

CROWN EMPLOYEES (FIRE AND RESCUE NSW FIREFIGHTING STAFF DEATH AND DISABILITY) AWARD 2012

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Application by New South Wales Fire Brigade Employees Union, Industrial Organisation of Employees.

(No. IRC 440 of 2012)

Before The Honourable Mr Justice Haylen

13 September 2012

AWARD

PART A - INTRODUCTION, INTENTIONS AND COMMITMENTS, INDEX AND DEFINITIONS

Clause 1. Introduction, Intentions and Commitments

- 1.1 This Award shall be known as the "Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2012".
- 1.2 The intentions and commitments of this Award are to:
 - 1.2.1 Provide benefits in the event that an on duty or off duty injury results in the death or total and permanent incapacity or partial and permanent incapacity of a firefighter.
 - 1.2.2 Provide rehabilitation and retraining in the event that on duty or off duty injury results in a firefighter suffering partial and permanent incapacity.
 - 1.2.3 Develop and implement an agreed health and fitness programme for firefighters.
- 1.3 This Award shall be in four parts as follows:

Part A - Introduction, Intentions and Commitments, Index and Definitions

Part B - Arrangements for firefighters entitled to the death and disability benefits prescribed by this Award.

Part C - Health and Fitness Programme

Part D - Disputes, Anti-discrimination, Leave Reserved and Area, Incidence and Duration.

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Clause 3. Definitions

"Actual retained earnings" means the average annual remuneration received by a retained firefighter calculated over either the preceding twelve months or five years, whichever is the greater, provided that any periods of special leave without pay, unpaid leave and/or suspension shall not be taken into account when calculating the periods of twelve months and five years.

"Actuary" means an actuary appointed by the Trustee of the Death and Disability Superannuation Fund.

"Compulsory employer contributions" has the same meaning as it has in section 12(1) of the *First State Superannuation Act 1992*.

"Death and Disability Superannuation Fund" means the superannuation fund established in accordance with Part B of this Award.

"Electricity industry superannuation scheme" ("EISS") has the same meaning as it has in the *Superannuation Administration Act 1996*.

"FBEU" means the Fire Brigade Employees' Union of New South Wales.

"FRNSW" means Fire and Rescue New South Wales, established as a Department of the Government under the *Fire Brigades Act 1989* and a Division of the Department of Attorney General and Justice under the *Public Sector Employment and Management Act 2002*.

"Firefighter" means either a permanent firefighter or a retained firefighter as defined in this clause.

"First State Superannuation Scheme" ("FSS") means the superannuation scheme established under the *First State Superannuation Act 1992*.

"Full pay" means the permanent firefighter's remuneration at the date of his/her injury, including any per rostered shift or weekly allowance that he/she was receiving at the date of his/her injury, or such higher remuneration to which the firefighter becomes entitled pursuant to that Award. Provided that where a permanent firefighter is at the date of his/her injury on any form of leave, his/her initial full pay shall be the remuneration (subject to the exclusions referred to within this definition) that would otherwise have been paid to the firefighter had he/she not been on such leave.

"Judges Pension Scheme" ("JPS") means the superannuation scheme established under the *Judges' Pensions Act 1953*.

"Local government superannuation scheme" ("LGSS") has the same meaning as it has in the *Superannuation Administration Act 1996*.

"On duty injury" means personal injury arising out of or in the course of employment as a firefighter and includes a disease which is contracted by a firefighter in the course of his/her employment as a firefighter and to which the employment was a contributing factor, and the aggravation, acceleration, exacerbation or deterioration of any disease, where his/her employment as a firefighter was a contributing factor to the aggravation, acceleration, exacerbation or deterioration but does not include a personal injury or disease arising out of or in the course of journeying to or from work subject to the proviso that a retained firefighter responding to an incident shall be considered to be on duty from the time of call.

"Off duty injury" means any personal injury or disease which is not an on duty injury.

"Parliamentary Contributory Superannuation Fund" ("PCSF") means the fund referred to in section 5 of the *Parliamentary Contributory Superannuation Act 1971*.

"Partial and permanent incapacity" means that a firefighter is no longer fit to carry out the full range of his/her pre-injury duties with FRNSW.

"PBRI" means the Police Blue Ribbon Insurance arrangements established under the Police Amendment (Death and Disability) Regulation 2011.

"Permanent firefighter" has the same meaning as 'employee' under the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011.

"Police Superannuation Scheme" ("PSS") means the superannuation scheme established under the *Police Regulation (Superannuation) Act 1906*.

"Retained firefighter" has the same meaning as 'employee' under the Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2011.

"Retained firefighter's deemed salary" means the hourly rate of pay of a retained Captain multiplied by a factor of 2088.

"Retained firefighter's primary employment" means employment with an employer other than FRNSW. In order for a retained firefighter's employment with an employer other than FRNSW to be eligible as primary employment for the purposes of payment of benefits pursuant to subclause 12.4 of this Award, the primary employment must be held as at the date of the on duty injury, and must be permanent employment of an average of at least 30 hours per week.

"Salary" means, in the case of a permanent firefighter holding the rank of Recruit Firefighter, Firefighter Level 1, Firefighter Level 2, Qualified Firefighter, Senior Firefighter, Leading Firefighter, Station Officer Level 1, Station Officer Level 2 or Inspector, the firefighter's "Total Weekly Rate" as set out at Table 1 of Part D of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011 multiplied by 52.1785 and, in the case of a permanent firefighter holding the rank of Superintendent or Chief Superintendent, the per annum amount set out at Table 1 of Part D of that Award provided that for the purposes of this Award, the salary of an employee holding an Operational Support position shall be that applicable to the employee's substantive operational rank.

"Spouse" means a person who falls within the definition of "spouse" or "de facto partner" in the *Superannuation Act 1916*.

"Total and permanent incapacity" means that the firefighter is unlikely, by reason of ill-health (whether physical or mental) to ever again engage in gainful employment for which the firefighter is reasonably qualified by education, training or experience.

"State Authorities Non-contributory Superannuation Scheme" ("SANCS") means the superannuation scheme established under the *State Authorities Non-contributory Superannuation Act 1987*.

"State Authorities Superannuation Scheme" ("SASS") means the superannuation scheme established under the *State Authorities Superannuation Act 1987*.

"State Superannuation Scheme" ("SSS") means the superannuation scheme established under the *Superannuation Act 1916*.

PART B

ARRANGEMENTS FOR FIREFIGHTERS ENTITLED TO THE DEATH AND DISABILITY BENEFITS PRESCRIBED BY THIS AWARD

Clause 4. Death and Disability Superannuation Fund

- 4.1 The NSW Fire Brigades will establish, with the agreement of the FBEU, a Death and Disability Superannuation Fund to pay the benefits prescribed by Clauses 7 and 10 of this Award. The Fund shall operate in accordance with relevant Commonwealth legislation and the terms of the trust deed by which it is created.
- 4.2 The terms of the trust deed by which the Death and Disability Superannuation Fund is created shall provide that the Trustee of the Death and Disability Superannuation Fund is required to reduce the benefits otherwise payable from the said fund so as to offset:
- 4.2.1 tax liabilities in the same circumstances and on the same bases as prescribed in section 61RA of the *Superannuation Act 1916*;
- 4.2.2 any benefits prescribed by this Award that have previously been paid from the Death and Disability Superannuation Fund or by FRNSW pursuant to this Award.

Clause 5. Contributions to the Death and Disability Superannuation Fund

- 5.1 Permanent firefighters who are covered by FSS or who have elected under section 10 of the *First State Superannuation Act 1992* to make other arrangements shall contribute 1.5 per cent of their salary to the Death and Disability Superannuation Fund.
- 5.2 Permanent firefighters who are contributors to SASS but who do not contribute to SASS for additional benefit cover shall contribute 1.5 per cent of their salary to the Death and Disability Superannuation Fund.
- 5.3 Permanent firefighters who are contributors to SASS and who contribute for additional benefit cover and who elect to relinquish that cover shall contribute 1.5 per cent of their salary to the Death and Disability Superannuation Fund.
- 5.4 Permanent firefighters who:
- 5.4.1 are contributors to SASS; and
- 5.4.2 contribute to SASS for additional benefit cover; and
- 5.4.3 elect not to relinquish that additional benefit cover,
- may elect to contribute 0.5 per cent of their salary to the Death and Disability Superannuation Fund in order to be entitled to receive the payments prescribed by this Award at subclauses 7.2 and 8.3 in relation to death or total and permanent incapacity and at Clause 9 in relation to partial and permanent incapacity only.
- 5.5 Permanent firefighters who:
- 5.5.1 are contributors to SASS; and
- 5.5.2 contribute to SASS for additional benefit cover; and

5.5.3 elect not to relinquish that additional benefit cover,

may elect to not be covered by this Award. Such firefighters shall not be eligible to receive a pension or lump sum payment prescribed by this Award.

- 5.6 The contributions prescribed by this Award in relation to permanent firefighters who are contributors to SASS are additional to the contributions that they are required to make under the *State Authorities Superannuation Act 1987*.
- 5.7 Notwithstanding the provisions of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011 and the Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2011, a firefighter who is required or elects to make contributions pursuant to this clause will do so by sacrificing an amount of unearned salary equivalent to the firefighter's contribution pursuant to this clause, unless they elect to contribute from their post-tax salary. Such salary sacrifice shall not be taken into account for the purpose of calculating the remuneration that the firefighter would have received in the event that no salary sacrifice had been applicable.
- 5.8 A permanent firefighter who is a contributor to SASS and who contributes for additional benefit cover shall within three months of commencing employment make an election on a "once only" basis, whether they wish to retain or relinquish that additional benefit cover.
- 5.9 Subject to subclause 5.10, FRNSW shall contribute \$18.82 per fortnight to the Death and Disability Superannuation Fund in respect of each retained firefighter.
- 5.10 FRNSW shall contribute \$6.27 per fortnight to the Death and Disability Superannuation Fund in respect of each retained firefighter who, by virtue of their primary employment, is already a member of SSS, PSS, the LGSS or EISS Division D "Defined Benefit Scheme", the JPS, PCSF, PBRI or who is a LGSS or EISS Division B "Retirement Scheme" member with additional benefit cover or who is a SASS member with additional benefit cover.
- 5.11 FRNSW shall contribute to the Death and Disability Superannuation Fund such sum as may be necessary to meet any shortfall between the Fund's reserves and that sum that it needs in order to pay the superannuation pensions and superannuation lump sum benefits prescribed by this Part.
- 5.12 A firefighter on any form of leave without pay shall continue to be covered by this Award and shall be required to make the contributions that he/she would otherwise have made had he/she not been on leave without pay.
- 5.13 FRNSW shall deduct the contributions that firefighters are required or elect to make pursuant to this clause from their salaries and forward such contributions to the Death and Disability Superannuation Fund.

Clause 6. Other Benefits Applicable to Firefighters

With the exception of the offsets prescribed by this Award, the benefits conferred upon firefighters by this Award shall be in addition to those benefits otherwise payable under the FSS Scheme, the SASS scheme and/or the *Workers Compensation Act 1987* and *Workplace Injury Management and Workers Compensation Act 1998*, as varied from time to time.

Clause 7. Permanent Firefighters - Pensions for "on Duty" Death and Total and Permanent Incapacity

- 7.1 In the case of those permanent firefighters who contribute to the Death and Disability Superannuation Fund in accordance with subclauses 5.1, 5.2 or 5.3 of this Award, a pension in accordance with this subclause shall be payable from that Fund in the event that an on duty injury results in a permanent firefighter's death or a permanent firefighter suffering total and permanent incapacity.
- 7.2 In the event that an on duty injury results in the death or total and permanent incapacity of a permanent firefighter for whom the Death and Disability Superannuation Fund is receiving contributions pursuant

to subclause 5.4, a lump sum payment of \$15,000 shall be paid from that Fund to the permanent firefighter or his/her estate.

7.3

7.3.1 A permanent firefighter who becomes totally and permanently incapacitated shall be paid a fortnightly pension calculated in accordance with subclause 7.3.2.

7.3.2 Pension = $\{S/260 + (9 \times N)\} \times \5.50

Where

S means the permanent firefighter's salary on his/her last day of service with FRNSW

N is the number derived from the calculation of a/b where:

a is the last published Consumer Price Index (All Groups) for Sydney; and

b is:

(a) the number 56.45; or

(b) if the Australian Statistician changes the reference base for the Consumer Price Index (All Groups Index) for Sydney, the number used in SSS.

Where the result of the calculation $\{S/260 + (9 \times N)\}$ is not a whole number the result is to be rounded up to the next whole number.

7.3.3 The fortnightly pension payable to the spouse of a permanent firefighter who, whilst still employed, dies as a consequence of an on-duty injury shall be two-thirds of the fortnightly pension that would have been payable to the permanent firefighter as calculated in accordance with subclause 7.3.2 above.

7.3.4 The fortnightly pension payable to the spouse of a former permanent firefighter who dies while receiving a pension under this Award shall be two-thirds of that former permanent firefighter's pension at the time of death.

7.3.5 Children's pensions are payable on the same basis as in SSS.

7.3.6 Pensions may be commuted on the same basis as applicable to SSS pensions.

7.3.7 The provisions of the other subclauses of this clause shall not apply in the event that an on duty injury results in the death of a permanent firefighter who does not have a spouse at the time of his or her death. In such cases, the permanent firefighter's death shall, for the purposes of this Award, be treated as if it was the result of an off duty injury and a lump sum payment shall be paid from the Death and Disability Superannuation Fund in accordance with subclause 8.2 of this Award, provided that if the age of the permanent firefighter at the time of his/her death was 65 years or more, then the benefit shall be a lump sum payment equivalent to the permanent firefighter's salary.

7.3.8 A minimum guaranteed lump sum benefit is payable in the same circumstances as prescribed in section 31A of the *Superannuation Act* 1916, but the "minimum benefit" as defined in section 31A(7) will not apply and for the purposes of this Award the minimum benefit shall be the amount of the offset as calculated under the Award.

7.3.9 The value of a primary or reversionary pension is subject to reduction as determined by the actuary where the relevant offset amount prescribed by subclause 7.4 is not paid into the Death and Disability Superannuation Fund.

7.3.10 To avoid doubt, the pensions payable under this clause shall be paid for the life of the pensioner and indexed on the same basis as SSS pensions.

7.4 In the case of pensions payable under subclause 7.3, the following offsets shall be applicable:

7.4.1 For non-SASS members, the offset shall be an amount that the actuary calculates as representing the compulsory employer contributions made by the NSW Fire Brigades in respect of the permanent firefighter plus interest on that amount.

7.4.2 For SASS members, the offset equals the total of the SASS employer-financed benefit and the SANCS benefit.

Clause 8. Permanent Firefighters - Lump Sum Payments for "Off Duty" Death and Total and Permanent Incapacity

8.1 The lump sum payments prescribed by this clause are payable from the Death and Disability Superannuation Fund.

8.2 In the event that an off duty injury results in the death or total and permanent incapacity of a permanent firefighter who contributes to the Death and Disability Superannuation Fund in accordance with subclauses 5.1, 5.2 or 5.3 of this Award, a lump sum payment in accordance with the scale set out in subclause 8.4 of this Award shall be paid to the permanent firefighter or his/her estate.

8.3 In the event that an off duty injury results in the death or total and permanent incapacity of a permanent firefighter of less than 65 years of age for whom the Death and Disability Superannuation Fund is receiving contributions pursuant to subclause 5.4, a lump sum payment of \$15,000 shall be paid to the permanent firefighter or his/her estate.

8.4 For the purposes of this subclause, a permanent firefighter's age shall be his/her age at the time of his/her death or at the date that he/she ceases to be employed by the NSW Fire Brigades or at such earlier date as may be determined by the Trustee of the Death and Disability Superannuation Fund.

AGE	LUMP SUM
Less than 61 years of age	\$350,000
At age 61 to less than 62 years of age	\$280,000
At age 62 to less than 63 years of age	\$210,000
At age 63 to less than 64 years of age	\$140,000
At age 64 to less than 65 years of age	\$70,000

Clause 9. Rehabilitation and Retraining and Lump Sum Payments for Permanent Firefighters Who Suffer Partial and Permanent Incapacity

9.1 The lump sum payments prescribed by this clause are payable by way of compensation for loss of earning capacity caused by the partial and permanent incapacity by FRNSW.

9.2 A permanent firefighter who suffers partial and permanent incapacity as the result of an on duty injury shall receive extensive rehabilitation/retraining for up to two years, leading to redeployment to alternative duties. If redeployment within FRNSW is not possible, the employment of the firefighter may be terminated and, in such circumstances, the firefighter shall receive a lump sum payment in accordance with Annexure A to this Award.

9.3 A permanent firefighter who suffers partial and permanent incapacity as the result of an off duty injury shall receive extensive rehabilitation/retraining for up to two years, leading to redeployment to alternative duties. Such a firefighter shall not be entitled to any benefit conferred by the provisions of the *Workers Compensation Act 1987* or the *Workplace Injury Management and Workers Compensation Act 1998* unless that benefit is conferred upon the firefighter by such statutes. If redeployment within FRNSW is not possible, the employment of the firefighter may be terminated. If such termination occurs prior to the expiry of the two years of rehabilitation/retraining, the firefighter shall be paid a lump sum

payment equivalent to the unexpired portion of the two years full pay or full pay to age 60 (whichever is the lesser).

- 9.4 The objective of the rehabilitation/retraining programme, which is to be on full pay, is to place every permanent firefighter who suffers partial and permanent incapacity in a suitable position within FRNSW. All reasonable efforts will be made by FRNSW to ensure that a permanent firefighter who suffers partial and permanent incapacity is so placed, including by identifying potential employment opportunities as soon as practicable and directing the rehabilitation/retraining programme to that end, and in consultation with the firefighter concerned and the FBEU (unless the firefighter expressly declines to agree to the FBEU being informed).
- 9.5 Where FRNSW believes that, notwithstanding every reasonable effort to the contrary, a suitable position may not be found for a permanent firefighter who, by reason of his or her partial and permanent incapacity, is undergoing the rehabilitation/retraining programme, the firefighter concerned and the FBEU (unless the firefighter expressly declines to agree to the FBEU being informed) shall be informed at the earliest possible opportunity.
- 9.6 An incapacitated firefighter's employment will not be terminated because of the lack of a suitable position within FRNSW without the firefighter's consent. In the event that the firefighter does not consent, an adequate opportunity will be given to the firefighter concerned and the FBEU (unless the firefighter expressly declines to agree to the FBEU being informed) to consider FRNSW's opinion that no suitable position is available and to put that opinion into dispute in accordance with the dispute resolution clause in this Award.
- 9.7 The parties agree that it is anticipated that the rehabilitation/retraining programme and forward planning associated with the programme will minimise the likelihood that any incapacitated firefighter will be terminated because at the end of the rehabilitation/retraining programme, a suitable position is not available.

Clause 10. Retained Firefighters - Pensions for "on Duty" Death and Total and Permanent Incapacity

- 10.1 Retained firefighters who, by virtue of their primary employment, are already members of SSS, PSS, the LGSS or EISS Division D "Defined Benefit Scheme", the JPS, PCSF (or such other public sector defined benefit schemes as agreed between the parties), PBRI or who are LGSS or EISS Division B "Retirement Scheme" members with additional benefit cover or who are SASS members with additional benefit cover shall not be entitled to the benefits set out at subclause 10.3. A lump sum payment of \$15,000 shall be paid to such retained firefighters or their estate in the event that an on duty injury results in their death or their suffering total and permanent incapacity.
- 10.2 In the case of retained firefighters who contribute to the Death and Disability Superannuation Fund (other than those referred to in subclause 10.1) a pension in accordance with this subclause shall be payable from that Fund in the event that an on duty injury results in their death or their suffering total and permanent incapacity.

10.3

10.3.1 A retained firefighter who becomes totally and permanently incapacitated shall be paid a fortnightly pension calculated in accordance with subclause 10.3.2.

10.3.2 Pension = $\{S/260 + (9 \times N)\} \times \5.50

Where

S means the retained firefighter's deemed salary on his/her last day of service with FRNSW

N is the number derived from the calculation of a/b where:

a is the last published Consumer Price Index (All Groups) for Sydney; and

- b is:
- (a) the number 56.45; or
 - (b) if the Australian Statistician changes the reference base for the Consumer Price Index (All Groups Index) for Sydney, the number used in SSS.

Where the result of the calculation $\{S/260 + (9 \times N)\}$ is not a whole number the result is to be rounded up to the next whole number.

- 10.3.3 The fortnightly pension payable to the spouse of a retained firefighter who, whilst still employed, dies as a consequence of an on-duty injury shall be two-thirds of the fortnightly pension that would have been payable to the retained firefighter as calculated in accordance with subclause 10.3.2 above.
 - 10.3.4 The fortnightly pension payable to the spouse of a former retained firefighter who dies while receiving a pension under this Award shall be two-thirds of that former retained firefighter's pension at the time of death.
 - 10.3.5 Children's pensions are payable on the same basis as in SSS.
 - 10.3.6 Pensions may be commuted on the same basis as applicable to SSS pensions.
 - 10.3.7 The provisions of the other subclauses of this clause shall not apply in the event that an on duty injury results in the death of a retained firefighter who does not have a spouse at the time of his or her death. In such cases, the retained firefighter's death shall, for the purposes of this Award, be treated as if it was the result of an off duty injury and a lump sum payment shall be paid from the Death and Disability Superannuation Fund in accordance with subclause 11.2 of this Award, provided that if the age of the retained firefighter at the time of his/her death was 65 years or more, then the benefit shall be a lump sum payment equivalent to the retained firefighter's deemed salary.
 - 10.3.8 A minimum guaranteed lump sum benefit is payable in the same circumstances as prescribed in section 31A of the *Superannuation Act 1916*, but the "minimum benefit" as defined in section 31A(7) will not apply and for the purposes of this Award the minimum benefit shall be the amount of the offset as calculated under the Award.
 - 10.3.9 The value of a primary or reversionary pension is subject to reduction as determined by the actuary where the relevant offset amount prescribed by subclause 10.4 is not paid into the Death and Disability Superannuation Fund.
 - 10.3.10 To avoid doubt, the pensions payable under this clause shall be paid for the life of the pensioner and indexed on the same basis as SSS pensions.
- 10.4 In the case of pensions payable under subclause 10.3, the offset shall be an amount that the actuary calculates as representing the compulsory employer contributions made by FRNSW in respect of the retained firefighter plus interest on that amount.

Clause 11. Retained Firefighters - Lump Sum Payments for "Off Duty" Death and Total and Permanent Incapacity

- 11.1 The lump sum payments prescribed by this clause are payable from the Death and Disability Superannuation Fund.
- 11.2 Subject to subclause 11.4, in the event that an off duty injury results in the death or total and permanent incapacity of a retained firefighter, a lump sum payment in accordance with the scale set out in subclause 11.3 shall be paid to the retained firefighter or his/her estate.

- 11.3 For the purposes of this subclause, a retained firefighter's age shall be his/her age at the time of his/her death or at the date that he/she ceases to be employed by FRNSW or at such earlier date as may be determined by the Trustee of the Death and Disability Superannuation Fund.

AGE	LUMP SUM
Less than 61 years of age	\$350,000
At age 61 to less than 62 years of age	\$280,000
At age 62 to less than 63 years of age	\$210,000
At age 63 to less than 64 years of age	\$140,000
At age 64 to less than 65 years of age	\$70,000

- 11.4 Retained firefighters who, by virtue of their primary employment, are already members of SSS, PSS, the LGSS or EISS Division D "Defined Benefit Scheme", the JPS, PCSF (or such other public sector defined benefit schemes as agreed between the parties), PBRI or who are LGSS or EISS Division B "Retirement Scheme" members with additional benefit cover or who are SASS members with additional benefit cover \$15,000 shall be paid to such retained firefighters or their estate in the event that an off duty injury results in their death or their suffering total and permanent incapacity.

Clause 12. Lump Sum Payments for Retained Firefighters Who Suffer Partial and Permanent Incapacity

- 12.1 The lump sum payments prescribed by this clause are payable by FRNSW.
- 12.2 FRNSW may terminate the employment of a retained firefighter who suffers partial and permanent incapacity. An adequate opportunity will be given to the retained firefighter concerned and the FBEU (unless the firefighter expressly declines to agree to the FBEU being informed) to consider FRNSW's intention to terminate the employment of a retained firefighter.
- 12.3 In the event that the employment of a retained firefighter is terminated because the firefighter suffers partial and permanent incapacity, the firefighter shall be paid a lump sum payment, by way of compensation for loss of earning capacity caused by the partial and permanent incapacity, in accordance with this clause.
- 12.4 A retained firefighter whose employment is terminated because the retained firefighter suffers partial and permanent incapacity as the result of an on duty injury shall be paid a lump sum payment in accordance with Annexure A to this Award with salary to be determined as follows:
- 12.4.1 where there is a loss of FRNSW employment only - on the basis of the retained firefighter's actual retained earnings;
- 12.4.2 where there is a loss of FRNSW employment and the retained firefighter's primary employment - on the basis of the retained firefighter's deemed salary on the date that he/she ceases to be employed by FRNSW.
- 12.5 A retained firefighter whose employment is terminated because the retained firefighter suffers partial and permanent incapacity as the result of an off duty injury shall be paid a lump sum payment equivalent to two years of the retained firefighter's actual retained earnings, or actual retained earnings to age 60 (whichever is the lesser).

Clause 13. Assessment of Entitlement to Benefits

- 13.1 Entitlement to the benefits to be provided by FRNSW pursuant to this Award shall be assessed through a mechanism to be agreed between the parties. The mechanism shall provide that any dispute as to the entitlement of a firefighter may be referred to the Industrial Relations Commission of New South Wales for final determination.
- 13.2 Entitlement to receive a pension or lump sum benefit from the Death and Disability Superannuation Fund shall be assessed in accordance with relevant Commonwealth legislation and the terms of the trust deed by which the Fund is created.

- 13.3 To avoid doubt, a firefighter can receive either a total and permanent incapacity benefit, or a partial and permanent incapacity benefit, but not both.
- 13.4 Subject to subclause 13.2, any dispute as to the entitlement to receive a pension or lump sum payment from the Death and Disability Superannuation Fund or any other dispute arising under or regarding the application of this Award may be referred to the Industrial Relations Commission of New South Wales for final determination.

PART C

HEALTH AND FITNESS PROGRAMME

Clause 14. Health and Fitness

- 14.1 The parties agree and accept the need for a compulsory health and fitness programme that is underpinned by practical support, education and assistance programs provided by FRNSW.
- 14.2 The parties agree to develop and implement a health and fitness programme in circumstances in which a member of the Industrial Relations Commission will oversight their progress and set appropriate time frames, subject to the proviso that the parties specifically agree to the inclusion of a sub-clause in the following terms:
- "A firefighter who fails to meet the prescribed health and fitness standards will be given an appropriate period of time, as determined on medical advice, to achieve the level of health and fitness required. Subsequently, a firefighter who fails the medical reassessment or who is deemed on medical advice not capable of regaining or maintaining an acceptable level of fitness will be rehabilitated to another position in accordance with FRNSW policy."
- 14.3 Negotiations will also commence on a proposed return to work policy, which shall include agreed alternative duties provisions. The content of any FRNSW policy in this regard will form part of health and fitness negotiations.
- 14.4 Health and fitness standards will be subject to negotiation and agreement, but shall apply to all firefighters with no distinction based upon rank.

PART D

GRIEVANCE MECHANISM, ANTI-DISCRIMINATION AND AREA. INCIDENCE, DURATION AND PARTIES BOUND

Clause 15. Grievance Mechanism

If an issue gives rise to a dispute it shall be dealt with in accordance with the Dispute Avoidance Procedures in Clause 35 of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011.

Clause 16. Anti-Discrimination

- 16.1 It is the intention of the parties bound by this Award to seek to achieve the object in section 3(f) of the *Industrial Relations Act 1996* to prevent and eliminate discrimination in the workplace. This includes discrimination on the grounds of race, sex, marital status, disability, homosexuality, transgender identity, age and responsibilities as a carer.
- 16.2 It follows that in fulfilling their obligations under clause 15 of this Award the parties have obligations to take all reasonable steps to ensure that the operation of the provisions of this Award are not directly or indirectly discriminatory in their effects. It will be consistent with the fulfilment of these obligations for the parties to make an application to vary any provision of this Award, which by its terms or operation, has direct or indirect discriminatory effect.

- 16.3 Under the *Anti-Discrimination Act 1977*, it is unlawful to victimise an employee because the employee has made or may make or has been involved in a complaint of unlawful discrimination or harassment.
- 16.4 Nothing in this clause is taken to affect any conduct or act which is specifically exempted from anti-discrimination legislation; offering or providing junior rates of pay to persons under 21 years of age; any act or practice of a body established to propagate religion which is exempted under section 56(d) of the *Anti-Discrimination Act 1977*; and/or a party to this Award from pursuing matters of unlawful discrimination in any State or Federal jurisdiction.
- 16.5 This clause does not create legal rights or obligations in addition to those imposed upon the parties by legislation referred to in this clause.

Clause 17. Leave Reserved

Leave is reserved to the parties generally to apply as they may be advised in respect of:

- 17.1 any adjustment under Commonwealth legislation governing superannuation which alters preservation rights at age 60 or in the event that any legislative change necessary for the implementation of this Award does not occur;
- 17.2 the definition of "actual retained earnings" at Clause 3; and
- 17.3 Clause 9 - Rehabilitation and Retraining and Lump Sum Payments for Permanent Firefighters who suffer Partial and Permanent Incapacity.

Clause 18. Area, Incidence, Duration and Parties Bound

- 18.1 This Award shall apply to all permanent firefighters and retained firefighters, as defined in Clause 3, Definitions, who are employed by FRNSW.
- 18.2 This Award shall rescind and replace the Crown Employees (NSW Fire Brigades Firefighting Staff Death and Disability) Award 2009 published 26 June 2009 (368 IG 364).
- 18.3 This Award shall be binding upon the FBEU and FRNSW.
- 18.4 This Award shall take effect on and from 22 March 2012 and shall remain in force until 21 March 2014.

ANNEXURE A

PARTIAL AND PERMANENT INCAPACITY BENEFITS PAYMENT SCALE

Age at termination	Benefit as multiple of salary
20	8.33
21	8.22
22	8.11
23	7.99
24	7.87
25	7.75
26	7.62
27	7.49
28	7.35
29	7.21
30	7.07
31	6.92
32	6.76
33	6.61
34	6.44
35	6.28

36	6.11
37	5.93
38	5.75
39	5.56
40	5.36
41	5.16
42	4.96
43	4.75
44	4.53
45	4.30
46	4.07
47	3.83
48	3.59
49	3.34
50	3.08
51	2.81
52	2.53
53	2.25
54	1.95
55	1.65
56	1.34
57	1.02
58	0.69
59	0.35
60	0.00

**AGREED MECHANISM FOR ASSESSMENT OF ENTITLEMENT TO BENEFITS
PROVIDED BY FRNSW PURSUANT TO SUBCLAUSE 13.1**

1. This mechanism will not apply, and a firefighter may not therefore be considered partially and permanently incapacitated, whilst ever a firefighter has a workers compensation claim in dispute. Conversely, this mechanism will apply in all other instances listed at point 2.
2. The procedures set out at points 3 to 6 inclusive will apply if:
 - (a) FRNSW has reason to believe that:
 - (i) a firefighter may be unfit for duty, permanently or otherwise, and that firefighter disagrees; or
 - (ii) it may be necessary to impose certain medical/physical conditions or restrictions on a firefighter, permanently or otherwise, and that firefighter disagrees with the need for some or all such conditions or restrictions; or
 - (b) A firefighter has reason, supported by medical information, to believe that:
 - (i) the firefighter may be unfit for duty, permanently or otherwise, and FRNSW disagrees; or
 - (ii) it may be necessary to impose certain medical/physical conditions or restrictions on the firefighter, permanently or otherwise, and FRNSW disagrees with the need for some or all such conditions or restrictions; or
 - (c) A firefighter has already been assessed as defined at points 7(b), 7(c) or 7(d) and subsequently obtains more contemporary information which suggests that they may be fit or that their requirements or restrictions should be changed, and FRNSW disagrees.
3. If the medical assessment is initiated by FRNSW at point 2(a) then FRNSW will advise the firefighter in writing of their need to undergo an immediate health assessment by a medical practitioner nominated by FRNSW, and its reason(s) for such referral.

4. If FRNSW believes at any point in time that a firefighter's condition is such that by remaining on-duty he/she may endanger themselves, their colleagues or the public, FRNSW will, having regard to the firefighter's circumstances, either assign appropriate alternative duties for the firefighter or direct the firefighter on leave pending the determination of their condition in accordance with this mechanism. A firefighter who is stood down from their ordinary duties in accordance with this point will continue to receive "full pay", as defined by the Award, until such date as the Industrial Relations Commission determines that the firefighter has failed to cooperate with the reasonable directions of FRNSW under this Clause, or the assessing medical practitioner reports pursuant to point 6 below.
5. Whether the medical assessment is initiated by FRNSW at point 2(a) or a firefighter at point 2(b), FRNSW will arrange for a reasonable appointment for the firefighter as soon as possible, if not with FRNSW's preferred medical practitioner then with some other suitable medical practitioner, and will notify both the firefighter and the assessing medical practitioner in writing setting out:
 - (a) the time, date and location of the appointment;
 - (b) the inherent requirements of the firefighter's ordinary duties and the firefighter's typical work environment(s);
 - (c) the health-related issue(s), if any, which FRNSW believes may be affecting work performance;
 - (d) the manner in which it is believed work performance has been/is being and/or maybe affected, including evidence where available;
 - (e) any specific question(s) from FRNSW. It will not be sufficient to simply request an assessment of a firefighter's "fitness to continue" or assume such question(s) would be inferred by the assessing medical practitioner from the general background information provided; and
 - (f) a summary of all relevant documents in checklist format.
6. The assessing medical practitioner should take into account any and all relevant material supplied by FRNSW, the firefighter and/or the firefighter's own medical practitioner(s). FRNSW will ensure that any material provided to the assessing medical practitioner will at the same time also be provided to the firefighter and/or the medical practitioner(s) nominated by the firefighter.
7. The assessing medical practitioner's report, which will be in writing and provided to both FRNSW and the firefighter, should conclude that the firefighter is, in that medical practitioner's opinion, either:
 - (a) fit to perform the firefighter's ordinary duties without any requirements or restrictions; or
 - (b) fit to perform the firefighter's ordinary duties with specified requirements or restrictions; or
 - (c) temporarily unfit to perform the firefighter's ordinary duties but fit to perform alternative duties, either with or without specified requirements or restrictions; or
 - (d) temporarily unfit to perform any FRNSW duties; or
 - (e) permanently unfit to perform the firefighter's ordinary duties.
8. FRNSW will write to the firefighter within 7 days of receipt of the assessing medical practitioner's report stating that it has either:
 - (a) wholly accepted the medical practitioner's report; or
 - (b) partially accepted the medical practitioner's report, together with the reason(s) for its non-acceptance of the relevant part(s); or
 - (c) accepted none of the medical practitioner's report and its reasons for same.

9. A firefighter may request that FRNSW review its determination at point 8 by way of report to the Commissioner. The Commissioner will consider all previous reports and documentation relating to the matter, together with any additional information which the firefighter may supply, and will within 14 days supply the firefighter concerned with a written and final FRNSW determination of the matter.
10. If the firefighter does not agree with the Commissioner's determination at point 9 then the matter may be referred to the Industrial Relations Commission for final determination.
11. A firefighter who is found to be temporarily unfit as per points 7(c) or 7(d) will be given the appropriate period of time, as advised by the assessing medical practitioner, necessary for the firefighter to return to their ordinary duties.
12. A firefighter who fails to return to their ordinary duties within the appropriate period of time, or within six months from the date they last performed their ordinary duties (which ever occurs first) will be referred for medical re-assessment.
13. The determination as to whether a firefighter's permanent incapacity is the result of an on duty injury or an off duty injury will be made by Suncorp as soon as possible following confirmation of the firefighter's permanent incapacity or, in the event that Suncorp is no longer able or willing to do so, by some other suitably qualified independent assess or agreed between the parties, provided that any dispute as to the appointment of an independent assessor or the entitlement of a firefighter suffering partial and permanent incapacity may be referred to the Industrial Relations Commission for final determination.
14. FRNSW will bear the cost of any assessment conducted by a medical practitioner pursuant to points 5, 6 and 7, and of any independent assessment conducted at point 13.
15. To avoid doubt, the provision within subclauses 9.4, 9.5, 9.6 and 12.2 of the Award where by the FBEU is to be informed "unless the firefighter expressly declines to agree to the FBEU being informed" is intended to allow the firefighter to seek the FBEU's advice before authorising or agreeing to any course of action or signing any document associated with those subclauses and unless the firefighter does expressly decline to agree to the FBEU being informed then FRNSW will neither expect nor allow a firefighter to authorise or agree to any course of action nor sign any document associated with those subclauses until such time as the FBEU has been notified in writing and been given adequate opportunity to confer with the firefighter.
16. A firefighter who fails to comply with a reasonable direction to attend and participate in a medical assessment under this mechanism may be subject to disciplinary action.
17. A firefighter who has been confirmed as suffering partial and permanent incapacity may at any time elect to be assessed by the Death and Disability Superannuation Fund for total and permanent incapacity, in which case FRNSW will make all reasonable efforts to assist the Fund in concluding such assessment as soon as practicable.
18. The employment of a firefighter who is confirmed as suffering partial and permanent incapacity will be terminated in accordance with subclause 9.6 of the Award or otherwise upon such firefighter's consent or request.

19. For the purpose of this mechanism, "ordinary duties" means the full range of work that was usually performed by the firefighter immediately prior to suffering the condition, illness or injury that caused them to cease to perform, in whole or in part, such work.

W. R. HAYLEN *J.*

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