

SUBMISSION OF THE VICTORIAN GOVERNMENT

In response to:

Commonwealth Senate Education and Employment Legislation
Committee inquiry into the Fair Work Amendment (Respect for
Emergency Services Volunteers) Bill 2016

12 September 2016

Overview

1. The Victorian Government opposes the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (**the Bill**).
2. The Government submits that the Bill represents an unnecessary and unfair attempt to target the proposed enterprise agreement covering the Victorian Country Fire Authority's (**CFA**) career firefighters.
3. The Victorian Government is concerned that amending the *Fair Work Act 2009* (**Fair Work Act**) to target one enterprise agreement, without proper policy justification, sets a dangerous precedent and may have unintended consequences.
4. In particular, the Bill creates significant uncertainties. A number of clauses of the Bill are ambiguous and ill-defined, and on one reading, could apply to a wide range of matters in agreements. This is likely to lead to uncertainty for parties negotiating enterprise agreements as to which clauses may or may not be unlawful and result in delay in the bargaining process and lengthy and protracted litigation.
5. The Bill is also based on misconceptions and misinformation about the proposed CFA agreement and represents an unnecessary interference in a matter involving the State of Victoria, the CFA and its volunteers.
6. The Commonwealth Government incorrectly asserts that the agreement “interferes with the capacity of the CFA to manage its volunteers in a range of areas”¹ and “will weaken the CFA as an organisation and compromise the safety of Victorians.”²
7. The terms and conditions of the CFA career firefighters are currently regulated by the *Country Fire Authority and United Firefighters’ Union of Australia Operations Staff Agreement 2010* (**current agreement**). The current agreement does not cover or apply to volunteers.
8. Like the current agreement, the proposed new agreement will cover and apply to career firefighters but will not cover or apply to volunteers.
9. The CFA, its career firefighters and CFA volunteers work together. Volunteers have been, and always will be, critical to the effective operation of the CFA. This is expressly recognised in the proposed agreement, *Country Fire Authority Act 1958* (**CFA Act**) and Volunteer Charter.
10. The Victorian Government urges the Committee not to support this Bill.

¹ Second Reading Speech, 31 August 2016, p.25

² Turnbull, M and Cash, M, ‘Fair Work Amendment to protect CFA’, (Media Release, 22 August 2016).

Introduction

1. The Victorian Government welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee inquiry into the Bill.
2. The Bill will predominantly impact on Victoria and, in particular, the CFA. Background information about the CFA is set out in **Attachment 1**.

Targeting one enterprise agreement establishes a bad precedent

3. The Bill will amend the enterprise agreement framework in the Fair Work Act to include a new category of unlawful terms, namely “objectionable emergency management terms”.
4. The enterprise agreement framework, contained in Part 2-4 of the Fair Work Act, is a key feature of the national workplace relations system. It is underpinned by rules in relation to the agreement making process, the content of agreements and the process for approval of agreements, administered by the Fair Work Commission.
5. The rules in relation to the content of enterprise agreements, including the matters that can and cannot be included, apply in relation to all enterprise agreements made under Part 2-4 of the Fair Work Act and therefore apply equally to all employers and employees covered by the national system.
6. These are current rules of general application, capable of being known by employers, employees and bargaining representatives engaged in enterprise bargaining.
7. The Victorian Government is concerned that, contrary to the principle that the Fair Work laws have general application, the Bill effectively and unreasonably targets one enterprise agreement in furtherance of the Commonwealth Government’s political agenda.
8. It is clear from the second reading speech to the Bill and statements made by the Commonwealth Government in the lead up to announcing this Bill, that it is targeted at the proposed agreement to cover the Victorian CFA career firefighters.
9. The Victorian Government is concerned that singling out one enterprise agreement is not an appropriate use of federal legislation. In particular, the Bill contains a number of vague and ambiguous terms, which have the potential to create significant uncertainties for parties to enterprise agreements. This is addressed further below.
10. Further, contrary to the Commonwealth Government’s statement that the legislation will “protect Australia’s emergency services [from a union takeover]”³, the Bill will apply predominantly to Victoria, in addition to the Territory State Emergency Services.
11. The Bill defines a “designated emergency management body” to include a body that is, or is part of, a fire-fighting body or a State Emergency Service of a State or Territory. This would include the CFA and Victorian State Emergency Service in

³ Second Reading Speech, 31 August 2016, p.24

Victoria, and State Emergency Services in the Australian Capital Territory and Northern Territory.

12. It is understood that it may not apply to fire-fighting bodies or emergency services in other States as, to the extent these bodies are not constitutional (“or trading”) corporations, these bodies are not covered by the Fair Work laws. This is because, unlike Victoria, other States have not referred their industrial relations powers over their public sectors to the Commonwealth. Consequently, Victoria is the only State in which public sector bodies that are not constitutional (“trading”) corporations are covered by the Fair Work laws.
13. This means, in effect, that the Bill creates an unfair and unjustifiable distinction between the rules in relation to the content of enterprise agreements covering certain employers and not others.
14. It is considered that that there is no proper policy justification for enacting this legislation, which will impact on a small number of enterprise agreements, and which the Victorian Government submits represents policy “on the run”.
15. The object of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. To amend the Fair Work laws with the aim of modifying a single agreement establishes a dangerous precedent.

Ambiguous and imprecise provisions

16. As noted above, the Bill will include a new category of unlawful terms, namely “objectionable emergency management terms”. An objectionable emergency management term is broadly defined in proposed s.195A(1) to include a term that has (or is likely to have the effect of):
 - restricting or limiting an emergency management body’s ability to
 - engage or deploy its volunteers;
 - provide support or equipment to those volunteers;
 - manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers;
 - otherwise manage its operations in relation to those volunteers;
 - requiring the body to consult, or reach agreement with, any other person or body before taking any action for the purposes of doing any of the above;
 - restricting or limiting the body’s ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community; or
 - requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the law confers or imposes on the body a power, function or duty that affects or could affect its volunteers.

17. The elements of this definition are ambiguous, unclear and imprecise and limited guidance is provided in the Explanatory Memorandum to the Bill as to the types of clauses that would fall within this definition.
18. It is unclear, for example, when a term of an agreement would have the effect of restricting or limiting an emergency management body's ability to "otherwise manage its operations in relation to... volunteers" or "to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community". These terms are broad and have very generalised meanings that would make it difficult for parties to apply in practice.
19. Given the generality of the provisions and lack of clarity, it will be difficult for parties to know with any certainty if particular terms in agreements will breach this provision. The Victorian Government is concerned that this may protract the bargaining process, delay approval of agreements, and lead to frequent and prolonged proceedings before the Fair Work Commission and courts.

Retrospective application of the Bill

20. The Bill has the potential to render terms already agreed in existing enterprise agreements as "objectionable emergency management terms". While the Commonwealth Government has emphasised that the Bill does not have any retrospective effect, this is misleading.⁴ The Bill explicitly states that the proposed amendments to the Fair Work Act would apply to enterprise agreements made before or after commencement. This means that if parties take *any action (own emphasis)* in reliance on an objectionable emergency management term in a current agreement before commencement of the legislation, this action will not be affected. However terms in current agreements, that were negotiated and entered into by parties before the commencement of the amendments, may be deemed unlawful and be of no effect following commencement. This would create uncertainty for parties to existing agreements, and could effectively undermine parties' intentions as reflected in the terms of existing agreements.

Misconceptions about proposed CFA and United Firefighters' Union (UFU) agreement

21. The Victorian Government is also concerned that the Bill is being justified on the basis of misinformation and misconception about the content and potential effects of the proposed CFA/UFU agreement.
22. The Commonwealth Government announced, during campaigning in the lead up to the Federal election, that it "would use all available federal powers to stop the CFA/UFU enterprise agreement from restricting the effective use of CFA volunteers."⁵ It stated that it would amend the Fair Work Act to "protect" the CFA.⁶ This commitment was made to a group of volunteer firefighters, promising to campaign against Federal Labor, only weeks before the Federal election.

⁴ Explanatory Memorandum, Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016, [37]

⁵ Turnbull, M and Cash, M, 'Fair Work Amendment to protect CFA', (Media Release, 22 August 2016).

⁶ Turnbull, M, 'Only the Turnbull Government will protect the Victorian CFA from Bill Shorten's union takeover', (Media Release, 15 June 2016).

23. In the second reading speech to the Bill, Prime Minister Turnbull asserts that the proposed agreement “interferes with the capacity of the CFA to manage its volunteers in a range of areas”.⁷ The Prime Minister states that the Bill “will ensure that enterprise agreements cannot be used in a way that permits unions to exert power over the valuable contributions of volunteers”.⁸
24. The proposed agreement does not contain content that departs from the types of matters ordinarily and lawfully contained in enterprise agreements made under Part 2-4 of the Fair Work Act or content that in any way justifies Commonwealth intervention in a matter that rightly concerns the State of Victoria, a Victorian agency and its employees.
25. The CFA and its operational firefighters are, for example, currently covered by the current agreement. The current agreement does not cover or apply to CFA volunteer firefighters.
26. The current agreement, like many enterprise agreements made under Part 2-4 of the Fair Work Act, contains terms in relation to such matters as:
 - wages and classifications;
 - allowances;
 - annual leave, personal/carer’s leave, compassionate leave and long service leave;
 - the manner in which work is performed;
 - occupational health and safety;
 - consultation requirements;
 - the process for managing change in relation to matters covered by the agreement or work performed by employees covered by the agreement;
 - the process for managing disputes in relation to the agreement, including steps for resolution at the workplace level escalating to referral to the Fair Work Commission (including arbitration in relation to disputes about consultation);
and
 - the relationship between the employer and the union and the role of the union.
27. The proposed agreement contains terms in relation to the same matters as the current agreement.
28. The proposed agreement also contains new provisions directed at improving the culture and diversity of the CFA. The recent Fire Services Review examined the resourcing, operations, management and culture of the CFA and Metropolitan Fire Brigade (MFB). The review identified a number of challenges and areas of improvement including workplace culture and morale, diversity and how the fire services work together. The Government has accepted the majority of the 20 recommendations and has committed to improving the fire services to ensure they can better protect lives and property in the future.
29. The proposed new agreement contains a clause committing the parties to developing strategies to increase diversity and also new requirements to promote interoperability and common standards across the CFA and the MFB. This contributes to reforms in

⁷ Second Reading Speech, 31 August 2016, p.25

⁸ Second Reading Speech, 31 August 2016, p.26

response to findings of the 2009 Victorian Bushfires Royal Commission, which identified concerns with control, operational integration and interagency standards.

30. The Government has also committed to establishment of a CFA Policy and Performance Committee, the focus of which will be on improving culture and diversity within the CFA, and recognising and valuing the work of volunteers and career firefighters.
31. The agreement includes a new clause which provides explicit recognition for the role of volunteers, in the following terms:

The Role of Volunteer (new clause)

The role of volunteers in fighting bushfires and maintaining community safety and delivering high quality services to the public in remote and regional areas and in integrated stations, is not altered by this Agreement.

For the avoidance of doubt, except as provided by Clause 60 – Peer Support, nothing in this agreement shall prevent volunteers in the CFA from providing services normally provided by such volunteers without remuneration.

32. Ultimately, the responsibility for emergency services, and specifically the CFA, is a matter for the Victorian Government to determine through its State legislation. This is not a matter for the Federal Government to determine on behalf of the State.
33. The Victorian Government urges the Committee to critically examine the Prime Minister’s claims about the effect of the proposed agreement and to make its own assessment.

Legislation unfairly targets Victoria

34. The Victorian Government further submits that there is no justification for Commonwealth intervention in a matter that concerns the State of Victoria, a Victorian agency and its employees, and which is currently before the Victorian Supreme Court.
35. The Commonwealth justifies the Bill on the basis that it is necessary “that the Commonwealth parliament steps in” to “protect” CFA volunteers.⁹
36. Whether or not the terms of the proposed agreement impact on CFA volunteers, and the interaction between the CFA Act and the proposed agreement, is currently subject to legal proceedings and will be a matter for the Victorian Supreme Court to determine.
37. The Victorian Government submits that this Bill amounts to an unnecessary and undue interference by the Commonwealth in a State matter.

⁹ Second Reading Speech, 31 August 2016, p.24

ATTACHMENT 1

Background – Victorian CFA

1. The CFA is a statutory body established under the Victorian CFA Act. It delivers prevention, preparedness, response, recovery and organisational support services for fires and other emergencies in outer metropolitan suburbs, regional and rural areas of Victoria.
2. The CFA has 1,220 brigades that service over one million homes, protecting 3.3 million Victorians. Of those brigades, 35 are currently integrated brigades comprised of both career staff and volunteers.
3. CFA's integrated brigades are located in urban areas in outer metropolitan Melbourne and major regional cities where the service demands are higher than in less densely populated regional and rural areas.
4. As at 30 June 2016, the CFA's workforce included 2,053 paid staff on a Full-Time Equivalent Basis (of whom 1,086 are career firefighters) and more than 57,116 volunteers (of whom 35,796 are operational firefighters).
5. The CFA and UFU are parties to an enterprise agreement - the *CFA/UFU Operational Staff Enterprise Agreement 2010* (**current agreement**), which sets out terms and conditions for the CFA's career firefighters.
6. On 30 September 2013, the current agreement reached its nominal expiry date but continues to operate. Since March 2013, the CFA and UFU have been negotiating a new agreement.
7. In August 2016, the CFA Board authorised the CEO to put a new agreement and its Joint Statement of Intent to a vote of career firefighters. The CFA Board has given an undertaking to the Supreme Court of Victoria not to put the proposed agreement to a ballot of its career firefighters pending the outcome of Victorian Supreme Court litigation involving the Volunteer Fire Brigades Victoria and the CFA.
8. In addition to career firefighters, the proposed *CFA-UFU Operational Staff Enterprise Agreement 2016* will apply to:
 - a. statewide operational managers, responsible for both integrated and volunteer brigades; and
 - b. specialist roles, such as Practical Area Drill Operators and Fire Service Communications Controllers.
9. Like the current agreement, the proposed agreement will not apply to volunteers.