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Dear Secretary

Inquiry into the provisions of the *Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016*

Thank you for the invitation to make a submission to the above inquiry.

The *Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016* ("the Bill") is objectionable on two levels.

Firstly, the Bill is entirely inconsistent with the basic policy of successive iterations of collective bargaining as embodied in Commonwealth law for over two decades and as is required by our international obligations. That well established framework provides for parties to bargain for an agreement that meets their needs, with resort to institutional support from an independent umpire, a limited right to take protected industrial action and the prospect that, if the requirements of the framework are not met, the independent umpire might ultimately intervene and determine, through a proper and procedurally fair hearing process, what the content of the bargain between them ought to be. It is a framework that is overwhelmingly facilitative of industrial parties reaching their own agreement with the support and supervision of an impartial tribunal. So much is plainly evident from section 171 of the *Fair Work Act*, which sets out the objects of the Part of the Act that deals with collective bargaining:

"The objects of this Part are:

- *(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and*
- *(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:*
  - *(i) making bargaining orders; and*
  - *(ii) dealing with disputes where the bargaining representatives request assistance; and*
  - *(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay."*

Consistent with that framework, the United Firefighters and the Country Authority after a protracted period of bargaining sought the assistance of the Fair Work Commission in November of last year to facilitate a resolution of the outstanding matters between them. That process continued for many months until in June 2016 the Fair Work Commission made a recommendation to resolve those

matters. That recommendation, along with the matters previously agreed, forms the basis of the collective agreement that ought now be put to the employees for voting on. This turn of events is entirely unexceptional and represents the expected operation of the collective bargaining framework consistently with its objects.

It is entirely repugnant to those collective bargaining objects for the Federal Government to use its legislative power to sideline the independent tribunal. Yet that is what this Bill achieves. It fundamentally undermines the authority of and confidence in the Fair Work Commission, and erodes the independence and impartiality of the collective bargaining framework. It sends a clear message to lobbyists and the PR industry that the government can be persuaded to intervene in an ad-hoc way to usurp the Fair Work Commission and modify collective agreements by passing legislation outlawing particular outcomes - if there's an interesting story to go with it (even if it is a fictional one). In that way, the narrative that lobbyists and the media can build around isolated industrial disputes become the driving force for industrial relations policy reform while broader systemic fairness issues in a changing labour market continue to be ignored.

The prospect that the government perceives that it has a mandate to unravel particular industrial agreements because it doesn't like them – for reasons that it has thus far embarrassingly been entirely unable to articulate – is truly concerning.

Secondly, the provisions of the Bill are highly problematic and are fertile ground for costly disputes which would be of little tangible benefit to anyone. For one, the scope of agreements it applies to is uncertain and is subject to change by mere regulation. The cumulative effect of section 109(3)(d) of the *Fair Work Act* and the proposed section 195A(4) is that the only requirement confining the scope of operation of the Bill is that the relevant employer is a body, or part of body, that is established for a public purpose by or under a law of the Commonwealth, a State or Territory. The remainder is entirely left up to regulations and thereby lacks any effective Parliamentary scrutiny. Beyond the current discussion about the CFA, we simply do not know which public instrumentalities will be declared to be covered by these provisions.

Where the Bill would apply, there is also considerable uncertainty about its effect. It seeks to invalidate terms of enterprise agreements on the basis of their "likely effects", not just their proven effects, which as a drafting device leaves much to conjecture, argument and legal fees. Arguments may be made about very remote indirect effects of action taken pursuant to the terms of an agreement. For example, if a particular agreement contained safe systems of work specifying career firefighting staffing by levels by rank and location, would it be argued that those standards are an unlawful restriction or limitation on the deployment of volunteers? Could it be said that a decision arrived at through consultation under the agreement that the emergency response uniforms of all firefighters must prominently display a rank or training standard so that the skills of the firefighter are immediately identifiable (for example breathing apparatus qualified) be said to be a limitation or restriction on the provision of equipment to volunteers?

Beyond the issue of the uncertain general definition of *objectionable emergency management term* is the interaction between such terms and the consultation terms in an agreement. The *Fair Work Act* provides a default standard consultation term derived from a safety net standard established more than 30 years ago. Many industries have, through successive agreements, developed more tailored consultation terms that build on the safety net standard. Emergency services are an industry where the need for consultation on matters beyond "major changes" having "significant effects" is plainly required. First and foremost, this is because there is absolutely no room for any doubt whatsoever on what relevant policies and procedures require and thus the participation of the workforce is essential.

Further, in making changes to and continuously improving policies and procedures, it is important to involve and benefit from the perspectives, knowledge and experience of persons at all levels of the chain of command. It is also critical to consult thoroughly about the design of uniforms and equipment to ensure that all requirements are catered for. A further difficulty with this Bill in this respect is that it does not attempt to excise only the "objectionable" content of a consultation clause. Rather, if the consultation clause contains any term that is "objectionable", the entirety of the clause becomes ineffective and is replaced by the model consultation term – notwithstanding that neither the employer nor the employees (or anyone else) considers the model term appropriate for the industry.

Whilst it may be possible to remediate some issues where "objectionable emergency management terms" are identified during an agreement approval process through the giving of undertakings, such remediation is an imperfect solution that is ignorant of the bargaining dynamics that led to the outcome reflected in the agreement that was put before the Commission. Firstly, undertakings are given only by an employer rather than being bargained – the Fair Work Commission need only seek the views of other bargaining representatives and the industrial merit of the undertaking is somewhat remote from its considerations. Secondly, an undertaking may not be a fair resolution if a bargaining representative has made a series of other concessions through bargaining in order to maintain its claim on the matter that has ultimately fallen foul of the technicality. Clearly, this is no substitute for and in fact undermines the framework of collective bargaining in good faith that is otherwise embodied in the *Fair Work Act*.

Puzzling aspect of this Bill are proposed sections 254A and 281AA which give certain volunteer representatives a statutory right to make submissions about matters concerning enterprise agreements, enterprise bargaining and workplace determinations. These provisions are curious primarily because they are not in any way linked or limited to the issue of the presence or otherwise of "objectionable emergency management terms" in agreements or workplace determinations. They effectively require the Fair Work Commission to consider submissions that may extend to matters that are entirely irrelevant to the questions at issue in a given matter before the Commission – for example a volunteer association's views on whether or not a majority support determination ought to be issued. This may create unnecessary delay and cost.

Finally, there is an element of retrospectivity in the Bill that is most concerning, particularly when combined with the extent and significance of matters that are left to regulation. This means that the contents of extant agreements, including consultation provisions tailored to industry needs, may effectively be altered by regulation. This could create manifest unfairness and be fertile ground for unnecessary disputation.

The Bill is an unwelcome and partisan interference in our national industrial relations framework and ought to be rejected.