#1 Justice Ross
30 March 2017

FairWork Commission

SENATE ESTIMATES COMMITTEE – 30 March 2017

PRESIDENT'S STATEMENT ABOUT INVOLVEMENT IN THE CFA/UFU BARGAINING DISPUTE

[1] This statement addresses claims that have been aired in the media about my involvement last year in the Country Fire Authority/United Firefighters' Union of Australia (CFA/UFU) bargaining dispute. These claims were contained in correspondence from Mr Michael Freshwater, a former member of the board of the CFA, to the Minister for Employment, Minister Cash.

[2] In Mr Freshwater's letter to Minister Cash dated 28 July 2016, he made a "formal complaint under s.641A of the *Fair Work Act 2009 (Cth)* about way in which [sic] the CFA/UFU negotiations were handled by the Commission, in particular the conduct of Justice Ross and Commissioner Roe." Mr Freshwater asserted that a "formal independent enquiry into these matters is warranted" and asked Minister Cash to "ensure that appropriate steps investigate this issue [sic] and provide transparency to the pubic [sic] are taken as a matter of urgency."

[3] I learnt of Mr Freshwater's letter to Minister Cash of 28 July 2016, when on 7 August 2016 a copy was provided to the Fair Work Commission (Commission) by a newspaper journalist. Further claims were published in the press on 31 October 2016. These were drawn from Mr Freshwater's voluminous further correspondence to Minister Cash dated 3 October 2016. I received a copy of this correspondence from the Minister on 14 November 2016.

[4] In correspondence to Minister Cash on 19 August 2016, 31 October 2016 and 8 December 2016 I responded in detail respectively to Mr Freshwater's original letter of complaint, to the Minister's request for clarification of certain matters and to Mr Freshwater's further correspondence to the Minister. However, to date I have received no indication of the outcome of the Minister's consideration of the complaint.

[5] In his letter of 28 July 2016, Mr Freshwater claims that the allocation of the CFA/UFU bargaining dispute to Commissioner Roe for conciliation was "outside normal protocols and has not been explained".

[6] I am informed that the Commission's case management system indicates that the bargaining dispute was initially allocated to Commissioner Wilson on Friday 23 October 2015 and then allocated to Commissioner Roe on Monday 26 October 2015. In response to media inquiries, on 24 June 2016 a Commission spokesperson provided a public explanation of the allocation to Commissioner Roe.

[7] The bargaining dispute fell within the Commission's Government Services Panel and the allocation to Commissioner Roe was made by the head of that Panel, Vice President Catanzariti. At the time, only two Members of the Panel, Commissioners Bissett and Wilson, were based in Melbourne and only two Commission Members based in Melbourne, Commissioners Roe and Wilson, had extensive recent experience and expertise in dealing with fire services disputes. Commissioner Roe had primary responsibility for fire fighting services from July 2010 until late 2013, when he moved to another panel. During 2013 Commissioner Roe had conciliated an earlier dispute about bargaining for the current CFA agreement.

[8] The allocation of the conciliation to Commissioner Roe was consistent with the Commission's longstanding practice in contentious matters, to make arrangements for conciliation and arbitration proceedings to be conducted by different Members. The allocation left Commissioner Wilson available to deal with any arbitral applications made in relation to the dispute. My recollection is that as the allocation was to be to a Member outside the Panel, the head of the Panel consulted with me and I agreed to the allocation.

[9] I did not receive any form of request from any party or stakeholder for the matter to be allocated to a particular Member. I am informed that no party objected to Commissioner Roe conducting the conciliation and no application was made during the protracted conciliation process for Commissioner Roe to recuse himself on the grounds of any actual or apprehended bias.

[10] Between November 2015 and May 2016 Commissioner Roe conducted around 28 conciliation conferences in the matter. I understand that the Victorian Government was involved throughout the conciliation process, including departmental officers participating in conciliation conferences. The CFA is a State agency and is subject to the Victorian Government's Public Sector Industrial Relations Policies. I understand these Policies to confer roles in relation to public sector enterprise bargaining on Industrial Relations Victoria, the Department of Treasury and Finance, and the Department of Premier and Cabinet, and to require Government approval of proposed enterprise agreements.

[11] Mr Freshwater claims in his correspondence of 3 October 2016, that it appears "Justice Ross voluntarily injected himself into the dispute, after the [Commission's] formal role had ceased … through advances of his own motion to the Executive government".

[12] On 24 May 2016 I was copied by the CEO of the CFA into correspondence from the CEO to Commissioner Roe. This correspondence indicated that the CFA had decided to ask me to make Directions under s.615C of the Fair Work Act, directing that the matter be transferred to me. It also identified outstanding "critical issues" in relation to a draft enterprise agreement. On the same day, the UFU emailed correspondence to me opposing the CFA's request.

[13] On 25 May 2016 the CFA wrote to me withdrawing its request, as the matter had been listed for further conciliation before Commissioner Roe. The CFA's letter stated that "CFA will give full consideration to any recommendations made by the

Commission and otherwise reserves its position to seek the assistance of the Commission if the process does not settle the dispute between the parties."

[14] On 1 June 2016 Commissioner Roe issued a final non-binding Recommendation, which recommended various amendments to a draft CFA/UFU enterprise agreement (draft agreement). The Recommendation was not accepted by the CFA. As a result, although the conciliation before Commissioner Roe had concluded, the bargaining dispute was unresolved and the matter remained before the Commission.

[15] On 6 June 2016, I was contacted by a member of the Victorian Government who advised me that the Secretary of the Department of Premier and Cabinet (Secretary) had been asked to communicate and work with the CFA Chair in relation to the Government's agreed position on the CFA agreement. In that context, I was asked whether I would participate in a discussion with the Secretary and the CFA Chair in relation to the outstanding matters in the dispute. I was also asked if I would be prepared to have a discussion with the Victorian Minister for Industrial Relations regarding some technical issues relating to the draft agreement.

[16] On 8 June 2016 I received a telephone call from the Secretary, asking me to participate in a telephone discussion on 9 June 2016 with him and the Chair and CEO of the CFA. I discussed this with Commissioner Roe, who did not object to my participation in the proposed telephone discussion. We also discussed the general nature of the CFA's concerns with the draft agreement, and some suggestions I had in relation to these concerns.

[17] In his letter of 3 October 2016, Mr Freshwater queried how I was "somehow almost immediately 'up to speed' with the complex negotiations and competing positions".

[18] The main sources of my knowledge of the issues in dispute were: the critical issues identified in the CFA's correspondence of 24 May 2016; a discussion I had with Commissioner Roe about matters raised in that correspondence; Commissioner Roe's final Recommendation (published on the Commission's website on 6 June 2016), and my discussion with Commissioner Roe related above.

[19] On 9 June 2016 I had a relatively brief telephone discussion with the acting Chair and the CEO of the CFA and the Secretary. During this discussion I identified what I apprehended to be the major concerns the CFA had with the draft agreement. I then outlined a range of possible approaches that the CFA may wish to consider that might address these concerns. I made it clear to the CFA that I was neither recommending nor advocating any particular position or approach to any of these concerns. I also made it clear that whether the CFA chose to proceed with the draft agreement in its present form or with any changes was entirely a matter for it.

[20] On 9 June 2016 I also had a brief telephone discussion with the Victorian Minister for Industrial Relations, Minister Hutchins. My recollection is that it was of the order of 10 minutes or so. Commissioner Roe and a Victorian departmental officer also participated in this telephone discussion. My recollection is that only three matters were discussed in this conversation: the nature of Commissioner Roe's

Recommendation concerning the role of volunteers; how the proposed process of monitoring the impact of the agreement on volunteers could work; and diversity issues, and that my contribution on each of these issues was essentially just to explain how the legislative scheme for enterprise agreements operates.

[21] I do not have a clear recollection of all of the details of this telephone discussion. In particular, I do not recall details of my contribution to the discussion about the nature of Commissioner Roe's Recommendation concerning the role of volunteers.

[22] So far as I can recall, I believe that in relation to the proposed process of monitoring, I explained that issues with agreement clauses identified in monitoring might be raised as disputes under the agreement and notified to the Commission, but that outside the limited circumstances in which the Commission can vary an agreement on application by a party, variation would require approval by employees. I recall that I also concurred with a suggestion from another participant that some issues with agreement clauses might be resolvable by an application to the Commission to vary the agreement to remove ambiguity or uncertainty.

[23] So far as I can recall, I believe that in relation to diversity issues, I explained that an agreement cannot override the right to request flexible working arrangements under the NES, and that if such an issue was identified during the agreement approval process the Commission might seek an appropriate undertaking.

[24] Minister Hutchins' subsequent comments in Parliament on 9 June 2016 as to the nature of this telephone conversation were inaccurate and were withdrawn later that day.

[25] In his letter of 3 October 2016, Mr Freshwater claims that "[t]here is no apparent statutory justification or reason for Justice Ross' involvement ... His involvement did not come about via a request of the parties, nor was it done in any open and transparent way" and Mr Freshwater asks "[w]hy the apparent level of subterfuge?"

[26] As related above, the bargaining dispute remained before the Commission and so it was open to the Commission to further deal with the dispute pursuant to s.595 of the Fair Work Act. My participation in the telephone discussions on 9 June 2016 may be characterised as offering suggestions, options and explanations.

[27] My involvement on 9 June 2016 was at the request of the Victorian Government. I understood the Victorian Government to have been involved throughout the conciliation process and the CFA's participation to be voluntary. The acting Chair and CEO of the CFA comment on this discussion on transcript before the Senate Education and Employment Legislation Committee inquiry into the Fair Work (Respect for Emergency Services Volunteers) Bill 2016 on 28 September 2016. I participated by telephone because on 9 June 2016 I was on pre-planned recreation leave from the Commission, on the NSW South Coast. I am not aware of any "level of subterfuge" on the part of any of the participants in the discussion on 9 June 2016.

[28] On 29 June 2016 a Commission spokesperson gave a public statement to the effect that, as I had been involved in seeking to facilitate a resolution of the CFA/UFU bargaining dispute, I would not be dealing with any subsequent application that may be made to the Commission in relation to the matter (including any application to approve any agreement reached). I confirm that I have had no further dealings with this matter.

[29] Mr Freshwater suggested in his letter to Minister Cash of 3 October 2016 that an inquiry into certain speculation in the media at least was warranted. As it is apparent that Mr Freshwater's letters to Minister Cash have been provided to or shown to the media, it appears that Mr Freshwater and/or persons to whom he has provided his letters of complaint have been promoting this media speculation. This is self-serving and highly inappropriate.

[30] In my written responses to Minister Cash I have pointed out that Mr Freshwater's correspondence proceeds on the basis of numerous mistakes of fact, many of which are readily apparent, and numerous instances of unfounded and mistaken speculation. I have submitted to Minister Cash that Mr Freshwater's correspondence does not provide any credible warrant for an inquiry into either my own conduct or Commissioner Roe's conduct for the purposes of s.641A of the Fair Work Act.