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I request to speak to the committee.

This is my submission on **underlying policy rationale problems** with the new Bill, and the parallels and potential problems that may arise like they did in Victoria Police when a similar issue arose.

We have seen what happens with the welfare of emergency services members when they are left in limbo, and their resources and money are not properly spent in the areas needed. In Victoria Police the cuts to Record Services Branch (RSB oversee things like warrants) and Police Prosecutions (the police members who represent Police in the magistrates' court) have seen increased numbers in mental health problems (including suicides) because the government is spending money and resources on where it thinks it is needed (front line services) and not asking members where it should be spent (backline services to ensure those picked up have their warrants and other paperwork timely executed).

This drain has seen many police officers leave after eating their own guns, or own sanity, and few getting the resources (such as workers compensation payouts for counselling) needed. Whilst it would be unfair to solely blame the Labor government for this poor treatment of police officers, these parallels of making decisions and spending money without proper consultation could see firefighters seeing the barrel of a gun themselves.

It is at crisis point for many staff and volunteer members, and if the government will just repeat the mistakes of policing past, who will stand up for firefighters?

This new Bill has several underlying policy rationale problems, which have leaked their implications onto other upcoming bills.

So, I ask the following be answered by government for further clarification;

The first question to ask is a simple one, why is this Bill just an amendment to the MFB Act?

If we truly need a new staff service shouldn't a new one be established with better public and firefighting consultation? If a new service isn't needed, and just an amendment is, why are all these resources being used up, rather than being directed into better things such as a more comprehensive compensation fund for the victims of Fiskville? Illnesses such as asbestos related conditions may not be comprehensively covered under the compensation bill, but these questions are not being explored, instead government is just fixing what they think needs fixing.

The second question is for the emergency services minister, why are allocation statements needed?

Allocation statements under s 105 (*Firefighters Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2017*) give the minister power to call upon CFA to give any property right, liability or obligation the minister needs to establish the FRV. According to the bill these terms paraphrased mean;

Property: any legal or equitable interest, now or in the future, vested or contingent, in real or personal property. This could include (and is not limited to) volunteer firefighter stations, appliances and equipment regardless of makeup of ownership (100% brought with community donations, or part owned by CFA part owned by the brigade etc).

Rights: all rights, powers, privileges and immunities that are actual, contingent or prospective owned by volunteers can be given to FRV under s 105.

Obligation: appears to be defined to the ordinary use of the word.

The word 'may' in this provision confers a directional power that the minister has a '(duty to do if all the conditions of the provision are met)'¹. Arguably, this criteria is set out by the explanatory memorandum that allows the minister to follow through with this power if any CFA station (integrated or not under s 105(2), has something that is needed to help establish the FRV.

This is because s 105(2) allows s 105(1) which just covers integrated stations, to be expanded to anything not belonging to the district headquarters or VEMTEC (which means other volunteer training colleges like Bangholme may be given to FRV). This includes volunteer only stations and other premises not listed in the column 2 of schedule 3 of the Bill, if they have any instructors or PAD operators whose job provides training to integrated brigade members (whether it is at the integrated station or not, and given the diversity of volunteer membership they'd be few stations excluded from this ministerial power).

The explanatory memorandum says this power is to establish the FRV only and ceases in 2018 and 2019.

This is because there are two conflicting dates on the bill (the Bill says 2018 and the explanatory memorandum says 2019) but there is little to suggest s15(1) *Interpretation of Legislation Act 1984* (Vic) wouldn't come into effect which may allow the minister to exercise this power after the expiry date/s.

The word 'must' in s 105(7) can be argued to be a direction (allowing the expiry dates to take effect and stop this power from being exercised) but still allow for a legal challenge (or parliamentary change) for the power to continue being used after the expiry. Whilst it is likely the former would prevail it is a concern this loop hole is still left open anyway.

From this power two major policy problems arise;

EBA problems

The EBA calls for UFU and CFA to agree to where staff are deployed and employed and transferred. Section 105(2)(a) allows the minister to take this obligation from CFA, such as their workplace obligation to follow the EBA, and move staff members for whatever operational or non-operational reason. There seems to be no real constraint on this minister's power. Why would the government wish to intervene with how the union and CFA operate by limiting the UFU's powers on commenting on these matters if they support the UFU and EBA?

It also leaves CFA in a pickle because if they don't follow the EBA then the UFU can act against them for breaching the EBA, but if they don't follow the minister's orders (allocation statements do not have a consultation clause CFA must comply or be in breach of the act which is upheld in the explanatory memorandum so CFA can't speak UFU) then they can be in trouble by the minister for not following a ministerial direction.

¹ *Samad v District Court of New South Wales* (2002) 209 CLR 140 (Beazley JA, Stein and Heydon JIA), cited in *Laying Down the Law* Ch 13 p 15.

CFA can also be liable for breaches against the volunteer charter (by the new bill before parliament) for entering agreements that don't protect the interests of volunteers (such as moving staff around without asking volunteers even though they can't go against the minister).

Why is the government putting volunteers in such potential legal situation?

The explanatory memorandum says once the allocation statement has been issued it is up to the minister's discretion to action it, but is written as a directional power for which there is no room for discretion, so what is the government playing at by having these sorts of powers over volunteers, the UFU and staff firefighters?

Volunteer Rights

The forced transfer of rights and liabilities are more of a concern for the FRV, because they will stay with them after this clause's expiry date, and will not be able to transfer them back to CFA (as s 105 is a one-way power). So, if someone were to commence a class action suit for Fiskville or Bangholme or even VEMTEC over their environmental problems, it is highly likely that FRV would be liable rather than CFA. What is a concern in this process is the lack of consultation and the loss of property rights for volunteers.

Whether CFA own the station outright as the RP/Owner or are under a lease agreement with the government for the building, the wording of this allocation statement allow the minister to take the station (or block off any part of it) for the establishment of FRV. This, just like any other right lost, would mean volunteers have no straightforward consultation or appeals process and can be left with a fire station, or truck or anything in between.

This would remain the property of FRV even if the expiry date could be successfully upheld.

There is nothing in the bill to suggest the government would have to replace anything given to FRV, it would be the minister's discretion to give volunteers money, or FRV money if the volunteer equipment is old/doesn't meet EBA standards.

This would be the case even if the brigade in question 'owned' it, such as the fire truck or hoses were brought with 100% community donations, or donations helped build 40% of the fire station. There may be private avenues a station could explore, such as equitable remedies, but given the indemnity clauses the government have given themselves (also known as legal protections which are listed under s 116) it is unlikely much could be done. This is because s 105 would allow the minister to control any part of the CFA trust fund (which is the structure all CFA finances are managed under). It would also apply to volunteer only stations under the legal argument of having instructors or PAD operators providing training to integrated stations and given the diversity of volunteer membership they'd be few stations whose instructors during the year wouldn't provide training to integrated firefighters either at their stations or away like at Bangholme.

Example

Mernda fire station is not integrated but have a member who is a paid CFA instructor, whom twice a year provides training to members from integrated stations at Bangholme. This would set up the argument that Mernda falls under the allocation powers for the minister. They are identified as having a station, that due to its close proximity to several nearby stations, and failing daytime response rates, to need FRV staff. The minister decides they only need day staff, and overrides the EBA to use his ministerial powers to make CFA convert this station into integration. This would

override any CFA and UFU agreements such as the EBA. After a month of this integration the minister decides the staff need the tanker. Currently the staff look after the pumper of Mernda, and volunteers the tanker. Volunteers lose their tanker and can only respond by 'brigade car' to incidents. After a month of not being able to respond due to this limitation the minister converts the station to FRV only. Again no consultation with communities, firefighters or their bodies (UFU and VFBV) are needed. Some may say its unlikely this would ever happen, but if its in the Bill as a possibility can you really trust government to *never* use it?

The third question: Why is the government and parliament accepting a bill to limit volunteer rights at Fair Work?

The new *Fair Work Bill* is summed up in the second reading speech-

Objective of the bill

The central purpose of the bill is to remedy the disparity between public sector employers that are constitutional corporations and public sector employers that are not constitutional corporations (referral employers) by legislating to ensure that section 5(1)(a) matters may be included in public sector enterprise agreements covering referral employers and those terms may be enforced by way of civil remedy provisions under the commonwealth Fair Work Act.

If an amended referral is not made in the manner proposed by the bill, some public sector employers and their employees are free to bargain about section 5(1)(a) matters, while others are not.

This Bill is designed to better codify some of the referral powers Victoria retained when industrial relations became a national, legal framework under the Howard government.

The government has said this has come about after the UFU and CFA last went to court², and codifies a way to approve EBAs with potential objectionable terms, that Labor said they would use even when back in opposition³, so if this was part of Labor's platform why wait for the UFU case? They didn't need the UFU case as a test case because they had the power to create the amendment without a referral case.

It is interesting to note however that the legal points that arose in that *UFU v CFA* case the same legal arguments just happen to be quoted in the government's submission⁴. Were the UFU involved in using their EBA to help the government test their potential new strength in fair work matters should the bill pass, was it coincidence or was it a move to set up the UFU as trying to bully their way into ensuring their EBA would pass regardless of CFA and community objections?

² See Government's submission to the productivity commission inquiry into the Workplace Relations Framework at paragraph 30 (http://www.pc.gov.au/data/assets/pdf_file/0011/188309/sub0176-workplace-relations.pdf)

³ https://www.maddocks.com.au/app/uploads/2015/01/The_Labor_Response.pdf Daniel Andrews wrote a letter himself to the CPSU

⁴ See point two above at paragraph 8.10

It should be noted that due to the VFBV's business registration not meeting the incorporated definitions under the 'respect the volunteers' amendment, only under State law, they may not a body that can speak on the EBA to Fair Work under the federal amendment. There is (arguably) room for volunteers to speak on their own behalf. It is however unlikely this would be effective, because under this new Bill 'objectionable' matters that would otherwise be prohibited under the Federal Fair Work Act can still be registered and approved by Fair Work resorting back to Victorian Fair Work laws. This isn't to get into a discussion about the constitutional validity of Victoria and Commonwealth industrial relations powers on the matter, but to ask the government why do they need to silence volunteers and union like this?

The fourth question, the new charter

The amendment to s 6H of the *CFA Act* will turn the charter into a penal provision, creating a penalty if the provision is breached. When interpreting a charter though, as per *Momcilovic v R* (2011), *Project Blue Sky* is to be upheld and that provision must be read in accordance to ordinary statutory interpretation⁵. This would change the current charter from a guideline to one that may create a penalty to leave any agreement or action breaching the charter as void.

Example

The FRV and government have signed their EBA and it is actioned. CFA signs on these staff members to fill up their old roles as members of integrated stations. CFA must uphold their EBA rights if keeping them as FRV members 'employed' by CFA or contracted from FRV to assist CFA. If these FRV firefighters are to be kept as employed by CFA (through the government as government employees) and CFA sign their EBA then the volunteer charter will void (cancel) their EBA and then what happens to these staff members? Even if CFA were to take these members on with their EBA (as the Bill does not suggest CFA could revoke their EBA rights with a separate CFA/FRV agreement) then that contract 'hiring' FRV staff becomes void.

Is the government then not going to proceed with the EBA in its current form, or do so anyway and give no regard to the firefighters left in limbo?

Will there be a second EBA, one for those who solely work at an FRV station and those who work at a CFA station?

It should be noted the transfer process has not be finalised at the time of writing this submission (as far as I am aware).

The fifth question, where is the money going to?

The explanatory memorandum says s 105 is needed to transfer things to FRV to establish that body so where is the money allocated for this project going to, if the FRV are going to get the volunteer's older equipment? The bill allows for no consolation so volunteers wouldn't get a say on the matter, and there is no legislative process listed on the bill to say how new equipment will flow into the service. Are the government going to properly cost this later on because it will cost more than

⁵ This can be further explored at page 46 (http://www.judicialcollege.vic.edu.au/sites/default/files/VictorianHumanRightsCharterCaseCollection_April2015.pdf)

projected, or are they unconcerned with volunteer stations being potentially left with less equipment or that staff may have equipment handed to them when support for volunteers should have seen it replaced ages ago?

1. Who would then wear the applicable penalty for breaching the EBA?

- a. Cl 90.4.1 of the EBA says UFU and CFA must agree on clothing (including PPC) equipment and technology and station wear and appliances, but CFA still be compelled to do the allocation statement when the EBA is signed? If so, will UFU be forced to go with what the minister wants? or will the minister be compelled to discuss the allocation statement with UFU because there is no discussion clause with the new Bill.

Finally, will what's happened to Victoria Police happen to firefighters?

Victoria Police, under the Labor government, have seen an increase to important front line services and moving once police roles to non-uniform roles like custody, to free up more police officers for front line services. Where this logic has failed is in two important areas; police prosecutions and RSB. These services are important for ensuring warrants are executed quickly (RSB) and that alleged members get their day in court (such as police opposing bail). The strain these services have seen under Labor have resorted in mental health problems and (whilst not accusing the government of pulling the trigger) seen members leave the force after eating their own guns or unable to function from the mental health problems after not addressing these lacking resources.

If this 'firefighting transformation' leaves any gap in resources or funding then what is happening within police (which suicides whilst taboo, they are a big problem in policing, along with members leaving and no money or resources to help with their mental health problems) will likely happen to firefighters too.

In conclusion, our police have been let down. If this Bill goes ahead without proper, and longer consultation, then our firefighters may find themselves in the same dark spot, facing the barrel of a gun. This piece in no way suggests the government is responsible for anything, I make no such accusation, but a plea that if government is willing to let down our emergency services then can this committee please help firefighters-

And help draw attention to the silent group facing a similar uphill battle: Victoria Police.

Thank you,

R. Isaacs