

Phase 1: Closing out bargaining - testing employee positions

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1. Context

1.1. Overview

- The Country Fire Authority (CFA) is presently reviewing its existing workplace relations arrangements, with a view to improved alignment with its operational objectives, immediately and for the long term.
- In this context, bargaining has been an ongoing source of division and disruption to the CFA for over two years. A key issue involves closing out the bargaining process as a priority.
- In our preliminary report, we identified three approaches open to the CFA to close out the bargaining. The CFA has elected to proceed with option 2, being to drive towards a rollover deal.
- This paper considers the implementation options associated with this option.

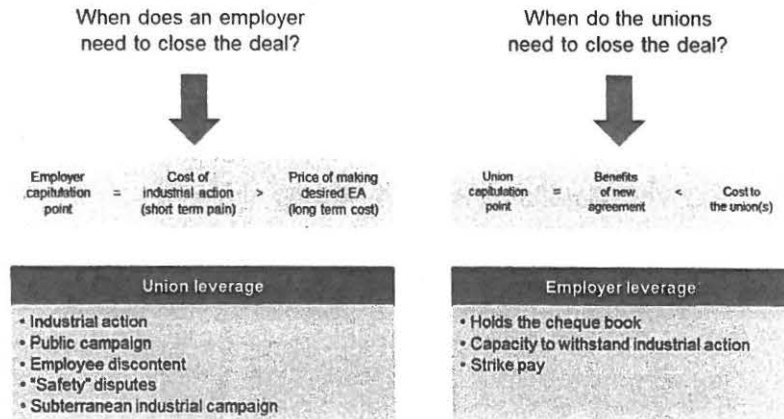
1.2. Approach

- We set out below the key actions to be taken by the CFA.
- Example of a roadmap of key activities to run the rollover strategy to vote are set out in **Annexure 1**. We would be pleased to develop this with you further to prepare a project management plan for the process, if required.

2. Closing out the bargaining



The bargaining equation



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- The current rollover deal is generous. The CFA is offering employees the security of a healthy wage increase in an environment where no change is otherwise proposed to the current framework of terms and conditions.
- However, to close the deal, the benefits of the rollover deal to the employees (and the United Firefighters Union of Australia (Victoria Branch) (UFU)) must outweigh the cost associated with maintaining a "No" campaign.

- A carefully executed communications approach will assist to maximise the likelihood of employees voting to support the rollover, and enhance the CFA's leverage in the bargaining equation.
- It is also necessary to ensure that steps are taken to engage with bargaining representatives, and potentially the Fair Work Commission, to explain the intended approach and to ensure that issues have been agitated in bargaining, consistent with good faith bargaining principles. In particular the CFA needs to be conscious that in communicating with employees it is providing information of which bargaining representatives are already aware. It would be prudent to review that this process has been concluded before formally putting any revised agreement to a vote.

2.1. Key actions

(a) Key messaging

- It is important to review and finalise the principles and rationale that underpin the rollover agenda. These can be drawn from the CFA's established values and workplace strategy objectives (such as promoting the 'one CFA' culture). See our earlier paper in this regard.
- These principles will underpin the CFA's messaging to employees and the UFU. They must be consistent and credible to build employee trust, and directed towards building a case for employee support for the rollover deal.

- This includes identifying the benefits of the rollover approach from the perspective of the employees.
- This might include messages such as:
 - "The CFA wishes to promote a 'one CFA' culture."
 - "It is not in anyone's interests to maintain a divisive dispute."
 - "The existing framework is an appropriate set of terms and conditions."
 - "The rollover proposal provides certainty in terms and conditions of employment together with a strong increase in wages."
 - "It is time to put this damaging bargaining dispute behind us and move forward. We want to focus on taking the necessary steps towards working effectively together now and into the future."
 - "Given the bargaining impasse, we want to give you, our employees, the opportunity to directly tell the business whether you support a rollover deal."
- The CFA should be careful with its messaging around the implications of a 'No' vote.
- It is open to the CFA to assert that it will reconsider the terms and conditions of its offer if the rollover

deal is rejected. It is also open to the CFA to assert that the current offer reflects a long period of negotiation and the business has gone as far as it can go. This messaging may be important to build employee trust and be transparent about next steps. However, it is important to avoid messaging that could later expose the CFA to a claim that:

- it intended to coerce employees to vote in favour of the rollover deal by making 'threats' about the implications of a no vote (contrary to the adverse action provision in s 343 of the *Fair Work Act 2009* (Cth) (**FW Act**)); or
- the employees did not genuinely agree to the rollover deal when they voted in favour of it, by reason of the asserted 'threats' (see s 188(c) of the FW Act).

(b) Leadership endorsement

- Identify the key group of managers who will be tasked with the responsibility of interfacing with, and influencing, the employees. The mandate here is to elicit employee support for the rollover deal as far as practicable.
- A "top down" approach to the CFA's communications strategy is important, as it evidences a whole of organisation commitment to building the future state. To this end, it is important to ensure that all CFA communications are consistently issued and in line with the "key messaging" at (a) above.

- Consider and develop leadership capability for driving communications with employees. This may include implementing development opportunities and training for the key group of managers, directed towards:
 - understanding the guiding principles relevant to the CFA to guide decision making;
 - management consistency;
 - empowering decision making;
 - tools for effective communication;
 - behavioural integrity;
 - dealing with conflict (such as vocal dissenters).

(c) Communications agenda

- The attitude of the employees to accepting a rollover deal is unknown. Implementing a direct communication process with employees is essential to:
 - enhance employee understanding of the CFA's rationale supporting the rollover agenda;
 - build employee awareness of any UFU myths; and

- achieve a higher degree of control in the process (and assist to marginalise the influence of the UFU as far as possible).
- Some practical tools for achieving this are set out below.
- To ensure that the employees hear the CFA's message (and not a diluted or inaccurate version that is misrepresented by the UFU), the communications protocol must involve the distribution of key messages directly to employees (rather than via the UFU). This can be achieved through various models:
 - communication roadshows conducted by the key group of managers;
 - small group discussions led by the key group of managers;
 - one on one sessions where reasonably practicable;
 - written communications to employees (to be placed on noticeboards and the like);
 - inviting employee feedback (providing a direct opportunity to be heard).
- It is important to keep steadily in mind that it will take multiple points of contact for this message to become understood and compelling. Multiple approaches to each employees, through multiple channels, need to be built into the communications planning.

- An effective mechanism for countering and exposing UFU misinformation is through the drafting and circulation of a "mythbusting" document. For example, this could involve the preparation a one-page document which compares a "UFU statement" against "the Facts". Done well, this can effectively dispel union myths and erode confidence in the UFU's agenda in a very public and visible way.
- Engage directly with bargaining representatives.
- Engage with employee groups who have been marginalised.
- Engage with volunteers.
- Engage with key external stakeholders. This may involve communicating with the Fair Work Commission (**Commission**) about the CFA's strategy to elicit prompt assistance at an early stage to maintain control of the process.

2.2. Prepare for the "No Campaign"

- In addition to the communications, it will be necessary to prepare for an on the ground response from the UFU. This could include exercising rights of entry, calling meetings and escalating the industrial action. Interference with attempts by management to communicate with employees (for example, by purporting to ban meetings).
- There is also the potential for unlawful direct action or intimidatory conduct. Any such conduct should be responded to quickly by appropriate legal avenues.

- Further, we recommend that the CFA conduct a safety-based risk assessment associated with the implementation of the process discussed in this paper and potential responses.
- It would be prudent to use the CFA's normal risk assessment framework for this process. Escalation points should be identified. We can provide further information as necessary in this regard.
- We recommend that the CFA consider undertaking this step on a privileged basis, given the potential for the employees and/or the UFU to allege that the CFA has taken adverse action against an employee within the meaning of the FW Act.
- Ensure that there are clear avenues for inappropriate conduct to be reported and that these are communicated, for example, a values breach hotline

2.3. Things to avoid in phase 1

- While it may be desirable, we recommend delaying measures directed towards increased union accountability until the employee's views have been tested through a vote for or against the rollover deal.
- In the current environment, calling out the consequences of the UFU's bad behaviour is likely to make closing the deal more protracted and play into the UFU's campaign for a 'No' vote.
- Further steps can be taken to counter the UFU's conduct and start driving the change in the next phase (which is briefly explored below), after the

employee positions on the rollover deal have been tested.

2.4. The decision point

- It is open to the CFA to test employee positions on the rollover deal in one of two ways:
 - The rollover agreement can be put to employees in a formal way, by issuing a new enterprise agreement to them as required by s 180(2) of the FW Act and taking all of the pre-approval steps necessary under Division 4 of the FW Act (such as taking all reasonable steps to notify employees before the agreement is issued to them of the time and place the vote will occur, and the voting method that will be used¹ and giving employees access to a copy of the agreement and any material incorporated by reference in it for seven clear days).²
 - Alternatively, the CFA can conduct an informal assessment of employee preference by taking a vote of employees in a manner the CFA considers appropriate (bearing a mind

¹ See s 180(3) of the *Fair Work Act 2009*.

² Other pre-approval steps involve taking all reasonable steps to ensure that the terms of the agreement and their effect are explained, taking into account the particular circumstances of the employees. We can provide further advice on this as needed.

that a show of hands in a robust environment such as this can work to the UFU's advantage). An option here is to conduct a survey of the workforce (done in a manner you like). As there are no restrictions on the form of questions that can be put, the questions can be crafted in a way that avoids getting what may be potentially blunt data in response to yes/no questions.

- The CFA can decide to conduct the vote as it sees fit and we would expect that a secret ballot is likely to be most appropriate.
- An example of the agreement making timeline is set out in the Annexure.

3. Next steps

3.1. If the employees vote "yes"

- The terms and conditions in the 2010 EBA will continue. Immediate next steps will involve implementing all necessary steps associated with filing the new agreement with the Commission for approval. We can provide further, more specific advice around this as needed (which will depend upon the approach taken by the CFA to test the employees' positions).
- In the longer term, once the rollover deal is formally approved by the Commission, the CFA's strategy to

start driving change (within the framework of the agreement) should be implemented.

3.2. If the employees vote "no"

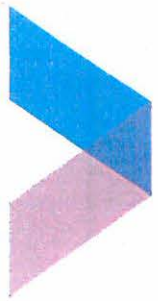
- If the rollover deal cannot be achieved and the employee's vote no, it will be necessary to fall back to Option 3 from our previous paper.
- In addition, our experience is that following a no vote, employees quickly want to know what happens next and will expect to see further concessions from the CFA. Plainly, it is important for the credibility of the leadership that further concessions are not made.
- The initial response to this event needs to be carefully planned. It can be effective in some situations to leave open the possibility of employees being given a further opportunity to agree to the rollover deal.
- We recommend that the CFA:
 - Evaluate in the period immediately after the ballot whether it may be desirable to put the rollover deal again in the same terms. You may wish to take steps to reinforce messaging and to obtain feedback from employees in this period.
 - Start the ramp up of its strategy for holding the UFU accountable for bad behaviour; and

- Then start implementing a program to bargain for a broader change agenda, including by escalating the bargaining dispute to a conclusion. Steps to consider here include termination of the agreement, responsive industrial action and other measures outlined in our previous paper.
- Further advice can be provided about this. In the meantime, the steps proposed for the CFA in this paper will build on the CFA's case for change and are recommended by us on the understanding that external intervention and arbitration may be a necessary next step.

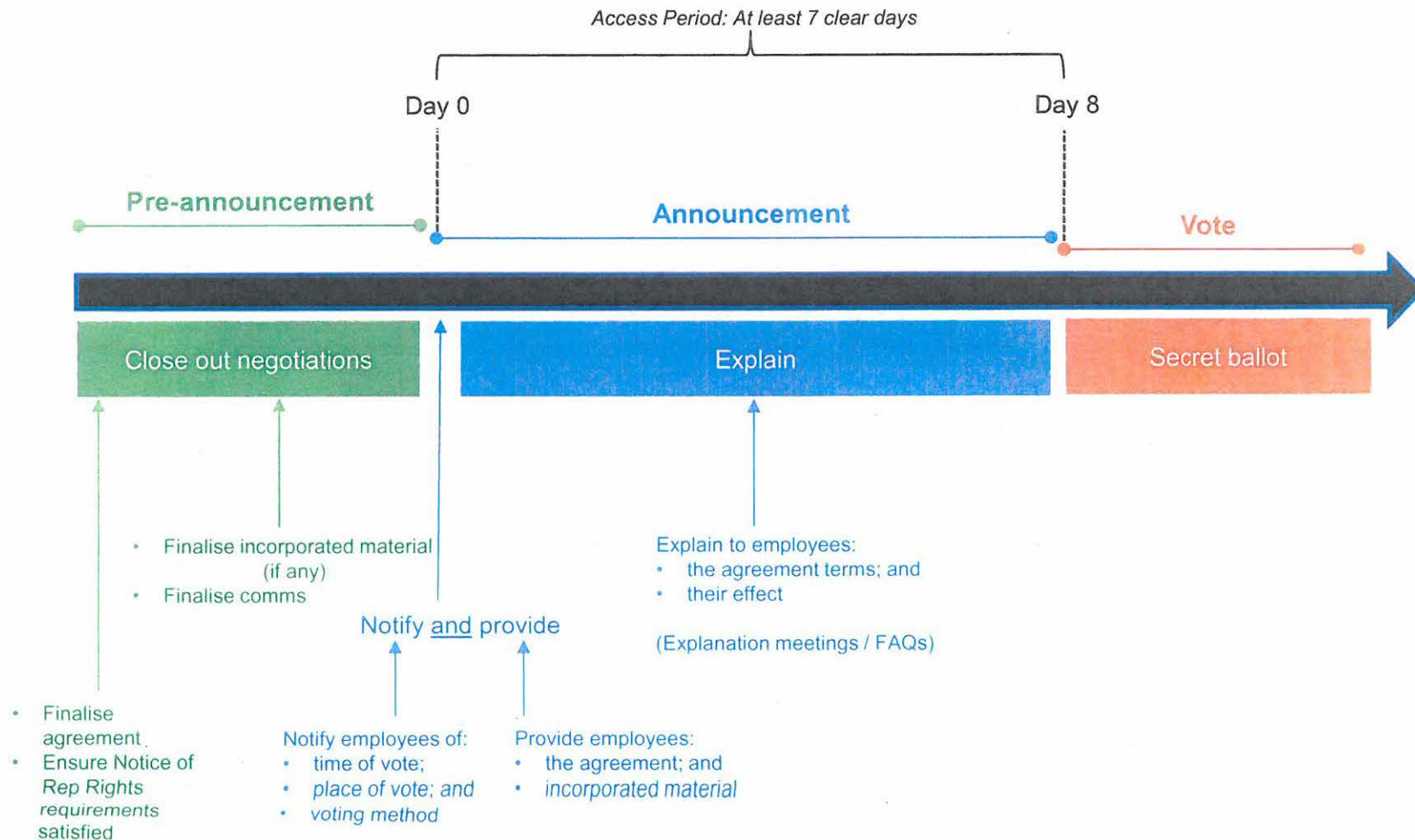
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Seyfarth Shaw Australia
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Annexure 1 - Rollover Roadmaps



Approval making timeline





Rollover Roadmap – No vote

	Apr	Apr	May (?)	May	TBA	TBA
				VOTE NO		FURTHER VOTE
Communication	Scene setting	Engaging with employees (onsite visits)	Execute of phase 1 rollover strategy		Change messaging campaign	
			Communicate key messages directly to employees (including myth busting)			
Leadership	Strategy signoff and endorsement	Top down messaging		Review ↑ Change Agenda	Top down messaging	
Internal Management	Strategy communication and roles	Engaging line management		Key management messaging		
Negotiation	Strategy development	Engage BRs	Approval period	Table Real Change Agenda	Consider Termination of agreement	
Industrial action	Continued industrial action	Sensitivity analysis/ contingencies		Possible industrial action		
Stakeholders	Stakeholder engagement (including FWC at an early stage)	Close out negotiations		Implement increased union accountability	FWC Engagement	
Other	No Campaign Risk Assessment	Implement safety/security plan				