

# **Recommendations for Settlement of a Collective Agreement between Fire and Emergency New Zealand (FENZ) and the New Zealand Professional Firefighters Union Inc (NZPFU).**

## **1. Background**

- 1.1. By undated and unsigned Terms of Reference<sup>1</sup>, but which I am aware were entered into between Fire and Emergency New Zealand (FENZ) and the New Zealand Professional Firefighters Union Inc (NZPFU) (collectively, the parties) with the assistance of the Office of the Minister of Internal Affairs and the Department of Internal Affairs on or about 31 August 2022, I was asked to be a facilitator/mediator in the parties' collective bargaining.
- 1.2. Originally it was agreed that I would provide my recommendations about the contentious contents of a new collective agreement, by 30 September. As a result of the complexity of the issues (including but not limited to financial considerations), and the necessity to exchange, absorb, understand and comment on voluminous written materials, this date was extended by consent.
- 1.3. From my prior mediatory involvement in July and August 2022 at the request of the parties, and from this most recent exercise, I record that their collective bargaining has been underlaid and made more difficult by a mutual lack of trust and confidence. That assessment will be reflected by the number and detail of my recommendations about issues which I recommend be addressed by their inclusion in a new collective agreement and otherwise formally by the parties during the currency of that collective agreement. I deal with those (no less important) issues at the conclusion of my report of recommendations for their collective agreement.

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<sup>1</sup> Attached

## 2. Terms of Reference

2.1. My terms of reference<sup>2</sup> required me to:

- facilitate the progression of an agreed outcome to the parties' collective bargaining
- alternatively, to provide a publically recommended settlement to the parties by 30 September 2022<sup>3</sup>
- to direct the mediation process to be participated by the parties in good faith
- to ensure timely provision of financial information relevant to the mediation/facilitation process with the assistance of an independent financial expert appointed by the Department of Internal Affairs, to provide transparency and assurance
- to provide the parties with my recommendations in draft for consideration and comment by them and further consideration by me before their finalisation, consistent with natural justice and obligations of good faith<sup>4</sup>
- determine whether my recommendations for the settlement of the bargaining should be made public and, if so, after due consideration to the parties' reporting and approval obligations [what I interpret to be their obligations to seek and obtain the approval of its members (in the case of the Union) and of the Board of FENZ]

2.2. Settlement between the parties of the issues in the bargaining having been unable to be achieved without the provision by me of recommendations, I have now moved to that recommendatory stage of my terms of reference.

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<sup>2</sup> Attached to this recommendation report

<sup>3</sup> By agreement of all concerned on 22 September, this deadline was extended

<sup>4</sup> On 12 October 2022 I received comprehensive and helpful submissions from both parties. After careful consideration of these I have made some changes (including some significant changes) to my draft report and provided both fuller reasonings both for those changes, and to support my decisions not to make recommendations for change.

### 3. Legal Principles

- 3.1. This is not the statutory process of facilitated bargaining under sections 50A to 50I inclusive of the Employment Relations Act 2000. However, one of the conditions on which it was agreed to was the withdrawal by FENZ of its application to the Employment Relations Authority for such a facilitated bargaining process to take place in the Authority. I have modelled my resolution of some procedural issues on that statutory process.

### 4. A Concise Recommendations-focused Report

- 4.1. Although this report provides background and context to the issues, I do not propose to provide detailed reasons for my recommendations. To do so for the initially 100 or so separate claims, albeit now reduced in number and scope, and from the volume of accumulated evidence and submissions would simply not be possible in the tight timeframe given and the need for the parties to settle and conclude a collective agreement. I have, nevertheless considered all of that information provided to me during the accumulated period of more than 34 hours of face-to-face meetings as well as that sent to me in correspondence.
- 4.2. It must be remembered that this is a **recommendations** report, not a decision about what will be the terms and conditions of employment set by a collective agreement. It is for the bargaining parties, FENZ and the NZPFU, to settle their collective agreement on the terms they agree to but after taking account of my recommendations.
- 4.3. For the avoidance of doubt and although firefighters (up to and including senior station officers) are the most numerous and prominent of the NZPFU members covered by the putative collective agreement, this report also covers a range of other roles at FENZ the holders of which are NZPFU

members. These include control room despatchers and communicators, fire safety staff, trainers and other staff.

## **5. Funding the Cost of Increased Remuneration and Associated Costs**

- 5.1. A significant element in FENZ's responses to the Union's many individual claims, and to their totality, is, simply, that it does not have the financial resources to meet the costs to it of those claims. NZPFU disagrees fundamentally, including by saying that the recommendations made in this report are both inadequate but also affordable by FENZ.
- 5.2. I should mention briefly what the parties know as the "passing-on" of improved terms and conditions gained by NBZPFU members, to other comparable staff who are not members of the Union. NZPFU rejects any notions that there should be any such passing on by FENZ but that even if there is, that the costs of passed-on terms and conditions should not be part of my considerations of affordability. Whether there is passing-on following a settlement of a collective agreement is a matter of bargaining between the parties if they wish to address that. The reality of the situation, however, is that employers generally are reluctant to have staff doing the same jobs but remunerated or otherwise treated differently. That is especially so where, like firefighters and communicators, they need to work closely and seamlessly together in situations of high trust and confidence between themselves. So, at least in the absence of a prohibition or a financial constraint on passing-on, reality dictates that FENZ is likely to wish to promote equity between these groups, if not immediately then when collective bargaining next occurs for those others.
- 5.3. Finally by way of general introduction, NZPFU says that so far as remuneration for its members is concerned, there are two essential drivers behind its claims. First, after years of neglect or inadequacy, its members' remuneration needs to catch-up to where it should have been . Second, and thereafter, the settlement should not only repair that inadequacy, but

maintain fair and proper remuneration for the immediate future: what may be captured by the phrase ‘catch up, followed by keep up’.

- 5.4. It is not within my remit to recommend new or different funding models that Parliament may provide for FENZ. As a Crown Entity, FENZ is funded principally, indeed overwhelmingly, by levies imposed on insurance policy premiums which are fixed percentages of those premiums. FENZ itself does not have the ability to increase unilaterally those levies. There will be a review of the levies in either 2025 or 2026, but the collective agreement concerned with these recommendations will probably be spent by that time.
- 5.5. FENZ’s alternatives to the impracticable increasing of its income by raising the levies, are (at least) threefold.
- 5.6. First, as the Union urges it to, FENZ might re-prioritise its current and forecast expenditures, whether capital expenditures or operating expenditures.
- 5.7. Second, the parties may agree to seek to persuade central government to augment the relatively modest “public good contribution” it currently makes (\$10m pa) to FENZ’s income. As well as FENZ’s traditional firefighting and fire prevention activities constituting a “public good”, its increasing involvement in medical emergencies, but unfunded by public health related sources, is also clearly a “public good”.
- 5.8. Third, FENZ may wish to consider how, in conjunction with the Crown, its current and prospective borrowings to fund both its long-term capital works projects and the prospective shortfall in levies from the change from the two-monthly to three-monthly levies’ payments basis, might be restructured. For example, a Crown debt forgiveness arrangement might offer an opportunity to free up funding for operational costs (including operations’ biggest component, remuneration) but still within the current funding model.

5.9. So as not to exceed my mandate, I simply identify these possibilities as solutions to FENZ's concerns about where increased operational funding might come from. I do not make any recommendations as to whether any or all of these possibilities might be available to allow those recommendations that I do make to be agreed to, and thereby to enable the collective agreement to be settled and ratified.

## **6. Independant Financial Advice**

6.1. The value of this scrutiny by Grant Thornton of the parties' claims and responses has been twofold. First, it has served as a verification of both parties' assertions of the costs to FENZ of the Union's claims. Second, it has examined and verified FENZ's assertions of the unaffordability of these claims. Incidentally, this process has also identified what is still in contention after various concessions have been made by both parties.

## **7. FENZ in 2022**

7.1. For what I suspect are largely historical reasons dating back to the late 19th Century and to a time in which insurance companies had their own fire brigades to protect the property of their insured clients, through local autonomous Fire Boards, to the regime immediately preceeding 2017 in which a mix of firefighting operations were merged into the current FENZ<sup>5</sup>, its funding mechanisms are, if not unique, then unusual. FENZ's principal (and overwhelming) source of income is by levies charged on the premiums of policies of insurance written for domestic and commercial properties, the registration of motor vehicles and similar sources of insurance premium levies. While domestic property levies are capped at a specified dollar figure and so are unable to be increased beyond their current percentage, FENZ's

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<sup>5</sup> The NZ Fire Service Commission incorporating fulltime and volunteer brigades, and local authorities and the Department of Conservation covering rural fires

income from commercial property levies is constrained only by the set percentage and the number and value of policies written. Those levies are available for adjustment (after a process of consultation and submission) but this is unlikely to occur before 2024 and perhaps even 2025 and so after the likely expiry of a new collective agreement. This means that for the vast majority of its income stream for the next several years, and absent some alternative planning, FENZ's ability to meet any significant increase in its expenditure is limited.

- 7.2. FENZ's costs of employment of fulltime staff is a substantial proportion not only of its operating budget but of its overall expenditure, and fulltime staff who are members of the NZPFU represent almost two thirds of all FTE staff.<sup>6</sup>

## **8. Non-core Firefighting Duties**

- 8.1. Several factors have led to NZPFU members being engaged in recent times in emergency activities other than their traditional role of suppressing fires. Numbers of urban, suburban and rural house fires have decreased, although large-scale and expensive-to-suppress rural fires have increasingly taxed resources. Water inundations are and probably will be more common, as are incidents involving an increasing range of toxic chemicals.
- 8.2. However, what is focussed on in this bargaining has been medical emergencies which are now a significant feature of a firefighter's job. Commensurate with the decline in the ability of ambulance services to attend to these, at least as the first responders on the scene, firefighters are increasingly called on to attend what are described as "Code Purple" incidents, serious medical emergencies

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<sup>6</sup> Although NZPFU membership is at a very high level of fulltime firefighting staff, there are some staff who are members of other unions or of none. In reality whatever terms and conditions are settled for NZPFU members, FENZ will probably wish to apply similar if not identical terms and conditions to those others

including cardiac arrests and suicides, actual or attempted. These are call-outs in addition to longer-standing features of firefighters' duties at the scenes of motor vehicle collisions. They are now often the first responders<sup>7</sup>, or at least co-responders, at such incidents and deploy a range of medical skills and strategies which have resulted, and continue to result, in lives saved and improved patient outcomes, surely a "public good".

- 8.3. Not only does this require the attaining and maintenance of appropriate paramedical training and skills, but such incidents expose firefighters to potentially serious personal psychological and related health issues. These are in addition to the physical medical consequences of exposure to dangerous chemicals and other substances, both in fires at at other emergency incidents.
- 8.4. Although a particular feature of the Union's claims to reflect these new duties, I do not recommend the payment of a separate medical emergencies allowance to firefighters. Most if not all professional firefighters may attend such emergencies and all should be trained appropriately, at least to a sufficient level to undertake these tasks. Because, to an extent, medical duties have replaced some of the former volume of traditional firefighting performed by firefighters, I consider that any compensation for this work should be incorporated in basic remuneration rates in these circumstances. I do not recommend a separate allowance for these duties. In recognition, however, of the additional skills required, acquired and used, and of the traumatic nature of many such incidents, I have taken this into account in recommending the increased remuneration I do in para 28 of this report.

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<sup>7</sup> In the sense of being, in practice, the first emergency service at the scene of a medical emergency even if the comprehensiveness of immediate treatment they can offer is not as great as paramedics with an ambulance service can.

## 9. Adequate Staffing Levels

- 9.1. There is really no dispute at all that the salaries of a trainee firefighters and, for some time, of those trainees after graduation, are low, unattractive and, unless changed, counterproductive to recruitment. Fulltime firefighters are not only a naturally aging workforce, but one in which a significant number of very experienced staff will retire within the next decade. For a variety of reasons, recruitment of new firefighting staff has been inadequate for some years. There is a need to make this an attractive career option, especially in a tight labour market and one in which FENZ is understandably seeking to engage a more diverse and already diversely-skilled range of recruits. I should explain that I do not mean that FENZ has been unable to attract sufficient numbers of quality recruits to its service. Rather, it appears to have limited recruiting intakes over the last few years. Irrespective of this, a service that (admirably) seeks to attract a diverse workforce with existing skills in a variety of trades and occupations and therefore from a demographic in their mid-20s onwards, needs to ensure that its recruiting is not undermined by paying such people (many supporting families) significantly less than they have earned previously.
- 9.2. Nevertheless, it is good to hear of FENZ's commitment to recruiting more firefighters and other staff and I encourage the Union to take FENZ at its word about this in a way it has become reluctant to do recently. If the Union does so, its trust in FENZ will need to be reciprocated by FENZ's fulfillment of those assurances.
- 9.3. Likewise, continued retention of inadequately-paid staff is not a factor that can be taken for granted. While it is true that firefighters generally see themselves as committing to a long term career in public service and are not frequently mobile seeking

better paying opportunities, such good will and commitment to service should not be taken for granted by FENZ.

- 9.4. This shortage of staff has manifested itself in another issue which is at the heart of this bargaining, the significant levels of overtime being worked by many NZPFU members to ensure the maintenance of coverage on all appliances at all stations.
- 9.5. Associated with this issue of staffing is what is known to the parties as “ratios”. This is the number of fulltime firefighters needed to ensure that all appliances are able to be staffed at all times by a crew of 4 firefighters. Currently this ratio is 4.5 per appliance, allowing for leave, sickness, training and other non-core duties but it is recognised by FENZ that this ratio must increase, probably to 5 and perhaps as high as 5.2 per appliance to maintain a full service. FENZ says that this issue is being addressed, albeit gradually, by greater recruitment and training of new firefighters.
- 9.6. While FENZ has, during the bargaining, given assurances of its increase in the 2022-2023 year of the number of training intake courses and, thereby, the numbers of new staff, NZPFU disbelieves these assurances. It says that, in any event, their depressed incomes continue for a number of years until such staff work themselves up into more senior roles. Like wise, NZPFU is skeptical of FENZ’s assurances of its determination to raise these ratios and also says that FENZ is unable to get even adequate numbers of good recruits into the service. As I have already identified, these are important issues of mutual trust and confidence.
- 9.7. On balance, I do not recommend enshrining these matters in the collective agreement in the way the NZPFU wishes me to recommend. For one thing, the quality or even the numbers of recruits cannot be legislated for contractually. But FENZ has made a public commitment and maximal (quality and quantity)

recruiting is in its interests as much if not more than in the Union's. So I consider that FENZ should be given the opportunity to make good on its solemn commitment to recruit more and good quality firefighters and communications staff without these being the subject of prescription and contractual obligation in the collective agreement.

## **10. “Valuing” Staff**

- 10.1. An oft-repeated complaint of the Union is that, as reflected in its responses to its claims, FENZ does not “value” its fulltime firefighters, at least as this may be reflected in recognising their claims to enhanced terms and conditions of employment. It is also an assertion made by the Union in relation to FENZ's treatment and recognition of non-firefighting FENZ staff and volunteer firefighters. I do not propose to engage in comparisons between NZPFU members and volunteers. There are tensions which need to be and are being worked through as part of the FENZ restructure from 2017 and need sensitive and tolerant handling.
- 10.2. Valuing people in material ways is difficult both to equate monetary benefits with non-monetary values, and the values placed on the jobs of front-line and office administration staff. It does, however, seem that many FENZ administrative and head office staff are well remunerated both for the hours worked and the skills and experience they bring to their jobs, when compared to firefighters.
- 10.3. FENZ's human resources (in plain language, its people) are its most valuable resource. While it needs its other resources to operate effectively, without its staff in mutual relationships of goodwill, trust and confidence, even at best FENZ cannot operate efficiently and effectively for the benefit of the community. It is important

that the value in which FENZ holds its firefighters, is reflected by the working conditions (including but not limited to, remuneration) in which that relationship operates. So too is the health, safety and welfare of firefighters an important reflection of that value that I am confident FENZ wishes to place on the efforts of those staff.

## **11. Health, Safety and Wellness**

- 11.1. This heading encompasses several different but related claims in the bargaining. Collectively, they seek either to compensate, or to provide for, improved health among firefighters. They are one of the forefront issues in the Union's claims. Because of their complexity and sensitivity, although not all can be addressed in a new collective agreement, I will, however, make recommendations about extra-collective agreement processes which attempt to address the others of these very significant issues.
- 11.2. This important topic can be subdivided into two distinct, albeit related, claims. The first relates to the mental and psychological health of NZPFU members. The second deals with their physical health, and in particular work-related cancers. Both relate to the prevention of illness or injury, and to the treatment of it if detected with a view to restoring health, continuing appropriate work or providing proper compensation and assistance.
- 11.3. The situation in regard to physical health checks has changed recently and is now dealt with at para 21 of this report
- 11.4. Turning to the second health element of mental and psychological wellbeing, the Union seeks to have settled the reimbursement of an annual sum spent by its individual members who voluntarily seek assessment and/or treatment for work-related conditions of this nature. No figure can yet be put on the probable costs and indeed

there may also be constraints on the availability of sufficient and closely-located psychologists to do this work.

- 11.5. Because of the greater uncertainty around this claim, I recommend only that it be the subject of the deliberations of one of the three general working parties that I recommend be established under the collective agreement which will work during its currency to develop concrete proposals and models. Again for the sake of clarity, I recommend that the costs of any programme of assessment and treatment this working group develops should be borne by FENZ and not from the para 28 remuneration/allowance 'pots' or 'envelopes' that I recommend later in this report.

## **12. Remuneration Comparitors**

- 12.1. This is an issue of pay equity, although not as that term is most commonly used these days in addressing sex or ethnic differentials between diverse occupations. In this case the issue is one of remuneration equity with other comparable groups including of other firefighters.
- 12.2. The issue addresses both the Union's opposition to the use by FENZ of "job sizing" information to inform remuneration comparisons and increases, and other comparitors apparently not previously considered by the parties. As I examine in more detail elsewhere in this report, it must be said that the expired collective agreement does include an agreed general provision that market reviews will be conducted for this purpose, although the Union's opposition is primarily to the particular system of job sizing used by FENZ.
- 12.3. Not for precise benchmarking purposes, but as an indication of a market (New Zealand) in which there are few if any real

comparitors, the Union advocates for remuneration of the sorts of levels of firefighters in Australian states. While superficially attractive, I consider that the necessary broader economic and cost-of-living information needed to make a true comparison are insufficiently certain to make these comparisons at this time.

12.4. The two apparently novel remuneration comparitors that I explored with the parties are Department of Conservation (DoC) staff when engaged on firefighting duties, and NZ international airport firefighters. Again the comparisons cannot be taken too far because of different circumstances, but in the absence of closer ones, they are revealing and relevant to my recommendations.

12.5. As to the remuneration of DoC staff undertaking occasional firefighting duties, FENZ says that this cannot be said to be the “correct” rate of pay for FENZ firefighters. What is significant, however, is that when engaged in firefighting, DoC staff are paid significantly more than FENZ firefighters. I accept that this is an occasional payment for those DoC staff, while FENZ firefighters receive essentially the same pay whether they are working on a fire ground or not. But as one of a number of relevant factors going to make up a comparative picture, these fire payments to DoC staff indicate the value placed by DoC on the importance of combatting fire on its estate and reflect the importance of the work done by its staff to suppress this.

12.6. DoC staff engaged in firefighting on the DoC estate (in the course of which they may well work alongside FENZ firefighters, both professional and volunteers), are paid their usual wages or salaries plus a bonus rate for firefighting duties. Funding for these bonuses comes from a FENZ grant to DoC, a lump sum which is not specified by FENZ as being allocatable to any particular persons or tasks. So it is DoC that chooses to use this grant to remunerate its staff for firefighting and FENZ re-emphasises that it is not its

decision how much DoC firefighters are paid. But the end result is that, when firefighting, DoC staff are paid significantly more than FENZ firefighters when this is calculated as an hourly rate of pay, in the case of the DoC staff for the duration of the incident.

- 12.7. More, but still not completely, comparable, is the situation of firefighters at NZ's international airports. The remuneration data from the two of the three principal airports (Auckland and Christchurch) where these emergency services are provided by the owner of the airport or by a service company contracted to the airport owner, shows that comparable ranks are also significantly better remunerated than FENZ firefighters for many comparable duties which include attendances at medical events. Such differences as there are between the airport and FENZ firefighter remunerations do not appear to be accounted for by other job-related differences between these 2 groups of firefighters/emergency personnel.
- 12.8. FENZ says that there is no evidence of airport emergency firefighters' duties (job descriptions) including attending similar incidents as do FENZ firefighters and medical emergencies in particular. While, fortunately, aircraft fires and crash emergencies are very rare, those who transit frequently and observantly through those airports can attest to their emergency firefighters attending first (in the absence of on-site ambulance stations) to medical emergencies, occasional fire alarm evacuations, and other emergency events.
- 12.9. So FENZ firefighters are, generally speaking, not insignificantly less well remunerated than what I assess to be the closest comparator groups in NZ.

12.10. There is also the remuneration equity issue between fulltime firefighters and other fulltime or fulltime equivalent (FTE) staff at FENZ. I acknowledge that I have not been provided with remuneration particulars for head office staff. I accept, also, that to engage sufficient quality staff in Wellington where it is headquartered administratively, FENZ needs to pay 'the going rate' for staff whose skills and experience enable them to move jobs both within the Public Service and in the private sector. I acknowledge also that a career as a fulltime firefighter is based not just on remuneration or even other terms and conditions of engagement in that role. Significant elements of a commitment to public and community service also underlie the long-term career structure of the firefighter role at FENZ. However, the well-publicised events around this bargaining round have illustrated that this commitment to community service cannot be overplayed or certainly relied on to resist and suppress claims to fair remuneration and other terms and conditions of employment.

12.11. So my intra-FENZ comparisons can only be limited to such obvious differences as working hours, dangers encountered, the standards of physical fitness and ability required, and the very limited ability of NZPFU members to advance their chosen careers in the public or private sectors.

12.12. I received strong submissions from FENZ opposing any comparisons other than with the Korn Ferry job-sizing and comparative system already mentioned and with ambulance staff (Emergency Medical Assistants) undertaking emergency response work. I should record these submissions and my responses to them.

12.13. I have already addressed the Korn Ferry comparative system elsewhere in this report and, at least on its own, I have concluded that it is not a particularly accurate indicator of all relevant criteria in such a comparison.

- 12.14. Without detailed evidence of ambulance staff duties in practice and pay, it is difficult to do more than a general comparison. It may be ( and in the absence of evidence and it being outside my terms of reference to do so, I express no conclusions), that the remuneration of these comparitors is also at an inadequately and unrealistically low base.
- 12.15. NZPFU members are inadequately remunerated when considered across the communities of workforces (including even one I suspect that is poorly remunerated) in comparison to other staff working at FENZ National Headquarters when those foregoing differentiating factors are included in the analysis.

**13. “They also serve who only stand and wait”<sup>8</sup>**

- 13.1. Figuratively, this quotation refers to the fact, occasionally referred to by FENZ in advancing its case in this bargaining, that its professional firefighters actually spend a quite small proportion of their time on duty attending to alarms and an even smaller proportion actually fighting fires or attending other emergency incidents. FENZ’s case is also that firefighters on a 12-hour night shift are not expected to attend to any work other than turning out for emergencies, between 11pm and 7am on the following day. In smaller suburban or other urban stations this might allow a watch (shift) of firefighters to sleep for that whole period, although they must be ready and able to turn out immediately if required. In larger metropolitan stations it is unlikely that a watch will have an uninterrupted period of rest on a night shift.
- 13.2. To be fair, I did not understand FENZ to be going so far as to say that firefighters on night shifts are paid to sleep: rather, these

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<sup>8</sup> Last line of a poem by John Milton “On his blindness”

shifts are generally less arduous than the 12-hour days shifts with which they alternate. All firefighters work to a roster of alternating 12-hour watches.

- 13.3. But the important feature of this arrangement is that FENZ is an emergency service that must be ready to attend any relevant emergency urgently and fully equipped to deal with it. Firefighters on nightshift do not have this time as their own to do as they wish as if they were off-duty. Standing, sitting or even sleeping, but always waiting in readiness, is in the nature of an emergency service. During day shifts other essential work such as training, maintaining and readying equipment for service and completing emergency-related administrative tasks are all vital elements of an emergency service such as FENZ.

#### **14. A 'Metropolitan Allowance'**

- 14.1. The NZPFU seeks a monetary allowance to compensate for the relatively higher costs of living in large metropolitan centres, and particularly Auckland. It is the successor to work done in 2018 when FENZ, in conjunction with the NZPFU, obtained a report from the firm PWC investigating the additional costs of living in Auckland as compared to other centres and with a view to considering whether an allowance therefor should be paid. The PWC report confirmed that there was then a significantly increased monetary cost to staff working and living in Auckland (perhaps as much as \$10,000 pa) and it seems unlikely that this will have decreased since then.<sup>9</sup> Indeed, it is likely that living and working in other metropolitan centres will also be more expensive than elsewhere and hence the Union's claim to this allowance has broadened geographically.

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<sup>9</sup> This comprehensive and completed report appears not to have been actioned following its receipt by FENZ

- 14.2. The NZPFU makes the point that some public servants do enjoy metro allowances to augment their remuneration when based in larger urban centres, including NZ Defence Force staff. Without more than this assertion, however, I suspect that the situation may not be analogous. Defence personnel have traditionally been accommodated in barracks and base housing, but that has decreased significantly in the last few decades, and more recently than many or even most firefighters and their families moved out of accommodation at fire stations.
- 14.3. Such situations, and perhaps even metro allowance claims, are not confined to FENZ firefighters and there are other significant groups of public servants who would seem to have equally meritorious claims to such allowances. I acknowledge the existence and effect of this economic consequence of metropolitan urban living. However, I consider that compensation in the form of a specific or general urban living allowance cannot be considered in isolation of that wider public service position and to which the Public Service Commissioner may wish to give consideration, particularly if it affects recruitment and retention of staff in Auckland and other larger metropolitan areas.
- 14.4. I do not recommend that the collective agreement address this issue at this time.

## **15. Occupational Diseases Provisions**

- 15.1. Noting that this Union claim is no longer termed one for “presumptive legislation”, the NZPFU remains rightly concerned about the increased risks to their physical health to which firefighters are put by the very nature of their work. It seeks to persuade FENZ to agree, in their collective agreement, that certain cancers diagnosed in and suffered by firefighters will be presumed

to have been attributable to their work thus expediting their treatment and compensation under the Accident Compensation scheme. While not unsympathetic to the exposure of firefighters to chemicals and other toxins and the consequences of this, FENZ does not, yet at least, accept the Union's absolutely presumptive way of addressing these risks. FENZ considers that, currently, expediting expert analysis of individual cases which, as an approved employer ACC provider it can achieve, is the preferable manner of dealing with these serious risks.

15.2. I consider that the answer to the Union's claims as currently framed lies in the phrase "presumptive legislation" that it has sometimes used to describe this claim in bargaining. Industrial diseases are a fraught and difficult issue for regimes such as New Zealand's Accident Compensation scheme with which any terms and conditions of employment (including in collective agreements) must be congruent and comply. While acknowledging the vital importance of the issue to the health of firefighters, I do not consider that it can be addressed adequately or properly in the collective agreement. It is a big and complex project requiring specialist expert input. At least as presently framed by the Union, it simply cannot be addressed adequately in a collective agreement that needs to be settled promptly. Rather, it should be the subject of a persuasive approach to government for proposed legislative change.

15.3. The NZPFU expresses its skepticism that FENZ will join it, or even provide a modicum of support to the Union, in an approach to government to change the accident compensation regime to enact such provisions. It says that, at least until now, FENZ has purported to maintain a principled aloofness from political engagement on such issues and is more than likely to continue to do so despite what the Union says are the risks to the health and safety of its workforce. I would simply comment that even if FENZ

considers that it cannot campaign politically and publicly for law reform, it may consider it has an obligation to at least support its staff to improve the adverse health outcomes of the work it expects them to perform.

15.4.

## **16. Joint Working or Project Groups**

16.1. This refers to the Union's wish to detail further and/or embed in the collective agreement, the nature, processes and outcomes of and from a number of joint union/employer working groups previously or to be established during the life of the collective agreement. It is associated with the controversy between the parties about when and how consultation between them should take place in the event of a dispute including whether and how the *status quo* should be maintained pending resolution of such disputes.

16.2. As will be seen, I address these important questions about consultation by recommendations for joint working or project groups to be established to operate throughout the course of the collective agreement.

## **17. Common Ground**

17.1. There are a number of areas of agreement between the parties on which I commend them and which will not therefore be addressed in these recommendations.

## **18. Areas of Controversy**

- 18.1. The still-contraversial areas between the parties can be categorised generally as follows:
- Remuneration (including base salaries, and allowances across a range of roles and grades within them)
  - Provisions for health, safety and wellness of staff
  - Disputes about the collective agreement's dispute provisions and how these are resolved (disputes about dispute resolution mechanisms)
  - Disputes about recruitment and retention of firefighters
  - Disputes about firefighting and other emergency plant and equipment
  - The medical emergency roles for firefighters
- 18.2. None of the foregoing is a completely discrete category: issues overlap between them, and some proposals for settlement span more than one of these areas.

## **19. A Collective Agreement Covering Three Time Periods and Inclusions and Exclusions**

- 19.1. This report's recommendations can be divided chronologically into 3 parts. These categories depend on the duration (itself an unsettled question) of the next collective agreement including setting a start date and fixing an expiry date. I will assume, and if necessary, do recommend that the currency of the new agreement be the 3 years starting 1 July 2021, so that its expiry date should be 30 June 2024.
- 19.2. The first trimester is the period between 30 June 2021 when the last collective agreement expired, and 30 June 2022 by when it was expected that a new collective agreement should have been settled

upon the final demise of the extended prior collective agreement. The second period is, therefore, between 1 July 2022 and 30 June 2023. The third period is the final one between 1 July 2023 and 30 June 2024.

- 19.3. Many of the matters in contention are simply not possible of complete formulation now or probably during the new collective agreement's duration. As to what is included in the new collective agreement and what should be addressed outside, but contemporaneously with it, is also in issue and the subject of my recommendations.
- 19.4. For all three periods, this is not just an exercise in recommending terms and conditions of employment. Such has been the loss of trust between the parties, and between individual firefighters and individual managers, that this needs to be re-built and re-established as an essential element of any settlement and, once done, needs to be durable and not fragile. That is an element behind my recommendations.
- 19.5. I am also very conscious that strike action has played some part in this dispute although, helpfully in advancing the process, notified strikes scheduled to take place on 2 and 9 September 2022 were called off to allow the present exercise the best prospects of success, not to mention to allow communities to be assured of their protection by firefighters at all times. Further, it was agreed that there would be no industrial action (strikes or lockouts) pending the completion of this current recommendations process. I have already referred to FENZ's conciliatory withdrawal of its claims in the Employment Relations Authority.
- 19.6. I recommend that before reinstating such strategies, the parties consider carefully these recommendations and resume their bargaining by negotiation.

## **20. FENZ's Claim to Unaffordability of the Union's Claims**

- 20.1. A significant feature of FENZ's contention that it cannot afford NZPFU's current claims is that it is significantly constrained by the current revenue generated through insurance levies. Unlike commercial enterprises, because of the emergency nature of the service it provides. Because labour productivity in an economic sense cannot be increased, very different than the usual considerations apply to this question of affordability of the Union's claims. FENZ is a statutory Crown entity which entails certain fiscal duties and responsibilities within which FENZ must operate.
- 20.2. FENZ has a 20 year capital budget forecast involving the expenditure of about \$2.9 billion allocated to improve and replenish its principal asset classes. These are its more than 650 fire stations many of which are, or soon will be, approaching the ends of their safe structural and fit-for-purpose lives, its firefighting appliances (many of which are likewise and even more immediately in need of replacement) and other plant and equipment.
- 20.3. NZPFU agree that a reasonable estimate of the financial cost of its 10 August 2022 offer is \$155 million. This is significantly less than the earlier assessment of the cost of the Union's proposals of approximately \$225 million. This reduction has been achieved both by a more precise recalculation of those costs and a reduction in numbers (from approximately 100 now to approximately 66) and costs of the claims, thus reducing the earlier cost estimate by about \$70 million.
- 20.4. In its submissions on the draft report, FENZ made the point that if it were to accept my recommendations involving expenditure beyond the extent of its last offer to the Union (as my recommendations now do), it would first have to secure additional

funding. I have allowed a short, but reasonable, period for it to seek ways to do so following delivery of this report. I am also providing the report to those who may be able to assist FENZ in this regard. I simply express the view that it would not seem to eliminate any prospect of a settlement or delay it significantly, if there were to be negotiations and even a settlement that was conditional on that funding being available. That is because of the urgency now of bringing finality to this unduly long dispute and certainty to the parties and to the community that FENZ's services will continue to operate at their optimum level.

## **21. Claims for Health Monitoring**

21.1. As noted at para 11, there has been recent change in relation to this claim. FENZ has agreed to contribute the sum of \$250 (excl GST) per year as reimbursement for employee-incurred costs of physical health checks. The NZPFU wants this to be the sum of \$500 over 2 years. The costs are so similar that I consider I should, and do, recommend that NZPFU members should be able to elect which of these reimbursements they wish to claim upon proof of expenditure of these sums for that purpose. Despite having further claims relating to the health and wellbeing of its members, the NZPFU does not regard this claim as being an interim arrangement or one linked to the wider subject of health standards that FENZ is exploring.

21.2. For the sake of clarity, I recommend that the costs of this allowance not be included in what I describe as the remuneration "pot" or "envelope" of increased funding at para 28 of this report.

## **22. Annual Remuneration Reviews**

- 22.1. Part one, clause 23 of the expired collective agreement provides that the employer and the union will meet in May each year that the collective agreement remains in force to review "market data and discuss and agree the remuneration rates that will apply from one July of that year". This provision requires FENZ to consult with the union "... over any proposed changes that may impact on the terms and conditions of employment of employees covered by this agreement." If agreement is not able to be reached, the clause provides that the parties "... will seek assistance through mediation services". Clause 1.23.2 allows an opportunity for such reviews to consider "whether a broader review of the benchmark organisations used for this market review is appropriate, and specialist advice may be sought to assist with this consideration."
- 22.2. My reading of part one, clause 23 indicates that it is sufficiently general that the Korn Ferry remuneration review system currently used (and strongly advocated for, by FENZ but as adamantly opposed by the Union), is not necessarily that which will or even should be used. "Market data" from other sources may be obtained and discussed. Clause 1.23.2 also allows for an annual review of the appropriateness of the benchmark organisations used for that review, thus allowing the use of different data, proprietary systems, and/or methodologies. I recommend that if this clause is to be retained in the new collective agreement, the parties adopt in practice a broader and less "job-sized"-only comparative analysis approach to remuneration reviews.

## **23. FENZ Claim: Consultation about Change**

- 23.1. FENZ wishes to review part one, clause 20 of the expired collective agreement which is headed "Consultation". Subclause 1.20.1

provides that FENZ is to consult with the union "over any proposed changes that may impact on the terms and conditions of employment of employees covered by this agreement." Clause 1.20.2 provides that FENZ's obligation to consult is not limited to consultation about the consequences of a proposed change or, more particularly, to proposed limitations on numbers (I presume of firefighters) but includes consultation about whether proposed changes should take place and about the reasoning for such proposed changes. The subclause is clear, also however, that such consultation does not extend to negotiation or a requirement for "full agreement". Nevertheless, consultation must include a genuine effort on the part of FENZ to respond to the Union's views, that effort being "motivated by a desire to reach consensus." Finally, clause 1.20.3 also confines the consultation process by specifying that it is not intended to restrict FENZ's "right to manage the organisation".

23.2. Despite being in the collective agreement as a result of negotiation, this clause bears a reasonably close resemblance to the statutory obligations of consultation under the Employment Relations Act 2000 and strikes a balance between consultation, and decision-making following consultation. It is, these days, unremarkable and to change it would be to regress from the legislative scheme for open and productive consultation.

23.3. FENZ's real concerns about the expired collective agreement's consultation obligations arise out of what FENZ considers to be excessive recourse to a combination of clause 1.20.1 and clause 1.9 (h) (i), ( what the parties know as the "peace obligation"). The peace obligation is part of the expired collective agreement's disputes procedure and, as well as prohibiting what is in effect strike action about a dispute, requires FENZ to "ensure that the circumstances which prevailed in each brigade prior to the matter becoming subject to this procedure shall be maintained until the dispute has been resolved." This is said by FENZ to mean that whenever the Union invokes as a

dispute an element of controversy, FENZ is legally incapable of effecting any change until the dispute is resolved by the clause 9 dispute resolution procedure or (as is included as part of that procedure), the dispute is resolved in the Authority or the Employment Court.

23.4. Allegations of excessively pedantic disputes about minutiae that are barely if at all employment-related, relate more to the significant breakdown in relations between the Union and FENZ and individuals within those bodies. The urgent need for the substantial improvement of these relationships should improve also the need for recourse to such provisions. I also urge the parties to consider the statutory definition of a “dispute” and consider, before referring what is said to be a “dispute” to the peace clause process, whether it is truly a dispute relating to the employment of Union members.

23.5. If these suggestions are insufficient to address FENZ’s concerns about what it says is the Union’s misuse of the disputes system, there is an alternative and traditional way in which FENZ can seek to deal with its dissatisfactions. This report makes some recommendations about consultation processes which may be sufficiently broad to encompass disputes of this sort. As in the case of annual remuneration reviews under clause 23, clauses 9 and 20 are extant collective provisions which. If they need to be changed or even abolished, this should be addressed by bargaining including, in practice, their being “bought out” by other concessions in the bargaining. I simply comment that it may be that concessions by one party in relation to one of these situations may allow for concessions to be made by the other party in relation to the other’s obligations. In effect, changes to these provisions can be traded off between the parties. That is the traditional *modus operandi* of collective bargaining based on an assessment of the values of gains and losses.

## **24. Allowances**

- 24.1. The expired collective agreement contains multiple allowances payable to firefighters and which are each the subject of bargaining. I recommend that in bargaining for the next collective agreement (i.e. following the one for which I am making specific recommendations now), the parties rationalise financial allowances into two categories. The first consists of current allowances for which all relevant staff qualify. By relevant staff I mean, for example, all firefighters, all communicators, all trainers et cetera. Those allowances so defined should then be incorporated into the base remuneration rates for these groups so that they are no longer recognised as separate allowances but compensation for the entitlement to them is still recognised.
- 24.2. The second category consists of allowances which reflect additional qualifications, training, duties et cetera that only some, but not all relevant staff (as defined above) are entitled to. I recommend that these allowances be maintained as separate allowances after the expiry of the new collective agreement.
- 24.3. In the longer term I recommend that the parties adopt as a principal that where new or additional duties may be expected to be undertaken by relevant staff, these principles be followed after 2023 – 2024.

## **25. Collective Agreement Coverage**

- 25.1. I recommend that the Union's claims to extended occupational group coverage be postponed until the next round of collective bargaining unless FENZ is agreeable to such extensions. I do so because of the more immediate need to improve the terms and conditions of the existing membership of the Union and to improve

the sorry state of relations between FENZ and the Union. In this regard, however, I do recommend that before the next round of collective bargaining that there be consultations about whom the Union wishes to have covered and that FENZ recognises a desire for coverage by the fact of Union membership and for the parties to agree realistically on coverage by reference to that membership of the Union.

25.2. I do not know whether, as the Union says, FENZ prefers its staff to be members of other unions or of no unions at all. What I do know is that the Employment Relations Act 2000 provides for free choice of union membership and for sanctions for breach of these rights, and that coercion is the antithesis of such freedom of choice.

**26. A Lump Sum Compensatory Payment for the Year 1.7.21-30.6.22?**

26.1. FENZ's proposal that all relevant NZPFU members be paid a lump sum of \$2000 for remuneration increases for the period 1/7/21 – 30/6/22 is not agreed to by the Union. That is despite the prospect of such a payment being received by its members sooner than if an array of backdated calculations has to be prepared before payments of arrears are made. The Union claimed this latter methodology of addressing the 2021-2022 year, although having now seen FENZ's detailed explanation in its submissions in response I think it best to leave without recommendation but for election by NZPFU, which of the two methods of payment it wishes to have for its members.<sup>10</sup>

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<sup>10</sup> Refer p 11 of FENZ's submissions of 12 October 2022

## 27. Reimbursement of Insurance Premiums

- 27.1. The Union seeks to have FENZ reimburse at the rate of up to \$50 per week per member, income protection insurance/medical insurance/life insurance premiums on policies arranged by members individually and paid by them. It says that all 'corporate staff' enjoy income protection and life insurance arrangements made and paid for by FENZ. The Union says it is difficult and expensive for its members to obtain cover because of the dangerous natures of their roles and the risks to them of injuries, illnesses and death.
- 27.2. FENZ does not deny the Union's assertions about these benefits for its non-firefighting staff but says that NZPFU members enjoy an advantageous superannuation scheme (including generous employer contributions) which compensates for at least some of the more serious risks of illness, injuries or death for Union members.
- 27.3. To avoid the costly administrative tasks associated with reimbursing payments, to attempt to take advantage of the better 'deals' that can usually be had by negotiating with brokers or insurers for a scheme to cover a workforce, and to recognise the importance of treating staff fairly and supportively in difficult circumstances, **I recommend that FENZ negotiate with the Union for the provision of life and medical insurance coverages for all Union members subject to the bargaining and paid for by FENZ.** I recommend that the costs associated with this recommendation fall outside the pots or envelopes referred to in the following para 28.

**28. NZPFU's claims having financial ongoing consequences for FENZ - Recommendations**

28.1. Rather than to recommend numerous individual increases, decreases or 'status quo' to the numerous claims, I have decided to recommend a methodology which focuses on what I consider should be the overall financial envelope that FENZ should commit to the settlement of the remuneration aspects of collective bargaining, but to allow the parties within this envelope to allocate that resource as they see fit and can agree upon.

28.2. I also recommend the following principles be applied to the manner in which those financial resources are allocated to the Union's claims.

- The need for firefighters' base remuneration to increase significantly to align it more closely with the remunerations of non-firefighting FENZ staff and other comparable firefighting base incomes identified in this report
- The need for attractive terms and conditions of employment (including especially remuneration) for recruitment and retention of top quality staff and thereby to ensure their commitment to long term public and community service
- The desirability of maintaining, by differential remuneration, ranking distinctions based on seniority, experience, training and qualifications of NZPFU members
- The need to balance the availability of overtime work for staff who wish to take this, with the needs of other staff who cannot or do not wish to work significant overtime, by attempting to ensure that base remuneration is adequate for those in the latter categories
- The need to address promptly and seriously the health, safety and wellness of firefighters and control room communicators by providing medical and psychological surveillance and treatment for

staff potentially and actually affected adversely by the inherent nature and risks attaching to these roles

- The desirability of involving practicing firefighters in early, genuine and detailed consultations leading to FENZ decision-making affecting relevant elements of FENZ's operations, including but not limited to, the health, safety and wellbeing of its greatest asset, its people

28.3. I recommend that the “envelopes” or “pots” from within which to apply these objectives in settlement of a new collective agreement is recommended to be as follows.<sup>11</sup>

28.4. For the year **1 July 2021 – 30 June 2022, increased base rates of remuneration and allowances to be allocated among all employee categories in amounts or percentages as the parties may agree upon, but in total amounting to a maximum increase of 3.5% per annum** over the applicable payments made in the previous year to NZPFU members covered by the bargaining, but adjusted to take account of any increases or decreases in numbers and relevant staff.

28.5. For the year **1 July 2022 – 30 June 2023, increased base rates of remuneration and allowances to be allocated among all employee categories in amounts or percentages as the parties may agree upon, but in total amounting to a maximum increase of 7.5% per annum** over the applicable payments made in the previous year to NZPFU members covered by the bargaining but adjusted to take account of any increases or decreases in numbers of relevant staff.

28.6. For the year **1 July 2023 – 30 June 2024, increased base rates of remuneration and allowances to be allocated among all employee categories in amounts or percentages as the parties may agree upon, but in total amounting to a maximum increase of 6.5% per annum** over the applicable payments made in the previous year to NZPFU members covered by the bargaining but adjusted to take account of any increases or decreases in numbers of relevant staff.

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<sup>11</sup> These percentages differ slightly from those proposed in the draft report circulated to the parties for comment and take account of the fact that, as pointed out to me and illustrating the value of draft reports, I then omitted to address some of the Union's claims which I consider justify my recommendation, albeit in a different manner than advocated for.

28.7. In all cases, **these increases are to be cumulative** year on year.

28.8. For the avoidance of doubt about how the remuneration/allowance ‘pot’ or ‘envelope’ scheme is recommended to work, I set out a purely hypothetical analysis of years, percentage increases and the methodology of accounting for increases in staff numbers.<sup>12</sup>

*Hypothetical example of % increase methodology*

*In 2022-2023 FENZ had 100 staff who were members of NZPFU and who earned a total in remuneration and allowances of \$7,500,000.*

*In 2023-2024 the numbers of relevant staff increased or was forecast to increase by 10 or 10% (new staff less retirees, ie a nett increase) to 110. The notional pre-increase in remuneration and allowances over the 2022 total would therefore be \$8,250,000 (ie 110% of \$7,500,000).*

*For that 2023-2024 year, therefore, the remuneration and allowances pot for distribution based on the 7.5% increase would be 107.5% of \$8,250,000, bringing the total pot for that year for distribution on remuneration and allowances to \$8,868,750 (ie 107.5% of \$8,250,000).*

*If there was the same or same anticipated nett increase in the numbers of relevant staff for the 2024 year (ie 10%), the notional remuneration/allowance pot before the percentage increase would be \$9,755,625. Increased by 6.5%, that pot available for remuneration and allowances in 2024 would be \$10,292,865 (ie 106.5% of \$10,389,741)*

28.9. Finally in this regard, I will answer a valid question posed by FENZ in its response to the draft report. The “pot” or “envelope” concept is intended to capture all expenditures that constitute remuneration, that is payments made to Union members in return for work performed and receivable in their proverbial back pockets. So, reimbursing allowances such as I have referred to in this report would not fall within that definition of remuneration and so should not be allowed for in the pots. Overtime payments would be remuneration as defined; superannuation contributions are in the nature of delayed remuneration and so would be included in the pots also. ACC contributions would fall outside remuneration as

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<sup>12</sup> While this example attempts to set out the calculation methodology of my recommendation, the (hypothetical) figures used are subject to verification and, if necessary, alteration, by Grant Thornton.

defined because they are a form of insurance premium. If there are other payments that FENZ is uncertain about, then it should apply the foregoing test.

28.10. I further recommend that all NZPFU members covered by the bargaining be paid a one-off a **sign-on bonus of \$1500 (before tax) upon ratification** of the new collective agreement. I have given consideration to FENZ's submissions opposing this bonus payment. It describes it as being excessive when compared to other similar payments made to other staff who are not NZPFU members, and as "double dipping". It is, however, not recommended on the basis that it is a payment of deferred remuneration. Rather, it is both an incentive to settle and represents the consequences of waiting too long for productive discussions to produce a new collective agreement. It can also be seen to represent FENZ's commitment to initiate an improving relationship with its valued staff and for having foregone claims to which the Union's members were seriously committed. Finally, it is also justifiable as a mark of FENZ's acknowledgment of staff commitment to continue to provide emergency services to the community by, in many cases, working excessive overtime during the period of COVID and for having to work at times with sub-standard appliances. It is a gesture, but one for which there is some justification in my view.

28.11. To avoid doubt, unless the parties agree otherwise on a case-by-case basis, these **recommendations** are not for percentage increases in the remuneration of one or more ranks or categories of NZPFU members. Rather they are intended to be a 'pot of funds' the contents of which represent the previous year's expenditure by FENZ on the remuneration and allowances, plus a percentage increase of that previous year's expenditure. Where the numbers of NZPFU members employed by FENZ have increased between years, the "pot of funds" should be increased proportionately to

ensure that the percentage increase in remuneration/allowance funding represents a true increase by that percentage. I recommend, if necessary, leaving the allocation of particular expenditures within those annual pots or envelopes to be the subject of revised claims by the Union which are thereafter bargained and settled with FENZ as to their particular allocations among NZPFU member groups.

28.12. I emphasise that not only are these recommendations for the parties' consideration but they do not suggest that the allocation of the contents of the funding pots be handed to the Union for distribution to its various classes of members as it decides. That is to be the subject of further negotiation between the parties. So, for example in relation to trainee firefighters, there is general agreement between the parties that there needs to be a significant increase in their remuneration, percentagewise more than others may expect to receive. Trainees will, however, number about 100 in any one year so that their significant percentage increases will still leave substantial room for increases in the remuneration of the numerically much larger group of NZPFU members.

28.13. To be excluded from this capped percentage scheme ( that is, to be funded separately and in addition to that envelope of funding referred to above) I recommend, in addition to those examples given in para. 28.9, be the following:

- the sign-on bonus of \$1500 per NZPFU-represented member;
- the costs of developing, implementing or continuing health, safety and welfare measures (as broadly defined and recommended above);
- the remuneration and allowances' costs to FENZ of additional NZPFU members engaged after the date of the settlement of the new collective agreement and whose terms and conditions of employment are governed by it

## **29. Publication of this Report**

**29.1.** The parties acknowledge that these recommendations may be made public. In order to allow the parties and those they represent to know of and seek advice about the following recommendations, I ask the parties not to publicise them beyond those who need to know, for a period of 7 calendar days following their release to the parties by me. Because of the role that the Minister of Internal Affairs, the Minister's delegate (Ross Wilson) and the Department of Internal Affairs have played in arranging this process, I will provide copies of this report to them at the same time as it will be provided to the parties. Any earlier drafts of the report were, however, provided only to the parties.

**29.2.** For the avoidance of doubt, **the embargo on general publication of this report is to remain until 5.00pm on Friday 21 October 2022.**

**29.3.** While staff of FENZ and their consultants and advisors, NZPFU officers and members, and those others to whom this report is distributed by me are free (and indeed encouraged) to discuss this report immediately after its release to them, I recommend that this be done with a view to progressing their further bargaining with the benefit of my recommendations. I recommend, however, that there be no distribution of it, whether in whole, in part or summarised to news media or its placement on any form of electronic social media for the period of the embargo referred to in para. 29.2 above.

**29.4.** I encourage the parties, once they have considered this report, to re-engage in bargaining promptly and in good faith.

**29.5. Although I have no power to regulate any lawful ‘industrial action’<sup>13</sup> or recourse to litigation that the parties may wish to commence or resume, I do urge them, as a matter of good faith bargaining, to refrain from doing so before they have given further negotiations a reasonable chance of success.**

### **30. Thanks**

30.1. I express my appreciation for the assistance I have received from the firm Grant Thornton ( Mark McDonald and Stephen Keen) as independent financial adviser to the facilitation.

30.2. I express my appreciation also for the submissions and advice of the members of the two teams (FENZ and the Union) and what I perceive to be their commitment to the short and long term improvement of the working conditions of New Zealand’s firefighters and of the vital role that FENZ and its staff play in the protection of communities throughout the country.

30.3. I acknowledge the assistance provided by the New Zealand Council of Trades Unions and of the office of the Minister of Internal Affairs and its appointee Ross Wilson in achieving agreement to this process.

### **31. Outside-Collective Agreement Consultation and Non-Agreement Processes**

31.1. FENZ accepts that it needs to consult with the NZPFU (and indeed also with its other staff or their representatives) in relation to employment issues affecting their terms and conditions of

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<sup>13</sup> Strikes or lockouts as broadly defined in the Employment Relations Act 2000

employment. It accepts also that it is “standard practice” for working groups to operate during the currency of a collective agreement between the parties on issues raised but unresolved in the bargaining. However, FENZ says that it is “critically important” that any such working parties be “set up for success” because of the recent history of dysfunctionality in these.

31.2. FENZ makes the point that such working parties as are established under the collective agreement need to be manageable and effectively resourced. There needs to be a limited number of working parties with defined subject matters and participated in by the appropriate people. FENZ agrees to resource three working parties. I accept all of the foregoing and would add that efficiencies can be added by making at least some of these parties’ deliberations and consultations online, that is by Zoom, Teams or similar linkups with members of the parties around the country to save of travel times and costs and for greater convenience. These communications programmes have facilities for private consultations among team members. While face-to-face meetings are also valuable, these could be reserved for working parties’ more important meetings.

31.3. I agree also with FENZ that the topics to be considered by such working parties should be agreed by both FENZ and NZPFU (and by any other people participating on them). My recommendations at the conclusion of this paragraph about their general natures will leave particular sub-topics to mutual decisions. In the absence of such agreement, my recommended default mechanism suggested in Schedule 1, is the IWC

31.4. I agree, and recommend, that the subjects for consideration by these working parties should be other than those dealt with in the collective agreement. Such collective agreement provisions are enforceable through the enforcement mechanisms of the Employment Relations Act, whether as disputes (as legislatively

defined) or as proceedings for compliance orders and/or penalties for breaches of the collective agreement. To allow on-going disputes about the content of matters already settled, would be to allow second-tier bargaining

- 31.5. FENZ, however, disagrees strongly with my final backstop recommendation of final and binding arbitration of working party issues that cannot be settled in those forums. While FENZ expresses concern about the risks of such a procedure to it, it is inherent in this process that those risks exist also for the Union. A final-offer arbitrator must choose between the parties's final proposals, and may not depart from either of those, whether in whole or in part. This has the strong incentive for the parties to pitch their offers towards the centre circle of the dispute at the risk of conceding everything to their opponent. I anticipate that such a process may, if put in place, be resorted to relatively rarely because of its potentially decisive outcomes and, thereby, its encouragement of compromise and settlement. I anticipate also that with an increasing re-establishment of mutual trust and confidence, such a process may be able to be shelved in subsequent collective bargaining.
- 31.6. FENZ expresses concern that such arbitrated decisions may incur significant expenditure for FENZ that it cannot afford or control, and in particular by causing it to be in breach of its statutory obligations. I think that too underestimates the nature of the process recommended: final arbitration decisions would not be made without hearing from parties and this would ensure that any claim of potential statutory breach would be drawn to the arbitrator's attention. If sustainable, this would likely result either in the NZPFU revising its offer to avoid that consequence, or, if not FENZ's offer succeeding. I reiterate my recommendation that neither party should have the exclusive right to nominate the subject matters of the working groups.

- 31.7. Noting FENZ's submissions about its obligations under the Crown Entities, Public Service and Fire and Emergency New Zealand Acts I also draw attention to its obligations under such other legislation as the Health and Safety at Work Act and the Employment Relations Act which impose obligations including to promote safe systems of work, to prevent injuries, and to consult in good faith.
- 31.8. I do accept FENZ's submissions that it should take pertinent account of staff and interests other than the NZPFU alone in relevant cases. To involve their representatives in relevant cases and FENZ being conscious as it is of the legitimate interests of others, should assure it that such processes will not be for the exclusive benefit of NZPFU members alone.
- 31.9. I recommend FENZ not to consider a final arbitration model only in terms of the operation of one variant of this under the Policing Act 2008. It is a broader, maleable, and bespoke system available for a wider range of dispute resolutions than collective bargaining and can be designed for specific uses as recommended here. While FENZ may be right that the use of this 'game-breaker' resolution may be unprecedented in collective bargaining solutions, so too is the level of mutual mistrust and unwillingness to resolve matters between these parties. I recommend this not as a permanent or even a long-term solution but as a temporary backstop to get productive relations conducted in good faith back on track. Counter-intuitive as this statement may seem, it is a process to assist the parties to return to making their own decisions.
- 31.10. So I recommend that the collective agreement contain clauses establishing and setting out the means of operation of a working party mechanism along the lines suggested in Appendix 1 annexed hereto. This will make the processes enforceable. Only in the case where no mutual resolution can be reached will there be an enforceable outcome. These proposals were discussed with the

parties during their July/August 2022 bargaining in which I assisted them as a mediator and so will be familiar to them.

31.11. I set out an example of a working group design and of a 'game-breaker' final offer arbitration provision, Schedules 1 and 2 to this report for the parties' consideration.

### **32. Costs of Mediation/Facilitation Assistance**

32.1 Finally, I record that to date the parties have shared equally in the costs and disbursements of my mediator/facilitator roles since July 2022. The Union asks that these be met entirely by FENZ and that I so recommend. Although they will not appear as a term of any collective agreement achieved thereby, I consider that this question (full or partial reimbursement) should likewise be decided by the parties themselves and therefore I make no recommendation in this regard.

Graeme Colgan  
14. October 2022

## Schedule 1

### Draft Working Parties or Groups Establishment Clauses for Collective Agreement

- 1.1. The parties agree that during the currency of this collective agreement (CA) they will jointly address a number of issues of mutual concern by the establishment, development and operation of subject matter- relevant working groups which will report their recommendations to FENZ and the NZPFU. The subject-matters of these working groups will include the following (but not in any order of priority) and allowing that some work groups may cover more than one associated topic:
  - a) Issues of health, Safety and Wellness not addressed by this collective agreement
  - b) Issues relating to FENZ plant and equipment affecting NZPFU members but not dealt with by this collective agreement (including but not limited to vehicles, and firefighting and other emergency equipment, PPE (including uniforms and protective clothing))
  - c) Issues relating to crewing ratios, overtime and deployment of NZPFU members not dealt with in this collective agreement
- 1.2. There shall be appointed by FENZ and NZPFU jointly, an independent workgroups' coordinator (IWC) or, if no such agreement between the parties can be reached, as shall be appointed on the nomination of the mediator/facilitator engaged by the parties to assist in the settlement of this collective agreement. Although funded by FENZ, the IWC is to be independent of FENZ and the NZPFU and have appropriate facilitative skills and experience in employment relations.
- 1.3. The members of these working groups will consist of equal numbers of NZPFU representatives (who shall be operational staff whose functions are covered by this collective agreement) and of FENZ management. If these groups are to include other non-NZPFU staff, then this balance is to be achieved by equal staff and management numbers. In addition, the working groups will be able to call upon the advice of such independent experts in the subject-matter field as the members may agree upon or in default of such agreement, as shall be nominated by the IWC.
- 1.4. If the subject-matters of any of the workgroups affects other FENZ staff and/or their unions (including but not limited to volunteer firefighters) than such staff/unions

will be consulted at appropriate times and their inputs considered by the workgroups. If there is any dispute about the involvement of other staff/unions in a workgroup's deliberations that cannot be resolved by the parties themselves, then the workgroup's IWC will determine that question and the parties will be bound by that independent determination of the IWC.

- 1.5. The workgroups will meet as recommended, and their engagements will be assisted, by the IWC who will report four-monthly in writing to FENZ and the NZPFU on the activities and operations of the workgroups.
- 1.6. The reasonable costs of engagement of the IWC, of the engagement of any independent expertise, and of the meetings of these workgroups, will be met by FENZ.
- 1.7. Such reports and recommendations of the workgroups as may be produced during the currency, or at the end of the duration of this collective agreement, shall be considered by the parties in good faith (as defined in s4 of the Employment Relations Act 2000) and shall form the basis of further consultation about changes to FENZ operations affecting NZPFU members including in respect of any collective agreement as successor to this collective agreement.
- 1.8. The establishment and operation of the workgroups as set out above are agreed to be legally enforceable rights and obligations of the parties under this collective agreement. The outcomes of the operations of the workgroups (being their recommendations to the parties) will, although subject to the Act's good faith obligations, not themselves be legally enforceable unless and until they are incorporated into any successor collective agreement or are otherwise agreed by the parties to be so.
- 1.9. The workgroups and the role of the IWC shall cease either by agreement of the parties or upon the expiry of this collective agreement, whichever is the sooner.

## **Schedule 2**

### **Draft Final Offer Arbitration Clause for Settlement of Disputes during Currency of the Collective Agreement**

1. The following sub-clauses shall, unless adopted or continued in amended form in any subsequent collective agreement between the parties, continue in operation for the duration in law of this collective agreement. As part of any bargaining for a successor collective agreement, the parties will assess and negotiate about the success or otherwise of the following sub-clauses.
2. The Union shall elect no more than 3 of the issues to be addressed by the Working Groups established under this collective agreement (to be called “the A Working Group Issues”). All other Working Group issues (to be designated “ the B Working Group issues”) will be subject to the processes described below but will not be subject to the following provisions for what will be known as “final offer arbitration”.
3. If, following the application of the procedures contained herein for all, (ie A & B) Working Group issues, the parties cannot agree upon the outcome of their discussions, then the issues covered by this procedure will be the subject of the following final offer arbitration process.
4. An independent final offer arbitrator will be appointed by the parties or, in default of their being able to do so, by the unilateral decision of the independent facilitator/mediator who assisted the parties to settle this collective agreement.
5. Each party will, as timetabled by the final offer arbitrator, file with the arbitrator and serve on the other party, a statement of its best offer to settle the issue.
6. The independent final offer arbitrator will, after considering any relevant submissions of the parties and any evidence (including expert evidence) provided by the parties, elect which of the two proposals made by the parties is to be the final decision of the issue. The arbitrator must adopt fully and finally one or other of the final offers. The arbitrator may not add to, alter, or subtract from either final offer and must advise the parties of which offer the arbitrator has selected.
7. The final offer so selected shall constitute the resolution of the issue and shall be final and binding on the parties. The offer so selected shall be enforceable as a term or condition of this collective agreement as if it were contained in the agreement as settled between the parties.

## Terms of Reference

Final version

*The purpose is for the appointed mediator to facilitate the progression of an agreed outcome to the current bargaining dispute between FENZ and PFU, or to provide a publicly recommended settlement to the parties by 30 September 2022.*

*The appointed mediator will be Graham Colgan, as agreed by the parties.*

### **Process**

- 1. The parties will commit in good faith to a facilitated mediation process as directed by the mediator.*
- 2. Any amended position from the ones tabled on 5 August 2022 (FENZ) and 10 August 2022 (NZPFU), will be provided to the mediator and the other party with a copy of the amended position, prior to the first day of mediation.*
- 3. The mediator will work with the parties and the independent financial expert appointed by the DIA, to ensure the timely provision of necessary financial information to provide for an independent assessment of the costing of financial offers and claims to then be workshopped in the facilitated mediation, to provide transparency and assurance.*
- 4. The mediator will provide to both parties his written recommendations in draft, so that each party can consider and comment on these and these comments can be duly considered, before the recommendations are finalised. This is a process consistent with natural justice and good faith obligations.*
- 5. The mediator will have the power to publicly recommend a settlement of the bargaining. Should the mediator elect to make his recommendations public, he shall give due consideration to the parties' reporting and approval obligations.*

Final Report Embargoed Until 1700 hours 21 October 2022

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