Senate Standing Committee on Education and Employment Inquiry into the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016

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This submission is made in my capacity as an academic expert on employment law and workplace relations, and the views expressed are mine alone.

In summary, I am concerned that the amendments proposed in the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 would be difficult to apply and potentially subject to a constitutional challenge. They are intended to help resolve a single dispute at a single State agency – yet the uncertainty they would create would likely serve to exacerbate that dispute and delay its resolution. Furthermore, at least some of the issues raised by that dispute can be addressed through legal mechanisms that already exist.

The scope of the proposed amendments

Although neither the Bill nor its Explanatory Memorandum say as much, this Bill is intended to respond to the ongoing dispute at Victoria's Country Fire Authority (CFA) over the terms of a proposed new enterprise agreement between the CFA and its employees. This is clear from both the Prime Minister's second reading speech of 31 August 2016 and the election policy to which the Bill seeks to give effect.[1]

The provisions which the Bill proposes to insert in the *Fair Work Act 2009* (FW Act) are framed to apply in the first instance to any State or Territory fire-fighting body or State Emergency Service. In theory, they could later be extended by regulation to any other type of "emergency management body", provided the body in question had been established by a federal, State or Territory law (proposed s 195A(4)).

In practice, however, it is unlikely that the new provisions would have any application beyond the Victorian CFA or equivalent bodies in the ACT or Northern Territory. This is because equivalent bodies in the other States are likely to continue to make enterprise agreements under State law, rather than the FW Act. And any other type of emergency management body making agreements under the FW Act could only be affected if it had volunteers who are members or have a member-like association with the body (see the definition of "volunteer" in proposed s 195A(6)).

It may also be noted that, if passed, the new FW Act provisions could be used to challenge terms in enterprise agreements that had already been approved by the Fair Work Commission (FWC): see cl 14 of the Bill. It is true that the amendments are not in a technical sense "retrospective", since they would not render any provisions invalid as from before the time the amendments took effect. But the amendments *would* have the potential effect of

[1] Liberal and National Parties, *Protecting Victoria's Country Fire Authority*, 2016.

changing the operation or effect of agreements that had already come into force, and that may indeed have been negotiated long before this legislation was ever conceived.

The CFA dispute

I am not in a position to express any opinion about the rights and wrongs of the current dispute at the Victorian CFA, not least because I have not seen the proposed agreement that has caused such controversy. But I would make the point that if the Bill is enacted in its current form, its provisions could only become relevant to this dispute if an agreement were concluded that:

- had the support of both the CFA board and a majority of the CFA employees to be covered by the agreement;
- had been found by the Victorian Supreme Court to be consistent with the legislation governing the CFA (since otherwise the Court would presumably not have lifted the injunction that at the time of writing is restraining the CFA Board from concluding any agreement);[2] and
- met the other requirements of the FW Act, including that the agreement not contain terms that discriminate against employees on the basis of gender, family or caring responsibilities, etc (see FW Act ss 194(a), 195).

The key points here are the second and third. It has been suggested that the proposed CFA agreement would be contrary to the requirements of State law. But there is no need for any change to be made to the FW Act to address that. It is a matter that can be, and likely will have been, resolved by the Victorian courts before any agreement reaches the FWC.

To put it another way, if the Supreme Court were satisfied that the agreement did not impede the CFA from fulfilling its statutory responsibilities, it would seem highly unlikely that the FWC could or would disagree. That would seem to negate any effective role for proposed s 195A(1)(d).

Similarly, any concerns about discriminatory clauses in the CFA agreement are capable of being addressed under the FW Act as it stands.

That leaves the matters set out in proposed s 195A(1)(a)–(c), which would outlaw any term that, in various ways, restricted or limited the role or use of volunteers. I have two concerns about those provisions, both of which go to the certainty of their operation.

Before detailing these concerns, however, it may be noted that the effect of these provisions could readily be circumvented by relocating any questionable terms from an enterprise agreement to a separate or "side" deal. This has become a common tactic over

[2] See "CFA dispute: Victorian volunteer firefighters win bid to halt workplace deal vote", *ABC Online*, 17 August 2016.

the past 15 years for employers and unions keen to avoid the impact of restrictions on the permissible content of industrial agreements.[3]

The interpretation issues

The first problem with the restrictions in proposed s 195A(1)(a)–(c) is to work out what they mean, or to predict how they might be interpreted or applied by the FWC, or by any court called upon to review a decision by the FWC about them or to enforce disputed terms in an existing agreement.

On one interpretation, for instance, *any* type of restriction on the role or use of volunteers would be unlawful, no matter how sensible or reasonable. On this view, for example, any attempt to reserve particular work (including management) for paid employees would be unlawful. So might the allocation of equipment or training to employees, on the basis that this would be (indirectly) restricting the availability of resources to volunteers.

To avoid that type of problem, the provisions might be interpreted as being concerned with *undue* or *unreasonable* restrictions (although those qualifiers do not appear in the legislation itself). But this would effectively mean the FWC or a court having to make discretionary judgments about the needs and operation of an emergency services body, potentially overriding the views of the relevant body's board and management. Some FWC members or judges might have the advantage of personal experience in volunteering for a body such as the CFA – but that might equally disqualify them from making decisions, on the grounds of perceived bias!

Constitutionality

The potential uncertainty about the operation of the proposed new FW Act provisions is compounded by the obvious potential for them to be challenged as unconstitutional.

There are two potential issues here. The first is foreshadowed in the legislation itself (see proposed s 195A(7)(b)). To the extent that the FW Act applies to an emergency services body only because of a referral of power from a State, that application is limited in certain ways. For example, the FW Act cannot apply to a referred employer in relation to certain matters concerning essential services or emergency situations (see eg s 30A(1), definition of "excluded subject matter, para (l)).

However, whatever the position with other bodies, this is not a limitation that affects the CFA. That is because the CFA has been held to be a trading corporation.[4] That makes it a national system employer for the purpose of s 14(1) of FW Act, without any need to rely on the 2009 Victorian referral of powers. The limitation noted above is thus irrelevant.

It is the second issue that presents the greater concern. The High Court has taken the view that while as a general rule federal laws can validly apply to the States and their agencies, the operation of such laws is subject to certain limitations which are said to be inherent in

[3] See A Stewart et al, *Creighton & Stewart's Labour Law*, 6th ed, 2016, [14.134]–[14.135].
[4] *United Firefighters' Union of Australia v Country Fire Authority* (2015) 228 FCR 497.

the federal character of the Constitution.[5] In particular, the Commonwealth cannot legislate in such a way as to 'significantly impair, curtail or weaken' the capacity of the States to function as autonomous and independent entities.[6]

In *Re Australian Education Union; Ex parte Victoria*[7] the High Court considered the application of these limitations in relation to the effect of federal industrial laws. The majority of the Court made it clear that there is nothing wrong in principle with federal laws prescribing minimum wages and conditions for State public sector workers (in that case teachers). But they added some riders, one of which was that any attempt to impair a State's ability 'to determine the number and identity of the persons whom it wishes to employ' would unduly interfere with its 'capacity to function as a government'.[8]

On the basis of this principle, for example, the High Court has held that federal laws cannot validly impose any obligation on a State or State agency to provide severance pay to retrenched workers or to consult with unions over proposed redundancies. Such requirements were considered to 'clearly impair' the State's right to determine the composition of its workforce.[9]

Similarly, the FWC has taken the view that neither an award nor a workplace determination – an arbitrated instrument made in settlement of a bargaining dispute – can validly restrict the use of seasonal, fixed-term or casual employees by a Victorian government agency.[10]

It appears to be different if a State agency *agrees* with its workers to accept limitations on its freedom to hire and hire. In 2015 the Federal Court held that the CFA's existing enterprise agreement, registered under the FW Act, could validly specify staffing levels.[11] But this was because the restriction was voluntarily assumed.

The potential application of these constitutional limitations to the proposals in the Bill should be evident. It could be argued that by preventing a State government agency such as the CFA from making its own decisions as to how to deploy a mix of professional firefighters and volunteers, or who it consults with before making those decisions, or (more broadly) what role to accord to volunteer firefighters, the Commonwealth would be unduly interfering with the agency's power to determine the composition of its workforce.

I do not go so far as to suggest that the Bill is necessarily unconstitutional. The principles concerned are necessarily imprecise and flexible in their application, being based on implications in the Constitution that, over the years, the High Court has chosen to formulate and apply in different ways. *Australian Education Union* was decided over 20 years ago by a differently constituted court, and did not deal with the role of volunteers. It is entirely possible that a challenge to the constitutionality of the Bill's provisions would fail. But it is just as possible that it would succeed.

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[5] See Stewart et al, above, [5.32]–[5.37].
[6] See eg *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at [32].
[7] (1995) 184 CLR 188.
[8] Ibid at 232.
[9] *Victoria v Commonwealth* (1996) 187 CLR 416 at 520–1.
[10] *Parks Victoria v Australian Workers Union* (2013) 234 IR 242.
[11] *United Firefighters' Union of Australia v Country Fire Authority* (2015) 228 FCR 497.

A recipe for uncertainty

If this Bill is passed, it can be assumed that attempts will be made to use the new provisions to challenge any new enterprise agreement made by the CFA – or possibly even provisions in its current agreement. This would likely still happen even if the current litigation in the Victorian Supreme Court were resolved in favour of the CFA, or if the CFA and the United Firefighters' Union agreed to make changes to the new enterprise agreement that satisfied the Court.

The one certainty in that situation is that there would be no certainty. Given the broad and ill-defined restrictions in proposed s 195A(1)(a)–(c), the difficulty in predicting their application, and the prospect of a constitutional challenge if they were successfully invoked to block the approval of a new enterprise agreement or to prevent certain terms being enforced, the potential for ongoing legal arguments should be obvious.

It seems reasonable to suppose, therefore, that whatever else the proposed new FW Act provisions might do, they would significantly increase the chances of the present dispute continuing right through the current fire season and beyond.

A note on intervention rights

A final note concerns proposed ss 254A and 281AA, which would entitle certain volunteer bodies to make a submission in relation to particular FWC proceedings (including an application for the approval of an enterprise agreement) that might potentially affect their members.

What is extraordinary about this proposal is that it would confer on the relevant bodies a right that is not guaranteed to any other party, with the sole exception of the Minister for Employment (and even that right is limited to matters involving public sector employment).[12] Under the FW Act as it stands it is entirely a matter for the FWC to determine, in accordance with its Rules, whether it hears or accepts submissions from a particular party in relation to the approval of an enterprise agreement. In practice, it will allow the likes of unions, employer associations and individual employees to intervene, if they have a genuine interest in the proceedings. But nobody (with the partial exception of the Minister) is *automatically* entitled to be heard.[13]

Hence if included in the FW Act, these proposed provisions would give volunteer bodies superior rights to employees, unions, governments – and, it may be noted, volunteers themselves.

[12] See FW Act s s597(1)(b). Both the federal and certain State Ministers do have a right to intervene in proceedings before a Full Bench, but even then this is subject to a public interest test (ss 597(1)(a), 597A(1)).
[13] See Stewart et al, [7.29], [14.80] and the cases cited there.