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## Workplace Relations Amendment (Protection for Emergency Management Volunteers) Bill 2003

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Workplace Relations Amendment (Protection for  
Emergency Management Volunteers) Bill 2003

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26 March 2003

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# Workplace Relations Amendment (Protection for Emergency Management Volunteers) Bill 2003

**Date Introduced:** 6 March 2003

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The day after Royal Assent

## Purpose

To amend the *Workplace Relations Act 1996* to protect emergency management workers from unlawful dismissal if their temporary absence from their normal employment is 'reasonable in all the circumstances'.

## Background

In foreshadowing the current Bill, the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, noted in relation to the recent bushfires that

A number of members on both sides of this House have expressed their concerns about the possibility that New South Wales Rural Fire Service volunteers and Victorian Country Fire Authority volunteers could be dismissed because of their work to protect communities in trouble.<sup>1</sup>

The risk of fire service or other emergency workers being dismissed because of their absence for emergency work appears minimal. A spokesperson for the Australian Industry Group said in January 2003 that 'in our experience most employers do take a very reasonable and fair approach when fires occur and volunteers are needed to fight the fires'.<sup>2</sup> While New South Wales introduced laws to protect emergency services volunteers after the January 1994 bushfires in that State, the laws have never been used or challenged. According to the NSW Office of Emergency Services, 'generally a phone call from the local emergency services commander would sort out any problems before they escalated'.<sup>3</sup>

Nevertheless, under current federal legislation, it is not illegal for an employer to dismiss an emergency services worker for being absent from their place of work when responding to a disaster situation. In January 2003, the Construction, Forestry, Mining and Energy

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Union (CFMEU) lodged a claim with the Australian Industrial Relations Commission (AIRC) to vary two federal ceramic awards to protect the income, employment and entitlements of emergency volunteer workers. A CFMEU representative noted that 'a hotel employee in Victoria lost his job the other day because he was fighting a bush fire'.<sup>4</sup>

Apart from NSW, laws to protect emergency services workers exist in most other States and Territories.<sup>5</sup> There are some limitations to the protection provided under such legislation. In NSW, for example, protection against 'victimisation' for being absent on emergency relief work appears to be available only when the Premier directs, through an order published in the State Gazette, that the relevant provisions apply to particular emergency operations.<sup>6</sup> In Tasmania and the Northern Territory a person engaged in relief work only receives protection against dismissal or loss of other 'employment rights' during a formally declared 'state of disaster' or 'state of emergency'.<sup>7</sup> In Queensland, protection against dismissal or loss of other employment benefits is only provided where a 'state of disaster' has been declared or the employee is directed to assist in an emergency situation by a police officer.<sup>8</sup>

In addition, there is no legislated protection for the employment rights of emergency services workers in Victoria or Western Australia.

In October 2002 the ALP introduced a Private Member's Bill - the Workplace Relations Amendment (Emergency Services) Bill 2002 - 'to provide employment protection to employees who take part in emergency operations as members of an emergency services organisation'. The Leader of the Opposition, the Hon. Simon Crean, MP, stated that the Bill 'will make sure that federal award employees have the same level of protection as their counterparts working under State and Territory laws'.<sup>9</sup>

According to the Minister, the current Bill is intended to have a wider scope:

At present, there is no specific federal legislation protecting volunteers who are temporarily absent from work undertaking emergency management activities. While there is some legislative protection in some states and territories, not all workers are covered and the protections differ. This bill will protect all workers who are absent from work on legitimate volunteer emergency management duties.<sup>10</sup>

The Explanatory Memorandum notes that 'the Bill does not create a right or entitlement to pay for the time the employee is absent'.<sup>11</sup> In its application to the AIRC, the CFMEU argues for an entitlement to two weeks paid leave to fight fire or floods. According to National Assistant Secretary Stephen Roach, many volunteers are 'currently penalised because, unless the boss is very generous, their pay is docked for time off the job'.<sup>12</sup> In contrast, the chief executive of Volunteer Fire Brigades Victoria, Allan Woodward, does not support payment for volunteers:

When people volunteer their time, they are making a gift. When you start to require payment to be made, then it's no longer a gift and it's against the spirit of volunteering.<sup>13</sup>

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It appears probable that the current Bill will be supported by the ALP. As the Minister noted:

this bill deserves to be marked because it is one of those bills that has come forward into the parliament as a result of some initiatives and statements from members opposite, as well as from some of the instincts and impulses of members on this side of the House.<sup>14</sup>

In February 2003, when the Minister foreshadowed the introduction of the current Bill, the Leader of the Opposition stated specifically that 'we can guarantee support for that because we introduced a private member's bill on it last October'.<sup>15</sup>

## Main Provisions

**Schedule 1** amends the Workplace Relations Act to protect emergency services workers from dismissal.

**Item 2** inserts **new paragraph 170CK(1)(c)** into the Workplace Relations Act. The new subsection provides that the object of section 170CK ('Employment not to be terminated on certain grounds') is, inter alia, to give effect to [Recommendation 166](#)<sup>16</sup> of the International Labour Organisation. Article 5 of Recommendation 166 states that absence from work due to civic obligation is not a valid reason for termination of employment.<sup>17</sup>

**Item 2** aims to expand constitutional coverage in section 170CK to all workers in Australia who volunteer for emergency operations.<sup>18</sup>

**Item 4** amends **subsection 170CK(2)** of the Workplace Relations Act by adding an additional reason for which dismissing an employee is prohibited, namely:

(i) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

**Item 5** inserts **new subsection 170CK(5)** which defines 'voluntary emergency management activity' as one involving 'dealing with an emergency or natural disaster' performed on a 'voluntary basis' either at the request of 'a recognised emergency management body' (of which the employee is a member or with which they have a 'member-like association') or where it would be 'reasonable to expect' that a request would have been made if circumstances permitted.

**New subsection 170CK(6)** states that an emergency management activity is still carried out on a 'voluntary basis' even if the employee receives 'an honorarium, a gratuity or a similar payment' in return.

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**New subsection 170 CK (7)** allows for all organisations that are bona fide involved in disaster or emergency relief to be included in the definition of 'a recognised emergency management body', including by regulation if not already specified.

In relation to the requirement that the employee's absence from work be 'reasonable having regard to all the circumstances', the Explanatory Memorandum notes that

This reasonableness requirement means that in most circumstances there would be an expectation that the employee would seek the employer's consent before absenting himself or herself from the workplace. However, there may be circumstances where prior consent would not be possible.

The duration of the absence would also have to be reasonable in all the circumstances, and in all cases would need to be temporary. The size of the employer's business is one factor which may affect what is considered reasonable. For example, it would arguably not be reasonable for the only employee of a small business to be absent from work for an extended period of time.<sup>19</sup>

## Concluding Comments

### 'Reasonable absence'

While the Explanatory Memorandum explains what the phrase 'reasonable having regard to all the circumstances' is intended to mean in relation to the temporary absence of an emergency services worker, this explanation may not be considered by a court if there is a dispute over the dismissal of such a worker.

Section 15 AB of the *Acts Interpretation Act 1901* (Cth) states that consideration may be given to 'extrinsic material', including 'any explanatory memorandum', when ascertaining the meaning of a statutory provision, but only when 'the provision is ambiguous or obscure'. As the Federal Court has stated, in relation to the similar phrase 'within a reasonable time',

There is, in my view, no warrant for referring to the Memorandum. Whilst the words 'within a reasonable time' will vary in different circumstances and statutory settings, they are not obscure; see s 15AB *Acts Interpretation Act 1901* (Cth).<sup>20</sup>

This means that a court may weigh up for itself whether in all the circumstances the absence of an emergency services worker was 'reasonable', without necessarily referring to the emphasis in the Explanatory Memorandum on seeking prior consent, duration of the absence and size of the employer's business.

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## Comparison with State legislation

### Applicable situations

The current Bill provides broad coverage of the range of conceivable situations in which emergency volunteers may need to be absent from their usual occupation. For example, it will apply not just where a formal state of disaster or emergency has been declared, but in any emergency situation where the employee's absence is 'reasonable'. In addition, it aims to cover all volunteer emergency workers Australia wide who are members of, or who have a 'member-like' association with, an emergency management organisation.

### Range of employment rights protected

The range of employment related rights protected by the current Bill is narrower than equivalent State and Territory legislation.

The amendments in the current Bill add volunteer emergency work as an additional prohibited reason for 'termination of employment' under Division 3 of the Workplace Relations Act (Cth). In contrast, the *State Emergency and Rescue Management Act 1989* (NSW) and the *Emergency Management Act 1999* (ACT) protect emergency services workers against the broader concept of 'victimisation'.<sup>21</sup> This not only includes 'termination' or 'dismissal' but also any other action 'to the employee's prejudice', including altering the employee's position or circumstances of employment, or 'injuring' the employee in any other way.

Similarly, the *State Disaster Act 1980* (SA) provides that an emergency services worker 'is not liable to be dismissed or prejudiced in employment' and that the person's 'actual or accruing rights' are to be determined as if they had not been absent from employment.<sup>22</sup>

The *State Counter-Disaster Organisation Act 1975* (Qld), the *Emergency Services Act 1976* (Tas) and the *Disasters Act 1982* (NT) also confer wider protection than the current Bill. These Acts safeguard 'employment rights' generally, not only preventing dismissal but specifically prohibiting 'loss of long service leave, sick leave, recreation leave, or other benefits'.<sup>23</sup>

### Salary and wages

In contrast to the current Bill, it appears that at least some of the State and Territory legislation may allow an emergency volunteer to claim salary and wages from their normal employer when absent from their usual job.

The *Public Safety Preservation Act 1986* (Qld) specifically provides for payment of normal wages during a period of absence where a person has been directed by a police officer to assist in an emergency situation.<sup>24</sup> The entitlement of an emergency volunteer under South Australian legislation to 'actual or accruing rights', and the prohibition in Queensland, Tasmania and the Northern Territory on loss of 'other benefits' during a

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declared state of disaster or emergency also appear to enable wages or salary to be claimed.<sup>25</sup> Arguably, the prohibition in NSW and ACT on 'victimisation' (defined to include situations where an employer '*otherwise injures* the employee in his or her employment')<sup>26</sup> may also allow an emergency services worker to claim wages for a period of absence.

The South Australian legislation entitles an employer to apply to the State Government for reimbursement of any wages or salary paid to an emergency services worker in respect of a period of absence.<sup>27</sup>

### **Range of people protected**

Under the ACT legislation there is protection not only for 'members' of an emergency management service, but also for 'casual volunteers', ie including those who on their 'own initiative and without remuneration or reward, assist members of a Territory service participating in an operation'.<sup>28</sup> Likewise, Queensland and the Northern Territory protect employment rights for anyone

'who, during the period of a state of disaster or state of emergency, is absent from his usual employment or duties in connection with counter disaster measures *in any capacity whatsoever*' (emphasis added).<sup>29</sup>

Such provisions enable a wider range of people to receive employment protection than the current Bill, which protects volunteers against dismissal only if they are members of or have a 'member-like' association with an emergency management organisation.

### **Employer's consent**

While the Explanatory Memorandum emphasises the relevance of seeking the employer's prior consent in determining whether the absence of an emergency volunteer is 'reasonable', the current Bill does not address the situation where a volunteer seeks consent but the employer refuses.

In contrast, legislation in Queensland, Tasmania and the Northern Territory states specifically that the employment rights of a volunteer are protected 'whether or not his usual employer has consented to his absence'.<sup>30</sup>

The ACT takes an alternative approach. ACT legislation does not focus on whether consent has been given. Instead it directs emergency services organisations to release a volunteer member from current operations if satisfied that their absence 'would cause significant hardship to the business of the employer'.<sup>31</sup> This allows an employer to seek the release of an emergency volunteer who did not obtain prior consent.

### **Workers compensation for emergency volunteers**

Another issue not addressed in the current Bill is the extent of protection available to volunteers when taking part in emergency operations. Most legal entitlements in the

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employment context are premised on the existence of a contract under which the worker is paid in return for work done. On this basis, volunteer workers are excluded from workers compensation legislation even if the injury or illness is directly related to the work they have been doing.

To get around this problem, volunteers in some States are 'deemed' to be employees under certain legislation. An example is the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), in which bush firefighters and ambulance workers are deemed to be employees for the purpose of workers compensation.<sup>32</sup>

In Victoria, volunteer emergency workers are entitled to compensation under the *Emergency Management Act 1986* if they are injured while engaged in an emergency activity.<sup>33</sup>

Most volunteer workers, however, are not afforded the same protection.<sup>34</sup>

## Parallel obligations

Since the protection afforded by the current Bill is narrower than in equivalent State and Territory legislation – and the Commonwealth's constitutional power may be limited<sup>35</sup> – it is unlikely that the Commonwealth intended 'to cover the field'<sup>36</sup> in relation to the rights of emergency services workers. In other words, the current Bill will not replace but add to existing State and Territory legislation in this area. Employers in States and Territories may therefore find themselves bound by two separate sets of obligations in relation to employees who are also emergency services volunteers.

Parliament may wish to consider expanding the protection for emergency services workers to include the type of broader provisions found in State and Territory legislation. However, the Commonwealth may not have sufficient constitutional power to enact comprehensive national laws providing such broader protection for all emergency volunteers.<sup>37</sup> Other ways of proceeding include a referral of power from the States<sup>38</sup> or a constitutional referendum.<sup>39</sup>

## Endnotes

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- 1 House of Representatives, *Debates*, 6 February 2003, p. 1141.
- 2 *The Australian*, 29 January 2003, p. 4.
- 3 *WorkplaceInfo*, 'Anti-victimisation laws protect emergency volunteers', 2 January 2002.
- 4 *Workplace Info*, 'CFMEU takes action to protect volunteers', 29 January 2003.
- 5 *State Emergency and Rescue Management Act 1989* (NSW) Part 3A; *Emergency Services Act 1976* (Tas) section 42; *State Counter-Disaster Organisation Act 1975* (Qld) section 35; *Public*

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*Safety Preservation Act 1986* (Qld) section 9; *Emergency Management Act 1999* (ACT) section 76; *Disasters Act 1982* (NT) section 47; *Fire and Emergency Act 1996* (NT) section 15; *State Disaster Act 1980* (SA) section 18.

- 6 *State Emergency and Rescue Management Act 1989* (NSW) section 60D.
- 7 *Emergency Services Act 1976* (Tas) section 42; *Disasters Act 1982* (NT) section 47; although this limitation does not apply to volunteer members of the NT Fire and Emergency Services: see *Fire and Emergency Act 1996* (NT) section 15.
- 8 *State Counter-Disaster Organisation Act 1975* (Qld) section 35; *Public Safety Preservation Act 1986* (Qld) sections 8 and 9.
- 9 Crean, Hon Simon, MP, 'First Reading', Workplace Relations Amendment (Emergency Services) Bill 2002, House of Representatives, *Debates*, 21 October 2002, p. 8120.
- 10 Abbott, Hon Tony, MP, 'Second Reading Speech', Workplace Relations Amendment (Protection for Emergency Management Volunteers) Bill 2003, House of Representatives, *Debates*, 6 March 2003, p. 1207.
- 11 Explanatory Memorandum, p. 1.
- 12 *The Australian* 29 January 2003.
- 13 *The Australian*, 29 January 2003.
- 14 Abbott, Hon Tony, MP, 'Second Reading Speech', Workplace Relations Amendment (Protection for Emergency Management Volunteers) Bill 2003, House of Representatives, *Debates*, 6 March 2003, p. 1207.
- 15 Crean, Hon Simon, MP, House of Representatives, *Debates*, 6 February 2003, p. 1141.
- 16 <http://www.ilo.org/ilolex/english/recdisp2.htm>
- 17 Explanatory Memorandum, p. 3.
- 18 The Commonwealth's ability to legislate in the area of workplace relations is based on a combination of constitutional powers: primarily s 51(35) 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. As Creighton and Stewart note, however, 'the wording of s 51(35) suggests that the founders of the Constitution intended that the Commonwealth Parliament should have only a limited power to make laws with respect to industrial relations'. (*Labour Law, an introduction*, 3<sup>rd</sup> edition p 82.)

Other provisions in the Constitution have been used in an attempt to broaden the constitutional coverage of Commonwealth workplace relations laws, including s 51(20) corporations, 51(1) trade and commerce and 51(29) external affairs. But compared with the ability of the States to legislate on the full range of industrial and workplace relations matters, it appears Commonwealth coverage in this area remains incomplete. According to Creighton and Stewart, 'relatively few incorporated bodies would now be excluded from the reach of s 51(20)...Nevertheless, there are many small to medium employers in Australia who do not have corporate status, but instead operate as sole traders or partnerships'. Moreover, 'what s 51(1) cannot do is to reach employers engaged only in intrastate trade, many of whom are

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likely to be the very businesses who would also fall outside the scope of the corporations power' (*Labour Law, an introduction*, 3<sup>rd</sup> edition pp 83-84.)

The High Court has held that the external affairs power in s 51 (29) can justify legislation – including industrial relations legislation - that is 'reasonably appropriate and adapted to' the implementation of an international instrument (*Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416. Thus, where an international instrument such as an ILO Convention addresses the relevant area, the external affairs power can be used to ensure that workers who might not come within the other heads of power are covered by the Commonwealth legislation.

As far as Recommendation 166 is concerned, however, there is uncertainty about whether the external affairs power can be used to implement anything less than an international 'obligation'. As Harris states, it should be noted that the court in the *Industrial Relations Case* 'did not find it necessary to decide whether mere recommendations (as opposed to treaties) could form the basis of s51(29) legislation.' (Bede Harris, *Essential Constitutional Law*, p 135). According to Blackshield and Williams, 'despite some peripheral comments on that question in the *Industrial Relations Act Case*, the precise effect of 'recommendations' must still be regarded as open'. (Blackshield and Williams, *Australian Constitutional Law and Theory*, 3<sup>rd</sup> edition, p. 774).

- 19 Explanatory Memorandum, pp. 3–4.
- 20 Kiefel J in *Bidjara Aboriginal Housing & Land Co Ltd v Indigenous Land Corporation* [2000] FCA 1501 (25 October 2000) at para 33, a statement specifically approved by the full Court on appeal at [2001] FCA 138 (27 February 2001) at para 34.
- 21 *State Emergency and Rescue Management Act 1989* (NSW) section 60C; *Emergency Management Act 1999* (ACT) section 76.
- 22 *State Disaster Act 1980* (SA) section 18.
- 23 *State Counter-Disaster Organisation Act 1975* (Qld) section 35; *Emergency Services Act 1976* (Tas) section 42; *Disasters Act 1982* (NT) section 47; *Fire and Emergency Act 1996* (NT) section 15.
- 24 Section 9.
- 25 As noted in *Australian Industrial Law Reporter* (at para 13-245), 'benefit' was defined by Johnson C in *Balfour v Travelstrength Ltd* (1980) 60 WAIG 1015 as follows:

the word 'benefit' ought to be wide enough to allow an employee to bring to the Commission a matter in which the employee believes he has been deprived of some advantage, entitlement, right, superiority, favour, good or perquisite by the action of the employer in contravention of a provision of the contract of service.

It was also approved and applied by the Full Bench in *Perth Finishing College Pty Ltd v Watts* at page 2313. The lack of limitation on the meaning of the word "benefit", or more accurately, the breadth of meaning permitted, was emphasised by the Full Bench in *Perth Finishing College Pty Ltd v Watts* at pp 2313-2314 (see also *Welsh v Hills* (1982) 72 WAIG 2708 (FB)).

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The phrase 'actual or accruing rights' would appear, if possible, to have an even wider meaning than 'benefit'. According to Mozely and Whiteley's Law Dictionary (12<sup>th</sup> edition, p 322) the word 'right' means 'a lawful title or claim to anything'. Given the wide scope of 'benefit' and 'right', use of these terms in the employment context would appear to include wages or salary.

- 26 *State Emergency and Rescue Management Act 1989* (NSW) section 60C, *Emergency Management Act 1999* (ACT) section 76 (emphasis added).
- 27 *State Disaster Act 1980* (SA) section 18.
- 28 *Emergency Management Act 1999* (ACT) sections 3 and 76.
- 29 *Disasters Act 1982* (NT) section 47; see also *State Counter-Disaster Organisation Act 1975* (Qld) section 35.
- 30 *State Counter-Disaster Organisation Act 1975* (Qld) section 35; *Emergency Services Act 1976* (Tas) section 42; *Disasters Act 1982* (NT) section 47.
- 31 *Emergency Management Act 1999* (ACT) section 76.
- 32 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) section 5 and Schedule 1.
- 33 *Emergency Management Act 1986* (Vic) section 27.
- 34 *Australian Industrial Law Reporter* 72–110.
- 35 See note 18 above.
- 36 Under section 109 of the Constitution, a Commonwealth law prevails over inconsistent State legislation. Inconsistency occurs – amongst other situations – where the Commonwealth intends its legislation to be the sole law on a particular topic, ie where the Commonwealth intends to 'cover the field' in the particular area.
- 37 Apart from uncertainty about whether the s 51 (20) 'external affairs' power can be used to implement an international 'recommendation' as opposed to an 'obligation' (see note 18 above), ILO Recommendation 166 (used as the basis for protection against termination in the current Bill) does not address wider employment rights. It would not therefore be constitutionally valid to use Recommendation 166 as the basis for laws conferring broader protection on emergency volunteers.
- 38 Section 51 (37) of the Constitution gives the Commonwealth the power to make laws in relation to 'matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States'. In 1996, Victoria referred its legislative authority over most aspects of employment conditions and labour relations to the Commonwealth. See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) section 6, discussed in Creighton and Stewart, *Labour Law, an introduction*, 3<sup>rd</sup> edition, p89.
- 39 Constitution section 128.

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