



SIGNAL SEVEN

6 May 2024

Flexible Work Arrangements and Frequently Asked Questions

We can now provide further information on FWA's because the recently arbitrated policy has been formalised by the arbitrator and is attached to this Signal 7. The BCOM have recently been provided with feedback both in the positive and the negative regarding the FWA policy. This Signal 7 is to inform on the process leading up to the policy, and the outcome. Unfortunately, the issue has spanned a number of years, and as such it is not a short history.

1. **Brief History**
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1. Brief History:

The UFU has been pursuing genuine consultation on a FWA policy since 2020. Initially this involved ACTF&R sending us a draft policy for our comment and input. The UFU responded with at least 16 comments and tracked changes on the policy, heard nothing back, and later followed up the status of the policy on at least 2 separate occasions, all before the end of 2020.

At that time we articulated a number of concerns about the draft policy including:

- The policy characterised FWAs as individual contracts, somewhat like "Australian Workplace Agreements" which were outlawed in 2009.
- All staff who entered such agreements were characterised as "part time", and we say that is misrepresentation of workplace rights because it contradicted the Enterprise Agreement.
- The policy sought to regulate matters of "primary" and "secondary" employment, and this is not relevant to FWAs.
- The policy allowed "extension" of FWAs not permissible at law.

Despite this, ACTF&R applied the policy without formally issuing it, and in so doing ignored our stated concerns.

Fast forward to 2022 where there was still no consulted or agreed policy, and the first FWA containing a 24-hour shift on an ongoing basis was approved by ACTF&R. The UFU raised a dispute over the application of the Agreement, initiating what is known as 'Status Quo'. As the Ag Chief Officer at the time was not answering or returning the phone calls of the Secretary the dispute was raised with the next appropriate level of management, the then ESA Commissioner. The ESA Commissioner gave an undertaking that ACTF&R would not enter into anymore 24-hour FWA's

while the dispute was afoot. The Signal 7 on 23/2/2022 outlines the matter and called for members to contact the BCOM regarding FWA's.

Jump forward again to early 2024 and the UFU and ACT Government were in the Federal Circuit Court of Australia, still trying to resolve the same issue. ACTF&R had again been approving FWA's that contained 24-hour shifts. We allege that this was in breach of the Agreement clauses on:

- Section D Hours of Work
- H.1 Work-Life Balance
- H.2 Flexible Working Arrangements
- P.1 Consultation
- P.11 Occupational Health and Safety
- S.1 Rosters
- S.5 Fatigue Management

We also allege that ACTF&R were in breach of the dispute resolution process and the status quo arrangements. In contrast there were many instances where genuine requests for valid FWA's had been made and otherwise refused, we allege in contravention of the Fair Work Act. This issue remains before the courts.

The UFU and ACTF&R attended court ordered confidential mediation in an attempt to prevent the issue going to trial. One of the outcomes of the mediation was that the two parties were to try to consult one last time on the policy. If agreement could not be reached, then the parties would be sent to an independent person for the policy to be arbitrated upon. Although progress was made, the policy could still not be agreed upon between the parties.

2. Arbitration:

What is arbitration?

“Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.”

Basically, the parties had tried everything possible to agree and they just couldn't get there. Someone external to the problem sits the parties down, hears both sides of the story and then makes a final decision on the matter.

Who was the arbitrator?

The arbitrator was Julius Roe. Mr Roe is frequently utilised by the ACT Government to mediate or arbitrate a diverse range of workplace disputes. His career spanned 40 years in industrial relations, including as a Fair Work Commissioner. He is no stranger to employment law.

What did the parties want from arbitration?

The UFU viewed there remained two main points of disagreement:

1. The UFU wanted to make sure that the policy reflected the law and offered certainty as to what was available as a FWA. The UFU believed that the position ACTF&R had taken in the policy would result in the policy contravening law and would continue to be ambiguous,

which would lead to further disputation. In short, the UFU wanted to ensure the policy would be lawful.

2. The UFU and ACTF&R did not agree on what constituted reasonable business grounds. In other words, the parties did not agree on the reasons that you could say 'no' to a request for a FWA.

Item 1 is simple. Both parties put forward their respective cases, with the UFU citing case law, pointing to references in the Agreement and providing other supporting material. The arbitrator decided that the FWA policy must be lawful, could not conflict with specific terms of the agreement and must be in accordance with the Fair Work Act. The reasons for his decision are now included in the policy.

Item 2 is not so simple. The UFU's position has always been that a FWA (or any other leave type for that matter) cannot be denied purely because it incurs the cost of OT. At the Ops Commanders meeting on 12/2/24 attendees were informed 13% of staff at present were on a FWA. ACTF&R have since said that this figure is incorrect, but we have no idea of exactly how many FWAs are in force. The UFU had also been informed that ACTF&R were struggling to deal with the high number and very likely could not accommodate any more.

During final attempts at the consultation ordered by the Court the UFU advanced a position that would effectively grant ACTF&R reasonable business grounds to deny a FWA. The UFU's preferred position was that there should only be limits or "quotas" on FWA's if it could be demonstrated that they resulted in an unacceptable incidence of overtime. We defined "unacceptable" as in excess of 13% of firefighters. Our basis for doing this was that according to Legislative Assembly Estimates answers to questions on notice, ACTF&R had saved over \$5.86 million (in 2023 dollars) over the life of the Agreement based on actual expenditure to 30 June 2023.

It is important to note that there were two parties with differing views and ultimately an arbitrator who made the final decision. The arbitrator agreed with the position put forward by ACTF&R in relation to numbers per platoon. As a result, their numbers and their limitations now appear in the policy.

The decision of the arbitrator is binding.

3. Where to from here?

Now that we can show you the policies, we would value your thoughts on them. We don't yet know when the policies will be formally issued by ACTF&R, but that shouldn't prevent members from providing us with any feedback. At the very least, the perspectives of members will help us to be alert to any difficulties going forward, and better consider how we can adjust.

4. Frequently Asked Questions and Comments

Q1. How is this a win for members?

A1. Focussing just on the FWA policy, our key goals have always been to ensure that the policy provides for fairness, consistency, transparency, and ultimately complies with the Agreement. The policy offers certainty as to what is available, and what are reasonable business grounds to deny a request. Where members have previously applied for a FWA and been denied with reasons like

‘your request for a FWA is too inflexible’ and ‘it costs too much money’, this will no longer happen. Alone, the cost of creating an overtime is not enough of a reason to deny a FWA.

Q2. Yeah, but you are limiting the amount of FWA’s that we can have.

A2. As noted above in the arbitration section the UFU proposed something vastly different from the end result. The limits imposed in the policy were not what we wanted; it was what ACTF&R wanted. We have spent years trying to sort this out, unable to come to agreement. It finally came to the point where an external individual was required to sit down and decide for both parties. We must abide by that decision.

Q3. A FWA should only be between the Chief Officer of the day and the individual who is requesting the FWA.

A3. FWA’s **must** be in accordance with law. They cannot be in breach of the Fair Work Act or the Enterprise Agreement, regardless of your relationship with the Chief Officer of the day. We say that in circumstances where an individual who might have a personal friendship with the Chief Officer and is granted a FWA that is in contravention of the Agreement on multiple counts, while at the same time there are other legitimate FWA’s being denied unlawfully, it is absolutely the business of the union to ensure that fairness, transparency, and consistency are followed.

Q4. Why did you just stop 24’s?

A4. As we advised in February 2022, we have not “stopped” 24-hour shifts. We have preserved them in the specific circumstances regulated by the Enterprise Agreement, based on clauses that are well known to all members. The outcome in relation to FWA policies is not just about 24’s and they are not the only arrangement that is affected. A number of other arrangements will no longer be approved. The reason is because they are in breach of the agreement and the FWA’s that have been entered into are unlawful. The BCOM does not condone ignoring the Agreement where it applies but it is perceived to ‘work for us’. It is the same behaviour that we attempt to hold ACTF&R accountable for. You cannot just apply the Agreement when it suits you. If you cannot rely on a legally enforceable agreement, what can you rely upon? Promises?

Q5. S5.6 is not about preventing 24-hour shifts on an ongoing basis... it is about preventing people doing back-to-back-to-to-back sets (effectively working 12 days straight, or more).

A5. Well... this is a new one. No one in the last 4 years has brought this up with the BCOM as an alternative interpretation, even while the 24’s have been the topic of signal 7’s where we have requested feedback, thoughts, experiences etc. Putting that aside, there are a number of flaws with this interpretation:

Firstly, nowhere in S5.6 does it refer to ‘sets’ or ongoing ‘sets’. The clause refers to 24-hour shifts and the prohibition on creating ongoing consecutive shifts.

Secondly, the clause itself still cannot operate in a FWA in the context being suggested. How can the relevant Commander exercise their discretion to approve a 24-hour shift, considering fatigue, if it has been already pre-approved? These are requirements of the same clause.

Most importantly, there are rules and laws that govern the interpretation of documents like Enterprise Agreements with mountains of case law on the topic. There is also an entire legal document devoted to it – the *Acts Interpretations Act 1901*. The interpretation put forward that it is

meant to apply to 'sets' falls over on so many levels and comes up woefully short in any legal argument.

Between a very experienced barrister, a very experienced solicitor, and two industrial practitioners with more than 100 years combined experience and a retired Fair Work Commissioner who dealt with interpreting Enterprise Agreements for a living, they all came up with the same interpretation. The BCOM respects that you have an opinion, and we can accept that you have this particular interpretation. The BCOM would also note that they are unlikely to go to the Secretary of our union for advice on tactical considerations at a structure fire or for operational guidance on the use of our vertical rescue equipment.

Q6. The policy is just one more document hindering the workforce moving towards 24's...

A6. The policy does not even refer to 24-hour shifts. The policy is clear that the FWA's must be in accordance with the Fair Work Act and Enterprise Agreements. If the Agreement changes, then new FWA's must be in accordance with the new Agreement. Regardless, the Agreement will always prevail over a policy where there are inconsistencies. See A4.5 of the Agreement.

Q7. Why wasn't I consulted about this policy?

A7. This one has a number of answers, depending on the way the question has been asked.

A7.A The UFU has been pursuing genuine consultation on this policy since 2020. There are obligations on the head of service to consult with affected staff or their representatives. We believe ACTF&R failed to genuinely consult with any of us. The end result is an arbitrated policy that we are bound by, pursuant to the courts.

We remain open to feedback while the policy is bedded down, and will take on board feedback from members: we cannot however commit to changing the policy to allow it to contradict the Agreement or the Fair Work Act: That is a matter of law.

Q7.B We should have had a vote. I would not have voted for 24's to no longer be options for FWA's, neither would anyone else I know.

A7.B It is a matter of law, not a matter of wants or feels. If we voted on it the BCOM would be misrepresenting your rights, the law, and it would have been disingenuous of us. It would likely result in the BCOM being in breach of the law. Office holders in a registered organisation (the union) are liable for fines and prosecutions that are heavier than those faced by directors of companies.

Q7.C How were we supposed to know what the BCOM would agree to in the policy?

A7.C Since 2022 we have had at least 4 signal 7's on the issue that clearly stated our concerns with arrangements being entered into. It has been the topic of at least four general meetings. Our position has been very clear all the way along. We have asked for written feedback regarding FWA's, especially of those who have entered one or had experience with one being rejected. We always encourage people to pick up the phone and talk to us. In the absence of anyone reaching out to UFU and raising an objection or concern with our position, we moved ahead. Finally, the policy was arbitrated on by an independent.

Q7.D I have heard the BCOM never actually consulted with anyone who was on a FWA about the policy.

A7.D Rumours are wonderful things aren't they. Two individuals on FWA's reached out to at least one member of the BCOM before the court ordered mediation, via phone. Electronic phone records exist. Discussion on where the case and policy was going or would likely end up was had with both of them. Both of the individuals' preferred (i.e. their first) FWA requests are now an option under the policy, where previously they both had been refused. Two further individuals who we now understand had 24's as a part of their FWA reached out to the BCOM after the issue had been arbitrated on. Unfortunately, by this stage it was too late for both of those individuals to influence the arbitrated policy. In any event, we were always unlikely to be able to help maintain FWAs that contradict the law. We also consulted with a number of members who applied for FWA's and were denied them.

Q7.E I have a FWA. I wanted to be consulted. Why wasn't I consulted directly?

A7.E Who are you and how are you affected? What are your arrangements? We don't mean that in a facetious way, more genuinely, we have no idea who you are. Previously we requested members to reach out to us if they were on a FWA. If we don't know who you are, you didn't reach out to us to let us know. The UFU requested ACTF&R provide us with information on FWA's, including who was on them and what type of arrangements they were on. ACTF&R refused, citing privacy concerns. We reached out... ACTF&R wouldn't give us information, affected individuals didn't give us information, what more could we have done?

Q8. I am a bit of a conspiracy theorist, but ACTF&R is struggling to find dayworkers and there are caps on the number of shift work FWA's but not Daywork FWA's. This smells like an attempt to force more people onto daywork...

A8. We usually are too. But in this instance, this is absolutely not the case. ACTF&R also proposed a limit on daywork FWA numbers. The arbitrator disagreed. That is why there is no FWA limit on dayworkers.

Q9. How will the limits per platoon work? It seems unfair that it may be first in, first served.

A9. We don't know. It was ACTF&R's position, not ours. It is a brand-new policy, and as yet, is untested. There is the caveat that the Chief Officer has the ability to go above the limited numbers. Additionally, the policy can be varied by agreement between the parties. We hope that if ACTF&R receive enough feedback on the limited numbers they will look to change the policy.

Q10. If I can't find someone to do a job share with me I am screwed... I can't work the part time roster.

A10. There are many ways to skin a cat, as long as they are lawful, they are open to you. As an example, you could continue to work full time, on your current platoon. You complete the first set, and when it comes to doing the second set you take leave without pay. This is a legitimate arrangement.

Q11. If there are already 4 people doing FWA's on my platoon I won't be able to do my job share

A11. Nothing in the policy, or the FWA clause in the Agreement alters other entitlements that are otherwise entitlements in their own right. Every item listed at H2.4 is an entitlement in its own right. Job sharing is its own entitlement, under H8, and can be granted in accordance subject to its own conditions.

Relevant Documents

1. Signal 7's:
 - a. [23 February 2022,](#)
 - b. [27 July 2023,](#)
 - c. [20 October 2023](#)
 - d. [13 February 2024,](#)
 - e. [26 February 2024,](#)
 - f. [27 February 2024,](#)
 - g. [26 March 2024](#)
 - h. [16 April 2024](#)
2. [The Arbitrator's Decision on FWA policy and Transition to Retirement](#)
3. [Tracked Changes version of 2020 Draft FWA policy, as provided by the UFU \(twice\)](#)
4. [The Amended Statement of Claim in the Federal Circuit Court matter.](#)
5. [Redacted letter to firefighter resigned from UFU](#)

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Strength in Unity

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