



# VOLUNTEER FIRE BRIGADES VICTORIA

## News Note

**NOTE TO MEMBERS – 15 June 2017**

### **FIRE SERVICES REFORM LEGISLATION UPDATE AND VFBV LEGAL ADVICE**

Attached to this News Note, is a copy of the legal advice provided to VFBV regarding the Presumptive Rights Compensation aspects of the proposed Firefighter's Presumptive Rights Compensation and Fire Services Legislation Amendment Bill 2017 (referred to here as 'the Bill').

This legal advice, provided by Jack Rush QC, a former Supreme Court Judge, former Chairman of the Victorian Bar Council, and Counsel Assisting the 2009 Victorian Bushfires Royal Commission confirms that the proposed presumptive rights legislation:

*"...establishes two distinct mechanisms for the operation of the presumption that specified cancers are due to the nature of firefighting – one for career firefighters and one for volunteer firefighters. The Bill discriminates against volunteer firefighters, is inequitable to them, has been drafted in a manner that is prejudicial to volunteer firefighters' entitlements and rights to claim for specified forms of cancer when compared to the claims process created by the Bill for career firefighters for precisely the same cancer conditions."*

This directly contradicts the Governments statements:

- Career Firefighters and Volunteers will get equal treatment – *They do not*
- That it is the same or better than the QLD model – *It is not*
- That the proposed legislation is what VFBV asked for – *It is not*

#### **Bill scheduled to go to Upper House for vote next Tuesday**

The Bill has been passed in the Legislative Assembly (lower House) and is supposedly scheduled to be put to the vote in the Legislative Council (Upper House) next week, probably Tuesday 20<sup>th</sup> June 2017. This is very disappointing for volunteers who have raised serious concerns about the lack of consultation regarding the Bill; the negative effect dismantling the existing CFA integrated service model; the potential erosion of Victoria's vital volunteer surge capacity; the lack of transparent process, operational or cost impact analysis; and the ambiguity, confusion and interference that will flow if this change is adopted.

Volunteers are supportive of genuine and cost effective fire service modernisation but we continue to urge the decision makers to withdraw or stop the adoption of the current Andrews' government

proposal. The approach to modernisation needs to be re-thought. Our strong view is that those aspects of the Bill relating to the split up of the integrated CFA model and the creation of FRV are so fundamentally flawed they should be rejected and at a minimum require a major rethink and review before being considered by the Legislative Council.

We are continuing to have asked MPs to take this legislation off the table for now or at least agree to a transparent and proper process of scrutiny and review before the legislation is passed.

Previous VFBV communiques have outlined VFBV broad concerns regarding the Bill and these concerns remain.

**Bill should be split to separate presumptive rights compensation from the aspects relating to structural changes to Victoria's Fire Services**

As stated above, VFBV concerns regarding the broader reform aspects of the Bill remain and are in addition to the Presumptive Rights Compensation aspects of the Bill. VFBV and many other respected public officials and bodies have already expressed our deep disappointment that the Bill combines two totally separate issues. One being firefighters' presumptive rights compensation and the other being proposed changes to the fire service structure and arrangements for Victoria. It is highly offensive and morally wrong to combine an issue so important as firefighter cancer protection with the proposed reforms to the fire services that essentially carve up CFA, one as a ransom note for the other.

VFBV has met with MPs from all sides of politics seeking support to separate those aspects of the Bill which relate to presumptive rights from the remaining aspects relating to the broader restructure of the fire services.

At this point in time our efforts have been unsuccessful however we remain hopeful that this issue will be respectfully resolved by a resolution to split the Bill when the legislation is considered in the Upper House.

**It is untrue and blatantly misleading to say the Firefighters Presumptive Rights Compensation aspects of the proposed Bill is the same as the QLD presumptive legislation**

Regarding the presumptive rights compensation aspects of the Bill I refer you to the attached legal advice provided to VFBV. This advice from Jack Rush QC confirms VFBV concerns that the proposed firefighter presumptive rights legislation is being sold as something that it clearly is not. The proposed Victorian legislation does not provide a simple process for volunteers, it does not treat volunteers and paid firefighters equally, it is not the same as the well regarded QLD model and it sets up potential for ambiguous protracted legal debate and bureaucratic hurdles for sick volunteers.

To sell the cancer protection as being the same as other simple and equitable models such as the QLD approach is false. The proposed Victorian cancer protection legislation is not the QLD model, it sets up a complex and ambiguous legal battle for volunteers and a much simpler process for paid firefighters. VFBV is pleased that paid firefighters will be provided with simple and compassionate cancer protection but why discriminate against volunteers?

All volunteers are urged to read the attached legal advice as it sets out a compelling case for there to be further work done on the presumptive rights protection aspects of the Bill before it is adopted.

VFBV believes this work could be done quite quickly if the true spirit of the QLD model is genuinely applied for both paid and volunteer firefighters in Victoria.

### **Serious concerns regarding the proposed fires services reform echoed by counsel assisting the 2009 Bushfires Royal Commission**

All members are encouraged to read the attached opinion of Jack Rush QC regarding the adverse effects of the proposed Bill on CFA volunteer capacity, Victoria's capacity to deal with major fires, CFA operations and support for volunteer.

VFBV have argued strongly that the proposed fire service reform change triggered by the legislation is not a modernisation of the fire services.

It creates less flexibility for the fire services to adapt to changing risk and service demands. The Government, the Emergency Management Commissioner, and the CFA Chief Officer are yet to be able to explain to the Victorian public what public safety improvement will occur in communities currently serviced by CFA's 35 Integrated Brigades. They are yet to explain how changing the logo on a truck that sits in Dandenong, Geelong or Bendigo today, somehow makes that community better protected tomorrow.

It further fragments Victoria's fire services when all recent reviews have said fire service modernisation needs to be about joining up effort.

It creates 35 separated fire service islands spread throughout regional Victoria creating confusion, duplication and complex chains of command.

Contrary to the Governments claim, none of the recent major reviews, and certainly not the 2009 fires Royal Commission, recommended splitting the world-renowned CFA model. This is confirmed and the propaganda being pedalled by the Government has now been called out by Jack Rush QC as 'nonsense'. Jack Rush has confirmed that the 2009 Bushfires Royal Commission applauded the CFA model as being 'the nations pre-eminent firefighting organisation.

Jack Rush has confirmed that the 2009 Bushfires Royal Commission recognised the importance of maintaining and strengthening the existing CFA model that fully integrates volunteers and paid firefighters. The 2009 Bushfires Royal Commission and other recent reviews recognised the absolute importance of the existing CFA model as the best way for Victoria.

The Government is marketing these reforms as restoring CFA to a strong and independent volunteer service. They omit the fact that all those operational positions covered by the UFU that support, lead and manage those same volunteers will now cleverly be forced to be contracted back in from the metro service - supposedly doing the same jobs they were doing before – but employed and grown by another service.

A clear motivation underpinning the proposed change is a blatant desire by those pushing it to avoid a simple test that now sits with the legislated Fair Work Commission umpire – the very same umpire that Victoria's Premier Daniel Andrews said we should all listen to up until the day the umpire's rules also require volunteers rights, capacity and contribution to be respected valued and recognised. The so called Fair Work barriers to any industrial agreement are only about ensuring industrial agreements don't restrict or limit how a body such as CFA supports, equips, deploys or respect volunteers. These tests are not only common sense; they essentially already exist in CFA legislation.

### **What is VFBV's vision for the future?**

Based on volunteer feedback and consultation from the 2015 Fire Services review, and as submitted to last year's Senate enquires, our view has been stated as the following:

Because volunteers are fundamental to Victoria's emergency management capability, fundamental to community resilience and at the core of communities sharing responsibility for their own safety, it is vitally important to ensure that they are involved in decision making on all issues that affect them, both to make the most of their frontline knowledge and to help sustain Victoria's essential volunteer resource.

VFBV wants to make it very clear that CFA volunteers appreciate and respect the dedication, skill and work of our CFA paid colleagues. Our vision for CFA is for it to be a modern and contemporary emergency service where volunteers and paid staff work side by side, as equals and respect one another.

We are against anything that tries to create a wedge between volunteers & paid staff, and any arrangements that seek to demoralise, discriminate or segregate volunteers from our paid colleagues.

We are all CFA members who want to put our communities first.

Our desire is for a modern approach, focussed on all people working together to maintain and build volunteer and community safety; a respectful culture focussed on empowering and supporting local volunteer brigades and community with the flexibility and agility to enable CFA to tailor resources and support to local community's needs.

The Governments proposed legislation is not modern, it is not flexible, it does not further community safety outcomes, and it does not promote interoperability or connectedness, and it does not build and strengthen community resilience before, during and after natural and other disasters.

### **The Bill should not proceed**

Volunteers are supportive of fire service modernisation but we continue to urge the decision makers to stop and have a re-think.

Our strong view is that those aspects of the Bill relating to the split up of the integrated CFA model and the creation of FRV are so fundamentally flawed they should be rejected and at a minimum require a major rethink and review before being considered by the Legislative Council. Jack Rush has thankfully called the Bill for what it is 'motivated by a political and ideological outcome', 'it will most certainly not produce a positive operational outcome, it weakens rather than strengthens the CFA and support for CFA volunteers'

### **What you need to do**

Volunteers should not give up. Please continue to write, email or visit your local MPs, particularly Upper House MPs, and ask them to vote against the legislation. At a minimum ask them, if they are not prepared to take this legislation off the table for now, at least agree to a transparent and proper process of scrutiny and review before the legislation is passed.

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# Re Firefighters Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2017 (Vic)

## ADVICE

### Introduction

1. I am asked to advise Volunteer Fire Brigades Victoria concerning **Firefighters Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2017** (“**the Bill**”). I am specifically requested to advise as to that part of the Bill that purports to provide a rebuttable presumption “...for career firefighters and volunteer firefighters suffering from specified forms of cancer (the specified cancers) for the purposes of claiming compensation under the **Workplace Injury Rehabilitation and Compensation Act 2013**” (“**the Workcover Act**”).
2. The Bill establishes two distinct mechanisms for the operation of the presumption that specified cancers are due to the nature of firefighting – one for career firefighters and one for volunteer firefighters. The Bill discriminates against volunteer firefighters, is inequitable to them, has been drafted in a manner that is prejudicial to volunteer firefighters’ entitlements and rights to claim for specified forms of cancer when compared to the claims process created by the Bill for career firefighters for precisely the same cancer conditions

### The Bill

#### Definitions

3. Relevant definitions contained in section 4 of the Bill are as follows:

***advisory committee*** means the advisory committee established under section 20.

***Authority*** means the Victorian Workcover Authority.

***career firefighter*** means a person who is or was employed by a fire service as a firefighter in a role in which fire fighting duties are or were a substantial portion.

***volunteer firefighter*** means a person who is or was a ***volunteer officer or member*** within the meaning of the **Country Fire Authority Act 1958** in a role in which fire fighting duties are or were a substantial portion.

4. It is to be observed the definitions in the Bill of career firefighter and volunteer firefighter are in substance identical.

#### Workplace Injury Rehabilitation and Compensation Act 2013

5. The Bill is to be read as if it formed part of the Workcover Act<sup>1</sup>. If a firefighter satisfies the presumption concerning the occurrence of a specified cancer the cancer is taken to be an injury within the meaning of the Workcover Act. This has particular significance for volunteers as referred to below<sup>2</sup>. The (Workcover) Authority becomes the manager of the volunteer’s claim.

#### Schedule 1

6. Schedule 1 of the Bill sets out 12 different cancers – the specified cancers. The cancers vary from “primary site brain cancer” to “primary site prostate cancer” to “primary site oesophageal cancer”. For each nominated cancer the Schedule establishes a “qualifying period”; thus by way of example the qualifying period for “primary site brain cancer” is five years, for “primary site prostate cancer” the qualifying period is 15 years.

#### *Presumption – career firefighter*

7. That a specified cancer is due to the nature of a career firefighter’s employment will be presumed upon it being demonstrated the cancer “occurs on or after 1 June 2016”<sup>3</sup>, “occurs during a period which [he or she] is employed as a career firefighter or within the 10 year period after [he or she] ceases to be employed or served as a firefighter”<sup>4</sup>, that before the specified cancer occurred he or she “is or was employed, or served as a firefighter, for at least the qualifying

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<sup>1</sup> S 5(1).

<sup>2</sup> The Bill does more than create presumptive entitlements for specified cancers. It completely changes the claims process for volunteer firefighters to the Workcover Scheme. At present, volunteer firefighters’ claims for injury compensation are dealt with under the Country Fire Authority Regulations 2014 Part 6 which is a more generous scheme. See [22] this Advice.

<sup>3</sup> S 6(1)(a)(ii).

<sup>4</sup> S 6(1)(b).

period” specified in Schedule 1 for the specified cancer<sup>5</sup> - using the examples above, brain cancer employment five years, prostate cancer employment 15 years.

8. A person is determined to be a career firefighter if “employed as a career firefighter at the time the injury occurs”<sup>6</sup> or if the career firefighter has ceased employment he or she will be deemed a career firefighter if “their most recent employment or service as a firefighter was as a career firefighter”<sup>7</sup> or “on balance the majority of their employment or service was as a career firefighter”<sup>8</sup>.
9. It is important to note the Bill does not specify any mechanism at all as to how it is to be determined “fire fighting duties are or were a substantial portion”<sup>9</sup> of the role of a career firefighter. Indeed, the Bill proceeds on the basis that to be “a career firefighter” is in itself sufficient to invoke the presumption irrespective of specific roles or duties as a career firefighter.
10. Notably the presumption in the equivalent interstate legislation requiring that the career firefighter be actually employed “for the purpose of fire fighting” and “attending fires to the extent necessary to fulfil the purpose of the person’s employment”<sup>10</sup> has been omitted from the Victorian legislation as it concerns career firefighters. This requirement has been omitted for career firefighters but, extraordinarily, included for volunteer firefighters.

*Presumption – volunteer firefighter*

11. That a specified cancer is due to the nature of a volunteer fire fighter’s service will be presumed upon it being demonstrated the cancer “occurs on or after 1 June 2016”<sup>11</sup>, “occurs during a period in which the volunteer firefighter served (sic) as a firefighter or within the 10 year period after the volunteer

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<sup>5</sup> S 6(1)(c).

<sup>6</sup> S 8(1).

<sup>7</sup> S 8(2)(a).

<sup>8</sup> S 8(2)(b).

<sup>9</sup> See definition of Career Firefighter.

<sup>10</sup> S 36E2(a)-(b) **Workers Compensation and Rehabilitation Act 2003 (Qld)**.

<sup>11</sup> S 9(1)(a)(ii).

firefighter ceases to serve as a firefighter”<sup>12</sup> and before the date upon which the specified cancer occurred

*“...the volunteer firefighter served as a firefighter for at least the qualifying period [specified in the table to Schedule 1], and the volunteer firefighter attended fires to the extent reasonably necessary to fulfil the purpose of their service as a firefighter - ...”*<sup>13</sup>

12. The discrepancy by the addition of the above condition is blatant, the Bill requires a volunteer firefighter to demonstrate attendance at fires “to the extent reasonably necessary to fulfil the purpose of their services of firefighter”. No such precondition is placed on career firefighters, indeed as noted above, it is highly likely this specific precondition (contained in equivalent Queensland legislation for both career and volunteer firefighters) was deliberately omitted for career firefighters in Victoria.
13. No explanation is provided in the Bill itself or in the Explanatory Memorandum as to why volunteer firefighters are exposed to this condition and career firefighters are not; no explanation is provided as to why the legislation is so slanted in favour of the claims of career firefighters.
14. The Bill then proceeds to establish a structure to determine whether a volunteer firefighter attended fires to the extent reasonably necessary to fulfil their service as a firefighter under section 9. The claim is to be administered by the (Workcover) Authority. The (Workcover) Authority must seek an expert opinion from an advisory committee<sup>14</sup>.
15. The advisory committee is to be established by the Minister<sup>15</sup>. One of the primary purposes of the advisory committee is to provide an “expert opinion” to the (Workcover) Authority as to whether a volunteer firefighter has attended fires to the extent reasonably necessary to fulfil the purposes of service as a firefighter<sup>16</sup>. The Bill makes provision for regulations to be made for the

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<sup>12</sup>S 9(1)(b).

<sup>13</sup>S 9(1)(c).

<sup>14</sup>S 12(1).

<sup>15</sup>S 20(1).

<sup>16</sup>S 20(a)(2).



appointment of the advisory committee<sup>17</sup> but provides no guidance whatsoever as to the background or expertise of those to be appointed<sup>18</sup>.

16. The (Workcover) Authority must have regard “to the expert opinion” of the advisory committee<sup>19</sup> but the (Workcover) Authority “is not required to make a determination that is consistent with the expert opinion”<sup>20</sup>.

### **Summary Concerning Volunteer Firefighters**

17. It is informative to summarise in practical terms the effect of these provisions on volunteer firefighters, noting that NONE of these additional provisions are applicable to career firefighters.
18. A volunteer firefighter has the following additional requirements compared to a career firefighter:-
- (a) must demonstrate attendance at fires to the extent reasonably necessary to fulfil the purpose of their service as a volunteer firefighter;
  - (b) an advisory committee, comprised of individuals of unknown expertise or experience will provide an expert opinion to the (Workcover) Authority for the purposes of determining whether a volunteer firefighter attended fires to the extent reasonably necessary to fulfil the purpose of their service;
  - (c) a decision of the advisory committee that a volunteer firefighter has attended fires to the extent reasonably necessary to fulfil the purpose of their service as a firefighter is not binding on the (Workcover) Authority;
  - (d) there is no provision for the expert opinion of the advisory committee to be provided to the volunteer firefighter whom it concerns.

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<sup>17</sup>S 20(3).

<sup>18</sup>The advisory committee is to have regard to relevant records, “local knowledge” and any other matters prescribed by the regulations. S 12(2)(a)-(b).

<sup>19</sup>S 12(3)(a).

<sup>20</sup>S 12(3)(b).

**Conclusion**

19. There is no definition or guidance as to what amount of service, what aspects of service a volunteer firefighter must demonstrate to satisfy the advisory committee or the (Workcover) Authority that such firefighter has attended fires to the extent reasonably necessary to fulfill the purpose of their service. The wording is vague and liable to inconsistent and capricious interpretation.
20. As stated above, no attempt has been made in the Bill or in the accompanying Explanatory Memorandum to explain why the operation of the presumption is made more difficult and arbitrary for volunteer firefighters.
21. The legislation is entirely unsatisfactory and prejudicial to volunteer firefighters who may be diagnosed and wish to claim for a specified cancer. By comparison with a career firefighter diagnosed with and wishing to claim for precisely the same specified cancer the volunteer is required to proceed through an ill-defined and arbitrary process culminating in the (Workcover) Authority being able to reject the expert opinion of an advisory committee established by the Act. This leads to the remarkable outcome that a volunteer firefighter may attend exactly the same fires, be exposed to exactly the same toxins but only the career firefighter will have the advantage of the presumption and a straightforward route to compensation. For the volunteer the Bill is capricious and unfair.

**CFA Regulations - Workcover**

22. I make the very important observation that the Bill changes the process by which volunteer firefighters can claim for injury and compensation caused by their service.
23. Currently, as noted in footnote 2, volunteer firefighters claims and entitlements are as provided for in CFA Regulations Part 6 (the regulations). The Bill changes the process of claim and entitlements for a specified cancer to the processes and entitlements as set out in the Workcover Act. The presumption will not arise if a volunteer firefighter seeks to pursue his entitlement, as would have been normal, under the regulations.

24. By comparison with the Workcover Act the regulations provide a simpler process for claims and do not contain caps or limits on various heads of loss such as loss of earnings.
25. I have not been asked to analyse or advise in detail on the differences between the Bill and the regulations however because of the far reaching ramifications of the Bill in relation to such claims it is important that my instructing solicitors and their clients are aware of these changes.



**JOHN T. (JACK) RUSH QC**  
8 June 2017

## **The CFA and the adverse effects of the Firefighters Presumptive Rights Compensation and Fire Services Legislation**

The Royal Commission into the Black Saturday fires of February 2009 is the most thorough and comprehensive investigation of firefighting operations in this State in the last 50 years.

The evidence and findings of the Royal Commission established that the CFA was the Nation's pre-eminent firefighting organisation. Yet this State Government, led by Premier Andrews, over its years in office, continues to demonstrate a determination to undermine the CFA to the destruction of the very essence of what makes that volunteer organisation so strong, the ethos, integrity and independence of volunteer firefighters across Victoria.

The legislation before Parliament the "Firefighters Presumptive Rights Compensation and Fire Services Legislation" is an extraordinary document.

Introduced without any form of consultation with volunteer firefighters the Bill, without explanation, discriminates against volunteer firefighters concerning their rights and entitlements to claim compensation for specified cancers said to be a primary reason for the introduction of the legislation.

This Bill establishes two different mechanisms for the operation of the presumption that specified cancers are due to the nature of firefighting – one for career firefighters and one for volunteer firefighters. The mechanisms of claim for volunteers involve statutory hurdles not in place for career firefighters. This leads to the remarkable outcome that a volunteer firefighter and career firefighter may attend exactly the same fires, be exposed to exactly the same toxins but only the career firefighter will have the advantage of the presumption and a straight forward route to compensation. For volunteers the Bill is capricious and unfair.

But more than this, the Bill, if passed, will serve to divide the CFA, weaken its capacity and effectiveness. To make the point crystal clear – the ability of the CFA to mobilise the tens of thousands of volunteers to meet the threat of catastrophic bushfire as was done on Black Saturday, is severely threatened by this legislation.

The Bill abolishes the CFA's 35 integrated brigades, those stations in outer Melbourne and the larger regional centres of Victoria operated by CFA volunteers and

CFA operational career firefighters. This integrated station model was noted by the Royal Commission to have worked extremely well. Unilaterally, the State Government proposes by this Bill to dismantle all these brigades. In place at each of these stations will be a new entity “Fire Rescue Victoria” which is largely based on the Metropolitan Fire Brigade model made up of only career firefighters. Volunteer firefighters are meant to be co-located in the same station their role and status diminished.

The introduction of this Bill was surrounded by the usual spin and propaganda of the political process. At the forefront of the misinformation campaign are the statements that the findings of the Royal Commission support this restructure thrust on the CFA by the Andrews Government closely supported by the United Firefighters’ Union. Premier Andrews justified the comment “our firefighters are let down by outdated structure” by reference to findings of the Royal Commission. This is nonsense.

The Royal Commission in fact stated there was no compelling reason to support fundamental structural change, further the Royal Commission stated the integrated stations work well and provide important surge capacity in times of need to rural areas and acknowledged “the substantial part the CFA plays on the fringe of Melbourne and its responsibilities in regional cities and large towns”. A role effectively ended by this Bill.

The Royal Commission noted the submission made on behalf of the Victorian Government that the model for non-integrated stations (read Fire Rescue Victoria) would be much more expensive and in the end the cost would be borne by ratepayers.

This Government fails to understand the culture of the CFA, what motivates volunteers to sacrifice so much for their community. No one will deny change when it is demonstrated to be needed, effective and based on proper investigation and process. That is not this Bill. The Bill is motivated by a political and ideological outcome, it most certainly will not produce a positive operational outcome, it weakens rather than strengthens the CFA and support for CFA volunteers.

**JACK RUSH**  
13 June 2017