 13, 14, 15, 16 and 38.3 are set out in the schedule to these reasons.

252 (a) The Discrimination Issue

253 This issue was raised in various guises by grounds 1 to 7 of the CFA's cross-appeal. The clauses under attack were clauses 13, 14 and 16. The nature of the attack was that the clauses required the CFA to discriminate against its non-union employees. There is no debate that if the clauses did require the CFA to discriminate in that way they would be pro tanto inoperative.

254 The path to this uncontroversial proposition is perhaps tortuous: a clause of a workplace agreement like the Agreement 'has no effect to the extent that it is an objectionable term' (s 356); an objectionable term includes a term of an agreement which requires or permits 'a contravention of Part 3-1' (s 12); in this context, 'permits' means more than 'allows' – it connotes actual authorisation: *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; (2012) 205 FCR 339 at [66]; Part 3-1 contains s 346(a) which prohibits a person from taking 'adverse action' against another person because of his or her membership, or lack of membership, of an industrial association such as a union; 'adverse action' is defined broadly to include discrimination by an

employer between employees (s 342(1) Table item 1). Such a term is also an unlawful term within the meaning of s 194(b) and will be of no effect by reason of s 253(1)(b). It does not matter, therefore, whether the term is an objectionable term or an unlawful term; the result will be the same and may be expressed shortly: a term which authorises an employer to discriminate against non-union employees is of no effect.

255 *Clauses 13, 14 and 16*

256 The CFA submitted that clauses 13, 14 and 16 of the Agreement authorised it to discriminate against its non-union staff by providing for a consultation regime which excluded their participation. Clause 13 sets up two consultation committees; clause 14 requires the processes of clause 13 to be applied where the CFA proposes to introduce significant change to the workplace and clause 16 erects a dispute resolution process for disputes which arise out of those consultation or change processes.

257 The essence of all of the CFA's arguments on this topic springs from the fact that neither clause 13 nor clause 16 provide any machinery which requires non-union employees to be involved in the processes which both clauses contemplate. This submission should be accepted. A perusal of clause 13 shows that the 'parties' to which it applies are the CFA and the UFU. Clause 13.2 creates a CFA/UFU Consultative Committee (the **Consultative Committee**) which is to consist of "people involved in the decision making processes of both organisations", those organisations being the CFA and the UFU. Necessarily, the employee representatives on this committee must be those who are involved in the decision-making processes of the UFU and will not be non-union members. On the other hand, clause 13.3.2 creates an Enterprise Bargaining Implementation Committee (the **EBIC**) which consists of equal numbers of management and employee representatives 'as determined by the respective parties', that is to say, by each of the UFU and CFA. This provision does not prevent the UFU from appointing to the EBIC persons who are not members of it and in this regard it is materially different from the Consultative Committee under clause 13.2.

258 Do either of these committee structures authorise the CFA to discriminate against its non-union employees? The primary judge thought not. One of his Honour's reasons for this was that the *FW Act* contemplated the possibility that employees might choose who represented them. Since it was obviously unworkable for all employees to be involved in the consultation procedures it was only natural, so the argument ran, that employees might choose representatives for that purpose. These clauses were, therefore, to be seen as examples of a process of representation acknowledged by the statute. In reaching this conclusion the primary judge followed (at [163]) very similar reasoning applied by this Court in *Klein* at [222]. The reasoning in *Klein* made explicit what was

otherwise implicit in the primary judge's reasoning, that the principle that the *FW Act* contemplated that employees might choose their representatives was grounded in s 176.

259 We do not think that s 176 can permissibly aid in reaching that conclusion but we do think s 205 may achieve the same result. Section 176(1) provides:

> **176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements**
>
> *Bargaining representatives*
>
> (1) The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed enterprise agreement that is not a greenfields agreement:
>
> (a) an employer that will be covered by the agreement is a bargaining representative for the agreement;
>
> (b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:
>
> (i) the employee is a member of the organisation; and
>
> (ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation—the organisation applied for the authorisation;
>
> unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or
>
> (c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;
>
> (d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.
>
> …

260 This says nothing about representation of employees in a consultation process. It is, instead, about representation of employees in the process of negotiation leading to an enterprise agreement. Further, it provides only that an employee may be represented by a person of his or her choosing in the process. We do not think s 176(1) can provide any support for the idea that a term of an enterprise agreement may provide that one person may represent another in a consultation processes. However, s 205(1) provides exactly that. It says that an enterprise agreement must include a term requiring the employer to consult with employees about major change and in that regard it is explicit that the term must 'allow for representation of those employees for the purposes of that consultation.' We differ from *Klein* (at [222]) to the extent that it suggests that the idea of representation in the context of a consultation term comes from s 176 – it comes from s 205(1) – and to the extent that the primary judge embraced that reasoning this was an error, although hardly one of significance (cf *Brown v West* (1990) 169 CLR 195 at 203-204).

261 The second matter which led the primary judge to conclude that the clauses were not discriminatory was that the clauses did not authorise the discriminatory selection of UFU members over non-union members. In this regard his Honour followed similar remarks made by this Court in *Klein* at [222]. We think it is important to be clear that the relevant person whose discriminatory conduct is under consideration is not the UFU but the CFA. The question then is whether the clauses permit (in the sense of authorise) or require the CFA to discriminate between its employees on the basis of their union membership.

262 What could that act of discrimination be? It can only be the CFA's act in not consulting with non-union employees about the matters covered by clauses 13 and 14. Neither in *Klein* nor in the case under appeal was attention given to the differences between the structures of the two committees erected by clause 13. The Consultative Committee created by clause 13.2 does not, for reasons we have already given, have any non-union employees upon it. And this would appear to authorise the CFA not to consult with non-union employees about whatever it is that the Consultative Committee is to do. The difficulty is that the terms of reference for that committee are not created by the Agreement but are instead to be the subject of post-agreement negotiations between the parties: see clause 13.2. It is possible to imagine that those negotiations may lead to functions being given to the Consultative Committee where the effect of the authorisation of the CFA by clause 13.2 not to consult with non-union employees may be truly discriminatory. For example, the CFA and UFU may decide that the Consultative Committee should deal with the issue of changes in work practices affecting all employees. On the other hand, the function which is given to the committee may be such that that the exclusion of non-union employees from the consultation process it envisages is not discriminatory in any way. For example, the function given to the Consultative Committee may be limited to working out protocols for communications between the CFA and the UFU, a topic in which the non-union employees would have no interest and non-consultation about which could not be discriminatory.

263 Once that is appreciated, it will be seen that it is impossible to say that clause 13.2 requires or authorises the CFA to discriminate against its non-union employees because the answer to that question can only be known after the terms of reference are agreed. For that reason, we would conclude that the clause does not require or authorise the CFA to engage in discriminatory conduct against its non-union employees, i.e., that it is not an objectionable or unlawful term. Of course, there is no present occasion to consider whether the settlement of the terms of reference might potentially itself involve the CFA in discriminatory conduct towards its non-unionised employees if

the Consultative Committee were to be given functions touching upon the role of the non-unionised staff.

264 The position in relation to the EBIC is different. Although the members of the EBIC do not have to be members of the UFU, they are appointed by it. It is possible, therefore, that the UFU may choose to permit non-union involvement in the EBIC's consultation processes by itself adopting a non-discriminatory posture. The primary judge thought that any attempt by the UFU to use its power of appointment in a discriminatory fashion would itself be unlawful (at [166]). We do not think this is correct as it is not adverse action for a union to discriminate in favour of its own members and against non-members: cf s 342(1). There would be no point belonging to a union if it were otherwise. Nevertheless, the basic point made by the primary judge is, with respect, a sound one in relation to a claim for direct discrimination. Clause 13.3 does not require or authorise the CFA not to consult with its non-union employees. That result only comes about if the UFU itself decides to exclude non-union members from the consultation processes.

265 No argument was advanced at trial or before this Court that clause 13.3 effected a species of indirect discrimination by erecting a facially neutral compositional requirement that, in fact, operated in a discriminatory fashion. In *Klein* the Court concluded that the word "discriminates" in the table in s 342(1) countenanced both direct and indirect discrimination (at 203-206 [92]-102]) although it did not go on to apply that conclusion to its analysis of the consultation clauses in that case. 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.

266 As the case was put, we would accept the correctness of both the trial judge's conclusion on this second matter (at [165]-[166]) and the corresponding part of *Klein* (at [222]). This conclusion does not foreclose a future argument based on indirect discrimination.

267 Although we do not accept the first step in the primary judge's reasoning that the *FW Act* contemplates representation at least so far as it is said to rest on s 176, that conclusion is immaterial where we do accept this second aspect of the primary judge's reasoning. Clauses 13 and 14 are not discriminatory in the manner alleged by the CFA.

268 The UFU submitted that even if clauses 13 and 14, in a vacuum, operated in a fashion which was discriminatory, nevertheless clause 15 operated to redress whatever problem existed. Clause 15 was the general dispute resolution clause. Because we would conclude that clauses 13 and 14 did not operate in a discriminatory fashion – at least in the way which was argued by the CFA – the operation of clause 15 is otiose to the outcome of the cross-appeal since its support is unnecessary. Had it been relevant, we would have doubted, as the primary judge did (at [168]), that clause 15 could be utilised as a consultation process both since it takes as its point of departure the existence of a dispute and because it is quite possible for consultation to occur in a milieu which does not involve any disputation.

269 Clause 16 was the subject of conflicting submissions by the parties. It is a specific dispute resolution clause whose subject matter is the consultation processes created by the Agreement. The CFA contended that in terms clause 16 was discriminatory because only the CFA or the UFU could enliven it depriving, therefore, non-union employees from having access to its procedures in respect of any dispute they had about the consultation processes. The UFU, on the other hand, submitted that whilst clause 16 apparently involved only the UFU, it did not require the UFU itself to behave in a discriminatory fashion. In an argument which was essentially analogous to the argument the UFU had advanced in relation to clause 13.2, it was said that the UFU could utilise the consultation dispute resolution process in an even handed fashion which did not favour union employees over non-union employees.

270 The primary judge was inclined to see clause 16 as valid because it provided for a mechanism of representation in the consultation process which had been voted on by CFA employees when they voted to accept the Agreement: at [169]. We do not agree that the fact that a majority of employees have voted in favour of an agreement means that all employees, including those who voted against it, have consented to be represented in the manner provided for. The operation of the statute is that they have not consented but their lack of consent is immaterial to whether the agreement is formed. Despite that, the clause remains valid because it does not require or authorise the CFA to discriminate against its non-unionised work force. 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.

271 At [170] his Honour then assessed whether the clauses had a discriminatory effect *as a matter of fact* and concluded, as the UFU had submitted, that they did not. It is not clear to us that his Honour accepted that this was really a relevant inquiry and our impression is that he was merely resolving the factual debates put before him. In any event, we do not think it is a relevant inquiry at least where no case of *indirect* discrimination was advanced by the CFA. The case was that the clauses discriminated in their terms – that is an issue that is to be determined by reference to those terms. If those terms discriminated it would not be relevant that their practical effect was otherwise. Since we do not think that his Honour upheld the clauses on this basis this issue is not connected to the conclusions his Honour reached and may be put to one side.

272 Formally, we would dismiss grounds 1-6 in relation to each of clauses 13, 14 and 16. We would reject ground 7 which related to whether the clauses factually discriminated on the basis that that is irrelevant on the way the case was framed.

273 (b) The Consultation Clause Issue

274 The issue was raised by grounds 8, 9 and 10.

275 The *FW Act* requires the Agreement to contain a consultation term: s 205. The CFA now argues that clauses 13, 14 and 16 did not constitute a consultation term within the meaning of s 205. The immediate consequence of that failure, if established, would be that s 205(2) would then imply into the Agreement the model consultation term prescribed by the regulations.

276 The conclusion above under section (a) is that clauses 13, 14 and 16 do not discriminate against the non-union workforce. This says little, however, about whether the same clauses constitute a consultation term within the meaning of s 205. Although now amended, section 205 provided:

> **205 Enterprise agreements to include a consultation term etc.**
>
> *Consultation term must be included in an enterprise agreement*
>
> (1) An enterprise agreement must include a term (a ***consultation term***) that:
>
> (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on the employees; and
>
> (b) allows for the representation of those employees for the purposes of that consultation.
>
> *Model consultation term*
>
> (2) If an enterprise agreement does not include a consultation term, the model consultation term is taken to be a term of the agreement.
>
> (3) The regulations must prescribe the ***model consultation term*** for enterprise agreements.

277 The CFA submitted that clauses 13, 14 and 16 did not, as s 205(1) requires, provide for consultation with the employees. The primary judge observed (at [174]) that s 205 provided that the Agreement could allow for the representation of employees as part of the process of consultation. In support of that observation the UFU pointed out that clause 876 of the Explanatory Memorandum accompanying the introduction of the Fair Work Bill 2008 (Cth) had indicated that the representative of employees under a consultation term could be a person from a union:

> …The term must also allow for the representation of those employees during consultation (subclause 205(1)). A person representing the employees could be an elected employee or a representative from an employee organisation.

278 The primary judge could see no reason why clauses 13, 14 and 16 did not fit this model. We agree. Clause 14 deals with significant change and requires clause 13 to be applied. It is apparent from clause 13.3.6 that it is the EBIC procedure under clause 13.3 which is enlivened and not the Consultative Committee under clause 13.2. That being so, clause 13.3 would require the CFA to consult with the employee representatives on the EBIC. Because s 205(1)(b) specifically contemplates representation it is impossible to say that clauses 13, 14 and 16 do not together constitute a consultation term within the meaning of s 205. The primary judge did not therefore err in his treatment of grounds 8 and 9.

279 Ground 10 only arose if grounds 8 and 9 were successful. It was a contention that if the clauses did not constitute a consultation term then s 205(2) would require the application of the model consultation term in the regulations. This issue does not arise. Ground 10 should be dismissed.

280 (c) The Dispute Resolution Issue

281 This issue was raised by ground 11 of the notice of cross-appeal.

282 Clause 15 is headed ‘Dispute Resolution’ and puts in place a general form of dispute resolution clause. Clause 15.2 defines an escalating scale of dispute resolution processes which will be engaged successively as each earlier one fails to resolve the dispute. The first of these involves the submission of the dispute to the relevant employee’s immediate supervisor (clause 15.2.1) and the last involves referral of the issue to the Commission for arbitration. The matters which can be the subject of the processes established by the clause are set out in clause 15.1. These include, relevantly:

> 15.1.2 all matters pertaining to the employment relationship, whether or not express

provision for any such matter is made in this agreement; and

…

283 This clause reflected the language of s 172 which we have set out at [159] above and which requires that enterprise agreements be made about 'permitted matters' and relevantly specifies two such matters.

284 The CFA submitted that s 172(1)(a) required matters to be identified which pertained in the relevant way, i.e., to the relationship of employment. Clause 15.2 merely copied the text of s 172(1)(a), so the CFA submitted, and in so doing failed to identify the matters to which the provision referred. Thus, to take an example, on this view of affairs it would be permissible to specify in an agreement that an issue about hours of work was a matter which might be dealt with under the dispute resolution procedures because hours of work was a matter which pertained to the employment relationship. But the general expression 'matters pertaining to the employment relationship' was couched at such a high level of abstraction that it failed to constitute a matter which might be seen as pertaining to the employment relationship within the meaning of s 172(1)(a). We do not agree. If clause 15.1.2 was uncertain in its operation we might be disposed to see some force in the point. But it is not. In order to determine whether a particular matter is covered by the dispute resolution procedure one has merely to ask whether the matter pertains to the employment relationship. We see no great difficulties in answering that question. There is thus no certainty problem. That problem aside, we see no objection to the Agreement simply modelling itself on the language of the provision.

285 The CFA also submitted that although s 172(1)(a) appeared to be broad enough to support a dispute resolution provision which covered disputes unrelated to the operation of the Agreement this was not so because of s 186(6). It was said that s 186(6) constrained what might otherwise be done under s 172(1)(a). We have set out s 186(6) at [163] above.

286 This argument is of no substance. Section 186(6)(a) required that any agreement contain a dispute resolution term dealing with disputes which do arise under the relevant agreement but we can see nothing from which the negative implication may be drawn that an agreement may contain no other kind of dispute resolution clause. There is therefore no reason to read s 186(6) as narrowing in any way the breadth of s 172(1)(a). The Full Bench of the Commission has previously reached the same conclusion: *Boral Resources (NSW) Pty Ltd Transport Workers' Union of Australia* [2010] FWAFB 8437; (2010) 202 IR 135; *Metropolitan Fire and Emergency Services Board v United Firefighters' Union of Australia (Vic Branch)* [2012] FWAFB 9555; (2012) 223 IR

448. The CFA submitted that these were wrongly decided and invited this Court not to come to the same view. For the reasons just given that invitation should be declined.

287 Ground 11 fails.

288 (d) The Commission Issue

289 The CFA then challenged the validity of clause 38.3, which is in these terms:

> In accordance with existing practice the parties agree that any new allowance and/or variation to an existing allowances claim will be referred to FWA for determination. Both parties reserve their rights to put their respective positions.

290 There were a number of complaints about this clause but each had as its premise a construction which assumed that it was free-standing and did not rely upon the machinery of the dispute resolution clause, clause 15. The primary judge was not disposed to agree with that construction holding at [241] that it did not permit the arbitration of allowance claims outside the dispute resolution machinery of clause 15.

291 On the appeal the CFA submitted that his Honour had erred in so concluding and that properly construed clause 38.3 was an independent power to arbitrate allowance claims. This was said to give rise to invalidity for four reasons:

(a) the scheme of the *FW Act* was premised on bargaining and as such clause 38.3 reintroduced a concept of arbitration which was, outside tightly constrained circumstances, contrary to the statute's underlying philosophy;

(b) the proper characterisation of clause 38.3 was that it was a clause about the powers of the Commission. It followed that it was not about the relationship between employer and employee and could not therefore be a 'permitted matter'. This had the consequence that it was invalid;

(c) the clause was said to have an uncertain operation; and

(d) it was said that clause 38.3 was not a dispute resolution procedure. This mattered because under the Act only such provisions may involve referrals to the Commission of matters for arbitration.

292 We agree with the primary judge's approach, under which these issues do not arise. His Honour began by seeking to construe the clause in its full context which included the fact that the parties had been unable to reach agreement on 44 identified matters in the lead up to the Agreement. In order to overcome that impasse they had agreed – and this agreement was recorded in writing –

that they would seek to reach agreement about these issues or otherwise refer them to the Commission for arbitration. As the primary judge correctly observed, this agreement sat, at least *prima facie*, a little uncomfortably with two other clauses. The first of these was clause 65 under which the parties bound themselves to make no further claims on each other. The second was the dispute resolution clause itself (clause 15). His Honour concluded that these not-yet-agreed matters were the subject matter of clause 38.3. So viewed it was to be seen as an explicitly contemplated carve-out from the no-further claims clause. Further, instead of being inconsistent with the dispute resolution clause the primary judge thought that it was simply one of the matters with which that clause could deal.

293 We are not sure that we share the primary judge's view that clause 38.3 was *only* a carve-out from the no-claims clause in respect of the pre-identified 44 matters although we accept it was certainly at least that. Its language is expressed, however, in terms which are not so confined. But whether the clause is limited in that fashion or not, we do not doubt his conclusion that the clause is merely to be read as dealing with one of the categories of disputes with which clause 15 might deal. This is for at least two reasons. First, whilst it is possible to read clause 38.3 as permitting the parties to determine allowances without ever having a disagreement about them and simply referring the issue for initial determination by the Commission, it is difficult to imagine those circumstances happening in the real world. The reference in the last sentence of the clause to the parties reserving their right to put their respective positions to the Commission rather assumes in the first place that they have differing positions which might be put.

294 Secondly, the language of clause 15.1.1 then becomes apposite for it shows ("…all matters for which express provision is made in this agreement") that it was intended that it should pick up and apply to other provisions in the agreement. In our opinion, clause 38.3 is such a provision.

295 Accordingly, as the primary judge correctly held, clause 38.3 is not the source of a power to refer matters to the Commission but merely the stipulation of another category of dispute to which clause 15 applies.

296 That being so, each of the CFA's challenges to the clause must fail. Properly construed, the clause is part of the dispute resolution procedure which the Act contemplates should exist and in respect of which it explicitly permits resolution by the Commission. The reference, in that circumstance, to an ability in the Commission to resolve these disputes is not contrary to the scheme of the legislation.

297 Nor can it be that, so construed, clause 38.3 is about the powers of the Commission and hence not a permitted matter. The clause is plainly about the relationship between employer and employee and, more specifically, the entitlement of employees to allowances. That it is also about the powers of the Commission does not deny it that quality. This is because the quality of being about the employment relationship and being about the powers of the Commission are not mutually exclusive.

298 The CFA's submission that the clause had an uncertain operation turned on the notion that the final scope of the agreement might not be known because the future operation of clause 38.3 could not be foreseen. That uncertainty as to future operation was said to generate real difficulties for the Commission in assessing whether to approve the Agreement and, in particular, to the necessity of the Commission being satisfied that the Agreement satisfied the 'better off overall test' in ss 186 and 193.

299 There may be practical limits to the ability of negotiating parties to leave outstanding disputes for later resolution under the terms of an enterprise agreement because of the 'better off overall test'. However, it is not the case that merely because some matters are left outstanding that the test *cannot* be passed. Whether it is passed or not will depend on an assessment – factual in nature – of the standard which s 193 imposes.

300 Insofar as the clause deals with matters which arise after the date of the agreement the posited problem does not arise. That the clause can operate in relation to circumstances, ex hypothesi, presently unknown and unknowable, can hardly be a ground for criticising it for having an uncertain operation.

301 Finally, there is no substance in the contention that the clause is not part of a dispute resolution clause. That is exactly what it is.

302 Conclusion

303 The parties should bring in orders to give effect to these reasons within 21 days. In the event that the parties cannot agree on the orders, they are to file and serve within 28 days the orders for which they contend, together with any written submission, limited to 3 pages, in support of those orders.

I certify that the preceding two hundred and sixty-three (263) numbered paragraphs are a true copy

of the Reasons for Judgment herein of the Honourable Justices Perram, Robertson and Griffiths.

Associate:

Dated: 8 January 2015

304 Schedule

Relevant clauses of the Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010

Clause 13

13. CONSULTATIVE PROCESSES

13.1. **Consultation**

Consultation means the full, meaningful and frank discussion of issues/proposals and the consideration of each party's views, prior to any decision. Committees established for the purpose of implementing aspects of this agreement are part of the consultative process.

13.2. **CFA / UFU Consultative Committee**

The parties agree to establish a CFA/UFU Consultative Committee comprising people involved in the decision making processes of both organisations.

The Committee's terms of reference, membership and working arrangements will be negotiated by the parties within six months of this agreement being lodged.

13.3. **Enterprise Bargaining Implementation Committee**

13.3.1. The parties are committed to effective consultation and communication throughout the CFA. As a demonstration of that commitment, the parties have undertaken to continue to operate an Enterprise Bargaining Implementation Committee (EBIC) to facilitate the implementation of this agreement and ongoing workplace reform.

13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.

13.3.3. There is an obligation on Committee members to cooperate positively to consider matters that will increase efficiency, productivity, competitiveness, training, career opportunities and job security.

13.3.4. The Committee will program meetings on a regular basis (initially at least monthly) and communicate the outcomes of meetings to employees covered by this agreement.

13.3.5. The respective parties, at their own initiative, may require the endorsement of their constituents in relation to proposals for change. No proposals for change arising from this agreement shall be implemented without referral to the Enterprise Bargaining Implementation Committee.

13.3.6. The aims of the Enterprise Bargaining Implementation Committee will be to:

(a) consult where provisions in this agreement require consultation:

(b) monitor the implementation of this agreement.

(c) consider and make recommendations regarding issues arising under this agreement.

(d) provide a mechanism for employee input into the implementation of this agreement. Thus providing an opportunity to utilise employee knowledge and experience to provide a mechanism for improving communication and cooperation between the CFA and its employees.

13.3.7. The Committee may, by agreement, alter its size and/or composition or establish working parties to research and make recommendations on specific issues for determination by EBIC at a later date.

13.4. **Operation of Consultative Committees**

13.4.1. Consultative Committees convened under this agreement will meet at times and localities which cause the least disruption to the operations of the Authority.

13.42. Where the UFU nominees are serving Authority employees the following will apply:

(a) When the employee is on duty, arrangements will be made to facilitate his or her attendance at meetings without loss of pay.

(b) When a meeting occurs while the employee is off duty, the employee will be paid for the time involved at overtime rates.

13.4.3. There is not a set number of representatives for any Committee. Nomination will be consistent with the task to be undertaken and the required expertise.

13.4.4. All Committees established under this agreement are recommendatory in nature and will operate on the basis of consensus when developing recommendations.

13.4.5. When a UFU representative who is a CFA employee travels to a meeting on days when the person is not on duty, the following shall occur:

(a) The person shall be provided with a vehicle to enable him/her to travel to the meeting. This shall be by way of CFA car or hire car to travel to and from the meeting. As a last resort the person may by agreement use his/her own vehicle and receive the appropriate vehicle allowance as prescribed in the agreement for each kilometre travelled;

(b) In the case of a person who requires air travel he/she shall be provided with air travel from his/her location to Melbourne and return. Such transport shall be arranged and paid for by the CFA. Travel to and from the airport to the meeting venue shall be provided by way of car hire or taxi as appropriate.

(c) Payment for travel time shall be as provided for in this agreement based on the distance between the persons work station and the station at which the meeting is being held or at a station of equivalent distance where the meeting is being held at a venue which is not a current career fire station.

(d) Payment for the time spent flying to and from the person's location to Melbourne Airport will be paid for at single time rates. In addition, the allowance prescribed in this agreement is to be paid for travel from Melbourne Airport to the meeting and return.

(e) Employees travelling to and from the same work location are to travel in the same vehicle wherever possible.

(f) The above matters in 13.4.5 with the exception of payment of airfares and transport for employees requiring air travel and vehicle allowance for the use of private vehicles are to apply when CFA employees who are UFU representatives attend meetings on days when they are not on duty.

(g) UFU will normally limit participation by CFA employees to no more than three on the basis that CFA will not unreasonably withhold agreement to UFU requests for greater numbers of participants. Requests for more than three representatives must be agreed between the parties before the relevant meeting occurs.

Clause 14

14. INTRODUCTION OF CHANGE

Where the employer wishes to implement significant change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.

Clause 15

15. DISPUTE RESOLUTION

15.1. This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:

15.1.1. all matters for which express provision is made in this agreement; and

15.1.2. all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and

15.1.3. all matters pertaining to the relationship between the CFA and UFU, whether or not express provision for any such matter is made in this agreement, and

15.1.4. all matters arising under the National Employment Standards.

The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause.

15.2. To ensure effective consultation between the employer, its employee(s) and the union on all matters, the following procedure shall be followed in an effort to achieve a satisfactory resolution of any dispute or grievance:

15.2.1. Step 1 The dispute shall be submitted by the union and/or employee(s) to the employee's immediate supervisor.

15.2.2. Step 2 If not settled at Step 1, the matter shall be submitted to the appropriate senior officer.

15.2.3. Step 3 If not settled at Step 2, the matter shall be recorded. The matter shall be submitted to the appropriate delegated Industrial Representative of the employer for consultation.

15.2.4. Steps 1 - 3 Must be concluded within a period of ten (10) consecutive days. Disputes are to be resolved at a local level wherever possible.

15.2.5. Step 4 If the matter is not settled at Step 3, the dispute shall be formally submitted in writing to the Manager Employee Relations, setting out details of the dispute and, where appropriate, with supporting documentation. The Manager Employee Relations shall convene a meeting of the employer, employee(s) and the union within a period of one week (7 days) of receipt of such submissions and endeavour to reach a satisfactory settlement.

15.2.6. Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWA. FWA may utilise all its powers in conciliation and arbitration to settle the dispute.

15.3 Notwithstanding the words contained in the above sub-clause, the steps of the procedure apply equally to a dispute raised by an employee, the union or Officer in Charge.

15.4. While the above procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 15.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.

15.5. This clause shall not apply to a dispute on a Health and Safety issue.

15.6. A dispute may be submitted, notified or referred under this clause by the UFU.

15.7. A decision of FWA under this clause may be appealed. A dispute is not resolved until any such appeal is determined.

Clause 16

16. CONSULTATION OFFICER & DISPUTES REGARDING CONSULTATION AND CHANGE

16.1. Any dispute from either party regarding consultation and change shall be dealt with in accordance with this clause and the dispute resolution clause of this agreement.

16.2. Where there is a dispute regarding consultation, before referring the matter to FWA either party may notify the Consultation Officer. The CFA Consultation Officer is an employee appointed by the CFA and agreed to by the UFU who is responsible for ensuring consultation proceeds pursuant to this agreement in a fair, timely and effective manner. The Consultation Officer is to act independently of either of the parties.

16.3. When a dispute has been notified to the Consultation Officer, the Consultation Officer shall arrange a meeting of the CFA CEO and the Secretary of the UFUA Victorian Branch (each with one other

person accompanying them if necessary having regard to the nature of the dispute). This meeting shall take place within 7 days of the Consultation Officer being notified of the dispute.

16.4. The Consultation Officer, the CFA and the Secretary shall attempt to resolve the dispute by consensus. They may decide to refer the matter for further consultation, decide that the matter is at an end or resolve it in another manner. If there is no resolution by consensus, either party may refer the matter to FWA pursuant to the dispute resolution clause.

Clause 38 (extract only)

38. ALLOWANCES AND REIMBURSEMENTS GENERAL

38.1. The monetary amounts of the allowances provided for in this agreement are set out in Schedule 4 and shall be paid in accordance with Australian Taxation Office legislation. However, in the case where an employee receives less than the net amount stipulated in Schedule 4 the parties agree to have discussions regarding the reduced quantum. Each party reserves their rights to pursue any reduction in net entitlements in accordance with the above so no employee is disadvantaged.

38.2. All other work related allowances will increase by 13.5% from the date of approval of this agreement.

38.3. In accordance with existing practice the parties agree that any new allowance and/or variation to an existing allowances claim will be referred to FWA for determination. Both parties reserve their rights to put their respective positions.

…