FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.266 - Industrial action related workplace determination

Parks Victoria

v

The Australian Workers' Union and others
(B2012/1554)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT HAMILTON
COMMISSIONER HAMPTON — MELBOURNE, 11 FEBRUARY 2013

Workplace determination - relevant factors - s.275 Fair Work Act 2009 - matters at issue - retrospectivity - relevance of Victorian Government wages policy - Fair Work (Commonwealth Powers) Act 2009 (Vic) - excluded subject matters - Re AEU.

Contents

1. Introduction

[1] On 31 May 2011, the *Parks Victoria Agreement 2008* (2008 Agreement) reached its nominal expiry date. The 2008 Agreement covered Parks Victoria, four unions (the Community and Public Sector Union, the Australian Municipal, Administrative, Clerical and Services Union, the Australian Workers' Union and the Association of Professional Engineers, Scientists and Managers, Australia (collectively, the Unions) and just over 1000 non-executive employees of Parks Victoria who are eligible to be members of the Unions.

[2] In June 2011, Parks Victoria and the Unions (as bargaining representatives for the employees) commenced negotiations for a replacement enterprise agreement, to be known as the *Parks Victoria Agreement 2011* (the proposed agreement).

[3] On 5 July 2012, the Unions and their members notified Parks Victoria of their intention to take protected industrial action in the form of bans on engaging emergency response work, to commence on 11 July 2012.

[4] On 11 July 2012, Deputy President Smith made an unopposed order under s.424 of the *Fair Work Act 2009* (Cth) (the Act), terminating the emergency response bans.[1] That order is a "termination of industrial action instrument" within the meaning of s.266 of the Act.

[5] During the post-industrial action negotiating period (which ended on 1 August 2012), Parks Victoria and the Unions did not settle all of the matters that were at issue during bargaining for the proposed agreement.

[6] Section 266(1) of the Act provides that the Fair Work Commission (the Commission) must make an industrial action related workplace determination (the workplace determination) if the following jurisdictional facts have been established:

> "(a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
>
> (b) the post-industrial action negotiating period ends; and
>
> (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during the bargaining for the agreement."

[7] It is common ground that these jurisdictional facts have been established. This decision concerns the workplace determination arising from those jurisdictional facts. Before turning to the relevant legislative provisions we propose to set out some background material about Parks Victoria.

2. Parks Victoria

[8] The Department of Sustainability and Environment (DSE) is Victoria's lead government agency for the sustainable management of land, water, fire and biodiversity.

[9] DSE delivers services to and has responsibilities for the State of Victoria either directly or through a number of portfolio agencies, including Parks Victoria. Parks Victoria provides these services on behalf of DSE under the *Parks Victoria Act 1998* (Vic), and

pursuant to a Management Services Agreement. Parks Victoria also performs similar agreed services on behalf of the Department of Transport in relation to local ports.

[10] Parks Victoria is a Victorian public statutory authority established by the *Parks Victoria Act 1998* (Vic). Under that Act, Parks Victoria's key responsibilities are to provide services to the State of Victoria and its agencies for, or with respect to, the management of parks, reserves and other land under the control of the State, including waterways land (within the meaning of the *Water Industry Act 1994* (Vic)). Parks Victoria is also required to carry out such other functions conferred on it by other State legislation, which includes the *National Parks Act 1975*, the *Crown Land (Reserves) Act 1978*, the *Conservation Forest and Lands Act 1987*, the *Port Management Act 1995* and the *Marine Act 1988*.

[11] The stated vision and purpose of Parks Victoria is for an outstanding parks and waterways system, protected and enhanced, for people, forever. It exists to:

(a) conserve, protect and enhance natural and cultural values;
(b) provide quality experiences, services and information to its customers;
(c) provide excellence and innovation in park management; and
(d) contribute to the environmental, social and economic wellbeing of Victorians.

[12] Parks Victoria is responsible for managing almost four million hectares of land and waterways, some 18% of Victoria. This includes management of a varied range of parks, from intensively used small urban parks, historic sites and small dispersed conservation reserves, through to large intact wilderness areas.

[13] Park Victoria's responsibilities include managing:

- 70% of Victoria's coastline (about 1200km)
- 45 national parks;
- 3 wilderness parks;
- 25 state parks;
- 30 metropolitan parks;
- 60 other parks;
- more than 2700 natural features or conservation reserves;
- 10 out of 11 of Victoria's wetlands of international importance; and
- 1500km of river frontage in the newly established River Red Gum Parks.[2]

[14] Parks Victoria also manages more than 25 000 assets, including:

- 47 visitor centre buildings;
- 671 shelters;
- 852 toilets;
- 515 viewing lookouts;
- 55 playgrounds;
- 14 000 kilometres of roads;
- 1 109 pedestrian and vehicular bridges;
- 3 700km of walking tracks;
- 89 sporting facilities, e.g. golf courses, ovals and wickets;
- 246 piers and jetties;

- 92 water access points, e.g. boat ramps, rowing launches and slippings; and
- 999 navigation aids.

[15] The parks and waterways managed by Parks Victoria attract 86.9 million visits each year.

[16] Parks Victoria's funding is primarily derived from two sources, being a grant from the Parks and Reserves Trust Account (PRTA) and allocation of funding from DSE pursuant to State appropriation. The PRTA is established under s.153A of the *Water Industry Act 1994* (Vic) and administered by DSE. The principal amounts paid into the PRTA are rates levied on Victorian land owners. Parks Victoria does not have any direct control over the amount of funding it receives from DSE.[3]

[17] Over the past two years Parks Victoria has identified a shortfall in its financial position, amounting to about $178 million over five years, as follows:

- $18.1 million in 2010–11;
- 33.8 million in 2011–12;
- $41.1 million in 2012–13;
- $42.2 million in 2013–14; and
- $43.2 million in 2014–15.

[18] The nature of the shortfall is significant, being approximately 22% of Parks Victoria's total budget over five years.[4]

[19] In 2011–12, the Victorian Government provided Parks Victoria with budget supplementation of $46.71 million, over five years from 2011–12. This budget supplementation was to specifically assist with its budget shortfall and was provided on the basis that Parks Victoria would fund the remaining shortfall of approximately $133 million.

[20] In June 2012, DSE provided a one-off payment of $1.56 million as a further general budget supplementation payment to assist Parks Victoria in managing its budget. DSE has identified a further one-off payment of $5 million. There is also a contingency provision in the Victorian budget for, among other things, unexpected wage increases.[5]

[21] In addition to its projected budget shortfall, Parks Victoria also needs to achieve budget savings and reduce its expenditure as a result of the reduction in appropriation funding to Departments (including DSE) announced in the 2011–12 state budget. These measures resulted in a reduction in the appropriation funding provided to Parks Victoria by DSE.[6]

[22] Due to these financial pressures and constraints, Parks Victoria has sought to achieve savings through cost reduction measures, including reducing operating costs and labour costs through attrition.[7] Parks Victoria developed a financial plan which consisted of three broad measures:

> (a) *Operating savings* — this includes reducing operating expenditure such as park presentation, minor works, business improvement initiatives, staff travel and accommodation, and park issues management. Parks Victoria plans to achieve a reduction of operational expenditure of approximately $15.2 million in 2012–13.

> (b) *Labour savings* — to date, labour cost reductions have been achieved through attrition only. During 2011–12, 100 staff left Parks Victoria through attrition and expiration of fixed term contracts and this has resulted in some reprioritising of works to ensure that key priorities have continued to be undertaken, while less important functions have been deferred or stopped. On 21 September 2012, Parks Victoria announced a voluntary departure program (VDP) for around 120 employees in selected positions. It is expected that these redundancies will be finalised early in 2013.
>
> (c) *Additional source revenue* — this means Parks Victoria generating its own revenue through a number of options, including through camping and roofed accommodation and from licensed tour operators. These revenue raising opportunities are limited and have a lengthy lead time as regulatory changes are required which have an associated lead time that is outside Parks Vivtoria's control.[8]

[23] In addition to cost reductions Parks Victoria will seek to increase revenue. However, the revenue options are limited, with lengthy lead times.[9] Parks Victoria's financial viability is also the subject of a review by relevant Ministers and senior departmental officers.[10]

[24] In terms of staffing levels, the number of full-time equivalents (FTEs) has gone down over time due to attrition.[11] Parks Victoria's Annual Report for 2011–12 shows a 6 per cent reduction in the total FTE's from June 2011 to June 2012 (from 1103 to 1036).[12] The process of reducing labour costs by attrition is ongoing.[13]

[25] In addition to attrition, Parks Victoria is seeking to reduce the number of FTEs by the VDP announced in September 2012.[14] In the first round of the VDP 64 employees accepted a departure package and the majority of those employees left Parks Victoria on 21 December 2012.[15] Parks Victoria is hoping to make a second round of offers leading to additional departures prior to 30 June 2013.[16]

[26] The impact of the attrition policy and the VDP on the workload of the remaining employees was a matter of contention in the proceedings. In his second witness statement Mr Mead (Human Resources Manager of Parks Victoria) stated , at paragraph 62:

> "I agree (speaking generally), that if administrative staff in a certain office or district accepted voluntary redundancies, and some of the work performed by those personnel needed to remain in the organisation, then there is the potential that this work would then need to be undertaken by other, existing staff in that office or district. However, Parks Victoria will of course need to make an assessment of the work required to be performed and there may be a re-prioritisation of work undertaken to take into account positions that no longer exist because of the VDPs."[17]

[27] Parks Victoria has not yet undertaken any planning to reallocate the tasks and responsibilities undertaken by employees who may have accepted redundancies. In his second witness statement Mr Mead stated:

> "I expect that this process will include detailed consideration of PV priorities and what activities or functions PV will continue to undertake, as well as the activities and functions that PV will decide that it will no longer undertake. As the decision to offer

> the VDP is based on PV's current financial position, PV has offered as many voluntary redundancies to eligible employees as it has been granted approval for, and will restructure around the gaps this leaves in the organisation once it is known which employees will accept voluntary redundancies.
>
> In that sense, it is not possible to say now, simply by reference to basic headcount figures, that any such reductions will be 'substantial', or that it is likely that there will be a 'substantial' impact on remaining employees covered by the Determination."[18]

[28] Mr Mead was cross examined about these issues.[19] The following exchange is set out between the Unions' counsel, Mr Harding, and Mr Mead:

> "Yes. Isn't it the inevitable result, Mr Mead, that there will be an assumption of work by remaining employees?---Until we have done the work I won't know. Until we have done the redesign, I can't answer that.
>
> Or you don't deny it?---I don't know.
>
> You can't guarantee to the tribunal that that won't occur over the life of the determination?---I can't either guarantee or not guarantee because we haven't done the work. We don't know what the impact will be on jobs until we have done the analysis.
>
> Yes. So you accept in your reply statement that that's a potential, don't you? It's a potential outcome?---Yes, we - yes, there will need to - we'll need to really look long and hard at how we deliver - how we do business, how we service the business, how we work internally, how we deliver services externally. We'll have to work smarter and we'll have to redesign jobs and reallocate work."[20]

[29] In this context the evidence of Ms Brooke (Ranger in charge, Mount Buffalo, Parks Victoria) as to the impact of such actions in the past, is relevant. Ms Brooke states that in her experience 'where administrative positions have been abolished in the past it has led to rangers having to take on administrative work that was previously undertaken by those employees.'[21] Ms Brooke provided a number of specific examples in support of this general proposition.[22] Ms Brooke was not cross examined on her evidence.

[30] In his second statement, Mr Mead did not contest the thrust of Ms Brooke's evidence, though he contested some of the detail as to the precise impact of some past changes.[23] As to the inference to be drawn from Ms Brooke's evidence, Mr Mead said that any suggestion that the planned removal of some administrative staff will increase the workload for remaining employees was 'speculative'.[24] However, elsewhere in his evidence Mr Mead agreed with the proposition that the reduction in staff numbers as a result of attrition had placed some pressure on service delivery, but despite this Parks Victoria has been able to meet or exceed its output targets.[25] He also conceded that maintaining output performance with fewer staff was a benefit to Parks Victoria.[26] We note Mr Mead's evidence as to there being a limited number of hours per day that employees could be required to work.[27] We accept this is so, but that does not preclude the prospect of employees being required to complete more tasks within existing working hours (i.e. an increase in their workload).

[31] Further, Mr Mead acknowledged that Parks Victoria was required to perform certain fixed work under its service agreements[28] and that in approving the VDP the Victorian

Government had required Parks Victoria to maintain service delivery.[29] He also agreed with the proposition that Parks Victoria had very limited capacity to restructure its operations,[30] though we note that this would not preclude a reprioritisation of tasks and the deferral or cessation of some of the work done by Parks Victoria.[31]

[32] In our view it is likely that Parks Victoria's attrition policy and the VDP program will result in *some* increase in workload for *some* of the remaining employees. Such a finding is based on past experience where administrative positions have been abolished and on the fact that, despite the recent reduction in staff numbers, Parks Victoria has been able to meet or exceed its output targets.

[33] Given Parks Victoria's obligation to maintain service delivery, it is likely that, if staff numbers reduce, some non-core activities will cease and there will be some increase in workload for some of the remaining staff. It is not possible to determine the extent of any increase in workload at this stage.

[34] These initiatives will provide a benefit to Parks Victoria in that it will be able to meet its service obligations with fewer staff.

[35] We now turn to our consideration of the legislative provisions relevant to the determination of these proceedings.

3. Legislative Framework

[36] The workplace determination provisions of the Act set out the scope of the merits arbitration required of the Commission. Sections 276 and 268, along with Division 5 of Part 2-5 of the Act deal exhaustively with the content of workplace determinations. Only four types of term may be included in a workplace determination (see ss.267 and 268).

(i) ***the agreed terms*** *(s.267(1)(a) and (2))*

An agreed term is a 'term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period agreed should be included in the agreement (s.274(2)).

(ii) ***arbitrated terms regarding the matters in issue*** *(s.267(1)(a) and (3))*

The determination must include the terms that the Commission considers deal with the matters that were still at issue at the end of the post industrial action negotiation period.

(iii) ***core terms*** *(s.267(1)(b))*

The 'core terms' are set out at s.272:

> "272 Core terms of workplace determinations
>
> *Core terms*
>
> (1) This section sets out the core terms that a workplace determination must include.
>
> *Nominal expiry date*

> (2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.
>
> *Permitted matters etc.*
>
> (3) The determination must not include:
>
> > (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
> >
> > (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
> >
> > (c) any designated outworker terms.
>
> *Better off overall test*
>
> (4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.
>
> *Safety net requirements*
>
> (5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:
>
> > (a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
> >
> > (b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees)."

Apart from ensuring that the workplace determination as a whole contains only permitted matters, satisfies the "better off overall test" and does not contravene s.272(5) of the FW Act, the only "core term" is a nominal expiry date no more than 4 years after the workplace determination comes into operation (s.272(2)).

(iv) **mandatory terms** (s267(1)(c))

The mandatory terms are set out at s.273:

> "273 Mandatory terms of workplace determinations
>
> *Mandatory terms*
>
> (1) This section sets out the mandatory terms that a workplace determination must include.
>
> *Term about settling disputes*
>
> (2) The determination must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the determination; and

(b) in relation to the National Employment Standards.

(3) Subsection (2) does not apply to the determination if FWA is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term
(4) The determination must include the model flexibility term unless FWA is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term
(5) The determination must include the model consultation term unless FWA is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements)."

[37] In relation to coverage, the workplace determination must be expressed to cover:

"(a) each employer that would have been covered by the proposed enterprise agreement concerned; and

(b) the employee who would have been covered by that agreement; and

(c) each employee organisation (if any) that was a bargaining representative of those employees (s.267(4))."

[38] Exhibit Parks 4 is the latest draft determination provided to the Commission.[32] The principal 'matters at issue' between the parties and the differences in the clauses proposed with respect to those matters are identified in Exhibit Unions 5. Exhibit Parks 4 is referred to throughout this document as the draft determination.

[39] The draft determination contains the mandatory terms about settling disputes (clauses 3.7 – 3.15), a flexibility term (clause 3.16) and a consultation term (clause 3.6), as required by ss.273(2)–(5) of the FW Act.

[40] The Commission is only required to conduct a "merits arbitration" in relation to the matters at issue at the end of the post industrial action negotiation period (the statutory period).

[41] The parties are agreed that at the end of the statutory period there were seven matters at issue which require an arbitral decision by the Commission, namely:

(i) wages and allowances increases (clauses 3.3, 7.2, 9.2(c) and Schedule 1 of the draft determination);

(ii) ceiling point performance pay (clause 7.4.1 of the draft determination);

(iii) progression (clauses 7.4.1 and 7.2 of the draft determination);

(iv) higher duties (clause 7.9 of the draft determination);

(v) rostered weekend employees (clauses 8.4 and 8.6 of the draft determination);

(vi) rostered standby employees (clause 8.5 of the draft determination); and

(vii) alternative employment arrangements (clause 5.6.4 of the draft determination).

[42] We note that Parks Victoria contended that a number of the agreed terms should not be included in the workplace determination because of the operation of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (the Referral Act) and the implied constitutional limitation on Commonwealth legislation curtailing the capacity of the States to function as governments, as explained in *Re Australian Education Union; Ex parte Victoria* (Re AEU). We deal with this contention later and for convenience refer to it as the Referral Act/Re AEU point.

[43] Following further conciliation after the end of the statutory period, the parties reached agreement in respect of five of the seven matters at issue (namely matters (iii) – (vii) set out at paragraph 41 above). It is common ground that, as these matters were agreed after the end of the relevant statutory period, they are not agreed terms within the meaning of s.274(2), but rather they remain matters at issue for arbitral determination by the Commission. However, in making such a determination the Commission will obviously have regard to the fact that the parties have reached agreement in respect of these issues.

[44] Having regard to these developments three principal issues remain for consideration and determination:

(ii) the wages and allowances matter at issue (clauses 3.3, 7.2, 9.2(c) and Schedule 1 of the draft determination);

(iii) the ceiling point performance pay matter at issue (clauses 7.4.1(a) and (b) of the draft determination); and

(iii) the Referral Act/Re AEU point.

[45] In determining the matters at issue, the Commission is required to take into account each of the factors set out in s.275.

"275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

(b) for a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;

(c) for a workplace determination other than a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination;

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time."

[46] The use of the word 'include' in s.275 suggests that the Commission is not confined to those considerations alone, and can have regard to any other relevant considerations in the circumstances of the particular case.[33] Sections 577 and 578 are relevant in this regard.

[47] Section 577 states:

"The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581)."

[48] Section 578 states:

"In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."

[49] Section 275(d) provides that the Commission must take the 'public interest' into account. The public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the FW Act.[34]

[50] The public interest refers to matters that may affect the public as a whole such as the achievement or otherwise of the objects of the FW Act, employment levels, inflation and the maintenance of appropriate industrial standards.[35]

[51] The statutory distinction between the interests of the employer and employees on the one hand (s.275(c)) and the public interest on the other (s.275(d)) leads us to conclude that the public interest is distinct from the interests of the parties, though the considerations may overlap. For example, matters which may be in the public interest may also be in the interests of one or more of the parties.[36]

[52] Section 275(e) provides that one of the factors which the Commission must take into account is 'how productivity might be improved in the enterprise ... concerned'. The meaning of the word 'productivity' in this context was considered in *Schweppes Australia Pty Ltd v United Voice Victoria Branch* (Schweppes).[37] In Schweppes the Full Bench decided:

> "... that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.
>
> Financial gains achieved by having the same labour input - the number of hours worked - produce the same output at less cost because of a reduced wage per hour is not productivity in the conventional sense."[38]

[53] As to s.275(f), neither party seeks any particular finding in relation to the reasonableness of the conduct of the bargaining representatives. It is not contended that such conduct was unreasonable. Accordingly, we find that for the purposes of s.275(f), the conduct of the bargaining representatives was reasonable during the bargaining for the proposed agreement.

[54] In relation to s.275(g), it is common ground that the bargaining representatives have complied with the good faith bargaining requirements.

[55] Parks Victoria submitted that in most workplace determination cases the factors in s.275(a) (the merits of the case) and s.275(e) (productivity) take on particular significance. This was said to be so because in respect of many matters at issue the other factors in s.275 are likely to largely balance each other out or be neutral. The Unions contend that this submission should be rejected.

[56] No authority was cited in support of the proposition advanced by Parks Victoria and in any event it seems to us to be largely irrelevant. In deciding the terms of the workplace determination we must take into account all of the factors set out in s.275.

[57] At the hearings on 4 and 5 December the evidence[39] set out below was adduced.

[58] The following witnesses gave evidence on behalf of Parks Victoria in the proceedings:

- Mr Greg Mead, Human Resources Manager, Parks Victoria[40];
- Dr William Jackson, Chief Executive Officer, Parks Victoria[41];
- Dr Peter Appleford, Deputy Secretary Land and Fire, Department of Sustainability and Environment (Victoria)[42];
- Mr Brendan Flynn, Deputy Secretary of the Economic and Financial Policy Division, Department of Treasury and Finance (Victoria).[43]

[59] Parks Victoria also filed a report titled 'Deloitte Report' by Mr Chris Richardson. Messrs Mead, Jackson, Appleford and Flynn were cross examined.

[60] The following witnesses gave evidence on behalf of the Unions' in the proceedings:

- Mr Wayne Townsend, Senior Industrial Officer, Community and Public Sector Union (CPSU)[44];
- Mr Matthew Price, Industrial Officer, CPSU (SPSF Group Victorian Branch)[45];
- Mr Sam Beechy, Organiser, The Australian Workers' Union (AWU)[46];
- Mr Ben Davis, Vice President, AWU, Victorian Branch[47];
- Ms Felicity Brooke, Ranger in Charge, Mount Buffalo, Parks Victoria[48];
- Mr John Argote, Ranger in Charge, Point Cook Coastal Park, Parks Victoria[49];
- Mr Mick Caldwell, Team Leader, Water, Parks Victoria.[50]

[61] The parties contributed to the efficient hearing of this matter by appropriately limiting the cross examination of witnesses and by focussing on the matters of real substance rather than on peripheral or marginally relevant issues.

[62] We deal first with the agreed terms before turning to the contested matters at issue.

4. The Agreed Terms

4.1 *Terms agreed during the statutory period*

[63] A substantial part of the proposed workplace determination is agreed. In his witness statement Mr Mead set out the changes incorporated into the proposed workplace determination.[51] One of these changes is contested (ceiling point performance pay), the others are agreed. There were 14 separate matters that were agreed between the parties, prior to the end of the negotiating period.[52] Some of these matters were technical and three of the 14 matters were not changes in a relevant sense, rather it was agreed to leave certain clauses as they existed under the 2008 Agreement, or agreement was reached not to include certain Union proposals. There was an agreement not to change fixed-term employment, not to make changes in relation to annual leave loading, and not to include a provision sought about labour

hire. In addition to the matters agreed prior to the end of the statutory period, the parties have recently reached agreement on a number of the matters at issue (see paragraph [43] of this decision). Each of the significant matters which have been agreed are set out below.

(i) Consultation arrangements for the implementation of change (Clause 3.6)

[64] The parties agreed to include a new consultation clause which requires Parks Victoria to consult with its employees in more limited circumstances than had previously applied. In particular:

- the amended clause only applies to proposals for major change, no such limitation appeared in the corresponding clause in the 2008 agreement; and

- the amended clause applies in circumstances where Parks Victoria has developed a proposal for major change the corresponding clause in the 2008 Agreement applied when Parks Victoria was merely considering a change.

[65] Mr Mead conceded that these changes favoured Parks Victoria as they provide a less onerous consultation obligation but said that 'it is difficult to quantify what the value of this change is without knowing how often a situation will arise where Parks Victoria is not required to consult (when it otherwise would have under the 2008 Agreement)'.[53] For this reason Parks Victoria did not assign a 'bankable value' to this change, within the context of the Victorian Government's wages policy. We deal with that policy later.

[66] We note that the agreed consultation arrangements are in identical terms to clause 10 of the Victorian Public Sector Workplace Determination 2012 (VPS determination).[54] We deal with the VPS determination at paragraphs [188]-[193].

[67] In his evidence Mr Flynn stated that the VPS determination was consistent with the Victorian Government's wages policy because all costs above 2.5% per annum were fully offset by genuine productivity gains linked to workforce reforms. One of the workforce reforms referred to by Mr Flynn was the change to the consultation arrangements:

> "[97] The VPS determination was consistent with the Government's wages policy as all costs above 2.5% per annum were fully offset by genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations, and the ultimate Determination. Departments received no additional budget supplementation to fund the outcome of the VPS Determination.
>
> [98] ...
>
> (b) management now has more flexibility when implementing change in the workplace, which will ensure more timely implementation of change across the public service. The definition of major change is now consistent with the model clause in the Fair Work Act. This significant improvement provides guidance on when consultation is required in line with community standards."[55]

[68] Mr Flynn is referring to clause 10 of the VPS determination.[56] It would seem to follow that, contrary to Mr Mead's evidence, the new consultation clause is properly seen as a workforce reform that will give rise to genuine productivity gains.

***(ii) Casual employees** (Clause 5.5(b))*

[69] This clause was amended to delete the words 'weekend penalties' from the list of matters said to be compensated for by the payment of the 25 per cent casual loading.

[70] In his second witness statement Mr Mead said that this change was a benefit to casual employees and that there was a 'clear cost implementation in the change'. The increased cost to Parks Victoria is said to arise from the fact that casual employees who work on a weekend will receive weekend penalties in addition to their casual loading.[57] In cross examination Mr Mead said that casuals who are rostered to work on weekends would be entitled to the weekend penalties prescribed in clause 8.4(b) of the draft determination. This is said to be so if they were classified as 'rostered weekend employees' (see clause 8.4).[58]

[71] We note that if a casual was regarded as a 'non rostered employee', within the meaning of clause 8.3, then it would appear to be the case that they would not be entitled to be paid weekend penalties when working on weekends. It is also relevant to note that the proposed changes in relation to casual employees are a consequence of the introduction of 'as worked' weekend penalties (see paragraphs [126] - [139] of this decision).

***(iii) Workload** (Clause 4.5(b)(iv))*

[72] An amendment was made to this clause to provide that if a dispute was not resolved under this clause, either Parks Victoria or an employee could refer the dispute to Fair Work Australia (now the Fair Work Commission) in accord with Subdivision B of Division 3 of Part 5-1 of the FW Act. Previously there was no access to arbitration. Mr Mead characterised this change as a benefit to employees but as there may never be a dispute under the clause he did not assign any cost to the change.[59] During cross examination Mr Mead acknowledged that the change provided some benefit to Parks Victoria:

> "Mr Mead, at 4.4 of the determination, if you go to the heading Outcomes for Parks Victoria, Parks identifies, 'Continued resolution of grievances and disputes in an orderly manner as an outcome of benefit to Parks.' Do you see that?---Yes.
>
> Doesn't it follow that the conferral of power on Fair Work Australia gives further effect to that outcome?---I think it gives - I mean, we could still have without a referral to Fair Work Australia. I think the referral to Fair Work Australia is a direct benefit to employees. We could not have a referral to Fair Work Australia and still have an output that gives us continued resolution of grievances and disputes in an orderly manner.
>
> Save that under the 2008 agreement, if you decided unilaterally to say no to an employee who had ventilated a dispute about workload, that doesn't guarantee, does it, that the dispute would be resolved in an orderly manner?---There was nowhere for the employee to take it, so I think - look, I think it certainly assists, there's no doubt about that.

> Then in 4.5(a) of the clause, 'Parks Victoria acknowledges the benefits to both the organisation and individual employees gained through employees having a balance between their professional and family life.' Do you accept that?---Yes.
>
> The conferral of power means that there's an opportunity for that to be objectively determined by Fair Work Australia on its merit?---Yes.
>
> That's consistent with the benefit to Parks Victoria, is it not?---Yes." [60]

[73] It seems to us that this change is in the interests of all parties, in that it provides an orderly mechanism for the resolution of disputes about workload.

(iv) Part -time employees *(Clause 5.2)*

[74] This clause was amended to ensure greater consistency with the part-time employment clause included in the relevant modern award, being the *State Government Agencies Administration Award 2010*.[61] The changes resulted in simpler language being used and do not create any tangible cost or benefit.

(v) Appointments by transfer *(Clause 6.2)*

[75] The parties agreed to insert the proposed clause 6.2(b) and, in particular, the words "if Parks Victoria is able to demonstrate sound operational reasons for requesting an Employee to undertake a different role in the same location, agreement cannot be unreasonably withheld." The comparable clause in the 2008 Agreement only allowed Parks Victoria to transfer an employee by mutual agreement. There was no obligation on an employee to agree to any transfer, regardless of Parks Victoria's reasons for requesting the change.[62]

[76] Parks Victoria conceded that the change under this clause creates a bankable saving. This is based on predicted savings through reduced recruitment expenditure. Parks Victoria has estimated that without this change, it would need to recruit new employees to address staffing needs. On a worst case scenario basis, this could be up to an additional 2.7 FTE positions each year.

(vi) Rostered work – outside the spread of hours *(Clause 8.7)*

[77] The comparable clause in the 2008 Agreement is in the following terms:

> "(a) When necessary to respond to particular operational requirements such as environmental or visitor management programs, Parks Victoria may request employees to work to a roster that starts or finishes **two hours or more** outside the normal spread of hours.
>
> (b) Rosters shall be prepared on the basis of:
>
> (i) Normal hours for the rostered employees being 38 hours per week averaged over a 2 week period.
>
> (ii) Individual shifts being 7.6 hours.

(iii) At least 7 days notice shall be given where there is a requirement to work a roster that is outside the normal spread of hours unless agreed otherwise.

(c) An employee rostered to work under this clause shall be paid 30% more than his/her substantive hourly rate for the 7.6 hours works. Time worked in excess of the ordinary rostered hours shall be paid at the rate of double time unless otherwise agreed.

(d) An employee who is rostered to work all their normal hours within the spread of hours and finishes work outside the spread of hours shall be paid overtime for all the actual time worked outside the spread of hours. Overtime will be paid at the rate of time and a half for the first two hours and double time thereafter. Time in lieu provisions will not apply to work outside the spread of hours." (emphasis added)

[78] The proposed clause in the draft determination is in identical terms save that the words in bold have been deleted.

[79] Mr Mead acknowledged that the change gave Parks Victoria greater flexibility in terms of rostering outside the spread of hours[63] but in his view 'the increased cost outweighed the increased flexibility'.[64] As the situation covered by the clause would rarely arise, Mr Mead considered that the amendment was cost neutral.[65]

[80] Mr Mead's reference to the increased costs arising from the proposed clause is based on an expectation that there will be more circumstances in which Parks Victoria will roster employees outside the span of hours. While the loading prescribed in the proposed clause is the same as under the 2008 Agreement, the more occasions on which Parks Victoria rosters employees outside the span of hours the higher the overall labour cost.

[81] In our view the proposed change provides Parks Victoria with greater flexibility in terms of rostering outside the spread of hours.

(vii) Home–based work *(Clause 8.9)*

[82] This is a new clause which provides that 'home based work arrangements may be agreed between Parks Victoria and an Employee on a case by case basis.'

[83] The proposed clause is in identical terms to clause 16 of the VPS determination.[66]

[84] In his evidence, Mr Mead considered the inclusion of home–based work arrangements to be primarily for the benefit of employees, and not Parks Victoria, as it provides employees with the benefit of flexibility in the performance of work. According to Mr Mead, Parks Victoria obtains no measurable benefit from employees having the additional ability to work from home, as opposed to working from their ordinary work location. However, given the relatively small number of instances where this could occur, and the difficulty in assigning a cost to such circumstances (given that, for certain employees, a large amount of their work could be done via remote computer access), Parks Victoria has not assigned any additional cost to this change.[67]

[85] In cross-examination Mr Mead conceded that to the extent home–based work contributes to a satisfied workforce it provides a benefit to Parks Victoria.[68]

[86] In his witness statement Mr Price indicated, at paragraphs 27(a)(iii):

> "The effect of this change is that PV has greater flexibility in when it may request employees to work outside the normal spread of hours."

[87] In our view the proposed clause has the potential to provide benefits to all parties.

(viii) Flexible leave arrangements *(Clause 6.2 of Appendix B)*

[88] Mr Mead's evidence was that this clause is a benefit to employees as it extends the period of time in which employees who purchase annual leave must take the annual leave. There was a 12 month limitation in the 2008 Agreement (clause 7.2(b)(iv) of Appendix B). The proposed clause provides an additional three months for leave to be taken from the expiry of the 12 month accrual period (clause 6.2(g)(iv) of the draft determination). As the amount of leave taken by employees does not change, Mr Mead did not consider that there is any additional cost in this change.[69]

[89] While the proposed change is a benefit to employees, it does not impose any additional costs upon Parks Victoria.

(ix) Domestic violence leave *(Clause 7.2.5 of Appendix B)*

[90] This is a new clause that was inserted into the workplace determination. It provides an employee the right to take paid leave in certain circumstances where there are incidents of domestic family violence.

[91] The proposed clause is of benefit to employees, though the extent of any additional cost to Parks Victoria is not likely to be significant. Mr Mead was not aware of any situation where an employee would have previously had need for such leave, and did not consider it is the type of situation where Parks Victoria could accurately predict the extent to which this entitlement will be used. For that reason, Mr Mead did not assign any additional cost to the clause.[70]

(x) Costs of employment related legal proceedings *(Clause 7.3.4 of Appendix B)*

[92] This clause provides that where an employee is required, in certain circumstances, to attend legal proceedings as a result of their employment with Parks Victoria, Parks Victoria will meet the employee's costs in such legal proceedings.

[93] The proposed clause is of benefit to employees, though the extent of any additional cost to Parks Victoria is not likely to be significant. Mr Mead was not aware of any situations where this would have been relied on, and accordingly did not contend that it was an additional cost.

***(xi) Emergency work** (Appendix A)*

[94] The parties agreed to adopt the DSE emergency work provisions (Appendix 6 Part 1) from the VPS determination. This new provision generally updates the previous emergency work provisions that were in the 2008 Agreement, including indexing relevant allowances and clarifying language. There is no reduction in terms and conditions for employees and there are no additional costs incurred by Parks Victoria as a result of this new Appendix as Parks Victoria is reimbursed by DSE for all additional costs associated with emergency work under Appendix A (such as allowances, loadings and overtime). For this reason, the changes to this Appendix are cost neutral.[71]

***(xii) Management of misconduct, disciplinary process and unsatisfactory work performance** (Clauses 5.11–5.13)*

[95] These clauses include a new system for managing underperformance and misconduct of employees. These clauses set out the processes and steps involved in managing misconduct and underperformance more clearly, and Mr Mead expected that, through this more rigorous process, some bankable savings will be achieved.[72] These savings would include the administrative time and costs saved through having a more efficient process, as well as the potential savings in any replacement of staff who are dismissed under these clauses, as any new employee is more likely to commence at the start of a grade, as compared to the large number of employees who are already at the top of their grade.

[96] The proposed clause is of benefit to Parks Victoria.

***(xiii) Overtime** (Clause 9.2)*

[97] This clause was amended to provide that part time employees do not get overtime until they work more than 10 hours per day. In his second witness statement Mr Mead said, at paragraph [27], this change to be cost neutral, as part-time employees receive time off in lieu if they work in excess of ordinary hours.

[98] In cross-examination Mr Mead conceded that the time off in lieu arrangements were on the basis of one for one, rather than at overtime rates.[73] He also agreed that the proposed change was a benefit to Parks Victoria:

> "In that event, they're not cost-neutral, it's a saving to the employer, isn't it?---It could be a saving to the employer.
>
> Well, it is, isn't it?---Well, we would see that it would be a situation where generally they would work 7.6 hours a day.
>
> If you acquired the right to require overtime for free up to 10 hours, apart from ordinary wages, that's a benefit to the employer, isn't it?---Yes."[74]

[99] The proposed clause is of benefit to Parks Victoria.

[100] We now turn to the matters at issue. The parties have recently reached an in-principle agreement in relation to a number of matters at issue in these proceedings. It is convenient to first deal with those matters.

4.2 *Terms agreed after the statutory period*

[101] After the end of the relevant statutory period the parties reached agreement in respect of five of the seven matters at issue. The parties made a joint submission in respect of the agreed matters. The parties submitted that each of these agreed matters at issue ought to be included in the determination. A summary of the agreed matters and the submissions of the parties in support of the inclusion of these matters in the determination is set out below.

(i) ***Alternative employment arrangements*** *(clause 5.6.4)*

[102] This change seeks to amend clause 5.6.4 of the 2008 Agreement to address what Mr Mead described as an unexpected and unintended issue.

[103] By way of background, clause 5.6.4 of the 2008 Agreement provides that Senior Officers may enter into an Alternative Employment Arrangement (AEA). The most common form of AEA gave an eligible employee the ability to enter into a lease arrangement for a motor vehicle through Parks Victoria. In effect the employee paid two–thirds of the cost of the lease, out of pre-tax earnings, and Parks Victoria paid the balance.

[104] The arrangement would not otherwise be available under the terms of the 2008 Agreement as the effect of taking on a motor vehicle lease would be, in most cases, to reduce the salary of an employee below the nominated salary required under the 2008 Agreement. The same position would apply under the workplace determination.

[105] As the vehicle under an AEA is treated as part of the employee's overall remuneration package, if an employee elected to terminate their AEA at the end of the vehicle lease then their actual salary increased (as they no longer have the benefit of the motor vehicle).

[106] A practice had developed whereby employees in defined–benefit superannuation funds, who had taken on a motor vehicle lease under an AEA, terminated the AEA just prior to their retirement. As a consequence, the value of the lease is added back into their salary, which has the effect of the employee's defined superannuation benefit increasing substantially.

[107] In his evidence, Mr Mead said that Parks Victoria 'considers this practice to be unfair to the organisation, particularly in circumstances where it is obliged to fully fund an employee's defined benefit'. According to Mr Mead, the indicative costs to Parks Victoria of each employee implementing this election is between $60 000 and $70 000. There are 25 Senior Officers who are members of defined–benefit funds who are eligible to access these arrangements.[75]

[108] The parties have agreed to a clause whereby existing employees who have an AEA in place, have until 30 June 2013 to notify Parks Victoria as to whether they intend to retain their motor vehicle lease under the AEA once that motor vehicle lease expires.

[109] If an employee does notify Parks Victoria by this date, and subsequently terminates their AEA and ends their motor vehicle lease, Parks Victoria will recognise the employee's actual salary amount (being their total remuneration package less statutory super contributions) for the purposes of their defined benefit superannuation fund.

[110] After this period, or for new employees employed after the determination comes into operation (who enter into an AEA), their salary for the purposes of their defined benefit superannuation fund will be capped at 80% of their total remuneration package.

[111] The only difference between the parties had been the timing of the cut-off arrangements, which have been resolved in favour of the Unions' proposal.[76]

[112] The parties submitted that the changes have merit (s.275(a)) and are in all parties' interests (s. 275(c)). The changes do not give rise to any immediate public interest or productivity issues either way, and neither party suggests that ss.275(f) and (g) have any application.

(ii) ***Progression*** *(clause 7.4.1)*

[113] The parties agreed to significant changes in the progression clause. Parks Victoria sought a revised progression clause which was very similar to the progression clause in the VPS determination so that 'any performance entitlement payable truly rewards excellent performance rather than paying 'performance pay' to the vast majority of employees, most of whom simply meet expectations'.[77] Mr Mead acknowledged that the agreed progression clause was very close to the terms of the relevant clause in the VPS determination and that the agreed clause met Parks Victoria's objectives.[78]

[114] The parties submitted that the changes made have merit – each party achieved something, and the changes have now been agreed (s.275(a)); the interests of Parks Victoria and its employees favour the inclusion of the agreed provision (s.275(c)); and the public interest is aided by the consistent application of performance pay criteria (s.275(d)). Tightened criteria for performance pay will increase the prospects of better service outcomes for the public (s.275(d)), whilst also leading to potential improvements in productivity (s.275(e)).

[115] Mr Mead estimated that the more rigorous performance management system would save Parks Victoria $458,000 in 2012–13; $570,000 in 2013–14 and $646,000 in 2014–15.[79]

[116] The parties also submitted that ss.275(f) and (g) do not have any application and that there is an incentive to bargain again in the future (s.275(h)).

(iii) ***Higher Duties*** *(clause 7.9)*

[117] The 2008 Agreement provides that employees who perform the duties of a higher classification receive 100 per cent of the rate of pay pertaining to the higher classification.[80] This is so despite the fact that the employee may only be performing part of the duties of the higher position or performing those higher duties for a portion of the employee's shift.

[118] In his evidence Mr Mead identified the problems with the existing clause:

> "The problem with the current Higher Duties clause is that in many circumstances, employees receive the full higher duties payment when full higher duties are not being performed. This means that at times employees are being paid for work that they are not performing.

> This clause has the additional problem of discouraging managers from offering higher duties to employees who would not be able to perform all of the higher duties of a higher classification, due to the additional costs involved in paying full higher duties. This discourages the organisation from offering development opportunities to employees based on the additional cost involved."[81]

[119] The parties have agreed to an amended higher duties clause, clause 7.9, in the following terms:

> (a) Higher duties payments shall only apply where an Employee is required by management to relieve in a position classified at a higher Grade for 5 or more consecutive working days in any one assignment.
>
> (b) Where an Employee is eligible for higher duties, a payment equal to the difference between the Employee's usual rate of pay and that of the rate of the higher classified position shall be paid for each period of higher duties worked for 5 or more consecutive working days, effective from the first working day of the assignment.
>
> (c) Provided that an Employee who is required to carry out only part of the duties of a higher classified position or who is unable to carry out all such duties because of lack of experience or qualifications, shall be paid such proportion of the higher duties otherwise payable under this clause as is agreed to by the employee and Parks Victoria.
>
> (d) If agreement is not reached on the proportion of the higher duties payable, either Parks Victoria or the Employee may initiate a dispute to determine the matter in accordance with the dispute resolution procedure contained in this determination.
>
> (e) Higher Duties may also be paid during periods of short term deployment as described in Clause 9.10 (Business Continuity/Short term deployment) where an Employee is required to undertake duties and the work value during the deployment is commensurate with the work value descriptors of a higher grade. Payment of higher duties in this instance shall require the approval of the Manager Human Resources.

[120] The agreed higher duties clause provides that Parks Victoria can offer proportionate higher duties (and only be required to pay proportionate payment of the higher rate) to all grades of employees, and not just grade 8 employees as was the case under the 2008 Agreement.

[121] In addition, the clause has been amended to provide that, where agreement as to the required proportionate rate cannot be reached between Parks Victoria and the relevant employee, either party will have the right to activate the dispute resolution procedure under the workplace determination.

[122] The agreed clause is in substantially the terms sought by Parks Victoria, save that the proportion of the higher duties payment to be paid to an employee who is required to carry out only part of the duties of the higher position is as agreed to by the employee and Parks Victoria. If agreement is not reached on the proportion of the higher duties payable the dispute may be resolved by arbitration by the Commission. Parks Victoria had sought the right to determine the proportionate payment in its sole discretion.

[123] Mr Mead was cross-examined about this issue:

> "If I can take you then to paragraph 30 of your reply statement, this is Parks 2, and there you deal with the higher duties reform. Now, what you sought initially in these proceedings as identified in the document that you've just been reading, was the right or rather the capacity to align the higher duties payment with the work actually performed, whatever proportion that was?---Yes.
>
> That's what you've got in the determination. Do you accept that?---Yes.
>
> The only variation is that the amount has to be agreed or the proportion - the actual proportion has to be agreed between the employee and the employer. Do you accept that?---Yes.
>
> Whereas you wanted it to be solely in your discretion?---Yes.
>
> That reform agreed in discussions between you and the union simply ensures the clause operates fairly. Do you accept that?---Yes."[82]

[124] In his second witness statement Mr Mead stated that 'the clause is likely to result in an increased use of proportionate higher duties ... creating a saving' for Parks Victoria.[83]

[125] In support of the inclusion of the proposed clause in the workplace determination the parties submitted that the logic (and merit) of the proposal is strong (s.275(a)), the parties have reached agreement, and whilst the proportionate payment requires agreement, either party has access to dispute resolution to resolve any difficulties (s.275(c)). Further, it was submitted that broader and increased access to higher duties is likely to lead to more highly skilled workers,[84] which improves productivity and is in the public interest (ss.275(d) and (e)). Sections 275(f) and (g) do not have any application.

(iv) ***Rostered weekend employees*** *(clauses 8.4 and 8.6)*

[126] Clauses 8.4 and 8.6 of the 2008 Agreement provide for employees to be rostered to work up to a nominated number of weekend days each year and receive an annualised allowance or loading for that capacity. The value of the annualised allowance increases, depending upon the number of rostered weekend days that are allocated to an individual employee, as follows:

- 10 days - 3.75 annual allowance;
- 20 days - 7.5% annual allowance;
- 30 days - 11.25% annual allowance; and
- 40 days - 15% annual allowance.

[127] The employees under the 2008 Agreement who receive these annualised allowances are primarily Rangers, as well as some Field Service Officers.

[128] There is no capacity under the 2008 Agreement for employees to receive 'as worked' shift loadings for weekend work. Any time worked on the weekend for employees who do

not receive annualised allowances is treated as overtime, and Parks Victoria has very limited capacity to require or roster such overtime to be worked.[85]

[129] In his evidence Mr Mead identified the problems with the current arrangements:

> "The current arrangement of annualised allowances is based on historical arrangements and does not meet or recognise the organisation's current requirements for weekend work. Introducing the option for 'as worked' weekend penalties will create more flexibility for PV to target its rostering on weekends around providing services efficiently and effectively.
>
> For example, it is common for an employee to continue to be rostered for a set number of weekend days for several years, even after they have changed position or their duties have changed. This has resulted in rostered weekend work not being tailored to suit the specific needs of a particular region or work location.
>
> It also means that weekend labour is often not allocated by the operational requirements of each park, but rather it is allocated depending on staff available for weekend work on the roster for each park. This means that some parks have too much labour for weekend work, while others do not have enough.
>
> PV is seeking additional flexibility in having the option to pay weekend penalties on an 'as worked basis' under the proposed determination, as an alternative to only having weekend employees who receive annualised allowances. PV would still have employees receiving annualised allowances, and indeed, there is likely to be a strong, ongoing need for Rostered Weekend Employees under the determination. The amendments sought are about providing PV with more relevant, effective and efficient options for labour allocation on weekends.'[86]

[130] The major amendments to clause 8.4 are to include the option for employees to work weekends on an as worked basis (subject to extensive notice requirements) for which they will receive weekend penalties equivalent to overtime under the workplace determination. No changes have been made to the arrangements in relation to annualised allowances. Under clause 8.4(a), employees may be remunerated for weekend work through an annualised allowance, as worked penalties, or a combination of both.

[131] In relation to clause 8.4(k), the parties have agreed to a further variation of the wording, as follows:

> "Superannuation contributions will be paid on as worked penalties, however payments made for weekend work on an as worked basis will only be added to salary for superannuation purposes for employees who are in a defined benefit superannuation fund, where permitted under the terms of the relevant Trust Deed for the defined benefit superannuation fund, or if there is no Trust Deed, the applicable governing rules for that defined superannuation fund. Where this is not permitted, superannuation contributions will be made on such payments to an appropriate accumulation fund nominated by the employee, or in the absence of nomination, the default specified in this determination."

[132] This variation will ensure that, where permitted by the relevant trust deed, payment for as worked penalties will be included for the purposes of that employee's salary for a defined–benefit superannuation fund.

[133] Clause 8.6 has been amended so that employees who do not receive at least 2 weeks' notice of a cancellation of weekend work that was to be worked on an as worked basis, will receive a minimum payment of one day's pay for the relevant weekend day that would have been worked, which will be payable at the Sunday loading in the event that the employee was rostered to work both weekend days.

[134] Mr Mead stated that the introduction of as worked penalties, of itself, does not create a bankable saving for Parks Victoria. This is said to be so because the payment for such weekend work will be the same as if employees worked overtime under the 2008 Agreement, such that as worked penalties is effectively cost neutral. Further, there have been no changes in this clause to the periods of notice that Parks Victoria can provide employees to reduce or cease their annualised weekend allowances, or any changes to the annualised allowances available. This means that, even though the introduction of as worked penalties will provide Parks Victoria with greater flexibility in rostering, it has the same rights and obligations to reduce or cease these allowances as it did under the 2008 Agreement. Parks Victoria did not propose any change to that arrangement.[87] Mr Mead says that for this reason, any potential reduction or cessation of annualised allowances is not itself a bankable saving that is created by any change in the rostered weekend work clause, rather it will come from better rostering organisation and efficiencies, which are implemented outside of the workplace determination.

[135] However, Mr Mead conceded that the option of as worked penalties is likely to provide Parks Victoria with additional flexibility with its rostering and, as a result, Parks Victoria will be more likely to, where necessary, reduce or cease the annualised allowances for some employees than was previously the case, thus creating savings.

[136] The introduction of a minimum payment in the event that as worked weekend work is cancelled is likely to create some additional cost for Parks Victoria, in circumstances where the rostered work is no longer required, but is cancelled with less than two weeks' notice.[88]

[137] During cross-examination Mr Mead conceded that the agreed changes had provided Parks Victoria with 'more relevant, effective and efficient options for labour allocations on weekends'.[89]

[138] The parties submitted that the changes made have merit and that the interests of Parks Victoria and its employees favour the inclusion of the agreed provision in the workplace determination (s.275(c)). The public interest (and productivity) is said to be aided by providing Parks Victoria with another means of allocating and remunerating weekend work in order to discharge its public functions. It is another flexibility available to Parks Victoria, that was not available under the 2008 Agreement, that improves productivity (ss.275(d) and (e)).

[139] Neither party suggested that ss.275(f) and (g) have any application. Both parties contended there is no disincentive to bargain in future arising from the proposed clause (s.275(h)). The as worked arrangement is new. The determination affords an opportunity for it to be utilised and to be assessed by the parties in practice and thereby provides an incentive to bargain in the future.

(v) ***Rostered stand–by employees*** *(clause 8.5)*

[140] Clause 8.5 of the 2008 Agreement is in the following terms:

> "8.5 Rostered Stand-by Employees
>
> (a) A Rostered Stand-by Employee will be rostered to be on stand-by on a regular basis as part of an annual duty roster. A Rostered Stand-by Employee shall be entitled to an annual allowance of 7.5% of substantive salary. The employee, on the basis of what is reasonable, will respond to, or initiate a response to, incidents as required for which no additional payment will be made.
>
> (b) The allowance is payable only whilst the employee is rostered to undertake annual stand-by duty in accordance with this sub-clause and will be added to salary for superannuation purposes. A minimum of three months notice in writing shall be given for cessation of the requirement to undertake annual stand-by duty."

[141] Clause 8.5 of the draft determination is in the same terms. The parties jointly submitted that, given that no changes were made to this clause from the 2008 Agreement, and the parties reached agreement as to that term in 2008, the Commission ought be satisfied that no changes are now required to the clause. It was submitted that there is nothing in the material which would enable the Commission to form any alternative view in any event.

[142] We have had regard to the matters put by the parties and to the factors identified in ss.275, 577 and 578 and to the objects of the FW Act. We are satisfied that each of the matters at issue agreed after the end of the relevant statutory period should be included in the workplace determination.

[143] We now turn to the contested matters at issue.

5. The contested matters at issue

5.1 *Wages and allowances increases*

[144] The parties are agreed that the workplace determination is to operate for a period of three years. The matter at issue concerns the level of increases in wages and allowances over the period of operation of the workplace determination.

[145] Parks Victoria's preferred outcome (clause 3.3(b) of the draft determination) is that the Commission award the following increases in wages and allowances:

- 3% on commencement of the workplace determination;
- 2.75% after 12 months; and
- 2.75% after 24 months.

[146] The Unions seek the following increases:

- 3.5% on 1 June 2012;
- 6.3% on commencement of the workplace determination;
- 4% after 12 months; and

- 4% after 24 months.

[147] In the event that we were not minded to grant a retrospective wage increase, the Unions submitted that we should 'front load' the first increase in the determination to compensate employees for the decline in their real wages since May 2011, by adding 3.5% to the 6.3% proposed to operate from 1 February 2013.

[148] Parks Victoria's preferred outcome involves an increase of 8.5% over the three year term of the workplace determination, whereas the Unions' proposal provides for an increase of 17.8%.[90]

[149] Parks Victoria also advances an alternate position in the event that the Commission does not accept its preferred outcome, namely:

- the Commission should award wage increases in the same terms as those in the VPS determination; and

- the Commission should also award an initial $1500 one-off bonus, similar to the sign on bonus included in the VPS determination.

[150] The VPS determination is dealt with later (see paragraphs [188]-[193]). For present purposes we note that the VPS determination provides for an increase of 12.5% over three and a half years and an initial $1500 bonus payment.

[151] Parks Victoria submitted that there is no basis for any award of retrospectivity and in any event there is no power to grant retrospectivity in the sense that the determination can only operate prospectively. This submission was based on the terms of s.276(1) of the FW Act, which states:

> "(1) A workplace determination operates from the date on which it is made."

[152] However, Parks Victoria does *not* contend that it is beyond the power of the Commission to include a clause which commences operation upon the actual commencement of the workplace determination and gives rise to a new obligation to calculate and provide back pay.[91] In our view this concession is entirely appropriate. While s.276(1) expressly provides that a workplace determination operates from the date on which it is made, that does not preclude the inclusion within the workplace determination of a requirement to give effect to a wage increase from an earlier date. Such a requirement operates prospectively in the sense that it has legal effect upon the workplace determination coming into operation. However while the Commission has the power to include such a provision in a workplace determination, Parks Victoria submitted that special, compelling or exceptional circumstances must exist to warrant such a course:

> "The Tribunal should exercise considerable caution in adjudging the consequences of this statutory scheme as being unfair or lacking equity."

[153] Parks Victoria also submitted that the front loading of increases; sign on bonuses; or building any element of compensation for the delay since the last pay increase, achieves the same end as retrospectivity and accordingly should be subject to a similar test of special, compelling or exceptional circumstances. It was submitted that such measures should be seen

as 'more than usually undesirable' as there is an element of conflict between compensating employees for delay and the statutory scheme, which itself leads to lengthy delay.

[154] Parks Victoria submits that there are no special, compelling or exceptional circumstances in this case. It is contended that the length of the delay since the last wage increase and the length of the bargaining process are circumstances which would attend most workplace determinations. The following points are advanced in support of that contention:

- the last pay increase in most enterprise bargaining agreements is usually 12 months before expiry (that was the position with the 2008 Agreement and is proposed in relation to this determination);

- the procedures in the Act for terminating protected industrial actions (and triggering the workplace determination process) are only intended to be available in exceptional circumstances. Combined with the good faith bargaining obligations and the capacity for the Commission to suspend most forms of protected industrial action, as an alternative to terminating action, it is not particularly unusual for unsuccessful enterprise bargaining to proceed for up to 12 months or more before being terminated; and

- the completion of the workplace determination process can take many months depending on the number of matters at issue.

[155] It was submitted that the combination of these factors suggests that, in almost all cases, periods of in excess of 24 months would elapse since the last pay increase. This case involved a 12 month period between the last pay increase and the expiry of the 2008 Agreement, just over 12 months of unsuccessful bargaining and around a 6 month workplace determination process. Parks Victoria submitted that such time periods are neither exceptional nor special.

[156] Parks Victoria also submitted that:

> "... much of any 'unfairness' caused by that delay cannot be laid at the feet of PV (as opposed to the usual processes involved in workplace determinations), such that it is comparatively unfair for PV to bear the significant burden of compensatory amounts for unfairness not of its making. This is particularly so given PV's financial position. And whilst it may be argued that PV has accrued a 'benefit' in not paying increased wages over the period of the delay, this benefit operates on the assumption that everyone is entitled to an annual wage increase in all circumstances, which is not a safe assumption'.[92]

[157] It is convenient to deal now with the proposition that special, compelling or exceptional circumstances must be shown before the Commission provides for a retrospective wage increase or adopts some other measure to compensate employees for the delay since the nominal expiry of the previous agreement. There are two aspects to this proposition. The first is the contention that the time which has elapsed since the nominal expiry date of the 2008 Agreement is not relevant to our determination of the level of the first wage increase under the workplace determination. The second aspect is the proposed test of special, compelling or exceptional circumstances before the Commission awards retrospectivity or some other measure to compensate employees for such delay.

[158] At the outset we note that compensating employees for such delay has been a common feature of workplace determinations, both under the FW Act and the legislative predecessors to the current provisions. In each of the cases footnoted the Commission, either awarded a retrospective wage increase[93] or front loaded the first increase[94] to compensate employees for the delay since they last received a wage increase. Further, in a number of these cases the Commission has not applied a test of special, compelling or exceptional circumstances before awarding either retrospectivity or a front loaded increase.[95]

[159] A similar proposition to that put by Parks Victoria was also put and rejected in *Transport Workers' Union of Australia v Qantas Airways Limited.*[96] In that case, the Transport Workers' Union submitted that the wage increases under the workplace determination should apply from 1 July 2011 as the employees had not received an increase in wages since July 2010. Qantas opposed retrospectivity and it's submission is summarised at paragraph [96] of the Full Bench's decision as follows:

> "Qantas submits that there are no exceptional circumstances warranting a retrospective wage increase, and applying a retrospective wage increase would place employees in the same position as they would have been if they had not engaged in damaging industrial action."

[160] The determination in that case commenced operation on 8 August 2012 and the Full Bench decided that the first wages increase would operate from 1 July 2011, as sought by the Transport Workers' Union and, by implication, rejected the submission advanced by Qantas.

[161] We are of the view that the time between the nominal expiry date of a previous agreement (in this case 31 May 2011) and the operative date of a workplace determination is a factor to be taken into account in deciding the wage increases to be included in the workplace determination. Further, in the circumstances of this matter we are of the view that the extent of the wage increase referable to this consideration is not going to be as great as the prospective wage increases we will award. The reason for such a distinction is simple. The aspects of the workplace determination that provide a benefit to the employer are prospective. It is appropriate that some of that benefit be shared with the employees, in the form of a higher wage increase. The same considerations do not apply to the wage increase which is referable to the passage of time since the nominal expiry date of the last agreement. During that period the employer did not have the benefit of the various changes incorporated in the workplace determination. We note that the Full Bench in *Schweppes* arrived at a similar conclusion. The adoption of such an approach also accords with our statutory obligation to have regard to the interests of the employers and employees covered by the determination (s.275(c)).

[162] We also note that the proposition advanced by Parks Victoria, if accepted, would reduce an employer's incentive to resolve disputes in a timely fashion. An employer may resist compromise in the knowledge that the employees will not be subsequently compensated for the delay. In our view a more balanced approach is required.

[163] We are satisfied that it is appropriate to have regard to the time which has elapsed since the nominal expiry date of the 2008 Agreement in determining the level of the first wage increase under the workplace determination.

[164] The bargaining process can be protracted, and the time taken in bargaining is not necessarily a function of unreasonable behaviour by a particular party. Absent unreasonable behaviour there is no reason in principle why a party should be disadvantaged by the time taken in the bargaining process.

[165] We acknowledge that in an appropriate case behaviour by a bargaining representative may warrant a different approach. But in this case no party contended that s.275(f) or (g) were enlivened in relation to this matter at issue.

[166] The proposition advanced by Parks Victoria that special, compelling or exceptional circumstances must be shown to warrant retrospectivity or front loading, derives from authorities dealing with the retrospective operation of awards and variations to awards. The Commission recently dealt with this issue in the *Modern Awards Review 2012* decision in which it decided that variations arising from the review would generally operate prospectively:

> "[112] Subitem 6(3) confers a broad discretion on the Tribunal to vary any of the modern awards in any way it considers necessary to remedy any issues identified in the Review. Specifically the provision does not impose any restrictions upon the Tribunal as to the operative date of any variation determination made as part of the Review.
>
> [113] Ai Group submitted that, in the context of the Review, the Tribunal should apply long standing past practice and only grant a retrospective operative date if "satisfied that there are exceptional circumstances".
>
> [114] We accept the proposition that it has been a long standing practice of the Tribunal and its predecessors that retrospectivity is not granted except in special and exceptional circumstances.[97] This general approach now finds legislative expression in ss.165, 166 and 167 of the FW Act. The ACTU submitted that, in the context of the Review, the Tribunal "should also be guided by the operational provisions in ss.165, 166 and 167 regarding retrospectivity".
>
> [115] For our part, we accept that as a general principle, variation determinations arising out of the Review should operate prospectively, unless there are exceptional circumstances which warrant a retrospective operative date."[98]

[167] But the task we are presently engaged in is quite different to the making or variation of an award. As explained by the Full Bench in *CFMEU v Curragh Queensland Mining Ltd*[99] the task of the Commission in a matter such as this is to assess the respective positions of the parties in relation to the matters at issue and, by reference to the relevant statutory factors, arrive at a conclusion that would be regarded as appropriate in the context of bargaining, had the bargaining concluded successfully. Such an approach does not involve a form of subjective prognostication as to the outcome of the negotiations, but rather involves an objective assessment of the statutory factors and an overall judgement as to an appropriate determination to apply to the operations concerned until the parties replace the determination with a new enterprise agreement.[100]

[168] We note that the proposition for which Parks Victoria contends was applied by the Australian Industrial Relations Commission in determining s.170MX awards under the *Workplace Relations Act 1996* (the WR Act). However the relevant legislative framework

under the WR Act and that applying under the Act is different in at least one material respect. Section 170MX(1) of the WR Act provided that the Australian Industrial Relations Commission had the arbitration powers in relation to s.170MX awards that it had under Part VI of the WR Act. Section 146 was contained within Part VI of the WR Act and provided that:

> "(1) An award shallbe expressed to come into force on a specified day.
>
> (2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award for the purposes of subsection (1) shall not be earlier than the date of the award."

[169] The equivalent provisions to s.146 of the WR Act are in ss.165 – 167 and ss.297 – 298 of the Act. In relation to the variation of modern awards, the operative date of such determinations must not be earlier than the day on which the determination is made, unless:

> (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
>
> (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

[170] In the event that a determination varying a modern award has retrospective effect, s.167 provides that such retrospectivity has no effect on the past approval of enterprise agreements or on the variation of such agreements. Section 167 also provides that such retrospectivity does not create a liability to pay a pecuniary penalty in circumstances where a person engaged in conduct before the determination was made and, but for the retrospective effect of the determination, the conduct would not have contravened a term of the modern award or an enterprise agreement. Similar provisions apply to the variation of national minimum wage orders (see ss.297 and 298).

[171] Importantly, there is no equivalent provision to s.170MX of the WR Act in the Act.

[172] We are, of course, aware that ss.165 – 167 and ss.297 – 298 of the Act speak of the retrospective operation of awards and (as we note at paragraph [152] of this decision) there is a conceptual difference between the retrospective operation of a determination and the inclusion of a provision which requires the employer to give effect to a wage increase from an earlier date. Despite this conceptual distinction, it is apparent that provisions such as the former s.146 informed the approach taken by the Commission to granting retrospective wage increases in the context of s.170MX awards.[101]

[173] In our view, the exercise of the Commission's discretion in determining the level and operative date of any wage increases in a workplace determination should not be constrained by the adoption of a threshold requirement of the type proposed by Parks Victoria (i.e. special, compelling or exceptional circumstances). As we have mentioned, the factors which the Commission must take into account in determining the matters at issue in a workplace determination are those set out in s.275. There is no warrant for the imposition of an additional requirement of the type proposed by Parks Victoria. The width of a statutory discretion is determined by the Act, it cannot be confined more narrowly than Parliament intended by the adoption of a binding rule.[102]

[174] In determining the level and operative date of wage increases in a workplace determination the Commission is seeking to arrive at an outcome which is fair in all the circumstances and that takes account of the factors in s.275 (and ss.557 and 578). Importantly, those factors include merit (s.275(a)) and the interests of the parties (s.275(c)). In considering these factors the *reasons* which have informed the approach taken by the Commission to retrospectivity in the award context, may be relevant and can be taken into account in making the workplace determination. In this regard Parks Victoria submitted that such reasons include:

- retrospectivity may impose a significant administrative burden on employers, for example in industries where there is a high turnover of employees or a period of attrition when a number of employees leave employment; and

- retrospective wage increases could put an employer under financial stress and adversely affect the ability for an employer to tender for new work, based on costs that were not forecast, or recover increases in labour costs awarded retrospectively, if existing contractual arrangements are in place.[103]

[175] It is not submitted that these particular considerations are relevant in this case, but it was submitted that Parks Victoria's financial position is a relevant consideration and we have taken that matter into account.

[176] We now turn to the other matters which are relevant to our consideration of this matter at issue.

[177] It is common ground that the following matters are relevant to the assessment of wage claims in the context of workplace determinations:

- the maintenance of real wages[104] and in this respect CPI figures are the appropriate measure of inflation;[105]
- wage outcomes for the same class of workers in the same industry;[106]
- wage rates and increases in comparable instruments.[107]

[178] Each of these matters is relevant, but they are not the only relevant matters and they are not determinative. Ultimately, the wage increase determined depends upon a consideration of all the relevant circumstances including the other aspects of the determination.[108] In Schweppes the Full Bench observed that:

> "Determining the level of wage increases in this context does not lend itself to the adoption of a decision rule or a mathematical formula. Fundamentally, the Tribunal is seeking to arrive at an outcome which is fair in all the circumstances and that appropriately balances the interests of the parties. The factors in s.275 and ss.557 and 578 of the Act are also relevant and must be taken into account."[109]

[179] Parks Victoria submitted that the following consideration is a relevant principle in assessing wage claims that can be gleaned from the cases:

> "...any claims for wage outcomes over and above the maintenance of real wages (i.e. over CPI inflation) should be supported by increases in work value or other relevant considerations, lest wage inflation drives price inflation in an endless upward spiral."[110]

[180] The Unions contended that this submission is wrong.

[181] We note that no authority is cited in support of the submission advanced by Parks Victoria. We also note that the Commission expressed a contrary view in Schweppes:

> "[110] ... Schweppes had submitted that 'any claims for wage outcomes over and above the maintenance of real wages (i.e. over CPI inflation) should be tied to and supported by increases in work values'. Our provisional view was that the cases referred to by Schweppes did not support the breadth of the proposition put. It seemed to us that the authorities supported a narrower proposition, namely that a party advocating the introduction of a new classification or allowance will need to satisfy the Tribunal that the proposal has merit. If the party advancing such a proposal does so on the basis of changes in work value, then they will need to demonstrate that the proposed classification or allowance satisfies the principles that have traditionally guided the Tribunal in its assessment of work value claims. Schweppes did not contest the provisional view as to the characterisation of the cases upon which it relied but maintained its position that real wage maintenance was the central consideration. We deal with that argument shortly. ...
>
> [118] We do not accept Schweppes' proposition that the rate of inflation should be the sole or predominant consideration in determining wage increases in a workplace determination. In a context in which actual wages and wage increases, through bargaining, have regard to wage movements generally and/or in relevant industry sectors and regard is had to wage movements in assessing relative living standards in fixing minimum award wages,[111] there is no basis for adopting a narrow focus on inflation in determining wage increases in a Workplace Determination. The level of inflation is, however, one relevant consideration. ..." [112]

[182] We adopt the above observations by the Full Bench in Schweppes.

[183] In terms of matter (i) in paragraph 177, the general economic environment is also relevant. The economic projections underpinning the 2012–13 Victorian State Budget are set out in Table 2.1 of Budget Paper No. 2, as follows:

Victorian Economic Projections (per cent)[113]

	2010-11 Actual	*2011-12 Forecast*	*2012-13 Forecast*	*2013-14 Forecast*	*2014-15 Forecast*	*2015-16 Forecast*
Real gross state product	2.5	1.50	1.75	2.75	2.75	2.75
Employment	3.5	0.00	0.25	2.00	1.75	1.75
Unemployment rate	5.1	5.50	5.75	5.50	5.25	5.00
Consumer price index	3.3	2.25	2.75	2.50	2.50	2.50
Consumer price index (excluding carbon price)	3.3	2.25	2.25	2.25	2.50	2.50
Wage price index	3.8	3.50	3.00	3.25	3.50	3.50
Population	1.5	1.60	1.60	1.60	1.60	1.60

[184] In relation to real wage maintenance the *2011–2012 Annual Wage Review* decision deals with the measurement of inflation as follows:

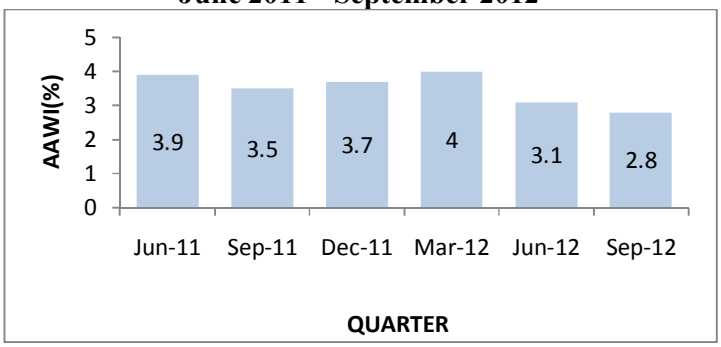
> "[73] Several different measures can be used to identify the nature of price movements, including the CPI, underlying inflation measures and living cost indices. The CPI measures changes in the prices of a 'basket' of consumer goods and services weighted to the expenditure patterns of the average household. Some items captured by the consumer 'basket' exhibit short-term price volatility, causing fluctuations in the CPI without leading to a sustained change in the inflation rate. As a result, the Australian Bureau of Statistics (ABS) produces two underlying inflation measures, the trimmed mean and weighted median, which eliminate volatile items.
>
> [74] The ABS also calculates indices to estimate changes in living costs. ...
>
> [75] Trends in the ALCI and CPI were similar until 2008, when annual increases in the ALCI began to exceed the increases in the CPI. The ABS attributes much of the difference to the inclusion of interest payments on mortgage debt and consumer credit charges in the ALCI, expenses which are not captured by the CPI. ..."[114]

[185] Inflation data is available for the period from the September Quarter 2011 to the September Quarter 2012.[115] The increases in the various inflation measures over this period are set out below:

CPI Australia	CPI (trimmed measures)	CPI (weighted measures)	ELCI
2.0%	2.4%	2.6%	1.0%

[186] As to matter (ii) in paragraph 177, the wage outcomes for public sector employees are relevant. Parks Victoria tendered a report by the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR) titled: *Trends in Federal Enterprise Bargaining September Quarter 2012*.[116] DEEWR Enterprise Bargaining Report notes that the average annualised wage increase (AAWI) for agreements lodged in the September quarter 2012 'reflects some moderation in wages growth'[117]. The AAWI for agreements covering public sector employees is set out in the chart below.

Chart 1
AAWI in Public Sector Agreements lodged in each quarter
June 2011 - September 2012



[187] The Report notes that the September quarter outcome was particularly influenced by the Victorian public health sector health professionals agreement, covering almost 42 000 employees, which had a 2.6% AAWI.[118]

[188] The VPS determination is also relevant in this context. The determination covers about 30 000 Victorian public sector employees.[119] Mr Flynn is the Deputy Secretary of the Economic and Financial Policy Division of the Victorian Department of Treasury and Finance.

[189] In terms of wages outcomes, the VPS determination provides for a $1500 cash payment for eligible employees on 1 July 2012, and the following wage increases:

- 3.25% on 1 July 2012;
- 1.25% on 1 January 2013;
- 1.5% on 1 July 2013;
- 1.75% on 1 January 2014;
- 1.5% on 1 July 2014;
- 1.75% on 1 January 2015; and
- 1.5% on 1 July 2015.

[190] Clause 24.1 of the VPS determination deals with the $1500 bonus payment:

> "Employees (other than casual Employees) employed by the Employer at or after the date of commencement of this Determination who received a salary on 1 July 2012, together with Employees absent during the first 52 weeks of Parental Leave, will receive a lump sum payment of $1,500 (or pro rata equivalent for part time Employees).
>
> The Employee's ordinary hours for calculating the pro rata amount will be averaged over the three months immediately preceding 1 July 2012."

[191] The VPS determination came into operation from the first pay period on or after 23 July 2012 and will continue in force until 31 December 2015. The determination replaces the 2006 Victorian Public Service Agreement, which had a nominal expiry date of 30 June 2011.

[192] In his evidence Mr Flynn stated:

> "The VPS Determination was consistent with the Government's wages policy as all costs above 2.5% per annum were fully offset by genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations, and the ultimate Determination. Departments received no additional budget supplementation to fund the outcome of the VPS Determination."[120]

[193] The workplace reforms referred to by Mr Flynn are set out at paragraph [98] of his witness statement, as follows:

"(a) a better system, for managing underperformance and misconduct of employees, with improved disciplinary sanctions for under-performing staff;

(b) management now has more flexibility when implementing change in the workplace, which will ensure more timely implementation of change across the public service. The definition of major change is now consistent with the model clause in the Fair Work Act. This significant improvement provides guidance on when consultation is required in line with community standards;

(c) the substantiation requirements for personal and carer's leave have been clarified to provide a consistent interpretation across government;

(d) the introduction of consistent performance standards across all levels of the service will allow for a more consistent approach to performance management of all staff; and

(e) access to progression payments has also been clarified, with eligible staff needing to have been in the workplace for six months rather than three months."

[194] We set out the Victorian Government's wages policy later.

[195] In his evidence Mr Townsend stated, at paragraph [18], that as of 1 November 2012, the following public entities have agreed in principle to the salary increases set out in clause 24 of the VPS determination for their employees:

Public Transport Development Authority (Public Transport Victoria)	Statutory body under Division 1A, *Transport Integration Act* 2010
Australian Centre for the Moving Image	Statutory body under Part 3, *Film Act 2001*
Growth Areas Authority	Statutory body under Division 2 *Planning and Environment Act 1987*
Victorian State Emergency Service Authority	Statutory body under Part 2, *Victoria State Emergency Service Act 2005*
Library Board of Victoria t/as State Library of Victoria	Statutory body under Part 3, *Libraries Act 1988*
Council of Trustees of the National Gallery of Victoria	Statutory body under Part 1, *National Gallery of Victoria Act 1966*
State of Victoria - Parliament of Victoria (Parliamentary Officers)	Parliamentary officers employed under Departments of the Parliament, *Parliamentary Administration Act 2005*
Film Victoria	Statutory body under Part 2, *Film Act 2001*
Museums Board of Victoria	Statutory body under Part 3, *Museums Act 1983*

[196] A number of the Unions' witnesses commented on the similarity of duties performed by some DSE employees, particularly field staff involved in fire management, and Parks Victoria employees.[121] Mr Beechey made specific reference to the proposed 2012 *DSE Field Staff Agreement* (the 2012 Draft Agreement). The Unions accept that the 2012 Draft

Agreement referred to in the evidence of Mr Beechey is 'in principle' only. However, they submit that the uncontested evidence of Mr Beechey is that it was bargained for with DSE and did not contain a 'trade off or reduction in other conditions or entitlements'. The implication from that evidence was that the Commission should have regard to the wage outcomes in the 2012 Draft Agreement when assessing the wages claims in these proceedings.

[197] In our view little significance can be attached to the 2012 Draft Agreement reached in respect of DSE Field Staff. The agreement has not yet been approved by the Secretary of DSE nor has it been assessed by the Department of Treasury and Finance for consistency with government wages policy.[122] As Dr Appleford noted in his evidence:

> "It is only once the 2012 Draft Agreement is approved by Government, that it will be put to a vote of employees covered by it for approval and lodged with Fair Work Australia."[123]

[198] As we mentioned previously, the other aspects of the workplace determination are also relevant to the determination of the wages claims. We deal with the most significant aspects of the determination at paragraphs [63]-[142]. The benefits that will accrue to Parks Victoria as a result of a number of the measures included in the workplace determination are relevant to our consideration of the appropriate level of increases in wages and allowances. As noted by the Full Bench in Schweppes:

> "Ultimately, the wage increase determined depends upon a consideration of all the relevant circumstances including the other aspects of the determination."[124]

[199] The particular aspects of the workplace determination which provide a significant benefit to Parks Victoria are:

- consultations arrangements for the implementation of change;
- appointments by transfer;
- management of misconduct,
- disciplinary process and unsatisfactory work performance;
- overtime;
- alternative employment arrangements;
- progression;
- higher duties and
- rostered weekend employees.

[200] We note that while a number of other clauses in the determination provide a benefit to employees, the evidence does not suggest that the benefits accruing to the employees will impose any significant cost upon Parks Victoria.

[201] The position taken by Parks Victoria in these proceedings is said to be heavily influenced by the Victorian Government's wages policy, which applies to Parks Victoria. It is convenient to deal now with the relevance of that policy to the determination of the level of wage and allowance increases in the workplace determination. We begin with a description of the policy.

[202] The Victorian Government's wages policy provides for increases of 2.5% per annum and permits further wage increases 'which can be funded from identifiable and costed

productivity savings derived from genuine workforce reform'.[125] The policy is canvassed in the evidence of a number of witnesses called by Parks Victoria[126] and is set out in a document titled *Public Sector Workplace Relations Policies, August 2012*[127] at pp 7-8, as follows:

"Departments and public sector agencies must adhere to the wages policy as follows:

- A wage guideline rate of 2.5 per cent per annum, so that the total cost of an agreement (including conditions, allowances or any other agreement related payments) is no more than 2.5 per cent annualised.

- There is no ceiling or limit on wage outcomes. However, enterprise agreement outcomes in excess of the wage guideline rate must be fully offset by genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations. These gains must be bankable, i.e. they must generate savings that will be available to fund any outcome in excess of the wage guideline rate.

- Enterprise agreement outcomes within the wage guideline rate must be fiscally sustainable and funded through ongoing and financially viable sources.

- Departments and agencies will be required to demonstrate that the funding of costs associated with their agreements accords with this policy and with sound and sustainable financial practices. Departments and agencies should provide evidence of workforce reforms proposed to be achieved through the agreement negotiations.

- The use of revenue to fund an agreement is capped at the wage guideline rate of 2.5 per cent per annum. Enterprise agreement outcomes in excess of the wage guideline rate must be funded through genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations.

- Where entities receive a combination of revenue and DFM indexation, the combined contribution to funding an agreement outcome must not exceed 2.5 per cent per annum of the starting salary base (including on-costs).

In complying with wages policy, departments and agencies should be aware of the following:

- Where the Minister for Finance considers an agreement contains provisions or outcomes that have broader public sector impacts the agreement may be referred to the relevant Cabinet Committee for consideration.

- All agreed wage outcomes between employers and employees need to take into account the recent decision by the Commonwealth Government to increase the employer superannuation guarantee.

- In exceptional circumstances, if a department or agency anticipates that it will not be able to sustainably fund the likely outcome of negotiations, the portfolio Minister must submit a business case to the relevant Cabinet Committee at least twelve months prior to the commencement of negotiations for a new agreement. The submission should:

- request a base review be undertaken by DTF;
- outline a business case which supports the request;
- demonstrate prima facie that cost increases flowing from the likely outcome of negotiations cannot be managed within the department's or agency's total budget without adversely affecting service delivery; and request a base review be undertaken by DTF;
- guarantee that any additional revenue sources identified by a price review will not be used for other purposes and will remain available until the relevant agreement is approved by Fair Work Australia (FWA) and commences operation.

  Date of First Pay Increase

  - The operative date for the first increase can be no earlier than the date in-principle agreement is reached between the negotiating parties and should not pre-date the nominal expiry date of the existing agreement. Agencies are required to submit a separate application to the PSIR Unit to lock in the operative date for the first salary increase. (see template application in the guidance for Public Sector Agencies)
  - The actual payment of salary increases cannot be made until the agreement commences operation (i.e. approval by FWA)."

[203] Parks Victoria submitted that the government's wages policy represents 'sound, fiscally responsible economic management, consistent with economic principles which seeks to improve the living standards of all Victorians'. Three reasons are advanced as to why this is said to be so:

> (a) the premise of basing wage outcomes in the target inflation rate plus realised productivity gains is financially and economically sound;
>
> (b) the consequences of providing wage increases which go beyond this are likely to have a negative impact on the Victorian Government's fiscal sustainability and the State's economic growth (particularly having regard to the very significant financial consequences of flow on to other public sector employees); and
>
> (c) it is particularly important for Victoria to be fiscally responsible and disciplined in economically uncertain times currently afflicting the global, Australian and Victorian economies.

[204] Parks Victoria submitted that a detailed consideration of the evidence (almost all of which was unchallenged) supported the following propositions:

> (a) the premise of basing wage outcomes on the target inflation rate plus realised productivity gains is financially and economically sound;
>
> (b) the particular wages policy in question, having regard to current and projected economic conditions, is fiscally conservative, reasonable and not unfair;

(c) the consequences of providing wage increases which go beyond the policy are likely to have a negative impact on the State's economic growth and will put at risk its fiscal sustainability (particularly having regard to the very significant financial consequences of flow on to other public sector employees);

(d) it is particularly important for Victoria to be fiscally responsible and disciplined in economically uncertain times currently afflicting the global, Australian and Victorian economies;

(e) the consequences for Parks Victoria of an award of wages outside of government wages policy are potentially significant; and

(f) there are broader public interest implications of an award of wage increases in excess of government wages policy.

[205] Parks Victoria accepts that there is no formula or methodology to assess wage claims in relation to a workplace determination and also submitted that the Victorian Government wages policy is a relevant, but not determinative, consideration.

[206] No party contended that the government's wages policy is binding on the Commission. Nor does there appear to be any debate that the government's wages policy is relevant, but not determinative. In this regard the Unions submit the government's wages policy is 'no more than a negotiating position' and the Commission should give it no greater weight than that.

[207] In our view, the Victorian Government's wages policy is relevant to our consideration of the level of wage increases to be included within the workplace determination. The policy is, of course, not determinative of that issue, however, given the size of the state government sector and the role of the government in allocating scarce resources to various public services (such as health, education and justice) it is appropriate to accord the policy more weight than one would to the negotiating position of parties without such responsibilities. Of course, such a policy cannot displace the Commission's consideration of the range of statutory factors to which it must have regard.

[208] In the course of his evidence Mr Flynn dealt with the practical application of the Government's wages policy. Mr Flynn was authorised by the State of Victoria to make his witness statement and stated that part of the purpose of his evidence was to speak on behalf of the government in relation to these proceedings.[128] In his witness statement Mr Flynn stated that the VPS determination was consistent with the government's wages policy.[129] During the course of his oral evidence Mr Flynn responded to a series of questions about the VPS determination:

"I think it's about 12.5 per cent over roughly three and a half years. Is that right? Is that from the commencement date to the nominal expiry date?---No, the way we calculate it was from the expiry of the previous agreement to the expiry of the new agreement. So that's a bit over - about four and a half years.

I see?---So June 2011 was our starting point.

So June 2011 was the starting pointing?---Yes.

> All right?---So that gives you about four and a half years.
>
> My understanding of the evidence of other witnesses in these proceedings is different to that, that you only look at the term of the agreement in assessing government wages policy. But you're saying you look at the nominal expiry date of the previous agreement and then the nominal expiry date of the new agreement, and that's the period you look at. Is that right?---Yes, that's the way that we do it."[130]

[209] Mr Flynn's evidence is significant because it makes clear the period over which an assessment is made as to whether an agreement or workplace determination is consistent with the government's wages policy. In applying the government's wages policy the period over which the assessment is made determines the wage increases which may be granted. An example illustrates this point.

[210] Parks Victoria submitted that the government's wages policy provides for increases of 2.5% per annum plus an amount 'for genuine productivity gains linked to workforce reform achieved as part of the agreement negotiations'. Parks Victoria submitted that the 'genuine productivity gains' within the draft determination amount to a 1% increase in wages over the life of the workplace determination. It is on that basis that Parks Victoria submitted that the wage increases should be:

- 3% on commencement of the workplace determination;
- 2.75% after 12 months; and
- 2.75% after 24 months.

[211] These increases amount to 8.5% over the term of the workplace determination.[131] Parks Victoria's primary position is predicated on the relevant period for the purpose of the government's wages policy, being three years from the commencement of the workplace determination until its nominal expiry date.

[212] On Mr Flynn's evidence a higher aggregate wage increase may be determined, consistent with the government's wages policy. According to Mr Flynn, the relevant period is from the nominal expiry date of the 2008 Agreement (i.e. 31 May 2011), until the nominal expiry date of the proposed determination (i.e. 3 years after commencement of the workplace determination). If the workplace determination were to commence on 1 March 2013 then the relevant period would be four years and 9 months. Applying Mr Flynn's approach suggests that the Victorian Government's guideline rate of 2.5% per annum over this period would yield an increase of 11.875% (i.e. 4.75 years at 2.5%). Add to this amount the 1% increase, which Parks Victoria submitted is the value of the productivity gains, and the total increase amounts to 12.875%. On this basis, on Parks Victoria's own case, a workplace determination which provided for wage increases totalling 12.875% would be consistent with the government's wages policy.

[213] We now turn to the submissions advanced by the parties in support of their respective positions. It is convenient to group those submissions by reference to the factors in s. 275 of the FW Act.

(i) ***Merit*** *(s.275(a))*

[214] As we have mentioned, the position taken by Parks Victoria is said to be heavily influenced by the Victorian Government's wages policy. As to other relevant considerations, Parks Victoria submitted that the Unions' proposal for 4% annual increases exceeds:

- projected inflation (at both national and state level);
- projected national and state wages growth;
- every past wage increase for Parks Victoria since 1998 (except two);
- government wages policy;
- the recent consent outcome in the VPS determination; and
- the other in principle agreements (set out in paragraph [18] of Exhibit Unions 6 (see paragraph [195] of this decision)).

[215] Parks Victoria also submitted that the wage increases proposed by the Unions must be assessed in the context of a tightened budgetary regime at state level; a significant funding shortfall at Parks Victoria; and reductions in employment and employment opportunities at Parks Victoria.

[216] The Unions advanced four points in support of the submission that their wage proposal is justified on merit:

(i) The decline in real wages that has been suffered by the employees to be covered by the workplace determination between 30 May 2011 and now, and as forecast by Mr Chris Richardson.

(ii) The benefits the employer will receive over the life of the workplace determination from the workplace determination itself, including but not limited to beneficial changes it won to corresponding conditions prescribed by the 2008 Agreement.

(iii) Productivity improvements during the life of the workplace determination. In the context of a matter at issue concerning wages, productivity improvement bears on merit.

(iv) Wage movements in comparable instruments and historical wage movements under previous instruments binding on the parties.

[217] Two of the increases proposed by the Unions are intended to compensate employees for the decline in their real wages: an increase of 3.5% on 1 June 2012; and a further 2.3% increase on 1 February 2013 (on the presumed commencement date of the workplace determination). The Unions submitted that the quantum of these increases is derived from movements in the Wage Price Index.

[218] The Unions submitted that the employees did not share in the wage movements enjoyed by the general Victorian community in 2011–12. In fact, their wages have, in real terms, declined when increases in the cost of living are taken into account. The last pay increase payable under the 2008 Agreement was on 1 June 2010 – it was 3.25%. In the 2010–11 financial year, headline CPI increased by 3.3% (0.05% more than the last wage increase). In the 2011–12 financial year, the employees' wages fell further behind by 2.3%. In the first quarter of the 2012–13 financial year the CPI in Melbourne increased by 1.7%.

[219] The Unions also submitted that the Commission should be mindful of the fact that, on Parks Victoria's own case there, is an unconditional component of the Victorian Government's wages policy, namely 2.5% per annum. This is the amount budgeted for by the government as an 'annualised wage guideline increase'.

[220] For our part we reject the proposition that the relevant period for the assessment of the decline in the employees' real wages is the date of their last wage increase under the 2008 Agreement (i.e. 1 June 2010). In our view the wage increases provided in the 2008 Agreement are to be understood as covering the period up until the nominal expiry date of that agreement.

[221] The second merit argument advanced by the Unions is that the benefit to the employer arising from the other terms of the workplace determination provide a fair justification for wage increases above what is necessary to maintain real wages.

[222] The third merit argument, productivity improvements, is dealt with under factor s.275(e).

[223] The final point advanced by the Unions in support of the merit of their proposed wage increases concerns wage movements in comparable instruments and historical wage movements for Parks Victoria's employees.

[224] We deal with the material relating to wage movements in comparable instruments at paragraphs [186] - [197] of this decision.

[225] In relation to the VPS determination the Unions submitted that:

> "The rates of pay that stem from the Victorian Public Service Workplace Determination are apposite rates of pay for these employees, and hence relevant to the assessment of the respective wages proposals. The VPS rates demonstrate that the PV proposal is undervalued ...
>
> A key difference between the Victorian Public Service Workplace Determination and the Determination is that the former increases rates, on a per annum basis, 4 times over 3.5 years. Excluding the proposed compensation of 3.5% and the $1500 payable under the Victorian Public Service Workplace Determination, the Unions' proposal is for a Determination that would provide for one 6.3% increase (which includes 2.3% compensation) and two 4% increases. The total value of the percentage increases under the Victorian Public Service Workplace Determination is 12.5%. If converted to 3 per annum wage increases, the per annum increases would be 4.16%."[132]

[226] In relation to the history of previous wage increases afforded to Parks Victoria's employees the Unions submitted that:

> "The uncontested evidence of Mr Price, based on the terms of industrial agreements made between the parties since 1998, is that rates of increase have never been less than 3%. Moreover, PV employees have enjoyed regular and consistent annual salary increases. Before the expiry of the 2008 Agreement, the longest delay in pay increases due to bargaining was 12 months. If accepted by the Tribunal, the PV wages proposal would be the lowest pay outcome for PV employees in 14 years."[133]

[227] The Unions also relied on s.578(b) of the Act and, in particular, the requirement that the Commission take into account equity, good conscience and the merits of the matter in performing its functions. In this context the Unions point to what they submitted is inconsistent conduct by the State of Victoria in relation to the application of its own wages policy. In particular:

> "The uncontested evidence of Mr Townsend is that the State Government's agreement to the rates of pay in the Victorian Public Service Workplace Determination 2012 was not consistent with the pay policy, as explained by Mr Flynn. Mr Flynn did not respond to Mr Townsend's evidence, despite having read his statement. His own evidence on the topic was not from personal knowledge. Further, whilst the evidence of Mr Jackson and Mr Flynn is that pay policy permits of no retrospectivity, that was not the position adopted by the State itself before the Tribunal when the Victorian Public Service Workplace Determination 2012 was made. The effective date of the first pay increase under that determination is 1 July 2012. It came into force on 23 July 2012...
>
> The evidence before the Tribunal demonstrates that pay policy is no more than a negotiating position, which as one might expect, which for analogous employees has not been strictly applied in accordance with its terms. The Tribunal should give it no greater weight than that. It does not supply the basis for 'some principle or concept of remuneration."[134]

[228] As to the evidence in respect of the Victorian economy, the Unions submitted that this is of little assistance to the Commission as Parks Victoria employees presently account for only 0.4% of the Victorian public sector. The Unions submitted that:

> "There is no evidence that the Unions' wages proposal would, if accepted, imperil the State budget, or worsen broader Victorian economic conditions. In any event, Mr Richardson and the Victorian Treasury forecast an improvement in the Victorian economy over the life of the Determination, returning the State to modest levels of growth over the period of the Determination."[135]

[229] The Unions also pointed to the contingency provision in the Victorian budget, which is available for unexpected wage increases.

[230] We acknowledge the relevance of the history of previous wage increases afforded to Parks Victoria's employees, but we are not persuaded by the Unions' submissions as to the weight to be attached to the evidence in respect of the Victorian economy. In our view the economic context is a significant factor in determining the level of wage increases in a workplace determination.

[231] As to the final matter raised by the Unions, we are not persuaded that the contingency provision in the Victorian budget is relevant in the context of this case. Parks Victoria is not asserting incapacity to pay.

(ii) ***The interests of the employer and employees*** *(s.275(c))*

[232] Parks Victoria submitted that in assessing and balancing the interests of Parks Victoria and its employees the consequences of the level of wages increases determined is a relevant consideration. In this context Parks Victoria submitted that, subject to further funding allocations from DSE or additional allocations from the budget contingency fund (neither of which are guaranteed), the likely consequences of wage increases in excess of government wages policy and inflation are:

- a further deterioration of Parks Victoria's already difficult financial situation;
- a further deterioration in Parks Victoria's viability; and
- reduced employment or reduced employment opportunities at Parks Victoria.[136]

[233] The Unions submitted that this factor calls for an appropriate balance between the legitimate expectations of the employees and the employer.[137] In that regard it was submitted that the employees have a legitimate expectation that they will share in the benefits provided to Parks Victoria by the other aspects of the workplace determination and in the benefits provided by their increased productivity. In this context the Unions referred to Mr Richardson's forecasts of wages growth of 4% annually as a sensible outcome and his statement that productivity gains 'may put pressure on employers to share more of these gains with employees'.

[234] As to the employer's interests the Unions submitted:

> "There is no legitimate expectation that is impaired or harmed by the Unions' pay proposal. To the extent the cost impost of the Unions' wages proposal is an interest requiring consideration under this factor, it is submitted that this matter should be given little weight by the Tribunal. On the claims made by it in these proceedings in all but pay and ceiling point performance pay PV has already met its objectives and hence satisfied its interests.
>
> The Unions accept that their pay proposal will cost more than the proposal of PV. However, pay increases otherwise justified on merit ought not to be subject to discount by factors beyond employee control, such as the budget choices made by PV and the State Government in its funding of PV. Nor is that necessary in this case.
>
> There is no evidence of any connection between the financial position of Parks Victoria and the benefits and burdens assumed by employees and PV under the Determination, or the work required of employees. PV is free to manage its costs as it sees fit, including by reducing the size of its workforce. It has the means to do that voluntarily, as it is doing, and compulsorily, through clause 5.10 of the Determination. The decision to reduce employment in PV is a decision made by PV to reduce its costs. No aspect of the Determination denies PV's right to raise or lower levels of employment."[138]

[235] The unions also submitted that there is no reliable evidence as to the cost impact of the Unions' pay proposal on Parks Victoria, nor is any submission or evidence advanced in respect of actual incapacity to pay.

(iii) ***Public interest*** *(s.275(d))*

[236] Parks Victoria submitted that the public interest points heavily in favour of wage increases consistent with government wages policy and inflation. Parks Victoria pointed to the adverse impact on inflation in the event that the Commission award increases in excess of movements in the Consumer Price Index, which were not offset by productivity gains. Parks Victoria also pointed to the potential negative impacts on employment and the consequences of expenses exceeding revenues in a public sector environment. In particular, Parks Victoria submitted:

> "Further redundancies or reductions in recruitment, caused by a PV budgetary position which is continuing at level or further deteriorating, which in turn is caused by cost increases beyond budget because of higher than budgeted wage increases, are negative public interest considerations ...
>
> In this case when the public sector is at issue, choices are being made every day about the allocation of limited resources to different interest groups across the Victorian public, and hence, across different public sector agencies. These decisions and competing interests are described in the government budget papers.
>
> The 'public interest' is negatively affected when an agency (here, PV) requires more funds, whether from some further allocation of funds or some 'contingency fund', because the State government in the 'public interest' has already allocated those funds elsewhere, or if it has not, it does not have them available to allocate elsewhere. Someone else (other than the PV employees) loses out."[139]

[237] Parks Victoria also submitted that the flow on effects of determining increases which are inconsistent with government wage policy are significant.

[238] The Unions' submission in relation to this factor is set out at paragraphs [127]-[130] of its final submission:

> "In this case, as PV is a public authority performing statutory functions, there is a public interest in ensuring those functions are carried out. The initiatives in the Determination that enhance flexibility and efficiency for PV have a public benefit because, as Mr Mead stated in evidence, they enable PV to deliver on its corporate plan. The corresponding public benefit is that employees subject to the provisions of the Determination and who assume the burden of delivery are remunerated fairly, reflecting the flexibility and efficiency so conferred. So much is the corollary of the statutory expectation these employees have under the *Public Administration Act 2004* to fair, reasonable and meritorious treatment in employment.
>
> There is no evidence that the Unions' pay proposal will have any wider effects on the State's budget, other services or the broader economy.

> The Unions have submitted that the pay policy is a negotiating position adopted by the State Government in bargaining for itself and other public sector agencies subject to it. The evidence of Mr Mead was that for increases above 2.5% offsets were required through cheaper terms and conditions. It may be useful to the State as a means of maintaining or reducing labour costs, but that is not a public interest factor.
>
> If the Tribunal is satisfied that pay policy will not produce for employees fair rates of salary increase, there is no other wider public interest that demands that it be given effect according to its terms by adopting rates of increase that rely on it, such as those proposed by PV. Given s. 8 of the *Public Administration Act 2004*, the public interest is to the contrary. Further, whilst the above 2.5% component of the policy is cast in terms of productivity its focus is, as Mr Flynn has said, about reducing labour input costs. That has nothing to do with productivity and is not for that reason alone is not to be counted as a public interest consideration."

[239] In our view the submission by Parks Victoria as to the flow on consequences of determining increases which are inconsistent with the government's wages policy lacks particularity. We agree with the Unions' submission as to the absence of evidence in support of this proposition.

(iv) ***Improvement in productivity in the enterprise*** *(s.275(e))*

[240] Parks Victoria submitted that there are no discernible productivity improvements or implications of any particular wages outcome.

[241] The Unions submitted that productivity in the enterprise will be improved over the life of the workplace determination[140] and the Unions' wages proposal explicitly shares these productivity improvements with the employees concerned.

[242] We are not persuaded that the Unions' wages proposal can properly be seen as improving productivity in Parks Victoria (within the meaning of s.275(e)). The submission advanced is really a matter which goes to our consideration of the merits and the interests of the parties.

(v) ***Conduct during bargaining/good faith bargaining*** (ss.275(f) and (g))

[243] No party contended that these factors have any relevant application to the matters at issue in this case.

(v) ***Incentives to bargain at a later time*** *(s.275(h))*

[244] Parks Victoria did not contend that this factor had any relevant application in relation to this matter at issue.

[245] The Unions submitted that acceptance of the pay proposal advanced by Parks Victoria will act as a disincentive to future bargaining:

> "... the Tribunal can be satisfied that inclusion of a term in the Determination that gives effect to the PV pay proposal, reliant as it is on the pay policy, will operate as a disincentive to future bargaining . It proved to be so in the failed bargaining that led to

these proceedings. To include the wages term PV proposes will encourage future use of that pay policy. The Unions confine this submission to the pay policy as currently in force, not a pay policy per se."[141]

[246] Given the decision we propose to make in relation to this matter at issue the consideration raised by the Unions does not arise.

[247] We now turn to our consideration of the submissions in relation to this matter at issue.

[248] As we have mentioned, the assessment of wage increases in the context of workplace determinations calls for the exercise of a broad judgement based on a range of considerations. We have had regard to the matters put by the parties and to the relevant statutory considerations. In particular we note:

- The increase in the minimum wage determined by the Commission to apply from 1 July 2012 was 2.9%.

- The general economic environment, including actual and forecast movements in the consumer price index. The ABS measures of inflation which eliminate volatile items have increased by about 2.5% from the September Quarter 2011 to the September Quarter 2012 and the forecast for 2013–14 and 2014–15 is for per annum increases of 2.5%. We note that the December quarter 2013 CPI is broadly consistent with those forecasts.[142]

- The time that has elapsed since the nominal expiry of the 2008 Agreement. The proposed 4.5% increase from 1 October 2012 compensates employees for the 21 month period from 1 June 2011 – 1 March 2013 (that is from the nominal expiry of the 2008 Agreement until the operative date of the determination).

- The benefits that have, and will, accrue to Parks Victoria as a consequence of its attrition policy and the VDP.

- Parks Victoria's financial position and, in particular, the identified shortfall in its funding.

- Wages outcomes for public sector employees generally. The VPS determination is particularly relevant in this regard and the overall increase is comparable to the wage outcome in that workplace determination, given that the period which is relevant to the increases in this workplace determination is longer than that in the VPS determination.

- The wages outcome is broadly consistent with the Victorian Government's wages policy.

- The other aspects of the determination including those which are of benefit to Parks Victoria.

[249] In the circumstances we have decided to incorporate the following increases in wages and allowances in the workplace determination:

- 1 October 2012 4.5%

- 1 March 2013 3.0%
- 1 March 2014 3.0%
- 1 March 2015 3.0%

[250] We now turn to our consideration of the other matter at issue, ceiling point performance pay.

5.2 C*eiling point lump sum performance pay*

[251] Under the 2008 Agreement, employees are graded at Grades 1 to 8. Grades 1 to 7 have a base salary point then a series of further steps within each grade, up to a 'ceiling point'. Grade 8 (Senior Officer) does not have separate salary points, rather it is broken into levels (SO1 and SO2) with each level having a separate salary range.[143]

[252] The ceiling point is the highest salary increment within each grade.

[253] The 2008 Agreement provides for an additional annual payment, described as performance pay for those employees who are at the ceiling point for their grade. This payment is in the form of a cash bonus equivalent to the 'progressive step amount' for that grade and does not result in an increase in the employee's substantive salary. Clause 7.8.2(2) of the 2008 Agreement relevantly provides:

> "... (b) Where an employee's substantive salary is at the designated ceiling point for his/her Grade, performance pay will be in the form of a cash bonus equivalent to the 'progressive step amount' for that grade and will not be an increase in substantive salary.
>
> (c) Performance pay will be effective from the start of the first pay period on or following each of the following dates: 1 July 2008; 1 July 2009 and 1 July 2010, subject to the following requirements being met:
>
> (i) Employees collectively have made a substantial contribution to the successful outcome of the Parks Victoria Business Plan for the financial year, as determined by the Chief Executive.
>
> (ii) The Employee individually has satisfactorily met both the performance targets and job behaviours described in his/her Work Plan for the year."

[254] Clause 7.8.2(2)(c) of the 2008 Agreement does not provide for any ongoing entitlement to ceiling point performance pay. It provides specific occasions when any ceiling point performance pay was payable and that entitlement ceased after the first pay period after 1 June 2010. Ceiling point performance pay was not paid in June 2011 or June 2012.

[255] Parks Victoria contended that ceiling point performance pay was a specific pay outcome negotiated as part of the 2008 Agreement and it was not intended that the provision be rolled over or otherwise repeated in subsequent enterprise agreements. On this basis it was put that there is no cogent or merit based reason why the provision ought to be re-introduced in the workplace determination.

[256] There is a conflict in the evidence regarding the nature of the relevant provision in the 2008 Agreement.

[257] In his evidence, Mr Mead stated that during the negotiations for the 2008 Agreement ceiling point lump sum performance pay was presented to employees as a pay outcome.[144] At paragraph 89 of his statement Mr Mead stated that:

> "It is my view that both PV and the Unions/Employees understood that during the negotiations for the 2008 Agreement, that the payment of the lump sum bonus for those at the ceiling point of their Grade was a specific pay outcome arising from the 2008 Agreement, and would not be an ongoing entitlement in future agreements."

[258] In his evidence Mr Davis denied that the ceiling point performance payments in the 2008 Agreement was a one-off benefit as part of the salary outcome for that agreement. In his first statement Mr Davis said, at paragraph [11]:

> "I deny what Mead says at paragraph 69 that the Unions 'understood during the negotiations' that it was a 'specific pay outcome arising from the 2008 Agreement and would not be an ongoing entitlement in future agreements'. That wasn't said during negotiations. It was not a commitment given by the Unions. The entitlement was the continuation of an entitlement that existed in the agreement we were replacing, the 2004 Parks Victoria Agreement. It was roll-over into the 2008 Agreement."[145]

[259] Ultimately it was common ground that it was unnecessary for us to resolve this conflict as the subjective intentions of the parties to the 2008 Agreement are not relevant to its proper construction and the Unions do not rely on the fact that ceiling point performance pay was a condition of the 2008 Agreement. At paragraph [153] of their final written submissions the Unions submitted that:

> "The Unions do not rely on the fact that performance pay for these employees was term and condition of the 2008 Agreement. The claim is justified on equitable grounds under the Determination as it stands. No weight should be given to PV's resistance of this condition on the ground of Mr Mead's subjective belief that performance pay for ceiling point employees was a 'pay outcome' of the 2008 Agreement. The uncontested evidence of Mr Davis is that it was not. However, the hopes and expectations of a party cannot sensibly be relied upon to deny a claim otherwise justified on its merits, as this claim is."

[260] Parks Victoria also submitted that the need to resolve this conflict has been overtaken by the terms of the 2008 Agreement itself and the proper characterisation of the Unions' claim in the present matter. Parks Victoria contended that what the Unions seek is not the rollover of the entitlement in the 2008 Agreement. Ceiling point performance pay has always been limited by reference to specific years. The entitlement now sought by the Unions is not so limited, but is ongoing.

[261] We now turn to the submissions advanced by the parties in support of their respective positions. It is convenient to group these submissions by reference to the factors in s.275 of the FW Act.

(i) ***Merit*** *(s.275(a))*

[262] As we have noted, the Unions did not rely on the inclusion of ceiling point performance pay in the 2008 Agreement and, in any event, the Unions are not seeking a rollover of the relevant terms in the 2008 Agreement. In that sense the Unions are not seeking to retain the status quo. This is significant because there is some support for the proposition that it is for the claimant in relation to any particular change from the status quo to make out a basis for that change.[146]

[263] Parks Victoria submitted that the following matters are relevant to an assessment of the merits of ceiling point performance pay:

(a) *The current status quo*: in this sense Parks Victoria contended that its position in these proceedings ought to be characterised as the retention of the status quo (as at this time), that is there is no entitlement to ceiling point performance pay, and the Unions' position is the reintroduction or reinvigoration of an entitlement that has ceased. On this basis Parks Victoria submitted that it is for the Unions to demonstrate the merit and need for the addition of ceiling point performance pay in the determination.

(b) *Government wages policy*: Mr Mead's evidence was that the inclusion of this claim in the workplace determination would be inconsistent with the Victorian Government's wages policy as the substantial additional cost would not be offset by the other provisions in the draft determination.[147]

(c) *Parks Victoria's financial position*: Parks Victoria submitted that granting the claim will negatively affect Parks Victoria's financial position by imposing unfunded costs without any guarantee of commensurate funding and this will not be in the interests of either Parks Victoria or its employees.

(d) *The distinction between outcomes for ceiling point and non-ceiling point employees:* The Unions contended that not including ceiling point performance pay will be discriminatory. The discrimination is said to arise as a result of all employees having to comply with clause 7.7 of the draft determination. In circumstances where only non–ceiling point employees will receive a direct financial benefit for achieving their goals through that process, Parks Victoria contended that this submission should be rejected because it does not compare 'apples with apples'.

Parks Victoria rejected the proposition that it would be unfair to not include ceiling point performance pay and yet require employees at the ceiling point to participate in annual performance reviews and complete work and development plans (which really go no further than setting out the requirements of their job).[148] Parks Victoria submitted that such a proposition lacks merit; misapprehends the purpose of such reviews and plans, and elevates an employee's participation in such a process to something akin to an additional duty or task, deserving of some additional allowance or payment.

(e) *The lack of any corresponding provision in any other public sector agreement:* The Unions' proposal is not consistent with the consent position adopted by the CPSU and the State of Victoria in the VPS determination which, despite having a

substantially similar progression clause, does not provide for ceiling point performance pay. In relation to this point Parks Victoria submitted:

"No evidence was led by the Unions as to whether (and if so, why) the absence of this entitlement from the VPS Workplace Determination also operates in an unfair and discriminatory fashion, as they argue in the current proceedings.

> In these circumstances, it cannot be said that including ceiling point performance pay in this workplace determination has industrial merit and equity, particularly when the initial basis for the Unions' proposed progression clause (subsequently agreed between the parties) was its similarity with the VPS Workplace Determination.
>
> Further, when assessing these particular issues, the potential that the inclusion of this entitlement (on this basis) will create a 'flow on' effect for other government agencies that do not currently have ceiling point performance pay (and the commensurate increased costs of this), cannot be ignored."[149]

[264] The essence of the Unions' merit argument was that the removal of ceiling point performance pay will be discriminatory as it will result in different and less favourable treatment for ceiling point employees:

"Under the Determination as it now stands, the same rules that apply to elicit performance from those below a ceiling point will apply to those who have arrived at that point. The same performance management processes will apply to both groups of employees if they don't perform.

An agreed term is clause 7.7.1. This clause makes clear that all employees will be required to undertake a work and development plan, including as to their progress and performance. In the progression clause that has been agreed, this clause forms the basis for setting progression criteria.

Under the Unions' proposal, progression payments and performance payments are justified on the same basis. That basis is identified in clause 7.4.1(c)(v) as the:

> "Central to progression is the need for supervisors and managers, in consultation with employees, to determine what should, and can, be delivered to warrant progression through a combination of increasing capability, productivity, performance and professionalism. This interaction between managers and employees gives authority and integrity to the structure and its sustainability in the long term."

The requirement and the objective of clause 7.4.1(c)(v) is for individual employees to increase their capability, productivity, performance and professionalism. This corresponds with the first two outcomes PV obtains through the cooperation obligation in clause 4.4(a), and the last. The quid pro quo is a sum of money. However, under the PV proposal there is nothing more for ceiling point employees. In this way, the PV proposal penalises performing employees. It would also penalise employees who choose to maintain their value, but not increase it. On the evidence, it is intended that they be subject to the unsatisfactory work performance process in clause 5.13."[150]

[265] The Unions also contended that such differential treatment was conceded by Mr Mead:

> "See, your proposal - that is, Parks' proposal, Mr Mead, proposes, does it not, to discriminate as between one group of people and another, for the same output that's required?--No.
>
> Well, under the agreed progression criteria, everyone is subject to the same progression rules, aren't they?--or performance rules, put it that way.
>
> The difference is that half your workforce is entitled to a payment for performance and the other half isn't?--Well, if you're at the top of the band for the work value for that particular grade, you've gone as far as you can go. If you're at the lower steps and you have salary points available, you can progress up to the top of the ceiling. But at the ceiling, it stops.
>
> I understand that. But in the event, isn't the logical response to relieve the ceiling point employees from the obligation to set progression criteria with their managers, or performance criteria?--No.
>
> Well, what's the rationale for treating one group of employees differently to another, for what is the same performance standard?-- I don't accept we're treating them differently. We want them all to participate in the performance management plan, in terms of their setting performance targets, undertaking development initiatives. It's all about them doing their job, being clear about what their outputs are, being clear about what their development needs are. The only difference is that if you are at the lower end of the band, you have access to a progression step. If you're at the ceiling, then you don't...
>
> So you reward one group of employees for performance, but not another. Doesn't that follow?---No. They're rewarded through their performance on the basis of their salary. So basically, for that, what we expect people to do in relation to their day-to-day work.
>
> Yes, but, Mr Mead, the salary that you pay - well, someone who is at the top of the ceiling point sits down with their manager and says, "All right, over the course of the year, we agree that I'm going to do the following things that we identify that are going to be of value to Parks Victoria." You accept that?---Yes.
>
> Someone at step 5.3 sits down with their manager, identifies the things that they might do that might increase their value to Parks Victoria. Isn't that correct?
> ---Yes.
>
> Isn't the difference, Mr Mead, that if the grade 5.3 employee achieves their criteria, they get rewarded with a pay increment?---If they meet their progression criteria, they can progress to the next salary point in the band.
>
> They get more money than they previously did?---They progress to the next salary point in the band.
>
> Which is more money than they previously had, isn't it?---Yes.

> A ceiling point employee who does exactly the same thing, stays where they are. Isn't that correct? In salary terms?---Yes. But they are at a higher salary for that work value anyway, because they're at the top of the work value for that particular work value band."[151]

[266] As we have noted, Parks Victoria contended that the Unions' discrimination argument is not based on an 'apples with apples' comparison. At paragraphs [128] - [130] of its final written submissions Parks Victoria submitted that:

> "In terms of progression within a Grade, each Grade (including each progression step within a Grade) has an assigned work value, relative to the salary payable for that Grade or step. The payment of progression pay to employees progressing to a new step, appropriately reflects the necessary change in work value for that new step.
>
> Whilst the method of setting performance criteria may be the same for all employees, the expectations of an employee's performance at each new step up a Grade will increase correspondingly. The Unions thereby misconstrue the purpose of the payments for progression as "more money for meeting their performance targets." This is not the case, as progression payments are payments attributable not only to meeting performance targets, but to a change in Grade point.
>
> By comparison and despite the similarities in setting performance criteria and assessing performance against them, there is no increase in either the work value or expectations for employees at the top of their Grade, which would warrant any additional 'performance payment.' Parks Victoria submits that the meeting of performance targets by these employees if fairly remunerated in both the higher salary they receive, plus any annual increases payable under the workplace determination (which by virtue of being percentage increases, are comparatively higher than those for an employee at a lower progression point in any event)."[152]

[267] We are not satisfied that the merits favour the inclusion of ceiling point performance pay in the workplace determination.

[268] We accept Mr Mead's evidence that the requirement for employees at the top of their salary band to have a performance and development plan is encompassed within the ceiling point salary level. Further, Mr Mead's evidence is:

> "...the performance and development plan specifies what an employee would be required to do on a day to day basis in terms of clarifying their goals, clarifying their outputs, so they are able to undertake the work which they are remunerated for."[153]

[269] We are not persuaded that the failure to include ceiling point performance pay in the determination would be discriminatory.

[270] We also note that the Unions did not identify any corresponding provision in any other public service agreement, and the costs of including the proposed clause are significant.

[271] A substantial proportion of the employees to be covered by the workplace determination are at the ceiling point of their grade. As at 1 July 2012, there were 528

employees (49.3% of employees) at the ceiling of their grade. Having regard to the progression provisions of the 2008 Agreement and in the workplace determination, it is estimated that almost 70 per cent of employees covered by the workplace determination will be at the ceiling point of their grade by 1 July 2014.[154]

(ii) ***The interests of the employer and employees*** (s.275(c))

[272] We agree with the Full Bench in *CFMEU v Curragh Queensland Mining Ltd*[155] that this factor calls for a consideration of the appropriate balance between the *legitimate* expectations of the employer(s) and employees.[156]

[273] Parks Victoria submitted that it is not in its interests to include ceiling point performance pay in the workplace determination as it will almost certainly worsen its financial position, whereas the Unions contended that the proposal is in the interests of employees because it meets their legitimate expectation that they will be fairly treated. The Unions also submitted that to meet the legitimate expectation of employees they will share in the productivity and capacity improvements required by their employers.

[274] We accept that employees have a legitimate expectation that they will be fairly treated, but that legitimate expectation does not support the Unions' claim. As we have mentioned, the failure to adopt the claim will not be discriminatory and the merits of the proposal do not favour its inclusion in the workplace determination. We also accept that employees have a legitimate expectation that they will share in productivity improvements, but there is little evidence of the level of productivity benefits flowing from ceiling point employees undertaking performance and development planning.

(iii) ***Public interest*** *(s.275(d))*

[275] Parks Victoria submitted that there are no immediate or compelling public interest considerations relevant to this issue.

[276] The Unions contended that their proposal is consistent with Parks Victoria's obligations under s.8(a) and (b) of the *Public Administration Act 2004* (Vic) to ensure meritorious, fair and reasonable treatment. It was submitted that ceiling point performance pay operates as a reward for increases in valuable employee output and as such is in the public interest.

[277] We are not persuaded that the proposed clause is in the public interest, having regard to the lack of merit associated with the proposal.

(iv) ***Improvement in productivity in the enterprise*** *(s.275(e))*

[278] For the reasons advanced in respect of the public interest, the Unions submitted that ceiling point performance pay is a productivity improvement measure.

[279] We are not persuaded that there are any identifiable productivity impacts in relation to this issue.

(v) ***Conduct during bargaining/good faith bargaining*** *(s.275(f) and (g))*

[280] No party contended that these factors have any relevant application to the matters at issue in this case.

(vi) ***Incentives to bargain at a later time*** *(s.275(b))*

[281] Parks Victoria submitted that the exclusion of ceiling point performance pay from the workplace determination is more likely to operate as an incentive to future bargaining:

> "... any contention of the Unions that PV's position gives rise to discrimination between two groups of employees, labours under an erroneous premise. The two groups referred to are not practically, nor substantively, the same.
>
> With this in mind, any 'performance pay' regime for employees at the ceiling point of their Grade, should either focus on changes to moving between Grades, or the design of a specific regime directly relevant and tailored to such employees. If this is what the Unions seek, the rejection of ceiling point performance pay now will incentivise the Unions to bargain for it at some later time."[157]

[282] The Unions submitted that, whether or not the proposal is included in the workplace determination, there will continue to be an incentive for the parties to bargain in the future on the subject. It was submitted that the inclusion of the term proposed by the Unions will not produce a disincentive to bargain.

[283] We agree with the Unions' submission that the inclusion of the proposed clause would not give rise to a disincentive to bargain.

[284] We now turn to our consideration of all of the factors relevant to our determination of this matter at issue.

[285] We have had regard to the factors identified in ss.275, 577 and 578 and to the objects of the FW Act. We have decided not to include the provision sought by the Unions in the workplace determination.

[286] In our view, neither the merits nor the public interest favour the inclusion of a provision in the terms sought. In the context of this particular matter at issue these considerations are decisive. The lack of merit and public interest in the proposal outweigh the considerations that may be said to favour the inclusion of ceiling point performance pay in the workplace determination.

[287] We now turn to Parks Victoria's contention that a number of the agreed terms should not be included in the determination because of the operation of the Referral Act and the implied limitation on Commonwealth legislation curtailing the capacity of the States to function as governments, as explained in Re AEU.

6. Referral Act/Re AEU point

[288] As mentioned previously, Parks Victoria contends that a number of terms should not be included in the workplace determination because of the operation of the Referral Act and the implied constitutional limitation explained in Re AEU.

[289] At the outset we note that each of the impugned clauses are 'agreed terms' within the meaning of s.274(2) of the Act. Further, s.267(2) provides that the workplace determination 'must include the agreed terms'. These considerations give rise to a question as to the effect of the statutory command in s.267(2) in relation to the impugned clauses. The answer to that question depends on the source and scope of the Commission's powers in Part 2-5 of the Act (which deals with workplace determinations and within which s.267(2) resides).

[290] It is common ground that Part 2-5 of the Act can only apply to Parks Victoria to the extent that it is supported by the Referral Act. This is so because workplace determinations can only apply to 'national system employers' and 'national system employees' (s.259 and s.267(4)). Parks Victoria is not a national system employer within the meaning of s.14 of the Act. But the term 'national system employer' (and 'national system employee') is given an extended meaning in respect of 'referring States'. The State of Victoria is a referring State within the meaning of s.30B and hence the provisions of Division 2A of Part 1-3 apply. Relevantly, s.30D serves to extend the definition of a national system employer to include Parks Victoria (also see s.30C in respect of the extended definition of national system employee). Further, s.30H provides that Division 2A only has effect to the extent of the matters referred to the Commonwealth Parliament by the Referral Act.

[291] The import of all this is that the Commission is empowered to make a workplace determination in respect of Parks Victoria and its employees, but only to the extent authorised by the Referral Act.

[292] Section 4 of the Referral Act provides as follows:

> "(1) Subject to section 5, the following matters are referred to the Parliament of the Commonwealth -
>
> (a) the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the provisions set out in the scheduled text in the Commonwealth Fair Work Act, as originally enacted, in the terms, or substantially in the terms, set out in the scheduled text;
>
> (b) the referred subject matters, but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act;
>
> (c) the referred transition matters." (s. 4(1))

[293] Section 5 of the Referral Act sets out the matters which are excluded from the matters referred by s. 4(1). For convenience we refer to matters in s.5 as 'excluded subject matter' (although we note that this term has a different meaning within the Referral Act, see s.3). The excluded subject matter which is relevant for present purposes is set out in s.5(1)(a):

> "(1) A matter referred by section 4(1) does not include -

> (a) matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers." [emphasis added]

[294] The Commission does not have jurisdiction to include in the workplace determination any terms (agreed or otherwise) which pertain to an excluded subject matter. To the extent that an agreed term deals with an excluded subject matter (within the meaning of s.5 of the Referral Act), s.267(2) has no valid operation. This is because the Referral Act is the sole source of the Commission's power in these proceedings and, as Fullagher J. said in *Australian Communist Party v The Commonwealth,*:[158]

> "... a stream cannot rise higher than its source."[159]

[295] The primary issue for determination is whether the impugned clauses deal with any excluded subject matter. In essence this involves the proper characterisation of the impugned clauses and an assessment as to whether they deal with excluded subject matter. The industrial merit of the impugned clauses is irrelevant to this task. Parks Victoria also advances an alternate submission based on the proposition that the matters proscribed by the High Court in *Re AEU* may be broader in scope than the excluded subject matter in s. 5(1)(a). We deal with that submission later. Before turning to the clauses in question we propose to make some general observations about the Referral Act, and, in particular, s.5 of that Act.

[296] A purposive approach is to be taken to the interpretation of the Referral Act.[160] The task is to seek to discover the underlying purpose or object of the Act and, if possible, to adopt an interpretation that furthers the purpose or object. Such an approach does not, of course, provide a warrant to ignore the actual words of the statute. As their Honours Burchett, Miles and Ryan JJ commented in *R v L*:

> "The requirement of s.15AA(1) that one construction be preferred to another can have meaning only where two constructions are otherwise open, and s.15AA(1) is not a warrant for redrafting legislation nearer to an assumed desire of the legislature."[161]

[297] We note that s.15AA(1) of the *Acts Interpretation Act* 1901 (Cth) is in substantially the same terms as s.35(a) of the *Interpretation of Legislation Act* 1984 (Vic). In addition to the *Interpretation of Legislation Act* 1984 (Vic), the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter) is also relevant to the task of interpreting Victorian statutes. Section 32 of that Act states:

> "**s. 32 Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (3) This section does not affect the validity of -
>
> (a) an Act or provision of an Act that is incompatible with a human right; or

> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made."

[298] The 'human rights' referred to in s. 32(1) means the civil and political rights set out in Part 2 of the Charter. The interpretive obligation in s. 32(1) was considered by the Victorian Court of Appeal in *R v Momcilovic*.[162]

[299] The Court of Appeal held, in effect, that s. 32(1) does not establish a new paradigm of interpretation. It does not require courts or tribunals, in the pursuit of human rights compatibility, to depart from the ordinary meaning of a statutory provision and hence from the intention of the legislative.[163] This aspect of the Court of Appeal's judgment was not overturned in the subsequent High Court appeal.[164]

[300] Section 32(1) requires Victorian statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights.[165]

[301] No party in these proceedings relied on the Charter. For our part, we are satisfied that the civil and political rights set out in Part 2 of the Charter are not enlivened in this case and there is no inconsistency between those rights and our interpretation of the Referral Act. We now turn to the relevant provisions of the Referral Act.

[302] The stated purpose of the Referral Act is set out in s.1. The purpose in s.1(a) is relevant for present purposes:

> "The purposes of this Act are -
>
> (a) to refer certain matters relating to workplace relations to the Commonwealth Parliament for the purposes of Section 51 (xxxvii) of the Constitution of the Commonwealth; ..."

[303] Of course the purpose of a statute is revealed from a consideration of the statute as a whole, and not simply by examining the purpose or objects clause.[166] Relevant extrinsic material can also assist in determining statutory purpose. In interpreting a Victorian statute, s.35(b) of the *Interpretation of Legislation Act* 1984 (Vic) provides that:

> "(b) consideration may be given to any matter or document that is relevant including but not limited to -
>
> (i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;
>
> (ii) reports of proceedings in any House of the Parliament;
>
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
>
> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissioners, Boards of Inquiry or other similar bodies."

[304] In our view the second reading speech and Explanatory Memorandum to the *Fair Work (Commonwealth Powers) Bill* are relevant documents within the meaning of s.35(b).

[305] In the second reading speech the Minister made the following observations about the coverage of the referral:

> "Whilst the new referral will result in almost all Victorian workers having the protection of the federal laws, it is important to note that some exemptions are made. These exemptions are similar to those that have operated since the Kennett government made the first referral of industrial relations powers in 1996. Members of Parliament, the judiciary, members of administrative tribunals, ministerial officers and senior executives in the public sector are all excluded. Persons holding office as parliamentary officers and certain other office-holders are also excluded.
>
> Victoria will not refer certain matters in relation to public sector employees. In particular, the state will not refer matters relating to the number, identity and appointment (but not the terms and conditions of appointment) and redundancy of public sector employees.
>
> These matters were excluded from Victoria's previous referral. They relate to matters that the High Court in the Re AEU decision held to be essential to the functioning of the states. For this reason, the High Court decided that such matters could not be subject to commonwealth legislation.
>
> Victoria also will not refer matters in relation to transfer of public sector employees and directions given to public sector employees under state laws dealing with essential services and situations of emergency services. These matters were excluded from Victoria's previous referral. This will maintain the integrity of state laws dealing with these matters.
>
> Victoria will not refer certain additional matters in relation to law enforcement officers. Again these matters were excluded from Victoria's previous referral. They are appropriate to maintaining the integrity of state laws governing law enforcement officers."[167] [emphasis added]

[306] The Explanatory Memorandum to the bill is also relevant. Clause 4 of the bill (which became s.4 of the Referral Act) provides for the reference of matters to the Commonwealth Parliament, subject to the exclusions in cl. 5. The Explanatory Memorandum to cl. 4 makes it clear that it was not intended to refer matters falling within the implied limitation:

> "Subclause (1) is not intended to refer to the Parliament of the Commonwealth matters that would involve the making of laws that would place special burdens or disabilities on the State, or the making of laws of general application that would operate to destroy or curtail or interfere with the continued existence of the State or its capacity to function as a government. Such matters were considered by the High Court in decisions including Re Australian Education Union; Ex Parte Victoria (1995) 184 CLR 188, Victoria v The Commonwealth (1996) 187 CLR 416 and Austin v The Commonwealth (2003) 215 CLR 185." [emphasis added]

[307] The Explanatory Memorandum to cl. 5 (which became s.5 of the Referral Act) is also instructive. Relevantly it states:

> "Subclause (1) paragraphs (a) to (g) exclude certain matters from the references in respect of public sector employees, public sector employers and certain other persons. These exclusions are based upon the High Court's consideration in Re Australian Education Union; Ex Parte Victoria of matters that would involve the making of Commonwealth laws of general application that would operate to destroy or curtail or interfere with the continued existence of the State or its capacity to function as a government.
>
> It is not intended that the exclusion in paragraph (b) of matters pertaining to redundancy, would prevent a federal tribunal or a court considering in a particular case whether a purported retrenchment was genuine and so whether this exclusion affects its jurisdiction." [emphasis added]

[308] It seems to us that the purpose of the Referral Act is to refer certain matters to the Commonwealth Parliament and to expressly exclude certain matters in relation to public sector employees. The exclusions in respect of the number, identity and appointment of public sector employees (s.5(1)(a)) were intended to reflect the same matters identified in *Re AEU* as being essential to the functioning of the States.

[309] The similarity of the language used to describe the excluded matter in s.5(1)(a) and that used by the High Court in *Re AEU* is also instructive. In *Re AEU* the High Court held:

> "At this point it is convenient to consider South Australia's argument based on impairment of a State's 'integrity' or 'autonomy'. Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation ... the operation of the implied limitation would preclude the Commission from making an award binding on the States in relation to qualifications and eligibility for employment, term of appointment and termination of employment, at least on the ground of redundancy."[168] [emphasis added]

[310] We also note that there are conceptual similarities between the approach taken by the High Court in *Re AEU* and the task of identifying excluded subject matter within the meaning of s. 5(1)(a). Both involve an exercise of characterisation. If a provision falls within the scope of an identified subject matter (eg. the number or identity of public servants) then it's beyond power. The task is not one of determining the *actual impact* of a provision on the impairment of a State's capacity to function as a government. In this regard the approach taken in *Re AEU* differs from that taken in a number of subsequent cases.[169] While the conceptual differences between the approach taken in *Re AEU* and that taken in subsequent cases is problematic, the resolution of those differences is a matter for the High Court.

[311] On the basis of the extrinsic materials and the language used in s.5(1)(a) it seems to us that the excluded subject matter in s.5(1)(a) is largely co-extensive with the *Re AEU* exclusions in respect of the number and identity of persons whom the State wishes to employ, the term of appointment of such persons and qualifications and eligibility for employment.[170] On this basis it is appropriate to construe the terms 'number', 'identity' and 'appointment', in s.5(1)(a), in a manner consistent with the interpretation of those terms in *Re AEU* and subsequent cases applying *Re AEU*.

[312] Two further points may be made about s.5(1)(a).

[313] First, the phrase 'pertaining to' has been given a particular meaning in the context of industrial legislation. In *Re Manufacturing Grocers' Employees Federation of Australia; ex parte Australian Chambers of Manufacturers* the High Court held:

> "The words 'pertaining to' in the definition of industrial matters mean 'belonging to' or 'within the sphere of' ..."[171]

[314] In our view it is appropriate to give the same meaning to the phrase 'pertaining to' in s.5(1)(a).

[315] Second, in *Re AEU, Ex parte Victoria*[172] a Full Court of the Industrial Relations Court of Australia considered the meaning of the word 'identity' as used by the joint judgment in *Re AEU*:

> "Counsel seek to avoid the effect of the statement in the joint judgment by contending that the word 'identity' was not intended as a reference to the particular persons to be employed, but only to their categorisation or qualifications. We do not agree. This would be an unnatural use of the word. We think their Honours were meaning to convey that a provision that prevents a government from determining which individuals it will employ affects its capacity to govern and is, therefore, beyond power."[173] [emphasis added]

[316] In that case the Court considered the validity of a clause in an award made by a Full Bench of the Commission which prohibited an employer making a 'new offer of employment to fill a vacant position' while a suitable employee designated as a potentially excess employee was available and willing to be redeployed to the vacant position. The effect of the clause was to deny the employer the right to engage a person to fill a particular position if a suitable potentially excess employee is available.

[317] The Commission had held that the provision was within power noting that the restraint imposed by the clause 'leaves room for a fair measure of employer discretion in the assessment of whether the position is one which may not be filled'.[174] The Commission said that, for 'the filling of a vacant position to be barred or frozen by operation of cl.7(b)(v) there must be an employee:

(i) who is a 'suitable employee';
(ii) who occupied an equivalent or higher position than the vacant position;
(iii) who is competent to perform the duties of the vacant position; and
(iv) who is available.

[318] The Commission concluded:

> "Because of the discretionary factors integral to the restraint in cl.7(b)(v) of the award, it does not amount to a direct or substantial interference with the State functioning of determining the number and identity of its workforce. Understood in its industrial context, the provision lacks both the elements of 'purpose' and the operational effect of 'control' of a State function which the Court in *Re AEU* and in *Melbourne Corporation* (Melbourne Corporation v The Commonwealth (1947) 74 CLR 31) associated with an invalid use of a Commonwealth power in application to a State government function."[175]

[319] On review the Full Court held that cl.7(b)(v) was inconsistent with the implied limitation and beyond power:

> "With respect to the Full Bench, it seems to us that cl 7(b)(v) plainly affects the capacity of the Victorian government "to determine the ... identity of the persons whom it wishes to employ". Whilst there is anyone who fulfils the four criteria identified by the Full Bench, an outsider may not be appointed to the vacancy. The effect of the provision cannot be avoided by reference to "discretionary factors". Either there is a person who fulfils the four criteria or there is not. The determination of the question whether a particular person fulfils those four criteria does not involve an exercise of discretion. It requires the making of a judgment having some subjective elements; but it must be assumed that the relevant judgment will be honestly made. If an honest judgment about the application of the four criteria to a particular employee leads to the conclusion that the employee falls within subpar (v), the effect of the subparagraph is to prevent the employer offering the position to anyone else... in the light of AEU the proper conclusion, in our opinion, is that cl 7(b)(v) exceeds the Commission's power and is invalid."[176]

[320] We now turn to the impugned clauses. The issue in dispute is whether or not any of the impugned terms constitute excluded subject matter within the meaning of the Referral Act. The impugned clauses concern seasonal, fixed term and casual employees, as well as parts of cl. 6.0, which deals with appointments/ promotions and relocation. We deal with each of these in turn and the impugned provisions are in red:

5.3 Seasonal Employees

a) Parks Victoria may engage employee's on a seasonal basis. Seasonal employment, including project fire fighters, shall only be used to undertake legitimate seasonal duties. A seasonal employee, including project fire fighters, is one who is engaged in either an ongoing or fixed term basis to work their ordinary hours~~,~~ (that equates to 76 hours per fortnight) within a defined period which can be a minimum of 3 months to 8 months duration at agreed location/s~~.~~ This shall be provided to the employee in writing at the commencement of the engagement.

b) A seasonal employee, with the exception of project fire fighters, may be required to work to a week-end roster in accordance with Clause 8.4 and Clause 8.6, for which an allowance is paid. However, the project fire fighters will be required to be available to participate in week-end Standby Rosters for Fire or other Emergency Work.

(c) Seasonal employment, including project fire fighters, shall not be used to diminish full time employment opportunities, conditions or roster opportunities for non

seasonal staff. Seasonal employees, including project fire fighters, shall not be employed in a manner that could hinder or disadvantage the professional development of full time employees.

a) (d)-The time outside the defined season would be the period of Inactive Employment where the Employee would be on leave without pay. At the end of each active period Parks Victoria would issue the Employee with a certificate stating that the Employee is "without paid employment". A period of Inactive Employment will not break that Employees continuity of service.

b) (e) There would be no restrictions on the seasonal Employee obtaining alternate employment through a third party during their period of Inactive Employment including the Employee being able to work for third parties that are providing a contracted service to Parks Victoria.

c) (f) If due to operational necessity and by agreement with the Employee, Parks Victoria needs to directly utilise the services of a seasonal Employee during their period of Inactive Employment, the seasonal Employee will become active and the Inactive Employment arrangements will cease for the time of the re-engagement. The minimum period of continuous recall to active service shall be 2 weeks and the Employee has the right to refuse the recall. If an Employee is recalled to work during their period of inactive service, Parks Victoria will assess the viability of a permanent position being created for the Employee.

[321] Parks Victoria contends that the second sentence of cl. 5.3(a) limits the circumstances in which seasonal employees may be engaged: they can only be engaged for a particular purpose, being 'legitimate seasonal duties'. It is submitted that, if operable this provision would restrict Parks Victoria in relation to the appointment of seasonal employees, to only those seasonal employees who undertake 'legitimate seasonal duties'. It could not appoint seasonal employees to perform other duties. It is contended that on any view, this provision regulates the appointment of these individuals. The same submission is advanced in relation to that part of cl. 5(a) which provides that seasonal employees can only be engaged for 'a minimum of 3 months to 8 months duration at agreed locations'.

[322] In relation to cl. 5.3(c), Parks Victoria submits that the subject matter and direct effect of this clause are clear: its only purpose (and effect) is to detail the circumstances in which Parks Victoria cannot appoint seasonal employees. It identifies a series of circumstances (over two sentences) in which seasonal employees 'shall not be used', of 'shall not be employed'.

[323] The Unions submit that cl. 5.3(a) defines seasonal employees and that the second sentence is to be read as explanatory of the concept. If persons are employed for other than seasonal duties, it would be inappropriate to describe them as seasonal employees. It is submitted that there is nothing in this sentence which infringes the State's right to determine the number or identity of persons it wishes to employ on a seasonal basis.

[324] The Unions also contend that the third sentence of cl. 5.3 (a) is further explanatory or descriptive of what is meant by a seasonal employee. It is submitted that the definition or identification of the category of employment to be regulated is not objectionable and does not infringe the State's right to determine the number and identify of persons whom it wishes to employ as seasonal employees.

[325] As to cl. 5.3(c) the Unions submit that this provision imposes a restriction on the work that can be undertaken by seasonal employees and as such it does not restrict the number and identity of persons sought to be employed as seasonal employees but seeks only to provide that the duties that they are given should not disadvantage full-time employees.

[326] The Unions also submit that in any event the impugned clauses fall within the exception to s.5(1)(a) being terms and conditions of appointment.

[327] It is convenient to deal with the last point first.

[328] The difficulty with this proposition is that it fails to sufficiently recognise the distinction between a clause pertaining to the appointment of public sector employees and one pertaining to the terms and conditions of appointment of such employees. Section 5(1)(a) is premised on there being a distinction between these two concepts. This is clearly demonstrated by the drafting of the provision itself, and the source of that drafting, namely *Re AEU*. An example serves to illustrate the distinction. A term which limits the number of casual employees which may be engaged, or the duration of their employment, is, in our view an excluded subject matter. This may be contrasted with a provision which prescribes the minimum payment for each casual engagement. Such a provision falls within the exclusion in s. 5(1)(a) in that it is a term and condition of appointment. The provision does not limit the employers ability to engage a casual employee for any term the employer chooses, it merely provides a minimum payment for each engagement.[177]

[329] It seems to us that, if accepted, the Unions' broad characterisation of the expression 'terms and conditions of employment' in s. 5(1)(a) would have the practical effect of rendering part of the excluded subject matter nugatory. In our view, the term 'appointment' in s. 5(1)(a) refers to the initial decision to employ and clauses which pertain to that issue whereas the expression 'terms and conditions of appointment' refers to the terms and conditions which operate once the person has been appointed. The distinction between these concepts is illustrated by the example in paragraph [324].

[330] As we have noted s. 5(1)(a) was intended to exclude the same matters identified in *Re AEU*. It is appropriate to interpret the word 'appointment' consistent with that legislative intention. Applying that approach, it seems to us that the expression 'appointment (other than terms and conditions of appointment) of employees in the public sector', in s.5(1)(a), operates to exclude provisions which specify the term of the appointment and the qualifications and eligibility for the appointment of public sector employees.[178]

[331] We now turn to the proper characterisation of the impugned provisions.

[332] In relation to the second sentence of cl. 5.3(a) we agree with the Unions' submission that this sentence is merely explanatory of the concept of seasonal employees. The expression 'legitimate seasonal duties' is not defined, but may be presumed to be intended to limit the scope of the duties that seasonal employees may be required to undertake. Classification definitions in industrial instruments often define the range of duties which employees may be required to undertake and we are not persuaded that such a provision constitutes excluded subject matter. Considered in isolation, once cl. 5.3(c) is excluded (see paragraph [334] and [335] below) this provision does not pertain to the number, identify or appointment of public sector employees.

[333] We now turn to that part of cl. 5.3(a) which provides that seasonal employees can only be appointed for a period 'which can be a minimum of 3 months to 8 months duration at agreed locations'. In our view this provision is an excluded subject matter. The provision operates to limit both the term of appointment and the location at which such employees will be based. In our view these matters are properly construed as 'pertaining to the ... appointment ... of employees in the public sector' within the meaning of s. 5(1)(a). We note that in *NTEU v Bendigo Regional Institute of TAFE*[179] a Full Bench of the Australian Industrial Relations Commission held that an award clause which provided that an employer 'shall not employ a person as a casual employee in excess of eight weeks at any one time', was contrary to the implied limitation, as explained in *Re AEU*.

[334] As to cl. 5.3(c) it is apparent that the provision seeks to restrict the circumstances in which seasonal employees may be appointed. In particular, seasonal employees:

- shall not be used to diminish full time employment opportunities, conditions or roster opportunities for non seasonal staff; and
- shall not be employed in a manner that could hinder or disadvantage the professional development of full time employees.

[335] The requirements in cl. 5.3(c) operate to deny the employer the right to engage a seasonal employee if that appointment would infringe the limitations in the clause. The clause operates to restrict the number of seasonal employees which the employer could appoint. It also seeks to place a qualification upon the appointment of such employees. In our view this provision constitutes excluded subject matter within the meaning of s. 5(1)(a). The provision pertains to the number and appointment of public sector employees. For reasons already given we reject the Unions' contention that the provision is concerned with terms and conditions of employment and hence falls within the scope of the exception in s. 5(1)(a).

5.4 Fixed Term Employees

(a) The use of fixed term contract positions will not be used for the purpose of undermining the job security, employment opportunities or rosters and conditions of ongoing Employees.

(b) Therefore, the use of fixed term employment in all areas covered by this Determination is limited to:

(i) replacement of staff proceeding on approved leave;

(i) meeting fluctuating client and staffing needs and unexpected increased workloads;

(i) undertaking a specified task or role which is funded for a specified period;

(i) filling a vacancy resulting from an Employee undertaking a temporary assignment or secondment; or

(i) temporarily filling a position where, following an appropriate selection process, a suitable ongoing Employee is not available.

(c) In other than exceptional and unforeseen circumstances, fixed term appointments shall be for a minimum of one month and a maximum of three years, subject to Clause 5.0 of Appendix B (Parental Leave).

a) (d) Where the affected Employees identify a fixed term position that does not meet

the criteria established in Clauses 5.4(b) and 5.4(c), they will refer such a position to Parks Victoria. And if as a result of discussions, the status of the position cannot be resolved, then the matter shall be dealt with under Clause 3.7 (Grievance Resolution Procedure) of this Determination.

b) (e) A fixed term Employee shall be paid at the same rate of pay as that of a full time Employee performing like duties. A fixed term Employee can be engaged to work on a full time seasonal or a part time basis.

c) (f) A fixed term Employee shall be entitled to all forms of paid leave available to a full time Employee on a pro-rata basis, as determined by the length of the engagement and the ordinary hours of work. Provided, however, that a fixed term Employee engaged for less than 12 months shall not be entitled to paid Parental, Study or Military leave.

d) (g) Existing Employees with at least 12 months of continuous service will be given an opportunity to express interest in all fixed term vacancies of 13 weeks or longer duration. Where an existing ongoing Employee is appointed to a fixed term position he/she will remain an ongoing Employee as described in Clause 5.1.

[336] Parks Victoria submits that each of the impugned parts of cl. 5.4 is substantially similar in operation and effect as the impugned parts of cl. 5.3. Parks Victoria objects to paragraphs (a), (b) and (c) of the clause on the basis that it restricts its ability to appoint people as it sees fit. It can only appoint them for specific purposes and for prescribed periods. It is said that the clauses pertain to the appointment of the fixed term employees.

[337] The Unions dispute Parks Victoria's characterisation of the impugned parts of cl. 5.4 and submit that they constitute 'terms and conditions of appointment' in the sense of regulating the use to which fixed term employees can be put and matters incidental thereto. On this basis it is submitted that cl. 5.4(a) has nothing to say about the number, identity or appointment of anyone but rather it is explanatory of the concept of the category of fixed term employment and the purposes for which the category is provided for. It is contended that the provisions deal, in terms, with the use that can be made of fixed term employees once appointed and therefore they fall within the exception in s.5(1)(a).

[338] The impugned provisions have a number of features in common with the provisions dealing with seasonal employees. Clause 5.4(a) is substantively the same as cl. 5.3(c) and for reasons we have already given constitutes excluded subject matter. Similarly, cl. 5.4(c) seeks to limit the term of appointment of fixed term employees (as cl. 5.3(a) does in respect of seasonal employees) and as such pertains to the 'appointment ... of employees in the public sector' and is an excluded subject matter.

[339] Clause 5.4(b) imposes a range of limitations upon the use of fixed term employees. The clause operates to deny the employer the right to engage fixed term employees if that appointment would infringe the limitations in cl. 5.4(b). The clause operates to restrict the number of fixed term employees which the employer could appoint and places a qualification upon the appointment of such employees. The provision pertains to the number and appointment of public sector employees and hence it is an excluded subject matter. We reject the contention that the provision is concerned with terms and conditions of employment, for reasons already given. We note that in *NTEU v Bendigo Regional Institute of TAFE*[180] a

clause to similar effect was held to be beyond power on the basis of the High Court's observations in *Re AEU*.

5.5 Casual Employees

~~a)~~ Parks Victoria may employ persons on a casual basis for the purpose of ad hoc or irregular work. Casual Employees shall not be employed in a manner that could hinder or disadvantage the professional development of ongoing Employees.

b) A casual Employee shall be engaged by the hour and paid the prescribed base hourly rate for the relevant classification plus a loading of 25%. The loading prescribed in this sub-clause is in lieu of paid leave (excluding any entitlement to Long Service Leave), overtime and public holidays not worked. It is also to compensate for the nature of casual employment. Overtime and a meal allowance will be paid at appropriate rates after a casual has been employed for 10 consecutive hours on any one day. Overtime will also apply to public holidays worked.

c) A casual Employee shall be provided with a minimum period of 3 hours employment and/or paid for a minimum of 3 hours of work on each engagement.

d) Notwithstanding anything to the contrary appearing elsewhere in this Determination, the services of a casual Employee may be terminated by one hour's notice on either side or by payment or forfeiture of one hour's wages/salary, as the case may be.

[340] Parks Victoria objects to the second sentence of cl. 5.5(a) on the basis that it limits the circumstances in which casual employees may be engaged. The Unions submit that the impugned sentence falls within the exception in s.5(1)(a) being a term or condition of employment.

[341] The drafting of cl. 5.5(a) is substantially the same as that in cl. 5.3(a) and for the reasons given in respect of that clause we are of the view that cl. 5.5(a) constitutes excluded subject matter. It is not a 'term or condition of employment' within the meaning of s.5 (1)(a) but rather pertains to the appointment of public sector employees and also restricts the number of such employees that may be appointed, hence it is excluded subject matter.

6.0 APPOINTMENTS/PROMOTIONS AND RELOCATION

(a) Parks Victoria, in appointing applicants for employment covered by this Determination, whether from inside or outside the organisation, shall ensure that such appointments are based on merit, and are non discriminatory in accordance with Equal Opportunity requirements.

6.1 Appointments/Promotions

(a) Recruitment to all positions at Parks Victoria will be based on merit, and will be in accordance with the Equal Opportunity Act 2010 (Vic).

(b) Parks Victoria shall not fill vacant or newly created positions by promotion of more than 12 weeks in duration without inviting applications from Employees within Parks Victoria. If no suitable internal applicant meets the selection criteria the Position may be made available to external applicants.

(c) Vacant or newly created positions that are for more than 12 weeks duration shall be first advertised internally, except when;

(i) it is unreasonable to expect the skills required for the position to exist in a

sufficient number of staff to offer a competitive process.

(ii) the location of the position is unlikely to attract a reasonable number of internal applicants.

(iii) the positions are for a new initiative or for a specific purpose which will attract new or specific skills and qualities.

a) (d) If any of the above points apply the position may be advertised internally and externally at the same time.

b) (e) Applicants for advertised positions shall be notified of the result of their application in writing within 10 working days after the appointment has been confirmed.

c) (f) Vacancies or newly created positions of 12 weeks duration or less may be offered or assigned in the first instance to an appropriate existing Employee.

[342] Parks Victoria submits that these clauses fall within the excluded matters in the Referral Act in that they deal with the subject matter of the appointment of employees in the public sector, other than the terms and conditions of that appointment. It is also submitted that the impugned clauses impair Parks Victoria's right to determine the identity of employees it wishes to appoint.

[343] The Unions submit that in respect of prospective employees the clause is merely declaratory of the obligations that the State of Victoria has in any event and does not impose any additional obligations upon it. On that basis it is submitted that the clause 'does not offend against the Referral Act'. Insofar as the clause relates to existing employees the Unions contend that it is a term or condition of employment and hence not an excluded matter.

[344] In our view, cl. 6(a) and cl. 6.1(a) affect the capacity of the employer to determine the identity of the persons it wishes to employ. Such appointments must be based on merit and be non-discriminatory. These factors require the exercise of a judgment, albeit a judgment having some subjective elements. The requirements that appointments be merit based brings with it the implication that the most meritorious candidate will be appointed. The effect of the provision would be to prevent the employer offering the position to someone other than the most meritorious candidate. In our view this constitutes a restriction on the ability of Parks Victoria to appoint employees and an impairment on Parks Victoria's right to determine the identity of the persons it wishes to appoint as employees. A clause with similar effect (though in different terms) was found to infringe the implied limitation in *Re AEU; Ex parte Victoria* [181] (discussed earlier at paragraph [315]-[319]).

[345] The requirements in cls. 6(a) and 6.1(a) that appointments be based on merit operates to deny the employer the right to engage a person who does not meet the specified criteria. Accordingly, the provision pertains to an excluded matter as it affects the employer's capacity to determine the identity of the persons it wishes to employ.

[346] We now turn to the requirement that appointments be 'non discriminatory' and in accordance with the *Equal Opportunity Act* 2010 (Vic). As we have noted the Unions contend that this provision is not an excluded matter as it is merely declaratory of the State's existing legal obligations.

[347] As a general proposition the fact that the clause may simply be declaratory of obligations imposed by Victorian law does not answer the question of whether or not the provision is excluded subject matter. While the imposition of substantively the same obligations pursuant to Victorian law may reduce the practical import of the clause, it cannot affect its validity. Validity depends on the Commission's power to include such a clause in a workplace determination. The sole source of that power is the Referral Act. If the clause falls within the scope of an excluded matter there is no power to include it in the determination. A proposition in similar terms was rejected in *Re AEU*; *ex parte Victoria*.

[348] However, other observations by the Court in that case lead us to conclude that this particular aspect of cls. 6(a) and 6.1(a) is *not* excluded subject matter. In *re AEU; ex parte Victoria* the Court considered the validity of a number of procedural requirements set out in Schedule 1 to the award under consideration. Relevantly, Schedule 1 provided as follows:

> "The employer and the Principal of a relevant school, (the Principal), shall observe the criteria and processes in this Schedule, and shall apply them in good faith within the framework of the criteria and staffing resource limits publicly declared by the Director to be followed in determining the staffing establishment for each workplace. The following process shall apply for the declaration of employees as excess to workplace requirements in the case of a workplace which is to continue in operation:
>
> ...
>
> (g) The Principal shall not discriminate against any employee on the basis of any one or more of the following reasons:
>
> (i) temporary absence from work because of illness or injury;
> (ii) union membership or participation in union activities outside working hours or with the employer's consent, during working hours;
> (iii) non-membership of a union or of an association that has applied to be registered as a union under the *Industrial Relations Act*;
> (iv) seeking office as, or acting or having acted in the capacity of, a representative of employees;
> (v) the filing of a complaint, or the participation in proceedings, against the employer;
> (vi) race, colour, gender, sexual preference, age, physical or mental impairment, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
> (vii) absence from work during maternity or other parental leave."

[349] As is apparent, Schedule 1 set out a process for the identification of employees to be declared excess to requirements for the purpose of being made redundant. The Court rejected a challenge to the validity of Schedule 1, in these terms:

> "Counsel say that this Schedule imports Commonwealth law criteria into the selection of those employees who are to be declared excess to workplace requirements and thereby impairs the capacity of Victoria to determine the identity of employees to be terminated. We do not agree. The Schedule does no more than specify a procedural regime. First, the Principal is to determine the curriculum areas in which there may be an excess of the staffing establishment (par (a)). This is entirely a matter for the

> judgment of the Principal, the representative of the employer. Having made that determination, the Principal is required to undertake a process of consultation with employees in the relevant curriculum areas (pars (b) and (c)) and the union (par (d)). The Principal must 'take into account' overall curriculum needs and submissions from individual employees and, in particular, compelling personal compassionate grounds (par (e)). However, at the end of the day, it is for the Principal to determine who shall be declared excess to workplace requirements. Although, no doubt, the Principal would tend to give preference to volunteers, he or she is not bound to do so; the ultimate decision is for the Principal alone. The only restriction on the Principal's decision is that it must not involve discrimination on any of the grounds specified in par (g). Those grounds are framed in terms almost identical to s 170DF(1) of the *Industrial Relations Act*; they reflect the general law. It could not possibly be contended that the proscription of discrimination on those grounds impairs the capacity of a State to govern."[182]

[350] It will be recalled that in *Re AEU* the High Court held that the implied limitation precluded the Commission from making an award binding on the States in relation to the identification of persons it wishes to dismiss from its employment on redundancy grounds. In the above passage from *Re AEU; ex parte Victoria* the Court was interpreting and applying what the High Court had said in *Re AEU*. In doing so the Court was clearly of the view that *Re AEU* did not support the proposition that the implied limitation precluded an award clause providing that the identification of persons to be made redundant must not involve discrimination. In a sense the Court was reading down the general proposition in *Re AEU* that the implied limitation precluded an award provision relating to the identity of persons to be made redundant.

[351] As we have indicated the excluded matter in s.5(1)(a) is largely coextensive with the relevant *Re AEU* exclusions. Accordingly, it is appropriate to construe the terms in s.5(1)(a) in a manner consistent with the interpretation of those terms in *Re AEU* and in subsequent cases applying *Re AEU*.

[352] Adopting this approach to the clause under consideration it seems to us that a requirement that appointments be non-discriminatory and in accordance with the *Equal Opportunity Act* 2010 (Vic) is not an excluded matter. On the reasoning in *Re AEU; ex parte Victoria* such a provision does not fall within the scope of the *Re AEU* proscription of award provisions regulating the identity or appointment of public sector employees. It is also relevant to note that the provision considered by the Court in *Re AEU, Ex parte Victoria* (i.e. Schedule 1) was the subject of subsequent consideration by Munro J in *Re Victorian Teachers Redundancy Award* 1994.[183] In that matter his Honour was considering applications to vary the award in light of the High Court's judgement in *Victoria v The Commonwealth.*[184] His Honour declined to vary Schedule 1 and in doing so rejected the proposition that the Schedule infringed the implied limitation.[185] A subsequent Full Bench, *Victoria v Health Services Union of Australia,*[186] referred to Munro J's consideration of the relevant authorities with apparent approval.[187]

[353] For the reasons given the provision is not an excluded matter within the meaning of s.5(1)(a).

[354] We now turn to the other provisions in clause 6.1 which are said to be excluded subject matter.

[355] Clause 6.1(b) provides that certain vacant or newly created positions (i.e. those more than 12 weeks in duration) must be first offered to existing employees. It is only in circumstances where no suitable internal applicant meets the selection criteria that the position may be made available to external applicants. As was the case in *Re AEU; ex parte Victoria*, the effect of this provision is to prevent the employer offering the position to anyone else in circumstances where there is a suitable internal candidate that meets the selection criteria. In such circumstances there may be a more meritorious external candidate but the employer would not have the option of appointing them. The provision affects the employer's capacity to determine the identity of the persons it wishes to employ and as such it is an excluded matter.

[356] As to cl. 6.1(c), this provision creates a default position whereby certain positions must be first advertised internally. Limited exceptions to this general rule are provided (in cl.6.1(c)(i), (ii) and (iii)).

[357] The provision only affects the sequencing of the advertising process, it is no longer part of a scheme which required internal candidates to be considered first (because cl. 6.1(b) deals with excluded subject matter and no longer forms part of the clause). The positions must be advertised internally first (save in the circumstance where one of the points in cl. 6.1(c)(i) to (iii) applies, see cl. 6.1(d)), before they can be advertised externally. The provision does not impact on the employer's capacity to determine the number or identity of the persons it wishes to employ, nor does it pertain to the appointment of those persons.

[358] We are not persuaded that this provision pertains to an excluded matter. The provision does not pertain to the number, identity or appointment of public sector employees. Unlike Clauses 6.0 and 6.1(a) and (b), this clause does not affect the employer's capacity to determine the identity of the persons it wishes to employ.

[359] We now turn to the alternate argument advanced on behalf of Parks Victoria.

[360] As we indicated earlier, in addition to relying on the excluded subject matter in s. 5(1)(a) Parks Victoria advances an alternate submission based on the High Court's observations in *Re AEU*. This submission proceeds on the assumption that the matters proscribed by the High Court in *Re AEU* may be broader in scope than the excluded subject matter in s. 5(1)(a).

[361] For their part the Unions contend that *Re AEU* and the implied limitation have no work to do in circumstances where powers have been referred to the Parliament of the Commonwealth by a State. In other words the challenge to the impugned clauses begins and ends with the determination of whether those clauses deal with any excluded subject matter within the meaning of s. 5(1)(a).

[362] It is unnecessary for us to resolve the controversy as to the application of *Re AEU* and the operation of the implied limitation in the context of a referral pursuant to s. 51(xxxvi) of the Constitution, for two reasons.

[363] First, as to *Re AEU*, while there are differences between the subject matter proscribed in *Re AEU* and the excluded subject matter in the Referral Act, those differences are not material in the present context. The challenge to the impugned clauses is made pursuant to s.

5(1)(a) and as we have already observed it seems to us that the excluded matter in s. 5(1)(a) is largely coextensive with the relevant *Re AEU* exclusions (see paragraph [307]. Indeed, Counsel for Parks Victoria conceded as much during the course of oral argument when he said:

> "... the Referral Act is drafted in a way to try to give effect to Re AEU ... So the difference between the application of Re AEU and the Referral Act is likely not to amount to very much. But it may. It may at the margin ..."[188]

[364] To the extent that there is any difference between the excluded subject matter in s. 5(1)(a) and the relevant *Re AEU* exclusions we are not persuaded that it alters the decision we have taken in respect of the impugned clauses. In such circumstances it is unnecessary for us to express a view on application of *Re AEU* in the context of the Referral Act.

[365] Second, as to the implied limitation, it is common ground that the application of the doctrine now requires an evaluation of the impact of the challenged provision. As their Honours Gaudron, Gummow and Hayne JJ observed in *Austin v Commonwealth*:

> "There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law (155). Further, this inquiry inevitably turns upon matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings.'[189]

[366] It seems to us that *Re AEU* can be reconciled with *Austin* on the basis that in *Re AEU* the court was developing a specific sub rule to the *Melbourne Corporation* case[190] such that certain features of State governments (such as the capacity to determine the number and identify of public sector employees) must be kept free of Commonwealth regulation, without requiring the States to demonstrate that regulation of those matters would *in fact* undermine the capacity of the State to govern.[191]

[367] In the context of the present case it is important to appreciate that Parks Victoria does *not* seek any finding to the effect that the impact of the impugned clauses is such as to impair the State of Victoria's capacity to function as a government. The case put by Parks Victoria is based upon s. 5(1)(a) and any residual application of *Re AEU*, it is not propounding a general case based on the implied limitation. As Counsel for Parks Victoria put it during the course of oral argument:

> "So the test for the Tribunal is not to in effect try and apply, with all the difficulty that involves, to a test that drives ultimately from the Melbourne Corporation case, but to accept that the High Court has drawn the line at Re AEU. We only rely upon Re AEU. We're not asking the Tribunal to find that if in their view the clause somehow impairs the operation of the state, but it is not covered by the limitation as described in Re AEU that it is therefore invalid. We're not asking the Tribunal to do that."[192]

[368] In these circumstances, it is unnecessary for us to determine whether the implied limitation has any operation in the context of the referred matters.

[369] We conclude this part of our decision by observing that the impugned clauses have been a feature of the industrial instruments which have applied to Parks Victoria, for many years. No previous challenge has been made to those provisions. The impugned clauses are also substantially similar to clauses recently agreed by the Victorian government in the context of the VPS determination. While the inconsistent approach taken by the Victorian government to these matters is regrettable it is not relevant to the task of determining whether the Commission has jurisdiction to include the impugned clauses in the workplace determination.

7. Conclusion

[370] We have now dealt with all of the matters still at issue at the end of the post industrial action negotiation period.

[371] We are satisfied that the determination we will make passes the better off overall test in s.193 of the FW Act, and that it includes all of the 'agreed terms'; terms which deal with matters still at issue at the end of the post industrial action negotiation period; the 'core terms' and the 'mandatory terms'. Further, the determination does not include any terms that would not be about permitted matters or a term that would be an unlawful term, if the determination were an enterprise agreement.

[372] We have had regard to the factors identified in ss.275, 577 and 578 and to the objects of the Act. In our view, the determination reflects an appropriate balance between these various considerations.

[373] The parties are directed to confer and file a joint draft Workplace Determination giving effect to our decision by 4.00pm Monday 18 February 2013. In the event that any disagreement arises between them as to the terms of the final determination these should be clearly identified. The terms of the determination will be settled by Commissioner Hampton with recourse to the Full Bench if necessary.

PRESIDENT

Appearances:

S. Wood SC with *M. Follett* of Counsel for Parks Victoria.

H. Borenstein SC with M. Harding of Counsel for the Australian Workers' Union; Australian Municipal, Administrative, Clerical and Services Union; the Community and Public Sector Union.

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[1] PR526198.

[2] See generally Exhibit Parks 1 at paragraphs 6 - 12.

[3] Exhibit Parks 8 at paragraphs 7-19.

[4] Ibid at paragraphs 22-27.

[5] Transcript, 5 December 2012, at PN 1485-1508.

[6] Exhibit Parks 8 at paragraphs 29-31 and Annexures PA-1 and PA-2.

[7] Exhibit Parks 1 at paragraph 50.

[8] Exhibit Parks 6 at paragraph 23.

[9] Exhibit Parks 8 at paragraphs 25, 26 and 28.

[10] Transcript, 4 December 2012, PN 1082 - 1092.

[11] Transcript, 4 December 2012, at PN 977.

[12] See Annexure MP3 to the statement of Matthew Price, Exhibit Unions 7 and Mr Mead's evidence at paragraphs 977-999 of the Transcript, 4 December 2012.

[13] Mr Mead's evidence at PN 303 of the Transcript, 4 December 2012.

[14] Mr Mead's evidence at PN 384-385 of the Transcript, 4 December 2012.

[15] Mr Mead's evidence at PN 395 of the Transcript, 4 December 2012.

[16] Mr Mead's evidence at PN 397 of the Transcript, 4 December 2012.

[17] Exhibit Parks 2 at paragraph 62.

[18] Exhibit Parks 2 at paragraphs 55-56.

[19] See Transcript, 4 December 2012, at PN 304 - 310; 331 - 339; 377 - 380 and 409 - 445.

[20] Transcript, 4 December 2012, at PN 419 - 422.

[21] Exhibit Unions 10 at paragraph 10.

[22] Ibid at paragraphs 11-16.

[23] Exhibit Parks 2 at paragraph 65.

[24] Ibid at paragraph 61.

[25] Transcript, 4 December 2012, at PN 304 - 305.

[26] Transcript, 4 December 2012, at PN 339.

[27] Transcript, 4 December 2012, at PN 424, 543 and 879.

[28] Transcript, 4 December 2012, at PN 417.

[29] Transcript, 4 December 2012, at PN 409.

[30] Transcript, 4 December 2012, at PN 299 - 300.

[31] See Mr Jackson's evidence, Exhibit Parks 6 at paragraphs 23(a) and (b); Exhibit Parks 7 at paragraphs 20 and 23.

[32] Filed by Parks Victoria on 30 November 2012.

[33] *AWU v Pioneer Construction Materials Pty Ltd,* PR925916, 19 December 2002, at paragraphs 32 - 33; *CPSU v Australian Protective Service,* PR910682, 29 October 2001, at paragraph 12 - 13.

[34] *O'Sullivan v Farrer* (1989) 168 CLR 210 at p216; *Randall v Australian Taxation Office* (2010) 198 IR 114 at paragraph 11.

[35] Ibid.

[36] *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement* 2000 (2005) 139 IR 34 at paragraph 23.

[37] [2012] FWAFB 7858.

[38] Ibid at paragraphs 45 - 46.

[39] See Exhibits Parks 1-11 and Exhibits Unions 1-15.

[40] Exhibit Parks 1; Exhibit Parks 2; Transcript, 4 December 2012, at PN 196 - PN 1015 and PN 1210 - PN 1320. (We note that paragraphs 38 - 46, 67 - 87 and 91 - 126 of Exhibit Parks 1 were not tendered by Parks Victoria but were put in evidence during the course of cross examination by the Unions').

[41] Exhibit Parks 6; Exhibit Parks 7; Transcript, 4 December 2012, at PN 1020 - PN 1204. (We note that paragraphs 4, 5, 8 and 9 of Exhibit Parks 7 were not tendered by Parks Victoria but were put in evidence during the course of cross examination by the Unions').

[42] Exhibit Parks 8; Exhibit Parks 9; Transcript, 4 December 2012, at PN 1325 - PN 1380.

[43] Exhibit Parks 10; Transcript, 5 December 2012, at PN 1423 - PN 1598.

[44] Exhibit Unions 6.

[45] Exhibit Unions 7.

[46] Exhibit Unions 8; Exhibit Unions 13.

[47] Exhibit Unions 9; Exhibit Unions 14.

[48] Exhibit Unions 10.

[49] Exhibit Unions 11.

[50] Exhibit Unions 12.

[51] Exhibit Parks 2 at paragraphs 12-36.

[52] See GM-6 annexed to Exhibit Parks 1.

[53] Exhibit Parks 2 at paragraph 15.

[54] AG895510.

[55] Exhibit Parks 10 at paragraph 97 and 98(b).

[56] See the statement of Wayne Townsend, Exhibit Unions 6, at paragraph 32. Mr Townsend was not cross examined and this aspect of his statement was not challenged by any other witness.

[57] Exhibit Parks 2 at paragraph 16.

[58] Transcript, 4 December 2012, at PN 469-488.

[59] Exhibit Parks 2 at paragraph 17.

[60] Transcript 4 December 2012, at PN 493-498.

[61] MA000121.

[62] Exhibit Unions 7 at paragraph 27(c).

[63] Transcript, 4 December 2012, at PN 519-528.

[64] Exhibit Parks 2 at paragraph 20.

[65] Ibid.

[66] Exhibit Unions 7 at paragraph 35(c).

[67] Exhibit Parks 2 at paragraph 21.

[68] Transcript, 4 December 2012, at PN 536.

[69] Exhibit Parks 2 at paragraph 22.

[70] Exhibit Parks 2 at paragraph 23.

[71] Exhibit Parks 2 at paragraph 25.

[72] Exhibit Parks 2 at paragraph 26.

[73] Transcript, 4 December 2012, at PN 540.

[74] Transcript 4 December 2012, at PN 542-544.

[75] Exhibit Unions 2 and Transcript, 4 December 2012, at PN 573, 588 and 600.

[76] See Mr Mead's evidence, Transcript, 4 December 2012 at PN 627 - 629.

[77] Ibid.

[78] Transcript, 4 December 2012, at PN 637-638.

[79] Exhibit Unions 2 at paragraph 68 and Transcript, 4 December 2012, at PN 573, 588, 600 and 1003-1004.

[80] Save for those employees acting in Grade 8 positions.

[81] Ibid.

[82] Transcript, 4 December 2012, at PN 630-634.

[83] Exhibit Parks 2 at paragraph 30.

[84] See paragraph 93 of Exhibit Parks 1.

[85] See paragraphs 99 - 110 of Exhibit Unions 2.

[86] Exhibit Unions 2 at paragraph 100-106 and Transcript, 4 December 2012, at PN 573, 588 and 600.

[87] Transcript, 4 December 2012, at PN 645.

[88] Exhibit Parks 2 at paragraphs 30-31 and Transcript, 4 December 2012, at PN 660-661.

[89] Transcript, 4 December 2012, at PN 652 - 653.

[90] Note that the practical effect of the increases proposed by each party will be slightly higher, due to the compounding effect of successive increases.

[91] See *Informax International Pty Ltd v Clarius Group Limited* [2012] FCAFC 165 at 146-155.

[92] Parks Victoria's final submissions, 14 December 2012, at paragraph 100.

[93] *Transport Workers Union of Australia v Qantas Airways Ltd and Anor* [2012] FWAFB 6612 at 96; *Health Services Union v Austin Health and Ors* [2009] AIRCFB 353 at 34; *Southlink Pty Ltd v Transport Workers Union* PR948148 at 96 - 97; *CPSU v Australian Protective Service (APS)* PR910682 at 272 - 277 and *Australian Education Union v State of South Australia (DETE) and CPSU and State of South Australia (DETE)* Print T1383 at 170.

[94] *Metropolitan Ambulance Service v LHMU; Rural Ambulance Service v LHMU;* 28 July 2005 PR960731 at 22-23.

[95] For example, *Schweppes Australia Pty Ltd v United Voice - Victoria Branch* [2012] FWAFB 8599; *TWU v Qantas* [2012] FWAFB 6612

[96] [2012] FWAFB 6612.

[97] *Ship Painters and Dockers* 94 CAR 579 at 619-620.

[98] [2012] FWAFB 5600 at paragraphs 112 - 115.

[99] Print Q4464.

[100] Ibid. Also see TWU v Qantas [2012] FWAFB 6612 at paragraphs 28 - 29.

[101] *CPSU v Australian Protective Service,* Print PR910682, at paragraph 272- 277.

[102] *Huntley v Alexander* (1922) 30 CLR 566 per Isaacs J.; *Norbis v Norbis* (1985) 161 CLR 513 at 537 per Brennan J.; and *Lambley v DP World Sydney Limited* [2013] FCA 4 at paragraph [34] per Katzmann J.

[103] Parks Victoria's response to the draft summary at pp 5-6.

[104] *HSU v Austin Health* (2009) 180 IR41 at paragraph 35.

[105] Ibid at paragraph 45.

[106] Ibid at paragraph 43; *Southlink Pty Ltd v TWUA* (PR948148) at paragraph 43; *State of South Australia v CEPU* (PR957094) at paragraph 91.

[107] *CPSU v Australian Protective Service* (PR910682) at paragraph 266; *State of South Australia v CEPU* (PR957094) at paragraph 91; *ANF v Queensland Department of Health* (2003) 126 IR 244 at paragraph 102.

[108] *Schweppes Australia Pty Ltd v United Voice - Victoria Branch* [2012] FWAFB 8599 at paragraph 115.

[109] Ibid at paragraph 130.

[110] Parks Victoria's written submissions of 12 October 2012, at paragraph 34.

[111] s.284(1)(c).

[112] [2012] FWAFB 8599 at paragraphs 110 and 118.

[113] Paragraph 41 and p14 of Annexure BF5 to Mr Flynn's witness statement of 12 October 2012, Exhibit Parks 10.

[114] [2012] FWAFB 5000 at paragraphs 73-75.

[115] ABS Catalogues 6401.0 and 6467.0.

[116] The DEEWR Enterprise Bargaining Report, Exhibit Parks 11.

[117] Ibid at p 1.

[118] Ibid at p 6.

[119] Exhibit Parks 10 at paragraph 96.

[120] Exhibit Parks 10 at paragraph 97.

[121] Beechey at paragraph 3-10; Argote at paragraphs 16-18 and Caldwell at paragraph 3-11.

[122] Exhibit Parks 9 at paragraph 97.

[123] Ibid.

[124] [2012] FWAFB 8599 at paragraph 115.

[125] Parks Victoria's written submissions of 12 October 2012 at paragraph 37.

[126] See Mr Mead's evidence: Exhibit Parks 1 at paragraphs 22-24 and Annexure GM3, Exhibit Parks 2 at paragraphs 3-11 and Transcript at PN, 4 December 2012, 676-685; Dr Jackson's evidence: Exhibit Parks 6 at paragraphs 37-38, Exhibit Parks 7 at paragraphs 13-17 and Transcript, 4 December 2012, at PN 1169-1179; Mr Brendan Flynn: Exhibit Parks 10 at paragraphs 78-103 and Transcript, 5 December 2012, at PN 1448-1477 and 1563-1574; Exhibit Parks 5: 'The Economic backdrop to wage determination for Parks Victoria' by Deloitte Access Economics, 10 October 2012 at paragraphs 224-261.

[127] Annexure GM-3 to Exhibit Parks 1.

[128] Transcript, 5 December 2012, at PN 1446-1447.

[129] Exhibit Parks 10 at paragraphs 96-98.

[130] Transcript, 5 December 2012, at PN 1570-1574.

[131] The actual amount of increase is slightly higher due to compounding.

[132] Unions' Final Submissions, 14 December 2012 at paragraphs 100 and 102.

[133] Ibid at paragraphs 103.

[134] Ibid at paragraphs 106 and 113.

[135] Ibid at paragraph 114.

[136] See the evidence referred to at paragraph 61 of Parks Victoria's final submission, dated 14 December 2012.

[137] *TWU v Qantas* [2012] FWAFB 6612 at paragraph 39.

[138] Ibid at paragraphs 120-122

[139] Paragraphs 68, 70-71 of Parks Victoria's final submissions, dated 14 December 2012.

[140] See paragraphs 131-145 of the Unions' Final Submissions, dated 14 December 2012.

[141] Ibid at paragraph 149.

[142] ABS Catalogue 6401.0, 23 January 2013.

[143] Exhibit Parks 1 at paragraph 54.

[144] Exhibit Parks 1 at paragraph 88.

[145] Also see Mr Davis' second statement at paragraph 2.

[146] *AEU v State of South Australia* Print T1389 at paragraph 23 and *TWUA v Qantas Airways Ltd* [2012] FWAFB 6612 at 34.

[147] Exhibit Parks 2 at paragraphs 39 and 41, and Exhibit Parks 3.

[148] Transcript, 4 December 2012, at PN 736-737.

[149] Parks Victoria's final submissions 14 December 2012 at paragraph 134-136.

[150] Unions final submissions, 14 December 2012 at paragraphs 155-158.

[151] Transcript, 4 December 2012, at PN 732-733 and PN 737 and 743.

[152] Parks Victoria's final written submissions at paragraphs 128 - 130.

[153] Transcript, 4 December 2012, at PN 950.

[154] Exhibit Parks 3.

[155] Print Q4464.

[156] Also see *Transport Workers Union of Australia v Qantas Airways Limited* [2012] FWFB 6612 at paragraph 39.

[157] Parks Victoria final submissions, 14 December 2012 at paragraphs 144-145.

[158] (1951) 83 CLR 1 at pp.258.

[159] Also see *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1 at 11-12 per Brennan CJ and McHugh J. For analogous reasoning in respect of the exclusions from the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) see: *Dempster v Comrie* (2000) 96 FCR 370 at paragraph 18 per Kiefel J. and [29]-[32] per Lehane J.

[160] S.35(a) of the *Interpretation of Legislation Act* 1984 (Vic).

[161] (1994) 49 FCR 534 at 538. Also see *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J.

[162] (2010) 25 VR 436.

[163] Ibid at paragraph 92.

[164] (2011) 245 CLR 1 at paragraph 51 per French CJ, and paragraph 565 per Crennan and Kiefel JJ.

[165] As to the application of the principle of legality to statutory interpretation see: *Bropho v Western Australia* (1990) 171 CLR 1 at pp18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Coco v The Queen* (1994) 179 CLR 427 at pp436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at pp329 per Gleeson CJ; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 at pp209. Also see J.J. Spigelman (205) 'The Principle of Legality and the Clear Statement Principle' 79 ALJ 769; and M. Gleeson (2009) 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights', 20 PLR 26.

[166] *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579-580 per Evatt and Northrop JJ; *JW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J.

[167] Victorian Parliamentary Hansard Legislative Council 4 June 2009, pp 2680-2681.

[168] (1994 - 1995) 184 CLR 188 at pp.232 to 234 per Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[169] For example, *Konrad v Victoria* (1999) 91 FCR 95 and *Austin v Commonwealth* (2003) 215 CLR 185.

[170] Also see *PTC v Strain* and *CORE v Howarth*, Print Q7860. In that matter the Full Bench observed that 's.5(1)(c) [the redundancy exclusion] of the [1996 Referral Act] is intended to operate so as to preserve the full scope of the implied limitation'. Although this observation was made in relation to the previous Referral Act it is apposite to the excluded matter presently under consideration.

[171] (1986) 160 CLR 341 at 353; also see *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64 at 84 and *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 at 362.

[172] (1996) 73 IR 250.

[173] Ibid at 263.

[174] (1995) 61 IR 174 at 198.

[175] Ibid at 200.

[176] (1996) 73 IR 250 at 262-263

[177] See *NTEU v Bendigo Regional Institute of TAFE and others*, Print R3868 per Giudice P., Polites SDP and Smith C at paragraphs 15-18.

[178] Ibid.

[179] Ibid.

[180] Ibid at paragraphs 28-30.

[181] (1996) 78 IR 250.

[182] (1996) 73 IR 250 at 261.

[183] Print P4491, 2 September 1997.

[184] 187 CLR 416.

[185] So much is apparent from his Honour's decision and subsequent order, see Print P4768.

[186] (1997) 77 IR 151.

[187] Ibid at 160

[188] Transcript at paragraphs 1830 and 1832.

[189] (2003) 215 CLR 185 at pp.124.

[190] (1947) 74 CLR 31

[191] See G Hill '*Austin v Commonwealth: Discrimination and the Melbourne Corporation Doctrine* 92003) 14 PLR 69 at 81-84.

[192] Transcript, 20 December 2012, at PN 1747.