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Committee Secretary
Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eec.sen@aph.gov.au

Dear Secretary

Re. Inquiry into the *Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016*

The Australian Industry Group (**Ai Group**) makes this submission to the Committee's inquiry into the provisions of the *Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016*.

The Bill would amend the *Fair Work Act 2009* (**FW Act**) to create a new "unlawful term" for enterprise agreements, entitled an "objectionable emergency management term". Terms that would impede volunteer emergency service bodies in managing their volunteer operations would become unlawful.

There is a legitimate public interest in prohibiting enterprise agreements from containing provisions which would prevent employers managing their businesses safely, productively and efficiently. This Bill deals with only one aspect of this, albeit an important one that is closely connected to public safety.

We have not identified any problems or concerns with any of the provisions of the Bill. However, in the sections that follow we have proposed two additional amendments to the FW Act designed to ensure that the policy intent of the Bill is not frustrated.

1. Section 739

Unless s.739 of the FW Act is amended, the policy intent of the Bill could be frustrated through unions notifying disputes to the Fair Work Commission (**FWC**) and having those disputes arbitrated.

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The Country Fire Association (**CFA**) Enterprise Agreement, that has been the subject of so much debate, gives the FWC the power to deal with (including by arbitration) disputes over an extremely wide range of matters. Dispute settlement clauses in enterprise agreements usually only enable the FWC to settle disputes about matters arising under the enterprise agreement and in relation to the National Employment Standards, consistent with s.186(6) of the FW Act. However, clause 26.1 in the CFA Enterprise Agreement is much broader. The clause states (emphasis added):

> "26.1 This dispute resolution process applies to:
>
> 26.1.1 all matters arising under this agreement; and
>
> 26.1.2 all matters relating to the application of, or for which express provision is made in this agreement; and
>
> 26.1.3 all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and
>
> 26.1.4 all matters pertaining to the relationship between the CFA and UFU, whether or not express provision for any such matter is made in this agreement; and
>
> 26.1.5 all matters arising under the National Employment Standards.
>
> The parties agree that disputes about any such matters may be dealt with by using the provisions in this clause.
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> - - -
>
> 26.2.6 Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWC. FWC may utilise all its powers in conciliation and arbitration to settle the dispute."

For example, despite the passage of the Bill through Parliament, the United Firefighters Union (**UFU**) may decide to notify a dispute to the FWC relating to how career firefighters are deployed by the CFA in the context of volunteers. Even though the Enterprise Agreement would not be able to contain express provisions about this matter, it is possible that the FWC could be convinced that it has the power to make a binding decision about the matter because the dispute settling term allows for the settlement of disputes about: *"all matters pertaining to the relationship between the CFA and UFU whether or not express provision for such matter is made in the agreement"* (clause 26.1.4).

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To address this concern, we propose that a new s.739(5A) be inserted into the FW Act along the lines of the following:

> "Despite subsection (4), the FWC must not make a decision under a dispute settling term in an enterprise agreement that would have the same or a similar effect to any unlawful term in section 194.

2. Removal of unlawful terms that have no effect

We propose that the Bill be amended to give the Fair Work Ombudsman (**FWO**) the role and power that the Employment Advocate (**EA**) had under s.298Z of the 1996 version of the *Workplace Relations Act 1996*. Under this legislation, the EA could (and did) make applications to the Commission to have agreements varied to remove objectionable provisions. A similar FWO role and powers should apply under the FW Act in respect of all unlawful terms.

When dealing with such an FWO application, consistent with the approach in s.298Z(3) of the former *Workplace Relations Act 1996,* the FWC should be required to vary the enterprise agreement to remove any unlawful term if the FWC is satisfied that the agreement contains such a term.

This power would be particularly useful given the provisions in Item 9 of the Bill which deem "objectionable emergency management terms" in current enterprise agreements to be of no effect. If a provision is of no effect, it should be removed from the agreement to avoid confusion and uncertainty.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy