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Mr Peter Cannon
President
Volunteer Fire Fighters Association

Your Ref:
Our Ref: HQ12/0432 & 12/026

By email:
peter.cannon@volunteerfirefighters.org.au

A handwritten signature in blue ink that reads 'Peter'.

29 February 2012

Dear Mr Cannon

Impact of *Work Health and Safety Act 2011 (NSW)* on Volunteers

I refer to your email dated 2 February 2012 in relation to the above issue.

In your email you are, in my view, unjustly critical of the manner in which the NSW Rural Fire Service has sought to communicate with volunteers in relation to the impact of the *Work Health and Safety Act 2011 (NSW)* (**New WHS Act**).

I reject your assertions in this regard and direct you to presentations, fact sheet, other material and links to relevant websites which have been made available, additional copies of which are attached for your information.

In your email you pose various questions which unfortunately suggest that you - and perhaps by extension - your membership are labouring under some significant misconceptions regarding the manner in which the New WHS Act operates in relation to volunteers.

I shall reiterate what has been previously communicated to our volunteer members in more detail below, however, the most important points to note are:

Firstly, the New WHS Act:

- formalises the equal treatment of volunteers and staff (something which the RFS has always done in practice); and
- clearly identifies the OH&S obligations under which RFS volunteers have always operated- that is, to ensure the health and safety of both themselves and their colleagues.

Secondly, an RFS volunteer will not be liable to prosecution for failing to ensure that the RFS observes its OH&S obligations, but may be if they fail to take reasonable care for their own health and safety or that of others or if they fail to comply with reasonable policies, procedures and directions.

Definitional differences

The RFS is a "person conducting a business or undertaking" (**PCBU**) (section 5) and as such must ensure the safety of all "workers." A "worker" is defined as a person who carries out work "in any capacity" - which will include RFS volunteers (section 7(h)).

The RFS, as a PCBU, must ensure the health and safety of its workers (including volunteers), consult with them on OH&S matters, and provide them with the necessary information, instruction and training.

Section 28 provides that, while at work, a worker must:

- take reasonable care for their own health and safety;
- take reasonable care that their actions do not adversely affect the health and safety of others;
- comply with any reasonable instructions regarding health and safety;
- comply with any reasonable policy or procedure regarding health and safety.

Volunteers can only be liable as "workers" not "officers"

For the purposes of the New WHS Act, the term "officer" is defined as:

"...a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority." (Section 252)

It is very important to understand that the definition of an "officer" under the New OHS Act is very different to that in the Rural Fires Act.

Officers, as that term is used in the New WHS Act must exercise "due diligence" to ensure that the PCBU complies with its OH&S duties. "Due diligence" means:

- having up-to-date knowledge of health and safety matters;
- having an understanding of the hazards and risks associated with operations;
- ensuring that the PCBU is minimising or eliminating these hazards and risks; and
- ensure that the PCBU is complying with its OH&S obligations.

As has always been the case, it is the senior salaried officers and management of the RFS who will be responsible in this regard and who will be liable to prosecution if they fail in their duties.

Clearly, Group Captains, Captains and Deputy Captains are unlikely to fall within this definition and will therefore not be subject to the obligation of "officers" under the New WHS Act.

However, even if a volunteer were to be held to be an "officer" as that term is defined in the New WHS Act, section 34 provides that a volunteer **cannot** be prosecuted for a breach of the officer obligations **under any circumstances**.

Possibility for prosecution of volunteers

That is not to say that volunteers may never find themselves in a situation where they are prosecuted for OH&S breaches.

If an individual volunteer does not take reasonable care for their own and other peoples' health and safety; or fails to comply with any reasonable instructions, policies and procedures regarding health and safety given by the RFS, they may be liable to prosecution. (See sections 28 and 29).

However, while the possibility exists, we believe the prospect of a volunteer being successfully prosecuted is extremely low.

The previous OHS legislation made provision for the prosecution of workers, as distinct from employer companies or individual directors of such companies, in similar circumstances. Notwithstanding that possibility, the prosecution of workers rarely occurred and then generally only in cases of egregious conduct showing a flagrant disregard for their health and safety and that of others.

When individual workers were prosecuted under the previous OHS legislation the onus of proof was reversed so that it was they who had to prove that they had not breached their OH&S obligations. Prosecutions may be even less likely to be instigated or less likely to succeed now that under the New WHS Act this reverse onus of proof has been removed and the prosecution has to prove its case.

As I am sure you would agree, there is no place in the RFS for a person who deliberately or recklessly put themselves or other crew members at risk of serious injury or death.

Support of the RFS for volunteers

The RFS can also assure its volunteers that, where they are acting in the furtherance of their duties as members of the RFS, short of the deliberate or reckless compromise of OH&S, both the State Government and the RFS will stand behind and support them, as we do in other instances where a volunteer is the subject of legal action. This support includes the provision of legal advice and representation at no cost to the volunteer as well as counselling and practical support.

Medical Fitness

There are already specific medical and fitness requirements for members of the RFS undertaking certain activities such as the use of breathing apparatus, remote area fire fighting and certain overseas fire fighting deployments.

More generally, training, procedures and guidelines remind all volunteers of their responsibilities to disclose any injury or illness that may place them or their crew at risk and where appropriate, members have obtained medical clearance from doctors to return to certain duties following illness or injury. Further, part of the membership application process requires new or transferring volunteers to disclose any medical conditions which may affect their ability to participate in RFS activities or affect their safety or that of others when doing so.

The New WHS Act may have implications for the manner in which the RFS accommodates volunteers who may have varying levels of physical fitness and/or medical conditions which make them suitable for different roles and responsibilities within the RFS. This issue will be considered by the RFS during the implementation phase of the new legislation. However, the RFS has always been and remains committed to welcoming and supporting each volunteer according to his or her own abilities.

We hope this information has clarified matters for you and we look forward to working with all of our volunteers to ensure a smooth transition under the New WHS Act. As an emergency services organisation the RFS has always been diligent as regards occupational health and safety, as have our volunteers and staff.

The RFS has always proceeded on the basis that the protection and safeguards offered by the OH&S legislation should be applied equally to volunteers and staff. As a result we do not anticipate that the changes under the New WHS Act will have any significant impact on the day to day way in which we operate. However, we trust it will clarify the position of volunteers and ensure that important OH&S issues are always at the forefront of our minds.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'S. Fitzsimmons', enclosed within a blue oval shape.

Shane Fitzsimmons AFSM
Commissioner