CODE RED: Fair Work and the long march of the unions through our emergency services institutions

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Executive Summary

There has been widespread community concern about the proposed new enterprise bargaining agreement (EBA) between Victoria’s County Fire Authority (CFA) and the United Firefighters Union (UFU) and the devastating effect that the union’s power-grab will have on the ability of the CFA to effectively manage its volunteers and fight fires.

So-called ‘consult and agree’ provisions and ‘dispute resolution’ clauses, which are increasingly being inserted into public sector EBAs, give unions an effective veto over a wide range of operational matters and are also responsible for an increase in disputes.

Just in relation to recent emergency services EBAs, matters that have been the subject of dispute resolution because of failed ‘consultation’ have included:

- a long dispute over whether management could limit firefighters’ personal internet use during work hours;
- migration of the Metropolitan Fire Board’s (MFB) computer operating system to Windows 7, was delayed by one year due to a dispute with the UFU;
- proposed changes to the type of Chinagraph Pencils used by firefighters; and
- the introduction of a number of technological improvements, such as new appliances, ladder platform replacement, breathing apparatuses and the like.

While the Turnbull Government recently introduced legislation to the Parliament to prohibit EBA clauses that restrict an emergency management body’s ability to manage volunteers, this change does not go far enough.

Instead, the Fair Work Act must be amended so that only matters pertaining to the employer-employee relationship are permitted in EBAs. This would not restrict the ability of unions to raise issues of concern with an employer, but would prevent them from using the system to thwart operational decisions with the backing of the Fair Work Commission.

This paper also recommends further reforms to the enterprise bargaining framework to:

- Remove the role of the Fair Work Commission in approving Enterprise Bargaining Agreements. This role is largely administrative. The substantive role of deciding whether employees are ‘better off overall’ compared to the award is also unnecessary. The best decision makers about this requirement are the employees themselves, along with their representatives;
- Amend the Act to strengthen provisions relating to flexibility terms to ensure that unions cannot attempt to limit their effectiveness; and
- Increase the duration of EBAs. This will increase flexibility, and limit the frequency of drawn-out negotiation process that – for the public sector bodies – have tended to morph into political campaigns.

These proposals represent common sense changes to improve efficiency, flexibility and productivity within the existing Fair Work regime –militating against the perverse incentives to exploit the EBA process.

However, they represent only a fraction of the wider industrial relations reforms that need to be undertaken in Australia.
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Introduction

The era of Fair Work in Australia’s industrial relations history has put unions in an unprecedented position of privilege and influence. Recently, the attempted hostile takeover of Victoria’s country fire services by the United Firefighters’ Union (UFU) has given us a look at the consequences of union excess.

For almost 1,200 days, negotiations between the County Fire Authority (CFA) and the UFU over a new enterprise bargaining agreement (EBA) have been at a stalemate. At the heart of the industrial dispute was not a matter of pay or conditions, but union demands for power under the EBA to effectively veto management decisions on CFA staffing (particularly including by volunteers – who are not party to the agreement), equipment and processes. The dispute came to public attention with the spectacular resignation of then-Minister for Emergency Services Jane Garrett, in response to the Andrews Government’s continued efforts to railroad the CFA into the contentious EBA. The CFA’s Chief Executive Officer resigned, along with the Chief Fire Officer. The CFA’s board was sacked by the Victorian government after it refused to approve the union’s claims.

The belligerence of the UFU – aided and abetted by an extremely sympathetic state government – has been the subject of considerable public debate. However, little attention has been given to the structural flaws with the Fair Work regime that have enabled the dispute to fester.

Commentary has focused on the relatively recent symptoms, but the underlying disease is more complex and longstanding. While public sector unions campaign vocally on ‘wages and conditions,’ enterprise bargaining agreements adopted since the commencement of the Fair Work regime have expanded union influence to organisational and operational matters. This has occurred to the detriment of taxpayers and emergency services organisations and threatens to compromise public safety.

Victorian emergency services bodies have been uniquely susceptible, due to – ironically – the Kennett Government’s referral of the state’s industrial relations powers to the Commonwealth in the 1990s. As a result, institutions like the CFA are exposed to the Fair Work regime, whereas the public service in other jurisdictions is governed by self-contained state systems.

Within the Victorian public service, the ongoing firefighters’ crisis is both the most extreme and the most illustrative case study on the consequences of Fair Work, because of:

- the relatively high confrontational culture within the UFU;
- the high-profile dispute between the CFA and the UFU, which has resulted in CFA senior management publicly expressing frustration with navigating the Fair Work system; and
- the incompetence of the Victorian state government in dealing with the dispute, which has played out largely in the public arena, giving us a rare insight into the dysfunctional relationship between emergency services workers and management.

This paper will:

- explore the way in which the Fair Work regime ‘opened the door’ to union control over emergency services bodies;
- examine the enterprise bargaining agreements that have served as the mechanism by which unions are able to exert influence over operational and organisational matters;
- discuss the impact of Fair Work and subsequent enterprise bargaining agreements, using the Victorian firefighters’ dispute as an example; and
- suggest reforms to the Fair Work Act that should be pursued.
Section 1: Legislative background

A brief history of collective and enterprise bargaining

Australia has a long history of collective bargaining. Formal laws allowing for the registration of unions passed in the parliaments of various colonies in the 1880s, following the passage of the Trade Union Act 1871 (UK). These laws made it possible for unions to negotiate with employers – although unions existed for decades prior, with craftsmen such as the shipwrights and cabinetmakers forming unions in the 1830s.

While enterprise-level bargaining was present in the early Australian experience, after Federation it would be almost a century until it would re-emerge as the dominant form of collective bargaining.

The new Federal parliament established the Commonwealth Court of Conciliation and Arbitration in 1904. Constitutionally, the court had jurisdiction to adjudicate disputes extending beyond the limits of more than one state. There were State-based regimes in place that co-existed with the Federal system. The union movement used compulsory conciliation and arbitration as a legal mechanism to take disputes to a tribunal where the employer refused to negotiate. When the court made a ruling, the decision was known as an ‘award’. The terms of awards would be extended out to all firms in a particular industry – limiting the scope for enterprise-level bargaining. Any agreements at a workplace level would be ‘above-award’ rather than in place of it. The conciliation and arbitration system provided the basis of the centralised Federal industrial relations framework that endured until the 1980s.

In 1993, the Keating government introduced the Industrial Relations Reform Act 1993 (the 1993 Act) which included provisions to ‘promote bargaining and facilitate agreements’ at a workplace level. The Minister for Industrial Relations, the Hon. Laurie Brereton MP, described the changes in the following terms:

This legislation marks the culmination of the government’s break with the past—our move as a nation from a centralised to a decentralised industrial relations system, to a system based primarily on bargaining at the workplace, with much less reliance on arbitration at the apex... In embarking upon this great change, employees and employers alike can and will benefit. Bargaining by nature should involve potential gain for both parties. It will be willingly embraced where it does. In creating a framework for fair, mutually advantageous bargaining, the legislation is vigilant in protecting those who have little to bargain, in protecting the weaker party. And that weaker party will almost invariably be the employee.

The 1993 Act provided for two forms of agreements – certified agreements and enterprise flexibility agreements (for the non-union sector). Importantly, these agreements allowed variation of the applicable award conditions subject to a no-disadvantage test.

From this time, agreements in one form or another became the dominant mechanism for collective bargaining in Australia – with the award system remaining as a default setting or safety net.

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1 E.g. see: Trade Union Act 1881 (NSW); Trade Unions Act 1884 (Vic).
3 Conciliation and Arbitration Act 1904.
4 Australian Constitution, section 51(XXXV).
Underlying economic rationale
The rationale underlying collective bargaining is that employees are able to gain above-market increases in wages and conditions from their employer by forming a union and restricting the supply of labour – in other words, by forming a monopoly. This can be achieved by a single union, or by several unions forming a cartel to advance their similar interests. If collective bargaining is to be done, it makes economic sense for bargaining to occur on the enterprise level.

On the employer side, the ability to pay wages and conditions will be relative to the economic value, productivity and efficiency of the work being undertaken. This will be different for different industries, and different for individual businesses within those industries. Enterprise bargaining, therefore, allows individual businesses to maximise their productivity. As a recent Productivity Commission report noted, enterprise bargaining provides ‘scope for cementing cooperation between parties that have a mutual stake in the efficiency and performance of the individual enterprise.’

On the employee side, it means that the union is bargaining with one employer – and this increases its bargaining power compared with having to negotiate with all firms in an industry.

Both parties benefit from lower transaction costs that are involved in reaching an agreement at the enterprise-level, compared with an industry-level agreement that might consist of tens or hundreds of employers. These transaction costs are further minimised by having all the employers’ obligations listed in a single enterprise agreement, rather than many different arrangements.

The points discussed above are equally relevant to public sector employers, as separate government departments, agencies or statutory authorities all have their own specific job functions and operational requirements. The public sector body (or the government of the day more generally) may be under pressure from employees – and their unions – to use an agreement to increase wages or gain other improvements in employment conditions. The political pressure that public sector unions seek to exert on governments cannot be understated (indeed, unions are given an incentive under the current agreement negotiation provisions for extending bargaining for as long as possible, as employees cannot strike or take other industrial action until the new agreement expires).

Meanwhile, an enterprise agreement provides the public sector body with an opportunity to lock in productivity improvements to offset pay increases. For all parties, the agreement combines all the employment obligations into a single document.

Current legislative provisions: Fair Work Act
The Fair Work Act 2009 (the Act) provides for one type of collective agreement known as an ‘enterprise agreement’. This is agreement between one or more national system employers and their employees. Relevantly, all employees in Victoria are covered (with limited exceptions in relation to State public sector employees).

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6 The authors’ view is that in a society that values freedom of association, nothing should prevent an individual from being able to join a union or undertake lawful union activity. Collective bargaining becomes an issue, however, where the industrial relations framework provides a union with a special privileged position.

7 Productivity Commission, Workplace Relations Framework, Inquiry report no. 76, 2015, p. 34.

8 See: Re Australian Education Union (1995) 184 CLR 188, where the High Court held that an industrial award (made under a predecessor to the Fair Work Act) could not impair the capacity of a State government to determine the number and identity of State government employees it wishes to employ or make redundant.
Content of the agreement

The Act describes the matters that the agreement can cover, what it must cover, and what it cannot cover. We will briefly consider these in turn.

First, section 172(1) of the Act provides that an agreement may be made about ‘permitted matters’, which are:

a) terms about the relationship between each employer and the employees covered by the agreement;
b) terms about the relationship between each employer and any employee organisations (e.g. a trade union) who will be covered by the agreement;
c) deductions from wages for any purpose authorised by an employee covered by the agreement; and

d) how the agreement will operate.

The broad wording of this section is problematic. For instance, it has enabled the union movement to seek extensive union perks out of public sector agreements. Lane and Paterson (2015) identified this issue in their analysis of Commonwealth public service EBAs:

> All agreements contain prescriptive arrangements which guarantee union delegates access to use workplace facilities, infrastructure, technology and resources – and paid time – for the purposes of carrying out their role with their union. This means all union delegates in the public sector receive taxpayer funding to carry out their union role and receive access to taxpayer funded resources.

In the context of the Victorian CFA dispute, the UFU has been able to make bargaining claims about the management of the CFA’s extensive volunteer capacity. The decisions of the Fair Work Commission to date seem to indicate that these clauses sit within the permitted matters. The issues with this proposed agreement and other case studies will be discussed in Section 2 of this paper.

In addition to the permitted matters, there are certain terms that are mandatory – including length of the agreement, dispute resolution, flexibility and consultation. Section 186(5) requires a term that specifies the length of the agreement – a nominal expiry date that is no longer than four years from the date of the agreement. Section 186(6) requires a dispute resolution procedure that must authorise either the Fair Work Commission or someone else that is independent of those covered by the agreement to settle disputes. Section 202 requires a flexibility term. Stewart notes that ‘unions have generally resisted the inclusion of broad flexibility terms in agreements. It has become standard practice for them to propose a term that permits the minimum possible scope for variation.’

Finally, section 205 requires an agreement to have a consultation term, requiring the employer to consult their employees about any major workplace changes that are likely to have a significant effect on them and allows the employees to have representation in that consultation. The

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requirement of these terms has facilitated the rise of union-control provisions guised as ‘consultation,’ which will be detailed in section 2 of this paper.

The Fair Work Regulations 2009 (the ‘Regulations’) provides for model dispute resolution, flexibility and consultation terms – an off-the-shelf term that the Fair Work Commission will adopt where one is not included in the agreement.

Accordingly, a question for reform is how to ensure that genuine flexibility provisions are being included in agreements – and how union control provisions are not guised as consultation. These policy questions will be addressed in section 5 of this paper.

Section 186(4) of the Act provides that an enterprise agreement cannot include any ‘unlawful terms’, which are defined in section 194. These include a discriminatory term, a term that would require a bargaining services fee, or a term that undermines other provisions of the Act relating to general protections, unfair dismissal, industrial action, or right to entry.

Agreement process

There are a number of preliminary steps that are set out in the Act before an agreement can be submitted to the Fair Work Commission for approval.

The first stage is the provision of notice to all employees that will be covered by the proposed agreement, and their bargaining rights. The form of this notice is prescribed by the Regulations.

Stage 2 is the appointment of bargaining representatives. In theory, employees can appoint anybody to act on their behalf, or be their own bargaining representative. In practice, particularly in the public sector context, this will generally be the relevant public sector union such as the Community and Public Sector Union or the UFU, for example. The employer is also able to appoint a representative.

Stage 3 is the substantive bargaining process, where the parties’ logs of claims are considered. While the Act does not provide detail about how this stage is to take place, there are a number of possible scenarios that may play out, which Figure 1 illustrates. After 21 days from the date of bargaining rights notification, the employer can take the agreement to a vote of members.

Stage 4 is employee endorsement of the proposed agreement. The Act requires before the vote takes place, the employer must take all reasonable steps to give employees a copy and explain the terms of the proposed agreement.

Where the agreement is passed, stage 5 is that a bargaining representative must apply to the Fair Work Commission for approval. Ordinarily, this needs to be done within 14 days of making the agreement. Under sections 186 and 187, for single-enterprise agreements, the Fair Work Commission must approve the agreement where it is satisfied that:

- the agreement has been genuinely agreed to by the employees covered by the agreement;
- the agreement passes the Better Off Overall Test (BOOT);

13 Fair Work Act 2009, section 181(2).
15 Fair Work Act 2009, section 185.
16 Note that the Productivity Commission review recommended the change to a no-disadvantage test (NDT), which would achieve the same outcome more efficiently by putting the burden of proof on the FWC rather
• the agreement does not include any unlawful terms or terms that are inconsistent with the NES;
• the group of employees covered by the agreement was fairly chosen;
• the agreement specifies a date as its nominal expiry date (not more than four years after the date of FWC approval);
• the agreement does not include any designated outworker terms;
• the agreement provides a dispute settlement procedure;
• the agreement includes a flexibility clause and a consultation clause; and
• approval is consistent with good faith bargaining.

than the proponents of the agreements. That is, under a NDT, in order to reject an agreement, the FWC would need to identify how a proposed agreement makes employees worse off overall. See recommendation 20.5.
Figure 1 – Bargaining Process under Part 2-4 of the Fair Work Act 2009

- **Notice of employee representational rights**
- **Appointment of Bargaining Representatives**
- **Bargaining Process**
- **Protected industrial action** (e.g. a strike) – this must be approved by employees by a secret ballot. The Fair Work Commission and the Minister for Employment have powers to make orders suspending or stopping industrial action in limited circumstances. This can only occur after an agreement is expired.
- **Unprotected industrial action** Fair Work Commission can make orders to stop the action, or prevent it from occurring – on its own initiative or upon an application.
- **Bargaining dispute** (e.g. breach of good faith requirements; or unable to reach agreement on proposed terms) – one or more bargaining representatives involved may apply to the Fair Work Commission, which may issue a bargaining order in relation to the proposed agreement.

**NB:** Penalties of up to $10,800 for an individual and $54,000 for a corporation apply for contravening an order.

- After 21 days from bargaining rights notification
- **Approval of Agreement by Employees**
  - If not approved
  - If approved, submit within 14 days
- **Fair Work Commission to Approve**
  - Approved (with or without undertakings)
  - If not approved

**Enterprise Agreement**

**Fair Work Commission can refer to any person or body the FWC considers appropriate**
Section 2: Enterprise Bargaining Agreements and the requirement to ‘consult’

One of the most insidious but largely unnoticed consequences of the Fair Work era is the steady creep of union influence beyond just pay and conditions, particularly in the public sector. Through increasingly audacious negotiation with state governments, unions are building clauses into industrial relations agreements that give them de facto control over a wide range of operational and organisational matters.

Prevalence of EBAs in the public sector

Section 1 of this paper outlined the positive economic justification for EBAs. Normatively, EBAs in the Fair Work era have arguably proven to be too inflexible and uneconomical to be an efficient pay-setting mechanism in the private sector. Nevertheless, their use has surged in the public sector, and EBAs remain the predominant workplace relations vehicle.

While only around 30 per cent of private sector workers are covered by a collective agreement, in the public sector that figure is close to 90 per cent. The comparison is shown in Figure 2.1, below.

Figure 2.1 – Type of employment by sector

![Bar chart showing type of employment by sector](image)


Looking at individual industries, we see that collective agreements are more prevalent in sectors with high public sector coverage — such as education, health, and public administration and safety. This is illustrated in Figure 2.2, below.

17 See, for example, Judith Sloan, ‘Enterprise bargaining set to boldly go way of the dodo’, *Weekend Australian*, 27-28 August 2016.
Figure 2.2 – Types of employment by industry


The apparent unattractiveness of EBAS to private sector employers compared with the public sector suggests that they are better suited to deals between government bodies and public sector unions, in which productivity and cost-saving are not dominant considerations.

The rise of ‘consultation’

Public sector EBAs have long been the subject of analysis for their notoriously generous pay and conditions when compared with the private sector (average weekly earnings for public sector workers, whose pay is as we have seen largely set under EBAS, is currently around $150 higher than private sector workers).  

However, less attention has been paid to the rise of so-called ‘consult and agree’ provisions that have increasingly been included in public sector EBAs in the Fair Work era. Lane and Paterson, in their examination of Commonwealth public service EBAs, discuss what they describe as ‘union-controlling provisions’:

Guised as ‘consultation,’ these clauses provide the union with varying degrees of control over different aspects of the operation of the agency or department. These clauses make it difficult for agencies and departments to respond to changing government and community priorities over the life of the agreement – and over time become entrenched.  

Similarly, EBAs between public sector unions and state emergency services authorities have increasingly included such ‘consultation’ provisions. Many of these provisions have been so general in scope that the unions have a de facto veto over a wide range of operational matters beyond just

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pay and conditions for workers. Often, this includes matters as remote as the introduction of new technology and equipment.

A recurring requirement in public sector EBAs is that unions be consulted on matters affecting the ‘employment relationship’ between workers and management. While this may sound reasonable, the term ‘employment relationship’ has been defined extremely broadly. The Full Bench of the Fair Work Commission, considering existing case law, has indicated that:

A matter will pertain to the relationship of employers and employees if it directly affects the conditions of employees, which includes all elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment.\(^\text{20}\)

Finally, in many cases, EBAs provide that unions must be given an opportunity to submit ‘alternative proposals’ to management decisions.

Table 2.1 – ‘Consultation’ clauses in Victorian emergency services EBAs

<table>
<thead>
<tr>
<th>Fire services</th>
<th>Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010</th>
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<tr>
<td></td>
<td>• Establishes dedicated ‘consultation committee’ comprising ‘equal numbers of management and employee representatives [ie the UFU]’. Decisions of the committee to be made ‘by consensus’.(^\text{21})</td>
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<td>• Specifies that ‘[n]o proposals for change arising from this agreement shall be implemented without referral to the… consultation committee’.(^\text{22})</td>
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<td></td>
<td>• Consultation required if management ‘wishes to implement change in matters pertaining to employee relationship [sic]’.(^\text{23})</td>
</tr>
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<td></td>
<td>• In relation to technological change, directs management to engage in ‘cooperative and consultative process’ as outlined in the EBA.(^\text{24})</td>
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| Country Fire Authority, United Firefighters’ Union of Australia, | Establishes ‘consultative committee’, with terms of reference and membership ‘to be negotiated’ between the union and management.\(^\text{25}\) |
|                                                               | Also establishes a separate ‘enterprise bargaining implementation committee,’ with equal numbers management and union representatives.\(^\text{26}\) |

\(^{20}\) United Firefighters Union of Australia v Metropolitan Fire & Emergency Services Board [2016] FWCFB 2894 at [26].
\(^{21}\) Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement [2010] FWAA 7414, cl 13.2.
\(^{22}\) Ibid cl 13.3.5.
\(^{23}\) Ibid cl 15.
\(^{24}\) Ibid cl 17.
\(^{25}\) Country Fire Authority, United Firefighters Union of Australia, Operational Staff Agreement [2010] FWAA 8164, cl 13.2.
\(^{26}\) Ibid cl 13.3.2.
| Operational Staff Enterprise Agreement 2010 | Requires consultation on broad range of matters, pertaining to ‘employment relationship’.27 |
| Draft Country Fire Authority-United Firefighters Union EBA, obtained by the Herald Sun28 | Establishes consultation committee with equal management and union membership.29 |
| | Consensus defined as ‘unanimous agreement... supported by all members’ of the committee, ‘required prior to the implementation of any change’.30 No relevant change can be implemented without referral to the committee.31 |
| | Consultation process required on extremely broad range of matters, including: |
| | – ‘Application or operation’ of EBA, ‘employees’ terms and conditions of employment’ and the ‘employment relationship’.32 |
| | – Technological change proposed by management.33 |
| | – Any CFA ‘policies’ that ‘affect employees’.34 |
| | Further requirement that the CFA and UFU agree on ‘all aspects’ of articles of clothing, equipment, technology, station wear and appliances.35 |

| Ambulance Victoria Enterprise Agreement 2009 | Far-reaching ‘implementation of change’ clause that applies to situations in which management intends to ‘restructure the workplace, introduce new technology or change existing work practices’.36 |
| | Management required to consult with affected employees and their ‘nominated representative’ (ie the relevant union) in relation to proposed changes.37 |
| | The union may submit ‘alternative proposals’ to any intended change which must be given ‘due consideration’ by management.38 |

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27 Ibid cl 14.
28 See ‘Secret draft agreement exposes full extent of Premier Andrews’ proposed surrender of CFA to United Firefighters Union’, Herald Sun, 26 April 2015.
29 Cl 21.3.1.
30 Cl 21.5.1.
31 Cl 21.5.5.
32 Cl 21.4.7.
33 Cl 25.
34 Cl 42.
35 Cl 90.4.
37 Ibid, cl 9.2.
38 Ibid, cl 9.4.
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<tr>
<th>Organisation</th>
<th>Agreement Year</th>
<th>Consultation Clauses</th>
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<tbody>
<tr>
<td>Ambulance Victoria</td>
<td>2015</td>
<td>(Identical consultation clauses as 2009 Ambulance Victoria agreement.)³⁹</td>
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<tr>
<td>Other emergency services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victoria Police Force Enterprise</td>
<td>2011</td>
<td>Broad ‘organisational change’ clause requiring consultation with PFA in relation to</td>
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<td></td>
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<td>‘major change[s] to the structure of the workplace, technology or existing work</td>
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<td>practices’ of police force members.⁴⁰</td>
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<tr>
<td></td>
<td></td>
<td>Management must provide PFA with an opportunity to submit alternative proposals.</td>
</tr>
<tr>
<td>Victoria State Emergency Service</td>
<td>2012</td>
<td>‘Implementation of change’ clause requiring consultation ‘likely to have a significant</td>
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<tr>
<td></td>
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<td>effect on employees’.⁴¹ Union may submit ‘alternative proposals’.⁴²</td>
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<td>Defines and therefore limits circumstances in which change is deemed ‘likely to have</td>
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<td></td>
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<td>a significant effect on employees’, such as termination of employment, alternation</td>
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<td></td>
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<td>of work hours and need for relocation or retraining.⁴³</td>
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**Dispute resolution clauses**

Public sector EBAs also typically include cumbersome ‘dispute resolution’ clauses. In cases where management and the relevant union cannot reach ‘consensus’ on a change proposed by management, these time-consuming processes can be invoked.

The flowchart in Figure 2.3 below is based on the current metropolitan fire fighters’ EBA. It illustrates the procedural nightmare faced by emergency services organisations in making a wide range of operational and organisational decisions. It is based on a theoretical situation in which the Metropolitan Fire and Emergency Services Board is seeking to introduce a new fire hose to be used by fire fighters.

Such a process to determine the use of a fire hose may seem like an extreme and unlikely scenario, but it is not. Evidence given to the FWC by the MFB in 2014 provided a catalogue of longstanding disputes between the MFB and the UFU over apparently trivial matters.⁴⁴

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⁴¹ Victoria State Emergency Service Agreement [2013] FWCA 9370, cl 10.1
⁴² Ibid cl 10.4.
⁴³ Ibid cl 10.2.
⁴⁴ This case is discussed further in Section 3.
Figure 2.3 – Example of ‘consultation’ process in emergency services EBAs

Such a process to determine the use of a fire hose may seem like an extreme and unlikely scenario, but it is not. Evidence given to the Fair Work Commission by the MFB in 2014 provided a catalogue of longstanding disputes between the MFB and the UFU over apparently trivial matters.46 Matters that had been the subject of dispute as a result of failed ‘consultation’ included:47

- the introduction of MFBSafe, software used to record health and safety incidents, which was the subject of negotiation for three years;
- the introduction of the MFB’s Workplace Behaviour Training Program, covering issues such as discrimination, harassment, and bullying;
- a long dispute over whether management could limit firefighters’ personal internet use during work hours;
- migration of the MFB’s computer operating system to Windows 7, was delayed by one year due to a dispute with the UFU;
- the number of appliances to attend bin fires in the Melbourne CBD;
- proposed changes to the model of Chinagraph Pencils used by firefighters; and
- the introduction of a number of technological improvements, such as new appliances, ladder platform replacement, breathing apparatuses and the like.

The fact that any of these innocuous matters can be subject to such labyrinthine dispute resolution procedures highlights the absurdity of the kind of ‘consultation’ process embedded in public sector EBAs. One wonders what the public policy benefit is of giving unions scope to intervene in matters so remote from the pay and conditions of their members.

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46 This case is discussed further in Section 3, on page [20].
47 See Metropolitan Fire & Emergency Services Board [2014] FWC 7776.
Section 3: Impact of consultation provisions

As demonstrated in the previous section, EBAs in the Fair Work era have the potential to mire emergency services organisations in long internal disputes over even the most minute operational and organisational decisions. This section will discuss the way in which consultation provisions are seriously impeding the operation of emergency services organisations.

Operational inflexibility

Anecdotal evidence suggests that consultation provisions with broad application are impeding the ability of emergency services organisations to respond to incidents. A letter from former Metropolitan Fire and Emergency Services Board (MFB) Chief Officer Peter Rau to Emergency Services Minister James Merlino, obtained by the Herald Sun in August 2016, gives valuable insight into these difficulties.48

Writing about ongoing negotiations over new EBAs for MFB and CFA (CFA) firefighters, Rau raises his objections to the continued use of consultation provisions:

[My] fundamental concern relates to the requirements under the current agreement that the Chief Officer must consult and reach agreement with the UFU in relation to operational matters... The current [UFU-MFB] Enterprise Agreement and its power of veto over my statutory responsibilities is unworkable and undermines community safety.49

Rau is particularly concerned with the proposed consultation provisions in the draft UFU-CFA EBA:50

I am concerned that, far from improving the already troubling position that exists under our current agreement, the proposed CFA [consultation] provisions would further hinder my ability as Chief Officer to effectively fulfil my statutory responsibilities as you and the community would expect.

[...] As the Chief Officer, I have to respond quickly and decisively in emergency situations. I am also required to make strategic decisions to prepare for emergency situations. As the head of operations I need to make decisions unimpeded by provisions... requiring agreement from a third party (UFU). The proposed CFA agreement would, if applied to the MFB, create even greater concerns.51

Finally, Rau provides some examples of ‘unacceptable situations’ resulting from protracted ‘consultation’ with the UFU. These include:

- a two-year delay to the deployment of new equipment by the MFB, ‘because the UFU refused to agree to their deployment’.52 Manpower was redirected from MFB operations during a heatwave in order to engage in consultation with union in relation to use the equipment. When that failed, according to Rau, ‘two Deputy Chief Officers spend a further afternoon and evening at the [Fair Work Commission]... distracting us from critical operational activities’;53

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49 Ibid.
50 See Table 2.1.
51 Above n1.
52 Ibid.
53 Ibid.
• The MFB’s Chief Officer and two Deputy Chief Officers were forced to spend six hours on a total fire ban day during a heatwave because the union ‘objected to the Chief Fire Officer contacting Assistant Chief Fire Officers and Commanders to ascertain their availability to assist if required in responding to emergencies on an extreme weather day’.

• The UFU directed employees not to comply with a direction by Rau to move an appliance from one fire station to another, as the union objected to not being consulted on the decision to relocate the appliance.

Former chairman of the CFA, John Peberdy, explains how the requirement to ‘consult’ has become an effective veto over management decisions:

> [W]e do not want [a] veto [for the UFU]... [T]he chief officer must have the power of managing the resources and to be able to make decisions around resources without having every decision or a lot of decisions being questioned. That does not mean that there should not be good consultation... But veto is different to consultation. Veto says we can disagree and then we have got a dispute, whereas consultation says, “We will discuss with you the reasons behind our decisions so that you are aware of those’, but it does not give a party a right to say, “Well, we are just not going to cooperate”.

Joe Buffone, then Chief Officer of the CFA, raised concerns earlier this year about expanded ‘consultation’ requirements being demanded by the UFU as part of negotiations over a new EBA:

> I do believe in consulting with our workforce on significant change in relation to employment related issues is a critical part of my decision-making responsibilities and remain committed to engaging with our people in a meaningful way, where appropriate. However, this is different to having to seek UFU agreement on changes that, in many cases, are matters that go to management of the CFA and the discharge of mine, the CEO’s and the [Country Fire] Authority’s statutory duties.

> I can see no merit or logic in having to agree with the UFU on key operational matters, for example, the specifications of uniforms, technology and appliances. In my view, the ‘veto’ clauses in the Proposed [Enterprise Bargaining] Agreement undermine my statutory authority as Chief Officer to have and maintain control, at all times, of resources – it effectively removes the discretion that rests with me under the CFA Act to make prompt and final decisions about operational matters. I do not consider these restrictions to be adequate or appropriate to meet the dynamic environment in which the CFA, as an emergency service provider, operates.

**Time and cost of disputes**

The issues outlined by Rau, Peberdy and Buffone, in addition to crippling the decision-making ability of emergency services bodies, are unsurprisingly costly and time-consuming.

Disputes that are resolved internally between management and unions (via consultation and dispute resolutions in the EBA) are difficult to quantify in terms of time lost. We can only rely on the kind of anecdotal evidence provided by Rau.

However, because adjudication by the Fair Work Commission (FWC) is built into the dispute resolution procedures in most emergency services EBAs, we can measure the incidence of industrial disputes over time.

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54 Ibid.
55 Ibid.
56 Evidence to the Standing Committee on the Environment and Planning, Parliament of Victoria, 3 August 2016 (Mr John Peberdy).
57 Joe Buffone, letter to the Hon James Merlino MP, Minister for Emergency Services, 19 June 2016.
Figure 3.1 demonstrates that, based on the number of orders made, the number of matters related to disputes between both the MFB and CFA and the UFU is significantly higher under the Fair Work-era EBAs than previously.

**Figure 3.1: Number of orders made by the Fair Work Commission, Fair Work Australia or the Australian Industrial Relations Commission related to disputes between MFB or CFA and UFU.**

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Orders made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Fair Work</td>
<td></td>
</tr>
<tr>
<td>1999 Agreement</td>
<td>2</td>
</tr>
<tr>
<td>2002 Agreement</td>
<td>14</td>
</tr>
<tr>
<td>2002 Agreement</td>
<td>7</td>
</tr>
<tr>
<td>2005 Agreement</td>
<td>3</td>
</tr>
<tr>
<td>Fair Work</td>
<td></td>
</tr>
<tr>
<td>2010 Agreement</td>
<td>27</td>
</tr>
<tr>
<td>2010 Agreement</td>
<td>25</td>
</tr>
</tbody>
</table>

**Source:** Australasian Legal Information Institute; Fair Work Commission.

While this information only gives us the ‘tip of the iceberg’, excluding information like disputes resolved by mediation prior to a hearing, it demonstrates the dramatic increase in matters being taken to the Fair Work Commission. In the case of the MFB, more judgments have been made under the current EBA than under the previous three EBAs put together. The number of orders made in relation to the CFA has more than trebled.

Unsurprisingly, this apparent increase in disputes between the union and fire authorities is driving up legal costs for emergency management authorities, which have almost doubled since the Fair Work-era EBAs have commenced operation as shown in Figure 3.2.

**Figure 3.2: Legal costs per year ($,000)**

**Source:** MFB and CFA, Annual Reports 2005-15.
Of course, not all disputes before the FWC arise from consultation provisions, but the recent spike in disputes is at least in part due to the heightened culture of litigiousness in the age of ‘consultation.’

**The Fair Work Commission and ‘tribunal activism’**

Despite the time and expense involved, seeking the intervention by the FWC in disputes would be justifiable if the tribunal were a reliable ‘circuit-breaker’ that could sensibly remedy disputes. Unfortunately, this has not been the case.

The role of the FWC in Australia’s industrial relations framework has been contentious throughout the Fair Work Era. Partly, this has been due to concerns about the composition of its members and the appointment process.\(^{58}\) A more important consideration, however, is the pervasive influence that the FWC has been given as a matter of design.

In its submission to the recent Productivity Commission inquiry into Australia’s workplace relations framework, the Australian Federation of Employers and Industries voices the frustration of employers in dealing with this omnipresent regulatory organ in a private sector context:

> The FWC is the institution at the centre of the existing workplace relations framework... Whilst we do consider the current composition of the FWC in itself presents challenges, the bigger issue we have is with the nature and breadth of functions that are exercised by the FWC... The work of the FWC is clearly broad and wide ranging with significant powers to affect the management of virtually every aspect of the workplace and running of a business. All of [its] functions were deliberately drafted [into the Act] to embed itself further into the day to day running of business, thus preventing business from making the thousands of decisions big and small which are an inherent part of trying to be productive, competitive and profitable. What is more, once the FWC has intervened and hamstrung the business there is no effective or cost effective appeal mechanism.\(^{59}\)

We will examine three ways in which the FWC exacerbates the problems faced by emergency services bodies:

- enabling union interference with operational and organisational decisions by management;
- failing to release emergency services bodies from EBAs which have proven to be dysfunctional; and
- railroading emergency services bodies into unfavourable EBAs.

**Interference with management decisions**

As we have seen, Fair Work-era emergency services EBAs require union input into operational or organisational decisions by management, whether that be via ‘consensus’ or the ability of the union to submit ‘alternative proposals’ to changes in relation to a wide range of matters.\(^{60}\) Disagreement between management and the unions is subject to lengthy dispute resolution procedures, which often include escalation to the FWC.

A number of decisions by the FWC demonstrate that unions are succeeding in working through the dispute resolution and FWC process to obtain at least part of their demands.

The following case study is one example of the FWC entertaining the union’s bid for influence over operational matters at the expense of management prerogative.

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\(^{58}\) See, for example, Productivity Commission, *Workplace Relations Framework Inquiry Report Vol 1* at 3.2.


\(^{60}\) See Table 2.1.
Case study No.1
United Firefighters’ Union of Australia v Country Fire Authority [2012] FWA 7155

In this case, the UFU applied to the FWC following an ongoing dispute over clause 27.4.7 of the 2010 CFA-UFU EBA, which required that the CFA seek approval for changes to deployment levels (as contained in the EBA).

In accordance with the EBA, the CFA and UFU undertook negotiations to increase the number of career firefighters over the course of the agreement. However, a prolonged dispute arose over whether the CFA was required to seek UFU approval over the deployment of recruit (or ‘above strength’) firefighters, in addition to experienced career firefighters.

The CFA argued that the inclusion of recruit firefighters risked ‘significant impediment to the performance by [the CFA] of [its] obligation to decide the way the operational personnel of the CFA should be best organised to achieve the CFA’s statutory functions’.

Further, on the broader issue of deployment levels, the CFA submitted that:

‘[If the CFA does not have the discretion itself to determine from time to time the number and composition of career firefighters in its employ according to the various considerations that are relevant in terms of performance of its statutory functions, the exercise of those functions will be significantly impeded.’

Accordingly, the CFA argued that the UFU, through clause 27.4.7, was attempting to exercise control over managerial matters outside the scope of the ‘employer-employee’ relationship and therefore the ‘permitted matters’ in enterprise bargaining agreements under the Act. Clause 27 went ‘well beyond any reasonable matter pertaining to the employment relationship’ and effectively ‘entirely remove[d] the CFA’s prerogative to consider, let alone determine staffing levels for itself’. Under EBA, the UFU was able to use clause 27 to ‘directly regulate and control CFA workplace planning processes’.

While the FWC gave some concessions to the CFA on the matter of recruit firefighters, it rejected the CFA’s overall argument. In his decision, Commissioner Roe stated that:

‘[Clause 27] is not an absolute removal of the authority and power of the Chief Officer or the CFA in respect to who it employs as suggested by the CFA. The establishment of staffing ratios, locations and levels in [the EBA] is based on suggestions of the Chief Officer and is included and regulated in the [EBA] for reasons including health, safety and welfare. […] I am satisfied that the provisions [of clause 27] are permitted matters [for enterprise bargaining agreements under the Fair Work Act]. It is hard to imagine anything of greater relevance in concern to employees… in respect to their relationship with their employer… than the issues of job security, workload and safety.’

As a result, the CFA was directed to effectively resume its negotiations with the UFU on deployment levels.
Reluctance to terminate EBAs

Under the Act, EBAs only cease their operation when they are replaced or terminated by the FWC. Importantly, this means that EBAs continue past their expiry date until the FWC determines otherwise.

Employers can apply to terminate an EBA after its expiry date, but must satisfy the FWC that terminating the EBA:

- Would not be contrary to the public interest and
- Is appropriate, taking into account all circumstances, including:
  - The views of the relevant employees, each employer and each ‘employee organisation’ (ie the unions); and
  - The circumstances of those employees, employers and organisations, including the likely effect that the termination will have on each of them.  

Satisfying the FWC of these requirements has proven to be an onerous task for emergency services bodies.

Case study No.2

Metropolitan Fire & Emergency Services Board [2014] FWC 7776

In this extraordinary 98-page judgment, Commissioner Wilson is asked to terminate two EBAs between the UFU and the MFB that had expired, including the 2010 MFB-UFU Operational Staff Agreement.

In its application, the MFB gave detailed evidence of the unworkability of the EBAs:

‘There are significant problems with the content of the [2010 MFB-UFU] Operational Staff Agreement… [T]here are provisions which seriously interfere with the process of change and improvement within the MFB and unreasonably impede the capacity of the MFB to carry out its statutory functions effectively.’

Specifically, the MFB highlighted a number of issues with the EBAs that unduly impeded its operational capacity:

- consultation and dispute resolution clauses, which were ‘overly onerous and unworkable’;
- requirements that the UFU be consulted over the introduction of change or variation to MFB policy and practice; and
- ‘status quo’ clauses, which require that existing practices remain in place during consultation in relation to changes proposed by management.

The effect of these clauses, according to the MFB was that ‘projects and initiatives are delayed or compromised and, in some cases, abandoned’, leading to the ‘delay or prevent[ion] of better service delivery and improved safety outcomes for employees and the public’.

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61 Fair Work Act 2009 (Cth), s 226.
Evidence was presented on a range of the what the FWC referred to as ‘illustrative matters’ that demonstrated the extent to which MFB decision-making had been impeded. Areas of decision-making that had been subject to UFU interference included:

- routine managerial matters (such as the migration of the MFB’s computer operating system to Windows 7);
- property holdings (such as the relocation of the Northcote fire station and refurbishment of the Eastern Hill fire station);
- operational matters (particularly related to the introduction of new equipment, including one dispute involving a change to the model of pencil used by firefighters); and
- interoperability with other emergency services authorities, including responding to state-wide emergencies such as bushfires.

It its response, the UFU openly admitted that one of its principal objections to termination of the EBAs was that the union would ‘lose the benefit of consultation clauses that have been in place for so many years’. Remarkably, the UFU admitted that its objective was continued interference with managerial decision-making:

‘In the MFB there is good reason why... the intrusion into management prerogative should be envisaged by the consultation and dispute resolution clauses of the agreements... [I]t is entirely legitimate that [firefighters] have a substantial say about the way in which, and the equipment with which, their work is to be carried out.’

The UFU further submitted that ‘[i]nsofar as the MFB now desires greater freedom of management action... its remedy is bargaining’. However, resolution through ‘consultation’ with the UFU, the MFB argued, had proven to be impossible:

‘The MFB has sought to bargain with the UFU to address [its] issues. But the UFU has shown no real interest in engaging in bargaining about these matters. The UFU has no incentive to bargain about these matters. It knows that the MFB cannot make any significant changes given the enormous control the UFU already has over change processes... Instead, it has engaged in surface bargaining by raising procedural issues and other insubstantial side issues in order to give the appearance of being prepared to negotiate, without in fact doing so.’

Commissioner Wilson, in light of this considerable evidence, noted that the EBAs contained a ‘greatly expanded range of provisions... over which consultation and agreement is required’ compared to pre-Fair Work EBAs. He conceded this had given rise to disputes over matters ‘related to corporate decision-making which would, in many public sector workplaces, be considered routine or unremarkable’. Termination of the EBAs would result in:

‘[A] positive impact for the MFB’s performance and productivity, for the reason [that] it will not be required to consult to the level it has in the past, or for as long and it will also not be subject to the “agreement-to-change” or “status quo” provisions.’

Further, Commissioner Wilson found that termination of the EBAs would not be contrary to the public interest or the objectives of the Act, nor would it compromise the safety of employees (a perennial argument of the union movement).
Accordingly, as this case study demonstrates, emergency services organisations are unlikely to be able to terminate an unfavourable or unworkable EBA until the union agrees to a new one.

The practical effect of this has been that emergency services unions, once securing a favourable EBA (typically under a union-friendly Labor government), are able to ‘ride out’ negotiations with conservative governments and secure an equally accommodating deal once the government changes.62

Role in approving EBAs

One reason for the low utilisation rate of EBAs in the private sector is perhaps the difficulty and unpredictability (not to mention expense) of having agreements approved by the FWC. In its submission to the Productivity Commission, one employer group described the difficulty of agreement approval under Fair Work:

[T]he system imposes high transaction costs on employers. Moreover, many agreements are subject to subjective considerations by tribunal members, reflected in the nature of the undertakings that are required from employers and the lack of uniformity in those undertakings... [T]he degree of complexity and inconsistency in agreement approval has become too high under the current framework... There is a great degree of variability in agreement approval under the [Fair Work] Act, including inconsistent tribunal approaches... [our] consultants and legal staff report that agreements which are identical or similar can be subject to different degrees of scrutiny by the FWC...63

The fact that emergency services bodies are now hamstrung by unworkable EBAs may be at least in part because such agreements have gone through this process.

Of more concern is the fact that the FWC appears to be actively intervening in the bargaining process with the effect of ‘railroading’ emergency services organisations into unfavourable EBAs. Amid the ongoing high-profile dispute over the new CFA-UFU EBA, reports emerged of an extraordinary intervention by FWC President Iain Ross to attempt to broker a resolution between the CFA and the union.64

While this is a particularly high-profile case, it may suggest a pattern of behind closed doors attempts at ‘conciliation’ which effectively strongarm emergency services bodies. Given that processes such as conciliation are informal and therefore not matters of public record, there is no way of knowing definitively.

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62 See, for example, ‘Victorian paramedics become best paid in Australia under “sweetheart deal”’, The Age, 29 April 2016.
64 See, for example, ‘CFA crisis: Email reveals Premier’s secret CFA side deal’, Herald Sun, 29 June 2016.
Section 4: Legislative action

Current legislative action to amend the Fair Work Act 2009

Section 1 of this paper detailed, amongst other things, the breadth of the ‘permitted matters’ allowable under an EBA. This breadth has allowed the UFU to insist on clauses that dictate or restrict the way that CFA management can deploy volunteers. Although the volunteers are not a party to this agreement, the agreement has the capacity to undermine their role and authority within the organisation – and fundamentally change the organisation’s character. Section 3 detailed some of the specific issues with the protracted dispute between the UFU, the CFA, and the Victorian Government. There are approximately 800 paid firefighters employed by the CFA, with around 55,000 additional volunteers. The focus of the legal and political issues has been on the effect that the proposed EBA will have on these volunteers.

During the 2016 election, Prime Minister Malcolm Turnbull addressed a rally of volunteer firefighters outside Victorian Parliament House. He said that the proposed agreement was ‘an extraordinary assault on fundamental Australian values of community service, of volunteerism.’ The Prime Minister pledged, ‘If we’re re-elected, we'll rectify it .... There would be changes to the Act that would relate to what would be objectionable or unacceptable clauses in EBAs.’

On 31 August 2016, the re-elected Turnbull government introduced this legislation to the Parliament in the form of the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (the Bill). The Bill proposes to amend the definition of unlawful terms to include an ‘objectionable emergency management term’ that cannot be included in an enterprise agreement that covers a ‘designated emergency management body.’

A designated emergency management body is:

- Either:
  - a body that is, or is a part of, a fire-fighting body or a State Emergency Service of a State or Territory (however described); or
  - a body that is, or is a part of a body that is, established for a public purpose by or under a Commonwealth, State or Territory law.

An enterprise agreement that covers a designated emergency management body cannot include an objectionable emergency management term – that is, a term that has, or is likely to have, the effect of:

- restricting or limiting the body’s ability to engage or deploy its volunteers; provide support or equipment to those volunteers; manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers; otherwise manage its operations in relation to those volunteers; or
- requiring the body to consult, or reach agreement with, any other person or body before taking any action for the purposes of engaging or deploying its volunteers; providing support or equipment to those volunteers; managing its relationship with, or working with, any recognised emergency management body in relation to those volunteers; otherwise managing its operations in relation to those volunteers; or

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66 Ibid.
c) restricting or limiting the body’s ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community; or

d) requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the law confers or imposes on the body a power, function, or duty that affects or could affect its volunteers. 68

The authors cannot see any substantive issues with the above changes. Indeed, it is a positive that the Bill encompasses all Federal, state and territory firefighting and emergency services bodies that have been created under statute, use volunteers, and are covered by the Act. It provides a legislative remedy for the current Victorian dispute while acting to prevent future disputes from arising in other states and territories. In this regard, it is less open to criticism (and constitutional legal challenge) that this single issue legislation that would treat Victoria differently from any other state.

However, the authors caution that that introducing new definitions and new unlawful terms to restore balance to public sector employers increases the Act’s complexity. An alternative option would be to limit the permitted matters to make it explicit that the management of any organisation have the primary responsibility for operational matters – including the role of volunteers. This proposal is outlined in Section 5.

Finally, the Bill provides an entitlement to volunteer bodies (e.g. Volunteer Fire Brigades Victoria) with the legal standing to make submissions to the Fair Work Commission in relation to matters about enterprise agreements or workplace determinations that affect, or could affect, the volunteers of a designated emergency management body. 69 This is particularly problematic. Only parties to an agreement should have standing to appear before the Fair Work Commission. It is hard to contemplate an agreement that did not “affect, or could affect” volunteers. If third party interests are materially affected (in a legal sense) by a proposed agreement then they will already have legal avenues to make representations or bring actions in their own right. We have seen the danger of extending legal standing with the ‘lawfare’ that has occurred under the Environment Protection and Biodiversity Conservation Act 1999, 70 as just one example. This aspect of the Bill actually undermines the main provisions that reinforce the role of management. Rather than management taking matters affecting volunteers into account when negotiating agreements with employees and their unions, this would now be a matter for the Fair Work Commission to determine.

This Bill passed the House of Representatives on 15 September 2016, and at the time of publication is still before the Senate. 71

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68 Ibid.
69 Ibid.
Section 5: Further recommendations for reform

1. Restrict the ‘permitted matters’ of Enterprise Bargaining Agreements

Enterprise bargaining is a mechanism to set out the pay and conditions for employees, and unions are a legitimate party to these negotiations. The enterprise bargaining process is not, however, a proxy tool to impose joint union-management deals about operational decision-making. This is particularly dangerous in public sector bodies. The public sector does not face the same budget or time constraints as the private sector, does not have the same profit motive, and does not have direct accountability measures. Governments are able tolerate extensive union interference in the day-to-day management of emergency services – and large delays in implementing management decisions through union veto power guised as “consultation” – because taxpayers are footing the bill, and this burden is spread thinly over the entire population. Additionally, in the Westminster tradition, public sector bodies are accountable to the Parliament via the relevant Minister; this is constrained where unions can effectively veto operational decision-making.

Accordingly, section 172(1)(b) of the Act should be repealed. This would remove “matters pertaining to the relationship between employer and employee organisations” from the list of permitted matters. In addition, the language of section 172 should be tightened to ensure that agreements could only include terms about permitted matters. This would go a long way to avoiding the problems that the Bill discussed in Section 4 attempts to address. Our recommendation, however, is the deregulatory approach – it would reduce the Act’s complexity, reduce the role of the Fair Work Commission, and limit the potential for disputes. It would have a wider application than the proposed legislation benefiting other private and public sector bodies that do not necessarily use volunteers, as well as addressing the issues of soft union benefits and hard union control disguised as ‘consultation.’ Our recommendation would not restrict the ability of a union to raise matters with an employer. What it would prevent is the ability of the union movement to use an EBA as a mechanism to thwart operational decision with the backing of the Fair Work Commission.

2. Remove the role of the Fair Work Commission in approving Enterprise Bargaining Agreements

Section 1 of this paper outlined the role of the Fair Work Commission (FWC) in approving EBAs. The FWC’s task in this regard is largely administrative. It involves a member of the commission going through a checklist and making sure that the bargaining representatives have followed all the steps.

The best argument for this function continuing is that it is better to have the FWC double check that these steps have been complied with to prevent a dispute about the legality of the agreement later down the track. The best response to this is that the majority of the agreements are made without any difficulties. Further, the appropriate time to get the ruling of the FWC is the time of a dispute – not at some point afterwards. For example, if there is an issue about the coverage of employees the time to seek the ruling of the FWC is when the disputed term is made known to the employees and their representatives – not after the employees have already approved the agreement.

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72 The authors note that this proposal was recommended by the Productivity Commission, and represents the position of the previous Workplace Relations Act 1996. See: Productivity Commission, Workplace Relations Framework Inquiry Report, No. 76, Vol. 1, p. 59.


74 See: Fair Work Act 2009, section 186(3).
This function of the FWC in approving agreements is also problematic because minor procedural defects have the capacity to undo an entire agreement. The recent Productivity Commission report highlighted a ludicrous case:

Peabody Moorvale Pty Ltd provided three pages — stapled together — to all of the employees to be covered by a proposed enterprise agreement. Some bargaining ensued, an agreement was struck, and the agreement was lodged with the FWC. However, by attaching the three documents together, the employer contravened requirements about the form of notice to be given to employees. The FWC had no real discretion in the matter, and was obliged by the Fair Work Act to reject the agreement. So, absurdly, the employer had to recommence the agreement process. There is a convincing variety of similar examples.\textsuperscript{75}

One of the only substantive questions for the FWC’s consideration is whether the agreement satisfies the ‘better off overall test’. Recall that the agreement will only come to the FWC for approval if a majority of the employees have approved it. The employees and their representatives are in the best position to determine whether an agreement passes this test, particularly given they are the ones that will be bound by its terms. The industrial relations system should trust employers, employees and their representatives to get the balance right.

The law should reflect the fundamental idea that an EBA is an agreement between an employer and its employees. Accordingly, the Act should be amended to provide that an agreement would be valid where the agreement has been reached between the employer and the employees. Employee agreement would be the final step in the agreement process. If the employees approve the agreement, the preceding steps will be taken to have been complied with or waived by the parties. There would be no need for the final step of the FWC’s approval. The FWC has a role for settling genuine disputes that arise under the Act. If the parties have not complied with the steps prescribed by law, then this could be brought to the FWC – as is currently the case.

Failing the above proposal, the Act should be amended to adopt the Productivity Commission’s recommendations to:

- allow the Fair Work Commission wider discretion to overlook minor procedural or technical errors when approving an agreement, as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of an unmet procedural requirement.
- extend the scope of this discretion to include minor errors or defects relating to the issuing or content of a notice of employee representational rights.\textsuperscript{76}

3. Increase efficiency and flexibility in the Enterprise Bargaining Agreement

Section 1 of this paper noted that part of the underlying rationale of bargaining on an enterprise level was the flexibility that it provided for employees and employers to tailor working arrangements for their own individual circumstances. Another aim was to lower transaction costs, compared to other forms of collective bargaining. These aims are contrasted by the realities presented in sections 2 and 3 of the paper. The evidence shows that public sector unions have attempted to stymie flexibility provisions or strip them of any meaningful content, and drawn out disputes, significantly increasing costs.

Accordingly, the Act requires reform to restore efficiency and flexibility within the enterprise bargaining system.

As indicated in section 1, flexibility terms must be included in any EBA. These terms enable an employee and their employer to agree to an ‘individual flexibility arrangement’, which varies the effect of the EBA in relation to that particular employee, in order to meet the genuine needs of the employee and employer. These are particularly necessary in an Act that does not provide for individual contracts. Unions seek to limit the flexibility to a single matter – which not only limits the ability of employers to adopt flexible work practices but also limits the freedom of employees covered by the agreement. As the Productivity Commission have recommended, section 203 of the Act should be amended to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. It should be noted that the mere inclusion of a full flexibility term in the agreement does not compel an employee to enter into an individual flexibility arrangement – but would simply maintain this as an option.

Sections 2 and 3 of this paper have indicated the length and frequency of disputes in emergency services agencies. Previous research from the Institute of Public Affairs notes that this is a wider problem in the public sector. Indeed, in Victoria, the Australian Education Union has already given its log of claims to the Victorian government despite the current public schools’ agreement not expiring until October 2016. Currently, the nominal expiry date for EBAs cannot be more than 4 years. This length should be increased to provide for greater flexibility and duration. The Productivity Commission has recommended a term of up to 5 years. This would not be a radical change, but would certainly limit the frequency of drawn-out negotiation process that – for the public sector bodies – have tended to morph into political campaigns.

**Conclusion**

There is genuine widespread community concern about the devastating effect of the current union power-grab on the culture and effectiveness of the CFA. Although, this is only one example of a wider trend of unions using the Act to insert clauses into workplace agreements that give unions influence over the management of business operations – to the point of effective veto power. Unions should not be able to use the system to put their own interests before those of employees, volunteers, management, customers or taxpayers.

The proposals outlined in this section represent common sense changes to improve efficiency, flexibility, and productivity within the existing Fair Work regime –militating against the perverse incentives to exploit the EBA process. However, there needs to be wider industrial relations reform undertaken in Australia. The current system simply reflects the re-regulation of the labour market that occurred in 2009 under the previous Federal Labor Government. There is more work to be done beyond the issue of enterprise bargaining.

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