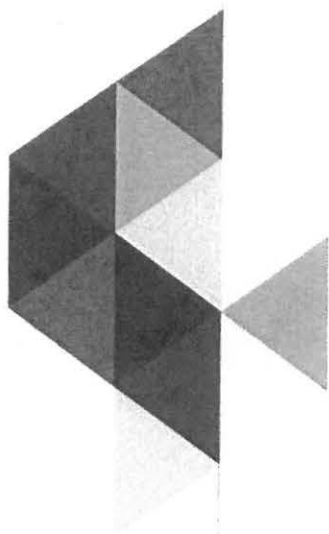


SEYFARTH
SHAW



**Preliminary report:
workplace strategy
development and execution**

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privilege

10 March 2016

Henry Skene
Partner

SEYFARTH SHAW AUSTRALIA
Level 27, 55 Collins Street
Melbourne VIC 3000
Tel: (03) 9631 0700

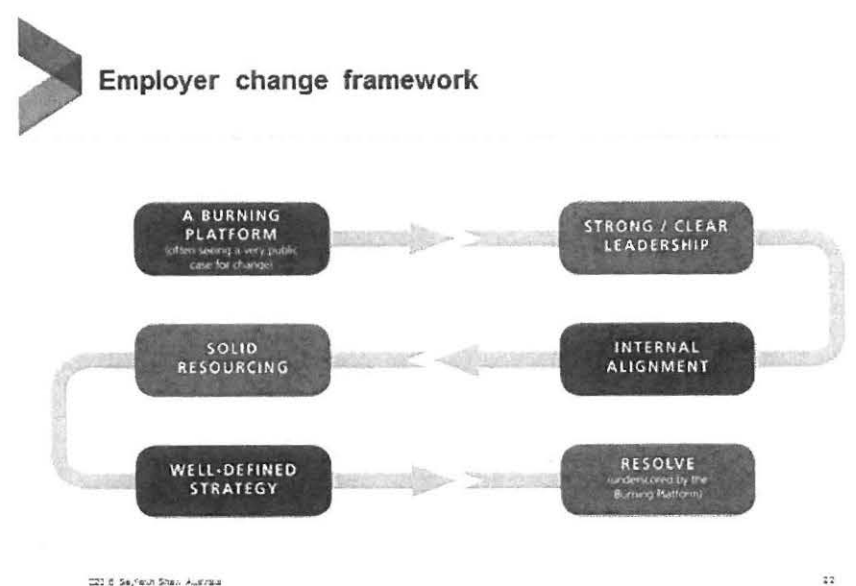
Table of Contents

	Page
1. Issue	1
2. Key recommendations	2
3. Context	5
4. Workplace Strategy Development.....	7
5. Principles	9
6. Increase employee engagement	10
7. Increase union accountability	12
8. Start driving the change	15
9. Closing out bargaining	16

1. Issue

1.1. Overview

- The Country Fire Authority (CFA) seeks to review its existing workplace relations arrangements and approach to align better with its operational objectives, immediately and for the long term.
- It is seeking to overcome difficult legacy arrangements, which have been characterised by disputation and resistance to change.
- In the short term, it must determine a preferred approach to closing out the protracted enterprise bargaining process in a manner that will best achieve its longer term workplace relations and operational objectives.
- Finally, the CFA wishes to engage its leaders to drive more effective employee engagement to achieve lasting cultural change. This includes resetting its relationship with the United Firefighters Union of Australia (Victoria Branch) (UFU), to reduce workplace conflict, protect managerial prerogative in relation to key decision making and to promote a dynamic of consultation and influence rather than veto and control.
- This must be achieved in a manner that is supported by other key stakeholders, including the leadership team and board, and not opposed by government.



1.2. Approach

- The Employer Change Framework has been applied to develop a workplace relations strategy consistent with these objectives.
- There is a strong case for change. This paper outlines a multi-dimensional approach to start driving the desired change now, with the end in mind.

2. Key recommendations

2.1. Overview

- There are options available to the CFA to start driving its desired change now.
- This paper makes recommendations in four key areas:
 - Employee engagement.
 - Union accountability.
 - Driving key change initiatives.
 - Bargaining strategy.
- Change on key initiatives can be achieved, irrespective of the preferred approach to bargaining. The union accountability and employee engagement proposals are essential to achieve a higher degree of control in the bargaining process.
- We have taken a “fresh eyes” approach to the recommendations in the paper. While we are aware that some issues raised have already been attempted by the CFA previously, we have retained such recommendations where we consider that there is an opportunity for the CFA to derive leverage by revisiting the issue.

Dimensions



2.2. Key recommendations

(a) Employee engagement

- (i) **Communications:** Implement a top-down communications strategy with key messages delivered through multiple channels, based on principles and rationale.
- (ii) **Leadership development:** Identify the key group of managers to interface with and influence employees. Consider training to build their capability in this regard. This will be necessary to address skepticism arising

from past experience and to condition the group for resistance from vocal employees and union representatives.

- (iii) **Cultural review:** Adopt a data-driven approach to build the case for reform on key cultural issues, including harassment, diversity, discrimination and ineffective management practices. An independent review or hotline to collect data could be implemented based on issues identified to date. There are optics advantages in this review being prepared externally. We consider there may also be scope for an external regulator to become involved, which could add credibility and profile to the findings.

(b) **Union accountability**

- (i) **Set boundaries:** Review existing processes to identify areas where the role of the UFU exceeds existing obligations or is not appropriately regulated. Seek to contain the disproportionate influence of the UFU by introducing alternative communication channels.
- (ii) **Right of entry:** Implement a visitor protocol to ensure that all entry to CFA premises is consistent with the *Fair Work Act 2009 (Cth) (Act)* and the *Country Fire Authority / United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010 (2010 EBA)*.

- (iii) **Strike pay:** Review existing practices to ensure that appropriate payments are withheld in respect of periods of industrial action. There is an opportunity to withhold payments in respect of partial work bans. There may also be a basis to press to recover certain payments made to date.

- (iv) **Consider challenge:** Potential legal avenues should be examined further (noting that the CFA has already received advice in relation to some matters. For example, we consider there is scope to challenge existing industrial action notices, to position a case regarding discriminatory provisions (and referral under section 216 of the Act) and the impact of *re AEU*.¹

(c) **Drive key change initiatives**

- (i) **Organisational effectiveness:** It is open to the CFA to introduce any reform that is not inconsistent with its existing obligations. The consent of the UFU will only be required where existing obligations provide for this. There are matters contemplated by the 2010 EBA which have not been completed (eg the Code of Conduct) and other desirable changes that are outside the 2010 EBA (behavioural change). Use the consultation and dispute resolution procedures in the 2010 EBA to the CFA's advantage.

¹ *Re Australian Education Union, Ex Parte Victoria* (1995) 184 CLR 188.

- (ii) **Legal framework:** Work within the framework of the Act and the 2010 EBA. Review deeds, MOUs, side agreements or practices against legal obligations. Reduce regulation where it is practical to do so.

positioned now with an eye to potential for further external intervention and arbitration. In this event, the CFA may want to press for more change now - it needs to ensure that it positions issues now to do so.

(d) **Execute bargaining strategy**

- (i) **Model terms:** Prepare model terms and conditions as a guide for future negotiations.
- (ii) **Assess approach:** Determine the CFA's preferred approach to current bargaining having regard to its assessment of the "pain vs gain" equation. Either: a confined approach directed at achieving a rollover of the 2010 EBA (and drive for change under it preparing for a more ambitious campaign next time; or drive or fall back to a progressive change agenda now, noting that this will involve escalating the dispute to conclusion.
- (iii) **Execute:** Both the employee engagement and the union accountability actions are necessary to support the CFA's preferred approach in bargaining. Continue to draw on the Act to hold bargaining representatives accountable. Use alternative channels to build and gauge employee support. Test employee support.
- (iv) **Prepare fall back:** The risk that the preferred option will not achieve support must be managed also. The strategy should be

2.3. **Immediate next steps**

- (a) **Risk assessment:** Review and test key recommendations and options with key management representatives. Develop guiding principles identified below. Undertake a risk-based approach, including a risk assessment to gauge risk appetite for the options. The objective is to identify ways to de-risk options as far as possible.
- (b) **Leadership alignment:** Change agenda must be endorsed by leadership of business and, to the extent necessary, socialised with Government before implementation. It is crucial build resolve here, to address skepticism from other levels of management and overcome adverse perceptions about past initiatives.
- (c) **Resourcing:** Determine internal and external resourcing required to support implementation, including stakeholder communication and alignment.
- (d) **Planning:** Finalise change agenda and prioritise. It is useful to set this against a timeframe identifying key areas of activity and operational overlay. A planning Workshop may be desirable here to develop a strategy implementation plan and escalation points.

- (e) **Proactive execution:** Prepare now for resistance and to drive / defend key initiatives both legally and practically. Crucial to avoid (wherever possible) any further impediments to change. When the communication process has started to bite, drive the CFA's preferred bargaining outcome.

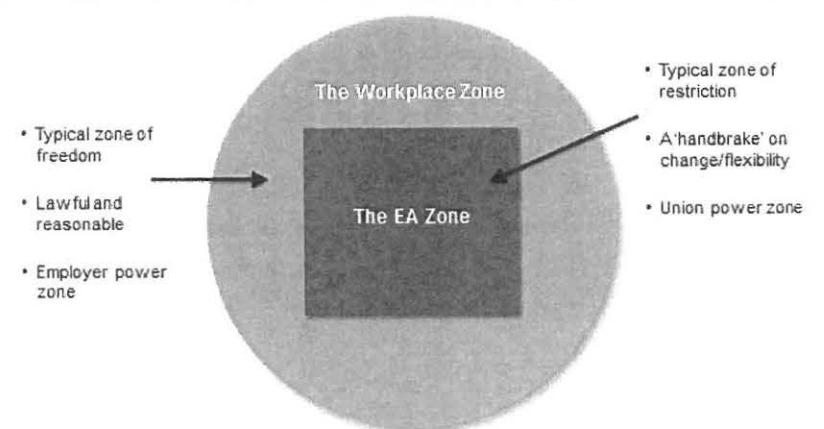
give the UFU various avenues to do so and to disrupt and delay management of the organisation. The CFA has found it difficult in the past to hold to account the UFU and the employees most closely aligned to the union agenda. The UFU operates independently from the lawful boundaries of its role under the legislation and the 2010 EBA.

3. Context

3.1. Workplace analysis

- The current workplace relations environment reflects the hallmarks of a highly traditional unionised setting, captive to the demands and influence of the UFU. Workplace relations are highly adversarial and wearing. Regulation is high and the current enterprise agreement contains various limitations on change.
- Further, even where there is no legal obstacle under the agreement, there is a (wrong) perception that change must be agreed with the UFU or may not be implemented.
- Leadership and communication channels with managers, supervisors and employees have been compromised by the adversarial environment. Managers sense they have low discretion and support to implement decision-making. As a result, they can be reluctant to make decisions and risk personal exposure or "scape-goating".
- The UFU places itself at the centre of the employer/employee relationship. Current agreements

Assessing the legacy environment



3.2. Bargaining impact

- Since 2013, the CFA has been in protracted negotiations with the UFUF over the 2010 EBA. The 2010 EBA covers and applies to CFA employees

including career firefighters, station officers, operations officers and managers.

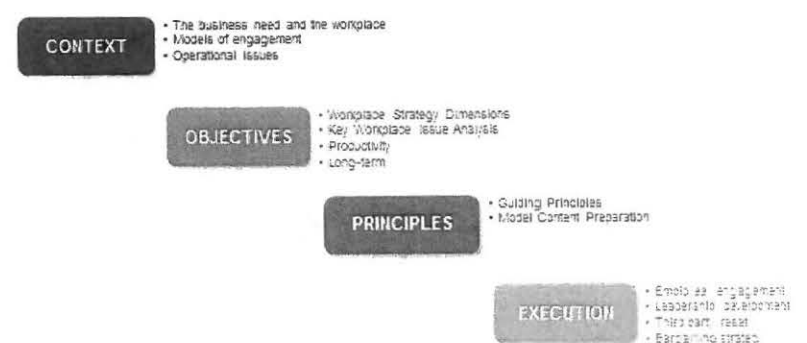
- The UFU has advanced various demands that would further compromise the capacity of the CFA to meet its operational objectives, and a substantial wage claim. The UFU is also mounting pressure on the Victorian Labor Government, alleging that promises to implement its agenda were made. This is occurring in the context of upcoming state elections.
- The UFU demands have been resisted to date. Negotiations are now at a stalemate and the CFA has, with the apparent support of Government, disengaged from the bargaining process for the time being.
- Most recently, the UFU notified the CFA of its intention to take protected industrial action (most recently on 14 January 2016).

4. Workplace Strategy Development

4.1. Key objectives

- The key objectives provide the end in mind for the workplace relations strategy of the CFA for the medium to long term. Short term objectives may also be included. Bargaining is only one element of the strategy development.
- The CFA has in place established values that should be at the heart of the workplace strategy objectives.
- Based on the preliminary workshop, key objectives for the CFA include the following:
 - Ensuring workplace arrangements:
 - support the CFA in meeting its statutory objectives;
 - promote diversity and anti-discrimination; and
 - promote “one CFA”.
 - Empowering managers and promoting effective management decision making.
 - Promoting direct engagement with employees at all levels of the organisation.

Strategy Development Overview



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- Reducing confrontation and disputation, particularly in relation to change initiatives.
- Ensuring a clear and certain framework of terms and conditions, where existing legal ambiguities are resolved.
- No more “bob a job”.
- Ensuring that the workplace relations strategy is supported by leadership and clearly understood throughout the organisation.

4.2. Key actions

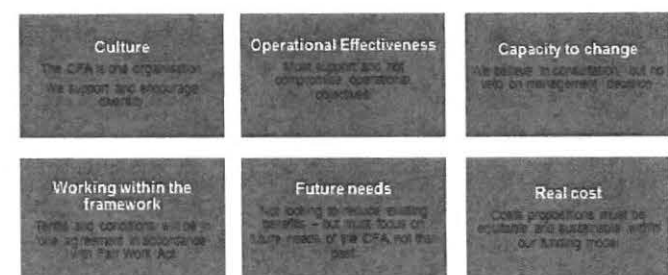
- Review and finalise the objectives with the management team. A medium to long term view should be taken.
- Review existing terms and conditions, including the 2010 EBA, to identify content that is inconsistent with desired end state. In this regard, we have prepared a "Top 10" issues list for your review - see **Annexure 2**.
- Develop model enterprise agreement content to guide incremental reform.
- Obtain leadership endorsement.

5. Principles

5.1. Analysis

- Principles provide a framework for management decision-making and a basis to test change initiatives and claims made. They assist to articulate a consistent rationale about why the CFA wishes to pursue particular objectives and why it will not accept particular claims.
- As a result, they assist with evaluation and communication of the change agenda. This can be particularly useful in meet good faith bargaining obligations and holding employee bargaining representatives to account.
- Based on the preliminary objectives set out above, examples of principles relevant to the CFA are set out in the adjacent diagram.

Guiding principles



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5.2. Key actions

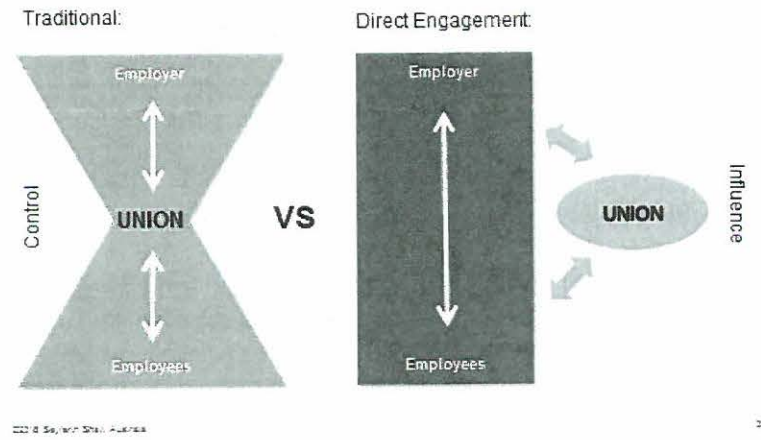
- Review and finalise principles with the management team. A medium to long term view should be taken.
- Obtain leadership endorsement. Test stakeholder support.
- Consider broader circulation of the principles to managers, supervisors and employees to guide decision making.

6. Increase employee engagement

6.1. Key objectives

- The current model of engagement at the CFA is that of traditional, captive workplace. The objective of this process is to drive towards a more progressive approach. The hallmarks of this change process are set out in **Annexure 1**.
- We recommend a two-part initial process to reset employee engagement:
 - Strategy team should review existing practices to identify where the role of the UFU is consistent with the “traditional model” and replace them to the extent possible with approaches consistent with the “progressive” model; and
 - Implement direct communications strategy to build employee awareness and alignment with objectives.
- Effective communication between the CFA and its employees is crucial to engagement. Existing arrangements indicate that the vision, values and workplace relations objectives of the CFA leadership are not clearly understood. Anecdotally there is skepticism about this and credibility about delivering change is low.

Competing models of engagement



6.2. Communication mindset

- Communications must be top-led and consistent with the strategy objectives and guiding principles.
- Communication must also be two-way. Review existing strategies to obtain information from employees and to provide them with an opportunities to provide feedback. Hence, top-down and bottom up approaches should be considered.
- Elements to consider include:
 - Clearly articulated values and principles, including that this is how the CFA will assess

and measure workplace initiatives and culture.

- Highlight principle, rationale, and benefits of change initiatives (including the bargaining deal).
- Avoid a communications vacuum - report on bargaining promptly.
- Challenge refusal to engage in the process and/or find alternative channels (eg. meetings).
- Constructively critique union position. Correct misleading information.
- Identify risks of union claims and risks of industrial action.
- Proactively test views of employees - work around avoiding behavior (get in front of them).
- Encourage employees to support initiatives, including voting "yes" to preferred bargaining outcome. Consider offering incentives.
- Discourage taking of industrial action. Identify cost to employees where relevant. Explain strike pay rationale where relevant.

6.3. Key actions

- Identify and engage a key management group to drive communications (OM's and OO's). Consider training for that group to assist with decision making and dealing with vocal dissenters.
- Implement a direct communications model with key messages delivered through multiple channels - in groups that are as small as is workable.
- Engage in "mythbusting" to counter and expose misinformation. Do this in a public and visible way. (UFU statement vs Truth) to erode confidence in the union agenda.
- Where possible gather and use simple data to illustrate a point - for example, quantify the value of the CFA offer if it had been accepted by employees.
- Engage employee groups who have been marginalised and volunteers.

7. Increase union accountability

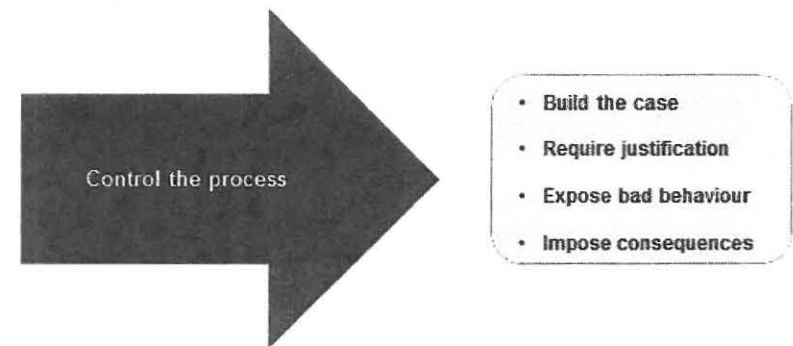
7.1. Analysis

- The UFU presently operates beyond the boundaries of the role authorised by the 2010 EBA or the Act. It has a group of very strongly aligned and vocal members, but this does not reflect the attitude of all employees. The union drives a culture of division and union control within the organisation, consistent with its objective of maximising employee numbers (and hence members).
- In some instances, this has included harassment and abuse of employees and managers who have been perceived to have stepped out of line.
- It is desirable to reset the CFA's relationship with the UFU. Build the case on bad behavior (optics are important here), communicate implications, call out consequences.
- While this will be an evolutionary change, there are immediate measures available to hold the union to its legal role. Further, steps can be taken to counter the disproportionate voice of the union and the culture of intimidation.
- Where the union has engaged in industrial action, more consideration should be given to applying the strike pay provisions of the Act. The CFA may have exposure here if it has not withheld payments in respect of periods of industrial action as required by the Act. This should be reviewed carefully. There may be significant leverage here for the future, but

also against the CFA if payments have been improperly made. Further, it may withhold in relation to the partial work bans.

- Finally, the existing notices are potentially open to challenge in various respects. This is set out in **Annexure 2**.

Boundaries and consequences



7.2. Key actions

- **Set boundaries:** Review existing processes to identify areas where the role of the UFU exceeds existing obligations or is not appropriately regulated (examples include consultation, dispute resolution). Seek to contain the disproportionate influence of the UFU by introducing alternative communication

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channels. The cultural review will provide data to support the case for change here.

- **Right of entry:** Implement a visitor protocol to ensure that all entry to CFA premises is consistent with the Act and the 2010 EBA. Any entry for the purpose of holding discussions with employees should be in accordance with the Act. Safety protocols may also be imposed.
- **Strike pay:** Review existing practices to ensure that appropriate payments are withheld in respect of periods of industrial action. There is an opportunity to withhold payments in respect of partial work bans. There may also be a basis to press to recover certain payments made to date.
- **Consider challenges:** Potential legal avenues should be examined further (noting that the CFA is already received advice in relation to some matters). For example, we consider there is scope to challenge existing industrial action notices, to position a case regarding discriminatory provisions (and referral under s. 216 of the Act) and the impact of *re AEU*.

Objective	Practice	Action item
Right of entry	The UFU can enter CFA premises at any time during workplace hours for any purpose relating to the EBA.	Require the UFU to comply with the right of entry provision for discussions. The UFU must give notice before entering the workplace.
Conduct	UFU representatives engage in harassment and intimidation.	External scrutiny. Impose standard that the UFU may only speak to employees in a manner consistent with values of respect and freedom of association.

Agreement compliance	The UFU can refer a dispute directly to the FWC. It does not have to observe Steps 1 - 4 of the dispute resolution procedure in Clause 15 of the EBA.	The UFU (like the CFA) must observe the procedure provided for in the EBA. FWC compliance.
Strike pay	No action taken in relation to partial work bans. Action in relation to other action unclear.	Internal review Impose consequences. See Annexure 2 .
Industrial action notices	No action taken to challenge to date.	Potential challenge. The CFA is entitled to directly engage with the workforce as well as putting position to bargaining representatives.

8. Start driving the change

8.1. Analysis

- It is open to the CFA to introduce any reform that is not inconsistent with its existing obligations. The consent of the UFU will only be required where existing obligations specifically provide for this.
- There are matters contemplated by the 2010 EBA which have not been completed (eg Code of Conduct) and other desirable changes that are not regulated by the 2010 EBA at all.
- Properly characterised (and consistent with the finding of the Fair Work Commission (**FWC**)), the consultation process in the EBA does not require consent of the UFU representatives. However, most issues can be escalated by the union through the dispute resolution procedure. This ends in merit based arbitration by the FWC. While clearly change will be contested by union parties, there is scope to use these provisions to drive change.
- The issues to pursue and proposed timing must be coordinated with the preferred strategy to close out bargaining considered below. For example, pursuing an issue during bargaining may be met with a claim in the bargaining process.

Maximising Leverage



8.2. Key actions

- Identify key initiatives that are either not regulated by the 2010 EBA or contemplated by the EBA but not yet completed. Select change items of value to the CFA and where there is a strong business case or merit case to support the change.
- Develop consultation plan, including subject matter, and material required to support the case for change.
- Prepare to defend challenges under the disputes procedure of the 2010 EBA. Ultimately, this means preparation for merit based arbitration before the FWC.

9. Closing out bargaining

9.1. Analysis

- Bargaining has been an ongoing source of division and disruption to the CFA for over two years. The process has presented unique challenges internally and externally to the organisation. The process has provided an ongoing platform to the UFU to wedge management and employees.
- A practical approach to close out the bargaining process is a priority.
- The key issue to assess is the viability of the status quo option - rolling over the 2010 EBA in its present terms (it would need to be assumed that the *Re AEU* content would remain in a such an agreement). This needs to be measured against the preparedness of the organisation to continue to engage in a protracted bargaining dispute - which would only be worthwhile if it were practically possible (and likely) that the CFA would achieve the change needed through this process. Going backwards from here is not an option and risking that must also be considered.



The pain vs gain equation

Bargaining Objectives Drive		
Imperative	Status Quo	Positive Change
Hallmarks	<ul style="list-style-type: none"> • roll-over deal • moderate pay increase 	<ul style="list-style-type: none"> • meaningful change (integrity behind position) • moderate pay increase (but sometimes high) or other cost
Suitable when	<ul style="list-style-type: none"> • risk averse environment • passive environment • low gain objective 	<ul style="list-style-type: none"> • status quo – unviable • more risk tolerant • high gain objective
Key Risks	<ul style="list-style-type: none"> • cost of status quo is underestimated over time 	<ul style="list-style-type: none"> • entrenching industrial relations • cost of bargaining > benefits

9.2. Options

- In general terms, there are three approaches open to the CFA from here:
 - **Option 1: Remain disengaged:** This is the status quo. It would be open to the CFA start driving change under existing arrangements, but it would continue to run the risk of bargaining disruption and escalation. The influence of the UFU is likely to build as an election approaches. Our preliminary view is that this option is not viable.

- **Option 2:** Drive for rollover deal. The current rollover deal is generous, particularly having regard to typical bargaining outcomes in the current environment. The attitude of employees to accepting a rollover is unknown. Unblocking information channels will allow the CFA to build the case to “move on” on current terms. This would require a carefully executed communications approach directed at bargaining specifically and a preparedness (of all stakeholders) to put the agreement to a vote in the face of a concerted “No” campaign from the UFU. Success depends on a majority of employees accepting the deal.
- **Option 3:** Drive for progressive change now. This would involve a preparedness to escalate the dispute to conclusion. Importantly, it would require the CFA to ensure that it included a strong and consistent case for change items, not just resisting the UFU claims. The Top 10 List is a starting point (See **Annexure 3**).
- Option 2, if achieved, has the advantage of closing out bargaining and the risk of protected industrial action. While it means that the terms and conditions in the 2010 EBA would continue, there is scope to continue to drive change within this framework and to better place the CFA for future bargaining. Of course, if Option 2 cannot be achieved, it will be necessary to prepare a fall back strategy predicated on Option 3. Our assessment is that ultimately the UFU will seek to escalate the dispute at a time

convenient to it. The CFA should carefully consider pre-empting this as it will invariably occur at a time of low leverage for the organisation. Further, if the dispute is going to escalate, then it is essential for the CFA to increase its gain agenda. A consistent message built on the principles opens the possibility of pressing for more in an arbitration scenario.

9.3. Key actions

- **Model terms:** Draw on model terms and conditions as a guide for future negotiations. Consider the Top 10 - see **Annexure 3**.
- **Risk assess approach:** Determine the CFA's preferred approach to current bargaining having regard to its assessment of the “pain vs gain” equation. Conduct SWOT analysis with management team.
- **Execute:** both the employee engagement and the union accountability actions are necessary to support preferred approach in bargaining. Use alternative channels to build and gauge employee support. Test employee support in principle. Continue to draw on Act to hold bargaining representatives accountable.
- **Position fall back:** The risk that the preferred option will not achieve support must also be managed. The strategy should be positioned now with an eye to potential for further external intervention and arbitration. In this event, the CFA may want to press for more change now - it needs to ensure that it positions issue now to do so.

* * * *

Seyfarth Shaw Australia
10 March 2016

Annexure 1 - Hallmarks of the engagement model

Hallmarks	Traditional – Captive	Traditional – Moderate	Traditional – Progressive	Transitional	Progressive – Direct Engagement
Employee Relationship	Hostile / disenfranchised workforce	Largely indifferent workforce	Some indifference but awareness / acknowledgement of business needs	Awareness of business needs and moderate-strong employee alignment	Engaged at or above industry norms
Line Manager Role	Low accountability for outcomes Low discretion / high rules	Some accountability for outcomes – but regularly undermined	High accountability for outcomes – but sometimes undermined	High accountability for outcomes	High accountability for outcomes High discretion / low rules
Union Relationship	Union controls many facets of employment (from hiring to termination)	Union a key stakeholder and remains influential within the business	<ul style="list-style-type: none"> • Union presence sometimes dictates business outcomes • Often highly confrontational flashpoints 	Union present but rarely dictates business outcomes	Limited union presence and no influence in business decisions
Instruments	<ul style="list-style-type: none"> • All collective • Multi-layered • Strong union controls • Highlight regulated employment arrangements 	<ul style="list-style-type: none"> • All collective • Some union controls 	<ul style="list-style-type: none"> • Collective • Low – no union controls • Varying degrees of regulation 	<ul style="list-style-type: none"> • Collective / individual • Low to no controls 	<ul style="list-style-type: none"> • Individual and/or non-union • Minimal / no restrictions on employee prerogative
Capacity For Change / Progress	Extremely limited	Limited – usually at a high loss	Sometimes possible but usually not without challenge	Sometimes possible but resistance remains	Possible and regular

Annexure 2 - Industrial action response leverage

The table below sets out potential responses to the most recent protected industrial action notified by the United Firefighters' Union to the CFA on 14 January 2016.² Also we have outlined sections of the Act and regulations relevant to our advice.

There is scope to challenge the notices and whether the notified conduct constitutes industrial action in the cases identified. Further, there is scope to withhold payments for industrial action where it is engaged in by relevant employees.

Clearly, the approach to be taken to these provisions must be consistent with the broader strategy and consideration must be given to escalation and likely responses.

A2.1 - Review of notices

Notice	Challenge whether industrial action?	Partial work ban	Other response (To be completed by management team...)
<p>NOTICE 1:</p> <p>The following action is to occur on 20 January 2016 and continue indefinitely:</p> <p>4. Only engaging on behalf of the employer in communications with the media for the immediate purpose of informing the public about a matter of health and safety;</p>	X	<p>Yes - for employees with responsibilities for communications.</p> <p>Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).</p> <p>Calculation of % based on time engaged in the action.</p>	Counter with own communications strategy.
<p>5. A ban on wearing uniform shirts, uniform jumpers or uniform jackets. To avoid doubt, this notified ban does not apply to the wearing of turnout gear, uniform t-shirts or uniform polo shirts.</p>	<p>Maybe</p> <p>Query whether satisfies legal definition of industrial</p>	<p>Yes.</p> <p>Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the</p>	It would be open to press back based on the exclusions. For example, the CFA could require them to work wearing the t-shirt or polo rather than anything else.

² See letter from Peter Marshall to Lucinda Nolan dated 14 January 2016.

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	action.	Act (see below). Calculation of the % to withhold is likely to be contentious.	
6. Only attending meetings at which any of the Chief Officer, Deputy Chief Officers, Chief Executive Officer, Corporate Managers or Corporate Directors attend if the purpose of the meeting is notified in advance and is about operational incidents, operational de-briefing, training, securing public health or occupational health and safety, or enterprise agreement bargaining.	✓	Yes. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below). Calculation of % based on time engaged in the action.	Consider taking this issue on in relation to bargaining meetings. The notice carves out communications about "enterprise agreement bargaining". Set the agenda for meetings accordingly. Note that while it is not permissible to negotiate with employees, it is permissible (and encouraged) to communicate with them about it. Or work around this. Use other managers.
9. A ban on conducting any process relating to employee misconduct or discipline;	X	Yes - for employees with responsibilities for discipline. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below). Calculation of % based on time engaged in the action.	Put employees on notice.
11. A ban on assisting in the preparation of ministerial reports;	X	Yes - for employees with responsibilities for reporting. Potential to reduce payment by a proportion if proper written notice given	Work around.

		in accordance with section 471 of the Act (see below). Calculation of % based on time engaged in the action.	
12. Responding to emails via the employers email system with the caps lock function turned on;	Maybe Query whether satisfies legal definition of industrial action in section 19 of the Act.	Yes. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below). Calculation of the % to withhold is likely to be contentious.	Make it personal. Ask them to be respectful.
14. Refusing to act down lower than an employee's substantive rank, unless the refusal to do so would result in the closure of a station;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around
15. Not undertaking an station maintenance or cleaning except for normal cleaning of living areas including messes, toilets, showers, bedrooms, and gyms;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
16. Not accepting recalls at an employee's home station or rostered station except for employees rostered to Mildura fire station, unless to do so would result in the closure of a station;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the	Work around

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		Act (see below).	
17. A ban on the introduction, implementation or use of the KRONOS rostering system for the deduction of any leave;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Put employees on notice.
20. A ban by Practical Area Drill supervisors and operators on performing gardening and general maintenance work.	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
21. A ban by Practical Area Drill supervisors and operators on processing accounts payable;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
28. A ban on Instructors completing Variation Vouchers (except for overtime records);	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Put employees on notice.
29. A ban on Instructors attending scheduled regional and district training meetings;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the	Work around.

		Act (see below).	
30. A ban on Instructors completing time sheets;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Put employees on notice.
31. A ban on Instructors attending any region and/or district conference;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
32. A refusal by Instructors to respond to enquiries from participants of a training course in relation to their participation on that training course, other than in relation to course content;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
34. A ban on Instructors organising or assisting with organising course materials other than recruit courses;	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).	Work around.
35. A ban on saluting.	X	Yes - for employees required to do so. Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the	Make it personal. Ask to respect.

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		Act (see below).	
<p>NOTICE 2:</p> <p>The following action is to occur on 20 January 2016 between 9.15am to 10.15am and will continue daily at that time:</p> <p>1. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 60 minutes <u>to communicate and display union badging and industrial campaign material in work locations and to the public and to wear industrial campaign t-shirts, badges and stickers in association with that activity;</u></p>	<p>✓</p> <p>We accept that a stoppage constitutes industrial action. However, the proposal here is to do something else which does not have a connection with the employee's normal work (ie. communicate and display union badging).</p>	X	Consider a policy proscribing the communication and display of promotional materials of other organisations on CFA premises or equipment without permission.
<p>2. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 60 minutes <u>for the purpose of making public and media statements in relation to the employer's bargaining position or employee's experiences as firefighters employed by the employer;</u></p>	<p>✓</p> <p>We accept that a stoppage constitutes industrial action. However, second part of the action proposes the making of public and media statements in relation to the employer's bargaining position or the employee's experiences as firefighters employed by the CFA. It is questionable whether that action constitutes industrial</p>	X	A policy based response may also be considered.

	action because it is not connected to the performance of work.		
<p>NOTICE 3:</p> <p>The following action is to occur on 20 January 2016 between 7.15pm to 8.15pm and will continued daily at that time:</p> <p>1. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 60 minutes <u>to communicate and display union badging and industrial campaign material in work locations and to the public and to wear industrial campaign t-shirts, badges and stickers in association with that activity;</u></p>	<p>✓</p> <p>As above.</p>	X	As above.
<p>2. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 60 minutes <u>for the purpose of making public and media statements in relation to the employer's bargaining position or employee's experiences as firefighters employed by the employer;</u></p>	<p>✓</p> <p>As above.</p>	X	As above.
<p>NOTICE 4:</p> <p>The following action is to occur on 20 January 2016 from 8:30am to 8:35am and will continue daily at that time:</p> <p>1. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA <u>for up to 5 minutes to communicate and display union badging and</u></p>	<p>✓</p> <p>As above.</p>	X	As above.

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<p><u>industrial campaign material in work locations and to the public and to wear industrial campaign t-shirts, badges and stickers in association with that activity;</u></p>			
<p>NOTICE 5: The following action is to occur on 20 January 2016 from 6:30pm to 6:35pm and will continue daily at that time:</p> <p>1. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 5 minutes <u>to communicate and display union badging and industrial campaign material in work locations and to the public and to wear industrial campaign t-shirts, badges and stickers in association with that activity;</u></p>	<p>✓ As above.</p>	<p>X</p>	<p>As above.</p>
<p>NOTICE 6: The following action is to occur on 20 January 2016 from 9pm to 9.30pm and will continue daily at that time:</p> <p>1. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA for up to 30 minutes <u>to communicate and display union badging and industrial campaign material in work locations and to the public and to wear industrial campaign t-shirts, badges and stickers in association with that activity;</u></p>	<p>✓ As above.</p>	<p>X</p>	<p>A policy based response may also be considered.</p>

<p>NOTICE 7:</p> <p>The following action is to occur on 20 January 2016 from 9.05am to 9.20am and will continue daily at that time:</p> <p>2. Stoppages, except responding to fires, incidents or any accident or emergency usually attended by CFA <i>for up to 15 minutes for the purpose of making public and media statements in relation to the employer's bargaining position or the employees' experiences as firefighters employed by the employer.</i></p>	<p>✓</p> <p>As above.</p>	<p>X</p>	<p>As above.</p>
<p>NOTICE 8:</p> <p>The following action is to occur on 20 January 2016 at 8am and continue indefinitely:</p> <p>8. A ban on creating a record of any employee's participation in the protected industrial actions the subject of Notices 1, 2, 3, 4, 5, 6, 7 and 8 herein.</p>	<p>✓</p> <p>Consideration should be given to challenging this action on the basis that it conflicts with a duty for an employee not to receive payment for periods of industrial action . It is unlawful to aid or abet such conduct</p>	<p>Yes - for employees required to do so.</p> <p>Potential to reduce payment by a proportion if proper written notice given in accordance with section 471 of the Act (see below).</p>	<p>As above.</p>

A2.1 - Relevant legislation: "Strike pay" and process for dealing with partial work bans

Meaning of industrial action

Industrial action is defined in section 19 of the *Fair Work Act 2009* (Cth) (Act) as action of any of the following kinds:

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- a. the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of work;
- b. a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
- c. a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- d. the lockout of employees from their employment by the employer of the employees.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

Withholding pay

Section 470(1) of the Act provides that if an employee engages in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.

This subsection is a civil remedy provision (see Part 4-1). This means that if an employee engages in protected industrial action for one hour on a particular day, the employer must not pay the employee for that one hour and if the employee takes protected industrial action for the whole day, then the employer must withhold all pay for that day. This section does not apply to a partial work ban.

Partial work bans are regulated by sections 471 and 472 (see below).

According to section 470(4), the section does not apply to an overtime ban unless (a) the employer requested or required the employee to work the period of overtime; and (b) the employee refused to work the period of overtime; and (c) the refusal was a contravention of the employee's obligation under a modern award, enterprise agreement or contract of employment. However, if the overtime ban meets the criteria set out in section 470(4), then the total duration of the industrial action is, or includes the period of overtime to which the ban relates.

Partial work bans

A partial work ban is "industrial action that is **not**: (a) a failure or refusal by an employee to attend for work; or a failure or refusal by an employee who attends for work to perform any work **at all**; or (c) an overtime ban.

Section 471(1) enables an employer to give an employee who is engaging in a "partial work ban" against the employer a "written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice" for the duration of the "industrial action period".

The "industrial action period" is the period starting at whichever is the later of the start of the first day the employee implemented the partial work ban, or the start of the next day on which the employee works after the day the employer gave the written notice in section 471(1) and ending at the end of the day on which the ban ceases (see section 471(5)).

Regulation 3.22 of the *Fair Work Regulations 2009* (Cth) (Regulations) provides that an employer's written notice under section 471(1) must be in English and in legible form and contain the content specified in regulation 3.23. The manner in which notice is not to be given is set out in section 471(7) and regulation 3.24.

An employer is not able to reduce an employee's payment for engaging in a partial work ban unless notice is given in accordance with the rules.

The proportion by which an employee's payment is to be reduced is to be worked out according to a three step process set out in regulation 3.21:

- **Step 1** - Identify the work that an employee or a class of employees is failing or refusing to perform, or is proposing to fail or refuse to perform.
- **Step 2** - Estimate the usual time that the employee or the class of employees would spend performing the work during a day.
- **Step 3** - Work out the time estimated in Step 2 as a percentage of an employee's usual hours of work for a day.

The solution is the proportion by which the employee's payment will be reduced for a day.

Can an employee challenge the reduction?

On application by an employee (or the employee's bargaining representative) the Fair Work Commission may make an order varying the proportion by which an employee's payment is reduced (see section 472 of the Act). In considering whether to make such an order, the Commission must take into account:

- whether the proportion specified in the notice was reasonable having regard to the nature and extent of the partial work ban to which it relates; and

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- fairness between the parties taking into account all the circumstances of the case.

Accepting or seeking payments relating to period of industrial action

It is unlawful for an employee to accept a payment if the employer would contravene section 470 by making the payment or ask the employer to make such a payment (see section 473 of the Act). A union must also not ask the employer to make a payment if making the payment would cause the employer to contravene section 470.

Annexure 3 - Top 10

We have reviewed the *Country Fire Authority / United Firefighters' Union Operational Staff Enterprise Agreement 2010 (Agreement)*.³

The table below identifies key provisions of the Agreement that are onerous to the CFA or that may operate inconsistently with the CFA's objectives for change in future.

Note: certain provisions in the Agreement were the subject of a recent Federal Court challenge.⁴ Notwithstanding the result of litigation to date, there remains an opportunity to test these provisions and drive change over time. In some cases, there is also scope for further legal challenge if desired.

Provision	Description	Analysis
13.	<p>Consultative processes</p> <p>13.1 Consultation</p> <p>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.</p> <p>13.2 CFA / UFU Consultative Committee</p> <p>The parties agree to establish a CFA / UFU Consultative Committee comprising people involved in the decision making processes of both organisations.</p> <p>The Committee's terms of reference, membership and working arrangements will be negotiated by the parties within six months of this agreement being lodged.</p> <p>13.3 Enterprise Bargaining Implementation Committee</p> <p>13.3.1 The parties are committed to effective consultation and communication throughout the CFA. As a demonstration of that commitment, the parties</p>	<p>Potential for indirect discrimination claim referred to by the Federal Court in <i>United Firefighters' Union of Australia v Country Fire Authority</i> [2015] FCAFC 1 at [229] and following.</p> <p>This should be considered further.</p> <p>External scrutiny on this issue by a regulator would likely demonstrate difficulties in the application of the provisions.</p>

³ Note that this contains a preliminary analysis and is not intended to be comprehensive.

⁴ See *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1.

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	<p>have undertaken to continue to operate an Enterprise Bargaining Implementation Committee (EBIC) to facilitate the implementation of this agreement and ongoing workplace reform.</p> <p>13.3.2 The Committee comprises equal number of management and employee representatives as determined by the respective parties and decision-making will be by consensus.</p> <p>13.3.3 There is an obligation on Committee members to co-operate positively to consider matters that will increase efficiency, productivity, competitiveness, training, career opportunities and job security.</p> <p>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.</p> <p>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 EBIC.</p> <p>13.3.6 The aims of the EBIC will be to:</p> <ul style="list-style-type: none">• consult where provisions of this agreement require consultation;• monitor the implementation of this agreement;• consider and make recommendations regarding issues arising under this agreement;• 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.	
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	<p>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.</p> <p>...</p>	
14.	<p>Introduction of change</p> <p>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.</p>	<p>"Significant change" is not defined in the agreement.</p> <p>Requirement to consult means that the CFA's proposals for workplace change may be delayed indefinitely. Not consistent with objective of organisational effectiveness.</p>
15.	<p>Dispute resolution</p> <p>15.1 This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:</p> <p>15.1.1 All matters for which express provision is made in this Agreement; and</p> <p>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</p> <p>15.1.3 All matters pertaining to the relationship between the CFA and the UFU whether or not express provision for any such matter is made in this Agreement; and</p> <p>15.1.4 All matters arising under the NES.</p> <p>The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause.</p> <p>15.2 To ensure effective consultation between the employer, employees and the Union on all matters the following procedure shall be followed in an</p>	<p>We are instructed that, in practice, disputes are not being resolved "at the local level" following the dispute resolution process. Rather the UFU submits disputes to the FWC directly.</p> <p>Not consistent with objective of union accountability.</p>

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	<p>effort to achieve a satisfactory resolution of any dispute or grievance:</p> <p>15.2.1 Step 1: The dispute shall be submitted by the union or the employee to the employee(s) immediate supervisor.</p> <p>15.2.2 Step 2: If not settled at Step 1, the matter shall be submitted to the appropriate senior officer.</p> <p>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.</p> <p>15.2.4 Steps 1 - 3 must be concluded within ten (10) days. Disputes are to be resolved at a local level wherever possible.</p> <p>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 endeavor to reach a satisfactory settlement.</p> <p>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 [FWC]. [FWC] may utilise all its powers in conciliation and arbitration to settle the dispute.</p> <p>...</p> <p>15.4 While the above procedures are being followed, including the resolution of any dispute by the FWA pursuant to clause 15.2.6, work must continue and the status quo must apply...</p> <p>15.5 This clause shall not apply to a dispute on the Health and Safety issue.</p> <p>15.6 A dispute may be submitted, notified or referred under this clause by the</p>	
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	<p>UFU.</p> <p>15.7 A decision of the [FWC] may be appealed. Dispute is not resolved until any such appeal is determined.</p>	
16.	<p>Consultation officer and disputes regarding consultation and change</p> <p>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.</p> <p>16.2 Where there is a dispute regarding consultation, before referring the matter to the [FWC], 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 the parties.</p> <p>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.</p> <p>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 [FWC] pursuant to the dispute resolution clause.</p>	<p>Potential for the UFU to delay dispute resolution process. Not consistent with organisational effectiveness.</p>
18.	<p>Work organisation</p> <p>18.1 Subject to the other terms of this agreement, the employer may direct an employee to carry out duties and use tools and equipment that are within the limits of the employee's skill, competence and training provided that</p>	<p>The condition "provided that such duties do not promote de-skilling" limits the CFA's capacity to direct an employee to perform work.</p>

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	such duties do not promote de-skilling...	
19.	<p>Counselling and Discipline</p> <p>19.2 Within the first 6 months of this agreement, the parties will develop an Employee Code of Conduct that deals with counselling, discipline and termination of employment. Until that Code of Conduct is agreed, any counselling or discipline shall be in accordance with the Country Fire Authority Act 1958 and the terms of this agreement.</p> <p>...</p>	<p>Requirement for agreement with the UFU impedes organisational effectiveness.</p> <p>We are instructed that the Code of Conduct is yet to be developed by the parties.</p>
21.	<p>Termination of employment</p> <p>21.1 An employee's employment may not be terminated unless:</p> <p>...</p> <p>21.1.2 The union must be notified of intention to terminate.</p> <p>21.1.3 Any dispute notified by the employee or the union has to be resolved.</p>	<p>Impedes CFA's capacity to terminate an employee's employment.</p>
23.5	<p>Access to the workplace for offices of the UFU</p> <p>23.5.1 Subject to reasonable notice, an officer/employee of the UFU may for the purposes of representing employees covered by this agreement for any purpose relating to the application of this agreement or entitlements that arise under this agreement (but not including any purpose referred to in section 481 or 484 of the FW Act):</p> <ul style="list-style-type: none"> at any time during working hours enter the CFA's prescribed premises, registered office or workplace where the CFA's employees are engaged ("workplace" for this clause here includes any place where employees are performing work or are attending pursuant to a direction of the CFA or are 	<p>Extends beyond union right of entry under statute. Allows "interviews".</p> <p>We are instructed that, in practice, union officials do not provide notice as required under the Agreement before entering CFA premises.</p> <p>UFU should only be allowed to enter CFA premises with permission, on notice and should not be allowed to interrupt employees while they are on duty.</p>

	<p>attending in their capacity as employees of the CFA).</p> <ul style="list-style-type: none"> at any time during working hours, inspect or view any work, material, machinery, appliance, document (including time and wages records), qualification of employees on the premises mentioned above; and interview, on the premises referred to above, an employee who is member, or is eligible to be a member, of the UFU. 	Inconsistent with objective of union accountability.
24.	<p>CFA policies</p> <p>24.1 ... Policy that is dealt with elsewhere in the agreement may only be varied by agreement. Should the CFA elect to modify, delete or add to existing policy that affects employees then any change or addition will be the subject of consultation pursuant to clause 13 of this agreement. Should any policy be inconsistent with a term of this agreement, then it will be invalid to the extent of any inconsistency.</p> <p>24.2 Policies that have not been dealt with through the consultative process will not be used to reduce the conditions of employment of employees covered by this agreement nor will they be used as a means of taking disciplinary action against employees covered by this agreement.</p>	<p>Requirement to consult restricts the CFA's ability to modify, delete or add to existing policy.</p> <p>Inconsistent with organisational effectiveness.</p>
27.	<p>Safe staffing levels</p> <ul style="list-style-type: none"> Current staffing levels fixed for life of the Agreement CFA will not make any employee redundant. CFA will undertake to increase the number of employees or career firefighters by 342. UFU asserts that future growth in staffing levels is needed. As such the UFU reserves this matter as an item to be pursued for a successor agreement. 	<p>Restriction on CFA's ability to manage staffing levels.</p> <p>Not consistent with organisational effectiveness.</p> <p>Note similar issues apply in respect of Clause 26 - Contracting out/Maintenance of Classifications and Clause 28 - Secondment and Lateral Entry and Clause 122 - Lateral Entry .</p>

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29.	Rostering 29.2 ... The CFA will not employ an employee on a part time or casual basis and no employee may hold a position on such as basis.	Restricts flexible employment options. Potentially inconsistent with diversity and equal opportunity objective as women are more likely to seek part time or casual employment.
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Annexure 4 - Overview of key authorities

1. *Ambulance Victoria v United Voice* (2014) 245 IR 375.
2. *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65.
3. *Aurizon Operations Ltd* (2015) 249 IR 55.
4. *Davids Distribution Pty Ltd v National Union Pty Ltd v National Union of Workers* (1999) 91 FCR 563.
5. *Metropolitan Fire & Emergency Services Board v United Firefighters' Union of Australia* [2014] FWC 7776.
6. *Mornington Peninsula Shire Council* (2011) 210 IR 419.
7. *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1.
8. *United Firefighters' Union of Australia v Easy* [2013] FCA 763.
9. *Qantas Airways Ltd v Transport Workers Union of Australia* (2011) 211 IR 1.
10. *Harrison v P & T Tube Mills Proprietary Limited* (2009) 181 IR 162.