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Landmark court ruling a victory for state public sector employees

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In a decision with wide ramifications for state governments negotiating with public sector unions, a full Federal Court has upheld a firefighters' union challenge to a ruling that clauses in an enterprise agreement infringed the states' implied constitutional protection identified by the High Court in Re AEU.

Unions say the judgment is "a landmark decision" that will pave the way for public sector agreements to again include basic entitlements such as redundancy pay and consultation before redundancies and allow unions to again negotiate to enshrine nurse:patient ratios and classroom sizes.

"The significance of this decision cannot be overstated as it now provides certainty and security of agreements reached on staffing levels, protections of classifications and related matters," the United Firefighters Union's Victorian branch told members in a bulletin.

Granting the UFU's appeal against Justice Bernard Murphy's ruling of January last year (see Related Article), Justices Nye Perram, Alan Robertson and John Griffith upheld the union's argument that Re AEU does not render invalid clauses in the 2010 Country Fire Authority agreement because the Victorian Government authority voluntarily entered it.

"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," the bench ruled.

In the 2010 agreement – which expired in September 2013 – the CFA committed to recruit an additional 342 firefighters by 2016.

The UFU then took action in the Federal Court when the CFA failed to meet its targets and sought to vary the recruitment rate.

The appeal bench rejected the CFA's argument that *Re AEU*, in effect, created a "sub-rule" that meant 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".

Instead, the Court said, *Re AEU* only applies when there is a "significant impairment to the State's capacity to function as a government" and that it will always be necessary for governments to "demonstrate the existence of such an impairment".

Justices Perram, Robertson and Griffith also rejected a CFA cross-appeal against Justice Bernard Murphy's finding that the CFA is a trading corporation and a cross-claim challenge to several unrelated clauses "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".

No CFA appeal to "unexpected" decision

While conceding that the appeal bench "found against CFA in all matters", CEO Mick Bourke says in a blog on the CFA website that the authority does not plan to mount a challenge.
"While this decision is not what we expected, we accept the decision of the Federal Court," he said.

Decision a "legal and moral victory": UFU

UFU Victorian branch secretary Peter Marshall told *Workplace Express* that the full court ruling is an "emphatic win for the union, but one we would much rather have not been involved in".
"It is a sensational victory, particularly because it makes the CFA accountable for reneging on an agreement they willingly entered into".

Marshall told members that the decision "changes the landscape of federal industrial relations law and constitutional law and is already being touted by legal commentators as one of the most significant decisions of this era".

"This will be a long-lasting and important legacy not just for fire service employees but for state sector employees who come within the federal industrial relations system."

Marshall said that the UFU will now ask the Federal Court to impose pecuniary penalties on the CFA for breaches of the enterprise agreement.

CPSU Victorian branch secretary Karen Batt said that the decision sets a "significant" precedent for the entire public sector workforce and establishes a "clear framework" for the next round of bargaining. due to start

this year.

"The Full Court has found that the Victorian Government misread the original *Re AEU* decision and has been misapplying the principles," she said.

Maurice Blackburn principal Kamal Farouque said *UFU v CFA* has been a "very important case which has resulted in a very significant decision and a sophisticated re-reading of *Re AEU*".

Farouque says the decision means that public sector entities that are considered trading corporations can voluntarily enter into industrial agreements containing matters previously thought to offend *Re AEU* and this will mean that public sector employees will again be able to rely on protections on redundancy pay, consultation and staffing levels.

He said there is widespread misconception that public sector workers enjoy better employment terms and conditions than other workers, but that the previous interpretation of *Re AEU* had meant that many did not have access to "basic conditions which other people take for granted".

He said state public sector employers will no longer be able to "hide behind the implied constitutional limits" and will have to "grapple with these issues on their merits".

Decision has immediate effect on GFB orders

FWC Deputy President Greg Smith yesterday revoked good faith bargaining orders he made against the union in November (see Related Article) and February (see Related Article) – as he promised he would if the full court found the clauses were not unconstitutional.

New strategies required for Victorian emergency sector bargaining

The full court decision also means that both the CFA and the Melbourne Fire Brigade (MFB) will have to reassess the negotiating positions they had adopted in trying to reach new agreements to cover rural and urban firefighters.

A CFA spokesperson said that the authority is still considering the impact of the decision, declining to reveal whether any decisions have been made on a new bargaining strategy.

In November, the Fair Work Commission refused a MFB application to terminate two enterprise agreements covering Melbourne's urban firefighters because they contained provisions that impeded the Brigade's ability to

introduce improvements (see Related Article).

The UFU has told members that the MFB will no longer be able to "rely on their misguided belief that staffing and other clauses are unenforceable".

United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1 (8 January 2015)