

NOTICE OF FILING

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Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Amended Reply

No. VID 165 of 2025

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Community and Public Sector Union and others named in the Schedule
First Applicant

The State of Victoria
Respondent

Unless otherwise defined, capitalised terms have the meaning ascribed to them in the Statement of Claim and the Amended Defence.

Save for any admissions (including deemed admissions in the Amended Defence dated 27 August 2025 ~~4 June 2025~~), the applicants join issue with each paragraph in the Amended Defence and otherwise reply as follows:

1. The applicants admit the allegations at paragraph 3(d) and (f).
2. The applicants admit the allegation at paragraph 4**(b)(a)(iii)**.

2A To the allegations at paragraph 14A, the applicants:

- (a) admit paragraph 14A(c), save that the applicants say that the Performance and Progression Purpose was only one purpose of the PPD Terms rather than “the” only purpose;
- (b) say further that the PPD Terms required that the Performance and Progression Purpose be achieved through the specific mechanism of Senior Grade employees and their managers agreeing to progression criteria that included measures of excellence and skill acquisition, that were commensurate with their higher level of responsibility and that were more challenging and difficult to achieve;

Filed on behalf of	The Applicants
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The applicants refer, without limitation, to clause 24.4(d) of the 2016 Agreement and clause 29.3(d)(ii) of the 2020 Agreement.

- (c) say further that by reason of:
- (i) clause 24.4 of the 2016 Agreement, during the 2016 Agreement Period the progression criteria of all employees consisted of:
1. achieving performance targets;
 2. demonstrating public sector values and behaviours; and
 3. applying learning and development; and
- (ii) clause 29.2 of the 2020 Agreement, during the 2020 Agreement Period progression criteria of all employees consisted of:
1. agreed performance goals appropriate to the employee's role;
 2. compliance with the Public Sector Values and Code of Conduct for Victorian Public Sector Employees;
 3. agreed learning and development goals required for the employee's role and/or to build to the Employee's professional capacity and career opportunities.
3. ~~The applicants admit the allegation at paragraph 20.~~
- 3A To the allegations at paragraph 35, the applicants:
- (a) admit the allegation at paragraph 35(b)(i);
 - (b) deny the allegation at paragraphs 35(b)(ii) and refer to and repeat paragraph 2A(c) above;
 - (c) deny the allegations at paragraphs 35(b)(iii) and 35(c);
 - (d) refer to and repeat paragraph 2A(b) above and say further that the PPD Terms:
 - (i) contemplated that Senior Grade employees' progression criteria would be more difficult and challenging to achieve than employees employed at Grades 1 to 4 (**Grade 1 to 4 employees**);

- (ii) required that the performance of Grade 1 to 4 employees and Senior Grade employees be assessed against their progression criteria according to the same standard, being whether they “met” their progression criteria;
 - (iii) did not contemplate that the performance of Senior Grade employees would be assessed against their progression criteria according to a higher standard than Grade 1 to 4 employees;
- (e) say that the progression criteria agreed by Senior Grade employees did not reflect the “expected normal requirements of their position” and instead reflected the agreed targets, goals and other matters set out at paragraph 2A(c) above that a Senior Grade employee needed to meet in order to be eligible for a progression payment or a Top of Grade or Value Range payment;
- (f) say that at all times during the 2016 and 2020 Agreement Periods, the Department:
- (i) unilaterally imposed and exclusively controlled the content of the qualitative standards by which managers measured employees’ performance against their progression criteria; and
 - (ii) only recognised Senior Grade employees as having “met” their progression criteria if those employees achieved the overall rating of “exceeding expectations” or higher in relation to the performance goals, job specific accountabilities and values and behaviours set out in their PDP

(together, the **Department’s Senior Grade performance standard**);
- (g) say that by the Department’s Senior Grade performance standard, the Department purported to measure Senior Grade employees’ performance against their progression criteria by reference to a higher standard than:
- (i) the standard of “met”; and
 - (ii) the standard by which the performance of Grades 1 to 4 employees was measured,

and that accordingly the Department’s Senior Grade performance standard was not consistent with the PPD Terms or the Performance and Progression Purpose.

3B To the allegations at paragraph 35B, the applicants:

- (a) admit the allegation at paragraph 35B(a) save that the applicants say that Senior Grade employees and their managers could only agree to the progression criteria that are set out at paragraph 2A(c) above;
- (b) deny the allegations at paragraphs 35B(b), (c) and (d);
- (c) say that Senior Grade employees did not, and could not, "agree" that their progression criteria included the Department's Senior Grade performance standard, in circumstances where:
 - (i) the Department's Senior Grade performance standard was:
 - 1. a unilateral requirement established and imposed by the policies and procedures of the Department, the content of which the Department had exclusive control over;
 - 2. a matter that each Senior Grade employee was required to comply with;

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The Department's Senior Grade performance standard was expressed in the Department's policies and procedures, including the DPGR Policy. It was a term of the employment of each employee in the Department, including the Senior Grade employees, that the employee comply with Department policies and procedures as amended and in force from time to time.

- (ii) further or alternatively, the matters referred to at sub-paragraphs 2A2(c) above comprised the entirety of all employees' progression criteria, and:
 - 1. the Department's Senior Grade performance standard was not expressed by clause 24.4 of the 2016 Agreement or clause 29.2 of the 2020 Agreement to form part of the progression criteria; and
 - 2. the Department's Senior Grade performance standard constituted a metric to measure performance against the progression criteria, and was not itself a progression criterion;
- (iii) further or alternatively, the Department's Senior Grade performance standard was incompatible with the PPD Terms by reason of the matters alleged at paragraph 3A(g) above;

- (d) say that the progression criteria that each Senior Grade employee “agreed” to in each performance cycle were required to be outlined in their respective performance plans, and to the extent that the Department alleges that those employees “agreed” to matters not outlined in their performance plan, those matters did not form part of their progression criteria.

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The applicants refer to clause 24.1(d) of the 2016 Agreement and Table 11 at clause 29.2(g) of the 2020 Agreement.

4. ~~The applicants deny the allegations at paragraph 35(d) and say further that:~~

~~(a) — by reason of:~~

~~(i) — clause 24.4 of the 2016 Agreement, during the 2016 Agreement Period an Employee’s progression criteria consisted of:~~

- ~~1. achieving performance targets;~~
- ~~2. demonstrating public sector values and behaviours; and~~
- ~~3. applying learning and development; and~~

~~(ii) — clause 29.2 of the 2020 Agreement, during the 2020 Agreement Period an Employee’s progression criteria consisted of:~~

- ~~1. agreed performance goals appropriate to the Employee’s role;~~
- ~~2. compliance with the Public Sector Values and Code of Conduct for Victorian Public Sector Employees;~~
- ~~3. agreed learning and development goals required for the Employee’s role and/or to build to the Employee’s professional capacity and career opportunities;~~

~~(b) — any requirement that each Employee achieve a particular rating in the end-of-cycle performance review with respect to their performance standards as in place at the end-of-cycle performance review, namely that they —~~

~~(i) — achieve the rating of “exceeding expectations” or above for the majority of the Department’s values and behaviours, and “achieving expectations” for the remainder;~~

~~(ii) achieve the rating of “exceeding expectations” or above for the majority of the Employee’s performance goals and job-specific accountabilities, and “achieving expectations” for the remainder; and~~

~~(iii) demonstrate active participation in learning activities (if applicable)~~

~~(the rating requirement),~~

~~was not capable of forming part of, or being agreed to form part of, any Employee’s progression criteria because:~~

~~(iv) the 2016 and 2020 Agreements provided that an Employee be paid a progression amount or top of grade or value range payment if the Employee was assessed as having “met”, or as “meeting”, his or her progression criteria;~~

~~(v) the matters referred to at sub-paragraphs 4(a)(i) and (a)(ii) above comprised the entirety of an Employee’s “progression criteria”; and~~

~~(vi) the rating requirement was in the nature of a metric for the measurement of the matters referred to at sub-paragraphs 4(a)(i) and (a)(ii) and not in the nature of a progression criterion; and~~

~~(vii) the rating requirement:~~

~~1. purported to measure the matters at sub-paragraphs 4(a)(i) and (a)(ii) by reference to a higher standard than the standard of “met” imposed by the 2016 and 2020 Agreements;~~

~~2. further or alternatively to sub-paragraph 4(vii)1, was not expressed by clause 24.4 of the 2016 Agreement or clause 29.2 of the 2020 Agreement to form part of the “progression criteria”;~~

~~(c) further or alternatively to (b), the Employees did not, and could not, “agree” that the rating requirement formed part of their progression criteria in circumstances where:~~

~~(i) the content and application of the rating requirement was exclusively within the Department’s control;~~

~~(ii) the rating requirement was a unilateral requirement imposed by the Department;~~

~~(iii) each Employee’s compliance with the rating requirement was compulsory.~~

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~~As to (c), the rating requirement was expressed in the Department's policies and procedures, including the DPGR Policy. It was a term of each Employee's employment that the Employee comply with Department policies and procedures as amended and in force from time to time.~~

5. To the allegations at paragraph 48, the applicants:
- (a) admit that Mr Wren was aware of the Department's Policies and Practices as to Progression;
 - (b) refer to and repeat paragraphs 4-3A(d) to (g) and 3B(c) and (d) above and, in the premises of paragraphs 4-3A(d) to (g) and 3B(c) and (d), deny that:
 - (i) Mr Wren could have, or did, agree to include the ~~rating requirement~~ Department's Senior Grade performance standard in his progression criteria;
 - (ii) the ~~rating requirement~~ Department's Senior Grade performance standard formed part of his progression criteria;
 - (c) otherwise deny paragraph 48.
6. To the allegations at paragraph 59, the applicants refer to and repeat paragraph 5 above.
7. To the allegations at paragraph 70, the applicants:
- (a) admit that Mr Powell was aware of the Department's Policies and Practices as to Progression;
 - (b) refer to and repeat paragraphs 4-3A(d) to (g) and 3B(c) and (d) above and, in the premises of paragraphs 4-3A(d) to (g) and 3B(c) and (d), deny that:
 - (i) Mr Powell could have, or did, agree to include the ~~rating requirement~~ Department's Senior Grade performance standard in his progression criteria;
 - (ii) the ~~rating requirement~~ Department's Senior Grade performance standard formed part of his progression criteria.
 - (c) otherwise deny paragraph 70.
8. To the allegations at paragraph 81, the applicants refer to and repeat paragraph 7 above.

9. To the allegations at paragraph 89, the applicants refer to and repeat paragraphs 4-3A(d) to (g) and 3B(c) and (d) above and, in the premises of paragraphs 4-3A(d) to (g) and 3B(c) and (d), deny that:
- (a) any 2016 Agreement Group Member could have, or did, agree to include the ~~rating requirement~~ Department's Senior Grade performance standard in his or her progression criteria;
 - (b) the ~~rating requirement~~ Department's Senior Grade performance standard formed part of any 2016 Agreement Group Members' progression criteria.
10. To the allegations at paragraph 98, the applicants refer to and repeat paragraph 7 above.
11. To the allegations at paragraph 106, the applicants refer to and repeat paragraphs 4-3A(d) to (g) and 3B(c) and (d) above and, in the premises of paragraphs 4-3A(d) to (g) and 3B(c) and (d) deny that:
- (a) any 2020 Agreement Group Member could have, or did, agree to include ~~rating requirement~~ Department's Senior Grade performance standard in his or her progression criteria;
 - (b) the ~~rating requirement~~ Department's Senior Grade performance standard formed part of any 2020 Agreement Group Members' progression criteria.
12. The applicants deny the allegations at paragraphs 118 and 119 and refer to and repeat paragraphs 3A(c) and (d) above.
13. To the allegations at paragraphs 120 and 121, the applicants:
- (a) deny the allegations;
 - (b) refer to and repeat paragraph 3A(d) above; and
 - (c) say further that Grades 1 to 4 employees who were assessed at their end of cycle performance review as having "achieved expectations" or higher in relation to their progression criteria "met" their progression criteria within the meaning of the 2016 or 2020 Agreement.

Date: ~~18 June 2025~~ 5 September 2025

A handwritten signature in black ink, appearing to read 'Imogen Szumer', written in a cursive style.

Signed by Imogen Szumer
Lawyer for the lead applicants

This amended pleading was prepared by Rachel Doyle SC and Declan Murphy of counsel.

Certificate of lawyer

I, Imogen Szumer, certify to the Court that, in relation to the reply filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~18 June 2025~~ 5 September 2025



Signed by Imogen Szumer
Lawyer for the Applicants

SCHEDULE

First Applicant: **Community and Public Sector Union**

Second Applicant: **Patrick Wren**

Third Applicant: **Ben Powell**