

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S CI 2016 02269

VOLUNTEER FIRE BRIGADES  
VICTORIA INC

Plaintiff

v

COUNTRY FIRE AUTHORITY

Defendant

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S CI 2016 02269

JUDGE: Ierodionou AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 6 October 2016  
DATE OF RULING: 18 October 2016  
CASE MAY BE CITED AS: Volunteer Fire Brigades Vic Inc v CFA (No 3)  
MEDIUM NEUTRAL CITATION: [2016] VSC 621

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PRACTICE AND PROCEDURE - Discovery of documents - Privilege - Without prejudice privilege - *Evidence Act 2008* (Vic) s 131 - *Fair Work Act 2009* (Cth) s 240 - Whether Fair Work Commission is an 'Australian court' for the purposes of the *Evidence Act 2008* (Vic) - Whether a dispute referred to the Fair Work Commission is one in respect of which relief can be given in an Australian proceeding - Whether Fair Work Commission processes are 'proceedings' - Whether internal documents are subject to without prejudice privilege - Whether emails are subject to without prejudice privilege

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Davis QC with Mr S Freire	Robinson Gill Lawyers
For the Defendant	Mr C O'Grady QC	Lander & Rogers



HER HONOUR:

### **Introduction**

- 1 The defendant asserts 'without prejudice' privilege over certain documents it has discovered. This ruling concerns whether or not that privilege can be maintained.
- 2 On 10 October 2016, the Court made orders requiring the defendant to provide a sample of documents to the Court for inspection. The sample documents are referred to below. They are documents over which the defendant asserts 'without prejudice' privilege and the plaintiff challenges that assertion.
- 3 As the Court has observed in previous rulings in this proceeding, a proposed enterprise agreement between the defendant and the United Firefighters Union of Australia ('the UFU') is at the heart of this dispute. The proposed enterprise agreement is intended to replace the *Country Fire Authority/United Firefighters Union of Australia Operational Staff Enterprise Agreement 2010*. In this ruling, a reference to 'the dispute' is a reference to the dispute in the Fair Work Commission ('the Commission') about the terms and conditions of the proposed enterprise agreement.

### **Submissions**

- 4 Both parties made oral and written submissions. The submissions concerned 'without prejudice' privilege in s 131 of the *Evidence Act 2008* (Vic) ('Evidence Act'). The crux of each parties' submissions is referred to below. The authorities referred to by each party are not reiterated here. They have been considered and the applicable principles are identified later in these reasons. Neither party could identify any authority on the application of s 131 to a dispute which was referred to the Commission under s 240 of the *Fair Work Act 2009* (Cth) ('FWA'). The s 240 FWA process arises from an application made to the Commission to deal with a bargaining dispute over a proposed enterprise agreement.
- 5 It was common ground between the parties that communications and documents produced in the course of a dispute about a proposed enterprise agreement before

the Commission under s 240 of the FWA may attract 'without prejudice' privilege in this proceeding. This issue is discussed further below.

- 6 The defendant relies on the affidavits of Frances Diver, chief executive officer of the defendant, affirmed on 26 September 2016 ('the 26 September Diver affidavit') and 5 October 2016 ('the 5 October Diver affidavit'), and Patrizia Mercuri, solicitor, affirmed 9 October 2016 ('the Mercuri affidavit').
- 7 The defendant submits that 'without prejudice' privilege in s 131(1)(a) of the Evidence Act extends to any communications between (a) the defendant and the UFU, or (b) the defendant or the UFU and third parties, including the defendant's advisers, the Victorian government and the Commission, in connection with an attempt to negotiate a settlement of the dispute.
- 8 The defendant refers to s 592(3) of the FWA which states that a conference 'must be in private, unless directed otherwise'. It says that the structure of the FWA contemplates privilege in the normal course of events. That is, the Commission processes under s 240 are a prima facie 'without prejudice' environment where the Commission brings the parties together to try to negotiate settlement of the bargaining dispute.
- 9 The defendant submits that the dispute is not analogous to a commercial dispute and that this fact needs to be borne in mind when considering relevant authorities. Authorities concerning commercial disputes are said to be of limited assistance when considering an industrial dispute.
- 10 The defendant says that this type of dispute necessarily involves putting forward positions and counter-positions and then considering compromise positions. These stages are all captured by the protection in s 131. Otherwise, each of the negotiating parties could go into the public domain with their respective negotiating positions. Communications between government and the defendant about how to respond to the Commission's recommendations or positions put forward by the UFU fall within s 131(1)(a). Section 131 should not be confined to communications that involve some

form of compromise. The words of s 131 are not confined in that way. There are public policy reasons for reading s 131 broadly.

- 11 The defendant submits that 'without prejudice' privilege in s 131(1)(b) of the Evidence Act extends to any documents that have been prepared in connection with an attempt to negotiate a settlement of the dispute.
- 12 The plaintiff submits that the fact that a party is in a s 240 FWA process does not mean that all communications produced within that process are 'without prejudice'. The plaintiff submits that a communication will fall within s 131(1)(a) only if it answers the description of being 'in connection with an attempt to negotiate a settlement of a dispute'. This involves, firstly, identifying the dispute. Secondly, identifying an attempt to negotiate the dispute. This question is one of nexus. Thirdly, the communication must be made or the document prepared 'in connection with' such an attempt. The connection between the dispute and the attempt to negotiate a settlement must be a direct or proper one; a tenuous connection is insufficient. Whether there is such a connection is a question of fact. Further, the negotiations must be confidential. For instance, if parties are aware that the communication could result in a public recommendation by the Commission then that communication may not be covered by 'without prejudice' privilege.
- 13 The plaintiff submits that certain communications are not covered by s 131. These are communications which merely consider why an enterprise agreement might contain lawful clauses, why an enterprise agreement might be bad for stakeholders, or provide mere statements of opinion. These communications are said to lack a sufficiently direct proximity to an attempt to resolve the dispute.
- 14 The plaintiff also submits that it is a stretch for an internal analysis by the plaintiff to fall within s 131.
- 15 The plaintiff submits that the FWA does not contain any overarching provision that says the s 240 process is 'without prejudice'. Negotiations about an enterprise agreement can be 'without prejudice', but whether a communication about a

negotiation is ‘without prejudice’ needs to be assessed on a communication-by-communication basis.

16 The plaintiff’s submissions in respect of the sample documents are referred to below.

### Applicable Principles

17 ‘Without prejudice’ privilege is governed by s 131 of the Evidence Act, which provides that:

- (1) Evidence is not to be adduced of –
  - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
  - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

18 Section 131(5) provides definitions of the key terms in s 131(1), including the following:

- (5) In this section –
  - (a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and
  - ...
  - (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person...

19 Section 131(2)(d) provides the following exception to the privilege:

- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; ...

20 The policy behind s 131 was explained by Mansfield J in *Silver Fox Co Pty Ltd v Lenards Pty Ltd (No 3)*:

Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations – whether private or by mediation – are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations

to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically.<sup>1</sup>

21 'Without prejudice' privilege should not be given a restricted application. To do so would be contrary to the public interest.<sup>2</sup>

22 There is no overarching provision in the FWA indicating that the s 240 process is 'without prejudice'. Section 592(3) stipulates that conferences must be conducted in private unless otherwise directed. There is no similar umbrella provision directed at the entire s 240 process. Nevertheless, for the reasons below, the 'without prejudice' privilege in s 131 may apply to disputes in the s 240 FWA process.

### **Applying s 131 of the Evidence Act to s 240 of the FWA**

23 Sections 131(1) and 131(5) indicate that the Court must be satisfied that the dispute which was referred to the Commission under s 240 is a 'dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding' (s 131(5)(a)). This seems to be common ground between the parties. The Court is satisfied that the dispute falls within this description for the reasons which follow.

24 Four questions arise under the relevant provisions in coming to this conclusion:

- (i) Were the parties in a dispute?
- (ii) Is that dispute one which can be dealt with in an 'Australian court'? That is, is the Commission an Australian court?
- (iii) Is the Commission process a 'proceeding' within that court?
- (iv) Can relief be given by the Commission in such a proceeding?

#### ***(i) Were the parties in a 'dispute'?***

25 Section 131 applies only where documents or communications were produced in the course of a 'dispute'. The parties clearly differ on the terms of the proposed enterprise agreement which should be recognised under the FWA and are, therefore, in 'dispute'.

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<sup>1</sup> (2004) 214 ALR 621 at 624 [36].

<sup>2</sup> *Heron Wood Pty Ltd v Ampol Petroleum (Vic) Pty Ltd* [1999] VSC 83 at [20] (per Beach J).

*(ii) Is the Commission an Australian court?*

26 In order for the privilege to apply, relief must be available in an Australian proceeding: s 131(5)(a). The term ‘Australian or overseas proceeding’ is defined in the Dictionary of the Evidence Act as ‘a proceeding (however described) in an Australian court or a foreign court’. The term ‘Australian court’ includes ‘a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence’.

27 Section 240(1) of the FWA allows parties to apply to the Commission to ‘deal with’ a dispute about a proposed enterprise agreement. Section 595(4) provides that the Commission may exercise any of its powers under Pt 5-1, Div 3, Sub-div B in dealing with a dispute. Section 590, which is within that sub-division, provides that the Commission may inform itself ‘in such manner as it considers appropriate’, including ‘by taking evidence under oath or affirmation in accordance with the regulations (if any)’: s 590(2)(d). The Commission can therefore be considered an Australian court as ‘a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence’.

*(iii) Is the Commission process a ‘proceeding’?*

28 The term ‘proceeding’ is not defined in the Evidence Act. The Evidence Act Dictionary definition of ‘Australian or overseas proceedings’ refers to a proceeding ‘however described’. Applications made to the Commission under s 240 of the FWA can be considered ‘proceedings’. They are inter partes and made if the parties are unable to resolve the dispute.

*(iv) Can relief be given by the Commission?*

29 Relief need not be available at the time at which the privileged communication was made or document produced. Rather, the dispute needs only to be of a kind for which relief could be granted, even if at a later time.<sup>3</sup>

30 This dispute is of a type which ‘may’ be subject to arbitration under s 240(4) of the

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<sup>3</sup> *Korean Airlines Co Ltd v Australian Competition and Consumer Commission (No 3)* (2008) 247 ALR 781 at 788 [67]–[69].

FWA. An arbitral award is a type of final determination of rights which could properly be seen as 'relief'. Other provisions of the FWA also allow for relief to be given by the Commission for this type of dispute. Depending on the course of the dispute, for example, the Commission has the power to grant relief in the form of a workplace determination under s 269 of the FWA.

31 For the reasons above, documents and communications prepared for negotiation in the s 240 process can be considered to have been produced in the course of a 'dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding'. In summary, this is because:

- (a) the parties were in dispute;
- (b) that dispute can be brought before the Commission;
- (c) the Commission is an Australian court;
- (d) the Commission may grant relief when dealing with the dispute; and
- (e) the Commission's process for dealing with the dispute can be characterised as a 'proceeding'.

*Application of s 131 to particular communications and documents*

32 As discussed above, the plaintiff submits that communications concerning statements of position, why an enterprise agreement might contain lawful clauses or why it might be bad for stakeholders are not covered by s 131. To the extent that such a submission attempts to provide definitive rules of the types or classes of documents not covered by s 131, it is rejected. Such rules detract from the attention which ought to be given to the words of s 131 itself. There is no reason why, for example, a statement of position should be a document that is ruled as being outside s 131 by virtue of its class. Rather, as submitted by the defendant, the putting forward of positions and counter-positions is capable of being covered by 'without prejudice' privilege. Analogously, documents prepared in connection with a formal mediation may be covered by the privilege.<sup>4</sup>

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<sup>4</sup> *Lewis v Nortex Pty Ltd (in liq)* [2002] NSWSC 1245 at [3].

33 The plaintiff's submission that it is a stretch for an internal analysis by the plaintiff to fall within s 131 is rejected. Internal analyses by a party are the type of document which may fall within s 131(1)(b) of the Evidence Act. In *Seven Network Ltd v News*, Graham J referred to 'documents such as working papers referable to the preparation of a settlement offer or a note recording the details of a settlement offer' as falling within that sub-section.<sup>5</sup>

34 Section 131 does not operate as an umbrella provision to provide protection to every document or communication connected with the s 240 process. There are exceptions in s 131(2). Further, the words of s 131(1)(a) and (b) are directed to particular communications and documents. One must then consider, when a communication is made, or a document is prepared, whether is it 'in connection with an attempt to negotiate a settlement' of a dispute.

35 In respect of the plaintiff's suggestion that documents in the s 240 process may not be covered by s 131 because they may become part of a public recommendation, this is rejected. One must consider whether a particular communication or document is in connection with an attempt to negotiate a settlement of a dispute, and if so, whether any of the exceptions in s 131(2) apply.

#### *Attempt to negotiate*

36 An 'attempt' requires a bona fide attempt to negotiate a settlement, but need not involve a compromise on the part of a party.<sup>6</sup> Thus, an assertion of a party's rights with an offer to settle or negotiate on those terms may be sufficient.<sup>7</sup> Similarly, 'without prejudice' privilege will apply 'to offers to negotiate and expressions of willingness to do so; it is not necessary that there be an offer capable of acceptance'.<sup>8</sup>

37 In *GPI Leisure Corporation Ltd (in liq) v Yuill* ('*GPI Leisure Corporation*'),<sup>9</sup> Young J held

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<sup>5</sup> *Seven Network Ltd v News Ltd* (2006) 151 FCR 450 at 459 [45].

<sup>6</sup> *Galafassi v Kelly* (2014) 87 NSWLR 119 at 145 [120].

<sup>7</sup> *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* (2011) 193 FCR 479 at 486 [36].

<sup>8</sup> *Korean Airlines Co Ltd v Australian Competition and Consumer Commission (No 3)* (2008) 247 ALR 781 at 789 [73]. While this was a summary of the common law position, Jacobson J goes on to state (at 789 [74]) that the same position prevails under s 131 of the *Evidence Act*.

<sup>9</sup> (1997) 42 NSWLR 225.

that whether there was an attempt to negotiate a settlement ‘is a question of nexus’:

There may be many communications between parties, which one can read between the lines as saying that certain things may happen, and if those certain things happen, the dispute might be settled. I do not consider that generally such a communication would fall within the privilege in s 131(1)(a).<sup>10</sup>

38 In the circumstances of that case, a letter marked ‘without prejudice’ could not be considered to be an ‘attempt’ to negotiate:

The present letter seems to me merely to be a communication which indicates that if the litigation can be dealt with in some practical way, the writer is open to suggestions. Alternatively it indicates that if a claim arises in the future, a mechanism can be put in place to deal with it. The letter does not suggest a method of compromising the underlying dispute. I do not consider that it is sufficiently close to “an attempt to negotiate a settlement” of the dispute to come within privilege.<sup>11</sup>

39 In *Galafassi v Kelly*<sup>12</sup> Gleeson JA determined that an email was not privileged. The email indicated that one party would be ‘grateful’ if the dispute could be handled in a way which would avoid publicity, but did not suggest a method of compromising the dispute.<sup>13</sup> Similarly, an email which merely expressed ‘hope’ of a resolution which avoided publicity was not an attempt at settlement.<sup>14</sup>

*‘In connection with’ the attempt*

40 Whether a communication or document can be considered to have been made or produced ‘in connection with’ an attempt to negotiate a settlement is a question of fact which depends upon the ‘content and context’ of a document.<sup>15</sup>

41 In *GPI Leisure Corporation*,<sup>16</sup> Young J held that the word ‘connection’ in s 131 requires a ‘direct connection’.<sup>17</sup> A ‘tenuous’ connection is insufficient.<sup>18</sup> However, the phrase ‘in connection with’ has been considered by this Court to be a ‘very broad

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<sup>10</sup> Ibid at 227.

<sup>11</sup> Ibid at 227.

<sup>12</sup> (2014) 87 NSWLR 119.

<sup>13</sup> *Galafassi v Kelly* (2014) 87 NSWLR 119 at 146 [129].

<sup>14</sup> Ibid at 147 [132].

<sup>15</sup> *Biovision 2020 Pty Ltd v CGU Insurance Ltd* [2010] VSC 589 at [38], [49], [52].

<sup>16</sup> *GPI Leisure Corporation Ltd (in liq) v Yuill* (1997) 42 NSWLR 225.

<sup>17</sup> Ibid at 226.

<sup>18</sup> *Seven Network Ltd v News Ltd* (2006) 151 FCR 450 at 461.

expression'.<sup>19</sup>

42 Considering these requirements in *Biovision 2020 Pty Ltd v CGU Insurance Ltd* ('*Biovision*'), Judd J held that:

Whether the requirement for the connection is formulated as a 'proper connection' or a 'direct connection', the claimant for privilege must establish the connection by evidence. That will ordinarily require evidence of the circumstances in which the document was prepared and the relevant context. Content cannot be divorced from context. If the underlying policy considerations are to be given effect in the application of s 131(1)(b), there must be evidence to establish the facts to support the claim.<sup>20</sup>

43 Judd J held in *Biovision* that this connection must be demonstrated for each document.<sup>21</sup>

### **Consideration**

44 The principles above are now applied in the consideration of whether each of the sample documents falls within s 131.

45 The 26 September Diver affidavit outlines the background to the dispute, including the s 240 FWA application by the defendant made on or about 22 October 2015, the Commission holding conciliation conferences, and final recommendation for settlement of the dispute by Commissioner Roe on 1 June 2016.

46 The 5 October Diver affidavit exhibits two schedules of documents over which 'without prejudice' privilege is claimed: Exhibits 'FD-6X' and 'FD-12X'. This affidavit updates previous affidavits of discovery affirmed by Ms Diver on 6 and 13 September 2016. In Schedule 1, Part C of Ms Diver's affidavit affirmed 13 September 2016, and Schedule 1, Part B of the 5 October affidavit, she deposes as to the basis for the 'without prejudice' claims.

47 The Mercuri affidavit is made after a review by the defendant's solicitors of privilege claims. Exhibits 'PRM-3' and 'PRM-4' to the Mercuri affidavit are updates of Exhibits 'FD-6X' and 'FD-12X' to the 5 October Diver affidavit, following the review.

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<sup>19</sup> *Biovision* at [38].

<sup>20</sup> *Ibid* [52].

<sup>21</sup> *Ibid* [52]-[55].

48 The following sample documents are identified in Exhibit 'PRM-3' to the Mercuri affidavit.

43. 22 January 2016

Email to Deborrah Jepsen from EMV and Lucinda Nolan, from Mark Gepp from the Office of the Hon. Jane Garrett MP, re: proceedings in the FWC and the CFA's outcomes sought in relation to clauses of the Proposed Agreement.

49 This document is an email from the Victorian government to the defendant and Emergency Management Victoria. There is also a document attached to the email. Accordingly, it should fully be described as:

Email to Deborrah Jepsen from EMV and Lucinda Nolan, from Mark Gepp from the Office of the Hon. Jane Garrett MP, and attached document re: proceedings in the FWC and the CFA's outcomes sought in relation to clauses of the Proposed Agreement. [additions underlined]

50 The cover email indicates that it is a communication between a person in dispute, the defendant, and third parties. The question then is whether it is in connection with an attempt to negotiate a settlement of the dispute. The plaintiff is concerned that this document is not connected with a compromise. Having inspected the email and attached document, the Court is satisfied that they are in connection with an attempt to negotiate a settlement of the dispute and fall within s 131(1)(a).

51 The next document for inspection is numbered 49 and described as follows:

49. 16 February 2016

Email from Peter Bertolus to Lucinda Nolan re: the CFA's/government's points of disagreement to Draft Recommendations.

52 This document is a cover email on an internal communication with the defendant. It needs to be read with the attached document, which is document 50.

50. 16 February 2016

Attachment: CFA-Government response to Draft Recommendations detailing points of disagreement with the draft recommendations of Commissioner Roe in section 240 proceeding.

53 The plaintiff's concern with this document is that it is a statement of position, and it

queries whether it is sufficiently connected with a settlement offer. The Court has ruled (above) that statements of position are not automatically excluded from s 131. Regardless, this document is not a mere statement of position.

54 Having inspected this document and document 49, the Court is satisfied that they fall within s 131(1)(b). That is, they are prepared in connection with an attempt to negotiate a settlement of the dispute.

55 The next document for inspection is numbered 62 and described as follows:

62. 26 May 2016

Email from Luana Payne, Corrs Chambers Westgarth, to Commissioner Roe re: the CFA's position in relation to matters arising as part of the dispute over the terms of the Proposed Agreement.

56 This document is a cover email between the defendant's solicitor and the Commission. The solicitor is an agent of the defendant within the meaning of s 131(5)(c). The Court is therefore satisfied that this is a communication between the defendant and a third party, namely the Commission. This email needs to be read with the attached document, which is document 66.

66. 26 May 2016

Attachment: The CFA's position on Preserving the role of volunteers – created for the purposes of FWC 240 proceedings dealing with the dispute over the terms of the Proposed Agreement.

57 The plaintiff's concern with this document is that it is a statement of position. The document is not fully described. It should be described as:

Attachment: The CFA's Alternative Proposal to the Union Claim on Preserving the role of volunteers – created for the purposes of FWC 240 proceedings dealing with the dispute over the terms of the Proposed Agreement. [additions underlined]

58 Having inspected this document and document 62, the Court is satisfied that they fall within s 131(1)(a). That is, they are in connection with an attempt to negotiate a settlement of a dispute.

59 The next document for inspection is numbered 78 and described as follows:

78. 31 May 2016

Email to CFA Board from Lucinda Nolan re: examples of significant issues arising from the UFU's claim under Version 17.2/1.0 of the Proposed Agreement and new key benefits to UFU/employees under version 17.2/1.0 of the Proposed Agreement.

60 The plaintiff's concern with this document is that it is internal to the defendant. It queries how the document is connected with an attempt to negotiate a settlement. It says that the description is opaque.

61 The document is not fully described. It should be described as:

Email to CFA Board from Lucinda Nolan and attached document re: examples of significant issues arising from the UFU's claim under Version 17.2/1.0 of the Proposed Agreement and new key benefits to UFU/employees under version 17.2/1.0 of the Proposed Agreement. [additions underlined]

62 This document is in the nature of a working document prepared in connection with an attempt to negotiate a settlement of the dispute. Having inspected the document, the Court is satisfied that that it falls within s 131(1)(b).

63 The next document for inspection is numbered 87 and described as follows:

87. 9 June 2016

Email to Lucinda Nolan and John Peberdy from Chris Eccles (Secretary of the Department of Premier & Cabinet) re: notes from President Ross reflecting teleconference in relation to the dispute over the terms of the Proposed Agreement and how aspects of that dispute might be addressed.

64 The plaintiff's concern is that it is unclear how this document is covered by privilege. The document is not fully described. It should be described as follows.

Email to Lucinda Nolan and John Peberdy from Chris Eccles (Secretary of the Department of Premier & Cabinet) and attached notes from President Ross reflecting teleconference in relation to the dispute over the terms of the Proposed Agreement and how aspects of that dispute might be addressed. [additions underlined]

65 The email is a communication from the Victorian government, a third party, to the defendant. It must be read with the attached notes. Having inspected the email and attached notes, the Court is satisfied that they fall within s 131(1)(a).

66 The next document for inspection is numbered 108 and described as follows:

108. 15 July 2016

Email from Tony Bates (Deputy Secretary, Department of Premier and Cabinet) to Emma Fenby and Frances Diver, re: attaching draft document setting out explanation of the Proposed Agreement, created for the purpose of complying with obligation under the *Fair Work Act 2009* (Cth) in relation to ensuring that the CFA take all reasonable steps to ensure that the terms of the Proposed Agreement, and the effect of those terms, are explained to employees.

67 This document is an email from the Victorian government, a third party, to the defendant. It needs to be read with the attached document, which is document 109.

109. 15 July 2016

Attachment: Document title 'Explanation of the proposed CFA/UFU Operational Staff Enterprise Agreement 2016' created for the purpose of complying with obligation under the *Fair Work Act 2009* (Cth) in relation to ensuring that the CFA take all reasonable steps to ensure that the terms of the Proposed Agreement, and the effect of those terms, are explained to employees.

68 This document is a draft explanation of the proposed agreement. It is not in connection with an attempt to negotiate a settlement of the dispute. The plaintiff's challenge to 'without prejudice' privilege in respect of this document, and document 108, is upheld.

69 The next document for inspection is numbered 114 and described as follows:

114. 29 August 2016

Email from Deborrah Jepsen to Emma Fenby cc. to Frances Diver and Neil Robertson, re: contribution to an update briefing in relation to staffing increases and specialist capability terms under the Proposed Agreement.

70 This document is an email from a third party, the Victorian government, to the defendant. The plaintiff's concern is that it does not concern an attempt to negotiate settlement of the dispute. Having inspected the document, the Court agrees. The plaintiff's challenge to 'without prejudice' privilege in respect of this document is upheld.

71 The next document for inspection is numbered 190 and described as follows:

190. [undated]

Table setting out the CFA and Government's response to Commissioner Roe's Recommendations, made in an attempt to resolve the dispute over the terms of the Proposed Agreement without further marked-up comments, prepared for the purpose of negotiations to resolve the dispute.

72 This document is a scanned copy of document 50, referred to above. The same analysis applies.

73 The following sample documents are identified in Exhibit 'PRM-4' to the Mercuri affidavit.

11. 2 February 2016

Email from Bruce Byatt, CFA, to Peter Bertolus, CFA and Craig Martin, CFA, re: CFA IR advice on Proposed Agreement, following Sword Process and in response to Victorian Government response to Commissioner Roe Final Recommendations, with attachment for the purposes of FWC 240 proceedings dealing with the dispute over the terms of the Proposed Agreement.

74 This document is an internal email communication. It needs to be read with the attached document, which is document 12.

12. [undated]

Attachment - Undated - Table setting out CFA IR advice on Proposed Agreement, following Sword Process and in response to Victorian Government response to Commissioner Roe Final Recommendations created for the purposes of FWC 240 proceedings dealing with the dispute over the terms of the Proposed Agreement.

75 The same analysis applies as with document 50, referred to above. Having inspected this document and document 11, the Court is satisfied that they fall within s 131(1)(b). That is, they are prepared in connection with an attempt to negotiate a settlement of a dispute.

76 The next document for inspection is numbered 17 and described as follows:

17. 22 February 2016

Automated email from scanner to Geoff Murphy, CFA re: attaching

costings of the Proposed Agreement, costings of Health Monitoring & Rehab Project, CFA notes on outcomes of discussion with Victorian Government regarding issues with Proposed Agreement following draft Roe recommendation, handwritten notes of meeting between Craig Martin, Bruce Byatt, Geoff Murphy on 3 February 2016 regarding costings of Proposed Agreement, and document prepared for the purpose of discussions with Victorian Government in relation to Commissioner Roe's draft recommendation of 14 January 2016 in respect of the dispute over the Proposed Agreement (Attachment found at FD-13X PII LR.004.0006.000328).

77 This document is a bundle of documents, as described above. The plaintiff's concern is that there is no evidence about the purpose of the documents.

78 The same analysis applies as with document 50, referred to above. Having inspected this bundle of documents, the Court is satisfied that they fall within s 131(1)(b). That is, they are prepared in connection with an attempt to negotiate a settlement of a dispute.

79 The next document for inspection is numbered 68 and described as follows:

68. 4 May 2016

Email chain between Jessica Ngo and Geoff Murphy re: inclusion of Portland in report on closest four CFA stations to each station in relation to travel time and distance, prepared for the purpose of considering Option 1 of the UFU's proposal in relation to service delivery by integrated stations under the '7 firefighters dispatched' model as part of the FWC 240 proceedings dealing with a dispute over the terms of the Proposed Agreement.

80 This document is an internal email communication. It needs to be read with the attached document, which is document 69.

69. [undated]

Attachment - Report by Jessica Ngo on four closest stations to Portland (by distance and travel time), prepared for the purpose of considering Option 1 of the UFU's proposal in relation to service delivery by integrated stations under the '7 firefighters dispatched' model as part of the FWC 240 proceedings dealing with a dispute over the terms of the Proposed Agreement.

81 The plaintiff's concern is that documents 68 and 69 are mere statements of position.

82 The same analysis applies as with document 50, referred to above. Having inspected

this bundle of documents, the Court is satisfied that they fall within s 131(1)(b). That is, they are prepared in connection with an attempt to negotiate a settlement of a dispute.

83 The next document for inspection is numbered 86 and described as follows:

86. 24 May 2016

Email from Geoff Murphy to Emily Ash, Sanjay Hira and John Maguire re: MFB station response times, prepared by Jessica Ngo and required for the purpose of analysing the UFU's '7 firefighters dispatched' proposal as part of the FWC 240 proceedings dealing with a dispute over the terms of the Proposed Agreement.

84 This document is an internal email communication. It needs to be read with the attached document, which is document 87.

87. [undated]

Attachment - Table setting out MFB station response times, prepared by Jessica Ngo for the purpose of analysing the UFU's '7 firefighters dispatched' proposal as part of the FWC 240 proceedings dealing with a dispute over the terms of the Proposed Agreement.

85 The plaintiff's concern with documents 86 and 87 is that analysis of the proposed enterprise agreement does not attract privilege. The Court disagrees. An analysis of a proposal may be a document prepared in connection with an attempt to negotiate a settlement of a dispute. An analysis of a proposal is a step to considering whether to accept it and settle the dispute, or to put a counter proposal and continue to negotiate towards a settlement. Documents 86 and 87 fall within such a description. The Court is satisfied that they fall within s 131(1)(b).

86 The next document for inspection is numbered 121 and described as follows:

121. 9 June 2016

Email from Lucinda Nolan to CFA Board re: meeting with Chris Eccles and President Ross about the dispute over the terms of the Proposed Agreement and working through issues with the UFU in the FWC 240 proceedings.

87 This document is an internal email communication. It forwards the email and notes which are described as document 87, above. The Court is satisfied this forwarding

email falls within s 131(1)(b).

88 The next document for inspection is numbered 124 and described as follows:

124. [undated]

Board Agendas, Minutes and Papers – March 2016 – relating and referring to the FWC 240 proceedings dealing with a dispute over the terms of the Proposed Agreement.

89 The plaintiff's concern with these document is that it is unclear how board minutes would fall within s 131, and queries whether they record attempts to negotiate a settlement of the dispute or something more removed.

90 The Court has inspected document 124. It is a bundle of documents that have been separated into parts (a) and (b). Part (a) includes documents in relation to the defendant's board meeting on 21 March 2016. Part (b) contains documents that have each page heavily redacted. The defendant informed the Court this was because they were not relevant to the proceeding.

91 These documents in part (a) cannot be characterised as documents prepared in connection with an attempt to negotiate a settlement to the dispute. They are board and committee minutes, agendas and information papers. Separately and additionally, there are very few express references to the dispute at all. The plaintiff's challenge to 'without prejudice' privilege in respect of this document is upheld.

92 The next document for inspection is numbered 144 and described as follows:

144. [undated]

Undated – Handwritten diary notes of Frances Diver, CFA, regarding Commissioner Roe recommendations and matters in dispute prepared in context of negotiations of dispute with the UFU over the terms of the Proposed Agreement.

93 The plaintiff's concern with this document is that it is undated and thus may fall outside of the dispute process. Having inspected the content of the document, the Court is satisfied that it was prepared during the process of negotiating the dispute.

The Court is satisfied that this documents falls within s 131(1)(b).

**Conclusion**

- 94 The plaintiff's challenge to the defendant's claim of 'without prejudice' privilege is upheld in respect of the following documents listed in the Mercuri affidavit: 108, 109, 114 of Exhibit 'PRM-3', and 124 of Exhibit 'PRM-4'.
- 95 The Court will hear submissions from the parties as to the appropriate form of orders.

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