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SUBMISSION TO THE SENATE STANDING COMMITTEES ON EDUCATION AND EMPLOYMENT

EDUCATION AND EMPLOYMENT LEGISLATION COMMITEE

FAIR WORK AMENDMENT (RESPECT FOR EMERGENCY SERVICES VOLUNTEERS) BILL 2016

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A – INTRODUCTION

1. Ryan Carlisle Thomas is a Victorian Legal Firm established in 1975. The firm has represented registered employee organisations and workers since its establishment.

2. It is submitted that the committee should be concerned by the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (the Bill). It is submitted that the Bill is legally flawed and represents bad policy.

3. No doubt the Committee is well appraised of the context in which the Bill comes before the Parliament. The Second Reading Speech provides some of the context with its focus on the CFA. The proposal emerged in the context of the recent election campaign. The context is important as informs any careful examination of the Bill. Ryan Carlisle Thomas is familiar with the industrial background to bargaining in the CFA having advised the United Firefighters Union Branch from time to time.

4. Ryan Carlisle Thomas welcomes the opportunity to comment on the bill.

B - KEY FEATURES OF THE BILL

5. The Bill renders certain terms of enterprise agreements objectionable. These are described as “objectionable emergency management terms”. As a result such terms cannot be included in an enterprise agreement, and, if they are included they have no effect to the extent that they are objectionable. Similarly these terms cannot be included in workplace determinations.

6. The Bill achieves this outcome by making such an objectionable term an unlawful term (see Fair Work Act 2009)(“the Act”) section 12 and section 194). The Fair Work Commission (‘the Commission”) must be satisfied in approving an enterprise agreement that the agreement does not include an unlawful term (section 186(4)). The terms of an enterprise agreement have no effect to the extent that they are unlawful terms (section 253(1)(b). Workplace determinations cannot include unlawful terms (section 272(3)(b)).

7. Objectionable emergency management terms under the Bill are those terms of an enterprise agreement that have, or are likely to have the effect of (in summary):

a. Restricting or limiting the employing agency's, ability to deploy, support, equip, manage, work or operate with volunteers; or
b. Requiring the employing agency to consult with or reach agreement with anyone before doing any of the things referred to in (a); or
c. Restricting the employing agency's ability to recognise, value, respect or promote, the use of volunteers; or
d. Requiring or permitting the employing agency to act inconsistently with State or Territory law so far as the law confers on the agency a power or duty that affects or could affect its volunteers.

8. The Act applies to employers that are, or a part of a firefighting body or a State Emergency Service, however described, (or a prescribed body) and that are established for a public purpose under a State or Territory Act. These are called "designated emergency management bodies".

9. The Bill defines volunteers as persons who engage in voluntary activities with the agency on a voluntary basis and are members of the agency or have a member-like relationship with it.

10. If an enterprise agreement contains consultation terms that are objectionable emergency management terms then the Model Consultation Clause provided for in the Regulations is taken to be a term of the agreement.

11. The Bill confers a right for established volunteer associations to make submissions to the Commission in relation to any matter relating to the making, bargaining for, representation in respect of bargaining, approval, variation and termination of an enterprise agreement. The same right is provided in respect of the making of a workplace determination by a Full Bench of the Commission (Part 2-5 and section 616(4)) and the resolution of disputes by that means. Such a right is conferred if the matter before the Commission "could effect" volunteers of the relevant employing agency and the right exists whether or not the Commission is to hold a hearing.

12. The Bill provides that on commencement the Act will apply to enterprise agreements and workplace determinations approved or made both before and after the commencement.

C - THE RIGHT TO MAKE SUBMISSIONS

13. The right for volunteer associations to make submissions is provided for in the Bill under new sections 254A and 281AA.

14. The Act currently provides for the Commission to hear from a person with a proper interest in a matter. Section 589(1) provides for the Commission to determine how, when and where a matter is to be dealt with, and for the making of interim decisions in relation to any matter before it. Section 590 provides for the Commission to inform itself in relation to any matter before it in such manner as it considers appropriate including by inviting, subject to any conditions it determines, oral or written submissions.

15. The Commission routinely exercises the power to allow persons to be heard with sufficient interest in a matter. The interest may be such as to attract a right to be heard because the matter directly affects the persons legal rights or interests and natural justice requires that they be heard. On the other hand, it may be that as a matter of fairness a party is permitted to be heard. (see R v Ludeke; Ex Parte Customs Officers Association of Australia, Fourth Division (1985) 155 CLR 513)

16. The Act provides for an entitlement for the Federal Minister to make submissions in relation to a matter before a Full Bench involving a public sector employment if it is in the public interest (section 597). State or Territory Workplace Relations Ministers are entitled to make a submission on matters before a Full Bench and if it is in the public interest that the Minister do so (section 597(A)).

17. Additional rights are conferred on Ministers in special circumstances under the Act such as the suspension of protected industrial action (see section 423)(7); section 424(2); and section 426(6)). However, there are no other rights conferred on particular persons to make submissions.

18. It can be seen from the foregoing that the “right” to make submissions to the Commission is carefully regulated under the Act and closely confined.

19. It is unprecedented for a private interest (i.e. an association of volunteers) to be accorded a statutory right of submission before the Commission. The only limitations on that right provided for in the Bill are that :

    a. The matter must be such that it "could affect" the volunteers; and
    b. That the matter must arise under the relevant part of the Act. The Parts of the Act concerned are the entirety of Part 2-4 - enterprise agreements and Part 2-5 – workplace determinations.

20. The proposal for particular associations to be accorded a statutory right to make submissions is flawed because:

    a. It removes from the Commission an important discretion to hear, or not, from interveners and limits the capacity of the Commission to regulate its own proceedings;
    b. It will require the Commission and bargaining representatives to address submissions made regardless of merit and proper interest;
    c. The limitation on the scope of submissions is illusory in circumstances where the Commission and bargaining representatives would need to address and assess any submission, if only for the purposes of determining whether or not the matter before the Commission "could affect" the volunteers;
    d. The right extends to all stages and aspects of the enterprise bargaining process;
    e. It provides for a stranger to the bargaining process to intrude into the bargaining between the industrial parties;
    f. It accords a private association greater rights of submission then accorded to even the Minister (or a State Minister); and
    g. It invites delay, disputation and complexity to an enterprise bargaining process as between bargaining representatives that is intended by the Act to be "simple, flexible and fair".(section 171(a)).

21. Under present arrangements if a volunteer association had a proper interest in a matter arising from the Commission it might apply to be heard.

22. The proposed right of submission and its scope and impact is compounded once it is appreciated that the right attaches to anything that "could affect" volunteers. (new section 254(A)(1)(b)and 281AA). This right of submission is not confined to the

question of whether or not a proposed agreement contains objectionable emergency management terms but is unlimited in scope save that the matter "could affect" volunteers.

23. A volunteer association under the Bill is accorded the right to make submissions at each stage of the bargaining process under Part 2-4 and Pat 2-5. It follows that an association might make submissions on:

    a. The terms of a proposed enterprise agreement subject to bargaining;
    b. The general and additional requirements for approval of enterprise agreements (section 186-188);
    c. Whether the enterprise agreement contains unlawful terms (section 194) and Bill new section 195(A));
    d. The consequences for consultation terms and the application of section 205(2)).
    e. The variation of an enterprise agreement (sections 210-211; 217);
    f. The termination of an enterprise agreement (sections 219-220; 225);
    g. The making of bargaining orders(section 229);
    h. The making of a serious breach declaration (section 235);
    i. The making of a majority support determination or scope orders (sections 237-238);
    j. Bargaining disputes including conciliation and mediation between bargaining representatives as well as in consent arbitrations (section 240); and
    k. The making and content of workplace determinations, including industrial action determinations (Part 2-5).

24. This unprecedented intrusion of a stranger to the process of enterprise bargaining as between bargaining representatives is inconsistent with the scheme of the Act. It is submitted that the proposal is misconceived legally, is inconsistent with good public policy and sensible industrial practice. The Bill accords a right of submission to selected private associations who are not required to have any members, but simply to have represented volunteers, who are in any event persons unable to be regulated by the Act.

D - CONSTITUTIONAL AND POLICY ISSUES

25. The Bill intrudes upon an agency of the State's capacity to reach an industrial agreement with its employees. That intrusion extends to subject matter that pertains to the employment relationship and the relationship between the employer and a registered organisation (see section 172).

26. The Bill is principally directed towards volunteers and agencies of the State. It is expressed to apply to firefighting bodies or State emergency services of the States or Territories established for public purpose under a law of the State and territory (Bill new section 195A and the meaning of "designated emergency management body").

27. The Bill renders certain terms of industrial agreements incapable of approval by the Commission and of no effect. Similarly the Bill prohibits the inclusion of such terms in workplace determinations even if a term satisfactory to the parties has been agreed (section 274 and 272(3)(b)).

28. The intrusion proposed by the Bill in respect of the general scheme of enterprise agreement bargaining and making for particular employer(s) raises both constitutional and policy issues.

29. In *Queensland Electricity Commission v the Commonwealth* (1985)159 CLR 192 the High Court struck down a law that made special provision for the hearing by the Australian Conciliation and Arbitration Commission of industrial disputes involving Queensland electricity authorities. The Court did so in accordance with the principles in *Melbourne Corporation v the Commonwealth* (1947) 74 CLR 31. The High Court found the law concerned offended an implied prohibition in the Constitution and that the prohibition extended to authorities brought into existence by a State to carry out public functions (per Mason J at 218).

30. The implied limitation identified in the *Queensland Electricity Commission* case was said by Mason J to comprise two elements as follows:

> " ...(1) the prohibition against discrimination which involves the placing on the States a special burdens or disability; (2) the prohibition against laws of general application which operate to destroy or curtailing the continuing existence of the states or the capacity to function as a government." (at 217)

31. A majority of the High Court more recently in *Austin v The Commonwealth* (2003) 2015 CLR185 held that the implied limitation consisted of only one element that must be applied to the facts. The Court in *Austin* identified the essential question as:

> "whether the law restricts or burdens one or more of the States in the exercise of their constitutional powers. **"** (per Gaudron, Gummow and Hayne JJ at [143])

32. The question of whether the implied limitation is infringed was said by the Court in *Austin* to require an:

> "... assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States to "function as governments'. These criteria are to be applied by consideration not only in form but also the substance and actual operation " of the federal law.... further this inquiry inevitably turns upon matters of evaluation and degree and of "constitutional facts" which are not readily established by objective methods in curial proceedings.(per Gaudron, Gummow and Hayne JJ at [124]).

33. A plain reading of the Bill suggests that it involves discrimination against particular agencies of the States and involves a special burden and disability in relation to their constitutional capacity.

34. The burden involves a restraint on those State agencies' capacity to conclude agreements with their employees. It does so by legislating that despite the wishes of the responsible State agency it cannot include provisions that limit or restrict its ability to deal with its volunteers. It accords a priority in the agency's dealings with their volunteers by imposing restrictions on its dealings with employees and removes the agency's discretion and right to determine for itself appropriate arrangements.

35. Regardless of whether the Bill would survive constitutional challenge on *Melbourne Corporation* (or other) grounds, the general issues raised require serious policy consideration. The key issue is the extent to which a Commonwealth law should target particular State agencies so that they do not have access to the full range of enterprise bargaining options applying to other employers and employees. It is submitted that the answer is no. The considerations that underpinned the decision in the *Queensland Electricity Case* have equal force in a policy context. The CFA is a State agency exercising state constitutional functions with responsibility for its own

industrial affairs, its employees and its relations with volunteers. What legitimate business is it for the Commonwealth to intrude and restrict that employer's capacity to conclude an enterprise agreement with its employees on terms satisfactory to it.

36. The rationale for the Commonwealth's intrusion was explained by the Prime Minister in the Second Reading Speech in the House of Representatives. He explained the Commonwealth position as follows:

> "Given that the government of Victoria has abdicated its authority on this matter and capitulated to the Union, it is our duty to intervene to protect the efforts of our volunteers."

37. Such an approach sits uncomfortably with the constitutional and practical arrangements under which States have responsibility for their firefighting services. Few matters can be regarded as more central to the core features of the State Government than the provision of such services. The question of whether the Victorian Government has abdicated its responsibilities, or chosen to exercise them in a particular way, is a matter for judgement. It is submitted that regardless, it is not for the Commonwealth to intrude in the circumstances.

38. The Explanatory Memorandum to the Bill refers to the Commonwealth's power to legislate as proposed as being derived from the States' referral to the Commonwealth of "workplace relations matters". The referral power is provided for in s51(xxxvii). In the case of Victoria the referral is given effect by the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* and Division 2A of Part 1-3 of the Act. The referral is relevantly the power for the Commonwealth to legislate with respect to the terms and conditions of employment contained in enterprise level agreements. Some doubt must attach as to whether the Bill can be supported by such a referral in circumstances where the Bill is not directed to employees. As the Statement of Compatibility with Human Rights in respect of the Bill notes:

> "The objective of the Bill is to protect the role of emergency service volunteers .....it is not directed towards employees...".

39. Consideration of a constitutional issue other than the implied limitation or the referral power throws up further policy considerations. A constitutional head of power possibly to be relied upon for the Bill, but not referred to in the Explanatory Memorandum, is the corporations power. The High Court in the Workchoices case

made it clear that the corporations power extends to the business functions and activities in constitutional corporations (*NSW v The Commonwealth* (2006) 229 CLR1 114). That power extended to the regulation of the terms and conditions of employment of employees of constitutional corporations. It may be that the same approach can be applied to volunteers associated with constitutional organisations. On the other hand, the quality of a trading corporation's relationship with volunteers may be too far removed from its trading character to fall within the scope of the constitutional corporations head of power.

40. The Bill has all the hallmarks of being a Bill about volunteers of a very particular type of constitutional corporation/state agency, rather then a Bill about trading corporations or about terms and conditions of employment as referred to the Commonwealth by States.

41. Regardless of the outcome of any debate on the constitutional questions, the policy question remains as to whether the Commonwealth should intrude upon a State agency's responsibility in balancing the proper interests of the volunteers and employees. It is submitted that the Commonwealth should not intrude in the manner proposed under this Bill. The Bill seeks to deny State agencies "the choice that the machinery provides" under the Act. (see *Melbourne Corporation* (1947) 74 at 84 per Dixon J).

E - MEANINGS AND UNCERTAINTY

42. Enterprise agreements are the product of negotiations and bargaining. Not infrequently that bargaining is hard fought. The Act regulates bargaining, permits the taking of protected industrial action and establishes processes for the making and approval of resulting agreements.

43. Bargaining is required to be in good faith (section 228). The enterprise agreement ultimately voted and agreed upon by employees is frequently the result of carefully wrought compromise, trade offs and interrelated bargains reflected in the various terms of the agreement.

44. The Bill introduces uncertainty as to the bargain reached between parties by rendering particular terms of an agreement once made and approved ineffective or terms that have been agreed incapable of inclusion at the time of approval.

45. This uncertainty is born of the Bill's drafting and approach. The Bill fixes on volunteers as being members or having member-like relationships with a relevant authority. It then renders objectionable, and thus ineffective (terms) that, for example:

    a. restrict the employer's ability to deploy its volunteers;
    b. Limit the employer's ability to provide equipment to volunteers.
    c. Restrict the agencies ability to manage its relationship with recognised emergency services bodies.
    d. Limit the employers ability to recognise, value or respect the contribution of its volunteers.

46. The emphasised words illustrate the uncertainty in respect of what is or is not permitted to be included in an enterprise agreement.

47. The Bill's uncertainty of drafting is illustrated by the confusion and uncertainty that is likely to arise from the question as to whether a term of an enterprise agreement:

    i. Is likely to have the effect concerned. ;
    ii. Limits or restricts the agency's ability in various regards;
    iii. Limits such matters as "respect for the contribution" of volunteers; or
    iv. Restricts the ability to "provide support to" volunteers.

48. A further unsatisfactory aspect of the Bill's is its treatment of consultation terms that are objectionable emergency management terms and are thus invalid. The proposed new section 195A and the amendment to section 205 means that if a term of an enterprise agreement requires, or is likely to have the effect of requiring, an employer to consult or reach agreement with anyone before dealing with volunteers (such as deploying or providing equipment to volunteers) it is ineffective to the extent that it does so (section 253(1)(b)). The Model Consultation term in the Regulations is deemed to be a term of the agreement if the agreement contains an offending consultation clause. However, the Model Consultation clause is of limited scope and is confined to consultation with employees about major changes and changes to employee's role and ordinary hours. As a result of the Bill invalidating an offending consultation clause but only to the extent that it is objectionable, and deeming the Model Clause as applying, impossibly complex questions of interpretation will arise

in applying the different provisions that the bargaining parties have had no role in addressing.

49. New sections 13 and 14 to Schedule 1 provide for the Bill to apply on commencement to enterprise agreements approved and workplace determinations made before the commencement. Accordingly the bargains struck by bargaining representatives and approved by the Commission, and determinations framed by Full Benches, are subject to disruption by the application of new restrictions of considerable uncertainty. Parties should be permitted to rely on the bargains they have made and had approved without the undoing of those arrangements by subsequent legislation. It is bad policy and bad in practice for the arrangements parties have relied upon, perhaps for several years, to be unpicked in the manner proposed. Confidence in the outcome of bargains is a key feature of the enterprise bargaining system. The application of new rules to unsettle completed agreements erodes confidence in the system and is unfair to the parties in practice. (By contrast see the approach in the Fair Work (Transitional Provisions and Consequential Amendments)Act 2009, Schedule 3, Item 4.)

50. A further consequence of the extension of unlawful terms in the manner proposed is the additional disputation it will generate in respect of bargaining. For example, applications for protected action ballot orders may be opposed on the basis that a bargaining representative is not genuinely seeking agreement because they have claimed what amounts to an objectionable emergency management term (section 443(1)(b)). This example illustrates the importance of lack of clarity in the Bill as to meaning of what are objectionable emergency management terms.

F - A PRIVATE ACT ?

51. At a policy level the Bill has the appearance of a “Private Bill” in essentially targeting a single entity, namely the Country Fire Authority. The Bill has a veneer of general application. The uncertainty about its general application is reflected in the necessary use of Regulations to determine:
    a. what are designated emergency management bodies and thus caught by the Bill (new section 195A(4))a)(ii);
    b. what are not designated emergency management bodies (new section 195A(5);and

c. what are volunteer bodies (new section 254(A)(2)(b).

It is submitted the use of Regulations to determine the actual scope and application of the Bill is an inappropriate use of Regulations in such a case.

52. Further, the definition of designated emergency management body refers to "State Emergency Service (*however described*)" (emphasis added). Such a description potentially brings within the scope of the Bill a range of bodies, with volunteers, such as hospitals and health services. The Explanatory Memorandum's suggestion (paragraphs 21 -22) that the bill is intended "only to apply to volunteer-based emergency management bodies" is simply not reflected in the Bill.

53. The Second Reading Speech discloses the plainly targeted nature of the Bill. In that speech it was made clear that the proposed Bill was directed at the CFA and the Volunteer Fire Brigades Victoria. As was said in the second reading speech the amendments "are simple, targeted measures."

54. It should be noted that the Bill in targeting a right for Volunteer Fire Brigades Victoria to make submissions to the Fair Work Commission on any matter that could affect volunteers, the Bill is not addressing some perceived deficiency in the voice of that association. The Country Fire Authority Act 1958 (Vic) provides for Volunteer Fire Brigades Victoria to nominate four volunteers to the CFA Board. (CFA Act, section 7 (4)). Further, Section 100 of the CFA Act itself provides for a specific role for the association as follows:

> "The role of Volunteer Fire Brigades Victoria Incorporated in relation to this Act is to enable members of the brigades (other then industry brigades) to consider and bring to the notice of the Authority all matters affecting the welfare and efficiency, other then questions of discipline and promotion."

55. The Bill, if passed into law, would operate to disrupt the arrangements established by the State of Victoria under the CFA Act under which:

i. The Board includes nominees of Volunteer Fire Brigades Victoria;
ii. The Board has general responsibility for the Authority.
iii. The Volunteer association has a specific role identified under the Act.
iv. The CFA has powers in relation to employment of its staff.

56. The Bill achieves this disruption by:

    a. Elevating the role of the volunteer association to a participant in the CFA's industrial relationship with its employees;
    b. Removing the CFA's capacity to determine in the public interest and for itself the appropriate balance in its relationships between volunteers and employees; and
    c. Accordingly primacy to the position of volunteers in respect of important matters regardless of the CFA's own assessment of the appropriate balance.

57. It is submitted that such an approach is an error of policy and such a disruptive and targeted intrusion should not be pursued.

G - CONCLUSION

58. It is submitted that the Bill involves bad law and bad policy. It is recommended that the Committee propose that the Senate reject the Bill.

Ryan Carlisle Thomas
9 September 2016