PUBLIC RESPONSE OF PETER MARSHALL AND UNITED FIREFIGHTERS' UNION OF AUSTRALIA TO IBAC'S SPECIAL REPORT ON OPERATION TURTON SEPTEMBER 2024

Introduction

1. On 25 September 2024, the Independent Broad-based Anti-corruption Commission (**IBAC**) transmitted its Special Report on Operation Turton (**the Report**) to Parliament pursuant to s 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* (**IBAC Act**).

2. Prior to transmitting the Report, the IBAC provided a copy of its proposed Special Report to Mr Marshall and the United Firefighters' Union (**UFU**) because they were persons about whom the IBAC Report contained adverse comments or opinions, and they were entitled by s 163(3) to be given a reasonable opportunity to respond to the adverse material. Mr Marshall and the UFU provided a comprehensive response to the IBAC. Regrettably, IBAC made only minor adjustments to its Report and chose not to deal in substance with the more difficult issues identified in Mr Marshall and the UFU's response.

3. As a consequence and to put the Report in its true context, Mr Marshall and the UFU are releasing this public response to the Report, which reflects the issues that were previously raised with IBAC and not dealt with.

Commissioner Elliot was not involved in any part of the investigation

4. As a preliminary matter, the IBAC Report is problematic in two respects, first whether Commissioner Elliott could truly have brought an independent mind to her exercise of powers where she adopted the comments, opinions and findings made by Commissioner Redlich at first instance, and second where the consequence of such action is to deny Mr Marshall and the UFU, and the other witnesses the opportunity to respond to comments, opinions and findings held by her, *prior* to her making her final findings.

5. At the time the proposed report was transmitted to Mr Marshall and the UFU for response, IBAC was constituted by Mr Robert Redlich KC and the IBAC report which he proposed to transmit to Parliament contained his adverse comments and

opinions based on his personal assessment of the evidence and material after having examined relevant witnesses, including Mr Marshall. Mr Redlich's term of office as Commissioner ended in December 2023 and he was replaced by Ms Victoria Elliott. Commissioner Elliott was not involved at all in any of the investigations carried out by Commissioner Redlich, including the examination of witnesses upon whose evidence Commissioner Redlich's comments and opinions relied.

6. Mr Marshall and the UFU indicated to Commissioner Elliott that in order for her to lawfully exercise her statutory duty in relation to the publication of a Special Report for Operation Turton, the proposed report provided to them for response must reflect *her* personal assessment and judgment of the propriety of any adverse comments or findings about any persons in the report, and the probity and weight of the evidence upon which they are based. Mr Marshall and the UFU sought confirmation from Commissioner Elliott as to whether she had in fact formed her own independent views about the adverse comments and opinions contained in the proposed IBAC Report and the evidence upon which they were based. Commissioner Elliott failed to confirm that she had done so and instead required Mr Marshall and the UFU to respond to the report as prepared by Commissioner Redlich, under threat that it would otherwise be transmitted to Parliament without their response. She informed Mr Marshall and the UFU that she proposed to include in the report which she transmits to Parliament, adverse comments and opinions which are "*in substance*" the same as Commissioner Redlich's IBAC Report. No explanation was provided as to the evidentiary basis upon which she decided on the validity of those comments and opinions. Nor did she explain what she meant by "*in substance*" – a simple change of wording would not suffice to establish that she had discharged her statutory duty to form her own independent opinion about those matters. This lack of transparency leaves a serious question hanging over the lawfulness of the Commissioner's exercise of her statutory duty the validity of the Report.

7. Mr Marshall and the UFU strenuously objected to being required to respond to the IBAC Report and the response which they provided was made without any concession about its validity but only to try and mitigate, to any extent possible, the damage to them from this flawed exercise of power by Commissioner Elliott. From the Report, it is clear that Commissioner Elliott had not made her own findings *prior* to providing a

copy of the report to Mr Marshall and the UFU to respond to, and that if she did come to any independent conclusions, she had only done so *after* having received the response from Mr Marshall and the UFU which responded to the findings made by Commissioner Redlich, not independent findings made by her.

8. In the final report that Commissioner Elliott transmitted to Parliament, she notes:

> *While the version of the report provided to Mr Marshall and the UFU (and the other witnesses involved in Operation Turton) was a version that was approved by the former Commissioner, the current Commissioner did not defer to the former Commissioner's judgment but independently formed a view as to whether to include any comments, opinions or findings in the report, interrogating the evidentiary basis for any such comments, opinions and findings and giving due consideration to the responses received by the affected person. As a result of the Commissioner's independent evaluation and judgment of those matters, which led to material changes to the version of the report provided to Mr Marshall and the UFU, this report has been published. (emphasis added)*

9. The Commissioner's reference to "material changes" exposes another serious legal flaw in the process adopted by the Commissioner: section 126(3) obliges the Commissioner to have provided Mr Marshall and the UFU with the report which she proposed to publish not which Mr Redlich proposed to publish and which she would reconsider later. Mr Marshall and the UFU were supposed to have an opportunity to respond to her proposed findings and adverse comments which she says were materially different.

10. Mr Marshall and the UFU did not have the benefit of being informed of Commissioner Elliott's independent proposed comments and opinions and the adverse material upon which they were based, to persuade her to form a different conclusion.

11. Mr Marshall and the UFU reserve their rights in respect of the above matters.

The IBAC Report does not make any findings of 'corrupt conduct'

12. The Report is divided into six parts. Part 1 is a summary of the investigation and outcomes. Part 2 sets out the Background of the investigation. Part 3 identifies the people and entities involved in the investigation. Part 4 is headed "*What IBAC's Investigation found*". This part sets out the substantive findings of the investigation. Part 4.1 states that "*Operation Turton identified five separate instances where MFB information was accessed or disclosed by MFB employees without authorisation*". It should be noted that only the instances outlined in Part 4.3, 4.4. and 4.5, were made known to Mr Marshall and the UFU for response. Information about the other two incidents outlined in Part 4.1 and 4.2 were redacted in the report provided to them. Part 5 is IBAC's analysis of organisational culture within the MFB and the resultant risk of corruption that IBAC claims to arise. Part 6 contains Commissioner Elliott's conclusions and recommendations.

13. The Report arises from an allegation of "*unauthorised accesses by Mr Trakas*". Following a 'preliminary inquiry', IBAC determined to commence Operation Turton as an 'investigation' in January 2019 under s 60(1)(b) of the IBAC Act, which enabled IBAC to use its full range of investigative powers. In June 2019, IBAC expanded the investigation to "*include further allegations of unauthorised access and disclosure of information*", including instances "*involving*" Mr Marshall.

14. In order to conduct an investigation under the IBAC Act, IBAC must suspect on reasonable grounds that the conduct constituted 'corrupt conduct', as required by s 60(2) of the IBAC Act. To constitute 'corrupt conduct', the conduct must amount to a 'relevant offence' which is any indictable offence against any Act, or one of the four common law offences specified in the IBAC Act.[1]

15. IBAC continued its investigation for two years. During this period, IBAC deployed its full range of investigative powers against Mr Marshall and the UFU, including search warrants to seize private and personal material, physical surveillance and interception of telephone calls made and received by Mr Marshall. IBAC notes in its report that it "*considers the use of such investigative methods used in Operation Turton, including telephone intercepts, was lawful and justified*."

[1] This includes attempt to pervert the course of justice; bribery of public official; perverting the course of justice; and misconduct in public office.

16. Yet despite this extraordinary intrusion into the personal and professional life of Mr Marshall and the operation of the union, the investigation did not yield a single finding of 'corrupt conduct'. After two years of investigation, the IBAC found five specific instances of what the IBAC considers to be 'unauthorised access or disclosures'. None of these amount to 'corrupt conduct' as defined in the IBAC Act. For reasons explained below in our analysis of Part 4, even the term 'unauthorised' is not an accurate characterisation of the conduct in several of those instances.

17. The fact that IBAC had failed to find 'corrupt conduct' is not explicitly stated in their report. Instead, the IBAC report is couched with words such as "*corruption risks*" and "*corruption vulnerabilities*" to give the allusion that the outcome of the investigation had indeed uncovered some form of corrupt conduct.

18. Given that a key function of IBAC is "*to identify, expose and investigate corrupt conduct*", it was only fair to the individuals mentioned in the Report, for IBAC to include an explicit statement that IBAC found no corrupt conduct in Operation Turton, lest the public be misled into thinking that IBAC had indeed found that they had engaged in corrupt conduct. This is not a hypothetical risk, given that The Herald Sun did in fact run an article on 26 September titled "*IBAC accuses firefighters union of corrupt conduct*" which was retracted and later changed to "*IBAC accuses fire brigade employees of improper conduct*".

The IBAC Report criticizes the 'consult and agree clause' despite there being no logical connection between the clause and the incidents of 'unauthorised disclosures and access' it investigated under Operation Turton

19. This issue will be explored in detail in subsequent parts of this response, however for the moment, it is important to note that even though the investigation had failed to find, identify or expose corrupt conduct, IBAC justifies the publication of the Report by asserting that it is doing so "*in line with its prevention and education functions*"[2] and that it is "*publishing this special report to inform the community and public sector of how poor workplace environment can lead to corruption vulnerabilities identified in this investigation"*. Under the guise of the 'prevention and education' function, the Report pivots to a misconceived and biased psycho-social hypothesis in Part 5 of the

[2] IBAC Report, p 33

Report, that attacks the union and the 'consult and agree' clause in the MFB enterprise bargaining agreement.

20. Therefore, despite Operation Turton ostensibly being concerned with an investigation into 'unauthorised disclosures', large portions of the Report went beyond the scope of its investigation (namely, to investigate unauthorised accesses and disclosures[3]), to direct criticism at the UFU and to include adverse commentary on the operation of the 'consult and agree' clause. IBAC's justification for this is that its "*role in investigating corrupt conduct is to understand what led to the conduct and how the conduct may be prevented in the future. This often requires analysis of the wider operating framework of the organisation or department in question. This analysis occurred in Operation Turton and the basis for that analysis is clearly referenced in the report"*.[4] However, the 'unauthorised disclosure and access' that IBAC investigated in Operation Turton is not 'corrupt conduct', and even if that fact is overlooked, the Report fails to properly explain what tenuous link, if any, existed between the 'consult and agree' clause and the findings of 'unauthorised disclosures and access'. For the reasons set out below， it is evident that Part 5 of the Report is devoid of any intellectual rigor or analysis and based on the one-sided views expressed by select past management and executives of the MFB.

21. Moreover, Mr Marshall, who was required to attend for two days for questioning in a hearing conducted by Commissioner Redlich, was never questioned about the operation of the 'consult and agree' clause in the enterprise bargaining agreement that the report seeks to impugn, nor about the culture within MFB which the report purports to address. There was no similar reluctance to get evidence about these matters from the MFB management witnesses who clearly had a partisan interest but whose evidence was nonetheless accepted without hesitation, even though it was never tested by cross-examination. No explanation has ever been provided for such a one-sided process.

22. These are all important matters which should have been considered by Commissioner Elliott before requiring Mr Marshall and the UFU to respond. They should only have been required to respond to what *she* then proposed to transmit to Parliament – that is

[3] IBAC Report, p 11.
[4] IBAC Report, p 40.

the point and purpose of s 162, and to do otherwise, IBAC has greatly undermined the critical natural justice process of that section.

23. It is proposed to now deal with and respond to the individual Parts of the Report.

Issues with Part 1 of the IBAC Report

'Summary of the investigation' makes sweeping conclusions that are unsupported by evidence

24. This Part is said to be a summary of the investigation conducted. Subsequently, in addressing Part 4, we will deal with issues concerning the particular incidents identified and investigated in Part 4.3 to 4.5, but it is proposed in this part to deal with the broad and unfounded assertions in Part 1 of the Report.

25. In the summary, the Report makes the broad sweeping conclusion that these incidents "*appear*" to have been "*largely driven by a desire to further the interests of the UFU or Mr Marshall*". This is unsupported by the evidence in the Report.

26. The incident set out in Part 4.1 is about Mr Trakas granting and removing access for himself to various MFB email accounts. IBAC identified 19 access events that had no explanation. These included instances of Mr Trakas' account providing and removing third-party access to the CIO's and CEO's mailboxes without any request or authorisation. None of these "third-parties" are said to be associated with Mr Marshall or the Union. When IBAC put to Mr Trakas that policy required him to get authorization "*from the CIO, or the owner of the mailbox*", Mr Trakas noted that there are some cases where the policy was not followed because it was "*not workable*". Mr Trakas also gave evidence about feeling pressure from "*mad, angry personal assistant[s]*".

27. None of this evidence could lead to the conclusion that it was the UFU or Mr Marshall who had pressured Mr Trakas to do what he did, or that he undertook those actions to benefit the UFU or Mr Marshall. Moreover, Mr Marshall and the UFU were given no opportunity to comment and respond in respect of this incident.

28. The incident set out in Part 4.2 is about a single event where Mr Trakas allowed Ms Pyliotis to use his computer and user profile to forward an email. IBAC "*was not able*

to determine Ms Pyliotis' motivation for doing this". The supposed email that was sent by Ms Pyliotis through Mr Trakas' account was never recovered.

29. There is insufficient evidence to support the conclusion that the conduct described in 4.2 was motivated by a desire to benefit Mr Marshall or the interests of the union. Further there is a question of whether Mr Trakas allowing Ms Pyliotis to use his account to send an email even constitutes 'unauthorised access' in circumstances where Mr Trakas, as the 'owner of the mailbox' approved her to do so.

30. The incident in Part 4.5 is about Ms Schroder telling Mr Marshall that MFB was extending the contracts of several MFB Executive Directors. Ms Schroder's evidence was that this was a matter that '*she did not support*" and that "*she wanted the Minister to be 'aware' of the situation*". Ms Schroder referred IBAC to a direction that prohibited MFB from extending executive contracts while the organisation was transitioning to FRV. Leaving aside for the moment the propriety of the contract extensions, it is evidently clear from the evidence of Ms Schroder that it was not her intention to pass on the information to Mr Marshall for his benefit or to assist the interests of the union.

31. Therefore, it is clear that at least three of the five incidents were not driven by a desire to further the interests of the union or Mr Marshall. The conclusion set out above in paragraph [25] is unfounded, but IBAC needs to lay the blame for the 'unauthorised access or disclosure' on Mr Marshall and the UFU, so that it can conclude that "*One factor in the unauthorized disclosures to the Union was some employees' belief that eventually the Union would be able to access this information through legitimate means*". From this, IBAC springboards to impugn the 'consult and agree' clause for giving rise to "*misconduct and corruption vulnerability*".[5] The fact that there is no evidentiary foundation or any logical reasoning explained for the conclusions made by IBAC regarding the 'consult and agree' clause will be discussed further below under Part 5.

[5] IBAC Report, p 6.

32. The recommendations in Part 1.3 are flawed in that they reflect the flaws and deficiencies outlined above, but moreover they reflect the bias that IBAC has brought to its investigation.

Issues with Part 2 of the IBAC Report

'Background' was poorly researched with selective quotes cited to advance IBAC's narrative

33. This Part deals with the background to the investigation. The literature cited in Part 2.1 is further elaborated on in Part 5.1 of the Report titled "organisational culture issues".

34. From reviewing IBAC's draft report, we found that IBAC's understanding, if any, of the workplace issues and specifically those explored by the cited reports, to be shallow and selective quotes had been taken from the reports simply to advance a narrative that would fit within their theory without any attempt at balance. In many cases, passages had been simply misquoted and a "convenient", but inaccurate, interpretation had been supplanted. This lack of research rigor deprives the IBAC Report and its hypothesis about MFB culture of any intellectual credibility. The reports cited are discussed in detail below.

The IBAC Report contorts the findings from the 2015 Fire Services Review to support its narrative of a 'bullying culture' without providing the context in which the findings were made and blatantly ignores the Review's finding into the failure of management as a factor

35. This report is cited in Part 2 and 5.1 of the Report. The Report of the Victorian Fire Services Review '*Drawing a line, building stronger services*', authored by David O'Byrne and published in October 2015 (**the Review**), was a broad review into the fire services focussing on "how fire services can reach their potential". It made key findings into operations, culture, management and resourcing in the fire services and culminated in 20 recommendations. Importantly, the report was the basis for the amalgamation of career firefighters from the CFA into MFB to create the newly formed FRV fire service, a move that had been advocated for by the UFU for many years.

36. In the response by Mr Marshall and the UFU to IBAC, it was noted that the Report had used the Review's findings without explaining how the findings fit in with the broader context in which they were made, and contorted specific findings to support IBAC's narrative that the union was to blame for bullying and other cultural issues at the MFB. For example, Mr Marshall and the UFU noted that the 'bullying culture' had not been put into context of the culture of strained relationships between volunteer and career firefighters described in the Review. It was also noted that an important qualification made in the Review, that it did not "*receive sufficient information to comment on the prevalence of such a culture*" had been omitted in the IBAC report. Moreover, it was pointed out that IBAC had misquoted findings that had the effect of emphasising the bullying at 'MFB' where the comments had been made in respect of both the MFB and the CFA.

37. The Report subsequently included the information outlined in the response of Mr Marshall and the UFU on p 23 and rectified the misquoted findings in part 2.1 that had been identified by Mr Marshall and the UFU.

38. Mr Marshall and the UFU's response also noted that the Review detailed the failure of management to properly deal with the bullying issues.

> "*In some instances, this was due to a lack of skills or lack of interests on the part of the responsible manager. In others, it was due to a lack of authority of the responsible manager, irrespective of how willing, to take any real, positive steps towards resolution. And in others, it was a case of the matter being handed up the line with no one taking any responsibility to address the issue or maintain communication with the complainant*".

39. The fact that the bullying culture persisted because of the failure of management is not the focus of the IBAC Report because this does not fit within their narrative that it is the 'union' who is responsible for a culture that enables misconduct, as opposed to poor management.

40. Mr Marshall and the UFU's response also noted that the Review found, in particular, that the industrial disputes during the term of the previous government (Napthine Liberal government) had a profoundly damaging effect on morale. The Review noted:

> *"From media reports at the time and the information received by the Review, it is clear that the previous government deployed a deliberately ideological attack against the UFU and effectively encouraged CFA and MFB to go to industrial war with their respective workforces."*

41. IBAC blatantly and egregiously wrongly attributes this quote to the view of Mr Marshall and the UFU on page 24, reporting that "*Mr Marshall and the UFU rejected the view that the UFU was to blame for the bullying and other cultural issues within MFB. <u>They said</u> that the cultural issues arose in the context of the strained relationship between volunteer and paid firefighters and 'ideological attacks' by the former government on the UFU*."

42. The Report minimises the above factors mentioned in the Review because they do not advance their narrative, that it is the union which contributes to a culture that enables misconduct. Instead, the narrow focus in the Report on bullying and the UFU, without any context or balance, implies that the Union is to blame for the cultural issues, which conveniently sets up the basis for the Report's negative conclusions about the Union in part 5.1 of the Report.

43. Moreover, once again there was the recurring failure by IBAC (for reasons that were never explained) to allow Mr Marshall or the UFU the basic fairness of an opportunity to respond to these generalised and broad-based bullying claims during the investigation.

<u>The IBAC Report fails to mention that the corrupt conduct outlined in the Victorian Ombudsman's Report was brought to light by information passed on from union delegates, the very same process IBAC investigated as 'unauthorised disclosure'</u>

44. Page 10 of the Report refers to the Victorian Ombudsman's report published on 19 June 2017 (**VO report**). The VO report was concerned with the corrupt conduct of a former MFB Chief Information Officer (**CIO**) who hired both her sons as employees of the MFB. Essentially the CIO failed to declare her personal relationship, falsified her sons' curricula vitae, and changed their names to conceal the family connection.

45. Mr Marshall had received information about the MFB CIO's misconduct through his delegates and reported it to the MFB to refer on to IBAC for investigation. Even

though this fact had been expressly brought to the attention of Commissioner Redlich in Mr Marshall's private examination, it was only added to the final IBAC report after Mr Marshall and the UFU had complained about its omission.

46. It is evident that these details are 'inconvenient' for IBAC for two reasons. First, it goes against the narrative of the Report which seeks to position Mr Marshall and the Union as the wrongdoers (this is further discussed below under the heading 'Campaign against the Union'). Second it came out during Commissioner Redlich's questioning of Mr Marshall that the process which enabled Mr Marshall to receive the information in relation to the CIO's corruption, that is through his union delegates, was ironically the very same process that IBAC was now investigating as an 'unauthorised disclosure'.

47. The fact that Commissioner Redlich, and subsequently Commissioner Elliott failed to consider this evidence in the preparation of their proposed findings and mention it only in the final report, because they are required by law to 'fairly set out' the response of Mr Marshall and the union,[6] highlights the lack of impartiality in the investigation. Moreover, IBAC's failure to mention in the substantive portion of its report (as opposed to the part setting out Mr Marshall and UFU's response) that it was in fact the first agency to receive the complaint but failed to investigate the matter, is also concerning. The incident is embarrassing for IBAC because it stands against the hypothesis in the report that it is the UFU that is responsible for culture which produces corrupt conduct, yet this incident was completely unrelated to the UFU and is clearly on a far higher level of corruption than the incidents it chose to investigate and impugn the Union with.

48. Whilst IBAC has broad discretion as to what matters it chooses to pursue, IBAC's choice not to investigate the blatant corrupt conduct of the MFB CIO, who hired her own sons and falsified documents, does not sit comfortably with the vigorous manner in which they have pursued Mr Marshall and the UFU and which one could regard only as 'double standards' or 'selective standards'.

[6] IBAC Act, s 162.

The IBAC Report's reliance on the minority report of Liberal and National Party members calls into question the impartiality and independence of the investigation

49. In the first footnote of the Report, IBAC relies on this minority report of the three Liberal and National Party members. In their response to IBAC, Mr Marshall and the UFU heavily criticised the IBAC for its carelessness or wilful blindness in citing only the minority report of the three Liberal and National Party members without any reference to the blatant political nature of the document. It was noted that this confirmed again IBAC's lack of concern to produce a fair, credible and even-handed report. It was noted that IBAC's failure to mention any other part of the Committee's report, including the minority report of Ministers Shing, Melham and Eideh, which contested and rejected the views contained in the Liberal and National Party members' report, exposed the complete lack of balance in the way which IBAC approached its investigation. In their response, Mr Marshall and the UFU also pointed out that IBAC had relied on a quote which they had taken out of context and attributed to the wrong minority report.

50. The final IBAC Report removed all references to the minority report in the body of its report following the complaints of bias by Mr Marshall and the UFU.

Issues with Part 4 of the IBAC Report

51. This Part of the Report deals with five instances of 'unauthorized access or disclosure' of MFB information by MFB employees.

The incident in Part 4.1 and 4.2 were not linked in any way to Mr Marshall or the UFU

52. As noted above, information about the incidents described in Part 4.1 and Part 4.2 were not provided to Mr Marshall and the UFU for comment, and there is no evidence to suggest that these incidents are linked in any way to Mr Marshall or the UFU.

Response to Part 4.3 - the alleged unauthorised disclosure of MFB document to the Emergency Services Minister

53. The Report describes this incident of 'unauthorised disclosure' as follows:

"*Mr Marshall 'asked around all the [UFU] delegates' and 'ended up getting a copy' of an internal MFB PowerPoint presentation relating to a business intelligence*

software program. He subsequently provided it to the then Minister for Emergency Services, the Honourable Lisa Neville MP".[7]

54. IBAC found "*this was a clear example of unauthorised disclosure of information both to the UFU and to the Minister*".[8]

55. The characterisation of the provision of the document to Mr Marshall and his subsequent provision of the document to the Minister as 'unauthorised disclosures' is not supported by evidence.

56. Firstly, the sentence that Mr Marshall "*asked around all the UFU delegates*" needs to be put in perspective. Mr Marshall's evidence to the Commission, from which the sentence above was selectively quoted, was as follows:

> *"**So there was talk within the fire service about this projection in relation to cutting numbers going ahead**. I asked around all the delegates and I ended up getting a copy of this document at the union office*."

57. As the complete quote demonstrates, Mr Marshall's enquiries to his delegates were completely legitimate. The UFU like all unions is made up of delegates or shop stewards who are employees that represent and defend the interests of their fellow employees as a labour union member and official. Since delegates/shop stewards are employees themselves, they have knowledge of MFB matters through their work. The delegates/shop stewards serve as the link and conduit of information between the union leadership and what's happening on the ground so that issues affecting employees can be brought to the union's attention. There is no unauthorised disclosure simply because a delegate/shop steward has passed on information to other officers of the Union such as Mr Marshall.

58. As the Secretary of UFU, Mr Marshall's role is to look out for the interests of member firefighters to create a better workplace for all. Top of that list is the safety and wellbeing of workers. Proposals to cut the number of workers affect not only the employment stability of workers generally but also the safety of the workers who

[7] IBAC Report, p 14.
[8] IBAC Report, p 15.

remain and who will be the ones left to fight a fire with less colleagues alongside them.

59. Mr Marshall was made aware that there was a proposal "*in relation to cutting numbers*" of employees. It is hardly surprising that he would make relevant enquiries and ask around the delegates given that this is a key issue affecting the safety and wellbeing of firefighters. It is difficult to see how there can be any criticism of Mr Marshall having made general enquiries and received information in relation to that issue from his delegates.

60. Furthermore, there is no clear evidence to support the conclusion that the disclosure to Mr Marshall was unauthorised. There was no evidence that the Powerpoint was a confidential document or that there was any expectation that it would not be shared more widely. As the IBAC report notes, the presentation had been first shared by an MFB employee with the "*MFB CEO and the broader MFB ELT*". Subsequently, the CEO shared the presentation with "*four MFB Deputy Chief Officers*" and it was also seen by "*a further two colleagues*".[9] There is no evidence in the Report to suggest the document was confidential and could not be shared with other MFB employees.[10]

61. Moreover, from Mr Marshall's perspective, there was nothing to alert him that the PowerPoint was a confidential document or that it had been the product of an unlawful access or disclosure. As the Minister has noted, the document itself, being a PowerPoint presentation, did not have the appearance of a confidential or leaked document.[11]

62. Mr Marshall, as Secretary of the Union, has an obligation to bring attention to this issue, being a matter that affected the work conditions of his members. The document confirmed the "*talk*" about "*a projection in relation to cutting numbers*". The response from the Minister confirms that the document was a "*pitch for MFB to retain a third party's software to assist MFB* ***to close stations and reallocate resources***".[12] The number of fire stations and fire fighting resources is highly relevant to the safety

[9] IBAC Report, p 15.
[10] IBAC Report, p 15.
[11] IBAC Report, p 15.
[12] IBAC Report, p 15.

of firefighters and the general public. In these circumstances, Mr Marshall's communication with the Minister can only be seen to be wholly beyond reproach.

63. Certainly, this was a document that should have been provided to the Minister by the executives themselves. Minister Neville was the responsible Minister for MFB. She was responsible for the administration of her portfolio and accountable to Parliament, which is in turn accountable to the people of Victoria.

64. Senior executives within the MFB must advise the Minister on all matters relevant to the agency. Nothing less can be expected under the Westminster system of responsible government. Without the proper information, the Minister cannot account to the Parliament and the community for actions and outcomes taken by the MFB. Section 8 of the *Metropolitan Fire Brigades Act 1958,* which was the operating legislation at the time, specifically provided for accountability to the Minister.

65. The nature of the duty and obligations of senior executives to advise their Minister is set out in the Government's guide 'Informing and Advising Ministers'.[13] In respect of the matters to advise the Minister, the Guide states that 'matters of significance' include, amongst other matters, the following:

    (a) A new policy proposal that has a material impact on the portfolio;

    (b) Expenditure exceeding their financial delegation;

    (c) A significant operational matter that has a material impact on the administration of the portfolio, for example public transport delays, hospital waiting times and teacher shortages.

66. This was a matter that fell within 'matters of significance' because as the Minister confirms in her response to the Report, 'MFB required her approval to procure the software described in the document'.

67. In the Report, Mr Marshall is criticised for informing the responsible Minister of matters within her responsible portfolio and which are matters of significance to the general public. In circumstances where the senior executives of an agency have failed

[13] https://vpsc.vic.gov.au/html-resources/informing-and-advising-ministers-guidance-to-secretaries-about-their-responsibilities/

to do so, contrary to the Government's Guideline described above, it is even more pertinent that the Minister is alerted to the information by other means. The recent Robodebt Royal Commission report underscored the dangers of such failure by senior bureaucrats.

68. The matter to which the Minister was alerted by Mr Marshall is a significant operational matter that impacts on the delivery of a public service, one that the Minister is responsible for, and no doubt will be criticised for should the delivery of the service fail to meet community expectations. It is absurd for IBAC to suggest that there was something improper in Mr Marshall passing on information that he received anonymously, to the Minister in relation to a matter that has significant operational consequences to the delivery of a public service as important as fire rescue services.

69. What is self-evidently more concerning (but strangely of no interest to IBAC) is why the Minister had not been given a copy of the document by the then CEO or MFB Board President prior to or during the meeting on 14 March 2019. The Minister had to 'present' them with her printed copy and ask "*why the software was being considered*''.[14] In the Minister's formal response to the IBAC report, the Minister noted that she ultimately did not agree with the procurement because it was "*contrary to Government policy*".

70. IBAC received the following information from Mr Marshall about the substantive issues

> *Dan Stephens had a consultant produce and if that's the consultant's name you were referring to before, I don't know if it is, that PowerPoint. Ah, that was about doing what they did over the UK. And that is they removed the second fire truck. Each fire station has two fire trucks. It requires seven firefighters on the fire grounds, to commence firefighting operations safely, that is, that, one crew goes into the building, ah with breathing apparatus, that's two firefighters. You must have two firefighters outside it's a matter of training and safety in breathing apparatus, in case the roof comes down. Ah the second truck you have a pump operator, an officer and then a safety*

[14] IBAC Report, p 15.

officer, you need seven on the ground. And what they did over the UK was that they…

71. Mr Marshall had been improperly cut-off by Commissioner Redlich before he could elaborate further about the substantive issues of the change proposed by the Powerpoint, the implication being that either Commissioner Redlich didn't understand the significance of what Mr Marshall was trying to explain or did not care. In his response, Mr Marshall offered to provide a further elaboration of the evidence which he was trying to give before being cut off. Mr Marshall was not invited by Commissioner Elliott to provide such further evidence.

72. Had IBAC come to this investigation with a truly open mind, it would have seen that the actions of the senior executives might have been more appropriate to examine than Mr Marshall, and their attitudes might have been relevant to the unhealthy culture which IBAC asserts in Part 5 and wrongly attributes to the Union.

73. In contrast and without any explanation, IBAC shows no interest in and does not question the conduct of Mr Stephens and his attempt to mislead the Minister or whether Mr Stephens had misspent public funds to pay for UK consultants in breach of procurement policies. They would be matters of much more significant corruption than the particular "unauthorised disclosure" to the Minister of information being kept from her by senior executives.

74. The one-side nature of all its findings is exposed by IBAC's sole focus in finding out who may have been responsible for this 'unauthorised disclosure', which distracts from the more important issue of accountability within government and the question of whether MFB management had tried to withhold crucial operational information from their own Minister.

Response to Part 4.4 - request for alleged unauthorised access to MFB information (April 2019)

75. This incident refers to Ms Pyliotis and a male colleague checking the "*incoming emails to the MFB ICS service desk to ascertain whether there were any requests to give the Board President 'any type of access' but [they] were unable to find any relevant information*".

76. It is important to clarify that this incident is not about Mr Marshall's conduct "*in reviewing incoming emails of the MFB CEO*", which is what is stated in the last sentence of Part 4.4, nor about Ms Pyliotis asking Mr Trakas "*whether he had ever accessed the emails of a former Board President"*, which the Report attributes to the incident in Part 4.4. These errors were overlooked in the final IBAC Report, notwithstanding the complaint from Mr Marshall and the UFU that it was important that the incident in Part 4.4 was correctly expressed and not mischaracterised as some form of access *into* the MFB CEO's email account.

77. IBAC made the correction on p 17 of the Report so that it reads as per the quote in paragraph [75] but overlooked the above errors.

78. IBAC's initial mischaracterisation/conflation of the evidence to portray this incident as some sort of access into the email account of the former Board President during the investigation phase not only underscores the careless manner in which this investigation was carried out, but it calls into question whether there had in fact been any 'unauthorised access' of information at all, given no one actually did or attempted to access Ms Doak's email and where there is no evidence to suggest that service desk requests were confidential and could not be disclosed.

79. Unsurprisingly, the news media have reported on the IBAC Report with titles such as "*Fire service chiefs' email hacked to help union boss*".[15] This portrayal that there was some way the email accounts of MFB executives were compromised or accessed to further the interests of the UFU and Mr Marshall, is completely unfounded. The incident in Part 4.3 did not involve any access into any person's email account. It is also worth re-emphasising at this point that the incident described in Part 4.1, which is about Mr Trakas granting and removing access to various email accounts of the MFB executive leadership team without authorisation, is completely unrelated to the UFU and Mr Marshall. In fact, Mr Trakas was talking about feeling pressure from '*mad, angry personal assistants*' to grant permissions to accounts, not from the union.

[15] Gus McCubbing, 'Fire service chiefs' email hacked to help union boss, inquiry finds' *The Financial Review* (online, 25 September 2024) <https://www.afr.com/politics/fire-service-chiefs-email-hacked-to-help-union-boss-inquiry-finds-20240925-p5kdcp>.

80. We note that articles which refer to the "hacking" of emails of fire service chiefs remain online without any effort made by the IBAC to correct their inaccurate reporting.[16]

Response to Part 4.5 – alleged unauthorised disclosure of MFB Information (May 2019)

81. As noted above, this incident relates to MFB Executive, Ms Schroder, disclosing to Mr Marshall that MFB executive contracts were being renewed and asking him to pass on that information to the Emergency Services Minister.

82. First, it should be noted that Mr Marshall was not played any of the telephone intercepts referred to in Part 4.5 and has had no opportunity to see the full transcripts of those conversations that provide the context of those recorded conversations. This denied him any reasonable opportunity from making any direct meaningful response to the evidence, as required under s 162 of the IBAC Act.

83. Rather Mr Marshall was questioned very generally about this matter. In his examination, Mr Marshall was asked whether he knew that MFB were in the process of extending some executive contracts, to which he answered "*yes I did"*. When it was suggested to him that Kristie Schroder told him that information, Mr Marshall answered "*That doesn't ring a bell but anyway I've already said yeah I did know about that, yep*." The questioning continues as follows:

> COUNSEL ASSISTING: Okay, now once you found out that information did you pass that information onto anyone?
>
> MR MARSHALL: Yeah to the government.
>
> COUNSEL ASSISTING: Yes, well why did you pass it on to the government?
>
> MR MARSHALL: Because effectively those people were trying to rort the system.

[16] Benita Kolovos, 'Victorian Anti-corruption Commission finds firefighters hacked emails to further union interests', *the Guardian* (online, 25 September 2024) <https://www.theguardian.com/australia-news/2024/sep/25/victoria-fire-brigade-email-hacks-ibac-corruption-commission>.

COUNSEL ASSISTING: Okay when you say 'Trying to rort the system' how did you -

- -

MR MARSHALL: **The exec - as, as I understand it and the reason I passed it on to government, as I understand it, the executive contracts - and I haven't got one. But as I understand it they have four, the drop-dead clause of four, ah four months' notice. And that is, no reason, see ya later, four months. My understanding is that um there was an attempt to extend the clauses so that people were given another three or four years, or whatever it was, ah which to subvert the ah process of the new FRV ah, going through that process. As I - and I think it was against government policy anyway.** But anyway I handed it over to the government to deal with.

COUNSEL ASSISTING: And what did you expect the government to do about that?

MR MARSHALL: That's a matter for them, not for me.

COUNSEL ASSISTING: Okay, but I presuming you passed that information on with a view to the government doing something about it?

MR MARSHALL: Well I don't know what they did or what they were gonna do, or what my view was other than the fact is I brought it to their attention, that they were trying to cook the books basically.

COUNSEL ASSISTING: Okay and I'm presuming you wouldn't have bothered to pass it on unless you had a strong interest in government taking some action about it?

MR MARSHALL: No, not correct.

COUNSEL ASSISTING: Okay. Now can I ask you about - you've told us - - -

COMMISSIONER REDLICH: How, how did, I'm sorry Mr Hannebery.

COUNSEL ASSISTING: That's all right.

COMMISSIONER REDLICH: How did the notion of either the MFB or the CFA internally offering executive contracts to current employees fit with the reforms that were then - that government was then seeking to implement in relation to Fire Rescue Victoria?

MR MARSHALL: I think Commissioner - - -

COMMISSIONER REDLICH: And career firefighters?

MR MARSHALL: - - - oh not career firefighters, I think Commissioner what they were trying to do is that, of course with the new organisation there would've been a whole new process. And I think what they were trying to do and the reason I brought it to the government, was they were trying to pervert that process by extending the contracts so that, if they were terminated, they'd have to get paid out a lot more money.

COMMISSIONER REDLICH: So, yes well I wonder, you didn't proffer that initially as your answer but was that the prime consideration for you?

MR MARSHALL: **That's, sorry that's, that's the same answer.** As to whether the government is - - -

COMMISSIONER REDLICH: Is it, okay.

MR MARSHALL: Yeah, see as to whether the government - I mightn't have expressed myself correctly but whether the government do anything about it, it's up to them. But they wouldn't have known if I hadn't have told them. And I'm not quite sure what they did do about it by the way.

(Emphasis added)

84. First it should be noted that at no time was the allegation put to him that the information he received from Ms Schroeder was unauthorised. Mr Marshall's evidence was that he already knew about the fact the MFB were in the process of extending some executive contracts.

85. Mr Marshall was upfront about the fact that he passed on that information to the government. Furthermore Mr Marshall explained the reasons he passed on the

information *twice*, first in response to Mr Hannebery's question, '*when you say 'Trying to rort the system' how did you..*' and then again when the Commissioner asked '*How did the notion of either the MFB or the CFA internally offering executive contracts to current employees fit with the reforms that were then - that government was then seeking to implement in relation to Fire Rescue Victoria?*'

86. In response to Mr Hannebery, Mr Marshall said:

> *The exec - as, as I understand it and the reason I passed it on to government, as I understand it, the executive contracts - and I haven't got one. But as I understand it they have four, the drop-dead clause of four, ah four months' notice. And that is, no reason, see ya later, four months. My understanding is that um there was an attempt to extend the clauses so that people were given another three or four years, or whatever it was, ah which to subvert the ah process of the new FRV ah, going through that process. As I - and I think it was against government policy anyway. But anyway I handed it over to the government to deal with.*

87. And in response to the Commissioner, Mr Marshall said:

> *- - - oh not career firefighters, I think Commissioner what they were trying to do is that, of course with the new organisation there would've been a whole new process. And I think what they were trying to do and the reason I brought it to the government, was they were trying to pervert that process by extending the contracts so that, if they were terminated, they'd have to get paid out a lot more money.*

88. It is clear from both answers that Mr Marshall passed on the information because he believed that by extending the contracts, the executives were seeking to increase their payouts when FRV was established. There is no difference in substance between Mr Marshall's first answer to Counsel Assisting, and his second answer to Commissioner Redlich. Commissioner Redlich was incorrect to state "*I wonder, you didn't proffer that initially as your answer…*", when Mr Marshall had clearly done so and later clarifies, "*That's, sorry that's, that's the <u>same</u> answer*."

89. Mr Marshall never hid the fact that he voluntarily passed on the information relating to executive contracts to the Government. It is clear from the above exchange that his answer had been consistent from the beginning. It was only following our response to IBAC setting out the entirety of the evidence above, that the final IBAC Report removed multiple irrelevant prejudicial facts against Mr Marshall.

90. The need for IBAC to portray this entire episode as some kind of 'wrongdoing' on Mr Marshall's behalf is again demonstrative of the narrow, limited and one-sided focus of this investigation. The bigger picture and matter of true public concern is clearly whether the executives at the MFB had engaged in corrupt conduct by seeking to extend their contract (without the knowledge of the Government) in order to increase their payouts. But curiously, the apparent corrupt conduct of MFB executives was clearly of no interest to the officers at IBAC. It did not fit with their preconceived anti-UFU narrative. Rather IBAC adamantly turned its focus on whether Mr Marshall alerting the government to the potential misconduct of MFB executives, could constitute an 'unauthorised disclosure'. However, even in this regard, no amount of embellishment of the evidence could lead one to conclude that Mr Marshall was responsible for any 'unauthorised disclosure'. As noted above, at no point does the evidence confirm that Mr Marshall believed that the information he possessed was unlawfully disclosed to him. The IBAC Report again takes the unreasonable position of criticising Mr Marshall for alerting the government to matters that he believed would be of concern to them.

Issues with Part 5 of the IBAC Report

91. This Part of the Report states that it seeks to highlight how deficiencies in MFB's systems, controls and culture led to repeated instances of 'unauthorised access and disclosure' of information.

<u>IBAC embarks on a campaign against the Union without offering the Union any opportunity to respond to the adverse material during its investigation</u>

92. The Report contains a collection of uncritically amassed material contrary to the interests of the UFU.

93. On page 23, the Report includes the quote of two operational interviewees from a *2016* Review by the MFB Board, who at that time stated, "you can never be sacked,

no matter what happens", and "no matter what you do, you always know the Union will back you up". IBAC then uses these quotes from 2016 to make the broad sweeping conclusion that "*These findings and statements* ***suggest a culture that enables misconduct****",* notwithstanding the fact that none of the individuals involved in the misconduct outlined in Parts 4.1 - 4.5 have expressed this attitude or cited it as a reason that enabled their conduct.

94. On page 24, the Report notes that "*evidence from other witnesses who held positions within the organisation or on the Board*" said "*management had long held concerns around unauthorised disclosures of MFB information and were trying to implement cultural and information security reforms, but these were often blocked by employees or the Union.* ***There were occasions where employees would escalate matters to the Union rather than implementing reforms****, including when management wanted to assess the capabilities and skills of ICS employees to determine if new positions were needed."* No specific examples are provided in the Report of what reforms were proposed and blocked by employees or the Union. The statement invites the reader to draw their own negative conclusions, notwithstanding the fact that the Union may have intervened for a number of legitimate reasons. Below at paragraph [104], an excerpt taken from a letter from Mr Marshall to the MFB President dated 6 February 2017 alludes to the heavy use of contract employees in ICS as a reason as to why the union did intervene.

95. On page 24, the Report cites the 2015 Fire Services Review, stating there was a "*division between corporate and operation members*" and that MFB had a "*serious and fundamental disconnect between the senior management and the operational firefighters*". Even though the Review was conducted many years before the matters in Operation Turton, the Report uses the finding of the Review to conclude that "*the* ***distrust of MFB management by employees was a key enabler for the improper conduct*** *exposed by Operation Turton*".

96. The Report goes on to state "*this distrust was strongly entwined with employees' strong allegiance to the Union. When asked by Mr Marshall or those aligned with him to access or disclose information without authorisation, employees were willing to, justifying their actions on the grounds they were helping the Union*'. As already noted above, the majority of the incidents investigated in Operation Turton were not shown

to be actions taken to further the Union or Mr Marshall's interests, or in any other way connected to the Union or Mr Marshall.

97. On page 25, the Report notes (in a way which is accepted uncritically) that the former MFB CEO's (2018 -19) view that "*the divide between employees and management at the MFB was caused by the UFU".*

98. Further the report quotes from the former MFB CEO (2014 – 17) that "*the strong union culture and industrial matters made it difficult for the MFB to manage employee behaviour*".

99. A further quote is provided from '*another witness'* who is not identified that "*no one wanted to 'take on' the UFU or its members due to a fear of 'retribution'", that "if people did go against UFU they would be 'subject to targeting', noting that this could include 'a barrage of grievances against you for any change you were trying to implement'"*

100. All of the above statements are used by IBAC in an effort to build a case against the union and its behaviour. Inexplicable and certainly unfairly, none of them were put to Mr Marshall for response during his examination.

101. It is highly problematic that all of the above statements are made in general terms, with no examples given.

102. At the time of receiving the draft report, IBAC did not reveal the identities of any person including the quotes attributed to the two CEOs above. By failing to identify who had provided those quotes, there was no way for the UFU to properly respond to the criticisms in any specific or meaningful way, or to assess the credibility and reliability of those quotes. It comes as no surprise that the quotes in paragraph [97] and [98] had come from CEOs who occupied their role whilst the union was locked in difficult negotiations with management over the enterprise bargaining agreement. Since the credibility of the CEOs were not challenged, there is no way of knowing whether their views expressed of the union and the 'consult and agree' clause, were coloured by their own grievances held against the union following the difficult enterprise bargaining agreement negotiations.

103. The quote in paragraph [99] uses the words 'retribution' and 'targeting', but the only example given by the individual as to what is meant by 'retribution' or 'targeting' is

'*a barrage of grievances against you for any change you wanted to implement*'. What the individual appears to refer to is the submission of a grievance by the union under the 'Dispute Resolution' clause in the enterprise bargaining agreement, which allows the union to submit a dispute or grievance to relevant chains of management if there has not been effective consultation between employer and its employee on a change that management wants to implement. There is no evidence that unreasonable grievances were submitted by the union, or that grievances were submitted for an improper purpose other than to direct that proper consultation occur in relation to changes proposed by management.

104. In contrast to the vague and generalised evidence in the Report, in their response to IBAC, Mr Marshall and the UFU provided evidence of a letter dated 6 February 2017, which demonstrates a specific instance where Mr Marshall had raised the issue of the fear of retribution within the ICS Department. This is the same letter in which Mr Marshall urges the MFB to report the ICS corruption risks to IBAC (which became the subject of the VO Report). Mr Marshall states:

> For many years, the UFU has been raising serious concerns regarding the MFB's use of contractual services within the ICS Department. **The high use of contractors has had a significant negative impact on permanent MFB employees**, **and has resulted in significant disputation between the parties including multiple disputes before the Fair Work Commission.**
>
> During those disputes, it became apparent that the MFB had no transparent system for the process of tendering for vendors for contracts for services/work and no oversight of their accounting from during the term of the contract and the ongoing payment of invoices based on a proper audit as to whether work invoiced was in accordance with work performed as well as ensuring that public monies were utilised in the most economical way. Of serious concern, it also appears that the MFB has bypassed human resources policies and procedures, resulting in what could be perceived as inflated utilisation of contractors rather than the more economical utilisation of suitably qualified permanent employees.
>
> It is our understanding (of again which we say is incumbent on the Board Members to investigate) that the MFB was unable to account for the

contractors and work performed and were also unable to fully explain what selection process was used and what was the analysis/scoping and proper procurement system that justified the engagement of contract work.

A matter that we believe should be brought to the MFB Board's attention is that there is a culture of fear within MFB employees of being able to speak out and raise these matters without having to worry about repercussions in relation to their substantive and future employment. Whether this is justified or a perception it is still extremely unhealthy as critical matters that the MFB Board needs to be made aware of would potentially be supressed as a result of this culture of fear.

Despite continually seeking answers to these matters, the MFB continually failed to provide clarity and transparency.

Late last year we understand that a very senior MFB executive resigned from the MFB. It is understood that this executive resigned following an uncovering of some of these matters by others within the MFB and further, it is alleged that the executive employed, in senior management roles reporting directly to the executive, two relatives, which is not consistent with the Victorian Code of Conduct.

(Emphasis added)

105. Had Mr Marshall or the UFU been afforded the most basic of procedural fairness, and been told of the allegations outlined above, evidence such as the above letter could have been provided to balance the picture *before* the proposed findings were made by Commissioner Redlich, and which as confirmed above, Mr Marshall and the Union were made to respond to. Commissioner Elliott failed to properly concern herself with such evidence in preparing her report in a more balanced way, simply setting out the response of Mr Marshall and the UFU without weighing that evidence against the evidence in the IBAC Report and without making any evaluative findings in respect of this piece of evidence.

106. Again, any finding that the UFU is and always has been an advocate for bringing to light suspected misconduct does not adhere to the narrative sought to be portrayed by

the Report. The UFU has raised the issue of employees being worried about speaking out in fear of repercussions in relation to their substantive and future employment, a matter which is in the direct control of management, not the union. Yet the Report only makes criticism of the Union, and not management. The above example goes to illustrate the one-sided nature of the Report in its inclusion of anonymised quotes without any critical judgment and denial to Mr Marshall and UFU or any semblance of fairness.

IBAC attacks the 'consult and agree' clause in Part 5.2.1 without providing any evidentiary basis for demonstrating how the clause could lead to 'corruption vulnerabilities' or the incidents that it investigated

107. The Report mounts significant attacks on the 'consult and agree' clause in the enterprise agreement, with no evidence to substantiate its conclusions.

108. This is another part of the Report, the credibility and integrity of which, is completely undermined by the failure to put any of its propositions and conclusions to Mr Marshall or the UFU for a response during its investigation. It is as though Commissioner Redlich was fearful of hearing the other side of the story.

109. The Report notes "*IBAC found the 'consult and agree' requirement impaired MFB's governance and ability to operate effectively and efficiently giving rise to misconduct and corruption vulnerability within the organisation. This is evident from the influence the Union exerted over the decision making of the MFB, an independent statutory authority of Government.*"[17]

110. The report further notes "*Additionally, the consult and agree clause as it currently operates – combined with the significant influence of the UFU within the MFB – led employees to share information directly with the union without permission required under the EBA*".[18]

111. First, it is noted that the Report does not clearly articulate any link between the operation of the 'consult and agree' clause and the so called 'corruption vulnerabilities' it speaks of. The Report fails to provide a single concrete example

[17] IBAC Report, p 27.
[18] IBAC Report, p 27.

where the operation of the 'consult and agree' clause has led to circumstances of corruption. For example, it could hardly be said that the MFB CIO's decision to hire her own sons has anything to do with the 'consult and agree' clause. It is also unclear how the 'consult and agree' clause can be blamed for the 'unauthorised access and disclosures' that is the subject of the findings in the IBAC investigation. At no point was it ever put to Mr Marshall that the 'consult and agree' clause is the reason why he received information from his delegates and others regarding Mr Stephens' proposal to cut firefighters, MFB executives' intentions to extend their contracts, or records of Ms Doak's requests to the IT Service Desk for access to folders. The assertion that the 'consult and agree' clause 'led employees to share information directly with the union without permission' is without foundation.

112. Given the lack of any demonstrated concrete connection between the 'consult and agree' clause and the 'unauthorised access and disclosures', it is confounding as to why IBAC chose to dedicate so much of its report criticising the clause other than this clause was a *bete noire* of MFB management, and of course, they were the only ones to whom IBAC had spoken and listened to in relation to the clause – Mr Marshall and the UFU were excluded from this discussion for reasons that are not explained.

113. On page 27, the Report wrongly asserts that consultation and dispute resolution are generally only required "*where department and agencies are proposing to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees*". However, that does not prescribe the limits of such a clause and the clause in the MFB agreements was approved by the Fair Work Commission and by the Victorian Government under its industrial policy. Strangely and inexplicably, IBAC's research did not extend to these relevant facts. Perhaps this is because their sole source of information was from the jaundiced MFB management who had a particular agenda to advance and they were accepted unquestioningly by Commissioner Redlich and subsequently Commissioner Elliott.

114. The need and rationale for the consult and agree measures, is evident when one considers the many management proposals to introduce equipment that have later been exposed as unsafe in the consultation phase and thereafter rectified. The below examples were given to IBAC:

Bronto Ladder replacement

115. In 2010, the MFB sought to replace its ladder platforms. MFB ordered two new Bronto Ladder Platform appliances without any consultation with the Union. The Union was able to lodge a grievance through the consult and agree clause and ensure that proper consultation took place prior to the ladder's deployment. After extensive consultation in October 2012, a serious safety problem was found where it was observed that there was a '*a three meter gap between the evacuation ladder on the cage and the ladder that was on the boom*'.

116. The issue was addressed by Mr Tisbury, a senior Station Officer of MFB in his witness statement in the case before the Fair Work Commission, reported in *Metropolitan Fire & Emergency Services Board v United Firefighters' Union of Australia* [2012] FWC 7776 (the 'Termination Case'):

> "... a 3 metre gap was discovered between the bucket at the end of the boom and the boom arm when deployed. Mr McQuade states an opinion at paragraph 117 that the three metre gap did not create a significant risk when viewed "in the context of the number of other primary means of bringing ladder platform down". As I read his statement, these means are identified at paragraph 90. The proposition that the 3 metre gap did not create a "significant risk" is preposterous.
>
> The ladder section on the arm of the boom is designed for the rapid and safe rescue of multiple victims, as well as firefighters, in the event of an emergency. In this way it acts in effect as a fire escape when deployed against the side of a building. If there is a three metre gap in the ladder between the bucket (where the firefighter is) and where the ladder ends on the boom the only way down is to jump from the bucket to the ladder. When the boom arm is fully deployed it is 45 metres in the air.
>
> It is difficult to comprehend how Mr McQuade could say that he found it difficult to envisage circumstances where a firefighter would need to descend from the bucket during an emergency via the ladder. On at least one occasion I am aware of during an actual fire in Moorabbin a firefighter was trapped in the bucket of the current appliance (not the one with the 3 metre gap) when the

fire engulfed the boom due to an unexpected wind change. The firefighter needed to use the ladder for a quick escape. If there had been a 3 metre gap the firefighter would have been forced to choose between remaining in the bucket and being burned or jumping the gap with the risk of a fall. Further, what Mr McQuade fails to mention is that if the truck ignition is turned off, which is not uncommon, the computer on the truck resets itself and will not allow the boom to be retracted until the computer is satisfied that all the safety settings have been properly set. This takes time. In the meantime, the firefighter in the bucket has to stay there until the system is reset or removes himself from the bucket by climbing down the boom. That would normally be done via the ladder, but not if there is a 3 metre gap in it.

Mr McQuade complains about the consultation the MFB had to engage in about this piece of equipment. However, it was only through the consultation process that employees learnt of the problem and raised an objection. The equipment has not yet been fixed and remains in the sheds."

117. Mr Marshall and the UFU noted in their response, that it is clear from the above example that actual firefighting experience brings a practical understanding of risks which may not be immediately evident to those in management who are responsible for procuring the equipment.

Digital portable radio

118. In March 2020, UFU discovered the new portable Motorola Radios (MMR Radios) used by the MFB were not functioning. In particular, the new MMR radio did not work in many buildings or externally in some cases; and they had worse coverage than the old radios. Additionally, it was found that the duress button could not be activated in some cases, and in other cases inadvertent false activation had been triggered.

119. Mr Marshall and the UFU noted that the UFU was able to bring this to the attention of management through the consult and agree clause leading to an agreement between the Union and FRV management to trial new portable radios.

Personal Protective Clothing

120. The replacement of personal protective clothing and equipment in the early 2000s is yet another example that demonstrates the need for the 'consultation and agree' clause. A comprehensive outline of the process is included in MFB Commander Philip John Taylor's statement that was tendered in the *Termination Case* (included as Annexure B), which is summarised below.

121. In the initial stage of planning the replacement of the existing Firemark Firefighting uniforms, MFB had issued 60 garments from 'Can't Tear Em' in 1999 into the field for trial. The garment was inspected by the UFU committee members and whilst the feedback was that the garments were an improvement from the existing MFB uniforms, there was concern as to the type and location of the moisture barrier within the garment.

122. It was identified that the moisture barrier between the innermost liner and the thermal barriers had reduced thermal insulation when compared with a design that locates the moisture barrier between the outer shell and the thermal barrier. Additionally, it was identified that a *polyurethane* barrier which was being proposed by the MFB had suffered significant failure and broken down over time according to significant research in the USA.

123. Around 2002, consultation regarding the specification for tender was close to completion. However, the UFU discovered that the final specifications in the tender were not in accordance with the specification that was developed following consultation, but simply stated that the garments must, as a minimum, meet the Australian Standards. The specification for tender developed through consultation were designed to achieve a higher level of protection than just the minimum.

124. During negotiations, UFU sought to have all products fairly tested to establish which would provide the best protections. This was in the face of management continually insisting upon eliminating higher level products and insisting on selecting their preferred garment fabric composite which was a Nomex outer shell. The Nomex outer shell had a polyurethane moisture barrier, the precise material that had been highlighted by the research in the USA to have suffered significant failures.

125. Eventually in 2006, there was a breakthrough in negotiations and MFB agreed to test new or different products. The testing of the materials indicated that the best composite of material for thermal protection was PBI Gold in conjunction with the

Airlock moisture barrier. Commander Taylor notes that he is "*firmly of the view that if the fire services had been successful in forcing the selection of their originally preferred garment composites, the result would have been the purchase of very expensive and dangerous PPC that would have degraded over a very short period of time resulting in a dangerous reduction in protection from the hazards of structural firefighting"*.

126. Commander Taylor notes a number of concerns by management, which included the following:

- The MFB was concerned with the high cost of replacing the old firefighting uniforms and the desire to have an easy to manage single supplier and distributor;
- The CFA wanted the lower cost replacement garments so that a greater number of garments could be provided to volunteers;
- There was a preference for all firefighters to be wearing exactly the same uniform.

127. Whilst blame for the delay in consultation has been laid on both sides,[19] what is evident is that management had concerns that went beyond safety. The Union on the other hand prioritised the safety of its members. 'Consultation and agreement' is important in any operational decision because there is a high risk that decisions made by management alone could compromise on firefighters' safety because cost and

[19] Lewis AM, Gordon J, *Report on the processes to select new personal protective clothing for Victorian firefighter* (Report, 28 February 2008). which is cited by the IBAC report, is critical of the Union. The Union on the other hand had been critical of the government's delays in replacing the old personal protective clothing following the severe burns suffered by Richard Zapart, a member of the UFUA. Four days later the Union wrote to the Minister for Police and Emergency Services, Mr Cameron, criticising the Victorian government over years-long delay in introducing new personal protective clothing for firefighters to replace the woollen PPC which Richard Zapart was wearing (see Annexure C: letter dated 28 November 2007 and 10 December 2007 to Dr Roslyn Kelleher, Executive Director of the Police, Emergency Services and Corrections). In the letters UFU states that 'the departmental review of the processes to select new PPC *which County Court Judge Lewis has been asked to conduct will be perceived by our members and the wider community to be a knee-jerk response to the UFU's recent criticism of the department and the government over those processes and an attempt to blame the union*'. The Union notes that '*neither the Minister nor your department nor the Emergency Services Commissioner nor WorkSafe has been called upon to make a submission to, nor appear before, Judge Lewis. On the contrary Judge Lewis is being "supported for the duration of the investigation" by the very Office of the Emergency Services Commissioner which has overseen and played a key role in the whole sorry PPC saga'.* The Union refused to participate in the review undertaken by Lewis J and independently asked the Coroner to investigate the matter who found that '*aspect of the firefighting equipment at the factory were deficient'.*

political consideration will invariably influence the decision making of management. We noted that it is in the interests of protecting the lives of firefighters that the 'consult and agree' clause has been included in successive EBA instruments.

128. As evidenced by IBAC's specific findings, IBAC has a narrow focus on 'unauthorised disclosures' and has neither the interest nor the expertise to pass judgment on the 'consult and agree' clause and how it operates in the broader firefighting context. Inherent in its findings concerning the 'consult and agree' clause is an assumption that the Board and the ELT are the sole arbiters of what is in the best interests of the organisation. Clearly, as illustrated by the above examples, there are many reasons why that is incorrect. The Report is written on the basis that the union has no constructive role to play in the running of the organisation, which is a fallacy given that it is the union through its thousands of members and overseas partnership with firefighting unions in Canada and the USA that can tap into the subject matter expertise in a way that no executive board could seek to replicate.

129. It is also a view out of keeping with current understandings in the world of industrial relations, about which IBAC seems to be ignorant. For example, in 1987, in *Re Cram,* the High Court stated:

> *"Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an "industrial matter".*
>
> *A dispute about the level of manning is a good example. It has a direct impact on the work to be done by employees; it affects the volume of work to be performed by each employee and the conditions in which he performs his work. So also with the mode of recruitment of the workforce. The competence and reliability of the workforce has a direct impact on the conditions of work, notably as they relate to occupational health and observance of safety standards. Employees, as well as management, have a legitimate interest in both these matters."*[20]

[20] *Re Cram; ex parte NSW Colliery proprietors Association* (1987) 187 CLR 117 at 135 (per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

130. IBAC lacks the background and understanding to make any informed assessment of the 'consult and agree' clause. IBAC's attempt to criticise the clause because it '*impaired MFB's governance and ability to operate effectively and efficiently giving rise to misconduct and corruption vulnerability within the organisation*' is not only baseless, it is reckless. IBAC is quick to criticise a clause that has developed over many years to protect the work conditions of firefighters, with no idea of its history and what its removal would mean for the safety of firefighters in Victoria. IBAC's views stand in stark contrast to the findings of the specialist industrial tribunal, the Fair Work Commission, which rejected an MFB application to terminate the enterprise agreement because of the UFU's use of the consult and agree clause. The Commissioner included in his reasons his concern that a termination would mean that "disputes that have a genuine connection with occupational health and safety will no longer be required to be the subject of consultation and a requirement to reach agreement and will not be able to progressed through the dispute resolution procedure". The Commissioner acknowledged the industrial value of the clause, unlike the IBAC.

131. The above criticism regarding IBAC's conclusion were all provided to the IBAC in our response. However, IBAC has failed to deal with and given due consideration to the issues raised in our response. Commissioner Elliott has chosen to make no changes regarding the findings in relation to the 'consult and agree' clause, failed to explain how she weighed the evidence provided by Mr Marshall and the union with the general and vague statements that is included in the Report, and why on balance she persisted with the proposed findings as approved by Commissioner Redlich and discounted the new evidence provided by Mr Marshall and the union. Instead, as required by law, IBAC has set out, in a truncated and general manner, the above information in Appendix A of its report. There is a three sentence response about 'IBAC's role' in "*understanding what led to the conduct and how the conduct may be prevented in the future*", how it requires analysis of the wider operating framework and that 'this analysis occurred in Operation Turton and "*the basis for that analysis is clearly referenced in the report*.

132. The basis for attacking the 'consult and agree' clause is clearly not referenced in the Report for the many reasons stated above, chief of which is that none of the incidents are linked to the 'consult and agree' clause. On 1 November 2024, Mr Marshall and

the UFU wrote to the IBAC criticising the irrational reasoning and lack of an evidentiary basis for the conclusions in its report about the 'consult and agree' clause and requested that IBAC retract those findings. This has not occurred to date.

Issues with Part 6 of the IBAC Report

133. In this Part, the Report repeats the findings and conclusions which have been discussed above. For the reasons outlines above, those findings and conclusions are unsound and should not be included in the report.

Concluding comments

134. The matters referred to above in this response demonstrate that the Report should not have been published as the final report of the investigation known as Operation Turton. There was no finding of corrupt conduct made. The associated analysis in Part 5 collate the comments of individuals who could hardly be said to be able to give an 'impartial' account given their role and grievances, and have no connection to the findings made during the investigation.

135. Beyond that, there is a real question of the overall utility of the report at this time. MFB no longer exists. The key people, like Stephens, have gone. There is a new organisation, FRV, about whose culture IBAC has no evidence. The three disclosures of information were trivial and unworthy of further action.

136. The sole purpose of the Report appears to be to weaponise the executive with a document that allows them to unfairly impugn the 'consult and agree' clause and seek its removal at the next round of enterprise bargaining negotiations. In fact, a recommendation which had been drafted was for the Industrial Relations Victoria to develop a standard position on consultation clauses for inclusion in bargaining agreements. That Recommendation was removed after the Victorian Government updated its Public Sector Industrial Relations Policies to include a consultation model clause, one that does not include an 'agree' component.

137. In our view, such matters cannot be decided by a body such as IBAC with no depth of knowledge or experience as to how that clause functions, its history and the many instances in which it has operated for the benefit of its employees. By allowing operational firefighters to have a say in decisions that affect their safety and livelihood should not be of surprise. The clause allows operational firefighters not

only to be 'consulted' on matters, which could be done in a cursory manner, or worse, done only to tick off a checklist, but to actually be able to say through their union representative, "no", we do not agree to this new unsafe uniform, or unsafe equipment, or unsafe practice that will put our lives at risk. The ability of operational firefighters to have a voice and, importantly, equal decision making power in matters concerning their safety and livelihood is a right that the IBAC has no place in interfering with.

Mr Marshall and UFU's experience in dealing with IBAC

138. Mr Marshall and UFU wish to draw attention to and make complaint about the failure of IBAC throughout its investigations of Mr Marshall and the UFU over the last four years or so, to take any meaningful steps to prevent and deal with repeated leaks to the media of supposedly confidential activities of IBAC. Those leaks have caused serious reputational damage and psychological stress and anxiety.

139. Mr Marshall has made repeated complaints to the former Commissioner about numerous media leaks and called on the Commissioner to exercise the available powers under the Act to track down and punish those who have breached the confidentiality obligations under the Act. Commissioner Redlich repeatedly declined to take any meaningful step.

140. On 14 February 2020, during the attendance of his first private examination, Mr Marshall asked the Commissioner why IBAC has not spoken to the reporters to substantiate the source of the leaks. The Commissioner's response was that "*you know* what a reporter would say if asked to disclose the source of their information" indicating that IBAC would not be going down that enquiry path. Nothing in the IBAC Act does in fact prohibit the IBAC from examining a reporter about their source and the reporter is required to answer. The Commissioner noted that '*in any event in the* circumstances where it is simply not possible to ascertain the source of those leaks, it's simply a risk that accompanies all of our attempts to conduct these examinations in private'.

141. On 26 February 2020, during the attendance at his second private examination, Mr Marshall was told by the Commissioner, "A large number of witnesses have given evidence in private examination. They've given evidence pursuant to a confidentiality

notice and my very strong sense is that one of the witnesses, that most recently gave evidence immediately before the adverse publicity about which Mr Marshall is concerned, probably broke the confidentiality notice".

142. The fact is, IBAC does possess the power to investigate and ascertain the source of the leaks in order to put a stop to the leaks that continued to damage Mr Marshall's reputation. It could have coercively examined the reporter to ascertain exactly which one of the previous witnesses was disclosing information to the media in breach of their confidentiality notice, an offence under s 44 of the IBAC Act. It had the ability to prosecute the witness who breached their confidentiality notice. If the reporter had refused to answer, an offence under s 136 of the IBAC Act, that too could have been prosecuted by IBAC. However, it chose to take none of those actions. It is evident, that IBAC applies a different standard to the way it deals with a matter that is in IBAC's interest to pursue, and matters it clearly regards as less significant such as witness welfare.

143. It is IBAC's continued failure to act and refusal to question the reporter that has directly resulted in the reputational damage to Mr Marshall. His complaints about the leaks to the media, which were profoundly damaging to his reputation, were treated as a nuisance rather than a serious issue that IBAC believed needed to be grappled with.

144. Commissioner Redlich seemed more concerned to protect IBAC officers, as exemplified in his letter of 11 October 2021 which is attached. Unfortunately for him, while he was preparing his letter, there was a leak of information in the Herald Sun on 9 October 2021 about the private examination of Mr Marshall, which identified the counsel who represented him at that hearing. That is information could only have come from an internal source at IBAC because no external source was present. When this was drawn to Commissioner Redlich's attention he offered no explanation.

145. Recently, a further leak occurred in the Australian newspaper about the content of the draft report for Operation Turton. A copy of the article is attached. Again, to our knowledge, IBAC has taken no action to identify the source of the leak which constitutes an offence under section 166. IBAC has the tools to identify the source of the leak, by questioning the persons to whom the report has been distributed including the relevant journalist.

146. There has been a history of serious psychological injury to persons that have been involved in IBAC investigations, and the publication of their involvement during the investigation is a very serious and potentially very harmful aspect of IBAC operations, on at last one occasion resulting in attempted suicide by a witness. IBAC has been a given a privileged position under the IBAC Act of being able to exercise great coercive powers which infringe upon common legal rights that otherwise protect citizens from intrusions into their lives. However, IBAC has failed to honour that privilege by failing to give proper attention to the considerable damage that results from leaks and failing to take all available action to track down the culprits who cause the leaks in breach of the offences in the Act.