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Court considers privilege issues in CFA discovery ruling

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Victoria's volunteer firefighters have won further discovery of documents from the Country Fire Authority, in a case that considered whether dispute proceedings in the Fair Work Commission are covered by "without prejudice" privilege.

The Victorian Supreme Court ruled yesterday that Volunteer Fire Brigades Victoria could have access to four internal CFA documents relevant to the VFBV's case to overturn a new enterprise agreement

However, Associate Justice Mary-Jane Ierodiaconou held that other documents should not be released because they were covered by "without prejudice" privilege.

The ruling considered how s131 of the 2008 Victorian Evidence Act applied in Fair Work Commission proceedings involving the volunteers and the CFA over its proposed enterprise agreement.

It focused on whether the Commission was "an Australian court" and whether s240 bargaining disputes before the Commission constituted "proceedings" under the Evidence Act.

The judge found the Evidence Act's definition of Australian court included the FWC as "a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence".

She said the term "proceeding" was not defined in the Evidence Act but that s240 applications to the Commission could be considered to be proceedings.

"They are *inter partes* [between the parties] and made if the parties are unable to resolve the dispute", she said.

The judge said there is no overarching provision in the Fair Work Act indicating that s240 processes are without prejudice, although s592(3) stipulates that conferences must be conducted in private unless otherwise directed.

She said the question of whether a communication or document was produced "in connection with" an attempt to negotiate a settlement was a question of fact that depended on the "content and context" of each document.

The judge examined a series of CFA internal documents to see whether they were covered by s131, granting access to four while refusing access to others.

Earlier this month, the Victorian Supreme Court ordered the CFA to produce communications with its minister and advice it received from the Andrews Labor Government about its proposed new enterprise agreement (see Related Article).

The VFBV sought the documents to support its case to stop the Authority proceeding with the agreement on the basis that it contains unlawful terms (see Related Article).

But Justice John Forrest knocked back most of the 13 subpoenas filed by the VFBV because it wanted documents "peripheral" to issues in dispute or "extraordinarily" wide in scope.

The trial of the VFBV's application to block the enterprise agreement has been set down for November 3.

The Turnbull Government has passed legislation to protect the role of volunteers in the [CFA](#) (see [Related Article](#)), but the United Firefighters Union has flagged that it will challenge it in the High Court (see [Related Article](#)).

[Volunteer Fire Brigades Vic Inc v CFA \(No 3\) \[2016\] VSC 621 \(18 October 2016\)](#)

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